

**Judgment 22/2006 HFT International (Guernsey) Limited v Equinox Finance Management (Guernsey) Limited – Royal Court (Civil Action File 924) – 3<sup>rd</sup> May, 2006**

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**Royal Court Civil Rules, 1989, Rule 39 – defendant’s application for specific discovery – principles to be applied- application granted**

**IN THE ROYAL COURT OF GUERNSEY**

3<sup>rd</sup> day of May, 2006 before Richard John Collas, Esquire, Deputy Bailiff; sitting alone.

In the matter of

HFT INTERNATIONAL (GUERNSEY) LIMITED

(Plaintiff)

v.

EQUINOX FINANCE MANAGEMENT  
(GUERNSEY) LIMITED

(Defendant)

Whereas on 24th April the Deputy Bailiff considered an application for specific discovery and heard thereon Advocates P. T. R. Ferbrache and J. P. Greenfield, Counsel for the Plaintiff and Defendant respectively, the Deputy Bailiff this day handed down judgment in the terms attached hereto and: -

1. GRANTED the Plaintiff’s application for specific discovery of the two documents requested insofar as such documents exist save that in paragraph 1 of the application there be inserted the words "as at the close of business on the last business day prior to 25th April, 2004" in place of "on 25th April, 2004";

2. ORDERED that discovery is to be given by close of business on 17th May, 2006; and
3. RESERVED the question of costs.

S. M. D. ROSS  
Her Majesty's Deputy Greffier

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Ferbrache, appearing for the Plaintiff, described the history of the relationship between the parties as a three-stage process. The first stage was governed by the terms of an agreement, dated 12 August 1997, that is defined in the pleadings as the Co-operation Agreement. Early in the year 2000 the relationship was renegotiated at the instigation of the Defendant and on 31 March 2000 the parties entered into a new agreement defined as “the Agreement” which, inter alia, terminated the Co-operation Agreement. The Agreement provided for the payment of remuneration from the Defendant to the Plaintiff “by way of commission”. There were two components to the commission (in clauses 3 and 4.2 of the Agreement). The first was calculated in accordance with a formula related to the performance fees received by the Defendant from the Fund and the second related to the management fees it received.

3. The second stage of the relationship between the parties commenced with the signing of the Agreement and ended on 25 April 2004 when the Agreement was terminated following the expiry of four months notice given by the Defendant. The Agreement contained no express provisions for its termination and the Plaintiff has not challenged the Defendant’s ability to terminate the Agreement with reasonable notice pursuant to an implied term and has not challenged the termination date. The parties are therefore agreed that the relationship ended on 25 April 2004.
4. The parties disagree as to whether the Plaintiff is entitled to any remuneration in respect of the period from 1 July 2003 to the date of termination and, if so, the basis on which that remuneration is to be calculated and the amount of remuneration due.

### **Procedural Background**

5. In the Royal Court, before myself and 3 Jurats, the trial of this action opened on 21 November 2005 but was adjourned at the conclusion of the Plaintiff’s counsel’s opening speech following an application by Advocate Greenfield, on behalf of the Defendant, contending that the basis on which the case had been opened went beyond the scope of the pleadings. That gave rise to an application to amend the Cause which I granted on 22 November. Later, the Defendant tabled a request for further and better particulars of the amended Cause which has since been resolved.
6. Discovery had been given by both parties on the original Cause prior to the commencement of the hearing on 21 November. Following the amendment of the Cause, I made an order for discovery on 23 January this year and this application for specific discovery has followed thereafter.

### **Legal Principles**

7. The legal principles governing the provision of documents through discovery procedures are well established and are not in dispute.

