In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL LIST
2010: No. 454

BETWEEN:-

(1) KINGATE GLOBAL FUND LIMITED (In Liquidation)
(2) KINGATE EURO FUND LIMITED (In Liquidation)

Plaintiffs

-and-

(1) KINGATE MANAGEMENT LIMITED
(2) FIM LIMITED
(3) FIM ADVISERS LLP
(4) FIRST PENINSULA TRUSTEES LIMITED
(as Trustee of the Ashby Trust)
(5) PORT OF HERCULES TRUSTEES LIMITED
(as Trustee of the El Prela Trust)
(6) ASHBY HOLDING SERVICES LIMITED
(7) EL PRELA GROUP HOLDING SERVICES LIMITED
(8) MR CARLO GROSSO
(9) MR FEDERICO CERETTI
(10) ASHBY INVESTMENT SERVICES LIMITED
(11) EL PRELA TRADING INVESTMENTS LIMITED
(12) ALPINE TRUSTEES LIMITED

Defendants

JUDGMENT ON PRELIMINARY ISSUES

(In Court)

Date of hearing: 11th – 15th and 18th – 19th May 2015[1]
Date of judgment: 25th September, 2015

Mr Adrian Beltrami QC and Mr Alex Potts, Sedgwick Chudleigh Ltd, for the Plaintiffs

Mr Saul Froomkin QC and Ms Venous Memari, Liberty Law Chambers Limited, for the First Defendant

Mr Thomas Lowe QC and Ms Sarah-Jane Hurrion, Hurrion & Associates Ltd, for the Second, Third, Eighth and Ninth Defendants

Mr Alan Boyle QC and Ms Katie Tornari, Marshall Diel & Myers Limited, for the Fourth to Seventh and Tenth to Twelfth Defendants

Overview

1. As this is quite a long judgment, it may assist the reader if I set out the different sections in a table of contents. References in brackets are to paragraph numbers. All the parties have met with some measure of success, albeit the Defendants more so than the Plaintiffs.

[1] The Court invited supplemental written submissions, which were received on or before 28th August 2015, on two authorities about which it had not been addressed in the course of argument: Arnold v Britton [2015] 2 WLR 1593 and R (Al-Skeini) v Defence Secretary [2007] QB 140.

(i) Articles of Association (30 – 42)
(ii) Information Memoranda (43 – 52)
(iii) Administration Agreements (53 – 60)
(iv) Manager Agreements (61 – 74)

(6) Issue (1)(b) (75 – 116)
(7) Issue (1)(a) (117 – 126)
(8) Issue (2) (127)
(9) Issue (3) (128 – 134)
(10) Issue (4) (135)
(11) Issue (5) (136 – 142)
(12) Issue (6) 143 – 152)
(13) Issue (7) (153 – 175)
(14) Summary (176 – 178).

Introduction

2. This is a ruling on the trial of a number of preliminary issues. They are all concerned with whether management fees ("the Disputed Fees") paid to the First Defendant ("KML") by the Plaintiffs ("Kingate Global" and "Kingate Euro", together "the Funds") under various management agreements ("the Manager Agreements") were contractually due to KML and, if so, whether the Funds are precluded from asserting a claim in unjust enrichment against KML and the various Defendants to whom the fees received by KML or their proceeds have been distributed.

3. Applications for the trial of these preliminary issues were prompted by the decision of the Privy Council in Fairfield Sentry Ltd v Migani & Ors [2014] 1 CLC 611; [2014] UKPC 9 ("Fairfield"). The applications have been brought by the Trust Defendants (as defined below) and KML respectively.

The parties

4. The Funds were investment companies incorporated in the British Virgin Islands ("BVI"). Kingate Global was incorporated on 11th February 1994

and Kingate Euro on 19th April 2000. They were established as open-ended investment funds issuing non-participating, redeemable shares offered for subscription by means of information memoranda. Over time, they became "feeder funds" to Bernard L Madoff Investment Securities LLC ("BLMIS"), an investment company established and operated by the notorious fraudster Bernard L Madoff which acted as the Funds' investment adviser. The vast majority of monies raised by the Funds were transferred to BLMIS for investment on the Funds' behalf. In fact Mr Madoff was running a Ponzi scheme and none of the monies were invested. Upon Mr Madoff's arrest in December 2008 the Funds collapsed and were placed in liquidation in the BVI and Bermuda.

5. Kingate Global commenced operations on 1st March 1994. There was a single class of shares, called Common Shares. On 1st March 1995 Kingate Global was recapitalised. It renamed the Common Shares as Class A Common Shares ("Class A Shares") and introduced a new class of shares called Class B Common Shares ("Class B Shares"). On 1st December 1995 the Fund introduced a further class of shares called DM Class Common Shares ("DM Shares"). Kingate Global redeemed the Class A Shares in 1997 and cancelled that share class designation in 1998, although Class B Shares continued to be named as such. On 1st January 1999 the DM Shares were renamed as Euro Class Shares and from 1st May 2000 the Class B Shares were renamed as US Dollar Shares. In around 2000 the DM Shares were "hived down" into Kingate Euro, ie shareholders of Kingate Global were given equal numbers of shares in Kingate Euro and the assets allocated to the DM Shares were transferred to Kingate Euro.

6. KML is a company incorporated in Bermuda which at all material times acted as Manager or Co-Manager of the Funds. Under the Manager Agreements, and unless it had been grossly negligent, KML was entitled to monthly management fees. Their amount was to be calculated by the relevant Fund's Administrator ("the Administrator") by reference to the month end net asset value ("NAV") of the Fund and class of shares to which the fees related. The successive Administrators were all independent

financial services companies. These calculations served a dual purpose, as they were also used to determine the subscription and redemption prices paid to the Fund by incoming investors and by the Fund to outgoing investors. As appears below, in the absence of bad faith or manifest error the calculations carried out by the Administrator were final and binding as between the Funds and the investors. An important issue for determination by the Court is whether they were also final and binding as between the Funds and KML.

7. The Second and Third Defendants ("FIM Ltd" and "FIM Advisers", together "FIM") are respectively a company and a limited liability partnership, both incorporated in England and Wales. The Plaintiff alleges that at all material times until July 2005 FIM Ltd acted as a consultant to KML and the Funds, and that FIM Advisers acted in that capacity at all material times since July 2005. FIM dispute this.

8. The Eighth and Ninth Defendants ("Mr Grosso" and "Mr Ceretti") were at all material times directors of FIM Ltd and principals of FIM Advisers. In this judgment I shall refer to the Second, Third, Eighth and Ninth Defendants collectively as "the FIM Defendants".

9. The Fourth Defendant ("Ashby") is trustee of the Ashby Trust, of which Mr Grosso is a discretionary beneficiary, and the owner of the Sixth Defendant ("Ashby Holding Services"). The Fifth Defendant ("El Prela") is trustee of the El Prela Trust, of which Mr Ceretti is a discretionary beneficiary, and the owner of the Seventh Defendant ("El Prela Group Holding").

10. The Twelfth Defendant ("Alpine Trustees") is a former trustee of the El Prela Trust. The Tenth and Eleventh Defendants ("Ashby Investment Services" and "El Prela Trading Investments") are investment companies wholly owned by Ashby and El Prela respectively.

11. KML has at all material times been owned beneficially by Ashby and El Prela. At present, Ashby holds half of the issued share capital in KML indirectly through Ashby Holding Services and El Prela holds the other half

indirectly through El Prela Group Holding. In this judgment I shall refer to the Fourth to Seventh and Tenth to Twelfth Defendants collectively as "the Trust Defendants".

The Funds' pleaded claims

12. The Funds have brought various non-fault based claims against the Defendants. It is with these that this Ruling is directly concerned. In the "Summary" section at the start of their Statement of Claim[2] they are summarised as follows:

> "*16 In addition, from their establishment until November 2008, the Funds paid [KML] hundreds of millions of US dollars in fees. The fees were calculated by reference to the Funds' net asset values. Because of Mr Madoff's fraud, at all material times, the Funds' only significant asset was their money at the bank. Accordingly, the Funds' net asset values were massively overstated, and the fees mistakenly overpaid.*
>
> *17 The Funds' claim is:*
>
> *17.1 in unjust enrichment on the ground of mistake, for the recovery of the overpaid fees from [KML] and/or [various of the Trust Defendants], as ultimate recipients of the fees, and/or Mr Grosso and Mr Ceretti, as ultimate recipients of the fees and/or ultimate beneficial owners of the shares in [KML];*
>
> *17.2 alternatively, for orders based on the Funds' retention of legal title to the overpaid fees and/or their traceable proceeds;*
>
> *17.3 alternatively, for declarations that [KML] and/or [various of the Trust Defendants] and/or Mr Grosso and Mr Ceretti hold the overpaid fees, together with their traceable proceeds, on trust for the Funds; …*"

13. The Trust Defendants, supported by the other Defendants, say that they have a complete defence to these claims, namely that KML was contractually entitled to all the management fees that it was paid as those fees were calculated by the Administrator.

[2] Or more accurately, the Re-Re-Re-Amended Statement of Claim, but that is a bit of a mouthful.

14. The Funds have addressed this defence in their Reply[3] to the Trust Defendants' Defence. Eg, they plead at para 15 that the Administrator made a manifest error in the calculation of the NAV in that:

"*15.1 it failed to verify the figures provided by BLMIS for the purpose of calculating the NAV; and/or*

15.2 it ignored inconsistencies in the figures provided by BLMIS; and/or

15.3 it failed to consider and address inconsistencies in the figures provided by BLMIS adequately; and/or

15.4 it relied on [KML] and/or Mr Ceretti and/or Mr Grosso and/or FIM to verify the figures provided by BLMIS and/or to check the calculations of the NAV, and/or it permitted [KML] and/or Mr Ceretti and/or Mr Grosso and/or FIM to vary the calculations of the NAV, as pleaded in paragraph 18 below;

such that, in the premises, those determinations were not binding on the shareholders in the Funds …"

The Funds' case is that in those circumstances the NAV calculations are not binding as between the Funds and KML, even if, which is denied, they would have been otherwise.

15. The Funds also plead that the NAV calculations that were carried out were not carried out by the Administrator:

"*18 Further and in any event … the Funds' Administrator sought as a matter of settled practice [KML's] and/or FIM's and/or Mr Ceretti's and/or Mr Grosso's approval of and comments on calculations of the NAV before finalising the calculations and sending them to shareholders. By way of example:*

18.1 The Funds' Administrator's recorded 'MONTH END PROCEDURE' for Kingate Global provides, under the heading 'FINAL PROCEDURES':

'Send the final NAV to Federico [Ceretti] for approval before sending out faxes to Shareholders'.

[3] As Re-Re-Re-Amended.

18.2 By fax dated 1 August 1995, Mr Ceretti indicated to Dan Voth of the Funds' Administrator that he believed the NAV for June to be wrong, and asked Mr Voth to amend the NAV accordingly.

18.3 By fax dated 4 January 1996, Dan Voth sought Mr Ceretti's approval of the 'FINAL NAV FOR CLASS A BEFORE PRICE IS PUBLISHED' on behalf of [KML]. Mr Ceretti responded on 5 January 1996, 'O.K.!!'

18.4 By fax dated 14 April 1997 addressed to Dan Voth, Mr Ceretti confirmed that the 'FINAL NAVS FOR KGF B AND DM ARE FINE'.

18.5 A memo dated 18 November 1997 prepared by Dan Voth notes that the NAV for the Class DM shares in Kingate Global had been restated for September 1997 and October 1997 due to a change in the method used for valuing forward contracts, and that Mr Ceretti had insisted that the NAV and share allocation for September subscriptions should be changed 'because it goes against his credibility as a "Hedge" fund manager'.

18.6 By email dated 1 November 2002 from the Funds' Administrator to KML, FIM's approval of the estimated NAV for the Funds was required 'before distribution to shareholders'. By email dated 4 November 2002 to KML, Mr Grosso responded that the estimates looked 'OK'.

18.7 By email dated 13 February 2008, the Funds' Administrator advised FIM of the NAV of both Funds for January 2008. Mr Ceretti responded by email dated 14 February 2008 querying the 'performance differential between the two funds', and asking the Funds' Administrator to check that forward contracts had been priced correctly.

