Deutsche Bank AG *v* Chang Tse Wen and another appeal
[2013] SGCA 49

Case Number	: Civil Appeals Nos 164 of 2012 and 2 of 2013
Decision Date	: 19 September 2013
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Ang Cheng Hock SC, Tan Xeauwei, Tan Kai Liang and Joel Lim (Allen & Gledhill LLP) for the appellant in Civil Appeal No 164 of 2012 and the respondent in Civil Appeal No 2 of 2013; K Muralidharan Pillai, Sim Wei Na and Ng Chun Ying (Rajah & Tann LLP) for the respondent in Civil Appeal No 164 of 2012 and the appellant in Civil Appeal No 2 of 2013.
Parties	: Deutsche Bank AG — Chang Tse Wen

Tort – Duty of Care

Tort – Misrepresentation

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 1 SLR 1310.]

19 September 2013 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 Dr Chang Tse Wen ("Dr Chang") was an investor who first met a representative from Deutsche Bank AG ("DB") in March 2007. Some months later, Dr Chang opened an account with DB into which he transferred a large amount of money. Through this account, Dr Chang purchased a very significant quantity of a financial product known popularly as an accumulator. The acquisition of the accumulators proved to be ill-fated. Dr Chang suffered substantial losses which wiped out the entire amount he had transferred to DB and then some. In fact, Dr Chang was informed by DB that having lost all the money he had transferred to his account, he still owed DB a further sum of US$1,788,855.41 ("the Contract Sum"). DB sought payment of this amount but Dr Chang refused to pay it. DB then sued him and he in turn responded by counterclaiming his losses, which, he maintained, had been sustained because of DB's negligence, breach of fiduciary duty and misrepresentation.

2 The trial judge ("the Judge") dismissed DB's claim for the Contract Sum. As for Dr Chang's counterclaim, the Judge dismissed it to the extent it was founded on the grounds of misrepresentation and breach of fiduciary duty. However, the Judge allowed Dr Chang's counterclaim in negligence and awarded him the sum of US$49,047,721.12 in damages. Dissatisfied, DB filed Civil Appeal No 164 of 2012 against the Judge's decision dismissing its claim and allowing Dr Chang's counterclaim in negligence, while Dr Chang brought a cross appeal, *viz*, Civil Appeal No 2 of 2013, against the Judge's dismissal of his counterclaim in misrepresentation. The Judge's decision is reported as *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 ("Judgment").

3 A number of evidentiary battles were fought below. On appeal, however, DB contended that its

case did not depend on a materially different view of the facts being taken from that which the Judge took. It was the legal conclusions that the Judge drew, with which DB took issue.

4 Some interesting questions have been raised. Under what circumstances will a bank come under a tortious duty to exercise care in advising a customer on the management of his wealth where the bank has not undertaken a contractual duty to do so? Will such a duty extend to stopping that customer from entering into transactions, the features of which he *does* understand? Is it legitimate to have regard to the contemporaneous or subsequent execution of contractual documentation between the bank and that customer to determine whether any such tortious duty arose?

Facts

5 This litigation finds its origins in a meeting that took place in Hong Kong in December 2006. That meeting was attended by Dr Chang, his fiancée Professor Carmay Lim ("Professor Lim"), and Mr Wan Fan Ting ("Mr Wan"). Mr Wan was then a priority banking manager in the employment of Standard Chartered Bank, Hong Kong ("Standard Chartered"). Mr Wan learnt from this meeting that Dr Chang would soon come into considerable wealth from the sale of his shares in Tanox Inc ("Tanox"), a NASDAQ-traded company. The sale would enable Dr Chang to monetise his life's work as a scientist.

6 In February 2007, Mr Wan left his employment with Standard Chartered and joined DB's Hong Kong operations as a relationship manager. In that capacity, Mr Wan initiated his second meeting with Dr Chang and Professor Lim. That was an important meeting in the narrative of this case and it took place on 15 March 2007 in Taipei.

7 At this meeting, Mr Wan introduced Dr Chang and Professor Lim to DB's private wealth management services. Mr Wan presented them with a brochure detailing DB's services ("the Brochure"). Professor Lim was persuaded at this meeting to open an account with DB and she duly signed an account application form. Dr Chang did not do the same; instead, he told Mr Wan that he would complete and submit the account application form after he had received the proceeds from the sale of his Tanox shares.

8 Over the next four months or so, Dr Chang made no request for DB to provide him with any advisory or other investment-related services, save that in or about April or May 2007, he did seek some advice from Mr Wan on the sale of his Tanox shares. This advice was given and acted on without incident or complaint.

9 Subsequently, in July 2007, Dr Chang contacted Mr Wan to inform him that he was ready to sign the account application form. He asked Mr Wan to send him the form, which he duly signed and returned. The form was dated 1 August 2007 and it incorporated by reference a service agreement ("the Service Agreement"). By 31 August 2007, Dr Chang had deposited a total of around US$26m into his new DB account. This represented about 20% of the total amount he received from the sale of his Tanox shares.

10 Dr Chang signed a second agreement on or around 23 November 2007, namely, the Master Agreement for Foreign Exchange Trading and Derivatives Transactions ("the Master Agreement").

The purchase of Discounted Share Purchase Programs

11 The term, Discounted Share Purchase Program ("DSPP"), is used by DB to refer to a type of financial instrument known colloquially as an accumulator. In *Teo Wai Cheong v Crédit Industriel et Commercial and another appeal* [2013] 3 SLR 573, we briefly described the salient features of an

accumulator contract for shares (at [4]). For all practical purposes, these were also applicable to DSPPs and are as follows:

(a) First, an investor agrees to accumulate a certain specified quantity of shares of a specified counter from a counterparty over an agreed period ("the agreed period").

(b) The agreement is fixed at a price which reflects a discount to the market price at which that counter is trading at the beginning of the agreed period. This market price is called the "Initial Price" and the discounted price is known as the "Forward Price" or the "Strike Price".

(c) The investor's obligation, which is to acquire an agreed number of shares on each trading day for the duration of the agreed period, may be prematurely terminated by agreement. However, if the market price of the shares rises above a certain specified price, known as the "Knock-Out Price", the accumulator is automatically terminated or "knocked out". This serves to cap the loss of the counterparty.

(d) As long as the prevailing market price is above the Strike Price but below the Knock-Out Price, the investor is obliged to purchase the specified quantity of shares at the Strike Price. In doing so, the investor will be accumulating shares at a discount to the prevailing market price.

(e) As already mentioned, once the Knock-Out Price is struck, the transaction ends. On the other hand, where the market price falls below the Strike Price, the investor may be obliged to purchase a multiple of the previously agreed quantity of shares ("the Multiplying Effect") at the Strike Price. This is also called "gearing" in banking circles. In such circumstances, the investor is incurring losses because the Strike Price is no longer at a discount to the market price. Moreover, in such circumstances, the losses are multiplied as a result of the Multiplying Effect.

(f) Assuming the accumulator does not get knocked out, the investor's maximum exposure under the accumulator in dollar terms is the cost of purchasing the multiple of the specified quantity of shares at the Strike Price for each day of the entire period of the transaction. The maximum exposure is derived on the basis of the market price being below the Strike Price for the entire period of the transaction, on which premise the Multiplying Effect would have been triggered.

12 Between 19 November and 12 December 2007, Dr Chang purchased 32 DSPPs using his DB account. Two more DSPPs were subsequently purchased in February 2008. In total, Dr Chang purchased 34 DSPPs for shares in Citigroup Inc ("Citigroup"), UBS AG, Société Générale SA and Washington Mutual Inc.

Dr Chang purchases shares and DSPPs on the side

13 Dr Chang had, aside from the account with DB, opened at least two other trading accounts at the time; one was with Fidelity Investments and the other with Citigroup Smith Barney. Unbeknownst to DB, Dr Chang used these two accounts to purchase 672,000 Citigroup shares in November 2007 for a total outlay of around US$21m.

14 Dr Chang later opened yet another account with Citigroup Smith Barney in December 2007, but this was in the name of Augusta Auswin Limited ("AAL"). AAL was Dr Chang's investment company; it was incorporated in the British Virgin Islands on 18 January 2007 and Dr Chang was its sole shareholder and director. Between January and May 2008, Dr Chang purchased a total of 32 DSPPs for shares in UBS AG, Société Générale SA and Cheung Kong (Holdings) Limited through the AAL account.

