Neutral Citation Number: [2024] EWHC 7 (Ch)

Case No: BL-2020-001404

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

Rolls Building, Fetter Lane
London

Date: 05/01/2024

Before :

HIS HONOUR JUDGE JARMAN KC
Sitting as a judge of the High Court
Between :

(1) VEGESENTIALS LIMITED **(2) FIBRE WATER LIMITED**	**Claimant**
- and -	
THE SHANGHAI COMMERCIAL & SAVINGS BANK LIMITED **(a company incorporated in Taiwan)**	**Defendant**

Mr Matthew Parker KC and Ms Judy Fu (instructed by **Enyo Law LLP**) for the **claimants**
Ms Laura John KC and Ms Nathalie Koh (instructed by **Stephenson Harwood LLP**) for the **defendant**

Hearing dates: 18- 26 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30 am Friday 5 January 2024 and sent to the parties and to the National Archives

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HIS HONOUR JUDGE JARMAN KC

HHJ JARMAN KC :

Introduction

1. The claimants seek damages from the defendant bank (the bank) for fraudulent misrepresentations set out in a letter dated 17 October 2017 (I shall refer to this simply as "the Letter") signed and stamped by Chi-Wen Chiang, its former corporate banking relationship manager of the Chung-Li Branch in Taiwan, to the effect that potential investors had free funds to invest £20 million in a new product which the first claimant was developing called FibreWater. The second claimant was incorporated for the purpose of this claim, and was assigned the first claimant's rights in FibreWater. Save where otherwise indicated, I shall refer to the first claimant simply as the claimant.

2. It is now conceded that those investors, Sika Enterprise Co Ltd and HCI (ITSB) Group (Sika/Henrikson), companies incorporated in Hong Kong and Anguilla respectively, had no such funds and that Mr Chiang made the fraudulent misrepresentations knowing them to be false and intending that it should be relied upon by the claimant. Precisely why he did so is unclear. It may have been with a view to promoting business with the bank, but his motive is immaterial to this claim. No funds were forthcoming, and FibreWater production and sale did not proceed. The claimant says that had the misrepresentations not been made, it would have continued to engage with alternative investors, and there was a real chance that investment would have been secured so as to allow FibreWater to be successfully produced, marketed and sold and to become profit making.

3. Although the fraudulent misrepresentations are now conceded, liability is not. The bank raises issues as to the applicable law, whether the claimant in fact relied on the misrepresentation, whether the bank is vicariously liable, as to causation and as to quantum.

Background

4. The claimant was founded in 2012 by Dr Andrew Mugadu and his then wife, Patience Arinaitwe. Dr Mugadu had worked for several years for an investment bank, eventually becoming an executive director, but this was his first venture into business. The claimant's business included the bottling and sale of fruit and vegetable drinks. Funds to start the business were raised by the sale of shares to friends and colleagues. However, the business did not become profitable. The claimant puts this down to the need for the drinks to be kept chilled and to their short shelf life, and consequent low margins. In 2017 the claimant decided to wind down that business and to focus on FibreWater.

5. FibreWater is made up of water, lemon juice, and chicory root fibre, or inulin, called Orafti HSI (orafti). Orafti is produced by a Belgian company called Beneo-Orafti SA (Beneo). By EU Commission Regulation No. 2015/2314, Beneo is entitled to make authorised digestive health claims as to the benefits of consuming chicory inulin. FibreWater does not need to be chilled, and has a longer shelf life, and higher margins, than the fruit and vegetable drinks.

6. In 2016, the claimant carried out market research in an effort to calculate the potential market for FibreWater. A survey was conducted by a market researcher called Populus who surveyed 2,101 adults in the UK. No samples were available to taste, and no price was indicated. 5% of those surveyed indicated that they definitely would buy the product and 14% indicated that they probably would buy. A further 28% indicated that they might or might not buy it. From these answers, and taking the UK adult population at the time of just under 50m, the claimant calculated that FibreWater had a potential UK market of 9.8 million adults.

7. Dr Mugadu used these results to create, with another shareholder of the claimant and former investment bank analyst, Quresh Shakir, a financial model which was used to calculate the funding needed for the production and distribution of FibreWater. It was clear that large scale funding was needed. Dr Mugadu made use of his business network in the campaign to raise financing and consequently was introduced to a Charles King who agreed to help Dr Mugadu source financing. Mr King proposed several different investors from January 2017 onwards, including US investors in April. Dr Mugadu also approached many potential investors. The cash flow model was used in an effort to attract investors, but despite these efforts no funding was forthcoming.

8. The events summarised from now on all took place in 2017, unless otherwise stated. Despite lack of funding, on 23 March the claimant entered into a supply contract with Beneo under which in return for exclusivity it agreed to buy minimum amounts of orafti each year, which for 2017 was £478,265 worth. At the time of entering into this contract, no investors had been found to support FibreWater. However, production commenced in May.

9. Efforts to find funding continued over the summer. During this time, the financial position of the claimant deteriorated. Debts incurred in the fruit and vegetable drinks business remained unpaid and some were being actively pursued. In emails to potential investors throughout the summer, Dr Mugadu made clear that without funding the claimant would cease business. Some sales of FibreWater commenced in June in the stores of two UK retailers and one in Denmark, and listings were also obtained in a major retailer in each of those countries. However, sales remained low, and by the beginning of August Dr Mugadu, in one of many emails chasing Mr King for updates on funding, said that the claimant was "on its knees" with cash flow. He accepted in cross-examination that by now, he was feeling let down by Mr King, and increasingly desperate.

10. It was in this context that Dr Mugadu began negotiations with representatives of Alpha Imtiyaz, a Saudi Arabian concern which might be interested in investing in FibreWater, as it had previously invested in a similar product, an isotonic water, in Poland. A shareholder and director of the claimant, Giovanni Davite, knew an Aziz Banza. He in turn knew brothers Ali and Fadil Al Nassar, who had connections with Alpha Imtiyaz. On 11 September Dr Mugadu emailed Mr Fadil Al Nassar, attaching a cash flow forecast for the claimant to the end of 2018, a copy of the Beneo contract, a summary of the Populus survey, and offering 50% shareholding in the claimant for an investment of £3 million.

11. In response, a request was made as to the level of investment sought and requesting some further information such as exit strategy, risks, whether there were other

investors and confirmation of point of sales. Dr Mugadu responded to those queries in an email on 30 September 2017 offering 49% of the equity in the claimant for a £3 million investment and confirming that the claimant could raise 20% of the investment from shareholders. He did not set out how that latter investment may impact on the 49% equity offer to Alpha Imtiyaz. Dr Mugadu emailed again in mid-October, with news of the forthcoming launch of FibreWater in 301 stores of a major retailer in the UK and a listing at 600 stores of a major Danish retailer, from early January 2018.