19 In the premises, [KML] and/or FIM and/or Mr Ceretti and/or Mr Grosso had input as to and/or control over the calculations of the NAV, and accordingly those calculations were not calculations performed by the Funds' Administrator and were therefore not binding as between the Funds and Kingate Management."

16. The Funds have supplied Voluntary Further and Better particulars of their Reply to the Trust Defendants in which they give a number of further examples of instances in which the Funds' Administrator sought KML's and/or FIM's and/or Mr Ceretti's and/or Mr Grosso's approval of and comments on calculations of the NAV before finalising the calculations and sending them to shareholders.

17. In a Response to Request for Further and Better Particulars requested by the FIM Defendants, the Funds further clarified their case on control:

> "*It is the Plaintiffs' case that [KML] (at least) exercised 'control over the NAV calculations' in that the Funds' Administrator sought their comments on and express approval of the NAV determinations before these were finalised and sent to the Funds' shareholders. In such circumstances, the Plaintiffs aver that, as a matter of settled practice:*
>
> *a. The approval of [KML] was an absolute precondition to the finalisation of the NAV determinations and their publication.*
>
> *b. No NAV determination would have been finalised or published without the approval of [KML].*
>
> *c. KML had the power to influence the content of the NAV determinations, should it be dissatisfied with them, or to withhold its approval if it was not satisfied.*
>
> *d. [KML] held the power of sanction or veto over the finalisation and publication of the NAV determinations.*"

18. The Funds have also brought various fault based claims against the Defendants. Although the Court is not presently concerned with the merits of those claims they are relevant to the determination of two of the preliminary issues.

19. The Funds plead at para 106 of the Statement of Claim that KML, in performing and/or delegating the performance of its services under the Manager Agreements, breached its contractual and tortious duties to the Funds. The alleged breaches, which are pleaded in some detail, focus on allegations that KML failed adequately or at all to carry out due diligence with respect to BLMIS; to monitor the investment advisory functions which it had delegated to BLMIS; or, insofar as it delegated responsibility for these tasks to FIM, to provide supervision to FIM.

20. The Funds plead at para 107 of the Statement of Claim:

"*For the avoidance of doubt, and if necessary, the Funds aver that these breaches of duty, individually or collectively, amounted to 'gross negligence' by [KML], within the terms of the purported exclusionary provisions in the Manager Agreements.*"

21. The Funds plead at para 12.3.2 of the Reply to KML's Defence:[4]

"*By reason of [KML's] breaches of duty detailed in paragraphs 106 to 107 of the Amended Statement of Claim, [KML] induced the mistake which resulted in the Funds making overpayments of management fees.*"

The preliminary issues

22. By an order dated 14th November 2014, the Court directed that there be a trial of the following preliminary issues. The various paragraphs in the Statement of Claim and the Reply mentioned in the preliminary issues are all set out or summarised above.

(1) (a) Whether the NAVs were determined from time to time by the Administrator on the assumption (made for the purposes only of the Trust Defendants' and KML's Preliminary Issues Summonses) that KML, and/or FIM, and/or Mr Grosso and/or Mr Ceretti had input over the calculation of the NAV to the extent of control, on the basis pleaded at paragraphs 18 and 19 of the Reply[5];

(b) If the answer to (a) is yes, were the Administrator's determinations of the NAV binding on the Funds for the purpose of calculating the fees due to KML pursuant to the Manager Agreements in force between the Funds and KML, in the absence of bad faith or manifest error;

[It will be more convenient to address 1(b) before considering 1(a) and that is what I propose to do.]

[4] As Amended.

[5] Re-Re-Re Amended Reply to the Trust Defendants' Defence

(2) If the answer to issue (1)(b) is yes, whether the fees paid by the Funds to KML on the basis of those NAV figures, ie the Disputed Fees, were, in the absence of bad faith or manifest error, properly due to KML under the terms of the Manager Agreements;

(3) If the answer to (2) is yes, and subject to issues (5) to (7), whether in consequence the Funds are precluded from asserting that the Disputed Fees, or any payments alleged by the Funds to originate from the Disputed Fees, are recoverable from: (a) KML; (b) the FIM Defendants; and (c) the Trust Defendants;

(4) If the answer to any of issues (1) to (3) is no, whether the Defendants have a defence to the claim in unjust enrichment insofar as this defence derives from alleged contractual entitlement on the part of KML;

(5) Whether the bad faith and/or manifest error of BLMIS constitutes bad faith and/or manifest error in relation to the calculation of the NAV, such that any determination of NAV made by the Administrator was not for this reason binding on the Funds and KML;

(6) If the facts are as pleaded by the Funds at paragraph 15 of the Reply, whether the conduct of the Administrator constituted bad faith and/or manifest error for the purpose of the NAV calculations, such that any determination of NAV made by it was not for this reason binding on the Funds and KML;

(7) If the breaches of duty pleaded at paragraphs 106 and 107 of the Statement of Claim are established, whether the Defendants are precluded from asserting a defence to the claim in unjust enrichment insofar as this defence derives from alleged contractual entitlement on the part of KML by reason of its inducement of the Funds' mistake.

23. I propose to address each issue irrespective of the answers to the previous issues. Whereas I am indebted to counsel for their detailed and careful submissions, I do not propose to address each and every point made by

them. However I shall address what appear to me to be their main lines of argument.

24. In approaching these issues I am not required to determine any issues of fact, save for inferences about the terms of the Administration Agreements and Manager Agreements in force during periods in which there are no extant executed copies. I anticipate that any such inferences will prove non-controversial.

The contractual framework

25. In order to understand the competing submissions on the Manager Agreements it is necessary to consider those Agreements in the context of other contractual documents relating to the Funds, namely the Articles of Association, the Information Memoranda published to potential investors, and the Administration Agreements.

26. Alan Boyle QC, counsel for the Trust Defendants, with whom the other Defendants agreed on this point, submitted that these documents were the component parts of an interlocking whole, and that the Articles of Association, the Information Memoranda and the Administration Agreements formed part of the essential commercial background and matrix against which the Manager Agreements fell to be construed ("the Contractual Scheme").

27. Adrian Beltrami QC, counsel for the Funds, while acknowledging that these documents formed part of the commercial background to the Manager Agreements, emphasised that the Manager Agreements must be construed in their own terms, and submitted that the background documents were of limited assistance in this task.

28. The Articles of Association for both Funds were amended and restated. Each class of shares had its own Information Memorandum, which was amended and restated on a number of occasions – there were 23 different versions altogether. Each class of shares also had its own Administration

Agreement and Manager Agreement, as amended from time to time. With respect to any period for which an executed copy of either or both of these Agreements for a particular class of shares has not been found, I draw the reasonable inference that during that period those shares were administered or managed on the terms *mutatis mutandis* of an Administration Agreement or Manager Agreement that was in force at the time with respect to another class of shares.

29. When describing the contractual framework it will be helpful to start with the Articles of Association, then go on to the Information Memoranda and the Administration Agreements, and conclude with the Manager Agreements. This approach should not be taken to imply a preference for the approach of one party to the construction of these documents over that of another.

Articles of Association

30. The Articles of Association of Kingate Global were a contract between the Fund and its members. They provided for the issue (Regulations 11 – 13) and redemption (Regulations 44 – 54) of shares in the Funds at a price equal to the NAV per share. The issue price fell to be determined at the Valuation Day immediately preceding the applicable Dealing Day and the Redemption Price at the Valuation Day on which the shares were redeemed. The Dealing Day was the first Business Day of each month following the initial issuance of shares in each month, or such other day as the directors might determine by resolution. The Valuation Day was the last Business Day of each month following the initial issuance of shares in each month, or such other day as the directors might determine by resolution. The definitions of these capitalised terms were set out in Regulation 1. However no shares were to be issued (Regulation 14) or redeemed (Regulation 47) when the determination of NAV was suspended pursuant to Regulation 62. The latter Regulation provided that the directors might at any time suspend the determination of NAV, and the issue and redemption of any of the Fund's shares, during various specified extraordinary events.

31. The NAV was to be determined by or under the direction of the Administrator as at each applicable Valuation Day under Regulations 55 – 64. It was to be the fair market value at that date of all the assets of the Fund less all its liabilities (Regulation 55). The liabilities included the fees of the Investment Adviser, the Manager and the Administrator earned but not yet paid (Regulations 55 and 56). NAVs were to be determined by the Administrator in large part utilizing information supplied by the various advisers and managers of the Fund (Regulation 56 [1][6]).

32. The Administrator was defined as Hemisphere Management Limited ("Hemisphere"), and any successor with whom the Fund entered into an administration agreement. The Manager was defined as KML and any successor with whom the Fund entered into a management agreement (Regulation 1).

33. Regulation 55 was amended in the Amended and Restated Articles of Association filed on 27th October 1995, which provided that the NAV of a class of shares, for the purpose of issuing and redeeming shares, shall be determined by or under the direction of the Administrator with the concurrence of the Directors at each applicable Valuation Day. The definition of Class A Shares Manager remained *mutatis mutandis* the same as the definition of the Common Shares Manager, and the Class B Shares Manager was defined as KML and Tremont (Bermuda) Limited and any successor with whom the Fund entered into a management agreement (Regulation 1).

34. If market quotations for the Fund's assets were not available or if the Administrator, in consultation with the Manager and the Investment Adviser, concluded that they were not indicative of fair value, those assets would be valued at their fair value as determined in good faith by the Administrator in consultation with the Manager and the Investment Adviser. The Administrator could conclusively rely on fair value valuations provided by

[6] The numbers in square brackets do not occur in the Articles but have been included in this judgment for ease of reference.

the Manager and the Investment Adviser, and independent appraisals generally would not be obtained in these situations (Regulation 56 [2]). The point was repeated but in broader terms and without qualification at Regulation 58: no independent appraisals in respect of the NAVs would be required. Regulation 58 also provided that the NAVs would be binding on all persons, ie investors and the Funds, absent bad faith or manifest error.

35. Regulation 56 was amended in the Amended and Restated Articles of Association filed on 6th June 2000 so as to provide that where the Administrator determined that market prices or quotations did not fairly represent the value of particular assets it was authorized to assign a different value to them. There was no longer any reference to consultation with a Manager or Investment Adviser, but there was a reference to the cost of appraisers or pricing services employed by the Fund, presumably to assist the Administrator in this task. The statement at Regulation 58 (now Regulation 57) that there was no need for independent appraisals was dropped. The Class B Shares Manager was renamed USD Class Manager. Manager was defined to mean the Class A Manager, the USD Class Manager, or any other person with whom the Fund entered into a Management Agreement. Eg in relation to the DM Shares (Regulation 1).

36. Returning to the unamended Articles, NAV was defined as the NAV of the Fund determined pursuant to the Articles (Regulation 1). For purposes of calculation of the NAV: (i) the price of shares in the Fund for which applications had been made (net of commission etc) was deemed to be an asset of the Fund as of the time at which such shares were first deemed to be in issue (Regulation 60 (a)); and (ii) the price of shares in the Fund to be redeemed was, from the close of business on the Valuation Day on which they were redeemed until the Redemption Price was paid, deemed to be a liability of the Fund (Regulation 60(b)). Thus the receipt of subscription monies and the payment out of redemption monies affected the calculation of NAV because they affected the amount of the Fund's assets.

37. The NAV per share was to be an amount equal to the NAV of the Fund divided by the number of shares outstanding (Regulation 61). For the

purpose of calculating such shares: (i) shares for which applications had been made under the Articles would be deemed to be in issue (ie outstanding) at the commencement of business on the relevant Dealing Day, ie the day on which they were allotted; and (ii) shares to be redeemed in accordance with the Articles would be deemed to remain in issue through the close of business on the Valuation Day on which they were actually redeemed (Regulation 64).

38. The Articles of Association of Kingate Euro were in substantially the same terms. The Administrator was defined as Hemisphere, and any successor with whom the Fund entered into an administration agreement. The Manager was defined as KML and any successor with whom the Fund entered into a management agreement. NAV was defined as the NAV of the assets belonging to the Fund or a class and/or series of shares and determined pursuant to the Articles (Regulation 1).

39. There were provisions regarding the issue (Regulation 13) and redemption (Regulation 45) of shares for a consideration equal to the NAV at the applicable Valuation Date, and for the determination of the NAV of the shares (Regulations 55 – 60).

