IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 65 of 2009 (RMJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

BETWEEN **ENNISMORE FUND MANAGEMENT LIMITED**

AND **FENRIS CONSULTING LIMITED**

IN OPEN COURT

Appearances: **Mr. Tom Lowe Q.C. instructed by Mr. William Jones, Ms. Lashonda Powell and Ms. Samantha Conolly of Ogier for the Applicant/Defendant**
Mr. Peter McMaster Q.C. and Ms. Victoria King of Appleby for the Respondent/Plaintiff

Before: **The Hon. Mr. Justice Robin McMillan**

Heard in Court: **21 -24 August 2018**
10-14 December 2018
18-21 December 2018

Draft Judgment Circulated: **4 March 2019**

Judgment Delivered: **18 March 2019**

HEADNOTE

The legal nature of an inquiry into damages – The scope and duration of an undertaking to the Court – Proof of loss and causation – Remoteness of damages and need for proof of type or kind of loss but not of a particular loss within that type or kind – Evaluation and assessment of damages – The jurisdiction of the Court to wield a broad axe.

JUDGMENT

Introduction

1. By Summons Application dated 17 October 2016 Fenris Consulting Limited ("the Defendant") ("Fenris") seeks in relation to Ennismore Fund Management Limited (" the Plaintiff") ("Ennismore") the following relief, viz., that:

> *"An inquiry be made as to whether the Defendant has sustained any and if any what damages by reason of the injunction granted in the Order dated 27 February 2009 which the Plaintiff ought to pay according to its undertaking contained in the said Order (the "Inquiry").*

2. In immediately relevant part, the original ex parte Order of Quin J dated 27 February 2009 (the "2009 Order") records that the Plaintiff by its Counsel undertakes as follows:

> *"If this Order has caused loss to the Defendant, and the Court decides that the Defendant should be compensated for that loss, the Plaintiff will comply with any order the Court may make."*

3. Again in immediately relevant part, orders are then made at paragraphs 4 and 5 :

> *"4. An order that pending determination of the Plaintiff's claim in this action or until further order, the Defendant be prohibited from seeking, procuring, authorizing or causing in any manner whatsoever any transfer, assignment or dealing in any manner whatsoever with:*
>
> ***a.*** *Any and all redemption proceeds relating to the 10,537.27 shares in the name of the Defendant in Ennismore Vigeland Fund;*

b. Any and all distributions made or to be made from the liquidation of Ennismore Vigeland Fund in respect of the 3,512.42 shares held in the name of the Defendant;and

c. The 7,828.22 shares in Ennismore European Smaller Companies Hedge Fund held in the name of the Defendant;

5. The Defendant (or anyone notified of this Order) may apply to the Court at any time to vary or discharge this Order (or so much of it as affects that person), but anyone wishing to do so must first inform the Plaintiff's attorneys in writing on not less than 10 days' notice."

Background

4. The Plaintiff is a company incorporated in England and Wales and it carries on business as the investment manager of a number of investment funds.

5. Mr Arne Vigeland ("Mr Vigeland" also known as Arne Vigeland-Paulsen or Arne Paulsen), an analyst and fund manager, was employed by Ennismore between November 2001 and July 2004. In May or June 2004, he relocated to Norway. He is Norwegian. From June 2004 to 2009 Mr Vigeland's services to Ennismore as a Fund Manager were provided through the Defendant, incorporated in Belize, pursuant to a consultancy services agreement. The consultancy services agreement was terminated by the Plaintiff on 5 February 2009 with effect from 5 April 2009, the Plaintiff having given the required 2 months' notice of termination.

6. During his time with Ennismore, Mr Vigeland managed the investments for the Ennismore Vigeland Fund ("EVF"), a portfolio of the Ennismore European Smaller Companies Fund ("ESCF") and a portfolio of the Ennismore European Smaller Companies Hedge Fund ("ESCHF").

(a) ESCF was a retail fund incorporated in Ireland regulated under the European UCITS directive and hence passported to be marketable throughout Europe.

(i) Its shares were denominated in GBP. However, daily prices were given to investors in GBP and Euros both for subscription and redemption.

(ii) Until July 2006 the ESCF operated under certain constraints which made it harder to short stocks. However the ESCHF was able to use synthetic instruments such as ARINS to replicate shorts.

(b) ESCHF is incorporated in the Cayman Islands. Its shares are denominated in Euros. It has more or less the identical investments as the ESCF, save that prior to July 2006 its short position was different.

7. The Plaintiff as indicated above is a UK based fund manager which manages both ESCF and ESCHF.

(a) It manages funds on an "*absolute return*" basis (meaning that it always seeks to make a return whatever market conditions) specialising in European small capitalisation shares. It does not merely seek to emulate or equal tracker funds or indices.

(b) However, its literature demonstrates that in raising money and reporting to investors as well as in its financial statements, Ennismore has at times in the past expressed its track record and performance by means of a comparison with an index published by HSBC which corresponds to broad fields of investments in which Ennismore's portfolio managers invested.

8. The Plaintiff conducts its business through a number of portfolio managers who manage funds on its behalf. Mr Vigeland had been first employed by the Plaintiff in November 2001 and from June 2002 he was allowed to manage funds. In 2004 when he relocated to Norway, his services were then provided by the Defendant pursuant to the consultancy services agreement.

9. Part of the agreement allowed Ennismore to "*clawback*" past bonus payments in the event of poor performance on the funds ("the clawback agreement"). In order to secure and enforce the clawback agreement, Ennismore paid out only half the bonuses in cash

The other half was invested in the Ennismore funds and released back to the portfolio manager on a rolling 3 year basis.

10. In 2009 the Plaintiff commenced proceedings against Fenris to recover the Defendant's funds pursuant to the clawback arrangement. It sought and obtained an injunction freezing those assets as previously set out above.

11. On 23 February 2009 Ennismore issued the proceedings and on 27 February 2009 it obtained an ex parte injunction from Quin J (i.e. the 2009 Order) prohibiting Fenris from transferring or disposing of:

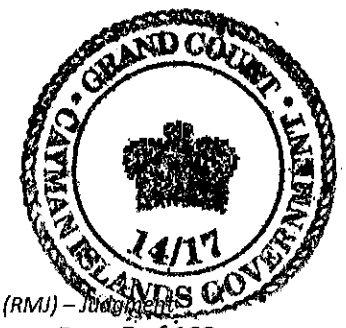
(a) The Defendant's redemption proceeds of 10,537.27 shares in EVF;
(b) Any distributions from the liquidation of EVF in respect of the 3,512.42 shares held in the name of the Defendant; and
(c) The 7,828.22 shares in ESCHF still registered in the Defendant's name.

12. As already stated the 2009 Order recorded the Plaintiff as giving the following undertaking in damages to Fenris:

"*If this Order has caused loss to [Fenris] and the Court decides that [Fenris] should be compensated for that loss [Ennismore] will comply with any order the Court may make*".

13. Substantially all of the Defendant's assets were the subject of the 2009 Order. The redemption proceeds/shares in EVF and ESCHF were converted into cash after the injunction was granted.

(a) Assets with a total of Euros 2, 316,591.75 were dealt with thus:



(i) Certain of the Defendant's shares in EVF were redeemed for the sum of EUR 521,505.34. and a further EUR 159,182.87 was distributed by the liquidators of EVF in October 2009.

(ii) The Defendant's 8,034.10 shares in ESCHF were worth EUR 203.62 per share or EUR 1,635,903.44 on the date of the 2009 Order (and were ultimately redeemed on 2 March 2009).

(b) The Plaintiff consented to the Defendant receiving EUR 159,182.87 from the liquidator of EVF.

(c) The 2009 Order was varied by Foster J to permit the frozen funds to be paid into an account with Bank of Butterfield jointly in the name "Appleby and Ogier Cause 90 of 2009" ("the Joint Account").

14. The Plaintiff's claim under the clawback agreement was tried by Foster J in December 2011. At the trial the Plaintiff's case involved in part an extensive examination into the factual background to the clawback agreement to support its construction. The Cayman Islands Court of Appeal and the Judicial Committee of the Privy Council however found that the background was ultimately irrelevant and that the dispute had to be resolved as a simple case of construction.

15. On 16 February 2012, Foster J gave Judgment in the sum of EUR 2,227,107 and ordered the sum of EUR 2,083,099 to be paid to the Plaintiff from the Joint Account.

16. The Defendant appealed against Foster J's Judgment. On 16 April. On 25 May 2016 Ennismore finally repaid to Fenris the sum of EUR 2,083,099.17.

17. What remains in these proceedings is the inquiry identified above as to any damages suffered by the Defendant as a result of the injunction pursuant to the undertaking given by the Plaintiff to the Court on 27 February 2009 and recorded in the 2009 Order itself.

18. Unfortunately, there is also an issue between the parties as to whether the chain of causation was broken by Foster J's Judgment in 2012, four years before the funds were ultimately returned following the Privy Council decision. This issue and its implications will be considered later.

19. The Defendant's contention is that the 2009 Order deprived Fenris of the capital sum which it would have made available to Mr Vigeland to build a portfolio of European "*small cap*" equities. The claim essentially is for the loss of opportunity to do that. The Defendant's case is that it would have been a natural and ordinary consequence of the injunction that Mr Vigeland was prevented from investing the capital in a portfolio of such equities.

The Legal Nature of an Inquiry

20. In the course of considering this matter it will be essential for the Court to have due regard to a number of separate and distinct general principles of law and to the particular sequence in which those principles should be both identified and then applied. In circumstances as unusual as the present case it is important to bear carefully in mind each of these aspects.

21. The historical background to the legal nature of an inquiry and an explanation of the legal concepts on which it is based are set out by Lord Diplock in *Hoffmann-La-Roche & Co. A.G. and others v. Secretary of State for Trade and Industry* [1975] AC 295 at pages 360A-361 F as follows:

> "*The practice of exacting an undertaking as to damages from a plaintiff to whom an interim injunction is granted originated during the Vice-Chancellorship of Sir James Knight Bruce who held that office from 1841 to 1851. At first it applied only to injunctions granted ex parte but after 1860 the practice was extended to all interlocutory injunctions. By the end of the century the insertion of such an undertaking in all orders for interim injunctions granted in litigation between subject and subject had become a matter of course.*

The advantages of this practice in any suit for the protection or enforcement of personal or proprietary rights are plain enough. An interim injunction is a temporary and exceptional remedy which is available before the rights of parties have been finally determined and, in the case of an ex parte injunction, even before the Court has been apprised of the nature of the defendant's case. To justify the grant of such a remedy the plaintiff must satisfy the court, first, that there is a strong prima facie case that he will be entitled to a final order, restraining the defendant from doing what he is threatening to do, and, secondly, that he will suffer irreparable injury which cannot be compensated by a subsequent award of damages in the action if the defendant is not prevented from doing it between the date of the application for the interim and the date of the final order made on trial of the action. Nevertheless, at the time of the application it is not possible for the court to be absolutely certain that the plaintiff will succeed at the trial in establishing his legal right to restrain the defendant from doing what he is threatening to do. If he should fail to do so the defendant may have suffered loss as a result of having been prevented from doing it while the interim injunction was in force; and any loss is likely to be damnum absque injuria for which he could not recover damages from the plaintiff at common law. So unless some other means is provided in this event for compensating the defendant for his loss there is a risk that injustice may be done.

It is to mitigate this risk that the court refuses to grant an interim injunction unless the Plaintiff is willing to furnish an undertaking by himself or by some other willing and responsible person

"to abide by any order the court may make as to damages in case the court shall hereafter be of opinion that the defendant shall have sustain any damages by reason of this order '(sc., the interim injunction)' which the plaintiff ought to pay."

The Court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it consider

that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction: see Smith v. Day (1882) 21 Ch. D. 421, per Brett L.J., at p. 427.

Besides mitigating the risk of injustice to the defendant the practice of exacting an undertaking as to damages facilitates the conduct of the business of the courts. It relieves the court of the necessity of embarking at an interlocutory stage upon an inquiry as to the likelihood of the defendant being able to establish facts to destroy the strong prima facie case which ex hypothesi will have been made out by the plaintiff. The procedure on motions is unsuited to inquiries into disputed facts. This is best left to the trial of the action, and if the plaintiff then succeeds in establishing his claim he suffers no harm from having given the undertaking, while if he fails to do so the defendant is compensated for any loss which he may have suffered by being temporarily prevented from doing what he was legally entitled to do."

22. A number of very important features emerged from these passages, not least that the undertaking is given not to the defendant but to the Court itself. Any non-performance of is of such extreme importance that it is a contempt of Court, and it attracts the remedies available for contempts, but the Court exacts the undertaking for the Defendant's benefit.

23. In other words, a solemn obligation to the Court itself arises. In my view, this obligation must be regarded both widely and fundamentally. In the context of the present case less attention has been paid to the gravity of this aspect than was perhaps ideal.

24. A further point to be made at this preliminary stage is that the reference by Lord Diplock to the *Smith v. Day* case is especially illuminating, and the Court will now consider this important authority in more detail.

25. Brett LJ states how an inquiry works in practice at page 428:

> *"Now in the present case there is no undertaking with the opposite party, but only with the Court. There is no contract on which the opposite party could sue, and let us examine the case by analogy to cases where there is a contract with, or an obligation to the other party. If damages are granted at all, I think the Court would never go beyond what would be given if there were an analogous contract with or duty to the opposite party. The rules as to damages are shewn in Hadley v. Baxendale (1). If the injunction had been obtained fraudulently or maliciously, the Court, I think, would act by analogy to the rule in the case of fraudulent or malicious breach of contract, and not confine itself to proximate damages, but give exemplary damages. In the present case there is no ground for alleging fraud or malice. The case then is to be governed by analogy to the ordinary breach of a contract or duty, and in such a case the damages to be allowed are the proximate and natural damages arising from such a breach, unless as in Hadley v. Baxendale, notice had been given to the opposite party, of there being some particular contract which would be affected by the breach."*

26. However, after some discussion of the timing of the procedure Jessel MR then makes this additional succinct comment at page 426:

> *"Apart from this, I am of opinion that there is no sufficient proof of any damage having been sustained, and that if any was sustained it is too remote for the present purpose. I might, indeed, say too remote for any purpose."*

27. In other words, the inquiring Court should first decide whether there is sufficient proof of any damage having been sustained and if any was sustained whether it is then too remote for present purposes.

28. There are different stages of inquiry. First, is there sufficient proof of any damage having been sustained? Secondly, if there is such proof of any damage, is this damage too remote or not too remote? Not only are there different stages, but in the opinion of this Court there are entirely different exercises. Then if appropriate quantification of loss follows as we shall see.

The Approach of the Courts to Establishment of Loss

29. In light of the general guidance provided by the *Hoffmann* case, it then becomes easier to discern the attitude and approach of the courts and the consistency of the themes which the courts have expressed.

30. By way of example, in *Les Laboratoires Servier v. Apotex Inc* [2008] EWHC 2347 (Ch) Norris J points out at paragraph 9 that he does not think he should be over eager in his scrutiny of the relevant evidence of loss or too ready to subject Apotex's methodology to minute criticism.

31. The learned judge proceeds to consider the balancing aspects of obtaining interlocutory relief, and in a critical analysis which this Court finds extremely helpful, he also states at paragraph 9:

> *"(a) Whilst, in order to obtain interlocutory relief, Servier will not have had to persuade Mann J that it was easy to calculate Apotex' loss in the event of the injunction being wrongly granted, it will have had to persuade him that that task was easier than the calculations of its own loss in the event that the injunction was withheld. The passages I have cited from its skeleton argument and evidence show that it did so. Having obtained the injunction on that footing it does not now lie in Servier's mouth to say that the task is one of extreme complexity and that the court should adopt a cautious approach. Having emphasised at the interlocutory stage the relative ease of the process, it should not at the final stage emphasise the difficulty.*

(b) In the analogous context of the assessment of damages for patent infringement, in General Tyre [1976] RPC 197 at 212 Lord Wilberforce said:-

> *"There are two essential principles in valuing the claim: first, that the plaintiffs have the burden of proving their loss: second that the defendants being wrongdoers, damages should be liberally assessed but that the object is to compensate the plaintiffs and not to punish the defendants."*

32. In the present case the Plaintiff has elected to emphasise and even amplify the difficulty of the process, and while it has conducted its case with exemplary vigour it has done so at some variance from the classical approach which has been widely approved in the applicable legal authorities. Not only does this make the task for the Court more difficult, but it actually makes the task for the Plaintiff itself more difficult as well.

33. Norris J concludes his reasoning by making some significant remarks as to what this Court has previously described as the second stage of the inquiry, adopting for the purpose of the *Apotex* case Lord Wilberforce's recognition of liberally assessing damages:

> *"The principle of "liberal assessment" seems to me equally applicable in the present context. Although a party who is granted interim relief but fails to establish it at trial is not strictly a "wrongdoer", but rather one who has obtained an advantage upon consideration of a necessarily incomplete picture, he is to be treated as if he had made a promise not to prevent that which the injunction in fact prevents. There should as a matter of principle be a degree of symmetry between the process by which he obtained his relief (an approximate answer involving a limited consideration of the detailed merits) and that by which he compensates the subject of the injunction for having done so without legal right (especially where, as here, the paying party has declined to provide the fullest details of the sales and profits which it made during the period for which the injunction was in force)."*

34. Before concluding with this authority, the Court wishes to add that Lord Wilberforce's quoted dictum essentially reformulates the highly perceptive comments of Brett LJ and Jessel MR in *Smith v Day*.

35. More recently the leading authorities have been reviewed in *Abbey Forwarding Ltd. v. Hone (No.3)* [2015] Ch 309. In addition to applying the *Smith v. Day* case and the *Hoffmann* case and considering the *Apotex* case, McCombe LJ provides some further elaborations.

