

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION



Cause No. FSD 113 of 2010 (AJJ)

The Hon Mr Justice Andrew J. Jones QC
11th to 15th and 20th July and 26th August 2011

BETWEEN : **WEAVING MACRO FIXED INCOME
 FUND LIMITED (In Liquidation)** Plaintiff

AND : **(1) STEFAN PETERSON
 (2) HANS EKSTROM** Defendants

APPEARANCES : Mr David Lord QC instructed by Mr Shaun Folpp of Ogier for the
 Plaintiff

Mr Ben Valentin instructed by Ms Kirsten Houghton of Campbells for the
Defendants

JUDGMENT

Introduction

1. This is an action for damages commenced by the Official Liquidators of Weaving Macro Fixed Income Fund Limited ("the Macro Fund") against its former directors, Messrs Hans Ekstrom and Stefan Peterson (whom I shall refer to collectively as "the Directors"). Messrs Ian Stokoe and David Walker of PricewaterhouseCoopers Finance & Recovery (Cayman) Ltd were initially appointed as voluntary liquidators by a special resolution passed by the sole voting shareholder on 19th March and were subsequently appointed as official liquidators by order of the Court made on 3rd April 2009. The Macro Fund was put into liquidation shortly after the Directors and professional service providers discovered that a high proportion of the assets reflected on its balance sheet were fictitious.

2. The Macro Fund was incorporated in April 2003 as an open ended investment company. Its authorized share capital of US\$50,000 was divided into 100 management shares of US\$1 each and 4,990,000 participating redeemable shares which were admitted to the Irish Stock Exchange, with the result that the company was subject to its *Code of Listing Requirements and Procedures for Investment Funds*. The Macro Fund's management structure was entirely conventional, except in respect of the composition of its board of directors. The investment manager was Weaving Capital (UK) Limited ("WCUK"), a company incorporated in England which carried on its business from offices in London. WCUK was indirectly owned and controlled by Mr Magnus Peterson, who was described in the Macro Fund's offering document as its "principal investment adviser". It would not be entirely accurate to describe WCUK as a "start-up operation", but it did not have any substantial track record as an investment manager. The administrator was PNC Global Investment Servicing (Europe) Limited ("PNC"), which carries on business in Dublin and is part of a large and well established financial services group. Another PNC group company acted as the Macro Fund's custodian, but it did not play a role in the events which are relevant to this action. The auditors were the Cayman Islands and Irish firms of Ernst & Young.
3. WCUK's obligations are set out in the Agreement dated 31st July 2003 which defines its role in the following terms –

"2. The [Macro Fund] (subject to the overall supervision of its Directors) hereby appoints the Advisor to manage the affairs of the Fund until its appointment shall be terminated as hereinafter provided and the Advisor hereby accepts such appointment and agrees to assume the obligations set forth herein."

"3. The Advisor may give advice by telephone, facsimile or other acceptable medium. The Advisor shall observe and comply with all instructions of the Fund given by similar mediums and the then current Memorandum and Articles of Association of the Fund and with the applicable provisions of any Private Placement Memorandum or any other document related to the Fund distributed by or on behalf of the Fund and all resolutions of the Directors of the Fund of which it has notice and other lawful orders and directions given to it from time to time by such Directors. Such instructions will be acknowledged by the Advisor and all activities engaged in by the Advisor hereunder shall at all times be subject to the control of and review by such Directors and any specific or general direction given by such Directors shall override the general authorisation given to the Advisor hereunder."

"4. Subject to the provisions of Clause 3, during the continuation of its appointment hereunder the Advisor shall be entitled to exercise each of the powers, duties and discretions as are vested in the Fund. In particular but without prejudice to the generality of the foregoing the Advisor shall:

- (i) *manage the investment and reinvestment of the assets of the Fund with power on behalf of and in the name of the Fund at its discretion to purchase, subscribe for or otherwise acquire investments and to sell, redeem, exchange, vary or transpose the same with a view to achieving the then current investment objectives of the Fund as laid down from time to time by its Directors;*

I make two observations about the terms of this contract. First, it is misleading to describe WCUK as “the Advisor” because the terms of the contract clearly impose a managerial function upon WCUK and I shall refer to it as “the investment manager”. Second, the contract provides that WCUK will carry out its functions as investment manager “subject to the overall supervision of [the] Directors”. It is accepted by the Directors that they did have a high level supervisory role, but the precise scope of their duty is an important issue which I have to decide.

- 4. PNC’s obligations as administrator are defined in the Administration and Accounting Services Agreement dated 30th July 2003, including the following terms –

Clause 7(b) - “[PNC] shall keep the following records: (i) all books and records with respect to the Fund’s books of account; and (ii) records of the Portfolio’s securities transactions.”

Clause 9 - “Liaison with Accountants. [PNC] shall act as liaison with the Fund’s independent public accountants and shall provide account analyses, fiscal year summaries, and other audit-related schedules with respect to the Fund. [PNC] shall take all reasonable action in the performance of its duties under this Agreement to assure that the necessary information is made available to such accountants for the expression of their opinion, as required by the Fund.”

Clause 14(a) - “[PNC] shall be under no duty hereunder to take any action on behalf of the Fund except as specifically set forth herein or as may be specifically agreed to by [PNC] and the Fund in a written amendment hereto.”

Clause 15 - “Description of Accounting Services on a Continuous Basis. PNC will perform the following accounting services if required with respect to the Fund:

- (v) *Post to and prepare the Statement of Assets and Liabilities and the Statement of Operations in U.S. dollar terms;*
- (ix) *Calculate capital gains and losses;*
- (x) *Determine net costs;*
- (xi) *Obtain security market quotes and currency exchange rates from independent pricing services approved by the Advisers, or if such quotes are unavailable, then obtain such prices from the Advisers, and in either case calculate the market value of the Fund’s investments in accordance with applicable valuation policies or guidelines provided by the Fund to PNC and acceptable to PNC; and*
- (xiii) *Arrange for the computation of the net asset value in accordance with the provisions of the prospectus.*

Clause 16 - "Description of Administration Services on a Continuous Basis

- (i) *Prepare monthly security transaction listings;*
- (ii) *Supply various normal and customary Fund statistical data as requested on an ongoing basis; and*
- (iii) *Perform such additional administrative duties relating to the administration of the Fund as may subsequently be agreed upon in writing between the Fund and PNC."*

I make three observations about the terms of this administration agreement. First, PNC was responsible for maintaining the Macro Funds accounting records, preparing its financial statements and determining its NAV per share. It prepared the annual financial statements, in respect of which it had an obligation to liaise with the auditors and provide them with whatever analyses, fiscal summaries or audit-related schedules might be required of them. It prepared the interim unaudited financial statements published to investors. It also determined the NAV at the end of each month, for which purpose it would have to prepare monthly financial statements.¹ Second, PNC had no responsibility for monitoring compliance by the Macro Fund or WCUK with the investment guidelines and restrictions and this was disclosed in the Offering Memorandum. Third, the administration agreement provided for PNC to take instructions only from "authorized persons" which was defined to mean any officer of the Macro Fund, which must include the Directors themselves. It was clearly open to the Directors to communicate directly with PNC and instruct PNC to provide them with copies of the monthly accounts and any other information or reports relating to the Macro Fund's financial condition which they might require in order to perform their supervisory duties.

5. As I have already said, the management structure adopted for the Macro Fund was entirely conventional, except in respect of the composition of its board of directors. Mr Ekstrom and Mr Stefan Peterson are close family relatives of the Macro Fund's promoter and principal investment manager. Mr Stefan Peterson is Magnus Peterson's younger brother. Mr Ekstrom is their elderly stepfather. At the time of his appointment, Mr Ekstrom was about 79 years old and had, by then, been retired from his position as head of the Trustee Department of Skandinaviska Enskilda Banken for about 13 years. He was 85 years old by the time he gave evidence to this Court. At the time of his appointment, Mr Stefan Peterson was a fulltime employee of Storebrand Investments, a large insurance company, for whom he was working in the company's Oslo office as a portfolio manager of its credit hedge fund. Because its participating shares were listed

¹ The Macro Fund's articles of association and offering documents provided for subscriptions and redemptions to be made on the first business day of each month as at the NAV per share determined on the previous day. It follows that that monthly management accounts had to be prepared in order to determine the NAV of the company and the NAV per share, but the accounting date was not necessarily the last day of the month.

on the Irish Stock Exchange, the Macro Fund had to have at least two independent directors.² On paper both Mr Ekstrom and Mr Stefan Peterson had appropriate professional credentials and met the ISE's independence requirement. With the benefit of hindsight, I find it difficult to avoid the conclusion that Mr Magnus Peterson chose to appoint his relatives as a means of meeting the minimum legal requirements without burdening himself with a real board of directors who could be expected to perform their supervisory role in an ordinary businesslike manner.

The law – the Directors' duties

6. Directors owe fiduciary duties to their companies to act bona fide in what they consider to be the best interests of the company, to exercise their powers for the purposes for which they are conferred and not to place themselves in a position where there is a conflict between their personal interests and their duty to the company. It is not alleged that these Directors acted in breach of these fiduciary duties. The Liquidators' case is that they acted in breach of their duty to exercise independent judgment, to exercise reasonable care, skill and diligence and to act in the interests of the Macro Fund, which means what they – not the Court – bona fide considered to be in its interests. It is necessary to analyse the scope of these duties in the context of the Macro Fund whose management structure, as described in its Offering Memorandum, would not have appeared to be materially different from countless other open ended investment companies incorporated in this jurisdiction and registered pursuant to the Mutual Funds Law.

7. A director must exercise his powers independently, without subordinating those powers to the will of others, except to the extent that they have properly delegated their powers. The Cayman Islands investment fund industry works on the basis that investment management, administration and accounting functions will be delegated to professional service providers and a company's independent non-executive directors will exercise a high level supervisory role. It is not disputed that these functions were properly delegated to WCUK and PNC. Nor is it disputed that, in spite of having properly delegated these functions, the Directors did retain a supervisory duty. Furthermore, their evidence is that they both appreciated that they did have such a duty. The nature and scope of this duty can only be determined by reference to the actual circumstances of this case, even though the overall management structure may not appear to be materially different from countless other open ended investment funds. The following statement

² Section 2.20 of the Irish Stock Exchange's *Code of Listing Requirement and Procedures for Investment Funds* required that "At least two of the directors, in the case of an applicant which is a company, must be independent. A director will be considered to be independent where: (i) he has no executive function with the investment manager, investment adviser and/or their affiliated companies; and/or (ii) he has an executive function with another service provider but is not responsible for carrying out work on behalf of the applicant."

was made by Jonathan Parker J. in *Re Barings PLC, Secretary of States for Trade and Industry v. Baker (No.5)* [1999] 1 BCLC 433 at p. 489. It was approved by the English Court of Appeal and I adopt it as constituting Cayman Islands law -

- “(i) Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company’s business to enable them properly to discharge their duties as directors.
- (ii) Whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions.
- (iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director’s role in the management of the company.”

