Go Dante Yap *v* Bank Austria Creditanstalt AG
[2011] SGCA 39

Case Number	: Civil Appeal No 156 of 2010
Decision Date	: 08 August 2011
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Kannan Ramesh, Eddee Ng and Paul Seah (Tan Kok Quan Partnership) for the appellant; Christopher Anand Daniel and Harjean Kaur (Advocatus Law LLP) for the respondent.
Parties	: Go Dante Yap — Bank Austria Creditanstalt AG

Banking

Tort

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 4 SLR 916.]

8 August 2011

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 This appeal arose from the judgment of the trial judge ("the Judge") in *Go Dante Yap v Bank Austria Creditanstalt AG* [2010] 4 SLR 916 ("the Judgment"), which concerned a dispute between the Appellant and the Respondent regarding losses suffered on the Appellant's investment portfolio following the Asian financial crisis of 1997 ("the Asian Financial Crisis").

2 Before the Judge, the Appellant advanced the following two claims:

(a) that 16 investments, entered into by the Respondent in his name, with his own funds as well as with funds loaned to him by the Respondent, were not authorised by him (the "Authorisation Claim"); and

(b) that the Respondent owed him, and breached, contractual and tortious duties which obliged it to advise him whether to make, hold or dispose of the investments that were to be made by the Respondent on his behalf, which breach caused him to suffer losses in relation to three of the 16 investments (the "Advisory Claim").

3 The Judge dismissed both the Appellant's claims. On the Authorisation Claim, he found against the Appellant on the facts, preferring the Respondent's evidence, notwithstanding that it was of a less than ideal quality. On the Advisory Claim, the Judge followed authorities in England and Singapore and held that, on the facts, there was no contractual or tortious duty on the Respondent to give investment advice to the Appellant.

4 The Appellant appealed against both these holdings. On the Authorisation Claim, the Appellant argued that the Judge should have preferred his evidence over the Respondent's, and/or that the Judge should have drawn an adverse inference against the Respondent in view of the poor quality of the latter's evidence. On the Advisory Claim, the Appellant argued that, although the Judge correctly appreciated the legal principles involved, he had misapplied them to the facts of the case.

5 At the oral hearing before us, counsel for the Appellant conceded that the appeal on the Authorisation Claim faced considerable difficulties, and he stated that, although he was prepared to argue the point, he preferred to focus his submissions on the Advisory Claim. Counsel was quite right to do so for, as we indicated at the hearing, the Authorisation Claim was hopeless in light of the Judge's clear finding of fact that the Appellant had not proven that the 16 investments were unauthorised. As we did not think that the Judge's finding in this regard could be said to have been against the weight of the evidence, there was little point in pursuing the appeal on that basis, and the main focus of the appeal was accordingly on the Advisory Claim.

6 At the conclusion of the hearing, we dismissed the appeal and awarded 90% of the costs of the appeal to the Respondent. Given our dismissal of the appeal in relation to the Authorisation Claim (for the same reasons expressed by the Judge), what follows is an explanation of our decision on the Advisory Claim, as we did not entirely agree with the Judge's reasoning in this regard.

Facts

Background

7 The Appellant was a businessman and national of the Philippines, while the Respondent was an Austrian-incorporated bank which, at the material times, operated branches in Hong Kong and Singapore. In early 1997, the Appellant was recommended the services of one Winnifred Natasha Tong Ching Laude ("Ms Ching"), a vice-president of the Respondent's Hong Kong branch, and met with her for the purpose of opening an account with the Respondent.

Account opening

8 On 3 June 1997, the Appellant opened two accounts with the Respondent: a savings account with the Hong Kong branch (the "Hong Kong account") and an investment account with the Singapore branch (the "Singapore account"), with Ms Ching handling both accounts. Both accounts required the Appellant to execute the following contractual agreements (collectively, the "Account-opening Documents"):

(a) the Account Opening and Custodian Agreement ("AOCA") for the Singapore account;

(b) the AOCA for the Hong Kong account;

(c) the Discretionary Investment Management Agreement ("DIMA") for the Singapore account;

(d) the DIMA for the Hong Kong account;

(e) the Investment Authority Instructions ("IAI") for the Singapore account; and

(f) the IAI for the Hong Kong account.

Both sets of AOCAs were in identical terms, as were both sets of DIMAs and IAIs, and therefore each pair of identical documents will be referred to as the "AOCA", "DIMA" and "IAI", respectively. The DIMA conferred on the Respondent the power and discretion to trade in securities on behalf of the Appellant using his account, without the need for his specific authorisation. However, the Appellant desired to limit the discretion that the DIMA conferred on the Respondent, and, to that end, executed the IAI, under which it was agreed that, notwithstanding the terms of the DIMA, the Respondent was not authorised to make any investment or sell any securities for the Singapore or Hong Kong account without the Appellant's instructions. In other words, the Appellant was to have the final say in deciding what securities to purchase or sell.

