Abdul Razak Valibhoy v Keppel Investment Management Ltd
[2002] SGHC 236

Case Number : Suit 693/2001/G

Decision Date : 11 October 2002

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean JC

Counsel Name(s) : Peter Gabriel and K Muralitherapany (Gabriel Peter & Partners) for the plaintiff; K Shanmugam SC, Stanley Lai, Ang Wee Tiong and Candace Ler (Allen & Gledhill) for the defendants

Parties : Abdul Razak Valibhoy — Keppel Investment Management Ltd

Judgment

Cur Adv Vult

GROUNDS OF DECISION

1. The Plaintiff, Abdul Razak Valibhoy, is a retired businessman. From 1962 to 1983, he managed his late father's cloth and textile business. In or about June 1995, Mr. Valibhoy inherited S$33m. Consequently, he sought the services of professional investment managers to manage his inheritance. The manager of Keppel Bank, Jalan Sultan branch, recommended the Defendants, Keppel Investment Management Ltd ("KIML") to Mr. Valibhoy. At that time, Mr. Valibhoy was an active client of the treasury department of Keppel Bank.

2. KIML was established in 1993 as a wholly owned subsidiary of Keppel Bank. Over the years, KIML won several investment fund awards. Both Keppel Bank and KIML are now part of the OCBC group.

3. On 25 July 1995, Mr. Valibhoy appointed KIML as the Investment Manager of the newly created Valibhoy Prosperity Fund ("the Fund") with an initial fund size of S$30m. KIML's appointment was terminated on 14 December 2000.

4. The claims in this action arose out of the fund management relationship between Mr. Valibhoy and KIML during the period July 1995 and December 2000. The limits of KIML's discretionary authority over investments during its appointment are the subject of dispute. Mr. Valibhoy's claims against KIML are for:

> (i) failure to exercise its discretion within agreed limitations or guidelines. It is alleged that KIML exceeded its authority and/or made unauthorised investments in quoted equities and/or bonds and/or money markets;
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> (ii) failure to timely dispose of the Plaintiff's investments as instructed;
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> (iii) failure to tax plan on behalf of the Plaintiff in that KIML remitted income to Singapore and;
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> (iv) failure to act in the Plaintiff's interest in the purchase of Ciputra Notes.

5. Mr. Valibhoy's claim is for losses suffered in the total sum of S$4,253,538.30 and

US$2,107,014.

6. At the start of the trial on 3 June 2002, the claims under item (i) were limited to those losses which related to transactions that were either unauthorised or outside of mandate. All other transactions were authorised. However, on the second day of the trial, the Plaintiff fundamentally changed the complexion of his case. By amendments to the Further & Better Particulars filed on 1 February 2002, *all* transactions were alleged to be unauthorised and/or outside of mandate. KIML is nonetheless still held accountable for those transactions where losses were made while no credit is given to gains arising from similar type transactions.

7. On the third day of the trial before evidence was led, the Plaintiff drastically pruned the various causes of action pleaded in the Amended Statement of Claim. The claims under items (i) to (iii) are now put as matters of breach of contract or collateral contract and insofar as item (iv) is concerned, it is put as matters of breach of fiduciary duty and/or breach of trust and/or in negligence.

8. At the close of the Plaintiff's case, KIML's Counsel, Mr. K. Shanmugam S.C., made a submission of no case to answer and elected to call no evidence. In the circumstances, the straightforward issue is whether or not the Plaintiff has on the evidence adduced made out his case on the balance of probabilities. If the evidence led for the Plaintiff is so unsatisfactory or unreliable that the court finds that the burden of proof on the Plaintiff has not been discharged, the claim fails completely. In coming to a decision whether the burden of proof has been discharged, I am entitled to take on board whatever relevant and admissible contemporaneous documentary evidence that are before the court.

The July 1995 Meetings

9. On 6 July 1995, the Plaintiff met representatives of both KIML and Keppel Bank. Subsequently, Mr.Valibhoy met the KIML representatives on 10 July 1995. KIML presented to Mr. Valibhoy a letter dated 10 July 1995 enclosing an investment proposal for a balanced and diversified portfolio and a brochure with biographies of its key personnel. Mr. Valibhoy at 16 of his affidavit of evidence-in-chief said that at this meeting, both parties "agreed on the particular allocations and the maximum amount of the fund that could be invested in equities, bonds [and] money markets respectively. If no good opportunity presented itself, the unused monies were to be kept in fixed deposit." The objectives of the investment fund as stated by Mr. Valibhoy were to be long term, "risk – free" ensuring preservation of capital yet at the same time earning an annual return of 7%. He also wanted to minimise personal tax liability from the returns.

10. On 12 July 1995, Mr. Valibhoy again met KIML representatives. At that meeting, he was handed an undated document entitled "Investment Plan for Mr. Abdul Razak Valibhoy" which he said was in accordance with the investment guidelines discussed two days earlier.

