HCCL 28/2008

[2018] HKCFI 1737

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMMERCIAL ACTION NO 28 OF 2008

———————

BETWEEN

SHINE GRACE INVESTMENT LTD	Plaintiff
and	
CITIBANK, N.A.	1st Defendant
HAILEY AMY SEEN KWAN MAK	2nd Defendant

———————

HCCL 28/2013

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMMERCIAL ACTION NO 28 OF 2013

———————

BETWEEN

SHINNING INTERNATIONAL HOLDINGS LIMITED	Plaintiff
and	
CITIBANK, N.A.	Defendant

———————

HCCL 29/2013

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

COMMERCIAL ACTION NO 29 OF 2013

———————

BETWEEN

BONDS & SONS INTERNATIONAL LIMITED	Plaintiff
and	
CITIBANK, N.A.	Defendant

———————

(Heard together)

Before: Hon Ng J in Court

Dates of Hearing: 13–17, 20–23, 28–29 November and 11–12 December 2017

Date of Judgment: 30 July 2018

———————

J U D G M E N T

———————

Table of Contents

A. Introduction

1. The main action HCCL 28/2008 ("**Main Action**") is concerned with 9 Equity Accumulator Contracts ("**Disputed ACs**") entered into by the Plaintiff ("**Shine Grace**") via Mrs Anita Chan Lai Ling ("**Mrs Chan**") with the 1st Defendant ("**Citibank**") on 15 and 16 October 2007. Since 20 November 2007, Citibank has issued margin call notices under the Disputed ACs demanding Shine Grace to deposit additional margin security. From 21 November 2007 onwards, Shine Grace has, by various letters to Citibank, disclaimed the Disputed ACs and asserted that they were invalid and unenforceable. Citibank's repeated margin calls were not met.

2. The stocks which underlay the Disputed ACs were 4 Hong Kong listed shares *viz*China Petroleum & Chemical ("**Sinopec**"), Petrochina Company Limited ("**Petrochina**"), China Shenhua Energy Company ("**Shenhua**") and China Life Insurance Company ("**China Life**").

3. The Disputed ACs resulted in heavy financial losses for Shine Grace. Out of the 9 Disputed ACs, 2 were "knocked out"[1] on the same day ie 15 October 2007 and 1 was "knocked out" on 1 November 2007. The remaining 6 open Disputed ACs were closed out and unwound by Citibank on 22 January 2008. The total unwinding costs of the open positions on those 6 Disputed ACs exceeded HK$427 million, while the losses suffered from the sale of the shares accumulated under all the Disputed ACs were around HK$51 million, making a total of HK$478 million.

4. In order to understand the background against which these losses were incurred, the best way is to plot the movement of the Hang Seng Index ("**Index**") and the share prices of the 4 stocks underlying the Disputed ACs at the material times:

(1) On 15 October 2007,

i. The Index closed at 29,540.

ii. Sinopec closed at HK$12.96.

iii. Petrochina closed at HK$18.78.

iv. Shenhua closed at HK$54.10.

v. China Life closed at HK$50.60.

(2) On 16 October 2007,

i. The Index closed at 28,954.

ii. Sinopec closed at HK$12.24.

iii. Petrochina closed at HK$18.38.

iv. Shenhua closed at HK$52.35.

v. China Life closed at HK$50.30.

(3) On 30 October 2007,

i. The Index closed at its peak of 31,638.

ii. Sinopec closed at HK$11.92.

iii. Petrochina closed at HK$19.76.

iv. Shenhua closed at HK$51.15.

v. China Life closed at HK$51.95.

(4) On 20 November 2007,

i. The Index closed at 27,771.

ii. Sinopec closed at HK$10.90.

iii. Petrochina closed at HK$14.84.

iv. Shenhua closed at HK$43.35.

v. China Life closed at HK$43.45.

(5) On 22 January 2008,

i. The Index closed at 21,757.

ii. Sinopec closed at HK$7.65.

iii. Petrochina closed at HK$9.62.

iv. Shenhua closed at HK$38.50.

v. China Life closed at HK$27.60.

5. After the 6 open Disputed ACs were closed out and unwounded, there was still a substantial shortfall which Citibank demanded from Shine Grace. Shine Grace did not meet the demand. Citibank then turned to Shine Grace's two guarantors *viz* Shinning International Holdings Limited ("**Shinning**") and Bonds & Sons International Limited ("**BSI**") and

transferred funds from their accounts with it ie HK$25,609,002.71 and HK$39,109,301.58 respectively to satisfy the outstanding liability.

6. In the Main Action, Shine Grace alleges what is commonly known as mis-selling of the Disputed ACs by Citibank. A summary of its complaints against Citibank and the 2nd Defendant ("**Ms Mak**") (collectively "**Defendants**") can be found in Section F below. Ms Mak was at all material times the relationship manager of Shine Grace and Mrs Chan.

7. In the prayer for relief, Shine Grace seeks *inter alia* a declaration that (i) it has not contracted with Citibank in respect of the Disputed ACs, (ii) the Disputed ACs are unenforceable, (iii) all notices, including margin call notices in respect of the Disputed ACs are invalid and of no legal effect. Shine Grace also seeks an order for the return of all securities and monies held by Citibank for or otherwise due to it as well as damages. Shine Grace further seeks damages or restitutionary relief against Ms Mak.

8. Each of Shinning and BSI had provided two limited guarantees ("**Shinning Guarantees**[2]" and "**BSI Guarantees**[3]") in support of Shine Grace's dealings with Citibank. These guarantees were the subject of the proceedings in HCCL 28/2013 ("**Shinning Action**") and HCCL 29/2013 ("**BSI Action**") (collectively, "**Guarantor Actions**") commenced by Shinning and BSI against Citibank.

9. In the Guarantor Actions, Shinning and BSI challenge the appropriation of HK$25,609,002.71 and HK$39,109,301.58 from their respective Citibank accounts on 25 January 2008 to satisfy Shine Grace's liability under the Disputed ACs. The basis of their challenge is that Shine Grace had not contracted with Citibank in respect of the Disputed ACs, alternatively, the Disputed ACs were void and/or unenforceable and thus Shine Grace had no liability under them. Citibank therefore had no right to call on the guarantees and appropriate funds from their respective accounts. They seek *inter alia* an Order that the funds appropriated by Citibank be re-credited to their accounts with interest.

10. An additional issue raised in the BSI Action is that BSI claims it had already terminated the BSI Guarantees by written notice on 26 July 2007. As far as the 2004 Guarantee is concerned, BSI claims it was terminated on 27 October 2007, upon the expiry of the 3-month notice period pursuant to clause 3 thereof. As far as the 2006 Guarantee is concerned, BSI claims it was terminated as of 26 July 2007. Upon their termination, BSI ceased to have any further liability under the BSI Guarantees. BSI therefore also seeks a declaration that the two guarantees were terminated on the aforesaid dates.

B. Mrs Chan

11. While Shine Grace was the contracting party of the Disputed ACs and the Plaintiff in the Main Action, the person at the heart of this case was Mrs Chan. She was a director of Shine Grace from 2 January 2003 until she passed away on 17 October 2007. There is no dispute that prior to her death, Shine Grace was solely beneficially owned, controlled and operated by her. There is also no dispute that all of Shine Grace's investment decisions were made by Mrs Chan and all its investment orders, including the Disputed ACs, were placed by her on behalf of Shine Grace. For these reasons, and for the sake of simplicity, a reference to

Mrs Chan in what follows is intended to include a reference to Shine Grace and *vice versa*, unless the context expressly or impliedly indicates otherwise.

12. After Mrs Chan's death, the only other director of Shine Grace, her brother, resigned with effect from 3 November 2007 while on 2 November 2007, Mrs Chan's 4 children (Anson, Johnson, Lily and Zandra) were appointed directors of Shine Grace.

13. By way of background, Mrs Chan was the sole beneficial owner of the so-called Lady Secret Group of companies. Shine Grace was a company within the Lady Secret Group. So was Shinning.

14. Mrs Chan was also the Chairman and Chief Executive of the Bonds Group, the holding company of which was Bonds & Sons Holdings Ltd ("**B & S Holdings**"). BSI was wholly-owned by B & S Holdings and hence a company within the Bonds Group. While the core business of the Bonds Group was in property investment, management, leasing and development, BSI itself also engaged in the trading of securities, including derivative instruments, from time to time. In December 2003, the Bonds Chan Family Unit Trust ("**Trust**") was established and all the shares of B & S Holdings were owned by the Trust. Mrs Chan had 44.45% beneficial interest in the Trust and hence the Bonds Group. Mrs Chan also had a minority interest in the trustee company which managed the Trust and was one of its six directors. Notwithstanding the niceties of the shareholding structure, the evidence shows that when Mrs Chan was alive, it was she who "called the shot" in BSI.

15. Mrs Chan was in many ways a remarkable person.

16. According to her eldest son Mr Anson Chan's description, she was born in Hong Kong in 1938 into a lower middle class family. She received education only up to Form 5. She was married to the late Mr Chan Shu-kui and, from 1965 until 1973, assisted her husband in running his businesses including *inter alia* real estate, education and a local stock brokerage firm Standard Capital Brokerage Limited. After her husband had passed away in 1973, Mrs Chan ran the family business including the brokerage firm. The firm only ceased business in 2002 when it was placed in voluntary liquidation. She was a licensed dealer, dealing director, commodities trading adviser and securities investment adviser. Mrs Chan had no formal business education. Mr Anson Chan described her as a "self-taught businesswoman, learning by experience".

17. Citibank has been one of Mrs Chan's bankers since 1980s. As shown in the bank's Annual Credit Approval in June 2007, her net worth was estimated at around US$400 million, US$430 million and US$453 million in 2005, 2006 and 2007 respectively. By any standard, she was a hugely successful businesswoman and an ultra-high net worth individual.

18. In terms of investment experience, Mrs Chan had decades of experience of active trading in the capital market. According to Ms Agatha Lai ("**Ms Lai**"), during the 1980s and 1990s, Mrs Chan had investments through a number of financial institutions for her own investment companies, on behalf of companies in the Bonds Group including BSI, and companies owned by her sons. Her investments covered a wide range of products including local and foreign equities, Hong Kong stock index futures, Hong Kong index options, stock options, foreign

exchange contracts, funds, bonds, treasury bills, and structured products such as equity linked notes and market linked instruments.

19. In January 2004, Mrs Chan was introduced to the then relatively new product of equity accumulators. From 2 January 2004 to 16 October 2007, Shine Grace, via her, entered into 282 equity accumulator contracts ("**ACs**") with Citibank, the last 9 of which were the Disputed ACs. In addition, BSI, via Mrs Chan, had entered into over 130 ACs with Citibank. Apart from Citibank, Mrs Chan had also entered into 50 ACs with the Bank of East Asia between 20 April and 16 October 2007.

20. With such a large investment portfolio, Mrs Chan had a team of support staff to assist her, including Ms Lai. According to Ms Lai, the team's role was solely of an administrative nature ie facilitating the settlement of trades, arranging funding for settlement, attending to accounting matters and compiling position and cash reports. All investment decisions were made and all orders were placed by and only by Mrs Chan. Mrs Chan normally worked from home and placed orders over the phone with Ms Mak[4].

21. Leaving aside the Disputed ACs, Shine Grace's trading in ACs with Citibank was very profitable. From Shine Grace's internal records, its net realized profits between 2004 and 2007 were close to HK$180 million.

22. Apart from being an enthusiastic and prolific investor, Mrs Chan had an exceptional ability to read the stock market. In a telephone conversation she had with Ms Mak on 15 October 2007 at 3:19 pm, Mrs Chan expressed her view that the Index would go up to 32,000 before it would come down. On that day, the Index opened at 29,147 and closed at 29,540. The Index peaked on 30 October 2007 at 31,638. Mrs Chan's prediction 15 days ago that the Index would go up to 32,000 only fell short by 362. Thereafter, the Index did begin to go south, as Mrs Chan had expected. Within 3 weeks, the Index dropped to 26,004 on 22 November 2007. After a short-lived rebound in late November and early December 2007, the Index went downhill sharply. By 22 January 2008, when the 6 remaining Disputed ACs were closed out, the Index dropped to 21,757.

23. Given her age of 69 in 2007, Mrs Chan was still highly energetic. Between 3 September and 5 October 2007, she, using Shine Grace as her vehicle, entered into over 40 ACs and realized HK$81 million profits from them. She was hospitalized on 6 October 2007 due to momentary loss of consciousness caused by overdose of medication. On 10 October 2007, Mrs Chan was discharged from hospital. It was recorded in the hospital's clinical discharge summary and the coroner's report that she recovered well without complication from this incident.

24. A few days later, Mrs Chan resumed trading in ACs.

25. On 15 October 2007, Shine Grace entered into 3 of the Disputed ACs with Citibank and 2 ACs with Bank of East Asia. On 16 October 2007, Shine Grace entered into the other 6 Disputed ACs with Citibank and 4 more ACs with Bank of East Asia, making it a total of 15 ACs in 2 days. On 15 October 2007, during the trading hours of the Hong Kong Stock Exchange, Mrs Chan had over 20 telephone conversations with Citibank's staff, mostly Ms Mak. On 16 October 2007, she had 18 such telephone conversations. This court has heard the audio recordings and read the transcripts of those conversations. Mrs Chan sounded alert, sometimes very animated and always good with figures. She was able to make

quick decisions on whether to enter into an AC for a particular listed stock, at what price and for how many shares. She was also able to exchange views with Ms Mak on the movement of the Index. Notwithstanding her recent hospitalization, this court finds Mrs Chan's cognitive ability was not impaired to any significant extent and she was able to make investment decisions of her own accord and in what she considered to be her best interests.

26. Unfortunately, Mrs Chan passed away on 17 October 2007 as a result of overdose of prescribed medication, the details of which are irrelevant for the present purpose.

27. On the evidence, Mrs Chan had no complaints about the Disputed ACs during her lifetime. It stands to reason that Shine Grace's present complaints against the Defendants are those of its directors appointed after her death.

C. Factual and expert witnesses

28. With the passing away of Mrs Chan, the testimony of the single most important person who could shed light on the factual issues raised in this action is no longer available at trial.

29. Shine Grace called two factual witnesses to testify on its behalf at trial:

(1) Ms Lai.

(2) Mr Anson Chan.

