Koh Kim Teck v Credit Suisse AG, Singapore Branch
[2015] SGHC 52

Suit No:	Suit No 942 of 2013 (Registrar's Appeal No 301 of 2014)
Decision Date:	26 February 2015
Court:	High Court
Coram:	Aedit Abdullah JC
Counsel:	Sarjit Singh Gill SC, Edmund Eng and Tan Su Hui (Shook Lin & Bok LLP) for the plaintiff/respondent; Alvin Yeo SC, Chua Sui Tong, Michelle Neo (WongPartnership LLP) for the defendant/appellant.

Subject Area / Catchwords

Civil procedure – Pleadings – Striking out

Tort – Negligence – Breach of duty

26 February 2015 Judgment reserved.

Aedit Abdullah JC:

Introduction

1 Mr Koh Kim Teck ("the Plaintiff") is suing Credit Suisse AG, Singapore Branch ("the Defendant") for, among other things, losses incurred by him because of what he alleges were breaches of duty by the Defendant in advising him on investments. On paper, the Plaintiff was not the Defendant's client. For various reasons, the Plaintiff carried out his investments and banking with the Defendant through a trust company, Smiling Sun Ltd ("SSL"). The Plaintiff filed a fairly lengthy statement of claim. The Defendant sought to strike out his claim. This was refused by the Assistant Registrar. The Defendant then appealed.

Background

2 The Defendant is the Singapore branch of a global banking institution. When the Plaintiff opened an account with the Defendant, he did so in the name of the trust company set up for this purpose, SSL. His banking and investment activities with the Defendant were also conducted using the same offshore corporate vehicle as an intermediary. Thus, the Defendant's client – on paper at least – was SSL, and not the Plaintiff.

3 However, on the Plaintiff's version of the facts, the Defendant's employees rendered advice to the Plaintiff directly and took instructions from the Plaintiff. Everyone was well aware that the Plaintiff's money funded the investments made in SSL's name. The Plaintiff was made to believe he could rely on the advice rendered to him. In fact, it was the Defendant who advised that the banking relationship be structured in an indirect way. Moreover, the sole shareholder, sole director and registered agent of SSL at all material times were agents and/or nominees of the Defendant.

4 Unfortunately, the investments made in SSL's name turned sour, causing heavy losses to the Plaintiff. The Plaintiff now sues the Defendant on the basis that the Defendant had breached the

duty of care owed to the Plaintiff *personally*. The writ of summons was filed on 16 October 2013, and the statement of claim ("the SOC") was filed and served on the Defendant on 4 March 2014.

5 The Defendant took the position that if anybody at all is entitled to sue, it would be *SSL*, *ie*, the party in a direct contractual relationship with the Defendant. The Defendant characterised the Plaintiff's suit as an unprincipled attempt to circumvent this "carefully chosen and constructed contractual relationship". The Defendant applied to strike out the Plaintiff's claim pursuant to O 18 r 19(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the ROC") and/or the inherent jurisdiction of the court in Summons No 1330 of 2014 ("Summons 1330"). Summons 1330 was filed on 14 March 2014.

6 Summons 1330 refers to all four grounds under O 18 r 19(1), *ie*, that the SOC (a) discloses no reasonable cause of action; (b) is scandalous, frivolous or vexatious; (c) may prejudice, embarrass or delay the fair trial of the action and/or (d) is otherwise an abuse of process by the Court.

7 Summons 1330 was heard by the Assistant Registrar ("the AR"), who dismissed the Defendant's application to strike out the SOC and ordered the Defendant to pay the costs fixed at S$14,000. The Defendant appealed. After hearing the parties on 23 December 2014, I reserved judgment.

The Plaintiff's account of the facts

8 The facts pleaded by the Plaintiff in the SOC run to 116 paragraphs and 43 pages. The extent to which the Defendant joins issue with the SOC is unclear, since no defence has yet been filed. From the affidavits filed on behalf of the Defendant, it is likely that many of the allegations in the SOC will be disputed should the case go to trial.

9 Between 2002 and 2003, an employee of the Defendant, Ms Jullie Kan ("Ms Kan"), approached the Plaintiff to try to obtain his custom as a private wealth investor. The Plaintiff was not initially interested in opening a private banking account with the Defendant. This was because of (at least in part) his aversion to risk and his lack of time to properly oversee his investments or even to conduct the necessary research and due diligence. Ms Kan represented that the Defendant had specialised personnel who could advise the Defendant's clients and attend to matters related to their investments. This failed to sway him at first. However, he was attracted to her subsequent suggestion that the Plaintiff should create a "safe haven" for his funds, and that the Defendant would advise him on the creation of a corporate trust structure. He was also told that the Defendant would set up the trust company and invest the Plaintiff's funds according to the Plaintiff's investment objective of wealth preservation. It was on this basis that the Plaintiff decided to engage the Defendant's services.

