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JPMORGAN CHASE BANK V SPRINGWELL NAVIGATION CORPORATION, PART 2

CONTRACTUAL PROVISIONS: THEIR EFFECT ON THE BANKER'S DUTY TO ADVISE

INTRODUCTION

In this second part of a series of *Commentaries* on particular aspects of the recent judgments of the English Court in ***JPMorgan Chase Bank v Springwell Navigation Corporation*** [2008] EWHC 1186 (Comm) and [2008] EWHC 1793 (Comm), detailed consideration is given to the various terms of the principal contractual documents upon which Chase relied (the "Relevant Provisions"), as contained within the MFA terms and conditions, the DDCS Letters, the GKO documentation, the GMRA, and relevant confirmations. Extracts from the Relevant Provisions are set out in the Appendix.

In particular, the judge's findings in the first judgment in relation to four principal contractual aspects are examined:

- The extent to which the nature and terms of contractual provisions can negate a duty of care.
- The extent to which representations, particularly as to non-reliance, can be circumvented.
- Arguments for avoiding the contractual documentation altogether.
- Springwell's attempts to place a narrow construction upon the Relevant Provisions.

According to Gloster J, it was in order to avoid the potential consequences of certain exclusions and disclaimers in the contractual documentation from 1992 onwards that Springwell had contended that Chase assumed a duty to advise at the outset of their relationship 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. Given the judge's decision (see Part 1) that no tortious duty to give general investment advice arose in the early period, whether as a result of or following the introduction of the Investment Bank salesman,

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JA, to Springwell's principal, AP, it was necessary for the judge to consider the terms of the subsequent contractual documentation as from 1992.

For the purposes of considering all of the issues arising in connection with the contractual documentation, including the Relevant Provisions, Gloster J found it instructive to identify certain general features, including:

(i) The contractual documents were written contractual agreements, concluded between commercial parties, which the judge found to be of equal bargaining power. The documents were not exceptional or unusual; they were, for the main part, ordinary standard form documents of the sort which might be expected to pass between a bank and its customer in the relevant area of activity. Some of them were industry standard documents (such as the GMRA), and most of them were no longer than a few pages, with clear terms.

(ii) The contractual documents were significant documents from Chase's perspective, because they confirmed the basis upon which Chase was prepared to trade with Springwell. Without the DDCS Letters, for example, there would have been no trading at all.

(iii) Most of the documents were signed on behalf of Springwell by way of acceptance of their terms in the knowledge that the documents were contractual documents.

LIMIT OF RELATIONSHIP DEFINED BY CONTRACT

Gloster J had concluded that Chase did not owe contractual or tortious duties of care to give general investment advice to Springwell, irrespective of the terms of the contractual documentation, including the Relevant Provisions (see Part 1). The judge added, however, that if she were wrong, the terms of the contractual documentation militated against a duty of care.

In determining whether the circumstances of a particular case are such as to impose a duty of care, an important factor is the way in which the parties have sought to regulate their relationship, and to allocate risk, by contract. If the parties have contractually defined the terms upon which they will conduct business, that may, in the normal case, provide a clear and often determinative *indication* as to the non-existence of any wider tortious duties. In the landmark case of ***Henderson v Merrett Syndicates Ltd***[1], the House of Lords stated:

> "The existence of an underlying contract…does not automatically exclude the general duty of care which the law imposes on those who voluntarily assume to act for others. But the nature and terms of the contractual relationship between the parties will be determinative of the scope of the responsibility assumed and can, in some cases, exclude any assumption of legal responsibility to [a person] for whom [another] has assumed to act."

As was made absolutely clear in *Henderson v Merrett*, a party to a contract may rely on a tort committed by the other party, as long as doing so is not inconsistent with the express or implied terms of the contract. Indeed, a person possessed of special skill or knowledge may owe a duty of care in tort by assuming a responsibility to another person within a relationship (whether special or particular to a transaction, and whether contractual or not), based upon the broad principle found in ***Hedley Byrne v Heller & Partners***[2]. Therefore, the *Hedley Byrne* assumption-of-responsibility principle is not merely restricted to cases of statements. However, in the context of a contractual relationship, it is necessary to ascertain whether the tortious duty is so inconsistent with the applicable contract that the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.[3]

Therefore, it is important to recognise that whilst the mere existence of a contractual right will not, in all cases, be inconsistent with the co-existence of another tortious right, nevertheless the agreement of the parties evidenced by a contract can modify and shape the tortious duties which, in the absence of a contract, would otherwise be applicable.

Gloster J accepted Chase's primary submission that it was not necessary, at least for the purposes of the general

1 [1995] 2 AC 145, at 206, per Lord Browne-Wilkinson.
2 [1964] AC 465.
3 See *Henderson v Merrett* at 194, per Lord Goff.

advisory duty of care, to undertake a detailed textual analysis of the precise ambit, extent and legal effect of the individual Relevant Provisions because the contractual documentation taken as a whole had the broader evidential significance, by describing and evidencing a course of dealing between the parties, of negating the assumption of any general advisory duty or obligation on the part of Chase. The judge also accepted that the contractual documentation presented a consistent and commercially coherent picture, namely that Springwell's trading through the Investment Bank was not *intended* to give rise to or impose upon the Private Bank or the Investment Bank investment advisory obligations or responsibilities, even in relation to the particular securities purchased or sold or, more generally, in relation to Springwell's financial position in light of its emerging markets portfolio. Moreover, even if any such advice was given, Springwell acknowledged that Chase had no responsibility for any such advice because (a) Springwell acknowledged that it had not relied upon any such advice in making its investment decisions and (b) it had agreed that Chase was not liable for any loss resulting from any investment decision by Springwell (save in the case of gross negligence or wilful default).

In all the circumstances, Gloster J accepted Chase's submission that the contractual documentation, whether taken at a straightforward contractual level or looked at more widely as an indication as to whether any common-law duties of care arose, showed that the parties specifically contracted upon the basis of a trading and banking relationship which negated any possibility of a general or specific advisory duty coming into existence.

In support of her conclusions, the judge went on to examine cases in which the contractual documentation had been found to define the relationship between the parties and which, in her opinion, excluded any parallel or free-standing common-law duties of care.

In ***IFE Fund v Goldman Sachs International***[4], there were various claims in misrepresentation in relation to an Information Memorandum provided by the Defendant ("GSI") to the Claimant. There was also a claim in respect of an alleged general duty of care to give advice, despite the fact that the Information Memorandum contained clauses (contained in an "Important Notice") comprising disclaimers to the effect that its content had not been independently verified by GSI, that GSI accepted no responsibility in respect of it, and that it should not be assumed that the information had been updated since the date of the document. One of the issues between the parties was whether or not the particular clauses in the Information Memorandum should be characterised as exclusion clauses and, therefore, subject to potential challenge under the Unfair Contract Terms Act 1977 (see further below). At first instance, the Court rejected the notion that they were exclusion clauses and considered them to define the nature of the relationship between the parties, with the result that there was simply no question of any general advisory duty. The Court stated:

> "The relevant paragraphs of the [Information Memorandum] are not ...to be characterised in substance as a notice excluding or restricting a liability for negligence, but more fundamentally as going to the issue whether there was a relationship between the parties (amounting to or equivalent to that of professional adviser and advisee) such as to make it just and reasonable to impose the alleged duty of care".[5]

This approach was endorsed and followed by the Court of Appeal, which stated:

> "[T]he argument that there was some free-standing duty of care owed by GSI to IFE in this case is in the light of the terms of the Important Notice hopeless. Nothing could be clearer than that GSI were not assuming any responsibility to the participants: Hedley Byrne v. Heller & Partners [1964] AC 465. *The foundation for liability for negligent misstatements demonstrates that where the terms on which someone is prepared to give advice or make a statement negatives any assumption of responsibility, no duty of care would be owed.* Although there might be cases where the law would impose a duty by virtue of a particular state of facts despite an attempt not "to assume responsibility", the relationship between GSI either as arranger or as vendor would not be one of them".[6]

4 [2006] EWHC 2887 (Comm) (Toulson J); [2007] 1 Lloyd's Rep 264; [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep 449.
5 Per Toulson J at 274 (paragraph 71).
6 Per Waller LJ at 456 (paragraph 28).

Gloster J referred to other cases which, in her opinion, strongly supported the fundamental importance of the contractual matrix in determining the existence and scope of a duty of care, and where the relevant contractual provisions had prevented the coming into existence of a general duty of care to advise.

In ***Peekay Intermark Ltd & Another v Australia & New Zealand Banking Group Ltd***[7], the first Claimant, Peekay, was the investment vehicle of the Second Claimant ("C2"), who had invested in emerging markets instruments with the bank since 1997. A salesperson telephoned C2 to see if Peekay wished to purchase a GKO-Linked Note issued by the bank. She described the nature of the investment to C2 in terms which suggested that the Note was structured so as to give the investor a proprietary interest in the underlying GKO. She did not explain to C2 that, in the event of a default, investors would have no control over the manner in which the investment was liquidated. The contractual documentation sent to C2—which he did not read before signing and returning—stated the correct position. Both the relevant terms and conditions and an "Emerging Markets Risk Disclosure Statement" (both to be signed by the client and returned to the bank) made clear that before entering into a transaction or making any investment, the client should independently assess the appropriateness and suitability of the investment based upon its own judgment and upon advice from such advisors as it considered necessary. It was an express term that the client was not relying upon any communication (written or oral) made by the bank as constituting either investment advice or a recommendation to enter into the transaction. It was incumbent upon the client to ensure that it fully understood the nature of the transaction and the contractual relationship into which it was about to enter.

A claim in misrepresentation succeeded at first instance, but the judgment was overturned by the Court of Appeal. The focus of the judgment in the Court of Appeal was on the need for commercial certainty between parties in commercial transactions such as the one in question and on the significance of the contractual documentation. The Court stated:

> "[T]he true position appeared clearly from the terms of the very contract which [Peekay] says it was induced to enter into by the misrepresentation… [I]t was not buried in a mass of small print but appeared on the face of the documents as part of the description of the investment product to which the contract related. It was accepted that a person who signs a document knowing that it is intended to have legal effect is generally bound by its terms, whether he has actually read them or not. The classic example of this is to be found in *L'Estrange v. Graucob* [1934] 2 KB 394. It is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community."[8]

The Court of Appeal held that by confirming that he had read and understood the Risk Disclosure Statement and by returning it with his instructions to make the investment, C2 offered to enter into a contract with the bank on behalf of Peekay on those terms and that that offer was accepted by the bank when it implemented his instructions. Therefore, it was part of the contract between them that Peekay was aware of the nature of the investment it was seeking to purchase and had satisfied itself that it was suitable for its needs. In those circumstances, since it had not been suggested that the bank misrepresented to C2 the effect of the documents, it was not open to Peekay to say that it did not understand the nature of the transaction described in the terms and conditions. As a result, Peekay could not assert that it was induced to enter into the contract by a misunderstanding of the nature of the investment derived from what the salesperson had said about the product some days earlier.

