IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2025] SGHC 4

Suit No 1043 of 2021

Between

Glassberg, Jonathan William

… Plaintiff

And

UBS AG, Singapore Branch

… Defendant

JUDGMENT

[Agency — Principal — Holding out]
[Contract — Contractual terms — Construction]
[Contract — Contractual terms — Unfair Contract Terms Act]
[Tort — Negligence — Duty of care]
[Tort — Negligence — Causation]
[Tort — Negligence — Contributory negligence]
[Tort — Vicarious liability]

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v
UBS AG, Singapore Branch

[2025] SGHC 4

General Division of the High Court — Suit No 1043 of 2021
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9, 10, 13, 15, 16, 28–30 May 2024, 25 September 2024

10 January 2025 Judgment reserved.

Wong Li Kok, Alex JC:

Introduction

1 The plaintiff was a customer of the defendant in what is most typically described as a private banking relationship. The plaintiff is an individual of means who had placed funds with the defendant. As with most private banking relationships, these funds were invested.

2 A dispute arose between the parties when one of these investments soured. The plaintiff alleges that the defendant breached its contractual duties in, amongst other things, not warning the plaintiff that this investment was hazardous and high-risk. The defendant points out that the plaintiff failed to appreciate the nature of their relationship, which placed no liability on the defendant for the plaintiff's investment decisions.

3 The heart of the plaintiff's complaint is that the defendant had betrayed his trust. According to the plaintiff, he invested substantial sums of money with the defendant and paid considerable fees in doing so. He claims that the defendant had engineered a system whereby the plaintiff put his trust in the defendant's relationship manager, Mr Stephan Freh ("Mr Freh"). That trust allowed the defendant to attract more investments from the plaintiff, perpetuating the relationship and payment of even more fees. However, the plaintiff feels that his trust was betrayed when Mr Freh recommended an investment which emerged to be fraudulent and culminated in the likely loss of the entire investment. The plaintiff takes the position that justice demands the defendant should step into the breach and take responsibility for Mr Freh's conduct. After all, this was a system that was of substantial benefit for the defendant, derived not just from the plaintiff's business, but from those of other customers as well.

4 This judgment explores the boundary between the plaintiff's search for justice, and the reality of the legal position he adopted when he entered into the banking relationship with the defendant.

Facts

The parties

5 The plaintiff has had a successful career as a broker. He was the former head of non-Yen bond trading at Credit Suisse First Boston, Tokyo. Around 2004, he co-founded JB Drax Honore, currently one of the world's largest

brokers of exchange-traded interest rate options, with offices in key financial hubs globally.[1]

6 The defendant is the Singapore branch of the Swiss bank, UBS AG.[2]

Background to the dispute

7 The parties' relationship started with the plaintiff's introduction to Mr Freh. At that time, Mr Freh worked with JP Morgan, with whom the plaintiff had a banking relationship.[3]

8 When Mr Freh changed jobs and moved to the defendant, he asked if the plaintiff would also like to move his account to the defendant. The plaintiff agreed.[4]

9 The plaintiff signed the defendant's Account Opening Form on 21 March 2012 ("Account Opening Form"), which incorporated by reference the defendant's General Terms & Conditions (the "General T&Cs") and Investment Services Terms & Conditions (the "Investment T&Cs").[5] The General T&Cs were updated on 9 October 2017 and the Investment T&Cs were updated in May 2017.[6] The plaintiff also completed and signed an investor profile questionnaire on 15 October 2015 (the "Investor Profile

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1 Affidavit of Evidence-in-Chief of Jonathan William Glassberg dated 5 January 2024 ("Mr Glassberg's AEIC") at paras 6–7.

2 Affidavit of Evidence-in-Chief of Mr Seow Jin Hui dated 5 January 2024 ("Mr Seow's AEIC") at para 5.

3 Mr Glassberg's AEIC at para 13.

4 Mr Glassberg's AEIC at para 14.

5 Agreed Chronology of Events dated 2 May 2024 ("Agreed Chronology of Events") at S/N 3.

6 Mr Seow's AEIC at paras 7(b)–7(c).

Questionnaire").[7] Under the Investor Profile Questionnaire, the plaintiff categorised himself as a "knowledgeable investor" based on his relevant work experience or education.[8]

10 It is not disputed that Mr Freh was the plaintiff's "Client Advisor", as defined in the contract documents (at [9] above), a role more commonly known as a relationship manager. I will use the term "relationship manager" to refer to Mr Freh's role vis-à-vis the parties.[9]

11 From 2012 to 2016, the plaintiff invested approximately £15,600,000 with the defendant.[10]

12 Around September 2016, the plaintiff subscribed for the defendant's "UBS Advice Premium – Active Portfolio Advisory Service" (the "APA Service"). The plaintiff pays a fee for the APA Service. In return, he gains access to an investment specialist for investment advice and monitoring services. The APA Service is governed by the Investment T&Cs.[11]

13 On 18 August 2017, Mr Freh sent an e-mail from his UBS e-mail address to the plaintiff, in relation to a fund known as the Direct Lending Income Fund ("DLIF") (the "18 August E-mail"). The e-mail stated the following with respect to the DLIF:[12]

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7 Agreed Bundle of Documents (Volume I) dated 2 May 2024 ("Agreed Bundle (Volume I)") at pp 41–50.

8 Agreed Bundle (Volume I) at p 48.

9 Mr Glassberg's AEIC at para 17; Mr Seow's AEIC at para 12.

10 Mr Glassberg's AEIC at para 19.

11 Agreed Chronology of Events at S/N 7; Agreed Bundle (Volume IV) at pp 1329–1375.

12 Agreed Chronology of Events at S/N 8; Agreed Bundle (Volume I) at pp 83–89.

> A client of mine introduced me to attached US fund focused on write loans to SMDs and underwrite receivables. He has invested around 40m. I have invested 200k myself. UBS gives 40% LV.
>
> One pager attached is straight forward. *This is not a UBS recommendation*. By now the fund has over 1bn in assets.
>
> [emphasis added]

14 Mr Freh sent further e-mails to the plaintiff on 3 November 2017 (the "3 November E-mail") and 29 November 2017, updating the plaintiff on further opportunities for investment in the DLIF. Neither of these e-mails forwarded or contained the 18 August E-mail.[13]

15 On 29 November 2017, the plaintiff and Mr Freh had a phone conversation where the DLIF was discussed. The plaintiff followed up on this conversation with an e-mail confirmation that he wanted to invest US$1,000,000 in the DLIF.[14]

16 On 20 February 2018, Mr Freh sent another e-mail to the plaintiff with some investment suggestions, one of which included the DLIF. This was followed by a phone call between the plaintiff and Mr Freh on 23 February 2018, during which the DLIF was discussed. The plaintiff agreed to invest an additional US$1,500,000 in the DLIF on the same day.[15]

17 Mr Freh left the defendant's employment in June 2018.[16]

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13 Agreed Chronology of Events at S/N 12–13; Agreed Bundle (Volume I) at pp 91–96, 98–103.