The close-out

15 On 6 March 2008, Mr Wan and his superior, Ms Cecilia Yan, informed Dr Chang that his total exposure under the DSPPs that had been purchased and booked in his DB account was around US$76m. In fact, between January and November 2008, several margin call letters had been issued by DB to Dr Chang. In addition, Dr Chang and Mr Wan had several discussions during this period on the best way to unwind his DSPPs. Eventually, in early November 2008, Dr Chang began selling some of the shares that he had accumulated under his DB account. The DSPPs he had purchased through his DB account but which had not been knocked out were unwound. On 21 and 24 November 2008, DB exercised their contractual termination and security rights and sold Dr Chang's accumulated shares which had been booked in his DB account. After the sale of all the shares, Dr Chang still owed DB the Contract Sum, which formed the basis of DB's original claim.

16 According to Dr Chang, he suffered a total loss of about US$49m from the 34 DSPP transactions that were entered into under his DB account. 18 DSPPs were knocked out while 16 DSPPs were closed out. Dr Chang computed his loss as the amount by which the net proceeds from the sale of the shares accumulated under the DSPPs fell short of his total outlay in connection with the DSPP transactions (these being the total purchase cost of the shares under the DSPPs *plus* the unwinding costs of the DSPPs *plus* the interest paid on the margin financing facility).

The Judge's findings

17 The Judge heard the claim and the counterclaim together. His findings can be summarised in the main as follows:

Negligence

(a) On the "unusual" facts of this case (including the circumstances surrounding the 15 March 2007 meeting and carrying on through to August 2007 when Dr Chang signed the account opening documents), Mr Wan and DB had assumed a duty of care in advising Dr Chang on managing his new wealth (Judgment at [123]–[125]). (The reference at [125] of the Judgment to *Dr Chang* having assumed a duty of care is plainly a typographical error.)

(b) This duty of care was a "pre-contractual" duty which arose before Dr Chang signed the account opening documents in August 2007 (Judgment at [128] and [149]). It arose on 15 March 2007, and the absence of a specialised advisory agreement did not preclude DB's assumption of such a duty (Judgment at [124]–[125]).

(c) The duty to take reasonable care to advise Dr Chang on the management of his wealth was breached when:

(i) Mr Wan and DB sold Dr Chang 34 DSPPs without advising Dr Chang as to the implications of the DSPPs being sold on terms that featured deep discounts to the market price of the underlying shares (Judgment at [143]);

(ii) Mr Wan and DB failed to draw Dr Chang's attention to the escalating risk in his portfolio even as this changed rapidly over the short period between November and December 2007; failed to inform him of his total accumulating exposure; and failed to provide him with any risk management advice (Judgment at [143] and [145]);

(iii) Mr Wan "applied for and DB extended unsolicited and unilateral margin trading

facilities to Dr Chang", when Dr Chang was "not asked nor was he advised of the [multiplied] risks of margin financing" (Judgment at [144]); and

(iv) the material changes between two of Dr Chang's risk profiles passed unnoticed by DB when they ought to have triggered an internal DB enquiry (Judgment at [145]).

Misrepresentation

(d) Dr Chang's counterclaim in misrepresentation against DB failed because the alleged misrepresentations were either:

(i) honestly held statements of a future intention to provide advice (Judgment at [98]);

(ii) statements of facts which were honestly believed to be true (Judgment at [98]); or

(iii) sales puff that did not amount to statements of fact (Judgment at [101]).

Breach of fiduciary duty

(e) The facts of the present case were insufficient to establish that Mr Wan and DB had exceptionally undertaken to promote Dr Chang's interests above their own. There were no exceptional circumstances warranting the finding that DB came under a fiduciary duty to Dr Chang (Judgment at [114]).

Damages

(f) All the losses that Dr Chang suffered from his purchases of the 34 DSPPs were caused in fact and in law by Mr Wan's and DB's breach of the duty of care owed to Dr Chang. The total loss was quantified at US$49,047,721.12, which figure, according to the Judge, was not challenged in DB's closing submissions (Judgment at [149]).

DB's original claim for the Contract Sum

(g) In the light of DB's liability for damages for breach of the duty of care owed to Dr Chang, the Contract Sum was not payable by Dr Chang (Judgment at [150]).

Issues

18 As noted above (at [2]), both DB and Dr Chang have appealed. Accordingly, the following issues arise for our decision and they are discussed below in the following order:

(a) First, did DB assume a tortious duty to take reasonable care in advising Dr Chang on the management of the proceeds from the sale of his Tanox shares?

(b) Second, if such a duty was owed by DB, had it been breached?

(c) Third, were the elements of the counterclaim in misrepresentation established?

(d) Fourth, was DB entitled to succeed in its claim for the Contract Sum?

(e) Finally, if DB had incurred liability to Dr Chang, were the damages appropriately quantified?

19 It is important to note at the outset that this case did not involve any allegation that DB had engaged in the mis-selling of a financial product. Counsel for Dr Chang, Mr K Muralidharan Pillai ("Mr Pillai"), clarified during the hearing before us that Dr Chang's case was *not* that he did not know of or understand the risks inherent in investing in DSPPs. Rather, his case was that he had not been given sound or appropriate strategic investment advice as to the management and structuring of his portfolio as a whole. This is a critical point. In the course of the submissions, much time and effort was directed to the question of whether Dr Chang was a sophisticated investor. This was ultimately irrelevant because it was clear on the facts presented that:

(a) Dr Chang knew and understood how DSPPs worked and hence appreciated the risks inherent in investing in these instruments;

(b) Dr Chang could well have worked out what his overall exposure was if, and to the extent, he was not expressly told this;

(c) Dr Chang was capable of understanding the overall terms and tenor of the various agreements he signed;

(d) Dr Chang could have taken advice or asked questions about anything he did not understand about these agreements but he never did so; and

(e) Dr Chang had, without reference to DB or Mr Wan, purchased 672,000 Citigroup shares in November 2007 for a total outlay of around US$21m, and between January and May 2008 he purchased a total of 32 DSPPs for shares in UBS AG, Société Générale SA and Cheung Kong (Holdings) Limited (see [13]–[14] above and [74]–[75] below).

20 The question of DB's liability to Dr Chang is to be seen and assessed in the context of these facts rather than in an arid and ultimately fruitless inquiry as to whether he should be regarded technically as a sophisticated investor.

Negligence

Did DB owe a duty of care to Dr Chang?

21 Judges have grappled with the precise boundaries of the tort of negligence ever since the salient principles underlying this head of liability were enunciated by Lord Atkin in *M'Alister (or Donoghue) (Pauper) v Stevenson* [1932] AC 562. At its core, the tort of negligence is centred on the observance of a legally imposed duty to avoid foreseeable harm. Some risk of harm or damage must be contemplated or shown to exist and the duty is to take reasonable care to avoid that risk materialising. The cause of action is generally completed when, because of the defendant's breach of that duty, the plaintiff is harmed.

22 The question, whether a duty of care has arisen, must be assessed by reference to the sequence of relevant facts and events up to the time the alleged duty is said to have been breached. For our purposes, the most important development in this regard has been the formulation of a test that incorporates the elements of foreseeability, proximity and policy. In *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"), we examined the issue and held that a unified test was henceforth to be utilised to determine the existence of a tortious duty of care regardless of the type of damage occasioned (at [115]):

115 To recapitulate: A *single* test to determine the existence of a duty of care should be

applied regardless of the nature of the damage caused (*ie*, pure economic loss or physical damage). It could be that a more restricted approach is preferable for cases of pure economic loss but this is to be done within the confines of a single test. ***This test is a two-stage test, comprising of, first, proximity and, second, policy considerations.*** These two stages are to be approached with reference to the facts of decided cases although the absence of such cases is not an absolute bar against a finding of duty. ***There is, of course, the threshold issue of factual foreseeability*** but since this is likely to be fulfilled in most cases, we do not see the need to include this as part of the *legal* test for a duty of care. [emphasis in italics in original; emphasis added in bold italics]

23 We subsequently elaborated on this in *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 ("*Animal Concerns*"), where we stated that while the second stage of the test in general only required the court to consider whether any policy considerations negated or limited the imposition of a duty of care, it did *not* prohibit the court from having due regard to the presence of policy considerations militating *in favour* of the imposition of such a duty (at [77]).

