Orient Centre Investments Ltd and Another v Societe Generale
[2007] SGCA 24

Case Number : CA 62/2006

Decision Date : 09 May 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA

Counsel Name(s) : N Sreenivasan (Straits Law Practice LLC) and Edwin Seah Li Ming (Edwin Seah & K S Teo) for the appellants; Suresh Nair and Victoria Xue (Allen & Gledhill) for the respondent

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

Civil Procedure – Pleadings – Striking out – Principles to be applied in striking out application – Whether too late in proceedings to order striking out

Contract – Contractual terms – Warranties and representations – Whether express terms in bank account opening documents binding on parties hence negating account holders' allegations against bank

9 May 2007Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

1 In this appeal, the appellants are Orient Centre Investments Ltd ("Orient") and Teo Song Kwang @ Richard ("Teo"). They have appealed against the decision of Lai Siu Chiu J ("the Judge") in striking out their claim against the respondent, Société Générale ("SG"), for damages for breach of representations, breach of fiduciary and other duties and for negligence in relation to investments in certain structured financial products.

2 This claim is part of a larger claim for damages which the appellants have allegedly suffered in a multitude of investments which they had made whilst relying on the advice of the second defendant, Kenneth Goh Tzu Seoh ("Goh"), their investment adviser and an employee of SG at the material time. The direct customer of SG was Orient but Teo has claimed that Orient was his nominee and *alter ego.*

Background

3 Orient opened an investment account ("the Investment Account") with SG on 18 May 1998. The appellants have alleged that Orient was induced to do so by certain representations made to Teo by Goh, who was then an assistant vice-president of SG and a client relationship manager in SG's private banking division. Goh resigned from SG on 4 May 2000. Subsequently, on 17 July 2000, he was appointed by Orient as its authorised signatory of the Investment Account after he had represented to Teo that if he remained as Orient's investment adviser he would be able to recover the losses then suffered by Orient. He is not a party to this appeal, but in his defence he has denied all the said allegations of the appellants against him.

4 The Investment Account was very active during its lifetime. The appellants have claimed that they had transferred a total of about US$7.2m into the account and had invested a total of about US$9.6m, but had suffered a loss in excess of US$1m in investing in the following types of

financial products, *viz*: (a) equities and warrants; (b) options; (c) certain structured financial products ("the structured products"); (d) foreign exchange transactions; and (e) derivatives. The banking relationship between Orient and SG was terminated by a notice from SG expiring 45 days from 26 April 2002.

5 On 11 August 2004, the appellants commenced an action claiming damages against SG and Goh for losses suffered by Orient in the Investment Account. The writ, endorsed with a statement of claim, was served on SG on 16 December 2004. SG applied to strike out the statement of claim, following which Orient amended it. The appellants did not file the amended statement of claim until 31 January 2005. On 22 March 2005, SG again applied, this time, to strike out Teo as a party to the action and also the appellants' claim relating to the investments made after Goh had left SG's employment and had been made Orient's signatory of the Investment Account. The appellants reacted to this application by filing an extensively re-amended statement of claim to withdraw their claim against SG with respect to investments made after Goh had left the employment of SG, and to plead that Teo was the nominee or *alter ego* of Orient in its relationship with SG. This led SG to withdraw its striking out application.

6 The appellants' claims as pleaded in the amended statement of claim were as follows:

Against SG

(a) an account of all transactions, investments, loans, purchases, sales on the Investment Account from 18 May 1998 till the date the said account was closed, showing the actual gain/losses;

(b) damages for losses arising from breach of mandate prior to 17 July 2000;

(c) damages for losses arising from breach of SG's duty of care prior to 17 July 2000;

(d) damages for unreasonable termination of the Investment Account;

(e) interest on such sums found to be due to the appellants from such periods and at such rates as the Court shall decide;

(f) costs; and

(g) such further and other relief as this honourable Court deems fit.

Against SG and Goh jointly and severally

(a) damages for misrepresentation in respect of losses prior to 17 July 2000;

(b) damages for breach of fiduciary duties and duty of care prior to 17 July 2000;

(c) interest on such sums found to be due to the appellants from such periods as this honourable Court deems fit;

(d) costs; and

(e) such further and other relief as this honourable Court deems fit.

Against Goh

(a) damages for misrepresentation, breach of fiduciary duties and breach of duty of care in respect of losses that occurred after 17 July 2000;

(b) interest on such sums found to be due to Orient and at such rates and for such periods as this honourable Court deems fit;

(c) costs; and

(d) such further and other relief as this honourable Court deems fit.

7 SG found Orient's claims to be "studiedly broad and impossibly vague" and as a result had to apply to court for further and better particulars and discovery on four separate occasions beginning on 20 May 2005 and ending on 23 January 2006. On 1 March 2006, SG applied to court to strike out the appellants' claims in their entirety on the ground that the pleadings, read with the particulars, did not disclose any cause of action against SG. The assistant registrar ("AR") struck out those portions of the appellants' claims which were based on (a) the alleged absence of mandate in relation to the structured products, the spot or forward exchange contracts and loans in the Investment Account; and (b) the alleged wrongful termination of the Investment Account. However, the AR refused to strike out the appellants' claims against SG based on Goh's alleged breach of representations, fiduciary and common law duties as an investment adviser in relation to the other types of investments in the Investment Account. The appellants did not appeal against the AR's order.

