IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT, FINANCIAL SERVICES DIVISION

Civil Appeal No. 11 of 2019
(Formerly Cause No FSD of 2009 (RMJ))

BETWEEN:

ENNISMORE FUND MANAGEMENT LIMITED

Appellant

-and-

FENRIS CONSULTING LIMITED

Respondent

Appearances:	**Peter McMaster QC and Daniel Hayward-Hughes of Appleby (Cayman) Ltd for the Appellant** **Tom Lowe QC instructed by William Jones of Ogier for the Respondent**
Before:	**The Rt Hon Sir John Goldring (President)** **The Rt Hon Sir Bernard Rix** **The Hon Sir Richard Field**
Heard:	**18 and 19 November 2019**
Draft Circulated:	**26 February 2020**
Judgment Delivered:	**15 April 2020**

JUDGMENT

Sir Richard Field

Introduction

1. This is an appeal against the order dated 11 April 2019 made by Justice McMillan that the Appellant ("EFML") should pay €5,354,601.07, plus interest of €339,320.34, to the Respondent ("Fenris") pursuant to EFML's cross-undertaking in damages given in respect of a freezing order made on 27 February 2009 against Fenris until determination of the EFML's claim in the action or until further order.

The relevant background facts

2. EFML is a fund manager incorporated in England. At the material time the funds managed by EFML were Ennismore European Smaller Companies Hedge Fund ("ESCHF"); Ennismore European Smaller Companies Fund ("ESCF"); and, from 2006, Ennismore Vigeland Fund

("EVF"). Under EFML's management, all three of these funds invested in European Small Cap Equities ("Small Caps"), namely shares in companies listed on European exchanges with a market capitalisation of approximately between €200 million to €3 billion. EFML managed the funds on an absolute return basis, seeking to make a return whatever the state of the market.

3. ESCF's shares were denominated in GBP, however daily prices were given in Euros as well as in GBP. The shares of ESCHF and EVF were denominated in Euros.

4. EFML employed fund managers/investment advisers (hereinafter "fund managers") with responsibility for portfolios of shares invested on behalf of the funds. A significant part of the annual remuneration EFML paid to its fund managers consisted of a discretionary bonus. This was a percentage of the increased value of the portfolios in question (net of allocated costs) which had contributed to EFML's entitlement to a performance fee as agreed between EFML and the funds it managed. 50% of the annual bonus was paid to the individual fund manager in cash and the other 50% ("the retained bonus") was invested in the name of the fund manager in the funds managed by EFML and was subject to a right of "clawback" by EFML if, in any of the next three years, the investment adviser's portfolio generated "negative value added" i.e. made a loss compared with the previous year.

5. In November 2001, EFML employed Mr Arne Vigeland, a Norwegian national, as an analyst. Mr Vigeland has a BSc in Business Administration from Bath University and an MSc in Finance from the London Business School. EFML promoted him to the position of fund manager in 2003. In May or June 2004, Mr Vigeland relocated to Norway and from June 2004 to 2009 his services to EFML as a fund manager were provided through Fenris in accordance with the terms of a consultancy services agreement made between Fenris and EFML ("the Consultancy Agreement").

6. Mr Vigeland was appointed fund manager/investment adviser of EVF following its incorporation in December 2006.

7. The performance of Mr Vigeland's portfolios earned him/Fenris a discretionary bonus for the years 2003 to 2006. On 6 April 2006, EFML, Fenris and Mr Vigeland entered into a written "Clawback Agreement" which consisted of three Sections under the following headings: "Background", "Principles of Clawback" and "Amounts subject to Clawback in respect of 2005".

8. The retained bonus earned by Fenris in respect of the year 2005 was invested by Fenris by subscribing for 8,034.1 shares in ESCHF in May 2006. The retained bonus earned by Fenris in

respect of the year 2006 was invested by Fenris by subscribing for 14,049.69 shares in EVF in February 2007.

9. Fenris earned no bonus in respect of the years 2007 and 2008 because the portfolios it managed sustained losses in those years.

10. On 17 December 2008, Fenris sent to EFML (addressed to EVF's Administrator) a redemption request for 75% of the shares it had acquired in EVF in February 2007 as retained bonus, namely 10,537.27 shares. On 31 December 2008, EVF complied with Fenris's redemption request. That left Fenris with 3,512.42 shares in EVF.

11. On 19 January 2009, EVF was placed in voluntary liquidation.

12. On 29 January 2009, Fenris sent a redemption request in respect of its 8,034.1 retained bonus shares in ESCHF and those shares were redeemed on 2 March 2009.

13. On 5 February 2009, EFML informed Fenris that they did not require Fenris to provide it with the services of an investment manager with immediate effect. The Consultancy Agreement provided for termination on the giving of two months' notice and thus the agreement terminated on 5 April 2009.

14. EFML claimed that it was entitled to clawback the retained bonuses attributable to the years 2005 and 2006 by reason of the losses suffered by the portfolios managed by Fenris acting by Mr Vigeland in 2007 and 2008. Fenris denied EFML's claimed entitlement.

15. On 27 February 2009, EFML obtained an *ex parte* injunction ("the injunction") granted by Quin J which in relevant part provided:

> 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:
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> (a) Any and all redemption proceeds relating to the 10,537.27 shares in the name of the Defendant in the Ennismore Vigeland Fund;
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> (b) Any and all distributions to be made from the liquidation of the Ennismore Vigeland Fund in respect of the 3,512.42 shares held in the name of the Defendant; and
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> (c) The 7,828.22 shares in the Ennismore European Smaller Companies Hedge Fund held in the name of the Defendant.

16. Quin J's order set out the cross-undertaking given by EFML that "[i]*f 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*".

17. Following the grant of the injunction, the shares in Fenris's name in EVF and ESCHF were converted into cash and, pursuant to an order made by Foster J, the resulting fund of €2,267,762.36 (including liquidation distributions) was frozen by being paid into an account ("the joint account") with the Bank of Butterfield in the joint names of "Appleby and Ogier Cause 90 of 2009".

18. By letter dated 8 May 2009 from Fenris's solicitors (Ogier) to EFML's solicitors (Appleby), Ogier, mistakenly believing that the bulk of Fenris' retained bonus was still invested in EFML's funds, proposed that Quin J's order should be amended to enable Fenris to redeem its remaining shareholding in ESCHF and to invest the proceeds and all distributions received from the estate of EVF in corporate bonds. The key passages in this letter read:

> 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.
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> 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.
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> 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.
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> 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.

19. EFML's claim that it was entitled by way of clawback to: (i) the redemption proceeds of the 10,537.27 EVF shares; (ii) all distributions in respect of the remaining 3,512.42 EVF shares; and (iii) to have transferred to it the 7,828.22 ESCHF shares in Fenris' name, alternatively damages for breach of the Clawback Agreement, was tried by Foster J in December 2011. EFML contended that it could clawback the same percentage of the net investment loss suffered by the portfolios managed by Fenris as had been used to calculate the original bonus. Fenris argued that EFML was only entitled to clawback the retained bonus if there had been a reduction in the performance fee earned by EMFL which was attributable to the loss made by the Fenris portfolios. Foster J held that on the true construction of the Clawback Agreement, having regard to the whole agreement and the surrounding factual background, EFML's construction of the Clawback Agreement was correct and ordered on 16 February 2012 that the sum of €2,038,099.17 (being the balance of the fund in the joint account after permitted withdrawals to go towards Fenris's legal costs) be paid to EFML from the joint account. On 28 February 2012, Fenris' application for a stay pending appeal to this court of enforcement of the order of 16 February 2012 was dismissed by Foster J and the sum of € 2,038,099.17 was duly paid to EFML.

20. On 16 April 2014, the Court of Appeal overruled Foster J's decision, finding that under the Clawback Agreement, clawback was to be measured by applying the bonus percentage to the reduction in EFML's performance fee attributable to the losses on the portfolios in question, which was not the case EMFL had pleaded or set out to prove.

21. On 19 April 2016, EFML's appeal against the decision of the Court of Appeal was dismissed by the Privy Council which upheld Fenris' interpretation of the Clawback Agreement.

22. On 25 May 2016, EFML repaid the sum of € 2,038,099.17 to Fenris.

The parties' cases in the inquiry as to damages

23. Fenris' pleaded case in its Points of Claim was that by reason of the injunction it had been deprived of the opportunity it would otherwise have taken of investing in the period 27 February 2009 to 25 May 2016 all of the assets frozen by the injunction which Fenris alleged

were worth €2,316,591.65[1] in a portfolio of European Small Cap Equities ("European Small Caps") adopting much the same investment strategy Mr Vigeland had employed before 2007/2008, which investment would have out-performed the benchmark HSBC Smaller European Return Index ("the HSBC index") by an annual average of around at least 10 percentage points per year.

24. The HSBC index is an equities index that EFML sometimes used to compare its own returns. It comprises the total investment returns of several hundred companies across Europe.

25. In his 6th affidavit dated 30 September 2016, Mr Vigeland produced two tables of figures. The first set out for each of the years 2002 to 2008 the HSBC index return, the Fenris/Vigeland return, the difference between the two returns, the compound period return, and the geometric average annual return in respect of the portfolios managed by Mr Vigeland and Fenris. The figure for the geometric average of the extent by which the Fenris/Vigeland return exceeded the HSBC index was 10.5%.

26. The second table set out the HSBC index return for each of the years 2009[2] to 2016 from which Mr Vigeland calculated that the HSBC index's total return for this period was 249.9%.

27. In paragraph 33 of this affidavit, taking the period covered by the injunction to be 7.24 years and the average geometric HSBC index to be 18.9% per year during this period, Mr Vigeland concluded that Fenris would have expected to outperform the HSBC index by 10.5 % per year, and would therefore have made an average geometric return of 29.4% per year and a total return of 547.0% during the injunction period, in consequence of which Fenris's loss was €2,316,591.65 x 547.0% = €12,671,141.68[3].