10 The trust company, SSL, was incorporated on 5 September 2003 in the British Virgin Islands ("BVI"). At the material time, SSL's sole director and sole shareholder were both agents and/or nominees of the Defendant, and the *Defendant* had full control of SSL through its agents and/or nominees. The Plaintiff was the beneficial owner of SSL's shares. At around the same time, an account ("the Account") was opened with the Defendant in the name of SSL. The Plaintiff was conferred a "Limited Power of Attorney" by SSL on 23 September 2003 in respect of "any transaction of an administrative nature". The Plaintiff also claims that SSL was the Plaintiff's nominee and/or alter ego in its dealings with the Defendant *vis-à-vis* the operation of the Account.

11 The Plaintiff proceeded to deposit his funds into the Account. Further, on the advice of one of the Defendant's employees, the Plaintiff applied for a US$5m facility with the Defendant in 2006. This led to the creation of a charge over all of SSL's assets as security for the debt. However, the

Plaintiff allegedly had no knowledge of the charge. This facility was subsequently increased to US$20m in April 2008, and increased again to US$30m in September 2008 after the Defendant made a "mistake" in managing the Account, resulting in the breach of the previous limit. For convenience, I will refer to each of the facilities by its limit, *eg*, I will refer to the facility for US$30m as the "US$30m Facility".

12 Various investment products, including Knock-out Discount Accumulators ("KODAs") and Dual Currency Investments ("DCIs"), were purchased on the Defendant's advice. The Defendant knew that the Plaintiff had no familiarity with both KODAs and DCIs.

13 The SOC also details his instructions to the Defendants' employees, as well as the various representations made to him by the Defendants' employees with respect to the movement of monies into the Account, the purchase of the KODAs and DCIs, and the various facilities on the Account. It is sufficient to say that the advice they rendered is alleged to have involved both material omissions and untruths.

14 On 21 October 2008, the Plaintiff was advised by the Defendant to sell down and close out the Account's then "open" DCIs and to sell certain shares. This was the first time that the Plaintiff had been warned of the risk of the DCIs. By that time the value of the portfolio had dropped precipitously. Nevertheless, the Plaintiff instructed the Defendant to wait for the DCIs to mature over the next few days instead of terminating them.

15 On 24 October 2008, the Defendant issued a fax addressed to SSL and copied to the Plaintiff, stating that, *inter alia*, the facility to collateral ratio had reached a level where the Defendant is entitled to close out SSL's trade positions. The notice further intimated that the Defendant would do so unless SSL deposited cash worth US$5.7m or its equivalent in the Account by 2pm on the day of the letter. The Plaintiff was caught unaware as he had not been previously informed that the US$30m Facility would allow the Defendant to "close out" the portfolio in the manner described, or even that there were pre-set limits to the facility to collateral ratio.

16 The Plaintiff was unable to provide the required additional collateral in time. The Defendant then closed out all of the Account's open investment positions, including the KODAs and the DCIs still in place, and liquidated all the assets in the Account pursuant to the charge. The result was that the assets and/or funds held in the Account were eliminated and the Account was placed in negative balance.

Duties alleged to be owed to the Plaintiff

17 The Plaintiff claims that the Defendant owed the Plaintiff a *common law* duty to take reasonable care in the following respects:

(a) when giving advice and/or providing information and/or in advising the Plaintiff on the management of his wealth;

(b) to advise the Plaintiff in respect of the Account (including, *eg*, identifying and limiting risk, and keeping him informed on key aspects of the running of the Account); and

(c) to not act in a way inconsistent with the Defendant's contractual duties to SSL and/or the Plaintiff under an implied term that the Defendant would give the Plaintiff a reasonable period for the provision of additional collateral.

18 The Plaintiff claims that the Defendant breached the abovementioned duty in relation to its investment advice rendered (or not rendered) to the Plaintiff, the running of the Account, and in failing to provide a reasonable period for the provision of additional collateral prior to the close out.

19 The Plaintiff therefore claims for the loss of US$26m (which is the amount the Plaintiff claims he credited into the Account from the date which Account was open to about 2009) and/or damages to be assessed.

