

HONG KONG / JUDGMENT

RE TIMOTHY MICHAEL LORD QC

COURT

Court of First Instance

DECIDED

16 August 2013

CASE / FILE NUMBER

HCMP1397/2013

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bjbj `E|| HCMP 1397/2013 IN THE HIGH COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO
1397 OF 2013

In the Matter of an application by Timothy Michael Lord QC to be approved, admitted and
enrolled as a barrister of the High Court of the Hong Kong Special Administrative Region for the
purpose of a particular case and In the Matter of the Legal Practitioners Ordinance (Cap
159) of the Laws of Hong Kong

Before: Hon Cheung CJHC in Court Date of Hearing: 6 August 2013 Date of Judgment: 6 August
2013 Date of Reasons for Judgment : 16 August 2013

REASONS FOR JUDGMENT

The application The applicant applies, under section 27(4) of the Legal Practitioners Ordinance
(Cap 159), to be admitted as a barrister for advising and appearing on behalf of Shine Grace
Investment Limited (Shine Grace) at the trial of HCCL 28/2008 and any applications or
proceedings (including appeals) incidental thereto . Shine Grace was a company beneficially
owned by Mrs Anita Chan until her death on 17 October

2007. She controlled the company, at least until the period when allegedly she became
incapacitated through illness, about 10 days before her death. The action concerned 9
accumulator contracts which Mrs Chan, on behalf of Shine Grace, entered into with
Citibank A, the 1st defendant, via its banker, Ms Hailey Mak, the 2nd defendant on 15 and
16 October

2007. Those contracts resulted in substantial loss to Shine Grace. The nub of Shine Grace's claim is that, knowing Mrs Chan to be incapacitated and not competent to make decisions in Shine Grace's best interests, Ms Mak inveigled her to enter into the accumulator contracts, which were massively imprudent and contrary to [Shine Grace's] best interests. In other words, Citibank and its banker had taken advantage of Mrs Chan's weakened mental state. By some substantial amendments allowed by the Commercial Judge on 11 April 2013, Shine Grace now also alleges that the defendants failed to disclose and explain the risk of the contracts, in light of the volatile market conditions on 15 and 16 October 2007, which rendered the contracts unsuitable for Shine Grace. Shine Grace's case is that there are two distinct types of risks in accumulators, that is, hold to maturity risk and mark market risk. The first type of risk focuses on a single point in time. The second type is much more complex and requires knowledge that accumulators actually have embedded options and the ability to calculate a key factor in options pricing, namely, implied volatility which, in turn, is said to depend on a number of factors. It is alleged that these matters are critical to an investor since they affect whether and how the bank calculates and calls margin, matters which Citibank allegedly did not explain to Mrs Chan. Moreover, it is alleged that a knowledgeable analysis of the boilerplate explanations which Citibank allegedly provided to Mrs Chan would reveal a number of inaccurate and/or misleading points. The defendants are therefore said to be guilty of misrepresentation, deceit, negligence and breach of duty, all founded on the alleged failure to make adequate risk disclosures and misrepresentations. The action has not yet been set down for trial. Shine Grace now wants to bring in the applicant, an undisputed London specialist in banking and financial services law, to advise and represent it in the case. The application is opposed by the Bar and, quite apparently, the Secretary for Justice does not support it either. The arguments The general principles applicable to admission of overseas counsel are very well established and they need not be repeated: *Re Flesch* QC [1999] 1 HKLRD 506; *Re McGregor* QC [2003] 3 HKLRD 585. Mr Pao (Mr Laurence Li with him), put the present application principally on the footing that Shine Grace's claim is of unusual difficulty and/or complexity, and is one in respect of which the applicant can add a significant dimension. He emphasized that this will be the first local case that involves a fundamental challenge to the manner in which equity accumulators are structured, marketed and sold by financial institutions to non institutional investors; the case will involve an informed, accurate and concrete analysis of the true nature of the financial risks involved in equity accumulators and financial derivatives which have not been the subject matter of detailed or any consideration at all in prior judicial decisions; and a proper understanding of these risks require an intricate knowledge of the sophisticated underlying financial concepts which are involved in derivative products. The case will involve issues requiring expert assistance and an effective cross examination of a financial expert will necessarily be assisted if leading counsel has a commensurate knowledge of the matters in question, which the applicant has. Furthermore, the case will involve a consideration of the role of a financial institution in advising a non institutional client where there is an admitted advisory relationship and in circumstances where the market is known to be volatile. Mr Pao also submitted that

