

# Scope of permitted expert evidence in structured investment products litigation

## Case summary

This recent case is one of the first to address the issue of expert evidence in an action involving the sale of accumulator products by a financial institution.

Acting for a bank in a mis-selling claim by a client in respect of accumulator contracts, Clifford Chance successfully obtained a ruling limiting the scope of admissible evidence.

## Application to adduce expert evidence

In summary, the Defendants' case in this action is that they entered into accumulator contracts with the Plaintiff as a result of the Plaintiff's misrepresentation, undue influence and breach of duties as a financial advisor. The Plaintiff denies these claims. The Defendants claim that the Plaintiff's employees made representations to the Defendants that the accumulator products were shares purchased at a discount, of low risk and suitable for the Defendants' investment objectives.

The Defendants sought to adduce expert evidence in relation to four issues:

1. The nature of and risks involved in the investment products sold by the Plaintiff to the 1st Defendant (the **Products**);
2. The suitability of the Products as an investment generally and for the 1<sup>st</sup> Defendant;
3. The sufficiency and/or adequacy of the risk warnings and information concerning the Products given by the Plaintiff to the 1<sup>st</sup> Defendant; and
4. The manner and cause of the losses suffered by the Defendants as a result of the Products.

The Plaintiff did not strongly oppose expert evidence on issue (i) even though it submitted that the evidence required would not be complex. Deputy High Court Judge Au Yeung gave leave to adduce expert evidence on this issue, on the basis that it would be relevant and helpful to the Court.

The Plaintiff was successful in arguing that leave to adduce expert evidence should not be given on issues (ii) and (iii). In her judgment, Deputy High Court Judge Au Yeung agreed with the Plaintiff's argument that it must be for the trial judge, not an expert, to determine the suitability of the Products for the 1<sup>st</sup> Defendant and the sufficiency or adequacy of risk warnings and information given about the Products. The suitability of the Products as an investment *generally* was also irrelevant to this case.

## Key Issues

**Application to adduce expert evidence**

**Affirmation unnecessary for this type of application**

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With regard to issue (iv), it was held that both the manner and cause of losses suffered by the Defendants were questions for the trial judge to answer, not an expert. During the hearing, the Defendants amended issue (iv) to read "*the quantum of losses suffered by the 1<sup>st</sup> Defendant*". The Plaintiff did not oppose expert evidence on amended issue (iv) and leave was given to adduce expert evidence.

### Affirmation unnecessary for this type of application

Although the Defendants' solicitors filed an affirmation in support of their application to adduce expert evidence, Deputy High Court Judge Au Yeung was of the view that an affirmation in support was not necessary for an application of this sort, save for good reasons. An order was made that the costs relating to the preparation of the affirmation should be reduced by half. (Clifford Chance had taken the view that an affirmation was unnecessary for an application of this sort and had not filed an affirmation in response.)

### Conclusion

This ruling is a helpful indication that the Court may be prepared to treat sceptically applications made to adduce a wide range of expert evidence in mis-selling claims involving structured investment products. In particular, given the potential difficulty in identifying, and the expense of, obtaining financial services experts, banks facing mis-selling claims should consider carefully whether it would be helpful to seek to limit the scope of admissible expert evidence.

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