

HONG KONG / JUDGMENT

JIN WEI CHENG v. UBS AG

COURT

Court of First Instance

DECIDED

4 June 2014

CASE / FILE NUMBER

HCA632/2012

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bjbj ge Lok in Chambers Date of Hearing: 7 April 2014 Date of Decision: 4 June 2014

DECISION

I have to deal with the following summonses: the plaintiff's summons dated 12 October 2013 (the Interrogatories Summons) seeking an order that items 1 and 3 of the defendant's Interrogatories dated 19 March 2013 be withdrawn, and also seeking a time extension in respect of the summons; the defendant's summons dated 22 October 2013 applying for specific discovery of the monthly statements of 3 accounts at Deutsche Bank and Credit Suisse which are in the name of the 3 companies related to the plaintiff (the 1st Discovery Summons); the defendant's summons dated 31 October 2013 applying to amend the 1st Discovery Summons for the monthly statements to include all periodic statements (the Amendment Summons); the defendant's summons dated 6 December 2013 applying for specific discovery of all monthly statements of 8 accounts at Deutsche Bank and Credit Suisse to the extent not covered by the 1st Discovery Summons (the 2nd Discovery Summons); and the defendant's summons dated 13 March 2014 seeking leave to file and serve the 2nd affirmation of Mr Michael Jon Long (the Time Summons).

Background

The defendant, UBS AG (), carries on the business of a private bank and the plaintiff, Mr Jin Wei Cheng (Mr Jin), was its former client. Mr Jin claims against UBS for unauthorized trading of his account (the Account) between 1 June 2006 and 20 August 2008 (the Relevant Period). Mr Jin became a client of UBS and opened the Account on 21 June 2001. Mr Jin was initially served by the client advisor, Mr Alfred Tsai (Mr Tsai), up to August 2005, and later Mr Le Yi (Mr Le) up to mid-2006. In mid-2006, Mr Marvin Zhang (Mr Zhang) took up servicing Mr Jin's Account. Mr Zhang continued in his role until Mr Jin complained to UBS in August 2008. The Account was not a discretionary account, meaning that UBS could not carry out trading activities in the Account on its own discretion. There is no dispute that Mr Jin held other accounts with UBS whether in

his own name or through other corporate entities, with one of them a proper discretionary account. In accordance with UBS's policy, the discretionary account was not managed by Mr Zhang but by another team. At Annex A to the Statement of Claim, Mr Jin sets out the authorised investments in the Account during the Relevant Period. At Annex B to the Statement of Claim, Mr Jin sets out the alleged unauthorised investments in the Account during the Relevant Period (the Disputed Transactions). Mr Jin claims against UBS for, inter alia, the losses arising from the Disputed Transactions. The total amount claimed is HK\$247,718,898.28 plus US\$610.987 as at 31 March 2012, plus further interests thereafter and costs. In a nutshell, UBS's defence is that Mr Jin had in fact authorized some of the transactions and, for the others, he had given UBS's client advisor, Mr Zhang, an oral general authority to trade the Account. Apart from the investment accounts in UBS, Mr Jin and the companies controlled by him had also investment accounts in other private banks including Deutsche Bank and Credit Suisse. For our present purpose, the main dispute between the parties under the Interrogatories Summons and the 1st and the 2nd Discovery Summonses is whether UBS is entitled to ask Mr Jin to disclose his investment and trading accounts in other financial institutions and the details of the trading activities in those accounts during the Relevant Period. Mr Yu, SC, counsel for UBS, accepts that the discovery and interrogatories should not extend to the general banking accounts of Mr Jin or the entities controlled by him. In such circumstances, there would be no discovery or interrogatories relating to these accounts. Mr Jin is not seriously objecting the Amendment Summons and the Time Summons. Subject to the issue of costs which would be dealt with separately, I make orders in term of the said summonses. I then turn to the main dispute between the parties. Mr Jin's arguments Mr Neoh, SC, counsel for Mr Jin, submits that whether Mr Jin held investment accounts in other financial institutions and the trading activities in those accounts during the Relevant Period are not relevant to the issues of the present case. The dispute between the parties is a simple one: did or did not Mr Jin authorise Mr Zhang to trade the Account in the way that Mr Zhang says he did? Mr Jin's case is that he thought that relatively simple investments were traded in the Account and he therefore paid little attention to the Account. He only discovered Mr Zhang's unauthorised trading when he wanted to withdraw a sum from the Account in 2008 and Mr Zhang allegedly confessed to him that there were no available funds in the Account. On the other hand, UBS's case is that Mr Jin had in fact authorised some of the transactions and, for the other vast majority, he had given Mr Zhang an oral general authority to trade. In Mr Zhang's statement, he has detailed exactly how Mr Jin had authorized each of the transaction. During the Relevant Period, there were trading activities involving 23 stocks and 20 investment products including funds, private equities, structured products and debt instruments. Most of the stocks were transacted more than once. Of the 23 stocks and 20 investment products, Mr Jin's case is that he authorised the dealings in only 2 stocks and 5 investment products, and the earlier acquisition but not Mr Zhang's disposal of 4 other investment products. According to Mr Jin, the defence of UBS is straightforward. It says that at a meeting on 3 October 2006, Mr Zhang had recommended Mr Jin to invest in stocks, and Mr Jin orally gave Mr Zhang general authority to trade. Mr Zhang exercised so much control that even when, much later, margin calls were made on the Account because the shares prices had dropped significantly, he dealt with the calls himself by selling down the shares and never discussed them with Mr Jin. Mr Neoh therefore submits that the