Advocate Ferbrache relies upon the classic formulation of the test as to relevance in the judgment of Brett L J in Compagnie Financière du Pacifique v Peruvian Guano Co (1882) 11 QBD 55 at P64:

*“It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may-not which must-either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words ‘either directly or indirectly’ because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry, which may have either of these two consequences”.*

8. These principles were considered, and applied, by Lieutenant-Bailiff Hancox in Norman Piette Limited v Hochtief Construction (UK) Ltd Royal Court Judgment 8/2005, 26 January 2005.
9. Advocate Ferbrache also drew my attention to paragraph 24/0/3 of the 1999 White Book and to Rule 10 of Order 24 which states that a party shall be entitled to serve a notice at any time requiring the other party to produce documents for inspection. In his written Skeleton Argument Advocate Greenfield argued that the Plaintiff had not requested these documents before the start of the trial in November 2005 and that there was nothing in the amendments to the pleadings made since that date to justify the request. He submitted that the Plaintiff did not previously regard the documents as material and nothing on the pleadings has altered that position. In my view, there is nothing in Rule 39 preventing the Plaintiff from making this application at this time. The Plaintiff has not explained why it did not regard the documents as relevant prior to the start of the November hearing but having had one aborted trial, I am keen that both parties should be properly prepared for the next hearing which is set down for the week commencing 12 June 2006. Any extra costs that may have been incurred can be dealt with in an order for costs.

### **The Application**

10. The application for specific discovery, as amended on 17 March, seeks two categories of document:
  1. *All and any documentation relating to the calculation of the NAV of the Fund on 25 April 2004;*
  2. *All documentation relating to the payment or transfer of cash or transfer of shares or value given for the Performance Fee and Management Fee to the Defendant for the period 1 July 2003 until 30 June 2004.*

11. Advocate Ferbrache relies heavily on a letter dated 20 April 2004 from Philippe Meier, the Plaintiff's Swiss Advocate, to the Defendant. In the letter, M Meier accepted the termination of the Agreement as at 25 April 2004 but stated that the Defendant:

*“remain(s) liable under clauses 3 and 4.2 of the 2000 Agreement up to [25 April 2004] for the Commission payable under the aforementioned clauses”.*

12. M Meier also asked the Defendant to prepare interim financial statements and calculate the Net Asset Value (“NAV”) of the Fund as at 25 April 2004 so that the commissions could be calculated and paid.
13. The Defendant's English solicitor replied on 30 April 2004 stating there was no need to prepare interim accounts as at 25 April but confirming the Defendant would provide a statement of commissions due in respect of the period to 25 April 2004. Later, on 22 June 2004 the Defendant's solicitor wrote that *“there are no “commissions owed and due” to be paid at this time”*. No commission has been paid in respect of the period to 25 April 2004.
14. Advocate Ferbrache submitted that the documents are needed in order to assess the quantum of the commission which the Plaintiff claims as at 25 April 2004. In reply, Advocate Greenfield does not dispute that the documents would be needed in order to calculate quantum but he argues that quantum is not to be decided at this stage of the proceedings. He says the Defendant's liability to pay commission, and the basis on which it would be calculated, are the only issues raised on the pleadings. In the prayer for relief in the Amended Cause, the Plaintiff seeks:

- (i) *A declaration that the Plaintiff is entitled to the performance and management fees due under the Agreement from 1 July 2003 up to 25 April 2004 and an account to be taken of the monies due to the Plaintiff from the Defendant as a result and judgment in a like amount; alternatively damages to be assessed;*
- (ii) *An order that such sum shall be paid by the Defendant to the Plaintiff in accordance with the Agreement;*
- (iii) *An order for such further or other relief as the Court may think just;*

15. Advocate Greenfield had understood from the pleadings that the Court would not be concerned with the quantum of any commission that might be due which, he assumed, the Plaintiff would want to assess subsequently if it succeeds on liability.
16. Advocate Ferbrache said it was his intention that the court should resolve all aspects of the dispute at a single hearing. If he knows the NAV of the Fund as at the date of termination he will be able to calculate the quantum of commission claimed and he will apply to amend the Cause again in order to plead that amount.

