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

[2022] SGHC 314

Suit No 1043 of 2021 (Registrar's Appeal No 275 of 2022)

Between

Jonathan William Glassberg

… *Plaintiff*

And

UBS AG, Singapore Branch

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Striking out]

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Introduction

1 The plaintiff, Jonathan William Glassberg, was at the material time a customer of the defendant, the Singapore branch of UBS AG, a Swiss bank.[1]

2 The plaintiff commenced the present action, HC/S 1043/2021 ("the Suit"), advancing both contractual and tortious claims against the defendant on account of the losses he had sustained due to his investment in the Direct Lending Income Fund ("DLIF" or "the Fund"). The plaintiff invested in the DLIF after receiving recommendations from a then-employee of the defendant, Mr Stephan Freh ("Mr Freh").

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[1] Hong Jia's 1st affidavit dated 5 May 2022 ("1HJ") at paras 6–7.

3 The defendant filed HC/SUM 1706/2022 ("SUM 1706") to strike out the entirety of the plaintiff's claims in the Suit under O 18 r 19(1)(*a*), (*b*), (*c*) and (*d*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") and/or the inherent jurisdiction of the court.[2] The learned assistant registrar ("the AR") dismissed SUM 1706 *in toto* and the defendant appealed.[3]

4 I allowed the defendant's appeal in HC/RA 275/2022 ("RA 275") in part and struck out the plaintiff's claims premised on the defendant's alleged breach of contract. For the avoidance of doubt, I affirmed the AR's decision in SUM 1706 to dismiss the defendant's application to strike out the plaintiff's tortious claim. As the plaintiff has appealed against my decision in RA 275, I now provide the full grounds of my decision, building on the oral remarks I previously delivered on 13 October 2022.

Facts

Background to the dispute

The plaintiff's relationship with the defendant and the APA Service

5 In April 2012, the plaintiff opened an account with the defendant[4] and Mr Freh was appointed as the plaintiff's client advisor.[5] In this capacity, Mr Freh would provide the plaintiff with investment advice and recommendations from time to time.[6]

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2 HC/SUM 1706/2022, prayer 1.

3 Certified Transcript dated 31 August 2022 ("CT 31 August 2022") at p 2, ln 1–2.

4 1HJ at para 8; Jonathan William Glassberg's 1st affidavit dated 23 June 2022 ("1JWG") at para 6.

5 1HJ at para 14; 1JWG at para 6.

6 Hong Jia's 2nd affidavit dated 11 August 2022 ("2HJ") at para 23.

6 In September 2016, the plaintiff paid for and subscribed to the defendant's "UBS Advice Premium – Active Portfolio Advisory Service" ("the APA Service"), which the plaintiff later terminated in May 2018. As part of the APA Service, the defendant would provide its clients with direct access to an investment specialist who would render investment advice and monitor clients' assets which fall within the defendant's investment universe.[7] Following the plaintiff's subscription to the APA Service, the relationship between him and the defendant was governed by the following documents:[8]

(a) the Account Opening Form dated 21 March 2012 ("the Account Opening Form");

(b) the General Terms & Conditions ("the General T&Cs"); and

(c) the Investment Services Terms & Conditions ("the Investment T&Cs").

7 Pertinently, the provision of the APA Service was subject to the terms and conditions set out in Section II of the Investment T&Cs. Put another way, Section II of the Investment T&Cs would only apply when the APA Service had been engaged. In such a situation, the Investment T&Cs would supplement the General T&Cs.[9] It followed that where the APA Service had *not* been engaged, only the General T&Cs would apply.[10]

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7 1HJ at p 95 (Section II of the Investment T&Cs at cl 1).

8 1HJ at para 9.

9 1HJ at p 39.

10 1HJ at para 37.

The plaintiff's investment in the DLIF

8 From 18 August 2017 to 23 February 2018, Mr Freh communicated with the plaintiff over e-mail and phone calls regarding investments in the DLIF. According to a fact sheet on the DLIF which was first sent to the plaintiff by e-mail on 18 August 2017, the Fund was described as a financier of non-bank lenders seeking to capitalise on the attractive "regulatory premium" that exists where regulation and other factors have disrupted traditional bank lending.[11] The plaintiff invested US$1m in the DLIF on 29 November 2017 and a further US$1.5m on 23 February 2018.[12] I briefly set out a chronology of the correspondence between Mr Freh and the plaintiff:[13]

(a) On 18 August 2017, Mr Freh sent an e-mail to the plaintiff titled "DLIF" introducing the DLIF as a potential investment. Importantly, the e-mail stated that the DLIF was "*not* a UBS recommendation" [emphasis added]. Mr Freh explained that he had been introduced to the DLIF by a client of his and that he had personally invested "200k". He attached a fact sheet providing information on the Fund, which included important disclosures concerning the potential risks of investing.[14]

(b) On 3 November 2017, Mr Freh once again sent an e-mail to the plaintiff with the same subject title of "DLIF", inquiring whether the plaintiff was interested in investing in the DLIF. He made reference to his earlier e-mail stating, "I ha[ve] sent below in the past". A similar fact

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11 1HJ at p 139.

12 1HJ at para 17; 1JWG at paras 15–32.

13 Defence (Amendment No 1) dated 27 January 2022 ("Defence") at paras 13–24.

14 1HJ at pp 137–143; 1JWG at pp 38–44.

sheet was attached to the e-mail containing the same disclosures as to risk.[15]

(c) On 29 November 2017, Mr Freh forwarded to the plaintiff an e-mail from a representative of Direct Lending Investments LLC ("DLI"), the DLIF's investment advisor/manager, informing him that there were openings for further investments. Mr Freh also inquired again whether the plaintiff would like to make an investment in the DLIF. A similar fact sheet was attached to the e-mail containing the same disclosures as to risk.[16] On the same day, Mr Freh informed the plaintiff over a phone call that the DLIF was introduced by one of the defendant's clients and as long as there was no underlying fraud in the Fund, the fact sheet pointed towards the Fund's very strong performance. The plaintiff then instructed Mr Freh to invest the sum of US$1m in the DLIF.

