IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 93

Suit No 337 of 2011

Between

(1) Tradewaves Ltd
(2) Aarvee Limited
(3) Rajendrakumar Patel
(4) Vandna Patel
(5) Nikesh P Daryani
(6) Neelam P Daryani
(7) Vikas P Daryani
(8) Parasram Daryani
(9) Ashokkumar Damodardas Raipancholia
(10) Dilip Damodardas Raipancholia
(11) Rajeshkumar Damodardas Raipancholia
(12) Arjan Mohandas Bhatia
(13) Kishin Mohandas Bhatia
(14) Suresh M Bhatia
(15) Bharat Mohandas
(16) Prerna Vinod Uttamchandani
(17) Kishu Nathurmal Uttamchandani

… *Plaintiffs*

And

Standard Chartered Bank

… *Defendant*

Suit No 338 of 2011

Between

(1) Jitendra Gopaldas Bhatia
(2) Gopal Gangaram Bhatia
(3) Kishanchand Gangaram Bhatia
(4) Nirmala Kishanchand
(5) Jayshree Kishanchand Bhatia
(6) Pushpa Gopal Bhatia
(7) Mandakini Manish Gajaria

… *Plaintiffs*

And

Standard Chartered Bank

… *Defendant*

JUDGMENT

[Contract] — [Duty of Care]

[Contract] — [Misrepresentation]

[Tort] — [Misrepresentation]

[Tort] — [Negligence]

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Tradewaves Ltd and others
v
Standard Chartered Bank and another suit

[2017] SGHC 93

High Court — Suit Nos 337 and 338 of 2011
Woo Bih Li J
14–17, 23–24, 28–31 October 2014; 4–7, 11–14, 18–19 November 2014; 7–10, 14–17, 23, 28–30 April 2015; 5–6 May 2015; 27–28 July 2015; 4–6, 11–14, 18–20 August 2015; 6–9, 12–16, 19, 23, 26–30 October 2015; 17 November 2015; 11–14 July 2016; 15 November 2016

26 April 2017 Judgment reserved.

Woo Bih Li J:

Introduction

1 The plaintiffs in Suit No 337 of 2011 ("Suit 337") and Suit No 338 of 2011 ("Suit 338") (referred to collectively as the "Plaintiffs") invested over US$9 million in Fairfield Sentry Limited ("Fairfield Sentry"), a feeder fund.[1] Fairfield Sentry, in turn, channelled 95%[2] of the funds invested with it by the Plaintiffs and many others (a total of over US$7 billion) into what turned out to be a Ponzi scheme perpetuated by Bernard L Madoff ("Madoff") through

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1 Agreed Bundle ("AB")17590

2 AB17597

his New York-registered broker-dealer company, Bernard L Madoff Investment Securities, Inc ("BLMIS").[3]

2 A Ponzi scheme is an investment fraud. It pays returns to existing investors using monies collected from new investors. New investors are solicited with the promise that their monies would be invested to produce high returns with minimal risk. However, few, if at all any, of these purported investments are actually made. With little legitimate earnings, the scheme requires a constant inflow of funds to continue. When new investors cannot be found, or when a large number of existing investors ask to redeem their investments, the scheme collapses.

3 In December 2008, Madoff voluntarily confessed to operating a Ponzi scheme, which remains the largest known recent financial fraud in the world. Madoff pleaded guilty to charges of securities fraud on 12 March 2009, and was sentenced to 150 years of imprisonment. Once the fraud was revealed, Fairfield Sentry suspended all redemptions from its fund, and was eventually wound up. The Plaintiffs lost their investments in Fairfield Sentry, except where some of them received partial redemptions before the redemptions were suspended.

4 The Plaintiffs made their investments in Fairfield Sentry between January 2004 and June 2007 through investment accounts with American Express Bank Limited ("AEB").[4] When Standard Chartered Bank ("SCB")

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[3] AB17596

[4] Statement of Claim (Amendment No 4) in Suit No 337 of 2011 ("SOC (337)") at para 27; Defence (Amendment No 5) in Suit No 337 of 2011 ("Defence (337)") at para 17; Statement of Claim (Amendment No 4) in Suit No 338 of 2011 ("SOC 338") at [15]; Defence (Amendment No 4) in Suit No 338 of 2011 ("Defence (337)") [13]

acquired AEB in 2008, SCB acquired these investment accounts.[5] The Plaintiffs thus became SCB's private banking customers. SCB is the defendant in both Suit 337 and Suit 338.

5 SCB is a company incorporated in the United Kingdom and registered in Singapore. It provides products and services related to consumer, corporate, and institutional banking.[6]

6 The Plaintiffs' claims were based on the conduct of AEB, and subsequently, on the conduct of SCB when SCB acquired AEB. For convenience, I will refer to either of these banks as "the Bank". Specifically, the Plaintiffs claimed against the Bank on the following grounds:

(a) First, the Bank, through its relationship managers, made express negligent or fraudulent misrepresentations that induced the Plaintiffs to invest in Fairfield Sentry and thereafter to maintain their investments until Fairfield Sentry collapsed.[7] In this regard, the Plaintiffs aver that they were unsophisticated and conservative investors who would not have invested in Fairfield Sentry had they understood the nature of the investment.

(b) Secondly, the Bank breached its contractual or tortious duties of skill and care in failing to conduct due diligence checks on Fairfield Sentry.[8]

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5 Defence (337) at para 4; Defence (338) at para 4

6 Defence (337) at [3]; Defence (338) at [3]

7 SOC (337) at [52]–[53]; SOC (338) at [40]–[41]

8 SOC (337) at [50]–[52]; SOC (338) at [38]–[40]

(c) Thirdly, the Bank breached its fiduciary duties to the Plaintiffs. In particular, this occurred when the Bank used the Plaintiffs' assets to invest in Fairfield Sentry but not in the Plaintiffs' names (as summarised in sub-para (d)), and when it made misrepresentations to the Plaintiffs.[9]

(d) Fourthly, the Bank wrongfully retained the Plaintiffs' money in an "omnibus" account, instead of carrying out the Plaintiffs' instructions to make the investments in Fairfield Sentry in the names of the Plaintiffs. In so doing, the Bank wrongfully retained and used the Plaintiffs' monies which amounted to money had and received by the Bank.[10] This was also said to have led to the Plaintiffs being unable to lodge a claim in BLMIS's liquidation.

(e) Fifthly, the Bank breached its duties of skill and care in failing to act on the instructions of some of the Plaintiffs to redeem their investments.[11]

(f) Sixthly, the Bank was unjustly enriched by the fees it collected from the Plaintiffs over the years for their investments in Fairfield Sentry.[12]

(g) Finally, the Plaintiffs reasonably incurred costs in their attempts to recover or mitigate their losses. The Plaintiffs had, upon the Bank's advice, lodged claims with the liquidating trustee in New

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9 SOC (337) at [47]–[49]; SOC (338) [35]–[37]

10 SOC (337) at [43]–[46]; SOC (338) at [31]–[34]

11 SOC (337) at [56]–[60]; SOC (338) at [44]–[45]

12 SOC (337) at [61]–[62]; SOC (338) [46]–[47]

York in respect of the liquidation of BLMIS proceedings ("the BLMIS liquidation proceedings"), but failed because they had no locus. Furthermore. the Plaintiffs (save for Nirmala and Jayshree) sued the Defendant in the New York District Court to recover their losses, but the Defendant successfully obtained a stay in favour of Singapore jurisdiction due to the presence of jurisdiction clauses in favour of Singapore in the Plaintiff's contractual documents with the Bank ("the New York action").[13]

7 In their reply submissions dated 11 October 2016, the Plaintiffs stated that they were no longer pursuing the claims for money had and received (as summarised in [6(d)] above) and for wasted costs arising from the New York action. They however maintained their claim in relation to costs incurred for the BLMIS liquidation proceedings (as summarised in the first part of [6(g)] above), though no substantive arguments were made by either party on that claim in their closing submissions.[14]

8 As regards the remaining claims, the Bank's defence was as follows:

(a) In relation to the claims for misrepresentation and failure of due diligence, the Bank's position was that it did not owe a duty of care to the Plaintiffs to advise them on investments.[15]

(i) Further, as regards the claim for misrepresentation, the Bank's position was that some of the representations alleged by

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13 SOC (337) at [63]; SOC (338) at [48]

14 Plaintiffs' reply submissions ("PRS") at [17(j),(l)] r/w Defendant's closing submissions ("DCS") [26(j),(l)]

15 DCS at [23(a)]

the Plaintiff were not made, and those that were made were true or made with the genuine and reasonable belief that they were true. The Bank also relied on contractual terms which provide that the Plaintiffs were not relying on advice given by the Bank, and in any event that Plaintiffs did not in fact rely on the alleged misrepresentations.[16]

(ii) Furthermore, as regards the claim for failure of due diligence, the Bank asserted that the Bank had conducted reasonable due diligence.[17]

(b) As regards the claim for breaches of fiduciary duties, the Bank denied that it owed the Plaintiffs any fiduciary duties. Further, it asserted that even if such duties were owed, they were not breached.[18]

(c) As regards the claims in respect of redemption requests, the Bank asserted that the losses were not caused by the Bank, but by Fairfield Sentry's suspension of the payment of proceeds.[19]

(d) As regards the claim for unjust enrichment, the Bank denied that it was unjustly enriched by the investment fees, which the Plaintiffs expressly agreed to pay.[20]

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16 DCS at [23(a)(ii)–(iii)]

17 DCS at [23(a)(i)]

18 Defence (337) at [23C]; Defence (338) at [20C]

19 DCS at [23(c)]

20 Defence (337) at [29]; Defence (338) at [27]

(e) As regards the claim for wasted costs incurred when the Plaintiffs lodged claims in the liquidation of BLMIS proceedings, the Bank denied all allegations.[21]

9 In addition, the Bank counterclaimed damages in the form of legal costs and expenses which the Bank incurred for the Plaintiffs' New York action commenced against the Bank in breach of exclusive jurisdiction clauses ("EJCs").[22] The Plaintiffs' defence to the counterclaim was that the EJCs do not govern the parties' relationship.[23]

Glossary

10 I set out the following definitions for easy reference:

Aarvee	Aarvee Limited, the 2nd Plaintiff in Suit 337.
AEB	American Express Bank Ltd.
Arjan	Arjan Mohandas Bhatia, the 12th Plaintiff in Suit 337.
Arjun	Arjun Mittal, who was employed by the Bank as an Investment Specialist from September 2002 to April 2008.
Ashok	Ashokkumar Damodardas Raipancholia, the 9th Plaintiff in Suit 337.
Bank	American Express Bank Ltd until 30 June

21 Defence (337) at [31(i)]; Defence (338) at [30(i)]

22 Defence (337) at [36]; Defence (338) at [36]

23 Plaintiff's Reply (Amendment No 4) & Defence to Counterclaim in Suit 337 of 2011 at [18A]–[18C]; Plaintiff's Reply (Amendment No 3) & Defence to Counterclaim in Suit 338 of 2011 at [15A]–[15B]

	2008 or Standard Chartered Bank from 1 July 2008 (as the case may be).
Barron's Article	An article titled "Don't Ask, Don't Tell". It was authored by Erin E Arvedlund and published in May 2001 by Barron's. Barron's is an American weekly newspaper founded in 1921 by Clarence Barron and covers US financial information, market developments, and relevant statistics.
Bharat	Bharat Mohandas, the 15th Plaintiff in Suit 337.
The Bhatias in Suit 337	Arjan Mohandas Bhatia, Kishin Mohandas Bhatia, Suresh M Bhatia, and Bharat Mohandas (the 12th, 13th, 14th, and 15th Plaintiffs respectively in Suit 337).
The Bhatias in Suit 338	Jitendra Gopaldas Bhatia, Gopal Gangaram Bhatia, Kishanchand Gangaram Bhatia, Nirmala Kishanchand, Jayshree Kishanchand Bhatia, Pushpa Gopal Bhatia and Mandakini Manish Gajaria (the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th Plaintiffs respectively in Suit 338).
Biswas	Prabir Biswas, the relationship manager for the Uttamchandanis.
BLMIS	Bernard L Madoff Investment Securities LLC. BLMIS was the investment advisor, sub-manager, broker-dealer and sub-custodian of Fairfield Sentry.
Casey	Frank Robert Casey, one of the Plaintiffs' expert witnesses.
CEM/CEMF	Concentrated Elite Manager Fund, also

	referred to as the Concentrated Elite Manager Fund of Funds, the Concentrated Elite Manager Portfolio or the Concentrated Star Fund of Funds Portfolio. This was a fund of hedge funds offered by the Bank for investment in 2003. Fairfield Sentry was a constituent fund in the CEM/CEMF.[24]
CIC	Client Investment Committee, a sub-committee of the Risk Management Committee of the Bank's board of directors.
CIF	Customer or Client Information File.
Citco	The various Citco entities which acted as Citco (Administrator) and/or Citco (Custodian) and/or (Citco Bank) at the material time.
Citco Bank	Citco Bank Nederland NV, Dublin Branch (incorporated in the Netherlands), Fairfield Sentry Ltd's payment bank.
Citco Fund Services	Citco Fund Services (Europe) BV (incorporated in the Netherlands), Fairfield Sentry Ltd's administrator, registrar and transfer agent.
Citco (Custodian)	Citco Bank Nederland NV, Dublin Branch (incorporated in the Netherlands) up to 2003, and Citco Global Custody NV (incorporated in the Netherlands) thereafter, being Fairfield Sentry Ltd's custodian.
Conner	Robert E Conner, one of the Plaintiffs'

[24] 129BAEIC (Friedman) at [56]

	expert witnesses.
The Daryanis	Nikesh P Daryani, Neelam P Daryani, Vikas P Daryani and Parasram Daryani (the 5th, 6th, 7th, and 8th Plaintiffs respectively in Suit 337).
DDQ	Due Diligence Questionnaire.
Dilip	Dilip Damodardas Raipancholia, the 10th Plaintiff in Suit 337.
DTC	The Depository Trust Company, based in New York City, is organized as a limited purpose trust company which provides safekeeping through electronic recordkeeping of securities balances and also acts like a clearing house to process and settle trades in corporate and municipal securities.
Fairfield Sentry	Fairfield Sentry Ltd (incorporated in the British Virgin Islands), the fund in which the Plaintiffs invested.
FGG	Fairfield Greenwich Group, Fairfield Greenwich Limited up till in or around July 2003,[25] and Fairfield Greenwich (Bermuda) Ltd thereafter,[26] all being Fairfield Sentry Ltd's investment manager.
FINRA	The Financial Industry Regulatory Authority, previously known as the National Association of Securities Dealers up till 2007.
Friedman	Robert Michael Friedman, the former

[25] 30AB p 17644–17586; DCS at [836]

[26] 30AB p 17888–17948; DCS at [836]

	Managing Director of the Bank, the Head of GIG, and the Chairman of the CIC from March 2002 until his retirement in February 2009.
GIG/GIS	A group known at various times as *"Global Investment Group"*, *"Global Investment Services"*, or *"Investment Product Management Group"* within American Express Bank Ltd.
Gopal	Gopal Gangaram Bhatia, the 2nd Plaintiff in Suit 338.
Hardiman	Joe Hardiman, the administrative product manager for hedge fund products at the material time.
Harish	Harish Rupani who together with his wife, Laju Rupani, are beneficial owners of Tradewaves Ltd, the 1st Plaintiff in Suit 337.
Holmes	Richard Holmes, managing director and global head of private banking of AEB from 1996, Chief Executive Officer of AEB from June 2000, and Chief Executive Officer of SCB's Europe operations from April 2008. He had initially chaired the Product Approval Committee and the CIC from their inception in or around 1996/1997 to 2000/2001 when Friedman took over.
Jayshree	Jayshree Kishanchand Bhatia, the 5th Plaintiff in Suit 338.
Jitendra	Jitendra Gopaldas Bhatia, the 1st Plaintiff in Suit 338.

Kandlur	Bhavanishanker S Kandlur, relationship manager for the Patels from December 2005 to 2009.
The Kapurs	Radhe Mohan Kapur and Vijay Kapur (the beneficial owners of Aarvee Ltd, the 2nd Plaintiff in Suit 337).
Karani	Naresh Karani, alternate relationship manager for the Uttamchandanis.
Kishanchand	Kishanchand Gangaram Bhatia, the 3rd Plaintiff in Suit 338.
Kishin	Kishin Mohandas Bhatia, the 13th Plaintiff in Suit 337.
Kishu	Kishu Nathurmal Uttamchandani, the 17th Plaintiff in Suit 337.
KPMG	A firm or company of auditors mentioned in Ziff's report and Porten's report (see [242] and [243] below).
Laju	Laju Rupani who together with her husband, Harish Rupani, are beneficial owners of Tradewaves Ltd, the 1st Plaintiff in Suit 337.
Loganathan	CM Loganathan, relationship manager for the Patels from April 2004 to December 2005.
Madoff	Bernard Lawrence Madoff.
Mandakini	Mandakini Manish Gajaria, the 7th Plaintiff in Suit 338.
MARHedge Article	An article titled "Madoff tops charts; skeptics ask how". It was authored by Michael Ocrant and published in May 2001 by MARHedge. MARHedge is a monthly

	publication targeted at the hedge fund community which was launched by the Managed Account Reports in 1994.
Menon	Surendran Menon, relationship manager for all the Plaintiffs except for the Patels and the Uttamchandanis.
NASDAQ	National Association of Securities Dealers Automated Quotations, a major United States-based securities exchange.
Neelam	Neelam P Daryani, the 6th Plaintiff in Suit 337.
Nikesh	Nikesh P Daryani, the 5th Plaintiff in Suit 337.
Nirmala	Nirmala Kishanchand, the 4th Plaintiff in Suit 338.
OTC	Over the Counter. It refers to the manner in which security is traded directly between two counterparties rather than over a formal exchange.
Parasram	Parasram Daryani, the 8th Plaintiff in Suit 337.
The Patels	Rajendrakumar Patel and Vandna Patel (the 3rd and 4th Plaintiffs respectively in Suit 337).
PBSA	Private Banking Services Agreement.
Perruchoud	Samuel Perruchoud, a former employee of the Bank who headed a specialised team within the GIG which was tasked with initial and ongoing review of all potential and actual hedge fund products. He left the Bank in 2007.

PerTrac	A company based in the United States that provides analytics, reporting and communications software for investment professionals, including hedge funds, funds of funds.
Porten	Charles Porten, one of the Defendant's expert witnesses.
PPM	Private Placement Memorandum.
Prerna	Prerna Vinod Uttamchandani, the 16th Plaintiff in Suit 337.
Pushpa	Pushpa Gopal Bhatia, the 6th Plaintiff in Suit 338.
PwC	Fairfield Sentry Ltd's auditors, being PricewaterhouseCoopers, Accountants NV until in or around 2006, and PricewaterhouseCoopers LLP from in or around 2006 onwards.
PwC Netherlands	PricewaterhouseCoopers, Accountants NV.
PwC Toronto	PricewaterhouseCoopers LLP.
Radhe	Radhe Mohan Kapur who together with his wife, Vijay Kapur, are beneficial owners of Aarvee Ltd, the 2nd Plaintiff in Suit 337.
The Raipancholias	Ashokkumar Damodardas Raipancholia, Dilip Damodardas Raipancholia, and Rajeshkumar Damodardas Raipancholia (the 9th, 10th, 11th Plaintiffs respectively in Suit 337).
Rajendra	Rajendrakumar Patel, the 3rd Plaintiff in Suit 337.

Rajesh	Rajeshkumar Damodardas Raipancholia, the 11th Plaintiff in Suit 337.
Renaissance	Renaissance Technologies LLC, a hedge fund that also invested in BLMIS. Renaissance's due diligence on BLMIS was examined in the SEC report.
The Rupanis	Harish Rupani and Laju Rupani (the beneficial owners of Tradewaves Ltd, the 1st Plaintiff in Suit 337).
S&P 100	The 100 leading U.S. stocks of a list maintained by Standard & Poor's.
SCB	Standard Chartered Bank, the Defendant in Suit 337 and Suit 338.
SEC	United States Securities and Exchange Commission.
SEC Report	United States Securities and Exchange Commission Office of Inspector General Report dated 31 August 2009.
Sharma	Brij Mohan Sharma, relationship manager for the Patels from January 2009 to December 2009.
SSC Strategy	Split Strike Conversion Strategy.
Standard Chartered GTC	Standard Chartered Private Bank General Terms and Conditions (applicable from September/October 2008).
Suit 337	Suit No. 337 of 2011/Z.
Suit 338	Suit No. 338 of 2011/D.
Suresh	Suresh M Bhatia, the 14th Plaintiff in Suit 337.

