QUESTIONING THE STRENGTH OF PROTECTIVE CLAUSES IN WEALTH MANAGEMENT CONTRACTS

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I. INTRODUCTION

Wealth management contracts often contain protective clauses attempting to shield the wealth manager from liability arising from their wrongful conduct, such as negligence and misrepresentation. It is often claimed that these clauses continue to present clients with 'insuperable difficulties' in litigating claims at common law and otherwise. While this was true under Singapore law, it is no longer so. Today, it is possible for clients to challenge these clauses under common law or to outflank them by using statutory remedies. However, even though litigating claims is no longer insuperable, it remains admittedly difficult to do so. Ultimately, an unsophisticated retail client would stand a better chance of successful litigation and obtain an adequate remedy than a corporate or sophisticated one. In the final analysis, the difficulty faced by clients in litigating their claims is inappropriate. The law is too biased towards the wealth manager and needs reform.

II. TYPES OF PROTECTIVE CLAUSES

Protective clauses in wealth management contracts fall broadly into two types: entire agreement clauses ('EAC') and non-reliance clauses ('NRC'). EACs restrict the parties' contractual relationship to the confines of the written document so as to prevent term implication and incorporation of collateral oral agreements unfavourable to the wealth manager. It is also to prevent tortious duties from arising as contractual disclaimers deny the requisite proximity with the client. NRCs, on the other hand, protect the wealth manager from misrepresentation liability by basically

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rewriting history using contract to say that the client did not rely on pre-contractual representations. It is therefore necessary for the client to invalidate these two clauses otherwise his claim for breach of duty is doomed.

III. CHALLENGING PROTECTIVE CLAUSES AT COMMON LAW

Unfortunately for the client, the common law would generally uphold EACs and NRCs.[1] Starting with EACs, courts uphold them due to the parol evidence rule.[2] This rule basically stipulates that where a contract is recorded in a written document, no extrinsic evidence may be adduced to vary or contradict the terms recorded. An EAC in the written contract therefore cannot be refuted to find collateral oral terms.

The common law's logic is however flawed. The parol evidence rule first requires parties to use a 'written contract' but not all written documents, such as receipts, qualify.[3] Parties are also free to construct their contract part written, part oral.[4] These factors must mean that a 'written contract' arises only when the parties intended a contractual instrument to contain their entire contract, if not then the parol evidence rule is inapplicable.[5] An EAC should therefore be ineffective if the parties did not actually intend the written document to comprise the entire contract.[6] Consequently, the parol evidence rule should only create a rebuttable presumption of fact that a written document is the whole contract and so a client should be allowed to adduce extrinsic

[1] See e.g. *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886 (SGCA) [*Deutsche Bank AG* SGCA]; *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221 [*Springwell Navigation*]; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133 [*AXA Sun Life*].

[2] *Shogun Finance Ltd v Hudson* [2004] 1 A.C. 919; Common law position codified in Singapore in *Evidence Act 1893* (2020 Rev Ed Sing), ss 93–102.

[3] D McLauchlin, "The Entire Agreement Clause: Conclusive or a Question of Weight?" (2012) 128 Law Q. Rev 521 at 527 [McLauchlin].

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

evidence to prove that there were collateral oral terms.[7] This is especially desirable for EACs as these are normally boilerplate clauses that the parties do not pay much attention to.[8]

Notwithstanding the parol evidence rule, there are also some limits on EACs to potentially assist clients. Terms normally implied by usage or course of dealing can be implied into the contract[9] and terms can still be added through rectification.[10] Unfortunately, these exceptions are not particularly useful to clients. It is not considered customary for wealth managers to owe fiduciary or advisory duties to clients and so courts are unwilling to imply such duties.[11] Wealth management contracts are also normally comprehensively drafted with no gaps left for term implication.[12] Rectification is also difficult as the client must show that the parties made a mistake in expressing their true agreement which infected the EAC.[13] This is further restrictively construed to cover only situations where an errant term is corrected and not situations where extra terms are inserted.[14] Rectification is thus only available where the parties wrote an inaccurate clause and not where they intended to be bound by that clause and another one.[15] Although the standard wealth management contract expressly disclaims many duties that clients would like the wealth manager to owe, wealth managers generally do not intend to owe any duties whatsoever at all times and thus rectification is not possible.

