IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 82

Suit No 942 of 2013 and 1123 of 2014

Between

(1) Koh Kim Teck
(2) Smiling Sun Limited

… *Plaintiffs*

And

Credit Suisse AG, Singapore Branch

… *Defendant*

GROUNDS OF DECISION

[Tort] — [Negligence] — [Duty of Care]
[Banking] — [Credit and Security]

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v
Credit Suisse AG, Singapore Branch

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Introduction

1 The plaintiffs sued the defendant bank, Credit Suisse AG, Singapore Branch (the "Bank"), for losses stemming from the poor performance of financial products purchased from the Bank in the financial crisis of 2007 to 2008. At the height of the crisis, the plaintiffs' bank account ("the account") was closed out and the assets in the account were liquidated. The plaintiffs suffered losses of about US$26m.

2 Having considered the parties' submissions, I dismissed the plaintiffs' claims, finding that the Bank owed no duty of care in contract or tort to advise the plaintiffs on investment matters or in respect of the closing out of the plaintiffs' account. The plaintiffs have since appealed.

Background facts

3 The first plaintiff, Mr Koh Kim Teck ("Mr Koh"), currently resides in Singapore. Prior to his relocation, Mr Koh had a successful career, first, as a stock dealer and, later, as a manager at various financial institutions in Malaysia. Upon his retirement at 50, Mr Koh was the senior general manager and a shareholder of a stockbroking company that was previously listed in Malaysia.[1] The second plaintiff, Smiling Sun Limited ("Smiling Sun"), is a company registered in the British Virgin Islands ("BVI"). It was set up to facilitate Mr Koh's investment activities with the Bank. In these grounds of decision, no distinction is drawn between Mr Koh and Smiling Sun except where necessary and the term "plaintiffs" will be used occasionally to describe Mr Koh and Smiling Sun collectively.

4 The circumstances surrounding the opening of the plaintiffs' account with the Bank and the assurances given to entice Mr Koh to invest with the Bank were matters of some dispute. Regardless, it was accepted that Mr Koh became a client of the Bank sometime in 2003. In September 2003, Smiling Sun was incorporated, with its shares held by the Bank's nominee shareholder on trust for Mr Koh.[2] A nominee and/or agent of the Bank was also pointed as a corporate director of Smiling Sun.[3] Mr Koh was and remains the sole beneficial owner of Smiling Sun.[4] On or around the time Smiling Sun was incorporated, the account was also opened under Smiling Sun's name. This was the account Mr Koh would eventually carry out his investment activities from. The account was a non-discretionary account.[5]

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1 Affidavit-Evidence-in-Chief ("AEIC") of Koh, pp 4–7.

2 AEIC of Koh, pp 15–17.

3 Amended Statement of Claim No 3, para 14.

4 Lead Counsel Opening Statement, Common Ground between Parties

5 To Mr Koh's recollection, there was little investment activity in the early years of the account.[6] However, from 2006, Mr Koh began to trade more heavily through the account. Over the course of 2007 and 2008, Mr Koh purchased structured products known as knock-out discount accumulators ("KODAs") and dual currency investments ("DCIs") from the Bank.[7]

Knock-out discount accumulators

6 A KODA is an over-the-counter structured derivative product that is typically used by investors to accumulate shares at a discounted price in hopes of selling the accumulated shares at a higher market price at a future date. Under a KODA, the investor purchases a pre-determined number of shares ("underlying shares") during the term of the KODA, typically between 6 to 12 months. The purchase price of the shares ("strike price") is fixed at a discount and therefore below the market price of these shares at the time the customer enters into the KODA. The investor agrees to purchase a pre-determined number of shares on each business day at the strike price during the term of the KODA. The investor is therefore obliged to pay for and take delivery of these purchased shares on a regular basis. The termination of the KODA depends on the "knock-out price", which is a pre-determined price agreed on by the investor:[8]

(a) If the market price of the underlying shares rises above the knock-out price, the KODA will be effectively terminated. The investor

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5 Lead Counsel Opening Statement, Common Ground between Parties.

6 AEIC of Koh, para 69.

7 Lead Counsel Opening Statement, Common Ground between Parties.

8 AEIC of Conrad Huber ("Huber"), paras 44–47.

will have to pay for and take delivery of any shares that were purchased before termination at the strike price.

(b) If the market price of the underlying shares remains below the knock-out price, the investor is obligated to purchase the pre-determined number of shares at the strike price for the duration of the term of the KODA, even if the market price of the underlying shares falls below the strike price.

7 In short, a KODA enables an investor to purchase the underlying shares at a significant discount to the market price. But if the market price of the underlying shares falls under the strike price for an extended period during the term of the KODA, the investor's loss will be the difference between the market price of the shares and the strike price at which the investor has to buy the shares under the KODA.[9]

8 A variation obliges the investor to purchase double (or another multiple) the number of shares at the strike price for each day on which the market price of the underlying shares falls below the strike price. Such KODAs have lower strike prices, thus giving a greater discount on the purchase of the underlying shares.[10] Mr Koh referred to these KODAs as having a "multiplying effect".

9 Between 8 October 2007 and 29 August 2008, Mr Koh purchased 29 KODAs through the account.[11] Mr Koh claims that the Bank did not properly advise him on the effect of the KODAs on the account and failed to adequately bring to his attention key information about the KODAs, such as the penalty to

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9 AEIC of Huber, paras 49–53.

10 AEIC of Huber, para 48.

11 Leading Counsel Statement, Common Ground between Parties.

be paid for premature termination of the KODAs and the multiplying effect of certain KODAs.

Dual currency investments

10 DCIs are short-term structured investment products under which an investor deposits a principal sum in a selected investment currency with the bank for a fixed tenure or term. An alternative currency and a pre-determined conversion rate between the investment currency and alternative currency are agreed on at the outset. The principal sum will be repaid with the yield at maturity. The bank has the option of repaying the principal and yield either in the original investment currency or in the alternative currency after conversion at the pre-determined conversion rate. This decision depends on the market foreign exchange rate on the day of the trade and the pre-determined conversion rate:[12]

(a) If the investment currency against the alternative currency is weaker than the pre-determined conversion rate at maturity, the principal will be redeemed in the investment currency.

(b) If the investment currency against the alternative currency is stronger than the pre-determined conversion rate at maturity, the repayment is in the alternative currency, converted at the pre-determined conversion rate.

11 A loss may result if the investment currency is repaid in the alternative currency. The investor thus bears the currency risks and the speculative risks in fixing the pre-determined conversion rate. DCIs are not principal protected and are exposed to foreign exchange rate fluctuations. The DCIs purchased by Mr

[12] AEIC of Hubert, paras 80–81; AEIC of Elan Cohen, p 38–40.

Koh generally involved Australian dollar ("AUD") and Japanese Yen ("JPY") pairings.

12 Between 21 February 2008 and 23 October 2008, Mr Koh purchased 891 DCIs through the account.[13] Mr Koh stated that he did not know that DCIs involved significant risk and that the risks that eventuated would affect the account.[14]

The collateral shortfall and close out of the account

13 Having procured a credit facility for the account in 2006, the investments made through the account were funded primarily, if not entirely, by credit. In return for the credit facility, Smiling Sun had to maintain sufficient collateral in the account. The credit limit of the facility was increased at various points; the collateral requirements were also correspondingly increased. As it transpired, the investments in structured products, the portfolio of the account and drawdowns on the credit facility led to substantial credit exposure.

14 Sometime around September to October 2008, the collapse of Lehman Brothers sparked off a global financial crisis by which stock markets worldwide were hit. One of the several ramifications of the crisis was that the AUD rapidly depreciated against the JPY. The sudden and significant depreciation of the AUD against the JPY resulted in Mr Koh sustaining substantial losses as his investments were heavily concentrated in the AUD, while the loans were substantially in the JPY. The corresponding decrease in collateral values resulted in a substantial collateral shortfall in the account.

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13 Lead Counsel's Statement, Common Ground between Parties.

14 AEIC of Koh, pp 58–61.

15 On 24 October 2008 at about 10am, Mr Koh received a close out notice from the Bank informing him that he had until 2pm to provide a top-up of US$5.7m. Mr Koh claimed that this close out notice gave an unreasonably short length of time for him to furnish additional collateral and that he would have been able to do so had he been given a reasonable amount of time. Further, the entire close out fiasco might have been avoided if he had known that the account was in a collateral shortfall earlier.[15]

16 Suffice it to say that Mr Koh did not provide the top-up. The Bank proceeded to close out all of the account's open investment positions, including the KODAs and DCIs that were then in place, and liquidated all the assets in the account.

