PROFESSIONAL LIABILITY IN THE WAKE OF PEEKAY AND SPRINGWELL

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Overview

1. Two major cases in the context of investment advice will be the focus of this presentation for the purposes of considering the scope and extent of professional liability in general. Our approach will be to consider the arguments available to claimants and defendants in such cases. The general tenor of these two authorities is that, at least so far as commercial investors are concerned, English law is now akin to traditional *caveat emptor* (let the buyer beware) reasoning, at least where the adviser has carefully assembled a boilerplate suite of appropriate exemption clauses and disclaimers. The question remains how far this approach may extend to other professionals and other categories of recipients of professional advice.

2. It is necessary to keep separate, so far as possible, a number of different questions:
   - which obligations were undertaken in contract?
   - which obligations did the defendant assume responsibility for at common law (in the tort of negligence), or which obligations will be imposed in negligence (irrespective of any assumption of responsibility)?
   - what is the impact of any exemption clause on contractual or other obligations?
   - what is the impact of any disclaimer on common law obligations?
   - does the Unfair Contract Terms Act 1977 apply so as to potentially invalidate any exemption clause or disclaimer?

The seminal case of Hedley Byrne

3. *Hedley Byrne v Heller & Partners*[1] is the seminal authority on the duty of care of persons who hold themselves out as proffering advice or providing information. The defendants were bankers for Easipower Ltd. They were asked by the plaintiff's bankers whether Easipower 'would be good for an advertising contract of £8–9,000'. They answered affirmatively, but expressly 'without responsibility on the part of the bank'. When Easipower became insolvent, the plaintiffs sought to recover damages from the bankers for negligent misstatement. Crucially the claim failed because of the express disclaimer of responsibility.

4. Nevertheless, the House of Lords held as a matter of principle that a negligent statement, oral or written, could give rise to an action in negligence for damages for economic loss, irrespective of whether any contractual or fiduciary relationship subsisted between the parties. Five individual speeches were given. Briefly stated, they elaborated a test based upon 'voluntary assumption of responsibility'.

5. Lord Morris (with whom Lord Hodson agreed) stated the principle as follows:

   > '[I]f in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows and should know, will place reliance upon it, then a duty of care will arise.[2]

6. Lord Devlin stated that:

   > 'the categories of special relationships which may give rise to a duty of care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in

[1] [1964] AC 465.

[2] [1964] AC 465, 502–03; this passage was cited with approval in *Spring v Guardian Assurance plc* [1995] 2 AC 296, 317 (Lord Goff), and in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 178 (Lord Goff).

Nocton v Lord Ashburton[3] are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract… I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former *Nocton v Lord Ashburton* has long stood as the authority and for the latter there is the decision of Salmon J in *Woods v Martins Bank Ltd* [4]of which I respectfully approve.'[5]

Status of the 'Assumption of Responsibility' Test

7. By the first half of the 1990s, as a result of the two prominent cases of *Smith v Eric S Bush*[6] and *Caparo Industries plc v Dickman*,[7] the 'voluntary assumption of responsibility' fell into disfavor, principally because (especially in the former case) the judges found it difficult to reconcile assuming responsibility with express notices disclaiming responsibility at the same time. Lord Griffiths in *Smith v Eric S Bush*[8] doubted the practical utility of the phrase 'voluntary assumption of responsibility'. Lord Roskill in *Caparo* agreed.[9]

8. However in *Henderson v Merrett Syndicates Ltd*,[10] Lord Goff rehabilitated the 'assumption of responsibility' test of liability, although shorn of the adjective 'voluntary'. His Lordship concluded that

   'though *Hedley Byrne* was concerned with the provision of information and advice, the example given by Lord Devlin of the relationship between solicitor and client and his and Lord Morris's statements of principles, show that the principle extends beyond the provision of information and advice to include the performance of other services. It follows, of course, that although, in the case of the provision of information and advice, reliance upon it by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect), nevertheless there may be other circumstances in which there will be the necessary reliance to give rise to the application of the principle.'[11]

9. Lord Goff rejected criticism of the test of 'assumption of responsibility'[12]and circumvented these difficulties by stressing the *objective* nature[13]of the assumption of responsibility test:

   '[E]specially in a context concerned with a liability which may arise under a contract or in a situation 'equivalent to contract,' it must be expected that an objective test will be applied when asking the question whether, in a particular case, responsibility should have been held to have been assumed by the defendant to the plaintiff.'[14]

[3] [1914] AC 932, 972.

[4] [1954] 1 QB 55.

[5] [1964] AC 465, 528–9, 530; this passage was approved in *Spring v Guardian Assurance plc* [1995] 2 AC 296, 317 (Lord Goff), and in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 178–80 (Lord Goff).

[6] [1990] 1 AC 831.

[7] [1990] 2 AC 605.

[8] [1990] 1 AC 831, 862.

[9] [1990] 2 AC 605, 628.

[10] [1995] 2 AC 145. See also *Spring v Guardian Assurance plc* [1995] 2 AC 296, 317 (Lord Goff).

[11] *Ibid*, 180.

[12] Such as in *Smith v Eric S Bush* [1990] 1 AC 831, 864–5, *per* Lord Griffiths; *Caparo Industries plc v Dickman* [1990] 2 AC 605, 628, *per* Lord Roskill.

[13] On the objective nature of the test, see also *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, 834, *per* Lord Steyn.

[14] [1995] 2 AC 145, 181, citing *Caparo Industries plc v Dickman* [1990] 2 AC 605, 637, *per* Lord Oliver.

