Als Memasa and another *v* UBS AG
[2012] SGCA 43

Case Number	: Civil Appeal No 8 of 2012
Decision Date	: 15 August 2012
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: N. Sreenivasan and Sujatha Selvakumar (Straits Law Practice LLC) for the appellants; Hri Kumar Nair SC, Teo Chun-Wei Benedict and Chiu Rouwei Charmaine (Drew & Napier LLC) for the respondent.
Parties	: Als Memasa and another — UBS AG

Civil Procedure – Pleadings – Amendment

Civil Procedure – Pleadings – Striking out

Contract – Contractual terms – Non-reliance clauses

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 30.]

15 August 2012 Judgment reserved.

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

Introduction

1 This is an appeal against the decision of the High Court Judge ("the Judge") in *ALS Memasa and another v UBS AG* [2012] SGHC 30 ("the GD") which affirmed the decision of the Assistant Registrar ("the AR") to strike out the Appellants' action in Suit No 935 of 2010 ("S 935/2010") and to dismiss the Appellants' application to amend the Statement of Claim ("SOC") *vide* Summons No 2942 of 2011 ("SUM 2942/2011").

Background facts

2 The second Appellant, Tjo Bun Khai ("Tjo"), is a wealthy retired Indonesian businessman. He is 95 years old and neither speaks nor writes English. The first Appellant, Als Memasa ("AM"), is Tjo's daughter who worked in a company in the family business. She is in her 60's and is unfamiliar with the English language.

3 For over 40 years, the Appellants were customers of a local bank – Oversea-Chinese Banking Corporation Limited ("OCBC"). Their OCBC accounts came under the care of one Gary Yeo ("Gary") and sometime in 2005, Gary and his team member, Donna Teo ("Donna"), informed the Appellants that he and his team would be leaving OCBC and joining the Respondent bank, UBS AG ("UBS"). Over the next few months, Gary and Donna regularly visited the Appellants in Jakarta to persuade them to move their funds and investments to UBS.

4 On 30 November 2006, the Appellants eventually opened, through Gary, three non-discretionary accounts with UBS, *viz*, two joint accounts between the Appellants and a sole account in the name

of Tjo ("the Appellants' accounts" or "their accounts", as the case may be). From the time the Appellants' accounts were opened up until September 2008, various transactions and investments were carried out under them. In particular, Russian bonds having a face value of US$4 million at a cost of about US$3.8 million ("the Russian bonds") were purchased for one of the Appellants' accounts on 3 September 2008.

5 In late September 2008, the Appellants were informed that the market value of their investments had fallen and their accounts had entered into margin call situations, mainly because the price of the Russian bonds had dropped drastically. In October 2008, the Appellants were informed that their accounts had lost over US$2 million and top up collateral was needed. Various assets and payments were given as collateral, but the Appellants were still unable to meet all the margin calls. Meanwhile, the price of the Russian bonds continued to fall.

6 Sometime in February 2009, UBS liquidated a large portion of the Appellants' investments. The Appellants subsequently travelled to Singapore to discuss the situation with Gary and Donna in April 2009, but were met by one Ling-Ly Loh ("Ling-Ly") from UBS instead. At the end of the meeting, Ling-Ly informed the Appellants that she would raise their unhappiness with the management of UBS.

7 Further margin calls were made by UBS subsequent to the meeting, and the Appellants did not receive an explanation from UBS which satisfied them.

Procedural history

8 As a result, the Appellants made a pre-action discovery application *vide* Originating Summons No 1358 of 2009 on 26 November 2009. This was dismissed on 8 March 2010.

9 The Appellants then proceeded to file S 935/2010 on 17 December 2010. On 14 February 2011, UBS applied *vide* Summons No 613 of 2011 ("SUM 613/2011") to strike out the Appellants' action as pleaded in the SOC. On 5 July 2011, the Appellants sought leave to amend the SOC *vide* SUM 2942/2011.

The decision of the AR

10 On 19 July 2011, the AR dismissed the Appellants' application to amend the SOC and allowed UBS's application to strike out the SOC.

11 The Appellants appealed against both decisions of the AR in Registrar's Appeals Nos 233 and 234 of 2011.

The decision of the Judge

12 The Judge upheld the AR's decision to strike out the SOC on the basis that the Appellants had abused the court's process by advancing a false case by pleading "a cause of action which they knew must be untrue for many, if not all, [of] the transactions executed by UBS", and then subsequently tailoring their claims to suit the evidence disclosed by the Respondent in its striking out application (at [48]–[50] of the GD).

13 In their SOC, the Appellants alleged, *inter alia*, that they had not given any instructions for all of the transactions made from their accounts, and that they did not understand why their accounts entered into margin call situations (see paras 11 and 12 of the SOC). [note: 1] However, the evidence disclosed by UBS in its striking out application in SUM 613/2011 showed that the Appellants had in

fact authorised some transactions, and had some understanding of why the margin calls were issued. It was on this basis that the Judge found the Appellants to have advanced a false case (at [32]–[36], [39] and [46] of the GD).

