COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2013/CLE/gen/00791

BETWEEN

STEPHEN CHROMIK

Plaintiff

-AND-

(1) ANSBACHER (BAHAMAS) LIMITED

1st Defendant

(2) CHESTER ASSET HOLDINGS LIMITED

2nd Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Phillip Davis QC with him Ms. Glenda Roker of Davis & Co. for the Plaintiff
Mr. Luther McDonald and Ms. Keri Sherman of Alexiou Knowles for the Defendants

Hearing Dates: 8 July 2019, 9 July 2019, 1 October 2019

Civil – Breach of Contract – Negligence – Wilful misconduct - Gross negligence - Duty of care and skill – Exclusion clause – Limitation of liability – Principal and Agency – Independent contractor – Third Party Notice - Damages – Measure of damages

The Plaintiff commenced this action against the 1st Defendant seeking, among other things, damages for breach of contract and breach of fiduciary duty arising from what he alleged was the gross negligence, wilful misconduct and/or wilful neglect of the 1st Defendant in failing to effect a sell order of 4000 Netflix shares in accordance with his instructions given on 26 August 2011.

Pursuant to the Plaintiff's instructions, the 1st Defendant, on the same day instructed the 3rd Party/2nd Defendant ("UBS") to sell the 4000 shares. Upon receiving the email authorization, UBS responded stating that the brokerage trading account only had 2000 shares. Without any check of its own records, the 1st Defendant relied exclusively on the representation of UBS and 2000 shares were sold on that day. Some weeks later, upon receiving the statement of account, the 1st

Defendant observed that the brokerage account reflected that there remained 2000 shares. By then, the price of the shares had fallen substantially. The 1st Defendant sought an explanation from UBS. A dispute arose between the 1st Defendant and UBS; neither taking responsibility but pointing finger at the other for negliegnce. Eight months later, the remaining 2000 shares were sold at a substantially diminished value.

The 1st Defendant alleged that it was not grossly negligent. It alleged that its contractual duties and obligations to the Plaintiff were discharged when it authorized UBS to sell all of the Plaintiff's shares held in its brokerage account. The 1st Defendant further maintained that UBS was not its agent but an independent contractor acting on behalf of the Plaintiff and therefore, UBS is solely responsible for the loss to the Plaintiff.

The Plaintiff then amended his claim to include UBS as the 3rd Party/2nd Defendant. Then, the 1st Defendant joined the 2nd Defendant at a very late stage in the proceedings and withdrew the Third Party Notice against UBS. At the trial, an issue arose as to whether the Plaintiff should have proceeded against UBS instead of against the 1st Defendant.

HELD: Finding that the First Defendant was grossly negligent in its breach of the contract and its fiduciary duty, the First Defendant is therefore liable to pay damages to the Plaintiff

1. The Plaintiff should have continued his claim against UBS if he wished for it to be a party to the proceedings. The filing of a Third Party Notice by the 1st Defendant does not make UBS a party but simply puts UBS on notice that should the Court finds against the 1st Defendant, the 1st Defendant will claim an indemnity against UBS.

2. The 1st Defendant breached Clauses 2 and 5 of the Securities Trading and Custodian Agreement when it failed to effect the sale of the 4000 Netflix shares following written instructions from the Plaintiff on 26 August 2011.

3. The 1st Defendant owed a fiduciary duty to the Plaintiff. It failed to exercise reasonable care and skill in the management of the Plaintiff's assets: **Karak Brothers Company Ltd v Burden** (1972) All ER 1210 considered.

4. The 1st Defendant is liable for the loss sustained by the Plaintiff as a consequence of its wilful misconduct and/or gross negligence pursuant to the exclusion clauses. Clause 8 of the Securities Trading and Custodian Agreement and Clause 5 of the Standard Terms and Conditions do not aid the 1st Defendant.

5. The degree of negligence was a serious one in that the 1st Defendant failed to investigate whether the representation by UBS had any merit resulting in the shares substantially dropping in price when they were sold some months later. During the period, the 1st Defendant did nothing to mitigate against the failure to sell the shares. The conduct of the 1st Defendant fell markedly short of the standard expected of such a bank: **Midland Bank and Trust Company (Jersey) Limited v Federated Pension Services** (1997) 2 LRC 81; **Great Scottish & Western Railway v British Railways Board** 10 February 2000; **Camerata Property Inc v Credit Suisse Securities (Europe) Ltd** [2011] EWHC 479 and **Armitage v Nurse** [198] Ch. 241 considered.

6. Whether or not UBS was an independent contractor is neither here nor there. The fact that the 1st Defendant was grossly negligent is dispositive of the case.

7. The object of an award of damages for breach of contract is to place a plaintiff in an equivalent position financially to that which he would have been in if the contract had not been breached. **Hadley v Baxendale** (1854) 9 Exch 341 at 354; **Halsbury's Laws of England, Volume 29** (2014), at para 534.

JUDGMENT

Charles J:

Introduction

[1] The Plaintiff ("Mr. Chromik") is a self-employed property analyst and investor. On 26 April 2013, he instituted the present action against the Defendant ("Ansbacher"), a private wealth management and financial service provider, seeking damages in the amount of $451,186.11 for breach of contract and breach of fiduciary duty arising out of the gross negligence, wilful misconduct and/or wilful neglect to effect a sell order of 4000 Netflix shares pursuant to his instructions given on 26 August 2011.

Procedural history/Pleadings

[2] In order to have a better understanding of this case, it is helpful that I set out the chronology of events (including the pleadings of the parties) since the filing of this action on 26 April 2013.

[3] On 29 May 2013, Ansbacher entered an appearance. On 3 September 2013, it (Ansbacher) issued a Third Party Notice against UBS Trustees (Bahamas) Ltd ("UBS") claiming an indemnity in respect of such sums as may be found due and owing to it by Mr. Chromik.

[4] On 9 September 2013, UBS entered an appearance as a Third Party ("the 3rd Party") in the action.

[5] On 7 April 2014, Ansbacher filed its Defence. In it, Ansbacher denied negligence and alleged that UBS was negligent in that it failed to execute its instructions relative to the 4000 Netflix shares and had sold only 2000 of the same. At paragraph 7 of the Defence, Ansbacher referred to UBS as "its broker."

[6] No doubt, as a result of the Defence filed by Ansbacher, Mr. Chromik filed a Summons on 5 September 2014 to amend his Statement of Claim and to add UBS as a 2nd Defendant. An Amended Statement of Claim was filed on 10 April 2015 joining UBS as the 3rd Party/2nd Defendant. In paragraph 4 of the Amended Statement of Claim, Mr. Chromik averred that UBS is the agent and custodian of Ansbacher. In paragraph 8, he alleged that Ansbacher and/or its agent/custodian, in breach of their custodian and fiduciary duties, sold 2000 Netflix shares belonging to him on 26 August 2011 and not 4000 shares as instructed in writing.

[7] Mr. Chromik claims damages against Ansbacher and UBS jointly or severally.

[8] On 21 April 2015, the Firm of Lennox Paton entered an appearance for UBS as the 2nd Defendant in this action.

[9] On 23 April 2015, Ansbacher filed its Amended Defence. In paragraph 4, Ansbacher denied that UBS was its agent and custodian (or indeed its broker as it had previously pleaded) but alleged that UBS was at all material times an independent contractor with whom it contracted on Mr. Chromik's behalf.

