Chang Pui Yin

and

Bank of Singapore Ltd

(Court of Appeal)

(Civil Appeal No 194 of 2016)

Lam V-P, Cheung and Kwan JJA

6 June, 20 July 2017

Contract law — construction — agreement between bank and customer — terms of agreement not altogether be disregarded in assessing purpose of customer's account — private banking services could be regarded as services of type ordinarily supplied or provided for private use within meaning of s.3(1)(c) — in deciding whether clause came within ambit of Control of Exemption Clauses Ordinance (Cap.71), superficial classification of its nature simply by reference to drafting without reference to context in which it was agreed or circumstances in which signature was appended would not suffice — Unconscionable Contracts Ordinance (Cap.458) s.3(1)(c)

Banking and finance — banking facilities — agreement between bank and customer — construction — proper approach to Unconscionable Contracts Ordinance (Cap.458) s.3(1)(c) and Control of Exemption Clauses Ordinance (Cap.71)

合約法 — 詮釋 — 銀行與客戶之間的協議 — 在評估客戶帳戶的目的時不能完全忽視協議條款 — 私人銀行服務可以被視為根據第3(1)(c)條屬通常供應或提供作私人使用的服務類型者 — 在決定條文是否屬於《管制免責條款條例》(第71章)的範圍時，其性質的表面分類簡單地參考其草擬，而沒有參考作出協議的內容或作出簽署的情況並不足夠 — 《不合情理合約條例》(第458章)第3(1)(c)條

銀行與金融 — 銀行融資 — 銀行與客戶之間的協議 — 詮釋 — 針對《不合情理合約條例》(第458章)第3(1)(c)條及《管制免責條款條例》(第71章)的適當做法

P1–2 were husband and wife. They were customers of D, a bank. P3 was P2's corporate vehicle for her investments. Although the bank knew Ps' investment objective was that of medium risk investors, it recommended high risk products to them. Upon being alerted to this mismatch, D promised to readjust their portfolio to medium risk level. Despite this promise, D, acting without Ps' knowledge, changed their risk profiles to high risk. Substantial losses

were incurred in Ps' accounts. D denied liability, its stance being that the accounts were not "advisory accounts" and were only operated on Ps' instructions. The Judge held that on the true construction of the agreement between D and Ps, it had agreed to provide an advisory service to them. And he found that it was in breach of its duty to them. On that basis, he entered in Ps' favour interlocutory judgment for damages to be assessed, doing so even though he held that neither the Unconscionable Contracts Ordinance (Cap.458) (the UCO) nor the Control of Exemption Clauses Ordinance (Cap.71) (the CECO), both of which Ps invoked, applied in the circumstances. D appealed.

Held, dismissing the appeal, that:

(1) The terms of the agreement between a bank and its customer could not be altogether disregarded in assessing the purpose of the customer's account. There were clauses of the agreement between D and Ps which ruled out the construction at which the Judge arrived (*Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd* [1989] 2 HKLR 639, *Customs and Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181 applied; *Li Kwok Heem John v Standard Chartered International (USA) Ltd* [2016] 1 HKC 535 distinguished). (See paras.44–50.)

(2) Contrary to the Judge's view, private banking services could be regarded as services of a type ordinarily supplied or provided for private use within the meaning of s.3(1)(c) of the UCO. Giving full effect to the clauses on which the Judge's construction was reached would be unconscionable. To avoid such an unconscionable result, the power under s.5 of the UCO should be exercised to limit the application of those clauses by holding that D could not rely on them to avoid liability to Ps (*Shum Kit Ching v Caesar Beauty Centre Ltd* [2003] 3 HKLRD 422, *Li Kwok Heem John v Standard Chartered International (USA) Ltd* [2016] 1 HKC 535, *Wong Lung v Chinese University of Hong Kong Employees' Credit Union* (unrep., HCA 1122/2010, [2016] HKEC 2421), *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 33 ALR 569 applied; *Green v Royal Bank of Scotland Plc* [2013] EWCA Civ 1197 considered). (See paras.51–92.)

(3) In deciding whether those clauses came within the ambit of the CECO, a superficial classification of their nature simply by reference to their drafting without reference to the context in which they were agreed or the circumstances in which Ps appended their signatures would not suffice. As a matter of substance, those clauses were for the exclusion or restriction of D's relevant obligation or duty. Given the unconscionability

of those clauses, they were not fair and reasonable. D could not rely on them to escape liability to Ps (*Cremdean Properties Ltd v Nash* (1977) 241 EG 837 (HC), [1977] 2 EGLR 80 (CA); *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2011] Bus LR D65, *Lee Yuk Shing v Dianoor International Ltd* [2016] 4 HKC 535 applied). (See paras.93–114.)

Appeal

This was an appeal by the defendant, Bank of Singapore Ltd, against the judgment of Bharwaney J dated 8 August 2016 that it was liable to the first and second plaintiffs, Chang Pui Yin and Chang Chen Theresa Linda, for breach of contractual duties (see [2016] HKEC 1721). The facts are set out in the judgment.

[*Editor's note*: This judgment addresses the proper approach: to the construction of agreements between bank and customer; to the Unconscionable Contracts Ordinance (Cap.458) and to the Control of Exemption Clauses Ordinance (Cap.71).]

Mr Charles Manzoni SC, Mr Jose Maurellet SC and Mr Wilson Leung, instructed by CP Lin & Co, for the plaintiffs.

Mr Jat Sew Tong SC, Mr Victor Dawes SC and Mr Joshua Chan, instructed by Deacons, for the defendant.

Legislation mentioned in the judgment

Australian Consumer Law [Australia] s.22, 22(1)(g)

Competition and Consumer Act 2010 [Australia] Sch.2

Control of Exemption Clauses Ordinance (Cap.71) ss.3, 3(1), (2), (6), 5(1), 7(2), 11, 12, Sch.2

Supply of Services (Implied Terms) Ordinance (Cap.457) ss.5, 8(1)

Unconscionable Contracts Ordinance (Cap.458) ss.3, 3(1), (1)(c), (3), 5, 5(1), 6(1), (2)

Unfair Contract Terms Act 1977 [United Kingdom] s.13(1)

Unfair Contract Terms Act [Singapore] s.13(1)

Cases cited in the judgment

Australian Competition and Consumer Commission v South East Melbourne Cleaning Pty Ltd [2015] FCA 25

Bankers Trust International Plc v PT Dharmala Sakti Sejahtera (No 2) [1996] CLC 518

Barclays Bank Plc v Grant-Thornton UK LLP [2015] EWHC 320, [2015] 1 CLC 180, [2015] 2 BCLC 537

Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd [2017] FCAFC 75

Cremdean Properties Ltd v Nash [1977] 1 EGLR 58, (1977) 241 EG 837 (HC)
Cremdean Properties Ltd v Nash [1977] 2 EGLR 80, (1977) 244 EG 547 (CA)
Crestsign Ltd v National Westminster Bank Plc [2014] EWHC 3043 (Ch), [2015] 2 All ER (Comm) 133
Customs and Excise Commissioners v Barclays Bank Plc [2006] UKHL 28, [2007] 1 AC 181, [2006] 3 WLR 1, [2006] 4 All ER 256, [2006] 1 CLC 1096
DBS Bank (Hong Kong) Ltd v San-Hot HK Industrial Co Ltd [2013] 4 HKC 1
Deutsche Bank AG v Chang Tse Wen [2013] 4 SLR 886
Feldarol Foundry Plc v Hermes Leasing (London) Ltd [2004] EWCA Civ 747
Formosa Taffeta Co Ltd v Banque Indosuez [2009] 1 HKLRD 568
Freeway Finance Co Ltd v Tam Chuen On Raymond [2010] 4 HKC 448
Green v Royal Bank of Scotland plc [2013] EWCA Civ 1197, [2014] Bus LR 168
Hedley Byrne & Co Ltd v Heller & Partner Ltd [1964] AC 465, [1963] 3 WLR 101, [1963] 2 All ER 575, [1963] 1 Lloyd's Rep 485
Henderson v Merrett Syndicates Ltd (No 1) [1995] 2 AC 145, [1994] 3 WLR 761, [1994] 3 All ER 506, [1994] CLC 918
JP Morgan Chase Bank (formerly The Chase Manhattan Bank) v Springwell Navigation Corp [2008] EWHC 1186 (Comm)
Lee Yuk Shing v Dianoor International Ltd [2016] 4 HKC 535
Li Kwok Heem John v Standard Chartered International (USA) Ltd [2016] 1 HKC 535
NMFM Property v Citibank (No 10) (2001) 186 ALR 442
Paciocco v Australia and New Zealand Banking Group Ltd (2015) 236 FCR 199, (2016) 33 ALR 569
Phillips Products Ltd v Hyland [1987] 1 WLR 659, [1987] 2 All ER 620, (1988) 4 Const LJ 53
R & B Customs Brokers Co Ltd v United Dominions Trust Ltd [1988] 1 WLR 321, [1988] 1 All ER 847, [1988] RTR 134
Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123, [2011] Bus LR D65
Rasbora v JCL Marine [1977] 1 Lloyd's Rep 645
Shum Kit Ching v Caesar Beauty Centre Ltd [2003] 3 HKLRD 422, [2003] 3 HKC 235
Smith v Eric S Bush (a firm) [1990] 1 AC 831, [1989] 2 WLR 790, [1989] 2 All ER 514, (1989) 21 HLR 424
Thomas v Triodos Bank NV [2017] EWHC 314 (QB)
Thornbridge Ltd v Barclays Bank Plc [2015] EWHC 3430 (QB)

Titan Steel Wheels Ltd v Royal Bank of Scotland Plc [2010] EWHC 211 (Comm), [2012] 1 CLC 191
Wong Lung v Chinese University of Hong Kong Employees' Credit Union (unrep., HCA 1122/2010, [2016] HKEC 2421)
Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd [1989] 2 HKLR 639

Other materials mentioned in the judgment
Chitty on Contracts (32nd ed.) para.15-070
Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (2003), paras.3.10, 5.1, 5.2, 5.3, 6.2(h), Sch.1
Law Reform Commission, Report on Sale of Goods or Supply of Services, paras.7.5.1–7.5.2, 7.7.5

Lam V-P (giving the judgment of the Court)

1. The 1st and 2nd plaintiffs [Mr and Mrs Chang respectively] are a couple, with Mr Chang born in 1924 and Mrs Chang born in 1934. They were married in 1975 and led humble lives in the United States. In the judgment below, they were described as "a simple couple who led uncomplicated lives"[1] until Mr Chang's windfall in 1997. Due to his family connection, Mr Chang received approximately $120 million from a wealthy relative and he shared part of it with Mrs Chang. They retired back to Hong Kong and they were introduced to Mrs Li, who was then a relationship manager of the Standard Chartered Bank to assist them in their wealth management.

