IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC(I) 9

Suit No 4 of 2021

Between

(1) Bidzina Ivanishvili
(2) Ekaterine Khvedelidze
(3) Tsotne Ivanishvili, a minor suing by his litigation representative, Ekaterine Khvedelidze
(4) Gvantsa Ivanishvili
(5) Bera Ivanishvili

… *Plaintiffs*

And

Credit Suisse Trust Limited

… *Defendant*

JUDGMENT

[Trusts — Trustees — Duties]
[Trusts — Breach of trust — Extent of liability]

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Ivanishvili, Bidzina and others
v
Credit Suisse Trust Ltd

[2023] SGHC(I) 9

Singapore International Commercial Court — Suit No 4 of 2021
Patricia Bergin IJ
5–9, 12–16, 19–23 September 2022, 16–17 February 2023

26 May 2023 Judgment reserved.

Patricia Bergin IJ:

Introduction

1 Bidzina Ivanishvili ("the plaintiff") had a long and for many years trusting relationship with Credit Suisse Trust Limited in Singapore ("the defendant"). That relationship commenced in 2004 when an officer of Credit Suisse AG Geneva Branch ("the Bank"), the private investment banking arm of the Credit Suisse Group ("CS Group" or "Credit Suisse") approached the plaintiff and offered to assist him with wealth management services.

2 The plaintiff was advised by the defendant and the Bank to use a structure pursuant to which he deposited over US$1.1 billion into the custody of the defendant to be placed on trust in "The Mandalay Trust" (or "the Trust") with the objective of "Inheritance Planning and Asset Holding". The responsible corporate vehicles of the Trust were Meadowsweet Assets Limited

("Meadowsweet"), Soothsayer Limited ("Soothsayer") and Lynden Management Ltd ("Lynden").

3 Unfortunately, the Bank had within its ranks a fraudster, Mr Patrice Lescaudron ("Mr Lescaudron"), who was appointed as the Trust's Relationship Manager ("RM") and over the next 9 years misappropriated many millions of dollars from the Trust. His scheming and fraudulent conduct was not halted until 2015 when market forces intervened, with the inevitable consequences of his arrest and subsequent imprisonment.

4 The Swiss Correctional Court (the "Swiss Court") found that Mr Lescaudron had: embezzled large amounts of money; purchased securities above market price causing damage to the plaintiff and to the Trust; and operated a scheme pursuant to which he opened various accounts and transferred moneys without the knowledge of either the plaintiff or the defendant for the purpose of covering losses in other clients' accounts which he had caused.[1]

5 The Swiss Court also recorded Mr Lescaudron's admission that he had forged orders by cutting and pasting the plaintiff's signature on documents. The Swiss Court described some of Mr Lescaudron's activities as follows:[2]

> Starting in 2009, having earned the client's trust in terms of the investments made, Patrice LESCAUDRON managed the accounts of Bidzina IVANISHVILI alone, without so much as a conversation taking place between them, which he classified as a "perverse way of operating". Subsequently, there was the non-execution by CREDIT SUISSE Singapore of client orders and losses, which he had hidden from the client in the Excel tables sent to him, for fear of losing his client. He had then performed unauthorised trades to recover the loss. This had been the case

1 Exhibit A, Volume 8, p 3.

2 Exhibit A, Volume 8, p 28.

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> at the end of 2009 and he had profited from transferring, through transfers or through the sale of securities at overly high prices, as part of the profit generated for other clients.

6 Mr Lescaudron presented statements to the plaintiff which "did not reflect reality".[3] He moved money around to cover up the transfers made to other clients and to also cover the actual losses that were incurred by various clients of the Bank. His method of operation was at times apparently rather frantic and the money misappropriated from the Trust's accounts was for "covering the losses generated by the trading operations that he had performed" in other clients' accounts without their agreement.[4] He utilised hidden sub-accounts and transferred funds into "side-pockets" in a web of fraudulent transactions.[5]

7 The plaintiff, his wife, Ekaterina Ivanishvili, and three of their children (together "the plaintiffs"), sue the defendant in respect of alleged breaches of trust and losses in respect of which they claim damages of approximately US$1.2 billion.

8 The plaintiffs claim that the defendant breached its obligations as trustee in failing to properly administer the Trust and failing to keep the Trust assets safe.

9 The defendant took a very robust approach to the plaintiffs' claims from the outset of the proceedings in 2017. Until August 2022, it put the plaintiffs to strict proof of the fraud perpetrated by Mr Lescaudron notwithstanding that

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3 Exhibit A, Volume 8, p 30.

4 Exhibit A, Volume 8, p 35.

5 Exhibit A, Volume 8, pp 46−47.

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Mr Lescaudron had pleaded guilty and had been convicted and imprisoned for the fraud.[6]

10 Until a few weeks before the commencement of the trial on 5 September 2022, the defendant had denied that it had a duty to "[s]afeguard the Trust Assets by having measures in place to detect and prevent fraud and misappropriation on the Trust Accounts from taking place and by acting on any relevant information obtained through those measures".[7]

11 On 5 September 2022, at the commencement of the trial, the defendant accepted it was "under a duty to protect the Trust Assets if it had actual knowledge that those assets were not being managed properly"[8]. However, it maintained that it "played a very limited role" in the facts which led to the fraud and on "the basis of its role, and what it was told, it could not have prevented the fraud or brought it to an end".[9]

12 On 16 September 2022 the defendant admitted "that it was required to take reasonable steps to protect and safeguard the Trust Assets from being misappropriated".[10]

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6 Geneva Correctional Court 9 February 2018 (Exhibit A, Volume 8, p 3); Court of Justice 26 June 2019; Swiss Federal Supreme Court 19 February 2020; Defence (Amendment No 3) para 52A.

7 Statement of Claim (Amendment No 4), para 27C(f); Defence (Amendment No 3) para 44B.

8 Defendant's Opening Statement 30 August 2022 ("DOS"), para 4.

9 DOS, para 14.

10 Defence (Amendment No 4), para 44B.

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The parties

The plaintiff

13 The plaintiff was born in Georgia and grew up in Chorvila, a small rural town in Georgia. He was educated in Georgia and graduated with Honours in Engineering and Economics from the State University in Tbilisi. At 25 years of age he moved to Moscow to study for a post-graduate degree in Economics at the Scientific Research Institute for Labour and Social Affairs.[11] He holds a PhD in Economic Science.[12]

14 During the 1980s the plaintiff established and operated a business in partnership with a business associate, Mr Vitaly Malkin ("Mr Malkin"), importing cheap telephones and computers from Asia for sale in the USSR. This business was funded by loans from family and friends.[13] It was a very successful business, the profits from which were used by the plaintiff and Mr Malkin to establish Rossiyskiy Kredit, one of the first privately owned banks in Russia.[14]

15 In 1989 the plaintiff met his wife, and they were married in 1994. They have four children, three of whom are plaintiffs and the fourth is now a resident of France.[15]

16 In 1993–1994, the plaintiff established the Cartu Group. The Cartu Group was established with the aim of attracting investment to Georgia and

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11 Bidzina Ivanishvili's AEIC ("BI"), para 14.

12 Exhibit A, Volume 1, p 110.

13 BI, para 19.

14 BI, para 20.

15 BI, para 15.

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developing banking businesses in Georgia.[16] In 1995, the plaintiff and his wife established the Cartu International Charity Foundation for the promotion of charitable causes in Georgia.[17]

17 The plaintiff and Mr Malkin were part owners of a metallurgical complex in Russia, known as Mikhailovsky, which was part of a group of metallurgical businesses under the brand name "Metalloinvest". In 2004 the plaintiff and Mr Malkin sold that business for approximately USD 1.6bn.[18] In 2006, Rossiyskiy Kredit sold its retail bank, Impexbank, to Raiffeisen Bank for USD 550m. These sales produced significant profits for the plaintiff and Mr Malkin.[19]

18 The plaintiff returned to live in Georgia in 2005.[20] He has had a very successful business life and has also been successful in politics, having served as the Prime Minister of Georgia from 2012 to 2013.[21]

19 The plaintiff's communication with the defendant and the Bank during the relevant period of their relationship was sometimes direct in face-to-face meetings with representatives of each entity and sometimes by e-mail directly to him. However, in the later years, the relationship was also conducted through the plaintiff's personal assistants/advisers who would deal directly with the representatives of the defendant and the Bank, consult with the plaintiff, and then respond to the defendant and/or the Bank. Those assistants were Mr Irakli

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16 BI at para 25.

17 BI at para 16.

18 BI at para 21.

19 BI at para 21.

20 BI at para 21.

21 BI at para 29.

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Garibashvili ("Mr Garibashvili") until about late 2010, Mr Zviad Khukhunashvili ("Mr Khukhunashvili") from about late 2010 until 2012, and Mr George Bachiashvili ("Mr Bachiashvili") from 2012.[22]

The defendant

20 The defendant, Credit Suisse Trust Limited, incorporated in Singapore, is a wholly owned subsidiary of Credit Suisse Trust AG ("CS Trust AG"), a Swiss company. CS Trust AG has other subsidiaries in other countries around the world. CS Trust AG and its subsidiaries will be referred to as the "CST Group".[23] The defendant was described as "well embedded into the [CST Group] Structure" which at the relevant times had around 350 employees working in 5 sub-departments.[24]

21 CS Trust AG is a subsidiary of the CS Group.[25] The Bank is also a part of the CS Group. The Bank has various branches around the world, including in Geneva and in Singapore. The Singapore branch of the Bank will be referred to as "the Singapore Bank". Credit Suisse Life (Bermuda) Limited ("CS Life") is a subsidiary of CS Bank.[26]

22 There were three main departments in the defendant: (i) Trust & Estate Advisory; (ii) Trust Management; and (iii) Legal & Compliance. In the Trust Management department, there were four Trust Management teams and one

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22 BI at para 89.

23 Statement of claim (Amendment No 4) at para 9.

24 Exhibit A Volume 11 page 788-789

25 Statement of claim (Amendment No 4) at para 9.

26 Exhibit A Vol 2 at p 539.

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Finance/Trust Accounting team.[27] These teams reported to the head of Trust Management.

23 Each of the defendant's heads of department had a "line manager" (a superior to which they reported) working in CS Trust AG which acted as the headquarters for the CST Group.[28] The defendant's head of Trust & Estate Advisory reported to the global head of Trust & Estate Advisory at CS Trust AG. The defendant's head of Trust Management reported to the global head of International Trust Management, who in turn reported to the global head of Trust & Insurance Management at CS Trust AG. The defendant's head of Legal & Compliance reported to a member of the Legal & Compliance team at CS Trust AG, who in turn reported to the global head of that department.[29] The global heads of Trust & Estate Advisory, Trust & Insurance Management and Legal & Compliance at CS Trust AG reported to the CEO of the CST Group.

24 The CEO of the CST Group reported directly to the head of Investment Services & Products, who was part of the private banking division of the CS Group.[30]

25 The defendant offered services as a professional trustee with the ability to utilise the investment banking arm of the CS Group for the investment of trust assets.

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27 As set out in the presentation given by Mr Dominik Birri to the Monetary Authority of Singapore ("MAS") in 2011 (Exhibit A, Volume 11, pp 787–788).

28 Transcript, 9 September 2022, p 150, lines 3–6.

29 Transcript, 9 September 2022, pp 147–150.

30 Exhibit A, Volume 11, p 808.

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The trial

The witnesses

26 Evidence in the trial was given over 14 days between 5 September 2022 and 22 September 2022 with some preliminary oral submissions from the parties on 23 September 2022. The parties then provided written closing submissions and written submissions in reply by the end of January 2023. Final oral submissions were made on 16 and 17 February 2023 when judgment was reserved.

27 The factual witnesses who gave oral evidence in the plaintiffs' cases were: the plaintiff who gave evidence on 5, 6, 7 and 8 September 2022; and Mr Bachiashvili who gave evidence on 8 and 9 September 2022.

28 The factual witnesses who gave oral evidence in the defendant's case were: Mr Dominik Iwan Birri ("Mr Birri"), the defendant's Head of Trust Management and Overall Centre Head and Executive Director from 2011 until 2015, who gave evidence on 9, 12 and 13 September 2022;[31] Ms Josephine Novoa Sampaoli ("Ms Sampaoli"), an employee of the Trust and Agency Team in the Geneva Office of CS Trust AG[32] who gave evidence on 13, 14 and 15 September 2022; Ms Sim I-May Joni ("Ms Sim") a Trust Manager with the defendant[33] who gave evidence on 15 and 16 September 2022; Ms Lau Chew Lui ("Ms Lau"), a Trust Manager with the defendant from June 2011 until July 2016,[34] who gave evidence on 16, 19 and 20 September 2022; and Ms Peh Bee

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31 Dominik Birri's AEIC ("DB"), para 8.

32 Josephine Novoa Sampaoli's AEIC ("JNS"), para 5.

33 Joni Sim's AEIC ("JS"), para 4.

34 Lau Chew Lui's AEIC ("LCL"), paras 7–9.

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Geok ("Ms Peh"), a Trust Accountant and later Trust Manager with the defendant from June 2003 until June 2021,[35] who gave evidence on 20 September 2022.

29 There were two other witnesses called by the defendant in respect of documentary searches and disclosure. They were Ms Luna Christie ("Ms Christie") a Senior Trust Manager with the defendant, and Mr Martin Eichmann ("Mr Eichmann"), the CEO of the defendant. They both gave evidence on the *voir dire* on 14 September 2022 (which subsequently became evidence in the trial).

30 To deal with the issue of quantification of loss, parties called two expert witnesses each. The expert forensic accounting expert witnesses, Mr William Howell Wyndham Davies ("Mr Davies") for the plaintiffs and Mr James Nicholson ("Mr Nicholson") for the defendant, gave evidence concurrently on 21 September 2022. The expert wealth management witnesses, Mr David Morrey ("Mr Morrey") for the plaintiffs and Ms Esther Mayr ("Ms Mayr") for the defendant, gave evidence concurrently on 22 September 2022. The experts' reports were admitted into evidence without objection. The forensic accounting experts filed a joint statement on 16 September 2022 ("the FA Joint Statement"), and the wealth management experts filed a joint statement on 5 September 2022 ("the WM Joint Statement").

The admission

31 On the tenth day of the trial, Friday 16 September 2022, the defendant advised that it wished to make a "concession" to the Court and the plaintiffs

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[35] Peh Bee Geok's AEIC ("PBG"), para 5.

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admitting "that it had acted in breach of its trustee's duties by 31 December 2008". That concession was in the following terms:[36]

> The defendant accepts that it ought to have, as at 31 December 2008, taken reasonable steps to address the issue of unauthorised transfers from the bank accounts of Meadowsweet Assets Limited, including directly contacting Mr Ivanishvili to verify the propriety of the transfers out of Meadowsweet's bank accounts.

32 On Saturday 17 September 2022 the defendant's solicitors, Allen & Gledhill LLP, wrote to the Court and the plaintiffs' solicitors in terms that included the following:[37]

> To narrow the issues to be determined at trial and facilitate the efficient allocation of the Honourable Court's time, we elaborate on the Defendant's position in light of the admission. The Defendant accepts that, had direct inquiry been made by the Defendant with Mr Ivanishvili on 31 December 2008, it would have led to a situation where Mr Lescaudron would have been removed as relationship manager permanently and/or new investment instructions or strategies for the trust assets would have been put in place, or the trust assets moved to another financial institution. The Defendant does not dispute causation in this regard.

33 On the eleventh day of the trial, Monday 19 September 2022, instructed Senior Counsel for the defendant, Mr Lee Eng Beng ("Mr Lee") explained:[38]

> Our position is that if direct enquiry had been made with Mr Ivanishvili in [*sic*] 31 December 2008, it would have led to a situation where Mr Lescaudron would have been removed permanently as relationship manager or would otherwise have been prevented from dealing with a [*sic*] trust assets. That's our position. So, in that respect we're not disputing causation.

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36 Transcript, 16 September 2022, p 95.

37 Exhibit PD1.

38 Transcript, 19 September 2022, p 12.

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34 The defendant made clear that its concession should not be understood as an admission or concession that it had a duty to review or monitor the wisdom of the investments of the Trust assets. Rather, its concession is expressly limited to a breach of its duty to keep the Trust assets safe.

35 At the time it made the admission, the defendant accepted that it followed from its breach of duty to keep the Trust assets safe that the plaintiffs would be entitled to some damages or compensation.[39] However that position changed by reason of a settlement that was reached between the Bank and the plaintiffs on 1 December 2022 ("the Settlement"). The defendant now contends that any losses suffered by the plaintiffs by reason of the breach of its duties as a trustee have been fully compensated in accordance with the Settlement.[40]

36 The plaintiffs contend that the defendant's choice of 31 December 2008 as the date of the admitted breach of its obligation as trustee was "tactical".[41] They claim that the defendant knew that the Trust assets had been depleted by the effects of the Global Financial Crisis ("GFC") of October 2008 by that date and that this "tactic", if accepted, would keep the assessment of damages lower than otherwise if the breach had occurred before the GFC.

37 The plaintiffs submitted that both as a matter of evidence and logic, the defendant's selection of 31 December 2008 as the date of breach is unsustainable.[42]

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39 Transcript, 19 September 2022, p 226.

40 Transcript, 16 February 2023, p 9.

41 Plaintiffs' closing submissions ("PCS"), para 30.

42 PCS, para 34.

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38 The plaintiffs contend that the defendant was in breach of its obligation as Trustee earlier than 31 December 2008. In support of this contention, the plaintiffs rely upon the defendant's conduct in failing to deal with unauthorised payments out of the Trust accounts ("unauthorised payments away" or "UPAs") during 2006 and 2007 when many millions of dollars were transferred out of the Trust accounts by Mr Lescaudron without the identification of the recipient of the funds and/or without the prior approval of the defendant.[43]

A forensic decision

39 The defendant had served other affidavits which, as late as 15 September 2022, the ninth day of trial, the plaintiffs anticipated would be read at trial.[44] However, the defendant's solicitors advised the Court in the letter of 17 September 2022 referred to at [32] above that, in the light of its admission on 16 September 2022, it had made the decision not to read those affidavits.[45] This is a forensic decision that might appear uncontroversial. However, one of those proposed witnesses was Mr Patrick Guldimann ("Mr Guldimann"), a trust accountant, who was brought from Switzerland to the defendant's Singapore office in 2015, following the discovery of Mr Lescaudron's fraud, to review the financial statements of the Trust.[46] Mr Guldimann produced restated accounts for the whole of the period 2006 to 2014. He had sworn two affidavits, the first on 18 April 2022 and the second on 29 August 2022.

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43 PCS, paras 35–42.

44 Transcript, 15 September 2023, pp 180–186.

45 Exhibit PD1, para 16 of A&G's letter dated 17 September 2022.

46 Transcript, 19 September 2022, p 193.

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40 Mr Guldimann's first affidavit was the subject of a report by Mr Davies of 28 July 2022.[47] Mr Davies was instructed to identify the "differences" between the originally approved financial statements for the Mandalay Trust and the restated financial statements for the same period "as exhibited" to Mr Guldimann's first affidavit (the "Restated Financial Statements").[48] Mr Davies' report refers not only to the restated financial statements exhibited to Mr Guldimann's first affidavit but he also extracts parts of and refers to other parts of Mr Guldimann's first affidavit.[49]

41 Mr Nicholson's report of 3 June 2022 referred in numerous paragraphs to having been "instructed" in respect of certain matters.[50] The plaintiffs' lawyers requested details of those instructions. Mr Guldimann's second affidavit was filed "to address" Mr Davies report of 28 July 2022 and "the instructions" given to Mr Nicholson in respect of his report of 3 June 2022.

42 Mr Guldimann's affidavits were relied on by Mr Davies and Mr Nicholson in reaching some of the conclusions in their joint report and were discussed in their evidence.[51] His second affidavit was referred to in the FA Joint Statement.[52]

43 Ms Lau was cross examined about Mr Guldimann's role in reviewing the Trust's accounts including in respect of e-mails written by him at the time

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47 Exhibit PX1.

48 Exhibit PX1, para 1.3.1.

49 Exhibit PX1 paras 5.4 to 5.9.

50 Exhibit DX1, 3 June 2022, paras 2.38, 5.13, 6.61, 6.98, 6.101, 6.106, and fn 192.

51 Transcript, 21 September 2022, pp 31–32.

52 Exhibit DX1, 16 September 2022, para 4.23 on p 24 and para 4.42 on p 34.

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of his work for the defendant. Ms Lau was also taken to the exhibits to Mr Guldimann's first affidavit.[53]

44 Mr Guldimann's role was also referred to by the parties in their written closing submissions on the apparent understanding that the Court would have access to the contents of the affidavits.[54] In fact, the defendant referred to a specific paragraph of Mr Guldimann's first affidavit in support of its contention in respect of the nature of the "restatement exercise".[55]

45 In final oral submissions, the parties were asked to address the issue of how the Court should deal with the "status" of Mr Guldimann's affidavits.[56] The plaintiffs tendered the affidavits not for the purpose of proving the truth of their contents but for the purpose of understanding the unchallenged evidence that has been given in relation to their contents including by the experts and Ms Lau.[57] The defendant objected to the tender on the basis of its lateness and the fact that the affidavits had not been read in Court submitting that such a step is "irregular".[58] The defendant could not point to any real prejudice other than suggesting that there is "uncertainty" about the scope of reliance on the contents of the affidavits.[59]

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53 Transcript, 19 September 2022, pp 193–223; 20 September 2022, pp 1–10.

54 PCS, paras 533–552; Defendant's reply closing submissions ("DRCS"), paras 256–311.

55 DRCS, para 308.

56 Transcript, 16 February 2023, pp 144–146; and 17 February 2023, p 49.

57 Transcript, 17 February 2023, pp 35–38; 45–50.

58 Transcript, 17 February 2023, pp 44–45.

59 Transcript, 17 February 2023, p 45.

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46 There are numerous aspects to the steps that Mr Guldimann took in restating the accounts that are already in evidence without objection. In all the circumstances and having regard to the reference by the parties to the affidavits in their submissions and the evidence of the experts and Ms Lau referred to above, it is appropriate that the affidavits be received into evidence as an exhibit.[60]

Settlement with the Bank – 1 December 2022

47 On 30 December 2022 the defendant's solicitors notified the Court that the Bank had reached an agreement with the plaintiff dated 1 December 2022 in respect of the payment of certain amounts that are claimed by the plaintiffs in these proceedings (the "Settlement").[61] These amounts related to misappropriations from the Meadowsweet accounts that were itemised in the first instance judgment of the Geneva Criminal Court dated 9 February 2018. The Settlement was expressly "confirmed not to impact in any way" the plaintiffs' "other claims" in these proceedings.[62]

48 The Settlement expressly preserves the plaintiffs' claims for "any other consequential losses from the failure" of the Bank and/or the defendant "to identify and/or take action" in respect of the transfers, the payment of which were the subject of the Settlement. [63]

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60 Marked as Exhibit G; The two affidavits of Patrick Guldimann sworn on 18 April 2022 and 29 August 2022.

61 Statement of Claim (Amendment No 4), para 109(h)(iii); Annexure 1 of the First Instance Judgement of the Geneva Criminal Court dated 9 February 2018.

62 Exhibit F, Recital G.

63 Exhibit F, cl 1 and cl 4.

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49 The Settlement also includes an agreement that if the Court finds that damages are to be awarded to the plaintiffs in these proceedings on a particular basis then it is agreed that such basis will, by consent, be adjusted to exclude both the transactions and the amounts paid under the Settlement from such assessment.[64]

50 The amount the Bank agreed to pay Meadowsweet, the plaintiff and the plaintiff's company Wellminstone SA in accordance with the Settlement was USD 79,430,773.[65]

Some litigious history

51 In the present proceedings the plaintiffs originally sued both the defendant and the Bank. The defendant and the Bank were successful at first instance in opposing the proceedings going forward in Singapore on the basis that the convenient forum was Switzerland. On appeal, after the plaintiffs discontinued the proceedings against the Bank and reshaped the proceedings seeking relief only from the defendant, the Court of Appeal allowed the proceedings as reconstituted to continue in this Court (see *Ivanishvili, Bidzina and others v Credit Suisse Trust Ltd* [2020] 2 SLR 638).

52 Although this is a matter of history, it is mentioned because the defendant contends that many of the plaintiffs' claims are more appropriately characterised as claims against the Bank for which it contends the defendant cannot and should not be held liable. The defendant also contends that the consequence of the arrangements reached in the Settlement is that the plaintiffs have been fully compensated for any loss suffered not only by reason of

64 Clause 3.3 of Settlement Agreement – Exhibit F.

65 Exhibit F Schedule 1

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Mr Lescaudron's fraud but also by reason of the admitted breach of duty by the defendant in failing to keep the Trust assets safe.

53 This contention is based in part on the nature of the arrangements under the Mandalay Trust. The defendant claims that because the plaintiff was appointed as the "Investment Manager" of the Trust it has no liability for the losses the plaintiffs claim over and above the amounts that were misappropriated by Mr Lescaudron for which it submits the plaintiffs have been fully compensated by the Settlement.

Events after 31 December 2008

54 The defendant also contends that events after 31 December 2008 are no longer relevant to the issues for determination because it has admitted that it was in breach of its duty as at that date and that this was a continuing breach. However, it has dealt with the events post 31 December 2008 in its submissions on the basis that the Court may take a different view.

55 The plaintiffs rely on events after that date as they contend they are relevant in reviewing the parties' relationships and to the determination of the nature, extent and date or dates of the various breaches of duty they allege were committed by the defendant. It was submitted that it is also important to the determination of whether, if the Court finds there are breaches other than or in addition to the breach admitted by the defendant, the defendant is entitled to relief under s 60 of the Trustees Act 1967 (2020 Rev Ed) (the "Trustees Act").

56 In the circumstances it will be necessary to consider the matter in far more detail than simply focussing on the parties' relationship and relevant events up to 31 December 2008.

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The Trust

The setup of the Trust

The parties meet – 30 November 2004

57 It was in 2004 after the plaintiff and Mr Malkin sold Mikhailovsky that the Bank approached him with a proposal that he place his funds with the defendant. The Bank officer who approached the plaintiff with this proposal was Ms Daria Mihaesco Krassiakov ("Ms Mihaesco"), a Senior RM with the Bank.[66]

58 On 30 November 2004 a meeting took place in Zurich attended by the plaintiff, Mr Malkin, Ms Mihaesco and two representatives of the Singapore private banking arm of the CS Group, Mr Beat Stamm ("Mr Stamm") and Mr J.M. Toffoletto.

59 In an internal e-mail dated 3 December 2004 between the defendant and representatives of the Bank purporting to summarise the discussions at this meeting the following was recorded by Mr Stamm:[67]

> After a smooth mutual introduction, the two business men informed us that they have decided to work with CS for the corporate finance transaction, as well as the investment management business thereafter. We have been informed that the corporate finance deal (sale) of USD 1.8 bn should go through in the days ahead, although the two BOs were mentioning another bidder that turned up lately who is willing to bid higher.
>
> There will be two a/c in Geneva (already opened) and two a/c in Singapore. The payments shall be received in Geneva around December 15-20, 2004. CS Geneva will retain USD 500m. The flow of assets into Singapore will be delayed until early 2005

66 BI, para 33.

67 Exhibit 1, Volume 1, p 49.

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> (total assets for SG are: USD 600m for BO B.I. and USD 550m for BO B.I).

60 The reference "BO" was to "beneficial owner" and "B.I." was a reference to the plaintiff. The summary also referred to discussion about the possible use of corporate vehicles in the British Virgin Islands ("BVI"), a Cyprus trust and accounts in Switzerland, with the conclusion that the plaintiff and Mr Malkin "rather prefer to have a full 'Singapore solution' in place immediately, not involving Cyprus, nor Switzerland, and therefore requested [the defendant] to prepare two Singapore Trusts (based on the submitted information about the Cyprus Trusts) with two underlying companies (e.g. Bahamas or BVI) in due time".[68]

61 The summary also recorded the following:[69]

> a) Mr. B.I. USD 600m
>
> ==========
>
> Client will later submit detailed investment guidelines; he is to be regarded as a conservative investor. USD 600m are to be place (*sic*) on weekly time deposit upon arrival of assets. Thereafter, assets are to be divided into USD 400m static fixed income portfolio and USD 200m dynamic portfolio, including equities and capital protected products. The reference currency is USD, any non-USD exposure must be discussed with the client beforehand (the client is not in favour of any EUR exposure at this point in time). The fixed income portion shall be 50:50 in US and European mid- to long-term government papers (only AAA, inclusive of Zero-Bonds); some Asian government bonds may be proposed if available in AAA. While the fixed income portfolio shall be non-discretionary, the dynamic portion could be fully or partly discretionary and shall follow an investment profile of up to Balanced, inclusive of an Asian PM Mandate to be proposed.

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68 Exhibit 1, Volume 1, pp 49–50.

69 Exhibit 1, Volume 1, p 50.

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62 Based on the above, it was suggested to the plaintiff that he put forward "guidelines" for the investment of his assets at the meeting.[70] The plaintiff claimed that rather than him giving any "advice" to the defendant or Credit Suisse generally, he went to Credit Suisse because he understood it was a "reliable" and "famous bank". His purpose in going to the meeting was to obtain advice as to how to invest his money so that it was "protected" and if anything were to happen to him, for it to be transferred to his family.[71]

63 The plaintiff was "quite surprised" to hear mention of Singapore (and the defendant) at this meeting and he claimed he was advised that his capital would be better protected with the laws and diversification in Singapore.[72] The plaintiff was adamant that he did not dictate the structure for the investments and said that all "offers" including the reference to "AAA" came from the Credit Suisse representatives.[73] His evidence included the following:[74]

> … [W]hen I approached the bank, my idea was to preserve the capital and whatever they suggested is the best way to do it was accepted by me, so this is when the trust appeared to begin with and Singapore trust was mentioned, and it was suggested as the most appropriate way of preserving the capital for the benefit of my family. Therefore, I was not thinking about it much at all. I was just accepting.

Paris Meeting – 9 March 2005

64 Following the execution of the trust documentation (discussed in detail in the next section), on 9 March 2005, the plaintiff met with Ms Mihaesco,

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70 Transcript, 5 September 2022, p 145.

71 Transcript 5 September 2022, p 146.

72 Transcript 5 September 2022, p 147.

73 Transcript 5 September 2022, pp 148–152.

74 Transcript 5 September 2022, p 160.

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Mr Stamm and Mr Massimo Hiber of the Singapore Bank at the Hotel George V in Paris. Mr Malkin also joined the meeting a short while after it commenced.

65 The Credit Suisse representatives were discussing the plaintiff's wishes or instructions concurrently with those of Mr Malkin. Mr Stamm "confirmed that all major documentation was in place" and the Singapore trusts with the underlying company had become "operational". He "summarised the prepared investment proposal based on" the plaintiff's "input" in November 2004 "consisting of non-discretionary fixed income-, as well as opportunistic-, partly discretionary elements".[75] A note of this meeting recorded that the plaintiff had been influenced by Mr Malkin in considering the "similar solution" of a special discretionary mandate. The note also recorded that:[76]

> Subsequently, **the clients jointly decided to have all funds with CS Geneva** (minus some funds to be managed by an external asset manager) **and all funds with CS Singapore under special discretionary mandates**. The clients also decided to equally split their assets between Geneva and Singapore (USD 825m per booking centre) although out of the Geneva booked assets some funds will be managed by an external asset manager who was introduced by [Mr Malkin].
>
> The clients concluded that based on today's discussion, as well as their earlier discussion with Jose Spescha, [a Credit Suisse officer] the managed portfolios shall be split equally into a core mandate (income oriented), as well as an opportunistic/plus mandate (total return oriented). While Geneva/Switzerland would apply a Global approach, Singapore would add Asian flavour in both mandates up to approx. 50% of the Singapore booked assets (attachment: overview investment scheme of all assets booked with CS).

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75 Exhibit A, Volume 1, p 219.

76 Exhibit A, Volume 1, p 220.

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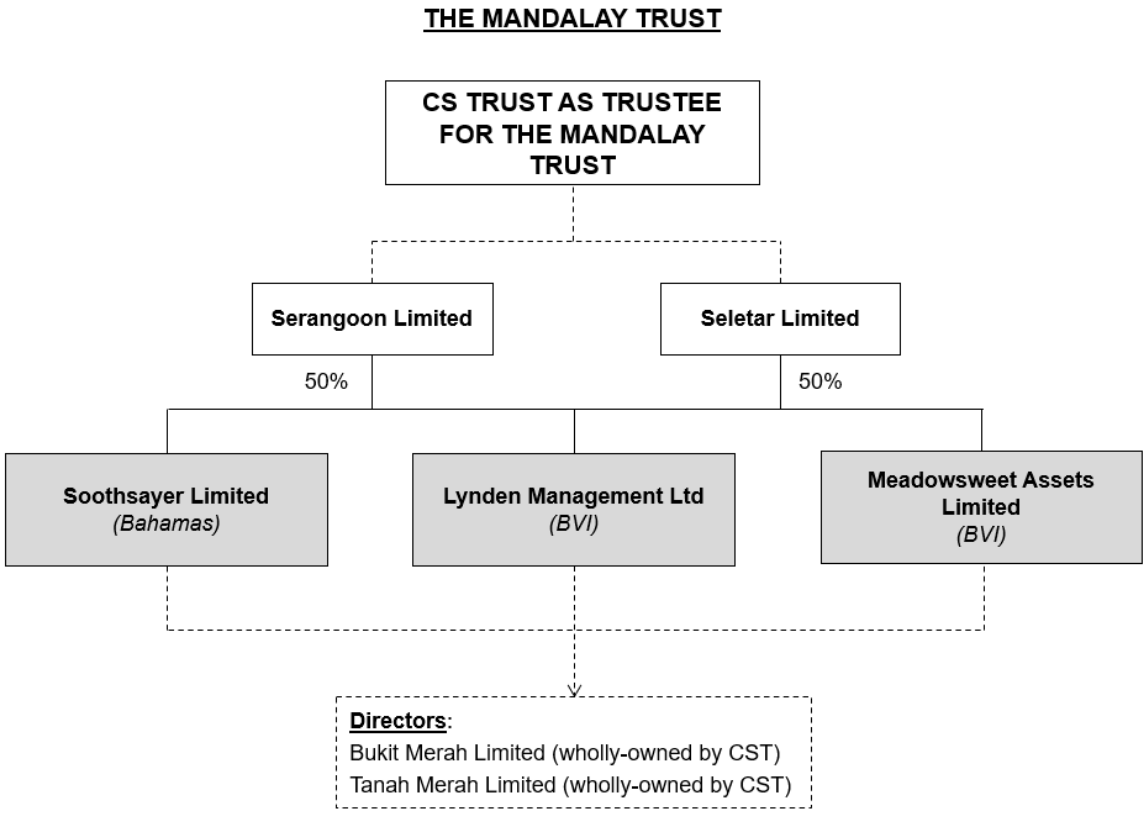
> Due to the nature of Asian markets (incl. transaction costs) and the additional added value created out of Singapore, the clients agreed on Massimo's proposal for a 0.8% p.a. flat fee arrangement, while the Geneva booked a/c are charged at 0.7% p.a. flat fee.
>
> [emphasis in original]

The Trust structure

66 The Trust has three underlying companies, Meadowsweet, Soothsayer and Lynden, that are held by nominees, Seletar Limited and Serangoon Limited, ultimately owned by the defendant.

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67 The structure of the Trust is as follows:[77]



68 The defendant owns the shares of Meadowsweet and Soothsayer in its capacity as trustee of the Trust.[78] The corporate directors, Bukit Merah Limited and Tanah Merah Limited, and the company secretary of both corporate directors, Clementi Limited ("Clementi"), are wholly owned by the defendant.

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77 JS, para 7.

78 Defence (Amendment No 4), para 7(1).

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The individual directors of the corporate directors include persons who are also directors of the defendant.[79]

69 Soothsayer held accounts with the Singapore Bank and Meadowsweet held accounts with the Bank. Lynden held a substantial collection of artworks.

70 On about 22 March 2005, the plaintiff arranged for USD 1.1bn to be transferred into the Meadowsweet accounts. On about 23 March 2005, USD 550m was transferred from the Meadowsweet accounts into the Soothsayer accounts.[80]

71 On or around 29 March 2005, Meadowsweet entered into discretionary portfolio management agreements with the Bank, under which the Bank was given a mandate to manage the assets within two accounts.[81] On or around 1 April 2005, Soothsayer entered into similar discretionary portfolio management agreements with the Singapore Bank for two accounts.[82]

Trust documentation

72 The various documents establishing and associated with the Trust and setting up the various accounts with the Bank and the Singapore Bank were drafted in Singapore and Geneva. They were sent to Ms Mihaesco to facilitate their execution by the plaintiff.

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79 Defence (Amendment No 4), para 7(3).

80 Defence (Amendment No 4), paras 28 and 31.

81 Defence (Amendment No 4), para 29.

82 Defence (Amendment No 4), para 32.

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73 On 9 December 2004, Mr Michael Low ("Mr Low"), Head of Trust Administration of the defendant, advised Mr Mark Jackman ("Mr Jackman"), the defendant's Managing Director, and others that it was intended to try and complete the trust documentation and have the account up and running by the close of December 2004. He also advised that he would send the Acceptance Documentation (see [76] below) "filled up with whatever details" that he could glean from the material with which he had been provided. Mr Low also advised Mr Jackman that he would go ahead with account opening in Singapore because the intention was to close down the Geneva accounts (which had been opened in the name of the Cyprus trusts and underlying companies) "once the Singapore solution is up and running, and thus transfer the full USD1.8b into the trust structure".[83]

74 On 10 December 2004, Mr Low forwarded the "first tranche of the trust documents" to Mr Stamm for "onward transmission to" the plaintiff. Mr Low advised that he had noticed that Mr Stamm had indicated that the plaintiff and Mr Malkin were to "act as authorised signatories of the companies" which he took "to mean that they are intended to be appointed as investment managers with limited powers of attorney". Mr Low advised that if this was so, Mr Stamm should have the plaintiff "also sign the attached form for appointment of investment manager" to be accompanied by the standard limited power of attorney ("LPOA") form.[84]

75 At this stage, the structure of the Trust was for the two companies, Meadowsweet and Soothsayer, to manage the Trust assets in Geneva and

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[83] Exhibit A, Volume 1, page 62.

[84] Exhibit A, Volume 1, page 65.

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Singapore respectively. Lynden was brought into the structure at a later time to hold the works of art collected by the plaintiff.

Acceptance Documentation – 28 February 2005

76 On 28 February 2005, the plaintiff signed a document in Geneva that was entitled "Credit Suisse Trust in Singapore. Acceptance Documentation, Trust/Company" ("the Acceptance Documentation").[85]

77 On the first page was a joint message from Mr Jackman and Mr Ethan Chue, the Assistant Vice-President of the defendant, in the following terms: [86]

> This document sets out the formalities that Credit Suisse Trust ("CST") in Singapore would like to observe when welcoming new clients to the organisation.
>
> It is essential that each page is initialled by the Proposer(s) as proof that the document has been read and understood in its entirety. Upon completion, this document, containing the original signatures, must be returned to CST in Singapore at the address below. Please note that a fax copy is not usually acceptable unless prior approval from CST has been obtained.
>
> In case you need any further assistance please contact CST in Singapore or your Relationship Manager at Credit Suisse, either of whom is ready to assist at any time.
>
> We thank you for the time and patience taken in completing this document.

78 The first section of the Acceptance Documentation, "Section A. Personal Information about the Proposer(s)" recorded the plaintiff as the "Proposer". It included a question: "In the normal course of events, is correspondence/open contact with the Proposer permitted?" to which the answer

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85 Exhibit A, Volume 1, p 97.

86 Exhibit A, Volume 1, p 98.

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"No" was typed.[87] In consequence of that answer, it was necessary to complete the "restricted contact details" of the person with whom the defendant could communicate, with the suggestion that it could be a "professional advisor of the Proposer(s)". Ms Mihaesco was identified as that person and details of her address and telephone numbers were recorded.[88]

79 A question as to whether copies of account advices, statements and general banking correspondence should also be retained at the "Credit Suisse branch in accordance with Credit Suisse regulations and remuneration" was answered "Yes" in handwriting. A question as to whether the defendant "could only accept advice/recommendations from the Proposer" was answered "Yes" in handwriting.[89]

80 In "Section B. Trust and Company Formation/Acceptance" the name of the Trust was recorded as "The Mandalay Trust" with the proper law of the Trust recorded as Singapore and the type of trust instrument as "CST Declaration of Trust". This section included an instruction that "Each page of the draft deed chosen by the Proposer(s) must be initialled by him/them and be included with this Acceptance Documentation". It also recorded that "CST will need to review the deed and take appropriate advice prior to accepting the Trust".[90]

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87 Exhibit A, Volume 1, p 102.

88 Exhibit A, Volume 1, p 102.

89 Exhibit A, Volume 1, p 102.

90 Exhibit A, Volume 1, p 103.

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81 The Acceptance Documentation recorded that Soothsayer would be a "direct subsidiary of the Trust". The objectives of the Trust/Company were recorded as "Inheritance Planning and Asset Holding".[91]

82 In the section entitled "Auditors and Accounts" it was recorded (with typed text) that "short form accounting" rather than "full detailed accounts" was preferred. It was noted that:[92]

> The short form accounting option is available for Trusts and Companies holding exclusively bankable assets with top graded banks. CST may exercise its discretion and adopt short form accounting where it considers this to be appropriate.

83 "Section C. Banking and Asset Details" included the following:[93]

> I/We reserve, as a condition of transferring assets to the Trust/Company which is to be/has been established, the right to choose (on a continuing basis)
>
> 1) the investment manager or advisor who shall be responsible for making decisions as to the assets of the Trust,
>
> and/or
>
> 2) the investment thereof.
>
> The account is to be maintained at the following bank:
>
> If more than one bank account is required, please photocopy this page and Section C1 which follows and complete accordingly.
>
> Name of bank — Credit Suisse Singapore
>
> 1 Raffles Link #05-02
>
> Singapore 039393
>
> …
>
> Preferred relationship

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91 Exhibit A, Volume 1, p 106.

92 Exhibit A, Volume 1, p 107.

93 Exhibit A, Volume 1, p 108.

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Manager at the above mentioned branch	Beat STAMM
Approximate amount and nature of bankable assets to be transferred to the Trust Fund/Company (please ensure currencies are clearly stated)	up to US$600mio.
From which bank(s) are the above assets to be transferred?	
Name of bank(s)	CS Geneva

84 In the section headed "Portfolio/Account Investment Manager", next to the heading "Family Name/Company Name", a handwritten entry recorded "Proposer - as per letter of appointment" with an initial and date which appears to be "3/3/05".

85 "Section D. Due Diligence" included a description of the "financial and business background, the overall net worth, and the social position of the Proposer(s)".[94] It recorded that the plaintiff had a PhD in Economic Science; was a Director of Impex Bank Moscow; had personal income of "USD 2m p.a from investments salary and bonus"; had an overall net worth of "USD 1.3bn bankable assets (+ real estate and business holdings)"; had no "significant association" with any "politically connected person over the last five years"; and had "sale of mining business and salary" as the source/origin of his assets, which had accumulated since 1992 when he "acquired his stake in the business now sold". The description of the assets and value to be transferred to the

[94] Exhibit A, Volume 1, pp 110–111.

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Trust/Company was "Bankable assets up to USD 600m". This section also included the following:[95]

> Envisaged level of bank account activity (please state expected size and frequency of payments in and payment out)
>
> Expecting low frequency of payments in and out.