12. Shortly before this, on 4 October, Mr King sent Dr Mugadu a draft agreement entitled *"*Interest Sale Agreement*"* naming Sika/Henrikson as potential investors. The initial terms of this draft agreement are unclear and record a consideration of £500,000 However, this sum was negotiated up to £20 million. It is not clear how. It is not in dispute that this draft agreement differed significantly and inexplicably from prior discussions or draft heads of terms sent from Mr King. For example, it refers to the claimant as "LLP/LTD" and to "Dr Andrew Mugaduu [sic] Family LLP". It states that ITSB is to be admitted as an additional member in consideration for "a capital contribution of £500.00" and that Ms Arinaitwe agrees to assign and transfer to ITSB 3.75% of her financial rights and obligations and management rights and obligations in the LLP, including the right to participate in 3.75% of the profits.

13. The only explanation which could be offered for these significant inconsistencies on behalf of the claimant, by Dr Mugadu, Mr Shakir and Mr Davite in cross-examination, was that this was a rough draft for them to work on, which in the event they did. I did not find this a wholly convincing explanation.

14. In response to a request from Dr Mugadu, Mr King sent an email on 16 October 2017 identifying Mr Chiang as Sika/Henrikson's banker. On the same date, Dr Mugadu asked the claimant's account manager at Barclays Bank Plc (Barclays), Jon Burrell, what information needed to be in a proof of funds letter for Barclays to accept the funds. Mr Burrell replied with what information was required. Later on the same day, Dr Mugadu produced a draft letter poof of funds letter, shared it with Mr Burrell, and sent the same to Mr King.

15. On 17 October 2017, Mr Chiang emailed Mr Burrell from his bank email address, copying (among others) Dr Mugadu and Ms Arinaitwe. The email attached the Letter, on the bank's letter head, stamped with an authentic bank stamp, and signed by Mr Chiang as corporate business manager. It gave his correspondence and email address at the bank. The Letter mostly followed Dr Mugadu's draft and stated that Sika/Henrikson was "ready, willing and able to invest £20 million … for a 95% ... equity stake in the claimant to support its production and marketing of the FibreWater brand in key consumer markets in Europe." Dr Mugadu's draft had suggested confirmation of available capital resources of over ….. million USD dollars. That was amended by Mr Chiang, to read "enough capital resources fully free of any liens, debts, and/or encumbrances." He also inserted Sika/Henrikson's bank details and his own position. He did not insert IBAN or BIC details where these had been called for in the draft.

16. Mr Burrell wrote to Mr Chiang to acknowledge receipt as follows:

> "Dear Chi-Weng Chiang,

Thank you for sending over details of the transaction.

Kind regards"

17. The claimant sought formal authorisation from its shareholders to enter into a share purchase agreement with Sika/Henrikson, attaching a copy of the Letter to the draft resolution. The shareholders approved the resolution, expressly with the proviso that the claimant's "know your client" (KYC) due diligence should be carried out, as should that of its bank, Barclays. The claimant entered into such an agreement on 1 November. That provided for an initial investment of £20m in return for a 95% shareholding. The first payment of £2.2-2.6 million was due on 2 January 2018.

18. Given the proposed large foreign investment by deposit, Barclays required completion of a KYC process before the sums could be received into the claimant's bank account. This was the focus of Barclay's emails to Dr Mugadu rather than a proof of funds letter as such. In a series of emails on 7 November Dr Mugadu and Mr Burrell discussed obtaining copies of passports of those being dealt with in Sika/Henrikson. Mr Burrell asked that documents should be certified by a solicitor or accountant. He also reminded Dr Mugadu of his request by email of 18 October for a solicitor's or accountant's letter from the claimant confirming the due diligence steps taken.

19. In text exchanges between Mr Davite and Mr Banza on or about 10 November the former informed the latter that "We have signed with the Chinese" and Mr Banza said, "Good luck with the Chinese." Mr Banza also made reference to 'Stephen' calling Mr Ali Al Nassar to complain about Dr Mugadu, and that he and Mr Ali Al Nassar had spoken to Dr Mugadu about it. In cross-examination the latter said he could not recall such a conversation and didn't know who 'Stephen' was. None of the claimant's witnesses knew. On 14 November, Mr Davite copied to Dr Mugadu, who acknowledged receipt, a message from Mr Ali Al Nassar in which he stated that he had dropped the deal with the claimant and that he didn't "want to talk about this transaction no more."

20. At this time however, Mr Fadil Al Nassar was still working with the investment committee of Alpha Imtiyaz which decided to propose the investment offered by the claimant. Mr Fadil Al Nassar's gave evidence that Alpha Imtiyaz agreed to so invest, and that they already had a distribution line for the Polish water and were contemplating manufacturing in Saudi Arabia. He added that he did not recall any instance where Alpha Imtiyaz pulled out of an investment after agreeing to it. Although there was no contemporary documentation or texts relevant to this evidence, it came across in a straightforward and genuine way and I accept it.

21. Mr Fadil Al Nassar by an email of 19 November to Dr Mugadu referred to "the investment that I secured for your business." On 23 November in a text exchange between Dr Mugadu and Mr Davite suggested offering a deal to Mr Fadil Al Nassar *"*if the Chinese are ok". It is not clear what this deal was. Dr Mugadu replied that he would have to speak to the Taiwanese investors first.

22. On 28 November Dr Mugadu responded to Mr Burrell's queries setting out the steps he had taken on due diligence. However, no solicitor's or accountant's letter was

provided then or at all. Mr Burrell simply responded the next day saying that he would revert when he had further confirmation.

23. On 29 November Dr Mugadu was expecting a cash advance from Sika/Henrikson. Mr Davite sent him a text on 5 December saying he prayed but did not believe that money was going to come through. The date for such an advance was put back to various dates in December.

24. On 14 December the claimant entered into a sponsorship agreement with the tennis player Sir Andy Murray to pay him a total of £6m over the following four years for him to sponsor FibreWater. The same day Dr Mugadu emailed Mr King saying without the cash advance the claimant could not produce FibreWater. Meanwhile, Dr Mugadu renewed efforts to get a possible investment of funds from Alpha Imtiyaz.

25. On 18 December Barclays wrote to the claimant terminating its account. In Dr Mugadu's oral evidence, he stated that he had a conversation with Mr Burrell just before Christmas in which Mr Burrell communicated that the reason for this was that KYC on Sika/Henrikson was not satisfactorily completed.