17 It was also not really disputed that the KODAs and DCIs and the drawdowns on the credit facility contributed to the collateral shortfall in the account. This shortfall, in turn, led to the eventual close out of the account and the losses that are now the subject of the present action. The ultimate question that falls to be decided is whose responsibility it is to bear the losses arising from the close out.

18 As a result of the close out, Mr Koh suffered losses of US$26m. Mr Koh sought to reclaim his losses by pursuing actions against the Bank for breaches of the Bank's duties of care in contract and tort, claiming that the Bank failed in its duties by advising him to invest in products that were unsuitable for his purposes and by mismanaging his account. The Bank's response was that that it owed Mr Koh no duty of care; furthermore, Mr Koh was not a risk-adverse and naive investor. The Bank contended that he had been fully apprised of the risks involved, and had made his own investment decisions that resulted in his

[15] AEIC of Koh, paras 254–256.

losses.

The plaintiffs' case

19 Mr Koh claimed in both contract and tort. In his closing submissions, emphasis was placed on the claim in tort as opposed to contract.

20 In essence, Mr Koh's case was that the Bank owed him a duty of care, whether in contract or tort, to take reasonable care when giving advice and provide information that met with his investment objective of wealth preservation; in particular, to provide advice on products that suited his purposes. Further, the Bank also owed him a duty of care to advise him in respect of the account; in particular, to carry out periodic reviews of the account, to monitor and manage the investments in the account, and to monitor and inform him of the credit exposure of the account and ensure that the credit limit was not breached.[16] The Bank, however, fell short of its duties in:[17]

(a) advising him to enter into investments (*ie*, KODAs and DCIs) which conflicted with his investment objectives;

(b) failing to provide him with sufficient information to enable him to make informed investment decisions in respect of the KODAs and DCIs;

(c) improperly managing the account and failing to limit the account's risk exposure; and

(d) failing to provide proper advice on the account.

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16 Amended Statement of Claim No 3, paras 89 and 101.

17 Amended Statement of Claim No 3, paras 104, 109, 111, 114 and 119–120.

21 In addition to the duties asserted above, Mr Koh submitted that implied in the contractual relationship between the parties was a term providing that a reasonable period would be given to furnish additional collateral.[18]

The defendant's case

22 The central thrust of the Bank's case was that Mr Koh was not the naive investor he painted himself out to be. He had sought riskier investments with the hopes of achieving higher yields and had chosen to engage in leveraged trading. The decision to purchase KODAs and DCIs was part of his investment strategy to capitalise on the falling market in the 2008 financial downturn. In the end, Mr Koh had only his own folly to blame. The Bank never undertook advisory or wealth management obligations *vis-à-vis* Mr Koh and had properly provided the necessary information for him to make an informed decision on the purchase of KODAs and DCIs. In this connection, the Bank contended that it owed Mr Koh no duty of care, whether in contract or tort; not least because the account was a non-discretionary account and the contractual terms governing the relationship between the Bank and Smiling Sun and/or Mr Koh excluded any advisory duty.[19] But even if it owed Mr Koh a duty of care, the Bank contended that it did not breach its duty to him.[20] Further, there was no room to imply a term to the effect of the Bank having to provide a reasonable period for the provision of additional collateral where there was a shortfall into the contractual relationship between the parties.[21]

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18 Amended Statement of Claim No 3, paras 89 and 103.

19 DCS, paras 104–105.

20 DCS, para 177.

21 DCS, para 275.

23 Apart from its main case, the Bank also submitted that Mr Koh had no standing to bring the action as the account was established in the name of Smiling Sun. The only relevant relationship in respect of the account was that between the Bank and Smiling Sun. Mr Koh was not a proper party to the recovery of losses suffered by the Smiling Sun. Indeed, the rule against reflective loss precluded Mr Koh, as Smiling Sun's shareholder, from bringing a claim against the Bank.[22]

24 Finally, Mr Koh's claims were time-barred.[23]

The decision

25 I found that the Bank did not owe any obligation to advise or manage the account, and thus owed no duty of care, whether in contract or tort. Even if the Bank did owe Mr Koh such responsibilities, the Bank would not have been in breach of them.

26 Whether the Bank owed Mr Koh a duty of care depends on the responsibilities it assumed in its dealings with Mr Koh. The starting point of this inquiry would be the contractual relationship between the parties. If the conclusion in respect of the contractual claim was that the Bank undertook no obligation to advise and manage the account, Mr Koh would face an uphill battle in respect of his claim in tort. Further, unless it could be shown that the Bank had acted in a manner which deviated from its contractually defined role, there would be little basis to find that there was a duty of care owed by the Bank to Mr Koh at common law (see *Deustche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886 ("*Chang Tse Wen*") at [51]). Hence, the contractual

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22 DCS, paras 316–322.

23 DCS, para 329.

claim will be considered first and then that in tort. It is essential to distinguish between claims in contract and tort even when these overlap on the facts, as rules relating to various aspects such as remoteness and the measure of damages will differ.

27 Mr Koh, in his submissions, divided the duty of care into several sub-duties:

(a) a duty of care to advise;

(b) a duty to ensure that the risks of the KODAs and DCIs were explained to the client;

(c) a duty to monitor the account; and

(d) a duty to provide a reasonable period for the provision of additional collateral top-up.

For clarity, some of these "sub-duties" merely described the responsibilities the Bank was said to have undertaken and do not give rise to distinct "duties" of care. The ultimate inquiry is whether the Bank owed a duty of care to Mr Koh. These responsibilities go towards the scope of such duty or the question of breach (see also *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 ("*Go Dante Yap*") at [18]–[19]).

28 There were many allegations made in the course of the proceedings and Mr Koh's case did evolve to some extent. I have not found it necessary to address all of the allegations made. My decision was based on what was necessary to resolve the dispute between the parties and hence these grounds of decision will not discuss matters which were tangential. Furthermore, many of the contentions overlapped. The arguments are addressed holistically (in

groups) rather than separately. In the end, many of the plaintiffs' allegations, when weighed against objective documentary evidence, fell away.

Contractual claim

29 Mr Koh sought to impose a list of obligations on the Bank in relation to the management of the account (*ie*, the recommendation of suitable investments, periodic review of the account, monitoring of the credit limit of the account, *etc*). Whether or not a contractual obligation existed depended entirely on the express or implied terms of the agreement between the parties. The contractual documents did not impose any such obligations.

No advisory or management relationship

30 The contractual arrangement between the parties did not point to any advisory or management relationship. In the account opening documents as well as the incorporation documents, Mr Koh specifically accepted that he was the one responsible for managing the account. In contrast, the Bank disclaimed any advisory or management duties. This was made clear in the Limited Power of Attorney for Asset Manager, which was signed by Mr Koh, as witnessed by the Bank:[24]

> The Attorney [Mr Koh] is an asset manager and investment advisor of the Principal(s) [Smiling Sun] independent from the Bank, and in this capacity, is not an agent of the Bank. …
>
> The Attorney's [Mr Koh's] signature and any of his/her declarations, actions and measures empowered within the limits of this power of attorney (including supplements hereto) are binding on the Principal(s). The obligations of the Bank are discharged insofar as it executes an instruction of the Attorney which is covered by the authority set out in this power of attorney … As a result of granting this power of attorney to the Attorney [Mr Koh], the Bank is released from any duty to advise, explain or admonish in respect of the management of assets by

[24] AB 1, p 202.

> the Attorney [Mr Koh] or in respect of individual investment management actions or their omission or any dealing for the Account. **The Bank bears no responsibility for the investment decisions of the Attorney [Mr Koh].**
>
> [emphasis in original]

Under the Limited Power of Attorney for Asset Manager, Mr Koh specifically accepted that he was responsible for the investments decisions and transactions of Smiling Sun, and that the Bank bore no responsibility for Mr Koh's investment decisions. The obligations of the Bank were discharged in so far as it executed Mr Koh's instructions and the Bank had no duty to advise, explain or admonish in respect of the management of assets by Mr Koh or in respect of individual investment management actions or their omission or any dealings for the account.