36. McCombe LJ points out the following consideration at page 323, paragraph 31:

> *"The undertaking is, in effect the "price" which the applicant for the injunction pays in return for the grant of the injunction. It is designed to protect the injuncted party from loss arising from the injunction, which is caused by the order, and which the court decides ought to be paid by the party who obtained it. The application of contractual principles is, therefore, "by analogy", which one sees from the very case to which Lord Diplock referred, namely Smith v Day."*

37. First, this reference to "*price*" is extremely salutary, because in the instant case the Plaintiff is effectively saying that either there should be no price, or at best a small price, or alternatively that it is not the Defendant to whom the price would be owed anyway. The Defendant would inevitably then be left without a remedy. Such an outcome would be wholly wrong.

38. The second helpful principle which emerges from the judgment is that of logical and sensible adjustment. He states at page 333, paragraphs 63 and 64:

> *"63 In the result, therefore, and perhaps not surprisingly, I reach the conclusion that the law as to the recoverability of loss suffered by reason of a cross-undertaking*

is as stated by Lord Diplock in his dictum in the Hoffmann-La Roche case, but with this caveat. Logical and sensible adjustments may well be required, simply because the court is not awarding damages for breach of contract. It is compensating for loss for which the defendant "should be compensated" (to apply the words of the undertaking). Labels such as "common law damages" and "equitable compensation" are not, to my mind, useful. The court is compensating for loss caused by the injunction which was wrongly granted. It will usually do so applying the useful rules as to remoteness derived from the law of contract, but because there is in truth no contract there has to be room for exceptions.

64. In my judgment, the law also meets the justice of the matter. A defendant wrongly injuncted should be compensated for losses that he should not have suffered, but a claimant should not be saddled with losses that no reasonable person would have foreseen at the time when the order was made, unless the claimant knew or ought to have known of other circumstances that was likely to give rise to the particular type of loss that occurred in the case at hand. A claimant may, however, find himself liable for losses which would not usually be foreseen in particular cases. One such case may be if loss, not usually foreseeable, arises before a defendant has had any real opportunity to notify the claimant of the likely loss or sensibly to apply to the court for a variation."

39. The third helpful principle which emerges from the judgment concerns what McCombe LJ describes as type of loss. He states at page 334, paragraphs 66 - 68:

"66. In the context of the present case, and before turning to factual issues, I would add that I accept Mr Coppel's submission that, for a loss to be recoverable, the remoteness rules only require that the claimant giving the undertaking should have reasonably foreseen loss of the type that was actually suffered by the defendant and not the particular loss within that type: see (again by analogy) Chitty on Contracts, 31st ed (2012), vol I, para 26-113.

67. I do not consider that the judge misstated the principles applicable, as the appellants contend, when he said [2013] Ch 455, para 27, that the rules rendered:

"recoverable either loss suffered by the injunctee that falls within the first or second rule in Hadley v Baxendale and arises from circumstances that were either actually known to the injunctor or deemed to have been known to the injunctor at the time when the injunctor is granted..."

Nor do I think the judge was in error when he said, at para 29:

"the cardinal point remains this: absent express notice of special circumstances arising after the date when the injunction is granted, the conventional approach is that compensation will not be recoverable for events occurring after the grant of the injunction that could not be foreseen at the time when the injunction was granted ..." (My emphasis.)

68. In my judgment, these passages were not indicating that the judge require proof of "actual notice of the actual circumstance" creating the loss before compensation for it was recoverable: cf para 66 of the appellants' skeleton argument. If a claimant has knowledge of special circumstances, giving rise to potential type of loss, or other actual knowledge of a particular loss it will be recoverable, but what amounts to such knowledge will be intensely fact-sensitive. However, as will appear below, I do think that in respect of one of the claims, the judge did wrongly require proof of "actual notice of the actual circumstance" creating the loss."

40. As the Court has previously emphasised, it is necessary to look not only at the applicable principles but at the applicable principles in the right sequence.

41. An illustration of the causation issue also appears in *Sagicor General Insurance (Cayman) Limited and Proprietors of Strata Plan No 151 v. Crawford Adjusters*

(Cayman) Limited and Six Others [2011 CD] CILR 130, where Henderson J approves a relaxed, common-sense approach to causation itself at page 170 paragraph 103:

> *"103. My approach towards causation cannot be an overly rigid application and must rely upon a common-sense assessment of the evidence. If the Mareva injunction and the proceedings were both contributors to damage that was suffered, I will not exclude that damage from consideration but ask whether the injunction was a "significant determinant" or operating cause of it. This is the test adopted by the Court Appeal of New Zealand in Bonz Group (Pty.) Ltd. v. Cooke (6). It is consistent with the approach in contract to concurrent causes which examines whether a cause was an "effective" or "operating" cause. The court concluded (9 TCLR 374, at para. 29):*
>
> *"In part, the decision to close the business may have been motivated by the need to devote time and money to the litigation, which was complex and expensive. But we are of the view that Hansen, J. was right to conclude that a significant determinant of that decision was the injunction."*

42. It is to be further noted that Henderson J's reference to a "*significant determinant*" has a special relevance to the question of the duration of the Order, a subject for later consideration in this Judgment.

43. Earlier in his Judgment Henderson J reiterates some of the broader principles which this Court is currently examining. He states at paragraph 92:

> *"92. To obtain the Mareva injunction, Sagicor gave its promise that it would compensate the Hurlstone parties for any loss caused by the order if it was discharged. Such damages are to be assessed on much the same basis as damages for breach of contract: F. Hoffmann-La Roche & CO. A.G. v. Trade & Indus. Secy. (20). That is common ground between the parties. The Hurlstone parties are entitled to be put as nearly as possible "in the same position as [they] would have been if [they] had not sustained the wrong for which [they are] now getting*

compensation or reparation": Livingstone v. Rawyards Coal Co. (27) (L.R. 5 App. Cas. At 39, per Lord Blackburn)."

44. The notion of an effective or operating cause is also set out in *SCF Tankers Limited v. Yuri Primalov and Others* [2017] EWCA C.V 1877. Beatson LJ states at paragraph 26:

"*26. The judge had previously set out the legal principles governing the approach to losses that are claimed to have been suffered by reason of a freezing order, an exercise which he stated will often be inherently imprecise. After considering the authorities, he concluded (at [58]) that what the Standard Maritime parties needed to prove was that on the balance of probabilities they would have sought to invest in a way that had a real, as distinct from fanciful, chance of making that profit and, if so, the best possible assessment of the overall chance of making the profit had to be made, taking account of the uncertainties inherent in the exercise. When setting out the principles, referring to Abbey Forwarding Ltd (in liquidation) v Hone [2014] EWCA Civ 711, [2015] Ch. 309, the judge had stated (at [48]) that the freezing order did not have to be the sole or exclusive cause of the loss in question. It had to be "an effective cause" and the burden is on the party who obtained the order to demonstrate a failure to mitigate. What must be within the reasonable contemplation of the parties is the type of loss but not the particular loss within that type.*"

<u>The Burden of Proof as to Causation</u>

45. At this point of the Court's review of causation in the context of an inquiry it is necessary to address a specific difference between the Plaintiff and the Defendant.

46. The Plaintiff puts forward the proposition that the Defendant has the burden of proving that the injunction caused it a loss. It sets out its argument at paragraphs 27 and 28 of its Closing Submissions:

"***Fenris has the burden of proving that the injunction caused it a loss***

27. *The proposition that the party seeking compensation under the undertaking (applicant) bears the burden of proving the loss claimed was caused by the injunction is supported by Barrat Manchester v Bolton Metropolitan Borough Council [1998] 1 WLR at 1003, 1008 G.*

28. *Where it is said that the injunction has caused a loss by preventing the applicant from pursuing a course of action that would or might have been profitable, the correct approach is that applicant bears the burden of proving on the balance of probability that had there been no injunction it would have pursued that course of action and, if he does so, the loss caused by being prevented from doing that can be assessed on a loss of chance basis. We refer to the following authorities, relied upon in opening.*

(1) Allied Maples v Simmons & Simmons [1995] 1 WLR 1602. This was a case of professional negligence, but the passage we rely upon applies generally to claims based on proof of a loss by reference to a hypothetical question about what would have happened in the past:

"Although the question is a hypothetical one, it is well established that the plaintiff must prove on the balance of probability that he would have taken action to obtain the benefit or avoid the risk." As that case shows, once this is proved on the balance of probabilities, the Court can go on to assess quantum on the basis of a loss of a chance.

(2) This use of a threshold balance of probabilities test before using the loss of chance approach is reflected in the following passage from Les Laboratoires Servier v Apotex Inc:

"A principled approach in such circumstances requires Apotex first to establish on the balance of probabilities that the chance of making a profit was real and not fanciful: if that threshold is crossed then the second stage of the inquiry is to evaluate that substantial chance (see Allied Maples v Simmons & Simmons).

(3) Fiona Trust v Privalov [2016] EWHC 2163. This is the approach that was in fact adopted by Males J.

"I conclude, therefore, that on the balance of probabilities Mr Nikitin would have sought to invest the funds which were in the event lodged in the Lawrence Graham account in such a programme."

The judge was determining a claim based on loss of profit from such a programme. His approach was that before he could assess and award damages on this basis he needed to find that the money would on the balance of probabilities have been invested in this way.

Conversely but consistently with using the balance of probabilities test to determine the threshold question, when he came to deal with the second claim he found:

"I am not persuaded that anything different would have been done with this money in the absence of the 2007 order. I find on the balance of probabilities that it would not. It follows that the defendants have failed to prove any loss suffered as a result of the 2007 order".

(4) Lastly we refer to Gee on Commercial Injunctions:

"Once it is proved that the respondent would have sought to enter a market and was prevented by the injunction, damages for being deprived of a new business by the injunction can be assessed on the basis of loss of a chance of entering a market."

47. It may be thought that this is a formidable and well supported arguments as well as an attractive one. The Defendant nonetheless makes effort to dispute it in this way at paragraph 28-30 of its Closing Submissions:

"***Prima Facie Case***

28. It is not strictly correct that "the loss claimed" needs to be proved in the ordinary way as per (McMaster QC's Closing [27]). That is not correct. The test is whether the Claimant suffered prima facie loss of the type alleged because the quantum or precise way in which it would have occurred is a matter of

quantification. The type of loss is obviously a loss of investment returns on a portfolio of shares.

29. *Moreover once a prima facie case of the type of loss is established, the burden then reverts to the Respondent. In SCF Tankers v Privalov [Beatson] LJ at [43] adopted a statement from Saville J in Avenida v Shiblaq Transcript 21 October 1988:*

"After stating that it is for the party seeking to enforce the undertaking to show that the damage he was sustained would not have been sustained but for the injunction, Saville J added:

> *"This approach does not mean that a party seeking to enforce an undertaking must deal with every conceivable or theoretical cause of the damage claimed, however unlikely this may be. Once a party has established a prima facie case that the damage was exclusively caused by the relevant order, then in the absence of other material to displace that prima facie case, the court can, and generally would, draw the inference that the damage would not have been sustained but for the order. In other words, the court seeks to approach and deal with this question of causation in a common-sense way.*

[Beatson] LJ clearly considered the burden shifted generally to the respondent once a prima facie case has been established:

"46 I do not consider that the onus was on the Standard Maritime parties to show that an application to release funds would fail. It sufficed for them to show that the order prevented them from such investing in newbuildings and the difficulties of any application to the court for the release of funds. In the words of Saville J, once a party has established a prima facie case that the damage caused by the order then, in the absence of other material to displace that prima facie case, the court can draw the inference that the damage would not have been sustained but for the order." P.5677

30 *In examining the factual evidence of causation a Court can draw inferences. Henderson J in Sagicor expressed himself as follows:*

> *"95 The burden of proof rests with the Hurlston parties to establish that any damage they say they have suffered was indeed caused by the injunction and not by any other event or circumstance. Having said that, I adopt as a useful guide the words of Mason, J. in Air Express Ltd. v. Ansett Transp. Indus. (Operations) Pty. Ltd. (1) (146 CLR at 332):*
>
> > *"Unless the circumstances indicate otherwise, when it appears that damage flows from the non-performance of an act and the performance of that act has been restrained by an interim injunction, the inference will generally be drawn that the damage has been occasioned by the injunction."*

48. The Court has considered these strong competing arguments with great care. Ultimately, and with great respect to Mr. Lowe Q.C. for the Defendant, the Court has come to the conclusion that on this preliminary issue of law the Defendant is wrong.

49. The reason for this conclusion is to be found in the precise words of Saville J as quoted above. The learned judge is specifically referring to a situation whether a party has established a prima facie case that the damage was exclusively caused by the relevant order, and not merely caused by the relevant order.

50. In the present case, for example, while the 2009 Order could be found to be an effective cause of loss it is not necessarily on the facts the exclusive cause, nor need it be the exclusive cause. Here, in the area of speculative professional investment some causes of damage could also arise for example from weather events, outbreaks of war or other catastrophic circumstances.

51. Accordingly in the absence of further explanation as to what Saville J may have meant by "*exclusively*", and exercising an abundance of caution, the Court rules that in the present matter there is no legal basis for accepting that once a prima facie case is established by

the Defendant the burden then shifts to the Plaintiff to show that the damage would not have been sustained but for the Order. Should this conclusion be wrong the Court also accepts in any event that the Defendant has clearly established a prima facie case at the very least.

52. It is of course still open to the Court to draw such inferences as it sees fit in the normal and conventional way.

53. Finally, although the Court will formally conclude its factual findings at a later point, it is fully anticipated that the Court will find that the Defendant has proved what it needs to prove in this respect on a balance of probabilities sufficient to satisfy the Court.

54. In the clear language of *Smith v. Day*, there is sufficient proof by the Defendant of damage having been sustained, and that damage is not too remote for the present purpose.

Remoteness and the Rule in Hadley v. Baxendale

55. In relation to remoteness of damages, the Defendant makes clear in paragraphs 31-35 of its written Closing Submissions that it relies upon the first, more general principle of remoteness set out in *Hadley v. Baxendale* (1854) 9 Ex 341.

56. Thus in the law of contract losses would be recoverable which arise naturally, i.e, according to the usual course of things, from a breach of contract itself. The loss must be of such a kind which a breaching party when it made the contract ought to have realized was not unlikely to result from a breach of contract.

57. In *Koufos v. Czarnikow Ltd* [1969] AC 350, known as *the Heron II* , Lord Reid at page 383 A-B goes so far as to say that the words "*not unlikely*" denote a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable.

58. Frankly this approach as illustrated by Lord Reid is entirely consistent with the further learning as to evaluation and assessment which will feature in this Judgment.

59. The Defendant then summarizes its position at paragraph 33:

> "*33. If the Court finds that Fenris would have invested in equities but for the 2009 Order as a matter of causation it cannot be the case that such a loss was too remote or unforeseeable. On the contrary this was loss of a kind which Ennismore at the time it gave the undertaking ought to have realized was not unlikely to result if it was found that the 2009 injunction was not justified.*"

60. In contrast, the Plaintiff asserts that this reasoning is over-broad, particularly in light of the judgment in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UK HL 48 [2009] AC 61.

61. As this Court understands it, the argument is made on the bases of dicta by Lord Hoffmann and Lord Hope of Craig that the party in breach may not be liable for losses which are not of the type or kind for which he can be treated as having assumed responsibility, the emphasis being on the assumption of responsibility or the lack of it.

62. It is however important to note that at page 62 B the Headnote indicates that *Hadley v. Baxendale* was applied.

63. In addition, the Court finds it instructive to identify the following statement of Lord Hope at page 73 G-H:

> "*The fact that the loss was foreseeable – the kind of result that the parties would have in mind, as the majority arbitrators put it – is not the test. Greater precision is needed than that. The question is whether the loss was a type of loss for which the party can reasonably be assumed to have assumed responsibility.*"

64. Notwithstanding the Plaintiff's contention and indeed contrary to it, this statement by Lord Hope in the context of an injunctive undertaking makes it clear that the question is not as to what type of loss the Plaintiff assumes responsibility for but rather as to what type of loss the Plaintiff is assumed to have assumed responsibility for. Likewise, Lord Hoffmann refers at paragraph 21 to losses of the type or kind for which a party in breach "*can be treated*" as having assumed responsibility.

65. Once the test is defined in this broader manner it is clear that the Plaintiff's argument is entirely misconceived. It attempts to circumvent the established law of over 150 years as expressed in *Hadley v Baxendale* and it finds no favour with this Court.

66. The Defendant meanwhile answers the Plaintiff's argument on a broad alternative basis, which essentially leads correctly to the same conclusion. The Defendant's argument proceeds at paragraphs 34-35:

> "*34. Ennismore has now relied on The Achilleas [2009] 1 AC 61 in which the English Supreme Court held that remoteness was not merely a question of probabilities but also turned on what risk the parties had assumed. That case had not changed the law (see John Grimes Partnership v Gubbins [2013] PNLR 13) in the Herron II. Moreover the exceptional case in The Achilleas applies to a voluntary consensual arrangement and has nothing to do with the undertaking given by a party which does not limit the risk imposed on the Defendant. Here the undertaking is that the Plaintiff is liable for all the types of losses that can be reasonably foreseen, even if the scale or size of the losses is not.*
>
> *35. Here it is submitted that Fenris' loss is clearly within the first limb of the Hadley v Baxendale because it was within the reasonable contemplation of the parties that, if free to do so, Fenris would wish to invest the proceeds of sale of EVF and ESCHF in share portfolios. The question whether it would have done so is a matter of causation but, if causation is proved, it cannot seriously be contended*

that such a type of loss was unforeseeable. It is irrelevant that the quantum or scale of loss was not foreseen."

67. Accordingly the Court concludes that *Hadley v Baxendale* has not been modified by the House of Lords, and that on reaching the remoteness of damages phase of the Court's Judgment it remains the correct rule to apply.

68. In other words, if the Plaintiff had sought the 2009 Order on the narrow basis now outlined by it above Quin J would never have granted it, because the undertaking would have been functionally worthless. A serious undertaking was given to the Court and there is no reason to believe that at that time the recent *The Achilleas* case was brought to Quin J's attention or relied upon explicitly or implicitly in any way whatsoever. The Plaintiff wanted the injunction and it paid the "*price*" to obtain it.

