

**DALAM MAHKAMAH TINGGI DI KUALA LUMPUR  
DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR  
NO. GUAMAN SIVIL: WA-22NCC-573-11/2020**

**ANTARA**

**ONG YEE MIAN**

**(NO. K/P: 541111-10-5924)**

**...PLAINTIF**

**DAN**

**1. OCBC BANK (MALAYSIA) BERHAD**

**(NO. SYARIKAT: 295400-W)**

**2. RHB ASSET MANAGEMENT SDN BHD**

**(NO. SYARIKAT: 174588-X)**

**...DEFENDAN-**

**DEFENDAN**

**GROUND OF JUDGMENT**

[1] This is an action by the Plaintiff, Ong Yee Mian ("**Ong**") seeking from OCBC Bank (Malaysia) Berhad ("**OCBC**"), the 1st Defendant, and RHB Asset Management Sdn Bhd ("**RHB**"), the 2nd Defendant, the refund of the balance of her investment in an investment fund managed by RHB which was subscribed by Ong through OCBC who acted as RHB's distributor of the investment fund.

[2] After a full trial, this court dismissed Ong's with costs. Ong appealed.



## Background facts

- [3] Ong, together with her husband, Ng Teh Kha (“**Ng**”) were the joint account holders of an OCBC account no. 7082249242 in OCBC, a commercial bank.
- [4] On or around 22.7.2014, an Information Memorandum (“**the Information Memorandum**”) was issued by RHB, a company which manages a fund known as “RHB-OSK Pre-IPO & Special Situation Fund 2” which is now known as “RHB Pre-IPO & Special Situation Fund 2” (“**the Investment Fund**”) which would principally invest in the US Dollar denominated shares of the fund in an exempt company with limited liability incorporated in the Cayman Islands (“**the Company**”).
- [5] The Investment Fund was approved by the Securities Commission and managed by RHB with TMF Trustee Berhad (“**TMFT**”) appointed as the trustee and custodian of the assets of the Investment Fund to safeguard the interest of unit holders of the fund. RHB, as the manager of the Investment Fund, and TMFT are at all times required to act in accordance with the provisions of a deed dated 21.7.2014 (“**the Deed**”) as modified by a first supplemental deed dated 23.3.2015 and a second supplemental deed dated 23.10.2015 governing the Investment Fund.
- [6] It is stated in the Information Memorandum, inter alia, that:



- a) The tenure of the Investment Fund will mirror the 5-year charter life of the Company and such tenure will automatically be extended in line with the extended tenure of the Company;
- b) The directors of the Company may extend the 5-year charter life of the Company for one additional year. Hence, the maximum tenure of the Investment Fund shall be 6 years;
- c) The maturity date of the Investment Fund shall be the 5th anniversary of the Commencement Date or such other date as may be notified in writing to the unit holders of the Investment Fund;
- d) Redemption by the unit holders is strictly not allowed during the tenure or extended tenure of the Investment Fund;
- e) The Manager will send a letter to all unit holders of the Investment Fund to inform them of any reduction or extension of the tenure of the Investment Fund; and
- f) The unit holders of the Investment Fund may terminate the fund provided that a special resolution is passed at a unit holders meeting to terminate the fund.



- [7] By way of a Unit Trust Application Form dated 28.8.2014 (“**the Application Form**”), Ong applied to OCBC to invest RM2 million in the Investment Fund (“**the Invested Sum**”). A total of 1,904,761.9000 units (“**the Units**”) were purchased and held by Malaysia Nominees (Tempatan) Sdn Bhd (“**Malaysia Nominees**”) on behalf of Ong in the Investment Fund. According to Ong, based on the maximum tenure of the Investment Fund of 6 years, her investment would expire on 28.8.2020.
- [8] The money to be invested in the Investment Fund was Ng’s but Ng, who was 65 years old in 2014 was deemed too old to invest in the Investment Fund. Therefore, the Investment Fund was subscribed in the name of Ong, who was 60 years of age at that time using funds provided by Ng. At all times, Ong took instructions from Ng in relation to the Investment Fund.
- [9] Near the expiry of the 6-year tenure of the Investment Fund, a meeting of unit holders of the Investment Fund was held on 10.6.2020 (“**the Unit Holders Meeting**”) to propose an extension of the tenure of the Investment Fund for an additional 2 years from 15.9.2020 which was approved by 112 out of 129 unit holders of the Investment Fund, extending the tenure of the Investment Fund to 15.9.2022.
- [10] On or around 28.9.2020, Ong and Ng visited the OCBC branch at Subang Jaya where OCBC had through its officer, Ms. Erica Cheong of OCBC informed them of the Unit



Holders Meeting and that the maturity date of the Investment Fund for an additional 2 years.