[10] In paragraph 15, Ansbacher averred that UBS was negligent in that it failed to execute its (Ansbacher) instructions relative to the 4000 Netflix shares and had sold only 2000 of the same. In paragraph 16, Ansbacher alleged that, as a result of its (UBS) negligence, UBS's records reflected Ansbacher's trading account as holding only 2000 Netflix shares as at 26 August 2011. In paragraph 18, Ansbacher stated that there were no funds on Mr. Chromik's account to be disbursed owing to the failure by UBS to effect the sell order as directed. Then, in paragraph 19, Ansbacher denied that it was negligent or breached any duty owing to Mr. Chromik by reason of the failure of UBS to effect the sell order and puts Mr. Chromik to strict proof of the facts and matters contained in paragraph 12 of the Amended Statement of Claim and the Particulars of Loss.

[11] On 5 May 2015, UBS filed a Defence. In paragraph 4 of its Defence, it denied that, at any time, it acted as the agent or custodian of Mr. Chromik or Ansbacher. UBS

further averred that at no time did it have an express or implied contractual relationship with Mr. Chromik or Ansbacher and stated that, at all material times, it was an entity named UBS (Bahamas) Ltd that provided, among other things, brokerage clearance services to Chester Asset Holdings Limited ("Chester") which apparently is beneficially owned by Ansbacher. The remainder of the Defence is neither admitted nor denied and essentially puts Mr. Chromik to prove the assertions in his Amended Statement of Claim.

[12] On 20 September 2016, the matter came before me for a Case Management Conference. I ordered that UBS' Summons to strike out be heard on 20 February 2017. The Court also gave directions in preparation for trial setting firm trial dates.

[13] On 20 February 2017, the Court ordered that UBS be struck out as the 3rd Party in the action and that Ansbacher is at liberty to amend its Third Party Notice by substituting the name of UBS (Bahamas) Ltd as the 3rd Party.

[14] On 4 July 2017, Ansbacher filed an ex parte summons seeking an order to issue a Third Party Notice against UBS (Bahamas) Ltd. (in voluntary liquidation) and to strike out UBS (Bahamas) Ltd as the 3rd Party. This application was heard on 9 November 2017. Mr. Ellis who appeared for Mr. Chromik did not oppose the application. The Court ordered that Ansbacher is at liberty to issue a Third Party Notice against UBS (Bahamas) Ltd (in voluntary liquidation) and that UBS (Bahamas) Ltd is struck out as a party in this action. The Court also give directions for the summary judgment application to be heard on 15 February 2018.

[15] Further Case Management was scheduled to take place on 7 December 2017. On that day, Ansbacher came with yet another Summons which was filed on 28 November 2017, to add Chester Asset Holdings Limited ("Chester") as a Defendant to these proceedings; that the pleadings be amended accordingly and for UBS (Bahamas) Ltd (in voluntary liquidation) to be struck out as a Third Party to these proceedings. There was no opposition to this application by Counsel for Mr. Chromik. Accordingly, the Court ordered that (i) UBS (Bahamas) Ltd (in

voluntary liquidation) shall be struck out as a Third Party to these proceedings; (ii) Ansbacher is at liberty to add Chester as a Defendant to these proceedings and that the pleadings be amended accordingly and (iii) upon amendment of the pleadings, Ansbacher and Chester (together "the Defendants") are at liberty to issue a Third Party Notice against UBS (Bahamas) Ltd (in voluntary liquidation). On hindsight, the order to add Chester as a defendant in the proceedings may have been erroneously made since it is for Mr. Chromik, as the Plaintiff, to decide whom he wished to sue; not Ansbacher. To top it all, it was being done at such a late stage in the proceedings. This was an inadvertence on my part.

[16] In the intervening period, an application was made for summary judgment premised on the fact that UBS was an agent and custodian of Ansbacher (see paragraph 4 of the Amended Statement of Claim). Ansbacher alleged that UBS was negligent in that it failed to execute its (Ansbacher) instructions relative to the 4000 Netflix shares and had sold only 2000 of the same: paragraph 15 of the Amended Defence.

[17] On 14 November 2017, Ansbacher filed another Third Party Notice claiming against UBS (Bahamas) Ltd (in voluntary liquidation) an indemnity in the event that Ansbacher was held to be liable.

[18] At the hearing on 15 February 2018, Ansbacher denied that UBS was its agent/custodian and stated that UBS was, at all material times, an independent contractor with whom it contracted on behalf of Mr. Chromik. Ansbacher maintained that UBS was negligent.

[19] On 28 February 2018, I delivered a written ruling. I dismissed the application for summary judgment on the basis that there exists a triable issue namely to discern what contract Ansbacher breached having denied that UBS was its agent/custodian and asserting that UBS was an independent contractor. In addition, Ansbacher, having given instructions to UBS to sell as instructed, would Ansbacher still be negligent was also an issue for trial.

[20] At paragraph 17 of the Ruling, I identified the key issue as: whether Ansbacher and/or UBS is/are liable for losses incurred consequent upon the failure to sell the 4000 Netflix shares on 26 August 2011.

[21] Then, at paragraphs 48-49 of the Ruling, I stated:

> **"[48]. Learned Queen's Counsel Mr. Davis premised his arguments by submitting that this is a case of breach of contract by Ansbacher and/or Ansbacher own negligence simpliciter and/or negligence through a third party for which it is vicariously liable. He submitted that UBS was the agent and custodian of Ansbacher. In its Amended Defence, Ansbacher denies that UBS was its agent/custodian and states that UBS, was at all material times, an independent contractor with whom it contracted on behalf of Mr. Chromik. Given the state of the evidence before me, I am unable to discern what contract Ansbacher breached to make a finding that it is liable in contract.**
>
> **[49] With respect to the claim in negligence against Ansbacher, this is an even more insurmountable task for Mr. Chromik since Ansbacher insists that UBS was negligent in that it failed to execute its instructions relative to the 4,000 Netflix shares and had sold only 2,000 of the same. Ansbacher asserts that, as a result of UBS' negligence, their records reflected that Ansbacher's trading account had only 2,000 shares as at 26 August 2011. If Ansbacher gave those instructions to UBS, then would Ansbacher still be negligent?"** [Emphasis added]

[22] On 16 February 2018, Ansbacher filed a Re-Amended Defence adding Chester as the 2nd Defendant and deleting UBS as the 3rd Party.

[23] On 17 April 2018, Ansbacher and Chester (together the Defendants") withdrew the Third Party Notice against UBS (Bahamas) Ltd (in voluntary liquidation).

The parties

[24] During the trial, an issue arose as to whether Ansbacher failed to pursue the application to add UBS as the 3rd Party to this action having held UBS up as its shield successfully to defend the summary judgment application. Learned Queen's Counsel Mr. Davis QC appearing for Mr. Chromik submitted that Ansbacher withdrew its application to add UBS as the 3rd Party leaving itself defenseless.

According to Mr. Davis QC "*the shield having been abandoned the question identified (in the summary judgment ruling whether Ansbacher and /or UBS is liable for the loss occasioned by Mr. Chromik) is easily answered. Ansbacher is liable, UBS no longer being in the equation*".

[25] If I understood well learned Counsel Mr. McDonald who appeared for Ansbacher, he submitted that the key issue that the Court identified in the summary judgment application may have been inaccurately reflected because unless there is an application by Mr. Chromik to join UBS as a defendant, the Court cannot make an order that a third party pays a plaintiff. In other words, the Court cannot make an order for negligence against a third party who is not a defendant.

[26] A convenient starting point is to look at the Amended Statement of Claim. Mr. Chromik applied to amend its pleadings and to join UBS as the 2nd Defendant. On 10 April 2015, when the Amended Statement of Claim was filed, UBS was reflected in it as the 3rd Party/2nd Defendant. In paragraph 4 of the Amended Statement of Claim, Mr. Chromik averred that UBS is the agent and custodian of Ansbacher. In its Amended Defence, Ansbacher did not admit it but alleged that UBS is an independent contractor. Finally, Mr. Chromik claims damages against Ansbacher and UBS jointly or severally.