[7] McLauchlin, *supra* note 3 at 528; Edwin Peel, *Treitel: The Law of Contract*, 15th ed (London, UK: Sweet & Maxwell, 2020) at para 6-022.

[8] McLauchlin, *supra* note 3 at 523, 531.

[9] *Novoship (UK) Ltd v Mikhaylyuk* [2015] EWHC 992 (Comm) at para 32.

[10] *JJ Huber (Investments) Ltd v Private DIY Co Ltd* [1995] NPC 102 (Ch).

[11] *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 (SGCA); S Booysen, "Financial Advice and the Duty to Advise", in S Booysen, ed, *Financial Advice and Investor Protection* (UK: Edward Elgar, 2021) at para 4.04 [Booysen].

[12] See e.g. *UBS AG v Ng Kok Qua* [2010] SGDC 509, *Orient Centre Investments v Société Generale* [2007] 3 SLR 566 (SGCA) [*Orient Centre Investments*] (for examples of no gaps); See e.g. *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 (SGCA) (for rare example of a gap present due to shoddy contract drafting).

[13] *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch) at para 75.

[14] *Procter & Gamble Co v Svenska Cellulosa Aktiebolaget SCA* [2012] EWHC 498 (Ch).

[15] McLauchlin, *supra* note 3 at 528.

Alternatively, the client may use *contra proferentum* to restrict the protective clauses' scope[16] but this is not possible if the wealth manager stipulated their exclusions thoroughly, which is often so.

For NRCs, there are two possible common law methods to enforce the clause: estoppel by representation and contractual estoppel.[17] Although the former is useless, the latter presents an insuperable difficulty to clients claiming misrepresentation.

Estoppel by representation first requires an unequivocal representation by party B that he did not rely on any statements, which B intended party A to act on. A must then have believed it to be true and acted in reliance of it.[18] It is however virtually impossible for A to prove he believed B's declaration of non-reliance.[19] Estoppel by representation is thus impotent in practice.

Contractual estoppel can however effectively shield the wealth manager from misrepresentation liability. Under English law, NRCs would be enforced simply to uphold the parties' agreement, notwithstanding that the client actually relied on the misrepresentations.[20] Singapore follows this harsh expression of documentary fundamentalism.[21] The Singapore High Court ('SGHC') however recently opined that it can be relaxed if an unsophisticated client was persuaded to sign the clause in ignorance of its nature.[22] Unfortunately, the Singapore Court of Appeal ('SGCA') declined to decide on whether the suggestion was acceptable.[23]

[16] See e.g. *Jiang Ou v EFG Bank AG* [2011] 4 SLR 246 (SGHC).

[17] L Mason, "Precluding Liability for Pre-contractual Misrepresentation: the Function and Validity of Non-reliance Clauses" (2014) J Bus L 313 at 314.

[18] *E A Grimstead & Son Ltd v McGarrigan* [1999] EWCA Civ 3029.

[19] *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317.

[20] *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386 [*Peekay Intermark*]; affirmed by *Springwell Navigation*, *supra* note 1 & *AXA Sun Life*, *supra* note 1.

[21] *Orient Centre Investments*, *supra* note 12; *Tradewaves Ltd v Standard Chartered Bank* [2017] SGHC 93 [*Tradewaves*].

[22] *Als Memasa v UBS AG* [2012] SGCA 43 at para 29; *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 (SGHC) [*Deutsche Bank AG* SGHC].

[23] *Deutsche Bank AG* SGHC, *supra* note 22.

However, assuming that the SGHC's position is adopted, since it was not overturned,[24] there still remains the potential conflict with an earlier case[25] where contractual estoppel was applied without qualification. It is suggested that the two cases can be distinguished based on the client's sophistication: the client in the earlier case[26] was found to be sophisticated while the client in the latter case was arguably not.[27] If so, then an unsophisticated client would now have a higher chance of invalidating NRCs.

It is submitted that contractual estoppel is unsound and should be abandoned completely. Firstly, the cases[28] establishing it were arguably decided *per incuriam*. The English Court of Appeal already rejected the doctrine in an earlier case.[29] As English courts are bound by the past decisions of same-level courts, the subsequent cases that established contractual estoppel[30] violated the doctrine of precedent and were hence wrongly decided.[31] Although Singapore is not bound by English cases, their illegitimacy under English law should still diminish its persuasiveness.

