

**CICA 3/2012
(FSD: 65/2009-AJEF)**

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT
FINANCIAL SERVICES DIVISION**

BEFORE

**The Rt. Hon. Sir John Chadwick, President
The Hon. Elliott Mottley, Justice of Appeal
The Hon. Abdulai Conteh, Justice of Appeal**

BETWEEN

ENNISMORE FUND MANAGEMENT LIMITED

Plaintiff/Respondent

-and-

FENRIS CONSULTING LIMITED

Defendant/Appellant

Mr Thomas Lowe QC instructed by **Mr Michael Makridakis** of Ogier appeared for the Appellant, Fenris Consulting Limited
Mr Mark Cunningham QC instructed by **Mr Rupert Coe** of Appleby (Cayman) Ltd appeared for the Respondent, Ennismore Fund Management Limited

Hearing: 23 and 24 July 2012

Delivered: 16 April 2014

JUDGMENT

Sir John Chadwick, President:

1. This is an appeal from an order made on 16 February 2012 by Justice Foster in proceedings brought by Ennismore Fund Management Limited (“Ennismore”) against Fenris Consulting Limited (“Fenris”).
2. Ennismore is a company incorporated in England and Wales. At the material times it was the investment manager of a Cayman Island Fund, Ennismore European Smaller Companies Hedge Fund (“ESCF”) and an Irish mutual Fund, Ennismore European Smaller Companies Fund (“OEIC”). From about October 2006 Ennismore was also

investment manager for a second Cayman Island Fund, Ennismore Vigeland Fund (“EVF”).

3. Mr Arne Vigeland (also known as Arne Vigeland-Paulson or Arne Paulson), an analyst and fund manager, was employed by Ennismore between November 2001 and July 2004. In May or June 2004 he relocated to Norway. Thereafter he continued to provide his services to Ennismore as a fund manager through Fenris, a company incorporated in Belize, under the terms of a letter (“the Consultancy Services Agreement”) dated 24 June 2004.
4. A substantial element in the remuneration paid by Ennismore to its fund managers were discretionary, or “bonus”, fees based on the performance of the individual funds, or portfolios, for which each fund manager was responsible. A portion of the discretionary fees payable to each fund manager in respect of each year was held back – and invested by Ennismore on the fund manager’s behalf – on the basis that the retained investments were subject to “clawback” by Ennismore in the event that the portfolios for which that fund manager was responsible under-performed in future years.
5. In 2007 and 2008, following a general collapse in financial markets, the funds, or portfolios, for which Fenris (or Mr Vigeland) was responsible (the “Fenris portfolios”) suffered losses. The issue in these proceedings is whether, in the events which happened, Ennismore was entitled to exercise rights of clawback against investments which it had retained out of discretionary fees payable to Fenris in respect of earlier years.

The Consultancy Services Agreement

6. The Consultancy Services Agreement required that Fenris would make available to Ennismore the services of one suitably qualified and experienced fund manager who would provide investment advice to Ennismore. The first fund manager was to be Mr Vigeland. His task was to make recommendations to Ennismore, concerning long and short equity investments, upon which Ennismore might act at its sole discretion. Neither Fenris nor Mr Vigeland was to have authority to commit Ennismore to the purchase or sale of any investments; or to place orders with brokers on behalf of Ennismore. Mr Vigeland, as fund manager, was to monitor, on a continuous basis,

investments made by Ennismore on the basis of advice received from him. Fees were to be agreed between the parties from time to time.

Annual performance bonuses

7. The Consultancy Services Agreement contained no provision for the payment of bonuses; but it was common ground that it was, at the time, the practice for Ennismore to pay annual performance bonuses to its fund managers (as I have said) and that, following the Consultancy Services Agreement, that practice extended to Fenris in respect of the services provided by Mr Vigeland. The practice was described in a letter dated 18 July 2005 from Ennismore to the shareholders in the Ennismore European Smaller Companies Fund.
8. The purpose of that letter was to propose a change in the fees which Ennismore charged to ESCF (the “Fund” and, together with OEIC, the “Funds”) in its own role as Investment Manager of the Fund; “and to give a few thoughts on the future of our business”. The letter was signed by Mr Gerhard Schöningh and Mr Geoff Oldfield, who were the co-founders of Ennismore and (then) the holders of all its shares.
9. The change in the fees which Ennismore charged to the Fund as Investment Manager was explained in the second paragraph of the letter of 18 July 2005:

“With effect from 1st September, we propose that the annual management fee is increased from 1.5% to 2% and that the cash benchmark, applied before a performance fee is charged, is dropped and replaced by a high watermark only”.

That charging structure is reflected in a document headed “Ennismore Fund Management Limited: Ennismore European Smaller Companies Hedge Fund” which is undated (but which, from internal evidence, must have been issued in or about August 2006). In that document, under the heading “Fund Information”, the charges paid by the Fund to Ennismore were summarised under three heads: (i) an annual investment management fee of 2%, payable monthly; (ii) a Performance Fee; and (iii) administration fees, charged *ad valorem* on successive tiers of the NAV of the Fund. The Performance Fee was described in these terms:

“20% performance fee on value added. Any under-performance relative to the benchmark compounds and is carried forward indefinitely and must be recouped fully before a performance fee is charged. If applicable, the performance fee is paid annually in January for performance achieved in the previous calendar year.”

10. The letter of 18 July 2005 went on to explain that Ennismore’s practice, in relation to the remuneration of its team of fund managers “was based around the principle of clawback”. The third paragraph of the letter contained the following passage:

“Each Investment Manager is allocated a fixed amount of equity and has full responsibility for running his or her ‘book’. Our Investment Managers’ remuneration is transparent, in that they earn a percentage of the fees that they generate for their book. Ennismore operates a ‘clawback’ system as a balance and check to the high degree of autonomy given to all Investment Managers. Only 50% of an Investment Manager’s bonus is paid in cash, while the balance is re-invested in the funds and subject to a clawback for a three year period. Should an Investment Manager generate a negative value-added in any of the three years, this is ‘clawed-back’ from the reinvestment. . . .”

11. A spreadsheet, headed “Bonuses & Salaries 31 Dec 05” issued to all Ennismore fund managers, including Mr Vigeland, in early 2006 provides an illustration of the remuneration structure. That spreadsheet (the “31 Dec 05 spreadsheet”) sets out in a table the remuneration earned by five fund managers (of which Mr Vigeland (AP) was one) for the calendar year 2005:

Salary received (Calendar 05)	LP	TH	SS	TC	AP
Current salary					80,000
Salary increase					<u>20,000</u>
New Salary					<u>100,000</u>
FM Bonus (50%)					1,385,891
Additional FM Bonus (50%)					<u>140,000</u>
					1,526,891
EBT Contribution (50% of FM Bonus)					<u>1,526,891</u>
Total Bonus plus EBT contribution					<u>3,053,728</u>
Pension					<u>0</u>
Total Bonus + EBT + Pension					<u>3,053,728</u>

It is unnecessary to show the salary and bonus figures for the other four fund managers which are set out in that table. The 31 Dec 05 spreadsheet contains a further table which provides particulars of the manner in which bonuses were calculated.

FM Bonuses	LP	TH	SS	TC	AP
OEIC					
Value added after benchmark charge	2,205,000	839,000	11,157,000	11,157,000	14,203,000
Less allocated costs	<u>(50,000)</u>	<u>(50,000)</u>	<u>(353,000)</u>	<u>(353,000)</u>	<u>(245,000)</u>
Value added	2,155,000	789,000	10,804,000	10,804,000	13,958,000
HF (GBP at ye rate 1.4542)					
Value added after bench mark charge	3,563,618	1,074,056	11,428,866	11,428,866	14,020,491
Less allocated costs	<u>(55,009)</u>	<u>(70,137)</u>	<u>(313,533)</u>	<u>(313,533)</u>	<u>(240,886)</u>
Value added	3,608,609	1,000,919	11,115,313	11,115,313	13,779,525
Performance Fee at 20% on VA after cost allocation					
OEIC	431,000	157,800	2,160,800	2,160,800	2,791,600
HF (GBP)	<u>721,722</u>	<u>200,784</u>	<u>2,160,800</u>	<u>2,160,800</u>	<u>2,755,985</u>
	1,152,722	358,584	4,383,583	4,383,583	5,547,585
FM Share (%)	30%	30%	38%	9%	50%
FM Share (£)	<u>345,817</u>	<u>107,575</u>	<u>1,665,888</u>	<u>294,584</u>	<u>2,773,783</u>

12. It can be seen from the 31 Dec 05 spreadsheet:

- (1) That the total bonus payable to Fenris in respect of Mr Vigeland's services (£3,053,783) was the aggregate of (i) the FM (Fund Manager) Share (£2,773,783) and (ii) a sum (2 x £140,000) described as "Additional FM Bonus".
- (2) That, of that total bonus (£3,053,783), 50% (£1,526,891) was retained as EBT (Employee Benefit Trust) contribution.
- (3) That the FM Share (£2,773,783) - which comprised the principal part of the bonus payable to Fenris in respect of Mr Vigeland's services - was itself said to be 50% of the "Performance fee at 20% on VA [value added] after cost allocation" (£5,547,585). [I should add (although nothing turns on the point) that the figure shown (£5,547,585) is arithmetically incorrect: the correct figure is £5,547,597: making that correction, Fenris' FM Share would be £2,773,799].

It can be seen, also:

- (4) That the FM Share (£2,773,783), which comprised the principal part of the bonus payable to Fenris in respect of Mr Vigeland's services, was 20% of the aggregate of (i) the value added (£13,958,000) in respect of OEIC and (ii) the value added

(£13,779,525) in respect of a second fund, HF (which is, I think, an abbreviation for Ennismore European Smaller Companies Hedge Fund) - after deduction, in both cases, of allocated costs - by the funds (or portfolios) for which Fenris (or Mr Vigeland) was responsible.

- (5) That the “Performance fee at 20% on VA after cost allocation” on which Fenris’ FM Share was based contained no element attributable to the value added to the Funds by portfolios for which individual fund managers other than Fenris (or Mr Vigeland) were responsible.

