Trinity Term
[2022] UKPC 27
Privy Council Appeal No 0076 of 2020

JUDGMENT

Ennismore Fund Management Ltd (Respondent) *v* Fenris Consulting Ltd (Appellant) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Briggs
Lord Sales
Lord Stephens
Lady Rose
Dame Kate Thirlwall

JUDGMENT GIVEN ON
27 June 2022

Heard on 27 January 2022

Appellant
Tom Lowe QC
(Instructed by Sharpe Pritchard)

Respondent
Peter McMaster QC
(Instructed by Alan Taylor & Co)

DAME KATE THIRLWALL:

1. This is an appeal from a decision of the Cayman Islands Court of Appeal setting aside an award of damages to the appellant of €5,354,601.07 by the Grand Court (McMillan J) and substituting for it an award of €558,034.89. The damages were awarded in respect of an undertaking in damages given by the respondent, Ennismore Fund Management Ltd (EFML), when obtaining a freezing injunction against the appellant, Fenris Consulting Ltd (Fenris), in February 2009 in anticipation of proceedings between the parties in which the appellant ultimately succeeded.

FACTS

2. We take the relevant facts from the judgment of the Court of Appeal. EFML is a fund manager based in London and incorporated in the UK. In the early 2000s it managed Cayman Islands-based funds known as Ennismore European Smaller Companies Hedge Fund (ESCHF); Ennismore European Smaller Companies Fund (ESCF); and, from 2006, Ennismore Vigeland Fund (EVF). 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 €200m to €3 billion. EFML managed the funds on an absolute return basis, seeking to make a return whatever the state of the market.

3. EFML employed fund managers. A discretionary bonus was a significant part of their annual remuneration. It 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 fund manager's portfolio made a loss compared with the previous year ("the Clawback Agreement").

4. Arne Vigeland was employed by EFML as an analyst in November 2001 and promoted to fund manager in 2003. In April 2004 Fenris was incorporated under the laws of Belize for the purpose of providing investment management services to EFML. In June 2004 EFML and Fenris entered into a consultancy agreement under which Fenris was to provide Mr Vigeland's services as an investment manager to EFML. The fee arrangement between EFML and Fenris resulted in retained bonus earned by Fenris for the years 2005 and 2006 being invested by EFML in shares in ESCHF (2005 bonus) and EVF (2006 bonus) pursuant to an arrangement under which half of the total bonus

amount would be paid in cash and the other half would be invested in Fenris' name in shares in EFML funds to secure the clawback (retained bonus). Fenris earned no bonus in respect of the years 2007 and 2008 because the portfolio that it managed sustained losses in those years. On 19 January 2009 EVF was placed in voluntary liquidation.

The underlying dispute

5. On 29 January 2009 Fenris made a request to redeem its 8,034 retained bonus shares in ESCHF and those shares were redeemed on 2 March 2009. On 5 February 2009 EFML informed Fenris that it did not require its services as an investment manager with immediate effect. The Consultancy Agreement provided for termination on two months' notice and so the agreement came to an end on 5 April 2009.

6. By February 2009 the parties were in dispute over whether retained bonus amounts invested in EFML funds were in fact liable to be clawed back by EFML. EFML began proceedings for declaratory relief to establish the status of these moneys. On the grounds that the moneys could be withdrawn and lost for enforcement purposes EFML obtained from Quin J on 27 February 2009 an ex-parte order freezing the shares and the proceeds of their redemption. EFML gave a cross-undertaking in damages.

7. The shares were converted into cash and on 30 July 2009 Foster J ordered that the proceeds of the frozen investments €2,267,762.36 should be placed into an interest-bearing bank account with Butterfield Bank in the Cayman Islands, in the joint names of the parties' attorneys. The money remained subject to the order of 27 February 2009.