30. Ms Lai was the financial controller of the Bonds Group and the head of the team which provided accounting and other administrative support for Mrs Chan's large investment portfolio. Her evidence was primarily, though not exclusively, on the background and other relatively non-controversial factual matters. Since Ms Lai had no role to play in determining Mrs Chan's investment strategy, was never involved in Mrs Chan's investment decisions and was not privy to Mrs Chan's numerous communications, by phone or otherwise, with Ms Mak, her evidence sheds little light on crucial factual matters concerning Mrs Chan's decision to enter into the Disputed ACs on 15 and 16 October 2007.

31. Ms Lai did have some dealings with Citibank's staff, principally Ms Mak, particularly after Mrs Chan's death. Ms Lai also has direct knowledge of the facts pertaining to the issue in the BSI Action regarding termination of the BSI Guarantees.

32. Mr Anson Chan is one of the current directors of BSI, having been appointed a director of BSI in about 2000, and Shine Grace. However, he became a director of Shine Grace only after Mrs Chan's death. He had no role in the formulation of Mrs Chan's investment strategy in ACs when she was alive. He also had no direct knowledge of Mrs Chan's investment strategy, decisions or the extent of her knowledge of the risks associated with ACs. Back in 2006 and 2007, Mr Chan already had some experience with ACs, both as a director of BSI (he told this court he entered into less than 10 ACs on behalf of BSI out of about 100) as well as on his own account. In the witness box, Mr Chan gave the impression that he was quite knowledgeable about ACs. Nevertheless, Mr Chan told this court that he and Mrs Chan never discussed about the ACs entered into by her — they only talked about stocks in general.

33. Like Ms Lai, Mr Chan was not privy to Mrs Chan's communications with Ms Mak and his evidence can shed little light on crucial factual matters concerning Mrs Chan's decision to enter in the Disputed ACs on 15 and 16 October 2007. While Mr Chan appeared to have listened to the tape recordings between Mrs Chan and Ms Mak on those two days and purported to analyse his mother's investment strategy and market outlook, the testimony he gave on those matters is more akin to submissions rather than factual evidence.

34. At trial, the Defendants called 4 factual witnesses.

35. Ms Mak is the Defendants' main witness. She was first assigned by Citibank to manage Mrs Chan's accounts in mid-1997 and independently so in mid-1999. From 1999 until 17 October 2007, Ms Mak was the relationship manager of Mrs Chan, and from March 2003 until 6 December 2007, she was the relationship manager of Shine Grace. Given her long-standing relationship with Mrs Chan and her frequent contact with Mrs Chan, it stands to reason that she must have developed an in-depth knowledge of Mrs Chan's investment experience, strategy and appetite. She said so in her witness statement and there is no reason for this court to doubt that. Ms Mak is of course the person directly involved in the events on 15 and 16 October 2007 when Mrs Chan decided to enter into the Disputed ACs.

36. The other 3 Citibank factual witnesses are:

(1) Ms Kiev Pui Shan Yim ("**Ms Yim**") — Ms Mak's assistant in relation to Mrs Chan's accounts from 2004 onwards. Her evidence is short and focuses primarily on the issue in the BSI Action regarding termination of the BSI Guarantees.

(2) Ms Cheung Shuk Kwan ("**Ms Cheung**") — Head of Citibank's Structured Products Desk from early 2007 onwards. Her evidence is primarily to explain the development and the features of ACs, as well as the training given to Citibank's relationship managers. She had no direct dealing with Mrs Chan.

(3) Mr Steven Lo ("**Mr Lo**") — Global Market Manager of Citibank's Thailand marketing team in 2007. Like Ms Cheung, his evidence is also primarily to explain the introduction and the features of ACs, the training given to Citibank's relationship managers, especially on risks. He had no direct dealing with Mrs Chan.

37. In addition, the statements of all other Citibank's witnesses, save for that of Mr Gopalakrishnan, were agreed to be in evidence, without the need for cross-examination. It seems to this court that the evidence of Ms Cheung, Mr Lo and all those who were not called, is quite peripheral and of little assistance. Ultimately, it is the credibility of Ms Mak, and, to a much smaller extent, Ms Yim, which has a significant impact on this court's deliberation on the factual issues raised.

38. This court has carefully considered the testimony, as well as the demeanour, of all factual witnesses, and assessed it against the documentary evidence and the known and undisputed circumstances of this case. This court has in particular considered the inherent probabilities or otherwise of their testimony and assessed their credibility accordingly. Fortunately, this court is greatly assisted in its task since most, if not all, of the material telephone conversations between the parties' representatives were recorded and the audio recordings and transcripts of those conversations were in evidence.

39. But, at the outset, this court wishes to record that it finds Ms Mak a truthful witness.

40. Ever since the commencement of the Main Action in 2008, Shine Grace has been making scathing attack on Ms Mak's integrity and professionalism. Such attack would put anyone in Ms Mak's position under tremendous pressure either to embellish her testimony or become highly defensive and argumentative while in the witness box. Yet, this court finds little sign of that. Ms Mak gave her evidence clearly and her response to questions, whether from Shine Grace or from this court, was mostly direct and prompt. Her credibility has withstood the test of cross-examination.

41. Importantly, Ms Mak was willing to admit to matters unfavourable to the Defence, the most prominent example of which was her admission that she did not know exactly how the Mark to Market value of the Disputed ACs was calculated. This in turn means she could not have been able to explain it adequately to anyone from Shine Grace, whether it was Mrs Chan who was simply not interested or Ms Lai who did ask her about it after Mrs Chan had passed away. Her credibility has withstood the test of cross-examination, notwithstanding the points made in Shine Grace's closing submissions at paragraphs 26-64 urging this court to reject her evidence.

42. At trial, Shine Grace and the Defendants each called 1 expert witness:

(1) Shine Grace – Mr Satyajit Das ("**Mr Das**").

(2) Defendants – Mr Pawan Malik ("**Mr Malik**").

43. Both experts are knowledgeable in their areas of expertise and on the whole this court finds them fair and honest witnesses. Their evidence, apart from facilitating this court's understanding of the nature, structure, rationale, potential risks and benefits of ACs in general, is primarily germane to Shine Grace's complaint of breach of duty by the Defendants. While the experts have produced voluminous expert reports, joint expert report, supplemental expert report and addendum to joint expert report, fortunately, most of the expert evidence can be regarded as common ground. Naturally, there are differences in opinion between the experts. After substantial refinement by the parties in the course of the trial, there are only three key areas of difference between the experts:

(1) Hold to Maturity ("**HTM**") Risk vs Mark to Market ("**MTM**") Risk — what is the true risk of the ACs to investors (share price or what affects the MTM including volatility)?

(2) Whether the Defendants have made sufficient disclosure of the risks of the Disputed ACs to Shine Grace?

(3) Objectives of the ACs and whether Shine Grace's trading strategy was consistent with the stated objectives of the ACs?

44. The relevant parts of the expert evidence will be discussed where appropriate, and the difference between the experts will be resolved only if and in so far as may be necessary, in the section "Breach of Duty" below. At this juncture, it is appropriate to repeat the warning on the utility of expert evidence sounded by Oliver J (as he then was) in *Midland Bank v Hett, Stubbs & Kemp* [1979] Ch 384 at 402 C-D:

" The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court …"

D. Shine Grace Account with Citibank — contractual framework

45. While Mrs Chan had been a customer of Citibank since 1980s, Shine Grace only opened an account with the bank in March 2003. On 12 March 2003, Mrs Chan on behalf of Shine Grace signed a number of account opening documents. They included what Mr Shieh SC described as first tier documents *viz* general banking documents between Shine Grace and Citibank as well as second tier documents *viz* those which governed derivative transactions.

46. For the present purpose, the most relevant first tier documents were:

(1) Application for Banking, Fiduciary and Investment Services – Corporation, which incorporated Citibank's Terms and Conditions for Banking, Fiduciary and Investment Services ("**General Terms**").

(2) Addendum to Terms and Conditions for Banking, Fiduciary and Investment Services, which incorporated Citibank's Risk Disclosure Statement ("**RDS**") and Terms and Conditions for Derivative Transactions ("**Derivative Terms**").

(3) Bank Mandate.

47. Clause I(H) and I(O) of the General Terms provided:

" **(H) Investment Decisions**

All investments are made solely upon my judgment and at my discretion. Nothing in your brochures or investment reports shall be construed by me as your investment advice as regards the relative attractiveness of one investment option over the other.

…

(O) Indemnity

… I fully understand that (1) you are not obliged to provide me with any financial, market or investment information or suggestion; (2) if you so act, you do not provide the same as a required service, nor act as an adviser; and (3) you assume no responsibility for the accuracy and completeness of or the performance or outcome of any investment made by me after receipt of the same."

48. Under Clause 3 of the Bank Mandate, Citibank was instructed to honour Shine Grace's written instructions provided that they were signed by the requisite number of authorised signatories. Schedule 1 to the Bank Mandate contained Shine Grace's list of designated authorised signatories. The authorised signatories were divided into two groups, Group A

and Group B. Under Group A, Mrs Chan was authorised to sign solely. Under Group B, two signatories were required *viz* Ms Lily Chan together with either Ms Lai or Mr Ho Shek Tim.

49. The most important second tier documents was the Master Derivative Agreement ("**MDA**"), which, by virtue of Clauses 2.1 and 6.2, incorporated *inter alia* the General Terms, RDS and Derivative Terms. The MDA set out the terms which governed the relationship between Shine Grace and Citibank on existing and future derivative transactions.

50. The key provisions of the MDA were:

" (a) Clause 2.3:

All advice, confirmations, schedules and addenda issued by us in respect of any transaction will constitute a supplement to, form an integral part of and be governed by this Agreement. You agree that this Agreement and all such documents shall constitute a single agreement for all purposes and govern all derivative transactions from time to time to be concluded with or through us, it being understood that you would not otherwise enter into any transaction".

(b) Clause 3.1:

From time to time, you may directly or indirectly instruct either our Hong Kong branch or Singapore branch to enter into derivative transactions. In all such transactions, we will act as your agent for your account and at your risk.

(c) Clause 4:

RISK DISCLOSURE STATEMENT

The risk of loss in derivative transactions may be substantial in certain circumstances. You understand the nature of transactions and the extent of your exposure to risk. You are also satisfied that the transactions are suitable for you in light of your circumstances and financial position...

(d) Clause 4.12:

ACKNOWLEDGMENT

You understand and agree that:

(a) the above brief statement cannot disclose all the risks and other significant aspects of the derivatives market and you should therefore carefully study derivative transactions before you trade;

(b) in respect of services rendered by us on a non-discretionary basis,

(i) you make your own judgment in relation to the transactions;

(ii) we assume no duty to give advice or make recommendations;

(iii) if we make any suggestions, we assume no responsibility for your portfolio or for any investment or transaction made;

…

(d) in either of the above cases,

(i) we and our affiliates may hold positions for ourselves or other clients which may not be consistent with our 'officers or employees' suggestions or discretionary management for you; and

(ii) any risks associated with and any losses suffered as a result of our entering into any transactions for you are for your account."

51. The relevant parts of the RDS provided that:

" The intention of this Statement is to inform you that the risk of loss in derivative transactions may be substantial in certain circumstances. You should not deal in them unless you understand the nature of the transactions you are entering into and the extent of your exposure to risk. You should also carefully consider whether and be satisfied that the transactions are suitable for you in the light of your circumstances and financial position. In considering whether to trade, you should also be aware of the following:

…

CONTINGENT LIABILITY TRANSACTIONS / MARGIN

All futures, options selling and contracts for differences are contingent liability transactions. They usually require deposit of an initial margin for transacting a larger base amount.

If you trade in futures, contracts for differences or sell options, you may sustain a total loss of the initial margin and any additional margins that you deposit to establish a position or maintain positions in the relevant market. If the market moves against you, you may be called upon to pay substantial additional margins at short notice to maintain your positions. If you fail to do so, your positions may be liquidated at a loss and you will be liable for any resulting deficit. The use of leverage can lead to large losses as well as gains.

…

ACKNOWLEDGEMENT

You understand and agree that

(a) the above brief Statement cannot disclose all the risks and other significant aspects of the derivatives market and you should therefore carefully study derivative transactions before you trade;

(b) in respect of services rendered by the Bank on a non-discretionary basis,

(i) you make your own judgment in relation to the transactions;

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

(iii) if the Bank makes any suggestions, it assumes no responsibility for your portfolio or for any investment or transaction made …"

52. Clauses 12, 13 and 14 of the Derivatives Terms dealt with margin, termination and close-out and liquidation:

" **12. Margin**

12.1 Prior to any Contract, you shall have deposited with us such Margin as having a value … equivalent to such percentage of the value or amount of the Contract as we may stipulate from time to time in accordance with our internal practice and policy …

12.2 We may at any time monitor your open position by squaring all your outstanding Contracts with Contracts which would otherwise have been necessary to off-set all your outstanding Contracts in such manner as we may deem fit. If the result of such net position shows a loss to you in an amount more than such percentage of the Margin … as we may stipulate from time to time in accordance with our internal practice and policy, we shall be entitled (but not obliged) to request your immediate deposit with us such additional Margin in form and content satisfactory to us …

12.3 In the event that you fail to comply forthwith with our demand for additional Margin, we are unable to contact you or in our opinion, the circumstances so require, we may without prior notice to or consent from you:-

(a) withdraw from any of your accounts with us sufficient amount in payment, and/or set off any Collateral held by us … against, such additional Margin;

(b) enter into one or more Contracts in exchange for or liquidation of the obligations maturing under any of your outstanding Contracts upon such terms as we consider fit; or

(c) deal with any of your outstanding Contracts in such manner as we consider fit.

13. Termination

…

13.2 In addition, any one of the following circumstances shall be Special Circumstance:

(a) If you shall fail duly to pay any amount hereunder when due or on demand …

14. Close-Out and Liquidation

14.1 If … a Special Circumstance has occurred and is continuing, then we shall have the right to close-out and liquidate in the manner described below…

…

14.6 Any request by you to terminate a Contract prior to its termination date shall be solely at our discretion …"

53. The third tier of contractual documents are Citibank's Confirmation ("**Confirmation**") and Tailored Investment Proposal ("**TIP**") relating to every individual AC, including the Disputed ACs, which were sent to Shine Grace after each AC trade. The provisions of these two documents will only be comprehensible after an explanation of the nature and main features of Citibank's ACs to which this court now turns.

E. Basic elements of Citibank's ACs

54. Both parties' experts agree in general on the nature, structure and payoffs of the kind of ACs relevant to the present case. It is therefore only necessary to give a brief summary of them for ease of comprehension of this Judgment.

