BANK WINS DECADE-LONG HONG KONG MIS-SELLING CASE

The Hong Kong Court of First Instance has handed a decisive win to the defendant bank in the latest mis-selling case to come before the courts. In *Shine Grace Investment Ltd v. Citibank, N.A.* [2018] HKEC 2123, the Court found overwhelmingly in favour of the bank, rejecting all of the plaintiff's claims. Clifford Chance acted for the bank.

The Court held that the relevant contractual terms were inconsistent with any alleged duty to advise, and on the facts, there were no other relevant factual circumstances surrounding the dealings between the parties to suggest any assumption of legal responsibility by the bank to advise on the suitability or the risks of the investments. The decision re-affirms the effectiveness of non-reliance clauses in bank-customer contracts following the approach taken by the courts in previous mis-selling cases.

Key issues

- The Hong Kong Court of First Instance has handed a decisive win to Citibank in a long-running mis-selling case.
- The Court found there was nothing to suggest any assumption of legal responsibility by the bank to advise on the suitability of the investments.
- Banks should maintain clear contemporaneous records showing their efforts in ascertaining suitability and explaining the associated risks.

BACKGROUND

The dispute concerned six equity accumulator contracts (the Disputed ACs) entered into by the plaintiff, Shine Grace, an investment vehicle used by the late Mrs. Anita Chan Lai Ling with the first defendant bank in October 2007. The second defendant was the relationship manager of Shine Grace and Mrs. Chan's group of companies.

The bank made repeated margin calls since November 2007, yet Shine Grace refused to deposit additional margin security and instead, disclaimed the Disputed ACs and asserted that they were invalid and unenforceable. On 22 January 2008, the Disputed ACs were closed out and unwound at a total cost that exceeded HK$427 million.

Shine Grace commenced proceedings claiming that the Disputed ACs were invalid and seeking damages close to HK$500 million. Two guarantors brought related proceedings against the bank under guarantees executed in favour of Shine Grace.

NO DUTY TO ADVISE

The Court held that there was no assumption of any duty to advise: whilst it is possible that a bank may assume responsibility to provide advice to a

customer, the mere giving of "advice" does not necessarily mean that the bank has assumed legal responsibility for it. On the facts, the Court found that the contractual terms were inconsistent with any alleged duty to advise, and the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (SFC Code of Conduct) had not been incorporated into the parties' agreement.

The Court was also satisfied that, having looked at all other relevant factual circumstances, the bank did not assume legal responsibility to advise on the suitability and risks of the Disputed ACs. In particular, the Court noted that Mrs. Chan was a very strong-minded and confident investor: she was not looking for someone to advise on what trades she should or should not do or the risks those trades involved.

The Court rejected the argument that the bank was subject to an "intermediate" common law duty to explain fully and accurately the nature and effect of a product, where it chooses to volunteer an explanation. It held that such a free-standing common law duty, irrespective of whether a bank has assumed legal responsibility to advise, was inconsistent with the approach adopted by the Court of Appeal in *Chang Pui Yin v. Bank of Singapore Limited*.

NO BREACH OF DUTY

In any event, the Court was satisfied that Shine Grace had received proper advice with respect to the suitability of, and the risks associated with, the Disputed ACs and there was no breach of duty.

The Court found that the Disputed ACs were not unsuitable for Shine Grace, particularly in view of Mrs. Chan's trading strategy and market outlook.

As regards the allegation that there was inadequate disclosure around the mark-to-market (MTM) risk, the Court held that the additional disclosures suggested by Shine Grace were unsupported by market practice or regulatory guidance, were more likely to confuse than to enlighten investors, and were unlikely to be helpful to investors in understanding the relevant risks over and above what had already been disclosed in the bank's risk disclosure statement.

On the facts, the Court also dismissed Shine Grace's misrepresentation claims against the bank and the relationship manager.

NO CAUSATION

The Court further considered that all the available evidence suggested that Mrs. Chan, as a "very strong-minded person and an enthusiastic, confident and prolific investor", would have entered into the Disputed ACs in any event. It was therefore "highly improbable" that she would have been dissuaded from doing so simply because of a warning about the risk of MTM losses and the possibility of additional margin calls.

ANALYSIS

The efficacy of non-reliance clauses has become somewhat academic in light of reforms to the Professional Investor Regime introduced by the SFC, which came into effect on 9 June 2017 and effectively negates the operation of such clauses.[1] Yet this case serves as a useful reminder of the importance for

1 See Clifford Chance Client Briefing December 2015 – *SFC seeks to abolish non-reliance clauses with new suitability requirement.*

banks to maintain clear contemporaneous records showing their efforts in ascertaining suitability and explaining the associated risks. On the facts, Mrs. Chan clearly understood the risks and made a conscious and informed decision to enter into the trades given her trading strategy and market outlook. In this regard, the Court stated that it was greatly assisted in its assessment by the fact that most, if not all, of the material telephone conversations between the parties' representatives were recorded and the audio recordings and transcripts of those conversations were in evidence.

The Court also took a practical approach in assessing complicated expert evidence concerning MTM risks, calculations and the concept of implied volatility. It expressly held that any quantitative scenario analysis of MTM values or calculations was unsupported by market practice or regulatory guidance, and was more likely to confuse than to enlighten investors. Legal practitioners are also reminded that the extent of legal duty in any given situation is ultimately a question of law for the courts and that expert opinion in this context is of little assistance.

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