[27] So, it seems to me that there is merit in Mr. McDonald's argument that Mr. Chromik should have continued his claim against UBS as it wished for UBS to be a defendant in these proceedings. Mr. McDonald helpfully elucidated the purpose of filing a Third Party Notice which in essence is to put that third party on notice that should the Court finds against Ansbacher, Ansbacher will claim against UBS an indemnity in respect of such sums as may be found due and owing by it to Mr. Chromik. Order 16 of the Rules of the Supreme Court ("RSC") supports the argument advanced by Mr. McDonald.

[28] Therefore, the onus was on Mr. Chromik to determine whether he would proceed with his claim against UBS. UBS was made the 2nd Defendant/3rd Party to this

action when Mr. Chromik filed his Amended Statement of Claim on 10 April 2015. UBS was struck out as the 3rd Party but not as the 2nd Defendant in these proceedings.

[29] Another point I wish to make is that the Court has powers either under its inherent jurisdiction and/or the RSC for any number of plaintiffs or defendants to be joined to the claim. As with amendments generally it is likely that the application will be granted if it does not cause injustice to other parties which can otherwise be compensated by costs: **Bevco Ltd v Alfa Laval Co. Ltd** [1994] 4 All ER 464 referred to.

[30] As indicated earlier, the application by Ansbacher to join Chester as the 2nd Defendant in these proceedings may have been inadvertently made by the Court. In any event, nothing substantial turns on the addition of Chester to this action as it played an infinitesimal role, if any.

[31] Having failed to prosecute against UBS, Mr. Chromik's action is solely against Ansbacher.

Factual matrix

[32] These facts are largely undisputed and can be gleaned from the pleadings, the evidence and the bundle of documents including the email correspondences between the parties. To the extent that some of the facts are disputed, then what is expressed must be taken as positive findings of facts made by me.

[33] On 1 July 2011, Mr. Chromik entered into a Securities Trading and Custodian Agreement with Ansbacher ("the Agreement") that established an account to hold certain assets. Shortly after the establishment of the account, Mr. Chromik deposited money, stocks and other assets which included 4000 shares in a company called and known as Netflix. UBS was Ansbacher's broker or agent and not an independent contractor. In any event, given the final outcome in this action, this issue is now moot.

[34] On 15 August 2011, unbeknown to Mr. Chromik, Ansbacher gave instruction to UBS to sell 2000 shares. At some point in time before 26 August 2011, those 2000 shares were sold to an entity called Jeffries & Co. Ansbacher then cancelled the instruction to UBS to sell those shares. By the time the instruction to cancel was given to UBS, the sale had already been settled. Ansbacher then gave instruction to buy back those shares. Therefore, Ansbacher, a prudent banker, ought to have been aware that there were 4000 shares.

[35] On 26 August 2011, Mr. Chromik gave written instructions to Ansbacher to liquidate all securities held to his credit in the account. Although he did not specify the exact number of shares, it is common ground between the parties that Mr. Chromik had 4000 shares in Netflix which was held by Ansbacher. Pursuant to his instructions, Ansbacher, on the same day, instructed UBS to sell the securities held to its credit in Chester which included the 4000 Netflix shares. Chester's relationship with UBS appears to be governed by the Agreement for Brokerage Clearance Services dated 12 May 2009.

[36] Upon receiving the email authorization to sell from Ansbacher sent at 1:32 p.m. on 26 August 2011; at 2:44 p.m. UBS informed Ansbacher that "*the only discrepancy is that we calculated the long position of Netflix as 2000 rather than 4000".* Without making any checks of its own records and, within twelve minutes, Ansbacher replied "*thank you George*." Shortly thereafter, 2000 shares were sold at a price of $465,176.05 ($232.9425 per share). It is indisputable that, as of that date, 4000 Netflix shares were available for sale and should have been sold.

[37] On 30 August 2011, UBS sent to Ansbacher the month-end portfolio statement for the trading account. No Netflix shares were reflected in its books. The proceeds from the sale for the securities as notified by UBS were credited to Mr. Chromik's account with Ansbacher.

[38] On receiving the 30 September 2011 Statement of Account from UBS, Ansbacher observed that the brokerage account reflected that there remained 2000 Netflix

shares held on behalf of Chester.

[39] On 3 October 2011, Ansbacher requested the cash activity report for the month of September 2011 as well as the custody report for Mr. Chromik's account from UBS; the receipt of which led to a request for UBS to explain why Ansbacher was not advised that the trade of 2000 Netflix shares which was settled on 15 August 2011, in which the cash balance was clear at the end of August 2011, failed to settle.

[40] On 4 October 2011, UBS provided an explanation to Ansbacher. The email reads "*Please see the above captioned e-mails that we received from you to cancel the Netflix with Jeffries & Co., was failing and then you advised us to cancel it but the trade end up settling again, so we went short and you sent a request to buy the shares back. The problem is I cancelled the transfer on the street but did not cancel it internally in our system until the 02-Sep-11*".

[41] On 5 October 2011, UBS indicated to Ansbacher that they were still investigating the matter with regards to the long position of 2000 shares. UBS also sought instructions from Ansbacher as to whether it should sell or continue to hold the position. Ansbacher's response was "*had Ansbacher been notified on 2 September 2011 when the reversal was made, that our account was now long 2000 shares of Netflix, Ansbacher would have been in a better position to advise UBS what should be done*". Ansbacher further stated that "*at the present time, we leave the decision as to if the holdings should be sold or kept long in the hands of UBS"*.

[42] On 6 October 2011, UBS reminded Ansbacher that "…*we ask you to kindly be reminded that UBS (Bahamas) Ltd. acts in the capacity of custodian/broker and consequently cannot take the decision in this instance as to whether to sell or hold the position*".

[43] On 10 October 2011, Ansbacher responded firmly to UBS that it held no position in Netflix and the account should be credited back with cash of $465,306.05 as was reflected on the UBS Client Investment/Portfolio Statement of 31 August 2011.

[44] By letter dated 17 October 2011, UBS confirmed that it held and will continue to hold 2000 shares of Netflix pending further instructions from Ansbacher and drawing attention to a caveat contained in the Investment/Portfolio statements. It can be inferred that UBS refuses to take any responsibility for any negligence.

[45] Upon receiving the official response from UBS, on 19 October 2011, Ansbacher advised Mr. Chromik that 2000 Netflix shares which were held to his credit on the account as one of the trades, had failed. Consequently, Ansbacher had to reverse this transaction in the amount of $456,176.05 from his account. Mr. Chromik was also advised that the matter was still being investigated and a more detailed report would be provided.

[46] On 24 October 2011, Ansbacher reminded UBS of the events occurring on 26 August 2011. It emphasized that, as its account did not permit margin or short selling, it relied on UBS's representation via telephone conversation before it instructed the sale of the 2000 Netflix shares. Further, on 30 August 2011, when UBS provided the August 2011 month end portfolio statements reflecting the closing positions, no Netflix shares were reflected. Ansbacher asserted that UBS failed to carry out the sale instruction since its records reflected an incorrect position; having identified the inadvertence and adjusting the account on 2 September 2011, UBS failed to inform Ansbacher, as it was obligated to do, and had UBS done so, the opportunity to sell when the price was $213.11 (as compared to $221.89) would have been embraced. UBS was requested to credit Mr. Chromik's account with cash of $465,306.05 failing which the matter would be referred to legal counsel and a formal complaint with the Securities Commission would be filed. Unquestionably, Ansbacher has identified negligence or wilful neglect/misconduct but says that UBS is the negligent party.