40. The NAV of the shares, for the purpose of issuing and redeeming shares, was to be determined by or under the direction of the Administrator with the concurrence of the directors as at each applicable Valuation Date or such other occasion as the directors might determine. It was the value at such date of all the assets belonging to the Fund less all its accrued debts and liabilities as calculated under the Regulations (Regulation 55). Regulation 56 gave guidance as to how the value of all the assets and liabilities of the Fund might be determined at the discretion of the Administrator. Eg the value of assets was to be recorded at their fair value as determined in good faith by the Administrator in the absence of current quotations or where the Administrator concluded that such quotations were not indicative of fair value (Regulation 56 (d)). The liabilities of the Fund were to include the fees of the Manager and the Administrator earned or accrued but not yet paid (Regulation 56 (e)).

41. The NAV of a share on any Valuation Date was to be calculated by dividing the NAV on that date by the total number of shares outstanding at the close of business on that date. Shares called for redemption on a Valuation Date were to be deemed outstanding on that date whereas shares subscribed for on a Valuation Date were not to be deemed outstanding on that date (Regulation 57(b)).

42. Any valuations made pursuant the Articles were to be binding on all persons in the absence of bad faith or manifest error (Regulation 58). The directors might suspend the determination of the NAV of the Fund, and consequently the right of members to require the Fund to issue or redeem shares of that class, in certain specified extraordinary circumstances (Regulation 59).

Information Memoranda

43. The Information Memorandum formed part of the contract between the investor and the Fund, whether Kingate Global or Kingate Euro, because the Subscription Agreement for shares in the Fund provided that the subscription was on the terms of the relevant Information Memorandum and subject to the provisions of the Memorandum and Articles of Association of the Fund. Thus, in the event of a discrepancy between the Information Memorandum and the Articles, the Articles would prevail.

44. The purpose of the Memorandum was to inform potential investors about the Fund to help them decide whether they wanted to invest in it. Taking the February 1994 Information Memorandum for the Common Shares as an example ("the February 1994 Memorandum"), it contained a Summary of key terms and concepts, and sections on the Fund, Investment Objectives, Investment Policy, Risk Factors, Management, Fees and Expenses, Shares of the Fund, Determination of NAV, Taxation and Additional Information.

45. The section on Management explained that the Manager performed services pursuant to the Manager Agreement and summarised what they were. It stated that the Manger received a monthly fee from the Fund calculated at an annual rate equal to 1.5% of the month-end NAV of the Fund, which was

generally payable as of the last Business Day of each month. Under the Information Memoranda for Class B Shares and DM Shares, the monthly 1.5% management fee was to be divided between the Co-Managers.

46. The section on Management also explained that pursuant to the Administration Agreement the Administrator was responsible *inter alia* for calculating, publishing or furnishing the subscription price of the shares in the Fund.

47. The section on the Determination of NAV contained a fairly full summary of Regulations 55, 56, 58 and 61 of the Articles of Association, which dealt with this topic. The following passages from that summary, including the guidelines to which they refer but which I have not set out, are repeated word for word in the 1994 Administration Agreements and Manager Agreements:

"*Net Asset Valuations are determined by the Administrator, in large part based upon information regarding the value of the Fund's portfolio assets provided by the Investment Advisors, as of the close of business on the last Business Day of each calendar month. The Fund generally seeks to have portfolio securities valued in accordance with the following guidelines.*

Portfolio securities are valued at the last sale price reported on the principal securities exchange or market on which the securities are traded. In the absence of reported sales prices on the valuation date, portfolio positions generally are valued at the last reported bid quotation in the case of securities held long and at the last reported offer quotation in the case of securities sold short. In special circumstances in which the Administrator determines that market prices or quotations do not fairly represent the value of particular assets based on information provided by the applicable Investment Advisor, the Administrator is authorized to assign a value to such assets which differs from the market prices or quotations based on information provided by the applicable Investment Advisor.

Securities or other assets which are not generally marketable, including illiquid direct investments of the Fund, generally are valued at the lesser of cost or market price, and may be subject to an additional discount upon the recommendation of the Administrator. If appraisals are available, references can be made to such appraisals. Shares of other investment funds will generally be valued at the Net Asset Value supplied by such funds, less any applicable redemption charges customarily imposed by such funds and less any

provision for non-accrued management and performance fees. The value of assets are recorded at their fair value as determined in good faith by the Administrator in the absence of current quotations or if the Administrator concludes that such quotations are not indicative of fair value by reason of illiquidity of a particular security or other factors.

In addition to special valuation calculations relating to illiquid securities, other special situations affecting the measurement of Net Asset Values may arise from time to time. Prospective investors should be aware that situations involving uncertainties as to the valuation of portfolio positions could have an adverse effect on the Fund's net assets if judgments regarding appropriate valuations made by the Administrator should prove incorrect. In the absence of bad faith or manifest error, the Net Asset Value calculations made by the Administrator are conclusive and binding on all shareholders."

48. The section on Additional Information stated that the Information Memorandum was not intended to provide a complete description of the Fund's Memorandum or Articles of Association or the Agreements with the Manager and Administrator which the memorandum had summarised. It stated that copies of all such documents were available for inspection by shareholders and prospective investors during normal business hours at the Administrator's office in Bermuda. The 1st March 1995 version of the Information Memorandum relating to Class A Shares emphasised the point by stating that the information in the Memorandum was qualified in its entirety by the Memorandum of Association and Articles.

49. The Information Memoranda for the other classes of shares were in substantially similar terms. They were amended and restated from time to time, eg to correspond with changes to the Articles. Presciently, under the heading "*Certain Risk Factors*" they included the warning that when the Fund invested with an Investment Adviser, the Fund did not have actual custody of the assets, and that there was therefore a risk that the assets with the Investment Advisor could be misappropriated. Subsequent versions of the Information Memoranda also warned that the information supplied by the Investment Adviser might be inaccurate or even fraudulent. See, eg, the Information Memorandum dated 1st May 2004 for Kingate Global:

"***Possibility of Fraud or Misappropriation***

Neither the Fund nor the Custodian has actual custody of the assets. Such actual custody rests with the Investment Adviser and its affiliated broker-dealer. Therefore, there is the risk that the custodian could abscond with those assets. There is always the risk that the assets with the Investment Advisor could be misappropriated. In addition, information supplied by the Investment Advisor may be inaccurate or even fraudulent. The Co-Managers are entitled to rely on such information (provided they do so in good faith) and are not required to undertake any due diligence to confirm the accuracy thereof."

50. As to the calculation of NAV, on 1st May 2000 an Information Memorandum was issued for the US Dollar Shares. The relevant part of the section headed "*Determination of Net Asset Value*" appears below and was the same or substantially the same in all subsequent Information Memoranda for US Dollar Shares.

"*Net Asset Value of the USD Shares is the market value of the Fund's total assets calculated as described below, less all accrued debts and liabilities, including (i) fees of the Co-Managers, the Administrator and the Bank earned or accrued but not yet paid, …*

The Administrator will determine the net asset value of the Fund's Portfolio assets attributable to the USD Shares at the close of business on the last Business Day of each calendar month. See 'CERTAIN RISK FACTORS'. The Administrator will verify the prices attributed to the securities held by the USD Shares of the Fund by reference to pricing sources independent of the Investment Advisor whenever reasonably possible.

. . . . .

The value of assets are recorded at their fair value as determined in good faith by the Administrator in the absence of current quotations or if the Administrator …determines that market prices or quotations do not fairly represent the value of particular assets, the Administrator is authorized to assign a value to such assets which differs from the market prices or quotations. The cost of appraisers or pricing services employed [by] the Fund is an expense of the Fund and as such a charge against Net Asset Value of the USD Shares.

Prospective Investors should be aware that situations involving uncertainties as to the valuation of portfolio positions could have an adverse effect on the Fund's net assets if judgments regarding appropriate valuations made by the Administrator should prove incorrect. See 'CERTAIN RISK FACTORS'. In the absence of bad faith or manifest error, the Net Asset Value calculations of the USD Shares made by the Administrator are conclusive and binding on all shareholders.

The Net Asset Value per USD Share shall equal the Net Asset Value of the assets of the Fund attributable to the USD Shares divided by the number of outstanding USD Shares on the relevant valuation date."

51. On 1st May 2000 an Information Memorandum was also issued for the Euro Shares. The section headed "*Determination of Net Asset Value*" was in very similar terms.

"*Net Asset Value of the Shares is equal to the market value of the Fund's total assets calculated as described below, less all accrued debts and liabilities, including (i) fees of the Manager and the Administrator earned or accrued but not yet paid, …*

Net asset valuations attributable to the Shares are determined by the Administrator having regard to the value of the Fund's portfolio assets attributable to [the] Shares as of the close of business on the last Business Day of each calendar month. See 'CERTAIN RISK FACTORS'.

. . . . .

The value of assets are recorded at their fair value as determined in good faith by the Administrator in the absence of current quotations or if the Administrator concludes that such quotations are not indicative of fair value by reason of illiquidity of a particular security or other factors. In special circumstances in which the Administrator determines that market prices or quotations do not fairly represent the value of particular assets, the Administrator is authorized to assign a value to such assets which differs from the market prices or quotations. The cost of appraisers or pricing services employed [by] the Fund is an expense of the Fund and as such a charge against Net Asset Value of the USD Shares.

Prospective investors should be aware that situations involving uncertainties as to the valuation of portfolio positions could have an adverse effect on the Fund's net assets if judgments regarding appropriate valuations made by the Administrator should prove incorrect. See 'CERTAIN RISK FACTORS'. In the absence of bad faith or manifest error, the Net Asset Value calculations of the Shares made by the Administrator are conclusive and binding on all shareholders.

The Net Asset Value per Share is equal to the Net Asset Value attributable to the Shares divided by the number of outstanding Shares on the relevant valuation date."

52. By an Information Memorandum issued on 1st May 2004 for the Euro Shares the paragraph above beginning "*Net asset valuations attributable to the*

Shares ...” was amended to follow *mutatis mutandis* the paragraph beginning “*The Administrator will determine* …” in the Information Memoranda for the US Dollar Shares.

Administration Agreements

53. The Administration Agreements were contracts between the relevant Fund, KML and the Administrator. The first such Agreement was made in 1994 in relation to the Common Shares. The Fund was Kingate Global and the Administrator was Hemisphere. The Interpretation clause defined NAV as meaning the NAV of all the shares calculated in accordance with Clause 4 of the Agreement as of the close of business on the last Business Day of each month. It also provided that unless the context otherwise required, words and expressions in the Agreement should bear the same meaning as in the Articles of the Fund. However any alteration or amendment of the Articles would not affect the Agreement without the affected party’s consent. (Clause 1.5).

54. The Administrator was to act upon the terms contained in the Agreement and in accordance *inter alia* with the Articles of the Fund (Clause 2), and to observe and comply with the Articles and with the applicable provisions of any prospectus, explanatory memorandum or other such document relating to, and distributed by or on behalf of, the Fund (Clause 3.8). The Information Memorandum would have fallen within the rubric of “*explanatory memorandum*”. The Administrator’s duties included the calculation of the NAV pursuant to Clause 4, the calculation of the subscription and redemption prices of the shares at each subscription and redemption date, and the calculation of the fees of the Manager (Clauses 3.4.4 – 3.4.6).

55. Clause 4 of the Administration Agreement dealt with the calculation of NAV. Clauses 4.1 to 4.4 repeated verbatim the passages cited above from the February 1994 Memorandum, save that Clause 4.1 provided that NAVs were to be determined by the Manager or the Administrator. The reference

to the Manager is anomalous and would appear to be a drafting error. There was a Clause 4.5 which is not found in the February 1994 Memorandum and which appears to be modelled on Regulation 56 [4] of the Articles of Association.

"*There will be deducted from the total value of the Fund's assets all accrued debts and liabilities, including (i) fees of the Investment Advisors, the Manager, the Consultant and the Administrator earned or accrued but not yet paid, (ii) a provision for the annual performance fees of the Manager and the Investment Advisors managed as of the valuation date, (iii) monthly amortization of organization costs, (iv) an allowance for the Fund's estimated annual audit and legal fees, and (v) any contingencies for which reserves are determined to be required. Net Asset Valuations will be expressed in U.S. Dollars, and any items denominated in other currencies will be translated at prevailing exchange rates as determined by the Administrator.*"

56. The Administration Agreement was restated and amended on 1st March 1995 so as to provide for the administration of both Class A and Class B Shares. It was further restated and amended on 1st May 2000 in relation to the Common Shares, which by now included the Class A Shares, Class B Shares and DM Class Shares. Although no Administration Agreement prior to that date has been found for the DM Shares, I draw the reasonable inference that the Administrator would have administered them on the same basis, *mutatis mutandis*, as the Class A and Class B Shares.

