Trinity Term
[2018] UKPC 15
Privy Council Appeal No 0001 of 2017

JUDGMENT

Al Sadik (Appellant) *v* Investcorp Bank BSC and others (Respondents) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Wilson
Lord Sumption
Lord Reed
Lord Hughes
Lord Briggs

JUDGMENT GIVEN ON

18 June 2018

Heard on 30 April and 1 May 2018

Appellant	*Respondents*
Michael Black QC	Lord Falconer of Thoroton
Marcus Staff	Edward Levey
(Instructed by Clyde & Co LLP)	(Instructed by Gibson Dunn & Crutcher LLP)

LORD BRIGGS:

1. This appeal from the Court of Appeal of the Cayman Islands is about leveraged investment in hedge funds. In this context, leverage means using borrowed money to increase the potential return on an investment. Thus, a return of 10% on a simple investment of US$100 will result in a net asset value of US$110. However, if the US$100 is invested at what is called “2x leverage” the amount invested is US$300 (ie US$100 plus borrowing of US$200). A 10% return on that investment will result in a net asset value of US$130 (ie US$330 less the loan of US$200). Thus, leaving aside borrowing costs, the application of 2x leverage to the original investment increases the return from 10% to 30%. But of course, losses on the underlying investment will also be increased by the use of leverage in the same proportion, generating in the example above a loss of 30% (plus borrowing costs) if the underlying investment loses 10% in value.

2. The leveraging of investment in hedge funds may be achieved, broadly speaking, in three ways. First, the investor may simply choose a hedge fund with its own internal element of leveraging. Secondly the investor may invest in one or more feeder funds, which are used as leveraging vehicles for multiple investors so as to increase the amount invested in the underlying hedge funds. Thirdly, the investor (or his investment managers) may set up a bespoke vehicle (or “SPV”) for the specific purpose of his own leverage, whereby the SPV borrows against the asset represented by its investment in one or more hedge funds, usually on non-recourse terms which limit the lender’s right to repayment to the amount derived from realising the pledged assets.

3. The appellant Mr Riad Tawfiq Al Sadik is a very wealthy, very experienced businessman, resident in Dubai. By 2007 his company Al Habtoor Engineering Enterprises LLC had become the largest construction and engineering company in the United Arab Emirates, with over 40,000 employees. In the course of a merger between Habtoor and an Australian company in 2007, Mr Al Sadik sold 45% of his shares in Habtoor for AED1.2 billion.

4. By the end of 2007 Mr Al Sadik was considering investing a substantial proportion of that sum in a hedge fund strategy promoted by the first respondent Investcorp Bank BSC (“Investcorp”) which was (and remains) an international investment firm, with offices in Bahrain, London and New York. On 28 January 2008 representatives of Investcorp presented Mr Al Sadik with a written proposal for investment (“the Investment Proposal”). This outlined a strategy for the investment of AED1 billion in three Investcorp funds. 50% was to be invested in the Leverage Diversified Strategies Fund Ltd SPC (“LDSF”) at 3x leverage. The remainder was to be invested in two blocks of 25% each in Single Managers Fund Ltd SPC (“SMFCo”)

at 1x leverage and in Leveraged Event Driven Fund ("LEDF") at 1x leverage. The Portfolio Objectives identified in the Investment Proposal included a target return of 45%+ over a three-year investment horizon. The Investment Proposal made it clear that the amount of leverage within the portfolio might change from time to time, but the aggregate initial leverage would be 2x: ie borrowing an additional AED2 billion in excess of the initial investment of AED1 billion. Each of LDSF, SMFCo and LEDF were, for leverage proposes, broadly equivalent to feeder funds as described above, so that the leverage method implicitly described in the Investment Proposal was the second of those outlined in para 2 above. Those three funds were available for investment by numerous Investcorp customers.

5. In the event, Mr Al Sadik decided only to invest AED500m (US$136m odd) with Investcorp pursuant to a written Share Purchase Agreement ("the SPA") dated 1 March 2008 and made between him and (1) Investcorp (2) Investcorp Nominee Holder Ltd and (3) Shallot IAM Ltd ("Shallot").