The Process of Evaluation and Assessment

69. Once it has been established that damages are such as may fairly and reasonably be considered arising naturally, i.e according to the usual course of things, from either the breach of contract or in this case the granting of the 2009 Order, the next question for the Court is as to how these damages are to be assessed.

70. Some general guidance is found in *Allied Maples Group Ltd v. Simmons & Simmons* [1995] IWLR 1602 when Stuart-Smith LJ states at page 1610 B-D:

"Questions of quantification of the plaintiff's loss, however, may depend upon future uncertain events. For example, whether and to what extent he will suffer osteoarthritis, whether he will continue to earn at the same rate until retirement, whether, but for the accident, he might have been promoted. It is trite law that these questions are not decided on a balance of probability, but rather on the court's assessment, often expressed in percentage terms, of the risk eventuating or the prospect of promotion, which it should be

noted depends in part at least on the hypothetical acts of a third party, namely the plaintiff's employer."

71. We are also reminded by the learned judge of two older authorities at page 1611 C-F:

"In Chaplin v. Hicks [1911] 2 K.B. 786 the defendant's breach of contract prevented the plaintiff from taking part in a beauty contest and deprived her of the chance of winning one of the prizes. The Court of Appeal upheld the judge's award on the basis that, while there was no certainty that she would have won, she lost the chance of doing so.
In Kitchen v. Royal Air Force Association [1958] 1 W.L.R. 563 the defendant solicitors negligently failed to issue a writ against the tortfeaser with the result that the plaintiff's claim was statute barred. The Court of Appeal upheld the judge's award of £2,000, which was two-thirds of the full liability value of the claim. The court firmly rejected the defendant's contention that she had to establish on a balance of probability that she would have won the action. Lord Evershed M.R considered, at p. 575, that she had "lost some right of value, some chose in action of reality and substance." But Parker L.J. put the matter more generally, at p. 576:

> *"If the plaintiff can satisfy the court that she would have had some prospect of success, then it would be for the court to evaluate those prospects, taking into consideration the difficulties that remained to be surmounted."*

72. In *Fiona Trust & Holding Corporation v. Privalov* (No 2) [2016] EWHC 2163 Males J adopts the same practical approach approved by Stuart - Smith LJ. He states at paragraphs 113-114:

"*113. As already indicated, there are a number of contingencies which call into question whether the defendants would have achieved the profits which they claim pursuant to their newbuildings case. Nevertheless I have found that the*

defendants would on the balance of probabilities have sought to conclude newbuildings contracts in the final quarter of 2005 and that there is at least a real and substantial chance that they would not only have succeeded in doing so but would have achieved the profits which they claim (or something very like those profits) based on resale contracts concluded in or about the spring of 2008 pursuant to which the resale price would have been received on delivery of the vessels.

114. In my judgment the fairest way to reflect the findings which I have made is to apply a suitable discount to the defendants' claim figures. In accordance with the approach of Floyd J in Tom Hoskins plc v EMW Law (a firm) [2010] EWHC 479 (Ch), [2010] All ER (D) 54, (Apr) (at [133]-[135]), it is not appropriate in a case of 'multiple contingencies' to apply 'percentage upon percentage'. It would in any event be highly artificial to attempt to do so. Rather it is necessary to evaluate 'the overall chances' of the defendants achieving the profit claimed. Inevitably this is a somewhat impressionistic assessment, but I must do the best I can. My conclusion, taking account of all the uncertainties which I have mentioned, is that the defendants had a 50% chance overall of achieving this profit and that the damages should be calculated accordingly."

73. Clearly in relation to undertaking as to damages and inquiry as to damages where a broad latitude is required a judge is fully permitted to exercise that broad latitude when it comes to matters of evaluation and assessment.

74. The same learned judge also makes plain his views at paragraph 51 following consideration of the *Apotex* case:

"*51. These were not freezing order cases and part of Norris J's reasoning is inapplicable to such cases. Nevertheless I consider that a liberal assessment of the defendants' damages should be adopted, provided that it is clear what this means. It does not mean that a defendant should be treated generously in the*

sense of being awarded damages which it has not suffered. It does mean, however, that the court must recognise that the assessment of damages suffered as a result of a freezing order will often be inherently imprecise, for example because the defendant cannot say precisely what it would have done with its funds but for the freezing order; that this problem has been created by the claimant's obtaining of an injunction to which it was not entitled; that in the light of these factors the kind of over eager scrutiny of a defendant's evidence and minute criticism of its methodology to which Norris J referred will not be appropriate; and that it is not an answer for a claimant to say that damages cannot be awarded because the defendant's business venture was to some extent speculative and might have resulted in a loss. Thus the defendant is not absolved from proving its damages, but these factors must be borne in mind in determining whether it has succeeded in doing so."

75. Finally, the most recent and indeed most authoritative summary is found in *One Step (Support) Ltd v. Morris-Garner* [2018] 2 WLR 1353, where Lord Reed states at paragraphs 37-38:

"*37. The quantification of economic loss is often relatively straightforward. There are, however, cases in which its precise measurement is inherently impossible. As Toulson LJ observed in Parabola Investments Ltd v Browallia Cal Ltd (formerly Union Cal Ltd) [2011] QB 477, para 22:*

"Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss."

An example relevant to the present case is the situation where a breach of contract affects the operation of a business. The court will have to select the method of measuring the loss which is the most apt in the circumstances to secure that the claimant is compensated for the loss which it has sustained. It may, for example, estimate the effect of the breach on the value of the business, or the effect on its profits, or the resultant management costs, or the loss of goodwill: see Chitty on Contracts, 32nd ed (2015), vol I, paras 26-172-26-174. The assessment of damages in such circumstances often involves what Lord Shaw described in the Watson, Laidlaw case 1914 SC (HL) 18, 29-30 as "the exercise of a sound imagination and the practice of the broad axe".

38. *Evidential difficulties in establishing the measure of loss are reflected in the degree of certainty with which the law requires damages to be proved. As is stated in Chitty, para 26-015: "Where it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence." In so far as the defendant may have destroyed or wrongfully prevented or impeded the claimant from adducing relevant evidence, the court can make presumptions in favour of the claimant. The point is illustrated by Armory v Delamirie (1721) I Str 505, where a chimney sweep's boy found a jewel and took it to the defendant's shop to find out what it was. The defendant returned only the empty socket, and was held liable to pay damages to the boy. Experts gave evidence about the value of the jewel which the socket could have accommodated, and Pratt CJ directed the jury "that, unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did."*

76. Once it is proved by the claimant on a balance of probabilities that some damage has been proved over and above very minor or nominal damage and that it is not too remote, then the Court can safely and prudently proceed along the path indicated by Lord Reed. It

is the responsibility of the Court to address the situation in the most sensible way that it can, given that one party has been the subject of an order to which the other party was not ultimately entitled.

The Duration of the Undertaking

77. It is now necessary to consider the duration of the undertaking which has previously been set out.

78. The position of the Plaintiff is essentially stated at paragraphs 67-68 of its Closing Submissions (Speaking Notes):

> *"67. The end date for which Ennismore contends is 16 February 2012. On that date Foster J ordered that the Butterfield monies be paid out to Ennismore in satisfaction of the judgment sum he had awarded Ennismore (A/11/1-2). After that date the reason that Fenris did not have the use of the money was that Foster J had required it to be paid in satisfaction of a judgment in Ennismore's favour.*
>
> *68. In addressing the end point the Court is asking itself the question, is such loss as Fenris may have suffered by not having the money at any given point in time within the wording of the undertaking in damages that is being enforced. The undertaking was an undertaking to comply with any order the Court might make "if this Order has caused loss to [Fenris]". If it caused loss at all the order caused loss by restraining Fenris from accessing and using the frozen money while the money was frozen. The money was not frozen after Foster J's judgment. Ennismore had it. Ennismore had it because they had won, not because of the freezing order."*

79. If this startling proposition were correct, it would mean that irrespective of loss suffered by the Defendant the undertaking by the Plaintiff would cease to operate on 16 February

2012, even though the proceedings continued for some years afterwards. Great injustice would result.

80. The Defendant inter alia makes a number of points in response at paragraphs 149-152 of its written Closing Submissions:

"*149. Following a trial on 16 February 2012 Foster J made an Order requiring Fenris to do everything necessary "to bring about the irrevocable payment to the Plaintiff of all monies held in [the Joint Account]" (see Order A/11/2 paragraph 3 (a)). Ennismore maintains that this judgment breaks the chain of causation.*

150. The first point to note is that the Judgment Order did not discharge the undertaking in damages retrospectively. It simply did not mention the undertaking. It also did not mention the 2009 Order as made or as varied. The undertaking in damages accordingly persists and it is a question of causation whether it continued to cause loss when the Judgment Order was made. The undertaking remains in full force. Indeed even if an injunction is discharged that has never been held impliedly to discharge an undertaking: it is the very circumstance which allows a party subsequently to apply for an inquiry.

151. Secondly, the Judgment is not in substance a discharge of the Mareva injunction at all. Paragraph 3(a) consummated the very purpose of the Mareva injunction which was to secure the outcome of Ennismore at the conclusion of the dispute. It would be perverse if the result of paragraph 3 (a) was to carry into effect the Mareva and, notwithstanding an appeal, remove the ability to recover damages for the continued wrongful retention of the frozen funds.

152. Thirdly, the 2009 Order did not by its own terms come to an end. Paragraph 4 of the 2009 Order was expressed to be "until determination or further order" which, it is submitted meant final order or determination. Suppose Foster J had not made the Judgment Order in terms of Paragraph 3(a) pending appeal, Fenris could not have shown the injunction to have been discharged."

81. It appears to the Court that the Plaintiff's arguments can be examined and dismissed upon a number of alternative bases. The Court will only focus on two of them.

82. First, there is the construction of paragraph 4 of the 2009 Order itself. "*Pending determination of the Plaintiff's claim*" means "*final determination*". Furthermore, "*until further order*" simply means that before final determination the injunction itself may be varied or discharged. However, if the injunction simply remains in place then until there has been a final determination the undertaking as to any damages caused by the injunction meanwhile also continues. It is inconceivable that Quin J would have granted the 2009 Order on any other basis, and the Court rules that the plain and natural meaning of the words is as they are described in this paragraph.

83. Alternatively, a persuasive argument arises from the dictum of Henderson J in the *Sagicor* case, where the learned judge refers at paragraph 103 to whether the injunction was a "*significant determinant*" or operating cause of the loss.

84. In this instance, the injunction was granted by Quin J on 27 February 2009. It was then varied by Foster J on 2 September 2010, primarily by directing at paragraph 2 of that variation that certain sums be paid to the Defendant and to Mr. Vigeland respectively.

85. Then by Consent Order dated 18 November 2011 the Court directed further payments to be made from the monies then currently held in a joint bank account at Butterfield Bank pursuant to the injunction.

86. Finally, on 16 February 2012 Foster J made the following Order:

"*It is hereby Adjudged and Ordered:*

1. *It is declared that the Plaintiff has been since 31 January 2009 entitled to receive a transfer of the following shares formerly held in the name of the Defendant ("the Clawback Shares"),*

(a) 14,049.69 shares in Ennismore Vigeland Fund; and

(b) 7,828.22 shares in Ennismore European Smaller Companies Hedge Fund,

or of the proceeds of the sale of the Clawback Shares, such proceeds amounting to EUR 2,227, 107.51 ("the Judgment Sum").

2. *The Defendant shall pay to the Plaintiff interest on the Judgment Sum at the statutory rate as and from 31 January 2009 until payment in full of the Judgment Sum, save that such interest shall be reduced by the amount of interest accrued on the investment of the Judgment Sum with Bank of Butterfield.*

3. *The Defendant shall pay the Judgment Sum and interest thereon as aforesaid to the Plaintiff as follows:*

   (a) after 14 days from the date of this Order, the Defendant will do or cause to be done all acts and things as are necessary to bring about the irrevocable payment to the Plaintiff of all monies (estimated to be in the sum of approximately EUR2,083,099.17) held in an account with Bank of Butterfield in the name of "Appleby and Ogier Cause 90 of 2009" by way of payment to account of the Judgment Sum and interest; and

   (b) the balance of the Judgment Sum and interest will be paid by the Defendant to the Plaintiff within 28 days from the date of this Order.

4. *Subject to any order the Court may make as to costs against Arne Vigeland, the Defendant pay the Plaintiff's costs of and incidental to these proceedings on the standard basis."*

87. What is immediately clear is that in addition to the Declaration made in paragraph 1 Foster J goes on to make a further specific direction in paragraph 3 in relation to the monies subject to the injunction, ordering the Defendant to do or cause to be done all acts and things as were necessary to bring about "*the irrevocable payment*" to the Plaintiff of all the monies held in the Bank of Butterfield account.

88. In the view of this Court this second direction in effect perfects the original injunction and perpetuates its operation. In other words, the Court finds that the injunction in respect of which the undertaking had been given was a significant determinant or operating cause of loss which did not cease on 16 February 2012. Instead, its effects became permanent.

89. Upon this alternative basis, the Court likewise rules that the undertaking continued in effect until the litigation finally ended on 19 April 2016 when the Privy Council Judgment was given.

The Evidence of Mr. Arne Vigeland

90. Mr. Arne Vigeland, sole director of the Defendant, provided evidence as set out in his Sixth Affidavit, dated 30 September 2016, his Witness Statement dated 17 November 2017 and his Supplemental Witness Statement dated 25 July 2018, in addition to his sworn testimony in Court. The Court does not intend to delve into every aspect of the evidence of Mr. Vigeland and the other witnesses. First, it is impractical to do so. Secondly, taking into account the principles of law which have now been identified, it is unnecessary and indeed in a number of respects immaterial to do so.

91. Mr. Vigeland confirms in his Sixth Affidavit that the Defendant is a company incorporated in Belize.

92. He provides at paragraphs 4-5 a brief history of the Company:

"*4. I should explain my relationship to the Company. The Company's sole shareholder was originally a Belizean trust called 'The 4th Dominion Trust' (the "Trust"). I am the sole trustee of the Trust. In my role as trustee of the Trust, I caused SJ Investments Ltd. ("SJI") to be incorporated in Belize on 1 October 2009 with a view to allowing it to engage in investment and other business activities.*

5. *Following the incorporation of SJI in late 2009, as trustee of the Trust, I transferred the shares in the Company to SJI, thereby making SJI the sole shareholder of the Company. I then personally loaned US$200,000 to the Trust, on terms which gave me the option to convert the loan into a 40% equity stake in SJI at any time prior to 1 January 2012. On 1 January 2012, I exercised my option and converted my loan into a 40% equity stake in SJI. As of the date of this affidavit, SJI remains the sole shareholder of the Company. The Trust holds 60% and I hold 40% of the shares in SJI. A copy of SJI's share register can be found at AV-6 p. 1-2."*

93. After recounting the course of the proceedings Mr. Vigeland confirms that on 25 May 2016 the Plaintiff repaid to the Defendant the sum of EUR 2,083,099.17. He continues at paragraphs 13-14:

"*13. Although the Judgment Sum had been in the sum of EUR 2,227,107.51 the value of the shares which were frozen by the Injunction at the date of the injunction had in fact been EUR 2,316,591.65:*

(a) The Company held 8,034.10 shares in Ennismore European Smaller Companies Hedge Fund ("EESCHF"): 7,852.11 shares which were issued on 1 May 2006, plus 181.98 "equalization shares" which were issued on 1 January 2009. I do not know where the figure of 7,828.22 shares which is referred to in the Injunction and the Order dated 16 February 2012 was taken from. On the date of the Injunction (27 February 2009) shares in EESCHF were worth 203.62 per share. The Company's 8,034.10 shares in EESCHF therefore had a value of EUR 1,635,903.44 on the date they were frozen by the Injunction. A copy of an email from Emily Allen of Ennismore dated 19 November 2008, which shows the number of shares held by the Company can be found at p.29 of AV-6 and a copy of a Bloomberg report which shows the EESCHF share value on 27 February 2009 can be found at p.30 of AV-6; and

(b) The Company held 10,537.27 shares in Ennismore Vigeland Fund ("EVF"), which were redeemed prior to the liquidation of EVF for the sum of EUR

521,505.34. The Company also held a further 3,512.42 shares in EVF, in respect of which the liquidators of EVF made a first and final distribution of EUR 159,182.87. The total value of the Company's shares in EVF was therefore EUR 680,688.21. A copy of a letter from ZolfoCooper to the Company dated 21 October 2009 which confirms the value of the Company's shares in EVF can be found at pp.31-33 of AV-6.

14. *As a result of Injunction, the Company was therefore deprived of the use of EUR 2,316,591.65 (EUR 1,635,903.44 plus EUR 680,688.21) from 29 February 2009 until the majority of that sum was repaid on 25 May 2016. The period from 29 February 2009 to 25 May 2016 is 2,644 days or 7.24 years (the "Injunction Period"). The difference between the sum which was frozen by the Injunction and the sum which was repaid on 25 May 2016 is a result of: (i) the Judgment Sum figure not reflecting the actual value of the Company's shares in EESCHF and EVF; and (ii) the Orders dated 24 September 2010 and 18 November 2011, by which the Injunction was varied to allow the Company to withdraw US$195,000 and US$65,000 respectively from the joint account at Bank of Butterfield in order to pay its legal costs."*

94. He then states that but for the injunction he would have been able [as Director] to invest the sum in question on behalf of the Company throughout the injunction period. Had he done so he believes he would also have been able to start a fund or find another position as a portfolio manager (paragraph 16).

95. A Norwegian citizen, he had worked with Merill Lynch in the Investment Banking Department before joining the Plaintiff as a Fund Manager in November 2001.

96. He describes his success in the role, eventually leading to the launch of Ennismore Vigeland Fund ("EVF") on 1 December 2006. At the time of its launch he was managing 27% of the funds under management with Ennismore. An announcement letter was sent out by the Plaintiff praising Mr. Vigeland and asserting his passion and love of investing.

