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JPMORGAN CHASE BANK V. SPRINGWELL NAVIGATION CORPORATION, PART 1: A BANKER'S DUTY TO ADVISE

INTRODUCTION

In two recent judgments of *Gloster J in JPMorgan Chase Bank v. Springwell Navigation Corporation* [2008] EWHC 1186 (Com) and [2008] EWHC 1793 (Com), the English Court has highlighted a number of the issues and legal principles likely to be faced by banks and other financial institutions and their counterparties in mis-selling and trading claims emerging from the global credit crisis. Whilst the judgments do not strictly make new law, the judge's interpretation of existing principles in *Springwell,* which may well become the subject of appeal, merits detailed analysis.

This first part of a series of *Commentaries* in relation to particular aspects of the judgments considers the judge's conclusion in the first judgment that, irrespective of the terms of relevant transactional and customer classification documentation, various entities in the JPMorgan Chase group, principally the Private Bank and the Investment Bank (together "**Chase**"), did not owe contractual or tortious duties of care to give general investment advice to its longstanding customer, Springwell Navigation Corporation ("**Springwell**"), and to use reasonable skill and care in so doing.

Subsequent *Commentaries* in this series will address the exclusions, disclaimers and representations in the contractual documentation relied upon by Chase in support of its contention that it had no duty to give general investment advice; Springwell's claim that Chase was liable for negligent misstatement or misrepresentation and for breach of fiduciary duty; the scope and relevance of the financial services regulatory framework; and the Court's ruling as to whether certain pass-through instruments achieved their purpose.

In deciding whether or not Chase owed contractual or tortious duties of care to give general investment advice to Springwell, the judge set out in great detail aspects of the dealings and relationship between the parties spanning more than 12 years (1986–1998). These consisted of a number of representatives of the Private Bank liaising with Springwell in relation to its financial investments and a bonds salesman

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in the Investment Bank engaging directly with Springwell's principal decision maker for the purposes of buying and selling financial investments, including emerging markets debt instruments. For the period from May 1997 to August 1998, taped telephone conversations between the Chase salesman and Springwell's principal were available, amounting to thousands of hours of conversation.

In essence the judge decided, based upon the facts set out in her judgment, that whilst the Chase salesman did make recommendations and provide advice to Springwell on a regular basis throughout the relevant period in relation to both particular investments and Springwell's portfolio, such recommendations and advice did not in themselves give rise to duties of care to give general investment advice.

It remains to be seen whether the Court of Appeal might take a different view of the facts. Although this judgment is heavily fact-dependent, not all of the facts are disclosed; there is very little quotation of correspondence and oral evidence, and none whatsoever of the taped telephone conversations. It is therefore necessary to be careful at this stage about expressing general propositions as to a bank's duty to advise in the context of this particular case.

Nevertheless, the judge helpfully sets out the principal factors that, in her judgment, served as indicators of the existence (or otherwise) of a contractual or tortious duty of care, including the absence of any written advisory agreement, the extent of Springwell's financial experience or sophistication and of its reliance upon both the bonds salesman and other Chase personnel, and the regulatory background. When balancing these factors against the extensive dealings between the parties in the relevant period, the judge determined that Chase did not assume a duty to give general investment advice and to use reasonable skill and care in so doing.

The judge acknowledged in her first judgment that the case might go to the Court of Appeal, and in case she were to be wrong in her conclusions in relation to the duty to advise, the judge stated that, nevertheless, the terms of the contractual documentation entered into between the parties during their relationship militated against a duty of care.

FACTUAL BACKGROUND

The Polemis family. Springwell (incorporated in Liberia) was the investment vehicle of the Polemis family, one of the longest-established Greek shipping families. The principals of Springwell were the Polemis brothers, AP and SP (together "the brothers"), with AP taking all of Springwell's important decisions. The Polemis family's relationship with Chase spanned 50 years, and AP and SP had had dealings with Chase for over 30 years.

Foreign exchange speculation. In the early to mid-1980s, the brothers were active traders in foreign exchange ("FX"), not just for the purposes of hedging currency exposure connected with the shipping business, but also for profit through speculation. During 1982, the Polemis group traded US$383 million with Chase. In 1984, Chase internally recorded a concern about these "speculative tendencies", which had generated a cash loss of £7.5 million in that year, which Chase considered to be "diametrically opposite" to the brothers' conservative investment strategy in the shipping markets. FX speculation continued over a three-year period until about 1985/1986, by which time it ceased.

Acquisition of Springwell. Springwell was acquired in June 1986 in order to carry out the treasury function for the Polemis group, holding the profits that flowed from the shipping operations. Previously, it was the family's practice to place their excess liquid funds on time deposits in the names of one or other of their shipping companies. This spare liquidity was now transferred to Springwell.

Springwell's account with the Shipping Department. Springwell opened an account with the Shipping Department in London in 1986. At that time, Mr Mellis ("EM") was head of the department.

Introduction to alternative investments. Between late 1987 and March 1988, the Shipping Department suggested an alternative investment to AP in the form of European Commercial Paper ("ECP"), which bore a higher rate of interest than time deposits. At some stage during this period, Chase (EM) introduced AP to Mr Atkinson ("JA"), an employee of the Investment Bank, who at that time was a salesman on the Chase Money Market Desk in London, selling ECP. By March 1989, Springwell's investments in ECP with Chase had grown to approximately US$48 million.

By this time, JA had also been selling a wider range of investments, including emerging markets debt instruments. Indeed, by 1990, Springwell had started to invest in debt instruments in emerging markets in Latin America.

JA specialises in selling emerging markets debt. In July 1990, JA joined the London Debt Arbitrage Group, which was subsequently renamed the Developing Countries' Capital Markets Group and, later, the International Fixed Income Group ("IFI"). This move meant that JA began to sell to Springwell predominantly emerging markets debt, a more specialised asset class than ECP, as the emerging markets debt market began to expand rapidly in the 1990s.

EM and Springwell's account move to the Private Bank. By now EM had moved from the Shipping Department to join the Private Bank, and Springwell's account, along with several other Greek shipping customers, was moved from the Shipping Department to the Private Bank on or about 20 August 1990.

Investment Management Accounts ("IMAs"). From late 1990 onwards, Springwell opened various different types of account with Chase, entered into various different facilities with Chase and signed various different trading agreements with Chase in respect of its banking and investment business. These products included IMAs, being accounts in which funds were invested in a range of assets and managed on a discretionary basis in accordance with the broad investment objectives specified by each customer on its application form. There was a quarterly management fee of 0.5 percent on the whole of the customer portfolio, and Springwell's investment objectives were stated, in late 1990, as "balanced".

Petrobras and the introduction to leverage. In August 1991, Springwell purchased a substantial tranche (US$40 million) of a US$250 million Eurobond issue by the Brazilian state oil company, Petrobras, using a US$15 million loan facility from the Private Bank, secured on the existing IMA with the Private Bank, as well as securities held by the Investment Bank. This Investment Grade Facility was then for a time used regularly and increased periodically in order to leverage Springwell's emerging markets portfolio, including Brazilian government "C" bonds (restructured defaulted loans).

By now, Springwell's portfolio at Chase had begun to grow exponentially, with Springwell's emerging markets investments mainly concentrated in Mexican and Brazilian instruments but also including Argentinean and Venezuelan instruments, during the early days of the emerging markets debt market.

