Determining the Nature & Consequences of a Breach of Fiduciary Duty: *Credit Suisse Trust Limited v Ivanishvili, Bidzina and others* [2024] SGCA(I) 5; [2024] 2 SLR 0164

I. Executive Summary

In 2004, Credit Suisse Trust Limited (Credit Suisse as "**CS**" and the trust as "**CS Trust**") was appointed the trustee of a trust holding assets exceeding US$1.1 billion (the "**Mandalay Trust**"), which was to be for the benefit of first respondent Mr Bidzina Ivanishvili ("**Mr Ivanishvili**") and his family, the second to fifth respondents (collectively, the "**respondents**"). In 2006, one Mr Patrice Lescaudron ("**Mr Lescaudron**") took over as Mr Ivanishvili's relationship manager at Credit Suisse AG ("**CS Bank**"). Between 2006 and 2015, Mr Lescaudron not only misappropriated the assets of the trust, but also covertly transferred and manipulated them to conceal losses in other clients' accounts (which he had also caused).

Mr Lescaudron's fraud was only unveiled in 2015. Mr Ivanishvili terminated his relationship with CS and claimed against CS Trust in the Singapore International Commercial Court (the "**SICC**") for its breaches of duties as trustee of the Mandalay Trust. The SICC found that CS Trust had indeed breached its duties, and awarded the respondents compensation of US$742.73 million, together with interest and costs.

CS Trust subsequently appealed to the Singapore Court of Appeal ("**CA**"), arguing that it had only breached a tortious duty of care, and should thus not be liable for losses beyond those due to Mr Lescaudron's direct acts. In *Credit Suisse Trust Limited v Ivanishvili, Bidzina and others* [2024] 2 SLR 0164, the CA examined both the nature of CS Trust's fiduciary duty, as well as how it compared with the tortious duty of care. It is helpful to note here that a fiduciary is a person who must act in the best interests of another person, known as the beneficiary. The distinguishing obligation of a fiduciary is the obligation of loyalty, which is an onerous and exacting standard.

The CA held that tortious and fiduciary duties were not mutually exclusive: they were theoretically distinct, and both duties could be owed (and breached) by the same person. CS Trust's admission that it had breached a tortious duty to safeguard the respondents' assets did not preclude a finding that it had *also* breached its fiduciary duty to act in good faith in doing so. The CA then found that CS Trust had clearly breached its core fiduciary duties to: (a) abide by the "no-conflict rule", which prohibits a fiduciary from placing themselves in a position of conflict of interest with their beneficiary, and (b) perform the trust honestly and in good faith for the benefit of, and in the interests of, the respondents. This gave rise to the presumption that CS Trust's breach caused the respondents' losses, and to rebut this presumption CS Trust would have to show that the respondents would have suffered the losses even if there was no breach. The CA, however, allowed CS Trust's appeal in part on quantification of the losses suffered.

II. Material Facts

In 2004, CS Trust was appointed the trustee of the Mandalay Trust. The assets of the Mandalay Trust (the "**Trust Assets**") comprised funds that were deposited into bank accounts with CS Bank branches in Geneva and Singapore. Two companies which were ultimately owned by CS Trust, Meadowsweet Assets Limited ("**Meadowsweet**") and Soothsayer Limited ("**Soothsayer**"), opened the accounts in Geneva (the "**Meadowsweet Accounts**") and Singapore (the "**Soothsayer Accounts**") respectively (the Meadowsweet Accounts and the Soothsayer Accounts are termed collectively the "**Trust Accounts**").

In 2006, the fraudster, Mr Lescaudron, took over as Mr Ivanishvili's relationship manager at CS Bank. Between 2006 and 2015, Mr Lescaudron not only misappropriated the Trust Assets, but also covertly transferred and manipulated them to conceal the losses in other clients' accounts (which he had also caused). A significant aspect of Mr Lescaudron's various acts of fraud took the form of "Unauthorised Payments Away" ("**UPAs**"), a term used internally by CS to refer to a class of high-risk transaction. By CS' own internal guidelines, transactions that are UPAs include payment transactions out of a bank account held by a structure (such as the Mandalay Trust) under a CS trustee (such as CS Trust) that are effected by a relationship manager of CS Bank (such as Mr Lescaudron) without the necessary approval. In short, UPAs represent unauthorised direct removals of the Trust Assets and a corresponding reduction to the Trust Accounts. While Mr Lescaudron was never formally authorised to deal with the Trust Assets, he was allowed to do so with impunity between 2006 and 2015.