11. According to Mr. Valibhoy, New Zealand Dollar was added into the basket of currencies in the Investment Plan. He also told KIML that between bonds and money markets, the weightage was to be 60% money markets (including fixed deposits) and 40% bond markets.

12. Both Mr. Valibhoy and KIML signed the Investment Agreement on 12 July 1995.

Unauthorised Investments and Excess of Mandate

13. The Plaintiff's allegation is that KIML in not following the asset allocation in the Investment

Plan had acted without his authorisation or outside of the agreed mandate. Counsel for the Plaintiff, Mr. Peter Gabriel, submitted that the crux of the dispute on authority is whether:

> (i) the Investment Plan was a collateral contract whereby the parties had agreed on the maximum asset allocation of the Fund that could be invested in equities, bonds and money markets respectively or;
>
> (ii) the Investment Plan constituted the Plaintiff's written instructions under the Investment Agreement dated 12 July 1995.

14. These two questions presuppose a finding that the Investment Agreement dated 12 July 1995 was the only document governing the rights and obligations of the parties. The Plaintiff's pleaded case is that the agreement governing the rights and obligations of the parties was evidenced by and/or contained in KIML's letter dated 10 July 1995, the Investment Plan and the Investment Agreement dated 12 July 1995.

15. The Plaintiff's bare assertion that the agreement was partly made orally at the 10 July 1995 meeting at KIML's office was abandoned at the trial. That decision foreshadows the shortcomings of the Plaintiff's case as pleaded - not only for what it alleges but also for what it does not allege.

16. In my view, the letter of 10 July 1995 was simply that of a covering letter. The statements in there were part and parcel of a normal "sales pitch" prior to any engagement. More importantly, Mr. Valibhoy was given a copy of the Investment Agreement on 10 July 1995 to review and that evinced a clear intention to embody the terms of the appointment in a formal contract. I will say more about the Investment Plan below. Suffice it to say that the letter of 10 July and Investment Plan were essentially pre-contract documents.

17. Through the Investment Agreement, Mr. Valibhoy appointed KIML investment manager of the Fund. In my judgment, the Investment Agreement constituted the entire agreement between the parties. It was the concluded formal document containing the contractual terms to which the parties agreed to bind themselves. The Investment Agreement superseded the pre-contract documents and discussions.

(i) Collateral Agreement

18. 11 of the Amended Statement of Claim reads:

> "Further or in the alternative, the Investment Plan contained and/or evidenced an agreement collateral and/or ancillary to the Agreement whereby the Plaintiff and the Defendants agreed on the maximum proportions of the Fund that could be invested in equities, bonds and money markets respectively."

19. Generally, a collateral contract involves as consideration the making of some other contract (the principal contract) so that a statement made before or at the time for entry into the principal contract is enforceable. The Plaintiff as the party seeking to rely on the collateral contract bears the burden of establishing that *both* parties intended to create a legally binding contract: Ralph Gibson LJ in *Kleinworth Benson Ltd v Malaysian Mining Corporation Berhad* [1989] 1 All E.R. 785 at 796.

20. Mr. Valibhoy's written testimony contradicted his contention that the Investment Plan evinced a collateral contract. In 25, he said that the undated Investment Plan was an integral part of the Investment Agreement and the Investment Plan represented his specific instructions to KIML as regards his "investment requirements, the particular allocation of the Fund and the maximum proportions of the Fund which could be invested in equities, bonds and money markets respectively".

21. In my judgment, the evidence adduced by the Plaintiff fell short of establishing any warranty or promise, let alone any warranty or promise intended to be acted on or which the Plaintiff could rely when he signed the Investment Agreement. What if any of the representatives from KIML said was not pleaded nor adduced in evidence. The question to be decided in every case is - did the parties intend the statement(s) to have contractual effect and be legally binding? If they did then an enforceable collateral contract arises. The statement(s) must take effect as a term or terms of the collateral contract. Without pleading and leading evidence on what was said by KIML, it is not possible to decide the effect in law of the statement(s).

22. In the result, the Plaintiff had not established the existence of a collateral contract contained in or evidenced by the Investment Plan.

(ii) Investment Plan (undated and unsigned)

23. Mr. Gabriel submitted that KIML's discretion in the Investment Agreement to invest in any market and asset class was fettered or varied by the Investment Plan. The Investment Plan was Mr. Valibhoy's written instruction to KIML under Clause 2 of the Investment Agreement (VN p 614). The Plaintiff averred in 12 of the Amended Statement of Claim that the Investment Plan was Mr. Valibhoy's written instruction under Clause 7(4) of the Investment Agreement.

24. Clause 7(4) of the Investment Agreement was not expressed in mandatory terms. By Clause 7(4), KIMPL "may" and not "must" or "will" comply with the instructions. In fact, it is in KIML's discretion not only to decide whether or not to assent to the instructions concerning the investment of the funds but when to act on the instructions. Further, if it so decides to act on the instructions, the investor is to indemnify KIML for undertaking those instructions.