8 However, SG appealed against the AR's order refusing to strike out the appellants' claims in their entirety, or, in the alternative, certain specific paragraphs of the re-amended statement of claim relating to (a) misrepresentation as to the nature of the account that led to the appellants' alleged losses; (b) breach of mandate or authority in relation to equities and warrants transactions; and (c) breach of fiduciary duties or duties as financial adviser in respect of the same. The Judge allowed the appeal partially and struck out the appellants' claim for losses arising from its investments in the structured products. The Judge did so, on two grounds: (a) that the appellants' pleaded causes of action contradicted Orient's own written representations and warranties made to SG in relation to the structured products; and (b) Goh's representations, which were alleged to have been made orally, were not admissible to contradict the written terms by reason of s 94 of the Evidence Act (Cap 97, 1997 Rev Ed). The Judge ordered that the re-amended statement of claim be amended further to remove the references to such claims, leaving intact the other pleaded causes of action.

Grounds of appeal relating to structured products

9 This appeal is only concerned with the appellants' claim for losses in relation to the structured products. The appellants have contended that the Judge was wrong in striking out their claims with respect to the structured products on the following grounds:

(a) Ground 1 – in reaching a finding on the structured products before the underlying facts common to all causes of action have been adjudicated upon;

(b) Ground 2 – in reaching the conclusion that since the transactions carried out were authorised, it negated the plea of negligence;

(c) Ground 3 – in reaching the finding that the Investment Account was a non-discretionary account by reason solely of the specific agreements (relating to the Investment Account and the structured product transactions) and not by any weight on the manner in which the transactions

had been carried out by Goh;

(d) Ground 4 – in not considering that the clauses relied on by SG to exclude liability and to exclude a fiduciary relationship are actually non-reliance clauses;

(e) Ground 5 – in allowing SG to make the application to strike out so late in the day; and

(f) Ground 6 – in holding that SG has satisfied the principles justifying a striking out at this stage of the proceedings.

10 Except for the first ground, the other five grounds of appeal do not need any elaboration as they are clear and specific. However, the first ground as advanced by counsel for the appellants requires some elaboration in order that the essential elements of the appellants' case on appeal can be appreciated. There is a certain degree of obfuscation in the reference to "the underlying facts common to all causes of action" which the Judge is alleged to have failed to adjudicate upon. The thrust of those words appear to be this: the appellants' claims for losses in the Investment Account included losses in relation to the structured products, and are based on Orient's reliance on Goh's representations or misrepresentations and/or as a result of Goh's misconduct and/or negligence as Orient's investment adviser. These are the common causes of action in relation to all the investments in the Investment Account, and until these common causes are adjudicated, *ie*, until it is determined whether or not Goh had committed the alleged breaches, it is premature and wrong for the Judge to decide that the appellants had no claim with respect to the structured products. To reinforce this argument, the appellants have pointed out that Goh, who was responsible for the losses suffered by the appellants, has not filed an affidavit to deny the allegations of the appellants on these matters. Because of the way counsel for the appellants has put his clients' case, it is necessary that we examine what these common underlying facts were, and to this task we now turn.

Common facts relating to claims of appellants

Alleged representations by Goh inducing opening of account

11 The first common fact alleged by the appellants is that Goh induced Teo to open the Investment Account by representing to Teo that:

(a) SG was rated one of the top five banks in the world; and

(b) SG had a special strategy that would *ensure*:

(i) the preservation of Teo's capital; and

(ii) a guaranteed return of 10% per annum on Teo's deposits.

In our view, the legal nature of these alleged representations is that they are warranties. Thus, Goh is alleged to have warranted to Teo that every investment made by Teo would be capital preserved and income guaranteed to the extent of 10% per annum. Naturally, Goh has denied that he had ever given any such warranty to Teo. Nevertheless, as will be seen, this is the main thrust of the appellants' case on appeal.

12 To open the Investment Account on behalf of Orient, Teo signed the following documents:

(a) Mandate for Limited Company Account;

(b) Indemnity for Telephone / Facsimile / Telex Instructions; and

(c) Declaration For Mail Held by Bank ("the Declaration").

The terms of the mandate and the indemnity are not relevant to the issues on appeal.

13 The Declaration contains a conclusive evidence clause which states that all discrepancies and errors contained in any bank statement sent to customers must be highlighted to the bank within the prescribed period, failing which the entries in the statement were deemed to be regular and proper. SG has relied on the conclusive evidence clause as a general defence to all the claims of the appellants, in response to which the appellants have contended that the conclusive evidence clause is unenforceable by virtue of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("the Unfair Contract Terms Act"). In our view, the appellants' argument based on the Unfair Contract Terms Act is not essential to the determination of the issues on appeal, and accordingly, we will not consider it. However, the "hold mail" provision in the Declaration is relevant as evidence in relation to the credibility of the appellants' allegation that the structured products, the subject matter of this appeal, were purchased by Goh for Orient without consulting Teo and also without regard to their investment objectives.

Alleged representations by Goh on nature of account

14 The appellants have also alleged that at some unspecified time either before or after the opening of the Investment Account, Goh had represented to Teo that (a) the Investment Account was a discretionary account; and (b) that Teo should rely on Goh for the most appropriate arrangements to ensure that the objectives mentioned at [11](b)(i) and [11](b)(ii) above would be met, and further, that pursuant to this representation, they had relied on Goh as their investment adviser in investing in options, equities and warrants, structured products, foreign exchange transactions and derivatives. These representations or assurances, as the appellants subsequently discovered, were not only untrue, but Goh had also breached his duties as the appellants' investment adviser and was negligent in the performance of his duties.