(d) On 20 February 2018, Mr Freh sent an e-mail to the plaintiff titled "Suggestions" providing investment advice including recommendations of certain investments to the plaintiff for his consideration. In particular, he referenced the DLIF and advised the plaintiff to invest another US$750,000. A similar fact sheet was attached to the e-mail containing the same disclosures as to risk.[17]

(e) On 23 February 2018, Mr Freh informed the plaintiff over a phone call that on his (Mr Freh's) personal portfolio, the DLIF was his "absolute largest and highest conviction of the year". He also noted that it may occur to someone looking at the DLIF to question whether there

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15 1JWG at pp 46–51.

16 1JWG at pp 53–58.

17 1JWG at pp 60–68.

was a Ponzi scheme or something similar in place. However, he mentioned that there were two other family offices which had invested in the DLIF, done due diligence and felt comfortable with the risk. Thereafter, the plaintiff instructed Mr Freh to invest a further US$1.5m in the DLIF.

9 Sometime in 2019, allegations of a multi-year fraud by DLI and its Chief Executive Officer, Brendan Ross, emerged. This followed a complaint filed by the US Securities and Exchange Commission against the DLIF.[18] DLI has since been placed under liquidation and the plaintiff consequently lost his investment of US$2.5m in the DLIF.[19] This precipitated the plaintiff's commencement of the Suit against the defendant to recover his losses.

The plaintiff's claims in the Suit

10 In the Suit, the plaintiff brought both contractual and tortious claims against the defendant. Specifically, the plaintiff claimed that:

(a) The defendant breached its contractual duties under cll 1, 3.1, 4.1, 4.2 and 11.1 of Section II of the Investment T&Cs and an additional implied term stipulating a duty to exercise reasonable skill and care in rendering investment advisory or monitoring services to the plaintiff ("Contract Claims").[20]

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18 1JWG at para 42.

19 1JWG at paras 43–44; 1HG at paras 18–20.

20 Statement of Claim dated 23 December 2021 ("SOC") at paras 5–7, 9–31, 35.

(b) Further and/or in the alternative, the defendant breached its tortious duties to take reasonable care in rendering investment advisory or monitoring services to the plaintiff ("Tort Claim").[21]

The parties' cases

11 As stated above, in SUM 1706, the defendant applied to strike out the plaintiff's claims in their entirety under O 18 r 19(1)(*a*), (*b*), (*c*) and (*d*) of the ROC and/or the inherent jurisdiction of the court.[22] In essence, the defendant argued that the Contract Claims and the Tort Claim were factually and legally unsustainable. In any event, the plaintiff's claims should be struck out as the defendant did not cause the plaintiff's loss. These arguments were maintained in RA 275. I outline the parties' positions on each of these arguments *seriatim*.

Contract Claims

12 The defendant submitted that the plaintiff's Contract Claims should be struck out because the APA Service had not been engaged and accordingly Section II of the Investment T&Cs did not apply to the plaintiff's investment in the DLIF. This was evidenced by the fact that Mr Freh was not a designated investment specialist and the DLIF was outside of the defendant's investment universe and not subject to monitoring. Therefore, seeing as the Contract Claims were premised principally upon the defendant's alleged breach of the express terms in Section II of the Investment T&Cs, it followed that they should be

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21 SOC at para 37.

22 HC/SUM 1706/2022, prayer 1.

struck out.[23] Furthermore, even if Section II of the Investment T&Cs applied, there was no breach of the relevant clauses.[24]

13 In response, the plaintiff adopted the diametrically opposite position that the APA Service had been engaged and thus Section II of the Investment T&Cs applied. The plaintiff argued that the APA Service need not be provided by an internally designated investment specialist, and it sufficed that a representative of the defendant provided investment services for the APA Service to be engaged.[25] Moreover, even if the APA Service comprised services provided by designated investment specialists of the defendant and were limited only to investments in the defendant's investment universe, the defendant was estopped from asserting that Mr Freh did not have the authority to provide the APA Service.[26] In addition, the defendant was estopped from asserting that the DLIF was not a "UBS recommended product" or not within the defendant's investment universe due to Mr Freh's conduct.[27] Lastly, there were at least serious questions to be tried on the following issues: (a) the interpretation of the term "investment specialist" and "investment universe" in the Investment T&Cs; (b) whether the defendant is estopped from relying on its strict contractual rights in light of the representations it made; and (c) the meaning of and the practice surrounding the defendant's use of an e-mail disclaimer stating that the e-mail and any offering material sent with it had been sent pursuant to a request "received by UBS" from the addressee (in the present case, the plaintiff).

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23 Defendant's submissions in SUM 1706 ("DS SUM 1706") at paras 70–71.

24 DS SUM 1706 at para 72.

25 Plaintiff's submissions in SUM 1706 ("PS SUM 1706") at paras 34–35.

26 PS SUM 1706 at para 39.

27 PS SUM 1706 at para 40.

Tort Claim

14 The defendant contended that the plaintiff's Tort Claim should be struck out as it did not owe a duty of care to advise him on his investment in the DLIF or to monitor his investment in the same. The defendant observed that the plaintiff primarily sought to rely on the Investment T&Cs as a basis for the imposition of a duty of care. Since they were inapplicable, the plaintiff's Tort Claim fell away. Furthermore, the General T&Cs made clear that: (a) the defendant did not assume any responsibility in advising the plaintiff; (b) the plaintiff did not rely on the defendant taking such care when making investment decisions; and (c) the plaintiff was not a vulnerable investor.[28]

15 The plaintiff maintained that the Investment T&Cs applied. In particular, he noted that cl 11.1 of Section II of the Investment T&Cs clearly pointed towards an imposition of a duty of care. In this regard, cl 11.1 provided that, "[i]n performing its obligations hereunder, the Bank shall act diligently and carefully in providing investment advice with respect to the Mandated Account". In any event, even if the Investment T&Cs did not apply, the General T&Cs did not exclude a duty of care from arising. Specifically, cl 5.1 of the General T&Cs did not expressly exclude the defendant's liability for negligence.[29] In addition, despite certain terms in the General T&Cs purportedly excluding the imposition of a duty of care, the defendant had yet to demonstrate that the plaintiff's reliance on the provisions in the Unfair Contract Terms Act 1977 (2020 Rev Ed) ("UCTA") to dispute these terms would be bound to fail.[30]

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28 DS SUM 1706 at paras 137–138.