10. The finding of assumption of responsibility by a professional man explained why there was no difficulty about liability for pure economic loss, nor indeed liability for negligent omission. Accordingly, Lord Goff concluded that the cases which can be brought under the umbrella of the *Hedley Byrne* case were exempted from the rigours of the three-stage test or arguments about the limits of incrementalism:

> 'It follows that, once the case is identified as falling within the *Hedley Bryne* principle, there should be no need to embark upon any further enquiry whether it is 'fair, just and reasonable' to impose liability for economic loss—a point which is, I consider, of some importance in the present case. The concept indicates that in some circumstances, for example where the undertaking to furnish the relevant service is given on an informal occasion, there may be no assumption of responsibility; and likewise an assumption of responsibility may be negatived by an appropriate disclaimer.'[15]

11. In cases where there was no direct contractual link between claimant and defendant (including the instant case) Lord Goff was prepared to accept that it may well be arguable that the overall contractual setting may nevertheless preclude recognition of a duty of care:

> 'I wish however to add that I strongly suspect that…in many cases in which a contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of, so to speak, short circuiting the contractual structure so put in place by the parties.'[16]

12. The ascertainment of the existence or scope of a duty of care arising from an assumption of responsibility is based (like most English private law exercises in construction) on an objective test. In *Williams v Natural Life Health Foods Ltd*, Lord Steyn also stressed objectivity:

> 'The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff.'[17]

In this situation Lord Steyn accepted that once an assumption of responsibility for the task was established, it was not necessary to enquire whether it was 'just, fair and reasonable' to impose a duty of care.[18]

The Latest Approach to the Tests for Imposing a Duty of Care

13. The tests for imposing a duty of care were reviewed by the House of Lords in *Commissioners of Customs & Excise v Barclays Bank*[19], a case which arose in a non-contractual context (liability for failing to implement freezing order). The speeches in that case referred to the three tests which had been used in deciding whether a defendant sued as causing pure economic loss to a claimant owed him a duty of care in tort[20]:

    i) the assumption of responsibility test, coupled with reliance;
    ii) the "three stage test": (a) whether the loss was reasonably foreseeable; (b) whether the relationship between the parties was of sufficient proximity; and (c) whether in all the circumstances it is fair just and reasonable to impose such a duty; and
    iii) the incremental test.

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[15] [1995] 2 AC 145, 181.

[16] [1995] 2 AC 145, 195.

[17] [1998] 1 WLR 830, 835.

[18] *Ibid*, 834; contrast the situtation where the enquiry proceeds by the three-stage test: *Marc Rich & Co AG v Bishop Rock Marine Co* [1996] 1 AC 211(Lord Steyn).

[19] [2007] 1 AC 181

[20] [2006] UKHL 28; [2007] 1 AC 181, at [4] *per* Lord Bingham.

14. Ultimately, the conclusion of their Lordships was that all of the tests operated at a high level of abstraction and accordingly the detail of each scenario had to be grappled with. Lord Bingham said:

> "… it seems to me that the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole".[21]

15. Similarly Lord Hoffmann[22] emphasised the need for the evolution of "lower level principles" as a more useful guide than "high abstractions":

> "35. There is a tendency, which has been remarked upon by many judges, for phrases like 'proximate', 'fair, just and reasonable' and 'assumption of responsibility' to be used as slogans rather than practical guides to whether a duty should exist or not. These phrases are often illuminating but discrimination is needed to identify the factual situations in which they provide useful guidance. For example, in a case in which A provides information to C which he knows will be relied upon by D, it is useful to ask whether A assumed responsibility to D: *Hedley Byrne & Co Ltd v Heller & Partners* Ltd [1964] AC 465: *Smith v Eric S Bush* [1990] 1 AC 831. Likewise, in a case in which A provides information on behalf of B to C for the purpose of being relied upon by C, it is useful to ask whether A assumed responsibility to C for the information or was only discharging his duty to B: *Williams v Natural Life Health Foods Ltd* [1998] AC 830. Or in a case in which A provided information to B for the purpose of enabling him to make one kind of decision, it may be useful to ask whether he assumed responsibility for its use for a different kind of decision: *Caparo Industries plc v Dickman* [1990] 2 AC 605. In these cases in which the loss has been caused by the claimant's reliance on information provided by the defendant, it is critical to decide whether the defendant (rather than someone else) assumed responsibility for the accuracy of the information to the claimant (rather than to someone else) or for its use by the claimant for one purpose (rather than another). 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. The purpose of the inquiry is to establish whether there was, in relation to the loss in question, the necessary relationship (or 'proximity') between the parties and, as Lord Goff of Chieveley pointed out in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 181, the existence of that relationship and the foreseeability of economic loss will make it unnecessary to undertake any further inquiry into whether it would be fair, just and reasonable to impose liability. In truth, the case is one in which, but for the alleged absence of the necessary

[21] [2007] 1 AC 181, at [8].
[22] [2007] 1 AC 181, at [35-36].

relationship, there would be no dispute that a duty to take care existed and the relationship is what makes it fair, just and reasonable to impose the duty.

> 36. It is equally true to say that a sufficient relationship will be held to exist when it is fair, just and reasonable to do so. Because the question of 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, it is by no means a simple question of fact. Questions of fairness and policy will enter into the decision and it may be more useful to try to identify these questions than simply to bandy terms like 'assumption of responsibility' and 'fair, just and reasonable'. In *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 295, 300-303 I tried to identify some of these considerations in order to encourage the evolution of lower-level principles which could be more useful than the high abstractions commonly used in such debates."

Peekay Intermark v Australia and New Zealand Bank

16. In the first of the two cases which we are considering in detail, *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd*[23], the Court of Appeal rejected a claim by a commercial investment vehicle for mis-selling a complex financial product, reversing the Deputy Judge who had held that the bank had fundamentally misrepresented the nature of a financial product by describing it as a proprietary investment in Russian bonds, whereas in fact it was a derivative or structured deposit contract. The Court of Appeal attached much greater importance to the contractual documentation and a signed declaration by the investor's agent (Mr Pawani) of a "Risk Disclosure Statement" that he understood the nature of the investment and the risks. The accurate description of the investment concerned was 'not buried in a mass of small print but appeared on the face of the documents as part of the description of the investment product.' The Court of Appeal reversed the judge's finding of inducement: the investor had relied on his own misunderstanding. Accordingly the claim failed in its entirety.

17. Moore-Bick LJ relied heavily on the traditional 'signature rule' and pronounced:[24]:

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

Peekay: Contractual Estoppel

18. The Court of Appeal was prepared to go further and indicated in obiter dicta that it may have been prepared to hold that the contractual documentation gave rise to a 'contractual estoppel.' Moore-Bick LJ (with the concurrence of Chadwick LJ and Lawrence Collins J) stated:

[23] [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511.

