**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**
**CICA (FSD) 8 of 2012**

**BEFORE**

**The Rt Hon Sir John Chadwick, Justice of Appeal**
**The Hon Elliott Mottley, Justice of Appeal**
**The Rt Hon Sir Anthony Campbell, Justice of Appeal**

**ON APPEAL FROM THE GRAND COURT**
**FSD 0047 of 2009**
**(The Hon Justice Andrew Jones QC)**

**BETWEEN**

**RIAD TAWFIQ AL SADIK**

**Plaintiff/Appellant**

**- and –**

**INVESTCORP BANK B.S.C.**
**INVESTCORP INVESTMENT ADVISERS LIMITED**
**SHALLOT IAM LIMITED**
**BLOSSOM IAM LIMITED**
**INVESTCORP NOMINEE HOLDER LIMITED**
**INVESTCORP TRADING LIMITED**

**Defendants/Respondents**

**Mr Michael Black QC** with **Mr Marcus Staff** instructed by Harney Westwood & Reigels appeared for the Appellant, Riad Tawfiq Al Sadik
**Lord Falconer of Thoroton QC** with **Mr Deepak Nambisan** instructed by Walkers appeared for the Respondents, Investcorp Bank B.S.C., Investcorp Investment Advisers Limited, Shallot IAM Limited, Blossom IAM Limited, Investcorp Nominee Holder Limited and Investcorp Trading Limited

Hearing: 20-23 November 2012
Judgment: 21 September 2016

_____

**JUDGMENT**

_____

**Sir John Chadwick, Justice of Appeal:**

1 This is an appeal from an order made on 18 May 2012 by Justice Andrew Jones QC dismissing the claims made by the appellant, Riad Tawfiq Al Sadik ("Mr Al Sadik"), as plaintiff in proceedings brought against Investcorp Bank B.S.C and five other defendants (together, unless it is necessary to distinguish between them, "Investcorp").

2 Mr Al Sadik was described by the judge as a wealthy businessman resident in Dubai, United Arab Emirates. In 2007 he sold part of his holding in a major construction and engineering company for AED1.2 billion (US$327 million), which he received in cash.

3 The first-named respondent/defendant, Investcorp Bank B.S.C ("Investcorp Bank"), is incorporated in the Kingdom of Bahrain as a Bahraini Stock Company. It carries on business as an international investment bank, with offices in Bahrain, London and New York. The second named respondent/defendant, Investcorp Investment Advisers Limited ("Investcorp Advisers") is a subsidiary of Investcorp Bank, incorporated and registered in the Cayman Islands and licenced by the Cayman Islands Monetary Authority. The fifth and sixth named respondents, Investcorp Nominee Holder Limited ("Investcorp Nominee 1") and Investcorp Trading Limited ("Investcorp Nominee 2") are also subsidiaries of Investcorp Bank, incorporated and registered in the Cayman Islands. The third named respondent/defendant, Shallot IAM Limited ("Shallot"), was incorporated and registered in the Cayman Islands on 28 February 2008. Its non-voting preference shares were issued to (and were, at the material times, held by) Investcorp Nominee 1 for Mr Al Sadik. Its ordinary (voting) shares were issued to (and were, at the material times, held by) Investcorp Nominee 2. The fourth named respondent/defendant, Blossom IAM Limited ("Blossom"), was incorporated and registered in the Cayman Islands on 27 December 2007. Its non-voting preference shares were issued to (and were, at the material times, held by) Shallot. Its ordinary (voting) shares were also issued to (and were, at the material times, held by) Investcorp Nominee 2.

4 On 27 February 2008 Mr Al Sadik transferred AED500 million to Investcorp Bank. As I have said, Shallot was incorporated on the following day. On 1 March 2008 Mr Al Sadik, Shallot, Investcorp Bank and Investcorp Nominee 1 entered into an agreement, described as a Share Purchase Agreement and headed "Investcorp Hedge Funds – Separately Managed Account" (the "SPA"), the purpose of which was set out, in the introductory paragraph, in the following terms (so far as material):

> "A. Purpose
>
> I [Mr Al Sadik] have requested Investcorp Bank B.S.C. . . . to establish a separately managed account (the 'Investment Account') which will invest in certain hedge funds or segregated accounts with any hedge fund managers selected by the Iinvestment Manager (as defined below), including, but not limited to, any Investcorp hedge fund (whether an Investcorp Fund of Hedge Funds, an Investcorp Single Manager Fund or any other Investcorp hedge fund product) . . .

> The Investment Account will be established as a special purpose vehicle, Shallot IAM Limited which will be incorporated under the laws of the Cayman Islands ('the Company'). . . ."

In that context "the Investment Manager" meant Investcorp Advisers, with whom (as provided by clause D of the SPA) the Company (Shallot) would enter into an investment management agreement. By clause B of the SPA Mr Al Sadik agreed to purchase, for an aggregate purchase price equal to the "Investment Amount", and Investcorp Bank agreed to procure the issuance and sale of UAE Dirham denominated Participating Non-Voting Redeemable Preference Shares of the Company at par. The "Investment Amount" (indicated on the signature page of the SPA) was AED 500 million.

5 On 4 March 2008 Investcorp Bank converted the Investment Amount into US Dollars and credited the proceeds of conversion (US$136,138,505) to the account of Shallot. Shallot retained a small part of that amount (some US$1.129 million) and paid the balance to Blossom. Blossom invested US$79 million in a Fund of Hedge Funds – known as Investcorp Diversified Strategies Fund ("DSF") – and the balance (some US$56.009 million) in five Single Manager Funds ("SMFs") which had been established by Investcorp. The investments were treated as having been made as at 1 March 2008.

6 On 10 April 2008 Blossom entered into a loan agreement ("the White Ibis III credit facility") with Royal Bank of Scotland ("RBS") for the purpose of using funds borrowed under that agreement to leverage Mr Al Sadik's investments. Drawings amounting in aggregate to US$214.1 million were made under that credit facility in the period May to September 2008; and were applied for that purpose.

7 As the judge observed, the timing of Mr Al Sadik's hedge funds investments was most unfortunate: 2008 turned out to be the hedge fund industry's worst year. Mr Al Sadik's investment with Investcorp suffered badly in the market crash following the bankruptcy of Lehman Brothers on 15 September 2008. The final redemption proceeds – realised after he had given instructions to redeem the investment on 10 December 2009 – reflected a total loss since inception of about AED 207.6 million (US$ 56 million), representing a negative return on investment of 42%. The loss was aggravated by the leveraging which had been effected by Investcorp. In these proceedings Mr Al Sadik seeks to recover his loss.

*The claims advanced in these proceedings*

8 In his statement of claim, dated 23 December 2009, Mr Al Sadik advanced his claims under the six heads set out in section C of that pleading. Given that not all of those heads of claim were pursued at trial, it is sufficient at this stage to refer to them in the summary form in which they are described in the original statement of claim: First Claim, Breach of Collateral Contract; Second Claim, Fraudulent Misrepresentation; Third Claim, Deceitful Non-Disclosure; Fourth Claim, Breach of Contract (unauthorised leveraging); Fifth Claim, Breach of Trust; Sixth Claim, Conspiracy. The statement of claim was amended on 26 August 2010, re-amended on 19 December 2011 and re-re-amended (during the course of the trial) on 31 January 2012. Following re-amendment, the statement of claim (as re-amended and re-re-amended) included a further five heads of claim: Seventh Claim, Fraudulent Misrepresentation (Performance Representation); Eighth Claim, Fraudulent Misrepresentation (Investment Presentation); Ninth Claim, Breach of Contract (Unauthorised Investment); Tenth Claim, Breach of Contract (Entry into the IMA); Eleventh Claim, Breach of Contract (duty to act fairly).

9 The judge recorded that, on the twenty-sixth day of the trial (after the conclusion of the evidence), four of those eleven pleaded heads of claim – the Second, Sixth, Seventh and Eighth Claims - were abandoned. He analysed the position at paragraph 1.14 of his judgment dated 18 May 2012:

> "1.14 At the commencement of the trial counsel opened Mr. Al Sadik's case on the basis of eleven pleaded claims which can be summarised in the following way. Firstly, he claimed that Investcorp orally agreed to guarantee him a 45% return on his initial investment of AED500 million after three years and that it has dishonestly repudiated this agreement. This guarantee is said to comprise a collateral contract made in consideration for entering into the Share Purchase Agreement ('the SPA') which is the equivalent of an investment management agreement. Investcorp denies having entered into any such collateral contract. This claim (the 1st claim in the Re-Re-Amended Statement of Claim) remains on foot. Secondly, he claimed that Investcorp had fraudulently misrepresented to him certain aspects of his investment, including the level of risk associated with it; Investcorp's belief in the attainability of the target return; and the basis upon which the investment would be made. These claims, coupled with a conspiracy claim, (the 2nd, 6th, 7th and 8th claims in the Re-Re-Amended Statement of Claim) were abandoned after the conclusion of the evidence on the 26th day of the trial. Thirdly, Mr. Al Sadik claims that Investcorp leveraged his investment without authority and then deceitfully concealed that it had done so. In brief summary, his case is that Investcorp represented to him that his funds would be invested in Investcorp' s leveraged proprietary hedge funds offering which disclosed predetermined levels of leverage. Instead, it is alleged that Investcorp acted in breach of contract and in breach of its fiduciary duties by secretly leveraging his assets at the portfolio level through a credit facility established with Royal Bank of Scotland Plc ('RBS').

> These claims (the 3rd, 4th and 9th claims in the Re-Re-Amended Statement of Claim) remain on foot. Finally, there is the 5th claim in the Re-Re-Amended Statement of Claim, described as a breach of trust claim, which is essentially based upon the allegation that Investcorp was under a duty to do everything in its power to ensure that the terms of the SPA were carried into effect in an honest manner in the interest of Mr. Al Sadik. The pleaded breach of trust was based upon the allegation, now abandoned, that Investcorp's investment decisions were motivated by a desire to alleviate a pressing liquidity crisis. . . ."

10 In that passage the judge identified five heads of claim – out of the eleven which had been pleaded – as claims which, by the end of the trial, Mr Al Sadik continued to pursue. Those were the First Claim (Breach of Collateral Contract), the Third Claim (Deceitful Non-Disclosure), the Fourth Claim (Breach of Contract (unauthorised leveraging)), the Fifth Claim (Breach of Trust), and the Ninth Claim (Breach of Contract (Unauthorised Investment)). He did not refer, in terms, to the Tenth Claim (Breach of Contract (Entry into the IMA)) or to the Eleventh Claim (Breach of Contract (duty to act fairly). But he went on to say this:

> "1.14 . . . The case put in Counsel's written Closing Submission is that the investment decisions were made for the improper purposes of providing complementary capital for its single manager programme (including the proposed Alt Beta fund) and generating two layers of fees. Whether it is open to the Plaintiff to pursue this un-pleaded claim is an issue I have to decide."

*The issues which the judge determined*

11 At paragraph 1.15 of his judgment, the judge identified the four issues which, in his view, he needed to resolve:

(1) Whether or not there was a collateral contract by which Investcorp guaranteed Mr Al Sadik's capital, together with a 45% return over three years.

(2) Whether, on the true construction of the SPA, Investcorp was not authorized to leverage Mr Al Sadik's assets for investment purposes at the portfolio level (as opposed to investing in hedge fund products designed to provide leveraged investments), whether through a special purpose vehicle or otherwise.

(3) Whether Investcorp deceitfully concealed its intention to leverage the assets, the manner in which the assets were leveraged and the extent of the leverage actually employed.

(4) Whether the asset allocation decisions, including decisions about the application of leverage, were made in breach of fiduciary duty.

12 He determined each of these issues against Mr Al Sadik; for the reasons which he gave in, respectively, sections 3, 4, 5 and 6 of his judgment. He summarised his conclusions in section 7 of that judgment:

> "7.2 No Collateral Contract, encompassing the Promise to Guarantee, was concluded between the parties with the result that the Plaintiff's First Claim is dismissed. Had I accepted the evidence of Mr. Al Sadik in preference to that of Mr. Al Khatib and concluded that an oral promise of a guaranteed return was made prior to execution of the SPA on 1st March 2008, I would have dismissed the First Claim on the basis that the promise was a matter of honour and that the parties had not intended to form a legally binding contract.
>
> 7.3 On its true construction, the SPA authorized the Defendants to leverage the Investment Amount for investment purposes by means of First Layer Leverage and/or Second Layer Leverage and the method by which this was done through Blossom (rather than Shallot) did not constitute a breach of contract. The transfer of the Investment Amount (less a small retention) from Shallot to Blossom was an administrative step which did not constitute an investment at all. It follows that the Plaintiff's Fourth and Ninth Claims are dismissed.
>
> 7.4 The Defendants' failure to inform the Plaintiff about their intention to leverage his assets by means of First Layer Leverage using the White Ibis III credit facility does not constitute a breach of its reporting obligations under the SPA. The fiduciary relationship arising out of the SPA did not impose upon the Defendants any disclosure obligation which was additional to or independent of the contractual obligation. The Defendants breached their obligations under Clause F.4 of the SPA in that, on its true construction, the Defendants failed to provide the Plaintiff with any statements of the underlying investments held through Blossom. Had the Defendants complied with Clause F.4, the fact that they had employed First Layer Leverage and the amount of the borrowing would have been disclosed to Mr. Al Sadik in the report for May 2008 (which would have been delivered in mid June). The Defendants' breach of contract resulted in Mr. Al Sadik not being informed about the level of leverage and the manner in which it had been carried out until 2nd March 2009. However, the Defendants' reporting was done bona fide in a manner which Mr. Kironde honestly believed would best serve Mr. Al Sadik's interest. There was no intention to conceal from Mr. Al Sadik the fact that his portfolio had been leveraged or the level of leverage or the manner in which it had been carried out. For these reasons I conclude that the non-disclosure was not deceitful with the result that the Plaintiff's Third Claim is dismissed.
>
> 7.5 The Defendants' initial asset allocation decision and the subsequent decisions in relation to the application of leverage were made bona fide for a proper purpose in accordance with the SPA. The allocation of half the Investment Amount to Single Managers (with 3x leverage), on the basis that the investment would be diversified across an additional four Single Managers (including Alt Beta funds) as and when new funds were launched, was made in what Investcorp believed to be in Mr. Al Sadik's interest and not for the ulterior purpose of capitalizing the new funds and/or increasing its fee income through the fee sharing arrangement with the Single Managers. For these reasons the Plaintiff's Fifth Claim is dismissed."

13 At paragraph 7.6 of his judgment the judge explained why he had reached the conclusion that, having decided the liability issues in favour of Investcorp, it would not be appropriate to say anything about the causation and quantum issues which would have arisen if he had found in favour of Mr Al Sadik. He said this:

> "7.6 . . . Counsel's written Closing Submissions disclose areas of disagreement which were not ventilated in the oral argument on the basis that further and more detailed written submissions would be made if I were to find in favour of the Plaintiff on all or any of his claims. For this reason it would not be appropriate for me to comment on any of these points."

*The grounds of appeal*

14 Notice of appeal from the judge's order of 18 May 2012 was filed on 30 May 2012. The relief sought is an order that "the judge's judgment and order be set aside and judgment entered for the Plaintiff with damages to be assessed or that there be a re-trial of the Plaintiff's claims". A Memorandum of Grounds of Appeal was filed on 29 June 2012. It sets out twenty-eight numbered grounds and (with two schedules) extends over 53 pages. The twenty-eight grounds of appeal are grouped under four heads: (i) "Breach of Collateral Contract to return his investment to the Appellant plus 45% at the end of three years" (grounds 1 to 8); (ii) "Breach of the SPA" (grounds 9 to 19); (iii) "Breach of Duty to Disclose" (grounds 20 to 24); and (iv) "Breach of Duty to Act in the Appellant's Best Interests" (grounds 25 to 28). Those four heads correspond (broadly) with the matters addressed, respectively, in sections 3, 4, 5 and 6 of the judge's judgment.

15 On 28 September 2012 those representing Mr Al Sadik filed a document described as "Appellant's Skeleton Argument". That document extended over 98 pages. After referring (at paragraph 4) to the grounds of appeal set out in the Memorandum of Grounds of Appeal, it is said (at paragraph 5) that Mr Al Sadik no longer pursues "Grounds 1 to 7 and 8 (*sic*)" in relation to the breach of collateral contract. But, in the following sentence, it is said that "Ground 6 which challenges findings about the credibility of the Respondent's witnesses is maintained". Further, it is said that "Ground 21 is not pursued"; and that "Ground 22 is pursued in relation to the judge's finding that the breach of Clause F.4 of the share purchase agreement (SPA) occurred innocently insofar as the finding meant that the respondents were not deceitful or led him to fail to award damages for the breach".

16 In the skeleton argument filed on behalf of Mr Al Sadik, (at paragraph 50) it is said that six issues are raised on the appeal. They are described in these terms:

(1) Breach of contract: the judge was wrong to hold that Clause A of the SPA was not breached by Investcorp when it caused Shallot to invest in Blossom (grounds 9 to 16).

(2) Loss and damage (Clause A): the judge was wrong to hold that even if Clause A had been breached Investcorp would not be liable for damages (grounds18 and 19).

(3) Pre-contractual deceitful non-disclosure: the judge erred when he failed to decide that Investcorp deceitfully did not disclose its intention to invest in Blossom (ground 23).

(4) Post-contractual deceitful non-disclosure (breach of Clause F.4): the judge was wrong to hold that Investcorp's breach of Clause F.4 was not done deceitfully (ground 24).

(5) Loss and damage for (breach of Clause F.4): the judge was wrong not to proceed to consider issues of loss and damage arising from the breach of Clause F.4 (ground 17).

(6) Breach of fiduciary duty: the judge was wrong to hold that Investcorp exercised the power of investment in clause A ("the Investment Power") in Mr Al Sadik's interests and not in its own interests (ground 27).

17 None of those issues are relevant to the judge's decision to dismiss the First Claim (Breach of Collateral Contract). The issues numbered (1) and (2) relate to the challenge to the judge's decision to dismiss the Fourth Claim (Breach of Contract (unauthorised leveraging)) and the Ninth Claim (Breach of Contract (Unauthorised Investment)). The issues numbered (3) and (4) relate to the judge's decision to dismiss the Third Claim (Deceitful Non-Disclosure). And the issues numbered (5) and (6), relate to the judge's decision to dismiss the Fifth Claim (Breach of Trust). Given (i) the claims that were pursued at the trial, (ii) the structure of the judge's judgment (which addresses those claims under the four sections 3, 4, 5 and 6) and (iii) the structure of the Memorandum of Grounds of Appeal (in which, as I have said, the grounds are set out under four heads which correspond (broadly) to those four sections of the judge's judgment), the orderly and convenient course, as it seems to me, is to follow (in this judgment) the structure of the Memorandum of Grounds of Appeal; rather than a new structure imposed by Mr Al Sadik's skeleton argument. I have in mind that permission to amend the grounds of appeal was neither sought nor granted; so that grounds raised for the first time in the skeleton

argument which are not found the Memorandum of Grounds of Appeal (if any) are not properly before this Court.

*The first issue*

*Whether there was a collateral contract by which Investcorp guaranteed Mr Al Sadik's capital, together with a 45% return over three years*

18 As I have said, the judge's reasons for dismissing the First Claim are set out in section 3 of his judgment. The issue which he addressed was whether or not there was a collateral contract by which Investcorp guaranteed Mr Al Sadik's capital, together with a 45% return over three years. He held that there was no such contract.

19 Grounds of appeal 1 to 8 – which, as I have said, were grouped in the Memorandum of Grounds of Appeal under the head "Breach of Collateral Contract to return his investment to the Appellant plus 45% at the end of three years" - were in these terms:

> "Ground 1: The learned Judge erred in finding that the Appellant's case was inherently improbable.
>
> Ground 2: The learned Judge misdirected himself as to the nature of the Appellant's case in relation to the collateral contract.
>
> Ground 3: Each of the learned Judge's errors in finding that the Appellant's case was inherently improbable and/or founded on dishonesty led him to err in law as to the correct test in making findings of fact.
>
> Ground 4: Each of the learned Judge's errors in finding that the Appellant's case was inherently improbable and/or founded on dishonesty and as to the test for making findings of fact, led him to apply (a) the wrong test for cogency of proof and/or (b) the wrong threshold of proof.
>
> Ground 5: The learned Judge erred in law when he held that there was no intention to create legal relations on or about 1st March, 2008 even if an oral promise to guarantee had been given to the Appellant by the First Respondent.
>
> Ground 6: The learned Judge erred in law when he decided that all of the witnesses of fact of the Respondents were consistently credible (and that their evidence on every material issue was to be preferred over the evidence of the Appellant and Mr. Zaidi). His findings were inconsistent with his own findings, ignored evidence inconsistent with the findings and based upon generalisations about the credibility of 'professional' bankers.
>
> Ground 7: The learned Judge erred in law when he decided that the Appellant and Mr Zaidi were not credible on every material issue and the evidence of the Respondents' witnesses should be preferred.
>
> Ground 8: By reason of the matters set out in Grounds 1 to 7 the learned Judge's decision in relation to the collateral contract was so unsafe, and/or a

> substantial wrong to the Appellant was occasioned, so as to render it just to order a re-trial."

20 Notwithstanding the conflicting statements in paragraph 5 of the Appellant's Skeleton Argument - that "Grounds 1 to 7 and 8" are not pursued; but that ground 6 is maintained - to which I have referred and, notwithstanding the absence of an express abandonment of an appeal from so much of the judge's order as dismisses the First Claim, it is clear that there is no longer a challenge on this appeal to the judge's finding in relation to the alleged breach of collateral contract. First, no such challenge was pursued, either in Mr Al Sadik's skeleton argument or in oral argument at the hearing of the appeal. Second, it is impossible to see how such a challenge could be pursued in the circumstances that all the grounds of appeal grouped under the first head ("Breach of Collateral Contract to return his investment to the Appellant plus 45% at the end of three years") in the Memorandum of Grounds of Appeal – other than, perhaps, ground 6 - were expressly abandoned in the Appellant's Skeleton Argument.

21 In those circumstances, I need refer only the judge's findings of fact in section 3 of his judgment which are of relevance to his conclusions on other issues.

*The judge's findings of fact in section 3 of his judgment (so far as now material)*

22 At paragraph 3.1 of his judgment, the judge explained that Mr Al Sadik's pleaded case was that Investcorp had promised him that, if he invested the Investment Amount (AED 500 million) in its hedge fund platform and kept his money there for 3 years, it would guarantee a return of 45% at the end of that period. The promise upon which Mr Al Sadik relied was referred to in the pleaded case, at the trial and by the judge in his judgment as "the Promise to Guarantee".

23 Investcorp's hedge fund platform had been described by the judge at paragraphs 1.8 to 1.12 of his judgment. It is, I think, sufficient at this stage to refer to paragraph 1.8, in which the judge had said this:

> "1.8 At the times material to this action, Investcorp's hedge fund platform comprised a number of funds of hedge funds, emerging manager funds and single manager funds having total assets under administration of about US$8 billion, of which about US$2 billion comprised its own proprietary capital. Those with which this case is most directly concerned are the Investcorp Diversified Strategies Fund Limited ('DSF'), the Investcorp Leveraged Diversified Strategies Fund Limited SPC ('LDSF'), the Investcorp Single Managers Fund Limited SPC ('SMFCo')

and six (later seven) single manager funds, referred to collectively as the 'Single Managers'. All these funds are incorporated in the Cayman Islands and are subject to the regulatory regime established under the Mutual Funds Law."

24 The Promise to Guarantee was said to have been offered to Mr Al Sadik orally on or about 22 January 2008 and accepted by him, orally or by conduct, either on 27 February 2008 (when he transferred the Investment Amount to Investcorp) or on 1 March 2008 when he entered into the SPA. Mr Al Sadik's claim under this head – based on the premise that Investcorp's subsequent denial of the existence of a binding Promise to Guarantee constituted an anticipatory repudiation of the collateral contract that had been made – was for damages in the principal sum of AED432.6 million: that being AED725 million (145% of the Investment Amount of AED500 million) less the amount of the redemption proceeds (AED292.4 million).

25 The judge found that, on 18 October 2007, Mr. Mazin Al Khatib ("Mr Al Khatib") – a relationship manager and a member of Investcorp's Placement and Relationship Management ("PRM") team based in Bahrain - sent Mr Al Sadik a hedge funds investment proposal document (the "Investment Presentation") in which there was set out a proposal for an investment amount of US$50 million in either a "Balanced" or a "Growth" portfolio, including potential asset allocations and expected returns and volatility figures. For the Balanced portfolio, which had an expected return of 12.3% and an expected volatility of 6.3%, the Investment Presentation proposed that 50% be invested in the Investcorp Balanced Fund ("IBF"), 15% in the Investcorp Event Driven Fund ("EDF"); 15% in the Investcorp Early Stage Fund ("ESF") and 20% in the LDSF (x3 equity leverage). For the Growth portfolio, which had a higher allocation to leveraged funds and correspondingly higher expected return of 14.7% and volatility of 8.3%, the Investment Presentation proposed that 30% be invested in the IBF, 20% in the ESF, 30% in the LDSF (x 3 equity leverage) and 20% in the Investcorp Leveraged Event Driven Fund ('LEDF') (x l equity leverage).

26 The judge went on to hold that there was a "follow-up" meeting between Mr Al Sadik and Mr Al Khatib on 25 December 2007 at which Mr Al Sadik told Mr Al Khatib that he wanted a return of 15% per annum and asked if Investcorp would be prepared to guarantee such an investment return. Mr. Al Khatib told him that Investcorp could not do so.

27 Following that meeting Mr Al Khatib discussed Mr Al Sadik's request for a guaranteed return with Mr Janick Fierens ("Mr Fierens"), who was the chief of staff of the PRM team responsible for managing client relationships within the countries of the Gulf Co-operation Council. The judge accepted Mr Fierens' evidence that his discussion with Mr Al Khatib was not directed to the question whether it would be possible to offer a guaranteed 15% return on investment (because, as the judge found, they both knew that that was out of the question); it was directed to identifying possible alternatives which might give Mr Al Sadik confidence in Investcorp's hedge fund programme. The judge found that Mr Fierens suggested that Mr. Al Sadik should be offered a higher hurdle rate for determining Investcorp's performance fee. He observed that an important feature of Investcorp's business model was the concept of an "alignment of interest" between the bank and its clients - in that the bank's proprietary capital was invested in parallel with that of its clients in all of its lines of business, including the hedge funds programme – and that Mr. Fierens' suggestion that Investcorp should not receive a performance fee unless Mr Al Sadik's return exceeded 45% over three years was consistent with that concept.

28 The judge found that there was then a meeting on 22 January 2008 attended by Mr Al Sadik, Mr Al Khatib and Mr Sewanyana Kironde ("Mr Kironde"), another member of the PRM team and a hedge fund product specialist. The judge accepted Mr Kironde's contemporary written record of that meeting – described as a "call note"; and, as the judge observed "prepared and circulated [routinely in the ordinary course of business] for the purpose of informing team members about meetings with clients and the essentials of what was said at those meetings" – as a reliable record of what had been said at that meeting. It was recorded in Mr Kironde's call note that:

> "We discussed the Investcorp platform, and how it could deliver returns that are more interesting than deposits. He wants a tailored portfolio that would give him a return of 45% flat over three years. He is very keen on the idea of 'risk sharing'. We told him that we cannot guarantee him the return, but that we can work out some sort of higher hurdle for the performance fee trigger. We promised him a proposal by next week."

Mr Al Katib's evidence, at paragraph 4.17 of his witness statement dated 9 June 2011 was to the same effect. He had said this:

> "4.17. I am quite clear in my mind that by the end of our meeting with Mr Al Sadik he understood that Investcorp was not guaranteeing and could not guarantee any return to him for the investment we were discussing. I am also quite clear that Mr Al Sadik understood that we were demonstrating our faith in Investcorp's ability to achieve his targeted return by offering to take a performance fee only

> once that return had been achieved There was no room for confusion – there could be no guarantee, but we believed the target could be achieved and were prepared to forego the major part of our fees until this happened".

The judge summarised the oral evidence which Mr Al Khatib and Mr Kironde gave at the trial, and described it as consistent with the position described by them, respectively, in the witness statement and in the call note. They were adamant, he said, that Mr Al Sadik had been told, at the meeting on 22 January 2008, that Investcorp could not provide him with the guarantee he was seeking; and the position was left on the basis that they would get back to him with a proposal for a higher hurdle rate for the performance fee. The judge accepted that evidence.

29 The judge found that the content of Mr. Kironde's call note was considered by Mr Ibrahim Gharghour ("Mr Gharghour") and Mr Deepak Gurnani ("Mr Gurnani"), who were, at the time, joint heads of Investcorp's Hedge Funds Group, based in New York; and that they agreed in principle to the suggestion that a performance fee be charged only after a 45% return on investment had been achieved, but subject to a three-year lockup. In an email sent to Mr Zahid Zakiuddin, then the head of the PRM team, on 24 January 2008, Mr Gharghour wrote:

> "To meet a 15% return annually, we are assuming we can have a vol/risk budget of 8-10%. We are also assuming the portfolio will be locked up for 3 years to allow for some credit opportunities exposure. We will also assume we can use our single managers. All of which will help in getting to the return targets as well as internally justify the unique performance fee calculations. We will also assume we have discretion in making changes in the portfolio"

On 25 January 2008 Mr John Franklin, head of asset allocation within the Hedge Funds Group, sent his initial ideas to Mr Gurnani; suggesting a 40% allocation to LDSF (3x leverage), 20% allocation to SMFCo (1x leverage) and a 40% allocation to the Credit Opportunities Fund ("COF") which was then planned but had not been launched. That document (referred to at the trial and in the judgment as the "Investment Proposal"" so as to distinguish it from the original "Investment Presentation") was completed and dated 28 January 2008, following further work by Mr Franklin with input from Mr. Fierens. The judge observed that there was nothing in any of the e-mail traffic passing amongst them to suggest that there was any intention to formulate a proposal for a guaranteed product.

30 The Investment Proposal was presented to Mr Al Sadik at a meeting on 28 January 2008, at which Mr Al Khatib, Mr Kironde and Mr Fierens were present. It included, on the first page, the following "Portfolio Objectives":

"• Target return of 45%+ over 3-year investment horizon

• Funding and expected return in AED

• Alignment of interest with risk to Investcorp if target return is not realized"

The judge accepted that the call note made by Mr Kironde after the meeting fairly and accurately reflected what had taken place. It was in these terms:

> "We presented the proposal, and emphasised that we take no performance fees until he has a return of 45%. After that we take 30% of the returns. He liked this alignment of interests. He is also fine with the three year term of the investment, and he no longer brings up the subject of the guarantee. Thus, the terms we offered are consistent with his expectations. He did not have many questions about the proposal. He also had another proposal (we think from HSBC), and he read off some of the managers in that proposal. There was some overlap with our managers. He thanked us for the work we had done on such short notice, and said that he wants to work with us. He will decide in the next couple of weeks as to how he will proceed Our best read is that we probably have an 80% chance of getting at least half of the amount originally discussed Whilst his deposit does not mature until 20 February we should finalise the hedging strategy that we will employ, and start drafting the share purchase agreement so that if he decides to go ahead we can deliver everything right away."

31 The judge explained that, the Investment Proposal having been accepted by Mr Al Sadik, at least in general terms, the next step was to agree the details and execute an investment management agreement. That took the form of a share purchase agreement (for the purchase of shares in the company (Shallot) which was to be used as the investment vehicle). The judge found that the process of agreeing the SPA began with a further meeting at Mr Al Sadik's office in Dubai on 24 February 2008, with Mr AI Khatib, Mr Kironde and Mr Fierens present. He referred to an email sent by Mr Kironde to Mr Gharghour and Mr Gurnani shortly after the meeting in which it was recorded that Mr Al Sadik would not agree to a one year hard lock-up unless Investcorp would give him a one year principal guarantee; and that Mr. Al Sadik had sought to reduce the management fee and the performance fee on gains above the 45% hurdle rate. The judge was satisfied that that email contained a reliable account of what took place. As he put it (at paragraph 3.16 of his judgment):

> "The focus was on Mr. Al Sadik's liquidity requirements. . . . he wanted better liquidity so that he could redeem his investment if it was performing badly. None of this is consistent with the notion that Investcorp had already agreed to guarantee his return and in my judgment the evidence clearly points to the conclusion that the parties were negotiating on the assumption that the return was not being guaranteed."

In reaching that conclusion, the judge rejected the evidence of Mr Al Sadik – and of Mr Saiyid Zaidi ("Mr Zaidi"), Mr Al Sadik's employee and investment adviser - that the Promise to Guarantee was reconfirmed by Mr Al Khatib on 24 February 2008.

32 The judge found that the terms of the SPA were negotiated at several meetings between 26 and 29 February 2008. He referred to Mr Al Sadik's reliance upon the deletion of clause E.1 as evidence tending to support the existence of the alleged collateral contract. He pointed out that that clause was included in Investcorp's standard form documentation; and had appeared in all the drafts of the SPA; but not in the document as signed. It took the form of a representation by the investor that:

> "I/We understand that an investment in the Company may be viewed as speculative and may result in the complete loss a/my/our investment due to the risks inherent in the Underlying Investments."

The judge noted that Mr Al Sadik's evidence was that this clause was a "deal breaker" because it was inconsistent with the alleged Promise to Guarantee; and that, on each occasion that the clause appeared in a draft, he complained to Mr Al Khatib and demanded that it be removed. The judge rejected that evidence. He found that the request for the removal of clause E.1 was first raised by Mr. Zaidi on 29 February 2008; not on the grounds that it would be inconsistent with a guarantee, but because "there were quite enough disclaimers in the SPA." He found that the clause was removed by Mr Zaidi, from the draft of the SPA that was on his computer, and did not appear in the document signed by Mr Al Sadik; and he found that its removal was accepted by Investcorp because it was seen as a representation having no effect on the commercial terms. The judge concluded that the removal of clause E.1 from the draft SPA was not evidence tending to support the existence of the collateral contract. In reaching that conclusion the judge observed (t paragraph 3.17 of his judgment) that:

> "3.17 . . . Mr Zaidi steadfastly refused to recognize even the possibility that he might have amended the document. This was an example of his unswerving adherence to every word of his witness statement, irrespective of any evidence to the contrary, which suggested to me that he is not a reliable witness."

33 At paragraph 3.18 the judge addressed the question whether, if (contrary to his finding on the facts) the Promise to Guarantee had been offered by Investcorp, that offer had been made with intention to create legal relations. For the reasons which he set out in that paragraph – including, in particular, evidence given by Mr Al Sadik in the course of cross-examination at the trial - he concluded that, even if an oral Promise to Guarantee was

given by Mr Al Khatib, there was no intention to create legal relations on or about 1 March 2008 (when, as pleaded, the alleged collateral contract was made).

34 The judge then turned to consider whether support for the existence of a collateral contract could be found in the parties' conduct after the execution of the SPA. He held that, following execution of the SPA, the parties continued to behave as if there was no Promise to Guarantee: in particular, he said that during the following six months Mr Al Khatib and Mr Kironde communicated with Mr Al Sadik on a number of occasions and that the call notes reflect that Mr Al Sadik expressed disappointment with the poor results but made no mention of having a guarantee. The judge referred (at paragraph 3.19 of his judgment) to a meeting between Mr Al Sadik and Mr Al Khatib on 8 September 2008. In an email sent by Mr Al Khatib to Mr Gharghour and Mr Kironde on 15 September 2008, Mr Al Khatib recorded that Mr Al Sadik was "extremely unhappy or angry rather" with Investcorp's performance; and that "He wants to see results otherwise he probably will redeem by year end". The judge observed that that was "not the reaction one might expect from a client who has the benefit of a guaranteed return with more than two years left to run". He went on to say this:

> "In his written evidence Mr Al Sadik denies having expressed unhappiness or anger and denies having threatened to redeem. In cross-examination he admitted that he was unhappy with the performance but continued to deny having threatened to redeem. Mr. Al Sadik's reaction to this e-mail is consistent with his reaction to other contemporaneous written evidence which appears to be inconsistent with his case. He disputes its accuracy or asserts that it is flat-out wrong. This is the reaction of someone who is re-inventing and re-interpreting the factual story to suit his case."

The judge held (at paragraph 3.20 of his judgment) that it was only after the market collapse which followed the bankruptcy of Lehman Brothers on 15 September 2008 that Mr Al Sadik began to assert that he had the benefit of a guaranteed return. He said that it was not in dispute that, in the period immediately after a meeting held on 17 September 2008, Mr Al Sadik telephoned Mr Al Khatib "repeatedly, insisting that he must be given a 'letter of guarantee'".

35 The judge referred (at paragraph 3.21 of his judgment) to a meeting on 20 October 2008 between Mr Al Sadik and Mr Al Khatib, at which there was an exchange of letters. He found that Mr. Al Khatib's call note in respect of that meeting recorded that Mr Al Sadik was "extremely angry" and compared Investcorp's performance unfavourably with that of Citigroup and HSBC, whose representatives were introduced to Mr Al Khatib as they were

leaving the office; and that Mr Al Khatib's response was that Investcorp's performance must have been worse "because of the leverage", to which Mr Al Sadik had responded that "everybody was leveraged". The judge said that Mr Al Khatib was very clear in his evidence that there was a discussion at this meeting about the use of leverage as the explanation for the relatively bad performance of the Investcorp portfolio in the market crash; and held that his evidence was consistent with the contemporaneous call note. He observed that:

> "Given that Mr Al Sadik had met with HSBC immediately before his meeting with Mr Al Khatib, it seems to me inherently likely that there should have been some discussions about the relative performance of the two portfolios, which would have lead on to a discussion about Investcorp's use of leverage."

The judge rejected the evidence of Mr Al Sadik (and Mr. Zaidi who had said that he was present at the meeting) that no such discussion took place. And he rejected their evidence that Mr Al Khatib had confirmed, orally at the meeting, the existence of the Promise to Guarantee.

36 Mr Al Sadik's letter, dated 20 October 2008 and exchanged at the meeting on that day, was in these terms (so far as material):

> ". . . 1 agreed to deposit with you Five Hundred Million Dirhams . . . on the commitment by Investcorp that it will return to me at the end of a 3 year period . . . a minimum of 145% of the amount deposited. Of course I left it to you to do whatever you thought is appropriate in terms of how and where you invest these funds. I kindly ask you to confirm that we share the same understanding and the same commitment".

The judge found that, following "considerable internal discussion", Investcorp's response to that letter, on 26 October 2008, included the statement that ". . .we would like to confirm that we share your understanding of the investment objectives of the hedge fund portfolio you have entrusted us with"; but without confirming the Promise to Guarantee. He went on to find that "having been put under extreme pressure by Mr Al Sadik, Mr Al Khatib wrote a second reply on 30 October 2008 which included the statement that "We acknowledge receipt of your letter and would like to confirm that we agree with the content and share your understanding of the investment objectives of the hedge fund portfolio you have entrusted us with". The judge noted (at paragraph 3.22 of his judgment) that Mr Al Sadik relied on that second reply as constituting written confirmation of the oral guarantee, although (as he observed) that was not what he thought at the time because he continued to complain in subsequent telephone

conversations that the response did not meet his requirements. He concluded that it might be said that the October correspondence "reflects a studied ambiguity". He said this:

> "I conclude that Mr Al Sadik avoided using the word 'guarantee' because he knew perfectly well that no guarantee, whether of capital alone or capital and the 45% return, had ever been offered to him. I also think that Investcorp's personnel refrained from specifically denying that any guarantee had been offered, not because they thought a guarantee had been offered, but because they were trying to manage down the unrealistic expectations of a difficult client in a diplomatic way, without provoking him to redeem."

He held that the letter of 30 October 2008 was not to be regarded as confirmation of the alleged Promise to Guarantee or as evidence that any oral Promise to Guarantee had ever been given.

37 The judge referred (at paragraph 3.23 of his judgment) to a meeting on 6 November 2008 between Mr Al Sadik and Mr Nemir Kirdar (the founder and executive chairman of Investcorp) at which Mr Al Khatib and Mr James Tanner (who had become head of Investcorp's PRM team on the retirement of Mr Zakiuddin) were present. He described the events at the meeting in some detail, relying on the evidence given by Mr Tanner, whom he found to be "a relatively independent observer" and "a capable industry professional who was plainly telling the truth". The judge found that Mr Kirdar had told Mr Al Sadik, "in terms", that Investcorp had not guaranteed his return on investment. That statement, the judge found, led to "a highly charged verbal confrontation (in Arabic) between Mr Al Sadik and Mr Al Khatib. The judge went on to record that Mr Al Sadik had said in evidence that shortly after that meeting he dictated a file note which was typed up by his assistant and sent to his lawyers a few days later. The judge held that the content of that note "bore no resemblance to what actually took place at the meeting". He said this:

> "It purports to record that Mr. Al Khatib had 'confirmed the agreement' by which Investcorp would 'return to me at the end of a 3 year period at least 145% of the invested amount' and that Mr. Kirdar said that Investcorp would 'stand by any agreement or commitment' made by its senior officers. I regard this file note and Mr. Al Sadik's subsequent letter of 23 November to Mr. Kirdar as thoroughly disingenuous misrepresentations of what was actually said at the meeting."