24 To summarise, therefore, the court in determining the existence of a duty of care should consider whether: (a) a threshold issue of factual foreseeability is satisfied; (b) there is sufficient legal proximity for a duty of care to arise; and (c) any policy considerations either negate or support the imposition of a duty of care.

25 The Judge set out to apply this test and he found that DB had assumed a "pre-contractual duty of care" in advising Dr Chang on managing his new wealth (Judgment at [123]–[125] and [128]):

123 I find that the RM [*viz*, Mr Wan] had sought out Dr Chang, and arranged for the 15 March 2007 meeting where he recorded Dr Chang's financial inexperience and that he was looking for advice to manage his new wealth. The RM then undertook to Dr Chang during the Presentation that DB was able to and would advise Dr Chang in managing his new wealth. As a result of the RM's Presentation on 15 March 2007, Dr Chang was persuaded to retain the RM and DB to advise him on managing his new wealth. Although there was no express contract governing their relationship between March and August 2007, Dr Chang had in the interim sought and obtained the RM's advice on how to transfer his Tanox Inc founder shares. When Dr Chang received the funds from the sale of the Tanox Inc shares in August 2007, he promptly opened an account with DB. Dr Chang's lack of sophistication and his looking to the RM and DB to advise him in managing his new wealth was clearly demonstrated by the 15 March 2007 meeting and this was confirmed by the RM's later recording of the same in the RM's submission of Dr Chang's CAPR 3 August 2007.

124 The absence of a specialised advisory agreement does not preclude in these factual circumstances the assumption of a duty of care by the RM and DB to advise Dr Chang in managing his new wealth. There was no follow-up action on the part of the RM or DB after the 15 March 2007 meeting until August 2007 when Dr Chang signed the account application form and placed deposits with DB. The RM and DB did not follow up by informing Dr Chang what services, advisory or otherwise, they would offer him.

125 *I find that these unusual facts cross the line resulting in the RM and Dr Chang assuming a duty of care in advising Dr Chang on managing his new wealth from the 15 March 2007 meeting.*

…

128 … In any event, on these facts Dr Chang is relying on a *pre-contractual duty of care*.

[emphasis added]

26 The reasoning set out in this extract is the essence of the basis on which the Judge found in favour of Dr Chang, and, with respect, it is somewhat unclear. While the circumstances of the 15 March 2007 meeting appear to have been the main consideration underlying the Judge's finding that DB did owe Dr Chang a duty of care, the Judge also made reference to the "unusual facts" which occurred *after* that meeting, including in particular:

(a) the fact that Mr Wan had given advice to Dr Chang on how to transfer his Tanox shares;

(b) the absence of a specialised advisory agreement; and

(c) the fact that DB never followed up by informing Dr Chang of any services, advisory or otherwise, that it would offer him.

Curiously, although the Judge said that he thought the duty came into existence on and from 15 March 2007, he appears to have found that it in fact arose on the basis of the "unusual facts" that came about after that date. According to the Judge, it was these "unusual facts" that caused the line to be crossed and resulted in Mr Wan and DB coming under a duty of care. This seems internally inconsistent in the sense that the duty could not logically have arisen on a particular date by reason only of facts that came into being after that date. Ultimately, nothing turns on this because, as we have observed, the question, whether a duty of care exists, must be judged by reference to the matrix of facts obtaining up to the time the duty is said to have been breached.

27 But we make this observation only to note that the Judge appeared not to think that anything that transpired at the meeting of 15 March 2007 was sufficient by itself to give rise to a duty of care. Insofar as he then relied on subsequent events, which he termed "unusual", it is not apparent to us why or in what way they could fairly be considered to have been out of the ordinary. On the contrary, these facts seem to revolve around a commonplace instance of a bank employee soliciting a high net worth individual to open an investment account with the bank. In its essence, the meeting on 15 March 2007 was a salesperson's pitch, more akin to an invitation to treat which eventually culminated in the signing of the account opening documents. And the facts that transpired subsequently were entirely consistent with this.

28 We therefore do not agree that the Judge's analysis of the facts is sufficient to establish the existence of a duty of care, and it accordingly falls on us to analyse them on the basis of the principles laid down in *Spandeck*.

Our analysis

Factual foreseeability

29 In *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric (practising under the name and style of W P Architects)* [2007] 1 SLR(R) 853, it was observed that the threshold requirement of factual foreseeability "will almost always be satisfied" [original emphasis omitted] (at [55]). This statement was endorsed in *Spandeck* subject to the observation that factual foreseeability is nonetheless a threshold question which the court must be satisfied is fulfilled "failing which the claim does not even take off" (at [76]). The present case illustrates why the inquiry remains a material one.

30 Was it factually foreseeable that a failure by DB to exercise reasonable care would harm Dr Chang? Of course, to answer this question, it is necessary first to establish just what DB undertook to

do, and that which, it is contended, DB was required to do with reasonable care. Beginning with the date of the meeting between Dr Chang and Mr Wan on 15 March 2007, on the facts it is impossible to see that DB had in fact undertaken to do *anything*, at least at that time. The Judge placed much reliance on the fact that Mr Wan made a presentation in the course of which he touted various services that *could* be offered, but whatever Mr Wan might have said, the one undeniable fact of the matter is that no agreement was reached at that meeting as to any services that *would* be carried out by DB for Dr Chang. Even assuming Mr Wan put forward DB's ability and interest in providing Dr Chang with investment advisory or wealth management services, it is clear beyond doubt that:

(a) they did not offer and Dr Chang did not accept or act on any specific advice at that meeting; and

(b) any willingness on DB's part to provide such services would have to be fleshed out with a much fuller exchange of information. There was no question of this having been agreed to or accepted at that meeting since Dr Chang expressly declined to open any account and said that he would only get in touch with Mr Wan after the sale of his Tanox shares had been concluded.

31 In that light, we turn to consider the subsequent "unusual facts" relied on by the Judge, the first of which was that DB failed to follow up on this meeting "until August 2007 when Dr Chang signed the account application form and placed deposits with DB" (Judgment at [124]). With respect, we do not agree that this was at all unusual in the circumstances. The ostensible lack of follow up was actually entirely consistent with the fact that Dr Chang had told Mr Wan at the 15 March 2007 meeting that he did not wish to open the account at that stage and would contact Mr Wan for this purpose only after he had completed the sale of the Tanox shares. In these circumstances, it would instead have been "unusual" if DB had pestered Dr Chang to conclude an arrangement or to accept DB's services before August 2007. On the contrary, the facts are that prior to August 2007 when the DB account was opened:

(a) DB had not undertaken to do anything;

(b) Dr Chang had no expectation that DB would do anything;

(c) consistent with this, DB had no duty to do anything; and

(d) DB in fact did nothing on its own initiative for Dr Chang.

32 The Judge also seemingly relied upon or at least referred to DB's failure to put forward a specialised advisory agreement or to specify "what services, advisory or otherwise, they would offer him" (Judgment at [124]). It is not evident to us how this could possibly be relied on to support the finding of a duty of care. On the contrary, what is material is that if Dr Chang genuinely believed that he was to receive a formal proposal to this effect, he undoubtedly knew that he never got it, and he never pressed for it.

33 In the circumstances, prior to August 2007 we do not think that even the inquiry of factual foreseeability could be resolved in Dr Chang's favour.

34 Before leaving this issue, we can dispose of one other point that the Judge and, before us, Mr Pillai referred to and that is that Dr Chang had approached Mr Wan for some advice on how to transfer his founder shares in Tanox. We make two short observations on this:

(a) Such advice as was given appears to have been of a sort that might routinely have been

sought from a solicitor. The fact that Dr Chang preferred to get this assistance from Mr Wan, presumably at no cost, does not provide any basis for finding a general duty of care to offer investment advisory or wealth management services. Nor do we find any aspect of this interaction between Dr Chang and Mr Wan in any way "unusual".

(b) There was no suggestion that there was anything objectionable in such advice as was given by Mr Wan on this issue.

