IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 165

Suit No 716 of 2014

Between

(1) Zillion Global Limited
(2) Fields Pacific Limited

… *Plaintiffs*

And

Deutsche Bank AG, Singapore Branch

… *Defendant*

JUDGMENT

[Contract] — [Breach]
[Contract] — [Contractual terms] — [Implied terms]
[Contract] — [Misrepresentation Act]
[Tort] — [Misrepresentation]
[Tort] — [Negligence] — [Breach of duty]
[Tort] — [Negligence] — [Causation]
[Tort] — [Negligence] — [Duty of care]

TABLE OF CONTENTS

INTRODUCTION **1**

DRAMATIS PERSONAE 3

FACTS **5**

BACKGROUND AND THE OPENING OF ACCOUNTS WITH DB AND OTHER BANKS 5

PAN'S RELATIONSHIP WITH DB AND HIS INVESTMENT OBJECTIVE 8

TRIP BETWEEN 30 JULY 2008 AND 1 AUGUST 2008 19

AUGUST 2008 25

18 SEPTEMBER 2008 MEETING (AND THE 17 SEPTEMBER 2008 MARGIN CALL LETTER) 25

3 OCTOBER 2008 MARGIN CALL LETTER 26

6 OCTOBER 2008 MARGIN CALL LETTER 29

8 OCTOBER 2008 TO 12 OCTOBER 2008 30

13 OCTOBER 2008 TRANSACTIONS 30

PARTIES' CASES **31**

ISSUE OF BREACH OF AN IMPLIED TERM **33**

SUMMARY OF THE PARTIES' POSITIONS 33

DECISION 35

Whether there was a gap in the contracts that the parties did not contemplate *35*

Whether the Alleged Implied Term was necessary for business efficacy *38*

Whether the Alleged Implied Term passed the officious bystander test *49*

Further comments *49*

ISSUE OF NEGLIGENCE **50**

SUMMARY OF THE PARTIES' POSITIONS 50

DECISION 52

Whether DB owed a duty of care to the Plaintiffs *52*

(1) Factual foreseeability 52

(2) Proximity 55

(3) Policy considerations 58

Whether DB was liable for any breach of its duty of care to the Plaintiffs *59*

(1) Failure to advise in accordance with an objective of wealth preservation 61

(2) Failure in relation to risk management 61

Gross negligence *71*

Loss *71*

ISSUE OF MISREPRESENTATION **73**

SUMMARY OF THE PARTIES' POSITIONS 73

DECISION 75

Whether DB made the two representations *76*

Whether the two representations were false *84*

Whether the two representations induced the Plaintiffs to enter into the 31 July 2008 Transactions *85*

Further comments *90*

ISSUE OF BREACH OF CONTRACT BY CLOSING OUT POSITIONS THROUGH THE 13 OCTOBER 2008 TRANSACTIONS **90**

SUMMARY OF THE PARTIES' POSITIONS 91

DECISION 92

Whether Pan authorised the closing out of positions on 13 October 2008 .....*92*

Whether DB breached cl 2.6 of the Master Agreement *97*

(1) 17 September 2008 Margin Call Letter.....98

(2) 3 October 2008 Margin Call Letter.....99

(3) 6 October 2008 Margin Call Letter.....108

Further comments *117*

OTHER ISSUES.....118

CONCLUSION.....118

Zillion Global Ltd and another
v
Deutsche Bank AG, Singapore Branch

[2019] SGHC 165

High Court — Suit No 716 of 2014
Woo Bih Li J
27, 28 February, 1, 2, 6–9, 13–16, 19–23, 27 March 2018; 18 June 2018

12 July 2019 Judgment reserved.

Woo Bih Li J:

Introduction

1 The plaintiffs, Zillion Global Limited and Fields Pacific Limited ("Zillion" and "Fields" respectively, and "the Plaintiffs" collectively), are companies incorporated in the British Virgin Islands. At all material times, the beneficial owner of the Plaintiffs was Mr Pan Fang-Jen ("Pan"), and their purpose was to hold his assets. The Plaintiffs were customers of the Private Wealth Management ("PWM") division of the defendant, Deutsche Bank AG, Singapore Branch ("DB").[1] The Plaintiffs had opened both discretionary accounts and advisory accounts (also known as non-discretionary accounts) with DB. The key difference between these two types of accounts was that for

[1] See Statement of Claim (Amendment No 2) ("SOC") at para 6; Defence (Amendment No 3) ("Defence") at para 11.

a discretionary account, the bank exercised its own discretion in deciding which transactions to enter into, but for an advisory account, the client made the decision as to which transactions to enter into. This suit is concerned primarily with the advisory accounts the Plaintiffs had with DB, *ie*, (i) Zillion's advisory account; (ii) a foreign exchange margin trading account ("FX GEM account") which was linked to Zillion's advisory account; and (iii) Fields' advisory account. These three accounts will be referred to as "the Accounts".

2 I make a preliminary point (on which I elaborate at [13] below) that in advancing their respective cases in their pleadings and submissions to this court, the parties generally did not draw a distinction between the Plaintiffs, or between the Accounts, should there be any distinction to draw. Since the parties chose to advance their cases as such, I will proceed on the basis that the arguments advanced by the Plaintiffs and by DB respectively applied to the Plaintiffs and the Accounts without distinction. I will also refer to Pan and the Plaintiffs interchangeably unless the context requires a distinction to be drawn between them.

3 The Plaintiffs filed the writ of summons on 3 July 2014 against DB. They had four main heads of claim against DB, namely, for: (a) breach of an implied term of the relevant contracts generally; (b) negligence generally; (c) misrepresentation on 30 July 2008 and 31 July 2008; and (d) breach of contract on 13 October 2008.

4 DB relied on contract terms in its defence to exclude or restrict its liability. DB also pleaded that the Plaintiffs' actions founded on contract and on tort in respect of and/or relating to any matter in the Accounts that had arisen prior to 3 July 2008 had accrued more than six years before the time the

Plaintiffs filed the writ of summons, and were barred by virtue of s 6(1)(*a*) of the Limitation Act (Cap 163, 1996 Rev Ed).

5 The trial for this suit was bifurcated. I heard the trial on liability over the course of 18 days, and reserved judgment.

Dramatis personae

6 I set out a table of *dramatis personae* of some of the persons involved at the material time and/or in these proceedings for easy reference:

Abbreviation	**Individual**
For the Plaintiffs	
Campana	Mr Bruno Campana, a Senior Managing Director in the Economic & Financial Consulting Practice of FTI Consulting LLP, and an expert witness at the trial
Chang	Ms Chang Hsu Fen (who is also known as Grace), an employee of Pan's businesses, and a factual witness at the trial
Chen	Ms Chen Chin Tzu (who is also known as Judy), an employee of Pan's businesses, and a factual witness at the trial
Pan	Mr Pan Fang-Jen, the beneficial owner of the Plaintiffs, and a factual witness at the trial
Walford	Dr Thomas Walford, a Director and Chief Executive of Expert Evidence International Limited, and an expert witness at the trial
For DB	

Beloreshki	Mr Tsevetan N Beloreshki, a Managing Director in Berkeley Research Group's Finance and Securities Litigation group, and an expert witness at the trial
Chan	Ms Chan Pui Kwan (who is also known as Kanas), then-Director and Fixed Income Specialist of the PWM division in Deutsche Bank Hong Kong ("DB HK"), and a factual witness at the trial
Chiu	Mr Chiu Chi Ming (who is also known as Dennis), then-Head of Credit Risk Management for Wealth Management, North Asia, and a factual witness at the trial
Juan	Ms Melanie Hsiao-Mei Juan, then-Assistant Vice-President of the PWM division in DB HK and Relationship Manager for the Accounts, who has left the employ of DB
Kwok	Mr Terry Kwok, then-Assistant Vice-President and Foreign Exchange Advisor of the PWM division in DB HK, who has left the employ of DB
Raju	Mr Ravi Raju, then-Head of the PWM division in the Asia Pacific, who has left the employ of DB
Sze	Mr Sze Siu Fung (who is also known as Patrick), then-Director and Head of Investment Advisory in DB HK, and a factual witness at the trial
Tang	Mr Masson Tang, then-Vice-President and member of the Investment Advisory team in DB HK, who has left the employ of DB
Tsang	Mr Bill Tsang, Ching Blu, then-Senior Investment Advisor of the PWM division in DB HK, and a factual witness at the trial
Yim	Mr Lok Yim, then-Managing Director and Head of the Fixed Income and Equities team in the Asia Pacific, and a factual witness at the trial

Facts

Background and the opening of accounts with DB and other banks

7 Pan was born in the People's Republic of China in 1941. He emigrated to the Republic of China ("Taiwan") with his parents when he was about seven years old. At all material times, he was a citizen and resident of Taiwan. He graduated from junior middle school in Taiwan but did not do well enough to progress to senior middle school. He enrolled in a vocational institute named World College of Journalism. As an adult, he was involved in many different business ventures. However, it was his coal business and property-related investments that made him his wealth.[2] At the material time, he was a retired businessman and a high net worth individual.[3] The Plaintiffs averred that Pan was not proficient in English and could not read, speak or understand English save for simple words;[4] DB disputed this and averred that while Pan preferred to converse in Mandarin, he was able to converse in English.[5]

8 Before November 2006, Pan had both discretionary and advisory accounts with other banks, namely, Citigroup Private Bank ("Citibank") and JP Morgan, and he invested substantial sums with each of these banks.[6] These accounts were opened in his name and in the names of companies of which he was the beneficial owner and which included the Plaintiffs.[7]

---

2 See Pan's affidavit dated 1 February 2018 ("Pan's affidavit") at paras 4, 5, 10, 16, 21.

3 See SOC at paras 3–4; Defence at paras 3–4.

4 SOC at para 10.

5 See Defence at para 23.

6 See Defence at para 7(a); Reply (Amendment No 3) ("Reply") at para 6(a); 60Agreed Bundle ("AB") 46495–46496.

7 See Pan's affidavit at para 34.

9 On or about 14 November 2006, DB approached Pan in Taipei, Taiwan to introduce its PWM services to him.[8] DB was represented by, *inter alia*, Juan and Tsang who were both conversant in Mandarin.[9]

10 In the following months, Pan opened both discretionary and advisory accounts with DB in the names of the Plaintiffs. A total of five accounts were opened (including the Accounts as mentioned at [1] above). Juan became the Relationship Manager for all five accounts.[10] The five accounts opened were:

(a) an advisory account in Fields' name opened on or around 20 December 2006;[11]

(b) an advisory account in Zillion's name opened on or around 22 March 2007,[12] and the linked FX GEM account in Zillion's name opened on 24 May 2007;[13] and

(c) two discretionary accounts in Zillion's name opened on 22 March 2007.[14]

11 Although the Plaintiffs had pleaded that their claims were in relation to all five accounts,[15] Pan agreed during cross-examination that the Plaintiffs'

---

8 See SOC at paras 13–14; Defence at paras 8(b), 13.

9 SOC at para 14; Defence at para 13.

10 SOC at para 14; Defence at para 13.

11 See SOC at para 21; Defence at paras 21, 26(a).

12 See SOC at para 23; Defence at paras 21, 26(b).

13 See Defence at para 26(b).

14 See SOC at para 24; Defence at para 21.

15 See SOC at para 28.

claims were in fact in relation to only three of these accounts: the advisory accounts and the linked FX GEM account, which are those listed at [10(a)] and [10(b)] above.[16] As mentioned at [1] above, these three accounts will be referred to as "the Accounts". The Plaintiffs' claims were not in relation to the two discretionary accounts listed at [10(c)] above.

12 When opening the Accounts, the Plaintiffs executed, *inter alia*, the following contractual documents:[17]

(a) Service Agreement: executed by Zillion on 22 March 2007 and by Fields on 20 December 2006;[18]

(b) Risk Disclosure Statement: executed by Zillion on 22 March 2007 and by Fields on 20 December 2006;[19]

(c) DB Master Agreement for Foreign Exchange Transactions and Derivatives Transactions ("Master Agreement"): executed by Zillion on 26 February 2008;[20] and

(d) Risk Disclosure Statement (Foreign Exchange and Derivative Transactions) ("Risk Disclosure Statement (FX)"): executed by Zillion on 26 February 2008.[21]

---

16 See Notes of Evidence of 27 February 2018 at p 82 lines 14–19.

17 See Defence at para 28; Reply at para 21.

18 See 7AB 4650–4660.

19 See 7AB 4486, 4510–4515.

20 7AB 4605–4619.

21 7AB 4598–4604.

13 As I mentioned at [2] above, I observe that in advancing their respective cases in their pleadings and submissions to this court, the parties generally did not draw a distinction between the Plaintiffs, or between the Accounts, should there be any distinction to draw. This lack of precision is odd, considering how some of the contractual documents were executed by Zillion only and not by Fields, like the Master Agreement and the Risk Disclosure Statement (FX). By way of another example, the three margin call letters which will be discussed later were also addressed to Zillion and not to Fields. However, since the parties chose to advance their cases as described, I will proceed on the basis that the arguments advanced by the Plaintiffs and by DB respectively applied to the Plaintiffs and the Accounts without distinction. Accordingly, I will proceed on the basis that the contractual documents and all other matters in question also applied to the Plaintiffs and the Accounts without distinction.

14 Returning to the chronology, around December 2006 and in 2007, Pan also opened both discretionary and advisory accounts in his name and in the Plaintiffs' names with another bank, the Union Bank of Switzerland ("UBS").[22]

Pan's relationship with DB and his investment objective

15 In relation to the Accounts, DB introduced financial products to Pan and/or the Plaintiffs as part of its PWM services.[23] DB and Pan had almost weekly meetings,[24] and from December 2006 to 13 October 2008, DB had almost daily telephone discussions with Pan and/or his staff (including Chang

---

22 See Defence at para 7(d); Reply at para 6(a); Pan's affidavit at para 34; 60AB 46496.

23 See Defence at para 54(c).

24 See Plaintiffs' Closing Submissions at para 22.

and Chen).[25] These meetings and telephone conversations were generally conducted in Mandarin. In these proceedings, DB produced in evidence voice logs of the telephone conversations of around 86 days.[26]

16 From January 2007 to September 2008, Pan injected approximately US$360m worth of assets and cash into the Accounts.[27]

17 As regards Pan and his investment objective, the Plaintiffs pleaded that Pan was an investor with no sophistication in respect of financial investments, and that his financial objective was to preserve his wealth and protect it from depreciation.[28] DB disputed this. DB pleaded that Pan was an experienced and sophisticated investor, who was also speculative and aggressive, with the growth of his wealth as his investment objective.[29] DB alleged that Pan exercised his own judgement and made his own decisions as to which transactions to enter into under the Accounts.[30]

18 For example, Yim's unchallenged description of Pan as set out in Yim's affidavit of evidence-in-chief ("AEIC") at paras 26–27 was as follows:

> 26. Indeed, at the meetings I attended, Mr Pan frequently emphasised that he did not require us to remind him of his potential exposures and that he had enough money to enter into the investments/trades that he wished to. If the Bank were not prepared to enter into the investments/trades, he would find another bank to do so. He was aware of the risks and exposures but he felt

25 See Plaintiffs' Closing Submissions at paras 22, 24.

26 See Plaintiffs' Closing Submissions at para 24.

27 See SOC at para 41; Defence at para 46.

28 SOC at para 4.

29 Defence at paras 4(c)–4(d).

30 See Defendant's Closing Submissions at para 20.

> that he had enough money to ride out any market adversities.
>
> 27. Another constant characteristic of our meetings was that whenever the Bank presented our views to Mr Pan, he did not accept them unquestioningly. *He had a very sharp and critical mind* and would often challenge our views, and *debated with us*. For instance, if we were of the view that a particular country's interest rates would be cut, he would ask us to justify our view and challenge our assumptions or inferences. Mr Pan would also *compare* our investment ideas with that of his other private bankers (e.g., from Citibank or JPMorgan). *I often found the discussions with Mr Pan intellectually challenging and stimulating.* Mr Pan was savvy about the financial markets. For instance, he had insightful views about the debt situation in the U.S., the growth of China and the performance of commodities. Mr Pan's challenges were one of the main reasons why our meetings would take such a long time.
>
> [emphasis added]

19 In terms of the documentation at the material time, Juan filled in, on behalf of DB, the "Client Acceptance & Profile Report" ("CAPR") for Pan twice.[31] The two CAPRs were completed internally within DB, without obtaining "confirmation" from Pan as to their contents.[32] The details concerning the two CAPRs are as follows:

> (a) Initially in the CAPR dated 26 January 2007,[33] Pan's objective for investable assets was described as "Balanced".[34] This meant that he was an investor who was "prepared to accept risk of infrequent and

---

31 See Notes of Evidence of 22 March 2018 ("NEs 22/03/18") at p 114 lines 14–16.

32 See Plaintiffs' Reply Closing Submissions at para 26(a).

33 7AB 4497–4503.

34 7AB 4501.

modest losses", and was "[s]eeking total return both from income and capital appreciation".[35]

(b) However, in the CAPR dated 24 April 2008,[36] Pan's risk profile was no longer described as "Balanced" but described as "Growth (higher risk/ possible higher return)" instead.[37] This meant that he was an investor who was "prepared to accept risk of market-like losses in line with those of the equity markets and who intend[ed] to meet the possibility of significant short-term fluctuations by long-term investments", and was "[s]eeking total return mainly via capital appreciation", where "[l]iquidity [was] of no primary concern".[38]

(c) Pan's risk profile was never described in either of the two CAPRs as "Conservative (lower risk/ lower return)", which was the third and remaining descriptor, and would have meant that he was a "[r]isk-averse investor who [sought] not to incur risk or losses", and was "[s]eeking stability and liquidity through current income and/ or modest return on capital".[39]

20 A Risk Profile Questionnaire dated 19 August 2008 was also completed in respect of Pan ("Questionnaire"),[40] which Sze believed Juan completed on

---

35 7AB 4501.

36 7AB 4630–4640.

37 7AB 4636.

38 7AB 4636.

39 7AB 4501, 4636.

40 7AB 4641–4644.

behalf of DB.[41] The Questionnaire was also completed internally within DB, without obtaining "confirmation" from Pan as to its contents.[42] The Questionnaire stated that Pan's risk rating was "5", which "indicated an aggressive risk profile and [that] the client was seeking capital growth".[43]

21 Whilst the two CAPRs and the Questionnaire were completed internally within DB, they reflected DB's assessment of Pan's risk profile, regardless as to whether or not that was in fact his risk profile. It would appear that DB did not think of Pan's investment objective as being to preserve his wealth and to protect it from depreciation.

22 On the other hand, the Plaintiffs highlighted a telephone conversation held on 6 December 2010 at or around 1pm primarily between Pan and Juan to support the Plaintiffs' submission that Pan's investment objective was simply to preserve his wealth.[44] It was recorded in the English translation of the transcript for this conversation that Juan replied "Yes" to a series of Pan's statements where he said: "What I want is not about the profit", "My main aim is not to shrink my asset" and "How not to decrease the value, it's my biggest wish".[45] It does not appear to me that Juan was affirming these statements that Pan made, but rather that she was just noting that he was making these statements. In any case, this conversation took place in December 2010, more than two years after the time the Plaintiffs pleaded that DB allegedly closed out certain positions under the Accounts in breach of contract on 31 October 2008

---

41 See Sze's affidavit dated 1 February 2018 ("Sze's affidavit") at para 15.

42 See Plaintiffs' Reply Closing Submissions at para 26(a).

43 7AB 4644; see Sze's affidavit at para 15.

44 See 59AB 46180–46298; Plaintiffs' Closing Submissions at para 234.

45 See 59AB 46261–46262.

(see [70(d)] below). I thus place little weight on this conversation of 6 December 2010 in understanding what Pan's objective was in relation to the Accounts at the material time.

23 I make some observations on Pan as an investor.

24 I find that Pan was evasive during cross-examination when answering questions from DB's counsel on the transactions the Plaintiffs entered into under the Accounts. This was so even when Pan was specifically referred to transcripts for telephone conversations between him and DB, and was asked questions on the contents of these transcripts.[46] I find that Pan was trying to portray himself as an investor who was fully dependent on DB's advice as to which transactions to enter into under the Accounts when in fact this was not the case.

25 I find that Pan had a mind of his own as to which transactions to enter into. From the English translations of the transcripts for various telephone conversations, it can be seen that Pan was not a passive listener who simply accepted DB's suggestions and advice, but was very much involved during the telephone discussions on which transactions to enter into.[47] He requested/directed DB to obtain certain specific information for him to make his investment decisions. For instance, one of Pan's directions was for DB to produce an analysis report in English on three telecommunication companies, and to have the report translated into Chinese.[48] Pan also said to hand him the

---

46 See *eg*, Notes of Evidence of 6 March 2018 at pp 21–27 referred to in Defendant's Closing Submissions at para 51.

47 See *eg*, 55AB 42825 (telephone conversation on 25 March 2008 at or around 2.18pm) referred to in Defendant's Closing Submissions at para 21.