Introduction of the Margin Forward Programme. In early 1992, Chase developed a Margin Forward Programme in relation to emerging markets debt investments, which enabled the purchaser to leverage against the security of the emerging markets debt instrument which it was seeking to purchase, under the terms of a Margin Forward Agreement ("MFA"), rather than (as previously under the Investment Grade Facility) against the security of other assets that were required to be of investment-grade quality. Indeed, Springwell's use of the Investment Grade Facility declined as its use of the Margin Forward Programme and related facility increased.

Customer classification and related documents. At about this time, as a result of a change in the regulatory regime, as the Securities Association was replaced by the Securities and Futures Authority (the "SFA"), and Chase became required to classify its customers in accordance with the new SFA Conduct of Business Rules (which came into effect on 1 April 1992), the Private Bank began to develop documentation designed to satisfy the "know your customer" and other regulatory requirements, whilst pre-qualifying new clients who wished to enter the Margin Forward Programme. These documents included an Experienced Investor Questionnaire ("EIQ") and, ultimately, a letter setting out terms of business applicable to clients' "Dealing in Developing Country Securities" (a "DDCS letter"). In addition, the Private Bank Credit Guide identified required characteristics for customers to be eligible to trade in emerging markets debt, including sophistication, capacity to withstand loss, prior experience and the fact that they were not looking to Chase for advice.

Springwell was classified as a non-private customer and so was not entitled to the benefit of regulatory obligations imposed on firms in respect of private customers, such as the obligation to recommend only suitable investments and to take reasonable steps to enable the private customer to understand the nature of the risks involved.

Leverage under the MFA. As from April 1992, Chase provided leverage to Springwell under the MFA in many transactions involving purchases by Springwell of emerging markets debt. This continued for more than five years until the MFA was replaced by another market standard document, the Global Master Repurchase Agreement ("GMRA"), issued by the Public Securities Association in New York, although subject to English law and jurisdiction.

The 1992 and 1993 DDCS letters and EIQ. By a DDCS letter dated 23 November 1992, written on the Private Bank's notepaper and signed on behalf of both the Private Bank and the Investment Bank, the Private Bank and the Investment Bank notified Springwell of its classification by them as a non-private customer for the purposes of the SFA Rules and of the effect of the classification. The letter did not appear to have been signed and returned to Chase. Subsequently, an EIQ for Springwell was completed and signed by the Private Bank on or about 8 May 1993, stating that Springwell was classified as "a sophisticated investor" who had "traded extensively in [emerging markets] debt for well over 3 years" and who was "fully aware of the *speculative nature* of this investment", including certain defined risks. It also stated that Springwell was "purchasing all emerging markets paper on an *execution-only* basis and was not looking to Chase for advice". According to EM, the body of the questionnaire would have been prepared with the customer before being signed by him. A further DDCS letter in the same terms as the 1992 DDCS letter was signed by AP, on behalf of Springwell, on 28 May 1993.

Emerging markets debt investments by early 1994. By March 1994, less than three years after Springwell's first purchase of emerging markets debt with leverage (the Petrobras bonds) in 1991, Springwell had increased its forward margin line up to US$350 million, which represented almost 45 percent of the total existing allocation to Greek customers of the Private Bank of US$785 million at that time.

EM leaves the Private Bank. At the end of March 1994, EM left Chase, and Mr Sheehan ("FS"), EM's assistant in the Shipping Department, became Springwell's relationship manager. JA continued to be one of the "product specialists" within the IFI team of the Investment Bank, to whom access was permitted to eligible Private Bank clients only.

The Tequila Crisis. In December 1994, the Mexican peso was devalued, which precipitated a strong sell-off in the emerging markets (the "Tequila Crisis"). JA described it to FS on 22 December 1994 as "the biggest meltdown . . . in emerging markets history". A period of instability followed as the peso continued to lose 50 percent of its value in the succeeding months and contagion spread into other Latin American countries. As a result, spreads on Mexican par and discount bonds widened and the price of bonds fell sharply. Spreads on Mexican par and discount bonds increased from about 250 basis points on 8 December 1994 to over 600 basis points between December 1994 and January 1995. In response to the crisis, Springwell invested heavily in Mexican and other Latin American securities, such that by 31 July 1995, the proportion of Mexican assets in Springwell's portfolio by face value had risen from about 13 percent in December 1994 to about 30 percent, or US$140.57 million. Despite a sharp fall in values in Springwell's emerging markets portfolio, which AP had discussed with Chase on 15 March 1995, AP did not take any action to reduce Springwell's emerging markets portfolio, but instead bought substantially in Mexico.

Springwell's dealings with Merrill Lynch. In early 1996, Springwell opened an emerging markets account at Merrill Lynch International ("ML"), obtaining a leverage facility of US$43 million, which was soon increased to US$70 million. Between April 1996 and July 1998, Springwell maintained an active portfolio of emerging markets investments at ML, purchasing bonds with a face value of US$127 million. Like Chase, ML also classified Springwell as a non-private customer for the purposes of the SFA Rules, and Springwell signed a letter accepting this classification. The ML account was used by Springwell and was also used for the transfer of certain assets from Chase to ML, so as to bring the account at Chase within the relevant limits. There were three transfers in total, two in 1996 and one in 1998.

Build-up of Springwell's Russian portfolio. Springwell, like many other non-resident investors, was attracted by the high yields in certain sovereign Russian debt instruments and, to a lesser extent, in the sovereign Eurobond market. The Russian Ministry of Finance had started to auction short-term zero-coupon rouble-denominated securities issued by the Russian Federation and known as "GKOs", in May 1993, to fund the Russian budget deficit. These bonds were

initially restricted to Russian resident accounts and were not available to offshore investors. However, after intense lobbying from foreign investors, the rules were changed in 1996 to allow direct participation from non-residents in the GKO market.

GKO-Linked Notes. Springwell, having amassed a very sizable emerging markets portfolio, started investing in Russia in March 1996. Chase's structured products group had developed a structured GKO-Linked Note, by which Chase intended that the return, as well as the full risks, of making the underlying GKO investment should pass through to investors. All but one of the GKO-Linked Notes purchased by Springwell had foreign exchange hedges embedded in them, being forward contracts for the conversion of the GKO rouble proceeds into dollars. Such structured investments were very common at the time, with many banks offering similar products. From 28 March 1996, Springwell invested on a recurring basis, and for the most part successfully, in GKO-Linked Notes. Springwell bought a total face value of US$428.6 million GKO-Linked Notes through Chase, with a purchase consideration of US$429.6 million (42 separate purchases). Of these, a total of US$325.4 million matured at par before the Russian financial crisis and default by Russia on certain of its financial obligations on 17 August 1998, realising a total net gain for Springwell on the non-impugned GKO-Linked Notes, after coupon and financing costs, of US$19.9 million.

As at 17 August 1998, Springwell held 11 GKO-Linked Notes in its portfolio, with a total purchase cost of US$87,837,270 and a nominal maturity or redemption amount of US$95,259,716.

New Russian dollar-denominated debt instruments—sovereign and corporate debt. Between November 1996 and August 1998, Springwell also invested in three Russian sovereign Eurobond issues. In addition, following numerous Russian regions, municipalities, banks and corporate issuers taking advantage of market conditions in 1997 to issue corporate bonds or notes, Springwell purchased corporate bonds or notes with a total purchase cost of US$81,726,870. These included bank bonds issued by Russian banks from among the 20 largest Russian banks by assets. Springwell also made purchases of other Russian bonds and former Soviet Union instruments.