6. The meaning of the SPA is a core issue in this appeal. It is convenient to set out its relevant provisions at this stage. "I/We" means Mr Al Sadik.

> "**Clause A**
>
> **PURPOSE**
>
> I/We have requested Investcorp Bank B.S.C. ('Investcorp') to establish a separately managed account (the 'Investment Account'), which will invest in certain hedge funds or segregated accounts with any hedge fund managers selected by the Investment Manager (as defined below), including, but not limited to, any Investcorp hedge fund (whether an Investcorp Fund of Hedge Funds, an Investcorp Single Manager Fund or any other Investcorp hedge fund product (any of the foregoing, an 'Investcorp Hedge Fund') or a hedge fund or a segregated account with any other hedge fund manager; provided, however that any such other hedge fund manager is at the time of investment a manager with which an Investcorp Hedge Fund is invested. The Investment Account will be established as a special purpose vehicle, Shallot IAM Limited which will be incorporated under the laws of the Cayman Islands (the 'Company'). All assets of the Company are hereafter referred to as the 'Assets Under Management' and each hedge fund or segregated account in which Assets Under Management are invested is hereafter referred to as an 'Underlying Investment'. To the extent that Assets Under Management are invested in any

Investcorp Fund of Hedge Funds, such investment will be made in non-fee bearing shares.

Clause D

ACTIONS TO BE TAKEN PRIOR TO ACCEPTANCE OF SUBSCRIPTION

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

1. The Company will enter into (a) an Investment Management Agreement (the 'Management Agreement'), pursuant to which the Company will appoint Investcorp Investment Advisers Limited ('IIAL' or the 'Investment Manager') as its sole and exclusive manager in respect of its acquisition, holding and disposition of its corporate assets. I/We understand that I/we may receive a copy of the Management Agreement upon written request to Investcorp.

2. The initial shareholder of the Company has elected the directors of the Company, who will continue to serve as directors of the Company until their successors are duly elected. I/We understand that the incumbent directors will have the power to fill any vacancies on the Company's board of directors. I/We further understand that the Company's board of directors will authorize or otherwise cause the Company to take any actions that the board believes are necessary or desirable in order to effectuate the purposes of this investment or otherwise manage the affairs of the Company.

Clause F.4

CALCULATION OF NET ASSET VALUE; REPORTS

4. A monthly statement of the Underlying Investments will be issued as soon as practicable after estimated net asset values have been received from all of the Underlying Investments or their administrators.

Clause H

REDEMPTION OF COMPANY SHARES

I/We may some [*sic*] or all of my/our Company Shares on the following terms:

1. I/We may redeem up to UAE Dirham 166,000,000 of the Company Shares at the end of any calendar quarter on not less than 60 days written notice.

2. I/We may redeem up to the remaining balance of the Company Shares, after the first anniversary of the initial investment, at the end of any calendar quarter on not less than 60 days written notice.

…

Clause I

BORROWING RELATIONSHIPS

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

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

2. The Company will seek to ensure that any interest rate and/or fees payable in connection with borrowings from Investcorp will be substantially in accordance with market practice."

7. As is apparent from Clause A of the SPA, Shallot was to be (and was) incorporated in the Cayman Islands, as a special purpose vehicle for handling Mr Al Sadik's investment, controlled by directors appointed by Investcorp. Mr Al Sadik had already paid AED500m to Investcorp in late February 2008. In early March it was converted to US$136m and credited to an account of Shallot. Contrary to Clause D1 of the SPA, Shallot did not appoint Investcorp Investment Advisors Ltd as Investment Manager (or anyone else) either then or for another year. Nonetheless Mr Al Sadik's investment was effectively managed by Investcorp, the requisite authority for that purpose from Shallot being provided by its directors, who were Investcorp appointees.