9 In addition, the Appellant also executed a loan facility letter ("the Loan Facility") under which the Respondent, *inter alia*, agreed to furnish the Appellant with a loan of up to US$5 million.

The investments

10 From June to November 1997, the Appellant remitted approximately US$5 million into the Singapore account. From July to October 1997, 16 investments, which comprised mainly emerging market debt instruments, were entered into by Ms Ching under the Appellant's Singapore account, partly or wholly financed by loans from the Respondent to the Appellant's Hong Kong account, pursuant to the Loan Facility.

The monthly meetings

11 From August to November 1997 (*ie*, throughout the period Ms Ching was entering into the 16 investments), the Appellant and Ms Ching had monthly meetings, where Ms Ching would show the Appellant the portfolio, currency and money market analyses from the previous month's transactions. According to Ms Ching, the Appellant would go through and discuss these documents with her, in order to review the performance of the Appellant's investments, which included examining the projected returns from these investments.

These proceedings

12 From September 1997 onwards, most of the securities comprising the 16 investments were either sold before maturity or redeemed upon maturity, while two securities were transferred by the Appellant to a different bank account with the Respondent. Consequently, only three of the 16 investments remained in the Singapore account by August 1998, on which the Appellant had suffered significant losses as a result of the effects of the Asian Financial Crisis, and it was these securities which formed the subject matter of the Advisory Claim:

(a) Bakrie International Finance FRN;

(b) Bakrie Brothers 1-year PN; and

(c) Rossiyskiy Kredit 10.25% Interest Notes.

The first two securities will be referred to collectively as the "Bakrie bonds", while the third will be referred to as the "Rossiyskiy notes".

13 From June to November 1999, there was an exchange of correspondence between the parties, in which the Appellant expressed unhappiness over the state of his investments (including complaints that certain investments were unauthorised), eventually culminating in the Appellant threatening legal action against the Respondent over its alleged "mishandling" of his investment accounts. The Appellant subsequently made good on his threat and commenced the present proceedings.

The Judgment

14 In the Judgment, the Judge made the following significant findings of fact:

(a) the Appellant had not proven that the 16 investments were unauthorised (see [68]–[75] of the Judgment);

(b) the 16 investments must therefore have been authorised (see [76] of the Judgment);

(c) the Appellant could easily understand the nature of the 16 investments and understood the types of risks involved, had sufficient knowledge of investment principles, and was therefore not an inexperienced and unsophisticated client who had to rely entirely on the Respondent for investment advice (see [91]–[94] of the Judgment); and

(d) Ms Ching provided recommendations of investments to the Appellant the monthly meetings (see [100] and [109] of the Judgment).

15 In dealing with the Advisory Claim, the Judge also considered a number of recent English and Singapore authorities, *viz*:

(a) *IFE Fund SA v Goldman Sachs International* [2007] 2 Lloyd's Rep 449 ("*Goldman Sachs*");

(b) *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 ("*Springwell*");

(c) *Titan Steel Wheels Limited v The Royal Bank of Scotland plc* [2010] EWHC 211 (subsequently reported as *Titan Steel Wheels Limited v The Royal Bank of Scotland plc* [2010] 2 Lloyd's Rep 92) ("*Titan Steel*"); and

(d) *Crédit Industriel et Commercial v Teo Wai Cheong* [2010] 3 SLR 1149 (it should, however, be noted that this court has, in the light of newly disclosed documents, ordered a new trial in that case (see *Teo Wai Cheong v Crédit Industriel et Commercial* [2011] SGCA 13)).

After elaborating the principles to be distilled from these cases (with which, on appeal, the Appellant did not quarrel), the Judge applied them to the facts and held that the Respondent did not owe any contractual or tortious duty to advise the Appellant as to his investments (see [107] and [111] of the Judgment). It was therefore with the application of those principles to the facts of this case that the Appellant took issue.

Our decision

16 As mentioned at [5] above, the only issue before us was whether the Judge was correct in his reasoning and conclusion on the Advisory Claim.

Preliminary observations on contractual and tortious duties

17 As a preliminary point, we should note that, although the Appellant did not dispute the applicable principles in this case, we were of the view that there was some misconception as to what those principles actually entailed, and that such misconception needed to be clarified.

18 In dealing with the Advisory Claim, both parties did not differentiate between the contractual and tortious duties which the Respondent was alleged to have owed to the Appellant, presumably because they regarded them as being completely co-extensive. The Judge approached the Advisory Claim in a similar fashion (see [90] of the Judgment). However, conflating contractual and tortious duties in this manner was apt to mislead, and we considered it more helpful to approach the contractual and tortious duties separately. In fact, it became apparent that the very phrase "Advisory Claim" was something of a misnomer.