29 PS SUM 1706 at paras 56–58.

30 PS SUM 1706 at para 59.

Causation

16 Finally, the defendant submitted that even if it were in breach of its contractual and/or tortious duties, this did not cause the plaintiff's loss.[31] Therefore, the plaintiff's claims were unsustainable and should be struck out. First, the plaintiff's claim that he would not have invested in the DLIF but for the defendant's breach of duty was factually unsustainable as the defendant was neither in a position to uncover the weaknesses concerning the DLIF[32] nor put on notice of the fraud.[33] Second, and in any event, the fraud within DLI constituted a *novus actus interveniens*, which broke the chain of causation.[34] Third, the purported expert affidavit by one Mr Oliver Patrick Henry Wilson ("Mr Wilson's affidavit") filed by the plaintiff to attest to causation ought to be disregarded as the conclusions therein were based solely on third-party reports regarding the DLIF which had not been identified or placed before the court.[35]

17 Against the defendant's submissions, the plaintiff argued that there was in fact a strong factual basis for the plaintiff's claim that the defendant had caused him loss and damage. The defendant had not shown that it would not have been able to discover the fraud or the risks of investing in the DLIF. Moreover, it appeared that the defendant was put on notice or had suspicions of the risk of investing in the DLIF or that there may have been fraud in the DLIF.[36]

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31 DS SUM 1706 at para 159.

32 DS SUM 1706 at paras 163–167.

33 DS SUM 1706 at para 175.

34 DS SUM 1706 at para 186.

35 DS SUM 1706 at para 177.

36 PS SUM 1706 at para 66.

Decision below

18 The AR dismissed the defendant's striking out application in SUM 1706 in its entirety.

19 In relation to the Contract Claims, the AR held that there was a possibility that the Investment T&Cs could be interpreted such that they applied to the plaintiff's DLIF investment. In particular:

(a) In relation to the provision of investment advice under the APA Service:[37]

(i) The AR noted that there was no definition of an "investment specialist" in any of the written documents issued by the defendant. While the Account Opening Form refers to an "investment specialist" and a "Client Advisor" separately, there was no indication that they could not be the same person. The distinction between the two roles was simply asserted by the defendant based on an internal HR designation not made known to customers.

(ii) Although the defendant suggested that it was the plaintiff who failed to use the APA Service, the plaintiff's conduct in failing to contact the investment specialist was consistent with his claim that he understood Mr Freh to be the investment specialist.

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37 CT 31 August 2022 at p 5, Oral Judgment at para 5.

(b) In relation to the provision of monitoring services under the APA Service:[38]

(i) The plaintiff claimed that there were representations in the form of updates from Mr Freh that the DLIF was being actively monitored (as part of the UBS investment universe) and that these representations estopped the Bank from claiming that it was not obliged to monitor. There was also a potential issue of whether the plaintiff had in fact received or read the e-mail stating that the DLIF was not a "UBS recommended product". The AR held that while it was undisputed that the DLIF was not in the defendant's investment universe, it was not impossible that estoppel may apply.

20 In relation to the Tort Claim, the AR held that there was a possibility that a duty of care could arise, notwithstanding certain clauses in the General T&Cs. Moreover, if the Investment T&Cs applied, cl 11.1 imposed a duty of care on the defendant:[39]

(a) First, while the defendant placed emphasis on the Risk Disclosure Statement in cl 7.1 of the General T&Cs to exclude a duty of care, negligence was not excluded in cl 5.1 of the General T&Cs and so there was a question concerning the interaction between these clauses.

(b) Second, the reasonableness of the clauses in the General T&Cs in view of the provisions in the UCTA was a question to be determined at trial with a full appreciation of the context.

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38 CT 31 August 2022 at pp 5–6, Oral Judgment at para 6.

39 CT 31 August 2022 at pp 6–7, Oral Judgment at para 8.

(c) Third, there were allegations about Mr Freh's possible representations which may undermine the defendant's disavowal of responsibility. In addition, the capacity in which Mr Freh made those representations was also contested.

(d) Fourth, there was a question as to whether the plaintiff was in fact "vulnerable".

21 Finally, in relation to causation, the AR observed that although Mr Wilson's affidavit should be given limited, if any, weight, it was premature to conclude that any monitoring by the defendant of the DLIF would have been futile as the defendant had not conducted any monitoring at all. Further, the plaintiff claimed that based on his calls with Mr Freh, Mr Freh appeared to be aware that the DLIF investment was a potential fraud – whether this had occurred or not was something that could be ventilated at trial.[40]

Issues to be determined

22 At the outset, I note that on the face of the summons, the defendant sought to strike out the plaintiff's claim in the Suit under all four grounds set out in O 18 r 19(1) of the ROC as well as the inherent jurisdiction of the court (see [3] above). However, it was apparent from the defendant's submissions that it was primarily focussed on whether each of the plaintiff's claims were factually or legally unsustainable and should be struck out under O 18 r 19(1)(*b*) of the ROC for being frivolous or vexatious.[41]

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40 CT 31 August 2022 at p 7, Oral Judgment at para 10.

41 Defendant's submissions in RA 275 ("DS RA 275") at para 6.

23 Therefore, the key issue for my determination was whether the plaintiff's claims were either factually and/or legally unsustainable such as to warrant striking out under O 18 r 19(1)(*b*) of the ROC.

