Wee Soon Kim Anthony v UBS AG (No 4)
[2004] SGCA 33

Case Number : CA 1/2004

Decision Date : 29 July 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Lim Chor Pee (Chor Pee and Partners) for appellant; Davinder Singh SC, Hri Kumar and Kabir Singh (Drew and Napier LLC) for respondent

Parties : Wee Soon Kim Anthony — UBS AG

Civil Procedure – Appeals – Appeal against findings of fact by trial judge – Whether findings of trial judge were plainly wrong

Civil Procedure – Pleadings – Whether re-re-amended statement of claim included particular allegation of the defendant's breaches of duty

Tort – Misrepresentation – Whether any loss occasioned by alleged misrepresentation.

29 July 2004

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an appeal against a decision of the High Court (in [2003] SGHC 305) dismissing the action of Mr Anthony Wee Soon Kim ("Wee") against the UBS AG Bank ("UBS") for damages on account of losses suffered in foreign exchange transactions effected by UBS on his behalf. Wee alleged that the losses he sustained were, in the main, due to misrepresentations and/or failure to exercise care on the part of UBS. We heard the appeal on 27 May 2004 and dismissed it for the reasons that follow.

The background

2 The appellant, Wee, was a senior advocate and solicitor of the Supreme Court of Singapore before he retired from practice in 1997. UBS is a Swiss banking corporation carrying on banking business in Singapore and elsewhere. In 1997 and 1998, Wee was a private banking customer of UBS and had accounts with the bank.

3 Sometime in August 1997, Wee decided to trade on the Malaysian Ringgit ("MYR" or "RM"). On 28 August 1997, Wee instructed Ms Shirreen Sin ("Sin"), an associate director/client adviser with UBS who was assigned by the bank to take care of Wee's accounts, to enter into a one-month foreign exchange forward contract. This involved the purchase of RM35m and the sale of US dollars ("USD" or "US$") at the forward rate of 2.8818. Contrary to expectations, the MYR depreciated after the purchase. On 12 September 1997, Wee met up with Sin as well as another officer of UBS, Mr Collin Koh ("Koh"), a director/investment adviser at the bank, to get their advice on how best to manage his MYR/USD position.

4 On 18 September 1997, with a view to averaging down the cost of the first purchase, Wee asked Sin to enter into another one-month forward contract involving the purchase of RM5m and sale of USD at the forward rate of 3.022.

5 With the benefit of hindsight, that period was the start of the Asian financial crisis. The MYR, together with other Asian currencies, further weakened against the USD. On the maturity of the two

forward contracts, instead of realising losses, Wee took out a USD loan from UBS to take up delivery of the RM40m which he placed in leveraged deposits ("LD"). RM35m was placed on a two-month deposit from 3 November 1997 to 5 January 1998 at an interest rate of 8.8% per annum and the remaining RM5m was placed on one-month deposit from 20 November to 22 December 1997 at a rate of 7.37% per annum. These LDs were held as security for the USD loans granted to Wee.

6 On 16 December 1997, shortly before the one-month deposit was due to mature, Sin and Koh (hereinafter collectively referred to as "the bank officers") called on Wee to update him on his MYR position. Koh suggested that Wee could realise his losses early by selling his MYR for USD in three to four separate trades over a period of time, taking advantage of interest rate fluctuations. Wee was agreeable but asked for a more concrete proposal for his consideration.

7 Three days later, on 19 December, the bank officers called on Wee again. They informed him that the interest rate for the MYR had fallen and that Wee would, as a result, be facing the prospect of paying more interest on his USD loan than he would be receiving from his MYR deposits (Koh mentioned 6.8% for USD loans and 3.25% for the MYR deposits). In view of this situation, the bank officers suggested that Wee consider subscribing to the UBS Dynamic Floor Fund ("DFF") strategy which consisted of two components:

(a) the MYR deposits would be converted to USD to invest in DFF. The Fund was capital-protected if held for a 12-month period and targeted a return of over 8.15% in MYR terms; and

(b) Wee would enter into a 12-month forward contract to purchase MYR at the USD/MYR exchange rate of 3.9745. This forward contract would enable him to have a more favourable exchange rate for his MYR as 12-month forward MYR rates were at a 3% premium to spot rates.