[11] Ong then requested to terminate Ong's investment in the Investment Fund and also requested for the refund the balance sum of her invested amount, which she calculated to be RM1,160,451.51 as of 31.8.2020, but OCBC did not accede to Ong's request.

[12] Dissatisfied with the inability to terminate the Investment Fund and obtain a refund of her investment in the Investment Fund, Ong commenced this legal action against OCBC on 19.11.2020. On 4.8.2021 RHB was added as a party to this action upon OCBC's application to add RHB in this action.

### **Ong's claim**

[13] Ong mainly prays for judgment against OCBC and RHB to be jointly and severally liable as follows:

- a) The outstanding sum of RM1,160,451.51 which is due and owed to be paid by OCBC and/ or RHB to Ong on 31.8.2020;
- b) Interest upon the judgment sum at 5% per annum from 31.8.2020 or 28.10.2020 when Ong first issued a demand to OCBC until the date of Judgment to be paid by OCBC and / or RHB; and



- c) Interest upon the judgment sum at 5% per annum from the date Judgment until the date of full settlement to be paid by OCBC and / or RHB.

### **Ong's case**

[14] Ong's case is that she is entitled to terminate her investment in the Investment Fund that had a maximum tenure of Ong's Investment of 6 years and expired on 27.8.2020 and be paid a refund for the balance of the Invested Sum in the Investment Fund based on the rate of the units in the Investment Fund as at 31.8.2020 less any subsequent refunds thereafter.

[15] OCBC's refusal to do so on the basis that the tenure of the Investment Fund was extended by two more years to 15.9.2022 was wrong as OCBC varied the terms of the Investment Fund unilaterally by extending the tenure of the fund without Ong's consent.

[16] Both OCBC and and RHB are jointly and severally liable to pay Ong the refund for the balance of the Invested Sum in the Investment Fund.

### **OCBC's case**

[17] OCBC's case is that it cannot be liable for Ong's claim as it merely acts as an agent for Ong and she is ultimately liable



for the units purchased as OCBC only buys, sells and holds the units purchased by Ong and does not act on its own.

[18] Further, the maturity date of the Investment Fund was not extended by OCBC but by RHB, through the decision of the unit holders, who extended the tenure of the Investment Fund in respect of Ong's Investment to 15.9.2022.

[19] The tenure of the Investment Fund was validly extended for an additional 2 years until 15.9.2022 through the Unit Holders Meeting and Ong is not entitled to the refund for the balance of the Invested Sum in the Investment Fund until the expiry of the tenure of the Investment Fund on 15.9.2022

### **RHB's case**

[20] RHB contended that Ong has no case and has not made out any case at all against RHB for RHB to be jointly and severally liable for the value of the units remaining in her account with OCBC as at 31.8.2020 as she has not made any allegation of breach or of wrongdoing against RHB.

[21] RHB had no dealings with Ong and neither did RHB OSK Asset Management Pte Ltd., the fund manager of the Company's assets.

[22] RHB did not unilaterally extended the maturity date of Ong's investment in the Investment Fund for an additional 2 years



but instead the maturity date of the Investment Fund was extended from 15.9.2020 to 15.9.2022 by resolution of the unit holders of the Investment Fund at the Unit Holders Meeting duly convened and conducted in accordance with the Deed governing the Investment Fund on 10.6.2020.

## **Issues**

[23] Two sets of Issues To Be Tried were filed for issues between Ong and OCBC and between Ong and RHB respectively. I have merged the issues and restate these as follows:

- a) Whether it was OCBC and/or RHB who extended the tenure of the Investment Fund to 15.9.202;
- b) Whether the tenure of the Investment Fund was validly extended to 15.9.2022; and
- c) Whether Ong is entitled to seek the refund of RM1,160,451.51 which is the balance of the Invested Sum from OCBC and/or RHB.

## **Witnesses**

[24] At the trial, the following witnesses gave evidence for Ong:





- a) Ong (PW1), who is the plaintiff in this action, whose examination in chief was given via her witness statement marked as WS-PW1; and
- b) Ng (PW2), the husband of Ong and the de facto investor, whose examination in chief was given via his witness statement marked as WS-PW2.

[25] The single witnesses for OCBC was Pang Ching Yi (DW1), an officer for OCBC who held the post of Unit Trust Product Manager from OCBC's Wealth Management Department, whose examination in chief was given via her witness statement marked as WS-DW1.