48 See 56AB 43344 (telephone conversation on 4 June 2008 at or around 4.27pm) referred to in Defendant's Closing Submissions at para 56.

original English version for him to "take a look" and that he would "find a telecommunications expert" with whom he would discuss the telecommunication companies.

26 As early as in May 2007 (at least from Pan's communications with DB), Pan was familiar with the operations of the various financial products he considered purchasing, like accumulators, and he was able to have discussions with DB's employees to assess whether to purchase them.[49] I do not accept the Plaintiffs' allegation that he did not understand the risks associated with accumulators and at [147] below, I elaborate on this point. At present, I mention briefly that even though the Plaintiffs suffered losses on accumulators, they continued to purchase accumulators even after 13 October 2008 when some positions of the Plaintiffs under the Accounts were closed out by DB, although they said that the value of these transactions was much less than those previously entered into.[50] Pan also made decisions on the type, size and specification of the transactions he wanted to enter into.[51] These financial products were relatively complex in their operations (see [48]–[49] below for a description of accumulators).

27 Pan also had some investment practices which appeared not to have the objective of simply preserving his wealth and protecting it from depreciation. For instance, Pan was willing to trade more in a company's stock even though

---

49 See *eg*, 55AB 42252–42257 (telephone conversation on 16 May 2007 at or around 12pm) referred to in Defendant's Closing Submissions at para 37.

50 See Plaintiffs' Reply Closing Submissions at para 24.

51 See *eg*, 55AB 42974–42975 (telephone conversation on 2 April 2008 at or around 5.11pm) referred to in Defendant's Closing Submissions at para 49(b); 56AB 43344–43345 (telephone conversation on 4 June 2008 at or around 4.27pm) referred to in Defendant's Closing Submissions at para 56.

its price was falling.[52] Pan was also unwilling to enter into a transaction where he could "earn money now, but [where he] would be cutting down [his] profits to 6% or so", as he said to DB's employees during a telephone conversation.[53]

28 In the circumstances, although the Plaintiffs sought to show that Pan did act on the recommendation of DB at times, this did not detract from the fact that he had his own mind and that it was he who finally decided what transactions to enter into and the terms thereof. I also find that Pan's investment objective was not to preserve his wealth and protect it from depreciation, but rather to grow his wealth by taking risks. Pan was an experienced investor who understood the financial products he purchased, and he chose to purchase numerous accumulators despite their complexity and risk of capital loss (see [49] below). He was aggressive in that he was prepared to take high risks for high returns. I reach these conclusions even without having to have regard to the CAPRs or the Questionnaire.

29 I also make some observations on Chang.

30 DB's case was that Chang was the main gatekeeper for the Accounts, *ie*, the key person for the Plaintiffs with whom DB would often communicate on transactions to be entered into, like in relation to information on prices, and Chang would in turn update Pan accordingly.[54]

---

52 See 56AB 43344–43345 (telephone conversation on 4 June 2008 at or around 4.27pm) referred to in Defendant's Closing Submissions at para 74.

53 See 56AB 43354 (telephone conversation on 4 June 2008 at or around 4.27pm) referred to in Defendant's Closing Submissions at para 75.

54 See Yim's affidavit dated 1 February 2018 ("Yim's affidavit") at para 20; Sze's affidavit at para 22.

31 On the other hand, the Plaintiffs took the position that Chang's role was initially only to safe-keep and apply one of two corporate seals of a company known as AOC International (presumably owned by Pan).[55] As a colleague of hers had a serious illness, Chang also joined the colleague and Pan in meetings and telephone discussions with banks.[56] Chang's role was to record the transactions which Pan entered into during the meetings and discussions. Gradually, she also started to arrange these meetings and discussions. However, Chang deposed in her AEIC that her main role was still to safe-keep and apply one of two corporate seals of AOC International.[57] The Plaintiffs also appeared to take the position that Pan and Chang were not even aware that Chang was treated by DB as Pan's gatekeeper.[58] Chang deposed in her AEIC that she did not have any financial investment qualifications and knew little about financial investments,[59] and she disagreed during cross-examination that she would discuss the terms of proposed investments before they were put to Pan.[60] Chang also deposed that she was not proficient in English and could not read, speak or understand English save for simple words.[61]

32 I find that Chang was hardly ignorant about the transactions the Plaintiffs entered into under the Accounts, despite her evidence to the contrary. In a telephone conversation held on 2 June 2008 at or around 2.49pm between Chang, Juan and Kwok, it began with Juan informing Kwok that "[Chang]

---

55 See Chang's affidavit dated 3 February 2018 ("Chang's affidavit") at para 13.

56 See Chang's affidavit at paras 13, 15.

57 See Chang's affidavit at para 15.

58 See Notes of Evidence of 19 March 2018 ("NEs 19/03/18") at p 69 lines 6–20.

59 See Chang's affidavit at paras 9, 17, 40.

60 See Notes of Evidence of 13 March 2018 ("NEs 13/03/18") at p 11 lines 5–10.

61 See Chang's affidavit at para 11.

wants to talk to us about how she calculates the [foreign exchange]".[62] Chang then started talking about her calculations. I will set out the conversation later at [103] below.

33 When cross-examined on this telephone conversation, Chang denied that she was doing any calculations in relation to the Accounts on behalf of Pan, or that she wanted to check DB's calculations.[63] She instead testified that Pan did not know she was doing these calculations.[64] During re-examination, Chang explained that she did these calculations for her own knowledge because she "would like to know in [her] mind".[65] I find her evidence in respect of this telephone conversation hard to believe.

34 There were numerous telephone conversations between Chang and DB's employees, of which Pan was not a part.[66] DB relied on Chang to convey information to Pan, and discussed proposed investments with her before they were put to Pan.[67]

35 I do not accept Pan's evidence that Chang discussed proposed investments with DB without his knowledge and consent. Pan's evidence in his AEIC and during cross-examination was that in April 2008, he scolded Chang for conveying DB's advice on accumulators to him instead of telling DB to

---

62 56AB 43307.

63 See NEs 13/03/18 at p 23 lines 9–15, p 24 line 10.

64 See NEs 13/03/18 at p 24 lines 2–3.

65 See Notes of Evidence of 14 March 2018 ("NEs 14/03/18") at p 31 lines 2–7.

66 See *eg*, 55AB 42950–42970 (telephone conversation on 2 April 2008 at or around 3.57pm) referred to in Defendant's Closing Submissions at para 49(a).

67 See *eg*, 55AB 42236–42245 (telephone conversations on 26 January 2007 at or around 10.21am, 11.37am, 12.02pm, 12.13pm).

advise him directly, and told Juan to explain proposed investments to him directly and not by way of passing messages through Chang.[68] However, in a telephone conversation held on 24 July 2008, Pan himself instructed DB, "Go and talk to [Chang] about [the transaction] and we will do this."[69] The fact that Pan would have separate discussions with Chang as to which transactions to enter into was evidenced in a telephone conversation where Pan told Juan, "[Chang] has given me ample 'brainwashing'."[70] In Chang's telephone conversations with DB's employees without Pan, Chang would also convey Pan's responses in respect of the Accounts and the transactions thereunder. In fact, Chang would even tell DB's employees how they should focus their conversations with Pan.[71]

36 In the circumstances, I find that Chang was the main gatekeeper for the Accounts, where DB would often communicate information pertaining to the Accounts to her and discuss proposed investments with her, for her to update Pan. She was familiar with the transactions entered into under the Accounts, and Pan also relied on her as he made decisions under the Accounts.

37 The remaining facts set out will focus on key dates and/or events relevant to the dispute between the parties in relation to the four main heads of claim.

---

68 See Pan's affidavit at para 93; Notes of Evidence of 1 March 2018 at p 67 lines 19–25, p 68 lines 1–19.

69 See 57AB 44317 (telephone conversation on 24 July 2008 at or around 11.31am) referred to in Defendant's Closing Submissions at para 139.

70 See *eg*, 55AB 42987 (telephone conversation on 2 April 2008 at or around 5.11pm) referred to in Defendant's Closing Submissions at para 139.

71 See *eg*, Chang's affidavit at paras 137–139.

Trip between 30 July 2008 and 1 August 2008

38 From 30 July 2008 to 1 August 2008, DB hosted Pan, Chang and Chen on a three-day all-expenses-paid trip to Hong Kong.[72]

39 The Plaintiffs pleaded that on 30 July 2008, Juan told Pan when he was checking in at the hotel, that DB had helped the Plaintiffs earn a profit of US$50m.[73]

40 On 31 July 2008, DB had a meeting with Pan at the office of DB HK ("31 July 2008 Meeting"). The attendees at this meeting included Pan, Chang, Juan, Kwok and Yim.

41 The Plaintiffs pleaded that at the 31 July 2008 Meeting, Juan repeated to Pan that DB had helped the Plaintiffs earn a profit of US$50m.[74] The Plaintiffs submitted that there did not appear to be anyone else who heard Juan make this representation other than Pan and (perhaps) Kwok (who had sat beside Pan during the meeting).[75] Pan deposed in his AEIC that he "recall[ed] exclaiming loudly that this was the best piece of news that [he] had heard in a while".[76] I will refer to the two times that Juan allegedly represented to Pan that the Plaintiffs had earned a profit of US$50m collectively as "the US$50m profit

---

72 SOC at para 37; Defence at para 42.

73 SOC at para 50.

74 SOC at para 51.

75 See Plaintiffs' Closing Submissions at para 298.

76 Pan's affidavit at para 246.

representation". DB did not admit that the US$50m profit representation had been made to Pan.[77]

42 The Plaintiffs also pleaded that at the 31 July 2008 Meeting, DB told Pan that the Plaintiffs made a profit of US$19.26m in respect of foreign exchange transactions alone ("the US$19.26m FX profit representation").[78] Specifically, the Plaintiffs alleged that it was Kwok who made the US$19.26m FX profit representation to Pan.[79] Pan deposed in his AEIC that he recalled Kwok telling him that "the Plaintiffs had also made approximately USD 20 million from foreign exchange transactions".[80]

43 On the other hand, Yim deposed in his AEIC that Kwok showed Pan a slide presentation titled "FX & Commodities" and dated the same day ("31 July 2008 Slides").[81] The 31 July 2008 Slides were in the form of hardcopies handed to Pan and the others at the meeting.[82] In the 31 July 2008 Slides, there was a slide titled "Zillion Global: FX P/L" showing a spreadsheet which summed several items of realised and unrealised profits and losses for foreign exchange transactions, and arrived at the grand total of US$19,264,844.49.[83] DB admitted that it had informed Pan by way of the 31 July 2008 Slides that the Plaintiffs'

---

77 Defence at para 57.

78 SOC at para 52.

79 See Plaintiffs' Closing Submissions at para 36(b).

80 Pan's affidavit at para 247.

81 See Yim's affidavit at paras 38–39; 52AB 40133–40144.

82 See NEs 19/03/18 at p 120 lines 20–25, p 121 lines 1–25, p 140 lines 14–18.

83 52AB 40139.

profit, including unrealised profits, in respect of foreign exchange transactions was US$19,264,844.49 as at 31 July 2008.[84]

44 At the 31 July 2008 Meeting, DB also recommended Pan to purchase various financial products, including "the Trumpet".[85] Thereafter, the Plaintiffs entered into, *inter alia*, the following transactions on 31 July 2008 ("31 July 2008 Transactions"), which the Plaintiffs pleaded generated the following financial consequences subsequently:[86]

(a) the Trumpet: alleged loss of US$12,493,100;

(b) Australian dollar ("AUD")/US dollar ("USD") accumulator (*ie*, to accumulate AUD at a certain strike price in USD[87]): alleged loss of US$15.7m;

(c) gold/USD accumulator: alleged loss of US$3.05m;

(d) Credit Derivative Transactions (Citigroup Inc): profit of US$327,932.98 (agreed between the parties); and

(e) Renewal Opportunity Notes (otherwise known as 'renewable opportunity certificates with accrual notes' ("ROCAs")) linked to uranium companies Cameco Corporation and USEC Inc: alleged loss of US$646,500.

---

84 Defence at para 58.

85 SOC at para 53; Defence at para 60.

86 See SOC at paras 55, 143; Defence at paras 65, 120; Reply at paras 42, 69.

87 Notes of Evidence of 9 March 2018 ("NEs 09/03/18") at p 142 lines 24–25, p 143 lines 1–3.

45 I will briefly provide some description of the financial products mentioned at [44(a)] to [44(c)] and [44(e)] above which allegedly resulted in losses for the Plaintiffs.

46 The Trumpet was five separate strangles which operated independently of each other,[88] and an investor would sell the Trumpet for an upfront combined premium of US$200,000.[89] Each of the five strangles was for a specified duration and was a combination of (i) a put option for AUD, with a lower "strike price" (in USD), and (ii) a call option for AUD, with a higher "strike price" (in USD).[90] Whether or not the options would be exercised by the buyer of the Trumpet depended on how the spot price (prevailing market price) for AUD changed. If the spot price for AUD fell below the lower strike price, the buyer of the Trumpet could exercise the put option, and the investor would have to buy a certain amount of AUD from him at the lower strike price. If instead the spot price for AUD rose above the higher strike price, the buyer of the Trumpet could exercise the call option, and the investor would have to sell a certain amount of AUD to him at the higher strike price. The five strangles had different combinations of lower and higher strike prices and different specified durations.[91]

47 Accordingly, the maximum profit the investor would receive from the Trumpet was the upfront combined premium of US$200,000.[92] The investor

---

88 See NEs 09/03/18 at p 151 lines 16–19; Notes of Evidence of 15 March 2018 ("NEs 15/03/18") at p 48 lines 15–19, p 49 lines 2–5.

89 See Exhibit D5 at p 3; NEs 15/03/18 at p 48 lines 20–21.

90 See NEs 09/03/18 at p 153 lines 1–3; NEs 15/03/18 at p 47 lines 1–4.

91 See Exhibit D5 at pp 3–8; NEs 15/03/18 at p 49 lines 6–11.

92 See NEs 15/03/18 at p 43 lines 16–17, p 48 lines 21–22.

would enjoy this maximum profit when the spot price for AUD remained within each of the five strangles' range of lower and higher strike prices.[93] However, the investor's profit would be reduced whenever the buyer of the Trumpet exercised a put option or a call option when the spot price for AUD moved outside of a strangle's range of lower and higher strike prices, *ie*, when it either fell below the lower strike price, or rose above the higher strike price.[94] Should the spot price for AUD move far outside of a strangle's range of lower and higher strike prices, the investor might see his upfront premium completely depleted and also suffer a loss.[95]

48 As for the accumulators, the type of accumulator in question was a structured product under which an investor committed to purchase and accumulate a varying quantity of a product at a pre-agreed "strike price" over a specified duration.[96] The strike price would have been set at a discount to the product's spot price at the time the accumulator was purchased. The investor would be obligated to continue purchasing and accumulating the product at the strike price, unless the product's spot price reached a pre-agreed "knock-out price". The accumulator would then be "knocked out" (terminated).[97] The knock-out price would have been set at a price higher than the product's spot price at the time the accumulator was purchased.

---

93 See NEs 09/03/18 at p 152 lines 7–10; NEs 15/03/18 at p 48 lines 10–12; Campana's affidavit dated 2 February 2018 ("Campana's affidavit") at p 1052 para 4.8.

94 See Campana's affidavit at p 1053 para 4.11.

95 See Campana's affidavit at p 1053 para 4.12; NEs 15/03/18 at p 43 lines 18–21, p 48 lines 12–14, 23–25.

96 See Beloreshki's affidavit dated 5 February 2018 ("Beloreshki's affidavit") at p 18 n 18; Campana's affidavit at p 34 para 3.34, p 1040 para 2.8.

97 See NEs 15/03/18 at p 107 lines 7–11, p 108 lines 21–24.

49 Accordingly, accumulating the product would be profitable when its spot price remained higher than the strike price. However, accumulating the product would be loss-making when its spot price became lower than the strike price. The investor would be obligated under the terms of the accumulator to continue purchasing the product at the strike price, and could additionally be required to accumulate a *larger* quantity of the product as well (at the strike price) at a pre-agreed "gearing ratio".[98] The gearing ratio was the multiplier used to determine the quantity of the product the investor would be required to purchase. At the time of purchase of the accumulator, the strike price could be negotiated lower in exchange for a higher gearing ratio. The investor bore the risk of capital loss contingent on a decline in the product's spot price.[99] (For a description of accumulators, see *Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886 ("*Chang Tse Wen*") at [11]; *Teo Wai Cheong v Crédit Industriel et Commercial and another appeal* [2013] 3 SLR 573 at [4]).

50 As for the ROCAs, a ROCA was a structured product which was an equity-linked note with a payoff dependent on the equity's performance over a specified duration, and an investor's principal (that was used to purchase the ROCA) was not guaranteed.[100] The ROCA was thus unlike a typical bond where an investor expected to receive his principal back.[101] When the equity traded within a specified range, the ROCA earned a fixed interest that was above the

---

98 See Campana's affidavit at p 34 para 3.35, p 36 para 3.41; Tsang's affidavit dated 1 February 2018 ("Tsang's affidavit") at paras 26, 43.

99 See Beloreshki's affidavit at p 18 n 18; Campana's affidavit at p 1040 para 2.8.

100 See Campana's affidavit at p 33 para 3.29; NEs 15/03/18 at p 121 line 24.

101 See NEs 15/03/18 at p 121 line 25, p 122 line 1.

market return.[102] However, when the equity traded outside this range, the ROCA did not earn any interest. Additionally, the ROCA might have a mandatory early redemption period such that if the equity traded at a specified price level before maturity, the ROCA must be redeemed for a pre-specified amount.[103] At maturity, the investor might also be required to take physical delivery of the equity, which meant that he might lose his principal if the price of the equity dropped.[104] Therefore, the investor bore the risk of capital loss contingent on a decline in the equity's price.[105]

51 It was the Plaintiffs' case that the US$50m profit representation and the US$19.26m FX profit representation were misrepresentations and that Pan relied solely on these representations when the Plaintiffs entered into the 31 July 2008 Transactions.

August 2008

52 In August 2008, collateral shortfall problems started materialising in the Accounts.[106]

18 September 2008 Meeting (and the 17 September 2008 Margin Call Letter)

53 On 18 September 2008, DB had a meeting with Pan at the office of DB HK ("18 September 2008 Meeting"). DB pleaded that during this meeting, its

---

102 See Campana's affidavit at p 33 para 3.29, p 34 para 3.30; NEs 15/03/18 at p 121 lines 9–10; Beloreshki's affidavit at p 19 n 19.

103 See Campana's affidavit at p 34 para 3.30; NEs 15/03/18 at p 121 lines 19–22.

104 See Campana's affidavit at p 34 para 3.32; NEs 15/03/18 at p 122 lines 2–4.

105 See Beloreshki's affidavit at p 19 n 19.

106 See Plaintiffs' Closing Submissions at para 38; Defendant's Closing Submissions at paras 63, 123.

employees informed Pan that DB had written a margin call letter addressed to Zillion and dated 17 September 2008 ("17 September 2008 Margin Call Letter"), and proceeded to discuss the letter's contents with Pan.[107]

54 The 17 September 2008 Margin Call Letter was in relation to Zillion's advisory account. It stated that there was a current shortfall of US$41,505,215.56 between the collateral value and the total exposure, and accordingly, DB requested that Zillion take immediate steps to restore the shortfall by 19 September 2008, by either providing additional security or reducing the total exposure. DB added that during the interim period when the shortfall was outstanding, it reserved its rights under the contracts, including the right to liquidate any part or the whole of the collateral without prior notice and the right to terminate the facility.

55 However, the Plaintiffs pleaded that DB neither sent the 17 September 2008 Margin Call Letter nor communicated its contents to them at the material time.[108] The Plaintiffs claimed that a copy of this letter was only provided by DB's solicitors to the Plaintiffs' solicitors after 13 October 2008.[109]

3 October 2008 Margin Call Letter

56 I proceed to discuss the events on the night of 3 October 2008. At or around 9.56pm, Juan sent an e-mail to Chang with the subject title "Fw: [Issued Margin Call Letter] / Zillion Global Group [with Zillion's advisory account number]" ("3 October 2008 E-mail"), and copied DB's employees, including

---

107 Defence at para 81; 6AB 4128–4142.

108 See SOC at para 75.

109 See SOC at para 75.

Yim and Sze, on the e-mail.[110] As for the contents of this e-mail, Juan had simply forwarded an internal DB e-mail and its attachment. The internal DB e-mail was originally sent on 3 October 2008 at or around 9.23pm by one Ms Samantha Leung from DB's Credit Risk Management to Juan, and the other recipients included Tsang, Yim and Sze (the latter two were copied on the e-mail).

