CLIFFORD
CHANCE

Briefing note 23 September 2013

Singapore Court of Appeal rules in favour of Deutsche Bank in Chang Tse Wen case

In the recent case of *Deutsche Bank AG v Chang Tse Wen and anor appeal* [2013] SGCA 49, the Singapore Court of Appeal clarified the circumstances under which a bank may come under a tortious duty of care in the context of a private banking relationship. It is now clear that the Singapore Courts will adopt a measured and carefully calibrated approach in determining the existence of any non-contractual or pre-contractual duty of care in a private banking relationship.

This Dr Chang Tse Wen was an investor who purchased a large quantity of a financial product, colloquially known as an accumulator, using an account he set up in 2007 with Deutsche Bank AG (**the bank).** Unfortunately for Dr Chang, he eventually suffered huge losses which not only wiped out the entire amount transferred into the account, but also led to him owing a further sum of money to the bank.

The bank commenced action against Dr Chang when he refused to pay the further sum, and Dr Chang in turn counterclaimed for his losses, which he argued was caused by the bank's negligence, breach of fiduciary duty and misrepresentation.

The High Court dismissed the bank's claim and allowed Dr Chang's counterclaim in negligence, awarding him the sum of US$49,047,721.12, representing the total amount of losses he suffered. The High Court was persuaded that the circumstances surrounding the interactions between Dr Chang and the bank's relationship manager, Mr Wan Fan Ting (**Wan**), before Dr Chang signed the account opening documents, showed that the bank and Wan had assumed a "pre-contractual" duty of care in advising Dr Chang on managing his wealth. This was despite the absence of a specialised advisory agreement.

On appeal, the Court of Appeal disagreed. It found that there was nothing in the circumstances supporting the conclusion that either the bank or Wan had assumed any responsibility to render investment advice on Dr Chang's portfolio or on the management of his wealth.

In coming to its conclusion, the Court of Appeal first highlighted that the case was not about the mis-selling of a financial product. Rather, as Dr Chang himself acknowledged, his case was that ***he had not been given sound or appropriate strategic advice as to the management and structuring of his portfolio***. There was no question that Dr Chang appreciated how accumulators worked and the risks inherent in such financial instruments.

Key points

- The Singapore Courts will adopt a measured and carefully calibrated approach, taking into account all facts shedding light on the parties' relationship, especially any contract(s) or agreement(s) entered into between the bank and the investor, to determine whether the bank had assumed any responsibility to provide strategic or investment advice.
- Solicitations or sales pitches in the form of the introduction and recommendation of financial products does not give rise to an advisory relationship.

The critical question was whether the bank or Wan had voluntarily assumed a responsibility to give financial or investment advice to Dr Chang. To answer this question, all the facts shedding light on the nature of the parties' relationship must be examined, including any contract(s) or agreement(s) entered into.

In finding that there was no assumption of responsibility by the bank to provide strategic advice to Dr Chang, the Court of Appeal emphasised the following factors.

First, the account opening documents entered into by Dr Chang, which incorporated the Service Agreement, did not refer to any obligation on the bank's part to provide strategic advice on Dr Chang's investment portfolio as a whole or in the management of his wealth. Later, Dr Chang also signed a Master Agreement, which once again made no mention of any obligation on the bank's part to provide strategic advice.

Particular significance was placed on the fact that the typical documents one would expect to accompany an advisory relationship, specifying details such as the expected rate of return, limits on the nature of investments, the anticipated investment time horizon, the bank's fee structure, were conspicuously missing.

The totality of the contractual arrangements between Dr Chang and the bank thus strongly indicated that the bank did not in fact undertake any obligation to either advise Dr Chang on his investment portfolio or on the management of his wealth.

Next, the account set up by Dr Chang was an execution-only account, meaning that the bank's role was confined to executing orders on behalf of Dr Chang. The bank had no discretionary mandate to enter into whatever transactions it thought appropriate having regard to any investment objectives laid down by Dr Chang.

> "Cleaning up the paperwork and communicating in clear terms with customers after the initial discussions to identify with precision just what is and is not being provided might well be a worthwhile exercise for banks to undertake. This could perhaps have obviated the present litigation"
>
> *Deutsche Bank AG v Chang Tse Wen and anor appeal* [2013] SGCA 49

The existence of this type of account was inherently inconsistent with a general undertaking by the bank to provide investment and wealth management advice.

As for the interaction between Wan and Dr Chang, the Court of Appeal noted that the High Court failed to explain how a "pre-contractual" duty arising out of the interactions between Wan and Dr Chang, prior to the signing of the account opening documents, could have survived the parties' entry into contracts on terms that did not include or contemplate such a duty.

An important distinction was drawn between communications in the nature of solicitations or sales pitches and attempts to offer strategic advice.

In a nod to the nature of private banking client relationships, the Court of Appeal observed that the introduction of products and the giving of recommendations form part of the normal role of a sales person in the private banking context: this alone was not sufficient by itself to give rise to an advisory relationship, with its accompanying tortious duty of care.

In this regard, the mere identification of products and investment opportunities for the investor's consideration, in itself, cannot be construed as giving strategic advice.

Finally, the Court of Appeal dismissed Dr Chang's complaint that the bank had a positive duty to either stop him from, or at least warn him against, entering into the number of accumulators he did. Given the court's earlier findings about the nature of the relationship between the parties, there was no legal duty on the bank's part to stop Dr Chang from undertaking trades, the potential risks and rewards of which he clearly understood.

The Court of Appeal's decision is highly welcome. It is now clear that despite the heightened, intensified, and more rigorous scrutiny of banks and their practices by regulators globally, the Singapore Courts will adopt a highly measured and carefully calibrated approach to the imposition of any non-contractual or pre-contractual duty of care on the part of banks and financial institutions. This carefully calibrated judicial approach augurs well for Singapore's continued development as a financial services and wealth management hub.

Contacts



Nish Shetty
Partner
Clifford Chance Asia

E: nish.shetty
@cliffordchance.com



Harpreet Nehal Singh SC
Partner
Clifford Chance Asia

E: harpreet.singh
@cliffordchance.com



Kabir Singh
Counsel
Clifford Chance Asia

E: kabir.singh
@cliffordchance.com



Keith Han
Associate
Clifford Chance Asia

E: keith.han
@cliffordchance.com



Matthew Newick
Partner
Clifford Chance

E: matthew.newick
@cliffordchance.com



Donna Wacker
Partner
Clifford Chance

E: donna.wacker
@cliffordchance.com



Edward Johnson
Consultant
Clifford Chance

E: edward.johnson
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com
www.cavenaghlaw.com.sg

Clifford Chance Asia
Clifford Chance Asia is a Formal Law Alliance between Clifford Chance Pte Ltd and Cavenagh Law LLP
12 Marina Boulevard, 25th Floor Tower 3,
Marina Bay Financial Centre, Singapore 018982
SINGAP-1-187288