13. The remuneration structure reflected in the 31 Dec 05 spreadsheet may be summarised as follows:

- (1) The overall performance fee earned by Ennismore as Investment Manager of the two Funds (the OEIC and the ESCF) – being 20% of the value added to those funds after deduction of allocated costs – was £15,826,057 (a figure not shown in the second table, but which may be ascertained by aggregating the figures in the ante-penultimate row of that table). In that context “value added” means “value added after benchmark charge”: that is to say, it is the value added to the Funds over the year in excess of the benchmark. That is taken as the measure of performance for the purposes of calculating the performance fee.
- (2) The overall performance fee earned by Ennismore as Investment Manager of the two Funds is attributable (and, as appears from the spreadsheet, has been attributed) to the performance of the several funds (or portfolios) for which individual fund managers (including Fenris (or Mr Vigeland) were responsible. The basis of attribution is the value added to the two Funds by each of the several portfolios for which individual fund managers were responsible: that is to say, the value added over the year by the performance of each of the several portfolios relative to the benchmark.
- (3) The FM Share to which an individual fund manager is entitled is a percentage of so much of the overall performance fee earned by Ennismore as is attributable to the performance of the portfolios for which that fund manager is responsible. The relevant percentage in the case of the Fenris portfolios is 50%: the relevant percentage in the case of the other fund managers differs, but (in each case) is less than 50%.

14. In the letter to shareholders dated 18 July 2005, to which I have referred earlier in this judgment, there is reference to the possibility that a fund manager might “generate a negative value-added” in one or more years. That did not happen in the year (2005) to which the 31 Dec 05 spreadsheet relates. But it is pertinent to consider, by reference to that spreadsheet, what the position would have been if the performance of the portfolios for which one of the individual fund managers was responsible had been such that the value added by those portfolios had been negative: that is to say, if the value added by those portfolios had been less than the benchmark figure.
15. In such a case the amount shown in the ante-penultimate row of the column relating to that fund manager in the second table would have been negative: reflecting the extent to which the performance of the portfolios for which he was responsible had fallen short of the benchmark figure. A negative amount in the ante-penultimate row of the column relating to that fund manager in the second table would have the effect (i) that the overall performance fee earned by Ennismore as Investment Manager of the two Funds would have been reduced by that amount and (ii) that, subject to any “Additional FM bonus” to which that fund manager was otherwise entitled (as shown in the fifth row of the first table), the amount of his “Total Bonus plus EBT contribution” would have been nil.
16. Further, if effect were to be given to the statement in the letter of 18 July 2005 that “Should an Investment Manager generate a negative value-added in any of the three years, this is ‘clawed-back’ from the reinvestment figure”, it could have been expected that Ennismore would have sought to “clawback” an amount equal to the negative value added from funds retained (and invested) out of bonuses to which that fund manager had become entitled in the previous three years. The effect of “clawback” in those circumstances would be that Ennismore would recover, from the relevant fund manager, an amount which would compensate it (in whole or in part) for the reduction in the overall performance fee: that is to say, Ennismore would recover, by way of clawback from the relevant fund manager, compensation for the loss which it sustained by reason of the fact that the amount of the overall performance fee which it had earned in that year as Investment Manager of the two Funds was less than it would have been if the value added by the portfolios for which the fund manager was responsible had not been less than the benchmark figure.

The Clawback Agreement

17. It was common ground that, until April 2006, the operation of the “clawback” system was not set out in any document having contractual effect between Ennismore and its fund managers; although, as I have said, it had been described in general terms in the letter to shareholders dated 18 July 2005. On 6 April 2006, Ennismore, Fenris and Mr Vigeland entered into a “clawback” agreement.
18. The Clawback Agreement contains three sections: “Background”, “Principles of Clawback” and “Amounts subject to Clawback in respect of 2005”. In the analysis which follows I will refer to those three sections, respectively, as “Section A”, “Section B” and “Section C”; to the separate paragraphs in Sections B and C as “B(1)”, “B(2)”, “C(1)”, “C(2)”, etc; and (where a paragraph contains two or more sentences) to those sentences as “A(i)”, “B(1)(i)”, etc. It is necessary to set out the text of the Clawback Agreement in full; but, for convenience, I do so as it would appear if the Sections, paragraphs and sentences were identified in that manner:

A. Background

(i) Under the agreement between the Company and Fenris dated 24 June 2004 the Company may pay discretionary fees to Fenris in respect of each calendar year. (ii) It is agreed that part of such fees may be paid subject to “clawback” against a share of any net investment losses attributable to the investment advice received by the Company from Fenris or AVP in the subsequent three years. (iii) Such fees will be invested in funds managed by the Company throughout the period that they are subject to clawback and the amount subject to clawback is the value of those investments from time to time.

B. Principles of Clawback

- (1) (i) Clawback operates on a first in – first out basis such that any clawback claims are made against assets subject to clawback received in respect of earlier years first. (ii) The percentage rate of net investment losses at which clawback is applied will match the percentage share of net investment profits upon which the assets under clawback were determined. (iii) E.g. if discretionary fees or bonuses were paid based upon 30% of the performance fee attributable to the net investment gain in respect of any year those fees or bonuses (and upon any investment appreciation therefrom) will become payable to the Company based upon 30% of the reduction in the performance fee earned by the Company attributable to any net investment losses.
- (2) For this purpose the net investment loss (if any) shall be calculated separately for each performance period and the performance periods shall be:
- (a) each calendar year; or
 - (b) for the year in which Fenris and AVP cease to manage a portfolio for the Company then the period shall run from 1

January until the date when Fenris and AVP ceased to manage the portfolio (the "Date of Cessation"). . . .

C. Amounts subject to Clawback in respect of 2005

- (1) (i) In respect of the year ended 31 December 2005 Ennismore has agreed to pay consultancy fees subject to clawback of £1,526,891 to Fenris which Fenris undertakes to invest in shares of Ennismore European Smaller Companies Hedge Fund (the "Shares"). (ii) The Shares will be registered in the name of Fenris. (iii) The value of the Shares will be subject to clawback at a rate of 55% of the reduction in the performance fee earned by the Company attributable to any net investment losses.
- (2) To provide security to the Company that any amounts due to it under the principle of clawback will be received by the Company, Fenris and AVP agree that the Shares cannot be sold, transferred or assigned without written consent of the Company.
- (3) After 31 January 2009, or 3 months after the Date of Cessation if earlier, the Company must give consent to the sale, transfer or assignment of the shares unless any amounts are due to it from either Fenris or AVP after offsetting any amounts payable by the Company to either Fenris or AVP."

19. The Clawback Agreement addresses four distinct matters in relation to "clawback".

First, the amount of the discretionary fees paid or payable in respect of a given year that is to be subject to clawback in subsequent years: for convenience, I will refer to that matter as "funds subject to clawback". Second, the requirements which must be satisfied before a right to clawback may be exercised against funds subject to clawback; I will refer to that as "the conditions which give rise to the right to clawback". Third, the amount that may be recovered from funds subject to clawback when the conditions which give rise to the right to clawback are satisfied: I will refer to that as "the amount of the clawback". Fourth, the priority in which the amount of the clawback in respect of any one year may be recovered from funds subject to clawback in respect of earlier years: I will refer to that as "the order in which clawback is to be applied".

20. Sentence A(ii) records that the parties have agreed that part of the discretionary fees paid by Ennismore to Fenris in respect of each calendar year may be paid "subject to 'clawback' against a share of any net investment losses attributable to the investment advice received by the Company from Fenris or AVP in the subsequent three years". That sentence defines the funds subject to clawback: they are that part of the discretionary fees paid by Ennismore to Fenris in any given calendar year which are so paid (whether by agreement between them or otherwise) upon terms that they will be subject to clawback. The sentence contains some indication as to the conditions

which will give rise to the right to clawback: the terms of payment are to be subject to clawback against a share of any net investment losses attributable to the investment advice received by the Company from Fenris”. That suggests that the “net investment losses” will be losses sustained by the Fenris portfolios: in that it is difficult to conceive of circumstances in which the Funds of which Ennismore is Investment Manager would suffer investment losses attributable to the investment advice received from Fenris other than as a consequence of the under-performance of the Fenris portfolios. But sentence A(ii) gives no definitive answer to the question “what conditions give rise to the right to clawback” – other than that those conditions will include the under-performance of the Fenris portfolios – or to the question “what is the amount of the clawback”.

21. Sentence B(1)(i) addresses the order in which clawback is to be applied. Sentence B(1)(ii) addresses the question “what is the amount of the clawback”: it provides that the percentage rate of net investment losses at which clawback is applied will match the percentage share of net investment profits upon which the assets under clawback were determined. The principle of equivalence is illustrated by the example in sentence B(1)(iii):

“E.g. if discretionary fees or bonuses were paid based upon 30% of the performance fee attributable to the net investment gain in respect of any year those fees or bonuses (and any investment appreciation therefrom) will become payable to the Company based upon 30% of . . .”

It is plain that the words “those fees or bonuses . . .”, in that example, do not refer to the whole of the discretionary fees or bonuses paid to Fenris in respect of an earlier year. It is only that part of the fees and bonuses which are “subject to clawback” – that is to say, which have been retained and invested pursuant to Section A – that are potentially liable to be repaid to the Company (Ennismore) under the principles of clawback. So the words “those fees or bonuses (. . .) will become payable to the Company based upon 30% of . . .” must be understood in the sense “*the amount of those fees or bonuses . . . which will become payable to the Company by way of clawback will be based upon 30% of . . .*” The additional words (in italics) must be read in, as a matter of necessary implication, in order to give the sentence the meaning that was plainly intended.

