Go Dante Yap *v* Bank Austria Creditanstalt AG
[2010] SGHC 220

Case Number : Suit No 424 of 2003

Decision Date : 05 August 2010

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Kannan Ramesh, Ng Ka Luon Eddee, See Chern Yang and Poon Ho Yen Claudia (Tan Kok Quan Partnership) for the plaintiff; Christopher Anand Daniel and Nicholas Jayaraj s/o Narayanan (Advocatus Law LLP) for the defendant.

Parties : Go Dante Yap — Bank Austria Creditanstalt AG

Banking

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 156 of 2010 was dismissed by the Court of Appeal on 08 February 2011. See [2011] SGCA 39.]

5 August 2010 Judgment reserved.

Andrew Ang J:

Introduction

1 The plaintiff, Dante Yap Go, is a businessman and a national of the Philippines. The defendant, Bank Austria Creditanstalt AG, is an Austrian-incorporated bank which formerly operated branches in Hong Kong and Singapore. This action was brought by the plaintiff against the defendant in respect of losses suffered on the plaintiff's investment portfolio following the Asian financial crisis of 1997 and 1998.

2 On 3 June 1997, the plaintiff had opened two investment accounts with the defendant's private banking department: one with the defendant's Hong Kong branch ("the Hong Kong account") and the other with its Singapore branch ("the Singapore account"). A credit facility of up to US$5m was granted by the defendant to the plaintiff via the Hong Kong account. Both accounts were handled by one Winnifred Natasha Tong Ching Laude ("Ms Ching") who was, at that time, a vice-president in the defendant's Hong Kong branch. Subsequently, a number of investments in emerging markets debt instruments were acquired under the Singapore account, some of which were financed using loans that were drawn down from the credit facility tied to the Hong Kong account.

3 A few of these investments were US Dollar ("USD") denominated Indonesian corporate bonds or short-term notes that were issued by the Bakrie Group of companies ("the Bakrie Group") and another company called Polysindo. These Indonesian notes were acquired in the month of July 1997.

4 What transpired within the following months in parts of Asia were events that became known as the Asian financial crisis. During this period of financial crisis, the value of the Indonesian rupiah depreciated substantially against the USD and, as a result, Indonesian companies that had borrowed in USD were suddenly faced with higher costs in servicing their debts. A number of Indonesian companies, one of them being the Bakrie Group, ended up defaulting on their bonds.

5 Also acquired under the Singapore account were Rossiyskiy Kredit 10.25% Interest Notes ("the Rossiyskiy Notes") purchased on 25 September 2007. The Rossiyskiy Notes, also denominated in USD, were issued by a Russian bank, Rossiyskiy Kredit Bank, and were linked to Gosudarstvenniye Kratkosrochniye Beskuponniye Obligatsio ("GKOs"), which were short-term rouble-denominated bonds issued by the Russian Government. The Asian financial crisis triggered a knock-on effect in the global economy and, as a result, the Russian Government devalued the rouble against the USD and defaulted on its GKOs. Faced with circumstances similar to those faced by the Indonesian companies, Rossiyskiy Kredit Bank, too, ended up defaulting on its GKO-linked Rossiyskiy Notes.

6 After five years or so had lapsed, the plaintiff commenced this action against the defendant on 2 May 2003 claiming for, *inter alia*, losses suffered on the abovementioned investments. As the defendant had ceased its operations in Asia sometime in October 2001, the plaintiff applied for and was granted leave on 16 May 2003 to serve the writ of summons out of jurisdiction at the defendant's registered place of business in Austria. However, the Singapore Consulate in Austria encountered difficulties in effecting service on the defendant, and it was only on 2 August 2005, more than two years after the action was commenced, that the defendant was finally served with the writ of summons.

7 The trial was then conducted over three tranches: from 14 to 23 May 2007 ("the first tranche"); from 25 to 27 February 2008 ("the second tranche"); and from 7 to 8 July 2008 ("the third tranche"). By the time parties appeared before me for the first tranche of the trial, a good ten years or so had already elapsed since the happening of the events that the witnesses were asked to testify on. This had a significant bearing on the quality of the evidence given by the witnesses of fact as will become apparent later in this judgment.

The plaintiff's claims

8 The plaintiff claims that a total of 16 investments purchased under his Singapore account and the loans drawn down from his Hong Kong account to finance those investments were not authorised by him ("the unauthorised investments claim").

9 The plaintiff then claims, in the alternative, that even if those investments and loans had been properly authorised, the defendant had breached its duty owed to the plaintiff, in contract and/or tort, by failing to advise him that it was imprudent to have maintained the portfolio that he was holding during the period of the Asian financial crisis ("the advisory claim").

The witnesses

Witnesses of fact

10 A total of six witnesses of fact testified and gave evidence. Four of them – the plaintiff, Ms Ching, Dr Michael Potyka ("Dr Potyka"), and Philippe Yin ("Yin") – were cross-examined before me, whereas the remaining two – Eric Chin Yeung Yin ("Chin") and Ms Lily Yeung ("Ms Yeung") – were examined in October 2009 before an examiner appointed by the Hong Kong courts and they both gave evidence in the form of depositions.

The plaintiff

11 The plaintiff struck me as an especially unreliable witness over the four and a half days that he was cross-examined on the witness stand.

12 I observed that he would often ask for questions to be repeated needlessly despite having the benefit of those questions being displayed on a monitor screen in front of him. I also noticed that the plaintiff would take far too long to give direct answers or to agree to matters that would have been fairly obvious to any reasonable person. There were also occasions on which he would embellish his evidence by introducing new explanations for the first time whenever he felt it was advantageous to do so. Furthermore, some of his responses were simply incredible. Once, he adamantly persisted that he had not seen the words "Hong Kong Branch" which appeared, in large font, not only in the title heading but also directly above his signature in a written agreement of which he had initialled every single page.

13 I also took note of another incident which further diminished the plaintiff's credibility in my view. On that occasion, counsel for the plaintiff, Mr Kannan Ramesh, was cross-examining Ms Ching in relation to a faxed document which the plaintiff had claimed was sent by him. The plaintiff had insisted that the handwriting on the fax note was his and that the name in the "From" field was his name. Notwithstanding the poor quality of the copy produced in court, I could discern that the name in the field appeared to be unlike the plaintiff's name. It was only later, after it had become clear from the transmission report, that the fax was sent from a phone line in Singapore and could not have been sent from him that the plaintiff then performed a complete turnabout and conceded that the handwriting was actually not his.

Ms Ching

14 Ms Ching's testimony was of obvious importance because the plaintiff had conducted his dealings with the defendant primarily through her. Ms Ching who had since returned to the Philippines to be a homemaker was, initially, reluctant to appear and the defendant had to take out an application for Ms Ching to be examined by way of foreign deposition in the Philippines. Ultimately, Ms Ching agreed to testify on the defendant's behalf and appeared before this court for the first and third tranches of the trial for cross-examination.

15 On the witness stand, Ms Ching was oftentimes defensive, given the nature of the plaintiff's allegations against her. As a result, some of her answers came across as being unnecessarily defiant and were somewhat unreasonable on occasion. She took issue with Mr Ramesh every time he used the word "advice" to describe her recommendations to the plaintiff. However, despite her failure at times to recall events or give precise answers, I did not think that she was lying on the essential point that the investments were authorised.

Dr Potyka

16 The defendant had originally scheduled for one Paul Francis Giles ("Giles") to appear as a witness on its behalf. Giles was the head of the defendant's Hong Kong branch at the material time and was in charge of overseeing the defendant's private banking services for its Asian clients from 1997 until 2000. His testimony was important because he had corresponded directly with the plaintiff in the aftermath of the Asian financial crisis and was also present at a number of meetings with the plaintiff. However, about a month before the trial, the defendant lost contact with Giles. Leave was subsequently granted for the defendant to add Dr Potyka as a replacement.

17 At the material time in 1997, Dr Potyka was the head of the defendant's main legal department based in Austria and he only became involved in this matter in early 2006. As a result, he had no personal knowledge of the events that took place. Dr Potyka was cross-examined before me during the first tranche of the trial and was also present throughout the proceedings as the defendant's representative.

Yin

18 Yin was the senior vice-president "Operations" of the defendant at the material time between 1997 and 1998 and he appeared before me during the second tranche of the trial. He gave evidence as to the defendant's internal procedures relating to the documenting and recording of instructions. Like Dr Potyka, Yin had no personal knowledge of the events that took place between the plaintiff and the defendant.

Ms Yeung

19 Ms Yeung was an assistant vice-president with the defendant at the material times and provided operational support to Ms Ching and other banking officers. Although Ms Yeung's position with the defendant would naturally have made her an important witness, the evidence that resulted from her deposition, however, was of limited value as she conceded that she could only vaguely remember the events that had occurred nearly 12 years ago.

Chin

20 For the same reason, the evidence of Chin was of hardly any assistance. In fact, Chin's recollection of his time with the defendant was even worse than that of Ms Yeung's. Chin was employed by the defendant from 1992 to 2002 and worked at the securities trading desk at the material times.