Repo Programme and the Global Master Repurchase Agreement ("GMRA"). In about September 1997, the emerging markets leverage programme was changed from the Margin Forward Programme to a repurchase ("Repo") programme, under the terms of which the Private Bank agreed to provide, by means of purchase and repurchase contracts between it and the customer, the financing arrangements for the securities which the customer was purchasing from the Investment Bank. All new leverage transactions after 3 October 1997 were carried out under GMRAs rather than under the previous Margin Forward Programme.

The 1997 DDCS letter. A third DDCS letter, dated 17 September 1997, in similar terms to the 1992 and 1993 letters, was delivered to Springwell in view of the merger between Chase and Chemical Bank in which the transactional business of the Investment Bank transferred from one entity within the Chase group to another. The letter was again on the Private Bank's paper but signed on behalf of the Private Bank and the Investment Bank. It was also signed and returned by way of purported acceptance by Springwell.

The Asian Crisis and Springwell's Indonesian investments. As part of its complaint, Springwell included three Indonesian investments purchased in October 1997. These purchases were made against the backdrop of the Asian Crisis. On 2 July 1997, Thailand allowed the baht to fall, provoking a burst of selling in the currency markets which spread quickly to Indonesia, the Philippines and Malaysia. AP discussed this with JA on 16 July 1997. The crisis primarily affected domestic currencies and financial markets, initially in Thailand and subsequently in other Asian countries, including Indonesia, Malaysia, the Philippines, Hong Kong and Japan.

Restructured debt of the former Soviet Union: Prins and IANs. In late 1997 and throughout the first eight months of 1998, Springwell bought significant holdings in what were known as Prins (restructured principal obligations) and IANs, or Interest Arrears Notes (restructured interest obligations). Prins were loans maturing in 2020 which had a settlement period of 10 days and paid interest partly in cash and partly in IANs. IANs were bonds maturing in 2015. They were cleared by the Euroclear system and settled in three days. From December 1997 to March 1998, Springwell bought and sold IANs through Chase and Prins through ML.

Subsequently, from April 1998, Springwell began to build up a substantial position in Prins, buying incrementally and frequently against the backdrop of a falling market. In June and July 1998, there were opportunities to take profits on some of Springwell's Prins when the market temporarily moved upwards. However, because prices had not appreciated to the levels at which AP wanted to sell, Springwell continued to buy Prins into late July and into August 1998 as prices fell very low. By 17 August 1998, Springwell held Prins and IANs with a total purchase cost of US$87,050,000. Eventually, following the Russian default, newly issued sovereign bonds were exchanged for the defaulted Prins and IANs, which were fully serviced since their issue.

Attempts by Chase to persuade Springwell to diversify after March 1996. Springwell contended that the person responsible for Greek customers from 1996, **SG,** accepted in his evidence that the role of the Private Bank involved advising Springwell as to appropriate investments and, in particular, as to diversification. From March 1996, SG was ultimately responsible for customer satisfaction, Private Bank credit exposure and the profitability of the group of Greek customers. During his meetings with AP, SG made repeated suggestions to AP to diversify Springwell's holdings. SG tended to stress the need for diversification to all of his customers. AP's response, however, to SG's diversification suggestions was to say that he did not make enough money from investing in anything other than emerging markets assets. In April 1998, SG sent two letters to Springwell, putting forward two formal diversification proposals to invest in managed funds. In his letters, he expressed opinions not only as to the products being recommended, but also as to the appropriate level of diversification in Springwell's portfolio as a whole and, in particular, as to Springwell's emerging markets investments. However, AP never read the letters, and he regarded SG's approaches as a nuisance.

Springwell contended that the Private Bank, whether by SG or otherwise, did not give advice to Springwell as to the need to diversify *within* its emerging markets portfolio or to reduce the extent of the Russian concentration within the portfolio. Nor did the Private Bank ever advise that there was ever a need for immediate and substantial diversification *out of* the emerging markets asset class on the basis that the undiversified portfolio was very high-risk, highly concentrated in Russia and dangerously exposed to loss.

Chase contended that the specific proposals for diversification put to AP by SG to invest in managed funds were in effect marketing approaches by the Private Bank. However, Springwell submitted that the role played by SG in connection with the diversification issue was wholly inconsistent with the notion that he was merely playing the role of a salesman.

Springwell's losses following the Russian default. Springwell had invested very profitably in GKO-Linked Notes from March 1996 and by 1998 had acquired a portfolio of emerging markets debt instruments with a face value in excess of US$700 million. However, it incurred significant mark-to-market losses following the Russian default on 17 August 1998 of more than US$200 million. As part of the measures imposed in Russia during the financial crisis, the referenced GKOs under Springwell's outstanding GKO-Linked Notes defaulted and were restructured. In addition, Springwell's other investments, not only in Russia but also in other states of the former Soviet Union as well as Indonesia, were heavily marked down in the aftermath of the Russian crisis.

COMMENCEMENT OF THE ENGLISH PROCEEDINGS

On 9 April 2001, Chase commenced proceedings in the English Court seeking a declaration that it had no liability to Springwell in respect of any of the relevant transactions. Springwell's claim, by way of counterclaim in the English proceedings, in respect of the loss in value of its investment portfolio, as at the commencement of the Russian financial crisis on 17 August 1998, was that no reasonable advisor could have advised Springwell to have held such a portfolio of emerging markets investments. Had Chase acted in accordance with its contractual, tortious and fiduciary duties, then in August 1998 Springwell would have held a different portfolio.

SPRINGWELL'S INVESTMENT OBJECTIVES

Springwell contended that it should have held a portfolio which was well diversified, predominately in liquid and low-risk investments, and structured in such a way that there would have been no appreciable risk that the capital value of individual investments, or the portfolio as a whole, would

be substantially reduced, such as by having to sell into a falling market. Springwell contended that its portfolio would have included time deposits and/or gilts, T-bonds and other blue-chip bonds, together with other fixed-income investments, possibly including emerging markets assets and managed funds—all of which would have been variously for income, liquidity and capital preservation.

Springwell further contended, if appropriate advice had been given, that the portfolio would not have been leveraged to such an extent that Springwell could be exposed to substantial margin calls or would have been forced to sell into a falling market. In the circumstances, Springwell contended that neither the Russian nor the earlier Asian financial crisis would have had any, or any substantial, effect on the value of its holdings and/or would not have caused any or any substantial loss to Springwell, because it would not have been required to sell any holding to produce cash.

SPRINGWELL'S CLAIM

Springwell alleged that as a result of Chase's breaches of duty:

- its portfolio collapsed in value after the Russian financial crisis in August 1998;
- it had no cash inflow from the GKO-Linked Notes on their due dates;
- it was unable to transfer cash into its principal business, shipping; and
- it had very substantial liabilities in respect of borrowings from Chase and had no option but to enter into a term loan with Chase on 15 January 1999 in order to pay off those liabilities.

Springwell claimed damages calculated by reference to the value of the investments in its portfolio as at 15 January 1999 (the date of the term loan) as compared with the portfolio that it should have had at that time, had Chase advised it properly. Springwell also contended that any increases in the value of its investments after 15 January 1999 were irrelevant as a matter of law.