8. The Directors’ duty to exercise reasonable care, skill and diligence comprises both an objective and a subjective element. They must exercise the care, skill and diligence that would be exercised by a reasonably diligent person having the general knowledge, skill and experience reasonably to be expected of a person acting as an independent non-executive director of an open ended investment fund incorporated in this jurisdiction. They are expected to perform a high level supervisory role. They are expected to act in a professional, businesslike manner, which these Directors conspicuously failed to do. Whilst independent non-executive directors rarely have the technical expertise and experience to be able to monitor sophisticated investment strategies and trading techniques in a direct hands-on manner, they are expected to satisfy themselves (on a continuing basis) that the investment manager’s strategy is fairly described in the offering document and that the investment manager is complying with whatever investment criteria and restrictions have been adopted by the fund. These Directors were not expected to supervise WCUK’s trading activities (in spite of having signed or approved statements apparently to this effect), but they were expected to satisfy themselves that it was complying with the investment restrictions. They were also expected to acquire a proper understanding of the financial results of the investment and trading activity, without which they would not be in a position to perform an overall supervisory role. It is the duty of the independent non-executive directors to satisfy themselves that there is an appropriate division of function and responsibility between the investment manager and administrator, the absence of which will necessarily impose

greater responsibility upon themselves. They need to satisfy themselves, on a continuing basis, that the various professional service providers are performing their functions in accordance with the terms of their respective contracts and that no managerial and/or administrative functions which ought to be performed are being left undone.

9. The duty to exercise care, skill and diligence also includes a subjective element. Directors are required to exercise the knowledge, skill and experience which they actually possess. It follows that the professional qualifications and business experience of the directors of an open ended investment fund is material information which needs to be disclosed in its offering document, with the result that the directors have a duty to ensure that the disclosure is accurate and not misleading. The Macro Fund's Offering Memorandum stated that Mr Stefan Peterson has a PhD in economics; worked for the Swedish National Debt Office as a credit analyst; subsequently joined Volvo's corporate finance department; and since 2000 had worked as a senior credit strategist at Storebrand Investments. In 2006 he left Storebrand and joined his brother's investment management business as a fulltime employee. He became chief executive officer of Weaving AB, based in Gothenberg, which was the investment manager of another open ended investment fund called Weaving Opportunities Fund ("the Opportunities Fund"). This fact was never disclosed in the Macro Fund's offering document.³ As regards Mr Ekstrom, the Offering Memorandum stated that he has over 40 years experience in the financial industry. It states that he held senior positions within Skandinaviska Enskilda Banken AB between 1960 and 1995, primarily as head of its Trust Department. Although both of them have made the point that they had no experience of trading financial instruments of the kind in which the Macro Fund was investing (or at all), it seems to me that they were held out as possessing, and actually possessed, qualifications and business experience of a kind which would have enabled them to perform their supervisory function in an effective way, had they chosen to do so.
10. Directors have a duty to exercise an independent judgment. As Lord Woolf MR said in *Re Westmid Packing Services Ltd* [1998] 2 BCLC 646, at page 653b-c,

"Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them. A proper degree of delegation and division of responsibility is permissible, and often necessary, but total abrogation of responsibility is not. A board of directors must not permit one individual to dominate them and use them, as Mr Griffiths plainly did in this case".

³ The final edition of the Macro Fund's Offering Memorandum issued on 24th September 2008 continued to describe Stefan Peterson as a senior credit strategist employed by Storebrand Investments.

In the context of open ended investment funds, investment management, administration and accounting functions are invariably delegated to contracted professional service providers, but the exercise by the directors of their power of delegation in this way does not absolve them from the duty to supervise the delegated functions. This means that they must do more than react to whatever problems may be brought to their attention by the other professional service providers. They must apply their minds and exercise an independent judgment, in the ordinary course of business, in respect of all the matters falling within the scope of their supervisory responsibilities. For example, when asked to sign the financial statements and accompanying management representation letter addressed to the auditors, the directors must exercise an independent judgment by conducting a review in an inquisitorial manner and making appropriate enquiries of those involved, in particular the administrator and auditor. They are not entitled to assume the posture of automatons, as these Directors did, by signing whatever documents are put in front of them by the investment manager without making enquiry or applying their minds to the matter in issue, on the assumption that the other service providers have all performed their respective roles (actual or perceived) and therefore do not need to be supervised in any way whatsoever.

11. The independent non-executive directors of investment funds are invariably paid a fee, the amount of which should be commensurate with their responsibilities and the time and attention which must be devoted to discharging their duties. Mr Ekstrom and Mr Stefan Peterson agreed to act gratuitously, a fact which was disclosed in the Macro Fund's Offering Memorandum. Mr Valentin suggested, in reliance upon an observation made by Sir Richard Scott V-C in one of the *Barings Plc cases*⁴, that the level of a director's reward may be a factor in determining the scope of his responsibility. The Vice Chancellor made this observation in the context of a disqualification proceeding against one of the bank's senior and most highly paid executive directors. In the context of the Macro Fund, the fact that these particular Directors were never paid any fees or expenses does not suggest that the scope of their duties was reduced and that they were not expected to perform the duties normally performed by independent non-executive directors of an investment fund. Rather, it tends to support the Liquidators' case that they never intended to perform their duties, or at least not in a serious way, and were merely lending their names to the Macro Fund as a favour to Mr Magnus Peterson.

⁴ *Re Barings Plc, Secretary of State v. Baker* [1998] BCC 583, at page 586.

The Law – wilful neglect or default

12. It is accepted that these Directors are entitled to rely upon the exculpatory provision contained in Article 182 of the Macro Fund's articles of association, which provides as follows –

“Every Director, agent or officer of the Company shall be indemnified out of the assets of the Company against any liability incurred by him as a result of any act or failure to act in carrying out his functions other than such liability (if any) that he may incur by his own wilful neglect or default. No such Director, agent or officer shall be liable to the Company for any loss or damage in carrying out his functions unless that liability arises through the wilful neglect or default of such Director, agent or officer.”

In order to recover any loss or damage, the burden rests upon the Liquidators to prove that it was caused by the Directors' “wilful neglect or default”. The classic formulation of what is meant by “wilful neglect or default” in the context of a company's articles of association is that of Romer J. in *Re City Equitable Fire Insurance* [1925] Ch 407 –

“An act, or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty.”

This test was adopted by Harre J. in *Prospect Properties Limited (In Liquidation) v. McNeill* [1990-91] CILR 171.

13. The test has two limbs: (a) knowing and intentional breach of duty or (b) acting recklessly, not caring whether or not the act or omission is a breach of duty. There was an argument between counsel as to whether the second limb of this test requires an appreciation on the part of the Directors their conduct might be a breach of duty, coupled with a conscious decision to carry on regardless of the consequences. I am inclined to agree with Mr Lord that the facts of this case are such that I do not need to resolve this issue. The case against these Directors is put fairly and squarely under the first limb of the test. The case against them is that “they did nothing” and carried on doing nothing for almost six years. If they knew that they had a duty to supervise – and they both claim to have been aware of this duty – but did nothing, then it seems to me that their neglect must be intentional. If the evidence establishes that directors have completely and utterly ignored their duty and made no serious attempt to perform their

duty, in spite of being conscious of a duty to supervise, as I think it does in this case, then their default must be regarded as wilful. The purpose and intended effect of Article 182 is to protect directors who do their incompetent best. Those who *attempt* to perform their duty, but fail as a result of their carelessness, no matter how gross, are relieved from liability. Those who have an appreciation of their duty, but make no attempt, or at least no serious attempt, to perform the duty are not relieved from liability.

The Directors' performance of their supervisory role

14. The case against these Directors is that they went through the motions of appearing to hold regular quarterly board meetings but, in reality, did nothing in that these meetings served no purpose other than recording of information that was in large part apparent from the monthly statements sent to investors. In addition, it is said that they provided what counsel described as an "administrative service" in that they signed documents or took responsibility for documents whenever asked to do so by Mr Magnus Peterson, without making any enquiry or any attempt to understand their content. For the purposes of analyzing their purported performance and the reasons for their alleged non-performance, Mr Valentin suggested that it is convenient to divide the life of the Macro Fund into three distinct phases. I agree with this approach because the content and scope of the Directors' general duties are, to some extent at least, different in each phase. Phase one is the period during which the Macro Fund was established, from its incorporation on 3rd April until the launch of its business on 8th August 2003. Phase two is the period from August 2003 until the autumn of 2008 when the Macro Fund was apparently carrying on its business in a successful manner. The final phase is the period of the financial crisis following the bankruptcy of Lehman Brothers in September 2008 through to March 2009 when the Macro Fund was put into liquidation.

Phase One – Establishment of the Macro Fund – April to August 2003

15. It was the Directors' duty to satisfy themselves that the overall structure Macro Fund was consistent with Cayman Islands industry standards and that the terms of the service providers' contracts, in particular those relating to the determination of NAV, remuneration and limitation of liability, were reasonable and consistent with industry standards. They should have made enquiry to ensure that they properly understood the nature and scope of the work which each of the professional service providers were proposing to do or, perhaps more importantly, proposing not to do, and that it would result in a proper division of responsibility. In particular, they needed to satisfy themselves that scope of the work intended to be performed by the investment manager and administrator in respect of the preparation of the Macro Fund's financial statements and determination of monthly NAVs was properly understood by all concerned and that

it would result in an appropriate division of responsibility between WCUK and PNC. The Directors had a duty to satisfy themselves that the scope of their own supervisory role was also clearly understood by all concerned. They could not seek to define or understand the scope of their own role without first obtaining a clear understanding of the roles of the other service providers. A desktop review of the contract documents is inherently unlikely to be sufficient for this purpose, especially if the promoter/investment manager is a start-up operation with which the other service providers have no prior business relationship and working experience.