26. On 20 December, in another text exchange, at 11:50pm GMT, Dr Mugadu told Mr Davite that he had spoken to Sika/Henrikson and had obtained their permission to offer Mr Fadil Al Nassar "10% for £2m and SIKA would take 65% for the balance £18m with [the claimant] keeping 25%." About an hour-and-a-half later Dr Mugadu put this to Mr Fadil Al Nassar, whilst offering "apologies for the delay in getting back to you." However, Dr Mugadu's attempts to find alternative funding, including from Alpha Imtiyaz, failed and the claimant's business collapsed.

27. No payments from Sika/Henrikson came through. In January 2018, Mr Davite reported the matter to the Taiwan Financial Supervisory Commission. The bank then conducted its own internal investigation and reported Mr Chiang to Taiwanese police, leading eventually to his prosecution and conviction on fraud charges arising out of the fraudulent Letter.

Applicable law

28. The first issue I deal with is as to the applicable law. The parties agree that this issue is to be determined by the application of the Rome II Regulation, but the claimant submits that the claim is governed by the law of England and Wales and the bank submits that it is governed by the law of Taiwan.

29. Article 4 of Rome II provides:

> "1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
>
> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

30. The claimant submits that the damage it claims to have suffered occurred in this jurisdiction because the share purchase agreement was governed by the law of England and Wales and provided for the payment of monies into the claimant's bank account with Barclays here. Any monies paid by Alpha Imtiyaz would also have been paid into that account. The claimant is incorporated in this jurisdiction and conducted most of its business here. Most of the lost profits claimed arise from the supply to UK retailers. Finally the sponsorship agreement with Sir Andy Murray is governed by the law of England and Wales.

31. The claimant also submits that the default rule in Article 4(1) is not displaced by Article 4(3), because the fraud relied on is not "manifestly more closely connected" with Taiwan. The claimant had no pre-existing relationship with the bank.

32. The bank submits that the fraud was part of a larger scheme and was planned, orchestrated, and implemented in Taiwan, and there are indications of such a larger scheme in the subsequent criminal proceedings against Mr Chiang. However, it is not clear precisely who was involved in planning the scheme or where they were located at the time. All that is clear is that Mr Chiang's involvement was at a time when he was based in Taiwan. As the bank further submits, the Letter was concerned with a bank account in Taiwan. However, the ultimate purpose of it was to confirm the ability of the investors, incorporated elsewhere, to transfer monies in Pounds and Euros for a shareholding in a company incorporated here to develop business in the UK and Europe.

33. In my judgment, the claimant's submissions on this point are to be preferred. Under Article 4(1) the damage relied upon occurred in this jurisdiction. Although some of the facts relied upon arose in Taiwan, as indicated above, it is not the case that the fraud was manifestly more closely connected with Taiwan within the meaning of Article 4(3). Accordingly the applicable law is that of England and Wales.

Vicarious liability

34. The next main issue is whether the bank is vicariously liable for Mr Chiang's fraudulent misrepresentation. The parties agree that that depends on whether Mr Chiang had, as a matter of fact, the bank's actual authority to sign and send the Letter, or whether the bank allowed it to appear so, in other words that he had ostensible authority, see *Armagas Ltd v Mundogas SA* [1986] AC 717.

35. The bank called three of its employees at the Chung-Li branch as witnesses. Regina Liao is a deputy supervisor of IT. Lin Keng Yao is a general manager in the credit department. Hsieh Tsai-Ying is a compliance supervisor. Each gave evidence through an interpreter. The essence of this evidence was that while Mr Chiang had the authority to sign a proof of funds letter in respect of clients' funds deposited with the bank, he was required to do so in a model format set out in the bank's operating manuals. The Letter went far beyond what was set out in that format.

36. Moreover, the manuals required such a letter to bear the authorised signature of a manager in the deposit department, and Mr Chiang was not employed in that department. Finally, the manuals required such a letter to be provided by hard copy handed over at the counter, and not by any other means such as email. The claimant criticises the bank's lack of full disclosure regarding its operations manual or other set of procedures to corroborate this evidence. However, there was nothing to contradict it and in my judgment each of the bank's witnesses gave evidence in an entirely straightforward and plausible way. I accept the evidence of each.

37. I am not satisfied that Mr Chiang had the actual authority of the bank to sign the Letter or to email it to the claimant.

38. As to ostensible authority, the Court of Appeal in *Armagas* at [63] summarised what the claimant needs to show, which as applied to this case may be stated as a holding out or representation by the bank to the claimant, intended to be and in fact acted upon by the claimant, that Mr Chiang had authority to do what he did, including acts falling within the usual scope of his ostensible authority.

39. The bank's case is that the Letter was so clearly unusual that it could not have appeared to the claimant that Mr Chiang had the authority to sign it or to email it. For the reasons given later in this judgment in relation to reliance, I accept that the Letter, on its own terms and in the circumstances in which it was sent, was suspicious if not highly suspicious. However, Mr Chiang was an appointed customer relations manager of the bank, and he could use its letter head and its stamp. Ms Hsieh confirmed that the seal was important to convey externally that a document was official.

40. One of the bank's witnesses, Ms Liao, carried out an investigation once the complaint was raised, and said that when she saw the Letter she thought it was "odd" as it was not in the language the bank used and it was not authorised by the loan department. However, she confirmed she could not say whether it was genuine until she carried out the investigation, including speaking to Mr Chiang. It was not suggested that the claimant was aware of the bank's internal procedures for a proof of funds letter.

41. Ms Liao also said that when it appeared that the Letter may not be genuine, she communicated with Barclays by email to say so as she did not want Barclays to be misled. I accept that the wording is odd, but that was largely wording chosen by Dr Mugadu. I am not satisfied that it follows that it must have been apparent that Mr Chiang did not have authority to sign or to email the Letter. In my judgment Mr Chaing's position, his use of the bank's letterhead and stamp were sufficient to give him apparent authority to do so. It follows that the bank is liable for fraudulent misrepresentation.

Reliance

42. In light of the bank's concession at trial that Mr Chiang intended that the Letter should be relied upon, I can focus in dealing with the issue of reliance, as did the parties at trial, on whether the Letter was in fact relied upon. In *Hayward v Zurich Insurance Co plc* [2016] UKSC 48, the Supreme Court held that it was not necessary for a claimant to prove that it believed the representation to be true. It was sufficient to show that they were induced to rely upon it even where the claimant had strong suspicions of lies. Nugee J, as he then was, in *Holyoake v Candy* [2017] EWHC 3397 (Ch), pointed out that the facts of the *Zurich* case involved whether a third party may accept the lies as truth. At paragraph 393, the judge said this:

> "Where all that happens, as in the present case, is that A tells a lie to B, it is difficult to envisage the circumstances in which that can induce B to act in a particular way unless B is taken in and believes that what A says is true, or at least might be true."