Giles (who did not appear)

21 After the first tranche of the trial, I granted leave to the defendant, who had resumed contact with Mr Giles, to call Giles to testify during the second tranche. However, after he had prepared his affidavit of evidence-in-chief ("AEIC"), Giles had a sudden change of heart and decided not to appear for cross-examination. The defendant then took out an application to have Giles attend an examination in Hong Kong but could not serve the necessary documents on him. As the evidence in Giles' AEIC was untested by cross-examination, I disallowed it from being admitted.

Expert witnesses

22 I heard expert evidence from three witnesses: a private banker, Ms Ng Bee Nah ("Ms Ng") who appeared on behalf of the plaintiff, and two consultants, Dr Cesar Saldana ("Dr Saldana") for the plaintiff and Mr Roman Scott ("Mr Scott") for the defendant. Much of the expert evidence related to the key events of the Asian financial crisis and the scope of a private bank's duty to give investment advice during the crisis. I found most of the expert evidence rather unnecessary because most of the matters covered were either matters of common sense or were matters of which one could not speak with much certainty.

Dr Saldana

23 Dr Saldana was commissioned by the Asian Development Bank to write the country paper on the Philippines as part of a study of the Asian financial crisis and the corporate governance issues underlying the financial crisis. He was also involved in preparing the consolidated report for five countries affected by the Asian financial crisis: the Philippines, Indonesia, Malaysia, Thailand and Korea.

Ms Ng

24 Ms Ng was the vice-president of a major European bank and has experience in leading and managing one of its private banking units since 2005. She was previously an assistant vice-president of the private banking department of another European bank from the year 2002. She gave opinion evidence in relation to private banking practices in Singapore and, more specifically, what was expected of a private banker during the Asian financial crisis.

Mr Scott

25 Mr Scott was the managing director of a bank advisory and private equity company based in Singapore. He was formerly a senior partner in the Singapore office of a global management consulting firm and has 20 years of experience in working with the private banking industry. He also served as an advisor to the Indonesian Government's key crisis resolution agency and four other Indonesian banks in connection with the Asian financial crisis.

The evidence

The introduction of Ms Ching to the plaintiff

26 Sometime in early 1997, the plaintiff had heard rumours that an "Asian financial crisis" was looming and that the Philippine peso might be devalued. Up till then, the plaintiff had 140 million pesos deposited with two Philippine banks and also some USD-denominated funds deposited in an account with the Swiss Bank Corporation (later to become "UBS"). After hearing those rumours, the plaintiff made the decision to transfer his funds out of the peso-denominated accounts.

27 Around the same time, Ms Ching was recommended to the plaintiff by one Jose Qua on the basis that she had given him advice on a number of currency investments which had proven helpful. After the plaintiff was told that Ms Ching was also the daughter of Alfredo Ching, a reputed businessman whom the plaintiff was acquainted with, the plaintiff agreed to meet her.

28 A meeting between the three of them was arranged and this first meeting was held at the Park Lane Hotel in Hong Kong. Ms Ching had arrived fully prepared to do business and, during the meeting, she showed the plaintiff worksheets containing a number of peso-denominated bonds. However, her recommendations were rejected by the plaintiff because of his concern that the peso was about to be devalued.

The subsequent meetings

29 The second meeting was held in Manila. In her written statement, Ms Ching claimed that the plaintiff had told her at the second meeting that he wanted to open an investment account but had no specific investments in mind yet. She claimed also that in one of their meetings (she could not recall which one) the plaintiff had told her that he wanted an investment return of 10 to 12% above the rates offered by money-market investments and that he was interested in investing in USD-denominated emerging markets debt. Apparently, the plaintiff then expressed an interest in bonds issued by conglomerates in Indonesia, Brazil and Russia after some discussion. Ms Ching also provided him with a worksheet illustrating how he could use a leveraging structure to finance his investments. Thereafter, Ms Ching continued to liaise with the plaintiff and prepared the necessary documentation for the plaintiff to open an investment account with the defendant.

30 The plaintiff's evidence differed markedly from Ms Ching's in substance and in detail. He alleged that, during the second meeting, Ms Ching had represented to him that the defendant had total knowledge of the market and could tell between safe and risky investments. Furthermore, he claimed

that Ms Ching had told him that one of the advantages of investing with a professional bank such as the defendant was that he would not lose any of his money and his capital would be preserved even in a worst-case scenario.

The opening of the investment accounts

31 As alluded to at [2] above, the plaintiff opened two accounts with the defendant on 3 June 1997. It was agreed that the plaintiff's investments were to be held in the Singapore account because he was concerned about the handover of Hong Kong to the People's Republic of China and did not want his investments to be held in Hong Kong. The Hong Kong account was opened because the defendant required that a Hong Kong-domiciled account be used if the plaintiff wished to obtain a loan facility from the defendant. The Singapore account was numbered 88XXX whereas the Hong Kong account was numbered 85XXX.

32 For the Singapore account, the plaintiff signed the following agreements:

(a) an Account Opening and Custodian Agreement ("AOCA"), dated 3 June 1997;

(b) a Discretionary Investment Management Agreement ("DIMA"), dated 3 June 1997;

(c) an Investment Authority Instruction ("IAI"), dated 3 June 1997;

(d) a Hold Mail Instruction ("HMI"), dated 3 June 1997; and

(e) a Notice of Assignment and Charge, dated 25 June 1997.

33 For the Hong Kong account, the plaintiff signed the following agreements:

(a) an AOCA, dated 3 June 1997;

(b) an IAI, dated 3 June 1997;

(c) an Investment Management Agreement ("IMA"), dated 25 June1997;

(d) a Loan Facility Letter ("LFL"), dated 25 June 1997; and

(e) a Charge Agreement, dated 25 June 1997.

The relevant contractual documents for the investment accounts

The contractual documents for the Singapore account

34 The contractual documents for the Singapore account are governed by Singapore law. The first agreement that was executed for the Singapore account was the AOCA, which was a standard term agreement for opening private bank accounts that would be used to hold funds or investments. In the plaintiff's case, he successfully negotiated for the annual account fee payable to the defendant (in cl 16.01 of the AOCA) to be reduced from the standard rate of 1% of total asset value per annum to 0.25% of the same.

35 The DIMA was a standard term agreement which has to be read with the AOCA. It granted the defendant the power and discretion to trade in securities on behalf of a client using the client's investment account without the need for the client's specific authorisation. In banking parlance, such

an investment account was termed a "discretionary account". However, because the plaintiff wanted to have the final say in deciding what investments to purchase, the parties executed the IAI to achieve that.

36 In the course of the trial, two nearly identical documents were referred to as the IAI. This initially caused a bit of confusion. However, it was clear from either document alone that the defendant was required to obtain the plaintiff's prior approval before it could buy or sell any security through the plaintiff's investment account; thereby achieving the intended effect of revoking the defendant's discretion under the DIMA.

37 The HMI simply ensured that all correspondence addressed to the plaintiff would be held by the defendant until the plaintiff collected them personally. The plaintiff had executed the HMI for reasons of privacy and out of fear that the value of his assets would be disclosed to other persons.

The contractual documents for the Hong Kong account

38 The Hong Kong account functioned essentially as a credit facility account with the defendant which would allow the plaintiff to draw down loans to fund the purchases of investments in his Singapore account. The contractual documents for the Hong Kong account are governed by Hong Kong law.

The plaintiff remits funds into the Singapore account

39 From the period of 11 June 1997 until 14 November 1997, the plaintiff remitted funds into the Singapore account on 13 separate occasions. The reason for remitting his funds in tranches was because the plaintiff had to wait for the various investments in his two Philippine bank accounts to mature and also because he wanted to obtain the most favourable exchange rates before converting the peso-denominated funds into USD.

40 By 22 July 1997, the plaintiff had already remitted a sum of US$4,009,873 into the Singapore account. Thereafter, the plaintiff ceased to remit funds into the Singapore account for a few months until November 1997 when the plaintiff remitted another sum of US$999,916 into the Singapore account. In total, the plaintiff remitted a sum of US$5,009,789 or approximately US$5m into the Singapore account from the period of June to November 1997.

The plaintiff's risk appetite

41 The plaintiff claimed that, during one of his meetings with Ms Ching before the accounts were opened, he had told Ms Ching that he wanted to preserve his investment capital and was only interested in conservative investments such as money market placements, blue chip stocks and bonds with the highest credit-rating of "AAA" ("the conservative investment mandate").

42 Ms Ching, however, claimed otherwise. She maintained that the plaintiff had told her that he wanted an investment return of 10 to 12% above the rates offered by money-market investments (see [29] above), although she could not recall the precise moment when the plaintiff had told her that. Such a rate of return would have classified the plaintiff as a high-risk investor, according to Ms Ching.