38 In a letter dated 30 December 2008 and written by Mr. Lawrence B. Kessler ("Mr. Kessler"), then Investcorp's general counsel, based in its head office in Bahrain, it was confirmed, in clear terms, that it was Investcorp's position that no guarantee had ever been offered. There was a further meeting on 14 January 2009 at which Mr Al Sadik, Mr Tanner, Mr Al Khatib and Mr Fierens were present. The purpose of that meeting, as the

judge found, was to discuss Mr Al Sadik's claim to have the benefit of a guarantee and to try and work out a way forward in circumstances where it had become obvious that the 45% return could not be achieved or at least not within the original timeline. Following that meeting Mr. Zaidi prepared a document entitled "minutes of meeting"; which purported to record that Mr Al Khatib confirmed the existence of the Promise to Guarantee. The judge found that, at the date of the meeting on 14 January 2009, Mr Al Khatib knew that the guarantee issue had been investigated by Mr. Tanner and Mr Kessler; he knew that Mr Kessler's letter of 30 December 2008 had explicitly denied that any guarantee had been offered. In these circumstances, he held that it was inherently unlikely that Mr Al Khatib would change his mind and confirm what had previously been denied. He accepted the evidence of Mr Tanner, Mr Al Khatib and Mr Fierens who each denied that Mr Al Khatib had "said any such thing". The judge held that:

> "This part of Mr. Zaidi's minutes is not simply self serving. In my judgment, it is plainly untrue."

39 In summarising his conclusions on the first issue, the judge observed (at paragraph 3.25 of his judgment) that he had approached his analysis of the evidence on the basis that it was inherently improbable that any investment bank would guarantee a return on a hedge fund portfolio of 45% over three years (which, he said, was then three times the risk-free rate available on US treasury bills). He reminded himself of the observations of Lord Nicholls of Birkenhead in *Re H (Minors)* [1996] AC 563, at page 586, that ". . . the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred". And he went on to say this:

> "I am unable to accept the evidence of Messrs. Al Sadik and Zaidi that the Promise to Guarantee was made at any of the meetings in January and February 2008 or confirmed at any of the meetings in September, October or November 2008. Their evidence in this regard is wholly unsupported by the contemporaneous documents, which point to the opposite conclusion. The Investment Proposal makes no reference to a guarantee for the simple reason that Mr. Al Sadik's request for one had been rejected. His argument about the deletion of Clause E.1 from the SPA is contrived. Mr. Al Sadik's assertion that he would never have made a substantial investment in hedge funds without the benefit of a guarantee is not credible having regard to the fact that he had invested some US$167 million in a hedge fund portfolio with HSBC just a few months earlier. The parties' behaviour after the investment was made is consistent with there being no guarantee. It was the occurrence of very serious losses following the bankruptcy of Lehman Brothers which prompted Mr. Al Sadik to embark upon an increasingly disingenuous attempt to extract from Investcorp confirmation of a guarantee which had never

been offered by any of its executives. In my judgment the existence of a collateral contract comprising the Promise to Guarantee has not been proved. . . ."

He added that, if he had accepted Mr Al Sadik's evidence that Mr. Al Khatib had promised to guarantee a 45% return over three years, he would also have been led to the conclusion (also on the basis of Mr Al Sadik's evidence) that there was no intention to create any legally enforceable contract.

*The second issue*
*Whether, on the true construction of the SPA, Investcorp was authorized to leverage Mr Al Sadik's assets for investment purposes at the portfolio level*

40 The judge's reasons for dismissing the Fourth and Ninth Claims are set out in section 4 of his judgment. The issue which he addressed was whether, on the true construction of the SPA, Investcorp was not authorized to leverage Mr Al Sadik's assets for investment purposes at the portfolio level (as opposed to investing in hedge fund products designed to provide leveraged investments), whether through a special purpose vehicle or otherwise. He held that, on its true construction, the SPA authorized Investcorp to leverage the Investment Amount for investment purposes by means of First Layer Leverage and/or Second Layer Leverage and the method by which this was done through Blossom (rather than Shallot) did not constitute a breach of contract: the transfer of the Investment Amount (less a small retention) from Shallot to Blossom was an administrative step which did not constitute an investment at all.

41 The judge explained (at paragraph 4.1 of his judgment) that Mr Al Sadik's Fourth and Ninth Claims were that Investcorp applied "First Layer Leverage" to the Investment Amount and caused Shallot to transfer the value representing the Investment Amount to Blossom, which was not an authorised investment, in breach of the express terms of the SPA. He explained what he meant by "First Layer Leverage" – and the related expression "Second Layer Leverage" - in a footnote to that paragraph:

> "4.1 . . . The expressions 'First Layer Leverage' and 'Second Layer Leverage' are not terms of art in the hedge fund industry. These expressions have been invented by counsel for the purposes of drafting the Plaintiff's Statement of Claim. I have adopted counsel's expression 'First Layer Leverage' to mean leveraging an investor's contributed funds at the portfolio level, which is what Investcorp in fact did on behalf of Mr. Al Sadik. I have adopted the expression 'Second Layer Leverage' to mean using an investor's contributed funds for investing in hedge funds which seek to achieve a certain level of leverage as part of their investment strategy, such as LDSF and SMFCo. From the Investor's point of view, assuming

> that First Layer Leverage is done through an SPV with limited recourse, it is possible to use either of these investment techniques to achieve an equivalent economic result."

It was, he said, Mr Al Sadik's case that the SPA did not give Investcorp any power to borrow for investment purposes and that the leveraging of the Investment Amount by way of Blossom was, as well as being a breach of fiduciary duty, also done in breach of contract and in excess of authority. It was alleged (in the Ninth Claim) that Blossom was not an authorized investment because it was not a "hedge fund" or a "segregated account" within the meaning of clause A of the SPA. Further, even if Blossom were an authorized investment, it was alleged (in the Fourth Claim) that it had no authority to employ First Layer Leverage: meaning that it had no authority to leverage its assets at the portfolio level for investment purposes.

42 The judge went on to explain (*ibid*) that Investcorp's defence to the Ninth Claim was that (i) Blossom was an investment authorized under clause A of the SPA, whether as an "Investcorp hedge fund product" or an "Investcorp fund of hedge funds"; (ii) Blossom was used as an administrative step for the purpose of compliance with the SPA; and (iii), even if the use of Blossom was a technical breach of the SPA, this caused no loss to Mr Al Sadik in excess of that which he would have suffered had he been invested in the vehicles specifically referred to in the Investment Proposal. Investcorp's pleaded defence to the Fourth Claim was that (i) Blossom was authorized under clause A of the SPA; and (ii) Investcorp was authorized under the SPA to invest in any authorized vehicle, including a leveraging vehicle.

43 At paragraph 4.2 of his judgment, the judge identified what he saw as the real issue between the parties: whether, on its true construction, the SPA permitted Investcorp to leverage the Investment Amount at the portfolio level, as opposed to investing in hedge funds, such as LDSF and SMFCo, which sought to achieve a certain level of leverage as part of their investment strategy. He said this:

> "4.2 If Investcorp was authorized to leverage Mr Al Sadik's contributed funds at the portfolio level, and then it must have been empowered to do so either directly through Shallot and/or indirectly through a wholly owned subsidiary, such as Blossom, incorporated specifically for this purpose. Clause D.2 of the SPA states that Shallot's -
>
> > '. . . board of directors will authorize or otherwise cause the Company to take any actions that the board believes are necessary or desirable in order to effectuate the purposes of this investment or otherwise manage the affairs of the Company.'

> If all or any part of Shallot's assets were to be leveraged at the portfolio level for investment purposes, I would expect this to be done through a wholly owned subsidiary incorporated especially for this purpose. In my judgment any suggestion that Investcorp had no power (acting by its employees who constituted Shallot's board of directors) to incorporate a subsidiary for this purpose would be unsustainable. The issue which I have to decide is whether or not Investcorp was authorized to leverage the contributed funds at the portfolio level and this turns upon the true meaning and effect of the SPA."

The judge answered the question which he had posed in the affirmative. At paragraph 4.9 of his judgment he said this:

> "4.9 My conclusion is that, on its true construction, the SPA does authorize First Layer Leverage. . . ."

*The judge's findings in section 4 of his judgment*

44 The reasoning which led to the judge to that conclusion may, I think, be summarised as follows:

(1) The law relating to the construction of contractual agreements was, he said, well settled. He identified, as the two leading authorities which had been followed and applied in the Grand Court, the decision of the House of Lords in *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 WLR 896 and the decision of the Privy Council in *Attorney-General of Belize* v *Belize Telecom Ltd* [2009] UKPC 10; [2009] 2 All ER 1127. He cited passages from the speeches of Lord Hoffmann in each of those appeals. Those passages are well known - they are found at [1998] 1 WLR 896, 912-913; and at [2009] UKPC 10 [16]-[19], [21]; [2009] 2 All ER 1127, 1132-113 – and it is unnecessary to set them out in this judgment at this stage (if at all).

(2) Having set out the terms of clause A of the SPA, to which I have referred earlier in this judgment, the judge pointed out that Shallot was duly incorporated and capitalized in accordance with that provision. He pointed out, also, that (as I have mentioned) clause D.1 provided that Shallot would enter into an Investment Management Agreement (the "IMA") with Investcorp Advisers; but that this was not done (for reasons not explored by the parties in evidence). The result, he said, was that the SPA stood alone. He recorded that it was common ground that the SPA conferred upon Investcorp a discretionary mandate to manage and invest the Investment Amount in accordance with the purposes stated in clause A. He went on to say "for the sake of completeness" that Clause I ("*Borrowing Relationships*") authorized Investcorp to

cause Shallot to borrow money to meet possible temporary cash shortfalls and for other corporate purposes, described as "Liquidity Borrowings", the amount of which would be limited to 25% of the company's equity; but that it was common ground that borrowing for liquidity purposes was materially different from borrowing for investment purposes, and that Clause I related only to the former. He noted that Clause L.1 provided that the contract should be governed and construed in accordance with the law of the Cayman Islands.

(3) The judge then turned to examine the relevant factual background. He explained, at paragraph 4.5 of his judgment, that the Investment Proposal, which was discussed with Mr Al Sadik at the meeting on 28 January 2008 to which I have referred, was not incorporated as a term of the SPA; but was an important part of the factual matrix against which the SPA must be construed. He pointed out that it was stated, on page 2 of the Investment Proposal (under the heading "Overview of Proposal"), that 50% of the portfolio was to be invested in the DSF "to function as core hedge fund holding" and that 50% was to be invested in 2 satellite portfolios - 25% in Investcorp Single Manager Platform and 25% in Opportunistic/Theme Funds – with "leverage at each underlying portfolios taking into account portfolio volatility". He said this:

> "On any objective analysis, it is plainly obvious that this part of the document is proposing a leveraged investment and there is nothing in any other part of the document tending to suggest otherwise."

He referred to page 5 of the Investment Proposal ("Indicative Terms") which, as he said, indicated (*inter alia*) the way in which such a portfolio could be constructed:

> *"1. Leveraged Diversified Strategies Fund (x3 equity leverage)*
> 2. *Single Manager Fund Co. (initially x1 equity leverage)*
> 3. *Leveraged Event Driven Fund (x1 equity leverage)"*

And he went on to say this:

> "4.5 . . . The first page to which I have referred (page 2) sets out an overview of the proposal which is that 50% should be invested in DSF as the core holding and 50% should be divided between two satellite portfolios comprising multiple single manager funds and multiple opportunistic and/or theme funds. The second page to which I have referred (page 5) gives an indication of the way in which this proposal could be implemented. This is explained more fully in the Appendices at pages 8, 9 and 10. Page 8 describes how the core holding in DSF can be leveraged 3x by investing in LDSF which is effectively a feeder fund established for this purpose . . . Page 9 describes how the proposed satellite portfolio of single manager funds could be leveraged up (then at 1x only) through SMFCo and adds the comment that the level of leverage is expected to increase as more single managers are added to the platform. The planned COF had not been launched and so page 10 explains how a satellite portfolio of theme funds

(of which there were five, as identified on page 13) could be achieved by investing in the LEDF which is a leveraged hedge fund product, similar to LDSF. It seems to me that the *Indicative Terms* indicate (inter alia) how the proposed leveraged investment could be implemented. It indicates that the core investment in DSF with 3x leverage can be achieved by investing in LDSF. It indicates that satellite Portfolios of single manager funds and theme funds with 1x leverage can be achieved by investing in SMFCo and LEDF respectively. Although it does not say so in terms, it seems to me that the Investment Proposal tells the reader that an investment in LDSF is the economic equivalent of a leveraged investment in DSF and that investments in SMFCo and LEDF are the economic equivalent of leveraged investments in portfolios comprising the six single manager funds and the five theme funds. There is nothing in the Investment Proposal which tends to suggest that it will be a term of the SPA that the investments in DSF and portfolios of single manager/theme funds should not be leveraged at the portfolio level. It merely indicates that the desired level of leverage could be achieved at the underlying fund level by investing in the identified feeder fund and funds of hedge funds."

(4) The judge accepted that the purpose of the SPA was for Mr Al Sadik to establish a managed account with Investcorp, by which he would invest in a portfolio of hedge funds managed by Investcorp pursuant to a discretionary mandate: its purpose was not to implement the Investment Proposal as such. He accepted that clause A of the SPA made it clear that Investcorp was to have a wide discretion: not limited to implementing exactly what was proposed in the Investment Proposal. Nevertheless, in his view, the purpose of the SPA was to authorise Investcorp to implement the Investment Proposal to the extent that its implementation was not actually inconsistent with what had been expressly agreed by the parties. By way of example, he pointed out that, although Investcorp was not authorised to implement any part of the Investment Proposal which would be inconsistent with the liquidity terms expressly agreed between the parties in clauses H.1 and H.2 of the SPA, it would be wrong in principle to construe the SPA in a way which involved implying a term which would make it impossible to implement any part of the Investment Proposal. As a further example, he pointed out that the Investment Proposal proposed that leveraged investments would be made in DSF and a satellite portfolio of single managers; and said that it would not be proper to imply a term into the SPA which would prevent such investments from being made but, conversely, it would be improper to imply a term to the effect that such investments must only be made in precisely the way set out in the Indicative Terms. In the final sentence of paragraph 4.6 of his judgment, he said this :

"4.6 The application of the legal principles explained in the dicta of Lord Hoffmann cited above, leads me to the conclusion that, on its true construction, the SPA authorizes Investcorp to construct a leveraged portfolio consistent with the Investment Proposal, save to the extent that the parties have expressly agreed otherwise."

(5) At paragraph 4.8 of his judgment the judge expressed agreement with the submission made on behalf of Investcorp that it was helpful to consider what he described as "the economic equivalency point" as a cross-check. He said this:

"4.8 The Investment Proposal says that 50% of the assets should be invested in DSF as the portfolio's core holding. It also says that this investment should be leveraged 3x. It is perfectly clear, and would be clear to anyone reading the SPA in the light of the Investment Proposal, that this economic result can be achieved in either of two ways. Leveraging 50% of the assets x3 at the portfolio level produces US$270 million to invest in DSF. This is consistent with the Investment Proposal. Investing US$67.5 million in the high risk x3 portfolio of LDSF, results in LDSF investing US$270 million in DSF. This is also consistent with the Investment Proposal. The two different scenarios can produce an economically equivalent result for Mr. Al Sadik for the following reasons. The evidence is that LDSF is the equivalent of a feeder fund. Its sole purpose is to act as a vehicle by which Investcorp's clients can obtain a leveraged exposure to DSF. By incorporating LDSF as a segregated portfolio company under Part XIV of the Companies Law, it is possible to offer Investcorp' s clients a multiple choice of leverage at various different levels. Each portfolio is a special purpose vehicle. In principle, its only asset is its investment in DSF and its only liability is the amount owing to the bank. It follows that by investing US$67.5 million in LDSF, the investor's actual exposure, in economic terms, is equivalent to a US$270 million investment in DSF subject to a US$202.5 million liability to a lender. There is nothing else on LDSF's balance sheet. The investor can achieve exactly the same result by investing US$67.5 million in his own SPV which then borrows US$202.5 million (secured, with limited recourse) and invests US$270 million directly into DSF. In principle, the two balance sheets will look the same. The only difference is that LDSF's balance sheet will be larger because it reflects the investments of multiple clients. Looked at objectively, there can be no justification for implying into the SPA a term to the effect that either one of these scenarios is prohibited, whereas the other is not. This would flout business common sense, because either scenario can produce an economically equivalent result for Mr. Al Sadik. Having regard to the content of the Investment Proposal and the fact that the parties are agreed that Clause A of the SPA permits an investment in LDSF, both scenarios must be permitted."

And he went on (*ibid*) to make three further observations:

"4.8 . . . First, I appreciate that SMFCo is not structured in exactly the same way as LDSF. It is also a segregated portfolio company and exists for the same purpose as LDSF. It provides Investcorp's clients with the opportunity to make leveraged investments in the single manager platform, but it is more like a fund of hedge funds because it is investing in six (or more) single manager funds in varying proportions, whereas LDSF has only one investment. It follows that a leveraged investment in all of the single manager funds will never be the exact economic

equivalent of an investment in SMFCo. Second, it makes no difference to the economics whether a leveraged investment in DSF and the single manager funds is made directly by Shallot or indirectly through a wholly owned subsidiary such as Blossom. Third, whether or not the use of the White Ibis III credit facility in fact produced an economically equivalent outcome is a different point which has no bearing on my analysis of the terms of the contract."

45 The judge said that his conclusion that, on its true construction, the SPA did authorise First Layer Leveraging disposed of Mr Sadik's Fourth and Ninth Claims. But he went on to address two other arguments:

(1) He accepted that Blossom was not a hedge fund or, I think, a "segregated account" or a "hedge fund product"; but he rejected the submission advanced on behalf of Mr Al Sadik that, for that reason, an investment in Blossom was unauthorized and constituted a breach of contract. He held that the submission was founded upon an artificial interpretation of the facts. He said this (at paragraph 4.10 of his judgment):

> "4.10 . . . A transfer of the whole or part of Mr. Al Sadik's contributed funds from Shallot to a wholly owned subsidiary [Blossom] cannot be characterized as an 'investment' at all. It was merely a transfer of assets which, by itself, could have no impact upon Shallot's NAV. Whether the transfer of assets is done by means of a loan and/or subscription for shares (as in this case) is irrelevant. In my judgment, it is plainly obvious that Blossom is simply a vehicle through which Investcorp performed (or failed to perform) its contractual obligations. The issue is whether or not the SPA permits First Layer Leverage. The manner in which it is done has no bearing upon this threshold question. If First Layer Leverage is unauthorized, Investcorp would be in breach of contract whether or not the relevant transaction(s) were put through Shallot or a subsidiary of Shallot or a combination of both."

(2) He accepted the submission advanced on behalf of Investcorp that Mr Al Sadik had failed to establish that, even if there had been an unauthorised investment in breach of contract, that breach had caused loss and damage. At paragraph 4.11 of his judgment he said this:

> "4.11 . . . The measure of damages for the purposes of the Fourth and Ninth pleaded breach of contract claims is the sum required to put the plaintiff in the position he would have been in had the contract been performed in accordance with its terms. The asset allocation contained in the Investment Proposal was not implemented because the proposed investment in opportunistic/theme funds was ruled out by the liquidity provisions subsequently incorporated in the SPA, which in turn led to the decision to make a 3x leveraged investment in the single manager funds rather than an investment in SMFCo. The burden of proof rests on the plaintiff, but [counsel for Mr Al Sadik] did not cross-examine Messrs. Franklin or Gurnani about how they would have constructed the portfolio, if the use of First Layer Leverage had not been open to them Nor did he attempt to ascertain how they could have applied leverage incrementally, if the use of First Layer Leverage was not open to them. In my judgment the most reasonable inference to draw from

> the evidence is that they would have allocated 50% to LDSF (x3) and 50% to SMFCo in March 2008. Had they done so, Mr. Opp's evidence leads to the conclusion that Mr. Al Sadik's loss would have been greater than that which he actually suffered. In conclusion, if Mr. Al Sadik had established that Investcorp was in breach of contract, as alleged in the Fourth and Ninth Claims, he would have failed to prove that the breaches caused any loss and damage."

*The questions for determination by this Court in relation to the second issue*

46 The questions for determination by this Court in relation to the second issue fall under two principal heads: (i) whether, in causing Shallot to transfer the Investment Amount to Blossom for investment, with leverage at the portfolio level (First Layer Leverage), Investcorp acted in breach of the SPA; and (ii) whether, if so, the investment made through Blossom was the cause of loss to Mr Al Sadik which he can recover from Investcorp by way of damages for that breach.

47 In summary, it is submitted on behalf of Mr Al Sadik, first, that the judge was wrong to hold that Investcorp was not in breach of the SPA either when it caused Shallot to transfer the investment amount to Blossom for investment or when it caused Blossom to leverage that investment by borrowing from RBS under the White Ibis III credit facility ("the breach of contract issue"); and, second, that the judge was wrong to hold that, even if there had been a breach of the SPA, Investcorp would not be liable for damages ("the causation issue"). It is submitted on behalf of Investcorp, first, that the judge's assessment of the factual matrix against which he construed the meaning of the SPA was impeccable, as was his application of the law, and that, on the evidence before him, the only conclusion the judge could have reached was that Investcorp had authority to leverage Mr Al Sadik's investment in the manner that it did; and, second, that the approach to the causation issue advanced on behalf of Mr Al Sadik is misconceived; in that it is based on a misunderstanding of the fundamental principle that, if a plaintiff would have suffered the loss for which he now claims irrespective of whether there was a breach of contract, then that breach cannot be said to have caused the loss.

*The breach of contract issue*

48 In support of his challenge to the judge's conclusion on the breach of contract issue, Mr Al Sadik relies on grounds 9 to 16 in the Memorandum of Grounds of Appeal:

> "Ground 9: The learned Judge erred in law when he misdirected himself as to the issue he had to decide on the Appellant's Fourth Claim and consequently failed to find that the transfer of the Investment Amount

(less a small retention) from Shallot to Blossom was made in breach of the SPA.

Ground 10: The learned Judge erred in law when, in order to decide the issue he identified in Ground 9 he inquired into the 'factual background'.

Ground 11: Even if it were permissible for the learned Judge to inquire into the factual background as an aid to the construction of the SPA, the learned Judge erred in law because his inquiry led him wrongly to imply a term (the Implied Term).

Ground 12: Even if it were correct for the learned Judge to inquire into the factual background he erred in law because his inquiry led him to imply the Implied Term and in any event to misconstrue the SPA, because no reasonable person would have concluded the Implied Term was contemplated by the parties or have construed the SPA in the way the learned Judge did.

Ground 13: The learned Judge erred in law when he held that the investments made by Blossom (pursuant to the Implied Term) were not made in breach of the SPA because such a finding required the implication of further terms: (a} that there was a power to borrow for investment purposes; and (b) that there was a power to grant security interests over the value representing the Investment Amount in order to borrow for investment purposes: whereas each of the additional implied terms imposes an unreasonable and/or perverse meaning on the express terms of the SPA.

Ground 14: Further or in the alternative, if the learned Judge were correct to hold that the investments made by Blossom were not made in breach of the SPA on the basis of his construction of the SPA, such a finding required the implication of terms that there was a power to borrow for investment purposes and that there was a power to grant security interests over the value representing the Investment Amount in order to borrow for investment purposes and was therefore wrong in law.

Ground 15: The learned Judge was wrong when he found that the transfer of the Investment Amount (less a small retention) from Shallot to Blossom was merely an 'administrative step' and not an investment.

Ground 16: The learned Judge was wrong when he held that the investment through Blossom was not prohibited because it was 'economically equivalent' to investments made on the express terms of the SPA."

49 In addressing the questions raised by those grounds it is necessary, first, to have in mind the terms of clause A of the SPA. I have set out the terms of that clause earlier in this judgment; but it is, I think, convenient to do so again:

"A. Purpose

I/ We have requested Investcorp Bank B.S.C. ("Investcorp") to establish a separately managed account (the "Investment Account"), which will invest in certain hedge funds or segregated accounts with any hedge funds managers

selected by the Investment Manager (as defined below), including, but not limited to, any Investcorp hedge fund (whether an Investcorp Fund of Hedge Funds, an Investcorp Single Manager Fund or any other Investcorp hedge fund product (any of the foregoing, an "Investcorp Hedge Fund") or a hedge fund or a segregated account with any other hedge fund manager; provided, however that any such other hedge fund manager is at the time of investment a manager with which an Investcorp Hedge Fund is invested. The Investment Account will be established as a special purpose vehicle, Shallot IAM Limited which will be incorporated under the laws of the Cayman Islands (the "Company"). All assets of the Company are hereafter referred to as the "Assets Under Management" and each hedge fund or segregated account in which Assets Under Management are invested is hereafter referred to as an "Underlying Investment". To the extent that Assets Under Management are invested in any Investcorp Fund of Hedge Funds, such investment will be made in non fee bearing shares."

The structure of the clause may be summarised as follows:

(1) Investcorp Bank is to establish a separately managed account – which is to take the form of a special purpose vehicle (Shallot) – for the purpose of investing in hedge funds or in segregated accounts with hedge funds managers.

(2) The hedge funds or segregated accounts with hedge fund managers in which Shallot is to invest are to be selected by the Investment Manager (Investcorp Advisers).

(3) The hedge funds or segregated accounts with hedge funds managers to be selected might include (but were not limited to) any Investcorp Hedge Fund – that is to say, an Investcorp Fund of Hedge Funds, an Investcorp Single Manager Fund or any other Investcorp hedge fund product - or a hedge fund or a segregated account with any other hedge fund manager which was, at the time of investment, a manager with which an Investcorp Hedge Fund was invested.

The hedge funds or segregated accounts in which assets of Shallot (defined as "Assets under Management") were invested were defined as "Underlying Investments".

50 As the judge pointed out, in the events which happened and for reasons that were not explored in evidence, Shallot and Investcorp Advisers did not enter into an Investment Management Agreement. In those circumstances the scheme for which clause A of the SPA provided could not take effect strictly in accordance with its terms – in that the hedge funds and segregated accounts with hedge funds managers which were to be selected by Investcorp Advisers (as Investment Manager) for investment of the Assets under Management were not selected by Investcorp Advisers – but that has not been a matter of complaint in these proceedings. The parties appear to have been content to treat the entity by which investment decisions were made – whether Investcorp Bank, Investcorp

Advisers, Shallot or Blossom - as immaterial to the questions in issue; and, in the circumstances that Investcorp Advisers, Shallot and Blossom were each controlled by Investcorp and that the individuals who were responsible for those decisions were Investcorp employees, there is no reason to think that that approach was other than realistic. In particular, there is no reason to think that different investment decisions would have been made if Investcorp Advisers had been appointed Investment Manager.

51 It is necessary, also, to have in mind the sequence of events which took place after Mr Al Sadik had transferred funds (the Investment Amount) to Investcorp Bank. As I have said, earlier in this judgment, Investcorp Bank converted the investment amount (AED 500 million) to US$136,138,505 and credited that amount to the account of Shallot on 4 March 2008. Shallot retained a small part of that amount (some US$1.129 million) and paid the balance to Blossom. Blossom invested US$79 million in Investcorp Diversified Strategies Fund ("DSF") and the balance (some US$56.009 million) in five Single Manager Funds ("SMFs") which had been established by Investcorp. The investments were treated as having been made as at 1 March 2008. Subsequently, on 10 April 2008, Blossom entered into the White Ibis III credit facility with RBS for the purpose of drawing funds under that facility in order to leverage Mr Al Sadik's investments. Drawings amounting in aggregate to US$214.1 million were made in the period May to September 2008; and were applied, by way of leverage, in making further investments in DSF and in SMFs. It has not been suggested on behalf of Mr Al Sadik that DSF and the SMFs in which Blossom invested were not hedge funds or segregated funds with hedge funds managers which could properly have been selected for investment under clause A of the SPA.

52 In my view, the question raised by ground 15 in the Memorandum of Grounds of Appeal – whether the judge was wrong to hold that the transfer of the Investment Amount (less a small retention) from Shallot to Blossom was merely an 'administrative step' and not an investment - is logically anterior to the questions raised under the other grounds. If the judge ought to have held that the transfer of funds to Blossom was an investment and not merely an administrative step taken in the course of investing those funds in DSF and the SMFs, then, given his finding that Blossom was not an Investcorp hedge fund, he should have concluded that there had been a breach of clause A of the SPA. The premise upon which the question which the judge identified as the real issue between

the parties rests - whether, on its true construction, the SPA permitted Investcorp to leverage the Investment Amount at the portfolio level, as opposed to investing in hedge funds, such as LDSF and SMFCo, which sought to achieve a certain level of leverage as part of their investment strategy – is that (as the judge assumed at paragraph 4.2 and held at paragraph 4.10 of his judgment) the transfer of funds from Shallot to Blossom was not, itself, to be treated as an investment of those funds for the purposes of the SPA. Whether he was correct to take the view that the transfer of funds from Shallot to Blossom was merely an administrative step is, I think, the first question which this Court needs to determine in relation to the appeal against the judge's decision that, on its true construction, the SPA authorised Investcorp to leverage Mr Al Sadik's assets for investment purposes at the portfolio level. It is only if the answer to that question is "Yes" that the other questions - raised under grounds 9 to 14 and 16 in the Memorandum of Grounds of Appeal - arise in relation to that appeal.

53 Further, in my view, the first limb of ground 12 in the Memorandum of Grounds of Appeal – that the judge was led to misconstrue the SPA "because no reasonable person would have concluded the Implied Term was contemplated by the parties" - adds little (if anything) to ground 11 – that the judge was wrong "to imply a term (the Implied Term)". The question raised by ground 12 – but not raised by ground 11 – is found in the second limb: whether the judge was led to misconstrue the SPA "because no reasonable person would have construed the SPA in the way the learned Judge did". Logically, as it seems to me, that question is properly to be considered after consideration of the other questions raised under grounds 9 to 11 and 13 to 16.

54 With those observations in mind, the questions raised by grounds 9 to 16 in the Memorandum of Grounds of Appeal may be summarised as follows:

(1) Was the judge correct to conclude –as he did, at paragraph 4.10 of his judgment - that the transfer of funds from Shallot to Blossom was an administrative step in taken in contemplation of the investment of those funds and was not, itself, to be treated as an investment of those funds (ground 15).

(2) Was the judge correct to direct himself – as he did, at paragraph 4.2 of his judgment – that the issue which he had to decide was "whether or not Investcorp was authorized to leverage the contributed funds at the portfolio level" (ground 9).

(3) If so, in deciding that issue, was the judge correct to have regard– as he did, at paragraph 4.5 of his judgment - to the factual background; and, in particular to the terms of the Investment Proposal (ground 10).

(4) If so, (a), in construing the SPA, was the judge led by his inquiry to imply a term (the Implied Term) that Investcorp was authorised "to construct a leveraged portfolio consistent with the Investment Proposal, save to the extent that the parties had expressly agreed otherwise"; and (b) was he wrong to do so, because no reasonable person would have concluded that the Implied Term was contemplated by the parties (grounds 11 and 12).

(5) In holding that the investments made by Blossom were not made in breach of the SPA, (a) was it necessary for the judge to imply further terms (i) that there was a power to borrow for investment purposes and (ii) that there was a power to grant security interests over the value representing the Investment Amount in order to borrow for investment purposes; and (b) was he wrong to do so (grounds 13 and 14).

(6) Was the judge correct to conclude – as he did, at paragraph 4.8 of his judgment - that the investment through Blossom was not prohibited because it was 'economically equivalent' to investments made on the express terms of the SPA (ground 16).

(7) Did the judge misconstrue the SPA, because no reasonable person would have construed the SPA in the way that the judge construed it (ground 12).

*Was the judge correct to conclude that the transfer of funds from Shallot to Blossom was an administrative step and was not to be treated as an investment of those funds*

55 As I have said, the judge took the view, expressed at paragraph 4.10 of his judgment, that a transfer of the whole or part of Mr Al Sadik's contributed funds from Shallot to a wholly owned subsidiary (Blossom) was not to be characterized as an "investment" for the purposes of clause A of the SPA: it was, he said, "plainly obvious that Blossom is simply a vehicle through which Investcorp performed (or failed to perform) its contractual obligations". The judge had indicated in the course of observations which he had made on the first day of the trial, during opening submissions made on behalf of Mr Al Sadik, that that was likely to be his view. He had said this (Transcript, 9 January 2012, page 56, line18, to page 57, line 2):

> "I am assuming it is proved that they did agree there should be what you call first layer leverage . . . If that is proved, then in the ordinary course of business I would expect it to be done through a special purpose vehicle such as Blossom. I find it

> hard to treat Blossom as an investment. It seems to me they have transferred funds to Blossom for the purposes of leveraging those funds for the purposes of then investing a greater amount . . ."

and he returned to that point in the course of Mr Al Sadik's closing submissions (Transcript, 6 March 2012, page 90, lines 9 to 20):

> "Why should I characterise it as an investment? They have merely transferred – formally they have subscribed for shares – Shallot has subscribed for shares in Blossom, but Blossom is a wholly-owned subsidiary and was never intended to be other than a wholly owned subsidiary. In the context of the SPA why should I regard that as an investment? It was a step towards making an investment. Now whether or not that was done in breach of contract is perhaps a different point, but isn't it just an administrative step. Isn't it the mechanism by which they carry out the SPA?"

56 Investcorp adopts that approach in resisting the challenge to the judge's conclusion on this point. It is said that the transfer of funds, effected by Shallot's subscription for shares in Blossom, was simply a step taken towards making the "investment" for Mr Al Sadik: that is to say, it was the mechanism by which Investcorp performed its obligations under the SPA. It was not an "investment" at all.

57 It is said on behalf of Investcorp that that proposition may be tested by considering what the position would have been had Investcorp done nothing other than transfer monies to Blossom. That would not have been an "investment" under the SPA; any more than a decision (say) to buy US Dollars with Mr Al Sadik's UAE Dirham funds (which had initially been transferred to Shallot) and then to put those US Dollars into Blossom would have been an "investment". The judge observed (at paragraph 4.2 of his judgment) that, if leverage at the portfolio level was authorised, then he would expect this to be carried out through a wholly-owned subsidiary incorporated especially for this purpose. The judge's conclusion, it is said, was supported by the unchallenged evidence of Professor Stowell, an expert witness. He expressed the view that:

> "Blossom was essentially a customised special purpose vehicle created for Mr Al Sadik's benefit to facilitate achievement of his investment objectives by enabling leverage to be applied to DSF and SMF investments and consistent with the discretionary investment mandate."

It was submitted that the incorporation of a subsidiary, such as Blossom, was plainly within the scope of the powers conferred upon Investcorp by the terms of the SPA; whether expressly, under Clause D.2, or as a matter of contractual construction.

58 Clause D.2 of the SPA was in these terms (so far as material):

"D Actions to be taken prior to acceptance of subscription

In contemplation of my/our investment, and as a condition precedent to the final acceptance thereof, I/we understand and agree that the following actions shall be taken:

1 . . .

2. . . . I/we further understand that [Shallot's] board of directors will authorize or otherwise cause [Shallot] to take any actions that the board believes are necessary or desirable in order to effectuate the purpose of this investment or otherwise manage the affairs of [Shallot]."

59 It is submitted on behalf of Mr Al Sadik that the judge was wrong to hold that the transfer of the Investment Amount (less a small retention) from Shallot to Blossom was merely an "administrative step" and not an "investment" for the purposes of clause A of the SPA. It is said, first, that Blossom was structured as a special investment fund; second, that the transfer of the Investment Amount to Blossom incurred risks and constraints which investment in accordance with the investment power contained in clause A of the SPA would not have incurred; and, third, that the use of Blossom to leverage the investments which it had made, by borrowing on the security of those investments for the purpose of making further investments, was inconsistent with clause I.1 of the SPA.

60 Clause I.1 of the SPA was in these terms:

"I. Borrowing relationships

In connection with my/our investment, I/we understand and agree that [Shallot] may be involved in certain borrowing relationships in accordance with the following terms:

1. [Shallot] may borrow from third-party lenders, and in some cases from Investcorp, to meet possible temporary cash shortfalls and for other corporate purposes "Liquidity Borrowings". The aggregate amount of Liquidity Borrowings shall not exceed 25% of the equity of [Shallot].

2. . . ."

61 In support of the submission that Blossom was structured as a special investment fund it is said (i) that the shares in Blossom for which Shallot subscribed were preference shares the value of which fluctuated with the value of Blossom's assets (which represented the value of the Investment Amount, less a small retention) and (ii) that, from the moment when Blossom borrowed money on the terms of its loan facility from RBS (the White Ibis III credit facility) its assets were grouped in a fund, the investment of which was subject to special rules that were defined by the terms of the White Ibis III credit facility.

62 In support of the submission that the transfer of the Investment Amount to Blossom incurred risks and constraints which would not have been incurred if that Investment Amount had been invested in accordance with the investment power conferred by clause A of the SPA, it is said on behalf of Mr Al Sadik (i) that the pledge of shares held by Blossom in the SMFs had the effect that RBS could have recourse to those shares in the event that the value of the DSF shares was insufficient to cover the borrowings for the purchase of the DSF shares, (ii) that the effect of the Product Concentration Limits under the White Ibis III rules had the effect that a decline in the value of one product might force the sale of other investments, (iii) that a decline in the value of Blossom's investments might force a sale of those investments in order to maintain the LTV ratio required under the White Ibis III rules, (iv) that, if one of Blossom's co-issuers was subject to a "Global Early Termination Event", then (even if Blossom was not in default of its own obligations under the terms of the White Ibis III credit facility) RBS had the right to foreclose on Blossom and take control of and sell its assets, (v) that, if Blossom needed to redeem investments to avoid or remedy a breach of the LTV ratio and/or the Product Concentration Limits, it would not be able to do so timeously, given the long redemption dates of the hedge funds in which its funds were invested and (vi) that, if Blossom did not have sufficient funds to pay its debts to RBS, Mr Sadik was exposed to the risk (an insolvency risk) that he would be subject to claims to claw back any proceeds he received on exercising his power to redeem. It was said that the investment rules by which Blossom was governed under the terms of the White Ibis III credit facility had the effect that it was a leveraged fund with unique risks not present in an investment in or among "Investcorp Hedge Funds"; and, further, that Blossom was a special investment fund with characteristics which differed in material respects from an "Investcorp Hedge Fund" in that it was a secret fund (which, it is said, had the effect that investment in it was a breach of clause A).

63 In support of the submission that the use of Blossom to leverage the investments which it had made, by borrowing on the security of those investments for the purpose of making further investments, was inconsistent with clause I.1 of the SPA, it was said that the effect of that clause was that Shallot was permitted to borrow only for liquidity purposes ("Liquidity Borrowings") and not for any other purposes: in particular, borrowing for investment purposes under that clause was not permitted. It was said that, if clause I.1 of the SPA prohibited borrowing for investment purposes, it must follow that the transfer of

the Investment Amount by Shallot to Blossom could not be treated as an administrative step for purposes of enabling Investcorp to perform its contractual obligations under the SPA; because the transfer was made for a purpose that was outside - indeed, inconsistent with - those obligations.

64 In my view the submissions advanced on behalf of Mr Al Sadik in support of its challenge to the judge's conclusion that the transfer of funds from Shallot to Blossom was an administrative step taken in contemplation of the investment of those funds and was not, itself, to be treated as an investment of those funds fail to distinguish between (i) the transfer of funds from Shallot to Blossom on 4 March 2008 and the investment of those funds by Blossom in DSF and the SMFs and (ii) the subsequent drawdown of funds from RBS under the White Ibis III credit facility, against the security of the shares in DSF and the SMFs then held by Blossom, in the period May to September 2008 and the application by Blossom of those borrowed funds, by way of leverage, in making further investments in DSF and in SMFs during that period. The transfer of funds from Shallot to Blossom on 4 March 2008 was made in order to enable Blossom to invest those funds, forthwith, in Underlying Investments (DSF and the SMFs). DSF and the SMFs were hedge funds or segregated funds with hedge funds managers which could properly have been selected for investment under clause A of the SPA. At the time of that transfer Blossom and RBS had not entered into the White Ibis III credit facility agreement. The fact that the transfer of funds from Shallot to Blossom on 4 March 2008 was made with a view to enabling leverage to take place in the future, once the White Ibis III credit facility was in place, does not lead to the conclusion that, at the time when that transfer was made, it was, itself, more than an administrative step; albeit a step taken not only for the purpose of the immediate investment of those funds in Underlying Investments which were authorised but also in contemplation of the possible use of those Underlying Investments in the future, by way of leverage, in making further investments in hedge funds and segregated accounts with funds managers. Whether or not the use of the Underlying Investments acquired in March 2008, by way of leverage, to enable further investments to be made in DSF and SMFs was authorised by the SPA is a question which has to be addressed; but it is a distinct question from the question whether the transfer of funds from Shallot to Blossom on 4 March 2008 was an administrative step taken in contemplation of the investment of those funds and was not, itself, to be treated as an investment of those funds. The answer to the one question does not provide the answer to the other. In my view the judge's answer to the

question whether the transfer of funds from Shallot to Blossom was an administrative step and not, itself, an investment of those funds was correct. I reject Mr Al Sadik's challenge to the conclusion which the judge reached on that question.

*Was the judge correct to direct himself that the issue which he had to decide was "whether or not Investcorp was authorized to leverage the contributed funds at the portfolio level"*

65 At paragraph 4.2 of his judgment the judge directed himself that "the issue which I have to decide is whether or not Investcorp was authorized to leverage the contributed funds at the portfolio level and this turns upon the true meaning and effect of the SPA". It is said on behalf of Mr Al Sadik that the judge was wrong to take that view: properly understood, it is said, the only issue which the judge had to decide was whether, on the true meaning and effect of the SPA, Blossom was to be regarded as an Investcorp Hedge Fund or a hedge fund or segregated account with any other hedge funds manager which at the time of investment was a manager with which an Investcorp Hedge Fund was invested. And, it is said, in re-casting Mr Al Sadik's case as he did, the judge demonstrated that his reasoning was inductive: he was working back from the conclusion that he was seeking to reach, rather than working forward from the facts towards the conclusion which he should have reached. Had he adopted the correct approach – which was to begin with the SPA and apply the appropriate principles of contractual construction - he could not have reached the conclusion which he did.