8. As it was entitled to do under the SPA, Investcorp had in the meantime decided not to proceed to invest Mr Al Sadik's money strictly in accordance with the Investment Proposal. Rather, it decided to split his investment between DSF (which was the hedge fund for which LDSF, described in the Investment Proposal, was the feeder fund) as to 50% and as to the balance between (initially) five single manager funds, for which SMFCo was, or was equivalent to, the relevant feeder fund. That decision did not involve an abandonment by Investcorp of an intention to leverage Mr Al Sadik's investment. On the contrary, its strategy involved 2x leverage of the 50% investment in DSF and 3x leverage of the investment of the balance in single manager funds. Since (for reasons which do not matter) the plan to leverage within feeder funds had been abandoned, Investcorp decided to achieve its planned leverage through a newly incorporated SPV, the fourth respondent Blossom IAM Ltd ("Blossom"), which was established as a wholly owned subsidiary of Shallot. After retaining US$1.129m, for use in part to establish currency hedges as between AED and US$, Shallot paid the balance of Mr Al Sadik's money to Blossom, which was in due course added as a party to a recently negotiated Master Note Purchase Agreement called White Ibis III whereby Investcorp could leverage customers' investments by borrowing from Royal Bank of Scotland ("RBS"). This enabled Blossom to leverage Mr Al Sadik's investments in the hedge funds described above by borrowing from RBS on the terms of the White Ibis III facility, on a non-recourse basis, secured on the assets constituted by the investment of Mr Al Sadik's money, together with the borrowed money, into the hedge funds.

9. The two main issues in this appeal are whether (a) Shallot's transfer of the balance of Mr Al Sadik's money to Blossom and (b) Blossom's leveraging of those funds under the White Ibis III facility at the direction of Investcorp and Shallot represented breaches of the SPA by Investcorp and Shallot.

10. Beginning in early May 2008, Investcorp began making monthly reports to Mr Al Sadik purportedly pursuant to Clause F4 of the SPA. Although those reports made occasional mention of Blossom, the trial judge Jones J found that they were not compliant with Clause F4, in particular because they did not disclose the amount of Blossom's (leveraged) investments in the underlying hedge funds, described in Clause F4 as "the Underlying Investments". The result was that the monthly reports did not

disclose that Blossom was being used for the purpose of leveraging Mr Al Sadik's investments, or the amount of that leverage.

11. In fact, borrowing by Blossom from RBS under the White Ibis III facility began only in May 2008, and continued at varying different levels during the life of the portfolio. By the beginning of September 2008 Mr Al Sadik's initial investment of US$136m was supported by additional borrowing from RBS of US$214m, amounting to a leveraged investment of US$350m, representing leverage at 1.57x, ie rather less than had been envisaged in the Investment Proposal.

12. Meanwhile, the seismic events which were to make 2008 the worst year ever for hedge fund investors had begun to unfold, with the collapse of Bear Sterns on 14 March. They culminated in the spectacular collapse of Lehman Brothers in September. By the beginning of October Mr Al Sadik's portfolio was showing a net overall loss, from inception, of 25%. As a leveraged investor he was, of course, particularly hard hit. By the end of January 2009 his net loss approached 50%, although it recovered a little thereafter.

13. In March 2009 Mr Al Sadik received from Investcorp the first compliant monthly report, showing the gross underlying investments by Blossom in the various hedge funds constituting the portfolio. The same report also revealed, month by month, a full historic description of the aggregate level of leverage, achieved by borrowing prior to the making of Underlying Investments, as defined by Clause F4.

14. Mr Al Sadik had, pursuant to Clause H of the SPA, enjoyed (but not exercised) a right to redeem up to one third of his portfolio during its first year, and a right thereafter to redeem the whole of it, in each case on 60 days' written notice. He did not choose to redeem any part of his portfolio until December 2009, and then without prejudice to his prior contention (for reasons set out below) that he was entitled to rescind the SPA and obtain all his money back. Upon redemption, he received back only AED292,398,778.45 of his original AED½ billion investment, incurring a loss slightly in excess of AED207m, ie 41.5% of his original investment.

15. Mr Al Sadik issued claims against Investcorp, Shallot, Blossom and other Investcorp entities in the Grand Court of the Cayman Islands on 14 December 2009. By the time of trial his wide-ranging claims, set out in a re-re-Amended Statement of Claim, were described by the Judge (at para 1.14 of his judgment) under the following headings:

a) Collateral contract.

b) Fraudulent misrepresentation inducing the SPA.

c) Unauthorised leveraging coupled with deceitful non-disclosure of it.

d) Breach of trust.