43 At the trial, Ms Ching acknowledged that a client's risk appetite was an important piece of information that had to be clearly documented in the client's file. However, when asked for documentary evidence of the plaintiff's risk appetite, Ms Ching could only point to her handwritten

minutes of a meeting with the plaintiff in June 1997. She could not recall whether she was required, as a matter of protocol, to officially record the plaintiff's assessed risk appetite in his client file, which I found troubling as I would have thought an assessment of a client's risk appetite was an essential component in the client's investment profile and any prudent bank would have ensured that such information was properly documented to protect its own position.

The monthly meetings between the plaintiff and Ms Ching

44 Ms Ching met with the plaintiff in Manila at least once a month from August to November 1997, and once in January 1998 in what parties have termed their "monthly meetings". At every one of those monthly meetings, Ms Ching would show the plaintiff four account statements which reflected the updated status of the Singapore account. The four statements were a portfolio analysis statement, a security analysis statement, a currency analysis statement and a money market analysis statement.

45 The portfolio analysis statement is a summary of all the assets and liabilities held in the Singapore account and it furnishes a percentage breakdown of the assets according to type, *eg*, bonds, equities, warrants, options, money markets and metals. The currency analysis statement is a breakdown of all the assets and liabilities according to currency whereas the security analysis and money market analysis statements are lists of all the purchased securities and money market placements for the Singapore account.

The plaintiff's instructions to the defendant

46 In the course of her dealings with the plaintiff, Ms Ching would receive instructions from the plaintiff either by phone or personally at their monthly meetings.

47 At the trial, the defendant produced a number of Ms Ching's handwritten minutes of the meetings as evidence of the plaintiff's instructions during those meetings. I noted that her handwritten minutes tended to be very brief and almost never indicated the exact dates of those meetings with the plaintiff. Even Yin conceded that this was unusual and not in accordance with procedure. Furthermore, Ms Ching admitted that she failed to keep a complete record of all the meetings that had taken place with the plaintiff. Astonishingly, for the period of 11 months from June 1997 to April 1998, Ms Ching recorded minutes for only five of her meetings with the plaintiff. She also confirmed that she kept no other record of the plaintiff's instructions but could remember taking rough notes which may have been thrown away.

48 As for the instructions that were given by phone, the defendant inexplicably failed to produce any evidence of the phone conversations between the plaintiff and the defendant. The initial explanation given was that no tape recordings were found because *no recordings had actually been made*. This contradicted, however, Yin's oral testimony that all phone conversations between the defendant and its clients were tape recorded as a matter of practice. It was at a later stage of his cross-examination that Yin suddenly remembered that the defendant would dispose of tape recordings after a period of six months as a matter of practice. Dr Potyka was equally incapable of shedding any light as to why no tape recordings were produced. He claimed that all the plaintiff's client files had been transferred to the defendant's head office in Vienna sometime in late 2001 after the defendant's Asian branches were closed down, and that whatever had been produced in court was everything that had been given to him.

49 The internal documents produced by the defendant as evidence of the plaintiff's instructions were mainly Client Settlement Tickets and Internal Drawdown Notices. However, the Client Settlement

Ticket does not reflect the client's instructions because it was a document that was generated after the completion of a trade by the defendant's Securities Trading Desk and thus only confirms that a transaction had occurred. Similarly, the other internal documents were not true records of the plaintiff's instructions because they were generated within the organisation *after* a client's instructions had already been received.

The investments that were acquired through the Singapore account

The allegedly unauthorised investments

50 The plaintiff alleges that the following 16 investments that were purchased in his Singapore account were unauthorised:

(a) Polysindo Notes, having a nominal value of US$1m, purchased on 16 July 1997 at the price of US$950,000 (95.05% of nominal value), effective on 21 July 1997 and maturing on 13 February 1998;

(b) Barito Pacific Lumber PN, having a nominal value of US$1m, purchased on 17 July 1997 at the price of US$974,000 (97.4% of nominal value), effective on 22 July 1997 and maturing on 20 November 1997;

(c) Banco do Brazil 8.375% Notes, having a nominal value of US$500,000, purchased on 17 July 1997 at the price of US$502,250 (100.45% of nominal value) plus US$5,001.76 (accrued interest), the total of which was US$507,251.76, effective on 22 July 1997 and maturing on 15 June 1998;

(d) Bakrie International Finance FRN, having a nominal value of US$2m, purchased on 18 July 1997 at the price of US$1,990,000 (99.5% of the nominal value) plus US$35,533.33 (accrued interest), the total of which was US$2,025,533.33, and subject to a call/put option at 100% of the nominal value exercisable on 5 November 1998, effective on 23 July 1997 and maturing on 5 November 1999;

(e) Banco do Brazil 8.375% Notes, having a nominal value of US$250,750, purchased on 22 July 1997 at the price of US$249,750 (99.9% of the nominal value) plus US$2,675.35 (accrued interest), the total of which was US$252,425.35, effective on 25 July 1997 and maturing on 15 June 2002;

(f) BBA Creditanstalt Bank Ltd 8.125% eight-year Notes, having a nominal value of US$1m, purchased on 23 July 1997 at the price of US$1,000,500 (100.05% of the nominal value), effective on 25 July 1997 and maturing on 25 July 2005;

(g) Bakrie Brothers one-year PN, having a nominal value of US$1.5m, purchased on 25 July 1997 at the price of US$1,389,750 (92.65% of the nominal value), effective on 6 August 1997 and maturing on 6 August 1998;

(h) BBA Creditanstalt Bank Ltd 8.125% eight-year Notes, purchased on 25 July 1997 at the price of US$500,000 (the nominal value) plus US$564.24 (accrued interest), the total of which was US$500,564.24, effective on 30 July 1997 and maturing on 25 July 2005;

(i) Bank of Boston Brazil 8% Notes, having the nominal value of US$550,000, purchased on 29 July 1997 at the price of US$552,090 (100.38% of the nominal value) plus US$244.44 (accrued

interest), the total of which was US$552,334.44, effective on 4 August 1997 and maturing on 2 February 1998;

(j) BBA Creditanstalt Bank Ltd ECP, having a nominal value US$500,000, purchased on 16 September 1997 at the price of US$469,050 (93.81% of the nominal value), effective on 19 September 1997 and maturing on 7 August 1998;

(k) Rossiyskiy Notes, having a nominal value of US$250,000, purchased on 25 September 1997 at the price of US$247,250 (98.9% of the nominal value), effective on 29 September 1997 and maturing on 29 September 2000;

(l) InkomBank Zero ECP, having a nominal value of US$500,000, purchased on 25 September 1997 at the price of US$478,350 (95.67% of the nominal value), effective on 1 October 1997 and maturing on 30 March 1998;

(m) InkomBank Zero ECP, having a nominal value of US$600,000, purchased on 14 October 1997 at the price of US$558,600 (93.1% of the nominal value), effective on 17 October 1997 and maturing on 20 July 1998;

(n) Banco BCN Barclays 8% (StepUp) Notes, purchased on 15 October 1997 at the price of US$500,000 (the nominal value) plus US$555.56 (accrued interest), the total of which was US$500,555.56, effective on 20 October 1997 and maturing on 15 October 2005;

(o) InkomBank Zero ECP, having a nominal value of US$200,000, purchased on 21 October 1997 at the price of US$186,800 (93.4% of the nominal value), effective on 24 October 1997 and maturing on 20 July 1998; and

(p) Banco do Brazil 9.375% Notes, having a nominal value of US$300,000, purchased on 24 October 1997 at the price of US$299,625 (99.875% of the nominal value) plus US$10,859.38 (accrued interest), of which the total was US$310,484.38, effective on 28 October 1997 and maturing on 15 June 2007.

The authorised investments

51 In addition to the above 16 disputed investments, a number of equity investments were purchased in the Singapore account. The plaintiff does not dispute that these equity investments were indeed properly authorised by him:

(a) 500 Hewlett-Packard Co shares, purchased on 24 July 1997 at the price of US$33,330;

(b) 600 McDonald's Corp shares, purchased on 25 July 1997 at the price of US$30,906;

(c) 500 Pfizer Inc shares, purchased on 25 July 1997 at the price of US$30,300;

(d) 400 American Express shares, purchased on 25 July 1997 at the price of US$31,512; and

(e) 500 Motorola Inc shares, purchased on 24 September 1997 at the price of US$34,087.50.

52 The plaintiff also authorised an investment in Banco Inter-Atlantico ECD, which was purchased on 17 July 1998 at US$481,750 (96.35% of the nominal value of US$500,000), effective on 21 July 1998 and maturing on 31 December 1998. This note was redeemed in full at maturity.