[47] Mr. Chromik became aware that his instructions were not carried out after having been advised on 29 September 2011, that funds (the proceeds of sale) were available for transfer and wiring instructions were given to transfer $425,000 immediately which was subsequently dishonoured. Mr. Chromik was further

advised that UBS instructed that one of the trades for the sale of 2000 shares had failed consequently Ansbacher might have to reverse the credit of $465,176.05 from his account.

[48] By letter dated 20 December 2011, Ansbacher communicated with Mr. Chromik stating that Ansbacher "*cannot release the funds on the captioned account until there has been a resolution of the trading issue with UBS*." The letter further stated:

> **"As you are aware, Ansbacher acts as custodian and settlement agent on your account and a dispute has arisen between Ansbacher and UBS over one of your failed sell order given on 26 August 2011 of Netflix shares. Ansbacher gave instructions to UBS to sell 4,000 Netflix shares, yet UBS categorically state [sic] that this account did not have 4,000 Netflix shares to sell but that there were only 2,000 Netflix shares to sell. Ansbacher therefore instructed UBS to sell whatever Netflix shares they held (on your behalf). As a result, UBS sold only 2,000 shares".** [Emphasis added]

[49] The letter further stated:

> **"At a later date UBS discovered that it still held 2,000 Netflix shares. To date, those shares are still held on the books of UBS and have not been sold and that there had been a significant reduction in the share price of Netflix."**[Emphasis added]

[50] On 2 April 2012, Ansbacher wrote to Mr. Chromik advising him that "*we have today debited your account in the amount of $465,176 representing the cost of 2000 shares of Netflix purchased for your account on 16 August 2011. Your account is now overdrawn in the amount of $34,292 and we request that the overdraft be settled immediately".* Ansbacher reiterated that UBS did not execute the sale instructions given on 26 August 2011 although initially it was confirmed that all shares were sold. Ansbacher noted that the fact that the shares were unsold only came to its attention in October 2011 when it received the September account statement from UBS. Ansbacher concluded "*[s]ince then, we have had several communications with UBS on your behalf requesting compensation for the loss suffered as a result of their failure to properly execute your instructions. UBS has refused to accept responsibility for the loss suffered*."

[51] On 23 April 2012, Mr. Chromik emailed Ansbacher expressing his desire for the shares to be sold and to advise how much money would be available. He also requested that he be called as soon as possible to discuss the details concerning the sale of the shares.

[52] On 30 April 2012, Mr. Chromik complained about the lack of response from Ansbacher. He stated "*You did not call me back the other day and there has been another $10,000 wiped off my shares*." He further complained that he could have been told that the shares were his to sell when the price was $125; now they have dropped to $81 and he instructed to sell at $101. He sought an explanation.

[53] On 4 May 2012, Mr. Chromik again complained about the lack of response from Ansbacher and requested for an immediate sale of the shares. He noted that "*time is of the essence*" as the price was dropping again. Ansbacher responded that it simply needed Mr. Chromik's written instructions to sell the 2000 shares.

[54] On 9 May 2012, Mr. Chromik inquired whether the sale was effected and if not, to call him as soon as possible so he could execute a sale. On this day, the remaining 2000 Netflix shares were sold at a substantially diminished value of $148,495. 35 ($74.25 per share). Between August 2011 and May 2012, the price of the Netflix shares fell and the loss occasioned by the failure to sell the additional 2000 Netflix shares in August 2011 is $316,680.70; the sum which is being claimed by Mr. Chromik.

The issues

[55] Learned Counsel Mr. McDonald identified six issues whereas Learned Queen's Counsel, Mr. Davis surmised that there is really one issue which was identified by this Court at the summary judgment hearing namely: whether Ansbacher and/or UBS are/is liable for the loss.

[56] In my considered opinion, the issues identified by both Counsel can be conveniently dealt with under the following two broad issues:

1. Whether Ansbacher and/or UBS are/is liable for the loss (issue was identified in the summary judgment application) and;

2. Whether Ansbacher breached the contract and was guilty of wilful neglect/misconduct and/or gross negligence?

The evidence

[57] Mr. Chromik testified on his own behalf. Due to health reasons he was permitted to give evidence via video link from the United Kingdom. He maintained what is contained in his witness statement filed on 29 June 2017.

[58] Mr. Chromik insisted that Ansbacher was not only negligent in failing to sell the shares but it exacerbated the problem by failing to disburse funds due and owing to him which caused him to lose his townhouse and $316,680.70 since the remainder of the shares were sold at a significant undervalue.

[59] Mr. Chromik was vigorously cross-examined by learned Counsel Mr. McDonald. Under cross-examination, Mr. Chromik indicated that he has previous experience with financial service providers and has signed agreements with them. He acknowledged that he signed the Securities Trading and Custodian Agreement with the Defendant and confirmed that the bank needed his instructions to direct the sale or acquisition of any securities on his behalf. Mr. Chromik also confirmed the email dated 26 August 2011 at 1:32 p.m. from Kendrick Albury of Ansbacher to George Maillis and Lynette Martinborough of UBS on the subject: Chester Assets Holdings Limited – 85794 which gave instructions to sell six securities including the 4000 Netflix shares as representing his instructions.

[60] During further cross-examination, Mr. Chromik was asked whether, between 26 August 2011 and 19 October 2011, he queried in writing why only 2000 Netflix shares were sold. He responded that he did not because when he looked at his account and realized what sort of money was there, he did not question the exact trade because it was showing ½ million dollars and during that time his wife was incredibly sick in hospital in Florida for two months. He agreed that he has no

written evidence to demonstrate that he raised any objection with Ansbacher during that period. According to him, there was no reason for him to ask questions since Ansbacher did not inform him that the sale of the Netflix shares had failed. He said that if they had done so, he certainly would have queried it. Mr. Chromik further explained that only upon receipt of a letter stating that he no longer had $465,000 that he began querying. He further indicated that he had called Ansbacher on many occasions but they stopped answering his calls.

[61] Mr. Chromik acknowledged that once the account at Ansbacher was established, he conducted a significant amount of trading and for a couple of weeks he gave Ansbacher instructions on a daily basis. He also stated that this was when things started to go wrong and Ansbacher was struggling to settle trades. He admitted that Ansbacher questioned him on the amount of trades he was allowed to do daily.

[62] Under re-examination, Mr. Chromik confirmed that on 26 August 2011, he instructed Ansbacher to liquidate his securities. He also confirmed that when he received the email of 19 October 2011, he was unaware of the circumstances that led to the failure of the sale of the 2000 Netflix shares. Prior to this date, he had no reason to believe that his instructions were not carried out.

[63] Mr. Carlton Mortier was the sole witness to testify on behalf of Ansbacher. He is a retired Certified Public Accountant and a former managing director of Ansbacher. Mr. Mortier testified that Mr. Chromik maintained an account with Ansbacher in which funds were deposited into for the purchase of securities, bonds and commodities. He further testified that Ansbacher served as a custodian of Mr. Chromik's account. Ansbacher's function was to hold money deposited into it and to effect the purchase and sale of such securities on Mr. Chromik's instructions.

[64] Mr. Mortier also testified that Ansbacher maintained a brokerage account with UBS and that account was held in the name of Chester. He stated that UBS provided Ansbacher with a month-end portfolio statement reflecting the closing position of

securities held in its account. The securities acquired at Mr. Chromik's instructions were held to his credit in Ansbacher's brokerage account with UBS.