[24] [2006] 2 Lloyd's Rep 511, at [43].

“56. There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel: see *Colchester Borough Council v Smith* [1991] Ch. 448, affirmed on appeal [1992] Ch.421.

“57. It is common to include in certain kinds of contracts an express acknowledgment by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in *Colchester Borough Council v Smith*. However, that particular question does not arise in this case. A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established: see *E A Grimstead & Son Ltd v McGarrigan* (CA) (unreported, 27th October 1999)

“60. The purpose of the Risk Disclosure Statement was both to draw to the attention of the investor the need for caution when investing in emerging markets and to make it clear that ANZ was only willing to enter into a contract with him on the assumption that he had satisfied himself that the transaction was suitable for him. By confirming that he had read and understood the statement and returning it with his instructions to make the investment Mr. Pawani offered to enter into a contract with ANZ on behalf of Peekay on those terms and that offer was accepted by the bank when it implemented his instructions. As a result it was part of the contract between them that Peekay was aware of the nature of the investment it was seeking to purchase and had satisfied that it was suitable for its needs. In those circumstances, and since it is not suggested that the bank misrepresented to Mr. Pawani the effect of the documents, I do not think that it is open to Peekay to say that it did not understand the nature of the transaction described in the FTCs; and if that is so, it cannot assert that it was induced to enter into the contract by a misunderstanding of the nature of the investment derived

> from what Mrs. Balasubramaniam had said about the product some days earlier.'[25]

19. Accordingly Moore-Bick LJ considered the risk disclosure statement about emerging markets and the signed declaration whereby the investor had assented to the proposition that he had satisfied himself that the transaction was suitable for its needs.

20. Chadwick LJ in his concurring judgment stated:

> 'Third, Peekay could not be heard to say (through Mr Pawani) that it had thought it unnecessary to read and understand the FTCs. The Risk Disclosure Statement was a contractual document – as Mr Pawani recognised when he returned it, signed, with the letter of 7 February 1998. ANZ accepted the investment instructions in that letter on the basis of the investor's confirmation that it had read and understood the terms of the Statement. That confirmation, as it seems to me, operates as a contractual estoppel to prevent Peekay from asserting in litigation that it had not, in fact read and understood the Risk Disclosure Statement. And, if it had read and understood the Risk Disclosure Statement, it must be taken to have accepted that ANZ would assume that it fully understood the nature of the transaction into which it was entering, was aware of the risks, and had determined that the transaction was suitable for its purposes. Given that, Peekay could not be heard to say that Mr Pawani had assumed that the FTCs which he had signed on its behalf did not need to be read and understood.'[26]

21. Accordingly, in *Peekay* the Court of Appeal was prepared to hold that the contractual documentation in that case gave rise to a 'contractual estoppel.'

22. In addition, in *Peekay* the Court of Appeal made it clear that, in the alternative the entire agreement clause may give rise to an estoppel by representation (based on Chadwick LJ's earlier judgment in *E A Grimstead & Son Ltd v McGarrigan* (CA) (unreported, 27th October 1999)), albeit the point had not been explored in evidence in that case.

Springwell Navigation: The Factual Matrix

23. In the second of our two cases, *J P Morgan Chase Bank v Springwell Navigation Corporation*[27], the investor ("Springwell") was a corporate vehicle of the Polemis family, wealthy Greek shipowners, operating a tanker and dry cargo fleet. The family used the commercial banking services of Chase in New York since the 1950s. From about 1986 the family shipping business was generating capital which was not immediately required for that sector, and which needed to be managed and invested. Springwell was thereby used from 1986 to perform this treasury function, with its decision-making carried out largely by Adamandios, the younger of the two Polemis brothers ("AP"). Its claim related to multi-million dollar losses on its emerging markets portfolio, including a headline figure of US$290 million for its direct losses.[28]

24. Emerging market bonds arose from the re-structuring of the debt of countries formerly known as "Less Developed Countries", but re-dubbed "emerging markets", with significant bond issues by Mexico in 1989, Venezuela in 1991, Argentina in 1993, Brazil and Poland in 1994,

[25] [2006] 2 Lloyd's Rep 511, at [56, 57 and 60].

[26] [2006] 2 Lloyd's Rep 511, at [70].

[27] [2008] EWHC 1186 (Comm) (the principal judgment on the general advisory claim and misrepresentation); [2008] EWHC 1793 (Comm) (judgment on the post-default claim and custody fees); [2008] EWHC 2848 (Comm) (judgment on costs); [2009] EWHC (Comm) 282 (refusing permission to appeal). On 16 June 2009 the Court of Appeal gave permission to appeal in respect of two aspects of the claim in respect of which permission was sought, namely misrepresentation in respect of the GKO-based notes and the post-default damages claim: [2009] EWCA Civ 716 (Aikens and Thomas LJJ).

[28] Quoted by the Court of Appeal: [2009] EWCA Civ 716, para [3] (Aikens LJ).

Ecuador and Bulgaria in 1995 and Russia in 1997.[29] Chase was a market maker in emerging market debt.[30]

25. The losses claimed for arose principally arising from the Russian government's default on some of its bonds in August 1998.[31] Springwell had invested heavily in derivative contracts issued by a Chase entity which were based on Russian GKO bonds.[32] Both the Russian government default and the Asian financial crisis had a devastating impact on the portfolio, which in turn, it was alleged, deprived the family shipping business of capital.

Springwell Navigation: The Claims

26. The claim was advanced against various Chase entities, including its "private bank" arm ("CMB"), its "investment bank" arm (at various times "CIBL" or "CMIL") and a Jersey-based issuer of derivatives within the group.[33] Springwell's principal claim against Chase was for damages or equitable compensation in respect of breach of contract, negligence, and breach of fiduciary duty[34] in respect of its investment losses.

27. The central allegation was that Springwell's investment portfolio as at August 1998, consisting principally of holdings in emerging markets, was one which reasonable investment adviser could have recommended. (This is described in the case as the "general advisory claim"). Instead, it was contended, Springwell should have held a more diversified portfolio, including more low risk investments and greater liquidity, comprising more deposit-based products, US Treasury bonds, and blue chip bonds, and similar investments.