The allegedly unauthorised loans that were drawn down from the Hong Kong account

53 Some of the investments were financed in part by loans that were drawn down from the Hong Kong account:

(a) A loan of US$760,400 for 72 days, from 21 July 1997 to 1 October 1997, at the interest rate of 6.78125% per annum, which was used to pay part of the purchase price of the Polysindo Notes (item (a) of [50] above);

(b) A loan of US$779,200 for 71 days, from 22 July 1997 to 1 October 1997, at the interest rate of 6.78125% per annum, which was used to pay part of the purchase price of the Barito Pacific Lumber PN (item (b) of [50] above);

(c) A loan of US$1,620,426.66 for 70 days, from 23 July 1997 to 1 October 1997, at the interest rate of 6.78125% per annum, which was used to pay part of the purchase price of the Bakrie International Finance FRN (item (d) of [50] above);

(d) A loan of US$209,387.31 for 58 days, from 4 August 1997 to 1 October 1997, at the interest rate of 6.6875% per annum, which was used to pay part of the purchase price of the Bank of Boston Brazil 8% Notes (item (i) of [50] above);

(e) A loan of US$1,389,750 for 56 days, from 6 August 1997 to 1 October 1997, at the interest rate of 6.6875% per annum, which was used to pay the entire purchase price of the Bakrie Brothers one-year PN (item (g) of [50] above);

(f) A loan of US$558,600 for 34 days, from 17 October 1997 to 20 November 1997, at the interest rate of 6.4375% per annum, which was used to pay the entire purchase price of the InkomBank Zero ECP (item (m) of [50] above);

(g) A loan of US$500,555.56 for 31 days, from 20 October 1997 to 20 November 1997, at the interest rate of 6.4375% per annum, which was used to pay the entire purchase price of the Banco BCN Barclays 8% (StepUp) Notes (item (n) of [50] above);

(h) A loan of US$154,131.10 for 27 days, from 24 October 1997 to 20 November 1997, at the interest rate of 6.4375% per annum, which was used to pay part of the purchase price of the InkomBank Zero ECP (item (o) at [50] above); and

(i) A loan of US$310,484.38 for 7 days, from 28 October 1997 to 4 November 1997, at the interest rate of 6.4375% per annum, which was used to pay the entire purchase price of the Banco do Brazil 9.375% Notes (item (p) of [50] above).

The opening of another account

54 The plaintiff was also the settlor of a trust called Sugarland Trust, of which the trustee was UBS Trustees (Jersey) Ltd ("UBST") and the beneficiaries were his son, his daughter and the plaintiff himself. On 23 October 1997, a third account was opened with the defendant, under the name of Crown Court Holdings Ltd, which was a wholly-owned subsidiary of UBST. This account was numbered 88XXX ("the Corporate account").

The Asian financial crisis and the investments

55 As already alluded to at [4] above, the stock and bond markets were severely affected by the Asian financial crisis and the value of some of the above investments dropped drastically, particularly the Bakrie International Finance FRN and the Bakrie Brothers one-year PN (items (d) and (g) of [50] above; collectively, the "Bakrie Notes"), which eventually became so depressed that there was effectively no market for them. However, the value of some of the investments eventually turned around and increased sufficiently such that they were redeemed fully with interest at maturity. The outcomes of the 16 allegedly unauthorised investments are listed below.

56 Five out of the 16 investments were sold before maturity:

(a) Banco do Brazil 8.375% Notes (items (c) and (e) of [50] above) sold on 10 September 1997 for US$759,250;

(b) BBA Creditanstalt Bank Ltd 8.125% eight-year Notes (items (f) and (g) of [50] above) sold on 13 October 1997 for US$1,515,421.88; and

(c) Banco do Brazil 9.375% Notes (item (p) of [50] above) sold on 16 July 1998 for US$284,212.50.

57 Six of the 16 investments were redeemed at maturity:

(a) Barito Pacific Lumber PN (item (b) of [50] above) redeemed on 20 November 1997;

(b) Bank of Boston Brazil 8% Notes (item (i) of [50] above) redeemed on 2 February 1998;

(c) Polysindo Notes (item (a) of [50] above) redeemed on 13 February 1998;

(d) InkomBank Zero ECP (item (l) of [50] above) redeemed on 30 March 1998; and

(e) InkomBank Zero ECP (items (m) and (o) of [50] above) redeemed on 20 July 1998.

58 Two of the 16 investments were subsequently transferred to the Corporate account sometime in April 1998 because, according to the plaintiff, they were both profitable and the Corporate account was "better protected" under the management of UBST (see [54] above):

(a) BBA Creditanstalt Bank Ltd ECP (item (j) of [50] above); and

(b) Banco BCN Barclays 8% (StepUp) Notes (item (n) of [50] above).

59 As of August 1998, besides the Banco Inter-Atlantico ECD bought in July 1998 (see [52] above), the only investments that remained in the Singapore account were the following:

(a) Bakrie Notes (items (4) and (7) of [50] above); and

(b) Rossiyskiy Notes (item (k) of [50] above).

The plaintiff repays part of the loans

60 In September 1997, the plaintiff promised to remit US$1m to the defendant to repay part of the outstanding loans, which was carried out by the plaintiff on 13 and 14 November 1997. The plaintiff's reason for making payment to the defendant was because interest on the outstanding loans was accumulating and he did not wish to incur more interest:

Q Mr Go, isn't it true that in fact you told Ms Ching that you will send US$1 million to repay part of that loan?

A That's correct.

Q Why would you do that, Mr Go --

A Well, at that time --

Q -- if you were not responsible for repayment of that loan?

A Well, at that time, your Honour, it's that I told Ms Ching to reverse the loan, and she told me she cannot, it cannot be done, simply because I have to sell off my assets first before the proceed [*sic*] can pay off the loan.

Based on this statement, I feel I been keeping paying high interest rate, I'm paying the defendant, and I'm afraid that the interest might grow bigger and bigger. Since the defendant has total control of my accounts, they can just deduct the interest rate due any time they want.

So in order to lessen the interest payment, I have, since I have cash sitting in other banks, I decided to remit US$1 million to Bakrie (sic) to pay off the loan to lessen the interest payment.

Court:Mr Go, you decided to remit US$1 million to Bakrie, did you say?

A I'm sorry, to the defendant, to the bank. Not Bakrie, to the bank.

The plaintiff's meeting with Giles and Ms Ching in February 1998 and his participation in the Bakrie Notes and Rossiyskiy Notes settlements

61 On 18 February 1998, the plaintiff met with Giles and Ms Ching and he was informed by Giles that the Bakrie Group intended to meet with its creditors to discuss a settlement as part of a debt-restructuring exercise. At this meeting, the plaintiff requested Ms Ching to send him more information about the Bakrie Group. Subsequently, the plaintiff also signed a letter addressed to the Bakrie Group dated 20 October 1998 to advise them that he was the beneficial owner of the Bakrie Notes. Subsequently, the plaintiff participated in restructuring talks with the Bakrie Group in a bid to salvage whatever value was left in the Bakrie Notes. The plaintiff himself met with the chairman of the Bakrie Group, Aburizal Bakrie, sometime in May 1999 at the Shangri-La Hotel in Manila and discussed the restructuring proposal that was being mooted then by the Bakrie Group.

62 After the defendant closed its Singapore branch in 2001, the assets that were held by the defendant in respect of the Bakrie Notes were transferred to HypoVereinsbank ("HVB"), Singapore, and held in escrow.

63 The Rossiyskiy Notes were sold to ING Barings at a settled amount as part of a rehabilitation arrangement, which was evidenced by a letter dated 8 September 2000 in which the plaintiff wrote to the defendant regarding the settlement. By then, the plaintiff had already raised the allegations that the investments were unauthorised.

The plaintiff raises the allegation that the investments were unauthorised

64 Sometime in late 1998, the defendant was involved in a merger and, as a result, the defendant wrote to the plaintiff requesting him to execute a new set of account documentation to reflect the changes. In his reply dated 28 June 1999, the plaintiff raised, for the first time, the allegation that the investments were not within the conservative investment mandate (see [41] above) and asked for documentary proof of his instructions to the defendant.

65 What followed was a series of exchanges between the plaintiff and Giles of the defendant. In a letter dated 21 July 1999 to the plaintiff, Giles responded to the plaintiff's allegation with the following statement:

> Regarding the more general comments in your letter, I would remind you this is a non-discretionary account, which is managed by yourself.

The plaintiff subsequently wrote back in a letter dated 11 August 1999 and alleged that the investments made in his account were unauthorised:

> You said that I opened a non-discretionary account with you that I managed by myself. Precisely, I wanted to have the information I asked because I believe that your bank invested my funds in ways that I had not authorized. ...

These exchanges culminated in the plaintiff's letter dated 15 March 2000 threatening legal action against the defendant for its "mishandling" of his investment accounts.

The unauthorised investments claim: whether the plaintiff had authorised the investments in his portfolio

It was unlikely that the plaintiff had given the defendant a conservative investment mandate

66 The plaintiff attempted to picture himself as a conservative and risk averse investor who was providing for the long-term future of his family. He produced account statements from his other banks claiming that, before 1997, he had only invested in conservative investments such as treasury bills and promissory notes issued by the Central Bank of the Philippines. However, this claim could not be substantiated because the statements that he produced gave no indication as to the nature or type of investments that had been made.