8. By letter dated 8 May 2009 from Fenris' attorneys (Ogier) to EFML's attorneys (Appleby), Ogier, mistakenly believing that the bulk of Fenris' retained bonus was still invested in EFML's funds, proposed that the 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 liquidation estate of EVF in corporate bonds. The Court of Appeal identified the following as key passages in this letter:

> "As your client is aware (and indeed pleads), Ennismore European Smaller Companies Hedge Fund has suffered losses to its net asset value. We are instructed that these losses continue to accrue, and as a result, the value of Fenris' investment has fallen by approximately 10% since 1 March this year. Given the existence of your client's undertaking,

> these losses would no doubt be also of paramount concern to your client.
>
> Given the volatility that continues to resonate within the global economy, and in order to minimize further losses accruing to the value of Fenris' investment, Fenris is desirous of redeeming its remaining shareholding in Ennismore European Smaller Companies Hedge Fund, and re-investing the redemption proceeds in corporate bonds, which we are instructed, represent a far more secure investment at this time.
>
> In addition, Fenris is desirous of re-investing any and all distributions received from the liquidation estate of Ennismore Vigeland Fund, together with those redemption proceeds which are payable arising out of the previous redemption of shares held in that Fund. This re-investment would also be in corporate bonds.
>
> Given the losses which Ennismore European Smaller Companies Fledge 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."

9. 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.

10. At that trial:

(i) EFML contended that it could claw back the same percentage of the net investment loss suffered by the portfolios managed by Fenris as had been used to calculate the original bonus;

(ii) Fenris argued that EFML was only entitled to clawback the retained bonus if there had been a reduction in the performance fee earned by EFML which was attributable to the loss made by the Fenris portfolios.

11. EFML succeeded at first instance. Foster J held that EFML's construction of the Clawback Agreement was correct. On 16 February 2012 he entered judgment in EFML's favour, declaring that since 31 January 2009 EFML had been entitled to the shares and the proceeds of sale of the shares. He ordered that Fenris do all that was necessary to ensure that the sum of €2,083,099.17 (being the balance of the fund in the joint account after permitted withdrawals on account of Fenris' legal costs) be paid to EFML from the joint account. On 28 February 2012 Fenris' application for a stay pending appeal to the Court of Appeal of enforcement of the order of 16 February 2012 was dismissed by Foster J and the sum of €2,083,099.17 was paid to EFML.

12. Fenris appealed. The appeal was heard on 23 and 24 July 2012 with judgment delivered on 16 April 2014. The Court of Appeal allowed the appeal, 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 EFML had pleaded or set out to prove.

13. On 16 July 2014 the Court of Appeal ordered that the order of 16 February 2012 be set aside.

14. EFML appealed to the Privy Council. The appeal was heard on 26 and 27 January 2016 with judgment delivered on 19 April 2016 ([2016] UKPC 9). The Privy Council advised dismissal of EFML's appeal. The order of Her Majesty was made on 4 May 2016. The €2,083,099.17 was returned to Fenris on 25 May 2016 (the handover date). Fenris did not seek interest.

The inquiry into damages

15. The hearing before McMillan J took place over 12 days on three separate occasions. The original time estimate was four days; the judge was presented with a

very large volume of evidence together with many authorities in respect of causation and quantification of loss.

16. It was Fenris' pleaded case 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 money frozen by the injunction. Fenris would have invested all of the money in a portfolio of European Small Cap Equities, adopting the same investment strategy as Mr Vigeland had employed before 2007/2008. That investment would have outperformed the benchmark HSBC Smaller European Return Index (the HSBC Index) by an annual average of around at least ten percentage points a year.

17. EFML had used the HSBC Index for the purposes of comparison with its own returns. It comprises the total investment returns of several hundred companies across Europe. It was Mr Vigeland's evidence, in an affidavit of 30 September 2016 (his sixth affidavit) that his investment strategy would have led to a return for Fenris 10.5% above the HSBC Index. On his calculation this would have translated into €12,671,141.68.

18. As well as the evidence of Mr Vigeland, Fenris relied on written material produced by EFML for their clients setting out Mr Vigeland's success in investing, and the large amount of money he had made for EFML.

19. A jointly instructed expert, Mr Croft, gave evidence on the likely quantum on the basis of the pleaded cases. He opined that given that the HSBC Index had been sold to Euromoney, Mr Vigeland's projected returns would be better compared to the Oslo Bors Small Cap Index than to the HSBC Index. In a supplemental witness statement Mr Vigeland revised the calculation set out in his sixth affidavit and first witness statement to take account of the HSBC Index returns used by Mr Croft and to correct an error in the figures he had used in calculating Fenris' loss. The revised loss quantified by Mr Vigeland was €20,416,960.69, calculated on the basis that the invested funds would have outperformed the HSBC Index by 17.7% over the 7.24 years, giving an annual return of 37.2% or a compound percentage return of 886.6%.