Tradewaves	Tradewaves Ltd, the 1st Plaintiff in Suit 337.
Tremont	Tremont Capital Group, a fund of funds business which the Bank worked with.
The Uttamchandanis	Prerna Vinod Uttamchandani and Kishu Nathurmal Uttamchandani (the 16th and 17th Plaintiffs respectively in Suit 337).
Vandna	Vandna Patel, the 4th Plaintiff in Suit 337.
Vijay	Vijay Kapur who together with her husband, Radhe Mohan Kapur, are beneficial owners of Aarvee Ltd, the 2nd Plaintiff in Suit 337.
Vikas	Vikas P Daryani, the 7th Plaintiff in Suit 337.
Ziff	Bradley Philip Ziff, one of the Defendant's expert witnesses.

The Plaintiffs' investment backgrounds

11 At heart, Suit 337 and Suit 338 are brought by individuals from eight families based in the United Arab Emirates, either in person or through family-controlled investment companies. For simplicity and without intending any disrespect, I shall refer to the members of the families by their first names.

12 Various individuals represented each family in the families' interactions with the Bank, which attended to the families through its relationship managers.

13 For ease of reference, I set out the Plaintiffs, their representatives, and the relationship managers of the Bank who dealt with them:

Plaintiff(s)	Point(s) of Contact	Relationship Manager(s)
Suit 337		
Tradewaves (1st Plaintiff)	Harish (director)	Menon
Aarvee (2nd Plaintiff)	Radhe (director)	Menon
the Patels (3rd to 4th Plaintiffs)	Mahesh Rajendra	Loganathan Kandlur Sharma
the Daryanis (5th to 8th Plaintiffs)	Nikesh Vikas	Menon
the Raipancholias (9th to 11th Plaintiffs)	Ashok Rajesh	Menon
the Bhatias (12th to 15th Plaintiffs)	Arjan	Menon
the Uttamchandanis (16th to 17th Plaintiffs)	Prerna Kishu	Karani Biswas
Suit 338		
the Bhatias	Jitendra Gopal Kishanchand	Menon

14 The Plaintiffs contend that they were unsophisticated and conservative investors who would not have invested in Fairfield Sentry had they understood the nature of the investment. Specifically, they claim that they believed that placing their funds with Fairfield Sentry was akin to placing their funds in fixed deposits (the alleged representations are dealt with in detail at [64] below and in the Annex to this judgment). Hence, I will elaborate on the Plaintiffs' backgrounds first.

Suit 337

15 There are 17 plaintiffs in Suit 337. The 1st and 2nd Plaintiffs are companies, while the 3rd to 17th Plaintiffs are individuals.

Tradewaves

16 The 1st Plaintiff, Tradewaves is a private investment company incorporated in the British Virgin Islands. It was set up to manage the wealth of Harish and his wife, Laju. Both Harish and Laju were shareholders and directors in Tradewaves.[27] Much of their wealth came from Harish's successful business, Equinox Trading Company, which traded in grain and food products.[28]

17 In December 1999, the Rupanis set up an investment account (CIF 62165) with AEB in their joint names (the "Rupani Account").[29] Through the Rupani Account, the Rupanis invested in mutual funds and other financial products, including Fairfield Sentry.[30] The Rupanis first invested in Fairfield Sentry in January 2004, and increased the investment in June 2004.[31] In July 2004, the Rupanis opened an investment account (CIF 100572) with AEB on behalf of Tradewaves (the "Tradewaves Account"),[32] and eventually transferred the Fairfield Sentry shares from the Rupani account to the Tradewaves Account.[33]

18 Harish made all the investment decisions in relation to the Rupani Account and the Tradewaves Account.[34]

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27 NOE 7 Nov 14 at p 52

28 18BAEIC at [7]–[8]

29 18BAEIC at [14]

30 18BAEIC at [11]; NOE 7 Nov 14 at p 83–86

31 NOE 7 Nov 14 at p 107

32 18BAEIC at [20]

33 NOE 12 Nov 14 at p 3–6

34 18BAEIC at [33]

19 Harish has a degree in commerce from the Bombay University in India.[35] Even before the Rupani Account was opened in 1999, Harish had private banking accounts with BNP Paribas (London), HSBC Republic Bank (Suisse) SA, Industrial Credit and Investment Corporation of India (ICICI), ABM-Amro, Credit Suisse, and UBS Bank (Geneva).[36] By January 2004, when the Rupanis first invested in Fairfield Sentry, Harish had through these accounts invested in mutual funds and hedge funds,[37] as well as equities, bonds, and preference shares.[38]

20 Moreover, Harish leveraged the investments held in the Tradewaves Account. This enabled him to magnify investment gains. By the same token however, any losses would be magnified as well. In addition, Harish borrowed in Japanese Yen to fund his US Dollar-denominated investments.[39] While this availed Harish of lower borrowing costs (due to the low interest rates on the Yen), he exposed himself to the risk of loss from adverse currency movements (should the Yen appreciate against the US Dollar).

Aarvee

21 The 2nd Plaintiff, Aarvee, is also a private investment company incorporated in the British Virgin Islands. It was set up to manage the wealth of Radhe and his wife, Vijay. Much of the Kapurs' wealth came from Radhe's

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35 NOE 7 Nov 14 at p 49

36 85BAEIC at [34(a)]; Summary of Plaintiffs' Background and Investment Experience (30 Nov 2015) at p 15; DCS at [606]

37 NOE 11 Nov 14 at pp 27–28

38 NOE 11 Nov 14 at p 2

39 85BAEIC at [34(e)]

successful business, Dubai Steel Company, which is a leading supplier of structural steel in the United Arab Emirates.[40]

22 In June 2003, the Kapurs opened an investment account (CIF 67100) with AEB in their joint names (the "Kapur Account").[41] Through the Kapur Account, the Kapurs invested in Fairfield Sentry. In January 2004, the Kapurs purchased Fairfield Sentry shares directly for the Kapur Account.[42]

23 In November 2006, with the assistance of AEB, the Kapurs set up Aarvee and an investment account with AEB (CIF 103065) in the name of Aarvee ("the Aarvee Account")[43]. All the assets in the Kapur Account were then transferred to the Aarvee Account.[44]

24 Radhe managed the Aarvee Account.[45]

25 Prior to opening the Kapur Account, Radhe had a private banking account with the London branch of AEB,[46] and a non-resident Indian investment account with Citibank.[47] From January 2000, Radhe had through the Citibank account invested in various mutual funds and hedge funds.[48]

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40 25BAEIC at [4]–[11] and 85BAEIC at [112]–[114]

41 25BAEIC at [20] and 85BAEIC at [116]

42 85BAEIC at [154]–[155]

43 85BAEIC at [124]

44 85BAEIC at [125]

45 85BAEIC at [120] and [124]

46 85BAEIC at [126(a)]

47 NOE 14 Apr 15 at p 19

48 NOE 14 Apr 15 at p 54

The Patels

26 The 3rd and 4th Plaintiffs are Rajendra and his wife, Vandna. The Patels are businesspersons who own a shop in Lusaka, Zambia.[49]

27 On or about January 2004, Rajendra and Vandna opened an investment account (CIF 100363) with AEB in their joint names (the "Patel Account").[50]

28 Maheshkumar Patel, the younger brother of Rajendra, managed the Patel Account.[51]

29 The Patels first invested in Fairfield Sentry in August 2005, and increased the investment at the end of 2007.[52]

30 By August 2005, when the Patels first invested in Fairfield Sentry, they had invested almost 56% of the Patel Account in portfolio investments, alternative investments, and other investments.[53] Within these investments were funds linked to foreign currency interest rates and assets in emerging markets.[54] By the end of 2007, when the Patels increased their investments in Fairfield Sentry, the Patel Account contained investments in the Permal FX hedge fund, a client-directed mutual fund portfolio, and a non-capital protected equity-linked investment.[55]

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49 28BAEIC at [9] and [18]

50 28BAEIC at [10]

51 28BAEIC at [13] and [25]

52 28BAEIC at [46], [52] and [56]

53 28BAEIC at Exhibit MP-5

54 NOE 4 Nov 14 at pp 75–76

55 NOE 4 Nov 14 at pp 77–78

The Daryanis

31 The 5th to 8th Plaintiffs are members of the Daryani family. They are Nikesh, Neelam, Vikas, and Parasram, respectively. Parasram is the patriarch. Neelam is his wife. Vikas and Nikesh are their sons.[56]

32 During the 1990s, Parasram founded Panvin Trading Company ("Panvin"), a distributor of electronic goods[57]. Vikas has been a partner in Panvin since its inception. Nikesh became a partner in Panvin in 1999 when he returned to Dubai after graduating from Duke University. Panvin has been a success and has contributed much to the Daryanis' wealth, which amounts to approximately US$30m.[58]

33 Between January 2000 and August 2004, the Daryanis opened four investment accounts (CIF 62328, 64701, 66481, and 100834) with AEB (the "Daryani Accounts").[59] The holders of the accounts are:

(a) CIF 62328: Parasam, Neelam, and Vikas;[60]

(b) CIF 100834: Parasam, Neelam, Vikas, and Nikesh;[61]

(c) CIF 66481: Neelam and Vikas;[62] and

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56 85BAEIC at [199]

57 85BAEIC at [201]

58 85BAEIC at [202]

59 32BAEIC at [18]–[28] and 85BAEIC at [202]

60 32BAEIC at [18]

61 32BAEIC at [23]

62 32BAEIC at [27]

(d) CIF 64701: Neelam and Nikesh.[63]

34 The Daryani's accounts were managed by Nikesh.[64] Nikesh completed his Bachelor's Degree in Finance at Duke University in 1999, and undertook a 9-month internship with the Global Investment Services division at the New York branch of AEB.[65] During his internship, Nikesh conducted due diligence on the investment products that AEB offered its private banking clients. In 2006, Nikesh obtained a Master's Degree in Finance from London Business School.[66] Thereafter, he worked as a portfolio manager in Algebra Capital Ltd and Franklin Templeton, specialising in equity and debt asset management.[67]

35 The Daryani Accounts invested in Fairfield Sentry shares since January 2004, when the Daryanis invested a total of US$850,000 in Fairfield Sentry across accounts CIF 66481, 64701, and 62328.[68] Between September 2004 and June 2007, the Daryanis steadily increased their investments in Fairfield Sentry across the Daryani Accounts.[69]

36 Prior to their initial investment in Fairfield Sentry, the Daryanis had a portfolio comprising equity-linked funds, derivatives, and structured products in their account with UBS.[70]

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63 32BAEIC at [28]

64 32BAEIC (Nikesh) at [43]–[44]; 85BAEIC at [202]

65 32BAEIC at [5]

66 32BAEIC at [6]

67 32 BAEIC at [8] and 85BAEIC at [225]

68 85BAEIC at [317]–[318]

69 85BAEIC at [320]

70 NOE 16 Apr 15 at pp 64–65

The Raipancholias

37 The 9th to 11th Plaintiffs are brothers in the Raipancholia family. They are Ashok, Dilip, and Rajesh, respectively.[71] The Raipancholia family owns a money exchange business in Dubai called Orient Exchange Co LLC.[72]

38 In March 2002, Ashok, Dilip, and Rajesh opened a private banking account (CIF 66519) with AEB in their joint names (the "Raipancholia Account"). Darmodardas, the father of Ashok, Dilip, and Rajesh, then transferred part of his funds into the Raipancholia Account.[73]

39 Rajesh managed the Raipancholia Account.[74]

40 The Raipancholia Account invested in Fairfield Sentry since January 2004.[75] Thereafter, between September 2004 and June 2007, the Raipancholias steadily increased their investments in Fairfield Sentry.[76]

41 Rajesh has a Bachelor of Commerce from the Bombay University.[77] Prior to making their first investment in Fairfield Sentry, the Raipancholias had invested in equities and mutual funds.[78] By January 2004, the

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71 85BAEIC at [369]

72 85BAEIC at [370]

73 85BAEIC at [374]–[375]

74 47BAEIC (Ashok) at [17]; 49BAEIC (Rajesh) at [19] and 85BAEIC at [378]

75 85BAEIC at [418]

76 85BAEIC at [412]–[421]

77 49BAEIC at [5] and NOE 18 Nov 14 at p 52

78 NOE 14 Nov 14 at p 107

Raipancholias had invested in non-investment grade bonds and hedge funds,[79] as well as equity-linked notes and alternative investments.[80]

The Bhatias (in Suit 337)

42 The 12th to 15th Plaintiffs are brothers in the Bhatia family. They are Arjan, Kishin, Suresh, and Bharat, respectively. Arjan is the eldest, and heads the family business, Emsons Trading LLC ("Emsons"). Emsons has a main office in Abu Dhabi manned by Suresh, Kishin and Bharat. The Abu Dhabi office imports and distributes food and non-food items, and runs a chain of department stores. In addition, Emsons has a branch office in Dubai manned by Arjan. The Dubai office deals in gifts, novelties, and toys.[81]

43 Coincidentally, the 12th to 15th Plaintiffs share the same family name as the Plaintiffs in Suit 338. However, the two families are not related.

44 In June 2003, Arjan, Kishin, Suresh, and Bharat opened a private banking account with AEB (CIF 66846) in their joint names (the "Bhatia (337) Account").[82]

45 Arjan, in consultation with Kishin, Suresh, and Bharat, handled the investments made by the Bhatia (337) Account.[83] Arjan's son, Rajeev, who has a Master's degree in Finance, guided the brothers on these investment decisions.[84]

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79 NOE 14 Nov 14 at p 114

80 85BAEIC at [406]

81 85BAEIC at [454]–[457]

82 85BAEIC at [462]

83 85BAEIC at [466]

46 Initially, the Bhatia (337) Account invested in Fairfield Sentry through AEB's in-house fund of funds.[85] When Fairfield Sentry begun accepting direct subscriptions from AEB's clients through AEB in January 2004, the Bhatias in Suit 337 purchased Fairfield Sentry shares directly for their account.[86] In April 2008, Arjan procured the redemption of US$100,000 of shares in Fairfield Sentry.[87]

47 Prior to opening the Bhatia (337) Account, the Bhatias in Suit 337 had been investing through private banking accounts with the Dubai branch of SCB, as well as with BNP Paribas, Prudential Bank, Merrill Lynch Bank, and Dryden Wealth Management.[88]

48 Besides investing in Fairfield Sentry, the Bhatias in Suit 337 had, by December 2004, invested in equities and non-investment grade bonds. By June 2007, the Bhatia (337) Account contained a client-directed mutual fund portfolio.[89]

The Uttamchandanis

49 The 16th and 17th Plaintiffs are Prerna and Kishu. Kishu is the head of the Uttamchandani family. Prerna is his daughter-in-law. Kishu had a son, Vinod Uttamchandani, who was Prerma's husband. Vinod passed away in the 1999.[90]

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84 85BAEIC at [457]

85 85BAEIC at [494]

86 85BAEIC at [500]–[503]

87 85BAEIC at [504]-[505]

88 85BAEIC at [467]

89 85BAEIC at [518]

50 Kishu and Prerna were Chairman and Director respectively of Rosha Trading Co LLC ("Rosha"). Rosha trades in ready-made garments and textiles.[91] Following Vinod's passing in 1999, Prerna managed Rosha's business operations, and its banking and investment accounts.[92]

51 Although Prerna took over the management of Rosha only after her husband's demise, she struck me as an intelligent lady who quickly gained experience in business and investment decisions. Further, she could and did make her own decisions, and did not simply rely on what she was told by others.

52 In December 2001, the Uttamchandanis opened an investment account (CIF 65851) with AEB in the name of C R Holdings Ltd (the "C R Holdings Account"), a private investment company incorporated by Kishu.[93] The Uttamchandanis used the C R Holdings Account to maintain their cash deposits.[94] In 2008, the Uttamchandanis unwound a trust with Credit Agricole that was set up shortly after Vinod's passing.[95] Thereafter, Prerna and Kishu transferred the funds from the C R Holdings Account and the proceeds from the Credit Agricole trust into a new investment account with AEB (CIF 107017) in their joint names (the "Uttamchandani Account").[96]

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90 63BAEIC at [9]

91 63BAEIC at [6]

92 63BAEIC at [14]–[15]

93 NOE 5 Nov 14 at p 11

94 63BAEIC at [16]–[18]

95 63BAEIC at [20]

96 63BAEIC at [20]–[28]

53 The Uttamchandanis first invested in Fairfield Sentry in April 2005, through the C R Holdings Account.[97] When they learnt that AEB had received an additional allotment of Fairfield Sentry shares in June 2007, the Uttamchandanis increased their investments in Fairfield Sentry.[98]

54 Prior to the Uttamchandanis' first investment in Fairfield Sentry, Prerna had been overseeing and managing the CR Holdings Account and the Uttamchandani Account, as well as the Uttamchandanis' private banking accounts with Credit Agricole, Merrill Lynch, ING, and UBS.[99] , Through these accounts, the Uttamchandanis had been investing in a variety of securities including currency options and derivatives,[100] hedge funds,[101] and precious metals.[102]

Suit 338

55 The seven Plaintiffs in Suit 338 are members of the same family. They are Jitendra, Gopal, Kishan, Nirmala, Jayshree, Pushpa, and Mandakini.[103] As mentioned above (at [43]), I shall refer to the Plaintiffs in Suit 338 as the Bhatias in Suit 338.

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97 63BAEIC at [51]

98 63BAEIC at [61]–[62]

99 NOE 5 Nov 14 at pp 31–32

100 NOE 5 Nov 14 at p 75

101 NOE 5 Nov 14 at p 67

102 Summary of Plaintiffs' Background and Investment Experience (30 Nov 2015) at pp 54–59

103 1BAEIC at [1]

56 Between November 2001 and October 2003, the Bhatias in Suit 338 opened three investment accounts (CIF 65265, 67101, 67465) with AEB (the "Bhatia (338) Accounts"). The holders of the accounts are as follow:

(a) CIF 65265: Gopal, Kishan, Nirmala, and Jayshree;[104]

(b) CIF 67101: Gopal, Kishan, Nirmala, and Jitendra;[105] and

(c) CIF 67465: Gopal, Kishan, Pushpa, and Mandakini (with Jitendra as an authorized signatory).[106]

57 Gopal and Kishan managed the Bhatia (338) Accounts until 2003, when Jitendra managed the accounts, with Kishan assisting.[107] Initially, the Bhatia (338) Account invested in Fairfield Sentry through AEB's in-house fund of funds. When Fairfield Sentry began accepting direct subscriptions from AEB's clients in January 2004, the Bhatias in Suit 338 purchased Fairfield Sentry shares for the Bhatia (338) Account.[108]

58 By 2001, prior to their first investment in Fairfield Sentry, Gopal and Kishan had investment accounts with the London and Indian branches of AEB, as well as with Credit Agricole and Merrill Lynch. Jitendra graduated with a Bachelor's Degree in Finance from the University of Indiana in 2000, and undertook a banking internship with the UK branch of Credit Agricole

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104 68BAEIC at [22]

105 68BAEIC at [33]

106 68BAEIC at [39] and [42]

107 16BAEIC (Gopal) at [24]–[26]; 17BAEIC (Kishan) at [49]–[52]; 1BAEIC (Jitendra) at [36]

108 68BAEIC at [138]

from 2001 to 2002.[109] By October 2002, the Bhatia (338) Accounts had invested in options, derivatives, and emerging market equities and debt.[110]

Fairfield Sentry

59 Fairfield Sentry allocated 95% of its assets to a discretionary account at BLMIS, a registered broker-dealer in New York.[111] BLMIS, in turn, professed to manage the assets and produce profits for its investors through a SSC Strategy, which was sometimes called a "collar". According to the Fairfield Private Placement Memorandum dated 1 October 2002 (the "Fairfield Placement Memorandum") provided by Fairfield Sentry to potential investors, this SSC Strategy entailed three steps:[112]

(a) purchasing a portfolio of equity stocks that together correlated to the S&P 100 index;

(b) selling call options with an exercise price above the prevailing stock price in an equivalent contract value dollar amount to the portfolio of stocks; and

(c) purchasing an equivalent quantity of put options with an exercise price below but close to the prevailing stock price.

60 By holding a call option and a put option for each stock it held, BLMIS limited – or "collared" – both the upside and downside of the stock.

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109 1BAEIC at [6]

110 68BAEIC at [51]

111 AB17596–17597

112 30AB 17597 (Private Placement Memorandum)

Claim in misrepresentation

61 The Plaintiffs allege that the Bank, through its relationship managers, made misrepresentations that induced them to invest in Fairfield Sentry.[113] I have set out in the Annex the representations in question and the persons to whom they were made.