8 In his affidavit of evidence-in-chief, in dealing with the question as to how he explained the DFF strategy to Wee, Koh deposed that:

> During the meeting, I carefully explained to [Wee], with the help of some presentation slides, the workings of the DFF Strategy and how it could work to manage his losses. [Wee] approved of the DFF strategy and signed a written instruction that Sin had prepared to invest all his then MYR holdings in the DFF Strategy.

9 A few days later, on 22 December 1997, Wee wrote to Sin as to what he understood to be the features of the strategy:

> … It was also agreed that I participate in your [DFF] on the basis of the explanation given by [Koh]. Put simply, it is a scheme whereby I can expect a yield more than if I were to simply deposit the funds in an interest bearing account.
>
> Additionally, it is still open to me to "manage" the funds so invested, e.g., in the interim I can sell the MYR within 3.80 to 3.50 range assuming that for the next 18 months or so the MYR would not return to pre-crisis level. Would you like to amplify on this?

10 The next day, 23 December, the bank officers faxed a detailed reply to Wee and for the purposes of this judgment, we need only quote the following passages:

> SBC Dynamic Floor 100% (USD). This will be the underlying asset for the strategy. The SBC Dynamic Floor is a USD denominated Fund. It targets a benchmark return of USD 12-month Euro-bid rate (this is 5.82% at the moment). In Ringgit terms, adjusted for costs, this translates to

8.15% at a spot USD/MYR rate of 3.80 on expiry of the 12-month period. The Fund is traded on a daily basis and can be liquidated theoretically any time. In practice, it is advisable to hold the fund for a medium term period of 6-12 months.

…

USD/MYR forward foreign exchange contracts: This is the second part of the strategy. On the subscription to the SBC Dynamic Floor Fund which is in USD, a 12-months forward foreign exchange contract buying Malaysian Ringgit and selling USD is entered into. This forward foreign exchange contract may be unwound anytime. 12-month forward Malaysian Ringgit trades at approx 3% premium to the spot or current rates.

…

The precise timing of selling the Ringgit (or unwinding the original purchase) will be done in consultation with yourself. Selling the Ringgit would leave open the underlying USD exposure of the SBC Dynamic Floor Fund. A suggested tentative strategy might look like: Sell MYR 10 million at 3.60, Sell MYR 10 million at 3.55, Sell MYR 10 million at 3.50, Sell MYR 10 million at 3.40. Each time we sell MYR, we would be squaring off and hence assuming the underlying USD exposure of the Fund. In a trading environment where the Ringgit trades in a range of 3.30 to 3.90, there will be opportunities to buy back the Ringgit at lower levels perhaps in the 3.80 area. Effective management of the Ringgit exposures will have the effect of improving the original 2.90 approx cost of your initial Ringgit position.

11 Also on the same day, the bank officers called on Wee and went through their proposal carefully. Wee wanted his son, Richard, to be involved in the matter before he made up his mind, therefore, Koh met Wee and Richard on 26 December 1997. Although Wee denied there was such a meeting on 26 December, Richard deposed that he was present at a meeting with Wee and Koh, thus affirming the events recounted by Koh.

12 On 5 January 1998, following the proposal, Wee converted his MYR deposits into USD and after deducting a 1% transaction fee, the balance of US$10,439,832.63 was invested in the DFF. The next day, 6 January, a forward contract to buy RM41,493,114.79 for value was entered into at the rate of 3.9745 and at the cost of US$10,439,832.63.

13 On 14 May 1998, after discussing with Koh on the telephone, Wee instructed Koh to sell RM11, 520,000 at the rate of 3.84 to US$1 and to buy US$3m. The object of this transaction was to unwind, in part, the 12-month forward contract. However, the next day, on Koh informing Wee that swap costs would be involved in the sale, Wee was upset and instead asked Koh not to proceed with the previous day's instruction. This unravelling resulted in an exchange loss of some US$63,500 for Wee.

14 On 9 June 1998, the seed for litigation was sowed. Wee wrote to UBS to complain that he invested into the DFF because of material misrepresentations on the part of the bank officers. He alleged that he was not aware that "swap points" were involved if he should close his MYR position early. Some correspondence and meetings ensued after the complaint but nothing conclusive could be reached between the parties. However, it was agreed that Sin's supervisor, Mr Nicholas Wood, would henceforth take over as Wee's relationship manager and deal with Wee in place of Sin.