16. Mr Valentin suggested in his written closing submission that it would be sufficient for the directors to satisfy themselves that the articles of association and service providers' contracts, which created the management structure and identified the responsibilities of those involved, were prepared by suitable professional advisers, by which he meant the lawyers retained by WCUK. I do not accept this proposition. The directors (or intended directors) of an investment fund must be alive to the fact that, when negotiating the terms of their respective contracts, all the service providers are quite properly acting in their own commercial interests. The lawyers retained by the promoter/investment manager, in this case WCUK, were acting on the instructions and in the interests of their client. Whilst the involvement of reputable and experienced lawyers is obviously helpful from the Directors point of view and will impact upon the way in which they approach their task, it is important to understand that the lawyers' duty to their client is quite different from that of the directors' duty to the company. The directors have a duty to exercise an independent judgment in what they consider to be the best interests of the company which, in this context, means its potential investors. As a practical matter, one would not expect the independent directors to have been involved in the negotiations amongst the various potential service providers and they may well be the last of the players to enter the scene. It is their duty to stand back, review the various contracts and satisfy themselves that each one is appropriate and consistent with industry standards and that, taken together, they do create an overall structure which will ensure a proper division of responsibility amongst the service providers. This is not a task which can be delegated to the lawyers retained by the promoter/investment manager. It is clear that Mr Ekstrom and Mr Stefan Peterson never made any attempt to understand exactly how each of the professional service providers intended to perform their respective duties.
17. The position of an investment fund's auditor is different from that of the other professional service providers in that the auditor's engagement does not commence until the end of the financial year. The Mutual Funds Law requires that every open ended investment fund shall have its accounts audited annually by an auditor approved by the Cayman Islands Monetary Authority ("CIMA"). The list of approved auditors is short. It comprises firms which are part of one or other of the large international networks,

together with a number of other well known firms which have specialist hedge fund audit practices. The Macro Fund was not entitled to commence its business without first retaining an approved auditor whose name and address must be disclosed in the offering document. The Directors had a duty to satisfy themselves that the audit firm engaged by WCUK was duly approved by CIMA and, more importantly, that it had conducted all necessary due diligence and issued its "letter of consent" without which the Macro Fund would not have been entitled to put its name in the offering document. As a practical matter, an approved audit firm cannot be expected to issue a letter of consent without at the same time seeking agreement to its standard contractual terms and conditions, as distinct from the engagement letter which will be executed when the audit field work is about to commence at or after the financial year end. Typically, audit firms seek to impose contractual limitations of liability and it was the Directors' duty to satisfy themselves that the auditors' contractual terms and conditions were reasonable and consistent with industry standards. The evidence suggests that Mr Ekstrom and Mr Stefan Peterson could not have applied their minds to the identity of the auditors, let alone the terms on which they would be appointed. They passed a resolution to appoint PricewaterhouseCoopers and learned only after the event that Ernst & Young had been appointed instead.

18. Finally, the Directors had a duty to satisfy themselves that the Macro Fund's offering document complied with the requirements of section 4(6) of the Mutual Funds Law. It must describe the rights attaching to the participating shares which will be issued to the investors and contain all such other information as is necessary to enable a prospective investor to make an informed decision as to whether or not to subscribe for or purchase shares in the Macro Fund. They could not discharge their duty by saying to themselves that the content of the offering document must be alright because the promoter/investment manager, its lawyers, the prospective administrator, auditor and other service providers are all reputable firms having experience in their respective fields. Every offering document should be subjected to a verification exercise, the purpose of which is to establish that it is both accurate and complete. How and by whom the verification exercise is done will depend upon the circumstances in general and the content of the document in question. As a practical matter, the various sections of an offering document will need to be verified by different people and the promoter's lawyers are likely to have responsibility for drawing all the information together. Independent directors should not need to do any of this work personally, but they will normally need to do more than carry out a desktop review. At the very least, they will need to make enquiry of the lawyers who have co-ordinated the work so as to gain a proper understanding of what has been done and with what result. The evidence is that these Directors made no attempt to satisfy themselves that the Macro Fund's original Offering Mocument was accurate and complete.

19. The Directors held their first (organizational) board meeting in Gothenberg, Sweden on 16th June 2003. The draft minutes of the meeting had been prepared in advance by the lawyers and were intended to serve as the agenda for the Directors. Mr Ekstrom did not give any evidence about this meeting. Mr Stefan Peterson recalled that there was such a meeting but remembered nothing about it. The minutes reflect that they approved the articles of association, an offering document and various ancillary documents, none of which have been identified and put in evidence. The minutes also reflect that the Directors resolved to appoint PricewaterhouseCoopers as auditors and that Fortis Fund Services (Isle of Man) Limited had already been appointed as administrator. Neither of these appointments were in fact made. The decisions apparently made at this meeting were superseded by subsequent events. An amended and restated memorandum and articles of association was adopted on 5th August 2003. At some stage between 16th June and 8th August 2003 the Cayman Islands and Irish firms of Ernst & Young were appointed as auditors. WCUK was appointed as investment manager pursuant to the Agreement dated 31st July 2003 and PFPC International Ltd (which subsequently changed its name and is referred to as "PNC") was appointed as administrator pursuant to the Administration and Accounting Services Agreement dated 30th July 2003. An amended version of the Offering Memorandum must have been prepared and issued to reflect all of these changes, but it has not been identified and put in evidence. The minutes of the next recorded board meeting held at Mr Ekstrom's house in Gothenberg on 29th August 2003 state that "*It was noted that [Macro Fund] was successfully launched on 8th August 2003 and that our appointments of custodian, administrator and investment manager were accepted. They are PFPC Trustee & Custodial Services Ltd, PFPC International Ltd and Weaving Capital (UK) Ltd respectively*". These minutes were written by Mr Magnus Peterson and so I think that it is intended to mean that the appointments made by him were accepted by the Directors. There is no evidence tending to suggest that either Mr Ekstrom or Mr Stefan Peterson played any role, or attempted to perform their duties in respect of establishment and launch of the Macro Fund in any way whatsoever.

Phase Two – Ordinary Course of Business – August 2003 to October 2008

Board Meetings

20. The Liquidators' case (pleaded in paragraph 47 of the amended statement of claim) is that "the Directors did nothing other than attend board meetings (at which no discussion or debate took place and whose purpose was solely to rubber stamp what the Directors had been told about [the Macro Fund's] performance) and on occasion carry out an administrative task such as signing a document when requested to do so by WCUK".

The Directors' case is that they held regular board meetings, usually on a quarterly basis, at which they discussed the affairs of the Macro Fund in a substantive manner for between one and three hours at a time. They have also emphasized the fact that they did discuss the Macro Fund with Mr Magnus Peterson at other times, but I think that these board meetings are relied upon as the single most important way in which they claim to have discharged their functions. It is therefore important to analysis exactly what took place at these meetings; what was the actual result of the meetings; and what was it that the Directors were attempting to achieve at these meetings.

21. The minutes of the meeting held at Mr Ekstrom's house on 29th August 2003 state that *"It was decided that the board of directors should meet quarterly in October, January, April and July each year"*. These dates tie in with the fact that the Macro Fund's financial year end was 31st December. The evidence establishes that meetings were generally held four times each year, though not necessarily on the dates stated in the minutes. The minutes of this first board meeting also record that –

"At each meeting we will assess the performance of the Company and the work done by the investment manager. It is essential that the investment manager acts within the guidelines and investment restrictions set by the Board. This will be closely looked upon at each board meeting and the Directors will have weekly discussions with the investment manager about the Company's positions and fixed income markets in general."

This was a self-serving resolution drafted by Mr Magnus Peterson. When cross-examined, Mr Stefan Peterson's explanation for having approved this resolution was that *"We wanted to be ambitious here ... we want this fund [to] operate well and to make an effort to make it to be a good company"*. I do not believe this evidence. They never made any attempt to comply with this resolution and, to the extent that they applied their minds to the contents of the minutes at all, I do not believe that, ever they intended to comply.

22. One would ordinarily expect an agenda to be prepared and circulated in advance of each meeting, reflecting input from the investment manager, the administrator and the directors themselves. I would expect the agendas to specify the matters for discussion, the reports to be presented and the individual officers of WCUK or PNC who will participate, either in person or by telephone. In particular, I would expect the agenda to provide for a representative of PNC to attend (at least occasionally) for the purpose of reviewing the Macro Fund's monthly or quarterly management accounts with the Directors.⁵ The evidence reflects that the Directors never in fact asked for any reports to

⁵ The e-mail correspondence passing between WCUK and PNC reflects that a team of PNC employees had some responsibility for the Macro Fund at any given time. This correspondence also reflects that the principal contact at

be prepared or for any representative of PNC, Ernst & Young or WCUK (other than Mr Magnus Peterson) to attend any board meeting, which points to the conclusion that they never attempted to perform their supervisory duty, let alone do anything on their own initiative.

23. Although the Directors never *asked* for any reports to be produced, they did receive a quarterly report from PNC, at least from April 2005 onwards. The PNC Quarterly Reports are important, if only because they were the only reports produced specifically for the Directors. The first of these reports relates to the quarter ended 31st March 2005 and must have been prepared for the board meeting due to be held on 29th April 2005. Whether any similar quarterly reports were prepared prior to this date is unclear. None have been put in evidence. On the final page of the Q2 2005 Report, under the heading *Administration Issues*, PNC asked the Directors to "*Please confirm what information you would like reported on*", which suggests that it might have been the first one. There is no evidence that the Directors ever responded to this question. The reports are all in the same format. Each one is between five and seven pages long. Page 1 of the Q2 2005 Report sets out the NAV and performance figures which is a reproduction of the information already published to the investors. Page 2 is a copy of the share register and reflects that there were 27 registered shareholders as at the quarter end, the majority by value being institutional clients.⁶ Pages 3 and 4 comprises a detailed list of the Macro Fund's investments, including the first of the interest rate swap transactions, which was valued at about US\$1.5 million. At the end of the last page there is a heading *Errors And Breaches* followed by the statement "*There have been no pricing errors on this Fund*". Finally, there is the heading *Administration Issues* to which I have already referred.

24. It is important to understand that the PNC Quarterly Reports did not contain either monthly or quarterly management accounts. The Directors knew that the NAV was determined monthly and that redemptions and subscriptions were accepted and paid monthly, for which purpose PNC must have been producing monthly management accounts. However, the only accounts ever seen by the Directors were the annual audited financial statements and the six monthly unaudited interim financial statements which were published to the investors. It is the duty of the directors of an investment fund to inform themselves about its investment activities and have a proper understanding of its financial condition, for which purpose it seems to me that these Directors ought to have reviewed the most recent management accounts at each quarterly board meeting. As I have already said, I do not believe that either Mr Magnus Peterson or the Directors ever intended to "have weekly discussions with the investment manager about the [Macro

PNC, at least during the critical period when interest rate swap transactions were being conducted with WCF, was Mr Frank Barden.

⁶ By 30th September 2008 there were about 140 registered shareholders.

Fund's] positions and fixed income markets in general" as stated in the minutes of the first board meeting. In reality, these Directors could not be expected to supervise WCUK's trading activities and they did not have the skill set to be able to do so, but they could and should have reviewed the financial results of that trading at their quarterly board meetings. The fact that they never once asked to see the management accounts and never once asked Mr Frank Barden⁷ to attend a board meeting (either in person or by phone) for the purpose of talking them through the Macro Fund's financial position, is evidence that they were not attempting to perform their duties.