31 Apart from the Limited Power of Attorney for Asset Manager, it is undisputed that the Account Opening Conditions show that the account was opened as a non-discretionary account. Clause 13.1 of the Account Opening Conditions clearly states that where the customer has agreed to the Bank managing the customer's assets on a non-discretionary basis, the customer agrees that such assets shall be managed by the Bank only in accordance with the customer's specific instructions. Notably, Mr Koh during cross-examination accepted that it was he who made the investment decisions in relation to the account:[25]

> Q: Mr Koh, you are saying that [the Bank] had to do the due diligence and make the recommendations but you would be the one who decides whether to buy or sell. Correct?
>
> A: Correct.

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[25] Transcript 29 August 2017, p 76–77.

32 There was also no investment advisory agreement signed between Mr Koh and the Bank. It is important to note that here, the Bank was selling its own financial products to a client. Unless specific advisory services were offered, there is no expectation for a seller to undertake to provide advice to the buyer. The seller may solicit a purchase by upselling or even by providing an opinion, but that should not be construed as advice intended to be relied upon by a client to structure a portfolio of investments.

33 On the stand, Mr Koh testified that while he had knowingly opened a non-discretionary account, he was merely acting on the Bank's suggestion (through a relationship manager) to open such an account as he was told that doing so would suit his purposes.[26] This explanation could not be accepted as true: Mr Koh is an experienced stockbroker who has had years of dealings with banks. Further, this was not the first time Mr Koh had opened an account as a client of a private bank. At the material time, Mr Koh had two other offshore accounts with other private banks.

34 Mr Koh also insisted that he did not read the relevant account opening documents.[27] This could not assist Mr Koh. As the Court of Appeal in *Chang Tse Wen* said (at [39]):

> [I]t 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

35 Nothing in the contractual arrangement between parties hinted at the Bank undertaking the responsibility of advising Mr Koh and managing the

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26 Transcript 29 August 2017, p 74–78.

27 Transcript 29 August 2017, p 69–70.

account. It was sufficient for me, on this basis, to dispose of Mr Koh's contractual claim as regards the contractual duty to advise. All that remained was whether, given my findings on the contractual arrangement of the parties, a duty of care nonetheless arose at common law. But before I turn to address the common law duty, there is one other aspect of Mr Koh's contractual claim.

No implied term for the Bank to provide reasonable period to furnish additional collateral

36 Mr Koh submitted that there should be an implied term in the contractual arrangement of the parties stipulating that a reasonable period for the provision of additional collateral be given in the event of a shortfall. In my judgment, there was no basis for such a term to be implied in the contractual relationship of the parties.

37 The court's approach towards the implication of terms in fact follows a three-step process outlined in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 ("*Sembcorp*") at [101]:

> (a) The first step is to ascertain whether there is a gap in the contract and if so, how it arose. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) The court then considers whether it is necessary and not just reasonable, in the business or commercial sense, to imply a term in order to give the contract efficacy ("the business efficacy test").
>
> (c) Finally, the court considers the specific term to be implied. This must be one to which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term

> been put to them at the time of formation of the contract ("the officious bystander test").

No term can be implied that contradicts the express terms; such a term would fail the officious bystander test (*Sembcorp* at [98]–[100]). It follows that it would be highly unlikely for the court to discern a gap in the contract if the term sought to be implied is contrary to the tenor of the express terms of the contract.

38 The relevant contractual document to examine was the credit facility application form (which was countersigned by Mr Koh) ("the form") which governed the collateral requirements of the account. Under cl 8 of the form, the Bank reserved the right to determine the length of time to be given where a collateral top-up was sought:[28]

> 8. **Collateral Security:** … the Bank may (at its sole and absolute discretion and without any obligation whatsoever to do so) notify the Borrower [Mr Koh] (whether orally or in writing) of such determination, whereupon *the Borrow shall within the period of time specified by the Bank in its notification (which period may, in certain circumstances be less than 24 hours) provide, or procure that any (or any other) Security Party acceptable to the Bank provides, additional security of such market value in the form of cash* or time deposits in Acceptable Currencies or in the form of such other Charged Assets as may be acceptable to the Bank …
>
> [emphasis added]

Clause 9 of the form goes on to state that the Bank had the right to close out the account should the borrower not comply with the obligations in the application. Given the clear and express words of cll 8 and 9, no gap in the contract existed that would permit the implication of the term sought by Mr Koh. The parties had clearly contemplated the period of time to be given to a borrower to furnish

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[28] AB 1, p 749.

additional collateral. Even if a term ought to be implied, I was of the view that the Bank would not be in breach of the term for the reasons stated below (at [75]–[95]).

39 An open question was whether cll 8 and 9 of the form ought to be unenforceable as being unreasonable. This was not specifically raised by Mr Koh. I will simply observe that if the issue of reasonableness should arise, the court would have to consider the fact that the Bank shoulders a default risk whenever it extends a credit facility to a client, and that it is always the choice of the client to trade on credit.

Tortious duty of care

40 The controlling authority on duty of care in tort is *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 which laid down that in determining whether a duty of care exists, the court first assesses if there is factual foreseeability; then whether there is legal proximity between the claimant and the defendant; and finally if there are any policy considerations that negate such a duty. The Court of Appeal subsequently elaborated in *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [77] that the court is not prohibited from having due regard to the presence of policy considerations militating in favour of the imposition of a duty of care.

41 In *Chang Tse Wen*, the leading authority on duty of care in respect of investment advisory or wealth management, the Court of Appeal emphasised the need to consider the closeness and directness of the relationship between the parties when examining the element of legal proximity. Additionally, the twin criteria of voluntary assumption of responsibility and reliance may also be used

to demonstrate proximity. The contractual matrix is, of course, a factor to be considered (at [36]–[37]).

Existence of the duty of care

42 Factual foreseeability was readily made out as it would have been foreseeable that Mr Koh would suffer loss from having relied on statements made by the Bank. While the Bank did submit on foreseeability, these arguments were not seriously pursued.[29]

43 The fulcrum was whether there was sufficient legal proximity between the parties. As noted above, there was no contractual obligation for the Bank to provide advice and wealth management. Given this finding, for legal proximity to be sufficiently established, there would have to be particularly cogent evidence that showed that the Bank had assumed additional responsibilities that went beyond the contract through its representations and conduct. To this end, I found that there was no such evidence. Indeed, as a matter of the evidence, it would be highly incongruous for the same parties to go to great lengths to record a non-discretionary contractual arrangement, while at the same time agreeing to a general undertaking to provide investment and wealth management advice that was not so recorded (see also *Chang Tse Wen* at [51]).

Representations made about the incorporation of Smiling Sun

44 Mr Koh's position was that the Bank had voluntarily assumed a higher level of responsibility in relation to Mr Koh and the account. He pointed out that the Bank knew that he was a risk-adverse investor who had the investment objective of wealth preservation. Further, the Bank also knew that he was uninterested in managing the investments in the account. Armed with such

[29] DCS, paras 137–144.

knowledge, the Bank, through its representatives, represented that it would advise him in structuring his portfolio and would manage the account on his behalf. Pursuant to its representations, the Bank took active steps in the conduct of the account. It was in this way that the Bank had voluntarily assumed responsibility over the account.[30]

45 I could not accept Mr Koh's submission. I found, instead, that the Bank had not undertaken additional duties during the life of the parties' relationship.

46 Mr Koh's pleaded claim was premised on the contention that he opened the account and had Smiling Sun incorporated in reliance on the representations purportedly made by Ms Kan Wai Kiat ("Ms Kan"), a relationship manager with the Bank. According to Mr Koh, while he rebuffed Ms Kan's initial attempts at having him invest with the Bank, he was eventually persuaded to do so because Ms Kan had suggested to him that the Bank could create a safe haven for his wealth, and told him that the Bank had dedicated teams to assist him in the management of his investments. She also proposed that a trust company be set up so that the Bank could manage the account on his behalf. Mr Koh relied heavily on the Due Diligence Information Form Ms Kan filled up on 18 September 2003 to show such representation:[31]

> Mr Koh is a very savvy investor and established stockbroker who has undergone 3 financial crises in Malaysia with the latest one in 1998 being the hardest on him. He learnt that he should preserve wealth and build wealth offshore as he aspires to retire in Australia or Canada. He is also keen to have access to funds to facilitate his (continuous) support for the poor and the Buddhist community in Tibet and India. As he is divorced and his closest relation is his aged mother (92 years old), he needs to establish a safe haven in the event he is [incapable] of taking

30 PCS, paras 40–61.

31 AEIC of Koh, p 870.

> care of himself. Ultimately, he would set up a trust for himself and his nieces and adopted children.
>
> Other main reason is that as an established stockbroker, he has opportunities to purchase some blocks of Malaysian shares which he may from time to time, purchase and hold. He would like to have confidentiality in such instances.