97. He states at paragraph 24:

> "*24. The Injunction prohibited the Company from dealing with: (1) the redemption proceeds arising out of the redemption of the Company's shares in EVF; (2) distributions within the liquidation of EVF; and, (3) the Company's shares in EESCHF. I was aware that EESCHF suffered losses to its net asset value in 2009 and that in the two months following the grant of the Injunction, the value of the Company's investment in EESCHF fell by approximately 10%.*"

98. On 8 May 2009 Ogier on behalf of the Defendant wrote to the Plaintiff's attorneys Appleby in these terms:

> "*As you are aware, pursuant to paragraph 4 of the Order, Fenris is prohibited from dealing with (1) redemption proceeds arising out of the redemption of shares held in Ennismore Vigeland Fund, (2) distributions within the liquidation of Ennismore Vigeland Fund, and (3) shares held in Ennismore European Smaller Companies Hedge Fund. The purpose of this letter is to seek your client's consent to allow Fenris to deal with these assets, in order to protect their value.*
>
> *As your client is aware (and indeed pleads), Ennismore European Smaller Companies Hedge Fund has suffered losses to its net asset value. We are instructed that these losses continue to accrue, and as a result, the value of Fenris' investment has fallen by approximately 10% since 1 March this year. Given the existence of your client's undertaking, these losses would no doubt be also of paramount concern to your client.*
>
> *Given the volatility that continues to resonate within the global economy, and in order to minimize further losses accruing to the value of Fenris' investment, Fenris is desirous of redeeming its remaining shareholding in Ennismore European Smaller Companies Hedge Fund, and re-investing the redemption proceeds in corporate bonds, which we are instructed, represent a far more secure investment at this time.*

In addition, Fenris is desirous of re-investing any and all distributions received from the liquidation estate of Ennismore Vigeland Fund, together with those redemption proceeds which are payable arising out of the previous redemption of shares held in that Fund. This re-investment would also be in corporate bonds.

Given the losses which Ennismore European Smaller Companies Hedge Fund continues to suffer, together with the loss of interest and other gains which the redemption proceeds payable to Fenris arising from its redemption of shares in Ennismore Vigeland Fund would otherwise be accruing, it is necessary (and reasonable) that Fenris be able to deal with its assets in this way. Whilst we are of the view that the prohibitions within the Order are capable of being set aside, in order to avoid any delay in effecting the proposed re-investments outlined above, Fenris is willing to agree similar prohibitions as those provided for in paragraph 4 of the Order with regard to its dealings with the bonds. For the avoidance of doubt, Fenris does not waive any claim it may have against your client as a result of the loss in value of its investments in Ennismore European Smaller Companies Hedge Fund and Ennismore Vigeland Fund, since 27 February, 2009. Fenris simply seeks to minimize future losses, with a view to protecting its investment- which it is currently precluded from doing given your client's unnecessary actions."

99. It is entirely clear from the language of this letter, which ultimately proved to be unsuccessful in its purpose, that the Company was not advocating corporate bonds as an investment per se. Rather, it was advocating that the Plaintiff utilise corporate bonds to protect the Defendant's investment as distinct from having that investment remaining in ESCHF.

100. In addition, in respect of the proposal the Plaintiff at no point simply replied that the Defendant which was "*desirous of re-investing*" was nothing more than a shell company only, as the Plaintiff now zealously proclaims it to be. The Court considers the current allegation that the Defendant is a shell without substance to be entirely unsound.

101. Mr. Vigeland continues at paragraphs 29-30:

"29. *But for the Injunction, the Company would have invested the full EUR 2,316,591.65 in "small cap equities", following the same investment strategy which I employed during my time at Ennismore. For the years from 2002 to 2008, my investment portfolio with Ennismore made an average annual return (geometric) of 21.5%, for a compound return over that period of 291.1%. Such returns outperformed the benchmark HSBC Smaller European Total Return Index (the "HSBC Index") by an annual average of 10.5 percentage points.*

30. *The HSBC Index comprises the total investment returns of several hundred small listed companies across Europe. It was the main equities index with which Ennismore compared its own returns. A copy of EESCHF's "Track Record" report from inception to June 2016 (the "Track Record") can be found at AV-6 pp. 69-75. As the Track Record shows on page 2 in column 4 of the table (AV-6 p. 70), Ennismore's EESCHF fund beat the HSBC Index by 5.7% since 1999. This includes a period before I began to manage funds and the falls in value in the exceptional years of 2007 and 2008."*

102. He concludes at paragraph 33:

"33. *As noted in paragraph 14 above, the Injunction Period covered 7.24 years, which means that the HSBC Index recorded an average geometric return of 18.9% per year over the Injunction period. In the absence of the Injunction, the Company would have expected to continue to outperform the HSBC Index by 10.5 percentage points per year, and would therefore have made an average geometric return of 29.5% per year and a total return of 547.0% over the Injunction Period. The Company's loss is therefore the sum of EUR 12,671,141.68 (i.e. EUR 2,316,591.65 multiplied by 547.0%)."*

103. This is an ambitious expectation, and one with which bearing in mind the applicable legal principles the Court has no compulsion necessarily to agree.

104. He describes at length a smaller investment in Acorn Geophysical Ltd ("Acorn") which proved disappointing but with which this Court is not fundamentally concerned. Indeed, he states that but for the injunction he would not have proceeded with Acorn.

105. In his Witness Statement Mr. Vigeland returns to the subject of his relationship to the Defendant at paragraphs 4-7:

"*4. I should explain my relationship to the Company. The Company's sole shareholder was originally a Belizean trust called "The 4th Dominion Trust' (the "Trust"). I was the sole trustee of the Trust from 20 August 1999 until 25 November 2008 (when I was replaced by Ms Bente Lund) and again from 1 November 2013 until 7 April 2016 (when I was replaced by Mr Frode Aschim).*

5. In my Sixth Affidavit in these proceedings, I stated that in my role as trustee of the Trust, I caused SJ Investments Ltd. ("SJI") to be incorporated in Belize on 1 October 2009 with a view to allowing it to engage in investment and other business activities. Whilst I did personally cause SJI to be incorporated in Belize on 1 October 2009, I was not in fact the trustee of the Trust at that time; Ms Lund was the Trustee and I was acting on behalf of the Trust with her agreement.

6. Following the incorporation of SJI in late 2009, Ms Lund, as trustee of the Trust, transferred the shares in the Company to to SJI, thereby making SJI the sole shareholder of the Company. I then personally loaned US$200,000 to the Trust, on terms which gave me the option to convert the loan into a 40% equity stake in SJI at any time prior to 1 January 2012. On 1 January 2012, I exercised my option and converted my loan into a 40% equity stake in SJI. As of the date of this affidavit, SJI remains the sole shareholder of the Company. The Trust holds 60% and I hold 40% of the shares in SJI.

7. As noted above, I was replaced as sole trustee of the Trust by Mr Aschim on 7 April 2016, in order to avoid any potential conflicts of interest between my personal interests in SJI and the interests of the Trust. I am not therefore in possession or control of any original documents relating to the Trust. I do however understand that

Mr Aschim remains the current sole trustee of the Trust, that the purpose of the Trust is to promote liberal political ideas in Scandinavia as defined by the trustee, and that there are no beneficiaries of the Trust."

106. Frankly none of this causes the Court any concern whatsoever nor does it touch upon the critical issues to be decided.

107. In the main, the matters raised largely reiterate those made in his Sixth Affidavit.

108. He emphasises that the portfolios which he managed at Ennismore outperformed the HSBC Index in 5 out of the 7 years between 2002 and 2008 (inclusive), and that during the injunction period from 27 February 2009 to 25 May 2016 the HSBC Index made a total return of 249.9% for which he provided annual breakdowns.

109. In his Supplemental Witness Statement he disputes the use by the joint expert, Mr David Croft, of the Oslo Bors Small Cap Index ("OSESX") as a benchmark or proxy by which to compare the Defendant's returns and to extrapolate for a hypothetical portfolio.

110. He makes a pertinent point at paragraph 8:

"*Secondly, I do not believe correlation between my investment portfolio and the OSESX was intended in the investment mandate. Because the mandate was so much wider, the OSESX would not have been an appropriate benchmark against which to measure the performance of my portfolio. "The benchmark universe is defined as a subset of the investment universe, ideally equal to it". (quote from Positive Alpha Generation by Dr Claude Diderich, 2009, page 234, an extract from which appears at pages 1 and 2 of Exhibit "AV-1" to this Statement). My investment mandate was not limited to the tiny OSESX universe (55-155 member stocks from 2002 to 2008). The HSBC Index was the intended proxy in Ennismore newsletters and marketing material since I joined in 2001.*

As noted above, although we were technically absolute return managers, we always benchmarked ourselves against the HSBC Index and we explicitly calculated and communicated to our clients our annual over performance against the HSBC Index."

111. He corrects at paragraph 14 a simple mistake in paragraph 33 of his Witness Statement dated 17 November 2017, in the line "*Compound Period Return*" having erroneously included the initial investment amount in the return figures. It is apparent in these various analyses that errors do creep in. He also makes some adjustments to an earlier table that he had prepared, as likewise Mr Croft had corrected his own values.

112. Additionally, he revises upwards his calculation of compound percentage loss to 886.6% or EUR 20,416,960.69.

113. None of these mathematical exercises in any way influences the Court, which will make its ultimate evaluation on a wider set of approved legal premises and principles.

114. Mr. Vigeland was cross-examined by Mr. McMaster Q.C.

115. He states on Day 5, page 5 lines 22-23 that the Defendant Company was incorporated for a broader purpose than to provide investment management services to the Plaintiff. It was struck off and then reinstated (Day 5, page 10, lines 15-20).

116. He is cross-examined about the settling of the 4th Dominion Trust and how its trust documentation had been altered, the alleged implication being that this had been dishonestly accomplished, which he denies. No motive for such alleged dishonesty is even put forward.

117. None of this is of any interest whatsoever to the Court. This entire subject has no bearing or materiality in relation to the matters which this Court is required to consider. In so far

as it constitutes an attempt to undermine Mr. Vigeland's credibility at large, it fails entirely, along with some further suggestion that Mr Vigeland had a small conviction in Norway for criminal damage, still under appeal. The attack on Mr Vigeland's credibility had nothing to do with relevant and probative matters and it was at best misconceived.

118. Asked about having a sector specific strategy Mr Vigeland replies on Day 6, pages 62, lines 21-25 – page 63, lines 1-11:

"21 No, and this goes back to the "initially". I think this
22 strategy is well-described in the presentation itself.
23 It is an opportunistic fund, so it moves from sector to
24 sector, based on an investment theme. I call it
25 a working hypothesis. So with all due respect to

1 Mr Croft's report, his analysis is a discrete time
2 period. It's a bit of a snapshot, basically, of my
3 overall strategy. My overall strategy is to move where
4 I see the highest opportunity at any point in time.
5 I do have energy sector competence and that gives me an
6 edge but it doesn't necessarily mean I have to be long
7 energy. The fact that you know an industry doesn't mean
8 to say that industry will out-perform the market
9 always, so in essence, if I may sort of summarise my
10 answer, I don't agree with paragraph 103 because that is
11 a too short time period in which to guage my strategy."

119. Significantly he explains on Day 6, page 79, lines 12-14 that the Defendant Company was struck off for non payment of fees. The invoice went to the Plaintiff and was not forwarded to him, so it was not paid. His factual explanation is unchallenged.

120. In other words the explanation, far from disclosing the Defendant as being a shell company, is a completely innocent one.

121. He confirms that his strategy was research-driven.

122. He emphasises at Day 6, p 110, lines 6-15 the market effects of shale oil production in 2007 – 2008, which apparently negatively affected energy stock performance.

123. There was nothing in either Mr. Vigeland's written or oral evidence to support the view that he was other than a credible and honest witness. The Court will return to this issue when reviewing the submissions of the respective Leading Counsel.

The Evidence of Mr. Andrew Blair

124. Mr. Andrew Blair provides a Witness Statement dated 17 November 2017 and a Supplemental Witness Statement dated 3 August 2018, as well as oral evidence.

125. In his first Witness Statement he describes himself as a Director of the Plaintiff and a chartered accountant.

126. He states that the Plaintiff is an English registered company in the investment management business ("EFM"). He explains the former role of the Defendant at paragraphs 6-9:

"*6. EFM awarded its portfolio managers (including Fenris) individual annual bonuses dependent upon the performance of the portfolio managed by that portfolio manager. Of these bonuses, a portion was paid out immediately to the portfolio manager. The remaining, or second, portion ("the retained portion") was retained for a period of three years. In the case of Fenris, the retained portion was invested in shares held in Fenris's name, with the shares being made subject to restrictions on redemption, transfer, or assignment.*

7. *If a portfolio manager's portfolio returned a neutral or positive performance for each of the next three years, he would then receive the retained portion of his bonus. However, in certain circumstances which were in dispute in these proceedings, some or all of the retained portion would not be paid to the portfolio manager (and would thus, be "clawed back" by EFM) if he returned a negative performance in any year during the three year period.*
8. *During the years 2005 and 2006 Fenris returned a positive performance and earned an annual bonus in each year, 50% of which was paid out immediately. During 2007 Fenris' portfolios returned a negative performance, which resulted in a reduction in the performance fee earned by EFM for that year (2007), and part of its "retained" bonus from previous years was clawed back.*
9. *During 2008 Fenris' portfolios again returned a negative performance. The dispute related to whether Fenris thereby became subject to clawback of the remainder of its bonus earned in 2005 and 2006 or whether it was entitled to receive payment of those bonuses."*

127. After outlining that history of the proceedings, he takes issue with Mr. Vigeland's approach to investment performance prior to the 2009 Order itself at paragraphs 21-26:

"*21. I am aware that in his pleaded case Mr Vigeland alleges that had there been no injunction he would have invested the funds affected by it in a portfolio of European equities with a relatively small market capitalization of between about GBP 300,000,000 and GBP 2,000,000,000 and that he maintains that his track record with Fenris as set out in Mr Vigeland's Sixth Affidavit sworn on 30 September 2016 (AV6) is relevant to an assessment of how this alleged portfolio would have performed.*

22. I have looked at the presentation at paragraph 31 of AV 6 and wish to make the Court aware that while I do not dispute the data on which it is based, nevertheless in certain respects it is misleading and it contains mathematical errors.

23. *Prior to July 2004 EFM did not formally allocate capital to individual portfolio managers. In the course of 2003 and 2004 it become more formalized that individual portfolio managers could deploy a percentage of the capital available at their own discretion, but before this Mr Vigeland's stock ideas had to be presented to Gerhard Schoeningh, Geoff Oldfield or Robert Gurner to justify capital being allocated to a particular investment, and those individuals had veto rights under certain circumstances over Mr Vigeland's investment proposal. [P:85].*

24. *As the track record states, the return figures are calculated based on capital employed prior to 2005 rather than based on capital allocation, which reflects the lack of formal capital allocation to Mr Vigeland. This is a significant difference in that the capital employed calculation effectively assumes that the portfolio manager has invested 100% of his portfolio value in long positions at all times since the capital employed is based on the book cost of long positions (and only of long positions, shorts being deemed not to utilise capital). Therefore, the Court in looking at the pre-2005 figures needs to bear in mind that the return on the whole of the available capital is or may be significantly lower than the return shown in AV6 because the return calculation for those years are based the capital employed in investment in investment rather than the total capital available for investment.*

25. *The return on NAV (allocated portfolio capital) is a more realistic figure for the style of portfolio management utilised at EFM where portfolio managers have discretion to vary their level of exposure to the market and are not expected to invest all the available capital. This is illustrated by the long exposure shown on the ESCF track record which has varied significantly over time [PSD:11]. It is also illustrated by the track record of one of EFM's other funds, Ennismore European Smaller Companies Fund, which employed the same investment strategy as ESCF [D:47]. Where a portfolio is less than fully invested in long positions, capital employed is lower than NAV i.e if a portfolio's long position exposure is 80% then capital employed will be 80% of NAV. Consequently the*

value of the portfolio return expressed as a percentage of capital employed would be higher than the percentage return on NAV. Therefore, the calculated returns shown for Mr Vigeland's performance from 2002-2004 (on the basis of capital employed) are likely to be higher than those calculated if he was running a portfolio based on an amount of available capital, as was the case from 2005 onwards.

26. I do not have figures for available capital so am not able to perform an adjustment for the Court. The case that Mr Vigeland is advancing, however, is a case by reference to a return on available capital and performance figures calculated by reference to capital employed do not therefore involve like for like comparison."

128. It may be helpful to note at this point that this Court does not intend to resolve this case on the basis of a statistical analysis, nor does the law require it to do so. It is sufficient to remark however that Mr Blair takes issue with Mr. Vigeland's calculations.

129. He describes the market in early 2009 at paragraphs 39-44:

"*The market in early 2009*

39. I return now to the statement in Ogier's letter of 8 May 2009 that Fenris wished to vary the Injunction to be able to invest the frozen monies into corporate bonds, and the suggestion now made by Mr Vigeland that if the money had not been frozen he would have invested it, on behalf of Fenris, in a portfolio of European equities with relatively small market capitalisations of between about GBP300,000,000 and GBP2,000,000,000 from 27 February 2009. I do not recall Mr Vigeland suggesting this at any time during the period of 27 February 2009 until 7 May 2014. The first that I was made aware of this claim was by way of the letter from Ogier to Appleby dated 8 May 2014.

40. Equity markets globally had crashed in 2008 during the historic financial crisis, and there was a considerable amount of uncertainty in the markets in early 2009 as a result. The portfolios that EFM managed were very conservatively positioned

during that time. As the ESCF track record shows, that fund's net exposure to equity markets was below 20% between October 2008 and May 2009 [PSD:11]. EFM's reduction of its exposure to this type of investment was a result of its concerns regarding the volatility of the market at that time, concerns which were evidently shared by Mr Vigeland as expressed in the letter from Ogier.