62 The Bank denies making these representations.[114] In the alternative, it submits that the Plaintiffs, as experienced investors, decided to invest in Fairfield Sentry independently and without relying on such representations.[115] The Bank also points to the non-reliance and non-representation clauses in the account-opening documentation to preclude any such reliance by the Plaintiffs.[116] In any event, the Bank submits that the Plaintiffs' claim in misrepresentation is a red herring: the Plaintiffs' losses were not caused by any alleged misrepresentations about the nature of the product and its associated market risks, but by Madoff's fraud.[117]

63 Even if the representations were made, the key question is whether they were actionable misrepresentations. For now I shall assume that the representations were indeed made, and examine whether they amounted to actionable misrepresentations.

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113 SOC (337) at [27]–[33] and [52]

114 Defence at [17A]–[19] and [26]–[26B]

115 Defence at [10], [11], and [18]

116 Defence at [10], [11], and [18]

117 DCS at [166]-[167]; See also DCS at [288], [514]

64 The Plaintiffs asserted that the representations made by the Bank were largely common to all of them.[118] The main representations, as summarised by the Plaintiffs in their closing submissions, were as follows:[119]

(a) That investments in Fairfield Sentry were safe and stable with consistent good returns and low volatility ("the first main representation");[120]

(b) That investments in Fairfield Sentry were like cash substitutes and /or like fixed deposits ("the second main representation");

(c) That investments in Fairfield Sentry were like gold dust (only for the Uttamchandani Family) ("the third main representation");

(d) That investments in Fairfield Sentry were exclusive and Fairfield Sentry was an exclusive and closed in fund ("the fourth main representation");[121] and

(e) That the Bank had conducted due diligence on Fairfield Sentry before recommending it to the Plaintiffs ("the fifth main representation").[122]

65 The Bank's position with regard to each main representation was as follows:

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118 Plaintiffs' Opening Statement at [49]

119 PCS at [525]

120 SOC (337) at [28], [30]–[32], and [53.1]

121 SOC (337) at [29], [32A], and [53.1]

122 SOC (337) at [29], [32A], and [53.2]

(a) The first main representation was made, but the representation was not negligently made as it was supported by the historical performance of Fairfield Sentry at the time the representation was made;[123]

(b) The second main representation was not made, and even if made, the Plaintiffs' losses were not caused by the representation as the loss was caused by Madoff's fraud and not by exposure to market risk;[124]

(c) The third main representation was not made, and even if made, was mere puff and was not actionable as misrepresentation.[125]

(d) The fourth main representation "may have been made", though not to all the Plaintiffs. Further, the representation was true, and in any event it was not material to the Plaintiffs' decision to invest;[126] and

(e) The fifth representation was not made, and even if made, was true.[127]

66 For completeness, I note that in *Li Kwok Heem John v Standard Chartered International (USA) Limited (formerly known as American Express Bank Limited)* [2016] 1 HKC 535 ("*John Li*"), another Standard Chartered entity was sued in the Hong Kong Special Administrative Region for *inter alia*

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123 Defendant's Closing Submissions ("DCS") at [362],[365]

124 DCS at [457], [513]–[514]

125 DCS at [516] and [533]

126 DCS at [370]–[375], [392]–[396]

127 DCS at [398]–[447]

misrepresentation relating to investments in Fairfield Sentry. The representation relied upon by the plaintiff there was the implied representation that Fairfield Sentry was an authentic investment (*John Li* at [161]). Significantly, this was not the case advanced by the Plaintiffs here.

What is a misrepresentation?

67 A misrepresentation consists in a false statement of existing or past fact made by one party before or at the time of making the contract, which is addressed to the other party and which induces the other party to enter into the contract (*Lim Koon Park and another v Yap Jin Meng Bryan and another* [2013] 4 SLR 150 ("*Lim Koon Park*") at [38]). Such falsity exists when the facts as asserted do not correspond with the facts as they exist: Pearlie Koh, "Misrepresentation and Nondisclosure" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 11.056.

68 Section 2(1) of the Misrepresentation Act (Cap 390, 1994 Rev Ed) does not alter the common law as to what constitutes a misrepresentation (*Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 at [23]). It does, however, reverse the burden of proof in one aspect, in that the party who made the misrepresentation has to show that he had reasonable grounds to believe that the fact represented was true (*Lim Koon Park* at [39]).

69 Words, however, are often ambiguous. Depending on the context, a statement may be true in one sense, and yet false in another. In *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 ("*Trans-world*"), the High Court held (at [63(a)]):

> Where there is ambiguity, the representee must do more than show that in its ordinary meaning the representation was false. *He has to show in which of the possible senses he understood it, and in that sense it was false.*
>
> [emphasis added]

70 This rule has a very practical justification. If the representee cannot show in which of the possible senses he understood a statement, it will be impossible to say that the statement is false and that he has been induced by it to alter his position. (*Chuan Bee Realty Pte Ltd v Teo Chee Yeow Aloysius and another* [1996] 2 SLR(R) 134 ("*Chuan Bee*") at [18]).

71 Further, the specific sense in which a representee understands an ambiguous statement is assessed at the time the statement was made. As observed by Steven Chong J (as he then was) in *Goldrich Venture Pte Ltd and another v Halcyon Offshore Pte Ltd* [2015] 3 SLR 990 ("*Goldrich*") (at [119]):

> In both *Trans-World* as well as the earlier case of *Chuan Bee* … the court found that the plaintiffs in each case had failed to plead the specific sense in which they understood the (ambiguous) representation *at the time it was made* so the claims were dismissed.
>
> [emphasis in original]

72 In *Goldrich*, the parties disputed whether the statement "Halcyon had secured big marine projects" referred to Halcyon Offshore Pte Ltd (the defendant) or the Halcyon Group (including the defendant's subsidiaries) having many projects. A reference to Halcyon Offshore Pte Ltd (the meaning asserted by the plaintiffs) would have been false, but a reference to the Halcyon Group would have been true. In the parties' other interactions at the time when the representation was made, the plaintiffs treated the defendant and the defendant's subsidiaries as a single unit. Accordingly, the plaintiffs failed to establish that the statement was false.

Were the statements made by the Bank actionable misrepresentations?

73 Before examining the statements in question, I must reiterate that what caused the losses on the Plaintiffs' investments in Fairfield Sentry were the fraudulent deeds of Madoff. This is unlike the slew of litigation in relation to the mis-selling of financial products, the value of which plummeted as a result of the global financial crisis that followed the bursting of the asset bubble in the USA in 2008 (see, *eg*, *Als Memasa and another v UBS AG* [2012] 4 SLR 992 ("*Als Memasa*"); *Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886 ("*Deutsche Bank (CA)*")). Consequently, for the Plaintiffs to succeed in their claim in misrepresentation, they must prove that they were misled by the Bank as to the risk of loss due to managerial fraud, rather than as to the risk of loss due to adverse market movements. In other words, the cause of the losses was managerial fraud and not market risk. It is not sufficient to merely show that the Bank made representations which the Plaintiffs understood to relate to market risk as this would be irrelevant: such representations would in any event not have caused the loss.

What did the Plaintiffs understand the statements to mean?

74 I have listed (at [64] above) the five main representations relied on by the Plaintiffs. I will now examine each main representation in turn, focusing on the Plaintiffs' understanding of the representations.

The first main representation

75 In my view, the Plaintiffs' understanding of the representation that Fairfield Sentry "was a safe and stable investment with consistent good returns and low volatility" had nothing to do with the risk of loss due to managerial fraud. What the Plaintiffs had in mind when Fairfield Sentry was marketed to

them was investment performance and market volatility. Fraud and managerial wrongdoing did not cross their minds. This point is illustrated by the testimony of the Plaintiffs during cross-examination on their claim that Fairfield Sentry was represented to them to be as safe as a fixed deposit. For example, this is the exchange between counsel for the Bank, Mr Patrick Ang, and the director of the 1st Plaintiff, Mr Harish Rupani:

> Ang: Mr Rupani, *based on this comparison between Fairfield Sentry with S&P 100 index*, would you agree that you were aware that Fairfield Sentry was not a product like a fixed deposit?
>
> Rupani: We never got to discussing this, but I -- at all times in the four-year period, I was aware this was not fixed deposit. It's just that *how it was sold to us, that it is as safe as fixed deposit.*[128]
>
> …
>
> Ang: Therefore, even if the words "*safe and stable*" were being said to you, as you allege, it would have been in the context of the previous *performance* of the particular investment, don't you agree?
>
> Rupani: Obviously, yes. I agree.[129]
>
> [emphasis added]

76 Furthermore there was no evidence from the Plaintiffs that they were thinking of the risk of managerial fraud or any other kind of fraud. Accordingly, this representation did not mislead the Plaintiffs as to the risk of loss due to managerial fraud. The first main representation is accordingly not actionable.

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128 NOE 11 Nov 14 at pp 105 and 106

129 NOE 12 Nov 14 at p 27

The second main representation

77 Throughout the course of the proceedings, the Plaintiffs' precise understanding of the second main representation was not made clear. From the various words and descriptions used by the Plaintiffs, it appeared that their allegation was that the Bank had represented the product to be in the nature of a fixed deposit, *ie*, "like" a fixed deposit.[130] Insofar as the references to "cash substitute" and "fixed deposit" were supposed to mean that Fairfield Sentry possessed the attributes (like cash substitutes and fixed deposits) of being a safe and stable investment or with consistent good returns and low volatility, this overlaps with the first main representation and is not actionable for the same reasons.

78 In any event, although I am analysing all the main representations on the assumption that each representation was made (as stated at [63] above), I pause to observe that it was unlikely that any relationship manager of the Bank would have marketed Fairfield Sentry as a product akin to a fixed deposit. The absurdity of the claim was illustrated during the cross-examination of Menon, the relationship manager for each of the Plaintiffs save for the Patels and the Uttamchandanis. When it was put to Menon that he "had represented that the Fairfield product was a safe and stable product with consistent returns and was good as a fixed deposit"[131], he replied: [132]

> [H]ow can I, an RM, you say, you tell me, experienced RM, so much private experience, Arjun Mittal, LLC, masters person, sell this hedge fund as a fixed deposit. People laugh at you. "Hey, listen, are you serious, this is a fixed deposit?"

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130 DCS at [448]–[453]

131 NOE 13 Aug 15 at p 115

132 NOE 13 Aug 15 at p 116

79 In my view, the Bank's officers would not have been so foolish as to describe Fairfield Sentry as akin to a fixed deposit and the Plaintiffs would not have believed any such description if made. The Plaintiffs portrayed themselves as unsophisticated and conservative investors who invested in Fairfield Sentry because they had been led to believe by the relationship managers of the Bank that Fairfield Sentry was akin to a fixed deposit.[133] However, it was clear to me from the Plaintiffs' backgrounds and investment experience that they were not the unsophisticated and conservative investors that they made themselves out to be. Furthermore, it was not disputed that the Plaintiffs must have known that the anticipated return from Fairfield Sentry was higher than the return from fixed deposit, at the material time. This was an important attraction of the intended investment. They must have known that with an anticipated higher return, the investment would be more risky than a fixed deposit even though it was marketed as a low risk product.

80 At all times, Fairfield Sentry was marketed by the Bank to the Plaintiffs as a feeder fund that simply channelled the investments made with it into Madoff's investment scheme.[134] Madoff's investment scheme, in turn, was marketed as a hedge fund – the value of which would fluctuate in accordance with the market value of the underlying assets – albeit one that had demonstrated low volatility over the years. Given the investment knowledge and experience of the Plaintiffs' representatives, it is inconceivable that they did not understand that investing in Fairfield Sentry differed from placing funds in a fixed deposit.

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133 See, *eg*, NOE 11 Nov 14 at pp 53–55, 69, 77, 106, 108, 115, 118, 119, 123, 130, 132, 134; 12 Nov 14 at pp 8, 26, 30; 13 Nov 14 at pp 110, 112, 114; 14 Nov 14 at pp 4, 10, 13, 16, 17

134 Plaintiffs' Closing Submissions ("PCS") at [441]–[442]; 70BA 777–819

81 Accordingly, I find that none of the Plaintiffs believed that they were putting their money into a product akin to a fixed deposit when they invested in Fairfield Sentry.

The third main representation

82 I turn now to the third main representation. It is surprising that it was presented in the Plaintiffs' closing submissions as one of the main representations as it was not pleaded by the Plaintiffs. Furthermore, it only arose in Prerna's evidence.[135] It is unclear to me why it was included as one of the main representations to the Plaintiffs. In any event, this representation adds nothing to the first main representation. As Prerna herself clarified, her understanding of the representation was that the investment "was safe and it was stable, that is what gold stands for, safe and stability".[136] The claim under this representation accordingly also fails for the same reasons as the first main representation. Finally, I also agree with the Bank's submission that the statement that Fairfield Sentry was "like gold dust" was a mere puff and thus not actionable.

The fourth main representation

83 In relation to the representation that investments in Fairfield Sentry were exclusive and available only to a select group of investors, I find that the representation was true. The Plaintiffs have not sought to argue that this representation was false, and instead appeared to be arguing that it was *true*. In their closing submissions, the Plaintiffs even quoted on a document prepared

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135 NOE 6 Nov 14 at p 31–33

136 NOE 6 Nov 14 at p 32, 36

by the Bank as stating that Fairfield Sentry was a fund "closed to new individual investors".[137] Further, in their reply submissions, the Plaintiffs also stated with reference to the Defendant's closing submissions that, "[t]he Bank *concedes* that Fairfield [Sentry] was an exclusive fund" (emphasis added).[138] The Plaintiffs' characterisation of the Bank's position as a *concession* suggested that the Plaintiffs were arguing for the same position as the Bank in this regard: that Fairfield Sentry was an exclusive fund.

84 For the sake of completeness, I note that the Plaintiffs have relied on a draft affidavit of evidence-in-chief ("AEIC") of Arjun to support their submission that the Bank had made the fourth main representation.[139] Arjun's draft AEIC was mainly relied on by the Plaintiffs for their account of how the Bank instructed its staff to market Fairfield Sentry (though the precise legal significance of this account remained unclear).[140] Parties have disputed the admissibility of this draft AEIC along with three other previous drafts of the same AEIC (collectively, "the draft AEICs"), which were all annexed to the supplemental AEIC of Jitendra. Arjun was formerly employed by the Bank as an Investment Specialist and had interacted with most of the Plaintiffs in relation to the Plaintiffs' investments in Fairfield Sentry.[141] Arjun was originally included in the Bank's list of witnesses. Jitendra subsequently was informed that the Bank did not follow up to get Arjun's AEIC prepared, and therefore took it upon himself to contact Arjun. Jitendra eventually instructed

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137 PCS at [710]

138 Plaintiffs' Reply Submissions ("PRS") at [223]

139 PCS at [713], [715]

140 PCS at [447]–[449] and [454]

141 154BAEIC (Jitendra' Supplemental AEIC) at [4]–[5]

the Plaintiffs' lawyers to prepare an AEIC with Arjun. This led to the four draft AEICs. Subsequently, Arjun declined to testify,[142] and the Bank also decided not to call Arjun as a witness. The Plaintiffs initially alleged that the Bank had suborned Arjun and pressurised him into not giving evidence for the Plaintiffs.[143] However, this point was not pursued in closing submissions.[144]

85 The Plaintiffs then sought to have Arjun's draft AEICs admitted under a hearsay exception, s 32(1)(*j*)(iv) of the Evidence Act (Cap 97) ("EA"). The provision states:

> 32.—(1) Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
>
> …
>
> (*j*) when the statement is made by a person in respect of whom it is shown —
>
> …
>
> (iv) that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to do so;

86 Subsection (3) provides that:

> A statement which is otherwise relevant under subsection (1) shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant.

87 The Bank objected to the admission of Arjun's draft AEICs on two grounds. First, the Bank submitted that s 32(1)(*j*)(iv) of the EA did not operate

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142 154BAEIC (Jitendra' Supplemental AEIC) at [7]–[12],[21]; PRS at [401]–[405]

143 154BAEIC (Jitendra' Supplemental AEIC) at [25]

144 Plaintiffs' PRS at [17(i)] r/w DCS at [26(i)]

because there was no clear evidence that the draft AEICS were Arjun's statements.[145] Second, even if the draft AEICs were admissible, the Court should still exclude them pursuant to s 32(3) of the EA as it will not be in the interests of justice to treat them as relevant. With respect to the second ground, the Bank contended that the draft AEICs were unreliable, as:[146]

> … it is not even clear whether the documents in fact reflect Arjun's statements, let alone which represents Arjun's last version. Even if we did, we do not know whether Arjun would have stood by it when cross-examined.

88 In this regard, the Bank relied on the decision of the High Court in *Sembcorp Marine Ltd v Aurol Anthony Sabastian* [2013] 1 SLR 245. In that case, the respondent was convicted of criminal contempt for the breach of an interim sealing order by forwarding sealed documents to a journalist. The respondent then applied to adduce further evidence in the form of a draft affidavit by the journalist. In examining the reliability of the draft affidavit, the High Court observed (at [26]):

> Thirdly and very importantly, the unaffirmed draft affidavit is not evidence I can rely on. I cannot ignore the fact that [the journalist] has consciously chosen not to affirm that draft. It cannot be assumed that if [the journalist] is called to the stand, he will give evidence as to what is stated in the draft. Whilst not pivotal on its own, taken in the context of my observations and reasons above, this becomes a very relevant factor against allowing the application.

89 Furthermore, in so far as the Plaintiffs relied on the substance of the draft AEICs for the fourth main representation, this did not advance their case as the fourth main representation was true as mentioned above.

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145 DCS at [816]–[822]

146 DCS at [827]

90 Looking at the evidence as a whole, I find that the draft affidavits were inadmissible. A prerequisite to invoking s 32(1)(*j*)(iv) of the EA to admit a statement is that the statement must be "made by a person" who subsequently refuses to give evidence. I am not persuaded that the draft AEICs were made by him, given that he did not swear or affirm them. While he may well have *intended* to make the statement, the point remains that he has not made it. The draft AEICs remain documents drafted by others for him. Accordingly, s 32(1)(*j*)(iv) of the EA was inapplicable and the drafts AEICs were not admitted into evidence. Further, even if I were inclined to admit the draft AEICs, I would have accorded them little weight as their contents were not tested by cross examination.

The fifth main representation

91 The alleged representation that the Bank had done due diligence begs the question of what type of due diligence was being referred to. If it referred to due diligence to ensure that Fairfield Sentry bore the characteristics referred to in the first main representation, then the claim must fail for the same reason as the first main representation. If on the other hand the representation referred to due diligence in relation to managerial fraud, then the fifth main representation may potentially be actionable.

92 In my view, the Plaintiffs' did not understand "due diligence" to refer to due diligence as to managerial fraud. This is illustrated, for example, in the AEIC of Arjan, which I quote at length to outline the context in which the issue of diligence was raised:[147]

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147 58BAEIC, Tab T1, [49]–[50]

> 49. Menon represented that Fairfield was a safe and stable investment with steady returns. He stressed that based on Fairfield's track record, it had extremely low volatility even when there was turbulence in the financial markets. He pitched Fairfield as a safe investment with modest consistent returns but rarely if ever performs negatively. Term sheets were shown to me to confirm this. He said that Fairfield was as good as cash. In other words, if we bought into Fairfield, it would be as good as holding cash in our hands. He referred to it as a "cash substitute" (or better than fixed deposits). It seemed that he knew that this was a major draw for me. He knew that as a conservative risk averse investor traditionally relying on cash deposits, the attraction of Fairfield as a cash substitute would achieve great mileage with me...
>
> 50. Naturally Menon added that [the Bank] had done strict due diligence on Fairfield which was the reason why he was able to present the product so confidently with so many statistics to back him up. Menon was persuasive. He seemed so confident about Fairfield. He was like a man on a mission when it came to Fairfield.

93 To my mind, it is clear that the alleged representation about due diligence was similar in context to that about the first main representation, *ie*, it was in respect of the past performance of good returns and low volatility. Any representation about due diligence had nothing to do with managerial fraud.

94 Further, even if I am wrong on this point and the fifth main representation in fact related to managerial fraud, I am of the opinion that the Bank had conducted due diligence. This will be discussed later under the claim for failure of due diligence by the Bank, separate from the allegation of misrepresentation.

Conclusion on the claim in misrepresentation

95 I have found that none of the five main representations would have been actionable misrepresentations, even if they were made. Accordingly, I

dismiss the claim in misrepresentation. In the circumstances, I do not need to make a definitive finding on whether such representations were made, save for the first main representation which the Bank accepted was made. I also do not need to consider here whether the Plaintiffs had relied on the alleged representations, and the effects (if any) of non-reliance and non-representation clauses in the account-opening documentation on the claim in misrepresentation.