47 The Bank's evidence was that it was Mr Koh who had wanted to establish an account with the Bank, and who had wanted to use an offshore company to open an account to maintain confidentiality in respect of his trades and to build wealth offshore. Further, it was he who had intended to consolidate assets from other offshore bank accounts under the account with the Bank.

48 Mr Koh's evidence cannot be accepted. The Due Diligence Information Form did not help to make out the alleged representations. It was an internal document that, as Mr Koh himself acknowledged,[32] was never shown to him. In any event, a bank's acknowledgment of a client's risk attitude is distinct and separate from a representation that it would advise and manage the account.

49 Apart from citing the Due Diligence Information Form, Mr Koh could not provide specific particulars about when and how the alleged representations were made to him. And as stated above, it would be highly unusual for the parties to open a non-discretionary account if the Bank had represented that it would manage the account on Mr Koh's behalf. There is every reason to reduce such an undertaking into contractual terms given that portfolio management is an added service and that it is the customer's option to open a non-discretionary account.

50 In contrast, the Bank's evidence was better corroborated. As was recorded in Due Diligence Information Form, it would appear that Mr Koh

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[32] AEIC of Koh, para 37.

sought to establish an account with the Bank for the purpose of "consolidating his other offshore accounts with BNP Singapore and Citibank Hongkong to [the Bank] as he found the existing 2 bankers too transactional and product pushing".[33] At trial, Mr Koh accepted that he was no stranger to the use of trust companies. On these previous occasions, trust companies were sought for safety and confidentiality. He also accepted that in respect of Smiling Sun specifically, the entity was used for safety and confidentiality.[34] This evidence was significant because Mr Koh's evidence in his affidavit of evidence-in-chief was that he had agreed to the proposed trust structure so that the Bank could manage the account on his behalf (which I did not accept).[35]

51 Regardless of whether the Bank made any representations, I also found that Mr Koh did not rely on the alleged representations and was the one who managed the account. The Bank did not purport to undertake additional duties in the operation of the account.

52 I start with the Bank's evidence. The Bank's investment consultant, Ms Lew Hwee Gin ("Ms Lew"), and relationship manager, Ms Koh Seng Chen ("Ms Koh") – both of whom were in close contact with Mr Koh during the time he bought the KODAs and DCIs – testified that Mr Koh was very active in managing the account.[36] Ms Koh also attested to the fact that Mr Koh would ask in-depth questions and request for more information or relevant research for his consideration.[37] And even when Ms Lew made any suggestions based on the

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33 AEIC of Koh, p 871.

34 Transcript 29 August 2017, pp 50–53.

35 AEIC of Koh, para 33.

36 AEIC of Lew, para 12; AEIC of Ms Koh, paras 8–10.

37 AEIC of Ms Koh, para 11.

Bank's research, Mr Koh would not hesitate to instruct Ms Lew otherwise if he disagreed.[38]

53 The evidence of the Bank's representatives was borne out by the objective records. For example, in an email sent by Ms Koh to her colleagues on 29 August 2008, she indicated that Mr Koh was requesting for research on Wilmar International Ltd and for the research to be faxed to him.[39] On that very same day, Mr Koh purchased a KODA from Wilmar International Ltd.[40] Furthermore, Mr Koh proved himself capable of evaluating investment strategies himself. During a call on 9 July 2008, Ms Lew informed Mr Koh that the market was "choppy", that long-term structures such as accumulators were inadvisable, and that Mr Koh should instead consider safer investments such as hedge funds. Nevertheless, Mr Koh admitted on the stand that he proceeded to purchase three more KODAs before the account was closed out, against the Bank's recommendations.[41]

54 Even on his own testimony, Mr Koh demonstrably managed his own investment portfolio. At trial, Mr Koh conceded that he did not blindly follow the recommendations of the Bank.[42] Specifically, in relation to his view on currencies, Mr Koh accepted that he would have had no difficulty making decisions on the basis of his own views even if the Bank suggested otherwise.[43] Mr Koh's management of the account was also borne out in the bank's records. For instance, it can be seen from the call transcripts that Mr Koh himself would

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38 AEIC of Lew, para 12.

39 AB 34, p 133.

40 AEIC of Koh, para 125.

41 Transcript 7 September 2017, pp 28–33.

42 Transcript 31 August 2017, p 76.

43 Transcript 30 August 2017, pp 81–82.

refer the Bank's representatives to his own research. Indeed, in a conversation on 27 May 2008 between Mr Koh and Ms Lew, the former referred the latter to a research report issued by Goldman Sachs.[44]

55 From the above, I concluded that the Bank did not undertake any obligation to advise Mr Koh on his portfolio and manage the account. It had acted consistently with its contractual arrangement with Mr Koh. On the other hand, Mr Koh was active in managing the account. However, for completeness, I shall address some of the points raised by Mr Koh.

56 Mr Koh at trial explained his actions on the basis that he had purchased products on behalf of friends and thus obtained outside research from them. I found that these assertions, which were not pleaded, were an afterthought.

57 Mr Koh also made several concessions in relation to the investments made and the management of the account, but reiterated that these actions were at all material times influenced by the Bank. In the end, the general tenor of Mr Koh's evidence was that he would first receive a proposal from the Bank, enter into "consultation" with the Bank on the proposal, and then make the decision to enter into a transaction.[45] In my view, there is a line between the giving of advice on the one hand, and the solicitation or the provision of information or opinion on the other. Without more, statements from a financial institution in the nature of the latter category are unlikely to attract the legal responsibilities attendant upon the provision of advice. Advice includes more than an exchange of information about a product. It requires the financial institution to take the further step of committing and communicating a considered position to a client with the intention that the analysis provided will be relied on by the client to

44 AEIC of Koh, pp 458-459.

45 Transcript 5 September 2017, pp 122–123; Transcript 8 September 2017, pp 118–122.

make an investment decision. From the call transcripts, it was evident that the parties' conversations were led by Mr Koh. The content of the conversations were simply discussions on possible investment strategies and exchanges of information and opinions (see [76] below). They were not advisory in nature.

58 Mr Koh also submitted that the Bank did not cede control of Smiling Sun to him at any point in time prior to 2014, this was unsustainable. The Limited Power of Attorney for Asset Manager clearly provided that Mr Koh had the ultimate authority to make investment decisions on behalf of Smiling Sun. Thus, the Bank's role was limited to executing Mr Koh's instructions.

Unilateral conduct of the Bank

59 Mr Koh also suggested that the Bank had assumed wider responsibilities in relation to the account, as the Bank had acted unilaterally on several occasions, more notably in respect of increasing the account's credit limit. I found this contention to be unsustainable.

60 The credit limit of the account was increased on several occasions. Mr Koh alleged that (a) some of these increases were done without his knowledge; and (b) the credit limit should never have been breached in the first place as he had instructed the Bank to ensure that the credit limit would not exceed a certain range.

61 The point that the Bank had acted unilaterally could be readily be disposed of. In so far as the increases in the credit limit from US$5m to US$20m and from US$20m to US$30m were concerned, Mr Koh was furnished with and did counter-sign the confirmation letters for the increases.[46] As regards the

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46 AB1, pp 773–811.

increase from US$2m to US$5m, the short point is this – Mr Koh asserted in his affidavit that he only discovered the increase from US$2m to US$5m after disclosure of documents from the Bank in 2016. He, however, averred that Ms Koh had advised him to increase the credit limit to US$5m in early 2008 and admitted on the stand that he knew of the new credit limit in 2008.[47] This inconsistency could not be overlooked. Perhaps the most telling piece of evidence was the telephone conversation between Mr Koh, Ms Kan and Ms Koh on 17 October 2008. This conversation was significant because it came shortly after Mr Koh wrote to the Bank and appeared to complain about the increases in the credit facility that were allegedly done without his knowledge:[48]

> Ms Koh: … I was quite shocked to see your letter to say that you do not know about the 30 million that has been increased or whatever, which we discussed at length and I said that's the best way I can do to help …
>
> …
>
> Ms Koh: All right, Mr Koh, we have spoken at every interval, at every increase. I do have my record --
>
> …
>
> Mr Koh: I am not dispute it.
>
> Ms Koh: Right.
>
> Mr Koh: It is done proper.
>
> Ms Koh: Correct.
>
> Mr Koh: Okay, from 20 to 30, also it's done proper.
>
> …
>
> Mr Koh: So I am only talking about this, when 20 – before the increase –
>
> …
>
> Mr Koh: -- 20 become 25. I am talking about that.

