Orient Centre Investments Ltd and Another v Societe Generale and Another [2006] SGHC 164

Case Number : Suit 663/2004

Decision Date : 19 September 2006

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Raj Palaniappan (Straits Law Practice LLC) and Edwin Seah (Edwin Seah & K S Teo) for the plaintiffs; Suresh Nair and Victoria Xue (Allen & Gledhill) for the first defendant

Parties : Orient Centre Investments Ltd; Teo Song Kwang alias Richard — Societe Generale; Goh Tzu Seoh

Civil Procedure – Striking out – When striking out may be made – Whether certain paragraphs in the plaintiffs' amended statement of claim should be struck out

Contract – Contractual terms – Parol evidence rule – Plaintiffs precluded from asserting oral representations which contradicted express terms of written agreements – Section 94 Evidence Act (Cap 97, 1997 Rev Ed)

19 September 2006

Lai Siu Chiu J:

Introduction

1 The first plaintiff, Orient Centre Investments Ltd, is a company incorporated in the British Virgin Islands. The second plaintiff is a Singaporean and was at the material time a shareholder and managing director of the first plaintiff which company was his *alter ego*. The second plaintiff had apparently purchased the first plaintiff as a shelf company through the defendants.

2 The first defendant, Société Générale ("SocGen" or "the Bank"), is a bank incorporated in France and has a Singapore branch located at 80 Robinson Road, #27-00, Singapore 068898. Prior to his resignation on 4 May 2000, the second defendant, Goh Tzu Seoh Kenneth, was an employee of the Singapore branch of SocGen and held the post of assistant vice-president; he was assigned to the Bank's private banking division as a relationship manager. The private banking division of SocGen catered to the investment needs of high net worth individuals.

3 The plaintiffs sued SocGen, *inter alia*, for misrepresentation and breach of fiduciary duties as financial advisers. SocGen applied by way of Summons No 904 of 2006 ("the application") for the following orders against the plaintiffs:

(a) that the writ of summons and the amended statement of claim be struck out and the action dismissed with costs payable to SocGen on an indemnity basis;

(b) alternatively, that paras 16 to 18 and/or paras 20 to 23 and/or para 25 and/or paras 26(a)(i) and 26(a)(ii) and/or paras 27 to 36 and/or their respective reliefs sought in the amended statement of claim be struck out.

4 The grounds of the application were that the plaintiffs' claim or relevant portions thereof disclosed no reasonable cause of action against SocGen and was frivolous or vexatious, and might prejudice, embarrass or delay the fair trial of this action or was otherwise an abuse of the process of

the court.

5 The application was heard by the assistant registrar ("the AR") who did not strike out the writ of summons; she only ordered certain portions of the amended statement of claim, *viz*, paras 26(a)(ii), 26(b), 26(c), 44–46 and 60A(iv), to be struck out. The AR declined to strike out the plaintiffs' other claims relating to misrepresentations, breaches of fiduciary duties, breach of mandate in relation to trading in securities, and negligence generally.

6 Against the AR's decision, SocGen filed an appeal via Registrar's Appeal No 113 of 2006 ("the appeal"). Although the second defendant was not a party to the application, his counsel attended the hearings of both the application and the Appeal on a watching brief for him. I heard and allowed the appeal. The plaintiffs have now filed a notice of appeal (in Civil Appeal No 62 of 2006) against my decision.

The facts

7 On 18 May 1998, the second plaintiff opened in the name of the first plaintiff an account (No 35513) ("the account") with SocGen's private banking division. In June 1998, the second plaintiff transferred from Citibank to the account the sum of US$4,847,689 ("the deposit"). (The second defendant joined SocGen's services after leaving Citibank). The persons authorised to operate the account were the second plaintiff and his son Teo Chien Howe. (Hereinafter the two individuals will be referred to collectively as "the authorised persons").

8 The plaintiffs did not want the Bank to send statements to the first plaintiff's address. Instead, at the request of the second plaintiff, the parties entered into a "hold mail" arrangement whereby SocGen held the statements of the first plaintiff which the second plaintiff agreed to collect within three months of every previous collection.