Proximity

35 The next earliest point at which any duty of care could possibly have arisen was in late July 2007, when Dr Chang contacted Mr Wan with a view to opening an account with DB. We assume (without deciding the point) that, at this stage, the inquiry as to factual foreseeability would be resolved in Dr Chang's favour and turn to the element of legal proximity.

36 In *Spandeck*, we made the following observations:

(a) when determining whether there is sufficient legal proximity, the particular facts of a case should be examined to determine the closeness and directness of the relationship between the parties (at [77]–[78]); and

(b) the twin criteria of voluntary assumption of responsibility and reliance may be used to demonstrate proximity (at [81]).

37 The contractual matrix is, of course, a factor to be considered when determining the question of legal proximity between the parties (see *Spandeck* at [108]; *Animal Concerns* at [66]). Indeed, the emphasis on the closeness and directness of the parties' relationship requires that *all* the facts should be examined, including those leading up to the conclusion of a contract (where that is part of the relevant factual matrix). In particular, circumstances showing that the alleged tortfeasor never undertook any relevant responsibility in its contract, or qualified it or even disclaimed it, would ordinarily be expected to feature in any court's inquiry on the existence of a duty of care.

38 In this case, as mentioned, Mr Pillai clarified that Dr Chang's case was *not* that he did not know of or understand the risks of investing in DSPPs. Rather, Dr Chang's case was that he had not been given sound or appropriate strategic investment advice as to the management and structuring of his portfolio as a whole. Where a person has voluntarily assumed a responsibility to give (and does give) financial or investment advice to another who then relies upon that advice, it may ordinarily be concluded that an advisory relationship has arisen between them. The existence of such a relationship will in turn give rise to the accompanying duty of care in tort. So much was adverted to by Gloster J (as she then was) in *JP Morgan Chase Bank (formerly known as The Chase Manhattan Bank) (a body corporate) and others v Springwell Navigation Corporation (a body corporate)* [2008] EWHC 1186 (Comm) ("*Springwell (HC)*") (at [450], [455] and [457]). Her observations in that judgment on the indicia of an advisory relationship were summarised in *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) (at [508]), and cited by the Judge below (Judgment at [120]). We agree in the main with these observations, but wish to emphasise that ultimately the key question is whether in all the circumstances there was sufficient proximity in the dealings between the parties. In *Springwell (HC)*, for instance, a distinction was drawn between advice given with the backing of research and study on the one hand and opinions given by a salesman in the course of trying to make a sale (at [361] and [452]). This is generally correct not as a rule or principle of law but where it is the result of the inquiry into whether the dealing was such as to give rise to a relationship of sufficient proximity. It follows from this that the *non*-existence of an

advisory relationship on the facts should not immediately be taken to mean that the requisite legal proximity as would give rise to a duty of care is absent. The court must ultimately have regard to all the circumstances of the case.

39 With these principles in mind we turn to examine the relevant facts. In late July 2007, Dr Chang informed Mr Wan that he was ready to open an account with DB. Mr Wan replied on 27 July 2007 that he had sent the DB account opening forms which Dr Chang should sign and courier back to him in Hong Kong. On 31 July 2007, Dr Chang told Mr Wan in the course of a telephone conversation that he would inform the latter if he had any questions pertaining to the account opening documents. In the event, no questions were forthcoming. Dr Chang duly signed and couriered the account opening documents back to Mr Wan in early August 2007. While Dr Chang subsequently claimed that he had not actually read the documents, he did not run a case of *non est factum*. On the facts that were before us, it was ultimately irrelevant whether he had in fact read the account opening documents since there was no suggestion that he did not have ample opportunity to do so, or that he would not have been able to understand their drift and tenor or to clarify any doubts.

40 As mentioned earlier, the account opening documents were dated 1 August 2007 and incorporated the Service Agreement. Crucially, the Service Agreement does *not* refer to any obligation on the part of DB to provide strategic advice on Dr Chang's investment portfolio as a whole or on the management of his wealth. We return here to the Judge's observation that DB did not spell out the advisory services it would offer. In fact, the critical point here is that whereas the meeting of 15 March 2007 was a precursor to the parties entering into a relationship with one another, on 1 August 2007 they did just that *and* they executed a series of documents that were intended to define and govern that relationship. It was pursuant to this that the DB account was duly opened. The account was an execution-only account, meaning that DB's role was confined to executing orders on behalf of Dr Chang. DB had no discretionary mandate to enter into whatever transactions it thought appropriate having regard to any investment objectives laid down by Dr Chang. On the totality of these facts, and having regard to the terms of the Service Agreement, it seems clear to us that DB had not assumed any responsibility to provide such advisory services as Dr Chang contended.

41 On 22 August 2007, Mr Wan met Dr Chang and Professor Lim in Taipei over lunch. At this meeting, Dr Chang did not express much interest in actively trading on his DB account. Evidently, this was because he had not yet received the sale proceeds from his Tanox shares. However, in the course of this meeting, Dr Chang signed certain supplementary documents in respect of his newly opened account with DB: a master subscription agreement and an online services application form. These documents did not alter the nature of the relationship that had been constituted between DB and Dr Chang. We note that there was an extremely brief discussion at this meeting between Dr Chang and Mr Wan about investing in "fixed income alternatives", but this clearly did not give rise to any basis for concluding that Mr Wan had assumed a responsibility on DB's behalf to provide general investment advice on Dr Chang's portfolio or on the management of his wealth.

42 During the months of September and October 2007, Mr Wan sent a number of emails to Dr Chang introducing various possible investments in the way of bonds, preference shares and equities. Dr Chang did not invest in any of the products suggested by Mr Wan, save for US$910,000 in perpetual bonds issued by Crédit Agricole SA (which was a mere fraction of Dr Chang's portfolio as at 31 October 2007) and some dual currency deposits. Importantly, at no time did Mr Wan offer or attempt to offer advice on the structuring of Dr Chang's overall portfolio. Mr Wan's emails were really in the nature of solicitations or sales pitches. For example, in an email dated 21 September 2007, Mr Wan wrote to Dr Chang as follows:

> Attached is the bond portfolio with very good rating and value for your reference.

In another email dated 3 October 2007, Mr Wan wrote:

> This is another good value bargin [*sic*] buy because it is AAA rated bank in Netherland [*sic*]. Offer semi-annual interest rate. Min is 100K USD.

It is impossible to see how communications of this ilk could possibly give rise to the conclusion that Mr Wan or DB had assumed any responsibility to render investment advice on Dr Chang's portfolio or on the management of his wealth.

43 In sum, the circumstances of the 22 August 2007 lunch meeting and the emails sent in September and October 2007 do not bear out the suggestion that DB had assumed any responsibility to give Dr Chang such strategic investment advice as the latter contended was the case in these proceedings. The introduction of products and the giving of recommendations form part of the normal role of a salesperson in the private banking context, and the mere fact that this transpired here is not sufficient by itself to give rise to an advisory relationship, with its accompanying tortious duties of care (*Springwell (HC)* at [450]–[451]).

44 This is especially so when seen in the overall context of the relationship between the parties. Trades were only entered into at Dr Chang's direction. There was no discretion vested in DB. Nothing in the contractual arrangements hinted of any obligation being undertaken by DB to advise Dr Chang on his investment portfolio or on the management of his wealth. Of course, it would have been possible to structure such an arrangement. But that would in all likelihood have given rise to a different set of documents specifying such things as Dr Chang's expected rate of return, the limits on the type of transactions he was or was not comfortable dealing with, the anticipated investment time horizon, DB's fee structure for such services and so on. The simple point is that this would have been a wholly different universe to what was reflected in the documents that Dr Chang *did* sign. Nothing in the evidence suggested that such issues had even been discussed.

45 On 19 November 2007, Dr Chang telephoned Mr Wan with the intention of purchasing a DSPP for Citigroup shares on behalf of Professor Lim. Such a purchase was made; however, Dr Chang then indicated in the course of the same conversation that he wished to purchase a DSPP for himself. Mr Wan suggested that he should hold off investing in DSPPs until after the conclusion of Professor Lim's DSPP contract, but Dr Chang was insistent.

46 At or around the same period, Dr Chang signed the Master Agreement dated 23 November 2007. Nothing in the Master Agreement contemplates any obligation on the part of DB to provide general advice on Dr Chang's investment portfolio or on the management of his wealth.