[65] He said that, by email dated 26 August 2011, Mr. Chromik instructed Ansbacher to liquidate all securities held to his credit. Based on those instructions and upon review of Ansbacher's records, Ansbacher instructed UBS to sell the following securities: Netflix 4,000; First Solar Inc. 2,000; Priceline.com Inc. 1,000; Sandridge Permian Trust 3,700; Carbonite Inc. 700; and Wynn Resorts Ltd. 3,000.

[66] Mr. Mortier also stated that George Maillis (an employee of UBS), advised Kendrick Albury (an employee of Ansbacher) that UBS only held 2000 Netflix shares in Chester's trading account. In reliance on Mr. Maillis' advice, Mr. Albury instructed Mr. Maillis to proceed with the sale. By return email at 2:44 p.m. on 26 August 2011, Mr. Maillis confirmed that UBS held 2000 Netflix shares in Chester's trading account and also advised that the sale of the shares had been executed as discussed. The proceeds from the sale for the securities were deposited to Mr. Chromik's account with Ansbacher and was made available for his use.

[67] In continuing to give evidence, Mr. Mortier further stated that, by email dated 30 August 2011, Mr. Maillis sent Ansbacher the month-end portfolio statement for Chester. No Netflix shares were reflected in its books. Some 35 days later, when Ansbacher received the 30 September 2011 Statement of Account, it observed that the brokerage account reflected that there remained 2000 Netflix shares held on behalf of Chester. An investigation was carried out which revealed that 2000 Netflix shares continued to be held by UBS on Chester's trading account as a result of a failed sale of the 2,000 Netflix shares on 15 August 2011. He said that on 19 October 2011, Mr. Chromik was advised that the Netflix shares were held to his credit in the account and that UBS was unwilling to take responsibility for its negligence. The matter was then referred to Ansbacher's attorney who demanded that UBS *"immediately take steps to restore to the correct financial position our client's account with you as if all 4,000 shares had been sold as instructed by Ansbacher on 26 August 2011.*"

[68] Additionally, Mr. Mortier stated that, by letter dated 14 December 2011, UBS' attorneys responded to Ansbacher that the matter was under review and, upon receipt of that letter, more particulars of what transpired was given to Mr. Chromik. Then on 6 February 2012, UBS wrote denying liability relying on a general exculpatory clause.

[69] Letters passed between the attorneys for both parties but, according to Mr. Mortier, UBS refused to resolve the matter amicably.

[70] Under extensive cross-examination Mr. Mortier remained calm and collected. However, at times, when pressed by Mr. Davis QC, he appeared evasive. Nonetheless, he confirmed that the instructions from Ansbacher to sell 4000 Netflix shares were based on the record that Ansbacher was holding and that Ansbacher would have been satisfied that 4000 Netflix shares were available for sale.

[71] Mr. Mortier also admitted that there was not much that Ansbacher could have done in 12 minutes after UBS pointed out that there may have been a discrepancy with respect to the shares in the account. He went on to state that the first reaction is "*not to delay a trade, a sale*". He further stated that *"If we would have done an investigation, it would have taken a much longer time".*

[72] During cross-examination it was suggested to Mr. Mortier that, after the discrepancy was raised by UBS, it did not appear that Ansbacher took any steps on that date to determine whether the discrepancy was factually true or not. He responded *"On that date, it would not have been possible, the time constraints to do that….It was not done on that day."*

[73] During further cross-examination, Mr. Mortier confirmed that Ansbacher was only entrusted with 4000 Netflix shares and it did not give any other instructions on 26 August 2011 except to sell the 4000 shares. He also confirmed that Ansbacher relied on the representation of UBS.

[74] When asked by the Court whether, in the bank's view, compensation was due to Mr. Chromik, Mr. Mortier stated *"on the face of it, yes…[but not from Ansbacher]"* (See: Transcript of Proceedings on 9 July 2019 at page 38, lines 19-26*).*

[75] As I analyzed the evidence of the witnesses, there is not too much dispute in their respective testimony. What is clear is that Ansbacher acknowledged that Mr. Chromik is entitled to be compensated but UBS should be the party to do so because of its negligence.

Discussion and analysis

Issue 1 - Whether Ansbacher and/or UBS is liable for the loss to Mr. Chromik

[76] In dismissing the summary judgment application brought by Mr. Chromik, the Court identified the key issue between the parties as "**whether Ansbacher and/or UBS is liable for losses incurred consequent upon the failure to sell the 4000 Netflix shares on 26 August 2011**".

[77] Learned Queen's Counsel Mr. Davis submitted that the correctness of the issue at the summary judgment hearing is reflected in the litany of exchanges between Ansbacher and UBS. Ansbacher accepted that Mr. Chromik is entitled to compensation. In his testimony before the Court on 9 July 2019 Mr. Mortier confirmed that Mr. Chromik is entitled to compensation but he hastily added "*but not from Ansbacher*." Ansbacher has repeatedly asserted that UBS was liable for the loss. This can also be found in various correspondences between the parties namely:

1. On 10 October 2011, Ansbacher wrote to UBS stating that "*Chester holds no position in Netflix and the account should be credited back with cash of $465,306.05. Based on UBS Client Investment/Portfolio Statement as of 31st August 2011….Kindly restore our amount to the agreed and reconciled position*."

2. On 24 October 2011, Ansbacher wrote to UBS stating "*By email of October 4, 2011, UBS confirmed to ABL that they received instructions from ABL to*

cancel the DVP trade in their system and they did not reverse the trade in their system until September 2, 2011. This clearly and unequivocally puts full responsibility with you." Later on in that very letter, Ansbacher continued thus. "*We submit that it was your duty to notify us in a timely manner of any corrections/adjustments made to our statement of account after it was sent to us and accordingly request that you credit our account with cash of $465,306.05 restoring our account to the position reflected in your August 30, 2011 statement."*

3. On 29 November 2011, Counsel for Ansbacher wrote to UBS as follows: "*A dispute between Ansbacher and UBS has arisen over a sell order given by Ansbacher to UBS on August 26th 2011 of Netflix shares. In short, Ansbacher gave instructions to sell 4,000 Netflix shares, yet you categorically stated that this account did not have 4,000 Netflix shares to sell but that there were only 2,000 shares in the account…..Our client therefore instructed UBS to sell whatever Netflix shares were in this account. In the result UBS sold only 2000 shares at that time…..Unfortunately, at this time the price of those shares has drastically reduced. Our client holds your institution fully responsible to us for any loss and damage with respect to this account including all legal costs that it has to bear in resolving this matter*….We have been instructed to advise you that you must immediately take steps to restore to the correct financial position our client's account with you, as if all 4000 shares had been sold, as instructed by Ansbacher on August 26th 2011. Your failure to do so will result in such legal action being taken and a formal complaint being filed with the Securities Commission of The Bahamas as our client may be advised without further notice to you.*"*

4. On 2 April 2012, Ansbacher wrote to Mr. Chromik stating, among other things, "*[S]ince then we have had several communications with UBS on your behalf requesting compensation for the loss suffered as a result of*

their failure to properly execute your instructions. UBS has refused to accept responsibility for the loss suffered."

[78] Learned Queen's Counsel Mr. Davis submitted that Ansbacher failed to pursue the application to add UBS as the 3rd Party to this action but held UBS up as a shield successfully to defend the summary judgment application. According to Mr. Davis, Ansbacher withdrew its application to add UBS as the 3rd Party leaving itself defenseless.

[79] In dismissing the summary judgment application brought by Mr. Chromik, the Court identified the key issue between the parties as "**whether Ansbacher and/or UBS is liable for losses incurred consequent upon the failure to sell the 4000 Netflix shares on 26 August 2011**".

