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Court of First Instance dismisses investor's US$10.4 million accumulator claim.

The recent case of Kwok Wai Hing Selina v HSBC Private Bank (Suisse) SA (HCCL7/2010) indicates that the Hong Kong courts may require private bank clients who suffer losses as a result of investing in financial products to bear the consequences of the risks that they have accepted. The Court enforced the terms of the account agreements and risk disclaimers that the investor had signed, dismissing in context the contractual relevance of the SFC Code of Conduct and (in the circumstances of the case) key statutory regimes and some internal documentation discrepancies in the handling of the account.

The claim

Ms Selina Kwok brought proceedings against HSBC Private Bank (Suisse) SA ("**Bank**") in relation to some 350 forward accumulators ("**FA**") that she had purchased between 2003 and 2007. As markets trended downward in late 2007, Ms Kwok elected to reduce her exposure under the FAs by unwinding the transactions. She claimed from the Bank the cost of doing so and the losses she sustained on her equity-linked note ("**ELN**") positions which had to be liquidated to meet these costs. She alleged that the Bank was in breach of its duties to her in respect of her account and the sale of the products.

The Bank's obligations: non-contractual core duties?

The Bank had executed standard account opening documentation for a non-discretionary account with Ms Kwok. This documentation, signed by Ms Kwok, included an extensive risk disclaimer which stated that Ms Kwok would assess the suitability of investments for herself and would not rely on advice from the Bank.

The Bank accepted that it owed duties to Ms Kwok as a client, including to act with due care and skill in executing her instructions, to ensure that any advice given was not misleading and to act diligently when providing information. Ms Kwok claimed that the Bank also owed her, and had breached, a set of "core duties". The alleged core duties included giving advice on investments, informing and warning of risks in relation to the account, and a duty not to sell unsuitable investment products to Ms Kwok. The core duties were alleged to have been voluntarily assumed by the Bank in its conduct of the relationship or implied by law, including by reference to the Code of Conduct for Persons

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Licensed by or Registered with the Securities and Futures Commission (the "**SFC Code**").

Findings

Justice Reyes found against Ms Kwok on almost every issue. He gave primary importance to the legal relationship between the Bank and Ms Kwok described in the account documentation. In particular, he noted that the Risk Disclosure Statement excluded investment advice and suitability assessment from the Bank's obligations. Reyes J emphasised the binding effect of Ms Kwok's signature on the documentation, including a professional investor form, a charge over her assets and credit facilities extended by the Bank. Neither subsequent oral exchanges between the parties nor the SFC Code could imply terms in the contractual relationship which were contrary to its express provisions. On that basis, the alleged core duties were not established and no breach of the Bank's acknowledged duties was found.

Notwithstanding the importance of the Risk Disclosure Statement, it was not necessary for the bank to explain the document to Ms Kwok: it was Ms Kwok's responsibility to ask the bank to explain any document that she did not understand before signing it.

Reyes J further dismissed any reliance on: (i) the Control of Exemption Clauses Ordinance (Cap. 71) on the basis that, in the absence of a breach of any duty, no issue of an exemption clause could arise; (ii) the Supply of Services (Implied Terms) Ordinance (Cap. 457) on the ground that he had rejected the alleged core duties and thus no issue of exercising reasonable skill and care in discharging such duties could arise; and (iii) the Unconscionable Contracts Ordinance (Cap. 459) on the basis that he found nothing unconscionable in the account documentation.

Damages

Obiter dicta, Reyes J noted that he would have refused to award damages assessed solely by reference to the losses incurred by Ms Kwok in late 2007. This approach would have given Ms Kwok "*a free ride*". Rather, as Ms Kwok claimed that the ELNs and FAs should not have been sold to her, she would have to give credit for the profits she had made by investing in such products through the Bank if her losses were to be calculated.

Conclusions

The law of investor mis-selling claims in Hong Kong has long been dominated by the decision in *Field v Barber Asia Ltd* [2004] 3 HKLRD 871, a case in which there was no account agreement to define the parties rights and obligations. The *Kwok v HSBC* decision, which reflects more recent UK authorities such as *JP Morgan Chase Bank v Springwell Navigation* [2008] EWHC 1186 and *Titan Steel Wheels Ltd v Royal Bank of Scotland plc* [2010] EWHC 211, focuses almost exclusively on the express contractual terms as the basis for the parties' allocation of risk and responsibility. The client should be bound by its signature on the account documentation and any duties excluded by the counterparty in that agreement cannot be reintroduced by implication, regulatory provision or in tort.

However, it would appear that the Court's view of the relative credibility of the key witnesses and the evidence of Ms Kwok's ability to understand her investment decisions influenced the outcome. In this regard, the availability of executed account documentation, written call reports and telephone recordings was critical. The safe custody of such material is a key element in dealing with claims of this kind.

The decision in the same week in *HSBC Private Bank (Suisse) SA v Mission Bridge Limited* (HCA 406/2008, 18 June 2012) also affords some good news for banks. The Court in that matter supported the proportionate expenditure of resources on litigation and refused all but the most necessary requests for discovery. Lok J commented in passing that the Hong Kong Monetary Authority Circular on customer access to telephone recordings (5 November 2008) could not have been intended to permit blanket requests without a specific purpose, for example the verification of a particular instruction.

The significance in this case of the contractual documentation and the finding that the client should be bound by her signature would appear to conflict with certain of the recent Legislative Council subcommittee findings and suggestions such as the suggestion that it should be incumbent on the bank to prove that the client did in fact understand the product in which she invested and to prove that any information provided to a client did not constitute investment advice.

Click here for a copy of the judgment.

Click here for our client alert on the Report of the Subcommittee to Study Issues Arising from Lehman Brother-related Minibonds and Structured Financial Products.

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