Lee Chang-Rung and others *v* Standard Chartered Bank
[2010] SGHC 276

Case Number	: Suit No 212 of 2009; (Registrar's Appeal No 125 of 2010)
Decision Date	: 17 September 2010
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Leonard Loo (Leonard Loo LLP) for the plaintiffs; Hri Kumar, SC and James Loh (Drew & Napier LLC) for the defendant.
Parties	: Lee Chang-Rung and others — Standard Chartered Bank

Civil Procedure

17 September 2010

Tay Yong Kwang J:

Introduction

1 On 16 March 2010, an AR of the Supreme Court heard an application by the defendant to strike out the plaintiffs' action on the ground of the plaintiffs' failure to comply with an "unless Order" in respect of discovery of documents. The AR ordered the amended writ of summons and statement of claim struck out and the action dismissed. He also ordered the plaintiffs to pay the defendant the costs of the application and of the action, such costs to be taxed or agreed between the parties. The case was then at the stage where exchange of affidavits of evidence-in-chief had been ordered and trial dates set for end March to early April 2010.

2 The plaintiffs appealed against the above orders and asked that they be given an extension of time to comply with the order of court dated 30 November 2009 by filing and serving on the defendant within 14 days a second supplementary list of documents and an affidavit verifying the same.

3 I dismissed the plaintiffs' appeal and ordered them to pay the defendant's costs of the appeal, such costs to be taxed or agreed. The plaintiffs now appeal to the Court of Appeal against my decision.

The facts

4 The plaintiffs are the joint holders of three accounts opened in October 2005 with American Express Bank Limited ("AEB") which was subsequently acquired by the defendant. The first account was held by the first and the second plaintiffs who are brother and sister. The second account was held by the first and the third plaintiffs who are brothers. The third account was held by the second and the fourth plaintiffs who are wife and husband.

5 Before opening the above accounts, the plaintiffs also had accounts with DBS and in October 2002, they began to purchase various investment products from DBS, including structured notes and dual currency investments.

6 The plaintiffs' relationship manager in the defendant was Daphne Lau ("Ms Lau"). In March 2008, Ms Lau spoke to the first and the fourth plaintiffs about a structured product known as 10Y NC3m Callable LIBOR Range Accrual Note ("the product"), the subject of the action here. In the conversation, Ms Lau referred to a previous investment and told the first plaintiff in Mandarin that the product was "just like the one we did at that time". This was a reference to a LIBOR-linked structured note which the first and the third plaintiffs had previously purchased from DBS.

7 The plaintiffs purchased the product, with the first and the second plaintiffs investing US$500,000 through their account. The first and the third plaintiffs invested US$100,000 and the second and the fourth plaintiffs also invested US$100,000.

8 On 4 March 2009, the plaintiffs commenced the present suit in relation to the product, alleging that Ms Lau made the following misrepresentations:

(a) the product is a safe investment;

(b) the product is 100% principal protected;

(c) there is no risk; and

(d) there is a guaranteed return of the plaintiffs' principal amount with a higher interest.

The plaintiffs pleaded that they were conservative customers who placed most of their money with the defendant in the form of fixed deposits. The defendant denied these averments and alleged that the plaintiffs were experienced investors who knew what they were buying. In an affidavit of 7 December 2009, the plaintiffs asserted that they were of the impression that their investments in the product were fixed deposits with slightly higher interest returns. One of the important issues for trial would therefore be the plaintiffs' experience in financial products of the nature in issue here.

9 On 15 July 2009, the plaintiffs filed their list of documents which did not contain documents relating to their investment experience in such structured products between October 2002 and March 2008 with any bank or financial institution. On 18 August 2009, the defendant's solicitors wrote to the plaintiffs' solicitors to ask for discovery of such documents. However, the plaintiffs did not accede to this request. The defendant therefore applied for specific discovery

10 On 23 October 2009, the AR who heard the application ordered the plaintiffs to give discovery as he was of the view that the documents requested were relevant and necessary. The plaintiffs were given three weeks (up to 13 November 2009) to comply with this order.