Secondly, contractual estoppel is fundamentally incongruous with established estoppel principles.[32] Traditionally, "estoppels at root require detriment"[33] because they are treated as independent sources of rights outside of the contract and so extra-contractual factors such as reliance and unconscionability are required to justify its invocation.[34] Contractual estoppel,

[24] The SGHC decided to eschew contractual estoppel in *Deutsche Bank* SGHC, *supra* note 22 on the basis of the client's unsophistication. This decision was overturned on appeal by the SGCA in *Deutsche Bank AG* SGCA, *supra* note 1 as they found Dr Chang to be sophisticated. The SGHC's approach of no contractual estoppel when the client is unsophisticated was however not addressed by the SGCA.

[25] *Orient Centre Investments*, *supra* note 12.

[26] See *Orient Centre Investments*, *ibid* (case involved a corporate client).

[27] *Deutsche Bank AG* SGHC, *supra* note 22.

[28] *Peekay Intermark Ltd*, *supra* note 20; *Springwell Navigation*, *supra* note 1.

[29] *Lowe v Lombank Ltd* [1960] 1 WLR 196 (CA).

[30] *Peekay Intermark*, *supra* note 20 , *Springwell Navigation*, *supra* note 1.

[31] G McMeel, "Documentary Fundamentalism in the Senior Courts: The Myth of Contractual Estoppel" (2011) LMCLQ 185 at 191 [McMeel].

[32] *Ibid.*

[33] Wilken & Ghaly, *The Law of Waiver, Variation, and Estoppel*, 3rd ed (Oxford: Oxford University Press, 2012) at para 13.22.

[34] McMeel, *supra* note 31 at 206.

however, lacks these requirements of detriment and is moreover practically indistinguishable from just enforcing the contract's terms.[35] The doctrine, being a black sheep, is thus heretical[36] and superfluous.[37]

Thirdly, just because a clause appears in a written contract does not necessarily mean that the parties actually agreed to it.[38] Without true agreement, it is merely a non-promissory statement of past fact.[39] This is especially pertinent to the wealth management context where the parties' close relationship makes it likely that protective clauses were not truly agreed to. Unlike the banking sector which is becoming increasingly de-personalised and hence treated more cautiously by clients, the wealth management sector is becoming increasingly personalised. The close 'familial' relationships created with clients give rise to a relationship of trust and confidence in the wealth manager which encourages clients to have blind trust in the wealth manager's intentions. Protective clauses contradicting earlier assurances are thus likely to be treated lightly or ignored completely.[40] While this is less relevant to institutional clients who might have legal advisers to fall back on to caution them,[41] it would be for retail clients who do not have such safety nets. Nevertheless, contractual estoppel should be eschewed for all client types since its monolithic nature completely fails to consider the nuances of the client's especial relationship with the wealth manager.

For both EACs and NRCs, it is claimed that contractual estoppel applies to them on the basis of the signature rule. This rule stipulates that, aside from situations of fraud, misrepresentation or *non est factum*, a person who signs a contractual document is bound by it, even if it was not read

[35] Kelry CF Loi, "Contractual estoppel and non-reliance clauses" [2015] LMCLQ 265 at 366 [Loi].

[36] McMeel, *supra* note 31 at 206.

[37] Loi, *supra* note 35 at 357.

[38] McLauchlin, *supra* note 3 at 536.

[39] Loi, *supra* note 35 at 351-353.

[40] This occurred in *Deutsche Bank AG* SGCA, *supra* note 1.

[41] See *Springwell Navigation*, *supra* note 1 (where even corporate clients can occasionally be too trusting and not read the contract carefully).

or understood.[42] A client failing to understand or read the protective clauses (not uncommon)[43] will therefore not render the clauses invalid.

The signature rule reason is however unconvincing as it contravenes the fundamental contract principle that there must first be an objective meeting of the minds to incorporate a term.[44] The rule essentially allows a mere signature to substitute for an objective mutual agreement to contract which cannot be right doctrinally.[45] A term should only be conclusive if the parties truly intended it so.[46]

Furthermore, the signature rule's *locus classicus*[47] is weak authority for the principle. It did not consider whether an EAC could exclude collateral oral agreements as it was not alleged that there were unrecorded terms, only that the document could not exclude implied terms.[48] It was therefore not held that a signed EAC conclusively proves the parties' intention for it to embody the whole contract.[49] A signed document is thus no more than strong evidence of contract conclusiveness[50] and so clients should be allowed to prove collateral oral agreements and to challenge the validity of signed terms.