28. Exhibited to Mr Vigeland's 6th affidavit was a document issued by EFML entitled "Ennismore European Smaller Companies Fund return since inception 27/01/1999 – 30/06/2016" which compared ESCHF's returns to the returns of the HSBC index and the MSCI Europe Large Cap Index. The document also contained detailed stock by stock performance reports of the portfolios managed by Fenris/Mr Vigeland showing both the long and the short investments.

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[1] As already stated, the sum paid into the joint account including the proceeds of the sale of the injuncted shares and the liquidation proceeds was €2,267,762.36, which sum was reduced to €2,083,099.17 by withdrawals to go towards Fenris' legal costs as permitted by Foster J.

[2] The returns for January and February were excluded because these months were outside the injunction period.

[3] The tabulated figures and the calculation of Fenris' loss set out in this affidavit were repeated without alteration in Mr Vigeland's first witness statement dated 17 November 2017.

Further such performance reports showing both the long and short investments made by Vigeland were disclosed by EFML in the course of the proceedings.

29. Fenris served a supplemental witness statement of Mr Vigeland shortly before the trial in response to the first report of the jointly instructed expert witness, Mr David Croft. In this report (in addition to other matters) it was pointed out that the HSBC index had been sold to Euromoney and Mr Croft had used the data for this index which was available from Bloomberg utilising the appropriate identifier. Mr Croft also expressed the opinion that Mr Vigeland's projected returns would be better compared to the Oslo Bors Small Cap Index ("OSESX index") than to the HSBC index. In his supplemental witness statement, Mr Vigeland revised his loss calculation made in his 6th affidavit and first witness statement to take account of the HSBC index returns used by Mr Croft and to correct an error made in the figures he had used in calculating Fenris' loss in his 6th affidavit and first witness statement. The revised loss quantified by Mr Vigeland was €20,416,960.69 which was calculated on the basis that the invested funds would have outperformed the HSBC index by 17.7% p.a. over the 7.24 years, giving an annual return of 37.2% or a compound percentage loss of 886.6%.

30. Fenris placed reliance on a letter to investors announcing the launch of EVF from Mr Geoff Oldfield, one of EFML's founders, in which reference was made to Mr Vigeland's passion and love of investing and his ability to translate these qualities into excellent investment results. An "Investor Presentation" issued by EMFL in connection with the launch of EVF set out respectively the capital with which Mr Vigeland had been provided and the gross returns he made thereon in the years 2003 to 2006 as follows: €19 million/46%; €51 million/33%; € 100 million/21% (in the first 8 months of the year).

31. Fenris did not advance any alternative case that it had suffered a generic investment loss by reason of having been denied the opportunity to invest the frozen funds. Nor was it suggested that Fenris' claim could be sustained by reference to a loss suffered by a person other than Fenris, for example, Mr Vigeland himself.

32. EFML put Fenris to proof of its pleaded loss. It strongly challenged Fenris' case that the frozen funds would have been invested by Fenris in a portfolio of European Small Caps throughout the period 27 February 2009 to 25 May 2016. It contended that Fenris' claim was an adventurous one made with the hindsight knowledge of the upward movement of the HSBC index over the period in question, particularly in the period April to June 2009. In challenging Fenris' claim, EFML relied, inter alia, on the following: (i) Fenris' view as expressed in Ogier's letter of 9 May 2009 that the retained bonus should be invested in corporate bonds rather than left in EFML's Small Caps funds due to the volatility in the markets at that time and the losses

accruing to the value of Fenris' investment in ESCHF; (ii) the evidence given by Mr Vigeland at the trial before Foster J that: (a) the cash element of the bonuses (GBP 3 million) received by Mr Vigeland and Fenris was transferred away and invested in Mr Vigeland's "pension trust" save for £26,000 retained by Fenris; and (b) the intended destination of the retained bonus was The Fourth Dominion Trust which was a trust for the support of liberal political causes; (iii) the evidence that showed that Fenris' sole purpose was to receive money from EFML for onward transmission elsewhere; (iv) the fact there was no evidence other than Mr Vigeland's say so that Mr Vigeland had been gearing up to invest or intended to invest the retained bonuses in European Small Caps at the time the injunction was granted on 27 February 2009; (v) the fact that Mr Vigeland's share portfolios had made losses from mid 2006 and all of 2007 and 2008 as shown in figure 3 of Mr Croft's first report; (vi) rather than invest the US$200,000 he had available at the time of the injunction in European Small Caps, Mr Vigeland had used this sum in about October 2009 to acquire an indirect 40% stake in a Bermuda based company, Acorn Geophysical Ltd ("Acorn"), which went on to make substantial profits undertaking seismic surveys in several African countries that had potential for oil exploration and from which dividends of US$ 5 million, US$ 2.5 million and US$ 625,000 respectively were paid by Acorn in October 2014, July 2015 and August 2015; (vii) the frozen monies when eventually paid were paid to SJI Investments Ltd which became the sole owner of Fenris and there is no evidence these monies were used to invest in a portfolio of European Small Caps.

33. EFML also submitted that, for the following reasons, the period during which Fenris was prevented by the injunction from using the frozen monies ended when Foster J made his order awarding the monies to be paid out to EFML on 16 February 2012: (i) the injunction was expressed to run "pending determination of the Plaintiff's claim in this action" which meant until judgment; and/or (2) the reason Fenris could not access the frozen funds after 16 February 2012 was that, following Foster J's order of that date, the monies were lawfully in the hands of EFML.

The key findings made by Justice McMillan ("the judge").

34. The judge's key findings were:

> (1) The undertaking did not cease once the frozen funds were ordered by Foster J to be paid to EFML on 16 February 2012, but endured until 25 May 2016 when EFML paid over to Fenris the money it had received pursuant to the order of Foster J. This was because: (i) the word "determination" in paragraph 4 of the injunction was to be construed as meaning "final determination" (para 82); (ii) the direction in para 3 of Foster J's order of 16 February 2012 that 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 ... held in an account with Bank of Butterfield ..." [emphasis supplied], perpetuated the injunction's operation so that the injunction "was a significant determinant operating cause of loss which did not cease on 16 February 2012" (paras 87 – 88).

(2) Mr Vigeland was an honest, reliable and credible witness and the Court accepted his evidence that, but for the injunction, he would have invested the total value of the frozen assets (€2,316,591.65) throughout the period 27 February 2009 (the date of the injunction) to 25 May 2016 (the date EFML paid the frozen funds over to Fenris) in a portfolio of European Small Caps adopting the same investment strategy he had employed before 2007/2008 (paras 94, 123, 249, 252 & 278).

(3) On the basis that there was an historical affinity between EFML's returns and those of the HSBC index resulting from the shared investment philosophy and sense of priorities and aspirations between EFML and Mr Vigeland, in quantifying Fenris' losses, the Court would take an average of the returns of the HSBC index and those of EFML, namely a blended figure of 210.05%, of the original injuncted amount (paras 291-292), with a 10% uplift to take account of: (a) the fact that neither EFML nor Fenris were tracker oriented in their strategies and did not invest simply to meet an index return; and (b) potential shorting opportunities of which Fenris had been denied (paras 291 – 293).

EFML's grounds of appeal

35. Put shortly, EFML contends that:

(1) The judge's finding that, but for the injunction, Fenris would have invested the frozen monies in a portfolio of European Small Caps managed by Mr Vigeland in the same way as he had managed funds during his time at EFML resulted from the judge misdirecting himself, taking into account matters he should have put to one side and failing to take into account matters he should have taken into account. In particular:

(a) the judge misunderstood the reference in the authorities to the undertaking being the "price" an applicant has to pay for an interlocutory injunction and proceeded on the basis that there was a presumption of significant loss for which EFML must pay substantial compensation;

(b) the judge misdirected himself as to how Fenris had to prove its pleaded loss and as to the approach the Court was entitled to take when assessing the alleged loss;

(c) the judge made unfair and unfounded criticisms of the manner in which EFML resisted Fenris' claim;

(d) the judge erred in making the above finding by asking whether Mr Vigeland genuinely believed the assertions he made in evidence that he would have invested the frozen

funds in the manner pleaded by Fenris when he should have asked himself if, having regard to all the surrounding circumstances, those assertions were correct on the balance of probabilities.

(2) The judge in any event erred in holding that the injunction had prevented Fenris from using the frozen monies in the period 27 February 2009 to 25 May 2016 when the injunction had only prevented Fenris from using these monies from 27 February 2009 to 16 February 2012.

Fenris' Respondent's Notice

36. Fenris' Respondent's Notice seeks to have McMillan J's decision affirmed on the additional ground: (i) that having accepted Fenris' evidence that, as result of the injunction, it had suffered some loss, the judge must have found at least a prima facie case to that effect and been satisfied that EFML had failed to displace that prima case; and (ii) accordingly, the judge had erred in holding that it was not sufficient for Fenris to demonstrate a prima case that, but for the injunction, it would have invested in European Small Caps and/or suffered some loss.

The applicable legal principles

37. As the judge observed, the development of the English Court's practice to require that a party granted an interim injunction should give an undertaking as to damages and the basis upon which such damages are to be assessed are canvassed in the following passage of Lord Diplock's celebrated speech in *Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 360A - 361F:

> "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.
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> 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 sustained 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 considers 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."

38. In *Smith v Day* (1882) 21 Ch. D. 421 (also noted by the judge), Brett LJ said at p 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."

39. The general applicability by analogy of the rules in *Hadley v Baxendale* to the assessment of compensation pursuant to an undertaking in damages was re-affirmed in *Abbey Forwarding Ltd v Hone (No.3)* [2015] Ch 309 where the Court of Appeal of England & Wales ("the EWCA") rejected the appellants' submission that recovery under a cross-undertaking was to be determined by reference only to causation and not by reference to the *Hadley v Baxendale* rules as to remoteness. In the opinion of the EWCA, damages pursuant to cross-undertakings in damages are to be assessed by reference to ordinary contractual principles including causation, mitigation and remoteness, although these principles may need to be applied with some flexibility to take account of the fact that the analogy with breach of contract is not exact (paras 38 – 44 and 63).