22. The same approach is found in paragraph C(1). Sentence C(1)(i) refers to £1,526,891 as the amount of “consultancy fees subject to clawback” which Ennismore has agreed to pay to Fenris in respect of the year 2005. The figure (£1,526,891) matches that shown in the 31 Dec 05 spreadsheet as retained (in “EBT Contribution (50% of FM Bonus)”. The figure is 50% of the aggregate of (i) “FM Share” (£2,773,783) and “Additional FM Bonus” (2x£140,000). More pertinently, in the present context, it is 55.05% of the FM Share. The £1,526,891 is to be invested in the “Shares”. Sentence C(1)(iii) provides that “the value of the Shares will be subject to clawback at a rate of 55% of . . .”.
23. That invites the question: “to what is the relevant percentage rate – 30% in the example given in sentence B(1)(iii) or 55% in respect of the year 2005, as stated in sentence C(1)(iii) - to be applied?” The answer to that question is provided by the words which the parties have used in the Clawback Agreement. It is stated, in terms, both in sentence B(1)(iii) and in sentence C(1)(iii), that the relevant percentage rate is to be applied to “the reduction in the performance fee earned by the Company [Ennismore] attributable to any net investment losses”.
24. That, as it seems to me, provides the answers both to the question “what is the amount of the clawback” and to the question “what conditions give rise to the right to clawback”. The requirements which must be satisfied if the right to clawback is to arise are (i) that net investment losses have been sustained by the Fenris portfolios and (ii) that there has been a reduction in the performance fee earned by Ennismore, as Investment Manager of the Funds, attributable to the net investment losses sustained by the Fenris portfolios. The amount of the clawback is the amount produced by applying the relevant percentage rate to the reduction in the performance fee earned by Ennismore.
25. The phrase “net investment losses” appears in sentences A(ii), B(1)(ii), B(1)(iii) and C(1)(iii). Reading and construing the Clawback Agreement as a whole, it seems to me plain that the phrase “any net investment losses” is used – in each of the sentences in which that phrase appears – to describe what, in the letter of 18 July 2005, was referred to as “negative value added”: that is to say, the phrase is used to describe the amount by which the value added to the Funds by the performance of the Fenris portfolios falls short of the benchmark figure. Two factors lead to that conclusion.

26. First, it is plain that the intention of the parties, reflected in the Clawback Agreement, is that there should be an equivalence in principle in the award of bonus and the operation of clawback. This is made clear by the statement in sentence B(1)(ii) that:

“The percentage rate of net investment losses at which clawback is applied will match the percentage share of net investment profits upon which the assets under clawback were determined.”

and in the example which follows in sentence B(1)(iii), to which I have already referred. As I have explained – by reference to the 31 Dec 05 spreadsheet – the phrase “net investment profits”, in the context in which it appears in that statement, means value added relative to the benchmark. The phrase describes the amount by which the value added to the Fund (OEIC or ESCF as the case may be) by the performance of the Fenris portfolios exceeds the benchmark. An individual fund manager is not awarded a bonus under the remuneration scheme if the NAV of the funds (or portfolios) for which he is responsible increase by an amount which is less than the benchmark: he must “beat” the benchmark in order to qualify for a bonus. The phrase “net investment losses” should be given a comparable meaning.

27. Second, as I have explained earlier in this judgment, it can be seen from an analysis of the 31 Dec 05 spreadsheet that it would be “negative value added” – that is to say, a shortfall in the performance of the funds (or portfolios) for which an individual fund manager was responsible in relation to the benchmark – that would give rise to a reduction in the performance fee earned by Ennismore as Manager of the two Funds. The necessary causal link, described by the word “attributable”, in both sentences B(1)(iii) and C(1)(iii), is the link between the shortfall in the performance of the Fenris portfolios relative to the benchmark and the reduction in the performance fee earned by Ennismore. There is no necessary causal link between “net investment losses” (in any more general sense) incurred in Mr Vigeland’s funds and the reduction in Ennismore’s performance fee. This can be illustrated by supposing a case in which, reflecting a general fall in the markets, the benchmark relevant to one of the two Funds fell by, say, 10% over the “performance period” in relation to which “net investment loss” was to be calculated in accordance with paragraph B(2) of the Clawback Agreement, but the NAV of the Fenris portfolios within that Fund fell, over the same period by 5%. In such a case the value added by the Fenris portfolios, relative to the benchmark, would be positive. The reduction (if any) in the performance fee earned by Ennismore would not be attributable to investment losses

in the funds for which Fenris (or Mr Vigeland) was responsible. There would be no basis for clawback.

28. As I have said, the Clawback Agreement addresses four distinct matters: (i) what funds are subject to clawback; (ii) what conditions give rise to the right to clawback; (iii) what is the amount of the clawback; and (iv) in what order of priority is clawback is to be applied. I hope it will not be thought lacking in courtesy to the judgment in the Grand Court, or to the arguments advanced by counsel on this appeal, if I say at this stage that I take the view that the meaning and effect of the Clawback Agreement in relation to those matters is not open to doubt. In summary:

- (1) The funds subject to clawback are that part of the discretionary fees paid by Ennismore to Fenris in any given calendar year which are so paid (whether by agreement between them or otherwise) upon terms that they will be subject to clawback.
- (2) The requirements that must be satisfied if the right to clawback is to arise are (i) that net investment losses have been sustained by the Fenris portfolios and (ii) that there has been a reduction in the performance fee earned by Ennismore, attributable to the net investment losses sustained by the Fenris portfolios. Net investment losses means the amount by which the value added to the Funds by the performance of the Fenris portfolios falls short of the benchmark figure.
- (3) The amount of the clawback is the product of the relevant percentage rate applied to the reduction in the performance fee earned by Ennismore.
- (4) Clawback is made from funds subject to clawback retained from earlier years before funds subject to clawback retained from later years.

29. It is important to appreciate that “the reduction in the performance fee earned by the Company” attributable to the net investment losses sustained by the Fenris portfolios must mean the reduction in the overall performance fee earned by Ennismore as Investment Manager of the two Funds: that is to say, the amount by which the performance fee earned by Ennismore as Investment Manager of the two Funds is less than it would have been if net investment losses had not been sustained by the Fenris portfolios. The expression cannot have been intended to mean “the reduction in the contribution made by the Fenris portfolios to the performance fee earned by Ennismore”. The reason is this: if the performance of the Fenris portfolios does not

exceed the benchmark, the Fenris portfolios make no contribution to the performance fee earned by Ennismore, the Fenris contribution is nil and there is no reduction in the nil contribution to the performance fee if the Fenris portfolios sustain net investment losses. But there may be a reduction in the overall performance fee earned by Ennismore in a case where the Fenris portfolios sustain net investment losses. That is because the losses sustained by the Fenris portfolios may have the effect of reducing the overall “value added” on which the Ennismore performance fee as Investment Manager of the two Funds is based. In my view it is impossible to give to the expression “the performance fee earned by Ennismore”, in the context in which that expression is used in the Clawback Agreement, a meaning other than “the performance fee earned by Ennismore as Investment Manager of the two Funds”: that is to say, the overall performance fee earned by Ennismore.

30. Nevertheless, in respect of a year in which markets have, generally, continued to rise, it can be expected that, if net investment losses have been sustained by the Fenris portfolios, the reduction in the overall performance fee earned by Ennismore, as Investment Manager of the Funds, attributable to the net investment losses sustained by the Fenris portfolios will be equal in amount to a percentage of the amount of the losses sustained by the Fenris portfolios.

31. The point can conveniently be illustrated by reference to the figures shown in the 31 Dec 05 spreadsheet. The performance fee earned by Ennismore as Investment Manager of the two Funds is shown there as 20% after cost allocation of the aggregate of the value added to each of the two Funds. The value added to each Fund is the aggregate of the value added by the portfolios for which each of the contributed fund managers are responsible. The position is shown in the table below:

Fund manager	LP	TH	SS	TC	AP	Aggregate
OEIC						
Value added after cost allocation	2,155,000	789,000	10,804,000	10,804,000	13,958,000	38,510,000
HF						
Value added after cost allocation	3,608,609	1,003,919	11,115,313	11,115,313	13,779,525	40,622,679
Aggregate value added after cost allocation	5,763,609	1,792,919	21,919,313	21,919,313	27,737,525	79,132,679
Performance fee at 20% on value added after cost allocation	1,152,722	358,584	4,383,583	4,383,583	5,547,585	15,826,057

The overall performance fee earned by Ennismore as Investment Manager of the two Funds was £15,826,057. The Fenris portfolios contributed £5,547,585 to that overall performance fee. If the Fenris portfolios had performed no better, but no worse, than benchmark, the overall performance fee earned by Ennismore would have been £10,278,472: that is to say, £5,547,585 less than it was. But that would not have been a “reduction in the performance fee attributable to net investment losses sustained by the Fenris portfolios”. If the Fenris portfolios had performed no better, but no worse, than benchmark, there would have been no net investment losses sustained by those portfolios.

32. But suppose that the Fenris portfolios had performed below benchmark; such that those portfolios sustained net investment losses of £25,000,000 (after cost allocation). The effect of including a negative value added figure of £25,000,000 in the table would be that the overall performance fee earned by Ennismore as Investment Manager of the two Funds would fall by £5,000,000 (20% of £25,000,000). The overall performance fee (£5,278,472) would be £5,000,000 less than it would have been if the Fenris portfolios had not sustained net investment losses. In such a case, the reduction in the performance fee earned by Ennismore would be equal to 20% of the net investment losses sustained by Ennismore.
33. But that will not be the position where there has been no general rise in the markets. Suppose that market conditions were such that the aggregate contribution of the portfolios for which the other individual fund managers were responsible to the value added to the two Funds was not £51,395,154 (as it was in 2005), but only £10,000,000. In such a case, the effect of including a negative value added figure of £25,000,000 in the table would be that the overall performance fee earned by Ennismore as Investment Manager of the two Funds would be nil. The overall performance fee earned by Ennismore as Investment Manager of the two Funds would be £2,000,000 (not £5,000,000) less than it would have been if the Fenris portfolios had not sustained net investment losses.
34. It is easy to see that, if there had been a general collapse in the markets, such that none of the portfolios for which individual fund managers are responsible performed better than benchmark in the given year, not only will the overall performance fee

earned by Ennismore as Investment Manager of the two Funds be nil, but it would have been nil even if the Fenris portfolios had performed in accordance with benchmark: that is to say, if the Fenris portfolios had not suffered net investment losses. In such a case it is impossible to say that there has been a reduction in the performance fee earned by Ennismore attributable to the net investment losses sustained by the Fenris portfolios.