Contract Claims

24 To recapitulate, the plaintiff alleged that the defendant breached its contractual duties under cll 1, 3.1, 4.1, 4.2 and 11.1 of Section II of the Investment T&Cs and an additional implied term stipulating a duty to exercise reasonable skill and care in rendering investment advisory or monitoring services to the plaintiff (see [10(a)] above). It was common ground that the plaintiff's case in respect of the Contract Claims hinged on whether the APA Service had been engaged, since the Investment T&Cs were only applicable to the plaintiff's investment in the DLIF in such a scenario. Quite simply, if they were not applicable, the plaintiff had no basis (as pleaded) for his claim for breach of contract as no contractual duties under the Investment T&Cs would have arisen.

25 I was of the view that the plaintiff did not have a factually sustainable claim that the APA Service had been engaged by the plaintiff in respect of his investment in the DLIF. Accordingly, there was no basis for the Investment T&Cs to apply. I shall elaborate on this.

26 To be clear, the APA Service offered direct access to an investment specialist of the defendant who was concerned with the provision of two forms of services, namely: (a) investment advice; and/or (b) monitoring services. This is reflected in cl 1 of Section II of the Investment T&Cs, which I reproduce as follows:[42]

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42 1HJ at p 95 (Section II of the Investment T&Cs at cl 1).

> **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.
>
> [emphasis in original in bold; emphasis added in bold italics]

27 Specifically, in relation to the monitoring services provided as part of the APA Service, cl 4.1 of Section II of the Investment T&Cs makes clear that such services would only be provided in relation to investments within the defendant's investment universe:[43]

> **4. Monitoring of Investment Instruments**
>
> 4.1 Based on the findings gained from investment analysis and research available to the Bank, the Bank will *monitor the performance of those investments in the Portfolio which are within its investment universe for active advisory services for the time being. For the avoidance of doubt, investments in the Portfolio which are outside the investment universe of the Bank (as modified by the Bank at its discretion from time to time) will not be monitored by the Bank.*
>
> [emphasis added]

28 The plaintiff argued that the APA Service was engaged as Mr Freh, acting on behalf of the defendant, had provided investment advice and represented that the DLIF investment was within the defendant's investment

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[43] 1HJ at p 95 (Section II of the Investment T&Cs at cl 4.1).

universe and was being monitored accordingly.[44] The defendant disputed this[45] and further contended that the plaintiff had failed to plead in his Statement of Claim that Mr Freh was an investment specialist and/or that the DLIF was an investment in the defendant's investment universe, and accordingly the pleading was fundamentally defective.[46]

Whether the APA Service had to be provided by investment specialists of the defendant

29 I address first the question of whether the APA Service *had* to be provided by a particular group of the defendant's employees designated as "investment specialists". If so, a related question would be whether Mr Freh could objectively be said to have fallen within this group of employees by reason of the undisputed fact that he had rendered investment advice to the plaintiff after his subscription to the APA Service.

30 At first blush, it appeared that there may have been a factual question to be tried. As the AR rightly noted, the Investment T&Cs did not contain a definition of "investment specialists" and it was unclear on the face of the documents whether it was intended to be a term of art or to describe a general category of persons equipped with specific knowledge or skillsets. This was notwithstanding the defendant's evidence that based on its own *internal* human resources Global Consolidated Reporting System, Mr Freh's function description was listed as "GFO SEA (SG/Indo)", indicating that he was not a

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44 1JWG at paras 12, 41 and 53–54; Plaintiff's submissions in RA 275 ("PS RA 275") at para 33.

45 1HJ at paras 34 and 40–49; DS RA 275 at para 93.

46 DS RA 275 at para 108; Certified Transcript dated 10 October 2022 ("CT 10 October 2022") at p 10, ln 5–8 and p 16, ln 12–24.

member of the APA team and instead belonged to the "South East Asia team under the Defendant's Global Family Office client advisor desk".[47]

31 That being said, I found considerable force in the defendant's argument that it would have made little sense for the plaintiff to subscribe and pay for the APA Service as an *additional* resource, only to maintain his *continued access* to Mr Freh's pre-existing services and advice. Here, it was relevant to note that the nature of the investment advice or services provided by Mr Freh did not appear to have expanded or altered in any way after the plaintiff subscribed to the APA Service. The plaintiff did not plead anything to this effect and had not said so in his affidavit. From a comparison of Mr Freh's e-mails to the plaintiff both before and after the plaintiff's subscription to the APA Service, the contents do not appear to be markedly different in form or substance.[48] I raise a few examples of these e-mails to illustrate this:

(a) On 11 April 2016, prior to the plaintiff's subscription to the APA Service, Mr Freh sent him an e-mail titled, "a few things". In the e-mail, Mr Freh provided the plaintiff with some recommendations on how to manage his investments in gold, "USDEUR hedge", "GBPJPY hedge", *etc*.[49]

(b) On 20 May 2016, also prior to the plaintiff's subscription to the APA Service, Mr Freh sent him an e-mail titled, "[t]houghts on bonds #2". In the e-mail, Mr Freh recommended an investment in a UBS

47 DS RA 275 at para 93; 1HJ at paras 43 and 45.

48 2HJ at pp 15–21 and 1JWS at pp 38–68.

49 2HJ at pp 15–16.

> Global Bond Basket, with a fact sheet describing the key features of the investment, its mechanics and risks, *etc*.[50]

As set out earlier (at [8]), Mr Freh's communications with the plaintiff concerning the investment in the DLIF was conducted in a manner similar to these aforementioned exchanges. Indeed, there was nothing additional or special to suggest that the later communications regarding the DLIF were done as part of services rendered under the APA Service, instead of in the usual course of advice provided in accordance with Mr Freh's role as the plaintiff's client advisor.