40. The party seeking compensation pursuant to an undertaking in damages bears the burden of proving the loss claimed was caused by the injunction supported by the undertaking, see *Barrat Manchester Ltd v Bolton Metropolitan Borough Council* [1998] 1 WLR 1003 at 1008G where Millett LJ took this proposition for granted; *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1979-1981) CLR 249 per Mason J at pp 324 – 325.

41. Where it is claimed that an injunction has caused loss by preventing the injuncted party from pursuing a particular course of action that would or might have been profitable, the question is a hypothetical one and the injuncted party bears the burden of proving on the balance of

probability that had there been no injunction he would have pursued that course of action; but if he discharges this burden, the loss caused by being prevented from pursuing the course of action is assessed on the loss of a chance basis; see *Les Laboratoires Servier et al v Apotex Inc et al* [2008] EWHC 2347 (Norris J) and *Fiona Trust & Holding Corporation v Yuri Privalov & Others* [2016] EWHC 2163 (Males J).

42. In *Apotex*, the cross-undertaking was given in support of an injunction restraining the sale of a generic version of a pharmaceutical product, perindopril, in breach of a patent of the claimant ("Servier"). Apotex contended that by reason of the injunction it had lost the opportunity of entering a new market for the sale of generic perindopril. In paragraph 5 (e) of his judgment, Norris J said:

> The fact that certainty or precision is not possible does not mean that a principled approach cannot be attempted. The profits that Apotex would have made from its exploitation of the opportunity to sell generic perindopril depend in part upon the hypothetical actions of third parties (other potential market participants) and in part upon Servier's response to them. 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 [1995] 1WLR 1602). As Lord Diplock explained in Mallett v McMonagle [1970] AC 166 at 176E-G
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> > "…. in assessing damages which depend on its view as to what…. would have happened in the future if something had not happened in the past, the Court must make an estimate as to what are the chances that a particular thing….. would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards…"

43. In *Privalov*, the claimants brought claims against a Mr Nikitin and his companies for in excess of US$ 577 million alleging bribery, corruption and diversion of assets. At the outset of the litigation, the claimants obtained a freezing order up to the value of US$ 225 million which was discharged shortly afterwards upon security being given in the sum of US$208.5 million which was paid into an account maintained by the defendants' then solicitors. In the usual way, the freezing order was supported by an undertaking in damages given by the claimants. Mr Nikitin and the other defendants were eventually found liable only for US$ 16 million, plus interest, and an inquiry into damages was ordered in which Mr Nikitin sought damages on the cross-undertaking on the basis that, but for the injunction, the funds used to provide security would have been used to purchase new buildings from Korean shipyards and make financial and other shipping investments. Males J adopted the approach articulated in the following

paragraphs of Toulson LJ's judgment in *Parabola Investments Ltd v Browalla Cal Ltd* [2010] EWCA Civ 486, a case in which the claimant sought to recover profits it would have made trading in stocks, shares and derivatives had its funds not been wrongly diverted from it:

> [22] There is a central flaw in the appellants' submissions. 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.
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> [23] The claimant has first to establish an actionable head of loss. This may in some circumstances consist of the loss of a chance, for example, *Chaplin v Hicks* [1911] 2 KB 786 and *Allied Maples Group Limited v Simmons and Simmons* [1995] 1 WLR 1602, but we are not concerned with that situation in the present case, because the judge found that, but for Mr Bomford's fraud, on a balance of probability Tangent would have traded profitably at stage 1, and would have traded more profitably with a larger fund at stage 2. The next task is to quantify the loss. Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account. (See *Davis v Taylor* [1974] AC 207, 212 (Lord Reid) and *Gregg v Scott* [2005] 2 AC 176, para 17 (Lord Nicholls) and paras 67-69 (Lord Hoffmann)).
>
> [24] The appellants' submission, for example, that "the case that a specific amount of profits would have been earned in stage 1 was unproven" is therefore misdirected. It is true that by the nature of things the judge could not find as a fact that the amount of lost profits at stage 1 was more likely than not to have been the specific figure which he awarded, but that is not to the point. The judge had to make a reasonable assessment and different judges might come to different assessments without being unreasonable. An appellate court will therefore be slow to interfere with the judge's assessment...

44. In paragraph 58 of *Privalov*, Males J, having set out the above paragraphs of Toulson LJ's judgment, said:

> [58] I adopt this approach. There is necessarily a degree of uncertainty in determining what Mr Nikitin would have done with his money if it had not been held in the Lawrence Graham account as security for the claimants' claims. Even if it can be said with reasonable confidence what he would have done or sought to do, for example that he would have sought to invest in a

> programme of new buildings, there remains considerable uncertainty in assessing the financial outcome which would have resulted. However, these uncertainties are not fatal to the defendants' claims. What the defendants need to prove is 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 a profit. If so, it will be necessary to make the best possible assessment of the profit which the defendants would have made, taking account of the uncertainties inherent in this exercise. In a case such as this where there are a number of such uncertainties, what needs to be assessed is the "overall chance" of the defendants making the profits in question (see *Tom Hoskins Plc v EMW Law* [2010] EWHC 479 (Ch) 479 at [133] to [135]).

45. And in paragraphs 72 - 73, Males J continued

> [72] Taking all these matters into account, it remains inherently credible, without needing to depend to any real extent on Mr Nikitin's credibility, that but for the 2005 order Mr Nikitin would have wished to invest the proceeds of resale of the four Hyundai and Daewoo new buildings; that he would have wished to invest them in the shipping business where he had been successful in the past and which was experiencing a boom which he considered (rightly as it turned out although inevitably there was a risk that he might be wrong) had some way still to go; and that by far the most likely shipping investment for him was a further programme of new buildings. 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.
>
> [73] It does not necessarily follow that such a program would have consisted of the purchase of four Suezmax vessels and two VLCCs. Mr Nikitin did not suggest that it did, only that this is what he would probably have done. However, the claimants did not suggest that the profits to be made from such vessels were markedly out of line with profits from the purchase of other types of vessel. I will therefore proceed on the basis that these are the types of vessel which Mr Nikitin would probably have sought to purchase, making some allowance for the uncertainty involved in this choice.

46. The decision of Males J in *Privalov* was challenged in the EWCA on the sole ground that the learned judge had erred in concluding that the freezing order caused the lost opportunity of investing in newbuildings. Males J opined 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 since the freezing order specifically prohibited the conclusion of newbuilding contracts, causation was established. On appeal, the claimants contended that Males J should have held that Mr Nikitin's failure to apply for the funds to be released to make such contracts meant that legal causation had not been established. The EWCA rejected this challenge. The test for causation in enforcement of cross-undertakings cases was the "but for", *sine qua non*, test. Although Males

J had stated that the freezing order must be an effective cause of the loss, if anything, that was a stricter test than the "but for" test and he had been entitled to deal with causation in the common-sense way he had adopted; see *SCF Tankers Ltd et v Privalov et al* [2017] EWCA Civ 1877 at [42], [44] and [45].

47. The principle expressed in the first sentence of paragraph 41 above can also be derived from the reasoning of Stuart-Smith LJ in *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602. Here, the plaintiff claimed that, in connection with its purchase of a group of properties, its conveyancing solicitors negligently failed to protect it from "first tenant liabilities" that might arise from leases that had been assigned before the purchase. At the start of the conveyancing process the defendant solicitors had included a warranty in the draft contract that would have protected the plaintiff from these liabilities, but the vendors struck it out of the draft documentation and it was replaced by a warranty that did not offer the necessary protection. After completion of the purchase, the plaintiff was faced with costly first tenant liabilities and it sued its solicitors alleging that if it had been advised that the replacement warranty did not protect it against first tenant liabilities it would have successfully required the vendor to agree to an appropriate warranty, failing which it would not have gone through with the purchase. It was argued on appeal that the plaintiff had to prove on the balance of probabilities not only that it would have sought to negotiate with the vendor to obtain appropriate protection but also that the purchaser would have agreed to the necessary warranty.

48. Stuart-Smith LJ categorised the case as one where the negligence consisted of an omission and the plaintiff's loss therefrom depended on the actions of a third party i.e. the vendor's response if the plaintiff had sought protection against first tenant liabilities by requiring that an appropriate warranty be given. At p. 1611 A – D of his judgment, Stuart-Smith LJ said:

> "(3) In many cases the plaintiff's loss depends on the hypothetical action of a third-party either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on the balance of probability, as Mr Jackson submits, that the third-party would have acted so as to confer the benefit, or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?
>
> Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr Jackson's submission is wrong and the second alternative is correct. In *Chaplin v Hicks* [1911] 2 KB 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…"

49. In my judgment, by parity of reasoning, this approach equally applies where a defendant's loss sought to be recovered under a cross-undertaking is the loss of an opportunity to take steps that might, depending on circumstances beyond the defendant's control, have resulted in a gain, which is the position in this appeal. In such a case, the defendant must prove on the balance of probabilities the opportunity that has been lost, but when assessing the damages for this loss, the Court will make the best possible assessment of the gain which the defendant would have made, taking account of and making allowances for the uncertainties inherent in this exercise.

50. It has been said in some cases where damages have had to be assessed pursuant to a cross-undertaking given in support of an injunction restraining the breach of a patent that "a liberal assessment" of the damages was appropriate. In *Apotex* the judge who granted the interim injunction (Mann J) accepted Servier's submission that Apotex's damages caused by the injunction were more easily capable of calculation than its own. In the course of his judgment assessing the damages to which Apotex was entitled, Norris J said at paragraph 9:

> Third, whilst it is for Apotex to establish its loss by adducing the relevant evidence, I do not think I should be over eager in my scrutiny of that evidence or too ready to subject Apotex' methodology to minute criticism. That is so for two reasons, quite apart from an acceptance of the proposition that the very nature of the exercise renders precision impossible. (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 calculation 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."
>
> 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).