86 The Acceptance Documentation was signed by the plaintiff in Geneva on 28 February 2005. The signature page contained a request that the defendant proceed with "the formation of the Trust/Company as appropriate"; a confirmation that the plaintiff was the beneficial owner of the assets to be transferred; and a confirmation that "the undertakings and comments given" in the Acceptance Documentation to the defendant "shall be irrevocable and remain valid" until the defendant "terminates its involvement with the Trust/Company".[96]

The Trust Deed – 7 March 2005

87 The declaration of trust establishing The Mandalay Trust was made by the defendant on 7 March 2005 ("the Trust Deed"). It was established under the proper law of Singapore which governed the operation of the Trust.[97] The "Initial Settled Property" of USD 100 was vested in the defendant as Trustee.[98] The "Trust Fund" was defined as: (i) the Initial Settled Property; (ii) all money, investments and property paid or transferred to and accepted by the Trustees as

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95 Exhibit A, Volume 1, p 111.

96 Exhibit A, Volume 1, p 112.

97 Exhibit A, Volume 1, p 120 (Clause 2).

98 Exhibit A, Volume 1, pp 119–120; 127 (Recital (f), Schedule 1).

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additions to the Trust Fund; and (iii) the investments and property from time to time representing such money, investments and additions or any part thereof.[99]

88 "Trustees" was defined to include the defendant and any other trustees for the time being.[100] The defendant stood possessed of the Trust Fund upon trust for the benefit of the plaintiffs and to accumulate the income of the Trust Fund and add accumulations to the capital of the Trust Fund for the beneficiaries.[101]

89 The defendant had wide discretionary powers including powers to appoint such new or other trust powers for the benefit of the plaintiffs. It also had wide discretionary powers to delegate to other persons any of its powers and discretions in this regard[102] which expressly survived any rule restricting the delegation of a power or discretion.[103]

90 The defendant had the power to exclude or add beneficiaries and to make payments for the benefit of minors.[104] It also had the power to vary by deed "all or any of the trust powers and provisions" of the Trust Deed so long as such variations benefited only the beneficiaries.[105]

91 Clause 10 provided as follows:[106]

> **GENERAL PROVISIONS RELATING TO THE EXERCISE OF POWERS**

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99 Exhibit A, Volume 1, p 120 (Clause 1(k)).

100 Exhibit A, Volume 1, p 120 (Clause 1(j)).

101 Exhibit A, Volume 1, p 121 (Clause 3).

102 Exhibit A, Volume 1, p 121 (Clause 4(a)).

103 Exhibit A, Volume 1, p 122 (Clause 5(a)).

104 Exhibit A, Volume 1, p 123 (Clauses 7–9).

105 Exhibit A, Volume 1, p 126 (Clause 19).

106 Exhibit A, Volume 1, p 124.

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> 10.(a) The Trustees shall exercise the powers and discretions vested in them as they shall think most expedient for the benefit of all or any of the persons actually or prospectively interested hereunder and may exercise (or refrain from exercising) any power or discretion for the benefit of any one or more of them without being obliged to consider the interest of the others or other.
>
> (b) Should any person when transferring assets to the Trust Fund impose any restrictions on the Trustees in relation to those assets with regard to (1) the choice of investment manager or investment advisor or (2) the investment thereof, the Trustee shall be bound thereby but the Trustee shall not in any circumstances be liable for any loss, damage, depreciation to those assets which may result from any action or inaction of the Trustees by virtue of the inability of the Trustees to have full control of the investment of those assets or by virtue of the Trustees following the advice of any such investment advisor and the Trustee shall be entitled to be reimbursed from the Trust Fund in respect of all claims, demands, liabilities, losses, costs, and expenses whatsoever in relation thereto.
>
> (c) Subject to the previous paragraphs every discretion vested in the Trustees shall be absolute and uncontrolled and every power vested in them shall be exercisable at their absolute and uncontrolled discretion and the Trustees shall have the same discretion in deciding whether or not to exercise any such power.

92 The defendant had power to give up, restrict or release any of the powers conferred on it by the Trust Deed so long as it did not conflict with the beneficial provisions of the Trust Deed.[107] It also had the power to appoint new and additional Trustees with provision made for a trustee's withdrawal.[108] The only other relevant express limitations on the defendant's exercise of its very broad powers was to prevent such exercise if it were to infringe the rule against perpetuities.[109]

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107 Exhibit A, Volume 1, p 124 (Clause 11).

108 Exhibit A, Volume 1, p 124–125 (Clause 14).

109 Exhibit A, Volume 1, pp 122 and 124 (Clauses 6 and 12).

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93 Clause 13 provided as follows:[110]

> **ADMINISTRATIVE POWERS**
>
> 13. The Trustees shall in addition and without prejudice to any powers which they have under the Proper Law have the powers and immunities set out in the Fourth Schedule hereto provided that such powers shall only be exercisable subject to any such restriction as is referred to in clause 10(b) hereof and that the trustee shall not exercise any of their powers so as to conflict with the beneficial provisions hereof.

94 Clause 16 provided as follows:[111]

> **EXEMPTION OF TRUSTEES FROM LIABILITY**
>
> 16. In the execution of the trusts and powers hereof no Trustee shall be liable for any loss to the Trust Fund arising in consequence of the failure depreciation or loss of any investment made in good faith or by reason of any act or omission made in good faith or of any other matter or thing except fraud or wilful misconduct or gross negligence on the part of the Trustee whom it is sought to make liable (or, in the case of a corporate trustee, any of its officers).

95 Clause 19 of the Trust Deed provided that the defendant or "Trustees" had "absolute and uncontrolled discretion" to vary all or any of the trust powers and provisions "if they considered the same to be in the interests of the beneficiaries or one or more of them". As the parties are at issue as to whether the Deed of Amendment and Restatement executed in July 2013 and referred to at [121] below is valid, it is convenient to extract the whole of the clause in relation to the defendant's power in this regard. It was in the following terms:[112]

> **POWER TO VARY**

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110 Exhibit A, Volume 1, p 124.

111 Exhibit A, Volume 1, p 125.

112 Exhibit A, Volume 1, p 126.

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> 19. The Trustees (being at least two in number or a trust company) shall in addition to all other powers conferred on them have power at any time or times during the Trust Period at their absolute and uncontrolled discretion by any deed revocable during the Trust Period or irrevocable if they consider the same to be in the interests of the Beneficiaries or one or more of them to vary all or any of the Trust powers and provisions herein declared or contained or to substitute therefor or to add thereto any other trusts, powers or provisions (including without prejudice to the generality of the foregoing any powers of appointment, maintenance or advancement and discretions, trusts or powers in relation to either or both capital and/or income and provisions as to investment or of any administrative nature) but so that no such trusts, powers and provisions shall be varied or substitute so as to confer any interest or benefit (whether vested, contingent or expectant or as the object of any power of appointment or discretionary trust or power or otherwise howsoever) on any person or persons except all or any one or more of the Beneficiaries, PROVIDED THAT the Trustees may at any time during the Trust Period by deed or deeds revocable during the Trust Period or irrevocable wholly or partially release or restrict any of the powers conferred on them by this clause.

96 The Fourth Schedule to the Trust Deed referred to as the "Administrative Powers" in Clause 13 of the Trust Deed included the following:[113]

> **GENERAL POWER**
>
> 1. Subject always to any restrictions expressly contained herein the Trustees shall in relation to the Trust Fund have all the same powers as a natural person acting as the beneficial owner of such property and such powers shall not be restricted by any principle of construction or rule or requirement of the Proper Law save to the extent that it is obligatory but shall operate according to the widest generality of which the foregoing words are capable notwithstanding that certain powers are hereinafter more particularly set forth.
>
> **POWERS OF INVESTMENT**

[113] Exhibit A, Volume 1, p 128.

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2.(a) The Trust Fund may be invested or laid out in the purchase of (or at interest upon the security of) such property whether involving liability or not and whether producing income or not or upon such personal credit with or without security as the Trustees shall in their absolute discretion think fit including the purchase erection and improvement of any property as a residence for any person and the purchase of chattels for the use of any person.

(b) The acquisition of any reversionary interest in property or any policy or securities or other investments (including bullion, works of art and jewellery) not producing income or in respect of which no dividend interest or rent is payable shall be deemed to be an authorised investment of the whole or any part of the Trust Fund.

(c) The acquisition of any limited interest in property or any annuity or policy or securities or other investments being of a wasting nature shall be deemed to be an authorised investment of the whole or any part of the Trust Fund,

(d) The Trustees shall have power to make any such investment as is mentioned in paragraphs (b) and (c) above notwithstanding that the making thereof may affect or alter inter se the interests of the persons respectively interested in the capital and income hereunder,

(e) The Trustees shall have power to apply any moneys forming part of the capital or income of the Trust Fund in the purchase or subscription of partly-paid shares and shall have power to pay up such shares at such times and in such manner as they shall in their absolute discretion determine.

(f) The Trustees shall be under no duty to diversify investments.

(g) The Trustees may invest the whole or any part of the capital or income of the Trust Fund in effecting purchasing or otherwise acquiring and paying premiums on any policy or policies of assurance upon the life or lives of any person or persons whether such policies be whole life or endowment or policies to cover death within any term (howsoever short) or policies restricted to death by accident and generally upon any terms and conditions as the Trustees shall think fit and the Trustees shall have all the powers of an absolute

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beneficial owner as respects any policy forming part of the Trust Fund including the power to exercise any option afforded by such policy or to sell or realise any such policy or to convert the same into a fully paid up policy or into any other form of assurance.

(h) The Trustees shall have power to leave any property subject to any of the trusts hereof in its original state or in the state of investment in which it may be from time to time.

(i) Without prejudice to the generality of paragraph (i) above the Trustees are expressly authorised to accept, acquire or retain indefinitely any property contributed or introduced by or acquired from any settlor of the Trust Fund or any part thereof or from any member of the immediate family of any such settlor notwithstanding that such property represents the whole or a substantial part of the Trust Fund.

(j) In the exercise of the powers herein contained the Trustees shall not be under any duty to see that the value of the Trust Fund or any part or parts thereof is preserved or enhanced in any way nor shall they be liable for any failure in that respect whatsoever.

POWER TO FORM COMPANIES

3. The Trustees shall have power at any time to form a company or companies in any jurisdiction and may at their discretion transfer to that company or those companies all or any part of the capital or income of the trust Fund whether by way of subscription, loan (at or free of interest and whether secured or unsecured) or otherwise and the costs and expenses of forming such a company shall be a charge on the Trust Fund.

TRUSTEES NOT BOUND TO INTERFERE IN BUSINESS OF COMPANY IN WHICH TRUST INTERESTED

4. The Trustees shall not be under any duty nor shall they be bound to interfere in the business of any company in which they (as trustees hereof) are interested and in particular: -

(a) The Trustees shall not be under any duty to exercise any control the Trustees may have over or to interfere in or become involved in the administration management or conduct of the business or affairs of any such company although the trustees (as trustees hereof) holds the whole or a majority of the shares carrying the

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control of the company and without prejudice to the generality of the foregoing the Trustees shall not be under any duty to exercise any voting powers or rights of representation or intervention conferred on the Trustees by any of the shares in respect of such company.

(b) The Trustees shall leave the administration management and conduct of the business and affairs of such company to the directors officers and other persons authorised to take part in the administration management or conduct thereof and the Trustees shall not be under any duty to supervise such directors officers or other persons so long as the Trustees do not have actual knowledge of any dishonesty relating to such business and affairs on the part of any of them.

(c) The Trustees shall assume at all times that the administration management and conduct of the business and affairs of such company are being carried on competently honestly diligently and in the best interests of the Trustees in their capacity as shareholders or howsoever they are interested therein and the Trustees shall assume until such time as they have actual knowledge to the contrary that persons appearing to be or who ad as the directors officers and other persons authorised to take part in the aforesaid administration management and conduct are duly appointed and authorised and so that the Trustees shall not be under any duty at any time to take any steps at all to ascertain whether or not the assumptions contained in this paragraph are correct.

(d) Without prejudice to the generality of the foregoing, the Trustees shall not be under any duty: -

(i) to exercise any rights or powers (whether available to them as shareholders debenture holders or otherwise) enabling them -to appoint or elect or to remove a director officer or other person authorised to take part in the administration management or conduct of the business or affairs of such company and in particular shall not be under any duty to take any steps to see

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that any trustee or any officer or nominee of the Trustees becomes a director or other officer of such company;

(ii) to exercise any power to require the payment of a dividend or other distribution of profit and whether of an income or capital nature.

(e) No Beneficiary shall be entitled in any way whatsoever to compel control or forbid the exercise in any particular manner of any powers discretions or privileges (including any voting rights) conferred on the Trustees by reason of any shares or other rights of whatsoever nature in or over such company.

(f) The Trustees shall not be liable in any way whatsoever for any loss to such company or the Trust Fund or the income thereof arising from any act or omission of the directors officers or other persons taking part (whether or not authorised) in the administration management and conduct of the business or affairs of such company (whether or not any such act or omission by any such foregoing persons shall be dishonest fraudulent negligent or otherwise),

(g) Without prejudice to the generality of the foregoing the Trustees shall not be rendered responsible in any way whatsoever for any default or other act or omission by the directors officers or other persons referred to in paragraph (f) above or by any express notice or intimation of such default or other act or omission and the Trustees shall not be obliged or required to make and enforce any claim in respect of such a default or other act or omission and no person who is or may become entitled hereunder shall be entitled to compel the making of such a claim but the Trustees may be required to lend their names for the purpose of proceedings brought by a Beneficiary in respect of any such default act or omission upon being given a full and sufficient indemnity against all costs and expenses of such proceedings.

TRUSTEES NOT BOUND TO OBTAIN INFORMATION REGARDING COMPANY IN WHICH TRUST IS INTERESTED

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5.(a) The Trustees shall not be under any duty to obtain or to seek to obtain in any way whatsoever any information regarding the administration management or conduct of the business or affairs of any company in which they (as trustees hereof) are or may be interested (although they hold (as trustees hereof) the whole or a majority of the shares carrying the control of the company) from the persons involved in the administration management or conduct or from the shareholders or other persons interested therein or any other matter relating to such company.

(b) The Trustees shall assume that such information as is supplied to them by any persons relating to such company is accurate and truthful unless the Trustees have actual knowledge to the contrary and the Trustees shall not be under any duty at any time to take any steps at all to ascertain whether or not the information is accurate and truthful.

(c) Without prejudice to the generality of the foregoing, the Trustees shall not be under any duty to request from any person any information referred to in paragraph (a) above other than:

(i) copies of any statements and directors' reports supplied under the constitution of the company or any other company or the general law applicable thereto;

(ii) copies of any annual returns made to the registry, if any, at which the company or any other company is registered; and

(iii) copies of any accounts filed at such registry.

(d) The Trustees shall not be liable in any way whatsoever for any loss sustained by the Trust Fund or the income thereof arising from the Trustees not taking all or any possible steps to obtain any information referred to in paragraph (a) above or to verify the accuracy and truthfulness of such information as is supplied to the Trustees.

(e) No Beneficiary shall be entitled to compel the Trustees to take any steps to obtain any information referred to in paragraph (a) above or to verify the accuracy and

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> truthfulness of such information as is supplied to the Trustees.
>
> (f) To the extent that the Trustees shall involve themselves in the administration, management conduct of the business or affairs of any company all or any of the shares in which form all or part of the Trust Fund they shall not be deemed by any rule of the Proper Law to possess any expertise in relation to the business or affairs of such company which they do not possess in fact.
>
> (g) For the purposes of this Clause and the preceding Clause a "company" shall include a partnership business or other entity (incorporated or unincorporated) wherever the same is resident or incorporated and shall include any subsidiary or affiliate of any such company and any successor company of any such company.

97 The Fourth Schedule also provided the power for the trustees to employ agents and to delegate "by deed" the execution or exercise of all or any trust powers and discretions. The power to employ agents included the power to appoint "banks trust companies or any other agent whatsoever whether associated or connected in any way with the Trustees or not". In circumstances where the defendant appointed an agent "associated or connected with" it, the Fourth Schedule provided that the defendant would not be responsible to account for any default of the agent if employed in good faith to transact any business or to do any act required to be done in the execution of the trusts.[114]

98 The Fourth Schedule also included the following:[115]

> **POWER TO DELEGATE**
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> 7. The Trustees shall have power (notwithstanding any rule of law to the contrary) by deed revocable during the Trust period or irrevocable to delegate to any person the

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114 Exhibit A, Volume 1, p 131 (Clause 6).

115 Exhibit A, Volume 1, p 131.

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> execution or exercise of all or any trust powers and discretions hereby or by law conferred on the Trustees.
>
> **POWER TO EMPLOY INVESTMENT ADVISOR OR MANAGER**
>
> 8.(a) The Trustee shall have power to engage the services of such investment advisor or advisors (whether associated or connected in any way with the Trustees or not) as the Trustees may from time to time think fit to advise the Trustees in respect of the investment and re-investment of the Trust Fund with power for the Trustees without being liable for any consequent loss to delegate to the investment advisor discretion to manage all or any part of the Trust Fund within the limits and for the period stipulated by the Trustees and the Trustees shall settle the terms and conditions for the remuneration of the investment advisor and the reimbursement of the investment advisor's expenses as the Trustees shall in their absolute discretion think fit and such remuneration and expenses shall be paid by the Trustees from the Trust Fund.
>
> (b) The Trustee shall not be bound to enquire into nor be in any manner responsible for any changes in the legal status of the investment advisor.
>
> (c) The Trustees shall incur no liability for any action taken pursuant to or for otherwise following the advice of the investment advisor however communicated.
>
> (d) The Trustees shall not be liable to account for any resultant profit if the investment advisor shall be associated or connected in any way with the Trustees.

99 Although the heading to this clause refers to "investment advisor or manager" the only expression used in the body of the clause is "investment advisor". The expression "investment manager or investment advisor" is used in the body of Clause 10(b) (see [91] above). The Trust Deed does not define "investment manager" nor "investment advisor".

Memorandum of Wishes – 7 March 2005

100 The defendant signed a document entitled "Memorandum of Wishes Concerning The Mandalay Trust" declared on 7 March 2005 (the

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"Memorandum of Wishes").[116] The Memorandum of Wishes recorded that its "purpose" was to "record information to assist in the administration of the trust and the exercise of any discretion and powers pursuant to the trust deed". It identified the plaintiff as "the principal beneficiary" and recorded that:

> During his lifetime, the Trustee may have regard to his recommendations in respect of the investment of the Trust Fund, the beneficiaries of the Trust and any distributions to the beneficiaries.

101 The plaintiff's signature appears above a line which records "Copy received by the principal beneficiary".[117]

The "Letter of Appointment" – 7 March 2005

102 A letter bearing the handwritten date 7 March 2005 addressed to the defendant and signed by the plaintiff (the "2005 Letter of Appointment") was in the following terms:[118]

> The Mandalay Trust
>
> I reserve, as a condition of transferring assets to the trust which is to be/has been, established, the right to choose (on a continuing basis) (1) the investment manager or advisor who shall be responsible for making decisions as to the assets of the trust, and/or (2) the investment thereof.
>
> I wish the trustees to appoint myself, Bidzina Ivanishvili, as the initial investment manager to the trust.

103 This letter appears to be what Mr Low described as the "form for appointment of investment manager" which he had asked Mr Stamm to have the plaintiff sign if he intended that the plaintiff was to act as an authorised

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116 Exhibit A, Volume 1, p 138.

117 Exhibit A, Volume 1, p 138.

118 Exhibit A, Volume 1, p 147.

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signatory of the companies (see [74] above). Notwithstanding Mr Low's anticipation of Mr Stamm's intention, the plaintiff was not an authorised signatory of the respective trust companies.

104 This is the letter, together with letters in later years, on which the defendant relies to contend that the nature of the Trust is a "reserved powers trust" of which the plaintiff was the "investment manager" and that its liability is limited by anti-*Bartlett* clauses (so named after the decision in *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515) in the Trust Deed.[119]

Limited power of attorney for asset manager – 7 March 2005

105 The plaintiff also signed a document entitled "Limited power of attorney for asset manager" ("the 2005 LPOA") addressed to the Singapore Bank. Soothsayer, as principal and holder of accounts with the Singapore Bank, appointed the plaintiff with effect from 7 March 2005 as its agent "to do and perform any transaction(s) relating to the management of the assets" in the accounts.[120]

106 The 2005 LPOA recorded that the plaintiff, as attorney, was the "asset manager" and "investment advisor" of Soothsayer and that Soothsayer acknowledged that the plaintiff had no authority to bind the Singapore Bank in any transaction, give any advice or recommendation, or make any representation on behalf of the Singapore Bank, or receive any payment or collect assets on the Singapore Bank's behalf. It was also acknowledged that the Singapore Bank would rely on the continuous validity, capacity and authority

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119 DCS, para 15.

120 Exhibit 1, Volume 1, pp 51–54.

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of the plaintiff to manage the assets until receipt of notice of revocation of the 2005 LPOA.

107 The 2005 LPOA also provided that the plaintiff was "not empowered to withdraw, either in whole or in part, securities or other assets" in the accounts with the Singapore Bank. It also expressly provided that the Singapore Bank "may (but shall not be required to) act on instructions signed purportedly by [the plaintiff]".[121]

Trust Committee Minute – 7 March 2005

108 A minute of the defendant's Trust Committee chaired by Mr Jackman and dated 7 March 2005 recorded resolutions which included: (a) a resolution accepting the trusteeship of The Mandalay Trust; and (b) a resolution that the plaintiff "be appointed as Investment Manager to The Mandalay Trust pursuant to the terms of the said trust".[122]

Other letters – 7 March 2005

109 In addition to the 2005 Letter of Appointment referred to above, the plaintiff signed other letters addressed to the defendant which bear the handwritten date 7 March 2005. These included: a letter requesting the defendant to open an account for "the Mandalay Trust/Soothsayer Limited"[123]; and a letter advising the defendant that the plaintiff understood that it was the defendant's usual practice to obtain confirmation that a proposed client had taken legal advice on "legal and tax matters in connection with the declaration"

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121 Exhibit 1, Volume 1, p 52.

122 Exhibit A, Volume 1, p 139.

123 Exhibit A, Volume 1, p 145.

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of trust and that he "had not found it necessary" to do so.[124] The latter letter recorded that the plaintiff did not "regard the defendant or its affiliates as responsible for any adverse legal or tax consequences which might arise or affect" the plaintiff or his family "as a consequence of having proposed/settled [the Trust]".

110 Although the letters referred to above bear the handwritten date 7 March 2005, it is apparent from communications between Mr Low and Ms Mihaesco that they were not signed by the plaintiff on the dates they bear.

111 On 3 March 2005 Mr Low wrote by e-mail to Ms Mihaesco advising that he had received the documents for the Mandalay Trust accounts and asking her to confirm "the date and place of signing" by the plaintiff. Mr Low advised that "other than that" he believed the documents were "in order" and he was processing them "for formal acceptance".[125]

112 Ms Mihaesco responded on 8 March 2005 advising that the documents for the plaintiff "have to be filled" and that they were signed in Geneva on 28 February, "as it is the day when we received them in Geneva and that he did not fill in anything".[126]

Soothsayer acquired – 7 March 2005

113 On 7 March 2005 the defendant's Trust Committee resolved that "The Mandalay Trust acquires Soothsayer Limited, as an underlying company

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124 Exhibit A, Volume 1, p 146.

125 Exhibit A, Volume 1, p 149.

126 Exhibit A, Volume 1, p 149.

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registered in the Bahamas by subscribing for 2 ordinary shares of USD1.00 each".

114 It was also resolved that "all assets that will be received in the account of Soothsayer Limited be accepted as additional settled assets of the Mandalay Trust". It was also resolved that the defendant "acting as Trustee of the Mandalay Trust" granted "unsecured, interest-free loans" to Soothsayer "based on the value of the additional settled assets that will be received" in Soothsayer's account, such loans to be repayable "on demand".[127]

Meadowsweet acquired – 10 March 2005

115 On 10 March 2005 the defendant's Trust Committee resolved that "The Mandalay Trust acquires Meadowsweet Assets Limited, as an underlying company registered in the British Virgin Islands by subscribing for 2 ordinary shares of USD1.00 each".

116 It was also resolved that "all assets that will be received in the account of Meadowsweet Assets Limited be accepted as additional settled assets of the Mandalay Trust". It was also resolved that the defendant "acting as Trustee of the Mandalay Trust" granted "unsecured, interest-free loans" to Meadowsweet "based on the value of the additional settled assets that will be received" in Meadowsweet's account, such loans to be repayable "on demand".[128]

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127 Exhibit A, Volume 1, p 139.

128 Exhibit A, Volume 1, p 154.

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Limited Power of Attorney – Pierre Grotz 12 April 2005

117 In a LPOA dated 12 April 2005 ("the Grotz LPOA"), a Mr Pierre Grotz ("Mr Grotz") is named as "Attorney" to Meadowsweet as principal in respect of account number 75-5 with the Bank ("account 75-5"). Mr Malkin introduced Mr Grotz to the plaintiff, the Bank and the defendant. Mr Grotz' relationship with Meadowsweet was described in the Grotz LPOA as "Advisor".[129]

118 The Grotz LPOA appears to have remained in place until 24 April 2007 when a discretionary portfolio management agreement was put in place in respect of account 75-5. Under this agreement, Meadowsweet appointed the Bank to "manage" the securities in account 75-5 based on the Bank's "investment policy and in compliance with the investment profile" chosen by Meadowsweet and any investment instructions Meadowsweet may give.[130] This agreement probably would have superseded the Grotz LPOA but there was no formal revocation on or around April 2007. On 31 March 2011, a letter was sent to the defendant, bearing the plaintiff's signature, requesting the removal of Mr Grotz as attorney and the appointment of the plaintiff as attorney instead.[131]

Limited Power of Attorney – 8 April 2011

119 Meadowsweet granted an LPOA to the plaintiff on 8 April 2013 in respect of a life policy that was taken out in 2011 (see [328]–[333] below) ("the CS Life LPOA").[132] The grant was in general terms with restrictions similar to those in the Meadowsweet LPOA referred to below.

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129 Exhibit A, Volume 1, p 231.

130 Exhibit A, Volume 1, p 353.

131 Exhibit 1, Volume 1, p 447.

132 Exhibit 2, pp 798–800.

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Limited Power of Attorney – 27 May 2013

120 Meadowsweet granted a LPOA to the plaintiff generally relating to "safekeeping account(s) and assets in accounts", and without limitation to any specified accounts ("the Meadowsweet LPOA"). The plaintiff was precluded from withdrawing, pledging or transferring all or part of the assets held in the Bank's accounts, or securities or valuables deposited with the Bank. He was also precluded from contracting loans or signing the acknowledgement of any balance form.[133]

Deed of Amendment and Restatement – 5 July 2013

121 A Deed of Amendment and Restatement for the Trust Deed ("the Deed of Amendment and Restatement") was executed 5 July 2013. Its genesis as discussed later (see [399]–[414] below) was in the defendant's desire to limit its liability in respect of the artworks collected by the plaintiff and over which the defendant was concerned it did not have custody or control.

122 The recitals to the Deed of Amendment and Restatement recorded that it was "supplemental to" the Trust Deed and that the defendant proposed to exercise its powers to vary the Trust Deed pursuant to Clause 19 of the Trust Deed (see [95] above). The recitals also recorded that the defendant was satisfied that the conditions in Clause 19 had been satisfied. The "Appointer" was defined as the plaintiff, or such person named by him. The other amendments to the Trust Deed were the inclusion of clauses 9 "Investment Manager" and 9A "Special Investment Manager".

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133 Exhibit A, Volume 3, pp 380–382.

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123 Clause 9 "Investment Manager" included the following:[134]

> The Trustee shall not have any investment or asset management functions, responsibilities, powers or duties in relation to this Amended and Restated Declaration, all of which shall be exercised exclusively by the Appointor or such person as the Appointor may from time to time appoint by deed delivered to the Trustees. In addition to the Investment Manager, the Appointor may from time to time appoint (by deed delivered to the Trustees) any person to be responsible for the investment or asset management functions, responsibilities, powers or duties relating to the assets held by a Special Nominated Company (such appointed person hereinafter referred to as the "Special Investment Manager"). For the avoidance of doubt, if there is no Special Investment Manager acting, the Investment Manager shall be responsible for the investment or asset management functions, responsibilities, powers or duties relating to the assets held by the Special Nominated Company until such time as a new Special Investment Manager is appointed in accordance with this clause 9. The Trustees shall not be responsible for any actions, omissions, defaults or negligence on the part of the Investment Manager (or the Special Investment Manager as the case may be) or for any loss or loss of profit to the Trust Fund. Any appointment of Investment Manager or Special Investment Manager by the Appointor may be revoked by the Appointor at any time by notice in writing delivered to the Trustees.

124 Clause 9A "Special Investment Manager" provided for the Appointor to declare any company in which the trustees held any interest to be a Special Nominated Company. The company that was nominated was Lynden.[135]

125 Clause 9A also provided that the Special Investment Manager would be "responsible for all investment and asset management functions relating to the works of art and the other assets held by the Special Nominated Company".[136] This included responsibility for the "management, maintenance and safe

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134 Exhibit A, Volume 3, p 397 (clause 9(a)).

135 Exhibit A, Volume 3, pp 399 and 418.

136 Exhibit A, Volume 3, p 399.

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custody of the works of art", and for "maximising returns whether by auction or private sale" when purchasing or selling works of art.

126 The defendant's powers set out in the Fourth Schedule of the Trust Deed were only exercisable in respect of assets held by a Special Nominated Company if there was no Special Investment Manager and no Investment Manager "acting". If there was a Special Investment Manager or Investment Manager, those powers and discretions were exercisable in respect of a Special Nominated Company's assets only with the written consent of the Special Investment Manager or Investment Manager. The clause also provided that the defendant, the Special Nominated Company, and its officers: did not have any "responsibility, duty or liability in relation to the works of art"; "shall not be liable in any manner for the failure of the Special Investment Manager (or the Investment Manager as the case may be) to fulfil his obligations or in implementing any direction of the Special Investment Manager (or the Investment Manager as the case may be)"; shall not have any duty to "monitor the actions of the Special Investment Manager"; and shall not have any duty to "consider whether any direction given to the [defendant] is appropriate". The defendant and Special Nominated Company were obliged to "follow any and all Investment Directions and other directions as set out in this clause" other than in exceptional circumstances, such as where it would be contrary to regulations to do so.

Deed of Appointment – 19 December 2013

127 On 19 December 2013 the plaintiff signed a deed as "Appointer", witnessed by Mr Bachiashvili, described as supplemental to the "Settlement" ("the Deed of Appointment"). The "Settlement" was defined as the Trust Deed and the Deed of Amendment and Restatement. The Deed of Appointment

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recited that the plaintiff had the power "pursuant to clause 9(a) of the Settlement" to "appoint an additional Investment Manager".

128 The Deed of Appointment recorded that in exercising the power conferred under Clause 9(a) the plaintiff declared Mr Bachiashvili "to be Investment Manager (acting singly)" with effect from 19 December 2013.[137]

Limited Powers of Attorney – 27 February 2014

129 Meadowsweet granted two LPOAs to Mr Bachiashvili, one in respect of its accounts with the Bank and one in respect of its accounts with CS Life. The LPOAs were generally in the same terms as those LPOAs that were granted to the plaintiff (see [120] above).[138]

The parties at issue in respect of trust

130 The parties are at issue in respect of the nature of the Trust, the plaintiff's status in respect of the operation of the Trust and the defendant's obligations and liabilities under the Trust Deed. There is also a challenge to the validity of the Deed of Amendment and Restatement.

131 The defendant claims that the Trust is a reserved powers trust, the provisions of which exclude it from liability to the plaintiffs for any of the losses that the Trust may have suffered other than those losses that are the subject of the Settlement with the Bank and for which the defendant claims the plaintiffs have been fully compensated.[139]

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137 Exhibit A, Volume 3, page 477.

138 Exhibit A, Volume 3, p 532 and 535; LCL, para 24.

139 Transcript, 16 February 2023, p 23.

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132 The plaintiffs claim that the defendant has misunderstood the effect of the provisions of the Trust Deed and surrounding relevant documents and submitted that the defendant is liable for the losses suffered by the Trust that exceed the scope of the Settlement.

133 It will be necessary to consider the provisions of the Trust Deed and other documentation and the parties claims in detail later in this judgment.

The Trust bank accounts and portfolios

Bank Account signatories – 10 March 2005

134 On 10 March 2005, the board of Meadowsweet appointed Clementi as the sole authorised signatory of the Meadowsweet accounts with the Bank, with capacity to use an Authorised Signatories List for the account in the future. Such List included Bukit Merah Limited and Tanah Merah Limited.[140] The plaintiff was not an authorised signatory nor was he on the Authorised Signatories List.

Meadowsweet account and mailing instruction to the Bank – 10 March 2005

135 On 10 March 2005, Bukit Merah Limited entered into a contract for the opening of an account and/or safekeeping account between Meadowsweet "as depositor" and the Bank. That contract included provisions in respect of correspondence which were cross-referenced to a letter of 10 March 2005 from Meadowsweet to the Bank. Meadowsweet's address was recorded as "Nerine Chamber" with a PO Box in Tortola in the BVI. That letter required the Bank to send the "Original transaction, advices, month-end investment portfolio statements, current account statements and bank correspondences" by mail to

140 Exhibit A, Volume 1, p 163.

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"c/o" of the defendant's address in Singapore. It also requested duplicate copies of these same documents to be "retained and released, only upon request".[141]

136 On 10 March 2005, Bukit Merah Limited also signed an "Order regarding the retaining of correspondence" on Meadowsweet's behalf instructing the Bank to retain "all the correspondence and documents pertaining to the account and safekeeping account". Meadowsweet had the authority to collect the correspondence and documents, however the order directed the Bank that if they were not collected or forwarded on the instructions to Meadowsweet, they were to be sent to the defendant at its Singapore address "REGULARLY" and the Bank was to "retain one duplicate copy".[142]

Meadowsweet discretionary portfolio management agreements with the Bank – 5 April 2005

137 On 23 March 2005 Ms Mihaesco forwarded two discretionary portfolio management agreements ("the Meadowsweet Discretionary Agreements") together with two Investment Profiles ("the Meadowsweet Profiles") to Mr Low. The Meadowsweet Discretionary Agreements were for two safekeeping accounts referred to for convenience as account 75-1 and account 75-4 with the Bank. In her covering e-mail, Ms Mihaesco advised that the term "plus" meant "opportunistic (return oriented)", and the term "core" referred to a "conventional mixed portfolio".[143]

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141 Exhibit A, Volume 1, p 157.

142 Exhibit A, Volume 1, p 158.

143 Exhibit 1, Volume 1, p 56.

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138 Clementi, for Meadowsweet, as "Client", signed the two Meadowsweet Discretionary Agreements with the Bank on 29 March 2005.[144] The Bank signed the Agreements on 5 April 2005.[145]

139 Each Meadowsweet Discretionary Agreement defined the "Portfolio" as the "safekeeping account and transaction accounts". Meadowsweet mandated and authorised the Bank to manage the Portfolio "independently and without special instructions, except the standing special instructions agreed upon, on a fully discretionary basis in accordance with the agreed investment profile".

140 Each Meadowsweet Discretionary Agreement provided that Meadowsweet was not to give any instructions to the Bank for the purchase, holding or sale of investments in respect of the Portfolio. However, it also provided that if Meadowsweet did give such instructions, the Bank was "neither obliged to monitor and assess as to whether the resulting composition of the portfolio after execution of such special instruction is still in accordance with the agreed investment profile or to effect transactions for adjustment purposes". Each Meadowsweet Discretionary Agreement recorded that Meadowsweet especially understood and agreed that "special instructions might not be carried out if the portfolio is invested in direct investment (e.g. investment funds, instruments of collective investments)".[146]

141 Each of the Meadowsweet Profiles was for a "Mixed Portfolio" defined to have "an average risk exposure through the acceptance of the fluctuation of

144 Exhibit 1, Volume 1, p 57–70.

145 Exhibit A, Volume 1, p 190.

146 Exhibit 1, Volume 1, pp 58 and 65.

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assets and value; long-term capital growth aimed at through steady income, capital and currency gain".[147]

142 They each recorded that when "managing the portfolio" the Bank would invest the assets in accordance with the "Asset allocation" in minimum, maximum and neutral percentages in four categories: (i) Liquidity; (ii) Bonds; (iii) Equities; and (iv) Alternative Investments. The allocation in respect of Liquidity and Bonds was identical in each Meadowsweet Profile but differed in relation to Equities and Alternative Investments. For account 75-1 the maximum allocation for Equities was 25% with the minimum and neutral allocations at 0%; and for account 75-4 the maximum allocation for Equities was 50%, with minimum at 10% and neutral 30%. The maximum allocation for Alternative Investments for account 75-1 was 50%, with minimum at 10% and neutral at 30%; and for account 75-4 the maximum was 25%, with minimum 0% and neutral 0%.[148]

143 The Meadowsweet Profile for account 75-1 recorded the Bank's disclosure that when it was "managing the portfolio" it would take the investment portfolio chosen by Meadowsweet into account "and the respective risk tolerance" and "decide on the allocation of the assets and the single investments to be made in order to reach and comply with the investment goals" of Meadowsweet "on an overall basis".[149] It also included the following:[150]

> Remarks:
>
> Non-investment grade debt can be included; at purchase the minimal Moody's rating is B3 (or equivalent rating e.g Standard

147 Exhibit 1, Volume 1, pp 62 and 69.

148 Exhibit 1, Volume 1, pp 60 and 67.

149 Exhibit 1, Volume 1, p 62.

150 Exhibit 1, Volume 1, p 61.

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> & Poor's). Maximum weight of a single investment position (e.g. bonds, equities) is 5%; tolerance limit is 1%. The total of convertible, High Yield, Emerging Markets, Structured Products, Commodities and Real Estate will not exceed 50% of total assets including: assets of this deposit & deposit …

Meadowsweet discretionary portfolio management agreement – 23 April 2007

144 As mentioned above at [117], the Grotz LPOA covered account 75-5 and no discretionary portfolio management agreement was entered in respect of this account until one was put in place on 23 April 2007. The terms of this agreement were similar to the other Meadowsweet Discretionary Agreements. The accompanying profile was also described as "Mixed Portfolio", with an investment objective of "real-term capital preservation and long-term capital growth" and a risk assessment of "asset fluctuation and average level of risk". The investment parameters of the profile were: liquidity of 0% to 45% with neutral of 0%; bonds of 40% to 90% with neutral of 70%; and equities of 15% to 40% with neutral of 30%.[151]

Soothsayer discretionary portfolio management agreements – 1 April 2005

145 On 1 April 2005 a meeting of directors of Soothsayer resolved that the company would establish two discretionary portfolio accounts with the Singapore Bank, referred to for convenience as account 80 and account 81, in US dollars in accordance with a relevant investment portfolio. They authorised Clementi to sign and accept the Singapore Bank's discretionary portfolio management agreements and investment profiles on Soothsayer's behalf. [152] On 1 April 2005, Clementi signed a discretionary portfolio management agreement (the "Soothsayer Discretionary Agreements") and a "Portfolio Mandate" ("the

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151 Exhibit A, Volume 1, pp 365–366.

152 Exhibit A, Volume 1, p 195.

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Soothsayer Portfolio Mandates") for each Soothsayer account with the Singapore Bank.

146 The Soothsayer Discretionary Agreements authorised the Singapore Bank to "manage" Soothsayer's accounts "from time to time" as agreed between Soothsayer and the Singapore Bank, subject to discretionary management by the Singapore Bank. They provided that the Singapore Bank would manage the accounts "in accordance with investment guidelines stipulated by" Soothsayer. Soothsayer was authorised to make additions to or withdrawals from the accounts "upon request" to the Singapore Bank provided it gave the Singapore Bank timely notice. Subject to those guidelines, the Singapore Bank had "complete discretion with regard to the management of the Discretionary Account". It was agreed that the Singapore Bank's "sole responsibility" in relation to the accounts was to "perform its duties and to make investment decisions in good faith".[153]

147 Each of the Soothsayer Discretionary Agreements included the following:

> **Custody**
>
> The Bank will act as custodian for the cash and assets in the Discretionary Account, the Bank will do so on its prevailing terms and conditions. If not already done, the client shall sign any documents and do all further acts and things as may be required in order to establish with the Bank a custodian account.

148 Each Soothsayer Portfolio Mandate recorded that the account would be held with the Singapore Bank "with management advice from Credit Suisse,

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153 Exhibit A, Volume 1, p 203.

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Singapore, Portfolio Management Asia-Pacific (the "Portfolio Managers")". The objectives were described as follows:[154]

> To achieve real-term capital preservation with earnings primarily through steady income from traditional fixed income products. Medium-term capital appreciation can be generated through holdings in these fixed income and similar products, equities and equity-related instruments, alternative investments and through gains from currencies. Performance enhancement will be achieved by investing in Asian equities and fixed-income securities traded on security exchanges or over-the-counter (OTC) markets. Risk tolerance will be slightly below average with low fluctuation of asset value accepted.

149 The Soothsayer Portfolio Mandate for account 80 was entitled "Global Income-Oriented Asian Core Portfolio" in US dollars. As referred to at [137] earlier, Ms Mihaesco had advised in her covering e-mail in relation to the Meadowsweet accounts that "Core" meant a "conventional mixed portfolio".[155] The "Benchmark Composite" for account 80 was: 15% FTSE World Index; 15% MSCI Far East Ex-Japan Index; and 70% Citigroup Eurodollar Bond AA- or Better 3-5 year Index.[156]

150 The investment parameters or "bandwidth" for account 80 were mandated as Equities 10% to 50% with a neutral of 30%; Fixed income securities 34% to 90% with a neutral of 70%; and Alternative Investments and cash at 0% to 25% with a neutral at 0%. The maximum exposure to Asian Fixed Income and Equities was limited to 50% of the respective portfolio allocation for each asset class. Asian Equities were listed as neutral at 15% and Asian Fixed Income Securities were listed as neutral at 35%.

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154 Exhibit A, Volume 1, pp 196 and 200.

155 Exhibit 1, Volume 1, p 56.

156 Exhibit A, Volume 1, p 196.

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151 Soothsayer directed the Singapore Bank to send it "monthly portfolio statements with performance" to its stated mailing address and that the "relationship manager and/or the "portfolio managers" would arrange and conduct periodic meetings with Soothsayer to review past performance as well as to present future investment strategies.[157]

152 The Soothsayer Portfolio Mandate for account 81 identified the portfolio as "Global Income-Oriented Asian Opportunity/Plus Portfolio" in US dollars. As mentioned at [137] earlier, Ms Mihaesco had advised that "Plus" meant an "opportunistic (return-oriented) portfolio".[158]

153 The "Benchmark Composite" for this mandate was: 70% Citigroup Eurodollar Bond AA- or Better 1-3 year Index; and 30% HFR Global Hedge Fund Index.[159]

154 The investment parameters for the account 81 mandate were: Equities between 0% and 25% with 0% neutral; Fixed Income Securities 35% to 90% with neutral at 70%; Alternative Investments 10% to 50% with neutral at 30%; and cash at 0% to 55% with neutral at 0%. Once again, Soothsayer directed the Singapore Bank to provide it with relevant information in the portfolio via fax, post or e-mail and to send it monthly portfolio statements with performance of the portfolio.[160]

Soothsayer discretionary portfolio mandates – 25 February 2009

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157 Exhibit A, Volume 1, p 197.

