

Understanding Trustee's Duties

A case study of the Hong Kong Court of Final Appeal Decision: *IQ EQ (NTC) Trustees Asia (Jersey) Limited & Anor v Bruno Arboit and Roderick John Sutton & Anor* FACV No. 2 of 2019

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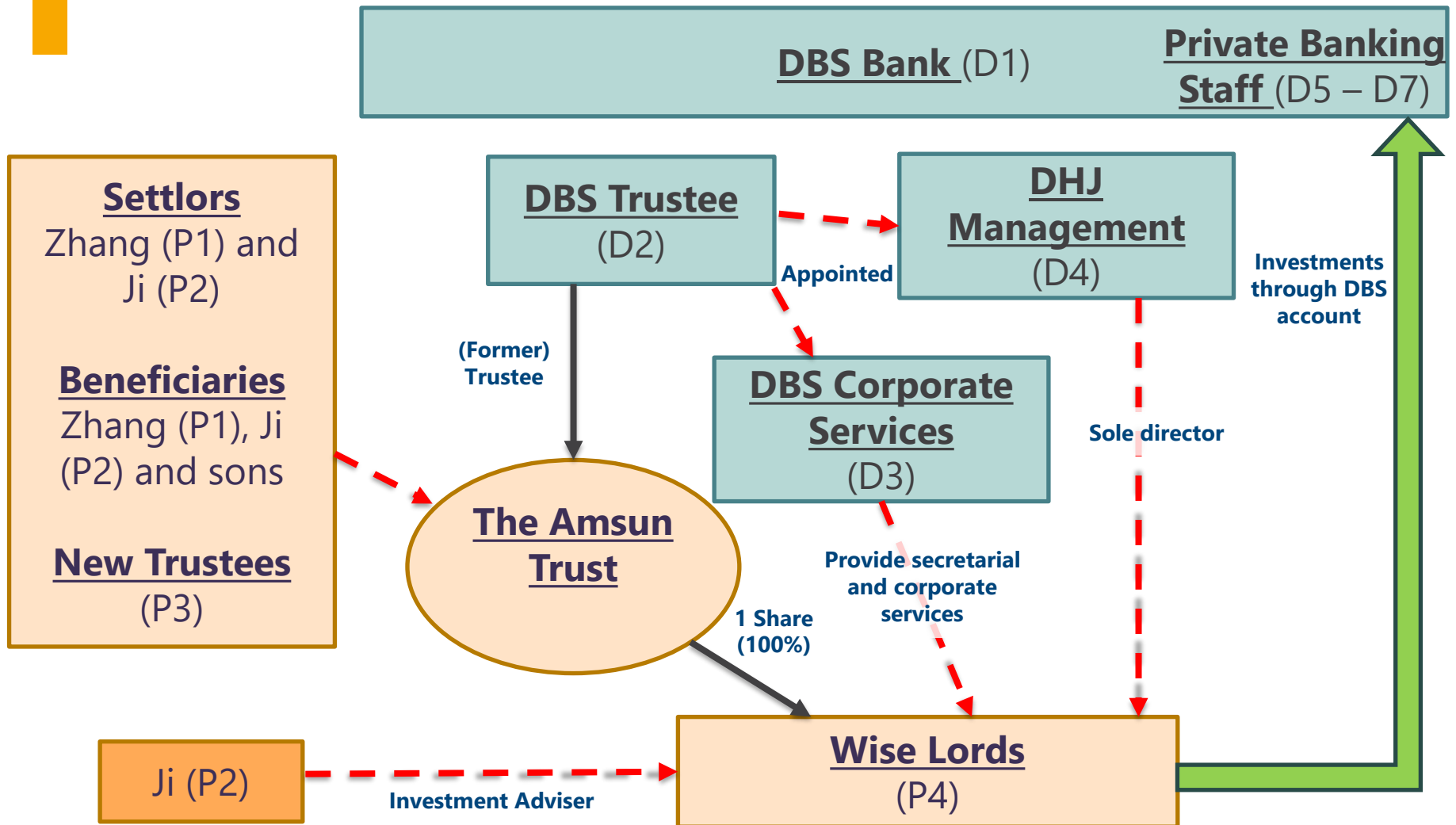
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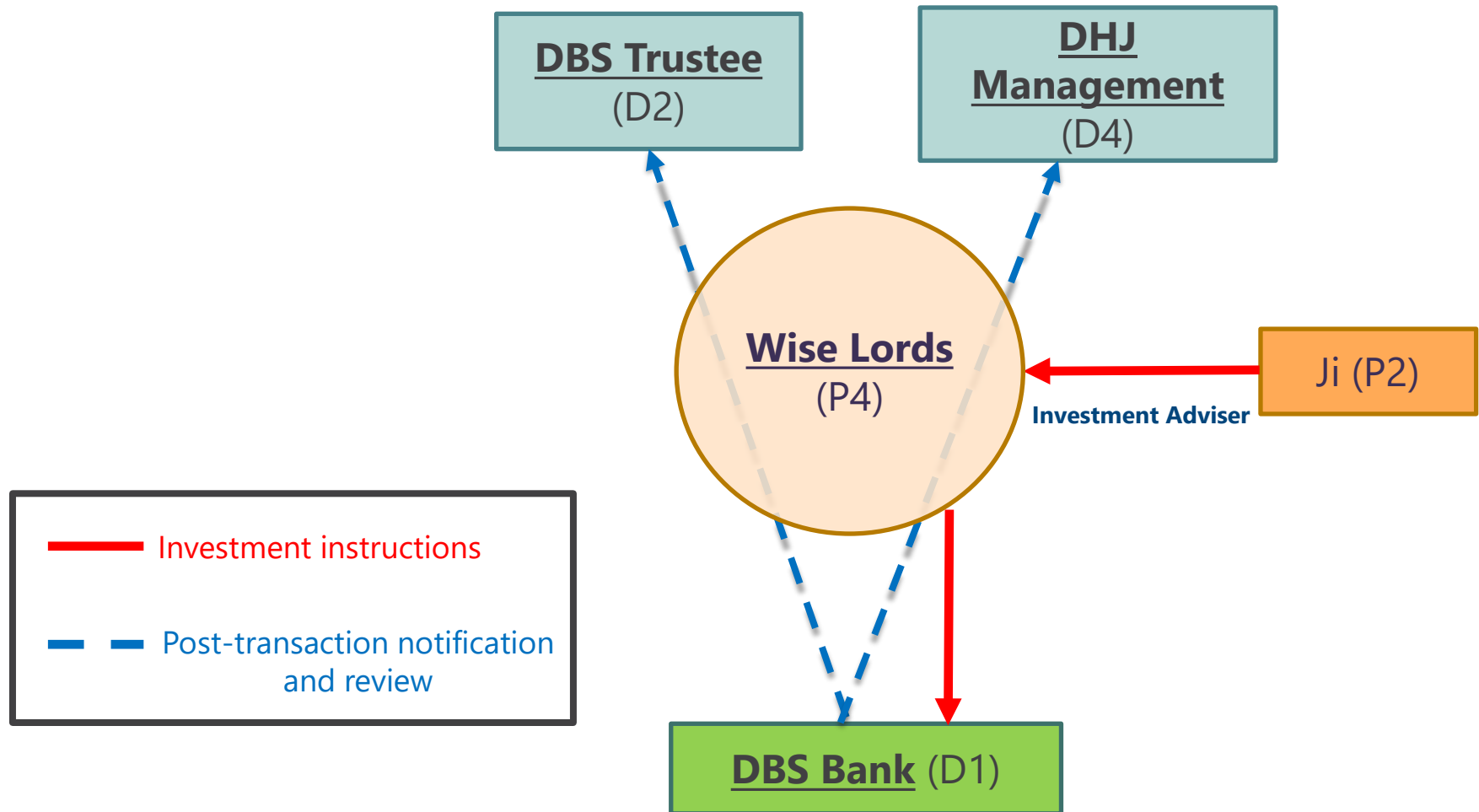
Topics to cover