Claim for breach of tortious and contractual duties of skill and care

96 The Plaintiffs pleaded that the Bank owed them contractual and tortious duties of care in respect of the investments that they made through the Bank.[148] In particular, the Plaintiffs alleged that the Bank owed the Plaintiffs a duty to "act with reasonable care and skill in advising them on their investments, making recommendations to them and generally advising them on the management of their portfolios".[149] Further, the Bank breached these duties by neglecting to conduct adequate due diligence on Fairfield Sentry. However, it was not clear what the Plaintiffs' case was as regards causation. If the Bank had conducted the due diligence which the Plaintiffs alleged that Bank omitted to do, what would have been the result? Without clarity on this point, it will be difficult to assess whether the Bank's alleged breach indeed caused the Plaintiffs' losses.

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148 Plaintiffs' Opening Statement at [66]

149 PCS at [291]; See also PCS at [120]–[121]; SOC (337) at [50]–[51]; SOC (338) at [38]–[39]

97 In their pleadings, the Plaintiffs' main focus appeared to have been that if the Bank conducted adequate due diligence, the Bank would have uncovered the fraud. For example, they pleaded that:[150]

> If the Defendants had conducted reasonable due diligence, including typical quantitative analysis, they would have established that Fairfield, Madoff and [BLMIS] were involved in an extensive fraudulent scheme which was no more than a giant Ponzi scheme.

98 Another example is the following:[151]

> Had the Defendants conducted independent due diligence and not relied entirely on the internally produced Fairfield documents, they would have discovered that Madoff did not even execute option trades. The Defendants failed to appreciate that there was no trade involving the Madoff run Fairfield investment at the time they sold the product to the Plaintiffs and thereafter when they continuously advised and induced the Plaintiffs to maintain the investment despite the fact that they were aware that Madoff held 95% of the assets in the Fairfield investment with the remaining 5% held as cash. Nothing was held by the original custodian, CITCO, contrary to the Defendants representations.

99 One of the Plaintiffs' experts, Casey, also gave evidence in his AEIC that "A simply [*sic*] question as to the trade counterparties on those purchases and verification of [BLMIS] custody would have exposed that fraud".[152]

100 It was therefore surprising when the Plaintiffs stated in their reply submissions that:[153]

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150 SOC (337) at [52.15]; SOC (338) at [40.15]

151 SOC (337) at [52.6]; SOC (338) at [40.6]; See also SOC (337) at [52.16] and [52.3A–D]; SOC (338) at [40.16] and [52.3A–D]

152 138BAEIC (Expert Report of Frank Casey) at [48]

153 PRS at [17(f)–(g)]

> … the Plaintiffs' case is that had the Bank conducted reasonable due diligence, including quantitative analysis, they would have concluded that Fairfield could not have achieved the performance with the reported strategy and it was therefore, too good to be true.
>
> *The Plaintiffs do not contend that the Bank could or should have detected the fraud…*
>
> … the Plaintiffs' case is that if the Bank had conducted due diligence or implemented standard practices or procedures adopted by investment management and wealth custodian banks to adequately protect the Plaintiffs' assets, it would have known that Fairfield could not have achieved the performance it touted with the reported strategy.
>
> *The Plaintiffs do not contend that by conducting proper due diligence or implementing proper procedures and practices, it could have uncovered the fraud.*
>
> [emphasis added]

101 Despite these statements, ambiguities remain. If the Bank "concluded that Fairfield could not have achieved the performance with the reported strategy and it was therefore, too good to be true" or "[knew] that Fairfield could not have achieved the performance it touted with the reported strategy", what then should the Bank have done or not have done?

102 To be fair, another of the Plaintiffs' expert, Conner asserted in his AEIC that if the Bank had conducted adequate due diligence, it would:

(a) Not have recommended Fairfield Sentry for investments by the Plaintiffs;[154]

(b) Have advised the Plaintiffs not to invest or remain invested in Fairfield Sentry.[155]

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154 138BAEIC (Expert Report of Robert Conner & Stuart Rosenthal) at [87], [89]

103 Nevertheless, the point remains that the Plaintiffs' statement of claim did not assert this clearly and, as mentioned above, appears to be focused on the allegation that due diligence would have uncovered the fraud.

104 The Bank denied that it had failed to conduct adequate due diligence on Fairfield Sentry, whether initially or on an on-going basis, and, instead, reasonably believed that Fairfield Sentry was "a genuine and viable investment option for the Plaintiffs".[156] The Bank added that, in any event, a stricter standard of due diligence on its part would not have revealed Madoff's fraud, given that others who were better positioned to discover the fraud (auditors, custodians, and regulators) did not succeed in doing so.[157]

105 In its Defence, the Bank also cited various clauses in the contractual documents signed by the Plaintiffs. These clauses purported to, inter alia, exclude any duties on the Bank to advise the Plaintiffs on their investments.[158]

Did the Bank owe the Plaintiffs a duty of care?

106 Although the Plaintiffs' pleadings suggested that they were relying on both a contractual duty of care and a tortious duty of care, their closing submissions focussed on the latter in relying on *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"). I shall thus focus on the tortious duty of care in this judgment.

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155 138BAEIC (Expert Report of Robert Conner & Stuart Rosenthal) at [18]–[19], [27], [92(g)]

156 Defence at [26(ii)(b)]; Defendant's Opening Statement at [4(a)]

157 Defence at [26(ii)(c)]; Defendant's Opening Statement at [4(b)]

158 Defence at [26(ii)(a)]

107 The Bank relied on a number of contractual terms to deny that it owed any duty of care to the Plaintiffs.

108 I will first consider if there would have been a duty of care in tort on the assumption that the contractual terms did not negate such a duty.

109 The test to determine the imposition of a duty of care is a two-stage test comprising, first, proximity and, second, policy considerations. This test is preceded by the threshold question of factual foreseeability: see *Spandeck* at [115].

110 In *Spandeck*, the Court of Appeal also said (at [115]) that factual foreseeability is likely to be fulfilled in most cases and hence the court saw no need to include it as part of the legal test for a duty of care. Subsequently, in *Deutsche Bank (CA)*, the Court of Appeal decided on the facts that factual foreseeability was not established.

111 In the present case, factual foreseeability was obvious. It was factually foreseeable that if the Bank did not exercise reasonable care when making a decision to recommend Fairfield Sentry to the Plaintiffs, and if the Plaintiffs acted on the recommendation, the Plaintiffs might be harmed as a consequence.

112 Coming back to the first stage of proximity, this is a reference to legal proximity. The focus is on the closeness of the relationship between the parties, including physical, circumstantial and causal proximity, supported by the twin criteria of voluntary assumption of responsibility and reliance: *Spandeck* at [81].

113 It is true that the accounts of the Plaintiffs were not discretionary accounts in that the Bank could not legally make investment decisions for the Plaintiffs. It is also true that the key representatives of the Plaintiffs had considerable investment experience which has been discussed in the earlier part of this judgment.

114 On the other hand, it was not disputed that the relationship managers of the Bank, including Menon who was the relationship manager of most of the Plaintiffs, had meetings from time to time with the Plaintiffs' key representatives to assess the portfolios of the Plaintiffs during which the relationship managers also recommended specific products from time to time for investment. In particular, they did introduce and recommend Fairfield Sentry highly for investment even though the ultimate decision to invest lay with the key representatives or the families themselves. Even Menon accepted that the Plaintiffs relied on the Bank's recommendation of Fairfield Sentry. However, these factors alone may not be enough to give rise to a duty of care.

115 In *Deutsche Bank (CA),* the Court of Appeal said at [43]:

> The introduction of products and the giving of recommendations form part of the normal role of a salesperson in the private banking context, and the mere fact that this transpired here is not sufficient by itself to give rise to an advisory relationship, with its accompanying tortious duties of care.

116 The above statement was based on observations made by Gloster J in *JP Morgan Chase Bank (formerly known as Chase Manhattan Bank) (a body corporate) v Springwell Navigation Corporation (a body corporate)* [2008] EWHC 1186 (Comm) ("*Springwell (HC)*").

117 Relying on the above passage, the Bank submitted that even though the Bank had repeated meetings with key representatives of the Plaintiffs to introduce products and suggest investments, this did not by itself give rise to a duty of care.

118 In *Springwell (HC)*, the person (referred to as JA) who was making recommendations to the bank's customers did so as part of his role as a salesman employed by a bank to buy and sell emerging market debt securities to the bank's customers. In that case, the court drew a distinction at [452] between an "investment advisor, properly so-called, who is retained to advise a client, usually backed by considerable research, in relation (for example) to the investments which a client should make, the structure of the investment portfolio, asset allocation and diversification, and the advice or recommendations given by a bonds salesperson such as JA, as part of the selling process, who was actually trading …".

119 In the case before me, persons like Menon were relationship managers whose role was not just to take instructions and occasionally make recommendations on what to buy or sell. These relationship managers made it a point to have meetings with the Plaintiffs to discuss and assess their portfolios.

120 Moreover, as Menon said in his AEIC at paras 6 and 7, he also provided customers with information regarding investment products that had been approved by AEB and subsequently SCB. He was generally aware that SCB (and presumably AEB) conducted due diligence on investment products before they were made available to clients for investment.

121 Furthermore, the relationship managers worked closely with Investment Specialists, who were eventually known as Investment Advisers ("IA"), who had specific knowledge of the investment products offered by the Bank to customers.

122 Broadly speaking, the relationship managers were considered "generalists" and the IA were considered "specialists". It was his usual practice to ask an IA to sit in on some meetings with customers.

123 At para 140 of Menon's AEIC, he said that it was the IA who took the lead in explaining the features and all the details of Fairfield Sentry when it was introduced to clients.

124 In my view, there was sufficient proximity between the Bank and the Plaintiffs which would have given rise to a duty of care on the part of the Bank in deciding whether to recommend Fairfield Sentry for investment.

125 I am also of the view that there is no policy consideration which would negate such a duty.

126 Accordingly, I conclude that the Bank would have owed a duty of care to the Plaintiffs in deciding whether to recommend Fairfield Sentry unless the duty of care is negated by the contractual terms.

127 I would add that a duty of care in deciding whether to recommend a product or even when making the recommendation is not the same as a duty of care to take the initiative to make recommendations in respect of a customer's investments. The former arises only when a bank is thinking of making a particular recommendation or is in fact making the recommendation. The

latter requires a bank to take the initiative to make recommendations in respect of the customer's investments, for example, to diversify in the light of an over-concentration of investments in a particular company, country or currency. The latter is a higher duty which was claimed by the customers in some cases. The present case concerns the former only and, more specifically, the duty of care in deciding whether to recommend Fairfield Sentry.

128 It was not disputed that a bank may use contractual terms to negate a duty of care. These terms may do so in two broad ways. The first is to exclude such a duty by, for example, having a term that states that the customer agrees that the bank owes no duty of care to the customer or the bank is under no liability to the customer for any act or omission or step taken. The Bank referred to such a term as an exclusion term. The second is to say that the bank has not made any representation or recommendation and/or the customer does not rely on any such representation or recommendation and relies solely on his own judgment. The Bank referred to such a term as a non-reliance term. Naturally each actual term will have to be considered to see if it achieves its intended purpose.

129 Non-reliance terms have given rise to the concept known as contractual estoppel whereby a customer may be estopped from raising true facts contrary to the contractual term. For example, a customer may be estopped from establishing that in fact a bank had made a representation or recommendation even though that did truly occur.

130 The doctrine of contractual estoppel is relatively new in Singapore and gave rise to vigorous arguments from the parties on its application here.

131 The Plaintiffs accepted that in *Orient Centre Investments Ltd and another v Société Générale* [2007] 3 SLR(R) 566 ("*Orient Centre*"), the Court of Appeal appeared to have accepted that contractual estoppel is part of Singapore law.[159]

132 However, the Plaintiffs submitted that the Court of Appeal in *Orient Centre* did not have regard to its earlier decision in *Fook Gee Finance Co Ltd v Liu Cho Chit and another* [1998] 1 SLR(R) 385 ("*Fook Gee Finance*") where the analysis precluded contractual estoppel reasoning.

133 On this point, the Bank submitted that the doctrine of contractual estoppel was first developed only in the English case of *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386 ("*Peekay*") which was decided after *Fook Gee Finance*. Therefore, the Singapore Court of Appeal in *Fook Gee Finance* did not consider or rule on this doctrine.

134 I am of the view that the Bank's submission on this point is correct in that the Court of Appeal in *Fook Gee Finance* did not decide whether contractual estoppel is applicable in Singapore. As mentioned above, the Plaintiffs accepted that the Court of Appeal in *Orient Centre* had applied that doctrine. In my view, the Court of Appeal in *Orient Centre* did cite *Peekay* with apparent approval and applied the doctrine of contractual estoppel. The decision in *Orient Centre* is binding on the High Court even if it was made without considering *Fook Gee Finance*. Whether the reasoning in *Fook Gee Finance* would have assisted the Plaintiffs is a matter I need not address.

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159 PCS at [1703]

135 I note that in *Als Memasa*, the Court of Appeal did mention its earlier decision in *Orient Centre*. It said at [25], that non-reliance clauses cannot immunise the bank from liability for unauthorised transactions. At [29], the Court of Appeal also remarked:

> However, in the light of the many allegations made against many financial institutions for "mis-selling" complex financial products to linguistically and financially illiterate and unwary customers during the financial crisis in 2008, it may be desirable for the courts to reconsider whether financial institutions should be accorded full immunity for such "misconduct" by relying on non-reliance clauses which unsophisticated customers might have been induced or persuaded to sign without truly understanding their potential legal effect on any form of misconduct or negligence on the part of the relevant officers in relation to the investment recommended by them.

136 I come now to the decision of the High Court in *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 ("*Deutsche Bank (HC)"*). There the High Court dismissed the bank's claim against the customer and allowed the customer's counterclaim against the bank.

137 The High Court observed at [136] that the plaintiffs in *Orient Centre* were financially sophisticated parties and noted the comment made in *Als Memasa* as to whether the courts should re-consider the entitlement of financial institutions to include non-reliance clauses against unsophisticated customers. Accordingly, the High Court distinguished *Orient Centre* on the basis that the customer was known to be financially inexperienced.

138 The High Court's decision was reversed on appeal in *Deutsche Bank (CA)*. The Court of Appeal decided that the customer had not even established that the bank there owed it the duty of care that was alleged. The Court of Appeal said at [79]:

> In view of our decision that DB did not owe Dr Chang a tortious duty of care in relation to the giving of wealth management advice, it is unnecessary for us to rule on the submissions that were made on the doctrine of contractual estoppel. We doubt the correctness of the Judge's exposition of this area of the law but as the issues raised are important, they are better addressed on a future occasion when it is necessary to do so.

139 Relying on the above passage, the Plaintiffs argued that the Court of Appeal in *Deutsche Bank (CA)* did not affirm the application of contractual estoppel in Singapore.

140 On the other hand, the Bank submitted that when the Court of Appeal expressed doubt on the correctness of the High Court's exposition on the doctrine, this was in the context of the High Court's view that contractual estoppel should operate only against sophisticated customers. There is some merit in this submission.

141 In any event, it seems to me that the short point is that the Court of Appeal in *Deutsche Bank (CA)* did not "overrule" or disagree with the decision of the Court of Appeal in *Orient Centre* where the doctrine of contractual estoppel was applied. Neither did the Court of Appeal in *Als Memasa* do so as its observation as to whether the doctrine of contractual estoppel should apply to unsophisticated customers was made *obiter dicta*. In my view, *Orient Centre* is still the law in Singapore. In any event, I am also of the view that the Plaintiffs are not unsophisticated customers as mentioned earlier (see [79]).

142 However, there were also various disputes as to whether various contractual terms were incorporated into the agreement between the Bank and

each Plaintiff or were binding on the Plaintiffs and which of the terms in various editions applied.

143 The Plaintiffs submitted that although the Bank relied on two sets of PBSA from AEB for different periods of time, three were mentioned at trial.

144 The Bank acknowledged in its closing submission that three versions from AEB were identified at trial as AEB's PBSA:

(a) Exhibit P30

(b) Exhibit P31 (which was allegedly the same as the document exhibited in Menon's AEIC)

(c) A third version identified and exhibited as the Revised AEB PBSA in Menon's AEIC.

145 The Bank also submitted that Exhibit P30 and P31 were exactly the same (in format and content) save that the words "Strategic Deposits" at pp 18 and 19 of Exhibit P30 were replaced with the words "Strategic Investments" at pp 18 and 19 of Exhibit P31. It also submitted that it was the third version which was different in format from Exhibit P30 and P31.

146 Following from the above, the Bank maintained that prior to October 2006, the version which applied was either Exhibit P30 or P31 and it was immaterial which as the substantive terms were the same.

147 After October 2006, it was the Revised AEB PBSA which applied.[160] The Bank contended that the Plaintiffs did not identify any substantive difference between this version and the other earlier two versions.

148 Thereafter, in July 2008, SCB acquired the private banking business of AEB. All the private banking accounts of AEB were transferred to SCB and, according to the Bank, the Revised AEB PBSA was superseded by the Standard Chartered GTC which applied from September/October 2006.[161]

149 However, the Plaintiffs argued that they, or most of them, did not in fact receive Exhibit P30 or P31 or the Revised AEB PBSA or the Standard Chartered GTC.[162] In some cases, they were provided only with the signature page of the account opening form.[163] These allegations were not accepted by the Bank.

150 The Bank also relied on various authorities for the propositions that a person is bound by the terms of a document even if he had been provided with and signed only the signature page and he is also bound by a document which is expressly incorporated even if he did not read or receive that document.

151 The Bank submitted that most of the accounts (except for Account Nos 103065 and 107017) were opened before October 2006. Each of the account holders had signed an account opening application form and it was stated on the page which was signed that all transactions were subject to the terms and conditions of the account application and the AEB PBSA.[164] This would be Exhibit P30 or P31 and it was immaterial which one. I would add that the signature page of the forms also had a statement that the applicant

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160 DCS at [31]

161 DCS at [32]

162 PCS at [1614]

163 PCS at [1615]-[1619] and [1622]

164 DCS at [35]

acknowledged receiving a copy of the PBSA or the relevant company resolution had such a statement.

152 The Bank submitted that for Account No 103065 which was opened with AEB on 8 November 2006, the relevant AEB account opening application form provided that the account was opened with AEB on the terms and conditions of the Revised AEB PBSA.[165] The Revised AEB PBSA was also sent to all existing account holders and superseded Exhibit P30 or P31.

153 For Account No 107017, the Bank submitted that it was opened with SCB on 20 October 2008 and that the relevant SCB account opening application form stipulated that the account holder had read and fully understood the Standard Chartered GTC.[166] Furthermore, the Standard Chartered GTC was sent to all existing account holders and superseded the Revised AEB PBSA.

154 As for the question whether the Bank had adduced sufficient evidence to establish that the Revised AEB PBSA and, subsequently, the Standard Chartered GTC were sent to existing account holders, the Plaintiffs submitted that the Bank was relying on emails from certain officers of the Bank to establish these facts but these officers were not called to testify.[167]

155 However, even if, for the sake of argument, the Bank did not establish that the new terms were sent, this did not mean that no terms applied. All it

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165 DCS at [38]

166 DCS at [42]

167 PCS at [1651]

would mean was that the existing terms continued to apply, *ie*, the terms contained in either Exhibit P30 or P31.

156 I am of the view that even if any of the Plaintiffs had received only the signing page of the account application form and/or did not receive Exhibit P30 or P31, he was still bound by either Exhibit P30 or P31 which would have been expressly incorporated.

157 While the Bank relied on various terms in Exhibit P30 or P31, I need only to refer to one for the time being. Under the Disclosure of Risks and Disclaimer, clause 3 stipulated that:

> 3. In accepting any services made available pursuant to this Agreement, the Customer understands and agrees that:-
>
> (a) the Customer makes its own judgment in relation to investment or trading transactions;
>
> (b) the Bank assumes no duty to make or give advice or make recommendations;
>
> (c) if the Bank makes any such suggestions, the Bank assumes no responsibility for the Customer's portfolio or for any investment or transaction made;
>
> …

158 Although cl 3(b) referred to "advice" and "recommendations" while cl 3(c) referred to "suggestions", it appears that the two provisions were related especially since cl 3(c) referred to "such" suggestions which in turn must refer to "advice" and "recommendations" in cl 3(b). The sum total of these two provisions was that they negated any duty of care on the part of the Bank to the Plaintiffs when making recommendations. This was reinforced by cl 3(a) for which contractual estoppel may apply.

159 So even if the Revised PBSA and the Standard Chartered GTC were not sent to those who had opened their accounts before October 2006, the above provisions would still apply.