57 The internal DB e-mail stated:

> …
>
> In view of aggregate shortfall in excess of USD 19mio [*sic*], with the decision from senior management, Margin Call Letter (see attached) is now issued to the subject client. …
>
> …
>
> **Appreciate your continued effort in rectifying the position and let us know the rectification by Monday 06 Oct 08.** …
>
> …
>
> [emphasis in original]

58 The attachment was a margin call letter DB had written, addressed to Zillion and dated 3 October 2008 ("3 October 2008 Margin Call Letter"). It was in relation to Zillion's advisory account. The 3 October 2008 Margin Call Letter stated that there was a current shortfall of US$8,950,765.73 between the collateral value and the total exposure, and accordingly, DB requested that Zillion take immediate steps to restore the shortfall by 6 October 2008, by either providing additional security or reducing the total exposure. As with the 17 September 2008 Margin Call Letter (see [54] above), DB added that during the interim period when the shortfall was outstanding, it reserved its rights under the contracts, including the right to liquidate any part or the whole of the

---

110 3AB 1868–1870; see also SOC at para 93.

collateral without prior notice and the right to terminate the facility. This letter was signed by Chiu and Samantha Leung.

59 At around the time Juan sent the 3 October 2008 E-mail to Chang, Juan also met Chang at Pan's office in Taipei. This "3 October 2008 Meeting" was held at around 10pm. DB pleaded that when Juan met Chang, Juan discussed the contents of the 3 October 2008 Margin Call Letter with Chang.[111] On the other hand, Chang deposed in her AEIC that while Juan mentioned that she had e-mailed a document to Chang, Juan did not tell Chang that the document was a margin call letter.[112]

60 The Plaintiffs pleaded that Chang did not check the 3 October 2008 E-mail that day, which was a Friday.[113] On 4 October 2008, there were telephone conversations between Chang and DB's employees. The Plaintiffs pleaded that it was the following day, on or about 5 October 2008, that Chang opened the 3 October 2008 E-mail.[114] They averred that Chang could not understand the contents of the e-mail because it was in English (which she could not read save for simple words), and that when she called Juan to ask what the e-mail was about, Juan said that she did not know as she herself had not read the e-mail.[115]

61 It was part of the Plaintiffs' case that sending the 3 October 2008 E-mail with the enclosed 3 October 2008 Margin Call Letter to Chang did not mean that DB had sent the 3 October 2008 Margin Call Letter to the Plaintiffs/Zillion

---

111 See Defence at para 93(e).

112 See Chang's affidavit at paras 403–404.

113 See SOC at para 93.

114 See SOC at para 96.

115 See SOC at para 96; Chang's affidavit at para 11.

because the e-mail and the letter should have been sent to Pan instead. As with the 17 September 2008 Margin Call Letter (see [55] above), the Plaintiffs averred that DB neither sent the 3 October 2008 Margin Call Letter nor communicated its contents to them at the material time.[116]

6 October 2008 Margin Call Letter

62 On 6 October 2008, DB had a meeting with Pan at the office of DB HK ("6 October 2008 Meeting"). The attendees at this meeting included Pan, Chang and Chen, and, from DB, Juan, Tsang, Yim, Sze and Chiu.[117]

63 DB pleaded that it had issued to the Plaintiffs a further margin call letter addressed to Pan, Zillion and dated 6 October 2008 ("6 October 2008 Margin Call Letter"), and DB's case was that the letter was handed to Pan at the 6 October 2008 Meeting, and that it had also informed Pan of the shortfall in the Accounts.[118]

64 The 6 October 2008 Margin Call Letter was in relation to the FX GEM account linked to Zillion's advisory account.[119] It stated that as at the valuation date of 6 October 2008, DB was under-collateralised in the sum of US$17,726,681.62, and accordingly requested that Zillion "post collateral with a post haircut market value of USD 17,726,681.62 for value 08 Oct 2008" [original emphasis omitted]. Unlike the 17 September 2008 Margin Call Letter and the 3 October 2008 Margin Call Letter (see [54] and [58] above

---

116 See SOC at para 98.

117 See SOC at para 100; Defence at para 95; 55AB 42223.

118 See Defence at para 95; 6AB 4180–4193.

119 See Sze's affidavit at para 51.

respectively), DB did not add that during the interim period when the shortfall was outstanding, it reserved its rights under the contracts, including the right to liquidate any part or the whole of the collateral without prior notice and the right to terminate the facility. However, the Plaintiffs did not raise any issue with regard to the differences between the contents of the 6 October 2008 Margin Call Letter and those of the earlier two letters.

65 The Plaintiffs did allege that DB neither gave a copy of the 6 October 2008 Margin Call Letter nor communicated its contents to Pan until after 13 October 2008.[120] The Plaintiffs alleged that there was no mention of such a letter during the 6 October 2008 Meeting.[121]

8 October 2008 to 12 October 2008

66 Thereafter, from 8 October 2008 to 12 October 2008, there were, amongst other things, telephone conversations involving Chang and DB's employees.

13 October 2008 Transactions

67 On 13 October 2008 at or around 1.59pm, there was a telephone conversation primarily between Pan and Sze.[122] It was DB's case that during this telephone conversation, Pan authorised DB to close out all positions required in order to reduce the shortfall in the Accounts.[123] It was the Plaintiffs' case that no such authorisation was given.

---

120 See Plaintiffs' Closing Submissions at para 153.

121 See Plaintiffs' Closing Submissions at para 153.

122 See SOC at para 105; Defence at para 99; Pan's affidavit at para 373.

123 See Defence at para 99(c).

68 Later that afternoon, DB closed out certain positions under the Accounts ("13 October 2008 Transactions"), and these included selling five gold call options, one AUD call option, three AUD forwards and A$80m, and unwinding a gold option.[124]

69 At about 7.28pm, Chang called Juan and Juan informed her that DB had closed out certain positions under the Accounts.[125] Pan deposed in his AEIC that Chang thereafter informed him of the same.[126]

Parties' cases

70 The Plaintiffs had four main heads of claim against DB, namely that:

(a) DB breached an implied term of the contracts with the Plaintiffs which obliged DB to provide regular updates on the state of the Accounts and the transactions thereunder;

(b) DB breached a tortious duty of care it owed to the Plaintiffs to take reasonable care and skill;

(c) DB was liable to the Plaintiffs for misrepresentation under s 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) and for negligent misrepresentation when DB made the US$50m profit representation and the US$19.26m FX profit representation; and

---

124 See SOC at para 112; Defence at para 103.

125 See SOC at para 108; Defence at para 100; Chang's affidavit at para 452.

126 See Pan's affidavit at paras 384–385.

(d) DB breached the contracts with the Plaintiffs by unilaterally closing out certain positions under the Accounts through the 13 October 2008 Transactions.

71 In so far as DB relied on contract terms in its defence, the Plaintiffs relied on ss 2 and 3 of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA") and pleaded that any contract term that sought to, amongst other things, exclude or restrict DB's liability for breach of contract or for negligence was unenforceable because it did not satisfy the requirement of reasonableness.[127]

72 As mentioned at [4] above, DB also pleaded that the Plaintiffs' actions founded on contract and on tort in respect of and/or relating to any matter in the Accounts that had arisen prior to 3 July 2008 had accrued more than six years before the time the Plaintiffs filed the writ of summons on 3 July 2014, and were barred by virtue of s 6(1)(*a*) of the Limitation Act.[128]

73 I will address the Plaintiffs' four main heads of claim *seriatim*. In so doing, I will generally analyse these claims on the premise that there was no contract term which excluded or restricted DB's liability. I will then proceed to consider, where necessary, whether there was any contract term that sought to exclude or restrict DB's liability and whether such a term was enforceable. I will thereafter also consider, where necessary, the issue of a time bar.

---

127 See Reply at paras 22A, 22B.

128 Defence at para 117A.

Issue of breach of an implied term

74 I proceed to consider the Plaintiffs' claim for breach of an implied term.

Summary of the parties' positions

75 The Plaintiffs pleaded that it was an implied term of the contracts between them and DB that DB must provide regular updates on the state of the Accounts and the transactions thereunder:

> (a) including providing information on the total assets, total liabilities, net assets/liabilities, outstanding notional values, collateral value, total exposure, mark-to-market value and notional value ("Specific Details");[129] and
>
> (b) providing these updates *daily*.[130]

I will refer to the pleaded implied term as "the Alleged Implied Term".

76 The Plaintiffs pleaded that DB breached the Alleged Implied Term by failing to provide daily updates with the Specific Details in relation to the Plaintiffs' investments in structured products for foreign exchange and commodities, such as gold, and in structured products for equities.[131] While DB provided the Plaintiffs with monthly client statements, monthly trading activity statements for foreign exchange investments, and various letters containing

---

129 SOC at para 113.

130 Further and Better Particulars of Statement of Claim dated 27 April 2015 served pursuant to the Defendant's Request dated 8 January 2015 ("F&BP of SOC 27/04/15") at para 31; see also Plaintiffs' Closing Submissions at para 92.

131 See SOC at para 118.

mark-to-market values for transactions,[132] the Plaintiffs alleged that these did not set out all the liabilities for the Accounts, the collateral value of the assets, the total exposure of the Accounts, and all the mark-to-market values of outstanding transactions.[133]

77 The Plaintiffs pleaded that had DB provided daily updates with the Specific Details, they would not have entered into transactions with a total exposure in excess of the value of their assets with DB, and they thus claimed all loss suffered as a result of this alleged breach.[134]

78 On the other hand, DB denied that the Alleged Implied Term was an implied term of the contracts between the Plaintiffs and DB.[135] DB also pleaded that there was no obligation to provide the Specific Details to the Plaintiffs in addition to the information set out in the monthly client statements.[136] In this regard, DB relied on various contract terms to support its pleadings.[137]

79 Further or in the alternative, DB pleaded that even if the Alleged Implied Term were an implied term of the contracts between the Plaintiffs and DB, DB had regularly provided the Specific Details to the Plaintiffs.[138]

---

132 See Plaintiffs' Closing Submissions at para 53; Yim's affidavit at paras 8–9.

133 See Plaintiffs' Closing Submissions at paras 55–57.

134 SOC at para 119.

135 Defence at para 104.

136 See Defence at paras 35(d)–35(e).

137 See Defence at para 35(e).

138 Defence at para 105.

Decision

80 As the Court of Appeal stated in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*"), the process of implying a term in a contract is "best understood as an exercise in giving effect to the parties' *presumed* intentions" (at [93]) [emphasis in original]. The three-step process to be used for implying a term in a contract is as follows (see *Sembcorp Marine* at [101]):

(a) first, a gap in the contract must have arisen because both parties did not contemplate the gap – a term will not be implied where one party had expressly contemplated the gap (see *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 at [75]);

(b) second, it must be necessary in the business or commercial sense to imply a term in order to give the contract efficiency – *ie*, the proposed term must be necessary for business efficacy; and

(c) third, the proposed term must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract – *ie*, the proposed term must pass the officious bystander test.

Whether there was a gap in the contracts that the parties did not contemplate

81 It was not disputed that there was no express term in the contracts between the Plaintiffs and DB that DB must provide regular updates with the Specific Details, whether daily or otherwise.[139] The question then is whether

139 See Plaintiffs' Closing Submissions at para 62.

there was a gap in the contracts as to DB's obligation to provide updates on the Accounts that the parties did not contemplate. The Plaintiffs contended that there was a gap because the parties *did not* and *could not* have contemplated this issue as to whether DB was to provide the Specific Details.[140] On the other hand, DB contended that there was no gap because the contractual documents had clearly set out and defined the parties' respective rights and responsibilities.[141]

82 I find that in entering the contracts with the Plaintiffs, DB contemplated the type and frequency of updates it would provide the Plaintiffs. DB contemplated that it would provide the Plaintiffs with "bank statements", since there was a "Bank statements" section in the Service Agreement (the document was mentioned at [12(a)] above).[142] This section, however, did not specify the information that was to be provided in these bank statements or how frequently these bank statements were to be provided.

83 On the other hand, the contractual documents stipulated that DB was not required to provide some of the Specific Details to the Plaintiffs unless the Plaintiffs requested them.[143] For instance, DB was not required to inform the Plaintiffs of "any potential *losses* which may arise because of changes in market quotations" (under cl 6 of "Our responsibilities" in the Service Agreement) [emphasis added].[144] DB was also not required to inform the Plaintiffs of the mark-to-market valuation of a derivative transaction, where the "Pricing risks

---

140 See Plaintiffs' Closing Submissions at para 63; Plaintiffs' Reply Closing Submissions at para 50.

141 See Defendants' Closing Submissions at para 90.

142 See 7AB 4651; Defendants' Closing Submissions at para 90.

143 See Defendants' Closing Submissions at para 92.

144 See 7AB 4655.

in relation to Over-the-Counter financial derivative transactions" sections in both the Risk Disclosure Statement and the Risk Disclosure Statement (FX) (the documents were mentioned respectively at [12(b)] and [12(d)] above) stated:[145]

> Pricing risks in relation to Over-the-Counter financial derivative transactions
>
> …
>
> You should not regard our provision of a *mark-to-market* valuation or price *at your request* as an offer to enter into or terminate the relevant OTC [over-the-counter] financial derivative Transaction at that value or price, unless we have indicated it is firm or binding. …
>
> [emphasis added]

84 I do not accept the Plaintiffs' submission that just because the contractual documents were based on DB's standard form contracts and were not negotiated between the parties, this meant that the parties did not and could not have contemplated the issue as to whether DB was to provide the Specific Details.[146]

85 Pan was an experienced investor who had advisory accounts with other banks before he opened advisory accounts with DB (*ie*, the Accounts). Indeed, it was the Plaintiffs' case that the client statements from Citibank and JP Morgan contained more information, at least with respect to providing the mark-to-market values, than those from DB.[147] If the Plaintiffs in fact considered the additional information important, they would have asked if DB's client statements would include such information.

---

145 See Defence at paras 30(c), 32(c), 35(e), 105(g); 7AB 4513, 4601.

146 See Plaintiffs' Closing Submissions at para 63.

147 See Plaintiffs' Closing Submissions at para 70.

86 Furthermore, DB would have been aware what information its client statements would provide. It chose not to provide more information initially (DB provided more information in respect of the Specific Details after 13 October 2008[148]).

87 Therefore, there was no true gap in the contracts between the Plaintiffs and DB as to DB's obligation to provide the Specific Details.

Whether the Alleged Implied Term was necessary for business efficacy

88 Even if there were a gap in the contracts as to DB's obligation to provide the Specific Details that the parties did not contemplate, the question would then have been whether it was necessary to imply the Alleged Implied Term for business efficacy.

89 The Plaintiffs first pleaded that the Alleged Implied Term was necessary for them to maintain a higher collateral value than the total exposure,[149] and to maintain the margin cover DB required.[150] In their pleadings, the Plaintiffs referred to the "Credit, banking and foreign exchange facilities" section in the Service Agreement,[151] and the "Margin requirements" section in the Risk Disclosure Statement.[152] The Plaintiffs also pleaded that without the Specific Details, they would not be in a position to make informed decisions in relation

148 See Plaintiffs' Closing Submissions at paras 58, 96.

149 SOC at para 116(c).

150 SOC at para 116(g).

151 See SOC at para 114; 7AB 4659.

152 See SOC at para 115; 7AB 4511.

to transactions under the Accounts.[153] The Plaintiffs pleaded that as a result, they entered into transactions with a total exposure in excess of the value of their assets with DB.[154]

90 On the other hand, DB submitted that it was not necessary to imply the Alleged Implied Term.[155] It submitted that the banking relationship with the Plaintiffs was commercially workable without DB providing them with the Specific Details.[156]

91 I make two preliminary points. First, while the Plaintiffs' submitted that the incomplete information DB provided, *ie*, without the Specific Details, allowed DB to misrepresent the state of the Accounts on several occasions because the Plaintiffs had no means of verifying the information it provided,[157] this had not been pleaded by the Plaintiffs. It is also a separate matter from the question of implying a term whether DB misrepresented the state of the Accounts on several occasions, and I will only deal with this under the Plaintiffs' claim for misrepresentation (see [70(c)] above). Also, as far as the issue of misrepresentation is concerned, the Plaintiffs pleaded that DB was liable in respect of only two specific representations, *ie*, the US$50m profit representation and the US$19.26m FX profit representation.

---

153 SOC at para 116(j).

154 SOC at para 119.

155 Defendants' Closing Submissions at para 95.

156 See Defendants' Closing Submissions at para 96.

157 See Plaintiffs' Closing Submissions at para 91; Plaintiffs' Reply Closing Submissions at para 63.

92 Second, DB provided the mark-to-market values for equities options and derivatives in client statements for August 2008,[158] and provided daily summary sheets after 13 October 2008, which included information on items constituting the Specific Details, such as that on the total assets, the collateral value and the total exposure.[159] However, the fact that DB provided some of the Specific Details to the Plaintiffs subsequently did not mean that providing such information was necessary to give efficiency to the contracts between the Plaintiffs and DB.

93 I set out the relevant contract terms to which the parties referred. The "Credit, banking and foreign exchange facilities" section in the Service Agreement stated:

> *Credit, banking and foreign exchange facilities*
>
> …
>
> 3. We have the right to determine the total value of collateral we consider acceptable ('*Collateral Value*').
>
> 4. We may assign a lower Collateral Value to collateral denominated in currencies different from the currencies of our exposure to you to take into account our currency exchange rate risk.
>
> 5. *The Collateral Value must not be less than 100% of the Total Exposure* (as defined below) at any time.
>
> 'Total Exposure' is an amount equal to *the sum of your Liabilities* under the Facilities at any time. If the Facilities we provide to you include a Foreign Exchange Facility, the 'Total Exposure' will, in addition to the amount described above, include an amount equal to *the sum of*:

158 See Plaintiffs' Closing Submissions at paras 55(a)(ix)–55(a)(x).

159 Plaintiffs' Closing Submissions at paras 96–97.

(i) *the Mark-to-Market Value* (as defined below) under each foreign exchange contract ('Contract'), whether or not due, for which you are in the loss

(ii) the Applicable Percentage as we may specify of the *Notional Value* (as defined below) of all Contracts, whether or not due

(iii) any other amount due and payable by you to us from time to time.

'Mark-to-Market Value' means the amount as we may determine of your loss or gain, whether realised or unrealised, under each Contract.

'Notional Value' means either the amount payable by you to us, or us to you, under a forward contract as we may determine.

6. *If, at any time, the Collateral Value is less than 100% of the Total Exposure, we may exercise our Rights on Termination.* We may (but need not) allow you time to restore the Collateral Value to more than 100% of the Total Exposure.

[emphasis added]

94 The "Margin requirements" section in the Risk Disclosure Statement stated:

Margin requirements

For Transactions on a margin basis:

1. *You must provide us with initial margin cover* before entering into a Transaction. We may determine the required amount of initial margin at our discretion. The amount of margin required varies with each type of transaction. We may change the margin required at any time and from time to time at our discretion, even after you have entered into the Transaction.

2. You must provide us with the margin cover by pledging, assigning or charging assets acceptable to us ('Collateral'). We will value the Collateral according to our prevailing practices from time to time.

3. The margin cover may fall below the amount we require because of various reasons (such as book losses arising from mark-to-market valuation of outstanding

> Transactions, losses arising from closed-out Transactions, or a fall in the value of the Collateral).
>
> 4. *If we determine that the margin cover is inadequate at any time,* we may take action such as:
>
> (a) asking you to provide additional Collateral (such amount may be substantial and may exceed your initial margin)
>
> (b) realising all or part of the Collateral as we think necessary to satisfy your Liabilities without notice
>
> (c) *closing out, liquidating, setting off, realising or otherwise dealing with any or all outstanding Transactions as we think fit.* You are responsible for any shortfall if the Transactions are liquidated at a loss and the loss is more than the total margin deposited.
>
> …
>
> [emphasis added]

I add that similar contract terms to these were also found in the "Margin requirements" section in the Risk Disclosure Statement (FX).[160]

95 From these contract terms, the Plaintiffs had to maintain a higher collateral value than the total exposure (cl 5 of "Credit, banking and foreign exchange facilities" in the Service Agreement) and had to maintain the required margin cover (cll 1 and 4 of "Margin requirements" in the Risk Disclosure Statement). However, the Plaintiffs did not express that a fear of insufficient collateral deterred them from entering into transactions under the Accounts.

96 Furthermore, the collateral and margin requirements were to secure the Plaintiffs' obligations to DB under the Accounts. As between the Plaintiffs and

---

160 See 7AB 4599.

DB, the collateral and margin requirements were to safeguard and protect DB's interests.