14 Mr Glassberg's AEIC at paras 41–44, Tabs 11–13.

15 Agreed Chronology of Events at S/N 19–21.

16 Mr Glassberg's AEIC at para 76.

18 On 14 February 2019, Mr Freh sent the plaintiff an e-mail informing him that the DLIF had suffered a loss to its loan book and that withdrawals from DLIF were suspended with a potential loss to the fund of 10–20%.[17]

19 In March 2019, following a complaint by the US Securities and Exchange Commission against the DLIF's investment manager, Direct Lending Investments LLC ("DLI"), allegations of a multi-year fraud in the DLIF involving DLI's CEO came to light.[18]

20 According to reports published by DLI and DLIF's receiver, DLI's investments were "generally poorly underwritten, inadequately documented, often without proper credit agreements and security interests, and inconsistently administered".[19] The receiver also found that DLI's previous purported successful loan-based platforms were overvalued, and returns from those investments were misrepresented. DLI had also made investments that were inconsistent with the representations of DLI's investment strategy made to investors.[20]

21 DLI has since been placed in liquidation. According to the plaintiff, his US$2,500,000 investment in the DLIF is of no value, subject to any recovery from the liquidation process.[21]

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17 Mr Glassberg's AEIC at Tab 30.

18 Mr Glassberg's AEIC at para 77.

19 Mr Glassberg's AEIC at para 78(g)(i), Tab 45.

20 Mr Glassberg's AEIC at paras 78(g)(iii)–78(g)(iv), Tab 45.

21 Mr Glassberg's AEIC at paras 80–81.

The parties' cases

22 There are three key threads to the plaintiff's claim:

(a) Firstly, the plaintiff alleges that the defendant breached its contractual duty to provide the plaintiff with diligent and careful advice. The plaintiff's case is that Mr Freh acted within the scope of the APA Service when he recommended the DLIF investment. The defendant was thus in breach of its obligation to "act diligently and carefully in providing investment advice".[22]

(b) Secondly, the plaintiff claims that the defendant is in breach of its tortious duty to take care in providing investment advice to the plaintiff.[23] The plaintiff argues that a relationship of trust had been built with Mr Freh (which was encouraged by the defendant) and a duty of care had thus arisen.[24] The defendant failed to meet the standard of care, by failing to properly advise the plaintiff of the risks of the DLIF investment.[25] As the plaintiff would not have invested in the DLIF had it not been for the defendant's breach of its tortious duty, the plaintiff's loss was a direct result of such breach.[26]

(c) Finally, the plaintiff argues in the alternative that even if it can be shown that the DLIF investment was not recommended by the defendant, it was clearly recommended by Mr Freh in his

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22 Plaintiff's Closing Submissions dated 5 July 2024 ("PCS") at paras 97–118; Agreed Bundle (Volume IV) at p 1336 (cl 11.1, s II of the Investment T&Cs).

23 PCS at paras 119–140.

24 PCS at paras 121–122.

25 PCS at para 130.

26 PCS at paras 138–139.

capacity as the defendant's employee. The defendant should thus be vicariously liable for Mr Freh's actions.[27]

23 The plaintiff's claim is for damages of US$2,500,000 or damages to be assessed, as well as interest and costs.[28]

24 The defendant counters that:

(a) Mr Freh did not have actual or ostensible authority from the defendant to offer the DLIF investment to the plaintiff.[29]

(b) The APA Service and the Investment T&Cs do not apply to the DLIF investment and thus the defendant could not have breached the same.[30]

(c) The defendant also does not owe a duty of care to the plaintiff as the General T&Cs exclude the defendant from such liability.[31] Even if such a duty of care did exist, the standard of care is a low one and the defendant did not fall below this standard.[32]

(d) Even if a tortious duty has been found and breached, the defendant alleges that the breach did not cause the plaintiff's loss. The defendant argues that the plaintiff would have invested in the DLIF

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27 PCS at paras 143–144.

28 Statement of Claim (Amendment No. 2) dated 24 November 2023 ("SOC (Amd No 2)") at p 19.

29 Defendant's Closing Submissions dated 5 July 2024 ("DCS") at paras 3–11.

30 DCS at paras 12–29.

31 DCS at paras 36–47.

32 DCS at paras 76–82.

regardless of any risks that were disclosed to him.[33] Further, the defendant would not have been in a position to detect the DLIF fraud as such fraud was a *novus actus interveniens*, which would break the chain of causation between the purported breach and the plaintiff's loss.[34]

(e) Finally, no vicarious liability should be imposed on the defendant. Amongst other things, Mr Freh did not owe a duty of care to the plaintiff and, even if such a duty was owed, Mr Freh was not negligent and did not cause the plaintiff's loss.[35]

Issues

25 There are six key issues to be determined:

(a) whether Mr Freh had actual or ostensible authority to offer DLIF as an investment to the plaintiff on behalf of the defendant;

(b) whether the defendant owes contractual obligations to the plaintiff under the Investment T&Cs;

(c) whether the defendant owes a tortious duty to the plaintiff and whether the defendant had breached that duty and caused loss to the plaintiff;

(d) whether the exclusion clauses on which the defendant seeks to rely are unreasonable within the meaning of the Unfair Contract Terms Act 1977 (2020 Rev Ed) ("UCTA");

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33 DCS at para 96.

34 DCS at paras 97–101.

35 DCS at paras 106–113.

(e) whether the defendant should be vicariously liable for Mr Freh's actions in recommending DLIF to the plaintiff; and

(f) if the defendant is liable to the plaintiff in contract or in tort, what is the scope of the loss suffered by the plaintiff, and whether the plaintiff should be partially liable for that loss because of contributory negligence.

Issue 1: Mr Freh did not have actual or ostensible authority to offer DLIF as an investment to the plaintiff

26 The plaintiff's case is that Mr Freh had actual or ostensible authority to act on behalf of the defendant in relation to the DLIF investment.[36] The plaintiff expresses frustration with the defendant's position that Mr Freh had no authority to offer DLIF as an investment to the plaintiff as Mr Freh was not an investment specialist and only the latter could offer investment advice under the APA Service,[37] stating that he was not previously aware of this fact. The plaintiff's position is that the defendant had put Mr Freh forward as the key contact point and relationship manager. Mr Freh's communications with the plaintiff relating to DLIF (such as at [13] to [16] above) were through the defendant's official e-mail address.[38] The defendant had deliberately created a relationship of trust between the plaintiff and Mr Freh, and the plaintiff did indeed trust Mr Freh with his investment decisions and transacted through him.[39] The plaintiff alleges that by taking a different position now, the defendant has found a convenient

36 SOC (Amd No 2) at para 30.

37 Mr Glassberg's AEIC at paras 88–89.

38 Mr Glassberg's AEIC at para 97.

39 Mr Glassberg's AEIC at para 95.

excuse for disassociating itself from Mr Freh's actions, and is manufacturing an implausible and impractical picture of the relationship between the parties.[40]

27 The plaintiff also argues that there is nothing in the Investment T&Cs (which governed the APA Service) which prevents Mr Freh from being delegated as the investment specialist, or from providing investment advice under the APA Service as the relationship manager.[41]

28 There is little doubt that Mr Freh did not have actual authority to offer DLIF as an investment to the plaintiff. On actual authority, the defendant's evidence is that Mr Freh was not authorised to offer investment options outside of the defendant's product universe.[42] Whether DLIF was within the defendant's product universe was previously conceded by the plaintiff in his appeal against the striking out of his claims. The Appellate Division noted in *Glassberg, Jonathan William v UBS AG, Singapore Branch* AD/CA 93/2022 (24 February 2023) at [3] that the "appellant accepts that, as a fact, the [DLIF] is outside that universe."

