CENTRE DE DROIT
BANCAIRE ET FINANCIER

Asset management contract

An expert opinion cannot compensate for the absence of factual allegations

Par Roxane Pedrazzini le 12 June 2025

The Federal Supreme Court has upheld a ruling by the Geneva Court of Appeal dismissing a liability claim against a bank for mismanagement on the grounds that the allegations were insufficient (ruling 4A_276/2024 of 31 March 2025).

The client had held a bank account with the bank in question since the 1960s. In 1995, she inherited EUR 3 million and entered into a management agreement with the bank. At that time, the client's portfolio consisted solely of bonds and cash.

In 2001, the client signed a document entitled 'investment profile' which proposed five portfolio structures. However, the client's choice was unclear, as she circled profile S2 (light growth and low risk) and ticked profile S3 (moderate growth and low risk). No asset class restrictions were specified. Nevertheless, the parties agreed that this was a conservative profile.

In September 2008, the client's son learned that his mother's portfolio was worth more than EUR 420,000, mainly due to investments in equities affected by the global financial crisis. The banking relationship was terminated in June 2010. At that date, the client's assets amounted to EUR 355,088.

In October 2016, the client's son filed a claim for payment against the bank. He essentially argued that the bank had breached the management contract and the investment profile by adopting an overly aggressive strategy between 2005 and 2009, characterised by excessive exposure to equities and the use of alternative products.

According to the claimant, the above breaches caused damage of EUR 45,936.45 corresponding to (i) losses directly related to the investments, (ii) remuneration unduly received by the bank and (iii) the bank's management fees and commissions.

In support of the above, the claimant merely makes general allegations about the composition and management of his mother's portfolio. He also requests a judicial expert opinion to assess the exact amount of his loss. In support of his claim, he produced a private expert opinion in support of two equally general allegations, namely that (i) the bank managed the portfolio in breach of the contract and (ii) the investment profile must correspond to *a very* conservative management style. The Court of First Instance refused to order a judicial expert opinion, holding that the questions submitted to it were of a legal nature.

Both Geneva courts rejected the claim for payment. The claimant therefore appealed to the Federal Court.

Our High Court first declared the complaint of arbitrariness in the establishment of the facts inadmissible. The Federal Court recalled that the duty of allegation, i.e. in this case determining whether the claimant had sufficiently alleged the asset classes of the portfolio that he considered incompatible with conservative management, was a question of law and not a question of fact.

Furthermore, the Federal Court confirmed the reasoning of the Geneva Court regarding the allegations of breach of contract and the existence of damage.

Indeed, according to our High Court, the appellant failed to demonstrate which transactions carried out by the bank were not in line with the agreed investment profile.

In fact, the appellant limited himself in his submissions to indicating the composition of his mother's portfolio, citing percentages of equities, bonds and alternative investments, without specifying which specific investments had breached the management contract or which ones had caused him damage. He also merely referred to a twelve-page table that he had drawn up himself, without detailing its contents. It was only at a late stage, in his final written pleadings and subsequent unsolicited submissions, that he mentioned specific investments and their performance for the first time. Furthermore, according to the Federal Court, it is not sufficient to allege in abstract terms that proper management should have consisted of allocating only 20 to 25 % of the portfolio to equities.

In a logical continuation, the Federal Court declared the appellant's complaint regarding the right to evidence inadmissible, holding that the Geneva courts had rightly considered that the expert opinion was not relevant to the allegations in the application, as the facts invoked were neither sufficiently precise nor of a technical nature, nor were they invoked in a timely manner. However, the expert opinion is not intended to replace the absence of allegations of elements capable of proving a breach of contract.

Finally, in the absence of a breach of contract, the Federal Court did not examine the question of damages. It nevertheless reiterated the need to compare the actual portfolio (or certain investments only) with a hypothetical portfolio (or hypothetical alternative investments). These elements must also be alleged by the claimant.

This ruling reiterates the importance of the claimant's duty to allege, particularly in cases of investment damage (see in particular Federal Supreme Court 4A_202/2019, commented on in Pittet, cdbf.ch/1297/). A judicial expert opinion cannot compensate for a lack of allegations. It is up to the claimant to clearly invoke the technical facts they intend to prove in order to demonstrate not only the contractual breaches but also the calculation of the damage. To this end, a private expert opinion can be useful as a basis for formulating these facts. It is therefore recommended that its content be substantially alleged. Even though a private expert opinion is now a means of proof (Art. 177 CPC), a judicial expert opinion should be sought, at least for the purpose of corroborating the technical conclusions of the private expert. Thus, the private expert opinion may also serve to guide the judicial expert in his or her task.