- Overview of the 2019 CFA Case
- Key legal principles discussed in the 2019 CFA Case
- Implications for Trustees
- Conclusion

Case Overview (1)



Case Overview (2)



Case Overview (3)

Wise Lords' Investments

- **Jan 2005 – Apr 2008** – Mutual funds, PRC focused. Generated overall profits exceeding HKD132.6m.
- **Dec 2006** – Started using credit facilities. Initially USD10m. Raised to USD100m in July 2008.
- **Late 2007 onwards** – Switched FX transactions: AUD, EUR and YEDs. Later preferred direct FX than YED.
- **As at 18 Aug 2008** – 85% portfolio in FX exposure (81% in AUD). Leveraged to 272%. NAV : Borrowing = USD35.4m : USD96.4m

Case Overview (4)



- From late Jul 2008, AUD continued to fall against USD.
- Wise Lords suffered substantial loss from its FX exposure.
- Zhang and Ji alleged breach of duty by Ds.
- New Trustees replaced DBS Trustee as trustee of Amsun Trust and shareholder of Wise Lords. In Feb 2011, Ps sued Ds.

Case Overview (5)

- Trial Judgment (13 Apr 2017)
 - Dismissed Ps' claim against DBS Bank, DBS Corporate Services and related bank staff
 - DBS Trustee and DHJ Management liable for gross negligent breach of trust and fiduciary duty and should pay equitable compensation to the New Trustees and Wise Lords.
 - Specifically, DBS Trustee and DHJ Management have failed to discharge their "*high level supervisory duty*" in approving (1) purchase of USD83m worth of AUD from 25 Jul to 5 Aug 2008; (2) increase of credit facility from USD58m to USD100m; and (3) purchase of 3 decumulators in Aug 2008.
- CA Judgment (27 Jul 2018)
 - Dismissed appeals filed by both parties.



Key issues *on Duties* before CFA

- Did DBS Trustee owe “high level supervisory duty” to the Amsun Trust?
- Did DHJ Management owe “high level supervisory duty” to Wise Lords?
- Were there breach of applicable duties?

Trustee - **NO** “high level supervisory duty” (1)

Duty in law?

Common law

In the case of a sole trustee of a Jersey law trust with more than one beneficiary, the trustee has a duty to obtain sufficient information about the affairs of the underlying company so as to enable it to make an informed decision whether to take any action for the protection of the trust property.

Legislation

Trust (Jersey) Law 1984

Art.21(3): **Subject to the terms of the trust**, a trustee shall, so far as is reasonable preserve and enhance the value of the trust property.

Trustee - **NO** “high level supervisory duty” (2)

Inconsistent with Anti-Bartlett clauses in Trust Deed

“Anti-Bartlett” clauses

DBS Trustee Not Bound to Interfere in Business of Wise Lords:-

- *shall not be under any duty* to exercise control over administration, management or conduct of business or affairs of Wise Lords;
- *shall leave* these to Wise Lords’ directors, officers or other persons *so long as there is no actual knowledge of dishonesty*;
- *shall not be liable* for their act or omission;
- *shall assume* business and affairs of Wise Lords are being carried on competently honestly diligently and in the best interests of the trustee *until such time as they shall have actual knowledge to the contrary*;

Trustee - **NO** “high level supervisory duty” (3)

Inconsistent with Anti-Bartlett clauses in Trust Deed

“Anti-Bartlett” clauses (cont.)

DBS Trustee Not Bound to Obtain Information Regarding Wise Lords

- *shall not be under any duty to obtain or to seek to obtain any information regarding the administration management or conduct of the business or affairs of Wise Lords from the persons involved in the administration...*
- *shall assume that such information as is supplied to them by any person relating to Wise Lords is accurate and truthful unless the Trustees have actual knowledge to the contrary...*

Trustee - **NO** "high level supervisory duty" (4)

Duty  applicable standard

- **1984 Jersey Trust Law:**

Article 21(1): A trustee shall in the execution of his or her duties and in the exercise of his or her powers and discretions **act with due diligence**, as would a prudent person to the **best of the trustee's ability and skill** and observe the **utmost good faith**.

- Court of Final Appeal:

*"the requirement ... **lay down the standards** which trustees must adhere to in executing their duties or in exercising their powers. It does not create free standing duties to act prudently, etc."*

Trustee - **NO** "high level supervisory duty" (5)

"Residual obligation"?

- Court of Appeal:

Anti-Bartlett provisions do not exclude *"residual obligation"* to exercise available powers in circumstances *"where no reasonable trustee could lawfully refrain from acting"*.