160 As for the two later sets of terms, the Bank relied on various provisions therein to deny liability.

161 It is unnecessary for me to go through such provisions or to decide whether they also negate any duty of care on the part of the Bank because, in any event, I will continue on the assumption that the Bank did owe a duty of care in deciding whether to recommend Fairfield Sentry to each of the Plaintiffs and that such duty was not negated by any of the contractual terms in any of the versions which the Bank relied on.

162 Before I move on, I clarify one point. The Plaintiffs argued that it was not open to the Bank to say that each set of terms was superseded by a new set of terms and then rely on the previous set to deny liability. They suggested that it was inconsistent for the Bank to do so. In my view, there is no such inconsistency. Assuming that each new set of terms was sent to the Plaintiffs, the Bank is correct that the new set will, in general, supersede the previous set. However, for the purpose of determining the rights and liabilities of the parties, the relevant time is the time when each investment was made in reliance on the Bank's recommendation. So, for example, if an account was opened before October 2006 but the investment decision was made in December 2006, then it will be the Revised AEB PBSA which applies to that investment.

Did the Bank breach its duties to the Plaintiffs?

163 The Plaintiffs contended that the Bank breached its duty of care to them by failing to: (i) "[implement] standard practices/procedures routinely adopted by investment management and wealth custodian banks to ensure that the Plaintiffs' funds were adequately safeguarded," and (ii) "conduct adequate and independent due diligence when recommending investment strategies and investment funds."[168]

164 The Bank submitted that it had "conducted due diligence that was consistent with the standards practices (if any) of institutions in a similar position to [itself] during the material time from 2002 to 2008."[169] In addition, "[a]t all material times, the Bank was unaware of any potential fraud; and it could not reasonably have known of the fraud either."[170] .

The law

165 The standard of care owed by the Bank to the Plaintiffs in performing due diligence on Fairfield Sentry is determined by reference to the steps a reasonable and competent private bank ought to have taken (*Deutsche Bank (CA)* at [72]). This is a common sense inquiry: "whether the reasonably prudent banker, faced with the same circumstances, would regard the course of action taken on the facts justifiable" (*Yogambikai Nagarajah v Indian Overseas Bank and another appeal* [1996] 2 SLR(R) 774 ("*Yogambikai*") at [62]).

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168 SOC (337) at [51]

169 Defence (337) at [24]

170 Defendant's Opening Statement at [3]

166 The Bank's obligations must necessarily be informed by the circumstances and prevailing industry standards at the material time (*ie*, before Madoff confessed to the fraud in December 2008).

The Bank's due diligence

167 The Bank's case was that it did conduct its own due diligence on Fairfield Sentry as well as rely on others. On the latter point, the Bank relied on, for example, the due diligence done by FGG itself and the fact that Fairfield Sentry was audited by PwC.

168 However, the Plaintiffs alleged that Holmes, one of the Bank's representatives, had admitted that the Bank relied entirely on Fairfield entities in respect of due diligence on Fairfield Sentry.[171] It was Harish's understanding that the Bank did not conduct its own due diligence.

169 Unfortunately for the Plaintiffs, their allegations, evidence and submissions about the Bank's admission were inconsistent.

170 In the Plaintiffs' pleadings in Suit 337, they provided some particulars of the allegation about the Bank's admission as follows[172]:

(a) First, that this admission was made at a meeting on or about 1 February 2009 in Dubai between Harish and Holmes.

(b) Secondly, that the admission was repeated by Holmes shortly after 23 February 2009.

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171 PCS at [123(p)]

172 See SOC (337) at paras 52.22 to 52.23

171 However, the further and better particulars of Statement of Claim (Amendment No 4) ("SOC") for Suit 337 dated 5 August 2011 referred to only one admission purportedly made at a meeting on 2 February 2009 (which was subsequently amended in the SOC to 1 February 2009)[173]. No mention was made of a repeat admission.

172 Also, the AEIC of Harish did not allude to any admission by Holmes at the meeting on 1 February 2009.[174] Instead, Harish's AEIC said at para 70 that Holmes' admission was made a day or two later after an email sent by Harish to one Farzaneh, another of the Bank's representatives, dated 23 February 2009.

173 An AEIC of Jitendra for Suit 338 stated at para 147 that at a meeting he had with Holmes (on 1 February 2009), Holmes had "stated categorically that the [Bank] had not conducted any of [its] own independent due diligence on Fairfield and had wholly relied on the due diligence conducted by Fairfield's auditors."[175]

174 However, in all the emails from Harish to the Bank after 1 February 2009 and after 23 February 2009 which raised the question of due diligence, no mention was made of any admission by Holmes.

175 Likewise, there was no email or any other correspondence from Jitendra making such an allegation.

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173 See Answer to 20(a) in Further and Better Particulars dated 5 August 2011

174 18BAEIC [63]

175 1BAEIC at [147]

176 The Plaintiffs' Closing Submissions dated 22 August 2016 alleged at para 123(p) that Holmes had admitted that the Bank did not conduct its own due diligence and had relied on Fairfield Sentry. However, in the more substantive part of such submissions at paras 923 to 954 on the issue of due diligence, no elaboration was given.

177 The Bank's Closing Submissions dated 19 September 2016 then assumed at para 399 that the Plaintiffs were no longer pursuing the allegation about Holmes' admission to Harish.

178 This then led the Plaintiffs to elaborate in the Plaintiffs' Reply Submissions at paras 241 to 248 about alleged admissions by Holmes to Jitendra and to Harish.

179 The Bank had called Holmes as a witness to rebut any allegation about his alleged admission which he did.

180 I was of the view that the Plaintiffs had failed to establish any admission by Holmes. Holmes would not have been so foolish as to commit the Bank to such a position. Furthermore, the inconsistent manner in which this allegation was presented suggests that Harish and Jitendra were not telling the truth. The absence of any mention of Holmes' admission in any of the emails from Harish thereafter which raised the question of due diligence reinforced this suggestion.

181 In any event, even if Holmes had made the alleged admission(s), it would not preclude the Bank from adducing evidence about its efforts at due diligence. The alleged admission(s) would at most be evidence to suggest that other evidence from the Bank about such efforts was untrue.

182 I shall now outline the Bank's evidence on the due diligence it conducted to set the context for evaluating the Plaintiffs' arguments that such due diligence was inadequate.

183 The Bank's evidence was largely found in the evidence of Friedman. Friedman worked at the Bank from 1992 until his retirement in 2009.[176] He headed the "GIG" of the Bank, which continually reviewed investment products made available by the Bank to its private banking clients.[177] He concurrently chaired the CIC, which approved new investments products and oversaw the on-going due diligence conducted by the GIG.[178]

184 Friedman set out the due diligence conducted by the Bank in two phases: due diligence conducted before Fairfield Sentry was approved by the Bank for client investment ("initial due diligence") and due diligence conducted thereafter ("on-going due diligence"). I shall adopt the same organisation in this judgement.

Initial due diligence

185 When the Bank learnt that Fairfield Sentry was accepting investments in late-2002, the GIG initiated due diligence on Fairfield Sentry and reviewed, in particular, the following documents:

(a) a DDQ 17 September 2002 produced by Fairfield Sentry;[179]

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176 129BAEIC at [5]

177 129BAEIC at [2]–[3]

178 129BAEIC at [4]

179 129BAEIC at [27(a)]

(b) the Fairfield Sentry directors' report and audited financial statements for the year ending 31 December 2001 (the "2001 Financial Statements");[180] and

(c) the Fairfield Placement Memorandum (above at [59]).[181]

186 The DDQ provided information about the management, strategy, and track record of Fairfield Sentry and its manager, FGG.[182] It highlighted that Fairfield Sentry had operated since 1990 and had US$3.9 billion in assets by 2002. And Fairfield Sentry employed a split-strike conversion strategy that had produced consistent returns since its inception. Moreover, Fairfield Greenwich had operated hedge funds since 1983, and had by 2002 managed US$5b for 5,000 investors across the world.[183]

187 The GIG found no concerns with the 2001 Financial Statements. PwC had represented in its Auditor's Report that "the financial statements [gave] a true and fair view of the financial position of [Fairfield Sentry] as of December 31, 2001 and of the results of its operations and its cash flows for that year".[184] In addition, Fairfield Sentry's annualised returns were good but not spectacular when compared to the performance of the S&P 100, various stock indices, and other hedge funds.[185] They were also explicable by the use

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180 129BAEIC at [27(b)]

181 129BAEIC at [27(c)]

182 129BAEIC at [29]

183 129BAEIC at [29]

184 129BAEIC at [31]

185 129BAEIC at [32]

of options collars and the opportunistic entry into and exits from the stock market.[186]

188 Across 2002, the GIG interviewed personnel from Fairfield Sentry and was convinced that Fairfield Sentry was managed by "knowledgeable professionals with significant experience in financial markets."[187] During an on-site visit to Fairfield Sentry on 18 December 2002, the GIG discussed the operational and oversight arrangements of Fairfield Sentry, the trade volumes of BLMIS, and the potential risks in BLMIS executing its own trades for Fairfield Sentry rather than using a third-party broker. Fairfield Sentry explained that they hired a former options trader to check trades and execution prices every month.[188]

189 The GIG did not find anything amiss in Madoff's refusal to meet the Bank for the purpose of due diligence. Madoff had an excellent reputation as the former chairman of NASDAQ's Trading Committee, and the Vice-Chairman of the NASD.[189] It was not uncommon for sought-after asset managers, particularly those who employed proprietary trading models, to decline to meet indirect investors.[190] Most mutual funds disclosed only their top 10 holdings at the end of each month. Moreover, Fairfield Sentry had represented that it was monitoring the daily trades and reviewing the trading tickets of BLMIS, and had substantiated Fairfield Sentry's claims by providing the Bank with frequent and detailed reports discussing BLMIS'

186 129BAEIC at [32]

187 129BAEIC at [33]

188 129BAEIC at [35]

189 129BAEIC at [41]

190 129BAEIC at [37]

trading activities and risk profiles.[191] Lastly, large and reputable independent organisations were involved in the oversight of BLMIS and Fairfield Sentry, the presence of which reassured the Bank that there were no due diligence concerns with Fairfield Sentry.[192]

(a) The auditor, administrator, and custodian respectively of Fairfield Sentry were PwC, Citco Fund Services, and Citco (Custodian).[193] Each was a reputable third-party whom the Bank believed was verifying and safeguarding Fairfield Sentry's assets.[194] PwC had "examin[ed], on a test basis, evidence supporting the amounts and disclosures in the financial statements."[195] Similarly, Citco Fund Services had "supervis[ed] the sub-custodians [including BLMIS]" and "ma[de] appropriate inquiries periodically to confirm that the obligations of the sub-custodians continue to be competently discharged."[196] Finally, Citco (Custodian) independently calculated the net asset values of Fairfield Sentry's assets, and reconciled these values with those reported by BLMIS.[197]

(b) As a regulated broker-dealer, BLMIS was regularly examined by its regulators, the National Association of Securities Dealers ("**NASD**") (and subsequently, the FINRA) and also the SEC. These

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191 129BAEIC at [39]–[40]

192 129BAEIC at [30]

193 129BAEIC at [30]

194 129BAEIC at [44]

195 AB114–139

196 AB209–279

197 129BAEIC at [46]

institutions were better placed than any bank to detect Madoff's wrongdoing, and found nothing amiss with BLMIS.[198]

(c) At least one other established and reputable fund manager, Tremont, had made significant investments with BLMIS. Tremont was known in the funds industry for its rigorous due diligence processes.[199] American Express Financial Advisors ("AFEA"), an affiliate of the Bank, had hired Tremont to develop AFEA's hedge fund business. The GIG was thus familiar with, and thought highly of, Tremont's operations and personnel.[200]

190 The due diligence conducted by the GIG also unearthed two news articles questioning the strategy and returns reported by Madoff and BLMIS: the MARHedge Article and the Barron's Article. I will elaborate on these articles and the Bank's response later.

191 Friedman added that, up until Madoff's fraud came to light, the Bank was itself convinced by the due diligence that it had performed on Fairfield Sentry, FGG and BLMIS.[201] In late-2002, when Fairfield Sentry began accepting investments from the Bank's clients, the Bank had provided the initial principal investment of $12m, which it then packaged into its in-house fund of funds that were sold to its clients.[202] Subsequently, when the Bank's clients invested directly in Fairfield Sentry, the Bank accepted the clients'

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198 129BAEIC (Friedman) at [42]; 150BAEIC (Expert Report of Ziff) at [46]

199 129BAEIC at [9]

200 129BAEIC at [43]

201 129BAEIC at [57]

202 129BAEIC at [56]

Fairfield Sentry holdings as collateral for loans extended to those clients.[203] Indeed the Bank gave a higher "loan to value ratio" of 60% for collateral value, instead of the usual 50% for other hedge fund holdings.[204]

On-going due diligence

192 Between 2003 and 2008, the GIG conducted on-going due diligence on Fairfield Sentry in accordance with its formal due diligence policies:[205]

(a) Monitoring Fairfield Sentry's performance, risks, and returns;

(b) Maintaining regular contact and communication with fund manager Fairfield Greenwich; and

(c) Providing quarterly reports to the CIC.

193 The GIG monitored the performance of Fairfield Sentry on both weekly and monthly intervals, based on the data it received from Fairfield Sentry. It examined, *inter alia*, net asset value, monthly returns and volatility, exposures, sensitivities, stress, and risk parameters.[206] It generated its own standardised reports on the performance of Fairfield Sentry, and performed monthly correlation analyses of the performance against that of various indices including the NASDAQ Composite US dollar Index.[207]

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203 129BAEIC at [59]

204 129BAEIC at [59]

205 129BAEIC at [62]

206 129BAEIC at [63]

207 129BAEIC at [64]

194 The on-going review of Fairfield Sentry's performance and risks revealed nothing of concern. The returns were consistent with what was expected of such a fund of its type, in the light of the prevailing market conditions. Especially reassuring was the close channels of communication between the GIG and Fairfield Sentry staff, as with Fairfield Sentry's provision of continual updates on its exposure to distressed funds and financial institutions during the mid-2007 global credit crisis. Most significantly, Fairfield Sentry (unlike many hedge funds at that time) continued to honour all redemption requests.[208]

195 Although the Plaintiffs did not necessarily accept what Friedman said the Bank had done by way of due diligence, the crux of their case was not so much that they disbelieved what Friedman was saying but rather that what the Bank had purportedly done was not good enough. The Bank should have done more and I will elaborate on the Plaintiffs' allegations on this point later.

Was the Bank's due diligence adequate?

196 As already mentioned, the Plaintiffs' loss was caused not by adverse market movements but by managerial fraud. The Bank did not at any time hold itself out as a professional in the realm of detecting misconduct. Hence, the standard of care to which the Bank will be held, in respect of performing due diligence on Fairfield Sentry, is that of a reasonably prudent private bank performing due diligence on a feeder fund. It will not be that of an auditor or other professional investigator: *Philips v William Whiteley, Ltd* [1938] 1 All ER 566; *Caminer v Northern and London Investment Trust, Ltd* [1951] AC 88.

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208 129BAEIC at [81]

197 Before I continue, I note the reliance placed by the Plaintiffs on the SEC report. In particular, the Plaintiffs emphasized that the SEC report had concluded that "'"[n]umerous private entities conducted basic due diligence of Madoff's operations and, without regulatory authority to compel information, came to the conclusion that an investment with Madoff was simply too risky".[209]

198 In my view, the SEC report must be viewed in its proper context as an investigation that took place *after* Madoff's confession. As the Bank pointed out, the purpose of the SEC report was to examine where and how the SEC itself had fallen short in its own prior investigation into "allegations made to the SEC regarding Madoff, going back to at least 1999",[210] and not to conclude whether financial institutions had failed in their due diligence.[211] Furthermore, while the SEC report does record "numerous cases" of private entities whose due diligence efforts led them to the conclusion that Madoff's firm was "too risky" to invest in, the SEC was not saying that entities which did not reach the same conclusion were negligent.

199 Instead, the SEC was looking for positive examples to learn from after its own failure to detect Madoff's fraud.

200 Nevertheless, I also note that doubts regarding BLMIS were raised in the MARHedge Article and the Barron's Article in early 2001. It would therefore be unfair to characterise all doubts about BLMIS as assertions made only with the benefit of hindsight.

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209 56AB 29810; PCS at [1125]

210 56AB 29387

211 DCS at [1079]

201 The particulars of the breaches of duty by the Bank, as pleaded by the Plaintiffs, can be grouped into two categories:

(a) Failure to conduct basic quantitative performance analysis on Fairfield Sentry to verify the plausibility of its returns;[212] and

(b) Failure to conduct adequate qualitative analysis on BLMIS.[213]

202 I will examine each of these contentions in detail in the following sections. I begin first with a few broad observations.

203 The Plaintiffs' contentions regarding the lack of quantitative analysis were largely based on a joint report by Conner and Stuart J Rosenthal Chartered Financial Analyst of Thornapple Associates, Inc. ("Thornapple") and the evidence of Conner. Yet Conner's contention was not that such analyses would reveal Madoff's fraud but that with such analyses, the Bank should not have recommended Fairfield Sentry to its clients for investment (see [102] above). That was not the thrust of the Plaintiffs' pleadings but I will continue on the premise that the verbiage in its pleadings allows it to pursue Conner's contention. Furthermore, although Conner did not assert that such analysis would reveal the fraud, the joint report did assert categorically that "[i]t is a statistical certainty that the Fairfield-reported returns were unattainable".[214]

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212 SOC (337) at [52.3C]; SOC (338) at [40.3C]

213 SOC (337) at [52.12]–[52.14]; SOC (337) at [52.5]–[52.7] and [52.10]; SOC (338) at [40.12]–[40.14] ; SOC (338) at [40.5]–[40.7]

214 138BAEIC (Expert Report of Robert Conner & Stuart Rosenthal) at [26]

204 Conner is a founding member of Thornapple.[215] He has over 35 years of experience in the securities industry, and has worked both with broker-dealers and investment managers.[216] He has advised the SEC on several large and complex matters involving securities, hedge funds, tax, and insurance.[217]

205 Conner used various methods of quantitative analysis of the returns alleged by Fairfield Sentry and sought to show that if the Bank had conducted such analysis, it would have realised that the purported returns of Fairfield Sentry were implausible. However, I will highlight three main points that undermine his emphasis on quantitative analysis.

206 First, while the Plaintiffs relied heavily on the MARHedge and Barron's articles because these articles questioned how BLMIS appeared to achieve its returns with exceptionally low volatility, these articles stopped short of suggesting that something must be wrong or so unbelievable that investors should stay away from BLMIS. They also stopped short of asserting categorically that the Fairfield-reported returns were unattainable. If quantitative analysis was as conclusive as Conner suggested, it would have been a simple matter for the authors in those articles to make a similar point.

207 Secondly, these articles were published in 2001 and many others continued investing in BLMIS thereafter, until Madoff himself confessed in December 2008. The Bank's list of institutional investors revealed well-known or international names. This included Bank Medici (exposure of US$2.1 billion), HSBC Holdings (exposure of US$1 billion), Royal Bank of Scotland

215 138BAEIC at [6]

216 138BAEIC at [2]

217 138BAEIC at [6]

(exposure of up to US$600 million) and BNP Paribas (exposure of US$476 million). Collectively, Madoff's fraud exceeded US$65 billion.[218] If the quantitative analysis should have been undertaken by the Bank and was as conclusive as Conner was suggesting, Madoff could not have fooled so many for so long. True, there were others who chose not to invest. However, they could have decided not to invest because they could not understand how BLMIS could achieve its returns with such low volatility and therefore decided not to invest. That is different from saying that their quantitative analysis demonstrated that the returns with the low volatility were not plausible. Indeed, there was no evidence about the actual quantitative analysis done by other investors.

208 Thirdly, according to Casey, the Plaintiffs' other expert, quantitative analysis is no more than 12.5–25% of the due diligence process.[219] The remaining 75–87.5% entails qualitative analysis. It is pertinent to note that although Conner emphasized the importance of quantitative analysis, he chose to express no opinion on Casey's statement that quantitative analysis is no more than 12.5%–25% of the due diligence process which means that qualitative analysis played a more important role.[220]

209 Conner's reason for not expressing an opinion was that he had not read Casey's report. This was surprising because he must have known that other experts were giving evidence, whether for the Plaintiffs or the Bank, and he should have acquainted himself with what they were saying. Furthermore,

218 DCS at [849] and the references therein; 150BAEIC (Ziff) at [35]

219 138BAEIC (Expert Report of Frank Casey) at [83]

220 NOE 5 May 15 at p 23 line 1–13

even if he had not read Casey's report before his oral testimony, he did not ask for time to revert on it. It seemed to me that the real reason why Conner declined to express an opinion was that Conner did not want to be engaged on this aspect of Casey's report as to do so would risk undermining Casey's report or his own report (*ie*, the joint report) or both. However, by choosing not to express an opinion on this aspect of Casey's report, he had in fact undermined his own emphasis on quantitative analysis.