32 In addition, it was apparent from the Account Opening Form that every client of the defendant is assigned and has access to a client advisor at the time they open an account with the defendant.[51] Part 3 of the Account Opening Form labelled "Investment Services" explicitly makes reference to a separate "investment specialist" and "client advisor", clearly distinguishing between the two roles:[52]

> **Active Portfolio Advisory Service:** Having regard to the Client's investment guidelines, 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. [emphasis in original in bold; emphasis added in bold italics]

It must follow then that Mr Freh would *not* also be expected to be the plaintiff's "investment specialist" who was to provide the additional APA Service to him.

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50 2HJ at pp 17–21.

51 1HJ at p 34; DS RA 275 at para 104.

52 1HJ at p 39.

Indeed, an investment specialist who was a member of the APA Service team, namely, Mr Souvan Kim ("Mr Kim"), had been in contact with the plaintiff. Tellingly, Mr Kim had identified himself as being a member of the APA Service team,[53] something which Mr Freh never once did. Notably, the AR highlighted that the plaintiff's conduct in failing to contact Mr Kim was in fact consistent with his claim that he understood Mr Freh to be his investment specialist. I make two observations here. First, it was immaterial that the plaintiff did not respond to Mr Kim, since it was not disputed that he could have done so. Second, the plaintiff *did not* plead that Mr Freh was his "investment specialist" or that Mr Freh had held himself out as one. With respect, I therefore differed from the AR's views in this regard.

33 It was also relevant to note that the plaintiff is a sophisticated investor, with substantial financial wherewithal and professional experience in the finance industry.[54] Yet, as the defendant rightly pointed out, it was perfectly plausible that he had laboured under a serious misunderstanding of the contractual terms in both the Account Opening Form and the APA Service that he had subscribed to.[55] This had led the plaintiff to believe that Mr Freh could provide and did provide the APA Service to him. The plain inference was that, in all likelihood, he had not made any real effort to read the contractual terms carefully (or at all) before he signed on the dotted line. It would appear that he had not attempted to fully understand their meaning or seek any clarification from Mr Freh or any other person in the defendant's employ as to how the APA Service worked and in particular, *who* would administer it for him.

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53 2HJ at p 24.

54 See DS RA 275 at paras 181–187.

55 CT 10 October 2022 at p 13 ln 28 to p 14 ln 25.

34 It therefore followed that the plaintiff's argument on estoppel was also unsustainable. The plaintiff argued that even if the APA Service comprised services provided by designated investment specialists of the defendant and applied to investments in the defendant's investment universe, the defendant was estopped from asserting that Mr Freh did not have the authority to provide the APA Service. To this end, the plaintiff submitted that the defendant had made a representation or acted in a manner which represented that Mr Freh had the authority to provide investment advisory services to the plaintiff, by holding out Mr Freh as a client advisor, and permitting him to send e-mails containing investment recommendations together with a UBS disclaimer that such e-mails were sent as a result of a request "received by UBS". The plaintiff's argument clearly missed the point. It simply did not matter whether the defendant had represented that Mr Freh had the authority to provide investment advisory services to the plaintiff. What was crucial was whether the defendant had represented to the plaintiff that Mr Freh was an investment specialist who was capable of providing the APA Service to him. However, this was patently not the plaintiff's submission.

35 Further, I should add that the plaintiff's reliance on the UBS disclaimer did not take him very far. As noted by the defendant, the disclaimer did not specifically pertain to the APA Service and there was no mention of the APA Service anywhere in the disclaimer.[56] It was a standard disclaimer that was appended to Mr Freh's e-mails to the plaintiff at the time.[57] Indeed, this same disclaimer was appended to Mr Freh's e-mails to the plaintiff even before the plaintiff had subscribed to the APA Service.[58]

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56 DS RA 275 at paras 128–129; 1JWG at p 154.

57 DS RA 275 at para 130.

58 DS RA 275 at para 132; 2HJ at pp 16, 20–21.

36 Therefore, to my mind, the APA Service necessarily had to be provided by a particular group of the defendant's employees designated as "investment specialists". In this regard, Mr Freh could not objectively have been said to fall within this group of employees by virtue only of the fact that he had rendered investment advice to the plaintiff after his subscription to the APA Service.

Whether the defendant was estopped from asserting that the DLIF was not within the defendant's investment universe

37 I next turn to address the issue of whether the DLIF was an investment subject to monitoring under the APA Service and consequently whether the Investment T&Cs applied to it.

38 The defendant adduced affidavit evidence from Mr James Fava ("Mr Fava"), a Funds Project Manager with the defendant, attesting to the fact that the DLIF was not an investment within the defendant's investment universe during the material period such that it would be subject to the monitoring obligations under the Investment T&Cs.[59] Mr Fava explained that all investments within the defendant's investment universe for Singapore-booked accounts would be set out in at least one of the following lists in the defendant's database: "Approved Universe, Singapore Advisory", "Approved Universe, Singapore Active Advisory", "Approved Universe, Singapore Contract-based Advisory", "Approved Universe, Singapore Hedge Fund Advisory", "Approved Universe, Singapore Hedge Fund Access", and "Approved Universe, Singapore Private Markets".[60] However, after conducting searches using the defendant's internal database portal known as the Product Inventory Cockpit, Mr Fava confirmed that the DLIF was not in any of the defendant's six lists and was

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59 James Fava 1st affidavit dated 5 May 2022 ("1JF") at paras 8 and 10.

60 1JF at para 5.

therefore not part of the defendant's investment universe.[61] Since this was so, the monitoring service under the APA Service was not engaged by virtue of cl 4.1 of Section II of the Investment T&Cs (see [27] above).