97 To ensure that the Plaintiffs met the collateral and margin requirements, DB did not necessarily have to update the Plaintiffs with the Specific Details. In this regard, I refer to another contract term relied on by DB, cl 2.6 of the Master Agreement, which was located under the "Obligations" section.[161] It stated:[162]

> **2. OBLIGATIONS**
>
> …
>
> 2.6 The Bank shall at its absolute discretion prescribe the amount of margin or collateral that the Counterparty or any Credit Support Provider must provide to the Bank in order to secure the Counterparty's obligations to the Bank under the Transactions, and may from time to time amend or add to such margin or collateral requirements. *Such margin or collateral requirements may be notified by the Bank to the Counterparty in writing or verbally.* If the Bank shall for any reason deem that there is *insufficient collateral* held pursuant to the terms of the Credit Support Documents that is available to satisfy the Counterparty's present or future obligations under this Agreement or the Counterparty's present or future obligations under any other agreement or arrangement between the Counterparty and the Bank, the Counterparty shall within *one business day's notice* thereof deliver additional collateral of a type acceptable to the Bank in its sole discretion … in an amount as may be required by the Bank. … The Bank may at its sole discretion apportion and/or allocate the collateral provided by the Counterparty amongst the Transactions to be secured and may request for additional collateral from the Counterparty if the Bank shall for any reason deem that there is insufficient collateral to secure a specific Transaction notwithstanding that the amount of the collateral

---

161 See Defendants' Closing Submissions at n 161; Defence at para 31(b).

162 7AB 4605–4607.

> securing the other Transactions is in excess of the obligations of the Counterparty to the Bank under those Transactions. For the avoidance of doubt, *if the Counterparty fails to deliver such additional collateral, such failure shall constitute an Event of Default* in respect of the Counterparty pursuant to Clause 5 below and the Bank may proceed to terminate some or all of the Transactions at its discretion pursuant to Clause 5 without further notice to the Counterparty other than the notice of termination to be provided under Clause 5.4.
>
> …
>
> [emphasis added]

98 Clause 2.6 of the Master Agreement stated that DB would notify the Plaintiffs of the collateral and margin requirements, and when there was insufficient collateral, DB would give the Plaintiffs "one business day's notice" to deliver additional collateral. Such a clause meant that for the Plaintiffs to maintain a higher collateral value than the total exposure and to maintain the required margin cover, DB did not have to update the Plaintiffs with the Specific Details; DB could simply notify the Plaintiffs of the collateral and margin requirements they had to fulfil.

99 I also observe that cl 2.7 of the Master Agreement, in a related context, stated:[163]

> 2.7 The Bank may at its absolute discretion impose a facility limit, position limit, ceiling limit, credit limit or any other trading limit (the 'Prescribed Limits') and/or ratios including close-out ratios and margin maintenance ratios (the 'Ratios') on the Transactions entered into by the Counterparty pursuant to this Agreement, and may at its discretion amend such limits and/or ratios from time to time. Any Prescribed Limits and/or Ratios may be notified … by the Bank to the Counterparty in writing or verbally. … *It shall be the Counterparty's responsibility*

163 7AB 4607.

> *to monitor its Transactions and to ensure that its Transactions … do not [(i)] exceed the Prescribed Limits and/or (ii) reach or breach any of the Ratios, as the case may be.* For the avoidance of doubt, if the Bank determines that the Counterparty's Transactions have (i) exceeded any of the Prescribed Limits, and/or (ii) reach or breach [*sic*] any of the Ratios, as the case may be, this shall constitute an Event of Default in respect of the Counterparty pursuant to Clause 5 below and the Bank may proceed to terminate any or all of the Transactions at its discretion pursuant to Clause 5 without further notice to the Counterparty other than the notice of termination to be provided under Clause 5.4. [original emphasis omitted; emphasis added in italics]

100 In my view, it was the Plaintiffs' responsibility to monitor the Accounts and ensure, amongst other things, that trading limits (the "Prescribed Limits") were not exceeded and the close-out ratios not reached. Hence, while DB's regular updates to the Plaintiffs with the Specific Details might assist them in monitoring for themselves whether there was sufficient collateral in the Accounts, it was not DB's responsibility to provide such updates of its own accord. Accordingly, there was no necessity to provide such regular updates for business efficacy for the contracts between the Plaintiffs and DB.

101 In any event, I find that the Plaintiffs themselves knew or at least had an idea of their positions in relation to the collateral value, the total exposure and the margin cover. This was particularly so when the Plaintiffs entered into transactions under the Accounts.

102 For instance, both Pan and Chang were aware that DB assigned different collateral values for different assets, and Chang was explaining the same to Pan in one of the telephone conversations involving her, Pan and DB's employees.[164]

103 Chang also knew how to do some form of calculation of the mark-to-market loss and demonstrated this understanding to DB's employees.[165] Chang could also calculate profits of transactions, and she conveyed this to DB's employees in a telephone conversation on 2 June 2008 at or around 2.49pm. I referred to this conversation at [32] above. The English translation of the relevant transcript stated:[166]

> …
>
> [Chang]: … I can even tell you if you ask me how much 1203 is making us?
>
> [Juan]: Wow, amazing! So…
>
> [Chang]: So, do you want to pay me to calculate it so you all don't have to do it?
>
> [Juan]: We want to calculate for you.
>
> [Chang]: Yes, please go ahead. Then, I can check if you have done it correctly. …
>
> …
>
> [Chang]: Don't forget my background is in finance! I am in charge of the account.
>
> …

---

164 See 55AB 42287–42289 (telephone conversation on 3 January 2008 at or around 2.24pm) referred to in Defendant's Closing Submissions at para 106(a).

165 See *eg*, 55AB 42811–42815 (telephone conversation on 25 March 2008 at or around 2.18pm) referred to in Defendant's Closing Submissions at para 101.

166 56AB 43311–43312.

104 As can be seen from that conversation, Chang was even teasing Juan (from DB) if DB wanted to pay Chang to make calculations for DB. While this was meant as a joke, there was no joke that Chang was making her own calculations. Chang's reference to her background in finance also gave a different picture from her AEIC where she said at para 17 that she did not have any financial investment qualifications (see [31] above). Hence, even if it were true that Chang did not have such formal qualifications, she was clearly experienced in financial matters as she herself alluded to. As mentioned at [33] above, I found Chang's evidence at trial that she was not doing calculations on behalf of Pan hard to believe.

105 In so far as Chang also gave evidence that she did not know how to calculate the mark-to-market value and the collateral value,[167] it might be that Chang was not able to calculate all the various items constituting the Specific Details with complete accuracy, where some of the figures were generated by DB's internal system.[168] Yet, in the light of the transcripts for various telephone conversations, I find that Chang was fairly knowledgeable about the various items constituting the Specific Details and that she assisted Pan with monitoring them for the Accounts and the transactions thereunder.

106 In any event, it was obvious that the Plaintiffs knew that they had to maintain a higher collateral value than the total exposure and to maintain the required margin cover. If the Plaintiffs were not able to do full calculations for these objectives without the Specific Details, they should have asked for them to be provided on a daily basis. They knew about the concept of the Specific

---

167 See NEs 13/03/18 at p 13 lines 2–20, p 57 lines 22–25, p 58 lines 1–6.

168 See Plaintiffs' Reply Closing Submissions at paras 60–61.

Details such as the mark-to-market values (see [85] above). Yet, transactions continued without the need for such details.

107 Indeed, it appeared that the Plaintiffs preferred to do calculations in relation to their portfolio on their own apart from DB. As Pan deposed in his AEIC, he said to Juan during a telephone conversation on 3 January 2008:[169]

> Your bank also has a number of methods of calculation. So, it is better for us to calculate ourselves. Otherwise, my head will be chopped up by you[.]

At trial, DB's counsel cross-examined Pan on this statement, asking him whether he was referring to the calculations for the collateral required for his transactions under the Accounts.[170] While Pan denied that he was referring to such calculations, he was unable to tell the court what the calculations were for if not for the collateral required. I add that even though Pan did not clarify what calculations he was referring to, the point is that the Plaintiffs were doing their own calculations because they believed that DB had its own way of doing its calculations. In other words, the Plaintiffs knew they had to protect their own interests.

108 In the circumstances, I find that it was not necessary to imply the Alleged Implied Term in the contracts between the Plaintiffs and DB for business efficacy.

109 Moreover, the Plaintiffs pitched their case at a very high level, by pleading that DB had to provide *daily* updates with the Specific Details. The Plaintiffs' own expert evidence from Campana did not support their pleaded

---

169 See Pan's affidavit at para 180.

170 See Notes of Evidence of 2 March 2018 at pp 42–44.

case. Campana explained that daily reporting of the Specific Details was "necessary" (because margin calls could occur daily).[171] However, in terms of market practice, he explained that monthly (not daily) reporting of mark-to-market valuation of the entire portfolio was the minimum standard,[172] and the Plaintiffs themselves cited this evidence from Campana in their closing submissions at para 93. Moreover, while the Plaintiffs argued that the other banks such as Citibank, JP Morgan and UBS provided mark-to-market values in their client statements,[173] the expert evidence of both Campana and Beloreshki, DB's expert witness, was that such mark-to-market values, if they were provided, were at best provided in *monthly* client statements.[174]

Whether the Alleged Implied Term passed the officious bystander test

110 Given my finding that it was not necessary to imply the Alleged Implied Term in the contracts between the Plaintiffs and DB for business efficacy, it is unnecessary to consider the officious bystander test.

111 In the circumstances, I find that the Alleged Implied Term was not an implied term of the contracts between the Plaintiffs and DB.

Further comments

112 I will briefly address one other point in relation to this issue of a breach of an implied term.

---

171 See Plaintiffs' Closing Submissions at para 94; Plaintiffs' Reply Closing Submissions at para 65.

172 NEs 09/03/18 at p 31 lines 2–5; Campana's affidavit at p 72 para 4.41.

173 See Plaintiffs' Closing Submissions at para 70.

174 See NEs 09/03/18 at p 56 lines 5–25, p 57 lines 1–10; NEs 15/03/18 at p 79 lines 3–25, p 80 lines 1–10.

113 DB pleaded that even if the Alleged Implied Term were an implied term of the contracts between the Plaintiffs and DB, DB had regularly provided the Specific Details to the Plaintiffs (see [79] above).[175] In so far as this was a claim that DB would not have breached the Alleged Implied Term if it were implied in the contracts, DB did not seem to make a similar submission in its closing submissions. In fact, in its closing submissions, DB submitted that the Specific Details could be, and were, communicated on an *ad hoc* basis whenever the Plaintiffs requested them.[176] Such a submission would not have supported a claim that DB had regularly provided the Specific Details to the Plaintiffs, whether daily or otherwise. In any case, given my finding that the Alleged Implied Term was not an implied term of the contracts between the Plaintiffs and DB, DB was not required to provide the Plaintiffs with the Specific Details daily.

Issue of negligence

114 I proceed to consider the Plaintiffs' claim for negligence.

Summary of the parties' positions

115 The Plaintiffs pleaded that by DB's conduct and/or representations, it had assumed a duty of care in tort towards the Plaintiffs to exercise reasonable care and skill in providing advice to them as a reasonably competent and prudent financial adviser and/or banker would.[177] The Plaintiffs also submitted that the standard of care was to be determined by reference to the steps that a reasonable

---

175 Defence at para 105.

176 See Defendant's Closing Submissions at para 108.

177 See SOC at para 131.

and competent bank ought to have taken.[178] In this regard, the Plaintiffs pleaded that DB breached its duty of care and pleaded 12 heads of breaches.[179] In the Plaintiffs' closing submissions, they grouped these breaches into two main categories:[180]

(a) the failure to manage the Accounts, to advise the Plaintiffs in accordance with their objective of wealth preservation, and to protect their wealth from depreciation; and

(b) the failure in relation to risk management.

116 The Plaintiffs pleaded that DB's conduct and actions resulted in enormous profit margins for DB, but extensive losses for the Plaintiffs.[181] They claimed all loss suffered as a result of DB's negligence and/or breaches of its duty of care.[182] The Plaintiffs further pleaded that DB's breaches of duty amounted to gross negligence.[183]

117 On the other hand, DB denied that it had assumed a duty of care towards the Plaintiffs.[184] DB pleaded that its duty and/or obligations were at all times governed by the contractual documents with the Plaintiffs,[185] and averred that it

---

178 See Plaintiffs' Closing Submissions at para 226.

179 See SOC at para 132.

180 See Plaintiffs' Closing Submissions at para 228.

181 See SOC at para 133.

182 SOC at para 133.

183 SOC at para 134.

184 Defence at para 113.

185 See Defence at para 113.

did not at any material time provide the Plaintiffs with advice on the Accounts.[186] DB also pleaded that even if it owed the Plaintiffs a duty of care as the Plaintiffs pleaded, it did not breach such duty.[187]

118 As mentioned at [73] above, I will address this claim for negligence first on the premise that there was no contract term which excluded or restricted DB's liability.

Decision

Whether DB owed a duty of care to the Plaintiffs

119 A duty of care will arise in tort if (a) it is factually foreseeable that the defendant's negligence might cause the plaintiff to suffer harm (the threshold issue); (b) there is sufficient legal proximity between the parties; and (c) policy considerations do not militate against a duty of care (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [73], [77], [83]). The question as to whether a duty of care has arisen must be assessed by reference to the sequence of relevant facts and events up to the time the alleged duty is said to have been breached (*Chang Tse Wen* ([49] *supra*) at [22]).

(1) Factual foreseeability

120 To determine whether it was factually foreseeable that a failure by DB to exercise reasonable care would harm the Plaintiffs, it is necessary first to establish what DB undertook to do with reasonable care (*Chang Tse Wen* at [30]).

---

186 See Defence at para 113(f).

187 See Defence at para 115.

121 The Plaintiffs submitted that DB undertook to help Pan manage his wealth and communicated this to him, and so it was foreseeable that if DB did not exercise reasonable care and skill in discharging its role, the Plaintiffs would suffer loss.[188] On the other hand, DB submitted that it never undertook and could not have undertaken to help Pan manage his wealth under the Accounts, because Pan preferred to make his own investment decisions and it was entirely up to him to decide what transactions to enter into under the Accounts.[189]

122 The Accounts referred to the Plaintiffs' two advisory accounts and the linked FX GEM Account, for which Pan made the decision as to which transactions to enter into. The fact that Pan decided which transactions to enter into under the Accounts, which included transactions not recommended by DB, did not mean that DB did not render assistance to Pan with the Accounts. It just meant that the decision-making lay with Pan.

123 Despite DB's averment in its pleadings that it did not at any material time provide the Plaintiffs with advice on the Accounts (see [117] above), this was factually not the case. There were many instances of telephone discussions during which DB gave advice or made recommendations. Yim himself agreed during cross-examination that DB would give advice on wealth management to a client for an advisory account.[190] Yim agreed that DB had set up a team of experts in April 2008 "to help [Pan] manage his wealth";[191] this was in relation

---

188 See Plaintiffs' Closing Submissions at para 183.

189 See Defendant's Closing Submissions at paras 164, 168.

190 Notes of Evidence of 20 March 2018 ("NEs 20/03/18") at p 44 lines 2–6.

191 See NEs 19/03/18 at p 39 lines 23–25, p 40 lines 1–5; Plaintiffs' Closing Submissions at para 181.

to the Accounts, *ie*, advisory accounts.[192] Also, in the "Customised Wealth Management" slides dated June 2008,[193] which DB presented to Pan during the full-day meeting on 3 July 2008 in Taipei,[194] DB stated: "We are committed to providing you with a banking, investment management, *advisory* and fiduciary platform that delivers proprietary and open architecture solutions of superior quality to cope with your needs" [original emphasis omitted; emphasis added in italics].[195] In relation to this statement, Yim agreed that DB provided an advisory platform.[196]

124 It was held in *Tradewaves Ltd and others v Standard Chartered Bank and another suit* [2017] SGHC 93 that it was factually foreseeable that if the bank in question did not exercise reasonable care when making a decision to recommend a certain investment to the plaintiffs with non-discretionary accounts (advisory accounts), and if the plaintiffs acted on the recommendation, they might be harmed as a consequence (at [111], [113]).[197]

125 I find that DB did give advice on wealth management to the Plaintiffs in relation to the Accounts. It was factually foreseeable that a failure by DB to exercise reasonable care when giving such advice would cause the Plaintiffs to suffer loss, if the Plaintiffs acted on the given advice.

---

192 Plaintiffs' Reply Closing Submissions at para 97.

193 See 51AB 39775–39810; 51AB 39811–39851.

194 See Pan's affidavit at paras 231–233; Yim's affidavit at para 34; NEs 19/03/18 at p 102 lines 1–12.

195 See 51AB 39802.

196 See NEs 19/03/18 at p 127 lines 3–14.

197 See Plaintiffs' Reply Closing Submissions at para 96.

(2) Proximity

126 The Court of Appeal has also recently expounded on the proximity requirement in *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd and another* [2018] 2 SLR 588 ("*NTUC Foodfare*"). I summarise the applicable principles therein:

(a) Proximity includes physical, circumstantial and causal proximity, and incorporates the twin criteria of voluntary assumption of responsibility by the defendant and reliance by the plaintiff (see *NTUC Foodfare* at [40(a)]).

(b) Other proximity factors include (see *NTUC Foodfare* at [40(b)]):

(i) the defendant's knowledge in relation to the plaintiff of the risk of harm, or of reliance by the plaintiff, or of the vulnerability of the plaintiff; and

(ii) the defendant's control over the situation giving rise to the risk of harm and the plaintiff's corresponding vulnerability.

(c) In cases of pure economic loss, there may be sufficient legal proximity between the parties even if the defendant does not voluntarily assume responsibility to the plaintiff and the plaintiff does not specifically rely on the defendant not to cause it loss (see *NTUC Foodfare* at [41]).

127 The contractual matrix is also a factor to be considered when determining the question of legal proximity between the parties, and this includes circumstances showing that the defendant never undertook any relevant responsibility in its contract or that the defendant qualified it or even

disclaimed it (see *Chang Tse Wen* at [37]). An express disclaimer of responsibility can prevent a duty of care from arising in tort, by negating the proximity sought to be established by the concept of an "assumption of responsibility", but such a disclaimer will be subject to the UCTA if it takes the form of a contractual exclusion clause (see *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [38]). For the time being, along with addressing this claim for negligence first on the premise that there was no contract term which excluded or restricted DB's liability (see [118] above), I will proceed on the assumption that there was no disclaimer or qualification of responsibility in the contracts between the parties.

128 As I found at [125] above, DB did give advice on wealth management to the Plaintiffs in relation to the Accounts. DB gave advice and made recommendations to the Plaintiffs on transactions under the Accounts through the Relationship Manager Juan and a team of experts.[198] This team of experts comprised at least ten product specialists in various types of investments, including Tsang (for investment advisory), Kwok (for foreign exchange strategy), Yim (head of global investment and sales) and Chan (for fixed income strategy).[199]

129 I consider the type of advice DB gave the Plaintiffs on wealth management in relation to the Accounts. This included:

---

198 See Plaintiffs' Closing Submissions at para 195.

199 See 51AB 39781.

(a) DB's almost daily telephone discussions with Chang and/or Pan to discuss investment ideas and pricing quotes and to provide updates on the Accounts (see [15] above);[200]

(b) DB's monthly meetings with Pan, in which Juan would review the Plaintiffs' portfolio and the different product specialists would update on the state of the Plaintiffs' investments in the respective products;[201] and

(c) DB's responses to Pan's requests for advice on what he should do with the Plaintiffs' portfolio.[202]

130 In so far as DB argued that it had given recommendations to the Plaintiffs in response to what Pan himself wanted,[203] this does not assist DB because it instead affirmed that DB was advising the Plaintiffs in relation to the Accounts.

131 I find that there was an advisory relationship between DB and the Plaintiffs, beyond the normal role of a salesperson in the private banking context introducing products (see *Chang Tse Wen* at [43]).

132 I also find that Pan did consider DB's advice and recommendations, even though he did not always agree with DB. Also, Pan's requests to DB for advice in relation to the Accounts evidenced some reliance on DB. Such reliance on Pan's part was also reasonable, in the light of how DB itself gave advice to

---

200 See Tsang's affidavit at para 34.

201 See Plaintiffs' Closing Submissions at para 199; Tsang's affidavit at para 36.

202 See Plaintiffs' Closing Submissions at paras 207–212.

203 See Defendant's Closing Submissions at para 188.

Pan in relation to the Accounts and provided him with a team of experts/product specialists in various types of investments.