20. There was no alternative case put by the appellant. The approach was described by EFML as all or nothing.

21. It was and is EFML's case that the appellant's case on loss was based entirely on hindsight - it being known by the time of the hearing that European Small Caps had

moved significantly upwards during the relevant period, particularly in the period April to June 2009. Objective factors made it clear that this would not have been the approach taken in 2009 onwards. EFML relied on the contents of the letter from Ogier of 8 May 2009 as contemporaneous evidence of the approach Mr Vigeland would have taken. They relied also on other factors to which the Board refer in detail later in this judgment.

22. EFML also submitted that the loss was limited to the period from the date of the freezing order in February 2009 to the date when Foster J ordered the moneys to be paid out to EFML, 16 February 2012, a total of about three years.

23. McMillan J found:

(i) that the undertaking and therefore the loss endured until 25 May 2016 when EFML paid over to Fenris the money it had received pursuant to the order of Foster J.

(ii) that Mr Vigeland was an honest reliable and credible witness and the court accepted his evidence that but for the injunction he would, on behalf of Fenris, 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 in a portfolio of European Small Caps adopting the same investment strategy he had employed before 2007/2008.

(iii) that in the light of the historical affinity between EFML's returns and those of the HSBC Index and the shared investment philosophy, sense of priorities and aspirations between EFML and Mr Vigeland, he took a blended figure of 210.05% of the original injuncted amount 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 deprived and assessed the loss at €5,354,601.07 plus interest of €339,320.34.

24. EFML appealed.

The Court of Appeal

25. EFML attacked the judge's findings on the basis that he had misdirected himself as to the law and made unsustainable findings of fact with the result that his finding that Fenris would have invested as Mr Vigeland had during his time at EFML could not stand. He had misdirected himself as to the nature of an undertaking given when a freezing injunction is obtained, he had misunderstood what was required for Fenris to prove its loss and the approach to be taken to assessing the loss. He had made unfair and unfounded criticisms of the manner in which EFML had resisted the claim and had erroneously relied on Mr Vigeland's genuine belief that he would have invested the frozen assets as he had asserted without considering whether other evidence pointed away from what he genuinely believed he would have done.

26. Finally, EFML submitted that the judge was wrong to find that the injunction had prevented Fenris from using the frozen moneys from 27 February 2009 to 25 May 2016. The correct period was 27 February 2009 to 16 February 2012, ie from the making of the freezing order to the date of judgment in the proceedings before Foster J.

27. In its respondent's notice Fenris sought to affirm the judge's decision on the additional ground that having accepted Fenris' evidence that, as a 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 facie case; accordingly the judge had erred in holding that it was not sufficient for Fenris to demonstrate a prima facie case that, but for the injunction, it would have invested in European Small Caps and/or suffered some loss.

28. The court heard the appeal over two days. Sir Richard Field JA gave the only substantive judgment with which Sir Bernard Rix JA and Sir John Goldring, presiding, agreed. They set aside the judge's findings on causation, assessed the loss and substituted an award of €558,034.89 which reflected the loss incurred between 16 May 2009 (that being the date on which Fenris would have invested the money had it not been frozen) and the date of Foster J's judgment, 16 February 2012.

29. There were a number of reasons for the decision to set aside the judge's findings:

First, that he had misunderstood and misapplied the view expressed in a number of authorities that the cross undertaking is the price the plaintiff pays in respect of an interlocutory injunction. At para 111 Sir Richard Field said:

> "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."

He continued:

> "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 plain view in paras 23, 37, 79, 233, 244, 265, 271, 272 and 273."

Second, it was plain that McMillan J considered the conduct of EFML to be at best unattractive and at worst dishonest. Parts of his judgment were intemperate and unfair to EFML. There is no need to repeat them. It was agreed before the Court of Appeal and before us that those findings could not stand.