25. Mr Ekstrom said in evidence that he received the Quarterly Reports directly from PNC about a week in advance of each meeting. During the course of his interview with the Liquidators, he was asked if he read them. He said "Not all of it. As you know I have no experience of these papers so I didn't pay any attention to that". He elaborated on this answer (by reference to the Q2 2008 Report) during his cross-examination. He said that he generally read the first few pages containing the published performance statistics and the share register and then glanced at the portfolio analysis, but admitted that he never studied any of these reports in detail. It is clear that he never attempted to make any use of these reports as a means of acquiring any real understanding of the Macro Fund's financial condition. He did express interest in whether the Macro Fund was complying with its anti-money laundering obligations, but not to the extent of asking PNC to explain its procedures. Put shortly, by his own admission Mr Ekstrom never really applied his mind to the content of the PNC Quarterly Reports. If he had been making any attempt to perform a supervisory function, one might have expected him to have Mr Frank Barden talk him through the Macro Fund's financial condition. The fact that he never once, throughout the six years of the Macro Fund's existence, asked Mr Barden or any other officer of PNC to attend a board meeting suggests that he was not attempting to perform his role as a director at all, let alone in an ordinary businesslike manner.
26. Mr Stefan Peterson's approach towards the PNC Quarterly Reports was slightly different, at least after he had joined the Weaving group as a fulltime executive. I accept his evidence that from 2006 onwards, he participated in frequent telephone conversations and face to face meetings between the staff of WCUK and Weaving AB. During this period Mr Magnus Peterson visited the Gothenberg office and Mr Stefan Peterson visited the London office for a whole day on four or five occasions each year. He also participated in WCUK's weekly or bi-weekly investment committee meetings which took the form of telephone conference calls attended by various different people. I was not told how many people were employed in the Gothenberg office at this time, but

⁷ Mr Frank Barden was an employee of PNC. The e-mail correspondence passing between WCUK and PNC reflects that a team of PNC employees had some responsibility for the Macro Fund at any given time but the principal contact, at least during the period when IRS transactions were being conducted with WCF, was Mr Frank Barden. He was not called to give evidence.

Mr Stefan Peterson said that WCUK employed fourteen people in London. I accept that the affairs of both the Macro Fund and the Opportunities Fund were discussed at these meetings. However, it is also clear that Mr Stefan Peterson participated in his capacity as chief executive officer of Weaving AB with responsibility for managing the investments of the Opportunities Fund. He was not participating in his capacity as a director of the Macro Fund, but his general knowledge of its investment portfolio and performance gained through these meetings affected his approach to the information contained in the PNC Quarterly Reports. He said that from his perspective the main purpose of the reports (specifically, those for Q4 2007 and Q1-4 2008) was to provide independent verification of what he already knew about the Macro Fund's investments and performance. However, he does not appear to have stood back, put on his director's hat, and made any attempt to satisfy himself about the Macro Fund's financial condition. Having listened to him give evidence, it was plainly obvious that he knew how to perform the directors' supervisory role in an effective way, but the evidence leads to the conclusion that he never attempted to do so. Whilst he repeatedly said in evidence that he understood that he had a supervisory responsibility in his capacity as a director, he never in fact behaved as if he had any intention of performing this duty. This explains why he obviously did not apply his mind to the content of the PNC Quarterly Reports. If he had any intention of satisfying himself about the Macro Fund's financial condition, he would surely have asked to see the monthly management accountants. This failure had serious consequences for the Macro Fund because Mr Stefan Peterson admitted in evidence that if he had reviewed these accounts, he would have appreciated that profitable interest rate swaps ("IRS") were (apparently) being closed out for no consideration. This discovery would have set in motion a line of enquiry leading, almost inevitably, to the revelation that Weaving Capital Finance ("WFC") was the counterparty and that the value of Macro Fund's assets had been materially overstated.

27. The resolution quoted in paragraph 21 above rightly states the importance of complying with the investment criteria and restrictions set out in the Macro Fund's Offering Memorandum.⁸ It stated that WCUK would adopt a rigorous pro-active approach towards risk management with a view to capital preservation. The investment restrictions comprised two key components. First, no more than 20% of the gross assets would be invested in the securities of any one issuer or be exposed to the creditworthiness or solvency of any one counterparty.⁹ Second, over-the-counter contracts such as the interest rate swaps would only be transacted with "a major bank counterparty". Even though I do not believe the Directors ever intended to comply with the resolution stated in the minutes of their first board meeting, these Directors had an

⁸ The investment restrictions remained the same in all the various editions of the Offering Memorandum.

⁹ In this respect the Offering Memorandum was re-stating the investment restrictions imposed upon the Macro Fund by section 2.52 of the Irish Stock Exchange Listing Requirements and Procedures.

on-going duty to satisfy themselves that the Macro Fund's investment manager was operating within the stated investment criteria and restrictions. Paragraph 6 of the pro-forma minutes signed by Mr Ekstrom as chairman of the meetings states that "*It was also noted that the investment manager had been acting within the guidelines and investment restrictions set by the Board*". This statement is repeated in identical terms in every set of board minutes, bar one, throughout the six year life of the Macro Fund.¹⁰ However, the fact that this point was "noted" in the minutes does not imply that there was any discussion about the matter or that the Directors had applied their minds to the issue. Mr Stefan Peterson's evidence is that from 2006 onwards they did put the question to Mr Magnus Peterson but they never asked Chas Dabha. Even if Mr Magnus Peterson told them that there had been compliance with the investment restrictions, it cannot be said that they discharged their duty by repeatedly signing pro-forma minutes in which this assertion was "noted". It was the Directors' duty to ensure that someone who understood the criteria was performing a proper analysis. They could have delegated this task to Mr Frank Barden (of PNC) or Mr Chas Dhabia (of WCUK),¹¹ in which case they would have been entitled to rely upon them to perform the work honestly and competently. However, these Directors never made any attempt to satisfy themselves that the Macro Fund was complying with the investment restrictions, even after it should have been apparent from the PNC Quarterly Reports that the restrictions were being ignored. Mr Stokoe's evidence is that the IRSs constituted 61.44% of reported gross assets as at 31st December 2007, which was three times the 20% limit, assuming that there was only one counterparty which is what Mr Magnus Peterson told PNC. Whilst it may not have been possible to perform this calculation on the basis of the information contained in the PNC Quarterly Reports alone, it is perfectly straightforward to calculate the value of the IRSs as a percentage of the NAV. By 31st December 2007 it was 86.99% of NAV and by 30th June 2008 it was 89.88%. However, Mr Stefan Peterson said in evidence that he believed that each of the IRS transactions had been done with a different major bank. I do not accept this evidence. One cannot believe something without having thought about it. The evidence leads to the conclusion that Mr Stefan Peterson never applied his mind to the investment restrictions and never paid any attention to the content of the PNC Quarterly Reports. If he had done so, he would have appreciated that two IRS transactions were *individually* valued at about 38% of NAV at 31st December 2007. If the Directors had read and thought about the information in these PNC Quarterly Reports, they could not have "noted" that the Macro Fund was complying with the investment restrictions without making enquiry, but they never did

¹⁰ There is one exception to this pattern. Paragraph 6 of the minutes dated 30th July 2004 states that more than 20% of the gross assets had been temporarily exposed to one counterparty as at 30th June 2004.

¹¹ Apart from Mr Magnus Peterson, the Offering Memoranda do not describe the key individuals who were involved in the day to day management of the Macro Fund, but they are identified in the Official Liquidators' first report. Mr Chas Dhabia is said to have been responsible for "Fund promotion, oversight and compliance".

so. The explanation for their behavior is that they were willing to sign whatever board minutes Mr Magnus Peterson put in front of them and did so without caring whether or not the content was true.

28. Mr Valentin makes the point, rightly in my view, that the evidence leads to the conclusion that PNC must have known that WCF was the swap counterparty and therefore ought to have known the Macro Fund was in breach of its investment restrictions because the exposure to WCF was significantly greater than 20% of gross assets over a substantial period of time. He emphasizes that PNC is a well known, reputable and experienced fund administrator and that the Directors were entitled to rely upon it to perform its contractual obligations in an honest and competent manner. I accept this proposition, but it misses the point that these Directors made no attempt to understand the scope of PNC's contracted duties. If they had had any discussion with Mr Frank Barden they might have understood the significance of Clause 14(a) of the Administration and Accounting Services Agreement which states that "[PNC] shall be under no duty to take any action on behalf of the Fund except as specifically agreed to by [PNC] and the Fund in a written amendment hereto".¹² They would have understood that Clause 15, which sets out the accounting services in a very specific way, did not provide for PNC to perform an analysis at the end of each month to determine whether or not the Macro Fund was in breach of its investment restrictions. Furthermore, they would have realized that the Offering Document specifically stated that "*The Administrator has no responsibility for monitoring compliance by the Fund or the Investment Manager with any investment policies or restrictions to which they are subject.*" If they had made enquiry and discovered that this task was not being performed, it would have been open to them to agree that it would be undertaken by PNC, in which case the Directors would have been entitled to rely upon PNC to perform the work and report upon the outcome in an honest and professionally competent manner. What actually happened is that the Directors routinely signed minutes of board meetings "noting" that the investment manager had complied with the investment restrictions without making any enquiry. If they had read the PNC Quarterly Reports or made any enquiry, they would have realized, not only that the restrictions were being ignored, but they would also have learned that the counterparty to the IRSs was WCF. They claim to be entitled to rely upon PNC to draw this to their attention, but if they had asked, they would have appreciated that PNC had specifically agreed that it would *not* be responsible for doing this work.

¹² Counsel for the parties accepted that the terms of PNC's Administration and Accounting Services Agreement was "standard form" in the sense that it complied with Cayman Islands industry standards and did not contain any unusual or unreasonable terms. The Directors should have understood that the purpose and effect of this agreement was to define the nature and scope of PNC's duties and to avoid any suggestion that it had an open ended obligation to do anything and everything which might be in the interests of the Macro Fund.