29 We then turn to the question of whether Mr Freh had ostensible authority to offer DLIF as an investment to the plaintiff.

30 In *EFG Bank AG, Singapore Branch v Surewin Worldwide limited and others* [2022] 5 SLR 915 ("*EFG Bank*") at [116], this court noted that ostensible authority to bind a principal against a counterparty will be found if the "principal has represented to the counterparty that the agent has such authority with the intention that the counterparty should rely on the representation and the

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40 PCS at paras 28–30.

41 PCS at para 25.

42 Mr Seow's AEIC at paras 42–45.

counterparty does in fact rely on the representation". At [117] of *EFG Bank*, this court went on to note that the mere fact that an agent is a chairman, director and majority shareholder of the principal does not amount to a representation that agent has the authority to bind the principal.

31 Similarly, in this case, the mere fact that Mr Freh is the defendant's relationship manager for the plaintiff and a senior employee of the defendant is not determinative of his ostensible authority. I need to consider what representations have in fact been made by the defendant to the plaintiff, with the intention that the plaintiff should rely on such representations.

32 I agree with the defendant that the plaintiff has not shown on a balance of probabilities that Mr Freh was authorised to offer DLIF as an investment to the plaintiff.[43]

33 The defendant's purported representations on Mr Freh's authority with respect to the DLIF investment were made through Mr Freh's use of official channels in his communications with the plaintiff. Whilst Mr Freh was communicating through official channels (*ie*, his UBS e-mail address), it is the substance of his communications rather than the form which is most instructive of whether Mr Freh was painted with ostensible authority.

34 The 18 August E-mail contained the key phrase referencing DLIF as "not a UBS recommendation" (see above at [13]). The plaintiff's evidence is that he receives between 250 to 300 e-mails a day, so he did not read this e-mail.[44] The 3 November E-mail is the next communication between Mr Freh

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43 DCS at paras 5–11.

44 Mr Glassberg's AEIC at paras 30–31.

and the plaintiff on DLIF. The first sentence of the 3 November E-mail states: "I had sent below in the past." The plaintiff's evidence on the 3 November E-mail is that the word "below" referenced the fact sheet for DLIF and not the 18 August E-mail as a whole.[45]

35 Whilst I accept the plaintiff's evidence that he did not read the 18 August E-mail, it was an e-mail that he should have read. There is a reason why someone as successful as the plaintiff receives between 250 to 300 e-mails a day. It is because he has the capacity to absorb and address that number of e-mails a day and, in turn, that is why he is as successful as he is.

36 To the plaintiff's credit, he accepts having read the 3 November E-mail.[46] However, I do not accept the plaintiff's argument that the reference to what has been sent "below in the past" refers only to the fact sheet for DLIF as contained in that e-mail. The fact sheets contained in the 18 August E-mail and the 3 November E-mail are different. The fact sheet attached to the 18 August E-mail shows DLIF's performance up to February 2017, whilst the 3 November E-mail shows DLIF's performance up to August 2017.[47] When Mr Freh stated that he had sent the "below in the past", he clearly meant the whole of his proposition on the DLIF investment. This gives the plaintiff a further opportunity to enquire as to the nature of DLIF or to specifically reference and review the 18 August E-mail. The Plaintiff chose not to do so.

37 Turning to the 20 November E-mail, I agree with the defendant that Mr Freh was careful in this e-mail in how he described the DLIF. The 20 November

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45 Mr Glassberg's AEIC at paras 34–35.

46 Mr Glassberg's AEIC at para 37.

47 Agreed Bundle (Volume I) at pp 84–89, 92–95.

E-mail gives a summary of investment options and the plaintiff's portfolio. Mr Freh references the defendant in the context of specific investments such as "UBS top pic" and "I/UBS share your view that … this (bonds) is an asset class that one does not need to own for the sake of owning it."[48] However, when referencing DLIF, Mr Freh changes to only using the first person when describing his views on DLIF – "DLIF … The one theme in the FI space that *I* really like" [emphasis added].

38 I find that the plaintiff has not shown on a balance of probabilities that the defendant represented to the plaintiff that Mr Freh had authority to offer DLIF as an investment to the plaintiff, with the intention that the plaintiff should rely on such representation. There is clear evidence that distinctions were drawn by Mr Freh (see above at [34], [36] and [37]) between what are and what are not UBS-sanctioned investments. The plaintiff's belief in a relationship of trust is insufficient to displace the careful positions adopted by Mr Freh in his correspondence with the plaintiff. That being the case, I conclude that no representations of authority for Mr Freh to offer DLIF have been made. Mr Freh had neither actual nor ostensible authority to offer DLIF as an investment to the plaintiff.

Issue 2: The defendant does not owe contractual obligations to the plaintiff under the Investment T&Cs

39 To the plaintiff's credit, he puts his cards on the table with respect to this issue in his closing submissions, where he states that his contractual claim turns on the single issue of whether Mr Freh's recommendation of DLIF falls within the scope of the APA Service.[49] Put another way, the plaintiff's contractual case

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48 Agreed Bundle (Volume I) at p 142.

49 PCS at para 97.

fails if I find that the Investment T&Cs (which govern the APA Service) do not apply to Mr Freh's interactions with the plaintiff on the DLIF.

40 The relevant provisions of the Investment T&Cs relied on by the plaintiff are set out here:[50]

> **1. UBS Advice™ Premium – Active Portfolio Advisory Service**
>
> The Client requests and instructs the Bank, for a fee, to provide direct access to an investment specialist of the Bank for investment advice and monitoring services (such services hereinafter referred to as **"UBS Advice™ Premium"** for a portfolio (**"Portfolio"**) of assets booked under his account or accounts opened with the Bank to receive these services (each a **"Mandated Account"**) taking into account the Programme Specifications (as defined below). The Client shall decide whether to adopt the advice provided and is responsible for making his own investment decisions.
>
> …
>
> **3. Investment advice**
>
> 3.1 The Client will receive direct access to the Bank's team of investment specialist for investment advice. Based on the Programme Specifications, the structure of the Portfolio and the Bank's investment analysis and research, the Bank advises the Client, subject to Clause 11 of Section 1 of the Account Terms and Conditions, on how to meet the Client's investment objectives.
>
> 3.2 The Client may contact the Bank's team of investment specialists at any time during normal office hours (09–17.30 h) on days that banks are generally open for business at the jurisdiction where the Mandated Account is maintained, and the Bank may also contact the Client directly.
>
> …
>
> **15. Delegation**
>
> The Client agrees that the Bank may, in its absolute discretion (and without prior reference, notification or consent of the Client), delegate to any Agent (which may include any branch of the Bank) the performance of all or any part of the duties of

50 Agreed Bundle (Volume IV) at pp 1335, 1337.

> the Bank in connection with the UBS Advice™ Premium service herein, upon such terms as the Bank shall consider fit and may disclose any information on or related to the Client or the Portfolio to any delegate. The Bank may grant to such Agent the authority to further sub-delegate, in its absolute discretion.