Although abandoning contractual estoppel undermines commercial certainty and would hence affect Singapore's status as a leading financial hub, the price paid for good industry practices is worthwhile. As protective clauses shield wealth managers from the consequences of their wrongdoing, a dangerous moral hazard is created: wealth managers would not be deterred from acting irresponsibly but their incentive to seek as many clients as possible to earn commissions remains. While such harm may be outweighed by the benefit of promoting economic growth

[42] *L'Estrange v F Graucob Ltd* [1934] 2 K.B. 394 [*L'Estrange*].

[43] See e.g. *Deutsche Bank AG* SGHC, *supra* note 22.

[44] McLauchlin, *supra* note 3 at 532; JR Spencer, "Signature, Consent, and the Rule in L'Estrange v Graucob" (1973) 32(1) Cambridge LJ 104 at 117.

[45] *Ibid.*

[46] *Ibid.*

[47] *L'Estrange*, *supra* note 42.

[48] McLauchlin, *supra* note 3 at 533.

[49] *Ibid.*

[50] *Ibid.*

through providing contractual certainty, it is only so where the protective clauses were genuinely agreed to. Unfortunately, protective clauses are frequently foisted on clients through standard forms that clients have little say over. Applying contractual estoppel would therefore licence wealth managers to act irresponsibly in the financial market which can potentially damage the economy significantly[51] and ultimately undermine Singapore's position as a leading financial hub. It is thus better to use a rebuttable presumption that protective clauses were not truly agreed to by clients, which applies to unsophisticated but not sophisticated clients.[52]

IV. CHALLENGING PROTECTIVE CLAUSES USING STATUTE

Notwithstanding the client's litigation difficulties at common law, there are still statutory methods to obtain remedies. These statutory avenues are however all unsatisfactory in one way or another.

A. UCTA & MA

The Unfair Contract Terms Act 1977[53] ('UCTA') and Misrepresentation Act 1967[54] ('MA') may assist the client to invalidate EACs and NRCs, but only in limited circumstances.

UCTA section 2(2) prevents wealth managers from contractually excluding or restricting liability for their negligence if it is unreasonable within the meaning in section 11. EACs have however been treated as falling outside UCTA's purview under English law. This is as protective clauses have been interpreted as not exempting liability but instead as merely defining the parties'

[51] See e.g. European Systemic Risk Board, *"Report on misconduct risk in the banking sector"* (June 2015) at 6 (redress costs for bank mis-selling amounted to EUR 100 billion globally from 2010 to 2015).

[52] Adopting a suggestion made in Booysen, *supra* note 11 at paras 4.45–4.46.

[53] *Unfair Contract Terms Act* (2020 Rev Ed Sing).

[54] *Misrepresentation Act* (2020 Rev Ed Sing).

relationship (ie. acting as a 'basis clause') and so UCTA is inapplicable.[55] Basically, the court ignores the substantive effect of a clause exempting liability in favour of what the clause claims to be.

MA section 3 invalidates any term excluding or restricting liability for misrepresentation if it is unreasonable within the meaning in UCTA section 11. Unfortunately, NRCs are rarely treated as exemption clauses. Under English law, the key requirement for invoking section 3 is whether the NRC sought to 'rewrite history' (ie. to retrospectively alter the 'character and effect' of pre-NRC representations).[56] This criterion was however butchered by subsequent cases[57] where there was an overemphasis on whether the contract states there was no reliance, as opposed to looking at what the client understood at the time of the misrepresentation.[58] Consequently, whether a NRC survives section 3 depends on whether contractual estoppel applies – which it would in most cases. Singapore unfortunately followed this English law for both types of protective clauses.[59]

English law is however becoming more pro-client. A recent English Court of Appeal case[60] favoured a substance over form approach, albeit in a non-financial context. The court held that if the party subject to a NRC relied upon what they reasonably considered to be a representation before the NRC was incorporated, then the NRC is an exclusion clause under MA section 3.[61] The 'basis clause' and contractual estoppel arguments thus no longer apply to pre-NRC representations unless the client was actually aware that they should not be relied upon.[62] Presumably this approach also extends to EACs. While no Singapore case has decided on the new English position, the

[55] *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm) [*IFE Fund SA*]; *Crestsign Ltd v National Westminster Bank plc* [2014] EWHC 3043 (Ch) [*Crestsign*].