29. The directors of investment funds have a duty to conduct their board meetings in a businesslike manner. This includes a duty to arrange for minutes to be taken of the meeting which fairly and accurately record the matters which were considered and the decisions which were made. The discussion should be summarized, at least to the extent that it is necessary for the reader to understand the basis upon which the decisions were made. Having been approved and signed by whoever was acting as chairman of the meeting, the minutes should be kept on the fund's minute book. In my judgment these Directors failed to perform this most basic duty. Mr Magnus Peterson produced a series of minutes for meetings intended to be held quarterly from August 2003 onwards. Both Mr Ekstrom and Mr Stefan Peterson said that these minutes were typed up by Mr Magnus Peterson shortly after each meeting. I do not believe this evidence. These minutes appear to be pro forma documents, produced by making amendments to a template. Their form and content is such that they could have been produced, and probably were produced, in advance of the meetings and were signed in the standard form irrespective of the discussion which might actually have taken place. The minutes purport to record the dates on which the meetings were held. They are intended to create the impression that meetings were held regularly close to the end of January, April, July and October each year. In fact many of the recorded dates are false and the directors relied upon Mr Ekstrom's diary entries to establish the dates upon which meetings actually took place. It is admitted that the meetings recorded as having taken place on 29th July and 28th October never took place at all. In spite of what the minutes reflect, there was no actual meeting between 22nd May and 23rd December 2008.¹³ The evidence is that Mr Magnus Peterson was in fact present at every meeting and that they only happened if and when he visited Gothenberg. However, the minutes do not record his presence at any meeting prior to 22nd May 2008. The minutes for 29th July and 28th October 2008 falsely record his presence, when in fact no meetings were held, probably for the very reason that he did not visit Gothenberg at that time. The template for the minutes has eleven paragraphs and is occasionally extended to a twelfth paragraph. Paragraph 1 is always the same. Paragraphs 2 and 3 "note" the quarterly and annualized returns respectively. Paragraph 4 refers to WCUK's performance fee. Paragraph 5 reproduces some macro-economic comment from the monthly investors' reports. Paragraph 6 always "notes" that the investment manager has been acting within the guidelines and restrictions. Paragraph 7 always "notes" that the administrator "has been calculating and distributing the Net Asset Value of the Company to the investors on time". Paragraph 8 records the number of investors and the amount subscribed.

¹³ Stefan said that he and Mr Ekstrom met at Weaving Gothenberg office at short notice on the morning of 28th October 2008 for the sole purpose of approving the unaudited interim financial statements for the six months ended 30th June 2008. There are no minutes relating to this meeting and no documentary evidence to corroborate that it did take place. The minutes which reflect a board meeting having taken place on 28th October 2008, at which Magnus was present and all the usual matters were "noted", are fictitious. It is admitted by the Directors that no such meeting took place until 23rd December 2008.

Paragraph 9 usually refers to the fact that the annual audit is in progress or that the audited financial statements have been filed. Paragraph 10 sets the dates for the next meeting and paragraph 11 declares the meeting closed. This template is used repeatedly without reference to any actual discussion which might have taken place. The Directors' evidence that they did have meetings in Gothenberg with Mr Magnus Peterson is not challenged, but I do not accept that any real business was ever done at these meetings. Having listened to the evidence of Mr Ekstrom in particular, I was left with the impression of an elderly gentleman sitting at home chatting to his two stepsons in a congratulatory way about Mr Magnus Peterson's apparently successful investment fund business. If they had ever attempted to perform their duty as directors, one would expect to see occasional e-mails identifying matters for discussion or reflecting decisions made. In fact, there is no documentary evidence reflecting that these Directors ever sought to discuss or enquire about any subject at all throughout the period of almost six years that they held office.¹⁴ In my judgment the minutes of these meetings are nothing more than a self-serving "note" prepared by Mr Magnus Peterson for the file. At least from January 2005 onwards (when he forged the ISDA Master Agreement and carried out the first of the fictitious interest rate swap transactions), Mr Magnus Peterson had an incentive to ensure that no serious business would be conducted at any directors' meeting. The way in which the meetings were conducted and documented suggests that the Directors met his needs and never attempted or intended to conduct any real business.

Audited Financial Statements

30. The Macro Fund's auditors were the Cayman Islands and Irish firms of Ernst & Young. The engagement letters describe how the audits would be performed. The Irish firm planned and executed the audit fieldwork and the Cayman Islands firm (as the statutory auditor for the purposes of the Mutual Funds Law) issued the audit opinions. Unqualified opinions were issued in respect of the Macro Fund's financial statements for the period ended 31st December 2004 and for the years ended 31st December 2005, 2006 and 2007. The Mutual Funds Law requires that audited financial statements be filed with CIMA within six months of the financial year end which means that the Macro Fund's filing deadline was 30th June each year. Not all of the audit engagement letters were put in evidence, but it is common ground that the one signed by Mr Ekstrom on 26th June 2007 (in respect of the 2006 audit) is typical and that its content is not in any way unusual. It states that the financial statements are "the responsibility of management" and it is accepted that for these purposes the "management" of the Macro

¹⁴ It is right to say that Mr Ekstrom did send at least two e-mails in which he made comments about the administrative expenses, but this was not done in a serious businesslike manner and there is no evidence that his comments were ever taken seriously. He never attempted to make it an agenda item for a board meeting.

Fund comprised WCUK as investment manager, PNC as administrator having responsibility for preparing the financial statements, and the Directors.

31. The independent directors of investment funds are expected to be able to read a balance sheet and have a basic understanding of the audit process. These Directors accepted responsibility for issuing management representation letters and signing the financial statements on behalf of the Macro Fund. In so doing, they were entitled to rely upon PNC to exercise reasonable skill, care and professional judgment in preparing the Macro Fund's financial statements. They were also entitled to rely upon the Ernst & Young firms to exercise reasonable skill, care and professional judgment in conducting their audits and issuing opinions upon the financial statements. Conversely, PNC and Ernst & Young are entitled to rely upon the Directors to perform their role. Whether or not the directors of an investment fund can properly delegate *all* their functions in respect of the financial statements to the investment manager and/or administrator (so that they are not regarded as part of "management" for the purposes of the applicable auditing standards) is not an issue which arises for consideration in this case, because these Directors did sign the financial statements, thereby accepting (or purporting to accept) responsibility for them. They did in fact sign all the financial statements issued by the Macro Fund, which means that they must have signed all of the associated management representation letters.¹⁵

32. If the independent directors of a fund accept a responsibility for its financial statements, as these Directors did, it is their duty to exercise an independent judgment in satisfying themselves that the financial statements do present fairly the fund's financial condition. They are required to exercise the skill and care reasonably to be expected of investment fund's independent non-executive directors. They must also bring to bear the expertise which they actually possess. When questioned about the Macro Fund's financial statements, Mr Ekstrom gave evidence in a hesitant manner and at times gave the impression that he did not fully grasp the points in issue. Given his professional background, he must have possessed the necessary skill set and I think that the hesitant and uncertain way in which he gave evidence on this subject was a reflection of his advanced age. In contrast, Mr Stefan Peterson demonstrated a clear and incisive understanding of the Macro Fund's financial statements, but I do not believe that he ever applied his mind to them at the time that he was a director.

¹⁵ All of the Macro Fund's audited financial statements have been put in evidence. The Directors signed each of them. Only three signed management representation letters are included in the evidence, namely those dated 29th June 2006, 27th June 2007 and 30th June 2008, each of which were signed by both Directors. Given that the Directors signed the earlier financial statements, it is reasonable to infer that they would have signed the associated management representation letters.

33. The documentary evidence about the way in which the Directors approached their task is limited. As regards the 2004 audit, the evidence is that Fergus McNally of Ernst & Young, Ireland sent drafts of the financial statements and a management representation letter to WCUK by e-mail on 27th June 2005. Chas Dahbia forwarded this e-mail and its attachments to Mr Stefan Peterson and Mr Ekstrom on 28th June at 2.18 pm (London time). His e-mail stated –

“Please see attached audit report for the fund, there are some minor changes that we have to get amended but largely it is fine. We are waiting for Ernst & Young to sign it off, I just thought I would give you something to review. The deadline is close of business on Thursday 30th so we need to get this done.

If you have any questions please do not hesitate to contact me.

Regards Chas”

Mr Stefan Peterson replied (from his Storebrand.com e-mail address), with a copy to Mr Ekstrom, at 9.07pm (Oslo time) on the same day. He replied as follows –

*“Hi Chas
We just faxed the signed docs. Hope it was the right version.
Let us know if it is not.
Rgrds Stefan”*

The “signed docs” to which Mr Stefan Peterson refers must be both the financial statements and the management representation letter. The Directors say that they did read these documents but evidence reflects that neither of them made any attempt to satisfy themselves that it was appropriate to sign them. They did not initiate any conversation with Mr Frank Barden or the audit engagement partner. They did not seek any information or written confirmations from WCUK or PNC. They did not ask for a long form report from Ernst & Young. They did not enquire about any issues which may have arisen during the course of the audit or the way in which they were resolved. They did not ask anyone to talk them through any of the footnote disclosure. The evidence is that they received the documents shortly after 2pm London time, read them, signed them and sent them back about five or six hours later, without comment and without having made any enquiry. In my judgment, it was a breach of duty for these Directors to behave in this way in the circumstances of this case

34. The documentary evidence of what happened in subsequent years is limited, but the Directors have made no suggestion, either in their witness statements or in their oral evidence, that they behaved any differently. There is some documentary evidence relating to the interim unaudited financial statements for the six months ended 30th June 2008 which had to be filed with the Irish Stock Exchange by 31st October. Sarah Davies

of PNC sent the drafts to WCUK by e-mail on 15th October. Mr Magnus Peterson responded the following day that "they seem fine to me" and on 16th October she sent him the "finalised draft for distribution to the Board". There the matter rested until the 27th October when PNC sent a reminder and Mr Magnus Peterson forwarded the documents to Mr Stefan Peterson (but not to Mr Ekstrom). On the 28th at 11.35am (Dublin time) PNC e-mailed Mr Magnus Peterson again to ask "Can you provide confirmation that the directors have approved the financial statements so that we can arrange for the ISE filing". At 1.13pm (London time) Mr Magnus Peterson e-mailed Stefan asking him to confirm directly to PNC that "We have today approved the financial statements for the Weaving Macro Fixed Income Fund for the six months to 30 June 2008". At 1.40pm (Gothenberg time) Stefan sent an e-mail to PNC in exactly the terms requested by Mr Magnus Peterson. Mr Ekstrom was copied in on this e-mail but he had not been copied in on any of the previous exchanges. Mr Stefan Peterson's oral evidence is that he and Mr Ekstrom did in fact meet earlier in the morning at the Gothenberg office when they reviewed and approved these financial statements. Mr Ekstrom said in his witness statement that he had no specific recollection of these events and has no entry in his diary, but thought it likely that he and Mr Stefan Peterson had got together on the morning of the 28th. Finally, on 2nd November (that is *after* the financial statements had been signed and filed with the Irish Stock Exchange) Mr Ekstrom sent an e-mail to Mr Magnus Peterson saying that he had "dutifully reviewed the financial statements for the first half of the year and have a few points of view/questions". He made some points about the amount of certain administrative fees and expenses. It was not suggested to me that Mr Ekstrom's comments were material to the approval of these financial statements.