The facts giving rise to the present dispute

35. It is common ground that:

- (1) In respect of the year 2005, Fenris became entitled to £3,053,728 by way of discretionary bonus; and that, on or about 1 May 2006, Fenris invested £1,540,779 (equivalent to 50% of that discretionary bonus with accrued interest) by subscribing for 8,034.1 shares in ESCF.
- (2) In respect of the year to 31 December 2006, Fenris became entitled to £1,833,808 by way of discretionary bonus; and that, on or about 8 February 2007, Fenris invested £919,904 (equivalent to 50% of that discretionary bonus) by subscribing for 14,049.69 shares in EVF.
- (3) In respect of each of the years to 31 December 2007 and 31 December 2008, the Fenris portfolios comprised within ESCF, EVF and OEIC – that is to say, the portfolios in relation to which Fenris (or Mr Vigeland) provided investment advice to Ennismore - sustained relative losses; such that Fenris was not entitled to receive (and did not receive) any sums by way of discretionary bonus.
- (4) On 17 December 2008 Fenris sent to Ennismore a redemption request (addressed to the administrator of EVF) in respect of 75% of the shares in EVF for which it had subscribed on 8 February 2008. On 30 December 2008 Ennismore sent that request on to the administrator of EVF; but under cover of a letter which stated that Ennismore consented to the redemption request only on the condition that the redemption proceeds were not paid over to Fenris. On the following day (31 December 2008) EVF redeemed 10,537.27 (75%) of the 14,049.69 shares for which Fenris had subscribed in February 2008.
- (5) On 19 January 2009 EVF was placed in voluntary liquidation.
- (6) On 29 January 2009 Fenris sent a redemption request in respect of its 8,034.1 shares in ESCF. Those shares were redeemed on 2 March 2009.

(7) On 5 February 2009 Ennismore gave notice to Fenris terminating the Consultancy Services Agreement dated 24 June 2004.

36. In those circumstances Ennismore claims to be entitled to “clawback” from the amounts retained from the 2005 and 2006 annual performance bonuses earned by Fenris and invested in ESCF and EVF shares (as the case may be) – or from the proceeds of redemption of those shares - the “losses” sustained in respect of the years 2007 and 2008.

These proceedings

37. These proceedings were commenced by writ issued on 23 February 2009. The relief sought, as set out in the statement of claim of the same date, was an order requiring that Fenris procure that (i) the redemption proceeds of the 10,537.27 EVF shares in its name be transferred to Ennismore, (ii) all distributions in respect of the remaining 3,512.42 EVF shares in its name be paid to Ennismore and (iii) that 7,828.22 of the ESCF shares then in its name be transferred to Ennismore; alternatively damages for breach of the Clawback Agreement.

38. On 27 February 2009 the Grand Court made an order giving leave to serve the proceedings out of the jurisdiction; and a freezing order in respect of (a) the redemption proceeds of the 10,537.27 EVF shares, (b) the distributions made from the liquidation of EVF in respect of the remaining 3,512.42 EVF shares and (c) the 7,828.22 ESCF shares. On 30 July 2009 that freezing order was varied to permit payment of the proceeds of redemption of the 10,537.27 EVF shares and the 7,828.22 ESCF shares and distributions in the liquidation of EVF in respect of the remaining 3,512.42 EVF shares into a joint account.

39. The proceedings came for trial before Justice Foster on 5 to 9 December 2011. Evidence was given by Mr Oldfield, Mr Blair, Mr Leo Perry (a fund manager employed by Ennismore) and Mr Vigeland. Where the evidence of Mr Vigeland was in conflict with the evidence of Mr Oldfield and Mr Blair, the judge preferred the evidence of Mr Oldfield and Mr Blair, for the reasons which he set out at paragraphs 54 to 57 of the written judgment which he handed down on 7 February 2012.

40. The judge upheld Ennismore's claim. By the order which he made on 16 February 2012 (filed on 24 February 2012) the judge declared that Ennismore had, since 31 January 2009, been entitled to receive a transfer of 14,049.69 EVF shares and 7,828,22 ESCF shares or the proceeds of the sale of those shares (which, he held, amounted to EUR2,227,107.51 ("the Judgment Sum")); and he directed that Fenris should pay interest on the Judgment Sum at the statutory rate from 31 January 2009 until payment (credit being given for interest received on the monies in the joint account).

The basis of Ennismore's claim

41. Before turning to examine the reasoning which led the judge to make the order that he did, it is necessary to have in mind the basis upon which Ennismore advanced its claims in the pleaded case set out in the Statement of Claim dated 26 February 2009. At paragraph 6 of that pleading the effect of the Clawback Agreement is said to be that:

" . . . If Discretionary Fees [meaning the annual performance bonuses paid by Ennismore to Fenris in respect of each calendar year (paragraph 5)] were paid to Fenris based on a percentage of a fund performance fee attributable to Ennismore (*sic*) in any year, they could be clawed back by Ennismore from Fenris based on the same percentage of the net investment loss suffered by the Ennismore managed fund (if attributable to the investment advice provided by Fenris)."

That, as it seems to me, is not an accurate statement of the effect of the Clawback Agreement. First, the relevant percentage was not the percentage of the fund performance fee attributable to Ennismore (whatever that may mean): it was the percentage of the performance fee earned by Ennismore, as Investment Manager of the Funds, which was applied in determining the discretionary fees payable to Fenris out of which monies subject to clawback were retained. Second, the basis of clawback was not "the same percentage of the net investment loss suffered by the Ennismore managed fund": it was the same percentage of the reduction of the performance fee earned by Ennismore, as Investment Manager of the Funds, attributable to the net investment losses suffered by the funds for which Fenris was responsible.

42. A more accurate statement of the true effect of the Clawback Agreement is that set out in paragraph 8 (c) of the Defence dated 20 April 2009:

" . . . on a proper construction of the Clawback Agreement Ennismore was only entitled to clawback those Discretionary Fees which were paid subject to

clawback in circumstances where the investment advice given by Fenris resulted in a reduction of the performance fee earned by Ennismore.”

In paragraph 8(b) of its Defence, Fenris denied that “Discretionary Fees or bonuses could be clawed back by Ennismore on the basis of net investments losses suffered by the relevant Ennismore managed fund”. It was correct to do so. A claim to clawback did not arise under the Clawback Agreement whenever net investment losses were suffered by one of the Funds (ESCF, EVF and OEIC) of which Ennismore was Investment Manager. Nor, in circumstances where a claim to clawback did arise, was that claim based on the net investment losses suffered by one of those Funds. For reasons which I have explained earlier in this judgment, discretionary fees or bonuses could be clawed back in circumstances where (i) there had been a shortfall relative to benchmark in the performance of the Fenris portfolios and (ii) there was a reduction in the performance fee earned by Ennismore as Investment Manager of those Funds attributable to the shortfall in the performance of the Fenris portfolios.

43. At paragraphs 17 and 18 of the Statement of Claim it was asserted on behalf of Ennismore that:

“17 In 2007, ESCF and OEIC suffered significant investment losses due to the investment advice of Fenris/AVP in the sum of £12,580,000 and therefore, the amount which Ennismore was entitled to clawback was £1,258,000 (representing 50% of the 20% of the negative return suffered by Ennismore). Fenris/AVP subsequently agreed to Ennismore’s entitlement to clawback all of this sum in accordance with the Clawback Agreement as supplemented by the Supplemental Agreement”

18. In 2008, ESCF and OEIC suffered significant net losses of which £31,007,000 was attributable to the investment advice of Fenris/AVP. Accordingly £2,962,000 (50% of the 20% negative return less Fenris’ management fee) was due to be paid by Fenris”.

It can be seen, first, that the amounts which Ennismore claimed to be entitled to clawback in respect of the years 2007 and 2008 were 10% (50% of 20%) of “the investment losses [or, in the case of 2008, ‘the net losses’] due or attributable to the investment advice of Fenris/AVP”; and, second, that it is said that, in respect of the losses suffered in 2007 (but not in respect of those suffered in 2008), “Fenris/AVP subsequently agreed to Ennismore’s entitlement to clawback all of this sum [£1,258,000] in accordance with the Clawback Agreement as supplemented by the Supplemental Agreement”.

44. For the reasons already explained, the claims made in the first sentence of paragraph 17 and in paragraph 18 of the Statement of Claim are based on a misunderstanding of the effect of the Clawback Agreement. The entitlement to clawback is in respect of the relevant percentage of the reduction in the performance fee earned by Ennismore attributable to any net investment losses suffered by the Fenris portfolios. As Fenris pointed out at paragraph 19(d)(i) (and repeated at paragraph 20(d)) of its Defence, Ennismore needed to establish that, in respect of each the years 2007 and 2008, the amount of the reduction in the performance fee earned by Ennismore which was attributable to investment losses suffered by the Fenris portfolios - that is to say, the difference between the performance fee that Ennismore did, in fact, earn in respect of each of those years and the amount of the performance fee that it would have earned as Investment Manager of the Funds but for the net investment losses suffered by the funds for which Fenris was responsible - was equal to 20% of the investment losses said to have been suffered by ESCF and OEIC. Ennismore did not plead that; nor did it attempt to establish that.

45. Nevertheless, Ennismore could succeed in its claim to clawback in respect of 2007 – and, in the event, did succeed in its claim to clawback in respect of that year – if it could establish that “subsequently” (that is to say, at some time after 2007) Fenris and/or Mr Vigeland agreed that Ennismore was entitled to clawback £1,258,000 in respect of 2007.