66 Investcorp's response is that the judge did address the correct issue - whether on its true construction the SPA permitted Investcorp to leverage Mr Al Sadik's investment at portfolio level – and that Mr Al Sadik's criticism is misplaced. In developing that response in written submissions and at the oral hearing of the appeal, it is said on behalf of Investcorp that the contention that the judge misdirected himself as to the issue he had to decide is unsustainable. The judge's approach, it is said, was wholly consistent with the approach adopted on behalf of Mr Al Sadik at trial. Reliance is placed on an exchange between the judge and counsel on the first day of the trial (Transcript, 9 January 2012, page 56, line18, to page 57, line 11).

67 I reject the submission that the only issue of contractual interpretation that the judge had to decide was whether, on the true meaning and effect of the SPA, Blossom was to be regarded as an Investcorp Hedge Fund or a hedge fund or segregated account with any other hedge funds manager which at the time of investment was a manager with which

an Investcorp Hedge Fund was invested. As I have said, the logically anterior question was whether the transfer of funds from Shallot to Blossom on 4 March 2008 was an administrative step taken in contemplation of the investment of those funds and was not, itself, to be treated as an investment of those funds. If, as the judge held (correctly, in my view), the answer to that question was "Yes", then the question whether Blossom itself was an Investcorp Hedge Fund or a hedge fund or segregated account with any other hedge funds manager did not arise. That question did not arise because, as Professor Stowell explained in his evidence (and the judge held), "Blossom was essentially a customised special purpose vehicle created for Mr Al Sadik's benefit to facilitate achievement of his investment objectives by enabling leverage to be applied to DSF and SMF investments . . .". The relevant questions, in this context, were (i) whether, under the terms of clause A of the SPA, the funds transferred by Shallot to Blossom could properly be invested in DSF and the SMFs, and (ii), if so, whether Blossom's investments in DSF and the SMFs could be leveraged at the portfolio level. If, but only if, the answer to each of those questions is "Yes", there is a third question to be determined: whether, in leveraging Blossom's investment, it was appropriate for Blossom to borrow under the terms of the White Ibis III credit facility. But that is not a question of contractual interpretation.

68 As I have said, the judge described Investcorp's hedge fund platform (at paragraph 1.8 of his judgment) as comprised of "a number of funds of hedge funds, emerging manager funds and single manager funds having total assets under administration of about US$8 billion". He explained (at paragraph 1.9 of his judgment) that "DSF was launched in April 1998 as a multi-manager, multi-strategy fund of hedge funds" and that "as at 30th June 2008 it was invested in about 77 different managers employing nine different investment strategies and had AUM of about US$2.1 billion". Investcorp group companies acted as both investment manager and administrator of DSF. Mr Al Sadik does not contend that DSF was not an Investcorp Hedge Fund. The judge went on to explain (at paragraph 1.11 of his judgment) that a single manager fund (an SMF) "is a pure play on one investment strategy employed by a single investment manager". He said that Investcorp's single manager platform was launched in December 2004; and that, by 31 December 2007 it comprised six Investcorp branded funds, each employing a different investment strategy with a different independent investment manager, having a total assets under management of about US$1.2 billion of which about US$474 million was Investcorp's own proprietary

capital. Mr Al Sadik does not contend that the SMFs were not hedge funds or segregated accounts with other hedge funds managers which at the time of investment were managers with which an Investcorp Hedge Fund was invested. It follows that the answer to the question whether, under the terms of clause A of the SPA, the funds transferred by Shallot to Blossom could properly be invested in DSF and the SMFs is not in doubt: the funds transferred could be so invested.

69 In those circumstances the question of contractual interpretation for decision by the judge was, indeed, "whether or not Investcorp was authorized to leverage the contributed funds at the portfolio level". In my view the judge was correct to direct himself as he did.

*Was the judge correct to have regard to the factual background; and, in particular to the terms of the Investment Proposal*

70 The judge reminded himself of the principles of law relating to contractual interpretation. In particular, he reminded himself of passages from the speeches of Lord Hoffmann in *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 WLR 896 and in *Attorney-General of Belize* v *Belize Telecom Ltd* [2009] UKPC 10; [2009] 2 All ER 1127. In the first of those cases Lord Hoffmann had pointed out (at [1998] 1 WLR 896, 912-913) that

> ". . . interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

and that, subject to the requirement that the admissible background knowledge does not include the previous negotiations of the parties and their declarations of subjective intent, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

71 The correct approach to the interpretation of contracts has been reviewed by the United Kingdom Supreme Court in *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619. At paragraph [15] of his judgment (with which Lord Sumption, Lord Hughes and Lord Hodge JJSC agreed) Lord Neuberger of Abbotsbury PSC observed that:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the

> relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see [*Prenn v Simmonds* [1971] 1WLR 1381] at pp 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 995-997 per Lord Wilberforce, *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in [*Rainy Sky SA v Kookmin Bank*] [2011] 1 WLR 2900, per Lord Clarke at paras 21-30."

In relation to (iv) - the facts and circumstances known or assumed by the parties at the time that the document was executed – Lord Neuberger emphasised, at paragraph [21] of his judgment, that:

> "When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

72 At paragraph 4.4 of his judgment the judge set out the terms of clause A of the SPA. He pointed out that, in the absence of the Investment Agreement which had been contemplated by that clause, the SPA stood alone. He commented that it was common ground that the SPA conferred upon Investcorp a discretionary mandate to manage and invest the Investment Amount in accordance with the purposes stated in clause A. He drew attention to the provisions in clause I.1 of the SPA (the terms of which I have set out earlier in this judgment); but observed that it was agreed that borrowing for liquidity purposes was materially different from borrowing for investment purposes and that clause I related only to the former. The question which he had to address – given that he had directed himself at paragraph 4.2 of his judgment (correctly, as I have held) that "the issue which I have to decide is whether or not Investcorp was authorized to leverage the contributed funds at the portfolio level and this turns upon the true meaning and effect of the SPA" – was whether, as a matter of contractual interpretation, the SPA permitted borrowing for investment purposes; or, more particularly, whether the SPA permitted borrowing on the security of existing investments in order to gear up (or add to) those investments by way of leverage.

73 At paragraph 4.5 of his judgment the judge turned to an examination of the circumstances in which Investcorp Bank, Investcorp Nominee 1 and Shallot entered in to the SPA. He described the Investment Proposal - which (as he said) was presented to Mr Al Sadik at a meeting on 28 January 2008 at which Mr Al Khatib, Mr Kironde and Mr Fierens were present - as an important part of the factual matrix. He noted that the Investment Proposal included, on the first page amongst "Portfolio Objectives", a target return of 45%+ over a three year investment horizon; and that, on the second page under the heading "Overview of Proposal, it was stated that the portfolio was to be invested, as to 50%, in DSF and, as to the other 50%, in two satellite portfolios (25% in the Investcorp Single Manager Platform and 25% in Opportunistic/Theme Funds) with "Leverage at each underlying portfolio taking into account portfolio volatility". He observed that "On any objective analysis, it is plainly obvious that this part of the document is proposing a leveraged investment and there is nothing in any other part of the document tending to suggest otherwise". At paragraph 4.6 of his judgment the judge said this:

> "4.6 The purpose of the SPA is for Mr. Al Sadik to establish a managed account with Investcorp, by which he will invest in a portfolio of hedge funds managed by Investcorp pursuant to a discretionary mandate. Its purpose is not to implement the Investment Proposal as such. The language of Clause A makes it clear that Investcorp is to have a wide discretion which is not limited to implementing exactly what was proposed in the Investment Proposal. However, I think that the purpose of the SPA was to authorize Investcorp to implement the Investment Proposal, to the extent that its implementation is not actually inconsistent with what has been expressly agreed by the parties".

74 At ground 10 in the Memorandum of Grounds of Appeal it is said that the judge erred in law when, in order to decide the issue he had identified (whether or not Investcorp was authorized to leverage the contributed funds at the portfolio level), he inquired into the "factual background". In elaboration of that ground, it is submitted that the judge was wrong to construe the SPA by reference to the contents of the Investment Proposal: in that the factual background would have been relevant if, and only if, (i) there was a clear mistake on the face of the SPA - in the sense that something had gone wrong with the language and it was clear what correction ought to be made in order to cure the mistake - or (ii) the SPA did not expressly provide for what was to happen when some event occurred (so that there was a potential need for the implication of a term). In the present case, it is said, neither of those conditions was satisfied. There was no such mistake on the face of the SPA; the judge was not invited by either Mr Al Sadik or Investcorp to find that there was; and he did not do so. The event that did occur (the investment in Blossom)

occurred, it is said, only because Investcorp Bank did not make an investment in accordance with the express terms of the SPA. Accordingly, an examination of the factual background was unnecessary in order to construe clause A of the SPA. The proper approach was to exclude examination of the terms of the Investment Proposal when construing the text of the SPA: on the basis that the Investment Proposal was of no relevance to the construction of the SPA, being only evidence of something said during the course of the negotiation of that agreement.

75 I reject the submission that, as a matter of law, the judge was wrong to have regard to the Investment Proposal when addressing the question which he had held he needed to determine: that is to say, the question whether or not Investcorp was authorised to leverage the contributed funds at the portfolio level. It is important to keep in mind that, in the events which happened, it was Blossom – and not Investcorp Bank or Shallot – that leveraged the funds which had been transferred to it; and that it did so by investing those funds in DSF and the SMFs (which were investments authorised under clause A of the SPA), borrowing against those investments under the terms of the White Ibis III credit facility and then investing those borrowed funds in further shares in DSF and the SMFs. In order to answer the question whether Investcorp was authorised to leverage the contributed funds at the portfolio level, the judge needed to ask himself whether the terms of the SPA required Investcorp Bank and/or Shallot (which were parties to that agreement) not to cause or permit Blossom (which was not a party to that agreement) to exercise its own corporate powers to enter into the White Ibis III credit facility and to draw down funds under that facility. The judge was entitled to take the view that the answer to that question turned on the scope of the statement, in clause D.2 of the SPA to which he had referred at paragraph 4.2 of his judgment: that is to say, to the statement that "I/we further understand that the Company's board of directors will authorize or otherwise cause the Company to take any actions that the board believes are necessary in order to effectuate the purposes of this investment". In asking himself whether that statement in the SPA required Investcorp and/or Shallot not to cause or permit Blossom to act as it did, the judge was entitled – indeed, I would hold, needed – to inquire into the discussions which had taken place at the meeting on 28 January 2008 (and the terms of the Investment Proposal which was presented to Mr Al Sadik at that meeting) in order to determine whether the meaning to be given to that statement – as a matter of contractual interpretation – did have that effect.

76 For those reasons, I hold that the judge was correct to inquire into the factual background; and, in particular, (i) that he was correct to have regard to the Investment Proposal in determining the question whether or not Investcorp was authorized to leverage the contributed funds at the portfolio level and (ii) that he was correct to have regard to the fact, which must have been obvious to Mr Al Sadik as well to Investcorp, that the return on investment (45% over three years) which Mr Al Sadik required - and which Investcorp needed to achieve if it were to earn a performance fee - was not capable of being achieved without leveraging in some form.

*Was the judge led by his inquiry to imply a term (the Implied Term) that Investcorp was authorised "to construct a leveraged portfolio consistent with the Investment Proposal, save to the extent that the parties had expressly agreed otherwise"; and, if so, was he wrong to do so, because no reasonable person would have concluded that the Implied Term was contemplated by the parties*

77 As I have said, earlier in this judgment, the judge directed himself (at paragraph 4.2 of his judgment) that the question which he needed to decide - whether or not Investcorp was authorized to leverage the contributed funds at the portfolio level – turned on the true meaning and effect of the SPA; he examined the relevant factual background and explained (at paragraph 4.5 of his judgment) that the Investment Proposal, presented to Mr Al Sadik at the meeting on 28 January 2008, was not incorporated as a term of the SPA but was an important part of the factual matrix against which the SPA must be construed; and he concluded (at paragraph 4.9 of his judgment) that, on its true construction, the SPA did authorise "First Layer Leverage" (by which expression he meant, as he explained at paragraph 4.1 of his judgment, "leveraging an investor's contributed funds at the portfolio level").

78 At paragraph 4.2 of his judgment the judge had pointed out that, if Investcorp was authorised to leverage Mr Al Sadik's contributed funds at the portfolio level, then "it must have been empowered to do so either directly through Shallot and/or indirectly through Blossom, incorporated specifically for this purpose". He referred to, and cited from, the third sentence in clause D.2 of the SPA. He went on to say that, if all or any part of Shallot's assets were to be leveraged at the portfolio level for investment purposes, he would expect this to be done through a wholly owned subsidiary incorporated especially for this purpose. And he held that, in his judgment, "any suggestion that Investcorp had no

power (acting by its employees who constituted Shallot's board of directors) to incorporate a subsidiary for this purpose would be unsustainable".

79 At paragraph 4.5 of his judgment, after referring to statements on page 2 of the Investment Proposal (under the heading "Overview of Proposal"), the judge observed that, on any objective analysis, it was plainly obvious that that part of the Investment Proposal was proposing a leveraged investment; and that there was nothing in any other part of document tending to suggest otherwise. He referred to, and set out, the Indicative Terms stated on page 5 of the Investment Proposal. He explained, by reference to the Appendices at pages 8, 9 and 10 of the Investment Proposal, that the Indicative Terms showed (i) that the core holding in DSF can be leveraged x3 by investing in LDSF, (ii) that the proposed satellite portfolio of SMFs could be leveraged up (then at x1 only) through SMFCo (with the comment that the level of leverage was expected to increase as more single managers were added to the platform and (iii) that a satellite portfolio of theme funds could be achieved by investing in the LEDF (which, he explained, was a leveraged hedge fund product, similar to LDSF).

80 The judge had described the characteristics of LDSF and SMFCo earlier in his judgment. At paragraph 1.10 he had said this:

> 1.10 LDSF is incorporated under Part XIV of the Companies Law as a segregated portfolio company. It is a hedge fund structured product which I characterize as a feeder fund, the sole purpose of which is to provide investors with the opportunity to make leveraged investments into DSF, through separate portfolios which offer investors the choice of lx, 2x, 2½x or 3x leverage. Each portfolio is a separate economic entity with its own assets and liabilities. It is not necessary for the purposes of this judgment to explain the mechanics of the synthetic financing arrangement between LDSF and Deutsche Bank AG, or any other relevant banks. Suffice it to say that the evidence establishes that it is the economic equivalent of a feeder fund whose only asset is its 'investment' in DSF and only liabilities are its 'loans' from Deutsche Bank, or any other relevant banks. An investment in LDSF is the economic equivalent of a leveraged investment in DSF and the investor determines his level of leverage by choosing the portfolio in which he will invest."

and, at paragraph 1.12, this:

> "1.12 SMFCo is also a segregated portfolio company which was launched on 15th January 2008. It serves the same purpose as LDSF, in that it provides investors with a leveraged exposure to all of the Single Managers. Investors pay no fees at the SMFCo level, but indirectly bear management and performance fees at the Single Manager level. Like LDSF, SMFCo is structured so as to provide a choice of leverage at 1x or 2x, but at the material time it was only in fact offering 1x leverage, which was to have a significant impact upon the construction of Mr. Al Sadik's portfolio. I do not characterize it as a feeder fund, because an investment in

> SMFCo is not the economic equivalent of a 1x leveraged investment in any one of the Single Managers. It has some of the characteristics of a fund of hedge funds because it is invested in all of the Single Managers."

He went on, at paragraph 4.5 of his judgment, to observe that, in his view, the Investment Proposal told the reader that an investment in LDSF was the economic equivalent of a leveraged investment in DSF and that investments in SMFCo and LEDF were the economic equivalent of leveraged investments in portfolios comprising the six SMFs and the five theme funds. But he pointed out that there was nothing in the Investment Proposal which suggested that it would be a term of the SPA that the investments in DSF and portfolios of single manager/theme funds should not be leveraged at the portfolio level (rather than through LDSF, SMFCo and LEDF).

81 I have set out the first three sentences of paragraph 4.6 of the judge's judgment in the previous section of this judgment, but (at the risk of unnecessary repetition) I think it convenient to do so again:

> "4.6 The purpose of the SPA is for Mr. Al Sadik to establish a managed account with Investcorp, by which he will invest in a portfolio of hedge funds managed by Investcorp pursuant to a discretionary mandate. Its purpose is not to implement the Investment Proposal as such. The language of Clause A makes it clear that Investcorp is to have a wide discretion which is not limited to implementing exactly what was proposed in the Investment Proposal. However, I think that the purpose of the SPA was to authorize Investcorp to implement the Investment Proposal, to the extent that its implementation is not actually inconsistent with what has been expressly agreed by the parties".

Consistently with his view that the purpose of the SPA was not to implement the Investment Proposal "as such", the judge went on to say that it would be improper to imply a term that investments "must only be made in precisely the way set out in the Indicative Terms". Nevertheless, consistently with his view that the purpose of the SPA was to authorise Investcorp to implement the Investment Proposal, the judge observed that it would be wrong in principle to construe the SPA in a way which involved implying a term which would make it impossible to implement any part of the Investment Proposal. Given that the Investment Proposal proposed that leveraged investments would be made in DSF and a satellite portfolio of SMFs, it would, he said, be improper to imply a term into the SPA which would prevent such investments from being made. He held that:

> ". . . on its true construction, the SPA authorizes Investcorp to construct a leveraged portfolio consistent with the Investment Proposal, save to the extent that the parties have expressly agreed otherwise."

82 It is said on behalf of Mr Al Sadik (in his challenge under ground 11 in the Memorandum of Grounds of Appeal) that, even if it were permissible for the judge to inquire into the factual background as an aid to the construction of the SPA, he erred in law because his inquiry led him wrongly to imply into that agreement a term to the effect that Investcorp had power to implement the Investment Proposal to the extent that its implementation was not actually inconsistent with its express terms (the Implied Term); and (in his challenge under at the first limb of ground 12) that the judge misconstrued the SPA "because no reasonable person would have concluded the Implied Term was contemplated by the parties or have construed the SPA in the way the learned Judge did".

83 In support of the submission that the judge reached his conclusion by implying a term that the SPA authorised Investcorp to construct a leveraged portfolio consistent with the Investment Proposal, save to the extent that the parties have expressly agreed otherwise – rather than by a process of construction of the words used – it is said on behalf of Mr Al Sadik that, although the judge purported to reach his conclusion by construing the SPA, his underlying reasoning demonstrates that he was not engaged in an exercise of construction. It is said that nowhere in the judge's reasoning did he attempt to interpret the words used by the parties: that he failed to ask himself what the parties would reasonably have been understood to mean when they used the words that they did in the circumstances known to them. Rather, it is said, the exercise in which the judge was engaged was the implication of a term permitting concerning the construction of a leveraged portfolio in circumstances where the words in the agreement negotiated and agreed between the parties did not do so. Without the Implied Term, it is said, there was no basis upon which investment in Blossom could be justified.

84 It is submitted on behalf of Investcorp that the "implied term" analysis adopted on behalf of Mr Al Sadik is artificial. First, it is said, that the judge, at the invitation of both parties, approached the particular issue that he was addressing at trial - whether or not Investcorp was authorised to leverage Mr Al Sadik's investment at the portfolio level - as a question of construction of the SPA; that both parties invited him to construe the SPA by applying essentially agreed legal principles; and that, as part of his analysis (at paragraph 4.6 of his judgment) he expressly rejected the implication of a term that Investcorp was permitted to effect investments only in the precise manner set out in the "Indicative Terms" in the

Investment Proposal (and, it might be added, a term that would prevent leveraged investments being made in DSF and a satellite portfolio of SMFs). In those circumstances it is most unlikely that he would have intended to imply other terms. Second, it is said, Mr Al Sadik's implied term analysis fails to explain why, if the judge did think it necessary to imply a term into the SPA, he chose to do so in terms which differed from those in which he expressed his conclusion (at paragraphs 4.9 and 7.3 of his judgment) on the particular issue that he was addressing: that First Layer Leverage was authorised. The implication of an implied term – in the terms asserted by Mr Al Sadik – was not a necessary step in the reasoning which led to that conclusion; and it served no purpose.

85 In my view there is force in the submissions advanced on behalf of Investcorp. I reject the submission, advanced on behalf of Mr Al Sadik, that the judge was led by his inquiry to imply a term that Investcorp was authorised "to construct a leveraged portfolio consistent with the Investment Proposal, save to the extent that the parties had expressly agreed otherwise". I accept that the judge took the view (as he said in the fourth sentence of paragraph 4.6 of his judgment) that the purpose of the SPA was to authorise Investcorp to implement the Investment Proposal, to the extent that its implementation was not actually inconsistent with what had been expressly agreed by the parties; and that he held (in the final sentence of paragraph 4.6) that, on its true construction, the SPA did authorise Investcorp to construct a leveraged portfolio consistent with the Investment Proposal (again, save to the extent that the parties had expressly agreed otherwise). But I am not persuaded that the judge reached his conclusion on the particular issue that he was addressing – that First Layer Leverage was authorised - on the basis that it was necessary for him to imply a term in the terms asserted by Mr Al Sadik; or that he did so.

86 In those circumstances it is unnecessary to address, in this judgment, the submissions advanced on behalf of each of the parties on the question whether or not the judge erred in implying the Implied Term. Given that, in my view, the judge did not imply such a term, that question does not arise.

*In holding that the investments made by Blossom were not made in breach of the SPA, was it necessary for the judge to imply further terms (i) that there was a power to borrow for investment purposes and (ii) that there was a power to grant security interests over the value representing the Investment Amount in order to borrow for investment purposes; and, if so, was he wrong to do so*

87 It is said on behalf of Mr Al Sadik (at ground 13 in the Memorandum of Grounds of Appeal) that the judge erred in law when he held that the investments made by Blossom (pursuant to the Implied Term) were not made in breach of the SPA; in that such a finding required the implication of further terms: (i) that there was a power to borrow for investment purposes; and (ii) that there was a power to grant security interests over the value representing the Investment Amount in order to borrow for investment purposes: whereas each of the additional implied terms imposed an unreasonable and/or perverse meaning on the express terms of the SPA. Further or in the alternative, it is said (at ground 14 in the Memorandum of Grounds of Appeal) that, if the judge were correct to hold that the investments made by Blossom were not made in breach of the SPA on the basis of his construction of the SPA, such a finding required the implication of terms that there was a power to borrow for investment purposes and that there was a power to grant security interests over the value representing the Investment Amount in order to borrow for investment purposes and was therefore wrong in law.

88 In elaboration of grounds 13 and 14, it is said on behalf of Mr Al Sadik that:

(1) An additional term that there was a power to borrow for investment purposes (if implied) would impose an unreasonable and/or perverse meaning on the express terms of the SPA, because:

(i) Clause I authorises borrowing for liquidity purposes only. The judge was correct to hold (at paragraph 4.4 of his judgment) that: ". . . borrowing for liquidity purposes is materially different from borrowing for investment purposes, and relates only to the former". Clause I is the only clause in the SPA that provides for borrowing: unless borrowing was permitted by that clause, it was not permitted.

(ii) It was not in dispute that the transfer of the Investment Amount (less a small retention) from Shallot to Blossom was made in order to facilitate borrowing for investment purposes. The Implied Term would have the effect that Investcorp was permitted to borrow for investment purposes; notwithstanding that the express terms of the SPA did not permit borrowing for such purposes; and so the Implied Term and/or the additional implied term that there was a power to borrow for investment purposes would have the effect that Investcorp was permitted to circumvent the express term contained in the SPA that borrowing could only be for liquidity purposes.

(2) An additional term that there was a power to grant security interests in order to borrow for investment purposes over the value representing the Investment Amount (if implied) would impose an unreasonable and/or perverse additional term on the express terms of the SPA, because:

(i) The SPA did not contain any authorisation, whether direct or indirect, to offer the value or any part of the value representing the Investment Amount as security in order to borrow for investment purposes; and Mr Al Sadik did not agree to confer such a power.

(iii) If Mr Sadik did not agree to confer a power to grant security interests over the value of the Investment Amount then no power to grant security interests in order to borrow for investment purposes can have been created.

89 As I have said - in the course of addressing, in the previous section of this judgment, the question whether the judge was led by his inquiry to imply a term (the Implied Term) that Investcorp was authorised to construct a leveraged portfolio consistent with the Investment Proposal, save to the extent that the parties had expressly agreed otherwise – it is submitted on behalf of Investcorp that the "implied term" analysis adopted on behalf of Mr Al Sadik is artificial. In the present context, it is pointed out on behalf of Investcorp that the combined effect of the terms which are said by Mr Al Sadik to have been implied by the judge adds nothing to the judge's decision on the true construction of the SPA. Taken together the effect of the first "implied term" (that the SPA authorised Investcorp to construct a leveraged portfolio consistent with the Investment Proposal, save to the extent that the parties have expressly agreed otherwise), the second "implied term" (that the SPA authorised borrowing for investment purposes) and the third "implied term" (that the SPA authorised the grant security interests over the value representing the Investment Amount in order to borrow for investment purposes) was that the SPA authorised First Layer Leverage". But that was the conclusion which the judge reached at paragraph 4.9 of his judgment; and, in reaching that conclusion, the judge did not adopt Mr Al Sadik's implied term analysis. The implied term analysis adds nothing to the judge's reasoning or to his conclusion.

90 Again, in my view, there is force in those submissions. I reject the submission, advanced on behalf of Mr Al Sadik, that, in holding that the investments made by Blossom were not made in breach of the SPA, it was necessary for the judge to imply further terms (i) that

there was a power to borrow for investment purposes and (ii) that there was a power to grant security interests over the value representing the Investment Amount in order to borrow for investment purposes. I accept, that the judge took the view that, in order to construct a leveraged portfolio consistent with the Investment Proposal with the use of First Layer leverage, it was necessary to borrow for investment purposes and necessary to secure that borrowing against the value of the investments which then represented the Investment Amount; but, again, I am not persuaded that the judge reached his conclusion on the particular issue that he was addressing – that First Layer Leverage was authorised - on the basis of implied terms.

91 As I have said, the judge had observed (at paragraph 4.2 of his judgment) that, if all or any part of Shallot's assets were to be leveraged at the portfolio level for investment purposes, he would expect this to be done through a wholly owned subsidiary of Shallot, incorporated especially for this purpose. And, after referring to clause D.2 of the SPA, he had held that any suggestion that Investcorp had no power (acting by its employees who constituted Shallot's board of directors) to incorporate a subsidiary for this purpose would be unsustainable. And, as I have said, whether or not the use of the Underlying Investments acquired in March 2008 by way of leverage to enable further investments to be made in DSF and SMFs was permitted under the SPA is a question which has to be addressed; but it is plain that the judge did not reach his conclusion that they could be used for that purpose by recourse to implied terms which were not expressed in the SPA. He reached that conclusion by construing the SPA – and, in particular, the scope of clause D.2 – on the basis of his view that the purpose of that agreement was to implement the Investment Proposal (save to the extent that the implementation of the Investment Proposal was inconsistent with what had been expressly agreed by the parties).

92 Given that, as I have held, the judge did not imply the additional terms that Mr Al Sadik has identified – that is to say, terms (i) that there was a power to borrow for investment purposes; and (ii) that there was a power to grant security interests over the value representing the Investment Amount in order to borrow for investment purposes – it is unnecessary to consider whether he would have been wrong to do so: that question does not arise.

*Was the judge correct to conclude that the investment through Blossom was not prohibited because it was 'economically equivalent' to investments made on the express terms of the SPA.*

93 Investcorp had submitted to the judge at trial that it was helpful, in construing the SPA, to consider what counsel had described as "the economic equivalency point" as a cross-check. The judge accepted that submission; and addressed that point at paragraph 4.8 of his judgment. In doing so he identified what he described as two scenarios in relation to the proposal (contained in the Investment Proposal) that 50% of the assets to be invested (that is to say, 50% of US$135 million, or US$67.5 million) should be invested in DSF and leveraged x3. The two scenarios were (i) leveraging 50% of the assets x3 at the portfolio level, which, he explained, would produce US270 million (that is to say, the aggregate of US$67.5 million and 3x US$67.5 million) to invest in DSF, or (ii) investing US$67.5 million in the high risk x3 portfolio of LDSF (which would lead to the investment by LDSF of US$270 million in DSF). The judge explained that each of those two different scenarios would produce an economically equivalent result for Mr Al Sadik: in that each would lead to an actual exposure, in economic terms, equivalent to an investment of US$270 million in DSF subject to a liability of US$202.5 million to a lender. The judge went on to say this:

> "Looked at objectively, there can be no justification for implying into the SPA a term to the effect that either one of these scenarios is prohibited, whereas the other is not. This would flout business common sense, because either scenario can produce an economically equivalent result for Mr. Al Sadik. Having regard to the content of the Investment Proposal and the fact that the parties are agreed that Clause A of the SPA permits an investment in LDSF, both scenarios must be permitted."

He observed that whether or not the use of the White Ibis III credit facility did, in fact, produce an economically equivalent outcome was of no relevance to his analysis of the contractual effect of the SPA.

94 It is submitted on behalf of Mr Al Sadik (under ground 16 in the Memorandum of Grounds of Appeal) that the judge was wrong to hold that the investment through Blossom was not prohibited because it was "economically equivalent" to investments made in accordance with the express terms of the SPA. In particular, it is said that the judge was wrong to conclude, at paragraph 4.8 of his judgment, that there could be no justification for implying into the SPA a term to the effect that the investments made by using Blossom were prohibited and that to find an implied term which had that effect

would flout business common sense because either scenario could produce an economically equivalent result for Mr Al Sadik, in that (i) the only issue the judge had to decide was whether or not the investment in Blossom was permitted (so his comment that he was (in effect) being invited by Mr Al Sadik to imply a term that the investment was prohibited was misconceived) and (ii) the judge reached his conclusion without having regard to the terms of the White Ibis III credit facility (which had the effect that investments made through Blossom were materially different from investments made on the express terms of the SPA). It is said that, if two investments could produce the same return but with materially different risk profiles, the investments cannot be regarded as "equivalent" in any meaningful way; as the judge should have appreciated if he had had regard to the evidence of the investment expert called on behalf of Mr Sadik (which, it is said, he failed to do).

95 Investcorp's response to the challenge under ground 16 is that the judge was entitled to rely, as a cross-check, on the economic equivalence of First Layer Leverage and Second Layer Leverage. It is said that the judge was right to hold that the economic equivalence of investments made using the Blossom and Shallot structures was a helpful cross-check; in that, as he observed at paragraph 4.8 of his judgment, if there was no meaningful difference between First Layer Leverage and Second Layer Leverage and the latter was authorised under the SPA, then it "would flout business common sense" to construe the SPA on the basis that the former was prohibited.

96 Further, Investcorp points out that Mr Al Sadik does not challenge the judge's analysis directly; rather, he appeals on the basis that Blossom was an investment (but not an investment authorised by the SPA) and that an investment in Blossom was not economically equivalent to an investment using the Shallot structure. It is said that, in advancing an appeal on that basis, Mr Al Sadik confuses two discrete concepts: (i) the use of First Layer Leverage, whether by an investment vehicle such as Blossom or otherwise; and (ii) leveraging at the portfolio level by borrowing on the particular terms of the White Ibis III credit facility. Investcorp submits that the judge was right to hold that the question whether or not Blossom's entry into the White Ibis III credit facility (by which means portfolio level leverage was obtained) was a permissible exercise of the authority to use First Level Leverage did not arise unless the use of First Level Leverage (or leverage at portfolio level) was itself authorised.

97 Investcorp submits that, on a true analysis, Mr Al Sadik's complaint about the White Ibis III credit facility is a complaint that Investcorp acted in breach of fiduciary duty in causing Blossom to use that facility, not a complaint that Investcorp acted in excess of authority in seeking to leverage at portfolio level through Blossom; and that the judge was correct to address the question of breach of fiduciary duty in section 6 of his judgment, rather than in section 4. The question of breach of fiduciary duty, it is said, arises only once the anterior question of authority has been determined. Properly analysed, the question whether the use of the White Ibis III credit facility was a permissible exercise of authority or a breach of fiduciary duty cannot arise unless, in principle, the use of First Layer Leverage was authorised: if Investcorp did not have authority to use First Layer Leverage, then the terms on which it was used are irrelevant to questions of liability.

98 In that context (while contending that it is of relevance only to the question whether Investcorp acted in breach of fiduciary duty in using the White Ibis III credit facility; and not to the question whether, in principle, the SPA conferred authority to leverage) Investcorp draws attention to the judge's conclusion that, if First Layer Leverage was authorised, then there was nothing unusual about the terms of the White Ibis III credit facility. It is pointed out that, in the face of much complaint about those terms, the judge found (at paragraphs 6.16 to 6.20 of his judgment) that there was nothing unusual or peculiar about them: they were entirely consistent with what he would expect to see in credit facilities of this type. And, it is pointed out that Mr Al Sadik did not suggest at trial, and does not assert on appeal, that the judge was wrong to make that finding.

99 In my view the judge was right to take the view that the question whether or not the use of the White Ibis III credit facility to implement First Level Leverage did, in fact, produce an economically equivalent outcome to the use of Second Level Leverage was of no relevance to his analysis of the contractual effect of the SPA. It is important to keep in mind that Blossom was not a party to the SPA and that, at the date that those who were parties to the SPA (Investcorp Bank, Investcorp Nominee 1 and Shallot) entered into that agreement, Blossom and RBS had not entered into the White Ibis III credit facility. Further, it was some two months later before Blossom first made a draw down of funds under that facility. In those circumstances, in determining whether, as a matter of construction of the SPA, First Level Leverage was authorised, it would not have been appropriate for the judge to construe the SPA by reference to the terms of the White Ibis III

credit facility; and he was correct not to do so. I reject the submission, advanced on behalf of Mr Al Sadik, that the judge was wrong to conclude that, as an aid to construing the SPA, he could regard First Layer (or portfolio level) Leverage through a special purpose vehicle (such as Blossom) as 'economically equivalent' to Second Layer Leverage through, say, LDSF.

*Was the judge correct to conclude that, on its true construction, the SPA did authorise First Layer Leverage*

100 At paragraph 4.2 of his judgment the judge had directed himself that the issue of contractual interpretation which he had to decide was whether, on its true construction, the SPA authorised First Layer Leverage. At paragraph 4.9 he concluded that, on its true construction, the SPA did authorise First Layer Leverage. That conclusion is challenged on the ground (in addition to those which I have already addressed), raised under the second limb of ground 12 in the Memorandum of Grounds of Appeal, that the judge was led to misconstrue the SPA "because no reasonable person would have construed the SPA in the way the learned Judge did".

101 In advancing that challenge, it is submitted on behalf of Mr Al Sadik that:

(1) The Investment Proposal was a marketing presentation suggesting possible investments, given to Mr Al Sadik at a meeting at his office in Dubai on 28 January 2008, before the negotiation of the detailed terms of the SPA (which took place between 24 and 28 February 2008). At that meeting on 28 January 2008 Mr Al Sadik raised no questions in relation to the contents of the Investment Proposal: he said no more than that he wanted to work with Investcorp and that he would decide in the next couple of weeks how to proceed. The Investment Proposal was not discussed again by the parties before the SPA was signed on 1 March 2008; nor at any material time thereafter. In those circumstances, Investcorp was right to concede that the Investment Proposal was never anything other than an example of proposed investments into Investcorp Hedge Funds. The references in the Investcorp Proposal to leverage were confined to references to leveraged funds (LDSF, LEDF and SMFCo) which were no more than possible investments which might be made under the discretionary mandate created by the SPA. There was nothing in the circumstances in which the Investment Proposal was given to Mr Al Sadik - or in the contents of that document - to support the judge's conclusion that Mr Al Sadik agreed that, unless an

action relating to the investment of his money was not prohibited by the SPA, it was permitted. The evidence as to the background to the negotiation of the SPA on which the judge relied did not support the conclusions he reached.

(2) The finding by the judge (at paragraph 4.5 of his judgment) that there was nothing in the Investment Proposal "which tends to suggest that it will be a term of the SPA that the investments in DSF and portfolios of single manager/theme funds should not be leveraged at the portfolio level" was wrong as a matter of law; and, in any event, led the judge to misconstrue the SPA, because: (i) there is nothing in the SPA which tends to suggest that it will be a term of, or otherwise permitted by, the SPA that investments in DSF and portfolios of Single Manager/theme funds may be leveraged at the portfolio level, (ii) the Investment Proposal proposed investment in proprietary hedge funds that leveraged their own assets in accordance with advertised policies and consequently only contemplated and permitted an investment in the funds identified in clause A of the SPA and was consistent with the express terms of the SPA, (iii) the contents of the SPA and the Investment Proposal do not support the conclusion that leveraged investment was permitted otherwise than on the express terms of the SPA and (iv) no other background facts in addition to the Investment Proposal support the conclusion that leveraged investment was permitted otherwise than on the express terms of the SPA.

(3) As a matter of construction, no term to the effect that that the SPA authorised leverage at the portfolio level - and/or authorised the construction of a portfolio consistent with the Investment Proposal save to the extent that the parties had agreed otherwise - can be found in the SPA because (i), notwithstanding that it was plainly open to the parties to refer to the Investment Proposal in the SPA, there are no words in the SPA that do so, (ii) the words of clause A of the SPA are consistent only with investment by Shallot in Investcorp branded leveraged funds or other hedge funds in which Investcorp were co-investors and (iii) the parties dealt expressly with Shallot's borrowing powers at clause I of the SPA

(4) In those circumstances, the judge was wrong to conclude that a person knowing the terms of the Investment Proposal and the SPA would have concluded that the SPA authorised leverage at the portfolio level and/or the construction of a portfolio consistent with the Investment Proposal save to the extent that the parties had agreed otherwise. There was nothing in the factual background that could have led a court

properly directing itself on the facts and the law to find that anything had gone wrong with the language of the SPA. It was clear what the parties meant by the terms of the SPA: indeed, the factual background indicated that clause A of the SPA expressly, unambiguously and exhaustively set out the investments authorised to be made.

102 In developing the submission that, as a matter of construction, no term to the effect that that the SPA authorised leverage at the portfolio level - and/or authorised the construction of a portfolio consistent with the Investment Proposal save to the extent that the parties had agreed otherwise - can be found in the SPA because the parties had dealt expressly with Shallot's borrowing powers at clause I of the SPA, it is said that, at Clause I.1 of the SPA, Shallot was given power to incur temporary "Liquidity Borrowings" to a limit equivalent to 25% of the equity of that company and that is inherently unlikely that, if the parties had intended that Shallot was to have an unlimited and generalised power to borrow for the purpose of leverage at the portfolio level, they would not have said so. It is pointed out that clause I.1 began with the words "In connection with my/our investment, I/we understand and agree that [Shallot] may be involved in certain borrowing relationships in accordance with the following terms" (so indicating that there would not be other borrowing relationships); and that clause I.2 regulated the interest on Liquidity Borrowings from Investcorp and it is inherently improbable that interest on other borrowings (if permitted) would be unregulated. In those circumstances, it is said, clause I.1 is a bar to the "administrative step" and to leverage at the portfolio level. It is said that the judge's construction of the SPA deprived Clause I.1 of any effect; and, in particular, deprived Mr Al Sadik of the protection that Clause I.1 was intended to provide.

103 In response to those submissions, it is said on behalf of Investcorp that the contents of the Investment Proposal show that the parties did not intend that Mr Al Sadik's investment should not be leveraged at portfolio level. It is said that the judge made three findings at paragraph 4.5 of his judgment:

(1) That the Investment Proposal made it "plainly obvious" that a leveraged investment was proposed; that Mr Al Sadik had acknowledged in his witness statements that he was perfectly happy for his investment to be placed into funds using Second Layer Leverage; that he confirmed this in his oral evidence (Transcript, 16 January 2012, page 76, lines 3 to 17); and that it was clear from that evidence that Mr Al Sadik's real complaint was (and is) about the wisdom of Investcorp's leverage decisions in respect

of his investment, not the type of leverage used. It is said that Mr Al Sadik's real complaint might have given rise to the need to examine whether there was a breach by Investcorp of its duty of care; but that it has nothing to do with issues of authority.

(2) That Mr Al Sadik did not dispute that the Investment Proposal told the reader (albeit not in terms) that an investment in LDSF was the economic equivalent of a leveraged investment in DSF and that investments in SMFCo and LEDF were the economic equivalent of leveraged investments in portfolios comprising the six SMFs and the five theme funds identified at page 13 of that proposal.

(3) That there was nothing in the Investment Proposal which suggested that it would be a term of the SPA that investments in DSF or portfolios of SMFs should not be leveraged at the portfolio level. The Investment Proposal simply indicated that the desired level of leverage could be achieved at the underlying fund level by investing in the identified feeder fund (LDSF) and fund of hedge funds (SMFCo). The 'Indicative Terms' on page 5 of the Investment Proposal not only set out how the portfolio might be constructed, but also identified that the proposed investment of Mr Al Sadik's monies would use leverage, with portfolio leverage at x2.5 across the indicative asset allocation and with 50% with x3 leverage.

104 Further, it is said on behalf of Investcorp, that the judge set out in his judgment the principles of law relating to the construction of contracts – which, it is said, had been referred to by each of the parties in their respective written closing submissions and were common ground - and applied those principles to the facts as he had found them to be. It is said that, in reaching his conclusions – expressed at paragraphs 4.6 and 4.9 of his judgment - the judge relied upon his finding (at paragraph 4.8 of his judgment) that there was no meaningful distinction between First Layer Leverage and Second Layer Leverage; and on his view that, if there were no meaningful distinction between First and Second Layer Leverage, then there was no basis on which a reasonable person with knowledge of the relevant facts would construe the SPA as authorising Second Layer Leverage but not authorizing First Layer Leverage. He relied, also, on his finding (at paragraph 4.1 of his judgment, on the basis of the evidence of Mr Opp) that no distinction between First Layer Leverage and Second Layer Leverage was recognised anywhere in the hedge funds industry. Further, he relied on his finding (at paragraphs 4.4 and 4.6 of the judgment) that the parties had agreed that Investcorp would have a broad discretionary mandate.