210 I shall now turn to the qualitative factors mentioned in Casey's report.

211 Casey is an investment banker with CP Baker Securities Incorporated. Since 1974, he has been an Investment Consultant and General Securities Representative registered with NASD (and subsequently, FINRA). Casey, along with one Harry Markopolos and Neil Chelo, formed a core team from May 2000 investigating Madoff and reporting him to the SEC. Casey also hired Michael Ocrant ("Ocrant") to be an investigative reporter. Ocrant published the MARHedge Article which I have mentioned above.[221]

212 However, Casey's evidence was also undermined by two main points.

213 First, he had postulated that with qualitative analysis, Maddof's fraud would have been uncovered. Yet, no one, including Casey and his team, uncovered the fraud even though Casey and his team were "hunting" (to use Casey's own words)[222] Madoff over many years. Furthermore, as mentioned above at [100], the Plaintiffs themselves no longer say that the Bank would have uncovered the fraud with proper due diligence.

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221 138BAEIC (Expert Report of Frank Casey) at [9]–[10]

222 NOE 28 April 15 at p 15 line 19–22; p 28 line 18

214 Secondly, Casey was not as objective as he should have been. It is trite law that an expert "should neither attempt nor be seen to be an advocate of or for a party's cause". An expert's advocacy is "limited to supporting his independent views and not his client's cause": *Vita Health Laboratories Pte Ltd and others v Pang Seng Meng* [2004] 4 SLR(R) 162 ("*Vita Health*") at [83]. I accept the Bank's submission[223] that Casey had descended into the fray and became an advocate for the Plaintiff. For example, Appendix 3 to Casey's expert report stated:[224]

> **APPENDIX 3: MADOFF REFERENCES**
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> 1. Erin Arvedlund's book, "Too Good to Be True: The Rise and Fall of Bernie Madoff." It's an excellent book with *all sorts of useful dirt on the banks.*
>
> 2. Andrew Kirtzman's book, "Betrayal: The Life and Lies of Bernie Madoff." While not as good as Erin's book, *it's got other information in it that you'll need to know.*
>
> 3. Diana B. Henriques' book, "The Wizard of Lies: Bernie Madoff and the Death of Trust." This is written from Bernie's viewpoint so it's a pack of lies but *useful because that's what the defense lawyers are going to be using against plaintiff teams.*
>
> …
>
> 5. The SEC OIG's 1,000 exhibits on the SEC's website contains lots of useful transcripts and letters that *will make you look like a superstar.*
>
> [emphasis added]

215 Before I continue, I should address another important point first. As noted above at [163], the Plaintiffs pleaded that the Bank failed to engage in standard due diligence which was routinely implemented in the industry.[225]

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223 DCS at [993]

224 138BAEIC at p 31

However, the evidence of Ziff was that there was no one industry standard.[226] Importantly, the Plaintiffs eventually conceded in their reply submissions that there was no industry standard as such.[227] This was despite Casey having advocated in his expert report a due diligence structure he called "T.I.P.S", which stood for "Third-Party Verifications, Internal Controls, Pedigree, Strategy".[228] Given the Plaintiffs' concession, I need not elaborate any further on T.I.P.S and on whether it represented industry standard. I will focus instead on the specific allegations of inadequacies in the Bank's due diligence that the Plaintiffs have raised in closing submissions.

Quantitative analysis

216 The Plaintiffs argued that the Bank failed to "conduct basic performance analysis of [Fairfield Sentry's] reported returns … which would have revealed the implausibility of the reported returns against the split strike conversion strategy."[229]

217 Additionally, the Plaintiffs argued that the Bank should have questioned the returns that Fairfield Sentry claimed to have produced through Madoff's ability to time the market (*ie*, shifting funds into and out of an asset based on a prediction of the future price of the asset).[230] Conner analysed Fairfield Sentry's gross returns between December 1990 to August 2003.

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225 SOC (337) at [51]

226 NOE 29 Oct 15 at p 44 line 8–22

227 PRS at [426(a)] and [503]

228 138BAEIC (Expert Report of Frank Casey) at [68]

229 SOC (337) at [52.3C]; SOC (338) at [40.3C]

230 138BAEIC (Expert Report of Robert Conner & Stuart Rosenthal) at [68]

218 According to Conner, who conducted an analysis to determine the purported stock timing associated with Fairfield Sentry's gross returns, Madoff had to correctly time the market 93.5% of the time to achieve the returns that he claimed, based on his split-strike investment strategy.[231] This was an improbable level of accuracy. "I've never met anyone who can bat .700 in calling market turns", American economist Burton Malkiel vividly described (B G Malkiel, *A Random Walk Down Wall Street* (WW Norton & Company, Inc., 1973).[232]

219 Thus, the Plaintiffs argued that the Bank had overlooked the "major red flag" that was the "the improbable high returns to risk parameters involving the Fairfield [Sentry] investment."[233]

220 On the other hand, the Bank said it did analyse Fairfield Sentry's returns, mainly with PerTrac software in December 2002/January 2003.[234] The PerTrac analysis was conducted as the Bank was looking for funds with "moderate returns and low volatility" to be included as part of the CEM/CEMF that the Bank offered.[235] PerTrac maintained a database of information from over 5,000 different funds, and produced monthly reports comparing the performance of Fairfield Sentry with the performances of the other funds and other benchmark indices.[236] Based on these analyses and a general review of Fairfield Sentry, the GIG concluded that Fairfield Sentry

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231 138BAEIC (Expert Report of Robert Conner & Stuart Rosenthal) at [72]

232 138BAEIC (Expert Report of Robert Conner & Stuart Rosenthal) at [70]

233 SOC (337) at [52.4]

234 NOE 14 Oct 15 at p 93 line 9–19

235 NOE 14 Oct 15 at p 101 line 8–15

236 NOE 14 Oct 15 at pp 97–100

produced good but not spectacular annualised returns, and had low volatility and relatively low correlation to the S&P 500.[237] Fairfield Sentry's low correlation to the S&P 500 lent credence to its claim that it practiced a "collared" investment strategy.

221 Even then, it seemed to me that the Bank was not considering the returns from the perspective as to whether they were too good to be true but whether, generally, Fairfield Sentry was having good returns with low volatility.

222 Coming back to Conner's analysis, Ziff said that he knew of no one who engaged in the types of analyses advanced by Conner.[238] He also disagreed with the accuracy of some of the calculations which Conner put forth and the conclusions which Conner drew.

223 Ziff pointed out that Conner's analysis was based on various assumptions.[239] I need mention two only. One assumption made was that Fairfield Sentry was always either invested in the SSC Strategy or Treasury bills for an entire month.[240] However, the evidence indicated that Fairfield Sentry purported to have been in the market for certain periods of the month and out in the remainder.[241] Another assumption made was that call options would be sold at the same time as the purchase of put options. Ziff pointed out

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237 129BAEIC at [32]

238 150BAEIC (Expert Report of Ziff) at [126]

239 DCS at [1179]–[1183]; 150BAEIC (Expert Report of Bradley Ziff) at [138] –[146]

240 138BAEIC (Expert Report of Robert Conner & Stuart Rosenthal) Exhibit 18 at p 117

241 58 AB 30994; DCS at [1182]; 150BAEIC (Expert Report of Bradley Ziff) at [143]

that this did not reflect BLMIS's strategy, which made use of market timing to generate profits by, *inter alia*, delaying the sale of calls.[242]

224 To be fair, Conner's point was that he was given data which was computed on a monthly basis and he did the analysis on that basis.[243] His use of the hypothetical premise that the sale of each call option was executed at the same time as the purchase of each put option was based on some Fairfield Sentry documents.[244] For example, the PPM gives such an impression, as it described the strategy as follows:[245]

> The establishment of a typical position entails (i) the purchase of a group or basket of equity securities that together will highly correlate to the S&P 100 Index (the "OEX"), (ii) the sale of out of the money OEX call options in an equivalent contract value dollar amount to the basket of equity securities, and (iii) the purchase of an equivalent number of out of the money OEX put options.

225 Furthermore, the notes of a meeting attended by, *inter alia*, Madoff and Friedman on 15 April 2008 recorded BLMIS's strategy as follows:

> The manager uses a spilt-strike conversion or bull spread strategy. He buys a basket of approx. 50 stocks within the S&P100 that have a 95% correlation to the S&P100 index. *At the same time* he buys a put and finances it with a short call…
>
> (emphasis added)

226 However, there was also documentary evidence that at times BLMIS purportedly deviated from this strategy. Fairfield Sentry and the Bank were aware that deviations were done. Conner himself accepted that Fairfield

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242 150BAEIC (Expert Report of Bradley Ziff) at [142]

243 NOE 5 May 15 at p 44 line 4–19

244 NOE 6 May 15 at p 27 line 8–22

245 30AB 17597 (Private Placement Memorandum)

Sentry was aware of such deviations.[246] Accordingly Conner's quantitative analysis could only go so far as the assumptions used, assuming that there were no errors in the calculations.

227 In the secretive and competitive realm of investment funds, it was not unreasonable for a fund manager to zealously protect his proprietary trading models. Most mutual funds disclosed only their top ten holdings at the end of each month.[247] Moreover, the timing of a fund's entry into a position was a matter of managerial discretion. Therefore it did not seem possible to determine whether Madoff's implementation of the SSC Strategy was capable of producing the alleged returns with the alleged low volatility.

228 Coming back to market timing, Conner's point was that it was not plausible for BLMIS and hence Fairfield Sentry to correctly time the market at an average of 93.5% which he (Conner) had derived or even at the lower percentage of 83.7% based on an analysis which Ziff had obtained.[248] Although there was an argument for the Bank that there were other funds which appeared to have better returns than Fairfield Sentry,[249] Conner's point was that Fairfield Sentry was doing exceptionally well when both bull and bear markets were taken into account. Furthermore, as mentioned in the MARHedge Article, it was the lack of volatility for Fairfield Sentry that was exceptional.

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246 NOE 6 May 15 at p 28 line 11–p 29 line 2

247 129BAEIC at [37]

248 NOE 26 Oct 15 at p 89 ln 18– p 90 ln 3; See also 150BAEIC (Expert Report of Ziff) at [152]–[154], [159]–[160]

249 150BAEIC (Expert Report of Ziff) at [165]

229 In any event, Ziff emphasized that FGG (at Fairfield Sentry) had informed the Bank that it did check the trade tickets.[250] Likewise Friedman also emphasized this point. He also said that the Bank did see some of the trade tickets in 2004 and in 2007.[251] As it turned out, these tickets were forgeries created in a sophisticated fraud as I shall come back to later.

Qualitative analysis

230 The Plaintiffs submitted that the Bank's qualitative due diligence was inadequate for the following reasons:

(a) The Bank did not employ sufficiently knowledgeable and qualified staff to supervise Fairfield Sentry;[252]

(b) The Bank failed to appreciate and mitigate "red flags" that attended BLMIS' operations;[253] and

(c) The Bank did not verify the trades reported by BLMIS or conduct independent due diligence on Madoff, and instead relied solely on Fairfield Sentry to do so.[254]

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250 See *eg*, NOE 27 Oct 15 at p 47 line 14–21; p 93 line 15–20; p 101 line 6–24; NOE 28 Oct 15 p 26 line 3–8; NOE 29 Oct 2015 p 10 line 23–24, p 67 line 6, p 106 line 3–7. 12–14

251 NOE 14 Oct 15 at p 23 line 14–17; p 24 line 12–24; p 36 line 9–19; p 55 line 24; NOE 15 Oct 15 at p 54 line 15–17; p 69 line 5–9; p 82 line 6–12; p 94 line 10–12; p 101 line 19–23; p 106 line 11–18; p 123 line 17–21.

252 SOC (337) at [52.3]

253 SOC (337) at [52.12]–[52.14]

254 SOC (337) at [52.5]–[52.7] and [52.10]

KNOWLEDGE AND EXPERTISE

231 The Plaintiffs submitted that the Bank failed to take "reasonable steps to ensure that [it] had supervisory personnel with proper understanding of the split strike conversion strategy and the reward and risk parameters of [Fairfield Sentry]."[255] Consequently, the Bank overlooked "how the magnitude and consistency of the reported returns of Fairfield [Sentry] could not have been reasonably attributed to the split strike conversion options strategy based on the S&P 100 Index and/or the timing of the US stock market."[256]

232 The Bank said it had two teams comprising senior staff members (the GIG and the CIC) review and approve the Fairfield Sentry investment.[257] The Bank's due diligence was primarily conducted by Perruchoud.[258] Perruchoud headed a specialized team within the GIG tasked with initial and ongoing review of all potential and actual hedge fund products offered to clients. He also had prior experience in derivatives before working in hedge funds since 1998.[259] In addition, Friedman, who headed the GIG and chaired the CIC, had vast professional experience in finance and banking, most of which spent handling sales and investment products.[260] By 2002 when the Bank marketed Fairfield Sentry, it had also learnt from the due diligence processes of Tremont through working closely with the Bank's affiliate, AFEA (see [189(c)] above).

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255 SOC (337)at [52.3]

256 SOC (337) at [52.3A]

257 129BAEIC at [10]–[11]

258 NOE 14 Oct 15 at p 12 line 13–19 (Friedman)

259 129BAEIC at [10]–[11]

260 129BAEIC at [6]

233 I add that the due diligence conducted by the Bank was not just a question of going through the motions. Ziff noted that Perruchoud did not recommend all funds which were under consideration. He did not recommend one because in his view, "the structure [was] very complex and [left] a lot of room for manipulation".[261]

234 The Bank also said it did take into account the mechanics and limitations of the split-strike conversion strategy. While reconciling Fairfield Sentry's performance with the returns on a split-strike conversion strategy, the GIG found that the strategy could account for *all* of Fairfield Sentry's returns. This evidence was not challenged by the Plaintiffs. Here is Friedman's response when asked about the analyses performed on Fairfield Sentry by the Bank:

> [The due diligence team] did look at the performance of [Fairfield Sentry], they looked at how it was done, they questioned Fairfield Greenwich on the issues relating to whether all of the performance came from the split-strike conversion strategy and Fairfield Greenwich essentially -- not essentially, Fairfield Greenwich told us that they could account for 100 per cent of the returns of the fund from day one through the trades that they received on a daily basis from BLMIS.[262]

235 Importantly, even if the Bank did not have enough staff who were sufficiently knowledgeable about options and the SSC Strategy, it is unclear what would have been uncovered if the Bank did have enough staff. As mentioned, Casey's evidence was that the Bank would have uncovered the fraud but the Plaintiffs are no longer pursuing this. What then would such staff have uncovered? The Plaintiffs' submissions were vague on this. The evidence

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261 150BAEIC (Expert Report of Ziff) at [92]

262 NOE 13 Oct 15 at p 115

for the Plaintiffs fell short of establishing specifically what else would have been discovered when no one else had uncovered anything more specific over the years.

RED FLAGS

236 The Plaintiffs submitted that the Bank failed to appreciate and mitigate various qualitative risks or "red flags" that attended the operations of Fairfield Sentry and BLMIS. The red flags identified by the Plaintiffs were as follow:

(a) BLMIS was at once investment manager, execution broker, and sub-custodian for Fairfield Sentry;[263]

(b) Fairfield Sentry was audited by PwC Netherlands from 2001 to 2005, but was audited by PwC Toronto in 2006;[264]

(c) Madoff was audited by a small three-man operation, Friehling & Horowitz;[265]

(d) Madoff did not charge any fees for his money management services, earning only commissions on the trades and thereby potentially foregoing around US$240m a year;[266] and

(e) The MARHedge Article and the Barron's Article had questioned how BLMIS was producing its returns.[267]

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263 138BAEIC (Supplemental Report of Frank Casey) at [3(a)(i)]

264 138BAEIC (Expert Report of Frank Casey) at [53]–[54]

265 138BAEIC (Expert Report of Frank Casey) at [55]

266 129BAEIC at p 333 (MARHedge Article); p 335 (Barron's Article); 138BAEIC (Supplemental Report of Frank Casey) at [4(c)(iii)]

267 138BAEIC (Expert Report of Frank Casey) at [56]

237 First, the Plaintiffs contended that the triple role of BLMIS as investment manager, execution broker, and sub-custodian of its clients' assets increased the risk of fraud. There was also evidence that in 2005, one of the Bank's clients had expressed concerns about Fairfield Sentry using Madoff as sub-custodian.[268]

238 On the other hand, the Bank said that there was a reputable and independent auditor (PwC) and custodian (Citco Bank) who were independently verifying BLMIS' trades and assets. The Bank was reassured by the fact that over a decade's worth of audited financial statements stated that all of BLMIS' assets were in place.[269] Moreover, BLMIS, as a registered broker-dealer was supervised by both FINRA and SEC, both of whom were regulators better placed than any Bank to detect wrongdoing (as stated at [189(b)] above). Finally, before Madoff's fraud was revealed, the industry regarded as acceptable the practice of fund managers trading through affiliated brokers, especially where the fund manager was itself a broker-dealer.[270] Although these points about reliance on third parties were only raised by the Bank in its third amendment of its defence on 8 July 2014,[271] they still carried some weight. More importantly, the Plaintiffs' point about a conflict of interest was addressed by the Bank's argument that it was not unknown then for others to similarly hold two or more of these roles at the same time. Although the Plaintiffs argued that this was done in big institutions where different departments were holding each of such roles unlike BLMIS which

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268 NOE 16 Oct 15 at p 36 line 7–25

269 NOE 16 Oct 15 at p 37 line 10–18.

270 129BAEIC at [47]

271 Defence (337) at [26(v)(c)]; Defence (338) at [23(v)(c)]

was really run by one and the same person *ie* Madoff, the Bank said that this was not considered a red flag then. I agree. If it were not acceptable, one of the regulators would have prohibited it or PwC or Citco Bank would have raised this as an issue then. They did not.

239 Secondly, Casey, on behalf of the Plaintiffs, suggested that Fairfield Sentry changed its auditors from PwC Netherlands to PwC Toronto in 2006 because the former "may have asked too many questions of Fairfield Sentry."[272] When questioned by counsel for the Bank, however, Casey conceded that he was merely "speculating".[273] Without any evidence in support, this suggestion must fail. Casey did not dispute a suggestion by counsel for the Bank that it was reasonable for the Bank to assume that had PwC Netherlands declined the 2006 audit on grounds of problems with Fairfield Sentry, PwC Netherlands would have told PwC Toronto of those grounds.[274] Furthermore, Casey's suggestion that PwC Netherlands may have asked too many questions was withdrawn by the Plaintiffs in their closing submissions.[275] The withdrawal reflected poorly on Casey's credibility because it suggested he was just trying to find fault with the Bank.

240 Thirdly, the Plaintiffs submitted that the Bank should have questioned why BLMIS, a fund with a value of over US$7b, was audited by a "small operation in a strip mall in upper state New York."[276] In cross-examination, however, Casey agreed that there was "nothing to preclude a small auditing

272 NOE 28 Apr 15 at p 104

273 NOE 28 Apr 15 at p 107

274 NOE 28 Apr 15 at p 105

275 PRS at [17(d)] r/w DCS at [26(d)]

276 138BAEIC (Expert Report of Frank Casey) at [70]

firm from doing the audits of big firms".[277] But more than that, what mattered to the Bank's due diligence was the identity of the auditor of Fairfield Sentry and not the auditor of BLMIS. What the Plaintiffs were investing in was Fairfield Sentry and not BLMIS. It was not unreasonable for the Bank to have relied on the audit of Fairfield Sentry conducted by PwC, one of the largest and most reputable accounting firms in the world. Furthermore there is no evidence that PwC Netherlands or PwC Toronto had expressed any concern as to whether BLMIS' auditors could do their job competently. If the small size of the auditors was justifiably a concern, either of these PwC entities would have been in a better position to raise the point. Furthermore neither the MarHedge nor Barron's article made this a point.

241 It is important to remember that this was a sophisticated fraud. As Ziff stated in his report, the fraud was orchestrated by a team of sophisticated professionals, including trading and operations staff at BLMIS as well as outside accountants. More than a dozen former BLMIS employees and people with whom BLMIS was connected, including its chief compliance officer, accountant, finance director, a top trader and computer programmers were convicted or pleaded guilty to fraud charges.[278]

242 Even a large outside auditor KPMG were fooled. According to Ziff there was testimony that Madoff's team fabricated reports purporting to show that trades had been processed properly through a clearing organisation which convinced auditors at KPMG when they visited BLMIS' office in New York. These so-called "SIAC reports" were hundreds of thousands of pages long.