15 After opening the Investment Account, Orient obtained a credit facility of US$9m for the purposes of investment on the terms of a facility letter dated 29 July 1998. The credit facility was available for drawdown under four sub-facilities, *viz*, (a) multi-currency short term loans; (b) standby letters of credit; (c) currency leverage investment facility; and (d) foreign exchange margin trading or options investment. The facility letter also stated that the four sub-facilities were subject to the terms and conditions contained in the following documents, *viz*:

(a) the Currency Leverage Investment Facility Agreement ("the CLIF Agreement");

(b) The Risk Disclosure Statement;

(c) The Letter of Set Off;

(d) Standard Terms and Conditions Governing Foreign Exchange Margin Trading/Option Investment ("FX Facilities").

Alleged representation by Goh on returns from facilities

16 In relation to these facilities, the appellants have also alleged that they were induced to accept them in reliance on Goh's representations that the appellants' financial objectives on capital

preservation and income return would be met, in the same way that they were induced to open the Investment Account.

Alleged duties of SG as financial adviser

17 The appellants have alleged that SG, as their financial adviser, owed them the following duties:

(a) to ascertain the financial and commercial background of the appellants;

(b) to establish the appellants' financial objectives and risk tolerance level;

(c) to inform the appellants that active management and active monitoring was essential;

(d) to give an explanation of the loss-limiting strategies available;

(e) to explain the nature, complexity and risk of such transactions;

(f) to ensure that the appellants fully understood the nature, complexity and risk of the structured products;

(g) to ensure that the appellants had the facility to monitor the movements of exchange rates;

(h) to know the financial products; and

(i) not to introduce a product to the appellants unless it was appropriate to the appellants' specific needs and risk profile.

SG's alleged breach of duties as financial adviser

18 The appellants have alleged that SG, as financial adviser, was in breach of its duties to the appellants in failing to:

(a) compile the risk profile and investment objectives for the appellants;

(b) consider the appellants' investment objectives and risk tolerance in making the investments;

(c) avoid investments in emerging markets;

(d) avoid investments in speculative, high risk and volatile markets;

(e) diversify the investments to hedge losses;

(f) avoid short-term trading for quick profit; and

(g) monitor the investments and products to avoid losses.

SG's alleged duties as banker

19 The appellants have alleged that SG, as banker to the appellants, owed them the following

duties:

(a) to employ qualified, competent and prudent persons to ascertain the appellants' investment objectives and risk profile;

(b) to deal with the appellants' deposit in a manner consistent with the appellants' investment objectives and risk profile;

(c) to supervise their employees;

(d) to take immediate measures to stop further losses once irregularities are discovered; and

(e) to act in compliance with the standards set for an international financial institution.

SG's breach of duties as banker

20 The appellants have also alleged that SG was in breach of its duties as an investment banker, because in agreeing to the Investment Account being opened as a non-discretionary account, it failed to:

(a) investigate or query the lack of proof or mandate for transactions carried out by Goh ;

(b) query or investigate the absence of the contract obtained in the ordinary course of business for an investment account;

(c) query or investigate the absence of the customary documents that set out the appellants' financial objectives, expected tax returns, risk tolerance, liquidity needs, time horizon, tax considerations, preferences, circumstances and particular needs;

(d) supervise or monitor the operations of the Investment Account and/or query, or investigate the irregular and/or suspicious trades; and

(e) query, inform or confirm with the appellants directly as to the purported authority granted to Goh in carrying out the various transactions.

SG's alleged breach of fiduciary and/or contractual duties

21 In addition to these breaches, the appellants also alleged that SG acted in complete disregard of its fiduciary duties and duties as financial adviser and without regard to the appellants' risk profile and investment objectives by:

(a) making indiscriminate purchases of a countless number of highly speculative equities and warrants without diversification in other products of different risks and nature, with too much concentration, exposure and weightage to one of two stocks;

(b) purchasing numerous structured products which were extremely highly leveraged, thinly traded and carried currency risks such as the Bangkok Bank deposit;

(c) carrying out short-term trade in respect of warrants such as "SGA SP 500 WRT 180399" and "SGA-D.J PWRT 190399";

(d) purchasing options and allowing them to expire without selling them;

(e) entering into speculative and risky spot or foreign currency contracts; and

(f) utilising the margin of the Investment Account to facilitate extraordinary activity ("churning") for the second defendant's (Goh's) own benefit.

22 The matters set out in [11] to [21] above are the underlying facts common to all the pleaded causes of action. Given the comprehensive list of breaches of representations and fiduciary and contractual duties and the equally long list of causes of action against SG, it bears reiteration that this appeal is only concerned with the structured products, so that we should not lose sight of the relevance of the arguments of counsel for the appellants on these issues. We will now consider the nature of the structured products and the express terms and conditions that SG has prescribed for such investments in order to protect itself from claims by aggrieved or disappointed investors for investment losses, a normal prospect that becomes a reality from time to time.

Nature of structured products

23 The appellants invested in five structured products but this appeal is concerned only with four of them as the fifth product was purchased after Goh had left the employment of SG. We will first describe the nature of these products and the specific terms applicable, followed by a summary of the applicable general terms and conditions.