2. In 2004, Mrs Li changed her employment to work for ING Bank [the Bank], as the defendant formerly was known. Mr and Mrs Chang opened private banking accounts with the Bank and were continuously served by Mrs Li.

3. The 3rd plaintiff [Nextday] was solely owned by Mrs Chang as she was its sole shareholder and director. It was only a corporate vehicle of Mrs Chang for her investment.

4. The plaintiffs suffered substantial losses in their investments conducted through the Bank. By this action, they claimed against the Bank for negligent advice, misrepresentation and breach of contract.

5. The action was tried before Bharwaney J in February and July 2014. At the pre-trial review on 15 January 2014, the learned Judge directed that the trial would be split into two parts and the first part of the trial would not deal with issues on proof of damage, proof of causation of damages which were reserved to the Judge in charge of the Commercial List in the second part of the trial.

[1] Judgment at [4].

6. On 8 August 2016, the Judge handed down the judgment in respect of the first part of the trial. He found for the plaintiffs in establishing that the Bank was liable to them for breach of duties. He entered interlocutory judgment for damages to be assessed against the Bank with costs.

7. This is the Bank's appeal against that judgment.

Findings by the Judge and the conclusions in the judgment

8. After adverting to the background of the plaintiffs and the genesis of their wealth, the Judge considered the investment knowledge and appetite of the plaintiffs. He found that they had limited investment knowledge,[2] rudimentary understanding about the investments they made through the Bank and the risks associated with them,[3] and their investment objective had always been to preserve their capital and achieve a return slightly better than bank deposits, belonging to the category of medium-risk investors.[4]

9. Notwithstanding her knowledge of the profiles and investment objectives of the plaintiffs, after the switch of their accounts to the Bank, Mrs Li recommended high risk products to them. Upon being alerted to the mismatch, Mrs Li promised Mrs Chang and Mr Chang that she would re-adjust their portfolio back to medium risk level. Despite such promise, the risk profiles of Mr Chang and Nextday maintained by the Bank internally were changed, without their knowledge, to high risk on 25 September 2007 instead. After September 2007, more than USD14 million worth of high risk products were sold to Mr Chang and Nextday.[5]

10. The Judge further found that the plaintiffs relied heavily on Mrs Li and Mrs Li was aware of that, so much so that the Judge described Mrs Li as the person in control of the plaintiffs' accounts.[6] Significantly, Mrs Li never told the plaintiffs that she was merely acting as a salesperson in making recommendations to them.[7] The Judge was not impressed by the evidence of Mrs Li and found that she had not properly explained the risks of the investments to the plaintiffs.[8]

11. In August 2008, the son of Mrs Chang confronted Mrs Li with the unsuitability of the investments in the plaintiffs' accounts. After that there were complaints raised by the plaintiffs at meetings in September and October 2008. By then substantial losses had been incurred in the plaintiffs' accounts. The Bank denied liability on the

[2] Judgment at [24].
[3] Judgment at [26], [30], [31].
[4] Judgment at [37], [40], [41].
[5] Judgment at [40]–[49]. As to the finding of the high risk nature of the products, see [51]–[69]. See also [115]–[117].
[6] Judgment at [70]–[80] in particular [79].
[7] Judgment at [72].
[8] Judgment at [81]–[114].

basis that the accounts were "advisory accounts" and they were only operated on the plaintiffs' instructions.[9]

12. Against such factual findings, the Judge examined the plaintiffs' claims against the Bank. The Bank relied on provisions in the documents executed by the plaintiffs when the accounts were opened. They were set out by the Judge at [121]–[122] of the judgment:

> [121] The contractual provisions defined the relationship between the Bank and the Changs and Nextday and set out the role and responsibilities of the respective parties. The following terms and conditions from the Services Agreement (Version 09/02) are material to the present case:
>
> A. GENERAL TERMS & CONDITIONS APPLICABLE TO ALL SERVICES
> These general terms and conditions, together with the specific terms applicable to particular services included in this booklet and any other terms and conditions with respect to particular accounts, facilities or services provided by the Bank (collectively, the *Services*), constitute your agreement (the *Services Agreement*) with the Bank. The terms in the Services Agreement, together with the terms in the Account Opening Form (which are incorporated by reference herein), will apply to and govern your relationship with the Bank. All terms and references used in the Account Opening Form which are not defined therein shall have the same meaning and construction in the Services Agreement unless the context requires otherwise.
> …
> (17) Risk Disclosure Statement
> PLEASE READ THE RISK DISCLOSURE STATEMENT IN ANNEX A CAREFULLY
> The intention of the Risk Disclosure Statement is to inform you that the risk of loss in any trading or investments in Securities, foreign currencies, derivative products or a combination of any of them can be substantial. You should therefore carefully consider whether such transactions are suitable for you in light of your financial condition and your understanding of the nature of the transactions and the extent of your exposure to loss.

[9] Judgment at [118]–[119].

In respect of all transactions entered into by you or by the Bank on your Instructions or on your behalf, you understand and agree that:

(i) you make your own judgment in relation to investment or trading transactions;

(ii) the Bank assumes no duty to give advice or make recommendations;

(iii) if the Bank makes any such suggestions, it assumes no responsibility for your portfolio or for any investments or transactions made;

(iv) any risk associated with and any losses suffered as a result of the Bank entering into any transactions or investments on your behalf are for your account; and

(v) subject to the provisions of cl.C(4), in respect of all trades you may effect, you are deemed to have obtained independent advice from your legal, financial and investment advisers. The Bank does not hold itself or any of its directors, employees or agents out as acting in an advisory capacity to you in relation to any such trades. None of the Bank's directors, employees or agents are authorised to give such advice.

The Risk Disclosure Statement cannot disclose all the risks of investing or trading in Securities, foreign currencies, derivative products or a combination of any of them. The Bank may from time to time send you descriptions of some products that the Bank may trade with or for you and the risks generally associated with these products, and further supplements on other products and risk descriptions which you are strongly recommended to read. Before you trade in any product or enter into any transaction, you should ensure that you understand the detailed terms and effects of such product or transaction and its suitability for you. You should read through these carefully and study the market before you trade or invest .

…

C. INVESTMENT SERVICES — TERMS AND CONDITIONS APPLICABLE TO INVESTMENT AND TRADING SERVICES

(1) Permissible Investments

If you request investment Services, the Bank will purchase, sell and hold investments for your Account(s)

and provide other Services incidental to this activity as set forth in this Agreement. Investments will be as directed by you in the case of custody Accounts (*Custody Accounts*) and Accounts which are established on an advisory basis only (*Non-Discretionary Accounts*). In the case of Accounts established on a discretionary basis (*Discretionary Account(s)*), investments will be as determined by the Bank in accordance with considerations of availability and applicable fiduciary standards. Investments (*Investments*) which may be made for a Client's account include stocks, bonds, warrants, options, forwards, futures, bonds, debentures, notes, unit trusts, currencies, precious metals and other financial investments and commodities, bank deposits, tenancy bills, commercial paper, mortgages, debt and equity securities of public and private sector issuers located in developing countries, sub-underwriting, and all other securities, money market investments, obligations and derivatives of every description in which the Bank may legally invest for the Client's account, in any currency, whether registered or unregistered, restricted or unrestricted, publicly traded or not and on or off any Exchange, whether rated or unrated and any documents or other instruments evidencing the Client's rights or interests therein.

…

(4) Management

For Discretionary Accounts, the Bank is appointed to manage Investments for the Client's account and to hold, sell, invest and reinvest in the Bank's sole discretion, guided by the investment objectives specified by the Client and agreed to by the Bank.

The Bank, its Affiliates and/or their staff may provide you with information and express views in relation to Investments. Such provision of information and expression of views shall not constitute the giving of investment advice (save for the giving of advice in respect of a Client's Discretionary Account) and the Bank, its Affiliates and their staff shall have no liability in respect thereof. The Client will make its own decisions regarding investments and may accept or disregard, in the Client's sole discretion, any views expressed for recommendations made by the Bank, its Affiliates and/or their staff, none of whom accept any liability (including but not limited to liability for any diminution in the value or loss or damage to any Investment) for any such decision made by the Client.

> The Bank will have no duty or responsibility to supervise Investments or to make recommendations with respect to the purchase, retention or sale of Investments. The Bank shall be under no duty to assess the prudence of any instructions given by the Client or on the Client's behalf, or to warn the Client if any instructions are ill-timed or inadvisable or if any instructions are likely to lead to a loss to the Client.
>
> All transactions for the Client's Accounts whether Discretionary, Non-Discretionary or Custody, will be for the sole account and risk of the Client. The Bank has no duty or responsibility to give notice of default or make demand for payment or take any other action with respect to any Investment as to which a default in payment has occurred. [The Judge's emphasis.]

[122] The Risks Disclosure Statement contained the following provisions:

> 1. For the avoidance of doubt, the Bank wishes to draw the Client's attention to certain financial risks generally associated with share trading transactions, foreign exchange trading transactions, currency trading transactions, options trading transactions and securities trading transactions (the "Transactions"). The Client must carry the burden of these and all other risks (which can be substantial) and the Bank will not be responsible for any losses whatsoever arising from or in connection with the Transactions generally. The Client should therefore consider whether such trading is suitable in the light of his/its financial condition. The Bank recommends that the Client obtains independent legal advice before entering into the Transactions.
> 2. This brief Risk Disclosure Statement does not purport to disclose or discuss all of the risks or other significant aspects of the derivatives, securities or currency markets or of entering into the Transactions. This Risk Disclosure Statement is intended as general guidance only and is not specific to any transaction.
> 3. The Client should carefully make its own assessment of the relevant markets and consider whether investing in the Investments will be suitable for the Client in the light of the Client's

own experience, financial circumstances and investment objectives. It is important for the Client to note that it is the Client's responsibility to ensure that the Client has fully understood the nature and the characteristics of, and the risks related to, the Investments before entering into the Agreement.

4. The Transactions may involve a wide range of various securities and products, some of which may be more volatile and risky than others. The Client should therefore be aware of the inherent risks involved in each such security/product and in the derivatives of each such security/product.

5. In considering whether to enter into the Agreement, the Client should be aware of the following:

(i) Certain securities and instruments may not be readily realisable. …

(ii) Options, futures, derivatives and contracts for differences can be highly volatile and carry a high risk of loss. …

(iii) Where liabilities in one currency are matched by an asset in a different currency, or where assets are denominated in a currency other than your reference currency, movements of exchange rates may have a separate effect, unfavourable or favourable, on any gain or loss otherwise experienced on the investment.

(iv) Interest Rate Risk: Securities may be issued with fixed or floating interest rates. Securities bearing fixed interest payments will be adversely affected by rising interest rates and the longer the term of such securities, the greater the interest rate risk or loss from the movement of the market interest rates.