[26] The following witnesses gave evidence for RHB:

- a) Edwin Leong Hoong Ming (DW2), an officer for RHB who held the post of Head, Product - Malaysia & Singapore whose examination in chief was given via his witness statement marked as WS-DW2; and
- b) Lim Wei Chien (DW3), an advocate & solicitor and partner in the firm of Messrs Wei Chien & Partners who chaired the Unit Holders Meeting on 10.6.2020 whose examination in chief was given via his witness statement marked as WS-DW3.



## Findings and analysis of the Court

### ***Who extended the tenure of the Investment Fund to 15.9.2022?***

*Whether it was OCBC and/or RHB who extended the tenure of the Investment Fund to 15.9.2022*

[27] Before submitting on the issue above, Ong invited the Court to examine the nature of the contractual relationship between Ong and OCBC for the purpose of determining whether OCBC could be made liable to Ong for the refund of the balance of the Invested Sum.

[28] Ong submitted that there were 3 distinct contracts which form the relationship between the parties in this action whereby:

- a) A first contract exists between OCBC and Ong where OCBC sells the Investment Fund to Ong, which is documented by the Application Form. Here, OCBC agreed to be RHB's distributor to sell the Investment Fund, managed by RHB, to OCBC's customers pursuant to a Distribution Agreement between OCBC and RHB dated 11.8.2014. Pursuant to this Distribution Agreement OCBC sold the Investment Fund to Ong.



- b) A second contract exists where Malaysia Nominees places OCBC's customers' investment with RHB. Here, when OCBC sold the Investment Fund to its customers including Ong, OCBC placed its customers' investments in Malaysia Nominees.
- c) A third contract exists when Malaysia Nominees holds the units of the Investment Fund on behalf of OCBC. After Malaysia Nominees received the funds from OCBC, Malaysia Nominees invested OCBC's customers' investments including Ong's. Malaysia Nominees was then registered as the unit holder.

[29] Following from the above, RHB managed the Investment Fund and TMF Trustees was appointed as trustee of the Investment Fund.

[30] Ong submitted that the privity of contract of the Invested Sum was between Ong and OCBC because when Ong decided to invest the Invested Sum in the Investment Fund, OCBC had required Ong to execute the Application Form, which was OCBC's document. Further, it was OCBC that issued to Ong Monthly Statements of the Invested Sum, Monthly Wealth Reports and the Statements of Dividend Distribution.

[31] Counsel for Ong referred the Court to the cases of *Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124 (FC) and *Leong Teck Ewe v. Tractors (M)*



*Sdn. Bhd.* [1990] 2 CLJ (Rep) 347 (HC) for the proposition that a person who signs a contract in his own name is prima facie a contracting party and liable.

[32] It was further submitted by Ong that the very fact that OCBC is the distributor of the Investment Fund meant that the privity of contract of the Invested Sum was between Ong and OCBC as OCBC at all material times dealt with Ong in its own name. This was evidenced by the Monthly Statements of the Invested Sum and Statements of Dividend Distribution issued by OCBC to Ong. Counsel for Ong referred the Court to the following authorities to support this submission:

- a) In *Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka* [supra] it was held that a person who holds out himself as an agent is still liable under a contract when he contracts in such form as shows that he is personally liable.
- b) In *Leong Teck Ewe v. Tractors (M) Sdn. Bhd.* [supra] it was held that an agent who does not disclose the existence of his principal and acknowledges documents in his own name without qualification is personally liable.
- c) In *Sagal (trading as Bunz UK) v. Atelier Bunz GmbH* [2009] 4 All ER 1253 it was held that a party who acted on its own behalf not on behalf of any principal



and contracts in his own name and not in the name of the principal is not treated as an agent.

[33] OCBC submitted that it only buys, sells and holds the units purchased by Ong and does not act on its own. The basis of the relationship between Ong and OCBC is that OCBC merely acts as an agent for Ong and Ong is ultimately liable for the units purchased.

[34] Counsel for OCBC referred the Court to cl. 1.1 of the OCBC Investment Services Terms & Conditions (“**OCBC Terms & Conditions**”), which Ong acknowledged in the Application Form to have been read. This clause stipulates:

*“OCBC Bank (M) Bhd may at its sole and absolute discretion, provide OCBC Investment Services to the Customer desirous of holding, subscribing, switching, transferring or redeeming of Units in any Fund. The Bank may from time to time agree with the Customer to act on the instructions of the Customer for holding, subscription, switching, transfer or redemption of Units, the processing of such transaction and the provision of OCBC Investment Services.”*