28. Furthermore, if properly advised the portfolio would not have been leveraged to the extent that it was – that is, Springwell had borrowed further funds from Chase, secured on the existing portfolio, to purchase more investments of the same type – exposing it to substantial margin calls and forced to liquidate assets on a falling market.

29. In the alternative, even if there were no general duty to give investment advice to Springwell, Chase was liable for negligent misstatement or breach of section 2(1) of the Misrepresentation Act 1967 in misleading Springwell as to the characteristics of the GKO-linked investments.

30. Springwell also claimed an account of, and equitable compensation for, alleged excessive profits made by Chase and for wrongly-charged custody fees.

31. Springwell claimed a distinct head of consequential loss in respect of the loss of profits from new vessels which it alleged the Polemis fleet would have acquired but for the capital losses on the investment portfolio.

32. Springwell lost in respect of all of these allegations, save for its claim in relation to custody fees.

[29] Para [142].

[30] Para [151].

[31] This was litigation on a grand scale: the first instalment of the trial lasted 68 days, with 390 lever-arch files in the trial bundle, and 22 lever arch files of authorities: para [17]. As the Court of Appeal noted at the permission hearing, they were faced with 'two judgments of Gloster J and the resulting orders from those judgments. The judgments were delivered after a trial lasting 68 days. They were given on 27 May 2008 and 25 July 2008. The first judgment runs to 742 paragraphs and covers 277 pages. The second covers 261 paragraphs over some 84 pages.' [2009] EWCA Civ 716, para [1] (Aikens LJ).

[32] GKO stands for Gosudarstvennye Kratkosrochniye Beskuponniye Obligatsii (in Russian).

[33] The group will be called 'Chase' herein. Despite Springwell' attempts to lump the group companies together, Gloster J found it necessary to distinguish separate entities when considering whether a duty of care was owed: para [54].

[34] Claims for fraud and dishonesty had been asserted for six years from the issue of proceedings in April 2001, but were abandoned at the eve of trial. Earlier proceedings in the USA had been dismissed on jurisdictional grounds.

Springwell Navigation: The Existence of a Contractual or Tortious Duty to Advise?

33. The existence and scope of general duty to advise was the principal battlefield in the case at first instance. The Judge accepted criticism from Chase's counsel, that both in its contractual and tortious formulations, the pleadings were "vague" or "opaque".[35]

34. The background was that from the early 1980s, the head of Chase's London-based Greek Shipping Department at the private bank, who knew the AP socially, had made statements that Chase wanted to provide a wider service than narrow ship finance, and wished to offer its clients a full wealth management service. In late 1987 the head of shipping introduced AP to Mr Justin Atkinson ("JA"), a Chase salesman[36], who could advise as to alternatives to deposit-based products. Springwell's case was that it knew little of investments and that it trusted Chase which held itself out as an expert in the field. AP was pre-occupied with the shipping business and had no educational or other experience of investment and fund management, or inclination or appetite for those subjects.

35. In Gloster J's view the alleged advisory duties were of a "very wide-ranging and onerous nature,"[37] embracing duties in relation to "know your customer", customer's attitude to risk, continuing obligations in recommending appropriate investments, and taking care as to the portfolio as a whole, the content of which should have been regularly reviewed and cross-checked against suitable investment objectives. Furthermore, it was alleged that the terms and risks of both investments and related borrowing should have been adequately explained.

36. Overall (in summary form) Springwell contended that "Chase was responsible for selecting and constructing Springwell's entire portfolio and providing ongoing investment advice about it, on what became effectively a daily basis…."[38] It might be said that the broad advisory duty contended for, only just fell short of an allegation that Chase had assumed an investment management or discretionary relationship over the portfolio.

37. Gloster J treated the contractual and tortious duties alleged as "concomitant and co-extensive".[39] Her Ladyship reviewed the authorities from *Hedley Byrne v Heller*[40] to the modern authorities of *Williams v Natural Life Health Foods Ltd*[41] and *Commissioners for Customs and Excise v Barclays Bank Ltd* .[42] From the former her Ladyship took the emphasis on an objective assessment of the facts[43], and from the latter Lord Hoffmann's encouragement of "lower level principles."[44]

38. Gloster J accordingly indicated:

> 'In the present case, the relevant "lower level" factors that, in my judgment, serve as indicators of the existence (or otherwise) of a contractual or tortious duty of care are at least the following:
>
> (i) the contractual context (including the terms of the relevant contractual documents and disclaimers, and the absence of any written advisory agreement);
> (ii) what, if anything, was said to AP by Chase representatives when he was introduced to JA in 1987/1988;

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[35] Paras [35-36]; and shifting in respect to the case in tort. See also paras [40-41].

[36] When first introduced to AP, JA was recommending European commercial paper as a representative of the Private bank. In 1990 he moved to CIBL's (the Investment Bank's) London Debt Arbitrage Group (later the Global Emerging Markets Group, and then the International Fixed Income Group).

[37] Para [42].

[38] Para [43].

[39] Para [47].

[40] [1964] AC 465.

[41] [1998] 1 WLR 830.

[42] [2006] UKHL 28, [2007] 1 AC 181.

[43] [1998] 1 WLR 830, esp at 835 *per* Lord Steyn.

[44] [2006] UKHL 28, [2007] 1 AC 181, para [35].