given the lack of local counsel with a level of skill, knowledge and experience of structured products and/or credit crunch litigation comparable to that of the applicant, admission of the applicant would serve to promote a strong and independent local Bar by allowing cross fertilization two local juniors will eventually be instructed to act for Shine Grace as well. For that reason also, counsel explained, no local counsel has been approached to conduct this case as leading counsel for Shine Grace. Mr Pao also said that admission of the applicant would enhance the reputation of Hong Kong as a leading international financial centre. He argued that the development of a mature and respected local jurisprudence in contentious financial product cases is of critical importance to Hong Kong. In developing our local jurisprudence, our courts should not be deprived of assistance from top overseas specialists in contentious cases. The present case involves the balance to be struck between the protection of investors and the development and marketing of sophisticated and innovative financial products, and in particular, the allocation of product risk these are all issues which are of significant importance to the financial system as a whole, both locally and internationally. Counsel referred to *Re Irvine QC* [1988] 2 HKLR 582 and *Re Goudie QC*, HCMP 764/2005, 29 April 2005, Ma CJHC, which alluded to the importance of maintaining the reputation of Hong Kong as an international financial centre. My views I am not with Mr Pao. I do not agree that this case will involve issues of unusual difficulty or complexity. There is certainly no question of Shine Grace's original case (prior to the amendment) raising any such issues. As Ms Yvonne Cheng SC (leading Mr Timothy Parker) for the Hong Kong Bar Association submitted, Shine Grace's original complaints involve basic principles of contract law; they turn largely on the factual question of Mrs Chan's mental capacity and the defendant's knowledge; and the niceties of accumulator contracts will not be relevant if Mrs Chan was mentally incapacitated, it will be straightforward for Shine Grace to show that she did not understand them. At the hearing, Mr Pao did not seriously argue otherwise. As for the further case introduced by the amendments, it is true that to some extent, the case will raise for the first time for our court's examination and determination factual and legal issues which have not been encountered before. Ms Leona Cheung, for the Secretary for Justice, has helpfully reminded the court that the fact that a case appears to be the first case of the type of situation in question and would carry with it some implications for future cases or, even more generally, on how some people might wish to arrange their affairs in future, does not by itself turn the case into an unusually difficult or complex one : *Re Pointer QC*, HCMP 455/2012, 3 April 2012, Cheung CJHC. Furthermore, even if some of the legal principles involved may not be covered by direct authority, that does not necessarily mean that they are of unusual difficulty or complexity. Legal issues may be interesting and the law may be capable of further development, but this does not by itself make the issues involved unusually difficult or complex : *Re Hapgood QC*, HCMP 101/2013, 19 February 2013, Cheung CJHC, paras 18, 24 and 25(1). I also agree with Ms Cheng that Shine Grace's case based on failure to advise and misrepresentation is highly fact sensitive. Indeed, the basic premises of the argument of unusual complexity are that the risks of the contracts were complex and hidden, and hence not properly disclosed and so forth. Yet this very specificity as to the structure and terms of the contracts detracts