Third, the Court of Appeal also found that the judge erred in his finding of fact, having relied entirely on the evidence of Mr Vigeland about what he would have done with the money but for the freezing order. The judge was entitled to treat Mr Vigeland as truthful and sincere, but it was incumbent upon him, when considering what Mr Vigeland would have done, to consider and evaluate also the evidence which pointed away from the conclusion contended for by Fenris. At para 120:

> "In particular, the judge failed to weigh and assess the matters relied on by EFML … 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 court recognised that the judge did 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. Sir Richard Field went on to say that the judge did not make any objective analysis of the relevant circumstances.

30. At para 122, Sir Richard Field observed:

> "… 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 *Chappel v Hart* …"

That was a reference to *Chappel v Hart* (1998) 195 CLR 232; [1998] HCA 55 at footnote 33 where McHugh J said:

> "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 appellate review laid down in *Abalos v Australian Commission* (1990) 171 CLR 167 and other cases are likely to have little application."

31. He then set out at para 126 the objective circumstances to which the court should have had regard alongside Mr Vigeland's evidence of what he believed he would have done with the frozen moneys 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 [which were relied on by EFML]:
>
> > (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 Fourth 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 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.

(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 £3m 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 had 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."

32. Sir Richard Field concluded at para 127 "Weighing the matters set out in para 126 … 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."

33. Sir Richard Field records an exchange between the bench and counsel during the hearing on the question whether the Court of Appeal could make its own assessment of the loss sustained by Fenris by reason of the injunction. Mr Lowe QC accepted that if the court were to set aside the judge's award in favour of Fenris, it would be open to it to substitute for that award its own finding as to the compensation to which Fenris was entitled, so long as the court did not upset the judge's findings on Mr Vigeland's credibility. Mr McMaster QC accepted that it was open to the court to conclude that, but for the injunction, Mr Vigeland would have invested the €2.2m frozen funds other than in a portfolio of European Small Caps managed in the same way as he managed the investments he made whilst with EFML. He also submitted that the way Fenris had pursued its damages claim meant that there was lack of evidence as to an alternative investment return and accordingly the court should adopt a conservative approach focussing on a rate of return in the range of 5%-10% pa.

34. At para 125 Sir Richard Field set out the evidence available to the Court of Appeal: the affidavits, witness statements and exhibits of all three witnesses who gave evidence at the trial, the transcript of the cross-examination and re-examination of Mr Vigeland, seven pages of the transcript of the cross-examination of Mr Blair (a director of EFML who gave evidence about Mr Vigeland's approach to investment performance prior to 2009) and the transcript of the cross-examination of Mr Vigeland during the morning of 7 December 2011 before Foster J. He concluded that "On the basis that it is accepted (as it should be) that Mr Vigeland 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". At para 131 Sir Richard Field went on to hold therefore that the court "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."

35. At para 133 he concluded that there was an

> "overall chance that through Mr Vigeland Fenris would have used the frozen funds (€2.2m) to make an investment that was less risky than a portfolio of European Small Caps with a lower and safer return. I take €2.2m 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 €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 two years and 276 days."

36. At para 134 he said, "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 would have been made." At para 135 he set out the calculation proposed to the judge at trial by EFML:

> "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 (ie about 8 1/3% pa) producing a profit of €550,000 on the invested capital of €2.2m."

At para 136 he concluded that "faute de mieux" EFML's calculation afforded 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% on an investment of the type I have found Fenris would have made".

37. Interest was to be added in the sum of €42,640.09 bringing the total award to €558,034.89.

The hearing before the Board

38. The question for the Board is whether, having set aside the judge's conclusion on causation (against which there is no appeal), the Court of Appeal erred in its assessment of the loss, including the duration of the period of loss.

39. Before turning to the central issues, we deal with a dispute as to what the Court of Appeal found. For Fenris, Mr Lowe submitted that the court had concluded that but for the freezing order the appellant would have invested in Small Caps. Mr McMaster submitted that this interpretation of the judgment was mistaken. No such finding had been made.