25. Mr. Gabriel argued that the Investment Plan was necessary as the Investment Agreement lacked details of the asset allocation. It was Mr. Valibhoy's framework on how the investments should be carried out and for KIML to comply. Mr. Gabriel submitted that as far as Mr. Valibhoy was concerned, his understanding of what transpired at the meeting on 12 July 1995 was that his investment guidelines were there for KIML to follow and KIML would exercise its discretion pursuant to it and not beyond it.

26. It is necessary to bear in mind KIML's investment methodology. Mr. Valibhoy had seen KIML's literature on this as early as 10 July 1995. He referred to and quoted in his written testimony those parts that were important to him. The proportion of funds to be invested in the different markets and asset classes would broadly be identified by KIML. The allocation and mix of asset classes would be monitored and adjusted regularly depending on KIML's assessment of the prevailing economic outlook and market conditions. Therefore, to effectively invest and manage the funds properly, flexibility is crucial and to KIML the key is absolute discretion over the management of the Fund.

27. If as Mr. Gabriel contended, given the importance of the Investment Plan to the Plaintiff as his investment framework for KIML, a reasonable investor like the Plaintiff would have insisted on certainty in relation to the Investment Plan. He was after all placing the bulk of his inheritance in KIML's hands. Mr. Valibhoy did not offer any reason as to why the Investment Plan was not included

or incorporated into the Investment Agreement. The Investment Agreement, in particular Clause 12, could have been but was not amended to include the undated Investment Plan as an additional restriction prior to execution of the Investment Agreement. Furthermore, the Investment Plan was unsigned and undated. There was no appropriately worded notation on the document itself or even a side letter from the Plaintiff or KIML about the Investment Plan. It was not suggested that there was no opportunity at that meeting to take any of these steps.

28. Throughout their fund management relationship, the Investment Plan was never once mentioned or referred in any communication. The Plaintiff had never in the past complained about KIML's "deviation" from the Investment Plan nor queried the unauthorised investments made by KIML. There was no mention of unauthorised transactions when he instructed KIML in May 2000 to dispose of investments in China and Hong Kong.

29. Mr. Shanmugam submitted that the Investment Plan, which was unsigned and undated, was not Mr. Valibhoy's written instruction to KIML. The Investment Plan was no different from a variety of investment proposals that were put forward by KIML at different times. Further, those investment proposals would necessarily change with effluxion of time and market vicissitudes.

30. Mr. Shanmugam drew my attention to the actual investment pattern of the Fund. Almost from the beginning, the actual investment pattern was not the same as the Investment Plan (see CB tab 8).

31. Given KIML's investment methodology, the Investment Plan could not really have been Mr. Valibhoy's mandate to KIML. It would be commercially unreal to suggest that the Investment Plan was the Plaintiff's long-term instruction. It would flout business common sense to construe the Investment Plan in that way. The Investment Plan could only at best operate for a while as a guide in the exercise of KIML's discretion but not as a fetter.

32. I find that the Investment Plan was not a written direction or specific instruction from Mr. Valibhoy given pursuant to either Clause 2 or 7(4) of the Investment Agreement. The Plaintiff had not on the balance of probabilities made out a prima facie case that the discretion vested in KIML by the Investment Agreement was restricted or varied by the undated and unsigned Investment Plan. There was no evidence that the Investment Agreement by mutual consent had been supplemented or amended by the Investment Plan (see Clause 18 of the Investment Agreement).

(iii) <u>Knowledge of the Plaintiff and Investment Agreement</u>

(a) *Quality of the Plaintiff's evidence*

33. On the issue of the Plaintiff's knowledge of the various investments, it is necessary to say something about the quality of the Plaintiff's evidence. Whether or not I accept his evidence must depend not only on my impression as to the reliability of his evidence, but also upon the underlying probabilities in the light of the relevant and admissible contemporaneous documents and other surrounding circumstances.

34. Mr. Valibhoy gave evidence for two days. He tried to portray himself as a sick old man neither bothering with details nor looking at the individual investments in the weekly and monthly statements and, therefore, did not know what investments he had. Occasionally, he would go through the profit/loss column in the monthly statements and, if he came across an item that had done particularly well or badly, he would call KIML for information. Basically, he had trusted and left everything to the professional fund manager who had basically let him down.

35. Having seen and heard him, I found him an unsatisfactory and unreliable witness. He was often defensive and argumentative. He frequently gave unnecessarily lengthy explanation to straightforward questions. There were times when his answers were incredible as when he maintained that he read only the bottom line of the monthly statements and closed his eyes to the rest of the information on the same page. At times, his answers came across as defiant and arrogant as when he did not see a need to complain to KIML about the unauthorised investments.

36. He often prevaricated. At times, he was unwilling to agree to matters unless they could be proven against on the documents. And, when confronted with documents, he would try to extricate himself from his earlier testimony that was demonstrably wrong thereby damaging his credibility as an honest and reliable witness.

37. Even on his illness, there was conflicting evidence. In his written testimony he said he suffered a heart attack in the last quarter of 1996. However, in the witness box, he said that his heart attack was in March 1996.