[35] OCBC also submitted that it is merely a distributor pursuant to the Distributor Agreement between OCBC and RHB dated 28.7.2006 (“**Distribution Agreement**”), the recitals of which state:

*“(B) The Bank is desirous of marketing and distributing Units in the Funds to the current and future clients of the Bank.*



(C) *The Manager has agreed to appoint the Bank as a non-exclusive distributor of the Funds for the purpose of soliciting purchases of Units in the Funds from the Bank's current and future clients upon the terms and conditions hereinafter appearing."*

[36] Further, cl. 3.3 of the Distribution Agreement provides:

*"Subject to the terms of this Agreement, the Bank is merely acting as distributor for the Manager and under no circumstances will the Bank assume obligations and liabilities (if any) of any of its customers..."*

[37] The Court finds that the evidence of Ong and Ng in their examination in chief does not support Ong's contention. There is nothing said about the nature of the relationship between Ong and OCBC. Ong's evidence in examination in chief (through WS-PW1, Q&A No. 4) she states:

*"Q : What is your relationship with OCBC?"*

*A : I invested in the Investment Fund with OCBC. The Account Number for the Investment Fund with OCBC is 7085017849. In addition, my husband and I had transferred our money in our joint name account in OCBC which is Account Number 7082249242 to invest in the Investment Fund."*

[38] The Court finds that both Ong and Ng did not lead any evidence to say that the Monthly Statements of the Invested Sum, Monthly Wealth Reports and the Statements of Dividend Distribution were proof that OCBC did not act as an agent or distributor only but assumes liability for the



Investment Fund. In fact, these documents, although filed in the Bundle of Documents, were never even adduced as evidence. OCBC's witness was not cross-examined on this point. As for the Application Form, no evidence in Ong and Ng's examination in chief was led on this as a basis for the contractual relationship between Ong and OCBC. Also, OCBC's witness was not cross-examined on this point.

[39] In Ng's cross-examination, he stated that he put his money in OCBC and OCBC will help him to do the investment:

*"SAS Do you know or not that, do you agree with me that. Let me ask again. Sorry. Do you agree that relationship between you and OCBC is that, OCBC as a distributor buys units in the fund and holds the units on your behalf?"*

*KHA I only know that I put my money in OCBC and then they will help me to do the investment. That is all, I know"*

[40] Having regard to Ong's lack of evidence and the terms of the OCBC Terms & Conditions and Distributor Agreement, I find that her contention that the privity of contract of the Invested Sum was between Ong and OCBC and as a consequence OCBC is liable to Ong for the refund of the balance sum of her invested amount has no merit.

[41] Coming back to the main issue of OCBC or RHB who extended the tenure of the Investment Fund, OCBC submitted that the maturity date of the Investment Fund was not extended by OCBC and it has no right to extend the same, based on the following reasons:



- a) The Investment Fund was set up by RHB and has at all material times been managed by RHB. This was admitted by RHB at paragraph 8.4(c) of RHB's Defence and stated to be so in Q&A No. 2 of WS-DW2;
- b) OCBC is only a distributor of the Investment Fund who is not privy to the management of the Investment Fund, pursuant to the Distribution Agreement and the Supplemental Agreement to the Distribution Agreement dated 11.8.2014; and
- c) The extension of the tenure of the Investment Fund was done by a resolution of the unit holders of the Investment Fund who decided to extend the tenure of the Investment Fund at the Unit Holders Meeting convened on 10.6.2020, not by OCBC. This is confirmed by RHB at Q&A No. 37 and Q&A No. 38 of WS-DW2.

[42] The contentions above regarding the extension of the tenure of the Investment Fund at the Unit Holders Meeting is uncontroverted. Given that OCBC is only a distributor for RHB in respect of the Investment Fund and does not manage the Investment Fund, it is clear that the extension has nothing to do with OCBC. The unit holders are the ones that made the decision to extend the Investment Fund, not OCBC. Therefore, it was not OCBC but RHB (through the decision of the unit holders) who extended the tenure of the





Investment Fund in respect of Ong's Investment to 15.9.2022.

[43] The next question is whether the extension of Ong's Investment to 15.9.2022 was validly done.

***Validity of extension of the Investment Fund tenure***

*Whether the tenure of the Investment Fund was validly extended to 15.9.2022*

[44] Ong's position is that OCBC varied the terms of the Investment Fund unilaterally by extending the tenure of the fund by an additional 2 years from the original maximum tenure of 6 years and this was not valid as it was done without Ong's consent. Following from this, once the Investment Fund reached its maturity date of 6 years, as agreed, OCBC must refund the balance of the investment sum to Ong.