Bangkok Bank Equity Linked Deposit ("BBELD")

24 This was a yield enhancement deposit for €1m for two and a half months linked to the market price of Bangkok Bank shares, maturing on 12 August 1999. The nominal amount of the deposit was €1m, but the actual amount was 96.56% thereof, thus giving an income yield of 29.83% per annum for the period of the investment. The deposit note stated expressly (a) that it was not a "Capital Guaranteed Product", and (b) that investors should invest in the product only after careful consideration with their own advisers of the suitability of this product in the light of their particular financial circumstances.

25 The BBELD was purchased subject to the terms of an Equity Linked Deposit Master Agreement dated 10 June 1999 ("the ELDMA") and a related Risk Disclosure Statement which, *inter alia*, explained the risks involved in this kind of investment. Article 4.11 of the ELDMA states that the depositor:

> … has not relied upon any representations (whether written or oral) of SG, other than the representations expressly set forth in the relevant facility letter and security documents and in any guarantee or other credits support document and is not in any fiduciary relationship with SG[.]

The Tiger Note 2

26 The Tiger Note 2 was a capital investment for US$1m (in notes of US$50,000 each, saleable only after six months of issue) for a fixed period of two and a half years from 7 July 1999 to its maturity on 22 January 2002. On maturity, the appellants would be repaid the capital sum according to a specified formula. The deposit was linked to a basket of three specified funds. The deposit was subject to the terms of an Indexed Deposit Agreement ("the Tiger Note 2 IDA").

27 The contract evidencing the Tiger Note 2 contained the following disclaimers: (a) that SG

assumed no fiduciary responsibility or liability for any consequences or otherwise arising from the investment; and (b) that Orient should consult its own advisers as to the suitability of the investment.

28 Under Art 4.2 of the Tiger Note 2 IDA:

> The Depositor hereby represents and warrants for the benefit of SG, that:
>
> **- it has concluded the present transaction after having carried out its analysis of the transaction, particularly in the light of its financial capacity and its objectives;**
>
> **- it is fully aware that the Deposit Final Value may be less than the Outstanding Deposit Amount;**
>
> **- it has examined and is familiar with the content of this Agreement and that it agrees and accepts its terms, and that it has examined and is familiar with the terms of the Prospectuses of the Funds.**
>
> [emphasis in bold in original]

These conditions say, essentially, that the appellants in purchasing the Tiger Note 2, warrant to SG that they would not rely on any advice or recommendation from SG and that they were fully aware that the investment was not capital guaranteed.

The Tokyo Deposit

29 This deposit was again a capital investment for US$500,000 linked to the Nikkei 225 Index for a period beginning from 30 June 1999 to16 July 2001. The deposit note expressly provided that it was capital guaranteed but only if it was not withdrawn prematurely. It was subject to the terms of an undated Indexed Deposit Agreement containing terms similar to those applicable to the Tiger Note 2. Another applicable document, called the Term Sheet, contained a disclaimer of any fiduciary relationship between SG and Orient in exactly the same terms as the Tiger Note 2.

The Tokyo Plus Deposit

30 The Tokyo Plus Deposit was a term deposit for US$500,000 which was similar to the Tokyo Deposit except that it was linked to the Fidelity Fund of Japan. It was for the period beginning 18 January 2000 and maturing on 30 July 2002. The deposit note also provided that it was capital guaranteed provided it was not withdrawn prematurely. The deposit was subject to the terms and conditions of a Fund Linked Deposit Agreement dated 28 January 2000. Article 4 of this agreement provided that:

> The Depositor hereby represents and warrants to SG that:
>
> …
>
> 4.3 it has made its own analysis of the mathematical formula for the final Redemption Amount, of the legal, tax and accounting aspects of the operations contemplated thereby and described in this Deposit Agreement and it has concluded the present transaction after having carried out its analysis of the transaction, particularly in the light of its financial capacity and its objectives;

4.4 as the Final Redemption Amount is linked to the value of the Shares and the value of the Shares may be subject to considerable fluctuations depending on the market forces, it is fully aware that the Final Redemption Amount may not be greater than the Nominal Amount;

4.5 as the final Redemption Amount is (i) linked to the value of the Shares and the value of the Shares may be subject to considerable fluctuations depending on the market forces and (ii) takes into account any Cost and Expenses incurred or suffered by SG in respect of selling the Shares and any costs, expenses, liabilities or losses incurred or suffered by SG as a consequence of breaking or unwinding or funding from other sources any arrangements it may have made for investing the proceeds of the Deposit or for hedging or funding its obligations under the Deposit, it is fully aware of the risks associated with the Deposit Agreement and that, as a result of early withdrawal/redemption of the Deposit prior to Maturity Date, the Early Redemption Amount may be significantly less than the Deposit Amount and even equal zero;

4.6 it has read understood and is familiar with the content of this Deposit Agreement and that it agrees and accepts its terms, and that it is not in any way relying on SG for the suitability of this product and is entering into this Deposit Agreement having independently assessed the suitability of the arrangement contemplated by this Deposit Agreement ;

4.7 it has the knowledge and sophistication to independently appraise and understand the financial and legal terms and conditions of the Deposit and to assume the economic consequences and risks thereof and has or will have, in fact, done so as a result of arm length's dealing with SG;

4.8 to the extent necessary, it has consulted with its investment, financial, legal or other advisors and has made its own investment, hedging and trading decisions in connection with the Deposit based upon its own judgment and the advice of such advisors (of which SG disclaims all liability) and not upon any view expressed by SG;

4.9 it has not relied upon any representations (whether written or oral) of SG and is not in any fiduciary relationship with SG;

…

[emphasis in bold in original]

31 It should be noted that before its maturity date, Orient instructed SG to withdraw 50% of the investment in the Tokyo Plus Deposit, leaving a balance of US$250,000 invested.