- Court of Final Appeal disagrees:

"residual obligation" = where there is actual knowledge of dishonesty

Anti-Bartlett clauses

DBS Trustee:-

- shall not be under any duty to exercise control over administration, management or conduct of business or affairs of Wise Lords
- shall leave these to Wise Lords' directors, officers or other persons so long as there is no actual knowledge of dishonesty

Trustee - **NO** “high level supervisory duty” (6)

Irreducible Core Obligation  Residual Obligation

Lord Millett in
Armitage v Nurse
(1997):

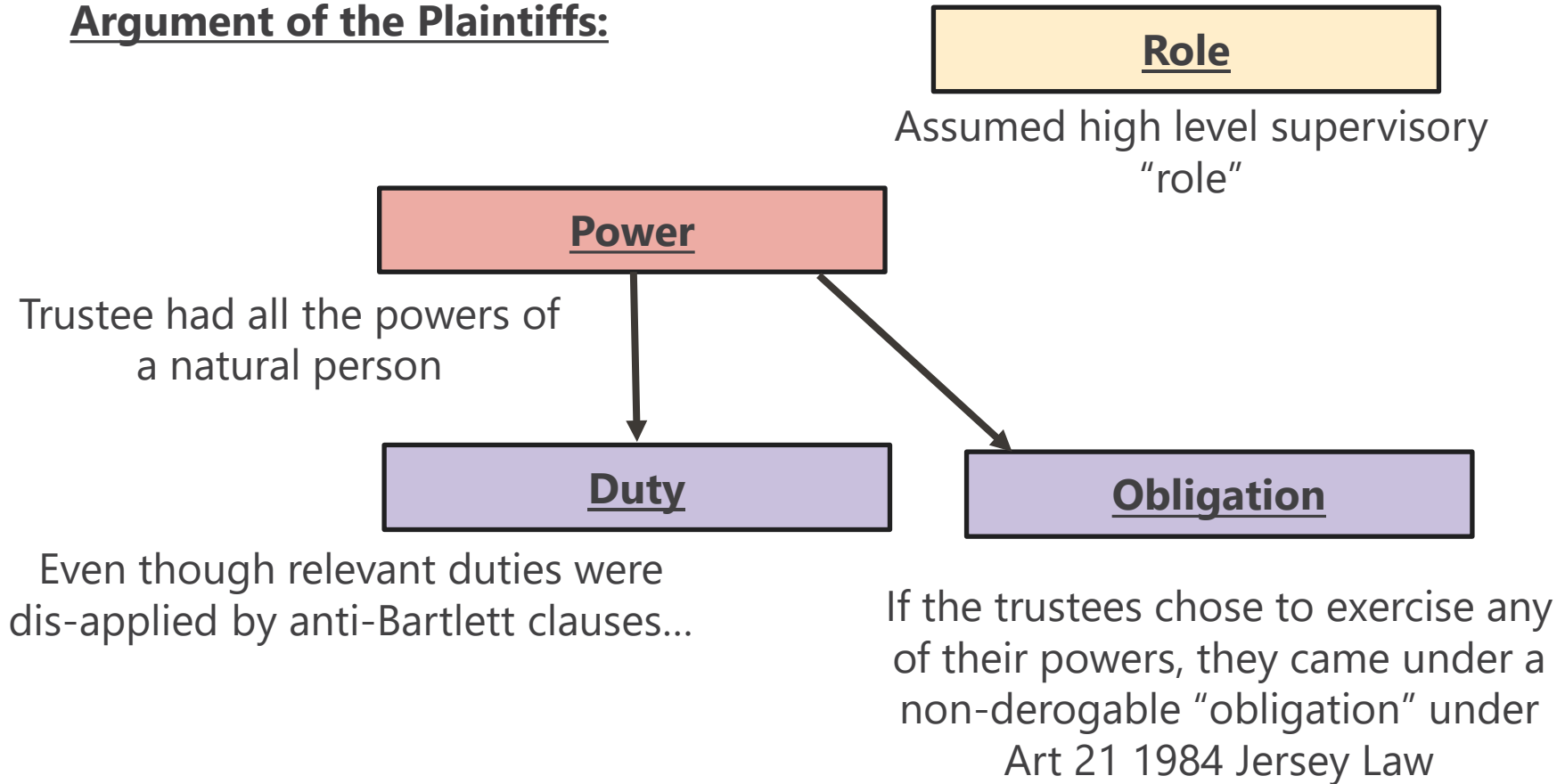
***“irreducible core
of obligations ...
to perform the
trusts honestly and
in good faith for
the benefit of the
beneficiaries”***