40. The Board is satisfied that the judge's finding that Fenris would have invested in Small Caps in the way Mr Vigeland had in the period before 2008-2009 was set aside by the Court of Appeal as we have described in detail above, see in particular para 122 of the Court of Appeal judgment set out at para 30 above. When considering its own assessment, the Court of Appeal rejected the appellant's case, see in particular para 127 at para 32 above. The reference to Small Caps in para 135 of the judgment is part of the calculation of the rate of return on the more conservative investment the Court of Appeal found Fenris would have made. It is not a finding that Fenris would have invested in Small Caps. The Board reject Mr Lowe's submission on this point.

GROUNDS OF APPEAL

41. The grounds of appeal may be summarised thus.

(i) The Court of Appeal wrongly held that the appellant had the burden of proving the amount of loss suffered on the balance of probabilities, by reference to a loss of a chance analysis.

(ii) The Court of Appeal should not have interfered with the judge's findings on quantification, as the respondent's appeal was limited to causation.

(iii) Once the respondent's appeal established that Fenris had suffered some loss (accepted by both the judge at first instance and the Court of Appeal) quantification should have been answered by the first instance judge's assessment of the evidence. The Court of Appeal had no basis upon which to determine the performance of a hypothetical portfolio of investments.

42. As to duration of the period of loss the grounds were as follows.

(i) There is no legal principle requiring liability on an undertaking in damages to be restricted to loss suffered prior to a judgment. Instead, the extent of the liability depends on a judicial finding of the losses attributable to the injunction as a matter of fact.

(ii) The freezing order was the only reason the funds were in the Cayman Islands, instead of in a portfolio under the appellant's control. Causation was established for the entire period the appellant was wrongfully kept out of its funds.

DURATION OF PERIOD OF LOSS

43. It is convenient to deal first, as the Court of Appeal did, with the duration of the period of loss.

44. Mr Lowe argued that the Court of Appeal's conclusion as to the period of loss was incorrect. This issue raised, he submitted, a straightforward question of factual causation. He relied on the Canadian case of *Algonquin Mercantile Corpn v Dart*

Industries Canada Ltd (1996) 12 CPR (3d) 289 referred to in *Gee on Commercial Injunctions*, 7th ed (2021), in support of his proposition that damages need not be restricted to losses sustained during the period for which the injunction was in force. The court was therefore wrong to conclude that the period of loss covered by the undertaking was terminated by the order of 16 February 2012. In *Algonquin* at para 37 the court said:

> "The usual undertaking given to the court by parties requesting an interlocutory injunction in the context of today's society in Canada involves, in my view, an undertaking to pay all damages which flow from the granting of the interlocutory injunction and is not in any way restricted to those which occurred during the period of the existence of the injunction itself, nor does the common law impose any artificial cut-off date. The assessment for the period following the injunction remains subject to the usual limitations as to remoteness, that is, as to whether in the particular circumstances of the case, after a certain period of time has passed and other circumstances have intervened, losses, if any, can still on a balance of probabilities, be attributed to the injunction with any reasonable degree of certainty."

45. In written and oral submissions on this issue Mr Lowe argued that the fact that there were funds in the bank account to satisfy the judgment affected (adversely to the appellant) Foster J's decision to refuse a stay pending appeal. He sought to develop a counterfactual scenario as follows.

(i) Fenris had and has no links with the Cayman Islands. Fenris is incorporated in Belize. It has no bank account in the Cayman Islands. Absent the freezing injunction the shares and cash would have been held outside the jurisdiction and invested profitably elsewhere. When Foster J gave judgment against Fenris there would have been no funds from which the judgment could be satisfied. EFML would not have found it easy to enforce its judgment.

(ii) Had Foster J heard the application for a stay in the absence of any funds in the jurisdiction he would have accepted that Fenris was trading profitably and he would not have required the judgment sum to be lodged as a condition of the stay because that would have required the liquidation of assets which, we are invited to accept, would have been making money.

46. Mr McMaster pointed out that there was no evidence at trial about what the prospects would have been of enforcing a Cayman Islands judgment had there been no assets in the Cayman Islands. The appellant had not invited the Court of Appeal to affirm the first instance judgment on that basis and the appellant could not be heard to complain now that the court had not considered it.