57. Under the 1st May 2000 Administration Agreement, the Administrator's calculation of the NAV was expressly required to be carried out pursuant to the Information Memorandum, and the Administrator was required to co-ordinate with consultants and agents of the Fund and with the Co-Manager with regard to the Fund's currency hedging activities and obtaining price quotes in a manner consistent with the Information Memorandum (Clause 3.4.4). The fees to be calculated were the fees of the Co-Manager (Clause 3.4.6). Clause 4 of the Agreement was simplified so as to provide:

"*4.1 The Net Asset Value of the [Fund] and of each Share shall be calculated and computed in accordance with the [Information] Memorandum, as the same shall exist from time to time. An accurate copy of the definition of Net Asset Value as set forth in the Memorandum is attached hereto as an exhibit.*

4.2 In the absence of bad faith or manifest error, the Net Asset Calculations made by the Administrator shall be conclusive and binding on all shareholders."

58. On 1st June 2007 Kingate Global and KML entered into an amended and restated Administration Agreement in relation to the Common Shares with a new Administrator, BISYS Hedge Fund Services Limited ("BISYS").

59. Clause 4.1 provided that the duties of the Administrator in relation to the calculation of NAV were to:

"*4.1.1 calculate and publish the net asset value per share for each class of shares issued by the [Fund] and the subscription and redemption prices per Share for each class of Shares issued by the [Fund] in accordance with the methodology contained in the Articles, the Offering memorandum or as directed by the Directors from time to time utilising, whenever reasonably practicable, such independent pricing services as chosen by the Administrator from time to time;*

4.1.2 oversee and review the calculation and payment of fees payable to the Administrator, the Manager and other service providers to the [Fund]; ..."

60. On 1st May 2000 Kingate Euro entered into an Administration Agreement with KML and Hemisphere. On 1st June 2007 Kingate Euro and KML entered into an amended and restated Administration Agreement with BISYS. Those agreements, which were in relation to the administration of the Euro Shares, were *mutatis mutandis* on the same terms as the agreements into which KML entered on those dates with Kingate Global.

Manager Agreements

61. The Manager Agreements were contracts between the relevant Fund and KML. They can usefully be regarded as falling into three blocks.

<u>1994 – 2004 ("the First Global Period")</u>

62. The first such agreement was concluded between Kingate Global and KML in relation to the Common Shares in 1994. The Interpretation clause was identical to the Interpretation clause in the first Administration Agreement.

63. The Manager was to act upon the terms contained in the Agreement and in accordance *inter alia* with the Articles (Clause 2) and to observe and comply *inter alia* with the Articles and with the applicable provisions of any prospectus, explanatory memorandum or other such document relating to the Fund and distributed by or on behalf of the Fund (Clause 3.3). The Manager was authorised, subject to the overall policy and supervision of the directors, to exercise the functions, duties, powers and discretions exercisable by the directors under the Articles, either itself or wholly or in part through its authorised agents or delegates, on behalf of the Fund. These included arranging for the performance of all accounting and administrative services which might be required by the Fund's operations (Clauses 3.1 and 3.4).

64. The Manager was to be paid a management fee calculated at an annual rate equal to 1.5% of the month-end NAV of the Fund before any current accrual for a Performance Fee. The management fee was generally payable as of the last Business Day of each month (Clause 6.1.1). As no Performance Fees were ever paid I need not concern myself with the terms of the Manager Agreement relating to them. Any dispute arising as to the amount of the Management and/or Performance Fee was to be referred to the Fund's auditors for settlement, who were entitled to make such further or other adjustments as might in the circumstances appear to them to be appropriate and whose decision was to be regarded as the decision of an expert and not of an arbitrator and was to be binding and final upon the parties (Clause 6.4). The dispute resolution provision was not included in any of the Manager Agreements under the Second Global Period or the Euro Period.

65. Clause 4, which dealt with the calculation of NAV, was identical to clause 4 of the first Administration Agreement, save that Clause 4.1 did not contain any reference to the determination of NAV by the Manager. Thus the Clause provided that "*Net Asset Valuations are determined by the Administrator* ...".

66. The Manager Agreement was amended on 1st March 1995 so as only to provide for the administration of Class A Shares. There is an unexecuted

copy of a Co-Manager Agreement dated 1995 in relation to the Class B Shares. The intended signatories were Kingate Global, KML, and Tremont (Bermuda) Limited ("Tremont"). The terms were *mutatis mutandis* the same as the terms for the Manager Agreement in relation to the Class A Shares. The Co-Managers were to be paid a Co-management fee calculated at an annual rate equal to 1.5% of the month-end NAV of the Fund attributable to Class B Shares. The Co-management fee was generally payable as of the last Business Day of each month. Appropriate adjustments would be made to account for capital contributions and withdrawals.

67. There is no extant copy of any Manager or Co-Manager Agreement relating to the DM Shares. However a Termination Agreement and Release ("TAR") dated 31st March 1997 between Kingate Global, KML and Tremont noted that all three were parties to a Co-Manager Agreement dated 1st January 1996 with respect to the DM Shares, which was terminated by the TAR, and a Co-Manager Agreement dated 1st March 1995 with respect to the Class B Shares, which remained in force unaffected by the TAR.

68. I draw the reasonable inferences that from 1st March 1995 the Class B shares were co-managed on the terms of the unexecuted copy of the Co-Manager Agreement; and that from or about 1st January 1996 the DM Shares were managed *mutatis mutandis* on the same terms until the TAR was executed, and thereafter *mutatis mutandis* on the same terms as the Class A Shares.

2004 – 2008 ("the Second Global Period")

69. Subsequently, KML and Tremont entered into separate Co-Manager Agreements with Kingate Global. These were undated, but referred to the Restated Information Memorandum dated 1st May 2004. The Agreement between Kingate Global and KML set out the various administrative services for which the Co-Manager was responsible. These included, under the ultimate supervision of the directors, reviewing the calculation of the Fund's shares on the part of the Administrator and verifying the calculation of the management fees charged to the Fund (Clause 3.1 (e) and (f)).

70. Clause 5.1 provided that as used in the Agreement, the NAV of the Fund and of the shares should have the meaning assigned to it in the Information Memorandum and should be calculated as described in the Information Memorandum. Clause 5.2 provided that the Co-Managers should receive a monthly management fee at an annual rate of 1.5% of the NAV of the Fund determined as of each Valuation Date (as defined in the Information Memorandum) of each calendar month. The fee was to be divided between them as they should from time to time agree by separate agreement. It was to be payable as of the last Business Day of each calendar month.

71. KML entered into a sole (rather than co-) Manager Agreement with Kingate Global on 1st January 2006. As to Administrative Services, it provided that in accordance with the provisions of the Memorandum and Articles of Association of the Fund, and under the ultimate supervision of the directors, the Manager should assist the Fund (in a manner consistent with existing practice) in the performance of certain of its administrative duties as might be agreed between the parties from time to time (Clause 3.1). The provisions for the calculation of NAV and *mutatis mutandis* the monthly management fee remained unchanged from the previous Agreement.

2000 – 2008 ("the Euro Period")

72. On 1st May 2000 KML entered into a Manager Agreement with Kingate Euro. The Definitions section in Part 1 provided that all capitalized terms used in the Agreement and not otherwise defined therein should have the meaning set forth in the Information Memorandum. The Manager was entitled to a fixed monthly asset based management fee as such fee was described in the Information Memorandum (Clause 4.1(a)). Under the ultimate supervision of the directors, the Manger was responsible for performing or procuring the performance of, *inter alia*, all aspects relating to the Fund's administration and accounting matters (Clause 3.1(f)).

73. Clause 4.3 defined the scope of the Manager's liability to the Fund:

"*The Manager (and any officer or director of the Manager) shall not be liable to the Fund or its Security holders for any error of judgment or for any loss suffered by the Fund or its security holders in connection with its services in the absence of gross negligence, wilful default, fraud, or dishonesty in the performance or non-performance of their obligations or duties.*"

74. All the Manager Agreements in all three periods included a clause in similar terms, although the Manager Agreements prior to 1st May 2000 referred to "*negligence*" rather than "*gross negligence*".

(1)(b) If the answer to (a) is yes [as to which, see below], were the Administrator's determinations of the NAV binding on the Funds for the purpose of calculating the fees due to KML pursuant to the Manager Agreements in force between the Funds and KML, in the absence of bad faith or manifest error?

75. The Defendants submit that the Court should answer this question in the affirmative and that absent bad faith or manifest error KML was entitled to be paid 1.5% of the NAV as determined at the time by the Administrator. The Funds submit that the Court should answer this question in the negative and that KML was entitled to be paid 1.5% of the "true" NAV, adjusted to take into account the fact of the Madoff fraud when this was discovered.

76. The Defendants place great reliance on Fairfield. The case concerned a mutual fund ("Fairfield") which was incorporated in the BVI and was closely analogous to the Funds. Like them, it was a feeder fund for BLMIS, with which it placed about 95% of its assets. The subscription and redemption prices for its shares were calculated monthly in accordance with the articles of association based on the NAV per share. The calculation was carried out by the directors rather than an administrator, and any certificate as to the NAV per share or the subscription or redemption price was expressed in the articles to be binding on all persons. Apart from these immaterial differences, the provisions in Fairfield's articles of association for the calculation of NAV were indistinguishable from the equivalent provisions in the Articles of Association of the Funds.

77. Fairfield, like the Funds, was a victim of Mr Madoff's Ponzi scheme. As a result, in December 2008 its directors suspended calculation of the NAV, thus effectively terminating the redemption of shares. Fairfield was subsequently placed in liquidation in the BVI.

78. The liquidators brought proceedings against a number of the members which had redeemed some or all of their shares before the calculation of NAV was suspended. They sought to recover from the defendants the amounts paid out to them on redemption, on the footing that they were paid out in the mistaken belief that the assets were as stated by BLMIS, when there were in fact no such assets. Any recoveries made on this basis could then be distributed rateably between all members, irrespective of when or whether they redeemed.

79. Lord Sumption, giving the judgment of the Board, held at paras 18 and 19 that whether the defendants were unjustly enriched depended upon whether they were contractually entitled to receive the payments. I shall consider unjust enrichment later in this judgment. For now, I shall focus on the issue of contractual entitlement, which Lord Sumption framed thus at para 19:

> " *... the Fund's claim to recover the redemption payments depends on whether it was bound by the redemption terms to make the payments which it did make. That in turn depends on whether the effect of those terms is that the Fund was obliged upon a redemption to pay (i) the true NAV per share, ascertained in the light of information which subsequently became available about Madoff's frauds, or (ii) the NAV per share which was determined by the directors at the time of redemption. If (ii) is correct then, the shares having been surrendered in exchange for the amount properly due under the articles, the redemption payments are irrecoverable.*"

80. Lord Sumption held at paras 21 – 24 that (ii) was correct and that the redemption payments were therefore irrecoverable.

> "*21 The starting point is the scheme of the articles. Articles 9 and 10 determine the status of investors as members of the Fund, a question which ought in principle to be capable of definitive resolution at any moment in the Fund's history. Both the subscription price under article 9 and the redemption price under article 10 depend on the NAV per share determined under article 11. Article 9(1)(a) provides that the issue of shares 'shall be made on the Dealing Day'. Article 9(1)(b) provides for the*

subscription price to be determined in accordance with article 9(2), which means that it is to be the NAV per share 'determined in accordance with Article 11'. Article 9(1)(c) provides for the subscription price to be payable at a time fixed by the directors, failing which any allotment for which payment is due may be cancelled. There are corresponding provisions of article 10 concerning redemptions. Article 10(1)(a) provides that the redemption of shares 'shall be made on the Dealing Day'. Article 10(1)(b) provides that the redemption is to be effected at the redemption price determined in accordance with article 10(2), which means the 'Redemption Price for each Share shall be the Net Asset Value per Share (as determined in accordance with Article 11)' on the dealing day. Under article 10(1)(c), that price must be paid as soon as practicable after the dealing day, being normally 30 days thereafter subject to specified and limited extensions. These provisions determine the amount due and the time of payment. Moreover, once the NAV per share for a given monthly valuation day is ascertained, subscriptions and redemptions effected at the corresponding subscription and redemption price will affect the determination of NAV per share on the following monthly valuation day. This is because the receipt of subscription moneys and the payment out of redemption moneys will affect the amount of the Fund's assets for the purpose of article 11(2). It will be apparent from this summary that the whole of this scheme depends upon the price being definitively ascertained by the dealing day and known to the parties shortly thereafter. It is unworkable on any other basis.