38. Mr. Valibhoy claimed to have taken a "hands-off" approach with KIML until around the last quarter of 1997. I find his "hands-off" testimony, as he would want the court to believe, implausible especially so in the early phase of a new relationship that involved a significant amount of his inheritance.

39. He was as with any other typical investor anxious about his investments. He demanded weekly updates preferring not to wait for monthly reports. He even asked for the weekly statements to be sent to him whenever he was in Malaysia. A reasonable private investor in the position of Mr. Valibhoy would probably pay attention to the weekly reports since it was a service specially requested by him. He admitted calling Gina Chan of KIML if he had any queries.

40. I find that he was far from being an unsophisticated investor as he made himself out to be. Prior to his relationship with KIML, Mr. Valibhoy was investing in quoted equities in the Singapore and Malaysian stock markets as well as in the forex market. According to KIML's Call Report dated 6 July 1995, Mr. Valibhoy's exposure on his foreign exchange trading account with the treasury department of Keppel Bank at that time was S$6m.

41. Overall, Mr. Valibhoy did not give his evidence in a fair, moderate and convincing way. His testimony lacked candour. His confusion or forgetfulness (whether genuine or feigned) on material aspects of his case did not help his case.

(b) *Knowledge of the Plaintiff*

42. Under Clause 13 of the Investment Agreement, KIML would have to and did provide Mr. Valibhoy with monthly statements of the investments in the portfolio. It was not disputed that Mr. Valibhoy received the monthly statements, which contained details of purchases/sales of investments made during the relevant month. The purchases/sales were classified by country, counter, transaction price and so on. The monthly statements would also contain details of all asset holdings as at that particular month end, interest received on cash and bonds, dividends received together with withholding tax, cash balance, net asset value, pre-tax return and profitability analysis on every class of asset and total profit or loss.

43. The weekly report covered transactions made during a five-day period. It gave the dates of purchases/sales over any given week, the counter and country where the purchases/sales had taken place, quantity, unit price and total cost (in two currencies) of the purchases/sales together with the

deal reference number.

44. Mr. Valibhoy maintained that he did not read the monthly and weekly statements in detail and thus never knew (and hence did not complain) that KIML were acting without authority. There can be no truth to his denial. It would be second nature for a person with his background to be curious about the types and magnitude of the transactions apart from just noting the losses and gains

45. He knew the purpose of KIML's weekly and monthly statements. So even if he did not read them carefully or at all, the weekly and monthly statements would still have the effect intended and would serve the purpose for which they were sent: *Banque Nationale de Paris v Tan Nancy & Anor* [2002] 1 SLR 29. In that case, the defendants disclaimed any knowledge of what was going on because the statements, credit and debit advices etc sent to the defendants by the bank were either unopened or unread. The Court of Appeal rejected it as a valid ground for denying knowledge about the transactions notified in the statements and other documents sent by the bank. It was to Mr. Valibhoy's own detriment that he did not protest, complain or query KIML about the unauthorised transactions. See for example *Ong & Co Pte Ltd v Foo Sae Heng* [1990] SLR 186; *RHB-Cathy Securities Pte Ltd v Ibrahim Khan & Ors* [1999] 3 SLR 464.

(c) *Investments were authorised*

46. Under the Investment Agreement, KIML was expressly empowered to manage for Mr. Valibhoy on a fully discretionary basis, a portfolio of equity, bond and foreign exchange investments. KIML had full authority and discretion to without prior reference to Mr. Valibhoy enter into any kind of authorised investment defined in Clause 1 of the Investment Agreement. The range of permitted investments under the Investment Agreement was extensive and KIML was given absolute discretion to decide on the spread and balance of the portfolio. The objective was to achieve "as high a total return consistent with capital preservation" (see Clause 7(1)(a)). Elsewhere, the Investment Agreement was subject to written directions from the Plaintiff, restrictions in Clause 12 and limitations set out therein. As illustration, KIML was subject to an obligation to exercise the discretionary power with reasonable care, skill, good faith and owe duties of a fiduciary. These obligations are all expressly stated in Clause 7(2) of the Investment Agreement.

47. It would be fair to say that before December 1997, Mr. Valibhoy was generally pleased with the Fund's performance and was content with the returns. About one year after KIML's appointment, he was able to and did withdraw S$1.7m profits from the Fund. In September 1997, he added RM 10m to the Fund.

48. In my judgment, the investments were made by KIML in exercise of its discretion and were authorised under the Investment Agreement. I find that Mr. Valibhoy knew or was aware what investments were made by KIML under the Investment Agreement. Overall, I am satisfied that he had by his conduct accepted the investments made by KIML.

49. In fact, Mr. Valibhoy is deemed under the Investment Agreement to have given permission for the investments made by KIML (see Clause 7(3)). At all times he acted as if the Investment Agreement was clear and binding. In the circumstances, he has no right to complain and his action must fail completely.