[45] Ong relies on illustration (c) of Section 63 of the Contracts Act 1950 which provides that if the parties to a contract agree to substitute a new contract for it the original contract need not be performed but when one party does not assent to the agreement, no new contract has been entered into. It appears that Ong is arguing that since no consent was given by Ong to the extension of the Investment Fund tenure then the original maximum tenure of 6 years applies



for her and she could obtain a refund of the balance of the investment sum after 28.8.2020.

[46] OCBC's evidence through DW1, which is uncontroverted, is that the tenure of the Investment Fund for an additional 2 years from 15.9.2020 was approved in the Unit Holders Meeting that was held on 10.6.2020. The facts relating to this are:

- a) On or around 27.4.2020, OCBC received (i) a Notice of Meeting; (ii) an Explanatory Notes; (iii) a Proxy Form; and (iv) Frequently Asked Questions issued by RHB. It was stated therein, inter alia, that a meeting had been summoned on 10.6.2020 pursuant to cl. 16.3.1 of the Deed to propose an extension of the tenure of the Investment Fund for an additional 2 years from 15.9.2020 ("**Proposed Extension**").
- b) By a letter dated 18.5.2020, OCBC informed Ong of the Unit Holders Meeting dated 10.6.2020 and requested Ong to revert with her instructions before 3.6.2020, This letter and the documents received by OCBC were transmitted via SMS to Ong's mobile number 0164172212 on 20.5.2020.
- c) On 27.5.2020, OCBC sent a message via SMS to Ong's mobile number 0164172212 inviting her to attend a live teleconference to be hosted by one Dr. Harrison Wang (a fund manager of the Investment



Fund) on 29.5.2020 for an update on the Investment Fund.

- d) Despite the above, Ong did not respond to or protest against OCBC's said letter of 18.5.2020 and/or SMS messages of 20.5.2020 and 27.5.2020 or revert with any instruction to OCBC by 3.6.2020 as regard to the meeting or the Proposed Extension. Consequently, OCBC did not attend the meeting on 10.6.2020.
- e) On 10.6.2020, the Proposed Extension was voted for and approved by 112 out of 129 unit holders of the Investment Fund. Due to the overwhelming majority of 86.82%, the tenure of the Investment Fund was extended to 15.9.2022.
- f) On 2.7.2020, OCBC sent another message via SMS to Ong's mobile number 0164172212 informing her, inter alia, the outcome of the Unit Holders Meeting and the extension of the tenure of the Investment Fund to 15.9.2022.

[47] During the trial, Ong confirmed that she received OCBC's SMS on 20.5.2020 pertaining to the Unit Holders Meeting. Her evidence in cross-examination was:

*"SAS: Ok. Can I confirm with you, that you have received SMS from OCBC? Yes or no?"*

*Ong: Yes, but I'm not sure it's regarding*



*what.*

*SAS: Ok, so I refer to 1333. Ok, my instructions are, that on this date 20.05.2020, this SMS was sent to you and there was content to say that 'Visit OCBC.com.my, propose resolution to vote reply for or against before 3rd June.' You received that SMS?*

*Ong: Yes, I received the SMS, but I don't understand."*

[48] Ng also admitted that OCBC did in fact notify Ong of the meeting to be held on 10.6.2020 but it was not brought to Ng's attention. OCBC submitted that Ong therefore did have knowledge of the meeting and did not give any instructions to OCBC to attend the meeting. Her evidence in cross-examination was:

*"SAS: Did you consult your husband when you received this SMS, or you just ignored it?*

*Ong: No, I did not."*

[49] OCBC submitted that the notices sent by OCBC to Ong by SMS constitute a sufficient notice as agreed by Ong in the OCBC Terms & Conditions. This was stated by DW1 in Q&A No. 31 of WS-DW1 wherein she stated that OCBC sent notices via letter and SMS as under cl. 11.1 of the OCBC Terms & Conditions, notices can be either via letter sent by post or by way of electronic transmission.

[50] Counsel for OCBC also referred the Court to cl. 16.4.26 of the Deed governing the Investment Fund which provides:



*“Resolutions passed at a meeting of Unit Holders bind all Unit Holders whether or not they were present at the meeting at which the resolutions were passed. No objection may be made as to any vote cast unless such objection is made at the meeting”.*

- [51] OCBC submitted that due to Ong’s own failure to reply OCBC's SMS and/or give instructions to OCBC with respect to her decision to the Proposed Extension despite notices sent by OCBC had been received by her, she is estopped from disputing the resolutions reached in the Unit Holders Meeting on 10.6.2020 and commencing this action against OCBC.
- [52] Counsel for Ong took objection to this and argued that OCBC cannot rely on its OCBC Terms & Conditions as according to Ng’s testimony, Ong and him were never given a copy of the same. Also, the OCBC Terms & Condition adduced for the trial was only printed on April 2015 which was after Ong had invested in the Investment Fund and cannot be binding on Ong as it was only prepared after Ong invested in the Investment Fund on 28.8.2014.
- [53] OCBC submitted that it was expressly confirmed and agreed in the Application Form that Ong had received the OCBC Terms & Conditions. OCBC also submitted that as the forms and documents were confirmed to have been executed and accepted by Ong, OCBC would not have an exact duplicate of the actual documents that were handed in 2014.