(iii) the actual role played by JA (including the purpose for which he was giving AP recommendations or advice) over the relevant period 1987-1998;
(iv) the actual role of the Shipping Department in the period 1987 - 1990, and, subsequently, the Private Bank, in the period 1990 -1994;
(v) the extent of AP's financial experience or sophistication;
(vi) the extent of AP's reliance on JA, CMB, CIBL and CMIL, including the extent to which it was foreseeable that he would rely upon them for the investment advice Springwell alleges it should have been given; and
(vii) the regulatory background.'[45]

39. Gloster J saw AP cross-examined for 12 days and also heard contemporaneous tape-recorded conversations in which AP 'came across as sophisticated and knowledgeable about emerging markets investments and familiar with the jargon used by JA.'[46]

40. Prior to the dealings complained of the Polemises had been active and speculative traders in foreign exchange during the 1980s, demonstrating 'clear willingness on the part of AP and SP, even at that early stage to accept substantial risk in the pursuit of profit, in the financial markets. It also shows considerable financial sophistication on their part.'[47] In the circumstances, and after a wide review of the relationship Gloster J held the evidence went nowhere near to establishing the widely pleaded duty in contract and tort to give Springwell general investment advice.[48]

41. In a difficult passage, Gloster J offered the following analysis of the relationship between JA as 'adviser' and AP as 'customer.' First, her Ladyship held that AP knew from the start that JA was 'a salesman of a limited asset class.'[49] Secondly, Gloster J nevertheless accepted Springwell's case that JA was not a mere 'execution only' salesman, merely carrying out the trade and not proffering advice.[50] Thirdly, and it necessarily follows, JA was giving investment advice.[51] Fourthly, Gloster J was accordingly prepared to recognise that some limited duty of care arose:

> 'Moreover, such personal recommendations, or advice, as AP was being given by JA – at least at this early stage – about the products that CIBL, by JA, was offering to sell…, has to be viewed, in my judgment, as no more than the recommendations of a trader to a buyer as to what was available, on what terms, and perhaps also as to the respective merits of the products on offer, given the requirements of the particular client. It may well be that, theoretically, in such circumstances, a low level duty of care would arise on the part of the salesman not to make any negligent misstatements, or even to use reasonable care not to recommend a highly risky investment without pointing out that it was such, but a low level duty along those lines is worlds away from the wide duty of care that was pleaded or relied upon as having arisen at this early stage…. Thus the notion that, in the context of the trading relationship at this early stage, as a result of the manner in which JA was introduced to AP, CIBL and/or CMB, by JA had either an obligation to ascertain Springwell's investment criteria, or to give wide ranging advice, for example, about portfolio diversification or concentration issues, or in relation to the general composition of the portfolio as a whole, is one that, in my judgment, simply does not reflect the reality of the position.'[52]

[45] Para [53].

[46] Para [65]. Overall Gloster J did not rate AP as a credible witness: para [68]. In contrast JA impressed as a witness: para [73].

[47] Para [80]. 'SP' is AP's elder brother.

[48] Paras [94], [429], [452] and [456].

[49] Para [105].

[50] Para [106].

[51] Para [107].

[52] Para [108].

42. Furthermore, Gloster J found as a fact that AP wanted Springwell's assets to be fully invested, and fully invested in emerging market debt.[53] In addition, her Ladyship found AP was the driving force in pushing for greater leverage in respect of the portfolio, and, accepting the evidence of one of Chase's witnesses that the investor profile of Springwell was 'sophisticated, aggressive, greedy' and that it was in many ways at the forefront of investing in emerging markets.'[54]

43. Furthermore, Gloster J was sympathetic to Chase's claim that it had tried to encourage Springwell to diversify its portfolio.[55]

44. Springwell was a 'highly sophisticated investor.'[56] The absence of a written advisory agreement and of any reference to such an agreement prior to litigation militated against the alleged duties.

45. There was no application for permission to appeal before the Court of Appeal in respect of Gloster J's dismissal of the general advisory claim.[57]

Springwell Navigation: The Regulatory Regime and Customer Classification

46. Gloster J was clear that in determining whether there was a general contractual or tortious duty to give general investment advice, she was not directly concerned with the applicable regulatory obligations of the Chase entities at the relevant time. In fact the Private Bank held both a banking licence and was regulated by the Securities and Futures Authority ("SFA") and the Investment Bank was also SFA regulated. The Chase entities were also listed money market institutions under section 43 of the Financial Services Act 1986, which exempted wholesale counterparty transactions from the provisions of the 1986 Act. Gloster J did not place any reliance on a 'wholesale counterparty notice' which Chase said it had provided to Springwell in 1990, and which was in any event superseded by Chase's customer classification exercise under the SFA conduct of business regime which was introduced in 1992 (when the SFA replaced the Securities Association).[58]

47. For the critical period Chase was subject to the SFA customer classification regime under which in 1992 Springwell was classified as a non-private customer, it being neither an individual who was not carrying on an investment business, nor a small business investor with capital or net assets of less than $5 million. The consequence was the SFA rules requiring suitable recommendations and reasonable steps to ensure that risks were understood, which applied to dealings with private customers, were inapplicable.[59]

Execution Only?

48. There is an extensive, but ultimately inconclusive discussion in *Springwell* of the meaning of "execution only" business, especially in the light of the SFA's "Guidance Notes on Execution-Only Business".[60] Gloster J accepted that during the course of his dealings with AP, JA did give advice and make recommendations, but nevertheless concluded:

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[53] Para [164].

[54] Paras [245-246]. AP had even gone on a fact-finding trip to Russia with JA in May 1997: para [289].

[55] Her Ladyship accepted the evidence of JA that on one occasion in 1997 JA said to AP: 'one thing I do understand very well is that … you are very well diversified within Emerging Markets Debt but you have no First World Debt you have no First World Equities and you have no emerging markets equities … And you have got to have some you should have some equities, you don't have a 500 million dollar f***ing portfolio with no equities anywhere.' (para [418]; expletive deleted).

[56] Para [432].

[57] [2009] EWCA Civ 716, paras [4] and [7] (Aikens LJ).

[58] Para [141].

[59] Para [200-207]. Springwell had accepted the same classification in its dealings with Merrill Lynch: para [283].

[60] Appendix 42 to the SFA Rules quoted at paras [366-367].