67 In his written statement, the plaintiff also referred to the low-to-medium risk investments held in his UBS accounts in an effort to demonstrate that he would *only* acquire low-to-medium risk investments. However, when cross-examined, he conceded that he had opened the Singapore account with the defendant because he wanted to pursue a different investment strategy from the low-to-medium risk investment policy which he had adopted for his UBS accounts. Therefore, the plaintiff failed to produce any credible evidence before me to support his assertion that he had given the defendant the conservative investment mandate. Between the evidence of the plaintiff and Ms Ching, I accepted Ms Ching's version of events. My conclusion on this point is further substantiated by the accounts of the plaintiff's conduct that follow.

The plaintiff's conduct throughout the relevant period was completely inconsistent with his claim that the investments were unauthorised

68 First, I found it incredible that the plaintiff chose not to complain to the defendant as soon as he had found out that unauthorised investments had been made on his behalf and that loans had

been made to his account. It was not disputed that Ms Ching had brought and showed the plaintiff account statements to update him about his Singapore account at their monthly meetings from August 1997 up till February 1998 (see [44] above). The plaintiff conceded that he had gone through the account statements for the Singapore account at the monthly meetings and was, therefore, aware of the securities that were held in that account.

69 Although the plaintiff made an attempt to create an issue out of the fact that he was not shown any statements for the Hong Kong account, he admitted that even without the Hong Kong account statements it would have been apparent to him that loans were indeed being drawn down to finance the purchase of the investments. This was because by August 1997 the plaintiff was already aware that a sum of approximately US$7m worth of investments had already been acquired in his Singapore account when he had only remitted approximately US$4m to the defendant in July 1997 (see [40] above). This could only mean that the balance of US$3m used to purchase the investments were financed using loans drawn down from the Hong Kong account.

70 When questioned during cross-examination as to why he did not complain to the defendant about the unauthorised investments immediately after seeing the monthly statements, the plaintiff gave an excuse that he thought that Ms Ching might have made an honest mistake in purchasing those investments. Even if that were true, it still did not explain why the plaintiff failed to register his concerns with the defendant for well over a year.

71 Another reason that was given by the plaintiff for not complaining upon seeing the account statements was that he had insufficient documents to lodge a proper complaint against Ms Ching. The plaintiff attempted, while on the witness stand, to spin new explanations for requiring more documents:

> Q I put to you that if what you are saying is true about all this being unauthorised, you wouldn't need any documents to prove that because you didn't authorise; what documents can there be that you need to prove that you didn't do something?
>
> A Well, I have to -- need the documents to see what is my total loan exposure, when was the loan extended, what are the interest rate, what are the duration, what currency is being given on the loan, because I am totally blank on that.

72 It was completely unbelievable that the plaintiff thought he needed more details before he could complain that US$7m worth of investments and loans had been made in his name without his authorisation. The improbability of it can be likened to a victim whose house is being razed by fire and yet decides to investigate the cause or measure the intensity of the flames instead of calling for help to extinguish it. Remarkably, the plaintiff obstinately insisted that he needed more exact details despite conceding that such information was irrelevant to his ground for complaint:

> Q Your response is, you need documents to check certain things.
>
> A Yes.
>
> Q One of the things you mentioned is currency.
>
> A Yes.
>
> Q I asked you: if it is in Thai baht compared to US dollars, are you more likely to pay? You said, "No I won't pay". So it doesn't make a difference to you if it is Thai baht or US dollars, right,

you still won't pay?

A That's correct.

…

Q Interest rate of the loans. If the loans were lent to you at 5.125 per cent, as compared to a later loan, which was 6.125 per cent, would you pay the lesser interest rate loan faster?

A I still will not pay.

…

Q Agree or not: a person in your position, who says, "Look, I never authorised any of these purchases, I have sent you US$4 million, you have done all these funny things I have never told you, I have been complaining for three or four months, now you say I owe you US$4 million."

A Right.

Q Any person in that position won't care how much the bank says is owing; he will simply say, "I don't owe you one cent, let alone US$4 million. I don't care what the dollars and cents amount is, I'm not paying you a cent." Correct or not?

A Correct, but at that point in time I still need some figures to show.

What made it even clearer that all this was merely an afterthought was that the plaintiff, tellingly, did not request for any documents from the defendant. Ultimately, the plaintiff had to concede that, by November 1997, he held, in his possession, sufficient documents to lodge a complaint against Ms Ching.

73 In his written statement, the plaintiff provided a laundry list of reasons for not wanting to complain about Ms Ching:

(a) the plaintiff did not wish to be seen as complaining against Ms Ching's father, who was not only a distant relative but also a senior and venerated member of the Filipino Chinese community;

(b) the plaintiff believed that Ms Ching was acting in his best interests at that time;

(c) the plaintiff did not wish to sour the new banking relationship between him and the defendant;

(d) the plaintiff thought that the purchases of the investments could not be reversed and that the only way forward was to request Ms Ching to sell them;

(e) the plaintiff was willing to drop the matter if Ms Ching was able to sell the investments because he adopted a policy of not being unduly confrontational and litigious in business disputes; and

(f) the plaintiff was keen in maintaining the secrecy of his investments with the defendant, especially with regard to the Sugarland Trust.

74 I found none of these reasons credible for the reason that it was extremely difficult to accept that the plaintiff was willing to risk millions of dollars of his hard-earned money for such superficial reasons.

75 Secondly, not only did the plaintiff choose not to complain until close to two years later, his actions within that period of time were completely inconsistent with his allegations that the investments were unauthorised. In the month of November 1997, the plaintiff had remitted a sum of close to S$1m to the defendant for the purpose of servicing part of the loans in his Hong Kong account (see [40] above). By then, the plaintiff was already fully aware of the investments that had already been acquired in the Singapore account (see [69] above). There was simply no reason for the plaintiff to have repaid the loans in part if he had not authorised those investments. The plaintiff's excuse for repaying the loans on the ground that he did not want interest to continue running was patently unbelievable, in my view. Additionally, after the Asian financial crisis, the plaintiff personally participated in the restructuring exercises and executed settlements for the Bakrie Notes and Rossiyskiy Notes, which clearly showed that he accepted the losses suffered on those investments. Indeed, the plaintiff's conduct was overwhelmingly consistent with that of a person who treated the investments as properly authorised.

76 Therefore, I could only come to the conclusion that the investments that were acquired in the plaintiff's Singapore account were properly authorised.

The defendant's failure to produce any proper records of clients' instructions

77 From the evidence, it was clear that there was a systemic problem of abject record-keeping within the defendant's organisation. Even Yin, the senior vice-president of operations, was of the attitude that he had no reason to doubt the defendant's officers. There was a worrying lack of compliance for procedural requirements, and even on the occasions when procedures were complied with, it took the form of bare compliance for the sake of formality with no real regard for the purpose of having such safeguards in place. For example, the defendant's internal documents show that the plaintiff purportedly gave instructions at the exact same time, or 9.00am, *on every single occasion*. It was conceded by Ms Yeung that the times recorded in those internal documents probably did not reflect the actual time that the instructions were received. To provide another example, although it was standard procedure for a private banking officer to fill in an order form for the trading desk whenever the officer wished to transact a security, no such order forms were filled by Ms Ching. Similarly, no tape recordings were produced and no proper explanation was given, although phone conversations were supposed to be recorded as a matter of practice (see [48] above). However, despite these failings, it is my view that Ms Ching, in disclosing the statement accounts to the plaintiff during the monthly meetings, had not acted dishonestly or tried to conceal any evidence from the plaintiff.

78 The plaintiff, in asking this court to draw an adverse inference against the defendant and find that the defendant had failed to discharge the burden of proving that the investments were properly authorised, was plainly mistaken, in my view. On this point, the plaintiff's reliance on the High Court decision of *Surender Singh s/o Jagdish Singh v Li Man Kay* [2010] 1 SLR 428 was also misplaced. In that case, the burden of proof was placed on the defendant hospital, NUH, only after the plaintiffs had *first* raised a *prima facie* case (at [220]–[221]):

> 220 I accept the plaintiffs' submission that pursuant to s 108 of the Evidence Act, the burden was on NUH to prove that the Deceased was adequately and appropriately monitored in Ward 43 during the crucial period after 1430 hours. As Ms Jasmail only arrived in Ward 43 after 1600 hours, the plaintiffs were not privy to any of the events that took place before her arrival. It would be

disproportionately difficult for the plaintiffs to prove a negative – that the staff of NUH had failed to monitor the Deceased in Ward 43. It was for NUH to show that the Deceased was monitored during the period in question.

221 However, a mere allegation by the plaintiffs that the Deceased was not monitored while in Ward 43 is insufficient to invoke s 108 of the Evidence Act. The plaintiffs must first establish a *prima facie* case against NUH that the Deceased was not monitored. As stated in Woodroffe and Ali, *Law of Evidence* ([141] *supra*) at p 4225):

> It is not the law that the plaintiff ... has to eliminate all possible evidence or circumstances which may exonerate the defendant ... If the facts are within the knowledge of the defendant ... then he has to prove them. *Of course, the plaintiff ... has to establish a prima facie case in the first instance, that is, to establish facts which give rise to a suspicion*. If this is done, [then] by reason of [s 108 of the Evidence Act], the burden is thrown on the defendant ...
>
> [emphasis added]

[emphasis in original]

In the present case, I have already determined at [76] above that there was sufficient evidence of the plaintiff's own conduct before me to find that the investments were properly authorised. The plaintiff's failure to raise even a *prima facie* case meant that the defendant did not have to bear the burden of proving that the investments were authorised. Similarly, there was no room for me to draw an adverse inference against the defendant for failing to produce any tape recordings.