In ***Valse Holdings v Merrill Lynch International Bank***[9], the Claimant, a Panamanian personal investment company, had retained Merrill Lynch ("ML") as its banker and as its financial advisor under ML's standard terms and conditions. The account was advisory rather than discretionary management, such that ML advised on investments but was not authorised to trade without express instructions. Valse's claim was essentially for negligent mismanagement and financial advice during the period 1999 to 2002 and for loss of approximately US$4 million, plus interest. Valse

7 [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511.
8 At 520, per Moore-Bick LJ (paragraph 43).
9 [2004] EWHC 2471 (Comm).

claimed that the account was managed by a senior financial consultant at ML and that under his management, "the Portfolio performed disastrously": the value of the Portfolio reduced during the period from US$13.9 million by some US$4.4 million. The principal allegation was that ML pursued an extraordinarily risky investment policy: the Portfolio was concentrated in volatile equities, especially in the technology sector, and was highly leveraged, in the sense that it was investing not only its own capital but money loaned to it by ML. In short, the claim was that "the Portfolio as a whole was far too risky and [the Claimant] should have been advised of that"[10].

The employee of ML whose advice was being criticised was a general investment advisor, not a salesman or a specialist in emerging markets. However, albeit that ML was the Claimant's financial advisor, the terms and conditions also included notification that ML had categorised the Claimant as a non-private customer by reason of its experience and understanding in relation to the investments in question and that the regulatory obligations to warn of the risks involved in any transaction which ML might recommend to provide written risk warnings in relation to transactions in derivatives and warrants and to give suitable advice were excluded. Valse argued that whilst the terms and conditions may have excluded the regulatory obligations, they said nothing about the common-law obligations, such as to monitor the portfolio by reference to the investment objectives and "to make recommendations consistent with the investment objectives and risk tolerance agreed and explain the risks of the transactions, strategies and overall portfolio on an ongoing basis".[11]

The Court rejected the claim and upheld the argument of ML that the non-private customer notification necessarily narrowed the scope of any common-law duty. The Court stated:

> "Essentially the difference between a discretionary account and an advisory account is that in the former the trader has discretion to make trades without taking the client's instructions. With an advisory account, however, the client is essentially in charge of his own portfolio, with the benefit of the Bank's advice. Where, as here, the client is designated an expert, and this designation as such has not been challenged, then the technical position is set out in the FSA Rules [as from 1 December 2001 and previously under the SFA Rules]. [ML] does not take responsibility for the suitability of the advice they give. There was no Non-Discretionary Management Agreement in existence and no *contractual duty*, in my view, owed to Valse, the client, as to the suitability of the portfolio as a whole. The Bank is, essentially, under an obligation to carry out the client's instructions and may not refuse to do so simply on the grounds that the instructions may conflict with an agreed investment objective. The client is the master of the account; the investment objectives are his servant and must be adapted to meet the client's trading decisions. The advisor must recommend investments which do not appear to him to conflict with the client's investment objectives, *but the client takes responsibility for accepting or rejecting any advice which is tendered to him*".[12]

Therefore, the Court held that even in the context of an acknowledged advisory relationship, there was, in the circumstances, no general obligation to advise as to suitability or to give sufficient risk warnings, because those obligations were not part of the agreed terms of business.

As far as Valse's principal was concerned, far from being the "enthusiastic amateur"[13] contended by Valse, the Court found:

> "[Valse's principal] knew exactly what he was doing …[T]he risks were palpable. He is the most able and successful man. He simply took a view of the market which turned out to be wrong. It was not any lack of understanding about the objectives and their labels which was of importance; it was his failure to take advice when it was given and a determination to pursue a course of action which he believed was in the best interests of the portfolio…[H]e was a knowing and informed investor".[14]

10 Paragraph 29, per Morison J.
11 Paragraph 66.
12 Paragraph 69.
13 Paragraph 66.
14 Paragraph 73.

In ***Bankers Trust International Plc v PT Dharmala Sakti Sejahtera***[15], the bank commenced proceedings in relation to two swap transactions entered into with an Indonesian corporate customer ("DSS"). The customer raised, among other things, allegations of misrepresentation and breach of a general duty of care in relation to the transactions.

The relationship under examination was not the conventional banker-customer relationship. The bank here was marketing to existing or prospective purchasers derivative products of its own devising which were both novel and complex. It had been seeking to transact derivatives business with DSS, which had considerable experience in derivatives trading, for some considerable time.

Bankers Trust made a presentation to DSS, after which the parties entered into an interest rate swap transaction. Interest rates moved against DSS, and a second transaction was entered into to replace the earlier one. However, not only was this second transaction more complex than the first, but in its letter to DSS offering the swap, the bank misdescribed the differences between the two transactions and failed to set out the other alternatives (such as simply cancelling the first transaction); furthermore, the formula upon which the second transaction was based was incorrect, such that it highlighted the advantages but failed to point out the disadvantages. This was also true of the accompanying literature. After the second swap had been entered into, interest rates again moved against DSS, and eventually the bank claimed to be owed nearly US$65 million.

DSS claimed that Bankers Trust had made fraudulent misrepresentations to it—namely, that the swaps were safe and suitable and that the second transaction was preferable to the first—and had given incomplete, inaccurate and unreliable economic forecasts. The Court rejected DSS's allegations on the basis that its skill and experience meant that it had not been induced to enter into these transactions on the basis of representations. It was for DSS to come to its own conclusions, and this responsibility should not be shifted to Bankers Trust.

When considering the position as to duty of care, the Court was concerned whether the circumstances were such as to give rise to a general duty of care to advise. On the facts, the Court found that they were not. In regard, in particular, to the second swap[16], Gloster J found the analysis to be instructive. DSS had sought to establish an advisory duty by relying on: (a) representations which were made; (b) the skill and knowledge of the bank when compared to that of DSS; (c) the particular circumstances of presentations made by the bank; and (d) the views of the bank's relevant officer as to his role and responsibilities.

In dealing with the question of representations, the Court found that they would or would not attract their own consequences in terms of the claim in misrepresentation. By themselves, they did not support a general duty of care. The Court stated:

> "[T]he existence of a duty of care does not depend upon the existence of any misrepresentation justifying rescission, and … the duty alleged by DSS extends to explaining fully and properly to DSS the operation, terms, meaning and effect of the proposed swaps and the risks and financial consequences of accepting them. The allegations go wider than those of misrepresentation and collateral undertaking. The principle, on which DSS founds itself here, is contained in cases such as Barclays Bank Plc v. Khaira [1992] 1 WLR 623, Cornish v. Midlands Bank Plc [1985] 3 All ER 513 and Box v. Midland Bank Ltd [1979] 2 LLR 391. In short, a bank negotiating and contracting with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to that other party. However, if the bank does give an explanation or tender advice, then it owes a duty to give that explanation or tender that advice fully, accurately and properly. How far that duty goes must once again depend on the precise nature of the circumstances and of the explanation or advice which is tendered. [Counsel for the bank] accepted that [the bank] did in the present case owe a duty to take reasonable care not to misstate facts in any of the relevant meetings or letters. DSS alleges that explanations and advice were tendered which went beyond the mere statement of facts, and that [the bank] owed correspondingly broader duties."[17]

15 [1996] CLC 518.
16 See pages 571–575; see also page 533.
17 See page 533.

As to the skill and knowledge of the bank, when compared to DSS, the Court considered the respective skill and knowledge to be relevant but not decisive. On the facts, the bank had a deeper expertise, but DSS had, and held itself out as having, sufficient expertise to understand the basic elements of what were very complex transactions. The Court did not consider the circumstances of the presentations sufficient to give rise to a duty of care. Furthermore, the Court acknowledged that, where both parties are pursuing their respective financial interests in a commercial transaction, advisory obligations will not normally arise:

> "The relationship was essentially commercial. DSS knew that [Bankers Trust] was soliciting DSS's custom for [Bankers Trust's] product and for [Bankers Trust's] own profit. The court should not be too ready to read duties of an advisory nature into this type of relationship".[18]

As for the views of the Bankers Trust officer, these were of minor significance. However, the Court placed more significance on "[Bankers Trust's] actual statement at the time of its role" in a letter it sent containing a non-private customer notification. Although not of contractual effect, the Court described the *evidential significance* of the effect of this as follows:

> "Although written to emphasise the inapplicability of the protection afforded to private customers by the [R]ules of the [SFA] the letter is written in terms which militate against the wide implied duties to investigate, inform, advise and warn suggested by DSS in this action"[19].

Having reviewed the principal factors on which DSS relied in support of more general advisory duties, the Court considered that the relationship between the bank and DSS did not impose on the bank any other or greater duty of care than a duty to represent fairly and accurately any facts and matters in relation to which the bank did make representations. This did not extend to advising DSS on alternative transactions or the advisability of speculative swaps in general.

COMMENT

In the present case, therefore, the important question was whether the Relevant Provisions could be taken to have limited or excluded, by agreement, a duty of care to advise. In regard to the DDCS Letters, for example, Gloster J considered that they succeeded both in treating Springwell as a sophisticated investor, within a non-advisory relationship in respect of which there was no duty to advise or to ensure that investments were suitable, and in excluding liability in respect of information provided to Springwell.

As a matter of principle, the judge was undoubtedly correct in her approach, but it is important to note certain features of the cases referred to, in the context of the principle that contractual provisions can prevent the coming into existence of a duty of care.

Firstly, *Peekay* is strictly a misrepresentation case and not a case of a concomitant and co-extensive duty of care. Whilst *Valse* determined that there was no contractual duty owed to the client as to the suitability of the portfolio as a whole, the case did not deal specifically with the question of exclusion of a tortious duty of care as a result of the relevant contractual terms. In *Bankers Trust v PT Dharmala*, although the Court did place some emphasis upon the non-private customer notification, it did so only as one of a number of evidential factors to be taken into account in determining whether or not the financial institution owed a tortious duty to advise. In itself, the non-private customer notification played a part in militating against an implied duty to advise, but only as part of the wider facts, including the experience and behaviour of the customer.

A further case, which was not referred to by Gloster J but which illustrates the need for the Court to consider the wider facts, is ***Australia & New Zealand Banking Group Ltd v Cattan & Anor***[20]. In this case, the bank sued for losses incurred by the Defendant customer ("C") as a result of trading in emerging markets debt instruments including Russian (non-sovereign) debt on a "when and if basis", namely an investment which gives the investor the opportunity to acquire debt should there be a re-scheduling of the country's debt. Up to that time, it was open to the investor to sell his rights.

18 See page 574.
19 See page 576.
20 (Unreported) (21 August 2001); [2001] All ER 10 (D).

The market had turned against C, and margin calls were made. After the debt was re-scheduled, C faced a relatively unattractive choice of closing out and sustaining a loss or persisting with the investment in the hope of getting his money back. In order to do the latter, he was offered the opportunity of entering into a deferred purchase agreement whereby he was "credited" with the amounts he had already paid by way of principal and margin call but undertook other obligations contained in the relevant agreement. After a period of reflection, C returned the agreement duly signed. However, problems persisted, and eventually the bank was forced to bring proceedings for monies due under the agreement. C alleged that although he had entered into the trades, he did so as a result of the bank improperly categorising him as a non-private investor, in breach of the IMRO Rules, and that he did not possess the knowledge and experience to be so classified. In reality, he asserted, he should have been treated as a private investor to whom the bank owed a duty of care to ensure that he did not enter into deals which he did not understand and which were inherently so risky that they were not suitable for a person of his standing and means. Therefore, C argued that he was not indebted to the Claimant bank and counterclaimed for losses made during his unsuccessful trading pursuant to Section 62(1) of the Financial Services Act 1986 (see now Section 150 of the Financial Services and Markets Act 2000).