[56] *IFE Fund SA*, *supra* note 55; *Raiffeisen Zentral Bank v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm); *Springwell Navigation Corp*, *supra* note 1; H Beale and G Palmer, "Non-reliance Clauses, Entire Agreement Clauses and Contractual Estoppel" in Booysen, *supra* note 11 at paras 5.38–5.42 [Beale & Palmer].

[57] *Crestsign*, *supra* note 55 at para 106–108; *Thornbridge Ltd v Barclays Bank plc* [2015] EWHC 3430 (QB) at para 109; Beale & Palmer, *supra* note 56 at paras 5.42–5.43.

[58] Beale & Palmer, *supra* note 56 at paras 5.43–5.45.

[59] *Orient Centre Investments*, *supra* note 12; *Tradewaves*, *supra* note 21..

[60] *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396 [*First Tower*].

[61] *Ibid.*

[62] Beale & Palmer, *supra* note 56 at para 5.48.

SGCA's past statements suggest future approval: they opined that courts should focus on the *substantive effect* and not *form* of a clause to determine if it is an exemption clause under UCTA.[63] If so, clients can now use the MA and UCTA to challenge protective clauses.

Ultimately the 'basis clause' reasoning misconstrues the MA and UCTA's true scope and should be rejected. Although the statutes' plain words confine their effect to only 'exemption' and 'restriction' of liability clauses, a purposive interpretation[64] reveals that parliament actually intended them to apply broadly to any clause which has the *effect* of preventing a duty of care from arising.[65] This means duty defining clauses would be captured as well.[66] While this would severely restrict the wealth manager's freedom to contractually define the scope of its obligations,[67] it is justifiable on the basis that the statutes only bite where the duty exclusion is unreasonable.

Notwithstanding UCTA and the MA applying to protective clauses, proving the requisite unreasonableness under UCTA section 11 is still difficult for clients. This is as courts generally assume that the parties desire commercial certainty and already reflected the risk allocation in the price paid.[68] Unreasonableness has thus been confined to exceptional situations where the clause was not clearly drafted[69] or poorly explained to the client,[70] even where the client is unsophisticated.[71]

[63] See *Deutsche Bank AG* SGCA, *supra* note 1 at para 63 (for *obiter dicta* supporting Smith v Eric S Bush [1990] 1 A.C. 831 & Phillips Products Ltd v Hyland [1987] 1 W.L.R. 659)

[64] UK, Law Commission, Exemption Clauses Second Report (London: Her Majesty's Stationery Office, 1975) at paras 36, 139; *First Tower, supra* note 60 at para 51.

[65] L Ho & T Mathias, "Basis Clauses and the Unfair Contract Terms Act 1977" (2014) 130 Law Q. Rev 377 at 380.

[66] *Ibid.*

[67] Norman Palmer & David Yates, "The Future of the Unfair Contract Terms Act 1977" (1981) 40(1) Cambridge LJ 108 at 127–128.

[68] *National Westminster Bank Plc v Utrecht-America Finance Company* [2001] 3 All ER 733 (CA).

[69] *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] 2 BCLC 54 (Com Ct).

[70] *Crestsign, supra* note 55.

[71] *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm); *AXA Sun Life, supra* note 1.

While the assumptions are true for sophisticated clients, especially where the client is more knowledgeable than the wealth manager,[72] it is not for unsophisticated ones. Unsophisticated clients often lack equal bargaining power and so struggle to avoid such draconian clauses from being imposed on them. They also frequently lack access to professional advice to fully understand the protective clauses' nature. The court's fear of unjustly allowing clients to escape a bad bargain here is thus misplaced.

However, not all unsophisticated clients deserve the same protection. 'Sophistication' is a nebulous concept under common law which can encompass transaction familiarity,[73] financial expertise[74] or whether the client was institutional.[75] Amongst such clients, institutional investors[76] who lack transaction familiarity or financial expertise should generally remain bound to protective clauses since they have equal bargaining power and can access professional advice.