19 The reason for this lay in the fact that contractual and tortious duties differ in their nature (see to similar effect the recent English Court of Appeal decision of *James Andrew Robinson v P E Jones (Contractors) Limited* [2011] EWCA Civ 9 ("*Robinson v Jones*") at [76] (*per* Jackson LJ)). Contractual duties find their genesis in the express or implied agreement of the contracting parties, and they may therefore be as narrow or specific as the parties desire. Therefore, there is nothing wrong with the concept of an express or implied "contractual duty to advise". A duty of care in the tort of negligence, however, is in general imposed by law upon the tortfeasor, and as a result it is necessarily a broad duty to take such care as is reasonable in the circumstances. Hence, it is not, strictly speaking, correct to speak of a "tortious duty to advise" without more and, in particular, without reference to any related contractual obligation (see by analogy the House of Lords decision of *A C Billings & Sons Ltd v Riden* [1958] 1 AC 240 at 264 (*per* Lord Somervell of Harrow)). If there could be a "tortious duty to advise", there would be no logical limit to how far a duty of care in the tort of negligence could be subdivided: the courts would be flooded with claims of specific "tortious duties" to answer telephone calls, respond to emails, read the newspapers or the like (see for instance the House of Lords decision of *Qualcast (Wolverhampton) Ltd v Haynes* [1959] 1 AC 743). Of course, it could well be a *breach* of a tortious duty of care (if one was owed) for someone not to give advice in certain circumstances, but that is not the same as saying that there was a tortious duty to give advice. As the author of T Weir, *A Casebook on Tort* (Sweet & Maxwell, 10th Ed, 2004) put it (at p 129), "[m]atters of detail are best treated as part of the question of breach, not as raising sub-duties with a specific content" (see also J Murphy, *Street on Torts* (Oxford University Press, 12th Ed, 2007) at pp 114–115). To frame a duty of care in the tort of negligence as narrowly as a specific

contractual obligation (as in the case of a "tortious duty to advise") would render the question of breach nugatory, for the tortfeasor would then be under a duty to do precisely that which he has been accused of not doing (*eg*, give advice), and there would be no room for the court to inquire whether it was in fact *reasonable* for him not to have done it – an indispensable element of the tort of negligence – with the result that, to quote a learned commentator (see D Howarth, "Many Duties of Care – Or A Duty of Care? Notes from the Underground" (2006) 26 OJLS 449 at p 466), "[t]he concept of fault would disappear" (see too, by the same author, "Negligence after *Murphy*: Time to Re-Think" [1991] CLJ 58 at p 72). Consequently, "[t]here is no reason why the law of tort should impose duties which are identical to the obligations negotiated by the parties" (see *Robinson v Jones* at [79] (*per* Jackson LJ)), in so far as the content of those contractual obligations is of a *different scope* from a tortious duty of care.

20 Where, however, the parties have expressly or impliedly negotiated an obligation on one of them to exercise care and skill in the exercise of his rights or duties under the contract, it is entirely possible that an identical duty of care could exist in the tort of negligence, as was accepted by the House of Lords in the leading decision of *Henderson and others v Merrett Syndicates Ltd and others* [1995] 2 AC 145 ("*Henderson v Merrett*") (see especially the speech of Lord Goff of Chieveley at 194–195). In other words, where a contract imposes a contractual duty of care on one of the parties, that may be said to be "a case where the relationship of proximity arises by virtue of the contract and the work to be performed under it" (see *Bryan v Maloney* (1995) 128 ALR 163 at 169 (*per* Mason CJ, Deane and Gaudron JJ)), which would in general give rise to a corresponding duty of care in the tort of negligence in the absence of any policy considerations militating against such a duty. In apparent contrast to these views, however, Stanley Burnton LJ in *Robinson v Jones* at [94] stated that "[i]t is important to note that a person who assumes a contractual duty of care does not thereby assume an identical duty of care in tort to the other contracting party." We agree that a contractual duty of care does not *automatically* mean that there is a duty of care in the tort of negligence, since it is always possible that, for example, the contract might contain an express clause excluding a tortious duty of care (as was the case in *Robinson v Jones* itself and in almost all the cases relied on by the Judge), or that the contractual framework may be so structured as to demonstrate that the parties intended thereby to exclude the imposition of a tortious duty of care (see *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [71]), but we do not concur with the implication contained in Stanley Burnton LJ's statement that the existence of a contractual duty of care is always insufficient on its own to give rise to a tortious duty of care, all other things being equal (see [34] below).