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47 Transcript 4 May 2018, pp 37–41.

48 AEIC of Mr Koh, Exhibit 55, p 5040.

> …
>
> Ms Koh: And I think I explained to you why it was 25. At that point when you have reached 25, and that was actually the KODA position which even until today, it is still the KODA positions that would have caused – no, okay. Let me requalify this. Not only the KODA positions, but the loans that you were doing, against the DCIs that you were matching. And as you know, we have spoken several times and also with the IC people that, you know currency-wise, we are very sceptical at one point, and we said, "Look, Aussie would be something", and I remember telling you, Aussie would be something that is, you know, very risky and is the volatility is very great, don't go all into it. But and, you know, the position itself today is all in Aussie, Mr Koh.

After Ms Koh informed Mr Koh that each increase in the credit facility had been made with his knowledge, Mr Koh said that this matter was not in dispute and that the increases were "proper". He clarified that the complaint was about why the US$20m credit limit was crossed. Ms Koh then told him that the products purchased and the drawdowns had led to the breach of the credit limit, and that she had advised him against certain actions which he had gone ahead to carry out. In these circumstances, I found that Mr Koh had been aware of the credit limit increases.

62 As regards the breaches in the credit limit, I accepted the Bank's submission that there was no evidence of Mr Koh ever instructing the Bank to monitor his account.[49] When asked if he was able to identify any telephone conversations where such instructions were given, Mr Koh was unable to do so.[50] On the contrary, there was evidence to suggest that Mr Koh had been monitoring the credit limit of the account himself. The evidence disclosed by Mr Koh showed that he had asked for and obtained a total of at least 52 *ad hoc* statements of investments and statements of accounts in addition to the regular

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49 Defendant's Closing Submissions, para 229.

50 Transcript 7 September 2018, p 79.

month-end statements issued by the Bank. The copies of these *ad hoc* statements disclosed by Mr Koh showed handwritten notations on the line item details of the loans drawn down on the account.[51] More importantly, as can be seen from the telephone conversation quoted above (at [61]), the credit limit of the facility had been breached because Mr Koh had disregarded the Bank's warnings and had gone ahead to make his own investment decisions.

Directive D-03380

63 Mr Koh further relied heavily on Directive D-03380, a document internally circulated by the Bank which set out the directives on the conduct of relationship managers *vis-à-vis* clients (in particular, the treatment of KODAs and DCIs), among other things. Based on this document, it was suggested that the Bank had assumed a duty of care towards him.

64 Mr Koh's reliance on Directive-03380 was misplaced. This was an internal document. At the highest, the document might have created obligations between the Bank and its employees. However, in so far as Mr Koh was concerned, the document merely represented best practices. Such a document could not supplant the clear contractual arrangement forged by the parties. I therefore did not find Directive D-03380 to have assisted Mr Koh's case.

Policy considerations

65 Given how the parties structured their relationship, I did not consider there to be any policy considerations in favour of the imposition of the duty of care.

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[51] Defendant's Closing Submissions, paras 102–103; AB 9, p 344 *et seq*; AB 10, p 6 *et seq*, AB 11, p 71 *et seq*.

Conclusions on the existence of the duty of care

66 The legal responsibilities that attach to a financial institution depend on the specific obligations undertaken by the institution in each particular case. There is no question that financial instruments may involve complex structures and that clients quite naturally expect financial institutions to provide them with the information necessary to make a proper investment decision. However, it must also be remembered that financial institutions are ultimately sellers of their own investment products and operate with a degree of self-interest. Investors must expect a degree of fluff, puff and seller's optimism, and exercise a degree of caution. Unless a financial institution undertakes to provide additional services such as the giving of advice or management of an account, the responsibility of investing resides in the client. It is incumbent on the client to clarify what he or she does not fully appreciate, as the investment decision is ultimately his or her own. In short, *caveat emptor*. That is not to say that absent any additional features in the banking relationship, financial institutions do not owe clients any responsibilities whatsoever. If the institution provided false information, the institution may well be liable for the misstatement. But that was not the claim before me.

67 The present case parallels *Chang Tse Wen* in many respects. In *Chang Tse Wen*, the Court of Appeal came to the conclusion that the bank in that case did not owe the client a duty of care. Notably, the account was operated as an execution-only (or non-discretionary) account, meaning that the bank's role was confined to executing orders on behalf of the client in that case. The bank had no discretionary mandate to enter into whatever transactions it thought appropriate having regard to any investment objectives laid down by the client. Further, having regard to the relevant contractual agreements, the bank had not assumed any responsibility to provide advisory services. Even on a

consideration of the statements made by the bank to the client, there was no undertaking of any advice or management of the client's affairs. These statements were in the nature of solicitations or sales pitches and were not an offer to advise on the structuring of the client's overall portfolio (at [40]–[57]).

68 In contrast, while the Court of Appeal in *Go Dante Yap* observed that a duty of care arose despite the client having the final say in deciding what products to purchase or sell, the case was distinguishable. The Court of Appeal's decision there was in relation to the exercise of skill and care on the part of the bank *in discharging the client's instructions* (at [26]–[27]).

69 Mr Koh submitted that the non-existence of an advisory relationship was inconclusive of whether there could be a duty of care and drew my attention to portions of *Chang Tse Wen* to this effect. Be that as it may, there was nothing to show that the Bank had accepted responsibility for the risk of Mr Koh's investing activities and the affairs of the account.

70 Looking at the facts as a whole, I was satisfied that no duty of care existed between the parties in the present case. The Bank had acted within the bounds of its legal relationship with Mr Koh. Whatever "advice" it gave to Mr Koh, be it through recommendations or updates, was simply a goodwill gesture extended to a client. Mr Koh had operated under certain assumptions in his dealings with the Bank, expecting at times that the Bank dissuade him from imprudent decisions. However, Mr Koh had the ultimate responsibility over his own investment decisions and in monitoring the credit limit of the account. He must therefore accept the risk of his purchases and the credit exposure to his account. That the account was eventually closed out was a consequence of Mr Koh's own doing.

Applicability of the Unfair Contract Terms Act

71 Mr Koh contended that there were clauses in the contract between the parties which purported to exclude or restrict any duty of care owed to him, and that these clauses were unreasonable and unenforceable under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA"). The Court of Appeal in *Chang Tse Wen* observed that whether contractual provisions are subject to the test of reasonableness under the UCTA depends on whether they have the effect of restricting or excluding a tortious duty (at [68]). The concern is with the substantive effect of the provision rather than form. This is because there have been suggestions that the UCTA merely seeks to address clauses that exclude or restrict liability, obligation or duty, and does not cover clauses which restrict the scope of the duty or obligation.

72 While the Court of Appeal's observations were *obiter*, I was satisfied that they are consonant with a purposive interpretation of UCTA. In this regard, the contractual provisions considered in my decision did not have the effect of restricting or excluding a tortious duty. The provisions were intended to merely regulate the relationship of the parties *vis-à-vis* each other and define the legal proximity of the parties. This was in contradistinction to provisions that negate a tortious duty. Examples of such provisions may be in the nature of a disclaimer that the aggrieved party accepts and waives liability for negligent acts on the tortfeasor's part. While some provisions in the contract were in the nature of no-reliance clauses, I had not found it necessary to refer to those provisions in coming to my decision.

Breaches of the duty of care

73 Much effort was spent by the parties on addressing the issue of whether the Bank had breached its duty to Mr Koh in view of the risks associated with

the investments and its failure to monitor and alert Mr Koh about the collateral shortfall in the account. In this regard, even if I were wrong on the question of the existence of the duty, no breach was made out in respect of:

(a) the Bank's introduction of KODAs and DCIs to Mr Koh; and

(b) the collateral shortfall in the account and its close out.

Introduction of KODAs and DCIs

74 Mr Koh argued that the Bank committed a breach in introducing KODAs and DCIs to him. He was a risk-adverse investor who knew little about investing apart from his experience in dealing with Malaysian shares. His investment objective was wealth preservation. The Bank had exploited his naivety and had mis-sold him investments that were wholly unsuited to his investment objective.

Mr Koh's risk appetite

75 I found that the Bank did not breach any duty of care in introducing the KODAs and DCIs to Mr Koh. Contrary to what Mr Koh claimed – namely, that he was risk-adverse and none-the-wiser – Mr Koh was in fact an aggressive investor who had been told of and was fully apprised of the risks involved. And if any recommendation was even given, Mr Koh did not rely on such recommendation and acted on his own.