43. It is the bank's case that the procuring of the Letter in this case by Dr Mugadu was not a genuine attempt to establish the financial position of Sika/Henrikson, but rather an attempt by him to provide Barclays with the required information relating to source of funds, and that relating to KYC at the same time. Dr Mugadu accepted in cross examination that he was looking to Barclays to tell him if there was anything missing. However, he also said in his written and oral evidence, despite accepting in cross-examination that there were "red flags" as to the truth of the Letter, that he nevertheless believed what it stated. In this regard, however, I am cautious about accepting this part of his evidence at face value, for several reasons.

44. The first is that, as he accepted in cross-examination, in order to test Mr King's claims in 2017 that he had instructed lawyers to draft documentation for potential investments, he told Mr King that he had contacted the lawyers, as he had, and was told that they had no such instructions. In fact, he had received no reply, so that was a lie. It was not under oath, so I attach limited weight to it, but it was made in writing as to what he had been told by Mr King's lawyers.

45. Second, in cross-examination he downplayed words which he and his colleagues used to one another to describe Mr King, and at times to Mr King himself, when repeated promises of investors throughout 2017 failed to materialise. The words used by Dr Mugadu to describe Mr King at various times included "a fraud," "bogus," "a scam" and as someone who would "manufacture a false offer." In one email he threatened to sue Mr King. His wife told him to stay away from Mr King and his offers. In cross-examination he said these were times when he was emotional and desperate and that he was not using the word fraud "in a legal sense." I accept that these were such times, but in my judgment these contemporaneous expressions clearly called into question Mr King's integrity, rather than for example just his competence, and Dr Mugadu's answers to the contrary in cross-examination were less than straightforward.

46. When Mr Shakir saw a copy of the Letter, he pointed out to Dr Mugadu that the IBAN and BIC codes were needed for a SWIFT transaction which is how banks usually transfer funds to other banks and suggested due diligence, which brought a response from Dr Mugadu that it was for Barclays to say what was wanted. Mr Shakir also sent Dr Mugadu a link to a website dealing with blocked fund scams where money will be requested to allow funds to be released, which are then not. That

website also emphasised the security of SWIFT transactions. Other colleagues also raised warnings, with one expressly telling Dr Mugadu not to rely on the Letter, but to carry out at least basic KYC. He did then carry out some due diligence, although this was of a fairly basic nature, such as passport and company registration checks. Again, in cross-examination Dr Mugadu showed a tendency to play down these concerns.

47. Dr Mugadu was cross-examined about his email to Mr Fadil Al Nassar on 21 December where he apologised for the delay in responding. It was put to him that this must refer to Mr Fadil Al Nassar's email of 19 November. He maintained that the two had had a telephone conversation on 20 November in which he turned the offer down. Generally, in relation to this period, Mr Fadil Al Nassar said that he may have had one or two phone conversations with Dr Mugadu, whom he did not meet in person, but could not really remember dates. He said that the two had a conversation in December when he was told that Dr Mugadu was proceeding with investors through Taiwan but could not recall details other than he replied that he wanted the same confirmed in an email.

48. There is no reference in subsequent texts or emails to the offer being turned down. In my judgment it is likely that the recollections of Dr Mugadu, and Mr Fadil Al Nasser, to the very limited extent that there is support from him on these points, are mistaken.

49. Dr Mugadu also maintained that a short time before the 21 December email was sent, he had a further conversation with Mr Fadil Al Nassar and it was this delay he was referring to. Mr Fadil Al Nassar in cross-examination said he did not recall what delay was being referred to. When it was put to Dr Mugadu that such a short delay would not have needed an apology, and that he must have been referring to delay since 19 November, Dr Mugadu replied that he was apologising as his email was sent the day after, rather than on the day of the conversation, and that different time zones might be in play. However, it was pointed out that all these emails were timed on GMT. In my judgment it is likely that he was referring to the delay since 19 November, and that his recollection of a conversation with Mr Fadil Al Nassar on 20 December is mistaken.

50. However, one thing which did come across genuinely, and which pervaded Dr Mugadu's evidence, was his belief in FibreWater. The bank in cross-examination and closing submissions pointed to many such "red flags" in submitting that the claimant could not have been induced by the Letter, in the context of growing mistrust of Mr King by Dr Mugadu throughout 2017 when various deals failed to materialise. I accept that the most telling examples of these red flags show that the Letter was suspicious, if not highly suspicious. These include Mr King's odd first draft of the share purchase agreement, the fact that Dr Mugadu drafted the Letter himself and sent it to Mr Chiang and copied to Mr King, the fact that Mr Chiang returned it very quickly in almost the same wording but without the requested IBAN and BIC codes, the large sums used in the Letter, and the fact that it went beyond proof of funds and dealt with intention, capital resources and status of the funds.

51. It does not follow from Dr Mugadu's belief in FibreWater that he was induced by the Letter to rely upon it. However, in my judgment it is likely that he, and hence the claimant, was induced to rely on the Letter, however suspicious he or his colleagues may have been. It is difficult to see why otherwise Dr Mugadu presented this to the shareholders, the claimant entered into the share purchase agreement or the

sponsorship agreement with Sir Andy Murray (committing itself to very large payments over four years) just a few weeks after receiving the Letter, or why the Alpha Imtiyaz potential was not at that time actively pursued.

52. In this connection, the bank criticised the claimant for not calling some 18 shareholders who had given short statements, which were not accepted, and submits that adverse inferences should be drawn from the failure. The claimant submits that the decision was made in the interests of proportionality, and that it is not clear, or at least not with sufficient notice, as to precisely what inferences are sought to be drawn, see *Imam-Sadeque v Bluebay* [2012] EWHC 3511 (QB) at [10]. In these circumstances I am not prepared to draw any such adverse inferences.

53. Accordingly, I find on the balance of probabilities that the claimant was induced to rely upon the Letter as truth of its contents.