158 Exhibit 1, Volume 1, p 56.

159 Exhibit A, Volume 1, p 200.

160 Exhibit A, Volume 1, p 201.

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155 On 25 February 2009, two new portfolio mandates ("the New Soothsayer Portfolio Mandates") were put in place for the Soothsayer accounts pursuant to the Soothsayer Discretionary Agreements. For account 80, the New Soothsayer Portfolio Mandate was described as "Core Asian". Its investment objective was "long-term capital growth" and its risk assessment was "increased value fluctuation, above average level of risk".[161] It provided the following framework of asset allocation: liquidity between 0% and 50% with a neutral of 5%; bonds between 0% and 50% with a neutral of 15%; equities between 20% and 80% with a neutral of 50%; and alternative investments between 5% and 50% with a neutral of 30%. It was recorded that:

> Performance enhancement will be achieved by investing in Asian equities and fixed income securities traded on exchanges or over-the-counter markets. Maximum exposure to Asian fixed income and equities will be limited to 50% of the portfolio allocation for each asset class.

156 The second New Soothsayer Portfolio Mandate covered account 82, for which there was no prior discretionary mandate. This portfolio mandate was described as "Plus Global". Its investment objective was "capital preservation and long-term capital growth" with "moderate value fluctuation, average level of risk". Its asset allocation framework was: liquidity between 0% and 50% with neutral of 5%; bonds between 0% and 50% with neutral of 25%; equities between 20% and 70% with neutral of 40%; and alternative investments between 5% and 50% with neutral of 30%.[162]

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161 Exhibit A, Volume 1, p 475.

162 Exhibit A, Volume 1, pp 478–479.

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Relevant events

157 The parties' relationship prior to the commencement of the proceedings spanned 13 years. There were many aspects and complexities to that relationship, particularly with the overlay of Mr Lescaudron's fraudulent conduct. In this section of the judgment, it is intended to deal only with those events that the parties have addressed as relevant to the issues for determination, rather than embarking upon a detailed analysis of every aspect of that relationship.

Gazprom investment – February 2006

158 In February 2006, Ms Mihaesco was dealing directly with the plaintiff in relation to various matters including in respect of the purchase of Gazprom ADRs. Ms Mihaesco's notes of 2 February 2006 include the following:[163]

> Client is calling because he wants to buy Gasprom ADRs (traded in London) for USD 400mios. In fact he [has] the same position in Moscow but as he is not Russian resident, taxes are too important and it is better for him to own Gasprom on this account. We receive written instructions.
>
> He agrees to take a fixed term advance as a similar amount should arrive in a few months relative to the sale of his bank (Impexbank).
>
> He will instruct us about the prices or we have to speak with his trader Mr Sitchov. First limit given at 84 then 84.5 client is calling and explaining details of the deal which is finalising in Moscow (the sale of IMPEXBANK). The total of the sale will be 550 mio. The amount will be sent in Russia because of Russian regulations when a foreign company (Raiffeisen BK) buying a Russian company (IMPEX).
>
> Funds will normally come to the account in Switzerland later on (after taxes have been paid).
>
> He also asks me to liquidate 400 mio out of his mandates and invest them in Gasprom ADR. He will give me instruction when

163 Exhibit 1, Volume 1, p 71.

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> to begin to invest (either himself or through his specialist ...). But he want to pay no more than 0.2% of fees.
>
> I have to send him a letter that he has to sign and send me back which confirms his wishes so that I get the ok from the trust in SG.

159 Ms Mihaesco's notes for 6 February 2006 include the following:[164]

> The client is calling me to place the following orders (confirmed in writing)
>
> The total amount is not changing (USD 400 million). He wants to buy Gasprom in foreign currency but traded in Moscow. He has been warned that the third-party commission taken by Gasprom Bank is very high (I told him 0.7 then called him back to explain to him that it will soon increase to 1.5%), to which the broker's fees are also added. He wants to buy some all the same due to the drop in value because he believes that the prices between London and Russia should level out over time. He also wants to buy Lukoil ADRs traded in London. The total amount is remaining the same for the time being (USD 400million). We can buy up to 50% of Lukoil maximum.
>
> The limit prices that he has given me:
>
> Gasprom traded in London: 84.5 (I explained to him that the ADR was trading above that, but he wants to stick to this limit)
>
> Gasprom Russia: 8
>
> Lukoil ADR London: 76.5

160 The reference to "confirmed in writing" in the first line of this note is probably a reference to a typed document purportedly signed and dated 3 February 2006 by the plaintiff in the following terms:[165]

> I, undersigned, instruct you to invest the amount of USD 400'000'000.- in Gasprom USD, ADRs traded in London (1 ADR = 10shares).
>
> I also ask you to put a Fixed Term Advance (loan) in place for same amount (USD 400'000'000.-) for three months. The credit will be guaranteed by Meadowsweet's accounts.

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164 Exhibit 1, Volume 1, p 71.

165 Exhibit A, Volume 1, p 290.

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> I will give you the instructions regarding the purchase orders or Mr Dmitry Sitchov [telephone number] will instruct you about the timing and amount to be bought. First purchases might happen on 3rd February already.

161 Although the plaintiff was initially sceptical in his evidence that he would have owned or purchased USD 400m worth of Gazprom shares, and although he did not have a recollection of the communications recorded in Ms Mihaesco's notes, he said that because so much time had passed he "theoretically … cannot exclude" that this occurred. He could not recall owning such a large holding of Gazprom shares but emphasised that this was during a period, 2006 to 2008, when he was trading Russian shares and co-ordinating the process himself. A large proportion of these trades were Gazprom and Lukoil shares.[166] Ultimately, the plaintiff's evidence was that he did not exclude the possibility that the value of Russian shares might have even been several hundred millions of dollars in the period from 2005 to 2008.[167]

162 As the plaintiff admitted, this was during a period in which he was "actively trading in Russian shares and was coordinating the process [himself]".[168] It is probable that Ms Mihaesco's notes are an accurate record of her communications with the plaintiff at this time and are instructive of the nature of the plaintiff's involvement in the management of this part of the Trust assets in February 2006.

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166 Transcript, 6 September 2022, pp 44–52.

167 Transcript, 6 September 2022, p 78.

168 Transcript, 6 September 2022, p 52.

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Mr Lescaudron becomes RM – June 2006

163 Ms Mihaesco left her employment with the Bank in June 2006. The plaintiff was disappointed because he had a good working relationship with Ms Mihaesco, particularly because he was able to converse comfortably with her in Russian.

164 It was at this time that Mr Lescaudron became the RM in respect of the Meadowsweet accounts held with the Bank.

Unauthorised Payments Away

165 It was not long after Mr Lescaudron took over as the RM that the defendant's officers became aware that he was making Unauthorised Payments Away from the Trust assets in the Meadowsweet bank accounts with the Bank.

166 A UPA is "a payment from a structure under CS Trust, for which CS Trust's prior approval was not obtained".[169] Credit Suisse's Best Practice Guidelines ("the Guidelines") in place during the relevant period which applied to all of CS Group locations worldwide, expressly recognised that UPAs "may present elevated legal, regulatory and reputational risks to CST Group should they not be reduced to a minimum". The Guidelines defined UPAs as follows:[170]

> UPAs are payment transactions (cash or non-cash and irrespective of the amount) out of a bank account held by an underlying company, trust, foundation etc. that were effected by a Relationship Manager (RM) of the bank with which the account is established (including CS and third-party banks) without having obtained pre-approval from the relevant decision-making bodies.

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169 JS, para 25.

170 Exhibit A, Volume 1, p 569.

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167 The Guidelines required the responsible Trust Manager to initiate the "rectification" of the UPAs within five working days of receiving notice and to "possibly" finalise the rectification after another five working days. The Guidelines also required the Trust Manager to retroactively obtain adequate documentation on which the transaction was based and executed. They also set up a monitoring and reporting regime and the steps to be taken to "escalate" the rectification of the UPAs in cases in which RMs created UPAs "in spite of adequate information and training".

168 UPAs were to be identified by comparing and/or matching payment instructions by the defendant to "Debit Advices" from the Bank. Debit Advices were documents delivered to the defendant by the RM reflecting a transaction that had been effected.[171] The Debit Advice form included a section in which it was intended that the recipient of any payment or distribution from the trust fund was identified. That section included the words "In favour of" next to which it was intended that the recipient's name(s) would be inserted. There was also a section for "Payment reason" where it was intended that the reason for and/or nature of the transaction would be recorded.

169 If there were no payment instructions in respect of a particular Debit Advice, that transaction would be identified as a "possible" UPA and followed up on by the Trust Manager. This "follow-up" involved the Trust Manager contacting the relevant RM to obtain details in relation to the particular transaction and documentation "evidencing the beneficiary's approval to ratify a distribution or payment that had been made".[172]

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171 For example: Exhibit A, Volume 1, p 455.

172 JS, para 28.

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170 UPAs were recognised as having been "clearly" forbidden by a "Compliance Alert" issued by the Credit Suisse Legal & Compliance Department in 2003.[173]

Immediate action required in relation to UPAs - December 2006

171 On 5 December 2006, Ms Sim, who was the Trust Manager of the Trust at the time, wrote to Mr Lescaudron's assistant, Ms Suzanne Raschle ("Ms Raschle"), with a copy to Mr Lescaudron, Mr Low and Ms Lina Teng ("Ms Teng"), a compliance officer working in "Business Risk Management/Compliance" of the defendant, advising that "6 debit advices for Meadowsweet" had been received but that she could not recall "giving authorisation for these payments" or receiving the relevant invoices. Ms Sim requested clarification and receipt of the invoices "duly signed" by the plaintiff.[174]

172 Ms Raschle responded by e-mail on 6 December 2006 in which she advised Ms Sim that an invoice had been sent on 4 December 2006. After further questioning by Ms Sim on 12 December 2006, Ms Raschle admitted that the invoice had already been paid whilst "waiting" for the defendant's "signed confirmation".[175] This prompted Ms Sim to write to Ms Raschle on 12 December 2006, with copies to Mr Lescaudron, Mr Low and Ms Teng, in terms that included the following:[176]

> Thanks for your candid reply but I would need to correct your perception of how the account should operate.

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173 Exhibit A, Volume 1, p 303.

174 Exhibit A, Volume 1, p 299.

175 Exhibit A, Volume 1, p 298.

176 Exhibit A, Volume 1, p 298.

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> As you know, Clementi Limited is the authorised signatory for account and all payments out of the account can only be made upon receipt an instruction signed by Clementi Limited. What we sign to you are not 'confirmations'; they are instructions. BI has limited power of attorney and hence payments should not be made based on his signature.
>
> Appreciate your kind cooperation to adhere to the signing mandate of the account – this would gravely affect the integrity of BI's trust structure.
>
> Please let me know if you need further clarification and I shall be glad to explain.

173 In an e-mail just moments later, Mr Low congratulated Ms Sim writing: "Well done, that's telling her. I'm not sure that it will make much difference, but we try ….".[177] In a further e-mail twenty minutes later, Mr Low wrote directly to Mr Lescaudron, with copies to Ms Teng, Ms Sim and Ms Raschle in the following terms:[178]

> I think we need to come to a common understanding on the procedure that goes with operating a trustee bank account. For the purposes of the bank, the client is the company (in this case Meadowsweet Assets Ltd), and the authorised signers are the directors of the company, which would be the Credit Suisse Trust controlled entity, Clementi Limited.
>
> While we do all realise that BI is the end client, the whole purpose of setting up this trust structure is to ensure that he is protected from any suggestion that he still has complete control of the assets, which may be implied if he is able to "operate" the bank account without the trustee's permission. I cannot stress enough the danger of this, as it may cause the entire trust structure to be treated as non-existent, and the implications of this would be extremely severe for us all as a bank.
>
> I would be most grateful therefore if you could in future take steps to avoid acting on Mr BI's signature to remit funds out of the account, to avoid potential complications. On our side, we will do our best to execute any instructions that may come in (as long as Mr BI has signed on them) within the same day if at all possible, subject to the time difference, failing which, it will

177 Exhibit A, Volume 1, p 298.

178 Exhibit A, Volume 1, p 300.

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> take place overnight. I believe this is the best way forward, but please do not hesitate to contact me at [phone number] if you require any clarification.

174 Also on 12 December 2006, Ms Teng provided her report on "Unauthorised Payments – November 2006 (CST Singapore)" to various recipients including Mr Jackman, Mr Low, Ms Sim, Mr Kevin Clerey of CS Trust AG ("Mr Clerey") and Mr Thomas Ditrich, the Head of Compliance at CS Trust AG ("Mr Ditrich").[179]

175 At about this time Ms Teng also had a telephone conversation with Mr Ditrich about the continuation of UPAs with "many instances … from CS Switzerland branches". She wrote separately to him on 12 December 2006 referring to that conversation and in terms that included the following:[180]

> Much effort, as I can see from day-to-day correspondences, has been put in to inform the RMs on who should be the correct authorised signatories.
>
> It works for some RMs but obviously not for all and in fact there were difficulties in getting hold of them and their co-operation.
>
> Sometimes we cannot help but question the internal controls of banks in making payments out. It is weird that payments can actually be effected without the correct authorised signatories. This is also not in the BOs' best interest since the validity trust structure may become questionable.
>
> Thanks very much in advance for looking into this.

176 On the following day, 13 December 2006, Mr Ditrich wrote by e-mail to Mr Clerey with the Subject Line "Your attention is required – Unauthorised Payments – November 2006 (CST Singapore)" with a copy to Ms Teng.

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179 Exhibit A, Volume 1, p 304.

180 Exhibit A, Volume 1, pp 303–304.

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Mr Ditrich forwarded Ms Teng's e-mail of 12 December to him and wrote in terms that included the following:[181]

> I would like to draw your attention to Lina's below email.
>
> There is one particular instance which requires immediate action:
>
> •Between the 10 to the 23 November 2006 several unauthorised payments in the total amount of **USD 35'412'000 (!)** have been made by Patrice Lescaudron, a RM at CS Geneva's Russian desk out of an entity administered by CST Singapore and all the payments went to a third party (not beneficiary) of the entity!
>
> I attach a Compliance Alert issued by the Legal & Compliance Department of Credit Suisse on the 23.10.2003. It clearly forbids unauthorised payments away and points out the risks related to CS.
>
> [attachment]
>
> I guess the unauthorised payments away reached an extend [sic] where CST has to react and address the issue to the competent body at CS.
>
> •There is absolute [sic] no control neither for CST nor for CS if the RM organises unauthorised payments away (in the extreme case, he can benefit anybody by this payments, including himself → risk of employee's fraud)
>
> •In the case of an overlying Trust an RM behaving like this exposes CS to the risk to be considered as constructive Trustee imposing to CS all the Trustee's responsibilities
>
> •For CST this behaviour of the CS RM imposes considerable regulatory and legal risks (it becomes impossible for CST to safeguard the interests of the beneficiaries and to prevent money laundering)
>
> Please let me know how you wish to proceed.

177 The Legal & Compliance Alert attached to Mr Ditrich's e-mail recorded that "often" settlors/founders or beneficiaries were not aware "that, upon establishment of a trust, the power of disposal over the transferred funds is passed to the trustee or the directors respectively" and the Bank was "not

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[181] Exhibit A, Volume 1, pp 303–304.

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entitled to carry out requests submitted by a beneficiary without the prior approval of the trustee".[182]

178 On 22 December 2006 the defendant became aware that Mr Lescaudron had transferred USD 60m out of another client's account on 8 December 2006, without the defendant's authorisation. Ms Sim wrote to Mr Lescaudron on 22 December 2006 advising that he was to "refrain from making payments out of the account prior to receiving authorisation" from the defendant.[183] On the same day Mr Low wrote to Ms Sim with copies to Mr Jackman and Ms Teng observing that he was "amazed that a banker is able to move USD60m without even getting signed instructions from the client (ie us!). So much for Swiss banking…".[184]

179 On 22 December 2006 Mr Jackman received an e-mail from Mr Michael Vlahovic ("Mr Vlahovic"), Mr Lescaudron's superior at the Bank, referring to the UPAs and advising that "this will not happen again". However, Mr Vlahovic suggested that Mr Lescaudron had done a "tremendous job under huge pressure" dealing with the plaintiff and the other client in a "dynamic" situation caused by Ms Mihaesco's departure.[185] Mr Vlahovic advised that he appreciated the "seriousness" of not advising the defendant "for a full 2 weeks" of the transfer and committed to providing the defendant with "whatever support you require in order to put this behind us". He suggested the situation arose not because of

182 Exhibit A, Volume 1, p 305.

183 Exhibit A, Volume 10, p 736.

184 Exhibit A, Volume 10, p 736.

185 Exhibit A, Volume 10, p 734.

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Swiss banking practice but rather by reason of the "extraordinary rearguard action" that the Bank had been fighting for the large part of the year.[186]

180 Mr Jackman's take on this explanation was that there were "[o]bviously some fairly select choices in Zurich when it comes to applications of rules".[187]

181 Although by November 2006 Mr Lescaudron had only been the RM for about 6 months, he made six UPAs totalling USD 35.412m between 10 and 23 November 2006.

UPAs continue

182 The defendant received a number of Debit Advices in March 2008 relating to transactions that had been effected by Mr Lescaudron in which the identity of the recipient or beneficiary of the funds was not identified. These Debit Advices were addressed to the defendant and were for varying amounts. The "customer adviser" was recorded as Mr Lescaudron.

183 Seven of the Debit Advices were dated 14 March 2008 in the amounts of: EUR 3.252m,[188] USD 1.32m,[189] USD 180,000,[190] USD 1.32m,[191]

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186 Exhibit A, Volume 10, p 734.

187 Exhibit A, Volume 10, p 734.

188 Exhibit A, Volume 1, p 533.

189 Exhibit A, Volume 1, p 534.

190 Exhibit A, Volume 1, p 535.

191 Exhibit A, Volume 1, p 536. Although this amount is identical to the Debit Advice at Exhibit A, Volume 1, page 534, it appears to be a separate amount having regard to the different "Reference" numbers.

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USD 1.881m,[192] USD 3.03m,[193] and EUR 3.2m.[194] A further two Debit Advices were dated 18 March 2008 in the amounts of: EUR 2.15m,[195] and EUR 1.67m.[196]

184 Those amounts totalled EUR 10.272m and USD 7.731m.[197]

185 Each of the Debit Advices simply recorded "AS PER ORDER OF 14 [or 18] MAR 08" and in the section for recording the identity of the recipient all that was recorded was: "BENEFICIARY: ACCORDING TO THE INSTRUCTIONS RECEIVED". [198]

186 In November 2008 the defendant received a further bundle of Debit Advices in respect of transactions effected by Mr Lescaudron. Once again, all but one of the Debit Advices failed to identify the recipient of the transferred amounts and simply recorded: "In favour of: ACCORDING TO THE INSTRUCTIONS RECEIVED".[199]

187 The "Payment reason" was recorded in the following various ways: "AS REQUESTED ON 27.11.2008" or "AS PER CLIENT'S REQUEST DD

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192 Exhibit A, Volume 1, p 537.

193 Exhibit A, Volume 1, p 538.

194 Exhibit A, Volume 1, p 539.

195 Exhibit A, Volume 1, p 540.

196 Exhibit A, Volume 1, p 541.

197 If the amounts at Exhibit A Volume 1 pages 534 and 536 are duplicated, then the figure would be USD 6.411m.

198 Exhibit A, Volume 1, pp 530–541.

199 All but one of the twelve received contained these words. Exhibit A Volume 1 page 525. One identified two individuals as recipients but contained that same "Payment reason" as the others.

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27.11.08" or "AS REQUESTED BY CLIENT DD 27.11.08" or "AS PER CLIENT'S INSTRUCTIONS DD 27.11.08".

188 There were twelve Debit Advices dated 28 November 2008 for debits totalling EUR 5.729m and USD 4.396m.[200]

189 These transactions in March 2008 and November 2008 are reasonably described as UPAs to which the Guidelines applied. Far from complying with the Guidelines to have the matter initiated and finalised possibly within ten business days of notification, nothing or very little appears to have been done until the following year in relation to these very large amounts of money being paid out of the Trust accounts without authorisation.

190 Ms Sim prepared a draft e-mail to Mr Low in which she recorded that she thought that she should highlight "the disturbing UPA trend for Meadowsweet". This draft e-mail included advice that Ms Sim's Trust Accountant, Ms Peh, had passed her "yet another stack" of Debit Advices, the ones dated 28 November 2008, for which the defendant had not authorised payment. Ms Sim made the observation that most of them "run into the millions" and that the major other payment dates were 17 October 2008. Ms Sim identified those Debit Advices as problematic because "they were not authorised by the trustee".[201]

191 On 19 February 2009, Ms Sim wrote to Mr Lescaudron and Ms Raschle, advising that she could not "reconcile" these "Unmatched payments out from

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200 Exhibit A, Volume 1, pp 518–529.

201 Transcript, 16 September 2022, p 65; Exhibit A, Volume 10, p 733.

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Meadowsweet". A request was made for documents including invoices or bills that the plaintiff had signed to indicate his requests for the payments.

192 On 11 March 2009 Ms Sim sent a reminder e-mail to Ms Raschle and Mr Lescaudron requesting the documentation. On this occasion, Ms Sim copied other officers of the defendant into the e-mail.

193 Rather incredibly, nothing further was done until 3 November 2009 when Ms Sim wrote to Mr Lescaudron's colleague Ms Raschle again as a "Follow Up" recording "Just a reminder to send us the documentation signed by [the plaintiff]".[202]

194 Almost a year later, on 3 February 2010, Ms Sim wrote to Mr Lescaudron and Ms Raschle recording that she had not heard from them in relation to the e-mail of 19 February 2009 and advised that she would appreciate their "urgent response".[203] There is no evidence that Mr Lescaudron responded to any of these e-mails and Ms Sim's evidence in relation to that failure was as follows:[204]

> Q. So a year had passed since you had previously chased Patrice Lescaudron for evidence relating to these payments, and he had not provided it. Did you at least receive an explanation from him about those payments in the interim?
>
> A. Not that I can recall.
>
> Q. You recall earlier today I showed you the UPA guideline that said UPAs have to be resolved within five days?
>
> A. Yes.

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202 Exhibit A, Volume 1, p 487.

203 Exhibit A, Volume 1, p 643.

204 Transcript, 16 September 2022, pp 89–91.

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Q. The 2009 UPAs that I have shown you had been outstanding for three or four months by the time of these emails I'm showing you now. Correct?

A. Correct.

Q. The March and October 2008 UPAs had been outstanding for two years, correct?

A. Correct.

Q. This was a serious breach of CST Group's best practice guidelines for UPAs, right?

A. Yes. Can I just explain on the timeline?

Q. Please go ahead.

A. I mean, because we usually wait for the physical debit advices to come, that will come in by snail mail, and then it goes through the trust accountant first before coming over to the trust managers. So there would be a time lag when we would actually get the advices. And by the time it comes to us, it's-- I can say for sure it's past the five-day working day stated in the guidelines. Yeah.

Q. Right. So the system--

A. So just to explain that the-- the reason why it seems so long, like--

Q. Well, firstly, that wouldn't explain the two years that we're--

A. Yes. Yes, yes.

Q. --waiting for the 2008 UPAs to be resolved, firstly.

A. Yes.

Q. Secondly, Ms Sim, your evidence suggests to me that the system that Credit Suisse Trust Singapore had put in place totally ignored the best practice guidelines that had been issued. Right?

A. Yes.

195 Ms Sim also gave the following evidence in relation to all the UPAs that took place up to December 2009:[205]

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[205] Transcript, 16 September 2022, pp 92–93.

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Q. … You could see the trend of the UPAs, right?

A. Yes.

Q. They were persistent, correct?

A. Yes.

Q. They were high value, correct?

A. Yes.

Q. Repeated reminders to Patrice Lescaudron were not working, correct?

A. Yes.

Q. Shouldn't the trustee have then said, "Patrice Lescaudron should not be allowed to deal with trust assets until we get to the bottom of this"?

A. Yes.

Q. I know I've taken you to 2010, but, in fact, according to the guidelines, if you think about that, even after just one or two years of these UPAs happening again and again, the trustee should already have done it right at the beginning. Correct?

A. Correct.

Q. When I say "done it", let me be clear, the trustee should've said "Patrice Lescaudron should not be allowed to deal with trust assets. Let's have an investigation and get to the bottom of this". Correct?

A. Yes.

Q. That should have been done as early as 2007, agree?

A. Agree.

196 Ms Sim's evidence-in-chief in her affidavit of 18 April 2022 included the following:[206]

> It appears that in or around March 2010, it was brought to my attention that there was a high volume of UPAs on the accounts of Meadowsweet. I followed up with Mr Lescaudron on this and raised this internally at the time with Peter Leppard, who was the Head of Trust Management. It was not uncommon for Mr

[206] JS, para 30(a).

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> Ivanishvili to give instructions to the RM directly for such payments to be made. I therefore did not find it unusual that Mr Ivanishvili would have on a fairly regular basis requested, and indeed expected, payments to be made immediately and at short notice, before the RM was able to obtain his signature on the instruction letters that CS Trust required for distributions or payments.

197 Ms Sim's affidavit evidence conveyed the distinct impression that UPAs in respect of the Mandalay Trust were not a problem until 2010 and even then, there was no reason to regard them as suspicious. This is in stark contrast to her evidence in which she accepted that waiting a year and not knowing the identity or location of the recipient of millions of dollars paid out of the Trust fund concerned her deeply.[207] Clearly, Ms Sim was well aware of the highly unsatisfactory trend of UPAs in which millions of dollars were transferred out of the Trust accounts without authorisation by the defendant and without the defendant having any knowledge of the recipient well before 2010.

198 On 25 November 2010 Ms Sim wrote to Mr Lescaudron advising that the defendant was "conducting a thorough review of the Trust and its companies" and noting that there were several outstanding matters to conclude. Ms Sim asked for Mr Lescaudron's assistance in respect of a number of matters. They included the following:[208]

> 1. Payments
>
> There are many payments out from Meadowsweet's account that have not received proper authorisation. We need to rectify the situation. However, the debit advices we have received do not have sufficient information for us to ratify these payments. I would like to propose that I mail you copies of all the debit advices and you write down on each debit advice the bank name, account name and account number to which the payments were made. Upon receipt of these debit advices, I can

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207 Transcript, 16 September 2022, p 72.

208 Exhibit A, Volume 2, pp 324–325.

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> draft one letter consolidating all these payments, so that Mr B.I. just needs to sign one letter. In view of the large number of debit advices, I cannot email them to you. Please confirm if this procedure is ok for you.
>
> 2. Limited power of attorney
>
> Our records show that Mr Pierre Grotz has limited power of attorney for Meadowsweet's account. Can we confirm this is still true and in force? If it is not, we will need to update the company records.

199 On the same day Mr Lescaudron advised Ms Sim by e-mail that he would not be back until the following day from a business trip and would review her e-mail "in priority".[209]

200 On 29 November 2010 Mr Lescaudron wrote to Ms Sim only in relation to Mr Grotz and in an exquisite display of hypocrisy asked her to "please remove immediately his POA as this person is subject to legal suits in different countries and he is highly indesirable [*sic*] for our bank (and for the client)".[210] Mr Lescaudron did not deal with the other matters that Ms Sim had raised in her e-mail. Ms Sim wrote again to Mr Lescaudron on 9 December 2010 and 15 December 2010 asking for him to attend to her requests and some additional matters that she raised "as a matter of urgency".[211]

201 On 21 December 2010 Mr Lescaudron delayed the matter further by suggesting that he had to deal with the situation in a "one-to-one conversation" with the plaintiff which was to take place no earlier than February 2011. Ms Sim acceded to the delay but asked for him to advise the date of the meeting.[212]

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209 Exhibit A, Volume 2, p 324.

210 Exhibit A, Volume 2, p 324.

211 Exhibit A, Volume 2, p 337.

212 Exhibit A, Volume 2, p 336.

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202 In January 2011 Ms Sim wrote to Ms Sampaoli advising her of the list of "pendings". This included questions about payments that had been made which did not, as Ms Sim saw it, fit in with "the purpose of the Trust" which was identified as "inheritance-planning". One matter that Ms Sim raised with Ms Sampaoli was the "many Unauthorised Payments outstanding" and asked whether she could assist because there were a lot of Debit Advices for which she was "pending information from [Mr Lescaudron]" so that the payments could be ratified.[213]

203 In early 2012, when the defendant was considering sending a letter to the Bank seeking an explanation of the transfers of funds without the defendant's authorisation, Ms Sampaoli wrote to Ms Sim and Ms Lau advising as follows:

> Patrice feels there is no need for you to send such letters since the cases have been solved. He is aware of UPAs and will try to involve us immediately in future in order to avoid any future problems. In future, no payments will be made to third parties regarding public relations, marketing, etc. The client will pay any fees/expenses directly from his personal account.

204 To emphasise the importance of Mr Lescaudron's opinion, Ms Sampaoli noted that the estimate of the potential 2012/2013 further business with the plaintiff was "USD 1.5 Billion" and stated "the bank wants to grow this relationship and, therefore, we should support it".[214]

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213 Exhibit A, Volume 2, p 343.

214 Exhibit A, Volume 2, p 528.

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205 On 23 May 2012 Mr Marc Ribes of Compliance International Zurich from the Bank wrote: "Even though these payments might have been post-approved by CST, I think that disciplinary measures are inevitable."[215]

206 In July 2012, Ms Valerie Voltas, Ms Sampaoli's assistant, suggested that Mr Lescaudron and his line manager would soon receive an escalation e-mail. In response, Mr Birri asked for the issues to be solved immediately and suggested "Let's not have an escalation here. Many thanks! Please come by in case you need help."[216]

207 Things did not change. On 27 August 2012, Ms Sim wrote to Ms Sampaoli and others seeking assistance "to remind Patrice and his team to make payment only upon receipt of proper authorisation (even with the 'standing' request letters in place, proper authorisation is required)".[217]

208 On 4 September 2012 Mr Babak Dastmaltschi ("Mr Dastmaltschi"), head of the Bank's Ultra High Net Worth Individuals Western and Emerging Europe Group, wrote to the compliance section and to Mr Lescaudron's then direct superior Mr Philippe Vitse ("Mr Vitse") in relation to the UPAs that Mr Lescaudron had effected. That communication included the following:[218]

> As you can see they are watching him like a hawk. Can you please ask him to stop this until the new trust is set up? Or figure out another way to get pre-clearances from the trust? Maybe there is a way for the trustee to provide some form of such authorisation? But all in all it really looks like we will have a real problem on our hands.

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215 Exhibit A, Volume 2, p 617.

216 Exhibit A, Volume 2, p 648.

217 Exhibit A, Volume 3, p 47.

218 Exhibit A, Volume 3, p 55.

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209 Mr Dastmaltschi's observations were unfortunately prescient. This was in the context of the risk management department advising Mr Vitse that cases which all related to Mr Lescaudron and needed to be looked into had been sent to those operating the ORIS system which was "apparently designed to detect potential fraud".[219]

210 In November 2012 Ms Sampaoli continued to assist Mr Lescaudron by requesting some assistance from her colleagues in this regard, noting that Mr Lescaudron "is very important to me".[220]

211 The drive for business, commissions and profit appears to have lulled so many into a false sense of comfort about Mr Lescaudron's manipulative and fraudulent conduct.

Other transactions – 2007/2008

212 On 11 May 2007 there were three recorded payments to a "Third Party". The first was for USD 2.939m; the second was for USD 10.496m; and the third was for USD 33.224m. The first two of those payments were not reconciled until 22 May 2007. The third was apparently not reconciled until 25 June 2007. However, the point made by the plaintiffs is that during that period Mr Lescaudron made unauthorised payments totalling USD 46.6m, notwithstanding that Mr Vlahovic had assured Mr Jackman that this would not happen again (see [179] above).[221]

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[219] Exhibit A, Volume 3, page 87

[220] Exhibit A, Volume 3, page 91

[221] Exhibit A, Volume 8, p 494; PCS, para 96.

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213 In June 2007 Mr Lescaudron began investing in shares on Meadowsweet account 75, in respect of which there was no discretionary portfolio management agreement.

214 The first investment that was made by Mr Lescaudron was in Carpathian Resources Ltd ("Carpathian").

215 The plaintiff gave evidence that he knew nothing about the Carpathian purchase or trading. He was asked about an e-mail purportedly sent to him on 30 July 2009 in which Mr Lescaudron advised him that he had received "free" Carpathian shares and that those shares were still in his portfolio but were valued at zero because they were not listed on the stock exchange. The e-mail also referred to a current share exchange that was to be completed between 1 August 2009 and 30 November 2009 with the suggestion that an escrow account had been opened at the Bank in the name of "Highmoor Business Corp" ("Highmoor"). The e-mail included advice that after the transfer of the securities to Highmoor, they would remain the plaintiff's property and by 1 December 2009 (at the latest) the plaintiff would receive new securities that would be listed on the stock exchange, suggested to be worth around USD 350,000. This e-mail suggested that because the old securities were obtained "for free", the transaction was "very advantageous".[222]

216 The plaintiff was quite adamant that he knew nothing of the contents of this e-mail, nor was he aware of the trading in Carpathian shares on the Meadowsweet account.[223] A similar investment was made by Mr Lescaudron in Copernic Global Fund Ltd in which Mr Lescaudron was the "investment

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222 Exhibit 2, p 76.

223 Transcript, 8 September 2022, pp 84–85.

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manager".[224] There is no evidence that the plaintiff had requested the purchase of Copernic shares or that he knew about the transactions.

New accounts opened and further trading

217 On 12 July 2007 Mr Lescaudron set up a new safekeeping account 75-8 for Meadowsweet. He also established two new cash accounts connected to account 75-8 being accounts 72-27 and 72-28.

218 On 24 July 2007 Mr Lescaudron transferred USD 100m from Meadowsweet's cash account 72 to the new account 72-28.

219 It is not in issue that Mr Lescaudron immediately began to use the Meadowsweet account 75-8 for trading, the level of which was described as potentially "churning"[225] and more consistent with a "day-trader".[226] As the wealth management expert, Mr Morrey,[227] explained, Mr Lescaudron invested against prevailing market sentiment and in volatile industries, in particular mining and pharmaceutical stocks with numerous transactions during a single day or week.[228]

220 The plaintiffs emphasised that the defendant did not take any action to investigate the opening of these new accounts which it had not authorised. The plaintiffs also emphasised that the defendant did not check the transfer of funds,

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224 Exhibit A, Volume 1, page 387.

225 Exhibit A, Volume 2, page 497.

226 Exhibit A, Volume 2, page 339.

227 Exhibit PX2, para 2.53.

228 Exhibit A, Volume 2, pp 339, 496–509.

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nor require the production of any proper records for the accounts which the plaintiffs claimed facilitated Mr Lescaudron's fraud.[229]

221 In the period August to October 2007 Mr Lescaudron misappropriated Trust assets by transferring funds from Meadowsweet and transferring securities to Meadowsweet in exchange at a price above the market value of the securities ("Overvalue Misappropriations"). Mr Lescaudron admitted that these transfers were fraudulent and he was convicted of fraud in respect of them.[230]

222 The first Overvalue Misappropriation involved the transfer of EUR 3m from the Meadowsweet account 72-27 to the account of another client of the Bank and a transfer of 300,000 shares in Meinl International Power Ltd ("Meinl") to Meadowsweet account 75-8. Ms Raschle advised Ms Sim that this was an "error", explaining that the 300,000 Meinl shares were not really for Meadowsweet but for another client. Ms Sim advised that the shares should "now be transferred to Meadowsweet" because the plaintiff had agreed to subscribe to the shares. Ms Raschle asked Ms Sim whether the plaintiff would have to sign a document to effect this transaction.[231]

223 In response Ms Sim advised that the plaintiff did not have to sign any particular document because he had the power to trade freely on the account and would only need the defendant's approval for withdrawals of funds from the account. Ms Sim gave evidence that at the time of this transaction she did not realise that it was an off-market trade and did not take any steps to check with the plaintiff whether he was agreeable to purchasing the shares. She admitted

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229 PCS, paras 102–103.

230 Exhibit A, Volume 8, pp 124–130 (section 2.2.3 of the Swiss Criminal Judgment).

231 Exhibit A, Volume 1, page 391.

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that if she had appreciated the nature of the transaction as an off-market trade, she certainly should have and would have checked with the plaintiff.[232]

224 In the circumstances, the defendant did not take any steps to enquire into the details of the transaction or the identity of the recipient of the moneys that were paid out of the Meadowsweet account. Nor did the defendant have any information or evidence that the plaintiff knew of or approved the transaction.

225 Mr Lescaudron proceeded with further transactions. On 15 October 2007 he transferred a total of EUR 15.5m from the Meadowsweet account 72-27 to the account of Top Matrix Holdings Ltd ("Top Matrix") and another individual, and a transfer of 1.55 million shares in Meinl was made to Meadowsweet's account 75-8.

226 These Overvalue Misappropriations continued with transfers out of the Meadowsweet accounts on 14 March 2008 in the amounts of USD 7.731m and EUR 10.272m. These figures correspond to the UPAs discussed at [183] above. In respect of the first transfer, a total of 11,910,920 Carpathian shares were transferred into the Meadowsweet accounts. In respect of the second transfer, a total of 975,200 Meinl shares were transferred into the Meadowsweet accounts. Mr Lescaudron was convicted of fraud in respect of these transactions.[233]

227 On 13 October 2008, Mr Lescaudron made further Overvalue Misappropriations. He transferred EUR 15,607,214 from the Meadowsweet accounts to the account of Top Matrix. In return, a total of 2,340,374 shares in Atrium European Real Estate Ltd were transferred to the Meadowsweet

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232 Transcript 16 September 2022, p 61, lines 6–11.

233 Exhibit A, Volume 8, pp 124–130, section 2.2.3.

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accounts, causing an immediate loss of EUR 3,928,747, the market value of the shares being EUR 11,678,467 at the time.

228 Mr Lescaudron also transferred a total of USD 7,693,648 from the Meadowsweet accounts to the Top Matrix account. He then transferred a total of 96,839 shares in Parts-B-Lyxor International Asset Management Lyxor ETF to the Meadowsweet accounts, causing an immediate loss of USD 5,272,673, the market price being USD 2,420,975 at the time.

229 The defendant authorised these transactions on the basis of a forged letter of instruction without being informed of the securities for which the payment was purportedly made.[234] The defendant did not request the original letter of instruction to verify the signature on the letter, nor did it request any documentary evidence to substantiate the Bank's claim that the recipient of the funds was a "business partner of Meadowsweet".[235]

230 The plaintiffs contended that the defendant was alerted to these transactions when it received the large number of Debit Advices relating to the UPAs on the Meadowsweet accounts (see [182] above). Ms Sim accepted that she did not know where or to whom the funds were transferred at the relevant time.[236]

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234 Exhibit A, Volume 14, pp 224–226; Exhibit A, Volume 8, pp 124–130, section 2.2.3; Exhibit A, Volume 1, pp 444 and 445.

235 Transcript, 16 September 2022, p 75.

236 Transcript, 16 September 2022, p 64, lines 15–19.

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Audit reports

231 On 16 February 2006 the Credit Suisse Group Internal Audit ("Internal Audit") produced a report that the defendant did not systematically track the resolution of deficiencies arising from Annual Fiduciary Reviews ("AFRs") and that in the result, there were a number of deficiencies which had not been resolved. These deficiencies remained unresolved for some years and Internal Audit warned that the arrangement in which annual accounts were not independently distributed to clients but delivered to the RM at the client's request "increases the risk that inappropriate or potentially fraudulent activity may not be identified and investigated in a timely manner".[237]

232 In an audit report of 5 June 2008 it was recognised that management controls were ineffective and there was a lack of proper management supervision.[238] The report recorded that Mr Vlahovic accepted the need for immediate action if there was to be improvement in the quality of certain key tasks as well as overall supervisory controls. Mr Vlahovic identified the "urgent priority" of the implementation of changes required to exemplify "Best Practice". He reported that he had introduced several measures and initiatives that were designed to support the "clean-up of existing business" and to ensure improved supervisory performance in the future.[239]

233 Although Mr Vlahovic had indicated his desire to achieve "Best Practice", the rating that was applied to the relevant market group of which Mr Lescaudron was a member was "D", defined as including "issues that could

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237 Exhibit A, Volume 8, p 694.

238 Exhibit A, Volume 1, p 412.

239 Exhibit A, Volume 1, p 412–414.

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expose the Audit Unit to a significant level of operational, financial or reputational risks".[240]

Instructions to close Mandates

234 On 7 October 2008 Ms Raschle wrote by e-mail to Ms Sim with a copy to Mr Lescaudron advising that the plaintiff wanted to "close the three mandat[e]s he has with CS Geneva. He confirmed today by telephone with Patrice Lescaudron".[241] It appears that Ms Raschle attached a letter dated 6 October 2008 purportedly signed by the plaintiff and asked Ms Sim "to send us your confirmation".

235 That letter was in the French language. The English translation of it records "Name of recipient" (which was left blank) with the heading "Instruction". The body of the letter was in the following terms: "Please close my three mandates Core USD, Plus USD and Core EUR and transfer the corresponding funds to my Meadowsweet PRIVAT account in reimbursement of the outstanding credits".[242]

236 The plaintiff did not recall signing the letter in question but accepted that the signature on it appeared to look like his. There is also a fax footer purportedly emanating from "Chorvila", the rural town where the plaintiff lived, on 7 October 2008 at 3.22pm.

237 On 9 October 2008 Ms Sim asked Ms Raschle to provide the translation of the letter into the English language and to provide the "full names" of the

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240 Exhibit A, Volume 1, pp 412 and 551.

241 Exhibit A, Volume 1, p 440.

242 Exhibit A, Volume 1, p 442.

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three mandates and "advise where the balances in these mandates will be transferred to" so that she could "draft the instruction correctly".

238 On 8 October 2008 Mr Stamm wrote by e-mail to numerous colleagues on the subject "Update: Big Georgian Client (B.I.): SG CIF 140208 (affected by market turmoil)". He reported that he had been "updated" the previous evening "about an emergency meeting" with the plaintiff. The "update" that Mr Stamm passed on to his colleagues on 8 October 2008 was in the following terms:[243]

> With immediate effect, the two Swiss-booked discretionary mandates in Geneva and the mandate in Zurich are cancelled. Up to USD 150 million are expected to move out of CS Singapore still in October 2008, although the two PM mandates in Singapore do remain in place!
>
> Client has large credit volume with CS Geneva he prefers to repay. He took these credits in order to purchase Russian securities whose prices dropped dramatically over the last weeks (nearly USD 200 million losses accumulated). He does not want to pay interests when in parallel he has cash invested in conservative mandates during this tough period when it is impossible to earn money. Client therefore wants to close the loan and wait for the stocks to reach descent prices.
>
> Furthermore, the client has some larger payments to make very shortly for a real estate project in Moscow/Russia.
>
> **This decision by the client is <u>not at all motivated by potential negative performance of mandates in Singapore (i.e. Lehman Bros bond exposure)</u> and he told us that as soon as Russian equities recover he will put again money in mandates with us. The client re-iterated to the Swiss RM yesterday that CS performance and service quality over the years have been truly appreciated.**
>
> The Swiss RM, myself and our Asset Management colleagues are confident that the proceeds of the real estate project he has and the proceeds of the sale of his equities will come back into mandates with Credit Suisse over time, specially with the experience he had on aggressive bets relative to our sound investment philosophy.

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243 Exhibit A, Volume 1, pp 438–439.