In November 2006, six UPAs totalling US$35.412 million was carried out by Mr Lescaudron, causing palpable alarm within CS Trust. However, rather than treat this unauthorised episode as a wake-up call, evidence showed that CS Trust did nothing about Mr Lescaudron's repeated recalcitrance over a period of approximately nine years thereafter.

In 2007, Mr Lescaudron expanded his repertoire of unauthorised dealings. In a single day on 11 May 2007, Mr Lescaudron made further UPAs exceeding US$46.6 million. Over the course of the year, he also (a) set up new bank accounts for Meadowsweet, despite lacking the authority to create new accounts, (b) transferred Trust Assets between the Trust Accounts, despite lacking the authority to transfer assets, and (c) began investing in shares and engaging in a high level of trading on the Trust Accounts, despite lacking any authority to trade. The level of trading was so high that it was described by CS' own subsequent internal audit as "churning". From August to October 2007, Mr Lescaudron fraudulently used the Trust Assets to purchase securities at an overvalue and benefitted personally from the trades. CS Trust was aware of the transactions but failed to take *any* steps to enquire into the transaction details or to investigate the identity of the recipient of the Trust Assets, or even to simply inquire with Mr Ivanishvili whether he had approved of the transactions.

In March and November 2008, Mr Lescaudron carried out a total of 21 UPAs involving tens of millions of Trust Assets. By then, CS Trust was well aware of the established pattern of UPAs. But nothing was done by CS Trust to address or even question these UPAs until February 2009, when CS Trust finally wrote to Mr Lescaudron, seeking supporting documents for the 2008 UPAs. This request was effectively ignored for a further two years thereafter.

It took until February 2012 for CS Trust to consider seeking an explanation from CS Bank in relation to Mr Lescaudron's UPAs, but for other reasons CS Trust ultimately still failed to do so. In this manner, Mr Lescaudron was allowed to continue to effect unauthorised transactions and deal with the Trust Assets. Despite having been made aware of Mr Lescaudron's continued execution of the clearly prohibited UPAs, and despite being concerned about this, nothing was done by CS Trust to investigate Mr Lescaudron or prevent his unauthorised access to the Trust Assets until 2015, when the price of certain shares purchased by Mr Lescaudron collapsed and his fraud was finally exposed. Subsequently, the respondents filed suit in the SICC.

The SICC found that CS Trust had breached its duty to safeguard the Trust assets as of 30 March 2008, and that Mr Ivanishvili would have removed all the Trust Assets to another professional trustee had CS Trust informed Mr Ivanishvili of Mr Lescaudron's misconduct by then. The losses that flowed from CS Trust's breach were, therefore, not limited to the direct

defalcations (i.e. acts) by Mr Lescaudron: by permitting Mr Lescaudron's continued access to the Trust Assets, CS Trust effectively left *all* the Trust Assets vulnerable to fraud. The SICC criticised CS Trust's preference of the "importance" of Mr Lescaudron in retaining "big client" Mr Ivanishvili, to the compliance with its core obligation of keeping the Trust Assets safe. Accordingly, the SICC ordered CS Trust to compensate the respondents based on the estimated returns the Trust Assets would have achieved had the whole portfolio been removed from CS to the management of another professional trustee.

Consequently, CS Trust appealed to the CA. CS Trust admitted the following: that it breached its duty to safeguard the Trust Assets by failing to take steps to detect and prevent Mr Lescaudron's misappropriations; that Mr Lescaudron would have been removed from his position by 31 December 2008 had such steps been taken; and that it should have contacted Mr Ivanishvili directly and ensured that movements out of the Trust Accounts were authorised. However, CS Trust premised its appeal on the argument that even if a trustee is in breach of its duty to safeguard the trust assets from misappropriation by a third party, a trustee that has no duties or powers of investment cannot be liable for bad investments carried out by that third party (here, Mr Lescaudron). As such, it argued it did not have a duty to monitor and review the investment decisions made and therefore could not be liable for losses arising from the bad or improper investments. CS Trust further argued that the extent of its liability should be reduced because of Mr Ivanishvili's contributory negligence.