(d) *3rd January 1996 mandate- Hong Kong equities up to S$1 million*

50. On the second day of hearing, the Plaintiff introduced the instance of the investment cap of

S$1m on Hong Kong equities by way of amendment to the Further & Better Particulars. The Plaintiff's case is that Hong Kong was not originally in the Investment Plan. On 3 January 1996, a written mandate of S$1m was given to KIML to invest in Hong Kong equities.

51. The case that was put forward before the court was that all transactions exceeding this mandate of S$1m constituted unauthorised dealings or were dealings outside the mandate. While in the witness box, Mr. Valibhoy surprisingly disclosed that there was another mandate of S$3m. I was therefore not persuaded that the mandate for Hong Kong equities remained static at S$1m.

52. Mr. Valibhoy claimed that he only concentrated on the profit/loss column of the monthly statements. He stated in his written testimony that he usually looked at the overall performance of the Fund. Even if that were true, the returns from the Hong Kong equities would have alerted him that the Fund's holding of Hong Kong equities must have exceeded S$1m. As an illustration, the value of the Fund, as at August 1997 was $32,394,312.65 of which the Fund held S$5,655,063 worth of Hong Kong equities and profits of S$1,009,530.13 were realised under Hong Kong equities during the month of August 1997. It is not in dispute that he did not query or complain to KIML about the purchases.

53. By comparison to other markets, Hong Kong was the best performing regional market during the period 31 July 1995 to 30 November 2000 with the Hang Seng Index rising by 85% in S$ terms (CB tab 23).

54. The Manager's Report dated 31 July 1997 showed the performance of the Fund as measured against the performance of a constructed Composite Benchmark Return. Since its inception in July 1995 to 30 June 1997, the Fund increased by 17.61% compared to 9.04% for the constructed Composite Benchmark Return (see DB 2658).

55. Additionally, the Plaintiff would have known from the investment proposal dated 20 May 1996 (and I disbelieve Mr. Valibhoy's testimony on this issue) that KIML recommended a further S$2m to be invested in Hong Kong equities (see DB 2648).

56. In September 1997, another investment proposal was given to Mr. Valibhoy (DB 2673). Under the proposal, asset allocated to equities accounted for 42% of the Fund with the recommendation for 55% of the allocation to equities earmarked for Hong Kong equities (DB 2674/2675).

57. Contrary to his professed lack of interest in detail, he was personally tracking his Hong Kong investments by subscribing to "Live Quotes" i.e. live stock price information from the Hong Kong market. He admitted to asking KIML for stock number code of the various Hong Kong equities in his portfolio so as to be in the know and/or to track their performance on his computer. He accepted that he would call KIML to follow the price movement of specific stocks. He admitted during cross-examination that he wanted to find out "how the markets are doing" (VN p 407).

(e) *Other Issues*

58. The Plaintiff's claim is supposedly for losses relating to unauthorised transactions. Using Hong Kong as illustration, the Plaintiff's claim is for losses in the months of September 1996, December 1996 and October 1997. It was not explained why no claims were made in this action for the other months like May 1996, June 1996 and November 1997 when they were similarly unauthorised and there were also losses. These inconsistencies are not just peculiar to the Hong Kong equities.

59. Mr. Shanmugam singled out the China Unicom claim as dishonest. Of the 150,000 shares

(which were said to be unauthorised) two out of the three lots (about 110,000 shares) sold at different times were profitable. The third lot was sold at a loss and the Plaintiff's claim is for this loss, totally ignoring the profit on the earlier sales of 110,000 shares. In my judgment, how the losses in the action arose and are computed and whether they arose as a result of purchases outside of mandate have not been adequately pleaded and established.

60. The Plaintiff had refused to deliver Further & Better Particulars of the losses pleaded in paragraph 21 of the Amended Statement of Claim. The Plaintiff was requested to identify the investments, the quantities, dates and prices at which they were bought and sold, and to provide a breakdown and details of how the alleged loss was computed.

61. Mr. Gabriel submitted that Mr. Valibhoy is claiming general damages, not special damages and therefore there was no need to give particulars. I agree with Mr. Shanmugan that the Plaintiff's claims are in the nature of special damages and they must be pleaded with sufficient particularity: *Mount Elizabeth Health Centre Pte Ltd v Mount Elizabeth Hospital Ltd* [1993] 1SLR 1021. The appellate court in *Perestrello E Companhia Limitada v United Paint Co Ltd* [1969] 3 All ER 479 held that where the amount claimed could be calculated, the claimant must give particulars of how the item is calculated so as to give fair warning to the defendant of the case he is to meet. This requirement is not restricted to a claim for special damages. It is equally applicable where justice of the particular case so requires (as in the present case) without which the nature of the claim is not properly disclosed and defendant does not know what to expect.