76 Mr Koh's investment appetite was exemplified by a phone conversation he had with Ms Lew dated 5 October 2007 (at 2.53pm, 3.38pm and 5.01pm):[52]

> Mr Koh: Yes. What I been --- I calculate where – if you advise, I must look – normally how I analysing –

[52] DCB Vol 1, pp 188–189, 222–226.

Ms Lew: Yes.

Mr Koh: -- how much capital you commit, how much you return you get, what is the risk. These are the mainly three criteria.

…

Mr Koh: So you need to analyse based on these three criteria.

…

Mr Koh: You jump here, jump there, jump everywhere, I cannot see what three criteria are you – I can't see it, do you get me or not?

Ms Lew: Yes.

…

Mr Koh: That one I – even the market is recession come in or whatever come in, I hold that kind of share, I can (inaudible). Not banking share.

…

Mr Koh: Yes, like I keep asking you for Australia counter, you never come back also.

Ms Lew: Oh, no. Okay, the – the thing is that the (inaudible) counters, right, the (inaudible) is a bit thin, and the pricing is not fantastic. And I think to be (inaudible) you probably need about a million dollar equivalent to do ELN. And we don't have –

Mr Koh: (inaudible).

Ms Lew: -- appetite also.

Mr Koh: Who don't have appetite?

Ms Lew: The clients do the whole --

Mr Koh: Your client --

Ms Lew: -- one million.

Mr Koh: -- your client don't have, (inaudible) don't mean I don't have appetite.

Ms Lew: The – okay.

Mr Koh: Don't assume my share is same as your other client.

Ms Lew: I see. Okay. Sorry about that.

> Mr Koh: Yes, you don't assume thing. You ask me, you see. If something I like it a lot, I can put in a lot of money.
>
> Ms Lew: Yes.
>
> Mr Koh: If – unless I don't like it, you see.
>
> …
>
> Mr Koh: Yes. If it's a good one, I like it very much, and the risk and reward is there, what for – if don't have (inaudible) thousand, I think it's too little for me already. I want to do 1, 2 million.
>
> …
>
> Mr Koh: But that is the main criteria you know. My main criteria is the risk-reward, the return and reward, you know.

77 It was evident that Mr Koh led the discussion and sought riskier investments that had the potential for higher returns. When it came to the KODAs, Ms Lew could be seen explaining how KODAs operated. Mr Koh would stop Ms Lew when he did not understand her explanation and would then provide his own opinions based on her explanation. It was clear that the product was explained to Mr Koh and that he could understand the mechanics of the product. What was notable in the conversation was Mr Koh's emphatic response to Ms Lew's comments on the general lack of appetite by her other clients for risk.

78 Mr Koh's statements to Ms Lew could hardly be said to be that of a conservative investor. Mr Koh knew the risks involved in KODAs and DCIs, and made the decision to enter into those investments with the expectation of higher returns. Whatever Mr Koh's investment objective might have been at the start, it was clear that by the time he purchased the KODAs and DCIs, his objective was to enhance his returns. Hence, the Bank did not act inconsistently with his investment objective in introducing him to KODAs and DCIs.

Similarly, Mr Koh entered into these investments with his eyes open and accepted the risks.

Explanation of risks

79 In any event, I was also satisfied that the Bank had sufficiently explained the risks involved in the purchase of KODAs and DCIs to Mr Koh.

80 In relation to the KODAs, Mr Koh claimed to have been left in the dark about the difficulties of premature termination (*ie*, the penalties to be paid, illiquidity, *etc*) and the multiplying effect of some of the KODAs. In relation to the DCIs, he asserted that he had not been told of the risks involved in such instruments and was ill-advised on the currency pairings. Instead, he was led to believe that DCIs functioned like fixed deposit accounts and thus carried low risk. There was little basis for these claims.

81 I begin with the KODAs. The call transcripts showed Ms Lew explaining the KODAs to Mr Koh; in particular, the multiplying effect and difficulties surrounding premature termination of the KODAs. Indeed, Mr Koh accepted during cross-examination that by 11 October 2007, he was aware of the multiplying effect of certain KODAs.[53] Furthermore, confirmation letters setting out the terms and conditions of each KODA purchase were issued to Mr Koh. These documents explained the features of the specific KODA, the risks involved in the purchase, its multiplying effect and the penalties for premature termination. By way of illustration, in a confirmation letter dated 23 October 2007, para 5 specifically stated:[54]

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53 Transcript 6 September 2017, p 6.

54 AEIC of Koh, p 1173.

> **Termination**. The Client understands that this Transaction cannot be terminated or transferred without prior written consent of [the Bank]. If [the Bank] agrees to terminate this Transaction at the Client's request, [the Bank] will suffer break costs (as determined by [the Bank]) and the Client must pay those break costs to [the Bank]. These break costs may be significant.

Notably, some of these documents were countersigned by Mr Koh and exhibited in his own affidavit.[55]

82 At the trial, Mr Koh did accept that Ms Lew had informed him that it was not possible to cut losses for the KODAs. However, Mr Koh then unpersuasively explained that he had sought a second opinion from another representative of the Bank who had informed him that the KODAs could be terminated.[56] This was a mere bare assertion. In the face of conflicting information, one would have expected Mr Koh to pursue the matter further and not simply take the word of another bank representative, whom he did not consistently deal with, as the final answer.

83 Turning to the DCIs, at the trial, Mr Koh accepted that Ms Lew had informed him of the features of a DCI and that DCIs were not principal protected.[57] He was also able to explain the broad features of DCIs and how such products operated.[58] In a call dated 17 October 2008 with Ms Koh and Ms Kan, Mr Koh himself stated that he had been warned of the currency risks and that he bought the DCIs on his own accord: "No one get me into that, okay. That is fair comment. In fact, credit to your girl, she did mention that currency is quite risky, okay".[59] I noted portions of the call where Mr Koh asserted that he had

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55 AEIC of Koh, pp 1164–1342.

56 Transcript 5 September 2017, pp 63–69.

57 Transcript 6 September 2017, p 88.

58 Transcript 6 September 2017, p 91.

been influenced by the Bank's upselling of the DCIs and took the Bank's opinion on DCIs into account when making his decision to purchase the DCIs. However, on balance, I was of the view that while the Bank might have upsold their products (as any eager seller would), information and features of the DCIs were ultimately conveyed to Mr Koh for him to make an informed decision.

84 As surfaced at the trial, Mr Koh's position appeared to be that it was insufficient for the Bank to merely bring the risks of products to his attention. The Bank ought to also have him appreciate the risks, in other words, to dissuade him where his investment strategies were imprudent.[60] To my mind, even if the Bank did have an obligation to advise him, it was difficult to accept the imposition of this more onerous standard of care. The standard of care incumbent on a bank would certainly depend on circumstantial factors. More would be needed before a bank can be said to shoulder a more onerous standard of care. For example, a demonstrable vulnerability on the part of the client would need to be shown. On this note, it was particularly difficult to accept the characterisation that Mr Koh was a clueless investor. He previously held a senior position at one of the top stockbroking houses in Malaysia. It was difficult to imagine that a man of Mr Koh's calibre and background, with the capability to amass US$26m from the sale of properties in Malaysia alone, would be oblivious to investment matters and reduced to merely rubber-stamping the Bank's recommendations.

85 Mr Koh attempted to downplay his investment experience by suggesting that he merely fulfilled an administrative role towards the end of his career, was only familiar with Malaysian shares and had lost touch with complex modern-

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59 Defendant's Core Bundle Vol 2, p 283.

60 Transcript 11 September 2017, pp 38–42.

day financial instruments. This was unpersuasive. First, there was nothing to show that the experience he had garnered in the financial industry was not transferrable. Second, and quite crucially, my findings above on Mr Koh's active role in the account were testament to his abilities.

Collateral shortfall and close out

86 In relation to the management of the account, Mr Koh alleged that the Bank misadvised him into applying for a credit facility to finance his trades, failed to review the state of the account, failed to monitor the credit limit of the credit facility, failed to discover the collateral shortfall in a timely manner, and failed to afford him a reasonable amount of time to furnish further collateral. Again, I have not found the Bank to be in breach of its alleged duty of care.

Risk exposure

87 The risk exposure of the account was the result of two things: (a) the nature of the products the account was concentrated with; and (b) increases in the collateral requirement due to rapid drawdowns on the credit facility. I found that the increased risk exposure of the account was Mr Koh's own doing.