16. Taking those heads of claim briefly, and in turn, the collateral contract claim consisted of an allegation that Investcorp had given a contractual guarantee of a 45% return on Mr Al Sadik's investment over three years (collateral to the SPA) and then repudiated it. This was rejected by the judge and by the Court of Appeal. It has not been pursued before the Board.

17. The second claim (dishonest misrepresentation procuring the SPA) was abandoned on day 26 of the ten-week trial. The alleged fraud had been based upon the supposed motive that Investcorp sought Mr Al Sadik's money to remedy a cash-flow shortage in its hedge funds business, and it was abandoned when it became apparent that there had been no such shortage.

18. The third claim was rejected both by the judge and by the Court of Appeal, but has been pursued before the Board. It will be necessary to describe it in more detail later but, in outline, the case was that the SPA did not authorise the transfer of Mr Al Sadik's money by Shallot otherwise than by investment in a qualifying hedge fund, and did not authorise borrowing other than for liquidity purposes, under Clause I of the SPA, so that both the payment to Blossom and its leveraging by means of the White Ibis III facility were unauthorised.

19. It was claimed that Investcorp's non-disclosure of the payment to Blossom and of its leveraging prior to investment in hedge funds was dishonest so that, in addition to rescission of the SPA, a claim was made for damages for deceit, in addition to the claim for damages for unauthorised investment and leveraging. It is to be noted at the outset that no alternative claim to purely contractual damages for an (innocent) breach of Clause F4 of the SPA was pleaded or proved in evidence. The judge found that there was indeed a breach by Investcorp of its reporting obligations in Clause F4 of the SPA between the inception of the portfolio in March 2008 and early March 2009, but that this had not been dishonest.

20. Finally, the fourth head of claim in breach of trust was based upon the allegation, rejected by the judge and by the Court of Appeal, that the defendants had pursued the leveraging of Mr Al Sadik's portfolio for their own purposes rather than in Mr Al Sadik's best interests, and therefore in breach of fiduciary duty. This had originally been pleaded upon the basis of the alleged (but eventually abandoned) motivation of

Investcorp to remedy a cash flow shortage, but was pursued unsuccessfully after the abandonment of that allegation on narrower grounds which the judge decided had not been pleaded but which, in any event, he rejected on the merits. The Court of Appeal concluded that the judge was entitled, on the evidence, to reach that conclusion, and the breach of trust claim has not been pursued before the Board.

21. In order fully to understand the issues as presented to the Board, and the relationship between them, it is necessary to say a little more about how the judge and the Court of Appeal dealt with the third head of claim, namely unauthorised payments to, and leverage by, Blossom, and dishonest concealment by Investcorp. It is also necessary to explain a little of the jargon used by the parties and by the court in addressing these issues. The Board has already described three potential ways of leveraging, namely: (i) investing in a hedge fund which uses internal leveraging; (ii) investing in a feeder fund which leverages multiple customers' investments before investing the proceeds in specific hedge funds; and (iii) setting up an SPV for the purposes of leveraging the particular customer's investment, by borrowing before investing. The last of these was described in the proceedings as "first layer leverage", or "leverage at the portfolio level". This is what Blossom did with Mr Al Sadik's money. Leveraging through the use of multi-customer feeder funds or through hedge funds with leveraging as part of their own strategy were both described in the proceedings as "second layer leverage". Provided that it is understood that, as the judge found after hearing expert evidence, these phrases were not terms of art in the hedge fund industry, they usefully summarise different ways of leveraging and help focus upon the true nature of Mr Al Sadik's claims. The Board will therefore use them without further explanation.

22. The judge found it appropriate to address, first, the question whether the SPA authorised first layer leverage. Having concluded that it did, he reasoned that the transfer of the bulk of Mr Al Sadik's money from Shallot to Blossom was not itself an investment, but just an administrative step designed to facilitate first layer leverage, and investment of the leveraged amount. The use of Blossom as a separate SPV for that purpose was appropriate because it provided a cleaner security structure to RBS, whereas the assets and liabilities of Shallot included its positions on the currency hedges undertaken to protect Mr Al Sadik, at his request, from currency movements as between his own currency of preference, namely AED, and the US$.