15 On 8 July 1998, UBS advised Wee that he would stand to make a profit of RM898,020.35 if he were to liquidate the DFF and exit the 12-month forward contract. While reserving his rights in relation

to his complaint on misrepresentation, Wee accepted the advice. This resulted in Wee receiving RM41,721,419.54, a net gain of RM915,245.71. However, Wee's gain would have been much more if not for the fact that in unwinding the forward contract, a swap cost of more than RM2,000,000 was incurred.

16 On 1 September 1998, the Malaysian government imposed a ban on the trading of MYR. The next day, Bank Negara Malaysia fixed the exchange rate for MYR at 3.80 to US$1. The upshot of it all was that eventually, Wee's entire MYR holding was converted to only US$10,555,155. Taking into account the original USD loan sum, plus the interest incurred, Wee's foray into the MYR market left him with a total loss of US$4,179,509.

17 On 4 July 2001, Wee commenced legal proceedings against UBS claiming, *inter alia,* damages for misrepresentation, breach of duty of care in contract and in tort and breach of fiduciary duties. The statement of claim was subsequently amended on several occasions. In his final submission, Wee identified the following four issues for the consideration of the judge:

(a) whether UBS had exercised reasonable care and skill in advising Wee on the MYR forward contracts of 28 August and 18 September 1997;

(b) whether by the fax of 12 September 1997, UBS had failed to advise Wee of the risk involved in the forward transaction and to advise him to close out the forward contract maturing on 2 October 1997 instead of taking delivery of the MYR;

(c) whether UBS had misrepresented to Wee in mid-December 1997 that he was paying 6.8% interest on his USD loan and receiving only 3.25% on his MYR LDs;

(d) whether UBS had misrepresented to Wee that the DFF strategy allowed him to exit his MYR position at any time without suffering any disadvantage; or in other words, whether the bank officers informed him that "swap points" would be involved if he closed out before the maturity date.

18 Kan Ting Chiu J held that the first two issues did not arise from the re-re-amended statement of claim. On the third issue, the judge found that the misrepresentation had been made out because at the time, 19 December 1997, Wee's MYR LDs were not earning interest at only 3.25% but at 8.8% with regard to the RM35m deposit and at 7.3% on the RM5m deposit. However, he went on to hold that this was a misrepresentation that did not cause Wee any loss. While it was not true that he was then already facing a negative interest position, he was certainly facing the prospect of such a position when the two deposits matured and were rolled. By subscribing to the DFF, Wee had, in fact, avoided a situation of having a negative interest differential

19 As regards the fourth issue, Kan J accepted the evidence of UBS that the effect of "swap points" was explained to Wee in layman's terms at their various meetings in December 1997. The judge noted that even Wee's own evidence was not that the concept of "swap points" was not explained to him but that he did not understand the explanation given by the bank officers. That being the position, he should bear the consequences if he chose not to seek clarification to enable him to understand better.

Issues on appeal

20 Although in the appellant's case, Wee had listed six issues (inclusive of the question of proper compensation) which arose for consideration, they can conveniently be grouped under three heads:

(a) whether issues (a) and (b) set out in [17] above were pleaded in the re-re-amended statement of claim;

(b) whether UBS had misrepresented to Wee in mid-December 1997 that he was paying 6.8% interest on his USD loan and only receiving 3.25% interest on his MYR LDs; and,

(c) whether UBS had failed to advise Wee that "swap points" would be involved in the event that the MYR forward contract was unwound prematurely.

First issue: pleading point

21 We will consider each issue in turn. The first was the pleading point. It essentially concerned the question whether the re-re-amended statement of claim could be construed to include the allegation that UBS had breached its duty of care in relation to the initial two purchases of RM35m and RM5m. There was really nothing in the pleadings as it stood at the commencement of the trial, which could be viewed to include such an allegation. There were no averments of fact to support it. It was only half way through the trial, after some 19 days of hearing, presumably because of a realisation that his case based on misrepresentation was not as strong as he thought, that he sought to amend the pleadings to include this. Kan J refused the application. The matter came on appeal before us and it was dismissed by this court.

22 In the appellant's oral submission before us, this point was, in our view, rightly not taken up by counsel for Wee. There were no merits in the issue.