(v) Investment Risk: Repayment on maturity may be subject to intervening circumstances such as government action or legal restrictions …

(vi) Tax Risks: Income or profit from trading or dealings in the Investments may be subject to withholding tax, capital gains tax or other taxes imposed …

(vii) Liquidity Risk: Under certain market conditions, it may be difficult or impossible to liquidate or otherwise dispose of the Investments before the interest and/or the principal sum is due and payable. The Bank is not obliged to purchase any of the Investments from the Client under any circumstances whatsoever.

(viii) Foreign Exchange Risk: The Investments may be priced in a foreign currency. Movements in foreign exchange rates of the currencies of the Investments against your primary reference currency may substantially reduce the yield which you may expect from the Investments and have an adverse effect on your profit/loss position.

(ix) Foreign Markets Risk: Foreign markets will involve different risks from your own [market/markets]. In some cases the risks may be greater. …

(x) Emerging Markets Risk: Investments in emerging markets need careful and independent assessment by you of each investment and the risks …

(xi) Electronic Trading: Trading by way of electronic trading facilities which are supported by computer-based component systems (for order-routing, execution, matching, registration, clearing of trades, etc.) carry a certain amount of risk. …

(xii) Risks of Counterparties And Brokers: All transactions involving the Investments are entered on the Client's behalf and at the Client's own risk …

(xiii) Others: The credit and financial risks of the issuer of the Investments are on the Client. The Bank is not the Client's fiduciary, nor does it accept any fiduciary obligations to the Client.

The Client's net returns from the Investments could also be reduced by transaction costs (i.e. commission, fees and other charges) charged by

the Bank. These costs must be considered in any risk assessment made by the Client.

Settlement of any transaction involving the Investments may be effected through correspondents or custodians appointed by the Client, the Bank or brokers. If any such correspondents or custodians should fail to carry out their instructions at all or fail to carry out their instructions properly, the Client may suffer loss in respect of the total amount of the Client's investment, interest payments, the underlying assets of such transaction and/or any right to receive or dispose of such assets.

6. The Bank makes no representations, warranties or guarantees regarding the performance of the Investments and the Bank shall not be responsible for the accuracy or completeness of any recommendation or information it may communicate to the Client.

7. All terms used herein which are not defined herein shall be construed according to their definitions in the Services Agreement. [The Judge's emphasis.]

13. Misrepresentation aside, the plaintiffs' case was that the Bank acted in breach of its duties towards them. At [124] of the judgment, the Judge summarised the way Mr Manzoni SC advanced the case of breach of duties on behalf of the plaintiffs at the trial:

> In his opening Mr Manzoni submitted that the duty was two-fold: the relationship manager should not be proposing to the client to buy an investment product that was obviously unsuited to the investment objective and risk appetite of the client; and secondly, if the relationship manager does propose such a product, he was obliged to point out the risks of the product and that it was not suitable to the client's investment objective and risk appetite.

14. The Bank relied on the provisions in the account opening documents to contend that there was no duty to advise. The crux of the Bank's case was set out by the Judge at [125] of the judgment:

> It was the Bank's case that no duty to advise arose in this case. Under the Old Services Agreement and the Updated Services Agreement, the Bank might provide the client with information and express views in relation to investments but it was under no duty to advise its client. Pursuant to the Services Agreement, a client makes his/her/its own judgment in relation to investment

> or trading transactions. Under the signed Risks Disclosure Statement and the Updated Risks Disclosure Statement, the Bank makes no representations, warranties or guarantees regarding the performance of the investments and the Bank shall not be responsible for the accuracy or completeness of any recommendation or information it may communicate to the client. It is the Bank's case that as an agent/servant for the Bank at all material times, Mrs Li's relevant responsibilities in relation to the accounts were principally to communicate with the plaintiffs with respect to matters concerning the plaintiffs' accounts; to identify investment products of potential interest to the plaintiffs or any of them and present such products to them for their respective consideration; and to arrange execution of transactions authorised by the plaintiffs. In the words of cl.C(4) of the Services Agreement, Mrs Li merely provided the plaintiffs with information and views in relation to investments for the plaintiffs' consideration and decision, but such provision of information and views did not constitute the giving of investment advice and the Bank had no liability in respect thereof.

15. The Bank also relied on contractual estoppel based on the same provisions, and the Judge allowed the argument to be run by granting leave to re-amend the defence.[10]

16. Hence, it was necessary for the Judge to consider whether the provisions had the effect as contended by the Bank. The Judge examined this question at [127]–[143] of the judgment. The conclusion of the Judge can be found at [138] and [140]:

> In my judgment, the only proper construction of the Services Agreement is that the Bank contracted to provide an advisory service to the client. The client did not have to accept any such advice and the decision, whether or not to buy or sell the investment product that was the subject matter of the advice, vested in the client …
>
> It was common ground that the accounts in question were not discretionary accounts. Custody accounts are accounts in which the Bank may accept securities and other investments for safekeeping. The accounts of the Changs and Nextday were custody accounts. They were also non-discretionary accounts that were "established on an advisory basis only". Most private banking accounts would tend to be non-discretionary as well as custody accounts, the custody element being included for the convenience of the client and because the investments have to be held by the bank as security for loans advanced to the client. However, in order to give effect to the assumption of a contractual advisory duty on the one hand, and the disclaimer of liability for any advice, on the

[10] Judgment at [126].

other, I am driven to accept Mr Manzoni's submissions that there is a distinction to be made in this case between custody accounts and non-discretionary accounts "established on an advisory basis only". Clauses which contain a disclaimer of liability for advice given must be construed to apply only to "pure" custody accounts which are not "established on an advisory basis only". On my construction of the Key Agreements, such clauses do not apply to discretionary accounts, as expressly stated, for example, in cl.C(4), nor to non-discretionary accounts "established on an advisory basis only …

17. Based on such construction, the Judge held that the Bank cannot exonerate itself by reference to those provisions.

18. The Judge then went on to find that the Bank was in breach of the duties it owed to the plaintiffs. The relevant findings are at [147]–[149] of the judgment:

[147] In addressing the scope of the advisory duty, Mr Manzoni submitted, relying upon decision of *Susan Field v Barber Asia Ltd*, that there were 3 components: firstly, the advisor has to have regard to the investor's investment objectives and risk appetite; secondly, he must only offer products which are suitable to the investment objectives and risk appetite of the investor; and, thirdly, he has to warn of the risks inherent in the investments that are being offered. I accept these submissions and find, based on s.5 of the Supply of Services (Implied Terms) Ordinance (Cap.457) and the decision in *Susan Field v Barber Asia Ltd*, that a contractual duty of care arose in this case that encompassed, at the very least, these 3 elements; namely, that Mrs Li and the Bank had to exercise reasonable care and skill to ascertain the investor's investment objectives and risk appetite and to have regard to these objectives and risk appetite; that Mrs Li and the Bank had to exercise reasonable care and skill to only offer products which were suitable to the investment objectives and risk appetite of the investor; and that Mrs Li and the Bank had to exercise reasonable care and skill to warn clients of the risks inherent in the investments that were being offered.

The breaches of the advisory duty

[148] Based on the findings of fact that I have made in this case, I conclude that Mrs Li and the Bank breached the contractual duty they owed to the Changs and to Nextday

by failing to exercise reasonable care and skill to ascertain and to have regard to their investment objectives and risk appetite; by failing to exercise reasonable care and skill when offering products which were not suitable to their investment objectives and risk appetite; and by failing to exercise reasonable care and skill to warn of the risks inherent in the investments that were being offered to them.

[149] The breaches occurred when Mrs Li advised and recommended to them to purchase products which did not match their investment objective of being medium risk investors and which raised the risk level of their portfolios to risk levels higher than medium risk. I find that the breaches occurred when Mrs Li advised and recommended to them to purchase products which raised the risk level of their portfolios to Risk Level 7 or higher, which I find to be risk levels higher than medium risk. I also find that the breaches continued during the period of time that the portfolios remained at Risk Level 7 or higher. Such continuing breaches occurred from the failure of Mrs Li and the Bank to advise them to alter the composition of their portfolios, by selling high risk products and purchasing lower risk products, as would reduce their portfolios to at least Risk Level 6; and/or by Mrs Li and the Bank continuing to advise and recommend to them to purchase products which maintained the risk level of their portfolios at Risk Level 7 or higher.

19. Whilst the Judge did not find it necessary to determine the other issues raised in granting interlocutory judgment against the Bank, he did decide some of them and make observations on others:

(a) He did not accept Mr Manzoni's submissions that the doctrine of contractual estoppel was not properly founded in law;[11]

(b) The existence of a "salesman duty" was accepted by the Bank though it was not necessary for him to decide whether such duty could co-exist with contractual estoppel;[12]

(c) It is also not necessary to consider if Mrs Li's explanations amounted to actionable misrepresentation, as there was no plea along that line in the pleadings. The only plea on misrepresentation was that the plaintiffs would be able to

[11] Judgment at [155].
[12] Judgment at [156].

obtain low interest loans and to invest in funds to achieve "guaranteed" returns and such claim failed on the facts;[13]

(d) The Judge also rejected "the defence of undue influence" though he found that the plaintiffs trusted Mrs Li. He found there was no evidence of coercion or emotional blackmail and the plaintiffs failed to establish that they were "completely dominated" or regarded themselves as obliged to be wholly subservient and obedient to Mrs Li;[14]

(e) The Judge held that the Unconscionable Contracts Ordinance (Cap.458) [UCO] is not applicable because private banking services are only available to the wealthy and as such they are not services ordinarily provided for private use, consumption or benefit within the definition of s.3(1) for a party "deals as consumer";[15]

(f) The Judge further held that if the contracts between the plaintiffs and the Bank were execution only, they cannot seek relief under the Control of Exemption Clauses Ordinance (Cap.71) [CECO] because the provisions in question were clauses defining the roles and obligations of the parties as opposed to clauses excluding liability. Further, if CECO applies, the Judge would have found that the provisions satisfy the test of reasonableness;[16] and

(g) He also held that if the doctrine of contractual estoppel is applicable, the plaintiffs could not rely on waiver to avoid its effect by reason of the lack of evidence of representations by the Bank that it would not rely on the contractual provisions.[17]

Issues in the appeal and the respondent's notice

20. The Bank appealed against the judgment. In light of the submissions advanced on behalf of the Bank before us, the appeal of the Bank is founded upon a challenge to the construction of the relevant provisions by the Judge. Mr Jat SC submitted that the Judge erred in holding that the provisions did not apply to the non-discretionary accounts of the plaintiffs.

21. In addition to defending the Judge's construction of the relevant provisions, Mr Manzoni on behalf of the plaintiffs also sought to uphold the result by reference to breaches of the salesman duty. Counsel also contended that the Bank could not rely on the provisions by reason of the UCO and CECO and the Judge was wrong in holding that they are not applicable.