'the semantic debate about whether JA's role should be defined as an "execution-only" for the purposes of the SFA Rules was ultimately of little utility. Nor did I find the views of the various Chase witnesses, or the experts, as to whether JA's role could or should be categorised as "execution-only", either for the purposes of the SFA Rules, or more widely, of any real assistance to the issue which I have to decide, namely whether Chase owed a common law duty of care to advise in the terms pleaded or advanced in argument. This is because I do not accept Mr. Brindle's [counsel for Springwell] argument that, if Springwell could not be categorised as an execution-only customer (because it was receiving personal recommendations from JA), it necessarily followed that Chase and Springwell owed advisory duties, with all the incidents of a fully-fledged common law duty of care.'[61]

49. 'Execution only' was characteristic of a transaction, not a relationship.[62] Gloster J concluded:

> 'My conclusion, as a matter of fact, and on the evidence restricted to the role discharged by JA in practice, without any regard to the terms of the contractual documentation, is that, JA, in his capacity as a salesman, did give investment advice, in the sense of personal recommendations to AP about what emerging markets investments Springwell should buy and sell, and, in a very generalised way, about the state of, and strategy for, its emerging markets portfolio. However I find that, at all times (save in relation to relatively few and unimportant instances, where, largely for practical reasons, a decision was taken by JA, e.g. to roll over a particular investment), AP retained control over the decision-making and all decisions as to whether to initiate trades were taken by him on Springwell's behalf.'[63]

50. This appears to amount to a finding that Springwell relied on its own judgment, rather than any recommendations proffered to it by Chase. Elsewhere Gloster J accepted that AP did rely upon JA 'to a considerable extent', at least with regard to providing information, executing instructions and offering recommendations, but that ultimately AP made his own decisions.[64] It was not correct to characterise the relationship as 'non-advisory' however, as advice was proffered. Rather in Gloster J's view there was no undertaking of general investment advisory responsibility.[65]

Springwell Navigation: Analysis of Conclusion on Duty to Advise?

51. The case illustrates the importance of the status and relative sophistication of the investor client. Whilst this case did not involve a market counterparty and therefore cannot be described as a 'wholesale' investment transaction, it did involve the corporate vehicle of a multi-million dollar shipping group and can therefore properly be characterised as a 'commercial' investment case. In such cases the documentation looms large in the characterisation of the relationship, given that different forms of advisory and portfolio management services and contracts are available, it will be difficult to persuade a Judge that the ensuing relationship differs from that described by the contemporaneous documents. Even the fact that recommendations are made and followed, does not appear to affect the agreed basis of dealing.

52. Gloster J quoted the analysis of Philip Wood of the approach of the English courts, based on cases such as *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd*[66] as illustrating a reluctance to impose a general advisory duty:

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[61] Para [370].

[62] Para [371]

[63] Para [373].

[64] Paras [447-448].

[65] Para [479].

[66] [2006] EWCA Civ 386, [2006] 1 CLC 582; [2006] 2 Lloyd's Rep 511.

> 'The above cases tend to show that where an investor loses on the investment, in the sophisticated investor context it will be hard for the investor to claim compensation from the seller of the investment. The message delivered by the courts is that effectively, if a buyer of a product does not understand the product, it should obtain proper advice and pay for it.'[67]

53. It might be tempting to describe the resulting legal scene as tantamount to *caveat emptor* or 'let the buyer beware' for commercial clients, and *a fortiori* wholesale clients. Nevertheless the reluctance to impose a general duty to advise does not entail that there is no duty only to provide accurate information, and accordingly a more limited scope of duty as recognised by Lord Hoffmann in the *South Australia Asset Management Corp v York Montague Ltd* or *SAAMCO* case, which concerned negligent valuations of commercial property.[68] However even the duty to provide information may be effectively discharged by appropriate documentation (which can over-ride any oral mis-statements) as the *Peekay Intermark* case demonstrates.

54. Overall in the absence of a clear contractual undertaking to advise there are serious obstacles in the way of commercial investors bringing claims for negligent investment advice or misrepresentation where the alleged adviser's documentation negates any duty to advise and provides accurate information, albeit the prospects for claims in misrepresentation may be reconsidered by the Court of Appeal in the pending appeal in *Springwell*.

Springwell Navigation: Breach of Fiduciary Duty

55. In *Springwell* it was accordingly held that neither the private bank nor the investment bank wings of Chase owed a commercial investor a duty to provide general investment advice as to the composition of a multi-million dollar portfolio of assets. As an alternative tack, the claimant investor had also pleaded a fiduciary relationship in order to advance three arguments. First, there was positive duty to disclose all material acts, including the content of the bank's documentation and explanation of the effect of such provisions. Secondly, to support an account of what was said to be an unusually large profit at the investor's expense. Thirdly, to support a duty of good faith, including obligations to avoid conflicts of interest. Gloster J accepted that the bank might owe fiduciary obligations in its capacity as custodian of assets for its customers, but was less impressed with the argument that the fiduciary relationship modified the contractual position:

> 'There is no need for me to conduct a meticulous rehearsal of the relevant authorities or to repeat the relevant facts relating to Springwell's relationship with the Private Bank and the Investment Bank. In the absence of any contractual agreement for Chase to provide investment advisory services to Springwell, or any common law acceptance of an obligation to do so (as I have found the position to be), I do not see how what was essentially a commercial banking relationship between Chase and Springwell could give rise to the extensive fiduciary obligations on the part of Chase contended for by Springwell. In effect, Springwell relied on the same facts to support it case that Chase owed investment advisory obligations as it did to support the existence of a fiduciary relationship. Chase may, in its capacity as custodian of securities held for Springwell's account, have had certain limited fiduciary obligations, but this is a far cry from the wide-ranging fiduciary relationship which Springwell asserted."[69]

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[67] Para [489] citing P Wood, *Regulation of International Finance* (Sweet & Maxwell, London 2007) para 14-16. Similarly, P Wood, *Law and Practice of International Finance [University Edition]* (Sweet & Maxwell, London 2008), para 22-06.

[68] *South Australia Asset Management Corp v York Montague Ltd ('SAAMCO')* [1997] AC 191. Compare the conclusion of the House of Lords in *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2001] UKHL 51, [2002] 1 Lloyd's Rep 157, [2001] 2 All ER (Comm) 929, [2002] PNLR 8 that in a particular transaction a reinsurance broker owed a duty to advise on whether to undertake a particular transaction, rather than a mere duty to provide information, and its impact on the remedy.

[69] [2008] EWHC 1186 (Comm), para [573].