No timely disposal of Hong Kong equities

62. The allegation is that KIML failed to liquidate his investments in Hong Kong by 31 May 2000.

63. A discretion, for example, to trade is precisely that: a discretion, and not an obligation. KIML was not obliged to dispose of the shares had it in its discretion felt it inappropriate to do so. The Plaintiff had not satisfied me that KIML's letter of 9 May 2000 (DB 359) turned the discretion in Clause 7(4) to an obligation to dispose of the shares by 31 May 2000 without regard to the prevailing market conditions and future economic and market outlook.

64. Besides, Mr. Valibhoy subsequently never complained that the stocks were not disposed by 31 May 2000. He continued to receive regular weekly and monthly reports, which would have revealed that those counters remained in the Fund. In December 2000, he did not query KIML as to why the stocks were not sold and had simply directed that they be transferred to Citibank NA.

65. During the trial, the Plaintiff disclosed that some of the shares had not been sold. It is a fact that the Plaintiff cannot claim for losses not suffered. The Plaintiff had not proven on the balance of probabilities that KIML's failure to dispose of the investments between 9 and 31 May 2000 caused his loss.

Tax Exposure

66. Mr. Valibhoy was aware and accepted that KIML had no obligation under the Investment Agreement to tax plan. The Plaintiff had not identified and proven the legal basis for his claim. Neither had the Plaintiff pleaded and proven the breach and loss. The mere production of Notices of Assessment (additional or amended) was not enough to prove his increased tax exposure. The Plaintiff did not identify those remittances that are the subject matter of his complaint. He also led no evidence on when and how much of the taxable income was remitted to Singapore and to what extent that had increased his tax exposure and liability.

Ciputra Notes

67. Ciputra Notes ("the Notes") were US$100 million interest bearing bonds issued by Ciputra Development International Finance B.V., a wholly owned subsidiary of PT Ciputra Development, an Indonesian listed company. The Notes were guaranteed by PT Ciputra Development. It was not disputed that PT Ciputra Development was at that time the largest listed property player in Indonesia and was perceived as a blue chip company. The company was involved in various residential, commercial and industrial property developments.

68. The Notes were managed and arranged by a consortium of financial institutions including Keppel Bank. The Plaintiff was allocated and issued with US$2m worth of Notes on 24 July 1995.

69. During the 1997/1998 Asian financial crisis, the Indonesian Rupiah depreciated sharply against the US Dollar. The issuer defaulted and the Notes were not redeemed in July 2001.

70. The Plaintiff's case is that KIML had acted in breach of trust and/or fiduciary duty and/or were negligent in that KIML:

> (i) by purchasing the Notes placed itself in a position where its own interest or interest of Keppel Bank conflicted with those of the Plaintiff. The purchase of the Notes was not in the interests of the Plaintiff;
>
> (ii) the purchase was not an investment made in good faith as KIML knowingly and intentionally assisted and/or preferred the interests of Keppel Bank as the Arranger and Manager of the issue of the Notes to those of the Plaintiff;
>
> (iii) failed to disclose its interest in the issue of the Notes in particular the role of Keppel Bank in the issue of the Notes;
>
> (iv) failed to make any or any adequate inquiry in order to established the precise nature of the issue of the Notes;
>
> (v) invested in the Notes well knowing that the Plaintiff was relying on its skill, knowledge and judgment to give him sound advice in such matters;
>
> (vi) failed to recommend a sound investment which would have suited the Plaintiff's express needs as had been requested by the Plaintiff at the outset and;
>
> (vii) failed to have a reasonable basis for making the recommendation to purchase the Notes.

(see paragraph 20(i) to (u) of Amended Statement of Claim)

(i) <u>Breach of Fiduciary Duty and/or Trust</u>

71. Clause 7(2) of the Investment Agreement provides that in accepting the appointment, KIML undertakes to exercise fiduciary duties with care and diligence. This clause renders it unnecessary to

look at the acts and circumstances to determine whether in fact a fiduciary relationship exist between the investor and investment manager. Whether founded on a breach of fiduciary duty under Clause 7(2) or breach of trust as alleged, the underlying rule in that a fiduciary or trustee must not place himself in a position where his duty and interest may conflict.

72. The Investment Agreement sets out the framework as to whether or not there is a conflict of interest. The conflict in question as provided by Clause 10(1), is a "real likelihood of conflict of interest" which is of the kind enunciated by Lord Upjohn in *Boardman & Anor v Phipps* [1967] 2 AC 46 and is now the generally accepted approach. Lord Upjohn said:

> "In my view [the phrase 'possibly may conflict'] means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict." [p124]

73. The question whether or not there is a real likelihood of conflict of interest is a question of fact. Wherein then lies the conflict?

74. The Plaintiff submitted that by taking up the Notes for Mr. Valibhoy, Keppel Bank's underwriting obligation was thus correspondingly reduced. KIML as trustee/fiduciary had put itself in a position of conflict as it had bought the Notes to benefit Keppel Bank. KIML as a wholly owned subsidiary of Keppel Bank therefore acted contrary to the interest of the Plaintiff. The Plaintiff's case is that a benefit to Keppel Bank is in itself a benefit to KIML as the latter as a member of the Keppel Bank group of companies.