[13] Judgment at [157].
[14] Judgment at [158].
[15] Judgment at [159].
[16] Judgment at [160] and [161].
[17] Judgment at [162].

The construction issue

22. Mr Jat submitted that banks generally do not owe their customers any duty to provide advice on the suitability and risks of investments. Whilst banks may assume responsibility to provide advice, the mere giving of advice does not necessarily mean that a bank has assumed legal responsibility for such advice. He relied substantially on *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm), in which Gloster J (as she then was) said at [374]:

> … In order to decide whether the advice given gave rise to obligations that went beyond the normal recommendations or 'advice', given in the daily interactions between an institution's sales force and a purchaser of its products, so as to import obligations of the type owed by a fully-fledged investment advisor, one needs to look at all aspects of the objective evidence of the relationship between the parties. For this reason, I found the use of the term 'advisory relationship' ambiguous; one has to be clear whether the term simply refers to a situation where A gives advice to B in the context of a commercial relationship; or whether the term necessarily connotes the existence of an obligation on the part of the provider of the advice to take reasonable care and/or to give advice about certain matters. …

23. Relying on the same judgment at [452], Mr Jat drew a distinction between an investment advisor who is retained to advise a client on investment and the advice and recommendations given by a salesperson as part of the selling process.

24. He submitted that the absence of a written advisory agreement setting out the scope of the duty to advise and the relevant fee structure was an important indication that the bank did not assume legal responsibility to advise on suitability and risks.

25. In the present case, he submitted that the Judge erred in construing cls.A(17) and C(4) of the Services Agreements and cls.1, 3 and 6 of the Risk Disclosure Statements as only applicable to custody accounts of the plaintiffs but not to their non-discretionary accounts. These clauses provide that the Bank assumes no duty to give advice and assumes no responsibility for the customer's portfolio or for any investments or transactions made. Further, if the Bank provides information and expresses views in relation to investments, the Bank would not accept any liability for investment decisions made by the plaintiffs and it is under no duty to assess the prudence of any instructions given by the plaintiffs. Counsel said the effect of these clauses was to negate the existence of any duty to recommend suitable investments and to warn the plaintiffs of the risk of such investments.

26. The Judge explained how he came to the construction he did at [127]–[141] of the judgment. He quite correctly noted that the accounts of the plaintiffs consisted of custody accounts and non-discretionary accounts. Identifying cl.C(1) as the primary clause governing the scope of the services provided by the Bank, and placing great significance on the expression "established on an advisory basis only" in that clause, he found that the services provided in respect of non-discretionary accounts included some advisory services. After referring to some cases, he rejected the suggestion that "advisory basis" means the accounts being operated in accordance with the "advice" from the customers. Making reference to the marketing brochure of the Bank, the Judge found that it was intended that advisory services would be provided by the Bank.

27. Mindful of the apparent conflict between the existence of a duty to advise and cls.C(4) and A(17), the Judge resolved the same by accepting Mr Manzoni's contention that those clauses were only applicable to pure custody accounts which are not established on an advisory basis. The Judge also relied on the principle that one should not construe a term or condition in a contract in a way that would make it repugnant to the commercial purpose of the contract.

28. Mr Jat submitted that the Judge erred in the following respects in arriving at such construction:

(a) The construction is not consistent with the language of the documents. The preamble in the Services Agreements clearly provides that the terms govern the relationship between the customer and the Bank without qualification. Clause A(17) also states that it applies to "all transactions entered into by you or by the Bank on your Instructions or on your behalf", showing that its application cannot be confined to pure custody accounts. To the same effect is the statement in cl.C(4) that "all transactions for the Client's Accounts whether Discretionary, Non-Discretionary or Custody, will be for the sole account and risk of the Client".

(b) The reality in terms of operation of the accounts also indicate that the clauses are applicable to non-discretionary accounts as well. Since custody accounts are only maintained for the safekeeping of securities, provisions in these clauses defining the Bank's responsibility for provision of advice could not have any meaningful application. Such provisions are more meaningful in the context of non-discretionary accounts through which investment transactions are conducted.

(c) The Judge neglected the distinction drawn by Gloster J in *JP Morgan Chase Bank v Springwell Navigation Corp* at [374] between the giving of advice and assumption of legal

> responsibility of such advice. As there was no term in the Services Agreements setting out the scope of advisory duty and fees structure for the same, it is inconceivable that the Bank would undertake to provide advice without remuneration and without limitation of liability.

29. Dealing first with the last limb of Mr Jat's submissions, on the facts of the present case, we do not derive much assistance from that citation from the judgment of Gloster J. We accept that as a matter of law the provision of information (even if it could factually be characterised as the giving of advice) in a banking context does not necessarily import a full-fledged duty of reasonable care and skill on the part of the bank as if it is giving advice as a financial or investment advisor. We also agree with Gloster J that it is necessary to look at all aspects of the objective evidence of the relationship between the parties in order to determine the extent of the duty assumed by the bank in offering the recommendations or advice.

30. There is obviously a difference between the duty owed by a full-fledged investment advisor and that by a salesperson marketing financial products. However, Gloster J did not regard the latter as owing no duty whatsoever. At [108] of the judgment in *JP Morgan Chase Bank v Springwell Navigation Corp*, the learned Judge observed as follows:

> … It may well be that, theoretically, in such circumstances, a low level duty of care would arise on the part of the salesman not to make any negligent misstatements, or even to use reasonable care not to recommend a highly risky investment without pointing out that it was such, but a low level duty along those lines is worlds away from the wide duty of care that was pleaded or relied upon as having arisen at this early stage …

31. When that case went to the English Court of Appeal (reported in [2010] 2 CLC 705), Aikens LJ was prepared to accept that there would be a low level duty of care on the part of a salesman not to make any negligent misstatements, and to use reasonable care not to recommend a highly risky investment without pointing out that it was such, see [123].

32. In *Crestsign Ltd v National Westminster Bank Plc* [2015] 2 All ER (Comm) 133, the Judge discussed this salesman duty at greater length. After alluding to the submissions advanced by counsel, the Judge held at [143] that a bank which undertakes to explain the nature and effect of a transaction owes a duty to take reasonable care to do so as fully and properly as the circumstances demand. In coming to such conclusion, as shown in [145]–[150], the Judge adopted the approach of Mance J (as he then was) in

Bankers Trust International Plc v PT Dharmala Sakti Sejahtera [1996] CLC 518, 553:

> In short, a bank negotiating and contracting with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to that other party. However, if the bank does give an explanation or tender advice, then it owes a duty to give that explanation or tender that advice fully, accurately and properly. How far that duty does must once again depend on the precise nature of the circumstances and of the explanation or advice which is tendered.

33. The Judge in *Crestsign Ltd v National Westminster Bank Plc* highlighted the distinction in the different levels of duties at [153]:

> In my judgment, he came under a duty to explain fully and accurately the nature and effect of the products in respect of which he chose to volunteer an explanation, but I do not think he came under a duty to explain fully other products that Crestsign might have wanted to purchase but which he did not wish to sell … An explanation of such other products, for the purpose of presenting a balanced picture, would be the territory of an advice-giving duty, which was excluded on the documents as I have already found …

34. As illustration of the salesman duty, Mr Manzoni also referred us to the decision of Lindgren J in the Federal Court of Australia in *NMFM Property v Citibank (No 10)* (2001) 186 ALR 442 at [396] to [402], which was endorsed by Stone J in *Formosa Taffeta Co Ltd v Banque Indosuez* [2009] 1 HKLRD 568 at [139]. Counsel also cited the recent judgment in *Thomas v Triodos Bank NV* [2017] EWHC 314 (QB) at [74] to [81].

35. We do not find it necessary to discuss these authorities at length in this judgment. As held by Lord Hoffmann in *Customs and Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181 at [36], whether a defendant has assumed responsibility is a legal inference to be drawn from his conduct against the background of all the circumstances of the case. At [35], His Lordship said:

> The answer does not depend upon what the defendant intended but, as in the case of contractual liability, upon what would reasonably be inferred from his conduct against the background of all the circumstances of the case.

36. It is thus necessary for the court to examine the conduct of the salesperson against the facts and circumstances of each case before one can determine if responsibility had been assumed when recommendations were made. It is not possible to regard decisions

reached in other cases with different facts and circumstances as directly applicable and transpose the same to the situation in the case before the court.

37. Hence, the giving of advice *per se* does not answer the question as to assumption of responsibility for such advice. One must examine the terms and conditions set out in the Services Agreements and the Risk Disclosure Statements as well as other relevant factual circumstances surrounding the dealings between the parties in determining the extent to which the Bank owed duties towards the plaintiffs in respect of the recommendations of financial products and the management of their portfolios.

38. Having regard to the way in which the Judge explained the extent of duties owed by the Bank and the breaches of the same at [147]–[149], quite obviously he did not find against the Bank on the basis that it owed the plaintiffs a full-fledged duty to advise (as advocated in *JP Morgan Chase Bank v Springwell Navigation Corp*). Though the Judge only referred to the advisory services provided by the Bank generally at [138], he must also have in mind the extent of the duty as elaborated later in the judgment.

39. On the issue of construction, we should focus on the relevant context and factual matrix at the time the Services Agreements were executed.

40. In our judgment, Mr Jat was correct in submitting that on its face, the terms and conditions in the Services Agreements were applicable to non-discretionary accounts as well as custody accounts. It was stated clearly in the Introduction section that the terms and conditions in the General Terms and Conditions (*viz* under Section A) are applicable to "all accounts established with, and all services provided by, the Bank". The heading of Section A was "General Terms & Conditions applicable to all services".

41. Referring to the Risk Disclosure Statement in cl.A(17), the intention was plain that it would be applicable to investment transactions (which would be conducted, in the cases of the plaintiffs, in the non-discretionary accounts) as opposed to mere custody services provided by the Bank.[18] As it was in such context that the references to "the risk of loss in any trading or investments" were made, the need to consider the suitability of transactions and extent of exposure to loss were meaningful. There were explicit references to "all transactions", "investment or trading transactions", the Bank making suggestions without assumption of responsibility "for your portfolio or for any investments or transactions made". All these were indicia that the parties intended that the terms would be applicable to the non-discretionary accounts.

42. The Judge placed great emphasis on cl.C(1) where the non-discretionary accounts were "established on an advisory basis

[18] It was provided under cl.C(7) that custody account was for safekeeping of securities or other investments. See also judgment at [140].

only", taking it as the primary clause governing the scope of the banking services. His Lordship took the view that it suggested that some advisory services were to be provided by the Bank in respect of these accounts.[19] He rightly held that "advisory basis" could not be referring to "advice" from the customers[20] (and Mr Jat properly accepted that this must be right). The Judge then, based himself on several English authorities, drew a distinction between "account on an execution basis only" and "account on advisory basis only".[21] He concluded that in light of some statements in the marketing brochure, the Bank did offer advisory services to the plaintiffs.[22]

43. Given that advisory services would be provided by the Bank, the non-discretionary accounts could not be accounts operated on an execution basis only. He regarded this objective fact as negating the statements in cls.C(4) and A(17) as they conflicted with the assumption of a contractual advisory duty on the part of the Bank.[23] He therefore felt driven to the construction suggested by Mr Manzoni.