[80] At the time that the Court heard and determined the summary judgment application, Mr. Chromik had filed his Amended Statement of Claim in which he had joined UBS as the 2nd Defendant in these proceedings. However, at the trial, Mr. Chromik failed to pursue his claim against UBS. He pursued it only against Ansbacher.

[81] In my judgment, Ansbacher is not defenseless. It filed an Amended Defence on 5 May 2015 which it has actively pursued. In essence, it denied that UBS was its agent and custodian and asserted that UBS was at all material times an independent contractor which whom Ansbacher contracted on behalf of Mr. Chromik. At paragraph 10, Ansbacher denied that Mr. Chromik gave instructions to liquidate securities held to his credit. At paragraph 15, Ansbacher alleged that UBS was negligent in that it failed to execute the instructions which it gave with respect to the 4000 Netflix shares and had sold only 2000 of the same. In paragraph 19, Ansbacher denied that it was negligent or breached any duty owing to Mr. Chromik by reason of the failure of UBS to effect the sell order. Ansbacher puts Mr. Chromik to proof of the facts and matters alleged in paragraph 12 of the Amended Statement of Claim and the Particulars of Loss.

[82] As I have earlier stated in this Judgment, it was for Mr. Chromik to join UBS as the 2nd Defendant which he did. He however failed to pursue his claim against UBS at the trial. It seems to me that this issue now falls away because the Court cannot find UBS liable in the absence of its participation as a defendant in this case.

Discussion and analysis

Issue 2: Breach of contract, wilful misconduct and gross negligence

[83] It is common ground that the documentation constituting the arrangement between the parties consists of (i) the Securities Trading & Custodian Agreement ("the STCA"), (ii) the Standard Terms and Conditions ("the STC") and (iii) a Telex/Electronic Indemnity. The relevant provisions are Clauses 2, 5 and 8. Clause 2 provides:

> **"The Custodian, as agent of the Client, undertakes to purchase (or receive against payment) Account Property for the Client, on the condition that payment be made only upon receipt of such Account Property by the Custodian or its Correspondents selected for such purpose, in form for transfer satisfactory to the Custodian or designated Correspondent, and provide further the Account has available funds for such purchase. The Custodian also undertakes to sell (or deliver against payment) Account Property held by the Custodian in its deliverable form for such sale or other disposition. It is further understood and agreed that the Account Property held by the Custodian in the Account shall at all times remain under the control of the Custodian."**

[84] By Clause 5 of the STCA, Ansbacher agreed to the following:

> "**The Custodian will be responsible for the performance of only such duties as are set forth herein or are contained in written instructions given to the Custodian by the Client. It is expressly understood and agreed that the Custodian is not under any duty or obligation to supervise the investment of or to advise or make recommendations to the Client with respect to the purchase, retention, sale, exchange or deposit of Account Property and accepted by the Custodian."**[Emphasis added]

[85] Then Clause 8 of the STCA provides:

> **"Notwithstanding anything contained in this Agreement, the Custodian shall not be liable for any loss to or any diminution in value**

of, the Account Property except where it is proven that the said loss or diminution in Account Property value resulted from the Custodian's wilful neglect or misconduct."[Emphasis added]

[86] Clause 4(c) and (i) of the Standard Terms & Conditions ("STC") provides:

> **"(c) The Bank will effect instructions by the customer as soon as practical during banking hours and on business days.**
> **…..**
> **(i) The Bank will not (unless it in its sole discretion decides otherwise) act on the Customer's instructions except if there is sufficient available credit balance on the customer's account, or when the Customer is within a prearranged borrowing limit"**.

[87] Clause 5 of the STC is particularly important. It provides:

> **"5. LIMITATION OF LIABILITY**
>
> **(a)** **In opening and maintaining an account for the Customer and providing its services to the Customer, neither the Bank nor any of its agents, officers, directors or employees and each of them shall be under any liability (including, without limitation, any liability for consequential loss or loss of profits) as a result of:**
>
> **(i) taking or omitting to take any action in relation or pursuant to these Terms and Conditions or any other agreement with the Customer; or**
>
> **(ii) the use of a code word or number code to identify an account of the Customer; or**
>
> **(iii) failing to recognize false, forged or altered instructions or documentation; or**
>
> **(iv) the incapacity of the Customer.**
>
> **save in the case of gross negligence, fraud or wilful misconduct on the part of the Bank, its agents, officers, directors or employee and each of them.**
>
> **(b)** **Neither the Bank nor any of its agents, officers, directors or employees and each of them shall be liable to the Customer if, for any reason or cause beyond the control of the Bank, the operation of an account or the Bank's ability to account to the Customer for any monies is restricted or otherwise affected to the detriment for the Customer including, without limitation on account of exchange restrictions, prohibition upon or**

suspensions of means to effect payment or requirements of any governmental authority. The Bank may, in its sole discretion, fulfil its obligation to the Customer by establishing an appropriate credit in favor of the Customer with or by assigning to the Customer an appropriate part of any monies owing to the Bank by a correspondent bank in the relevant currency provided that the whole of the indebtedness and liabilities of the Customer to the Bank shall, at such time, have been discharged and satisfied.

(c) Neither the Bank nor any of its agents officers or employees shall be responsible for any loss or damages (including, without limitation, consequential loss or loss of profits) arising as a result of mail or other communication system delays or failures or arising out of the use of external clearing systems of the Bank's correspondents.

(d) Neither the bank nor any of its agents, officers, directors or employees and each of them shall be liable to the Customer in respect to any failure to provide services to the Customer to the extent such failure is the result of circumstances which are beyond its control and which it could not with due diligence have avoided, including without limitation any form of government intervention, war, flood, fire or act of God. The Bank shall use all reasonable endeavors to minimize the effect of the circumstances." [Emphasis added]

[88] Clause 8 (e) is also of significance. It puts an obligation on the client to regularly check his statements of account, advices and correspondences. Failure to do so will exonerate the bank from liability. Clause 8(e) provides:

> **"The Customer shall be responsible for checking the details shown on all statements of account, advices and correspondences relating to an account immediately upon receipt from the Bank and to report in writing to the Bank any alleged errors or omissions appearing thereon. If the Customer fails to report to the Bank any alleged errors or omissions appearing on a statement of account, advice or correspondence within 30 days of the date of issue of the statements of account, advice or correspondence, the Bank shall be entitled, as against the Customer, to treat the transactions shown thereon as authorized by the Customer and the relevant statement of account, advice or correspondence as being accurate and binding on the Customer."**

[89] Briefly put, on 26 August 2011, Mr. Chromik gave written instructions to Ansbacher to liquidate securities that it held to his credit in its account including the 4000 Netflix shares ('the sell instructions).

[90] Learned Queen's Counsel Mr. Davis correctly argued that those instructions were given to Ansbacher as Mr. Chromik's agent and as a custodian of his property that was held in its account in accordance with the Agreement. He also correctly argued that Ansbacher was under a duty and an obligation to sell as per those instructions in accordance with clauses 2 and 5 of the Agreement.

[91] To reiterate, I have already found as a fact that the sell instructions from Mr. Chromik to Ansbacher included instructions to sell 4000 Netflix shares. The letter dated 20 December 2011 from Ansbacher to Mr. Chromik puts this position beyond doubt. The letter stated, in part, that *"Ansbacher gave instruction to UBS to sell 4,000 Netflix shares…"* This admission by Ansbacher including the admission by Mr. Mortier during his oral testimony contradicted the position set out in paragraph 10 of its Amended Defence where Ansbacher expressly denied that Mr. Chromik instructed them to sell a specified number of Netflix shares.