41 The plaintiff raises several issues to counter the defendant's primary case that the Investment T&Cs only apply when an investment specialist is engaged to carry out the APA Service and that Mr Freh was not an investment specialist. The key aspects of the plaintiff's argument in this regard are:

(a) As noted above at [27], the plaintiff avers that there is nothing in the Investment T&Cs which either prevents Mr Freh from being delegated as the investment specialist or from providing investment advice under the APA Service as the relationship manager. Further, the right of delegation of the defendant's obligations under the APA Service (under clause 15, section II of the Investment T&Cs) runs contrary to the defendant's narrative that the APA Service can only be provided by an Investment Specialist.[51]

(b) The plaintiff also argues that the defendant's own evidence was that the APA Service was versatile and flexible. There was also no internal guideline which required the APA Service to be provided only by Investment Specialists.[52]

(c) The plaintiff adds that it is counter-intuitive for a sophisticated client like Mr Glassberg to be presented with such a "mechanical" and "artificial" conception of the APA Service, when it was positioned as a

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51 PCS at para 99(b).

52 PCS at paras 99(c)–99(d).

"bespoke, premium advisory service".[53] Since the plaintiff paid to the defendant a fixed annual fee of 1.6% of the value of the plaintiff's portfolio (amounting to £77,835 between 9 October 2017 and 4 May 2018),[54] such expectations were justified.

(d) Finally, the plaintiff points out that the two DLIF investment trades booked by the defendant for the plaintiff were booked into a portfolio dedicated to the APA Service. This was "Portfolio 01", which bore the description "UBS Advice Premium - Balanced".[55]

42 The gist of the defendant's retort is that the plaintiff is cherry-picking parts of the evidence and Investment T&Cs to suit his case. The defendant asks me to take a step back and to appreciate the wider context in which the APA Service was provided. This would allow me to form a more complete picture of the contractual relationship between the parties on the APA Service and, ultimately, whether it applied to the DLIF investment.

43 I agree with the defendant that Mr Freh's recommendation of the DLIF investment to the plaintiff does not fall within the APA Service. The plaintiff's case is that, given the amounts he invests with the defendant, he was led to believe that the services provided by the defendant (including the APA Service) would be adjusted to suit his expectations. This was not an unreasonable belief, and Mr Freh may have done his best to meet the plaintiff's expectations. However, when a dispute arises, it is the precise terms of the contractual relationship between the parties that come to the fore.

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53 PCS at para 99(e).

54 PCS at para 18.

55 PCS at paras 75, 103(d).

44 The APA Service is an additional service that the defendant offers to supplement the usual services provided to the plaintiff. Clause 1, section II of the Investment T&Cs (see at [40] above) states that the APA Service provides the plaintiff with direct access to an investment specialist for investment advice or monitoring services. Clauses 3.1 and 3.2, section II of the Investment T&Cs (see at [40] above) similarly provide that the plaintiff would receive direct access to an investment specialist, and explain how the plaintiff may contact that investment specialist.

45 The Account Opening Form also states that the provision of the investment services "is governed by a set of terms and conditions which will supplement the Account Terms and Conditions",[56] referring to the Investment T&Cs. The same Account Opening Form also creates a clear distinction between the investment specialist under the APA Service and the relationship manager:[57]

> … the Bank will provide direct access to an investment specialist of the Bank for advice in respect of a portfolio of assets which the Client has deposited in an account with the Bank pursuant to this Service, subject to the terms governing this Service in Section II. The Client will complete the relevant **Programme Specifications** together with his Client Advisor in respect of his investment guidelines.

46 Looking at the context and purpose behind the APA Service, I agree with the defendant that the commercial logic[58] behind the APA Service is for a separate service to be provided by the defendant, and that the investment specialists would be the individuals providing that service. There is no logic in

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56 Agreed Bundle (Volume I) at page 30.

57 Agreed Bundle (Volume I) at page 30.

58 Defendant's Reply Submissions dated 26 July 2024 ("DRS") at paras 15–16.

the plaintiff paying for the APA Service, only for Mr Freh to provide the service that he is already providing to the plaintiff.

47 This is further supported by the testimony of the plaintiff's expert, Ms Effie Konstantine Datson ("Ms Datson"), where she accepted that an investment specialist was an additional resource available to the plaintiff:[59]

> Q. … And because you were previously heading a team of investment specialists, you will understand that that is something additional, it's an additional resource because typically the point of contact that the customer would have, typically, is with his relationship manager?
>
> A. Correct.

48 The plaintiff himself corroborated this point in his own testimony, when he conceded that it was now clear to him that Mr Freh was not playing both the role of relationship manager and that of investment specialist:[60]

> Q. Just to underscore that point, and because the investment specialist is somebody with specific expertise, having access to him provides you a second resource in the bank. Do you understand?
>
> A. That is what it was supposed to do, yes.
>
> …
>
> Q. … [D]o you accept that he [*ie*, Mr Freh] is not playing both roles, you say it's not clear?
>
> A. Yes, it's clear now that he was not playing both roles, yes, you have made it clear.
>
> Q. So you accept that he was not an investment specialist?
>
> A. Now it's clear to me, yes.

49 This point is neatly summarised by the testimony of Mr Kim Souvan ("Mr Kim"), an investment specialist at UBS and subpoenaed to testify by the

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59 Transcript dated 15 May 2024 at p 48, lines 22–25 and p 49, lines 1–3.

60 Transcript dated 9 May 2024 at p 78, lines 11–15 and p 90, lines 4–11.

plaintiff. When cross-examined by the defendant's counsel, Mr Kim explained that each client chooses how they want to leverage investment specialists as the additional resource provided under the APA Service.[61] In other words, the plaintiff may have found it odd to have a separate investment specialist provide the APA Service, but other customers may have found it perfectly logical and welcomed it.

50 I agree with the defendant's position that Mr Freh is not an investment specialist. This is made clear in the defendant's internal records, where Mr Freh is listed as a family office client advisor. The plaintiff has not adduced any evidence to contradict this.[62] The plaintiff has half-heartedly submitted that Mr Freh fronted the APA Service, but discussed recommendations with investment specialists without disclosing the name of his clients. While he states that that "appears to be how UBS provided [the plaintiff] with the APA Service",[63] the parts of the evidence referred to by the plaintiff in his closing submissions do not paint the picture he is seeking to introduce.[64] Instead, I agree with the defendant's case that this suggestion is speculative as there is no evidence that Mr Kim discussed DLIF with Mr Freh.[65]

51 The plaintiff's oral evidence further reinforces this point. When specifically asked if Mr Freh had performed any APA Service for him, the plaintiff conceded that: "[T]hat was not my understanding at the time. It is now my understanding."[66]

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61 Transcript dated 13 May 2024 at p 55, lines 23–25 and p 56, lines 1–3.