39 Crucially, the plaintiff did not dispute that the DLIF was not part of the defendant's investment universe. However, he argued that the defendant was nonetheless estopped from asserting that the DLIF was not within its investment universe. In this connection, the plaintiff alleged that Mr Freh, acting on behalf of the defendant, had represented by his conduct from November 2017 to May 2018 that the DLIF was a "UBS recommended product" or within the defendant's investment universe. In particular, Mr Freh had consistently treated the DLIF in the same way as any other UBS recommended investment product, including sending the recommendations using his UBS e-mail address and providing updates on the performance of the DLIF.[62]

40 With respect, I was unable to accept that the plaintiff had established a proper factual basis for estoppel to apply. The plaintiff had conveniently glossed over a material piece of evidence in the form of the 18 August 2017 e-mail sent by Mr Freh to him (see [8(a)] above), which was the first ever e-mail sent by Mr Freh concerning the DLIF. In that e-mail, Mr Freh unequivocally stated that the DLIF had been introduced to him by a client of his and was "*not* a UBS recommendation" [emphasis added].[63] In this regard, I was satisfied that from the context of the discussions, this statement should be interpreted as meaning that the DLIF was an investment outside of the defendant's investment universe. This e-mail assisted not only in determining whether any form of estoppel could

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61 1JF at paras 6 and 8.

62 PS RA 275 at para 51.

63 1HJ at pp 137–143; 1JWG at pp 38–44.

be said to have had arisen, but also in facilitating an appreciation of what the plaintiff knew or ought to have known from the outset. The plaintiff did not dispute that the 18 August 2017 e-mail was sent and received by him,[64] although he claimed that he did not "recall receiving or reading" the e-mail.[65] I agreed with the defendant that this was irrelevant. In any event, it was but a bare assertion by the plaintiff. Even if the plaintiff maintained this assertion at trial, it would be difficult to accept that he could conveniently disavow any knowledge of what Mr Freh had informed him of from the outset.

41 Further, the plaintiff's argument that he was only relying on the conduct of Mr Freh in his recommendations concerning the DLIF between *November 2017* to *May 2018* (excluding the 18 August 2017 e-mail) was contrived.[66] It would be entirely artificial to consider Mr Freh's subsequent e-mails between November 2017 and May 2018 without an appreciation of the prior context set out in the 18 August 2017 e-mail expressly indicating that the DLIF was not a UBS recommendation. Besides, it was notable that even in Mr Freh's second e-mail concerning the DLIF sent on 3 November 2017, he had made reference to his earlier 18 August 2017 e-mail stating, "I ha[ve] sent below in the past" (see [8(b)] above).[67] Moreover, the fact that Mr Freh communicated with the plaintiff using his UBS e-mail account did not transform the DLIF into a UBS recommendation, much less into a form of advice rendered under the APA Service by Mr Freh as an "investment specialist". Thus, I once again differed from the AR's view that this issue of estoppel was a factual issue that

64 CT 10 October 2022 at p 38, ln 13–21.

65 1JWG at para 17.

66 CT 10 October 2022 at p 37 ln 31–p 38 ln 8.

67 1JWG at pp 46–51.

was best resolved at trial.[68] As an aside, I note further that the plaintiff had not sought to lay any blame on Mr Freh or make any claim against him personally, for reasons best known to himself.

42 For completeness, I address briefly the defendant's contention that the plaintiff had failed to plead estoppel despite the requirements in O 18 r 8(1) of the ROC.[69] While it is true that the plaintiff did not expressly plead the words "estoppel" in his Statement of Claim, I noted that this was not strictly necessary: see *Letchimy d/o Palanisamy Nadasan Majeed (alias Khadijah Nadasan) v Maha Devi d/o Palanisamy Nadasan (administrator of the estate of Devi d/o Gurusamy, deceased*) [2021] 1 SLR 970 ("*Letchimy*") at [5]. What is required is for the material facts giving rise to the estoppel (especially the representation(s) relied upon) and the elements of the estoppel to be pleaded with sufficient particularity: see *Tembusu Growth Fund II Ltd and another v Yee Fook Khong and another* [2020] SGHC 104 at [106]–[107]; *Letchimy* at [5]. Taking the plaintiff's argument at its highest and assuming that the material facts giving rise to the estoppel had been properly pleaded, in my view, the 18 August 2017 e-mail was nonetheless a compelling and cogent rebuttal of the plaintiff's claim that estoppel had arisen.

Whether there was a breach of contractual duties under the Investment T&Cs

43 I next consider whether there was a factual and legal basis for the alleged breach of contractual duties under the relevant clauses of the Investment T&Cs.

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68 CT 31 August 2022 at pp 5–6, Oral Judgment at para 6.

69 DS RA 275 at para 146.

44 First, the plaintiff alleged that the defendant had breached cll 1, 3.1 and 11.1 of Section II of the Investment T&Cs. Clause 1 is set out above at [26].

45 Clause 3.1 reads as follows:[70]

> **3. Investment advice**
>
> 3.1 The Client will receive direct access to the Bank's team of investment specialist[s] 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.

46 Clause 11.1 reads as follows:

> **11. Liability**
>
> 11.1 In performing its obligations hereunder, the Bank shall act diligently and carefully in providing investment advice with respect to the Mandated Account. …

47 In this regard, the plaintiff pleaded that these terms were breached because, the defendant, *inter alia*: (a) had not provided any further information or details about the DLIF; (b) did not inform the plaintiff of any due diligence, investment analysis, and/or investment research it had done into the DLIF and its findings; (c) did not advise the plaintiff on how an investment in the DLIF would meet his investment objectives; and (d) did not advise the plaintiff on the risks and returns from the investment in the DLIF.[71]

48 However, given my earlier findings that the investment advisory service under the APA Service had not been engaged by the defendant in respect of the DLIF investment, the plaintiff's allegations of breach in respect of cll 1, 3.1 and

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70 1HJ at p 95 (Section II of the Investment T&Cs at cl 3.1).

71 PS RA 275 at paras 60 and 66.

11.1 of Section II of the Investment T&Cs were factually and legally unsustainable.

49 Second, the plaintiff also alleged that the defendant had breached cl 4.1 of Section II of the Investment T&Cs (see [27] above), which concerned the defendant's monitoring obligations under the APA Service. I deal with this point shortly. Given that the plaintiff did not dispute that the DLIF was not part of the defendant's investment universe, and in view of my finding that the plaintiff's claim of estoppel was unsustainable, there was no obligation for the defendant to monitor the DLIF under cl 4.1, and accordingly no basis for any breach as alleged.