The Court considered that C was a sophisticated investor who understood emerging markets risk in leveraged structures and had been properly classified as a non-private customer. Therefore, the Court found that the exclusion of the bank's regulatory obligations defined the relationship between the parties and, when taking into account the wider facts including the experience and behaviour of the customer, no duty of care to advise existed.

Therefore, *Cattan* illustrates that contractual customer classification is but one factor, albeit an important one, to be taken into account when assessing the extent to which a tortious duty of care has been negated. This will be considered in more detail in Part 4 (the regulatory framework).

CIRCUMVENTION OF REPRESENTATIONS AND ACKNOWLEDGEMENTS

Given the judge's findings that the contractual documentation militated against and, in this case, negated a duty to advise with skill and care, it was necessary for Gloster J to consider Springwell's arguments for circumventing its own representations and acknowledgements in the contractual documentation. In particular, Springwell submitted that Chase could not rely upon representations or acknowledgements of fact in the Relevant Provisions, such as:

(i) that Springwell was a sophisticated investor;

(ii) that the transactions had been conducted on an execution-only basis;

(iii) that the Chase entities had not given, and Springwell had not received, any advice in relation to any of the relevant transactions;

(iv) that Springwell had not relied upon any advice from any of the Chase entities.

This, Springwell submitted, was because of the principle articulated by the Court of Appeal in ***Lowe v Lombank Limited***[21], that where a false statement is made about a matter of *past* fact, that statement cannot operate either as an estoppel by representation *or* (where the fact is expressed as an agreement) a contractual estoppel, unless:

(i) the maker of the statement intended it to be taken as true and relied upon;

(ii) the other party believed it to be true; and

(iii) the other party in fact relied upon it.

Essentially, the Court of Appeal in *Lowe v Lombank* decided that clauses stating that one party "acknowledges" or "acknowledges and agrees" something as to past fact which is untrue cannot operate as positive contractual obligations:

> "In so far as it was a representation it could operate only as an estoppel preventing the plaintiff from asserting the contrary…To call it an agreement as well as an acknowledgement by the plaintiff cannot

21 [1960] 1 WLR 196 (CA).

convert a statement as to past facts, known by both parties to be untrue, into a contractual obligation, which is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the time of the promise or will exist in the future. To say that [a person] "agrees" that he has not done something in the past means no more than that [person], at the request of [another], represents that he has not done that thing in the past. If intended by the [representor] to be acted upon by the person to whom the representation is made, believed to be true by such person and acted upon by such person to his detriment, it can give rise to an estoppel: it cannot give rise to any positive contractual obligation. Although contained in the same document as the contract, it is not a contractual promise."[22]

At best, such statements can give rise to an estoppel by representation, but only if:

(a) the statement is clear and unambiguous;

(b) the Plaintiff meant it to be acted upon by the Defendant or, at any rate, so conducted himself that a reasonable person in the position of the Defendant would take the representation to be true and believe that it was meant that he should act upon it; and

(c) the Defendant did in fact believe it to be true and was induced by such belief to act upon it[23].

These requirements for a representation to operate as an evidential estoppel were also emphasised by the Court of Appeal in ***EA Grimstead & Son Limited v McGarrigan*** (*obiter*) and in ***Watford Electronics v Sanderson***[24]. In both cases, the Court of Appeal considered that an acknowledgement as to non-reliance upon representations or warranties other than those contained within the relevant agreement (*i.e.*, excluding pre-contractual representations) is capable of operating as an evidential estoppel and that in order to establish such an estoppel, the three requirements identified by the Court of Appeal in *Lowe v Lombank* must be satisfied.[25] In *EA Grimstead*, the Court of Appeal stated:

"There are…at least two good reasons why the courts should not refuse to give effect to an acknowledgment of non-reliance in a commercial contract between experienced parties of equal bargaining power—a fortiori, where those parties have the benefit of professional advice. First, it is reasonable to assume that the parties desire commercial certainty…[and] want to avoid the uncertainty of litigation based on allegations as to the content of oral discussions at pre-contractual meetings. Second, it is reasonable to assume that the price to be paid reflects the commercial risk which each party…is willing to accept." (page 35AC)

Springwell argued that if a statement of *past fact* was expressed as an agreement, "it could not amount to a contractual obligation"; as a matter of substance, it was no different from a representation; and therefore, the *Lowe v Lombank* requirements that needed to be fulfilled for an estoppel by representation to arise applied equally to such a contractual statement. As a consequence, Chase had to prove that it believed the statements to be true and that it acted in reliance upon that belief. Springwell submitted that the parties cannot "agree" that they have done something in the past or that a subsisting relationship (which they are not amending or even purporting to amend) shall be characterised as something it is not, without running into the difficulty referred to in the passage from *Lowe v Lombank* set out earlier. The parties can amend it, or they can settle a disagreement about an existing state of affairs in order to found a basis for *subsequent* performance, but the recital of something untrue which is not relied upon as true so as to create an estoppel is not a contractual obligation.

Chase, on the other hand, sought to rely upon the Court of Appeal's decision in *Peekay Intermark v Australia & New Zealand Banking Group* (*supra*) to support the proposition that a contractual estoppel was not required to satisfy the requirements applicable to estoppel by representation. Chase argued that the relevant clause under scrutiny in *Lowe v Lombank* (a hire purchase agreement in respect of a motor car) did not use the language of agreement.

22 At page 204.
23 At page 205; see also *Chitty on Contracts* (30th Ed.), paragraph 14-133.
24 (27 October 1999) (Unreported) (CA); and [2001] EWCA Civ 317 at paragraphs 40–41.
25 See also *Quest 4 Finance Limited v Maxfield & Others* [2007] EWHC 2313 – Claimant finance company unable to establish that it believed and relied upon a declaration by the Defendants of non-reliance upon the Claimant in a Warranty document. Therefore, the Defendants were not estopped from alleging that they had relied upon statements in the Claimant's brochure to the effect that no personal guarantees were required from company directors and that the Warranty was simply to protect the Claimant against fraud.

Gloster J listed the so-called "untrue" statements in the Relevant Provisions (describing them, in light of her findings on the facts, as fairly modest in scope), as follows:

(i) *that Springwell was a sophisticated investor*: by 1992 (when the MFA was signed) and certainly increasingly thereafter, the judge found that it was not untrue to refer to Springwell as a "sophisticated" investor;

(ii) *that the services were execution-only*: although, for similar reasons, it may not have been correct to describe the service provided by JA as "execution-only" (depending upon the view one took of the phrase "execution-only"), the advice being provided was of the type described in (iii) below;

(iii) *that Springwell did not receive advice from Chase*: although in 1992, and thereafter, AP was in receipt of advice (in the loose sense) and recommendations from JA, that was advice given in JA's capacity as a salesman, and not pursuant to any investment advisory agreement concluded at the time of Springwell's introduction to JA (or thereafter), either with the Private Bank or the Investment Bank;

(iv) *that Springwell did not rely upon Chase's advice*: although, as the judge had found, AP relied to a certain extent upon JA's advice in making his investment decisions for Springwell, such decisions were ultimately his own.

Therefore, Gloster J considered that to the extent that any of the statements in the Relevant Provisions did not accurately reflect certain aspects of Springwell's actual trading relationship with Chase, any such inconsistency was, in qualitative terms, very different from the obviously false assertion in *Lowe v Lombank* that the Plaintiff had not made the purpose of her acquisition of the motor car known to the Defendant finance company.

Gloster J considered that the ratio of the decision in *Lowe v Lombank* could not, when analysed in its context, be regarded as authority for the far-reaching proposition that there could never be an agreement in a contract that the parties were conducting their dealings on the basis that a past event had not occurred, or that a particular fact was the case, although both parties knew that in reality that past event had, or might have, occurred, or that the particular fact was not, or might not have been, the case. Gloster J saw nothing inappropriate or commercially offensive about Chase being permitted to rely on the statements in the Relevant Provisions, even if it could be said that in some respects they did not accurately reflect every aspect of the dealing relationship.

Gloster J added that all of the relevant terms of the contractual documentation fell squarely within the *Peekay* analysis, as contractual representations (and in some cases, warranties) or "agreements" as to the basis upon which the business was to be conducted. Thus, for example, where the contract provided that by placing an order, Springwell represented (see Appendix: Clause 4 of the 1997 DDCS Letter) that it was a sophisticated investor and that it had independently and without reliance on Chase made a decision to acquire the instrument, which was not a mere statement of historical fact, but a contractual representation forming the agreed and binding basis upon which the parties would transact every future purchase. The same analysis applied in respect of every clause in every document to which Springwell took this objection, according to the judge. It made no difference to the analysis that the statements gave rise to a contractual estoppel, whether some statements were expressed in the language of representation or of acknowledgement.

In *Peekay*, the relevant documentation included two passages in a Risk Disclosure Statement, which C2, on behalf of Peekay, confirmed by his signature that he had read and understood. The relevant passages contained detailed warnings to investors of the risks associated with various kinds of emerging markets investments, in the following terms:

> "You should also ensure that you fully understand the nature of the transaction and contractual relationship into which you are entering."
>
> "The issuer assumes that the customer is aware of the risks and practices described herein, and that prior to each transaction the customer has determined that such transaction is suitable for him."[26]

26 See [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511, at paragraph 55.

Gloster J stated that all three judges in the Court of Appeal in *Peekay* were agreed that the provisions in the documentation gave rise to a contractual estoppel which contractually precluded the Claimant from making assertions of fact to the contrary. This was in addition to and distinct from any questions of estoppel by representation. She considered their reasoning to be firmly rooted in, and consistent with, the importance of freedom of contract and contractual certainty. The particular clauses concerned the question of understanding as to the nature of the instrument, which had direct relevance to certain of the allegations made by Springwell in the context of its misrepresentation claim. But, in Gloster J's judgment, the principle extended more broadly and applied to any other form of contractual statement, for instance as to sophistication or non-reliance on advice generally. In each case, the parties are contractually free to determine the factual basis upon which they conduct business. Furthermore, according to Gloster J, subsequent authorities showed that *Peekay* had been taken to represent the law on contractual estoppel.[27]

Gloster J added that her analysis was also consistent with Rix J in ***Deepak Fertilisers v ICI*** [1998] 2 Lloyd's Rep 139, a case relating to an entire agreement clause.

Gloster J did not consider the contractual estoppel argument of *Peekay* to be in any way inconsistent with the analysis of estoppel by representation. She accepted Chase's submission that they were different forms of estoppel with different jurisprudential bases, and the relevant point in *Lowe v Lombank* had to be viewed in its relevant statutory and factual context. In that case, the written document recording a mere statement as to past fact could not as a matter of language amount to a contractual promise. The analysis in *Peekay* was consistent with the analysis in *Lowe v Lombank*, even though Gloster J had some difficulty in seeing the distinction between a "statement as to past facts" (*Lowe v Lombank*) and a statement that "facts exist [or do not exist] at the time of the promise" [see also *Chitty*, paragraph 14-133 *supra*].

Gloster J, furthermore, did not accept Springwell's submission that contractual estoppel could not be utilised to enable the parties to agree that they will deal with each other, going forward, on the basis that no advice should be deemed to have been given. Whilst, of course, JA was well aware, for example, that he had made recommendations as to the advisability of purchasing the relevant GKO-Linked Notes, that did not prevent a contractual estoppel from arising.