105 In developing the submission that the parties had agreed that Investcorp would have a broad discretionary mandate, it is said on behalf of Investcorp: (i) that it was common ground at trial that the SPA conferred upon Investcorp a mandate to manage and invest the Investment Amount in accordance with the purposes set out in clause A; (ii) that the judge was correct to observe that the language of clause A, on its face, made it clear that Mr Al Sadik granted Investcorp a wide discretion; (iii) that there was nothing on the face of clause A which imposed any particular limitation; nothing, for example, which required that Investcorp was to implement exactly what was set out in the Investment Proposal or which prohibited the use of First Layer Leverage; (iv) that it would have made no sense for there to be any such limitation.

106 It is said on behalf of Investcorp that it would have made no sense for there to be a limitation in clause A of the SPA (or elsewhere in that agreement) in circumstances where (i) there was no meaningful difference between First Layer Leverage and Second Layer Leverage, (ii) both parties accepted that Investcorp was to have a discretion as to the investment of Mr Al Sadik's money, including investing it in funds which used leverage, (iii) clause D.2 of the SPA gave Shallot the authority to take "any actions that the board believes are necessary or desirable in order to effectuate the purposes of the investment or otherwise manage the affairs of [Shallot]", (iv) Professor Stowell's unchallenged expert evidence was that, under a discretionary mandate such as this, the money manager would ordinarily be permitted to decide on the particular structure to be used to make the investment and (v) that Professor Stowell's unchallenged expert evidence (Transcript, 21 February 2012, page 40, line 18, to page 41, line 2) was that there was nothing surprising about the use of a structure such as Blossom to effect Mr Al Sadik's investment.

107 Investcorp submits that clause I of the SPA did not prohibit the use of First Layer Leverage. It is pointed out that the judge found, at paragraph 4.4 of his judgment, that:

> "Clause I (under the heading Borrowing Relationships) authorizes Investcorp to cause Shallot to borrow money to meet possible temporary cash shortfalls and for other corporate purposes, described as "Liquidity Borrowings", the amount of which will be limited to 25% of the company's equity. It is agreed that borrowing for liquidity purposes is materially different from borrowing for investment purposes, and that Clause I relates only to the former."

It is said that Mr Al Sadik did not dispute in his Written Closing Submissions at trial that the parties were agreed that borrowing for liquidity purposes is not the same thing as

borrowing for investment purposes: his counsel had made oral closing submissions on this basis (Transcript, 6 March 2012, page 96, lines 1 to 5):

> ". . . the issue in relation to borrowing power . . . is whether Shallot had the power under SPA to borrow for investment purposes. It is not disputed and I think never has been that it had the power to borrow for liquidity purposes under I."

In those circumstances it is said that to be difficult to understand the basis on which Mr Al Sadik now seeks to reopen the point by contending that clause I.1 has the effect that Shallot was permitted to borrow only for liquidity purposes and not for any other purposes; in particular, not for investment purposes. It is said that the significance of the fact that the parties agreed (and the judge held) that borrowing for liquidity is not the same thing as borrowing for investment is not that this shows that First Layer Leverage was not authorised under the SPA: rather, as the judge recognised, it shows that clause I has nothing to do with the authority issue. It is said that Mr Al Sadik has misunderstood the purposes of provisions such as clause I. Clause I did not limit or restrict any other clause of the SPA; in particular, it did not limit or restrict the scope of clause A and it did not limit or restrict Investcorp's authority to leverage the sums invested at the portfolio level. Investcorp seeks to rely on Mr Boynton's oral evidence that Clause I was intended to deal with the limits of Shallot's direct borrowing, primarily in order to cover short term liquidity issues, which was unchallenged (Transcript, 1 February 2012, page 83, line 25, to page 85, line 15, and 2 February 2012, page 72, line 19, to page 74, line 22). It is said that Blossom's auditors, Ernst & Young, signed off on the accounts to 30 June 2009 on the basis of this interpretation of clause I, as confirmed by Habib Al Mulla & Co, one of Dubai's leading law firms. Mr Al Sadik's assertion, first made in these proceedings in his second witness statement, that the question of borrowing by Shallot was specifically discussed during the SPA negotiations and the results of those discussions were recorded in Clause I of the SPA, contradicted his previous assertion, made in his first witness statement, that leverage of his investment was never discussed during the SPA negotiations. And, it is said, his oral evidence at trial (Transcript, 12 January 2012, page 87, line 19, to page 88, line 12) made it clear that his understanding was that Clause I had nothing to do with borrowing for leverage. In those circumstances, it is said on behalf of Investcorp that Clause I of the SPA was not intended to, and did not, prohibit borrowing for investment; and that that is what a reasonable person with knowledge of the background would have understood.

108 In approaching Mr Al Sadik's challenge, under the second limb of ground 12 in the Memorandum of Grounds of Appeal, to the judge's conclusion that on its true construction, the SPA did authorise First Layer Leverage – a challenge based upon the assertion that the judge was led to misconstrue the SPA "because no reasonable person would have construed the SPA in the way the learned Judge did" – it is important, in my view, to have in mind that, in reaching that conclusion, the judge held (i) that the transfer of the Investment Amount (less a small retention) from Shallot to Blossom was an administrative step (and was not itself an "investment" in Blossom for the purposes of the SPA), (ii) that it was "plainly obvious" that the Investment Proposal was proposing a leveraged investment, (iii) that the purpose of the SPA was to authorise Investcorp to implement the Investment Proposal (save to the extent that its implementation was actually inconsistent with what had been expressly agreed by the parties) and (iv) that he could regard First Layer (or portfolio level) Leverage through a special purpose vehicle (such as Blossom) as 'economically equivalent' to Second Layer Leverage through, say, LDSF. In my view he was correct to make each of those findings.

109 It is also important to have in mind that it was common ground that, notwithstanding that no Investment Manager had been appointed to carry out the task of selection, the investments permitted under clause A of the SPA included any Investcorp Hedge Fund or a hedge fund or segregated account with any hedge funds managers (provided that any such other hedge fund manager is at the time of investment a manager with which an Investcorp Hedge Fund is invested); and that that class included (*inter alia*) DSF and LDSF. As the judge explained, investment in a high risk (leveraged) portfolio of LDSF was economically equivalent to investment in DSF leveraged at the portfolio level. Given that investment in DSF was authorised under clause A, there was no reason – in the absence of clear words either in clause A of the SPA or elsewhere in that agreement – to construe the SPA in a way which permitted leveraged investment in DSF by one means (Second Layer Leverage through a high risk portfolio of LDSF) but did not permit leveraged investment in DSF by the other means (First Layer Leverage at the portfolio level through a special purpose vehicle controlled by Investcorp).

110 I agree with the judge's view that there is nothing in clause A of the SPA which suggests that leveraged investment in DSF at the portfolio level is not permitted: clause A does not address that question. I also agree with the judge's view that there is nothing in clause I of

the SPA which leads to the conclusion that leveraged investment in DSF at the portfolio level is not permitted. Clause I authorises borrowing by Shallot to meet possible temporary cash shortfalls and for other corporate purposes: it does not address the question whether borrowing by an SPV controlled by Investcorp in order to leverage investments at the portfolio level is, or is not, authorised.

111 In those circumstances, there was no reason for the judge to construe the SPA in a way which permitted leveraged investment in DSF by means of Second Layer Leverage but did not permit leveraged investment in DSF by First Layer Leverage; provided that he was satisfied that borrowing by an SPV upon the security of investments for the purpose of leveraging at the portfolio level was permitted by that agreement. In that context, it is important to have in mind that the question whether Blossom itself had power to borrow on the security of the investments which it held (or would acquire) did not depend on the terms of the SPA. Blossom was not a party to the SPA; and its power to borrow on the security of the investments which it held was derived from its own constitution. The relevant question, as it seems to me, was whether Investcorp (or Shallot) would be in breach of the SPA if it caused or permitted Blossom, which it controlled, to borrow. The judge found the answer to that question in the terms of clause D.2 of the SPA: Shallot's board of directors were authorised to cause Shallot "to take any actions that the board believes are necessary or desirable to in order to effectuate the purposes of this investment". The judge was satisfied that leveraging was necessary in order to effectuate the purposes of the investment. If Shallot's board of directors believed that leveraging at the portfolio level (rather than Second Layer Leveraging through LDSF) was desirable, then there was no reason to think that Investcorp or Shallot would be in breach of the SPA if Blossom was caused or permitted to borrow for that purpose, upon the security of the investments which it held (or would acquire).

112 I reject the submission, advanced on behalf of Mr Al Sadik, that the judge was led to misconstrue the SPA "because no reasonable person would have construed the SPA in the way the learned Judge did". In my view the judge was correct to conclude that, on its true construction, the SPA did authorise First Layer Leverage.

*The causation issue*

113 The judge observed (at paragraph 4.11 of his judgment) that "if, contrary to my findings, Investcorp was not authorized to leverage the Investment Amount at the portfolio level and/or Blossom is characterized as an unauthorized investment, Investcorp's case is that the breach of contract caused no loss and damage". It is clear from that observation that the judge identified two distinct cases in which a claim for damages might arise: (i) if he ought to have held that the transfer of funds by Shallot to Blossom on or about 4 March 2008 was not merely an administrative step but was an investment in Blossom (so that, properly analysed, the breach of contract lay in making an unauthorised investment) and (ii) if he were correct in his conclusion that that the transfer of funds to Blossom was merely an administrative step, but wrong to hold that leverage at the portfolio level was authorised by the SPA (so that, properly analysed, the breach of contract lay, not in making an unauthorized investment in Blossom, but in causing or permitting Blossom to make further, leveraged, investments in DSF and the SMFs in the period May to September 2008 with borrowed funds. For convenience, I will refer to those cases, respectively, as "the unauthorized investment claim" and "the leveraged investments claim".

114 Given that I would hold (i) that the judge was correct to take the view that the transfer of funds by Shallot to Blossom was merely an administrative step - and so not properly to be regarded as an investment in Blossom for the purposes of the SPA - and (ii) that the judge was also correct to take the view that leverage at the portfolio level was authorised by the SPA, it is, perhaps, unnecessary for me to address the causation issue in this judgment. But it may be of assistance if I do so to the extent that that issue arises in the context of the Fourth Claim.

115 Although the judge identified, correctly, that there were (at least) those two distinct cases in which – if he were wrong in his conclusions as to the meaning and effect of the SPA - a claim for damages might arise, it appears that, in addressing the causation issue, he made no distinction between them. At paragraph 4.11 of his judgment, he said this:

> "4.11 The burden of proof rests on the plaintiff, but [counsel for Mr Al Sadik] did not cross-examine Messrs. Franklin or Gurnani about how they would have constructed the portfolio, if the use of First Layer Leverage had not been open to them Nor did he attempt to ascertain how they could have applied leverage incrementally, if the use of First Layer Leverage was not open to them. In my judgment the most reasonable inference to draw from the evidence is that they would have allocated 50% to LDSF (x3) and 50% to SMFCo in March 2008. Had they done so, Mr. Opp's evidence leads to the conclusion that Mr. Al Sadik's loss would have been greater than that which he actually suffered. In conclusion, if Mr.

Al Sadik had established that Investcorp was in breach of contract, as alleged in the Fourth and Ninth Claims, he would have failed to prove that the breaches caused any loss and damage."

116 In support of his challenge to the judge's conclusion on the causation issue, Mr Al Sadik did not rely - either in the Appellant's Skeleton Argument or in oral submissions made at the hearing of the appeal - on ground 17 in the Memorandum of Grounds of Appeal: that, when the judge found that Clause F.4 of the SPA had been breached he ought to have proceeded to consider and decide whether or not the breach had caused Mr Al Sadik loss and damage. He relied on that ground in support of his challenge to the judge's conclusion on what I have described as the third issue. In relation to the Fourth Claim, Mr Al Sadik relies on grounds 18 and 19 in the Memorandum of Grounds of Appeal.

> "Ground 18: The learned Judge erred in law when in connection with the Appellant's Fourth Claim he held that even if the First Respondent had exercised the Investment Power correctly the Appellant would not have suffered loss or damage.
>
> Ground 19: Further and in the alternative to Ground 18 the learned Judge erred in equity when in connection with the Appellant's Fourth Claim he held that even if the First Respondent had exercised the Investment Power correctly the Appellant would not have suffered loss or damage."

117 It is, perhaps, less than clear whether the phrase "even if the First Respondent had exercised the Investment Power correctly" is intended to refer to cover both (i) the hypothesis that Shallot had not made a transfer of funds to Blossom in March 2008 ("the unauthorized investment claim") and (ii) the hypothesis that that transfer had been properly made (as merely an administrative step) but that Blossom had not made further, leveraged, investments in DSF and the SMFs in the period May to September 2008 with borrowed funds ("the leveraged investments claim"). The probability, I think, is that the judge saw no reason to distinguish between the outcome if Mr Al Sadik succeeded on the unauthorized investment claim and the outcome if Mr Al Sadik succeeded only on the leveraged investments claim. The reasonable inference to draw, in either case, was that the Investment Amount would have been allocated, in March 2008, equally between LDSF and SMFCo; and that, if that had occurred, Mr Al Sadik's loss would have been greater than that which he actually suffered.

118 Grounds 18 and 19 in the Memorandum of Grounds of Appeal, taken together, raise the question whether the applicable principles of causation differ if the claim is brought in

equity (for breach of trust or breach of fiduciary duty) rather than in law (for breach of contract). In its submissions in response to the causation issue under the Fourth Claim, Investcorp's submissions did not distinguish between those two grounds. That is understandable, given that the Fourth Claim was pleaded in the re-re-amended statement of claim, at paragraphs C21 and C22 under the head "Breach of Contract (Unauthorised Leveraging)", as a claim for breach of contract; and the judge treated it as such. In those circumstances, it seems to me inappropriate - as well as being unnecessary for the reasons already mentioned - that I should address the question raised by ground 19: that is to say, the question whether the applicable principles of causation differ if the claim is brought in equity (for breach of trust or breach of fiduciary duty) rather than in law (for breach of contract); and, if so, whether the judge was wrong to conclude (if and in so far as he did so), that, if Mr Al Sadik had established (i) the unauthorised investment claim and/or (ii) the leveraged investments claim, he would have failed to recover damages in equity for breach of trust or breach of fiduciary duty on the ground that Mr Al Sadik had not suffered loss by reason of that breach.

119 The question which arises under ground 18 in the Memorandum of Grounds of Appeal is whether the judge wrong to conclude that, if Mr Al Sadik had established (i) the unauthorised investment claim and/or (ii) the leveraged investments claim, he would have failed to recover damages at law for breach of contract on the ground that Mr Al Sadik had not suffered loss by reason of that breach.

120 Before addressing that question I should add that it is pointed out on behalf of Mr Al Sadik that the judge recorded (at paragraph 7.6 of his judgment):

> "7.6 . . . I came to the conclusion that it would not be appropriate for me to say anything about the causation and quantum issues which would have arisen in the event that I had found in favour of the Plaintiff. Counsels' written Closing Submission disclose areas of disagreement which were not ventilated in the oral argument on the basis that further and more detailed written submissions would be made if I were to find in favour of the Plaintiff on all or any of his claims. For this reason it would not be appropriate for me to comment on any of these points."

It is said to be the case, therefore, that the judge's findings were made without the benefit of full argument of the parties.

*Was the judge wrong to conclude that, if Mr Al Sadik had established (i) the unauthorised investment claim and/or (ii) the leveraged investments claim, he would have failed to recover damages at law for breach of contract on the ground that Mr Al Sadik had not suffered loss by reason of that breach.*

121 It is submitted on behalf of Mr Al Sadik that the judge was wrong to hold, at paragraph 4.11 of his judgment that, even if Investcorp had exercised the Investment Power correctly, Mr Al Sadik would have been in no better position than that in which (in the events which happened) he was. It is clear from the submissions advanced that Mr Al Sadik relies, primarily at least, on the unauthorised investment claim rather than on the leveraged investment claim. It is said on his behalf that the judge's decision to draw the inference that Investcorp would have allocated "50% to LDSF (x3) and 50% to SMFCo in March 2008" was wrong in law because the investment in Blossom made by Investcorp was not a legitimate performance of the SPA but an unauthorised investment – and so a breach of contract - which caused loss to Mr Al Sadik; and there is no rule or principle of law that enables a contract-breaker to claim there was no causation where he has chosen an illegitimate method of performance (rather that chosen between legitimate methods of performance).

122 In developing that submission it is said that:

(1) Shallot undertook to appoint - and Investcorp Bank undertook to procure the appointment of - Investcorp Advisers to be the Investment Manager. It was for the Investment Manager to exercise the power of selection of investments (the Investment Power) under clause A of the SPA. The appointment of Investment Manager was not made; and it is not in dispute that Investcorp Bank took responsibility for the Investment Power and exercised it. Mr Al Sadik claims that Investcorp breached the Investment Power when it selected - and transferred to - Blossom US$135 million. His claim is for losses caused by that selection and transfer. He contends that Investcorp failed to perform the SPA in the manner to which he was contractually entitled: in that (although, because the Investment Power was a fiduciary power of investment it did not need to be exercised at all) he was entitled to expect that, if any investments were selected, these would be investments permitted by the Investment Power. His claim for loss and damages is advanced under the general principle that damages for breach of contract are to compensate a plaintiff for damages he has suffered through the breach. Mr Al Sadik did not bargain for an investment in Blossom and the loss he claims is loss sustained through and caused by that breach.

(2) The breach of contract of which Mr Al Sadik complains deprived him of a real profit: equal to the losses incurred by the blended leverage element of an investment in Blossom. When Mr Al Sadik redeemed his shares in Shallot he received AED

292,398,778. He suffered a gross loss on his investment in Shallot of the difference between that amount and AED 500 million: that is to say, a gross loss of AED207, 601, 222. Nevertheless, he has quantified his claim at AED202,937,666; by calculating what the value of Shallot's shares would have been but for the element of blended leverage applied to the investment in Blossom and excluding losses resulting from investments which Blossom made to the extent these were not leveraged. The reduction which he has made is on the basis that the unleveraged portion of the investments were (as good as) disclosed to him and would have been permitted if Shallot had made them (which, it is said, he believed it had done until March 2009, when Investcorp sent him the false IMA in a deceitful attempt to justify the investment in Blossom).

123 It is said on behalf of Mr Al Sadik that the relevant question is whether or not there is a basis in law for the proposition that because Investcorp had a choice of investments it can avoid liability in damages by proving that, if it had not breached its contract, it could and would have chosen a single investment which would have led to an even greater loss than that actually suffered. There are, it is said, three ways in which that question may be resolved: first, by reference to the so-called "minimum performance rule", second, by reference to the principles of causation and, third, by reliance on breach of trust. In developing that submission (in the context of the claim for damages at law for breach of contract) it is said that:

(1) Damages for expectation losses may be limited by the minimum performance rule; which requires that, where the promisor has a discretion between the mode or level of performance, his liability in damages is presumptively limited to the mode or level least burdensome to him and not (if different) the one least beneficial to the promisee. But the minimum performance rule has no application in the circumstances of the present case. The Investment Power in clause A of the SPA is discretionary: it provides for the Investment Manager to make a selection. But it was not more burdensome for the Investment Manager to select one investment rather than to select another. And the same was true for Investcorp which, in the events which happened, chose to exercise the power. Exercise of the Investment Power imposed the same burden on each occasion: the burden of making (or of deciding not to make) a selection. Further, the relevant measure for the reduction of damages under the minimum performance rule is not what is least beneficial to the promisee; but what is

least burdensome to the promisor. There was no difference in the burden on Investcorp (as contract breaker) between different modes of performance; because in every case the burden was the same. Therefore the minimum performance rule has no application in the present case.

(2) There is no rule or principle of law that permits a contract breaker to argue that there is no causation by advancing a hypothesis about what he (the contract breaker) would have done if he had not broken his contract. Such a hypothesis may be advanced in respect of what the plaintiff or a third party would have done (*i.e.*, to prove that the loss would have occurred despite the breach complained of); but that does not arise in this case. Accordingly, the fact that Mr Al Sadik's counsel did not cross examine the Investcorp witnesses about what they would have done, if (instead of acting in breach of the Investment Power) Investcorp had acted under that power, is not to the point.

(3) Accordingly, the principles of causation do not excuse Investcorp from liability in damages for breach of contract.

124 Investcorp's response to ground 18 in the Memorandum of Grounds of Appeal is that the judge was correct to hold that, even if Investcorp had acted in breach of its contractual obligations under the SPA, that breach was not the cause of Mr Al Sadik's loss; in that it was open to him on the evidence (which Mr Al Sadik had not challenged in cross-examination at the trial) to conclude that that loss would have occurred - and, indeed, would have been greater - if Investcorp had fulfilled those obligations. Mr Opp's unchallenged expert evidence, it was said, was (i) that, had investments been made in LDSF (2x leverage portfolio) and SMFCo (3x leverage portfolio, extrapolating the performance of SMFCo with 1x leverage), Mr Al Sadik would have suffered losses which exceeded those which he did suffer as a result of the investments made by Blossom to the extent of some AED97.57 million and (ii) that had investments been made in LDSF (2x leverage portfolio) and SMFCo (1x leverage portfolio), Mr Al Sadik would have suffered losses which exceeded those which he did suffer as a result of the investments made by Blossom to the extent of some AED8.44 million. Accordingly, it is said, even if Mr Al Sadik were to succeed in his breach of contract claims he is unable to recover anything in excess of nominal damages: reliance is placed on observations in *McGregor on Damages, 18th Edition (2011)*, at paragraphs 10-004 to 10-005.

125 In developing that response, it is said on behalf of Investcorp that the principles by reference to which issues of causation, foreseeability and remoteness are determined in the context of a breach of contract claim are well established and may be summarised as follows:

(1) Where a party sustains a loss by reason of breach of contract he is, so far as can be done by a monetary award, to be placed in the same position as he would have been if the contract had been performed. *Robinson v. Harman* (1848) 1 Exch. 850, at 855; *Livingstone v. Rawyards Coal Co.* (1880) 5 App.Cas. 25, at 39; *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673, at 688-689.

(2) There must be a causal connection between a defendant's breach of contract and a plaintiff's loss: *Chitty on Contracts (30th Edition)*, at paragraph 26-032. In other words, a successful plaintiff cannot recover damages in respect of loss not caused by the defendant's conduct: *McGregor on Damages, 18th Edition (2011)*, at paragraph 1-024.

(3) A defendant's wrongful conduct is a cause of a plaintiff's harm if such harm would not have occurred without it; i.e. "but for" it. Even then, satisfying the "but for" test is a necessary condition for the imposition of liability but is by no means sufficient: *McGregor on Damages, 18th Edition (2011)*, at paragraphs 6-005 to 6-007.

It is said that the judge found, at paragraph 4.11 of his judgment, that even if Mr Al Sadik had established that Investcorp was in breach of contract, as alleged in his Fourth and Ninth Claims, he would have failed to prove that the breaches caused any loss and damage. The judge accepted Investcorp's case – pleaded at paragraphs 19 and 199 of the Amended Defence - that, even if the use of Blossom had amounted to a technical breach of the SPA, this had caused Mr Al Sadik no loss in excess of that which he would have suffered had he been invested in the funds specifically referred to in the Investment Proposal. He was entitled to find - on basis of Investcorp's expert evidence on this point which was not challenged at trial - that, even if Investcorp did breach the SPA (which it did not), had it performed its contractual obligations then Mr Al Sadik would have suffered greater losses than he did as a result of Investcorp's use of the Blossom structure. It is submitted on behalf of Investcorp that the judge's application of basic principles of causation was correct.

126 I agree that the judge reached the correct conclusion in relation to the unauthorised investment claim. As I have said, the obligation of Investcorp under the SPA was to establish an SPV (Shallot) as a separately managed account for the purpose of investing in hedge funds or in segregated accounts with hedge funds managers to be selected by Investcorp Advisers. On the evidence at trial the judge was entitled to conclude that, if that obligation had been performed without the interposition of Blossom, the probability was that the Investment Amount would have been allocated equally between LDSF (x3 leveraged portfolio) and SMFCo in March 2008. The measure of damages (if any) for breach of contract in law is the difference between the position in which Mr Al Sadik would have been if that had been done and the position in which he was as a result of the interposition of Blossom. Mr Al Sadik would have been in no better position if Blossom had not been used.

127 It seems to me, however, that the position is different in relation to the leveraged investments claim. That claim arises if the judge was correct to hold that there was no breach of contract on 4 March 2008 - when the Investment Amount (less a small retention) was transferred by Shallot to Blossom - but wrong to hold that First Layer Leverage was authorised by the SPA. On that basis there were breaches of contract when Blossom borrowed for investment on 1 May, 1 June, 1 August and 1 September 2008. The measure of damages (if any) for these breaches of contract, as it seems to me, is the difference between the position that Mr Al Sadik would have been in if those borrowings had not taken place and the position in which he was in consequence of those borrowings. *Prima facie*, that would equate to the figure of AED202,937,666 which Mr Al Sadik claims to be his loss after calculating what the value of Shallot's shares would have been but for the element of blended leverage applied to the investment in Blossom and excluding losses resulting from investments which Blossom made to the extent these were not leveraged. But the Court heard no argument on that question; and I make no finding that that figure is correct.

*The third issue*

*Whether Investcorp deceitfully concealed its intention to leverage the assets, the manner in which the assets were leveraged and the extent of the leverage actually employed.*

128 The judge's reasons for dismissing the Third Claim are set out in section 5 of his judgment. The issue which he addressed was whether Investcorp deceitfully concealed its

intention to leverage the assets, the manner in which the assets were leveraged and the extent of the leverage actually employed. He held that Investcorp's failure to inform Mr Al Sadik about its intention to leverage his assets by means of First Layer Leverage using the White Ibis III credit facility did not constitute a breach of its reporting obligations under the SPA; in that the fiduciary relationship arising out of the SPA did not impose upon Investcorp any disclosure obligation which was additional to or independent of the contractual obligation. He accepted that Investcorp was in breach of its obligations under Clause F.4 of the SPA, in that Investcorp failed to provide Mr Al Sadik with any statements of the underlying investments held through Blossom; and he found that, had Investcorp complied with Clause F.4, the fact that it had employed First Layer Leverage and the amount of the borrowing would have been disclosed to Mr. Al Sadik in the report for May 2008 (which would have been delivered in mid June); and that, in the events which happened, Investcorp's breach of contract led to Mr Al Sadik not being informed about the level of leverage and the manner in which it had been carried out until 2 March 2009. But he held that, nevertheless, Investcorp's reporting was done *bona fide* in a manner which Mr Kironde honestly believed would best serve Mr Al Sadik's interests; and that there was no intention to conceal from Mr Al Sadik the fact that his portfolio had been leveraged or the level of leverage or the manner in which it had been carried out. He concluded that, in those circumstances, the non-disclosure was not deceitful.

*The judge's findings in section 5 of his judgment*

129 The judge explained (at paragraph 5.1 of his judgment) that Mr Al Sadik's case was that Investcorp had no authority to borrow money on the security of his assets; that by doing so, Investcorp not only acted in breach of contract, but did so deliberately for its own improper purposes; and that it then dishonestly concealed what had been done. It followed, he said, that there were two elements to the factual case on deceitful non-disclosure:

(1) Whether (as alleged) Investcorp acted in breach of its fiduciary duty in March 2008 by failing to tell Mr. Al Sadik that it had decided to leverage his assets at the portfolio level and invest the proceeds directly in DSF and the single manager funds, rather than invest in LDSF and SMFCo which is what he probably expected. In that context, it was Mr Al Sadik's case that the use of Blossom as the vehicle through which to leverage the assets was a device by which to conceal the existence of the borrowing.

(2) Whether, having entered into the White Ibis III credit facility with RBS, there was a further on-going breach of duty in that Investcorp deliberately failed to comply with its

reporting obligation under Clause F.4 of the SPA in order to conceal both the existence of the credit facility and the subsequent application of leverage from time to time during the period from 1 May 2008 onwards.

The judge acknowledged that Mr Sadik's case had not been put on the basis that there were two distinct breaches of fiduciary duty; but took the view that it was convenient to analyse the two elements separately.

130 At paragraphs 5.2 to 5.6 of his judgment the judge reminded himself of the relevant principles of law. He noted that it was not in dispute that Investcorp owed a fiduciary duty to Mr Al Sadik and that the core obligation of a fiduciary was that of loyalty: as explained by Lord Justice Millett in *Bristol & West Building Society v Mothew* [1998] Ch.1. The dispute on the law, he said, was whether or not the existence of the fiduciary relationship gave rise to a reporting obligation which was additional to and independent of the contractual duty. He held that it did not. He reached that conclusion on the basis of observations in the opinion of the Judicial Committee of the Privy Council in *Kelly* v. *Cooper* [1993] AC 205, at pages 213-214 and in the judgment of the High Court of Australia in *Hospital Products Ltd* v. *United States Surgical Corporation* [1984] 156 CLR. 41 at page 97. After setting out the passages in those authorities on which he relied, he said this (at paragraph 5.3 of his judgment:

> "5.3 In my judgment, it follows that the scope of the fiduciary duties owed by Investcorp to Mr. Al Sadik (and in particular the duty to disclose information about the investments made on his behalf) are to be defined by reference to the terms of the SPA."

In reaching that conclusion he rejected the submission, advanced on behalf of Mr Al Sadik, that, under the law in the Cayman Islands, an investment manager owes a fiduciary duty to disclose to its client everything that is or may be material to the exercise of the client's judgment, whatever the terms of the reporting obligations contained in the investment management agreement (in this case, clauses F.2 and F.4 of the SPA), with the consequence, it was said, that Investcorp was under a continuing obligation to disclose from time to time all the facts and information which would be material to any decision which Mr Al Sadik might reasonably be expected to make (including a decision to terminate the mandate or give instructions to redeem investments or to de-leverage the investments or to change the investment criteria). He held that that proposition was wrong in principle; and was not supported by the Canadian decisions - *Davidson v Noram Capital Management Inc* [2005] Can LII 63766, *Laflamme* v *Prudential-Bache Commodities*

*Canada Ltd* [2001]1 SCR 638, *Ryder* v *Osler, Wills, Bickle Ltd* (1985), 49 O.R. [609] and *Williamson* v *Williams* [1997] N.S.J. No.26l – on which counsel for Mr Al Sadik relied. In his view "these authorities are entirely consistent with *Kelly* v *Cooper* and lead to the conclusion that the existence of a fiduciary relationship does not impose upon Investcorp a reporting obligation over and above that for which Mr Al Sadik contracted."

131 At paragraphs 5.7 to 5.11 of his judgment, the judge addressed the first of the two elements of the factual case on deceitful non-disclosure which he had identified: whether Investcorp acted in breach of its fiduciary duty in March 2008 by failing to tell Mr Al Sadik that it had decided to leverage his assets at the portfolio level and invest the proceeds directly in DSF and the SMFs, rather than invest in LDSF and SMFCo. He concluded, at paragraph 5.11, that the evidence established that Investcorp believed that it had authority to make leveraged investments, through the mechanism of First and/or Second Layer Leverage; and that, given the discretionary mandate, there was no need to explain the actual arrangements to Mr Al Sadik. He held that the evidence did not establish that Investcorp deceitfully concealed the borrowing arrangements from Mr Al Sadik or that Blossom was incorporated as a mechanism for achieving that purpose.

132 The judge set out the passages in the evidence on which he relied in reaching those conclusions. It is not, I think, necessary to do so in this judgment (at least, at this stage): it is sufficient to identify the steps in the judge's reasoning:

(1) At paragraph 5.7 the judge explained that the construction of the portfolio was the work of Mr Franklin, in conjunction with Mr Gurnani and Mr Gharghour (who, he said, was responsible for making the final decision). He explained that Mr Al Sadik's liquidity requirements had the effect that the original plan to invest in COF could not be implemented; and that, in those circumstances, it was decided to invest 50% of his portfolio in SMFs with x3 leverage. And he explained that, because SMFCo did not offer that level of leverage, an alternative arrangement had to be adopted. That, he said, was the context in which the decision to apply First Layer Leverage was made.

(2) He found that the evidence established that it never occurred to Mr. Franklin, Mr. Gharghour, Mr. Boynton or anyone else involved in the process that Investcorp might not have authority to construct a portfolio using First Layer Leverage rather than Second Layer Leverage. He went on to say this:

> "5.7 . . . Having decided to apply First Layer Leverage, I think that it is equally clear that they simply took it for granted, without really applying their minds to the

point, that the credit facility would be established through an SPV incorporated as a subsidiary of Shallot."

In support of that view he referred to paragraphs 6.9 to 6.17 and 9.18 and 9.19 in the first witness statement of Mr. Franklin, dated 9 June 2011, and to paragraph 5.5 in the witness statement of Mr Boynton, of the same date.

(3) At paragraph 5.8 of his judgment, the judge said this:

> "5.8 Messrs. Franklin, Boynton, Gurnani and Kironde were all cross-examined at length on this subject. They are all experienced industry professionals. They impressed me as honest witnesses whose evidence can be relied upon. They all deny that Blossom was created for the purpose of concealing from Mr. Al Sadik the fact that his investment would be leveraged. In my judgment the contemporaneous e-mail traffic passing amongst these (and other) Investcorp executives in March 2008 reflects the kind of discussion one would expect to see in the ordinary course of business. It is consistent with their oral evidence and I found no documentary evidence tending to suggest that they were behaving dishonestly or had any motive to do so."

The judge set out the passages from the transcript of the oral evidence given at trial by Mr Franklin, Mr Boynton and Mr Gurnani. He summarised Mr. Franklin's evidence. It was, he said, that Mr Franklin had never considered the question of using Shallot as the borrowing vehicle and that the incorporation of Blossom was a normal and natural thing for the Funds Administration team to do; that the first time he came across any suggestion that Blossom had been created to hide leverage was when he saw the allegation in the statement of claim; and that, whilst it would obviously have been possible to put the borrowing transaction through Shallot, his understanding was that Mr Gharghour and Mr Gurnani had decided upon the use of a "clean structure", meaning an SPV. Mr Gurnani, he said, had "focused on the economics and was 'agnostic' about the mechanics for achieving the desired result"; by which he meant (as the judge said) that, so long as the desired level of leverage was achieved, it did not matter whether it was done through First or Second Layer Leverage. Mr Gurnani did not accept that Blossom was inserted into the structure so that borrowing could be hidden from Mr Al Sadik; and he said that, when he and Mr Gharghour had first met Mr Al Sadik, leverage would have been raised.

(4) The judge found that the credit facility was arranged by Mr Ravi Nevile ("Mr. Nevile"), a member of Investcorp's banking department based in London. He said this (at paragraph 5.9 of his judgment):

> "5.9 [Mr Nevile] conducted the negotiations with RBS as a result of which Blossom was added into an existing credit facility known as White Ibis III . . . During the course of his negotiations, on 31 March 2008, he sent an e-mail

addressed to Messrs Kironde, Mirza and Khatib, with a copy to Mr Gharghour, asking them to confirm to him what language is contained in the SPA on the subject of giving security to the lender. He commented that '*in order for me to close the leverage for the client we will need to pledge some of the shares in the portfolio'*, meaning some of the underlying assets. The only reply came from Mr Gharghour, who said '*It may be a problem having client sign a new SPA with a pledge of his shares'*. Neither Mr Gharghour nor Mr Nevile was called to give evidence and there are no follow-up e-mail exchanges. In fact Blossom, as the borrower, gave security over its assets, which is what I would expect to happen in a limited recourse transaction of this sort. Mr Gharghour's response suggests that he misunderstood the question and thought that Mr Nevile was suggesting that Mr Al Sadik or Shallot might have to join in the transaction for the purpose of pledging Mr Al Sadik's shares in Shallot or Shallot's shares in Blossom. The fact that Mr Gharghour did not want to go back to his client for this purpose does not lead me to draw the inference he was acting for some improper purpose or believed that he was acting without authority."

(5) At paragraph 5.10 of his judgment the judge explained that Mr Al Sadik's pleaded case was that the reason for Investcorp's deceitful non-disclosure was that it was suffering a liquidity crisis and needed to borrow large sums of money to inject into its hedge fund platform and indirectly obtain liquidity for itself. He went on to say that, in the light of overwhelming evidence that no such liquidity crisis existed, this allegation was rightly abandoned; and that no other motive was suggested. He observed that it had been put to Mr Gurnani, Mr Franklin and Mr Boynton that Blossom was incorporated because they all knew that the SPA did not contain an adequate borrowing power. But, he said, the evidence was that they did not know the terms of the SPA or did not apply their minds to the scope of the borrowing powers: they all took it for granted that there was no contractual limitation upon the ability of Shallot to employ First Layer Leverage, whether directly or indirectly through a subsidiary incorporated specially for this purpose. He found that there was no evidence that RBS asked for the SPA and/or IMA (which did not exist); and that there was no reason to suppose that RBS would have looked behind the borrower's memorandum and articles of association and the usual resolutions of its board of directors. He said this:

"5.10 It seems to me that Mr. Gharghour's desire to present the bank with a '*clean structure*' is exactly what is to be expected of any asset manager in these circumstances. Blossom could be presented to the bank as a special purpose vehicle whose sole function is to enter into the credit facility and own the assets purchased with the proceeds of the loan. The bank would have security over all its assets and its audited financial statements (reported in US dollars) would tell the bank what it needs to know about its customer's financial position in the simplest possible way. In contrast, Shallot could not be presented as a special purpose vehicle because it will enter into a series of forward foreign currency transactions.

Its financial statements will be presented in Dirhams and it will have other assets over which the bank has no security."

133 At paragraphs 5.12 to 5.22 of his judgment the judge addressed the second of the two elements of the factual case on deceitful non-disclosure which he had identified: whether, having entered into the credit facility with RBS, there was a further on-going breach of duty in that Investcorp deliberately failed to comply with its reporting obligation under Clause F.4 of the SPA in order to conceal both the existence of the credit facility and the subsequent application of leverage from time to time during the period from 1 May 2008 onwards. He accepted that there had been a breach of the contractual reporting obligation, but held (at paragraph 5.22) that the evidence did not point to the conclusion that anybody on the Investcorp side had deliberately intended to mislead Mr Al Sadik by concealing the fact that his investment had been leveraged from 1 May 2008 onwards. In their minds (he said) there was nothing to conceal: the evidence showed that they took it for granted that they had authority to leverage the investment and that they did not draw any distinction between what has been described as First Layer Leverage and Second Layer Leverage.

134 The reasoning which led the judge to that conclusion may be summarised as follows:

(1) He noted (at paragraph 5.12 of his judgment) that there was no material dispute about what reports were actually sent to Mr Al Sadik during the relevant period up to March 2009: he was sent NAV statements every month. He described those as single page documents, each specifying the number of redeemable preference shares issued by Shallot, the net asset value per share and the net asset value of the company expressed in UAE Dirhams. He recorded that it was accepted that the production of this information and its presentation in this simple format was all that Investcorp was required to provide in order to comply with its obligation under Clause F.2.

(2) He found that, in addition, Mr Al Sadik was provided with reports generated from Investcorp's Funds Processing System, referred to as "FPS2 Reports", which contained an estimate of the portfolio value, information about the portfolio's performance (presented in a graphical and statistical format), the annualized rate of return and the asset allocation (presented as a pie chart). Those reports, he said, were prepared monthly for the months ending 30 April 2008 through to 31 October 2008; and most, if not all of them, were received by Mr Al Sadik. He explained that the asset allocation pie charts in the FPS2 Reports for May and each subsequent month are headed "Asset Allocation (Blossom IAM Limited) as at [date]".

(3) He accepted Mr Zaidi's evidence that, on receipt of the first of these reports (on 5 June 2008), he called Mr Kironde to enquire about the reference to Blossom; and that he was told that it referred to an internal arrangement to distinguish between the UAE Dirham and US dollar accounts. He observed that, on any view, that was an incomplete explanation of the reasons for having incorporated Blossom; but that it was an explanation which apparently made sense to Mr Zaidi at the time and it was consistent with the fact that Blossom's functional currency was US Dollars and Shallot's reporting currency was UAE Dirhams. He was satisfied that the failure to provide a full and complete explanation for the use of Blossom did not lead to the conclusion that Mr Kironde was intending to mislead his client.

(4) He found that, on 26 June 2008, in response to a request from Mr Zaidi for information about the underlying investments, Mr Kironde sent him the first of two documents referred to as "Allocation Tables". He explained that those tables comprised two parts. The first part identified each of the underlying hedge fund investments and stated what appeared to be the market value as at the beginning and end of each month from inception until 31 May 2008; the second part set out the percentage allocation (that is to say, the value of each investment as a percentage of Shallot's total NAV). The judge described the second part as accurate; but he took the view that the first part was misleading (at least, in the absence of an explanatory footnote); in that, although the first drawdown of US$67.5 million was made from the RBS credit facility on 1 May 2008, the additional amount invested into each of the underlying funds was not reflected in either the opening values for 1 May 2008 or the market values for 31 May 2008. Instead, he said, the numbers for the month of May 2008 were the notional net value of the investments after setting off against each one a pro-rated share of principal and accrued interest owing to RBS. A second Allocation Table was sent to Mr Zaidi containing up-dated information for the months of June, July and August 2008. Again, as the judge said, this table accurately reflected Shallot's NAV and the percentage of the total portfolio allocated to each of the underlying hedge funds as at the beginning and end of each month from inception until 31 August 2008. In the final sentence of paragraph 5.13 of his judgment the judge said this:

> "5.13 . . . However, in the absence of any footnote to explain the accounting treatment which has been adopted, I consider the first parts of both Allocation Tables to be misleading because they appear to reflect the market value of the underlying investments, rather than an analysis of Shallot's NAV."