9 The second plaintiff alleged in the amended statement of claim that he was induced by the second defendant to become SocGen's customer (and to make the deposit) by representations made to him from time to time at various meetings he had had with the second defendant between end-1997 and early May 1998.

10 The representations included, *inter alia*, the following:

(a) the Asian financial crisis was over, the market was at rock bottom, there were a lot of investment opportunities for the second plaintiff to make money;

(b) SocGen was rated one of the top five banks in the world, it had a special investment strategy that ensured preservation of the second plaintiff's capital and guaranteed him returns of 10% per annum;

(c) SocGen's investment account was a discretionary account; and

(d) the second plaintiff should rely on the second defendant's expertise, knowledge and ability for the most appropriate financial arrangements in respect of the deposit to ensure capital preservation and guaranteed returns of 10% per annum.

11 Allegedly acting on the faith and truth of the aforesaid representations and induced thereby, the second plaintiff agreed to open an investment account with SocGen ("the investment account") and accepted the Bank's facilities in the Bank's letters of offer dated 29 July 1998, 19 September

2000 and 18 September 2001 (hereinafter referred to, respectively, as "the first letter of offer", "the second letter of offer" and "the third letter of offer"; and, collectively, as "the letters of offer"). The investment account of the first plaintiff comprised of structured products, foreign exchange/currency trades, securities trades and credit facilities. A clause in the letters of offer headed "EXPIRY" gave SocGen the right at any time to terminate immediately the facilities it extended, at its absolute discretion. Upon such notice of termination, the first plaintiff would have to repay forthwith all outstanding sums owed to the Bank.

12 The plaintiffs further alleged that the first plaintiff was induced by the second defendant's representations to the second plaintiff to enter into the following agreements:

(a) an equity-linked deposit master agreement;

(b) a fund-linked deposit agreement (the "Tokyo Plus Deposit") with a deposit of US$250,000; and

(c) an indexed deposit agreement (linked to four cyclical funds) with a deposit of US$75,000.

13 The second plaintiff alleged that each of the representations made to him by the second defendant turned out to be untrue as the capital of the first plaintiff was reduced to approximately US$2m by July 2000 and the first plaintiff incurred substantial losses on the investment account.

14 Although the investment account was a non-discretionary account, the second plaintiff alleged that he discovered that the second defendant had without the plaintiffs' instructions or mandate entered into the following transactions:

(a) purchase of options, equities, warrants and structured products;

(b) entering into spot/forward exchange contracts; and

(c) taking loans from the facilities granted by SocGen under the letters of offer.

15 On 1 November 2001, the second plaintiff made the first of many requests of SocGen for documents on the investment account. According to SocGen, the tone of his correspondence became increasingly hostile and culminated with his letter dated 1 April 2002 wherein he demanded full restitution of all his money deposited with SocGen, together with interest at 10% per annum.

16 As SocGen felt the banker-customer relationship had broken down, the Bank wrote on 26 April 2002 to the plaintiffs ("the termination notice") giving 45 days' notice of the termination of its relationship with the plaintiffs. It inquired whether 45 days was a sufficient notice period but received no response from the plaintiffs. Under the terms of the letters of offer in para 11, the Bank could have but did not exercise its rights to terminate the banker-customer relationship immediately.

17 The termination notice was accompanied by SocGen's separate letter demanding payment of US$317,140.51 and S$804,556.47 from the first plaintiff.

18 Neither the first nor the second plaintiff paid the sums demanded by SocGen. Consequently, in its letter dated 24 July 2002, SocGen gave notice to the first plaintiff that it was exercising the Bank's rights of set-off against securities, cash deposits, bonds, *etc*, charged to the Bank. (Earlier on, in May 2001, the Bank had on the first plaintiff's instructions redeemed two structured deposits which

had then not yet matured, *viz*, the "Tokyo Plus deposit" and the "United States dollar deposit" linked to the four cyclical funds). The outstanding sums were reduced as a result of the Bank's set-off.

