LEGAL UPDATE

CASE UPDATE

11 April 2019

HIGH COURT CLARIFIES BANK'S DUTY TO CUSTOMER

Koh Kim Teck, Smiling Sun Limited v Credit Suisse AG, Singapore Branch
[2019] SGHC 82

SUMMARY

The Singapore High Court ("**Court**") considered whether a bank owed any investment advisory duty to its customer in either contract or tort, and found on the facts of this case that no such duty arose. The Court also alluded to key factors it would consider to determine whether a duty of care arises beyond the contractual duties owed by a bank to its customer.

BACKGROUND

The Plaintiff ("**Koh**") had made substantial investments through the Bank via Smiling Sun, a BVI special purpose vehicle. Smiling Sun's account with the Bank was funded by a credit facility. Smiling Sun drew down on this facility, partly in Japanese Yen ("**JYP**"), and invested in dual currency investment products ("**DCI**") and knock-out discount accumulators ("**KODA**").

When the financial crisis in 2008 unfolded, the Australian dollar ("**AUD**") rapidly depreciated against the JYP. As such, Koh was affected by both the fall in the value of his investments (which were in AUD), and the drawdown on his credit facilities (which were in JYP). This caused a collateral shortfall, which prompted the Bank to give Koh a close out notice to top up his collateral in four hours. Koh did not do so, and the Bank closed out all of Smiling Sun's open positions, causing Koh to lose about US$26 million.

Koh and Smiling Sun sued the Bank for an alleged breach of its duty of care owed to Koh in contract and tort. With regard to the scope of both the duties allegedly owed in contract and tort, Koh pleaded that the Bank owed him several sub-duties:

(a) to take reasonable care when giving advice and provide Koh with information that met with his investment objectives;

(b) to monitor and manage the investments in Smiling Sun's account, as well as the account's risk exposure; and

(c) with respect to the scope of the Bank's contractual duties, to provide a reasonable period for the provision of collateral top-ups.

THE HC'S DECISION

The Court found that the Bank did not owe any of the alleged duties in either contract or tort, and even if these duties arose, the Bank had not breached them.

Duties not owed in contract

In relation to the Bank's alleged duty to provide advice that met with Koh's investment objectives, and to monitor Smiling Sun's account, the Court found that the contractual arrangement between the parties did not point to any advisory or management relationship. Koh had accepted under the account documents that he was responsible for managing the account, and the Bank had expressly disclaimed any responsibility for Koh's investment decisions. Further, the account was a non-discretionary account, meaning the Bank was to manage assets only in accordance with Koh's instructions.

In relation to the Bank's alleged duty to provide a reasonable period for the provision of collateral top-ups, the Court rejected Koh's attempt to imply an obligation on the Bank's part to this effect. This was because there was no gap in the contract between parties permitting the implication of this term. In particular, Clause 8 of the credit facility application form expressly reserved the Bank's right to determine the length of time to be given where a collateral top-up was sought.

Duties not owed in tort

The Court referred to the Court of Appeal decision in *Deustche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886 for the proposition that a bank's tortious duties to its customer would not normally extend beyond its contractual duties, unless the bank's conduct had deviated from its contractually defined role. Given that the Bank owed Koh none of the pleaded obligations by way of contract, the Court held that it would require cogent evidence to establish that the Bank had assumed these responsibilities through its representations and conduct. The Court concluded that there was no such evidence.

In this regard, the Court found that the Bank did not make any representation to advise Koh on his portfolio, nor did it manage the account on his behalf. The Court also found that contrary to Koh's contentions, the Bank's internal documents did not create any obligations between the Bank and Koh, and could not serve as representations to Koh since they were not even shown to Koh. Further, the Court found that Koh was very active in managing the account, and stuck to his investment strategies even against the Bank's recommendations. As such, it held that the Bank did not come under a duty to manage the account or advise Koh on his portfolio.

On the Bank's alleged duty to advise Koh, the Court drew a distinction between the giving of advice, and the provision of information and held that the Bank only provided Koh with information, and gave no advice amounting to a representation.

Bank would not have breached its duty of care to Koh

The Court held that the Bank did not breach its duty to advise Koh on products that suited his investment objectives. The Court found that the Bank's recommendations of the KODAs and DCIs cohered with Koh's investment objective. The Court further held that any duty of care owed by the Bank would generally be limited to bringing the risks of the relevant investment strategies to Koh's attention, unless Koh could point to some vulnerability on his part. In this regard, the Court found that Koh was not vulnerable, as he had previously held a senior position at a top stockbroking house in Malaysia. As such, the Bank had discharged its duty by explaining the features and risks associated with KODAs and DCIs during calls with Koh.

The Court held that the Bank did not breach its duty to advise Koh on the risk exposure of his credit facility, or to monitor this risk. Koh had applied for the credit facility of his own accord, and gave instructions to draw down on the facility. The resulting increase in collateral shortfall risk was therefore of Koh's doing. The Bank had brought the collateral limit to Koh's attention, and in any event, Koh was familiar with how these limits worked. The Bank had also raised to Koh warning signs as the financial crisis developed, but Koh remained steadfast in his investment strategy. The Court further held that the Bank did not breach its duty in failing to notify Koh of the collateral shortfall in the account at an earlier date, because the credit facility application forms clearly spelt out the need to maintain collateral value in the account and the Bank's right to impose a close out. Therefore, Koh had assumed the risk of a close out. The Court acknowledged the force of Koh's argument that the Bank had given an unreasonably short time to furnish additional collateral, but found that this was justified given the Bank's legitimate concerns in clamping down on Koh's aggressive investment strategy in the unfolding financial crisis.

COMMENT

This case supports and reinforces earlier decisions in generally limiting a bank's duty to that provided for in its account terms and conditions. However, the Court made some observations that merit a closer look.

First, whilst the Court acknowledged that there was force in Koh's argument that the time given to furnish additional collateral was unreasonable, it considered the reasonableness of the Bank's exercise of discretion, by taking into account the legitimate concerns of the Bank and the relevant circumstances at the material time. The Court's approach in this case is therefore consistent with its decision in *ABN Amro Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186, which accepted that a bank's contractual discretion is not unfettered, because it cannot be exercised capriciously or irrationally. Financial institutions should therefore seek advice if there is uncertainty over whether its exercise of contractual discretion may be construed to be capricious or irrational.

Second, in deciding that the Bank did not owe any additional duty of care to Koh, the Court appeared to have relied in part on Koh's profile as a sophisticated and experienced investor. In the course of the judgment, the Court referred to vulnerability as a possible factor militating in favour of imposing a more onerous duty of care. The vulnerability of a customer may also affect how the Court would distinguish between a "sales pitch" and a representation amounting to a voluntary assumption of responsibility, because a bank making representations to a vulnerable customer would be cognizant of the customer's increased propensity to rely on what has been communicated by the bank. It would therefore be prudent for financial institutions to still exercise caution when giving information or advice to its customers, notwithstanding the protection offered by express provisions in its account documents.

If you have any questions or comments on this article, please contact:

Benedict Teo
Head, Banking & Financial Disputes
T : +65 6531 2499
E: benedict.teo@drewnapier.com

Click here to view Benedict's profile

Pauline Chong
Head, Banking & Finance
T : +65 6531 2796
E: pauline.chong@drewnapier.com

Click here to view Pauline's profile

Elaine Lim Mei Yee
Senior Associate, Dispute Resolution
T : +65 6531 2233
E: elaine.lim@drewnapier.com

Click here to learn about our **Banking & Finance Practice**

Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733
T : +65 9726 0573 (After Hours)
F : +65 6535 4906

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