(5) He explained (at paragraph 5.14 of his judgment) that an FPS2 Report (including Blossom' name) and an Allocation Table (including the information that he had described as misleading) was contained in the Portfolio Update - August 2008 discussed at the meeting between Mr Kironde and Mr Al Sadik and Mr Zaidi on 17 September 2008. He held that Mr Kironde was responsible for determining how the information would be presented in the Allocation Table. He explained that the original draft, prepared by Mr Mirza, included a column entitled "Cash and Other Assets" which was said to reflect a number of components including loan interest; but that that column had been removed on Mr Kironde's instructions. He held that, given that that table was intended to reflect the notional net value of the investments comprised in the portfolio (that is to say, the net value of each investment after setting off a pro-rated share of the liabilities, the accrued interest expense and other minor items on Shallot's balance sheet), it should have been treated in the same way as the principal amount owing to RBS. But, he said, Mr. Kironde categorically denied that the removal of this column was motivated by a desire to hide the existence of the leverage . The judge accepted that evidence, for reasons which he gave: in particular he held that Mr Kironde would not have invited Mr Zaidi to go to Bahrain to meet the Funds Administration department (as the judge found that he did) if he were trying to conceal the fact that the portfolio had been leveraged.

(6) He summarised (at paragraph 5.15 of his judgment) the evidence of Mr Boynton; on which he had confidence in relying. He found that the Funds Administration department (of which Mr Boynton was head at the material time) had not appreciated that the SPA required other than standard monthly and quarterly reporting: which they understood to be restricted to the issue of monthly estimated and quarterly final NAV statements in respect of Shallot. He summarised the basis upon which those statements would be prepared; and concluded, on the basis of his analysis of the underlying accounting records, that that was done in exactly the way one would expect of a professional fund administrator.

(7) He explained (at paragraph 5.16 of his judgment) that clause F.4 of the SPA required Investcorp to provide a statement of the "Underlying Investments"; a term which was defined by clause A of the SPA to mean each hedge fund or segregated account in which the assets of Shallot were invested. He held that a statement of the investments contained in a portfolio required particulars of the identity, quantity, cost price and

market value of each security: it did not require Investcorp to perform a complex accounting exercise of the kind performed, on Mr Kironde's instructions, to produce the Allocation Tables. It was enough, he said, that Mr Al Sadik be provided with the information contained in the schedule entitled "Client/Entity Holdings"; with that information, he would have the opportunity to review the performance of the hedge funds in which he was invested, using the fact sheets and all the other information available to him on Investcorp's client website; and clause F.4 of the SPA cannot have been intended to serve any other purpose. He said this:

> "5.16. It seems to me that the Funds Administration department was in fact collating the information called for by Clause F.4 in the ordinary course of preparing the monthly NAV statements and it would have been perfectly simple to put it into the form of a client report. However, as a result of an administrative oversight, the Funds Administration department failed to produce the reports necessary to discharge the contractual reporting obligations in respect of six clients, including Mr. Al Sadik. Mr. Boynton said that there was a 'generic problem' in relation to these managed accounts caused by a lack of communication between PRM and Funds Administration, with the result that his department failed to produce reports tailored to the reporting requirements specified in individual share purchase agreements."

(8) He found that, on 26 February 2009, a table headed "Blossom IAM Limited (Since Inception on 01 March 2008 to 31 January 2009") was sent to Mr Zaidi. He said that the table was in three parts: the first part was entitled "Underlying Manager Performance" and set out the monthly performance figures for each of the hedge funds; the second part was entitled "Allocation (Based on Total Equity + Debt)" and set out the percentage of the gross amount of the investment allocated to each fund; the third part was entitled "Approx. Performance Attribution" and reflected the performance of Blossom, so enabling Mr Al Sadik to see the effect of the leverage upon the performance of his portfolio. The judge found that Mr Al Sadik responded angrily to this information and claimed not to know that leverage had been applied to his investment; that he asked for more detail about the leverage; and that, in response, on 2 March 2009 he was sent a document described as a "decomposition statement". The judge described that as "simply another three part table setting out the market value of the investments, the percentage allocation, the amount of leverage, the debt-to-equity ratio, total equity and percentage return for each month from inception to 31st January 2009".

(9) He held (at paragraph 5.17 of his judgment) that, on any view, Investcorp's reporting was unsatisfactory; and there was a failure to comply with the requirements of clause

F.4 of the SPA. But he went on to remind himself that the issue which he had to decide was whether the failings in reporting which he had identified reflected a deliberate and deceitful attempt to mislead Mr Al Sadik and to conceal from him the fact that his assets had been leveraged.

(10) In addressing that issue, he observed that it was related to the question whether Investcorp had authority to leverage the investment: if Investcorp's executives believed they had authority to leverage the assets (as in his view, they did) an obvious motive for deceit disappeared and it became difficult to infer that the reporting (or absence of reporting) was done in bad faith.

(11) He noted (at paragraph 5.18 of his judgment), that it was not in dispute that Investcorp had failed to provide Mr Al Sadik with any proper explanation for having incorporated Blossom until 2 March 2009; but, he said, the evidence did not point to the conclusion that Investcorp had deliberately and deceitfully concealed Blossom's existence. He summarised the evidence which led him to that view:

(i) Blossom's existence, he said, was disclosed in the FPS2 Reports sent to Mr Zaidi in respect of the months from May to October 2008. Mr Kironde explained that he had some control over the format and could exclude (but not add) certain fields. The judge observed that, if Mr Kironde was attempting to conceal the existence of Blossom, he would have taken its name (or the pie chart containing its name) out of these documents.

(ii) Mr Kironde was in a position to influence the extent of the information sent to Mr Zaidi in response to his request made in February 2009.There was no evidence to suggest that Mr Kironde attempted to exclude information about the borrowings from the documents sent on 26 February and 2 March 2009.

(iii) By an email dated 1 March 2009, Mr Mirza sent a draft of the "decomposition statement" to those involved, including Mr Al Khatib and Mr Tanner. He pointed out to them that "[Mr Al Sadik] will see the total leverage amount and will not be happy. The IMA is being signed today/early tomorrow". No one suggested that there should be anything other than full disclosure of the leverage; although (as the judge noted) Mr Tanner did respond by asking the recipients of that email to delete it from their systems on the ground that he did not like the statement to which have just referred.

(iv) On receipt of the document sent to him on 26 February 2009 Mr Zaidi had asked for a copy of the "Investment Management Agreement"; which, pursuant to clause D.1 of the SPA, was to be entered into between Investcorp Advisers Limited and Shallot. Mr Zaidi's request exposed the fact that no investment management agreement had ever been executed. The judge found that Investcorp's response to the request was deceitful. He said this (at paragraph 5.19 of his judgment):

> "5.19 A standard form investment management agreement was prepared, including an express term authorizing First Layer Leverage, and executed on 1st March 2009. The parties are Shallot, Investcorp Bank B.S.C. and Investcorp Investment Advisers Limited. It purports to have retrospective effect and is dated 'effective as of March 4, 2008' which is the date on which the first investments were made. This document was sent to Mr. Al Sadik on 8th March 2009 without explaining to him that it had been executed only a few days beforehand. When he complained about the use of leverage, Investcorp wrote to him on 10th March 2009 and said '*In our discussions with and presentations to you prior to setting up this portfolio we made it clear that to achieve the returns you wished for, it was anticipated that we would introduce leverage to the portfolio'*. This is true, but the letter goes on to say '*This* is *provided for in Section 1(b) of the Investcorp Hedge Funds Management Agreement*' without disclosing that the document had only been executed the previous week and could not have had retrospective effect. Investcorp rightly places no reliance upon this document which is not binding and enforceable in accordance with its terms, but it is relevant to my assessment of the credibility of the evidence of those involved in its production."

135 The judge set out his conclusions on the third issue - whether Investcorp deceitfully concealed its intention to leverage the assets, the manner in which the assets were leveraged and the extent of the leverage actually employed - at paragraphs 5.20 to 5.22 of his judgment. It is, I think, appropriate in this judgment to include those paragraphs in full:

> "5.20 Mr. Al Sadik knew that Investcorp believed the target return of 45% could only be achieved by making a leveraged investment. The Investment Proposal clearly spells out a proposal to make a leveraged investment and Mr. Al Sadik could not have been under any misapprehension about Investcorp's intention. The Investment Proposal also proposes specific levels of leverage and indicates how this can be achieved through investments in LDSF (x3), SMFCo (x1) and LEDF (x1). It is reasonable to infer that Mr. Al Sadik would have expected his portfolio to be structured in this way, but he also understood that he was giving Investcorp a discretionary mandate which meant that he would not necessarily be consulted or informed about the actual asset allocation or the way in which the desired level of leverage would be achieved. The evidence establishes that Investcorp believed that it had authority to make a leveraged investment and had no reason to doubt that Mr. Al Sadik agreed with this approach. Investcorp's executives did not focus on the language of the SPA, even when asked to do so by Mr. Nevile, and it never occurred to them that they might be authorized to make a leveraged investment

directly through LSDF and SMFCo, but not authorized to enter into a limited recourse credit facility for the purpose of making a leveraged investment directly into DSF and the single manager funds. The failure to inform Mr. Al Sadik about the way in which the leveraged investment was in fact being made is not indicative of any intention to conceal anything. Furthermore, if he had been fully informed in March or April 2008 about the way in which Investcorp intended to leverage the investment, I find it difficult to envisage why he would have objected in principle to the use of a limited recourse credit facility offered by a bank but accepted an investment in LDSF and SMFCo, when the two approaches were intended to achieve an equivalent economic result for him. In principle, the returns would be the same and the management fee would also be the same, because he had already agreed that no fee would be charged on leverage.

5.21 The failure to inform Mr. Al Sadik in advance about the intention to apply First Layer Leverage was not a breach of duty, but the failure to inform him after the fact came about as a result of a breach of the reporting requirements of Clause F.4. The Funds Administration department collated the information necessary to produce an F.4 Report. This was done routinely each month as a necessary step in the calculation of Shallot's NAV and the information could easily have been put into the form of a report for distribution to clients. The Funds Administration department failed to produce these reports because it was not part of the 'standard reporting' and, as a result of an innocent oversight, they failed to appreciate that there was a requirement to produce various reports for six clients, including Mr. Al Sadik. When Mr. Zaidi asked for this information on or about 5th June 2008, the relevant information was provided to Mr. Kironde, but he does not appear to have applied his mind to the contractual requirements of the SPA.

5.22 Instead, he focused on how to respond to the request for information in a way which would best meet what he perceived to be his client's needs. He concluded, rightly in my judgment, that the provision of an F.4 Report by itself would be unhelpful and that something more was required to reconcile the statement of underlying investments with the NAV statement (the F.2 Report). This could have been done by adding in a brief summary of the other components on Shallot's balance sheet which were the principal and interest owing to RBS, the market value of the hedging transactions (which could be an asset or a liability) and the accrual for fees and start-up costs. This would be the conventional approach. Instead, Mr. Kironde decided that it would be more helpful to provide his client with the Allocation Table, which constitutes a 'netted down' version of what would otherwise be the F.4 Report. The end result is that he failed to comply with the contractual requirement, but I am satisfied that his decision was made bona fide for a proper purpose. He approached the exercise in exactly the same way three months later when preparing the Allocation Table for the period ended 31st August. The evidence does not point to the conclusion that Mr. Kironde (or anybody else) was deliberately attempting to mislead Mr. Al Sadik by concealing the fact that his investment had been leveraged from 1st May onwards. In their minds there was nothing to conceal. The evidence shows that they took it for granted (rightly in my judgment) that they had authority to leverage the investment and that they did not draw any distinction between what has been described as First and Second Layer Leverage. Mr. Kironde must bear principal responsibility for Investcorp's failure to comply with the requirements of Clause F.4, but I am satisfied that this breach of contract occurred innocently and does not equate to a

breach of fiduciary duty. He was not deceitfully attempting to conceal the fact that Mr. Al Sadik's portfolio was being leveraged. In Mr. Kironde's mind, there was nothing to hide."

*The questions for determination by this Court in relation to the third issue*

136 As I have said, in reaching his conclusion that the third of the four issues which (at paragraph 1.15 of his judgment) he had identified as those which he needed to resolve - whether Investcorp deceitfully concealed its intention to leverage the assets, the manner in which the assets were leveraged and the extent of the leverage actually employed - should be determined in favour of Investcorp, the judge held that:

(1) Investcorp's failure to inform Mr Al Sadik in advance about its intention to leverage his assets by means of First Layer Leverage using the White Ibis III credit facility did not constitute a breach of its reporting obligations under the SPA; in that the fiduciary relationship arising out of the SPA did not impose upon Investcorp any disclosure obligation which was additional to or independent of the contractual obligation.

(2) Although Investcorp was in breach of its obligations under Clause F.4 of the SPA and, in the events which happened, Investcorp's breach of those contractual obligations led to Mr Al Sadik not being informed about the level of leverage and the manner in which it had been carried out until 2 March 2009, nevertheless, Investcorp's reporting was done *bona fide* in a manner which it (through Mr Kironde) honestly believed would best serve Mr Al Sadik's interests; and that there was no intention to conceal from Mr Al Sadik the fact that his portfolio had been leveraged or the level of leverage or the manner in which it had been carried out.

137 The judge's conclusion that, in the circumstances of the present case, the fiduciary relationship arising out of the SPA did not give rise to a reporting obligation which was additional to and independent of the contractual duty, was challenged by Mr Al Sadik in the Memorandum of Grounds of Appeal. Ground 21 is in these terms:

> "Ground 21: The learned Judge erred when he held that that the existence of a fiduciary duty did not give rise to a reporting obligation which is additional to and independent of the contractual duty to report under Clause F.4 of the SPA."

That ground was abandoned by Mr Al Sadik in his Appellant's Skeleton Argument and there was no attempt to pursue it at the oral hearing of the appeal. In those circumstances it might be thought that the issue whether the fiduciary relationship arising out of the SPA

gave rise to a reporting obligation which was additional to and independent of the contractual duty is no longer for determination by this Court.

138 Nevertheless, Mr Al Sadik does challenge the judge's failure to hold that Investcorp was in breach of duty in failing to disclose to him, before 4 March 2008, that it was intending to leverage his assets at the portfolio level and invest the proceeds directly in DSF and the SMFs; rather than to invest those assets in LDSF and SMFCo (which, as the judge observed at paragraph 5.1 of his judgment, is what Mr Al Sadik probably expected to occur). Grounds 20 and 23 in the Memorandum of Grounds of Appeal are in these terms:

> "Ground 20: The learned Judge erred when he omitted to decide the issues in connection with the Appellant's case that the Respondents were in breach of a duty to disclose arising from their fiduciary duty of loyalty to the Appellant.
>
> Ground 23: The learned Judge erred in law when he omitted to consider and make findings on the issue whether or not the Respondents' alleged breach of the duty to disclose (consequent upon its fiduciary duty of loyalty), arising before the SPA was entered into or in any event before 4th March 2008, was deceitful."

It is convenient to refer to the issues raised by those grounds as "the pre-investment non-disclosure issues".

139 Investcorp's response in relation to the pre-investment non-disclosure issues is (i) that the non-disclosure claim which Mr Al Sadik is now seeking to advance is a new claim which was not part of his pleaded case and was not advanced at trial; (ii) that, properly understood, the new claim is (in part) an impermissible attempt to resurrect his abandoned fraudulent misrepresentation claims; and (iii) that, in any event, the new claim cannot be sustained given the judge's finding that Investcorp acted honestly when it did not disclose its intention to apply First Layer Leverage (a finding which, it is said, an appellate court should not overturn without compelling reasons). In those circumstances, it is said, this Court should hold that it is not open to Mr Al Sadik to advance the new non-disclosure claim on this appeal.

140 The judge explained (at paragraph 5.1 of his judgment) that Mr Al Sadik's case was that Investcorp had no authority to borrow money on the security of his assets; that by doing so, Investcorp not only acted in breach of contract, but did so deliberately for its own improper purposes; and that it then dishonestly concealed what had been done. In those circumstances the judge took the view that there were two elements to the factual case on

deceitful non-disclosure: (i) whether (as alleged) Investcorp acted in breach of its fiduciary duty in March 2008 by failing to tell Mr. Al Sadik that it had decided to leverage his assets and (ii) whether, having entered into the White Ibis III credit facility with RBS on 10 March 2008, there was a further on-going breach of duty in that Investcorp deliberately failed to comply with its reporting obligation under Clause F.4 of the SPA in order to conceal both the existence of the credit facility and the subsequent application of leverage from time to time during the period from 1 May 2008 onwards.

141 As I have said, in relation to the second of those elements, the judge held that Investcorp had failed to comply with its reporting obligations under clause F.4 of the SPA. Nevertheless, he held that Investcorp had sought, *bona fide*, to comply with those obligations in a manner which it honestly believed would best serve Mr Al Sadik's interests; and that there was no intention to conceal from Mr Al Sadik the fact that his portfolio had been leveraged or the level of leverage or the manner in which it had been carried out. He made no award of damages in respect of what he regarded as an "innocent" breach of clause F.4 of the SPA. Mr Al Sadik challenges both the judge's conclusion that, in failing to comply with its reporting obligations Investcorp had acted honestly and the judge's failure to award damages for what he had held to be an innocent breach of clause F.4. Ground 22 (read with the clarification in the Appellant's Skeleton Argument) and ground 24 in the Memorandum of Grounds of Appeal are in these terms:

> "Ground 22: The learned judge was wrong in law to hold that insofar as he held the Respondents' breach of Clause F.4 occurred innocently he should not award damages for that breach.
>
> Ground 24: The learned Judge misdirected himself when he found that the breach of Clause F.4 was not deceitful."

Ground 22 in the Memorandum of Grounds of Appeal supplements ground 17:

> "Ground 17: When the learned Judge found that Clause F.4 of the SPA had been breached he ought to have proceeded to consider and decide whether or not the breach had caused the Appellant loss and damage."

It is convenient to refer to the issues raised by those grounds as "the post-investment non-disclosure issues".

142 Investcorp's response in relation to the post-investment non-disclosure issues is (i) that Mr Al Sadik's challenge to the judge's finding that Investcorp's breach of clause F.4 of the SPA was not deceitful is founded on assertions of inference with no evidential basis and should be rejected on the ground that an appellate court should not overturn a finding that

a witness was honest without compelling reasons; and (ii) that the judge was correct not to have considered loss and damage on the basis of an innocent breach of Clause F.4: no such claim was either pleaded or advanced at trial.

143 It follows that the questions for determination by this Court in relation to the third issue fall under four main heads:

(1) Whether it is open to Mr Al Sadik to pursue, on appeal, a claim in respect of pre-investment non-disclosure.

(2) If so, whether the judge ought to have held that Investcorp's failure to disclose, before 4 March 2008, that it was intending to leverage his assets at the portfolio level, was deceitful.

(3) Whether the judge was wrong to hold that Investcorp's post-investment breaches of clause F.4 of the SPA were not deceitful.

(4) Whether, given the judge's finding that Investcorp's post-investment breaches of clause F.4 were innocent and not deceitful, he should, nevertheless, have made findings on the loss and damage caused to Mr Al Sadik by reason of that breach.

*Is it open to Mr Al Sadik to pursue a claim in respect of pre-investment non-disclosure on this appeal*

144 It is said, in the Appellant's Skeleton Argument, that Mr Al Sadik's claim in deceit rested on two foundations: (i) active representation, in that Investcorp made a representation in the form of a statement to Mr Al Sadik, reckless as to its truth or falsity, on which he relied when he authorised Investcorp Bank to transfer US$135 million to Shallot on 4 March 2008 for investment on the terms of the SPA, and (ii) implied representation, in that the law recognises that non-disclosure where there is a duty to disclose is tantamount to an implied representation that there is nothing relevant to disclose.

145 In advancing his challenge under ground 20 in the Memorandum of Grounds of Appeal it is said on behalf of Mr Al Sadik that, having noted (at paragraph 5.1 of his judgment) that he alleged that "Investcorp acted in breach of its fiduciary duty in March 2008 by failing to tell [him] that it had decided to leverage his assets at the portfolio level and invest the proceeds directly in DSF and the single manager funds, rather than invest in LDSF and SMFCo which is probably what he expected", the judge was wrong to decide that issue summarily, on the basis that "The use of Blossom as a vehicle through which to leverage the assets is alleged to have been a device by which to conceal the existence of

borrowing" and that ". . . the evidence does not establish that Investcorp deceitfully concealed the borrowing arrangements from Mr. Al Sadik or that Blossom was incorporated as a mechanism for achieving that purpose". It is said that the judge ought to have addressed the issues to which Mr Al Sadik's allegation of breach of fiduciary duty gave rise.

146 In developing that submission it is said that, properly understood, Mr Al Sadik's claim in respect of pre-investment non-disclosure was that Investcorp had represented to him that it was intending to make investments authorised by the terms of the SPA when it knew full well that that was not what it was intending to do; that is to say, it knew that it was going to invest in Blossom. The effect of the judge's approach was that he did not address or decide the main issues arising from the claim of pre-investment non-disclosure; and he was wrong not to do so. It is said that the material before this Court - in particular, the judgment and Investcorp's Amended Defence - is sufficient to identify the issues which the judge ought to have decided. The elements of Mr Al Sadik's claim in respect of pre-investment non-disclosure are said to be these:

(1) Mr Al Sadik claimed, and Investcorp admitted, that he sent the Investment Amount (AED 500 million) to Investcorp Bank on 27 February 2008; and that it was received and accepted on trust for him "for the purpose of investing it on the terms of an agreement in writing to be negotiated".

(2) Mr Al Sadik pleaded that Investcorp Bank "undertook" that the AED500 million which he had transferred to it would be invested in Shallot on the terms of the SPA, and that Investcorp (i) deliberately did not disclose (and deceived him as to) its intention to invest in Blossom before the signature of the SPA; (ii) intended (secretly) to invest in Blossom "contrary to the representations they had made and to make an investment [in Blossom] which was not an authorised investment", which it then did; and (iii) never "intended to do what it represented to Mr Al Sadik would be done" and "deceived Mr. Al Sadik to obtain his money to do something different."

(3) The core of the claim for "Deceitful Non-Disclosure" is at paragraphs C16 to C20 of the re-re-amended statement of claim. Those paragraphs contain the following claims:

(i) that Investcorp was under a duty to disclose to Mr Al Sadik and not to conceal from him its intention to divert US$ 135 million to Blossom (which was not an authorised investment on the terms of the SPA);

(ii) that the disclosure of Investcorp's intention should have been made before the

SPA was signed; and that Investcorp breached its duty to disclose "knowingly or recklessly (and deceitfully)";

(iii) that the failure to disclose the intention to invest in Blossom was a breach of duty because Investcorp did not make the disclosure before entry into the SPA.

(4) Mr Al Sadik's claim contained a specific allegation that Investcorp was under a pre-investment fiduciary duty to disclose, which (it is said) is an aspect of a separate allegation that Investcorp represented that it would abide by the SPA (but deceitfully did not do so).

(5) Accordingly Mr Al Sadik claimed that, by reason of Investcorp's deceitful non-disclosure, he authorised Investcorp Bank to transfer his AED500 million to Shallot as an investment on the terms of the SPA and thereby suffered loss in the value of the Investment Amount.

147 In further development of his submission that the judge ought to have addressed the issues to which Mr Al Sadik's allegation of breach of fiduciary duty gave rise, it is said that the findings of fact which the judge made (at paragraphs 5.19 and 6.2 of the judgment) - that the date on which "the first investments were made" and "implemented" was 4 March, 2008 - are relevant to that pleaded case in relation to the breach of the pre-investment fiduciary duties to disclose because (i) it was on that date (4 March 2008) that Investcorp transferred the Investment Amount to Shallot and caused it to invest in Blossom, (ii) it was on that date that the SPA was carried into effect (that is to say, it was on that date that the investment in Shallot was made); and (iii), until that date, Investcorp held the Investment Amount on trust for Mr Al Sadik to invest according to the terms of the SPA. In those circumstances it is submitted that the judge ought to have addressed the issues (i) whether or not Investcorp was under a duty, on or before 4 March 2008, to disclose to Mr Al Sadik its intention not to make an investment authorised by clause A of the SPA; and/or to divert the value representing the Investment Amount to Blossom and (ii), if so, whether or not Investcorp was in breach of that duty.

148 It is submitted on behalf of Investcorp that the pre-investment non-disclosure claim which Mr Al Sadik seeks to advance is not open to him on this appeal. It is said that, in seeking to advance that claim on appeal Mr Al Sadik has ignored the basis on which the Third Claim was pleaded and advanced at trial. In essence, it is said, the Third Claim (as pleaded and

advanced at trial) was that Investcorp dishonestly acted in breach of various "Duties to Disclose" which arose on Investcorp's receipt of Mr Al Sadik's monies and the entry into the SPA on 1 March 2008. The premise on which Mr Al Sadik appeals (namely that this aspect of his appeal is in respect of his Third Claim) is wrong. Properly analysed, these "pre-investment non-disclosure" elements of Mr Al Sadik's appeal are an impermissible attempt, first, to resurrect the Eighth Claim (for fraudulent misrepresentation) abandoned at trial at the conclusion of the evidence - and possibly also the Second Claim, which was in related terms - and, second, to advance a new, unpleaded, claim based on new allegations of fraudulent misrepresentation. The first of those allegations - described by Mr Al Sadik as the "active representation" basis of his appeal - is that Investcorp represented that Mr Al Sadik's investment would be authorised under the SPA. The second - described as the "implied representation" basis of the appeal – is that there was an implied representation by Investcorp (in circumstances where, it is said, Investcorp was under a fiduciary duty to disclose its intention to use the Blossom structure) that there was nothing relevant to disclose.

149 In developing those submissions, it is said that:

(1) The pleaded allegations in support of the Third Claim were (in summary):

(i) that Investcorp was under a duty to disclose: (a) the intention to use First Layer Leverage through an SPV incorporated for that purpose; (b) the full extent of First Layer leverage from time to time; and (c) the intention to divert - and the diversion of - his investment amount into Blossom: paragraph C16 of the re-re–amended statement of claim;

(ii) that the duty to disclose arose: (i) from Clause F4 of the SPA and Investcorp's duties to disclose as a trustee and (ii) upon receipt of Mr Al Sadik's investment amount on 27 February 2008 (and/or on 1 March 2008) "when the SPA was entered into" : paragraphs C17 and C19 of the re-re–amended statement of claim);

(iii) that Investcorp breached each of the duties "knowingly or recklessly (and deceitfully)": paragraph C18 of the re-re-amended statement of claim; and that the Particulars of Breach alleged are all particulars of an alleged intention to deceive Mr Al Sadik: paragraph C20 of the re-re-amended statement of claim;

(iv) that the investment in Blossom was made in secret to facilitate unauthorised leverage: paragraph C20.2 of the re-re-amended statement of claim;

(v) that Investcorp was suffering a liquidity crisis; and that its motive for acting as it did was that Investcorp wanted to raise funds as quickly as possible in order to invest in its hedge funds: paragraphs A22.4(b)(iv) and (v), A23 and A26A of the re-re-amended statement of claim;

(vi) that the loss and damage alleged to flow from the deceitful non-disclosure is the Investment Amount and the lost opportunity to invest it elsewhere (that is to say, the tortious measure of damage): paragraph C29 of the re-re-amended statement of claim.

(2) The new and unpleaded version of the Third Claim was not advanced at trial and rests on two bases, "active representation" and "implied representation":

*Active representation*

(i) Investcorp made "active representations" to Mr Al Sadik that: (a) the only leveraged investments made would be in "Investcorp Hedge Funds" which were authorised by clause A of the SPA; (b) and that Investcorp would abide by the terms of the SPA (the "Representations");

(ii) Mr Al Sadik acted on the Representations on 4 March 2008 when Investcorp invested in Blossom; by that date Investcorp had decided to invest in Blossom which was an unauthorised investment; accordingly, by that date, Investcorp knew that the Representations were untrue;

(iii) in those circumstances, the failure to correct the Representations on or before 4 March 2008 was deceitful;

*Implied representation*

(iv) Investcorp made an implied representation that there was nothing relevant to disclose in circumstances where it had a fiduciary duty to disclose its intention to invest in Blossom, but did not do so.

(3) In seeking to advance the Third Claim on the basis of pre-investment representations (whether "active" or "implied") Mr Al Sadik is attempting to revive (in another form) a case in fraudulent misrepresentation (or deceit) which was abandoned at trial. Indeed, the active representation formulation of Mr Al Sadik's new claim is advanced in terms which are virtually identical to those in which the abandoned Eighth Claim (described on its face as being a claim for "Fraudulent Misrepresentation") at paragraph C26B (and summarised at paragraph A16B) of the re-re–amended statement of claim) had been advanced.

(4) The essence of the Eighth Claim was that Investcorp deliberately led Mr Al Sadik to believe that the Investment Amount would be invested in Investcorp Hedge Funds or other Authorised Investments, when at all times prior to the SPA being signed Investcorp knew this was untrue. Further, the Second Claim (the "Risk Representation" claim) – which was the 'inverse' of the Eighth Claim (in that Mr Al Sadik alleged, at paragraphs C11 to C15 of the re-re-amended statement of claim, that Investcorp deliberately led him to believe that the only investment technique that would be used was a direct (that is to say, unleveraged) investment in hedge funds and that no other technique would be employed) - was abandoned at the same stage of the trial. Mr Al Sadik expressly abandoned these two claims prior to closing submissions; neither party made submissions on them and the judge was told by Mr Al Sadik that they were not being pursued. It is now too late for him to reintroduce those claims in another guise.

(5) Even if he had not already abandoned the "active representation" element of his new claim – which, of itself, is sufficient to preclude him from reintroducing it - Mr Al Sadik should not be allowed to advance his new pre-investment non-disclosure claim because neither formulation of that new claim had been pleaded or advanced at trial. In particular:

(i) the Third Claim is not a fraudulent misrepresentation claim; it is neither pleaded nor framed in those terms;

(ii) none of Investcorp's PRM or Hedge Funds witnesses were cross-examined on the basis that they had deliberately misled Mr Al Sadik as to their intention to apply First Layer Leverage before he agreed to invest his funds; indeed, an inconsistent case - (a) that the Investment Proposal did not make any representation as to the structure of the investment and (b) that they had not told Mr Al Sadik about the possibility of using First Layer Leverage before he signed the SPA because they were unaware that this was the Hedge Funds team's intention - was put to the PRM witnesses involved in presenting the Investment Proposal to Mr Al Sadik and negotiating the SPA;

(iii) the pre-investment non-disclosure case which Mr Al Sadik seeks to advance on this appeal was not developed at trial in his written or oral closing submissions in relation to the Third Claim; in particular, neither (a) the active and implied representation analysis, nor (b) the suggestion that 4 March 2008 was the

critical date on which Mr Al Sadik relied upon the Bank's representations nor (c) the claim that Mr Gurnani and Mr Gharghour were "reckless" as to whether there was authority to invest through Blossom - a core allegation on which Mr Al Sadik seeks to advance his "new" fraudulent misrepresentation claim – were relied upon in those written or oral submissions.

In those circumstances, it is said, the judge cannot be criticised for failing to identify – and so failing to address - any pre-investment non-disclosure claim in the terms set out (at paragraphs 152 and following) in the Appellant's Skeleton Argument: Mr Al Sadik's criticism of the judge's failure to consider not only a claim that was expressly abandoned but also an unpleaded claim first formulated only in the Memorandum of Grounds of Appeal is ill-founded.

150 In my view there is force in the submission that it is not open to Mr Al Sadik to advance on this appeal a claim based on the allegation that Investcorp made a deceitful pre-investment "active representation" that his investment would be authorised under the SPA.

151 As Mr Al Sadik asserts in the Appellant's Skeleton Argument, the "core" of the Third Claim - the claim for "Deceitful Non-Disclosure" - is at paragraphs C16 to C20 of the re-re-amended statement of claim. Those paragraphs are in these terms (so far as material in the present context):

> "16. Investcorp Bank was under a duty to disclose to Mr. Al Sadik and not to conceal from him - (i) the intention of Investcorp Bank, Shallot, Blossom and Investcorp Nominee 1 or each of them to arrange First Layer Leverage; and/or (ii) the fact of the arrangement of the First Layer Leverage; and/or (iii) the full extent of First Layer leverage from time-to-time, and/or (iv) the intention to divert and the diversion of the value representing the Investment Amount to Blossom (which was not an authorised investment on the terms of the SPA and which served as a screen to conceal the true state of affairs from Mr. Al Sadik) ("the Duties to Disclose"). An honest person would have discharged the Duties to Disclose.
>
> 17. The Duties to Disclose were each continuing duties which arose immediately upon the receipt by Investcorp Bank of the Investment Amount on 27th February, 2008 and in any event on 1st March, 2008 when the SPA was entered into. Investcorp Bank was in breach of each of the Duties to Disclose from the moment when the duties arose until on or about 2nd March, 2009 when Mr. Al Sadik received the Decomposition Statement in which the disclosure was for the first time made.
>
> 18. Investcorp Bank breached each of the Duties knowingly or recklessly (and deceitfully) and so breached its contractual and/or fiduciary duty owned to Mr. Al Sadik to disclose those facts to Mr. Al Sadik and/or not to conceal them from him. Each of the breaches of duty caused loss and harm to Mr. Al Sadik.

19. The duties to disclose arose from 2 independent sources –

19.1 Duty in contract: . . .

19.2 Duty as a trustee: Upon the receipt by Investcorp Bank of the Investment Amount on 28th February, 2008 to hold and invest the same on the terms of the SPA, and from and upon the parties' entry into the SPA on or about 1st March, 2008 Investcorp Bank was constituted Mr. Al Sadik's trustee on the terms more particularly described in Part A at paragraphs 14 to 16 and Part B at paragraphs 51 to 57. As Mr. Al Sadik's trustee Investcorp Bank was under each of the Duties to Disclose.

Particulars of Breach

20. The intention to deceive is shown by Investcorp Bank's conduct (done by its servants or agents) who actively sought to conceal the true facts from Mr. Al Sadik:

20.1 the intention to use First Layer Leverage was not disclosed to Mr. Al Sadik on or before his entry into the SPA;

20.2 as pleaded in Part A in paragraph 21 the investment in Blossom was done in secret in order to facilitate unauthorised leveraging so as to exclude the effect of leveraging from the net asset value of the shares of Shallot;

. . ."

152 Investcorp is correct to point out that, as pleaded, Mr Al Sadik's Third Claim was not advanced on the basis of active (or explicit) misrepresentation: there is no allegation of explicit misrepresentation - in particular, no allegation of explicit pre-investment representation - in the paragraphs that I have just set out. The Third Claim is for "Deceitful Non-Disclosure" not for "Fraudulent Misrepresentation". And that is how the judge understood the position when he said at paragraph 5.1 of his judgment that there were two aspects to Mr Al Sadik's factual case on deceitful nondisclosure:

> "5.1 . . . Firstly, it is alleged that Investcorp acted in breach of its fiduciary duty in March 2008 by failing to tell Mr. Al Sadik that it had decided to leverage his assets at the portfolio level and invest the proceeds directly in DSF and the single manager funds, rather than invest in LDSF and SMFCo which is what he probably expected. . . .".

153 Investcorp is also correct to point out that Mr Al Sadik's claim in respect of fraudulent misrepresentation was advanced as the Eighth Claim - the claim for "Fraudulent Misrepresentation (Investment Representation)" - which is pleaded at paragraph 26B of the re-re-amended statement of claim:

> "26B (1) Investcorp Bank made the Investment Representation [that the entire value of the Investment Amount would be invested in Investcorp Hedge Funds or in other Authorised Investments] between about November 2007 and about 1st March, 2008 when the SPA was signed . . .

(2) The Investment Representation was made for and on behalf of Investcorp Bank by Mr. Al Khatib and Mr. Kironde. The Investment Representation became a misrepresentation when the bank decided that it was not going to invest the Investment Amount in Investcorp Hedge Funds or other Authorised Investments, but instead in Blossom. Investcorp Bank and/or Mr. Al Khatib and Mr. Kironde knowingly or recklessly allowed Mr. Al Sadik to rely on the truth of the Investment Representation whereas they had no honest belief that it was true.

(3) Mr. Al Sadik was induced to enter into the SPA by the Investment Representation and when Mr. Al Khatib signed the SPA for and on behalf of Investcorp Bank he knew (i) that Mr. Al Sadik believed the Investment Representation was true; and (ii) knowingly concealed the falsity of the Investment Representation in order to induce Mr. Al Sadik to enter into the SPA.

(4) For the reasons given in Part A at paragraph 16B Mr. Al Sadik was materially deceived by the [Investment] Representation.

Particulars

(5) Investcorp Bank's knowledge that the Investment Representation was false (or that it was reckless as to its truth or falsity) is shown by the fact that it did not make the investments it had proposed to Mr. Al Sadik and instead made the investment in Blossom which was not an Authorised Investment as particularised in Part A at paragraph 36.

(6) The speed with which the investment was made in Blossom (that is to say, on the same day the SPA was signed) shows that before and on signature of the SPA Investcorp Bank intended the entire value representing the Investment Amount to be invested in Blossom only. The circumstances in which the investment was made are particularised in Part B at paragraph 105.3A. Investcorp Bank's motives for making the misrepresentation are pleaded in Part A at paragraph 13C."

As I have said - and as the judge recorded at paragraph 1.14 of his judgment - the Eighth Claim was expressly abandoned on the twenty-sixth day of the trial (after the conclusion of the evidence). In my view Investcorp's submission that, in seeking to advance on appeal the Third Claim on the basis of pre-investment active (or explicit) representations, Mr Al Sadik is attempting to revive (in another form) a case in fraudulent misrepresentation (or deceit) which was abandoned at trial is correct. It is not open to him to do so; and that attempt should be rejected.

154 I take the view, also, that it is not open to Mr Al Sadik to advance on this appeal a claim based on the proposition that there was an implied representation by Investcorp that there was nothing relevant to disclose in circumstances where, it is said, Investcorp was under a fiduciary duty to disclose its intention to use the Blossom structure.

155 At paragraph C17 of the re-re-amended statement of claim it is pleaded that the duties to disclose upon which Mr Al Sadik relied:

> ". . . were each continuing duties which arose immediately upon the receipt by Investcorp Bank of the Investment Amount on 27th February, 2008 and in any event on 1st March, 2008 when the SPA was entered into."

It is not in dispute that, in the period between the receipt of the Investment Amount and the execution of the SPA, Investcorp Bank held the Investment Amount upon trust "for Mr. Al Sadik for the purpose of investing it on the terms of an agreement in writing to be negotiated". For convenience, I will refer to that trust as "the pre-SPA trust". Given the terms of the pre-SPA trust, it necessarily came to an end when Investcorp Bank and Mr Al Sadik (with other parties) entered into the SPA on 1 March 2008. From that date until 4 March 2008 (when Investcorp Bank converted the Investment Amount into US Dollars and credited the proceeds to the account of Shallot), the Investment Amount was held by Investcorp Bank upon the trusts of the SPA ("the post-SPA trust"). In the circumstances that there is no appeal before this Court from the judge's finding that the fiduciary relationship arising out of the SPA did not impose upon Investcorp any disclosure obligation which was additional to or independent of the contractual obligation imposed by clause F.4 of the SPA, it is necessary to consider the position under the pre-SPA trust and the position under the post-SPA trust as separate questions.

156 In advancing the submission that the fiduciary relationship between Investcorp Bank and Mr Al Sadik under the pre-SPA trust gave rise to a fiduciary duty to disclose, Mr Al Sadik relies on the judgment of Lady Justice Arden (with which, on the relevant issue, the other members of the Court of Appeal, Lord Justice Mummery and Mr Justice Holman agreed) in *Item Software (UK) Ltd v Fassihi and others* [2004] EWCA Civ 1244; [2004] BCC 994.

157 The issue before the Court of Appeal in *Item Software* (so far as material in the present context) was whether the trial judge had been right to hold that the appellant, Mr Fassihi, was in breach of his duties as a director of the respondent company, Item Software Ltd ("Item"), in failing to disclose to Item his own misconduct at the time that that misconduct occurred ("the disclosure issue"). The facts which gave rise to the disclosure issue may be summarised as follows. At the relevant time a major part of Item's business was the distribution of software products for Isograph Ltd ("Isograph"). In November 1998 Item decided to attempt to negotiate more favourable terms with Isograph. At the same time, Mr Fassihi secretly approached Isograph with his own proposals, which involved establishing his own company, RAMS International Ltd ("RAMS"), to take over the contract between

Item and Isograph. In the events which happened, the negotiations between Item and Isograph failed because Mr Dehghani, the managing director of Item, insisted - with the encouragement of Mr Fassihi - on terms that Isograph was not prepared to accept. Isograph terminated its contract with Item by giving twelve months' notice expiring on 11 May 2000. Item then discovered what Mr Fassihi had done, and he was summarily dismissed for misconduct on 26 June 2000. Item brought proceedings against Mr Fassihi alleging (so far as material) that he was in breach of duty as a director and employee in seeking to divert the contract with Isograph to RAMS ("the diversion issue") and for having pressed Mr Dehghani to take a hard line in the negotiations with Isograph so as to improve the prospects of obtaining the business for himself ("the sabotage issue"). Those claims failed before the trial judge, who was not satisfied that Mr Fassihi's conduct in seeking to divert the contract to RAMS or in pressing Mr Dehghani to take a hard line in negotiations with Isograph was the cause of Item losing its contract; but Item succeeded on the disclosure issue. In holding that Mr Fassihi was in breach of duty in failing to disclose to Item his own wrongdoing, the trial judge was satisfied that loss had resulted from that non-disclosure. He held that it was highly probable that, had Mr Fassihi disclosed what he had done, this would indeed have changed Mr Dehghani's attitude to the negotiations with Isograph radically; and would have led him to accept Isograph's proposal "instead of indulging in the further brinkmanship which caused Isograph to lose patience and serve notice of termination".