19 In his letters dated 20 and 30 August 2002 respectively to SocGen on the first plaintiff's behalf, the second plaintiff denied owing the Bank any sums and renewed his demand for the Bank to return the money he had deposited into the investment account.

20 The writ in this action was filed on 11 August 2004 but was not served on SocGen until 16 December 2004. The application itself was only taken out on 1 March 2006, after numerous interlocutory applications and registrar's appeals therefrom had been filed and heard. I should point out however that in the opening paragraph of its original defence, SocGen reserved its right to strike out the statement of claim on the basis it was embarrassing, frivolous and vexatious, or otherwise an abuse of process. To date, the plaintiffs have filed six sets of further and better particulars pertaining to the statement of claim and the reply while the second plaintiff has answered interrogatories administered by the second defendant.

The pleadings

21 In the lengthy amended statement of claim, the following allegations were levelled against the defendants:

(a) the second defendant made the representations set out in [10] above well knowing them to be false and untrue, or recklessly not caring whether they were false and untrue;

(b) SocGen allowed the second defendant to carry out transactions on the investment account between 18 May 1998 and 16 July 2000 without the approval of the authorised persons;

(c) the second defendant was its employee and therefore an agent of SocGen;

(d) the defendants owed the plaintiffs a duty of care and fiduciary duties as financial advisers (which they breached) to:

(i) establish the plaintiffs' financial objectives and risk tolerance level;

(ii) ensure that the plaintiffs fully understood the nature, complexity and risk of the structured products;

(iii) ensure that the plaintiffs had the facility to monitor the movement of exchange rates;

(iv) know the financial products;

(v) not to introduce a product to the plaintiffs unless it was appropriate to the plaintiffs' specific needs and risk profile;

(e) the defendants did the following:

(i) indiscriminately purchased countless number of highly speculative equities and warrants without diversification into other products of different risks and nature, with undue weightage on one or two stocks;

(ii) purchased numerous structured products which were extremely highly

leveraged, thinly traded, and carried currency risks;

(iii) carried out short-term trades on various structured products;

(iv) purchased stock and allowed them to expire without selling them;

(v) entered into speculative and risky spot-foreign currency contracts;

(vi) utilised the investment account to facilitate "churning" activities for their own benefit.

22 It was alleged that between 26 April and 26 August 2002, the value of the first plaintiff's portfolio decreased to US$194,737.40 from US$334,397.12. The plaintiffs further alleged that SocGen unreasonably terminated the investment account by the termination notice, forcing the first plaintiff to prematurely liquidate the remaining investments and products in the investment account and to suffer further loss and damage. (In the subsequent further and better particulars of the pleadings filed by the plaintiffs, it was alleged that the plaintiffs had invested a total of US$9,636,827.94 and received US$8,420,040.82 back from SocGen, thereby suffering a loss in excess of US$1m.)

23 In their amended statement of claim, the plaintiffs further alleged that, in order to induce the plaintiffs to retain the defendants as their financial advisers and to appoint the second defendant as agent to act on behalf of the first plaintiff in relation to the investment account, the second defendant represented and warranted to the first plaintiff that the second defendant would personally recoup the losses of the plaintiffs if given a chance. Acting in reliance of and on the faith of the second defendant's representations, the first plaintiff appointed the second defendant as its authorised signatory on 17 July 2000.

24 Subsequently the first plaintiff realised that the aforesaid representation was false. By mid-2001, the second defendant without notice abandoned the plaintiffs and was no longer contactable. From the transaction statements rendered to the plaintiffs after November 2001, the plaintiffs discovered that between July 2000 and July 2001, the defendants had sold existing stocks in order to liquidate the plaintiffs' investments.

25 In addition to their claim for damages for misrepresentation for the losses they had sustained, the plaintiffs claimed against SocGen for an account of all transactions, investments, loans, purchases and sales on the investment account from 18 May 1998 till the date the investment account was closed.