The advisory claim: whether the defendant owed the plaintiff a contractual and/or tortious duty to advise him as to the investments in his portfolio

The law

79 The question whether a private bank owes a duty to its clients to give investment advice has received a fair bit of judicial attention lately. The judgment by Mrs Justice Gloster ("Gloster J") of the English High Court in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 ("*Springwell*") conveniently sets out the relevant legal principles and factors that the court has to consider in arriving at its decision. *Springwell* has recently been cited with approval in the Singapore High Court decision of *Crédit Industriel et Commercial v Teo Wai Cheong* [2010] SGHC 155 ("*CIC*").

80 In *Springwell*, the client by the same name (an investment vehicle owned by the Polemis family) brought a counterclaim against the plaintiff bank, Chase, in contract and in tort after it suffered losses to its portfolio as a result of the Russian financial crisis. Taking Lord Hoffmann's cue in *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at 199 to develop "lower-level principles which could be more useful than the high abstractions commonly used in such debates", Gloster J identified the following "lower level" factors that serve as indicators of the existence or otherwise of any contractual or tortious duty of care (at [53]):

i) the contractual context (including the terms of the relevant contractual documents and disclaimers, and the absence of any written advisory agreement);

ii) what, if anything, was said to AP [of the Polemis family] by Chase representatives when he was introduced to JA in 1987/1988;

iii) the actual role played by JA (including the purpose for which he was giving AP recommendations or advice) over the relevant period 1987–1998;

iv) the actual role of the Shipping Department [of Chase] in the period 1987-1990, and, subsequently, the Private Bank [of Chase], in the period 1990–1994;

v) the extent of AP's financial experience or sophistication;

vi) the extent of AP's reliance on JA [an employee of Chase], CMB, CIBL and CMIL, including the extent to which it was foreseeable that he would rely upon them for the investment advice Springwell alleges it should have been given; and

vii) the regulatory background.

81 It must first be noted that Gloster J's analysis proceeded on the basis that Springwell's claims in contract and in tort overlapped completely. Counsel for Springwell had agreed that the concurrent duties alleged by Springwell were concomitant and co-extensive, and as a result, Gloster J dealt with both the claims in contract and tort as a single issue and held that (*Springwell* at [47]):

> ... an analysis of the relationship between the parties, by means of an objective analysis of the relevant facts relating to the dealings between the parties in the relevant contextual scene, therefore informs the court *both* whether a contractual duty and a tortious duty of care exist. [emphasis added]

82 Since the House of Lords' decision in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 ("*Henderson*"), it is now trite law that out of the same contractual context, a general duty of care can arise as a concurrent tortious duty co-existing with the contractual duty. The relationship between concurrent duties owed in contract and tort, however, is a very close one. In *Henderson*, the House of Lords applied the principle established in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 that an assumption of responsibility coupled with reliance may give rise to a tortious duty of care (the "*Hedley Byrne* principle") and held that such a duty can exist concurrently with an existing contractual duty, so long as the latter does not limit or exclude the former.

83 The significance of the contractual relationship in determining the scope of any duty of care owed in tort was emphasised by the editors of *Jackson & Powell on Professional Liability* (Sweet & Maxwell, 6th Ed, 2007) ("*Jackson & Powell*") at paras 2-110 and 2-111:

> ***(v) Can the Concurrent Duty in Tort be More Extensive than the Contractual Obligations?***
>
> 2–110 **As a matter of principle, if the contract of retainer governs the whole of the parties' relationship, the answer should be no**. If, however, the contract governs only part of the parties' dealings, in other aspects of the parties' mutual activities there may be a tortious duty of care but no parallel contractual obligation … **In any particular case, it will be important to establish whether the professional in effect undertook some further task or gave some advice beyond that which he had contracted to give**.
>
> *(vi) Further Significance of the Contract*
>
> 2–111 **Absent some act or advice beyond the scope of his contract, it is in the contract**

between the professional and his client that the extent of his tortious duty will be found. His tortious duty of care will be no greater in scope than the implied contractual promise to exercise reasonable skill and care. Moreover, **the contract can have greater significance: by defining what the professional is to do, it may explain the scope of his responsibility and the extent to which responsibility or risk is to rest with his client or is to be borne by others**.

[emphasis added in bold]

84 To summarise, if there was an assumption of legal responsibility whereby one party undertakes to perform a task or service for another, the contract may modify or exclude the scope of any existing tortious duties arising out of that assumption of responsibility. However, if there was no assumption of responsibility by either party, the contract will *generally* be completely determinative of the scope of the parties' duties. This position appears to be borne out from the authorities that follow.

85 In *Springwell* ([79] *supra*), the relationship between Springwell and Chase was governed by a number of contracts spanning a period of ten years. Although the contractual terms found in the individual agreements did not purport to cover the entire breadth and timeframe of that relationship, Gloster J held, nevertheless, that the terms found in the principal agreements were evidence of a wider course of dealing that governed their relationship as a whole (at [477]). Gloster J cited the House of Lords' decision of *Henderson* ([82] *supra*) and held that the contractual terms which had been found to govern the entirety of dealings between the parties negated any possibility of an advisory duty coming into existence (at [474]–[475]):

474. It was common ground that, **in determining whether the circumstances are such as to impose a duty of care, an important factor is the way in which the parties have sought to regulate their relationships, and to allocate risk, by contract**. If the parties have contractually defined the terms upon which they will conduct business, then that may in the normal case provide a clear and often determinative indication as to the non-existence of any wider tortious duty. In *Henderson v Merrett* Lord Browne-Wilkinson said:

'The existence of a contract does not exclude the co-existence of concurrent fiduciary duties (indeed, the contract may well be their source); but **the contract can and does modify the extent and nature of the general duty that would otherwise arise**.

In my judgment, this traditional approach of equity to fiduciary duties is instructive when considering the relationship between a contract and any duty of care arising under the *Hedley Byrne* principle (of which fiduciary duties of care are merely an example). The existence of an underlying contract (e.g. as between solicitor and client) does not automatically exclude the general duty of care which the law imposes on those who voluntarily assume to act for others. **But the nature and terms of the contractual relationship between the parties will be determinative of the scope of the responsibility assumed and can, in some cases, exclude any assumption of legal responsibility to the plaintiff for whom the defendant has assumed to act**

...

I can see no good reason for holding that the existence of a contractual right is in all circumstances inconsistent with another tortious right, provided that it is understood that the agreement of the parties evidenced by the contract can modify and shape the tortious

duties which, in the absence of contract, would be applicable.'

475. In my judgment the various terms of the principal contractual documents upon which Chase relies (i.e. the Relevant Provisions), and which I have set out above, clearly show that Springwell and Chase were dealing with each other on a stipulated and accepted basis that, whatever advice or recommendations may have been given by Chase in the course of their trading relationship (i.e. the sale by CIBL/CMIL to Springwell of emerging markets securities, and the financing by CMB of various of Springwell's purchases), no obligations to give appropriate investment advice, or duties of care as an investment advisor, were being assumed by either the Private Bank, CMB, or the Investment Bank, as the entity actually selling Springwell the relevant securities, (i.e. CIBL or CMIL), whether in relation to Springwell's emerging markets portfolio or, more generally, as to what Springwell should do, given the existence of that portfolio. **Thus I accept the submissions made on behalf of Chase that the contractual documentation, whether taken at a straightforward contractual level, or looked at more widely, as an indication as to whether any common law duties of care arose, showed that the parties specifically contracted upon the basis of a trading and banking relationship which negated any possibility of a general or specific advisory duty coming into existence**.

[emphasis added in bold]

86 An example where a contractual term excluded the scope of any concurrent tortious duty can be found in the recent English decision *IFE Fund SA v Goldman Sachs International* [2007] 2 Lloyd's Rep 449. Waller LJ, sitting in the Court of Appeal, referred to the judgment of Toulson J below with approval and held that the contract between the parties, who were both commercially sophisticated, excluded any scope for imposing a duty to advise on the bank, Goldman Sachs. In that case, Goldman Sachs successfully relied on an "Important Notice" which contained standard terms expressly stating that it had not independently verified the information set out in a Syndication Information Memorandum and that it accepted no responsibility for the accuracy or completeness of the information (at [17] and [28]):

17. [Toulson J] held that there was no duty of care as alleged, and did so in these terms:

63. **The mezzanine syndication involved a number of interlocking contractual relationships giving rise to rights and obligations defined in documents drafted by specialist lawyers. In such circumstances the court should be very slow to superimpose any obligations in negligence going beyond those carefully defined in the contractual documentation**.