44. With respect, the Judge's approach was flawed:

(a) The extent of the assumption of legal responsibility for a statement is, as observed by Lord Hoffmann in *Customs and Excise Commissioners v Barclays Bank Plc*, facts and circumstances sensitive. The terms of the agreement between the parties is one of the relevant circumstances and in some cases disclaimers have been held to be effective to negate the assumption of legal responsibility;[24]

(b) Therefore, it is not possible to deduce from the mere fact that a statement has been made (which can be described in a general sense as advisory services) that the maker of a statement has assumed legal responsibility for such statement. It is also erroneous to hold that because there had been such assumption of legal responsibility, clauses in the agreement which are inconsistent with such assumption of responsibility must be inapplicable. Such an approach is tantamount to disregarding those clauses in the assessment as to the extent to which legal responsibility has been assumed for the statement and that would be wrong in law;

(c) The question of assumption of legal responsibility has to be assessed by reference to the facts and circumstances of the

[19] Judgment at [130].
[20] Judgment at [131] and [136].
[21] Judgment at [132]–[136].
[22] Judgment at [137].
[23] Judgment at [138]–[139].
[24] *Hedley Byrne & Co Ltd v Heller & Partner Ltd* [1964] AC 465; see also the analysis of Lord Goff in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 193B–E. A more recent example can be found in *Barclays Bank Plc v Grant-Thornton UK LLP* [2015] EWHC 320, [2015] 1 CLC 180.

present case instead of transposing what has been determined in the context of different sets of facts and circumstances in some other cases. Thus, the Judge had been unfortunately misguided by the distinction between "execution only accounts" and "advisory or discretionary accounts" in the English cases decided in different settings. It is, in our respectful view, of little assistance to extrapolate from the English cases a general distinction and apply it (as if it is a rule of law) in the present case to differentiate the applicability of the clauses to the custody accounts and non-discretionary accounts;

(d) On the application of the repugnancy principle, it actually begs the question. It cannot be assumed that the commercial purposes of the opening and operation of these accounts were to be examined from the plaintiffs' point of view. The purposes had to be common to both the plaintiffs and the Bank. Mr Jat submitted that the bargain between the parties was that: (i) the Bank agreed to recommend investments and provide information in good faith and without charge; (ii) in return, the customers agreed that the Bank does not assume legal responsibility if the investment makes a loss. As shall be explained below, we find this analysis to be too simplistic as it does not capture the full picture as to the dealings between the parties. The same is true if the commercial purpose of the opening and operation of the accounts were to be regarded as the rendering of advisory services by the Bank to the plaintiffs;

(e) In *Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd* [1989] 2 HKLR 639, the arguments based on repugnancy were rejected by the Privy Council. Lord Goff said at p.645G:

> Their Lordships wish to stress that to reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified in circumstances where the two clauses are in truth irreconcilable.

(f) We cannot discern any irreconcilability between giving full effect to cls.A(17) and C(4) on the one hand and accepting that the non-discretionary accounts were described as "established on an advisory basis only". The latter phrase does not set out the extent of the Bank's duty in respect of suggestions or advice rendered;

(g) The Judge appears to refer to a broader argument on repugnancy: giving effect to these clauses would be repugnant to the main object and intention of the contract in terms of advisory services rendered by the Bank to the plaintiffs. In

***Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd*, Lord Goff addressed a similar argument at p.646:**

> … the difficulty with this proposition is that it ignores altogether the terms upon which the goods were bailed to the Company. Their Lordships do not consider that, for this purpose, the 'main object or intention' of a contract can be ascertained without any reference to its terms. Of course, there may be cases where, having regard to the main purpose of contract, it would be proper to construe a particular exemption clause in a restricted sense. … But it does not follow that exemptions clauses should be rejected or cut down merely because they are in sweeping terms. It may well be that a storage company is only prepared to contract on such terms, making only a modest charge and perhaps requiring the owner of the goods to obtain his own insurance. If it is made plain to owners of goods wishing to avail themselves of its services that the liability of the storage company is to be of a very limited nature, as set out in the terms and conditions, of the contract, then there is no impediment at common law to a contract being made on those terms. True, exemption clauses will be scrutinized with some stringency, with the effect (for example) that, in accordance with established principle, a party will not be held to have contracted out of liability for negligence except upon clear terms; but principles such as these are designed to do no more than to assist in ascertaining the intention of the parties from the contractual documents. Where the contractual intention is plain it should, in their Lordships' opinion, be given effect to, even though this may result in a very restricted obligation resting upon the party relying upon the exemptions in the contract.

(h) We are of the view that the same reasoning is applicable here.

45. In this appeal, Mr Manzoni sought to support the Judge's construction. He submitted that though the clauses in question were *ex facie* wide enough to be applicable to non-discretionary accounts, when one pays proper regard to the context and factual matrix, they should not apply to those accounts. Counsel said the very purpose of an advisory account is to provide advice. There was a clear distinction between a custody account and an advisory account. The latter was an account with services beyond execution. Coupled with Mrs Li's knowledge that the plaintiffs' accounts were opened as a continuation of their previous relationship at the Standard Chartered Bank (when Mrs Li had been directing the plaintiffs' investments), Mr Manzoni submitted that it made little commercial sense for the Bank to contract out of the very service which it offered to provide. A more rational construction was the one adopted

by the Judge, confining the application of these clauses to custody accounts.

46. With respect, we cannot accept these submissions. In substance, the foundation of Mr Manzoni's submissions is that the commercial purpose of the setting up of these accounts was for the Bank to give advice to the plaintiffs. As we have explained above, this approach is flawed. One cannot disregard the terms of the agreement altogether in assessing the purpose of the accounts. The accounts were opened to facilitate the plaintiffs' conduct of their investment through the use of the Bank's services. Part of such services involved the Bank recommending certain products to the plaintiffs. There is no inherent implausibility or lack of commercial sense in Mr Jat's submissions that such recommendations were put forward by the Bank on the basis that it would not assume legal responsibility for the same.

47. In his oral submissions, Mr Manzoni drew a line between advisory duty and investment duty and submitted that even if it is held that the clauses apply to non-discretionary accounts, they were only effective as disclaimers of the investment duty but did not operate as disclaimers of the advisory duty on the part of the Bank.

48. This was not an argument adopted by the Judge. In any event, we do not think it is possible to draw such a line in the relevant terms and conditions in the present case. The following clauses clearly point to recommendations or suggestions made by the Bank, as such relate to what Mr Manzoni classified as the advisory duty:

> In respect of all transactions entered into by you or by the Bank on your Instructions or on your behalf, you understand and agree that:
>
> …
>
> (ii) the Bank assumes no duty to give advice or make recommendations;
>
> (iii) if the Bank makes any such suggestions, it assumes no responsibility for your portfolio or for any investments or transactions made;
>
> (iv) any risk associated with and any losses suffered as a result of the Bank entering into any transactions or investments on your behalf are for your account; and
>
> (v) subject to the provisions of cl.C(4), in respect of all trades you may effect, you are deemed to have obtained independent advice from your legal, financial and investment advisers. The Bank does not hold itself or any of its directors, employees or agents out as acting in an advisory capacity to you in relation to any such trades.

> None of the Bank's directors, employees or agents are authorised to give such advice. … (cl.A(17), our emphasis)
>
> …
> The Bank, its Affiliates and/or their staff may provide you with information and express views in relation to Investments. Such provision of information and expression of views shall not constitute the giving of investment advice (save for the giving of advice in respect of a Client's Discretionary Account) and the Bank, its Affiliates and their staff shall have no liability in respect thereof. The Client will make its own decisions regarding investments and may accept or disregard, in the Client's sole discretion, any views expressed for recommendations made by the Bank, its Affiliates and/or their staff, none of whom accept any liability (including but not limited to liability for any diminution in the value or loss or damage to any Investment) for any such decision made by the Client." (cl.C(4))
> …
> 6. The Bank makes no representations, warranties or guarantees regarding the performance of the Investments and the Bank shall not be responsible for the accuracy or completeness of any recommendation or information it may communicate to the Client. (Risk Disclosure Statement)

49. Mr Manzoni placed considerable reliance on *Li Kwok Heem John v Standard Chartered International (USA) Ltd* [2016] 1 HKC 535. However, we derived little assistance from that judgment on the question of construction. As Mr Jat submitted, there are material distinctions in the relevant provisions between that case and the present case. Most importantly, the comparable clauses in that case were contained in the Risk Disclosure Statement which Louis Chan J found to be inapplicable to the products in question, see [174]. The General Business Conditions in that case did not contain provisions similar to cls.A(17) and C(4) in the present case.

50. On a proper construction of cls.A(17) and C(4), subject to what we shall say below, we are of the view that they are applicable to non-discretionary accounts of the plaintiff. We respectfully disagree with the Judge on this issue.

Unconscionable Contracts Ordinance

51. The UCO provides for relief in respect of a contract for supply of services in which one of the parties deals as consumer. If the court finds any part of such contract to have been unconscionable in the circumstances relating to the contract at the time it was made, the court may grant the relief set out in s.5(1) of the UCO. Such relief includes the enforcement of the contract without the

unconscionable part or limiting the application of, or revising or altering, any unconscionable part so as to avoid any unconscionable result.

52. The provision of services in relation to the non-discretionary accounts are contracts for the supply of services. The Judge however held that the plaintiffs did not deal as consumer, thus UCO was not applicable in the present case.

53. Section 3 of the UCO defines the circumstances in which a party to a contract "deals as consumer". Section 3(1) reads:

> (1) A party to a contract 'deals as consumer' in relation to another party if —
>
> (a) he neither makes the contract in the course of a business nor holds himself out as doing so;
> (b) the other party does make the contract in the course of a business; and
> (c) the goods passing or services provided under or in pursuance of the contract are of a type ordinarily supplied or provided for private use, consumption or benefit.

54. There is no doubt that the plaintiffs did not make the contracts with the Bank in the course of a business whilst the Bank did. The Judge found against the plaintiffs because he was of the view that as private banking services are only available to the wealthy, they are not services ordinarily provided for private use, consumption or benefit. In other words, the criterion in s.3(1)(c) was not satisfied.