[92] With respect to a bank's contractual duty to its customer, the case of **Karak Rubber Co Ltd v Burden and others (No. 2)** [1972] 1 ALL ER 1210 relied upon by Mr. Davis QC is instructive. At page 1225, Brightman J relied on the conclusion reached by Ungoed-Thomas J in **Selangor United Robber Estates Ltd v Cradock (a bankrupt) (No 3)** [1968] 2 All ER 1073 at 1118,1119 where he stated:

> **"…a bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which vary almost infinitely…."**

[93] Learned Counsel Mr. McDonald, in describing the relationship between Mr. Chromik and Ansbacher, submitted that Ansbacher was Mr. Chromik's custodian

and Mr. Chromik was a 'day trader" instructing many more trades on the account than the parties had anticipated in their agreement. He submitted that during the month of August 2011, Ansbacher was questioning Mr. Chromik's trading activity and the extent was acknowledged by Mr. Mortier when he spoke to the difficulties posed by Mr. Chromik's trading activity. In any event, that does not diminish the fact that Ansbacher owed a duty to Mr. Chromik based on their contractual relationship. Ansbacher owed a fiduciary duty to exercise reasonable care and skill in the management of Mr. Chromik's account.

[94] The next question is whether Ansbacher breached its contractual and fiduciary obligations to Mr. Chromik. In other words, whether Ansbacher was guilty of wilful misconduct and/or gross negligence?

[95] One of the defences raised by Ansbacher is that it has the benefit of Clause 5 of the STC which is an exculpation clause limiting its liability unless it can be established that it has been guilty of gross negligence, willful default/misconduct or fraud. Mr. Chromik asserted that Ansbacher is guilty of willful neglect/misconduct and/or gross negligence.

[96] Mr. Davis QC submitted that Ansbacher' actions and inactions in respect of the losing or misplacement of the 2000 shares for months are clear examples of wilful neglect, wilful misconduct and gross negligence on the part of Ansbacher.

[97] So, what is wilful misconduct? Wilful misconduct refers to conduct by a person who knows that he is committing, and intends to commit a breach of duty, or is reckless in the sense of not caring whether or not he commits a breach of duty. Wilful misconduct requires appreciation by the person guilty of the misconduct that what this person is doing is contrary to his duty as trustee, alternatively recklessness consisting of this person shutting his eyes to the probability that his misconduct is in breach of his duty: **Midland Bank and Trust Company (Jersey) Limited v Federated Pension Services** (1997) 2 LRC 81 at page 119.

[98] With respect to gross negligence, it is a phrase that the English Courts, and by extension, our Courts have, over the years, grappled with the meaning in a civil law context. But a number of English cases has assisted in this regard. In **Midland Bank** (supra), for example, the UK Court of Appeal considered what amounts to "gross negligence". In a much-cited passage, Le Quesne JA, at page 119, stated:

> **"In each of [these cases] the approach was to treat 'gross negligence' as meaning 'very great negligence', or flagrant or extreme negligence, or negligence consisting of 'a very marked departure from the standards' of responsible and competent people. In none of them was it suggested that 'gross negligence' involved either 'a certain mens rea' or 'an intentional disregard of danger' or recklessness.**
>
> **In our judgment, the direction to the Jurats in the present case as to the meaning of 'gross negligence' was erroneous. <u>All that this phrase means is a serious or flagrant degree of negligence. It does not import any question of intentional or reckless fault</u>…"**

[99] A few years later, the English Court of Appeal decided the case of **Great Scottish & Western Railway v British Railways Board** 10 February 2000. In a relatively succinct decision, the Court of Appeal interpreted the meaning of gross negligence in this manner:

> **"In the context of [the exclusion clause], the words "gross negligence" take their colour from the contrast with "wilful neglect" [also referred to in the clause] and refer to *an act or omission not done deliberately but which in the circumstances would be regarded by those familiar with the circumstances as a serious error. The likely consequences of the error are clearly a significant factor*. Thus, whether negligence is gross is a function of the nature of the error and the seriousness of the risk which results from it."**

[100] About a decade later, the phrase "gross negligence" surfaced again, this time in a banking case: **Camerata Property Inc v Credit Suisse Securities (Europe) Ltd** [2011] EWHC 479. Camerata incurred significant losses as a result of investments made on the advice of the investment bank Credit Suisse. Camerata alleged that Credit Suisse was negligent in its advice and sought to recover its losses from it. Credit Suisse relied upon a limitation of liability clause in the contract with Camerata which provided that it would not be liable for any advice given unless

that liability arose directly as a consequence of "gross negligence." Camerata argued that under English law there is no relevant distinction between negligence and gross negligence. The judge rejected that argument concluding that the relevant question was not whether "gross negligence" was a familiar concept in English law but rather what the parties meant by the expression "gross." The judge stated that "**gross' was clearly intended to represent something more fundamental than a failure to exercise proper skill and care constituting negligence**. The judge found that **as a matter of ordinary language, "gross negligence" was capable of embracing "not only conduct undertaken with actual appreciation of the risks involved, but also serious regard of or indifference to an obvious risk.**"

[101] Learned Counsel Mr. McDonald referred to the definition given by Millett LJ (as he then was) in the English case of **Armitage v Nurse** [1998] Ch. 241 where the learned Lord Justice describes the difference between "negligence" and "gross negligence" as a difference of degree, not of kind.

[102] In the present case, for Mr. Chromik to succeed against Ansbacher, he has to demonstrate something more than mere negligence on the part of Ansbacher in order for the exclusion clause of liability not to apply.

[103] Besides the applicable legal principles, in order to determine whether Ansbacher was grossly negligent, requires an analysis of the evidence of what (if anything) actually transpired after Ansbacher received the sell instructions from Mr. Chromik and its (Ansbacher's) response to the discrepancy raised by UBS regarding the amount of Netflix shares it held on the brokerage account following UBS' receipt of the sell authorization from Ansbacher.

[104] By email dated 26 August, 2011 Ansbacher authorized UBS to sell securities including the 4000 Netflix shares. UBS's response to the sell authorization that same day (and approximately one hour later) stated *"the only discrepancy is that we calculated the long position of Netflix as 2000 rather than 4000."* The email

went on to state *"We [UBS] executed sale of 2000 as confirmed by phone".* It cannot be disputed that there was also a subsequent telephone conversation between Ansbacher and UBS regarding the *"discrepancy".* Put differently, UBS received further authorization by telephone from Ansbacher to *"execute the sale of 2000 [Netflix shares]"*. Within 12 minutes, Ansbacher responded by email stating *"thank you George".*

[105] As already expressed, Ansbacher was under a duty to ensure that the 4000 Netflix shares were sold. When the discrepancy was raised by UBS, one would have expected a professional banker like Ansbacher to embark on an immediate investigation of the matter with a view to resolving the discrepancy instead of submissively responding "*thank you George*." The starting point should have been for Ansbacher to carry out an investigation of its own records rather than relying exclusively on the representation from UBS. It was clear that Ansbacher did not conduct any searches of its own records. It could not have done so, in twelve minutes, according to Mr. Mortier. Therefore, the first omission on the part of Ansbacher is that it failed to carry out its own internal searches and/or contact Mr. Chromik to obtain further instructions. This is not the standard expected of a bank of the ilk of Ansbacher.