23. The preference of the Court of Appeal was to address the authority issues in the reverse order, taking the issue whether Shallot was authorised to pay Mr Al Sadik's money to Blossom before the issue as to authority for first layer leverage. In anticipation of this analysis, once raised by the court during oral submissions, Investcorp advanced an alternative case before the Court of Appeal that the payment to Blossom was an investment rather than an administrative step, which was authorised because Blossom was itself a hedge fund. The Court of Appeal rejected this alternative analysis,

upholding the judge's conclusion that the payment to Blossom was an administrative step in advance of authorised leveraged investment.

24. Before the Board, it was initially submitted for Mr Al Sadik that Investcorp's alternative submission in the Court of Appeal about the nature of the payment to Blossom amounted to a concession that it was not an administrative step, from which it was wrong of the Court of Appeal, and would be wrong for the Board, to allow Investcorp to resile. This was the first of the issues for this appeal set out in the Statement of Agreed Facts and Issues.

25. The Board's pre-reading of the extensive papers for this appeal made it appear most unlikely that this alternative case about the nature of the payment to Blossom involved any concession by Investcorp by way of derogation from its primary case, upheld by the judge, that it had been an administrative step. In the event, Mr Michael Black QC for Mr Al Sadik very properly conceded, at the beginning of his sensible and carefully prepared submissions, that no concession had been involved, and that Investcorp's argument that the payment to Blossom was an investment in a hedge fund was never more than an alternative. The Board need therefore say no more about Issue (1).

26. Issue (2) is in three parts:

a) Whether Shallot's purchase of shares in Blossom was an unauthorised investment contrary to the terms of the SPA.

b) Whether the use by Investcorp of Blossom to borrow for the purpose of making leveraged investments was a breach of the SPA.

c) Whether (if there was either such breach) Mr Al Sadik thereby suffered actionable loss.

Parts (a) and (b) of this issue raise questions of construction of the SPA and its application to agreed facts. Part (c) arises if, but only if, Mr Al Sadik succeeds on either, or both, of parts (a) and (b). The existence of concurrent judgments of both courts below on parts (a) and (b) of this issue does not absolve the Board from forming its own view, because the question is one of law.

27. Mr Black's well-presented arguments on construction of the SPA may, at some risk of oversimplification, be summarised as follows. First, Mr Al Sadik's money was not simply paid to Blossom to be held on trust for him for the purposes of investment.

It was paid as the subscription price for the issue of redeemable preference shares by Blossom to Shallot. Blossom had its own business of leveraging and investment, using what was its own money (rather than Mr Al Sadik's money) for that purpose. Therefore Shallot's payment to Blossom was both in substance and in form an investment. Since (as the Court of Appeal found) Blossom was not a hedge fund within the meaning of the SPA, Shallot's investment in it was necessarily unauthorised.

28. Secondly, the SPA made no express reference at all to leverage, nor authorised Investcorp or Shallot to carry out leverage as a preliminary to investment. While that did not prevent second layer leverage, because it would be carried out by an investee hedge fund (or feeder fund), there was therefore no authority in the SPA for first layer leverage, whether by Investcorp or Shallot as parties to the SPA, or by any other entity which they chose to set up for that purpose, as a preliminary to investment.

29. Thirdly, the SPA contains an express but limited power for Investcorp or Shallot to borrow, namely for liquidity purposes only. There being no other express power to borrow in the SPA, the inclusion of a power for that limited purpose necessarily excluded the construction of the SPA as including a power to borrow for any other purpose, including leveraging.

30. Fourthly, the judge's view (endorsed by the Court of Appeal) that first and second layer leverage are, broadly, economically equivalent was both wrong as a matter of fact and, in any event, irrelevant. First layer leverage could not therefore be treated as authorised by the SPA, merely because, against a factual background which included the Investment Proposal, its purpose might be taken to include leveraged investment in hedge funds.