22 The Fund's case is that when article 10(2) defines the redemption price as the NAV per share 'determined in accordance with Article 11', it means the NAV correctly determined by dividing the NAV of the Fund by the number of shares in issue in accordance with articles 11(1)[b], 11(2) and 11(3). If this is right, the same must be true of article 9(1)(c), which fixes the subscription price by reference to the same provisions of article 11. The directors' determination of the NAV per share as at the valuation day, under article 11, was not definitive according to this analysis unless a certificate was issued pursuant to article 11(1)[c], and that would happen only if the directors chose to issue one.

23 In the Board's opinion, this is an impossible construction. If it were correct, an essential term of both the subscription for shares and their redemption, namely the price, would not be definitively ascertained at the time when the transaction took effect, nor at the time when the price fell to be paid. Indeed, it would not be definitively ascertained for an indefinite period after the transaction had ostensibly been completed, because unless a certificate was issued it would always be possible to vary the determination of the NAV per share made by the directors at the time and substitute a different one based on information acquired long afterwards about the existence or

value of the assets. This would not only expose members who had redeemed their shares to an open-ended liability to repay part of the price received if it subsequently appeared that the assets were worth less than was thought at the time. It would confer on them an open-ended right to recover more (at the expense of other members) if it later appeared that they were worth more. Corresponding problems would arise out of the retrospective variation of the subscription price long after the shares had been allotted. Indeed, it is difficult to see how the directors could perform their duty under article 9(1)(b) not to allot or issue a share at less than the subscription price if the latter might depend on information coming to light after the allotment had been made.

24 If, as the articles clearly envisage, the subscription price and the redemption price are to be definitively ascertained at the time of the subscription or redemption, then the NAV per share on which those prices are based must be the one determined by the directors at the time, whether or not the determination was correctly carried out in accordance with articles 11(2) and (3)."

81. I accept Mr Boyle's submission, with which the other counsel for the Defendants agreed, that, with respect to the calculation of NAV, the articles of association in Fairfield are materially indistinguishable from the Articles of Association of the Funds. It follows that Lord Sumption's analysis of the articles in Fairfield is of binding effect with respect to the Funds' Articles. Even if it were not binding, I would find it wholly persuasive. I am therefore satisfied that in the absence of bad faith or manifest error the monthly NAV determinations by the Administrator were final and binding upon the Funds and their members for the purposes of calculating the subscription and redemption prices of shares.

82. That does not answer the question of whether in the absence of bad faith or manifest error the monthly NAV determinations were also final and binding upon the Funds for the purpose of calculating the monthly management fees due to KML. This is really two questions. First, whether the monthly NAV determinations by the Administrator for the purposes of the subscription and redemption of shares were to be used to calculate the monthly management fees due to KML. Second, if they were to be used for that purpose, whether absent bad faith or manifest error they were final and binding or alternatively merely provisional and therefore open to correction if found to be incorrect.

83. The answers will depend on the construction of the various Manager Agreements, which Mr Beltrami characterised as long term service agreements between the Funds and their managers. I was referred to a number of authorities to assist me with this task. They included ICS Ltd v West Bromwich BS [1998] 1 WLR 896, HL; Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988; Re Sigma Finance Corp (in administrative receivership) [2010] BCC 40; Sebastian Holdings v Deutsche Bank [2010] 2 CLC 300, EWCA; Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900, UKSC; BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd [2013] EWCA Civ 416; and Marley v Rawlings [2015] AC 129, UKSC. In supplemental written submissions I was also addressed on two judgments which were not handed down until after the hearing before me: Arnold v Britton [2015] 2 WLR 1593, UKSC; and Wood v Sureterm Direct Ltd [2015] EWCA Civ 839.

84. Lord Neuberger, with whose judgment Lord Sumption and Lord Hughes agreed, helpfully summarised the applicable principles in Arnold v Britton at para 15. Although directed to the interpretation of a particular clause in a number of leases, his summary is *mutatis mutandis* of general application.

> "*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] AC 1101, para 14.*

85. Thus the task of the court is to construe the parties' implied intention, ie the intention which is reasonably to be inferred from the contract read in the context of the relevant background knowledge, even though this may not correspond with the parties' actual, subjective intention. As Lord Hoffmann, giving the judgment of the Board in Attorney General of Belize v Belize Telecom Ltd, stated at para 16, that meaning is not necessarily or always what the authors or parties to the document would have intended. However there is no evidence of any such disparity in the present case.

86. Lord Neuberger continued:

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 [1971] 1 WLR 1381, 1384-1386; 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 v Ali [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in Rainy Sky* [2011] 1 WLR 2900 *, paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC.*"

87. As to the documentary context mentioned by Lord Neuberger, Thomas Lowe QC, counsel for the FIM Defendants, referred me to para 40 of the judgment of the Court given by Thomas LJ (as he then was) in Sebastian Holdings v Deutsche Bank:

"*The Supreme Court emphasised in Re Sigma Finance Corp [2009] UKSC 2 the need, when looking at a complex series of agreements, to construe an agreement which was part of a series of agreements by taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme.*"

That is a principle which assumes particular significance in the context of this case.

88. There is sometimes a tension between two of the factors mentioned by Lord Neuberger, namely the language of the contract and business common sense. In Rainy Sky, giving the judgment of the Court, Lord Clarke stated at para 30 that:

"*... where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense.*"

89. In similar vein, in Re Sigma Finance Corp (in administrative receivership) Lord Collins, with whom Lords Hope and Mance agreed, warned at para 35 against an overly literal approach to construction:

"*In complex documents of the kind in issue there are bound to be ambiguities, infelicities and inconsistencies. An over-literal interpretation of one provision without regard to the whole may distort or frustrate the commercial purpose. This is one of those too frequent cases where a document has been subjected to the type of textual analysis more appropriate to the interpretation of tax legislation which has been the subject of detailed scrutiny at all committee stages than to an instrument securing commercial obligations: cf. Satyam Computer Services Ltd v Upaid Systems Ltd [2008] EWCA Civ 487, [2008] 2 C.L.C. 864, at [2]*."

90. On the other hand, in Arnold v Britton Lord Neuberger cautioned that commercial common sense, while a very important factor to take into account when interpreting a contract:

(1) should not be invoked to undervalue the importance of the language of the provision which is to be construed (para 17);

(2) should not be invoked retrospectively (para 19):

"*The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language*";

and that

(3) a court should be slow to reject the natural meaning of a provision as correct simply because it appears to have been a very imprudent one for the parties to have agreed, even ignoring the benefit of hindsight (para 20).

91. I am satisfied that a reasonable person, having all the background knowledge of the parties, which would have included the terms of the Articles of Association, Information Memoranda and Administration Agreements, would have understood the parties to the Manager Agreements to intend that the monthly NAV determinations by the Administrator for the purposes of the subscription and redemption of shares were to be used to calculate the monthly management fee due to KML. I am therefore satisfied that this was an express contractual term. There is no suggestion in any of the contractual documents that any other calculations were to be used for this purpose.

92. As to the First Global Period:

(1) The Manager Agreements in force during this period provided that (i) the management fee was calculated at an annual rate equal to 1.5% of the month end NAV of the Fund; and (ii) the NAVs were determined by the Administrator as of the close of business on the last Business Day of each calendar month.

(2) The Administration Agreements in force during this period provided that: (i) the Administrator's duties included the calculation of the NAV; the calculation of the Subscription Price and the Redemption Price of the shares at each Subscription and Redemption Date; and the calculation of the fees of the Manager or Co-Manager; and (ii) NAVs were determined by the Administrator or Manager as of the close of business on the last Business Day of each calendar month.

93. The Manager Agreements stated in express terms that the monthly management or co-management fee was to be calculated based upon the month end NAV for the Fund and that the NAV was determined by the Administrator. From which I conclude that the monthly management fee was based upon the monthly NAV as determined by the Administrator. The Administration Agreements, to which KML was also a party, provide contextual support for this construction although it is not dependent upon them.

94. As to the Second Global Period:

(1) The Co-Manager and Manager Agreements in force during this period provided that: (i) the Co-Managers shall be entitled, in the aggregate, to receive from the Fund a monthly management fee at an annual rate of 1.5% of the NAV of the Fund determined as of each valuation date of each calendar month; and (ii) the NAV of the Fund and of the US Dollar shares should have the meaning assigned to it in the Information Memorandum and should be calculated as described in the Information Memorandum.

(2) The Information Memoranda in force during this period provided that: (i) the Administrator would determine the NAV of the Fund's Portfolio assets attributable to the US Dollar shares at the close of business on the last Business Day of each month; (ii) the Manager or Co-Managers received a monthly fee from the Fund calculated at an annual rate equal to 1.5% of the month end NAV of the Fund attributable to the US Dollar Shares; and (iii) the subscription and redemption prices for the shares were equal to the NAV per share at the Valuation or Redemption Date.

95. The Co-Manager and Manager Agreements stated that the monthly co-management or management fee was to be calculated based upon the month end NAV for the Fund calculated as described in the Information Memoranda. The Information Memoranda stated that the Administrator would determine the NAV. From which I conclude that the monthly management fee was based upon the monthly NAV as determined by the Administrator.

96. As to the Euro Period:

(1) The Manager Agreements in force during this period provided that the Manager shall be entitled to a fixed, asset based monthly management fee as defined and described in the Information Memorandum.

(2) The Information Memoranda in force during this period provided that: (i) NAVs attributable to the Euro Shares were determined by the Administrator having regard to the value of the Fund's portfolio assets attributable to Euro Shares as of the close of business on the last Business Day of each calendar month; (ii) the Manager or Co-Managers received a monthly fee from the Fund calculated at an annual rate equal to 1.5% of the month end NAV of the Fund attributable to the Euro Shares; and (iii) the subscription and redemption prices for the shares were equal to the NAV per share at the Valuation or Redemption Date.

97. The Manager Agreements stated that the monthly management fee was to be calculated based upon the month end NAV for the Fund calculated as described in the Information Memoranda. The Information Memoranda stated that the Administrator would determine the NAV. From which I conclude that the monthly management fee was based upon the monthly NAV as determined by the Administrator.

98. I therefore reject Mr Beltrami's submission, based on a detailed textual analysis, that all that the Manager Agreements provided was a methodology for the calculation of the management fee, and not that any given calculation carried out by the Administrator pursuant to that methodology was contractually binding.

99. I also reject Mr Beltrami's submission that the power of the directors to suspend the calculation of NAV is indicative that such calculations were not intended to be a condition precedent for entitlement to payment of a management fee, and hence that there was no contractual requirement that they should be used for its determination. The calculation of NAVs was only ever likely to be suspended in extraordinary circumstances – as happened in this case when the Madoff fraud was uncovered. Uncertainty over whether and on what basis the manager would be paid in such circumstances, assuming that the Funds had sufficient assets to make such payments, is not sufficient to undermine what I am satisfied is the clear and obvious construction of the Manager Agreements as set out in the preceding paragraphs.

100. The more difficult question is whether absent bad faith or manifest error the Administrator's monthly NAV calculations were final and binding on the Funds with respect to the calculation of management fees.

101. I accept that, whereas the scheme for the subscription and redemption of shares would have been unworkable unless the monthly NAV calculations were final and binding, the contractual arrangements for the payment of management fees would have been workable if they were merely provisional and subject to correction. Though in my judgment the finality and certainty

of a final and binding determination makes better commercial sense than an arrangement whereby at some indeterminate date, maybe many years later, the management fees might fall to be recalculated.