62 DCS at para 18.

63 PCS at para 35.

64 PCS at paras 32, 38–39.

65 DRS at para 20; Transcript dated 13 May 2024 at p 19, lines 3–19.

66 Transcript dated 9 May 2024 at p 91, lines 20–25.

52 Turning finally to the plaintiff's point on the DLIF investment being booked under a portfolio dedicated to the APA Service (see at [41(d)] above), I agree with the plaintiff that Mr Kim had conceded that DLIF was likely booked under an APA Service portfolio.[67] However, this simple fact is insufficient to show that the APA Service was engaged, and that investment advice had been provided by investment specialists. Mr Kim's oral testimony on this point does not lead any further from his concession.

53 In light of the above, I conclude that the APA Service and Investment T&Cs do not apply to the DLIF investment, and the plaintiff's claim in contract fails.

Issue 3: The defendant does not owe a tortious duty of care to the plaintiff

54 Given my finding that the APA Service and the Investment T&Cs do not apply to the DLIF investment, what other duties does the defendant owe the plaintiff with respect to the DLIF investment? The plaintiff's case is that the defendant still owes a tortious duty to the plaintiff.

55 The plaintiff argues that the banking relationship between the plaintiff and the defendant was more than just a typical retail banking association. Mr Freh was more than just a salesperson. He was a trusted advisor on whom the plaintiff relied and, as noted above at [26], this was a relationship that the defendant encouraged.[68] The plaintiff further relies on a number of authorities with similar factual matrices as the current case to support his position that a duty of care arises. Some of these are summarised below:

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67 Transcript dated 13 May 2024 at p 36, lines 1–5.

68 PCS at para 121.

(a) In *Tradewaves Ltd and others v Standard Chartered Bank and another suit* [2017] SGHC 93 ("*Tradewaves*"), this court found that, even with experienced investors (at [113]), a duty of care arose because the relationship managers did more than just take instructions or occasionally make recommendations (at [119]).

(b) In *Zillion Global and another v Deutsche Bank AG, Singapore Branch* [2020] 4 SLR 425, this court found that a duty of care arose in a wealth management relationship where the bank discussed investment ideas, held regular meetings to update the plaintiffs on their portfolio, and provided advice on the same (at [129], [134]).

(c) In *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 ("*Go Dante Yap*"), the Court of Appeal found it difficult to resist finding that a duty of care existed where a private banker held itself out to have skills and expertise to make investment recommendations, and actively gave information or advice, knowing that the client would place reliance on said skills and expertise(at [35]).

56 The plaintiff also argues that the General T&Cs do not negate the duty of care created by the relationship between the parties. The plaintiff points to clause 5.1, section 1 of the General T&Cs ("Clause 5.1"), which is set out in full below:[69]

> Any action which the Bank may take or omit to take in connection with the Account, the Services or any Instructions shall be solely for the Client's account and risk. Unless *due to the Bank's negligence, wilful conduct or fraud*, neither the Bank nor any of the Bank's Affiliates and Agents or any director, officer, employee or agent of any of the foregoing shall be liable for any losses, damages, costs, expenses, fees, charges, actions, suits, proceedings, claims or demands or for any diminution in

[69] Agreed Bundle (Volume IV) at p 1291.

> the value of or loss or damage to any assets (including any lost opportunity to increase the value of such assets) held in or booked to the Account or in respect of the Services, or for the acts, omissions, default, bankruptcy or insolvency of any Agent appointed by the Bank in good faith, or any other persons through whom Instructions are effected. Under no circumstances shall the Bank, its Affiliates or Agents or any director, officer, employee or agent of any of the foregoing be liable for any indirect loss or damage, consequential loss or loss of profit howsoever arising. The Bank, its Affiliates and Agents and every director, officer, employee or agent of any of the foregoing shall be entitled to every exemption from liability, every defence and every indemnity to which the Bank is entitled under applicable law and, for the purposes hereof, the Bank is and shall be deemed to be acting as agent on behalf of and for the benefit of such entities and persons. [emphasis added]

57 The plaintiff contends that Clause 5.1 must be read in the context of the whole General T&Cs. Since Clause 5.1 states that the defendant would be liable for loss and damage "due to the Bank's negligence, wilful misconduct and fraud", any other disclaimer which seeks to prevent a duty of care from arising should not be considered, and any ambiguity should be interpreted strictly against the defendant.[70]

58 The defendant disagrees that there was any ambiguity in the General T&Cs and seeks to rely on clause 7.1, section 2 ("Clause 7.1") and clause 2.4(k), section 3 ("Clause 2.4(k)") of the General T&Cs, to disclaim liability for any duty of care owed to the plaintiff. Clauses 7.1 and 2.4(k) are set out in full below.[71] Clause 7.1 states:[72]

> 7.1 The Client accepts all risks arising from its opening and maintenance of the Account and acceptance of any of the Services made available by the Bank, including but not limited to, any loss suffered as a result of entering into any investment, trading or other transaction. The Client's attention is drawn to

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70 PCS at para 125.

71 Agreed Bundle (Volume IV) at pp 1291, 1311.

72 Agreed Bundle (Volume IV) at p 1291.

> and the Client acknowledges that he has read and fully understood the Risk Disclosure Statement and all documents referred to therein (as evidence by his signature thereto or in the Account Opening Form). In accepting Services made available by the Bank, the Client acknowledges that, subject to Clause 11.1 below, he makes his own assessment and relies on his own judgment. *The Bank is not obliged to give advice or make recommendations and, notwithstanding that the Bank may do so on request by the Client or otherwise, subject to Clause 11.1 below, it is done without any responsibility on the part of the Bank and on the basis that the Client will nevertheless make his own assessment and rely on his own judgment*. In all circumstances, where the Bank makes no recommendation or recommends against the Client to enter an investment or purchase a particular asset, including a Financial Product (as defined in Clause 11.1 below) or a specific quantity of it, and if the Client still decides to proceed without or against the Bank's recommendation, the Client acknowledges that he makes his own assessment and relies on his own judgment and understands that the Bank does not evaluate or consider that such investment or asset (or a specific quantity of it) is reasonably suitable for the Client. Without any prejudice to the foregoing, the Client acknowledges that any internal assessment methodology used by the Bank in reviewing or assessing a Client's Account (including, but not limited to, any investor risk profiling or risk assessment) is subject to limitations and does not take into consideration transactions or other changes in the Account on a real-time basis. [emphasis added]

59 Clause 2.4(k) states:[73]

> 2.4 The Client agrees, confirms, represents and/or warrants on an on-going basis that:
>
> …
>
> k. subject to Clause 11 of Section 1 of the General Terms and Conditions, the Bank and/or its nominees *does not have any obligation to carry out any due diligence* or monitoring obligations *with respect to the Client's investment in the Fund and the Bank and/or its nominees shall have no responsibility for the performance of the Client's investment in the Fund*.
>
> [emphasis added]

[73] Agreed Bundle (Volume IV) at p 1311.