35. Even if Mr Ekstrom did go to the Gothenberg office on the morning of 28th October to review the financial statements and sign a management representation letter sent to Mr Stefan Peterson the previous evening, the evidence shows that the Directors' approach to their task had not changed since 2005, in spite of the fact that these events took place only about six weeks after the bankruptcy of Lehman Brothers in the midst of the most serious financial crisis in recent memory. They signed what they were asked to sign by Mr Magnus Peterson without taking any steps to satisfy themselves that it was appropriate to do so. Mr Stefan Peterson was even told by his brother exactly what he should say to PNC and he duly obliged. In my judgment these Directors made no attempt to perform their duties in relation to the Macro Fund's financial statements. They signed what was put in front of them without making any enquiry. They did so because they were doing a favour for Mr Magnus Peterson without any intention of performing their duties as directors.

Execution of the 2007 Management Agreements

36. WCUK acted as the Macro Fund's investment manager from its inception until its liquidation in March 2009 and there is no evidence that any of those involved, including the Directors, ever thought otherwise. However a substantial amount of time was spent during the trial considering the new Investment Advisory Agreement and Management Agreement executed in January 2007. On paper, these new agreements would have fundamentally changed the management structure of the Macro Fund. Under the terms of the Management Agreement, the Macro Fund appointed Weaving Capital Management ("WCM"), a newly incorporated Cayman Islands company, as its investment manager. WCM was supposedly controlled by Mr Ekstrom and Mr Stefan Peterson who were appointed as its sole directors. Under the terms of the Investment Advisory Agreement made between the Macro Fund, WCM and WCUK, WCUK would perform a purely advisory role and have no authority to make any decisions on behalf of the Macro Fund. These agreements were said to have been prepared "for tax reasons". On paper, they gave the impression that WCM, represented by Mr Ekstrom and Mr Stefan Peterson, would in future have hands on day to day responsibility for managing the Macro Fund's investments, acting upon advice received from WCUK. This structure was disclosed in a revised offering document. Mr Valentin pointed out that the September 2008 edition of the Offering Document contains a single sentence to the effect that WCM had somehow delegated the performance of its obligations back to WCUK, which would appear to defeat the whole purpose of the exercise. I regard these contracts as a sham. It was wholly impractical for Mr Ekstrom and Mr Stefan Peterson to perform the role of investment manager, even by going through the motions of acting on advice received from WCUK. There could never have been any genuine intention that any of the parties would act upon these agreements and they never in fact did so. What then is the relevance of this evidence?
37. Mr Ekstrom signed the Management Agreement on behalf of the Macro Fund and Mr Stefan Peterson signed on behalf of WCM. Mr Ekstrom also signed the Investment Advisory Agreement on behalf of the Macro Fund. Mr Stefan Peterson signed on behalf of WCM and Mr Magnus Peterson and Chas Dabha signed on behalf of WCUK. Mr Ekstrom appears to have signed what was put in front of him without applying his mind to its content. He was not able to explain why he signed these agreements or how he thought that the arrangement could benefit the Macro Fund. There is some evidence that Mr Stefan Peterson had a greater involvement in the exercise because he was on the list of those to whom drafts were circulated on 18th December 2006, but he does not appear to have any better understanding of what Mr Magnus Peterson was trying to achieve by this exercise. In the final analysis, my conclusion is that these Directors executed sham contracts and permitted WCM's name to appear in the revised Offering Memorandum

dated 24th September 2008 when they knew perfectly well that it would not in fact have any role in the management of the Macro Fund. I accept Mr Valentin's submission that there is no evidence that any investor was misled and it is reasonable to conclude that no harm was done as a result of this episode, apart from wasting money on legal fees. However, it must be a breach of duty for the directors of a investment fund to execute sham contracts and allow them to be described in an offering document. It demonstrates again that these Directors were willing to sign whatever was put in front of them without exercising any judgment or applying their minds to the matter in any way.

Execution of "side letters"

38. It is not unusual for potential investors in investment funds to seek to impose extra contractual conditions in consideration for agreeing to subscribe for shares. Such contractual arrangements are usually referred to as "side letters". The issue likely to arise is whether the fund can properly enter into a contract whereby one investor is given more favourable terms than those which are available to the general body of investors. The evidence is that the Directors were called upon to deal with two such requests.
39. Firstly, in September 2007 a fund of funds based in Jersey called Ermitage Highbury Fund LP ("Ermitage") proposed to subscribe for shares in the Macro Fund on condition that a side letter be issued. The Macro Fund and WCUK were asked to represent, inter alia, that they had not issued any side letters which had the effect of conferring any rights or benefits upon any other investor which were not being made available to Ermitage. They were also asked to agree that, in the event that any side letter was subsequently issued to any other investor, Ermitage would be notified and offered the same rights or benefits. The rest of the Ermitage side letter contained a series of representations and contractual terms, some of which have the effect of conferring rights upon Ermitage which go beyond the rights conferred upon the general body of investors. Secondly, in January 2008 a segregated portfolio company called Good Steward Trading Company SPC ("GSTC") proposed to subscribe for shares on condition that the Macro Fund agreed to adopt an investment strategy consistent with its "Socially Responsible Guidelines". This meant that the Macro Fund would have to agree not to invest in securities issued by or based upon the value of any companies on the GSTC's "Restricted Company List" or "Prohibited Security List".
40. The details of these two side letters are not directly relevant to the issues which I have to decide in this case, but it will be apparent that the execution of side letters is a complicated subject giving rise to difficult management issues, because each successive investor is attempting to obtain most favoured treatment at the expense of all the other investors. For example, the terms of the Ermitage side letter meant that the Macro Fund

could not enter into the GSTC side letter without offering Ermitage the same opportunity to impose similar investment restrictions. It is inevitable that investment managers will be under pressure to accommodate those seeking to impose side letters, because they are inherently likely to be the larger and more influential institutional investors. Whilst it is common practice for Cayman Islands funds to enter into side letters of this sort, it seems to me that independent directors need to be alive to the issues which are likely to arise. It is not suggested that the execution of these side letters caused any damage to the Macro Fund.¹⁶ The only relevance of this evidence is that the way in which the Directors dealt with the matter sheds light on their attitude of mind and approach towards the performance of their duties generally. The Directors approved and signed both letters at short notice. They did so at the request of WCUK in the knowledge that legal advice had been sought and obtained in both cases. On the other hand, there is no evidence that the Directors made any enquiry or sought to understand whether or not the execution of side letter agreements of this sort could impact adversely on the macro Fund. This is another example of these Directors signing what was put in front of them without applying their minds to the matter in issue.

Phase Three – financial Crisis and Liquidation – October 2008 to March 2009

41. Mr Ekstrom signed minutes purporting to show that a board meeting had been held in Gothenberg with Mr Magnus Peterson present on 29th July 2008 and that all the usual matters had been duly discussed and “noted”. The Directors admit that this meeting never in fact happened. These fictitious minutes stated that the “next” board meeting would be held on 28th October. In the meantime Lehman Brothers went into bankruptcy on 15th September and the consequential credit crunch developed into the most serious financial crisis in recent memory. This crisis would have impacted adversely on the Macro Fund in any event, even if its balance sheet had not contained fictitious assets, which were valued at \$589 million (representing 79% of NAV) in October 2008. It seems to me that if these Directors were attempting to perform their supervisory role, even in the most superficial way, they would have been concerned that these events might cause problems for the Macro Fund, such as substantial redemption requests or even counterparty failure. The way in which these Directors behaved during this most serious financial crisis is, in my judgment, the most compelling evidence that they never intended to perform their duties as directors.

¹⁶ Mr Stokoe’s evidence is that the Ermitage letter was signed by both directors on the same day that the request was received, although Ermitage’s name does not appear in the shareholder list. A signed copy of GSTC side letter has not been put in evidence, but its name does appear in the shareholder list, which suggests that its side letter was executed and came into effect. Mr Stokoe says that he was unable to find any correspondence by which either of the Directors raised and question about the nature or scope of these side letters.

42. I have already described the way in which the Directors dealt with the unaudited interim financial statements which needed to be filed with the Irish Stock Exchange by 31st October. Almost two months later, on 23rd December 2008, Mr Ekstrom signed minutes purporting to show that a board meeting took place in Gothenberg with Mr Magnus Peterson present on 28th October at which all the usual matters were “noted”. Even if Mr Ekstrom and Mr Stefan Peterson did get together at the Gothenberg office on the morning of the 28th for the purpose of signing off on the financial statements, it is admitted that the meeting reflected in these minutes never took place.¹⁷ The Directors signed a written resolution on 8th October approving an amended offering document, which merely reflected that the administrator and custodian had changed their names and addresses. On 2nd November Mr Ekstrom sent an e-mail to Mr Magnus Peterson (written in Swedish) in which he commented upon the amounts of various fees and administrative expenses. He never received any response. However, this e-mail does establish that he must have read the 2008 interim unaudited financial statements, but not necessarily before approving and signing them on the 28th October. They signed waiver forms on 31st December and 1st January authorizing payment of 25% of the November redemptions. On 6th or 7th January 2009 Mr Stefan Peterson signed a letter, back-dated to 31st December 2008, stating that “the Fund’s directors have exercised their discretion to postpone a pro rata proportion of existing redemptions until market conditions improve”. There is no evidence that the Directors ever met or gave any consideration to the issue and it appears that Mr Stefan Peterson simply signed it at Mr Magnus Peterson’s request, without reference to Mr Ekstrom. The Directors were copied in on some e-mails discussing the need to close out IRSs in order to generate cash, but Mr Stefan Peterson said that he did not read them carefully at the time.

43. Most importantly, Mr Ekstrom’s evidence is that he received the PNC Quarterly Report for Q3 2008 on 6th November, although he did not open the e-mail and print out the attachment until the following day.¹⁸ This Quarterly Report is significant because, for the first time, PNC identified WCF as the counterparty to all of the IRSs. It is seven pages long. On the last page under the heading *Prices* it states “*The Interest Rate Swap Positions are priced from the counterparty which is Weaving Capital Fund Limited.*” It follows that the Macro Fund’s principal asset, having a reported market value of \$549.8 million, was dependent upon WCF’s continuing ability to pay this amount. Since this asset represented about 76% of the reported NAV (a fact which was also

¹⁷ Mr Ekstrom sent an e-mail to Magnus on 23rd December 2008, to which was attached the minutes of board meetings purportedly held on 22nd May, 29th July and 28th October. Mr Ekstrom’s evidence is that he signed all three sets of minutes on 23rd December 2008 and that he knew that the July and October meetings had never taken place.