[106] Then, it was revealed that instructions were given to UBS on 15 August 2011 to sell 2000 shares. Unexplained issues arose resulting in Ansbacher seeking to cancel the instructions which was given after the sale was settled resulting in a buy back of the shares. Upon the buy back, the reversal of the trade was effected on the streets and not internally until 2 September 2011 after the August month end statement would have been sent to Ansbacher. Upon receipt of the statement, it should have been noted that it (the statement) was not reflecting the instructions given. This fact was not discovered by Ansbacher but brought to its attention by UBS in October 2011. However, the evidence revealed that a cash activity report was forwarded to Ansbacher on 16 September 2011 which would have shown that the instructions were not carried out. Having had issue with the sale and buy back prior to 26 August 2011, receiving a statement at the end of August and receiving

a cash activities report on 16 September 2011, the opportunity to mitigate against the failure to sell 4000 shares was lost. So, it is clear that the conduct of Ansbacher was a very marked departure from the standards of responsible and competent people as it knew or ought to have known, recalling the material in its possession that there was a failure to carry out the instructions given by Mr. Chromik before October 2011 when it stated that it became aware of the failed sale.

[107] Having been made aware than 2000 shares were sold, the conduct of Ansbacher to act on Mr. Chromik's instruction also fell markedly short of the standard expected. Firstly, Ansbacher maintained the account until 2 April 2012 with a balance reflecting that the instructions were carried out. Secondly, Mr. Chromik was only made aware that the shares were still owned by him sometime shortly before 30 April 2012. Thirdly, he sought to have the shares sold complaining that the value was dropping, resulting in the subsequent sale taking place on 9 May 2012.

[108] Learned Counsel Mr. McDonald argued that, in accordance with Clause 8(e) of the STC, Mr. Chromik was responsible for checking the details shown on all statements of account, advices and correspondences relating to the account immediately upon receipt from the bank and to report any errors to the Bank. As Mr. Davis QC correctly pointed out, on its own evidence, Ansbacher did not know until 3 October 2011 because the account showed that the shares had been sold. Mr. Chromik confirmed that his account showed that the shares had been sold.

[109] Mr. McDonald also stridently argued that the sell instructions were acted upon and relayed to UBS and therefore Ansbacher discharged its duties and obligations to Mr. Chromik.

[110] In my considered opinion, it is not sufficient for Ansbacher to simply say that it discharged its obligations to Mr. Chromik by simply relaying the sell instructions to UBS. Ansbacher's primary obligation, in my view, was to ensure that Mr. Chromik's sell instructions were carried out accordingly and as soon as possible given the

volatility and fluctuation which seem to be embedded in the stock market trading industry. Clause 2 of the STCA specifically and unequivocally states that "…***The Custodian also undertakes to sell…".***

[111] It seems to me that Ansbacher's secondary yet equally important obligation under Clause 2 of the STCA was to ensure that it "remains in control of the account property". This, in my judgment, encompasses a responsibility to immediately investigate and resolve any discrepancy in order to ensure that Mr. Chromik's sell instructions were carried out. Clause 2 further provides that ***"…It is further understood and agreed that the Account Property held by the Custodian in the Account shall at all times remain under the control of the Custodian."***

[112] In my opinion, the failure of Ansbacher to resolve the discrepancy conclusively and promptly against its own records and even to obtain further instructions from Mr. Chromik fell markedly below the standard expected of a professional and competent bank. In fact, the problem started with Ansbacher not checking its own records but took the representation by UBS as conclusive.

[113] In addition, Mr. McDonald argued that, if there was any failure on Ansbacher's part, the same was excluded and their liability is limited under Clause 8 of the Agreement and Clause 5 of STC.

[114] As reiterated, Ansbacher was under a fiduciary duty to Mr. Chromik to exercise reasonable care and skill in carrying out its obligations under the contract. I find that Ansbacher's actions and inactions with respect to resolving the discrepancy following receipt of the sell instructions amount to gross negligence on its part. It was not merely an advertence but serious negligence amounting to reckless disregard for the instructions given by Mr. Chromik. I further find that the discrepancy could have been resolved very readily had a proper check been conducted and/or further instructions obtained from Mr. Chromik. I also find that Ansbacher could have given earlier instructions to UBS to sell the remaining 2000 shares rather than waiting until 9 May 2012 to do so. Instead, it left it in the hands

of UBS which reminded Ansbacher that it is only a custodian/broker and therefore it could not make such a decision.

[115] All the circumstances must be weighed and balanced when considering whether acts or omissions causing damage resulting from negligence merits the description of gross. Weighing and balancing them accordingly, in my judgment, Ansbacher is liable to Mr. Chromik as it was grossly negligent and exhibited wilful neglect/misconduct when it later failed and/or refused to give instructions to UBS whether or not to sell the remaining shares.

[116] Suffice it to say, the above exclusion clauses do not aid Ansbacher in these circumstances.

[117] Consequently, Ansbacher is liable to Mr. Chromik for the loss and damage which he has suffered as a result of Ansbacher's failure to execute the sell order on 26 August 2011.

Independent contractor

[118] In paragraph 50 of its written submissions and also at the summary judgment hearing, Ansbacher raised the issue that it engaged UBS as its designated correspondent through its subsidiary, Chester. Learned Counsel Mr. McDonald argued that it is nonsensical for Mr. Chromik to say that UBS was Ansbacher's agent.

[119] At this trial, no evidence was adduced from Mr. Mortier on this issue. In any event, UBS is not a party to this action so it cannot to defend itself. However, I am reminded that, during the course of the dispute, UBS reminded Ansbacher that it was its broker and custodian. A broker is just a person who buys and sells on behalf of others. That also makes him an agent. But, nothing of substance turns on this issue as a result of my finding that Ansbacher was guilty of gross negligence and/or wilful misconduct.

Damages

[120] Ansbacher, having been found to have been grossly negligent, is liable to pay damages to Mr. Chromik. The object of an award of damages for breach of contract is to place a plaintiff in the equivalent position financially to the position he would have been in had the contract not been breached.

[121] The measure of damages consequential upon a breach of contract is set out in the leading authority of **Hadley v Baxendale** (1854) 9 Exch 341 at 354; [1843-60] All ER Rep 461 at 465. The learned editors of **Halsbury's Laws of England, Volume 29** (2014), in considering the rule in **Hadley v Baxendale** state that:

> **"Nevertheless, the broad effect of recent authority has been to analyze the *Hadley v Baxendale* principle as disclosing not a two-part but a single rule, an approach which corresponds with how the matter is approached in practice. The two aspects of the general principle do not, on this approach, need to be treated antithetically and indeed on occasion run into one another. The broad rule is said to be, essentially, that the innocent party recovers that loss which was in the assumed contemplation of both parties in the light of the general and specific facts (as the case may be) known to both parties or, put another way, that the question is whether, on the information available to the defendant when the contract was made, he should reasonably have realized that such loss was sufficiently likely to result from the breach of contract."** [Emphasis added]

[122] Ansbacher is liable to Mr. Chromik for the diminution of 2000 shares.

[123] On 9 May 2012, the remaining 2000 Netflix shares were sold at a diminished value of $148,495.35 ($74.25 per share). Between August 2011 and May 2012, the share price of Netflix shares fell and the loss occasioned by the failure to sell the additional 2000 Netflix shares in August 2011 is $316,680.70. Mr. Chromik is entitled to that amount which I will order.

[124] Mr. Davis, QC confirmed during the proceedings that Mr. Chromik has abandoned his claims for consequential loss and loss of profit.

Conclusion

[125] In conclusion, it is ordered that Ansbacher shall pay to Mr. Chromik the following:

i. Damages in the sum of $316,680.70;

ii. Interest at the rate of 4% from the date of the filing of the Writ of Summons to the date of Judgment;

iii. Interest thereafter at the statutory rate of 6.25 % from the date of Judgment to the date of payment; and

iv. Cost to the Plaintiff (Mr. Chromik) to be taxed if not agreed.

Dated this 22nd day of June, A.D., 2020

Indra H. Charles
Justice