75. The submissions are pure conjectures. The existence of a holding-subsidiary relationship did not ipso facto create a conflict of interest. There was no evidence of that the Notes were undersubscribed. There was no evidence that Keppel Bank had in fact benefited from KIML's purchase of the Notes on behalf of the Fund. There is no suggestion that it was a case of Keppel Bank desperate to offload and KIML bought the Notes to help out Keppel Bank. There was no evidence that the management of Keppel Bank made the decision for KIML. The Plaintiff led no evidence of real likelihood of conflict of interest. On the other hand, it may be inferred from the evidence that the Plaintiff did not consider the identity of the underwriter a matter of importance. Mr. Valibhoy was asked during cross-examination what was important to him in a bond issue. His answer was the currency of the bond, the interest rate and the issuer (VN p 515-516).

76. It is the Plaintiff's case that he never knew about the facts relating to acquisition of the Notes. Mr. Valibhoy asserted that he was not told about Keppel Bank's involvement in the Notes.

77. The purchase of the Notes, its value were notified vide Portfolio Valuation Statement dated 31 July 1995 and thereafter in the weekly and monthly reports. Mr. Valibhoy was also provided with the market valuation of the Notes. Mr. Valibhoy was interested in investing in Indonesia and in property. Mr. Valibhoy said he remembered asking Gina Chan about this company. The Plaintiff was told that it was an Indonesian company and that KIML had invested in bonds issued by Ciputra. The Notes were denominated in US Dollars.

78. I am not satisfied that Mr. Valibhoy's recollection of his conversation with Gina Chan was

limited to what he had told the court. It is not improbable that he was told that Keppel Bank was the underwriter but he had forgotten about it. Overall, Mr. Valibhoy appeared to have accepted the Notes on the face of it. He cannot complain in causative terms of what he knew was the position

79. The Plaintiff did not establish at all that the Notes when they were bought were not in his interest. The Notes offered high interest rates, which ranged from 7.675% to 8.2375% per annum (CB tab 19). He received interest totalling US$325,867.99 (equivalent to S$465,619.78) between January 1996 and July 1997 from this investment of US$2m.

80. Market opinion at that time on PT Ciputra Development was favourable. It may be inferred from the fact that Keppel Bank, other banks and financial institutions took up the Notes (DB 2269) that the Notes were supported and well regarded by Keppel Bank as well as by other financial institutions to be a good investment. It was the perception of those in Keppel Bank that Indonesian bonds were very much sought after at the time including the Notes although it was not rated (DB 2146).

81. The Plaintiff had made a bare allegation of bad faith on the part of KIML (see paragraph 20 (p)). Such a plea is essentially one of dishonesty and without particulars, this allegations fails: *The Supreme Court Practice 1999* vol. 1 18/12/14;. *Lewin on Trust (17th ed)* 40-32. In any event, the Plaintiff had not shown the causative link between the alleged breach of duty and the Plaintiff's loss of investment. At that time the fortunes of Ciputra like many others in Indonesia were severely affected by the Asian financial crisis and the consequential meltdown of the Indonesian economy. Nobody foresaw the end of the Suharto era. In a claim for equitable compensation, causation and the need for a plaintiff to prove his loss are necessary.

Amendments to Further & Better Particulars

82. KIML had previously requested particulars of paragraph 20 (o), (p), (q), (r), (t) and (u) of the Amended Statement of Claim. The Plaintiff provided some particulars of sub-paragraph (t) but refused the rest on the ground that the facts had been sufficiently pleaded and/or the request was for evidence.

83. Since then, Mr. Shanmugam had unsuccessfully pressed Mr. Valibhoy's legal advisers for an identification of the real issues at stake. On the second day of the trial, the Plaintiff applied for leave to amend his Further & Better Particulars dated 17 January 2002. I refused the Plaintiff's application to amend paragraph 20 (t) and (u) and he has appealed against my decision.

84. The amendments sought were as follows:

> "(i) The Ciputra Group had a substantial currency risk in that substantial assets and revenues were in Indonesian Rupiah but liabilities and interest were in US Dollars. There was no hedging against this currency risk.
>
> (ii) 80% of the Ciputra Group were owned by family related entities;
>
> (iii) 7 out of 9 directors of Ciputra Development were family members."

85. Mr. Gabriel argued that the amendments were necessitated by Gina Chan's supplemental

affidavit of evidence-in-chief. The Plaintiff's contention is untenable. In my view it was too late for the amendments to be made. The court is normally slow to allow amendments at the trial stage in respect of matters apparent to the Plaintiff a long time ago. See *The Supreme Court Practice 1999 vol. 1* 20/8/11*; Hong Leong Finance Ltd v Famco (S) Pte Ltd* [1992] 2 SLR 1108. The proposed amendments came from the Offering Circular that was discovered in December 2001. The Plaintiff had this document in his own list of documents before KIML gave discovery. Mr. Valibhoy admitted receiving from Citibank NA a copy each of the Offering Circular and Bloomberg Report dated 27 July 1995 before he filed his claim. Like the defendants in *Goh Kim Hai v Pacific Can Investment Holdings Ltd* [1996] 2 SLR 109, the Plaintiff has had many opportunities to put forward his case so much so that he must be held strictly to what has been previously stated.