21 In addition to a contractual duty to advise, therefore, it was also necessary to enquire whether there was, in this case, an express or implied contractual duty of skill and care on the part of the Respondent in discharging the instructions of the Appellant.

Contractual duties

Contractual duty to advise

22 The Appellant contended (at para 62 of the Appellant's case) that the contractual framework between the parties imposed on the Respondent a wide-ranging duty of:

a. rendering advice on the suitability of the investments selected by the [R]espondent for the [A]ppellant's portfolio in order for the [A]ppellant to make a fully informed decision on whether or not to authorise the [R]espondent's selections. This would include advice on issues such as the pros and cons of the investments, as well as the risks involved with each investment selected after taking into account the prevailing economic factors;

b. giving continual advice on the state of the investments and on how to manage them through their lifespan, especially in light of changing economic factors that may affect their performance; and

c. advising the [A]ppellant on the appropriate time and manner with [*sic*] which to exit the investments, again with reference to their performance against the backdrop of the prevailing economic climate.

23 It was fair to say, as the Judge did (at [95] of the Judgment), that the Account-opening Documents certainly did *not* contain any *express* terms providing for such a detailed duty to advise. The Judge also rejected the contention that the Respondent was under an *implied* contractual duty to advise the Appellant, and with this conclusion we agreed entirely. The very specificity with which the Appellant characterised the duty to advise, and the onerous obligations such a duty would have imposed on the Respondent, made it highly implausible that this was the presumed intention of the parties or that such a term was either necessary to give business efficacy to the parties' contractual relationship or was so obvious that it went without saying (see the decision of this court in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518 at [36], [80] and [81]).

Contractual duty of skill and care

24 The absence of an express or implied contractual duty to *advise* the Appellant did not mean, however, that the Respondent did not owe a contractual duty of *skill and care* to the Appellant under the Account-opening Documents. In contracts under which a skilled or professional person agrees to render certain services to his client in return for a specified or reasonable fee, there is at common law an implied term in law that he will exercise reasonable skill and care in rendering those services (see the House of Lords decision of *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 572–573 (*per* Viscount Simonds) and *Jackson & Powell on Professional Liability* (J L Powell and R Stewart gen eds) (Sweet & Maxwell, 6th Ed, 2007) ("*Jackson & Powell*") at para 2-007), and, in relation to banks specifically, it is trite law that a bank in carrying out the instructions of its customer is under an implied contractual duty to exercise skill and care (see the decision of this court in *Bank of America National Trust and Savings Association v Herman Iskandar and another* [1998] 1 SLR(R) 848 at [45]), albeit such a duty has usually been considered in the context of whether the bank was put on notice that its customer was being defrauded (see, for example, the decision of this court in *Yogambikai Nagarajah v Indian Overseas Bank* [1996] 2 SLR(R) 774 and the English High Court decision of *Selangor United Rubber Estates Ltd v Cradock and others (No 3)* [1968] 1 WLR 1555).

25 Consequently, we considered that there was ample authority from which to conclude that the Respondent owed the Appellant an implied contractual duty of care in carrying out his instructions under the Account-opening Documents. It should be said that the Judge did not expressly deal with this point, but, to the extent that the Judgment suggested otherwise, we were unable to agree.

Tortious duty

26 As to whether the Respondent owed the Appellant a duty of care in the tort of negligence, we also disagreed with the Judge's conclusion that no duty of care had arisen. It was here that the parties' failure to articulate clearly the nature of a duty of care in the tort of negligence was most keenly felt, for the Judge's refusal to impose a tortious duty on the Respondent would likely have been influenced by the undesirability of requiring private banks to continuously give advice to their clients on each and every one of the client's investments throughout the lifespan (no matter how long) of those investments, in the manner contended for by the Appellant (see [22] above).

27 However, as we have noted at [19] above, the correct question was not whether the Respondent owed the Appellant a tortious duty to advise, but whether the Respondent owed the Appellant a tortious duty to take reasonable care in rendering services to him and following his instructions, and, if so, whether it had breached that duty by failing to give the advice which the Appellant alleged should have been given in circumstances where any reasonable bank in the Respondent's position would have given that advice.

28 In *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"), this court laid down a single test to determine the imposition of a duty of care in all claims arising out of negligence in the context of pure economic loss ("the *Spandeck* test"), and rejected the English approach of a general exclusionary rule against the recovery of pure economic loss (which, incidentally, appeared to have influenced Stanley Brunton LJ's view in *Robinson v Jones* at [94] that a contractual duty of care did not give rise to a tortious duty of care (see [20] above)). That the losses suffered by the Appellant in this case were purely economic was therefore a relevant, but not overriding, consideration. In addition, the *Spandeck* test was held to be a two-stage test comprising first, proximity, and second, policy considerations, which were together preceded by the threshold question of factual foreseeability. This court also made clear that the *Spandeck* test was to be applied incrementally with reference to analogous cases.

