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Hong Kong Court of Appeal Upholds Dismissal of Mis-selling Claim Made Against a Major Bank

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The Court of Appeal (the "**CA**") has recently handed down its judgment in CACV 483, 484 & 485/2018 (*Shine Grace Investment Ltd v Citibank, N.A. & Anor*), upholding the decision of the Court of First Instance in rejecting the plaintiffs' claims for alleged mis-selling of equity accumulator contracts by Citibank, N.A. (the "**Bank**").

The CA's decision re-affirms the principle that in ascertaining the scope of a bank's duty of care towards a customer, the Court places significant weight on the relevant factual circumstances (including the nature of the parties' dealings and the relative sophistication of the customer) as well as the terms of contractual documentation. Of particular note is that the mere fact of the bank volunteering advice to a customer cannot be taken to mean that it has assumed the legal duty to advise on the suitability of investments.

1. **Background**

The dispute involved three related actions. The main action concerned claims made by Shine Grace Investment Ltd ("**Shine Grace**"), an investment vehicle owned and controlled by Mrs Anita Chan ("**Mrs Chan**") until her sudden death on 17 October 2007, that the Bank had mis-sold nine equity accumulator contracts (the "**Disputed ACs**") to Shine Grace on 15 and 16 October 2007. The other two actions were brought by Shine Grace's two guarantors, Shinning International Holdings Limited ("**Shinning**") and Bonds & Sons International Limited ("**BSI**"), seeking to challenge the Bank's transfer of funds from the accounts of Shinning and BSI to meet the outstanding liability of Shine Grace.

Three of the nine Disputed ACs were knocked out in October/November 2007. Since 20 November 2007, the Bank had demanded Shine Grace to deposit additional margin security, but Shine Grace (then controlled by the children of Mrs Chan following her death) disclaimed the Disputed ACs and asserted that they were invalid and unenforceable. The remaining six Disputed ACs were closed out and unwound by the Bank in January 2008. Shine Grace suffered losses totaling around HK$478 million, which included the costs of unwinding the Disputed ACs (exceeding HK$427 million) and losses of around HK$51 million from the sale of shares accumulated under the Disputed ACs.

The trial of the three actions took place before the Honourable Mr Justice Ng ("**Ng J**") in November and December 2017, lasting 13 days. On 30 July 2018, Ng J handed down his judgment dismissing all three actions, finding that (i) the Bank did not owe to Shine Grace the alleged duty to advise, (ii) even if there was such a duty, the Bank did not breach the same and (iii) the alleged breach of duty did not cause Shine Grace's losses. Shine Grace, Shinning and BSI appealed against Ng J's judgment.

2. **The CA's Judgment**

The CA dismissed the appeal on 9 September 2022, upholding Ng J's findings in respect

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of each element of Shine Grace's claims.

2.1 Duty of care

The CA confirmed that the Bank was not under a duty to advise Shine Grace on the suitability and risks of Disputed ACs, regardless of what recommendations or suggestions might have been made to Shine Grace during the course of their relationship.

With reference to *Chang Pui Yin v Bank of Singapore Ltd* [2017] 4 HKLRD 458, the CA noted that the starting point is that banks are not normally under a duty to advise customers on the prudence or risks of their investments. However, the scope of a bank's duty of care is highly fact-sensitive, and turns on the precise nature of its relationship with the customer.

The CA observed that an enormous body of evidence (including no less than 680 items of audio recordings) was available before the trial judge as to the parties' dealings, and it would not be appropriate for the CA to embark on its own fact findings in an unfocused review of such evidence. The trial judge was entitled to find on the evidence that Mrs Chan, being a sophisticated and experienced investor, had her own investment strategy and did not rely on any investment advice from the Bank; the Bank was primarily following Mrs Chan's instructions in facilitating execution of trades.

The CA also agreed with Ng J's interpretation of Clause 4.12 of the Master Derivative Agreement, which had the clear effect of disclaiming any duty on the part of the Bank to give advice or make recommendations to Shine Grace. The material parts of the clause provided the following:

> *"You understand and agree that:*
>
> *(a) the above brief statement cannot disclose all the risks and other significant aspects of the derivatives market and you should therefore carefully study derivative transactions before you trade;*
>
> *(b) in respect of services rendered by us on a non discretionary basis,*
>
> *(i) you make your own judgment in relation to the transactions;*
>
> *(ii) we assume no duty to give advice or make recommendations;*
>
> *(iii) if we make any suggestions, we assume no responsibility for your portfolio or for any investment or transaction made;*
>
> *…*
>
> *(d) in either of the above cases,*
>
> *(i) we and our affiliates may hold positions for ourselves or other clients which may not be consistent with our officers' or employees' suggestions or discretionary management for you; and*
>
> *(ii) any risks associated with and any losses suffered as a result of our entering into any transactions for you are for your account."*

The CA emphasised that the mere fact that the bank had volunteered to give advice cannot be taken to mean that the bank must have assumed the legal responsibility to

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advise a customer on the suitability of his/her investment.

The CA also rejected the argument that the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (the "**SFC Code**") should inform the common law duties to which the Bank was subject. The SFC Code cannot 'create' a duty of care which does not exist under common law.

2.2 Breach of duties

Having found that there was no duty on the Bank to advise Shine Grace on the Disputed ACs, it was not strictly necessary to consider the issue on breach of duties. Nevertheless, the CA held that there was no breach of duty on the part of the Bank.

The CA upheld Ng J's evaluative conclusion that the Disputed ACs were not unsuitable for Shine Grace. Mrs Chan was a sophisticated investor, and had her own team of staff to monitor her investments and make regular reports. It is not the Bank's job to 'micromanage' Mrs Chan's financial affairs, and it cannot be regarded as having breached its duty in failing to advise her in these circumstances.

The CA also rejected the argument that there was inadequate or unsatisfactory disclosure of material risks of the Disputed ACs in the contractual documentation.

2.3 Causation

The CA held that Ng J was entitled to conclude, on the available evidence, that Mrs Chan would have entered into the Disputed ACs anyway; to suggest that the Bank could have somehow dissuaded Mrs Chan from entering into the Disputed ACs by advising that they were unsuitable was wholly speculative. Accordingly, Shine Grace has not established the causation element.

3. Comments

The CA's decision re-affirms the long established legal principle that the appellate court will only intervene in respect of findings of fact if there are palpable errors identified which are sufficiently material to undermine the trial judge's conclusion. In this case, the trial judge's task involved going through voluminous audio recordings and receiving days of oral testimony, and was entitled to come to the evaluative conclusions that he did. The CA found that Shine Grace has not identified any palpable error made by the trial judge to disturb his factual findings.

Of note is that since the reforms to the Professional Investor Regime by the Securities and Futures Commission (which came into effect on 9 June 2017), where a written client agreement is required, it must include a suitability clause to the following effect:

> *"If we [the intermediary] solicit the sale of or recommend any financial product to you [the client], the financial product must be reasonably suitable for you having regard to your financial situation, investment experience and investment objectives. No other provision of this agreement or any other document we may ask you to sign and no statement we may ask you to make derogates from this clause."*

The requirement of a mandatory suitability clause would undermine the effect of non-reliance provisions such as the one in the Master Derivative Agreement referred to above.

In any event, *Shine Grace* remains an important case that illustrates the value of having clear contractual documentation and contemporaneous records of dealings, which would inform the scope of any legal duties assumed by a bank towards its customers.

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