47 Unbeknownst to DB, and as mentioned earlier, Dr Chang had separately begun to accumulate Citigroup shares. He had purchased a total of 672,000 Citigroup shares through his accounts with Fidelity Investments and Citigroup Smith Barney between 14 and 29 November 2007 at a cost of around US$21m.

48 It is in the context of all these facts that the question of legal proximity is to be assessed. The critical point that seemed to trouble the Judge centred on the fact that in the course of a short period of 24 days, between 19 November and 12 December 2007, Dr Chang purchased 32 DSPPs. As troubling as this might seem on its own, the legal basis for imposing liability on DB in such circumstances must be carefully analysed. We make two points here:

(a) Given the clarification and the consequent observations we have made at [19] above, Dr Chang's case was not and indeed could not be run on the premise that he needed advice about

the nature of DSPPs. The question in analysing the events surrounding his acquisition of these DSPPs is not whether DB should have warned him about their potential toxicity because this was not the case that he was running against DB. Indeed, by all accounts the inference to be drawn in the circumstances is that Dr Chang was less concerned about this simply because he had taken a view on the market and it was a view, with its accompanying risk, that he was entitled to take.

(b) The case that *was* run was that Dr Chang was a novice who did not understand how best, or sensibly, to structure his overall portfolio and so ended up with a dangerous overconcentration of DSPPs which caused him the losses that he incurred. It is perhaps true that Dr Chang was a novice; and it is undoubtedly true that he did in fact end up with a dangerous overconcentration of DSPPs. The question for us is whether, on the facts presented, DB had either voluntarily undertaken a responsibility to advise Dr Chang on how to structure his portfolio, or known that Dr Chang was relying on them to render such advice and moved forward on that basis without disabusing him of any notion that he could so rely on them. In short, as we have put it earlier, had an advisory relationship come into being?

Analysis of the issue of legal proximity

49 In our judgment, the circumstances prevailing from late July to November 2007 plainly fail to establish an advisory relationship between DB and Dr Chang. The facts do not bear out any suggestion:

(a) that DB or Mr Wan had assumed any responsibility to render investment or wealth management advice to Dr Chang; or

(b) that Dr Chang was relying on DB to provide such advice, and that DB knew this and went along with it.

50 First, each of the agreements mentioned at [39]–[41] and [46] above simply do not refer to any obligation on, or assumption of responsibility by, DB to provide investment advice to Dr Chang on his portfolio or on the management of his wealth. A perusal of these agreements would have revealed this, and there can be no reasonable basis for suggesting that Dr Chang either could not understand the terms of the agreements he signed (and which formed the basis on which he opened his account) or was misled as to those terms.

51 Second, as a matter of the evidence, it would have been highly unusual to find two quite separate types of relationship between the same parties where one, an execution-only contractual relationship, was meticulously recorded in written agreements while the other, a general undertaking to provide investment and wealth management advice, was not only not so recorded but was not even hinted at anywhere in the evidence at all. Moreover, as a matter of law, it would be equally unusual in such circumstances to find that wide obligations were imposed on or assumed by DB in tort well beyond those expressly or impliedly undertaken in the agreements that DB entered into with Dr Chang (see, *eg*, *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and others* [1986] AC 80 at 107). The Judge found that such a duty had been undertaken and he characterised it as a pre-contractual duty. This characterisation is wont to confuse because it suggests that the pre-contractual duty was a prelude to the execution of a contract which would address that very undertaking. In general, where parties are in pre-contractual negotiations looking to conclude a formal agreement, the expectation is that their mutual rights and obligations will be set out there. In this case, a series of contracts did follow and no plausible attempt has been made to explain how the "pre-contractual" duty somehow survived the parties' entry into those contracts on terms that did not include or

contemplate such a duty.

52 Third, the fact that DB may have told Dr Chang at the 15 March 2007 meeting that it had the capability to provide investment and wealth management advice did not amount to their having undertaken to place that capability at Dr Chang's service. There was no evidence before us to suggest that it had so undertaken. The question then is whether advice was in fact given by DB in such circumstances that it attracted the imposition of the obligations and duties of care of an investment advisor in respect of the views actually expressed (*Springwell (HC)* at [452]). Of this, again, there is no evidence.

53 Fourth, Dr Chang's complaint was that DB had a positive duty to stop him from, or perhaps more realistically, at least to warn him *against*, entering into the number of DSPPs that he did. Leaving aside the fact that attempts were in fact made to quell Dr Chang's enthusiasm for these instruments (of which more will be said shortly), it is not evident to us how, in the light of the forgoing facts, DB could be said to have come under such a duty as a matter of law. At the material time, DB was dealing with a customer who had considerable means and an evident understanding of what he was doing and why. He was dealing with DB to trade for him. Even if DB had known that he was a novice, that fact alone would not have been sufficient to create a *legal* duty on their part to stop him from undertaking trades, the potential risks and rewards of which it believed he understood, and which, as it transpired, he did.

54 Fifth, Dr Chang never asked Mr Wan or DB at any time for investment advice on his portfolio or on the management of his wealth. Clearly, Dr Chang did not view their relationship at the material time as one in which he expected Mr Wan and DB to render advice in the design and construction of a successful investment portfolio. If he had ever thought that this was what DB had agreed to do, then he could not have missed the fact that it never in fact did this; and his utter silence in pressing them to do this would be inexplicable given the extensive and regular contact he had with DB's officers throughout the material periods. Significantly, he was trading large amounts in other accounts which he never mentioned to DB. This too was inconsistent with any suggestion that Dr Chang thought DB had assumed a responsibility to give advice on the management of his wealth or on his overall portfolio. How could Dr Chang have reasonably thought that DB had undertaken a responsibility to advise him on the management of a portfolio about which it did not have a complete picture?

55 Finally, no investment advisory agreement was ever signed between DB and Dr Chang. In the absence of other relevant circumstances, this is a significant pointer against the existence of an advisory obligation (*Springwell (HC)* at [435] and [441]).

56 All these facts show that an investment advisory relationship, along with its consequential duties of care, did not arise here. Indeed, the totality of the circumstances before us simply did not lead us to conclude that the requisite legal proximity had been established such as would give rise to a duty of care on DB's part.

57 Mr Pillai sought to rely on our decision in *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 ("*Go Dante Yap*") to support his argument that a duty of care did arise here. That case was of no assistance to Mr Pillai. In *Go Dante Yap*, the client signed a discretionary investment management agreement which conferred on the bank the discretion to trade in securities on his behalf. Even though this discretion was limited by another agreement which vested the client with the final authority to decide which securities to purchase or sell, it was held that the bank owed its client a duty to take reasonable care in rendering services to him and in following his instructions. Sufficient proximity was found in that case, principally because of the bank's acceptance of "the [client] as someone *whose money and assets were under its control*, and on whose behalf it could and was

expected to expend considerable sums in order to acquire various investments" [emphasis added] (at [35]). Crucially, this element was absent in the present case: Dr Chang did not place any money or assets under DB's *control*, nor did he expect DB to expend considerable sums of his money to acquire investments on his behalf.

Conclusion on the issue of legal proximity

58 A key plank of the Judge's conclusion on the existence of a duty of care was his finding that DB undertook to Dr Chang during the 15 March 2007 meeting that it was able to and would advise Dr Chang in managing his new wealth. For the reasons stated above, this was erroneous. Even the Judge appeared to think that no duty of care came into existence on 15 March 2007. The fact that Dr Chang suffered horrendous losses should not be allowed to divert attention from the key inquiry, which is whether DB came under a duty of care in managing his wealth. If one has proper regard to what transpired after that fateful day, it remains clear, in our judgment, that no duty of care ever came into existence.

59 Finally, although this formed no part of Dr Chang's case, for completeness, we observe that whereas DSPPs are *now* considered high-risk instruments which attract the highest risk ratings, at the time these transactions were entered into, DSPPs were internally rated by DB's Private Wealth Management group as Class 3 products (with Class 5 being the highest risk). There was no evidence before the court that Class 3 products were considered inherently unsuitable for an investor such as Dr Chang at the time he purchased them.