102. Further, considering the Manager Agreements in the context of the overall scheme of the Funds, it would be anomalous if the management fees calculated by the Administrator were final and binding as regards the NAV used to determine the monthly subscription and redemption fees but not as regards the monies owing to KML. Particularly as management fees earned or accrued but not yet paid were one of the components of the calculation of NAV.

103. The Manager Agreements did not expressly provide for what was to happen if it transpired that the monthly NAV determinations by the Administrator did not represent the "true" NAV of the Funds. The question arises as to whether they did so by implication. The principles applicable to implying a contractual term were authoritatively stated by Lord Hoffmann in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988:

> "*17 The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.*
>
> *18 In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.*
>
> . . . . .
>
> *21 It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would*

spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech [in Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 1 WLR 601] that this question can be reformulated in various ways which a court may find helpful in providing an answer—the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on—but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"

104. Thus if it transpired that the monthly NAV determinations by the Administrator did not represent the "true" NAV of the Funds, then for the purpose of calculating management fees, and absent bad faith or manifest error, those NAV determinations would stand unless there was an implied term to the contrary. This is because the parties had expressly agreed that it was on the basis of the NAV determinations that the management fees were to be calculated.

105. Mr Beltrami submitted that, by analogy with conclusive evidence clause cases such as London and Regional Properties v Ministry of Defence [2008] EWCA Civ 1212, it would take the clearest possible terms to make the Administrator's determination final and binding. If by that he meant that something more was required than an agreement that such determination was to be used to calculate the monthly management fee then I reject his submission. The agreement was final and binding absent an implied term that it was not.

106. Although Mr Beltrami did not accept that the Plaintiffs' construction required the implication of any terms, he did rely on several express terms of the Manager Agreements and, with respect to the Second Global Period and the Euro Period, the Information Memoranda, to support the construction for which he contended. He would no doubt submit that they supported the implication of a term if in order to make good his case one needed to be implied.

107. First, Mr Beltrami noted the recurring provision that in the absence of bad faith or manifest error the NAV calculations made by the Administrator were conclusive and binding on all shareholders but that there was no equivalent provision that they were conclusive and binding on managers. This was, he submitted, indicative that the NAV calculations were not intended to be so.

108. Mr Boyle submitted in reply that the clause referred to shareholders because it had been taken from the Information Memorandum which was a document addressed to shareholders. Had the clause been intended to provide that the NAV calculations were not binding on managers, he submitted, it would have said so in express terms. In fact, Mr Boyle submitted, the clause did not make valuations binding which would otherwise not be binding – as was clear from Fairfield they were binding upon the shareholders in any event – but defined the only circumstances in which they would not be binding, namely bad faith and manifest error. I accept Mr Boyle's submissions on this point.

109. To the extent necessary, Mr Beltrami relied on the principle of interpretation "*expressio unius est exclusio alterius*".[7] Both counsel referred me to various cases cited in the Fifth Edition of Lewison on the Interpretation of Contracts. As Jenkins LJ said in Dean v Wiesengrund [1955] 2 QB 120, EWCA, at 130 – 131, albeit in the context of a case of statutory construction:

> "*... this principle is ... no more than an aid to construction, and has little, if any, weight where it is possible ... to account for the expressio unius on grounds other than an intention to effect the exclusio alterius.*"

110. In my judgment the *expressio unius* principle is of little assistance in construing the "*conclusive and binding on all shareholders*" provision as it raises rather than answers the question of whether it is possible to account for the fact that the shareholders but not the manager are mentioned on grounds other than an intention to exclude the manager.

[7] The expression of one thing is the exclusion of another.

111. Mr Beltrami also relied on Clause 6.4 of the Manager Agreements during the First Global Period which provided that any dispute arising as to the amount of the management fee was to be referred to the Fund's auditors for settlement. He submitted that it was difficult to understand the purpose of this provision in relation to management fees if any dispute related only to the arithmetic of the Administrator's calculation. But, he submitted, the provision made perfect sense if the auditors were able to recalculate the "true" NAV for the purpose of adjusting management fees calculated on the basis of erroneous information.

112. Mr Boyle replied that the real purpose of the provision was the resolution of disputes regarding the performance fee, the calculation of which was quite complicated. The inclusion of the management fee in the clause was subsidiary to this purpose. Thus, he submitted, its inclusion was not a reliable indicator of the potential ambit of the disputes over the management fee which the auditors might have been called upon to decide. Tellingly, neither performance fees nor a dispute resolution mechanism featured in the Manager Agreements for the Second Global Period or the Euro Period.

113. Even if the auditors were able to determine the "true" NAV for purposes of adjusting the management fee, it is not clear how that would assist Mr Beltrami. The contractual position would then be that, absent an implied term to the contrary, the calculation of NAV by the Administrator was final and binding for purposes of determining the management fee unless and until it was varied by the auditors, at which point the auditors' calculation would become final and binding. Insofar as relevant, the same would apply, *mutatis mutandis* to the calculation of the performance fee, which was not based on NAV.

114. Although Mr Beltrami referred me to various agreements with other service providers, I was not taken through them in detail and find them of little assistance.

115. Having found that it was an express term of the Manager Agreements that the monthly NAV determinations by the Administrator for the purposes of

the subscription and redemption of shares were to be used to calculate the monthly management fee due to KML, I am satisfied that there was no express contractual term that these determinations were merely provisional and open to correction if later found to be inaccurate. Neither was there any implied term to that effect as that is not what the instrument, read as a whole against the relevant background, would reasonably have been understood to mean.

116. Accordingly, I find that the Administrator's determinations of the NAV were binding on the Funds for the purpose of calculating the fees due to KML pursuant to the Manager Agreements in force between the Funds and KML, in the absence of bad faith or manifest error.

(1)(a) Whether the NAVs were determined from time to time by the Administrator on the assumption (made for the purposes only of the Trust Defendants' and KML's Preliminary Issues Summonses) that KML, and/or FIM, and/or Mr Grosso and/or Mr Ceretti had input over the calculation of the NAV to the extent of control, on the basis pleaded at paragraphs 18 and 19 of the Reply

117. The Administrator compiled the components of the NAV calculation, which was based largely on figures supplied by BLMIS, carried out the NAV calculation based on those components, and then sent it out to the shareholders. However Mr Beltrami submitted that in spite of all this the Administrator did not determine the NAV within the meaning of the Manager Agreements because KML et al had the power to give or withhold approval of the NAV calculations, and hence to influence them. That is what was meant by "*control*" in the Funds' pleaded case.

118. I agree with Mr Lowe that the existence of "*control*" in the sense alleged did not mean that it was someone other than the Administrator who carried out the NAV determination. In other words, I am satisfied that a reasonable person having all the background knowledge which would have been available to the parties would have understood that, assuming "*control*" in

the sense alleged, the NAVs were determined from time to time by the Administrator within the meaning of "*determined*" and its cognates as they were used in the Manager Agreements and other documents within the Contractual Scheme.

119. This construction accords with the natural and ordinary meaning of "*determined*". It also makes good commercial sense. As I have found that the monthly NAV determinations by the Administrator for the purposes of the subscription and redemption of shares were to be used to calculate the monthly management fee due to KML, if the determinations were only purported for the one purpose they would only be purported for the other. This would undermine the certainty needed to make the scheme for the subscription and redemption of shares workable.

120. Moreover, I accept Mr Lowe's submission that absent bad faith or manifest error the Court should not look behind the ostensible NAV determination to enquire whether that determination was actual or merely purported. He relied on Lord Sumption's observations about the finality of the calculation of NAV for the purposes of subscription and redemption prices at para 24 of Fairfield, which is set out above. If it is final for that purpose then it is final for the purpose of calculating management fees.

121. I shall deal briefly with the authorities to which I was referred, although my finding on this issue is not dependent upon them. Mr Beltrami submitted that, by analogy with conclusive certification cases, the requirement that the NAV was to be determined by the Administrator was to be strictly construed and the Administrator was required to act independently. See North Shore Ventures Ltd v Anstead Holdings Inc ("North Shore") [2012] Ch 31, EWCA, per Sir Andrew Morritt C at para 46 (strictly construed) and Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd [2006] EWHC 89 (TCC) *per* Jackson J (as he then was) at paras 36 – 36 (requirement to act independently).

122. The former case concerned the construction of a guarantee and the latter case the construction of a building contract, so the factual circumstances of

the certifications were somewhat different to the facts of the instant case. However Mr Beltrami submitted that the requirements of strict construction and independence were of general application where two parties appointed a third to make a determination binding upon them.

123. Assuming that this is correct, these authorities do not take the matter much further. I am satisfied that, assuming control in the sense alleged, the exercise undertaken by the Administrator counted as a determination within the meaning of the Manager Agreements and other documents within the Contractual Scheme when they are properly construed.

124. Mr Lowe submitted that as a matter of common law all that was required of the Administrator was that it carried out the NAV calculation rationally (in a public law sense) and in good faith. See, eg, the judgment of the Court given by Rix LJ in WestLB AG v Nomura Bank International Plc [2012] EWCA Civ 495 at para 30. This requirement is very similar to the express provision in the Contractual Scheme that in the absence of bad faith or manifest error the Administrator's determination would be final and binding on all shareholders. I accept that the Administrator was required to act rationally and in good faith, but this does not preclude a requirement that the Administrator was also required to act independently.

125. I am not required to determine whether control by KML et al was consistent with the Manager Agreements. Mr Beltrami submitted that the parties could not reasonably be taken to have intended that KML was in effect the arbiter of its fees. But as Mr Boyle submitted, the express terms of the Manager Agreements provided that the Manager should supervise the performance of the Funds' administrative and accounting functions.

    (1) During the First Global Period, the Manager Agreement provided that, subject to the supervision of the directors, KML should have power to arrange for the performance of all accounting and administrative services which might be required by the Fund's operations (Clause 3.1).

(2) During the Second Global Period, the Manager Agreements provided that under the ultimate supervision of the directors KML was responsible for performing or procuring the performance of *inter alia* reviewing the calculation of the Fund's shares on the part of the Administrator and verifying the calculation of the management fees charged to the Fund (Clause 3.1 (e) and (f)).

(3) During the Euro Period, under the 1st May 2000 Manager Agreement, and under the ultimate supervision of the directors, the Manager was responsible for performing or procuring the performance of, *inter alia*, all aspects relating to the Fund's administration and accounting matters (Clause 3.1(f)).

126. Be that as it may, for the reasons given above I am satisfied that the NAVs were determined from time to time by the Administrator on the assumption that KML et al had input over the calculation of the NAV to the extent of control, on the basis pleaded at paragraphs 18 and 19 of the Reply.

(2) If the answer to (1)(b) is yes, whether the fees paid by the Funds to KML on the basis of those NAV figures, ie the Disputed Fees, were, in the absence of bad faith or manifest error, properly due to KML under the terms of the Manager Agreements

127. In light of the answer to issue 1(b), I am satisfied that the Disputed Fees, were, in the absence of bad faith or manifest error, properly due to KML under the terms of the Manager Agreements.

(3) If the answer to (2) is yes, and subject to issues (5) to (7), whether in consequence the Funds are precluded from asserting that the Disputed Fees, or any payments alleged by the Funds to originate from the Disputed Fees, are recoverable from: (a) KML; (b) the FIM Defendants; and (c) the Trust Defendants

128. The issue here is whether KML's contractual entitlement to payment of the management fees which it received defeats the Funds' claim for unjust enrichment. Consideration of this issue proceeds on the assumption that, subject to the contractual entitlement point, the unjust enrichment claim is properly arguable.

129. The Funds' case, as summarised in their written submissions, is that they made a mistake on each occasion on which they paid fees to KML, as these were calculated and paid by reference to the stated NAVs of the Funds and on the assumption that the monthly determinations were accurate. By reason of the fraud being perpetrated by Mr Madoff and BLMIS, the stated NAVs were in fact grossly overstated because they were based on assets which did not exist (because they had been misappropriated by BLMIS and used in order to maintain the Ponzi scheme). The true position was that at all material times the Funds were insolvent or nearly insolvent and that the "correct" NAVs were very different to those which were stated. Had the true position been known, the Funds would have paid no, or very substantially reduced, fees, and KML could not have claimed anything more.

130. The Funds have brought restitutionary claims against both KML, as the direct recipient of the fees, and the FIM Defendants and the Trust Defendants, as their indirect recipients. They accept that, should the defence of contractual entitlement defeat the claim in restitution against KML, it would also preclude the claim in restitution against the indirect recipients.