41. *EFM's positioning in April 2009 was unfortunate for our investors. At the end of March we held 11% net exposure for ESCF (58% long; 57% short). However during April 2009 equity markets rallied sharply with the HSBC index (in Euros) increasing by 23.1% in the month. In the period of June to December 2009 the HSBC Index increased by 26% compared with its increase of 59.7% for the period of March to December 2009. The increase in the HSBC Index from June 2009 until May 2016 was 166% whereas from 1 March 2009 to May 2016 the increase in the HSBC Index was 249% as shown in AV6.*

42. *Mr Vigeland had worked within the EFM portfolio management culture and his portfolio within the ESCF had net short equity exposure at 31 December 2008 which indicates a lack of confidence in the market at that time.*

43. *A decision had been taken to close EVF in December 2008, the NAV per share of the fund having declined by 50.1% since its launch in December 2006 which may also have dented Mr Vigeland's confidence in investing in equities, at least for a time.*

44. *In the light of this I have no reason to doubt the view expressed in Ogier's letter that Fenris wished to redeem the remainder of its shareholding in ESCF, a fund which invested in the shares of listed European smaller companies, to re-invest in corporate bonds due to concerns about "the volatility that continues to resonate within the global economy" "with a view to protecting its investment" was true at that time. Having taken a defensive position, closing EVF and reducing ESCF's exposure, EFM did not benefit from the sharp rally of the markets in April 2009 and had Mr Vigeland taken the same position, as Ogier's letter suggests, he would not have so benefited either."*

130. Mr. Vigeland has made clear, as indeed does the Ogier letter, that the alternatives available were between corporate bonds and the Plaintiff managing the frozen funds, rather than between corporate bonds and somehow managing the funds in the market at large. Unlike Mr. Blair, the Court has carefully noted and recognised the distinction.

131. At this juncture the Court also comments that closing down the EVF in December 2008, at a most inauspicious moment in the market cycle, casts some significant doubt on the Plaintiff's acuity and professional judgment. Such conduct might even be fairly described as misguided.

132. In Mr. Blair's Supplemental Witness Statement he responds to some of the assertions made in Mr. Vigeland's own Supplemental Witness Statement. By way of example, he states at paragraphs 3-8:

> "*3. At paragraph 4 of AV2 Mr Vigeland asserts that the HSBC Index was the intended proxy for the EVF, ESCF and ESCHF portfolios and that it was used as the benchmark by the fund managers. As I stated at paragraph 37 of AB1, the EVF newsletters expressly stated that the fund was not referenced to any benchmark index. Furthermore, EFM's performance fees were calculated based on absolute performance and not performance relative to any equity index. The HSBC Index was only ever referenced to give our investors an idea of the market conditions that we were facing. The HSBC Index is not considered in any way in the construction of EFM's investment portfolios. It therefore was not in any way the intended proxy for any of those portfolios.*
>
> *4. At paragraphs 5 and 6 of AV2 Mr Vigeland states that he does not accept and takes issue with the use of the OSESX index (Oslo Bors Small Cap Index, i.e Norwegian small cap index) as a proxy by which to compare his historical portfolios for a hypothetical portfolio. He asserts that his portfolio had very little to do with the "Norwegian economy" and that it neither had a high degree of correlation nor shared a common investment universe with the OSESX.*

5. *What Mr Vigeland has left out of his explanation is that the Norwegian economy is heavily reliant on the energy sector. As Mr Croft observes in paragraph 98 of his first report Mr Vigeland's investments at least from 2004 to 2006 reflected the EVF investment strategy, which was described as being likely to have the majority of its assets in the energy sector, with a strong bias to oil related and Norwegian small caps. Mr Vigeland's EVF portfolio was indeed heavily weighted to the energy sector and stocks listed and/or quoted in Norway.*

6. *The Annual Report for EVF as at 31 December 2007 shows its entire investment portfolio as at that date on pages 28 and 29 [Bundle E Tab 27]. Only two of the long positions are not categorised as Norwegian, and both of those stocks were traded in Norway. Further, of the 19 long positions 7 are stocks included in the list of OSESX constituents as at July 2007 [Exhibit AV-1 pages 13-15]. I therefore do not see any justification for Mr Vigeland's objection to the use of the OSESX index as a comparator index for a hypothetical portfolio as it is clear from the data of his actual, previous portfolios that they did in fact have similarities and share a common investment universe.*

7. *At paragraph 7 of AV2 Mr Vigeland criticises Mr Croft's use of only the ESCHF performance data (as opposed to the use of ESCF data at least for the periods pre-September 2006) in his anaylsis of Mr Vigeland's historical investment strategy and in building a hypothetical portfolio. He objects to the use of only the ESCHF data since the investment portfolios of the two the funds were not identical due to the heavy concentration of short positions in ESCHF (resulting from shorting constraints in the ESCF) which would have resulted in different investment returns.*

8. *However, in Mr Vigeland's argument for the use of the ESCF data, Mr Vigeland neglects to point out that the ESCF currency was GBP, whereas the ESCHF was in EUR. The historic performance data is being compared to the HSBC Index performance in EUR. As I explained at paragraph 27 of AB1, it is inappropriate to compare GBP based returns (ESCF) against a EUR based index (the HSBC Index)."*

133. He again states at paragraphs 12-13:

> "*12. When reading paragraphs 8 to 9 of AV2 it is important to note that EFM's fund managers, including Mr Vigeland, were not just "technically" absolute return managers, as he claims, but were unequivocally absolute return managers. As I explained at paragraph 3 above, the EVF fund was not referenced to any benchmark index and the HSBC Index was not considered in the construction of EFM's portfolios. Mr Vigeland's sector exposure was much more closely aligned to the OSESX than to the HSBC Index, but his investments were selected without any consideration of any index.*
>
> *13. Despite EFM's investment mandates being wider than for example the relatively narrow OSESX investment universe, or even that of the HSBC Index, as a component within EFM's funds' overall investment portfolios Mr Vigeland was much more narrowly focused in his stock selection than our other managers who looked at a wider area of our investable universe, and so it is not inappropriate to use the OSESX as a comparator against Mr Vigeland's portfolios, as opposed to any other index."*

134. Given that the HSBC Index has been widely used in the Plaintiff's own investment literature, this reluctance subsequently to be associated with it causes the Court some moderate degree of concern in relation to Mr. Blair's factual recollections.

135. However, in overall terms it is sufficient for the Court carefully to note that there are differences of particular viewpoint rather than to attempt a statistical study as to whose viewpoint is right and whose viewpoint is wrong.

136. Mr. Blair then deals briefly with Mr Croft's approach, presumably in order to set the Plaintiff's position aside from that of Mr Croft, for whatever reason that may be. He states at paragraphs 18-20:

"***The Expert Evidence of Mr Croft***

18. As set out above, I do not think that the criticisms made by Mr Vigeland in AV2 of Mr Croft's approach and calculations are warranted. However, I do not agree with Mr Croft's application of the 12.1% rate of return for the hypothetical portfolio rather than the 9.6% rate which he calculated in his first report dated 2 February 2018.

19. The question Mr Croft was asked to answer (Question 17g. of the joint revised letter of instructions to Mr Croft dated 15 January 2018 and referenced in Question 6(2) of Appleby's letter to Mr Croft dated 19 February 2018 listing EFM's follow-up questions [both in Bundle B Tab 7]) included the assumption that the exposure of the hypothetical portfolio was 50% of NAV at all times. Mr Croft's original calculation of a return of 9.6% assumes that the exposure is maintained at 50% of the capital (i.e. 50% of the NAV) at all times, whereas the 12.1% involves an increasing level of market exposure as it assumes only 50% of the initial capital is not exposed to the market at any given time rather than 50% of the current capital (NAV).

20. The 12.1% calculation is therefore not appropriate for a hypothetical portfolio reflective of Mr Vigeland's previous performance and strategy because if Mr Croft's reasoned analysis is that a hypothetical portfolio would involve maintained exposure of 50% of NAV at all times this would mean 50% of the current capital, not only the initial capital, and so the original calculation of 9.6% would be more appropriate than the 12.1% for any such hypothetical portfolio."

137. By this stage it will have become apparent from the evidence that persons of experience and skill in the investment industry can have widely differing opinions.

138. There is some additional examination in chief by Mr. McMaster and Mr. Blair is then cross-examined.

139. There is the following exchange with the Court and the Defendant's Leading Counsel on Day 7, page 48, lines 16-25, page 49, lines 1-20:

"*Mr Justice McMillan: I know the wording might seem a little odd, but given that Ennismore refers so frequently to HSBC index, would it be fair or reasonable to say that that was basically the working bible in terms of a big picture?*

A. No. It was – because our focus was European small cap equities, we wanted to let people know what European small cap equities were generally doing, but it wasn't the basis for – in any way referred to in our stock selection process.

Q Mr Lowe: So your investment managers were obviously not— They were—you didn't want to track the index. They were required to identify value opportunities.

A Yes.

Q For an absolute return.

A Yes. The index itself was not something that should have been effective in the investment process.

Q No, but in terms of presenting yourself to investors, virtually every document that we see you invite a comparison between your fund's performance and the HSBC index.

A Yes. To give an idea how we performed compared with the small cap market.

14 Q But not—it isn't until 2006 that your newsletters on
15 page 188 contain the qualification that you refer to.
16 November 2006 refers – if your Lordship looks at, "Fund
17 details, on page 188, you can see a sentence is
18 introduced – I'm pretty sure it's for the first time:
19 "Index data is provided in the following table as
20 a guide to general equity market conditions."

140. He is asked about gross exposure, meaning a total investment position of long and short investments. He is also asked about net exposure, meaning long investments minus short investments (Day 7, pages 92-93).

141. There is also reference to where gross exposure could exceed 100% of a fund in question, and he mentions "*leveraging the long side*", whereby as the Court understands it utilising an aggressive short investment strategy one can pursue higher rewards at correspondingly greater risk (Day 7, pages 94-95).

142. The Court considers this conceptual discussion to be of significant importance for this reason. If the Defendant investing its own money and without having any wider responsibility to any other investors chose to maximise potential profit by an aggressive but high risk shorting strategy, it was entirely at liberty to do so. What might be called "*the chance*" was there to be taken. Accordingly in terms of evaluation and assessment this is an important factor which the Court should properly and appropriately bear in mind in arriving at its decision.

143. There is a discussion of the fall in net asset values beginning in the latter part of 2007.

144. The following exchange on Day 7, pages 124- 125 puts the situation into perspective:

"*24 Q Now, of course, Lehmans didn't just happen out of the*
25 blue either.

A No. Well, it caught a lot of people out.

Q It caught a lot of people off guard yes, and so what we can see are the losses that the Vigeland fund show are not losses which are really unexpected, given the financial crisis that was occurring in '07 and '08.

A It's not unreasonable to incur losses.

Q I mean, these were unprecedented events, weren't they?

A Yes.

Q This period is one you hope never to repeat, presumably.

A I think most people hope never to repeat it.

Q Yes. All right. If you go to –

Mr Justice McMillan: Put it another way, I think what you may be getting at, Mr Lowe, is this; was there any reason to believe Mr Vigeland was at fault during that period as distinct from other people making similar investments? Was he specifically at fault in any way.

A I definitely wouldn't use the word, "At fault", but it was – I would still see it as disappointing performance in that period, but not as fault.

Mr Lowe: And it wasn't unusual for people to have disappointing performance in that period, was it?

A No. But some people were more disappointing than others."

145. The Court found Mr Blair to be honest and credible, but perhaps inevitably somewhat protective of the Plaintiff's interests. In other words he was less than completely impartial in his testimony.

The Evidence of Mr David Croft

146. Mr David Croft submitted an Expert Report dated 2 February 2018, a Supplemental Report dated 2 March 2018, Corrections and Amendments to a Supplemental Report dated 25 July 2018 and a Second Supplemental Report dated 14 August 2018.

147. By way of an evolving perspective and prior to Mr. Croft being sworn, the Court made to the Defendant's Leading Counsel the following general observation on Day 8, page 29, lines 7-18:

> "*Mr Justice McMillan: Well, the trouble is, and I may be making a generalisation here, but we have layers of figures. Mr Vigeland has figures based on his approach to the situation, some figures are blended, and then there are different stages, as you have just described, of Mr. Croft's figures, and then you have this business of looking at the euro and the sterling funds and maybe the sterling as though it were euro and vice versa. There are a whole range of possibilities that build-up and build-up and I listen with great respect to what I'm being told, but at the end of the day I will have to come back to some basic principles for all this.*"

148. In his Report of 2 February 2018 Mr Croft states that he has been jointly instructed as a single expert by Ogier acting for the Defendant and by Appleby (Cayman) acting for the Plaintiff.

149. He sets out the materials upon which he relies and then sets out a series of Questions which had been put to him and his Answers initially in summary form.

150. For example, in Question 4 he states that the investment performance analysis suggests that Mr. Vigeland's overall returns were higher than those of the HSBC Index, relatively weakly correlated to them and riskier than the Index, with risk adjusted returns moderately higher overall.

151. He also states that in his view Mr Vigeland's returns and risks would be better compared to the Oslo Bors Small Cap Index ("OSESX") rather than to the HSBC Index, the OSESX Index having returns most correlated with his, and/or a combination of this and a hedge fund equity long/short index, although the HSBC Index was of some relevance.

152. Mr. Croft describes his background and experience. He is a Director of GBRW Limited, a consultancy specialising in providing advice on banking and financial market issues. He has worked for a number of leading financial institutions, including Citibank/ Citigroup, American Express Bank and ING Bank.

153. Then at paragraphs 22-25 he provides expert information as to risks and returns in small capitalized enterprises:

"IV. **RISKS AND RETURNS OF INVESTING IN SMALL CAPS**

22. By way of background in this section I have provided a short description of small cap investing.

23. Compared to large caps, there are several investment risks in small cap shares, which together tend to restrict lead the size of specialist small cap funds:

a. Daily trading volumes are lower so liquidity (the ability to be able to buy and sell without significantly causing the price to change) is less. Because of this small caps tend to fall further and faster than the large caps during general market downturns;

b. The prices of individual shares (but not necessarily that of diversified portfolios) are generally more volatile and are more

exposed to the state of the domestic economy than large-caps and mid-caps;

c. *The smaller financial resources of small companies increases the risk of outright failure during an economic recession compared to large cap equities;*

d. *They are far less researched by analysts so there is a higher cost to investment analysis and the selection of particular shares.*

24. *It is accepted wisdom in the fund management industry that small cap equities pose higher risks but also offer higher returns over the long term on average than large cap equities. There is empirical evidence for this in the USA and European markets: over the last 15 years the Russell 2000 has outperformed the S&P500, the MDAX has outperformed the DAX, and the CAC Mid 60 has outperformed the CAC although the FTSE 250 did not outperform the FTSE 100.*

25. *Sales and earnings growth are key drivers of long-term returns of equities, and these are often stronger for small-caps than large-caps since it is generally easier for small companies to generate high rates of expansion than it is for large cap companies. Small cap companies often invest significantly more, relative to their size on research and development than large cap companies. Investing in small-cap stocks is also seen as a way of capturing the returns from the early stages of new industries and new market opportunities. However the lack of research coverage can lead to significant inefficiencies and mispricing of small-cap shares, which can be exploited by a fund manager through a combination of proprietary research and active portfolio management."*

154. He provides some background to the HSBC Index at paragraph 29:

"29. *HSBC's index business was sold to Euromoney some time ago and the Index is now part of Euromoney's EMIX series of indices. The original HSBC European Smaller Companies Index was a USD denominated one rather than a EUR denominated one, although it is always possible to convert it to EUR using the*

daily end of day FX rates. The time series of data for the Index has been continued and is available from the Bloomberg market data services. The ticker or identifier JCSCEURT gives daily USD values of the total return index (i.e. it takes account of dividends and corporate actions) but only back to 2007; years prior to that have only monthly returns. Throughout my report I have based my calculated Index returns on JCSCEURT expressed in EUR but for clarity have continued to refer to the JCSCEURT index as the HSBC Index (or the "Index"). My data and calculations are shown below in Figure 1."

155. He compares HSBC Index returns with the Defendant's returns.

156. By way of general illustration only, the Court notes Mr Croft's comments at paragraph 36:

"*36. I calculate the compound annual return for Mr Vigeland's investments from 1 June 2002 to 31 December 2008 to have been 13.0% resulting in an outperformance of the Index of 5.9%, compared to 21.5% and an outperformance of 10.5% shown in the table of paragraph 31 of AV-6.*"

157. Statistical charts and tables follow, and Mr. Croft states at paragraph 44:

"*44. The conclusions that may be drawn from this analysis is that compared to the Index:*

- *Mr Vigeland's overall returns were higher than but riskier than the Index, with higher volatility around the average return;*
- *He had greater single month losses than an investment in the HSBC Index, except in 2007;*
- *His risk adjusted returns as shown by the Sharpe ratios were moderately higher than the Index for the period overall;*
- *His returns were relatively weakly correlated with those of the Index."*

158. Turning more broadly to what the Court would describe as projection, Mr. Croft states at paragraphs 61-62:

> "*61. If invested in the Index over the period 27 February 2009 to 25 May 2016 I calculate that EUR 2,316,591.65 would have earned a total return of EUR 5,740.088 so the terminal value would have been EUR 8,056,680.*
>
> *62. Over the period as a whole the trend in the appreciation in value would have been strongly positive at a compound rate of 19.3% annually but would not have been uniform, as I have illustrated with the chart below of monthly percentage changes with the cumulative value indexed from a base of 100 at 27 February 2009. The terminal indexed value would be 359. There would have been an initial period of rapid increase (over 25% in the first two months and over 50% in the first 6 months) and relatively steep fall in mid-2011 of about 25%."*

159. These figures are then followed by a further chart.

160. He observes at paragraph 71 that a sustained period of negative returns was suffered by Mr Vigeland between June 2008 and December 2008 inclusive; the HSBC Index also had negative returns during the same months.