The two principal issues identified by the judge

46. After describing the parties (at paragraphs 1 to 3 of his judgment), the early background (paragraphs 4 and 5), the “General Concept of Clawback” (paragraphs 6 and 7) and Mr Vigeland’s return to Norway (paragraphs 8 and 9) and after setting out the terms of the Clawback Agreement, the judge identified the “two principal issues concerning the Clawback Agreement”. At paragraph 11 of his judgment he said this:

“There are two principal issues concerning the Clawback Agreement. First, there is what has been described as the construction issue. It is contended on behalf of Fenris that, pursuant to the terms of the Clawback Agreement, any clawback is linked and referable to and limited by the reduction in the overall performance fee earned by Ennismore itself in any year. If there is no such reduction in performance fee or, indeed no performance fee earned at all, it is argued, no clawback is payable. On the other hand, it is contended on behalf of Ennismore that clawback is linked to and based upon Mr. Vigeland’s own individual performance (on behalf of Fenris) as a fund manager in managing

his portfolios in accordance with the general principle of clawback and the intention and application of the system. The second main issue, which really falls into two parts, concerns (a) the meaning of the words “attributable to” in the Clawback Agreement, and (b) whether, in light of that meaning, the losses sustained on Mr. Vigeland’s portfolios in the years 2007 and 2008, to which I will refer below, are attributable to Mr. Vigeland/Fenris. . . .”

47. In identifying the first of the two principal issues in those terms, the judge took the view that Fenris was advancing a case that the entitlement to clawback was “linked and referable to and limited by the reduction in the overall performance fee earned by Ennismore itself in any year”. The judge was plainly correct to take that view in the light of the written closing submissions lodged on behalf of Fenris. At paragraph 24(1) of those written submissions it was said that:

“The Defendant’s case is that clawback would occur if the cumulative effect of Fenris’ investment advice on [Ennismore’s] overall performance fee in a calendar year was negative. In other words, Fenris agreed to compensate [Ennismore] for any reduction that Fenris caused in [Ennismore’s] earned performance fee in the same calendar year.”

Having identified, correctly, that that was the case advanced on behalf of Fenris, the judge seems to have taken the view that that case was inconsistent with the case which, as he thought, was advanced on behalf of Ennismore: “that clawback was linked to and based upon Mr Vigeland’s own individual performance as a fund manager in managing his portfolios . . .”. It is not clear that the judge appreciated that the two propositions are not mutually inconsistent. As I have explained earlier in this judgment, upon a true analysis of the Clawback Agreement, it is necessary - in order for an entitlement to clawback to arise - both (i) that there has been a reduction in the performance fee earned by Ennismore as Investment Manager of the Funds, and (ii) that there has been a shortfall relative to benchmark in the performance of the Fenris portfolios. The entitlement to clawback arises in circumstances where the reduction in the performance fee earned by Ennismore is attributable to the shortfall in the performance of the Fenris portfolios.

48. The judge stated his conclusion on the first issue at paragraph 58 of his judgment:

“In my Judgment, having regard to the factors to which I have referred, which I consider reflect the general principles to be derived from the relevant authorities, as applicable to all the particular circumstances of this case, the true meaning and correct interpretation of the Clawback Agreement taken as whole and which, in my view, a reasonable person with knowledge of the circumstances would have understood the parties to have meant and agreed at

the time, is that contended for by Ennismore. I consider that the operation of clawback under the Clawback Agreement was intended, and agreed by the parties to be, and was, based upon and related to the individual performance of Mr. Vigeland, on behalf of Fenris, in the management of the particular portfolios for which he was responsible and the profits or losses on those particular portfolios. It was not, as submitted for Fenris, meant by the parties or agreed by them when entering the agreement, to be based upon, related to or qualified by the performance of Ennismore itself as a whole or specifically its own performance fee, notwithstanding some of the language of the document, and I so hold.”

It will be apparent, from what I have already said, that I agree with the judge that the parties intended that the operation of clawback under the Clawback Agreement was to be related to the individual performance of Mr. Vigeland, on behalf of Fenris, in the management of the portfolios for which he was responsible: in that an entitlement to clawback did not arise unless the performance of the Fenris portfolios fell short of the benchmark. But, if and so far as the judge intended to adopt the proposition advanced on behalf of Ennismore in paragraph 6 of its Statement of Claim – that bonus could be clawed back by Ennismore from Fenris based on the same percentage of the net investment loss suffered by the Ennismore managed Fund - I do not agree with his view. The entitlement, under the Clawback Agreement, was to repayment, out of retained monies subject to clawback, of an amount equal to the reduction of the overall performance fee earned by Ennismore in respect of the Funds, if – but only if - that reduction was attributable to the shortfall in the performance of the Fenris portfolios for which Fenris (or Mr Vigeland) was responsible.

49. The judge stated his conclusion on the second issue (the “Attribution Issue”) at paragraph 60 of his judgment:

“Turning to the issue of the phrase “*attributable to*” as used in the Clawback Agreement, I accept and agree with the broad interpretation of that phrase contended for on behalf of Ennismore. I do not accept that it necessarily implies culpability or negligence. In my view, having regard to the Clawback Agreement as a whole and the interpretation of it on behalf of Ennismore, which I have adopted, the necessary connection between Mr. Vigeland/Fenris and the losses (as the profits) on the portfolios which Mr. Vigeland managed is made out and the losses do fall within the meaning of “*attributable to*” insofar as necessary in these circumstances and for these purposes. I am satisfied that the relevant losses in the years 2007 and 2008 fall to be attributed to Mr. Vigeland/Fenris and that Ennismore have made out their case in that respect.”

I agree with the statements in the first and second sentences of that paragraph. There is no basis upon which to imply concepts of culpability or blame into what is no more

than a causal link. It is important to keep in mind that the relevant question, in the context of the Clawback Agreement, is whether the reduction in the performance fee (if any) is attributable to the net investment losses – that is to say, shortfall relative to benchmark - suffered by the Fenris portfolios. Properly understood, the relevant question is not whether the net investment losses are attributable to the investment advice received from Fenris or Mr Vigeland; although (if that were a relevant question) I would agree with the answer which the judge gave.

The judge's findings of fact

Findings of fact in relation to the year 2007

50. Before turning to the findings of fact which led the judge to the conclusions which he reached on the two “principal” issues of construction and attribution, it is convenient to refer to the findings of fact which he made in relation to the year 2007. These are set out in paragraphs 15, 16 and 41 of his judgment:

“15. The year 2007 was the first year in which there was an overall loss in the portfolios which Mr. Vigeland was managing. His portfolios were down by a total sum of £12,580,000.00. Using the same methodology as was applied and agreed in 2006 (i.e. 50% x 20%, or 10% net) Ennismore calculated that an amount of £1,258,000.00 was to be clawed back in respect of those losses. Mr. Blair, based on what he contended he had agreed with Mr. Vigeland, produced a schedule, setting out the clawback calculations which referred to “*actual agreed clawback applied*”, which shows the clawback to be clawed back against, firstly, the management fee payable in respect of EVF (£519,000.00), secondly, against sums retained in respect of potential clawback in the year 2004 as invested on behalf of Mr. Vigeland through the EBT and, thirdly, a proportion of the shares representing potential clawback in respect of the year 2005 (205.88 shares in the ESCF) (leaving a balance of 7828 shares in the ESCF still held in respect of clawback, the redemption proceeds of which form part of Ennismore’s claim in these proceedings in respect of the 2008 clawback). Ennismore’s position is that the methodology used in respect of the 2007 clawback, as before, had nothing to do with Ennismore’s own performance fee but was arrived at on the basis of Mr. Vigeland’s own individual investment performance, consistent with the way potential clawback had been calculated in previous years and in accordance with the clawback concept as understood by and applied to all the fund managers at Ennismore. Mr. Blair strongly contended that he had agreed the clawback details for the year 2007 with Mr. Vigeland in a telephone conversation on 30th January 2008, subsequent to which he produced the schedule to which I have referred.

16. In his oral evidence Mr. Vigeland vigorously denied that he had agreed to Ennismore’s entitlement to clawback in the sum of £1,258,000.00 in respect of the year 2007 and he denied ever receiving the schedule

produced by Mr. Blair referring to “*actual agreed clawback applied*”. Mr. Blair in fact conceded that the schedule had not been sent to Mr. Vigeland, but he was adamant that Mr. Vigeland had indeed agreed the amount of the clawback with him on the telephone. Mr. Blair and Mr. Vigeland were each extensively cross-examined on whether such agreement was reached between them on 30th January 2008 and there was a clear conflict of evidence between them as to what was discussed, on which I shall comment below.

...

51 The Clawback Agreement did not cover every aspect of the remuneration and clawback which was applicable to Fenris/Mr. Vigeland. The Agreement did not provide for the actual percentages to be applied in determining the retention to be made by way of potential clawback in respect of any future losses on the portfolios managed by Mr. Vigeland/Fenris. It was accepted on behalf of Fenris that the Clawback Agreement did not cater for that and that the parties would have to reach subsequent agreement to fill the absence of such provision in the Clawback Agreement. The parties duly did so by subsequently applying multipliers of 20% and then 50% (net 10%) initially to the investment profits and subsequent to the investment losses in Mr. Vigeland’s/Fenris’ portfolios. This methodology was applied by agreement to the profits on the portfolios managed by Mr. Vigeland/Fenris in the years 2005 and 2006. Ennismore’s case is that pursuant to such supplemental agreement, and consistent with the agreed intent of the Clawback Agreement, it also applied the same actual multipliers to the losses on Mr. Vigeland’s/Fenris’ portfolio in calculating the clawback in respect of 2007. The consequent amount of the clawback was agreed as I have found, between Mr. Blair and Mr. Vigeland in their telephone meeting on 30 January 2008. As I have already mentioned, Mr. Vigeland strongly disputed any such agreement. I have considered Mr. Blair’s contemporaneous hand written note of the meeting, together with the schedule which he produced after the meeting marked “Actual Agreed Clawback Applied” (albeit not sent to Mr. Vigeland) in reliance upon what he contended had been agreed as well as his adamant insistence under vigorous cross-examination that Mr. Vigeland had indeed agreed the figures with him. I have also, of course, considered Mr. Vigeland’s equally adamant insistence in his equally vigorous cross-examination that he had not so agreed, although he had no note or other documentary evidence of the discussion. Having considered all this and my assessment of the witnesses, I found Mr. Blair’s evidence the more convincing and reliable. I will say more about my assessment of the witnesses and their evidence generally later in this judgment and at this stage I will simply say that I preferred and accepted the evidence of Mr. Blair on this factual dispute. In my judgment the calculation and application of the 2007 clawback was indeed agreed between Mr. Blair on behalf of Ennismore on the one hand and Mr. Vigeland on behalf of Fenris on the other in late January 2008.”