31. Finally, in the absence of any express authority, a power to conduct first layer leverage or to create a SPV as an administrative step for that purpose, could not be treated as included within the SPA by way of implied term, since none of the well-known conditions for the implication of terms was satisfied.

32. The opinion of the Board is that the judge and the Court of Appeal were both correct in concluding that, upon its true construction, rather than by way of implied term, the SPA authorised first layer leverage and that the payment to (or purchase of shares in) Blossom was an authorised administrative step, rather than an investment, for the achievement of that leveraging purpose. The Board's reasoning is as follows.

33. The SPA is, quintessentially, a commercial agreement of a business kind, dealing with the substance of the transaction between Mr Al Sadik and Investcorp at a relatively high level of generality, and by reference to purpose, rather than by spelling out in minute detail every power exercisable by Investcorp and Shallot, in the manner

sometimes to be found in a modern trust deed. Thus Clause A sets out the purpose of the agreement in broad and general terms, while Clause D2 simply provides, in its last sentence, that:

> "… The Company's board of directors will authorize or otherwise cause the Company (*Shallot*) to take any actions that the board believes are necessary or desirable in order to effectuate the purposes of this investment …"

34. Looking more closely at Clause A, the hedge funds or segregated accounts, investment in which forms the purpose of the agreement, are identified in non-exclusive terms. They are "certain hedge funds or segregated accounts with any hedge fund managers selected by the Investment Manager (as defined below), including, <u>but not limited to</u>, any Investcorp hedge fund … or any other Investcorp hedge fund product … or a hedge fund or a segregated account with any other hedge fund manager … with which an Investcorp Hedge Fund is invested" (The Board's underlining).

It is apparent from Clause D1 that the Investment Manager was to be an Investcorp entity.

35. Next, it was plainly legitimate for the judge and the Court of Appeal to have regard, as part of the admissible factual background known to the parties, to the fact that the Investment Proposal had suggested leveraged investments in hedge funds so that, as a matter of construction and without the need to identify an implied term, the purpose of the agreement identified in Clause A of investing in hedge funds included leveraged investment in hedge funds. The judge was, in the Board's view, right to conclude that the purpose identified in Clause A needed to be construed so as to permit investment in accordance with the Investment Proposal although, of course, the discretionary power to select hedge funds conferred on Investcorp meant that it was not required to do so, either as specified in the Investment Proposal, or indeed at all.

36. There is no basis on which to challenge the judge's finding, after hearing expert evidence, that the hedge fund industry did not at the time of the SPA treat first and second layer leveraging as terms of art, or make any particular distinction between leveraging at the portfolio level before investment, or investing in internally leveraged feeder funds or hedge funds. They were simply different available techniques for leveraging so that a discretionary investment agreement would leave the investment manager free to choose whatever method appeared most appropriate in the interests of the customer. The Board sees no reason to doubt the judge's conclusion that those different methods of leveraging were, or could be, economically equivalent, but such equivalence is not a necessary element in the Board's reasoning.

37. Accordingly the SPA conferred authority on Investcorp, whether through Shallot or through some other SPV formed for the purpose, to conduct leveraging at first or second layer, as appropriate, being actions taken which were "necessary or desirable in order to effectuate the purposes of this investment", within the meaning of Clause D2.

38. On that analysis, the setting up of Blossom as a wholly owned subsidiary of Shallot for the specific purpose of leveraging, on the basis that it was better placed to make the necessary borrowings than was Shallot, for the reasons given above, was indeed an administrative step, also falling within the confines of Clause D2 of the SPA, for effectuating the purposes of the investment as set out in Clause A.

39. While it might be said in the abstract that the purchase of shares by one company in another company, by contrast with the transfer of funds to that other company to be held on trust, may at first sight look more like an investment than an administrative step, it cannot in the Board's view sensibly be treated as an investment within the meaning of Clause A of the SPA, once it is appreciated that Blossom is a wholly owned subsidiary of Shallot, funded entirely by Shallot, to be used only for the purposes of leveraging Mr Al Sadik's money prior to investment. What is or is not an investment must be ascertained within the confines of the SPA, and in particular by reference to Clause A, rather than in the abstract.