29 We noted that, in the Judgment, the Judge did not apply the *Spandeck* test in order to arrive at his conclusion that no duty of care in the tort of negligence was owed by the Respondent to the Appellant, but, instead, adopted and applied several "'lower level' factors" formulated by Gloster J in *Springwell* (see below at [36] as well as the Judgment at [80]). While this was not necessarily incorrect insofar as these factors could ultimately be placed within the framework of the *Spandeck* test (and indeed we will refer to them later in these grounds), we believed that applying the *Spandeck* test would have allowed these factors to be seen in their proper perspective, thereby yielding a different answer.

Factual foreseeability

30 It was clearly foreseeable that, on the facts of this case, if the Respondent did not exercise due care in the discharge of its role under the Account-opening Documents, the Appellant would suffer loss, and we did not understand counsel for the Respondent to have been arguing to the contrary.

Proximity

(1) Our view on proximity

31 As for whether there was sufficient proximity between the parties, within the meaning of the first stage of the *Spandeck* test, we were of the opinion that there clearly was such proximity, and that this was well supported by the relevant authorities. In *Spandeck* (at [78]), this court endorsed the views expressed by Deane J in the High Court of Australia decision of *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 55 to the effect that proximity might reflect:

> … an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance.

32 This concept of an "assumption of responsibility" as the basis of a sufficiently proximate

relationship so as to give rise to a duty of care in the tort of negligence derived from the seminal decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] 1 AC 465 ("*Hedley Byrne*"), where the various members of the House of Lords formulated the applicable principle in a number of ways, but that which attracted the greatest support was Lord Morris of Borth-y-Gest's statement (with which Lord Hodson (at 514) expressly agreed and Lord Devlin (at 530) was prepared to agree) at 503 that:

> … if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to … another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

In *Hedley Byrne* at 530, after remarking that his Lordship was prepared to endorse such a formulation, Lord Devlin stated that:

> Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of *banker and customer* … *Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows*. [emphasis added]

33 *Hedley Byrne* was unanimously approved by the House of Lords in *Henderson v Merrett*, where one of the issues was whether, in addition to the admitted contractual duty of skill and care that was owed by Lloyd's managing agents to members ("Names") of the underwriting syndicate managed by the managing agents ("direct Names"), a duty of care in the tort of negligence was also owed by the managing agents to the direct Names. Lord Goff, with whom all of their Lordships agreed, stated (at 180) that:

> [The principle laid down in *Hedley Byrne*] rests upon a relationship between the parties, which may be general or specific to the particular transaction, and which *may or may not be contractual in nature* … In particular … where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, he may be held to have relied on the defendant to exercise due skill and care in such conduct. [emphasis added]

Lord Goff applied the *Hedley Byrne* principle to the relationship between the direct Names and the managing agents to find a tortious duty of care, and concluded (at 182) that:

> For my part I can see no reason why a duty of care should not … be owed by managing agents at Lloyd's to a Name who is a member of a syndicate under the management of the agents [*ie*, a direct Name]. Indeed … the relationship between Name and managing agent appears to provide a classic example of the type of relationship to which the principle in *Hedley Byrne* applies. In so saying, I put on one side the question of the impact, if any, upon the relationship of the contractual context in which it is set. But, that apart, there is in my opinion plainly an assumption of responsibility in the relevant sense by the managing agents towards the Names in their syndicates. The managing agents have accepted the Names as members of a syndicate under their management. They obviously hold themselves out as possessing a special expertise to advise the Names on the suitability of risks to be underwritten; and on the circumstances in which, and the extent to which, reinsurance should be taken out and claims should be settled. The Names, as the managing agents well knew, placed implicit reliance on that expertise, in that they gave authority to the managing agents to bind them to contracts of insurance and reinsurance and to the settlement of claims. I can see no escape from the conclusion that, in these circumstances, prima facie a duty of care is owed in tort by the managing agents of such

Names.

34 As we alluded at [20] above, the implied contractual duty of skill and care owed by the Respondent to the Appellant under the Account-opening Documents was sufficient to create the necessary proximity required by a duty of care in tort. Indeed, it was difficult to imagine a clearer example of "an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage" to another party (see [31] above) than a contractual duty to exercise care and skill, and it was plain that Lord Goff had just such a possibility in mind in *Henderson v Merrett* (at 180 (see [33] above) and 187), a conclusion which was also reached by Lord Devlin with specific reference to banks and their customers in *Hedley Byrne* (see [32] above).