26 In its defence, SocGen averred that only the first plaintiff was its customer and that it dealt with the first plaintiff as a separate legal entity from the second plaintiff. SocGen denied it owed the same duties to the second plaintiff as it did to the first plaintiff. The Bank denied that the first plaintiff deposited US$4,847,689; the sum deposited with SocGen was only US$2,266,290.84 and it came not from Citibank but from HSBC Investment Bank (Singapore). (When the plaintiffs rendered further and better particulars of their pleadings on 5 December 2005, the sums remitted in six tranches from Citibank to SocGen between 19 August 1998 and 16 December 1999 were said to total US$7,220,115.85.)

27 SocGen denied that the second defendant had made the representations alleged by the plaintiffs and averred that, if the representations had been made, the second defendant had made them without the actual or ostensible authority of the Bank and had made them to the second plaintiff as an agent of the first plaintiff.

28 SocGen pointed out that the investment account was a non-discretionary account and the directors of the first plaintiff were entitled to operate it. Pursuant to para 3 of the Bank's "MANDATE FOR LIMITED COMPANY ACCOUNT" executed by the first plaintiff, the first plaintiff's directors were authorised to:

(a) arrange with SocGen for advances to the first plaintiff;

(b) deliver, withdraw and deal with any securities deposited by the first plaintiff with the Bank;

(c) enter into foreign exchange contracts with SocGen.

29 The Bank averred that it was authorised to operate the investment account according to instructions received from the authorised persons by telephone, fax or telex in which regard, the first plaintiff had executed an indemnity for telephone/facsimile/telex instructions in favour of the Bank. The first plaintiff had also executed a general indemnity in favour of the Bank for the investment account.

30 SocGen averred that the first letter of offer was accepted by the first plaintiff on 3 August 1998 only after the first plaintiff had passed a director's resolution to that effect.

31 SocGen averred that on 3 August 1998, the first plaintiff executed the following documents in addition to the first letter of offer:

(a) the standard terms of the Bank;

(b) the Bank's standard terms and conditions governing foreign exchange margin trading/option investment facilities;

(c) the currency leverage investment agreement; and

(d) the risk disclosure statement for currency leverage investment/foreign exchange/option investment facilities.

32 The Bank pleaded that by the terms of the above documents, the first plaintiff had accepted the risks in relation to the facilities extended by SocGen and had acknowledged that it did not rely on advice or presentations made by the second defendant in entering into any transactions with or through SocGen. The Bank averred that the plaintiffs were precluded from asserting that any of the transactions in the investment account were not authorised. SocGen relied on confirmation advices and monthly statements issued to the first plaintiff.

33 In the alternative, SocGen alleged that the second plaintiff was an experienced and sophisticated investor as well as a successful businessman. Consequently, the second plaintiff did not and did not reasonably rely on the alleged representations made by the second defendant. To the extent that the second plaintiff was responsible for the first plaintiff's actions, the first plaintiff similarly did not rely on the alleged representations.

34 In his re-amended defence, the second defendant contended that the second plaintiff was not a customer of the Bank in relation to the investment account. Although he admitted meeting the second plaintiff on various occasions up to May 1998 to discuss the opening of a private banking account with SocGen, the second defendant denied making the representations and warranties

alleged by the second plaintiff but admitted he explained the products and services available from SocGen. The second defendant specifically denied he had represented to the second plaintiff he would ensure capital preservation to the first plaintiff or that he guaranteed returns of 10% per annum on the first plaintiff's investments.

35 As was similarly pleaded by SocGen, the second defendant averred that the second plaintiff was already an experienced businessman and a sophisticated investor by the time discussions took place between them on the opening of the investment account. In so far as the second plaintiff was responsible for the first plaintiff's actions, the first plaintiff had the benefit of the second plaintiff's experience and sophistication. The particulars furnished by the second defendant on the experience and sophistication of the second plaintiff included the fact that the latter had been a director of numerous companies which included Seng Hup Corporation Berhad, a company listed on the Kuala Lumpur Stock Exchange, as well as the fact that he had significant shareholdings in numerous companies in Singapore and Malaysia.