60 The defendant also relies on *Tradewaves* at [128] and *Go Dante Yap* at [38] to advance its case that an express disclaimer of liability are ousters of any duty of care arising as against the defendant.[74]

61 I agree that Clause 7.1 is an express disclaimer of liability against a duty of care arising with respect to the DLIF investment.

62 The plaintiff points out, from *Chitty on Contracts* vol 1 (Hugh G Beale gen ed) (Sweet & Maxwell, 35th Ed, 2023) at para 16-091, that if words in a contract have two meanings, one of which would validate the contract or a particular clause and the other which would "render it void, ineffective or meaningless", the former meaning should be adopted.[75] That being the case, the defendant's reading of Clause 7.1 is that it is consistent with Clause 5.1. The former expressly states that the defendant has no obligation to "give advice and to make recommendations" and expressly disclaims responsibility (and thus any duty to take care) where it does so. This does not mean that Clause 5.1 has no meaning and that the defendant can never be liable for negligence The defendant acknowledges that Clause 5.1 does not prevent a duty of care from arising against the defendant in a situation where an instruction is negligently carried out, such as in a situation where an express instruction from the plaintiff is erroneously carried out (*ie*, a hypothetical situation where $1,000,000 is erroneously transferred following an express instruction to transfer $100,000).[76]. However, Clause 5.1 does not go so far as to provide for the defendant's

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74 DCS at paras 38, 43.

75 PCS at para 125.

76 DRS at para 49; PCS at para 126.

acceptance of responsibility for the giving of investment advice and recommendations, which falls within the purview of Clause 7.1.[77]

63 I find Clause 2.4(k) to be of less help to the defendant. Section 3 of the General T&Cs ("Product Conditions") contains terms and conditions that specifically govern the "products" offered by the defendant. These include "Cash Services" such as fixed deposits,[78] but also "Fund Subscriptions",[79] which govern the DLIF investment. Clause 2.4(k) states that the defendant has "no responsibility for the performance" of the investment. But this, on its own, does not negate a duty of care.

64 Given my finding that no duty of care arises between the parties, I do not have to determine the issue of whether contractual estoppel applies to the plaintiff in this case.

65 Given my finding that no duty of care arises between the parties, I also do not need to determine the standard of care expected of the defendant, or whether the defendant's actions caused the plaintiff's loss. For the sake of completeness, I address each issue briefly.

66 The Court of Appeal's decision in *Go Dante Yap* at [46] informs of the issues to consider when evaluating the standard of care in an investment banking context where investments made on behalf of the complainant had gone awry. The three considerations highlighted in that case, which I find equally applicable to the current case, are:

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77 DRS at para 48.

78 Agreed Bundle (Volume IV) at p 1306.

79 Agreed Bundle (Volume IV) at p 1310.

(a) the prevailing circumstances whilst cautioning against the use of hindsight;

(b) the experience and sophistication of the complainant; and

(c) the contractual framework.

67 The plaintiff painted the circumstances as one of a world post financial crisis of 2008/2009, where there was a move towards the "common law's control of banking misfeasance through tort".[80] However, the plaintiff first made its investment in DLIF at the end of 2017. This was almost a decade after the 2008/2009 financial crisis. That being the case, I do not see the immediate aftermath of the 2008/2009 financial crisis as particularly relevant to the issue of the prevailing circumstances. It is, however, correct to say that no investments are completely foolproof, and the risk of fraud (such as the Madoff fraud) can never be ruled out.

68 The plaintiff then seeks to rely on this court's decision in *Saimee bin Jumaat v IPP Financial Advisors Pte Ltd and others* [2019] SGHC 159 ("*Saimee bin Jumaat*") at [20] to illustrate the point that the plaintiff's experience in government bonds did not equate to experience with direct lending funds like the DLIF.[81] I do not find that the plaintiff's reliance on *Saimee bin Jumaat* helped him. The complainant in that case had been a professional horse jockey since the age of 16, until his retirement at the age of 40, and had never received any formal financial education (*Saimee bin Jumaat* at [1] and [20]). This is a far cry from the plaintiff, who had a successful career as a broker, co-founded one of the world's largest brokers of exchange traded interest rate

80 PCS at para 128.

81 PCS at para 131(a).

options (see above at [5]), and had almost 40 years of professional experience in the banking industry.[82] The plaintiff had also confirmed to the defendant that he was a knowledgeable investor (see above at [9]). I conclude that the plaintiff was also able to exercise his own judgment when it came to investment decisions and questions – *eg*, he asked specific questions about the DLIF with respect to the countries in which the DLIF lent to its clients and whether the DLIF had monthly liquidity.[83]

69 With respect to the contractual framework, I will not repeat the findings made on the Investment T&Cs and the General T&Cs (at [46] and [61]–[62] above, respectively). However, I will summarise some of the other acknowledgements made by the plaintiff under the General T&Cs:

(a) At clause 2.4(b), section 3, Part C of the General T&Cs, the plaintiff acknowledges that he has "sufficient knowledge and experience to make his own evaluations" of the risks of his investments and that he can assume such risks and will take independent professional advice on the same.[84]

(b) At clause 2.3(a), section 3, Part C of the General T&Cs, the plaintiff acknowledges that he will read and understand the information memorandum of any fund he invests in, including the risk factors associated with the same.[85]

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82 DCS at para 61.

83 Transcript dated 9 May 2024 at p 199, lines 22–25 and p 200, lines 1–2.

84 Agreed Bundle (Volume IV) at p 1311.

85 Agreed Bundle (Volume IV) at p 1310.

(c) At clause 1(d), section 6 of the General T&Cs, the plaintiff acknowledges that he has read and understood the "Risk Disclosure Statement" (*ie.* section 6 of the General T&Cs as a whole);[86]

(d) At clause 1(e), section 6 of the General T&Cs, the plaintiff acknowledges that he "makes his own assessment and relies on his own judgment in relation to any and all investment … decisions" and accepts all risks and losses associated therewith.[87]

(e) Finally, at clause 20, section 6 of the General T&Cs, the plaintiff acknowledges that he is to take all necessary steps to ensure he understands the investments he makes, and makes these investments based on his "personal judgment".[88]

In this light, the contractual framework between the parties is clearly one that places substantial emphasis on the plaintiff ensuring that he understands and takes personal responsibility for his investment decisions.

70 Based on the above, I conclude that the standard of care owed by the defendant is a low one. The plaintiff was a sophisticated investor, the contractual framework between the parties was one which obliged the plaintiff to make his own investment decisions, and there were no special circumstances which affected this outcome.

71 With respect to causation, as the plaintiff points out, the determination of causation needs a "common sense approach" that does not follow a

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86 Agreed Bundle (Volume IV) at p 1323.

87 Agreed Bundle (Volume IV) at p 1323.

88 Agreed Bundle (Volume IV) at pp 1325–1326.

"theoretical analysis" or "abstract reasoning".[89] That being the case, and since I have found that no duty of care exists and, even if it such duty did exist, there has been no breach of that duty, it would be a speculative and unproductive exercise to attempt to address the issue of causation in any practical detail. There are, however, two connected observations I will make in relation to the plaintiff's case on causation. The first being whether the plaintiff would have invested in the DLIF if he had, in accordance with his case, been properly advised. The second is the connected point on *novus actus interveniens*.