Second issue: misrepresentation

23 The decision of Kan J on this issue was being challenged by both parties. On the part of Wee, while he endorsed the judge's finding that the bank officers did make a misrepresentation, he argued that the judge was wrong to have found that he had suffered no loss on account of the misrepresentation. On the other hand, UBS contended that the judge's finding that there was a misrepresentation was wrong and should be set aside

24 We shall first deal with UBS' contention as it would be a more logical starting point. The judge's finding on the point rested entirely on what Koh deposed in his affidavit of evidence-in-chief regarding the meeting Wee had with him and Sin on 19 December 1997. It read as follows:

> At this meeting, Sin and I pointed out that [Wee's] LD was incurring a loss for him as he was paying more in interest on the USD loans than he was receiving on his MYR deposits. In fact, at the time, [Wee] was paying an interest rate of about 6.8% per annum on his USD loans while his MYR deposits were only earning him interest at the rate of about 3.25% per annum.

25 However, when Koh was called to the witness-box and before he was cross-examined, he corrected what was stated in the affidavit. He clarified that he represented to Wee that, in view of the falling interest rates for the MYR, Wee was facing the prospect of a negative interest differential when his deposit rolled over on 22 December 1997. In this regard, counsel for UBS also pointed out that Koh's corrected version of what transpired was substantiated by Wee himself in his affidavit of evidence-in-chief:

> In early December 1997, [Sin] drew my attention to the fact that because of the short-term volatility of the prevailing foreign exchange market, the MYR one-month deposit interest rate had dropped to a very low rate of about 3.25% per annum. Meanwhile, the US$14,040,572 loan to

"purchase" the leveraged deposit was accruing interest at about 6.8% per annum. I was badly distressed by that news. I was at that time already shell-shocked by the deteriorating MYR position and *was alarmed to learn that I now faced a "double whammy", i.e. having to face the prospect* of my borrowing costs in US$ exceeding the interest received on my MYR deposit in addition to the risk of a worsening spot exchange risk in the US$/MYR foreign exchange rate. [Sin] then arranged for me to meet Colin Koh and herself on 19 December 1997. [emphasis added]

26 In Wee's supplementary affidavit of evidence-in-chief he again repeated that the bank officers told him of the then volatile foreign exchange market. He stated:

I have, at paragraph 45 of my Affidavit of Evidence-in-Chief, deposed that in early December 1997, [Sin] drew my attention to the fact that because of the short-term volatility of the prevailing foreign exchange market, the MYR one-month deposit interest rate had dropped to a very low rate of about 3.25% per annum, while the US$14,040,572 loan taken to "purchase" the leveraged deposit was accruing interest at about 6.8% per annum.

27 Therefore, it was not Wee's position that the bank officers had represented to him that his MYR LDs were, on 19 December 1997, already only earning 3.25% per annum. In Wee's mind, he was clear that at the time, in view of the serious drop in the one-month MYR deposit interest rate, he was facing the prospect of a "double whammy" (*ie*, the direct exchange loss and the negative interest differential). There was no misapprehension on Wee's part and this also appeared from the following cross-examination of him:

Q: And looking at para 45, the last few lines where you say "… was alarmed to learn that I now faced a 'double whammy' … having to face the prospect …"; the 'prospect' there means in future, correct?

A: That was the impression I was led to believe, Sir.

Q: Thank you. Therefore if you stayed in Ringgit and rollover the Ringgit in future, you would face the prospect of a double whammy?

A: That was what I was led to believe on the 23rd of December, Sir.

28 At the time the meeting of 19 December 1997 took place, the RM5m deposit had only three days left before maturity. A decision had to be taken by Wee whether to roll over on 22 December 1997 or do something else. If he decided to roll over, he would suffer a negative interest differential as the interest rate he was paying on the USD loans which he had obtained to fund the RM5m purchase was higher than the interest which the RM5m deposit would earn if rolled over on 22 December 1997.

29 The approach taken by the judge in finding that there was a misrepresentation was set out in [14] and [15] of his judgment as follows:

When confronted with that [paragraph in Koh's affidavit of evidence-in-chief], Sin and Koh conceded that they were mistaken. They tried to redeem themselves by explaining that when they had the discussion on 19 December, they knew that the defendant would face a negative interest rate differential if he rolled over the deposits again.

While that was correct, it was not what they had deposed to, that on 19 December they told the plaintiff that he was *already* experiencing negative interest on his deposits.

