"I Kill You Later" – Bank's Risk Disclosure Statement effective in Accumulator case

July 2012

The High Court has found in favour of a bank in its first decision on a mis-selling case in relation to structured products, allowing the bank to rely upon the express contractual terms in the account opening forms, in particular, to negate any assumption of the duties not otherwise contained in the contract between the bank and its customers.

In the recent case of *Kwok Wai Hing Selina v HSBC Private Bank (Suisse) SA* (the "**Client**" and the "**Bank**"), the Client incurred huge financial losses relating to her investments in structured products following a crash in the financial markets in late 2007. She alleged that various breaches of duty by the Bank caused her to suffer financial losses of around HK$80 million. However, the Court found that the Bank did not owe any enhanced duties to advise or manage the Client's account, as claimed by the Client, and dismissed her claims of unsophistication and lack of understanding in relation to structured products that she purchased. A Risk Disclosure Statement (the "**Statement**") was found to have clearly placed the burden on the Client to manage her own financial position – despite recommendations provided by a bank from time to time, it is "*ultimately … for a client to assess whether a particular transaction was suitable in light of that client's financial condition, risk tolerance and investment experience*".

While the facts of each case, including in particular the individual circumstances of each investor, will be crucial in determining any mis-selling case, the Court's views in this case provide some guidance on the determination of the future cases, and certainly provide some important takeaway points.

Background

The Client, a wealthy housewife with two years' university education in London, opened an execution-only account with the Bank and thereafter entered into various contracts with the Bank for Forward Accumulator ("**FA**"s) products and other structured products. FAs, commonly dubbed "I Kill You Later", are a high risk product and carried a risk rating of level 5 (the highest level of risk given by the Bank).

Upon opening her account, the Client was given an Account Opening Booklet (the "**Booklet**"), which included the Statement. The Statement, which contained commonly found exclusion clauses, expressly warned, among other things, that the risk of loss may be substantial, the Bank does not offer investment advice and, if in any doubt about any investment the investor should seek independent professional advice.

The Client was asked to read, sign and return the Booklet to the Bank.

Credit facilities were provided to the Client. In an effort to grow the relationship with the Client, the relationship manager changed the Client's investment strategy from "medium" to "aggressive" without consulting the Client. This permitted the credit facilities provided to the Client to be increased to 100% of her net worth and thereby facilitated the Client's ability to trade in a large number of FAs and other structured products.

As the market dropped in 2007, the Client found her financial exposure to FAs to far exceed her assets and she had no alternative but to unwind her transactions. She was required to pay out around US$10.4 million to unwind her transactions and cover her borrowings owed to the Bank on the credit facilities. The Client claimed that sum as the cost of mitigating the potential losses she was facing by reason of HSBC's alleged breaches of obligations owed to her.

The Court's Decision

The Court found that while the Client may have been financially unsophisticated, as an adult, not a child, she was perfectly capable of understanding the key terms of the Statement and should have made inquiries of the Bank if she did not understand. The Bank was entitled, in the absence of indication to the contrary, to assume that the Client had read and understood the terms of the Booklet. The Court reaffirmed the elementary principles of contract law that:

- An adult is bound by his signature on an agreement.
- Parties to an agreement are bound by the terms of that agreement and it would be difficult to prove a duty in tort wider than the terms of the agreement.
- One cannot imply obligations which are contrary to the express terms of an agreement.
- The subsequent conduct of one or other party to an agreement cannot be used to construe the terms of the agreement.

The Court also rejected claims that the Bank owed a number of duties to the Client:

- The Bank did not owe a duty to advise the Client: the terms of the Statement were clear on the risks involved and the need to seek independent professional advice.

- The Bank did not owe a duty to manage the Client's account with due care and skill: the Client's account was an execution-only account, not a discretionary account. The Bank owed only a duty to execute the Client's instructions promptly with due care and skill.

- The Bank owed no duty to inform and warn the Client of risks in relation to her account, nor a negative duty "not to over-sell products" that were unsuitable for her known risk appetite, investment objective, or net worth: it was for the Client to monitor her own financial exposure.

- The Bank owed no contractual duty to the Client to perform regular know-your-client updates: while the Bank ought to have consulted the Client before revising her investment strategy (from "medium" to "aggressive"), the reality was that her risk appetite had changed and the Statement placed the burden on the Client to assess the suitability of financial products for her investment.

Further submissions on behalf of the Client attempting to rely on the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (the "**Code**"), the Control of Exemption Clauses Ordinance, the Supply of Services (Implied Terms) Ordinance and the Unconscionable Contracts Ordinance were all also rejected. The Court ruled that the Code "cannot override express contractual provisions" and impose any contractual duty which the Bank had not undertaken by the clear terms of the Booklet.

Witness Credibility and Evidence

The Court also commented on the credibility of the main witnesses, the Client and the relationship manager, and in the end approached the testimony of both witnesses with caution and sought to rely on contemporaneous documentation, including telephone call transcripts and meeting notes. The Court further questioned the value of meeting notes that had not been created quite contemporaneously (sometimes days or weeks after the event), given any favourable spin (albeit unintentional) that they may have cast on the events recorded.

Comments

While the circumstances of each mis-selling case will differ, this robust decision reaffirms a bank's ability to rely on the terms of a signed contract between it and its clients. The starting point in a claim for breach of duty is the contract. Special circumstances must be proven before any wider duty in tort can be established. While the Code governs the relationships between bankers and customers and is admissible as evidence of the extent of a duty, it is not to be treated as law and it cannot override express contractual provisions.

This case therefore serves a timely reminder of the importance of the terms of contract between the parties, particularly in relation to exclusion clauses, disclosures and the allocation of risk.

In light of the Court's comments on witness credibility, this case also highlights the importance of keeping proper documentation, including recordings of telephone calls and contemporaneous meeting notes (which should be prepared as close to the event as possible if not immediately thereafter).

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