72 With respect to the first point, I find the plaintiff's case to be contradictory. On the one hand, the plaintiff states that he would not have invested in the DLIF in the first place, had the defendant carried out its duties properly.[90] On the other hand, the plaintiff's clear evidence is that he trusted Mr Freh as his relationship manager and trusted advisor, and he only made the DLIF investment on Mr Freh's recommendation.[91] The plaintiff's evidence under both cross-examination and re-examination was that he would not have read the literature related to the DLIF, such as the detailed information memorandum, even if it was provided to him.[92] The plaintiff's detailed and specific evidence with respect to his relationship of trust with Mr Freh is preferable to the speculative and nebulous case I am asked to make out, of whether he would have invested in the DLIF even if he had been properly advised. The only conclusion I reach from this is that the plaintiff would have invested in DLIF so

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89 PCS at para 137.

90 PCS at paras 138–139.

91 Mr Glassberg's AEIC at para 95; Transcript dated 9 May 2024 at p 46, line 8; Transcript dated 10 May 2024 at p 159, lines 17–23; PCS at paras 15, 16, 121(d) and 138.

92 Transcript dated 10 May 2024 at p 99, lines 16–18 and p 202, lines 5–10.

long as Mr Freh recommended that he did so, and the plaintiff's case is that Mr Freh did so recommend.[93]

73 I move to address the parties' arguments on *novus actus interveniens*, on the basis that the plaintiff would have invested in the DLIF (as noted at [72] above). The plaintiff claims that there can be no intervening act in this case. He seems to cast doubt on the defendant's case that the fraud committed in DLIF (see above at [19] and [20]) was an intervening third party act. Quoting the decision of the England and Wales Court of Appeal in *Rubenstein v HSBC Bank plc* [2013] 1 All ER (Comm) 915 ("*Rubenstein*"),[94] the plaintiff extracted that court's observation (at [103]) that an investment advisor who recommends an investment may be responsible if a flaw in that investment causes loss to the complainant.

74 *Rubenstein* was a case addressing remoteness of damage based on the statutory regime in the United Kingdom under the Conduct of Business Rules of the Financial Services and Markets Act 2000 (*Rubenstein* at [59] and [123]). That is not the basis of the plaintiff's claim in this case. On the issue of *novus actus interveniens*, I prefer the summary provided in Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016), the text referred to by the plaintiff. A few pages further on from the quote provided by the plaintiff,[95] the authors discuss the role third parties play in intervening acts. It is theorised (at para 07.077) that "the more deliberate and intentional the third-party act, the more likely that it will be taken to constitute a *novus actus interveniens*". The authors add (at para 07.079) that the "more

93 PCS at para 138.

94 PCS at para 139.

95 PCS at para 139.

unreasonable the third-party action, the more likely that it would be regarded as a *novus actus interveniens*". This is consistent with authority quoted by the defendant that the voluntary acts of third parties (particularly criminal acts) will often constitute an intervening act (*Robinson v West Yorkshire Chief Constable* [2018] AC 736 at [80]).

75 I agree with the defendant's case that the fraud in DLIF did constitute an intervening act. Even if there was a breach of duty by the defendant, the fraud in DLIF was a *novus actus interveniens* that broke the chain of causation.

76 In light of the above, I find that the defendant does not owe a tortious duty of care to the plaintiff. Even if a duty was owed, the defendant did not breach this duty as the standard of care was a low one. Further, even if there was a breach of duty, the fraud in DLIF broke the chain of causation. Accordingly, the plaintiff's claim in tort fails.

Issue 4: The exclusion clauses on which the defendant seeks to rely are not unreasonable within the meaning of UCTA

77 The plaintiff also seeks to rely on the UCTA to say that the defendant's exclusion and limitation of liability clauses in the General T&Cs are unreasonable.[96] It is not apparent, from the plaintiff's submissions, which particular provision in the UCTA he is seeking to rely on. The defendant surmises,[97] as do I, that the relevant provision is s 2(2) of the UCTA. The defendant does not deny that the reasonableness test as set out in s 11(1) of the UCTA is engaged. Instead, the defendant argues that the clauses in the General

96 PCS at para 127.

97 DCS at para 48.

T&Cs (principally Clauses 5.1 and 7.1) (the "Exclusion Clauses"), on which it seeks to rely, are reasonable.[98]

78 The plaintiff correctly points out that the "burden of proof lies on the party who is asserting the validity of the clause to show that it is reasonable" (*The Law of Contract in Singapore* vol 1 (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at para 07.140).[99] The learned author goes on to note in that same paragraph that the facts of each individual case will determine whether a clause is reasonable, so there is limited utility in precedent cases as "the evidence of the surrounding circumstances may be very different in each case."

79 In my judgment, the Exclusion Clauses on which the defendant seeks to rely are reasonable for the following reasons:

(a) The plaintiff's expert, Ms Datson, confirmed with reference to, amongst others, Clauses 7.1 and 2.4(k), that these are standard clauses in the banking industry and are "foundational and well understood".[100]

(b) It is reasonable for the defendant to have such Exclusion Clauses given the volume of business the defendant undertakes in this area. The Exclusion Clauses are also reasonable bearing in mind the commercial position between the parties under the General T&Cs is for the plaintiff to take ultimate responsibility for investment decisions (see above at [69] and [70]).

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98 DCS at para 54.

99 PCS at para 127.

100 Transcript dated 15 May 2024 at p 187, lines 14–15 and p 188, lines 7–8, referring to clauses referenced earlier in cross examination, in Transcript dated 15 May 2024 at p 175, line 7 and p 177, lines 20–21.

(c) The plaintiff himself concedes that these clauses are standard clauses in the banking industry and that his brokerage uses similar clauses.[101] Even if the plaintiff does not understand the exact legal content of the Exclusions Clauses, he clearly understands their broad commercial purpose. That being the case, it is not unfair or unreasonable in this case that he is bound by them.

80 In light of the above, the plaintiff's contention that the UCTA should prevent the defendant from relying on the Exclusion Clauses fails.

Issue 5: The defendant is not vicariously liable for Mr Freh's conduct

81 The plaintiff also argues that the defendant should be vicariously liable for Mr Freh's negligence. The plaintiff contends that Mr Freh was negligent in making the recommendation of the DLIF investment as he failed to take reasonable care and exercise reasonable diligence, and it is fair and just that the defendant be held vicariously liable for Mr Freh's negligence.[102]

82 The defendant makes the simple retort that Clause 5.1[103] provides that every employee of the defendant (which would include Mr Freh) can rely on the same liability exclusions and defences to which the defendant is entitled. As the defendant owes no duty to the plaintiff in tort, Mr Freh also owes no such duty. Consequently, the defendant cannot be vicariously liable to the plaintiff for Mr Freh's purported liability in negligence.[104]

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101 Transcript dated 10 May 2024 at p 187, lines 14–15 and p 188, lines 7–8.