158 In dismissing the appeal against the decision of the trial judge on the disclosure issue, Lady Justice Arden said this:

> "[41] For my part, I do not consider that it is correct to infer from the cases to which I have referred that a fiduciary owes a separate and independent duty to disclose his own misconduct to his principal or more generally information of relevance and concern to it. So to hold would lead to a proliferation of duties and arguments about their breadth. I prefer to base my conclusion in this case on the fundamental duty to which a director is subject, that is the duty to act in what he in good faith considers to be the best interests of his company. This duty of loyalty is the 'time-honoured' rule: per Goulding J in *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11, 21. . . ."

And she went on to say this:

> [44] . . . on the facts of this case, there is no basis on which Mr Fassihi could reasonably have come to the conclusion that it was not in the interests of Item to know of his breach of duty. In my judgment, he could not fulfil his duty of loyalty in this case except by telling Item about his setting up of RAMS, and his plan to acquire the Isograph contract for himself."

159 It is accepted on behalf of Mr Al Sadik that the Court of Appeal in the *Item Software* case held that a fiduciary does not owe a separate and independent duty to disclose to his principal his own misconduct; or, more generally, to disclose information of relevance to the principal. The *ratio* of the decision on the disclosure issue, it is said, is that a duty to disclose is a facet of the duty of loyalty and arises if there is an expectation of disclosure: a fiduciary is under a duty to disclose to his principal information which it is in the economic interests of the principal to know unless he can prove he had a reasonable belief that the principal's economic interests would not be affected if he did not disclose: the fiduciary may escape liability if he can show that in the circumstances there was no expectation of disclosure.

160 Investcorp's response is that, properly understood, the *Item Software* case does not support the proposition for which Mr Al Sadik contends. Lady Justice Arden explained that a fiduciary does not owe a separate and independent duty to disclose his misconduct. *Item Software* is authority for the proposition that a company director may be obliged to report his own wrongdoing. A director is, of course, a fiduciary; but the case was decided on the basis of the duty owed by a director as director. Reliance is placed, also, on the observations of Mr Justice Etherton in *Shepherd Investments Ltd and another v Walters and others* [2006] EWHC 836 at [85] and [86]. When referring to the judgment of Lady Justice Arden in the *Item Software* case, Mr Justice Etherton said this:

> "[86] . . . The Court of Appeal held, on the facts of the case, that there was no basis on which the defendant could reasonably have come to the conclusion that it was not in the interests of the claimant company to know of his breach of duty: he could not fulfil his duty of loyalty on the facts of that case except by telling the claimant of his setting up of his own company, and his plan to acquire the contract for himself."

At paragraph [132] he explained that:

> "[132] . . . In the case of the acts of his fellow directors in promoting a rival business, the breach of fiduciary duty of the director is failing to disclose matters which are of relevance and concern to the company and which, if acting in good faith in the best interests of the company, the director would disclose. Those are straightforward applications of ordinary principles of equity concerning fiduciary duties."

161 In my view, the true position, in the light of the observations of the Court of Appeal in *Item Software* and those of Mr Justice Etherton in *Shepherd Investments*, is that there is no separate and independent duty upon a fiduciary to disclose his own misconduct; or, more generally, to disclose information of relevance to the principal. But a fiduciary duty to

disclose may arise - as an element or facet of the fiduciary's duty of loyalty in the particular circumstances - in respect of matters (including his own misconduct) which a person in his position, acting in good faith, would appreciate should be disclosed (in that, without such disclosure, he would be unable to fulfil his duty of loyalty).

162 In order, therefore, to answer the question whether the judge ought to have held that Investcorp Bank owed to Mr Al Sadik a fiduciary duty, before they each entered into the SPA on 1 March 2008, to disclose its intention to leverage his investment at the portfolio level, it is necessary to ask, first, whether Investcorp had, indeed formed such an intention at the relevant time; and (if so), second, whether the judge should have found on the facts that were before him at trial that Investcorp Bank, acting in good faith, should have appreciated that it could not fulfil its duties of loyalty under the pre-SPA trust without disclosing that intention to Mr Al Sadik.

163 Adopting that approach, the answer to the question whether the judge ought to have held that Investcorp Bank owed to Mr Al Sadik a fiduciary duty, before they each entered into the SPA on 1 March 2008, to disclose its intention to leverage his investment at the portfolio level must be "No". That is because, by the conclusion of the trial, it was common ground between the parties (and the subject of a finding of fact by the judge) that Investcorp had not formed that intention before 1 March 2008. The position is stated at paragraph 92.8 of the Written Closing Submissions on behalf of Mr Al Sadik, dated 28 February 2008:

> "92. Based on the evidence at trial, the following facts are understood to be agreed between the parties in relation to the reporting/non-disclosure issues:
> . . .
> 92.8 It was not until 1 March 2008 at the earliest that Investcorp formed the intention to arrange leverage through an SPV instead of a direct investment in leveraged Products."

That that was the position is said to be supported by the evidence of Mr Franklin (Transcript, 15 February 2012, page 22, line 23 to page 25, line 10); and it is consistent with the judge's analysis of the evidence at paragraphs 5.7 and 5.8 of his judgment. It is, also, the judge's finding of fact at paragraph 6.2 of his judgment. In my view, it is not open to Mr Al Sadik to advance on this appeal a case of implied non-disclosure based on the premise that - in order to fulfil its duties of loyalty under the pre-SPA trust - Investcorp Bank was under a fiduciary duty to disclose an intention to arrange leverage at the portfolio level.

164 Nor is it open to Mr Al Sadik to advance on this appeal a case of implied non-disclosure based on the premise that - in order to fulfil its duties of loyalty under the post-SPA trust- Investcorp Bank was under a fiduciary duty to disclose the intention (which, on the evidence, it did form shortly after 1 March 2008), to arrange leverage at the portfolio level. The reason which leads to that conclusion is that - as I have said - the judge held that the fiduciary relationship arising out of the SPA did not impose upon Investcorp any disclosure obligation which was additional to or independent of the contractual obligation imposed by clause F.4. In reaching that conclusion he pointed out that it was not disputed that Investcorp owed a fiduciary duty to Mr Al Sadik and that the core obligation of a fiduciary was that of loyalty. He referred to the observations of Lord Justice Millett in *Bristol & West Building Society v Mothew* [1998] Ch. 1, 18:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations."

But, after reviewing the authorities (at paragraphs 5.2 to 5.6 of his judgment), he held that the fiduciary relationship which arose under the post-SPA trust imposed no obligations to disclose other than those for which the parties had contracted in the SPA itself. Although, as I have said, that conclusion was challenged (at ground 21 in the Memorandum of Grounds of Appeal), that challenge was withdrawn in the Appellant's Skeleton Argument; and it was not pursued at the oral hearing of the appeal. Absent an appeal from the judge's conclusion on this issue, Mr Al Sadik cannot re-open the point.

*Ought the judge to have held that Investcorp's failure to disclose, before 4 March 2008, that it was intending to leverage his assets at the portfolio level, was deceitful.*

165 Ground 23 in the Memorandum of Grounds of Appeal is in these terms:

> "Ground 23: The learned Judge erred in law when he omitted to consider and make findings on the issue whether or not the Respondents' alleged breach of the duty to disclose (consequent upon its fiduciary duty of loyalty), arising before the SPA was entered into or in any event before 4th March 2008, was deceitful."

In advancing that ground on behalf of Mr Al Sadik it is said that the judge did not address the issue whether or not Investcorp's failure to make pre-contractual (or pre-investment)

disclosure of its intention to leverage Mr Al Sadik's investment at the portfolio level through Blossom was deceitful, because, having held that no additional duty to disclose (that is to say, no duty to disclose in addition to the contractual duty under clause F.4 of the SPA) arose by reason of the fiduciary relationship between Investcorp and Mr Al Sadik, he did not go on to decide whether or not Investcorp's breach of its fiduciary duty to disclose before the SPA was entered into (or in any event on or before 4 March 2008), was deceitful.

166 Given that I would hold - for the reasons set out in the previous section of this judgment - that it is not open to Mr Al Sadik to pursue, on this appeal, a claim in respect of pre-investment non-disclosure, I find it unnecessary to address the question whether the judge ought to have held that Investcorp's failure to disclose, before 4 March 2008, that it was intending to leverage his assets at the portfolio level, was deceitful. If it is not open to Mr Al Sadik to pursue a claim in respect of pre-investment non-disclosure, that question does not arise on this appeal.

*Was the judge wrong to hold that Investcorp's post-investment breaches of clause F.4 of the SPA were not deceitful.*

167 Ground 24 of the Memorandum of Grounds of Appeal is in these terms:

> "Ground 24: The learned Judge misdirected himself when he found that the breach of Clause F.4 was not deceitful."

In advancing that ground it is said on behalf of Mr Al Sadik that the judge was correct to identify the second factual element of the Third Claim ("Deceitful Non-Disclosure") as he did (at paragraph 5.1 of his judgment)

> "5.1 . . . Secondly, having entered into the credit facility with RBS, it is alleged that there was a further on-going breach of duty in that Investcorp deliberately failed to comply with its reporting obligation under Clause F.4 of the SPA in order to conceal both the existence of the credit facility and the subsequent application of leverage from time to time during the period from 1 May 2008 onwards.

and correct, also, to accept that there had been a breach of the contractual reporting obligation under clause F.4 of the SPA; but that the judge was wrong to conclude (at paragraph 5.22 of his judgment) that the evidence did not point to the conclusion that anybody on the Investcorp side had deliberately intended to mislead Mr Al Sadik by concealing the fact that his investment had been leveraged from 1 May 2008 onwards:

> "5.22 The evidence does not point to the conclusion that Mr. Kironde (or anybody else) was deliberately attempting to mislead Mr. Al Sadik by concealing the fact that his investment had been leveraged from 1st May onwards. In their

> minds there was nothing to conceal. The evidence shows that they took it for granted (rightly in my judgment) that they had authority to leverage the investment and that they did not draw any distinction between what has been described as First and Second Layer Leverage."

It is submitted that the judge's conclusion was wrong in that (i) he failed to have regard to the findings he had made - that the IMA was deceitful and that Investcorp was reckless about its powers - which tended to show that Investcorp had a motive to deceive Mr Al Sadik about the investments that had been made in and by means of Blossom and (ii) his findings on the issue of deceit (set out in Schedule 2 of the Memorandum of Grounds of Appeal) were wrong.

168 In developing those submissions it is said that, in addressing the facts (and the judge's findings) in relation to Investcorp's failure to comply with its reporting obligations, it is important to have in mind that:

(1) At the time the relevant reports were sent to Mr Al Sadik, he did not know that Shallot had invested in Blossom; what Blossom was; or that it existed as a fund to do with his investment.

> It is said that those matters should have been brought to Mr Al Sadik's attention at the time the relevant reports were sent to him because the investments had been made by Blossom, which had incurred liabilities when it borrowed from RBS. The periodical reports sent to Mr Al Sadik should have stated, but did not state, all the assets or any of the liabilities incurred: they showed only a quantity of investments made in DSF and the SMFs in a value that reflected the equity of Mr Al Sadik's investment and were represented as investments made by Shallot. The investments shown had in fact been made by Blossom and not by Shallot.

(2) The reports were under the control of Mr Kironde.

> It is said that, on 26 February 2009 a table headed "Blossom IAM Limited (Since Inception on 01 March 2008 to 31 January 2009)", prepared by Mr Kironde, was sent to Mr Zaidi, in response to an information request from him. The judge held that on this occasion (and for the first time) Mr Al Sadik could see the use of leverage. If Blossom were an investment in a fund then Blossom should have been named in Investcorp's report of "Underlying Investments"; because that is what Blossom was. The problem for Investcorp was that Blossom was not an authorised investment. Investcorp sought to overcome that problem by not reporting the existence of Blossom (or all of its assets and

liabilities). Further, it is said, Investcorp's case that Blossom was not actually an investment and secondly that Investcorp's reporting systems were disorganised does not stand up to analysis and the judge was wrong to hold that it did.

(3) The picture presented by the reports was misleading.

It is said that the picture presented by the reports was also seriously deficient, in that it had the effect that Mr Al Sadik did not have information he had a right to know pursuant to Clause F.4; and which he needed to know. He needed to know because that information would inform him whether or not to exercise his right to redeem (a right conferred by clause H of the SPA).

(4) Mr Kironde was a well-educated and intelligent man who went to Harvard and he was an experienced banker.

It is said to be beyond doubt that Mr Kironde knew precisely what the SPA obliged Investcorp to report to Mr Al Sadik and why Mr Al Sadik needed to know it; in that Mr Kironde was very well informed about the background to and contents of the SPA. He had been at the meeting on 28 January 2008 when the Investment Proposal was given to Mr Al Sadik; he negotiated the terms of the SPA in person with Mr Al Sadik; he was Mr. Zaidi's point of contact and source of information about the investment; and he knew about Blossom and that it was a leveraged vehicle with a variety of reference assets in which it was making leveraged investments. Even if others at Investcorp were incompetent, Mr Kironde was not. It is not credible that Mr Kironde did not know that Mr Al Sadik had a right to know about Blossom's assets and liabilities or why he needed to know that information.

(5) Mr Kironde could have provided Mr Al Sadik with the missing information.

It is said also to be beyond doubt that, if Mr Kironde did not have that information to hand he could have obtained it. He chose not to provide it. He made that choice despite knowing that Mr Al Sadik had a right and need to know what it would have disclosed. Indeed it is not in dispute that Mr Kironde deliberately removed information that would have shown leverage so that Mr Al Sadik would not see it.

(6) The judge held that Investcorp's letter of 10 March 2009 was a deceitful response to Mr Al Sadik's request for the IMA.

It is said that Mr Kironde wrote and signed that letter and that it is established he knew when the IMA was drafted and signed because he had received the "Please delete this e-mail" instruction sent by Mr. Tanner on 1 March 2009 to disguise the date the IMA had been entered into. Therefore Mr Kironde was fully informed about the import and intended effect of the IMA. An honest person knowing what Mr Kironde knew would have refused to send the letter of 10 March 2009. In sending that letter Mr Kironde was dishonest. This follows "axiomatically" from the judge's findings on the IMA.

(7) Mr Kironde's conduct in relation to the IMA needs to be put in context.

It is said that Mr Kironde's conduct in relation to the IMA entailed a fraud whereby a false and dishonest statement was made to Mr Al Sadik. The fiduciary (Investcorp) deceived its beneficiary. Mr Kironde was a central participant in that. The judge should have condemned such conduct in the strongest terms. The IMA and missing information both relate to the fact that an investment had been made in Blossom. The IMA was produced to justify the hitherto unexplained or reported investments of Blossom. The circumstances of non- disclosure (the missing information) and false disclosure are so closely connected as to be inseparable and the judge was wrong not to assess Mr. Kironde's conduct in relation to reporting with his dishonesty in relation to the IMA.

169 Amongst the findings of fact made by the judge which are challenged on behalf of Mr Al Sadik are those set out in Schedule 2 to the Memorandum of Grounds of Appeal:

(1) *The first finding*: It is said that his finding (at paragraph 5.12 of his judgment) that Mr Kironde "had no reason to mislead his client about the use of leverage" was wrong because Mr Kironde was subject to the same motives as Investcorp to mislead Mr Al Sadik about the use of leverage. Behind the motive to mislead Mr Al Sadik lay Investcorp's desire to earn fees and propagate its hedge funds line of business. Withholding information about what had actually been done lowered the risk that Mr Al Sadik would redeem and deprive Investcorp of fees and funds for its business was a motive. In addition, because Investcorp had not made immediate disclosure it had put itself in an embarrassing position, because if eventually it did disclose it would have to explain why it had not disclosed before: thus the initial failure to disclose generated a

motive not to disclose later. Investcorp's eventual response to its embarrassment was to deceive Mr Al Sadik with the false IMA.

(2) *The second finding*: It is said that his finding (at paragraph 5.12 of his judgment) that Mr Kironde was not intending to mislead his client (Mr Al Sadik) about Blossom was wrong because, in answer to a direct question put by Mr Zaidi to Mr Kironde about the significance of the name "Blossom" which had appeared without explanation in a pie-chart sent by Investcorp, he replied with an answer that was neither full nor complete (as the judge found) when he claimed that it was an internal matter and nothing more than to differentiate between the USD and AED. Mr Kironde knew what Blossom was and could have given an explanation about it but he chose not do to so (then or subsequently); therefore he knew that the answer he gave was misleading and in the premises he was being deceitful, that is to say an honest person would have given a full and complete answer to the question put.

(3) *The third finding*: It is said that his finding (at paragraph 5.14 of his judgment) that Mr Kironde's decision to remove information from the reports sent to Mr Zaidi which would have shown the amount of leverage was not "motivated by a desire to hide the existence of leverage" was wrong because Mr Kironde did in fact alter the information that was sent to Mr Al Sadik about his investments in a way that made them misleading which is not something an honest person with nothing to conceal would have done.

(4) *The fourth finding*: It is said that his finding (at paragraph 5.18 of his judgement) that because Mr Kironde left a reference to Blossom in a pie-chart he was not attempting to conceal its existence was wrong because (i) there is a material probability that Mr Kironde left the reference to Blossom in the pie-chart only because he was careless in his perpetration of the deceit of Mr. Al Sadik; (ii) a small amount of accurate information which is not full information may be deployed by a deceitful person who wishes afterwards to claim that he was not being deceitful; and (iii) Mr Kironde misled Mr Zaidi as to the true function of Blossom and admitted that he never informed him that the purpose of Blossom was to enable the borrowing from RBS.

(5) *The fifth finding*: It is said that the finding (at paragraph 5.14 of his judgment) that Mr Kironde's invitation to Mr Zaidi to visit Bahrain to meet with Investcorp's Funds Administration Department to discuss reporting shows that he was not trying to conceal the portfolio had been leveraged is wrong because (i) all of the facts about

leverage were known to Mr Kironde but he chose not to explain them to Mr Zaidi and (ii) the invitation to visit Investcorp's Funds Administration Department could not reasonably be construed as meaning that leverage was not being deliberately concealed from Mr Zaidi and Mr Al Sadik.

170 In those circumstances, it is said, the judge ought to have concluded that Mr Kironde made a conscious and deliberate choice to withhold information in breach of clause F.4 of the SPA. An honest person in possession of the information, knowing that Mr Al Sadik had a right to it and needed to know it, would not have withheld it. The judge ought to have concluded that Mr Kironde intended Mr Al Sadik to rely on the incomplete information he was sent, in order to induce him not to redeem his investment. Investcorp was as deceitful about its disclosure of the assets and liabilities of Blossom as it was deceitful about the IMA: that is what the judge should have found.

171 In response to those submissions it is said on behalf of Investcorp that, applying well-established principles of appellate review, there is no basis on which to overturn the judge's assessment that Mr Kironde had not dishonestly or deceitfully sought to conceal the leverage of Mr Al Sadik's investment at portfolio level, in that (i) Mr Al Sadik's arguments give no meaningful explanation why the judge erred in reaching any of his conclusions on the honesty of Investcorp's witnesses (and in particular Mr Kironde); (ii), in any event, Mr Al Sadik's newly identified motives for what he says was Mr Kironde's dishonest behaviour were never put to that witness; and (iii) Mr Al Sadik's suggestion that the judge did not take into account his own findings in connection with the preparation of the IMA in assessing Mr Kironde's credibility is wrong, given that (at paragraph 5.19 of the judgment) the judge stated in terms that he was taking those findings into account.

172 In developing that response, it is said that Mr Al Sadik's appeal from the judge's finding of fact that Mr Kironde had not deceitfully attempted to conceal the fact that Mr Al Sadik's portfolio was being leveraged is without merit, in that:

(1) An appellate court should be extremely reluctant to overturn a finding of fact made - as this finding was made - on the basis of the judge's assessment of the evidence he heard at trial and which was the subject of lengthy cross- examination.

(2) The judge found (at paragraph 5.12 of his judgment) that Mr Kironde was an honest witness. Mr Al Sadik has advanced no clear challenge to the judge's assessment of Mr Kironde's evidence. Again, an assessment of honesty in a witness whom the judge has

had the advantage of hearing and seeing under cross-examination is not susceptible to review by an appellate court in the absence of compelling reasons.

(3) Mr Al Sadik does not, either in his grounds of appeal or skeleton argument, explain how or why the judge erred in reaching any of his conclusions. Rather, Mr Al Sadik seeks to re-argue the factual case in relation to reporting and deceit. In doing so, he makes a series of bare assertions that certain inferences are "beyond doubt". None of those assertions are supported by the evidence; most are founded on Mr Al Sadik's contention that the use of Blossom and the application of First Layer Leverage were unauthorised; a view which the judge rejected; and most (if not all) are founded on contentions that were not put to Mr Kironde in cross- examination.

(4) Mr Al Sadik cannot mount any sensible challenge to the judge's finding (at paragraph 5.17 of his judgment) that Mr Kironde had no motive to conceal leverage from Mr Al Sadik. If there is no basis on which to challenge that finding, then there is no basis on which the finding that Mr Kironde did not deliberately conceal the application of leverage from Mr Al Sadik can be challenged. As the judge put it, correctly, without a motive to conceal leverage from Mr Al Sadik "it becomes difficult to infer that the reporting (or absence of reporting) was done in bad faith".

173 Investcorp points out that the judge's finding that Mr Kironde had no motive to conceal leverage from Mr Al Sadik was based on his findings (at paragraphs 5.20 and 5.22 of his judgment) that Mr Kironde, along with other Investcorp employees, "believed that Investcorp had authority to make a leveraged investment and had no reason to doubt that Mr Al Sadik agreed with this approach" and, in relation to that authority, did not draw any distinction between First and Second Layer leverage. Mr Al Sadik does not challenge those findings: it would be difficult for him to do so, given that they are founded on Mr Kironde's evidence on those matters which was not challenged at the trial. Rather, it is said on behalf of Investcorp, the case which Mr Al Sadik advances on appeal is that the judge was wrong to conclude that Mr Kironde had no reason to mislead him about the use of leverage, because Mr Kironde was "subject to the same motives as the Bank". The motives on which Mr Al Sadik now relies, it is said, are (i) to "lower the risk that Mr Al Sadik would redeem and deprive the Bank of fees and funds" and (ii) to escape from the embarrassing position in which Investcorp Bank found itself as a result of its initial failure to disclose the use of leverage at the portfolio level. But, it is said, Mr Al Sadik's attempt to rely on those supposed motives is hopeless, in that:

(1) Mr Al Sadik fails to explain why Mr Kironde might have feared either that Mr Al Sadik would redeem if he found out about Blossom or considered that the fact of having not disclosed this at the outset was "embarrassing". The basis advanced in the Appellant's Skeleton Argument (at paragraph 213) - that Investcorp knew that Blossom was not an authorised investment - cannot stand with the judge's finding that Mr Kironde believed that Blossom was authorised; a finding which is not challenged on appeal.

(2) Neither of the two motives on which Mr Al Sadik now seeks to rely was put to Mr Kironde in cross-examination. Indeed, it is said, the trial record shows that no alleged motive at all was ever put to Mr Kironde.

In summary, it is said that Mr Al Sadik advances no sensible basis upon which the judge's finding of fact that Mr Kironde had no motive to conceal leverage can be overturned by this Court: His inability, or failure, to do so is fatal to his appeal.

174 It is said on behalf of Investcorp that, absent any motive for Mr Kironde (and Investcorp) to act in breach of clause F4, Mr Al Sadik's case in support of his appeal from the judge's finding of fact that Mr Kironde did not deliberately (and deceitfully) withhold information in breach of the reporting obligation which that clause contains rests on two arguments:

(1) That Mr Kironde knew what the SPA obliged Investcorp to report - a matter which Mr Al Sadik contends is beyond doubt - and could have easily provided Mr Al Sadik with that information to which he had a right and which he needed; and that it is to be inferred from Mr Kironde's decision not to provide that information that the breach of Clause F.4 was deliberate. That argument is said to be devoid of merit, in that:

(i) The judge made a finding (at paragraph 5.21 of his judgment) - to which Mr Al Sadik makes no reference - that Mr Kironde did not apply his mind to the reporting obligations set out in the SPA; and, it is implicit in the judge's overall finding (at paragraph 5.22 of his judgment) that Mr Kironde's breach of clause F.4 was innocent that he did not know what Clause F.4 required.

(ii) The judge's finding that Mr Kironde did not apply his mind to the reporting obligations set out in clause F.4 is consistent with Mr Kironde's unchallenged evidence that: (a) Funds Administration was generally responsible for discharging SPA reporting requirements; (b) Clause F.4 was not a standard reporting provision and Mr Kironde had not focussed on the provision before February 2009; and (c) that he did not think (when he was asked to consider

Clause F.4 in the witness box) that the provision required him to report the assets and liabilities of Blossom, or that it was necessary to do so. Further, it was not put to Mr Kironde in cross-examination that he knew what Clause F.4 required or indeed, even that this was something he should have known.

(iii) Mr Al Sadik's challenge to the judge's finding that Mr Kironde did not apply his mind to the reporting obligations set out in clause F.4 is unsustainable: it amounts to no more than the bare assertion that it is "beyond doubt" that Mr Kironde knew what was required under the SPA because (i) Mr Kironde is "an intelligent man who went to Harvard and he is an experienced banker", (ii) Mr Kironde was involved in presenting the Investment Proposal to Mr Al Sadik, in negotiating the SPA and was the point of contact for Mr Zaidi in relation to reporting and (iii) he knew what Blossom was. That assertion provides no basis on which this Court can overturn the judge's finding of fact that a witness whom he has seen and heard did not act dishonestly in relation to a breach of contract.

(2) That "it is not in dispute that Mr Kironde deliberately removed information that would have shown leverage so that Mr Al Sadik would not see it". In advancing that argument it is said that Mr Al Sadik is referring to Mr Kironde's preparation of an "Allocation Table" that was sent to Mr Zaidi on 11 September 2008 after a "cash" column, the negative figure in which would have revealed (amongst other things) the existence of leverage, had been removed from a draft on Mr Kironde's instruction. Mr Al Sadik's statement as to what is "not in dispute" is misleading: it suggests that the parties agreed (and/or that the judge found) that Mr Kironde removed the "cash" column in order to conceal leverage. But that is an incomplete statement of the facts: the judge accepted (at paragraph 5.14 of his judgment) Mr Kironde's denial that this was the reason for removing the column. Mr Al Sadik offers no basis on which the judge's finding may be overturned; beyond the bare assertion that this was "not something an honest person with nothing to conceal would have done": Again, that assertion provides no basis on which this Court can overturn the judge's finding of fact that a witness whom he has seen and heard did not act dishonestly in relation to a breach of contract.

175 Further, it is said that Mr Al Sadik's contention that the judge was "wrong not to take account of his finding that Mr Kironde's conduct in relation to the IMA was dishonest" is without foundation, in that:

(1) The judge did not expressly make any criticism of Mr Kironde in relation to the IMA; and there was no evidence upon which he should have done.

(2) Even if the judge did intend to criticise Mr Kironde (amongst others) in relation to the IMA, it is incorrect to assert that he did not take account of the circumstances in which the IMA was prepared by Investcorp and sent to Mr Al Sadik in the letter dated 10 March 2009. The judge expressly acknowledged (at paragraph 5.19 of his judgment) that Investcorp's conduct with respect to the IMA was "*relevant to [his] assessment of the credibility of the evidence of those involved in its production*".

(3) The basis on which the contention that the judge ought to have taken the conduct of Investec and its employees in relation to the IMA into account in reaching his conclusion that Mr Kironde did not deliberately (and deceitfully) withhold information in breach of the reporting obligation is advanced is that:

> "If the Bank was prepared as it did to deceive Mr Al Sadik about his investment in March 2009 in connection with the false IMA in order to disguise a breach of contract which occurred when it invested in Blossom, then it is very likely that it was reckless in 2008 too when Mr Gurnani and Mr Gharghour took the decision to invest in Blossom".

Leaving aside what is said to be the wholly illogical nature of that proposition, it is submitted on behalf of Investcorp that it has no evidential basis, it was not put to Mr Gurnani and, in particular, it was not put to either Mr Kironde or Mr Boynton, the individuals involved in dealing with the preparation of IMA. If Mr Al Sadik's case was that the IMA was drafted to cover up the alleged recklessness of Investcorp's Hedge Funds team in making the investment in circumstances where they were uncertain about their authority to do so, then Mr Al Sadik was under an obligation to advance that case at trial and put it to the relevant witnesses. He did not do so and it is not open to an appellate court to make such a finding; *a fortiori*, having regard to the judge's other findings of fact.

176 Further, it is said that Mr Al Sadik's challenges to the findings in Schedule 2 to the Memorandum of Grounds of Appeal cannot be maintained. The criticisms of the "first finding" (in relation to motive) and the "third finding" (in relation to the Allocation Table) have been addressed on behalf of Investcorp in submissions to which reference has already been made. The other three findings that Mr Al Sadik seeks to challenge are the "second finding" (that Mr Kironde was not intending to mislead Mr Al Sadik about Blossom when he gave him an incomplete explanation of the reason for it), the "fourth

finding" (that, because Mr Kironde left a reference to Blossom in the FPS2 reports sent to Mr Al Sadik, he was not attempting to conceal its existence) and the "fifth finding" (that Mr Kironde's invitation to Mr Zaidi to visit Bahrain to meet with the Bank's funds administration department to discuss reporting showed that he was not trying to conceal that the portfolio had been leveraged). These challenges have no prospects of success, in that:

(1) None of them can be supported without establishing a motive for Mr Kironde to conceal Blossom and/or leverage from Mr Al Sadik.

(2) None of the allegations which Mr Al Sadik now seeks to advance as to Mr Kironde's intentions were put to him in cross-examination. They are no more than mere assertions of inferences which Mr Al Sadik submits that the judge should have drawn without any evidential foundation,

177 As I have said, the Third Claim (Deceitful Non-Disclosure) is pleaded at paragraphs C16 to C20 of the re-re-amended statement of claim. The particulars of the deceitful post-investment non-disclosure relied upon are set out at sub-paragraphs 20(3) to 20(6) of that pleading. They are in these terms:

> "20.3 none of the Monthly Summaries, the Tabular Summaries or the Allocation Tables . . . disclosed the fact of, or the full extent from time-to-time of, the First Layer Leverage . . . and it was impossible for Mr. Al Sadik to detect the same from any of those documents;
>
> 20.4 no other communication was made during the material time to Mr. Al Sadik by Investcorp Bank (or any other person) informing him of the fact and full extent from time-to-time of the First Layer Leverage . . .;
>
> 20.5 when . . . Mr. Zaidi asked Mr. Kironde about the reference to Blossom in the Monthly Summaries Mr. Kironde replied falsely that it was part of an internal arrangement to show the value of the asset in a foreign currency;
>
> 20.6 when Mr. Al Sadik became alarmed about the precipitous drop in the value of his investment in about October 2008 he began to seek explanations from Investcorp Bank about why this had occurred. The explanations sought by Mr. Al Sadik and the answers given to him by Investcorp Bank are described in Part B at paragraphs 66 to 88;
>
> 20.7 one of the main causes for the reduction in the value Mr. Al Sadik's investment was the very large extent (from time-to-time) of the First Layer Leverage but Investcorp Bank did not explain this to Mr. Al Sadik despite many opportunities to do so. . . ."

The issue for the judge was whether that course of non-disclosure was deceitful. He held that it was not. I am not persuaded that he was wrong to take that view.

178 The principal reasons which lead me to take that view are these:

(1) I accept that an appellate court should not overturn a finding of fact made - as this finding was made - on the basis of the judge's assessment of the evidence he heard at trial and which was the subject of lengthy cross- examination without very cogent reasons.

(2) I accept that the arguments advanced on behalf of Mr Al Sadik provide no basis on which this Court should hold that the judge erred in reaching any of his conclusions on the honesty of those of Investcorp's witnesses who gave evidence in relation to the matters pleaded. In particular, I accept:

(i) that the judge was entitled to reject the submission that Mr Kironde (or, so far as material, Mr Gurnani, Mr Franklin or any other Investcorp employee) had a motive to conceal from Mr Al Sadik the fact that his assets were being leveraged through Blossom at the portfolio level; in particular, I accept that he was entitled to reject that submission in the circumstances that the motives on which Mr Al Sadik now seeks to rely were not put to those witnesses in the course of cross-examination on their evidence; and

(ii) that the submission that the judge assessed the credibility of Mr Kironde (and other witnesses) without having regard to his findings in relation to the IMA - in so far as those findings were of relevance to events which had occurred some months earlier - is ill-founded, given the judge's statement (at paragraph 5.19 of his judgment) that that document was relevant to his assessment of the credibility of those involved in its production;

In those circumstances, it would be wrong, as it seems to me, for this Court to reverse the findings of the judge as to the honesty of Mr Kironde (and others) whom he had the advantage of seeing and hearing when they gave evidence at the trial.

*Given the judge's finding that Investcorp's post-investment breaches of clause F.4 were innocent and not deceitful, should he, nevertheless, have made findings on the loss and damage caused to Mr Al Sadik by reason of that breach.*

179 Grounds 17 and 22 in the Memorandum of Grounds of Appeal are in these terms:

> "Ground 17: When the learned Judge found that Clause F.4 of the SPA had been breached he ought to have proceeded to consider and decide whether or not the breach had caused the Appellant loss and damage.
>
> Ground 22: The learned judge was wrong in law to hold that insofar as he held the Respondents' breach of Clause F.4 occurred innocently he should not award damages for that breach."

It is submitted on behalf of Mr Al Sadik that, having found (at paragraph 5.16 of his judgment) that Investcorp was in breach of the duty to report under Clause F.4 of the SPA, the judge should have gone on to consider whether or not that breach had caused Mr Al Sadik loss and damage. Had the judge considered that question, it is said that he should have found that Mr Al Sadik had suffered loss and damage because he would have exercised his Power to Redeem to the maximum extent available on the first date that a monthly statement pursuant to clause F.4 had been issued in which the RBS loan was shown (that is to say the statement for May 2008); and that the loss and damage which he suffered was to be measured by all of the losses incurred in consequence of leverage through Blossom from the date that he would have redeemed in exercise of that power until the date he did redeem.

180 In developing those grounds it was submitted that:

(1) The judge was wrong to have any regard as to whether or not the breach was innocent. It is said that the judge ought to have held that the breach of clause F.4 was also a breach fiduciary duty, because the fiduciary duty to disclose (consequent upon Investcorp's fiduciary duty of loyalty) was a continuing duty; and that the unsatisfactory reporting by Investcorp, which he had found at paragraph 5.17 of the judgment, was both a breach of clause F.4 of the SPA and a breach of fiduciary duty, irrespective of Investcorp's innocence or otherwise; and that Mr Al Sadik was therefore entitled to the appropriate relief.

(2) Mr Al Sadik rescinded the SPA on 24 November 2009 for misrepresentation and for deceitful non-disclosure. In these proceedings he seeks (i) an order confirming his rescission and for restitution by Investcorp of the full amount of his investment (AED500 million) and (ii) damages for consequential loss to be assessed by reference to what he would have earned.

181 Given that (i) I would hold that no fiduciary duty to disclose an intention to leverage at the portfolio level arose under the pre-SPA trusts (because, if for no other reason, Investcorp had not formed such an intention before the SPA was executed), (ii) the judge held that no fiduciary duty to disclose (independently of or in addition to the contractual duty to report under clause F.4) arose under the SPA and there is no appeal on that issue and (iii) that the judge held (and I agree) that the non-disclosure in breach of clause F.4 was not deceitful, I find it unnecessary to address the claims to damages in so far as they are advanced on the

basis of breach of fiduciary duty or on the basis of deceitful non-disclosure. Nor do I find it necessary to address a claim for damages based on pre-contractual misrepresentation. In my view, no such claim was pleaded or established. On a true analysis, as it seems to me, Mr Al Sadik's claims lay in contract, for innocent breach of the reporting obligations imposed by clause F.4.

182 In response to the submission that the judge ought to have addressed the question whether Mr Al Sadik was entitled to an award of damages in respect of what he had held to be an innocent breach of clause F.4 of the SPA, it is said on behalf of Investcorp that the judge was correct not to make findings on the loss and damage caused to Mr Al Sadik by reason of the breach of Clause F4 in that no such loss and damage was pleaded: Mr Al Sadik's claim for loss and damage was put on the tortious and not the contractual basis. More particularly, it is said that:

(1) No such loss and damage was pleaded. Mr Al Sadik's claim for loss and damage for Deceitful Non-Disclosure (pleaded at paragraph C29 of the re-re-amended statement of claim) is on the tortious basis: that is to say, it is for the full investment amount and the loss of the opportunity to invest that amount elsewhere. This reflects, and is consistent only with, Mr Al Sadik's claim that there was a deceit that was planned and executed from the inception of Blossom. There is no alternative pleading for loss and damage on the basis that had Clause F4 been complied with (i.e. the contractual basis for a damages claim), Mr Al Sadik would have redeemed particular amounts at various points in time when he received Investcorp's reports.

(2) Mr Al Sadik did not advance any such case at trial. Although Mr Al Sadik made claims (for the first time) in his oral evidence that he would have redeemed at various points, a claim for loss and damage based on clause F4 was not pursued in his Written Closing Submissions. The point was specifically raised on behalf of Investcorp in counsel's oral Closing Submissions (Transcript, 5 March 2012, page 14, lines 1 to 22.)

> Counsel: In relation to F4 -- and I will come to this in more detail -- the nature of the case that has been put and pleaded is one of deceitful non-disclosure.
>
> The judge: Which is not the same thing as breach of contract?
>
> Counsel: Exactly, my Lord, and indeed that has a significance in relation to pleading, because the way the loss and damage is pleaded is right from the start there was a deceit being planned and executed to deceive as to what was going on, damages claimed, the whole of the sum invested, and the opportunity to invest it in something else. There is no plea of, 'At some stage during the course of the process, maybe June after leverage had been applied,

> I would have been told this, I would have done something different'. So if Mr Al Sadik fails on his deceitful non-disclosure case, he can't then try to revive it by saying it is an F4 case without the deceitful element, because he has not pleaded such a case. If one looks at the way the case is pleaded, the F4 is pleaded as part of 'the intention to deceive'. So I respectfully say that's the end of the deceitful non-disclosure case.

Counsel for Mr Al Sadik did not dissent from that analysis when the loss and damage pleading point was raised with him directly in his oral Closing Submissions (Transcript 6 March 2012, page 115, lines 1 to 22).

183 In seeking to advance a claim in contract for innocent breach of the reporting obligations imposed by clause F.4, it is said on behalf of Mr Al Sadik (correctly) that, given that leverage at the portfolio level was first effected by Investcorp on 1 May 2008, Investcorp was under a contractual duty to provide a report in the course of June 2008 which disclosed that that had occurred. It is said that, if Investcorp had provided such a report to Mr Al Sadik in the course of June 2008 (as it should have done) then, pursuant to Clause H.1, he would have been able to redeem AED 166 million at the end of the next calendar quarter on 60 days' notice written notice. That is to say, he would have redeemed AED 166 million as at 30 September 2008 and the balance as at 29 March 2009. It is said that, in the course of his cross-examination, Mr Al Sadik repeatedly stated that he would have redeemed if he had learned about the use of leverage by reference to an investment in LDSF: if he had discovered that his investment had been leveraged in a fund like Blossom (and all that implied) he would have redeemed. The judge was wrong not to proceed to assess Mr Al Sadik's claim for loss and damage for breach of Clause F.4 for which he claimed.

184 In response to that submission, it is said on behalf of Investcorp that Mr Al Sadik's assertion that he would have redeemed if he had learned about the use of leverage is not to be believed. In determining whether the judge should have considered loss and damage in consequence of breach of Clause F4, no weight should be given to Mr Al Sadik's assertion that he "repeatedly stated" in evidence that he would have redeemed had he seen from the reports that leverage (in any form) had been applied. Investcorp relies on the judge's observation (at paragraph 5.20 of his judgment) that:

> "5.20 . . . [It is] difficult to envisage why [Mr Al Sadik] would have objected in principle to the use of a limited recourse credit facility offered by a bank but accepted an investment in LDSF and SMFCo, when the two approaches were intended to achieve an equivalent economic result for him. In principle, the returns

would be the same and the management fee would also be the same, because he had already agreed that no fee would be charged on leverage".

Further, it is said that the references in the Appellant's Skeleton Argument to Mr Al Sadik's oral evidence at trial are all examples of Mr Al Sadik saying (in effect) that he would have objected to the leverage and redeemed because of the volatility in the markets in 2008. This evidence, it is said, is not credible having regard to: (i) the judge's findings in relation to the credibility of Mr Al Sadik (in particular, the judge's finding, at paragraph 3.11 of his judgment, that Mr Al Sadik had given "disingenuously contrived" evidence in relation to his appetite for risk; (ii) the abandonment of ground 7 in the Memorandum of Grounds of Appeal (in which Mr Al Sadik had sought to challenge the judge's finding that Mr Al Sadik's evidence on every major issue was simply not credible ); (iii) the fact that Mr Al Sadik made these assertions for the first time in his oral evidence (they do not appear anywhere in his 69 pages of written evidence); (iv) Mr Al Sadik's written evidence that he believed he had been offered a guaranteed return of 45% over three years (if that were his belief, why would he redeem his funds in those circumstances); (v) Mr Al Sadik's evidence that he was personally indifferent as to whether he received any reports: (vi) the judge's finding (at paragraph 5.20 of his judgment) that, during the Investment Proposal stage and the negotiation of the SPA, Mr Al Sadik was content for his investment to be leveraged through leveraged funds, and that he knew that the 45% target return could only be achieved by making a leveraged investment; (vii) the judge's finding (at paragraph 3.21 of his judgment) that there was discussion between Mr Al Khatib and Mr Al Sadik about leverage having been applied to his investment on 20 October 2008 and the absence of any evidence that Mr Al Sadik raised any objection to the application of leverage at that time.