THE INTRODUCTION OF JA AND HIS ROLE

Springwell asserted that JA was introduced as someone who would be providing advice on alternatives to time deposits, that he was part of EM's team, that EM would be supervising him to ensure that JA's advice was in accordance with what EM understood to be Springwell's requirements and that only suitable investments would be offered. In other words, Springwell claimed that it was being offered an advisory service from JA, supervised by EM.

It was an important part of Springwell's case that JA gave it investment advice throughout his dealings with it over the next 11 years and that Chase, through JA, performed the role of investment advisor. Springwell asserted that the fact that JA was actually a salesman was not explained to it at the time of his introduction. In the alternative, Springwell contended at various times during the trial that even if JA was originally no more than a salesman, he nevertheless became, over time, a fully fledged investment advisor. On the other hand, Chase contended that it was quite apparent that JA was working in a department within the Investment Bank which was mainly focused on a limited asset class, namely buying and selling ECP. It was in his capacity as a non-advisory execution-only salesman that JA bought investments from, and sold investments to, a number of Chase customers, including Springwell.

EXISTENCE OF AN ADVISORY OBLIGATION: CONTRACT

Springwell's case in contract was that each of the Private Bank and the Investment Bank had a contractual obligation to advise Springwell as to appropriate investments and to use reasonable skill and care in so doing, in return for the reasonable profits, fees and commissions which Springwell, by AP, knew and impliedly consented to those entities earning from their dealings with Springwell. Springwell contended that the Private Bank's contractual obligations to advise as to appropriate investments arose under the terms of the banking contract concluded between itself and Springwell in 1986, when Springwell first became a customer of the Private Bank, such investment advice being a service provided pursuant to the terms of that contract.

Furthermore, Springwell contended that when EM introduced AP to JA (who was at that time a salesman on the Chase Money Market Desk selling ECP), he held JA out as acting on behalf of the Private Bank and by doing so offered Springwell an advisory service which was accepted by Springwell "when it first received and acted upon advice from JA". As for the Investment Bank, its contractual obligation to provide appropriate investment advice arose in the same manner as alleged in respect of the Private Bank, such that, according to Chase, AP was offered an investment advisory service jointly by the Private Bank (acting by EM and JA) and by the Investment Bank (acting by its employee, JA).

EXISTENCE OF AN ADVISORY OBLIGATION: TORT

Springwell's case in tort was that both the Private Bank and the Investment Bank had tortious obligations to give appropriate investment advice to Springwell. In essence, Springwell contended that Chase assumed a responsibility to give such advice to Springwell by reason of a number of matters, including the circumstances in which JA was introduced to AP/Springwell by EM; the fact that EM allegedly made statements to AP to the effect that he would be looking after Springwell and that Chase was able to offer a full private banking advisory and wealth management service; the fact that Chase knew AP was not an expert or sophisticated investor and had no experience of investment or fund management and that Springwell did not have any employees with which to carry on an investment or fund management business; the fact that JA did give investment advice to Springwell and held himself out to Springwell as giving such advice and as managing and taking care of Springwell's portfolio with AP; the fact that it was or should have been apparent to JA that AP was relying entirely on JA to advise him as to what investments were appropriate for Springwell; and the fact that AP understood JA to be giving advice as part of an advisory role in which he recommended investments to Springwell, as AP himself lacked both the information and expertise to select and assess which investments were suitable.

Therefore, Springwell relied on both the arrangements which it alleged were put in place at the start of its investment relationship with Chase and on the course of the dealings between the parties thereafter. Springwell submitted that Chase's undertaking to advise Springwell and its giving of advice represented a paradigm example of a Defendant "tendering skilled advice or services in circumstances where he knows or ought to know that an identified party will rely on his advice"[1].

SPRINGWELL'S RELIANCE ON THE EARLY PERIOD TO AVOID EXCLUSIONS AND DISCLAIMERS

According to Gloster J, it was in order to avoid the potential consequences of certain exclusions and disclaimers in the contractual documentation between Springwell and Chase as from 1992 onwards that Springwell contended that Chase assumed a duty to advise at the outset in 1986 or 1987. Furthermore, Springwell contended that as a result of the advice given and relied upon for the five years thereafter (as well as subsequently), Chase was prevented from relying upon the relevant exclusions and disclaimers. These matters are to be considered in Part 2.

THE EXTENT OF THE DUTIES OF CARE ALLEGED AGAINST CHASE

The duties of care which Springwell alleged that Chase owed from 1986/1987 onwards were described by Gloster J as being of a very wide-ranging and onerous nature. The "advisory role" was said to have given rise to a duty of care which had numerous necessary incidents. These included contentions that the Private Bank and the Investment Bank were bound:

- To establish in discussion with AP Springwell's investment expertise, investment objectives and attitude to risk having regard to Springwell's strategic function;
- At regular intervals to review Springwell's investment objectives and attitude to risk so as to identify any changes in them;

1 *Commissioners of Customs and Excise v Barclays Bank* [2007] 1 AC 181, per Lord Mance at paragraphs 92 and 93.

- To take reasonable care in advising Springwell that particular investments and the portfolio as a whole were appropriate, having regard to what had been established as being Springwell's investment objectives and attitude to risk;
- To give adequate explanations to AP so as to enable him to understand the risks inherent in particular investments and to understand the balance of risk inherent in the portfolio as a whole;
- To give adequate explanations to AP of all documentation to be signed by Springwell (including, if and to the extent that the relevant provisions (*i.e.*, exclusions, disclaimers, representations, etc.) had the effect contended for by Chase, explaining the existence and effect of the relevant provisions in the relevant documentation).

Springwell contended that these duties were continuing duties which subsisted throughout the period of Springwell's dealings with Chase.

As well as putting its case on the basis of JA's introduction by EM to AP at the outset and on the basis of how the relationship developed over the period between 1986/1987 and 1998, Springwell's case in regard to the Private Bank shifted over the course of the trial. Springwell's principal allegation had been that the advisory relationship was with the Investment Bank (through the advice provided by JA) and that the Private Bank's obligations were to supervise the Investment Bank and JA. This case developed into a more closely and narrowly defined one, to the effect that as Springwell's portfolio became larger and more concentrated in Russian securities, the Private Bank itself, irrespective and independently of the role of JA, became subject to a duty to warn Springwell of risks inherent in the Russian concentration in its portfolio and the need for greater diversification. However, Springwell never identified during the course of the trial a date when the Private Bank assumed responsibility to advise in such a way.

In summary, according to Springwell, Chase was responsible for selecting and constructing Springwell's entire portfolio and providing ongoing investment advice about it, on what became effectively a daily basis, throughout all of Springwell's dealings with Chase. Under Springwell's "general advisory" claim, it was alleged that because there was an "advisory relationship", every time that JA offered an investment for sale to Springwell, he was obliged to give, and was implicitly giving, advice as to the suitability and risk characteristics of that investment, both on its own and as part of Springwell's overall portfolio, whether or not this followed an express request by AP to find a particular type of investment, such as GKO-Linked Notes, or to find investments that met particular requirements, such as price. Since Springwell sought damages for failure to advise Springwell to sell investments, it appeared to the judge that Springwell's case, at its highest, was that JA was obliged to give, and implicitly gave, ongoing and updated advice as to the merits of *retaining* every investment which Springwell had previously purchased.

Furthermore, Springwell's case was that, even disregarding the circumstances of JA's introduction and the role of EM and his successors at the Private Bank, Chase (through the activities of JA) held itself out as advising and willing to advise on an ongoing basis both on particular investments and on the general composition of the client's portfolio as a whole. Springwell relied in particular on transcripts of the thousands of hours of taped telephone conversations between JA and AP relating to the period from May 1997 onwards (transcripts of earlier conversations not being available).

