

CASE UPDATE

SINGAPORE HIGH COURT DISMISSES CLAIM BY SEASONED INVESTOR AGAINST BANK

Lam Chi Kin David v Deutsche Bank AG [2010] SGHC 50

Executive summary

The Singapore High Court has dismissed a claim brought by a “sophisticated and successful investor” against a private bank for losses allegedly sustained from the wrongful closure of his foreign exchange positions. In reaching its decision, the Court placed emphasis on the fact that not only was the plaintiff a seasoned investor, he had also adopted a blunderbuss approach, making a wide range of allegations against the defendant bank which he was ultimately unable to prove. The Court was also astute to conclude that this action was in fact an attempt to transfer the losses which he had suffered as a result of market movements onto the bank.

Background

In November 2007, Lam Chi Kin David (the “**Plaintiff**”) opened a Private Wealth Management Account (the “**Account**”) with Deutsche Bank AG (the “**Bank**”). The Account held the Plaintiff’s deposits and loans in various foreign currencies.

The Plaintiff was active in foreign exchange (“**FX**”) trades. The Account remained in a healthy state till early October 2008, when market movements caused a margin shortfall.

On or around 7 October 2008, the Account entered into a margin shortfall of USD610,000. This deteriorated to USD2.3 million on 8 October 2008. On 10 October 2008, the margin shortfall increased to USD5,460,370.02. At this point, the Account was in negative equity of about USD1,054,612.74.

The Plaintiff was appraised of the margin shortfall at all material times. However, he informed the Bank that he was unable to or unwilling to deliver additional collateral to clear the margin shortfall. On 10 October 2008, the Bank liquidated the Plaintiff’s FX positions in an attempt to clear the margin shortfall. However, the proceeds of these margin call transactions were insufficient to clear the margin shortfall – there remained an outstanding sum of USD1,135,239.43. The Bank then made a request for payment of this sum, but the Plaintiff did not respond.

MAIN OFFICE

20 Raffles Place
#17-00 Ocean Towers
Singapore 048620

t +65 6535 0733

f +65 6535 4906

mail@drewnapier.com
www.drewnapier.com

Co. Reg. No. 200102509E

The High Court proceedings

On 11 November 2008, the Plaintiff commenced proceedings against the Bank to recover the losses (estimated to be in excess of NZD30 million) suffered following the margin call transactions undertaken by the Bank on 10 October 2008.

The Plaintiff alleged that the Bank had wrongfully closed out his FX positions in breach of the notice requirement under Clause 2.6 of the Bank's Master Agreement (which was signed by the Plaintiff when the Account was opened) ("**Clause 2.6**"). The Plaintiff alleged that he was entitled to at least one business day's notice to deliver the collateral as stipulated under Clause 2.6. The Plaintiff also alleged that the Bank failed to give him the 48-hour grace period which it had purportedly promised to him.

The Bank submitted that it had made the following valid margin calls:

- (i) by a fax dated 7 October 2008, where the Bank informed the Plaintiff that his collateral availability under the Account had fallen into a "negative of USD610,000";
- (ii) by a fax dated 8 October 2008, where the Bank informed the Plaintiff that his margin shortfall had increased to USD2.3 million; and
- (iii) by a letter dated 10 October 2008, where the Bank required the Plaintiff to restore the margin shortfall of USD5,460,370.02 by 5 pm, Singapore time, on the same day.

The Bank also counterclaimed the sum of USD1,135,239.43.

The High Court's decision

The Court dismissed the Plaintiff's claim and allowed the Bank's counterclaim together with interest and costs.

At the outset, the learned Judicial Commissioner Steven Chong noted that the Plaintiff had amended his case several times as to where the fault of the bank lay and was "undecided" as to how to run his case until the trial began.

The Plaintiff had initiated proceedings with several pleaded causes of action, including an alleged failure by the Bank to act on his instructions, an alleged breach of duty by the Bank in providing inaccurate and unreliable computation of the margin shortfall on 10 October 2008, and an alleged failure by the Bank to properly advise him not to maintain certain FX positions.

However, by the time the trial started, the only remaining cause of action was the Plaintiff's claim for wrongful closure of his FX positions.

The Court held that the Bank had, by its fax dated 7 October 2008, made a valid margin call. The Plaintiff knew that there was a margin shortfall but had indicated that he was unable to or unwilling to deliver additional collateral to clear it. As such, the Bank was entitled to close out the Plaintiff's FX positions. On this ground alone, the Plaintiff's claim was dismissed.