40. Finally, perhaps Mr Al Sadik's best argument is to be found in the borrowing powers to be found in Clause I, on the basis of the application of the principle *expressio unius est exclusio alterius*. But once it is appreciated that Clause I conferred the power to borrow for liquidity purposes in addition to any borrowing necessitated by leveraging in order to achieve the investment purpose set out in Clause A, that argument falls away. If leveraging is part of the Clause A purpose and borrowing is necessary for leveraging, as an action taken under Clause D2 to effectuate the Clause A purpose, then it would be destructive of that purpose if the SPA was construed so as to permit borrowing only for liquidity purposes. Accordingly, as the judge held, Clause I is about borrowing wholly unconnected with leveraging.

41. The Board read and heard interesting argument about part (c) of Issue (2), namely the questions as to causation and quantum of damages which would arise if a breach of the SPA by the use of Blossom for first layer leveraging had been made good. Since the Board has concluded that both courts below were correct in concluding that there was no such breach, those consequential issues cannot now arise. Suffice it to say that, in the Board's view, Mr Al Sadik would have found it an uphill task to demonstrate that this supposed breach of the SPA caused him loss, in the light of the judge's finding that, had Investcorp perceived that first layer leveraging through Blossom was not permissible, it would have adopted second layer leveraging of his portfolio through the feeder funds, which would have caused greater loss than in fact he suffered.

42. Issue (3) challenges, fairly and squarely, the finding of both the judge and the Court of Appeal that Investcorp's undoubted breach of Clause F4 of the SPA was innocent rather than dishonest.

43. Mr Black very sensibly acknowledged that, in pursuing this ground of appeal, he faced the triple obstacles that there were (i) concurrent factual findings by the courts below, (ii) about an issue of primary fact, (iii) where the trial judge had exonerated a party from an allegation of want of probity. In *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11, paras 4 to 7, Lord Mance explains why each of these three factors makes the Board reluctant to intervene, as a matter of settled practice, save in very limited circumstances. The practice applies as much to appeals to the Board as of right (like this one) as it does to appeals where permission is required: see para 6, where Lord Mance cited the following passage from the decision of the United States Supreme Court in *Anderson v City of Bessemer* (1985) 470 US 564 at 574-575:

> "Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be 'the 'main event' … rather than a 'try-out on the road''."

Lord Mance continued:

> "The considerations mentioned in this passage are of course of particular importance when considering whether permission to appeal should be given, in a context where that does not exist as of right. But, even when an appeal is before the Board, they serve as a reminder that the Board cannot be expected to devote unlimited resources to re-examining every aspect of the trial process."

44. The Board's settled practice is not just to treat the scales as loaded against an appellant in the circumstances described above, but altogether to decline to interfere with concurrent findings of pure fact. This means, as Mr Black acknowledged, that an appellant seeking to mount such an appeal must first persuade the Board that the case comes within that very limited special category which justifies a departure from that practice.

45. One example given by the Board in *Devi v Roy* [1946] AC 508 is where it can properly be said that the decision appealed from consisted of such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. Mr Black submitted that the present case fell into that category. Whereas it had taken Jones J only two and a half months to prepare and deliver his judgment after many weeks of trial, it had taken the members of the Court of Appeal no less than three years and ten months after a four-day appeal to deliver their judgments. He submitted that the absence of reference to Investcorp's new point (see Issue (1) above) and the absence of any express reference to counsel's oral submissions, suggested that, by the time those judgments were prepared, the members of the court had no reliable recollection of the hearing. The result was, he submitted, that Mr Al Sadik had been deprived of an effective first appeal, and that there had not in substance been two concurrent decisions on the merits of this issue.

46. Neither the parties nor the Board know whether there were personal circumstances affecting one or more of the members of the Court of Appeal which caused or contributed to this very long delay in giving judgment. Objectively speaking, the Board regards such a delay as truly exceptional, and considers that it amounts, without more, to a real injustice to all the parties concerned, all the more so where serious allegations of impropriety were at stake.