The law on striking out

20 Pleadings should only be struck out in plain and obvious cases, not requiring detailed and lengthy examination. This is expressed in the Court of Appeal's decision in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 ("*Gabriel Peter*") at [18]:

18 In general, it is only in plain and obvious cases that the power of striking out should be invoked. This was the view taken by Lindley MR in *Hubbuck & Sons, Limited v Wilkinson, Heywood & Clark, Limited* [1899] 1 QB 86 at 91. It should not be exercised by a minute and protracted examination of the documents and facts of the case in order to see if the plaintiff really has a cause of action. The practice of the courts has been that, where an application for striking out involves a lengthy and serious argument, the court should decline to proceed with the argument unless, not only does it have doubts as to the soundness of the pleading but, in addition, it is satisfied that striking out will obviate the necessity for a trial or reduce the burden of preparing for a trial.

21 Further, "the claim must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out" (*Singapore Civil Procedure* (Sweet & Maxwell, 2013) ("*Singapore Civil Procedure*") at para 18/19/6; accepted in *Chan Kin Foo v City Developments Ltd* [2013] 2 SLR 895 at [47]).

22 Under O 18 r 19(1)(*a*), a reasonable cause of action is one "which has some chance of success when only the allegations in the pleading are considered" and "the mere fact that the case is weak and is not likely to succeed is no ground for striking it out" (*Gabriel Peter* at [21]). It is essentially a question of law, and the pleaded facts are presumed to be true in favour of the claimant (*Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] 1 SLR(R) 844 at [29]).

23 When an action is plainly or obviously unsustainable, the court may strike out the claim for being "frivolous or vexatious" under O 18 r 19(1)(*b*) of the ROC, or in the exercise of its inherent jurisdiction (see *The "Bunga Melati 5"* [2012] 4 SLR 546 at [32] and [33]). A claim can be either legally or factually unsustainable, as explained in *The "Bunga Melati 5"* at [39] as follows:

(a) *legally unsustainable*: if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks"; or

(b) *factually unsustainable*: if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based".

24 Finally, a claim is an abuse of process if the court's process is not used *bona fide* and properly (*Gabriel Peter* at [22]).

The AR's decision

25 Before the AR, the Defendant raised the following arguments:

(a) First, the Plaintiff's claim discloses no reasonable cause of action. The Plaintiff has no standing to pursue claims in relation to the Account, which is in SSL's name. It was the Plaintiff who chose to use SSL to establish the banking relationship. Further, the Plaintiff's claim for losses merely mirror SSL's losses in the Account, and is not recoverable as a matter of BVI law, being the law of the place of SSL's incorporation.

(b) Secondly, the Plaintiff's claim is an attempt to circumvent the contractual framework governing SSL's banking relationship with the Defendant and is thus frivolous and/or vexatious and/or otherwise an abuse of process.

26 The AR characterised the issues before him as follows:

(a) The first issue: Whether the Plaintiff's case discloses no reasonable cause of action as, even in the pleaded circumstances, the Defendant does not owe any duty of care to the Plaintiff.

(b) The second issue: Whether the Plaintiff's case is doomed to fail for violating the rule against reflective loss.

(c) The third issue: Whether the Plaintiff's action is frivolous, vexatious or otherwise an abuse of process for being contrary to the relevant contractual documentation.

27 With respect to the first issue, the AR applied the test set out in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"). To begin, he determined that if the Defendant had been negligent in managing the funds entrusted to it, it was plainly foreseeable that the Plaintiff would ultimately be harmed.

28 The first criterion of proximity was also satisfied as there was causal proximity between the Plaintiff and the Defendant in the sense that there was a sufficiently close causal connection between the Plaintiff's loss and any negligence by the Defendant. The parties were clear that the various transactions, including the incorporation of SSL, were to be carried out for the sole purpose of investing the Plaintiff's personal funds. The Defendant looked to the Plaintiff for instructions, not SSL. The Plaintiff had hardly anything to do with SSL. In essence, the total disregard for the views of SSL showed that both parties were quite aware of the reality that it was ultimately the Plaintiff's money that was at stake.

29 As for whether there are any policy considerations that would militate against the imposition of a duty of care, the AR answered in the negative. While the parties had interposed a trust between them, it only meant they had chosen that there would be no contractual or fiduciary duties owed to each other. The parties did not agree that they would not owe each other any duty of care in negligence. On the whole, it was not impossible to find that the Defendant owes the Plaintiff a duty of care.

30 On the second issue, the AR noted that there was a dispute over whether Singapore or BVI law governs the issue. He declined to determine it. Whether or not Singapore or BVI law applied, it would not be appropriate to terminate the Plaintiff's action on this ground. While it was clear from the expert evidence before him that the rule against reflective loss was good law in BVI, it was unclear whether certain exceptions to the rule will be accepted or rejected by the BVI court. If

Singapore law applied, then the possibility of the Plaintiff's case succeeding increased, based on the Singapore Court of Appeal judgment in *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597.