51. Given the judge's finding of fact in paragraph 41 of his judgment, Ennismore was entitled to succeed in its claim (made in paragraph 17 of the Statement of Claim) to clawback £1,258,000 in respect of the year 2007 on the basis of the agreement made at the end of January 2008; it did not need to rely on its interpretation of the relevant terms of the Clawback Agreement to establish its entitlement to clawback that sum.
52. But, in any event, as the judge had explained, at paragraph 15 of his judgment, the agreement was that clawback in respect of the year 2007 was to be effected (i) against the management fee payable in respect of EVF (£519,000.00), (ii) against sums retained in respect of potential clawback in the year 2004 and (iii) against 205.88 of the ESCF shares for which Fenris subscribed in May 2006. Those 205.88 shares have already been deducted from the 8,034.1 shares in ESCF for which Fenris subscribed; leaving the balance of 7,828 ESCF shares in the ESCF which is the subject of Ennismore's claim in these proceedings in respect of the 2008 clawback. So, as it seems to me, for one reason or the other, the claim made in paragraph 17 of the Statement of Claim gives rise to no "live" issue before this Court. To put the point another way, the claim to clawback in respect of the year 2007 has already been satisfied from the management fee payable in respect of EVF, from sums retained in respect of potential clawback in the year 2004 and against 205.88 of the ESCF shares for which Fenris subscribed in May 2006. The relief claimed in these proceedings – an order requiring that Fenris procure that (i) the redemption proceeds of the 10,537.27 EVF shares in its name be transferred to Ennismore, (ii) all distributions in respect of the remaining 3,512.42 EVF shares in its name be paid to Ennismore and (iii) that 7,828.22 of the ESCF shares then in its name be transferred to Ennismore – all relates to the claim to clawback in respect of the year 2008, made paragraph 18 of the Statement of Claim. There is no counterclaim in respect of the previous year.

Findings of fact in relation to the year 2008

53. The judge's findings of fact in relation to the year 2008 are set out at paragraphs 17 to 22 of his judgment:
- “17. The year 2008 was a very bad year for the portfolios managed by Mr. Vigeland/Fenris, as it was for other fund managers. Mr. Vigeland's portfolios were down by a total of slightly over £31m. Adopting the same methodology as before, Ennismore calculated the consequential clawback payable by Mr. Vigeland/Fenris in respect of those losses to be £2,962,000.00. According to a schedule produced by Ennismore in

January 2009 the assets subject to this clawback were to be £1,476,000.00 worth of the shares invested in the ESCF from 2005 and £661,000.00 worth of shares in the EVF from 2006, totaling £2,137,000.00, leaving a balance due of £825,000.00 to be carried forward. These figures were updated from the figures in Ennismore's Statement of Claim.

18. In its Defence Fenris pleaded in respect of 2008:

'the Defendant does not admit losses totaling £31,007,000 odd or of any amount, were attributable to the investment advice of Fenris.'

In his cross-examination Mr. Vigeland eventually conceded that some of the total £31m losses were attributable to him but said that it was not possible for him to tell how much from the records produced by Ennismore. He contended that the investment valuations used in arriving at the £31m total losses were based on write-downs, many of which were notional valuations and were not "real" market values, which were imposed on his portfolios by Mr. Oldfield and therefore not attributable to Mr. Vigeland. He also maintained his argument that clawback was anyway only payable if, as a result of investment advice attributable to him, the performance fee earned by Ennismore itself was reduced, and since Ennismore received no performance fee for 2008 there could be no clawback payable. I will consider these contentions later in this judgment.

19. On 2nd January 2009 Mr. Oldfield e-mailed Mr. Vigeland, with a copy to Mr. Blair, in which he said inter alia:

'I want to try and get year end stuff sorted out as soon as possible and therefore would be grateful if you could arrange for your clawback amounts [in respect of 2008] to be paid so I, in turn, can pay Fund Managers' bonuses. I know you've been speaking to Andy [Mr. Blair] re a tax issue you have. This sounds like you've been unfortunate in the structure you set up and I hope you're able to resolve it satisfactorily. I must stress, however, we cannot allow this to delay the prompt repayment of all clawback amounts which the E'more remuneration system is so dependent on.'

Mr. Vigeland was cross-examined about this email and he denied that it amounted to a clear indication that there would be a clawback payable. He argued that since the actual figures for 2008 were not available to Mr. Oldfield at that time, he could not assume that clawback would be payable. On 5th January 2009 Mr. Vigeland responded to Mr. Oldfield's email of 2nd January 2009 and simply said:

'I am meeting with a new tax lawyer today to get a second opinion on the tax issue. I will get back to you as soon as possible after that.'

20. On 13th January 2009 there was a meeting between Mr. Oldfield and Mr. Blair on the one hand and Mr. Vigeland on the other hand. Mr. Blair's note of the meeting states:

"tax regime – interpretation has changed < 66% ownership of Fenris – applies personal taxation – tax was due when funds paid

to Fenris. NOK has weaken so he has a gain there – loss from investment no deductible due to Cayman entities? Claim based on underline investment – Arne had not shown the clawback letter to his tax advisors.”

Mr. Oldfield’s evidence was that at this meeting Mr. Vigeland stated:

“that he would be unable to pay the amount due under clawback because of a personal tax liability that he would have on the original amounts paid to Fenris. When it was re-affirmed to him that Fenris was liable for the gross amount he stated that he could not and would not pay. At that point I reminded him of the Clawback Agreement and it appeared clear that he had forgotten the existence of the signed document. I suggested that he re-read the Clawback Agreement and then we would discuss it further. Mr. Blair gave him a copy of the Clawback Agreement immediately after the meeting and rather than discussing it [Mr. Vigeland] returned to Norway. At no point in this meeting did he question the amount that was due under clawback or suggest that clawback did not apply”.

On cross-examination Mr. Oldfield emphatically confirmed his recollection of the meeting as set out in his evidence above and Mr. Blair also confirmed the gist of the meeting, although he was not personally present when, according to Mr. Oldfield, Mr. Vigeland stated that he could not and would not pay the amount due under clawback. Mr. Vigeland, in his oral evidence denied the accuracy of Mr. Blair’s note of the meeting and also emphatically denied that he had said that he could not and would not pay the amount due under the clawback or said anything similar. There is therefore again a clear conflict of evidence, this time principally between Mr. Oldfield and Mr. Vigeland as to what was said at the meeting on 13th January 2009.

21. On 15th January 2009 Fenris, through Mr. Vigeland, wrote to Citco, the administrator of the EVF, asking it to proceed with redemption of the shares it held (originally invested subject to clawback) and to rescind its “self-imposed restriction to sell, redeem, transfer and assign” its investment. The letter also stated that the underlying agreement between Fenris and Ennismore no longer applied. Ennismore had not given any consent to Citco to proceed with the redemption of such shares.
22. By letter dated 30th January 2009 Fenris, through Mr. Vigeland, wrote to Ennismore disputing the financial claims of Ennismore against Fenris in respect of clawback. The letter specifically stated:

‘the value of the Shares will be subject to clawback at a rate of 55% of the reduction in performance fee earned by the Company [Ennismore] attributable to any net investment losses’. As you are aware, EFM [Ennismore] did not earn any performance fee in 2008, and that lack of performance fee was irrespective of the net investment loss attributable to the investment advice by Fenris. The year 2008 was a poor year for many of EFM’s Fund Managers, and the absence of performance fee for EFM would

obviously have been the result with or without the investment advice of Fenris. The reduction in the performance fee actually earned by EFM in 2008 is therefore nil. [my emphasis]”

Findings as to the parties’ understanding and intentions

54. In reaching his conclusion on the two “principal” issues, the judge relied on findings as to the parties’ understanding and intentions which he had made in earlier paragraphs of his judgment. Those findings may, I think, fairly be summarized as follows:

(1) He found (at paragraph 6 of his judgment) that a system of “clawback” had been devised and developed by Mr Oldfield and his co-founder of Ennismore, Mr Schöningh, “after much thought and discussion” and that it was implemented “right from the start of the company”. He said this:

“The intention was that fund managers would be and were remunerated largely by way of a discretionary bonus based on the performance of the specific portfolios which they were individually managing and a portion of such discretionary performance-related bonus would be and was held back and invested on the fund manager’s behalf for a period of three years during which it was subject to being clawed back by Ennismore in the event of and in proportion to any losses in the fund manager’s portfolios during that period.”

(2) He found (on the evidence given by Mr. Oldfield, Mr. Blair and Mr. Leo Perry) that all of the fund managers at Ennismore understood and were familiar with the clawback system, its purpose and how it worked and was applied. As he put it, at paragraph 34 of his judgment:

“The evidence of the Ennismore witnesses satisfied me that there was no doubt that all fund managers at Ennismore, including Mr. Vigeland, were well-aware of and familiar with the system and, in particular, that they clearly understood that it was based on and calculated in each case having regard to the individual performance of the specific portfolios managed by the fund manager concerned.”

And, at paragraph 35:

“All the fund managers understood that the intention of the clawback system was to discourage a short-term approach to investment by fund managers by disincentivising them in that respect by entitling Ennismore to clawback a portion of an individual’s discretionary bonus payments in the event of future losses in the portfolios being managed by that individual. This was well known and understood by each fund manager, including Mr. Vigeland. I found the evidence of Mr. Oldfield, Mr. Blair and Mr. Perry convincing and persuasive and I was left in little or no doubt that Mr. Vigeland was entirely familiar with the commercial purpose of the intention of the clawback system and how it operated, that it related to, and in each case, was based upon the individual investment performance of individual fund managers’ portfolios

and not upon the overall performance or performance fee of Ennismore itself or the performance of the whole “team” of fund managers.”