161. He states at paragraph 83:

> "*83. In hindsight the end-to-end returns from the equity markets and bonds during 2009-2016 were exceptionally high (the Index averaged 22%) and borrowing costs for leverage were exceptionally low, so potentially higher returns would have been available from successfully selecting the better returning individual shares and/or leveraging. Whether these strategies could produce an ex post facto ratio 0.4 better than the Index cannot be known in advance."*

162. It is significant that Mr. Croft refers to hindsight because, as we have already seen, particular shorting strategies could have an extremely significant material effect, either for good or for ill.

163. At paragraph 95 he states:

> "95. *If say the Oslo Bors Small Cap Index were used (converted to EUR) as a proxy instead of the HSBC Index, i.e the further assumption is made that the selection of shares in the hypothetical portfolio continued to have the bias that Mr Vigeland had. The OSESX index is a market capitalisation index of about 125 small cap shares denominated in NOK, none of which has a capitalisation larger than EUR 1 billion and many of which are less than EUR 100 million. This would give a compound return of 3.6% p.a. If the Oslo Bors all share Index were used the return would be 6.7%. If the further step is taken of assuming that a better proxy would 25% net long in the HSBC Index and 25% in the Oslo Bors Small Cap Index, the return would be 6.6%."*

164. He continues at paragraph 98-100:

> "98. *The description of the EVF strategy given in the 2006 Investor Presentation prior to its launch described the EVF approach as being unleveraged, opportunistic and more concentrated than that of ESCF with a strong bias to oil related and Norwegian small caps. The letter to investors stated that the EVF was "likely to have the majority of its assets in the energy sector". Based on my review of the Ennismore Performance Reports for 2005-08 (I do not have year end portfolio positions for 2002 to 2003 but based on a sample of the trading activity reports it appears Mr Vigeland's strategy was similar), and on the EVF investor letters of 2007 and 2008, it appears that the stated EVF strategy reflected how Mr Vigeland had in fact investing during the period 2004 to 2006.*

99. No specific return objective or overall risk appears to have been set for EVF but the ESCF return objective was to earn a positive annual return independent of market conditions i.e. ESCF returns would not be expected to track the overall equity market performance or closely track any particular index. It is reasonable to suppose Mr Vigeland had a similar return objective. It is not entirely clear to me what the investment holding period of the strategy was intended to be; there are references to long term investments and 3-5 year horizons in the EVF investor letters which loosely may have been the case with the largest 6-8 investments but other shares were actively traded, being held for months rather than years.

100. I have not analysed the history of the portfolios in complete detail but during 2003 to 2006 the net long positions averaged closed to 50% of NAV and the exposure to Norway and energy related companies was typically over 60%. The EVF investor letters reveal the research driven nature in the selection of individual shares."

165. Mr Croft returns to the issue of comparability at paragraphs 114-115:

"*114. The question of the relevance of the HSBC Index can be answered by considering the ESCF and ESCHF fund objective and description which Ennismore states on its website "is managed as an absolute return fund with the objective of generating positive returns irrespective of market conditions rather than performing relative to any benchmark index" from European small cap equities. An investor presentation on the website from 2010 makes clear that ESCF did not use leverage, held short positions as well as long positions and selected shares on the basis of its research capabilities in an area of under researched small cap equities. Mr Vigeland would be expected to operate under this mandate prior to the EVF.*

115. I would consider the HSBC Index to be a reasonable and relevant comparison or benchmark for a long only fund investing in European small caps although ESCF, ESCHF and EVF all had a return objective of an absolute return and not one of

tracking or outperforming an index. The HSBC Index includes 15 countries and about 1350 companies across most industries and is a well-diversified, market capitalisation weighted, long only index but denominated in USD, although it is easily converted in to EUR (as I have done for my calculations). Its relevance is that that it represents the universe of European listed small cap shares to which ESCF and ESCHF investments were constrained. However as the fund annual fees were typical of hedge fund fees (2% management fee and 20% performance fee) an additional benchmark might be the average return on long/short equity hedge funds."

166. Mr Croft goes on to conclude as follows at paragraph 117:

"*117. Unsurprisingly the undiversified portfolio of Mr Vigeland had a relatively weak – but not insignificant- correlation to the HSBC Index and a better one to the Oslo small cap index. At these correlation levels, the predictive power of them for the portfolio performance would be weak. If the agreed investment strategy and mandate was heavily Norway and energy, in my view his returns and risk would be better compared to the OSESX index, this being the closest index to his main investments, and/or a combination of this and a hedge fund equity long/short index, although I would not say the HSBC Index was irrelevant."*

167. The Court must emphasise that the passages which have been identified, and indeed further passages identified in the subsequent Reports, are not intended to convey every aspect of Mr. Croft's extensive analyses. Instead they are selected in order to highlight themes and information which may be of assistance to the Court as it weighs its findings and conclusions.

168. In his Supplemental Report in response to a question from Ogier, Mr Croft states:

"An absolute return strategy is broadly one which aims to earn a return over a specified investment horizon (often taken as one year) which will be a positive return regardless of the broad market conditions or the direction in which the broad market is trending and usually with a low volatility of returns objective. There are a wide range of different strategies or reducing volatility including simple diversification across equities, bonds, cash and properties; generally investors expect returns from them to be more reliably positive (but by no means are returns in fact always positive) than a relative return fund or an index tracking fund. Some absolute return funds are sold as quasi-substitutes for fixed income securities or funds. An absolute return strategy does not closely track a market index or aim to outperform it so is generally not measured against a broad long only equity market index."

169. In the detail of this Supplemental Report he is also asked to answer a number of enquiries which, while no doubt worthy of clarification, do not in any significant way modify his previous statements. Recalculations are made and corrections given.

170. Following on from that there is Mr Croft's formal Corrections and Amendments to Supplemental Report.

171. An excerpt on page 2 illustrates the difficulties which Mr Croft candidly faces:

"I have since repeated the exercise of obtaining daily prices for the indices and exchange rates involved and re-calculated the hypothetical returns set out in my First Report at paragraphs 92 to 95 and corrected in my Supplemental Report. Despite having my calculations checked I have now identified data errors and calculation errors that lead to differences between re-calculated returns and the returns stated in my Supplemental Report. I apologize for these errors. The data errors were to do with the series of daily dates, index levels and exchange rates used which were downloaded from Bloomberg: the indices did not have a single series of dates consistent with each other or with the exchange rates used to convert them to EUR (due to days when exchanges were closed)

and I failed to spot this when organizing or using the data. I have now used Bloomberg's own EUR denominated index values rather than calculating a EUR equivalent. This means there is an identifiable source of the data but also means I do not know exactly what exchange rates were used."

172. More tables follow and the Court reminds itself as Mr Croft points out on page 6 that he is using a set of 3 hypothetical proxies for his calculated 50% net long HSBC Index, 50% net long OSESX Index and 25% net long HSBC plus 25% net long OSESX, to determine period end values. The practical assistance to the Court of all of this material is really very limited.

173. Then we reach the Second Supplemental Report of Mr Croft. There are further revisions and a table appears on page 4 showing value at end of 2008 using annual compounding of yearly return. This shows that from 1 June 2002 until 31 December 2008 a complete series of Defendant/Vigeland returns outperformed the HSBC Index by a range of 16.8 to 17.6. Obviously, depending on the precise comparator, results will differ, which is why the Court views all of these statistical approaches with a respectful skepticism.

174. There is also in oral examination on Day 8, page 136, lines 2-10 this statement:

"2 *A There is a general point here which I think I made in my*
3 *report, I'm pretty sure that I did, is that the sorts of*
4 *stocks that were invested in were small caps, very small*
5 *caps in some cases. They would be illiquid, and the*
6 *reliability of the price in the market is not good, and*
7 *it can be moved around quite substantially by buying*
8 *activity or selling activities and the actual pricing*
9 *and valuations that have gone into these gains and*
10 *losses has to be taken with a very large pinch of salt."*

175. Then there is this exchange with Leading Counsel for the Plaintiff and also with the Court on Day 8, page 151 lines 19-25 page 152, lines 1-24:

"*19. Q It's okay. Page 13, paragraph 49. Headed,*
20 "Conclusion". What he says is:
21 "As noted above, if not for the injunction the
22 company would have invested the full €2.3million
23 equities in the small cap equities following the same
24 investment strategy which I employed during my time at
25 Ennismore".

151

1 What I was putting to you was that if he had
2 followed the same strategy then the best predictor of
3 his returns, the better predictor of his returns would
4 be the OSESX index.
5 A It would be a better predictor, not a good one. It
6 would not be a good predictor but it would be a better
7 one.
8 Q A better predictor than the HSBC index?
9 A Yes.
10 Q Yes, and why just to elaborate that, why wouldn't it be
11 a good predictor?
12 A Because it still has a fairly low correlation. 0.51 on
13 my calculations.
14 Q Yes?
15 Mr Justice McMillan: It would be a predictor but not a good
16 predictor? Is that what you say?
17 A Yes. It would be a better predictor, my Lord, but not

18 a good one.
19 Mr Justice McMillan: A better predictor than?
20 Mr McMaster: HSBC.
21 Mr Justice McMillan: But not a good predictor. One of
22 these models, in a way—I don't say they cancel each
23 other out but they create a very confusing picture when
24 you stack them up. "

176. In effect, the Court must arrive at a conclusion which while taking into account the investment factors set forth in the evidence is not necessarily governed by the same precise factors.

177. A simplified explanation of the short strategy is proved on Day 9, page 13, lines 6-21:

"6 Q Yes. Now, with a short if the share goes down in value
7 you have the opportunity to buy the stock in the market
8 at a lower price and return it – sorry – at a lower
9 price than you originally sold the stock for on Day 1
10 and return that stock to the broker and therefore make
11 a profit.
12 A Correct.
13 Q So imagine you sold – you borrowed stock and sold it
14 for US$100 and you had an opportunity to buy it back for
15 US$90. You get US$100 cash from the original sale and
16 you only have to use US$90 of that to buy the stock back
17 so you make a US$10 actual profit?
18 A Correct.
19 Q Conversely, if the stock went up in value by US$10 at
20 the time you closed the position you would lose US$10.
21 A Yes."

178. A further instructive exchange is found on Day 9, page 20, lines 3-18:

> *"3 Q With a short position you have to, at some point, you*
> *4 have to restore what you borrowed?*
> *5 A Yes.*
> *6 Q And if the price goes up exponentially you could suffer*
> *7 much, much more loss than you paid for the asset in the*
> *8 first place.*
> *9 A Yes. Shorts are riskier in that respect.*
> *10 Q Shorts are much riskier?*
> *11 Mr Justice McMillan: If at the same time your longs went*
> *12 down you would be insolvent.*
> *13 A You could be, in principle.*
> *14 Mr Justice McMillan: Yes. I'm beginning to see in*
> *15 a dynamic sense—I have had the benefit of a great*
> *16 deal of evidence which looks at it in a more static,*
> *17 theoretical way, but it's beginning to come together as*
> *18 a dynamic process."*

179. Once again, the Court emphasizes that it has selected and highlighted only limited aspects of Mr Croft's expert evidence by way of identifying a framework that can prove of broad assistance. Indeed, it readily became clear from Mr Croft's insights that the greater the theoretical detail that one goes into the more numerous become the pinches of salt to which he alludes.

180. The Court has formed the view that like both Mr. Vigeland and Mr. Blair Mr. Croft has given his evidence in a credible and honest manner, bearing fully in mind that the issues before the Court are in some respects completely without precedent.

<u>The Status of Fenris Consulting Limited</u>

181. The Plaintiff has contended that the Defendant is no more than a shell company whose sole purpose was to serve as a conduit for money to Mr. Vigeland, and that Mr. Vigeland's assertion that the money due to the Defendant would have been invested by it should carry no weight with the Court.

182. By way of context however, it is perhaps helpful specifically to record some individual items of material which are before the Court.

183. First, in his First Affidavit dated 27 October 2009, Mr Vigeland states at paragraph 6:

> "*6. The Company was incorporated for the sole purpose of providing investment management services to Ennismore Fund Management Limited ("Ennismore"). Ennismore is an English registered company which is the Investment Manager of two funds situated in the Cayman Islands namely Ennismore Vigeland Fund ("EVF") and Ennismore European Smaller Companies Hedge Fund ("ESCF") and one other fund which is an Irish mutual fund, namely Ennismore European Smaller Companies Fund ("the OEIC").*"

184. There is no logical reason why once that purpose ended the Defendant could not continue to be in active existence even though such an outcome would be highly inconvenient to the Plaintiff in this inquiry.

185. Secondly, one may usefully consider the terms of the letter dated 5 February 2009 from the Plaintiff to the Defendant:

> "*Termination of Consultancy Agreement*
>
> *In accordance with the Consultancy Agreement dated 24 June 2004 between Ennismore Fund Management Limited ("Ennismore") and Fenris Consulting Limited ("Fenris") we hereby give two months' notice of termination with effect from the date hereof.*

As you are aware significant sums are due from Fenris to Ennismore under the terms of the agreements between us. Your unwillingness to pay such amounts to Ennismore has led to a breakdown of trust. As a consequence of this we do not require Fenris to provide us with the services of an Investment Manager with immediate effect.

We will provide details of the precise amount due (after offsetting any amounts due by Ennismore to Fenris) shortly. No action should be taken that will reduce Fenris' ability to settle these debts.

Ennismore reserves all of its rights in respect of the Consultancy Agreement, the Clawback Agreement dated 6 April 2006, this letter and Fenris and Arne Vigeland's conduct, and whether arising under the Consultancy Agreement, this letter, at law or otherwise. For the avoidance of doubt this letter does not constitute a waiver of any such rights. For the further avoidance of doubt this letter does not terminate the obligations of Fenris and/or Arne Vigeland under the Clawback Agreement dated 6 April 2006 which remains in full force and effect. This reservation of rights includes, but is not limited to, the right to take proceedings in any jurisdiction and/or to serve any further notice to you and the right to claim with respect to any loss, cost or expense arising out of or connected with the Consultancy Agreement and/or the Clawback Agreement.

Please can you acknowledge receipt of this letter."

186. The Plaintiff clearly is treating the Defendant at this point as rather more than a mere shell, and indeed it goes so far as to remind the Defendant of its "*obligations*" under the Clawback Agreement dated 6 April 2006.

187. Thirdly, there are the formal terms of the Consultancy Services Agreement dated 24 June 2004, which demonstrate on the part of the Plaintiff a clear distinction in numerous ways between the functions of the Defendant and Mr Vigeland:

"***Consultancy Services Agreement***

We are writing to you to confirm our understanding of the consultancy services that you will be providing to Ennismore Fund Management Limited ("EFML") and we should be grateful if you would sign the enclosed copy of this letter by way of agreement.

Fenris Consulting Ltd. will make available to EFML the services of one suitably qualified and experienced investment manager (the "Investment Manager") employed by Fenris Consulting Ltd. who will exclusively provide investment advice to EFML. The identity of the Investment Manager will be agreed between Fenris Consulting Ltd. and EFML from time to time. The first Investment Manager will be Arne Paulsen.

The Investment Manager will make recommendations to EFML concerning long and short equity investments which EFML may act upon at its sole discretion. Neither Fenris Consulting Ltd. nor the Investment Manager shall have the authority to commit EFML to the purchase or sale of any investments and may not place orders with brokers on behalf of EFML. The Investment Manager will monitor investments made by EFML on the basis of advice received from the Investment Manager on a continuing basis.

The Investment Manager will attend the offices of EFML for approximately two business days every four to six weeks and during each such visit shall make himself available for a meeting with the Directors of EFML to discuss the investment advice provided under this agreement.

EFML will from time to time advise Fenris Consulting Ltd. of the portfolio limits that apply to the level of investments in respect of which investment advice is sought from Fenris Consulting Ltd.

Fees shall be agreed between the parties from time to time and shall be paid on a monthly basis following receipt of an invoice by EFML.

This agreement may be terminated by two months notice by either side or immediately by EFML should Fenris Consulting Ltd. wish to change the Investment Manager."

188. We even see here a situation envisaged by the Plaintiff where the Defendant itself might wish to change the Investment Manager from being Mr. Vigeland.

189. Finally, in this regard and as previously observed by the Court, when the Defendant by letter dated 8 May 2009 indicated through Ogier that it was desirous of reinvesting the redemption proceeds in corporate bonds no point was raised by the Plaintiff that the Defendant was functionally moribund. If that was what the Plaintiff genuinely believed at the material time, then it had ample opportunity to state it. It did not do so.

190. The Court considers the argument as to Fenris being a shell company to be based on expediency rather than on facts and to have no merit.

The Closing Submissions of the Defendant

191. The Court has already indicated the nature of its rulings on a number of legal and constructive issues which have arisen in this case, and for reasons of brevity it does not intend to re-examine them at this stage, but instead simply to set out some salient features of the respective Closing Submissions.

192. At paragraph 23 the Defendant propounds causation in fact: would the loss have been suffered but for the injunction or alternatively was the injunction one significant determinant.

193. The Defendant submits that the Court should then consider whether remoteness, which it describes as a form of causation in law, is proved, viz., by considering whether or not the loss was of a type which fairly and reasonably arose naturally, according to the usual course of things, in causing that loss.

194. This approach is both simple and conventional and has much to recommend it.

195. The Defendant states that there is no dispute between the parties that the burden is on the claimant to show that the loss and the type of loss would not have been suffered "*but for*" the order. Once again, the Court has no difficulty with this approach.

196. In terms of whether the Defendant as claimant need only show a prima facie case as to loss, the Court has already ruled against the Defendant, although ultimately nothing of substance turns on that specific ruling.

197. There follows a discussion as to quantification and uncertainty, in respect of which the law appears to the Court to be well settled.