31 On the third issue, the AR found that the contractual documentation was relevant at trial for determining whether any duty of care could be founded. However, it did not mean that the Plaintiff's claim in negligence was *obviously unsustainable* as the contractual documentation did not disclose any clear and specific intention to exclude a common law duty of care. It was at best ambiguous. He relied on the following grounds:

(a) firstly, there was no documentation between the Plaintiff and the Defendant (save for one exception), and the terms relied on by the Defendant were agreed between the Defendant and SSL;

(b) secondly, even if the terms bound the Plaintiff in spite of him not being party to the documentation, there was the question of whether the terms will pass muster under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA"); and

(c) thirdly, the exact implications of the terms relied upon were not clearly fatal to the Plaintiff's case. Even the clause relied on in the Limited Power of Attorney, which was the only document signed by the Plaintiff in his personal capacity, only indicated that the Defendant took no responsibility towards SSL for the investment decisions made by the Plaintiff as attorney, without saying anything about responsibilities owed by the Defendant to the Plaintiff *personally*.

32 For the above reasons, the AR declined, in his words, to "prematurely abort the action". Accordingly, he dismissed the application and ordered that the Defendant pay costs of S$14,000.

Summary of the parties' submissions on appeal

33 The Defendant has taken a more focused approach on appeal. It is not pursuing its argument below that the Plaintiff's claim offends the rule against reflective loss. Instead, it submits as follows:

(a) first, the SOC discloses no reasonable cause of action as the Plaintiff was in effect trying to "reverse pierce" SSL's corporate veil; and

(b) second, the Plaintiff's claims are frivolous and/or vexatious and/or otherwise an abuse of process as they are nothing more than an attempt to circumvent the contractual framework between SSL and the Defendant.

34 In reply, the Plaintiff argues that the Defendant's reliance on the "reverse piercing" issue is premised on a deliberate misstatement of the gravamen of the Plaintiff's position in the suit, and, in any event, the authorities the Defendant relies on do not meet the threshold of "impossibility" required for such an application.

My decision

Whether the Plaintiff's claims disclose no reasonable cause of action

Whether the Plaintiff has pleaded a separate and independent duty owed by the Defendant to the Plaintiff

35 The Defendant's counsel, Mr Alvin Yeo SC ("Mr Yeo"), argues that the Plaintiff did not plead that the Defendant owed it a duty separate and independent from that owed to SSL. Rather, all that is pleaded in the SOC is a bare assertion that SSL is the Plaintiff's *alter ego*. There is no basis for that other than his assertion that he owns and controls SSL. In other words, the only case the SOC discloses is that the Plaintiff, not SSL, was the real "customer" of the Defendant; thus, the Plaintiff is seeking to displace SSL *entirely* as the customer of the Account by asking the Court to "reverse pierce" SSL's corporate veil. The Defendant submits that this fact was not appreciated by the AR.

36 On a plain reading of the SOC as a whole, I find that it does disclose the averment that the Defendant owes the Plaintiff a separate and independent duty. In my view, the Defendant's characterisation of the Plaintiff's case is a strained interpretation of the SOC. For completeness, I note that the Plaintiff submits that the personal claim is its primary claim in the suit, and the *alter ego* plea is merely an alternative. While it is not entirely clear from the SOC which claim is the primary one, this does not mean that the Plaintiff has failed to plead the material facts necessary to establish a separate duty of care in tort.

37 To support its contention that the Defendant owed the Plaintiff a duty of care (as set out at [17] above), the Plaintiff relies on paras 88 to 95 of the SOC, in particular, para 88 which I set out in full as follows:

The Defendant was fully aware that although the Account was in the name of SSL, the Plaintiff:

a. Was the **ultimate beneficial owner** and/or alter ego of SSL;

b. relied entirely on the investment advice and expert opinion of the Defendant to make the investment decisions and/or make investment decisions on behalf of SSL; and

c. was the person who ultimately gained or made loss from such decisions.

[emphasis added in bold]

38 Para 14 of the SOC also states:

At all material times, SSL was the **nominee** and/or alter ego of the Plaintiff in its dealings with the Defendant *vis a vis* the operation of the Account. [emphasis added in bold]

39 As the Plaintiff argues, the words "ultimate beneficial owner" and "nominee" do not necessarily import connotations of veil piercing. I will also add that a plain reading of para 88b of the SOC indicates that what is asserted is that the Defendant owes a duty *directly* to the Plaintiff as it was the Plaintiff *himself* who relied on the Defendant's investment advice.

40 Moreover, the Plaintiff's pleaded grounds for the alleged duty of care include assertions that the Defendant knew of the Plaintiff's cautious investment approach, and that the Defendant had undertaken to provide advice and/or information to enable the Plaintiff to make informed decisions. By undertaking these tasks, the Defendant had assumed responsibility to take reasonable care to ensure that its advice was suitable and/or that the information was sufficient for its purpose.