131. As Saul Froomkin QC, counsel for KML, submitted, the applicable legal principles are to be found at para 18 of Lord Sumption's judgment in Fairfield:

> "*18 The basic principle is not in dispute. The payee of money 'cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him':* Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349 *at 408B (Lord Hope). Or, as Professor Burrows has put it in his* Restatement of the English Law of Unjust Enrichment *(2012) at §3(6), 'in general, an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid contractual, statutory or other legal obligation.' Therefore, to the extent that a payment made under a mistake discharges a contractual*

debt of the payee, it cannot be recovered, unless (which is not suggested) the mistake is such as to avoid the contract: Barclays Bank Ltd v W.J. Simms Son & Cooke (Southern) Ltd [1980] QB 67 , 695. So far as the payment exceeds the debt properly due, then the payer is in principle entitled to recover the excess.

19 It follows that the Fund's claim to recover the redemption payments depends on whether it was bound by the redemption terms to make the payments which it did make."

132. The passage was part of the *ratio* of the case in that, notwithstanding Mr Beltrami's submission to the contrary, it was a necessary link in the chain of reasoning which led the judge to his conclusion. This is clear from the first sentence in para 19: "*It follows that …*". In order to arrive at the conclusion that the Fund's claim to recover the redemption payments depended on whether it was bound by the redemption terms to make the payments which it did make, Lord Sumption first considered and rejected the possibility that the Fund had a restitutionary claim to the redemption payments. As stated by Brooke LJ in R (Al-Skeini) v Defence Secretary [2007] QB 140, EWCA, at para 145:

"*The ratio decidendi of a case has been defined as any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the reasoning adopted by him: Cross & Harris, Precedent in English Law, 4th ed (1991), p 72; and see Dunnachie v Kingston upon Hull City Council [2004] ICR 481, para 82.*"

133. Lord Sumption's reasoning is therefore binding upon me. I would find it strongly persuasive even if it were not. I need not assess the merits of Mr Beltrami's bold submission that it was not in fact correct, or go behind the judgment to consider the authorities on which it was based. (Although I shall have something to say about them when considering issue 7.) For purposes of unjust enrichment, the facts of the present case are materially indistinguishable from the facts in Fairfield. The Funds made payments which discharged the contractual debts which they owed to KML. Subject to issues (5) to (7) those payments cannot be recovered if mistaken as it was neither submitted, nor was it seriously arguable, that the mistake was such as to avoid the Manager Agreements.

134. I conclude that subject to issues (5) to (7), the Funds are in consequence precluded from asserting that the Disputed Fees, or any payments alleged by the Funds to originate from the Disputed Fees, are recoverable from any of the Defendants.

(4) If the answer to any of issues (1) to (3) is no, whether the Defendants have a defence to the claim in unjust enrichment insofar as this defence derives from alleged contractual entitlement on the part of KML

135. If, however, the answer to any of issues (1) to (3) is no, the Defendants do not have a defence to the claim in unjust enrichment insofar as this defence derives from alleged contractual entitlement on the part of KML.

(5) Whether the bad faith and/or manifest error of BLMIS constitutes bad faith and/or manifest error in relation to the calculation of the NAV, such that any determination of NAV made by the Administrator was not for this reason binding on the Funds and KML

136. This issue is straightforward. Turning first to the linguistic context, the references to bad faith and manifest error in the Manager Agreements and the other documents in the Contractual Scheme are all in substantially the same terms as the reference in the Manager Agreement for the First Global Period (at clause 4.4):

"*In the absence of bad faith or manifest error, the Net Asset Value Calculations made by the Administrator are conclusive and binding on all shareholders.*"

137. The reference needs to be considered in context:

"*In addition to special valuation calculations relating to illiquid securities, other special situations affecting the measurement of Net Asset Values may arise from time to time. Prospective investors should be aware that situations involving uncertainties as to the valuation of portfolio positions could have an adverse effect on the Fund's net assets if judgments regarding appropriate valuations made by the Administrator should prove incorrect. In the absence of bad faith or manifest error, the Net Asset Value calculations*

made by the Administrator are conclusive and binding on all shareholders." [Emphasis added.]

138. What the clause is saying is that judgments by the Administrator as to the calculation of NAV may prove incorrect but that unless the Administrator has acted in bad faith or made a manifest error those calculations will nonetheless be final and binding on all shareholders. This construction finds contextual support in that it occurs within clause 4, headed "*Net Asset Value*", which deals with the calculation of NAV by the Administrator.

139. The Manager Agreements fall to be construed in the context of the other documents in the contractual scheme. As summarised earlier in this judgment, Kingate Global's Articles of Association provided at Regulation 58 that the NAVs would be binding on all persons absent bad faith or manifest error [Regulation 58]. This is in substance the same provision as appeared in the Manager Agreements. Regulation 56[2] provided that the Administrator could conclusively rely on fair value valuations provided by the Manager and the Investment Adviser, and that no independent appraisals in respect of the NAVs would be required. Their conclusiveness was not qualified by that Regulation. Doubtless that is why independent valuations were not required. As any valuations provided by the Manager or the Investment Adviser were conclusive, they could not be impugned on grounds of bad faith or manifest error.

140. During the Second Global Period and the Euro Period, the Manager Agreements provided that the Manager was entitled to a fixed monthly based management fee as described in the Information Memoranda. The Information Memoranda included the standard provision that in the absence of bad faith or manifest error the NAV calculations made by the Administrator were conclusive and binding on all shareholders and referred to "*CERTAIN RISK FACTORS*". These included the possibility of fraud or misappropriation by the Investment Adviser or other third party. The reference to these risk factors emphasised the point made in the Manager Agreement for the First Global Period. Notwithstanding third party fraud or misappropriation, the NAV calculations made by the Administrator would

be conclusive and binding on all shareholders absent bad faith or manifest error by the Administrator.

141. The commercial context supports this construction. It was an express term of the Manager Agreements that the monthly management fee due to KML was to be calculated based on the monthly NAV determinations by the Administrator for the purposes of the subscription and redemption of shares. Given the need for those calculations to be certain, it would make little commercial sense to expose the Funds to the risk that they could potentially be set aside on the basis of unknown and unknowable factors that were beyond the Administrator's control.

142. I conclude that the bad faith and/or manifest error of BLMIS does not constitute bad faith and/or manifest error in relation to the calculation of the NAV, such that any determination of NAV made by the Administrator was not for this reason binding on the Funds and KML.

(6) If the facts are as pleaded by the Funds at paragraph 15 of the Reply, whether the conduct of the Administrator constituted bad faith and/or manifest error for the purpose of the NAV calculations, such that any determination of NAV made by it was not for this reason binding on the Funds and KML

143. On the alleged facts, this issue is concerned not with bad faith but with manifest error. A "*manifest error*" was defined by Lewison J (as he then was) in IIG Capital v Van Der Merwe [2008] 1 All ER (Comm) 435, Ch D, at para 52 as: "*one that is obvious or easily demonstrable without extensive investigation.*" This definition was approved by the Court of Appeal of England and Wales in that case as reported at [2008] 2 All ER (Comm) 1185 at para 35.

144. The error need not be apparent on the face of the determination: it is permissible to examine the process by which the determination was arrived at and to show that the determination was obviously wrong by reference to an error in that process. See eg Axa Sun Life Services v Campbell Martin

[2011] 1 CLC 312, EWCA, *per* Stanley Burnton LJ at paras 72 – 74 and Rix LJ at para 108; and IG Index Plc v Colley [2013] EWHC 478, QB, *per* Stadlen J at para 813.

145. On the facts of this case, therefore, it would be permissible to go behind the NAVs and examine the calculations which gave rise to them. If the Administrator made an obvious error in the calculations then that error would count as manifest. But the calculations would have to be wrong on the basis of the material before the Administrator, rather than wrong on the basis of the true state of affairs as known to BLMIS and Mr Madoff. Any irregularities in the process by which the Administrator calculated those figures would be relevant only insofar as they went to demonstrate that the figures were wrong.

146. The error need not be detected at the time. In IG Index Plc v Colley due to the fraud of one of the defendants it went undetected for years. See the judgment of Stadlen J at 826. In North Shore the existence of a manifest error in the amount of debt certified as owing under a guarantee depended upon the Court of Appeal finding that a purported variation of a loan agreement had contractual effect. As Smith LJ stated at para 61, the guarantors could see immediately that the certificate was incorrect, but they could not demonstrate that conclusively until the court had determined the issue of variation. It is in that context that Sir Andrew Morritt's statement at para 53 that he could "*see no reason why the error must be manifest at the time of the certificate*" should be understood.

147. In the present case there was no error detected at the time. But, as Mr Boyle submitted, any error should, to count as manifest, have been reasonably *capable* of detection by the Administrator at or near the time when it was made. The possibility of prompt detection was important given the importance of the monthly NAV determinations for the redemption and calculation of shares. In practical terms, therefore, the question is whether any error is something which the Administrator should have spotted. The fact that no such error was in fact spotted by the Administrator is beside the point.

148. Turning to para 15 of the Reply, it will be recalled that the Administrator allegedly:

(1) failed to verify the figures provided by BLMIS for the purpose of calculating the NAV; and/or

(2) ignored inconsistencies in the figures provided by BLMIS; and/or

(3) failed to consider and address inconsistencies in the figures provided by BLMIS adequately; and/or

(4) relied on KML and/or Mr Ceretti and/or Mr Grosso and/or FIM to verify the figures provided by BLMIS and/or to check the calculations of the NAV, and/or it permitted KML and/or Mr Ceretti and/or Mr Grosso and/or FIM to vary the calculations of the NAV, as pleaded in paragraph 18 of the Reply.

149. These allegations are merely bare bones. The affidavit of Jeremy Scott filed on behalf of the Funds' Joint Liquidators put some flesh on them:

"*205. From about January 2000, the Administrator started to carry out its own price checking of the securities bought and sold according to the Madoff monthly statements, in that it consulted publicly available sources (such as Bloomberg) in order to see whether the prices at which Madoff said (in the statements) the securities had been bought and/or sold corresponded with information published elsewhere. ...*

206. ... on at least one occasion, the price checking process generated inconsistencies which could not be verified by the Administrator. On that occasion, FIM (through Mr Grosso) advised the Funds to accept the figures provided by Madoff, notwithstanding the inconsistencies identified by the Administrator."

150. Mr Scott then went on to give details of that one occasion. The Administrator contacted KML to draw to its attention valuation differences between BLMIS and Bloomberg. The upshot was that one Mr Wetherhill, who was a director of the Funds and also of KML, and the Administrator took steps to convene Board Meetings of the Funds for the purpose of obtaining resolutions that following the advice of FIM they would utilise the prices provided by BLMIS, which resolutions were duly signed by the

directors. It would therefore appear that the four allegations are all interrelated.

151. Mr Boyle argued persuasively that on the strength of Mr Scott's affidavit the Administrator did not ignore or fail to address the inconsistency, but acted together with the Funds and KML to address it. There is considerable force in his submission that Mr Scott's affidavit would not support a finding of manifest error by the Administrator. However Mr Beltrami fairly pointed out that the purpose of the parties putting in evidence was to enable the Court to determine the construction issues based on a factual platform, and not to make good the pleaded allegations.

152. I therefore conclude that if the facts are as pleaded by the Funds at paragraph 15 of the Reply, then the conduct of the Administrator *may* have constituted manifest error (but not bad faith) for the purpose of the NAV calculations, such that any determination of NAV made by it was not for this reason binding on the Funds and KML. The facts are not pleaded with sufficient particularity for me to make a finding one way or the other.

(7) If the breaches of duty pleaded at paragraphs 106 and 107 of the Statement of Claim are established, whether the Defendants are precluded from asserting a defence to the claim in unjust enrichment insofar as this defence derives from alleged contractual entitlement on the part of KML by reason of its inducement of the Funds' mistake

153. Although the wording of this question was agreed by all parties prior to the hearing, there were two aspects of it that proved controversial. First, although the question is premised on a mistake by the Funds, Mr Lowe submitted that there was in fact no such mistake as the Funds were contractually obliged to pay the NAV as determined by the Administrator. Any mistake in the calculation of the NAV was therefore attributable, he submitted, to the Administrator and not the Funds.