14 Further, the Appellants applied to amend their SOC *vide* SUM 2942/2011 to specifically plead their claim *vis-à-vis* the Russian bonds transaction for the first time after a telephone transcript (which showed that UBS might have purchased the Russian bonds without the Appellants' authority, and also misrepresented the nature and risk of these bonds to AM (see [21] below)) was disclosed by UBS in its striking out application in SUM 613/2011. This led the Judge to find that the Appellants were hoping to obtain evidence first and tailor their claim accordingly.

15 In respect of the Russian bonds claim, the Judge found that the Russian bonds might not have been purchased with the Appellants' prior instructions, but that AM had subsequently affirmed the transaction. At [53] of the GD, the Judge said:

> Nevertheless, there was some evidence that as regards one transaction, UBS might have purchased [the Russian bonds] without instruction and AM then affirmed the purchase after a discussion with a UBS officer. In that discussion, some representations were made by the UBS officer.

16 The Judge held further that "[f]or present purposes, it did not matter whether the consent was given before the purchase was effected or was an affirmation after the purchase. The [Appellants] were precluded from relying on any misrepresentation because of the contractual terms" (at [78] of the GD). The "contractual terms" referred to by the Judge are the non-reliance clauses as set out in [55] of the GD ("the non-reliance clauses"):

> ...
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> 157. Clause 7.1 of Section 1 (Account Mandate) of the Account Terms and Conditions states:
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> > 7.1 The Client accepts all risks arising from its opening and maintenance of the Account and acceptance of any of the Services made available by the Bank, including but not limited to, any loss suffered as a result of entering into any investment, trading or other transaction. The Client's attention is drawn to and the Client acknowledges that he has read and fully understood the Risk Disclosure Statement and all documents referred to therein (as evidenced by his signature thereto or in the Account Opening Form). In accepting Services made available by the Bank (other than discretionary investment or management services), the Client acknowledges that it makes its own assessment and relies on its own judgment. The Bank is not obliged to give advice or make recommendations and, notwithstanding that the Bank may do so on request by the Client or otherwise, such advice or recommendations are given or made diligently, and with reasonable care based on analyses and available alternatives the Bank should reasonably know to exist (and the Client acknowledges and agrees that it is so given or made) without any responsibility on the part of the Bank and on the basis that the Client will nevertheless make its own assessment and rely on its own judgment.
>
> 158. Clause 1 of Section 6 (Risk Disclosure Statement) of the Account Terms and Conditions states:
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> > 1. **General Conditions**

a. The terms and conditions in this Section 6 are applicable to transactions involving equities, foreign exchange, precious metals, bonds, commodities, interest rates, securities, market indices and any combination of these, and any spot, forward contracts, swaps, options and other derivatives transactions thereof including any structured products incorporating any or any combination of the preceding (the "Transactions").

b. Due to the volatile nature of the Transactions and the underlying assets therein, participation in a Transaction involves a certain degree of risk. The Client's attention is hereby drawn to such risks (which can be substantial). The Client should consult his advisors on the nature of such Transactions and carefully consider whether the kind of Transaction is appropriate for him in the light of his experience, objectives and personal and financial circumstances. The Client carries the burden of all risks involved in such Transactions and the Bank is not responsible for any losses whatsoever or howsoever arising from the Transactions.

...

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

...

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

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

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

22 **Acknowledgement of Risk**

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

17 The Judge also considered the Appellants' arguments on the defence of *non est factum* to the non-reliance clauses and held that they were bound to fail (at [71]–[72] of the GD).

Our decision

18 Before us, counsel for the Appellants limited his clients' claim to losses arising from the purchase of the Russian bonds. He argued that the Appellants' claim based on the purchase of the Russian bonds should be allowed to proceed to trial in view of the Judge's finding that there was some evidence that the Russian bonds might have been purchased without prior instructions from the Appellants. In response to UBS's submission that even if the purchase of the Russian bonds was unauthorised, the Appellants had subsequently affirmed it, counsel for the Appellants contended that there was no affirmation as UBS's officer had misrepresented to AM the nature and risk of the investment during the conversation referred to at [53] of the GD.

19 Counsel for UBS, on the other hand, argued vigorously that the evidence before the Judge showed that AM had given authority to UBS to buy the Russian bonds. However, he conceded that UBS did not produce any telephone transcripts or internal documents evidencing AM authorising the purchase of the Russian bonds.

Triable issues: whether there was authorisation or valid affirmation of the purchase of the Russian bonds

20 We are of the view that the Appellants' limited claim based on the losses arising from the purchase of the Russian bonds should be allowed to go to trial, given the lack of documentary evidence showing that AM had authorised the purchase of the Russian bonds. Further, we note that the Judge's finding of a possible or likely lack of authority in the purchase of the Russian bonds by UBS would ordinarily have given rise to a triable issue, but for the finding that the Appellants had affirmed the purchase.