THE AMBIT OF THE FACTUAL ENQUIRY

In light of the way in which Springwell put its case, therefore, it was necessary for the Court not only to consider the position at the date, and as a result, of the introduction of JA to Springwell, but also to consider the ongoing relationship (a) between Springwell (acting by AP) and JA (whether acting on behalf of the Private Bank or the Investment Bank) and (b) the Private Bank (acting through other personnel) and Springwell (acting by AP) over time, so as to see whether the relationship had developed into something different by 1996–1998.

Therefore, when considering the evidence for the purposes of an analysis as to whether the alleged duties of care existed, Gloster J did so by reference to three different periods in the chronology, namely the time of the

introduction of JA to Springwell in late 1987/early 1988; the period 1990 to April 1994 (when EM left Chase), during which Springwell's account was with the Private Bank under the supervision of EM; and as at 17 August 1998, by reference to what occurred during the period 1994–1998 and, in particular, the period 1997–1998, during which Springwell's emerging markets portfolio built up a substantial concentration in Russian securities, so that it constituted 45.5 percent of Springwell's emerging markets portfolio by market value as at 31 July 1998.

THE LEGAL LANDSCAPE

The relationship between Springwell and Chase was both the conventional one of banker and customer and one of trading counterparties.

From a contractual point of view, the bank mandate signed by Springwell when it first opened its account with Chase in July 1986, on standard terms, did not expressly provide any basis for the advisory relationship of the sort alleged. It did not refer to any obligation on Chase's part to advise Springwell, nor was Gloster J prepared to imply such a duty merely from the express terms of the form.

This was, in fact, a case where the alleged contract and the alleged duty of care were concomitant and co-extensive, such that an analysis of the relationship between the parties, by means of an objective analysis of the relevant facts relating to the dealings between the parties in the relevant contextual scene, informs the Court both as to whether a contractual duty and/or a tortious duty of care exist[2]. The primary focus had to be on exchanges (*i.e.,* statements and conduct) which crossed the line between the parties[3].

Cases that address the circumstances in which one party will owe a duty of care in tort giving rise to a liability in economic loss[4] are often "quasi-contract" cases, where the relationship between the parties is said to be one of, or akin to, contract and where the contractual and tortious analysis is essentially the same.

In *Commissioners of Customs and Excise v. Barclays Bank*[5], the House of Lords recently reviewed the relevant cases and referred to the three tests which have been used in deciding whether a Defendant causing pure economic loss to a Claimant owes the Claimant a duty of care in tort, namely:

(i) The assumption of responsibility test, coupled with reliance;

(ii) The "three-fold test": whether the loss is reasonably foreseeable, whether the relationship between the parties is of sufficient proximity and whether in all the circumstances it is fair, just and reasonable to impose a duty; and

(iii) The incremental test (see below).

However, all of these tests operate at what the House of Lords termed "a high level of abstraction", so each of them requires, at a lower level, an analysis of all of the relevant facts in the overall determination so as to identify, as in the case of contractual liability, what could reasonably be inferred from the parties' conduct against the background of all the circumstances of the case[6]. Because the question of 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, it is nevertheless by no means simply a question of facts. Questions of fairness and policy will enter into the decision, and it may be more useful to identify these questions rather than simply to "bandy" terms like "assumption of responsibility" and "fair, just and reasonable"[7]. In *Morgan Crucible Co Plc v. Hill Samuel & Co Ltd [1991] Ch 295, at 301,* Lord Hoffmann had tried to identify some of these considerations in order to encourage the evolution of *lower-level principles* which could be more useful than the high abstractions or high-level generalisations commonly used.

2 *See Williams v. Natural Life Health Foods Ltd [1998]* 1 WLR 830 (HL) at 835 F.
3 *Ibid.*
4 *See Hedley Byrne v. Heller* [1964] AC 465 (HL).
5 [2007] 1 AC 181.
6 [2007] 1 AC 181 at 199C per Lord Hoffmann (paragraph 35).
7 *See* [2007] 1 AC 181 at 199F per Lord Hoffmann (paragraph 36).

The incremental approach recommended by the House of Lords in *Caparo*[8] required an analysis of the factors which have been treated as relevant to the existence, scope or non-existence of a duty in earlier cases so as, by analogy, to deduce the lower-level principles which could be applied to new or novel situations.

In short, concepts such as proximity and fairness are just convenient labels ready to be attached to features of different specific situations. A detailed examination of all the circumstances of the case is required, so as to enable the law to recognise *pragmatically* whether a specific situation gives rise to a duty of care of a given scope[8].

CREDIBILITY OF PRINCIPAL WITNESSES

Before summarising her conclusions on the factual evidence, the judge expressed her opinion of the reliability and credibility of the principal witnesses.

Gloster J found EM, who gave evidence on behalf of Springwell, to be an unsatisfactory witness whose evidence was vague and confused and shifted during the course of the trial. At times, the judge found him to be evasive and considered that he was not an independent witness.

As for AP, Gloster J considered him to be a commercially astute and clever businessman. By the time of the recorded conversations from 1997, he came across as sophisticated and knowledgeable about emerging markets investments and familiar with the jargon used by JA. He was in charge of the conversations, dictating their direction, and was domineering as well as, to some extent, opinionated. He never gave the impression of being a man out of his depth or unable to cope with the topics under discussion.

On many occasions AP's oral evidence flatly contradicted his written statements; on others, he wildly elaborated the evidence contained in his original witness statements in a wholly unconvincing way. Indeed, in certain instances, AP's evidence was considered by Gloster J to be demonstrably untrue, and he also felt able to give definitive evidence on matters on which he could not possibly have been in a position to do so.

On the other hand, the judge found no reason whatsoever to doubt the integrity of JA, either as a witness or in his capacity as a salesman. He was not unduly defensive, despite pressure put upon him by Springwell's allegations, and the judge found him to be an honest witness who did not pretend to remember things when he clearly had no recollection.

CONCLUSIONS ABOUT THE INTRODUCTION OF JA TO AP/SPRINGWELL

Based upon the entirety of the evidence in relation to the introduction of JA to AP in late 1987/early 1988, Gloster J concluded that it went nowhere near to establishing Springwell's pleaded or argued case that the Private Bank or the Investment Bank had a contractual or tortious obligation to give *general investment advice* to Springwell in the extensive terms pleaded. The judge concluded that during the period 1988 to 1990, AP himself never for one moment thought that he had the benefit of an *investment advisory relationship* with the Shipping Department/Private Bank. Never at any stage during this period did AP receive a single report, document, review, analysis or other evidence of this supposed supervisory and advisory function.

The judge did not accept AP's or EM's evidence that JA was introduced or described in terms such as "an investment advisor" or as someone who would be giving the type of extensive advice alleged by Springwell. ECP was a relatively benign product, which was presented as an alternative, but akin to, time deposits. The brothers were experienced and sophisticated businessmen and did not need such an investment advisor. They had speculated extensively in foreign exchange without considering that they needed an advisor.