Causation

54. The next issue is closely related to the issue of reliance, and that is causation. There appeared to be some differences between the parties as to whether the "but for" test applies to issues of causation in an action in deceit. In Clerk and Lindsell on Torts 24th edition, this is said at [2.24] when dealing with causation:

> "The rule that the "but for" test does not apply in actions for deceit is based on the paradigm fact-situation where A makes a fraudulent statement to B, who believes it even though he should not have done so if he had made proper enquiry. B was negligent, but A cannot say "you should not have believed me", nor can A's employer say "you should not have believed him""

55. The editors, in the chapter dealing with deceit, continue thus at [17.52]:

> "The claimant in deceit must, of course, show that his loss results from the defendant's misrepresentation (though it should be noted that rules of causation are often manipulated in favour of deceit claimants). The better position is that the claimant is not limited to such losses as are suffered in connection with the falsity of the representation, but can recover all losses directly resulting. So if a buyer is deceived into buying bonds which he then chooses to retain as a business decision, and those bonds later decline in value, he cannot recover in respect of the subsequent decline: this is due to his own commercial choice, not to the original deceit. Similarly, while there is some authority that a defendant who deceives the claimant into entering a business transaction is liable without reference to whether the claimant might otherwise have invested his money in some other unprofitable scheme, this attitude is difficult to defend. The better view is that if the claimant can increase his recovery by showing he would have invested his money profitably, by parity of reasoning the defendant ought to be able to reduce his exposure by showing

> that, but for his deceit, the claimant would have lost it in any case. ”

56. In *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 284H Lord Steyn said this:

> “But it is settled that at any rate in the law of obligations causation is to be categorised as an issue of fact…What has further been established is that the “but for” test, although it often yields the right answer, does not always do so. That has led judges to apply the pragmatic test whether the condition in question was a substantial factor in producing the result. On other occasions judges assert that the guiding criterion is whether in common sense terms there is a sufficient causal connection: see *Yorkshire Dale Steamship Co. Ltd. V. Minister of War Transport* [1942] A.C. 691, 706, per Lord Wright. There is no material difference between these two approaches.”

57. In my judgment the better approach in this particular case is to ask whether in common sense terms there was a sufficient causal connection between the Letter and the claimed losses, although it may well be that the same result would flow on these particular facts from an application of the “but for” test. The factual issue of causation comes down to a fairly straightforward question, namely whether had the Letter not been sent the claimant would have secured funding from Alpha Imtiyaz. That question involves the conduct of a third party, namely Alpha Imtiyaz, and so further considerations arise.

58. David Richards J (as he then was) in *4 Eng Limited v Roger Harper* [2008] EWHC 915 (Ch) at [56]:

> “In *Allied Maples Ltd v Simmons & Simmons* the Court of Appeal held that a claimant must establish on the balance of probabilities how it would have acted. 4 Eng must therefore show on the balance of probabilities that, if given the opportunity, it could and would have purchased Tarvail. Where the loss of opportunity is dependent also on the conduct of third parties, the claimant normally has to show that there was a real and substantial chance that the third party would have acted to confer the relevant benefit. At p 1615D Stuart-Smith LJ said:
>
> > “But, in my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.””

59. The bank submits that it was not the inducement which I have found, which caused the loss. Its pleaded case, in paragraph 36.1 of the amended defence is that the claimant "behaved without prudence and common sense and/or such alleged losses are not the natural result of" the claimant acting upon the Letter. The circumstances relied upon include those pleaded in paragraph 22 of the amended defence, which has eight subparagraphs. These plead that information set out in the Letter would normally be sent from the investor's bank to the bank where the funds would be sent by the SWIFT system, which is an encrypted bank to bank system. The bank's internal procedures for a proof of funds letter, outlined above, are also referred to. Accordingly, it is pleaded that the Letter was highly irregular both in form and content a well as the method by which it was sent, as was clear to Barclays at the time. It is pleaded that someone at Barclays (not Mr Burrell) emailed the bank in January 2018 confirming that they "had doubts" about the Letter and hence did not act upon it.

60. In closing submissions, Mr Parker for the claimant took a pleading point that Ms John for the bank went further in her closing submissions than the pleaded case. Whilst not accepting that she did, in the alternative she made an application to re-amend the defence by adding to paragraph 36.1 the following:

> "…but rather the First Claimant's own decisions and/or actions in (i) entering into the SPA and Sponsorship Agreement and (ii) not entering into the alleged investment opportunity with Alpha Imtiyaz in the absence of any satisfactory completion of KYC. Further or alternatively, causation cannot be made out in circumstances in which Alpha Imtiyaz withdrew from the alleged investment opportunity and/or in fact the First Claimant did not withdraw from the same."

61. As Mr Parker submits, this is a very late application to amend without any justification for the lateness being put forward. He submits that Dr Mugadu should have been given an opportunity to deal with these matters.

62. By CPR r 16.5 where a defendant denies an allegation in the particulars of claim the reasons for that must be set out in the defence. In my judgment the proposed amendment does take matters somewhat further. The presently pleaded case sets out the reasons for the assertion that the Letter was highly irregular, but the proposed amendment sets out the alternative cause of any loss. However, the first three of the further facts sought to be relied upon were not in dispute: the claimant entered into the share purchase agreement and the sponsorship agreement and did not enter into the investment opportunity with Alpha Imtiyaz.

63. There were factual issues as to why engagement with Alpha Imtiyaz did not continue and these were dealt with in cross examination and re-examination. The claimant submits that it was because it had secured the Letter and proceeded on the basis that funds would be forthcoming from Sika/Henrikson. The bank submits that it was because Alpha Imtiyaz withdrew. I deal further with those issues in the following paragraph. In my judgment, allowing the proposed amendment does not cause prejudice to the claimant and I do so allow.

64. I have already found that Dr Mugadu delayed in replying to the email dated 19 November of Mr Fasil Al Nassar until 21 December. The reason he did so is likely to be, as he asserts, that he was relying upon the Letter to show that funds would be forthcoming from Sika/Henrikson. It is also likely that the reason he then approached Mr Fasil Al Nassar offering a deal to Alpha Imtiyaz was that the claimant was desperate for cash to maintain production of FibreWater and that promised cash advances by Sika/Henrikson were not forthcoming.

65. However it is also likely that, as the contemporary text messages show, Dr Mugadu was spoken to in mid-November by Mr Banza and Mr Ali Al Nassar about the complaints which they had heard about him and that he became aware that Mr Ali Al Nassar was then dropping the deal and didn't want to hear anything more about it. Dr Mugadu maintained in cross-examination that Mr Ali Al Nassar was not the investor, and it was not for him to drop the deal.

66. This had some support from the oral evidence of the latter's brother Mr Fadil Al Nassar, who accepted that during this time he was in contact with his brother but maintained his brother did not mention to him the complaint or his conversation about it with Dr Mugadu or that he had pulled the deal. Instead, he told him that he had also tried but failed to contact Dr Mugadu. In my judgment that evidence was inconsistent with the contemporaneous texts, and it is implausible that his brother when speaking to him should not tell him about the complaint or that he had dropped the deal, but instead told him that he had failed to contact Dr Mugadu. In my judgment it is more likely that the contemporaneous texts are accurate.