¹⁸ Mr Ekstrom’s evidence is that the PNC Quarterly reports were normally received about a week before each scheduled meeting which suggests that the report for Q3 2008 was received about two weeks later than usual, a fact which apparently passed without comment on the part of the Directors.

apparent on the face of the report) it would have been obvious to anyone reading the report that WCF's solvency was critical to the Macro Fund. Mr Ekstrom was a director of WCF at this time, but says that he thought that the company had been dormant since 2003. If Mr Ekstrom had read this report and applied his mind to its content, he would have appreciated, at the very least, that there were some very serious questions to be answered. When asked to explain which parts of this particular report he read, Mr Ekstrom said –

A. Well, I read this first page and the second were the shareholders. And yes, and the third and fourth, and I had a quick look over these – all these different kinds of securities. That's all.

What he meant was that he read page one of the report and the list of shareholders (which is at pages 2 – 4) and had a “quick look” at the portfolio analysis (which is pages 5 – 7). It was clear that he did not pay any more attention to the Q3 2008 Report than he had to any of the previous ones. Counsel put the question this way-

Q.....You read the pages dealing with the shareholder register, and whilst you might glance at the portfolio analysis and the rest of the pages

A. Correct.

Q. You didn't study them in any detail whatsoever ?

A. No.

Q. Was that simply because you knew that you wouldn't be able to take any benefit from any study of them ?

A. Yes, and I knew that Stefan was very clever this.

Q. So in effect, the review of the pages from portfolio analysis onwards you left to Stefan Peterson ?

A. Yes.

I regard this explanation as a disingenuous one because Mr Ekstrom must have known that Mr Stefan Peterson was paying no more attention to the PNC Reports than he was himself. In spite of the extraordinary events of the preceding two months which had prompted redemption requests from Macro Fund shareholders valued at \$138.4 million (and processed on 3rd November), Mr Ekstrom still paid no more attention to the Q3 2008 Report than he had to any previous ones. He never suggested to Mr Stefan Peterson that they might convene the board meeting planned for 28th October and call upon PNC to provide them with up to date management accounts and WCUK to report on the redemption requests and liquidity position. His failure to read the key part of the Q3 2008 Report or do any of the things which one might expect a director to do in these circumstances, is evidence pointing to the conclusion that he never intended to perform his duties as a director.

44. Mr Stefan Peterson's position was different from that of Mr Ekstrom. At this time Mr Stefan Peterson was a fulltime employee and CEO of the Weaving AB, with responsibility for managing the Opportunities Fund. He communicated with Mr Magnus Peterson on a regular basis. He knew that the Macro Fund received substantial redemption requests in September and October. He said that he was concerned about illiquidity in the market but not about the Macro Fund's counterparty risk. He said –

"A. I was not concerned pre-Lehman, but after Lehman, I understood all counterparties, all instruments were illiquid in the market. That's why I was concerned. I was not concerned since I assured myself that the Macro Fund did not have any exposure to weak financial institutions. That they had an okay financial institution on the other side of the swaps, and that they could in due time deliver on the swaps. That was my belief."

I do not believe that Mr Stefan Peterson assured himself that the Macro Fund was not exposed to financially weak counterparties. There is no evidence that he made any enquiry before or after receiving the Q3 2008 Quarterly Report. If he did read it at all, it is plainly obvious that he could not have applied his mind to its content, otherwise he would have noticed that WCF was said to be the counterparty to all the IRSs. He did not convene the board meeting which was supposed to take place on 28th October. He did not ask for the September or October management accounts. He did not ask WCUK to provide him with a counterparty risk analysis. He knew that substantial redemption requests had been received and says that he was concerned about the Macro Fund's cash position, but he did not ask for a cash flow projection or any report about the way in which WCUK intended to meet the redemption requests. Whilst he says that he spoke to his brother on a regular basis, he has not said that he specifically asked Mr Magnus Peterson to identify the counterparties to the IRSs (and that Mr Magnus Peterson lied to him). He did not speak to Mr Frank Barden about the Macro Fund, in spite of the fact that he did communicate with him about the Opportunities Fund for which PNC was also the administrator. There is no evidence that Mr Stefan Peterson took any steps at all, even after the bankruptcy of Lehman Brothers, to assure himself that the Macro Fund would be able to meet its obligations. He repeatedly said in evidence that he understood that, as a director, he had a supervisory role, but the evidence is that he never made any attempt to perform this role, which leads me to the conclusion that he never intended to perform his duties. He behaved as if he was doing a favour for his brother by acting as a director of the Macro Fund in name only.

45. The Macro Fund entered into 30 over the counter IRS transactions with WCF. These were "plain vanilla" transactions whereby the WCF agreed to pay interest based upon a predetermined fixed rate on a specified notional amount, in consideration for which the Macro Fund agreed to pay interest based upon a floating rate referenced to one year

sterling LIBOR.¹⁹ The value of an IRS to the floating-rate payer increases when interest rates decline after entering into the swap and these transactions turned out to be consistently profitable for the Macro Fund, especially during 2008 when interest rates declined sharply to record lows.²⁰ These transactions were made pursuant to an ISDA Master Agreement purportedly signed on 20th January 2005 by Mr Ekstrom on behalf of the Macro Fund and Mr Stefan Peterson on behalf of WCF. In May 2006, Mr Edward Platt (of WCUK)²¹ faxed a copy of this agreement to Mr Frank Barden (of PNC), stating "*Please find Contracts held at year end for Interest Rate Swaps*". Both Mr Ekstrom and Mr Stefan Peterson said in their witness statements that they do not recall having signed this agreement and did not become aware of it until March 2009 when the Macro Fund was put into liquidation.²² Mr Stefan Peterson said in cross-examination that it did not look like his signature and the surrounding words are in Mr Magnus Peterson's handwriting. Mr Ekstrom said that he had no memory of the agreement at all and that he did not think that he had signed it. I was told by counsel that it is Mr Magnus Peterson's case in the proceedings brought against him in the English High Court by WCUK (acting by its liquidators) that he did copy their signatures, but that he was authorized to do so. Notwithstanding that Mr Ekstrom and Mr Stefan Peterson frequently signed what was put in front of them without enquiring whether or not it was appropriate to do so, on balance I think this document was probably forged by Mr Magnus Peterson.

46. It is not disputed that these IRS transactions were fictitious. They constituted the mechanism by which Mr Magnus Peterson dishonestly dressed up the balance sheet of the Macro Fund to inflate its NAV and give the impression that it was making a steady return, when in fact it was suffering substantial losses. Details of each IRS and the market value attributed to them are set out in the PNC Quarterly Reports, which reflected that their total market value rose significantly from \$15.9 million at the end of 2005; to \$86.8 million by the end of 2006; \$195.6 million by the end of 2007; and \$626.6 million by the end of 2008. As a percentage of the Macro Fund's reported NAV, the total value of the IRSs fluctuated but it was generally more than 70% from mid 2006 onwards. Each IRS is given a simple Security ID, for example "GBP 08-08-2014", which means that the transaction is denominated in pounds sterling and matures on 8th

¹⁹ I was told that a few transactions were done the other way, with the Macro Fund paying a fixed rate and WCF paying a floating rate, but the evidence is that the swaps were consistently profitable for the Macro Fund.

²⁰ Dr. Okongwu's Revised Expert Report states that "In the fall of 2008 the twelve month £Libor rate declined from approximately 6% nearly to 3%."

²¹ The Official Liquidators' First Report states that Edward Platt was an employee of WCUK responsible for trading and risk management. Assuming that he did in fact send the fax bearing his name, Mr Platt must have known that WCF was the IRS counterparty.

²² Mr Ekstrom's witness statement paragraph 112 and Stefan Peterson's witness statement paragraph 59.

August 2014. By comparing one quarterly report with the next, one can see that from time to time IRSs having a substantial market value disappear from the list, implying that they have been closed out in which case the Macro Fund should have received a payment reflecting the reported value. In fact, the Macro Fund never received any payments from WCF, which never had any substantial assets.²³ On 26 occasions between February 2005 and February 2009 documentation was generated to show that IRSs recorded in the balance sheet as having a positive value were closed out for nil consideration. On 17 other occasions in this period the notional amount of the IRS was reduced so as to reduce its value to the Macro Fund. This was obviously done because the greater the amount of fictitious assets reflected on the balance sheet, the greater the risk for Mr Magnus Peterson that his fraud would be discovered. It is common ground that PNC knew that WCF was the counterparty to the IRSs and it is reasonable to infer that this fact must have come to the attention of Ernst & Young during the course of the audits. It is also common ground that whatever concerns they may have had about WCF's financial status and the fact that apparently valuable assets were being written off were not communicated to the Directors.

47. It is not in dispute that WCF was incorporated in the British Virgin Islands in 1999 and was the vehicle through which Mr Magnus Peterson originally promoted his investment fund business. Its investment manager was WCUK and its sole directors were Mr Ekstrom and Mr Stefan Peterson. Mr Ekstrom continued to be a director until it was put into liquidation by order of the court in April 2009. Mr Stefan Peterson is said to have resigned as a director in 2006. WCF's business appears not to have been successful. Mr Ekstrom stated in his witness statement that "*My recollection now of WCF, my role as a director and what I did in that capacity is very limited indeed. I remember that WCF was a relatively small fund and believe that it was relatively volatile, initially making but then losing money*". There is a suggestion that some of its investors transferred their money to the Macro Fund. The unchallenged evidence of Mr Nicholas Carter, its joint official liquidator, is that WCF has no assets, or at least no assets having a realizable value, except for a loan receivable of about £250,000 due from a former employee of WCUK and secured on a residential property in England. Mr Ekstrom and Mr Stefan Peterson said that they believed WCF to be dormant. The evidence points to the conclusion that the only real reason for its continued existence is that it was the vehicle through which Mr Magnus Peterson dishonestly manipulated the Macro Fund's balance sheet and defrauded its investors. Mr Carter's unchallenged evidence is that he has received "very little co-operation from those involved in the conduct and management of

²³ Mr Stokoe's unchallenged evidence is that five interest payments were made by the Macro Fund in respect of IRS transactions between July 2006 and September 2008, totaling £8,103,700. On paper, these payments should have been made to WCF. In fact the Macro Fund paid this money to WCUK. On paper a sixth payment of £2,625,000 should have been made on 17th February 2006 by WCF to the Macro Fund. Mr Stokoe's evidence is that this payment appears never to have been made, presumably because WCF did not have any assets.

WCF". In particular, he states in his reports that Mr Ekstrom has failed make a statement of affairs or otherwise respond to his requests for information.