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> I will work closely with Lena Teoh to check on the options we have to present to the client in the days ahead as we have only about USD 125 million in liquidity, so we likely propose to send less than USD 150 million to CS Switzerland.
>
> Important: Credit Management to negotiate after my go ahead with their Swiss CRM counterparts to find out about the usage of our hold cover to CS Geneva (currently USD 250 million). This action will basically strongly influence the total amount of cash we can freely send to CS Switzerland.
>
> We will keep all stake holders informed and also request Controlling to support us timely with a new LOA to be signed for the cash transfer to CS Geneva once the amount of the cash transfer is finalised.
>
> Sorry for the bad news, but it is purely market related, not at all CS (Singapore) related.

239 Mr Stamm decided later that evening to transfer only USD 100m to Geneva at that time and to decide in November 2008 if the additional USD 50m would be needed. It was planned to "rebalance the two portfolios" and "gradually raise cash again".[244]

240 On 13 October 2008 Mr Stamm asked Ms Sim to urgently prepare transfer instructions for USD 100m to Meadowsweet at the Bank. Ms Sim complied with those instructions and asked Mr Lescaudron and Ms Raschle to arrange for the plaintiff to sign the relevant letters and to return them to her.[245] The evidence does not disclose that the plaintiff signed the documents or that he instructed the transaction. The plaintiffs claim that the defendant took no steps to verify that the plaintiff had in fact instructed the transfer.[246]

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244 Exhibit A, Volume 1, p 438.

245 Exhibit A, Volume 1, p 446.

246 PCS, para 141.

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241 On 24 October 2008 Mr Lescaudron advised Mr Stamm and Ms Lena Teoh ("Ms Teoh") that following their conference call he had contacted the plaintiff and informed him about their "comments and recommendations". Mr Lescaudron advised that the plaintiff "mostly agreed on our proposals". Those proposals related to the Soothsayer Core portfolio and the Soothsayer Plus portfolio. Mr Lescaudron advised that the plaintiff had agreed to a reduction of equities from the current level of 19% to 10% in the Soothsayer Core portfolio; and an increase of gold up to 10% of the mandate with the proceeds from equities and the rest in cash. Mr Lescaudron also advised that the plaintiff had agreed to the transformation of the Soothsayer Plus portfolio in EUR "but not as fast as we said". He advised that the plaintiff had asked "to do it progressively, to start now, up to 20% of the value of the mandate" and then to stop and to see the level of EUR in order to decide to go further.[247]

242 On 28 October 2008 Ms Teoh advised Mr Low of the discussion with Mr Lescaudron and that the client had decided "on some fundamental changes to the portfolio's investment profile moving forward". Ms Teoh advised that she would be drafting some changes to the guidelines and expected some communication from the client for the Trust to follow up on.[248]

243 The plaintiff gave evidence that he regarded it as "unimaginable" that he would ever ask the defendant or the Bank to "stop managing [his] accounts". He accepted that he could not remember what he signed in 2008, but thought it was impossible that he would instruct the closure of the mandates.[249] However, he said that it was "possible" that he signed the document because it was

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247 Exhibit A, Volume 1, page 452.

248 Exhibit A, Volume 1, page 452.

249 Transcript, 8 September 2022, page 71.

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presented to him and he did not read or understand it.[250] The plaintiff was shown additional documents that were produced during the trial consisting of a number of e-mails to and from Ms Raschle.[251] However, he said that after looking at those e-mails he could not recall whether he signed those documents asking for the cancellation of the mandates. He did accept that it was "possible" that he signed them without knowing or understanding them.[252]

244 Irrespective of this evidence, it was submitted on the plaintiffs' behalf that it should have been apparent to the defendant that the letter of instruction was "manifestly inadequate" and could not be relied upon as an instruction from the plaintiff to cancel the discretionary mandates. Ms Sim confirmed during her evidence that she did not give instructions for the cancellation of the mandates and that any cancellation was therefore unauthorised.[253]

245 In any event, the discretionary mandates for the Meadowsweet account 75-1, 75-4 and 75-5 appear to have been cancelled in October 2008. The investments held on those accounts were sold progressively from October 2008 and the accounts were closed on 10 August 2009, 14 August 2009 and 29 January 2009 respectively.[254]

246 The plaintiffs submitted that the most likely explanation for these transactions is that it was Mr Lescaudron who procured the cancellation of the discretionary mandates and the transfer of funds from Soothsayer to

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250 Transcript, 8 September 2022, p 71.

251 Exhibit 4; Transcript, 8 September 2022, pp 71–74.

252 Transcript, 8 September 2022, p 74.

253 Transcript, 16 September 2022, p 17.

254 PCS, para 140.

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Meadowsweet so that he could use the funds to cover the losses incurred by other clients and continue with the risky leveraged trading strategy to recover the amounts that he had lost.[255] He had to avoid the money cycle running out (see *Perry, Tamar and Another v Esculier, Jacques Henry Georges and another* [2023] SGCA(I) 2 at [1]).

247 Ms Sim gave the following evidence:[256]

> Q. Once the discretionary mandates were closed, the bank's discretionary mandate team was no longer authorised to manage the investment in those accounts. Correct?
>
> A. Correct.
>
> Q. What that actually meant was that discretionary mandate team from the private bank, they could no longer be looking at the account. Correct?
>
> A. Correct, yes.
>
> Q. So what happened here was that without the trustee authorising it, we had a situation where the people that would normally be watching this account and dealing with it, their eyes were shut. Correct?
>
> A. Correct.
>
> …
>
> Q. If there was no power of attorney and transactions continued to be done on those accounts, then that would be something worrying to the trustee.
>
> A. Yes.
>
> Q. The trustee would be able to see those transactions happening, you'd be aware of it, correct?
>
> A. Not-- not on a daily-- not on a day-to-day basis.
>
> Q. Yes, not a day-to-day basis. Not immediately.
>
> A. Yes.

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255 PCS, para 142.

256 Transcript, 16 September 2022, pp 17–18.

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> Q. But you would, of course, receive the documentation in due course?
>
> A. The bank statements yes.

Investment Strategy Advice

248 Mr Lescaudron provided the plaintiff with a document entitled "Investment Strategy" for the portfolio structure recorded as being "currently as follows (21/02/2009)" in which he advised that there were different proposals for the portfolio which could "obtain even better profitability with minimal risk". [257] There is an issue as to whether the reference to "(21/02/2009)" was a typographical error which is discussed later at [474].

249 The structure of the portfolio was described as "Mandate" at 288; "Advisor" at 118; and "Private" at 566. Mr Lescaudron suggested that the "Biordana Foundation" with "145 (Lukoil only)" should be added to the "Private" section of the portfolio. These numbers were stated not to include the Singapore assets.

250 The "Mandate" section of the portfolio was described as the "central part" of the investment ensuring "a good level of profitability, higher than the benchmark with high security" which Mr Lescaudron advised gave the plaintiff significant credit opportunity and should not be changed.

251 The "Advisor" section of the portfolio was described as having "more active trading" which was "a more risky part than the Mandate part but with a higher expectation of annual profitability". Mr Lescaudron advised that there would be more transactions on this part of the portfolio but with the "goal of achieving gains more rapidly".

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[257] Exhibit 1, Volume 1, p 163.

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252 The "Private" section of the portfolio was described as comprising "Russian securities (Gazprom and Lukoil) and a few securities in the metals sector". Mr Lescaudron recommended that the plaintiff keep the Russian securities because the Bank, as well as most other banks, was very positive about these securities. He also advised selling the remaining metal positions so the proceeds could be added to the Mandate part of the portfolio.

253 Mr Lescaudron advised that in this strategy the plaintiff should "leverage" his positions "to increase [his] annual profitability". The portfolio structure would then be: Management Mandate 364; Trading 118; and Russian Securities 635. He advised that the policy had changed in relation to the Russian securities and that credit of approximately 65% on Gazprom and Lukoil could be granted resulting in a maximum credit potential for the plaintiff of approximately USD 726m. He proposed that the plaintiff keep half of that amount "to profit from exceptional market situations (sharp drop in the indices, sharp drop in the precious metals, as in May 2006) in order to buy at low prices, as [he] did in a remarkable way last year".[258] Mr Lescaudron also advised that the plaintiff should credit USD 363m immediately to invest in instruments that gave regular annual returns significantly higher than the cost of credit and regardless of market conditions.

254 Mr Lescaudron proposed three options for the plaintiff: (i) to build a diversified fund portfolio without leverage and without capital protection; (ii) to build a diversified portfolio with leverage and without capital protection; and (iii) to build a diversified portfolio with capital protection and moderate

[258] Exhibit 1, Volume 1, p 164.

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leverage. He advised that the first option was the "simplest and most flexible solution" for the plaintiff.[259]

IPPRs – 2008 onwards

255 One of the Group Directives issued by Credit Suisse in about 2007[260] related to Investment Portfolio Performance Reviews ("IPPRs").[261] There is no issue that this directive applied to the operations of the defendant. It required a "monitoring" in the "centre of administration" of "investment portfolio performance" in all discretionary portfolios that were held by Credit Suisse and all portfolios where the "client acts as investment manager" with a limited power of attorney being granted.

256 The directive recorded that Credit Suisse Asset Management would provide benchmarks of the investment profiles to be used when monitoring the portfolios with a "tolerance spread" for each investment profile in general at +30% and -15% referred to as the "default tolerance spread". [262] It directed that that the IPPR was to be prepared by the Trust Accountant and completed by the Trust Manager.[263] The monitoring period was for 12 months and it was expected that IPPRs would be completed to monitor the previous 12 months.[264]

257 The directive included some guidance in relation to remedial actions that could be taken in the event that underperformance was discovered. It suggested

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259 Exhibit 1, Volume 1, p 165.

260 PCS, para 144; Exhibit A, Volume 8, pp 450–455; PBG, para 22.

261 Exhibit A, Volume 2, p 330.

262 Exhibit A, Volume 2, p 332 (para 3.4).

263 Exhibit A, Volume 2, p 334 (clause 4.4).

264 Exhibit A, Volume 2, p 332 (clause 3.5).

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that the reviewer (the Trust Accountant and/or the Trust Manager) would: see if trends existed and look at other portfolios managed by the same manager; consult with principals/beneficiaries to alert them to the underperformance of the portfolio and to take soundings on their wishes for future action; set a timeframe for improvement in investment performance; if performance remained unsatisfactory, consider any options other than replacing the investment manager; and/or replace the investment manager and consider circumstances where it may be appropriate to terminate the mandate.[265]

258 The directive also required the reviewer to analyse and clarify any reasons for the portfolio exceeding tolerances with the possibility that the mandate could be placed on a "watch list" to be reviewed in the next period.[266]

259 Clearly the defendant had a system and procedures in place which required it to monitor the performance of the portfolios in the Meadowsweet and Soothsayer Trust accounts. The defendant contended that these reviews were not meant to involve supervision or assessment of decisions as to how the Trust Assets had been invested or managed.[267] It submitted that, at best, it was an internal high-level check which was not reported or even known to the beneficiaries of the Trust and could not be "regarded as an assumption of responsibility for supervising investments.[268]

260 It is not in issue that the defendant was "frequently tardy" in preparing IPPRs and that it did not complete IPPRs in certain years. The IPPR for the

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265 Exhibit A, Volume 2, p 335.

266 Exhibit A, Volume 2, p 334 (clause 4.3) and p 335.

267 DOS, para 83.

268 DOS, para 83(b).

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Meadowsweet accounts for the year ended 31 December 2008 was only prepared in April 2010. It records that Ms Peh prepared it on 29 April 2010 and recorded a portfolio value at year end of USD 65,860,689. It, along with all other IPPRs that were prepared, identified the "portfolio manager" as "CS". This IPPR recorded a performance on the previous year's comparison at -51.12% compared to Credit Suisse's benchmark of -33.03%. It recorded "under performance" of -25.09%. The action that was proposed in the IPPR was to "review again next year".[269] This was hardly meaningful as that "next year" (2009) had already passed by the time this IPPR was prepared.

261 The reasons for the -25.09% underperformance in this IPPR were recorded as "mainly due to the downfall" of the economy in the last quarter of 2008. It recorded that the stock price and bond value had also fallen "tremendously". There was no explanation in this IPPR for the underperformance compared to the benchmark generated by Credit Suisse of -33.03% which more probably than not had already taken into account the decline in the economy at the time.

262 Notwithstanding the defendant's description of the IPPR as an internal high-level check with no assumption of responsibility for supervising investments, its Trust Manager of 20 years' experience, Ms Sim, gave compelling evidence about the IPPR and the need to investigate the underperformance or, as it was described in evidence, the "big drop". Ms Sim was referred to the difference between the value at 31 December 2008 of

[269] Exhibit A, Volume 2, p 379.

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USD 65,860,689 and the value as at 28 February 2007 of USD 944,687,401.[270] She gave the following evidence:[271]

> Q. Shouldn't you have noticed it and investigated how that happened?
>
> A. Yes.
>
> …
>
> Q. Seeing such a dramatic drop, your job was to find out what was the reason for it correct?
>
> A. Yes.
>
> Q. There may be more than one reason--
>
> A. Yes.
>
> Q. --but certainly such a dramatic drop, you would have to figure out whether all of it-- well, you would have to find out the reasons for that entire drop, right?
>
> A. Yes.
>
> Q. Would you accept that no such investigation was done in 2008?
>
> A. Yes.
>
> …
>
> Court. What did you understand was the reason that you would investigate such a big drop? Why would you do that?
>
> A. I think as trustee, we need to know-- well, our primary function is to safeguard the assets, so we would want to know where the funds are going to, and such a drastic change, I think we need to account for that.

263 The plaintiffs claim that the defendant failed to exercise reasonable diligence when conducting its IPPRs throughout the years. This much is quite clear from the candid evidence of Ms Sim in which she accepted that she did

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270 Exhibit A, Volume 2, pp 378 and 379.

271 Transcript, 16 September 2022, pp 157–159.

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not take the process "seriously", nor did she investigate and analyse the reasons for underperformance as mandated by the directive.[272]

264 There was more than one example where the remedial action of putting a portfolio on the watch list for the next period was deployed when it would serve no purpose. The IPPR for the year ended 31 December 2011 was not completed until 1 November 2013, almost two years after the period under review.[273] Even the defendant's own officers observed that placing the portfolio on the watch list for the next period could hardly be considered "meaningful remedial action".[274]

265 In June 2014 one of the defendant's officers, Ms Lau, received pre-populated draft review reports which recorded a performance of -2707% and -646% for the Meadowsweet accounts 75-8 and 75 respectively. The benchmarks generated by CS were around 7% for both accounts. Ms Lau agreed that she knew immediately that something was wrong and she needed to investigate it.[275] Rather than following the directive to escalate the matter to the Centre Head, Ms Lau sought an explanation from Mr Lescaudron, notwithstanding that he was the person responsible for the underperformance.[276]

266 Ms Lau wrote to Mr Lescaudron's superior officer, Mr Castella, advising that she had noted the difference between the two figures and asked for the reasons resulting in "the significant under-performance" and whether

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272 Transcript, 16 September 2022, p 148.

273 Exhibit A, Volume 15, p 799.

274 Exhibit A, Volume 3, p 436; Transcript, 16 September 2022, p 149.

275 Transcript, 19 September 2022, p 67.

276 Transcript, 19 September 2022, p 67.

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there were any mitigation measures taken or to be taken. She also asked for a short rationale in case no remedial action was to be taken.[277]

267 Mr Lescaudron responded to Ms Lau's questions and advised that the profit made by the "client" in the previous year on all of the investments with Credit Suisse amounted to USD 153m which was "17% of performance". He stated that, as a result, no measures were being taken.

268 What Ms Lau did was to simply rephrase the explanations provided by Mr Lescaudron and insert them into the IPPR for both accounts. One being a discretionary account, the other being the advisory account.[278] Ms Lau did not take any steps to verify the figures or the information that Mr Lescaudron had provided.[279] She accepted that she did not "fully" satisfy the requirements of the directive.[280] She gave the following evidence:[281]

> Q. Ms Lau by accepting this explanation by the relationship manager, you were failing to protect the interests of the beneficiaries; isn't that right?
>
> A. Not following the directives 100 percent.
>
> Q. Yes. But the effect, Ms Lau, was that you failed to protect the interests of the beneficiaries, right?
>
> A. It wasn't crossed my mind that it was not protecting the interest of the beneficiary at that time.
>
> Q. But today, now thinking about it, you realise that; right?
>
> A. With the benefit of the hindsight, yes, I should, of course, have asked for a review of the structure itself-- of The Mandalay Trust instead of the overall view of the customer's portfolios.

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277 Exhibit A, Volume 15, p 377.

278 Exhibit A, Volume 3, pp 661–663.

279 Transcript, 19 September 2022, p 76.

280 Transcript, 19 September 2022, pp 77.

281 Transcript, 19 September 2022, p 79–81.

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Q. Yes. And at that time, you also understood, did you not, that Mr Ivanishvili was not the only beneficiary of The Mandalay Trust; right?

A. Yes.

Q. So there were other beneficiaries' interests--

A. Yes.

Q. --to take care of; right?

A. Yes.

Q. The fact that one beneficiary, one of six beneficiaries, has assets in another account, that is no comfort to the other beneficiaries if the portfolio for the six beneficiaries is poorly managed; correct?

A. Yes.

Q. Now, the truth is, Ms Lau, you wrote down what the bank told you without checking; isn't that right?

A. Yes.

Q. And you parroted the bank's conclusion that no remedial action was necessary; right?

A. Yes.

Q. You did not do the IPPRs properly; isn't that so?

A. Not based on the sub-portfolio, yes.

Q. You did not do the IPPRs properly, Ms Lau; isn't that right?

A. Yes.

The Art Collection

269 On 27 April 2006 the plaintiff wrote to the defendant advising that he would be "grateful if the trustee could consider" his request to acquire a BVI company, Lynden, under the Trust for the purpose of placing a bid at an auction held by Sotheby's of New York for a Picasso painting the price of which was expected to be in the region of USD 50m. The plaintiff also suggested that if the defendant acceded to this request, it would be necessary to grant a power of attorney to an individual to act on behalf of the company together with various

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other machinery provisions to enable the bid to be made at the auction. The defendant acceded to the plaintiff's request. Lynden was acquired and added to the Trust structure.[282] A power of attorney was issued and numerous paintings were purchased at various auctions over time.

270 By August 2007 officers within Credit Suisse Head Office in Zurich were concerned about exposure in relation to the artworks that the plaintiff had collected which were apparently then worth approximately USD 350m. There was concern that Credit Suisse was not sure of the location of the artworks, whether they were kept in good condition and/or whether they were insured. One of the matters that was identified as a "Risk" was that "Unauthorized payments in substantial amounts are made by the bank's RM from time to time in connection with the art collection".

271 Mr Daniel Strazzer ("Mr Strazzer"), the Head of Legal and Compliance in CS Trust AG in Zurich, prepared a Memorandum dated 2 August 2007 with three options outlining possible ways "forward". The three options proposed by Mr Strazzer were: (i) to stop any involvement of the defendant with the art collection; (ii) to stop any involvement of the defendant as trustee with the art collection but still provide services to the holding company Lynden; and (iii) for the defendant to stay involved as trustee with the art collection but try to reduce its current risk as trustee. Mr Strazzer suggested that the client would be "maybe unhappy" with the first option, "maybe happy" with the second option and "probably happy" with the third option.[283]

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282 Exhibit A, Volume 8, p 548.

283 Exhibit A, Volume 1, pp 514–515.

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272 In relation to the third option, Mr Strazzer suggested that a separate trust should be set up into which the holding company of the artwork could be transferred; or alternatively, there should be a transfer of the artworks out of Lynden to the new structure. He also identified what he described as "Risk mitigating measures" and suggested the following:[284]

> The deed of the new trust has to explicitly address the holding of artworks and has to be drafted to reduce the respective risks (a legal opinion would be needed to exactly define how far our risks could be mitigated).
>
> The new trust respectively the new underlying company should conclude an agreement with the settlor as effective holder of the artworks which transfers the respective risks (safeguarding of artworks), as far as possible, to the client.

273 In identifying the risk mitigating measures in respect of the third option, Mr Strazzer also noted that the risk of "unauthorized payments" would not be avoided.

274 Mr Strazzer forwarded his memorandum to several colleagues, including Mr Jackman, referring back to a previous discussion in which the colleagues had identified the fact that the activities relating to the management of the art collection were something with which the defendant was "not totally comfortable". He asked Mr Jackman to review the memorandum and await some "feedback" in relation to the "client's reaction" to the proposals and alternatives.[285]

275 As at 15 April 2008, the value of the paintings held by Lynden on the basis of their purchase prices was USD 573,416,441. These paintings were by

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284 Exhibit A, Volume 1, p 515.

285 Exhibit A, Volume 1, p 513.

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various artists including Picasso, Chagall, Monet, Matisse, Kandinsky, Van Gogh, Cézanne, Renoir and Modigliani.

276 In April 2008, Mr Ditrich conducted a Compliance On Site Visit at the defendant's premises in Singapore. He reviewed the structure in relation to the purchase of artworks by the plaintiff and noted that for each purchase of artwork the "client" would sign off the invoices issued by Sotheby's or Christies and send them to the RM to arrange for payment from the Meadowsweet account. He also noted that in some instances the RM carried out the settlement directly without having received a payment instruction by the defendant representing Meadowsweet as account holder. Mr Ditrich observed that this led to UPAs which the defendant would subsequently investigate and having received a plausible explanation with corresponding documentation would authorise the settlement.

277 Mr Ditrich also observed that between April 2006 and April 2008, 245 pieces of artwork had been purchased but were not physically delivered to the defendant as trustee so that it was not able to "exercise the required control over the trust assets". He also observed that it was not possible for the defendant to "trace whether artworks have meanwhile been sold". However, he noted that if the paintings had been delivered to the defendant as trustee there would have been problems with safekeeping. Mr Ditrich regarded these arrangements as "unsatisfactory" and recorded that the situation of the trustee of the Mandalay Trust not having control over a substantial part of the trust assets had been brought to the attention of CST Group's senior management by the defendant's local senior management. Although the proposals to solve this situation had been evaluated in Mr Strazzer's memorandum and submitted to the head of Credit Suisse Moscow in August 2007, this issue had not been resolved by the time Mr Ditrich made his site visit to Singapore in April 2008.

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278 Mr Ditrich came up with the idea that because the plaintiff's letter of 27 April 2006 did not "explicitly" indicate an intention to contribute the artworks into the Mandalay Trust to be held on behalf the beneficiaries, the artworks "would not be considered to form part of the trust assets". Additionally, Mr Ditrich suggested that the payments out of the Meadowsweet account "could be regarded as distributions to the primary beneficiary. He noted that this "point of view" would need to be formally fixed in a letter of consent/understanding and submitted to the plaintiff for "sign off".[286]

279 On 13 August 2008 Ms Sim wrote to Mr Lescaudron, with copies to Ms Raschle and Mr Low advising that she was following up on the artwork owned by Lynden for which the defendant had from time to time made payments from the Meadowsweet account. Ms Sim advised Mr Lescaudron that the defendant had been informed in 2007 that the artwork would eventually be housed either in a purpose-built or business centre in Tbilisi, Georgia but that the defendant was not aware of the location of the artwork as the plaintiff had merely said that it was in "a safe place". After drawing attention to the "less than favourable" political situation in Georgia at the time, Ms Sim advised that the defendant was gravely concerned about the safety of the artwork and asked Mr Lescaudron for an update.

280 Mr Lescaudron responded to Ms Sim two weeks later advising that he had spoken to the plaintiff only on 28 August 2008 because prior to that the plaintiff had been "unreachable". Mr Lescaudron informed Ms Sim that the plaintiff had informed him that 50% of the collection was in Tbilisi in a special exposition centre which the plaintiff built and which was not open to the public,

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[286] Exhibit A, Volume 8, pp 549–550.

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and 50% was still in the plaintiff's house, 200km from Tbilisi and in "a safe area".[287]

281 Although the defendant and CS Trust AG had expressed concerns about their exposure in respect of the artworks that had been purchased by the plaintiff as early as 2006 and 2007/2008, it was not until 29 November 2012 that Ms Sim wrote to Ms Sampaoli with copies to others including Mr Birri in relation to "The Mandalay Trust – artwork".[288]

282 Ms Sim advised that after consulting both Singapore and BVI counsel, "Singapore counsel has recommended to re-state the trust deed to include investment provisions specific to the artwork".[289] Ms Sim asked Ms Sampaoli to arrange for the plaintiff to review and sign a number of documents including: a letter to the defendant in relation to the restatement of the Trust Deed, the Deed of Amendment and Restatement, a Deed of Appointment of Special Nominated Company and a Deed of Appointment of Special Investment Manager. Ms Sim advised Ms Sampaoli that the "major change" that had been effected by the Deed of Amendment and Restatement was "the addition of clause 9 and clause 9A" to the original Trust Deed (see [123]–[126] above).

283 The defendant had some difficulty in obtaining the plaintiff's signature on these documents and in April 2013 they wrote to Mr Bachiashvili seeking his "assistance" to have the documents signed by the plaintiff and returned to the defendant "as soon as possible".[290]

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287 Exhibit A, Volume 1, pp 542–543.

288 Exhibit A, Volume 3, p 108.

289 Exhibit A, Volume 3, p 108.

290 Exhibit A, Volume 3, p 243.

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284 The Deed of Amendment and Restatement is dated 5 July 2013.

Raptor shares

285 In an e-mail dated 25 October 2010, Mr Lescaudron recommended to the plaintiff that he sell two positions from his European stock and, if agreed, buy certain shares including "an American pharmaceutical company called RAPTOR PHARMACEUTICAL, whose current stock price is USD 3.45 and which we think may rise to USD 7 in 12 months".[291]

286 The plaintiff's affidavit evidence was that in 2011 Mr Lescaudron had told him about Raptor being a "very good investment opportunity" and he "knew the company well".[292] He claimed that Mr Lescaudron informed him that he was limited as to how much stock he could purchase on the Credit Suisse accounts and therefore recommended that the plaintiff purchase additional Raptor stock using his accounts with other banks.

287 The plaintiff followed Mr Lescaudron's recommendation and purchased Raptor stock in accounts with two other banks, Coutts Bank and Cartu Bank. On 14 June 2011, Coutts Bank confirmed that it had completed an order for the plaintiff by purchasing 74,755 shares at USD 6.2852 totalling USD 469,850.13.[293]

288 After Mr Bachiashvili took over as the plaintiff's personal assistant, he had communications with Mr Lescaudron about Raptor shares. On 8 August 2013 Mr Lescaudron wrote to Mr Bachiashvili informing him that he had

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291 Exhibit 1, Volume 24, p 87.

292 BI, para 106.

293 BI, Tab 25.

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advised the plaintiff eighteen months ago to buy Raptor shares "because I expected a sharp rise in the stock price for the next 3 years".[294] He advised him that the shares were purchased at around USD 5.50 and that he knew that the plaintiff had purchased stock in other banks. He also advised Mr Bachiashvili that this was "a bit confidential" and that was why he was writing to him from his "personal email". Mr Lescaudron noted that as he had expected (or predicted) the stock had risen significantly to the then current price of USD 10.16 and advised as follows:

> In fact this story is not over and we could say that it is only the beginning. I could write you a full report on the investment rationale (tell me if you need it) but to make it short there is an extremely low downside risk and a very high potential up, 3 to 5 times the current price.
>
> My own target for 2014 is a minimum of 22 usd and no real maximum. More over the company is a candidate for a take-over and could be bought out at any time. I guarantee you that these statements are not the results of insider information whatsoever. This is the result of deep analysis, meetings with the management team of the company and knowledge of the pharma sector
>
> Therefore, and that is the reason for this email, in case Mr BI has still the stock in the other banks and even though the accumulated profit is very high, I would highly advise you to keep this stock for a while
>
> I would be pleased to share my knowledge for this business case with you should you wish to know more. Let me know if you need more info.

289 In response to Mr Bachiashvili's request for more information on the stock Mr Lescaudron advised that the stock should continue to grow and probably peak at USD 35/40 in 2015/2016 but "could drop of course, in case global markets become very bad". However, he highly recommended keeping the stock and "to 'play' the different news that will come during the next 15/18

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294 BI, p 510.

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months", which could propel the stock "much much higher".[295] Mr Bachiashvili responded by observing that this was "very interesting" and that he would "include the info in the update to the [plaintiff]".[296]

290 Mr Bachiashvili gave evidence that he believed that he spoke to the plaintiff and informed him that he had received an e-mail from Mr Lescaudron about the investment and that it was "doing pretty well".[297]

291 As Raptor was a United States company, it was necessary to file relevant documents with the United States Securities and Exchange Commission ("SEC") under the *Securities Exchange Act 1934*. The plaintiff and Mr Bachiashvili signed one of these documents for the year 2013 which identified the plaintiff as beneficially owning 3,619,987 Raptor shares or 5.8% of the company. It also identified Mr Bachiashvili as holding 3,052,250 shares or 4.89% of the company. Others who were identified in the SEC document as owning shares were Soothsayer (567,737 shares or 0.91% of the company); Meadowsweet (3,052,250 shares or 4.89% of the company); and the defendant (3,619,987 shares or 5.8% of the company) "in its capacity as trustee of the Trust" and disclaiming beneficial ownership of the ordinary shares. That document recorded Mr Bachiashvili as the "investment manager of the Trust".[298]

292 In a similar document that was filed with the SEC for the following year, the plaintiff, Mr Bachiashvili, Meadowsweet and the defendant were all

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295 Exhibit 1, Volume 3, p 351.

296 Exhibit A, Volume 3, p 350.

297 Transcript, 9 September 2022, p 90.

298 Exhibit 1, Volume 8, pp 93–95.

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identified as beneficial owners of 3,445,000 shares, or 5.51% of Raptor, each. Once again, the document identified the defendant as holding the shares as trustee of the Mandalay Trust and not as the beneficial owner of the shares.[299]

293 When Mr Bachiashvili was asked about these documents in cross-examination, he said that he did not hold the shares as beneficial owner but as the "investment manager of the Trust".[300] He said that he understood what the document was about and he signed it.[301]

294 There is no issue that from around May 2010 onwards Mr Lescaudron began purchasing shares in Raptor using Trust moneys without authorisation. By December 2012, 16.95% of the Trust assets were invested directly (through direct purchases of shares or options) or indirectly (through funds which invested solely or predominantly in Raptor). That figure increased to 56.52% in November 2013 and remained above 40% until September 2015, with highs of 76.24% in June 2015 and 78.91% in August 2015.[302]

295 From around October 2011, Internal Audit conducted an investigation, the report of which included the observation that seven of Mr Lescaudron's clients were investing in companies, including Raptor, despite the fact that they were "non-advised" investments.[303] It also reported that Mr Lescaudron's clients owned 24% of the shares in Raptor, notwithstanding that they were not in the Bank's "product buffet".[304]

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299 Exhibit 1, Volume 8, p 105.

300 Transcript, 9 September 2022, p 92.

301 Transcript, 9 September 2022, p 93.

302 Exhibit PX1, Appendix 6.5.1.

303 Exhibit A, Volume 2, pp 464–468.

304 Exhibit A, Volume 2, p 474.

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296 In February 2012 Internal Audit noted that Raptor was being traded in very high volumes by Mr Lescaudron and that he was placing "bulk orders".[305] It was concluded that he was taking some investment initiatives without orders being documented and he was managing some of the accounts "on a semi-discretionary basis".[306]

297 There were further investigations into Mr Lescaudron's trading activity in Raptor. It was noted that Mr Lescaudron started buying shares in Raptor on his personal account on 30 April 2010 after which a few of his "important clients" started to buy significant amounts of the shares on 28 July 2010. It was also noted that Mr Lescaudron sold his position on Raptor with a gain over a period of one year while his customers were still "massively buying" resulting in those clients together owning 19% of the company. Mr Lescaudron purchased Raptor shares on his personal account again on 17 May 2012.

298 Internal Audit noted that the Raptor share was "quite illiquid" and that the customers who had purchased the shares appeared not to know each other. It concluded that Mr Lescaudron had "misused inside/sensitive information" to generate a gain for himself and that he should not be trading those shares for himself.[307]

299 These matters were escalated to the compliance team of Credit Suisse on 22 June 2012. As a result of these investigations, it was decided in November 2012 that "disciplinary measures" would be taken against Mr Lescaudron which

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305 Exhibit A, Volume 1, p 44.

306 Exhibit A, Volume 2, p 497.

307 Exhibit A, Volume 2, pp 620–621.

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included a written warning, "ring-fencing" and the removal of his direct supervisor.

300 On 22 November 2013 an officer of CS Life, who confirmed that CS Life had been informed that it held a significant position in Raptor, asked Ms Sampaoli to inform Mr Lescaudron that "no further investments" linked to CS Life were allowed until explicit pre-approval from it was obtained.[308] Ms Sampaoli forwarded that request on to Mr Lescaudron.[309] However, Mr Lescaudron advised her that the position would be gradually reduced to less than 5% from 25 November 2013, which would probably take two to three months.[310]

301 This did not satisfy CS Life and Mr Lescaudron gave the excuse that he thought it was only the initial position purchased that was to be reduced. At the end of January 2014 Mr Lescaudron said that he understood that the whole position was to be reduced and he agreed to do so on a "monthly basis". Ms Sampaoli advised that the reason for Mr Lescaudron's conduct was due to a good trading opportunity for the client and it would "not happen again".[311]

302 The problem continued into August 2014 when Mr Lescaudron was advised once again to urgently reduce the position after CS Life had been informed that it then held 11.07% of the shares in Raptor.

303 The problem continued. Ms Sampaoli was asked on a number of occasions to advise Mr Lescaudron to reduce the position and not to purchase

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308 Exhibit A, Volume 3, p 467.

309 Exhibit A, Volume 3, p 471.

310 Exhibit A, Volume 3, p 474.

311 Exhibit A, Volume 3, p 509.

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any further Raptor shares. Ms Sampaoli agreed that she knew that this was an issue that was causing concern within Credit Suisse, but when asked whether she knew it was a serious issue, she said she did not see it that way.[312] She sought to explain it on the basis that she thought that CS Life was merely trying to avoid a threshold so they did not have to make a report. She accepted that CS Life wanted Mr Lescaudron to reduce the position and gave the following evidence:[313]

> Q. Even after being warned again, Mr Patrice Lescaudron was now buying even more Raptor shares. Correct?
>
> A. Yes, correct.
>
> Q. Were you not worried when you saw this email that Patrice Lescaudron was simply ignoring the rules?
>
> A. No, because a client can choose to trade, you know, if he finds it's a good opportunity or if he feels that there is a potential for growth, he is free to invest more money in a selective company.
>
> …
>
> Q. And the previous emails also raise concern about the levels of the Raptor shares, right?
>
> A. Correct.
>
> Q. Do you mean that just because there was also a reporting issue, you did not think it was a serious matter?
>
> A. My-- my recollection of the facts is that if it had been a serious issue, Credit Suisse Life would've gone directly to Credit Suisse. This was my understanding. They just wanted me to raise this to the RM, but I didn't see it as such a serious issue.
>
> Q. When you are copied on emails that say that this is a "very urgent and important topic", you think it's not serious?

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312 Transcript, 15 September 2022, p 4.

313 Transcript, 15 September 2022, pp 5–7.

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> A. I don't think it's not serious, it's not correct. It can be serious, but sometimes you are receiving messages where it says "it's serious" and "it's so serious". So my recollection of the facts was that at the time, I thought this was not a serious issue, otherwise Credit Suisse Life would have gone directly to the bank. This was my understanding at the time.
>
> Q. You knew that Patrice Lescaudron had again disregarded instructions to reduce the position. You knew that, right?
>
> A. Yes.

304 The Raptor trading and the shortfalls in the various accounts converged in September 2015. The 10% threshold was once again reached in the CS Life accounts and the price of Raptor shares collapsed. The consequence of this was that margin calls were triggered on the Trust accounts.

Bonus payments

305 It is not in issue that the plaintiff paid Mr Lescaudron what have been described as "bonus payments" over a period of some years. The plaintiff had thought it was "accepted practice" until Mr Bachiashvili became his assistant and advised him otherwise after which the payments ceased in 2012. The defendant submitted that it is rather striking that there is no allegation that the plaintiff has been defrauded of the bonus payments that he gave to Mr Lescaudron. It submitted that the plaintiff was remunerating Mr Lescaudron for something "of value" which the plaintiff genuinely believed that Mr Lescaudron provided to him: the management of the assets in the Mandalay Trust and advice on investment matters. It was submitted that this is why he considered it appropriate to privately remunerate Mr Lescaudron and this may

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be an explanation for why the plaintiff chose not to monitor and manage the Trust assets closely.[314]

A proposed change

306 On 11 August 2011 Mr Lescaudron purportedly wrote by e-mail to the plaintiff referring to their conversation of the previous day and advising as follows:[315]

> The situation is of course very bad because the world's stock markets have lost between 20% and 30% in 2 weeks, which has been extremely violent. Russian stocks have lost the most and as you have a lot of them, your portfolios have suffered a lot. However you have a big gold position in Singapore and gold has risen a lot, so the Singapore portfolio is only down 13% instead of 25%.
>
> Following our conversation yesterday, please be advised that I've spoken with Singapore to transfer USD 100 million from Singapore to Switzerland. The transfer process will be ready by the end of the month.

307 On 15 August 2011, the plaintiff's then assistant, Mr Khukhunashvili, wrote by e-mail to Mr Lescaudron in the following terms (in which "Boris" is a reference to the plaintiff):[316]

> Boris asked me to apply for your expertise and discuss opportunities for managing his Geneva assets that he used to manage himself. Reason is that at present he does not have enough time to dedicate to the portfolio so he would rather let a professional hedge fund do the job. It could be either someone in CS or an outsider, but the managed portfolio should not leave the bank. After we pick several possibilities, we review them with Boris.
>
> I may know very little of hedge funds, so please bear with my questions:

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314 DCS, paras 266–269.

315 Exhibit 2, p 92.

316 Exhibit 1, Volume 1, pp 581–582.

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> Should we go with an offshore manager or UCITS?
>
> Single manager or a portfolio?
>
> Managed account?
>
> Strategies?
>
> Please let me know your thoughts and when it is good time to discuss.

308 The plaintiff was asked whether he requested his assistant Mr Khukhunashvili to write this e-mail. His evidence on this topic included that it was "a very strange letter" and one it was "unimaginable" that he would have asked to be sent to Mr Lescaudron, because of the suggestion that he was managing Geneva assets.

309 The plaintiff's evidence was relevantly:[317]

> But then my main objection to this letter is that I was not managing the Geneva assets at the time of this letter. I have stopped managing in 2008, I got rid of all the assets I had been managing before that, and since 2008 I have not been managing them anymore. So it's impossible that I would ask them in 2011 to start managing the assets I was managing then, because it just did not happen.
>
> And just to clarify, even before 2008, I was managing only Russian assets, Russian part of assets, which was less than half of the entire amount. So over $650 million assets which were not Russian, they were always managed by Credit Suisse itself. So even before that, I was managing only part, only Russian part of the assets, and after 2008 I didn't manage any assets at all.

310 On 3 October 2011 Mr Khukhunashvili wrote by e-mail to the plaintiff on the topic of "hedge funds" advising that Mr Lescaudron agreed that "risky assets have already reached, or nearly reached, the bottom" and that "now may be the best time to invest in hedge funds". The evidence establishes that this was

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317 Transcript, 7 September 2022, pp 44–45.

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an error as Mr Lescaudron had advised that "now is not the best timing to invest".[318] Mr Khukhunashvili observed that the "Swiss portfolio" was "100% invested in stocks, most of which are Russian stocks that have already fallen by 30-50%" and that "[u]nder the right conditions Russian stocks may grow by 30% in several weeks".[319]

311 It was suggested to the plaintiff in cross-examination that this communication demonstrates that his evidence that he stopped managing the Russian stocks in 2008 and gave instructions that they be sold cannot be accepted. However, the plaintiff reiterated that evidence, noting that he had not had any real contact with the Russian market since he stopped managing the stock in 2008. He observed that Mr Lescaudron had contacts in and visited Russia regularly and suggested that he and the defendant were not constrained by him from purchasing Russian stocks.[320]

312 The plaintiff agreed that discussions with Mr Lescaudron did occur in relation to the establishment of a hedge fund and that such a proposal was subsequently implemented. [321] However, he remained staunch in his denial that he was managing the Geneva assets as described in Mr Khukhunashvili's e-mail.

313 In 2011, the plaintiff was busy. He was involved in politics, campaigning for the political party that he had established, Georgia Dream. He

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318 Exhibit 1, Volume 1, p 701.

319 Exhibit 1 Volume 2, p 49.

320 Transcript, 6 September 2022, pp 83–86.

321 Transcript, 7 September 2022, pp 43–45.

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was successful at the election and was elected Prime Minister of Georgia in 2012 with an arrangement that he would serve as Prime Minister for one year.

Georgian Cooperation Fund

314 In March or April 2013, the plaintiff advised Mr Bachiashvili that he wanted to use the Cartu Group (which he had established) to boost foreign investment in Georgia for the benefit of the economy generally. They decided that the Georgian Cooperation Fund ("GCF") be set up and used for this purpose. Work was started on this proposal and in September 2013 the GCF was established. Mr Bachiashvili was and is the 100% beneficial owner of the GCF through a holding company and the plaintiff is the investor.[322]

315 On 11 April 2014 a letter apparently signed by the plaintiff as "Investment Manager" was sent to the defendant. It was headed "Letter of Recommendation in relation to the investment in GCF LP".

316 The opening paragraph of the letter recorded: "I am writing to you as the Investment Manager of the Mandalay Trust having been appointed on 7 March 2005 pursuant to clause 9(d) of the Trust Deed".[323] There is an ambiguity to this statement. It might be read as the plaintiff claiming that he was appointed on 7 March 2005 pursuant to clause 9(d) of the Trust Deed. Alternatively, it might be read as the plaintiff claiming that he had been appointed on that date and was writing the letter pursuant to clause 9(d) of the Trust Deed.

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322 BI, para 26; George Bachiashvili's AEIC 3 February 2022 ("GB"), paras 10–11.

323 Exhibit 2, p 579.

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317 An assessment of whether it was the former rather than the latter reading that was intended would consider the next sentence in the letter which was in the following terms:[324]

> So long as the Investment Manager appointed under clause 9(d) of the Trust Deed shall act as the Investment Manager, the Trustees shall not under any circumstances be liable for any loss or diminution in the value of the Trust Fund whatsoever or howsoever caused, including as a result of acting on the recommendations of the Investment Manager.

318 The Trust Deed that was in force on 7 March 2005 did not have a clause 9(d). The Deed of Amendment and Restatement, however, did have a clause 9(d). Clause 9(d) of The Deed of Amendment and Restatement is not a clause by which the Investment Manager is appointed but rather a clause authorising the Investment Manager to give to the Trustees "directions' to execute the Investment Manager's investment and asset management decisions.[325]

319 The plaintiff was not appointed as Investment Manager pursuant to clause 9(d) of either the Trust Deed or the Deed of Amendment and Restatement. The only document purporting to appoint the plaintiff as "Investment Manager to the Mandalay Trust" is the minute of the defendant's Trust Committee of 7 March 2005 recording the resolution to so appoint him (see [113] above).[326]

320 In any event, the letter records that "Pursuant to the powers under the Trust Deed" the plaintiff "would like to recommend" that Meadowsweet make

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324 Exhibit 2, p 579.