47. It is clear to the Board that the underlying proposition in Fenris' case is that the judgment could not have been enforced had the assets been out of the jurisdiction. Even if that were correct, and we make no finding in that respect, it does not change the fact that there was a judgment of the court against Fenris which it was liable to satisfy. A court will not award compensation to a party for being deprived of the opportunity to avoid the consequences of a judgment properly obtained against it.

48. The Board would add that the counterfactual scenario is highly speculative. It requires an assumption that Foster J would have been satisfied that this was a case in which a stay should be granted. Assuming, for the purposes of the counterfactual, that he was so persuaded it is unreal to suggest that he would not have required the judgment sum to be lodged at court in the Cayman Islands as a condition of the stay. It is to be remembered that the freezing injunction was granted by Quin J because there was a risk of assets being dissipated and lost for enforcement purposes. In our judgment the grant of a stay was highly unlikely, and a stay without funds being brought onshore was out of the question.

49. Mr McMaster further submitted that even if the appellant were able to prove that the respondent would not have been able to enforce the order of Foster J the respondent should not be obliged to compensate the appellant for the resulting loss. He referred the Board to the observations of Lord Sumption in the Supreme Court decision in *Patel v Mirza* [2017] AC 467. The issue being considered by Lord Sumption in that part of his judgment was consistency as between the various branches of the law, drawing on the majority judgment of the Supreme Court of Canada given by McLachlin J in *Hall v Herbert* [1993] 2 SCR 159, 176 in which she observed that it was intolerable that one branch of the law should "punish conduct with the one hand while rewarding it with the other".

50. Inconsistency does not arise in this case. The question of the duration of the loss is to be resolved by applying ordinary principles of causation. The case of *Algonquin* is not to the point. The loss flowing from the injunction did not continue after the order had been discharged. From the date of the judgment of Foster J such loss as occurred flowed from the judgment and the consequential orders which led to frozen moneys being used to meet the judgment in favour of EFML. The Court of Appeal put it thus at para 110: "[the Foster J judgment] totally eclipsed the freezing

order as the cause of Fenris' inability to take the opportunity of using the proceeds of retained bonus assets to invest in European Small Caps". The Board agree.

51. It is long established that the courts do not compensate a litigant who succeeds on appeal for losing at first instance. Where a litigant has been kept out of his money during the period between judgment and appeal he may receive interest on the judgment sum. Damages are not payable.

52. The Board rejects this ground of appeal. The period of loss remains the period between the date on which Fenris would have invested the money had it not been frozen and the date of Foster J's judgment, that is between 16 May 2009 and 16 February 2012.

The Court of Appeal's assessment of loss (grounds 1-6)

53. There were before the Court of Appeal a very large number of authorities on the assessment of damages arising on an undertaking, many of which were analysed in the judgment. Most of them were referred to in the skeleton arguments before the Board, but only a very few were referred to in oral submissions. It is necessary to refer only to a few.

54. The approach to the assessment of damages where an undertaking is enforced is analogous to that taken where there has been a breach of contract. This is so notwithstanding that there is no contract between the parties and the undertaking is given not to the injuncted party but to the court. The principal authority on the point is *Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, p 361E-F (see the speech of Lord Diplock):

> "… if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed … 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 LJ at 427."

55. Sir Richard Field correctly summarised the position thus: Fenris was entitled to recover damages from EFML as though the parties had entered into a contract by which EFML would not prevent Fenris from doing that which the injunction prevented.

56. We were referred to a number of cases in which the general approach is adjusted and refined to reflect particular circumstances. This is not such a case. The general approach applies.

57. There was no dispute that the burden of proving the loss was on Fenris as the party seeking compensation pursuant to the undertaking. The court had rejected the contention that Fenris could prove on the balance of probabilities that it would have invested in European Small Caps as before. After enquiry from the Bench the respondent did not dispute that Fenris could prove on the balance of probabilities that it had lost the opportunity to invest the frozen moneys profitably. The issue for the court was what loss flowed from that lost opportunity. The parties disagreed about how the moneys would have been invested and how the loss was to be quantified.