Even if, contrary to her conclusion, Chase had to rely on estoppel by representation, the judge considered that the three limbs of the relevant test were adequately satisfied to permit it to do so, because:

(a) the terms of the Relevant Provisions were clear and unambiguous;

(b) by signing the various documents, Springwell so conducted itself that a reasonable person in the position of Chase would have taken the representation to be true and believed that Springwell intended that Chase should act upon it; and

(c) on her findings of fact, the judge considered that Chase did, *at least to a certain extent*, believe the representations to be true and was induced by such belief to act upon them. For example, at the time the relevant documents were signed, Chase did believe that Springwell was a sophisticated and experienced investor which was capable of making, and did in fact make, its own decision on every purchase that it made. Although Chase knew that JA was giving AP advice (in the nature of recommendations and opinions based on Chase research materials) and that AP relied on such advice in reaching his investment decisions, it knew that AP would in fact always make his own decision as to whether to invest or not. Further, Chase in fact thought that Springwell did not look to Chase as an investment advisor and did not consider that Chase was its investment advisor. Thus the representations in one sense reflected Chase's own view of the reality. Certainly, Chase acted in reliance on those beliefs, because it would not have traded with Springwell had Springwell not signed the documents.

27 See *Bottin International Investments v Venson* [2006] EWHC 3112 (Ch) at paragraph 154; *Donegal International v Republic of Zambia* [2007] EWHC 197 (Comm); [2007] 1 LLR 397 paragraphs 13 and 465. See also *Orient Centre Investments v Societe Generale* [2007] SGCA 24 (Singapore, Court of Appeal) (at paragraphs 51–52).

COMMENT

This part of the first judgment is one of the most important, highlighting tension in the law between estoppel by representation and contractual estoppel in commercial contracts between parties of equal bargaining power. It raises important questions as to the proper analysis of statements in contractual documents and, in particular: whether statements as to past facts or acts, even if expressed as an agreement, can give rise to a contractual promise or only a representation; whether an evidential estoppel arises requiring satisfaction of the three-limb test in *Lowe v Lombank*; and whether the provisions, as drafted, give rise to a contractual estoppel, without the need for the satisfaction of the three-limb test.

Unfortunately, the judge did not deal in any detail with the wording in the Relevant Provisions and, in particular, whether statements made in the Relevant Provisions were to be considered as contractual promises or representations, and whether as to past or future facts. For example, in the DDCS Letters, the customer's confirmation of the terms by its signature did not expressly amount to an agreement to the representations made, but simply to the fact of being treated as a non-private customer.

Although the judge relied upon the Court of Appeal's decision in *Peekay*, that case did not deal specifically with estoppel by representation, including statements as to past fact. The only statement as to past fact in the wording under scrutiny in *Peekay* was that the client (through C2) had satisfied itself that the transaction was suitable. However, that statement as to past fact was swept up in the Court of Appeal's general analysis of the client's confirmation that it understood the Risk Disclosure Statement generally, which gave rise to a contractual estoppel[28] preventing the client from claiming that it had been induced to enter into the transaction by a misrepresentation as to its nature.

In *Peekay*, the bank's contractual estoppel argument was raised only during the course of the appeal itself. It was given permission to argue that Peekay's confirmation, by signature of the Risk Disclosure Statement, that it had read and understood the Risk Disclosure Statement meant that it was estopped from asserting that it had not understood the nature and effect of the Final Terms and Conditions relating to investments in GKOs such that it could not maintain that it had been induced by misrepresentation to enter into the contract. The Court of Appeal stated:

> "There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to *settle a disagreement* as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance." (paragraph 56)

The specific reference to settlement of a disagreement echoed the facts of ***Colchester Borough Council v Smith***, in which a dispute as to whether or not a tenant had gained adverse possession of property was settled on the basis of an agreement, among other things, that the tenant had not in fact gained adverse possession. The Court of Appeal's decision in *Colchester Borough Council*, which was not a case of misrepresentation, was firmly rooted in the Court's interest in upholding agreements to compromise disputes. As the Court of Appeal in *Peekay* stated:

> "Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed." (paragraph 56)

The Court of Appeal went on to deal specifically with express acknowledgements by the parties that they had not been induced to enter into a contract by representations other than those contained in the contract itself:

> "The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentations. However, [there is] no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly

28 See *Colchester Borough Council v Smith* [1991] Ch 448, affirmed on appeal [1992] Ch 421.

> drafted, should not give rise to a contractual estoppel of the kind recognised in *Colchester Borough Council v Smith*".

However, the Court of Appeal did not give examples of the kind of clause which it had in mind. In any event, it confirmed that this particular question did not arise in *Peekay*. Indeed, the Court of Appeal went on to state:

> "A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established: see *EA Grimstead & Son Ltd v McGarrigan* [*supra*]".

Therefore, the Court of Appeal confirmed, in effect, that the question of whether a particular clause seeking to exclude claims in respect of pre-contractual representations could give rise to a contractual rather than an evidential estoppel depended upon the wording of the clause. Whilst this was consistent with the Court of Appeal's own decision in *Lowe v Lombank*, it is unfortunate that the Court of Appeal did not comment specifically upon its previous decisions and observations in the cases of *EA Grimstead* and *Watford Electronics*.

Although Gloster J relied, in part, upon the fact that *Peekay* appears to have been followed in subsequent cases, those cases cite *Peekay* in relation to the very point that did not arise in *Peekay* itself, namely whether non-reliance clauses in respect of representations other than those set out in the relevant agreement can create a contractual estoppel in respect of pre-contractual misrepresentation. In ***Bottin International v Venson Group***[29], Clause 16(d) of the relevant agreement recorded the purchaser's acknowledgement that it had not relied upon any warranty, representation or information in entering into the SPA, except as set out in the agreement itself. In ***Donegal International v Zambia***[30], Clause 3(1)(d) of the relevant settlement agreement recorded: "The Republic of Zambia acknowledges and confirms that it is not entering into this Agreement in reliance upon any statement (*other than expressly set out herein*)…".

These decisions at first instance seem to be inconsistent with the Court of Appeal's decisions and observations in relation to identical provisions in the cases of *EA Grimstead* and *Watford Electronics*, to the effect that the representations fell to be considered in the context of the three-limb test in *Lowe v Lombank*. It is not at all clear, therefore, that it is fair to say, as Gloster J did, that the cases of *Bottin* and *Donegal* show that *Peekay* has been taken to represent the law on contractual estoppel.

When dealing specifically with the argument in *Peekay*, the Court of Appeal analysed the situation on the basis of offer and acceptance. Peekay, by confirming that it had read and understood the Risk Disclosure Statement and by returning it with its instructions to the Respondent bank to make the investment, offered to enter into a contract on those terms, and that offer was accepted by the bank when it implemented the instructions. As a result, it was part of the contract between Peekay and the bank that Peekay was aware of the nature of the investment it was seeking to purchase and had satisfied itself that it was suitable for its needs. In those circumstances, and since it was not suggested that the bank misrepresented the effect of the documents, it was not open to Peekay to say that it did not understand the nature of the transaction described in the Final Terms and Conditions, and if that was so, it could not assert that it was induced to enter into the contract by a misunderstanding of the nature of the investment derived from what the salesperson had said about the GKO product some days earlier. In other words, the Court of Appeal found, on the facts of the case, that Peekay accepted that the bank was willing to enter into a contract with it only on the assumption that it had satisfied itself that the transaction was suitable and that agreement was reached on that basis. If Peekay had not satisfied itself prior to the transaction, it nevertheless agreed that at the time of the agreement, it was satisfied that the transaction was suitable. These facts distinguish *Peekay* from *Lowe v Lombank*, in which the individual consumer concerned signed documents containing bald acknowledgements and agreements as to past facts (*e.g.*, inspection of the motor vehicle) which were simply incorrect.

In the context of the uncertainty as to whether statements of past fact always require satisfaction of the three-limb test set out in *Lowe v Lombank*, it is notable that the judge stated that there was nothing inappropriate or commercially offensive about Chase being permitted to rely on the

29 *Supra*.
30 *Supra*.

statements in the Relevant Provisions even if it could be said that in some respects those statements did not accurately reflect every aspect of the dealing relationship. Whilst the Court of Appeal in *Peekay* may have agreed that the facts of that case gave rise to a contractual estoppel, the judgment did not address estoppel by representation and did not go into any detail at all about the relevance of statements as to past facts and any consequences thereof in the context of a contractual estoppel analysis.

Pending further review of the Court of Appeal's decision in *Peekay*, perhaps on appeal in this case, it is necessary to be careful as to whether the particular wording of clauses such as non-reliance clauses might afford a defence of contractual estoppel or evidential estoppel requiring satisfaction of the three-limb test in *Lowe v Lombank*.

It is interesting that, in conclusion, Gloster J considered the possibility of Chase having to satisfy the requirements for estoppel by representation. In particular, she stated that if Chase had to show that it did not believe that AP relied *at all* on any of JA's advice in coming to his investment decisions, then it would fail to establish estoppel by representation. Therefore, according to Gloster J, should Springwell appeal and succeed in its argument that *Lowe v Lombank* applies and that under the relevant test Chase would have to prove that it believed Springwell's statements in the Relevant Provisions to be true and that it acted in reliance upon that belief, the estoppel defence might fall away.

AVOIDANCE OF THE CONTRACTUAL DOCUMENTATION ALTOGETHER

Springwell's further attack on the Relevant Provisions was to seek to avoid them through reliance on a number of legal principles. The judge explained that the thrust of Springwell's arguments under each head was that the contractual documentation was inconsistent with the alleged advisory relationship as it operated in practice. It was clear to her that all other arguments were related or factually inter-dependent.

Gloster J noted that it was not suggested that Chase positively misrepresented the terms of any of the contractual documents. Nor was any case based on an allegation of a *non est factum*, namely that Springwell executed documents under a fundamental misapprehension as to their nature.

(1) The Principle in *Interfoto v Stiletto*

Springwell relied upon the principle in ***Interfoto v Stiletto***, namely that:

> "…if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party". [31]

Springwell contended that the Relevant Provisions were unusual and onerous in that they purported to empty the advisory undertaking of any content. This required that they be drawn very clearly to Springwell's attention. Chase did not do anything to draw the Relevant Provisions to Springwell's attention, and this was plainly insufficient in the circumstances. Therefore, Springwell contended under the principle that Chase should not be entitled to enforce them. Whilst Springwell's pleaded case appeared to make the allegation only in respect of the GKO-Linked Note confirmations, Springwell's submissions extended to all the Relevant Provisions. Nevertheless, even though, strictly speaking, the question of whether any relevant clause was particularly onerous or unusual ought to have been considered on the basis of evidence, including expert evidence, the judge determined the argument in respect of all Relevant Provisions.

In *Interfoto*, a clause in the Plaintiffs' delivery note imposed a "holding fee" of £5 per day plus VAT for transparencies held over the allowed period of 14 days. The return of 47 transparencies four weeks late led to a charge of almost £3,800. The Court stated:

> "The tendency of the English authorities has … been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular condition said to bind him; and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question. This may yield a result not very different from the civil law principle of

31 [1989] 1 QB 433, at 439, per Dillon LJ.

