# Plus Ultra

*Legal Translations, Legislation & Publishing*

# *Translation Excerpt of Civil Judgment*

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The following is an excerpt from Plus Ultra's translation into English of the March 27, 2024 judgment of the trial court for the Central District of the Netherlands, case number: C/16/553041/HA ZA 23-157 in the civil action brought by a Dutch musician and his limited liability company, Plaintiff 1 and 2 respectively, against Triodos Bank N.V. The case focuses on the alleged breach of the bank's duty of care for failure to inform its client sufficiently about the risks of "putting all his eggs in one basket" at the bank.

Sometimes I like to read Dutch case law and compare it under U.S. law. As I read the court opinion as a common lawyer, I was most intrigued by what it does not say. It raises some issues and questions. Here are some that immediately came to mind.

This case sheds light on Netherlands dark pools for reasons and problems that are different than the regular American cases. Whereas American cases about dark pools center mostly on the actors and use of information, this Netherlands case shows how operational problems beyond those two can lead to a chain of events spiraling into a fatal crash. There is no allegation of misconduct in the bank's dark pool—the dark pool just crashed on its own.

The musician seemed to have nearly EUR 4 million to invest. Doesn't that make him a sophisticated investor or doesn't that bring him comfortably within the statutory definition of an "accredited investor"? Arguably, under *SEC v. Ralston Purina Co.*, 346 U.S. 119, and its progeny with that kind of money he is able to fend for himself. What's more, he has not only an agent but also a company. So doesn't that negate his alleged financial illiteracy? For one thing, he is sophisticated enough to have not only an agent but also a company. Even if he personally claims to be financially illiterate, does that mean his agent and company are as well? What I mean to say is if you're sophisticated enough to have both an agent and a company, then I don't see why you can't be sophisticated enough to seek proper investment advice or take the losses when the investment risks materialize. Please note that his company is not a sole proprietorship but a limited liability company. To incorporate one, you need to go through some complex parts in the articles of organization about the company's shares and finances with the help of advisors. So I'm doubtful whether financial and corporate illiteracy would pass muster on appeal in the U.S.

Importantly, the ruling pierces through the plaintiff's corporate veil in a very short sentence. In one fell swoop it imputes the individual's alleged financial and investment illiteracy to the company and his agent. However, considering it wasn't the musician who signed the investment contract but the company, this seems too broad a brush to hold the bank liable for alleged breach of its fiduciary duties. The ruling gives the musician the benefit of not being financially literate but it was not the musician but the company that signed the contract. More importantly, the company *is* financially literate.

This important because the duty to inform differs as financial literacy differs. The analysis of the fiduciary duties is different when a non-accredited investor is advised to put all his eggs in one basket, as opposed to when an accredited investor is so advised. If the latter adopts such strategy instead of diversification, it's safe to assume he purposefully does so based on his investment knowledge and information. An accredited investor has his own duties, too, such as the duty of due diligence. Would you as an alleged non-accredited retail investor put all your eggs in one basket to begin with or would you start trading on an unlit venue?

**"2. What is this case about?**

*In a nutshell*

2.1. In 2011, [Plaintiff 2] invested part of his assets (approximately € 2.6 million) in Triodos Bank depositary receipts. [Plaintiff 2]'s cause of action sounds in mistake, seeking rescission of (multiple) purchase agreements. Additionally, [Plaintiff 2] claims Triodos Bank breached its duty of care towards [Plaintiff 2]—essentially—by advising him to buy a very risky portfolio when in fact he was actually very risk-averse and by failing to warn him of the risks of investing in depositary receipts. Accordingly, [Plaintiff 2] seeks damages through a damages-computation proceeding. Triodos Bank denies [Plaintiff 2]'s claims of mistake and breach of its duty of care, averring in addition that the statute of limitations has run on [Plaintiff 2]'s claims.

*What's the court's opinion?*

2.2. The statute of limitations has run on most of the mistake-based claims which, further, cannot be granted on other grounds. So those claims will be dismissed. The claims sounding in breach of the duty of care will be granted for the following reasons.

*How does investing in Triodos Bank depositary receipts work?*

2.3. Triodos Bank issues shares to Stichting Administratiekantoor Aandelen Triodos Bank (hereafter: "SAAT") which in turn issues depositary receipts. Financially, receipt holders are comparable to shareholders. For example, they receive dividends and incur price risks; however, they have no voting rights during Triodos Bank's annual general meeting of shareholders. The depositary receipts were not traded on any exchange. The purchase and sale of depositary receipts was through Triodos Bank (except for private transactions among investors). Using the depositary receipt's net asset value, the bank would be the counterparty to buyers and sellers. Whenever the number of sell orders exceeded the number of buy orders, Triodos Bank would apply its buy-and-hold limit [the maximum value in euros of depositary receipts that Triodos Bank may buy and hold] as permitted by law, which had a maximum of 3% of Triodos Bank's core capital.