51. These observations of Norris J were endorsed by the EWCA in *AstraZeneca AB v KRKA dd Novo Mesto* [2015] EWCA 484 (another patent case), Kitchen LJ stating at [16]:

> The application for an interim injunction in this case was supported by a witness statement from Mr Mark Jones, the president of the AZ group company responsible for marketing Nexium in this country. He expressed great apprehension about Consilient's marketing plans and maintained that since Emozul was "substitutable with Nexium tablets, over 90% of AZ's market would appear to be accessible to the defendants from launch" and that the entry of Emozul into the market would lead to a significant loss of market share for Nexium or a downward price spiral. Faced with this evidence, the defendants formed the view that they would not defeat the application and so submitted to the injunction. In my judgment this is just the kind of evidence which supports the adoption of a liberal but fair assessment of loss.

52. In my view, unless the injunction was obtained fraudulently or maliciously[4], the above observations as to "liberal assessment" do not apply where the injunction supported by the cross-undertaking is of the *Mareva* (freezing order) type, to which the approach in *American Cyanamid v Ethicon* Ltd [1975] 396 does not apply; see Lord Donaldson of Lymington MR in *Polly Peck International plc v Nadir (No 2)* [1992] 4 All E R 769 at p. 786a Thus, in the case of a standard *Mareva* order, since the court must be satisfied not only that the plaintiff has a good arguable claim but also that there is a real risk of dissipation which would render the plaintiff's judgment of no effect, the plaintiff will not have to show that damages would be an inadequate remedy and the balance of convenience is in his favour.

53. I am also of the view that Norris J's reference to Lord Wilberforce's dictum in *General Tyre* is inapposite. A party found to have breached a patent is a "wrongdoer" in a different and stronger sense than is a party who, having shown he has a good arguable case, fails to establish his case at trial, particularly where, as in this case, he loses on a difficult question of construction of the relevant contract. As Stephen J said in the High Court of Australia in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 46 CLR 249 at para 13:

> In both contract and tort it is enough that the breach of contract or of duty is one direct cause of whatever damage a plaintiff has suffered – McGregor on

[4] *Sagicor General (Cayman) Limited and Proprietors of Strata Plan No 151 v Crawford Adjusters (Cayman) Limited and Six Others* [2011 (1) CILR 130]

> Damages, 13 ed. (1972), pp 69,118. The breach is a wrongful act on the defendant's part and the common law visits him with liability for the consequences to the plaintiff, subject always to rules as to remoteness. But a plaintiff who sues for an injunction and obtains interlocutory relief, giving an undertaking to the court as the price of that relief, commits no wrongful act, no breach of contract or of duty when, at the trial, he fails to obtain any perpetual injunction. If, as a result of the grant of interlocutory relief, the defendant has been harmed there will, however, have been injustice and, an undertaking having been given, the court will … right that injustice and compensate the defendant for the harm done to him.

54. Accordingly, I agree with the observation of Males J in paragraph [51] of *Primalov*:

> 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.

55. In light of the above principles, for Fenris to establish its pleaded claim for damages for the loss it claimed to have suffered by reason of the injunction, it had, as a minimum, to prove on the balance of probabilities that, acting by Mr Vigeland, it would have invested the whole of the frozen funds in a portfolio of European Small Caps throughout the period of 27 February 2009 to 25 May 2016 using broadly the same investment strategy Mr Vigeland had used during his time with EFML. If Fenris satisfied this threshold requirement, it would be entitled to such lost profit as it could persuade the Court it would have had a substantial chance of making, the Court making the best assessment of the profit it could.

EFML's submissions on its appeal grounds 1 (a) to (d) as set out in paragraph 35 above.

56. I will set out EFML's submissions by reference to the four contentions highlighted in paragraph 35 above.

[a] *EFML's case that the judge misunderstood the reference in the authorities to the undertaking being the "price" an applicant has to pay for an interlocutory injunction and proceeded on the basis that there was a presumption of significant loss for which EFML must pay substantial compensation.*

57. In dealing with this part of EFML's case it is convenient to proceed by taking each of paragraphs of the judgment EFML criticises and then summarising EFML's submissions thereon.

Paragraphs 281 and 37

> Paragraph 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.

58. This paragraph comes within the section of the judgment headed "The Findings of the Court" and follows the judge's conclusion in paragraph 278 that, based on Mr Vigeland's direct evidence that but for the injunction Fenris would have invested the frozen funds as alleged in Fenris' pleading, the Court had no hesitation in finding that this allegation had been proved upon a balance of probabilities.

> Paragraph 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.

59. This paragraph comes immediately after the judge's citation of the following passage in the judgment of McCombe LJ in *Abbey Forwarding*:

> 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.

EFML's submissions

60. The judge erred in saying what he did in paragraph 281. The mere fact that Fenris may have been deprived in general of an opportunity to invest its own money cannot justify the inference that Fenris would have invested the frozen funds in the manner pleaded in the Points of Claim, which had to be proved on the balance of probabilities. As to the remarks in paragraph 37, these indicate that the judge's overall approach was to treat the inquiry as a process of extracting a price, in which loss is presumed and a party that challenges what it submits is an exaggerated claim is to be regarded as behaving distastefully. In proceeding in this way, the judge misunderstood the reference in the authorities to the undertaking being the price an applicant has to pay for an interlocutory injunction.

Paragraph 23

61. Having set out the passage from Lord Diplock's speech in *Hoffmann-La Roche* quoted in paragraph 37 hereinabove, the judge said in paragraph 23:

> In other words, a solemn obligation to the Court 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.

EFML's submissions

62. What the judge says in this paragraph does not come from the law of contract. It is unexplained and appears to be a gloss the judge is putting on the legal test to be applied. It is part of the judge's mistaken approach that led the judge to treat the inquiry as a process of extracting a price for damage to Fenris that is presumed to have been suffered.

Paragraphs 233 and 244

63. In paragraph 233 the judge was responding to EFML's closing submissions that: (a) Fenris had failed to prove to the requisite standard that it would have invested the frozen monies as pleaded in its Points of Claim; (b) but if Fenris had met this requirement, the Court should consider awarding the indicative total of €636,625 on the basis that the start and end dates were 1 June

2009 to 16 February 2012, the principal sum was about €2.2 million and the rate of return was about 25% corresponding to 50% of the average of the HSBC and OSESX indices.

> Paragraph 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, the courts would be most reluctant ever to grant any injunctions at all.
>
> Paragraph 244
>
> However, this generalized proposition [the party seeking compensation under an undertaking bears the burden of proving that the loss claimed was caused by the injunction] must be broken down into its various sequential elements and not simply used as an excuse to pay nothing.

EFML's submissions

64. In paragraph 233, the judge overlooked the fact that the reason the Court was faced with a situation that it either had to award damages on Fenris' favourable scenario or to award nothing was due to Fenris' decision, for which EFML was not responsible, to advance as its sole case that it had suffered the pleaded loss by reason of the injunction. The judge's distaste in this paragraph and in paragraph 244 for the stance taken by EFML in its closing submissions that it could only deal with the claim it faced and was entitled to submit that the alleged loss had not been proved, is a further indication that the judge's starting point was that a price had to be paid by a party who obtains an interim injunction and loses at trial.

Paragraph 265

65. In this paragraph the judge responds to EFML's submission that an undertaking in damages is not extracted because the court regards the plaintiff potentially as a wrongdoer if it fails to establish the underlying cause of action but because it wants to make good any harm caused to the defendant if the defendant turns out to have been right.

> 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.

EFML's submissions

66. It was not EFML's case that if another party had suffered loss it was that party's problem alone. The judge's conclusion that EMFL's position was that if harm was done to a third party, it was that party's problem, was an unfair finding. No claim was made in the trial by reference to loss suffered by another party and EMFL never attempted to shrug off responsibility for third party loss. The judge's remarks show that he was of the view that loss had been suffered by somebody and even if it was not the loss claimed, or suffered by the party claiming, he was going to award compensation against EMFL who had to pay a price for getting an injunction and losing at trial. Further, when the judge refers to a "high degree of scrutiny" he is not referring to the ordinary scrutiny that a judge pays to arguments about what the evidence shows on the balance of probabilities: he is describing an exceptional approach involving a raised threshold that is not explained or justified and which is wrong in principle. When one sees the judge coupling his observations about EFML's submissions with a suggestion that he should not accede to them lest the undertaking be circumvented, undermined or negated, and when one asks what underlies this and his other remarks, it is hard to escape the conclusion that the judge is not assessing the evidence by reference to the standards of an ordinary breach of contract (as the law requires) but by reference to some presumption that a price in the form of substantial compensation must be paid, or by reference to some other standard not spelled out. Also, when the judge directed himself that EFML is not entitled to be shielded from the consequences of doing what it was not entitled to, he again fell into serious error since his approach was that because the injunction was granted and EFML failed ultimately in its claim, there had to be consequences for EFML.

Paragraphs 271, 272 and 273

67. In these paragraphs, the judge is dealing with EFML's arguments that: (a) the injunction did not cause loss after the date of Foster J' s judgment when the monies ceased to be frozen and in law unconditionally belonged to EFML; and (b) Fenris was unable to point to any history of retention of bonus received in cash:

> 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 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 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.

EFML's submissions

68. If the judge had correctly directed himself about the test to be applied for compensating Fenris and the approach to be taken to the evidence, he would have concluded that EFML had done no more than advanced fairly arguable points. His suggestions in these paragraphs that EFML had not acted in good faith, was failing to mitigate its mistake in commencing the proceedings and had done its best to abnegate its responsibilities, point to his applying the wrong legal test: acting on a presumption of substantial compensation to ensure that EFML pays the price for having obtained the injunction and then failed to uphold its claim on appeal.