30 It seemed to us that the judge failed to appreciate that when Koh explained that what was stated in his affidavit of evidence-in-chief was a mistake, he meant to say the paragraph in his affidavit had not accurately described what transpired. Koh did not concede that he made any misrepresentation. He was saying that the paragraph in his affidavit did not accurately describe what he said to Wee that day due to some loose language. The judge held Koh to what he stated in his affidavit and did not accept Koh's clarification of the mistake made in that paragraph of his affidavit.

31 Apart from the fact that Wee himself, as shown above, knew that Koh was referring to a state of affairs which was to come in a matter of a few days, Wee did not allege that the bank officers had made the misrepresentation. Moreover, we could see no reason why Koh or Sin would need to resort to any misrepresentation. Their purpose in coming to see Wee was to update him on the unfortunate turn of events in the foreign currency market involving the USD and MYR and to give him time to assess what to do in the apparently bad situation (*ie* with the MYR deposits at that point in time, earning less in interest than the interest which Wee would have to pay on the USD loans). There was no reason why the alleged misrepresentation would need to be made at all. Wee knew clearly that Koh was referring to things to come, upon the maturity of the current MYR LDs. The judge appeared not to have given any consideration to the clarification made by Koh or the fact that Wee knew precisely what Koh was referring to (*ie* of the state of affairs which would soon come to pass). Neither did he consider, in determining which was the true version, whether there was any reason for the bank officers in wanting to make the alleged misrepresentation. Accordingly, and with respect, we differed from the judge and found that no such misrepresentation was made.

32 We were conscious that this was a finding of fact by the trial judge. We noted that the judge did not say that the bank officers were unreliable. We think, in this case, we were in as good a position as the court below to come to a determination on the factual issue. Here, we would quote what this court stated in *Teknikal dan Kejuruteraan Pte Ltd v Resources Development Corp (Pte) Ltd* [1994] 3 SLR 743 at [56]:

> … The issues before us concern to an extent the evaluation of the quality of the evidence given by RDC's witnesses. *The evaluation involves testing a witness's evidence against inherent probabilities or against uncontroverted facts*, including the conduct of the parties at the relevant time. *We are in this instance in as good a position as the court of first instance*, although we must, where appropriate, give due allowance to the fact that we have not had the advantage of seeing the witnesses that the trial court had. [emphasis added]

33 In view of the above determination, Wee's challenge that the judge was not correct to hold that Wee had suffered no loss on account of the misrepresentation had become academic. Nevertheless, we will briefly address the point. The reasons why the judge came to that view were set out in [17] to [19] of his judgment as follows

> … In his affidavit [Wee] acknowledged that he was warned about negative interest rate differential and the worsening exchange rate before the meeting of 19 December, and was alarmed by the prospect of being in that position. When he met Sin and Koh on 19 December, they were still speaking of the negative interest rate differential, though they overstated the case in saying that he was already in that position when he was actually facing the prospect of being in that position.
>
> By his own account, he was sufficiently alarmed at the *prospect* of negative interest to want to avoid the "double whammy". The prospect was as real whether or not he was already in negative interest, whether he was told "You are in negative interest" or "You will be in negative interest if you roll over the deposits."

> There was no question that if the deposits were rolled over, they would yield reduced interest at around 3.25%. As the plaintiff subscribed to the SBC Fund to avoid negative interest, and had avoided that, he cannot complain about the advice, the mistake notwithstanding. He had benefited from the decision. The plaintiff has not shown that the representation caused him loss.

34 We agree with the judge that no loss had been shown by Wee. Assuming that Wee was told on 19 December that he was already in a negative interest position but in fact was not, that misstatement, as such, did not cause him to suffer any loss. Up to the maturity of the two MYR LDs he would be receiving the benefits of the positive interest differential. Nothing could change that.

35 Upon the expiry of each of the LDs, the misrepresentation would then become immaterial. At that point, if Wee were to decide that he would like to roll over the deposits, they would only earn interest at 3.25% per annum giving rise to the situation of a negative interest differential, a position which the bank officers were trying to help him to avoid. On account of that stark reality, Wee decided to adopt the DFF strategy which enabled him to overcome that situation. We were unable to see any loss arising.