matters in issue concern entirely what communications did or did not take place between Mr Jin and Mr Zhang. In such circumstances, whether Mr Jin had investment accounts in other financial institutions and the trading activities in those accounts are completely irrelevant. Such information cannot shed any light on whether Mr Jin did or did not give Mr Zhang the alleged general discretionary authority to trade the Account. Further, whether Mr Jin had maintained discretionary investment accounts in other financial institutions is neither here nor there. The court cannot simply base on such information to conclude that Mr Jin had the propensity to give general authority to his account managers to trade on a discretionary basis. According to Mr Neoh, UBS's discovery, including by its interrogatories, is only a fishing expedition. The exercise is equivalent to Mr Jin seeking discovery of the monthly statements of Mr Zhang's other clients on the basis that such statements would shed light on what transpired between Mr Zhang and Mr Jin. Further, the discovery and interrogatories sought by UBS would be a severe intrusion into Mr Jin's privacy and the scale would also be too oppressive. Discussion If the issues between the parties are that simple, I agree that the discovery and interrogatories are unnecessary.

Unfortunately, the issues are more complicated than those depicted by Mr Neoh. With a view to support his allegations, Mr Jin seeks to rely on the facts that he was a conservative investor and he was not interested in trading in high-risk investments such as stocks and other complicated investment products, and as a result it was unlikely that he would have authorised Mr Zhang to trade in these investments. It is part of Mr Jin's pleaded case that he had told all of his client advisors that they could recommend investments other than high-risk investments for his consideration. Mr Jin also pleads that amongst the Disputed Transactions were sizeable transactions in 4 penny stocks : that the transactions in these stocks were contrary to common and reasonable investment practice and were suspicious; that Mr Zhang's purchases of these 4 stocks had the effect and were apparently for supporting prices; and that this is a further indication that Mr Zhang's trading was unauthorised. Further, Mr Jin said the following in his witness statement dated 9 June 2013:

11. Since I was an industrialist and did not have much investment experience, and UBS was a reputable bank, I trusted UBS. Therefore all the investment transactions that I entered into had been recommended by Mr Tsai.
12. Before I purchased any investment product recommended by Mr Tsai, I would always have asked him whether the risk was high. I would only purchase those he replied that the risk was not high. This is because my investment aim was to preserve my capital and to have capital appreciation and Mr Tsai had known it very well.
13. I replied on Mr Tsai's recommendations to enter into investment transaction every time. Overall speaking, the number of investments that I made was not great and the transactions made were not frequent. Some of the investments were profitable while others suffered loss. I did not have special requirements set for Mr Tsai. Mr Tsai told me that as a whole the Account's rate of annual return was about four to five per cent. I had no opinion on it.

17. When Mr Le suggested me purchase investment products, I clearly stated to him that my purpose was capital preservation and appreciation. Before making every purchase of investment products I would always have asked Mr Le whether the risk was high. I would only purchase those products after he replied that the risk was not high. Mr Le would explain the contents of the investment products to me. Despite Mr Le's explanation, I had limited understanding about those investment products. This was because those products were very complicated and highly technical. Furthermore, I do not understand English. I relied on the reputation of UBS and Mr Le's experience and professional knowledge, in particular, purchase was made only if he said the risk was low.
21. When Mr Zhang first took over the responsibility to manage the Account, he did not have much contact with me, except for calling me two to three times per month to report on the status of the Account. I told him that my objective was to preserve the capital and to have capital appreciation. I did not want to invest in high-risk items. Although he could recommend investment products to me, every investment had to be made upon my authorisation. Mr Zhang said that he would first review the existing investment items in the Account before making suggestions.
25. At that time, Mr Zhang tried very hard to recommend to me a fund managed by UBS. I must state that, every time Mr Zhang recommended investment products to me, I always asked him about the investment risks, because I did not want to buy high-risk investment products. Mr Zhang told me that the fund was managed by UBS, so the risk was not high and it was very reliable. I trusted UBS's management and Mr Zhang's experience and knowledge, so I agreed to buy that fund. ..
29. Personally I had been all along reluctant to invest in stocks because stock investment involved high risks. Every time only upon the client's service manager's very strong recommendation, I agreed to buy some stocks reluctantly.
30. According to UBS's record, I received a call from Mr Zhang in early November 2006. The Account later bought CITIC Resources shares (stock code: 1205), which was strongly recommended to me by Mr Zhang. I asked him whether the investment risk was high. He said that he had a thorough understanding of that company and was therefore confident in this share. I therefore authorised him to buy some shares. Later Mr Zhang also recommended other stocks to me. However, I was not willing to buy high-risk products and did not agree with him.
34. The purpose of my investment was capital preservation and appreciation. I had never initiated a request to invest in any product. I only acted in accordance with the recommendations of the client service managers. I very much trusted Mr Zhang. Mr Jin's message is clear. He was a conservative investor. He has repeated many times that the objectives of his investment were to preserve the capital and to have capital appreciation. Mr Jin was not interested in buying high-risk investment products and stocks, and it was therefore unlikely that he would have authorised Mr Zhang to trade in these investments.