B. FAA

The Financial Advisers Act 2001[77] ('FAA') may assist clients in obtaining remedies. Section 34(1) obliges financial advisors[78] to disclose all material information relating to the financial product recommended to a client. Section 35(1) prohibits the financial adviser from making misrepresentations whether fraudulently, recklessly or negligently. This applies broadly as all statements "in connection with the provision of any financial advisory service" are included. Section 36(1) requires financial advisers who make recommendations relating to any investment product, where a client would reasonably expect to rely on the adviser's recommendation, to have

[72] See e.g. *Springwell Navigation*, *supra* note 1.

[73] *Wingecarribee Shire Council v Lehman Brothers Australia Ltd* [2012] FCA 1028 [*Wingecarribee*].

[74] *Deutsche Bank AG* SGCA, *supra* note 1; *Springwell Navigation*, *supra* note 1.

[75] *Australian Securities and Investments Commission v Citigroup Global Markets Australia (No 4)* [2007] FCA 963.

[76] See e.g. *Wingecarrihee*, *supra* note 73.

[77] *Financial Advisors Act* (2020 Rev Ed Sing) [FAA].

[78] *Ibid*, s 2(1) ("financial adviser" means a person who carries on a business of providing any financial advisory service, but does not include any person specified in the First Schedule).

a reasonable basis for the recommendation. This arguably includes considering the client's suitability for the product per MAS Notice FAA-N16 and Financial Advisers Regulations[79] Reg 18B.[80] As the FAA now allows one to obtain statutory damages from a financial adviser's breach of the aforementioned sections, clients can obtain remedies in those situations (if there was reasonable reliance).[81]

However, the FAA may be practically ineffectual. Firstly, unlike UCTA or the MA, the FAA neither expressly provides that terms inconsistent with it are void nor gives any guidance for such situations.[82] It is thus possible that protective clauses would exclude the operation of the FAA.[83] Secondly, the FAA does not cover all client types. It only covers individuals and not corporate clients. Thirdly, not all individuals enjoy similar protection. 'Accredited investors' and 'High Net Worth Individuals' (essentially, individuals with high net worth or income) are excluded from sections 34, 36 and Reg 18B's protections. This is problematic because wealth is not a reliable proxy for financial expertise. Although an opt-in regime was instituted in 2019 to allow such investors to choose their preferred classification,[84] protection might still be lacking in practice. This is as wealth managers often restrict the sale of lucrative financial products to only investors of a certain classification and so investors are strongly incentivised to choose a higher classification despite the risks involved.[85]

C. CPFTA

Since 2009, financial services fall under the Consumer Protection (Fair Trading) Act 2003[86]

[79] *Financial Advisors Regulations* (Cap 110, Reg 2, 2004 Rev Ed Sing)

[80] D Neo, "Singapore: Boosting Regulation to Protect Vulnerable Investors" in Booysen, *supra* note 11 at para 11.10 [Neo].

[81] FAA, *supra* note 77, ss 34(6), 35(3), 36(3).

[82] Neo, *supra* note 80 at para 11.56.

[83] *Ibid.*

[84] *Securities and Futures (Classes of Investors) Regulations 2018* (S 665/2018, Sing), regs 3(2)–3(3).

[85] See e.g. *Deutsche Bank AG* SGCA, *supra* note 1.

[86] *Consumer Protection (Fair Trading) Act 2003* (2020 Rev Ed Sing).

('CPFTA') and so clients can now use it to challenge protective terms. As the CPFTA invalidates any term inconsistent with it,[87] terms inserted through sharp practice[88] (such as by pressure selling or misrepresentation) and terms unconscionably restricting the wealth manager's liability can be invalidated.[89]

However, the CPFTA is not particularly useful to clients in reality. Firstly, only consumers are protected.[90] Secondly, it only applies to individuals and not corporate consumers. Thirdly, CPFTA claims are limited to only SGD 30,000 which is far too low for virtually all wealth management contracts. Thus, while getting a claim under CPFTA may be better than nothing, it is a hollow victory for the client.

The CPFTA should therefore have its claim limits increased for financial services. This is especially necessary amidst the increase in consumer investment participation. Recently, online investment services have become ubiquitous amongst everyday Singaporeans, enabled by the aggressive marketing of 'one-stop' investment smartphone applications.[91] The market is however crowded and rival applications intensely compete against each other.[92] This cutthroat business environment, combined with the business model of such tech products typically requiring a sufficiently large number of trades by users to be profitable,[93] creates a real temptation for sharp

[87] *Ibid*, s 35.

[88] *Ibid*, s 4.

[89] *Ibid*, Second Schedule.