Court of Final Appeal:

- ≠ “Residual Obligation”
- Do not include “duty of skill and care, prudence and diligence”
- Do not posit some broad duty to exercise available powers in circumstances where no reasonable trustee could lawfully refrain from exercising those powers
- Do not operate to override express terms of the trust

Role / Power v Duty / Obligation (1)

Argument of the Plaintiffs:



Role / Power v Duty / Obligation (2)



Role  duty

- Role / power / duty / obligation of supervision excluded by Anti-Bartlett clauses
- “High level supervisory role” involved post-transaction review – no real supervision power

Role

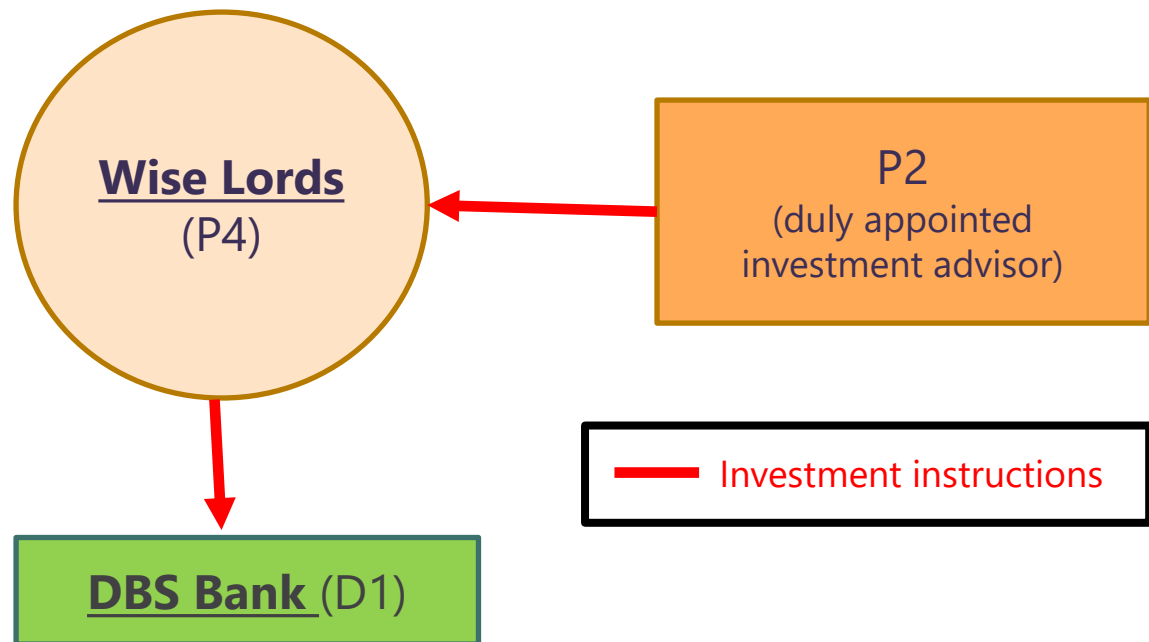
Power

Duty

Obligation

What about DHJ Management, the director?

- **NO** “high level supervisory duty”
- Ordinary duties of a director – fiduciary duty



Were there breach of applicable duties? **NO**

- No “high level supervisory duty” in the first place
- Even if there was such duty, Court of Final Appeal *obiter*:
 - No basis for concluding gross negligence
 - DBS Trustee protected by exculpatory clause covering acts or omissions short of fraud, misconduct or gross negligence.
 - Even assuming DHJ Management failed to exercise director’s duties competently, protected by Service Agreement which provide for exemptions and indemnities except “in the case of gross negligence”



Conclusion

- Identify duties – law and trust instrument
- Ensure compliance with standard of care in execution of duties
- Irreducible core obligations – perform trust honestly and in good faith for the benefit of the beneficiaries

Questions?

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