55. With respect, that is a rather surprising conclusion. In this appeal, Mr Dawes SC (who argued this part of the appeal on behalf of the Bank) was unable to make any submissions to support the Judge's conclusion. In our judgment, one cannot determine if a service is ordinarily provided for private use, consumption or benefit simply by examining the class of the consumers using such service. There are wealthy consumers and there are less wealthy consumers. What is required is that the services (or goods) in question are ordinarily provided for private use, consumption or benefit, the criterion is satisfied notwithstanding that the services are offered at a price or on other terms which only those with considerable wealth could afford or meet. Mr Manzoni referred to several authorities as illustration of this proposition: *Wong Lung v Chinese University of Hong Kong Employees' Credit Union* (unrep., HCA 1122/2010, [2016] HKEC 2421, 2 Nov 2016) (investment advisory services); *Freeway v Tam Chuen On Raymond* [2010] 4 HKC 448 (loan

agreement for $5 million); *Rasbora v JCL Marine* [1977] 1 Lloyd's Rep 645 (36-foot power boat); *Feldarol Foundry Plc v Hermes Leasing (London) Ltd* [2004] EWCA Civ 747 (hire purchase of a Lamborghini).

56. Section 3(3) places the onus of proving that a person does not deal as consumer on the party making such allegation. There is no evidence to suggest that private banking is not a service ordinarily provided for private use or benefit.

57. We hold that the Judge erred in his conclusion that UCO was not applicable to private banking services.

58. Therefore, we have to consider if the terms relied upon by the Bank, particularly those set out in [48] above, are unconscionable in the circumstances relating to the contract at the time it was made.

59. Section 6(1) of the UCO directs the court to have regard to the following matters:

> (1) In determining whether a contract or part of a contract was unconscionable in the circumstances relating to the contract at the time it was made, the court may have regard to (among other things) —
>
> (a) the relative strengths of the bargaining positions of the consumer and the other party;
> (b) whether, as a result of conduct engaged in by the other party, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the other party;
> (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
> (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the other party or a person acting on behalf of the other party in relation to the supply or possible supply of the goods or services; and
> (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the other party.

60. By the expression "among other things", the section also makes it clear that the list is non-exhaustive, see *Shum Kit Ching v Caesar Beauty Centre Ltd* [2003] 3 HKLRD 422. As held in that

case, the court must have regard to all circumstances relevant to the determination if a part of a contract is unconscionable.

61. The UCO was drafted with reference to Australian legislation (see Law Reform Commission's Report on Sale of Goods or Supply of Services at paras.7.5.1–7.5.2 and 7.7.5). Whilst the wording is not exactly the same and the Australian Trade Practices Act 1974 has been replaced by the Australian Consumer Law in Sch.2 of the Competition and Consumer Act 2010, in our view the underlying concepts regarding unconscionable conduct in the Australian jurisprudence provides some guidance in identifying if a particular provision is unconscionable in the UCO context.

62. At the same time, one must also keep in mind the distinctions between the UCO and the Australian statutes. Notably, the Australian statutes target unconscionable conduct as opposed to unconscionable contract. As such, the inquiry under the Australian statutes is wider, transcending the circumstances at the time the contract is made. In Hong Kong, the UCO is directed against unconscionable contracts and expressly stipulates that the court shall not have regard to any unconscionability arising from circumstances that were not reasonably foreseeable at the time the contract was made, see s.6(2).

63. The list of non-exhaustive factors in s.22 of the Australian Consumer Law [ACL] contains, in addition to factors in s.6(1) of the UCO, several other factors. Section 22 provides:

> 22 *Matters the court may have regard to for the purposes of section 21*
>
> (1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the *supplier*) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the *customer*), the court may have regard to:
>
> (a) the relative strengths of the bargaining positions of the supplier and the customer; and
> (b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonable necessary for the protection of the legitimate interests of the supplier; and
> (c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and
> (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used

against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the customer:

(i) any intended conduct of the supplier that might affect the interests of the customer; and

(ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and

(j) if there is a contract between the supplier and the customer for the supply of the goods or services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the customer engaged in, in connection

> with their commercial relationship, after they entered into the contract; and
>
> (k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and
> (l) the extent to which the supplier and the customer acted in good faith.

64. Depending on the facts and circumstances of a case, we are of the view that some of these additional factors could also be relevant in the examination of the unconscionability of a contract in the Hong Kong UCO context. As shall be explained below, in the present case, factors (g) and (i) are of some significance.

65. We have been referred to several Australian authorities on the topic. It is not necessary for us to discuss all of them. Instead, we would highlight some propositions which, after paying due regard to the differences between the UCO and the Australian statutes, we believe to be helpful in applying the UCO in the Hong Kong context. We derive these propositions principally from recent Australian authorities: *Australian Competition and Consumer Commission v South East Melbourne Cleaning Pty Ltd* [2015] FCA 25; *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, (2016) 33 ALR 569; *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* [2017] FCAFC 75.

66. Whilst the court must have regard to the non-exhaustive list of factors in the statute, it should also consider all other relevant matters and circumstances reasonably foreseeable at the time of making the contract in determining if there is any unconscionability in the terms of the contract. Unconscionability means "something not done in good conscience" and it is to be evaluated by reference to a normative standard of conscience. In such evaluation in the statutory context, the court is not constrained by the general equitable concept of unconscionability.

67. Hardship or bad bargain for a party *per se* cannot be a sufficient foundation for a finding of unconscionability. At the same time, it may not be too helpful to ask if there has been a high level of moral obloquy or moral tainting.[25] Whilst conduct involving

[25] See *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd* [2017] FCAFC 75 at [52]; *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [262]; *Australian Competition and Consumer Commission v South East Melbourne Cleaning Pty Ltd* [2015] FCA 25 at [116(i)].

dishonesty, sharp practice or conscious wrongdoing are unconscionable, conduct falling short of these could still be regarded as unconscionable.

68. In *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [296], Allsop CJ explained the evaluation of unconscionability as follows:

> … It does not involve personal intuitive assertion. It is an evaluation which must be reasoned and enunciated by reference to the values and norms recognised by the text, structure and context of the legislation, and made against an assessment of all connected circumstances. The evaluation includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.[26]

69. Much of what His Honour said in terms of the norms and values embedded in the law is equally apposite in Hong Kong. We respectfully echo the sentiment and we consider that a similar approach is equally applicable in the context of our UCO though (unlike the position in Australia) we are confined to consumer's dealings and unconscionability of the terms of contract at the time the contract is made.

70. In that context, as opined by Recorder Edward Chan SC in *Shum Kit Ching v Caesar Beauty Centre Ltd* at p.428, the court may have regard to:

(a) all existing circumstances which are relevant whether they are known to the party against whom relief is sought or not;
(b) future circumstances if those circumstances were reasonably foreseeable having regard to the existing circumstances; and

[26] At [259] to [295] of the judgment, Allsop CJ recited the infusion of these norms and values in the law.

(c) the legal effect of the contract at the time the contract is made whether this effect is appreciated by the party against whom relief is sought or not.

71. Coming to the facts of the present appeal, the focus of the inquiry is whether the standard terms in the Services Agreements and the Risk Disclosure Statements, in particular those set out at [48] above are conscionable. In terms of the matters in the s.6(1) non-exhaustive list, none of them is determinative. On the relative strengths of the bargaining positions of the parties, though the plaintiffs were not poor and uneducated and could have chosen to use the services of another institution for the maintenance of their substantial wealth, the reality remains that there is very little scope for them to negotiate a different set of terms and conditions.

72. On the reasonable need to protect the legitimate interests of the Bank, it depends on the extent of the protection. Whilst we accept there is a reasonable need for protection of some potential liabilities flowing from recommendations of financial products, we do not see any legitimate interest on the part of the Bank to have absolute protection so that it would not be liable for conduct amounting to a complete disregard of the express instructions of the customers in terms of their investment objectives and risk appetites as had happened in the present case (as we shall further explain below).

73. Though the evidence shows that no one drew the attention of the plaintiffs specifically to the clauses in question, we accept the 2nd plaintiff could understand English and the clauses in question. Also there is no suggestion that undue influence had been exercised upon the plaintiffs in procuring the agreements to be signed. We shall address the question of unfair tactics later.

74. There is not much evidence on the possibility of the plaintiffs acquiring identical or equivalent services from other institutions. They had previously maintained their accounts with the Standard Chartered Bank. We are prepared to accept that the plaintiffs could have opened private banking accounts with similar services offered by other banks. Yet we find this factor to be of minimal significance in the context of the present case.

75. As we said, on the facts of the present case these statutory factors are inconclusive. As held by the High Court of Australia in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 33 ALR 569, one should not regard any of these factors as determinative. The list of factors is not meant to be relied upon as a score list and whether a term is unconscionable is not to be determined by checking how many are achieved out of the several factors mentioned in it. Hence, the existence of inequality in bargaining power cannot by itself be conclusive on unconscionability

(as in *Paciocco*). Likewise, the absence of such inequality would not be conclusive as to the conscionability of the contract. The same can be said in respect of the other matters in the list. The court must have regard to all the circumstances relating to the contract at the time it was made in the exercise of its evaluative judgment to determine if the contract (or part of it) is unconscionable.

76. In addition to the matters in the statutory list, the following facts and matters, in our judgment, are also relevant to the exercise of that evaluative judgment:

(a) The trust placed by the plaintiffs in Mrs Li and the *modus operandi* in the management of the plaintiffs' accounts in the past when she served them at the Standard Chartered Bank.[27] Mrs Li's knowledge in these regards must be imputed to the Bank as she represented the Bank in dealing with them in opening the accounts;

(b) Though the plaintiffs were not uneducated or unintelligent, they had very limited understanding of and experience in investments and financial products.[28] In this connection, we find what was said by L Chan J in *Li Kwok Heem John v Standard Chartered International (USA) Ltd* [2016] 1 HKC 535 at [190], albeit in the context of CECO,[29] to be pertinent;

(c) When the accounts were opened, the Bank collected information from the plaintiffs concerning their risk appetites and was well aware that their investment objective was to preserve their capital and achieve a return that was slightly better than bank deposits. Their profiles (old age and moderate lifestyle) also indicated that their investment objective was moderate;[30]

(d) At the time the accounts were opened, the Bank marketed itself as one providing solutions to suit the personal situation of its customers and, significantly, not as salesperson, but one selecting the best products from the market to match the client's risk profile.[31] Mrs Li had never informed the plaintiffs that in recommending products to them, she was merely acting

[27] Judgment at [70]–[80].

[28] Judgment at [24]–[31].

[29] L Chan J made those observations regarding a plaintiff who was a partner in a large accountancy practice who had about 20 years' experience in investing in equities. The relevant part of the observations is:

> … when it came to investing in funds, he could not tell which of the multitude of funds available from the defendant was suitable for him. He also needed access to these funds which was not always available to an individual investor. Hence, he needed the service of the defendant. The defendant also professed to be able to assist the plaintiff in satisfying his investment needs. …

[30] Judgment at [37]–[43] and [117].