58. Mr Lowe submits that the Court of Appeal erred in taking the submissions made by EFML at first instance as to the quantification of loss and incorporating them into its decision on quantification. He submits that the judge at first instance had rejected EFML's submission and there had been no appeal against that rejection and so it followed that once the court was satisfied that causation was established it should have followed the judge's calculation, there being no appeal against quantification. The Board reject this submission which ignores the court's express findings that the whole of the judge's findings on causation of loss should be set aside. This included the finding that the appellant would have invested in Small Caps as he had done in the past. The finding having been set aside (and the court not being persuaded to make the same finding afresh) quantification of loss on the basis of the finding fell away.

59. Mr Lowe points to some passages of Sir Richard Field's judgment in support of a submission that the court erroneously assessed damages on the basis of loss of a chance. By way of example at para 41 Sir Richard Field says:

> "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."

This was correct. He continued, “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”. Whilst this may be true in some circumstances this was not a loss of a chance case. The assessment of damages on the basis of loss of a chance is generally appropriate when the injured party’s loss depends on the hypothetical actions of a third party. It is most commonly (although not exclusively) used in cases of professional negligence where what is lost is the right to claim damages. For a recent, authoritative review of the award of damages for loss of a chance by the Supreme Court see the judgment of Lord Briggs in *Perry v Raleys Solicitors* [2020] AC 352, paras 16-21.

> “16. Commonly, the main difficulty arises from the fact that the court is required to assess what if any financial or other benefit the client would have obtained in a counterfactual world … Similar difficulties arise where the question of causation or assessment of damage depends upon the court forming a view about the likelihood of a future rather than past event.”

> “17. In both those types of situation (that is the future and the counterfactual) the court occasionally departs from the ordinary burden on a claimant to prove facts on the balance of probabilities by having recourse to the concept of loss of opportunity or loss of a chance. Sometimes the court makes such a departure where the strict application of the balance of probability test would produce an absurd result, for example where what has been lost through negligence is a claim with substantial but uncertain prospects of success, where it would be absurd to decide the negligence claim on an all or nothing basis, giving nothing if the prospects of success were 49%, but full damages if they were 51% ...”

> “18. Sometimes it is simply unfair to visit upon the client the same burden of proving the facts in the underlying (lost) claim as part of his claim against the negligent professional. This may be because of the passage of time following the occasion when, with competent advice, the underlying claim would have been pursued. Sometimes it is because it is simply impracticable to prove, in proceedings against the professional, facts which would ordinarily be provable in

> proceedings against the third party who would be the defendant to the underlying claim …"

> "20. For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation."

> "21. This sensible, fair and practicable dividing line was laid down by the Court of Appeal in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602."

60. It was not disputed that the Court of Appeal could find on the balance of probabilities that the appellant would have invested the frozen moneys profitably but for the injunction. What was required was the best assessment the court could make of the likely profits Fenris would have made, the court having rejected the submission that Fenris would have invested in European Small Caps as before. It is instructive to consider, as Sir Richard Field did, the judgment of Toulson LJ in *Parabola Investments Ltd v Browallia Cal Ltd* [2011] QB 477, para 23. That was a case involving fraud, but the same principles apply:

> "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 & 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 *Davies v Taylor* [1974] AC 207, 212 per Lord Reid, and *Gregg v Scott* [2005] 2 AC 176, para 17 per Lord Nicholls, and paras 67-69 per Lord Hoffmann."

61. In *SCF Tankers Ltd (formerly known as Fiona Trust & Holding Corp) v Privalov* [2018] 1 WLR 5623 ("*Privalov*"), which was the principal focus of Sir Richard Field's analysis of the law, Males J was considering the award of damages arising out of freezing orders (and a related order for security for costs) in a complex commercial shipping case. At para 58 he adopted Toulson LJ's approach to the exercise in the case before him:

> "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 claimant's 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' claim. 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] ECC 20, paras 133-135."

62. Later in the judgment Males J accepted on the balance of probabilities the injuncted party's case on what would have been their approach to investment and determined that there was a 50% chance that the profits claimed would have been achieved. He awarded 50% of the sum claimed.