36 The second defendant also relied on various terms and conditions in the documentation (mentioned in [12], [29] and [31] above) executed on the first plaintiff's behalf by the second plaintiff, to say the plaintiffs were precluded from raising the allegations they had made in the amended statement of claim.

37 In his reply, the second plaintiff admitted he had some knowledge of investments, had previously held private banking accounts and was a businessman; but he denied he was an experienced and sophisticated investor and an experienced and successful businessman. The second plaintiff maintained he relied solely on the defendants' representations and warranties set out in [10] above.

The contract between the parties

38 The application was supported by an affidavit of Loi Chee Seng ("Loi's affidavit") who was/is the vice-president (legal) of SocGen. Loi's affidavit exhibited the documentation which the second plaintiff had executed on the first plaintiff's behalf when the investment account was opened. SocGen relied heavily on the documentation for the application.

3 9 Amongst the comprehensive documents of SocGen (apart from those in [12] above) signed by the second plaintiff on the first plaintiff's behalf were three agreements all dated 18 May 1998. These applied to all the transactions and were:

(a) the mandate for limited company account ("the Mandate");

(b) the declaration for mail held by SocGen ("the Declaration");

(c) the indemnity for telephone/facimile/telex instructions (the Indemnity").

40 The Mandate addressed to SocGen contained cl 5 that states:

> That the bank be authorised but not obliged to honour and act on any instruction, confirmation, or authority whether oral or in writing (including telex, teletype, facsimile or cable) given, signed, or sent by [the first plaintiff] or its authorised representative(s) and [the Bank] shall not be liable for so acting in good faith upon any such instruction, confirmation or authority notwithstanding that it shall subsequently be shown that the same was not given or signed or sent by such person(s).

41 The Declaration contained the following clause:

> The undersigned is required to collect all contents in the folder within three months from the date thereof, and thereafter within three months from each collection. Any discrepancies/errors must be highlighted by the undersigned to [the Bank] within ten days of collection.

According to Loi's affidavit, the first plaintiff never disputed the statements which the second plaintiff (in his affidavit filed on 15 November 2005) admitted he had received.

42 The Indemnity contained the following clauses:

> This letter serves to grant all and each officer of [SocGen], Singapore Branch full and complete authority to follow our telephone/facsimile/telex instructions which may from time to time be, or purported to be given on our behalf by any (~~one~~/two) of the persons mentioned below….
>
> We hereby indemnify in full [the Bank] and all officers acting on our purported telephone/facsimile/telex instructions. We undertake to minimise the possibility of errors, mistaken voice identity and forged documents and acknowledge and assume the inherent risks involved.

All three agreements were signed by the authorised persons (see [7] above).

43 In addition to the documents referred to in [38] above, the first plaintiff agreed to be bound by SocGen's standard terms ("the Standard Terms") as well as the Bank's standard terms and conditions governing foreign exchange facilities ("the FX terms") for the facilities extended under the letters of offer. Clause 19(g) of the Standard Terms states as follows:

> Risk Management: As part of the Customer's risk management policy, the Bank recommends that the Customer enter derivative product transactions only after having analysed (if necessary with the help of outside advisors) the specific risk they imply and the possible advantages to be obtained. In order to facilitate the monitoring of the Customer's risks the Customer may obtain from the Bank, on request and on conditions to be determined, an assessment of the market value of the transactions which the Customer has entered into with [SocGen].

44 The FX terms included the following clauses:

> 12 The Customer represents and warrants that:-
>
> …
>
> (f) it is exercising its own business judgment independently of the Bank in entering into the FX Facilities and each Contract. It is acting for its own account and it has made its own independent decision to enter into the Contracts, and to whether the Contracts are appropriate or proper for it based upon its own judgment and upon advice from such independent advisors as it has deemed necessary. It is not relying on communication (written or oral) of the Bank as investment advice or as a recommendation to enter into that Contract it being understood that information and explanations related to terms and conditions of a Contract shall not be considered investment advice or a recommendation to enter into that Contract. It has not received from the Bank any assurances or guarantees as to the expected results of that Contract; and
>
> …

(h) the Bank is not acting as a fiduciary for or as an advisor to it in respect of the Contracts …

…

14 Each contract shall be deemed to have been undertaken by the Customer in reliance only upon the Customer's own judgment. The Bank does not hold out any of the Bank's employees, agents or correspondents as having any authority to advise, and the Bank does not purport to advise the Customer on the terms of, or on any other matters connected with, the Contracts.