- (3) He found that the genesis of the Clawback Agreement was Mr. Vigeland’s previous employment by Ennismore as a fund manager, operating in the context of and being remunerated on the basis of the clawback system; that it was his move to Norway which gave rise to the need for the Clawback Agreement; but that there was nothing to suggest that the parties intended to depart from the well-established clawback system simply because Mr. Vigeland happened to have moved to Norway and then carried out his portfolio management functions through an offshore company as a consultant instead of as an employee for reasons unrelated to the terms and conditions which had always applied to him as a fund manager at Ennismore. In the judge’s view (expressed at paragraph 37):

“When the parties recorded the clawback arrangements in the Clawback Agreement there was, in my assessment, no intention by the parties to change the clawback system as it applied to all fund managers, including, for several years, to Mr. Vigeland”

And (at paragraph 38):

“. . . the commercial purpose of the Clawback Agreement was simply to record in writing, what had not previously been so recorded, namely how the well-established clawback system would continue to operate and apply with respect to Mr. Vigeland’s own portfolio management for Ennismore, notwithstanding, he was now operating through Fenris”.

- (4) Having found (at paragraph 41 of his judgment) that the calculation and application of the 2007 clawback had been agreed between Mr. Blair on behalf of Ennismore on the one hand and Mr. Vigeland on behalf of Fenris on the other in the course of a telephone conversation on 30 January 2008, he went on to say this (at paragraph 42):

“The significance of the agreement, as I have found it, of the 2007 clawback is, in my opinion, considerable, not as an aid to the interpretation of the Clawback Agreement, which it is not, but as evidence of there being a supplemental agreement filling the lacuna in the Clawback Agreement. It is also entirely consistent with the agreed application in respect of the previous years, 2005 and 2006 of the 20% x 50% (or net 10%) multipliers and with what Ennismore subsequently relied upon, pursuant to such supplemental agreement, in respect of the year 2008.”

- (5) He found (at paragraph 44) that Mr. Oldfield, in an e-mail sent to Mr. Vigeland on 2 January 2009, had made it clear that a substantial clawback was payable by Mr. Vigeland/Fenris in respect of 2008; and that that must have been obvious to Mr. Vigeland. He said this:

“The evidence was that fund managers were provided with the performance details of their portfolios on a monthly basis but could access them themselves at any time. Mr. Vigeland clearly had access to the detailed state of his portfolios on a regular and frequent basis and must have been intimately aware of the details of the very significant losses on his portfolios during 2008, which would inevitably result in a substantial clawback claim as Mr. Oldfield intimated to him as early as 2nd January 2009. . . . He said nothing at all to object in principle to the clawback claim on the ground that, as he now contends, clawback was linked to reduction of Ennismore’s own performance fee (or that the losses were not attributable to him). . . . He did not say anything at all to the effect that the figures were not available but that anyway there could be no clawback because of the terms of the Clawback Agreement or because Ennismore had no performance fee or because the losses were not attributable to him. I agree with and accept the submission of Leading Counsel for Ennismore that was a clear indication of Mr. Vigeland’s true state of mind at that time, namely that he understood and accepted that there would be a clawback in respect of the significant losses on his portfolios on the same basis as agreed previously, namely based upon the results in his portfolios . . .”

The judge’s reasoning

55. The judge observed (at paragraph 23 of his judgment) that:

“The parties substantially agreed that, as I have already mentioned, the first of the two principal issues for determination in this case is the true meaning and construction of the Clawback Agreement and in particular whether, as a matter of interpretation, clawback was based upon and limited to the amount of reduction in the overall performance fee earned by Ennismore itself, as contended by Mr. Vigeland and Fenris, and not based upon the individual investment performance of the portfolios managed by Mr. Vigeland, as contended by Ennismore. . . .”

He explained (at paragraph 24) that Fenris relied upon two passages in the Clawback Agreement in support of its interpretation that clawback was based on the reduction in Ennismore’s own performance fee attributable to portfolio losses: first, and principally, the sentence, in Section C (“Amounts subject to Clawback in respect of 2005”) that

“The value of the Shares will be subject to clawback at a rate of 55% of the reduction in the performance fee earned by the Company attributable to any net investment losses”,

placing emphasis on the words which he underlined; and, second, on the earlier passage, in Section B (“Principles of Clawback”), where there is reference to discretionary fees or bonuses becoming

“. . . payable to the Company based upon 30% of the reduction in the performance fee earned by the Company attributable to any net investment losses”,

again placing emphasis on the words which he underlined. He noted that it had been submitted on behalf of Fenris that:

“. . . those passages made it clear that clawback was to be based on any reduction in Ennismore’s own performance fee, insofar as attributable to investment losses on the portfolios managed by Mr. Vigeland.”

56. At paragraph 25 of his judgment the judge reminded himself of the observations of Lord Clarke of Stone-cum-Ebony in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [14], [21]:

“[21] For the most part, the correct approach to construction of the Bonds, as in the case of any contract, was not in dispute . . . those cases show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. . . . The relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”

“[21] The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the Court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the Court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other.”

“[26] . . . In *Gan Insurance Ltd v Tai Ping Insurance Co Ltd* [2001] CLC 103, Mance LJ said:

’13. . . Speaking of a poorly drafted and ambiguous contract, Lord Bridge [in *Mitsui Construction Co Ltd v A-G of Hong Kong* (1986) 33 BLR 14] said that poor drafting itself provides:

‘no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language that they have used interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing the court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis’.”

57. The judge turned, at paragraphs 26 and 27 of his judgment, to the submissions advanced on behalf of Ennismore. Those submissions included the need to consider the Clawback Agreement as a whole (rather than to rely on individual passages of that agreement in isolation). Adopting that approach, it was said to be plain that clawback was based upon the losses in the individual portfolios managed by Mr. Vigeland/Fenris “as had always been the case under the clawback concept”; and that the parties had not intended there to be any link to or limitation imposed on clawback by reference to any reduction in the performance fee earned by Ennismore itself. It was submitted that “any such link or limitation would have been entirely contrary to the whole purpose of the clawback concept as explained by Mr. Oldfield and Mr. Blair, on which they were not challenged in cross examination and not essentially contradicted either by Mr. Vigeland”. It was said that both Mr Oldfield and Mr Blair had confirmed the nature and individual performance-related purpose of clawback; and had explained clearly how Fenris’ interpretation of the agreement would contravene the entire intent of the clawback system and would make no commercial sense. In particular reference was made to the second sentence in Section A of the Clawback Agreement (“Background”):

‘It is agreed that part of such fees may be paid subject to ‘clawback’ against a share of any net investment losses attributable to the investment advice received by the Company from Fenris or AVP . . . in the subsequent three years’

and also to the first two sentences of Section B (“*Principles of Clawback*”):

“Clawback operates on a first in- first out basis such that any clawback claims are made against assets subject to clawback received in respect of earlier years first. The percentage rate of net investment losses at which clawback is applied will match the percentage share of net investment profits upon which the assets under clawback were determined.”

The judge went on to observe that it was also contended that the following sentence, commencing ‘*E.g. if . . .*’, was simply an example of a discretionary fee (or bonus) and was clearly not a mandatory provision. It was argued that it was merely an illustration of the symmetry between the calculation of bonuses or profits and the calculation of amounts due payable under clawback or losses. At paragraph 27 he said this:

“It was accordingly submitted for Ennismore that it is clear from considering the overall agreement that the operation of clawback, as it always had been, was concerned only with the performance of the individual portfolios managed by Mr. Vigeland/Fenris and that there was not intended by the parties to be

any link to or limitation imposed on clawback by reference to any reduction in the performance fee earned by Ennismore itself. It was argued that any such link or limitation would have been entirely contrary to the whole purpose of the clawback concept as explained by Mr. Oldfield and Mr. Blair, on which they were not challenged in cross examination and not essentially contradicted either by Mr. Vigeland. They both confirmed the nature and individual performance-related purpose of clawback and explained clearly how Fenris' interpretation of the agreement would contravene the entire intent of the clawback system and would make no commercial sense."

58. At paragraph 28 of his judgment the judge reminded himself that it was submitted on behalf of Fenris that, on a true construction of the Clawback Agreement, it did not operate if Ennismore was unable to show any "reduction in the performance fee due to [Ennismore] attributable to Fenris' investment advice"; and that no such reduction in performance fee for this purpose had been alleged or established. He said this:

"The position of Fenris/Mr. Vigeland is that on a true construction of the Clawback Agreement it does not operate if Ennismore is unable to show any "reduction in the performance fee due to EFM [Ennismore] attributable to Fenris' investment advice" and that no such reduction in performance fee for this purpose had been alleged or established by Ennismore. In fact, in 2008 Ennismore earned no performance fee at all and it was contended that therefore no clawback was payable in respect of the losses that year on the express terms of the Clawback Agreement."

59. At paragraphs 29 and 30 of his judgment the judge referred to the well known passage in the judgment of Lord Hoffmann in *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1WLR 896 – setting out the principles by which contractual documents are to be construed – and to observations of Lord Wilberforce in *Reardon Smith v Yngvar Hansen-Tangen* [1976] 1WLR 989 at pages 995 and 996. And, at paragraphs 31 and 32, he referred to the observations of Lord Reid in *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners* [1970] AC 583 at 603 and in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, at page 552; which had been cited to him in support of the proposition that in construing the Clawback Agreement it was not legitimate to consider evidence of what was said or done by the parties after the date of the Agreement.

60. At paragraphs 33 to 45 of his judgment ("Analysis and Comment") the judge made the findings of fact which I have already set out earlier in this judgment. Those findings led him to the conclusion that the submissions advanced on behalf of

Ennismore, in relation to what he had described as the Construction Issue, were to be preferred.

61. At paragraphs 46 to 53 of his judgment (under the heading “The Attribution Issue”) the judge addressed what he had identified, at paragraph 11, as the second main issue: that is to say “(a) the meaning of the words “attributable to” in the Clawback Agreement, and (b) whether, in light of that meaning, the losses sustained on Mr. Vigeland’s portfolios in the years 2007 and 2008, to which I will refer below, are attributable to Mr. Vigeland/Fenris. . . .”. He explained (at paragraph 46) that it had been submitted of behalf of Fenris that “attributable to not only meant caused by but that an element of fault or blame is to be implied”; and that it was said that “relevant losses were only attributable to Mr. Vigeland’s/Fenris’ investment advice if that advice was clearly wrong or bad or negligent, but not otherwise and that there was no evidence to support such a finding”. On the other hand, as he explained, Ennismore relied on observations in the judgment of the Court of Appeal of Singapore in *Ho Soo Fong and Another v Standard Chartered Bank* [2007] 2 SLR 181; in which that Court had interpreted the meaning of the words “attributable to” as used in a statute (which contained reference to “pecuniary loss that is attributable to an act, refusal or failure referred to in paragraph . . .”) and in the course of which reference had been made to *Lee v Ross (No.2)* [2003] NSW SC 507 in which the Australian Court had had to consider the meaning of “attributable to” in a similar statute. All that was required, it was submitted, was “a contributory causal connection”: fault or blame was not a necessary factor.