88 Mr Koh was not unfamiliar with leveraged trading. On Mr Koh's own evidence, he had previously provided loans for trading to his clients from an account he had with a different bank.[61] When it came to the Bank, Mr Koh was the one who made the decision to apply for the credit facility as he wanted to carry out trades using the facility. According to Mr Koh, the Bank had advised him to apply for the credit facility as most of his funds were locked up in fixed deposits. However, the documentary record told a different tale. In an email dated 3 May 2006 from Ms Koh to Credit Suisse Trust, Ms Koh recorded that

[61] Transcript 29 August 2017, pp 37–40.

Mr Koh was requesting to apply for a credit facility on an urgent basis to finance his trades.[62] The following day, Ms Koh informed Mr Koh that his application was approved.[63] Shortly after, on 5 May 2006, Mr Koh began giving instructions to drawdown on the credit facility.[64] And on 8 May 2006, Mr Koh instructed Ms Koh to make an additional drawdown.[65] Hence, contrary to Mr Koh's case, he had not applied for the credit facility on the advice of the Bank but had himself sought the credit facility to finance his trades. The picture that emerged was that of an investor who made the decision to engage in leveraged trading. It followed that such an investor has to bear the consequences and risks attendant to trading on credit.

89 It is apt at this juncture to mention that under the terms of the application for the credit facility, there were provisions stating that the drawdowns should not exceed the collateral value of the account and that a failure to ensure this might lead to a close out.[66] By way of a confirmation letter dated 8 May 2006, Mr Koh was informed that the utilisation of the credit facility was subject to limit availability and the availability of aggregate collateral value to support any utilisation. The total outstanding for the facility had to be lower than the credit limit or the aggregate collateral value.[67] Mr Koh alleged that Ms Koh had told him that it was not necessary to read the confirmation letter. However, even if Ms Koh had told him not to read the confirmation letter, Mr Koh was not unfamiliar with the way in which credit facilities operated. In fact, by Mr Koh's own case, in instructing the Bank to ensure that the credit exposure of the

62 AB 33, p 357.

63 AEIC of Ms Koh Vol 1, pp 7–8.

64 AEIC of Koh, pp 155–159.

65 AEIC of Koh, p 188.

66 AEIC of Ms Koh Vol I, pp 7–8.

67 AEIC of Ms Koh Vol 1, p 11.

account was kept in check, he must have known the manner in which a credit facility might affect the account.

90 In any event, I was satisfied that the Bank did bring to Mr Koh's attention warning signs as the financial crisis gained traction. At the trial, Mr Koh acknowledged, albeit with some hesitation, that various bank representatives had conveyed to him the level of risk in the account and advised him to deleverage in the months where the account was said to have rapidly deteriorated:[68]

> Q: Mr Koh, isn't it correct that [the Bank] had been warning you to take less risk and reduce your loans and I'm referring to the months of July and September 2008.
>
> A: I disagree because it is not warning, it is advice.
>
> Q: Not warning you, just advising you?
>
> A: Yeah.
>
> …
>
> Q: You see, Mr Koh, you had received plenty of warnings to pay down your Japanese yen debt by this time and I don't just mean in October. You had received warnings before October 2008 to pay down your debt in Japanese yen; correct?
>
> A: I agree.

Mr Koh did not heed the Bank's advice to reduce risk and deleverage as he wanted to capture the investment opportunities in a falling market:[69]

> Q: So, Mr Koh, despite all the warnings you were getting, you took the view that if a recession came, the commodities prices would drop and then the economy will start to recover; correct?
>
> A: Yes.
>
> …

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68 Transcript 7 September 2017, pp 80–81, 101.

69 Transcript 7 September 2017, pp 55, 81.

> Q: When [the Bank] advised you or warned you of the levels of risk and asked you to reduce risk, you still went ahead to make your own investment decisions; agree?
>
> A: Agree, but that one I was misled.
>
> Q: Just to be clear, when you say "misled", it was the matters you were referring to earlier when you said [Ms Lew] did not properly explain to you the features of the KODA? That's what you are referring to; right?
>
> A: Correct.

As can be seen from the evidence above, the Bank had taken steps to review the account and had expressed its concerns to Mr Koh. Indeed, the Bank had an interest in keeping Mr Koh's use of the credit facility in check as the Bank itself was shouldering the risk of his default. It therefore came as no surprise that in the months leading up to the eventual close out of the account, Mr Koh received calls from the Bank indicating the concerning outlook of Mr Koh's account. However, Mr Koh was steadfast with his investment strategy.

91 Mr Koh made the further point that the Bank had failed to have him truly appreciate the gravity of the situation and had failed to take the extra step of telling him how to mitigate the problems with the account. I was of the view that the standard of care incumbent on the Bank was not to be pitched that high. There were sufficient red flags to indicate that the situation in the account was headed in an unsustainable direction, and possibly to a close out. However, being the aggressive investor that he was, Mr Koh refused to deleverage and continued to enter into further trades that led to the increasing exposure of the account.

Close out of the account

92 I now come to the Bank's failure to discover the collateral shortfall at an earlier juncture and the short notice provided for Mr Koh to furnish additional

collateral. Mr Koh's point was that had the Bank discovered the collateral shortfall earlier, informed him of the matter and given him more time to furnish collateral, the close out would not have happened. This is because Mr Koh could have taken steps to remedy the situation and was in the position to readily provide the additional collateral. Instead, the close out notice only gave him four hours to furnish additional collateral. While I sympathised with Mr Koh's plight, having weighed the circumstances, I was unable to agree with Mr Koh that the Bank had breached its duty in this regard.

93 According to Mr Koh, a collateral shortfall in the account occurred as early as 3 October 2008. However, the Bank only discovered the shortfall on 21 October 2008.[70] Be that as it may, the circumstances were such that even assuming that the Bank had discovered the shortfall at a late juncture, its decision to close out the account was not a breach of its duty of care. Mr Koh had applied for the credit facility as he wanted to engage in leveraged trading. The credit facility application forms clearly spelt out the need to maintain collateral value in the account and the right of the Bank to impose a close out. Mr Koh must therefore be taken to have assumed the risk of a close out.

94 There was force in Mr Koh's contention that the time given to furnish additional collateral was unreasonable. This was especially so since he had the capacity to prevent the close out and there had been some success at deleveraging the account prior to the close out. However, this must be weighed against the concerns of the Bank and the unfolding circumstances at the material time. Mr Koh's investment strategy had hitherto been aggressive, and Mr Koh had not heeded the Bank's indications to reduce risk and deleverage. Set against the uncertainty of a financial crisis which affected various financial institutions

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70 PCS, pp 50–51.

worldwide, the Bank made the decision to exercise its right to close out the account.

95 Furthermore, it would appear that at the material time, Mr Koh felt that a close out was a reasonable decision on the part of the Bank. According to the Bank, Mr Koh was contacted about the close out at around 2.27pm on 24 October 2008. During the call, Mr Koh did not raise any objections to the close out, nor did he mention that he could or would top-up the account. Instead, Mr Koh only requested that the liquidation be carried in a managed manner. In a follow-up call, Mr Koh mentioned that there was "no problem, if [the Bank] really want to close [*sic*]" and to "[j]ust try to … do it in the ordinary manner".[71] These matters were recorded in the call transcripts and I saw no reason to doubt their contents.[72]

Peripheral issues

96 As I have disposed of the matter on its merits, I will only make brief observations on the following peripheral issues: (a) the issue of reflective loss; (b) expert evidence; and (c) whether the claims were time-barred.

Reflective loss

97 The Bank argued that Mr Koh was precluded from bringing claims against it as, being a shareholder of Smiling Sun, Mr Koh's loss was a reflection of the loss of Smiling Sun.[73] On this related note, the Bank adduced expert evidence on BVI law relating to the rule against reflective loss.

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71 AEIC of Kong Wu, paras 38–40.

72 AEIC of Kong Wu, Exhibit 21, p 415 *et seq*.

73 DCS, p 158; Minute Sheet dated 7 August 2018.

98 According to the Bank, its only client was Smiling Sun as the relevant agreements were entered into between the Bank and Smiling Sun. I was doubtful of the Bank's position.

99 First and foremost, Mr Koh's claim in tort did not require that there be a direct contractual relationship with the Bank.

