FOREWORD BY PETER ELLINGER

The chapters comprised in this volume investigate the liability borne by financial advisers for advice which leads to a loss incurred by the recipient. This book considers the issues arising out of the contractual documentation as well as liability imposed in tort (negligence), in equity (for the breach of a fiduciary duty) and under statutory regimes. The discussion is focused on several common law jurisdictions (such as Australia, Hong Kong and Singapore) as well as the law of the United Kingdom – which is heavily influenced by statutes originating at the centre of the EU (Brussels) – and in the civil law jurisdiction of the People’s Republic of China.

In many jurisdictions the adviser is often a bank, sued in respect of a statement made by an employee of its wealth management section. Nowadays banks would not dispute that wealth management is one of their core businesses. Notably, as late as 1959 – in Woods v Martins Bank – an English bank argued that the giving of advice on a financial transaction was outside the scope of ‘banking business’. The plea was dismissed in reliance on the bank’s own prospectus, in which it claimed expertise in this field.

In practice, banks are well placed to undertake wealth management advisory services. Since the middle of the nineteenth century both common law and civil law jurisdictions have considered the banker–customer relationship to be that of creditor and debtor. Duties of care, or fiduciary duties, arose mainly where the bank undertook them or when imposed by common law or by statute. An Australian authority describes a bank as a reservoir of money. This is an apt description because both individuals and corporations usually hold their funds in a bank account. Amounts received by the customer are credited to the account while the customer makes payments due from him by remitting them from his account either by drawing cheques made payable to his creditor or by funds transfer. It is only natural that when the funds maintained in the account reach a given sum, the customer asks the bank to advise him on investment thereof. As a result, wealth management is one of the core facets of banking business. Indeed, some banks specialize in it and do not open current accounts. Some banks accept a person as a customer only if s/he invests a minimum amount.

The chapters in this book describe the mechanisms introduced to protect the customer from losses incurred when financial advice backfires. Notably, advisers attempt to contract out of bearing duties of care by introducing clauses under which the customer assumes liability. These are adhesion contracts, often including clauses set out in tiny font which is hard to read. The regimes introduced in the jurisdictions under discussion aim to impose a certain minimum responsibility on the adviser. Achieving that goal has proven to be a challenge requiring a multi-faceted response.
A balanced framework of rights and responsibilities is not an end in itself. As the volume emphasizes, access to affordable dispute resolution mechanisms is essential. A particular problem encountered by a would-be litigant is the issue of conflict. Many banks cease to send any work to a lawyer who represents a customer who wishes to proceed against them. In practice, this means that many experienced banking lawyers refuse to take up a case against a bank. To date, this problem has not been tackled effectively, although alternative dispute resolution for smaller disputes where legal representation is not allowed does help.

These and other issues have been tackled in the jurisdictions under consideration in this volume. The subject is an important one and volumes of this nature have a valuable role to play in highlighting gaps and other problems with a view to informing the ongoing debate about how the law should respond to the needs of retail investors.

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