[54] Counsel for OCBC also pointed out that Ng admitted that he is one of many investors in the Investment Fund and based on the outcome of the Proposed Extension, he has no choice but to follow the majority decision i.e. to extend the maturity date of the Investment Fund to 15.9.2022. The evidence in cross-examination was:

*FKF*                    *Alright, this is what you were told. Now, you told us just now that you accept that you are one of many investors in the fund, that you don't expect any different treatment of how other investors of the fund are treated.*

*KHA*                    *Yes.*

*FKF*                    *So, Mr Ng, would you be prepared to accept that what is binding on other investors of the fund, the unit holders of the fund, would also bind you?*

*KHA*                    *I have no opportunity to object what they have decided to do.*

*FKF*                    *Yes, we heard, we understand you, Mr Ng. We know you're not, you would have not agreed to the extension, alright. But I'm suggesting to you now, I'm putting to you, ok, that because there is an overwhelming majority, even if you had attended, even if you had been allowed to attend the meeting, you would have been in the minority.*

*KHA*                    *That's why I said I cannot... I have no opportunity to object, but that doesn't mean I agree.*

*FKF*                    *I'm not saying that you are agreeing, but what i am saying, Mr Ng, is that as an investor of the fund, if you were in the minority, you'd have to go with the majority.*

*KHA*                    *Yes, no choice.*

*FKF*                    *Yes, no choice, alright, ok. Because you did tell the Court just now you were*



*not expecting any special treatment, right, you've got to go with all other unit holders.*

*KHA Yes, no choice.*

*FKF Ok, so, if all other unit holders want the two-year extension-*

*KHA Then I have no choice.*

*FKF Mr Ng, I'm suggesting to you, ok, perhaps, the correct thing for you to do is to just accept the two-year extension, and to go with what everybody, well, most of the other people in the fund have chosen to do.*

*KHA I have no choice but to follow."*

- [55] After considering the submissions above I find that the tenure of the Investment Fund was validly extended to 15.9.2022 for the reasons stated below.
- [56] Ong received OCBC's SMS on 20.5.2020 on the Unit Holders Meeting to be held on 10.6.2020 which was not brought to Ng's attention. Therefore, no instructions were given by Ong or Ng to OCBC for the purpose of voting during the meeting.
- [57] The notices sent by OCBC to Ong by SMS constitute a sufficient notice as agreed by Ong in the OCBC Terms & Conditions as provided in cl. 11.1 which states that OCBC may give notices via electronic transmission or in any other manner as the OCBC may deem fit.
- [58] Pursuant to cl. 16.4.26 of the Deed, resolutions passed at a meeting of Unit Holders of the Investment Fund bind all Unit



Holders whether or not they were present at the meeting at which the resolutions were passed. It provides:

*“Resolutions passed at a meeting of Unit Holders bind all Unit Holders whether or not they were present at the meeting at which the resolutions were passed. No objection may be made as to any vote cast unless such objection is made at the meeting.”*

[59] The Unit Holders Meeting held on 10.6.2020 was validly held and the resolutions were valid as no challenge were raised as to the validity of the meeting and as to the resolutions that were passed. In any event, Ong is estopped from disputing the resolutions reached in the Unit Holders Meeting on 10.6.2020 as a result of her own inaction. She failed to reply OCBC's SMS and/or give instructions to OCBC on her decision to the Proposed Extension despite notices sent by OCBC received by her.