325 Exhibit A, Volume 3, p 398.

326 Exhibit A, Volume 1, p 139.

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a USD 100m investment in GCF with a subscription date of 14 April 2014. It also included the following:

> In recommending that the Company make the Investment I, as Investment manager, hereby:
>
> …
>
> 4. Instruct that the Directors of the Company complete where necessary the Private Placement Documents in order to subscribe for the Investment and provide all necessary information and documentation to expedite the Investment as well as the payment of the capital commitment and any additional fees or payments as specified in the Private Placement Documents and in doing so I hereby makes the same representations, warranties and covenants which an investor/subscriber is required to make within the Private Placement Documents

321 The letter concluded with the plaintiff undertaking to indemnify Meadowsweet, its directors and employees in relation to the investment.

322 The investment was made and any profits that were made were reinvested into the GCF.[327]

323 This letter is relied upon by the defendant in support of its claims that it did not have any investment powers and the plaintiff was managing the investment of the Trust Assets.

Loan to shareholders of TBC Bank

324 On 7 April 2014 Mr Bachiashvili wrote by e-mail to Mr Lescaudron referring to an earlier communication two weeks previously in which he advised that the plaintiff was "looking at lending up to $100M to the shareholders" of

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[327] Transcript, 8 September 2022, p 4.

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Georgia's second largest bank, TBC Bank. This e-mail was headed "100Mn USD loan facility".[328]

325 Mr Bachiashvili advised that TBC Bank was "going to IPO" and the shareholders wished to purchase shares at IPO. He advised that the transfer would be made directly to the shareholders' brokerage account one or two days before the IPO so that the broker could guarantee that the amount "will be used irrevocably to purchase shares at IPO "which will be pledged right away".

326 Mr Bachiashvili asked that the "CS team" draft two agreements (one between borrower and lender and the other with the broker regarding the pledge) or a three-way agreement between borrower, lender and broker. He requested that this should occur "right away, as we have a tight timetable before IPO".[329]

327 This communication made no mention of the source of funds for the loan, whether from the Trust Fund or the plaintiff's personal accounts. However, the plaintiff's evidence was somewhat equivocal as to whether it was through the Trust.[330]

CS Life Meadowsweet Policies

328 On 31 March 2011 at a meeting with the plaintiff in Georgia, attended by Ms Sampaoli, Mr Lescaudron, Mr Felipe Godard (Mr Lescaudron's then superior) and Mr Gharibashvili (the plaintiff's then assistant), Ms Sampaoli proposed that the plaintiff take out an insurance policy with CS Life (the "CS Life Meadowsweet Policy") by investing an insurance premium through the

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328 Exhibit 2, p 477.

329 Exhibit 2, p 478.

330 Transcript, 8 September 2022, pp 20–21.

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Bank which would provide benefits such as life insurance and savings on stamp duty.[331] CS Life had calculated that the plaintiff could save significant sums on stamp duty by investing in the CS Life Meadowsweet Policy.[332]

329 It was suggested to the plaintiff that while the assets would take the form of an insurance premium to be held in an account with the Bank, it could be managed by the plaintiff or any person chosen by him.

330 On 2 April 2011, the plaintiff signed a letter of wishes which included that: Meadowsweet sign the CS Life Meadowsweet Policy application form; the policyholder should be Meadowsweet; the insured person should be the plaintiff; the beneficiary should be Meadowsweet; and once CS Life opened its account with the Bank, all assets then held by Meadowsweet in the Bank were to be transferred to that new account.[333] Finally, the letter recorded that the plaintiff wished to be appointed the investment manager for the CS Life Meadowsweet Policy. [334]

331 On 8 April 2011 the plaintiff signed the application form which recorded that the CS Life Meadowsweet Policy was to be held in the name of Meadowsweet with the plaintiff as the insured person and Meadowsweet as the beneficiary.[335] There was to be a single premium of USD 363m.[336] On the same day a LPOA was signed by CS Life, appointing Meadowsweet as its attorney to deal with the Bank in relation to investments under the CS Life Meadowsweet

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331 Transcript, 13 September 2022, p 134 lines 10–15 and p 140 lines 22–24.

332 JNS, para 13(b).

333 BI, para 100.

334 BI, p 404.

335 Exhibit 1, Volume 1, p 453.

336 Exhibit 1, Volume 1, p 454.

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Policy.[337] Another document was also signed on that date, sub-delegating Meadowsweet's power under the LPOA to the plaintiff.[338] Although there is no real issue that the plaintiff signed this document, his evidence was that he did not remember signing it.[339]

332 On 7 November 2011, the CS Life Meadowsweet Policy was issued with a commencement date of 25 October 2011.[340] The single premium was USD 480,267,313 paid from Meadowsweet's accounts with the Bank.[341]

333 In addition to the CS Life Meadowsweet Policy, the plaintiff held another life insurance policy with CS Life (the "CS Life Sandcay Policy"). The single premium payment for the CS Life Sandcay Policy was USD 275,075,927.[342]

334 The plaintiffs commenced proceedings in the Supreme Court of Bermuda against CS Life in respect of losses from the two CS Life Policies claiming that the Bank became aware of Mr Lescaudron's wrongdoings as early as 2011 but failed to take any steps to stop him or investigate his conduct properly (the "Bermuda Proceedings"). The plaintiffs' primary claim was for damages of USD 553.86m.

335 Chief Justice Hargun found that CS Life did not take adequate action to prevent Mr Lescaudron's fraudulent mismanagement of the plaintiffs' assets

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337 Exhibit 1, Volume 1, at p 462.

338 Exhibit 1, Volume 1, at pp 463–465.

339 BI, para 86.

340 BI, p 454.

341 Defence (Amendment No 4), para 37; Reply (Amendment No 4), para 25.

342 Exhibit A, Volume 10, p 414 (the Bermuda Judgment at [58]).

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under the two CS Life Policies. CS Life was held to be in breach of its contractual obligations and fiduciary duties owed to the plaintiffs and that the plaintiffs were entitled to damages amounting to the difference between the value of the CS Life Policies and the value that would have been achieved if those assets had been invested in a medium risk portfolio from inception.[343] An appeal is pending.

The fraud is discovered

336 It is not in issue that in 2015 after margin calls were made in consequence of the collapse in the value of the Raptor shares, the defendant discovered that Mr Lescaudron had been involved in fraudulent activities involving the Mandalay Trust. It is also not in issue that the defendant did not notify the plaintiff of this discovery at that time.

337 On 15 September 2015 Mr Bachiashvili wrote to the Bank and the defendant confirming information that had been provided to him that day which included that: there was a margin call of USD 4m because "of the sudden drop of share price of Raptor"; there were roughly 14.2m shares which represented 18% of the total share capital of Raptor; the initial purchase of the shares and the total amount was explicitly agreed and approved by the plaintiff; and there was buy and sell activity on the accounts for the Raptor shares in the past 24 months. He also confirmed that the Bank had suggested that: USD 10m worth of other shares should be sold; the sale proceeds should be transferred to cover the margin call; and two of the hedge fund investments should be moved in order to replenish funds elsewhere.

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343 Exhibit A Volume 10, pp 672–674 (The Bermuda Judgment at [758]–[760]).

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338 Mr Bachiashvili asked for information so that he and the plaintiff could have a "more thorough analysis" which included the following: (i) historic buying and selling activity for Raptor shares for all accounts and structures; (ii) documentation orders signed by the plaintiff or the managers regarding the shares; (iii) the direct contact details of the analyst in Credit Suisse covering Raptor so that he could talk to them; (iv) the latest research notes on Raptor; (v) the investment thesis of why the position was in the portfolio, why it was attributed its current weighting and when it was last rebalanced; (vi) the details of the availability of any bulk buy orders; (vii) information for out of the money put protection in the market, availability and duration; (viii) an estimate of time for a program sell with no market impact to liquidate half of the position (in days); and (ix) a list of the top 20 shareholders in Raptor.[344]

339 Mr Bachiashvili informed the Bank and the defendant that he had a "20 minute call" with the plaintiff and had given him the information recorded in the confirmatory e-mail. He advised that his reaction was "very negative" and listed "the main points" that the plaintiff had raised. Those points are important as they are relied upon by the defendant to suggest that they demonstrate that the plaintiff was managing the assets in the Mandalay Trust. Those points as recorded by Mr Bachiashvili were as follows:[345]

> 1. It was the first time he found out of the size of the total exposure to the company (170Mn USD before the fall). (Frankly I was also very surprised by this)
>
> 2. He doesn't remember giving approval to this size of exposure on any of the shares. He also doesn't recall any document/order of that magnitude (although he recalls that this company has been mentioned and he had agreed to some exposure)?

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344 Exhibit 1, Volume 9, p 626.

345 Exhibit A, Volume 9, p 627.

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> 3. Even if he had approved such a purchase 7 years back, he does not understand why has the position been kept for this long and why were there additional purchases since then? According to the new mandate which was signed in the 2012/2013 he was not supposed to actively manage any part of the portfolio therefore CS investment team was responsible for managing (disposing or otherwise) any shares which were bought before (with or without direct order of the BO)?
>
> 4. How would CS risk department let you hold for 6-7 years a single stock representing 50% of all clients equity investments? This is not normal? Moreover, if we calculate what share it represents in the US Equities part of the portfolio this would be a scary number. (Please correct me if I am wrong)
>
> 5. What was the information you had about the company and what control did you have over it (while holding 18%). The BO doesn't understand how could one have 18% in the company without any control of the company?
>
> 6. And why were there any purchases made in the recent months? Who decided to even further increase the exposure?
>
> Dear Cedric and team, it is very unpleasant for me to have such a conversation, however in our opinion there has been a serious failure on several levels. I hope you will be able to address this issue in great detail and provide explanations. BO is thinking of launching a serious investigation of this matter.
>
> Until he has more explanations he refused to talk about the margin call part of the conversation (and given the relation we have I kindly suggest to wait until there is a concrete remedy and action plan).

340 By this time, Mr Lescaudron had been removed from his position as RM for the plaintiff.

341 On 22 September 2015 Ms Sampaoli received a copy of an e-mail on the subject "LPI restructuring to PLF for Georgian client".[346] That e-mail noted that the plaintiff urgently needed liquidity "due to poor performance of some illiquid

346 Exhibit A, Volume 4, p 371.

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investments and a margin call on leverage granted against securities that lost 40% in value". This was a reference to the Raptor shares. The e-mail noted that Ms Sampaoli had emphasised that "the LPI structure" would "need to be exited in any case ASAP".[347]

342 On 24 September 2015 Ms Sampaoli wrote to Ms Lau and Mr Birri in the following terms:[348]

> This is to inform you that the RM of the above clients, Patrice LESCAUDRON, is not available for the moment. We do not know exactly know [*sic*] what is going on but we understand that Patrice was sick lately and that he is not reachable for the moment.
>
> His colleagues at the bank are a bit nervous since the main tasks were only done by Patrice. His boss and his personal assistants are now dealing with all issues and talking to George [Bachiashvili] and to the clients. On my side, I have not heard anything from the client or his advisors.
>
> As soon as I know more, I will inform you.

343 On 25 September 2015 Ms Lau responded to Ms Sampaoli with a copy to Mr Birri informing Ms Sampaoli that she was really "sorry to hear of Patrice being unwell" and observing that he is "instrumental" in the client relationship.[349] Ms Lau asked Ms Sampaoli to let her know if there was anything with which she could assist.

344 Ms Sampaoli gave the following evidence in respect of these events and communications:[350]

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347 Exhibit A, Volume 4, p 371.

348 Exhibit A, Volume 10, p 165.

349 Exhibit A, Volume 10, p 164.

350 Transcript, 15 September 2022, pp 90–93.

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Q. So didn't the trustee need to know as soon as possible?

A. Yes, I would imagine so, yes.

Q. So you would've told them?

A. Yes.

Q. Wouldn't Mr Ivanishvili have to know right away?

A. Yes, I agree.

Q. Was he told right away?

A. I don't know.

Q. Did you tell him right away?

A. I didn't.

Court. You did not?

A. I did not.

Q. You knew Patrice Lescaudron was no longer in the picture. You were left as the only person with direct contact with Mr Ivanishvili, but you did not tell him promptly about this news. Correct?

A. Correct.

…

Q. Now why didn't you tell him right away?

A. I don't remember in detail how this happened but I know that our line managers and our CEO was involved and it was my impression that they would take care of everything.

Q. They would-- you thought that they would tell Mr Ivanishvili?

A. Yes, correct.

Q. You thought it was their job?

A. Yes.

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> Q. These are people in Credit Suisse Trust Switzerland, right?
>
> A. Correct.
>
> Q. So you expected that they would tell Mr Ivanishvili not the Singapore trustees?
>
> A. I would expect that they would inform the client and the trustees.
>
> …
>
> Q. Ms Sampaoli, you agree that once the trustee knows of these, this news, they would have to tell the client, correct?
>
> A. Yes, correct.
>
> Q. And you understood that people senior to you in the CS Trust organisation in Switzerland would be doing that?
>
> A. Correct.

345 Ms Sampaoli was asked about her e-mail to Ms Lau, and in particular the reference to Mr Lescaudron being "sick lately". It was suggested that she was not being candid with the defendant and gave the following evidence:[351]

> Q. Ms Sampaoli you were withholding information from the trustee, isn't that right?
>
> A. I don't think so. No, I wasn't because I was not told exactly what'd happened, so I didn't know.
>
> Q. Ms Sampaoli you knew that there had been a margin call right?
>
> A. Yes. The margin call, yes.
>
> Q. You didn't mention that to your colleagues at the trustee, right?
>
> A. No, I didn't.
>
> Q. You knew that Patrice Lescaudron was no longer in charge, correct?

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[351] Transcript, 15 September 2022, pp 94–97.

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A. Correct.

Q. You did not tell that to your colleagues at the trustee right?

A. Yes, I'm saying in this message that he's no longer--what do I say sorry.

…

Court. The question was that you were withholding things, information, that is from the trustee.

A. No, I don't agree.

…

Q. You had been told that Patrice Lescaudron was no longer in charge. You did not tell your colleagues at the trustee that, did you?

A. No.

Q. In fact, you told them that he wasn't around because he was sick. That's what you told them, right?

A. Yes, because this is the initial information we had received.

Q. But by this time, you knew the reason he was not contactable was because he was no longer in charge. Isn't that right?

A. Yes, correct.

Q. So you were saying something false to your colleagues in Singapore, were you not?

A. Yes, I agree, I was not clear in my message.

Q. No I'm not suggesting to you that you were not clear. I'm suggesting to you that you were not telling them the truth about why Patrice Lescaudron was not contactable.

A. Yes.

Q. You were lying to them, were you not?

A. No, I was not.

Q. By then, you knew it wasn't that he was sick, right, Ms Sampaoli?

A. Yes, right.

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> Q. So you lied to your colleagues at the trustees, isn't that right?
>
> A. No, I-- I didn't lie on purpose, that's for sure.
>
> Court. It was a slip, was it?
>
> A. Yes.
>
> Court. I see. Why didn't you just tell the trustee the truth?
>
> A. I don't recall.
>
> Q. Well, Ms--
>
> A. Can I add something, please?
>
> Q. Yes.
>
> A. I'm not really informed about what was going on, neither by my line managers, nor by the bank. So myself, I was really in the dark also.
>
> Court. You knew that he wasn't in charge and you didn't tell them that. You told them that he was sick, which was not the position.
>
> A. Agree.

346 On 1 October 2015 Mr Bachiashvili wrote to Ms Sampaoli referring to a telephone conversation with her earlier that day. That e-mail included the following:[352]

> Referring to our telephone conversation earlier today, I can confirm that we might be having a situation where Credit Suisse Bank or some of its employees are involved in possible fraud which has caused us serious damages. At this point to our best knowledge we are talking about losses of more than 700Mn USD.

347 Mr Bachiashvili referred to Ms Sampaoli's confirmation that "Credit Suisse Trust is representing our interests and will be acting in our best interests when protecting our assets (even if against Credit Suisse Bank)".[353] He

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352 Exhibit A, Volume 4, p 416.

353 Exhibit A, Volume 4, p 416.

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requested documentation including correspondence in "Retained Mail" and asked Ms Sampaoli to copy him in on any correspondence between the defendant and the Bank.

348 In response, Ms Sampaoli advised Mr Bachiashvili that she had forwarded his message to the "Legal Department" and would revert to him as soon as possible, at the latest early the following week. Ms Sampaoli then wrote: "In the meantime, I confirm that we will perform our fiduciary duties as Trustees".[354]

349 At this point Ms Sampaoli knew that the Retained Mail had been destroyed but did not inform Mr Bachiashvili of this fact. She agreed that she informed Mr Bachiashvili that she had no idea about the fraud and questioned how it could have happened.[355] She gave the following evidence:[356]

> Q. That wasn't entirely true, right, Ms Sampaoli?
>
> A. Yes, that's-- that's what-- was true.
>
> Q. You knew already by then there had been unauthorised trading on Raptor that caused margin calls, right?
>
> A. Yes.
>
> Q. Did you tell Mr Bachiashvili that?
>
> A. No, I didn't.
>
> Q. Did you tell him that by 22 September, one-and-a-half weeks before he learned all of this that Patrice Lescaudron was no longer in charge?
>
> A. No I didn't.
>
> …

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354 Exhibit A, Volume 4, p 416.

355 Transcript, 15 September 2022, p 102.

356 Transcript, 15 September 2022, pp 102–103.

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> Q. What, if anything, did the trustees do to protect the interests of the beneficiaries?
>
> …
>
> A. I don't know, because since the case came up, I was not authorised to discuss any issues with the client or his advisers. Our legal department was taking the lead.

350 Ms Sampaoli accepted that but for the Legal Department's involvement she would certainly have informed the plaintiff and his family of the problems that had arisen.[357]

351 It was about this time in October 2015 that Mr Guldimann commenced the process for the restatement of the financial statements. Ms Lau agreed that this was done very discreetly and that the plaintiffs were not informed that the original financial statements were being reviewed, even though they should have been informed of that process.[358]

352 Mr Guldimann created spreadsheets which tabulated the contributions and the distributions for Meadowsweet and Soothsayer. He also prepared spreadsheets to reconcile the original financial statements and the Restated Financial Statements. It is not in issue that the contribution and distribution spreadsheets identified moneys coming into and going out of the Mandalay Trust. This spreadsheet listed many transactions in which the recipient of and the supporting documents for the purported distribution were not identified. Ms Lau gave evidence in respect of these transactions which included the following:[359]

> Q. Now, if there was no documentary evidence, if there was no documentary evidence about where this money had

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357 Transcript, 15 September 2022, pp 105–106.

358 Transcript, 19 September 2022, p 198.

359 Transcript, 19 September 2022, pp 216–220.

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gone, then it would not be possible to conclude that this was a distribution to the beneficiaries; right?

A. Yes.

Q. Now, when it says "distribution", that means distribution to the beneficiaries; right?

A. Yes.

Q. Thank you. Do you know how Mr Guldimann could classify a payment to an unknown third party as a distribution to beneficiaries without any documentation? Do you know?

A. No.

Q. Would you agree with me that one would have to ask Mr Guldimann to get the answer to that question?

A. Yes.

Q. Now, if one was reclassifying a payment to an unknown third party of €15 million as a distribution to beneficiaries, that would be improper; right?

A. Yes.

…

Q. So the original financial statements say that capital distributions were 44 million, and after the restatement, they've ballooned to 81 million. Ms Lau, the trustee was not able to classify some payments as distributions previously, but now, under Mr Guldimann's magical restatement, he's able to classify them as millions, tens of millions of dollars of payments apparently to my clients. Can you explain how this happens?

A. I was not involved in the preparation, so I cannot explain.

Q. You'd agree with me that I would have to ask Mr Guldimann to get an explanation?

A. Yes.

353 After reviewing further (ultimately unread) evidence of Mr Guldimann and Ms Dawna Wright that was filed by the defendant, Mr Davies expressed the opinion that the 2017 restated accounts were "wrong" in several areas, one of which was that they treated the unauthorised transactions as loans or movements

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in loans, whereas they should have been treated as a charge to the profit and loss account. If they had been treated as a charge to the profit and loss account, the accounts should faithfully represent and explain the nature of the adjustments so that the readers of the accounts can understand them. However, no such explanations were given in those accounts.

354 Mr Davies explained that treating the unauthorised payments as repayment of the shareholder effectively brought them to account as a distribution to the beneficiaries.[360]

355 The plaintiffs submitted that the "tactical" decision made by the defendant at the last moment not to call Mr Guldimann, notwithstanding that he had filed two AEICs the contents of which had been the subject of evidence in the trial, leads to the irresistible conclusion that his evidence would have been very damaging to the defendant's case.

356 As discussed earlier at [40], Mr Davies was instructed to provide a report identifying the differences between the originally approved financial statements for the Mandalay Trust, Meadowsweet and Soothsayer for the years 2006–2014 and the Restated Financial Statements for the same period prepared by Mr Guldimann.[361]

357 Mr Davies concluded that the two main areas of changes that were consistently made in the Restated Financial Statements were the contributions and distributions in the Trust financial statements and the presentation of the

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360 Transcript, 21 September 2022, p 64.

361 Exhibit PX1, 28 July 2022, paragraph 4.1.

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value of the assets and liabilities held with the Bank in the Meadowsweet and Soothsayer financial statements.[362]

358 The changes that Mr Davies identified led him to the conclusion that the Restated Financial Statements were "substantially unrecognisable by comparison" to the original financial statements.[363]

359 The Trust capital account balance (which would allow a user to establish the net balance of cash and securities that were held on trust at the period end) was markedly different in the years 31 December 2013 and 31 December 2014, being a difference of 23.7% and 24.4% respectively. It is, accordingly, significant that such changes were made.[364]

360 The net assets balance, a key metric to a user of the Meadowsweet financial statements because it would allow the user to determine the level of assets or liabilities held at the period end, also had marked differences between the original financial statements and the Restated Financial Statements. To year end 28 February 2007 there was a difference of 20.1%. The original financial statements recorded USD 198,110,466, whereas the Restated Financial Statements recorded USD 158,224,556.

361 Significantly, as at 31 December 2009, the original financial statements recorded a deficit at USD 3,565,120 compared to the Restated Financial Statements of a deficit of USD 6,651,746, an 86.6% difference. The greatest differences were in the period ending 31 December 2013 and 31 December 2014

362 Exhibit PX1, 28 July 2022, para 4.4.

363 Exhibit PX1, 28 July 2022, para 4.11.

364 Exhibit PX1, 28 July 2022, para 4.14.

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recording differences of 1547.9% and 367.8% respectively. Similarly, the differences in the Meadowsweet profit/loss balances show differences ranging from 22.3% to 503.3%.

362 Mr Davies was also asked whether it was possible to identify the contributions and distributions that were incorrectly valued, not booked, or wrongly classified as contributions/distributions. Although Mr Davies was able to identify the differences between the original financial statements and the Restated Financial Statements in respect of contributions and distributions, such movements described as "substantial", he concluded that there was no clear correlation between the respective contribution and distribution differences. In other words, Mr Davies concluded that they did not balance out.[365]

363 Ultimately, Mr Davies could not answer the question because the documents that were provided to him did not permit the necessary analysis. One point of significance made by Mr Davies was that the beauty of accounting, and specifically double-entry book-keeping, is that if proper books and records have been maintained, every item in a set of financial statements should be supported by a transaction or series of transactions.[366]

364 However, in the present case, it appears that this was not the case. The documents were incomplete. Some contribution and distribution listings did not cover the same period as the Restated Financial Statements. Some documents contained details of the entity in which cash transactions occurred while others did not. There were instances where the value of a group of transactions did not appear to aggregate to the subtotal which was displayed beneath them. It was

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365 Exhibit PX1, 28 July 2022, paras 6.1–6.6.

366 Exhibit PX1, 28 July 2022, para 6.8.

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also unclear why those instances occurred and whether they should be taken into account in any analysis. Mr Davies also concluded that there were comments within some of the listings of contributions and distributions which introduced uncertainty as to their validity and many of the documents included a covering e-mail that did not include any background as to what the listing contained or the original purpose of the listing.[367]

365 As discussed earlier, Mr Guldimann did not commence his work until 2015. By this time, Mr Lescaudron had been engaging in fraudulent activity for at least 8 years. Obviously, the records that were kept by the Trust and/or on behalf of the Trust needed rectification by the very reason of Mr Guldimann's production of the Restated Financial Statements. The motivation for that exercise is in issue.

366 The work that Mr Guldimann did from 2015 onwards is work that, if done in 2008 or even 2009, would have alerted the defendant at the very least, to the need to rectify its records that were obviously wanting.

367 The mechanisms or tools that are used by a trustee to safeguard the trust assets are obviously a matter for the trustee within the confines of the trust arrangement and obligations to the beneficiaries. However, an integral part of that mechanism is accurate financial statements and the capacity to check the accuracy of those statements. It would seem on the evidence produced by Mr Davies in reliance upon Mr Guldimann's work that such a mechanism was not properly in place to enable the defendant to make the proper assessment for the purposes of safeguarding the plaintiffs' Trust assets.

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[367] Exhibit PX1, 28 July 2022, para 6.10.

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368 The plaintiffs submitted that apart from breaching its duties to the plaintiffs, the defendant sought to conceal the fraud on the trust accounts. It was submitted that not only did it not provide proper accounting to the plaintiffs, but it also positively sought to cover up the unauthorised payments by categorising them as proper distributions.

369 The plaintiffs submitted that the defendant's opportunistic and dishonest conduct in using the account restatement exercise to reclassify payments to unknown third parties as distributions to the beneficiaries amounted not just to a breach of the defendant's duties as trustee to account to the plaintiffs, but also a breach of the defendant trustee's irreducible core duties to act honestly and in good faith.[368]

The defendant's attitude

370 One matter of some significance is the defendant's attitude to moneys leaving the Trust without: (a) its authorisation; (b) knowledge of the settlor's/beneficiaries' wishes; (c) knowledge of the reason for the payment; or (d) the identity of the recipient of the funds.

371 The intricacies of effecting business transactions and trust transactions in different time zones in the international or global structure of the operations of the CS Group caused it to recognise that there may be delays in achieving some necessary steps in such transactions.

372 It was in 2010 that the CST Group published the Guideline in respect of UPAs.[369] Although that Guideline refers to these unauthorised payments

368 PCS, paras 548–541.

369 DB, para 38 and Tab 13.

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presenting "elevated legal, regulatory and reputational risks" for the CST Group and notes that they "seriously jeopardise" the "due diligence framework", there is no express statement of recognition that such payments will or could cause a serious breach of a trustee's obligation to safeguard the Trust assets. Indeed, the defendant's Head of Trust Management and overall Centre Head and Executive Director from 2011 until 2015, Mr Birri, described UPAs as "a breach of administrative and formality procedures"[370] and "procedural lapses"[371] rather than any indication of the possibility of fraudulent activity. Although he did accept in cross-examination that one would not know if UPAs were merely procedural lapses unless the transactions were investigated.[372]

373 Mr Birri was the only senior officer of director status of the defendant who was called to give evidence in the proceedings. He left the defendant's employ in 2015. He was brought into the defendant's operations to replace Mr Peter Leppard in October or November 2011 because of "negative reports" on the defendant.[373]

374 A Credit Suisse Best Practice Guideline of 10 April 2007 entitled "Duties and Responsibilities of Trustees, Foundation Councils and Company Directors" dealt with numerous matters including the verification of assets as follows:[374]

> **5 Verifying the assets**
>
> All assets owned by a trust/foundation/company must be registered in its name or indisputably held to its order. In the

370 DB, para 39.

371 Dominik Birri's Supplementary AEIC, para 33.

372 Transcript, 12 September 2022, pp 52–53.

373 Transcript, 9 September 2022, pp 143–144; Exhibit A, Volume 8, pp 376, 685 and 694.

374 Exhibit A, Volume 11, pp 363–364.

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> case of a trust, this may be in the trustee's name, or preferably in the name of an underlying, wholly owned company. Where assets are registered in the name of a nominee company, a confirmation/agreement should be obtained that the nominee is holding the assets to the order of the trustees/entity concerned. Furthermore, all assets owned should at all times be under the full control of CST and held separately from assets belonging to other trusts/foundations. Confirmation should be obtained as to the location of the assets and documents of title also obtained.

375 The guideline recorded that it was necessary to "always review the investments regularly and record/minute the results of that review". It provided a checklist for various aspects of the defendant's operation. Where the function of investment management was to be delegated, the checklist included that the defendant should ensure that the investment manager was reputable and competent. Some of the questions that needed to be asked and answered were whether the individual was: a professional investment manager; related to the principal; possessed an investment management qualification with a track record in investment management; or experienced in investment management. The checklist also included the following:[375]

> Consider the controlling influence over the assets. This must be under the full control of CST at all times. Ensure that the Principal and the beneficiaries are aware of this from the outset in order to avoid problems later on.

376 Mr Birri gave the following evidence in relation to assets being held by a nominee company or a company controlled by the defendant:[376]

> Q. But despite being held by the underlying company, the assets were still regarded as trust assets, correct?
>
> A. Yes.
>
> …

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375 Exhibit A, Volume 11, p 370.

376 Transcript, 12 September 2022, pp 29–31.

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> Q. Those assets would still be under the full control of the defendant even though there was an underlying company holding the assets. Correct?
>
> A. Yes, when there was an underlying company, where we were directors, then it was still under our full control. That's right.
>
> …
>
> Q. Just for clarity, what was set up in respect of The Mandalay Trust was that the assets were held by nominee companies that were under the control of the defendant trustee?
>
> A. The assets were under our manco, we call them, managed companies, meaning that CST directors were controlling those companies.

377 When Mr Birri took up his role in the defendant's operations in Singapore, the UPAs were a continuing issue. In February 2012, the Global Head of Trust Management advised him that action was required to stop UPAs.[377] It was decided that a letter would be sent to the Bank seeking an explanation for the transfer of funds without the defendant's authorisation in an attempt to stop the UPAs on the Mandalay Trust accounts (this is the letter referred to at [203] above).[378] Mr Birri agreed that there was no reason why such letters could not have been sent earlier.[379]

378 As mentioned above, Ms Sampaoli entered the debate about the letters and suggested that: "CS estimates the potential for 2012-2013 with this client to USD 1.5 billion. The Bank wants to grow this relationship and, therefore, we should support it". Mr Birri accepted that Mr Sampaoli's e-mail conveyed the message that he should not "rock the boat" or Credit Suisse would lose out.[380]

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377 Transcript, 12 September 2022, p 61.

378 Transcript, 12 September 2022, pp 63–65.

379 Transcript, 12 September 2022, p 65.

380 Transcript, 12 September 2022, p 66.

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Although Mr Birri claimed he could not remember what had happened, it is quite clear that after Ms Sampaoli's "don't rock the boat" message, the letter was not sent. Mr Birri finally accepted that "it could be" that the letters were "never sent".[381]

379 Mr Birri was pressed further in cross-examination and was taken to Ms Sampaoli's explanation that Mr Lescaudron felt there was no need to send the letters because the "cases have been solved". Ms Sampaoli also reported that Mr Lescaudron was "aware of the UPAs" and that he "will try to involve us immediately in future in order to avoid any future problems".[382]

380 When it was suggested to Mr Birri that he should have sent the letter irrespective of Ms Sampaoli's e-mail, he resorted to what appeared to be an excuse for not sending the letters. He said that UPAs were "quite common" and that "many" RMs in Singapore produced UPAs for the defendant.[383] Indeed, he described them as "hundreds of UPAs".

381 Mr Birri went on to try to explain that when they wanted to please the client, RMs went ahead with the transaction before authorisation was sought or given and they saw it as an administrative matter. His evidence continued:[384]

> Court. Wasn't your role to control that, to stop it?
>
> A. No, we were not policing that. The trustee was not policing. The only thing we could do, that's why I said before, we cannot stop, because we were not in the lead here. The only thing we could do is escalate and escalate to compliance, business risk, line management, to the bank--

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381 Transcript, 12 September 2022, p 67.

382 Transcript, 12 September 2022, p 70.

383 Transcript, 12 September 2022, p 73.

384 Transcript, 12 September 2022, p 74–75.

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Court. But if you're the trustee whose consent is necessary for the transaction to take place, you can say so, can't you?

A. Yes.

Court. And so if someone is making a transaction without your consent, surely you're in a position to control them to say "Stop it unless I agree". Isn't that the position?

A. Yeah that's what-- that's what we tried. It was like a--

Court. But that's your position, isn't it?

A. Yes that was my position.

Court. And if you as the head of the trust, as you were, were saying that this was happening, you, as responsible head would have said, "You are not permitted to do this unless we consent", surely?

A. Yes.

…

Q. You see Mr Birri, a decision had been made to send the letter, right? Remember those emails?

A. Yes.

Q. And then that course was aborted.

A. That's right.

Q. And I do want a "yes" or "no" to this question. I'm sorry, you will have to answer, you're on the stand. A responsible trustee would have sent the letter, "yes" or "no"?

A. Yes.

Q. The real reason you decided not to send the letter was you did not want to jeopardise Credit Suisse's chance of getting $1.5 billion more business from Mr Ivanishvili. Isn't that right?

A. I don't remember.

…

Q. So on Friday, I asked you whether it was correct that you had been brought in to clean up the problems in Credit Suisse Trust Singapore and you agreed.

A. That's correct.

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> Q. So having been brought in to clean up these problems, you were the person that should have insisted on the letter being sent. Isn't that right?
>
> A. Yes. I was the head of the trust management at that time. And-- yes.
>
> Q. Instead of doing that, instead of doing what was in the interest of the beneficiaries, you did what was in the interests of Credit Suisse. Isn't that right?
>
> A. I don't remember.

382 Mr Birri accepted that in April 2012 he knew that the strategy of dealing with UPAs, by escalation to more superior officers/departments, was not working. He gave the following evidence:[385]

> Q. Month after month of hundreds of millions of dollars' worth of UPAs, right?
>
> A. Yes.
>
> Q. As the trustee don't you think you should've insisted on an investigation by the bank pending the conclusion of which Patrice Lescaudron should not have been managing trust assets? Don't you think you should've done that?
>
> A. As I said, we had hundreds of UPAs, we had many RMs with UPAs. I could not insist on every RM to put him under investigation.
>
> Q. It's a very unattractive answer. So I just want to understand it. You are saying that because there were so many problems, you did nothing to solve any of them. Is that your evidence?
>
> A. No, that's not what I'm saying. I'm saying that this was not unusual to have UPAs. We had other RMs that produced UPAs and we had constant education process to-- to tell the RMs to stop the UPAs. I think that we were looking at, and I don't remember this for every transaction, important for us was to have the request from the settlors, to have a signed form by the settlor. So as long as we had that we knew that the settlor wants it and then we thought our-- our thinking at that time was when we had the settlor's request and the

385 Transcript, 12 September 2022, pages 80–84.

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signature, we have his okay to do the transfer, and what happens in-- in the CS bank is-- is mainly, I put it now a bit casually, administrative problem between us and the bank. That's why I said the RMs had to be educated on those cases.

…

Q. If an investigation had been done, the truth would've come out, right?

A. I don't know that. I don't know how these investigations work, I don't know what kind of investigations we're talking about. I don't know.

Q. Mr Birri, you're not a bystander; you were the trustee right?

A. Yes, I was.

Q. Wouldn't you in an investigation have insisted on a very simple thing: that the trustee itself contact Mr Ivanishvili and ask him, "Are you giving these instructions to the RM"?

A. Yes, but as far as I was aware, this-- these transactions, we always had the-- the letter from Ivanishvili with his signature on it, so for us it was clear that he wants those transactions.

Q. Mr Birri, you didn't necessarily have those-- well, you certainly didn't have those documents from Mr Ivanishvili when these transactions were flagged as UPAs, right?

A. I don't remember what documents we had at what time.

…

Q. Why would you not contact Mr Ivanishvili after UPAs had been happening year after year in such large amounts, why wouldn't you do the simple thing of asking Mr Ivanishvili, "Are you really the one giving these instructions to the RM?"

A. There was no-- there was no CST policy which told us to do so, and also I understand, based on the documents I've seen, also in my lawyers', that Ivanishvili didn't want to be contacted. He wanted to have a single point of contact, which is quite common, or was quite common, and that was the RM. So he wanted basically everything to go through the RM.

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…

Q. You did not ask for an investigation because you did not want to be blamed for the bank not getting the $1.5 billion of investment that Josephine had mentioned. Do you agree or disagree?

A. I don't remember.

383 Mr Birri was asked further questions about UPAs throughout 2012 and accepted that even if there were some UPAs that were resolved, he knew that it was necessary to get to the bottom of why the UPAs had happened. He gave the following evidence:[386]

Q. In particular you knew that that was important in this case because UPAs had been recurring year on year. Right?

A. Not on-- not only this case we had other cases as I said before, of UPAs.

Q. Yes, yes, don't-- please--

A. It was a general-- general problem we tried to address.

Q. Okay, but--

A. You have to know that I was overseeing 1,500 structures. This was one of those and we had UPAs in other structures. So there were many, it was not uncommon, and we tried out best to-- to educate the RMs to stop with the UPAs.

Q. But, Mr Birri, the UPAs mean that moneys are leaving the trust without the approval of the trustee, right?

A. That's right.

Q. Whether there was one account that had UPAs or 100 accounts that had UPAs, each of those accounts deserve the trustee's full attention, isn't that right?

A. Yes, that's right. That's why we escalated according to our policies and procedures every UPA to the respective department and stakeholder within CS Trust and the bank, I understand.

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386 Transcript, 12 September 2022, pp 97–100.

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Q. So by the time we get to August and you see these things repeating again and again, didn't it even cross your mind that you had to revisit sending that letter officially to the bank?

A. I didn't remember whether there were any letters sent or what, all the conversations took part with Josephine. I really don't remember. I remember we took all of this seriously and we-- we really did what we thought was right at that time to escalate all these matters to the respective departments.

Q. No, no, Mr Birri, you didn't do all that you thought was necessary. You had thought what was necessary was to send a formal letter to the bank asking for two very defined things and having thought of that, you decided not to do it. Right?

A. As I said before, I don't remember that decision or why that decision has been made or whether they have been sent. I simply don't remember.

Court. Well let's assume for the moment that they weren't sent.

A. Okay.

…

Q. On the assumption that those are the facts, wouldn't you agree with me that the trustee was not acting in a proper manner?

A. I think we escalated and we did what we could do at that time. If there-- if a letter would have been-- a letter would've been a good idea as well, looking at this from today's stand-- from today, I would say.

Q. Don't you think an independent trustee, someone that was not connected with CS Bank, would've done exactly that?

A. Maybe. I don't know, I've never worked for independent trustee. I don't know how they work.

384 Mr Birri's role with the defendant in Singapore was the first time that he had personal experience as a trustee. He gave the following evidence:[387]

[387] Transcript, 12 September 2022, pp 100–102.

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Court. With the very large volumes of money that were invested, it would be a delicate matter to ensure that they're protected, I presume.

A. Yes.

Court. In the circumstances, although you've told me that you escalated things, you were, in fact, new in Singapore at the time.

A. Yes.

Court. Did it make it difficult for you to move into a situation where there was a negative audit report?

A. Yes, it was a big-- it was a challenge, yes. Yes, we-- we focused on those audit points. I mean, we looked at the audit report, and I remember we had this -- these points and I had to focus on them, like the timeliness of -- you know of transactions, these third-party transactions was a big topic, I discussed a lot with Patrik Marti. These were the -- were the-- really the areas we were looking into, yes.

Court. On the one hand, you have RMs who are pushing for business I presume--

A. Yes, that's right.

Court. --and on the other, you have a trustee who has to keep itself very carefully looking at the realities and the needs for protection of the assets that are invested in the trust.

A. Yes.

Court. Insofar as the RMs pushing for business is concerned, therefore, "I'm not suggesting scepticism but I'm suggesting great caution." Would that be your approach?

A. Caution on their behaviour or--

Court. Caution to ensure that the push for business is not going to overpower the need to protect the asset.

A. I agree, yes. There was always a great push from the RM to get moneys in, to get assets in.

Court. Did their salary depend upon the business written?

A. The RMs'?

Court. Yes.

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A. Yes, of course, and bonus. I mean, as far as I know; I'm not an RM but I think so, yes.

Court. Another reason to be more cautious, I suppose. Would that be right?

A. Yes.

385 In other evidence Mr Birri agreed that the defendant did not prepare the accounts in respect of the trust accounts in a timely fashion. There were 622 delinquent accounts for 2010 that had only been reduced to 523 the following year.[388] He said that he inherited the problem of these hundreds of outstanding accounts from his predecessor. [389] Obviously if the accounts are not available to the trustee the duty to safeguard the assets may be compromised. Although one of Mr Birri's tasks was to "reduce those late financial statements", he knew that the defendant did not have enough resources to accomplish it. The defendant resorted to hiring of temporary staff to clear the backlog but even then it was not enough and the number of delinquent accounts increased.[390]

386 Mr Birri gave evidence prior to the defendant making its admission on the tenth day of the trial. His evidence exposed the huge deficiencies in the defendant's processes and attitudes at the time that he was the head and executive director of the defendant. Mr Birri was policy-focused and appeared to be unable to see the true nature of an UPA. He did not appear to appreciate that every time millions of dollars went out of the Trust without authorisation the defendant's duty to protect the Trust assets was compromised.

387 Mr Birri's explanation that UPAs were not uncommon and that there were hundreds of them was, as Senior Counsel for the plaintiff put it rather

388 Transcript, 13 September 2022, p 3.

389 Transcript, 13 September 2022, p 5.

390 Transcript, 13 September 2022, pp 4–10.

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neutrally, a "very unattractive" statement. Any attempt to justify inactivity or a lack of appropriate activity on the basis that there were a lot of UPAs is a most dangerous attribute in a trustee. As soon as a payment out of the trust funds is made without the trustee's authority, steps should have been taken to stop it and if it did not cease, then the person who was guilty of such conduct irrespective of whether they were within the Bank and/or the defendant should have been prevented from having access to the Trust funds.

388 It is also wrong-headed to suggest that this would have been difficult because Mr Lescaudron was in the Bank's employ rather than the defendant's employ. This was not a staffing arrangement matter. This was about access to assets in a Trust that was fully controlled by the defendant and it on its own and with and through its underlying companies were the appropriate decision makers as to who could have access to Trust assets.

Consideration

389 There is now no issue that by 31 December 2008 the defendant breached its duty to the plaintiffs to safeguard the Trust assets. However, notwithstanding the defendant's admission that it did "not dispute causation in this regard", its position at the conclusion of the trial was that it was only liable to the plaintiffs for those funds that were misappropriated by Mr Lescaudron for which it claims the plaintiffs have been fully compensated by the Settlement with the Bank. The defendant argues that any other losses suffered by the plaintiffs fall outside the scope of its duty and are hence not recoverable.[391]

391 DCS, para 47.

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390 The plaintiffs claimed that the defendant's admission included an acceptance that one alternative, in respect of which the defendant did not dispute causation, was that the whole portfolio would have been removed from the defendant's custody and placed with another institution. They claimed that the defendant is liable to compensate the plaintiffs for the difference between what the portfolio would have achieved in the hands of that other institution and what was actually achieved, giving credit for what was paid in the Settlement.[392]

391 At this juncture it is appropriate to identify the relevant issues for determination. It is necessary to determine that nature of the Mandalay Trust, the context in which the defendant was providing its services to the plaintiffs and the extent of its duties to the plaintiffs in that context.

392 It is necessary to determine whether the defendant was in breach of its duty to safeguard the Trust Assets earlier than the admitted date, 31 December 2008.

393 It is also necessary to determine whether the plaintiff was managing any of the Trust assets and if so, the consequences of such management.