56. Gloster J concluded there was no fiduciary duty to explain the effect of the contractual documentation.[70]

Contractual Provisions Excluding any Common Law Duty of Care

57. In cases involving two commercial parties there is evidence in the recent cases that detailed contractual documentation will be taken as defining the relationship between the parties, so as to preclude any free-standing common law duties of care.[71]

58. Furthermore, there is judicial reluctance to characterise such terms which purport to define the parties' relationship as exemption clauses so as to bring them within the statutory regimes of the Unfair Contract Terms Act 1977 and section 3 of the Misrepresentation Act 1967.[72]
59. The two recent cases of *Peekay* and *Springwell* exemplify this approach, with the former (as noted above) prominently asserting a doctrine of contractual estoppel.

60. A wide-ranging attack was made on the contractual estoppel reasoning in *Peekay* in *Springwell* where, in summary Gloster J concluded:

> 'i) the decision of the Court of Appeal in *Peekay* is not *obiter* insofar as it relates to contractual estoppel;
> ii) *Peekay* and subsequent authorities indeed recognise that there is a difference between contractual estoppel and estoppel by representation, in that the former species of estoppel does not require the parties to prove detrimental reliance;
> iii) a contractual estoppel can arise from an agreement or a representation about past facts;
> iv) the decision in *Peekay* was not reached *per incuriam*, and is not inconsistent with the *ratio* in *Lowe v Lombank*; and
> v) the decision in *Peekay* shows that the contractual effect of the Relevant Provisions is to preclude the coming into existence of any general duty of care to give investment advice; and Springwell is not entitled to contend that the Relevant Provisions are not binding upon it simply because: at various stages of the relationship, the Investment Bank, by JA, (or indeed the Private Bank) may, to a greater or lesser extent, have been giving advice or making recommendations to AP; or AP may, to a greater or lesser extent, having been relying on such advice in making Springwell's investment decisions.'[73]

61. Gloster J developed her reasons in support of these conclusions at some length in paras [557-568] of the Judgment where the learned Judge concluded that contractual estoppel formed part of the ratio of the case, and had been followed on two occasions in subsequent High Court cases.[74] Critically estoppel by contract requires no evidence of detrimental reliance (in contrast to estoppels by representation).

Springwell *Navigation*: The Contractual Provisions

62. Springwell's case was that an advisory duty arose as early as 1986, whereas the first written, contractual disclaimers only dated from 1992. Chase had developed a programme for investment in the emerging market debt sector in 1992 (the 'Master Forward Programme'), in which it afforded Springwell a $40 million facility. A significant plank of Chase's defence were

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[70] [2008] EWHC 1186 (Comm), para [576].

[71] See, for example, [2006] EWHC 2887 (Comm); affd [2007] EWCA Civ 811.

[72] See also the refusal to consider clauses limiting the authority of agents as being exemption clauses for the purposes of the 1967 Act and the 1977 Act: *Overbrooke Estates v Glencombe Properties Ltd [*1974] 1 WLR 1335; *Museprime Properties Ltd v Adhill Properties Ltd* [1990] 2 EGLR 196.

[73] Para [556].

[74] *Bottin International Investments v Venson* [2006] EWHC 3112 (Ch), para [154] (Blackburne J) and *Donegal International v Republic of Zambia* [2007] EWHC 197 (Comm); [2007] 1 Lloyd's Rep 397, para [465] (Andrew Smith J): (*Springwell* at para [561]). Furthermore, it was consistent with the analysis of Rix J in *Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals and Polymers Ltd* [1998] 2 Lloyd's Rep 139, at paras [168-69]; affd [1999] 1 Lloyd's Rep 387 (*Springwell* at para [565]).

various disclaimers and risk warnings in its contractual documentation with Springwell. In the case these were described as the 'Relevant Provisions' in the 'Relevant Documents' which comprised:

(1) a Master Forward Agreement ('MFA') dated 24 April 1992 between CIBL and Springwell, and confirmations under it;
(2) a Dealings in Developing Countries Securities dated 28 May 1993 between CMB and Springwell;
(3) a Dealings in Developing Countries Securities dated 17 September 1997 between CMB and Springwell;
(4) a Global Master Repurchase Agreement ('the GMRA') dated 22 September 1997 between CMB and Springwell;
(5) various leverage confirmations; and
(6) documentation in respect of the GKO-linked investments.

63. These comprised a mixture of ordinary terms and conditions of business, representations or acknowledgement as to non-reliance and conventional exemption clauses.[75]

64. The 'Relevant Provisions" in the MFA and the GMRA included acknowledgements that Springwell: acted independently and without reliance on Chase and did not consider Chase to be advising it of the investment merits of any transaction; was a sophisticated investor and understood the risks involved; was a business customer or non-private customer. It was further acknowledged that transactions were 'execution only' and that the contractual documentation represented the 'entire agreement' of the parties.[76]

65. Furthermore, the 'Dealings in Developing Countries Securities' Letters contained similar acknowledgements and confirmed Springwell's classification as a non-private customer and of the effect of reduced protection under the SFA Rules (compared to a private customer).[77]

66. The 'risks disclosure' sheet attached to documentation in respect of the GKO-linked investments comprised various warnings, including as to default by the Russian government, which risks the signatory confirmed it understood and accepted.[78]

67. These documents were signed on behalf of Springwell. Gloster J rejected as 'incredible' AP's evidence that had the provisions as to sophisticated investor status and the absence of advice been explained to him, he would not have signed the MFA.[79] Gloster J concluded:

> 'that by sending the letters, CMB, CIBL and CMIL made it clear to Springwell that, in respect of transactions otherwise subject to the rules of the SFA, Springwell was not entitled to the regulatory protections available to a private customer. They also confirmed that they were not undertaking any obligation to Springwell to advise as to suitability or to take steps to enable Springwell to understand the nature of the risks involved in any transaction which Springwell chose to conclude. On the face of the documents, by signing the latter two letters, Springwell purportedly agreed to these terms. Furthermore, in such manner Springwell also purportedly agreed and represented that it placed no reliance at all on Chase and further that it was itself able to evaluate the merits and risks associated with the instruments it purchased. I accept that it was only on this basis that Chase was willing to conduct business with Springwell in the way which it did.'[80]

[75] Para [478].

[76] Paras [210-211] and [344-347].