[b] *EFML's case that the judge was confused and misdirected himself as to how Fenris had to prove its pleaded loss and as to the approach the Court was entitled to take when assessing the alleged loss.*

69. EFML contends that the judge misdirected himself in paragraphs 30[5] and 34, where, in the former paragraph, he implicitly approves Norris J's observation in *Apotex* that he will not be over eager in his scrutiny of the evidence of loss, and in the latter, he endorses Lord Wilberforce's dictum in *General Tyre* set out in paragraph 50 hereinabove with the comment that that dictum "essentially reformulates the highly perceptive comments of Brett LJ and Jessel MR in *Smith v Day*." EFML submits that the judge erred in treating *Apotex* and *General Tyre* on the footing that they were analogous to the instant case when they were not, neither of them being a freezing order case, *Apotex* being a patent interim injunction case and *General Tyre* being an action for damages for the breach of a patent. Further, neither Brett LJ nor Jessell MR said anything in *Smith v Day* about treating a party against whom a cross-undertaking is sought to be enforced as a wrongdoer.

70. In paragraph 76, the judge said:

[5] See also paragraph 275 of the judgment in the section headed **The Findings of the Court**: "In this regard the Court reminds itself of the comment of 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 (sic) subject Apotex's methodology to minute criticism."

> 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 was not ultimately entitled.

71. EFML argues that the proposition of law set out in the first sentence of these remarks does not accurately state what Fenris had to prove to be awarded the damages it claimed in its pleaded case. What Fenris had to prove on the balance of probabilities was not that it suffered some damage over and above very minor or nominal damage but that it would have invested the frozen funds in European Small Caps adopting the same approach as Mr Vigeland took whilst with EFML. EFML also submits that the second sentence of this paragraph is another indication that the judge had misunderstood the reference in the authorities to the undertaking being the price for the injunction.

72. In paragraphs 53 and 54 the judge says:

> 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 sufficient purpose.

73. EFML observes that the judge does not in these paragraphs identify what needs to be proved on the balance of probabilities but anticipates that the necessary finding will be made in Fenris' favour without stating what it is or how it is reached. The judge then goes on to deal with the question of remoteness (paras 55 – 68) without having identified the loss that is under consideration and continues to keep the loss he is going to find on the balance of probabilities hanging in the air as he considers: (a) the process of evaluation and assessment (paras 69 – 76); (b) the duration of the undertaking (paras 77 – 89); (c) the evidence of Mr Vigeland (paras 90-123); (d) the evidence of Mr Blair (paras 124 – 145); (e) the evidence of Mr Croft (paras 146 – 180); (f) the status of Fenris (paras 181 – 190); (g) Fenris' closing submissions (paras 191 – 231); EMFL's closing submissions (paras 232 – 273).

74. Finally, in paragraph 278 under the heading of "The Findings of the Court", the judge says: "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 upon a balance of probabilities."[6]

75. EFML points out that in paragraph 200, the judge recites without accepting the submission made on behalf of Fenris that if Fenris can show that it would have ensured Mr Vigeland invested the funds as pleaded in its Points of Claim, Fenris would have proved causation and estimating its lost return would be a matter of assessment.

76. EFML also refers to how the judge deals in paragraph 246 with its submission on what Fenris must prove to establish its claim. The submission in question was: "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 the 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 a chance basis. We refer to the following authorities, relied on in opening."

77. The judge rejected this submission, stating in paragraph 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.

78. EFML contends that its submission recited in paragraph 246 was manifestly correct and that the judge erred in rejecting it by reference to the concept of "effective cause". Causation where an undertaking in damages is sought to be enforced is decided on the "but for" test. The concept of effective cause comes into play where a consequence has two concurrent independent causes[7] and it is not possible to say that the consequence would have followed but for one of the causes, nor for the other.

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[6] The judge does not here say what investment of funds has been proved but in paragraph 274 -- the first paragraph under the heading "The Findings of the Court" he referred to Fenris' pleaded case that Mr Vigeland would have invested the funds in European Small Caps and so his finding in paragraph 278 should be construed as finding that Fenris would have invested the funds in European Small Caps in accordance with Mr Vigeland's evidence to this effect.

[7] As was the case in *Privalov* and *Sagicor General (Cayman) Limited and Proprietors of Strata Plan No 151 v Crawford Adjusters (Cayman) Limited and Six Others* [2011 (1) CILR 130]

[c] *The judge made unfair criticisms of the manner in which EFML resisted Fenris' claim indicating a mistaken approach to the assessment of Fenris' loss or that the judge harboured a certain animus towards EFML.*

Paragraph 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.

79. EFML contends that on any view, these highly critical remarks on the case advanced by EFML, a case which EFML was perfectly entitled to put, were unfair.

80. I would add that whilst it is not entirely clear what the judge meant by the word "process" it seems likely that he was referring back to the same word used in part of the extract from Norris J's judgment in *Apotex* which he quoted in paragraph 31, which extract the judge found "*extremely helpful.*" In this passage, Norris J uses the word "process" to denote the persuading of Mann J by Servier that, in the event of an injunction, Apotex's loss was easier to calculate than the loss that would be suffered by Servier if the injunction were not granted. If "process" is indeed a reference back to Norris J's judgment, it is arguable that the criticism made in paragraph 32 is especially misplaced because there was no evidence (nor was there likely to be) that when obtaining the injunction EFML submitted to Quin J that Fenris' losses if the injunction was granted were easier to calculate than EMFL's losses if the injunction was not granted.

Paragraph 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.

81. This observation is the judge's response to EFML's closing submission that the end date of the period during which Fenris could have been caused loss by the injunction was 16 February 2012 when the sum awarded by Foster J was paid out to EFML.

82. EMFL submits that these remarks are an emotional and unfair reaction on the part of the judge that indicates a mindset that one way or the other Fenris should be awarded substantial compensation irrespective of EFML's submissions.

Paragraph 100

83. In this paragraph the judge said that EFML's "zealously proclaimed" contention that Fenris was a shell company and as such would not be expected to start investing on its own account, was "entirely unsound". He based these remarks on the fact that in its response to Ogier's letter of 8 May 2009 (see para 18 above), EFML said nothing about Fenris being a shell company.

84. EFML submits that this was an unfair and disproportionate response to this part of its case given that: (i) Fenris was accepting in the 8 May 2009 letter that if the frozen money were swapped for bonds, the bonds would be frozen; and (ii) cash bonuses had never been retained by Fenris for investment but were instead otherwise transferred away.

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

85. EFML argues that this is an inappropriate and unfair criticism of EFML's business judgment. The implications of the decision to close EVF for EFML's business acuity and professional judgment was not an issue in the case. The judge had not heard evidence and argument on the point from both sides. Mr Blair testified that the fund was making losses, investors were redeeming out and the fund was closed for those reasons. But the judge went on to repeat the criticism in paragraph 255.

> Paragraph 255
>
> 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 done so.

86. EFML submits that the words "it is not irrelevant" indicate that the judge took this unjustified conclusion into account in reaching his findings on the facts. The conclusion was unjustified because other than the fact that the market recovered after the fund closed, there was nothing on which to base it and there was no finding that this should have been foreseen.

[d] *EFML's case that, in finding Fenris would have invested the frozen funds as pleaded in the Points of Claim the judge misdirected himself by asking whether Mr Vigeland genuinely believed the assertions he made in evidence that he would have invested the frozen funds in the manner pleaded by Fenris instead of asking himself if, having regard to all the surrounding circumstances, those assertions were correct on the balance of probabilities.*

87. EFML submits that it is clear from the following paragraphs of the judgment that the judge did indeed make this finding on the basis that he believed the assertions made by Mr Vigeland rather than asking whether it was to be inferred from all the circumstances of the case that this is what Fenris would have done.

Paragraph 249

88. Responding to EFML's submission that whether Fenris would have invested as pleaded in its Points of Claim was a question that could only be answered by inference from all the circumstances and there was no evidence Fenris was gearing up to start an investment business at the time of the injunction, the judge said in paragraph 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 ...

Paragraphs 252 and 253

> 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 the lack of preparatory steps (paragraph 47). Once again, we return to the question of Mr Vigeland's credibility ...

Paragraphs 277 and 278

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.

89. EFML submits that, in proceeding in this way, the judge seriously misdirected himself. Mr Vigeland's assertions that he would have invested the frozen funds as pleaded in Fenris' Points of Claim amounted to no more than an expression of his belief that this is what he would have done and the judge's belief that Mr Vigeland was a truthful witness could only have allowed the judge to form a view as to Mr Vigeland's own state of mind. It did not allow the judge to form a view as to whether Mr Vigeland's belief about what he would have done represented what, on the balance of probabilities, would have happened. The judge had to determine a counterfactual and should have done so not by asking whether Mr Vigeland genuinely believed the assertions he was making but by asking whether those assertions were correct having regard to the objective surrounding circumstances.

90. Mr McMaster QC for EFML referred to a number of medical negligence cases where there had been a failure to warn a patient of the risks of a procedure he or she elected to undergo and the question was whether the patient would have gone ahead with the procedure if the warning had been given. In *Chappel v Hart* [1998] HCA 55, McHugh J said at footnote 33:

> Human nature being what it is, most plaintiffs will genuinely believe that, if he or she had been given an option that would or might have avoided the injury, the option would have been taken. In determining the reliability of the plaintiff's evidence in jurisdictions where the subjective test operates, therefore, demeanour can play little part in accepting the plaintiff's evidence. It may be a ground for rejecting the plaintiff's evidence. But given that most plaintiffs will genuinely believe that they would have taken another option, if presented to them, the reliability of their evidence can only be determined by reference to objective factors, particularly the attitude and conduct of the plaintiff at or about the time when the breach of duty occurred. For that reason, the restrictions on appellant review laid down in *Abalos v Australian Postal Commission* (1990) 171 CLR 167 and other cases are likely to have little application.