45 The first plaintiff had executed on 3 August 1998 the Bank's "Currency Leverage Investment Facility Agreement" and "Risk Disclosure Statement for Currency Leverage Investment/Foreign Exchange/Option Investment Facilities" ("the Investment Agreement" and "the Risk Disclosure Statement" respectively). Clause 9 in the Investment Agreement excluded the Bank from liability. It states:

9. EXCLUDED LIABILITY

9.1 …

9.2 Any transaction to be pursued or concluded by the Client pursuant to which the terms of this Agreement apply shall be made solely in reliance on the Client's own judgement and not in reliance on any representation, advice, view, opinion or other statement which may have been expressed by the Bank or any of the Bank employees, agents or representatives and neither the Bank nor its employees, agents or representatives shall have any liability in respect of the same if expressed at all.

9.3 The Bank does not warrant, undertake or in any way guarantee profits or freedom from loss and risk in relation to transactions to be pursued or concluded by the Client pursuant to the terms of this Agreement. The Client understands and accepts that it is solely responsible for familiarising itself with all aspects of such transactions and the risks involved.

Clause 21 in the Investment Agreement was a risk management clause similar in terms to cl 19(g) in the Standard Terms (see [43] above).

46 The Risk Disclosure Statement contained the following clause:

15 The Bank will act upon the authorised instructions of the Customer or the Customer's authorized persons and the Customer cannot assume that the Bank will, and the Bank shall be under no obligation to warn the Customer or the Customer's authorized persons if the Customer's or the Customer's authorized persons' instructions are ill-timed or inadvisable for any reason or if instructions from the Customer or any of the Customer's authorized persons are likely to lead to loss to the Customer. The Bank will not be responsible for any advice or opinions given by any of its employees or agents with respect to the Facility, any Contract or the Customer's investment/trading activities.

47 The Risk Disclosure Statement also contained a risk management clause similar to cl 19(g) of the Standard Terms.

48 The first plaintiff then executed an "Equity Linked Deposit Master Agreement" dated

10 June 1999 ("the Master Agreement") followed by a "Risk Disclosure Statement" and a "Deal Confirmation" dated 14 June 1999 ("the Confirmation Statement"). The three documents related to an equity-linked deposit opened by the first plaintiff on 14 June 1999 relating to shares in Bangkok Bank Public Co Ltd. The Confirmation Statement contained the following disclaimer (in italics):

> *Disclaimer:*
>
> *This is not a Capital Guaranteed Product.*
>
> *Investors should reach an investment decision on this product only after careful consideration with their own advisers of the suitability of this product in light of their particular financial circumstances.*

49 Article 4 (specifically, Arts 4.1 to 4.13) of the Master Agreement contained representations and warranties addressed to SocGen by the first plaintiff as depositor, which included the following:

> 4.13 it is aware that this is not a capital guaranteed product. In a worse case scenario, it could sustain an entire loss of its investment and should therefore reach an investment decision on this product only after careful consideration with its own advisers as to the suitability of this product in light of its particular financial circumstances.

50 The "Risk Disclosure Statement" contained the following warning in capital letters:

> This notice does not purport to disclose or discuss all of the risks and other significant aspects of the facility. You should therefore consult with your own legal, tax and financial advisers prior to entering into the agreement or placing any deposit with [SocGen] pursuant to the agreement.

51 The first plaintiff executed structured products deposit agreements that covered:

> (a) the "Tiger Note 2" transactions (including redemption and liquidation) ("the Tiger Note 2");
>
> (b) the "Tokyo Note Deposit" transactions (including redemption and liquidation) ("the Tokyo Note Deposit");
>
> (c) the "Tokyo Plus Deposit" transactions (including redemption and liquidation) dated 22 May 2000 ("the Tokyo Plus Deposit"); and
>
> (d) four cyclical funds transactions (including redemption and liquidation).

