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Briefing note April 2015

Hong Kong High Court confirms the effectiveness of non-reliance clauses in bank-customer contracts

The Hong Kong High Court recently handed down its reasons for decision[1] dismissing a customer's mis-selling claim against DBS in respect of the sale of financial products; confirming the applicability of contractual estoppel and non-reliance clauses in Hong Kong.

Overview

A DBS Bank (Hong Kong) Ltd ("**DBS**") private banking customer, Sit Pan Jit, ("**Customer**"), who had entered into a number of contracts with DBS in respect of various financial products ("**Financial Products**") and had suffered significant losses on those products during the 2008 financial crisis, brought a claim against DBS for mis-selling the Financial Products to him. (DBS had commenced proceedings to recover monies owed in respect of the Financial Products; the Customer counterclaimed for mis-selling.)

Specifically, the Customer alleged (amongst other things) that: (i) there was an oral contract between him and DBS whereby he agreed to engage DBS's services in making investments for him and DBS agreed to so serve him; (ii) DBS had made common law and statutory misrepresentations (pursuant to section 108 of the *Securities and Futures Ordinance (Cap.571)* ("**SFO**")) to him about the Financial Products prior to the Customer entering into the underlying contracts, including in respect of the risks associated with the Financial Products; and (iii) DBS had breached its fiduciary, tortious and contractual duties to him.

DBS denied the allegations and relied on its standard non-reliance clauses in the underlying contracts (the "**Non-reliance Clauses**") the effect of which was that DBS had no duty to give investment advice to the Customer and, even if DBS did give any investment advice, it was provided on an "execution only" basis and the Customer was not entitled to rely on the advice and should exercise his own independent judgment in making investment decisions.

[1] *DBS Bank (Hong Kong) Ltd v Sit Pan Jit* (unreported, HCA 382/2009, [2015] HKEC 548]).

Court findings

The Court rejected the Customer's allegations in respect of the alleged oral contract including on the basis of an "entire agreement" clause in the underlying contractual documentation (that is, the full contractual terms were to be found in the underlying written contracts and not elsewhere).

The Court also rejected the Customer's misrepresentation claim on the basis that the misrepresentations, as a matter of fact, had not been proved. The Court held that even if the misrepresentations had been proved, the Customer was prevented (as a matter of contractual estoppel) from asserting that he was induced by, and/or had relied upon, any representations by DBS on the basis of the Non-reliance Clauses (following *DBS Bank v San-Hot*[2] in which the Court similarly upheld non-reliance clauses in respect of a misrepresentation claim).

Deputy High Court Judge Marlene Ng held that "*the ultimate rationale for contractual estoppel is freedom of contract. Contractual estoppel arises from the contract between the parties. Since the parties had agreed a state of affairs to be the case, a party who denied such state of affairs was the case was in breach of contract, and the court would not permit a party to benefit from his own wrong. The basis for upholding or striking down a contractual provision was not so much whether the parties were commercial or non-commercial, sophisticated or unsophisticated, of equal or unequal bargaining power, but rather that the provision was one which both parties were aware of and freely agreed to.*"

The Court further held that there was no reason why the principles of contractual estoppel would not apply to misrepresentation claims pursuant to section 108 of the SFO.

The Court also considered the extent of banks' fiduciary, contractual and tortious duties in respect of the sale of financial products to their customers, noting that a duty of care to advise should not be readily inferred into commercial relationships.

The Court held that DBS owed to the Customer the standard duties to act fairly and honestly, and with due care, skill and diligence, in providing private banking services to him. The Non-reliance Clauses defined the relationship between DBS and the Customer such that no additional contractual or tortious duties could arise. This meant that even if DBS provided advice to the Customer, the Customer could not assert that he had relied upon, or had been induced by, such advice in making his investments. The Court held there was no fiduciary relationship in the "execution only" arrangement between the Customer and DBS.

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[2] *DBS Bank (Hong Kong) Ltd v San-Hot HK Industrial Co Ltd* (unreported, HCA 2279/2008, [2013] HKEC 352).

Implications

This case demonstrates the Court's continued willingness to enforce the express terms of contracts between banks and their customers (in this matter by enforcing non-reliance clauses which clearly defined the nature and scope of the services which DBS contracted to provide to the Customer).[3]

However, if the SFC's proposed changes to the Professional Investor Regime[4] ("**New PIR**") come into effect, banks will no longer be able to use non-reliance clauses in the way they have historically done so.

Specifically, the New PIR proposes to: (a) prohibit banks from including non-reliance clauses in their customer contracts[5] and (b) require banks to include a clause in customer contracts requiring the bank to ensure any financial product recommended to the client is suitable for that client.[6]

It should be noted, however, that had the *DBS v Sit* case been determined under the New PIR it is possible that the Court may not have ultimately found differently for DBS as, amongst other things, DBS was found (as a matter of fact) not to have made the misrepresentations to the Customer and the Court found (as an aside) that the Financial Products were suitable for the Customer.

Ultimately, however, it would be more difficult for a bank to run such a case in light of the New PIR as the bank would no longer be able to point to a non-reliance clause (being a major part of the bank's defence) to create a contractual estoppel and limit the bank's duties to the customer. It will therefore be important for banks, in respect of any future mis-selling cases, to ensure that they have retained records relating to suitability of products and any recommendations made to customers.

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[3] The Court has previously enforced non-reliance clauses in favour of banks in *Kwok Wai Hing Selina v HSBC Private Bank (Suisse) SA (formerly known as HSBC Republic Bank (Suisse) SA)* [2012] 4 HKC 260 and *DBS v San-Hot*.

[4] See the SFC's "Consultation Conclusions on the Proposed Amendments to the Professional investor Regime and Further Consultation on the Client Agreement Requirements" dated 25 September 2014 and our Briefing Note dated September 2014: "SFC Consultation Conclusions on the Proposed Amendments to the Professional investor Regime and Further Consultation of the Client Agreement Requirements."

[5] Proposed new clause 6.5 of the Code of Conduct : "…*This paragraph precludes the incorporation in the client agreement (or in any other documents signed or statement made by the client) of any clause, provision or term by which a client purports to acknowledge that no reliance is placed on any recommendation made or advice given by the licensed or registered person*."

[6] Proposed new clause 6.2(i) of the Code of Conduct: "*If we [the intermediary] solicit the sale of or recommend any financial product to you [the client], the financial product must be reasonably suitable for you having regard to your financial situation, investment experience and investment objectives. No other provision of this agreement or any other document we may ask you to sign and no statement we may ask you to make derogates from this clause."*

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