86. The amendments, if allowed, would cause injustice to KIML who would have to defend what would essentially be a different case based on negligence. If the amendments were allowed, KIML would have to be afforded an opportunity to prepare and call witnesses to challenge the Plaintiffs on these allegations which happened some seven years ago. That in turn would have necessitated vacating the trial. It did not seem right to allow that to happen at so late a stage especially when the amendments sought by the Plaintiff were previously requested but refused.

87. In any case, the proposed amendments would not aid the Plaintiff. To succeed on his claim in negligence, the Plaintiff must, but did not, plead that no reasonable fund manager would in the circumstances have purchased the Notes. He also did not plead the damage resulting from the breach of duty of care. Be that as it may, there was no evidence to suggest a factual basis for such a plea. To permit the amendments would in effect be allowing the Plaintiff to plead a cause of action that was on the facts not open to him. In that sense, the cause of action in negligence was not made out.

88. In the circumstances, I disallowed the Plaintiff's application to amend sub-paragraphs 20(t) and (u) of the Further & Better Particulars.

Admissibility of Expert Evidence

89. Before the Plaintiff led evidence, the Defendants applied on the third day of the trial for the Affidavits of Peter Douglas and Henry Tan (three in number) to be ruled inadmissible and excluded from these proceedings.

90. After hearing Counsel and reviewing the affidavits in question, I found KIML's complaints valid and allowed KIML's application. The Plaintiff has appealed against my decision.

91. As to whether KIML acted without authority that was a question for the court to decide and not a matter for expert evidence. Henry Tan and Peter Douglas overreached their function as experts in that they had in their respective conclusions transgressed into the exclusive province of the court for the determination of questions of fact and law. See *Sarkar's Law of Evidence* pp871, 883; *Joseph Crosfield & Sons Ltd v Techno-Chemical Laboratories Ltd* (1913) 29 TLR 378; *Yewdale v Insurance Corporation* [1995] ACWSJ LEXIS 45538. An expert could not assist the court in its interpretation of a document, as it is a matter for the court to read the language of the agreement or document, to analyse the facts and apply the law to the facts.

92. The affidavits of Peter Douglas were not confined to the issues before the court. They went beyond the Plaintiff's pleaded case and were therefore irrelevant. In determining whether expert evidence is admissible, the criteria of relevance and necessity must be considered. See *Mathew v Canada* [2001] ACWSJ LEXIS 16589. On the calculations in Henry Tan's affidavit, they are the result

of an arithmetical exercise and did not satisfy the criterion of necessity. See *Mathew v Canada* 22. Given the issues in the pleaded case, the court would not be assisted by these experts. The court is able to form its own conclusions on the issues and work out the arithmetic without the opinion of the experts.

Set-off

93. The Plaintiff's contention is that as the claims were in respect of distinct and separate causes of action, he is not required to set-off or give credit for the gains against the losses.

94. In *Brown v KMR Services Ltd* [1995] 4 All ER 598, no set-off or credit was given against losses in underwriting years 1988, 1989 and 1990 for the profits made on those syndicates in 1986 and 1987 as the plaintiff had an independent cause of action in respect of each separate contractual year. Each cause of action gave a right in law to recover damages which the plaintiff had suffered by reason of the breach of contract.

95. The facts of the present case showed that the investing and management of a portfolio of investments based on the Investment Agreement is that of an ongoing account. The performance of the portfolio and indeed the categories of investment within are to be looked upon as a whole in that profits and losses arising from disposals of investments must be aggregated. Each purchase of investment cannot be realistically viewed as a single and separate transaction for purposes of ascertaining the true position of the portfolio or category of investments. Therefore, it is only correct that profits and losses arising out of the disposal of investments based on an ongoing account in the case of a portfolio of investments are to be set-off in order to determine the real position. *Brown v KMR Services Ltd,* which is relied upon by the Plaintiff, is distinguishable on the facts and does not assist the Plaintiff.

96. Accordingly, the net amount after set-off for all transactions is a profit of $3,930,567.37. At the end of the day, the Plaintiff had suffered no loss. And even if KIML had committed a breach of contract and/or duty of a trustee or fiduciary, KIML would be under no liability to compensate the Plaintiff. I would mention that the Plaintiff's accountants were working to ascertain the net amount during the course of the trial and the result was tendered to the court, as an agreed fact after the trial. It is disturbing that the Plaintiff launched this action and proceeded to trial before such verification.

97. All said, the Plaintiff's claims were unfounded.

Conclusion

98. For all these reasons, the Plaintiff's action is dismissed with costs. I will hear parties on their submissions on the question of costs.

Sgd:

BELINDA ANG SAW EAN

JUDICIAL COMMISSIONER