100 Second, unlike the banking relationship between corporate clients and a bank, the relationship between the Bank, Mr Koh and Smiling Sun was far more complex. Smiling Sun was a special purpose trust vehicle set up with the assistance of the Bank for the benefit of Mr Koh. The Bank knew, for all intents and purposes, that it had to deal with, and did in fact deal, with Mr Koh. Indeed, the Limited Power of Attorney for Asset Manager executed between Mr Koh and Smiling Sun was witnessed by the Bank. Further, the property and assets held by Smiling Sun were that of Mr Koh.[74] Hence, while Mr Koh and Smiling Sun are separate legal entities, the situation was such that the Bank could not simply point to the corporate form to escape liability.

Expert evidence

101 Both sides adduced expert opinions on various points. For Mr Koh, a certain Mr Elan Cohen was called to provide his views on banking and investment matters. Mr Robert Charles John Foote for the bank and Mr Paul Barrington Dennis QC for Mr Koh were called to give evidence on BVI law relating to the rule against reflective loss.[75] I, however, did not find it necessary to rely on the evidence of the experts. Save for the explanation as to how KODAs and DCIs operated, the case did not turn on the evidence of the experts.

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74 AB 1, p 199.

75 DCS, para 23.

This case was decided on issues of either fact or law, which are matters within the province of the court (see also *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2018] SGHC 131 at [37]).

Time bar

The law

102 Before addressing the arguments proper, it is useful to set out the relevant statutory provisions. The general limitation period for actions founded on contract and tort is encapsulated in s 6 of the Limitation Act (Cap 163, Rev Ed 1996) ("the Act"):

> **Limitation of actions of contract and tort and certain other actions**
>
> **6.**—(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:
>
> (a) actions founded on a contract or on tort;
>
> …

103 Section 24A of the Act deals specifically with the time limits for an action in respect of negligence or breach of duty. Generally, an action for damages in respect of negligence or breach of duty would be barred if brought six years from the date on which the cause of action accrued. However, where the damage is latent, the relevant time period will run three years from the earliest date on which the plaintiff had both the requisite knowledge and a right to bring the action, if that period expires later than the period of six years:

> **Time limits for negligence, nuisance and breach of duty actions in respect of latent injuries and damage**
>
> **24A.**—(1) This section shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract … or independently of any contract …).

> …
>
> (3) An action to which this section applies, other than one referred to in subsection (2), shall not be brought after the expiration of the period of —
>
> > (a) 6 years from the date on which the cause of action accrued; or
> >
> > (b) 3 years from the earliest date on which the plaintiff … first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action, if that period expires later than the period mentioned in paragraph (a).

104 The requisite knowledge for the purposes of s 24A(3) of the Act is elaborated on in the subsections that follow. Generally, what is required is the knowledge that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence or breach of duty, the identity of the defendant and material facts about the damage which would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment (see s 24(4) of the Act). Knowledge includes knowledge which the plaintiff might reasonably be expected to acquire from observable or ascertainable facts (with or without appropriate expert advice which is reasonable for the plaintiff to seek) (see s 24(6) of the Act). It is not necessary that the plaintiff knew the act or omission to involve negligence or breach of duty as a matter of law (see s 24(5) of the Act).

Application of the law

105 The parties clashed on the time at which the relevant causes of action accrued. It is trite law that for contractual claims, the date on which the cause of action is accrued is the date of the contractual breach. For tortious claims, the

date on which the cause of action accrued is the date on which the damage was suffered.

106 For context, this action was a consolidation of Suit No 942 of 2013 ("Suit 942") and Suit No 1123 of 2014 ("Suit 1123"); Mr Koh and Smiling Sun were the plaintiffs of those respective suits. Suit 942 was commenced on 16 October 2013. Suit 1123 was commenced on 23 October 2014.[76]

107 The Bank submitted that a substantial part of Mr Koh's (or the plaintiffs') claims have been time-barred. The limitation period for the plaintiffs' contractual and tortious claims accrued from the time that Mr Koh purchased each KODA and DCI.[77] Thus in so far Mr Koh's claims in respect of the KODAs and DCIs purchased before 16 October 2007 were concerned, the claims would be time-barred. In so far as Smiling Sun's claims in respect of the KODAs and DCIs purchased before 23 October 2008 are concerned, the claims would also be time-barred. For all other claims in respect of alleged breaches of duty, these claims were time-barred if the breaches occurred before 16 October 2007 and 23 October 2008, respectively.

108 Mr Koh submitted that the time bar for the tortious claims had not been reached. The damage occurred on 24 October 2008, when the Bank closed out the account.[78] Both suits were within time. I treated the argument in respect of the tortious claims to be the same as that in respect of the contractual claims.

109 The claims before me were varied – some were premised on contract, others tort; some concerned the Bank's negligence, others (such as the breach

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76 DCS, para 323.

77 DCS, para 329.

78 PCS Reply, para 143.

of an implied duty to provide a reasonable time period to furnish additional collateral) did not. Hence, the issues in relation to each claim varied to some degree. I, however, did not propose to address each claim specifically as I had disposed the matter on its merits. It sufficed to say that at the hearing on 7 August 2018, I indicated that substantial parts of Mr Koh's (or the plaintiffs') claims were time-barred. I accepted the Bank's position that the limitation period for the plaintiffs' contractual and tortious claims accrued from the time that Mr Koh purchased each KODA and DCI. That was the relevant point of time: see John Powell *et al*, *Jackson & Powell on Professional Liability* (Sweet & Maxwell, 8th Ed, 2017) at para 5-064:[79]

> Consistently with the approach to claims against surveyors, solicitors and insurance brokers, a client of a financial adviser will suffer loss and damage when he makes an investment or otherwise acts to his detriment in reliance upon negligent advice. Where the complaint is that the breach of duty by the financial adviser caused the claimant to make an investment which carried a greater degree of risk than was appropriate, damage is suffered when that investment is made and the claimant is exposed to the risk, even if the risk does not materialise at that point and there is a chance that the investment actually made will outperform that which should or would have been made. So in *Shore v Sedgwick Financial Services Ltd* the claimant had transferred from his occupational pension scheme to a more risky scheme in reliance on the defendant's advice. Relying on the decision of the House of Lords in *Law Society v Sephton*, the claimant argued that mere exposure to risk was not itself loss, but was equivalent to the exposure to a contingency. Rejecting that argument, Dyson LJ, with whom the other members of the Court of Appeal agreed, held that the claimant had received an inferior scheme, because it involved a higher degree of risk which he did not want. This did not involve the application of a subjective basis of valuation, rather the Court valued the investment applying the investment criterion which the claimant had stipulated.

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79 DBOA, Tab 54.

As the claims accrued from the time Mr Koh purchased the KODAs and DCIs, a number of the claims had crossed the six-year limitation period and were time-barred.

110 I did not find s 24A(3) of the Act to assist the plaintiffs. The close out notice was issued on 24 October 2008. This would have provided Mr Koh with the requisite knowledge to commence the present action, and the three-year period under s 24(3)(b) would have expired no later than 23 October 2011.

111 Mr Koh, at the trial, attempted to furnish reasons for the late commencement of the action. He mentioned that he was reeling from the shock of his losses and was implicated in criminal proceedings in Malaysia for alleged murder. To my mind, Mr Koh could have taken out a protective writ.

112 There was also an allegation that the Bank had schemed to have Smiling Sun struck off the BVI register of companies to thwart Mr Koh's attempts at commencing legal action. The simple point is this – Smiling Sun was restored to the BVI register of companies on 31 October 2013. Suit 1123, however, was only commenced close to a year later on 23 October 2014.

Costs

113 Costs were awarded to the Bank, partly on an indemnity basis following the Bank's making of an offer to settle.

Conclusion

114 Mr Koh, the Plaintiff, was not owed any duty or obligation by the Bank in respect of the investments he made, or in respect of the close out of his account. It is always important to bear in mind that the relationship between a

client and a bank is governed by the contractual documents that are signed. Contrary to the advertisements that are often put out, this is not a pastel-coloured relationship that is almost familial: a bank looks out for itself and has many lawyers. While exceptions to such relationships may exist, they are likely to be rare, exclusive and expensive for the client.

Aedit Abdullah
Judge

Choh Thian Chee Irving, Kor Wan Wen Melissa and Lim Bee Li (Optimus Chambers LLC) for the plaintiffs;
Alvin Yeo Khirn Hai SC, Daniel Chan, Lim Wei Lee, Noel Chua Yi How, Sanjay S Kumar, Vithiya d/o Rajendra (Wongpartnership LLP) for the defendant.