133 I accept that the advisory relationship between DB and the Plaintiffs did not stem from the contractual documents executed between them, where in DB's words, the contractual documents generally recorded "an execution-only contractual relationship".[204] No investment advisory agreement was signed between the parties. These facts, in and of themselves, however, did not preclude a duty of care from arising in tort.

134 In the circumstances, I find that there was voluntary assumption of responsibility by DB to give advice on wealth management to the Plaintiffs in relation to the Accounts, and that there was reliance by the Plaintiffs on such advice being given with reasonable care and skill. I find that there was sufficient legal proximity between the parties for a duty of care to arise in tort, owing from DB to the Plaintiffs.

(3) Policy considerations

135 In this case, I am of the view that there was no policy consideration militating against a duty of care to the Plaintiffs on the part of DB.

136 Therefore, I find that DB owed the Plaintiffs a duty of care in tort when giving them advice on wealth management in relation to the Accounts.

---

204 See Defendant's Closing Submissions at para 195.

Whether DB was liable for any breach of its duty of care to the Plaintiffs

137 The question then is whether DB breached its duty of care to the Plaintiffs. Answering this question requires defining the scope of the duty of care and the standard of care owed by DB.

138 The standard of care DB owed to the Plaintiffs when giving advice on wealth management in relation to the Accounts is determined by reference to the advice that a reasonable and competent bank in DB's position ought to have given (*Chang Tse Wen* at [72]).

139 I turn to consider the two categories of breaches which the Plaintiffs, in their closing submissions, alleged DB committed (see [115] above):

(a) the failure to manage the Accounts, to advise the Plaintiffs in accordance with their objective of wealth preservation, and to protect their wealth from depreciation; and

(b) the failure in relation to risk management.

As mentioned, the Plaintiffs had pleaded 12 heads of breaches which they grouped into these two categories. The first of the 12 heads of breaches is that at [139(a)] above. The remaining 11 heads of breaches were grouped under that at [139(b)] above.

140 I make two preliminary points. First, I find that the standard of care owed by DB did not involve DB "managing" the Accounts, as might be suggested at [139(a)] above. The decisions as to which transactions to enter into under the Accounts (advisory accounts) were to be made by the Plaintiffs; DB had no discretion in managing the Accounts. I emphasise that the standard of care DB

owed to the Plaintiffs was with regard to *giving advice* on wealth management in relation to the Accounts.

141 Second, as DB submitted, one difficulty with the Plaintiffs' claim for negligence was Pan's own evidence at the trial.[205] I reproduce the relevant portion of Pan's cross-examination:[206]

> [Q]. Mr Pan, you said in an earlier answer that you never said the bank's advice was no good. You confirmed to his Honour, the judge, that you have no complaint about the advice given by the bank to you in relation to the investments you made.
>
> A. What I want to say is that *the bank kept telling me lies. It is not a matter of whether their advice is good or no good.* The bank should never tell their clients something that is untrue.
>
> [emphasis added]

In fact, Pan maintained the same position during his re-examination, as follows:[207]

> A. I think Mr Yeo had interpreted it as I never said that the bank's advice was no good. But *I would not comment on whether they are good or no good. …*
>
> …
>
> A. *The main thing is they cheated me.*
>
> [emphasis added]

142 Although the Plaintiffs submitted that DB had taken Pan's evidence out of context,[208] I do not agree. Pan's evidence and position at the trial seemed to

---

205 See Defendant's Closing Submissions at paras 159–161.

206 See Notes of Evidence of 7 March 2018 ("NEs 07/03/18") at p 13 lines 14–22.

207 See Notes of Evidence of 8 March 2018 at p 54 lines 13–15, p 55 line 17.

208 See Plaintiffs' Reply Submissions at para 91.

contradict the Plaintiffs' case that DB breached its duty of care to them when giving them advice on wealth management in relation to the Accounts. Pan appeared not to take issue with the advice that DB gave, but was complaining instead that DB "lie[d]" to him. It would thus seem that Pan was not complaining that DB was negligent in giving advice, but instead that DB told certain "lies" or made certain misrepresentations. It was not clear what these "lies" were about. Nevertheless, despite Pan's evidence suggesting that he was not complaining about DB's negligence in giving advice, I will consider the two categories of breaches of duty which the Plaintiffs alleged DB had committed since the Plaintiffs were still pursuing them.

(1) Failure to advise in accordance with an objective of wealth preservation

143 I have found at [28] above that Pan's investment objective was not to preserve his wealth and protect it from depreciation, but rather to grow his wealth by taking risks. Accordingly, DB did not owe a duty to advise the Plaintiffs in accordance with an objective of wealth preservation.

(2) Failure in relation to risk management

144 The remaining 11 heads of breaches the Plaintiffs pleaded were grouped under the category of "the failure in relation to risk management" (see [139(b)] above) in their closing submissions. I elaborate on what these 11 heads of breaches pertained to:

(a) as regards the financial products (like accumulators):[209]

(i) failing to advise the Plaintiffs of their nature and the risks associated with them; and

(ii) recommending the Plaintiffs to purchase them when they allowed DB to unfairly earn/charge higher prices, margins, fees and/or commissions to DB's benefit and to the Plaintiffs' detriment;

(b) as regards the exposure and margin issues:[210]

(i) over-exposing the Accounts when recommending the Plaintiffs to purchase financial products to the extent that their total exposure was in excess of the value of their assets with DB;

(ii) failing to warn the Plaintiffs that their total exposure was in excess of the value of their assets and the consequences thereof; and

(iii) failing to inform the Plaintiffs that they were transacting on leverage and/or margin, and the extent of leverage and/or margin utilised;

(c) generally:[211]

(i) failing to provide the Plaintiffs with regular updates of all transactions under the Accounts;

---

209 See SOC at paras 132(b)–132(c).

210 See SOC at paras 132(d)–132(e), 132(h).

211 See SOC at paras 132(f)–132(g), 132(i), 132(k)–132(l).

(ii) failing to provide the Plaintiffs regular updates with the Specific Details;

(iii) failing to provide the Plaintiffs with monitoring and reviews of the Accounts and to actively manage their portfolio to manage risk to meet their investment objectives;

(iv) failing to properly and clearly inform the Plaintiffs of the problems in the Accounts; and

(v) failing to provide the Plaintiffs with proper and adequate advice to deal with the problems in the Accounts bearing in mind their objective to preserve wealth and protect it from depreciation; and

(d) unilaterally increasing the Plaintiffs' credit limit to US$600m without their consent and/or knowledge.[212]

145 The Plaintiffs' general claim was that if they had known that their portfolio was carrying so much risk, they would not have entered into so many transactions with DB.[213]

146 As regards the financial products (see [144(a)] above), as DB pointed out, the Plaintiffs did not submit on [144(a)(i)] above.[214]

---

212 See SOC at para 132(j).

213 See Plaintiffs' Closing Submissions at para 281.

214 See Defendant's Closing Submissions at para 249.

147 The Plaintiffs also did not submit that DB failed to warn them of any risks in relation to the financial products,[215] even though during the trial, it was suggested by or for the Plaintiffs that Pan did not realise the risks associated with financial products like accumulators.[216] In any event, I find that he did understand that accumulators were risky (see [26] and [28] above). As Tsang mentioned at para 26 of his AEIC, some of the accumulators which the Plaintiffs bought had a gearing ratio of three, which meant that they would potentially have to purchase three times the underlying product at a loss, but by accepting such a ratio, they were able to get a lower strike price (see also [49] above). While there was some suggestion by the Plaintiffs that any discussion on the gearing ratio was only with Chang and not with Pan himself,[217] I am of the view that, even if that were correct, Chang did communicate the substance of such discussions to Pan. After all, that was her role (see [36] above).

148 For [144(a)(ii)] above, there is no evidence that DB recommended products just because it could earn higher margins, fees or commissions. This was just a blanket attempt by the Plaintiffs to tarnish the court's perception of DB.

149 As regards the exposure and margin issues (see [144(b)] above), for [144(b)(i)] and [144(b)(ii)] above, the Plaintiffs submitted that DB allowed them to trade to the extent that their total exposure exceeded the value of their assets because DB would simply ask Pan to remit more assets into the Accounts

---

215 See NEs 15/03/18 at p 125 lines 22–23.

216 See NEs 19/03/18 at p 32 lines 24–25, p 33 lines 1–4; Notes of Evidence of 21 March 2018 ("NEs 21/03/18") at p 37 line 25, p 38 lines 1–7; see also Pan's affidavit at para 104.

217 See NEs 21/03/18 at p 79 lines 3–25, p 80 lines 1–4.

after entering into more transactions.[218] On the other hand, DB submitted that there was no evidence that it had recommended the Plaintiffs to purchase financial products in circumstances as would cause their total exposure to exceed the value of their assets,[219] and no evidence that immediately after the Plaintiffs purchased a financial product, their total exposure exceeded the value of their assets.[220] DB argued that this would make no sense as it would have been against its interests to be under-collateralised.[221]

150 I have observed that as between the parties, the collateral and margin requirements were to safeguard and protect DB's interests, because these requirements were to secure the Plaintiffs' obligations to DB under the Accounts (see [96] above). It would not have been to DB's benefit to be under-collateralised. In any event, there is no basis to suggest that if DB knew that further transactions under the Accounts might cause DB to be under-collateralised, DB must either stop making recommendations or alert the Plaintiffs that DB might be under-collateralised if the Plaintiffs entered into further transactions. The Plaintiffs knew that the burden was on them, and not on DB, to ensure that they either had sufficient collateral or could provide sufficient collateral.

151 As for [144(b)(iii)] above, regarding DB's alleged failure to inform the Plaintiffs that they were transacting on leverage and/or margin, it is obvious to me that they knew this despite attempts by Pan, during oral evidence, to suggest

---

218 See Plaintiffs' Reply Closing Submissions at para 148.

219 See Defendant's Closing Submissions at para 254.

220 See Defendant's Closing Submissions at para 255.

221 See Defendant's Closing Submissions at para 254.

that he did not even know that he was borrowing money from DB. Regarding DB's alleged failure to inform the Plaintiffs about the extent of leverage and/or margin utilised, my findings at [150] above apply; DB did not have a duty to inform the Plaintiffs about the extent of leverage and/or margin utilised.

152 As regards the sub-paragraphs of [144(c)] above, these relate to the alleged failures of DB to monitor the Plaintiffs' portfolio and provide them with regular updates. Pan deposed in his AEIC that DB told him at a meeting on 7 April 2008 that it "would monitor transactions on [his] portfolio to manage risk".[222] Also, in the "Customised Wealth Management" slides dated June 2008 which DB presented to Pan (mentioned at [123] above), DB set out that the Plaintiffs' team of experts/product specialists (see [128] above) would provide the Plaintiffs with, *inter alia*, "[m]onitoring and review" services.[223] In this regard, the Plaintiffs pleaded that one of the "representations" DB made to them was that it would provide them with "[m]onitoring and review" services as stated in the "Customised Wealth Management" slides.[224]

153 However, while the Plaintiffs referred in their pleadings to the "Customised Wealth Management" slides and alleged that DB did not provide them with regular risk assessments and risk monitoring in relation to the Accounts,[225] this was not a claim that the Plaintiffs eventually made where the Plaintiffs' claims were restricted to the four heads of claim listed at [70(a)]–[70(d)] above. Instead of relying on the "Customised Wealth Management"

---

222 Pan's affidavit at para 208.

223 See 51AB 39782; NEs 19/03/18 at p 113 lines 2–9.

224 See SOC at para 44(d).

225 See SOC at para 47(g).

slides, or on any other explicit or express promise or assurance that DB would monitor the Plaintiffs' portfolio, the Plaintiffs only pleaded that DB breached its general duty of care owed to the Plaintiffs in allegedly failing to monitor their portfolio and provide them with regular updates. As mentioned, the Plaintiffs also relied on a claim for breach of the Alleged Implied Term, which suggested that the Plaintiffs should be regularly updated with the Specific Details to assist them in monitoring for themselves whether there was sufficient collateral (see [100] above), as opposed to DB monitoring on the Plaintiffs' behalf. I have found the claim on the Alleged Implied Term to be unsuccessful.

154 As the Plaintiffs' claim for breach of the general duty of care and of the Alleged Implied Term did not rely on any express promise or assurance, I find that the standard of care owed by DB to the Plaintiffs did not involve DB monitoring the Plaintiffs' portfolio such as to provide them with regular updates of DB's own accord. This was even if DB might choose to voluntarily offer such a service at times.

155 Specifically, as regards [144(c)(ii)] above, DB submitted that the Plaintiffs were provided with, amongst other things, client statements of the Accounts throughout the banking relationship.[226] Although the statements did not contain all the Specific Details, I have concluded that there was no implied (contractual) obligation on DB to provide such details.

156 Importantly, there was no concrete evidence that if such details had been provided, the Plaintiffs would not have entered into the various transactions

---

226 See Defendant's Closing Submissions at para 260.

under the Accounts. This was just a bare and sweeping allegation by the Plaintiffs.

157 As regards [144(c)(iii)] and [144(c)(v)] above, my findings in relation to the alleged breach of failing to advise the Plaintiffs in accordance with an objective of wealth preservation (see [143] above), as discussed in the previous section, apply. There was no such objective of wealth preservation.

158 As regards [144(d)] above, as DB pointed out, the Plaintiffs did not lead any evidence on this, or submit on it in their closing submissions.[227]

159 The Plaintiffs also did not establish how the 11 heads of breaches that they pleaded respectively caused them to suffer loss. The alleged breaches were also pleaded generally without specific proof of loss, which is necessary for a negligence claim to be actionable (see *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918 at [47]). It was insufficient for the Plaintiffs to just allege that DB breached its duty of care to them or that the trial was bifurcated with damages to be assessed. The Plaintiffs still had to establish liability first on the part of DB which meant that the Plaintiffs had to establish that some loss was occasioned by each breach before damages are assessed.

160 I turn to consider the Plaintiffs' closing submissions on the overarching general allegation about "the failure in relation to risk management" (see [139(b)] and [144] above) over and above the 11 heads of breaches mentioned.

---

227 See Defendant's Closing Submissions at para 262.

161 On 17 September 2008, there was a telephone conversation at or around 10.11pm involving Pan and Juan, where the English translation of the transcript for this conversation recorded Juan as saying:[228]

> …
>
> [Juan]: Okay. Mr. Pan, with the recent situation in the market, I want to tell you that we, at Deutsche Bank, definitely do not have any excuses. Okay. *We really definitely have no excuses in getting your portfolio into the state that it is in today.* Okay. But, we want to say that *whatever money is lost this time*, okay, we will, in the future, definitely earn back the money with planning.
>
> …
>
> [Juan]: … Mr. Pan, I must admit to you that, actually, whether you are looking at the FX or stock market, I believe that the majority of our judgements were accurate. *But what we completely did not do was to do a consideration of your risks. …*
>
> [emphasis added]

162 The Plaintiffs sought to use such statements from Juan to make the point that DB admitted its failure to properly advise the Plaintiffs on portfolio risks,[229] meaning the risks encountered by the entire portfolio as opposed to specific transactions. However, as I have found, the standard of care owed by DB to the Plaintiffs did not involve DB monitoring the Plaintiffs' portfolio such as to provide them with regular updates, including on portfolio risks, of DB's own accord (see [154] above). Even if the standard of care owed by DB to the Plaintiffs involved DB monitoring the Plaintiffs' portfolio as such, and even if DB breached such a duty of care, the Plaintiffs again did not establish how such a breach caused them to suffer loss (see [159] above).

---

228 See 58AB 45455–45456, 45460.

229 See Plaintiffs' Closing Submissions at para 251.

163 The Plaintiffs also sought to show that DB blatantly ignored the risks in the Plaintiffs' portfolio, and instead knowingly went ahead to advise them to enter into even more transactions to exacerbate the existing risks.[230] To do this, the Plaintiffs referred to five specific instances on the following dates: 16 May 2007, 15 April 2008, 14 July 2008, 31 July 2008 and 25 September 2008.[231] However, in response to DB's time bar argument in relation to matters prior to 3 July 2008 (see [72] above), the Plaintiffs submitted that their claims were not for specific transactions entered into before 3 July 2008.[232] Moreover, the Plaintiffs also submitted that their claim for negligence was not premised on specific transactions but on the failure to manage risks generally.[233] The Plaintiffs have, however, also not established how any negligence caused them to suffer loss generally.

164 Since the Plaintiffs were not relying on specific transactions in their claim for negligence, it is not necessary for me to address the five specific instances they had mentioned which were apparently mentioned only to show how DB had conducted themselves and not to show the Plaintiffs' reliance on any alleged breach or causation of loss.

165 It was not sufficient for the Plaintiffs to select telephone conversations which seemed to suggest that DB was acting negligently or inconsistently. Having considered the Plaintiffs' pleadings, the evidence and their submissions, I find that they have not established liability on the part of DB for breach of its

---

230 See Plaintiffs' Closing Submissions at para 260.

231 See Plaintiffs' Closing Submissions at paras 261–265.

232 See Plaintiffs' Reply Closing Submissions at para 46.

233 See Plaintiffs' Reply Closing Submissions at para 114.

duty of care to the Plaintiffs when giving them advice on wealth management in relation to the Accounts. This is regardless of whether DB in fact failed to properly advise the Plaintiffs in relation to risk management as alleged.

Gross negligence

166 The Plaintiffs alleged that there was also gross negligence on DB's part without specifying why this was alleged. It appears that this allegation was made to overcome cl 1 of "Our responsibilities" in the Service Agreement which exempted DB from liability for negligence *simpliciter*.[234] It is not necessary for this court to address this allegation as I have found that the Plaintiffs have not established liability even under a claim of negligence *simpliciter*.

Loss

167 I briefly comment on the parties' submissions on the loss that the Plaintiffs allegedly suffered as a result of DB's alleged negligence.

168 The Plaintiffs stated in its reply closing submissions at para 152 that "it cannot be seriously disputed that the Plaintiffs suffered [loss] as a result of [DB's] breach" and that this is "a matter of common sense". DB did dispute that the Plaintiffs suffered loss and the burden is on the Plaintiffs to prove that they did.

169 The Plaintiffs pleaded that all loss suffered as a result of DB's negligence amounted to US$282m.[235] This figure was derived by a broad brush approach in which the Plaintiffs simply took US$360m, being the assets injected

234 See 7AB 4655.

235 F&BP of SOC 27/04/15 at para 35.

by Pan into the Accounts from January 2007 to September 2008 (see [16] above), and subtracted US$78m, being the net value of the Plaintiffs' assets with DB by end October 2008.[236] As DB pointed out, the Plaintiffs' case would then have been that DB mismanaged the Plaintiffs' entire portfolio[237] from the time the assets were injected by Pan to end October 2008. Yet the Plaintiffs did not assert that they would not have entered into any transaction but for DB's alleged negligence.[238] As DB also submitted, some transactions would have resulted in profits for the Plaintiffs, and some of the Plaintiffs' losses would have been caused by transactions Pan himself wanted to enter into regardless of DB's advice or Pan's omission to accept such advice and by the unprecedented adverse market conditions at the material time.[239] Furthermore, some of the transactions would be caught by DB's time bar argument. While the Plaintiffs appeared to acknowledge this by saying that their claims were not for specific transactions entered into before 3 July 2008, their broad brush approach ignored this limitation.

170 The Plaintiffs even denied that some of their losses were caused by transactions Pan himself wanted to enter into and by the market conditions at the material time.[240] The Plaintiffs then submitted that in any case, these arguments on loss simply went to the issue of quantum. Such a submission only reinforces my finding that the Plaintiffs did not connect any allegation of breach of duty with causation of loss.

---

236 6AB 4469.

237 See Defendant's Closing Submissions at para 279.

238 See Defendant's Closing Submissions at para 285.

239 See Defendant's Closing Submissions at para 280.

240 See Plaintiffs' Reply Closing Submissions at para 154.

Issue of misrepresentation

171 I proceed to consider the Plaintiffs' claim for misrepresentation.

Summary of the parties' positions

172 The Plaintiffs pleaded that DB made the following two representations, which were false and on which they relied when entering into the 31 July 2008 Transactions:[241]

(a) the US$50m profit representation, which was made to Pan by Juan on 30 July 2008 and at the 31 July 2008 Meeting (see [39] and [41] above); and

(b) the US$19.26m FX profit representation, which was made to Pan by Kwok at the 31 July 2008 Meeting (see [42] above).