> good faith, at any rate so far as the formation of the contract is concerned.
>
> ...[The defendants] are to be relieved because the plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention."[32]

Gloster J considered that subsequent authorities show that, in the absence of any general duty under English law to negotiate in good faith[33], and in the interests of commercial certainty, the application of the *Interfoto* principle is necessarily very restricted. In ***HIH Casualty and General Insurance v New Hampshire Insurance Co.***[34], the Court of Appeal considered that the principle simply did not apply at all in the case of *signed* contracts:

> "Interfoto v Stiletto was not concerned with the effectiveness of an incorporation clause in a signed contract, which is essentially a question of construction, but rather with a question of notice: the question of whether sufficient notice has been given to a person by means of a document which has not been signed so as to render that person contractually bound by the term or terms set out in that document"[35].

However, Gloster J commented that the question whether the principle could ever conceivably apply to signed contracts had not been conclusively determined. In ***Amiri Flight Authority v BAE Systems***[36], the Court left open the possibility that there might be some unusual types of contract to which the principle might apply, and it referred to "*a provision of an extraneous or wholly unusual nature*";[37] but the judge considered these to be very far removed from the *Springwell* case. Equally, in ***Ocean Chemical Transport Inc. v Exnor Craggs***,[38] the Court of Appeal seemed prepared to assume (although it did not matter for that case) that the principle might apply to a signed contract in "extreme circumstances".[39] Gloster J also referred to ***Lacey's Footwear v Bowler***, in which the Court of Appeal refused to apply a standard term limiting liability to the value of goods, contained in the small print of the Defendant carriers' terms and conditions, when the carriers had failed to effect full insurance cover for the Plaintiff wholesalers' goods[40].

Whatever the precise scope of the principle, Gloster J concluded that it must, on any basis, have a very limited application to signed contracts between commercial parties operating in the financial markets. In her view, the principle did not apply in the circumstances of the present case, even though she found that many, if not most, of the Relevant Provisions were not *expressly* drawn to Springwell's attention. In her judgment, none of the Relevant Provisions in any of the contractual documentation could be characterised as "particularly onerous or unusual",[41] let alone "unreasonable" or "extortionate". Indeed, Springwell had not adduced any market or expert evidence to support such a characterisation.

The Relevant Provisions confirmed, in various ways, that Chase was not providing investment advice to Springwell in its decision to purchase emerging markets investments and was not assuming liability for any advice which it did provide. Nor were the Relevant Provisions unusual; they were routine, standard-form and normal provisions in contractual documents of their kind.

Indeed, many of the terms were contained in very similar contracts provided by other banks, which Springwell or the brothers happily signed. For example, after the default, another Polemis corporate investment vehicle signed a document containing provisions broadly similar to the MFA, a standard contract drafted by Chase for the Margin Forward Programme with another bank. Springwell had signed a GMRA, an industry standard (PSA) document, with ML. Springwell also signed a document similar to the DDCS Letters with ML. These were standard documents designed by Chase's compliance department, consistent with the SFA's guidance. It was standard banking practice to require a customer to sign such a letter if he wished to trade in particular fields.

32 Per Bingham LJ, at page 445.
33 See, *e.g.*, per Bingham LJ in *Interfoto* at page 439.
34 [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep 161.
35 Per Rix LJ at paragraph 209.
36 [2003] EWCA Civ 1447; [2003] 2 Lloyd's Rep 767.
37 Per Mance LJ, at paragraph 15.
38 [2000] 1 Lloyd's Rep 446.
39 Per Waller LJ, at paragraphs 48 and 49.
40 [1997] 2 Lloyd's Rep 369, at 384–385.
41 See per Dillon LJ in *Interfoto* (*supra*), and per Rix LJ in *HIH* at paragraph 211.

Chase relied upon the sheer number and regularity of the documents which were routinely provided to Springwell to sign, including several copies of the confirmations. Gloster J considered that Chase had done enough to bring home to Springwell the overall thrust of the contractual documents by repeatedly requiring signatures from Springwell. Ultimately, the responsibility for Springwell's choice not to bother to read, or to read with sufficient attention, the Relevant Provisions (if indeed it did not do so) had to be its own.

Finally, contrary to Springwell's suggestion that its case under the *Interfoto* principle was at its strongest in respect of the GKO-Linked Notes, because they had never been received by Springwell, the judge found (and Springwell had belatedly accepted) that the Notes had indeed been received.

Comment

It seems clear that the underlying basis for the judge's rejection of Springwell's reliance upon the principle in *Interfoto v Stiletto* was that it had very limited application to signed contracts between commercial parties operating in the financial markets. This highlights the question of when individual principals of an investment vehicle, which has been classified as a non-private customer, become commercial parties with equal bargaining power in the context of financial investments, along with the extent of the relevance of the underlying financial markets business. This question will be considered in the context of the regulatory framework in Part 4.

Although the Court of Appeal in *HIH Casualty v New Hampshire* did not state expressly that the *Interfoto* principle simply did not apply at all in the case of signed contracts, that was suggested both in *HIH Casualty* and also in *Amiri Flight Authority v BAE*[42]. In any event, the Court of Appeal in *Amiri* found it difficult to see the relevance of the *Interfoto* principle because the *Amiri* case itself concerned a signed contract which the Plaintiffs had had the opportunity to read and consider overnight before signing. As a result, the Court of Appeal in *Amiri*, just as in *HIH Casualty*, considered the question to be principally one of construction and not one of fair notice.

However, in *Ocean Chemicals v Exnor* (*supra*), the Court of Appeal decided that where a party had signed an acknowledgement of the terms and conditions and of their incorporation, as Springwell had in relation to a number of the Relevant Provisions, the *Interfoto* principle might apply in an extreme case, such as where the signature was obtained under pressure of time "or other [unspecified] circumstances" and where it was possible to satisfy the test of whether the clause was one which was particularly onerous or unusual for incorporation in the contract in question. In *Ocean Chemicals*, where the relevant contractual provision excluded the Defendant's liability unless a claim were to be brought within six months of the delivery of goods, the Plaintiffs had signed an express acknowledgement, and it could not be said that the Respondents had failed in their duty to bring the existence of the term to the notice of the Plaintiffs (through their agents), having sent the terms to the Plaintiffs' agents long before the contract was signed.

At the end of the day, Springwell did not make its task any easier by failing to put forward expert evidence, the importance of which was highlighted in *HIH Casualty v New Hampshire*.

Finally, where it is appropriate to rely upon the *Interfoto* principle, the Court of Appeal has stated that the right approach is to apply carefully the principles set out clearly by Bingham LJ as to: the nature of the transaction in question; the character of the parties; the particular notice (if any) given of the allegedly onerous condition; and whether, in all the circumstances, it is fair to hold a party bound by the condition in question.

(2) Unilateral Mistake

Springwell also submitted that the Relevant Provisions were unenforceable by virtue of unilateral mistake on the part of Springwell. Springwell relied upon the Court of Appeal's translation in ***Hurst Stores and Interiors Ltd v ML Europe Property Ltd***[43] of its own statements of principle in ***Commission for New Towns v Cooper (Great Britain) Ltd***[44], in light of which it would have to be established that:

(1) Springwell was mistaken as to the content and effect of the Relevant Provisions;

42 *Supra*. See per Mance LJ, at paragraph 15.
43 [2004] BLR 249, at paragraph 20.
44 [1995] 2 Ch 259.

(2) Chase had actual or "shut-eye" knowledge of the mistake; and

(3) overall, the conduct of Chase was unconscionable.

As for knowledge, Springwell contended that Chase "must have known or shut its eyes to the fact that Springwell cannot have intended to vary its relationship with Chase" in the manner purported by the Relevant Provisions (in particular that Chase would cease responsibility for advising), and Springwell cannot therefore have understood that the documents contained any provisions purporting to have that effect. However, the judge considered that there was no basis for the allegation that Chase had "knowledge" of Springwell's alleged mistake.

In any event, the judge had concluded that there was no original contract or relationship between Chase and Springwell under which Chase assumed legal responsibilities to give general or specific investment advice to Springwell in the first place. Gloster J stated that Springwell's arguments would also fail on the basis that, whatever may have been the extent of AP's comprehension of the Relevant Provisions, he was not "mistaken" as to their terms. Moreover, as the judge had explained, the Relevant Provisions did not prevent JA from doing what he had always done: giving information, advice and recommendations to Springwell about emerging markets investments or the state of the market. All the Relevant Provisions did was to define the Investment Bank's and Private Bank's trading relationship with Springwell, so that their dealings were conducted on the basis (whether assumed or actual) that no investment advice was being given by any Chase entity for which it could be held responsible.

Gloster J concluded by stating that the requirements for setting aside a contractual provision on the grounds of unilateral mistake are very strict; see ***Rowallan Group v Edgehill Portfolio Ltd***[45]. In the circumstances of the present case, there were certainly no grounds for invoking such a *drastic remedy*[46].

Comment

Springwell's case for avoiding the Relevant Provisions on the basis of unilateral mistake, on the facts of this case, did not appear to be strong. As a general rule, there cannot be an effective unilateral mistake as to the terms of a contract unless the mistaken party has a positive belief that the terms say one thing when in fact they say another, and the other party knows of the mistake. On the face of the wording of the Relevant Provisions, and given their extent, it would seem difficult for Springwell successfully to argue that it had a positive belief that the contractual terms required Chase to provide general investment advice throughout the relationship. Furthermore, proving knowledge on the part of Chase would also seem to be very difficult.

In the case of rectification, the nature of the knowledge that a party must be shown to have of the other's mistake was considered in detail by the Court of Appeal in ***George Wimpey UK Ltd v VI Construction Ltd***[47], by reference to the analysis of the various forms of knowledge made in ***Baden v Societe Generale***[48], such that it must amount to:

(i) actual knowledge;

(ii) wilfully shutting one's eyes to the obvious; or

(iii) wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make.

In ***Agip (Africa) Ltd v Jackson***[49], the Court considered that the true distinction was between honesty and dishonesty, such that in cases (i) to (iii) above, the non-mistaken party would not be acting honestly. By implication, the same would not be true if that party had merely (again, adopting the categories from *Baden v Societe Generale*):

(iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; or

(v) knowledge of circumstances which would put an honest and reasonable man on enquiry.

In *George Wimpey*, the Court of Appeal stated:

> "The remedy of rectification for unilateral mistake is a drastic remedy, for it has the result of imposing on

45 [2007] EWHC 32 (Ch), at paragraph 14 per Lightman J.
46 Per Lightman J, *supra*.
47 [2005] EWCA Civ 77, [2005] BLR 135.
48 [1993] 1 WLR 509 (although decided in 1983).
49 [1990] Ch 265 at 293.

> the defendant to the claim a contract which he did not, and did not intend to, make. Accordingly, the conditions for the grant of such relief must be strictly satisfied."[50]

This strict requirement for satisfaction of the conditions for the grant of rectification and the drastic nature of the remedy were echoed in the case cited by Gloster J, *Rowallan v Edgehill*[51]. In order to succeed in its defence of unilateral mistake and to persuade the Court to exercise its discretion to rectify the contract, the Defendant must establish not only the Claimant's knowledge of the mistake but also unconscionable conduct or "sharp practice".

All in all, on the facts of the present case, it would seem to be very difficult for Springwell, on appeal, to satisfy the strict test for rectification required to be satisfied under the doctrine of unilateral mistake as to the terms of a contract.