63. The Court of Appeal of England and Wales dismissed the appeal against Males J's judgment in *Privalov* [2017] EWCA Civ 1877; [2018] 1 WLR 5623. Sir Richard Field

recorded the decision thus "The test for causation in enforcement of cross-undertakings 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 …"

64. Sir Richard Field adopted, broadly, the approach of Males J. At para 127 of his judgment, he concluded that Fenris had failed to show on the balance of probabilities that, but for the injunction, it would have invested the frozen funds in European Small Caps as it alleged. Instead, he made his own assessment that Fenris would have made a less risky investment. At para 133 he referred to this in terms of there being "an overall chance" that Fenris would have done that, but in context, following what he had said in para 127, it is clear that the assessment he made about this was on the balance of probabilities. That is also made clear by his own calculation of the loss at paras 135-137. He accepted EFML's submission as to the profile of the investment portfolio Fenris would have been likely to have adopted and found that the rate of return "on an investment of the type I have found Fenris would have made" (para 136) would have been 8.5% pa, which rate he applied without any discount for uncertainty in order to arrive at the figure of €515,394.80 for Fenris' loss (para 137). Accordingly, whilst there are a number of references in the judgment to damages being assessed on the basis of "loss of a chance", it is clear that the approach in fact adopted by the court was entirely orthodox.

65. It is clear to the Board that the court did not assess damages on the basis of loss of a chance and we reject Fenris' complaint that it did. We also reject the submission that the judge erred in requiring Fenris to prove on the balance of probabilities that it would have invested the money in the way it had pleaded. Mr Lowe submitted that Fenris was required only to establish a prima facie case, which it was easily able to do. He relied on two cases in support of that submission: *Financiera Avenida SA v Shiblaq* The Times 21 November 1988; [1990] CA Transcript No 973, unreported (Saville J) and *Privalov* to which we have already referred.

66. Neither of these cases supports the proposition for which Mr Lowe contends. As we have already observed, the Court of Appeal in *Privalov* upheld the approach and decision of Males J which starts from the proposition that it is for the injuncted party to prove on a balance of probabilities that it would have invested the funds profitably. They did so having referred to the decision of Saville J in *Avenida v Shiblaq*. In that case the defendant to a freezing injunction asserted that the effect of it was that he was forced to resign as a broker from his place of employment, thereby losing commissions. Against this, it was alleged that he would have lost his employment or

significant commissions anyway, as a result of the scandal which had given rise to the litigation in respect of which the injunction was granted. Saville J said:

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

67. This case does not stand for the proposition which the appellant advances. The reference to establishing causation based on a prima facie case refers to situations where the loss is apparent (in that case, the loss of a job), and what is contested is its cause. On the facts of this appeal, if the appellant establishes loss in the form of being prevented from investing, then it is obvious that this stems from the freezing injunction but it is still incumbent on the injuncted party to establish that it would have acted in a particular way on the balance of probabilities, with more than a prima facie case.

68. The Board rejects Mr Lowe's further submission that there was no evidence upon which the Court of Appeal could properly rely in support of its conclusion on quantification. The court had before it the evidence set out at paras 33 and 36 above. There was evidence, including the Ogier letter and evidence given by Mr Vigeland in cross-examination about what he had done with other funds, which supported the conclusion that Fenris would have taken a much more conservative approach than the one contended for with the benefit of hindsight. Fenris' adventurous, all or nothing approach having failed, it cannot be heard to complain that the court relied on such evidence as was available to reach a much more conservative conclusion. In the absence of any alternative or fall-back case from the appellant the court's approach may be thought to be a generous one. The use of a starting figure inclusive of the sums expended on legal fees underlines that generosity.

69. Mr Lowe further submits that rather than accepting the respondent's submissions on how the loss should be calculated the court should have made a

"liberal assessment" of the loss as described in a number of the authorities. This submission adds nothing to those we have already considered. The references in the cases to liberal assessment do not imply an assessment of loss which is greater than that to which the losing party is fairly entitled. Given the Board's view that the court took a generous approach to the appellant it does not accept that a liberal assessment (as opposed to an over generous one) could or ought to have led to a higher award of damages in this case.

CONCLUSION

70. Notwithstanding some confusion in the language in certain passages of the judgment, the Board is satisfied that the Court of Appeal took an orthodox approach and reached conclusions which were consistent with authority and open to it on the evidence.

71. Accordingly, the Board will humbly advise Her Majesty that this appeal be dismissed.