52 The Tiger Note 2 was an investment made on 21 July 1999, and which would mature in two and a half years (on 22 January 2002). The Tokyo Note Deposit was to mature in two years (on 16 July 2001). Both notes as well as the Tokyo Plus Deposit were 100% capital guaranteed. The term sheets for the Tiger Note 2 and Tokyo Note Deposit contained the following warning in bold, italic print:

> [SocGen] assumes no fiduciary responsibility or liability for any consequences, financial or otherwise arising from the implementation of this proposal. You should consult to the extent necessary with your own independent, competent, legal financial or other professional advisors, to ensure that any decision you make is suitable for you in the light of your circumstances and financial position.

The Tokyo Plus Deposit agreement contained a risk management clause (in Art 14.3) in terms similar to those set out in [42] above.

53 The indexed deposit agreement which governed the four cyclical funds contained representations and warranties which were similar to those contained in the Master Agreement set out earlier in [48].

The decision

54 The allegations contained in the amended statement of claim can be grouped into three categories:

(a) The plaintiffs were induced by the second defendant's representations to transfer money from Citibank to SocGen and to open the investment account with the latter.

(b) The second defendant guaranteed preservation of capital and 10% returns per annum.

(c) The second plaintiff was told the investment account was a discretionary account.

55 The paragraphs in the amended statement of claim that were struck out by the AR were the following:

26. On diverse dates, but between 13 August 1998 and 16 July 2000, the [second defendant] carried out the following transactions, *inter alia* under the SG Investment Account (hereinafter collectively referred to as "the Transactions"):

a. Made purchases of:

iii. Structured Products;

b. Entered into Spot/Forward Exchange contracts;

c. Took loans from the facilities granted by the [first defendant].

44. By its letter dated 26 April 2002, the [first defendant] unilaterally terminated the SG Investment Account and its banker-customer relationship with the Plaintiffs, giving 45-days notice on the grounds that the allegations of impropriety justified the termination of their existing relationship.

45. The Plaintiffs aver that the termination was negligent and done without regard to the [first plaintiff's] financial position.

46. By reason of the said termination, the [first plaintiff] was forced to prematurely liquidate the remaining investments and products under the SG Investment Account causing it to suffer further loss and damage.

Particulars

(a) The net proceeds from two capital guaranteed products referred to in paragraph (20)(b) and (c) were diminished due to the [first defendant's] early redemption;

(b) Between 26 April 2002 and 26 August 2002, the valuation of the [first plaintiff's]

portfolio had decreased from an estimated sum of USD 334,397.12 to an estimated sum of USD 194,737.40.

60 And the Plaintiffs claim:

A. Against the [first defendant]:

iv. Damages for unreasonable termination of the SG Investment Account;

56 On my part, I ordered the amended statement of claim to be re-amended to remove all references to misrepresentation or breach of fiduciary duties or breach of duty as financial advisers relating to structured products the first plaintiff had purchased from SocGen, regardless of whatever representations had been made to the second plaintiff by the second defendant.

57 Save for two documents which were signed by the second plaintiff's son, all the agreements were personally executed by the second plaintiff. Both individuals were the authorised persons to operate the investment account and it made no difference whether the father or the son signed a document or both signed. Based on the Mandate and the Indemnity, as SocGen was entitled to carry out the first plaintiff's oral and/or fax instructions on all the transactions as conveyed through the second defendant, it did not lie in the mouth of the plaintiffs to allege otherwise. If the transactions on the investment account were authorised, the allegation that the Bank was negligent in carrying out the trades cannot stand. Hence, the plea of negligence was struck out.

58 The terms and conditions of the documents executed by the second plaintiff on behalf of the first plaintiff and/or for himself contained representations and warranties made by the plaintiffs to SocGen, not *vice versa*. Looking at the clauses set out in [42]–[52] above, the plaintiffs' claim against SocGen based on misrepresentation was also unsustainable.