55. A derivative is a contract between two or more parties the value of which is tied to a specified underlying financial asset, in the present case, listed shares. ACs are bespoke derivatives, illiquid and not publicly traded. They are known as "over-the-counter" derivatives since the contracting parties do not go through a recognised exchange in order to trade.

56. Under an AC, an investor contracts to purchase from Citibank a fixed number of the underlying listed shares ("**daily number of shares**") at the accumulating forward price ("**AFP**"or"**strike price**") on each trading day for the duration of the contract ie 1 year. The AFP is set at a discount to the market price ("**spot price**") of the listed shares prevailing at the time of the AC. The discount is typically 10-20% below spot price in order to make the AC attractive to investors. In the case of the Disputed ACs, the AFP was fixed at between 81.30% to 84.80% of the spot price.

57. If the spot price of the listed shares rises to or above the pre-agreed knock-out price level ("**knock-out price**"), the AC will terminate and the investor is no longer entitled or obliged to purchase further shares. The knock-out price is set at a premium to the spot price of the listed shares at the time of the AC. The premium is typically 2-5% above the spot price. In the case of the Disputed ACs, it was set at 2% above spot price. In other words, the knock-out price of each of the Disputed ACs was set at 102% of the spot price.

58. Settlement under the AC takes place at the end of the month. The investor will receive the shares which had been "accumulated" in the preceding month and has to make payment to Citibank for them. If, on the date of settlement, the spot price of the listed shares is higher than the AFP, the investor gains an unrealised profit. If, on the other hand, the spot price is lower than the AFP, the investor suffers an unrealised loss. In both instances, the gain or loss is not realised until the investor sells the shares in the market.

59. The Disputed ACs in the present case provide for a guaranteed period of 1 month. This means the investor is entitled to purchase 1 month's number of the listed shares at the AFP from Citibank even if, for instance, the AC is knocked out on the 1st day. The investor can

take delivery of the shares or place an order to sell all of them without waiting until the end of the month.

60. The ACs contain a step-up feature. This means when the spot price of the listed shares closes below the AFP on a trading day, the investor is obliged to purchase double the daily number of shares ("**stepped-up daily number of shares**"). This "step-up" feature has the effect of magnifying the losses of the investor.

61. At any given point of time, a value can be attributed to an AC. The process of calculating the value of the AC is referred to as MTM. The MTM value of the AC represents the estimated credit exposure of the parties to each other in case of non-performance. From Citibank's point of view, the MTM value represents the amount which it is likely to lose if the investor defaults at that moment in time. The MTM value of an AC depends on a number of variables, including the spot price of the underlying shares, the implied volatility of the underlying shares, their expected dividend, interest rate and the remaining duration of the contract. Since an AC is not publicly traded, ascertaining the MTM value of the AC is highly complicated. It requires the use of sophisticated financial models which are not available to the public. Different banks have different formulae for ascertaining the MTM value of an AC.

62. All financial institutions, including Citibank, require investors to put up margins. These margin requirements can be divided into two broad types.

(1) First, an initial margin. This will be a percentage of the investor's maximum exposure under the AC ("**MAIA**"). Different banks have different initial margin requirements. Further, the level of initial margin varies from AC to AC. In Shine Grace's case, there was at least 1 case in October 2004 where the initial margin was set at 100% (ie the investor had to pay the entire notional amount of the contract up front). With respect to the Disputed ACs, the initial margin was set at either 15% or 18%.

(2) Second, the financial institution may demand for additional margin when the risk to the bank changes during the term of the contract. The primary determinant of the level of additional margin with respect to an AC is its MTM value. If the MTM exposure increases, the financial institution will call for additional margin.

63. With this brief introduction in mind, this court now returns to the third tier contractual documents which are the most important documents in light of the issues in this case.

64. The purpose of the Confirmation was to set out the terms and conditions of each individual AC in question. The TIP was annexed to the Confirmation.

65. The Confirmation provided that:

" This Confirmation supplements and forms part of the Master Derivatives Agreement signed by you with us … If we do not receive any objections to the details set out in this Confirmation within ninety days of the date you reeive or are deemed to have received it, this Confirmation shall be conclusive evidence, without further proof that the details herein are correct."

66. Importantly, the Confirmation contained a representation and acknowledgement by the investor:

" In connection with this Confirmation, you represent and acknowledge to us that: i. you have the capacity to evaluate this Transaction (including decisions regarding the appropriateness or suitability of this Transaction) and have made your own decision to enter into this Transaction; ii. you understand the terms, conditions, and risks of this Transaction as stated in the Tailored Investment Proposal (ECU012-50702) iii. you are willing to assume (financially and otherwise) those risks and that this transaction is consistent with your investment objectives ..."

67. As far as the TIP is concerned, it contained information on the product description, investment objectives, investment rationale, risks of the trade as well as its detailed terms and conditions. The following features of the TIP are particularly important.

68. First, the Product Description section provided:

" This strategy comprises a series of Forward contracts and is suitable for clients who wish to accumulate a long position for a specific number of units of an underlying security, at a predetermined "Accumulating Forward Price" (AFP), which is lower than the spot price on trade date … It is suitable for clients who expect the price of the underlying security to remain stable at or above the current spot level as of trade date for the duration of the contract. However, if the price of the underlying security declines below the AFP on settlement dates, the client could suffer significant losses."

69. Second, the sections entitled "Investment Objectives" and "Investment Rationale" provided a summary of the suitability of the investment. For ACs with a guaranteed period, the section "Investment Objectives" stated:

" You seek:

- To accumulate a long position in the underlying security over a period of time.

- To take delivery of the underlying security at potentially lower price than spot price on trade date.

- To accumulate a minimum amount of shares over the guaranteed period.

You can accept:

- Significant losses if the price of the underlying security falls below the pre-determined AFP. Since the number of shares accumulated will be "stepped-up" if the closing price is below AFP, more shares will be accumulated in such cases and will INCREASE the losses incurred.

- Limited liquidity.

- Limited upside gain if the structure is knocked out when Trigger Event has occurred."

70. Third, the section entitled "Investment Rationale" provided:

“ This strategy is suitable for clients who wish to accumulate a long position for a specific number of units of an underlying security, at a predetermined “Accumulating Forward Price” (AFP), which is lower than the spot price on trade date. This strategy is suitable for clients who expect the price of the underlying security to remain stable at or above the current spot level as of trade date for the duration of this contract. However, if the price of the underlying security declines below the AFP on settlement dates, the client could suffer significant losses.”

71. Fourth, the section entitled “Risk Information” gave a summary of the risks of the trade including *inter alia* the following:

“ The fluctuations of the equity markets can be significant. The value of the various components embedded in this strategy is affected by a number of factors including but not limited to, general market forces, price of the underlying security, interest rates, the volatility and the time remaining to maturity. All of these will have an impact on the overall value of the strategy. There is no guarantee that the price of the underlying security will always trade above the current spot price but below the Knock out Level. If the price of the underlying security declines below the pre-determined AFP, the client could have significant losses.

Leverage increases risk significantly. A relatively small market movement will have a proportionately larger impact on the funds you have deposited or may have to deposit. This can work for you as well as against you. A variety of factors (such as option volatility, interest rates, time, etc) affect the price/value of this strategy at any point in time and since this strategy will be marked to market, any change in these factors can have a significant adverse impact on the value of your transaction. Standard top-up and sell-out rules will apply and you may be required at short notice to make additional margin deposits or liquidate your position at significant loss.”

72. Fifth, in the rectangular box at the bottom of the front page, there was a disclaimer which read:

“ Prior to making any investment decision, you should fully understand the economic risks and merits, as well as the legal, tax and accounting characteristics and consequences of the transaction, and make your own determination that the investment is consistent with your objectives and that you are able to assume the risk. You are solely responsible for consulting your own independent advisers as to the legal, tax, accounting and related matters concerning this transaction and nothing in this document or any communication, whether or not in writing, between you and Citibank … constitutes such advice.”

73. Sixth, each TIP contained a “sensitivity analysis” providing projections as to how the investor’s realised gain or loss would be impacted by (a) the price at which the investor sold the accumulated shares, (b) the percentage of the contract duration which had elapsed before the AC was knocked out and (c) the number of days on which the step-up feature was engaged.

74. Lastly, the TIP provided that the risk rating for the ACs was “Very High (5)”, which was the highest possible rating.

F. Shine Grace’s case in the main action

75. As prolifically pleaded in the Re-amended Statement of Claim but skillfully refined in Shine Grace's closing submissions, its complaints against Citibank and Ms Mak consist of three broad categories.

76. First, breach of duty to advise on the (un)suitability of the Disputed ACs for Mrs Chan/Shine Grace. At paragraph 107 of Shine Grace's closing submissions, it is submitted that the Defendants had breached their duty in respect of *ensuring* the suitability of the ACs for Mrs Chan. However, given the central plank of Shine Grace's entire case is that the ACs were wholly unsuitable for Mrs Chan, and in light of Shine Grace's submissions from paragraphs 111 to 122 on "Duty to advise on suitability", it seems reasonably clear to this court that Shine Grace's real complaint is that the Defendants were in breach of their duty to advise or warn Mrs Chan that the Disputed ACs were unsuitable for her.

77. Shine Grace contends that the Dispute ACs were manifestly unsuitable for Mrs Chan because:

(1) Mrs Chan's market outlook and strategy immediately prior to the Disputed ACs were inconsistent with the investment objectives and underlying rationale for ACs as expressly stated in the TIPs — her expectation of an imminent market correction after the Index reached 32,000 points[5] did not accord with any expectation that "the price of the underlying security to remain stable at or above the current spot level as of trade date for the duration of the contract"[6].

(2) The volume and size of the transactions, including the total maximum exposure under the Disputed ACs, were unprecedented — as at 16 October 2007, Shine Grace's total maximum exposure or MAIA was over HK$2.7 billion — and could not have been supported by Mrs Chan's personal financial resources. In particular, the 2 Shenhua ACs, with a maximum exposure of HK$670.7 million and HK$452 million, were particularly unsuitable as she had never invested in any Shenhua ACs before and was unfamiliar with Shenhua.

(3) Citibank and Ms Mak knew of the steady and gradual "changing of the guard" in the leadership of the Bonds Group whereby the assets of BSI were to be separated from Mrs Chan's personal trading. In these circumstances, trades of the size of the Disputed ACs were plainly unsuitable.

78. Second, breach of duty to provide reasonable, fair, accurate and honest advice and breach of duty not to mislead. In this regard, Shine Grace contends that

(1) there was a contractual advisory relationship between itself and Citibank, as confirmed in Citibank's Suitability Confirmations;

(2) there was an assumption of responsibility by Citibank and Ms Mak which gave rise to a *Hedley Byrne* duty;

(3) Citibank and Ms Mak owed Shine Grace a "mezzanine", "intermediate common law duty of explanation"; and

(4) Citibank and Ms Mak owed Shine Grace a limited duty not to mislead.

79. Shine Grace further contends that the following matters were not accurately, adequately, and properly disclosed by Citibank and Ms Mak and/or positively misleading:

(1) The "black box" nature of the MTM calculations[7] or the fact that these calculations could not be independently verified.

(2) The TIPs, which Citibank and Ms Mak relied upon as sufficiently disclosed the risks, including those of MTM losses and implied volatility, were positively misleading given:

(a) The inadequacy of the disclosure on MTM risk.

(b) The overemphasis on HTM risk and absolute share price movement.

(3) The failure to disclose that there could be MTM losses on the ACs even where the share price remained above the AFP was especially misleading.

80. Third, misrepresentation. Shine Grace contends that Citibank and Ms Mak had misrepresented the risks of entering into the Disputed ACs in light of the market conditions on 15 and 16 October 2007. In particular, Shine Grace contends that Ms Mak had represented that its ACs position was very safe (even though there was an anticipated downturn in the market) because it would have been released from its open positions by the time of the anticipated downturn. Shine Grace submits that the message conveyed by Ms Mak to Mrs Chan was that all of Shine Grace's ACs would be knocked out before the anticipated market downturn and for that reason Shine Grace's position was very safe, and it was safe for Shine Grace to enter into further ACs ("**Alleged Representation**"). The relevant telephone conversation took place on 15 October 2007 at 3:19 pm.

81. Shine Grace contends that both Citibank (through the TIPs and its staff) and Ms Mak made misleading statements of half-truths by dedicating elaborate effort in describing risks or loss relating to absolute share price movements without adequate, if any, reference to substantial MTM losses and sudden margin calls irrespective of absolute share price movement. Further, Ms Mak had no reasonable basis to expect, or to encourage Mrs Chan to expect, the price of the underlying shares would reach Knock-out level within a short period of time and failed to inform Mrs Chan of the same. Lastly, Ms Mak could not have held an honest belief that Shine Grace's position would be very safe given that it was not investing in the ACs for the designed purpose as set out in the TIPs.

G. Citibank's and Ms Mak's defence in the main action

82. Citibank's and Ms Mak's positions have been succinctly summarised in the opening section of their closing submissions.

83. First, the Defendants did not owe the alleged duty to provide Shine Grace "full, accurate and proper" advice on the suitability and risks of its investments ("**Advisory Duties**").

(1) The Defendants did not assume legal responsibility to provide any advice or warnings on the suitability or risks of Shine Grace's investments. This is clearly set out in the relevant terms of the contract between them.

(2) Even if the Defendants provided recommendations, suggestions or opinions from time to time, this did not amount to an assumption of responsibility going beyond the terms of the banking contract, as such actions are expressly contemplated by the contractual terms.

84. Second, even if the Defendants owed a duty to advise Shine Grace on the risks of its investments, the Defendants were not in breach of such duties.

(1) The Defendants were not in breach of the alleged duty to advise Shine Grace on the effects of volatility on MTM values/margin calls. Such risk was clearly set out in the TIP sheets, which were made available to Mrs Chan since January 2004. Shine Grace's suggestion that the Defendants ought to have provided greater elaboration of the risk of MTM loss due to changes in implied volatility is unsustainable because (a) there was no such market practice at the time; (b) it was not required by the regulatory guidance; (c) the alleged disclosure sought is inherently inaccurate and likely to mislead investors; and (d) the disclosure sought is in any event of little use to retail investors.

(2) The Defendants were not in breach of the alleged duty to advise on the unsuitability of the Disputed ACs, because the Disputed ACs were not unsuitable for Shine Grace. As mentioned above, this was accepted by Mr Das, whose evidence destroyed this point completely.

85. Third, there is no causal link between the alleged breaches of duty and Mrs Chan's decision to enter into the Disputed ACs.