Some observations on the applicability of the UCTA

60 This is sufficient for the purposes of dealing with DB's appeal against the Judge's finding on Dr Chang's counterclaim. However, especially as counsel had made submissions on this, we think it desirable to state our tentative views on one aspect of the general law surrounding the imposition of a tortious duty of care where the giving of investment advice is concerned. The particular point is whether contractual provisions which have the effect of restricting or excluding a tortious duty are subject to the test of reasonableness under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA").

61 In *Nitine Jantilal v BNP Paribas Wealth Management* [2012] SGHC 28 ("*Nitine Jantilal*"), a client argued that his bank owed him a duty of care in tort in the management of his financial affairs. It was held there that the existence of such a duty was negatived by, among other things, the presence of certain non-reliance clauses in the signed documentation between the bank and the client (at [13]–[14]). This decision was upheld on appeal (in Civil Appeal No 19 of 2012) without any written grounds of decision being issued.

62 The court in *Nitine Jantilal* did not have to consider the (frequently harnessed) argument that non-reliance and non-representation clauses merely define the basis of the relationship of the parties and do not exclude liability. Such basis clauses, as they are commonly known, are said to be effective in excluding a tortious duty of care altogether; yet, it is argued that such clauses do not fall within the ambit of the UCTA because they are not in fact exclusion clauses: see, *eg*, *IFE Fund SA v Goldman Sachs International* [2007] 2 Lloyd's Rep 449; *Springwell (HC)*; *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] 2 Lloyd's Rep 92; *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2011] 1 Lloyd's Rep 123; *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] 2 CLC 705; *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] 2 BCLC 54 ("*Camerata*").

63 In our view, this issue invites further clarification and analysis. The argument is that clauses which define the scope or nature of the relationship between the parties are different in kind from those which exclude liability for breach of an existing duty. But this seems to place undue emphasis on the *form* of the language used rather than on its substantive *effect*. Section 13(1) of UCTA prevents a party from excluding or restricting liability by reference to a contractual term or non-contractual notice *which excludes or restricts the relevant obligation or duty*. This seems to preclude any material distinction being drawn between clauses which exclude liability and those which restrict the scope of the duty or the obligation.

64 We note that none of the judgments cited at [62] above appear to have examined the effect of the decisions of the English Court of Appeal in *Phillips Products Ltd v Hyland and another* [1987] 1 WLR 659 ("*Phillips*") and of the House of Lords in *Smith v Eric S Bush* [1990] 1 AC 831 ("*Smith*"). The Judge also did not refer to either *Phillips* or *Smith* in his discussion of this issue (Judgment at [127]).

65 In *Phillips*, the plaintiff hired an excavator and driver from the second defendant. Clause 8 of the conditions of hire provided that the driver alone would be responsible for all claims arising in connection with the operation of the excavator. Unfortunately, the driver negligently caused considerable damage to the plaintiff's building while operating the excavator. The second defendant argued that cl 8 did not fall within the UK equivalent of s 2(2) of the UCTA because it was no more than an attempt by the parties to divide and allocate the obligations arising in relation to the contract by transferring the liability for the acts of the driver from the second defendant to the plaintiff. It was further argued that such a transfer was not an attempt to exclude liability within the meaning of the UCTA. However, Slade LJ was wholly unconvinced by this argument and, in rejecting it, said as follows (at 666):

> … In applying section 2(2), it is not relevant to consider whether the form of a condition is such that it can aptly be given the label of an "exclusion" or "restriction" clause. There is no mystique about "exclusion" or "restriction" clauses. To decide whether a person "excludes" liability by reference to a contract term, ***you look at the effect of the term. You look at its substance.*** The effect here is beyond doubt. [The second defendant does] most certainly purport to exclude their liability for negligence *by reference to* clause 8. … [emphasis in italics in original; emphasis added in bold italics]

66 A few years later, *Smith* reached the House of Lords. An argument similar to that made in *Phillips* was raised again, albeit this time in the context of a non-contractual notice, *ie*, that such a notice in preventing a duty of care from ever arising was outside the operation of the UK equivalent of the UCTA. This argument was flatly rejected by Lord Templeman, who observed (at 848):

> … This construction would not give effect to the manifest intention of the Act but would emasculate the Act. The construction would provide no control over standard form exclusion clauses which individual members of the public are obliged to accept. …

67 Similar sentiments were expressed by Lord Griffiths (at 856–857) and Lord Jauncey of Tullichettle (at 873). Lord Griffiths also cited *Phillips* with approval (at 857). *Phillips* and *Smith* therefore stand for the proposition that any attempt to exclude or restrict an obligation or duty by reference to a contractual term or non-contractual notice will not be effective, unless the term or notice satisfies the requirement of reasonableness under the UCTA.

68 This seems to us at present to be correct because the mere fact that a clause is labelled a basis clause should not be determinative as to its true effect. The term "basis clause" appears to have developed in contradistinction to the term "exclusion clause" and to this extent it might be an

unfortunate misnomer. The UCTA does not in fact contain any reference to "exclusion clauses". Rather, the UCTA simply addresses itself to clauses which "exclude or restrict" a liability, obligation or duty. The legislative eye is firmly set on the substantive *effect* of a term or notice, rather than on its *form* or identification. Seen in this light, the only question which arises for a court is whether a term or notice has the effect of excluding or restricting the imposition of a duty of care in law. If so, it will have to satisfy the requirement of reasonableness. It has not been necessary for us to address either of these questions in this case because, on the view that we have formed from all the other surrounding circumstances, there was no duty to begin with.

Standard of care and breach of duty

69 Much time and effort was spent in the parties' oral and written submissions addressing the relevant standard of care and whether the alleged duty had in fact been breached. Again, on the view we have formed, it is not necessary for us to reach this issue but in deference to the arguments that were presented, we comment on this briefly.

70 The Judge found that DB had breached their duty of care in advising Dr Chang on managing his new wealth when:

(a) Mr Wan and DB sold Dr Chang 34 DSPPs without advising Dr Chang as to the implications of the DSPPs' deep discount to the market price of the underlying shares (Judgment at [143]);

(b) Mr Wan and DB failed to provide Dr Chang with any risk management advice (Judgment at [143]);

(c) DB extended unsolicited unilateral margin trading facilities to Dr Chang (Judgment at [144]); and

(d) DB failed to notice Dr Chang's sudden recorded changes in his risk profile (Judgment at [145]).

71 On appeal, Mr Pillai submitted that this duty had been breached because:

(a) DB failed to warn Dr Chang of the risk of holding too many international bank DSPPs ("overconcentration risk");

(b) DB failed to warn Dr Chang of his total maximum exposure under the DSPPs purchased; and

(c) DB unilaterally extended margin trading facilities to Dr Chang without warning him of the multiplied risks of trading on margin.

72 As a preliminary point, we note that Dr Chang did not adduce any expert evidence as to whether any advice that Mr Wan failed to give was advice that a reasonable and competent relationship manager in Mr Wan's position ought to have given. The opinion of Dr Chang's expert witness, Professor Ho Yew Kee ("Professor Ho"), was not ultimately helpful because Professor Ho is a professor specialising in accounting studies. He had no professional experience as a relationship manager in the private wealth management industry and it was not clear on what alternate basis he could offer assistance on the issue of the applicable standard of conduct for relationship managers in Mr Wan's situation. As Butler-Sloss LJ said in *Sansom v Metcalfe Hambleton & Co* [1998] PNLR 542 (at 549):

> … [A] court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party) *without evidence from those within the same profession* as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard. It is not an absolute rule as Sachs L.J. indicated by his example [in *Worboys v Acme Investments Ltd* (1969) 4 BLR 133 at 139] but, less [*sic*] it is an obvious case, in the absence of the relevant expert evidence the claim will not be proved. [emphasis added]

These observations were applied in *Camerata* (at [189]), a case concerning private banking.