2.4. Up till 2019 it maintained an average buy-and-hold ratio of no more than approximately 0.17% of the maximum buy-and-hold limit. By mid-2019 Triodos Bank halted its depositary-receipt trade for four weeks to transition into a new accounting valuation system. After resuming trade, it saw an increase in its buy-and-hold ratio during approximately three months of as much as 40% of the maximum buy-and-hold limit. That was the first time when Triodos Bank adopted a limit to sell depositary receipts of up to € 1 million per week. After those three months the percentage returned to its prior level, bringing its buy-and-hold ratio back to approximately 0.17% of the maximum buy-and-hold limit. In March 2020—with the outbreak of Corona—its ratio soared rapidly, reaching approximately 71% by late March 2020, which was when Triodos Bank decided to close its depositary-receipt trading venue. By October 2020 the bank reopened trading with a reduced sell limit for depositary receipts of € 5,000 per week and two weeks later of € 1,000 per week. For the remaining months of 2020 the used buy-and-hold ratio remained approximately 80% of the maximum buy-and-hold limit (which in the meanwhile had been raised by almost € 8 million). Ultimately, on January 5, 2021, Triodos Bank definitively discontinued its depositary-receipt trading (Triodos Bank's Exhibit 2).

2.5. Triodos Bank announced in December 2021 that its depositary receipts would be listed on a multilateral trading facility (hereafter: "MTF") in the future. An MTF is a centrally organized and

regulated venue where receipt holders can engage in private transactions to buy and sell depositary receipts. The receipt's price fluctuates depending on offer and demand. At that point, Triodos Bank is no longer counterparty in depositary receipt transactions. The MTF's depositary receipt trading ultimately resumed on July 5, 2023. On October 25, 2023 the receipt price was € 24.

*The start of the relationship between [Plaintiff 2] and Triodos Bank*

2.6. [Plaintiff 1] is a Dutch [ ] and [Plaintiff 2] B.V. (hereafter: [Plaintiff 2]) is the company he uses to organize his work. [Plaintiff 1] is both director and sole shareholder of [Plaintiff 2]. In May 2011 [Plaintiff 2]'s agent [A] (hereafter: [A]) introduced him to Triodos Bank. At the time, he was (still) a client of ING Bank but wanted to leave the bank. His reason was that the bank, against his will, increasingly invested in stocks, which he thought was too complex. On May 18, 2011, after talking to [B] (hereafter: [B]) who would become his advisor at Triodos Bank, they started to open (bank) accounts at Triodos Bank.

2.7. On August 1, 2011, [Plaintiff 2] and Triodos Bank entered into a written investment advice agreement. [Plaintiff 2] signed the agreement but both [Plaintiff 2] and Triodos Bank consider the agreement to cover the relationship between [Plaintiff 1] and Triodos Bank as well.

2.8. The agreement provides in pertinent part that Triodos Bank will advise [Plaintiff 2] on structuring the securities portfolio he holds with Triodos Bank. Triodos Bank commits to behave as a good fiduciary and to pursue [Plaintiff 2]'s interests, principles and goals to the best of its abilities. Triodos Bank will check at least once a year whether [Plaintiff 2]'s portfolio structure still matches his risk profile, unless both or either party decides (in writing) to dispense with that check. The agreement is subject to Triodos Bank's terms and conditions.

2.9. Annexed to the agreement is a form [Plaintiff 2] and Triodos Bank signed on October 24, 2011 to assess the risk profile for legal entities. Apart from the handwritten comment "execution-only portfolio" on the dotted line for the question "Total number of points and corresponding risk profile," they did not complete the form.

2.10. [Plaintiff 2], [A] and [B] had a consultation on October 24, 2011. That is also the date they signed the aforesaid (uncompleted) form to assess the risk profile. Following up on the consultation, [B] sent [Plaintiff 2] a written investment proposal on October 25, 2011 ([Plaintiff 2]'s Exhibit 4) for (liquid) investment assets totaling € 2.6 million. [B]'s proposal was basically as follows: 10% in stocks, 10% in bonds, 5% in gold (not through Triodos Bank), 5% in Triodos Renewables Europe Fund, 10% in Triodos Bank depositary receipts, and the rest of the assets were kept liquid at [Plaintiff 2]'s request.

2.11. The next day, Wednesday, October 26, 2011, [Plaintiff 2] sent [B] an e-mail in response to the proposal, asking him to go through with the part of the proposal to buy depositary receipts before that coming Friday, because that was when the term for the purchase free of charge would end. [Plaintiff 2] wanted to decide on the remainder of the proposal later on after they have discussed it. In this connection he asks [B] whether the first sale of depositary receipts would be free of charge as well, because, if so, he wanted to invest everything in depositary receipts first and then redistribute at a later point. [B] answered he could not promise the sale of depositary receipts was going to be free of charge.

2.12. On October 28, 2011, this ultimately resulted in a buy order for a total of 27,396 Triodos Bank depositary receipts, which represented a value of approximately € 2 million.