59 I left intact the plaintiffs' allegation that the second plaintiff was induced by the second defendant to transfer money from Citibank to SocGen. This allegation should proceed to trial.

60 The allegation that the second defendant represented that the investment account was a discretionary account directly contradicted the Mandate, the Indemnity and the Risk Disclosure Statement. Although their counsel conceded that the three named documents did state that the investment account was non-discretionary, the plaintiffs contended that none of the other agreements set out in [43], [45] and [48] above actually stated that the investment account was non-discretionary. Even if it was non-discretionary, the second defendant had represented otherwise to the plaintiffs. As the plaintiffs had conceded that at least three documents which they signed did state the account was non-discretionary, how could they maintain their action to support the opposite argument? I would add that the whole tenor of the documentation executed by the plaintiffs showed that the investment account was non-discretionary, despite the absence of the word itself in the agreements. If indeed the second defendant had represented the opposite and informed the plaintiffs the investment account was discretionary, it was the second defendant and not the Bank who should be sued.

61 Similarly, the alleged representation that the plaintiffs' investment would be capital guaranteed with a guaranteed return of 10% per annum was in clear conflict with Art 4.13 of the Master Agreement which stated that the investment in Bangkok Bank was not capital guaranteed (see [49] above). It is to be noted that the AR struck out para 26(a)(iii) of the amended statement of claim (see [55] above). The claim that the second defendant made purchases of structured products having been struck out against which decision the plaintiffs did not appeal, how could any

misrepresentation remain relating to those structured products?

62 Clause 9.2 of the Investment Agreement also made it clear that the Bank would not be responsible and/or liable for any representations, advice or viewpoints made to the second plaintiff by the second defendant (see [45] above).

63 Equally, the plaintiffs' allegation of breach of fiduciary duties and breach of duty as financial advisers went against the express disclaimers of liability set out in [44], [45], [47] and [52] above, not to mention that the risk management clause (see [43] above) incorporated into the Standard Terms, the Investment Agreement and the Risk Disclosure Statement read with the three documents listed in [38] above effectively precluded the plaintiffs from raising this allegation at all.

64 On the contrary, the documentation showed that SocGen made every effort to warn the plaintiffs of the risks involved in the various products in which the first plaintiff invested. The documents rebutted the plaintiffs' allegation that the second plaintiff had been misled.

65 Under the parol evidence rule in s 94 of the Evidence Act (Cap 97, 1997 Rev Ed), the plaintiffs are in any event precluded from asserting oral representations which contradict the express terms of the written agreements they had signed, all of which were to the effect that the Bank did not assume fiduciary duties, was not a financial adviser to the plaintiffs and that the plaintiffs had assumed the risks of the investments made by the first plaintiff. Indeed, the Bank's terms and conditions went further to recommend the plaintiffs to seek advice from their own advisers.

66 I would add that the plaintiffs' complaints in [22] of premature liquidation of the first plaintiff's investments were equally unsustainable because the deposits in the Tokyo Plus Deposit and for cyclical funds were liquidated on the first plaintiff's instructions. As a result, the capital guarantees relating to these two funds were rendered inoperative.

67 I did not strike out the plaintiffs' claim against SocGen based on its liability as principal for the acts of the second defendant. I would observe however that even if SocGen was liable as principal, such liability ceased upon the second defendant's resignation on 4 May 2000. Whatever complaints the plaintiffs may have had after that date were a matter between the plaintiffs and the second defendant.

68 The submissions of counsel for the plaintiffs in opposing the appeal did not condense to specifics but merely rehashed the well-worn principles relating to striking-out applications and the court's general reluctance to take such a draconian step save in plain and obvious cases where the claim was obviously unsustainable. I found the exception to apply in this case. Hence, I allowed the Bank's appeal.

69 My orders would necessitate further amendments being made to the amended statement of claim, particularly to delete the paragraphs prayed for in the application as set out in [3(b)] above, which the AR did not grant.