173 The Plaintiffs' misrepresentation claim rested on two bases. First, the Plaintiffs submitted that DB was liable to them for misrepresentation under s 2(1) of the Misrepresentation Act.[242] Second, the Plaintiffs pleaded that further and/or in the alternative, DB was liable to them for negligent misrepresentation, where DB owed the Plaintiffs a duty of care in tort to take reasonable care that the two representations were accurate, and it breached this duty of care.[243]

174 The Plaintiffs claimed all loss suffered as a result of the US$50m profit representation and the US$19.26m FX profit representation.[244] In this regard,

---

241 SOC at paras 54, 139.

242 See Plaintiffs' Closing Submissions at paras 334, 355.

243 SOC at paras 141–142.

244 See SOC at para 140.

the Plaintiffs submitted that they suffered a loss of US$31,889,600 from some of the 31 July 2008 Transactions, *ie*, at [44(a)] to [44(c)] and [44(e)] above. Further, the Plaintiffs pleaded that the Accounts would not have been in shortfall and/or have insufficient collateral up until 13 October 2008 if the Plaintiffs had not, *inter alia*, entered into the 31 July 2008 Transactions.[245]

175 On the other hand, DB denied that it was liable to the Plaintiffs for misrepresentation under s 2(1) of the Misrepresentation Act or for negligent misrepresentation.

176 As regards the US$50m profit representation, DB did not admit that it was made to Pan.[246] As regards the US$19.26m FX profit representation, DB admitted that the 31 July 2008 Slides which were shown to Pan contained the information that the Plaintiffs' profit, including unrealised profits, in respect of foreign exchange transactions was US$19,264,844.49 as at 31 July 2008 (see [43] above). DB also pleaded that even if the two representations were made, they were true and/or DB honestly believed them to be true.[247]

177 DB also pleaded that the 31 July 2008 Transactions were entered into pursuant to Pan's and/or his investment team's own assessment and/or decision, and not in reliance on any alleged representation.[248] Further, DB relied on various contract terms and pleaded that the Plaintiffs were estopped and precluded from saying that they had relied on the two alleged representations.[249]

---

245 SOC at para 144.

246 Defence at para 57.

247 See Defence at para 59.

248 Defence at para 62.

249 See Defence at paras 18(e), 29(g), 29(h), 30(a), 31(e), 32(a), 63.

178 As mentioned at [73] above, I will address this claim for misrepresentation first on the premise that there was no contract term which excluded or restricted DB's liability.

Decision

179 Since there are common elements between misrepresentation under s 2(1) of the Misrepresentation Act and negligent misrepresentation, I will consider them together.

180 Section 2(1) of the Misrepresentation Act states:

> **Damages for misrepresentation**
>
> **2.**—(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.
>
> …

181 Briefly, for DB to be liable to the Plaintiffs for misrepresentation under s 2(1) of the Misrepresentation Act or for negligent misrepresentation, the Plaintiffs needed to prove that:

(a) DB (via its employees) made the US$50m profit representation and the US$19.26m FX profit representation to the Plaintiffs (via Pan);

(b) both representations were false;

(c) both representations induced the Plaintiffs to enter into the 31 July 2008 Transactions; and

(d) as a result thereof the Plaintiffs suffered loss.

Whether DB made the two representations

182 As mentioned, the Plaintiffs pleaded that Juan made the US$50m profit representation to Pan first on 30 July 2008 and again at the 31 July 2008 Meeting. The Plaintiffs submitted that there did not appear to be anyone else who heard Juan make this representation other than Pan and (perhaps) Kwok; Juan and Kwok did not give any evidence to this court. The Plaintiffs also alleged that Kwok made the US$19.26m FX profit representation to Pan at the 31 July 2008 Meeting.

183 As regards the US$50m profit representation, the Plaintiffs' case rested on Pan's evidence and several telephone conversations subsequent to 31 July 2008 where he mentioned the representation to Juan who did not deny it.[250] The Plaintiffs further submitted that an adverse inference ought to be drawn from DB's failure to call Juan as a witness at the trial, pursuant to s 116 of the Evidence Act (Cap 97, 1997 Rev Ed), to the effect that she would have confirmed that she made the US$50m profit representation to Pan.[251]

184 On the other hand, DB submitted that if the US$50m profit representation were made at the 31 July 2008 Meeting, the other attendees, specifically Chang and Yim, would have been aware of it.[252] DB submitted that

---

250 See Plaintiffs' Closing Submissions at paras 297, 299, 305.

251 See Plaintiffs' Closing Submissions at paras 309, 315.

252 See Defendant's Closing Submissions at para 293.

it was also curious that neither Pan nor Chang ever sought to clarify how the alleged profit of US$50m was derived.[253] DB also argued that no adverse inference should be drawn from Juan's absence at the trial.

185 As regards the US$19.26m FX profit representation, the Plaintiffs in their closing submissions were content to rest their case on DB's admission that the 31 July 2008 Slides contained the information that the Plaintiffs' profit, including unrealised profits, in respect of foreign exchange transactions was US$19,264,844.49.[254]

186 I first consider Pan's evidence.

187 As mentioned at [41] above, Pan deposed in his AEIC that when Juan repeated the US$50m profit representation to him at the 31 July 2008 Meeting, he "recall[ed] exclaiming loudly that this was the best piece of news that [he] had heard in a while". However, Pan did not ask DB how this substantial profit was made, or even discuss this representation with Chang at the very least. Instead, Chang did not hear or know of the US$50m profit representation on 31 July 2008 even though she attended the same meeting. She deposed in her AEIC that she received a call during the meeting and was walking out of the meeting room when "[she] heard Mr Pan saying quite loudly that he had just heard the best piece of news that he had heard in a while".[255] Her evidence was that the earliest point at which she learnt that the Plaintiffs had earned a profit of US$50m was during the telephone conversation on 17 September 2008 at or

---

253 See Defendant's Closing Submissions at para 296.

254 See Plaintiffs' Closing Submissions at para 322; see also Plaintiffs' Reply Closing Submissions at paras 161–163.

255 Chang's affidavit at para 256.

around 10.11pm involving her, Pan and Juan.[256] It was recorded in the English translation of the transcript for this conversation as follows:[257]

> …
>
> [Pan]: … whatever it was, if you [Juan] have told me at that time, 1 or 2 months ago when I have earned 50 million, to immediately cash it out, of course, it is too (inaudible) to talk about this now.
>
> [Juan]: Yep.
>
> …

I will discuss this telephone conversation with the other telephone conversations raised by the Plaintiffs at [191] below.

188 It is difficult to believe that if the US$50m profit representation had been made, Pan did not bother asking for more information from DB or discussing it with Chang. After all, the US$50m profit was not a small sum even for someone of Pan's wealth. Such a representation would have caused surprise since, on the Plaintiffs' own case, they were not aware of such a profit.

189 Moreover, if the US$50m profit representation had been made, it seems likely that Pan would have ascertained from DB as to whether the US$50m profit included the US$19.26m profit in respect of foreign exchange transactions. Instead, Pan's evidence was inconsistent as to whether the US$50m profit representation and the US$19.26m FX profit representation were separate or not. The statement of claim suggested that the US$19.26m FX profit representation was a separate representation over and above the US$50m

---

256 See NEs 14/03/18 at p 15 lines 20–22, p 17 lines 16–25, p 18 lines 1–2.

257 See 58AB 45460–45461.

profit representation.[258] Pan's evidence in his AEIC also suggested the same.[259] However, when Pan was asked at trial whether the two representations were separate, he gave a different version that the US$19.26m FX profit representation was part of the US$50m profit representation.[260] Pan's oral evidence, which was inconsistent with the Plaintiffs' pleadings and his AEIC, called into question the credibility and/or reliability of Pan's account of the two representations.

190 Furthermore, Pan deposed in his AEIC that he recalled Kwok telling him that "the Plaintiffs had also made approximately USD 20 million from foreign exchange transactions" (see [42] above). He testified during cross-examination that DB did not explain how the US$20m was derived, and that DB did not show him the 31 July 2008 Slides.[261] However, apart from Pan's evidence, the 31 July 2008 Slides seem to be the only piece of evidence suggesting that the Plaintiffs' profit in respect of foreign exchange transactions was around US$19.26m. The Plaintiffs were also content to rest their case for the US$19.26m FX profit representation on the 31 July 2008 Slides. Where Pan testified that DB did not show him the 31 July 2008 Slides, or perhaps he could not recall his having seen them, his account of the two representations again lacked credibility and/or reliability.

191 I turn to consider the telephone conversations subsequent to 31 July 2008 as raised by the Plaintiffs. In the English translations of the transcripts for

---

258 See SOC at paras 52, 136.

259 See Pan's affidavit at paras 247, 252.

260 See NEs 07/03/18 at p 29 line 25, p 30 lines 1–11, p 32 lines 10–16.

261 See NEs 07/03/18 at p 34 lines 11–25, p 35 lines 1–12.

the telephone conversations involving Pan and Juan on 10 September 2008,[262] 17 September 2008 (referred to at [187] above),[263] 9 October 2008,[264] 21 July 2009[265] and 6 December 2010,[266] Pan made some reference to Juan having told him that the Plaintiffs earned US$50m. However, in all these transcripts, read in the light of their respective conversations, I find that whilst Juan did not deny Pan's statements, she did not affirm them either; she merely noted that Pan was making such allegations (even if her reply was recorded to be "Yep."; for a similar instance, see [22] above).

192 Pan's point in referring to the US$50m profit representation, on 17 September 2008 in particular, was that DB did not advise him to cash out. It is also important to note that in the subsequent telephone conversations on which the Plaintiffs relied, Pan did not accuse Juan of any misrepresentation. Neither did he say that he had entered into the 31 July 2008 Transactions because of the US$50m profit representation.

193 The Plaintiffs also submitted that during a telephone conversation involving Juan and Pan on 11 August 2008, less than two weeks after 30 July 2008 and 31 July 2008, Juan informed Pan that "[a]s seen from the account, due to the depreciation of the Australian Dollar and gold prices, what we have been earning previously had dropped by about 10 million", but added in reply to Pan that "we are still making profits now".[267] This was recorded in the English

---

262 See 58AB 44887.

263 See 58AB 45460–45461.

264 See 59AB 45722.

265 See 59AB 45972–45973, 46126.

266 See 59AB 46248–46250.

267 See 57AB 44494.

translation of the transcript for this telephone conversation. The Plaintiffs submitted this as further support that the US$50m profit representation was made just 11 or 12 days ago.[268] I find that this telephone conversation is equivocal as to whether the US$50m profit representation was made.

194 I turn to consider whether an adverse inference ought to be drawn from DB's failure to call Juan as a witness at the trial. In this regard, I mention first that I do not accept DB's submission that it was for the Plaintiffs to call Juan as a witness,[269] where Juan was DB's former employee and the then-Assistant Vice-President of the PWM division in DB HK.

195 Section 116 and its illustration (*g*) of the Evidence Act state:

> **Court may presume existence of certain fact**
>
> **116.** The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> *Illustrations*
>
> The court may presume —
>
> …
>
> (*g*) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;
>
> …

268 See Plaintiffs' Closing Submissions at para 320.

269 See Defendant's Closing Submissions at para 337.

196 In *Koh Bee Choo v Choo Chai Huah* [2007] SGCA 21, it was stated that for a court to draw an adverse inference, there must first be some substratum of evidence establishing a *prima facie* case against the person against whom the inference is to be drawn, and that person must have some particular access to the information he is said to be hiding (at [28]). It was also stated that the court's ability to draw an adverse inference does not and cannot displace a party's legal burden of proof (at [28]).

197 In *Surender Singh s/o Jagdish Singh and another (administrators of the estate of Narindar Kaur d/o Sarwan Singh, deceased) v Li Man Kay and others* [2010] 1 SLR 428, Lai Siu Chiu J held that it would not be appropriate to draw an adverse inference against a party from the failure to call a certain witness when that party had not deliberately omitted to call that individual or consciously concealed or held back evidence from the court (at [150]). Lai J held that in any event, the opposing counsel had failed to put to any of that party's witnesses in the course of cross-examination that the reason for that individual's absence was her potentially unfavourable testimony (at [150]).

198 Even if I were to find that the Plaintiffs have adduced some substratum of evidence establishing a *prima facie* case against DB that Juan made the US$50m profit representation, I find that this was not sufficient for this court to draw an adverse inference from DB's failure to call Juan as a witness. In this case, Juan had left the employ of DB in around 2012,[270] before the Plaintiffs even commenced this action. Furthermore, the Plaintiffs did not allege that Juan was resident in Singapore at all material times and that a subpoena could have been issued to compel her attendance as a witness.

---

[270] NEs 19/03/18 at p 10 lines 3–5.

199 Moreover, I find that in cross-examining Yim, the Plaintiffs' counsel had only asked him on Juan's role as a Relationship Manager and the following as to her absence in these proceedings:[271]

> Q. Why did Deutsche Bank not call Melanie Juan as a witness in this suit?
>
> A. We did. We asked her to do so.
>
> Q. Is it a written request?
>
> A. I believe it was a written request to -- by our lawyers and I also met up with her personally to ask her.
>
> Q. But she did not agree to come?
>
> A. She declined to come.
>
> Q. Why did she decline to come?
>
> A. She said she was afraid to come to court.
>
> Q. Let's move on to Mr Kwok. No, before that, did she explain why she's afraid to come to court?
>
> A. She said two things. She's currently working in another institution. She was afraid what this may happen and she was afraid of Mr Pan.
>
> Q. Let's move on to Mr Terry Kwok. …

Cross-examination of Yim on this point was also general in that the Plaintiffs' counsel did not suggest that DB had deliberately avoided calling Juan to give evidence as DB knew that her evidence would be adverse to it.

200 As such, I do not find it appropriate to draw an adverse inference against DB from its failure to call Juan as a witness. Even if an adverse inference were to be drawn against DB that Juan's evidence would have been unfavourable to it, I would not have found that such an adverse inference was specific to this point that Juan made the US$50m profit representation to Pan.

---

271 NEs 19/03/18 at p 10 lines 10–25.

201 In the circumstances, I find that the Plaintiffs have not proven that DB made the US$50m profit representation to them. Only in so far as the 31 July 2008 Slides contained the information that the Plaintiffs' profit in respect of foreign exchange transactions was US$19,264,844.49 do I accept that DB made the US$19.26m FX profit representation to the Plaintiffs.

Whether the two representations were false

202 However, if I had found that DB had made the US$50m profit representation to the Plaintiffs, I would have found that this representation was false. Although DB pleaded that this representation was true and/or DB honestly believed it to be true (see [176] above), it made no submissions in its closing submissions as to the veracity of this representation. This was in spite of the Plaintiffs' submission that according to their expert Campana, the Accounts were suffering a loss of US$37m on 31 July 2008.[272]

203 As for the US$19.26m FX profit representation, the Plaintiffs submitted that there was in fact a loss of around US$0.5m in respect of foreign exchange transactions as at 31 July 2008. First, there was a summation error in the spreadsheet in the 31 July 2008 Slides (see [43] above), and the grand total on the spreadsheet should have reflected a profit of around US$18.3m instead of US$19.26m (US$19,264,844.49).[273] DB's witnesses accepted during cross-examination that the summation error was made.

204 Nevertheless, the Plaintiffs' claim that the US$19.26m FX profit representation was false was not that a lesser profit of US$18.3m was made, but

---

272 See Plaintiffs' Closing Submissions at para 324; Campana's affidavit at p 93 para 5.13.

273 See Plaintiffs' Closing Submissions at para 331.

as mentioned, that there was instead a loss (of around US$0.5m) in respect of foreign exchange transactions.

205 In this regard, contrary to DB's submission,[274] I find that the Plaintiffs have shown that the US$19.26m FX profit representation was false. The Plaintiffs submitted that while the spreadsheet in the 31 July 2008 Slides stated that it was computing both realised and unrealised profits and losses for foreign exchange transactions, it failed to take into account that there was a mark-to-market loss of US$18.8m, when such loss constituted part of the unrealised losses.[275] If this mark-to-market loss had been taken into account, the spreadsheet should have reflected a net loss of around US$0.5m (*ie*, subtracting US$18.8m from the corrected value for profit of US$18.3m).[276] Since DB's expert Beloreshki himself testified that "[u]nrealised profit would *assume* a reference to a mark-to-market value" [emphasis added],[277] I find that the US$19.26m FX profit representation was false.

Whether the two representations induced the Plaintiffs to enter into the 31 July 2008 Transactions

206 However, given that the Plaintiffs' pleaded case was that they relied on both the US$50m profit representation and the US$19.26m FX profit representation when entering into the 31 July 2008 Transactions, the Plaintiffs' claim for misrepresentation necessarily fails since the Plaintiffs have not proven that DB made the US$50m profit representation to them.

---

274 See Defendant's Closing Submissions at paras 300–301.

275 See Plaintiffs' Closing Submissions at para 332.

276 See Plaintiffs' Closing Submissions at paras 331–332.

277 See Notes of Evidence of 16 March 2018 at p 55 lines 4–16.

207 I add that in Pan's telephone conversations with Juan subsequent to the alleged misrepresentations, he referred only to a US$50m profit representation but not to the US$19.26m (or US$20m) FX profit representation. Furthermore, as mentioned, he himself eventually said that the latter was part of the former.

208 The fact that Pan was also inconsistent as to whether the US$19.26m FX profit representation was in addition to or part of the US$50m profit representation showed that the US$19.26m FX profit representation did not play a real and substantial role in his mind when he decided to enter into the 31 July 2008 Transactions.

209 Accordingly, I find that DB was not liable to the Plaintiffs for misrepresentation under s 2(1) of the Misrepresentation Act or for negligent misrepresentation.

210 Nevertheless, I will also consider whether the US$50m profit representation had induced the Plaintiffs to enter into the 31 July 2008 Transactions, assuming that it had been made by DB to the Plaintiffs.

211 In *Fong Maun Yee and another v Yoong Weng Ho Robert* [1997] 1 SLR(R) 751 at [52], the Court of Appeal held that the negligent misrepresentation need not be the sole and decisive factor in inducing the representee to act and that it is sufficient if it played a real and substantial role in causing the representee to act to his detriment. The court may still find that the representee was induced by the misrepresentation if he relied partly on his own expertise and experience and partly on the misrepresentation (see *Jurong Town Corp v Wishing Star Ltd* [2005] 3 SLR(R) 283 at [116]–[117]; *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [20]).

212 The Plaintiffs submitted that Pan was impressed to hear the US$50m profit representation, and felt obliged to continue allowing DB to manage the Accounts, and so he agreed, without question, with DB's advice to enter into the 31 July 2008 Transactions.[278] The Plaintiffs submitted that Pan would not have entered into those transactions otherwise, if DB had told him that the Plaintiffs' portfolio was suffering a loss.[279]

213 On the other hand, DB submitted that the representation did not induce the Plaintiffs to enter into the 31 July 2008 Transactions, and made two main arguments. First, DB submitted that the Plaintiffs had entered into transactions under the Accounts similar to the 31 July 2008 Transactions both before and after 31 July 2008.[280] Second, DB submitted that Pan had entered into similar transactions with other banks both before and after 31 July 2008.[281]

214 As for the various transactions the Plaintiffs entered into on 31 July 2008 (see [44] above):

(a) The Trumpet: Where the Trumpet was five separate strangles which operated independently of each other, DB submitted that Pan had entered into a gold strangle earlier in July 2008 before 31 July 2008.[282] DB submitted that the Trumpet was just another case of Pan executing

278 See Plaintiffs' Closing Submissions at para 341.

279 See Plaintiffs' Closing Submissions at para 342.

280 See Defendant's Closing Submissions at para 310(a).

281 See Defendant's Closing Submissions at para 310(b).

282 See Defendant's Closing Submissions at para 313.

the same investment strategy, albeit with a different asset (AUD) instead of gold.[283]

(b) AUD and gold accumulators: DB submitted that 31 July 2008 was not the first time Pan bought AUD and gold accumulators under the Accounts,[284] although I note the Plaintiffs' submission that 31 July 2008 was the first time Pan bought an AUD accumulator since DB cautioned him of an overconcentration in AUD on 7 April 2008.[285] DB also submitted that Pan held long positions in AUD and gold accumulators with other banks both before and after 31 July 2008, including in August 2008.[286]

(c) Credit Derivative Transactions: The Plaintiffs submitted that 31 July 2008 was the first time Pan entered into the Credit Derivative Transactions under the Accounts.[287] However, the Credit Derivative Transactions had generated a profit, *ie*, no loss was suffered (see [44(d)] above).

(d) ROCAs linked to uranium companies: DB submitted that Pan had invested in such ROCAs before 31 July 2008.[288] DB also submitted that in a telephone conversation involving Pan and Juan on 11 July 2008,

---

283 See Defendant's Closing Submissions at para 316.

284 See Defendant's Closing Submissions at para 317.

285 See Plaintiffs' Reply Closing Submissions at para 176.

286 See Defendant's Closing Submissions at para 322; Beloreshki's affidavit at p 22 paras 50–51.

287 See Plaintiffs' Reply Closing Submissions at para 176.

288 See Defendant's Closing Submissions at para 321.

> Pan had specifically instructed Juan to look into how he could gain exposure to uranium companies.[289]

215 In my view, it is irrelevant whether the Plaintiffs had previously entered into transactions of a similar nature with DB or with other banks before 31 July 2008. The Plaintiffs' point was that they had entered into the 31 July 2008 Transactions not because they were unaware of the nature of the transactions (although this too was disputed in respect of the Trumpet[290]), but that they entered into them because of the US$50m profit representation.