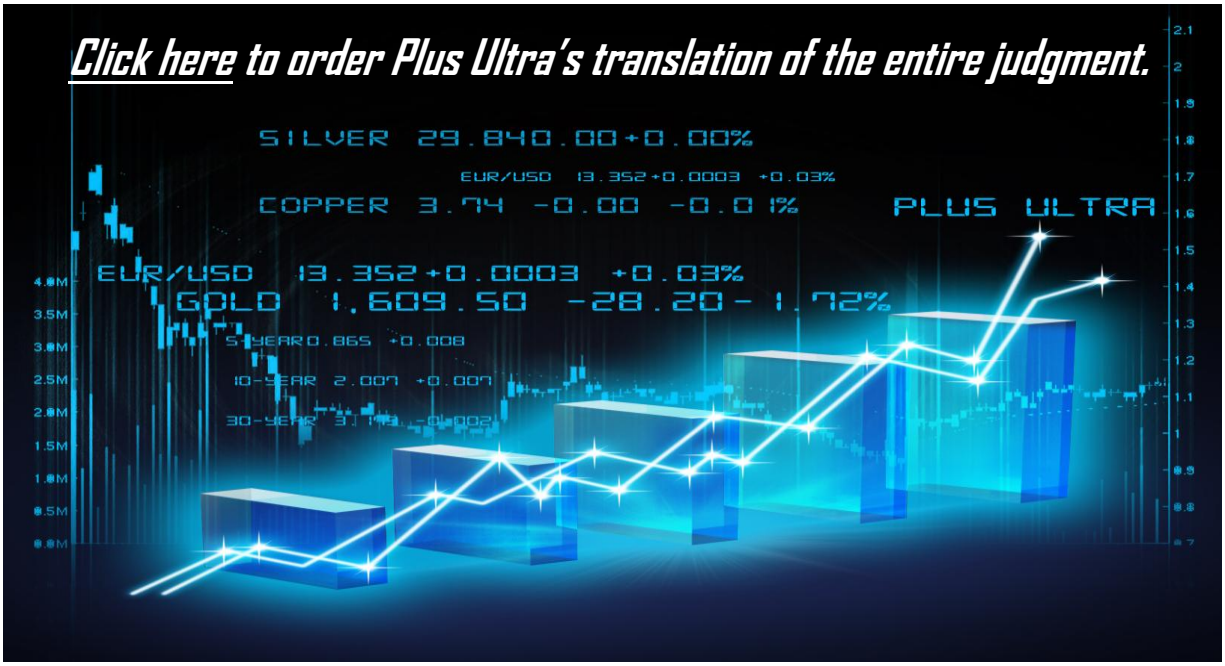
*The remainder of the relationship between [Plaintiff 2] and Triodos Bank*

2.13. The record includes multiple consultations at Triodos Bank's office during the period from 2011 through 2019, at least once a year and sometimes more. Internally, [B] would make notes about these consultations in Triodos Bank's system. [Plaintiff 2] did not receive those notes. The internal notes show that the relationship between [B] and [Plaintiff 2] was a consultative relationship in the broadest sense of the word. They not only talked about investments but also, for instance, about mortgages and writing a will.

2.14. Additionally, the submitted e-mail correspondence shows that, in addition to their annual consultations, [Plaintiff 2] and [B] would also e-mail every now and then. For example, on March 15, 2013 [Plaintiff 2] forwarded an e-mail he had received from [corporation] to [B] which warned of the risk [Plaintiff 2] was running by putting his assets in a single investment category at Triodos Bank and included a link to a *Telegraaf* newspaper article about Triodos depositary receipts. That same day [B] e-mailed to assuage [Plaintiff 2] worries, responding that this was not news nor reason to change course.

2.15. By mid-2012 [Plaintiff 2] bought another 4,053 depositary receipts for a value of € 300,000. In July 2017, [Plaintiff 2] bought another 5,555 depositary receipts for a value of € 450,000. His depositary-receipt portfolio also grew during the years from 2014 through mid-2019 through stock-dividend payments, reaching a maximum number of 46,844 depositary receipts. During those years [Plaintiff 2] also received cash dividends totaling about € 304,616, according to Triodos Bank.

2.16. When [B] left Triodos Bank by late 2019, he was succeeded by [C] (hereafter: "[C]"). [Plaintiff 2] states he did not get along as well with [C] as he did with [B], and he started to feel increasingly uncomfortable with the depositary receipts. By March 2020 [Plaintiff 2] started a steady sale of his depositary receipts. In March 2020, right before closing of trade, he sold € 1 million in depositary receipts (11,904) and upon resumption of trade in October of that year he continued to sell the maximum number of depositary receipts permitted. By January 1, 2022 [Plaintiff 2] held a rounded total of 33,592 depositary receipts, which at the € 59 price level of that moment per depositary receipt represented a total value of almost € 2 million ([Plaintiff 2]'s Exhibit 34)."




# Plus Ultra

## *Case Law*

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