(1) Mrs Chan would have entered into the Disputed ACs even if the Defendants specifically drew her attention to the risk of MTM losses due to changes in implied volatility:

(a) As mentioned above, Mrs Chan took the view that the Disputed ACs would be knocked out during the anticipated market upswing. If so, margin calls would not have been a material risk to her. In the words of Mr Das:

" ...if she had a high probability or she had a high assurance that it knocked out, then clearly those other risks are irrelevant, like the mark-to-market risk. I would agree with that then."

(b) In any event, Mrs Chan did not underestimate the risk of margin calls. She understood and accepted the worst case scenario in terms of margin calls. She knew that substantial margin calls could come at any time and was willing and able to meet such margin calls. In the circumstances, Mrs Chan would not have been dissuaded by disclosure of the risk of a margin call due to changes in implied volatility.

(2) Similarly, Mrs Chan would have entered into the Disputed ACs even if the Defendants had attempted to warn her that those trades were "unsuitable" for her in light of her market outlook:

(a) Having entered into hundreds of ACs prior to 15 October 2007, Mrs Chan held strong views about her investment strategy, which was highly successful and had resulted in realised profits of about HK$180 million by then.

(b) She did not rely on the bank's advice, particularly advice on what trades she should or should not do. On the contrary, she expressly instructed Citibank's staff not to do anything to stop her from trading.

(c) This is particularly true on 15 and 16 October 2007, when Mrs Chan was keen to enter into further trades which she thought would be profitable.

(d) In the circumstances, it is entirely unrealistic to suggest that Mrs Chan would have changed her mind because of a formal warning by Ms Mak that the Disputed ACs were "unsuitable".

86. Fourth, Shine Grace is contractually estopped from asserting that the Defendants were under duties to provide full, proper and accurate advice concerning the suitability and risks of the Disputed ACs.

87. Fifth, Ms Mak did not misrepresent that Shine Grace's position would be very safe and that it would be very safe for Shine Grace to enter into further ACs. In any event, this could not have had any influence on Mrs Chan as she was the one who suggested that they were very safe.

H. Duty to advise

88. The starting point is this: the mere fact that the relationship between the parties is one of banker and customer does not mean the bank has a duty to consider the prudence of an investment transaction from the customer's perspective or to warn him of the risk involved: *Firth on Derivatives* §4.012.

89. Of course, in any given case, it is possible that a bank may assume responsibility to provide advice to a customer. However, the mere giving of "advice" does not necessarily mean that a bank has assumed legal responsibility for it. In *Chang Pui Yin & Ors v Bank of Singapore Limited* [2017] 4 HKLRD 458 at [29] Lam VP said:

" 29. … We accept that as a matter of law the provision of information (even if it could factually be characterized as the giving of advice) in a banking context does not necessarily import a full-fledged duty of reasonable care and skill on the part of the bank as if it is giving advice as a financial or investment advisor. We also agree with Gloster J [in *JP Morgan Chase Bank v Springwell Navigation Corporation*] that it is necessary to look at all aspects of the objective evidence of the relationship between the parties in order to determine the extent of the duty assumed by the bank in offering the recommendations or advices."

90. On the court's approach in determining whether a bank has assumed legal responsibility, Lam VP had this to say at [35] to [37]:

" 35. … As held by Lord Hoffmann in *Customs and Excise Commissioner v Barclays Bank plc* [2007] 1 AC 181 at [36], whether a defendant has assumed responsibility is a legal inference to be drawn from his conduct against the background of all the circumstances of the case. At [35], His Lordship said:

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

36. It is thus necessary for the court to examine the conduct of the salesperson against the facts and circumstances of each case before one can determine if responsibility had been assumed when recommendations were made …

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

91. One important aspect of the objective evidence in determining whether a bank has assumed legal responsibility to provide advice and owes a duty of care to its customer is the terms of the contract between them: *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] 2 Lloyd’s Rep 92 at [85]-[89]; *DBS Bank (Hong Kong) Ltd v San-Hot HK Industrial Co Ltd* [2013] 4 HKC 1 at [223].

92. In *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* at [85]-[89], David Steel J explained the various ways in which the contractual terms might impact on the issue of assumption of responsibility. At [89], the learned Judge concluded:

“ … the contractual provisions provide an evidential basis negating the coming into existence of a duty of care … Where the parties have purported to allocate by contract their respective roles and the risks involved in their relationship, this will in the normal run preclude any wider obligation from arising from a common law duty of care: *Henderson v Merrett* [1995] 2 AC 145.” (emphasis added)

93. Similarly, in *DBS Bank (Hong Kong) Ltd v San-Hot HK Industrial Co Ltd*, DHCJ Pow SC summarized the proper question to ask at [223]:

“… when one objectively analyze the things said and done by DBS’s staff to Madam Hao [the client] throughout their dealings, one has to firmly bear in mind the contractual context under which such things were said and done. That was an important, if not the most important, contextual scene. The proper question was: whether such things were said and done within the framework contemplated by the terms and scope of the banking services agreement as oppose to DBS assuming responsibilities over and above their contractual obligations stipulated in the express terms of the banking services agreement.” (emphasis added)

94. In *Chang Pui Yin & Ors v Bank of Singapore Limited* at [44(a)]-[44(b)], Lam VP reiterated the importance of examining the terms of the contract between the parties as follows:

“ (a) The extent of the assumption of legal responsibility for a statement is, as observed by Lord Hoffmann in *Customs and Excise Commissioner v Barclays Bank plc, supra*, facts and circumstances sensitive. The terms of the agreement between the parties is one of the relevant

circumstances and in some cases disclaimers have been held to be effective to negate the assumption of legal responsibility.

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

95. During his oral opening, Mr Jat SC properly accepted that a banker is under a general duty not to mislead. Subject to that, he submits that the terms of the contract between Citibank and Shine Grace are inconsistent with the alleged duty to advise which Shine Grace contends for. In this regard, Clauses 4.12(b) and (d) of the MDA are of particular significance:

" **ACKNOWLEDGMENT**

You understand and agree that:

…

(b) in respect of services rendered by us on a non-discretionary basis,

(i) you make your own judgment in relation to the transactions;

(ii) we assume no duty to give advice or make recommendations;

(iii) if we make any suggestions, we assume no responsibility for your portfolio or for any investment or transaction made.

…

(d) in either of the above cases…

(ii) any risks associated with and any losses suffered as a result of our entering into any transactions for you are for your account."

96. A similarly-worded Acknowledgment can be found in the RDS: see paragraph 51 above. The MDA and RDS are what Mr Shieh SC describes as second tier contractual documents.

97. The scope of Clause 4.12 is broad and its meaning is plain: Shine Grace should make its own judgment in relation to its investment transactions. Citibank and its staff disclaimed any duty to give advice or make recommendations and if suggestions were made by them, they assumed no responsibility for any investment made by Shine Grace. There is nothing in Clause 4.12 which limits the sort of advice, recommendations or suggestions which were intended to be covered by it. There is also nothing in Clause 4.12 which limits the situations

in which it was apt to cover. In this regard, this court finds Shine Grace's argument that (i) a distinction should be drawn between Shine Grace's "own judgment" and Shine Grace's "own *independent* judgment" and (ii) some limitations should be placed on its scope at paragraphs 231.1 and 231.3 of its closing submissions rather contrived and should be rejected. Shine Grace's argument at paragraphs 231.2 of its closing submissions is completely at odds with the express terms of Clause 4.12(b) (iii) and must similarly be rejected.

98. Mr Jat SC submits and this court agrees that the alleged duties to advise on (a) the suitability of the Disputed ACs or (b) the nature of the MTM calculations, the effect of volatility on the MTM value of the Disputed ACs, the possibility of sustaining MTM losses even where the share price remained above the AFP etc are simply inconsistent with the terms of Clause 4.12. Indeed, the alleged duties to advise are inconsistent with the terms of all the three tiers of contractual documents taken as a whole, including in particular those parts of the General Terms (first tier) and the TIPs (third tier) referred to in sections D and E above which are part of the objective evidence of the relationship between Citibank and Shine Grace that the Court can and should look at in order to determine the issue of assumption of responsibility.

99. Mr Shieh SC, on the other hand, relies on Clause 5.1 of the MDA and submits that the SFC Code of Conduct ("**SFC Code**") was expressly incorporated into the agreement between the parties for the purposes of a "derivative transaction or its underlying instrument" such as the Disputed ACs. As such, in so far as the SFC Code imposes a duty on a registered financial institution such as Citibank, including, for instance, a duty to act responsibly, diligently and carefully in providing advice or recommendations suitable to the client or a duty to ensure the client understands the nature and risks of a recommended transaction, the duty also became a contractual duty.

100. This is purely a matter of contractual interpretation and, with respect, this court is unable to accept the interpretation put forward by Mr Shieh SC.

101. Clause 5.1 of the MDA provided:

" **GOVERNING LAW**

5.1 Each derivative transaction or its underlying instrument or asset shall be subject to the rules, regulations, by-laws, guidelines and policies of all relevant governmental and other regulatory bodies and agencies, including but not limited to the applicable stock, commodity, futures or options exchanges or markets, if any, and the rules, regulations, by-laws, guidelines, policies and customary market practices as the same may be constituted from time to time at the applicable exchanges or markets, if any".

102. As its title makes clear, Clause 5.1 is concerned with the law governing the *"derivative transaction or its underlying instrument or asset"* rather than the parties to the transaction or the underlying instrument ie between a financial institution and its customers. Clause 5.1 subjects the transaction, instrument or asset to the relevant rules and regulations etc of relevant governmental and other regulatory bodies and agencies such as stock exchanges and markets as well as customary practices of those exchanges and markets. If Clause 5.1 was intended to have the effect submitted by Shine Grace ie all the duties imposed by the SFC Code on a registered financial institution shall be incorporated into the contracts between the

institution and its customers, the drafter of Clause 5.1 could easily have done so in clear and express terms. But that was not the case.

103. Further, it cannot be said that Clause 5.1 has the effect suggested by Mr Shieh SC by necessary implication. As submitted by the Defendants, there is no discernible commercial reason to incorporate all of the relevant rules, regulations and market practice applicable to a derivative transaction into the contract between Citibank and its customers. On the contrary, it would be pointless to do so. The example provided in the Defendants' opening submissions at paragraph 207 is a fair case in point. The Rules and Regulations of the Hong Kong Stock Exchange fall squarely within the phrase *"*rules, regulations…at the applicable exchanges*"* in Clause 5.1 but they are not concerned with the legal rights and duties of a financial institution *vis-à-vis* its customers. If so, why should Clause 5.1 be construed in a way so as to have such a pointless effect?

104. Lastly, while Clause 5.1 deals with the Governing Law of a *"derivative transaction or its underlying instrument or asset"*, it is well-established that the SFC Code does not have the force of law: *Ever-long Securities Co Ltd v Wong Sio Po* [2004] 2 HKLRD 143 at [51]; *Kwok Wai Hing Selina v HSBC Private Bank (Suisse) SA* unrep, HCCL 7/2010, 21 June 2012, Reyes J at [133]-[135]. Rather, it is primarily promulgated for the purpose of determining whether a person is a fit and proper person to be or to remain as a licensed or registered person under the Securities and Futures Ordinance: *DBS Bank (Hong Kong) Ltd v San-Hot HK Industrial Co Ltd* at [217]. Hence, this court is not satisfied that the SFC Code is within the ambit of Clause 5.1 or that the parties to the MDA, whether Citibank or Shine Grace, intended to incorporate it into the MDA for the purpose of defining the scope of Citibank's duties towards Shine Grace.

105. To conclude, this court is satisfied that the contractual terms, taken as a whole, are only consistent with the conclusion that Citibank and Shine Grace had agreed to deal with each other on the basis that Citibank did not assume any duty or responsibility to advise, no matter what recommendations or suggestions might have been provided to Shine Grace by Citibank in the course of their relationship.

106. This court now turns to examine whether "other relevant factual circumstances surrounding the dealings between the parties" support Shine Grace's contention that the Defendants had assumed legal responsibility to advise which went beyond the terms of the contractual arrangement.

107. In this regard, Mr Shieh SC places heavy emphasis on the Suitability Confirmation Letters[8] issued by Citibank to Shine Grace from time to time. In the Suitability Confirmations dated 31 August 2006 and 20 April 2007, under the heading "Type of relationship", Citibank expressly confirmed that "You seek predominantly investment advisory services from us". Mr Shieh SC submits that this is an express confirmation of the nature of the relationship between Citibank and Shine Grace as "investment advisory". Similarly, in various bank statements and transaction confirmations sent by Citibank to Shine Grace, Shine Grace's account was described by Citibank as "Investment Advisory" and "Investment Advisory Portfolio".

108. While Shine Grace cannot point to any definition of the "Investment Advisory" classification by Citibank in the contemporaneous documents, it prays in aid paragraph 13 of the Re-re-amended Defence and Counterclaim which states that "Advisory" most accurately

described Mrs Chan's investment relationship with Citibank.[9] The first of the four categories of relationships was pleaded as:

" 1. Advisory

In this case, the client generally wishes to be advised or informed of various products that are suitable and consistent with the stated investment objectives …"

109. It does not appear to this court that paragraph 13 of the Re-re-amended Defence and Counterclaim takes the matter any further. Shine Grace might well wish to be advised or informed of investment products suitable and consistent with its investment objectives and Citibank might well be willing to provide such advice or information, but it is a quantum leap to suggest that therefore Citibank must be taken to have assumed legal responsibility for providing such advice or information which went beyond the contractual arrangement between the two which negated such legal responsibility. If, as held by Lam VP at [37] in *Chang Pui Yin & Ors v Bank of Singapore Limited*, the giving of advice *per se* does not answer the question as to assumption of responsibility for such advice, it is difficult to accept the mere classification of the relationship as "Advisory" or "Investment Advisory" would answer the question.

110. But the matter does not stop there. The evidence before this court shows that Mrs Chan was a very strong-minded as well as confident investor. In her own words during a telephone conversation with Ms Mak on 7 September 2007, Mrs Chan had navigated the stock market for over 30 years. The evidence also shows that Citibank's staff were on more than one occasion expressly asked not to interfere with her investment decisions. This is reflected in a Call Detail Report dated 24 November 2014 of what transpired at a dinner between Mrs Chan, Ms Mak and Dr Yau, as well as another Call Detail Report dated 16 August 2016 of what was discussed transpired at a dinner between Mrs Chan and Ms Mak.