91. In *Smith v Barking, Havering and Brentwood Health Authority* (1994) 5 Med L R 285 Hutchinson J said at 289:

> [T]here is a peculiar difficulty involved in this sort of case – not least for the plaintiff herself – in giving, after the adverse outcome of the operation is known, reliable answers as to what she would have decided before the operation had she been given proper advice as to the risks inherent in it. Accordingly, it would, in my judgment, be right in the ordinary case to give particular weight to the objective assessment. If everything points to the fact that a reasonable plaintiff, properly informed, would have assented to the operation, the assertion from the witness box, made after the adverse outcome is known, in a wholly artificial situation and in the knowledge that the outcome of the case depends upon that assertion being maintained, does not carry great weight unless there are extraneous or additional factors to substantiate it. By extraneous or additional factors I mean, and I am not doing more than giving examples, religious or some other firmly-held convictions; particular social or domestic considerations justifying a decision not in accordance with what, objectively, seems the right one; assertions in the immediate aftermath of the operation made in a context other than that of a possible claim for damages; in other words, some particular factor which suggests that the plaintiff had grounds for not doing what a reasonable person in her situation might be expected to have done.

92. In *Allied Maples*, Stuart-Smith LJ said at p. 1610 D

> If the defendant's negligence consists of an omission, for example to provide proper equipment, given proper instructions or advice, causation depends not on a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given? This can only be a matter of inference to be determined from all the circumstances.

Fenris' submissions in reply to EFML's submissions [a],[b],[c]&[d]

93. It is plain from the judgment that the judge correctly proceeded on the basis that: (a) Fenris had to prove on the balance of probabilities that, through Mr Vigeland, it would have invested the frozen funds in European Small Caps adopting broadly the same strategy he had employed whilst with EFML; and (b) if this burden were satisfied, the quantification of Fenris' loss was to be assessed by taking a flexible broad-brush approach, the court doing its best to make a fair assessment.

94. Proceeding in this way, the judge found on the balance of probabilities that, but for the injunction, Fenris, acting through Mr Vigeland, would indeed have invested the frozen funds

in European Small Caps adopting broadly the same investment strategy he had used during his time with EFML. And having heard the evidence of Mr Vigeland, Mr Blair and Mr Croft, and having received detailed submissions on the topic, the judge was fully entitled to quantify Fenris' loss in the manner that he did. Indeed, it was to be noted that EFML had not appealed against the judge's quantification of Fenris' loss; it was his finding that Fenris had proved that it would have invested the frozen monies as pleaded in its Points of Claim that EFML was challenging.

95. The judge was also entitled to proceed, as he did, on the basis that it was sufficient as a matter of law for Fenris to establish on the balance of probabilities that "some loss" was suffered. "But for" causation did not require more than that.

96. As to the observations of the judge: (a) that the cross-undertaking was the price for the injunction; (b) that EFML was shirking its responsibility having given the cross – undertaking; (c) that EFML's position required a high degree of scrutiny; (d) that called into question EFML's good faith and good business judgment (EFML's liquidation of EVF), and others of a similar tenor[8], these were unfortunate and could not be defended but there was no connection between these comments and the outcome of the trial; they therefore are not a ground for setting aside the judge's decision.

97. The judge was entitled on the evidence of Mr Vigeland to find that, but for the injunction, Fenris, acting through Mr Vigeland, would have invested the frozen funds in European Small Caps as pleaded in the Points of Claim. In his evidence in-chief and in cross-examination, Mr Vigeland related his investment qualifications, his passion for investing, his record as a fund manager with EFML, his bottom up research approach to investing, the gross returns he made on his EFML portfolios in the years 2003 - 2006 and the praise that he received from Mr Oldfield for these results in the letter to investors announcing the launch of EVF. In cross-examination, Mr Vigeland said that at the time of the injunction he intended to invest the retained bonus monies in a portfolio of European Small caps once he was free from EFML on 5 April. This was direct evidence of his intentions; it was not evidence of a counterfactual scenario. When cross-examined about the letter from Ogier dated 8 May 2009, Mr Vigeland declined to agree that it showed that what Fenris wanted was to be protected from the volatility in the global economy, stating that the purpose of the letter was to agree a conservative proposal with EFML; the letter was not meant to describe what Fenris would have done without the injunction. Mr Vigeland testified that if the money from selling out the retained bonus investments had been available, he would not have invested in Acorn, as he had in fact done,

[8] See paras 23, 32, 37, 79, 131, 233, 255, 271, 272 & 273

but would have caused Fenris to invest in a portfolio of European Small Caps; it would have taken no more than a day to set up the banking and brokerage arrangements necessary for the establishment of this portfolio.

[e] *EFML's second ground of appeal that: (i) the injunction ceased to have effect when Foster J's order of 16 February 2012 was made; (ii) alternatively, if the undertaking endured until the decision of the Privy Council, the injunction was not the cause of any loss suffered by Fenris after the making of Foster J's order*

98. In relevant part, the order granting the injunction provided:

> 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 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 the Ennismore Vigeland Fund;
>
> (b) Any and all distributions to be made from the liquidation of the 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 the Ennismore European Smaller Companies Hedge Fund held in the name of the Defendant.

99. As already noted, EFML contends that the period over which the injunction prevented Fenris from using the frozen funds ceased upon the making of Foster J's order on 16 February 2012. That order provided in relevant part:

> 1. It is declared that the Plaintiff has been since 31 January 2009 entitled to receive transfer of the following shares formerly held in the name of the Defendant ("the Clawback Shares"),
>
> (a) 14,049.69 shares in Ennismore in Vigeland Fund; and
>
> (b) 7,828.22 shares in Ennismore European Smaller Companies Hedge Fund, or the proceeds of the sale of the Clawback Shares, such proceeds amounting to EUR 2,227,107.51 ("the Judgment Sum").
>
> 2 ...
>
> 3. The Defendant shall pay the Judgment Sum and interest thereon as aforesaid to the Plaintiff as follows:
>
> (a) after 14 days ... the Defendant will do or cause to be done all acts and things necessary to bring about the irrevocable payment to the Plaintiff of all monies ... held in [the joint account] 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 of the date of this Order.

100. Mr McMaster argued that Foster J's order "determined" the Plaintiff's claim with the result that the injunction came to an end when that order was made. It was submitted that the natural and ordinary meaning of the word "determined" in the context of the injunction as a whole was the making of the decision on EFML's claim. Whichever way that decision went, there would be no further need for the freezing order to continue. Fenris' only option after Foster J's order was to apply for a stay pending an appeal which it did unsuccessfully.

101. Citing the decision of Neuberger J *Cantor Index v Lister* [2002] C.R. 25, Mr McMaster's alternative construction argument was that the words "further order" in paragraph 4 of the injunction meant an order that expressly or impliedly discharged the injunction, and that is what Foster J's order did because: (a) following that order the injunction served no purpose; and (b) the order required Fenris to carry out acts that otherwise would have been a breach of the injunction.

102. Mr McMaster advanced the yet further alternative submission that if the undertaking remained on foot notwithstanding Foster J's order, it was not the injunction that caused Fenris to miss the opportunity after 16 February 2012 to invest the frozen funds as pleaded in the Points of Claim, it was the transfer of those funds into the legal ownership of EFML pursuant to Foster J's order.

Fenris' case that the judge was correct to hold that the cross-undertaking endured until the Privy Council's decision upholding the judgment of the Court of Appeal

103. Mr Lowe QC for Fenris argued that: (a) as a matter of construction, the cross-undertaking in the 2 February 2009 freezing order continued to apply unless and until the order was discharged; and (b) whether the order was "eclipsed" by Foster J's judgment was to be determined as a question of causation.

104. In Mr Lowe's submission, Foster J's order did not purport to discharge the cross-undertaking whether prospectively or retrospectively. It did not mention the undertaking or the freezing order; nor did it in substance discharge the freezing injunction. The injunction was expressed to be "until determination or further order" which meant *final* order or determination, as the judge found.

105. Further, a break in the chain of causation is not sufficiently proved by establishing a concurrent cause. Instead, the intervening event must "completely obliterate" the other cause, see *Borealis AB v Geogas Trading SA* [2010] EWCA 2789 (Comm) per Gross LJ at [44] citing *Clerk & Lindsell on Torts (19th ed.)* at para 2-78. Here, notwithstanding Foster J's order, the freezing order remained an effective cause or a significant determinant of Fenris being deprived of its funds because it was due to that order that Fenris' retained bonus portfolio was liquidated, the proceeds paid into the joint account and paragraphs 1 and 2 were inserted into Foster J's order.

Discussion and Decision

The duration of the injunction

106. It is convenient to take first the issue of the duration of the injunction. There are two sets of words in the freezing order that are key for the resolution of this issue:

[A] "pending determination of the Plaintiff's claim in this action"

[B] "or until further order"

107. In my opinion, construed in the context of the order as a whole and bearing in mind the purpose of a freezing order i.e. to preserve the assets of the defendant so that a judgment obtained by the plaintiff will not be of no effect, the words "pending determination of the Plaintiff's claim in this action" mean until judgment has been given on EFML's claim in the Grand Court together with the consequential orders made thereon. The words do not mean "*final* determination of the Plaintiff's claim in the action" so that the freezing order is to continue until the exhaustion of all rights to appeal, including to the Privy Council. They do not have this meaning because such a construction would be fundamentally at odds with the above-stated purpose of the freezing order. What the unsuccessful defendant can do after a trial is to apply for a stay of execution which the court might grant if his grounds of appeal have merit, there is a real risk that, if there be no stay, the defendant would be unable to recover sums paid to the plaintiff under the judgment if the appeal succeeds, and the defendant is willing to pay the judgment sum into court. As we have seen, Fenris' application for a stay pending appeal was refused. If a stay had been granted, then EFML would have had the opportunity to request that any necessary and appropriate protection of the proceeds should be granted pending determination of any appeal by Fenris. And if EFML had lost the trial and had itself wished to appeal, it would similarly have had the opportunity to apply to extend or renew the freezing order until after its appeal had been determined. Such procedures are entirely standard.

108. I also accept Mr McMaster's submission that the words "further order" mean an order that expressly or impliedly discharges the injunction. And that is what Foster J's order impliedly did by requiring Fenris "to do or cause to be done all acts and things necessary to bring about the irrevocable payment to the Plaintiff of all monies … held in [the joint account] by way of payment to account of the Judgment Sum and interest".