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277 NOE 30 Apr 15 at p 53

278 150BAEIC (Expert Report of Ziff) at [37]

Notwithstanding the fact that KPMG "kept drilling down on" the reports, the auditors left apparently convinced that BLMIS' records were real.[279]

243 According to another of the Bank's expert, Porten, HSBC had retained KPMG to audit the internal controls and operations at BLMIS and KPMG failed to uncover the fraud.[280] The full name and exact entity of HSBC or KPMG was not mentioned in the report of Ziff or Porten but that is not material for present purposes.

244 Fourthly, the Plaintiffs submitted that the fact that Madoff charged no fees for his fund management services (as opposed to commissions on trades) was a red flag because Madoff was forgoing very substantial fees.[281] This point was also raised by both the MARHedge Article and the Barron's Article, where Madoff explained when interviewed for the MARHedge Article that he "did not want to get involved in the administration and marketing required … nor to deal with investors",[282] which would be required if he offered the funds for sale directly to earn such fees. In my view, while foregoing such fees might appear surprising, it was insufficient to raise an alarm. Madoff's explanation was plausible, in light of the entire circumstances: BLMIS's money managing services could benefit its *primary* business of market making, as pointed out in the MARHedge Article itself.[283]

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279 150BAEIC (Expert Report of Ziff) at [42]–[43]

280 139BAEIC (Expert Report of Charles Porten) at [66]

281 PCS at [1059]–[1062]

282 129BAEIC at p 333 (MARHedge Article)

283 129BAEIC at p 332 (MARHedge Article)

245 Lastly, the Plaintiffs argued that the Bank should have been put on alert by the MARHedge Article and the Barron's Article (both articles were published in May 2001) as to the possibility of wrongdoing in BLMIS. Friedman, on the other hand, stated that he had read the articles, but "did not find the articles particularly troubling".[284] In my view, whilst the two articles were red flags, they must be seen in perspective. The two articles only questioned *how* BLMIS could have produced returns which others were unable to fully replicate through a split-strike conversion strategy. They did not allege fraud on Madoff's part. Moreover, there were other factors that I have mentioned. As Friedman testified, "one of the biggest audit firms in the world was going in [to Fairfield Sentry] and checking on the trades and checking on the assets being there."[285]

246 On balance, therefore, I find that the Plaintiffs did not establish that the Bank failed to appreciate and mitigate the red flags of Fairfield Sentry. Whilst I accept that some red flags were raised, they must be seen in light of the steps which the Bank said it took, as raised by Friedman and summarised at [185]–[194] above.

INDEPENDENT VERIFICATION OF TRADES

247 The Plaintiffs contended that the Bank simply relied on information and documents provided by Fairfield Sentry instead of ensuring that there was independent verification of BLMIS' returns.[286] The Bank failed to independently verify whether Fairfield Sentry had indeed checked the trades

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284 129BAEIC at [49]

285 NOE 15 Oct 15 at p 67

286 SOC (337) at [52.5]

and positions reported by BLMIS. The Plaintiffs' position was also that the Bank should have verified BLMIS' claims with institutions such as the DTC and the Federal Reserve.[287] This latter part was based on Casey's evidence, but the point was subsequently not pursued,[288] thus again affecting the credibility of Casey as an expert witness. Presumably, the point was not pursued because Madoff purported to execute the options trades OTC and not on any exchange and the information would not have been available to DTC or the Federal Reserve.

248 The Plaintiffs also argued that the Bank should have verified BLMIS' option trades with counterparties given that BLMIS purported to trade substantially in options, and there was no sign of such trades in the options market.[289] According to the Plaintiffs, the Bank should have verified BLMIS's purported option trades with its counterparties, as Fairfield Sentry knew the identities of these counterparties and had assessed these counterparties' creditworthiness.[290]

249 The Plaintiffs' argument seemed attractive. However, this submission was not specifically pleaded by the Plaintiffs. There was also no evidence as to whether the alleged counterparties would have entertained any such inquiry by the Bank who was not the auditor of Fairfield Sentry or BLMIS. Furthermore, Casey and others who were hunting Madoff also did not appear to have ascertained the identity of the alleged counterparties or make inquiries of alleged counterparties of BLMIS. It is not clear whether the authors of the

287 138BAEIC (Expert Report of Frank Casey) at [41]

288 DCS at [1092]

289 PCS at [1163]–[1190]; 138BAEIC (Expert Report of Casey at [20]–[25], [48]

290 150 BAEIC at p66

MARHedge Article and the Barron's Article did so. Casey had also accepted that there was no evidence to show that it was industry practice at the material time to make such inquiries although he also said that people did carry out such inquiries.[291] The latter part of his evidence was not supported by the facts. If indeed such inquiries were made by some (although it was not industry practice to do so), how was it that the inquiries did not reveal anything definitely amiss? Either they were not done at all or, if done, such inquiries were not as fruitful as the Plaintiffs were suggesting. Furthermore, it is not clear whether PwC or KPMG had obtained confirmation from counterparties which were in turn also forged or had simply relied on whatever documents which BLMIS had supplied without verifying with the counterparties.

250 The Bank submitted that it had reasonably relied on the information and assessment of reputable independent professionals in discharge of its due diligence responsibilities. In addition, the Bank had independently reviewed Fairfield Sentry based on the information available to it and found (i) nothing material which would have pointed to Madoff's fraud, and (ii) Fairfield Sentry to be performing in accordance with its investment objectives.[292]

251 In my view, it was reasonable for the Bank to have relied on the reviews performed by such independent professionals as PwC, Citco Fund Services, and Citco Bank. A person may generally rely on a third-party to discharge his due diligence obligations (*Saxby Bridge Financial Planning Pty Ltd and Others v Australian Securities and Investments Commission* [2003] AATA 480) or otherwise insulate himself from negligence liability (*Fullowka*

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291 NOE 28 April 15 p 103 line 15–22

292 See, *eg*, DCS at [936]–[939] and [963]–[967]

v Pinkerton's of Canada Ltd [2010] 1 SCR 132). For him to discharge the standard of care expected of him, however, he must have assessed the identity, capacity, and credibility of the third-party relied on, and satisfied himself as to its experience and competence. I accept the Bank's submission that it not only verified the credibility of third parties that it relied on, but also independently reviewed Fairfield Sentry by taking the steps detailed above at [185]–[194]. Therefore the Bank's reliance on third parties, when seen in the context of its entire due diligence process, was reasonable.

252 The Plaintiffs sought to argue that only professionals may delegate duties, and the Bank, as "salesmen", cannot delegate.[293] They relied on *Arbiter Group Plc v Gill Jennings & Every* [2000] PNLR 680 ("*Arbiter Group*"), a case which was also cited by the Bank.[294]

253 In *Arbiter Group* at [20], Swinton Thomas LJ stated that "[a] professional man in appropriate circumstances is entitled to delegate tasks". In my view, this passage cannot be construed as limiting the right to delegate duties to professionals. *Arbiter Group* concerned the issue of whether a firm of patent agents could delegate a certain task. The issue of whether non-professionals could delegate their duties did not arise in that case; neither did the case articulate a definition of "professionals" for this purpose. There was also no express finding that the patent agent was a professional. Accordingly, *Arbiter Group* was of no assistance to the Plaintiffs' case.

254 Furthermore, I see no reason in principle why only professionals should be allowed to delegate duties: one would ordinarily think that

293 PRS at [588]–[590]

294 DCS at [1002]

professionals (whatever the definition of "professionals" may be) should be held to a *higher* standard than non-professionals. Since professionals may delegate in the appropriate circumstances, I see no reason why non-professionals may not. Thus, it is not necessary for me to go on to decide whether the Bank was a "professional" in the present case.

255 I note that the Court of Appeal in *TV Media Pte Ltd v De Cruz Andrea Heidi and another appeal* [2004] 3 SLR(R) 543 held that a defendant was not entitled to place "unquestioning reliance" on a third party to discharge its duty of care (at [71]). In my view, *TV Media* may be distinguished from the present case. In *TV Media*, the Court of Appeal rejected an assertion by a distributor of tainted slimming pills that it discharged its duty of care simply by relying on the Health Sciences Authority's (the "HSA") approval of the pills. Featuring prominently in its decision, however, was the fact that the distributor knew of a report produced by an independent laboratory raising doubts about the safety of the pills. Further, public policy considerations militated against allowing the distributor to fulfil its duty of care by simply relying on the HSA's tests (at [66]–[71]):

> 70 … We also recognise that, as a matter of public policy, it might not be reasonable to expect a government agency to carry out in-depth testing of each of the thousands of products submitted to it. Equally, it might not be economically efficient to place the costs of such testing on the government. Rather, given the large profits [the distributor] hoped to rake in from sales of [the pills], we do not deem it too onerous for [the distributor] to have sought professional advice on the [independent laboratory's] report.

256 In contrast, as I have found earlier, the red flags surrounding BLMIS were less serious when seen in context of the steps which the Bank took.

257 It is also important to remember that FGG said that it had carried out its own due diligence. For example, it said that it had engaged an independent former options trader to verify the trades executed by BLMIS. The trade tickets were checked on a daily basis. There was no evidence to suggest that FGG lied about this.

258 The Plaintiffs did not make it clear whether they accepted that FGG had checked the trade tickets on a daily basis. Their point was that the Bank should not have delegated this responsibility to FGG or relied on it and should have checked the options trades itself since the Bank's customers were investing in Fairfield Sentry. The Bank's position was that FGG had a "long-standing relationship with [Madoff]" as its third-party manager (and hence sub-manager of Fairfield Sentry). This granted FGG "increased access to both BLMIS and [Madoff] himself".[295] Fairfield Sentry was perceived to be well-managed and had US$3.9 billion in assets by 2002 (see [186]).

259 As Ziff elaborated, by October 2008, FGG managed about "US$16.2 billion in client and firm assets and employed more than 120 investment professionals in New York, London and Bermuda and had representative offices in the United States, Europe and Latin America." During the period when the Bank was conducting due diligence, it was clear to market participants that FGG did not become a US$16 billion firm by pure luck. "Its marketing efforts focused on the added value its rigorous due diligence provided to investors."[296]

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295 139BAEIC (Expert Report of Charles Porten) at [69]—[70]

296 150BAEIC (Expert Report of Ziff) at [57]–[58]

260 I also note that, importantly, Fairfield Sentry was managed independently by different people from those who operated BLMIS. There was and is no specific suggestion that those who managed Fairfield Sentry were associates or cronies of Madoff. I am of the view that the Bank was not obliged to replicate the steps which FGG had done. Otherwise, it would have to cover the same ground and continue to do so each time its customers invest in a feeder fund. One has to bear in mind that Fairfield Sentry was one of numerous funds available for investing in. There was no evidence that private banks would replicate such steps each and every time they considered recommending a feeder fund to their clients for investment.

261 It was suggested by Casey that the Bank itself had acknowledged that it was "very weak on proper due diligence".[297] In support, Casey pointed to two of the Bank's internal emails by Hardiman, who was a senior director[298] of the Bank and was involved in CIC meetings.[299] On 5 May 2004, Hardiman wrote to Perruchoud, stating "Do we have some type of waiver on our requirements in regard to this fund? I understand the circumstances but want to make sure we have the proper coverage from a paper trail standpoint vis-a-vee [*sic*] CIC requirements".[300] On 27 April 2005, Hardiman wrote another email, this time to one Scott Berniker, an analyst at the Bank.[301] In that email, Hardiman stated that "[Fairfield] Sentry is an odd ball and the reality is that the on-going due diligence is very light".[302] There was no elaboration in the

297 138BAEIC (Expert Report of Frank Casey) at [35]; See also PCS [1531]—[1544]

298 34AB 20200

299 NOE 16 Oct 15 p 16—17

300 34AB 20132

301 NOE 16 Oct 15 p 13

302 34AB 20200

email as to why he thought due diligence was light. The Plaintiffs relied on these emails as express acknowledgements by the Bank of its lack of due diligence.[303]

262 In oral evidence, Friedman accepted Hardiman's claim that Fairfield Sentry was an "oddball":[304]

> Well it was an oddball. I'm sorry. It was an oddball because it was, as we discussed yesterday, the only fund where we had the set up where we were investing through a feeder fund and relying on Fairfield Greenwich to do the due diligence on an ongoing basis rather than doing the due diligence with Madoff ourselves. So yes, in that sense it was an oddball from day one until the end.

263 Earlier in his testimony, Friedman also acknowledged that the due diligence for Fairfield Sentry did not meet the CIC due diligence requirement for a "standard hedge fund", which requires "an annual visit and a quarterly discussion and a little write-up to the CIC each quarter".[305] Friedman also confirmed that no waiver of this requirement was sought.[306]

264 Friedman, however, attempted to downplay Hardiman's role in due diligence. According to Friedman, Hardiman was only the "administrative product manager"; he was not directly involved with the due diligence.[307]

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303 PCS at [1541]

304 NOE 16 Oct 15 at p 16

305 NOE 15 Oct 15 at p 135

306 NOE 15 Oct 15 at p 134

307 NOE 16 Oct 15 at p 17

308 NOE 15 Oct 15 at pp 132–133

Friedman characterised Hardiman's role as that of a "policeman": to check that the due diligence team complied with the CIC due diligence requirements.[308]

265 At the material time, there did not appear to be any written response to Hardman's emails. In my view, Hardiman's emails did lend some support to the Plaintiffs' arguments about lack of due diligence by the Bank but it was vague. He did not give evidence and he was not the main person in charge of due diligence. Perruchoud was. Perruchoud also did not give evidence because he had left the Bank. In any event, there was still the problem as to what other steps should have been taken and what would have been uncovered if they had been taken.

CONCLUSION ON BREACH OF DUTY

266 Coming back to the question whether the Bank should have recommended Fairfield Sentry as an investment, we have the benefit of hindsight. The experience of Renaissance, which was recorded in the SEC report, illustrates how difficult it was to conclude that something was definitely amiss. According to the SEC report, after due diligence was performed, there was concern in Renaissance about the investment with Madoff. However, opinions diverged. One piece of information helped to allay concerns, *ie*, that Madoff had been investigated by the SEC earlier. Renaissance also doubted that Madoff could be engaged in fraud because he operated through highly-regulated brokerage accounts. Because of competing viewpoints, Renaissance initially reduced this investment by about half and later exited the investment entirely for unrelated reasons.[309] The Plaintiffs relied on the partial withdrawal to support their allegation that the Bank should

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309 56AB 29543–29544

not have recommended the investment in the first place or at least withdraw its recommendation while the Bank relied on the partial continued investment to support its decision to recommend the investment.

267 The burden of proof is on the Plaintiffs. Considering the arguments as a whole, I am of the view that the Plaintiffs have failed to establish that the Bank breached its tortious duty of care owed to the Plaintiffs. Furthermore, even if it did, the Plaintiffs have not established what the Bank would have discovered if it had taken the steps alleged. I have dealt with the evidence of the Plaintiffs' experts and explained why their evidence was unpersuasive. As the Plaintiffs have not satisfied their burden of proving that the Bank's due diligence was inadequate, I need not elaborate further on the arguments put forth by the Bank's experts, Ziff and Porten. It is also not necessary for me to address the Plaintiffs' arguments about Ziff's or Porten's lack of expertise or lack of objectivity. The weakness in the Plaintiffs' case on the Bank's failure to do due diligence was that the evidence of their own experts was not persuasive. Furthermore, to the extent that I have referred to Ziff's report and Porten's report, the matters referred to were mostly not contentious.

Conclusion on the claim for breach of tortious duties of care

268 In conclusion, I find that the Bank did not owe the Plaintiffs the tortious duty of care which the Plaintiffs contended. Even if the Bank did owe such a duty, I find that the Plaintiffs have not proved that the Bank failed to discharge its duty. I dismiss the claim based on the tortious duty to exercise due diligence.

Claim in breach of fiduciary duty

269 The Plaintiffs also alleged that the Bank owed fiduciary duties to them, and that these duties were breached.[310] They relied, *inter alia*, on an internal email of the Bank concerning an internal audit of GIS. The email stated:[311]

> We reviewed the investment and vendor management functions to ensure that internal controls were operating effectively and that GIS had exercised its fiduciary responsibilities with respect to the investment of client assets.

270 The Bank, on the other hand, denied the existence of a fiduciary relationship,[312] pointing out that the internal audit email was not made by legally-trained personnel, and the email was not communicated to the Plaintiffs and thus did not govern the Bank's relationship with the Plaintiffs.[313] The Bank further argued that even if the Bank owed the Plaintiffs a fiduciary duty, such duty was not breached.

271 In their closing submissions, the Plaintiffs described the alleged breaches of fiduciary duty by the Bank in the following manner: "[the] major elements of the breach or breaches are misrepresentation and due diligence failures".[314] The Plaintiffs' claim in breach of fiduciary duty adds little to their claims in misrepresentation and for failure of due diligence, both of which I have already rejected. Thus, I dismiss the Plaintiffs' claim in breach of fiduciary duty. There is no need for me to come to a definitive conclusion on whether the Bank owed a fiduciary duty to the Plaintiffs although I doubt such

310 SOC (337) at [47]–[49]

311 129 BAEIC p 83

312 DCS at [92]–[115]

313 DCS at [107]–[110]

314 PCS at [439]; see also [118]

a duty existed. Passing references in internal emails of the Bank to a fiduciary duty do not in themselves create such a duty. It is also unnecessary for me to discuss whether the contractual terms negated the existence of any fiduciary duty.

Claim in unjust enrichment

272 The Plaintiffs also claimed against the Bank in unjust enrichment, contending that the Bank was unjustly enriched through the investment fees it collected from the Plaintiffs.[315]

273 The elements of unjust enrichment, as recently affirmed by the Court of Appeal in *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 are (at [90]):

> (a) that a benefit has been received or an enrichment has accrued to the defendant;
>
> (b) that the benefit or enrichment is at the claimant's expense; and
>
> (c) that the defendant's enrichment is "unjust".

274 In *Wee Chiaw Sek Anna v Ng Li-Ann (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Anna Wee*"), the Court of Appeal clarified (at [134]–[137]) that a claimant must point to a recognised unjust factor underlying the claim in unjust enrichment. The list of recognised factors has been catalogued in academic treatises and was referred to by the Court of Appeal in *Anna Wee* (at [132]–[133]). The Court of Appeal referred

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315 SOC (337) at [61]

to the following summary by Prof Andrew Burrows in Prof Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) as follows (at p 86):

> As regards the cause of action of unjust enrichment, the main unjust factors can be listed as follows: mistake, duress, undue influence, exploitation of weakness, human incapacity, failure of consideration, ignorance, legal compulsion, necessity, illegality and public authority ultra vires exaction and payment.

275 The Court of Appeal also referred to a summary by Charles Mitchell, Paul Mitchell & Stephen Watterson, Goff & Jones: *The Law of Unjust Enrichment* (Sweet & Maxwell, 8th Ed, 2011) as follows (at para 1-22):

> Lack of consent and want of authority; mistake; duress; undue influence; failure of basis; necessity; secondary liability; *ultra vires* receipts and payments by public bodies; legal incapacity; illegality; and money paid pursuant to a judgment that is later reversed.
>
> (emphasis in original)

276 The Plaintiffs have not specified which unjust factor or factors they were relying on, apart from a vague assertion in their closing submissions that "[t]here are substantial unjust factors".[316] Their pleaded case states:[317]

> 61. Further, the Defendants charged the Plaintiffs investment fees by debiting the Plaintiffs' accounts on a quarterly basis from November 2004 to October 2008. The Plaintiffs aver and will contend that, having regard to the breach and/or breaches and/or misrepresentations on the part of the Defendants, their servants or agents, the Defendants were not entitled to collect any such investment fees. By collecting the investment fees over this period, the Defendants have accordingly unjustly enriched themselves.
>
> 62. The Plaintiffs further aver and will contend that the conduct of the Defendants in advising, recommending and

316 PCS at [1877]; see also DCS at [1257]–[1260]

317 SOC (337) at [61]–[62]

> inducing the Plaintiffs to invest in Fairfield was calculated to make substantial income which would exceed any damages or compensation that they may be liable to the Plaintiffs for their breach or breaches and/or misrepresentations.

277 Insofar as the Plaintiffs rely on the Bank's alleged misrepresentations or duty of care, these are claims that I have already dismissed above. There was also no evidence that the Bank had calculated that the income it would earn from each of its customer's investment in Fairfield Sentry through it would exceed any compensation it would have to pay for any wrongdoing. This was a spurious allegation that the Plaintiffs and their solicitors appeared to have thrown in without thought. Accordingly, I also dismiss the Plaintiffs' claim in unjust enrichment.