198. A fundamental contention is then set out at paragraph 47 which the Court endorses and approves:

> "*47. Moreover the chance of Fenris running particular investment profitably is not a question of causation but a question of assessment of damages. Quantification does not depend on the balance of probabilities but on an assessment by a judge. Nor does the judge apply a "discount" for uncertainty in the assessment because uncertainty is part of the process of assessment (see One-Step). The judge does not determine that the quantum or extent of loss is "more probable than not". This assessment has nothing to do with causation and does not suffer a discount (see Vasiliou v Hajigeorgiou [2010] EWCA 1475 [25/-27].."*

199. In terms of boundaries paragraph 47 distinguishes between where causation ends and what may conveniently be called assessment or evaluation begins. In other words, once the type of loss has been established there is then a separate determination as to quantification within that type.

200. The argument on this point is articulated at paragraph 50:

> "*50. Here it is sufficient that Fenris can show that it would have ensured Mr Vigeland invested the funds in a portfolio of investments broadly copying the role he performed at Ennismore but also with at least the same freedom of what he could do. If the Court accepts this then Fenris has proved causation and estimating Fenris' lost return is entirely a matter of assessment.*"

201. A detailed and important review of generous or liberal assessment then appears at paragraphs 55 following references to the *Apotex* case and the *SCF Tankers* case:

> "*55. This broadly corresponds to saying that the Court is entitled to wield the "broad axe" which it always wields in an exercise of quantification but it must do so in favour of the claimant in the inquiry to reflect the fact that it should not subject the claimant's case to over-eager scrutiny or minute criticism of the methodology. That is what, it is submitted, most of Ennismore's arguments invited the Court to do. Moreover, Fenris' methodology for calculating the lost returns by reference to a broad index habitually used by Ennismore should not have been but was subjected to minute criticism.*"

202. In the instant case justice cannot be done by looking at minute pictures but only at one much larger one.

203 There then follows a series of submissions as to Mr Vigeland's credibility, the valid point being made that there are no aspects of significant factual evidence on which Mr Blair and Mr Vigeland disagree. The Court would only add that either they were both honest or

they were both dishonest, and the Court prefers and accepts the former view over the latter view.

204. Having seen and heard Mr Vigeland give evidence, the Court was in no way alarmed by him or by his evidence.

205. In relation to the Plaintiff's protracted cross-examination as to Mr Vigeland's handling of the 4th Dominion Trust, the Defendant concedes that Mr Vigeland clearly did not understand the significance of Trust records, amending the instrument as he did, failing to keep the original instrument, failing to file a separate record of amendments and failing to redate the amended documentation. Lack of understanding is probably an understatement, but unless all of this somehow impinges on Mr Vigeland's credibility it is all immaterial.

206. No dishonest purpose or intention was posited by the Plaintiff, and as far as the Court could see the whole forensic exercise on this subject was unfortunately pointless.

207. In separate legal proceedings in England, Mrs Justice Asplin stated that she did not find him to be reliable and that he was extremely evasive. She preferred the evidence of Mr Andrew Blair and Mr Geoffrey Oldfield, although it is worth noting that she found them very argumentative and belligerent.

208. Likewise at first instance this in this matter Foster J considered Mr. Vigeland's evidence unreliable and unconvincing and unpersuasive.

209. In the context of this inquiry however the Court is unable to come to the same conclusion or to a similar conclusion as to Mr. Vigeland's credibility, nor does the Court find that there was any rational basis for it coming to any other view than it does.

210. This case does of course raise matters of considerable legal and factual significance but Mr. Vigeland's credibility in reality is not one of them.

211. The direct argument as to causation is taken up again at paragraph 85:

> "85. *The issue of causation is whether, but for the injunction, Fenris would have invested the funds in February or March 2009 in a portfolio of shares just as he had done at Ennismore. That involved longs in a small number of stocks and shorts in a variety of European equities as well as non-European equities. His investment universe was not restricted. It is not the case as Mr McMaster QC suggested that the Court is being asked to make some form of different case which Fenris has not put."*

212. In a real sense the most difficult issue in these proceedings arises not from the fact that the Defendant's investment universe was restricted but from the fact that it was not restricted.

213. An additional point is raises at paragraph 91:

> "91. *It was not suggested or put to Mr Vigeland that Fenris' purpose was to dissipate these funds. In fact he was not cross-examined about the purpose of the redemption. In those circumstances, Ennismore cannot challenge the evidence as to what Fenris would have done."*

214. This is persuasively developed at paragraphs 95-97:

> "95. *Mr Vigeland had made a living from the business of acquiring portfolios of shares and managing investments over a number of years.*
>
> *(a) Mr Vigeland had been employed by Ennismore from November 2001 initially as an investment analyst shares in EVF and/or ESCHF. He "started managing money" in June 2002.*

(b) *By 2006 Mr Vigeland had several years of success at Ennismore (having consistently outperformed Ennismore and the HSBC Index – as to which see below "Track Record").*

(c) *By then at the age of 35 and after 4 years he was managing over 25% of all of Ennismore's funds. It is worth noting that Ennismore was a reputable and successful fund manager.*

96. Mr Oldfield (one of the founders and current sole shareholder of Ennismore) told investors that "Mr Vigeland's passion and love of investing was obvious" from the first time he met him, "as was his in-depth knowledge of the oil industry" (see Mr Oldfield's letter B/3/17). Mr Blair confirmed this (Day 6 p149:5-10).

97. Mr Oldfield recognised Mr Vigeland's track record, telling investors "first-hand experience over the last five years has verified Arne's ability to translate those qualities into an excellent investment result. In my opinion he remains as passionate and focused on investing as he was 11 years ago." (B/3/17). Again Mr Blair confirmed this (Day 6 p150: 11-16)."

215. In light of the evidence in this case, an important observation is made and developed at paragraph 104, to the effect that Mr Vigeland's investment strategy from 2004 onwards had increasingly focused on a portfolio of short investments.

216. Significantly, the Court is also reminded at paragraph 104 (f) of this wider pattern of conduct too:

"(f) It is noticeable that there was a significant increase in the short exposure of Ennismore generally from the end of 2006 from an average short exposure of below 20% of NAV to an average well over 40% NAV (see B/5 ca p3 of the track record covering May 2005 to July 2009). This is consistent with a change in overall strategy at Ennismore and is reflected by the increase in Mr Vigeland's short exposure save that the started earlier from 2005 onwards."

217. The argument as to Fenris's role having or not having come to an end is set out at paragraphs 108-11:

> "*108. Mr McMaster QC's argument (see [33] p21) is that the sole purpose of [Fenris] came to an end when its association with Ennismore was terminated.*
>
> *109. This ignores the fact that Fenris had accumulated assets (whether or not it was required to do so) and in 2009 had to do something with those assets. The funds it invested represented part of the return it made when it managed funds. It did not spend any of these funds or seek to monetise them prior to end of 2008.*
>
> *110. It cannot therefore be said that there is an inference that Fenris and Mr Vigeland would have wanted to dissipate these funds at the conclusion of the relationship with Ennismore when Mr Vigeland would have needed to build up some form of income to earn a living.*
>
> *111. Ennismore suggests that the absence of preparatory steps shows Fenris was not about to launch a business Closing [44]-[46]. The questions missed the point that Fenris was in the process of recovering the redeemed funds and until and unless it did it could not start any business or manage those funds."*

218. Dissipation is addressed, inter alia, at paragraphs 141-142:

> "*141. Ennismore's suggestion that Fenris had always spent all it was paid is therefore factually incorrect. Fenris had always reinvested half of what it was paid at Ennismore. In fact it had not itself for its own purpose dissipated or withdrawn any or the investments. True, it was required to do so but it is incorrect to argue that there was a pattern of total withdrawn/dissipation of the funds paid. This had never happened.*
>
> *142. The fact that a substantial fund was invested in Ennismore's European Small Caps at the time of the injunction is also the obvious and principal reason why it cannot be said that, if there had been no injunction, Fenris would have been*

liquidated. To do so would have thrown away the investment opportunity that existed by having the services of Mr Vigeland available to it."

219. The striking off issue is addressed succinctly at paragraph 145:

"*145. Fenris was struck off at some point in 2008. The fact is that Mr. Vigeland did restore the Company's registration. He clearly considered that Fenris had assets and sought to redeem shares. Fenris had assets which could not be claimed unless the Company was restored."*

220. The Court is unable to see how this proposition can logically be disputed.

221. The duration of the injunction is then reviewed at length, a matter which the Court has had little difficulty in resolving in accordance with the interests of justice and the protection of rights.

222. An excellent argument as to quantification is set out at paragraph 169-170:

"*169. It is submitted that in determining the track record of Fenris and Mr Vigeland and in considering what portfolio Fenris would have had in the period 2009 to 2016 the Court is entitled to take a broad brush common sense view favouring Mr Vigeland with a more liberal approach. The hypothesis by this stage of the argument is that Fenris is only in the difficulty of not being able to show exactly what profits would have been earned on actual portfolio because the 2009 Order wrongfully deprived it of the ability of building a real portfolio. The hypothetical nature of the inquiry is due to Ennismore wrongfully obtaining the 2009 Order and it does not lie in its mouth to complain of the uncertain nature of this inquiry.*

170. Fenris'/Mr Vigeland's track record between 2002 and 2008 is a reasonable basis for ascertaining what level of performance could have been expected of him with

respect to the relevant portfolio. Despite a plethora of reports and lengthy examination, the track record is within broad terms reasonably clear."

223. The following summary analysis of Mr Vigeland's track record is found at paragraph 173, referring to a preceding table:

"(a) On average Mr Vigeland outperformed the HSBC Index even without taking account of 2002.

(b) He also outperformed Ennismore in every year apart from 2007 and 2008 when he nevertheless outperformed the HSBC Index.

(c) In this same period Ennismore only outperformed the HSBC Index in 2007 and 2008."

224. The Defendant also refers at paragraph 217 to the following exchange between the Court and Mr Croft:

"*Mr Justice McMillan: What I'm getting, and I'm afraid it is a very simplified level, was that in the investment world if someone has a pool of money, 2.3 million, and that person is able to construct an investment strategy, the usage of that money will not necessarily be limited to its face value, but once leveraged through long and short exposures may well have an enhanced quantification, if you will, assuming everything goes all right, could go the other way, in which case it would shrink, but the point I think I'm getting – you will correct me if I'm wrong – is that a fund such as 2.3 million in the hands of an experienced investor could have the potential to go much beyond its face value or to some degree beyond its face value as an investment seed money, never mind getting into profit.*

A Yes, my Lord."

225. A number of detailed submissions are made which again for reasons of brevity only the Court will refrain from setting out.

226. Instead, the Court now turns to the Defendant's central submission at paragraph 228:

> "*228. It is submitted that the Court taking a liberal view should award Fenris a sum which realistically represents its track record as a fund manager able to construct a portfolio of share investments that often beat the market by a significant margin. If it happens to be the case that a manager such as Fenris/Mr Vigeland can expect to outperform an index that rose steadily over this period there is no reason why the Court should not compensate him accordingly for being wrongfully deprived of funds."*

227. It is both a simple proposition and a crucial one.

228. The Court fully recognises that the culture in which the Plaintiff, the Defendant and Mr Vigeland operated was one of outperformance, or as it may be better described, one of positive absolute return.

229. The Court is accordingly invited to consider 3 alternative approaches, described as "*ranges*", at paragraph 235-236:

> "*235. The Court has a number of options and this can produce ranges:*
> *(a) The Norwegian AI Share Index:*
>
> *(i) annual compound return between 2009 and 2016 was 13.4 (i.e. it was stated by Mr Croft at 6.7% at A/20/30 [95] but like the figure of 3.6 for the OSESX it would need to be doubled if it was 100% invested – see Mr Croft at Day 8 p116).*
>
> *(ii) Taking that rate the Oslo All Share Index return during the Injunction period can be calculated as (1.134)^7.24-1=151.7%*
>
> *(b) The HSBC Index:*

(i) *The HSBC Index annual compound rate between 2009 and 2016 was 19.2 (i.e. 9.6% at A/22/3 at Answer (1) which as Mr Croft explains was 50% of total).*

(ii) *The HSBC return during the injunction period was 255.3% of the frozen funds (A20/14, Figure 4)*

(c) Ennismore's own returns:

(i) *The Ennismore returns during the injunction period was approx.(139.87/52.83) – 1= 164.8% (B5/3&5)*

236. The Court could take a blend of HSBC and Oslo All Share just as Mr Croft sought with the HSBC with the OSESX. Using an average of the two (255.3% + 151.7%)/2 or 203.5%. produces a return over the period of 203.5%. Using an average of HSBC and Ennismore's returns would produce (255.3 + 164.8)/2 or 210.05%."

230. The Court notes at this stage that bearing in mind the historical reliance of the Plaintiff on the HSBC Index a solution along the lines suggested in paragraph 236 may well not be inappropriate.

231. Finally, in paragraph 237 an argument is made that the Court should then include a possible uplift of 10% to take account of the fact that neither the Plaintiff nor the Defendant were what has been described as tracking and neither would have invested simply to return an index level of profitability.

<u>The Closing Submissions of the Plaintiff</u>

232. The Plaintiff in its Closing Submissions has summarized its case at some length at paragraph 2:

"Ennismore's Case in Summary

2. Ennismore's case in outline is as follows.

(1) *Fenris has the burden of proving that the injunction caused it a loss.*

(2) *Fenris' case on loss is that without the injunction the frozen money would have been retained by Fenris and managed by Mr Vigeland as he had managed money for clients of Ennismore. The Court should find that Fenris has failed to prove that this would have happened and has therefore failed to prove the loss that it has alleged.*

(3) *Fenris has chosen to advance no other case, probably for tactical reasons, and should therefore be awarded nothing on this inquiry.*

(4) *If, however, the Court finds that Fenris has proved that it suffered a loss by being deprived of the opportunity to make a profit through Mr Vigeland's investing the frozen money, the Court should set about quantifying the loss. This is in certain respects necessarily an imprecise task.*

(5) *In quantifying the loss the Court should:*

(a) make a finding about the start date and the end date for the period of loss;

(b) make a finding about the rate of return to award during this period; and

(c) make a finding about what sum to use as the principal sum for calculating loss.

That will allow the loss to be quantified, it may require a small amount of further work by the parties.

(6) *The findings that Ennismore will invite the Court to make will be:*

(a) A start date of 1 June 2009.

(b) An end date of 16 February 2012.

(c) A rate of return that corresponds to 50% of the average of the HSBC and OSESX index (in Euros) in this period (in fact in this period they are almost identical so one could in fact just take one or other index).

(d) The exact data required to perform the calculation is not available, but an indicative and fairly close calculation using data that is available is as follows:

(i) Rate of return of about 25% over the period.

(ii) Principal sum of about €2.2 million euros over the period.

(ii) Loss of 16 February 2012 €550,000.

(iii) Interest on loss of €550,000 under the Judicature Law from 16 February 2012 to (say) 16 February 2019 at a rate of 2.25%, being €86,625.

(iv) Indicative total €636,625."

233. The Court notes with some disquiet that the Plaintiff seeks to minimise, if not entirely eliminate, any consequences in respect of the undertaking which it provided to Mr Justice Quin. If this attitude were to be more generally adopted, courts would be most reluctant ever to grant any injunctions at all.

234. Turning to the details of the Plaintiff's Submissions, the Plaintiff states its criticisms of Mr Vigeland at paragraph 5:

"5. *Mr Vigeland was not a satisfactory witness because:*

(1) He would change his evidence to suit his case.

(2) He would try to evade questions when he didn't like the answer.

(3) He was combative in cross examination. He was answering not in an attempt to help the Court but in an attempt to win his (i.e. Fenris') case.

(4) He was reluctant to agree the obvious.

(5) He created two false versions of the trust document for the 4th Dominion Trust. They both bore false dates. Worse, he allowed one of them to go before the Court as the true document, when he now says it wrongly identified the beneficiary at the time as his heirs (in place of liberal political causes).

The Court observed all of this, but to refresh the Court's memory, certain examples are given below."

235. Over a ten year period, it would hardly be surprising if occasional inconsistencies were found in a person's testimony without his or her credibility being thereby impugned in the least.

236. Examples are given at paragraphs 6-14. The Court has read and considered the passages in question and it finds them to be of no significance whatever.

237. By way of perspective while Asplin J is said to have found Mr Vigeland not to be reliable, the learned judge has also described Mr Blair as very argumentative and

belligerent. This Court nonetheless makes no adverse finding as to Mr Blair on such a basis any more than it does as to Mr Vigeland on any basis.

238. The Plaintiff then analyses what it characterises as the Trust Document evidence. The problem is that while this evidence demonstrates to some extent Mr Vigeland's incapacities when it comes to the elements of trust administration, those incapacities have nothing to do with any issue in this case apart conceivably from credibility. Even within the context of credibility the Court finds that Mr Vigeland's evidence in this area was both honest and somewhat incoherent, and the evidence was somewhat incoherent only because his actions were somewhat incoherent and not because he was lying in any way.

239. The Trust Document analysis extends from paragraphs 16-19, and from pages 9-17. It is of no assistance to the Court despite the extraordinary reliance that the Plaintiff places upon it.

240. Quite frankly the Defendant is seeking damages arising from an express undertaking to the Court. This inquiry is not about Mr. Vigeland's personal and professional reputation.

241. At paragraph 20 the Plaintiff states that the Court needs to be vigilant to ensure that its sense of fairness is not abused. The Court agrees.

242. Turning to the claim, the Plaintiff very properly cautions at paragraph 21 against exaggeration and for careful and skeptical scrutiny. This approach is in principle

compatible with the legal authorities and the guidance which have earlier been identified in this Judgment, and there is no necessity at this stage for the Court to repeat them.

243. The Plaintiff's contention that the party seeking compensation under an undertaking bears the burden of proving that the loss claimed was caused by the injunction is in broad terms generally correct (paragraph 27).

244. However, this generalized proposition must be broken down into its various sequential elements and not simply used as an excuse to pay someone nothing.