111. Indeed, the evidence shows Mrs Chan was too confident and perhaps impatient to seek or listen to advice on the suitability of ACs from Citibank, particularly advice on the risks due to market movement, the method for the calculation of MTM values or the failure to meet margin calls. In this regard, Ms Mak summed it up at paragraphs 44 and 45 of her witness statement as follows:

" 44. As Mrs Chan became more experienced in trading Accumulators, she developed her own view. Mrs Chan would call me and ask for pricing on certain stocks which were not covered by the Bank. Where Mrs Chan had a bullish view of a stock, she would enter into an Accumulator with that stock (as the underlying stock) even when the spot price of the stock exceeded the Bank's target price.

45. Throughout the course of our relationship and particularly as it developed over the years, Mrs Chan had no patience to listen to the explanation of product details on products she had been investing into for years, particularly each time when she placed an order. From past experience, she would just hang up whenever we tried to take her through product risk disclosure or to repeat the details of her order on the phone. She would then ring back later, complaining we were too slow in placing her orders and instructing us to dispense with repeating the risk disclosure each time she placed orders in respect of products that she was familiar with. Mrs Chan felt that any delay in putting through and executing her orders

would result in less favourable executed price of the underlying stock particularly in a fast moving market…"

112. As Ms Mak pointed out during cross-examination on Day 8, what Mrs Chan wanted was someone smart enough who could execute trades quickly, efficiently and accurately. She was not looking for a person to advise her on what trades she should or should not do or what risks those trades involved.

113. Looking at all "other relevant factual circumstances" in the round, this court is satisfied that Citibank did not assume legal responsibility to advise Mrs Chan on the suitability and risks of ACs, as this court finds, on the evidence, that Mrs Chan did not require such service, at least in relation to the Disputed ACs.

114. Lastly, Shine Grace submits that Citibank was subject to an "intermediate" common law duty of explanation to the effect that

" where a banker chooses to volunteer an explanation in respect of a financial product, the banker is subject to a duty to explain fully and accurately the nature and effect of the product."[10]

115. Reliance was placed by Shine Grace on *Bankers' Trust International Plc v PT Dharmala (Sakti Sejahtera)* [1996] CLC 518, *Crestign Ltd v National Westminster Bank & Royal Bank of Scotland* [2014] EWHC 3043 (Ch) [2015] 2 All ER (Comm) 133 and *Wani LLP v Royal Bank of Scotland Plc* [2015] EWHC 1181 (Ch) in support of its submission.

116. However, the proposition that there exists such a free-standing common law duty, *irrespective* of whether a banker has assumed legal responsibility to advise its customers in light of the contractual arrangement between the parties and all other relevant factual circumstances, is inconsistent with the approach adopted by the Court of Appeal in *Chang Pui Yin & Ors v Bank of Singapore Limited* which is of course binding on this court. The proposition is also inconsistent with the reasoning in *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* and *DBS Bank (Hong Kong) Ltd v San-Hot HK Industrial Co Ltd*, which, albeit not binding, this court finds persuasive. In view of this court's conclusion at paragraph 105 above, this court would similarly reject Shine Grace's submission that Citibank was subject to an "intermediate" common law duty of explanation.

I. Breach of duty

117. Shine Grace's complaints of breach of duty by the Defendants have already been set out in section F above. For ease of reference, they are summarized below:

(1) Breach of duty to advise on the (un)suitability of the Disputed ACs.

(2) Breach of duty to provide reasonable, fair, accurate and honest advice and duty not to mislead. In this regard, Shine Grace contends that the following matters were not accurately, adequately, and properly disclosed by Citibank and Ms Mak and/or were positively misleading:

(a) The "black box" nature of the MTM calculations[11] or the fact that these calculations could not be independently verified.

(b) The TIPs, which Citibank and Ms Mak relied upon as sufficiently disclosed the risks, were positively misleading given:

i. The inadequacy of the disclosure on MTM risk.

ii. The overemphasis on HTM risk and absolute share price movement.

(c) The failure to disclose that there could be MTM losses even where the share price remained above the AFP was especially misleading.

118. While the Defendants contend they were under no duty to advise Shine Grace, and this court agrees, they nevertheless go onto submit that they have fully and properly advised Shine Grace on the suitability of and the risks associated with the Disputed ACs. It goes without saying that the Defendants also submit they have not misled Shine Grace in any way.

(Un)Suitability of the Disputed ACs

119. To put Shine Grace's complaint in its proper perspective, it is useful to remind oneself at the outset that Mrs Chan's trading of ACs with Citibank has been highly profitable. On Shine Grace's own calculation, the net realized profit from 2004 to 2007 (excluding the Disputed ACs) was over US$22.6 million (~HK$180 million). Out of that, a whopping US$18.634 million (~HK$146 million) was made in 2007. According to the Defendants' calculation, which was not contradicted, Shine Grace made a profit of around HK$80 million in September and earlier October 2007 alone. It is also useful to bear in mind there is no suggestion that the Product Description, Investment Rationale and Investment Objectives stated in the TIPs of the Disputed ACs were materially different, if at all, from those stated in the TIPs of the earlier ACs which were profitable. If so, what was so unsuitable about the Disputed ACs that the Defendants were supposed to advise?

120. In the "Product Description" section of the TIPs, Citibank set out the strategy for which the Disputed ACs were suitable and originally designed.

" This strategy comprises a series of Forward contracts and is suitable for clients who wish to accumulate a long position for a specific number of units of an underlying security, at a predetermined "Accumulating Forward Price" (AFP), which is lower than the spot price on trade date. This strategy accumulates the shares from but excluding Trade Date up to and including a specified Guaranteed Period End Date even if Trigger Event occurs. At end of the Guaranteed Period, the strategy will accumulate shares ONLY IF the Trigger Event has not occurred. It is suitable for clients who expect the price of the underlying security to remain stable at or above the current spot level as of trade date for the duration of the contract. However, if the price of the underlying security declines below the AFP on settlement dates, the client could suffer significant losses." (emphasis added) [12]

121. In its closing submissions, Shine Grace seizes upon this part of the TIPs in support of its submission that the Disputed ACs were manifestly unsuitable for the following reasons.

122. First, Mrs Chan's market outlook and strategy immediately prior to entering the Disputed ACs in October 2007 were inconsistent with the Product Description and Investment Rationale of ACs as stated in the TIPs. This is because her expectation of an imminent market correction after the Hang Seng Index had reached 30,000 or 32,000[13] did not accord with any expectation that "the price of the underlying security to remain stable at or above the current spot level as of trade date for the duration of the contract."

123. Second, the volume and size of the Disputed ACs were unprecedented and could not have been supported by Mrs Chan's personal financial resources. The Shenhua ACs were particularly unsuitable as Mrs Chan was unfamiliar with Shenhua yet the MAIA of the 2 Shenhua ACs was over HK$1.1 billion and the initial margin was around HK$200 million.

124. For ease of reference, details of the Disputed ACs are set out below:

Citibank Ref No.	Trade Date	Underlying Shares	**AFP (HKD)**	**KO Level (HKD)**	Daily Number of Shares	Step-up Daily Number of Shares	Initial Margin (HK$)	MAIA (HK$)
EA 71015066	15 Oct 2007	Sinopec	10.3819	12.7432	20,000	40,000	15,323,684.40	102,157,896
EA 71015026	15 Oct 2007	Petrochina	14.9900	18.4600	50,000	100,000	55,313,100.00	368,754,000
EA 71015126	15 Oct 2007	Shenhua	45.4418	55.1793	30,000	60,000	120,729,774.24	670,720,968
EA 71016109	16 Oct 2007	Shenhua	45.9400	55.2600	20,000	40,000	81,368,928.00	452,049,600
EA 71016024	16 Oct 2007	Petrochina	16.0368	20.1199	50,000	100,000	59,175,792.00	394,505,280
EA 71016137	16 Oct 2007	Petrochina	15.7865	19.8060	50,000	100,000	58,252,185.00	388,347,900
EA 71016061	16 Oct 2007	Sinopec	10.7526	13.2942	10,000	20,000	7,935,418.80	52,902,792
EA 71016018	16 Oct 2007	Sinopec	10.6583	13.1775	30,000	60,000	23,597,476.20	157,316,508
EA 71016037	16 Oct 2007	China Life	42.4683	52.6338	25,000	50,000	94,024,816.20	522,360,090

125. In summary, the total MAIA of the Disputed ACs was around HK$3.109 billion. If one disregards the first 2 Disputed ACs ie EA71015066 and EA71015026, which were knocked out on the same day, the total MAIA would be around HK$2.6 billion. If one further disregards the 6th Disputed AC ie EA71016137 knocked out on 1 November 2007, the MAIA came to around HK$2.25 billion. The initial margin of all the Disputed ACs, set at either 15% or 18% of the MAIA, was around HK$515 million.

126. Third, the Defendants knew of the steady and gradual "changing of the guard" in the leadership of the Bonds Group such that the assets of BSI were to be separated from

Mrs Chan's personal trading. Hence, trades of the size of the Disputed ACs were plainly unsuitable.

127. With respect, none of the reasons put forward establish that the Disputed ACs were unsuitable for Mrs Chan.

128. First, as submitted by the Defendants, ACs are not only suitable for investors who intended to accumulate shares over the *entire* one-year duration of the ACs. As stated in the "Investment Objectives" section of the TIPs:

" You seek:

- To accumulate a long position in the underlying security over a period of time.

- To take delivery of the underlying security at potentially lower price than spot price on trade date.

- To accumulate a minimum amount of shares over the guaranteed period."

129. All the Disputed ACs contained a guaranteed accumulation period of one month even if the ACs were knocked out before then. This allowed Shine Grace to accumulate at least one month's worth of the underlying stocks at a substantial discount — in the case of the Disputed ACs, the AFP was fixed at between 83.10% to 84.80% of the spot price so the discount would be between ~ 15% to ~ 17%. If the share price rose to 102% of the spot price and the AC was knocked out, which happened to 3 of the Disputed ACs, Shine Grace could have sold those shares at a significant profit ie the discount plus 2%. This is a beneficial result for any investor. It is also consistent with one of the Investment Objectives set out in the TIPs.

130. Importantly, it is also consistent with one of Mrs Chan's trading strategies as established on the evidence. In response to this court's question on Day 7 regarding a phone conversation between Mrs Chan and Ms Mak on 15 October 2007 at 2:47 pm, Ms Mak testified, at that time, Mrs Chan hoped the ACs would be knocked out quickly so she could earn a quick profit and then use the money to enter into another AC. This court accepts Ms Mak's testimony and shall so find. This strategy has worked well for Mrs Chan in the past. According to Schedule 3 of the Re-re-amended Defence and Counterclaim by Citibank, of the 282 ACs traded by Mrs Chan since January 2004, only 12 were not knocked out and she had made a handsome profit out of them.

131. Second, Mrs Chan's trading strategy was not based solely on the expectation that the Disputed ACs would all be knocked out during the guaranteed period. Although Mrs Chan envisaged a market correction sometime in the future, she did not think it would be as serious as it eventually turned out to be, as shown by the figures in paragraph 4 above. This can be seen from the transcripts of phone conversations on 15 October 2007 at 10:19 am, 16 October 2007 at 11:13 am where Ms Mak and Mrs Chan exchanged their views on the market outlook. As Ms Mak pointed out in her evidence, Mrs Chan did not have a bearish view of the market in the medium to long term. On the contrary, Mrs Chan had a positive long-term outlook in relation to the underlying shares in question and the market as a whole, so she was

prepared to accumulate the shares even if the Disputed ACs were not knocked out. Again, this court accepts Ms Mak's testimony and shall so find.

132. Concerning the alleged unprecedented volume and size of the Disputed ACs, they were in fact not that unprecedented.

133. One example given by the Defendants is that Mrs Chan entered into 34 ACs in September 2007, including 3 China Life ACs on 28 September 2007 with a total MAIA of ~ HK$1.3 billion. This is to be contrasted with the MAIA for the 2 Shenhua ACs she entered into on 15 and 16 October 2007 which was ~ HK$1.1 billion. Another example comes from Shine Grace's own internal records. Prior to the Disputed ACs, its maximum exposure came close to or hit the HK$2 billion mark three times: on 14 September 2007 (at HK$1.97 billion), 17 September 2007 (at HK$2.12 billion) and then on 5 October 2007 (at HK$2.014 billion). This was not much smaller from the MAIA of the Disputed ACs if one disregards the first two which were knocked out on the same day ie ~ HK$2.6 billion[14]. There is no suggestion that Shine Grace's outstanding ACs as at 14, 17 September or 5 October 2007 were unsuitable by reason of their volume and size. It lies ill in Shine Grace's mouth to argue the Disputed ACs were unsuitable owing to their volume and size whereas those earlier profitable ACs were not.

134. A similar response can be made of the argument that the Defendants knew of the "changing of the guard" in the leadership of the Bonds Group such that the assets of BSI were to be separated from Mrs Chan's personal trading and hence the size of the Disputed ACs were plainly unsuitable. Shine Grace claimed the "changing of the guard" started by early 2007 when Mrs Chan evinced a clear intention that BSI was to be kept separate from Shine Grace's trading. But the fact remains that Mrs Chan very actively traded in ACs in 2007, having entered into over 100 ACs with Citibank prior to the Disputed ones. Nevertheless, instead of reducing the size and volume of her AC trades, Mrs Chan's maximum exposure on her AC trades gradually increased from around HK$190 million in January 2007 to HK$1 billion in March 2007 and reached the HK$2 billion level in September and early October 2007, without showing any signs of difficulty in financing her trading of that size and volume. In these circumstances, it can hardly be said the so-called "changing of the guard" had rendered the Disputed ACs unsuitable for Shine Grace.

135. To conclude, this court finds the Disputed ACs were not unsuitable and that Shine Grace's complaint in this regard is unfounded.

MTM calculations, risks of MTM losses due to implied volatility and MTM losses where spot price was above AFP

136. Concerning MTM calculations, much is agreed by the two experts:

(1) The MTM value of the Disputed ACs would have been calculated using financial models.

(2) The financial models would use a number of inputs to generate the value of the contracts at a given point of time.

(3) The MTM represents the credit exposure of the parties to each other in case of non-performance under the contract. The MTM is the approximate amount that the bank

stood to lose if the investor defaulted, in the absence of any form of credit enhancement, either by way of collateral or margin.

(4) In the present case, the Disputed ACs were subject to credit enhancement in the form of margins: initial margin and additional margin, if and when the value of the Disputed ACs changed.