The USD/4Funds Deposit

32 This was a capital deposit for US$1m which was similar to the Tiger Note 2 except that it was linked to four cyclical funds and subject to an Indexed Deposit Agreement dated 31 May 2000 containing terms similar to those applicable to the Tiger Note 2. In particular, Art 4 was the same in both agreements. Its maturity date was 21 November 2003. Orient has withdrawn its claim against SG for alleged losses with respect to this deposit as it was made after Goh left SG's employment.

General terms and conditions applicable to structured products

33 The general terms and conditions applicable to the structured products are found in the documents referred to in [15] above. The relevant clauses in these documents are discussed below.

Clause 9.2 of the CLIF Agreement

34 This clause provides, *inter alia*, that any transaction shall be made solely in reliance on the client's own judgment and not in reliance on any representation, advice, view, opinion or other statement by any of SG's employees, agents or representatives. More importantly, cl 9.3 provides that SG does not warrant or guarantee profits or freedom from loss and risk in relation to any transaction made by the customer under the agreement, and that the customer is solely responsible for the risk involved.

The Risk Disclosure Statement

35 The Risk Disclosure Statement provides that SG will not be held 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 or trading activities. Under cl 16 thereof, the customer confirms and represents to SG, with respect to the facility and any transactions, that it has independently assessed and assumed the risks thereof, and has made its own investment, hedging and trading decisions in connection with any transaction based upon its own judgment and not upon any view expressed by the Bank, and that Orient has not relied upon any representations (whether written or oral of the Bank, other than the representations expressly set forth in the relevant facility letters and security documents and in any guarantee or other credit support document and is not in any fiduciary relationship with the Bank, and that it has not obtained from the Bank (directly or indirectly through any other person) any advice, counsel or assurances as to the expected or projected success, profitability, performance, results or benefits of any transaction.

Clause 19(g) of the SG Standard Terms

36 This clause states that the investor should invest in derivative products after analysing the risks involved, if necessary with the help of outside advisers.

Clauses 12(f) to 12(h) and 14 of the Standard Terms and Conditions for FX Facilities ("FX standard terms")

37 Clause 12(f) to 12(h) of the FX standard terms provide, *inter alia*, that the investor *represents and warrants* that (a) it is exercising its own business judgment independently of SG in entering into the FX facilities and each contract; (b) that it is not relying on communication (written or oral) of SG as investment advice or as a recommendation to enter into the contract; (c) that it has not received from SG any guarantee as to the expected results of that contract; (d) that it is aware of all material risks associated with the FX facilities and each contract; and (e) that SG is not acting as a *fiduciary for or as an adviser* in respect of the contracts.

38 Clause 14 goes on to state that:

> 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 any other matters connected with, the Contracts.

Analysis of appellants' grounds of appeal

39 Having set out the underlying facts common to the appellants' causes of action, we will now consider the merits of each of the grounds of appeal.

Ground (1) – Common underlying facts

40 The appellants' argument under ground (1) is that the Judge was not in a position to strike out the appellants' claim in relation to the structured products unless she first found that Goh did not make the representations and did not misconduct himself or was not negligent in acting as an investment adviser to the appellants. In advancing this argument, counsel for the appellants has simply chosen to ignore the express terms applicable to the structured products and their adverse impact on the appellants' claims which were based entirely on oral representations allegedly made by Goh that Orient's investments would be capital guaranteed and also income guaranteed at 10% per annum. Instead, counsel adopted a different tack to bypass the conclusiveness of the express terms by asserting, in para 58 of their case, that "Each instrument or arrangement entered into was part of and in fulfillment of the primary objective of depositing funds with [SG] for investment and gain." Implicit in this argument is the assertion that each structured product was purchased by or on the advice of Goh to fulfil the primary objective of no loss of capital and a return of 10% per annum on the capital invested. In other words, the argument is that either the pre-contractual representation allegedly made by Goh on capital preservation and income returns had ambulatory effect and overrode or superseded all the subsequent general and specific terms and conditions applicable to each structured product, or that the same representation was expressly or implicitly repeated by Goh every time the appellants invested in a structured product. From the appellants' point of view, the written terms and conditions applicable to the structured products were irrelevant and had no legal effect. Hence, in counsel's words, they could not absolve SG from liability for breach of warranties.

41 A parallel argument advanced by counsel for the appellants was that the Investment Account was, or was misrepresented as, a discretionary account, with the consequence that Goh, who was managing the account, had assumed duties as an investment manager. It was further argued that even if Goh had not made any such representation, the fact that the Investment Account was a non-discretionary account also imposed fiduciary and common law duties on Goh because he was and had acted as an investment adviser to the appellants and that SG could not disclaim the existence of such duties in the circumstances.

Non-reliance clauses, exclusion clauses and warranties

42 Counsel had a third argument based on a point of pleading. He contended that the clauses relied on by way of defence were either in the nature of non-reliance clauses or exclusion clauses. As non-reliance clauses, they have the effect of raising an evidential estoppel, but it is a defence which must be pleaded, and which SG has failed to do so in its pleadings. Accordingly, SG must apply to amend its defence to plead this defence before it is allowed to rely on the clauses. Further, if they are in the nature of exclusion clauses, SG has the burden of showing that they are enforceable under the Unfair Contract Terms Act, a burden SG has not discharged.