41 These facts relate to the Defendant's actions towards *the Plaintiff* and also fit with the overall tenor of the SOC, which primarily details the interactions between the Plaintiff *personally* and the

Defendant's employees. Indeed, but for the alternative "*alter ego*" plea in paras 14 and 88(a), there is nothing in the SOC that is inconsistent with a plea of a duty of care that is *personal* to the Plaintiff.

42 For completeness, I will also add that it is trite that pleadings must contain only material facts (subject to certain exceptions). Material facts are facts which are necessary to establish a cause of action or defence, as well as facts which a party is entitled to prove at trial. The plaintiff is not required to plead the legal result or consequences of the facts stated in his pleading; this is a matter for the court to decide. Of course, the facts which form the basis for that conclusion must be pleaded. With respect to negligence, I refer to Jeffrey Pinsler SC's views in his book, *Principles of Civil Procedure* (Academy Publishing, 2013), at para 15.016:

As it is only material facts which may be stated in the pleading, the advocate must avoid setting down his legal arguments or theories of the law. The whole purpose of the pleading process is to state the facts on which each party relies so that the court may arrive at the appropriate legal conclusion. The legal result of the facts is entirely a matter for the court. For example, it is unnecessary for the plaintiff in a negligence action to plead the legal elements of the cause of action. *All he has to do is set out the circumstances in which the duty arose, the facts which constitute the breach of duty, and the facts which establish the damage resulting from the breach.* As the legal conclusion is a matter for the court to determine, it is not necessary for the plaintiff to plead the legal consequences of the facts stated in his pleading. …

[emphasis added]

43 In the present case, therefore, the Plaintiff need only state the material facts which give rise to the existence of a duty, breach and damage. As I have noted above, he has done so.

Whether it is impossible for a duty of care to arise

44 The question then is whether it is *possible* for the pleaded facts to establish that a separate and independent duty of care in tort was owed by the Defendant to the Plaintiff in respect of the Account.

45 I have set out at some length the pleaded facts, but I shall reiterate the key points. The Defendant's employee had courted the Plaintiff's personal custom. The Plaintiff had made known that he had no time to monitor any investments or to conduct the necessary research or due diligence. The Defendant (a major and reputable bank) had represented to the Plaintiff that it was fully capable of managing his investments and providing *him* with advice. With respect to the various investments, the Defendant also knew that the Plaintiff would be funding the account and would be looking to the Defendant for advice and relying on the same. The Defendant advised the Plaintiff to structure the banking relationship in this indirect manner, and the key personnel of SSL were nominated and appointed by the Defendant.

46 It is evident that the threshold question of foreseeability in *Spandeck* is easily satisfied, for the reasons given by the AR (at [27] above).

47 The next question is whether it is possible to find that the Plaintiff and Defendant were in a sufficiently proximate relationship to found a *prima facie* duty of care. The Court of Appeal has accepted what has been termed the "*Hedley Byrne* principle" (after the seminal House of Lords decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465), which establishes that the assumption of responsibility can be the basis of a sufficiently proximate relationship so as to give rise to a duty of care in the tort of negligence. For the *Hedley Byrne* principle to apply, it must be shown

that there has been "an assumption of responsibility by the tortfeasor to *take care* in the giving of information or advice or the performance of a service, and reliance by the plaintiff on such care being taken". In this respect, see the Court of Appeal decision in *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [33] to [35] and [39], which was affirmed in *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] 3 SLR 761 ("*Anwar Patrick Adrian*") at [69] to [71].

48 In analysing this issue, an important question is whether or not the underlying contractual arrangements evince the intention to exclude the imposition of a tortious duty of care. The following passage in *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 ("*Tan Boon Kwee*") at [71] is instructive:

71 The mere fact that there is a pre-existing contractual relationship or backdrop between the parties should not, in itself, be sufficient to exclude a duty of care on one of them to avoid causing pure economic loss to the other (the situation is *a fortiori* where, as here, there is in fact *no* contractual relationship between the parties, but merely a contractual backdrop, in the sense that each party was in a separate contractual relationship with a third party, *viz*, A.n.A). The true principle, in determining whether or not any contractual arrangement has this effect, should be whether or not the parties structured their contracts intending thereby to exclude the imposition of a tortious duty of care (see the House of Lords decision of *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 193-194).