Steven Chong JC noted that the Bank's faxes of 7 and 8 October 2008 contained the notation that they did not constitute "official bank's statement or advice" and did not explicitly call for the Plaintiff to clear the margin shortfall. However, upon examination of the Plaintiff's evidence, the Court found that the Plaintiff was "clearly aware" that the faxes constituted margin calls which required him to take steps to rectify the margin shortfall.

The Plaintiff had described himself as a "professional investor" in the account opening forms. It was clear that the Plaintiff was "a seasoned FX investor" who "knew exactly what he was required to do when his account fell into margin shortfall".

The Plaintiff had also admitted in his evidence that because of the margin shortfall of USD610,000 on 7 October 2008, the Bank was entitled to close out the FX positions in the Account. The evidence further showed that after receiving the faxes of 7 and 8 October 2008, the Plaintiff had instructed his banker (an employee of the Bank) to carry out some FX "Limit Order" transactions to reduce the margin shortfall.

Although the Court did not have to deal with the issue of whether Clause 2.6 was applicable, and if a 48-hour grace period had indeed been promised by the Bank to the Plaintiff, it expressed its views on the matter.

The Court dismissed the Plaintiff's argument that he was, under Clause 2.6, entitled to at least one business day's notice to clear the margin shortfall.

The Court concluded that Clause 2.6 conferred on the Bank a right to require the Plaintiff to deliver additional collateral if the Bank should deem for any reason that the existing collateral was insufficient. It did not govern the margin call.

Even if Clause 2.6 governed the margin calls, it would not have assisted the Plaintiff in light of his own "unequivocal confirmation" that he was unable and or unwilling to deliver additional collateral to clear the margin shortfall even if time was extended to 14 October 2008.

The Plaintiff had also claimed that the Bank was estopped from relying on the terms and conditions contained in banking agreements with the Plaintiff to close out the Plaintiff's FX positions without notice. According to the Plaintiff, the Bank's managing director had promised, in July 2008, to give him a 48-hour grace period to respond to any margin calls as the Plaintiff was regarded as a "key client".

While the Court accepted the Plaintiff's submission that the promise had been made, given the Plaintiff's confirmation that he was unable to deliver the additional collateral even if the grace period was extended to beyond the 48-hour grace period, it was not inequitable for the Bank to enforce its rights to close out the FX positions.

Comment

The past one and a half years have borne witness to a significant rise in litigation against financial institutions in respect of investment losses. This is not surprising in light of the recent market turmoil. While each case must necessarily be considered on its own facts, this

latest decision of the Singapore High Court illustrates that the Singapore Courts will be astute to decipher whether losses were truly the result of missteps on the part of the financial institutions or whether they simply were the result of market movements. It may have been thought easy to level allegations of all stripes against financial institutions and their investment professionals; it will, however, serve plaintiffs (and would-be plaintiffs) well to be reminded that each and every one of these allegations will have to be painstakingly proved.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the litigation and dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors' profiles on our [website](#)), or:

Cavinder Bull, SC

Director (Litigation & Dispute Resolution)

T: +65 6531 2416

E: cavinder.bull@drewnapier.com

The contents of this update are only intended to provide general information on the subject covered. Nothing in this publication should be treated as specific professional legal advice concerning any particular business, operational or other situations with which you might be faced. Drew & Napier LLC accepts no liability for, and does not guarantee the accuracy of, the information contained in this publication, and does not accept any liability for any loss or damage arising from any reliance thereon.

OUR BUSINESS GROUPS AND PRACTICE AREAS

BANKING/GENERAL FINANCE

David Ang
T +65 6531 2236
F +65 6535 4864
E david.ang@drewnapier.com

Valerie Kwok
T +65 6531 2222
F +65 6535 4864
E valerie.kwok@drewnapier.com

Sandy Foo
T +65 6531 4118
F +65 6535 4864
E sandy.foo@drewnapier.com

BIOMEDICAL SCIENCES

Tony Yeo
T +65 6531 2512
F +65 6220 0324
E tony.yeo@drewnapier.com

BUILDING & CONSTRUCTION

Tan Liam Beng
T +65 6531 4139
F +65 6533 3591
E liambeng.tan@drewnapier.com

CAPITAL MARKETS

Sin Boon Ann
T +65 6531 2206
F +65 6535 4906
E boonann.sin@drewnapier.com

Petrus Huang
T +65 6531 2208
F +65 6535 4906
E petrus.huang@drewnapier.com

CHINA BUSINESS GROUP

David Chin
T +65 6531 2304
F +65 6535 1952
E david.chin@drewnapier.com

COMPETITION LAW

Cavinder Bull, SC (contentious)
T +65 6531 2416
F +65 6533 3591
E cavinder.bull@drewnapier.com