UBS disputes these allegations. According to UBS, Mr Jin was a high net worth individual who held investments with financial institutions other than UBS. During the course of his relationship with UBS, Mr Jin became increasingly more aggressive as an investor, willing to take higher risks in an effort to achieve greater returns. By 2006 when Mr Zhang took over as client advisor for the Account, Mr Jin was an experienced investor, having invested in various different types of products including debt instruments, structured products, funds and private equity, and he subsequently instructed Mr Zhang to invest more aggressively. Apart from the defence that Mr Jin had expressly or impliedly authorised the Disputed Transactions, UBS also pleads that: Mr Jin ratified and adopted the Disputed Transactions or is estopped from disputing them, including because he failed to make timely complaints in relation to those transactions in circumstances where he had actual or deemed notice of them ; and Mr Jin s claim is precluded by various contractual terms applicable between the parties . In my judgment, the nature and the extent of Mr Jin s investment transactions through other financial institutions are plainly relevant for the court to determine: (i) Mr Jin s investment experience and sophistication; (ii) Mr Jin s investment objectives and appetite for risk; and (iii) whether Mr Jin was a person who was reluctant to trade in high-risk investments as alleged by him. I agree with Mr Yu that the issue is not merely one of credibility. As shown in his witness statement, it is Mr Jin who has put these matters in issue, and so UBS should be allowed to conduct investigation to see whether Mr Jin s allegations about his investment experience and sophistication, his investment objectives and strategy and appetite for risks are true. In fact, it is common ground that some if not most of the Disputed Transactions involved the trading of high-risk investments such as penny stocks. Obviously, Mr Jin s investment objectives and appetite for risks would be most relevant for the court to determine whether Mr Jin had authorised Mr Zhang to invest in such high-risk investment products and stocks or had given general authority to Mr Zhang to trade the Account. Further, according to the Wealth Management Call Report dated 26 February 2008, Mr Jin apparently transferred US\$5 million to his account in Deutsche Bank to meet the margin calls there . The mention of margin calls certainly suggests the carrying out of trading activities using leverages. By reason of such revelation, UBS should be allowed to investigate as to whether Mr Jin had traded in volatile and high-risks products, probably using significant leverages, in his other investment accounts. I also accept that Mr Jin is in possession of the relevant statements relating to his investment accounts in other financial institutions covering the Relevant Period. Even if Mr Jin does not himself possess the statements, he should not have any difficulty in obtaining them from the relevant financial institutions. Having satisfied the relevance of the documents sought in the discovery (including the interrogatories) and that Mr Jin is in possession or control of the documents sought, I then have to consider whether I should exercise the discretion in favour of the discovery and interrogatories, in particular the court should give effect to the underlying objectives of the rules and procedures when it exercises the discretion whether to order discovery . To me, this is plainly an appropriate case for the exercise of such discretion. The documents and answers sought are necessary for fairly disposing of the matter in the action. In their absence, the court will be deprived of information which is highly relevant to the