67. Mr Fadil Al Nassar accepted in cross-examination that he personally vouched for the directors of the claimant to the lawyer for Alpha Imtiyaz because of his brother's connections. In my judgment, it is likely that his brother felt embarrassed when a complaint was received about Dr Mugadu and/or it appeared that the claimant was proceeding with other investors. That is why he did not want to talk about the transaction. As for dropping the deal, it is apparent from the texts that up until that point, Mr Ali Al Nassar was more involved in the transaction than his brother or Dr Mugadu now recall.

68. However, I have already accepted Mr Fadil Al Nassar's evidence that he continued to work with Alpha Imtiyaz who agreed to the proposal, and hence his email to Dr Mugadu on 19 November. It is likely by then that his brother had dropped out of any further involvement in the transaction. Nevertheless, I am satisfied that the primary reason that transaction with Alpha Imtiyaz did not proceed was Dr Mugadu's engagement with Sika/Henrikson at that point and lack of engagement with Alpha Imtiyaz. There was some limited support of that position by Mr Davite in his evidence.

69. The bank further submits that the claimant's decisions to enter into the share purchase and sponsorship agreements and not to pursue the Alpha Imtiyaz offer when first made, in the knowledge that the Barclays KYC was not completed, were separate from the Letter and amount to a break in the chain of causation or a separate cause of any loss. For there to be such a break, the subsequent cause must be overwhelming, see *Borealis AB v Geogas Tarding SA* [2011] 1 Lloyd's Rep 482 [44-45]. I have already accepted that the claimant did rely upon the letter in the way intended, and in

those circumstances it cannot justifiably be said that steps taken in consequence of such reliance amounted to a break in the chain of causation of separate causes of loss.

70. I am satisfied therefore that the Letter was the substantial cause of any claimed loss which the claimant may prove.

Loss of a chance

71. The bank next submits that the claimant is unable to show a real or substantial chance that Alpha Imtiyaz would have invested £3million. It relies on the contemporaneous documents to show that it was Alpha Imtiyaz who withdrew from the transaction, but I have already made findings that that was not the case. It further relies on the lack of evidence as to what the transaction involved or its terms, the lack of clarity as to what was on offer, and the lack of draft or formal documentation. There was one email exchange in September 2017 when Mr Fadil Al Nassar raised follow up queries. As Dr Mugadu observed in his 21 December email, those parties had only "begun a conversation."

72. In my judgment there is force in these further points which mean that a done deal with Alpha Imtiyaz was very far from a near certainty, or even a likelihood. Nevertheless, the evidence of Mr Fadil Al Nassar on this point, which I have accepted, is such that in my judgment there was a real chance, as opposed to a speculative one, of such a transaction being concluded. In his witness statement he said that Alpha Imtiyaz was comfortable in not undertaking normal due diligence because Dr Mugadu was seen as being credible, the amount of the investment was relatively small and that he was to have a seat on the board of the claimant. I accept that part of his evidence. The assessment of this chance is not capable on the evidence of precise quantification, but I would assess that chance as 20% .

Quantum

73. It is acknowledged by both sides that precise quantification of any losses which the claimant has suffered is a difficult exercise which will not allow precise calculation. In those circumstances the court must do the best it can. As Lord Reed put it in *One Step (Support) Ltd v Morris-Garner* [2019] AC 649 at [36-37], quoting Lord Shaw in the *Watson, Laidlaw case* 1914 SC (HL) 18, 29–30, where precise measurement is inherently impossible, the court must use:

> "…the exercise of a sound imagination and the practice of the broad axe."

74. Both sides instructed forensic accountants, each of whom submitted a report and an updated report, and a joint statement of agreement and disagreement. The approach of Stephen Grant of Azets Holdings Ltd for the claimant was to take the cash flow model which Dr Mugadu and Mr Shakir had prepared at the outset, and to make what appeared to Mr Grant to be reasonable adjustments. The approach of David Mitchell of Interpath Ltd was to critique Mr Grant's adjustments.

75. Their joint statement runs to 38 pages, but the areas of agreement are dealt with in just one of them. Those areas include that the primary appropriate approach to assess the quantum of any loss of profit is the income approach, also called the discounted cash

flow. That is only appropriate if the forecasts are viable. Each has adopted a valuation date of 1 January 2018 and agrees that interest should be applied, at a rate to be determined by the court from that date until the award is paid. They agree that the claimant's loss should be considered over (a) a 10 year period and (b) over a period of 10 years plus a terminal value. They agree each other's mathematical calculations.

76. There, however, the agreement ends. The experts after giving oral evidence remain apart, and in some respects far apart, on some 13 key areas of disagreement, and upon assumptions used by Mr Grant.

77. The experts dealt with a number of different scenarios. Scenario 1 is based on sales of FibreWater from the maximum amount of orafti which the claimant could purchase under from the Beneo, rather than assumptions as to marketing production and sales. In my judgment that is of limited assistance. Scenario 2a focusses on the claimant's existing and potential debts upon receipt of the £3million and the impact on profits. This was the scenario which the experts focussed upon. Scenario 2b assumes that the claimant could have expanded the sales of FibreWater into other European countries such as Austria, Belgium, the Netherlands, Serbia and Switzerland if it had obtained the £3 million investment. In my judgment, there is little to show that such an expansion was likely. Accordingly, like the experts, I shall focus on scenario 2a.

78. That scenario assumes sales of FibreWater in the UK, Germany and Scandinavia, and an impact resulting from Sir Andy Murray's endorsement of 4% in the UK and 2% in Scandinavia and Germany on a 'low' basis. On that basis, Mr Grant calculates a present value of the forecast profits of £48,485,000. Mr Mitchell's corresponding figure is nil.

Key Disagreements

79. The first key disagreement identified was the probability of Alpha Imtiyaz making the investment and on what terms. Mr Grant's view is that these are factual matters and not matters of expert evidence. I agree, and I have already made findings in relation to this under the heading loss of chance.

80. Next is the issue of what liabilities of the claimant would have been paid immediately from the £3million if advanced by Alpha Imtiyaz. Mr Grant takes a figure of £345,354 from contemporary accounts but says that even those need not have been paid all at once. However, there is other documentation from the time indicating larger figures, from £468,000 to £812,000. The contemporaneous documentation includes an email from Dr Mugadu referring to "urgent" payments of £639,000 which the claimant needed to make. In my judgment that provides a better indication of what payments the claimant is likely to have had to make urgently upon receipt of the £3million.

81. Mr Mitchell adds other liabilities which the claimant would have to discharge upon such receipt. For the reasons given below, with one exception I am not persuaded that it would. The exception is operating costs of £79,265 to achieve sales in the first month in Denmark, which is a component of scenario 2a. Mr Grant disagrees, and says that marketing costs were yet to be incurred and that it was unlikely that distributors would demand repayment of costs already incurred to the detriment of growing and developing the brand. However, in my judgment it is likely that

marketing costs would be incurred before the expected cash flow in Denmark would materialise, and it is likely that incurred costs would be demanded before the incurring of further costs.

