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Liability

High-risk wealth management gone wrong

Par Yannick Caballero Cuevas le 9 December 2021

In the 4A_263/2021 ruling, the Federal Supreme Court analyses the liability of an asset management company under Art. 55 CO. The company had hired an asset manager as an external manager who had adopted a risky investment strategy. This strategy resulted in substantial losses for the client.

In March 2008, the client opened an account with a first Swiss bank and entrusted the management of all his assets to a trader specialising in derivatives. In May 2008, the client suffered significant losses. According to the manager, they were due to a defect in the trading platform.

On the manager's advice, the client opened an account with a second bank in July 2008 in order to benefit from its trading platform, which better met their expectations. In the account opening documents, the client selected all the products offered by the platform and accepted the general terms and conditions. He also confirmed that he had read the risk statement. In August 2008, the client transferred all his assets to the second bank. At the same time, he granted power of attorney to the manager.

In order to work as an external manager and receive commissions, the manager was hired by an asset management company as a Senior Trader. This employment was communicated to the client on 15 October 2008.

On 3 November 2008, the client contacted the manager to express his concern about the losses incurred. The manager informed him that his portfolio would quickly recover the losses. Immediately afterwards, the client signed a new power of attorney in favour of the manager in his capacity as an employee of the company. On 5 November, the client contacted the manager again, as the portfolio had suffered significant losses in the space of a few days.

Subsequently, the client repeatedly complained to the manager and the bank about the losses incurred. On 9 January 2009, the client's lawyer asked the manager to cease all management and indicated that the loss for the period from 31 October 2008 to 9 January 2009 amounted to CHF 727,341. On 31 March 2009, the company terminated the manager's employment contract with immediate effect. The manager died in 2012.

When a request for payment was made against the bank and the company, the Court of First Instance dismissed the client's claims. The client lodged an appeal with the Court of Justice of the Canton of Geneva, which overturned the judgement and referred the case back for a judicial expert opinion. The Court again dismissed the client's claims against the bank, but ordered the company to repay the retrocessions received for the period from 6 November 2008 to 9 January 2009. In a ruling dated 16 March 2021, the Court of Justice rejected the company's appeal and the client's joint appeal.

The client then lodged a civil appeal with the Federal Court. He argued that the manager was guilty of unfair management and that the conditions of art. 55 CO were met. The company would thus have to pay compensation for the damage, estimated at CHF 727,341.

According to art. 55 para. 1 CO, the employer is civilly liable for the act of his employee if (i) the act is in a relationship of personal subordination to the employer, (ii) the act is committed in the performance of his work, (iii) the act is unlawful, (iv) the injured party suffers damage and (v) there is a natural and adequate causal relationship between the damage and the unlawful act.

The Federal Court notes that the client has not proven unfair management within the meaning of Art. 158 PC. On the one hand, there is nothing in the file to suggest that the manager intentionally breached his obligations to the client. Furthermore, the client did not dispute the fact that he wanted and approved of the manager's management during the period in question. In this regard, the expert report indicates that no risk profile had been established. The profile therefore had to be deduced from the type and style of management employed by the manager. This management consisted of buying and selling derivative products with leverage in short intervals. The manager therefore placed large amounts in order to profit from slight differences in prices over short periods. This type of management should therefore be considered very risky.

Furthermore, the expert report ruled out churning. The numerous transactions carried out by the manager were inherent to a high-frequency strategy.

In view of the documents in the file, the client therefore wanted aggressive, not conservative, management. He had also understood the type of management and the inherent risks. The bank's general terms and conditions clearly stated the extent of the risks assumed by the client, which could include the total loss of capital. In addition, the client had real-time access to his online account and was able to find out about the transactions carried out.

Therefore, the Federal Court dismissed the appeal.

It is interesting to note that, due to the lack of a written management mandate, the Federal Court referred to the bank's documentation to establish that the client had been sufficiently informed of the risks. Furthermore, the client's ability to directly access the trading platform worked against him. Indeed, the client could at any time find out about and understand the investment strategy.

On reading this judgement, clients with real-time access to their accounts on an online trading platform, but managed by an administrator, should pay attention to the transactions carried out and challenge any strategy that deviates from the desired management. Otherwise, this direct access could be held against them.

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