73 But there were other, more serious, weaknesses in Dr Chang's case. As to Dr Chang's first contention that DB failed to warn him of the overconcentration risk, at no stage did Dr Chang attempt to show *when* his portfolio of DSPPs became overconcentrated such that a reasonable relationship manager in Mr Wan's position should have warned him against further purchases of DSPPs. In the present case, Mr Wan did in fact warn Dr Chang of the overconcentration risk on 3 December 2007 and Dr Chang has not explained why this was insufficient to discharge any obligation DB had come under or adduced evidence to suggest that this warning came too late. In fact, Dr Chang's response to Mr Wan's warning on 3 December 2007 was to assure him that he would be able to top up the collateral in his account, should this prove necessary. Indeed, similar warnings were expressed by Mr Wan on 7, 10 and 12 December 2007 in the course of their telephone conversations. However, Dr Chang purchased a further 14 DSPPs during the same period (from 4 to 12 December 2007).

74 This was also significant in underscoring the precise nature of the relationship between DB and Dr Chang. DB did not manage his portfolio; it merely identified products and investment opportunities for his consideration. This also demonstrated that Dr Chang was undeterred by Mr Wan's warnings. Dr Chang's case that DB failed to warn him of his overconcentration risk was further weakened by his purchase of 27 *more* DSPPs for shares in UBS AG, Société Générale SA and Cheung Kong (Holdings) Limited in the months of January and February 2008 through his AAL account without DB's knowledge.

75 By May 2008, this number had risen to 32 DSPPs in his AAL account. These purchases go some way towards corroborating DB's case that Dr Chang had entered into his earlier DSPP transactions using his DB account not because of any alleged misrepresentations or advice attributable to DB or of any failure on their part to warn him not to do so. In fact, aside from Mr Wan's warnings in December 2007, Mr Kai Chen, the Citigroup Smith Barney relationship manager for the AAL account, had also expressed serious reservations about Dr Chang's further purchases of accumulators. In particular, Mr Kai Chen informed Dr Chang on 5 February 2008 that:

> … Per my earlier phone conversation, I am concern about the single stock concentration risk on your position and I know the current accumulated shares still very small as we just begin this month and we should stick on the sell plan to reduce the risk.

Dr Chang responded on the same day:

> I appreciate that you and your company monitor the risk of my investment. My rationale for investing in Citibank, UBS and Societe Generale [*sic*] at their present price ranges are the following:
>
> (1) they are being traded near their book values,
>
> (2) their dividend yields are 4-6% even with dividend cut adjustments,

(3) their share prices are near yearly or 5-year low,

Plus, they are among the largest banks in the world, each with very extensive international operations.

I choose Chong [*sic*] Kong among the largest companies in the HK exchange, because it has a relatively low price to book ratio, P/E ratio, and a solid growth record.

I fully understand my obligation to adhere to the collateral requirement. Please get approval for me to purchase my accumulator and deaccumulator [*sic*] contracts within my collateral amount allocated to my bank account. If a sharp financial down-turn should occur, I have other asset to back up.

As seen from this response and his further purchases of accumulators from February to May 2008, Dr Chang made a demonstrably independent decision to enter into such contracts as a means of accumulating shares in banks and blue chip companies. The warnings he did get never deterred his resolve.

76 Next, as to the allegation that DB failed to warn Dr Chang of his total maximum exposure under the DSPPs purchased, the fact is that Dr Chang could easily have worked out his maximum exposure from the DSPP term sheets and excel spreadsheets that were regularly given to him by DB. The remarks of Reyes J in *Kwok Wai Hing Selina v HSBC Private Bank (Suisse) SA (formerly known as HSBC Republic Bank (Suisse) SA)* [2012] 4 HKC 260 are apposite (at [112]–[113]):

112. Thus, it is difficult to believe that, had she applied her mind to the matter, Ms Kwok could not have calculated her maximum (worst possible scenario) exposure on [a Forward Accumulator ("FA")]. That would be the situation where the market price went down to 0 immediately after an FA was executed. In that case, the exposure would be 2 x the daily number of shares which she was obliged to buy x the strike price x the number of trading days in a year (roughly 250).

113. Mr Fung made great play in Court about Ms Kwok not having a computer. But an ordinary calculator or pen and paper should have sufficed.

Significantly, Dr Chang himself agreed in cross-examination below that it would have been a matter of simple arithmetic to calculate how much was payable under each DSPP contract.

77 We lastly touch on the fact that DB had unilaterally provided margin trading facilities to Dr Chang. The short point here is that Dr Chang clearly knew that he was purchasing DSPPs on a margin basis. First, Dr Chang was furnished with the terms of DB's margin trading facility by a letter addressed to him on 28 November 2007. Second, the transcripts of various telephone conversations between Dr Chang and Mr Wan from 29 November to 3 December 2007 reveal that Dr Chang quite clearly appreciated the fact that he was trading on margin:

(a) On 29 November 2007, Dr Chang decided to withdraw his purchase order for a DSPP for shares in DB itself because the purchase would require him to pay the full amount in cash and this would use up the entire value of his collateral. It was also explained to Dr Chang that he could instead choose to purchase other DSPPs (such as those for UBS AG or Citigroup shares) which did not have such a requirement. Specifically, Mr Wan mentioned that Dr Chang should "use the minimum amount of money to get the biggest profit". After this explanation, Dr Chang placed an order to purchase two DSPPs for Citigroup shares instead.

(b) On 30 November 2007, Dr Chang made inquiries on "his buying power" with respect to DSPPs for UBS shares, as well as on the collateral requirement of such DSPPs. It was explained to him that the collateral requirement was 25%, which meant that Dr Chang only needed $25 of collateral in his DB account to make a $100 purchase.

(c) On 3 December 2007, Dr Chang had placed orders for DSPPs for shares in UBS AG and Société Générale SA. He was then informed by Mr Wan that he had used up all of his collateral. In response, Dr Chang reduced these orders by half in order to free up some of his collateral to purchase more DSPPs for Citigroup shares. Finally, Dr Chang also expressed his willingness to top up his collateral with DB in the event of a margin call.

78 In the circumstances, even if we had found that DB owed a duty to Dr Chang to take reasonable care in advising him on the management of his wealth, Dr Chang would not have succeeded on the facts in showing that such a duty had been breached. He was aware and was in fact warned of the overconcentration risk. He was or ought to have been aware of the scale of his total exposure. And he knew he was trading on margin and fully intended to exploit the full extent of his leverage. This was all so because he was convinced that he was accumulating the shares in question at prices that would ultimately prove profitable.

Contractual estoppel

79 In view of our decision that DB did not owe Dr Chang a tortious duty of care in relation to the giving of wealth management advice, it is unnecessary for us to rule on the submissions that were made on the doctrine of contractual estoppel. We doubt the correctness of the Judge's exposition of this area of the law but as the issues raised are important, they are better addressed on a future occasion when it is necessary to do so.

Misrepresentation

80 We now consider Dr Chang's cross appeal against the Judge's decision dismissing his counterclaim in misrepresentation. Dr Chang's case was that the following written statements in the Brochure were representations of fact:

(a) DB *would* always act in the best interest of their clients and that their clients could trust Deutsche Bank Private Wealth Management ("DBPWM") to manage their wealth and investments;

(b) DB *would* act as a financial advisor to their clients and would help to manage their clients' wealth and investments;

(c) DB *would* do their utmost to understand their clients' investment objectives and investment experience;

(d) DB *would* be able to provide financial products and investment advice that were customised to suit their clients' investment objectives and investment experience; and

(e) DB *would* provide a team of competent and responsible bankers, relationship managers and resources who were qualified and authorised to advise on and manage their clients' wealth and investments.

81 Dr Chang also alleged that Mr Wan had made the following oral representations in the course of the presentation on 15 March 2007:

(a) Mr Wan fully understood Dr Chang's and Professor Lim's investment objectives and concerns that they had shared with him orally at the presentation on 15 March 2007;

(b) DBPWM *would* be able to provide financial advice to Dr Chang and Professor Lim and manage their wealth and investments in accordance with their investment objectives and needs;

(c) within DBPWM, one of Mr Wan's strengths was in the area of bond investments and his team members in DBPWM had strengths in other areas of investment;

(d) as a team, DBPWM *would* be able to meet the wealth management and investment needs of Dr Chang and Professor Lim;

(e) as a team, DBPWM *would* be able to offer a variety of financial products which would be tailored to meet the requirements of Dr Chang and Professor Lim;

(f) the services provided by DBPWM were amongst the best when compared to other international banks; and

(g) if Dr Chang and Professor Lim were customers of DBPWM, Mr Wan could travel to Taiwan to meet them if they needed to speak to him in person on their wealth management and investment needs.