Nevertheless, the judge did find as a fact that JA made recommendations and in that sense advised AP what to buy, during the early period of selling ECP to Springwell. However, the judge concluded that right from the start, JA was understood by AP to be a salesman of a limited asset class. Indeed, AP himself described JA as a salesman in 1988, but "much more than a salesman in 1996 or 1997 or 1998", which was inconsistent with the assertion that JA had

8 *See Caparo Industries Plc v. Dickman [1990]* 2 AC 605 at 617–618, per Lord Bridge; *Bankers Trust International v. PT Dharmala Sakti Sejahtera* [1996] CLC 518 at 577G, per Mance J.

been introduced as a full-scale investment advisor. From 1990, when JA moved to what ultimately became IFI, AP knew JA's focus was in emerging markets and that that was the paper, and the only paper, he was selling.

The judge accepted Springwell's submission that even at this early stage, JA was not acting as an "execution-only" salesman (as JA himself accepted), in the sense of merely executing the trade and not giving advice. However, whilst the advice given by JA might indeed be termed investment advice, the judge did not consider the word "investment" to add anything of substance. Even if the word "advice" or "advisor" had been used by EM in the context of his introduction of JA, it could not reasonably have been understood by AP, at this early stage, to create an ongoing advisory relationship of the extensive nature alleged by Springwell.

All in all, the judge concluded that whilst it may have been the case, in all the circumstances, that a *low-level duty of care* would arise on the part of a salesman not to make any negligent misstatements, or even to use reasonable care not to recommend a highly risky investment without pointing that out, a low-level duty along such lines was "worlds away" from the wide duty of care pleaded by Springwell or relied upon as having arisen at this early stage. It was at the lower end of the spectrum, rather like the giving of an ad hoc piece of investment advice.

Therefore, the notion that in the context of the trading relationship at this early stage, as a result of the manner in which JA was introduced to AP, the Investment Bank and/or the Private Bank, by JA, had either an obligation to ascertain Springwell's investment criteria, or to give wide-ranging advice, for example, about portfolio diversification or concentration issues, or in relation to the general composition of the portfolio as a whole, was one that simply did not reflect the reality of the position.

CONCLUSIONS ABOUT THE ROLE DISCHARGED BY JA IN PRACTICE

In regard to the role discharged by JA in practice, Gloster J concluded that in his capacity as a salesman, he did give investment advice, in the sense of personal recommendations to AP about what emerging markets investments Springwell should buy and sell and, in a very generalised way, about the state of and strategy for its emerging markets portfolio. However, at all times AP retained control over the decision making, and all decisions as to whether to initiate trades were taken by him on Springwell's behalf.

It was common ground that JA was a salesman of debt securities, employed by the Investment Bank to buy investments from and sell investments to Chase's customers, and that he was not employed as an investment advisor. Chase itself even described some of the telephone conversations between JA and AP as "long general investment review conversations", in which they reviewed together the emerging markets portfolio as a whole, or parts of it, in order to monitor performance, improve credit quality or formulate future investments proposals. Indeed, sometimes JA even gave advice to AP as to what he should do in regard to investment proposals from ML. However, Chase submitted that whilst salesmen frequently express their views and make recommendations, they do not thereby, and without more, assume advisory duties of care in respect of their opinions, let alone a more general positive duty to give advice. Furthermore, none of this did make, or could reasonably have made, AP think that JA was anything other than a salesman.

In cross-examination, JA accepted that it was part of his responsibility to have a hand in the shape of the portfolio, considering himself "a key constituent for the shape of [Springwell's] emerging markets portfolio". He accepted that he would look to give Springwell diversification whilst trying to keep within guidelines such as in terms of concentration of investment. He agreed that "[he] always had what was good for the client in . . . mind whenever [he] sold or bought anything for them".

JA's superiors did not agree that recommendations amounted to "investment advice". Although a salesman might provide market and price information, make recommendations and otherwise provide a "value-added" service to sophisticated clients, nevertheless clients would exercise their own judgment. Chase emphasised the substantive distinction between the role of a salesman and the role of an advisor within IFI by stating that no advisory service was provided and that Chase was not being paid for advice; it was a trading business, and an investment

advisory service could not be offered by a salesman reading off a screen; an investment advisory service is an entirely different sort of service, more profound and extensive, and directed to a different goal.

So far as the term "execution-only" was concerned, Gloster J did not accept that even if Springwell could not be categorised as an execution-only customer (because it was receiving personal recommendations from JA), that did not necessarily mean that Chase owed advisory duties, with all the incidents of a fully fledged common-law duty of care. The issue for determination was not whether any particular transaction did or did not fit within a certain description given in the SFA Rules.

CONCLUSIONS ABOUT THE DUTY TO ADVISE: RELEVANT FACTORS

Having considered in great detail the facts relating to the relationship between Springwell and Chase during the period 1990–1998, as well as extensive further evidence referred to in the parties' closing submissions, Gloster J concluded that neither the Private Bank nor the Investment Bank owed contractual or tortious obligations to Springwell to advise it as to appropriate investments or as to the structure of its portfolio, either in the wide terms alleged or otherwise.

The judge based her conclusions upon "arguably relevant" factors pointing to or against the existence of a duty to advise, and by reference to her conclusions on the arguments raised by the parties. The relevant *lower-level* factors that served as indicators of the non-existence of a contractual or tortious duty of care, involving matters of fact, were as follows:

The sophistication of AP/Springwell as an investor. The judge concluded that Springwell was a highly sophisticated investor, although its state of financial sophistication was not, in relative terms, comparable to that of Chase, as a major financial institution. Having already had more experience than most others in the emerging markets, in particular in Brazil, at a time when investment in emerging markets was in its infancy, AP rapidly acquired vast experience in the emerging markets asset class. He was at the forefront of emerging markets debt investments, acquiring personal and direct experience of the volatility in the markets, such as through the Tequila Crisis. By the mid-1990s, he was a hugely experienced and sophisticated emerging markets investor. Although he may not have had the appetite to trawl through research material sent to him by JA in any great detail, he certainly read some of it, if only superficially, from time to time and was always keenly aware of the commercial terms (price, yield, maturity date, etc.) of the investments that JA had on offer. He was definitely not an innocent abroad. Furthermore, the evidence relating to Springwell's dealings in emerging markets instruments with other banks and financial institutions, both before and after the Russian default, showed sophistication on the part of Springwell and the brothers. Springwell signed and accepted non-private customer letters with ML, prior to the signing of the 1997 DDCS letter with Chase. After the Russian default, Springwell and/or other Polemis group companies signed documentation with other financial institutions confirming their sophistication and experience. Likewise, those other banks and institutions characterised AP, Springwell and other Polemis companies as expert investors.

The absence of an advisory agreement. Gloster J considered that although the absence of a written advisory agreement between the Private Bank and Springwell did not of itself predicate that no free-standing duty of care to give appropriate investment advice, whether based in tort or contract, could have come into existence between the respective Chase entities and Springwell, it was a strong pointer against the existence of any such duty. If Chase had assumed a responsibility to provide investment advice, one would have expected not only that Chase would have defined the scope of its duties in a written document, but also that it would have put in place an appropriate and agreed fee structure for the investment management/advisory services it was providing. In addition, one would have expected the advice to have been provided to Springwell by an investment advisor rather than a salesman. Banking experts on each side agreed about the prevalence in practice of written advisory contracts.

The presence or absence of the indicia of an advisory relationship. Gloster J noted, in particular, as part of the general absence of any indicia of, or reference to, an advisory relationship, the fact that prior to commencement of any litigation against Chase, Springwell never asserted

that it had an investment advisory agreement with Chase or that Chase had assumed obligations to give Springwell investment advice. No mention was made in correspondence following termination of the alleged advisory agreement in January 1999, and no complaint was made when Springwell was facing substantial mark-to-market losses in August/September 1998 in the aftermath of the Russian default that breaches of Chase investment advisory obligations had been the cause of Springwell's losses.