50 Lastly, I was of the view that there was also no factual basis for the plaintiff's allegation of breach in respect of cl 4.2 of Section II of the Investment T&Cs.[72] Clause 4.2 provides as follows:[73]

> 4.2 Further the Bank will inform the Client from time to time if the structure of the Portfolio deviates from the prevailing Programme Specifications. The Client understands that the Bank continues to provide its advice based upon the prevailing Programme Specifications agreed upon and as the same may be amended from time to time in accordance with the process described in paragraph 2.3 above.

The plaintiff submitted that the defendant was in breach of cl 4.2 as "UBS did not provide any other information or advice to [the plaintiff]".[74] I accepted however that the plaintiff did not specifically plead that: (a) the structure of the Portfolio (as defined in cl 1, see [26] above) had deviated from the prevailing

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72 DS RA 275 at paras 168–171.

73 1HJ at p 95 (Section II of the Investment T&Cs at cl 3.1).

74 PS RA 275 at para 65; SOC at para 36.

Programme Specifications; and (b) he was not informed of any such deviation, which were the specific obligations set out in cl 4.2. This therefore warranted the striking out of the alleged breach of cl 4.2.

Whether there was breach of an implied term in the Investment T&Cs

51 The plaintiff also sought to argue that the defendant had breached an implied term in the Investment T&Cs that it would exercise reasonable skill and care in rendering investment advisory or monitoring services to the plaintiff.[75] As I explained above, it was clear that the Investment T&Cs did not apply as the APA Service (*ie*, both its investment advisory and monitoring services) was not engaged. As such, I agreed with the defendant that the claim for breach of an implied term in the Investment T&Cs was without merit.

Conclusion on the Contract Claims

52 The plaintiff's case appeared to be premised on a fundamental misunderstanding of the contractual duties owed to him by the defendant. He assumed that Mr Freh was his "investment specialist" while also serving as his client advisor but did not specifically plead this. He did not plead that Mr Freh had held himself out as an "investment specialist". He also did not plead that he was denied access to any investment advice (or advisor) as far as the DLIF was concerned. As such, the plaintiff's argument on Mr Freh's role appeared to be an afterthought. Finally, it was undisputed that the DLIF was not within the defendant's investment universe and further it was clear to me that there was no basis for estoppel to apply.

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[75] DS RA 275 at para 172.

53 Given the factual context, I did not accept that contractual duties arose under the Investment T&Cs. As I was not persuaded that there was a legal and factual basis for the plaintiff's claim for breach of the defendant's alleged contractual duties, I allowed the defendant's appeal on this point and struck out the plaintiff's Contract Claims.

Tort Claim

54 The plaintiff's Tort Claim is based on: (a) the defendant having assumed responsibility as it offered investment advisory and/or monitoring services to the plaintiff and held itself out as possessing skills and expertise in that area; and (b) it being factually foreseeable that if the defendant did not exercise due care, the plaintiff would suffer loss.[76] In seeking to strike out the plaintiff's Tort Claim, the defendant made two arguments. First, the plaintiff relied primarily on the Investment T&Cs to establish a contractual duty of care on the part of the defendant. However, as the Investment T&Cs were inapplicable, the plaintiff's Tort Claim was unsustainable.[77] Second, the General T&Cs made clear that: (a) the defendant did not assume any responsibility in the event that it did advise the plaintiff; (b) the plaintiff did not rely on the defendant taking such care when making investment decisions; and (c) the plaintiff was not a vulnerable investor.[78]

55 In relation to the defendant's first argument, the plaintiff argued that even if the Investment T&Cs, in particular cl 11.1 of Section II, did not apply, he still had a sustainable claim in tort. This was because the plaintiff did not solely rely on the Investment T&Cs to establish a duty of care, but also the

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76 PS RA 275 at para 67; SOC at para 8.

77 DS RA 275 at para 178.

78 DS RA 275 at para 179.

course of conduct between Mr Freh and the plaintiff which gave rise to the necessary proximity.[79] Despite having accepted that the APA Service was not engaged and the Investment T&Cs were not applicable, I was of the view that, should the matter proceed to trial, it might still be possible to find that there was both voluntary assumption of responsibility on the defendant's part and reliance by the plaintiff, as to demonstrate sufficient proximity in the dealings between the parties. It is necessary to examine all the facts including those leading up to the conclusion of a contract and a duty of care in tort may still arise on those facts: *Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886 at [37]–[38].

56 In relation to the defendant's second argument, it relied on the following exclusion and/or non-reliance clauses in the General T&Cs to argue that a duty of care was precluded from arising: (a) cl 7.1 of Section 1 Mandate; and (b) cl 2.4k of Section C of Section 3 Product Conditions.[80] Clause 7.1 of Section 1 Mandate reads as follows:[81]

> 7.1 … 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 judgement. 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.* … [emphasis added]

Clause 2.4k of Section C of Section 3 Product Conditions reads as follows:[82]

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79 PS RA 275 at para 70.

80 DS RA 275 at para 179.

81 1HJ at p 53 (Section 1 Mandate of the General T&Cs at cl 7.1).

82 1HJ at p 73 (Section C of Section 3 Product Conditions of the General T&Cs at cl 2.4k).

> 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]

57 However, the plaintiff pointed to cl 5.1 of the General T&Cs, arguing that liability for negligence was not expressly excluded:[83]

> 5.1 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 misconduct 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 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. … [emphasis added]

58 The AR was of the view that there was an outstanding question concerning the interaction between cl 5.1 of the General T&Cs which did not exclude liability for negligence, and the other terms in the General T&Cs relied upon by the defendant which may prevent a tortious duty of care from arising. I shared the same view. To my mind, the General T&Cs did not clearly preclude a duty of care in tort from arising. It would not be appropriate to determine the import of the clauses and rationalise the interaction between them based on

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83 1HJ at p 53 (Section 1 Mandate of the General T&Cs at cl 5.1).

affidavit evidence alone. The proper construction of the various contractual terms relied upon may involve findings of fact which are best resolved at trial. This is consistent with the High Court's observations in *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2015] SGHC 52 at [70].