11 The plaintiffs did not comply with the AR's order. On the last day for compliance, they applied for a reasonable extension of time to comply with the said order. This application was supported by an affidavit of their solicitor who merely stated that the plaintiffs would file and serve an affidavit to explain their position and would send him their affidavit for filing shortly as they were in Taiwan. However, the said affidavit of the plaintiffs was not filed nor served and there was therefore no explanation about why they required the extension of time to comply with the AR's order on

discovery.

12 That same day, the defendant's solicitors wrote to the plaintiffs' solicitors to ask them to comply with the AR's order by 16 November 2009 and to inform them to request an urgent hearing date for their application for extension of time. There was no response to this letter.

13 On 20 November 2009, the defendant's solicitors inspected the court files and discovered that the hearing date for the plaintiffs' application for extension of time had already been given as 30 November 2009. However, the plaintiffs had still not served their application on the defendant's solicitors. Accordingly, on 24 November 2009, the defendant applied for an "unless order" which was fixed for hearing on the same day as the plaintiffs' application for extension of time.

14 The next day, the plaintiffs informed the court that their solicitor, Mr Leonard Loo, would be overseas from 25 November 2009 to 3 December 2009 and asked for an adjournment of the defendant's application. The defendant was not amenable to this request. On 26 November 2009, the plaintiffs wrote to the court to state that both their solicitors, Mr Leonard Loo and Mr Edwin Loo, were overseas and that there would be no solicitor to attend the hearing on 30 November 2009.

15 On 30 November 2009, an AR dismissed the plaintiffs' application for extension of time and granted an "unless order" to the defendant. Under this order, the plaintiffs had to comply with the order for discovery by 7 December 2009, failing which the writ of summons and the statement of claim would be struck out and their action against the defendant dismissed. The trial dates for this action had already been given as 29 March to 1 April 2010 and the parties had to file and exchange their witnesses' affidavits of evidence-in-chief by 15 January 2010.

16 On 4 December 2009, the plaintiffs appealed against the "unless order" and the dismissal of their application for extension of time. They served these notices of appeal on the defendant on 7 December 2009, the last day for compliance with the "unless order".

17 On 7 December 2009, the plaintiffs also filed an affidavit in purported compliance with the "unless order". In this affidavit, they disclosed four documents relating to two investments.

18 As a result of this affidavit, the defendant's solicitors asked the plaintiffs' solicitors whether they intended to proceed with their appeals. On 17 December 2009, the plaintiffs' solicitors replied and asked the defendant to confirm that the plaintiffs had complied with their obligations under the AR's order for discovery and offered to pay costs. The defendant's solicitors responded the same day to state that only the plaintiffs would know whether they had complied with the AR's order for discovery.

19 On 28 January 2010, Andrew Ang J heard the plaintiffs' appeals. In the course of the hearing, the plaintiffs' solicitors again asked that the defendant confirm that the plaintiffs had complied with their discovery obligations and the "unless order". Andrew Ang J refused to direct the defendant to give such confirmation whereupon the plaintiffs' solicitors applied to withdraw the appeals. Leave was granted and costs were ordered against the plaintiffs.

20 In the said affidavit of 7 December 2009, the plaintiffs stated as follows:

1. I am the 1st Plaintiff in this Suit no.212/2009/R and am duly authorized by the Plaintiff to affirm this Affidavit for and on behalf of all the Plaintiffs.

2. This Affidavit is made by the Plaintiffs in compliance with the Orders of Court dated

23 October 2009 and 30 November 2009.

3. Insofar as the matter to which I depose to are within my personal knowledge, they are true and insofar as they are not within my personal knowledge, they are true to the best of my information and belief. For convenience, the documents referred to herein are annexed hereto and marked as "LCR-2" and references will be made to its page numbers.