(3) The Unfair Contract Terms Act 1977/the Misrepresentation Act 1967

Finally, in what the judge described as a "last ditch argument", Springwell sought to avoid the Relevant Provisions on the grounds that they variously fell within the scope of both the Unfair Contract Terms Act 1977 ("UCTA") and the Misrepresentation Act 1967 ("MA 1967"). Pursuant to Section 2(2) of UCTA, a person cannot exclude or restrict his liability for negligence (as a business liability—see Section 1(3)) except insofar as the term or notice satisfies the requirement of reasonableness. By Section 13, this includes clauses which make the liability or its enforcement subject to restrictive or onerous conditions or exclude or restrict any right or remedy in respect of the liability. Gloster J noted that Section 3 of MA 1967 extended the ambit of the legislation to clauses which purport to exclude liability for misrepresentation.

Springwell submitted, therefore, that the burden fell on Chase to establish that the Relevant Provisions satisfied the statutory test of reasonableness, pursuant to Section 11 and Schedule 2 of UCTA. This included whether each term was a fair and reasonable one, having regard to the circumstances which were or ought reasonably to have been known to or in the contemplation of the parties when the contract was made, and taking into account such matters as the strength of the bargaining position of each party relative to the other. Although Section 11(2) of UCTA makes the guidelines laid down in Schedule 2 expressly applicable only to Sections 6 and 7 of UCTA, they are frequently regarded as being of general application.[52]

Springwell argued that insofar as the Relevant Provisions sought to exclude liability *indirectly* (by, for example, disclaiming an advisory relationship or the fact of advice having been given or relied upon), they purported to empty Chase's freely assumed obligation to advise of any force and to effect a significant reallocation of risk as between Chase and Springwell without any corresponding reallocation of reward and without drawing the fact of the attempted reallocation to Springwell's attention so that Springwell was in ignorance of it.

Springwell relied upon a passage in *Firth's Law of Derivatives*[53], as follows:

> "...The more extensive the advisory relationship, the less reasonable a provision denying the existence of such a relationship is likely to be. Where, for example, there is a relationship of banker and customer and the customer is clearly looking to the bank for recommendations about the appropriate course of action, it would probably not be sufficient simply to include a provision in the transaction documentation claiming that no advice has been given. If the bank wishes to avoid being held to have assumed responsibility for giving such advice, and the potential liability that goes with it, it probably needs to do much more than this to ensure that the customer understands the true nature of the relationship".

Springwell also argued that insofar as the Relevant Provisions sought to exclude liability *directly* (for example, the last sentence of paragraphs 4 and 6 of the DDCS Letters), similar considerations to that set out above applied.

Gloster J pointed out that the documents themselves comprised various types of clauses. There were a small number of genuine exclusion clauses (*e.g.*, the last

50 *Supra* at paragraph 65, per Sedley LJ.
51 *Supra*.
52 See *Granville Oil & Chemicals Limited v Davis Turner & Co Ltd* [2003] 2 Lloyd's Rep 356, 358; *Balmoral Group Ltd v Borealis UK Ltd* [2001] 1 Lloyd's Rep 93; *Shepherd Homes Ltd v Encia Remediation Limited* [2007] EWHC 70.
53 Paragraph 4.024.

sentence of paragraph 4 and the last main clause in the last sentence of paragraph 6 of the DDCS Letters). The bulk of the terms, however, were not exclusion clauses, according to the judge, but merely clauses which defined the nature of the services which Chase was rendering to Springwell and which confirmed the basis on which the parties were transacting business.

Chase submitted that most of the provisions within the contractual documentation did not fall within the scope of the legislation. There was a clear distinction between clauses which excluded liability and clauses which defined the terms upon which the parties were conducting their business (in other words, clauses which prevented an obligation from arising in the first place).[54]

Gloster J accepted Chase's submission. Terms which simply define the basis upon which services will be rendered and confirm the basis upon which parties are transacting business are not subject to Section 2 of UCTA. Otherwise, the judge stated, every contract which contained contractual terms defining the extent of each party's obligations would have to satisfy the requirement of reasonableness.

By way of example, the judge referred to *IFE v Goldman Sachs*[55], at first instance, in which the Court concluded that the terms in question should not be characterised as a notice excluding or restricting liability for negligence, "but more fundamentally as going to the issue whether there was a relationship between the parties (amounting to or equivalent to that of professional advisor and advisee) such as to make it just and reasonable to impose the alleged duty of care". The Court of Appeal took exactly the same approach, in characterising the clauses as determining the basis of the relationship between the parties.[56]

In practice, the legislation is of very limited application in the case of commercial contracts between commercial counterparties. In ***Photo Production Ltd v Securicor***[57], the Court said that, in commercial matters generally, when the parties were of equal bargaining power, Parliament's intention was one of "leaving the parties free to apportion the risks as they think fit … and respecting their decisions."[58] In ***Granville Oil & Chemicals v Davis Turner & Co.***[59], the Court made the same point, stating:

> "The 1977 Act obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms."[60]

The reluctance of the courts to interfere in contracts concluded between commercial parties in relation to substantial transactions reflects the strong business need for commercial certainty as emphasised in *EA Grimstead & Son Ltd v McGarrigan*[61].

In Gloster J's judgment, even to the extent that the Relevant Provisions in the contractual documentation fell within the scope of the legislation, such terms could not, in the context of the dealings between Chase and Springwell, be characterised as unreasonable. On the contrary, she considered that they were reasonable. In reaching this conclusion, she took account of the following matters:

(i) These were substantial contracts between commercial counterparties of equal bargaining power. Springwell had absolutely no need to continue to trade with Chase. It did not need to trade in the emerging markets at all, but if it wished to do so, it could trade with other competitor banks (and indeed did so, with ML).

(ii) None of the terms of the contractual documentation was intrinsically unfair or unreasonable. They merely defined and delineated the terms upon which the parties were prepared to do business and in fact did business. None of the exclusions of liability

54 See *Tudor Grange Holdings v Citibank* [1992] Ch 53 per Sir Richard Scott, V-C at paragraphs 65–66 (UCTA is normally regarded as being aimed at exemption clauses in the strict sense).
55 *Supra*. [2006] EWHC 2887 (Comm); [2007] 1 Lloyd's Rep 264.
56 [2007] EWCA Civ 811; [2007] 2 Lloyd's Rep 449.
57 [1980] AC 827.
58 Per Lord Wilberforce at 843; see also *Watford Electronics v Sanderson* [2001] BLR 143, at paragraph 55 per Chadwick LJ.
59 *Supra*.
60 Per Tuckey LJ at paragraph 31.
61 *Supra*, per Chadwick LJ at 146.

(including the exclusion clause in the DDCS) could be characterised, in context, as unduly harsh or unreasonable.

(iii) Many of the documents were standard documents (whether standard within Chase or standard within the market), and indeed, many of the terms were contained in other contracts signed by Springwell. The expert evidence supported the proposition that these were standard market terms.

Therefore, Springwell's case under this head also failed.

Comment

It seems that the thrust of Springwell's case was not that any of the contractual terms was inherently unreasonable, but rather, based upon the passage from *Firth* (above), that it was unreasonable for Chase to seek to contract on such terms, given the existing advisory relationship, as alleged, without a full explanation. In other words, the complaint was not really as to the alleged unreasonableness of the terms of the Relevant Provisions, but rather, as to the circumstances in which Springwell came to sign up to them. The judge had rejected Springwell's allegation that Chase assumed obligations to give investment advice from the date of Springwell's initial introduction to JA. She did not consider that the fact that JA continued to provide information and gave recommendations, advice and opinions to AP, in the way which she had described, meant that it was unreasonable for Chase to have included the Relevant Provisions or to rely upon them.

Although the judge did not mention that Section 13(1) of UCTA covers an exclusion of liability by reference to terms which exclude or restrict the relevant obligation or duty, the point of importance was that the contractual provisions themselves, by defining the terms upon which the parties would conduct business, prevented an obligation from arising in the first place.

As for the passage in *Firth*, in its full context it appears to relate only to a relationship between a bank and a private individual/private customer in any event. It does not seem to provide any real support for the characterisation of standard provisions governing trading relationships in the financial markets as unreasonable in the circumstances of this case.

SPRINGWELL'S ATTEMPT TO PLACE A NARROW CONSTRUCTION ON THE RELEVANT PROVISIONS

Over and above Springwell's legal arguments as part of its extensive attack on Chase's asserted entitlement to rely upon the contractual documentation as negating a duty of care, Springwell also sought to circumvent the effect of the contractual documentation which it signed or which it received, by attempting to place a narrow construction on the Relevant Provisions.

Gloster J stated that the object of the Court construing the contractual documentation is to discover the intention of the parties from the words used; this, in turn, is to be derived by ascertaining the meaning which a document would convey to a reasonable person having all the background knowledge which would reasonably have been available to both parties in the situation in which they were at the time of the contract[62]. Furthermore, commercial documents must be construed in a business-like fashion, and there must be ascribed to the words a meaning that would make good commercial sense.[63]

SPECIFIC CONSTRUCTION POINTS ON THE MFA

Springwell contended that because the MFA was entered into between the Investment Bank and Springwell and that it related solely to the forward sale contracts to be entered into between Springwell and the Investment Bank, its terms could avail the Investment Bank only, and only in respect of transactions between the Investment Bank and Springwell. Therefore, Springwell contended that its provisions could not affect claims against the Private Bank, the Investment Bank's successor entity following the acquisition of Chemical Bank in 1996, or Chase Manhattan Securities (C.I.) Limited ("CMSCI") as the principal contracting party in respect of the GKO-Linked Notes.

62 *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, at 912.
63 See *Chitty on Contracts* (30th Ed.), at paragraph 12-057.

Gloster J rejected these arguments on the basis that the relevant representations, warranties and acknowledgements by Springwell contained in Section 6(b) of the MFA (see Appendix) specifically provided that Springwell acknowledged that it had made its own decision to acquire the relevant instruments independently and without reliance not only upon the Investment Bank but also any subsidiary "or affiliate of [the Investment Bank]" and did not expect the Investment Bank "or any such entity to be responsible for advising it". In addition, Springwell represented that it was a "sophisticated investor familiar with debt obligations" of the relevant sort. Even though the Private Bank was not a party to the contract, given the close commercial connection in the relevant context between the Private Bank and the Investment Bank, there was no reason in law why the Private Bank should not be entitled to point to the relevant clause as evidence to negate the coming into existence of any obligation upon its part to advise in relation to the relevant transactions. Indeed, the judge was apparently not referred to any authority to the contrary in this context.

Gloster J also rejected a further point of construction in respect of the MFA confirmations. Springwell contended that because the transactions with the Investment Bank were not transactions where "charges" were made, the relevant clause, which stated, among other things, that the transaction was "effected upon an execution-only basis, without [the Investment Bank] having given or being requested or expected to give advice about the investment merits of the transaction", did not bite. The statement and confirmation that no advice had been given by the Investment Bank applied irrespective of whether a charge was in fact made.

