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Hong Kong court rules in favour of bank in mis-selling claim brought by experienced investor

Shine Grace commenced court proceedings against Citibank and Mak in 2008 (the Main Action). Two guarantor actions in relation to guarantees covering the Disputed ACs were also commenced by Shinning and BSI (both controlled by Chan when the guarantees were entered into) in 2013. This briefing will focus on the Main Action only.

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IN THE LATEST DECISION ON MIS-SELLING OF INVESTMENT PRODUCTS ARISING OUT OF THE 2008 FINANCIAL CRISIS, the Court of First Instance ruled in favour of Citibank and the bank's relationship manager (Ms Mak) to dismiss an investor's claim.

What happened in the case?

The plaintiff, Shine Grace Investment Ltd, was an investment vehicle which was solely beneficially owned, controlled and operated by a Mrs Chan until she passed away on 17 October 2007. Chan had engaged Citibank as one of her bankers since the 1980s, and over the years had enjoyed handsome profits by trading in equity accumulator contracts (ACs) with Citibank. Mak was Citibank's relationship manager for Shine Grace and Chan at the time. Chan was an experienced and active trader in the capital markets, with investments covering a wide range of products including structured products such as equity-linked notes and other market-linked instruments. It was common ground that all of Shine Grace's investment decisions were made by Chan.

The case arose out of nine particular ACs (Disputed ACs) which Chan had entered into before her death; Shine Grace suffered total losses from trading in the Disputed ACs of HK$478 million.

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The court's decision

Mr Justice Peter Ng found that Shine Grace had wholly failed to establish liability on the part of Citibank and Mak in all of its claims in relation to (i) breach of duty to advise on the (un)suitability of the Disputed ACs; (ii) breach of duty to provide reasonable, fair, accurate and honest advice and breach of duty not to mislead; and (iii) misrepresentation.

(i) Duty to advise

This case should be read in contrast with another mis-selling case in Chang Pui Yin and others v Bank of Singapore Limited HCCL 12/2013, 8 August 2016 and Chang Pui Yin v Bank of Singapore Ltd CACV 194/2016, 20 July 2017 (please refer to our previous note of "Investor Beware? Hong Kong Court Confirmed Bank's Advisory Duty to Inexperienced Investors" on the first instance decision linked here). While the banks in both Shine Grace and Chang sought to rely on non-reliance clauses in the contractual documents to dispute any assumption of legal responsibility to advise, the outcome was different, as illustrated in the following comparison table:

	SHINE GRACE	CHANG
Characteristics of the plaintiff(s)	• Chan was a very strong minded person and an enthusiastic, confident and prolific investor • Chan was too confident and impatient to seek or listen to advice on the suitability of ACs from Citibank, particularly advice on the risks due to market movement, the method for the calculation of MTM values or the failure to meet margin calls • Chan was so strong minded and confident that, once she had formed a view to go for a particular trade, Citibank's staff, as well as her other bankers, were expressly instructed not to interfere	• The Changs were a simple couple who led uncomplicated lives • They had limited investment knowledge, rudimentary understanding about the investments they made through BOS and the risks associated with them, and their investment objective had always been to preserve their capital and achieve a return slightly better than bank deposits, belonging to the category of medium-risk investors
The court's assessment on assumption of legal responsibility to advise	• Citibank had no duty to advise in light of the disclaimer of any duty to give advice in the contractual documents • Citibank did not assume any duty or responsibility to advise, no matter what recommendations or suggestions might have been provided to Shine Grace by Citibank in the course of their relationship • Citibank would not have breached a duty to advise even if Citibank had a duty to advise, as the Disputed ACs were not unsuitable for Shine Grace	• The non-reliance clauses were capable of applying to the "advisory" account in relation to which advice was provided, in addition to the "execution-only" accounts • However, BOS could not rely on the non-reliance clauses in the contractual documents as they were unconscionable under the Unconscionable Contracts Ordinance (UCO) and an unreasonable exclusion of liability under the Control of Exemption Clause Ordinance (CECO)

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Citing and adopting the legal principles set out in Chang, the court in Shine Grace found that whether a defendant had assumed responsibility is a legal inference to be drawn from its conduct against the background of all the circumstances of the case. The mere fact that a statement had been made does not necessarily lead to the conclusion that there had been an assumption of legal responsibility on the part of the statement maker. Further, it would be erroneous to hold that if there had been any such assumption of legal responsibility, contractual non-advisory or non-reliance clauses must be inapplicable. The court affirmed the importance of giving effect to the contractual terms.

However, unlike in Chang, arguments based on UCO and CECO did not arise in Shine Grace. It is noteworthy that the court gave considerable weight to Chan's degree of sophistication and risk appetite as well as the relationship and interaction between Chan and Citibank. This was in stark contrast to Chang where the court found that the non-reliance clauses were unconscionable and unreasonable on the basis that, among other things, BOS took advantage of the trust the Changs had placed in the relationship manager and prevented them from being able to make informed decisions on their investments based on their medium-risk objectives. Having said that, in light of the factual findings that the Disputed ACs were not unsuitable, any arguments based on UCO and CECO would have been of little assistance to Shine Grace.

(ii) Duty to provide reasonable, fair, accurate and honest advice and duty not to mislead

The court rejected Shine Grace's proposition that Citibank owed a free-standing "intermediate" common law duty to advise regardless of whether Citibank had assumed legal responsibility to advise.

The court rejected Shine Grace's argument that the lack of disclosure in relation to MTM risks of the Disputed ACs was misleading. Replying on expert evidence, the court found that on the facts there had been such disclosure and there was no real connection between the complaint and what actually happened with the Disputed ACs.

(iii) Misrepresentation

The court also rejected Shine Grace's misrepresentation claim after considering evidence of the transcript of relevant conversations between Chan and Mak. The court held that there was no misrepresentation and no causal link between what Mak had said and Chan's decision to enter into the Disputed ACs.

> **" IT IS NOTEWORTHY THAT THE COURT GAVE CONSIDERABLE WEIGHT TO CHAN'S DEGREE OF SOPHISTICATION AND RISK APPETITE AS WELL AS THE RELATIONSHIP AND INTERACTION BETWEEN CHAN AND CITIBANK."**

Causation

Further, the court held that Shine Grace had failed to establish causation to prove that it would have avoided the losses claimed but for the defendants' alleged breaches of duties. The evidence suggested that Chan would have entered into the Disputed ACs anyway. The court attached considerable weight to Chan's character as described above.

Practical considerations

1. The character and experience of investors, as well as the investment portfolio, are relevant factors in determining the nature of the banking relationship, which in turn defines the scope of the bank's duty to advise (if any) by way of assumption of legal responsibility, and may ultimately affect the outcome of a case.
2. Proper banking documentation plays a crucial role in supporting the bank's position and can demonstrate the credibility of its employee witnesses during litigation proceedings. This is a developing area of the law, and the outcome of a case can often hinge on factual findings based on contemporaneous documents.
3. Following the implementation of the SFC's suitability anti-avoidance clause requirement on 9 June 2017, financial institutions are required to include a clause where written client agreements are required to the effect that if they solicit the sale of or recommend any financial product to a client, the financial product must be reasonably suitable for the client having regard to his financial situation, investment experience and investment objectives. Financial institutions cannot contract out of this clause. Going forward, any non-reliance clauses to be relied on by banks will be subject to scrutiny against the backdrop of the new regulatory regime. ■