The actual role played by JA in the period 1990–1998. As Gloster J had already found, JA gave advice to Springwell during his many telephone conversations with AP. That advice variously took the form of recommendations, expressions of views and opinions as to the state of the market, the relevant merits of various investments, or as to what course Springwell should take, whether in relation to a particular investment (*i.e.,* buy, sell or hold), or sometimes more generally. JA also went to great lengths to source and present investment opportunities to Springwell. However, JA's role did not change over time, regardless of the increasing frequency of his dealings with AP over the years, from one of a pure salesman to that of an investment advisor.

The advice given by JA over the entire period did not impose upon him or his employer, the Investment Bank, the duties of care or obligations of an investment advisor or asset manager, as Springwell contended. Gloster J considered there to be a *real distinction* between the investment advisor, properly so-called, who was retained to advise the client, usually backed by considerable research, such as in relation to the investments which a client should make, the structure of the investment portfolio, asset allocation and diversification, and the advice or recommendations given by a bonds salesperson such as JA as part of the selling process, who was actually trading and dealing with markets in a volatile environment that requires the salesperson to make decisions based on prices on screens many times a day.

Gloster J considered that whilst JA's recommendations influenced the make-up of Springwell's portfolio as it started to build up its investments in Russia, it was AP's desire for profit which drove the percentage of Russian investments in Springwell's portfolio towards 50 percent by August 1998. Although the judge also accepted that AP "relied upon" JA to a considerable extent, such as for accurate prices, the availability of particular bonds or issues, and to effect AP's instructions to buy or sell instruments, AP was not a man who would blindly or docilely follow the view of someone else. He clearly valued JA's views and opinions and the process of talking things through with JA and frequently asked JA for his views. Indeed, AP made decisions which were in line with JA's views and recommendations. However, AP also ignored JA's views on many occasions and made decisions which went against JA's views. He did not "rubber stamp" JA's suggestions, but was clearly a man who made his own decisions. He had a dominating and manipulative personality and was a shrewd and sophisticated operator who, even if he did not have enthusiasm for the fine detail, showed himself to have a keen appreciation of the products' commercial terms and potential, whether for loss or for profit. He was well aware of the risks (and potential returns) that a market such as Russia might afford. He was also clearly well aware of the cost and impact of leveraging Springwell's portfolio under Chase's financing programmes and the difference between the terms on offer at Chase and at rival institutions such as ML.

All in all, the fact that a customer was taking a salesman's advice and recommendations into account in making decisions whether to buy, sell or retain investments, and in that sense relying upon them, did not predicate that a duty of care arose on the part of the salesman. Reliance on its own, even if established, did not necessarily give rise to an advisory relationship, with consequential duties of care.

Gloster J could not accept that AP ever understood JA to be Springwell's investment advisor. The reality was that AP and JA would communicate with each other when Springwell needed to buy or sell something, when investments were maturing and needed re-investment, or when JA wanted to sell something to Springwell. It was in that context that JA would advise AP. The absence of the indicia of any advisory relationship, referred to earlier, also supported the judge's views.

It is important to note that the judge made clear that she was not saying a duty of care and obligations to advise could never arise when a salesperson, in that capacity, made recommendations. Gloster J's conclusion was simply that in the circumstances of this case, the fact that

JA, in his capacity as a salesman, may have been giving advice or expressing his views as to particular strategy or diversification within Springwell's emerging markets portfolio, or even making general comments as to the desirability of diversification of the portfolio outside that asset class upon which Springwell relied in reaching its decisions, did not amount to an *assumption of responsibility* on the part of the Investment Bank, so as to bring into play the full range of obligations of an investment advisor, as contended by Springwell.

A function of a salesman giving advice, recommendations and information, and in that sense providing a value-added service to clients who will then make their own decisions as to whether and what to buy or sell, is entirely consistent with the role not only of an emerging markets bond salesman in the financial world but, indeed, with that of any salesman in ordinary life[9].

In conclusion, the judge decided that the actual role discharged by JA during the relevant period did not give rise to any obligation, whether contractual or based on a common-law duty of care, on the part of his employer, the Investment Bank, to advise Springwell in the extensive terms pleaded. Irrespective of the terms of the contractual documentation, she concluded nonetheless that the fact that JA was giving advice in his capacity as a salesman did not give rise to the extensive duties of care on the part of the Investment Bank alleged by Springwell. In fact, the judge found that the capacity in which JA was acting was a strong pointer against the assumption of any responsibility, or legal obligation, to give general investment advice.

So far as the Private Bank was concerned, it also did not have the extensive obligations and responsibilities to advise alleged by Springwell, simply by virtue of the fact that it provided Springwell with access to JA and the IFI sales department, or because the Private Bank allegedly had some sort of responsibility for the activities of JA and for the recommendations and advice that he was giving throughout the relevant period in his capacity as a salesman in the Investment Bank.

As a matter of law, the judge did not consider that the Private Bank had legal responsibility for the conduct of JA as an employee of the Investment Bank who, as AP well knew, worked in the Investment Bank and separately from the Private Bank.

The actual role of the Private Bank in the period 1990–1998 and AP's reliance upon it. Gloster J found that no free-standing obligation to advise (in the sense of an obligation that was separate from the activities of JA), whether in contract or based on a common-law duty of care, arose by virtue of the Private Bank's role as such, its actual conduct over the relevant period, or the circumstances with which it was faced, namely a client with an increasingly large exposure in emerging markets debt securities concentrated in Russia who was engaged in an extensive trading relationship with the Investment Bank.

A serious flaw in Springwell's case under this head was that it had never been clearly articulated. There was no clear identification of precisely what duties were owed at any particular time or the specific date upon which it was alleged that the Private Bank had assumed legal obligations to Springwell. Once again, irrespective of the terms of the relevant contractual documentation, the judge concluded that no duty of care arose from the circumstances relating to the role of the Private Bank.

So far as diversification proposals made by the Private Bank in the years 1996–1998 were concerned, the judge stated that it was "common ground" that these were made by way of marketing presentations, soliciting investments in specific products. They were not put forward as part of a strategy of diversification or in order to bring about a restructuring of Springwell's portfolio. On a full analysis of the evidence, Gloster J concluded that there was nothing in these diversification communications that could be characterised as an assumption by the Private Bank of the responsibility to give Springwell wide-ranging investment advice as to the structure of its portfolio, the need for diversification or asset allocation. In reality, Springwell had, of its own volition, with AP's increasing appetite for the substantial returns that investing in emerging markets afforded, adopted a strategy of concentration in emerging markets and, in particular, in Russian debt instruments. AP was, throughout, pointedly dismissive of the diversification proposals of the Private Bank.

9 *See Riggs AP Bank Limited v Eurocopy (GB) Ltd* (1998) Ch D (6 November 1998) (unreported) (Hart J), as an instructive example.

In coming to the conclusion that no free-standing duty of care was owed by the Private Bank, the judge also took into consideration a handful of internal Chase documents in 1994 and 1995 that referred to Chase or the Private Bank as Springwell's "trusted financial advisor". The documents were generated by the Private Bank, not JA or anybody else within the Investment Bank. The judge was satisfied on the evidence that the term was used within the Private Bank for no real purpose other than as an internal marketing slogan for a short period of time. These documents were also wholly inconsistent with the terms of the formal contractual documentation which were unambiguous about the absence of advice or of any reliance by the customer on such advice.