394 It is also necessary to determine the defendant's claim of contributory negligence and its claim to be excused in respect of any breach of duty earlier than its admitted breach.

395 It will be necessary to consider the numerous issues dealt with in the expert evidence in respect of the quantification of the plaintiffs' loss by reason of the defendant's admitted breach of duty and any earlier breach of duty.

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[392] PRCS, para 144.

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Nature of the trust

396 In determining the nature of the Mandalay Trust, it will be necessary to consider the trust instruments and surrounding documents together with the operation of the Trust.

Validity of Deed of Amendment and Restatement

397 It is appropriate at this point to deal with the status of the Deed of Amendment and Restatement.

398 The plaintiffs submitted that there is little relevance to the Deed of Amendment and Restatement having regard to the fact that it was executed some five years after the defendant's admitted breach. That submission has force. However, for completeness it is appropriate to consider the parties' contentions in respect of its validity and/or enforceability.

399 The plaintiffs submitted that the plaintiff did not give his informed consent to the amendments. His unchallenged evidence was that he did not and would not have agreed to the amendments in the Deed of Amendment and Restatement had he known their true legal effect. He also gave evidence that the Deed of Amendment and Restatement was not explained to him.[393]

400 One of the letters that Ms Sim asked Mr Sampaoli to have the plaintiff sign was a letter addressed to the defendant in relation to the Deed of Amendment and Restatement that was in the following terms:[394]

> On 7 March 2005, at my request, the Declaration of Trust constituting The Mandalay Trust was established by Credit

[393] BI, paras 44–45; Transcript, 8 September 2022, p 22.

[394] Exhibit A, Volume 3, p 110.

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> Suisse Trust Limited, Singapore for the benefit of myself, my wife and children.
>
> In 2006, the Trust started to invest in artwork through its underlying company Lynden Management Ltd and to-date, it holds a sizeable portfolio of artwork.
>
> In view of this, I am agreeable to amend and re-state the Declaration of Trust constituting The Mandalay Trust to expressly accommodate the inherent investment needs of this unique asset class (ie. artwork).
>
> Please now arrange to execute the Deed of Amendment and Restatement, copy of which I have read through and acknowledged accordingly on each page.

401 Ms Sim gave evidence that she knew that the defendant's solicitors, Baker McKenzie, were advising on amendments that were "not just for the artwork" but that they would also "impact the bankable assets".[395] Ms Sim accepted that this should have been conveyed to the client.[396]

402 The plaintiffs submitted that even if the defendant declared the Deed of Amendment and Restatement on the plaintiff's instructions, it amounted to an exercise of a power on the purported instruction of only one beneficiary without giving independent consideration to the proper exercise of the power, in breach of the trustee's duties to all the beneficiaries, and thus rendered the exercise of the power void.[397]

403 The plaintiffs also submitted that the amendments went much further than was reasonably necessary to accommodate the artwork held by the Mandalay Trust. The plaintiffs also emphasised that the Deed of Amendment and Restatement was executed only on 5 July 2013, long after the time that the

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395 Transcript, 16 September 2022, p 109.

396 Transcript, 16 September 2022, p 109.

397 PCS, para 294.

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defendant now admits it should have communicated with the plaintiff in respect of Mr Lescaudron's conduct, in consequence of which Mr Lescaudron would have been removed.

404 It is not in issue that discretionary power conferred on a trustee must not be exercised for an improper purpose: *British Airways plc v Airways, Pension Scheme Trustee Ltd* [2018] EWCA Civ 1533. Nor is it in issue that an exercise of power that amounts to fraud on a power is void: *Lewin on Trusts* (20th ed, Sweet & Maxwell 2020) ("*Lewin on Trusts*") at para 30-067.

405 The plaintiffs emphasised that the wording of Clause 19 of the Trust Deed, on which the defendant relies for its power to amend the Trust Deed, allowed the defendant to make amendments for the benefit only of the plaintiffs (if it considers the same to be in the interests of the beneficiaries) and not for the benefit of any other person (see [95] above).[398]

406 The defendant contended that it had the power to amend the Trust Deed without requiring the approval of all beneficiaries "so long as" (as it claimed is the case here) "no interest or benefit is conferred on any person(s) other than the beneficiaries".[399] The plaintiffs claimed that the contemporaneous documents demonstrate that the defendant failed to consider the beneficiaries' interests and that it declared the Deed of Amendment and Restatement for the improper purpose of protecting itself, thus conferring a benefit on itself.

407 In this regard, the plaintiffs relied on the documents referred to in which Mr Birri asked Ms Sim to instruct Baker McKenzie to review the Trust Deed,

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398 Exhibit A, Volume 1, p 126.

399 DOS, para 91.

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with advice that the "aim is to reduce the risk of the trustee in regard to the holding of artworks". Mr Birri confirmed that this was the purpose of amending the Trust Deed in the following evidence:[400]

> Q. Mr Birri, the purpose of amending the trust deed was to reduce the risk of the trustee in regard to the holding of artworks. Correct?
>
> A. Yes.
>
> Q. Your concern was with the risk to the trustee, not the beneficiaries' interest. Agree or disagree?
>
> A. Here, I say that. Yes, that's correct. I wanted to reduce the risk of the trustee.

408 The plaintiffs submitted that the defendant declared the Deed of Amendment and Restatement solely for its own benefit to remove the risks it faced in holding the artwork, and not for the benefit or in the interests of the beneficiaries.

409 The plaintiffs also submitted that Clause 19 of the Trust Deed did not confer any power on the defendant to "restate", as opposed to "vary", the Trust Deed. It was submitted that by restating the Trust Deed, it was intended to revoke the Trust Deed and resettle the Mandalay Trust. This was therefore *ultra vires* and is void. In support of this contention the plaintiffs relied on the preamble to the Deed of Amendment and Restatement which recorded that it was the defendant's wishes to amend and restate the original Trust Deed "in its entirety".[401]

410 The communications both oral and written over the years 2007/2008 to 2012 referred to at [270]–[281] earlier support the finding that the defendant

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400 Transcript 12 September 2022, p 26.

401 Exhibit A, Volume 3, p 392.

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was concerned that the documentation in place at the time (the Trust Deed and various minutes and letters) did not make clear that it was not liable for losses that may be incurred by reason of the loss or damage to the very valuable artworks that had been purchased by the plaintiff and over which it did not have physical custody.

411 If there was already protection for the defendant from such liability in Clause 10(b) of the Trust Deed because the plaintiff had managed this investment and the defendant did not have full control of the investment, then the Deed of Amendment and Restatement may not have conferred a benefit on the defendant that it did not already enjoy. However, as discussed earlier, Lynden was established well after the acquisition of Meadowsweet and Soothsayer and there was no imposition of any restrictions or conditions on the defendant when the artworks were purchased and transferred into the Trust by the plaintiff. The defendant was therefore concerned to specify in detail, as it did in the Deed of Amendment and Restatement, that the defendant had no investment or asset management functions in respect of the artwork. However, it went further to provide that it had no investment or asset management functions generally.

412 The whole focus of the correspondence at the time of the drafting of the Deed of Amendment and Restatement was on the defendant's exposure in respect of the artworks and the need to protect it from any liability in respect of the loss or damage to the artworks. The letter that the defendant drafted for the plaintiff to sign at the time referred to at [400] above recorded relevantly that the plaintiff (alone rather than all the beneficiaries) was "agreeable" to the Deed of Amendment and Restatement "to expressly accommodate the inherent investment needs of this unique asset class (ie. artwork)". It is obvious that the

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expression inherent investment "needs" was a euphemism for the inherent investment "risks" from which that the defendant wished to be protected.

413 Even if it could be argued that the Deed of Amendment and Restatement conferred a benefit on one or more of the beneficiaries in respect of investment "needs", the defendant could not exercise the power to vary the Trust Deed if it conferred a benefit on itself. This is clear from the wording of Clause 19 and the defendant does not suggest otherwise.

414 Mr Birri's candid evidence that the Trust Deed was amended to reduce the defendant's risk in respect of the artwork is compelling support for the conclusion that it was to confer and did confer a benefit on the defendant. It is also compelling support for the proposition that the exercise of the power to vary the Trust Deed in Clause 19 of the Trust Deed was for that ulterior purpose rather than the permitted purpose of benefiting only the beneficiaries.

415 Although in the circumstances of the defendant's admission it is probably unnecessary to determine this issue, if it had been necessary, the justifiable conclusion is that the Deed of Amendment and Restatement is void and/or unenforceable.

Reserved power trust

416 A mechanism that may be utilised to achieve a principal's/settlor's retention of control over the assets in a trust is the appointment of a beneficiary/settlor as an investment manager or investment advisor. This mechanism has been referred to as a reserved powers trust, the validity of which is not in issue. Section 90(5) of the Trustees Act provides: "No trust or settlement of any property on trust is invalid by reason only of the person creating the trust or making the settlement reserving to the person all or any

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powers of investment or asset management functions under the trust or settlement."

417 The defendant claims that the Mandalay Trust operated as a reserved powers trust in which the plaintiff reserved to himself the power of investment of the Trust assets to the exclusion of the defendant.

418 The parties' submissions focused significantly on clauses 10 and 16 and paragraphs 4 and 5 of Schedule 4 of the Trust Deed. These provisions are the so-called "anti-*Bartlett*" clauses named after the judgment in *Barlett v Barclays Bank Trust Co Ltd* [1980] Ch 515.

419 It is usual in a reserved powers trust for the Trust Deed to include anti-*Bartlett* provisions to provide the trustee with protection from liability where the settlor has control of the investments. This has been the subject of commentary in respect of a structure which includes underlying companies similar to that found in the present case, including relevantly in *Lewin on Trusts* as follows (at para 34-059):

> (6) Even if the clause also relieves the trustee of any duty to interfere, it will afford no protection if the trustee does not stand aloof from the company. A corporate trustee which supplies employees as directors of a company held by the trust will have chosen to conduct its affairs and may be liable accordingly. It is common for trustees of offshore settlements to hold trust assets through holding companies: the holding company is administered by the trustee, its directors being officers or employees of the trustee. An anti-*Bartlett* clause in ordinary form will then provide no protection for the trustee. But where the underlying assets consist of one or more trading companies, the clause may be extended to cover such companies.
>
> (7) Even when there is a clause which comprehensively excludes any duty to supervise or interfere or make enquiries, the trustee necessarily retains the practical

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> power to do those things by virtue of its control of the company. It has been contended that the trustee owes a residual or high-level duty to act in circumstances when no reasonable trustee would refrain from doing so. The contention, however, has been firmly rejected at the highest level in Hong Kong, in reliance on a sweeping anti-*Bartlett* clause, and we consider that the decision represents English law. In effect, therefore there is no public policy which requires the recognition of such a duty in the teeth of the trust instrument and its existence, if any, is a matter of construction of the instrument.

420 The decision referred to in the second paragraph extracted above is the judgment of the Hong Kong Court of Final Appeal in *Zhang Hon Li and Ors v DBS Bank (Hong Kong) Ltd and Ors* [2019] HKCFA 45 ("*Zhang*").

421 In *Zhang* the settlors were husband and wife who were customers of DBS Bank (Hong Kong) Ltd: at [9]. Before the trust was established, the settlors set up a BVI investment company, Wise Lords Ltd ("Wise Lords") of which the wife was the sole director and shareholder: at [10]. After the Trust was established, the sole share in Wise Lords belonging to the wife was transferred to DBS Trustee HK (Jersey) Ltd and the wife was replaced as sole director of Wise Lords by DHJ Management Ltd, part of DBS Corporate Services (Hong Kong) Ltd: at [12]. DBS Corporate Services provided a nominee director for Wise Lords as well as company secretary services, a correspondence address and bank-authorised signatories. The wife was appointed Wise Lords' investment advisor and authorised by Wise Lords to give investment instructions on its behalf: at [12].

422 The Court of Final Appeal was considering anti-*Bartlett* clauses that were relevantly identical to the clauses in the present case and described them as follows at [64]:

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> Anti-Bartlett provisions are generally incorporated in the Trust Deed in cases like the present because the parties wish to enable the settlor or the settlor's nominee freely to exercise control and management of the underlying company, especially regarding matters such as its investment decisions, and to relieve the trustees of any management or supervisory duties in that regard (save where extreme situations such as those involving actual knowledge of dishonesty might arise). To postulate that the parties' chosen scheme may be overridden by some implied, non-derogable external duty arising in circumstances "where no reasonable trustee could refrain from exercising otherwise excluded powers" would be to introduce an amorphous and ill-defined basis for undermining a legitimate arrangement consciously adopted by the parties, exposing the trustees to unanticipated risks of liability and sowing confusion as to the extent of their duties.

423 The Court also referred to the "irreducible core of obligations" fundamental to the concept of a trust that was recognised by Millett LJ in *Armitage v Nurse* [1998] Ch 241 ("*Armitage v Nurse*") as the duty of trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries and which did not include the duties of "skill and care, prudence and diligence". Importantly, the Court said that those core obligations do not "operate to override express terms of a trust" but rather "provide a touchstone for deciding whether the minimum requirements for constituting a trust have been met": at [65].

424 In the present case, there was the 2005 Letter of Appointment dated 7 March 2005 and the subsequent resolution by the defendant's Trust Committee to appoint the plaintiff as the investment manager to the Mandalay Trust (see [102] and [108] above). In the 2005 Letter of Appointment, the plaintiff reserved the "right" to choose the investment manager who was recorded as being "responsible for making decisions as to the assets of the trust" and the "investment" of those assets.

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425 The purpose of the Memorandum of Wishes, also dated 7 March 2005, was "to assist in the administration of the trust and the exercise of any discretion and powers pursuant to the trust deed" (see [100] above). That memorandum recorded that during the plaintiff's lifetime, the defendant "may have regard to his recommendations in respect of the investment of the Trust Fund, the beneficiaries of the Trust and any distributions to the beneficiaries".

426 In *Zhang*, one of the beneficiaries/settlors of the trust, the wife, was appointed as investment adviser and a Letter of Wishes was executed. That Letter of Wishes was in different terms to the Memorandum of Wishes in the present case. That Letter used mandatory rather than permissive language recording that during the beneficiary's/settlor's lifetime the trustee "should always consult her in the first place with regards to all matters and her recommendation should be final": at [12].

427 A trustee who is permitted to have regard to a beneficiary's recommendations free of any direction that such be accepted as final is in a different position from a trustee who should, ought to or even must have regard to the beneficiary's recommendation with the stipulation that it be treated as final. On one view, the former accommodates the prospect of the retention of control or some control of the investments in the trustee whilst the latter does not, except perhaps in exceptional circumstances.

428 In any event, in the present case, where there is a reservation of control and the beneficiary/settlor exercises that control over the investment of assets in the Trust Fund, Clause 10(b) of the Trust Deed provides protection for the defendant from liability for loss caused by any action or inaction by the trustee by reason of its inability to exercise control over the subject assets (see [91] above).

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429 The defendant submitted that a reserved powers trust draws a very clear line between the duties of a trustee to safeguard trust assets and the duty of a trustee to review and monitor investment activity, which is excluded from the trustee's obligations in such circumstances. The defendant submitted that it did not delegate the investment powers but rather such powers were "never vested" in the defendant.[402]

430 In *Sim Poh Ping v Winsta Holding Pte Ltd and Anor* [2020] 1 SLR 1199 ("*Sim Poh Ping*"), the Court of Appeal considered the "important distinction" between the trustee's "custodial stewardship duty" and "management stewardship duty" as follows (at [100]):

> It is fundamental to the law of trusts that ***trustees*** owe a duty to their beneficiaries to administer trust property *in accordance with the terms of the trust*. Trustees owe a ***custodial stewardship duty*** and a ***management stewardship duty***. Breach of the former duty occurs where the trustee *misapplies trust assets*. The trustee commits a different breach when he breaches his management stewardship duty; it occurs where he *fails* to *administer the trust fund in accordance with his equitable duties*, such as when he administers the trust negligently, in breach of his equitable duty of care.
>
> [emphasis in original]

431 In *Appleby Corporate Services (BVI) Ltd v Sitco Trustees (BVI) Ltd* 17 ITELR 413 ("*Appleby*"), the investment manager of the trust appointed pursuant to an investment management agreement was to have complete discretion in investment decisions subject to a certain trading authority which set out how the fund was to be allocated. The trustee relied on an understanding that the settlor would monitor the asset allocation on a monthly basis. Although the trustee made enquiry with the investment manager on certain matters, it did

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402 Transcript, 16 February 2022, p 9.

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not engage in systematic review of the portfolio to ensure that it complied with relevant guidelines.

432 The Court held that even if the settlor had agreed to monitor the asset allocation monthly, it would not relieve the trustee of its "duty of care" to the beneficiaries of the trust: at [16]. It was held that had the trustee reviewed the conduct of the account regularly, it would have seen that the investment guidelines were not being complied with and unless it could rely on some exonerating provisions of the relevant statute or a trust document, it was liable to the trust for whatever damage had occurred because of its negligence in failing to keep the management of the fund under review: at [41], [42] and [55]. The plaintiffs relied on this decision in support of their contention that the defendant failed to keep the Trust assets under proper review.

433 The defendant submitted that the decision in *Appleby* is distinguishable because the trustee had powers of investment and exercised those powers. It submitted that *Appleby* does not support any proposition in a reserved powers trust that somehow the duty to safeguard the assets "creeps into a duty to monitor and review investments".[403]

434 Although the defendant continued to make submissions that it was not obliged to monitor the wisdom of the Trust investments, it is certainly no part of the plaintiffs' case that the defendant was in breach of such a duty. The plaintiffs do not complain about the defendant's failure to monitor the wisdom of the investments. Rather it is the defendant's failure to properly monitor the Trust so as to enable it to know whether the Trust assets were safe that is the subject of complaint.

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[403] Transcript, 16 February 2022, p 39.

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435 The nature of a reserved powers trust that the defendant propounds is an 'all or nothing' concept. In that concept, if a settlor/beneficiary reserves powers of investment to himself or herself, then the trustee would have no powers of investment and no liability in respect of any loss resulting from the investment of the Trust assets. There is no room in that concept for the sharing of investment responsibilities between the trustee and the settlor/beneficiary. Such a restriction is not a prerequisite to the existence of such a trust. A trust arrangement is developed to fit the requirements of each beneficiary. The label is not the driver for the structure. The needs of the beneficiaries and the willingness of the trustee to take on the trustee responsibilities should be the drivers of the structure.

436 In Singapore, the concept of a shared arrangement with the settlor/beneficiary having investment powers over only parts of the Trust assets leaving the trustee with the investment powers over the residuum is recognised in the governing statute. Section 90(5) of the Trustees Act discussed earlier refers to the reservation of "*all or any* powers of investment or asset management" [emphasis added].

437 The caution gleaned from the Court's observation in *Zhang* not to introduce "amorphous and ill-defined" arrangements that may expose the trustees "to unanticipated risks of liability" and sow "confusion as to the extent of their duties" can be accommodated if care is taken to transparently set the parameters of the parties' obligations and duties at the outset of the relationship.

The Mandalay Trust

438 The Trust documentation that was put in place in the present case did not define or explain the ambit of the role of Investment Manager to the

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Mandalay Trust. The relevant internal CST Group Directive published some four years after the establishment of the Trust recorded the need to delegate the management of trust assets to a person with "special expertise" which had to occur by a "formal delegation" as an LPOA was not by itself a delegation. It also recorded that where a settlor/beneficiary acts as an "investment advisor" it was necessary to take "appropriate measures" such as clauses in the trust deed "to exclude or limit" the trustee's liability.[404]

439 The only part of the Trust Deed dealing with the appointment of the Investment Advisor or Manager was clause 8 of the Fourth Schedule. However, the defendant eschewed the application of this provision in respect of the appointment of the plaintiff as investment manager and contended that "when a proposer reserves to himself the power of investment and to choose the investment manager, clause 10(b) is the operative provision then that basically prevents the trustee from having any investment powers or duties". [405]

440 Clause 10(b) does not "prevent" the defendant from exercising investment powers *per se*. Rather it provides protection for the defendant from liability if it does not have "full control of the investment" of an asset the subject of any claim against it. The responsibility for the management and or investment of the assets must be assessed by considering the Trust documentation and all the relevant circumstances of the operation of the Trust.

441 The 2005 Letter of Appointment reserves to the plaintiff "the right to choose" the investment of the Trust Assets. The Meadowsweet Discretionary Agreements and Soothsayer Discretionary Agreements did not include any such

404 Exhibit A, Volume 8, p 612.

405 Transcript, 5 September 2022, pp 69–70.

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reservation, nor did they include any reference to the plaintiff as the "Investment Manager". Rather, as discussed earlier, they appointed the Bank and the Singapore Bank respectively to manage the investment of the Trust assets.

442 The defendant's very broad powers in relation to the Trust assets under the Trust Deed were exercisable at its "absolute uncontrolled discretion" except in circumstances where the plaintiff was entitled to and did impose restrictions upon it. One such circumstance was if "when transferring assets to the Trust Fund", the plaintiff imposed any restrictions on the defendant "with regard to (i) the choice of investment manager or investment advisor or (ii) the investment" of the transferred assets.

443 The defendant claimed that such restrictions were imposed upon it by the plaintiff by the terms of the 2005 Letter of Appointment and by which it was bound by reason of clause 10(b) of the Trust Deed.[406] It also contended that by reason of the provisions of the 2005 Letter of Appointment and Clause 10(b) of the Trust Deed it was restricted from exercising any investment powers as they had been reserved to the plaintiff.

444 The 2005 Letter of Appointment did not use the language of the imposition of "restrictions" on the defendant as found in Clause 10(b) of the Trust Deed. Rather the letter imposed a "condition" on the transfer of the Trust assets to the defendant. It was a reservation to the plaintiff of "the right to choose" the investment manager or advisor (on a continuing basis) "and/or" "the right to choose" the investment of the Trust Assets. The 2005 Letter of Appointment also included additional words not found in the Trust Deed. It recorded that the investment manager or advisor "shall be responsible for

406 Exhibit A, Volume 1, p 147.

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making decisions as to the assets of the trust". As discussed earlier, the Trust Deed does not define the term "investment manager or investment advisor" (see [99] and [438]).

445 The 2005 Letter of Appointment also recorded the plaintiff's "wish" for the defendant to appoint him as "the initial investment manager to the trust".

446 Clause 10(b) of the Trust Deed provides protection for the defendant from liability for losses resulting from the defendant's action or inaction by reason of its inability "to have full control of the investment of those assets" the subject of any restrictions imposed on it. It also provided protection from liability for any action or inaction by reason of the defendant "following the advice of any such investment advisor".

447 It is the former of these protections that the defendant relies upon. It submitted that it could not have full control of the investment of the assets because it was the plaintiff who was exercising such control. The defendant submitted that the powers of investment in clause 2 of the Fourth Schedule of the Trust Deed were never vested in the defendant.[407]

448 The only mention of "investment manager or advisor" other than separately referred to in Clause 10(b) of the Trust Deed is found in Clause 8 of the Fourth Schedule. That clause was the source of the defendant's specific power to "engage the services of such investment advisor or advisors" from time to time as it thought fit to advise it "in respect of the investment and re-investment of the Trust Fund". It was also a source of power to "delegate to the

[407] Defendant's Written Submissions 23 September 2022, paras 40 and 45.

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investment advisor discretion to manage all or any part of the Trust Fund within the limits and for the period stipulated" by the defendant.

449 At its meeting on 7 March 2005, the Trust Committee of the defendant resolved that the plaintiff be appointed as "Investment Manager to the Mandalay Trust pursuant to the terms of the said trust". There was no identification of which "terms of the said trust" pursuant to which the Committee was purporting to appoint the plaintiff. There was no identification of whether the plaintiff was to manage or was delegated to manage all or any part or parts of the Trust Fund nor was there any indication of any limits stipulated by the defendant. There is no evidence that the plaintiff was ever informed of the resolution. Indeed, as the plaintiff said in evidence, if he had been informed that it was his responsibility, rather than the defendant's responsibility, to manage all the investments, it would have been the end of his relationship with the defendant and the Bank (see [456] below).[408]

450 It is probable that the 2005 Letter of Appointment was drafted by Mr Low or one of his assistants and the only basis that Mr Low stipulated to Mr Stamm for the plaintiff having to sign it was if it was intended that the plaintiff was to be an authorised signatory of the Trust companies.

451 On 29 March 2005, approximately three weeks after the Committee's resolution on 7 March 2005 purporting to appoint the plaintiff as Investment Manager, the defendant through Meadowsweet expressly mandated and authorised the Bank to manage those parts of the Trust assets identified in the Meadowsweet Discretionary Agreements referred to earlier (at [137]–[143]). It was in these documents that the clear "limits" were set for the management of

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408 BI, para 76.

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the Trust assets. A few days later, on 1 April 2005, Soothsayer gave "complete discretion" to the Singapore Bank to manage the Trust Assets transferred to it (see [145] above).

Plaintiff's status and management of Trust Assets

452 The Acceptance Documentation that the plaintiff signed in Geneva on 28 February 2005 included as a condition of transferring assets to the Trust/Company "which is to be/has been in established" a reservation of the right to choose the investment manager or advisor who was to be responsible for making decisions as to the assets of the Trust and the investment of those assets. At that stage, the Trust/Company had not yet been established.

453 There is no doubt that the plaintiff signed the 2005 Letter of Appointment in which he expressly reserved as a condition of transferring his assets to the Trust, "the right to choose (on a continuing basis) the investment manager or advisor who shall be responsible for making decisions as to the assets of the trust" and "the investment" of those assets. He also expressed the wish to be appointed as the "initial investment manager to the trust".[409] The plaintiffs submitted that this "is merely a letter of request" signed by the plaintiff on 28 February 2005 prior to the establishment of the Mandalay Trust and "if" the plaintiff was appointed as investment manager, this was by the defendant's Trust Committee's resolution on 7 March 2005.

454 The plaintiff agreed that, generally, when he signed a document, he was indicating that he was agreeable to what was stated in the document.[410] He did

409 Exhibit A, Volume 1, p 52.

410 Transcript, 6 September 2022, pp 1,3 and 4.

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not ask for translation of any documents that he signed with the defendant and signed "whatever they have offered me".[411]

455 When he was asked about the section in the Acceptance Documentation in relation to the reservation of his right to choose the investment manager, he said that he would "not imagine" that it would have been discussed with him. He said he "never got interested enough to learn about it" and understood "there might be somebody who would be manager" but only understood it as "some kind of mistake" when they "started pointing at me".[412] This was in the context of the claim that he was the investment manager having been made in the Bermuda Proceedings.

456 When the plaintiff was shown the 2005 Letter of Appointment his evidence was:[413]

> Q. … Do you recall signing this letter?
>
> A. The signature does look like mine, but content-wise it does sound weird, it's quite strange and unimaginable.
>
> Q. So do you recall signing this letter?
>
> A. I don't remember, but I would not have signed it ever.
>
> Q. Can I clarify your evidence? Your evidence is that you would not have signed it if you understood what it means. Is that correct?
>
> A. Yes, indeed, and if anybody were to tell me that I was to be the investment manager and I was supposed to make decisions on investment, it would have ended my relationship with Credit Suisse.

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411 Transcript, 6 September 2022, p 6.

412 Transcript, 6 September 2022, pp 14–16.

413 Transcript, 6 September 2022, p 34.

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457 The defendant did not call any evidence from any officer of the defendant, Meadowsweet, Soothsayer, the Bank or the Singapore Bank suggesting that there had been discussions with the plaintiff at this time about the role of Investment Manager, the plaintiff's willingness to take on such a role and/or the consequences of taking on such a role as it affected the defendant's liability and/or duty to the plaintiffs. None of the witnesses that the defendant did call gave any evidence about these matters.

458 There is no evidence as to what the defendant expected of the plaintiff in such a role. Nor is there any evidence of any process that was proposed to the plaintiff by which the plaintiff's relationship with the defendant, Meadowsweet and/or Soothsayer would operate or how he would or should manage the investment of the Trust assets.

459 The best that can be gleaned from the evidence about any such process is by implication from the Memorandum of Wishes pursuant to which the plaintiff might make recommendations about the investment of the Trust assets and the defendant, Meadowsweet and/or Soothsayer "may have regard to his recommendations".

460 On the first day of his cross-examination the plaintiff gave the following evidence:[414]

> The only thing I can tell you, that I have never been managing this, I was always giving them for the discretionary mandate. Only exception was these Russian assets, which I have started managing before even I'd opened these accounts. Yes, I owned these assets, these shares, even before I opened the account in Credit Suisse. I have transferred these shares from Cyprus bank to the Credit Suisse and I was managing them, but this was the only exception. In all those banks I have had accounts,

414 Transcript, 5 September 2022, p 133.

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> I was never managing them. It was always their discretionary mandate, and this was the-- these were our assets-- Russian assets were the only exception.

461 The plaintiff accepted that from 2005 to 2008 he was managing the Russian shares and precious metal investments and that the consequences of the management of these investments was his responsibility.[415]

462 On the second day of his cross-examination, it was suggested to the plaintiff that there were "various occasions" when he was "giving instructions on what investments the trust should undertake outside of Russian shares and precious metals". The plaintiff accepted that he gave such "instructions" in respect of Raptor shares.[416] He also accepted that such "instructions" related to the Grotz LPOA.[417] However he emphasised that he did not "interfere into these investments".[418]

463 He also accepted that he gave instructions in relation to the investment in the GCF.[419] He gave the following evidence:[420]

> Court. In your affidavit, you have informed the Court that you provided your views on these investments and some in precious metals, and you consulted with Credit Suisse because you felt comfortable with that. Remember giving that evidence?
>
> A. Of course, I was managing these Russian assets from 2005 to 2008, and including precious metals, and I could have had some consulting-- I could have received

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415 Transcript, 6 September 2022, p 79–80.

416 Transcript, 6 September 2022, p 27.

417 Transcript, 6 September 2022, p 28.

418 Transcript, 6 September 2022, p 29.

419 Transcript, 6 September 2022, p 30.

420 Transcript, 7 September 2022, pp 74–76.

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> some advices also from Credit Suisse on these matters. It was normal.
>
> Court. I understand your evidence is that that was the only management that you took on in respect of the Trust. Is that right?
>
> A. Yes, the only exception was with regards to the hedge fund. He-- I told that Patrice was offering these hedge funds to me, and then after I have received sufficient knowledge about this matter, I have reminded him to return to these hedge fund issues. And there was another exception with Raptor shares, which I have purchased from the other bank with the advice of Patrice.
>
> …
>
> Court. I'm just asking you to clarify for me, you informed the Court that the only management that you did was in relation to the Russian shares. That's true, isn't it? Earlier in your affidavit.
>
> A. It is.
>
> …
>
> Q. But now you accept that there was some involvement in management of the hedge fund arrangement and the Raptor shares. Is that right?
>
> A. Yes. I just want to show you these two different cases, you know, first, when Patrice convinced me, I have instructed him to create this hedge fund, and also Patrice convinced me to purchase these Raptor shares. I just wanted to show that these were exceptions and unusual in our relationship so that's what I wanted to show you.

464 The plaintiff was cross-examined in relation to the letter to the defendant apparently signed by him and dated 11 April 2014 in relation to the GCF.[421]

465 As discussed earlier, by the time of the letter of 11 April 2014, the plaintiff and Mr Bachiashvili had decided to establish the GCF to facilitate

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421 Transcript, 8 September 2022, p 18.

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investment in Georgia for, amongst other things, the development of infrastructure.[422] When asked whether he had signed this letter, the plaintiff said that he "could have signed it" but that it would have been written by either Mr Lescaudron or another manager. He gave the following evidence:[423]

> But as for the contents, I don't see any contradiction here.
>
> Except -- except for one point, the point stating that I am-- that I was appointed the investment manager since 2007, which I -- I disagree with. And maybe I didn't pay attention to this paragraph when I was signing this letter, this letter that has been drawn up by bank, and I did not pay attention when I was signing it. So that's only point I would like to disagree with here.

466 The plaintiff described his "responsibility" in relation to the GCF and the Russian shares as follows:[424]

> And because I considered the money, the assets and the capital that I entrusted Credit Suisse with as being mine, I considered that I was free to manage it the way I wanted; therefore, I created the structure that would be more convenient to manage it in Georgia. And similar to what was happening with the Russian shares that I mentioned as an exception, the ones that I was managing myself, the GCF-related matters were also the same, also an exception when I was managing the things myself. And my responsibility and not the trust's responsibility.

467 The plaintiff reiterated that the capital was initially his own and that he brought the entirety of the money into the Trust and gave the following evidence:[425]

> A portion of this money from the very beginning was under my responsibility because it was related to Russian shares. The other part of these moneys was passed over into responsibility of the Credit Suisse because I entrusted them to manage it, and I was not interfering with the management of that portion.

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422 Transcript, 6 September 2022, p 25.

423 Transcript, 8 September 2022, p 19.

424 Transcript, 8 September 2022, pp 6–7.

425 Transcript, 8 September 2022, p 10.

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> And, of course, for the part which I have taken out and which I have invested into GCF was under my responsibility together with Bachiashvili, of course, Bachiashvili shared this responsibility, I was requiring from him. But for the part remaining with the bank under the bank custody, that was their responsibility and it's still remaining there, under their responsibility.

468 In later evidence the plaintiff dealt with his decision to lend USD 100m to the shareholders of TBC Bank. He said that it was his idea and "I should have mentioned in the beginning, I forgot to mention it, that this was the outline of how this 100 million were to be lent".[426] He was then asked whether it was "carried out ultimately through" the Trust. He said that he did not know "the technicalities" and that "it might have been through" the Trust but "how exactly it has been done, I do not know".[427]

469 In further evidence, the plaintiff returned to his original position to "stress that apart from trade in Russian shares, I was not managing anything".[428] However, he gave the following evidence a little later:[429]

> Q. Mr Ivanishvili, at all times after The Mandalay Trust was set up, you were knowingly acting as investment manager of the trust and undertaking or supervising the investment of the trust assets. Do you agree or disagree?
>
> A. Of course no, and I will explain this. This word actually "knowingly", so knowingly, I knew that-- I knew-- I knew that the full responsibility was upon the bank, CS Bank, and the-- including trusts and all its structures. That's what I knew.
>
> Except-- except for the Russian-- Russian assets, Russian shares from 2005 to 2008, except for GCF and also except for works of art, which we have already discussed. Except for these three cases.

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426 Transcript, 8 September 2022, pp 20–21.

427 Transcript, 8 September 2022, p 21.

428 Transcript 8 September 2022, pp 43–44.

429 Transcript 8 September 2022, pp 115–116.

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470 Although the plaintiff admitted that he was responsible for the management and consequences of the management of the Russian shares and precious metals up to 2008, he denied that he managed Russian shares or investments after 2008.

471 The defendant relied upon the "Investment Strategy" document referred to earlier at [248] to contend that the plaintiff continued to manage the investment of Russian assets after that date. As discussed earlier, that document refers to a portfolio structure with the date "(21/02/2009)".[430] The defendant suggests that it was sent by Mr Lescaudron to the plaintiff in early 2009 and is supportive of a conclusion that the plaintiff was managing Russian shares and precious metals after 2008 and at least as at 21 February 2009.[431]

472 The defendant submitted that there was no reason for Mr Lescaudron to give a recommendation to the plaintiff to hold on to certain shares if the plaintiff was not making decisions on these investments after 2008.

473 It is appropriate to make two observations about this submission. The first is that the plaintiff could well have been giving his recommendations or views on investments without excluding the defendant from managing the investments and/or from having full control of the investments. The second is that this process in the Investment Strategy document was occurring either in 2007, or very early in 2009, at a time when there is no issue that the plaintiff was managing the investments in Russian shares and precious metals up to the end of 2008.

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430 Exhibit 1, Volume 1, p 163.

431 DCS, paras 365–366.

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474 The Investment Strategy document was discovered/disclosed by the plaintiff in the proceedings together with an e-mail from Mr Lescaudron dated 20 February *2007*.[432] The handwritten notes on the Investment Strategy document suggest that it was received by the plaintiff in February 2007. Indeed, the content of the document with reference to the plaintiff purchasing at "low prices" the previous year is in the paragraph referring to what occurred in "May 2006".[433] One conclusion to be drawn from these circumstances is that it is more probable that the Investment Strategy document was forwarded to the plaintiff by Mr Lescaudron in February 2007 and that the reference "21/02/2009" was a typographical error. However, even if was sent on 21 February 2009 it is only a very short time after the date the plaintiff claims he ceased the management of the Russian shares.

475 The plaintiffs submitted that in any event the document does not record any instructions originating from the plaintiff to make investments in Russian securities. Nor does it refer to Russian shares or securities being part of the Mandalay Trust. It was also submitted that the tenor of the document is consistent with the plaintiff's uncontradicted or unchallenged evidence that he had high-level meetings with the defendant where proposals and recommendations were given to him.[434]

476 The plaintiffs submitted that the fact that the plaintiff agreed with the defendant's proposals or recommendations and/or the Bank's proposals or recommendations does not mean that he was managing the investments. Rather, it was submitted, it demonstrates that it was the defendant who was making

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[432] Exhibit 1, Volume 1, pp 159–165.

[433] Exhibit 1, Volume 1, p 164.

[434] BI, para 55.

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those decisions with the arrangement between Meadowsweet and the Bank and at times discussing some of them with the plaintiff. Of course, there was a great deal that was not discussed with or disclosed to the plaintiff as Mr Lescaudron pursued his fraudulent activities covering them up with false reports and a tissue of lies and moving money as he pleased to fill the gaps in his trading activity.

477 On balance, the Investment Strategy document does not detract from the plaintiff's evidence that he managed the investment in the Russian shares and precious metals up to 2008 and not beyond that date.

Determination

478 It is clear from the plaintiff's evidence that he regarded himself as being in control of the investment of the Russian shares and precious metal investments up to the end of 2008. In the circumstances a finding is made that the plaintiff managed and was in control of the investment of the Russian shares and precious metal investments from 2005 up to the end of 2008.

479 A finding is also made that the other Trust assets over which the plaintiff had control of the investment were the USD 100m for the GCF and USD 100m loan to the directors of the TBC Bank.

480 The plaintiff identified the art collection as a matter over which he had control. This appears to be a non-contentious admission because it does not relate to any assessment that was carried out by the experts in assisting the Court in respect of the process for assessing any quantification of damages. The same position pertains to the GCF and TBC Bank 'investments'. The artworks were purchased by the plaintiff, and he did not depend upon the defendant to give advice or indeed to have physical control of those Trust assets.

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481 The Raptor shares were clearly managed by Mr Lescaudron. His fraudulent activity with forged communications purporting to have been approved by the plaintiff were obviously calculated to ensure that he was able to continue with his activity earning millions of dollars in commissions.

482 The fact that there was concurrent management of the Trust assets, part by the plaintiff and part by the defendant through Meadowsweet and Soothsayer with the Bank and the Singapore Bank is consistent with the plaintiff's 2005 Letter of Appointment. He exercised his right to choose the investment in Russian shares and precious metals between 2005 and 2008. He also exercised his right in respect of the art collection, the GCF and the loan to the shareholders of TBC Bank.

483 The plaintiff managed the investments of these Trust assets whilst the defendant through its underlying companies managed the investment of other Trust assets.

484 The plaintiff accepted in evidence, that he (and not the defendant) was responsible for any losses suffered on those investments that he managed in that period.

485 This does not detract from the ability to apply the label of a reserved powers trust to the arrangement between the parties. It is necessary to determine in each case the extent of the reservation and the consequences of that reservation. The protection in clause 10(b) of the Trust Deed applied to those assets that were managed by the plaintiff.

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Breach of duty

486 The plaintiffs claimed that during the administration of the Trust, the defendant committed repeated and flagrant breaches of its duties. They claimed that the defendant was informed of relevant transactions in respect of which it had an obligation to act and in respect of which it failed to do so. The plaintiffs claim that this commenced in 2007 and over the next 8 years a "catalogue of failures" occurred including: permitting misappropriation of the Trust assets; failing to detect Mr Lescaudron's forgeries; permitting the Trust assets to be managed by an unauthorised individual; failing to monitor the performance of the Trust assets; failing to keep proper records; failing to accurately account to the beneficiaries; and dishonestly concealing the fraud on the Trust accounts.[435]

487 In light of the defendant's admission, the parties' focus was on the defendant's breach of duty to safeguard the Trust assets.

Duties not in issue

488 The defendant admitted that it had a duty to protect and safeguard the Trust assets from being misappropriated.[436]

489 It admitted that it had a duty to distribute the Trust assets in accordance with the Trust Deed, the Deed of Amendment and Restatement and related documents.[437] It also admitted that it was required to refrain from acting on any wishes and/or requests communicated to it or on the basis of information provided by employees of other entities of CS Group, if it had actual knowledge

435 PCS, para 385.

436 Defence (Amendment No 4), para 44B.

437 Defence (Amendment No 4), para 44C(1).

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that such wishes and/or requests did not originate from the plaintiff and/or any representative of the plaintiff or that the information provided was not accurate.[438]

490 The defendant also admitted that it was required not to act solely at the direction of other parties and to give its own consideration to the exercise of its powers and discretions, in accordance with the Trust Deed, the Deed of Amendment and Restatement and related documents. It admitted that it was required to keep proper records and account to the beneficiaries of the Mandalay Trust in accordance with those deeds and related documents.[439]

491 The defendant also accepted that it had a concurrent duty to account to the beneficiaries which required it to know: (i) the nature of the assets comprising the Trust; (ii) the location of the assets; (iii) the identity of the custodian of the assets; and (iv) who was managing the assets.[440]

The duty to safeguard the Trust assets

492 The defendant deployed a new expression during its final oral submissions. It relates to both the defendant's duties as trustee and the extent of the defendant's admission made on the tenth day of the trial. The expression deployed was that as trustee the defendant had an obligation to "police the perimeter" of the Trust. That expression is not taken from any authority and the defendant candidly indicated that it is its own creation.

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438 Defence (Amendment No 4), para 44C(2).

439 Defence (Amendment No 4), para 44C(3) & (4).

440 Transcript, 16 February 2022, p 25.

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493 The defendant submitted that its duty to safeguard the Trust assets is not one of strict liability but one in which it is required to take reasonable care to "police the perimeter" of the Trust.

494 It is inappropriate to adopt the defendant's nomenclature in respect of its duty to the plaintiffs as "policing the perimeter of the trust" because (in the language of the Court of Final Appeal in *Zhang*) it would introduce an "amorphous and ill-defined" concept which has the capacity to undermine a "legitimate arrangement consciously adopted by the parties".

495 It is not in issue that for the defendant to comply with its duty to safeguard the Trust assets it had to ensure that no monies left the Trust without its authorisation and/or without it knowing the identity of the recipient of those Trust assets.

496 The breadth of the defendant's admission is significant. It admitted that by 31 December 2008, when it saw the perimeter of the Trust being breached by unauthorised payments away, it should have notified the beneficiaries, or at least notified the plaintiff. Its admission included the very important step of "directly contacting" the plaintiff/beneficiary to verify the payments in question.

497 The obligations recognised in the terms of the defendant's admission sit within the irreducible core of obligations described by Millett LJ in *Armitage v Nurse* at 253–254. This is what the defendant had to do to meet the obligation to perform the trust honestly and in good faith for the benefit of the plaintiffs. It knew that millions and millions of dollars and euros were leaving its custody of the Trust without its authorisation, and to discharge its core obligations it was required at the very least to inform the plaintiffs of that position.

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498 It is not enough to sit by and observe the Trust at its edge or perimeter. Once the events alert a trustee that something is amiss inside the perimeter, as the defendant accepts occurred in the present case by 31 December 2008, the trustee was required to act honestly and in good faith and advise the beneficiaries.