4. I confirm that each of the Plaintiffs only invested in the following structured products with DBS Bank Ltd in Singapore from October 2002 to March 2008:-

PARTICULARS

Invested by which Plaintiff	Name of Structured Products
2nd and 4th Plaintiffs	7 years Callable Surf deposit 28 (USD Tranche A)
1st and 3rd Plaintiffs	Surf deposit 02 – Account (USD Tranche A)

5. In relation of the structured products with DBS Bank Ltd in Singapore, the Plaintiffs have the following documents in their possession, custody or power:-

   (a) Surf Deposit 02 – Final Termsheet;

   (b) Confirmation note 17 October 2002;

   (c) Confirmation advice for the 1st and 3rd Plaintiffs dated 7 July 2005; and

   (d) Statement of Accounts for the 1st and 3rd Plaintiffs dated 31 October 2002.

6. When each of the Plaintiffs invested in the aforesaid structured products with DBS Bank Ltd in Singapore, the Plaintiffs were of the impression that these were fixed deposits with slightly higher interest returns.

7. Apart from what is stated and disclosed herein and apart from the matters as pleaded in the present law suit, each of the Plaintiffs did not invest in any structured products with any other bank or financial institution, whether in Singapore or elsewhere, from October 2002 to March 2008.

8. The statements of fact made in all the paragraphs of the Plaintiffs' Supplementary List of Documents ("List") now produced and shown to me and marked as "LCR-2" are true. These statements of facts therein are true to the best of the Plaintiffs' knowledge, information and belief.

21 The plaintiffs' supplementary list of documents exhibited to the above affidavit disclosed a deposit confirmation dated 17 October 2002 in respect of the first and the third plaintiffs' investment in Surf Deposit 02, a statement of accounts for October 2002, the final term sheet for Surf Deposit 02 and a confirmation advice dated 7 July 2005 in respect of the second and the fourth plaintiffs' investment in Surf Deposit 28.

22 The deposit confirmation for Surf Deposit 02 showed that there were at least three other sets of documents relating to this deposit which were not disclosed by the plaintiffs. The statement of accounts for October 2002 indicated that the first and the third plaintiffs had bought another undisclosed investment in October 2002. The confirmation advice of 7 July 2005 also indicated that the plaintiffs had various bank accounts in which their investments and the interest therefrom were held.

23 On 8 December 2009, the defendant's solicitors wrote to the plaintiffs' solicitors to ask that the plaintiffs confirm that the first and the third plaintiffs never had any statement of accounts in their possession, custody or power besides the one for October 2002 and that the second and the fourth plaintiffs never had any statement of accounts in their possession, custody or power. The plaintiffs replied on 17 December 2009 saying that the plaintiffs only had the disclosed documents.

24 The defendant then applied under section 175 Evidence Act (Cap. 97) to obtain discovery directly from DBS, a non-party in this action. The plaintiffs opposed this application. An AR heard the application and ordered DBS to provide the documents.

25 DBS complied with the order of court and provided the defendant's solicitors various documents which took up almost two arch-lever files. These documents indicated that the plaintiffs had made investments in structured products with DBS between October 2002 and March 2008 totalling almost US$5 million, most of which were not mentioned by the plaintiffs. These documents included term sheets, statements of account and interest payout letters addressed to the plaintiffs and/or signed by them.

The application before the AR

26 The AR who heard the defendant's application to strike out the plaintiffs' action on the ground of the plaintiffs' failure to comply with the "unless Order" ruled in the following manner:

> (1) The Surf Deposits are no doubt structured products falling within the ambit of the Discovery Order. The documents disclosed by DBS are relevant as the structures of the Surf Deposits are similar to the Product, and importantly, there were disclosed risks in relation to the Surf Deposits (*cf*. the representation of "no risk").
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> (2) The plaintiffs had been, at the very least, cavalier and reckless with regard to their discovery obligations. Notwithstanding that the contents of the Discovery Affidavit are untrue, default alone of the Unless Order by itself might not justify striking out as: (a) a fair trial is still possible; and (b) the non-disclosure was a matter of degree, as opposed to complete non-disclosure.
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> (3) However, by arguing that they thought Surf Deposits are not Structured Deposits and were outside the ambit of the Discovery Order, the plaintiffs have compounded their present predicament, as that is a clear attempt to mislead the court given that the plaintiffs knew full well (at the time of the Discovery Affidavit was filed) that Surf Deposits were structured products falling within the ambit of the Discovery Order: see the Discovery Affidavit at paragraphs 4 – 6. In view of the totality of the plaintiffs' conduct herein, the court has little alternative but to allow the defendant's application.

After hearing the parties on the question of costs, the AR added:

> Costs of this application to be agreed if not taxed. I would reiterate that if the plaintiffs had

apologised to the Court for their default and not sought to absolve themselves by arguing that the Surf Notes were not structured products, the outcome of this hearing might have been different for the reasons given at (2) above.

The appeal

27 Counsel for the plaintiffs submitted before me that the plaintiffs had not disclosed a full list of their investments with DBS for the following reasons:

(a) they did not keep track of all their investments with DBS;

(b) they were of the view that they only invested in fixed deposits with DBS; and/or

(c) they disclosed that they invested in Surf Deposits already and did not hide this fact from the court.

As a result, the plaintiffs could not keep track of their losses and could only produce limited records in discovery. Although they did not manage to disclose the full extent of their investments with DBS due to their poor record maintenance, they did disclose that they invested in a particular investment product.

28 Counsel for the plaintiffs went on to submit that the plaintiffs were under the impression that Ms Lau referred to fixed deposits in their conversation of 13 March 2008. They relied on her to supply them with the documents relating to their investment with DBS. On the face of the documents disclosed by the plaintiffs in their affidavit of 7 December 2009, none of the documents contradicted their position. The October 2002 statement did not disclose a further Surf Deposit investment. The plaintiffs are also prepared to give any further explanation on oath as to what has happened to all their documents relating to their investment with DBS in order to achieve a fair and open trial. In the circumstances, they ought to be given an extension of time to file additional documents and to have their action restored.

29 The plaintiffs submitted that their case was unlike that in *Manilal & Sons v Bhupendra KJ Khan (t/a JB International)* [1989] 2 SLR(R) 603 where the action was struck out because a claim that certain documents were not in existence was found to be untrue. That case also held that even if the defaulting party's omission was not deliberate, it had arisen out of gross negligence amounting to wilfulness. The plaintiffs also argued that their case did not fall within the four instances cited in *Alliance Management SA v Pendleton Lane P & Anor* [2008] 4 SLR 1 ("*Alliance Management*") where an action would be struck out. These instances are where the defaulting party has deliberately or wilfully failed to comply with an "unless order", where the court has made successive orders for discovery (not "unless orders") which have not been complied with so that the default is clearly contumacious, where the consequences of non-compliance with an order or rule requiring discovery is such that there is a serious risk that a fair trial may no longer be possible and where there are circumstances in which the deliberate suppression of evidence might justify striking out even if a fair trial is still possible. In the present case, '[w]hether or not the plaintiffs invested $1 or $1 million in Surf Deposits, they have explained that they invested in Surf Deposits. This is already a known fact". The plaintiffs conceded, on hindsight, that they should have kept proper records of their banking relationship with DBS.

30 The defendant took quite the opposite view. It submitted that the plaintiffs' non-disclosure of their full investment experience in structured products with DBS and the documents relating thereto was wilful and deliberate. Their disclosure of their investments in Surf Deposits 02 and 28 was selective. In particular, there was non-disclosure of the first and the third plaintiffs' investment of some US$1.4 million in Surf Deposit 28. The plaintiffs could not have been unaware of the rest of their investments in both Surf Deposits since the first plaintiff was the common joint account holder. Moreover, the value of the undisclosed investments was significantly higher than what was disclosed and it was plainly inconceivable that the plaintiffs did not recall them. Significantly, a large investment of about US$925,000 in Surf Deposit 09 was still ongoing as at November 2008, some six months after the plaintiffs invested in the product in issue here. Surf Deposit 09 is very similar to the product as they are both structured products linked to the US LIBOR and both have a tenor of 10 years.