43 The general non-reliance clauses that counsel had in mind would be the following:

(a) Clause 9.2 of the CLIF Agreement (see [34]);

(b) the Risk Disclosure Statement (see [35]);

(c) Clause 19(g) of the SG Standard Terms (see [36]); and

(d) Clause 14 of the FX standard terms (see [38]).

Furthermore, there were other specific disclaimer clauses in the Tiger Note 2 (see [27]; the Tokyo Deposit (see [29]), the Tokyo Plus Deposit (see [30]); and the USD/4 Funds Deposit (see [32]).

44 In support of the first argument, counsel referred to the observations of Chadwick LJ in *E A Grimstead & Son Ltd v Francis Patrick McGarrigan* (27 October 1999) (Court of Appeal, UK) ("*Grimstead*") that clauses stating that a party does not rely on the representation of another party or will not be influenced by it are capable of giving rise to an evidential estoppel provided that the three requirements in *Lowe v Lombank Ltd* [1960] 1 WLR 196 were satisfied, *ie*, (a) that the statement in those clauses were clear and unequivocal; (b) that the representor had intended that the representee should act on those statements; and (c) that the representee had believed the statements to be true and had acted upon them. Chadwick LJ further stated:

> In my view an acknowledgement of non-reliance, in the form which appears in clauses 2.5 and 8.1 in the present agreement, is capable of operating as an evidential estoppel. It is apt to prevent the party who has given the acknowledgement from asserting in subsequent litigation against the party to whom it has been given that it is not true. That seems to me to be a proper use of an acknowledgement of this nature, which, as Mr Justice Jacob has pointed out in the Thomas Witter case, has become a common feature of professionally drawn commercial contracts.

Chadwick LJ went on to consider whether the representor would have been precluded from relying on the representation by reason of the provisions of s 3 of the Misrepresentation Act 1967 (c 7) (UK) as amended by the Unfair Contracts Act 1977 (c 50) (UK) on the ground of unreasonableness, and concluded as follows:

> There are, as it seems to me, at least two good reasons why the courts should not refuse to give effect to an acknowledgment of non-reliance in a commercial contract between experienced parties of equal bargaining power – a fortiori, where those parties have the benefit of professional advice. First, it is reasonable to assume that the parties desire commercial certainty. They want to order their affairs on the basis that the bargain between them can be found within the document which they have signed. They want to avoid the uncertainty of litigation based on allegations as to the content of oral discussions at pre-contractual meetings. Second, it is reasonable to assume that the price to be paid reflects the commercial risk which each party – or, more usually, the purchaser – is willing to accept. The risk is determined, in part at least, by the warranties which the vendor is prepared to give. The tighter the warranties, the lesser the risk and (in principle, at least) the greater the price which the vendor will require and which the purchaser will be prepared to pay. It is legitimate, and commercially desirable, that both parties should be able to measure the risk, and agree the price, on the basis of warranties which have been given and accepted.

45 In our view, counsel's pleading point has no merit for two reasons. First, although SG did not expressly plead the defence of estoppel by reference to the non-reliance clauses in the various agreements relating to the structured products, it has pleaded them for their legal effect as a defence in its pleadings. In our view, since such clauses are capable of giving rise to an evidential estoppel as a matter of law, it is sufficient for pleading purposes that the clauses are pleaded for their legal effect without having to put a label on the defence. The following statement from Singapore Court Practice 2006 (LexisNexis, 2006) para 18/8/11, sums up this proposition:

> In *Boustead Trading (1985) v Arab Malaysian Merchant Bank* [1995] 3 MLJ 331, at 341, the

Malaysian Court of Appeal did not think that the failure to specifically plead the term 'estoppel' should bar the court's consideration of the issue. Referring to authority, the court stated that as long as the pleader pleads the material facts it is not essential for him to state any 'special formula in staccato' (applying *Laws Holdings v Short* (1972) 46 ALJR 563, at 571; also see *Richland Trade & Development v United Malayan Banking* [1996] 4 MLJ 233, at 246). The court went on to state: 'it may be desirable for a pleader to use that term (ie estoppel); but it is not fatal if he does not'. … Gopal Sri Ram JCA stated that '... it is not vital to plead estoppel if the facts giving rise to this legal doctrine are established in the pleading, thereby giving the opposing party sufficient notice of it'. This accords with the general principle that the rules of pleading are concerned with the material facts which establish the legal result rather than the legal result itself.

46 Secondly, in any event, many of the material clauses in the agreements are also in the nature of representations and warranties and have been relied upon as such by SG by way of defence in its pleadings. For example, cl 12 of the FX standard terms is expressed as a representation and a warranty. It provides that:

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. …

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

[emphasis added]

These representations and warranties apply to all the structured products.

47 Furthermore, Orient had also made similar specific representations and warranties to SG with respect to each of the structured products. In the case of the BBELD, Art 4 of the ELDMA provides that:

The Depositor *hereby represents and warrants* to SG that:

…

4.11 it has not relied upon any representations (whether written or oral) of SG, other than the representations expressly set forth in the relevant facility letters and security documents and in any guarantee or other credits support document and is not in any fiduciary relationship with SG;

…

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.