499 This does not run counter to the finding in *Zhang* at [51] that there were no "high level supervisory duties" imposed on the trustee in that case. Rather this analysis and conclusion flows from the defendant's admission of breach. In any event, there is an important distinction between a high-level supervisory duty over the wisdom of investments and a high-level supervisory duty over the safety of the trust assets. In *Zhang*, the Court firmly rejected the existence of the former and the latter duty was not in issue.

The date of breach of duty to safeguard the Trust assets

500 Although the defendant admitted that it breached its duty to safeguard the Trust assets by 31 December 2008, it does not accept that it was in breach of its duty prior to that date. It accepts that the admitted breach as at 31 December 2008 was continuing and caused loss and damage to the plaintiffs.

501 The plaintiffs contended that the defendant was in breach of its duty to safeguard the Mandalay Trust assets earlier than 31 December 2008. It was submitted that as early as December 2006 the defendant had identified the real risk of employee fraud from Mr Lescaudron's conduct. The plaintiffs contended that the defendant was in breach of its duty to safeguard the Mandalay Trust Assets as early as 2007, and certainly no later than March 2008.

502 As the defendant's only admission of breach is that it failed in its duty to safeguard the Mandalay Trust assets as at 31 December 2008, it will be

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necessary to determine whether the defendant was in breach of such duty earlier than the admitted date.

503 The plaintiffs claimed that by the end of 2006, the defendant knew that Mr Lescaudron's conduct was a fraud risk and that it needed to take immediate action in response. The defendant submitted that there is no basis for this claim. It referred to the e-mail from Ms Sim of 12 December 2006 (see [172] above) and emphasised that the words "this would gravely affect the integrity" of the plaintiff's "trust structure" suggest Ms Sim's concern was to uphold the integrity of the Trust rather than demonstrating any concern about a "potential fraud".[441]

504 In a similar vein, the defendant emphasised the statements made by Mr Low in the correspondence at about this time in which he said that such conduct "would be extremely severe for us all as a bank".[442] The defendant contended that this demonstrates that Mr Low was concerned about upholding the integrity of the Trust and not the risk of potential fraud.

505 Similarly, the defendant relied on the words in Ms Teng's correspondence referring to the "validity" of the Trust structure becoming "questionable". It submitted that this demonstrates a concern quite different from a concern about a potential fraud risk.

506 The defendant also submitted that Mr Ditrich's correspondence in December 2006 is demonstrative of a primary focus on "considerable regulatory

441 Exhibit A, Volume 1, p 300–301; DRCS at para 128.

442 Exhibit A, Volume 1, p 300.

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and legal risks" which it claimed mirrors Ms Teng's concerns of upholding "the integrity of the Trust".

507 The defendant's analysis of Mr Ditrich's correspondence, including the Legal and Compliance Alert attached to it, downplays Mr Ditrich's obvious concern in respect of Mr Lescaudron's conduct. The Alert referred to the danger of causing "invalidity of the Trust as a whole" and thus making it impossible for the Trust to achieve the purpose for which it was created. It is certainly true that there was no express statement within the Alert that UPAs were "red flags of fraud".[443] However, it is obvious that when Mr Ditrich referred to an RM organising UPAs with the consequence of benefiting anybody including himself with a risk of employee fraud in the extreme case, Mr Ditrich was clearly concerned about the prospect of fraud and was wishing to avoid a fraud.

508 The irresistible conclusion from the correspondence is that Mr Ditrich's concerns and the concerns of others involved in the communications were certainly not limited to maintaining the integrity of the structure. A very senior officer of Credit Suisse referring to the prospect of employee fraud in open communications to his colleagues in this fashion is a most serious matter and one that suggests that, as early as 2006, there was a concern that what was happening might, albeit in the extreme case, amount to a fraud.

509 The defendant also submitted that because UPAs were "not uncommon," they were not seen as a "red flag of fraud".[444]

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443 DRCS at para 130.

444 DCS, para 148(5).

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510 The plaintiffs relied upon Ms Sim's evidence that at the time of Mr Ditrich's correspondence referring to the risk of employee's fraud she understood that this was one of the dangers and the possible things that could happen "coming out of a UPA".[445] Ms Sim also agreed that this was why UPAs were "strictly forbidden".[446] However, the defendant emphasised Ms Sim's evidence that she did not know or suspect that Mr Lescaudron was in fact misappropriating Trust assets.[447]

511 Notwithstanding the correspondence in December 2006 in which Mr Ditrich advised his colleagues that the instance of the UPAs required "immediate action", the defendant submitted that UPAs were viewed as "administrative breaches of procedures that were not inherently suspicious or automatic red flags of fraud".[448]

512 The plaintiffs submitted that the defendant did not conduct any proper investigations into the UPAs in 2006. The defendant submitted that if it had pressed Mr Lescaudron to give an explanation at that time, he would have been able to produce legitimate documentation to support the payments. It is therefore submitted that there is simply no basis for the contention that by the end of 2006 the defendant knew that Mr Lescaudron's conduct was a fraud risk and that it needed to take action in response.

513 There is no issue that on 14 and 18 March 2008 millions of dollars and millions of euros left the Trust without the defendant's authorisation and

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445 Transcript, 16 September 2022, p 32.

446 Transcript, 16 September 2022, p 32.

447 DRCS, para 130.

448 DRCS, para 131.

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without it knowing the reason for the payment or the destination of the payment or the identity of the recipient of those millions of dollars and millions of euros ("the March 2008 transactions") (see [183] above).

514 It is also not in issue that the same thing occurred on 28 November 2008 ("the November 2008 transactions") (see [186] above).

515 The defendant explains that the date of its admitted breach, "by 31 December 2008", was chosen because the November 2008 transactions were a "sea-change in UPA activity"[449] and a "tipping point"[450] that should have caused it to take action resulting in Mr Lescaudron's activities being terminated.

516 The expression "sea change" in this context is reasonably understood to mean "a profound or notable transformation".[451] The expression "tipping point" in the same context is reasonably understood to mean "a time at which a change or an effect cannot be stopped".[452] Both these descriptions are indicative of some extraordinary event having occurred. However, extraordinary events had occurred and accumulated well before 31 December 2008.

517 As discussed earlier at [172]–[173], Mr Low wrote directly to Mr Lescaudron and Ms Sim wrote directly to Ms Raschle in December 2006 with instructions that could not have been clearer. They included that payments should not be made without Clementi's signature approving the transaction. Notwithstanding these clear directions, Mr Lescaudron embarked on a spree using the Trust assets clearly unconstrained and apparently unburdened by the

449 DCS, para 195.

450 DRCS, para 161.

451 New Oxford Dictionary of English.

452 Cambridge Dictionary.

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defendant's directions paying out over USD 46.6m in one day on 11 May 2007 (see [212] above).

518 In July 2007, Mr Lescaudron opened the new accounts for Meadowsweet without authorisation and embarked on the share trade churn whilst at the same time effecting the Overvalue Misappropriations for which more than ten years later, he would be convicted and imprisoned.

519 The defendant submitted rather extraordinarily that the evidence of its own witness, Ms Sim, that Mr Lescaudron should have been precluded from dealing with the Trust assets "as early as 2007" should not be given weight. It was a significant concession by Ms Sim and is to be taken into consideration with all the other evidence relevant to the issues for determination.[453] Although in the plaintiffs' written submissions it was contended that this should have happened "no later than 2007",[454] this was not the language deployed by Ms Sim.

520 Although the defendant suggested that it was the November 2008 transactions that were the sea change and the tipping point, the March 2008 transactions were just as extraordinary and in some respects even more extraordinary than the November 2008 transactions. The March 2008 transactions occurred over two days close to each other, seven transactions on the first day and two on the second day. The twelve relevant November 2008 transactions occurred on the one day. The March 2008 transactions totalled EUR 10.72m and USD 7.731m whereas the November 2008 transactions totalled EUR 5.729m and USD 4.396m.

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453 Transcript 16 September 2022, p 93.

454 PCS, paras 12, 15 and 42.

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521 The March 2008 transactions were not surrounded by market turmoil and the GFC whereas the November 2008 transactions occurred in close proximity to these events.

522 The March 2008 transactions were much closer in time to the defendant's direction to Mr Lescaudron of how the Trust arrangement and transactions should be conducted.

523 Although the defendant's witness, Ms Sim, made the concession that Mr Lescaudron should have been precluded from having access to the Trust assets as early as 2007, that was a response in cross-examination which should be taken into account with the further analysis above to decide the date upon which the defendant was in breach of its duty to safeguard the Trust assets.

Breach of duty 30 March 2008

524 In all the circumstances and having regard to the events between late 2006 and March 2008 it is clear that by no later than March 2008, any individual or professional trustee, acting honestly and in good faith in compliance with its duty to safeguard the Trust Assets, would have had no justification for continuing to allow Mr Lescaudron to have access to the Trust assets. The failure to preclude such access by no later than 30 March 2008 (allowing for notice of the payments out without authority) was a breach of the defendant's duty to the plaintiffs to safeguard the Trust assets.

Liability for consequences of breach

525 The defendant contended that if there is a finding of breach earlier than the admitted breach then it is entitled to the protection from liability for any damages suffered in respect of assets over which it did not have full control.

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526 The starting point in this consideration is clause 10(b) of the Trust Deed extracted again here for context:

> Should any person when transferring assets to the Trust Fund impose any restrictions on the Trustees in relation to those assets with regard to (1) the choice of investment manager or investment advisor or (2) the investment thereof, the Trustee shall be bound thereby but the Trustee shall not in any circumstances be liable for any loss, damage, depreciation to those assets which may result from any action or inaction of the Trustees by virtue of the inability of the Trustees to have full control of the investment of those assets or by virtue of the Trustees following the advice of any such investment advisor and the Trustee shall be entitled to be reimbursed from the Trust Fund in respect of all claims, demands, liabilities, losses, costs, and expenses whatsoever in relation thereto.

527 The plaintiffs contended that the defendant is unable to claim the protection of the anti-*Bartlett* clauses because it has not remained "aloof" from Meadowsweet and Soothsayer as the operative investment companies.

528 The defendant submitted that although the trustee in *Zhang* was not completely "aloof" from the investment company, the Court did not see this as an impediment to giving effect to the anti-*Bartlett* clauses. As discussed earlier the Trust arrangements in *Zhang* were different from those in the Mandalay Trust. The trustee's obligations in *Zhang* to treat the investment adviser's recommendations as "final" were different from the position in the Mandalay Trust.

529 The defendant submitted that in a reserved powers trust it is unexceptional for the trustee to provide administrative services to facilitate the running of the business under the trust. It is also submitted that as long as the trustee does not manage the business itself, there is no inconsistency between the trustee being the owner and director of the investment company and clauses

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in the trust documentation excluding the trustee's power and duty to manage and invest the trust assets.

530 The defendant contended that this was the case with Meadowsweet. There is no dispute that the defendant owned the shares in Meadowsweet and appointed Meadowsweet's directors. There is also no dispute that the directors were the signatories of Meadowsweet's bank account with the Bank. It was submitted that these directors did not participate in the investment or management of the funds in those bank accounts. Rather, this was carried out by Mr Lescaudron and, as the defendant claimed, under the direction of the plaintiff and Mr Bachiashvili as the appointed investment managers of the Mandalay Trust. The defendant emphasised the plaintiff's evidence that he looked to the Bank, and not to the defendant, to manage the investments of the Trust assets.

531 The defendant submitted that in all the circumstances of this case, there is no basis on which the anti-*Bartlett* clauses would not apply and protect it from liability for the loss suffered by the plaintiffs by reason of its breach of duty.

532 The plaintiffs contended that the defendant exercised complete control over the investment companies and, therefore, the anti-*Bartlett* clauses are simply inapplicable. They submitted that even if the defendant had no duty to involve itself in the management of the companies, it was not relieved of the duty to satisfy itself that nothing untoward was affecting the Trust assets.

533 The plaintiffs submitted that *Zhang* is distinguishable from the present circumstances. It was submitted that in *Zhang* the Court held that the anti-*Bartlett* clause excluded any supervisory duty for the trustee to keep itself informed about the affairs of the holding company because of the very specific

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circumstance that the subject investments had been made at the instigation of one of the plaintiffs. It was submitted that the distinguishing feature to the present case is that there was a very close interconnection between the Bank and the defendant, and the investments were made through the Bank's employees, including Mr Lescaudron, and employees of the defendant. It was submitted that although the defendant pleaded a case and tried to suggest it was effectively and functionally independent of the Bank, this was resoundingly exposed through the trial to be false.

534 The plaintiffs submitted that there is justified academic criticism that *Zhang* "went too far". It was submitted that a trustee who ignores a significant fall in profits and then relies on an exemption clause to refuse to enquire about such a fall should lose the protection of the exemption clause: *Underhill & Hayton, Law of Trusts and Trustees* (20th ed, LexisNexis 2022) at para 51.55.

535 The plaintiffs also submitted that if anti-*Bartlett* clauses can displace many, if not all, of the defendant's obligations, then the nature of the trust fails to have any resonance. However, the plaintiffs point out that if, as admitted, the defendant has an irreducible core duty to safeguard trust assets from being misappropriated, it must follow that the defendant has an irreducible core duty to account which must necessarily involve reviewing and monitoring the Trust assets. Otherwise, the defendant would not be able to safeguard the assets from being misappropriated and to account for them to the beneficiaries.

536 The plaintiffs submitted that there is clear evidence that the defendant regarded itself as owing fiduciary duties to the plaintiffs and that it regarded the duty to review and monitor the Trust assets as a facet of those duties.[455]

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455 Transcript, 16 September 2022, p 132.

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537 The plaintiff managed some of the investments of the Trust assets and the defendant managed the other investments of the Trust assets. The anti-*Bartlett* clauses protect the defendant from liability for any losses suffered in respect of the assets the investment of which the plaintiff was managing. They do not protect the defendant from liability for losses suffered in respect of the assets the investment of which the defendant was managing through Meadowsweet and/or Soothsayer.

538 The defendant accepted that one of the alternative consequences of its admitted breach of duty as at 31 December 2008 was that the whole portfolio would have been removed from the defendant and placed with another trustee. However, the defendant does not accept that this was an alternative consequence of any breach that the Court may find occurred earlier than 31 December 2008. The defendant submitted that this is not a probable consequence because Mr Lescaudron would have been able to give a plausible explanation for his conduct.

539 The defendant's submission focuses more on Mr Lescaudron's capacity to deceive the defendant (and others) rather than the nature of the disclosure that should properly have been made to the plaintiffs by no later than 30 March 2008 in respect of the defendant's duty to safeguard the Trust assets.

540 The disclosure to the plaintiffs in March 2008 should have been made with the appropriate candour and transparency expected of a trustee acting honestly and in good faith in the best interests of the beneficiaries. That disclosure would include the detail of the unsuccessful efforts since December 2006 to rein Mr Lescaudron in to prevent him from paying millions of dollars and millions of euros out of the Trust accounts without authority. This would then have exposed the desultory nature of the defendant's efforts in this regard.

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541 The plaintiff's evidence, which is accepted, that had he known that he was supposed to manage the investment of all the Trust assets, he would have ended his relationship with the Bank and the defendant, makes it more probable than not that had he known in March 2008: (a) that Mr Lescaudron had been paying away millions of dollars and millions of euros of Trust monies without authorisation; and (b) of the desultory efforts of the defendant to stop Mr Lescaudron from doing so, he would have ended the relationship with the defendant.

542 In support of its contention that it is not responsible for any losses beyond the funds that were misappropriated by Mr Lescaudron, the defendant submitted that any such losses were outside the scope of its duty to the plaintiffs. It submitted that just because it admitted that if it had performed its duty to safeguard the Trust assets Mr Lescaudron would have been removed from having access to the Trust assets by 31 December 2008, that did not mean that the investment losses beyond the misappropriations can be "pegged" to the breach of duty to safeguard the assets.[456]

543 The defendant relied upon several authorities for the proposition that in awarding equitable compensation, the Court must assess the nature of the duty, the scope of the duty that has been breached and the loss that flows from that breach (see *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 211H and 213E; *Manchester Building Society v Grant Thornton UK LLP* [2021] 3 WLR 81; *Main v Giambrone & Law (a firm)* [2017] EWCA Civ 1193; *LIV Bridging Finance Ltd v EAD Solicitors LLP* [2020] EWHC 1590 (Ch)). The defendant claimed that the losses alleged by the

456 Transcript, 16 February 2023, p 76.

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plaintiffs did not fall within its "scope of duty" or did not flow from the breach of its duty to safeguard the Trust assets.

544 The losses that flowed from the defendant's breach of trust are not limited to the funds that were stolen by Mr Lescaudron. The Trust assets, as a whole, were vulnerable to Mr Lescaudron's fraudulent manipulation in support of the deceitful scheme that he had constructed and implemented. This manipulation included not only outright theft of funds but also the movement of funds into and out of investments to enable Mr Lescaudron to cover his tracks and losses to keep his scheme afloat and to earn him millions of dollars and/or euros in commissions. These so called 'investments' were the vehicles he used to achieve his fraudulent goals. These investments were sometimes unsuitable and at other times overconcentrated. However, but for those that were managed by the plaintiff, they were all part of Mr Lescaudron's scheme. The fact that he was permitted to continue in his role was causative of the losses beyond the misappropriations suffered by the plaintiffs.

545 The defendant's submission that is not responsible for any losses beyond the funds that were misappropriated by Mr Lescaudron because such losses were outside the scope of its duty to the plaintiffs to safeguard the Trust assets is not accepted.

546 If the defendant had advised the plaintiff directly on 30 March 2008 of the conduct by Mr Lescaudron in making the unauthorised payments away, as it was its duty to do so, not only would Mr Lescaudron's access to the Trust assets been removed but it is more probable than not that the whole portfolio would have been removed to another professional trustee.

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547 The consequence of the breach by the defendant in failing to safeguard the Trust assets as at 30 March 2008 is that it is liable to the plaintiffs for the difference between the value of the portfolio that was not affected by fraud and would have been managed by a professional, competent trustee and the value of the portfolio managed by the defendant, subject to the matters dealt with below relating to the quantification of the plaintiffs' loss.

Contributory negligence

548 The defendant submitted that any damages awarded to the plaintiffs for the breach of its duty to safeguard the Trust assets should be reduced by reason of the plaintiff's contributory negligence in failing to monitor and manage the investment of the Trust assets.[457]

549 The defendant submitted that both the plaintiff and Mr Bachiashvili failed in their obligations as Investment Managers to ensure that they were regularly updated about the status of investments of the Trust assets and to act upon information they received.[458] In this regard the defendant relied upon the plaintiff's evidence that "there was no obligation on the part of Mr Lescaudron to update me on trust accounts, and therefore I was not receiving any updates from him on that".[459] The plaintiff gave evidence that he "would never look inside what was in the structure or whatever was going on inside".[460] He was only interested in the "bottom line figure" as reported by Mr Lescaudron through Mr Bachiashvili.[461]

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457 DCS, para 224.

458 DCS, paras 226–227 and 235.

459 Transcript, 8 September 2022, p 119.

460 Transcript, 6 September 2022, p 58.

461 Transcript, 9 September 2022, p 28.

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550 The plaintiff did not believe that he had responsibility for managing the Trust assets other than those identified earlier. As already discussed, his purpose in retaining the defendant was so that it could manage the Trust assets and that had he known that he was supposed to be managing the Trust assets, he would have ended his relationship with the Bank and the defendant (see [456] above). In those circumstances he did not instruct Mr Bachiashvili to monitor and manage the investment of the Trust assets.

551 The defendant also submitted that instead of relying on official Bank statements, the plaintiff and Mr Bachiashvili placed undue reliance on information in Excel reports from Mr Lescaudron.[462] On two occasions early in 2013, Mr Lescaudron sent Mr Bachiashvili official Bank statements along with a spreadsheet that he had prepared.[463] Mr Lescaudron then stopped sending the Bank statements. Mr Bachiashvili explained that "it was clear – to him and to me that the Excel was more convenient way to report" because he "was also not interested in the particular composition of the portfolios". Mr Bachiashvili took Mr Lescaudron's reports "at face value" in reporting the bottom-line figure to the plaintiff.[464]

552 The defendant also contended that the relationship that developed between the plaintiff and Mr Lescaudron and later also with Mr Bachiashvili was an effective delegation to Mr Lescaudron of the management and monitoring of the investments of the Trust assets. It was submitted that this gave Mr Lescaudron the opportunity to defraud the Mandalay Trust and that the plaintiff and Mr Bachiashvili should have foreseen this. It was submitted that as

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462 DCS, para 242.

463 Transcript, 9 September 2022, p 39–40.

464 Transcript, 9 September 2022, p 28.

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a sophisticated investor and businessman, the plaintiff must have known that there was minimal supervision of Mr Lescaudron and that this created the opportunity for Mr Lescaudron to take advantage of his position.[465]

553 The defendant also relied upon the plaintiff's failure to inform the defendant and/or the Bank that he had made bonus payments to Mr Lescaudron. It was submitted that had the plaintiff informed the defendant or the Bank about these payments, they would have insisted on the removal of Mr Lescaudron from involvement with any of the Trust assets.[466]

554 It was submitted that in all the circumstances the plaintiff must be held partially responsible for any investment-related losses to the Mandalay Trust which it claims should be allocated as to 60% to the plaintiff and 40% to the defendant.[467]

555 The plaintiffs and the defendant are at issue in respect of the nature of a trustee's duty to safeguard the Trust assets. The plaintiffs contended that it is an equitable duty whereas the defendant contended that it is a common law duty of care.

556 In this case the defendant's core and equitable duty to the plaintiffs was to safeguard the Trust assets, a breach of which was a breach of trust. This was not a matter of a failure of skill and care, prudence and diligence (see *Armitage v Nurse*; *Sim Poh Ping* at [99]–[103]).

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465 DCS, paras 269–270.

466 DCS, para 251.

467 DCS, para 272.

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557 However, the defendant contended that even if the duty is equitable a defence of contributory negligence is available. In this regard it relied upon the absence from the definition of "fault" in ss 2 and 3(1) of the Contributory Negligence and Personal Injuries Act 1953 (2020 Rev Ed) (the "Contributory Negligence Act") of any stipulation as to whether a defence of contributory negligence is available to a defendant against claims for breaches of fiduciary and/or equitable duties to suggest that in line with the decision in *Kidd v Paull and Williamsons LLP* [2018] SC 193 ("*Kidd*") it is an available defence.

558 In *Kidd* the Court was dealing in part with an admitted breach of fiduciary duty in which there were various contentious issues including whether contributory negligence was available as a defence to an action for such a breach. Lord Tyre observed at [39] and [40] that "Scots law" had never adopted the "English dichotomy between law and equity" and was "untroubled by historic distinctions between law and equity". His Lordship found (at [66]) the observations of Lord Hoffmann and Lord Rodger in *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4)* [2002] 3 WLR 1547, that there was no contributory negligence defence to a claim of fraudulent misrepresentation, as a "highly persuasive" basis to conclude that the same position should pertain under Scots law. However his Lordship concluded at [69] that "at least in cases where the breach of fiduciary duty is found to have been unintentional, a defence of contributory fault may be available to the defender".

559 In the present case the defendant claimed that its admitted breach, and it follows the breach as found on 30 March 2008, were unintentional and therefore the defence of contributory negligence is available.

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560 The plaintiffs submitted that the defence of contributory negligence is not available to the defendant in respect of the breach of its equitable duty to safeguard the Trust assets.[468] In support of this submission the plaintiffs relied on *Pilmer v Duke Group Ltd (in liq)* (2001) 180 ALR 249 ("*Pilmer v Duke*").

561 In *Pilmer v Duke* the High Court of Australia at [71] referred to McLachlin J's (as her Honour then was) analysis of the "distinct character of the fiduciary obligation" contrasting its ambit with that of contract and tort in *Norberg v Wynrib* [1992] 2 SCR 226 at 272, referring also to her earlier statement of principle to similar effect in *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 542–545. In contract and tort "the parties are taken to be independent and equal actors, concerned primarily with their own self-interest". In contrast the fiduciary relationship is where "one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other".

562 In contrast to the Scots law as explained in *Kidd* there was recognition in *Pilmer v Duke* that in Australia "the substantive rules of equity have retained their identity as part of a separate and coherent body of principles" (at [173]). Reference was made to the High Court's various judgments establishing that "losses sustained by reason of a breach of duty by a trustee or other fiduciary is determined by equitable principles" and that there were "severe conceptual difficulties in the path of acceptance of notions of contributory negligence as applicable to diminish awards of equitable compensation for breach of fiduciary duty" (at [85]–[86]).

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468 PRCS para 91.

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563 The defendant rightly pointed out that some of these observations were *obiter* however it is inconsistent with the trustee's core obligation to keep the Trust assets safe that a beneficiary should be bound to protect himself or herself against a trustee breaching such a profoundly important obligation.

564 The defendant's contention that the breach of its duty is simply a breach of its duty of care in tort is not accepted.

565 When a trustee fails to safeguard trust assets it is in breach of an equitable duty to the beneficiaries: *Sim Poh Ping* at [100]. The admitted breach and the breach found to have been committed as at 30 March 2008 are breaches of an equitable duty, not a duty of care in tort. A defence of contributory negligence is not available to the breach as found.

566 Notwithstanding this finding it is for completeness appropriate to deal with the plaintiffs' responses to the defendant's contentions. The plaintiffs submitted that it is simply not open to the defendant to advance a defence of contributory negligence which is both unpleaded and unsupported by the evidence.[469]

567 The plaintiffs contended that the plaintiff was only appointed Investment Manager because the defendant needed time to execute the discretionary mandates with the Bank. Mr Bachiashvili was only appointed for the sole purpose of signing off on OTC trade confirmations after they were made.[470] It was submitted that the contemporaneous documents demonstrated

469 PRCS, para 137.

470 DRCS, paras 103–104.

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that no one expected either the plaintiff of Mr Bachiashvili to manage the investment of all the Trust assets.[471]

568 Further, the plaintiffs submitted that any failure by the plaintiff or Mr Bachiashvili to ensure that they were regularly updated about the investment of Trust assets cannot have caused the plaintiffs' losses. This is because any information that they would have received would only have been through the fraudster, Mr Lescaudron, who was the designated point of contact.[472] It is also submitted that the defendant and other Credit Suisse entities withheld important information from the plaintiff and Mr Bachiashvili, not least the millions of dollars and millions of euros of unauthorised payments from the Trust accounts from 2006 onwards.[473]

569 The plaintiffs emphasised that the bonus payments to Mr Lescaudron ceased in 2012. Mr Lescaudron's unauthorised dealing with the Trust assets continued until September 2015. It was submitted that the plaintiff did not confer or delegate any investment powers to Mr Lescaudron. It was also submitted that the best that the defendant could do was to point to Mr Lescaudron's so-called investment advice in relation to the Raptor shares which does not demonstrate investment advice in relation to the Trust accounts. In any event, it was submitted that the plaintiff's evidence was that he did not pay Mr Lescaudron in exchange for so-called advice to invest in Raptor.[474] His evidence was that he paid the bonuses for Mr Lescaudron's services as an employee of the Bank and expressed regret that he was not attentive enough to the technical

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471 DRCS, para 109.

472 DRCS, para 117.

473 DRCS, para 118.

474 Transcript, 7 September 2022, p 15.

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details as to the way such bonuses had been paid until of course Mr Bachiashvili advised him of the correct position.[475]

570 Section 3(1) of the Contributory Negligence Act provides that damages "be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage". In determining what is just and equitable, regard may be had to the relative causative potency of the parties' conduct and the relative moral blameworthiness of the parties' conduct: *Asnah bte Ab Rahman v Li Jianlin* [2016] 2 SLR 944 at [118]. The defendant's conduct from 2006 as discussed in detail earlier in this judgment, was both causatively potent and morally blameworthy such that it would not be fair, just and equitable to attribute any proportion to the plaintiff let alone the plaintiffs.

Should the defendant be excused

571 The defendant argues that it is entitled to be relieved of any liability for breach of duty prior to 31 December 2008 pursuant to s 60 of the Trustees Act.[476]

572 Section 60 of the Trustees Act provides as follows:

> **Power to relieve trustee from personal liability**
>
> **60.** If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before, on or after 1 September 1929, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, then the court may relieve the trustee either wholly or partly from personal liability for the same.

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475 Transcript, 7 September 2022, p 14.

476 DCS, para 215.

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573 The defendant submitted that it acted honestly and reasonably prior to 31 December 2008. It claimed that it entrusted the Trust assets to the Bank because it believed that this was what the plaintiff wanted. It also claimed it did not know that Mr Lescaudron, rather than the plaintiff, was the one actually managing the investments and contended that it is fanciful to suggest that it should have identified unsuitable or overconcentrated investments.[477]

574 The plaintiffs submitted that the defendant: allowed unauthorised payments of millions of dollars of Trust funds in many instances without asking for evidence of instructions from the plaintiff; allowed trading to take place on certain Trust accounts for which the defendant's documentation indicated there was no one authorised to conduct trading; and concealed unauthorised payments and Mr Lescaudron's fraud from the plaintiffs.

575 Any trustee acting honestly and in good faith in compliance with its duty to safeguard the Trust assets, would have had no justification for continuing to allow Mr Lescaudron to have access to the Trust assets from 30 March 2008. By that time, the UPAs of significant sums had occurred in the Trust accounts and the defendant was very well aware of this.

576 It is not accepted that the defendant's conduct was reasonable. It preferred the "importance" of Mr Lescaudron in retaining the "big client" (the plaintiff) with the Credit Suisse organisation to the compliance with its core obligation of keeping the Trust assets safe. It knew that Mr Lescaudron was in breach of its directions that had been established for the purpose of avoiding employee fraud and in some instances waited for up to two years for a response from him when he was questioned about his flagrant breaches. Its tolerance of

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477 DCS, para 219.

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these flagrant breaches was not in good faith and was unreasonable. It would certainly not be fair to excuse the defendant for its breach of trust.

577 In these circumstances, the defendant it is not entitled to be relieved of liability under s 60 of the Trustees Act.

Adverse inferences

578 The plaintiffs alleged that the defendant was resistant to providing proper discovery throughout the proceedings and submitted that adverse inferences should be drawn against it.

579 The plaintiffs complained of the piecemeal fashion in which the defendant provided them with relevant documents prior to the commencement of trial.[478] Many of the documents disclosed were heavily redacted, with the redactions only lifted for some of the documents in the midst of trial after the Court observed that it would be helpful for that to be done.[479] During trial, the defendant continued to disclose further documents.[480] Many of these documents were obtained from the Bank, at the defendant's request. The plaintiffs submitted that this demonstrated that the defendant could obtain documents from the Bank "at the drop of a hat", despite its position taken throughout proceedings that it was difficult to obtain documents from the Bank. [481] It was submitted that the defendant's attempt to foist large numbers of documents on the plaintiffs during the plaintiff's cross-examination was highly

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478 PCS at paras 623–636.

479 PCS at para 644.

480 PCS at para 646.

481 PCS, paras 648–649.

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inappropriate.[482] It was also submitted that the defendant's disclosure of e-mails involving its witnesses after the conclusion of their evidence was prejudicial to the plaintiffs.[483]

580 On 12 September 2022, along with a further list of documents, the defendant filed two affidavits: one sworn by Ms Christie and one sworn by Mr Eichmann. Ms Christie's affidavit elaborated on an earlier affidavit, which had been filed at the Court's request to explain when the defendant had received certain documents. Mr Eichmann explained in his affidavit why further documents had been filed after his confirmation in an affidavit verifying lists of documents that there were no more relevant documents in the defendant's possession custody or power.

581 It was on these affidavits that Ms Christie and Mr Eichmann were cross-examined on the *voir dire* on 14 September 2022.

582 The plaintiffs submitted that the defendant's conduct deprived it of a reasonable opportunity to consider the new documents and their impact on the plaintiffs' cases.[484] It was submitted that the defendant should not be allowed to benefit from its improper conduct and deficient discovery.[485]

583 The plaintiffs submitted that the Court should draw the following adverse inferences: that the defendant deliberately withheld documents because these documents would harm its case and support the plaintiffs' cases; that the defendant was able, but refused to, obtain relevant documents from the Bank

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482 PCS, para 650.

483 PCS, paras 681–682.

484 PCS, para 699.

485 PCS, para 701.

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because these documents would be damaging to its case and support the plaintiffs' cases; that the defendant did not recall Mr Birri and Ms Sim to give direct evidence on e-mails to which they were party that were disclosed after the conclusion of their evidence because their evidence would be harmful to the defendant's case; that the defendant refused to call Mr Guldimann to give evidence in relation to his restatement exercise because it would show that the defendant acted dishonestly to conceal the fraud; and that the defendant refused to call any witnesses from its compliance team because they worked closely with the Bank's compliance team, which had actual knowledge of Mr Lescaudron's fraud.

584 It is appropriate to take into account the pressures and complexities of the preparation for and conduct of the trial, including the numerous amendments to the pleadings. Notwithstanding these considerations, the process of ongoing discovery/disclosure by the defendant during the trial was at times rather chaotic. There certainly appeared to be a lack of a disciplined approach to compliance with its discovery/disclosure obligations with the need for the plaintiffs to persist in their applications for proper compliance by the defendant. Numerous affidavits had to be filed by the defendant correcting earlier affidavits in relation to the defendant's list of documents and the plaintiffs had to deal with all of this whilst running the trial.

585 However, I am not satisfied that adverse inferences should be drawn that the defendant deliberately withheld documents or that it refused to seek documents from the Bank. Rather the defendant's conduct in respect of its discovery/disclosure referred to above was consistent with its desultory efforts to rein in Mr Lescaudron demonstrating a lack of proper and disciplined commitment to its legal obligations.

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586 The plaintiffs could have sought leave to further cross-examine either or both Mr Birri and Ms Sim after the production of the subject e-mails but chose not to do so. The defendant's failure to recall them itself for further evidence-in-chief is not a basis for the adverse inference sought by the plaintiffs not least for the reason that it is unnecessary in light of the conclusions that the defendant is not entitled to be excused under section 60 of the Trustees Act.

587 The absence of Mr Guldimann from the witness box is in a different category. Certainly, there were matters in respect of the restatement exercise that required explanation with the reasonable expectation that the defendant would have called Mr Guldimann to provide that explanation. It is appropriate in the circumstances to infer that the defendant chose not to call him because his evidence would not have assisted its case and supported the plaintiffs' claims. It is appropriate to infer adversely to the defendant that its failure to call Mr Guldimann supports the finding that the restatement of the accounts did not accurately reflect the reality of the transactions effected by Mr Lescaudron and is further support for the finding that the defendant did not act in good faith when it failed to disclose Mr Lescaudron's fraud to the plaintiffs in a timely fashion.

588 The absence of members of the compliance team from the witness box is not a basis for a further inference adverse to the defendant. The witnesses who were called made appropriate admissions during their cross-examination that the defendant should have prevented Mr Lescaudron from having access to the Trust assets from as early as 2007 (see [195] above).

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Expert issues

589 The issue for determination which arises from the defendant's breach of its duty to the plaintiffs is what would have happened if the Trust assets had not been affected by fraud and had been placed with a competent and professional portfolio manager as at the date of breach.

590 To assist the Court in determining this and related issues, the parties have relied on experts in wealth management and forensic accounting.

591 As discussed earlier, the forensic accounting experts who assisted the Court in this regard were Mr Davies, whose affidavits and reports were read by the plaintiffs, and Mr Nicholson, whose affidavits and reports were read by the defendant. The wealth management/investment management experts who assisted the Court were Mr Morrey, whose affidavit and reports were read by the plaintiffs, and Ms Mayr, whose affidavits and reports were read by the defendant.

592 There is no issue that each of the experts who assisted the Court is suitably and relevantly qualified and expert in their respective fields as described in their written evidence. Their tasks were clearly vast, and it is obvious that the experts applied themselves diligently, professionally and honestly to those tasks. The system of expert assistance to the Court is integral to the proper administration of justice and it is appropriate to recognise that invaluable service in this matter.

593 The experts were required to construct alternative medium-risk portfolios for each of the Meadowsweet accounts, the Soothsayer accounts, and the CS Life Meadowsweet accounts. These portfolios were referred to as "Benchmark Portfolios".

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594 The Benchmark Portfolios were constructed by the wealth management experts and the forensic accounting experts used the Benchmark Portfolios to calculate what the returns would have been if the Trust assets had been invested in accordance with those Benchmark Portfolios.

Forensic accounting expert evidence

595 The forensic accounting experts, Mr Nicholson and Mr Davies, gave evidence concurrently on 21 September 2022.[486]

596 In their initial presentations to the Court, Mr Davies described the various "Models" for quantification of damages and Mr Nicholson described the accounts and the quantification of loss.

The Models

597 The Models that have been constructed by the experts can be separated into two broad categories: the Whole Portfolio Model (Models 1A and Model 1B); and the Specific Transaction Model (Models 2, 3 and 4) dealing with misappropriation, unsuitable transactions, and overconcentration respectively.

598 The Whole Portfolio Model 1A represents the position in which all assets are withdrawn from the Trust at the relevant date of breach and invested in a Benchmark Portfolio, the result of which investment at the end of the relevant period is compared with the portfolio in the defendant's custody. The

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486 Mr Davies Reports of 26 March 2022 and 28 July 2022 with errata of 20 September 2022; the joint report of Mr Davies and Mr Nicholson of 16 September 2022 and the joint report of Mr Davies and Ms Mayr of 31 August 2022 were admitted as evidence and marked Exhibit PX1. Mr Nicholson's Report of 30 June 2022 and his joint statement with Mr Morrey of 1 September 2022 were admitted as evidence and marked Exhibit DX1. Transcript 22 September 2022 pages 27 and 31.

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difference between those outcomes calculated by the experts is the loss allegedly suffered by the plaintiffs as a result of the defendant's breach of duty.

599 Model 1B was described by Mr Davies as Model 1A "with a twist".[487] This Model differs from Model 1A in that it excludes transactions/trading on Meadowsweet's account 75 for the plaintiff's trading in Russian shares and precious metals up to 31 December 2008. Model 1B therefore starts the quantification of loss from 31 December 2008 for this account.

600 The Specific Transaction Model calculates the total of the various improper transactions into the relevant Benchmark Portfolios. This Model is based on the approach that but for the defendant's breach, these transactions would not have happened, and these sums would have appreciated in accordance with the relevant Benchmark Portfolios.

601 Model 2 assembles all the unauthorised transactions, netting off payment that had been received as at the date of the trial in September 2022, and then investing that amount in the Benchmark Portfolio (excluding the trading in Carpathian shares).[488] Unauthorised transactions comprise misappropriations and transactions at an overvalue.

602 Model 3 identifies the objectionable alleged unsuitable positions identified by the wealth management experts and places them in the Benchmark Portfolio.

603 Model 4 identifies the alleged overconcentration transactions and places them in the Benchmark Portfolio in what Mr Davies described as a very

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487 Transcript, 21 September 2022, p 45.

488 Transcript, 21 September 2022, p 45.

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complicated and multifaceted exercise.[489] Overconcentration occurs where the value of a certain security exceeds a threshold identified by the wealth management experts.

604 In Models 2, 3 and 4 the experts were dealing with the disputed transactional position one by one and applying the Benchmark Portfolio to each of those transactions whether they were in an account or a sub-account. This required some weighting of the average of the sub-account albeit it did not have "much of an impact".[490]

The Accounts

605 Monies went from The Mandalay Trust into Meadowsweet and Soothsayer. In March 2005 Soothsayer was opened with an initial investment of USD 550m. Soothsayer had three sub-accounts which had discretionary mandates which were closed in 2009 and 2013.

606 A Meadowsweet account was opened in 2005 with an initial investment of USD 550m. There were three sub-accounts with discretionary mandates closed in January and August 2009.

607 Meadowsweet also invested in the CS Life Meadowsweet accounts opened in September 2011 with approximately USD 100m of initial investment in cash and USD 350.48m of value injected into that account.[491]

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489 Transcript, 21 September 2022, p 46.

490 Transcript, 21 September 2022, p 112.

491 Exhibit PX1, 3 June 2022, para 4.80.

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Approaches to quantification of Loss

608 Mr Davies and Mr Nicholson reached agreements in respect of the list of trades, capital movements and the performance of the trust accounts based on three sets of documents. Those documents were: (i) investment reports that describe assets and liabilities for each account and which show the balances on particular dates; (ii) statements of safekeeping with details for all accounts at particular dates; and (iii) statements of account which show the cash transactions for cash accounts associated with each trust account typically covering quarterly or biannual periods.

609 For the Specific Transaction Models, the three broad classes of items that were considered by the experts were: (i) the unsuitable positions; (ii) the overconcentrated positions; and (iii) the unauthorised transfers which contain both misappropriations and transactions at an overvalue.

610 The differences between the experts in respect of the calculation of loss on the unsuitable positions arises by reason of their respective applications of the different conclusions reached by Mr Morrey or Ms Mayr. Mr Morrey and Ms Mayr had different methods for determining whether a position was unsuitable.

611 Overconcentrated positions were those in which there was too much of a particular investment in the fund. Mr Davies and Mr Nicholson assessed what was necessary to reduce those overconcentrated positions to acceptable levels within the fund, took the money that would have been realised by selling down those positions and reinvested it in Benchmark Portfolios.

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612 Some investments were both overconcentrated and unsuitable. Where this occurred Mr Nicholson and Mr Davies adjusted that overlap and translated that into the figures as calculated.

613 One difference between these experts is how they dealt with the complicated and esoteric circumstance "where the counterfactual goes negative". This is seen most obviously in Model 4, overconcentration. Mr Davies dealt with this by allowing it to go "negative" in the exercise. Whereas Mr Nicholson took the money out with the result that it does not benefit from the multiplier either positively or negatively.[492]

614 There were some differences between the experts in relation to the transactions at an overvalue in Model 2. For certain transactions, they agreed that the losses would be calculated assuming that in the "but for" position, the transfers would still have taken place, but at market value instead of at an overvalue. For the others, Mr Davies' calculations assumed that the transfers would not have taken place at all. The total difference in quantification arising from the differing approaches is USD 2.94m (4%).[493]

615 Following Mr Morrey and Ms Mayr's differing approaches to options, Mr Nicholson and Mr Davies dealt with options differently when constructing Model 3. They also approached the profits from the sale of the Raptor shares differently. Ultimately, the difference between them as to quantum arising from the Raptor share issue was approximately USD 0.1m.[494]

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492 Transcript, 21 September 2022, pp 104–105.

493 Transcript, 21 September 2022, pp 156–158; FA Joint Statement at para 5.31.

494 Transcript, 21 September 2022, p 163.

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616 In dealing with Model 4, Mr Nicholson and Mr Davies implemented the respective conclusions of Mr Morrey and Ms Mayr. Differences arose in their calculations due to the different ways they treated options when calculating overconcentration.[495] They also disagreed about how "lost profits" from overconcentrated investments should be brought to account.[496]

617 There was a difference between Mr Nicholson and Mr Davies in respect of the Carpathian shares. Mr Davies took the view that the Carpathian investment should have been invested into the Benchmark Portfolio, whereas Mr Nicholson took the view that it should not. The difference between them probably stemmed from the difference in relation to their instructions, specifically in respect of whether that investment was unauthorised. Ultimately that difference in quantification is approximately USD 1.7m.[497]

618 There was a difference between Mr Nicholson and Mr Davies in respect of the transfer of monies from Soothsayer to Meadowsweet in 2014. Mr Davies took the balance in Soothsayer at 31 December 2007 and modelled it as if the amount remained in Soothsayer until the date of trial. Mr Nicholson took the transfer out of Soothsayer to Meadowsweet into account to decide what would have happened. The consequential use of a different rate of return between those two accounts is a difference of USD 2m between Mr Nicholson and Mr Davies.