82. Mr Mitchell also includes a liability of £478,265 under the Beneo agreement because he takes the view the claimant would have had to purchase orafti up front to maintain the exclusivity provisions. However, as Mr Grant observes, no penalty was charged by Beneo to the claimant for not purchasing the specified amount each year, and yet exclusivity was maintained in the UK until 2020 and in Germany and Scandinavia until August 2018. In my judgment it is not appropriate to include this item.

83. Mr Mitchell also includes a liability of up to £250,000 as an up-front payment likely to be required under a sponsorship agreement with Sir Andy Murray as a result of receiving the £3million, because of the risk that sales would not materialise. In my judgment there is force in that. Mr Grant says that there is no evidence to support the need for an up-front payment, which in any event could have been made from cash flow rather than immediately from the £3million. In my judgment it is likely that an up front-payment would have been required, for the reason given by Mr Mitchell, and would be needed to be paid from the £3 million to help cash flow, rather than from cash flow. This liability should be included.

84. Mr Mitchell also includes a shareholder loan of £130,000, shareholder debt of £170,000 and a director's loan to Dr Mugadu of £261,505. The contemporaneous document is unclear on these items and the balance sheet of the claimant refers only to the director's loan. Mr Grant observes that the claimant had shareholder debt since incorporation, and it is unlikely that the shareholders or Dr Mugadu would demand repayment to the potential prejudice to the promotion of FibreWater. I accept that to some extent, but Dr Mugadu himself included a figure of £300,000 in respect of such loans in the £639,000 which he said needed to be paid urgently, and which I have already accepted. In my judgment, he is unlikely to have done so if such payment might prejudice the promotion.

85. Next Mr Mitchell says that £743,750 of the £3million would be needed for office costs, branding and marketing costs, without which the projected cash flow would not have been achieved. Mr Grant says that this was planned expenditure, not a liability at the date of breach, and could have been made from cash flow. In my judgment there is some force in both these views, in that some of these costs are likely to have needed immediate payment for cash flow to come on, but the rest could have been made from cash flow thereafter. In my judgment about a third of Mr Mitchell's figure is likely to have fallen in the former category so I would allow £250,000.

86. On this section, Mr Mitchell concludes that once the liabilities and expenditure referred to by him have been taken into account the £3million would have been insufficient to support the projected cash flows. I have accepted that some of these should be taken into account but have concluded that the majority should not and accordingly do not accept his consequent conclusion.

87. Mr Mitchell also says that the fact that people interviewed in the Populus survey did not taste FibreWater impacts on the reliability of the survey when extrapolating it to calculate market demand. However, in my judgment the survey was to test the market demand for the concept of FibreWater, which was being promoted for its health

benefits rather than its taste. The product had been sold in 2017 and there is nothing to suggest that taste was an issue. As Mr Grant observes, taste could have been adjusted if necessary. Mr Mitchell says that a further impact on reliability was that the survey was conducted without an indication of price, other than to ask those surveyed to assume a reasonable price. In my judgment that assumption was sufficient to allow reasonable reliability of the survey to assess market demand for this particular product, and it is not appropriate to make any adjustment for these points.

88. There are further issues between the experts as to the viability of assumptions of FibreWater's market. The first of these arises from the difference between market reports relating to the bottled water industry on the one hand (including in commercial settings such as restaurants), and those relating to the fruit drinks and functional beverage market on the other. Functional waters, which for present purposes includes FibreWater as it has a health function, are excluded from the former, and yet Mr Mitchell uses these to produce a lower market penetration than that of Mr Grant. In my judgment Mr Grant's criticism of the focus on bottled water market reports is well founded, and I prefer his approach. The whole point of FibreWater is that it is something materially more than just another bottled water.

89. Mr Mitchell also relied on other reasons to cast doubt on the viability of Mr Grant's cash flow figures, namely the claimant's outstanding liabilities/expenditure, and the performance of FibreWater to the date of breach to assess its historical success in developing sales. I have already made findings in respect of the first of these other reasons. I have also allowed for some further marketing and branding cost out of the £3 million. In my judgment Mr Grant's cash flows are viable.

Disputed assumptions

90. That completes my determination of the key areas of disagreement between the experts. However, their joint statement goes on to deal with assumptions made by Mr Grant which Mr Mitchell does not agree with. The former assumes that cash flows in Germany and Scandinavia would commence in January 2018, as FibreWater was already selling in Scandinavia and the claimant had planned meetings in November 2017 to target the major German supermarkets. Mr Mitchell's corresponding start date is January 2019 as further operational cash flows and investment would be needed to fund this expansion. I have already dealt with this to some extent. Mr Mitchell points out that it took 11 months for FibreWater to be listed in a major UK retailer, but it was so listed by the date of breach, and in my judgment that is likely to have been a positive factor in marketing in these other countries. In my judgment Mr Grant's assumption in this regard is reasonable.

91. Mr Grant's assumed start date for the other countries in scenario 2b is January 2019, and I have already touched upon this scenario. As Mr Mitchell points out, in respect of these countries, that there were no historic sales or contracts or exclusivity under the Beneo contract. In my judgment it is not reasonable to include any cash flow from these countries.

92. The next issue relates to Mr Grant's assumption of a market penetration by FibreWater at 20%, based on the Populus survey that 19% of those surveyed said that they would definitely or probably buy the product. Mr Mitchell adjusts this figure by 35%, on the basis that purchase intention might not translate into sales. He bases this

figure on a study carried out in the USA as long ago as 1974. The sample size was small and it is not clear what product was being tested or why it was not bought. In my judgment it is a flimsy basis for the adjustment sought, although I would accept a modest adjustment to allow for this possibility. Accordingly, a reasonable expectation of market penetration is 15%.

93. Mr Grant assumes that 10% of the available market would buy in year one, but Mr Mitchell's figure is half of that to reflect the time lag to build the infrastructure needed for the projected sales of FibreWater. Mr Mitchell has regard again to the 11 months it took for the product to be listed by a major retailer in the UK. However, as Mr Grant points out by the autumn of 2017 the claimant already had infrastructure in place for the supply of ingredients, production and distribution. In my judgment Mr Grant's figure is the more reasonable.

94. Mr Grant assumes a growth in sales of 5% from 2021 and 4% from 2027. Mr Mitchell assumes a more gradual growth, having regard to rates of inflation. However, I accept Mr Grant's point that inflation measures change in the price of goods and is not a reliable indication of growth in sales of FibreWater, and I accept his figure.