216 The first problem for the Plaintiffs is the same one already mentioned, *ie*, that the Plaintiffs had initially proceeded on the basis that two representations had been made and that Pan relied solely on the two representations.

217 Since Pan had said in oral evidence that the US$19.26m FX profit representation was part of, and not in addition to, the US$50m profit representation, this would affect his credibility as to whether he then relied solely, or primarily, on the US$50m profit representation.

218 Furthermore, as canvassed at [188] above, if in fact Juan had actually said that the Plaintiffs had made US$50m profit (as at the date of the meeting), then Pan would have asked where this surprising profit came from and also discussed it with Chang, who was doing her own calculations. However, he did not.

---

289 See Defendant's Closing Submissions at paras 60, 320; 56AB 43738–43739 (telephone conversation on 11 July 2008 at or around 3.05pm).

290 See NEs 07/03/18 at p 53 lines 2–25.

219 I have found that Pan was not someone who blindly accepted what DB told him. The fact that he did not make any further inquiry about the US$50m profit suggested that he did not rely on it to enter into the 31 July 2008 Transactions.

220 In the circumstances, I would also have found that the Plaintiffs had failed to establish that the US$50m profit representation, if made, had induced them to enter into those transactions.

221 In the light of all my above findings, there is no need for me to elaborate as to whether it was necessary for the Plaintiffs to prove that DB intended to induce the Plaintiffs to enter into the 31 July 2008 Transactions by the two representations.[291]

Further comments

222 There is no need for me to consider the parties' remaining arguments on the claim for misrepresentation.

Issue of breach of contract by closing out positions through the 13 October 2008 Transactions

223 I proceed to consider the Plaintiffs' claim for breach of contract when DB closed out certain positions under the Accounts through the 13 October 2008 Transactions.

---

[291] See Plaintiffs' Closing Submissions at para 344; Defendant's Closing Submissions at para 324; Plaintiffs' Reply Closing Submissions at para 180.

Summary of the parties' positions

224 The Plaintiffs submitted that Pan did not authorise DB to close out positions under the Accounts on 13 October 2008 (see [67] above).[292] The Plaintiffs pleaded that DB had instead unilaterally closed out certain positions under the Accounts in breach of contract.[293] The Plaintiffs pleaded that DB had breached cl 2.6 of the Master Agreement (set out again at [238] below) by not giving them the requisite one business day's notice before closing out the positions through the 13 October 2008 Transactions.[294] The Plaintiffs thus claimed all loss suffered as a result of this alleged breach.[295]

225 On the other hand, DB denied that it had closed out the positions under the Accounts in breach of contract.[296] DB averred that the Accounts had been in shortfall and/or had insufficient collateral,[297] and on 13 October 2008, in view of the continuing shortfall, Pan expressly authorised DB to close out all positions required in order to reduce the shortfall.[298]

226 Further or in the alternative, DB submitted that it had not breached cl 2.6 of the Master Agreement because it had provided proper notice of the collateral shortfall in the Accounts,[299] and it was therefore entitled to close out certain positions even if Pan had not expressly authorised the close-out.

---

292 See Plaintiffs' Closing Submissions at para 108.

293 See SOC at para 122.

294 See SOC at para 121(b).

295 SOC at para 122.

296 Defence at para 112.

297 See Defence at para 99(a).

298 Defence at para 99(c).

299 See Defendant's Closing Submissions at para 121.

227 Further or in the alternative, DB relied on various contract terms and pleaded that it was in any event entitled to terminate and/or close out the outstanding transactions in the Accounts as the margin cover and/or the collateral value was inadequate, and/or the close-out ratios were reached.[300]

228 I mention that the Plaintiffs had also pleaded that DB had breached cl 2.6 of the Master Agreement by closing out positions under the Accounts when the Accounts were not in shortfall and/or had sufficient collateral.[301] In this regard, the Plaintiffs had pleaded that DB had failed to give any value to their BOE Technology Group Co Ltd shares, Creed Corporation shares, 400,000 Allianz preferred shares and 200,000 ING preferred shares. However, in their closing submissions, the Plaintiffs did not pursue these points. After DB submitted in its closing submissions at para 127 that the Plaintiffs appeared to have abandoned their position that the Accounts were not in shortfall on 13 October 2008, the Plaintiffs also did not reply to this point in their reply submissions. I will thus proceed on the premise that the Plaintiffs have accepted that the Accounts were in fact in shortfall and/or had insufficient collateral on 13 October 2008.

Decision

Whether Pan authorised the closing out of positions on 13 October 2008

229 I first consider whether Pan authorised DB to close out positions under the Accounts on 13 October 2008.

---

300 See Defence at para 99(e); Defendant's Closing Submissions at para 157.

301 See SOC at para 121(a).

230 The parties essentially disputed as to whether Pan had given such authorisation in a telephone conversation on 13 October 2008 at or around 1.59pm involving Pan and Sze (see [67] above). The duration of the conversation was just over three minutes, and the conversation was conducted in Mandarin and Cantonese, interspersed with some English words. I set out at length the relevant portions of the English translation of the transcript for this conversation, and I have underlined the words which were spoken in English during the conversation:[302]

…

[Sze]: Er, Mr Pan, good afternoon, how are you?

…

[Pan]: ---I don't wish you guys to give us any more <u>margin call</u>. You guys think how (you) want to come out, *we come and make a final decision*, don't every day what should come out didn't come out; what should be done is not done.

[Sze]: (I) know.

[Pan]: Then again I don't have any money to use. Everyday it seems I have <u>margin call</u> again.

[Sze]: <u>Okay</u>.

[Pan]: Is that alright?

[Sze]: Okay.

[Pan]: At the very least, like you tell me, eh, you guys---(inaudible) like we originally have about more than 300 million, isn't it? 360 million, then now you say it's only left with 140 million. Is that correct?

[Sze]: Er---

[Pan]: This is not untrue, isn't that right?

[Sze]: Er---

---

302 59AB 45770–45774.

[Pan]: Then now you want margin call again. So, you are still left with how much now? Then we have---have this figure. *You guys as a team come and take charge of it.*

[Sze]: Ah.

[Pan]: Don't everyday come---come and tell me at the last minute. I also don't know what should be done.

[Sze]: So, Mr Pan, since you say we will---*our team will discuss about it again, the things that need to be close out will be close out*---

[Pan]: That's right.

[Sze]: ---and not everyday drag on---drag on.

[Pan]: That's right, that's right. Everyday keep dragging---dragging on, until the head aches.

…

[Pan]: … Everyday telling me, telephoning me to say you have margin call now.

…

[Sze]: There is something else, Mr Pan, because I---I don't know if Melanie [Juan] has given you a figure because up till last Friday we---because the market is still dropping, so now it's only about 70 million plus.

…

[Sze]: Okay, we will calculate it again and at the same time, *we will determine what we will close out now, that is, which position to close out.*

[Pan]: Correct.

…

[Sze]: Okay, (I) know. We will---*we will get in touch with you by phone in about two hours' time*, okay?

[Pan]: Okay. …

…

[emphasis added]

231 In relation to the line by Sze, "we will *determine* what we will close out now" [emphasis added], Sze testified that the word "determine" was translated from the Chinese equivalent for "confirm" (*ie*, "*que ding*", and not "*jue ding*").[303]

232 The Plaintiffs submitted that during the telephone conversation, Pan had asked Sze to consider which positions Pan had to close out and get back to Pan for a final decision.[304] The Plaintiffs submitted that Pan did not authorise Sze to close out any positions in the Plaintiffs' portfolio. On the other hand, DB contended that Pan had expressly authorised DB to close out positions on 13 October 2008.[305]

233 I find that during the telephone conversation, Pan did not authorise DB to close out the positions on 13 October 2008, *ie*, enter into the 13 October 2008 Transactions. I agree with the Plaintiffs' submission that Pan had asked Sze to get back to Pan for a final decision as to which positions to close out. Pan said as much when he said at the beginning of this conversation, "You guys think how (you) want to come out, *we* come and make a final decision" [emphasis added]. Pan's later statement, "You guys as a team come and take charge of it", should be understood bearing in mind his first statement.

234 I find that Sze's references to his team discussing the matter, determining or confirming which positions to close out and getting back to Pan in about two hours' time suggested that Sze was going to get back to Pan with

---

303 NEs 22/03/18 at p 109 lines 20–25, p 110 lines 1–2.

304 Plaintiffs' Closing Submissions at para 112.

305 Defendant's Closing Submissions at para 115.

the team's view and discuss with Pan so that Pan would at least have his say before DB made a final decision as to which outstanding positions to close out.

235 I also do not find that the other arguments of DB assist DB much. DB submitted that Pan testified that he would have allowed DB to close out the positions under the Accounts if he had understood that there was a margin call.[306] In respect of this submission, even if Pan in fact knew that there was a margin call and even if he would have allowed DB to close out some positions, this did not mean that he did in fact authorise any closing out on 13 October 2008.

236 DB also argued that Pan's conduct in continuing to trade under the Accounts after the Plaintiffs were informed about the close-out on 13 October 2008 was entirely inconsistent with the conduct of a customer who claimed that he had been aggrieved by a bank which had acted without his authority.[307] I do not place much weight on this submission. There was evidence from Pan that he had complained to Raju on 14 November 2008 that he had not authorised the close-out on 13 October 2008,[308] and Raju did respond to his complaint by a letter dated 1 December 2008, although this was to state DB's position.[309] So Pan's conduct in continuing to trade under the Accounts did not necessarily mean that he was wrong about the absence of express authorisation from him.

---

306 Defendant's Closing Submissions at para 119.

307 See Defendant's Closing Submissions at para 120.

308 See Pan's affidavit at paras 392–393.

309 See 6AB 4203–4207.

Whether DB breached cl 2.6 of the Master Agreement

237 I proceed to consider whether DB gave the requisite notice under cl 2.6 of the Master Agreement before closing out the positions under the Accounts through the 13 October 2008 Transactions.

238 I reproduce the relevant portion of cl 2.6 of the Master Agreement (which was earlier set out at [97] above):[310]

> 2.6 … Such margin or collateral requirements may be notified by the Bank to the Counterparty *in writing or verbally*. If the Bank shall for any reason deem that there is insufficient collateral held … *the Counterparty shall within one business day's notice thereof deliver additional collateral of a type acceptable to the Bank* in its sole discretion … in an amount as may be required by the Bank. … For the avoidance of doubt, *if the Counterparty fails to deliver such additional collateral, such failure shall constitute an Event of Default* in respect of the Counterparty pursuant to Clause 5 below and *the Bank may proceed to terminate some or all of the Transactions at its discretion pursuant to Clause 5 without further notice to the Counterparty* other than the notice of termination to be provided under Clause 5.4. [emphasis added]

239 The requisite notice under cl 2.6 was one business day for the Plaintiffs to deliver additional collateral to DB, and this notice to deliver additional collateral was otherwise known as a "margin call". The parties did not seem to dispute that DB could make a margin call "in writing or verbally".[311]

240 As to whether DB gave the requisite notice under cl 2.6, there were essentially three margin call letters and the related events surrounding these

---

310 7AB 4606–4607.

311 See Defendant's Closing Submissions at para 135; Plaintiffs' Closing Submissions at para 127.

letters to consider. The three margin call letters were: a 17 September 2008 Margin Call Letter, a 3 October 2008 Margin Call Letter and a 6 October 2008 Margin Call Letter. Although there were some differences in content between the first two letters and the third letter, the Plaintiffs did not dispute that all three letters were in the nature of margin calls (unlike in *Lam Chi Kin David v Deutsche Bank AG* [2011] 1 SLR 800 ("*Lam Chi Kin David*") at [19]–[20]). This was so even though one of their experts, Walford, drew a distinction in his report between a margin call and a situation where a bank informs a client of a collateral shortfall without specifying the value of the additional collateral to deliver and the time period within which the client must deliver the additional collateral.[312] I will consider the three letters in turn.

241 I mention one other point first, having set out cl 2.6. I note that the parties did not plead or submit on the "notice of termination to be provided under Clause 5.4", referred to at the end of cl 2.6. Since there was no pleading or submission about it, I will proceed on the basis that it was not in issue between the parties.

(1) 17 September 2008 Margin Call Letter

242 There was some dispute between the parties as to whether DB communicated the contents of the 17 September 2008 Margin Call Letter to the Plaintiffs during the 18 September 2008 Meeting (see [53] and [55] above).

243 However, I find that, in any event, the 17 September 2008 Margin Call Letter and/or any communication of its contents would not constitute the

---

312 See Plaintiffs' Closing Submissions at paras 126–127; Walford's affidavit dated 31 January 2018 at p 55 paras 9.126–9.127.

requisite notice under cl 2.6 of the Master Agreement. There did not seem to be a dispute between the parties that any collateral shortfall which was the subject of the 17 September 2008 Margin Call Letter was rectified a few days later.[313] Yim and Sze had agreed in cross-examination that the collateral shortfall was rectified a few days later (like as at 25 September 2008).[314]

(2) 3 October 2008 Margin Call Letter

244 The 3 October 2008 Margin Call Letter was contained in the attachment of the 3 October 2008 E-mail which Juan sent Chang on 3 October 2008 at or around 9.56pm (see [56] and [58] above). DB also pleaded that at the 3 October 2008 Meeting when Juan met Chang at Pan's office in Taipei, Juan discussed the contents of the 3 October 2008 Margin Call Letter with Chang (see [59] above).

245 As mentioned at [58] above, the 3 October 2008 Margin Call Letter stated that there was a current shortfall of US$8,950,765.73 between the collateral value and the total exposure, and accordingly, DB requested that Zillion take immediate steps to restore the shortfall by 6 October 2008, by either providing additional security or reducing the total exposure. DB added that during the interim period when the shortfall was outstanding, it reserved its rights under the contracts, including the right to liquidate any part or the whole of the collateral without prior notice and the right to terminate the facility.

---

313 See Defendant's Closing Submissions at para 134.

314 See Plaintiffs' Closing Submissions at para 133; NEs 20/03/18 at p 68 lines 5–9; NEs 22/03/18 at p 67 lines 24–25, p 68.

246 As regards the pleadings in relation to the 3 October 2008 Margin Call Letter, the Plaintiffs pleaded in their statement of claim that DB neither sent the 3 October 2008 Margin Call Letter nor communicated its contents to the Plaintiffs themselves on 3 October 2008 or at all.[315] DB pleaded in its defence that the Plaintiffs were aware of the 3 October 2008 Margin Call Letter as DB's representatives had communicated its contents to Chang in person at the 3 October 2008 Meeting as well as over the telephone on 3 October 2008.[316] To this pleading, the Plaintiffs in its reply only joined issue with DB, without any elaboration.[317]

247 It was in Chang's AEIC that she deposed that she had "no authority" under the Accounts and that Juan should have sent the 3 October 2008 Margin Call Letter directly to Pan.[318] It was in Pan's AEIC that he deposed that DB only gave him a copy of this letter after 13 October 2008.[319]

248 As regards the parties' closing submissions, DB submitted that it was proper for it to inform the Plaintiffs of the 3 October 2008 Margin Call Letter by sending a copy of it to Chang instead of to Pan.[320] DB argued that Pan had intimated by his conduct that Chang was authorised to discuss all matters relating to the Accounts with DB,[321] although Chang was not authorised to make any decision as to which transaction to enter into. DB cited the High Court case

---

315 See SOC at para 98.

316 See Defence at paras 93, 93(e).

317 See Reply at para 56.

318 See Chang's affidavit at para 406.

319 See Pan's affidavit at para 351.

320 See Defendant's Closing Submissions at para 143.

321 See Defendant's Closing Submissions at para 141.

of *Goldrich Venture Pte Ltd and another v Halcyon Offshore Pte Ltd* [2015] 3 SLR 990 at [55] for a proposition about ostensible authority (also known as apparent authority) arising where there has been a representation by the conduct of a principal. DB submitted that Pan had never raised any issues or restrictions on the matters/information that Chang could discuss with or obtain from DB.[322] DB contended that Chang also did not previously take the position that she had no authority to communicate with DB on the collateral or margin position of the Accounts.[323]

249 On the other hand, the Plaintiffs submitted that sending a copy of the 3 October 2008 Margin Call Letter to Chang did not mean that it was sent to the Plaintiffs because DB needed specific authorisation from Pan before it could send such account-related information to Chang, and there was no such authorisation.[324] Based on the contractual documents, Chang was not named as an authorised signatory of any of the Accounts.[325] The authorised signatory was either Pan (singly) or his two sons (jointly).[326]

250 As a preliminary point, I do not place much weight on Exhibit P6 which is the English translation of a letter from Pan addressed to DB dated 28 April 2009, which had been typewritten in Chinese requesting DB to send account-related information to Chang.[327] The Plaintiffs raised this letter as an example of how DB required such specific authorisation from Pan before it could send

---

322 See Defendant's Closing Submissions at para 139.

323 See Defendant's Closing Submissions at para 138(c)(iv).

324 See Plaintiffs' Closing Submissions at paras 142–144.

325 See 7AB 4486, 4510, 4598, 4616.

326 See also Pan's affidavit at paras 63, 123.

327 See also 6AB 4345.

account-related information to Chang.[328] Whether or not it was DB that required this letter before sending such information to Chang, this letter was sent some months after the close-out on 13 October 2008. The letter is thus equivocal as to whether DB could send account-related information to Chang before 13 October 2008, because the letter could instead show that the parties were being more careful as to how account-related information was being conveyed after 13 October 2008.

251 On the concept of ostensible authority, the Court of Appeal in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [48] cited with approval Lord Keith of Kinkel's explanation in *Armagas Ltd v Mundogas SA (The "Ocean Frost")* [1986] 2 Lloyd's Rep 109 at 112 as follows:

> … Ostensible authority comes about where the principal, by words or *conduct*, has *represented* that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him *in reliance on that representation*. The principle in these circumstances is *estoppel* from denying that actual authority existed. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has *placed the agent in a position which in the outside world* is generally regarded as carrying authority to enter into transactions of the kind in question. Ostensible general authority may also arise where the agent has had *a course of dealing with a particular contractor and the principal has acquiesced* in this course of dealing and honoured transactions arising out of it. … [emphasis added]

The Court of Appeal in *Guy Neale and others v Ku De Ta SG Pte Ltd* [2015] 4 SLR 283 ("*Guy Neale*") stated that the question of apparent authority is a question of mixed fact and law, and it is thus important to "analyse the facts to ascertain what exactly the alleged representation is" (at [98]).

---

328 See Plaintiffs' Closing Submissions at para 144.

252 I note also that the Court of Appeal in *Guy Neale* analysed the doctrine of ostensible authority as an instance of estoppel (at [95]–[97]). In the subsequent case of *The "Bunga Melati 5"* [2016] 2 SLR 1114, the Court of Appeal noted its decision in *Guy Neale*, and did not think it necessary on the facts of the case before it to decide whether there is a real difference between the doctrines of ostensible authority and of agency by estoppel (at [12]). Neither is it necessary for me to consider whether there is any such difference on the facts in the present case.

253 Yim gave evidence as to how DB was to issue a margin call to Pan. I set out Yim's evidence during cross-examination:[329]

> Q. Were you the one who instructed Ms Juan to send the letter via email?
>
> A. No. The -- the instruction was for the RM [Relationship Manager] *to send the margin call letters to the clients.*
>
> Q. *So it wasn't your instruction as well for Ms Juan to actually send the margin call letter to Grace Chang?*
>
> A. *Not that I was aware of.*
>
> Q. So that was a decision which Ms Melanie Juan made herself?
>
> A. I don't know.
>
> Q. Would you agree with me, and I think you probably would given your evidence earlier, that the 3 October margin call letter should have been sent to Mr Pan?
>
> A. *I would agree that that would have followed up to send to Mr Pan*, but I think margin calls are verbal as well as letter. But, yes, if you ask me in hindsight would I have copied -- would we better copy everyone else, the answer is yes.
>
> Q. You referred to verbal communications.
>
> A. Yes.