35 However, even leaving aside the contractual framework established by the Account-opening Documents, by analogy with Lord Goff's reasoning, there was unmistakeably an assumption of responsibility in the relevant sense by the Respondent towards the Appellant. The Respondent accepted the Appellant 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. It could hardly be denied that the Respondent, in offering private banking and wealth-management facilities, held itself out as possessing special skill or expertise (a concept that was to be understood broadly (see *Henderson v Merrett* at 180)) to manage investments and transact in emerging market securities, or to search for and recommend such investments (which Ms Ching in fact did (see [100] of the Judgment)). The Appellant, as Ms Ching well knew, placed implicit reliance upon that expertise, in that he gave her (and therefore the Respondent) authority to bind him to purchases of the Bakrie bonds and the Rossiyskiy notes, as well as other securities. Given that Ms Ching was so placed that the Appellant could reasonably rely upon her judgment, skill or her ability to make careful inquiry, and given also that she was actively giving information or advice to the Appellant (in the form of recommending suitable investments to him and, by her own evidence, advising him of the pros and cons of those investments), who, as she should have known, would place reliance on her judgment, skill and ability to take care (see Lord Morris's statement of principle at [32] above), it was difficult to resist the conclusion that, in line with *Hedley Byrne* and *Henderson v Merrett*, there was sufficient proximity between the parties to give rise to a *prima facie* duty of care in the tort of negligence on the part of the Respondent. The point was reinforced in *Jackson & Powell*, where it was stated at para 15-032 (albeit without any authority being cited) that "[a] financial practitioner will *generally* owe a duty of care in tort to his client quite apart from any contract that exists between them" [emphasis added].

(2) The Judge's views

36 As we stated at [29] above, the Judge adopted a somewhat different approach to the question of the Respondent's tortious duty of care in the court below, relying on a number of "'lower level' factors" articulated by Gloster J in *Springwell*, in which the learned judge took the cue from Lord Hoffman in *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at [36] to develop "lower-level principles which could be more useful than the high abstractions commonly used in … debates [concerning the question of whether a duty of care existed]". The relevant "'lower level' factors" adopted by the Judge from *Springwell* (at [52]) were as follows (see [90] of the Judgment):

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

(b) the contractual context;

(c) the actual role played by Ms Ching; and

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

We gave consideration to these factors in so far as they affected the proximity between the parties for the purposes of the *Spandeck* test, and our conclusions were as follows.

37 We had no reason to disagree with the Judge's assessment (at [94] of the Judgment) that the Appellant was not an inexperienced and unsophisticated client who had to rely entirely on the Respondent for advice relating to the management of his investment portfolio. However, the real question was not whether he was relying on the Respondent for advice, but whether he was relying on the Respondent to take such care as was reasonable in the circumstances. In addition, we were of the view that the commercial experience of the Appellant was more relevant to the question of the standard of care (*ie*, whether the Respondent had breached its duty of care (see [48] below)), than to the existence of the duty of care itself. After all, it was difficult to see why, taking a simple illustration, a doctor would not owe his patient a duty to take care in treating him simply because his patient was also a doctor.

38 As for the contractual context, there were two matters to be considered: first, the execution by the Appellant of the IAI, and second, the Judge's reliance on the various cases cited at [15] above. It was true that the IAI represented a significant curtailment of the Respondent's discretionary power to manage and apply the assets of the Appellant, in that his final approval was always needed. That surely did not mean, however, that the Respondent was not assuming a responsibility to exercise skill and care, or that the Appellant was not relying on such skill and care being exercised, within the limits of the Respondent's reduced mandate. As for the cases relied on by the Judge, it was drawn to his attention that the respective banking relationships in those cases were governed by express terms and disclaimers that negated the existence of a tortious duty of care (see [105] of the Judgment), but the Judge was not persuaded that this difference was critical (see [106] of the Judgment). With respect, we begged to differ. It was clear from the actual decision in *Hedley Byrne* itself that an express disclaimer of responsibility could prevent a tortious duty of care from arising, by negating the proximity sought to be established by the concept of an "assumption of responsibility". Where such a disclaimer takes the form of a contractual exclusion clause, such a term would now be subject to the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA") (see the House of Lords decision of *Smith v Eric S Bush* [1990] 1 AC 831), but the general principle is still the same. In *Goldman Sachs*, *Springwell* and *Titan Steel*, the material terms of the contracts governing the banking relationship were highly detailed and, as was accepted by the respective judges deciding those cases, the relevant terms made it abundantly clear that the banks were not accepting or assuming any responsibility to take care, and/or that the client was not relying on such care being taken. In such circumstances, it was inevitable that no duty of care in tort was found to be owed by the banks in those cases. In contrast, the Account-opening Documents in this case were disorganised and somewhat inadequately drafted, and did not unequivocally demonstrate an understanding between the parties that the Respondent was not prepared to be responsible or careful in the provision of any information, advice or service it furnished to the Appellant. Certainly, as we have stated earlier in this paragraph, the IAI was not sufficient to achieve that effect.