49 It is also perfectly possible for one party to owe a duty of care to another even if the parties have *deliberately* decided *not* to be in a direct contractual relationship, see, *eg*, the English Court of Appeal case of *Riyad Bank & Ors v Ahli United Bank (UK) plc* [2006] 1 CLC 1007 ("*Riyad Bank*"). A specific decision not to have any contractual relationship between the parties is "a neutral consideration until one knows what the reason for that decision was" (*Riyad Bank* at [28], *per* Longmore LJ).

50 On the other hand, in arguing that it is not possible for a duty of care to arise on the presently pleaded facts, the Defendant relies heavily on the English High Court case of *Diamantis Diamantides v JP Morgan Chase Bank & Others* [2005] EWHC 263 ("*Diamantis (HC)*"), which result was affirmed by the English Court of Appeal in *Diamantis Diamantides v JP Morgan Chase Bank and others* [2005] EWCA Civ 1612 ("*Diamantis (CA)*").

51 In *Diamantis*, the plaintiff had, through two Liberian companies (first Ursa Navigation Inc ("Ursa") and then Pollux Holding Limited ("Pollux")), purchased investments from JP Morgan Chase Bank ("Chase"). Both companies were wholly owned and controlled by the plaintiff. Chase had courted the plaintiff as its client. Chase had provided him advice and told him that he was a very important client of the bank. In that case, it was not pleaded that the plaintiff opened any accounts with Chase in his personal capacity or purchased any investments from Chase. On the contrary, it was pleaded that the accounts were opened and maintained by the companies and that investments were purchased by the companies.

52 The claim was founded on the plaintiff being "a customer in his personal capacity and that everyone concerned understood and agreed that he was the customer or client" of Chase (*Diamantis (HC)* at [12]). The plaintiff claimed that there was an "advisory relationship" between Chase and the plaintiff, whereas there was a "transactional relationship" between Chase and Pollux.

53 Morison J, at the English High Court, struck out the plaintiff's claim. I cite below the key portion of his reasoning (*Diamantis (HC)* at [27] and [28]):

… The question is whether Mr Diamantides has a claim at all. That depends upon a credible case being advanced that Chase and he were in a contractual relationship: banker and customer. The facts pleaded show clearly that at all times Pollux was the customer and Mr Diamantides, the principal behind the company and sole shareholder and controller was the voice for and asset provider to the company. Had Mr Diamantides wanted to trade in his own name and had, which I doubt, the Bank been willing to accept him as a private investor for trading in risky emerging market instruments, then he would have bought and sold instruments in his own name. Instead, and possibly necessarily, the Bank dealt with all transactions for and on behalf of the company, Pollux. Because Pollux is a company which carried on the business of investing for its sole shareholder's benefit, it did not have the protection afforded by the statutory scheme then in force to a 'private investor'. …

28. I accept Mr Hapgood QC's submissions. In particular I think he rightly submitted this is an unprincipled attempt by an individual, who chose to invest through a corporate vehicle, to pierce the veil of his own company. That is not in law permissible: see Trustor AB v Smallbone [2001] 1 WLR 1177. The beginning and end of this case is that Pollux was the customer; Mr Diamantides was not. As Pollux's voice, the advice was given to him on behalf of Pollux and he caused Pollux to act on it. There is no commercial sense in a split between advisory and transactional activities. It is, frankly, meaningless and would make the regulatory regime impossible. …

54 It is apparent that it was important to Morison J that Chase was unlikely to have been willing to deal with the plaintiff directly in the first place. Also relevant to his decision was his view that the plaintiff was trying to avoid the consequences of Pollux not being a private investor, which would make nonsense of the regulatory regime then in force, an undoubtedly important policy consideration (see also *Diamantis (HC)* at [16]).

55 On appeal, the English Court of Appeal dismissed the plaintiff's appeal on a different point. It was found that the plaintiff could not succeed as the pleaded facts were not capable of supporting his pleaded case that the advisory duties were owed to him alone, while the transactional obligations were owed exclusively to Pollux; such an unusual situation could only arise "as a result of special arrangements between the personal client, the investment manager and the company defining the scope of the relationships between them" (*Diamantis (CA)* at [41] and [43]).

56 It should be emphasised that after considering the cases of *Johnson v Gore Wood & Co* [1999] BCC 474 and *Conway v Ratiu and others* [2005] All ER (D) 103 (Nov), Moore-Bick LJ, who delivered the leading judgment of the Court of Appeal, stated that he would have been *inclined to agree* with the submission that it is perfectly possible for the bank to owe fiduciary duties to the plaintiff, from whom it received its instructions and whom it knew to be the person behind Ursa and Pollux, if it had gone *no further than that* (*Diamantis (CA)* at [36]). The Court of Appeal's decision to uphold the striking out of the plaintiff's claim below was therefore based on the unique case advanced by the plaintiff.