[60] Ong's inaction is fatal and is not open for the Plaintiff at this point in time to challenge the extension. Ong's inaction amounts to laches and as such she has waived her right to challenge it. In *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202 (HC) Edgar Joseph Jr J stated:

*“The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted ...*





[61] Further, in *Alfred Templeton*, His Lordship explained acquiescence by citing *Glasson v. Fuller* [1922] SABL 148:

*“... A man who stands by and sees an act about to be done which will be injurious to himself, and makes no objection, cannot complain of that act as a wrong at all. He never has any right of action, because he stands by and allows the act to be done.”*

[62] Ong has also waived her rights to object to the extension of the Investment Fund’s tenure as she did nothing when she received the OCBC SMS regarding the Unit Holders Meeting. Waiver has been explained in *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 3 MLJ 633:

*“By definition, waiver is the abandonment of a right and is either express or implied; it may be implied from conduct which is inconsistent with the continuation of the right.”*

[63] Ng admitted that he is one of many investors in the Investment Fund and based on the outcome of the Unit Holders Meeting, he had no choice but to follow the majority decision of extending the maturity date of the Investment Fund to 15.9.2022 and that it is not relevant whether Ong agreed or consented to the extension. The intrinsic evidential value of admissions was explained by the High Court in *Esso Malaysia Bhd v. Hills Agency (M) Sdn Bhd & Ors* [1994] 1 MLJ 740 as follows:

*“Admission are strongest evidence possible and even a wrong construction of document will be assumed to be correct in view of the admission.”*



[64] I do not accept the submission of Ong that the OCBC Terms & Condition printed on April 2015 exhibited by OCBC cannot be binding on Ong as it was only prepared after Ong invested in the Investment Fund on 28.8.2014. I accept OCBC's submission that as the forms and documents were confirmed to have been executed and accepted by Ong, OCBC would not have an exact duplicate of the actual documents that were handed in 2014. For the purpose of the trial the Court accepts that it is sufficient for OCBC to rely on the reprint of the OCBC Terms & Condition in 2015.

[65] In any event Ong herself admitted that neither she nor her husband Ng bothered to read the documents provided to her by the representative of OCBC on the day she signed the forms. Thus, it is doubtful that Ong was relying on any provisions with regards the mode of sending notices provided in the OCBC Terms & Condition given to her when she invested in the Investment Fund on 28.8.2014. In any event, there is no position taken by Ong on the proper mode of sending notices in the OCBC Terms & Condition given to her in 2014.

[66] As it was RHB (through the decision of the unit holders), not OCBC who extended the tenure of the Investment Fund in respect of Ong's Investment to 15.9.2022, the consent of Ong to be given to OCBC before the tenure of the Investment Fund is extended by 2 years is not relevant.



[67] OCBC as an agent or distributor of the Investment Fund does not have control over the extension of the tenure of the Investment Fund and cannot be liable for Ong's inability to redeem her investment before the new maturity date of 15.9.2022. The best Ong could have done in the circumstances was to instruct OCBC to vote on her behalf during the Unit Holder's Meeting on the Proposed Extension. However, the opportunity to do this was foregone by Ong when she ignored the Notice on the Unit Holder's Meeting sent by OCBC.

### **Entitlement to refund**

*Whether Ong is entitled to seek the refund of RM1,160,451.51 which is the balance of the Invested Sum from OCBC and/or RHB*

[68] Ong submitted that a sum of RM740,653.10 is to be refunded to her by OCBC based upon the maturity date of 6 years of the Investment Fund. This a sum which is less than sum of RM1,160,451.51, which was claimed in this action. The reduction in the sum takes into account certain refunds made to her on 4 occasions of RM94,437.50, RM48,697.88, RM48,091.95 and RM212,659.35 after the filing of this action.

[69] The refund is premised on OCBC being the party who extended the tenure of the Investment Fund and the tenure of the Investment Fund not validly extended to 15.9.2022.



[70] However, this Court has already found that it is RHB through the decision of the unit holders, not OCBC who extended the tenure of the Investment Fund and the tenure of the Investment Fund was validly extended to 15.9.2022. Therefore, Ong does not have a basis for the refund as claimed in this action. Further, Ong is not entitled to seek the refund of the balance of the Invested Sum amounting to RM740,653.10 in this action because Clauses 7(f), 12(d) and 31 of the Information Memorandum received by Ong in August 2014 expressly provide that no redemption is allowed by a shareholder or unit holder during the tenure of the Investment Fund. This is confirmed by DW2 at Q&A No. 40 of WS-DW2.