[90] *Ibid*, s 3.

[91] Yahoo News, "Super-app, moomoo, is the only investment platform to break through top five most downloaded finance apps in Singapore in 2021 since its launch" (March 8, 2022) , online: <https://finance.yahoo.com/news/super-app-moomoo-only-investment-060000424.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAHsCPBDVzFGtIhHvpTNnDm4K3xRridHHv5Jda6JlFhvYtWQZopfo-wDweJCujr-srCIqwMBtWL-CrGeyUZ5btZ_UtKwj8wu-XaOIIGvhoQAi_VLjaYTSGgQT-ikAPaGZAF-9WQ_je1Akr4FSapghSFFauFl9k5HTb_jcRy1AIZ0C>.

[92] *Ibid* (for moomoo's fight to be the top five most downloaded finance app in Singapore in 2021).

[93] See e.g. for the United States: Robinhood's business model. See Investopedia, "How Does Robinhood Make Money?" (08 October 2022), online: <https://www.investopedia.com/articles/active-trading/020515/how-robinhood-makes-money.asp> .

practice (such as deceptive marketing).[94] The CPFTA, being specialised in tackling sharp practice, and is more protective of consumers than the other statutes,[95] is thus needed to handle this emerging situation. Unfortunately, its low claim cap renders it impotent. Although these investment applications are ostensibly only for small trades, it is easy to see how repeated usage can spiral into larger trades as the applications are structured like games to promote increasing, and intense user participation. A larger cap is therefore necessary to protect consumers adequately.

V. OTHER REMEDIES

Despite the protective clauses, the client may still get relief at the damages stage by pleading contributory negligence. Essentially, the client pleads contributory negligence on the part of the wealth manager to reduce the damages claimed against him. This method *prima facie* appears useful because wealth management litigation often arises from the bank suing the client to obtain compensation for losses incurred during trading.[96] It is however of limited effectiveness in reality. First, the wealth manager must have been negligent but this is difficult to make out in light of the court's general reluctance to find duties of care (both in tort and contract) owed by the wealth manager.[97] Second, the client must not have broken the chain of causation and so the client must not have continued to trade anyway or acted unreasonably post-breach.[98] More problematically, contributory negligence only operates as a shield and not a sword and so the client cannot make a claim independently of the lawsuit against him or to obtain damages from the wealth manager.

Alternatively, the client may use extra-judicial remedies. The Financial Industry Disputes Resolution Centre Limited ('FIDReC') was set up in Singapore to provide a low-cost consumer-

[94] See e.g. for the United States: Robinhood. See CNBC, "Robinhood to pay $70 million for outages and misleading customers, the largest-ever FINRA penalty" (30 June 2021), online: <https://www.cnbc.com/2021/06/30/robinhood-to-pay-70-million-for-misleading-customers-and-outages-the-largest-finra-penalty-ever.html>.

[95] See the discussion on the UCTA, MA and FAA in the earlier sections.

[96] See e.g. *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) ; *Deutsche Bank AG* SGCA, *supra* note 1.

[97] *Ibid.*

[98] *Bank Leumi (UK) plc v Wachner* [2011] EWHC 656 (Comm) [*Bank Leumi*].

friendly dispute settlement mechanism. FIDReC offers to mediate and then adjudicate disputes. The process is simple, fast and cheap. No external lawyers are allowed at hearings. FIDReC is very helpful in situations where the client faces practical difficulties in litigating his claims. This is likely where a low net worth, unsophisticated retail client challenges a big institutional wealth manager as the resource and legal talent imbalance between the two might make it practically insuperable for the client to litigate. The pro-consumer features of FIDReC thus helpfully level the playing field between a financially and legally challenged client and their wealth manager.

VI. DO WEALTH MANAGERS NEED STRONG PROTECTION?

It is feared that without strong protective clauses, wealth managers might be unjustly liable for extreme losses arising from an intervening unforeseen event, such as a financial crisis, that was not particularly related to their wrongdoing.[99] This fear is however misplaced as there are already adequate safeguards present to protect wealth managers from unfair liability.

Without NRCs and EACs, a contractual duty of care may be implied into the contract or it may be possible to find sufficient proximity to establish a tortious duty of care in executing the wealth account or advising the client.[100] A contractual duty to act as a fiduciary might also be implied. Although breaching these duties can potentially impose substantial liability on the wealth manager, it would not be to an unjust extent.