64. Goldman Sachs was not acting as an adviser to IFE or purporting to carry out any professional service for IFE, as the terms of the SIM made plain. It was acting for the sponsors and not on behalf of the recipients of the SIM. In general a party involved in negotiations towards a commercial venture owes no positive duty of disclosure towards another prospective party. A duty of disclosure may be undertaken, but no such duty was undertaken in this case either expressly or impliedly. The expression 'assumption of responsibility' has on occasions been used in cases where it would be more accurate to speak of the court imposing a responsibility, but I can see no ground on which it would be fair to impose on Goldman Sachs the duty of care contended for by IFE.

…

28. I can start by clearing one or two issues out of the way. **First it seems to me that the**

argument that there was some free-standing duty of care owed by GSI to IFE in this case is in the light of the terms of the Important Notice hopeless. Nothing could be clearer than that GSI were not assuming any responsibility to the participants: *Hedley Byrne v Heller & Partners* [1964] AC 465. **The foundation for liability for negligent misstatements demonstrates that where the terms on which someone is prepared to give advice or make a statement negatives any assumption of responsibility, no duty of care will be owed. Although there might be cases where the law would impose a duty by virtue of a particular state of facts despite an attempt not 'to assume responsibility', the relationship between GSI either as arranger or as vendor would not be one of them. I entirely agree with [Toulson J] on this aspect** …

[emphasis added in bold]

87 In the more recent decision of *Titan Steel Wheels Ltd v The Royal Bank of Scotland plc* [2010] EWHC 211 ("*Titan Steel*") Steel J was of the opinion that the scope of the obligations owed by the bank to its client were fully defined in the contractual terms (at [81], [82] and [85]):

81. These terms expressly provided that the Bank would not provide advisory services and that any opinions expressed by the Bank did not constitute investment advice. Titan was to take independent advice as might be necessary. In that sense the Bank was making it clear that it was only providing an execution service.

82. The specific terms of each transaction, both as contained in the post transaction acknowledgements and the confirmations were to the same effect. In particular:

i) Titan was to seek independent advice if required.

ii) Titan placed no reliance on the Bank for advice or recommendations 'of any sort'.

…

85. I turn to the impact of these terms. In this regard there was some confusion in Titan's case as to whether it was alleging a pre-existing duty of care at the time the products were purchased or that the Bank assumed a duty of care in respect of Ms Plested's 'advice'. **But on either basis, I conclude that the terms outlined, taken as whole, are only consistent with the conclusion that Titan and the Bank were agreeing to conduct their dealings on the basis that the Bank was not acting as an advisor nor undertaking any duty of care regardless of what recommendations, suggestions or advice were tendered**.

[emphasis added in bold]

88 Finally, in the Singapore decision of *CIC* ([79] *supra*) (see [79] above) Philip Pillai JC decided that the question whether a private bank owes a duty to advise its client will ultimately depend on the contract and the conduct of parties (at [2], [83] and [84]):

2 The present case raises a core question of law about private banking and sophisticated clients. When is a private bank acting as a trusted advisor of its client and when is it not? *The answer to this question of law falls to be determined by the particular contractual documentation and conduct adduced in evidence in each case*.

…

83 I now return to the core question of law about private banking and sophisticated clients raised in [2] in the light of the relevant contractual documents and the evidence adduced in this dispute:

> When is a private bank acting as a trusted advisor of its client and when is it not?

84 A private bank is not acting as a trusted advisor of its client when (a) its account opening form and Risk Disclosure Statement highlight to the client that he is responsible for the risks in his transactions and recommends that he takes advice from other professional advisers, including his accountants, lawyers and tax advisors, and further that the bank does not make recommendations or give advice and (b) this is borne out by the evidence of conduct.

[emphasis added]

89 It is thus clear from the authorities that the court will not lightly find the existence of an additional duty within a banking relationship that is already governed by contract unless there is conduct amounting to an assumption of responsibility coupled with reliance under the *Hedley Byrne* principle ([82] *supra*).

90 As the plaintiff has claimed that the defendant owed concurrent and co-extensive duties in both contract and tort to advise him as to the prudence of his investment portfolio, I gratefully adopt the "lower level" factors formulated by Gloster J in *Springwell* in so far as they are relevant to the present case and list them as follows:

(a) the extent of the plaintiff's financial experience and sophistication;

(b) the contractual context;

(c) the actual role played by Ms Ching (including the purpose for which she was giving the plaintiff recommendations); and

(d) the extent of the plaintiff's reliance on Ms Ching.

Whether the plaintiff was an inexperienced and unsophisticated investor

91 The plaintiff attempted to give the impression that he was an inexperienced and unsophisticated investor who relied heavily on others for investment advice. He did so by calling attention to his three existing UBS investment accounts, of which one was an advisory account and the other two were discretionary accounts, to support his claim that he was incapable of making investment decisions and managing his own investments. I found this submission difficult to accept on the plaintiff's own evidence.

92 In my judgment, whether or not a particular client is a sophisticated one depends on the particular factual matrix concerned. In the present case, the investments forming the subject of dispute were simply corporate and sovereign-linked bonds which, in my view, were simple securities that could easily be understood by someone with the plaintiff's knowledge and experience. The plaintiff, who was also a successful and wealthy businessman, clearly understood the types of risk involved, such as default risk and exchange-rate risk. Not only that, the plaintiff was shrewd enough to move his funds out of the peso in early 1997 in anticipation of its devaluation.

93 The plaintiff also conceded that he had sufficient knowledge of investment principles to make

the investment decisions for his UBS advisory account and, therefore, had no problems rejecting UBS's recommendations. Indeed, it was the plaintiff's own evidence that he relied on UBS's recommendations simply to offset his lack of knowledge of *the type of investments that were available in the market*. Similarly, in his relationship with the defendant, the plaintiff had no difficulty rejecting Ms Ching's recommendations when he thought that they were too risky.

94 I therefore find that, in the particular context of the present case, the plaintiff was not an inexperienced and unsophisticated client who had to rely entirely on the defendant for advice relating to the management of his investment portfolio.

Whether the contractual terms imposed a duty on the defendant to act as the plaintiff's investment advisor

95 I begin by noting that none of the contractual terms expressly provide for an advisory relationship between the parties. Mr Ramesh argued that, nevertheless, a duty to advise ought to be implied into the contract.

96 The first argument by Mr Ramesh for implying such a duty was that the very nature of a private banking relationship ought to give rise to an implied duty on the private banker's part to advise a customer on investments. The reason given was that the private banking relationship is a special relationship whereby the bank holds itself out as having the requisite experience to chart a successful course of judgment to a high net-worth individual who entrusts a portion of his wealth to the private bank and relies on the bank's judgment and advice.

97 In my view, this line of argument was based not on contract as argued by Mr Ramesh but on the twin criteria of voluntary assumption of responsibility and reliance, which are essential factors in meeting the test of proximity for establishing a *prima facie* duty of care in law (see *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck Engineering*") at [81]), and accordingly, I will address this argument in a later part of my judgment.

98 The next argument by Mr Ramesh was that the parties had agreed for the Singapore account to be an advisory account, and thus the defendant owed a continuing duty to the plaintiff to give investment advice related to his portfolio. To establish this, Mr Ramesh relied on the following grounds:

(1) there were no express terms negating the duty to advise;

(2) the manner in which the contractual documentation was executed;

(3) the fact that the plaintiff was charged an account fee; and

(4) the fact that the defendant's representatives had endorsed the existence of a duty to advise.

99 As there are no express terms providing for a duty to advise, Mr Ramesh sought to establish that there was significance in the order in which the contractual documents were executed (the plaintiff had executed the DIMA before executing the IAI). Mr Ramesh argued that the effect of executing the DIMA first was that the defendant owed a duty to use its discretion to source for and select appropriate investments on behalf of the plaintiff, taking into account his risk profile and the economic circumstances. The subsequent execution of the IAI merely revoked the defendant's power to make investment decisions on behalf of the plaintiff, without relieving the defendant from its

continuing duty to recommend suitable investments under the DIMA.