109. The conclusion I have reached that the entirety of the freezing order ceased to have effect upon the making of Foster J's order means that it is strictly unnecessary to deal with EFML's submission that, if the undertaking continued until the payment of the sum ordered to be paid by the Privy Council, after Foster J's order it was not the injunction that caused Fenris to miss the opportunity to invest the frozen funds as pleaded in the Points of Claim, it was the transfer of those funds into the legal ownership of EFML pursuant to Foster J's order. However, since the point was fully argued by both sides I propose to deal with it, albeit briefly.

110. It is well established in the authorities that causation is a question of fact which should be decided by applying the relevant principles in a common-sense way[9]. Adopting this approach, I am of the view that Foster J's order totally eclipsed the freezing order as the cause of Fenris' inability to take the opportunity of using the proceeds of its retained bonus assets to invest in European Small Caps as pleaded in the Points of Claim.

The challenge to the finding that Fenris had proved on the balance of probabilities that, but for the injunction, it would have used the frozen monies to invest in European Small Caps as pleaded in the Points of Claim

111. I accept EFML's submission that the judge misunderstood and misapplied the view expressed in several of the leading authorities that the cross-undertaking is the price the plaintiff pays in respect of an interlocutory injunction. It is clear in my opinion that the judge erroneously allowed himself to be swayed by these authorities to proceed on the basis that where some damage to the defendant can be seen to have resulted from the injunction, the plaintiff is honour bound to compensate the defendant regardless of whether that damage strictly speaking is the damage that the defendant has sued for and/or proves to the requisite standard. I agree with EFML's submission that the judge on many occasions gave every appearance that he was not assessing the evidence by reference to the standards applicable where there has been an ordinary breach of contract (as was required) but by reference to some presumption that a price in the form of substantial compensation must be paid by EFML. This mistaken approach is in

[9] See eg *BHP Billiton Ltd v Dalmine SpA* [2003] EWCA Civ 170 at [26] per Rix LJ.

plain view in paragraphs 23, 37, 79, 233, 244, 265, 271, 272, 273, all of which are cited hereinabove.

112. I am also of the view that the judge erred in implicitly: (a) approving Norris J's approach in *Apotex* that he would not be over eager in his scrutiny of the relevant evidence of loss (paras 30 & 275); and (b) accepting the applicability of Lord Wilberforce's dictum in *General Tyre* that the damages should be liberally assessed because the defendant is a wrongdoer (paras 31, 32).

113. The judge was in error here because, as explained in paragraphs 52 – 54 hereinabove: (i) *Apotex* was not a freezing order case but a patent interlocutory injunction case; (ii) *General Tyre* was a claim for damages for breach of a patent, not a claim for damages pursuant to a cross-undertaking; (iii) there is highly persuasive authority that a plaintiff against whom a cross-undertaking is sought to be enforced is not to be treated as a wrongdoer in the same way that a party who is in breach of contract or a duty owed in tort is so treated; see Stephen J in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 46 CLR 249 at para 13.

114. I accept EFML's submission that there are passages in the judgment that show that the judge: (a) misunderstood some of the authorities he cited for some of the principles he held to be applicable to the assessment of the damages to which Fenris was entitled (paras 34 and 246); (b) at times proceeded on the erroneous basis that if Fenris proved on the balance of probabilities that it had suffered some loss that was not minor or nominal, the court should assess the damages as best it could on the available evidence (paras 76); (c) at other times, proceeded on the basis that it was clear that Fenris had been deprived of the opportunity to re-invest its own resources and it should be inferred that Fenris must have suffered at least some significant loss as distinct from nominal or no loss (para 281); and (d) once Fenris had proved on a balance of probabilities that it had suffered an "investment loss", the quantification of that loss was an entirely different matter (para 258).

115. In paragraph 34, the judge says that Lord Wilberforce's quoted dictum essentially reformulates the highly perceptive comments of Brett LJ and Jessel MR in *Smith v Day*. However, neither of the latter judges said anything about treating a party who gives a cross-undertaking but loses at trial as a wrongdoer.

116. As for paragraph 246, the judge clearly erred in rejecting EFML's proposition that, where it is said that the injunction has caused a loss preventing the applicant from pursuing a course of action that would have been profitable, the correct approach is that the 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 a chance basis. The judge said "*unfortunately this definition fails 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*". In my view there exist no valid reasons for rejecting EFML's proposition. It is a perfectly correct statement of the law. Further and in any event, as EFML submits, it is well established on the authorities that the causation test in cases where a cross-undertaking is being enforced is the "but for" test with the concept of effective cause only coming into play if there are two concurrent causes, as there were for example in *Sagicor*, namely, the existence of the proceedings and the injunction itself. What the judge meant by "in terms of remoteness proof as to the kind or type of loss allegedly incurred" is a mystery.

117. The problem with what the judge said in paragraphs 76, 258 and 281 is that Fenris was not claiming a generic investment loss but the lost profit that it pleaded would have resulted from Mr Vigeland investing the frozen funds in European Small Caps as he said he would have done but for the injunction. It is true that the judge addressed the question whether Fenris had proved on the balance of probability that but for the injunction it would have invested the frozen funds as pleaded in the Points of Claim. However, what he said in paragraphs 76, 258 and 281 undermines and casts doubt on the affirmative answer he gave to that question.

118. Turning to Section [c] of EFML's case - the judge's unfair observations and criticisms of EFML - as Mr Lowe conceded, these remarks are indefensible and ought never to have been made. They evidence in my view an unwarranted impatience with EFML for insisting that Fenris, having advanced its one pleaded compensation claim, should recover no damages at all unless it proved on the balance of probability that Mr Vigeland, but for the injunction, would have invested the frozen monies in the manner pleaded.

119. I agree with EFML's submissions in Section [d] of its case on appeal that the judge seriously misdirected himself in basing his finding that Fenris would have invested the frozen funds as pleaded in its Points of Claim on the assertions made in evidence by Mr Vigeland. It is true that in paragraph 281 the judge says that the Court can and should infer that Fenris' deprivation of the opportunity to re-invest its own resources had caused Fenris at least some significant loss as distinct from nominal loss or no loss. However, as I have held above, the judge erred in expressing himself as he did in this paragraph and in any case this finding fell far short of establishing the claim for lost profit that the judge upheld. Indeed, it is to be noted that in his

written appeal submissions[10], Mr Lowe states: "*McMillan J did not infer that Fenris would have invested. On the contrary, he expressly said that he had concluded that Fenris would have invested because he believed Mr Vigeland's evidence.*"

120. As *Chappell v Hart*, *Smith v Barking, Havering and Brentwood Health Authority* and *Allied Maples* make abundantly clear, whether an individual would have adopted a course of conduct essential for the establishment of his or his company's claim must be determined from all the circumstances and not on the basis of self-serving evidence given with the benefit of hindsight of what the witness believed he would have done. It follows that what the judge ought to have done was not only to consider whether he believed in Mr Vigeland as a sincere witness but also to identify and weigh the objective features of the circumstances of the case pointing both in favour of and against Fenris' case. This is how Males J assessed the evidence in *Primalov*[11] but it is not what the judge did in this case. In particular, the judge failed to weigh and assess the matters relied on by EFML set out in paragraph 32 (i) – (vii) hereinabove which EFML strongly contended pointed to a conclusion that Mr Vigeland would not have invested the frozen funds in the manner pleaded by Fenris. The judge did, it is true, refer to Ogier's letter of 8 May 2009 but he did not address the point EFML was making in respect of that letter, namely, that Fenris would not have invested in European Small Caps from 27 February 2009 in light of both the volatility that continued to resonate within the global economy and the losses that were being suffered by ESCHF as described in the letter. Instead, having set out the terms of the letter when giving his account of Mr Vigeland's evidence, the judge concluded that it was clear that Fenris was not advocating corporate bonds as an investment per se but was advocating that EFML use corporate bonds to protect Fenris' investment.

121. In EFML's closing submissions, the point was made by reference to a number of circumstances that there was no evidence to which Fenris could point by way of argument in favour of an inference from a surrounding circumstance. As EFML submits on appeal, the judge dealt with these points by a series of counterpoints (see paras 248 – 256) which are of no avail to Fenris given the absence from the judgment of an objective analysis of the relevant circumstances. For the most part, the counterpoints go to a possible reason why there was an absence of evidence but this does not fill the missing evaluative gap.

Setting aside the judge's finding that Fenris would, but for the injunction, have invested the frozen funds in the manner pleaded in the Points of Claim

[10] Paragraph 30
[11] See in particular para 72

122. In my judgment the deficiencies in the judge's judgment I have identified above are so serious that this court should set aside his finding that, on the balance of probability, but for the injunction, Fenris would, through Mr Vigeland, have invested the frozen funds in European Small Caps broadly following the investment strategy he had adopted when with EFML. This finding was the result of an evaluative exercise that erroneously focussed on the evidence of Mr Vigeland and the judge's belief that he was a truthful witness, rather than on the objective factors arising from the surrounding circumstances. In these circumstances, the usual restriction on appellate review of a court's finding of fact does not operate, as McHugh J observed in the last sentence of the passage in his judgment in *Chappell v Hart* set out in paragraph 90 hereinabove.

123. The judge's finding is also seriously flawed by reason of: (a) the judge's underlying starting point that EFML should pay substantial compensation to Fenris as the price for having obtained the injunction on a claim that failed at trial; (b) the judge's various observations that: (i) if Fenris proved on the balance of probabilities that it had suffered some loss that was not minor or nominal, the court should assess the damages as best it could on the available evidence (para76); (ii) it being clear that Fenris had been deprived of the opportunity to re-invest its own resources, it was to be inferred that Fenris must have suffered at least some significant loss distinct from nominal or no loss (para 281); and (iii) once Fenris proves on a balance of probability an investment loss, the quantification of that loss is an entirely different matter (para 258); (c) the unfair and pejorative observations and criticisms aimed at EFML noted above, such as calling into question EFML's good faith (para 272) and criticising EFML's business judgment in winding up EVF when it did (paras 131 & 255).