In tortious and contractual negligence cases, a client can potentially claim the entire loss but it is subject to the client proving causation and remoteness. Although causation uses the 'but for' test which has a low threshold, it can still provide fair and effective protection. There is no causation where the client would have still made the loss-making trades anyway,[101] would have used their

[99] Elise Bant & Jeannie Paterson, "Limitations on Defendant Liability for Misleading or Deceptive Conduct Under Statute: Some Insights from Negligent Misstatement" in K Barker, R Grantham & W Swain, eds, *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (London, UK: Hart Publishing, 2015) at 162; K Barnett, "Causation, Remoteness and Calculation of Damages for Financial Mis-Selling" in Booysen, *supra* note 11 at para 7.065 [Barnett].

[100] See comments by judges in *Deutsche Bank AG* SGCA, *supra* note 1.

[101] *Bank Leumi*, *supra* note 98.

independent judgement instead, or acted unreasonably post-breach as those would break the chain of causation.[102] Moreover, causation shields the wealth manager from liability where the loss was due to poor market conditions not of their own making (such as by selling defective products).[103] Remoteness also provides fair protection. In contract, a loss is remote if it does not arise 'naturally' from the breach in question and is not one that could have been reasonably contemplated by the parties.[104] In tort, a loss is remote if it was of a type not reasonably foreseeable by the tortfeasor,[105] with courts being more stringent in applying remoteness for such 'pure economic loss' cases.[106] Moreover, any losses claimable are limited to only those arising from the tortfeasor's scope of duty.[107] Although the MA might grant excessive remedies for negligent misrepresentation by adopting the 'fiction of fraud' approach (where even remote losses are claimable) this is only applicable to English and not Singapore law.[108] The wealth manager's liability, when imposed, is therefore proportionate.

Breaches of fiduciary duties do not impose unfair liabilities on wealth managers. This is as the breach must have caused the losses claimed (a safeguard present in Singapore,[109] unlike the UK).[110]

[102] *Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd* (1987) 78 ALR 193 (FCA); Barnett, *supra* note 99 at para 7.084.

[103] *Bank Leumi*, *supra* note 98; *Zaki v Credit Suisse (UK) Ltd* [2011] 2 CLC 523 (Com Ct). Compare *Wingecarribee*, *supra* note 73; *Rubenstein v HSBC Bank* [2012] EWCA Civ 1184 [*Rubenstein*].

[104] *Hadley v Baxendale* (1854) 9 Ex 341; Note *Transfield Shipping v Mercator Shipping Inc (The Achilleas)* [2009] 1 AC 61 (HL) was rejected in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 (SGCA).

[105] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388 (PC); *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617 (PC).

[106] Barnett, *supra* note 99 at para 7.076.

[107] *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191; *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20; *Rubenstein*, *supra* note 103.

[108] *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297 (CA) was rejected in *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 (SGCA).

[109] *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] 1 SLR 1199 (SGCA) at para 238.

[110] See *Brickenden v London Loan & Savings Company of Canada* [1934] 3 DLR 465 (PC) (for the '*Brickenden* rule').

Although the remoteness and mitigation rules do not apply[111] and so the liability here may exceed that for negligence breaches, it is justifiable on the basis of giving effect to the strong public interest in deterring fiduciaries from acting in their own self-interests.[112]

Even if we assume that the liability imposed is excessive, wealth managers can still avoid them easily. To avoid misrepresentation, wealth managers can just avoid making representations they do not wish to be liable for. To avoid liability from collateral terms or implied duties, the wealth manager can just avoid making collateral oral agreements and not act in a way that attracts fiduciary or tortious duties. These are not difficult asks. There is therefore no injustice in making wealth managers liable for unnecessarily causing loss to clients.

VII. CONCLUSION

While it is not insuperable for clients to litigate their claims against wealth managers when there are protective clauses, it is still difficult to do so. Ultimately, the enforceability of protective clauses should not be treated dogmatically such that they are either insuperable or powerless. To strike the right balance, the circumstances of each case, in particular client's sophistication and the parties' intentions, should be used to decide whether protective clauses are enforceable.

[111] *Hodgkinson v Simms* [1994] 3 SCR 377 (SCC).

[112] *Ibid*; Peter Millett, "Equity's Place in the Law of Commerce" (1998) 114(2) Law Q. Rev 214 at 225.