95. Mr Mitchell makes a capital expenditure adjustment of 1% in relation to infrastructure required to support ongoing projected sales, although that figure as he accepted was not the result of any particular analysis. Mr Grant again points to the fact that much of the production storage and distribution of FibreWater had been developed at the date of breach, which I have accepted. However, in my judgment it is reasonable to allow for ongoing capital expenditure in this regard, and Mr Grant appears to accept that "limited" additional plant and machinery, and research and development would be required, and yet puts no figure on it. I accept Mr Mitchell's figure.

96. A similar difference arises in respect of working capital. Mr Mitchell considers it is reasonable to adopt an average net working capital provision of 6.5% of revenue, and points to the fact that the claimant's original cash flow model makes provision for this. Mr Grant makes no provision as the claimant intended to use a factoring facility to increase cash available for current liabilities and says that Mr Mitchell's calculation is flawed as he includes a factoring fee but assumes a 60 day delay before payment which suggests no factoring. However, I accept Mr Mitchell's evidence that it is normal practice to make this adjustment to fund growth in operations and increase in revenue year upon year. I accept too his figure.

97. Mr Grant has not included tax in his calculation, but Mr Mitchell has calculated the loss on a post-tax basis and if taxable then the award can be grossed up. The better approach, in my judgment, is that unless it is clear what if any tax would be payable on damages by way of loss of profit in the present case, then there should be no deduction, see *Stoke-on-Trent City Council v Wood Mitchell* [1980] 1 WLR 254. The issue in my judgment is less than straightforward, and the experts did not go into a great deal of detail. I prefer the approach of Mr Grant.

98. There was also disagreement upon the likely impact of any sponsorship deal with Sir Andy Murray. Mr Mitchell accepted however that a reasonable starting point was to take 18% but then to make a deduction because not all potential buyers may be familiar with this sponsor. In my judgment it is reasonable to take Mr Grant's mid estimate of 11% in the UK and 5.5% in Germany.

99. Both experts apply a discount rate to reflect the risks of achieving the projected cash flows. Mr Grant's view is that the claimant is not a startup company but a first or second stage company, on the basis that it is not less than one year old and funding is not going to be used for product development, testing or test marketing. The appropriate rate for such company is 30-60%. The mid-point of 45% is the figure used in the claimant's cash flow model. Mr Mitchell's figure is 60% to take account of the limited trading, the risks of the survey, the risks of extrapolating the UK assumptions to Germany and Scandinavia, the limitations of the sponsorship agreement and the risk that costs are understated. I have already dealt to some extent with the risks of the survey and whether costs are understated. I accept that there are such risks but in my judgment some of these are not as marked as Mr Mitchell assumes, and the appropriate rate is somewhat lower than his figure, namely 55%.

100. The final assumption which the experts disagree about is the proportion of cash flow attributable to the claimant, but each agrees that this is a matter of law. However, Mr Grant points out the shareholding would have been adjusted if the Alpha Imtiyaz investment had been made, but nevertheless the benefit of the projected cash flows would accrue to the company. Mr Mitchell says that had such an investment taken place, then the previous shareholders would hold 51% of any profits. In my judgment, however, it is the claimant as a corporate body which would be entitled to the profits, and the shareholder to any dividends declared by the claimant.

101. That completes my determination of the issues between the experts of the assumptions made. Their joint statement goes on to set out further assumptions which Mr Mitchell does not necessarily agree with but in respect of which he has not amended his calculations. In those circumstances I am prepared to accept these further assumptions of Mr Grant.

102. The joint statement ends with the heading "other areas of disagreement." It appears that some of these may already have been covered, but as the experts deal with them under this separate heading, I shall also deal with them in that way.

103. The first is that Mr Mitchell considered whether the claimant had established a successful business and thus brand equity but says he did not use this analysis to compare directly the performance of the sales of fruit drinks on the one hand and FibreWater on the other. In my judgment he was right not to do so, because as Mr Grant point out these are very different products. Mr Mitchell therefore considers that no brand equity had been established. Mr Grant accepts that to some extent and says that the brand awareness may not have developed significantly until the claimant had the funding to market the product or had obtained celebrity endorsement. He also points out that FibreWater won Beneo's product of the year in January 2018, suggesting that the brand had perceived quality. I accept these points of Mr Grant.

104. Mr Grant also makes the point that had Alpha Imtiyaz made the investment in November, the claimant would have had most of that month and December to prepare for a full launch of FibreWater in January 2018 including hiring additional staff and meeting with retailers and distributors. I accept these points, but I also accept Mr Mitchell's point that the brand equity was such as not to give confidence of achieving sales on that basis alone.

105. Mr Mitchell has referred to comparable products and takes the view that the fibre water market is still nascent. However, I accept Mr Grant's point that these products are not close comparators.

106. In various paragraphs in the bank's closing submissions, from paragraph 118 onwards, points are made on initial bottling distribution and pallet costs, marketing costs pre 2018 and in January 2018, the jump from 16,000 bottles sold in 2017 to Mr Grant's assumption of 450,000 bottles sold in the UK in January 2018 and more in Scandinavia and Germany, assumptions as to individual consumption of FibreWater, and what is termed "sense checks." I have taken these submissions into account in my determination of the issues as set out above.

107. In conclusion, the claimant succeeds in its claim for damages. The figure is likely to be significantly less than that calculated by Mr Grant for the reasons I have endeavoured to set out above.

108. Counsel helpfully indicated in closing submissions that upon the court determining these issues between the experts, they were hopeful that the experts would be able to fine tune their figures so as to arrive at a final figure. I too very much hope that they will be able to do that. To any such figure must be applied the 20% loss of chance evaluation which I have arrived at above.

109. The parties did not make detailed submissions on the appropriate interest rates and I would hope that those too can be the subject of agreement. If not, that can be the subject of written submissions referred to below.

110. The claimant also claims an indemnity in respect of a potential claim under the sponsorship agreement. None has yet been intimated, but in my judgment in principle it is appropriate to provide for such an indemnity.

111. I invite the parties to attempt to agree a draft minute of order, which should be filed within 14 days of hand down of this judgment, together with written submissions on any consequential matters which cannot be agreed. I would hope that any such matters can be determined on the basis of the written submissions without the need for a further hearing. If one or both parties consider that one is necessary they should say so in their written submissions and I will consider such a request.

112. I should like to end this judgment by expressing my gratitude to all involved in the presentation of the parties' respective cases and for the written and oral submissions of counsel which were thorough yet focussed and which I found to be of considerable assistance in determining the not altogether straightforward issues in this case.