Claim for failure to redeem the Plaintiffs' investments

278 The Plaintiffs also claimed that the Bank was in breach for failing to redeem the Plaintiffs' investment in Fairfield Sentry pursuant to some of the Plaintiffs' instructions. Unfortunately, the nature of the duty alleged to be breach, *eg*, a tortious, contractual or fiduciary duty, was never made clear in the pleadings.[318] Confusingly, reference is even made to "misrepresentations" in the section of the Plaintiffs' Statement of Claim for failure to redeem.[319]

279 The pertinent facts relating to this particular dispute may be summarised as follows. Under the procedure and timeline for redemption requests set out in the PPM, an investor will have to give instructions for redemption "at least 15 calendar days prior to the Redemption Date", and "Redemption Date" was defined as generally the last day of each month.[320]

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318 SOC (337) at [56]–[60]; SOC (338) at [44]–[45]

319 SOC (337) at [60]; SOC (338) [45]

When Madoff's fraud came to light on 12 December 2008, Fairfield Sentry suspended payment of proceeds for requests to redeem shares for the Redemption Date of 30 November 2008. Thus, for an investor to redeem his or her shares in Fairfield Sentry before the suspension of payment of proceeds, instructions had to be given to the Bank by 17 October 2008 so that the instructions could be processed in time for the Redemption Date of 31 October 2008. Instructions given to the Bank to redeem investments in Fairfield Sentry by the Bhatias in Suit 338, the Patels, the Daryanis, the Raipancholias and the Uttamchandanis were unfortunately given after 17 October 2008.

280 The Plaintiffs main argument for this claim was that they were not bound by the PPM because they were not provided with the PPM and did not know of the timeline therein.[321] In fact, the Plaintiffs went as far as to assert that "the Bank deliberately withheld the PPM from the Plaintiffs".[322]

281 It is curious, to say the least, that the assertion that the Bank deliberately withheld the PPM from the Plaintiffs has resurfaced. At trial, counsel for the Plaintiffs Mr Niru Pillai had clarified to this court that he "cannot establish" that the PPM was deliberately withheld by the Bank from the Plaintiffs.[323] That was a very serious allegation which should not have been made in the first place without adequate evidence. In light of Mr Pillai's clarification, I have no hesitation in rejecting the allegation.

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320 Defence (337) at [26H]; Defence (338) at [26]

321 PCS at [1834]–[1839]

322 PCS at [1837]; DCS at [1231]

323 NOE 11 August 15 p 31 line 3–16

282 In any event, the argument that the Plaintiffs had not read the PPM is neither here nor there. The Plaintiffs accept that the letters of instructions which they signed referred to the "Subscription Agreement for the Fund", which in turn referred to the PPM in the section titled "Redemptions".[324] I accordingly find that the Plaintiffs are bound by the PPM's redemption procedure.

283 I turn now to the Patels' claim in particular. The Patels had managed to redeem 50% of their investments,[325] based on instructions to redeem 50% of Fairfield Sentry given on 10 October 2014.[326] Their claim was thus for the remaining 50% which were not successfully redeemed. Mahesh alleged that he had subsequently given instructions to redeem the remaining 50%, on a date three to four days earlier or later than 28 October 2008.[327] Thus, on the Plaintiffs' own case, the instruction to redeem the remaining 50% was not given by 17 October 2008 and could not have been processed before payment of proceeds for requests to redeem shares in Fairfield Sentry were suspended.

284 I note that counsel for the Plaintiffs had relied on correspondence between the Bank to Mahesh, consisting of an email from Kandlur to Mahesh dated 28 October 2008[328] and the transcript of a telephone conversation between Mahesh and Sharma on 12 December 2008.[329] Such evidence, in particular the latter, suggested that the Bank had assured Mahesh that all of the

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324 PCS at [1764]–[1767]

325 28BAEIC at [67]

326 31BAEIC at p 861

327 NOE 31 Oct 2014 at p 74 line 22 – p 76 line 12

328 31BAEIC at p 875

329 31BAEIC at p 868–870

Patel's investments in Fairfield Sentry had been successfully redeemed. Nevertheless, it was difficult to see how this fact could assist the Plaintiffs' case given Mahesh's own position about the date on which he gave instructions for the redemption of the remaining 50% of the Patel's investment in Fairfield Sentry. It seemed to me that Sharma had wrongly assumed that the instructions to redeem the remaining 50% had been given in time when in fact it was not.

285 Thus, I dismiss the Plaintiffs' claim for the Bank's failure to redeem investments.

Claim for wasted costs in the BLMIS liquidation proceedings

286 Finally, the Plaintiffs also claimed against the Bank for the costs they incurred in lodging claims with the liquidating trustee of BLMIS in New York (this is not to be confused with the Plaintiffs' claim for wasted costs in relation to the New York action they brought against the Bank, which has been dropped, as noted above at [7]). The Plaintiffs pleaded that these costs were costs reasonably incurred in their "attempts to recover or *mitigate* their losses" (emphasis added).[330] Insofar as the Plaintiffs' claim was in *mitigation* of losses, then it must surely fail given that I have found that the Bank was not liable for the Plaintiffs' losses in the first place.

287 Nevertheless, I note that there was some suggestion in the pleadings that the Plaintiffs was making this claim under the tort of negligence. The particulars provided by the Plaintiffs also stated that they were "advised" by the Bank "to lodge claims with the liquidating trustee in New York in respect

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330 SOC (337) at [63]

of the [BLMIS liquidation proceedings]".[331] However, such an allegation must also fail because the evidence does not support the Plaintiffs' claim that the Bank provided such advice.

288 In particular, the written correspondence from the Bank to the Plaintiffs showed that the Bank was merely informing the Plaintiffs of the option of lodging such claims. For example, in a letter dated 9 February 2009 to Harish (whom some of the Plaintiffs discussed with before filing a claim in the BLMIS liquidation proceedings[332]), the Bank stated that "[i]t is not yet known whether the [liquidation trustee of BLMIS] will consider claims submitted by Investors who invested in funds that were invested with Madoff, and thus are not direct customers of [BLMIS]".[333] Another letter sent from the Bank to Jitendra on 19 February 2009 made a similar point, stating that "[i]nvestors in Fairfield Sentry … do not have a direct relationship with [BLMIS], and it is as yet unknown whether they will be eligible to recover through the [liquidation process of BLMIS]. This is something about which clients may wish to seek independent advice".[334] It was not disputed that the Plaintiffs engaged American attorneys to lodge their claims. Furthermore, the Plaintiffs' did not make any submission on this point (as noted above at [7]). Accordingly, it appears that the Plaintiffs were not intending to pursue this claim but stopped short of saying so. I dismiss their claim.

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331 SOC (337) at [63.1]

332 See *eg* 58BAEIC at [88] (Arjan Bhatia); 25BAEIC at [107]–[109] (Radhe Kapur)

333 23BAEIC 1417 (Harish Rupani)

334 16BAEIC at 4013 (Jitendra Bhatia)

The Bank's counterclaim

289 I turn now to the Bank's counterclaim for the costs it incurred in the New York action, which was commenced by the Plaintiffs' (with the exception of Nirmala and Jayshree)[335] in breach of EJCs.

290 The Plaintiffs' defence before me was that they were not bound by the EJCs as they were not provided with the documents in which the clauses are found.[336] I find no merit in this defence. The issue of whether the Plaintiffs were bound by the EJCs has already been ventilated in the New York action: the learned judge even observed in his judgment that the Plaintiffs had made "all-but-the-kitchen-sink attempts to refute the forum selection clause".[337] After thorough consideration, the learned judge found that the Plaintiffs were bound by the EJCs[338] and they are bound by that ruling.

291 Nevertheless, I am not minded to grant the Bank's counterclaim for costs incurred in the New York action. This should have been sought during the New York action itself, and not from the Singapore courts. Counsel for the Bank had relied on a decision of the English Court of Appeal in *Sunrock Aircraft Corp Ltd v Scandinavian Airlines System Denmark-Norway-Sweden* [2007] EWCA Civ 882 ("*Sunrock Aircraft*") for the *obiter* observation at [37] that "damages can be awarded for a loss incurred by the failure to comply with the terms of an exclusive jurisdiction clause".[339] I pause to note that the

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335 DCS at [1262]

336 PRS at [740]

337 123BAEIC at p 1419

338 123BAEIC at p 1421, 1424

339 DCS at [1269]

passage cited only stated that such damages *can* be granted; it does not say that such damages *must* be granted as of right. Therefore, guidance is required as to when it would be appropriate to award such damages. In this respect, *Sunrock Aircraft* does not assist, for the issue of damages for breach of an EJC did not arise in *Sunrock Aircraft*, which was concerned instead with the breach of an agreement to refer a dispute for expert determination.

292 A more relevant case is *Union Discount Co Ltd v Zoller and others* [2002] 1 WLR 1517 ("*Union Discount*"), which was also referred to in *Sunrock Aircraft* at [37]. In *Union Discount*, the defendants had brought proceedings in New York in breach of EJCs in favour of England. The plaintiff successfully struck out the proceedings in New York, and then sued the defendants in England to recover their legal costs in New York as damages. The plaintiff's claim for costs was initially struck out by the High Court. The decision to strike out was reversed by the English Court of Appeal in *Union Discount*. In holding that the plaintiff was in principle entitled to recover as damages the cost of litigation abroad in breach of EJCs, the Court noted (at [18]) the presence of the "following unusual features":

> (i) The costs which the claimant seeks to recover in the English proceedings were incurred by him when he was a defendant in foreign proceedings brought by the defendant in the English proceedings.
>
> (ii) The claimant in the foreign proceedings brought those proceedings in breach of an express term, the EJC, which, it is assumed for present purposes, has the effect of entitling the English claimant to damages for its breach.
>
> (iii) The rules of the foreign forum only permitted recovery of costs in exceptional circumstances.
>
> (iv) The foreign court made no adjudication as to costs.

293 In the present case, the Bank did not argue that any of these exceptional features applied. While the Bank, like the plaintiff in *Union Discount*, was also sued in New York, in my view this similarity *alone* is insufficient to prove that the unusual features listed above were also present here. Evidence should have been adduced to prove any unusual feature relied on, *eg* that the Bank could not have claimed for its legal costs in the New York action. This was not done. The judgment rendered in respect of the New York action made no mention of costs. Hence, I dismiss the Bank's counterclaim.

Costs

294 I will hear parties on costs of the claims and counterclaim.

Concluding remarks

295 The Plaintiffs made many allegations. Some of them should not have been made in the first place. For example, there was really no basis for the Plaintiffs to suggest that the Bank had wrongfully retained and used their monies, instead of investing the monies in Fairfield Sentry, just because the investments were not made directly in the names of the Plaintiffs themselves. Another example is the Plaintiffs' allegation that the Bank had advised the Plaintiffs to lodge claims in the BLMIS liquidation proceedings. This was clearly untrue as demonstrated by the correspondence from the Bank.

Woo Bih Li
Judge

Niru Pillai, Liew Teck Huat, Alex Yeo, Jason Yeo, Thaddeus Oh, Beverly Ng, Achala Menon and Sarah Nair (Global Law Alliance LLC) for the plaintiffs in both suits;
Ang Peng Koon Patrick, Mohammed Reza, Disa Sim, Paul Tan Beng Hwee, Ang Siok Hoon, Gan Eng Tong, On Wee Chun Derek, Allen Ng, Reuben Gavin Peter (Rajah & Tann Singapore LLP) for the defendant in both suits.

Annex

	Suit 337							**Suit 338**
	Tradewaves (Harish Rupani)	**Aarvee** (Radhe Kapur)	the **Patels**	the **Daryanis**	the **Rapiancholias**	the **Bhatias**	the **Uttam-chandanis**	the **Bhatias**
Safe and Stable with Good Returns								
Stable with Consistent or Good Returns[1]	✓[2]	✓[3]	✓[4]	✓[5]	✓[6]	✓[7]	✓[8]	✓[9]
Safe and Secure;[10] Risk Reducer	✓[11]	✓[12]	✓[13]	✓[14]	✓[15]	✓[16]	✓[17]	✓[18]
Low or No Risk and/or Volatility[19]	✓[20]	✓[21]	✓[22]	✓[23]	✓[24]	✓[25]	✓[26]	✓[27]
Cash Substitute;[28] As Good as Fixed Deposit	✓[29]	✓[30]	✓[31]	✓[32]	✓[33]	✓[34]	✓[35]	✓[36]
Exclusive and Closed-in Fund[37]	✓[38]	✓[39]	✓[40]	✓[41]	✓[42]	✓[43]	✓[44]	✓[45]
Reliable and Sound Investment	✓[46]				✓[47]	✓[48]	✓[49]	
No or only Handful of Negative Months		✓[50]		✓[51]	✓[52]	✓[53]	✓[54]	
Capital Preservation; Strong	✓[55]	✓[56]						
Legendary Fund;				✓[57]			✓[58]	✓[59]

Mythical; Gold Dust								
Due Diligence conducted on Fairfield Sentry								
Due Diligence Conducted[60]	✓[61]	✓[62]	✓[63]	✓[64]	✓[65]	✓[66]	✓[67]	✓[68]

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1 SOC (337) at [28], [30], [31], [36], [37], [39], [53.1]
2 NOE 11 Nov 14 at pp 102, 123, 130; 12 Nov 14 at pp 8, 14, 26, 30; 13 Nov 14 at pp 7, 8
3 NOE 14 Apr 15 at pp 102, 111; 15 Apr 15 at pp 35, 38, 39, 57
4 NOE 31 Oct 14 at pp 33, 34, 52; 4 Nov 14 at pp 27, 37, 73, 116
5 NOE 16 Apr 15 at pp 105, 114, 118, 131, 138, 148, 154; 17 Apr 15 at pp 2, 7, 12, 13, 16, 18, 21, 22, 74, 75; 23 Apr 15 at pp 35, 38, 40; 27 Jul 15 at p 73
6 NOE 19 Apr 15 at pp 22, 30, 51, 54, 56
7 NOE 8 Apr 15 at pp 26, 28, 39, 41, 99, 100, 102, 110; 9 Apr 15 at pp 9, 22
8 NOE 6 Nov 14 at pp 74, 103
9 NOE 23 Oct 14 at pp 51, 54, 55; 24 Oct 14 at pp 101, 104, 114
10 SOC (337) at [36], [39], [53.1]
11 NOE 11 Nov 14 at pp 106, 125, 130, 134; 12 Nov 14 at pp 7, 8
12 NOE 15 Apr 15 at pp 57, 62, 113
13 NOE 31 Oct 14 at pp 4, 22, 23, 33, 124; 4 Nov 14 at pp 27, 37
14 NOE 16 Apr 15 at pp 105, 118, 123, 124, 135, 148, 154; 17 Apr 15 at pp 12, 18, 20, 30, 75, 77; 23 Apr 15 at pp 35, 38, 40, 73, 27 Jul 15 at pp 61, 68, 72
15 NOE 19 Apr 15 at p 22

[16] NOE 8 Apr 15 at pp 28, 39, 76, 78, 102
[17] NOE 6 Nov 14 at pp 26, 27, 29, 43
[18] NOE 17 Oct 14 at pp 10, 20, 43, 99; 23 Oct 14 at pp 23, 36, 51; 24 Oct 14 at pp 32, 106, 110, 113, 115; 28 Oct 14 at pp 97, 98, 142
[19] SOC (337) at [30], [36], [39], [52.17]
[20] NOE 13 Nov 14 at p 114
[21] NOE 14 Apr 15 at pp 125, 129; F&BP 1SDB at p 114; F&BP 2SDB at p 153
[22] NOE 31 Oct 14 at pp 12, 33, 34; 4 Nov 14 at pp 98, 116
[23] NOE 16 Apr 15 at p 154; 17 Apr 15 at pp 2, 4, 11, 12; 23 Apr 15 at pp 39, 41;
[24] NOE 19 Apr 15 at pp 51, 54, 55
[25] NOE 8 Apr 15 at p 39; F&BPs 1SDB at pp 94, 104
[26] NOE 6 Nov 14 at p 85; F&BPs 1SDB at p 94, 114
[27] NOE 17 Oct 14 at p 20; 24 Oct 14 at pp 31, 32, 47
[28] SOC (337) at [28], [36], [39]
[29] 18BAEIC at [34], [35], [38], [42], [44], [51]; NOE 11 Nov 14 at pp 53–55, 69, 77, 106, 108, 115, 118, 119, 123, 130, 132, 134; 12 Nov 14 at pp 8, 26, 30; 13 Nov 14 at pp 110, 112, 114; 14 Nov 14 at pp 4, 10, 13, 16, 17
[30] NOE 14 Apr 15 at p 125
[31] NOE 30 Oct 14 at pp 81, 87, 102; 31 Oct 14 at pp 4, ,21, 26, 33, 115; 4 Nov 14 at pp 28, 29
[32] NOE 16 Apr 15 at pp 105, 115, 117, 137, 138, 140, 141, 148, 154, 155; 17 Apr 15 at pp 15, 18, 20, 74; 27 Jul 15 at pp 59, 61, 64, 68, 72, 73; 28 Jul 15 at pp 3, 8, 15, 33, 37

[33] NOE 18 Apr 15 at pp 23, 25, 26, 32, 34, 36; 19 Apr 15 at pp 22, 24, 27, 32, 48, 52, 53

[34] NOE 8 Apr 15 at pp 39, 41, 42, 44, 62, 65, 75, 76, 78, 90, 99, 100, 102; 9 Apr 15 at pp 9, 23, 26, 28
[35] NOE 6 Nov 14 at pp 27, 30, 33, 36, 38, 39, 41, 84, 106
[36] NOE 16 Oct 14 at p 45; 17 Oct 14 at pp 17, 18, 20, 44, 50; 23 Oct 14 at p 51; 24 Oct 14 at pp 29, 32, 33, 68, 101, 104, 106, 109, 110, 111, 113, 114, 115; 28 Oct 14 at pp 62, 67, 97, 100, 131, 147
[37] SOC (337) at [31], [32], [37]
[38] NOE 11 Nov 14 at pp 116, 131
[39] NOE 14 Apr 15 at p 103; 15 Apr 15 at pp 39, 67
[40] F&BPs 2SDB at p 196
[41] NOE 16 Apr 15 at pp 115, 118, 131, 136; 17 Apr 15 at pp 2, 13, 15, 16, 18, 75; 27 Jul 15 at pp 59, 61, 68, 69; 28 Jul 15 at p 25
[42] NOE 19 Apr 15 at pp 39, 56, 58
[43] NOE 8 Apr 15 at p 48
[44] NOE 6 Nov 14 at pp 27, 30
[45] NOE 17 Oct 14 at pp 17, 49; 28 Oct 14 at p 97
[46] 18BAEIC at [38]
[47] Supplemental F&BPs 3SDB at p 206
[48] Supplemental F&BPs 3SDB at p 209
[49] Supplemental F&BPs 3SDB at p 213
[50] F&BPs 3SDB at pp 43, 196
[51] NOE 16 Apr 15 at pp 130, 136, 149; 17 Apr 15 at p 7; 27 Jul 15 at pp 59, 61; 28 Jul 15 at pp 3, 14, 22
[52] F&BPs 1SDB at pp 94, 99
[53] NOE 8 Apr 15 at p 39
[54] NOE 6 Nov 14 at p 63

[55] NOE 11 Nov 14 at pp 70, 77, 110, 130; 14 Nov 14 at p 4
[56] NOE 14 Apr 15 at pp 102, 131; 15 Apr 15 at p 38
[57] NOE 16 Apr 15 at pp 155, 139; 17 Apr 15 at pp 2, 16, 19; 27 Jul 15 at pp 62, 78; 28 Jul 15 at p 22
[58] NOE 6 Nov 14 at pp 19, 26, 27, 35, 36, 38, 39, 42, 89, 106; 7 Nov 14 at p 31
[59] NOE 17 Nov 14 at pp 16, 19; 23 Oct 14 at pp 107, 109, 11; 24 Oct 14 at p 31
[60] SOC (Suit 337) at [29], [32A], [53.2]
[61] 18BAEIC at [38]; NOE 11 Nov 14 at pp 54, 70, 77; 13 Nov 14 at p 113; 14 Nov 14 at p 4
[62] NOE 14 Apr 15 at pp 105–107
[63] NOE 31 Oct 14 at pp 5, 21; 4 Nov 14 at pp 35, 47
[64] NOE 16 Apr 15 at pp 118, 119; 27 Jul 15 at pp 62, 63, 78
[65] F&BPs 1SDB at p 94; 2SDB at p 252
[66] NOE 8 Apr 15 at p 44; Supplemental F&BPs 2SDB at p 279; 3SDB at p 209
[67] F&BPs 1SDB at p 94; 2SDB at pp 306 and 309
[68] NOE 16 Oct 14 at p 39; 17Oct 14 at p 18; 24 Oct 14 at p 30; 28 Oct 14 at pp 97, 98, 100