21 The particulars of the alleged misrepresentation by UBS are set out at para 13 of the proposed Amended Statement of Claim (at [62] of the GD). One of the particulars refers to a statement made by UBS's officer, one Ms Audrey Kua, when queried by AM on the risks involved in investing in the Russian bonds. The statement made by Ms Audrey Kua as recorded in the telephone transcript is reproduced below: [note: 2]

> No, there are no ups and downs. For bonds, there are no ups and downs. But now, we will hold until June 2010, right?

22 In our view, if the purchase of the Russian bonds was in fact unauthorised, and UBS's officer had misrepresented to AM the nature of and risks inherent in the Russian bonds in order to induce her to affirm the transaction and continue holding the bonds, it would not amount to a valid affirmation of the unauthorised purchase in law. As between UBS and AM, there can be no affirmation by AM without a sufficient understanding of what she was affirming.

23 Whether or not there was any misrepresentation as alleged by the Appellants is a factual issue which can only be determined after a full trial when the relevant witnesses have given oral evidence. The trial judge may have to consider a number of factual matters, which might include when and why UBS recommended to the Appellants the investment in the Russian bonds, the global investment climate in relation to the Russian bonds at the material time, whether the Appellants were informed of the purchase of the Russian bonds in writing, and if not, why not; and whether the purchase of the Russian bonds were documented internally, and if not, why not.

24 Before the Judge, counsel for UBS argued that the Appellants' claim in relation to all the transactions carried out by UBS, including the purchase of the Russian bonds, was barred by reason of the non-reliance clauses. Before us, counsel for UBS reiterated this argument and referred to *Orient Centre Investments Ltd and another v Société Générale* [2007] 3 SLR(R) 566 ("*Orient Centre*

Investments") where this court said at [50]–[51]:

> 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 [*ie*,*Société Générale*] 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 [*ie, Orient Centre Investments Ltd*] 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).

25 We should add that although non-reliance clauses, such as those in the present case (see [16] above), are intended to immunise the banks and financial institutions from liability for post-contractual representations made by their officers, we are of the view that they cannot immunise UBS from liability for unauthorised transactions. Put simply, the factual issues in this present case are whether the purchase of the Russian bonds was authorised or not, and if not, whether it was validly affirmed by the Appellants. To fully explore and investigate into these issues, we are of the view that the matter should proceed to a full trial.

Other issues: non-reliance clauses and the relevance of illiteracy

26 There are two additional issues which the court may need to look further into, in the light of the prevalence of non-reliance clauses used in standard investment management documents which banks and financial institutions require their clients to sign in order to protect themselves from bad or even negligent advice to invest in financial products which may not be appropriate to the clients' risk profiles or their financial needs.

27 The first issue is whether non-reliance clauses in the nature of exclusion clauses are subject to the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed). This issue was raised by counsel for the appellants in *Orient Centre Investments* at [42]–[44], but this court did not find it necessary to comment on or decide the point at that time.

28 The second related issue is the relevance of illiteracy. The established common law principle in contract is that a party is generally bound by his signature on a contract even if he is unaware of the existence or effect of some particular term in that contract. He is not bound only if he can successfully plead and establish *non est factum*, *ie*, although he signed the agreement, his mind did not go with his signature, for example, because he was mentally incapacitated or that he was misled into signing it, thinking that it related to the transaction he had really intended to enter into. Save for

these exceptions, linguistic illiteracy (usually in English) is a disability, not a privilege.

29 However, in the light of the many allegations made against many financial institutions for "mis-selling" complex financial products to linguistically and financially illiterate and unwary customers during the financial crisis in 2008, it may be desirable for the courts to reconsider whether financial institutions should be accorded full immunity for such "misconduct" by relying on non-reliance clauses which unsophisticated customers might have been induced or persuaded to sign without truly understanding their potential legal effect on any form of misconduct or negligence on the part of the relevant officers in relation to the investment recommended by them.

Conclusion

30 In the present case, while the Appellants might have overstated their case initially by asserting factually incorrect and unsupportable claims, and to that extent might have abused the process of the court, that would not be a sufficient justification for the court to bar them from pursuing a claim on which there is *prima facie* some evidence to support it. The inconvenience caused to UBS by the Appellants in this respect can be adequately compensated in costs.

31 Accordingly, we allow this appeal. Leave is granted for the Appellants to amend their SOC to confine their claim to the Russian bonds, and to file it within two weeks from today.

32 Costs of this appeal and the proceedings below will be costs in the cause. There will be the usual consequential orders, and liberty to apply.

[note: 1] Appellant's Core Bundle, Vol II, p 9

[note: 2] Appellant's Core Bundle, Vol II, p 63

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