100 I certainly find nothing controversial in the submission that the defendant was obliged to search for and recommend suitable investments. In fact, the evidence suggested that they had proceeded on that very basis. But it does not necessarily follow from there that parties had agreed for the defendant to continually give investment advice to the plaintiff. In my opinion, it is one thing to require the defendant *to recommend securities that were available in the market and within the plaintiff's risk appetite*, and it is quite another to require the defendant *to continually give wide-ranging advice with regards to the portfolio and recommend investment decisions* such as when to trade or hold on to particular securities. The mere duty to recommend securities, in my view, certainly does not, without more, give rise to a further and continuing duty to give advice with regards to the management of the investment portfolio. In arriving at this decision, I find some support from *Springwell* ([79] *supra*) at [108]:

> … All that Springwell was being offered, through AP being given access to JA, was the provision of an alternative product to time deposits. Moreover, such personal recommendations, or advice, as AP was being given by JA – at least at this early stage – about the products that CIBL, by JA, was offering to sell (mainly ECP), *has to be viewed, in my judgment, as no more than the recommendations of a trader to a buyer as to what was available, on what terms, and perhaps also as to the respective merits of the products on offer, given the requirements of the particular client. It may well be that, theoretically, in such circumstances, a low level duty of care would arise on the part of the salesman not to make any negligent misstatements, or even to use reasonable care not to recommend a highly risky investment without pointing out that it was such, but a low level duty along those lines is worlds away from the wide duty of care that was pleaded or relied upon as having arisen at this early stage*. In Mr. Brindle's words, it was at the lower end of the spectrum. Thus the notion that, in the context of the trading relationship at this early stage, as a result of the manner in which JA was introduced to AP, CIBL and/or CMB, by JA had either an obligation to ascertain Springwell's investment criteria, or to give wide ranging advice, for example, about portfolio diversification or concentration issues, or in relation to the general composition of the portfolio as a whole, is one that, in my judgment, simply does not reflect the reality of the position.
>
> [emphasis added]

101 Equally damaging to the plaintiff's argument was the evidence of his own conduct. Indeed, the plaintiff himself was of the view that the account was to be completely managed by him, as evident from his letter to the defendant dated 11 August 1999 in which he conceded that the Singapore account was *non-discretionary* and that he would be managing his own portfolio (see [65] above). Furthermore, at no point in time during the entire relationship did the plaintiff ask Ms Ching for her opinion with regards to the investments that were already in his portfolio. One would have thought that, in the midst of the uncertainty during the Asian financial crisis, a client who had contracted for advisory services would have hurriedly sought professional investment advice from his contracted advisor. It was unbelievable that the plaintiff simply sat back and made no request for advice had he actually contracted for advisory services from the defendant.

102 The plaintiff also sought to characterise the account fee as being consideration for investment advice. He argued that because the defendant still charged a fee, despite having executed the IAI, it must have been intended as consideration for providing advisory services. The plaintiff even went so far as to claim that there was no other reason for him to pay the defendant quarterly fees. I was not persuaded by this argument. The fee payable can be found in cl 16.01 of the AOCA, which was an agreement that was executed whenever an account was opened with the defendant, regardless of

whether it was a discretionary account or not. This meant that the fee was charged by the defendant for simply acting as the *custodian* of the assets held in a client's account and not for the management of those assets. This was evidenced in the Preamble, read with cll 16.01 and 20 of the AOCA:

> [The plaintiff] wish[es] to open accounts with [the defendant] and to hold in such accounts for [himself] any cash, term deposits, securities, deeds, documents, and other properties now or hereafter deposited with or transferred to you or to any third party nominated by [the defendant] for the purpose.
>
> …
>
> 16.01 A fee shall be payable to the Bank amounting to ~~one~~ .25 percent per annum, which fee shall be charged per quarter or part thereof, in arrear, based on the total market value, as reflected in the Bank's statement of account, of all the assets held by the Bank in relation to these accounts on the relevant Quarter Day or the day upon which the accounts are closed if other than on a Quarter Day.
>
> 20. … The [defendant] shall not be responsible for the management of any Investments, or for any diminution in the value of the Investments.
>
> [amendment in original]

The argument by the plaintiff that the fee was for advisory services was plainly unsupported by the objective documentary evidence and I rejected it accordingly.

103 Mr Ramesh then attempted to rely on a statement that was made in these proceedings by a Dr Karl Tambornino ("Dr Tambornino"), general counsel for the defendant. Mr Ramesh argued that the statement amounted to an admission on the defendant's part that it was under a duty to advise. This statement can be found in para 6 of his affidavit filed for an earlier stay application in favour of the Hong Kong courts on 24 October 2005 ("the Affidavit Statement"), which reads:

> The core element of the business relationship between the Plaintiff and the Defendant is the rendering of investment advice and investment management, respectively, in Hong Kong. While investments may have been carried out on the Plaintiff's behalf through the conduit of the Singapore Account, the actual investment advice and investment services that were carried out on behalf of the Plaintiff was performed by a Private Banking business subsidiary of the Defendant based in Hong Kong, pursuant to Articles [sic] 9 of the DIMA and IMA, respectively.

Mr Ramesh had also referred Yin to Dr Tambornino's Affidavit Statement during cross-examination in an attempt to extract a concession that the duty to advise was a core element of a private banking relationship. However, Yin pointed out that any such duty would fall to be defined by the contractual documents:

> Q What Dr Tambornino is saying is that it is a fundamental principle or fundamental basis of the relationship between the plaintiff, Mr Go, and the bank that the defendant would render investment advice and investment management in relation to the account?
>
> A Correct.
>
> Q Would you accept that proposition that Dr Tambornino makes in paragraphs 6 and 7, that it is

a fundamental basis of the relationship between the plaintiff and the defendant that the defendant would offer investment advice and investment management services in relation to his accounts?

A Correct.

Q You accept that?

A Yes.

Q That was your understanding of the relationship between Mr Go and the bank?

A As far as I can remember, yes.

Q Right?

A As far as I can remember.

Q You have no reason to disagree with paragraphs 6 and 7 of the affidavit?

A I can't remember exactly the nature of the account opening.

Q I understand. But you would accept that, based on what Dr Tambornino has said, you have no reason to disagree with what he is saying is [sic] paragraphs 6 and 7?

A No, because I would suspect that he would have had supporting documents to say what he's saying.

104 In my view, the plaintiff has placed far too much significance on Dr Tambornino's Affidavit Statement. First, Dr Tambornino's Affidavit Statement must be read in the context of the application for which it was made, which was for a stay of proceedings on the ground of *forum non conveniens*. Furthermore, Dr Tambornino had simply acknowledged that there was a duty to give investment advice but he did not venture to define the scope of that duty. The precise scope of the duty to advise, as correctly pointed out by Yin, falls to be defined by the contract (subject to any duty arising from the *Hedley Byrne* principle ([82] *supra*) which will be addressed separately below). As mentioned at [100] above, the evidence suggests that parties had proceeded on the basis that the defendant was under a duty only to recommend suitable investments to the plaintiff.

105 Finally, Mr Ramesh sought to distinguish the present case from the cases cited from [79] to [88] above on the basis that the banking relationships in those cases were governed by express terms and disclaimers that negated the duty to advise. For convenience, I shall categorise the material contractual terms that were present in the cases cited above:

(a) the bank was not making any recommendation or giving any advice to the client or acting as an adviser (*CIC* ([79] *supra*) at [19]; *Titan Steel* ([87] *supra*) at [30]; *IFE Fund* ((86] *supra*) at [13]; *Springwell* ([79] *supra*) at [210]); and

(b) the client would seek his own independent advice (*CIC* at [19]; *Titan Steel* at [30]).

106 Although the plaintiff was right to point out that no such terms can be found in the present case, I was not persuaded that this difference was critical. Each agreement has to be construed on its own terms. In the present case, the parties had executed the DIMA first before subsequently

executing the IAI. As the DIMA was the standard term agreement for opening a discretionary account which was managed solely by the bank. It was only natural that there were no disclaimers or contractual terms negating any duty to advise to be found in it as there was no need to provide for that.

107 Accordingly, my conclusion is that there was no contractual duty on the defendant to continue to provide investment advice to the plaintiff after it had recommended investment products that were available in the market to the plaintiff.

The actual role played by Ms Ching and the extent of reliance the plaintiff placed on her

108 As mentioned earlier at [97] above, the fulfilment of the twin criteria of voluntary assumption of responsibility and reliance will give rise to a *prima facie* duty of care under the *Hedley Byrne* principle. To determine whether these criteria have been met, it would be necessary to examine the actual role that was played by Ms Ching and the extent to which the plaintiff had relied on her.

109 As already established, Ms Ching had provided recommendations of investments to the plaintiff at the monthly meetings. At most, this would give rise to the sort of low-level duty of care, as defined by Gloster J, not to "make any negligent misstatements, or even to use reasonable care not to recommend a highly risky investment without pointing out that it was such" (at [100] above). However, during cross-examination, the plaintiff conceded that *he had not relied on any of Ms Ching's recommendations*. This was for the obvious reason that any admission of reliance would fly contrary to his primary case that the investments were unauthorised. Accordingly, the plaintiff cannot now complain that his losses were the result of the defendant's failure to take reasonable care and skill in making those recommendations.

110 Both sides also accepted that Ms Ching did not provide any other form of advice to the plaintiff. That being the case, there was no ground for the plaintiff to argue that the defendant had voluntarily assumed any responsibility for giving investment advice to the plaintiff on an ongoing basis. The plaintiff also conceded that the investments in the Singapore account during the Asian financial crisis were not held in reliance upon any advice.

111 As a result, I concluded that the defendant owed no duty of care in tort to give investment advice to the plaintiff.

The expert evidence

112 Having concluded that the defendant owed no duty in contract or tort to give investment advice to the plaintiff in relation to the investments that were held in the Singapore account, there was no need for me to consider the expert evidence and make a determination on the scope of a bank's duty to give investment advice during the Asian financial crisis.

Conclusion

113 For the foregoing reasons, I dismissed the plaintiff's action with costs to be taxed unless agreed.