39 In so far as the last two factors (see [36] above) were concerned, the Judge held that, although Ms Ching had provided recommendations of investments to the Appellant at monthly meetings, the Appellant had conceded during cross-examination that he had not relied on Ms Ching's recommendations, and that this was fatal to the existence of a duty of care in negligence. We would stress again that the requisite assumption of responsibility and reliance under the *Hedley Byrne* principle is an assumption of responsibility by the tortfeasor to *take care* in the giving of information or advice or the performance of a service, and reliance by the plaintiff on such care being taken (see the statements of Lord Morris and Lord Goff cited at [32] and [33] above, and the judgment of

Lord Reid at 486 of *Hedley Byrne*), and not, as the Judge seemed to have thought, an assumption of responsibility by the tortfeasor to do specific acts (*viz*, the giving of investment advice) and reliance by the plaintiff on those acts (see [109] and [110] of the Judgment). That is of course consistent with what we have already said in relation to the nature of a duty of care in the tort of negligence (see [19] above).

Policy considerations

40 Having decided, therefore, that a *prima facie* duty of care was owed in tort by the Respondent to the Appellant, the second stage of the *Spandeck* test required a determination of whether that duty was negated by policy considerations.

41 Our view was that there were no such policy considerations militating against the imposition of a duty of care in the tort of negligence on a private bank that was concurrent and co-extensive with the implied contractual duty of care and skill owed to its customers. *Ex hypothesi*, if the law has seen fit to imply a contractual duty of care into the banker-customer relationship, a tortious duty of care with the same scope and content was unlikely to run afoul of policy considerations such as consistency with any existing statutory or regulatory framework, the avoidance of indeterminate liability and undue interference with market activity. As observed in Justice W P M Zeeman, "Contributory Negligence – A Defence Limited to Actions in Tort?" (1994) 2 Tort LR 16 (at p 17), it was:

> … difficult to imagine a case where there is implied into a contract a term whereby a party to the contract is required to act without negligence where there is not created a corresponding duty of care …

Conclusion on the issue of duty of care

42 For the foregoing reasons, therefore, we considered that the Respondent did owe the Appellant a duty of care in contract and in tort.

43 The Asian Financial Crisis and the recent global financial crisis have demonstrated that imprudent behaviour on the part of financial institutions can have disastrous consequences not just for individual customers, but for the economy as a whole. The Respondent's position on when banks would owe their customers a duty of care, to the effect that such a duty was a highly exceptional one, seemed rather anomalous when viewed against that background.

44 In our view, it was always open to banks and other providers of financial services to exclude or limit their duty of care via disclaimers or exclusion clauses, subject of course to the controls of the UCTA and/or the common law. The absence of such measures, coupled with the factual circumstances of this case, led us to the conclusion that a duty of care was owed.

Breach of duty

45 Our conclusion that the Respondent owed a duty of care to the Appellant in contract and in tort, however, was not the end of the analysis. It was still necessary to decide whether, on the facts, such a duty had been breached by the Respondent, because it did not provide information to and/or advise the Appellant to the extent he alleged that it should have (see [22] above).

46 It was trite that the Respondent was required to exercise "reasonable skill and care", but the exact standard of care in this case was informed by a number of matters, *viz*:

(a) the prevailing circumstances and the danger of hindsight;

(b) the experience and sophistication of the Appellant; and

(c) the contractual framework.

The prevailing circumstances and hindsight

47 It had to be borne in mind that the situation in which the parties found themselves in mid-1997 was one of extreme economic turbulence and turmoil. Many of the world's best financial minds were caught unawares by the speed with which the Asian Financial Crisis unfolded, and the extent of damage which was to follow. As global financial markets are by their very nature volatile, speculative and unpredictable, it seemed to us that the law ought not to make excessive demands of the level of competence and care to be expected of a private bank in the position of the Respondent (see, for example, the New South Wales decision of *Lloyd v Citicorp Australia Ltd and another* (1986) 11 NSWLR 286 ("*Lloyd v Citicorp*") at 287–288), especially during the height of the Asian Financial Crisis. In this respect, it was also useful to recall the words of Denning LJ in the English Court of Appeal decision of *Roe v Minister of Health and another* [1954] 2 WLR 915 at 923–924, cautioning against the use of hindsight in assessing whether an alleged tortfeasor has been negligent, since it was easy to be wise after the event; and the chaotic events of 1997 should not (adopting the language of the learned judge) be viewed dispassionately with 2011 spectacles, with the effect of imposing an artificially high standard of care in an area of conduct where risks and gambles were expected to be taken on a daily basis. As has been aptly observed in *Jackson & Powell* at para 2-001:

> Traditionally, the professions operate in spheres where success cannot be achieved in every case. Very often success or failure depends upon factors beyond the professional person's control ... Even where the critical factors are within the professional person's control, he still cannot guarantee success. In matters of fine judgment or great complexity no human being can be right every time.