The CA noted that both of CS Trust's arguments were predicated on the basis that its breach was of a *tortious* duty of care, rather than of *fiduciary* duties as had been found by the SICC.

III. Issues on Appeal

On appeal, the CA first determined the *nature* of CS Trust's breach of its duties: specifically, whether CS Trust had breached its *fiduciary* duties. Second, the CA quantified the losses which the respondents suffered. The applicable principles for quantification were closely tied to the nature of the duties breached.

A. Whether CS Trust had breached its fiduciary duties

CS Trust effectively submitted that there were in substance only two fiduciary duties: the "no-profit rule" and the "no-conflict rule". According to CS Trust, if there had been no breach of either rule, then there should not have been a breach of the duty to act honestly and in good faith in the interest of the beneficiary. Thus, as it was neither in breach of the no-profit rule nor the no-conflict rule, it was not in breach of its fiduciary duties.

The CA rejected this submission. It held that the duty of loyalty owed by a fiduciary to their principal was the root from which recognised and more specific fiduciary duties stemmed. While the no-profit rule – which prohibited a fiduciary from obtaining an advantage out of their fiduciary position without the informed consent of the principal – and the no-conflict rule – which prohibited a fiduciary from placing themselves in a position of conflict of interest with their principal – were core fiduciary duties, they were merely facets or manifestations of the fundamental duty of loyalty, and were not exhaustive as to the breadth of fiduciary duties. Accepting CS Trust's submission that there could not be a breach of fiduciary duty without a breach of the no-profit or no-conflict rule would make a mockery of the obligation of loyalty.

Further, the CA emphasised that the tortious duty of care and fiduciary duties were distinct duties. The duty of care targeted *careless and incompetence*. It measured the performance of the tortfeasor against an objective standard of reasonable behaviour. In contrast, the fiduciary

duty targeted *disloyalty* – mere incompetence was insufficient. The difference between the two lay in the person's state of mind in performing. Although there could be overlap between the two in the factual circumstances of a breach, they were neither binary nor mutually exclusive.

With the above principles in mind, the CA held that CS Trust had breached its fiduciary duty to perform the trust honestly and in good faith for the benefit of, and in the interests of, the respondents. This duty had a positive dimension that manifested in at least two ways, both of which CS Trust had breached.

First, CS Trust had breached its fiduciary duty to act in good faith in the *actuating* sense. This duty positively required the trustee to act where he knew that the interests of the beneficiaries were at risk of harm. The decision to act or not act had to be made honestly and in good faith for the benefit of, and in the interest of, the beneficiaries. CS Trust knew that the UPAs carried out by Mr Lescaudron were against the respondents' interests and was indeed alarmed by the significant volume (in rate and quantum) of UPAs from an early stage. Yet, despite having actual knowledge of the fact that the UPAs had been recurring over a sustained period of time and the risk of harm posed by UPAs, CS Trust did nothing but sit on its hands.

Second, CS Trust had breached its fiduciary duty to act in good faith in the *adjectival* sense. This duty regulated the performance of non-fiduciary duties or exercise of powers – trustees had to act in good faith in performing those duties or exercising those powers. Although a trustee was not obliged to guarantee a particular *outcome*, he had to ensure that he conducted himself in a manner befitting his obligation of loyalty and his undertaking to act in the beneficiaries' interests. CS Trust had failed to act in good faith in carrying out its duty to safeguard the Trust Assets. Even if the duty to safeguard trust assets was regarded as a tortious duty to take reasonable care to ensure that trust property was kept secure, the fact that CS Trust admitted that it had breached *that* tortious duty did not preclude a finding that it had *also* breached its fiduciary duty to act in good faith in doing so.

Finally, the CA found that CS Trust had also breached the no-conflict rule. CS Trust's witnesses testified that CS Trust would have acted to stem the UPAs had the bank holding the Trust Assets been an unaffiliated third-party bank rather than CS Bank. This supported the SICC's finding that CS Trust had preferred the business interests of CS in retaining the "big client" Mr Ivanishvili over the duties it owed to the respondents.

B. Quantification of compensation

With respect to CS Trust's breach of its fiduciary duties, once the respondents established that loss had been sustained, a presumption arose that CS Trust's breaches had caused the loss. To rebut this presumption, CS Trust had to show that the respondents would have suffered the loss in spite of its breach.