245. At paragraph 28, the Submission in part state:

> *"28. Where it is said that the injunction has caused a loss by preventing the applicant from pursuing a course of action that would have been profitable, the correct approach is that applicant bears the burden of proving on the balance of probability that had there been no injunction it would have pursued that course of action and, if he does so, the loss caused by being prevented from doing that can be assessed on a loss of chance basis. We refer to the following authorities, relied upon in opening."*

246. Unfortunately this definition fails in this paragraph at least to identify the concept of effective cause, and it also fails to mention in terms of remoteness proof as to the kind or type of loss allegedly incurred. It is only when those features have been properly addressed that one can then go on if appropriate to look at assessment and evaluation

247. A threshold argument is then made that no proof or no sufficient proof arises that if there had been no injunction liquidated clawback assets would have been paid to and retained by the Defendant.

248. The argument is developed in this way at paragraph 30:

> "*30. Unless Fenris succeeds in showing that this would have happened, then Fenris has failed to show it has suffered a loss. This is not a question about whether something happened or did not happen. It is not a question of historical fact but a hypothetical question about whether something would have happened if there had been no injunction. It is a question that can only be answered by inference from all the circumstances. Fenris bears the burden of proof and Fenris must show circumstances that support the inference it asks the Court to draw. The relevant circumstances are set out below and examined, this approach is taken to show that the circumstances do not support the inference, not in an attempt by Ennismore to prove or disapprove anything.*
>
> *31. One undeniable fact is that there is no evidence that shows that Fenris was in the process of gearing up to start an investment business, which was then stopped in its tracks by the injunction. There are therefore no preparatory steps to which Fenris can point in support of the inference that it argues the Court should draw."*

249. With great respect, the proof upon this issue is far from being based only on inference. Mr Vigeland directly states at paragraph 18 of his Witness Statement dated 17 November 2017 that but for the injunction, he would have been able to invest the sum of EUR 2,316,591.65 on behalf of the Defendant Company throughout the injunction period. In effect, Mr Vigeland is saying that he would have been able to invest and would have done so, not that he would have been able to invest and would not have done so. He has also directly indicated as we have seen in oral testimony that he would have sought investment opportunities.

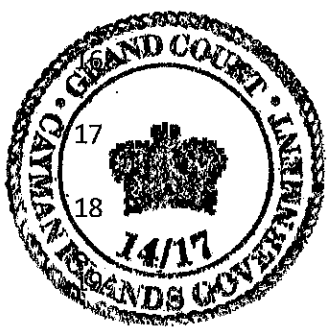
250. At paragraph 33 the Plaintiff contends that the Defendant was a "*shell company whose purpose was to receive money from Ennismore for onward transmission.*" For the Plaintiff now to describe Fenris as a shell company when it has been deprived of its funds in the first place is extremely misconceived.

251. The striking off of the Defendant then features to paragraphs 37-39, a matter which this Court regards as no more than a minor or an even miniscule event in the circumstances of this case.

252. Ultimately, the question of whether the Defendant would or would not have invested the funds had they been available is a matter of fact. Mr Vigeland has asserted that they would have been so invested, and frankly on a balance of probabilities the Court believes him and it has no difficulty whatever in doing so.

253. The Plaintiff strongly disputes whether the Defendant would have retained and invested its funds, managed by Mr Vigeland in the same way and following the same strategy as at Ennismore, due to lack of preparatory steps (paragraph 47). Once again, we return to the question of Mr Vigeland's credibility. The submissions state at paragraphs 49-50:

> "*49. Mr Vigeland has been able to produce no document reflecting the intention he claims to have. There are no emails containing enquiries of service providers about the terms on which they might provide services, no evidence of any exploratory dialogue. The only evidence of intention comes from Mr Vigeland himself and it is thoroughly unreliable. There is otherwise no evidence from which the Court can infer an intention to start a business investing in small caps at this time.*
>
> *50. The Court is asked to infer that nevertheless Fenris would have embarked on just such a business. With no evidence of intention the court might want to consider whether there is evidence of appetite to do this that might, absent evidence of actual intention, support an inference that this would happen. The sole director of Fenris was Mr Vigeland so it is evidence that Mr Vigeland had an appetite for doing this in February 2009 that the court is looking for."*



254. The argument continues at paragraph 53:

> "*53. By the end of 2009 Mr Vigeland had experienced a period of two and half years of declines in value in his small cap investments. He is unable to point to a run of success prior to the injunction in support of an inference that he would have*

invested in small cap equities because he had previously enjoyed success in doing so. Indeed examination of the record shows losses in all three of his funds for two and half years running, ending in the ignominy of having the fund with his name liquidated within two years of starting up."

255. Two points immediately occur. First, notwithstanding the contention that Mr Vigeland's record ended in the ignominy of having the fund liquidated within two years of starting up, it is not irrelevant that the Plaintiff caused the liquidation at the most unsound and misguided point that it could have do so. Secondly, there is manifested a strange assumption that the Defendant is not free to deal with its own resources as it sees fit. In other words the Defendant should only be dealing with them as the Plaintiff sees fit. The Court finds this attitude to be more than a little odd.

256. Reliance is then placed on the terms of the letter from Ogier on 8 May 2009 (paragraph 54). However, the desire to reinvest the redemption proceeds in corporate bonds in preference to the Plaintiff otherwise investing them is both consistent with the language in the letter and with the contemporary lack of confidence between the parties. Ultimately what the Defendant did with its money was the Defendant's business.

257. The Plaintiff returns to the theme at paragraph 62:

"62. The Court can therefore see that the situation in which Fenris is entitled to nothing if it cannot prove it would (a) have retained and invested the frozen

money and (b) invested the frozen money in small caps through Mr Vigeland is a situation entirely of Fenris' choosing."

258. This proposition seems to the Court to ignore the fact that once the Defendant proves on a balance of probabilities a loss of the kind or type alleged, viz., an investment loss, the quantification of that loss is then an entirely separate matter.

259. Then there follows a series of submissions as to the duration of the undertaking, a matter which the Court has had no difficulty in resolving in favour of the Defendant for the reasons previously set out.

260. The Plaintiff then argues as to how a notional Fenris fund would have been constructed in any event, as indicated at paragraph 74:

"*74. The difficulty for the Court, if it concludes that Mr Vigeland would have been investing the frozen money for Ennismore* [sic], *is in deciding what outcome might have resulted. That is fundamentally a question about how his portfolio might have been constructed. In order to assess loss from being deprived of the opportunity to invest the Court has to take some broad view about the way in which his portfolio would have been constructed. Ennismore submit that the Court ought to proceed on the following basis:*

(1) The portfolio would have followed the same long/short strategy as Mr Vigeland had followed at Ennismore.

(2) The stocks would have continued to have the same bias as Mr Vigeland's stocks had had at Ennismore (towards Norway and Energy).

Both of these were consistent features of the way Mr Vigeland managed money at Ennismore."

261. The Plaintiff in addition argues for a conservative investment strategy at paragraph 77:

"*77. Long/short strategy. If the Court assumes a long/short strategy it is submitted the Court should assume a 50% net long position. At trial Mr Lowe has argued for a different assumption (more than 50% net long) – because it would yield a greater return than the 50% figure. But the Court should be looking to make a reasonable assumption and the 50% figure is supported by:*

(1) The breakdown for the EVF, see e.g. E/7/130, which shows that, if anything, the position was less than 50% net long over time.

(2) The breakdown for the ESCHF and ESCF, see for example (E/7/180 and 181), which shows a 50% net long position.

(3) Perhaps most tellingly of all, Question 17 on D/7/56 (Fenris' own question) and assumption g ("the net exposure was on average 50% of NAV"). This is the very assumption that Fenris asked Mr Croft to make.

(4) Mr Lowe put questions about the investor presentation D5. That refers to a range of 50 to 70%. It is legitimate to look at this, but this is a statement about what was expected in the EVF and it was not in fact borne out by what happened (see point (1) above).

(5) *If looking at the past we see figures for the position D5/13 from 2006 to date giving an annualized net long very close to 50% (54%), 2005 was 65, 2004 was 69 and 2003 was 8.*

(6) *Looking at these sources it is difficult to resist the assumed figure provided by Mr Vigeland himself of 50% net long. It being generous to Fenris might take a figure of 60%, but taking all sources this is on the high side."*

262. These submissions fail to take into account that freed from the constraints of the Plaintiff's business operations the Defendant could invest in the type or kind of investments that it saw fit to invest in without constraint and in the absence of other investors whose funds might need more conservative protection, utilising an aggressive shorting strategy if it so wished. The risks would increase, but so too might the rewards.

263. The Plaintiff has also provided written Reply Submissions.

264. In the Plaintiff's Reply Submissions, the point is made in paragraph 1 that the Plaintiff is not a wrongdoer: it is not wrong to seek interim relief and it is not wrong to persuade the Court that interim relief should be ordered. The point is elaborated upon at paragraph 1 (5):

"*5. This is about enforcing an undertaking. That undertaking is not extracted because the court regards the plaintiff potentially as a wrongdoer in the event that it fails on the underlying cause of action. It is extracted purely because the law recognises that at the time of granting the injunction it cannot be sure who is*

right and it wants to make good any harm caused to the defendant if the defendant turns out to have been right. That does not make the Plaintiff a wrongdoer."

265. Unfortunately the Plaintiff's position logically is not only that no harm has been done to the Defendant but also that if any harm has been done to anyone else, it is simply their problem alone and no one else's. A party who adopts that kind of thinking requires a high degree of scrutiny. The undertaking was given to the Court and it is the responsibility of the Court to ensure that it is not circumvented, undermined or negated. The fact that the Plaintiff is not a wrongdoer in seeking an injunction as such does not mean that it should be shielded from its own actions when it was not entitled to do as it did.

266. At paragraph 6 the Plaintiff states that it is wrong to conclude that the inquiry into damages that would follow the freezing order should be conducted on different principles from the inquiry into damages that would follow the grant of any other order. This Court is concerned with how the principles of causation, remoteness and quantification operate in circumstances which have arisen in relation to financial investment. The circumstances appear to be unique to these proceedings and it is only these proceedings that concern us.

267. More fundamentally the Plaintiff displays a serious conceptual error at the conclusion of paragraph 7:

"7. *The point is that proof of loss and establishing causation are distinct and no principle applicable to establishing causation can diminish the proposition that loss has to be established on the balance of probabilities."*

268. Proof of actual damage is one issue, proof of foreseeability of the kind or type of damage is a second one, and quantification, which does not require proof on a balance of probabilities because it is impossible to prove in that manner, is a third issue. Here it is alleged that the Defendant suffered some damage, that the kind or type of damage was foreseeable, and that the amount of damage can be quantified. These are obvious phases of the inquiry, regardless of how the Plaintiff attempts to redefine the process or the sequence.

269. Various arguments are put forward to support the premise that the injunction did not cause loss after the date of the Judgment of Foster J. One argument proceeds as follows at paragraph 9 (5) (f):

"... *The judgment obliterated the injunction because it moved from a regime of frozen money to which title was in dispute and which F was restrained from dealing with to a regime where the money was not frozen, but in law unconditionally belonged to E.*"

270. This is rather like saying to the victor go the spoils of victory, but only when the Plaintiff is the victor.

271. The Court considers it is fundamental that upon the assumption that the undertaking was given in good faith it should be honoured in good faith as well.

272. The Plaintiff complains yet again that the Defendant has failed to prove that it would have otherwise retained the clawback investment, and that the Defendant is quite unable to point to any history of retention in support of the inference which it wants to draw. Equally the Defendant can point to there being no history of termination in similar circumstances, thus requiring it to make other arrangements for its future survival. The Plaintiff has already made a mistake in commencing the proceedings, and instead of mitigating the consequences its arguments would compound them.

273. In summary, a wide array of points has been raised, not all of which the Court has considered necessary to set out. They reveal that at every turn the Plaintiff has done its best to abnegate its responsibilities. This may not be wrongdoing but neither is it an exercise of prudence.

The Findings of the Court

274. The Defendant has clearly stated at paragraph 19 of the Defendant's Points of Claim that had Fenris been able to dispose freely of its assets, it would have made these freely available so that Mr Vigeland could have re-invested the proceeds on Fenris' behalf of the period between 27 February 2009 and 25 May 2016. Then in paragraph 22 it alleged that it has suffered loss and damage, being the lost profit it would otherwise have been able to make or the lost opportunity to have its funds invested profitably. All of this as we have seen is exhaustively contested by the Plaintiff.

275. In this regard the Court reminds itself of the comment by Norris J in the *Apotex* case that the Court should not be over eager in its scrutiny of the relevant evidence or too ready too subject Apotex's methodology to minute criticism.

276. Henderson J adopts a similar approach in the *Sagicor* case, stating at paragraph 103 that his approach towards causation cannot be an overly rigid application and must rely upon a common-sense assessment of the evidence.

277. With this instructive guidance in mind, the Court has carefully considered the evidence in this case as to causation of loss, also generally described as proof of damage. The Court has found Mr Vigeland to be a credible witness in terms of this inquiry.

278. Based upon Mr Vigeland's direct evidence to the effect that the Defendant was deprived of its funds and but for the injunction would have invested those funds, the Court has no hesitation at all in finding that this allegation has been proved to the Court's satisfaction upon a balance of probabilities.

279. Although numerous and unsuccessful attempts have been made by the Defendant to impugn Mr Vigeland's credibility, it is significant that no material evidence has been put forward which expressly contradicts what he has said. Obviously that is because there is no such direct evidence.

280. In addition, the Court has previously indicated that based upon the circumstances arising it is open to the Court to draw such inferences as it sees fit in the normal and conventional way.

281. It is clear to the Court that where the Defendant has been deprived of the opportunity to re-invest its own resources it can and should be inferred that this deprivation has caused the Defendant at least some significant loss as distinct from nominal loss or no loss.

282. This view is entirely consistent with the view expressed by Henderson J in the *Sagicor* case at paragraph 95:

> "*95. The burden of proof rests with the Hurlstone parties to establish that any damage they say have suffered was indeed caused by the injunction and not by any other event or circumstance. Having said that, I adopt as a useful guide the words of Mason, J. in Air Express Ltd. v. Ansett Transp. Indus. (Operations) Pty. Ltd. (1) (146 CLR at 332):*
>
> *"Unless the circumstances indicate otherwise, when it appears that damage flows from the non-performance of an act and the performance of that act has been restrained by an interim injunction, the inference will generally be drawn that the damage has been occasioned by the injunction."*

283. It remains necessary for the Court to reiterate that in terms of the party bearing the loss this Court is also satisfied on a balance of probabilities that the Defendant is not a shell company but a substantive one, and moreover a company that has suffered a real loss and not a fictitious one.

284. Moving forward to the next phase, this Court takes fully into account the rule as to remoteness of damages summarised at paragraph 56 of this Judgment. Loss has arisen naturally, i.e according to the usual course of things, from an investment entity being wrongfully deprived of its assets. The Court finds with no difficulty on a balance of probabilities that investment loss is a loss of the kind which the Plaintiff when it sought the 2009 Order ought to have realised and did realize was not unlikely to result from the injunction ultimately having been improperly obtained. Put in summary form, the Plaintiff wanted the injunction and obviously it came at a "*price*".

285. The Court now turns to the issue of quantification or assessment of loss. As we have seen, McCombe LJ states in the *Abbey Forwarding* case that the party giving the undertaking should have reasonably foreseen loss of the type that was actually suffered and not the particular loss within that type. This is a critical and important principle in the context of the instant case.

286. Beatson LJ in the *SCF Tankers* case described an exercise that will often be imprecise. In the *Fiona Trust* case Stuart-Smith LJ considers that "*a liberal assessment of the Defendant's damages should be adopted.*"

287. Finally as we have also seen Lord Reed in the *One-Step* case adopting dicta of Toulson LJ recognizes that some forms of consequential loss are not capable of precise calculation "*because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the Defendant's wrongful conduct as distinct from things which have happened.*"

288. The widely approved course in circumstances such as the present ones is not to abandon measurement of the loss but instead to approach it as the exercise of a sound imagination and the wielding of the broad axe. The Court is necessarily constructing and therefore imagining a situation which never arose because Ennismore prevented it from arising.

289. Proof of the impossible is not of course required. What is required is assessment with a view to compensation. It is a protective practice to meet the justice of the matter.

Conclusion

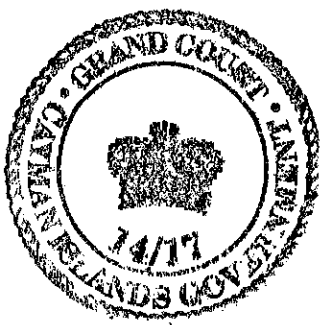
290. Accordingly the Court has examined in detail the range of options which has been presented, primarily but not exclusively by the Defendant.

291. The Court bears in mind that prior to the ending of their professional relationship that Ennismore and Mr Vigeland had a shared investment philosophy and a shared sense of priorities and aspirations. The Court also recognises what might be described as a

historical affinity between Ennismore's returns and those of the HSBC Index. In terms of fairness, the Court considers a solution based upon those two factors to provide proportionate and measured compensation.

292. Based upon this reasoning, the Court rules that in terms of compensation over the period which the Court has identified the Court will use an average of HSBC and Ennismore's returns, producing a blended figure of 210.05% of the original injuncted amount. This option is in fact set out at paragraph 236 of the Defendant's Written Submissions.

293. Finally, in regard to compensation the Court is also fully aware of the potential opportunities that can result from an aggressive shorting strategy. The Defendant has indeed requested at paragraph 237 that the Court should adopt in addition to the option amount now identified a further uplift of *"say 10%"* to take account of the fact that neither Ennismore or Fenris were tracker oriented in their strategies and that neither would have invested simply to meet an index return. The Court recognises and directs that there be a 10% uplift, both for the reasoning identified in paragraph 237 and also because of the potential shorting opportunities which Fenris was denied.



294. The Court directs that a further hearing take place so that figures can be finalized which accord with the rulings in this Judgment. The Court at that time will also address the matter of statutory interest and such other consequential matters as may arise.

Robin McMillan

THE HON. JUSTICE McMILLAN
JUDGE OF THE GRAND COURT

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