57 It is clear to me that, notwithstanding certain factual similarities, the *Diamantis* cases are distinguishable. Indeed, Moore-Bick LJ's remarks in *Diamantis (CA)* at [36] support the Plaintiff's case.

58 Thus, at this stage, I do not think it is *impossible* to find that there had been an assumption of responsibility by the Defendant to take care *vis-à-vis* the Plaintiff *simply* because the Account was opened in SSL's name instead.

59 Additionally, I also agree with the AR for the reasons he stated that there is certainly sufficient *causal* proximity in this regard (see [28] above).

60 That leaves the final question of whether there are any policy considerations that negate the imposition of a duty of care. I find that there are none. The AR approached the issue of the contractual matrix as a policy consideration, while in the present case I have considered it under the first limb of the *Spandeck* test. As noted in *Tan Boon Kwee* at [66] to [69], the contractual matrix may, depending on the facts, be treated as a proximity factor or a policy consideration. Nevertheless, given the overlap between the two limbs of the *Spandeck* test, the result will often be the same. In any event, as is apparent, I concur with the AR's conclusion. As the AR notes, quite rightly, nothing in the facts pleaded indicates that the parties did not intend to owe the other a duty of care in negligence.

Whether it is impossible for the alter ego averment to succeed

61 For completeness, I will briefly address whether it is appropriate to strike out the "*alter ego*" averment on the argument that it is an impermissible act of "reverse piercing". The difference between a typical case where the court is asked to pierce the corporate veil of a company, and a case of "reverse piercing", is that in the latter, it is not a third party who is seeking to hold a shareholder or controller of the company liable for the company's liabilities. Rather, the shareholder *himself* asks the court to disregard the separate legal personality of the company, so as to enable him to pursue claims against a third party that had dealt with the company. The defendant argues, quite forcefully, that it requires even *more* exceptional circumstances before a court will permit a shareholder to disregard the company's separate legal personality in order to pursue his claims personally. To allow a shareholder to deny the existence of incorporation as and when he chooses would undermine the separate legal personality doctrine and open the floodgates.

62 In this regard, the defendant refers to Jeff H Y Chan, "Should 'reverse piercing' of the corporate veil be introduced into English law?" (2014) Comp Law 35(6) Comp Law 163 ("Jeff Chan"). As argued in Jeff Chan, corporations are expected to "take the rough with the smooth". Owners of corporations should not be allowed to "manipulate the legal status of their corporation to suit their current needs, without due respect to the legal order of a corporation form" (Jeff Chan at p 168). Yet, various arguments in favour of allowing reverse piercing are also noted in Jeff Chan at p 167. The author accepts that the position is unsettled in English law (at p 164). Further, as the Defendant admits, there does not appear to have been any "reverse piercing" cases brought before the Singapore courts to date.

63 It is inappropriate to strike out an action that contains a point of law which requires serious argument. However, if the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question (see *Singapore Civil Procedure* at para 18/19/6). In my view, the issue of "reverse piercing" does require serious argument, and is certainly not *unarguable* and *unsustainable*. This is an issue better resolved at another forum. Thus, I am also not inclined to strike out the *alter ego* averment on the basis that it is an impermissible attempt at "reverse piercing" the corporate veil.

64 For the above reasons, I find that it is inappropriate to strike out the SOC on this ground.

Whether the Plaintiff's claims are frivolous or vexatious and/or otherwise an abuse of process

65 For the argument that the Plaintiff's claims are frivolous or vexatious and/or otherwise an abuse of process, the Defendant refers to various contractual terms that were concluded between the Defendant and SSL in respect of the Account, including:

(a) the account opening terms such as the 2003 Account Opening Conditions and the 2003 Risk Disclosure Statement;

(b) the Limited Power of Attorney;

(c) confirmation letters in respect of SSL's investments in the KODAs ("the KODA Confirmation Letters"); and

(d) the facility letter for the US$30m Facility.

66 It is not necessary to set out the various provisions at length. It is sufficient to state that, according to the Defendant, the effect of the abovementioned documentation is that:

(a) the Defendant and SSL have expressly agreed that the Defendant would not be SSL's financial adviser;

(b) the Defendant owes no duty to advise SSL and bears no responsibility to SSL in respect of any investments conducted through the Account;

(c) SSL would be responsible for any transactions it ultimately chooses to enter into and would not be relying on any advice from the Defendant or its officers; and

(d) SSL was required to provide any additional collateral required by the Defendant within such period specified by the Defendant, which may be less than 24 hours.

67 Thus, the Defendant submits that the duty of care allegedly owed to the Plaintiff is completely inconsistent with the contractual framework. The Plaintiff has "deliberately constructed an artificial case so as to circumvent the contractual framework governing the Account".