137. As explained in section E above and as is clear from the evidence, the financial models used by banks to calculate the MTM value of ACs are highly complex and sophisticated and not readily available to outsiders. The inputs used to generate the MTM value of an AC at a given point of time include the spot price of the underlying shares, their implied volatility, their expected dividend, interest rate and the remaining duration of the contract. Hence, in theory and in practice, the MTM value can and does vary from time to time for the duration of an AC since, at the very least, the spot price of the underlying shares is likely to change from time to time, even though the extent of which may not be substantial in a relatively stable market.

138. Shine Grace seizes upon this, as well as Ms Mak's description of MTM calculations as "black box" in her phone conversation with Ms Lai and submits that, at the very least, the fact that the Disputed ACs involved a black-box calculation ought to have been drawn to Mrs Chan's attention which the Defendants have failed to do so. By reason of the Defendants' failure, the investor ie Mrs Chan would not have been in a position to gauge the extent of MTM losses (and cater for cash flow to meet sudden margin calls) in advance, and hence could not have made an informed and calculated decision whether or not to enter into the Disputed ACs.

139. Relying on Mr Das' criticisms of Citibank's risk disclosure and his suggestion that Citibank should have provided more complete disclosure of *inter alia* an investor's exposure to implied volatility risk, both qualitative and quantitative, in section H of his Expert Report and section F of the Joint Expert Report, Shine Grace further submits that the TIPs have overemphasized the HTM risk and absolute share price movement but failed to (i) sufficiently explain the nature of implied volatility and its impact on the value of an AC and potential margin calls; (ii) adequately disclose MTM risks, including the possibility that there could be MTM losses even when the spot price remained above the AFP; (iii) provide any quantitative analysis on MTM risks.

140. To put these submissions in their proper perspective, one should first set out what the Defendants have disclosed in the TIPs under the section "Risk Information":

" The fluctuations of the equity markets can be significant. <u>The value of the various components embedded in this strategy is affected by a number of factors including but not limited to, general market forces, price of the underlying security, interest rates, the volatility and the time remaining to maturity</u>. All of these will have an impact on the overall value of the strategy …

Leverage increases risk significantly. A relatively small market movement will have a proportionally larger impact on the funds you have deposited or may have to deposit … <u>A variety of factors (such as option volatility, interest rates, time, etc) affect the price/value of this strategy at any point in time and since this strategy will be marked to market, any change in these factors can have a significant adverse impact on the value of your transaction.</u>

Standard top-up and sell-out rules apply and you may be required at short notice to make additional margin deposits or liquidate your position at a significant loss." (emphasis added)

141. It seems to this court that the TIPs have summarized, in "layman's" language, what the parties' experts have set out extensively in their reports concerning the risk of MTM loss, how such loss can arise and its impact on the margin requirements. In particular, the TIPs inform the investor that MTM loss can occur, and additional margin calls may follow, if there is an adverse variation to *any one of the factors* that go into valuing an AC, including, in particular, a drop in the spot price of the underlying share and, in the event of market fluctuation, an adverse change to implied volatility. Of course, with the benefit of hindsight and if one compares the TIPs with the hundreds of pages of expert reports adduced in these proceedings, one can always find fault with the TIPs and make the point that the TIPs could have explained this or that concept, such as implied volatility, or disclosed this or that risk, such as MTM risk, more fully. But hindsight is not a very reliable guide.

142. Given that the MTM value of an AC depends on a variety of factors, some of these factors can and do vary in the 12-month duration of the AC, and the extent of variation of these factors eg share price movement and implied volatility, for the entire 12 months are difficult to predict correctly before an AC is entered into, this court does not see what useful purpose it would serve for the Defendants to emphasise to Mrs Chan, prior to her entering into the Disputed ACs, that the calculation of their MTM value was very complicated and was akin to a black box. In any event, one can readily tell from the TIPs that it was a complicated process and that should there be an adverse change to the MTM value, an investor might be required to make additional margin deposits at short notice or to liquidate his/her position at a loss.

143. In response to Mr Das' criticism and Shine Grace's submissions aforesaid, the Defendants make a number of points in reply. This court finds those points persuasive and holds that they render Shine Grace's complaint of inadequate disclosure by the Defendants wholly unjustified.

144. First, the additional disclosure suggested by Shine Grace is unsupported by market practice or regulatory guidance.

145. As far as market practice is concerned, this is confirmed by Mr Malik who explained in his Expert Report that he was not aware of any bank term sheets for structured products provided to investors at the material time which included various MTM values for the contract's duration or which explained in detail how implied volatility affected MTM values, how it was derived or the quantum effect of changes in implied volatility on the value of an AC and its margin requirement. Mr Malik further explained it would be unusual to provide quantitative scenario analyses of potential MTM values on different dates as such analyses would be rife with assumptions and could be proved wrong by market events. This court accepts Mr Malik's explanation.

146. In court, Mr Das also accepted there was no market practice as such and that he had not seen any documentation created by financial institutions at the material time which set out a sensitivity analysis on implied volatility. This court should add that no documentation has been adduced in evidence in these proceedings which contained sensitivity analysis on implied volatility or the additional disclosure suggested by Shine Grace.

147. Concerning regulatory guidance, suffice it to note that, even after the 2008 financial crisis, the Hong Kong Monetary Authority ("**HKMA**"), in their letters dated 22 December 2010 and 31 October 2011 to Authorised Institutions setting out its expected standards of conduct for those institutions engaged in selling accumulators, did not specifically require banks to explain the concept of implied volatility and its role in the calculation of MTM values or to set out scenario analyses showing the effect of changes in implied volatility over time.

148. The parties disagree on who has the burden of proving market practice. It seems to this court the point regarding the absence of market practice (or regulatory standard) is not so much about which side has the burden of proving an established market practice or regulatory standard on risk disclosure. The point is simply that Shine Grace's criticism of the Defendants' risk disclosure to customers cannot be justified by reference to any market practice prevailing in 2007 or the regulatory standard set by the HKMA afterwards.

149. Second, Shine Grace's suggested additional explanation of the concept of implied volatility and scenario analyses setting out the effect of changes to implied volatility on MTM value are more likely to confuse than to enlighten investors.

150. The difficulty in seeking to explain the concept of implied volatility is self-evident. All one has to do is to go through the transcript of the "top-up" examination-in-chief of Mr Das in the morning of Day 10 to appreciate this. In response to a question by this court, Mr Das accepted that investors, sophisticated or not, would have difficulty understanding the detailed explanation provided by him earlier on in the witness box, as illustrated by the following exchange between Mr Das and the Court:

"Court: Mr Das, can I ask you one question. If you are going to explain these concepts to a retail investor, high net worth, very rich, would you explain it in these terms? Do you expect the high net worth retail investors, seriously, would understand you?

A: Your Lordship, I don't think that is — you are absolutely correct, it wouldn't be explained in those terms."

151. Mr Das has himself prepared a Suggested Sensitivity Analysis for Changes in Implied Volatility at Annexure 4 of his Expert Report ("**Sensitivity Analysis**"). He also contended that a chart of implied volatility sensitivity prepared by Mr Malik ("**Chart**") and set out in paragraph F.30 of the Joint Expert Report could have been done and would have been useful to investors before they entered into an AC.

152. However, the Defendants submit and this court agrees that the Sensitivity Analysis and the Chart are unlikely to be helpful to investors in understanding implied volatility risks over and above what has already been disclosed in the TIPs. There are several reasons for it.

153. The first reason is that investors would not be able to understand the Sensitivity Analysis and the Chart unless they first have a workable understanding of the concept of implied volatility and what is meant by a percentage increase (or decrease) in implied volatility in the first place. The following exchange during cross-examination between Mr Das and Mr Dawes on the Sensitivity Analysis fairly illustrated this problem:

"Q: As someone who doesn't understand the concept of implied volatility — I mean, the sensitivity analysis that the bank has conducted on its term sheets, as a matter of fact we know, we focus on share price, we focus on duration, so an investor can use pen and pencil and a calculator to verify those figures there.

On this table, for an ordinary private banking investor of accumulators, first of all, they don't usually have a concept of implied volatility. So in the first place, you would have to explain it to them?

A: Yes, you would.

Q: It is also something that is not easily conceptualised, if I can put it this way. It is expressed in percentage terms and you've got to basically compare one point to another?

A: That would depend on the investor. I can't generalise and say when an investor to understand it or not. It would depend on their educational background and a bunch of other things."

154. Of course, different investors have different educational background and level of understanding of structured products. But it does seem far-fetched, and unsupported by evidence, to suggest a retail investor, even a sophisticated, experienced, high net worth one, would be able to comprehend something like the Sensitivity Analysis or the Chart without a serious lecture by someone equally knowledgeable as Mr Das or Mr Malik.

155. The second reason is that MTM sensitivity analysis involves the provision of MTM values for various scenarios at various points in time in the future for which, *ex hypothesis*, there is no actual market data at the time an AC was entered into. Because of that, the analysis necessarily depends on the making of a broad range of assumptions. It goes without saying that the analysis provided to an investor prior to an AC may turn out to be inaccurate if the assumptions are later shown to be incorrect.

156. For instance, the Sensitivity Analysis proposed by Mr Das assumes all variables (other than spot price, time remaining to maturity and implied volatility) are held constant while the volatility assumed is held constant for the remaining term of the AC. If so, the figures of MTM gains and losses set out in the analysis will turn out to be inaccurate if any of the assumed constant changes. This was frankly acknowledged by Mr Das in cross-examination.

157. The third reason is that valuation of an AC is a dynamic process which depends heavily on the fluctuation of spot price of the underlying shares. This is the point illustrated in paragraph F.9 and section K of the Joint Expert Report and emphasized by Mr Malik who testified during cross-examination that an adverse change to the MTM value of an AC was primarily driven by a drop in the spot price:

"A: Yes. I guess my bemusement is from the fact that we are spending so much time talking about volatility, whereas the real prime driver for these contracts is price, and I agree with you that volatility can have an impact, and it is technically possible for the value of a contract to fall by virtue of volatility changing and not price, but you are then referring these to an actual call that was made by Citibank to the client, and I can demonstrate, based on the chart in F.9, that the prices of these instruments was falling at the same time. So you can see the reason for the margin call was not the volatility; it was a combination of the fact that perhaps

volatility rose at the beginning, but the prime driver of these so-called margin calls would have been the fact that the price of the contracts fell as a function of share prices falling."

158. The potential for a sensitivity analysis to mislead or confuse investors was clearly explained in Mr Malik's examination-in-chief in the morning of Day 11:

"A: … So you can see the issue that a bank might have in producing sensitivity analyses in the future, which is based on several assumptions, most of which are likely to come unstuck in the future. The values are going to be frozen in time and, when compared with the actual values at the relevant time by the investor, could cause confusion, because when you look at the mark-to-market values that actually take place at that time, and you compare them with the chart, notwithstanding the fact that the chart that was provided at the outset had the caveats to suggest that these were all hypothetical, but it is a number that they could reference against, and they look to see these numbers to be completely different, it creates more confusion. And from a bank's perspective, it creates potential issues because you are potentially misleading the client, because you are providing them with a scenario which is likely not to come true.

And I guess the point of all of this, my Lord, is, what is it that you are actually trying to convey to the investor? If the point is that you're trying to let the investor know that you have a mark-to-market obligation, and this mark-to-market of the contract will be impacted by various constituent risks, such as price, interest rates, volatility, et cetera — well, my Lord, they already do that in the term sheet. They provide you with the ingredients. The point is, why is it, a bank might ask, that a retail investor wants to know the granularity of the impact of each of these constituent risks? If they just want to know the mark-to-market, we can give that to them.

MR DAWES: Can you just help me with this. I understand from the question that we discussed with Mr Das yesterday that we can end up in a scenario where, come six months after you enter into the contract, the input to these charts are completely correct, you find the right column and the right row, but the figure can be totally different. We discussed that yesterday.

A: It could be, in the sense that you have to be an oracle of the highest order to have first of all predicted all the market inputs to be precisely what transpires in reality in the distant future. But some aspects of the market data may have moved in such a way that the actual valuation that is extracted from the model at that time might be different, and that creates more confusion. I mean, that is a hypothetical scenario of the highest order, because you are assuming at the first instance that you can predict market prices in the future, which is impossible."

159. This court accepts Mr Malik's testimony.

160. This problem was also recognised by Mr Das who ultimately acknowledged the suggested sensitivity analysis can only be used for the purpose of illustrating that changes in implied volatility could have an adverse impact on the MTM value:

"Q: … So your suggestion is, do something like this, give it to a retail investor, with a number of assumptions in this table, and the figures at the end of the day, six months later, could come out to be totally different, even if all your assumptions are correct —

A: That's correct, and that would be —

Q: — and you would say that is helpful for the purpose of verifying the figures from the bank?

A: It would be — no — it would be — I did not say that.

If you read the joint expert report and my report, it's clear that what I was saying is they would know the liquidity claims that could be made on them potentially. I think I accept that these numbers could be different to what the actual ones are. I'm not disagreeing with you on that. What I'm saying is on day one, even the most rudimentary investor would understand that leaving share price to one side, if there was a change in this variable — which I may or may not fully grasp — then what would happen is there would be a mark-to-market loss which would result in a margin call. That is the information that would be conveyed."

161. But the suggested sensitivity analysis is wholly unnecessary for this purpose. The information is already set out in the TIPs. If so, the suggested MTM sensitivity analysis provides no added value to an investor. Instead, as Mr Malik pointed out, if the investor is really interested in finding out the impact of volatility on the MTM value of an AC, the easiest way would be to ask the bank to provide MTM valuations on a regular basis.

162. Lastly, Shine Grace complains that the lack of disclosure that the ACs could show MTM losses even where the spot price had dropped but remained above the AFP, which both Mr Das and Mr Malik agreed was possible, was especially misleading.

163. This court does not find this complaint at all valid. The TIPs have clearly disclosed the MTM value of an AC can be affected by *inter alia* the price of the underlying security, meaning there could be MTM losses (as well as additional margin calls) as long as the spot price of the underlying share has dropped. Obviously, the bigger the drop, the bigger the MTM losses. As illustrated by the example given by Mr Malik, there could be MTM losses if the spot price dropped from $100 to $81 but was still above the AFP of $80. The reason can be found in this exchange between the court and Mr Malik:

"COURT: Mr Malik, you just used an example of buying shares at $100 and the share price dropped to 81 but still $1 above AFP, there would be a mark-to-market loss.

A: Yes, my Lord.

COURT: But if the AFP is only 80, you are not buying it at 100, you are buying at 80.

A: That's correct.

COURT: So how –

A: So you would have no realized loss, in the sense that you haven't actually bought anything at that time.

COURT: So could you explain to me why, when the spot has dropped from 100 to 81, but $1 above AFP, the mark-to-market value would drop?