issues it is required to resolve. Further, in order to avoid any disruption to the trial, it would be desirable for Mr Jin to provide the documents and answers before the trial. I also do not accept that the discovery and interrogatories are too oppressive or the exercise is an unnecessary intrusion to Mr Jin's privacy. It is Mr Jin himself who has put matters such as his investment experience and sophistication, his risk appetite and his investment objectives and strategy in issue. Taking into account that the discovery and interrogatories are limited to the investment accounts (and not general banking accounts) and the trading activities in these accounts during the Relevant Period, I agree that the discovery and interrogatories are proportionate to the adjudication of the dispute in the present case, in particular the quantum of Mr Jin's claim is substantial. Further, Mr Jin is protected by the implied undertaking as regards the use or disclosure of the documents produced, and so there is no merit in his complaint about intrusion to privacy. In respect of Mr Jin's Interrogatories Summons, Mr Jin is also seeking extension of time for him to make the application for the withdrawal of the interrogatories. As I allow UBS to administer the interrogatories on merits, it is quite unnecessary for me to consider the question of extension of time. By reason of the aforesaid, I allow UBS to seek discovery and to administer interrogatories in respect of the investment accounts of Mr Jin and the entities controlled by him in other financial institutions during the Relevant Period. As mentioned above, the ambit of the discovery and interrogatories would not extend to the general banking accounts of Mr Jin which did not involve any trading of stocks or other investment products. In respect of the other investment accounts of Mr Jin, I also allow UBS to seek discovery and interrogatories as to whether there were operated on a discretionary basis during the relevant period; and if so how the relevant discretionary authority was granted; and whether there was a hold mail arrangement for each account. In fact, Mr Jin has provided partial answers to the questions as to discretionary accounts and hold mail arrangement in relation to the investment accounts with Credit Suisse and Deutsche Bank. In such circumstances, there is no logical reason why the same discovery or interrogatories do not apply to the other investment accounts of Mr Jin. Furthermore, the number of discretionary accounts that Mr Jin held with other financial institutions would be directly relevant for the court to determine whether Mr Jin's allegations about his investment experience and sophistication, his investment objectives and strategy are true. Finally, whether Mr Jin had experience of or was in the habit of using hold mail arrangement in his dealings with other financial institutions is relevant for the court to determine whether Mr Jin's allegations about him relying on the expertise of the staff of UBS and not checking the confirmations, advices and statements are true and reasonable. Mr Jin has provided partial answers to some of the requests for discovery and interrogatories administered by UBS. These answers are not good enough. If the 8 investment accounts in Deutsche Bank and Credit Suisse already disclosed are the only investment accounts held by Mr Jin and his companies, Mr Jin, not his solicitor, has to file an affirmation to confirm that this is indeed the case. There is serious overlapping between the Discovery Summons and the Interrogatories Summons. As agreed by the parties in the hearing, they would try to work out the wordings of the order so as to give effect to the ambit of discovery and interrogatories allowed by the court. I therefore direct

the parties to submit the agreed order for the court s approval within 21 days. In the case of any disagreement, either party is at liberty to restore the summonses before me for further argument. I also make a costs order nisi that: subject to paragraph (ii) below, the costs of the Interrogatories Summons and the 1st and the 2nd Discovery Summonses be paid by Mr Jin; and the costs of and occasioned by the Amendment Summons and the Time Summons be paid by UBS. The order nisi shall be made absolute 21 days after the date of the handing down of this Decision. (David Lok) Deputy High Court Judge Mr Anthony Neoh, SC, and Mr Laurence Li, instructed by Paul C K Tang & Chiu, for the plaintiff Mr Benjamin Yu, SC, and Mr Alexander Stock, instructed by Herbert Smith Freehills, for the defendant Defence and Counterclaim, at 29 & 30 witness statement of Mr Zhang s dated 16 April 2013, at 41-177 Defence and Counterclaim, at 30.7 witness statement of Mr Zhang, at 166-172 30, 32 and 35 of the Statement of Claim 69-73 of the Statement of Claim the witness statement of Mr Jin is in Chinese, and the passages quoted in the judgment are contained in the certified English translation of the witness statement 26, 27, 30.7, 30.9, 30.23 & 57 of the Defence and Counterclaim 3.4, 31 & 32 of the Defence and Counterclaim 3.7 & 97 & Schedule 2 of the Defence and Counterclaim Sunny Tadjudin v Bank of America, National Association, unrep, HCA 322/2008, decision of DHCJ M Chan (as she then was) on 22 December 2011, at - PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V gd8B gdjRk hjRk hjRk hjRk hjRk hjRk hjRk hjRk hjRk hjRk gd<t hjRk hjRk hjRk hFj] hFj] gd2J h]yu h]yu h]yu hi<F h;vZ hi<F hi<F ~zu hjRk gd]l [Content_Types].xml Iw}, \$yi} _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml w toc'v)I`n 3Vq%`#q x}r :\TZaG I u3 L+M2 e\O* \$*c?)6-r IqbJ#x ,AGm T[XF64 E)` # R>QD =(K& =al- 4vfa 0%M0 theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/_rels/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> i\$&`G %c(R w;)f 9Nh@K Df^*F Ezar cjlF 65!y 65!y Z!4 DCCJ 5066/2007 Judiciary HCAL.dot Judiciary Microsoft Office Word Judiciary hong Kong DCCJ 5066/2007 Title <b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{5C7635C1-5E6F-424A-8598-160A08DF404A}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Office Word 97-2003 Document MSWordDoc Word.Document.8

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