[emphasis added]

48 In the case of Tiger Note 2, it is subject to the Tiger Note 2 IDA, Art 4.2 of which provides that the depositor r*epresents and warrants* for the benefit of SG that, *inter alia*:

> **it has concluded the present transaction after having carried out its analysis of the transaction, particularly in the light of its financial capacity and its objectives;**
>
> …
>
> [emphasis in bold in original]

49 In the case of the Tokyo Deposit, Art 4.2 of the related Indexed Deposit Agreement is in the same terms as Art 4.2 of the Tiger Note 2 IDA. Likewise in the case of the Tokyo Plus Deposit, Art 4.2 of the related Indexed Deposit Agreement is in the same terms as Art 4.2 of the related agreements for the first two products.

50 In our view, the combined effect of the express general and specific terms and conditions applicable to the structured products provides an insuperable obstacle to any claim by the appellants against SG based on the alleged breach of representations or duties, fiduciary or contractual or on negligence on the part of Goh. In the face of Orient's own representations and warranties with respect to each of the structured products, it is not possible for the appellants to argue that Orient had relied on any alleged representation on the part of Goh that he would ensure that the appellants' capital would be preserved and that it would earn a return of 10% per annum on each deposit. It was therefore unnecessary for the Judge to determine the factual merits of the appellants' allegations before determining the legal merits of SG's defence.

Pre-contractual representations superseded by express terms

51 In our view, even if Goh had made the representation concerning capital preservation and income return, it would not have assisted the appellants in relation to the structured products, as they have represented and warranted that they did not rely on any representation given by any of SG's officers. Moreover, Teo could not have misunderstood the clear and specific terms governing the structured products. An analogous case is that of the English Court of Appeal in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511 ("*Peekay*"), which was recently affirmed in *Bottin International Investments Limited v Venson Group plc* [2006] EWHC 3112 (Ch).

52 In *Peekay*, RB, a bank officer, asked the plaintiff's *alter ego*, P, whether he would like to invest in a Russian structured deposit without telling him that it was linked to some Russian Government bonds called GKO or that in the event of sovereign default investors would have no control over how the investment would be liquidated. P replied that he was interested. RB then e-mailed an attachment to P containing the final terms and conditions ("FTCs") relating to a hedged Russian Treasury bill. The FTCs described the investment as a deposit and set out various terms relating to it, including the maturity date and the projected rate of return. The FTCs were accompanied by a document described as an "Emerging Markets Risk Disclosure Statement". Later, RB faxed copies of all the documents to P for signature on behalf of the plaintiff. P looked over the documents but did not read them, assuming that they reflected what RB had told him about the investment. He signed the documents, returned them to the bank with instructions to buy US$250,000 "Russian GKO Note as per attached document".

53 Subsequently, the Russian government announced a moratorium on its debt obligations under

the GKO Notes, as a result of which the plaintiff only recovered US$5,918.06 from the deposit. The plaintiff claimed damages from the bank under s 2 of the Misrepresentation Act 1967 ([44] *supra*) alleging that RB had misrepresented the nature of the investment by giving P the impression that it would have a proprietary interest of some kind in the GKO, and that P had been induced to invest in it on its behalf. The High Court found for the plaintiff. However, the Court of Appeal reversed the decision on the ground that although RB had given P that impression, the terms of the FTCs were sufficient to make it clear to P, if he had read them, that the nature of the investment was fundamentally different from that which he had been given to understand. The Court of Appeal also held that P signed the documents by his own assumption that the investment product to which they related corresponded to the description he had previously been given, and not as a result of any inducement by RB. The Court further held that by confirming that he had read and understood the Risk Disclosure Statement and by returning it to the bank, P was aware of the nature of the investment. Accordingly, the plaintiff could not assert that it was induced to enter into the contract by a misunderstanding of the nature of the investment.

Ground (2) – Authorisation does not mean absence of negligence

54 One of the reasons given by the Judge (see [2006] SGHC 164 at [57]) for striking out the appellants' claim based on the lack of mandate was that:

> 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.

Counsel has contended that the Judge erred in law in so holding as the conclusion does not, as a matter of logic, follow from the premise. Even if Goh had the authority to invest in the structured products, he could have been negligent in advising Orient to do so. We agree with this submission. However, this is only an argument in logic and has nothing to do with the facts. It assumes that Goh had advised Orient to invest in the structured products when, according to the contractual terms, Orient had represented and warranted to SG that it would make its own assessment of the suitability of the investment and would not rely on any advice from SG to invest in those products: see [30] and [34] to [38] above. Since the premise is wrong, the argument based on logic is untenable. In any event, this argument is peripheral, and has no impact on our finding (which will be elaborated on at [66] below) that the appellants have suffered no loss whatsoever in its investments in the structured products.

Ground (3) – Nature of the Investment Account

55 The Judge has found that the Investment Account, by its express terms, was a non-discretionary account. The appellants have sought to outflank this finding by asserting that Goh had misrepresented to Orient that the Investment Account was a discretionary account and, moreover, had on that basis taken over control of it and made investments on behalf of Orient at his discretion, and that in so acting Goh had assumed all the fiduciary and common law duties of an investment manager.

56 In our view, this argument is a smokescreen. The essence of a discretionary account is that the investment manager may make any investments he thinks fit or suitable for his client without reference to his client: see *Valse Holdings SA v Merrill Lynch International Bank Ltd* [2004] EWCH 2471 at [69] where Morison J said:

> Essentially the difference between a discretionary account and an advisory account is that in the former the trader has discretion to make trades without taking his client's instructions. With an

advisory account, however, the client is essentially in charge of his own portfolio, with the benefit of the Bank's advice.