59 Further, the parties disagreed as to whether the clauses in the General T&Cs relied upon by the defendant which allegedly preclude a duty of care from arising are reasonable under s 2(2) read with s 11 of the UCTA.[84] In this regard, I noted that the determination of whether a particular clause is reasonable is an extremely fact specific inquiry. This was observed by Judith Prakash J (as she then was) in *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712 at [45] in the following terms:

> … The mere fact that a party had apparently willingly entered into a contract containing exclusion and limitation terms also did not prevent him from subsequently raising questions of reasonableness. Further, a provision that was commonly found in an industry may be reasonable by reason of it being in common use; but it could also be unreasonable nevertheless. The question whether a contractual term satisfied the requirement of reasonableness depended on the facts of each case. In principle, a term which had been found to satisfy the reasonableness requirement in one case may not satisfy it in another.

Accordingly, it would be more appropriate for the reasonableness of the clauses to be determined at trial after the factual background of the parties' relationship is fully canvassed.

60 For the above reasons, I was not convinced that the plaintiff's Tort Claim was factually and legally unsustainable such as to warrant being struck out.

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[84] 1JWG at para 61; PS RA 275 at para 72; DS RA 275 at para 190.

Causation

61 Finally, the defendant contended that even if it owed the plaintiff contractual and/or tortious duties and breached the same, the plaintiff's claims should nonetheless be struck out because it did not cause the plaintiff's loss.[85] In this connection, the defendant argued that the plaintiff's claim that he would not have invested in the DLIF but for the defendant's negligence was factually unsustainable as the defendant was not in a position to uncover the fraud concerning the DLIF.[86] In any event, the fraud within DLI constituted a *novus actus interveniens*, which broke the chain of causation.[87]

62 In response, the plaintiff sought to adduce Mr Wilson's affidavit which, *inter alia*, pointed towards "significant weaknesses" in the DLIF prior to 2018 when the investment was first recommended to the plaintiff.[88] I agreed with the AR and the defendant that no reliance should be placed on Mr Wilson's affidavit. To the extent that Mr Wilson's affidavit was intended to be relied upon by the plaintiff as expert evidence, it is well-established that it must comply with the requirements set out in O 40A r 3 of the ROC. Mr Wilson did not provide expert evidence in a written report exhibited to his affidavit in contravention of O 40A r 3(1) of the ROC. Further, his affidavit largely contained conclusions based on third-party due diligence reports regarding the DLIF which had not been identified or placed before the court contrary to O 40A r 3(2)(*b*) of the ROC.[89] Even if I accepted that Mr Wilson's affidavit was purely meant to serve

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85 DS RA 275 at para 203.

86 DS RA 275 at paras 214–226.

87 DS RA 275 at para 247.

88 PS RA 275 at para 78; Oliver Patrick Henry Wilson's first affidavit dated 23 June 2022 at para 17.

89 DS RA 275 at para 230.

as a factual affidavit, pursuant to O 41 r 5(1) of the ROC, it should only contain such facts as he was able of his own knowledge to prove. While for interlocutory proceedings, an affidavit may contain statements of information or belief with the sources and grounds thereof (see O 41 r 5(2) of the ROC), Mr Wilson's affidavit merely contained a summary of a number of third-party due diligence reports which were not referenced or identified. Moreover, Mr Wilson did not attest to any facts which were within his own personal knowledge. This was highly wanting of a factual affidavit.

63 I return to the defendant's argument on causation. In this regard, I confine the following analysis to the plaintiff's Tort Claim given my earlier finding that the plaintiff's Contractual Claims were unsustainable and ought to be struck out. On the basis of the plaintiff's Tort Claim, I was of the view that there were issues to be decided at trial as to whether the alleged breach of the defendant's tortious duties caused the plaintiff's loss. From the evidence available (excluding Mr Wilson's affidavit), I agreed with the AR that it was unclear at this stage whether any monitoring of the DLIF on the defendant's part would necessarily have been futile.[90] It also appeared at least from the discussions over the phone between the plaintiff and Mr Freh concerning the DLIF that there may be some relevant additional context behind Mr Freh's alleged remarks concerning "fraud" and "a Ponzi scheme" which should be fleshed out at trial (see also [8(c)] and [8(e)] above).[91]

64 I briefly touch on the defendant's point that the fraud within DLI constituted a *novus actus interveniens*. The defendant submitted that the fraud within DLI was the act of a third party over which the defendant could not have

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90 CT 31 August 2022 at p 7, Oral Judgment at para 10.

91 1JWG at para 68.

exercised control and thus operated as a *novus actus interveniens* which broke the chain of causation.[92] I accepted the plaintiff's submission that it would not be appropriate to conclusively determine whether the fraud within DLI constituted a *novus actus interveniens* at this juncture,[93] as it would properly require an exercise in "legal judgment" having had full appreciation of the facts of the case: *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184 at [103].

Conclusion

65 For the reasons set out above, I allowed the appeal in part and struck out the plaintiff's claim in so far as it was premised on the defendant's breach of contract. The plaintiff's remaining claim in tort was not obviously unsustainable and the threshold for striking out had not been met. I accordingly affirmed the AR's decision in respect of the claim in tort. In the circumstances, as both parties had succeeded partially at the hearing of the appeal, I made no order as to costs.

See Kee Oon
Judge of the High Court

Yu Kexin (Yu Law) for the plaintiff;
Teo Chun-Wei Benedict, Lee Wei Alexander, Lim Siyang Lucas
(Drew & Napier LLC) for the defendant.

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92 DS RA 275 at paras 249 and 255.

93 PS RA 275 at para 83.