31 The defendant also took issue with the fact that the plaintiffs objected to its application to order DBS to give disclosure of the relevant documents. The documents furnished for the six-year period were voluminous and it was suspicious that the plaintiffs only had the few documents that they disclosed. The fact that they suffered significant losses as a result of the premature termination of their investments in Surf Deposits 18 and 28 also contradicted their assertion that they thought the Surf Deposits were fixed deposits with slightly higher interest returns. Further, the documents themselves made it quite clear that the investments were Surf Deposits and not fixed deposits. In any event, for the purposes of complying with the "unless order", the plaintiffs obviously knew that Surf Deposits were not fixed deposits but structured products because they disclosed two Surf Deposits. If the plaintiffs were unsure about the documents, they could have requested DBS to furnish the details of their investments but there was no evidence that any such action had been attempted. The defendant therefore submitted that the plaintiffs' conduct was calculated to suppress relevant documents relating to their investment experience in structured products, a central issue in the action at hand. These documents were adverse to their case. At the very least, it was argued, "the plaintiffs were grossly negligent and wilfully neglected to make enquiries and/or to disclose numerous relevant documents".

32 The defendant referred to the third and the fourth instances cited in *Alliance Management* (see [29] above) where striking out would be justified. It submitted that the plaintiffs' conduct had been "nothing short of extraordinary", that it was "difficult to imagine a more egregious case" than this and that it was clear the plaintiffs have no intention whatsoever of complying with their discovery obligations. Striking out here is therefore justified even if a fair trial is still possible. However, the defendant argued, a fair trial would not be possible here. The documents suppressed were severely damaging to the plaintiffs' case. By concealing them, the plaintiffs were clearly seeking to wrest for themselves an unfair tactical advantage, without regard for the rules of engagement or the orders of court. Their conduct showed that they had no qualms about lying on oath to avoid their discovery obligations in order to advance their case. If the defendant had not been aware of their investments with DBS, it was clear that the plaintiffs would have got away with their non-disclosure, thereby severely prejudicing the defence of the action.

33 In *Federal Lands Commissioner v Neo Hong Huat* [1998] SGHC 131, the defaulting party would insist that he had no documents and wait to see if the other party could produce any. If the latter could, he would then admit to the documents' existence. The defendant submitted that the present case went beyond even that kind of conduct because the plaintiffs refused to admit to their failure even when confronted with the relevant documents. In their reply affidavit, despite being confronted with the documents from DBS, the plaintiffs claimed that they had complied with the discovery order and there was no prejudice to the defendant as the plaintiffs had already disclosed that they invested in Surf Deposits. They then went on to argue that Surf Deposits are not structured products.

34 The plaintiffs are clearly individuals of considerable means. The defendant argued that they must have investments elsewhere that only they knew about. Their conduct so far did not give any confidence that they will take their discovery obligations seriously if their action is restored. On the contrary, there is every indication that they will not.

35 After considering the arguments, I agreed with the defendant's submissions. On the facts here, there is a serious risk that a fair trial may not be possible in the light of the hide and seek strategy adopted by the plaintiffs and there is no indication that they will henceforth pursue their claim honestly and fairly. In any event, even if a fair trial is still possible, the deliberate suppression of highly relevant documents, which on their face are clearly adverse to the plaintiffs' position on a crucial issue in their action, coupled with their unrepentant attitude, justify the draconian measure of striking out the plaintiffs' action.

36 I therefore dismissed the plaintiffs' appeal and awarded the defendant its costs of the appeal, to be taxed or agreed.