ADDITIONAL FACTORS INFLUENCING THE JUDGMENT

There were clearly a number of other factors which influenced the judge's decision in relation to duty of care, whether expressly stated by the judge or to be inferred by obvious inference, as follows:

- Gloster J stated that in addition to the arguably relevant factors pointing to or against the existence of a duty to advise summarised above, she had been influenced by the terms of the contractual documentation (*e.g.,* the MFA, the GMRA, the DDCS letters and trade confirmations), which incorporated a number of exclusions, disclaimers and representations such as to non-reliance. Although the judge expressed opinions based upon the relevant factors in isolation, there is no doubt that her conclusions were affected by the contractual documentation, which will be considered in Part 2. It is important to note, however, the judge's statement that even if she were wrong in her conclusion based upon JA's actual role over the period 1990–1998, and the fact that JA was giving recommendations and advice to Springwell, the relevant terms of the contractual documents would have precluded an assumption of responsibility on the part of both the Investment Bank and the Private Bank.
- The "serious flaw" in Springwell's case in respect of the role of the Private Bank and AP's reliance upon the Private Bank due to the focus of its case shifting over the course of the trial, and its failure to identify a date when the Private Bank assumed the responsibility to advise (see above).
- Gloster J's view that Springwell's pleaded investment objectives and its alleged attitude to risk were the "construct of fantasy which bore no relation to reality". Furthermore, in regard to the suggestion that high-quality corporate bonds or gilts would have generated a sufficient return to be of interest to AP the judge found this to be "fanciful". There were other aspects of AP's evidence which the judge found to be unsatisfactory, such as his evidence that had he refused to sign the MFA, he would have moved Springwell's account to the Chase Private Bank in Geneva. Gloster J considered this evidence to be "approaching fantasy" and "unreal".
- Springwell's original case was, according to Gloster J, an exaggerated and wholly incredible case, to the effect that it had two investment requirements, namely capital preservation and liquidity. Gloster J considered this to be fanciful, bearing in mind that it had invested enormous sums aggressively and on a leveraged basis in the emerging markets for the best part of a decade and continued to do so whenever possible even after the Russian default. Some eight years after the Russian default, in 2006, Springwell changed its case. It alleged that as the relationship with JA developed and as he came to trust JA, AP became willing "as a result of JA's failure to explain, and misrepresentation of, the risks involved" to invest part of the portfolio in investments which "were also subject to a risk of fluctuation". However, it remained his objective not to run any "appreciable risks" that the capital value might be reduced.
- The fact that Springwell's complaint against Chase was first brought in the United States, in December 1999, on the grounds of *fraud* and negligent advice. The claim was dismissed on jurisdictional grounds and all appeals were refused before Chase commenced the English proceedings on 9 April 2001. Nevertheless, Chase persisted for six years with allegations that Chase had acted dishonestly for about a year in mis-selling Russian investments, knowing them to be unsuitable, and only abandoned these allegations of fraud and dishonesty shortly before trial.

- Despite the fact that Springwell dropped allegations of dishonesty against JA before the trial, it maintained a parallel allegation that JA had acted in breach of fiduciary duty, in particular, in consciously taking advantage of AP, when selling instruments to Springwell between October 1997 and 1998. Springwell pursued the most wide-ranging allegations of negligence and negligent misrepresentation against JA and subjected him to a very searching examination of his conduct, his approach, his integrity and his professionalism.

COMMENT

This is a cogent judgment when considering the duty of care in isolation from the contractual documentation entered into between the parties. However, the judge's statement that the salesman owed "low-level" duties of care, her suggestion that she might be wrong in her decision, and her acknowledgment that the matter generally might go to appeal serve to cast a spotlight upon certain features of the judgment.

It is fair to say that Springwell set a high bar for itself in, it seems, contending that Chase had agreed to provide or had assumed a responsibility for the full range of obligations of an investment advisor. Furthermore, the very fact that it changed its case in fundamental respects during trial is likely to have weakened the force of its arguments. Nevertheless, in the context of three broad competing tests for establishing a duty of care, including one (incrementalism) which remains vague, there might be limited scope for argument as to a duty of care in respect of the make-up of the portfolio, given the advice and recommendations made by JA. On the other hand, the lack of an advisory agreement, the absence of a fee structure, and the extent to which AP made his own decisions present strong counter-arguments.

Certain features of the first judgment, which would be interesting subjects for future debate if the matter were to go further, include the following.

Foreign exchange speculation. In circumstances where customers have embarked upon speculative and risky transactions, even in cases where advice has been given by a financial practitioner, the Court has been reluctant to impose a duty of care (*see Stafford v. Conti Commodity Services Ltd* [1981] 1 All ER 691; *Merrill Lynch Futures Inc. v. York House Trading Ltd and Anor* (1984) (unreported)). In *Springwell*, however, the judge appears to have formed the impression that the brothers were prone to speculation, without any real summary of the underlying evidence, unlike other aspects of her factual analysis.

"Execution-only". Having accepted Springwell's submission that even in the early stages of the relationship JA was not acting as an "execution-only" salesman in the sense of merely executing the trade and not giving advice, and having considered the regulatory background to be one of the relevant factors that served as indicators of the existence of a duty of care, the judge concluded that the true meaning of "execution-only" was of little utility and ultimately went only to the technical point of regulatory classification. This would appear to cause tension with the judge's findings in relation to the DDCS letters, which were also for the purposes of regulatory classification. The terms of the DDCS letters will be considered in Part 2 and the regulatory framework in Part 4.

Regulatory background. In the context of the regulatory background generally, having considered this to be one of the "lower-level" factors serving as an indicator of the existence or otherwise of a duty of care, the judge concluded that the regulatory background did not significantly impact on her analysis of the relationship between Chase and Springwell and the issue as to whether Chase owed Springwell investment advisory obligations. Once again there would seem to be some tension in the judge's conclusions, which highlights the question of whether the process of regulatory classification and the status of "non-private customer" preclude any common-law duties of care.

Conclusions in respect of 1990–1994. In the summary of her conclusions in respect of the period 1990–1994, the judge mentions a significant number of new matters for the first time. This in itself highlights the fact that the judgment does not disclose all of the relevant facts but more perhaps a preponderance of facts supporting the arguments with which the judge found favour.

Chase's attempts in relation to diversification. The judge concluded that there was nothing in the diversification communications from March 1996 between Chase and Springwell that could be characterised as an assumption by the Private Bank of the responsibility to give Springwell wide-ranging investment advice as to the structure of its portfolio, the need for diversification or asset allocation. In effect, the judge agreed with Chase that its proposals were nothing more than marketing pitches. However, whilst the judge's conclusion appears to be based upon the fact that this was common ground between the parties, there is no mention of this being common ground in the detailed analysis in the judgment. As a result, the precise basis for the judge's conclusion is unclear.

"Trusted financial advisor". Similarly, the basis for the judge's conclusion that the use of the term "trusted financial advisor" in Chase documents in 1994 and 1995 represented nothing other than an internal marketing slogan for a short period of time is not clear. Indeed, it seems that the judge's ultimate conclusion was actually based upon the fact that these documents were considered by her to be inconsistent with the terms of the formal contractual documentation.

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