---

329 NEs 20/03/18 at p 71 lines 8–25, p 72 lines 1–21.

> Q. I'm going to suggest to you that even if Deutsche Bank wanted to make a verbal margin call, that should have been done to Mr Pan directly. Would you agree with me?
>
> A. *I would agree with you that Mr Pan needed to know that was his case.*
>
> Q. Yes, *because he's the authorised person under the plaintiffs' account*, right, Mr Yim?
>
> A. *Yes, he is.*
>
> Q. *Ms Grace Chang*, I think we have gone through this yesterday, *does not have any authority under the accounts*, right, Mr Yim?
>
> A. *That is the understanding you have shown me.*
>
> Q. *I don't believe that Mr Pan had given the bank any express authorisation to send the 3 October 2008 margin call letter to Ms Chang*, right, Mr Yim?
>
> A. *That is correct* although Grace has been -- was involved all the way, but you are right from that perspective there was -- *not that I know of from an explicit written letter.*
>
> [emphasis added]

Yim testified that Pan was the authorised person named under the Accounts and Yim did not dispute that, as such, Chang did not have any authority under the Accounts. However, this did not answer the question as to whether or not Chang had *ostensible* authority to receive a margin call from DB on behalf of the Plaintiffs.

254 In this case, as mentioned at [36] above, Chang was the main gatekeeper for the Accounts. There was frequent communication in the past between Chang and DB on various matters pertaining to the Accounts including the discussion of the collateral position of the Accounts. Chang agreed during cross-examination that she would convey to Pan what DB told her about insufficient

collateral from August 2008 to October 2008.[330] In this regard, Pan was aware that DB was conveying information about insufficient collateral to Chang, and that Chang was in turn conveying such information to him. In Pan's AEIC at para 354, he said that he did not recall Juan informing him of any collateral shortfall (on 3 October 2008). Instead, he heard about the shortfall from Chang. Significantly, at that time, he did not protest to DB to say that such information should have been given to him directly instead of to Chang.

255 In the circumstances, I find that Pan represented, at least by his conduct, that Chang had the requisite authority to receive a margin call from DB on behalf of the Plaintiffs, and that DB relied upon this representation in sending her a copy of the 3 October 2008 Margin Call Letter. This representation was made by Pan acquiescing, and not objecting, to the course of dealing where DB had discussions with Chang on virtually all matters pertaining to the Accounts, including on the collateral position of the Accounts. I thus find that Chang had ostensible authority to receive a margin call from DB. In the light of this, I find that the Plaintiffs were estopped from asserting that Chang was not authorised to receive a margin call from DB.

256 Where the 3 October 2008 E-mail and its attachment, *ie*, the 3 October 2008 Margin Call Letter, were sent to Chang, I find that DB had given the requisite notice under cl 2.6 of the Master Agreement. This is in spite of the Plaintiffs' submission that Chang could not understand the contents of the e-mail and the letter because they were in English.[331] Most, if not all, of the written communication from DB's employees to Chang were in English.[332]

---

330 See NEs 13/03/18 at p 48 lines 10–15.

331 See SOC at para 96; Plaintiffs' Closing Submissions at para 149.

257 Chang said that she did not open the 3 October 2008 E-mail until 5 October 2008. She also said that she did not understand the contents of the e-mail and its attachment and that when she asked Juan about them, Juan said that she herself did not know their contents because she had not read the e-mail. Chang said that Juan told her the e-mail was not important since they were going to meet the next day, *ie*, on 6 October 2008.[333]

258 I do not accept that Chang only opened the 3 October 2008 E-mail on 5 October 2008, even though 3 October 2008 was a Friday and the e-mail was sent late that night. This was a tense time for financial institutions and investors. Chang said that Juan had informed her that she (Juan) had e-mailed her a document when they met that night, *ie*, the 3 October 2008 Meeting. Chang would have opened the e-mail by the next day, *ie*, 4 October 2008.

259 During cross-examination, Tsang raised two telephone conversations that took place on 4 October 2008 between him, Juan and Chang at or around 11.04pm and 11.37pm respectively,[334] to show that they were discussing how to tell Pan at the 6 October 2008 Meeting about the issue of a margin call.[335] Of note is what Juan said during the telephone conversation at or around 11.37pm, as recorded in the English translation of the relevant transcript (the words which were spoken in English are underlined):[336]

> [Juan]: … <u>Grace</u>, I---I feel that I will still tell him, that is, 'Mr Pan,' I still want to tell him about 'the pressure

---

332 See NEs 14/03/18 at p 45 lines 4–25.

333 See Chang's affidavit at para 404.

334 See 59AB 45593–45621; 59AB 45622–45632.

335 See NEs 21/03/18 at pp 128–140; Tsang's affidavit at para 84.

336 59AB 45628–45629.

> of this margin call,' and also 'your---your liabilities are like this.' I feel that I will definitely---I will definitely mention (it) …

260 Furthermore, whether Chang had opened the 3 October 2008 E-mail and its attachment on 4 October 2008 or on 5 October 2008, I do not accept that Juan told Chang that Juan herself did not know the contents of the attachment because she had not read the e-mail. Juan must have known the contents and their importance. She had been told to make a margin call (see [57] above) and she took the trouble to send the e-mail and its attachment at a late hour on 3 October 2008.

261 In my view, Chang had understood the contents of the e-mail and its attachment either from Juan or one of Chang's own colleagues or she could read enough English to understand them. She was preparing for Pan's meeting with DB on 6 October 2008, as evidenced by the telephone conversations on 4 October 2008, so that even if she learnt of the e-mail and its attachment only on 5 October 2008, she would have ensured that she understood their contents by 6 October 2008.

262 I note also that Chang deposed in her AEIC that she told Juan during the telephone conversation on 4 October 2008 at or around 11.04pm that Juan should be discussing the margin issues with Pan directly.[337] In my view, Chang was uncomfortable in relaying the margin call from DB to Pan directly, but this did not mean that she did not have ostensible authority to receive the margin call from DB on behalf of the Plaintiffs. As mentioned, where the 3 October 2008 E-mail and its attachment, *ie*, the 3 October 2008 Margin Call Letter, were sent to Chang, DB had given the requisite notice under cl 2.6 of the Master

---

337 See Chang's affidavit at para 418.

Agreement (see [256] above), regardless of whether Chang subsequently relayed the margin call to Pan. In any case, where Chang informed Pan of the collateral shortfall in the Accounts on 3 October 2008 prior to the 6 October 2008 Meeting (see [254] above), I am of the view that she would have also relayed the margin call from DB to Pan, and that she would not have confined her discussion with Pan to just merely informing him about a collateral shortfall.

(3) 6 October 2008 Margin Call Letter

263 I proceed to consider the 6 October 2008 Margin Call Letter. DB pleaded that during the 6 October 2008 Meeting, it had issued to the Plaintiffs that letter. DB's case was that the letter was handed to Pan at the 6 October 2008 Meeting, and that it had also informed Pan of the shortfall in the Accounts (see [63] above). On the other hand, the Plaintiffs submitted that DB neither gave a copy of the 6 October 2008 Margin Call Letter nor communicated its contents to Pan until after 13 October 2008 (see [65] above). The Plaintiffs submitted that there was no mention of such a letter during the 6 October 2008 Meeting.

264 In this regard, the parties sought to adduce evidence, including circumstantial evidence, to prove that Pan was or was not handed the 6 October 2008 Margin Call Letter, and relatedly whether he was or was not aware of this margin call.

265 As mentioned, the attendees at the 6 October 2008 Meeting included Pan, Chang and Chen, and, from DB, Juan, Tsang, Yim, Sze and Chiu (see [62] above).

266 I first consider the evidence from the employees of DB who were present at the 6 October 2008 Meeting. Juan was not a witness in these proceedings. Tsang did not give any evidence as to whether a copy of the 6 October 2008

Margin Call Letter was provided to Pan.[338] Yim deposed in his AEIC that the collateral shortfall in the Accounts was communicated to Pan although Yim could not specifically recall if a copy of the 6 October 2008 Margin Call Letter was provided to Pan.[339]

267 Sze was the only employee of DB who gave more detailed evidence in relation to the 6 October 2008 Margin Call Letter. I set out Sze's evidence during cross-examination:[340]

> A. … But the point was, before going into the door -- okay, glass door of that meeting, I told Ms Juan, 'We need to -- you need to present physically the letter to Mr Pan.' Because in the meeting, *Dennis [Chiu] was there*. He -- *he came from credit risk management department.* In this meeting, *he was the policeman to make sure that we do that.* So I have this very clear memory.
>
> Q. Your evidence is you told Ms Juan before you entered the glass door to give that letter?
>
> A. To remind her.
>
> …
>
> Q. But did you see her physically give the letter to Mr Pan during the meeting?
>
> A. I do not recall. But it should happen like that.
>
> Q. Mr Sze, I'm just asking – it's either you do not recall or it happened. So is it you do not recall or did you really see Ms Juan give that letter to Mr Pan?
>
> A. I do not recall it happened.
>
> …
>
> Q. So do you want to change your evidence at paragraph 52 [of your AEIC] when you say 'at the meeting, Melanie

338 Tsang's affidavit at para 86.

339 Yim's affidavit at para 66.

340 NEs 22/03/18 at p 85 line 25, p 86 lines 1–19, p 87 lines 24–25, p 88 lines 1–8.

> [Juan] provided Mr Pan with the 6 October 2008 margin call letter'?
>
> A. I would say I would change -- I believe Melanie provided.
>
> Q. So it's:
>
> *'I believe Melanie provided Mr Pan with the 6 October 2008 margin call letter.'*
>
> Right?
>
> A. Yes.
>
> [emphasis added]

268 The Plaintiffs submitted that if the fact that Juan had to present the 6 October 2008 Margin Call Letter to Pan at the meeting was weighing on Sze's mind, he must have taken note and would have remembered if Juan physically gave a copy of the letter to Pan.[341]

269 As for Chiu, despite being the "policeman" to make sure that Pan was handed the 6 October 2008 Margin Call Letter, Chiu deposed in his AEIC that he did not have any specific recollection of the 6 October 2008 Meeting.[342] He also deposed that in October 2008, he was attending to margin call issues of other customers as well.[343] Chiu was not cross-examined on these matters in his AEIC.

270 I find that the evidence from the employees of DB of the 6 October 2008 Meeting does not assist DB in proving that Pan was handed the 6 October 2008 Margin Call Letter.

---

341 See Plaintiffs' Closing Submissions at para 163.

342 Chiu's affidavit dated 12 January 2018 ("Chiu's affidavit") at para 42.

343 Chiu's affidavit at para 42.

271 Next, I note that the call report for the 6 October 2008 Meeting which was logged by Juan on 15 October 2008 did not state that Juan had handed Pan the 6 October 2008 Margin Call Letter during the meeting.[344] While the omission to state this in the call report does not necessarily mean that Juan had omitted to hand Pan the letter, the omission to state so in the call report does not assist DB in proving that Pan was handed the letter.

272 I proceed to consider the communications between the Plaintiffs and DB after 6 October 2008.

273 On 8 October 2008, there was a telephone conversation at or around 7.52pm between Chang and Juan.[345] The duration of the conversation was over 17 minutes, and the conversation was conducted in Mandarin, interspersed with some English words. I reproduce a portion of the English translation of the transcript for this conversation, and have underlined the words which were spoken in English during the conversation:[346]

> …
>
> [Juan]: But, Grace, frankly speaking, it has already reached this situation already, actually---actually *the bank* it will---it *will really close out everything.*
>
> [Chang]: Will everything what?
>
> [Juan]: Will close out all the positions.
>
> [Chang]: Will close out all the positions?
>
> [Juan]: Mm, because *the margin call*, the shortfall, the feeling is it is endless.
>
> [Chang]: Correct.

---

344 See Plaintiffs' Closing Submissions at para 159; 55AB 42223.

345 See 59AB 45652–45667.

346 59AB 45661.

…

[emphasis added]

274 On 9 October 2008, there was a telephone conversation at or around 11.27am between Chang, Juan, Sze and another DB employee.[347] The duration of the conversation was over 12 minutes, and the conversation was conducted in Mandarin, interspersed with some English words. I reproduce a portion of the English translation of the transcript for this conversation, and have underlined the words which were spoken in English during the conversation:[348]

…

[Juan]: Er, Grace, actually *we want to close out* at the same time is also to protect Mr Pan's asset, but at the same time *is also because of margin call*.

[Chang]: I always felt---

[Juan]: Okay---so I say cannot---we cannot keep telling Mr Pan that it's because of margin call then we have to do in this way, but actually this is---it is equivalent to we---

(Speakers speaking simultaneously)

[Chang]: Correct, it is not wrong, I know, I know your (plural) margin call, but Mr Pan always felt that margin call has been brought up a long time ago. Within a period of time you can do it also, you don't have to wait until the last day margin call when it must be done then do it.

[Juan]: Mm.

…

[Sze]: … Grace, I---I know Mr Pan is very angry with this margin call problem.

[Chang]: Ah.

[Sze]: But today our margin call (inaudible) is very serious.

---

347 See 59AB 45693–45705.

348 59AB 45697, 45699.

> …
>
> [Chang]: You must face this problem.
>
> [Sze]: ---all of us have pressure, management asked us to tell Mr Pan if he could *close out* the accumulator first.
>
> [Chang]: Mm.
>
> …
>
> [emphasis added]

275 Through these two telephone conversations between Chang and DB's employees on 8 October 2008 and 9 October 2008, it can be seen that they were discussing the issue of a *margin call* and the question of DB *closing out* positions under the Accounts.

276 I then consider again the telephone conversation on 13 October 2008 at or around 1.59pm involving Pan and Sze, which was set out at [230] above. As DB submitted, Pan had used the words "margin call" in English at four points during the telephone conversation (which was conducted mainly in Mandarin and Cantonese), as follows:[349]

> (a) "I don't wish you guys to give us any more margin call. You guys think how (you) want to come out, we come and make a final decision …"
>
> (b) "Then again I don't have any money to use. Everyday it seems I have margin call again."
>
> (c) "Then now you want margin call again."

---

349 See Defendant's Closing Submissions at paras 136, 155(e).

(d) "Everyday telling me, telephoning me to say you have margin call now."

I reproduce also two of Sze's replies during this conversation:

(a) "… our team will discuss about it again, the things that need to be *close out* will be close out …" [emphasis added].

(b) "… we will determine what we will *close out* now, that is, which position to close out" [emphasis added].

277 With respect to this telephone conversation, Pan testified that he understood "margin calls" to mean "insufficient assets",[350] and Chang testified that she and Pan understood a "margin call" to mean that the Plaintiffs were "short of money".[351] The Plaintiffs submitted that Pan could not have been using "margin call" in the "formal sense", because it was not even DB's case that it made margin calls in the formal sense every day, but only that there was a collateral shortfall every day from 3 October 2008 to 13 October 2008.[352]

278 I do not accept that Pan understood "margin calls" to only mean "insufficient assets", and I do not accept that Pan was ignorant in that a "margin call" meant a notice to deliver additional collateral only. The fact that Pan used the words "margin call" in English, when the telephone conversation was conducted mainly in Mandarin and Cantonese, suggested that Pan was comfortable with the English words "margin call" and that he understood the

---

350 See Pan's affidavit at para 374; NEs 07/03/18 at p 73 lines 3–25, p 74 lines 1–15.

351 NEs 14/03/18 at p 11 lines 4–7, p 26 lines 19–25, p 27 line 1.

352 See Plaintiffs' Reply Closing Submissions at para 76.

meaning they carried. This is unsurprising as he was an experienced investor. I also note that Chang in her AEIC deposed that during a telephone conversation on 8 August 2008, some two months before 13 October 2008, she told Juan that "[Pan] wants to tell me [Chang] what a margin call is".[353]

279 Sze's replies on closing out positions under the Accounts were also consistent with the consequence of a margin call if further collateral were not provided. Pan did not express surprise at Sze's replies, and in fact, Pan expected such a response; he had asked Sze to get back to him for a final decision as to which positions to close out (see [233] above).

280 Sze's replies must also be considered against the backdrop of the prior telephone conversations between Chang and DB's employees on 4 October 2008, 8 October 2008 and 9 October 2008. Whilst Pan was not involved in these conversations, these conversations show consistency in how DB discussed the issue of *margin call* across the telephone conversations on 4 October 2008, 8 October 2008, 9 October 2008 and 13 October 2008. DB's consistency, in discussing the issue of margin call with the closing out of positions under the Accounts, makes it difficult for me to believe that Pan was ignorant of the consequence of a margin call and only thought "margin calls" to mean "insufficient assets" without the need for the Plaintiffs to undertake any steps.

281 Therefore, whilst the telephone conversation on 13 October 2008 did not expressly mention or refer to the 6 October 2008 Margin Call Letter or any other margin call letter, Pan's reference to "margin call" must have been to a margin call DB had made to the Plaintiffs. Even if Chang did not inform Pan of the

---

353 See Chang's affidavit at para 43; 57AB 44458 (telephone conversation on 8 August 2008 at or around 1.01pm).

margin call of 3 October 2008, in my view, Pan had been informed by DB at the 6 October 2008 Meeting of the substance of the 6 October 2008 Margin Call Letter pertaining to the FX GEM account, as well as the substance of the attachment to the 3 October 2008 E-mail, *ie*, the 3 October 2008 Margin Call Letter, pertaining to Zillion's advisory account. This was so even if neither the 6 October 2008 Margin Call Letter nor the 3 October 2008 E-mail and its attachment were in fact handed to Pan on 6 October 2008.

282 Chang who attended the 6 October 2008 Meeting was also aware that Pan had been so informed. That is why when there were follow-up telephone conversations on 8 October 2008 and 9 October 2008 between DB and Chang, references were made to "margin call", "shortfall" and the point that, "Mr Pan is very angry with this margin call problem", and Chang did not at any time say that Pan was unaware of any margin call. That is why on 13 October 2008, Pan said to Sze that he did not want DB to give any more margin call.

283 The reference by Pan to, "Everyday it seems I have margin call again" was not a reference to fresh margin calls daily but rather that DB was constantly pressing the Plaintiffs to come up with a solution in that period, from 3 October 2008 to 13 October 2008, such that Pan felt as though DB was making margin calls daily.

284 Likewise when Pan said, "Everyday telling me, telephoning me to say you have margin call now", this was Pan's way of referring to the frequent discussions which DB was having with Chang, if not with him, about the unresolved margin calls during that period such that he felt as though DB was making margin calls daily.

285 Accordingly by 13 October 2008, Pan had had more than one business day's notice of a margin call. Again his subsequent complaint to DB was not that he had not been given time to resolve the margin call issue but that he had not authorised any close-out.

286 I thus find that DB gave the requisite notice under cl 2.6 of the Master Agreement orally, if not in writing, before closing out the positions under the Accounts through the 13 October 2008 Transactions. I therefore find that DB did not breach the contracts between it and the Plaintiffs by closing out the positions.

287 It may be that the Plaintiffs could have instead claimed that DB had waived its right to close out until Sze had gotten back to Pan that day, and that had Sze gotten back to Pan, Pan would have agreed to close out other positions than those which DB closed out, *ie*, the 13 October 2008 Transactions. However, that was not the basis of the Plaintiffs' claim on the close-out issue.

Further comments

288 I will briefly address one other point in relation to the Plaintiffs' claim for breach of contract when DB closed out certain positions under the Accounts through the 13 October 2008 Transactions. Relying on various contract terms, DB had a further position that it was in any event entitled to terminate and/or close out the outstanding transactions in the Accounts as the margin cover and/or the collateral value was inadequate, and/or the close-out ratios were reached (see [227] above). DB did not substantiate this further position with reasons. I do not understand DB's further position because at face value, it appears that those contract terms which DB relied on might still have required it to give reasonable notice to the Plaintiffs before closing out positions under

the Accounts (see *Lam Chi Kin David* at [29(b)][354]), *ie*, a similar analysis would have to be conducted as for whether DB gave the requisite notice under cl 2.6 of the Master Agreement. I nevertheless make no further comments on this.

Other issues

289 In the light of my decision on the Plaintiffs' four main heads of claim, it is not necessary for me to consider whether there was any contract term that sought to exclude or restrict DB's liability and whether such a term was enforceable (see [73] above). In this regard, I mention that these were points the parties submitted on, in their closing submissions, in relation to the heads of claim for negligence and misrepresentation.

290 It is also not necessary for me to elaborate on the issue of a time bar.

Conclusion

291 In the circumstances, I dismiss the Plaintiffs' claims against DB.

292 I will hear the parties on costs.

Woo Bih Li
Judge

---

354 See Plaintiffs' Closing Submissions at para 123(d).

Chong Chi Chuin Christopher, Corinne Taylor Lai Sze Huei, Tan Lee Jane, Chan Ying Ling and Josh Samuel Tan Wensu (cLegal LLC) for the plaintiffs;
Yeo Khirn Hai Alvin SC, Sim Bock Eng, Aw Wen Ni, Chua Sin Yen, Jacqueline, Tan Kia Hua, Ho Wei Jie, Vincent and Quay Li Yun, Valerie (WongPartnership LLP) for the defendant.