The CA noted that the appropriate remedy for CS Trust's breach of fiduciary duties depended on whether the breach was custodial or non-custodial. (A custodial breach results in the misapplication of the principal's funds, while a non-custodial breach does not involve stewardship of assets entrusted to the fiduciary. For the former, a substitutive remedy, which seeks to restore the trust fund, is appropriate. For the latter, a reparative remedy, which seeks to "repair" the loss caused to the principal, is appropriate.) In this case, as the crux of CS Trust's breach was its failure to act in good faith – a non-custodial breach – a reparative remedy was appropriate.

The CA stated that the remedy of equitable compensation (a reparative remedy) ought to put the respondents in the position they would have been in had there been no breach of fiduciary duty. In the SICC (the trial court), this compensation was quantified with the assistance of two sets of experts: the wealth management experts and the forensic accounting experts.

The wealth management experts were required to construct "Benchmark Portfolios" that were alternative medium-risk portfolios for the Meadowsweet Accounts, the Soothsayer Accounts, and accounts held by Meadowsweet with a subsidiary of CS Bank, Credit Suisse Life (Bermuda) Ltd (the "**CS Life Meadowsweet Accounts**"). Then, the forensic accounting experts used the Benchmark Portfolios to project what the returns would have been for each account if the Trust Assets had been invested in accordance with those Benchmark Portfolios. The forensic accounting experts applied various models (the "**Models**") in calculating the compensation owed to the respondents based, among other things, on different proportions of the Trust Assets in the assessment.

The SICC held that the just and fair method to be applied in calculating compensation for the loss was in accordance with the Whole Portfolio Model, utilising the approach adopted by the respondents' (then the plaintiffs') experts. On appeal, after addressing the usual thresholds for appellate intervention, the CA addressed the following key issues:
(1) the appropriate Model for quantification of the respondents' losses;
(2) the appropriate specifications to be used for the Model; and
(3) the appropriate specifications to be used for the Benchmark Portfolios.

(1) The appropriate Model for quantification of the respondents' losses

The experts had considered two categories of Models: the "Whole Portfolio Model" ("**Model 1**") and the "Specific Transactions Model" ("**Models 2, 3 and 4**").

Model number	**Model name**		**Explanation of the basis on which loss is calculated**
1	Whole Portfolio Model		Assumes that, at a defined date, the moneys were no longer invested in the Trust Accounts and instead invested in the relevant Benchmark Portfolio.
2	"Specific Transactions Models"	"Unauthorised Transfers Model"	Calculation of unauthorised transfers away from the Trust Assets and the values that could have been earned on the unauthorised transfers with reference to the Benchmark Portfolio (accounting for the repayment made by CS).
3		"Objectionable Transactions Model"	Assumes that trust moneys were invested in the Trust Accounts but that the investments in certain "Objectionable Transactions" were instead invested in the relevant Benchmark Portfolio.
4		"Overconcentration Model"	A calculation of the loss from investments being held at an overconcentrated level, assuming that the funds forming the overconcentrated element were instead invested in the relevant Benchmark Portfolio.

CS Trust argued that the Whole Portfolio Model was inappropriate because it overcompensated the respondents. *First*, CS Trust contended that the Whole Portfolio Model wrongly assumed that all investments made after 30 March 2008 would not have taken place. CS Trust framed its case on quantification as a breach of only a *duty of care* to protect and safeguard the Trust

Assets by failing to prevent improper investments from taking place. It therefore argued that the respondents were only entitled to recover losses incurred from improper investments which they alleged that CS Trust ought to have prevented, which was more appropriately measured by the Specific Transactions Model. *Second*, CS Trust asserted that the Whole Portfolio Model held CS Trust liable for the underperformance of the Trust Accounts against the standard of the Benchmark Portfolios, even if such underperformance was unrelated to Mr Lescaudron's wrongdoing. The Whole Portfolio Model thus conferred a windfall upon the respondents by putting them in a position as if the Trust Accounts never underperformed the market during the relevant period. *Third*, CS Trust argued that there was no reason why the removal of the Trust Assets from CS Bank necessarily meant a complete divestment and reinvestment of the Trust Assets on 30 March 2008. It was entirely plausible that investments and funds could have been moved to be managed by another portfolio manager.