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495 FA Joint Statement paras 5.45–5.46.

496 FA Joint Statement para 5.47.

497 Transcript, 21 September 2022, pp 87–91

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Calculation of Loss[498]

(1) Whole Portfolio Model

619 Mr Davies calculated the loss based on Model 1A of the Whole Portfolio Model and in reliance on Mr Morrey's conclusions as USD 1.291bn. On the same basis, Mr Nicholson calculated it as USD 1.287bn. The net difference between them resulting from their different forensic accounting approaches is therefore approximately USD 4m.[499]

620 When Mr Nicholson relied on Ms Mayr's conclusions he calculated the loss as USD 846.3m.

621 Mr Davies calculated the loss based on Model 1B of the Whole Portfolio Model and in reliance on Mr Morrey's conclusions as USD 926m. On the same basis Mr Nicholson calculated it as USD 921.7m. When Mr Nicholson relied on Ms Mayr's conclusions he calculated the loss as USD 567.3m.

(2) Specific Transactions Model

622 Mr Davies calculated the loss under Model 2 as between USD 71m and USD 73.9m. Mr Nicholson's calculation was USD 69.3m in reliance on Mr Morrey's conclusions and USD 53.2m in reliance on Ms Mayr's conclusions.

623 Mr Davies calculated the loss under Model 3 as USD 557.4m. Mr Nicholson's calculation was USD 529.2m in reliance on Mr Morrey's conclusions and USD 339.9m in reliance on Ms Mayr's conclusions.

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498 Exhibit DX1, page 9, Table 2.1 (FA Joint Statement).

499 Transcript, 21 September 2022, p 171.

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624 Mr Davies calculated the loss under Model 4 as USD 106.5m. Mr Nicholson's calculation was USD 153.1m in reliance on Mr Morrey's conclusions and USD 73m in reliance on Ms Mayr's conclusions.

Wealth management expert evidence

625 The wealth management experts Mr Morrey and Ms Mayr, gave evidence concurrently on 22 September 2022.[500] Each provided an oral presentation in the form of an overview with supporting documents and were then questioned by Senior Counsel for the parties and by the Court at the conclusion of which they had the opportunity to make any final comments.[501]

626 Mr Morrey and Ms Mayr agreed that the intended purpose of the Trust accounts was "to achieve long-term capital growth, but with a medium level of risk". They agreed that the purpose was to achieve a return in the long-term that beats inflation and does not have positions that are subject to volatility with a high probability of severe loss in the portfolio. They also agreed that it would be a balanced portfolio.[502]

627 Their primary task was to construct Benchmark Portfolios to achieve investment returns that would or should have been achieved had they been managed by a competent, professional investment manager where the trust fund

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500 Transcript 22 September 2022 page 2–12. Morrey's report of 26 March 2020 was admitted as evidence and marked as Exhibit PX2. Ms Mayr's report of 8 June 2022 was admitted as evidence and marked Exhibit DX2. Their Joint Report of 5 September 2022 was admitted as evidence and marked as Exhibit PDX 2 and their Joint Report of 31 August 2022 was admitted as evidence and marked as Exhibit PDX 4. Their joint errata 20 September 2022 marked as Exhibit PDX 3.

501 Transcript 22 September 2022 pages 2–224.

502 Transcript, 22 September 2022, page 13–14.

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was not affected by fraud.[503] The three key similarities in their approaches were: (i) they shared the same view of the intended purpose of long-term capital growth in a medium risk portfolio: (ii) their Benchmark Portfolios were "static" staying the same throughout the life of the trust accounts, with one exception; and (iii) they would use contemporaneous documents to guide the construction of the Benchmark Portfolios.[504]

628 For the purposes of the Specific Transactions Model, these experts also had the task of looking at certain positions in the Trust accounts to see if they were unsuitable because of overconcentration or otherwise. Mr Morrey identified 32 that were unsuitable, 20 of which Ms Mayr agreed and 6 of which she partially agreed. Mr Morrey identified 42 positions which were overconcentrated and Ms Mayr identified 58 positions.[505]

629 The three 'big differences" in their approaches were that: (i) Ms Mayr chose price-only indices to model performance, whereas Mr Morrey chose total return indices; (ii) they used different asset allocations with different mixes of equities, bonds and alternatives; and (iii) the modelling of the individual asset classes was different by reason of the selection of different performance benchmarks.[506]

One account or sub-accounts

630 Mr Morrey constructed his Benchmark Portfolios on a trust account basis whereas Ms Mayr constructed her Benchmark Portfolios at a sub-account

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503 Transcript, 22 September 2022, page 15.

504 Transcript, 22 September 2022, page 15–17.

505 Transcript, 22 September 2022, page 14.

506 Transcript, 22 September 2022, pp 17–18.

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level. This meant that Mr Morrey had one Benchmark Portfolio for Meadowsweet, one for Soothsayer, and one for CS Life Meadowsweet. Ms Mayr, on the other hand, had one Benchmark Portfolio for each sub-account within Meadowsweet, Soothsayer and CS Life Meadowsweet. For each sub-account, Ms Mayr built a Benchmark Portfolio reflective of the discretionary mandates that were available. Where there was no discretionary mandate available for a sub-account, Ms Mayr used an average of those that were available from the other sub-accounts of the relevant Trust account.

631 There were assumptions that had to be made in both approaches because there were instances where there were no applicable mandates.[507]

632 Ms Mayr's evidence was that the construction of the Benchmark Portfolios based on the sub-accounts is relevant only to the Specific Transaction Models, Models 2, 3 and 4, because Mr Davies and Mr Nicholson were able to ascertain the individual sub-accounts in which each specific transaction took place.

633 Mr Davies and Mr Nicholson used one Benchmark Portfolio for each Trust account for the Whole Portfolio Model, because there was insufficient information about transfers between sub-accounts.[508] It is not in issue that the sub-accounts method does not affect the Whole Portfolio Model.[509]

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507 Transcript, 22 September 2022, pp 43–45.

508 Transcript 21 September 2022, p 111.

509 Transcript 22 September 2022, p 43–45.

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Compound annual growth rate[510]

634 It is necessary to determine whether the plaintiffs' Benchmark Portfolio for the Meadowsweet accounts from December 2007, with a compound annual growth rate ("CAGR") of 4.3%, or the defendant's Benchmark Portfolio for the same account which has a CAGR of 2.5%, is appropriate in all the circumstances. It is also necessary to determine whether, for the Meadowsweet accounts from December 2008, the plaintiffs' CAGR of 5.4% or the defendant's CAGR of 3.5% is appropriate. The separate CAGRs from December 2007 and from December 2008 arise from the need to deal with account 75 differently in Model 1B.

635 It is also necessary to determine whether the plaintiffs' Benchmark Portfolio for the Soothsayer account with a CAGR of 5.7%, or the defendant's Benchmark Portfolio for the same account with a CAGR of 3.7%, is appropriate in all the circumstances.

636 It is also necessary to determine whether the plaintiffs' Benchmark Portfolio for the CS Life Meadowsweet accounts with a CAGR of 8.2%, or the defendant's Benchmark Portfolio for the same accounts with a CAGR of 4.2%, from September 2011 when the accounts were opened, is appropriate in all the circumstances.

637 Notwithstanding that the CAGRs that Mr Morrey's Benchmark Portfolios achieved were higher than the CAGRs for Ms Mayr's Benchmark Portfolios, Mr Morrey described them as "pretty pedestrian" and "relatively easy to achieve" for a "solid portfolio manager".[511]

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510 FA Joint Statement at para 5.22.

511 Transcript, 22 September 2022, pp 36–37.

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Choice of index

638 The difference between the respective CAGRs is accounted for, in part, in the choice made by Ms Mayr of a price-only benchmark or index on equities, and a total return benchmark or index chosen by Mr Morrey. It is therefore necessary to decide which of those two indices should apply. The total return index reflects investment performance which will have had dividends and other distributions retained and reinvested; whereas the price-only index reflects capital growth without taking account of the reinvestment of dividends.[512]

639 Both Mr Morrey and Ms Mayr used the total return index for bonds and alternatives. The difference between them is in the allocation of the index to equities.

640 Mr Morrey explained the differences as follows:[513]

> But the price-only index is simply the weighted average of the end-of-day share price in the case of an equity. We are talking about equities here. So, as the stock price moves day to day, the index moves with it.
>
> The total return version of the same index obviously has that price component, but it also adds in the dividends that are paid on those shares, six-monthly, annually, so it takes the income, the distribution of those dividends and it includes those in the value of the benchmark, and it also treats those dividends as being reinvested in the benchmark. So once we see they start to compound the investment return, they start to produce their own investment return within the benchmark, very standard compounding of investment growth that you get with most investment types. Even a bank deposit, when the bank pays the interest into the bank account, it starts to compound, obviously, in value.

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512 But see Ms Mayr's evidence at Transcript, 22 September 2022, pp 223–224.

513 Transcript, 22 September 2022, pp 24–25.

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641 The defendant submitted that Mr Morrey was not able to give a satisfactory basis for his choice of the total return index. Mr Morrey's evidence was as follows:[514]

> So I obviously have a view the total return is the correct choice. I think, for me, what it comes down to we were instructed to produce the alternative return that an investor might reasonably be expected to achieve and the return investor would reasonably expect to achieve would include dividends and would include reinvestment, the compound growth on their investments. By using price-only, essentially dividends vanish into thin air. They're just nowhere in the return and so that's not the way an investor would experience owning, sharing or holding an ETF that's tracking one of these indices. They would benefit from the dividends, they would benefit from the compounding of those dividends, so that's why I'm happy that the total return is the right answer.

642 Ms Mayr rejected Mr Morrey's proposition that the "dividends vanish into thin air". Her evidence in response was that she was not saying that the underlying dividends of the invested shares could not be produced and reinvested. Rather her evidence was that the "target", or benchmark, could not include the dividends.[515]

643 Ms Mayr's evidence was that a portfolio manager who uses a total return index for equities would "set themselves a target that is not achievable" because "all dividends" that are paid out cannot be split across the asset classes but must be reinvested only in equities to "achieve the performance that a total return index sets".[516] Ms Mayr concluded that this results in equities becoming "more and more overweight as time goes on" which means that the portfolio manager cannot achieve the target because discretionary mandates specify ranges of asset

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514 Transcript, 22 September 2022, pp 26–27.

515 Transcript, 22 September 2022, p 51.

516 Transcript 22 September 2022 p 47.

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allocation and "they have to split it" (meaning the dividend) "across the different asset classes".[517] Ms Mayr accepted that the portfolio manager may still be able to maintain a balanced portfolio depending upon the performance in the other asset classes.[518] However on her analysis, bonds would not be producing enough interest to cover reinvestment in liquidity and alternatives to "make up the gap to the equities".[519]

644 Mr Morrey took issue with the suggestion that the use of the total return index sets a target that is unachievable.[520] He agreed that the reinvestment of the dividends into equities may swell the equities, but pointed out that the same would be true if all the share prices go up significantly.[521] Thus, he referred to the "reality" in which the portfolio manager would have to rebalance the portfolio for movements in the share price and for the dividends received, regardless of whether a price only or total return index is used.[522]

645 Ms Mayr accepted that a portfolio manager would rebalance the portfolio on a regular basis but made the distinction between the reality of the underlying portfolio and the portfolio in the benchmark construct.[523] In the former, with the example of a portfolio with 40% allocated to equities, an investment of $40 in equities with a 10% dividend becomes $44. The total return index assumes the full $4 dividend is reinvested in equities whereas what the

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517 Transcript 22 September 2022 p 48.

518 Transcript 22 September 2022 p 48.

519 Transcript 22 September 2022 p 49.

520 Transcript 22 September 2022 p 80.

521 Transcript 22 September 2022 p 81.

522 Transcript 22 September 2022 pp 49 and 81.

523 Transcript, 22 September 2022, p 100.

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portfolio manager in the underlying portfolio would do is reinvest only $1.60 being 40% of $4. Ms Mayr said that this is why it makes it more difficult to hit the target, although she had said earlier that the target was not able to be achieved.[524]

646 Mr Morrey gave evidence that the application of the total return index includes reinvestment of dividends and compound growth for equities, achieving a higher rate compounded over time.[525] He emphasised that this is "what happens in the real world"; the investor would benefit from the payment of dividends and from the compound growth.[526]

647 Ms Mayr then explained that a benchmark is simply a tool that an investment manager sets to calibrate the risk of investments and assess performance. The investment manager does not necessarily purchase the exact same assets that make up the benchmark index. Instead, other assets are purchased with a similar risk level to those that make up the benchmark index and the benchmark index is used as the target rate of return.[527] Ms Mayr accepted that the difference between the two benchmarks was that the total return index was a more "aggressive" target while the price return index was "safer".[528]

Asset allocation

648 The choices that were made in the various mandates were between allocations in the four categories: liquidity, bonds, equities and alternative

524 Transcript, 22 September 2022, p 104.

525 Transcript, 22 September 2022, pp 105–106.

526 Transcript, 22 September 2022, p 106.

527 Transcript, 22 September 2022, pp 74–75.

528 Transcript, 22 September 2022, pp 107–109.

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investments. "Alternative investments" has been described as a "catch-all phrase for everything else" including hedge funds and gold.[529]

649 The experts differed on the asset allocations particularly in respect of the Benchmark Portfolio for CS Life Meadowsweet. Although there were contemporaneous documents to assist with the construction of the Benchmark Portfolios for the Meadowsweet and Soothsayer portfolios with the Bank and the Singapore Bank respectively (see [137]–[156] above), there was no such assistance available for the construction of the CS Life Meadowsweet Benchmark Portfolio.

650 Ms Mayr's asset allocation of 32.5% equities for the CS Life Meadowsweet Benchmark Portfolio was based on the average of the asset allocation for the Soothsayer and Meadowsweet portfolios.[530]

651 Ms Mayr claimed that her use of the "actual available discretionary mandates" allowed her to avoid bias and the use of hindsight and also allowed her to ensure that the "actual intended level of risk" was accurately reflected in the Benchmark Portfolios.[531]

652 Mr Morrey suggested that Ms Mayr's approach to the allocation of 32.5% equities was a "problem" because it takes a 2005 investment solution (the Soothsayer portfolio) for long-term medium risk capital growth and applies it to a portfolio that was created in 2011. Mr Morrey was "confident" that in 2011 an investment manager would not have regarded that 2005 solution as

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529 Transcript, 22 September 2022, p 43.

530 Transcript, 22 September 2022, p 28.

531 Ms Mayr's Presentation to the Court page 5.

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"appropriate for achieving the investment purpose" and it would not have been "the optimum portfolio construction". This is particularly in the context of interest rates plummeting by 2008 such that bond rates would not beat inflation and the "remarkable bull run" in equities from 2009 onwards.[532]

653 In all those circumstances Mr Morrey's asset allocation was a "much more equity-rich alternative portfolio" with 60% equities.[533]

654 Mr Morrey expressed the opinion that by reason of the carrying across of the asset allocations in the Soothsayer and Meadowsweet mandates with tweaks[534] into the CS Life Meadowsweet Benchmark Portfolio, Ms Mayr created a low risk rather than a medium risk portfolio.[535]

Overall CAGRs

655 The experts' CAGRs on each of the Portfolios from 2007 to 2021 were: 2.5% (Ms Mayr) and 4.3% (Mr Morrey) for Meadowsweet from December 2007; 3.5% (Ms Mayr) and 5.4% (Mr Morrey) for Meadowsweet from December 2008; 4.2% (Ms Mayr) and 8.2% (Mr Morrey) for CS Life Meadowsweet from September 2011; and 3.7% (Ms Mayr) and 5.7% (Mr Morrey) for Soothsayer from December 2007.[536]

656 Ms Mayr did not agree that a 2.5% or 3.5% return on an investment of USD 1.1bn from an ultra-high net worth investor over 13 or 14 years was

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532 Transcript, 22 September 2022, pp 29–31.

533 Transcript, 22 September 2022, p 31.

534 Transcript, 22 September 2022, p 169.

535 Transcript, 22 September 2022, p 170.

536 Exhibit DX1, p 57.

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"incredibly low".[537] Ms Mayr cautioned that the figures need to be viewed in the context of the risk that the investor was willing to take and the asset allocation that reflects that risk.[538] Ms Mayr would not accept that these figures were "simply too low" for such an investment over that period in a medium risk portfolio.[539]

657 Ms Mayr suggested that a low-risk range would be 2% to 3% and a high-risk range would be 8% to 12%.[540] It follows that a medium-risk range on Ms Mayr's evidence would be 3.1% to 7.9%.

658 Mr Morrey described the low-risk portfolio seeking "capital preservation" but with a return that keeps ahead of inflation with the range at 2.5% to 3.5%.[541] The high-risk would be "just over 10%.[542] It follows that a medium-risk range on Mr Morrey's evidence would be from 3.6% to 9.9%.

Unsuitability

659 The experts' positions in respect of the various investments that were regarded as "unsuitable" are efficiently captured and set out in Ms Mayr's presentation to the Court.[543]

660 Mr Morrey found that all the 32 investments alleged by the plaintiffs to be unsuitable were indeed unsuitable, and unsuitable for the full period that they

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537 Transcript, 22 September 2022 p 174.

538 Transcript, 22 September 2022 p 175.

539 Transcript, 22 September 2022 p 177.

540 Transcript, 22 September 2022 p 178.

541 Transcript, 22 September 2022, p 181.

542 Transcript, 22 September 2022, p 182.

543 Ms Mayr's Presentation to the Court page 22.

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were held in the Trust. Ms Mayr took the stance that: (i) higher risk positions that are held at a very low concentration could be suitable for a medium risk portfolio; and (ii) positions that are unsuitable only because of a particular breach are suitable prior to the event but not after the event.[544]

661 If the Specific Transaction Model were to be applied, it would be necessary to determine which of the two approaches should be adopted in respect of each of the investments on which there is disagreement between the experts.

Overconcentration

662 The issue of the appropriate concentration thresholds in the portfolio was a little more controversial. The experts agreed that the discretionary mandates for two of the accounts (the Meadowsweet account 75-1 and Soothsayer account 81) included a concentration requirement of 5% with +1% tolerance. Overconcentration occurred when the holding of a single asset exceeded that threshold relative to the value of the assets in the account.

663 Mr Morrey applied the above concentration threshold to all the Trust accounts. On the other hand, Ms Mayr did not apply the concentration threshold as fixed on those two accounts across the other accounts. That was because of her view that those two accounts had characteristics not shared by the other accounts. Ms Mayr explained the various concentration thresholds that she applied after reviewing the regulatory standards for the investment in mutual funds by retail investors. Ms Mayr applied a 10% concentration limit with 1%

544 Transcript 22 September 2022 page 55: Presentation page 22

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tolerance on other Soothsayer accounts; and the "5/10/40 Rule" with 1% tolerance for the other Meadowsweet and CS Life Meadowsweet accounts.

664 Mr Morrey and Ms Mayr debated the appropriate application of the 5/10/40 Rule to assist the Court. Mr Morrey's exposition was as follows:[545]

> The rule simply says you can't have positions above 5 per cent, but if you are allowed to, at the discretion of your local regulator, then you can't have positions above 10 per cent and the sum of the 5 to 10s, in aggregate, have to be no more than 40 per cent.

665 If it were necessary to apply this Model, choices would have to made in respect of the appropriate concentration thresholds to be applied to the Benchmark Portfolios.

Fees

666 There was a difference between Ms Mayr and Mr Morrey in respect of the appropriate level of fees to be charged in respect of the Benchmark Portfolios. While they agreed that 0.8% was an appropriate level of fees for the Soothsayer accounts, Ms Mayr assumed a rate of 0.7% and Mr Morrey assumed a rate of 0.5% for the Meadowsweet and CS Life Meadowsweet accounts.

667 Ms Mayr had assumed the slightly higher fees for the Soothsayer accounts based on a perceived need for management in the Asia focus of the Soothsayer discretionary mandates, and therefore applied a 0.1% reduction to obtain the 0.7% figure.

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545 Transcript, 22 September 2022, p 212.

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668 The fees at 0.5% are in line with the actual fees charged and should be applied.[546]

Date of change in Soothsayer Mandates

669 Ms Mayr and Mr Morrey also differed on the dates from which the new Soothsayer Mandates should apply. Ms Mayr took the date from 1 February 2009 which was the date from which the Mandate applied albeit that the instructions were not given until 25 February 2009 when the Mandate was signed. Mr Morrey took the date from 25 February 2009 as that was the date on which there was authority to alter the profile of the account.

670 Although the Mandate was to apply from 1 February 2009 the reality was that the relevant transactions were not effected in accordance with the change until after the instructions were received on 25 February 2009. The latter date is the appropriate date from which to apply the change.

Quantification

671 The plaintiffs' case is that the quantum of loss should be calculated in accordance with the Whole Portfolio Model from the end of 2007 referable to the Benchmark Portfolios referred to as Model 1A or in accordance with Model 1B to accommodate the plaintiff's management of the Russian stocks and precious metals up to the end of 2008.

672 If the Whole Portfolio Model is applicable to the quantification of loss, it is unnecessary to then consider the alternative proposed portfolios Models 2

546 WM Joint Statement, para 5.7.3.

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to 4 involving unauthorised transfers, or unsuitable or overconcentrated investments.

Applicable Model

673 The defendant accepted by its admission that by no later than 31 December 2008 one alternative consequence was that the whole portfolio would not have been affected by fraud and would have been removed to a different financial institution placing it in the hands of a competent and professional portfolio manager.

674 Mr Nicholson expressed the view that the Whole Portfolio Model assumes that all investment positions in the Trust accounts should be "reversed", which implies that all investments made by the Trust accounts were "inappropriate". He added that whether this assumption was correct was ultimately a matter for the Court to determine.[547]

675 One challenge that was presented to the forensic accountants was the problem of dealing with the consequences of the actions of "someone who is seeking to deceive and divert". Mr Davies observed that "different types of mischief" carried out by Mr Lescaudron had been identified and it was "very likely" that other yet undiscovered mischief had occurred. The experts did not know what the trading policy was or indeed whether there was a trading policy behind the investments that took place within the Trust. There were "scores of challenges", but the experts accepted those limitations and challenges and were able to reach agreement on most matters.[548]

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547 Exhibit DX1, p 58, para 5.23.

548 Transcript, 21 September 2022, pp 83–84.

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676 Although Mr Nicholson gave evidence that he was not aware of "red flags in the data itself", he accepted that when one is dealing with a lengthy history of a fraudster who went to some lengths to secrete what was behind the façade, he would have a concern that there may be red flags.[549] Mr Nicholson said that he had not finished thinking about this because prior to giving evidence, it had not been discussed with Mr Davies but he thought it was "a pretty small part of the overall space".[550]

677 In making the assessment of how best to calculate compensation for the loss suffered by the plaintiffs by reason of the defendant's breach of duty, it is necessary to recognise that the investments, even those that have been opined upon by the experts as "suitable", were sitting within a portfolio the management of which was infected by fraud either directly or indirectly and maintaining parts or sections of the portfolio may be, to use Mr Nicholson's terminology, "inappropriate".

678 Mr Nicholson claimed that adopting the Whole Portfolio Model significantly increases losses. This opinion was based on the comparison of the amount calculated on the Whole Portfolio Model with the amounts in the other Models. The fact that the amount is greater under the Whole Portfolio Model is not a basis for rejecting it. Rather, it is necessary to decide as a matter of principle, irrespective of the total figures, whether the application of a particular Model to calculate compensation is just and fair in the circumstances of the plaintiffs' loss suffered by reason of the defendant's breach.

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549 Transcript, 21 September 2022, pp 94–95.

550 Transcript, 21 September 2022, p 180.

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679 The defendant contended that if the Whole Portfolio Model is to be adopted, then the Court should prefer the evidence of Ms Mayr to that of Mr Morrey and also exclude the following investments from the assessment: (i) investments made under the discretionary mandates or by Mr Grotz; (ii) investments made in Russian securities beyond 2008; (iii) investments made in precious metals; (iv) investments made up to 5% of the ordinary share capital of Raptor; and (v) investments in hedge funds.[551]

680 The plaintiffs complained that it was after the conclusion of the trial that the defendant claimed that the plaintiff was responsible for certain categories of investment and that this claim is both unpleaded and unparticularised. The plaintiffs also claimed that there is no evidence that instructions in relation to these investments came from the plaintiff.

681 The defendant did plead that the investment managers appointed by the plaintiff, which included himself and Mr Bachiashvili, were responsible for and exercised powers of investment management to the exclusion of the defendant.[552] Indeed, the defendant cross-examined the plaintiff in line with this defence which evidence is extracted earlier at [460]–[470].

682 The defendant submitted that if its submission to exclude these investments is accepted, "the Court's ruling in this regard will have to be supplemented if necessary and preferably by agreement of the parties, by the particulars of the investments which fall under each of the categories".[553]

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551 DCS, para 378.

552 Defence (Amendment No 4), para 73(2)(b).

553 DCS, para 380.

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683 In response, the plaintiffs submitted that such a proposal is in fact a "damning admission" that the defendant is not able to substantiate its case on the specific investments that should be excluded. Rather, it was submitted that if the defendant had done so there would be no need for the parties to try to agree on the particulars of such investments.[554]

684 The plaintiffs also submitted that to accede to the defendant's request in this regard would be "procedurally unjust" and the plaintiffs would be deprived of the opportunity to address the allegations in evidence. The plaintiffs also submitted that it would be "wholly inappropriate" to ask the Court to reach a decision without being in possession of all the relevant information and without being apprised of the consequences of such a decision. The plaintiffs submitted that the suggestion that the Court should "supplement" its judgment, risks further rounds of expert evidence and potentially a further hearing if the parties are unable to agree, all at further cost to the parties. It was also submitted that this is a device by the defendant to achieve the deferral of quantification by "the back door", the defendant having previously failed to have the trial bifurcated.[555]

685 The defendant submitted that applying the Whole Portfolio Model would require it to compensate the plaintiffs for the shortfall between the actual performance versus the target (or benchmarks) in relation to non-impugned transactions or investments. It submitted that the plaintiffs' submission that if Mr Lescaudron's fraud had been uncovered the plaintiffs would have moved their funds away to a medium risk portfolio does not address the point that medium risk portfolios do not always hit their targets. It submitted that the

554 PRCS, para 164.

555 PRCS, para 167.

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position is different for impugned transactions for which it accepts it may be justified to give the plaintiffs the full benefit of the target. However, it was submitted there is no basis for awarding the plaintiffs a guaranteed return on transactions which are not pleaded and are not impugned.

686 In response, the plaintiffs submitted that they expressly pleaded that they were seeking to recover the difference between the value of the Trust Fund and the value that a competent, non-fraudulent trustee would have achieved had there been no breach.[556]

687 There is no issue between the parties that the objective of the quantification is to put the plaintiffs in the position they would have been but for the relevant breach of trust.

688 The plaintiffs emphasised that they do not seek to be compensated for poor investment performance but rather the difference in performance between a fraudulently managed portfolio and a properly managed portfolio not affected by fraud.

689 The defendant admitted that had it not breached its duty, one of the alternatives that would probably have occurred was that the whole portfolio would have been removed to another institution to be managed by a prudent and professional portfolio manager. The Whole Portfolio Model is consistent with that alternative. It does not guarantee that "targets" are hit or positive returns are made. It simply places the whole portfolio in the constructed medium-risk portfolio with the indicia as identified to determine what would have been achieved but for the defendant's breach. The purpose of the evidence from the

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[556] Statement of Claim (Amendment No 4), para 112.

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wealth management experts was to determine the rate of return that an investment in a medium-risk portfolio would likely have achieved.

690 The Whole Portfolio Model does not rest on the premise that all the investments in the Trust accounts were "inappropriate". Rather, it rests on the premise that it is possible to determine, with the assistance of expert evidence, the likely rate of return on a medium-risk portfolio in the relevant time period.

Conclusions

691 The defendant breached its duty to the plaintiffs in failing to safeguard the Trust Assets as at 30 March 2008 by failing to prevent Mr Lescaudron from having any further access to the Trust assets. The probable consequence is that but for that breach the whole Trust portfolio would have been removed to another institution for management.

692 In the circumstances and having regard to the plaintiffs' management of the investment of Russian shares and precious metals up to 2008, the Whole Portfolio Model 1B is the appropriate mechanism to be utilised for the quantification of the plaintiffs' loss suffered by reason of the defendant's breach.

693 The evidence of all the experts was cogent and clear. As discussed, the evidence of and calculation by the forensic accountants, Mr Nicholson and Mr Davies, depended upon the conclusions reached by Ms Mayr and Mr Morrey.

694 Ms Mayr's careful approach to ensure an absence of relevant bias and ensuring commitment to the 'client's' instructions in the construction of the Benchmark Portfolios are matters of significance. However, it is important to

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ensure that the reality of achieving appropriate investment returns in a portfolio as defined for the purpose of creating the "counterfactual" or the "parallel universe" in the quantification of loss is not constrained by timidity caused by these creations, but rather is undertaken with them in mind in a robust and careful analysis. The exclusion of bias and ensuring the loyal performance of the task of assisting the Court were essential features of the evidence of both Ms Mayr and Mr Morrey. On balance I found Mr Morrey's approach compelling and preferred it to that of Ms Mayr.

695 The approaches adopted by Mr Morrey to each of the matters in issue should be adopted for the relevant calculations by the forensic accountants.

696 It is necessary to recognise the concessions made by the plaintiffs that the other two investments, the GCF and the TBC Loan were his responsibility and not the responsibility of the defendant. He also accepted that the art collection investment was his responsibility. These investments were not included in the quantification under Whole Portfolio Model 1B because they were treated as capital payments out of the Trust.[557]

697 It is appropriate at this juncture to determine whether the additional investments identified by the defendant should be excluded from the quantification in accordance with of the Whole Portfolio Model 1B.

Investments managed under discretionary mandates or by Mr Grotz

698 The defendant asserted that it was not alleged by the plaintiffs that Mr Lescaudron interfered in the investments that were made in the

[557] Transcript, 21 September 2022, p 152; Paras 15.7–15.8 of Exhibit PX1, 3 June 2022.

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Meadowsweet accounts and the Soothsayer accounts when they were managed under discretionary mandates.[558] The plaintiffs submitted that, contrary to the defendant's assertions, they had pleaded that in June 2007 Mr Lescaudron started carrying out investments on the Trust accounts without instructions or authority and did so until September 2015.[559] The plaintiffs also point out that they pleaded that from July 2007 Mr Lescaudron was making investment decisions on the Meadowsweet accounts.[560]

699 In October 2008 Mr Lescaudron gave instructions to the Singapore Bank in which he claimed that the plaintiff wanted to increase gold up to 10% of the mandate, being "definitely not in physical".[561] The plaintiffs submitted that there is no evidence that this was a genuine instruction from the plaintiff and that shortly afterwards, investments were made in SPDR Gold Trust at a level that the experts agree was overconcentrated.[562]

700 The plaintiffs also referred to Mr Lescaudron's instructions to the Singapore Bank in October 2010 (described as "speculative" with "high volatility") on the discretionary mandate accounts.[563] In addition, the investments in Raptor and Tethys Petroleum Ltd were made on Soothsayer Accounts No 80 and No 81, discretionary mandate accounts. The plaintiffs emphasised that these instructions from Mr Lescaudron were given to the Singapore Bank before any mention of the Raptor shares was made to the

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558 DCS, para 358.

559 Statement of Claim (Amendment No 4), para 40A.

560 Statement of Claim (Amendment No 4), para 52A(b).

561 Exhibit A, Volume 1, p 452.

562 WM Joint Statement, Table A5-3 at s/n 2.

563 PCS, paras 179–180.

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plaintiff.[564] Mr Lescaudron also directed and requested transfers of funds from Soothsayer to Meadowsweet. The plaintiffs contended that this was for the purpose of plugging holes caused by his unauthorised trading between 2011 to 2015.[565]

701 Some of the documents that are relied upon in the defendant's case in relation to the instructions provided by Mr Lescaudron include the plaintiff's signature that is either barely visible or certainly not capable of being verified as genuine.[566]

702 It was submitted that Mr Lescaudron's decisions and instructions in respect of the liquidation of investments for the purpose of covering his own tracks affected the performance of the discretionary accounts.[567]

703 Accordingly, the plaintiffs submitted that the defendant's contention that the discretionary mandates were outside the influence of Mr Lescaudron is unsustainable.[568]

704 The plaintiffs contended that had the discretionary mandates been left in place, rather than closed by Mr Lescaudron without instructions, and had the recovery from the financial crash been left in the hands of experts, the performance of the accounts would probably have been very different. In any event, the plaintiffs submitted that the discretionary mandates were only in operation for a small portion of the relevant period. In all the circumstances,

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564 PCS, paras 351–353.

565 PCS, paras 246–247.

566 PCS, para 249.

567 PRCS, para 170(e).

568 DCS, para 361.

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they submitted there is no basis to exclude the investments made under the discretionary mandates from the Whole Portfolio Model.[569]

705 Mr Lescaudron was involved with the assets being managed under the discretionary mandates. The true extent of that involvement in light of his fraudulent and deceptive conduct will always be tinged with some uncertainty. However, that is not a basis for the exclusion of this category of investment from the application of the Whole Portfolio Model 1B.

706 The plaintiffs also claimed that it is unnecessary to exclude any investments made by Mr Grotz under the LPOA in respect of Meadowsweet Account 75-5 because this was replaced by a discretionary mandate over the accounts on 23 April 2007.[570] Ms Sim's evidence was that the discretionary mandate meant that it was the Bank that was responsible for the management of the assets in that account rather than Mr Grotz. As the Whole Portfolio Model calculated loss from 31 December 2007 and/or 31 December 2008, it was submitted that any exclusion in relation to Mr Grotz is irrelevant. These submissions have force.

707 The investments under the discretionary mandates and any investments managed by Mr Grotz will not be excluded from the quantification in accordance with Whole Portfolio Model 1B.

Investment in Russian shares after 2008

708 Having regard to the analysis of the evidence earlier in this judgment at [470]–[478], it is not appropriate to exclude investments in Russian securities

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569 PRCS, para 172.

570 PCS paras 97 and 308(d).

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after December 2008. Although the portfolio was structured such that at times 100% of those investments were in Russian stock, it is not accepted that the plaintiff had management involvement in that stock after December 2008.

709 The investment in Russian shares after 2008 will not be excluded from the quantification in accordance with Whole Portfolio Model 1B.

Investments in precious metals

710 The investments in precious metals prior to the end of 2008 are already excluded from the Whole Portfolio Model 1B. Any such investments thereafter will remain in the portfolio for quantification under the Model.

5% investment in Raptor

711 The defendant contended that an investment of up to 5% in Raptor shares should be excluded from the Whole Portfolio Model.

712 The plaintiffs contended that there is every reason to believe that a properly managed portfolio, one without Mr Lescaudron's interference, would not have invested in Raptor. They submitted that the investment in Raptor was a fundamental facet of Mr Lescaudron's fraud, beginning in 2010 without authorisation and without informing the plaintiff of the investment. It is quite clear that Mr Lescaudron built up large indirect investments in Raptor to fraudulently earn commissions for himself.[571]

713 The plaintiffs submitted that to justify the exclusion of 5% investment in Raptor from the Whole Portfolio Model, the defendant would have to establish that the plaintiff would have directed such an investment even if in

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571 PRCS, footnote 317.

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2008 Mr Lescaudron had been precluded from having access to the Trust assets. The plaintiffs submitted that having regard to the fact that the investment in Raptor was entirely Mr Lescaudron's idea, it is "fanciful" to suggest that the plaintiff would have independently requested such an investment.[572]

714 The plaintiffs also submitted that a properly managed, non-fraudulent, medium risk investment portfolio would not include an investment in Raptor, even at 5%. Such an investment would be unsuitable and was on the list of restricted stocks of at least Credit Suisse.[573]

715 The plaintiffs emphasised that the plaintiff cannot be said to be bound by the approval given to purchase Raptor shares given that material facts and matters were concealed from him by Mr Lescaudron. They submitted that had Mr Lescaudron been precluded from having access to the Trust assets, none of the investments in Raptor would have been made.

716 Although the plaintiff agreed in evidence that he accepted Mr Lescaudron's advice to invest in Raptor, it is clear that the plaintiff was deceptively manipulated to make the investment to enable Mr Lescaudron to continue his scheme by giving this part of it verisimilitude as he continued to earn the kickbacks from the company for his own benefit.

717 The defendant was not excluded from the "full control" of this investment. As the evidence discloses, numerous directions were given to Mr Lescaudron for the investment to be reduced, some of which he acted upon

572 PRCS, para 202(a).

573 PRCS, para 203.

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albeit very tardily.[574] The defendant did not communicate with the plaintiffs about this investment notwithstanding that it was giving those directions to Mr Lescaudron.

718 It is not appropriate to exclude this investment from the quantification under the Whole Portfolio Model 1B. On the balance of probabilities, this investment would not have occurred where the Trust assets were moved to a different institution after 30 March 2008.

Investments in hedge funds

719 The plaintiffs submitted that the defendant's suggestion that investments in hedge funds should be excluded from the Whole Portfolio Model is misconceived. It was submitted that, realistically, it could not be said that the plaintiff was responsible for any investments in hedge funds which were part of Mr Lescaudron's fraud. Therefore, the plaintiffs submitted that without identifying the specific hedge funds that the defendant seeks to exclude, it is impossible to ascertain whether they are investments which would have been carried out under a properly managed investment portfolio, or whether they were part and parcel of Mr Lescaudron's fraud.[575]

720 It is also important to identify what has been regarded as a typographical error in Mr Khukhunashvili's e-mail of 3 October 2011 in which he says that Mr Lescaudron agreed that "now" may be the best time to invest in hedge funds. Whereas Mr Lescaudron's e-mail a few days earlier on 27 September 2011

574 PCS, paras 231 and 241.

575 PRCS, para 211.

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recorded that Mr Khukhunashvili was "perfectly right" that "now is not the best timing to invest" in hedge funds.[576]

721 The plaintiffs submitted that what was happening in these communications was that Mr Lescaudron was advising that if a decision was eventually made to invest in hedge funds, this should be done progressively.[577]

722 The plaintiffs also pointed out that the communications made no mention of the Trust Fund or Trust assets being invested in hedge funds. Indeed, the plaintiffs highlighted the fact that in his cross-examination the plaintiff was asked about investments either through the trust accounts or his "personal accounts".[578]

723 The plaintiffs' submissions in respect of the paucity of evidence in respect of the nature of the hedge funds is compelling. Although as discussed earlier there were detailed communications between Mr Bachiashvili and Mr Lescaudron in respect of investment the hedge funds, the evidence does not disclose the detail of the subsequent investment. The plaintiff agreed that there was a subsequent investment but did not provide the detail of that investment. The plaintiffs submitted that although there were investments in hedge funds held on Credit Suisse accounts, such investments were not investments of funds in the Mandalay Trust but rather of a separate trust, the Green Vals Trust.[579]

724 The defendant has taken a broad-brush approach to this claim for exclusion which is not made out. The defendant does not even go as far as to

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576 Exhibit 1, Volume 1, p 701.

577 PRCS, para 216.

578 Transcript, 7 September 2022, p 15.

579 PRCS, para 219.

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identify a specific investment in a hedge fund that was allegedly made on the plaintiff's instruction. Its point is that the plaintiff "approved of investments in hedge funds generally" and "on that basis, it should be excluded".[580] Even if this proposition were to be accepted, it is unclear what bearing it could have on the assessment of loss given that the defendant has not identified any relevant transactions.

725 In any event, Mr Davies clarified that if an investment was indeed made in a hedge fund using Trust assets, it would be treated as a capital payment out, like with the GCF investment (see [696] above). There would therefore be no need to exclude such an investment from the Whole Portfolio Model 1B. From the point the investment was made, that sum would have left the Model and not accumulated benchmark growth.[581] Mr Nicholson's qualification was that investments in hedge funds could be included in the Whole Portfolio Model 1B if they were "treated as purchases of assets within the fund".[582]

726 In all the circumstances it is not appropriate to exclude such investments from the quantification under the Whole Portfolio Model 1B.

Conclusions

727 It is noted that the defendant has admitted that it was in breach of its duty to the plaintiffs to safeguard the Trust assets by 31 December 2008.

728 The plaintiffs have established that the defendant breached its duty to the plaintiffs to safeguard the Trust assets as at 30 March 2008. The plaintiffs

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580 Transcript, 16 February 2022, p 95.

581 Transcript, 21 September 2022, p 152; 164–165.

582 Transcript, 21 September 2022, p 168.

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are entitled to a declaration and orders to that effect. The loss suffered by the plaintiffs is the difference between what would have been achieved if the whole portfolio had been removed and managed by a competent, professional trustee and the Trust assets were not affected by fraud, and what was actually achieved.

729 The appropriate, just and fair method to be applied in calculating compensation for the loss is in accordance with the Whole Portfolio Method 1B utilising the approach adopted by Mr Davies in reliance upon Mr Morrey's conclusions as discussed earlier. That amount as presently calculated to the date of trial is USD 926 million.

730 The defendant is liable to compensate the plaintiffs for their loss in the amount calculated in accordance with Model 1B from 30 March 2008 to the date of this judgment. As a result of the Settlement, this sum should be reduced by USD 79,430,773. Further, the parties will ensure that any sum recovered in the Bermuda Proceedings will be adjusted so as to ensure there is no double recovery.[583]

731 The experts indicated their willingness to assist the Court further by adjusting any of their calculations in accordance with the Court's findings. The experts are requested to assist the Court by updating the Model 1B calculations to commence from the date of breach, 30 March 2008, to the date of this judgment.

732 The amount of compensation in accordance with Model 1B once updated by the experts is, as agreed by the parties, to restore the Trust to the

583 Statement of Claim (Amendment No 4), para 112.

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amount that it would have achieved but for the defendant's breach.[584] In the circumstances because the plaintiffs have experienced difficulties in extracting the balance of the Trust funds from the defendant, it is appropriate that compensation be payable by the defendant into a Trust Fund, the identity and location of which the plaintiffs are to notify the defendant forthwith. The defendant is to make payment of the amount of compensation into the Trust Fund as directed by the plaintiffs or their Trustee.

733 The parties are to prepare short minutes of order to reflect these findings together with agreed orders as to costs and any interest.

734 If the parties are unable to reach agreement on costs and/or interest, they should file an agreed timetable for submissions on costs and/or interest by no later than 30 June 2023. If the parties agree, the question of costs and/or interest, will be dealt with on the papers. If the parties wish to have an oral hearing in respect of costs and/or interest, they should deal with this in the timetable.

Patricia Bergin
International Judge

Cavinder Bull SC, Woo Shu Yan, Tan Yuan Kheng, Fiona Chew Yan Bei, Kelly Tseng Ai Lin, Gerald Paul Seah Yong Sing and Liang Fang Ling Elisabeth (Drew & Napier LLC) for the plaintiffs;
Lee Eng Beng SC, Disa Sim and Torsten Cheong (Rajah & Tann Singapore LLP) (instructed), Kenneth Lim Tao Chung, Mak Sushan Melissa, Afzal Ali, Wong Pei Ting, Yeow Yuet Cheong, Gan Yun

584 Transcript, 6 September 2022, pp 128–129.

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Han Rebecca and Justin William Jeremiah (Allen & Gledhill LLP)
for the defendant.

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