124. I should add that Fenris' Respondent's Notice is of no avail in the face of this Court's decision to set aside the captioned finding of the judge because the prima facie finding relied on in the Notice is as deficient, tainted and open to challenge as is the finding I propose should be set aside. Further and in any event, in order to recover the lost profit claimed, it was not enough for Fenris to prove that it had suffered "some loss"; instead, for the reasons given above, Fenris had to prove on the balance of probabilities that, but for the injunction, it would have invested in European Small Caps in the manner pleaded in the Points of Claim.

Should there be a reference back to the Grand Court for a finding whether, on the balance of probabilities, Fenris, but for the injunction, would throughout the period 27 February 2009 to 25 May 2016 have invested the frozen funds as pleaded in the Points of Claim or should this Court decide this question?

125. This Court has the affidavits, witness statements and exhibits of all three witnesses who gave evidence at the trial, the pleadings, the transcript of the cross-examination and re-examination of Mr Vigeland, pages 118 – 125 of the transcript of the cross-examination of Mr Blair ("the Blair transcript") and the transcript of the cross-examination of Mr Vigeland during the morning of 7 December 2011 before Foster J. On the basis that it is accepted (as it should be) that Mr Vinegard genuinely believed he would have invested the frozen funds in the manner he described in his evidence, the Court therefore has, in my judgment, the necessary material to decide the aforesaid question itself.

126. The Court must reach its finding having regard primarily to the objective circumstances of the case together with Mr Vigeland's evidence of what he believed he would have done with the frozen monies but for the injunction. There is no doubt that at the time of the launch of EVF, EFML regarded Mr Vigeland as having a passion and love for investing and thought well of him as a fund manager. Prior to the launch of EVF, he had achieved the impressive percentage returns on his portfolios that were stated in EFML's announcement of EVF's launch. It is also the case that during April 2009, equity markets rallied sharply with the HSBC index in Euros increasing by 23.1% in the month and in the period June to December 2009, by 26%. These matters must however be set against the following.

(1) The investments Mr Vigeland made for EFML were not made with Fenris' money but with the money provided by the investors in EFML's funds, whereas if, but for the injunction, he had used the frozen funds to make the investments Fenris pleads he would have made from 27 February 2009 to 25 May 2016, he would have been hazarding the money of Fenris of which he was the sole director (Fenris' sole shareholder being, until late 2009, The 4th Dominion Trust, a discretionary political trust in favour of liberal causes ("the Trust")).

(2) Following the collapse of Bear Stearns in the last quarter of 2007, Lehman Brothers had collapsed in September 2008[12] setting off a global financial crisis.

(3) In December 2008, the decision was taken to close EVF, the NAV per share of the fund having declined by 50.1% since its launch in December 2006.

(4) As evidenced by Ogier's letter of 8 May 2009: (i) the value of shares in ESCHF had fallen by approximately 10% since March 2009 and these losses were continuing to accrue; (ii) Fenris recognised at this date the volatility that continued to resonate within the global economy.

[12]Blair transcript, p. 119,120.

(5) As at 27 February 2009 (and 5 April 2009 when Mr Vigeland left EFML), his EFML portfolios had made losses from mid 2006 to the end of 2008.

(6) From at least 27 February 2009, Mr Vigeland had available US$200,000 which he chose not to invest in European Small Caps when the HSBC index was rising after April 2009 but instead used this money to acquire an indirect 40% stake in Acorn which went on to make substantial profits undertaking seismic surveys from which dividends of US$ 5 million, US$ 2.5 million and US$ 625,000 respectively were paid by Acorn in October 2014, July 2015 and August 2015.

(7) The £3 million in cash bonuses that had been previously received from EFML by Mr Vigeland and Fenris had been transferred away (less £26,000) in part to Mr Vigeland's "pension trust" and in part to the Trust and was not invested in European Small Caps.

(8) There was no evidence beyond Mr Vigeland's say so that Fenris had been gearing up to invest the proceeds of the retained bonus shares in European Small Caps.

(9) In evidence under cross-examination at the trial before Foster J on 5 December 2011, Mr Vigeland said that the retained bonus was to go to the Trust and he made no mention of a plan to invest this money in European Small Caps.

127. Weighing the matters set out in paragraph 126 hereinabove, I find that they do not on the balance of probabilities give rise to the inference that, but for the injunction, Fenris (acting by Mr Vigeland) would have invested the frozen funds in European Small Caps as pleaded in Fenris' Points of Claim. My reasons are as follows. First, no such investment (apart from the investment of the retained bonus which Fenris was obliged to make) was ever undertaken by Fenris or Mr Vigeland using their own money, not even previously when the £3million cash bonus had been received, or when the HSBC index began to rise in April 2009 when Mr Vigeland had US$ 200,000 to invest; or when the Privy Council ordered EFML to pay the value of the frozen funds, plus interest, to the order of Fenris. Secondly, as the Ogier letter of 8 May 2009 evidences, there were very sound reasons for not risking Fenris' own money by investing it in European Small Caps in the Spring of 2009, given the very poor performance of Mr Vigeland's EFML's portfolios from mid 2006 to the end of 2008 and the volatility that was still resonating within the global economy following the collapse of Bear Stearns in the fourth quarter of 2007 and the collapse of Lehman Brothers in September 2008. Thirdly, Fenris, through Mr Vigeland, has claimed throughout the proceedings that the whole of the € 2.2 million of frozen monies would have been invested in European Small Caps from 27 February 2009, yet at that date the notice of termination of the Consultancy Agreement had over a month

to run and the HSBC index was at about -25%. Fourthly, at the trial of the action before Foster J, Mr Vigeland testified he intended that once the retained bonus was free from clawback the money would go to the Trust.

Can this Court make its own assessment of the loss sustained by Fenris by reason of the injunction?

128. Mr Lowe accepted in argument that if this Court were to set aside the judge's award in favour of Fenris, it would be open to the Court to substitute for that award its own finding as to the compensation to which Fenris was entitled, so long as we did not upset the judge's findings on Mr Vigeland's credibility.

129. For his part, Mr McMaster accepted that it was open to us to conclude that, but for the injunction, Mr Vigeland would have invested the frozen funds (€2.2 million) other than in a portfolio of European Small Caps managed in the same way as he managed the investments he made whilst with EFML.

130. Mr McMaster went on to submit that due to the way Fenris had pursued its damages claim there was a lack of evidence as to alternative investment returns and accordingly the Court should adopt a conservative approach focussing on a rate of return in the range of 5% - 10% p.a.

131. In the light of these submissions by Counsel for both sides, I conclude that we should embrace the task of assessing the compensation payable under the cross-undertaking on the basis that Mr Vigeland sincerely believed that he would have invested the frozen funds as pleaded in Fenris' Points of Claim.

132. Consistently with the approach taken in *Allied Maples* and *Privalov* cited above, we must make the best possible assessment of the profit which Fenris would have made, taking account of and allowing for the uncertainties inherent in this exercise with a view to determining what profit there was an overall chance Fenris would have made.

133. In my judgment, there is an overall chance that through Mr Vigeland Fenris would have used the frozen funds (€2.2 million) to make an investment that was less risky than a portfolio of European Small Caps with a lower and safer return. I take €2.2 million as the invested sum although it is a somewhat generous figure because Fenris would have had to finance its costs of defending EFML's clawback claim whether or not there was a freezing order, and we know that those costs would have amounted to at least the €184,663, this being the total sum that Foster J permitted to be withdrawn from the frozen joint account to go towards Fenris' costs. As to when the investment would have been made, I think that the chances are that this would

have happened somewhat after Ogier's letter of 8 May 2009, say on about 16 May 2009. The loss period is therefore 16 May 2009 to 16 February 2012, some 2 years and 276 days.

134. As Mr McMaster observed, there is very considerable uncertainty as to what the rate of return would have been on the type of investment I find there was an overall chance Fenris would have made.

135. In its closing submissions at the trial, EFML proposed a calculation of the profit to be awarded by the judge if he found that Fenris had been deprived of the opportunity to make a profit through Mr Vigeland's investing the frozen money. The calculation was predicated on: (i) investment in Small Caps with a bias towards Norway and Energy stocks pursuing the same long/short strategy as Mr Vigeland had followed at EFML, namely a 50% net long position; and (ii) a rate of return that corresponded to 50% of the average of the HSBC and OSESX indices in the period 1 June 2009 to 16 February 2012. On the basis of this methodology, the rate of return was about 25% over the period (i.e. about 8 1/3rd % p.a.) producing a profit of €550,000 on the invested capital of €2.2 million.

136. In my judgment, *faute de mieux,* EFML's calculation affords a reasonable basis for us to conclude that there was an overall chance that Fenris would have achieved an annual rate of return of 8.5% p.a. on an investment of the type I have found Fenris would have made.

137. Adopting this rate of return, the lost profit over the period of 2 years and 276 days is €515,394.80. In addition, I think Fenris is entitled to interest on this sum pursuant to s. 34 of the Judicature Law at the applicable rate of 2 ¼ % p.a.[13] for half the period from 16 February 2012 to 18 March 2019, the date of McMillan J's judgment (3 years + 199 days). I take this as the applicable period bearing in mind that Fenris declined to run an alternative claim for a generic loss of profit, opting instead for an all-or-nothing claim premised on investment in European Small Caps following the strategy adopted by Mr Vigeland whilst he was with EFML.

138. The interest due pursuant to s.34 of the Judicature Law is € 42,640.09[14].

139. The total compensation I would award Fenris is therefore € 558,034.89.

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[13] See the Judgment Debt (Rates of Interest) Rules 2012

[14] The period in question covers two rates of interest for Euros under the Judgment Debt (Rates of Interest) Rules 2012: 2.875% p.a. from 16 February 2012 to 31 January 2013 and 2.25% p.a. from 1 February 2013 to 18 March 2019.

Conclusion

140. For the reasons given above, I would allow this appeal and in place of the sum awarded by the judge, I would award Fenris compensation in the sum of € 558,034.89.

Sir Bernard Rix

I agree.

Sir John Goldring

I also agree.