57 In a discretionary account, an investment manager *may* manage his client's account in his absolute discretion, but this does not mean that every time he makes an investment for the client he *must* do so, acting in his discretion. Nothing in the nature of a discretionary account prevents the manager from seeking the client's instructions to make a particular or any investment. In such a case, in the event that the client suffers a loss on the investment, then whether or not the investment manager is in breach of his duties as such would depend on whether he was negligent or in breach of his fiduciary or other duties in advising the client to make that investment, and whether his advice is subject to any liability exclusion clauses.

58 The fact that an investment account is discretionary or advisory cannot determine the duties of the trader or manager to the client or his liability for losses suffered by the client. In the case of the structured products, the contractual terms speak for themselves. For this reason, the appellants' argument on the nature of the Investment Account is irrelevant. But, in so far as the documents signed by Orient speak for themselves, counsel has not drawn our attention to any clause in the documents which suggest that the Investment Account was a discretionary account.

Ground (4) – Non-reliance clauses as estoppel not pleaded

59 Essentially, the argument in this ground of appeal is that the contractual terms relied upon by SG as a defence to the appellants' claim are non-reliance clauses or exclusion clauses. We have dealt with these arguments in [42] to [45] above and it is not necessary to repeat them here. This ground of appeal has no merit.

Grounds (5) and (6) – Delay in application to strike out claims

60 The appellants' contention in ground (5) is that SG should not have been allowed to apply to strike out the appellants' claims with respect to the structured products so late in the day. In our view, the short answer to this argument is that the generality and vagueness of the appellants' claims were such that SG had to make seven interlocutory applications between 31 January 2005 and 23 January 2006 for discovery and further and better particulars before they could decide whether the appellants had a *prima facie* case against SG on the materials disclosed in these applications.

61 In our view, it was not too late for SG to make its striking out application on 1 March 2006: see *Tapematic SpA v Wirana Pte Ltd* [2002] 4 SLR 953, at 961–962.

62 In ground (6), the appellants contended that SG has not satisfied the threshold requirements of O 18 r 19 of the Rules of Court (Cap 322, R 5 2006 Rev Ed) and that the re-amended statement of claim discloses a reasonable cause of action with respect to the structured products. As stated in the Singapore White Book, *Singapore Civil Procedure* 2003 (G P Selvam gen ed) (Sweet & Maxwell Asia, 2003) at para 18/19/6, the claim must be obviously unsustainable and it must be impossible, not just improbable, for the claim to succeed, for striking out to be granted. Citing the decision in *Gabriel Peter & Partners v Wee Chong Jin* [1998] 1 SLR 374, the note also states:

> It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action …

This note seems to support the appellants' argument. However, the note goes on to state:

> Where an application to strike out pleadings involves a prolonged and serious argument, the court should, as a rule decline to proceed with the argument unless it not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial, and therefore, where the court is satisfied, even after substantial argument both at first instance or on appeal, that the defence does not disclose a reasonable ground of defence, it will order it to be struck out.

63 In our view, the reasoning in this passage applies equally to the striking out of the appellants' claim in the present action, having regard to the representations and warranties made by the appellants for the benefit of SG and also the fact that the appellants have not been able to show any loss arising from its investments in the structured products. An illustrative case is *Chok Boon Hock v Great Eastern Life Assurance Co Ltd* [1999] 1 SLR 344, where the judge in dismissing the plaintiff's statement of claim noted at [26] that:

> In the light of the express terms of the agency agreement and the GSM agreement providing for variations to be made by the defendant to the commission structure, the plaintiff's statement of claim plainly discloses no reasonable cause of action, is vexatious and is an abuse of process of the court

64 In the present case, we are of the view, to quote the words of Nathan J in *Connell v National Companies and Securities Commission* 15 ACLR 75 at 79 (also quoted by Choo J in *Kim Hok Yung v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2000] 4 SLR 508 at [18]), that:

> The utterly forlorn nature of the [appellants' claims in relation to the structured products] is apparent on the documents. Nothing could breathe life into [them] …

Financial objectives of structured products

65 Finally, there is one critical aspect of the case on which neither counsel for the appellants nor counsel for SG focused on, and that was the appellants' financial objectives in purchasing the structured products. Each structured product had its own specific aims as follows:

> (a) In the case of the BBELD, the guaranteed return on the deposit was an enhanced yield of 29.83% per annum for two and a half months, which was much higher than the return Goh was alleged to have promised Teo. The main objective of this investment was to secure a high return, subject to the risk of the Bangkok Bank shares being traded below the strike price. However, Orient has neither alleged nor particularised a loss of capital in this investment.
>
> (b) In the cases of the Tiger Note 2 for US$1m, the Tokyo Deposit for US$500,000 and the Tokyo Plus Deposit for US$500,000, each of the related Term Sheet states that the deposit was "**100% Capital Guaranteed**", although maturing at different times. The investment objective in each case was capital growth only and not income. Hence, Goh's alleged representation on return of 10% per annum on invested capital was not relevant in all three investments.

66 The fact of the matter is that in relation to the structured products, the appellants have not suffered any loss at all. This would explain why the appellants are unable to particularise any such loss. Given the specific terms of Goh's alleged representation of capital preservation and a 10% return on capital, the failure or inability of the appellants to particularise their losses supports the conclusion that they had suffered no loss at all. For this reason alone, the appellants' claim must fail.

Conclusion

67 In our view, this appeal has no merit. Accordingly, we dismiss it with costs.

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