47. Mere delay, however long, does not of itself render a judgment unreliable as a proper exercise of judicial decision making. Rather, it increases the risk of unreliability. The Board has therefore carefully scrutinised the judgments of the Court of Appeal, to see whether they can properly be said to fall within that exceptional category which fail to constitute judicial procedure at all. They consist of a leading judgment by Sir John Chadwick JA, with which Mottley JA and Sir Anthony Campbell JA simply agreed.

48. Viewed as a whole, Sir John Chadwick's judgment runs to 150 closely-reasoned pages in which, on every one of the many issues before the Court of Appeal, he conducts a meticulous and careful review of the relevant materials in this heavily documented case, including the pleadings, the evidence, the judge's reasoning and the parties' submissions to the Court of Appeal. Although described as a skeleton argument, the appellant's written submissions, even ignoring their appendices, ran to no less than 99 pages. The Court of Appeal was provided with transcripts of counsel's oral argument.

49. Sir John Chadwick's reasoning for his conclusion on the issue of deceit in relation to the breach of Clause F4 runs to 11 closely-reasoned pages, in the course of which he directed himself correctly as to the appropriate attitude of an appellate court to such an issue. His conclusion, that the judge was fully entitled, on the evidence, to find as he did (rather than expressing his own opinion on the issue) was a proper approach to be adopted by the Court of Appeal, and one which does not of itself detract

from the court's decision on that issue being one of two concurrent decisions on primary fact.

50. The Board was not persuaded by Mr Black's submission that the Court of Appeal had altogether forgotten about Investcorp's alternative argument that the payment to Blossom was an investment in a hedge fund. Rather, Sir John Chadwick's conclusion, in agreement with the judge, that the payment amounted to an administrative step, made it unnecessary for that alternative submission to be addressed.

51. It is true that Sir John Chadwick's judgment is not studded with references to what was said in oral argument. But this was a case in which the written arguments were in substance full written submissions, despite their mis-description as skeleton arguments. Furthermore, it is not necessary for a judge to recite the parties' submissions in detail. His task, as has frequently been emphasised, is to express his own reasoning for his decision in a manner intelligible to the parties and to any appellate court. The Board is entirely satisfied that the Court of Appeal did so in this case, both generally, and specifically in relation to the issue whether the breach of Clause F4 was dishonest.

52. The analysis of this issue by Jones J, which the Board has also carefully considered, was, as is appropriate for a first instance judge, even more thorough and detailed than that of the Court of Appeal. It is evident from a reading of the 22 page section devoted to this single issue that the judge brought to bear his considerable experience of hedge fund investment. His conclusion was based on a detailed analysis of Investcorp's reports, of the role and motivation of the various Investcorp staff involved in their production and delivery, and it was backed by a fully-reasoned explanation why, after extensive cross-examination over many weeks, the judge found the evidence of the witnesses whose conduct was impugned as deceitful both trustworthy and honest. He also took fully into account, as a factor pointing the other way, his conclusion that Investcorp had deceitfully concealed from Mr Al Sadik and his investment advisor the fact that it took a year from the inception of the portfolio for the requisite Investment Management Agreement to be made between Shallot and Investcorp Investment Advisors Ltd, and that it was then backdated.

53. For all those reasons, and after fully considering the written and oral submissions on this point made on behalf of Mr Al Sadik, the Board was not persuaded that this is one of those exceptional cases justifying a departure from the settled practice in relation to concurrent findings of primary fact. Accordingly the Board did not call upon Lord Falconer to respond to those submissions on behalf of the respondents, and does not consider it appropriate to enter into the detail of the argument on this issue. In accordance with that settled practice, the Board declines to intervene in relation to those concurrent findings of the Grand Court and the Court of Appeal of the Cayman Islands.

54. It follows that the last issue, relating to causation, rescission and loss, if a case of deceitful non-disclosure had been made out, does not arise. The Board notes that what had appeared to be presented as an alternative case of causation and loss, based purely upon the breach of Clause F4, treated as a breach of contract, was not, in the event, pursued by counsel on behalf of Mr Al Sadik. He made that clear in his reply submissions. He no doubt had it in mind that, as already described, both the judge and the Court of Appeal concluded that it had never been pleaded in the first place.

55. The Board will therefore humbly advise Her Majesty that this appeal should be dismissed.