SPECIFIC CONSTRUCTION POINTS ON THE 1993 AND 1997 DDCS LETTERS

Springwell took a series of points of construction in relation to the DDCS Letters and, in particular, the following:

(i) The introductory words of the DDCS Letters limited the applicability of the terms to any *forthcoming* introduction by the Private Bank of Springwell to the Investment Bank and to any transactions following that introduction. Gloster J rejected this argument since it reflected an unrealistic approach to the construction of a commercial document. Springwell had been introduced to JA in 1987 or 1988 and shortly afterwards started dealing directly with him. The DDCS Letter was subsequently introduced as one of the requirements for affording clients access to the Master Forward Programme. No reasonable reader of the DDCS Letters, in the position of Springwell, would think that there had to be any further introduction by the Private Bank to the Investment Bank for the terms of the Letters to apply to future dealings. Therefore, the judge rejected the assertion that the DDCS Letters did not apply because Springwell had already been introduced to JA and because both the Private Bank and the Investment Bank had already assumed general advisory obligations five years before the date of the 1993 DDCS Letter.

(ii) Even if the DDCS Letters, as regards the Private Bank, were not limited to a future introduction, the most they could ever have covered would have been Springwell's dealings in "Instruments" (as defined in the Letters). Therefore, the DDCS Letters could not have limited or excluded the Private Bank's responsibility to consider the appropriate mix of asset classes in Springwell's portfolio and to advise on diversification accordingly. Gloster J rejected this argument as being "*unreal*", both as to language and given the context. The whole point of the DDCS Letters was to make clear that, in circumstances where the Private Bank was affording Springwell access to the Investment Bank, and Springwell was going to be buying and selling the emerging markets instruments through the Investment Bank, the Private Bank was not going to be "required to give [Springwell] investment advice generally or in relation to specific investments, make any enquiries about, or to consider, [Springwell's] particular financial circumstances or investment objectives" and that the Private Bank was not liable for any loss which Springwell might incur arising out of any investment decision taken by Springwell (see Clause 4). The content of the DDCS Letters made it plain that they were concerned directly with the issue of advice, and on any sensible basis of construction they applied to the very activity to which they were directly addressed.

(iii) In relation to the Investment Bank, the DDCS Letters applied only in respect of subsequent transactions in which the Investment Bank, as agent, was "dealing for" Springwell, whereas in fact the Investment Bank only dealt "*with*" Springwell as principal. According to Gloster J, neither the commercial context nor the language used, either in the introductory words or in the rest of the DDCS Letters, justified restricting them to a transaction where the Investment Bank was acting in a formal agency role and excluding the situation where the Investment Bank sold or bought as principal. An Investment Bank engaged, as JA was, in the activity of selling emerging markets debt instruments to Springwell could, in normal language, be said to have been dealing for its customer generally in receiving orders, acquiring investments in order to sell to the customer and selling investments onto the customer, notwithstanding that the actual sale was as principal. Furthermore, it would have been obvious to a reasonable reader in Springwell's position that the context of the DDCS Letters showed that they were not concerned with agency arrangements, but with the role of an Investment Bank in selling instruments to the customer. That was reflected in almost every single clause in the Letters. For example, Clause 5 referred in terms to whether the Private Bank or the Investment Bank "deals *with* or for you", showing that there was no magic or necessary restriction in the words used.

(iv) Even if the Investment Bank did "deal for" Springwell, the protection afforded by the Letters did not cover Springwell's claims, because they arose not out of any activity by the Investment Bank in dealing for Springwell, but rather out of another activity, namely an advisory activity. Gloster J rejected this submission by stating simply that she did so "for similar reasons" to those given by her in relation to Springwell's arguments in (iii) above.

(v) There was nothing in paragraphs 1 to 3 of the DDCS Letters which could preclude Springwell's claims, since this was just a warning that Chase would not be obliged by the SFA Rules to take certain steps. The paragraphs said nothing about any common-law obligation to do so. Therefore, the DDCS Letters addressed suitability only as a matter of regulatory protection, and any common-law duty was unaffected by the regulatory exclusions. Gloster J rejected this submission. She agreed with Chase that there would have been no commercial purpose in serving a notice to the effect that Chase was not obliged to do something under the SFA Rules which it remained obliged to do in some other way, and alternatively that if that had indeed been the purpose of the Letter, it would have said so. Gloster J considered that when Clause 3 was read in the full context of the Letter and, in particular, with Clause 4, the *clear implication* was that, under the terms of the DDCS Letters, Chase was not accepting any liability to advise on risk or on suitability of investment.

Springwell also submitted that the first sentence of Clause 4 purported to exclude an obligation/requirement to give advice but did not address the possibility that Chase might in fact choose to give such advice or the consequences if it did. Nevertheless, Gloster J found that the Private Bank never gave advice and was not responsible for any advice that might have been given by JA and that the first sentence of Clause 4 was a clear statement that it had no obligation to give the extensive investment advice that Springwell claimed it should have given, such as in relation to the composition or management of the portfolio as a whole, or diversification, whether within the emerging markets portfolio or between asset classes. As far as the Investment Bank was concerned (and also the Private Bank itself, if the judge were to be wrong in her conclusion that the Private Bank was not responsible for any advice given by JA), the statement that Chase entities were not *required* to give *investment advice* supported the judge's conclusion that the fact that JA gave certain advice in his capacity as a salesman did not impose any common-law duty of care on the Investment Bank (or the Private Bank), whether in respect of advice in relation to specific assets or, more generally, in relation to the composition or management of the portfolio as a whole; or in relation to diversification, whether within the emerging markets portfolio or between asset classes. In any event, the subsequent sentences of Clause 4 dealing with acknowledgement of non-reliance and exclusion of liability for loss were strong *indicators* of no responsibility being assumed by Chase for any investment advice that may in fact have been given.

Finally, Springwell submitted that the ambit of the DDCS Letters was limited to "Instruments," which were defined as "debt and equity securities of public and private sector issuers located in developing countries". Therefore, Springwell submitted that assets such as the GKO-Linked Notes (in 42 of which Springwell invested between 1996 and 1998) did not fall within that definition. However, given the commercial background to Springwell's actual dealings in emerging markets securities, the judge did not consider that the terms of the DDCS Letters could realistically be construed so restrictively as to exclude structured or derivative products.

SPECIFIC CONSTRUCTION POINTS ON THE GMRA

Springwell contended that because the GMRA was an agreement between itself and the Private Bank, its provisions could not affect Springwell's claims against the Investment Bank or against CMSCI. Furthermore, since the representations in the GMRA related only to "Transactions", as therein defined, the Relevant Provisions applied only in respect of the financing transactions and not to the underlying transactions of sale and purchase between Springwell and the Investment Bank. Therefore, the provisions could give rise to estoppels only in respect of the repo transactions and not in respect of the underlying purchases, which were separate transactions usually involving different Chase entities and which were documented by Chase as separate transactions in the transaction confirmations.

Whilst the judge agreed that, as a matter of contract, only the Private Bank could rely on the relevant provisions in the GMRA because the Investment Bank was not a party to the agreement, she did not accept that the limited definition of "Transaction" meant that the Private Bank was not entitled to rely on the relevant provisions to exclude liability for Springwell's claims or that such provisions were irrelevant to Springwell's claims against the Private Bank. Nor did the judge accept that, whatever their effect, the provisions could give rise to estoppels only in respect of the financing transactions (with the Private Bank) and not in respect of Springwell's underlying purchases of emerging markets instruments from other Chase entities. By reference to the second sentence in Clause 25 (see Appendix) to the effect that neither party shall have responsibility or liability whatsoever in respect of any advice given "or on any other commercial matters concerned with any Transaction", the judge concluded that it would be impossible for Springwell to sue the Private Bank in respect of any actual advice that it might have given (whether by JA or otherwise) in relation to the suitability (or otherwise) of any underlying purchase transactions financed under the GMRA (even though those underlying transactions would not have been between the Private Bank and Springwell), since on any basis such a transaction was a "commercial matter…concerned with any Transaction". Furthermore, Clause 9, in combination with Clauses 24 and 25, was a strong pointer against the existence of any free-standing duty of care on the part of the Private Bank to give general investment advice.

SPECIFIC CONSTRUCTION POINTS ON THE GKO-LINKED NOTES DOCUMENTATION

Springwell submitted that Chase was not entitled to rely on Clauses 5(e), 6(a) and 6(c) of the Notes (see Appendix) for a number of reasons. Springwell contended that the Notes were contracts between CMSCI and the Private Bank as the defined "Holder", which gave the representations and warranties in Clause 6. Therefore, the representations/ warranties could not give rise to an estoppel preventing Springwell from asserting that Springwell relied on advice as to the advisability of purchasing the GKO-Linked Notes or on representations or that Springwell had such advice or representations given to it; none of these documents was material to the dealings between Springwell and Chase.

Gloster J did not agree. As the GKO-Linked Note confirmations made clear, the contract for the issue of the Notes was between the issuer (CMSCI) and Springwell, and under that contract Springwell was entitled to have the Note issued in its name. Indeed, the confirmations stated that the Note had been issued to Springwell. Under the terms of that contract, the issuer and Springwell agreed that because of the financing arrangements, whether under the MFA or the GMRA, the Note would actually be issued in the name of the Private Bank, which was purchasing the Note from Springwell. The reality was that, in effect (whatever the strict legal position), at all times Springwell was the beneficial holder/owner of the Notes in that, subject to satisfaction of its financing obligations to the Private Bank under the GMRA, it was entitled to have them issued in its name on

purchase from CMSCI and transferred into its name on re-purchase from the Private Bank, albeit that the Private Bank had title to the Notes until satisfaction of Springwell's liabilities under the financing arrangements. Therefore, Springwell could make a claim only in respect of the purchase or sale of the GKO-Linked Notes, subject to the terms of those Notes, whether or not Springwell was named as the Holder when they were first issued.

In the wider evidential context, moreover, the judge considered that the provisions of the Notes, the terms and conditions, and the confirmations strongly supported the argument that neither the Private Bank nor the Investment Bank had a duty of care to give general or specific investment advice.

COMMENT

By seeking to narrow the meaning of the Relevant Provisions both generally and in relation to individual words within clauses and sub-clauses, Springwell ran the significant risk that its approach might be found to be unattractive.

Since Springwell's claims in relation to the GKO-Linked Notes covered transactions effected between 1996 and 1998, it needed to avoid the terms of both the MFA and the subsequent GMRA, as well as the DDCS Letters and GKO-Linked Notes. However, the judgment does not provide details of the particular claims made by Springwell against specific Chase entities, so it is difficult to assess the relevance and potential impact of Springwell's construction arguments. It is also difficult to assess whether the extent to which the judge conferred the benefit of the protections under the Relevant Provisions upon all Chase entities (whether expressly referred to in the particular Relevant Provision or not) represented a fair approach. It is clear that overall, Gloster J considered the terms of the documentation to represent counter-indicators as to the existence of any duty of care to give general investment advice.

At the heart of the parties' relationship were the DDCS Letters, which Gloster J considered to be highly significant letters, intended to reflect both the classification of clients as non-private customers and, following on from that classification, the understanding and agreement of the parties that neither the Private Bank nor the Investment Bank would have any obligation to give investment advice, whether generally or in relation to any specific investments, or to consider the client's particular financial circumstances or investment objectives. The DDCS Letters also contained a representation by the client that he had independently, and without reliance on the Chase entities, made his decision to acquire the relevant investments, as well as the exclusion of any liability on the part of the Chase entities for any client loss.