185 In my judgment, if the judge had been minded to make an award of damages in respect of a claim in contract, for innocent breach of the reporting obligations imposed by clause F.4, he would have needed to decide whether, and if so when on or after 30 September 2008), Mr Al Sadik would have redeemed his investment pursuant to clause H of the SPA. It is clear - given the points advanced on behalf of Investcorp to which I have referred - that those issues would have been contested. The judge made no findings on those issues. He was entitled to take the view - having regard to (i) the absence of any pleading raising those issues, (ii) the decision, on behalf of Mr Al Sadik, not re to raise those issues in his Closing Written Submissions and (iii) the exchanges during oral closing submissions to which I have referred - that he did not need to: those issues were not before him for determination.

186 In those circumstances - for the reasons which I have set out - I would reject the submission that, having held that Investcorp was in breach of the duty to report under Clause F.4 of the SPA, but that that breach was innocent, the judge should have gone on to consider whether or not that breach had caused Mr Al Sadik loss and damage.

*The fourth issue*

*Whether the asset allocation decisions, including decisions about the application of leverage, were made in breach of fiduciary duty*

187 The judge's reasons for dismissing the Fifth Claim are set out in section 6 of his judgment. The issue which he addressed was whether the asset allocation decisions, including decisions about the application of leverage, were made in breach of fiduciary duty. He held that Investcorp's initial asset allocation decision and the subsequent decisions in relation to the application of leverage were made *bona fide* for a proper purpose in accordance with the SPA; in that the allocation of half the Investment Amount to SMFs (with x3 leverage), on the basis that the investment would be diversified across an additional four SMFs (including Alt Beta funds) as and when new funds were launched, was made in what Investcorp believed to be in Mr. Al Sadik's interest and not for the ulterior purpose of capitalizing the new funds and/or increasing its fee income through the fee sharing arrangement with the SMFs.

*The judge's findings in section 6 of his judgment*

188 At paragraph 6.1 of his judgment the judge explained that, although the Fifth Claim, as pleaded, alleged breach of trust by Investcorp Bank and/or Investcorp Nominee 1 in the capacity as trustee of the shares issued by Shallot, on a true analysis the obligation to manage the assets of Shallot (as opposed to its shares), whether held directly or through its subsidiary, was a contractual one arising under the SPA; that, in the absence of any Investment Management agreement between Shallot and Investcorp Advisers, that obligation was performed at the material times by Investcorp Bank; and that the facts and matters pleaded constituted a claim against Investcorp Bank that it exercised its discretionary powers under the SPA in breach of its fiduciary duties. It was on that basis, he said, that he intended to address the Fifth Claim.

189 At paragraphs 6.2 and 6.3 of his judgment, the judge described how the Fifth Claim had evolved in the pleadings and at the trial. He explained that it was common ground that the

SPA conferred a discretionary mandate upon Investcorp; that investing in DSF and/or the SMFs fell within the scope of Investcorp's authority under the SPA; and that Investcorp owed Mr Al Sadik a fiduciary duty to exercise its power for a proper purpose in accordance with the terms of the SPA. Investcorp's obligation, he said, was to manage the portfolio in what it *bona fide* believed to be in the interests of its client, Mr Al Sadik, and not for some ulterior purpose in its own interest. He explained that the Fifth Claim, "as finally articulated in counsel's written Closing Submission", was that Investcorp's asset allocators (Mr Gharghour and Mr. Gurnani) formulated a plan to put one half of Mr Al Sadik's money in DSF (with x2 leverage) and the other half in SMFs (with x3 leverage), with the intent that the SMF portion would be notionally divided into 10 equal parts: six of those parts to be invested in the six existing SMFs (one part in each SMF) and the remaining four parts to be invested in new SMFs and/or Alt Beta products as and when these became available. He said that the fact that such a plan was formulated on about 2 March 2008, and was implemented from 4 March 2008 onwards, was not in dispute. Mr Al Sadik's case, the judge said, was that it was an illegitimate and dishonest plan designed to serve Investcorp's interests: first, by generating capital for the development of Investcorp's Hedge Funds line of business; and, second, by generating two layers of fees from Mr Al Sadik's investment in the SMFs. The allegation pleaded on behalf of Mr Al Sadik was that Investcorp pursued that plan without regard to Mr Al Sadik's interests from 4 March 2008 (when the first investments were made) until 1 September 2008 (when leverage was added for the last time); and that it was abandoned around 16 September 2008 only because the asset allocators had reason to believe Mr Al Sadik might redeem his investment. It was alleged that the decision to employ First Layer Leverage through Blossom, using the White Ibis III credit facility, lay at the heart of the breach of fiduciary duty because Blossom was the vehicle through which the fraud was committed and the means by which it was concealed from Mr Al Sadik.

190 The judge observed that, although the re-re-amended statement of claim contained an express plea of fraud and dishonesty, that case (and the case advanced by counsel for Mr Al Sadik in his written opening submissions) differed in material respects from the case put in Mr Al Sadik's Written Closing Submissions. The judge pointed out that motive for allegedly dishonest conduct was an important element of the case to be put to witnesses in cross-examination. The motive that had been advanced, when the case was opened, was that Investcorp needed to resolve a liquidity crisis which it was then facing. But, as the

judge held, there was overwhelming evidence that Investcorp was never facing any liquidity crisis. When, as the judge put it at paragraph 6.3 of his judgment, it became apparent to Mr Al Sadik's counsel that the case, as opened, was unsustainable, it was abandoned; and, thereafter, the case was put on the basis of what counsel described as "The Plan". That case, the judge observed, was based on a distinctly different motive for the dishonest behaviour alleged against Investcorp. But he was not persuaded that, in asserting a different motive of the dishonest behaviour alleged, the factual case, as ultimately presented to the court, was so fundamentally different from the pleaded case that he should dismiss it for that reason alone. At its core, he said, the case against Investcorp was - and always had been - that it ignored Mr Al Sadik's best interests and acted for some selfish interest of its own.

190 Nevertheless, as the judge explained at paragraph 6.3 of his judgment, the fact that the case had altered at a late stage of the trial in the way that he had described did have an effect on his approach to the evidence. After referring to observations of Mr Justice Lewison in *Abbey Forwarding Limited (in Liquidation) v Hone et al* [2010] EWHC 2029 (Ch), at [47] - citing with approval observations of Mr Justice Briggs in *Dempster v HMRC* [2008] STC 2079, at [26] – the judge held (at paragraph 6.3) that:

> "Where the actions or statements of Investcorp's witnesses are open to an innocent interpretation, I should not draw the contrary inference that they were acting dishonestly for some improper purpose if the allegation was not fairly and squarely put to them in cross-examination."

191 The judge then turned to address, at paragraphs 6.4 to 6.9 of his judgment, "how and why Investcorp's investment plan for Mr AI Sadik's portfolio was formulated". His findings of fact may be summarised as follows:

(1) The portfolio construction work was done by Mr Franklin, with input from Mr Gharghour and Mr Gurnani (to whom he reported) and from Mr Mirza. Mr Franklin's work began on 24 January 2008 when Mr Gharghour forwarded to him an e-mail from Mr Mirza notifying him about the potential new client, the client's requirements and a suggested portfolio. Mr Mirza's summary of the client's requirements included a 3 year lock-up period. That turned out to be inconsistent with Mr Al Sadik's liquidity requirements. His asset allocation proposal comprised 50% in Investcorp Balanced Fund ("IBF"), 30% in Investcorp Event Driven Hedge Fund ("EDF") and 20% in SMFCo with overall portfolio leveraged x1 or x1.5 "depending

on what is possible from banks and impact of hedging cost on client returns". In other words, the judge said, Mr Mirza was contemplating First Layer Leverage and his e-mail reflected that he had already contacted Mr Nevile, who was a banker employed in Investcorp's banking department in London.

(2) Mr Al Sadik's requirement for a hedge fund portfolio denominated in UAE Dirhams was highly unusual. It was driven by his belief that the Dirham might be revalued against the US Dollar. There was discussion amongst members of the Hedge Fund and PRM groups about the cost of hedging the currency risk. In his email dated 24 January 2008 Mr Kironde suggested that the hedging cost might be as much as 4%-5% per annum.

(3) Mr Franklin's initial work was sent to Mr Gurnani on 25 January 2008. Mr Franklin made some assumptions which had an important impact on the gross returns needed to generate a net return of 45% over three years (equivalent to 13.2% per annum compounded). He assumed that the management and administration fees would be 1.2% of NAV per annum; whereas, as the judge pointed out, the management fee ultimately negotiated by Mr Al Sadik was only 0.5% of the initial equity for the first year and thereafter 0.5% of NAV calculated annually. Mr Franklin assumed that the hedging cost would be 3% whereas the overall actual net cost turned out to be lower. He initially proposed to allocate 40% of the assets to LDSF with x3 leverage, 20% to SMFs with x1x leverage and 40% to "Credit Opportunities Fund/Opportunistic Funds" unleveraged (which included reference to the planned COF which had not then been launched). He estimated the volatility at 12% to 13% which he considered reasonable given that he was looking at a gross return target of 20%. The expected returns were derived from information reflected in Investcorp's then current Hedge Fund Asset Allocation Policy Manual. Some, but not all, of his spread sheets and draft workings were put in evidence.

(4) While Mr Franklin was working on the portfolio construction, Mr Nevile was thinking about ways in which the leverage and currency hedging might be done. He summarized his initial ideas in an e-mail sent on 25 January 2008 to all those members of the Hedge Fund and PRM groups involved in the matter. He proposed that Investcorp set up an SPV for the client; and that the SPV would invest into Leveraged Note which would be either a US Dollar denominated note with Dresdner Bank (on the basis that Investcorp would do the hedging) or a UAE Dirham

denominated note with UBS (on the basis that UBS would also deal with the hedging). The judge found that Mr Nevile obviously intended that those proposals would be discussed with Mr Al Sadik at the meeting to be held on 28 January 2008; but Mr Gharghour responded that he should "forget all this for the time being". Mr Gharghour's view was that the mechanics of the hedging (and leverage) and the corporate structure should be left until the next stage of discussion with Mr Al Sadik.

(5) Mr Franklin sent his final draft of what was to become the Investment Proposal to the PRM team on 26 January 2008; expecting that they would make amendments. His proposed asset allocation was 50% in LDSF with x3 leverage, 25% in SMFs with x2 leverage and 25% in "Opportunistic Funds" with x1 leverage (including the planned COF). He expected the PRM team to make presentational alterations; but not to make any fundamental changes to the portfolio composition.

(6) Mr Mirza and Mr. Fierens worked on the proposal. The final asset allocation, as it appeared in the Investment Proposal handed to Mr A Sadik at the meeting on 28 January 2008, was described by the judge in paragraph 4.5 of his judgment, to which I have already referred. The general description of the proposed portfolio, contained in the "Overview of Proposal" (on page 2 of the Investment Proposal) remained the same; but the "Indicative Terms" (on page 5) referred to SMFCo (rather than to the underlying SMFs) and to LEDF (rather than to COF, which did not then exist). The judge found that two fundamental elements of the Investment Proposal were clear: first, it did not propose a guaranteed return; second, it did propose a leveraged investment.

(7) The meeting on 28 January 2008 was attended by Mr Al Khatib, Mr Kironde and Mr Fierens. The Investment Proposal was in the form of a slide presentation. Mr Kironde took Mr Al Sadik through it; but Mr Al Sadik moved the discussion along quickly and would not allow him to linger on the individual slides. There was no discussion at the meeting about the way in which the investment would be leveraged. The judge concluded that, following that meeting, Mr Al Sadik must have been left with the impression that it would be done by investing in the identified hedge fund products which offer a specific level of leverage. He said this:

> "6.7 My analysis of the evidence relating to the preparation of the Investment Proposal and its presentation to Mr. Al Sadik does not lead me to conclude that any of the Investcorp personnel were acting unprofessionally. In particular, the evidence does not support the allegation that Mr. Franklin deliberately overestimated the gross returns needed to meet Mr. Al Sadik's target in order to

justify increased leverage and therefore increased AUM [Assets under Management]."

(8) Mr Franklin did no further work on the portfolio construction until 24 February 2008; when he received an account of the meeting which had taken place with Mr Al Sadik on that day. The judge found that, from the perspective of Mr Franklin (as the person responsible for the portfolio construction), the key point to emerge from that meeting was the change in Mr Al Sadik's liquidity requirements. For this reason his original proposal to include COF in the portfolio would have to be dropped: because that proposal envisaged an initial two year hard lock-up period. Mr Franklin ran the figures for two alternative portfolios which sought to off-set the anticipated reduction in the expected return resulting from the exclusion of COF by increasing the leverage and increasing the exposure to SMFs. He conducted various back testing exercises and sent the result of his calculations to Mr Gurnani on 27 February 2008. He put forward two alternative scenarios: the first based on one half the assets being allocated to SMFs (x3 leverage) and one half to LDSF (x2 leverage); the second based on two thirds allocated to SMFs (x3 leverage) and one third to LDSF (x2 leverage). The expected returns (gross of hedging costs) were estimated at 21% and 22.3% respectively. Mr Franklin initially made a mistake in his volatility calculations, which was corrected in an e-mail later in the day. His revised volatility estimate was 13-14% for the first scenario and 16-17% for the second scenario. Mr Gurnani responded by e-mail indicating that the first scenario should be adopted. That was both lower risk and involved a lower allocation to SMFs than the second scenario. The judge observed that that response was inconsistent with the case advanced on behalf of Mr Al Sadik. As he said:

> 6.8 . . . If Mr. Gurnani had been motivated by a desire to use Mr. Al Sadik's money for the purpose of generating two layers of fees, one might expect him to have decided upon Mr. Franklin's second scenario."

192 At paragraph 6.9 of his judgment, the judge recorded that both Mr Franklin and Mr Gurnani were cross-examined at length about the details of the work done and decisions made in relation to the construction of the initial portfolio; and that it was put to each of them that the asset allocation exercise was "driven by the fees" and "the economics of the deal". He pointed out that the allegation was that the increased allocation of 50% to SMFs (x3 leverage) – rather than the 25% allocation to SMFCo (x1 leverage) reflected in the Investment Proposal - was driven by the existence of fee sharing arrangements between

Investcorp and the SMFs. It was also put to Mr Gurnani that Mr Al Sadik's portfolio was intended to be used as a source of "complementary capital" for the purposes of capitalizing the new SMFs and the Alt Beta fund, thus reducing the amount of seed capital needed from Investcorp itself. In order to put these allegations in their proper context, the judge took the view that it was necessary to say something about the concept of SMFs and the way in which they were promoted.

193 He did so, at paragraphs 6.10 to 6.12 of his judgment, in a section headed "The single manager concept – fee sharing arrangements". After setting out passages from the evidence of Mr Gurnani and of Professor Stowell (an expert witness called by Investcorp) and explaining that, in the present context, SMFs were funds managed by independent investment managers selected by Investcorp, he said this:

> "6.11 . . . They [the independent investment managers] are experienced individuals whose investment strategies and track record (working with established investment management firms) have impressed Investcorp and met its selection criteria. Investcorp provides the seed capital (which is usually locked up for two years), risk management oversight (which is highly important in the context of a start-up operation), and back office services. The single manager funds will usually charge investors a standard "*2 and 20*" fee structure, meaning a management fee of 2% of NAV per annum plus a performance fee of 20% of realized profits, over a hurdle rate. In consideration for providing the seed capital and on-going services, Investcorp is remunerated by receiving a percentage of the fees on a sliding scale depending upon the amount of Investcorp's capital contribution and the size of the NAV. It is not disputed that this arrangement is consistent with established industry practice and that it is fully disclosed in the offering documents published by each of the Single Managers, copies of which were readily available to Mr Al Sadik. . . ."

But the judge went on to point out that it was accepted that these fee sharing arrangements were not brought to Mr Al Sadik's attention, either at the time of executing the SPA or at any time thereafter. And he accepted that investing Mr Al Sadik's money in the SMFs indirectly generated a higher fee income for Investcorp than an investment in DSF (for instance) would have done; and that investing in SMFCo, which in turn invested in the SMFs, had the same indirect result. Nevertheless he noted that both Mr Franklin and Mr Gurnani "emphatically denied" that the portfolio construction was "driven by fees" or by "the economics of the deal". The judge set out passages from the evidence of Mr Gurnani which were to that effect. At paragraph 6.12 of his judgment he said this:

> "6.12 The terms of the fee sharing arrangements vary. In each case there is a sliding scale starting at nil and rising to a maximum which varies considerably. In each case the fixed management fee is 2% of NAV and I assume that the performance fee is 20% of realized gains over some specified hurdle rate. It

follows that Investcorp's maximum share of the management fee varies from 0.2% up to 1% of the Single Manager's NAV and its maximum share of any performance fee would vary from 2% to 10% of the profit over the hurdle rate. I do not have any evidence about the actual amount received by Investcorp from the Single Managers as a result of the investments made on behalf of Mr Al Sadik, but it would always be negligible relative to Investcorp's total income of US$383 million for the year ended 30th June 2008, of which US$85.7 million was earned from the hedge funds line of business. In these circumstances, it must be inherently unlikely that the existence of this type of fee sharing arrangement (which is actually compensation and not a commission or profit share) would motivate Messrs. Franklin, Gurnani and Gharghour to behave unprofessionally. Mr. Gurnani explained quite convincingly that what matters from a commercial point of view is generating good returns for clients. In my judgment the evidence leads to the conclusion that the decision to allocate half of the Investment Amount to Single Managers (leveraged 3x) was made bona fide in the belief that it was an appropriate component for Mr. Al Sadik's portfolio having regard to the 45% return target over three years. If Messrs. Gurnani and Gharghour's decision had been 'driven by the fees' one might expect them to have opted for Mr. Franklin's Scenario #2 which involved allocating two-thirds to Single Managers rather than Scenario #1 which proposed allocating only half to them."

194 At paragraphs 6.13 to 6.15 of his judgment, the judge addressed the case, advanced on behalf of Mr Al Sadik, that the allocation of one half of his investment to SMFs was driven by a need to replace or complement proprietary capital. He referred to an email chain sent by Mr Kapoor on 19 February 2008, on which counsel for Mr Al Sadik relied. He explained that Mr Kapoor had informed the Hedge Funds group about his budget plan for the amount of Investcorp's proprietary capital to be allocated to its hedge fund business for 2008; and that that had led Mr Franklin to set out his proposed plan for the following six to twelve months on the assumption that the budget figure was US$1.9 billion; and to project a US$400 million investment in four new SMFs and three new Alt Beta products. But the judge held that that documentation did not lead him to infer that Mr Franklin's portfolio construction was in any way driven an intention that part of Mr Al Sadik's capital could be used to substitute or "complement" Investcorp's proprietary capital. He set out passages from the written evidence of Mr Gurnani and referred to answers which he (Mr Gurnani) and Mr Franklin had given; and he went to say this (at paragraph 6.14 of his judgment):

> "6.14 Investcorp did decide to reduce the amount of proprietary capital allocated to its hedge fund line of business but this decision was not communicated to the Hedge Fund group until after they had made the decision to deploy Mr. Al Sadik's funds in the Single Managers. Nor did this decision prevent the launch of new Single Managers."

Those conclusions, he said, were apparent from the examination of a series of e-mails, beginning in May 2008, when Mr Kapoor explained to Mr Gurnani and others that he did

not wish to allocate US$50-100 million of proprietary capital to COF. He explained that Mr Kapoor had written in his email sent on 4 May 2008 that his primary concern was that Investcorp already had significant exposure to the credit opportunities strategy, both through the Washington Corner and investments in DSF and IBF. This e-mail exchange prompted discussions between Mr Kapoor and Mr Chehime about the scale of Investcorp's hedge funds co-investments and they agreed that the amount should be reduced. The conclusions reached were set out by Mr. Chehime in a presentation entitled "Optimizing HF Investment Risk Profile" which he sent to Mr. Kapoor on 1 May 2008. The judge said that the presentation proposed a staged reduction of hedge fund proprietary capital, starting with a reduction to US$1.75 billion by 1 July 2008 and culminating in a target proprietary capital of US$1.25 billion by 1 July 2009. The reduction was to be achieved by reducing the investment in the funds of hedge funds, thus enabling Investcorp to continue providing seed capital for the single manager programme. The judge found that the overall reason for this strategy was the reallocation of capital to new ventures. In consequence, he said, a redemption request was made on 26 May 2008; but Mr Gurnani and Mr Gharghour sought to defer redemption on the basis that, although it could be met, it would prevent the continuing reduction of DSF's overdraft which had been mandated by a recent review of the hedge fund line of business. The result, he said, was that they agreed to postpone the proposed redemption and settled on a target phased reduction of the proprietary capital invested in the hedge fund line of business down to US$1.25 billion by 1 July 2009. He concluded (at paragraph 6.15 of his judgment) that Mr Kapoor's e-mail of 4 June 2008 reflected a decision to provide proprietary capital of US$25 million (rather than the previously agreed amount of US$50 million) for each of three Alt Beta strategies; and he noted that Mr Kapoor also agreed, later in June 2009, to provide just under US$100 million of proprietary capital to seed two further SMFs, namely White Eagle and Hawkstone. The judge held that those decisions did not support Mr Al Sadik's case that the allocation of half of his money to SMFs was motivated by a need to replace or complement proprietary capital. He said that:

> "6.15 The injection of just under US$100 million of capital to two new seeded managers in June and July 2008, and the fact that the planned reduction in proprietary capital co-investments was to be from a fund of hedge funds, not Single Managers, suggests that Investcorp continued to be fully committed to its single manager programme."

195 At paragraphs 6.16 to 6.20 of his judgment, the judge addressed Mr Al Sadik's complaint that the use of First Layer Leverage caused him substantial disadvantages, over and above those which would have resulted from an investment in leveraged hedge fund products such as LDSF and SMFCo; and that (in particular) the terms of the White Ibis III credit facility exposed him to a materially higher degree of risk of loss. The judge explained (at paragraph 6.21) that the decision to invest in SMFs with x3 leverage necessarily required the use of First Layer Leverage because SMFCo offered only x1 leverage.

196 The judge explained that "White Ibis III" was the name used by Investcorp to describe the Master Note Purchase Agreement dated as of 2 January 2008 and originally made between LEDF and SMFCo (in each case acting solely for only one of their respective segregated portfolios), as issuers of loan notes, and RBS, as the initial noteholder. The purpose of this agreement, he said, was to enable LEDF and SMFCo to obtain credit with which to make leveraged investments in EDF and the SMFs respectively. It was amended and re-stated on 10 April 2008 for the specific purpose of adding Blossom as an additional issuer for the purpose of financing leveraged investments in DSF and the SMFs (including the proposed Alt Beta fund).

197 The judge pointed out (at paragraph 6.17 of his judgment) that the three issuers (LEDF, SMFCo and Blossom) were unrelated entities; and that, accordingly, the White Ibis III credit facility necessarily constituted a limited recourse facility under which RBS had recourse to Blossom's assets only for the purpose of discharging Blossom's liabilities. There was never, he said, any question of the issuers' assets being used to cross-collateralize each other's liabilities. He referred to what he described as the theoretical possibility that a default on the part of one issuer could have an adverse impact on the other two issuers: a possibility which, he said, could arise because a default by one issuer could constitute a "global early termination event"; giving RBS the option to terminate the facility as a whole and so putting the other issuers in the position of having to re-finance their borrowings, either with RBS itself or another bank. He described that as a risk inherent in any multi-party credit facility; and said that it had no more significance for Blossom than for LEDF and SMFCo.

198 At paragraph 6.18 the judge explained that, under the White Ibis III credit facility, the issuers (LEDF, SMFCo and Blossom) were subject to restrictions of a kind ordinarily included in this type of credit facility. Blossom, he said, was subject to a loan to value ratio

of 70%: which had the effect that its equity of US$135 million would support borrowings up to US$315 million, so limiting the overall leverage ratio to x2.3 or thereabouts. He explained that, during the first year of the White Ibis III credit facility the concentration of Blossom's investments was subject to the following limitations: (i) at least 40% of the portfolio was to be invested in DSF (reducing to 33% in the second year); (ii) no more than 60% of the portfolio was to be invested in SMFs; and (iii) no more than 20% of the portfolio was to be invested in Alt Beta. He said that Mr Franklin's involvement in the negotiations with RBS ensured that the investment restrictions were consistent with asset allocation decisions made in respect of Blossom. But he accepted that it was right to say that the existence of such specific borrowing restrictions would present a need to re-negotiate in the event that Investcorp decided to re-allocate the assets - for example, by investing in IBF rather than DSF- and also right to say that the existence of investment restrictions might force a borrower to re-balance his portfolio as a result of changes in the relative market values of its components. He expressed the view that that consequence would not necessarily be against the interests of the borrower. He held that it was normal for this type of credit facility to include borrowing restrictions; that the restrictions agreed with RBS were intended to facilitate Mr Al Sadik's portfolio construction; and that there was no reason to suppose that those restrictions could not have been re-negotiated to accommodate a different portfolio, so long as the change did not adversely impact upon RBS's assessment of its counterparty risk.

199 The judge went on to explain (at paragraph 6.19 of his judgment) that the use of First Layer Leverage resulted in a concentration of risk, compared with leveraging the investment through separate vehicles such as LDSF and SMFCo. Leveraging investments in DSF and the SMFs separately, through LDSF and SMFCo, would lead, he said, to what counsel had called "product isolation": that is to say, that a catastrophic loss or insolvency of DSF, for example, would have no impact upon the value of Mr Al Sadik's investment in the SMFs. To have replicated that position using First Layer Leverage it would have been necessary to enter into two or more limited recourse credit facilities with different banks for the purpose of leveraging each investment separately. By causing Blossom to enter into a single credit facility, Investcorp had deprived Mr Al Sadik of the benefit of "product isolation". But this was equally true in relation SMFCo. The fullest "product isolation" for Mr Al Sadik, could have been achieved, not by investing in SMFCo, but by

leveraging his investments in the SMFs separately through six limited recourse credit facilities with six different banks.

200 The judge explained (at paragraph 6.20 of his judgment) that the purpose of entering into the White Ibis III credit facility was twofold; first, it was necessary because a x3 leveraged exposure to the SMFs could not be achieved through SMFCo; second, it was desirable to use First Layer Leverage because it provided Investcorp with the flexibility to apply leverage incrementally and control the level of leverage more easily. He went on to say this:

> "6.20 . . . With the benefit of hindsight, it can be said that this advantage was real because Mr Al Sadik's losses would have been greater if he had been fully invested in LDSF and SMFCo from day one. However, the use of a multi-party credit facility in the terms of White Ibis III also carried with it certain disadvantages and risks, but it cannot be said that they were in any way unusual or peculiar to Blossom. Both Prof. Stowell and Mr. Opp said that, in their experience, the investment restrictions and other terms of White Ibis III intended to protect the lender's interest, were consistent with what they would normally expect to see in credit facilities of this sort. There is nothing about these terms which leads me to the conclusion that Investcorp was disregarding Mr Al Sadik's best interests by entering into this credit facility."

201 At paragraphs 6.21 to 6.27 of his judgment the judge addressed Mr Al Sadik's complaint that, in applying leverage to his portfolio incrementally, Investcorp was serving its own interests, and acting to his disadvantage. At paragraph 6.21 he set out (in a table) the amounts drawn down, for the purpose of leverage, in the months of May, June, August and September 2008. That table showed that the first draw down was on 1 May 2008. The judge explained that it was said, on behalf of Mr Al Sadik, that draw down commenced on 1 May 2008 only because that was the earliest opportunity after the funds became available; and that the reason for not applying the maximum amount which could be drawn down under the credit facility "on day one" was that Investcorp was "saving the bullets" for use when the new SMFs and Alt Beta fund were launched. But, he said, Mr Gurnani emphatically denied this allegation: he insisted that leverage was applied incrementally because Investcorp was cautious about the economic environment and market outlook. The judge observed that the phrase "saving the bullets", adopted by counsel on behalf of Mr Al Sadik, was taken from an email sent by Mr Gharghour on 18 June 2008 to Mr Kironde and Mr Franklin in response to a request from Mr Kironde for an explanation why the Interlachen Fixed Income Relative Value Fund had been excluded from Blossom's asset allocation. The email was in these terms:

> "Very simple: we are not yet sure if we will roll out this fund as a stand alone fund and want to save our bullets for single managers and alt beta (we have 4 new fundings soon, 2 alt beta and 2 new single managers, white eagle, which is European event, and Hawkstone which is long/short European fund)."

After setting out passages from the oral evidence of Mr Franklin and Mr Gurnani, the judge concluded that he should not draw any adverse inference from what he described as "Mr. Gharghour's colourful use of language". He said this (at paragraph 6.23 of his judgment):

> "6.23 . . . It seems to me that it describes a perfectly legitimate investment strategy which has been fully explained by the evidence of Mr. Franklin and Mr. Gurnani. The decision to diversify the portfolio of Single Managers by adding four additional funds/strategies (but not duplicating strategies) does not raise a red flag in my mind and suggest that Investcorp was putting its own interest ahead of Mr. Al Sadik's interest. Mr. Franklin and Mr. Gurnani struck me as honest, experienced industry professionals. There was nothing about their explanation for the original asset allocation decision or the subsequent applications of leverage which tended to suggest that they were acting dishonestly for some improper purpose."

202 The judge went on to explain (at paragraph 6.24 of his judgment) that Mr Al Sadik also relied on email exchanges on 23 to 25 May 2008, in which Mr Gurnani, Mr Gharghour and Mr Franklin discussed the decision to apply leverage on 1 June 2008, and on an email sent on 28 May 2008, in which the outcome of those discussions was reported to Mr Boynton. After setting out the terms of those emails and observing, first, that the outcome was consistent with the policy that Investcorp should use its own proprietary capital to launch a new SMF and that client capital should follow some months later and, second, that, in the light of the decision, Mr Franklin proposed to make a corresponding increase in the allocation to the existing six SMFs, with the result that US$67.5 million was drawn down, thereby increasing the overall leverage ratio from 0.5% to 1.0%, the judge said this:

> "6.24 . . . I do not infer from this e-mail exchange any improper motive on the part of Investcorp. To the contrary, it seems to me that it is evidence that the decision makers were complying with Investcorp's established policy and acting in their client's interest. If Messrs. Gurnani and Gharghour were intent upon using Mr. Al Sadik's portfolio simply as means of launching White Eagle for Investcorp's own commercial benefit, one might expect them to have followed Mr. Franklin's suggestion. They did not."

203 At paragraph 6.25 of his judgment the judge explained that, at around this time (May 2008), Investcorp was conducting the annual review of its various lines of business. He said that Mr Al Sadik relied on a memorandum dated 14 May 2008 sent by the chief

operating officer (Mr Long) to the chairman (Mr Kirdar), with a copy to the chief financial officer (Mr Kapoor). That memorandum comprised a summary of key action points and key points for discussion. Under the heading "Hedge Fund (HF) Review", it was said that:

> "1. HF Group to agree a set of actions with Rishi to get HF Group (all business activities within HFs) to the 40% net fee margin benchmark within a defined period of time.
>
> 2. No LDSF (i.e. the levered product) campaign to be launched by PRM until the market stabilizes (and when a campaign is launched, HF/PRM to consider a minimum 1 year lock up period).
>
> 3. HF to de-risk LDSF at the Fund level (as opposed to going to clients suggesting a shift from the levered product)."

The judge said that Mr. Fierens (the chief of staff of PRM), in explaining this memorandum, had explained that paragraph 2 did not mean that Investcorp intended to cease marketing its leveraged hedge funds; it simply meant that there would be no "campaign-based approach, where we would do a marketing blitz around a certain product"; that paragraph 3 meant "protecting the downside" by making sure that no leverage was being run accidentally at the underlying fund level (meaning DSF); and that Investcorp never made the decision to "get people out of LDSF into unlevered products". The judge said that Mr. Gurnani explained this part of the review in the same way. The judge held that:

> "6.25 . . . This evidence does not point to the conclusion that the decision to add leverage on 1st June was inconsistent with Investcorp's market outlook or any high level policy."

204 The judge explained (at paragraph 6.26 of his judgment) that, on 25 June 2008, Mr Franklin sent an email to Mr Gharghour and Mr Gurnani with his asset allocation recommendations for 1 July. Those included a recommendation for a further draw-down from the credit facility for the purpose of investing an additional US$33.9 million in DSF (which would take the leverage ratio up to x1.5); and a recommendation that nothing more be added to the SMFs, with a view to investing in the two new ones (White Eagle and Hawkstone) on 1 September or 1 October and then three Alt Beta products for a total of eleven, rather than ten, SMFs. The judge said that that proposal was discussed in a conference call on the following day, in which Mr Gharghour, Mr Gurnani, Mr Kironde and Mr Mirza took part. The judge held that that evidence did not suggest "blind adherence to an investment strategy without regard to Mr. Al Sadik's interest". To the contrary, he said, it evidenced that a review was conducted. In the event, as the judge

found, Mr Franklin's recommendation was not followed; no leverage was added on 1 July; and, as at 30 June 2008, the portfolio's performance was slightly down.

205 As the table at paragraph 6.21 of the judgment shows, leverage was added as at 1 August 2008; when an additional US$33.9 million was invested into DSF, taking the leverage ratio up to x1.5 for DSF and x1.3 for the portfolio as a whole. The judge explained that that proposal was reflected in an e-mail from Mr Nirav Shah; but that there was no documentary evidence recording that the proposal was reviewed in a conference call, as in the prior month. The judge said that, although Mr Gurnani had no specific recollection of what took place, he had explained in the course of his cross-examination that there was a process which was followed every time; that Mr Franklin did not have authority to make asset allocation decisions; that he was absolutely sure that he (Mr Gurnani) would have participated in the review and made the final decision; and that the decision was recorded in the follow-up email which constituted the instructions to Mr Boynton who was responsible for its implementation. The judge held that, in the light of Mr. Gurnani's evidence that there was a review process which was always followed, it would not be reasonable to infer that no review took place simply because there is no documentary evidence of it having done so.

206 At paragraph 6.28 of his judgment the judge referred to a similar email, which was circulated on 25 August, 2008, in respect of the proposed asset allocations for 1 September 2008. That email, he said, related to SMFCo, Blossom and another client company. In it, Mr Franklin recommended adding US$22.8 million to Blossom's investment in DSF which would take the leverage ratio to x1.85; commented that this would be "slightly short of intended 2.0x since the debt that RBS allowed slightly fell short of plan"; and recommended investing:

> "Blossom in white eagle: 7th single manager - 22.4m, reserving place for 1 more SM after white eagle and 3 alt beta products. The current leverage level on single managers after white eagle investment is 1.3x (planned leveraged is 3.0x)"

The judge went on to explain that Mr Franklin also recommended, in that email, that SMFCo invest an additional US$7.5 million and that the other client invest US$2.5 million (representing 4% of its equity of US$62.5 million) in White Eagle. All those proposals, he said, were approved by both Mr Gharghour and Mr Gurnani; and, at the time that decision was made, they must have known that the NAV of DSF and the SMFs had fallen in the month, although they would not have known the precise numbers until later. He explained

that, as at 31August 2008, the NAV of Mr Al Sadik's portfolio was US$128.2 million, compared with US$132.6 million at 31 July and US$135 million at inception. That decision, he said was consistent with the original asset allocation decision made at the beginning of March 2008; but he did not regard it as evidence of a blind adherence to the plan without regard to Mr Al Sadik's interests. After setting out passages in the evidence of Mr Gurnani in answer to questions as to the reasons for increasing the leverage incrementally – which were to the effect (as the judge summarised), that the asset allocation decision made in March 2008, with a three year time horizon, was still being pursued six months later, notwithstanding that the NAV of the portfolio had fallen from US$135 million to US$128.2 million during the period – the judge said this:

> "6.28 In my judgment, the evidence does not allow me to infer that this decision was made without regard to Mr. Al Sadik's interest, in blind adherence to a plan which was improper from its inception. With the benefit of hindsight, it can be said that wrong decisions were made and that Mr. Al Sadik would have been better off if his investment had not been leveraged but those decisions were honestly made in accordance with an established review and decision making process."

*The questions for determination by this Court in relation to the fourth issue*

207 Mr Al Sadik's case in respect of his Fifth Claim ("Breach of Trust") was pleaded in these terms (at paragraphs C23 and 24 of the re-re-amended statement of claim:

> "23. On the terms of the Trust arising between Investcorp Bank and Mr. Al Sadik . . . Investcorp Bank was under a duty ("the Trust Duties") – (i) to do everything within its power to ensure that the terms of the SPA were carried into effect in a fair and honest manner and (ii) and under a duty of loyalty and fidelity to Mr. Al Sadik.
>
> 24. By organising and permitting the investment of the trust fund (in the value of the Investment Amount) in circumstances in which First Layer Leverage would be used each of Investcorp Bank and/or Investcorp Nominee 1 committed a breach of the first and/or the second of the Trust Duties."

But, as the judge explained (at paragraphs 6.2 and 6.3 of his judgment) the claim evolved during the course of the trial; and, "as finally articulated in counsel's written Closing Submission", was advanced on the basis that, on or about 2 March 2008, Investcorp's asset allocators (Mr Gharghour and Mr Gurnani) formulated a plan ("the Plan") for the investment of the Investment Amount which was implemented from 4 March 2008 and pursued, without regard to Mr Al Sadik's interests, until September 2008; and which was "an illegitimate and dishonest plan designed to serve Investcorp's interests: first, by generating capital for the development of Investcorp's Hedge Funds line of business; and, second, by generating two layers of fees from Mr Al Sadik's investment in the SMFs".

The judge observed that, the motive for allegedly dishonest conduct was an important element of the case and needed to be put to be put to witnesses in cross-examination. That observation was of particular relevance in a case where, as in the present case, the motive (or motives) alleged and relied upon by Mr Al Sadik had changed in the course of the trial. He accepted that, at its core, the case against Investcorp was - and always had been - that it ignored Mr Al Sadik's best interests and acted for some selfish interest of its own. But he directed himself that, where the actions or statements of Investcorp's witnesses were open to an innocent interpretation, he should not draw the contrary inference that they were acting dishonestly for some improper purpose if the allegation was not fairly and squarely put to them in cross-examination.

208 In summary, it is submitted on behalf of Mr Al Sadik, first, that the judge misconstrued his case on the issue whether or not Investcorp exercised the Investment Power in its own interests in breach of fiduciary duty and that, as a result approached the evidence on the basis that allegations of fraud were being made against Investcorp and its witnesses; and second, that the judge was led by his flawed approach to the evidence to hold, wrongly, that Investcorp exercised the power of investment in clause A in Mr Al Sadik's interests and not in its own interests. It is said on behalf of Investcorp that the judge's approach to the evidence and his application of the burden of proof was plainly correct; and that, regardless of questions about the "approach" to the evidence he heard at trial, the only conclusion available to the judge, as he found, was that Investcorp at all times acted in Mr Al Sadik's interests.

209 The questions for determination by this Court in relation to the fourth issue are:

(1) Whether the judge misconstrued the nature of Mr Al Sadik's case that Investcorp exercised the Investment Power in breach of fiduciary duty; and so approached the evidence on the wrong basis.

(2) Whether the judge's approach to the evidence led him to conclude, wrongly, that Investcorp had exercised the Investment Power in Mr Al Sadik's interests rather than in its own interests.

*Did the judge misconstrue the nature of Mr Al Sadik's case that Investcorp exercised the Investment Power in breach of fiduciary duty; and so approach the evidence on the wrong basis.*

210 Grounds 25 and 26 in the Memorandum of Grounds of Appeal were in these terms:

> "Ground 25: The learned Judge misconstrued the Appellant's case on the issue whether or not the First Respondent exercised the Investment Power in its own interests in breach of fiduciary duty.
>
> Ground 26: The learned Judge erred in law when he incorrectly approached the evidence about breach of fiduciary duty on the basis that allegations of fraud were being made."

211 It is submitted on behalf of Mr Al Sadik that, in stating (at paragraph 6.2 of his judgment) that "The Plaintiff's case is that [the Plan] was an illegitimate and dishonest plan designed to serve Investcorp's interests", the judge misconstrued Mr Al Sadik's case; and that he was wrong to state that Mr Al Sadik had alleged "fraud" because Mr Al Sadik did not make any such allegation. Correctly understood, it is said, Mr Al Sadik's case was: (i) that the Investment Power under the SPA was a fiduciary power; (ii) that because the IMA had not been executed the Investment Power was held on trust by Investcorp; (iii) that Investcorp was under a duty of loyalty in respect of the exercise of the Investment Power; (iv) that Investcorp was under a duty to exercise the Investment Power only in the best interests of Mr Al Sadik; (v) that Investcorp exercised the Investment Power for its own benefit and/or without any or any proper regard for the interests of Mr Al Sadik; (vi) that Investcorp exercised the Investment Power primarily for its own benefit to propagate its hedge funds line of business and/or to earn additional fees from the SMFs; (vii) that Mr Al Sadik did not give his informed consent to the exercise by Investcorp of the Investment Power primarily for its own benefit; and (viii) that Investcorp was in breach of its duty to exercise the Investment Power only in the best interests of Mr Al Sadik in that it acted in circumstances where it had a personal interest which was in conflict with the duty it owed to Mr Al Sadik.

212 In developing the submission that the judge erred in treating Mr Al Sadik's case as founded on an allegation of dishonesty - and that the judge's observation, at paragraph 6.3 of his judgment that:

> "Where the actions or statements of Investcorp's witnesses are open to innocent interpretation, I should not draw the contrary inference that they were acting dishonestly for some improper purpose if the allegation was not fairly and squarely put to then in cross-examination"

was wrong as a matter of law - it is said:

(1) Mr Al Sadik's case was that Investcorp was in breach of its fiduciary duty of loyalty, not that Investcorp had been dishonest; the issue whether or not Investcorp's

witnesses had an honest or dishonest state of mind was not relevant to the issues the judge had to decide in relation to the Fifth Claim.