48. The Directors had a meeting at Mr Ekstrom's home with Mr Magnus Peterson present on 23rd December 2008. Mr Stefan Peterson claims that they discussed counterparty risk in general without referring to the IRS positions or the counterparty (or counterparties). If this is true, then it seems to me that the discussion must have been nothing more than a general chat about the state of the market. I find it difficult to believe that they could have had a serious discussion about the Macro Fund's counterparty risk without reference to the Q3 2008 Quarterly Report or the IRS positions. The only documentary evidence that this meeting ever took place is Mr Ekstrom's diary entry and his e-mail to Chas Dabhia sent on 26th December in which he said "At our meeting with the Macro Fund the other day I complained about the increasing costs showed ion the Financial Statements ended June 30". There is nothing to suggest that they discussed counterparty risk or the redemption problem. I accept that a meeting took place but I find it difficult to characterize it as a board meeting at which they attempted to address the problems then actually facing the Macro Fund. No minutes of this meeting were ever prepared. However, on this same day Mr Ekstrom did sign minutes of meetings purportedly held on 29th July and 28th October. These meetings had never taken place. My conclusion is that these Directors were simply accommodating Mr. Magnus Peterson by signing fictitious minutes intended to give the impression that proper board meetings were being still being held at quarterly intervals.
49. On 28th January 2009 Mr Frank Barden forwarded an e-mail chain to Mr Ekstrom and Mr Stefan Peterson in which he asked Mr Magnus Peterson to explain how he proposed to pay outstanding redemptions of about \$98 million. He asked if cash would be raised by closing out some of the IRS positions, which had a reported market value of about \$626 million as at 31st December and represented 107% of NAV. He even made the point that "previously there has been no gain/loss on closing out any of these positions". About two hours later PNC sent the Q4 2008 Quarterly Report to Mr Ekstrom and Mr Stefan Peterson. It revealed an extraordinary picture. Seven of the ten IRSs on the Q3 2008 Report (which then had a reported value of about \$353 million) had disappeared from the list. The three that remained had increased in value by a huge percentage because of the dramatic fall in the one year sterling Libor rate during the previous quarter. For example the IRS identified as GBP 08-11-15 increased in value from about £25.8 million to £243 million. The Q4 2008 Report stated "The Interest Rate Swap positions are priced from the counterparty which is Weaving Capital Fund Limited Limited. The value of the Interest Rate Swap positions as at 31st December 2008 are \$626,567,149." Both Mr Ekstrom and Mr Stefan Peterson claim to have read the e-mails and the Q4 2008 Report, but I do not believe that they did so. They each state in

their witness statements (which have been drafted for them in identical terms) as follows - "As it was, I simply did not pick up the reference made to WCF in the last two administrator's reports. I am certain that this is the case because I distinctly remember it coming as a complete surprise to me to learn from PNC's fax of 5th March 2009 that the counterparty was in fact WCF". This is not a credible explanation for their failure to react in any way to what they were being told.

50. The Directors' final meeting was held on 22nd February 2009, probably only because Mr Magnus Peterson visited Gothenberg. Mr Ekstrom signed minutes purporting to show that the meeting had been held on 19th February as planned. To a large extent these minutes, which were drafted by Mr Magnus Peterson, "note" the usual information. Clause 7 actually states "It was noted that the investment adviser had been acting within the guidelines and investment restrictions set by the Board. No compliance breaches were reported for the period". This was blatantly untrue. Mr Frank Barden had reported that the exposure to WCF was 107% of NAV. Clause 8 contained the usual statement that "The administrator's report was reviewed ..." which is impossible to believe having regard to the fact that the Directors did not react to its content in any way whatsoever. Clause 11 is not in the standard form. It discusses the redemption problem and states "Using the powers under Article 50 the Directors determined on 30th December that redemption payments due by the end of December would be deferred to such time as liquidity returned to fixed income markets....". This statement was also untrue, or at least inconsistent with what they had told the investors in the letter dated 31st December 2008 and signed by Mr Stefan Peterson on 6th or 7th January 2009. In spite of the fact that the Directors obviously appreciated that the Western World was in the midst of a serious financial crisis, they continued to go through the motions of holding meetings and Mr Ekstrom continued to sign minutes designed to give the impression that they were functioning as a board of directors, whereas in reality they had not read the materials sent to them and had made no attempt to understand the Macro Fund's financial condition.

Conclusion

51. In my judgment the evidence in this case leads, unequivocally, to the conclusion that both of these Directors are guilty of wilful neglect or default because they consciously chose not to perform their duties to the Macro Fund, or at least not in any meaningful way. Given their business backgrounds and experience, they must have known that the directors of an investment fund whose shares were listed on the Irish Stock Exchange, would be expected to act in a businesslike manner and that they could not discharge their duty by signing whatever documents were put in front of them (including standard form minutes of meetings) without reading them, or if they did read them, without

applying their minds to their content. They claim to have appreciated that that they had a high level supervisory duty, yet they never once, in six years, asked any of those whom they were supposedly supervising to give them a written report or attend a board meeting to provide them with an oral report. Every board meeting took the form of a discussion with Mr. Magnus Peterson and no one else. There were no agendas and there is no record of the discussion. The board minutes were created by Mr. Magnus Peterson, but they are standard form documents intended to constitute a "note" for the file and create the impression that the Directors were reviewing the affairs of the company on a regular quarterly basis, whereas there is no evidence that any real business was ever in fact conducted at these meetings. It is clear that these Directors consistently signed financial statements, management representation letters, side letters and other documents without making any enquiry whatsoever. In 2007 they signed sham investment management and advisory agreements either without reading them or, if they did, knowing that the agreements would never be acted upon. This modus operandi was so firmly entrenched that not even the bankruptcy of Lehman Brothers and the ensuing financial crisis was sufficient to prompt them into convening board meeting or reading the Q3 2008 Quarterly Report which contained damning information about the identity of the IRS counterparty. This failure cannot be treated as an error of judgment or negligence, because Mr Ekstrom subsequently signed minutes which falsely asserted that a meeting *did* take place and that they *did* review the administrator's report.

52. Mr Valentin makes the point that it is inherently implausible that these Directors, neither of whom had any financial or other incentive to put their professional reputations at risk, would intentionally ignore their duties and carry on doing nothing for six years regardless of the possible consequences. I think that he is falling into the error of asking me to judge them with the benefit of hindsight. The evidence clearly points to the conclusion that they both subordinated themselves to Magnus Peterson's wishes. They were motivated by a desire to keep him happy by going through the motions of appearing to act as independent directors of his investment fund. If they had applied their minds for a moment, they would have appreciated that their behavior was wrong. In my judgment their behavior in December 2008, when Mr Ekstrom signed fictitious minutes of two meetings which never took place, leads unequivocally to the conclusion that they knew perfectly well that their behavior was wrong.

Causation and quantum of damage

53. The Liquidators' case on causation is set out in paragraphs 51-54 of the amended statement of claim. It is said that if the Directors had not acted in wilful neglect or default of their duties, they would have discovered that WCF was counterparty to the IRS transactions, with the result that the sequence of events which actually played out in

March 2009 would have played out at a much earlier stage in the life of the Macro Fund, certainly no later than November 2008 when they received the Q3 2008 Quarterly Report from PNC. I adopt the following statement of Briggs J. in *Lexi Holdings Plc v. Luqman* [2008] 2 BCLC 725, at page 735 as the correct approach to be adopted towards causation in this type of case.

“The question whether a breach of duty constituted by total inactivity causes a particular loss raises issues of law, fact and hypothesis. The law serves to define the relevant duty, and the steps which that duty required these defendants to take is ascertained by the application of those legal principles to the relevant factual background, including, importantly, the particular knowledge, experience and skill which each [defendant] actually had. Thereafter, the court must construct a necessarily hypothetical edifice so as to ascertain what would probably have happened if the relevant duties had been performed, so as to ascertain whether in that event the losses actually suffered by [the company] would, probably, not have been suffered. Subject to any relevant questions of remoteness ..., the difference between [the company’s] actual financial position and its hypothetical financial position derived from the assumption that the relevant duties had been performed represents the measure of loss caused by the defendants’ breach of duty.”


54. The first question I must ask myself is when and how would the Directors have discovered that WCF was the IRS counterparty if they had performed their duties? Mr Lord provided me with a list of events, occurring at a time when the reported value of the IRSs was material to the balance sheet, which would have led the Directors to make relevant enquiries had they performed their duties. Whilst there is evidence to support the allegation that the discovery would have been made as early as June 2006 when the Directors signed the 2005 audited financial statements, Mr Lord chose to put his case on the basis of the events which occurred at the beginning of November 2008 and so I do not need to consider any earlier scenario. If the Directors had read the Q3 2008 Quarterly Report, it would have set off alarm bells. An emergency board meeting would have been convened at which Messrs Frank Barden, Magnus Peterson, Chas Dabhia and possibly others would have been required to attend. Mr Frank Barden would have discovered that the Directors believed that WCF was dormant and claimed to be unaware that it was the counterparty to the IRS transactions. I do not know what Magnus Peterson had previously told him about WCF, but it must have been wholly inconsistent with what he would have been told by the Directors. It would have been immediately apparent to all concerned that they had been misled by Magnus Peterson. The Directors would have instructed lawyers who would have advised that the Macro Fund be put into liquidation. Even if the company had not been put into liquidation immediately, it is inconceivable that any directors, properly advised, would have permitted the pending redemptions to have been paid because (no matter what explanation might have been offered by Magnus Peterson) it would have been plainly obvious to all concerned that the published NAV per share was seriously overstated

because it would soon have become apparent that there was no possibility of WCF being able to pay \$589 million, which was the reported market value of the IRSSs as at 30th October 2008.

55. The second question is what loss was suffered by the Macro Fund as a result of this scenario not having played out at the beginning of November 2008 as a result of the Directors' wilful neglect or default of their duties? Mr Lord did not pursue the proposition that the loss caused by the Directors' breach should be determined by reference to the net trading losses incurred during the "extended period of trading", that is to say during the period from the date on which the Macro Fund's business would have been terminated (sometime shortly after 6th November 2008) until the date on which it was actually terminated (on or shortly before 19th March 2009). He put his case on the more straightforward basis that the loss suffered by the company is the amount of the irrecoverable redemption payments made during the "extended period of trading" on the basis of falsely inflated NAV calculations. A total amount of US\$141,600,490 was paid out by way of redemptions between 24th November 2008 and 26th February 2009, based upon a grossly inflated NAV per share. The difference between what was actually paid and what would have been payable based upon a realistic NAV (taking into account the true value of the IRSSs) is said to be not less than \$111 million. The unchallenged evidence of Mr Carter, WCF's official liquidator, is that the company's realizable assets are minimal. Counsel stated that the Macro Fund's loss is "not less than" this amount because the Official Liquidators have deliberately done their calculations in a manner most favourable to the Directors.

56. I am satisfied that the Macro Fund's loss caused by the Directors' wilful neglect or default is at least US\$111 million. Since counsel for the Plaintiff has not sought to advance any higher claim (for example, by including the amount of percentage fees paid to WCUK during the extended period of trading), I give judgment against each of the Defendants in the sum of US\$111 million, plus costs to be taxed if not agreed.

DATED the 26th day of August 2011



Hon Mr Justice Andrew J. Jones QC