[31] Judgment at [137].

as a salesperson with no particular expertise.[32] Nor had the Bank made any effort to draw the attention of the plaintiffs to the clauses in the Services Agreements and the Risk Disclosure Statements as Mrs Li herself had no knowledge of the same;[33]

(e) In reality, Mrs Li not only gave investment advice, but also managed the investment portfolios for the plaintiffs without alerting them to the risks pertaining to the products;[34]

(f) Soon after the accounts were opened, Mrs Li introduced high risk products into their portfolios contrary to their investment objectives.[35]

77. Though some the above matters took place after the Changs had opened their accounts (but before the Nextday's accounts were opened in July 2005), in light of the history of dealings between Mrs Li and the Changs as well as the proximity in time at which high risk products were introduced to their portfolios, the unconscionability (and, as explained below, we find there is unconscionability) flowing from the clauses (excluding the Bank's liabilities arising from these matters) was reasonably foreseeable when the agreements were executed.

78. It is all the more so in respect of the Nextday's accounts. By the time those accounts were opened, Mrs Li had been investing high risk products for the Changs for quite some time.

79. We come to the view that the clauses were unconscionable because (a) they make a complete mockery of the purported compliance by the Bank with their regulatory duties (which were in place to protect investors like the Changs) and their purported efforts to ascertain the investment objectives and risk appetites of the plaintiffs in order to select suitable products for them; and (b) the whole arrangement adopted by the Bank was to deprive the plaintiffs of the opportunity to make informed decisions on the risk level of the products they invested in and yet placed the entire risk arising out of such decisions on them, taking advantage of the trust they placed in Mrs Li.

80. According to the 2003 version of the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission [the Code] (which was the applicable version at the material time) and was applicable to the representatives of the Bank involved in the business of private banking, a licensed or registered person should act in the best interests of its clients in providing services to its clients.[36] Such person should take all reasonable steps

[32] Judgment at [72].
[33] Judgment at [88].
[34] Judgment at [80]–[114].
[35] Judgment at [23] and [66].
[36] Paragraph 3.10 of the Code.

to know his or her clients, including their investment objectives and should ensure the suitability of the recommendation or solicitation for a client is, having regard to information about the client, reasonable in all the circumstances.[37] When providing services in relation to derivative products or leveraged transactions, he or she should also make sure that the client understands the nature and risks of the products.[38]

81. Pursuant to the Code, Risk Disclosure Statements had to be provided and there were standard terms which had to be included in such statements.[39] It is indeed ironic that, as we have seen in the present case, that financial institutions made use of the Risk Disclosure Statements to limit their responsibilities to the customers.

82. In our judgment, the Code set out the benchmark for the standard in the financial industry which was applicable to the Bank at the material time. In compliance with such standard, the Bank obtained information about the plaintiffs in terms of those recorded in the biodata files maintained by the Bank. Such information included the risk profiles and appetites as well as investment objectives of the plaintiffs. The Code required the Bank to pay regard to such information in the conduct of its business with the plaintiffs in respect of investment transactions in the private banking accounts. In the present context, in recommending products to or solicitation of the plaintiffs, the Bank had a duty under the Code to act accordingly.

83. The Bank, in effect, contended that irrespective of its duties under the Code, it could rely on the clauses in the Services Agreements and the Risk Disclosure Statement to escape liability for not fulfilling such duties. In this connection, Mr Jat faintly referred to *Green v Royal Bank of Scotland plc* [2013] EWCA Civ 1197, [2014] Bus LR 168 where the English Court of Appeal rejected the notion of a common law duty of care arising from duties set out in a set of professional standards. However, it is plain that the English Court of Appeal did not have to consider the matter from the angle of a statutory provision similar to our UCO. In line with the observations of Tim Kerr QC sitting as a deputy judge in *Crestsign Ltd v National Westminster Bank Plc* [2015] 2 All ER (Comm) 133 at [146]–[148], we think it is necessary to bear in mind the difference in context that the industry standard is said to be relevant. It is perhaps in light of that, Mr Jat did not actually cite any particular part of the judgment in *Green v Royal Bank of Scotland Plc*. Having read that judgment, we do not believe the English Court of Appeal ruled out the potential relevance of the professional standard in examining the common law duties though

[37] Paragraphs 5.1 and 5.2 of the Code.
[38] Paragraph 5.3 of the Code.
[39] Paragraph 6.2(h) and Sch.1 of the Code. The standard terms did not include provisions for limiting liability.

they decided that it would not be correct to hold that they were coterminous.[40]

84. We can advert back to the Australian approach in which the statute explicitly provides that industry standard is a relevant matter to be considered in assessing unconsionability, see s.22(1)(g) of the ACL. We respectfully regard it as a sound approach and counsel did not put forward any serious argument to persuade us to exclude the obligations under the Code from our assessment in the context of UCO. This is particularly so when the Bank, in its marketing efforts, projected the image that it would be selecting suitable products for its customers, an image which is misleading if it were permitted to rely on the clauses in the agreements to escape liability.

85. After all, the Code was a standard for fair and responsible dealings in the financial industry agreed upon by the stakeholders. It was the norms set by the industry. As such the court should accept it as the embodiment of the business conscience to which we can make reference in assessing what is unconscionable in the context of the UCO.

86. Mindful of the lack of arguments before us on *Green v Royal Bank of Scotland Plc*, we refrain from imposing by the backdoor through the operation of the UCO a duty on the part of the Bank which is coterminous with its duties under the Code. We can see that there is scope for argument that not every breach of the Code would give rise to unconscionability in the context of the UCO. Much depends on the facts and circumstances of each case. This brings us to the second feature we pinpointed earlier which leads us to our evaluative judgment on unconscionability in the present instance.

87. According to the Judge's findings, the plaintiffs had no idea that Mrs Li did not follow their investment objectives as medium risk investors and put their funds in high risk portfolios. This was possible only because the plaintiffs placed their full trust in Mrs Li and the Bank was aware of the situation. At no stage did the Bank alert the plaintiffs that these portfolios were high risk and they could lose a substantial portion of their wealth before they consented to adopt the recommendations of Mrs Li.

88. We have no problem with the Bank telling the plaintiffs that they should bear the risk consequences of their own investment decisions provided that the Bank had not conducted itself in a manner which misled the plaintiffs. Had the plaintiffs made informed choices about their investments, it would not be unconscionable for the Bank to stipulate that they should bear the consequences. Regrettably, in the present case, Mrs Li had deemed fit to recommend high risk products to the plaintiffs without alerting them

[40] See [18] of the judgment in *Green v Royal Bank of Scotland Plc*.

in any way that investment in such products was not consistent with their investment objectives and risk profiles. According to the findings of the Judge, what she did was to exploit the trust which the plaintiffs placed upon her and lull them into a false sense of security without drawing to their attention the fact that the Bank did not accept responsibility for the recommendations and the products were a high risk. The plaintiffs were not given any opportunity to make any informed choice.

89. Before the execution of the Services Agreements, the plaintiffs had not been specifically alerted to the fact that Mrs Li was only acting as a salesperson in making recommendations on investment products and she might suggest products not consistent with their investment objectives and unsuitable for them. On the contrary, the Bank was painting a very different picture in projecting an image of its representative acting professionally in their investment recommendations and selection products. Viewed in that light, it is of significance that the clauses in question and their effects had not been highlighted and were buried amongst many standard clauses. Whilst we do not agree with Mr Dawes' submission that UCO only focuses on procedural fairness, we have no hesitation in coming to the conclusion that unfair tactics were employed in procuring the plaintiffs' agreement to such clauses.

90. We have no doubt that the features in the present case are so aberrant from commercial norms that the reliance of the clauses in question to avoid liabilities on the part of the Bank can properly be characterised as unconscionable. In so holding, we do not accept Mr Jat's submission that it was a fair and reasonable bargain since customers benefit from the availability of investment services without charge. Whilst apparently the Bank did not charge the plaintiffs directly in respect of recommendations by Mrs Li, the Bank (as a sales agent for the products) would earn commissions from the transactions. Further, since these were leveraged transactions, the Bank also earned interest in respect of the loans it provided to the plaintiffs. The Bank did not act gratuitously in providing such services.

91. It was not reasonably necessary to give the clauses in [48] their full effect to protect the Bank's legitimate interest. There is no reason why the Bank should have any legitimate interest in avoiding liability on the facts of the present case when all they needed to have done was either to make it very clear to the customers that they only acted as salesperson and the recommendations of their representatives might not be consistent with the customers' objectives or to take reasonable steps to make sure the customers understood the risk level of the products they recommended.

92. We therefore come to the conclusion that giving full effect to the clauses in [48] above would be unconscionable. The Court should exercise its power under s.5 of the UCO to limit the application of those clauses to avoid the unconscionable result by holding that the Bank cannot rely on those clauses to avoid liability to the plaintiffs in the present case.

Control of Exemption Clauses Ordinance

93. The plaintiffs also relied on the CECO. The Judge held that this Ordinance was not applicable because, if the contracts were execution only and not advisory, the clauses define the responsibility of the plaintiffs as opposed to excluding liability. Further, on the same supposition, if the Ordinance was applicable, the Judge found that they were not unreasonable.

94. However, as we held above, the clauses in question are not confined in their operation to "execution only" services, it behoves us to address these issues afresh. Insofar as Mr Jat laboured under the misapprehension that the Judge had decided on the applicability of CECO and the reasonableness of the clauses in the context of advisory contracts, he failed to pay proper regard to the first sentence at [160] of the judgment.

95. On the non-applicability of the CECO, the Judge referred to the judgment of Gloster J in *JP Morgan Chase Bank v Springwell Navigation Corp* at [601]–[602]; Deputy Judge Jason Pow SC in *DBS Bank (Hong Kong) Ltd v San-Hot HK Industrial Co Ltd* [2013] 4 HKC 1 at [234] and David Steel J in *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2012] 1 CLC 191 at [104]. These authorities drew a distinction between "basis clause" and "exclusion clause".

96. For our part, we find the discussion in the judgment of Christopher Clarke J (as he then was) in *Raiffeisen Zentralbank Österreich AG v Royal Bank of Scotland Plc* [2011] 1 Lloyd's Rep 123 at [313] to [315] illuminating:

> [313] … It is obviously advantageous that commercial parties of equal bargaining power should be able to agree what responsibility they are taking (or not taking) towards each other without having to satisfy some reasonableness test. At the same time there is a danger that the 'ingenuity of the draftsman' will insert into a myriad of contracts a clause to the effect that the basis upon which the parties are contracting is that no representations have been made, are intended to be relied on or have been relied on, as a means of evading liability which is intended to be impregnable.