(2) The judge was wrong to approach the Fifth Claim on the basis that Mr Al Sadik "explicitly pleads a case of fraud and dishonesty". He seems to have arrived at this wrong conclusion because a pleaded motive for fraudulent misrepresentation claims (which Mr. Al Sadik did not eventually pursue) was that Investcorp had suffered from a liquidity crisis. However, the Fifth Claim was not put on the basis of fraud; and the judge was wrong to approach the Fifth Claim as he did.

(3) The judge's approach led him to make the observation at paragraph 6.3 of his judgment (set out above); that approach coloured the judge's assessment of the evidence of Investcorp's witnesses in relation to the Fifth Claim and renders the entire judgment in respect of the Fifth Claim unsafe.

(4) The approach was wrong and unsafe for the additional reason that the judge should have recognised that, because the Investment Power was a fiduciary power, the burden lay on Investcorp to show that it had been exercised in the best interests of Mr Al Sadik.

In summary, it is said that, having concluded, wrongly, that Investcorp's admitted fiduciary duties added nothing to its contractual duties - and notwithstanding the recognition of Investcorp's own witnesses that Investcorp was bound to act in Mr Al Sadik's best interests - the judge not only reversed the burden of proof (by assuming that it lay on Mr Al Sadik) but imposed an inappropriate standard of proof (namely that applicable to fraud). His analysis of the evidence was entirely vitiated by these fundamental errors of law.

213 In response, it is submitted on behalf of Investcorp that the judge correctly described and assessed the Fifth Claim; and that Mr Al Sadik's partial quotation of paragraph 6.3 of the judgment provides no support for the submission that the judge considered the wrong case. In short, it is said, Mr Al Sadik appears to have misunderstood not only what the judge said but also his own case as advanced at trial. More particularly, it is said that:

(1) The judge's observation, at paragraph 6.3 of his judgment, that where the actions or statements of Investcorp's witnesses were open to an innocent interpretation he should not draw the inference that they were acting dishonestly for some improper purpose if the allegation was not fairly and squarely put to them in cross-examination, must be understood in the context in which it was made. Counsel for Mr Al Sadik had been

challenged, on a number of occasions during the trial, for failing properly to put his case to Mr Gurnani and Mr Franklin , among others (Transcript, 15 February 2012, page 145, line 24 to page 149, line 7, and Transcript,16 February 2012, page 63, line 6, to page 66, line 19, provide examples). The judge's conclusion was self-evidently correct.

(2) The judge approached the issue of what findings he could properly make in relation to the honesty of Investcorp's witnesses against the background of his description of the evolution of the Fifth Claim. The Fifth Claim had alleged Breach of Trust based on Investcorp's arrangement and application of First Layer Leverage (at paragraphs C23 and C24 of the re-re-amended statement of claim). The judge's approach to the issue to which he referred at paragraph 6.3 of his judgment was consistent with the pleaded case that Investcorp had breached the duty to carry out the SPA honestly.

(3) In the latter stages of trial, the case advanced by Mr Al Sadik in respect of the Fifth Claim changed radically, and was finally formulated only in paragraphs 224 to 275 of his Written Closing Submissions, served after 26 days of trial. But that change was in respect of the alleged motive for Investcorp's behaviour. At paragraph 1.14 of his judgment the judge described that re-formulated case in these terms:

> "Finally, there is the 5th claim in the Re-Re-Amended Statement of Claim, described as a breach of trust claim which is essentially based upon the allegation that Investcorp was under a duty to do everything in its power to ensure that the terms of the SPA were carried into effect in an honest manner in the interests of Mr Al Sadik. The pleaded breach of trust was based upon the allegation, now abandoned, that Investcorp's investment decisions were motivated by a desire to alleviate a pressing liquidity crisis. The case put in Counsel's written Closing Submissions is that the investment decisions were made for the improper purpose of providing complementary capital for its single manager programme (including the proposed Alt Beta fund) and generating two layers of fees. Whether it is open to the Plaintiff to pursue this un-pleaded claim is an issue I have to decide."

The judge correctly identified (at paragraph 6.3 of his judgment) that the "Plan" first alleged by Mr Al Sadik at trial was a "distinctly different motive for the dishonest behaviour originally alleged against Investcorp". The central allegation that Mr Gurnani and Mr Franklin knowingly pursued an improper purpose, deliberately acting in Investcorp's own interests and acting against the interests of Mr Al Sadik, plainly involved the implicit allegation of dishonest conduct. Mr Al Sadik overlooks the fact that his allegations concerning the "Plan" were inextricably linked to his case on the use of Blossom and its inclusion in the investment structure, which was also put on the basis that Investcorp had acted dishonestly. This was acknowledged by counsel for

Mr Al Sadik in his oral closing submissions (Transcript, 6 March 2012, page 160, lines 1 to 5 and 16 to 19). The judge observed (at paragraph 6.2 of his judgment) that the decision to use First Layer Leverage through Blossom, using the White Ibis III credit facility, went to the heart of Mr Al Sadik's allegations of fiduciary duty.

(4) It is not open to Mr Al Sadik to suggest , on this appeal, that his case at trial was not that Investcorp acted dishonestly having regard to the exchange between judge and counsel in the course of his unsuccessful application to amend his case on the eve of trial (Transcript of hearing on 1 December 2011, page 21, lines 3 to 8):

> "The judge: I think there would be more force in that point if this really was a negligence action. It's not -- it's a breach of fiduciary duty to which you're making serious allegations of dishonesty.
>
> Counsel: Yes, we are, My Lord."

Further, in response to the submissions that, in making his findings of fact, the judge shifted the burden of proof and applied the wrong standard of proof, it is said on behalf of Investcorp that:

(5) Mr Al Sadik's contention that the burden of proof lay on Investcorp to establish that it did not act in breach of trust is ill-founded. It is readily apparent from the judgment that the judge applied well- established principles. Mr Al Sadik has identified no basis on which it can be said that the judge was wrong to do so; and cites no authority in support of his unreasoned assertion. It is accepted, as trite law, that a fiduciary is bound to account for any profit that he has received in breach of fiduciary duty. The taking of an account is the means by which the beneficiary requires the trustee to justify his stewardship of trust property: the trustee must show what he has done with that property: on the taking of an account, the court lays the burden on the defaulting fiduciary to show that the profit is not one for which he must account. But, it is said, that is not this case: (i) Investcorp had not been found to have acted in breach of fiduciary duty; (ii) there is no dispute as to what Investcorp did with the monies invested by Mr Al Sadik; and (iii) no account has been ordered in respect of any profit. Mr Al Sadik ignores the wider point of principle that the burden of proof lies on the party who asserts the truth of the issue in dispute: in the present context that issue was whether Investcorp acted in breach of fiduciary duty. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden (the so-called evidential burden) shifts to the other party, who will fail on the issue in question unless he adduces evidence sufficient to rebut the presumption.

(6) It is then for the court to make its decision on the "balance of probabilities", and this is the standard of proof required in civil cases. Mr Al Sadik has failed to identify any basis for his submission that the judge applied the wrong standard of proof. Nowhere in his judgment did the judge suggest that he was applying anything other than the ordinary civil standard of proof.

Accordingly, it is said, the judge was correct to conclude that he should only make a finding of dishonesty if that allegation had been fairly put to a witness: that was a relevant and necessary conclusion in the context of the case that Mr Al Sadik advanced at trial. The attempt to overturn the judge's first-hand impressions of the relevant witnesses is hopeless.

214 The Fifth Claim ("Breach of Trust) was pleaded at paragraphs C23 and C24 of the re-re-amended statement of claim:

> "23. On the terms of the Trust arising between Investcorp Bank and Mr. Al Sadik . . . Investcorp Bank was under a duty ("the Trust Duties") – (i) to do everything within its power to ensure that the terms of the SPA were carried into effect in a fair and honest manner and (ii) and under a duty of loyalty and fidelity to Mr. Al Sadik.
>
> 24. By organising and permitting the investment of the trust fund (in the value of the Investment Amount) in circumstances in which First Layer Leverage would be used each of Investcorp Bank and/or Investcorp Nominee 1 committed a breach of the first and/or the second of the Trust Duties.

In my view the judge was right to treat that as a claim founded on allegations of dishonesty. Paragraph 24 of the re-re-amended statement of claim alleged that, by investing the trust fund in circumstances in which First Layer Leverage would be used, Investcorp committed a breach of the first of the Trust Duties identified in paragraph 23; and paragraph 23 identified, as the first of the Trust Duties, a duty to do everything in its power to ensure that the terms of the SPA were carried into effect "in a fair and honest manner". Taken together, the substance of the allegation is that, in using First Layer Leverage, Investcorp failed to act in an honest manner: that is to say, that Investcorp acted dishonestly.

215 The claim evolved during the course of the trial - as the judge explained (at paragraphs 6.2 and 6.3 of his judgment) - because Mr Al Sadik (through his counsel) recognised that the motive originally relied upon as the foundation for the allegation of dishonesty could not be established, the case against Investcorp remained "that it ignored Mr Al Sadik's best interests and acted for some selfish interest of its own". As the judge put it - correctly, in

my view - the factual case ultimately presented to the court, although "asserting a different motive of the dishonest behaviour alleged" , was not fundamentally different from the pleaded case. In those circumstances, I reject the submission that the judge misconstrued the nature of Mr Al Sadik's case in relation to the Fifth Claim. The claim was at the outset, and remained, a claim based on allegations of dishonest conduct on the part of Investcorp and its relevant employees. The judge was right to treat it as such.

216 I reject, also, the submission that the judge approached the evidence on the wrong basis. I agree with Investcorp that the burden of establishing the case that it was in breach of trust - or in breach of fiduciary duty - lay on Mr Al Sadik; and that the evidential burden did not shift in the course of the trial. In my view, that submission is correct; for the reasons which Investcorp has advanced. The Fifth Claim was not a claim for an account of profits: the primary rule that the burden of proof lies on the party who asserts the truth of the issue in dispute was not displaced. And I agree with Investcorp that there is nothing in the judge's judgment to suggest that the judge applied a standard of proof other than the civil standard of proof. But the allegations of dishonesty that were at the core of Mr Al Sadik's case were serious allegations against professional bankers; and the judge was right to approach them on that basis. In particular, he was right not to make findings against Mr Kironde (and others) on issues that had not been fairly and squarely put to them in cross-examination.

*Did the judge's approach to the evidence lead him to conclude, wrongly, that Investcorp had exercised the Investment Power in Mr Al Sadik's interests rather than in its own interests.*

217 Grounds 27 and 28 in the Memorandum of Grounds of Appeal were in these terms:

> "Ground 27: The learned Judge's errors of law caused him wrongly to hold that the Appellant had failed to prove his case that there was an "*ulterior purpose"* for the Respondents' asset allocation when in fact the burden of proof was on the Respondents to demonstrate that they had obtained the Appellant's informed consent to the asset allocation."
>
> Ground 28: The learned Judge's failure to adopt the correct approach to determining the question of whether the Respondents had acted in the Appellant's best interests caused him to fail to take into account the arguments by the Appellant that the allocation decisions taken by the First Respondent were taken for its own benefit without regard to the interests of the Appellant."

218 It is said on behalf of Mr Al Sadik that, had the judge adopted the correct approach he would have held that Investcorp had failed to establish that it had acted in Mr Al Sadik's best interests in exercising the discretionary Investment Power. In particular Investcorp

failed to answer, adequately or at all, why it was in Mr Al Sadik's best interests that Investcorp chose the investments that it did; why it exposed Mr Al Sadik to the risks that it did; and why it applied leverage to Mr Al Sadik's portfolio when and in the sums it did. Investcorp failed to establish that there was any process to consider, or any actual consideration of, the performance of Mr Al Sadik's portfolio against the risks to which he was exposed; and failed to establish that it acted otherwise than in its own interests in the undisclosed maximisation of its fee income and the propagation of its hedge funds line of business.

219 In developing that ground it is submitted that:

(1) The judge's findings of fact - that Mr Gurnani's decision to adopt Scenario 1 instead of Scenario 2 "was not motivated by a desire to use Mr. Al Sadik's money for the purpose of generating two layers of fees" (at paragraph 6.8 of his judgment) and that the decision to allocate half of the Investment Amount to the SMFs (x3 leverage) "was made bona fide in the belief that it was an appropriate component for Mr. Al Sadik's portfolio having regard to the 45% target return over three years" (at paragraph 6.12 of his judgment) - were wrong; in that the judge failed to take into account the following material circumstances:

(i) that Scenario 1 and Scenario 2 were each in respect of an unauthorised investment;

(ii) that he had made findings of fact, at paragraphs 6.11 and 6.12 of the judgment (a) that Investcorp earned two layers of fees (that is to say management and performance fees on the terms of the SPA and fees from each of the SMFs from investments made on behalf of Mr Al Sadik), (b) that the fee sharing arrangements between Investcorp and the SMFs "were not brought to Mr. Al Sadik's attention, either at the time of executing the SPA or at any time thereafter" and (c) that "It is correct to say that investing Mr. Al Sadik's money in the Single Managers indirectly generates a higher fee income for Investcorp";

(iii) that, under the terms of the SPA, Investcorp had delegated the selection of investments to the holder of the Investment Power and that, therefore, the onus of reading the offering documents of the SMFs did not fall on Mr Al Sadik, but on the holder of the Investment Power, and that it was for the holder of the Investment Power to obtain Mr Al Sadik's informed consent to permit

Investcorp to earn additional fees from the SMFs which were identified in the offering documents;

(iv) that Investcorp's motivation was not relevant to the question whether or not it had breached its fiduciary obligation not to put itself in a position where there was a conflict between its own interest and the interest of Mr Al Sadik; and

(v) that the burden of proving that Investcorp had obtained the informed consent of Mr Al Sadik to permit it to make investments where there was a conflict between Investcorp's duty and interest lay on Investcorp and Investcorp did not discharge that burden.

(2) Investcorp's intended course of action (the "Plan") was to invest Mr Al Sadik's money 50% in DSF x2 and 50% divided equally between SMF x3 and/or Alt Beta x3. The way in which the Plan was implemented reveals the reasons for it and this can be seen in the pattern of investments made. The judge failed to consider Mr Al Sadik's submissions (set out at paragraph 235 of his Written Closing Submissions) in which he demonstrated that leverage was not applied carefully and incrementally, but systematically and in accordance with a single asset allocation decision that had been taken on 2 March 2008. That asset allocation decision was not reconsidered and there was no deviation from it. The decision was taken for the benefit of the development of Investcorp's hedge funds line of business and not for the benefit of Mr Al Sadik. In those circumstances, it is said, the asset allocation decision was taken in breach of the overriding duty of loyalty; and was selfish conduct and contrary to Investcorp's duty to act only in Mr Al Sadik's best interests. More particularly:

(i) Under the White Ibis III credit facility an equity investment of US$135 million could produce a maximum buying power of US$450 million. The effect was that, to invest in DSF x2 (under the Plan), the allocation of buying power intended for that category had to be US$193 million: and, to invest in SMF x3 (under the Plan), the allocation of buying power intended for that category had to be US$257 million.

(ii) The Investments Table (Appendix 1 to the Appellant's Skeleton Argument on this appeal) shows that already, by 1 July 2008 (see Row D) each of the six SMFs then in existence had received nearly the entire allocation that the Plan envisaged would (and on the terms of the RBS loan could) be allocated to it: that is to say, US$22.4 million. When Blossom invested in a seventh SMF

(White Eagle, launched only two months earlier) Investcorp allocated an identical amount (US$22.4 million) to that SMF also (see Row F). The Table shows that, by 1 September 2008, Blossom had reached its leverage target in respect of DSF at x2: that is to say, US$192.3 million had been invested).

(iii) It can be seen from the Investments Table, (a) that, by 1 September 2008, Investcorp had leveraged Mr Al Sadik's investment very nearly to the maximum amount possible in accordance with the Plan; and (b) that it was only waiting for new SMFs and/or Alt Beta products before leveraging to maximum. The only thing that constrained Investcorp was the lack of SMFs and/or Alt Beta products.

(iv) In mid-September 2008, Investcorp was determined to invest all funds Blossom could raise out of the RBS facility in a new SMF (Hawkstone) to be launched on 1 October 2008 and in Alt Beta products which Investcorp was planning to launch on the same day. The only reason the final investments were not made is that Investcorp believed that Mr Al Sadik had threatened to redeem by the year end. The internal e-mails show that Investcorp was desperate for funding for its new projects and saw Blossom as a ready source (in fact the only available external source) to propagate its hedge funds line of business.

(3) The Plan was devised in order to use Mr. Al Sadik's investment as a source of capital to propagate Investcorp's hedge funds line of business. The investment pattern demonstrates that the decisions to apply leverage when (and in the amounts) that it was applied were driven by the availability of new products. Investcorp was acting in its own interests and not in the interests of Mr Al Sadik. This is further evidenced by the fact that, although (under the SPA) had a choice of over eighty funds in which to invest, it chose to invest only in Blossom. Investcorp made that choice so that it could implement the Plan.

(4) The findings of the judge, at paragraph 7.5 of his judgment, that:

> "The Defendants' initial asset allocation decision and the subsequent decisions in relation to the application of leverage were made bona fide for a proper purpose in accordance with the SPA. The allocation of half the Investment Amount to Single Managers (with 3x leverage), on the basis that the investment would be diversified across an additional four Single Managers (including Alt Beta funds) as and when new funds were launched, was made in what Investcorp believed to be in Mr. Al Sadik's interest and not for the ulterior purpose of capitalizing the new funds and/or increasing its fee income through the fee sharing arrangement with the Single Managers"

indicates that he ignored, or did not take into account, the arguments which had been advanced at trial. In particular, the judge failed to take into account that each of the following decisions taken by Investcorp was taken to enable it to make investments in new Single Manager Funds and in new Alt Beta products as and when these became available:

(i) the decision to generate funds by making the investment in Blossom and to negotiate the White Ibis III facility;

(ii) the decision not to obtain Mr Al Sadik's consent to borrowing by means of the White Ibis III credit facility;

(iii) the decision not to make investments in named Investcorp leveraged funds but instead to make the investment in Blossom;

(iv) the decision to negotiate the maximum allocation with RBS to invest into the SMFs and new, untried and untested Alt Beta products (which were not hedge funds but accounts traded to simulate returns that could be expected from hedge funds);

(v) the decision to divide the capital available from the White Ibis III credit facility for SMFs and Alt Beta into l 0 equal parts without discrimination contrary to weighting adopted by SMFCo and Mr Franklin's recommendation;

(vi) the decision to reserve the maximum allocation of capital to Alt Beta products under RBS's liquidity guidelines for Alt Beta products;

(vii) the decision to leverage Mr Al Sadik's investment in due course to the level of the maximum LTV under the White Ibis III credit facility;

(viii) the decision to abandon its policy not to use client capital to seed Alt Beta products and use Mr Al Sadik's capital to seed Alt Beta products;

(ix) the decision to increase leverage in DSF in step with investments in new SMFs and Alt Beta products;

(x) the decision to make an investment of 10% of the capital allocation for the SMFs and Alt Beta as soon as each such fund or product was or would be available;

(xi) the decision to plan to borrow and draw down the maximum available under the White Ibis III credit facility in the immediate aftermath of the collapse of Lehman Brothers in the single-minded pursuit of their own interest in the

launch of the Alt Beta products and without any or any proper regard to the interests of Mr Al Sadik.

And, further, the judge failed to take into account that, because Investcorp had less and less capital available to propagate its hedge funds line of business, it needed Mr Al Sadik's funds to do so.

(5) Notwithstanding that the burden of proving that Investcorp exercised the Investment Power in the best interest of Mr Al Sadik lay on Investcorp and not on Mr Al Sadik, Investcorp did not produce any documentary evidence that it ever considered the best interests of Mr Al Sadik in the way his investments were structured. In support of Mr Al Sadik's grounds of appeal reliance is placed on the matters identified in Schedules 1 and 2 to the Memorandum of Grounds of Appeal.

220 In response to the submission that the judge failed to consider Mr Al Sadik's case (advanced at paragraph 235 of his Written Closing Submissions), that Investcorp had taken its investment decisions in breach of the duty of loyalty and contrary to the duty to act in Mr Al Sadik's interests, it is said on behalf of Investcorp that the judge's decision not to address in his judgment a number of the matters raised in paragraph 235 of Mr Al Sadik's Written Closing Submissions is not a proper ground for challenge: reliance is placed on the observations in *Eagil Trust Co Ltd v Piggot-Brown* [1985] 3 All ER 119 that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is said that the evidence set out in section 6 of his judgment supports the judge's finding that Investcorp was acting in Mr Al Sadik's best interests when applying leverage to his portfolio; that. Mr Al Sadik has failed to point to any convincing reason why the judge should have addressed the arguments in paragraph 235 of his Written Closing Submissions; and that his complaint that the judge did not do so has no weight.

221 In response to Mr Al Sadik's submission that, on the facts, Investcorp failed to establish that it had acted in Mr Al Sadik's best interests in exercising the discretionary investment power, it is submitted on behalf of Investcorp that it had adduced extensive evidence in relation to the portfolio construction and asset allocation process - as can be seen from the judge's consideration of that evidence throughout section 6 of his judgment - a significant portion of which formed the basis of the judge's findings. That evidence included:

(1) The reasons for Mr Gurnani's decision to adopt Scenario 2, following the tightening of Mr Al Sadik's portfolio liquidity requirements, which had the effect that he selected (of the two alternatives) the portfolio with a lower risk profile and lesser allocation to SMFs. That decision, and its effect, contradicted Mr Al Sadik's case: as the judge observed, at paragraph 6.8 of his judgment, if the motive had been fees, Mr Gurnani could have been expected to select the alternative scenario.

(2) The process by which Investcorp selected and promoted SMFs, which was described in detail by Mr Gurnani – as the judge found at paragraph 6.11 of his judgement - and was not criticised in any way.

(3) The reasons for revenue sharing arrangements with the SMFs, which were recognized by the judge as a form of compensation and not as a commission or profit share. The judge found (at paragraph 6.12 of his judgment) that it must be inherently unlikely that the existence of a revenue sharing arrangement with the SMFs would motivate Mr Franklin, Mr Gurnani or Mr Gharghour to behave unprofessionally.

(4) The email chain from 19 February 2008 – discussing the budget plan for proprietary capital - did not lead the judge to infer (as he said at paragraph 6.13 of his judgment) that Mr Franklin's portfolio construction was in any way driven by the motive that part of Mr Al Sadik's capital could be used to substitute or "complement" Investcorp's proprietary capital. The judge found (at paragraph 6.14 of his judgment) that Investcorp's decision to reduce the amount of proprietary capital allocated to its hedge fund line of business was not communicated to the Hedge Fund group until after they had made the decision to deploy Mr Al Sadik's funds in the SMFs.

(5) The reasons for Mr Kapoor's decision to seed two further SMFs (White Eagle and Hawkstone), which, as the judge held (at paragraph 6.15 of his judgment) did not support Mr Al Sadik's case that the allocation of half of Mr Al Sadik's money to the SMFs was motivated by a need to replace or "complement" proprietary capital.

(6) The reasons for the decision to defer investment of Mr Al Sadik's capital into White Eagle until after the initial investment of proprietary capital into that fund, which, as the judge held (at paragraph 6.24 of his judgment) supported the view that the decision makers were complying with Investcorp's established policy and acting in its client's interest.

222 In developing the submission that, in any event, it is plain from his judgment that the judge did consider Mr Al Sadik's case in reaching his decision (at paragraph 7.5 of his judgment)

that Investcorp's investment and leverage decisions were made *bona fide* and for a proper purpose in accordance with the SPA, it is said that the judge made the following findings:

(1) At paragraph 6.23 of his judgment, that there was nothing about Mr Gurnani and Mr Franklin's explanation of the original asset allocation decision or the subsequent applications of leverage which tended to suggest that they were acting dishonestly for some improper purpose.

(2) At paragraph 6.12 of his judgment, that the decision to allocate half of the Investment Amount to SMFs (x3 leverage) was made *bona fide* in the belief that it was an appropriate component for Mr Al Sadik's portfolio having regard to the 45% return target over three years.

(3) At paragraph 6.23 of his judgment that the strategy of investing in SMFs and Alt Beta, and saving funds for investment in new products, was perfectly legitimate and was fully explained by the evidence of Mr Franklin and Mr Gurnani.

(4) At paragraphs 6.26 and 6.28 of his judgment, that the evidence did not support an allegation of blind adherence to an investment strategy without regard to Mr Al Sadik's interests; but, on the contrary, investment decisions were made honestly in accordance with an established review and decision making process.

(5) At paragraph 7.5 of his judgment, that the allocation to SMFs was made in what Investcorp believed to be in Mr Al Sadik's interest and not for the ulterior purpose of capitalising the new funds and/or increasing its fee income through the fee sharing arrangement with SMFs.

223 It is pointed out on behalf of Investcorp that the judge's conclusions were reached with the benefit of extensive written evidence (over one hundred pages of witness statements from the Hedge Funds team alone) and lengthy cross-examination; and that they were largely informed by his judgment of the credibility of Mr Gurnani and Mr Franklin, whom he found (at paragraph 6.23 of his judgment) to be honest and experienced industry professionals. It is said that, in challenging those conclusions, Mr Al Sadik seeks to rely on the pattern of investments by Investcorp from March to September 2008 (Appellant's Skeleton Argument, paragraph 251 and Appendix 1). The nature and timing of these investments is not in dispute; and in any event the judge properly considered and addressed these matters when he found (at paragraph 6.28 of his judgment) that the investment decisions were made honestly in accordance with an established review and decision making process. At paragraph 7.5 of his judgment the judge rejected Mr Al

Sadik's case (which he now seeks to revive on appeal) that Investcorp used the "Plan' as a source of capital to propagate its hedge funds business. The judge rejected that case on the basis of the evidence; and Mr Al Sadik has identified no basis on which the judge's decision to do so may be overturned on appeal.

224 It is asserted in ground 27 in the Memorandum of Grounds of Appeal that the judge reached his conclusion that Mr Al Sadik had failed to prove his case that there was an "ulterior purpose" for Investcorp's asset allocation as a result of "errors of law"; and, at ground 28, that it was the judge's "failure to adopt the correct approach to determining the question of whether the Respondents had acted in the Appellant's best interests" which led him to leave out of account Mr Al Sadik's arguments that the allocation decisions were taken for the benefit of Investcorp without regard to his interests. Given that I have held that the judge did not err in his approach to the evidence in relation to the Fifth Claim - whether in laying the burden of proving his case on Mr Al Sadik or in applying the wrong standard of proof - I reject those assertions. If the judge were wrong to hold that, in exercising its power to allocate assets to Mr Al Sadik's investment, that was not because he adopted the wrong approach to the evidence: if he were wrong, it was because he misunderstood the evidence or failed in his task of evaluating the evidence in the light of the arguments which had been put to him.

225 I reject, also, the submissions - advanced on behalf of Mr Al Sadik - that (i) the judge's finding of fact (at paragraph 6.8 of his judgment) that Mr Gurnani's decision to adopt Scenario 1 instead of Scenario 2 was not motivated by a desire to use Mr. Al Sadik's money for the purpose of generating two layers of fees and (ii) that the judge's finding (at paragraph 6.12 of his judgment) that the decision to allocate half of the Investment Amount to the SMFs (x3 leverage) "was made bona fide in the belief that it was an appropriate component for Mr Al Sadik's portfolio having regard to the 45% target return over three years" were flawed; in that the judge failed to take into account material circumstances. In particular:

(1) Given that the judge had reached the conclusion (with which I agree) earlier in his judgment that leveraging at the portfolio level was authorised by the SPA, it cannot be said that either Scenario 1 or Scenario 2 were "in respect of an unauthorised investment".

(2) The judge accepted (in making the findings that he did at paragraphs 6.11 and 6.12 of his judgment) that investing in the SMFs "indirectly generates a higher fee income for Investcorp"; but explained (at paragraph 6.12) why he took the view that "it must be inherently unlikely that the existence of this type of fee sharing arrangement (which is actually compensation and not a commission or profit share) would motivate Messrs. Franklin, Gurnani and Gharghour to behave unprofessionally".

(3) The judge appreciated that Investcorp had not obtained Mr Al Sadik's informed consent to the fee sharing arrangements. It is not in dispute that Mr Al Sadik could have informed himself of those arrangements if he had chosen to read the SMFs offering documents; but, whether or not there was any onus upon him to do so is irrelevant in the present context.

(4) It is irrelevant, also, to the findings of fact which the judge made at paragraphs 6.8 and 6.12 of his judgment that Investcorp had not obtained Mr Al Sadik's informed consent to the fee sharing arrangements. The Fifth Claim was not a claim for the recovery of undisclosed profits.

(5) The claim which was before the judge was not based on an allegation that Investcorp had put itself in a position of conflict: the allegation was that Investcorp's conduct was dishonest in that it had deliberately chosen to prefer its own interest to the interest of Mr Al Sadik. In that context the question of motivation was of obvious relevance.

226 It is said on behalf of Mr Al Sadik that the judge's conclusion (at paragraph 7.5 of his judgment) that Investcorp's initial asset allocation decision and the subsequent decisions in relation to the application of leverage were made *bona fide* for a proper purpose in accordance with the SPA - in what Investcorp believed to be in Mr. Al Sadik's interest and not for the ulterior purpose of capitalizing the new funds and/or increasing its fee income through the fee sharing arrangement with the SMFs - indicated that the judge ignored, or did not take into account, the arguments which had been advanced at trial. In particular, it is said that the judge did not take account of the arguments at paragraph 235 of Mr Al Sadik's Written Closing Submissions; in that the judge did not refer, expressly, to each of those arguments. In addressing that criticism, it seems to me appropriate (notwithstanding the length of paragraph 235 in the Written Closing Submissions) to set it out in this judgment:

> "235 It is important to keep in mind some basic mathematics -

235.1 The amount invested in Blossom by Shallot on 4 March 2008 was just less than USD135 million. For the purpose of illustrating the mathematics 135 million is taken as the starting point and all amounts of money are in millions (A) 50% of 135 at 2x leverage produces 202.5; (B) 50% of 135 at 3x leverage produces 270. This means that according to the Plan when it was originally formulated the asset allocators would have been looking at buying power of USD 472.5 million and finance for leverage of USD337.5 million.

235.2 The terms of the RBS facility were as follows: (A) there was a loan to value ratio (LTV) fixed at 70%; (B) in the first year of the facility the concentration of investments was limited: to 60% of the portfolio in SMs; to 20% of the portfolio in Alt Beta; and to10% of the portfolio in any given Alt Beta. In addition at least 40% of the portfolio had to be invested in DSF at any given time.

235.3 The 70% LTV ratio means that with 135 million of equity it would be possible to borrow no more than USD315 million and the maximum buying power would be USD450 million (i.e. equity+debt). If the RBS facility concentration limits are applied to these numbers it means that: no more than USD270 million could be allocated to SM (because the SM component was capped at 60%) of which no more than 90 million could be allocated to Alt Beta of which no more than 45 million could be allocated to any given Alt Beta product.

235.4 The concentration limits referred to the "portfolio", therefore, in order for an investment of USD270 million to be made in SMs (on these figures) it would have been necessary to invest USD180 million in DSF.

235.5 For the avoidance of doubt (by reference to what is said in the foregoing paragraph) it is to be noted that if, e.g., only USD100 million was invested in DSF then the maximum funding available for SMs would be USD150 million. Of course, if from such a position the value of DSF were to decline then the LTV limits could easily be breached and it would be necessary to redeem SMs or vice versa. Such a situation could give rise to distress depending on the ability to redeem from SMs in order to rebalance the concentration. By October 2008 precisely that problem had arisen on Blossom's account and there was a forced redemption of USD80 million in November. This is because the 80% of Investcorp's suspension/redemption trigger was at a real risk of being breached.

235.6 There is a pattern to the way the AA was done. Again working from a figure of USD135 million of equity. 50% of available debt was allocated to the SMs/Alt Betas side, i.e., USD450 million divided by 2 which produces USD225 million. If this is divided by 10 SMs (the target) USD22.5 million is available to each. By the 1 June the existing 6 single managers had each received USD22.4 million (i.e. just below the equal allocation figure). This meant that on the SMs/Alt Beta side on 1 June 2008 there remained USD90.6 million, i.e., USD22.6 million was left over for each in future. These calculations are consistent with the contemporaneous documents which are referred to below.

235.7 In order to fund more SM/Alt Beta managers it would have been necessary to leverage DSF up so that the initial (self-imposed) fifty fifty concentration limit would be maintained. For each SM added it was necessary to add equal funding to the DSF side. It is to be noted that redemptions from DSF were available only

quarterly on 60 days' notice therefore if Investcorp believed that a new Single Manager would be ready for follow on funding or an Alt Beta product was ready for seeding imminently actually storing funds in DSF would have been impractical because the funds would not have been instantly available.

235.8 The position on 1 September (having regard to debt) was as follows. At that stage DSF stood at 2x leverage (see the table in Mr Franklin's first witness statement). This means that DSF had reached its target maximum leverage according to the AA Plan. Therefore, in so far as this could support the application of leverage to the SMs/Alt Beta side that is where all the remaining AAs would be. In the course of September AA decisions were being taken that would use up all of the remaining credit on the SMs/Al Beta side: investment in one more SM (Hawkstone) and capital used to seed 2 Alt Beta products – which was all to happen on 1 October 2008. It did not happen only because Investcorp formed the belief on or about 16 September that the Plaintiff was threatening to redeem.

235.9 The Plaintiff's case is that leverage was not applied carefully and incrementally but systematically and according to one AA decision that was taken on 2 March 2008, which was not reconsidered and not deviated from, and which was taken for the benefit of the development of Investcorp's Hedge Fund LOB and not for the benefit of the Plaintiff (whose interests were merely incidental).That was a breach of the overriding duty of loyalty and was selfish conduct and contrary to the duty to act fairly. Investcorp has admitted it was a fiduciary in all respects, it was exercising a fiduciary power and therefore it owed a duty to the Plaintiff of the highest order, which he says it did not discharge. The burden is on Investcorp to prove the reverse.

235.10 Investcorp's main witness on AA was Mr. Gurnani. His colleague Mr. Gharghour was not called. Those two were the asset allocation decision takers. Mr. Gurnani's evidence showed that at all material times he had a pure and unswerving faith in the benefits of the Single Manager Program and Alt Beta products. He believes that the newer a fund is the more likely it is to make money, which is bizarre and should not be given credit because ex hypothesi, if he is right then Investcorp would set up and abandon funds on a regular basis. Above all, he showed that there was never a shadow of a doubt in his mind that his original AA decision (to organise the Plaintiff's investment to fund new SMs and Alt Beta products) might not have been the right one. This is inexplicable because the stark fact is that Mr. Gurnani's decisions (on which he relied for Mr. Franklin's help) lost almost USD7 5 million of the Plaintiff's money in a matter of months pursing a disastrous investment policy: he applied leverage in a very bad market (to which his trite response is that even in bad markets hedge funds are expected to do well which might be the case for some specific hedge fund based on particular information, but as a general statement is meaningless.

235.11 It is undeniable that when Investcorp decided to invest the Plaintiff in SMs they obtained 2 lots of fees. The first fee was charged at the level of the SPA (*sic).* The second fee was Investcorp's share of the fees of the SMs.The higher the leverage the higher the fee. An ordinary investor, going into SMFCo would have paid only one set of fees. Mr. Gurnani testified that Investcorp's flagship funds did not invest in the SM platform, because, as Mr. Gurnani explained at great length, it

would not be an arm's length arrangement (by which he clearly meant there would be a conflict of interest) and it would be necessary to go back to the investors on every occasion. The obvious and only legal reason why DSF would have to go back to the investors to approve such a decision is because it would have to be disclosed that the investment manager (Investcorp) was not impartial because it was taking a fee on both sides of the deal and that therefore it had a conflict of interest. It is not possible to draw a meaningful distinction between the position of investors in DSF and the Plaintiff for these purposes. There was a conflict of interest and the fees should have been but were not disclosed to the Plaintiff. It is in the very nature of a fiduciary discretionary power of investment that the fiduciary looks out for the principal's interests; the principal has conferred the power, so that someone else will have the responsibility of looking after his interest unselfishly, with absolute loyalty: therefore it does not behove a fiduciary to turn around and say, "you should have known" or "you could have read the fund memoranda yourself": that was the fiduciary's job, it lay within the ambit of his fiduciary responsibility; and the fiduciary cannot turn around and say that to his principal that he should have been looking after his own interest by doing a task which the principal had conferred on the fiduciary. The Defendants' position on this is tautologous: they have no way out. Equity does not tolerate a fiduciary to obtain a collateral benefit by reason of his fiduciary relationship unless he has been permitted to do so by his principal after giving the most full and frank disclosure.

235.12 Mr Gurnani's evidence that Investcorp's flagship funds did not invest in SMs is simply wrong. It is wrong because on 1 January 2008 IBSF invested in the SM's when it became the only invention (*sic*) in SMFCo.

235.13 Yet another aspect of the Investcorp's breach of fiduciary duty lies in the nature of the high risk investments it pursued. The law says that a person who has a discretionary power of investment is not obliged to exercise it. He can choose not to do so. If he does so he must do so in good faith. The Plaintiff demonstrated massive faith in Investcorp when he conferred the discretionary power on it: he did not for one minute believe that it would play fast and loose with his money. He was an experienced investor but he was not an expert and it is too much to expect him to have understood or second guessed each and every aspect of his investment. It was a complicated investment (as this case has demonstrated) in funds of hedge funds: e.g., it involved the use of leverage through investment in leveraged vehicles (such as LDSF 3x), or so the Plaintiff thought – in fact the position was much more complicated than that: Blossom borrowed money from RBS in order to pursue a combined 2x and 3x strategy in which concentration limits applied, this meant that if one side of the equation did badly the LTV ratio could be breached and forced redemptions would occur giving rise to a situation in which the investment Manager has lost control :and that is precisely what did occur in October 2008.This was an unwise, high stakes and very risky way to structure the Plaintiff's investment: and it was done without the Plaintiff's knowledge or consent. There is a very real and material difference in control between an isolated investment that is leveraged, and one that is interdependent with another investment that is leveraged: the latter type of arrangement is apt to veer out of control.

235.14 Mr. Gurnani says that he was a numbers man, all he was interested in was the asset allocation: he left the detail on which he based his decisions to Mr.

> Franklin, and if it was a complicated decision, e.g., to do with structuring and leverage, he left it to Mr. Gharghour. Mr. Gurnani says it was Mr. Gharghour who took the decisions about leverage. So far as Mr. Gurnani was concerned, as long as the asset allocations he wanted were made, he did not mind how it was done. Mr. Gurnani admitted that he did not know the terms of the SPA; or the terms of the RBS facility: and, he thought that if he needed to know these terms someone else would tell him about them. He did not even see the investment proposal that had been put to the client before he took his AA decisions. Mr. Gurnani's attitude towards the responsibilities that his own job [imposed] displays breath taking insouciance: it is astonishing that the person exercising a fiduciary power of investment did not understand the scope of his investment mandate or the constraints upon it, or even receive a properly detailed memorandum about what the client wanted. What the client wanted should have been checked and verified. Mr. Gurnani was relying, in relation to what he intended to be an investment worth almost half a billion dollars (*sic*), on information provided by employees (Mr. Al Khatib and Mr. Kironde) who he knew would be amply rewarded for the investments that had been made by reference to the AUM that had been brought in. Mr. Franklin said in evidence that the PRM team's compensation was linked to the amount of leverage applied. He should have checked, he did not check. The way Investcorp was organised meant that the asset allocators did not know things they should have made it their business to find out."

227 I reject that the submission that this Court can be asked to infer that the judge ignored, or did not take into account, the arguments which had been advanced at trial. In my view that inference cannot be drawn either (i) from a judge's decision not to refer to each and every argument put to him or (ii) from the judge's decision to make findings of fact which differ from those which the arguments were advanced to support. The inference that the judge took no account of the arguments cannot be drawn because it ignores the obvious possibilities (i) that, in a lengthy, detailed and obviously careful judgment, the judge chose not to refer to arguments which he found irrelevant or of little assistance and (ii) that the judge made the findings that he did because he preferred to rely on the evidence of the witnesses that he had seen heard rather than on counsel's submissions.

228 The question for the judge in relation to the Fifth Claim was whether, in making the initial asset allocations and applying leverage, Investcorp (through its relevant employees) improperly and in breach of fiduciary duty, preferred its own interests to those of Mr Al Sadik. The question was not whether the investment decisions that were made were sensible or wise, or whether other investment managers would or might have made other investment decisions. The question for this Court is not whether it would have reached the conclusions of fact on those issues which the judge reached; but whether, on the evidence which was before him at trial, those were conclusions of fact which were open to the

judge. And, in addressing that question, this Court must have proper regard to the fact that the judge had the advantage (which this Court does not have) of seeing and hearing the witnesses give their evidence.

229 In my view there is no basis on which this Court could hold that it was not open to the judge to reach the conclusions that he did in relation to the Fifth Claim.

*Conclusion and disposal of appeal*

230 For the reasons that I have set out in this judgment, I would dismiss this appeal.

231 In the circumstances that I would reject all (or substantially all) of the submissions advanced on behalf of Mr Al Sadik, I take the view that there is no reason why the costs of the appeal should not follow the event. Costs should be assessed on the standard basis. But the parties should have the opportunity to make representations to the Court of Appeal, if they so wish, that some other order as to costs would be more appropriate. Such representations (if any) should be made in writing within 28 days of the delivery of this judgment.

**Elliott Mottley, Justice of Appeal**

232 I have read the judgment of Chadwick JA in draft and have nothing to add.

**Sir Anthony Campbell, Justice of Appeal**

233 I have had the advantage of reading in draft the judgment of Chadwick JA and for the reasons that he has given I agree that the appeal should be dismissed.