Lim Chong Kin (non-contentious)

T +65 6531 4110
F +65 6535 4864
E chongkin.lim@drewnapier.com

CORPORATE

David Ang
T +65 6531 2236
F +65 6535 4864
E david.ang@drewnapier.com

Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

OTHER OFFICES**Drewmarks Patents & Designs (Malaysia) Sdn Bhd**

9th floor
Bangunan Getah Asli (Menara)
148 Jalan Ampang
50450 Kuala Lumpur, Malaysia
T +603 2162 2522/2162 2529
F +603 2162 2804
E drewmark@tm.net.my

CORPORATE (cont'd)

Sin Boon Ann
T +65 6531 2206
F +65 6535 4906
E boonann.sin@drewnapier.com

Yeo Wee Kiong
T +65 6531 2500
F +65 6535 4864
E weekiong.yeo@drewnapier.com

CORPORATE INSOLVENCY & RESTRUCTURING

Sushil Nair
T +65 6531 2410
F +65 6533 9029
E sushil.nair@drewnapier.com

Manoj Sandrasegara
T +65 6531 4156
F +65 6533 9029
E manoj.sandra@drewnapier.com

EMPLOYMENT & IMMIGRATION

Indranee Rajah, SC
T +65 6531 4100
F +65 6532 7149
E indranee.rajah@drewnapier.com

FAMILY & MATRIMONIAL

Randolph Khoo
T +65 6531 2418
F +65 6532 7149
E randolph.khoo@drewnapier.com

FUND MANAGEMENT, REIT & PRIVATE EQUITY

Petrus Huang
T +65 6531 2208
F +65 6535 4906
E petrus.huang@drewnapier.com

INSURANCE & REINSURANCE

Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

INTELLECTUAL PROPERTY

Dedar Singh Gill
T +65 6531 2507
F +65 6533 0694
E dedar.singh@drewnapier.com

Cecilia Girvin
T +65 6531 2510
F +65 6533 0694
E cecilia.girvin@drewnapier.com

INTERNATIONAL ARBITRATION

Davinder Singh, SC
T +65 6531 2403
F +65 6532 7149
E davinder.singh@drewnapier.com

Jimmy Yim, SC
T +65 6531 2504/2505
F +65 6533 9029
E jimmy.yim@drewnapier.com

LITIGATION

Davinder Singh, SC
T +65 6531 2403
F +65 6532 7149
E davinder.singh@drewnapier.com

Jimmy Yim, SC
T +65 6531 2504/2505
F +65 6533 9029
E jimmy.yim@drewnapier.com

Indranee Rajah, SC
T +65 6531 4100
F +65 6532 7149
E indranee.rajah@drewnapier.com

PROJECT FINANCE
Gary Pryke
T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

Valerie Kwok
T +65 6531 2222
F +65 6535 4864
E valerie.kwok@drewnapier.com

Sandy Foo
T +65 6531 4118
F +65 6535 4864
E sandy.foo@drewnapier.com

PROPERTY
Zennifa Rahim
T +65 6531 2392
F +65 6535 1952
E zennifa.rahim@drewnapier.com

SHIPPING & INT'L TRADE
Ian Koh
T +65 6531 2436
F +65 6533 3591
E ian.koh@drewnapier.com

TAX & PRIVATE CLIENT SERVICES
Ong Sim Ho
T +65 6531 2250
F +65 6535 4864
E simho.ong@drewnapier.com

TMT
Lim Chong Kin
T +65 6531 4110
F +65 6535 4864
E chongkin.lim@drewnapier.com

TRANSNATIONAL & CROSS-BORDER WORK
Julian Kwek
T +65 6531 2485
F +65 6533 9029
E julian.kwek@drewnapier.com

PT Drewmarks Konsultama

Correspondence address:
20 Raffles Place
#17-00 Ocean Towers
Singapore 048620
T +65 6531 2503/6531 2504
F +65 6533 0694
E ip@drewnapier.com

DrewCorp Services Pte Ltd

20 Raffles Place
#09-01 Ocean Towers
Singapore 048620
ROC No. 200102492H
T +65 6531 2266
F +65 6533 1542 / 6533 7649
E services@drewcorpservices.com