[71] Clause 7(f) of the Information Memorandum provides:

*“Due to the illiquid nature of certain of the Company's private equity assets, such as investments in pre-IPO securities, which may not have a liquid trading market before the IPO, it would not be practical to allow for redemption by a shareholder in the Company. In lieu of redemption, the Company provides an automatic distribution mechanism to the shareholders.”*

[72] Clause 12(d) of the Information Memorandum provides:

**“REDEMPTION OF UNITS BY UNIT HOLDERS OF THE FUND IS NOT ALLOWED.**

*This is because the Fund will not be able to redeem its share holdings in the Company. Due to the illiquid nature of some of the Company's private equity assets, such as investments in pre-IPO\* securities, which may not have a liquid trading market before the IPO\* it would not be practical to*



*allow for redemption of shares held in the Company by the Fund. Moreover, units of the Fund are only transferable to other Qualified Investors. However, in lieu of redemption, the Company has an automatic distribution mechanism to the Fund (please see item 7(f) and 20 for details)."*

[73] Clause 31 of the Information Memorandum provides:

*"Redemption Settlement*

*Redemption by the unit holders of the Fund is not allowed.*

*However, redemption settlement pursuant to a compulsory redemption to facilitate the Fund's capital repayment by the Manager will be made to the Fund's unit holders within 10 days."*

[74] DW1's evidence, which the Court accepts, is that due to the extension of the tenure of the Investment Fund to September 2022 by the unit holders on 10.6.2022, OCBC is not entitled to terminate Ong's units or investment in the Investment Fund (Q&A No. 36, WS-DW1).

[75] Based on the aforesaid reasons, Ong is not entitled to terminate and/or seek for the balance of the Invested Sum before 15.9.2022.

[76] Another reason Ong does not have right to be refunded the sum of RM740,653.10 before the Investment Fund's new maturity date of 15.9.2022 is estoppel. After the original 6-year period of the Investment Fund, in 4 occasions she received and accepted the compulsory redemptions without any dispute or protest, even after this suit was filed and



despite her claim being for units that were held by her as of 31.8.2020.

[77] The redemptions after the 6-year period are as follows:

<b>Date of Redemption</b>	<b>Number of Units Redeemed</b>	<b>Net Amount Paid (RM)</b>
March 2021	116,647.11	94,437.50
September 2021	56,168.26	48,697.88
October 2021	55,681.31	48,091.95
February / March 2022	280,072.89	212,659.35
<b>TOTAL</b>	<b>508,569.57</b>	<b>403,886.68</b>

[78] By her own conduct, Ong had admitted and accepted the extension of the Investment Fund when she received and accepted the compulsory redemptions after the 6 year period and furthermore, after the filing of this action.

[79] In the Singaporean case of *Ong & Co. Pte Ltd v. Foo Sae Heng* [1990] 3 CLJ (Rep) 820 it was held that the defendant there had effectively affirmed that the transactions were properly carried out and therefore estopped from maintaining this suit against the defendant. It was held:

*“By not objecting to the documents sent to him, he had effectively affirmed that the transactions were properly carried out. He was estopped from denying the same.”*



[80] Based on the Statement of Claim, Ong's claim is for 1,337,696.26 units at the rate of RM0.86 which amounts to RM1,160,451.51. However, since then, Ong had accepted the proceeds from the compulsory redemptions and no longer has 1,337,696.26 units as pleaded in the Statement of Claim.

[81] Not only has the amount claim been completely changed due to the compulsory redemptions done, the fact that Ong did not object to these redemptions and coupled with fact that Ng had agreed and accepted that Ong is bound by the decision of the majority of the unit holders as found above renders this claim unsustainable. It is emphasized again that by Ong's conduct and Ng's own admission, Ong has accepted the extension done by the unit holders. Ong is therefore bound by the same and this renders this claim to be premature as the maturity of the Investment Fund will take place in September 2022. Not only does Ong not have a cause of action against OCBC, she herself has accepted the extension and at this stage waived her rights to object to the extension.

### **Liability of RHB**

[82] Given that the tenure of the Investment Fund was validly extended to 15.9.2022 and Ong is not entitled to the refund of the balance of the investment sum, RHB is not liable to any claim of Ong in respect of the refund.



[83] This position is fortified by the fact that Ong also has not made out any case at all against RHB as except for Ong's prayer for reliefs in paragraph 30 of her Amended Statement of Claim that OCBC and RHB be jointly and severally liable for the value of the units remaining in her account with OCBC as at 31.8.2020, she has not made any allegation of breach or of wrongdoing against RHB.

[84] Further, RHB had no dealings with Ong and neither did RHB OSK Asset Management Pte Ltd. which was also expressly pleaded in paragraph 14 of Ong's Amended Statement of Claim.

### **Conclusion**

[85] Premised on the aforesaid reasons, Ong has not proven her case on a balance of probabilities and the claim is dismissed with costs of RM25,000 to be paid to OCBC and RM5,000 to be paid to RHB.

**17 October 2022**

**ATAN MUSTAFFA YUSSOF AHMAD**

Judge

Kuala Lumpur High Court NCC1

(Commercial Division)



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