However, the judge did not address Springwell's submission in the context of the DDCS Letters in relation to the specific distinction under Schedule 1 to the Financial Services Act 1986 between the different activities of "dealing" (see paragraph 12) and "investment advice" (see paragraph 15). Springwell had submitted that the distinction was pertinent to the content of the DDCS Letters because they purported to be regulatory documents incorporating notification to Springwell that it was to be treated as a non-private customer; they were headed "Dealings in Developing Countries Securities", emphasising that they concerned "dealing"; and the service which the letters envisaged the Investment Bank providing to the would-be client was a non-advisory, execution-only dealing service. By contrast, Springwell's claims arose out of advice or failure to advise, not only in relation to particular transactions or dealings, but also relating to portfolio strategy and structure, on the balance of risk in Springwell's portfolio as a whole and the appropriate mix of investments between asset classes. As a result, Springwell submitted that the language of the Letters was simply inept to cover such activities. It is unfortunate that Gloster J did not deal with this argument in her judgment. This aspect will be considered in more detail in Part 4.

At the same time, Gloster J did not address in detail Springwell's argument that the DDCS Letters referred to suitability only as a matter of regulatory protection and that any common-law duty was unaffected by the regulatory exclusions. Gloster J's conclusion that the "clear implication" was that Chase did not accept any liability to advise on risk, or on suitability of investment, does not fully address the point. This aspect will also be dealt with in the context of the regulatory framework in Part 4.

LAWYER CONTACT

If you would like further advice or assistance, please contact your principal Firm representative or the lawyer listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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APPENDIX

THE TERMS OF SPRINGWELL'S MFA

The MFA between Springwell and the Investment Bank ("IB") was signed by AP on Springwell's behalf and by JA on IB's behalf and dated as of 24 April 1992. Section 6 of the MFA contained a number of representations, warranties and acknowledgements by Springwell, including the following:

(i) "[Springwell] *has made*, independently and *without reliance* on IB or any subsidiary or *affiliate* of IB, its own decision to acquire the Specified Instruments for such Transaction and does not expect IB or any such entity to be responsible for advising it as to the investment merits of any Transaction…

(ii) [Springwell] is a sophisticated investor familiar with debt obligations of the nature of the Specified Instruments and… understands and is fully able to bear all of the risks involved … including …a risk of loss …

(iii) [Springwell] is a business customer or non-private customer, as the case may be, under the Rules of [the SFA]".

THE TERMS OF MFA CONFIRMATIONS

The standard form of confirmation for transactions under the MFA included, in Clause 5, the following wording:

> "[IB] … advises you, and [Springwell] hereby confirms, that with respect to the Transaction, any charges made reflect the fact that it *was* effected upon an execution-only basis, *without [IB] having given* or being requested or expected to give *advice* about the investment merits of the Transaction".

THE TERMS OF THE DDCS LETTERS

The DDCS Letters included the following terms:

> "We refer to our recent discussions when you informed us that you [(IB)] wished us *to effect an introduction* to the markets desk of our associated company, [(IB)], with a view to you dealing for your own account in various *debt and equity securities of public and private sector issuers located in developing countries* ('instruments').

1. [The Private Bank ('PB')] and IB have decided …to categorise you as a Non-Private Customer for the purposes of the [SFA Rules].

2. By treating you as a Non-Private Customer, you will not gain the same degree of protection under the rules of SFA than if you were to be treated as a Private Customer. Neither [PB] nor [IB] will be required to … give you risk disclosure statements [or] to ensure that any advice which is given to you is suitable to your circumstances …

3. Please note that your rights to sue either [PB] or [IB] for damages under section 62 of the Financial Services Act 1986 will be restricted as, in the main, you will only be able to sue for breaches of the obligations owed to you as a Non-Private Customer which will not include the Private Customer protections outlined above.

4. *Neither [PB] nor [IB] is required to give you investment advice* generally or in relation to specific investments, make any enquiries about, or to consider, your particular financial circumstances or *investment objectives*. By placing an order with [PB] or [IB] *you represent that you are a sophisticated investor* … and that you *have* independently, *without reliance on [PB], [IB] or any associated person,* made a decision to acquire the instrument *having examined* such information relating to the instrument and the issuer thereof as you deem relevant and appropriate. You *have represented* to [PB] and [IB], and therefore they have assumed that, you are *fully familiar* and able to evaluate the merits and risks associated with such instruments… You should therefore consider whether an instrument is appropriate in your particular financial circumstances or in the light of your investment objectives. Neither *[PB] nor [IB] is liable for any loss* which you may incur arising out of any

investment decision made by you in consequence of any service contemplated in this letter unless such loss is caused by its gross negligence or wilful misconduct…

5. Your attention is drawn to the fact that when [PB] or [IB] deals *with* or for you …

6. When providing you with any circular, information memorandum, investment advertisement, published recommendation or any other written or oral information regarding any instrument or investment opportunity, neither [PB] nor [IB] will have taken any independent steps to verify the document or information and no representation or warranty, express or implied, is or will be made by either [PB] or [IB], their representative officers, servants or agents or those of their associated companies in or in relation to such documents or information *nor will [PB] or [IB] or any of their associated companies be responsible or liable … for the fairness, accuracy or completeness of such documents or information.*

7. (a) You hereby:

   (i) mortgage, pledge and charge to [IB] by way of first fixed security interest all your present and future rights, title and interest in and to your investments now or hereafter deposited or transferred with or to, or to the order of, [PB], [IB] or any other company in the Chase Manhattan Group …"

At the end of the DDCS Letter, there was provision for the customer to sign below the following statement:

"I have read and understood the above notice and consent to be treated as a Non-Private Customer".

THE RELEVANT TERMS OF THE GKO DOCUMENTATION

The GKO-Linked Notes themselves were issued by Chase Manhattan Securities (C.I.) Limited ("CMSCI") to the Private Bank as Holder. Whilst contractually, there was an agreement between CMSCI (as issuer) to issue the relevant Note to Springwell, as recorded in the trade confirmations for the Notes, the financing arrangements (latterly under the GMRA) by which Springwell sold the Notes when issued to the Private Bank, and then itself repurchased them when its obligations under the financing arrangements had been satisfied in full, meant that the Notes were issued directly into the name of the Private Bank, the relevant non-transferable and non-negotiable provisions of the Notes having been waived.

The Notes contained the following express acknowledgements, representations and warranties:

"Section 5 - Other Risks Assumed by Holder".

(c) The Holder assumes all risks of all Transactions entered into in connection with a Note

(e) CMSCI has not made any representations and warranties whatsoever, either express or implied, including, without limitation, any representation or warranty as to (i) the due execution, legality, validity, adequacy or enforceability of the Designated GKO Assets or any other Transaction or any document relating thereto; (ii) the financial condition of any party to a Transaction or the performance of any party to a Transaction of any of their obligations related to any Transactions or that it has made, or will make, any inquiries concerning any such parties;…and (iv) as to the content of or the applicability of the S Account Rules. Chase shall not have any duty or responsibility to provide to the Holder with any credit or other information concerning the affairs or the financial or other condition or business of any party to the Transactions which may come into the possession of Chase.

(f) This Note has liquidity risk and is highly structured…

Section 6

(a) *The Holder hereby represents and warrants* to CMSCI (for itself and on behalf of [IB] that …

(b) It has the *knowledge and experience in financial and business matters* as to be capable of evaluating the merits and risks of this Note and it has determined that purchasing this Note is appropriate in light of the Holder's business strategies and objectives;

(c) *The Holder acknowledges that it understands the risks and potential consequences associated with purchasing this Note*, that it has made such

independent appraisal of Russia and its economy and legal and political circumstances as the Holder deems appropriate and has consulted with legal, investment, ERISA, accounting, tax and other advisors to the extent appropriate to assist in understanding and evaluating the risks involved and the consequences of purchasing this Note… and has been given access to all information about Chase, the Transactions … this Note … the Designated Assets that the Holder has requested… In addition, the Holder *has not relied on and acknowledges* that neither CMSCI nor [IB] has made any representation or warranty with respect to the *advisability* of purchasing this Note".

The terms and conditions sheets referred to Springwell as the client and stated that:

(i) "Clients are advised to make an independent review and reach their own conclusions regarding the legal, credit, tax and accounting aspects of this offering relating to their particular circumstances. Neither [IB], nor [PB], nor any person acting on their behalf, makes any representation or warranty, implied or expressed, regarding the accuracy, completeness or currentness of the information contained herein…";

(ii) "The Notes are illiquid and not actively traded in any financial market";

and above the signature, on behalf of the client, the document read: "The undersigned accepts and agrees to these Terms and Conditions, including the attached RISKS DISCLOSURE".

The attached Risks Disclosure sheet set out a list of "Key Risks to Investor", including: "Default risk of the Russian Government on the underlying instruments"; "Default risk of the Russian Bank counterparty as counterparty to CMBI on the local forward contract"; "Risk of the inability to convert roubles to Dollars".

THE TERMS OF GKO-LINKED NOTE CONFIRMATIONS

The GKO-Linked Note confirmations contained the following statements:

"This is to confirm that a 10.00% Linked (S Account) GKO Note (the 'Note') has been issued by [CMSCI] to [Springwell] (the 'Customer') on July 20, 1998.

In connection with the financing of the purchase price of the Note from [PB], the provisions of the Note that render it non-transferable and non-negotiable will be waived for the purpose of selling the Note to [PB] and the subsequent transfer to the Customer of the Note when its obligations in connection with such financing have been satisfied in full… it is agreed that the Note will be issued in the name of [PB].

The Customer hereby represents and warrants that it has read the Note and understands the terms of the Note.

The summary of the terms of the Note are in the attached Terms and Conditions sheet. Please confirm your *acceptance of these terms by signing this confirmation* and faxing it [to Chase]".

RELEVANT TERMS OF THE GMRA

The GMRA included the following representations and warranties:

"[Clause] 9 **Representations**

Each party represents and warrants to the other that –

(g) In connection with this Agreement and each transaction:

(iv) Unless there is a written agreement [with the other party] to the contrary, *it is not relying on any advice* (whether written or oral) of the other party, *other than representations expressly set out in this agreement*;

(v) It has made and will make its own decisions regarding the entry into of any Transaction based upon its own judgment and *upon advice from such professional advisers as it has deemed it necessary to consult*;

(vi) It understands the terms and conditions and risks of each Transaction and is willing to assume (financially and otherwise) those risks."

By Clause 24, Springwell represented that, as at the date of the GMRA and of each transaction thereunder, "(a) it is a sophisticated investor;…(d) it is familiar with and is able to evaluate the merits and risks associated with Transactions…".

By Clause 25, it was agreed that:

> "Each transaction shall be deemed to have been entered into by each party *in reliance only upon its own judgment.* Neither party shall have any responsibility or liability whatsoever in respect of any advice given as to whether or not the other party should enter into any Transaction (whether as Buyer or Seller) ... or on any other commercial matters concerned with any Transaction ...whether or not such advice was given or views were expressed at the request of the other party".

THE TERMS OF THE GMRA CONFIRMATIONS

The confirmations under the GMRA which were faxed to Springwell in respect of each transaction provided that:

> "This confirmation supplements and forms part of and is subject to the [GMRA] as entered into between us as of [date] as the same may be amended from time to time (the Agreement). All provisions contained in the Agreement govern this confirmation except as expressly modified below".

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