17. In considering the application for specific discovery I have to decide whether the documents requested relate to any matter in question between the parties. I bear in mind the classic definition of Brett L J which I quoted above. I also have regard to paragraph 4.13 of *Matthews and Malek on Discovery*:

*“In practice relevance is primarily tested by reference to the pleadings. However “matters in question” covers a wider ground than the issues as disclosed in the pleadings. The Court on discovery is entitled to look outside the pleadings in order to determine what matters are in issue between the parties. Indeed, there need not be pleadings for a matter to be said to be in issue”.*

18. I am satisfied that the NAV of the Fund as at the date of termination of the Agreement is a matter in question in these proceedings. The Plaintiff first asked for it in M Meier’s letter of 20 April 2004 and has continued to ask for it on a number of subsequent occasions.
19. In considering this application it is not for me to pre-judge any future application the Plaintiff may bring to amend the pleadings in order to plead quantum. Knowledge of the NAV may simplify the issues, or it may complicate them, I know not. I have indicated to counsel that this decision will not prevent either of them from bringing an application to split the hearing into separate trials on liability and quantum. Again, I do not pre-judge the outcome of any such application if and when it is made.
20. The Defendant raised a number of further issues. Firstly, 25 April 2004 was not a trading day as it was a Sunday. Advocate Ferbrache responded by saying that he would calculate the NAV as at close of business on the last business day prior to Sunday 25 April, which was probably Friday 23 April.
21. Advocate Greenfield also stated that the Fund was valued, and a NAV calculated, only at the end of each calendar month. These values have been disclosed, attached to an e-mail which appears at Tab 80 of the trial bundle. They include “Bid” and “Offer” prices as at 31 March and 30 April.
22. The Defendant has not calculated the NAV as at any date between those dates. Advocate Ferbrache submitted, without citing any supporting authority, that I had the power to order calculations to be made. I do not accept that I have such power. Indeed, as Advocate Greenfield submitted, if I was to order the preparation of an account I would be pre-judging the outcome of the trial as that is one of the heads of relief sought by the Plaintiff.
23. Advocate Greenfield confirmed that it would be possible to calculate a daily NAV notwithstanding that the Fund is said to be invested in illiquid assets mainly or exclusively situate in Russia and other C.I.S. countries. Some of the data required for the calculation may be held electronically but a computer data base containing information which

is capable of being retrieved and converted into readable form is a “document” capable of being the subject of discovery – see para 24/2/3 or the 1999 White Book. The party giving discovery has the obligation of ensuring the information is converted and presented in a readable form.

24. I cannot, at this stage in the proceedings, order the Defendant to calculate the NAV of the fund if it has not previously done so but if it can be calculated, the information required to carry out the calculation, in so far as it exists, should be disclosed to the Plaintiff. The Plaintiff will also require details of the methodology to be used. I assume that will be in a Procedures Manual, or similar, which will also have to be disclosed.
25. Whereas the calculation of the NAV is relevant to both elements of the commission, the documents requested in paragraph 2 of the application are only relevant to the second component. Advocate Greenfield does not dispute their relevance but argues that such documents have already been disclosed, including the audited accounts of the Fund prepared by Ernst & Young. Documents already disclosed show that the performance fees received by the Defendant for the year to 30 June 2005 amount to \$456,263.00. The significance of that amount is that, under clause 4 of the Agreement, no commission is payable to the Plaintiff in respect of this second element of the calculation unless the management fees received by the Defendant exceed \$500,000.00 in respect of an accounting period.
26. The Plaintiff has not challenged the audited accounts but, as Advocate Ferbrache submitted, that is not the test. The Plaintiff is entitled to relevant documents that may fairly lead it to a train of enquiry which may either advance its case or damage the case of its adversary.

### **Conclusion**

27. For the reasons given above, I grant the Plaintiff’s application for specific discovery of the two categories of document requested, in so far as such documents exist, save that in paragraph 1 of the application, I insert “as at the close of business on the last business day prior to 25 April 2004” in place of “on 25 April 2004”. In view of the hearing date in June, I order that discovery is to be given by close of business on 17 May 2006. If either counsel require any further clarification of the terms of the order or wish to make any submissions as to the date on which discovery is to take place, they are to apply to the Deputy Greffier for a further hearing as soon as possible. I propose to reserve costs unless application is made for some other order.