A: My Lord, because the mark-to-market on day one is calculated on the basis of stock prices being at 100.

COURT: I see.

A: So when that comes down, the value of the –

COURT: That's just the way MTM is –

A: That's the value of the contract has gone down.

COURT: So that explains –

A: Why you can be above AFP, still have a margin call and it has nothing to do with volatility, or it may.

COURT: Thank you."

164. In any event, as submitted by the Defendants, this complaint is highly artificial as there is no real connection between this complaint and what actually happened with the Disputed ACs. What actually happened was that the spot prices of the underlying shares had fallen well below AFP when those 6 Disputed ACs were finally closed out on 22 January 2008, as shown by the following table.

Date of ACs	**Underlying share**	**Spot at inception (HKD)**	**AFP (HKD)**	**Spot at close out (HKD)**	% difference (initial spot and spot at close out)	**% difference (AFP and spot at close out)**
15 October	Shenhua	54.0794	45.4418	38.5	-28.8%	-15.3%
16 October	Sinopec	12.9191	10.6583	7.65	-40.8%	-28.2%
16 October	Sinopec	13.0335	10.7526	7.65	-41.3%	-28.9%
16 October	Shenhua	54.1800	45.9400	38.5	-28.9%	-16.2%
16 October	Petro China	19.7254	16.0368	9.62	-51.2%	-40.0%
16 October	China Life	51.6018	42.4683	27.6	-46.5%	-35.0%

J. Misrepresentation

165. The misrepresentation claim is wholly devoid of merits and can be disposed of quickly.

166. Shine Grace's claim for misrepresentation consists of: (i) misrepresentation at common law, (ii) under the Misrepresentation Ordinance, Cap 284 and (iii) under section 108 of the Securities and Futures Ordinance, Cap 571. In each case, Shine Grace must establish that:

(1) Ms Mak made the Alleged Representation;

(2) the Representation was an actionable statement of present or past fact; and

(3) the statement was a "but for" cause of the Disputed ACs.

Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc [2011] 1 Lloyd's Rep 123 at [81]-[87], [153]-[199]; *DBS Bank (Hong Kong) Ltd v San-Hot HK Industrial Co Ltd* [2013] 4 HKC 1 at [16].

167. First, in determining the meaning of an alleged representation, as in all matters in law, context is paramount. The test is what a reasonable person would have understood from the words used in the context in which they were made: *IFE Fund SA v Goldman Sachs International* [2006] 2 CLC 1043 at [50].

168. For the present purpose, the context was this:

(1) The telephone conversation took place on 15 October 2007 at 3:19 pm, near close of market. At the time, the first two ACs entered into earlier that day ie the Sinopec and Petrochina ACs, were likely to be knocked out and were eventually knocked out on the same day.

(2) Mrs Chan and Ms Mak were not discussing any further AC trades. What happened during that conversation was that Ms Mak and Mrs Chan were only discussing the trades which had already been done. There was no evidence that during that conversation, Mrs Chan had already intended or even contemplated doing the Disputed ACs the next day ie 16 October 2007. This was confirmed by Ms Mak in the witness box.

(3) It was Mrs Chan who said "Of course, we were very safe" and all Ms Mak did, which she accepted in cross-examination, was that she "went along with what [Mrs Chan] said" and agreed with her that "of course we are safe".

169. If one reads the transcript of the relevant conversation properly or listens to the voice log in context, it is clear, and this court finds, Ms Mak did not make the Alleged Representation that all of Shine Grace's accumulator positions would be knocked out before the anticipated market downturn and that for this reason Shine Grace's position would be very safe and it was very safe to enter into further ACs including the Disputed ACs.

170. Second, what Ms Mak said to Mrs Chan during the said telephone conversation was a statement of opinion relating to future market movement. It is trite law that such statements are not actionable unless the opinion is not honestly held: *Chitty on Contracts* 32nd Ed Para 7.007-7.008. There is no evidential basis for Shine Grace to suggest that Ms Mak did not honestly hold the opinion she expressed in that telephone conversation. All that Shine Grace can say in their closing submissions is that Ms Mak "could not have honestly held such

opinion and/or did not have reasonable or any grounds for holding the same". That is really no more than a bare assertion on the part of Shine Grace.

171. Third, Shine Grace failed to establish the necessary causal link between what Ms Mak said and Mrs Chan's decision to enter into the Disputed ACs. As stated above, it was Mrs Chan who expressed her view to Ms Mak that "we were very safe" and Ms Mak was only going along with Mrs Chan. This is wholly insufficient to establish causation: *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc*at [153]-[162]. On the evidence, this court finds Mrs Chan to be a very strong-minded person and an enthusiastic, confident and prolific investor. Given her past success with her ACs trades, this court finds it hard to accept that Mrs Chan entered into the Disputed ACs because Ms Mak echoed her view that "we were very safe". For the same reason, albeit this relates more directly to Ms Mak's alleged breach of duty rather than misrepresentation, this court rejects one of Shine Grace's attack on Ms Mak that she used unethical high pressure sales and solicitation techniques in inducing Mrs Chan to enter into the Disputed ACs.

K. Causation

172. It is trite law that in order to establish liability, Shine Grace must prove that it would have avoided the losses claimed but for the Defendants' alleged breaches of duties: *Clerk & Lindsell on Torts* 21st Ed at para 2.15. The test is a subjective one: *Clerk & Lindsell on Torts* 21st Edat para 2.15, *Montgomery vs Lanarkshie Health Board* [2015] AC 1430 at [96]-[105].

173. In the present case, Shine Grace submits that Mrs Chan would not have entered into the Disputed ACs, irrespective of past transactions and her trading history, had she been given a proper explanation of the significant risks (including the black box nature of the MTM calculations) underlying the Disputed ACs and had she been warned of their (un)suitability. Since the test is subjective and since this court does not have the benefit of hearing from Mrs Chan as to whether and if yes in what ways she would have acted differently, it is inherently difficult to see how Shine Grace can pass this hurdle of establishing causation.

174. The Defendants, on the other hand, submit that all the available evidence suggests that Mrs Chan would have entered into the Disputed ACs any way — in other words, Shine Grace has failed to establish the necessary causal link between the alleged breaches of duties and Mrs Chan's entering into the Disputed ACs.

175. This court accepts the Defendants' submission and will so find, for these reasons.

176. First, this court has already made a finding that Mrs Chan was a very strong-minded person and an enthusiastic, confident and prolific investor. Indeed, Mrs Chan was so strong-minded and confident that, once she had formed a view to go for a particular trade, the Defendants' staff, as well as her other bankers, were expressly instructed not to interfere.

177. One example is the report of a dinner between Ms Mak, Mrs Chan and Dr Yau on 24 November 2004, which stated as follows:

" … This is a social dinner where Mrs [Chan] also shared her view on the equity market. She has a strong bullish view on CK and believe [*sic*] it should reach $80 by year end. She also shared her intention to long the shares outright in the few days and emphasized whenever she

has market sense in trades, it has been proved to be successful and trader should not stop her instruction." (emphasis added)

178. A similar example can be found in Ms Mak's written report of her dinner with Mrs Chan on 16 August 2006 which recorded the following exchange:

" … Reminded Mrs Chan of her existing open positions to prevent and monitor concentration; Mrs Chan appreciated our investment discipline and reiterated her financial strength and elaborated her investment exposure only represents a small percentage of her networth. She further shared she always reiterated to her other bankers not to interrupt her investment decision as when she feels the market sense, she will take action to open position immediately. If she feels discouraged, she will do it in other financial institution instead." (emphasis added)

179. That this was Mrs Chan's character and attitude was confirmed by Ms Mak in court on Day 7 and Day 8, whose testimony this court accepts:

"Q: And you expected Mrs Chan to listen to your warning and to take your warnings into account in forming her decisions; correct?

A: Well, Mrs Chan had her own views and -- well, I would say something to her and she would listen, and if what I said fit her, then she would accept it.

A: … But talking about Mrs Chan's character, she would listen to things that is the same as her views. If she hears something that is not the same as her view, then she would ignore it."

180. In these circumstances, it is wholly speculative for Shine Grace to suggest that the Defendants could have dissuaded Mrs Chan from entering into the Disputed ACs by advising her that they were somehow unsuitable for her, whether generally or in light of the circumstances prevailing on 15 and 16 October 2007.

181. Second, it seems to this court highly improbable that Mrs Chan would have been dissuaded from entering into the Disputed ACs simply by the Defendants warning her of the risk of MTM losses due to eg spot price movements or fluctuations in implied volatility and the possibility of additional margin calls. Mrs Chan herself was a person of substantial net worth and she had access not just to Shine Grace's but also BSI's and Shinning's resources, as well as credit lines available to her various PICs, to support her trades.

(1) As of 2007, Mrs Chan's net worth was conservatively estimated at USD453 million, of which a substantial portion was invested in liquid assets.

(2) Further, the undisputed fact is that the assets of Shine Grace, combined with the guarantees of BSI and Shinning, were sufficient to satisfy the HK$427 million unwinding costs of the Disputed ACs when the market had dropped substantially in January 2008. Citibank was thus able to recoup all of the losses arising from the Disputed ACs without having to draw on the assets of any of the other companies within the Lady Secret Group or the Bonds Group.

(3) To put the above figures in their proper perspective, this court should point out that in a letter dated 18 January 2008 headed "Account No 689383 — Final Notice of Collateral

Top-up", Citibank only demanded from Shine Grace additional security valued at US$18,383,840.

182. Mrs Chan was a seasoned investor and knew full well that additional margin calls could arise whenever the market turned which could be any time. Hence, Mrs Chan knew full well that ACs were only suitable for investors with substantial financial strength like herself. This can be seen from the telephone conversation on 2 October 2007 at 4:02 pm:

*"Hailey: ... **即係**嗱好似阿、阿、阿、阿契女嗷，你契女嗷，我**唔敢叫***佢做。*

*Mrs Chan: **點會嗌***佢-

Hailey: **太貴啦**，**你叫**佢，個市一回佢頂唔順㗎。

Mrs Chan: **咪係囉**。

Hailey: **你一定要有實力先可以做得**，**唔咪個個做到**㗎。呢啲錢就算你見到係上緊，第一你有膽色、有實力，唔係個個可以搵到喋呢啲錢，係咪咁話，你話？

Mrs Chan: **喀**。

Hailey: **一、一**turn嗰陣時你點、點頂呀，你冇實力，你點頂呀。

Mrs Chan: **係呀**。

Hailey: **嘩**，**輸到阿媽都唔認得**，call margin, **斬倉囉**。

Mrs Chan: **斬**，**上**嗰輪斬到**死囉**。

Hailey: **咪就係囉**，**你點頂**，**頂唔到嘅**，**所以唔可以、唔可以亂嚟**，**唔可以心雄**吖。"

183. The evidence shows that Mrs Chan had never paid too much attention to margin calls — that was the responsibility of Ms Lai. This can be seen from a telephone conversation between Ms Mak and Ms Lai on 30 September 2004 at 4:55 pm:

"Hailey: ... **如果**same day**趕住出俾你**，**係咪你都要個**terms㗎喇因為你compile report**俾老闆**〔Agatha: **喀**，**除**咗個--，**喀**，**除**咗〕㗎嘛，而老闆都唔care嗰個margin嗰啲嘅。

Agatha: **老闆唔會睇**margin**囉**，**我睇**啫。

Hailey: **係囉**，**我同你睇**啫。

Agatha: **但係**佢、佢care嗰啲spot吖，bla bla bla。"

184. On the evidence, there were previous occasions between October 2004 and September 2007 where Shine Grace ran into margin shortfalls ranging from US$0.6 million to US$23 million. On most occasions, Ms Lai was able to arrange sufficient funds to rectify the

shortfall although there was an occasion where the shortfall was resolved through improvement in market conditions.

L. Conclusion on liability

185. For all the above reasons, this court concludes that Shine Grace has wholly failed to establish liability on the part of the Defendants. No useful purpose will be served for this court to go on to consider the parties' submissions on quantum.

M. Guarantor actions

Shinning Action

186. Shinning had provided Citibank with two Shinning Guarantees on 10 March 2006 for US$4 million and on 16 June 2006 for US$3 million by which Shinning agreed to satisfy on demand

" all and every the (sic) sum and sums of money which are now or shall at any time be owing, to the Bank [Citibank] anywhere on any account whatsoever whether from the Principal [Shine Grace] solely or from the Principal jointly with any other person or persons … together with in all the cases aforesaid all interest discount and other bankers' charges …

The Bank shall as long as any moneys remain owing hereunder have a lien therefore on all moneys now or hereafter standing to my/our credit with the Bank whether on any current or other account …"

187. After the 6 open Disputed ACs had been closed out and unwounded and after Shine Grace had failed to meet Citibank's demand to pay for the shortfall, on 24 January 2008, Citibank issued a letter of demand to Shinning for ~US$3.276 million. This demand was not met and on the next day, Citibank appropriated HK$25,609,002.71 from its accounts.

188. The sole basis of Shinning's claim against Citibank is that Shine Grace was not liable to pay Citibank any sums under the Disputed ACs or otherwise and therefore it was not entitled to issue the letter of demand to Shinning or to appropriate funds from its accounts. In other words, Shinning's claim against Citibank is dependent on Shine Grace succeeding in the Main Action. Given that Shine Grace has wholly failed to establish liability against Citibank in the Main Action, which in turn means Shine Grace was indeed liable to pay Citibank for sums due under the Disputed ACs, Shinning's claim against Citibank must also fail.

BSI Action

189. BSI has also provided Citibank with the 2004 Guarantee on 18 October 2004 for US$5 million and the 2006 Guarantee on 23 May 2006 for US$7 million by which BSI agreed to satisfy on demand Shine Grace's liabilities to Citibank.

190. As in the case of Shinning, after the 6 open Disputed ACs had been closed out and unwounded and after Shine Grace had failed to meet Citibank's demand to pay for the shortfall, on 24 January 2008, Citibank issued a letter of demand to BSI for

~US$4.958 million. This demand was not met and on the next day, Citibank appropriated HK$39,109,301.58 from its accounts.

191. The first basis of BSI's claim against Citibank is the same as that of Shinning's claim against Citibank ie Shine Grace was not liable to pay Citibank any sums under the Disputed ACs or otherwise and therefore it was not entitled to issue the letter of demand to BSI or to appropriate funds from its accounts. For reasons already explained at paragraph 189 above, this basis of BSI's claim against Citibank must fail.