82 Before we consider the merits of Dr Chang's appeal on the misrepresentation issue, we note that Dr Chang had in fact changed his case in the course of the proceedings below. His original pleadings alleged that DB had made false representations regarding the nature, features and risks of DSPPs. Subsequently, after general discovery was completed, it became apparent that Dr Chang was well apprised of the nature, features and risks of trading DSPPs. Dr Chang then amended his pleadings to allege that DB had misrepresented to him that it would provide a customised wealth management service which he could trust: (a) while offering a set of banking terms which had the opposite effect without pointing out the discrepancy; and (b) despite knowing that Dr Chang was a financially unsophisticated customer. Dr Chang accordingly anchored his revised counterclaim in misrepresentation to the representations allegedly made at the 15 March 2007 meeting.

Statements of future intention

83 Insofar as most of the alleged representations consisted of statements that DB or Mr Wan "would" do something, the Judge viewed these as statements of future intention. They were *prima facie* not statements of fact which could ground a claim in misrepresentation. We would add that they might possibly be construed as statements of the capability that *could* be placed at Dr Chang's service *if* he did engage DB as managers and advisors. It is true that a statement of future intention can sometimes be re-characterised as a representation of fact. As Lewison J (as he then was) held in *FoodCo UK LLP (t/a Muffin Break) and others v Henry Boot Developments Limited* [2010] EWHC 358 (Ch), a statement of future intention might contain an implicit representation that (at [198]):

(a) its maker had an honest belief in the statement;

(b) its maker had reasonable grounds to make the statement; or

(c) its maker had the present intention to carry out the matters expressed in the statement.

The Judge stated that even if these statements could be re-characterised as representations of fact,

Dr Chang had *not* proven on a balance of probabilities that Mr Wan or DB did not honestly believe that these were true at the time they were made to Dr Chang.

84 On appeal, Dr Chang argued that DB could not have held an honest belief that the statements were true because they were at odds with the disclaimer on the last page of the Brochure that had been handed to Dr Chang at that very meeting: "neither [DB] nor any of its affiliates or Representatives, Officers or employees shall be in anyway be [*sic*] accountable or responsible for any incorrect advice, recommendation and the contents hereof". In our judgment, this contention fails on several counts. First, the content of the material that was handed over as well as what is said to have been conveyed at that meeting was essentially standard promotional fare. The disclaimer was plainly *intended* to prevent anyone reading the material handed over from thinking that it was meant to be relied upon, and to qualify any representations which might have been made in the course of the client presentation. Put simply, Dr Chang did not show why it should not be given effect to.

85 Second, this promotional fare was meant to interest the prospect into entering into a relationship with DB. This relationship could have entailed DB providing advisory or wealth management services. The burden lay on Dr Chang to show that Mr Wan and DB did not honestly believe that they could or would enter into such an arrangement but there is no basis for thinking this at all. The fact that DB did not wish statements made in an introductory solicitation meeting to form the basis of a liability on its part does not mean that it was not prepared or willing to enter into an investment advisory or wealth management agreement if that was what Dr Chang in fact wanted (and if they were then able to agree terms). We agree with the Judge that the evidence did not establish that, to the extent these were statements of future intention, DB or Mr Wan lacked an honest belief in their truth, and therefore Dr Chang's claim must fail on this ground also.

86 We note in passing that DB denied that the statements had in fact been made but nothing turns on this. However, in this connection, it is significant that the representations never found their way into the agreements eventually signed between DB and Dr Chang, and Dr Chang never took any steps to call for the execution of any agreement dealing specifically with what he claimed he had been led to expect. To the extent it is suggested that this was because Dr Chang never read the account opening documents that were sent to him (which he signed and sent back without raising any questions), his proper plea should have been for rectification pursuant to a unilateral mistake of fact; but this was not the case that was pleaded or presented and on the evidence that we have seen it was not a case that had any plausible chance of success. Further, as we have noted, Dr Chang sensibly, in our judgment, did not mount a case of *non est factum*; there was no suggestion that DB had ever misled Dr Chang as to the tenor, terms or effect of the documents he was sent; and tellingly, Dr Chang never conducted his affairs with DB as if he was relying on them to advise him on the structuring of his portfolio.

Sales Puff

87 As for the alleged representation at [81(f)] above, the Judge found that it was mere sales puff. He therefore held that this could not constitute a misrepresentation. With respect, the Judge failed to consider that what looks like sales puff may yet sometimes be more properly viewed as a representation of fact. This will depend on the degree or obviousness of its untruth, the circumstances of its making and, in particular, the expertise and knowledge attributable to the person to whom it is made (*Fordy v Harwood* [1999] EWCA Civ 1134).

88 In *Easterbrook v Hopkins* [1918] NZLR 428, the respondent had bought over the appellant's grocery business in reliance of the latter's representations that the business was "a little gold-mine" and that it was one of the best in the town. The appellant tried to argue that these statements were

not representations but merely sales puff. He failed. It was held that the jury was justified in treating the statements as a definite representation that the business was a highly profitable one, made with the object of inducing the respondent to buy the business. It was also thought significant that the respondent knew nothing of business and had relied on the appellant's guidance. The court evidently would have viewed these statements differently had they been made to a person experienced in business and armed with the necessary information to ascertain the actual profits of the business (at 443).

89 In the case at hand, the representation, that the services provided by DBPWM were amongst the best when compared to other international banks, seemed to us to be one of fact. It was not obviously untrue. As the Brochure itself illustrated, DB had won many industry awards and accolades over the years. Moreover, this representation was made in the course of a presentation to a potential client. Such a statement would not have been viewed as hyperbole in Dr Chang's eyes; rather, it could well have been material in convincing him to open an account with DB. In the light of all this, DB could not argue that the representation at [81(f)] above was mere puff that was not actionable. The real difficulty with Dr Chang's claim, however, is that he did not show on the evidence that the representation was false. The fact of the awards suggested the contrary. We therefore hold that Dr Chang's allegation in this regard also was not made out.

DB's appeal on quantum of damages

90 On the view that we have taken of this case, it follows that the order for damages made by the Judge in favour of Dr Chang must be set aside. We therefore do not need to deal with DB's contentions that the quantum of damages was wrongly calculated.

DB's contractual claim

91 Finally, we turn to DB's claim for the Contract Sum. We note that Dr Chang did not dispute that this sum was payable to DB. In fact, Dr Chang conceded that the Contract Sum would have to be set off against any damages he received from his counterclaim. Since liability for this contractual amount is not denied, we hold that Dr Chang is obliged to pay the Contract Sum to DB.

Conclusion

92 The financial services industry in Singapore has seen remarkable growth in recent years. Banks and other financial institutions are plainly aware that they operate within a regulated legal framework. But they are equally aware that they operate in a competitive marketplace and this can at times induce them to present themselves to their clients as extremely accomplished and capable one-stop shops able to service every need of their customers. It is not at all surprising that, as happened in this case, a bank in the course of an introductory meeting should endeavour to demonstrate its ability to provide high-quality services in relation to wealth management. But banks would do well to recall that the services they do hold themselves as capable of providing may not always be accepted by the client. Cleaning up the paperwork and communicating in clear terms with customers after the initial discussions to identify with precision just what is and is not being provided might well be a worthwhile exercise for banks to undertake. This could perhaps have obviated the present litigation.

93 While we had some sympathy for the substantial losses incurred by Dr Chang, we find in the premises that DB owed him no tortious duty of care in advising him on the management and structuring of his portfolio as a whole. In addition, we are of the view that Dr Chang's counterclaim in misrepresentation has not been made out on the facts. Accordingly, we allow Civil Appeal No 164 of 2012 and dismiss Civil Appeal No 2 of 2013. DB is entitled to recover the pleaded claim amount of

US$1,788,855.41 from Dr Chang. Simple interest is payable on this amount from 27 August 2009 to the date of payment at 3% per annum. The costs of both these appeals, as well as of the trial below, are to be awarded to DB. This will be on an indemnity basis insofar as it relates to the enforcement of DB's claim (as this has been agreed in the relevant documentation) and on the standard basis insofar as it relates to Dr Chang's counterclaims and are to be taxed if not agreed. There will be the usual consequential orders.