The respondents in turn stressed that CS Trust had breached its *fiduciary duty* to act honestly and in good faith. Accordingly, the appropriate remedy for such a breach was for the account to be put in the position it would have been in had it not been for CS Trust's breach, which required a hypothetical assessment of what a properly managed investment portfolio would have achieved. The Whole Portfolio Model was thus most appropriate.

The CA agreed with the respondents and held that the Whole Portfolio Model was the most appropriate Model for quantification of the respondents' losses. The CA agreed with the SICC that Mr Ivanishvili would have removed all the Trust Assets to another professional trustee had CS Trust informed Mr Ivanishvili of Mr Lescaudron's misconduct by 30 March 2008. Hence, the CA preferred the Whole Portfolio Model, which estimated returns based on the assumption that all the Trust Assets were no longer invested in the Trust Accounts at a defined date and were instead invested in accordance with a Benchmark Portfolio.

The CA held that the Specific Transactions Model advanced by CS Trust did *not* address the true premise of the respondents' case that, but for CS Trust's breaches of fiduciary duties, *all* of the Trust Assets would have been moved to be managed by a different competent professional trustee. Having established such a loss, the only escape route available to CS Trust was for it to prove that the respondents would have suffered the same losses even under the management of the alternative competent professional trustee, of which the legal burden of proof lay fully and squarely on CS Trust. CS Trust's failure to discharge this burden meant that it should remain liable for the entire loss (subject to adjustments to exclude certain transactions attributable to Mr Ivanishvili).

(2) The appropriate specifications to be used for the Whole Portfolio Model

The parties disputed the many specifications used by the experts for the Models. This affected the portion of Trust Assets to be accounted for under the Whole Portfolio Model, the shortfall for which CS Trust had to compensate the respondents. In the CA's view, the construction of the alternative investment portfolio was, as far as possible, to be done with reference to what Mr Ivanishvili himself would have done in the circumstances. Therefore, what could be discerned about Mr Ivanishvili's investment preferences and risk appetite, and any other objective facts relating to his likely behaviour, had to be accounted for.

The CA generally upheld the SICC's findings, departing from the SICC's decision in only one respect. While the SICC found it inappropriate to exclude the investments made in hedge funds from the Whole Portfolio Model, the CA found that all hedge fund investments were to be *prima facie* excluded from the Whole Portfolio Model. This was because Mr Ivanishvili had

admitted that unlike "other investments" for which he did not provide specific instructions, in the case of investment in hedge funds, he had explicitly authorised at least some of them.

The CA held that the SICC had omitted to consider material factual evidence that showed that the hedge fund investments would have been made in any event, which therefore put the evidential burden on the respondents to identify and show that specific hedge fund investments were unauthorised. This approach had the benefit of achieving a fairer estimation, because it avoided an all or nothing scenario where the sums represented in all the hedge fund investments were either totally included or excluded from the Whole Portfolio Model, invariably overcompensating or undercompensating the respondents. To this end, the CA directed the respondents to specifically identify the hedge fund investments that should not be excluded from the Whole Portfolio Model. Certain hedge fund investments specifically identified by the respondents were later included in the Whole Portfolio Model for being fraudulent, unsuitable or overconcentrated.

(3) The appropriate specifications to be used for the Benchmark Portfolios

The parties disputed the specifications used by their respective wealth management experts in their respective Benchmark Portfolios. These specifications affected the construction of the Benchmark Portfolios and the corresponding rates of return used, which was applied to the Whole Portfolio Model to estimate what the invested Trust Assets would have yielded.

The CA preferred CS Trust's expert's asset allocation of including alternative investments for the CS Life Meadowsweet Benchmark Portfolio, over the respondents' expert's allocation which excluded alternative investments (which the SICC had adopted). This was because the contemporaneous documents available indicated that Mr Ivanishvili in fact had an investment risk appetite that included alternative investments in his portfolios. The CA also made further findings regarding: the experts' choices of indices and exchange traded funds to project the performance of the various asset classes; and that the SICC ought to have accounted for and deducted portfolio management fees from Mr Morrey's Benchmark Portfolios.

IV. Conclusion

In conclusion, the CA allowed CS Trust's appeal but only in part. The SICC's award of US$742.73 million was to be adjusted based on changes made to the specifications of the Whole Portfolio Model and Benchmark Portfolios.

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