Third issue: "swap points"

36 On this issue, the judge held that the bank officers had explained the DFF strategy, including the "swap points", to Wee over the several meetings from 16 to 26 December 1997. Wee was told that "swap points" would come into play if he should exit from his forward position prematurely.

37 This issue was Wee's main plank in this appeal. His claim in damages for breach of fiduciary duties or in contract, depended entirely on whether he was advised on the "swap points". He also alleged that there was misrepresentation on account of this omission. Generally, misrepresentation entails a positive assertion of fact. It is unnecessary for us to go further into this as the judge found, and we agreed, that there was no omission.

38 Wee submitted that the judge's finding on the question was wholly erroneous. He argued that Koh and Sin never mentioned the matter of "swap points" at the meeting of 19 December and neither was it stated in their letters to him of 18 and 23 December 1997. It was only mentioned in a passing reference in Sin's fax of 29 December with no explanation of the effect of the "swap points". In any event, this fax came after Wee had agreed to adopt the DFF strategy.

39 The first observation we would make is that on this issue, Wee was challenging a finding of fact of the trial judge. What he was arguing was that the judge should accept his evidence instead of the evidence of the bank officers. It is trite law that an appellate court will not upset a finding of fact which is based on the evidence of witnesses, unless the appellant satisfies the appellate court that this determination of the trial judge is plainly wrong: see *Peh Eng Leng v Pek Eng Leong* [1996] 2 SLR 305 and *Seah Ting Soon t/a Sing Meng Co Wooden Cases Factory v Indonesian Tractors Co Pte Ltd* [2001] 1 SLR 521. We are conscious of our decision above at [31] and [32] where we upset a finding of fact of the judge. But the situation here is quite different from the position there.

40 The second is that it was not Wee's evidence at the trial that there was no explanation of the matter of "swap points" by the bank officers. His position was that although the officers did explain the "swap points", he did not understand the concept. At [37] of his judgment, Kan J stated:

> It was also clear that the plaintiff only committed himself to the strategy after the discussions, and he was informed of the transactions after they were made. His own evidence was not that there were no explanations of the premium/swap points and the consequences of closing out a

forward position before maturity, but that he did not understand them. But he did not inform Koh or Sin [of] that or that he still needed more explanation. After the discussions, he confirmed that he accepted the strategy proposed.

41 Before we go into the evidence which supported the judge's finding that the bank officers did explain the matter of "swap points", we will quote a passage of the judge at [21], where he explained the nature of "swap points"

> When a purchaser buys currency on a forward contract, e.g. buy MYR with US$ on a 12-month forward contract, he does not pay the spot exchange rate. As the two currencies would pay interest at different rates, swap points worked out on the difference between the rates have to be factored into the applicable forward exchange rate. When the transaction is to buy a higher interest currency with a lower interest currency, the swap points will be in favour of the purchaser. The swap points in such a situation can be described as a discount on the purchase price, or a premium to the purchaser. When the purchaser decides to close out the forward position before time, he enters into a reverse transaction, to sell the same amount of MYR and buy US$ on the same forward date to cancel the earlier transaction. It is another forward transaction (albeit for a shorter period), to buy and sell the two currencies in the reversed order. This second transaction, being a forward transaction, is not transacted on the prevailing spot rate. Swap points will also have to be worked out on the different interest rates then prevailing. If that works out to the disadvantage of the buyer he has to pay above the spot rate.

42 UBS's expert, Professor Heinz Riehl, put the matter very succinctly as follows:

> The exchange rate differential between a spot exchange rate and a forward exchange rate is also known as the foreign exchange swap rate. The forward exchange rate is equal to the spot exchange rate plus the swap exchange rate, and the swap exchange rate is nothing but the interest rate differential expressed in terms of a foreign exchange rate differential.

43 The position can perhaps be more readily understood if we use the more common transaction of a fixed deposit as an example. If a person has a fixed deposit for 12 months at 10% per annum, he cannot reasonably think that he will, as of right, still receive a return of 10% per annum, if he breaks the deposit prematurely. A penalty for the early breakage is to be expected. The penalty will naturally be computed by reference to the relevant interest rate prevailing at the time of the breakage.