192. The only additional issue raised in the BSI Action is that on 26 July 2007, BSI gave Citibank:

(1) written notice of its intention to terminate the 2004 Guarantee after the expiration of 3 months pursuant to Clause 3 thereof; and

(2) written notice of its termination of the 2006 Guarantee with immediate effect.

(collectively "**Termination Notices**")

193. Clause 3 of the 2004 Guarantee provided:

" This guarantee shall be binding on the undersigned … until the expiration of three calendar months after your receipt of a written notice to determine this guarantee served by the undersigned … Any such notice shall not release the undersigned in respect of liability existing at the time of receipt, nor shall any such notice release the undersigned in respect of any of the liabilities of the Borrower [Shine Grace] … incurred … after the receipt but before the expiration of the said notice including future liabilities incurred before but maturing after the expiration of the said notice."

194. Unlike the 2004 Guarantee, the 2006 Guarantee did not contain an express provision for the giving of notice of termination by BSI.

195. On the basis of the above, BSI contends that:

(1) As of 26 July 2007, the 2006 Guarantee was terminated and BSI ceased to be liable to Citibank thereunder in respect of any liabilities incurred by Shine Grace on or after 26 July 2007.

(2) As of 27 October 2007, the 2004 Guarantee was terminated in accordance with its terms following the expiry of the 3-month notice period and pursuant to Clause 3 thereof, BSI ceased to be liable to Citibank thereunder in respect of any liabilities incurred by Shine Grace on or after 27 October 2007.

196. Citibank does not dispute that BSI did issue the Termination Notices on 26 July 2007. But it submits that the BSI Guarantees had not been terminated because BSI, via Ms Lai, had agreed to suspend the termination of the 2 guarantees, the reason being they were needed as part of the collateral in support the trading of Shine Grace. As evidence of the agreement to suspend the termination, Citibank refers to a phone call between Ms Lai and

Ms Yim on 17 August 2007 at 3:55 pm ("**1st phone call**") and a phone call between Ms Lai and Ms Mak on 5 October 2007 at 12:00 pm ("**2nd phone call**").

197. The 1st phone call took place on 17 August 2007. On that day, Ms Lai and Ms Yim had altogether 7 phone conversations. The subject matter of those conversations revolved around Shine Grace's trading, its margin position and collateral position including, in particular, BSI's exposure by virtue of its guarantees for Shine Grace's liabilities. The following is the English translation of the relevant part of the 1st phone call:

" AL: Hello, Kiev?

KY: Yes, Agatha.

AL: For Bonds & Sons, can you check for me, for the exposure, it guarantees Shine Grace, can you, is it in Singapore, can you check how much is the guarantee given to Shine Grace? As I can see the exposure of Bonds & Sons has increased. It was 10 last week, it becomes 14 this week. Is that the maximum amount that Bonds & Sons is guaranteeing Shine Grace?

KY: You mean the two letters from you earlier, to …

AL: I think you are now putting that on hold.

KY: Yah.

AL: Without this $10 million guarantee, we will have to prepare funding of $10 million, but I can see there is an exposure of $10 million. Bonds & Sons has no activities these few months,

KY: Yes.

AL: The margin for the FX accumulator, the contracts should have all ended. There should not be any margin for the FX accumulator. The only exposure should be the guarantee to the Shine Grace account.

KY: Exposure … you give me a minute … now it's 14069 …

AL: This is my understanding. Hailey said the available credit of Bonds & Sons, will follow our guarantee form, maximum limit is US$12 million, to guarantee Shine Grace, and she took US$10 million. So now, can we check currently, how much Bonds & Sons cross guarantee Shine Grace?

KY: OK.

AL: The maximum limit of our guarantee should be $12 million, but now it has gone up to $14 million, I am not sure what that is.

KY: OK. Let me take a look."

198. What is reasonably clear from the 7 phone conversations, particularly the 1st phone call, is that Ms Lai

(1) was closely monitoring the collateral position and exposure of Shine Grace and BSI;

(2) knew full well that if the BSI Guarantees were terminated, Mrs Chan would have to provide alternative funding in support of her trading in ACs; and

(3) instructed Ms Yim to put the Termination Notices on hold.

199. In its written closing, Shine Grace submits that Ms Lai did not give instruction to Ms Yim to put the Termination Notices on hold in the 1st phone call. Rather, Ms Lai was simply referring to the fact that the Termination Notices had been put on hold by Citibank.

200. This court does not accept this submission.

201. First, while it is true that Ms Yim and her colleague in the credit department *viz* Ms Amy Cheong did appear to have decided internally not to take action on the Termination Notices during a phone conversation on 14 August 2007, that was an *internal* matter of Citibank — there is no evidence that Ms Lai was aware of that when she spoke to Ms Yim 3 days later on 17 August 2007.

202. Second, when Ms Lai was cross-examined on the 1st phone call on Day 5, she first said "When I said 'hold it', I mean hold that letter, hold that termination letter." The next moment of her cross-examination, Ms Lai retracted and said what she actually meant was that Citibank "were holding the letter; according to my understanding, they had not done that matter". That retraction was obvious to this court and has dented Ms Lai's credibility.

203. Third, when Ms Yim was cross-examined on the 1st phone call by Counsel for Shine Grace, the line of the cross-examination was *not* that Ms Lai had not made a request to put the Termination Notices on hold or Ms Yim did not accede to the request. Rather, the line of cross-examination was that Citibank did not put the Termination Notices on hold because of Ms Lai's request.

204. For these reasons, and having heard the audio recording and read the Chinese transcript of the 1st phone call, this court has no doubt that Ms Lai did give instructions to Ms Yim to put the Termination Notices on hold in that conversation and shall so find. In this regard, the English translation of the relevant part of the conversation is simply wrong.

205. The 2nd phone call took place on 5 October 2007. The following is the English translation of the relevant part of the 2nd phone call:

" [Ms Lai]: Hailey?

[HM]: Yes.

[Ms Lai]: When you were on leave earlier, we sent in a letter, regarding Bonds & Sons' guarantee to Shine Grace.

[HM]: Yes.

[Ms Lai]: For 12 million, 2 guarantee forms.

[HM]: You mean 24 in total?

[Ms Lai]: No, in all, 5 plus 7.

[HM]: Yes.

[Ms Lai]: We sent a letter to cancel the guarantee. But subsequently there were a lot of trades done, so you held it back.

[HM]: So do you need to cancel it?

[Ms Lai]: Now that the portfolio and stocks have all been liquidated, the margin should be more than sufficient.

[HM]: She [Mrs Chan] did some trades today.

[Ms Lai]: Huh?

[HM]: She did some trades today. She is still watching the level to trade.

[Ms Lai]: She is still watching the level?

[HM]: Yes. Shall we do it this way: I suggest at the end of this month, I need to do the credit approval. I've told you to wait for me to come back.

[Ms Lai]: Yes.

[HM]: I need to complete the review by end of the month. We will rectify all these by end of the month. Is that ok? We only cancel the guarantee by end of October.

[Ms Lai]: End of October?

[HM]: Yes. She has two tranches of China Life …

[Ms Lai]: But we will be receiving the 100 million of the China Life next week.

[HM]: It doesn't matter. They only look at the surplus.

[Ms Lai]: Oh yes. China Life, you will take …

[HM]: 70%, left with 30%.

[Ms Lai]: 30% left. Did she enter into some new trades again today?

[HM]: Yes.

[Ms Lai]: Ok. So end of October.

[HM]: Yes. Will that be better? As I also need to do the review, I will have to look at everything.

[Ms Lai]: OK …"

206. In cross-examination, Ms Lai accepted that she agreed to the suspension of the Termination Notices in that conversation and that the BSI Guarantees would remain in place in order to support Mrs Chan's AC trades because she was told Mrs Chan had entered into new ACs and she was "afraid that the surplus might not be enough". It is reasonably clear from that conversation that the agreed suspension of the Termination Notices would last until at least the end of October 2007.

207. The Defendants submit and this court agrees that the context surrounding the 2 phone calls is of importance. Between August and October 2007, Shine Grace entered into over 60 ACs with Citibank and, apart from brief intermittent periods lasting for a few days, there was a collateral shortfall in Shine Grace's account from 13 August to 5 October 2007. That is the context of the phone calls between Ms Lai, Ms Yim and Ms Mak and that provides the obvious explanation as to why Ms Lai requested and agreed to put the Termination Notices on hold.

208. Lastly, this court has taken in account of the fact that:

(1) The BSI Guarantees were listed as collateral in Shine Grace's credit position reports in October, November and December 2007;

(2) Ms Lai had not followed up on the termination of the BSI Guarantees with Citibank after 5 October 2007;

(3) BSI had made no complaint about Citibank's failure to terminate the BSI Guarantees until the writ in the BSI Action was issued in October 2013, some 6 years later.

209. For all these reasons, this court has no hesitation in finding that Ms Lai did instruct and agree with Citibank to suspend the Termination Notices pending further discussions after the completion of Citibank's annual credit review at the end of October 2007. In so far as Ms Lai denies having done so, this court rejects her evidence.

210. The next issue is Shine Grace's submission that Ms Lai had no authority to agree to the suspension of the Termination Notices.

211. In the view of this court, the submission is also without merits.

212. Ms Lai was the Financial Controller of the Bonds Group since 1992 and the undisputed evidence is that she was the one who gave instructions to Citibank on matters relating to BSI's account and, in particular, the use of BSI's funds to support Mrs Chan's AC trades. This court has already referred to the phone conversation between Ms Lai and Ms Mak concerning margin calls in general at paragraph 183 above. This court has also referred to the 7 phone conversations between Ms Lai and Ms Yim on 17 August 2007 concerning Shine Grace's trading, its margin and collateral position especially BSI's exposure by virtue of its guarantees for Shine Grace's liabilities at paragraph 198 above. At

paragraphs 72 and 74 of her 1st witness statement, Ms Lai said this regarding funding for the Shine Grace's account:

" 72. As noted above, my staff and I only became aware of trades after Mrs Chan had placed orders with Citibank. If Mrs Chan placed investments with margin requirements which could not be adequately covered by the loanable value of assets held in respect of the Shine Grace Account and Hailey Mak notified me of a margin shortfall, I would look into the calculations of both the margin requirements and the loanable amount in the first instance, and if there was a need for more funding, I would look for funding options and then discuss the viable options with Mrs Chan.

…

74. I would then explore avenues for funding, usually in the following order:

74.1 First, I would check if there was any available credit or "surplus" that Citibank recognized as available to Shine Grace.

74.2 If not, I would check whether cash funding was available from any other companies in the Lady Secret Group (which were also ultimately wholly beneficially owned by Mrs Chan) that could be transferred to the Shine Grace Account.

74.3 If not, I would check with Hailey Mak whether part of the guarantees by Shinning and/or B & S International in respect of the Shine Grace Account (referred to below) remained un-utilised.

74.4 If not, I would check if there was any surplus in Shinning's account for cash to be transferred to the Shine Grace Account, or if an additional guarantee could be granted by Shinning in respect of the Shine Grace Account.

74.5 If not, I would check if there was any company in the Bonds Group which owed money to Mrs Chan or her personal companies and had any cash or credit which could be utilised.

74.6 If not, I would consider proposing to sell some of the investments held by Mrs Chan's personal companies."

213. On the totality of the evidence before this court, it is reasonably clear that Ms Lai was the financial "gatekeeper" of companies controlled by Mrs Chan, including Shine Grace and BSI, and gave instructions on their behalf to Citibank from time to time regarding their financial affairs. There is no reason for this court or Citibank to think that specifically in relation to the BSI Guarantees, Ms Lai lacked the necessary authority to agree to suspend the Termination Notices. No convincing reason has been suggested by Counsel for BSI.

214. To conclude, this court finds Ms Lai had the authority to and did on behalf of BSI instruct and agree with Citibank to suspend the Termination Notices until further discussions after end of October 2007. Since such discussions never took place, this court also finds the BSI Guarantees had not been terminated.

215. For all the above reasons, BSI's claim against Citibank fails.

N. Citibank's counterclaim against Shine Grace

216. In view of this court's findings in the Guarantee Actions, Citibank's counterclaim against Shine Grace becomes academic.

O. Disposition and costs order nisi

217. The Plaintiff's claim in the Main Action is dismissed. There shall be judgment in favour of the Defendants with costs, to be taxed if not agreed and paid forthwith, with certificate for 3 counsel.

218. The Plaintiff's claim in the Shinning Action is dismissed. There shall be judgment in favour of the Defendant with costs, to be taxed if not agreed and paid forthwith, with certificate for 3 counsel.

219. The Plaintiff's claim in the BSI Action is dismissed. There shall be judgment in favour of the Defendant with costs, to be taxed if not agreed and paid forthwith, with certificate for 3 counsel.

220. Lastly, I thank the legal representatives of all parties for their helpful assistance.

(Peter Ng)
Judge of the Court of First Instance
High Court

Mr Paul Shieh SC, Mr Jin Pao and Mr Byron Chiu, instructed by Reed Smith Richards Butler, for the Plaintiff in HCCL 28/2008,
HCCL 28/2013 and HCCL29/2013

Mr Jat Sew Tong SC, Mr Victor Dawes SC and Mr Joshua Chan, instructed by Clifford Chance, for the 1st and 2nd Defendants in HCCL 28/2008 and the Defendant in HCCL 28/2013 and HCCL 29/2013

---

[1] The meaning of which shall become apparent later in section E.

[2] In March and June 2006 respectively.

[3] In 2004 ("**2004 Guarantee**") and 2006 ("**2006 Guarantee**") respectively.

[4] Save from 23 April to 31 August 2007 when Ms Mak was on extended leave.

[5] As recorded in her telephone conversation with Ms Mak on 15 October 2007 at 3:19 pm.

[6] See the section entitled “Investment Rationale” in the TIP.

[7] Telephone conversation between Ms Mak and Ms Lai on 15 November 2007 at 2:44 pm at counter 95.

[8] Which are not contractual in nature.

[9] Ms Mak also accepts this best described Citibank’s role in the management of Mrs Chan’s relationship in her witness statement.

[10] Paragraph 153 of Shine Grace’s opening submissions and section D1 of Shine Grace’s closing submissions.

[11] Telephone conversation between Ms Mak and Ms Lai on 15 November 2007 at 2:44 pm at counter 95.

[12] A shorter version of it appears in the “Investment Rationale” section of the TIPs.

[13] In a telephone conversation she had with Ms Mak on 15 October 2007 at 3:19 pm.

[14] Shine Grace’s own calculation was that its maximum exposure on 16 October 2007 was ~ HK$2.7 billion.