102 PCS at paras 142–143.

103 Agreed Bundle (Volume IV) at p 1291.

104 DCS at paras 106–107.

83 I agree with the defendant's reading of Clause 5.1 (at [82] above) and conclude that the defendant is not vicariously liable to the plaintiff.

84 Even if I am wrong on the interpretation of Clause 5.1, I do not accept that vicarious liability has been made out by the plaintiff.

85 In *Ng Huat Seng and another v Munib Mohammad Madni and another* [2017] 2 SLR 1074 ("*Ng Huat Seng*"), the Court of Appeal set out a two-stage test to determine whether vicarious liability ought to be imposed. The defendant helpfully summarises this test in their submissions, and this is replicated here:[105]

> (a) first, the relationship between the primary tortfeasor and the defendant must be sufficiently close so as to make it fair, just and reasonable to impose vicarious liability on the defendant for the primary tortfeasor's acts; and
>
> (b) second, there must be a sufficient connection between the defendant and the primary tortfeasor's relationship on the one hand, and the commission of the tort on the other. In particular, the question is whether the relationship created or significantly enhanced the risk of the tort being committed.

86 Applying the test in *Ng Huat Seng*, there is little doubt that Mr Freh was acting in the capacity of the defendant's employee when making the DLIF recommendation. That being the case, there is little dispute that the first limb of the test, which requires the establishment of a close connection between Mr Freh and the defendant, is made out.

87 The second part of the test is more nuanced, and I rely on the Court of Appeal's explanation in *Ng Huat Seng* (at [67]) on how its decision is reconciled with its earlier decision in *Skandinaviska Enskilda Baken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540

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105 DCS at paras 103(a)–103(b).

("*Skandinaviska*").

88 *Skandinaviska* addressed whether vicarious liability should be imposed on the defendant company in that case ("APB") for torts committed by its finance manager. *Skandinaviska* at [75] decided that, in assessing whether vicarious liability had to be imposed, the court must "examine all the relevant circumstances – *including policy considerations* – and determine whether it would be fair and just to impose vicarious liability on the employer" [emphasis in original]. The court in *Skandinaviska* went on to elaborate at [78] that vicarious liability "comes into play when the law is unable, for practical reasons, to make the blameworthy party bear the financial costs of the tort". That being the case, it is an anomaly in the common law as it presents a form of strict liability on the employer. For that reason, vicarious liability can only be justified (*Skandinaviska* at [78]):

> … if the victim of the tort is himself *not at fault, or is less at fault than the blameworthy party and/or the ultimate defendant*. It is only in a situation where the primary device for imposing liability – *ie*, fault – is incapable of providing the victim with effective compensation from the blameworthy party that resort to other factors to assign liability (and, thus, provide effective victim compensation) may be justified. In other words, a precondition for the imposition of vicarious liability is that the victim seeking compensation should either be without fault himself, or be less at fault than the blameworthy party and/or the ultimate defendant; otherwise, the policy of victim compensation as a justification for imposing vicarious liability loses much of its moral force. [emphasis added]

89 The court in *Ng Huat Seng* went on to clarify at [67] that this test in *Skandinaviska* is made in the context of a close relationship having already been established. Thus, the court in *Skandinaviska* was seeking to "determine whether it would be fair, just and reasonable to impose vicarious liability" on APB in that case.

90 Considering the guidance provided in *Ng Huat Seng* and *Skandinaviska*, I find that it is not fair, just and reasonable to impose vicarious liability on the defendant in this case. There are two key reasons for my decision.

91 Firstly, I disagree with the plaintiff that just because he was less at fault than the defendant, vicarious liability should be imposed on the defendant pursuant to *Skandinaviska*.[106] The allocation of fault is only a "precondition for the imposition of vicarious liability" (*Skandinaviska* at [78]), and it is not the only determinative factor. I still need to determine whether it is fair, just and reasonable to impose vicarious liability, bearing in mind the circumstances of the case. The facts of *Skandinaviska* presented one extreme case where the plaintiff (in that case) seeking to impose vicarious liability had the means and resources to protect themselves from fraudulent acts but failed to do so (*Skandinaviska* at [92]), and thus, the "moral force" (*Skandinaviska* at [78]) behind the imposition of vicarious liability was not engaged. The current case takes on a greyer tone, but I find that there are equally good reasons not to impose vicarious liability. The plaintiff was a sophisticated investor who had acknowledged to the defendant that he will make his own investment decisions and read the details of those investments, including the information memoranda (see [69] above). As noted in *Skandinaviska* at [93], "the policy consideration of deterrence … works both ways." No encouragement should be provided to parties who contractually agree to do certain things, fail to do them, and then seek the assistance of the law to make up for those shortcomings.

92 Secondly, I also disagree with the plaintiff's case that the defendant did not have sufficient controls in place to address Mr Freh's conduct in recommending the DLIF investment. The plaintiff argued that this was contrary

106 PCS at para 143; Plaintiff's Reply Submissions dated 26 July 2024 at para 55(d).

to the defendant's own internal rules and that this provided good reason for why vicarious liability should be imposed.[107] On the contrary, I find that there is evidence that the defendant's controls worked, because Mr Freh had told the plaintiff explicitly (in the 18 August E-mail) that DLIF was not a UBS-recommended investment. The fact that the plaintiff did not read the 18 August E-mail does nothing to lessen the fact that it was sent and that it was made clear that DLIF was not a UBS-recommended investment.

93 I conclude that the defendant is not vicariously liable for Mr Freh's conduct.

Issue 6: Scope of the plaintiff's loss and contributory negligence

94 Given my findings above that the defendant does not owe (a) contractual obligations to the plaintiff under the Investment T&Cs; or (b) a tortious duty of care to the plaintiff, I do not have to address the question of the loss suffered, and whether the plaintiff contributed to the loss as a result of his own negligence.

Conclusion

95 The title of the second page of the Investor Profile Questionnaire sets out in large bold letters: "Every client is *different*" [emphasis in original], promising "solutions for your wealth" and "your individual needs are addressed". The plaintiff will appreciate the irony in these statements. The plaintiff's not unreasonable expectation was that he would be given the personalised service that the defendant's motherhood statements had promised. However, as I have found in this decision, there is a clear disconnect between

107 PCS at para 143.

the defendant's aspirational statements for its customers, and the cold legal reality of its contractual terms. This court's position is not to comment on the former but to rule on the latter.

96 The plaintiff's claim for damages and interest fails.[108]

97 I will hear the parties on costs.

98 I would like to commend both sets of counsel for their organisation and economy with the court's time. The documents and bundles were well-organised. Counsel communicated well with one another and pre-empted issues that were helpful to me.

Wong Li Kok, Alex
Judicial Commissioner

Tham Lijing (Tham Lijing LLC, Duxton Hill Chambers (Singapore Group Practice)) (instructed), Yu Kexin (Yu Law) for the plaintiff;
Teo Chun-Wei Benedict, Tham Feei Sy and Lim Siyang Lucas (Drew & Napier LLC) for the defendant.

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108 SOC (Amd No 2) at p 19.