44 Wee, in his Case, emphasised that at the meeting of 19 December there was no mention of "swap points". Koh, however, said that at the meeting he explained the operation of the "swap points" by reference to interest rate differentials. He also said that he explained the DFF strategy with the help of some presentation materials, one of which was a chart. Copies of these materials were given to Wee. Here, we would quote Koh's evidence in court explaining the chart:

> If you look at this table or the chart, on the top left hand corner, you will find basically some numbers there. The third number gives "SPOT … MYR" AT 3.9000. You will find that two rows down from that, you will see "FWD 1 YEAR 0.1350". Then you will find "FWD RATE 4.03500". Now essentially, 3.90 plus 0.1350 equals 4.0350. Now we defined what these swap points were, they were defined as an interest rate differential between the MYR and USD on a one year basis for that period because these were one year MYR forwards.

45 After the meeting of 19 December, there was correspondence on 22 December and 23 December, followed by a meeting on the very same day. At Wee's request, there was a further meeting on 26 December for the purpose of explaining the DFF strategy to Wee's son, Richard. On

29 December, Sin wrote a report to Wee, where the following was stated:

> At the same time, we have done a forward for one year at 3.9745, the breakdown being: client sells USD10,439,832.63 buys MYR41,493,114.79 at 3.87 (spot) + 0.1045 (Swap) i.e. 3.9745 for value 6 Jan 1999.

There was no query from Wee as to what was meant by "swap".

46 The judge, having reviewed the evidence, including the documents, came to the following conclusions at [36] to [38]:

> It was not disputed that the plaintiff, Sin and Koh met in December and discussed the predicament that he was in and the options available for him to mitigate his losses. At that time, the plaintiff was very concerned at the position he was in. The meetings they had were not casual gatherings. There were serious matters to be discussed and decisions to be taken. Koh elaborated at the trial that "(t)here are about six hours worth of meetings on the 16th, 19th, 23rd and also on the 26th in addition after [the letter of 23 December] was written. And those six hours [of] meetings, there was very, very full discussion on the operation of the forward in conjunction with the Dynamic Floor Fund."
>
> It was also clear that the plaintiff only committed himself to the strategy after the discussions, and he was informed of the transactions after they were made. His own evidence was not that there were no explanations of the premium/swap points and the consequences of closing out a forward position before maturity, but that he did not understand them. But he did not inform Koh or Sin [of] that or that he still needed more explanation. After the discussions, he confirmed that he accepted the strategy proposed.
>
> Much was said by his counsel that in the letters, visit reports and the transcript of telephone conversations produced at the trial, there was no explicit statement that the premium/swap points may have to be paid back. Koh said that that was covered in the discussions they had and I accept that. Sin had also referred to that to the plaintiff and his son. The plaintiff's reply was that the discussions and Sin's explanation on premium and spot rates were gobbledygook to him. But he is not diffident or tongue-tied, and he was a big client. If he needed further explanation, he kept that to himself and gave instructions to enter into the strategy instead. The evidence was that whenever he sought explanations and clarifications from Sin or Koh, they would provide them.

47 There was no basis for us to interfere with this finding of fact of the judge, who preferred the evidence of the bank officers over that of Wee. Wee was shown to be unreliable (*eg* he claimed to be a novice in foreign exchange dealings when he was not so and he denied that there was a meeting on 26 December when his son admitted there was). It was not only a decision that was not against the weight of the evidence, it was plainly correct. Moreover, his final position would appear to be that perhaps the matter of "swap points" might have been explained to him by the bank officers but he did not understand it.

48 In closing, we would add that in his more than 30 years of legal practice, Wee had routinely advised banks on legal matters. He obviously had reasonable knowledge of matters relating to banking. Before he dealt with UBS, he was a customer of Citibank with whom he had carried out a number of foreign exchange transactions. Wee is not a person who will take things lying down or suffer in silence. He is not a person who would do anything unless he fully understands the situation.

49 It was unfortunate that Wee's speculation in the MYR on such a huge scale had turned sour, thereby incurring substantial losses. However, that is a risk which every trader in foreign currency will have to bear. There was evidence that his foray into the MYR was at the suggestion of his son, Richard. Thus, when he was confronted with the prospect of a "double whammy", he brought Richard into the picture before a decision was taken by Wee to subscribe to the DFF strategy. We could see no basis to place the loss at the door of UBS.

50 In the result, we dismissed the appeal and awarded costs to the respondent. The security for costs, together with any accrued interest, was ordered to be released to the respondent to account for the respondent's costs of this appeal.