[314] In this respect the key question, as it seems to me, is whether the clause attempts to rewrite history or parts company with reality. If sophisticated commercial parties agree, in terms of which they are both aware, to regulate their future relationship by prescribing the basis on which they will be dealing with each other and what representations they are or are not making, a suitably-drafted clause may properly be regarded as establishing that no representations (or none other than honest belief) are being made or are intended to be relied on. Such parties are capable of distinguishing between statements which are to be treated as representations on which the recipient is entitled to rely, and statements which do not have that character, and should be allowed to agree among themselves into which category any given statement may fall.

[315] *Per contra*, to tell the man in the street that the car you are selling him is perfect and then agree that the basis of your contract is that no representations have been made or relied on, may be nothing more than an attempt retrospectively to alter the character and effect of what has gone before, and in substance an attempt to exclude or restrict liability.

97. It is noteworthy that in the English cases, the Judges emphasised the difference between a case where commercial parties of equal bargaining power negotiated with each other at arms length and a case where a consumer dealt with a large commercial entity doing business on standard terms without any scope for negotiation. Thus, *Springwell* and *Titan Steel Wheels Ltd* (like *Raiffeisen Zentralbank*) are cases falling within the former category. In *Springwell*, Gloster J said at [603] and [604]:

[603] The legislation [referring to the Unfair Contract Terms Act 1977] is, in practice of very limited application in the case of commercial contracts between commercial counterparties. In *Photo Productions Ltd v Securicor*, Lord Wilberforce said that, in commercial matters generally, when the parties were not of unequal bargaining power, Parliament's intention was one of 'leaving the parties free to apportion the risks as they think fit … and respecting their decisions'. Tuckey LJ made the same point in *Granville Oil & Chemicals v Davis Turner & Co* …

[604] The reluctance of the Courts to interfere in contracts concluded between commercial parties in relation to

> substantial transactions reflects the strong business need for commercial certainty … (Our emphasis.)

98. In *Titan Steel Wheels Ltd*, David Steel J alluded to the dichotomy between those who deal as consumers and others which underlie the Unfair Contract Terms Act 1977, citing the judgment of Dillon LJ in *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321.

99. In Hong Kong, whilst Deputy Judge Pow SC in *DBS Bank (Hong Kong) Ltd v San-Hot HK Industrial Co Ltd* concluded in favour of the bank in that case that its scope of services was defined by the terms of the agreement, L Chan J distinguished the same and concluded against the bank on this point in *Li Kwok Heem John v Standard Chartered International (USA) Ltd* [2016] 1 HKC 535 at [177] and [178].

100. In *Lee Yuk Shing v Dianoor International Ltd* [2016] 4 HKC 535, the Court of Appeal dealt with the argument that a clause merely defines the extent of responsibility of a party as opposed to operate to exclude liability (thus not attracting the application of the CECO) in a non-banking context. Kwan JA stressed at [96] and [97] that one should be cautious before accepting this line of argument which could emasculate this piece of legislation and one must look into the substance of the matter and not part company with reality.

101. A similar point arose in the banking context in the Singaporean case of *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886. The Singapore Court of Appeal examined the English authorities and had this to say at [63]:

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

102. Section 13(1) of the Singaporean UCTA is the same as s.5(1) of our CECO. It provides:

(1) To the extent that this Ordinance prevents the exclusion or restriction of any liability it also prevents —

(a) making the liability or its enforcement subject to restrictive or onerous conditions;
(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
(c) excluding or restricting rules of evidence or procedure,

and (to that extent) sections 7, 10, 11 and 12 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

103. The latter part of that provision refers to terms and notices which exclude or restrict the relevant obligation or duty. The same provision is to be found in s.13(1) of the Unfair Contract Terms Act 1977. The English authorities cited above did not appear to have considered the implications arising from this part of the statute. *Chitty on Contracts* (32nd ed.) discussed this issue at para.15-070 without reference to the Singapore Court of Appeal judgment. The learned editor had this to say:

> … The purpose of this provision appears to be to bring within the control of the 1977 Act terms, for example, which state that the seller gives no undertaking with respect to the quality or fitness for purpose of the goods sold or which state that a surveyor accepts no responsibility with respect to the accuracy of a valuation report supplied by him. Exemption clauses of this nature do not purport to exclude to restrict *liability* for breach of an obligation or duty, but purport to exclude the relevant obligation … or duty …It may be difficult, however, to differentiate between contractual provisions which exclude or restrict the relevant obligation or duty, and those which define the scope of the obligation or which specify the duties of the parties….Further, there may be difficulty in distinguishing between provisions which exclude or restrict the relevant obligation or duty, and those which prevent it from arising …

104. Coming back to *Deutsche Bank AG v Chang Tse Wen*, after referring to the earlier English cases of *Phillips Products Ltd v Hyland* [1987] 1 WLR 659 and *Smith v Bush* [1990] 1 AC 831, the Singapore Court of Appeal continued at [67] and [68]:

> [67] … *Phillips* and *Smith v Bush* therefore stand for the proposition that any attempt to exclude or restrict an

> obligation or duty by reference to a contractual term or non-contractual notice will not be effective, unless the term or notice satisfies the requirement of reasonableness under the UCTA.
>
> [68] This seems to us at present to be correct because the mere fact that a clause is labelled a basis clause should not be determinative as to its true effect. The term 'basis clause' appears to have developed in contradistinction to the term 'exclusion clause' and to this extent it might be an unfortunate misnomer. The UCTA does not in fact contain any reference to 'exclusion clauses'. Rather, the UCTA simply addresses itself to clauses which 'exclude or restrict' a liability, obligation or duty. The legislative eye is firmly set on the substantive *effect* of a term or notice, rather than on its *form* or identification. Seen in this light, the only question which arises for a court is whether a term or notice has the effect of excluding or restricting the imposition of a duty of care in law. If so, it will have to satisfy the requirement of reasonableness. …

105. Arguments based on *Smith v Bush* had been run in England but met with little success, see *Titan Steel Wheels Ltd* at [101]–[104] and *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB) at [110]. Judges in those cases regarded the law as having moved on since *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, see the discussion at *Titan Steel Wheels Ltd* at [87]–[90]; *Springwell* (Gloster J) at [474]. In the latter case, Gloster J pinpointed the rationale for drawing a distinction between terms which define the basis upon which services are supplied and exemption clauses at [602]:

> Thus terms which simply define the basis upon which services will be rendered and confirm the basis upon which parties are transacting business are not subject to section 2 of UCTA. Otherwise, every contract which contains contractual terms defining the extent of each party's obligations would have to satisfy the requirement of reasonableness. …

106. We are of the view that a superficial classification of the nature of a clause simply by reference to its drafting without reference to the context in which the term was agreed or circumstances in which a signature is appended to a document would not suffice. As Kwan JA put it in *Lee Yuk Shing v Dianoor International Ltd*, such an approach will emasculate the statute. It also fails to pay proper regard to s.5(1). In this connection, we reject the written submissions of the Bank that the section only prevents

the exclusion or restriction of obligations or duties insofar as it amounts to "excluding or restricting liability". The correct analysis is that the issue has to be resolved by reference to substance rather than form. This is also the English approach. In *Raiffeisen Zentralbank* at [274]–[276], Christopher Clarke J referred to the earlier decision of *Cremdean Properties Ltd v Nash* (1977) 241 EG 837 and [1977] 2 EGLR 80. He quoted the following part of the judgment from Bridge LJ in that case:

> … if the ingenuity of the draftsman could devise language which would have [the effect of annulment of existence of any earlier representation], I am extremely doubtful whether the court would allow it to operate so as to defeat section 3. … I should have thought that that was only a form of words the intended and actual effect of which was to exclude or restrict liability, and I should not have thought that the courts would have been ready to allow such ingenuity in the form of language to defeat the plain purpose at which section 3 is aimed.

107. And at [308]–[310], His Lordship explained the approach of the court in applying the UCTA without being outmanoeuvred by artful draftsmanship:

> [308] In such a situation section 3 is, as it seems to me, applicable because, on those facts, there has been what the person to whom the statement was made would reasonably understand to be a representation, which was intended to be and was in fact relied on. <u>The clause seeks to avoid liability for what, absent the clause, would be a clear liability in misrepresentation</u> . …
>
> [310] As has already been said, the essential question is whether the clause in question goes to whether the alleged representation was made … or whether it excludes or restricts liability in respect of representations made, intended to be acted on and in fact acted on: and that question is one of substance, not form.
>
> (Our emphasis, highlighting that the effect of the clause is relevant.)

108. We believe this was what His Lordship adverted to when he subsequently adopted the test at [314] of "attempts to rewrite history or part company with reality".

109. Thus, the Court must examine the substance in the context of the dealings between the parties (and as the Singapore Court of Appeal held, the effect of such clauses is part of the context as opposed to their form).

110. In light of the findings by the Judge, in particular those set out at [8]–[11] above and the matters highlighted at [76] above, the reality was that the Bank had intimated to the plaintiffs that it would select products for the plaintiffs according to their investment objectives and risk appetite and Mrs Li was aware that the plaintiffs would rely on her in that regard. As we have said earlier by reference to the judgment of Lord Hoffmann in *Customs and Excise Commissioners v Barclays Bank Plc*, one must have regard to all the circumstances of the case in deciding whether the Bank had assumed responsibility. On the facts as found by the Judge, we have no difficulty in coming to the conclusion that as a matter of substance the clauses in question are provisions which exclude or restrict the relevant obligation or duty of the Bank. Hence, they would not be effective to exclude or restrict liability for negligence unless they satisfied the requirement of reasonableness in the CECO, see s.7(2).

111. The test of reasonableness is set out in s.3 of the CECO. In the present context, the relevant provisions are in s.3(1) and (6):

> (1) In relation to a contract term, the requirement of reasonableness for the purposes of this Ordinance and section 4 of the Misrepresentation Ordinance (Cap.284) is satisfied only if the court or arbitrator determines that the term was a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.
>
> …
>
> (6) It is for the person claiming that a contract term or notice satisfies the requirement of reasonableness to prove that it does.

112. Though there are guidelines in Sch.2 of the CECO on the application of the test of reasonableness, it only applies under s.3(2) for the purposes of ss.11 and 12 which have no application in the present case.

113. It is not necessary for us to repeat what we have said above in the context of the UCO. Given our conclusion on unconscionability of the clauses in question, we have little difficulty in concluding that the Bank fails to satisfy us that the clauses are fair and reasonable ones to be included having regard to the circumstances of the present case.

114. Hence, the Bank cannot rely on these clauses to escape liability to the plaintiffs.

Disposition

115. For the above reasons,[41] we dismiss the Bank's appeal. We make an order *nisi* that the Bank shall pay 2/3 of the costs of the plaintiffs. Such costs are to be taxed with certificate for two counsel if not agreed.

Reported by Kemal Bokhary

[41] For the purpose of this judgment, we need not discuss the implications of ss.5 and 8(1) of the Supply of Services (Implied Terms) Ordinance (Cap.457) as the parties have not advanced arguments on the same in the present appeal.