[77] Paras [222], [226-227], [234] and [348].

[78] Paras [319-22].

[79] Paras [212] and [214].

[80] Para [236].

68. It followed from the 'Relevant Provisions' that Chase assumed no obligations to provide investment advice, and furthermore the documentation 'governed the entirety of the dealings between the parties.'[81]

Springwell *Navigation*: The Unfair Contract Terms Act 1997/the Misrepresentation Act 1967

69. Gloster J characterized reliance on these Acts as 'by way of last ditch argument'.[82] She accepted Chase's submission that:

> 'most of the provisions within the contractual documentation do not fall within the scope of this legislation. There is a clear distinction between clauses which exclude liability and clauses which define the terms upon which the parties are conducting their business; in other words, clauses which prevent an obligation from arising in the first place.'[83]

70. Even if that were wrong, and to the extent that the Acts had application, the approach of the Courts to purely commercial contracts was pithily stated by Tuckey LJ in *Granville Oil & Chemicals v Davis Turner & Co*[84]:

> 'For these reasons I think the Judge reached the wrong conclusion in this case. If necessary I would say he was plainly wrong. I am pleased to reach this decision. The 1977 Act obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms.'

71. The factors militating against the conclusion that the Relevant Provisions were unreasonable, and were. indeed, reasonable, included in *Springwell*:

> 'i) These were substantial contracts between commercial counterparties of equal bargaining power. As I have already held, Springwell had absolutely no need to continue to trade with Chase. It did not need to trade in the emerging markets at all but, if it wished to do so, it could trade with other competitor banks (and, indeed, did so, with ML[Merrill Lynch]).
> ii) None of the terms of the contractual documentation was intrinsically unfair or unreasonable. They merely defined and delineated the terms upon which the parties were prepared to do business and in fact did business. None of the exclusions of liability (including the exclusion clause in the DDCS Letters) could be characterised, in context, as unduly harsh or unreasonable.
> iii) Many of the documents were standard documents (whether standard within Chase or standard within the market) and, indeed, many of the terms were contained in other contracts signed by Springwell. The expert evidence supported the proposition that these were standard market terms.'[85]

81 Paras [475-476].

82 Para [597].

83 Para [600] relying on *Tudor Grange Holdings v Citibank* [1992] Ch 53, at [65-66] and *IFE v Goldman Sachs* [2007] EWCA Civ 811, at [28].

84 [2003] EWCA Civ.570; [2003] 2 Lloyd's Rep 356, at [31].

85 Para [605].

Conclusions and the Regulatory Context

72. *Peekay* and *Springwell* accordingly suggest that commercial investors face an uphill struggle in successfully making claims for poor investment advice.[86] Conversely retail investors face fewer obstacles, benefitting from a regulatory regime where contracting out of regulatory responsibilities is not permitted.[87]

73. Where the regulatory regime falls silent it is matter for the common law what liability may be imposed. The Court of Appeal in *Gorham v British Telecommunications plc*,[88] was emphatic that the silence of the regulatory regime was no reason for not recognizing a duty of care, in that case to the widow of the recipient of poor financial advice who was prejudiced as a result. Pill LJ stated:

> 'In my judgment, the stress placed upon the statutory code as a decisive ground for refusing a remedy is misplaced. Mr. Palmer [counsel for the widow] rightly accepted the pressing need which developed in the 1980s for a statutory framework within which financial services could be provided. I do not however discern a parliamentary intention to eliminate the power of courts to decide whether a duty of care arises in a particular situation and, if so, what its extent is. Had Parliament not intervened, remedies for the abuses which existed in this field would almost certainly have been developed by the courts. The courts now do so in the context, and with the benefit of, rules and codes of practice laid down by those concerned with the maintenance of proper standards. The courts can be expected to attach considerable weight to the content of codes drafted in these circumstances but are not excluded from making their own assessment of a situation.
>
> In particular, the silence of the codes on the subject of the rights of beneficiaries does not exclude the power of the court to consider whether a duty of care exists. The present question does not appear to me to have been addressed by Parliament or by Lautro and the issue is to be decided according to common law principles. The plaintiffs are not seeking to extend the scope of the duty admittedly owed by Standard Life; they argue only that the duty is owed to them as well as to Mr. Gorham. In my judgment, the principle in *White v. Jones* [1995] 2 A.C. 207, as expressed by Lord Goff, covers the present situation.'[89]

74. In contrast, in *Seymour v Caroline Ockwell & Co (a firm)*[90] HHJ Havelock-Allen QC rejected the imposition of a direct duty of care by an intermediary higher up the chain of advice (in addition to the admitted duty on the client-facing independent financial adviser) in a context where the regulatory code was silent and held:

> 'My conclusion on the matrix issues is that the contractual chain and framework of statutory duties tell against the imposition of a direct duty of care on ZIFA. It would be a duty which by-passed the regulatory regime and side-stepped the contractual remedy. Whilst not of itself fatal, it is significant that the relevant provisions of the Adopted FIMBRA Rules (in particular Rules 29.5.1 and 29.5.3) place responsibility for recommendations and information squarely on the shoulders of the professional whose clients are relying on the advice being given. Mr and Mrs Seymour were not ZIFA's clients. They were the clients of Miss Ockwell. This structure would be avoided if a direct duty was to be imposed.'[91]

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[86] In *Allied Dunbar Assurance plc v Webwatch Ltd* (Unreported, 1 June 2009) HHJ Havelock-Allan QC applied Peekay and Springwell to prevent by way of contractual estoppel and estoppel by representation a former intermediary of Allied Dunbar from raising claims against its principal in negligent misrepresentation: paras [48-63].

[87] COBS 2.1.2R.

[88] [2000] 1 WLR 2129.

[89] [2000] 1 WLR 2129, 2141. Schiemann LJ agreed.

[90] [2005] EWHC 1137 (QB), [2005] PNLR 758 (Bristol Mercantile Court).

[91] [2005] EWHC 1137 (QB), para [142].

75. The application of these principles to parties – such as smaller commercial investors and sophisticated individual investors and high net worth individuals – is open to debate.

John Virgo, Guildhall Chambers
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September 2009