The Appellant's experience

48 As the Judge found (see [91]–[94] of the Judgment), the Appellant was commercially savvy and had sufficient knowledge of investment principles to understand the types of risk involved. Again, this fact would have served to lower the standard of care to be expected of the Respondent in *this* particular case (see *Lloyd v Citicorp* at 288–289), for it would have been entitled to assume that the Appellant could rely on his own judgment and sources of information, without requiring constant updates and advice from Ms Ching.

The contractual framework

49 Indeed, given the existence of the IAI, it was clear that the parties had contracted on the basis that the Appellant was to maintain a significant degree of control over his accounts and investment portfolio, and while this contractual arrangement might not have been sufficient to displace the duty of care owed by the Respondent (see [38] above), it did mean that standard of care placed on the Respondent was less onerous than it might otherwise have been.

50 It was also noteworthy that cl 6 of the DIMA provided as follows:

> **6. Liability of the [Respondent]**

> *The [Respondent] shall not be liable for any error of judgment … or for any loss* arising out of any investment or for any act or omission in the execution and management of the [assets and investments under the custodianship of the Respondent] *unless such loss has been occasioned by the* default, fraud or *gross negligence of the [Respondent] …*
>
> [emphasis added]

The effect of cl 6 of the DIMA was not addressed to us in argument, and it would therefore be inappropriate for us to express a concluded view on the matter, save to say that one possible effect of cl 6 was that the use of the words "gross negligence" served to drastically reduce the standard of care owed by the Respondent, such that the Respondent would only be liable if it had been extremely careless. Courts in Singapore have not often been called upon to construe the meaning of the phrase "gross negligence" in this context (an exception being the Singapore High Court decision of *Sie Choon Poh (trading as Image Galaxy) v Amara Hotel Properties Pte Ltd* [2005] 3 SLR(R) 576), and, in view of the differences of approach in other Commonwealth jurisdictions (see the treatment of the subject in *Charlesworth & Percy on Negligence* (C Walton gen ed) (Sweet & Maxwell, 12th Ed, 2010) at para 1-15 as compared to that in A M Linden and B Feldthusen, *Canadian Tort Law* (LexisNexis Butterworths, 8th Ed, 2006) at pp 196–198) as well as the commercial importance of such clauses, we were content to reserve our analysis for a case in which the issue arose squarely for consideration.

Conclusion on the issue of breach

51 Given that the standard of care imposed on the Respondent was not a high one, we were of the view that the Respondent had discharged its duty of care, whether in contract or tort, by virtue of the fact that Ms Ching, in the course of her monthly meetings with the Appellant, consistently recommended suitable investments to him, advised him of the pros and cons of those investments, as well as reviewed the performance of investments already entered into on his behalf. There was much disagreement during the trial between Ms Ching and counsel for the Appellant as to whether such actions were to be regarded as "advice" or "information" or "recommendations" (as a result of the unfortunate focus on whether the Respondent had a tortious "duty to advise"), but the exact terminology was unimportant because Ms Ching was steadfast and unshaken in her testimony that she would have drawn to the attention of the Appellant the various factors and considerations germane to his investments, and that, to the best of her recollection, she did in fact do so. For the reasons we have given, we considered that that was sufficient to discharge the Respondent's duty of care to the Appellant.

Conclusion

52 In the result, we upheld the Judge's decision on the Advisory Claim (albeit for somewhat different reasons) and dismissed the Appellant's appeal, with the Respondent being awarded 90% of the costs of the appeal.

53 On the issue of costs, we were dismayed upon receiving the Appellant's and Respondent's cases to discover that they ran to about 250 and 500 pages, respectively, which were among the longest this court has ever received. In an appeal which was fairly straightforward, it was astonishing that the parties' written submissions were so prolix. It was even more troubling that despite their length, the parties' cases were not especially illuminating as to the key issues of law involved. The parties' submissions were therefore of a wholly unhelpful and unnecessary length. In *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [109]–[113], this court cautioned against *excessively* voluminous written cases, and we wish to reiterate those observations, lest this particular style of written advocacy takes root at the Bar. In order to register our disapproval of

excessively lengthy Appellant's or Respondent's cases, we accordingly awarded the Respondent only 90% of the costs of the appeal.