154. The answer to this point is, as Mr Beltrami submitted, that the Funds' mistake was to believe that the information supplied by BLMIS was correct.

Had the Funds known the true state of affairs there is in my judgment an irresistible inference that they would have suspended the determination of NAV, as they did when the Madoff fraud was uncovered. Had they done so, the management fees to which KML was entitled – or at any rate those which fell to be calculated after the suspension – would have been substantially less.

155. Second, there was a lively debate as to whether for purposes of answering this question the Court should assume that the pleaded facts were sufficient to establish that KML induced the Funds' mistake. I read the question as requiring the Court to make that assumption. I am in any case unable to say from the pleadings whether or not the alleged breaches of duty induced the Funds' mistake: I can properly conclude only that they may have done.

156. On the assumption, which I make for the purposes of this question, that KML did induce the Funds' mistake, Mr Beltrami put his case in two ways. First, he submitted that such inducement negatived KML's contractual entitlement to the payment of management fees, at least insofar as such payment exceeded the "true" NAV of the Funds, whatever that might have been from time to time.

157. Mr Beltrami relied upon the principle that a party will not generally be entitled to take advantage of his own breach of contract as against the other party. This principle applies as much to a party seeking to obtain a benefit under a continuing contract as it does to a party who relies on his breach to avoid a contract and thereby escape his obligations. See the leading judgment of Lord Jauncey, with whom the other members of the House of Lords agreed, in Alghussein Establishment v Eton College [1988] 1 WLR 587 at 591 D – E and 594 C – D.

158. There are two further aspects of the principle which are material to the instant case. First, it is necessary to show that the contractual rights or benefits which the party in question is seeking to assert or claim arise as a direct consequence of that party's prior breach. See the leading judgment of Mr Justice Ribeiro PJ, with whom the other members of the Court of Final

Appeal of the Hong Kong Special Administrative Region agreed, in Kensland Realty Limited v Whale View Investment Limited [2001] HKCFA 57 at para 95.

159. On the Funds' case, the overpayment of management fees arose as a direct consequence of KML's breach of duty. It is true that, as Mr Boyle submitted, KML does not need to rely on a breach of duty to establish its right to payment: it performed services under the Manager Agreements for which it was contractually entitled to be paid. But were it not for that breach of duty then on the Funds' case the amount to which KML was entitled would have been substantially less.

160. Secondly, the principle is one not of law but of construction. See Alghussein Establishment v Eton College *per* Lord Jauncey at 595 G – H. It is a presumption which will be rebutted if the agreement contains clear express provisions to the contrary. See the speech of Lord Jauncey at 595 C – D, citing with approval the speech of Lord Diplock in Cheall v Association of Professional Executive Clerical and Computer Staff [1983] 2 AC 180, HL, at 189.

161. Mr Boyle submitted that as the Manager Agreements defined the scope of KML's liabilities to the Funds there was no room for the application of the presumption. For ease of reference I shall repeat the specimen clause from the Manager Agreement dated 1st May 2000 with Kingate Euro which is set out earlier in this judgment.

> "*The Manager (and any officer or director of the Manager) shall not be liable to the Fund or its Security holders for any error of judgment or for any loss suffered by the Fund or its security holders in connection with its services in the absence of gross negligence, wilful default, fraud, or dishonesty in the performance or non-performance of their obligations or duties.*"

162. In my judgment this clause, like the similar clauses in the other Manager Agreements, limits the circumstances in which KML may be liable to the relevant Fund but does not limit the nature of that liability. Thus the clause contains a clear, express provision that the presumption will not apply in the

absence of gross negligence, wilful default, fraud, or dishonesty in the performance or non-performance by KML of its obligations or duties: it does not provide that the presumption will not apply if any one of those circumstances is present.

163. The upshot is that I accept Mr Beltrami's submission that, on the assumption that KML induced the Funds' mistake, such inducement negatived KML's contractual entitlement to the payment of management fees insofar as such payment exceeded the "true" NAV of the Funds. It follows that in those circumstances contractual entitlement cannot give rise to a defence to the Funds' claim in unjust enrichment.

164. The alternative way in which Mr Beltrami put his case was that, assuming that KML was contractually entitled to the management fees which it received, the Funds should be permitted to recover the mistaken payments as the mistake was induced by KML's breach of duty. He relied principally on two cases: Barclays Bank v Simms [1980] QB 677, HC, and Sybron v Rochem [1984] Ch 112, EWCA.

165. In Barclays Bank v Simms, Goff J (as he then was) stated:

> "*From this formidable line of authority certain simple principles can, in my judgment, be deduced: (1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if ... (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; ...*
>
> . . . . .
>
> *To these simple propositions, I append the following footnotes:*
>
> *(a) Proposition 1. This is founded upon the speeches in the three cases in the House of Lords, to which I have referred. It is also consistent with the opinion expressed by Turner J. in Thomas v. Houston Corbett & Co. [1969] N.Z.L.R. 151, 167. Of course, if the money was due under a contract between the payer and the payee, there can be no recovery on this ground unless the contract itself is held void for mistake (as in Norwich Union Fire*

Insurance Society Ltd. v. Wm. H. Price Ltd. [1934] A.C. 455) or is rescinded by the plaintiff. ...

(c) Proposition 2 (b). This is founded upon the decision In Aiken v. Short,1 H. & N. 210, and upon dicta in Kerrison v. Glyn, Mills, Currie & Co.,81 L.J.K.B. 465. However, even if the payee has given consideration for the payment, for example by accepting the payment in discharge of a debt owed to him by a third party on whose behalf the payer is authorised to discharge it, that transaction may itself be set aside (and so provide no defence to the claim) if the payer's mistake was induced by the payee, or possibly even where the payee, being aware of the payer's mistake, did not receive the money in good faith: cf. Ward & Co. v. Wallis [1900] 1 Q.B. 675, 678-679, per Kennedy J."

[Paragraph breaks added for ease of reference.]

166. The footnote to Proposition 1 was evidently what Lord Sumption relied upon as authority for the proposition cited earlier in this judgment from Fairfield that:

"*to the extent that a payment made under a mistake discharges a contractual debt of the payee, it cannot be recovered, unless (which is not suggested) the mistake is such as to avoid the contract: ...*"

167. Mr Beltrami relied upon the footnote to Proposition 2(b). However the footnote was directed to three party cases where A paid B to discharge a debt owed to B by C rather than two party cases where A paid B to discharge a debt owed to B by A. The present case, like Fairfield, involves the latter situation. Insofar as the footnote to Proposition 2(b) is applicable to two party cases, it does not – and does not purport – to override the requirement in the footnote to Proposition 1 that there can be no recovery of money paid under a mistake of fact unless the contract itself is held void for mistake. As noted above, there is not and could not credibly be any suggestion that the Manager Agreements fall into this category. In the premises, Barclays Bank v Simms does not assist Mr Beltrami.

168. In Sybron v Rochem the relevant defendant ("the Defendant") was employed by the relevant plaintiff ("the Plaintiff") in a senior management position. During the period of the Defendant's employment they both made payments for the benefit of the Defendant to a pension and life assurance

scheme administered by the Plaintiff. Upon the Defendant's early retirement and pursuant to the scheme the Plaintiff paid him a lump sum.

169. It was a term of the scheme that if the Defendant was dismissed for fraud or serious misconduct the Plaintiff did not have to make any payment to the Defendant insofar as that payment was funded by the Plaintiff's contributions to the scheme.

170. Unbeknown to the Plaintiff, the Defendant while still in its employ was engaged in a conspiracy with other employees of the Plaintiff and its affiliates to set up a business in direct competition with the Plaintiff and its affiliates.

171. When the Plaintiff learned of the Defendant's activities it brought proceedings against him to recover the lump sum payment, less the contributions made by the Defendant, on the ground that the payment was made on a mistake of fact. Had the Plaintiff known of the Defendant's misconduct it would have dismissed him and would not have made the payment.

172. The Plaintiff succeeded both at first instance and on appeal. The Court of Appeal held that the Defendant was under a duty to disclose the misconduct of the other employees to the Plaintiff notwithstanding that such disclosure would inevitably have disclosed his own misconduct. His failure to do so was a fraudulent breach of his duty to the Plaintiff and one which induced the Plaintiff's mistake.

173. The facts of Sybron v Rochem are far removed from the facts of the instant case. In Sybron the Plaintiff was mistaken about a fact which would have entitled it to terminate the contract, which brings the case within Goff J's footnote to Proposition 1. Moreover, the mistake was induced by the Defendant's fraudulent conduct. In the instant case, the Funds' mistake would not have entitled them to terminate the Manager Agreements, and it was allegedly induced by KML performing its contractual duties

inadequately but not dishonestly. Consequently Sybron v Rochem does not assist Mr Beltrami either.

174. Assuming that KML was contractually entitled to the management fees paid, therefore, the Defendants are not precluded from asserting a contractual entitlement defence to the claim in unjust enrichment by reason of KML's inducement of the Funds' mistake.

175. Nonetheless, I conclude that if the breaches of duty pleaded at paragraphs 106 and 107 of the Statement of Claim are established, the Defendants are precluded from asserting a defence to the claim in unjust enrichment insofar as this defence derives from alleged contractual entitlement on the part of KML by reason of its inducement of the Funds' mistake. As stated above, this is because such inducement negatived KML's contractual entitlement to the payment of management fees insofar as such payment exceeded the "true" NAV of the Funds.

Summary

176. The preliminary issues are therefore resolved as follows:

(1) (a) Whether the NAVs were determined from time to time by the Administrator on the assumption (made for the purposes only of the Trust Defendants' and KML's Preliminary Issues Summonses) that KML, and/or FIM, and/or Mr Grosso and/or Mr Ceretti had input over the calculation of the NAV to the extent of control, on the basis pleaded at paragraphs 18 and 19 of the Reply;

Yes, the NAVs were determined from time to time by the Administrator.

(b) If the answer to (a) is yes, were the Administrator's determinations of the NAV binding on the Funds for the purpose of calculating the fees due to KML pursuant to the Manager Agreements in force between the Funds and KML, in the absence of bad faith or manifest error;

Yes, the Administrator's determinations were binding on the Funds for that purpose.

(2) If the answer to issue (1)(b) is yes, whether the fees paid by the Funds to KML on the basis of those NAV figures, ie the Disputed Fees, were, in the absence of bad faith or manifest error, properly due to KML under the terms of the Manager Agreements;

Yes, in the absence of bad faith or manifest error, the fees were properly due to KML.

(3) If the answer to (2) is yes, and subject to issues (5) to (7), whether in consequence the Funds are precluded from asserting that the Disputed Fees, or any payments alleged by the Funds to originate from the Disputed Fees, are recoverable from: (a) KML; (b) the FIM Defendants; and (c) the Trust Defendants;

Yes, subject to issues (5) to (7), the Funds are so precluded.

(4) If the answer to any of issues (1) to (3) is no, whether the Defendants have a defence to the claim in unjust enrichment insofar as this defence derives from alleged contractual entitlement on the part of KML;

No, in those circumstances they do not.

(5) Whether the bad faith and/or manifest error of BLMIS constitutes bad faith and/or manifest error in relation to the calculation of the NAV, such that any determination of NAV made by the Administrator was not for this reason binding on the Funds and KML;

No, it does not.

(6) If the facts are as pleaded by the Funds at paragraph 15 of the Reply, whether the conduct of the Administrator constituted bad faith and/or manifest error for the purpose of the NAV calculations, such that any determination of NAV made by it was not for this reason binding on the Funds and KML;

It may have constituted manifest error, such that any determination of NAV made by the Administrator was not binding on the Funds or KML.

(7) If the breaches of duty pleaded at paragraphs 106 and 107 of the Statement of Claim are established, whether the Defendants are precluded from asserting a defence to the claim in unjust enrichment insofar as this defence derives from alleged contractual entitlement on the part of KML by reason of its inducement of the Funds' mistake.

Yes, in that event the Defendants are precluded on the basis that KML's inducement of the Funds' mistake negatived its contractual entitlement.

177. Thus in order to succeed on a mistake based claim the Plaintiffs must first establish fault on the part of the Administrator or KML.

178. I shall hear the parties as to costs.

Dated this 25th day of September, 2015

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Hellman J