substantially from the submission that legal principles of general application fall to be decided in the case. Furthermore, as Ms Cheng also submitted, even if the contracts are complex it does not follow that a trial of the allegation that they were mis sold will necessarily be one which is unusually difficult. The principal questions, on the facts, will remain something like whether the various risks were explained to Mrs Chan and whether Mrs Chan had the capacity to understand them. The suggested issues will involve, in my view, application of existing principles to the facts of the case, rather than the development of such principles. And as mentioned, they cannot be determined generally for all cases given that they are fact specific. I also agree with both Ms Cheng and Ms Cheung that the 15 complex issues of fact and law set out in the solicitors letter to the Bar appear to be largely factual or technical issues on which expert witnesses would no doubt render valuable assistance to the court and counsel alike. In reality, the suggested unusual difficulty and complexity lie with technical or expert matters. What is required is good expert assistance. What is not necessarily required is overseas specialist counsel. I take it as an essential requirement of a good trial counsel the ability to deal with experts and expert evidence in fields which counsel knows very little or practicably nothing about. That is by nature of counsel s work a requirement of necessity. No counsel can be expected to know everything outside the law. By necessity, counsel, and indeed the court, must possess the ability to deal with experts and expert evidence. In my view, such an ability is certainly not lacking amongst many of our senior counsel (and indeed junior ones as well) practising in the local Bar. This also answers completely Mr s point which I do not accept at all, that is, that there is, in the present case, no need to approach the local Bar to see whether there are sufficiently good and competent local leading counsel available who can adequately lead the case for Shine Grace. For the question here is not whether there are local counsel with a level of skill, knowledge and experience of structured products and/or credit crunch litigation comparable to that of the applicant. The question, rather, is whether there are available suitable local counsel to take up the intended role of the applicant in the legal team. Suitability is to be gauged, as both Ms Cheng and Ms Cheung helpfully submitted, not against the best assistance available in the whole common law world, or the level of skill, knowledge and experience of the applicant, but with reference to the level of competence and ability that is required in order to provide the court with professional assistance and the litigant with proper legal representation commensurate with the case concerned: see the discussion on the level of competence and ability required in the context of considering the public interest in the proper administration of justice in *Re Dicker* QC [2013] 2 HKLRD 245, para 16. Given the true nature of the legal and factual issues involved, I have no doubt that we have got in the local Bar senior counsel of sufficient standing, skill and ability to tackle the issues involved. He or she may or may not have the same knowledge and experience of structured products as the applicant. But, like the court, senior counsel will be assisted by expert witnesses and one must act on the assumption that these are expert witnesses of competence. And with their expert assistance, I am not convinced putting it negatively, as the burden is on the applicant to establish otherwise that someone belonging to the cream of our civil Bar would not be able to adequately lead the case for Shine Grace,

or that the applicant's presence at trial would add a significant dimension to the resolution of the issues involved. Counsel submitted that there are no local counsel with sufficient credit crunch litigation experience comparable to that of the applicant. If that is so, this is all the more reason for reserving for our leading civil practitioners the opportunity to conduct such litigation in the instant case, thereby further enhancing the strength and independence of our local Bar, to the benefit of the public interest. Happily, in the present case, since the case has not been set down, availability of local counsel including the very top ones is not in question. Both Hong Kong and the local Bar have moved on very substantially since Cons, Acting CJ decided *Re Irvine* back in May

1988. In that case, the Acting Chief Justice admitted a London silk to appear for the plaintiff in a commercial case together with a local leader and junior on two appeals against interlocutory orders. That case involved a plaintiff which was a commodity futures and options brokerage company incorporated under the laws of Illinois in the United States; and the defendants were a futures broker incorporated in Hong Kong and its holding company. The case concerned a claim of around US\$7.2 million as being due on a futures trading account. Damages for breach of contract and misrepresentation were also claimed. In allowing the admission, the Acting Chief Justice pointed out that one of the several competing interests pertaining to the public interest is the need to maintain the reputation of Hong Kong as an international financial centre. The judge stressed the word international, partly because the plaintiff came from overseas, and partly because financial transactions of the kind which underlied the proceedings were truly international in their nature. The judge pointed to the events in October 1987 when the stock markets worldwide crashed and said that markets of one financial centre could no longer hope to function in isolation from what was happening in other markets around the world. The judge said that it would be detrimental to the reputation of Hong Kong if the financial world elsewhere were led to believe that even where there was no question as to the maintenance of a strong and independent Bar, obstacles would nevertheless still be placed in the path of presenting their cases to the court in what they were advised was the best way that they could. The general principles stated by the Acting Chief Justice are as relevant today as they were then. It is certainly in the public interest that Hong Kong's reputation as an international financial centre be jealously guarded. There is no question about that. However, in the past 25 years, the Hong Kong Bar has grown in size and depth substantially and there are indeed extremely competent and capable people practising in the Bar, including of course the top end of the Bar. On the facts of the present case, I do not believe Hong Kong's excellent reputation as an international financial centre will be harmed at all if *Shine Grace* is restricted to retaining local leading counsel to conduct the trial, particularly when the case has not been set down for trial and availability of counsel is therefore not in question.

Disposition

I have taken on board all submissions made whether they have been expressly referred to in this judgment or not. Having considered the entire circumstances, I have come to the firm conclusion that the application should be rejected, and for these reasons that I now give, the application was dismissed at the conclusion of the hearing. (Andrew Cheung) Chief Judge of the High Court Mr Jin Pao and Mr Laurence Li, instructed by Reed Smith Richards Butler, for the applicant Ms Yvonne Cheng SC and Mr Timothy Parker, instructed by Keith Lam Lau & Chan, for the Hong Kong Bar Association Ms Leona Cheung SGC, of the Department of Justice, for the Secretary for Justice

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