68 I have already applied the *Spandeck* test to the pleaded facts, above. The question here is whether the evidence of the contractual framework described at [66] above affects the analysis, such that the Plaintiff's claim is obviously unsustainable or an abuse of process. Undoubtedly, the existence of an express disclaimer of responsibility is relevant in determining the existence and scope of any duty of care. As I noted at [60] above, this might be considered under either the first or the second limb of the *Spandeck* test.

69 In my view, striking out the SOC on this ground is not appropriate for a number of reasons.

70 Firstly, the interpretation of some of the terms the Defendant relies in support of its case is hotly contested even at this stage. The proper construction of the various contractual terms relied upon may involve findings of fact which can only be resolved at trial. This was a fact rightly noted by the AR. Indeed, Mr Yeo submits that he is not asking the court to decide whether the clauses provide a complete defence to any claim.

71 Secondly, even if I accept the Defendant's interpretation of these clauses, there is the question of whether these clauses are even *valid* and *binding* on SSL in the first place. Some of the clauses may be properly characterised as non-reliance or non-representation clauses. Such "basis clauses", so called because they are said to merely define the *basis* of the relationship of the parties to the contract, may not necessarily prevent a duty of care from arising. In *Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886 at [60] to [67], the Court of Appeal took the view (albeit *obiter*) that if the substantive effect of such "basis clauses" is to exclude or restrict the imposition of a duty of a care in law, they will have to satisfy the requirement of the test of reasonableness under the UCTA. In the circumstances of the present case, it is not impossible that some or all of these clauses may fall within the scope of the UCTA and be found to be unreasonable. If it turns out that the contractual terms are invalid, it seems to me that it will only be in very unusual circumstances that an alleged duty of care will be negated or circumscribed *simply* for being inconsistent with those invalid contractual terms. Thus, the AR was quite right to take this issue into account.

72 Even *if* these terms are valid and binding on *SSL*, there is also the question of what effect, if any, they may have *vis-à-vis* the *Plaintiff*. Indeed, the Plaintiff asserts that he never received a copy of the 2003 Account Opening Conditions (Mr Koh Kim Teck's first affidavit, para 31) or the 2003 Risk Disclosure Statement (Mr Koh Kim Teck's first affidavit, para 38). The Plaintiff also states that the KODA Confirmation Letters were only signed by him on SSL's behalf *after* each individual trade was done. He had not read the said letters because, *inter alia*, the Defendant's representatives had told him there was no need for him to go through the terms after their explanations of the KODAs (Mr Koh Kim Teck's first affidavit, paras 39 to 42). There is, at the very least, a question to be resolved as to the Plaintiff's knowledge of the terms at the material time.

73 I note the AR's view that the documentation does not bind the Plaintiff, save for the Limited Power of Attorney, since he is not personally a party to the contracts entered into between SSL and the Defendant. This assumes that SSL and the Plaintiff are separate legal persons. To the extent that the Plaintiff's claim does not rely on the *alter ego* plea, this distinction between SSL and the Plaintiff is justifiable. However, in the Plaintiff's alternative plea that SSL is his *alter ego*, it is precisely this consequence of incorporation that is being disclaimed. Can a claimant, in the same breath, ask the court to lower the corporate veil in tort and then insist on the doctrine of separate legal personality in contract, with regard to what is substantially the same transaction? It seems to me that it will only be in highly unusual circumstances that a court will disregard the corporate form only for *part* of its dealings with the same party. To be fair to the Plaintiff, he does not draw this clear line between himself and SSL in his written submissions on appeal. In any event, the legal effect of these terms remains unclear.

74 In summary, as far as the alleged advisory duties are concerned, the Plaintiff's claim is not obviously unsustainable. This must be so, considering that there are numerous issues of fact and law that need to be resolved before the court can say for certain what exactly was agreed between SSL and the Defendant, and the extent that these terms are enforceable in law against SSL (or the Plaintiff). Until then, it is impossible to say for certain what impact the contractual framework has on any duty of care owed by the Defendant to the Plaintiff.

75 As for the Defendant's alleged duty not to act in a way inconsistent with an implied term that the Defendant would give the Plaintiff a reasonable period for the provision of additional collateral, this turns on whether it is *possible* that such a term might be implied. Similarly, I am unable to say, at this stage, that it is *not* possible.

76 I therefore dismiss the appeal on this ground as well.

Conclusion

77 In summary, the proper resolution of the case throws up a number of factual and legal issues that cannot be properly resolved at this stage. The Plaintiff's claim cannot be said to disclose no reasonable cause of action or be frivolous, or vexatious, or an abuse of the process of the court. For the reasons stated, I dismiss the appeal. I will hear the parties on costs.