62. The judge pointed out that the phrase “net investment losses attributable to the investment advice received . . . from Fenris [or Mr. Vigeland]”, placing emphasis on the words which he underlined, appeared in the Clawback Agreement only in the second sentence of Section A (“Background”); and that, where the phrase “net investment losses” appeared in the second sentence of the first paragraph in Section B (“Principles of Clawback”) – and, he might have said, in the third sentence of that paragraph – and in the third sentence of the first paragraph of Section C (“Amounts subject to clawback in respect of 2005”) it was not limited or qualified by the words “attributable to investment advice”. Further, what he described as “the mirror

reference to ‘net investment profits’” was not so qualified. He concluded, accepting the submissions advanced on behalf of Ennismore that:

“ . . . when the whole Clawback Agreement is considered notions of blame for losses, or credit for profits, are inappropriate and I do not consider that there is any inference to that effect to be drawn from the language of the Agreement.”

It followed that, in the judge’s view, the only issue in the “Attribution” context was whether the investments in question were part of the Fenris portfolios and whether their performance gave rise to profit or loss.

63. At paragraph 49 of his judgment the judge addressed that issue: whether, in light of the meaning of “attributable to” which he had accepted, Ennismore had established that there was the necessary connection between the £31million losses on the Fenris portfolios in 2008 and the investment advice of Mr. Vigeland. He pointed out that there was no doubt that the shares concerned were in Mr. Vigeland’s/Fenris’ portfolios; but, explained that Fenris had argued that the losses were not attributable to advice given by Mr Vigeland. He said this:

“Initially he [Mr Vigeland] appeared to contend that as a result of the generally difficult situation in the markets in 2008, Mr. Oldfield, as Chief Investment Officer, devised what was referred to as ‘the democratic’ process with regard to investment decisions generally. That involved regular meetings of all of the fund managers (with Mr. Vigeland usually participating by conference call) at which the investments in all portfolios were generally discussed by the whole ‘team’. As a result, according to Mr. Vigeland, investment decisions with regard to his portfolios were often no longer his own but effectively made by the ‘team’. However, this contention based on the ‘democratic process’ was not put to Ennismore’s witnesses and Mr. Vigeland’s emphasis changed during the course of the trial. His argument that investments in his portfolios were subject to collective and democratic decisions appeared to be dropped and instead it was replaced with the contrary proposition that it was Mr. Oldfield himself who significantly interfered with and gave instructions to Mr. Vigeland as to how investments in his portfolios were to be dealt with and how they were to be valued, such that the consequences were not to be attributed to Mr. Vigeland.”

The judge observed that it had been pointed out on behalf of Ennismore that the latter contention had not been pleaded by Fenris, nor foreshadowed in Mr. Vigeland’s witness statement; but, as he said, it had been given considerable emphasis by Mr. Vigeland in his evidence and by counsel on behalf of Fenris in his closing submissions. Both Mr Vigeland and counsel, he said, had sought to support this contention from the documents produced by Ennismore.

64. After reviewing the evidence given by Mr Vigeland and that given by Mr Oldfield on this issue, the judge concluded (at paragraph 52 of his judgment) that he was not satisfied Mr. Oldfield had done more than advise as Chief Investment Officer; nor that the portfolios did not remain in any relevant sense under the management of Mr. Vigeland. He held that:

“As far as the share re-valuations were concerned, no persuasive reasons were put forward to satisfy me that they were unfair, inappropriate or unreasonable or that they were not fully discussed with Mr. Vigeland as fund manager.”

The grounds of appeal

65. Fenris appeals from the order made by the judge on 16 February 2012 on the grounds - set out in the Memorandum of Grounds of Appeal dated 16 May 2012 filed on its behalf - that the judge erred in his construction of two expressions in the relevant provision of the Clawback Agreement: (i) the expression “reduction in performance fee earned by the Company” and (ii) the expression “losses attributable to the investment advice”. Further, it is said, the judge should have held that Ennismore had failed to establish the losses attributable to advice given by Mr Vigeland in relation to portfolios for which Fenris was the investment adviser. Those grounds were developed in the skeleton argument filed on its behalf and in oral submissions.

66. It is submitted on behalf of Fenris that the judge gave no weight to the expression “reduction in the performance fees earned by the Company”; and that, in failing to do so, he fell into error. I accept those submissions. Fenris submitted that the reason the judge fell into error was because he misunderstood the issue which he had to decide. The judge was wrong to think that he needed to decide, as a matter of construction, between two propositions which he treated as inconsistent: whether (i) the clawback was limited to “*the amount of the reduction in the overall performance fees earned by Ennismore itself...*” or (ii) the clawback extended to a sum “*based upon the individual investment performance of the portfolio managed by Mr. Vigeland as contended by Ennismore*”. That, it was said, was not the issue which he had to decide. Fenris accepted that clawback was based on its own investment performance. The two propositions were not inconsistent. The judge had to decide whether entitlement to clawback arose only in circumstances where Ennismore had suffered a reduction in its own overall performance fees which was attributable to a shortfall in the performance of the Fenris portfolios. The operation of clawback did not require that Fenris should

compensate Ennismore in circumstances where Ennismore had suffered no loss attributable to a shortfall in the performance of the Fenris portfolios. The issue for determination was whether the clawback was calculated as a percentage of the “*reduction in performance fees earned by the Company*” attributable to the adverse effects of the investment advice given by the fund manager. It was never in issue that the clawback was based on the fund manager’s performance.

67. The substantial complaint, as it seems to me, is not that the judge erred in his construction of the expression “reduction in the performance fee earned by the Company”; but that he failed to give that expression any meaning or weight at all. It is true that he referred, at paragraph 24 of his judgment, to the submission made on behalf of Fenris that sentences B(1)(iii) and C(1)(iii) make it clear that clawback was to be based on the reduction in Ennismore’s own performance fee insofar as attributable to any net investment losses on the Fenris portfolios. But he did not address that submission, save to say (in paragraph 26) that Ennismore submitted that “the whole of the Clawback Agreement should be considered rather than relying on individual passages of the agreement in isolation”.
68. In particular, the judge failed to address the problem that – if clawback was not to be measured by applying the relevant percentage to reduction in performance fee - there was nothing in the Clawback Agreement which explained how the amount to be clawed back should be determined. He was forced to conclude that there was a lacuna which the parties were left to fill by subsequent agreement. Properly construed, there is no such lacuna in the Clawback Agreement. It is not correct, in my view, to dismiss the Clawback Agreement as a poorly drafted document. And, properly construed, it serves the sensible commercial purpose of providing compensation to Ennismore in respect of losses which it suffers (by way of reduction in its performance fee) in consequence of the under-performance of the Fenris portfolios. The judge gave no explanation why he thought that the parties should have intended to impose an obligation on Fenris to pay monies to Ennismore in circumstances where Ennismore had not suffered any loss in consequence of the under-performance of the Fenris portfolios. But that is the effect of the construction of the Clawback Agreement which Ennismore advanced and the judge accepted.

69. It was submitted on behalf of Fenris in this Court that it is important to appreciate that, prior to 2008, there had been no relevant course of dealing, which would elucidate whether clawback was due in circumstances when Ennismore had not suffered any reduction in its own performance fee:

“ Not only had there been virtually no actual clawback at all in the history of the company (only 2 instances over 6 years for 7 or more fund managers) but Ennismore had never ended up with a cataclysmic event which caused most fund managers to earn nothing. That had never occurred before 2008. No practice existed which would assist on any of the questions of construction”.

I accept that submission as correct. It seems to me fatal to the judge’s conclusion that all the fund managers, including Mr Vigeland, understood the principles of clawback: no-one, on the evidence, had ever had to address the question whether Ennismore could exercise the right to clawback in circumstances in which it had suffered no loss attributable to the under-performance of the portfolios for which an individual fund manager was responsible. As I have explained, earlier in this judgment, it could be expected that, in a market that was generally rising, the under-performance of the portfolios for which one of the individual fund managers was responsible would lead to a right to clawback which was equal both to the relevant percentage of the net investment losses and to the relevant percentage of the reduction in Ennismore’s performance fee: because the two amounts would be the same. So the question what should happen if the two amounts were not the same would not arise – and had not arisen - in practice.

70. It was submitted on behalf of Fenris that the use in the Clawback Agreement of the phrase “reduction in performance fees earned by the Company” – in both sentences B(1)(iii) and C(1)(iii) required Ennismore to demonstrate that the shortfall in the year 2008, relative to benchmark, in the performance of the Fenris portfolios (if established) had reduced the performance fees earned by Ennismore as Investment Manager of the Funds before it could claim to be entitled to clawback the funds retained. I accept that submission as correct. I accept, also, the submission that Ennismore led no evidence to show that there had been such a reduction.

71. For those reasons I am satisfied that the judge was wrong to make the order that he did. He ought to have concluded that Ennismore had misunderstood the effect of the Clawback Agreement; and that, basing its claim on that misunderstanding, it had failed to plead or to establish either (i) that a right to clawback against Fenris arose in

respect of the year 2008 or (ii) that the amount that could be clawed back in the exercise of that right (if any) was the amount claimed in these proceedings.

Conclusion

72. I would allow this appeal and set aside the order made by the judge on 12 February 2012.

Elliott Mottley Justice of Appeal

73. I agree.

Abdulai Conteh, Justice of Appeal

74. I agree with the judgment of Chadwick P which I have had the benefit of reading in draft, and for the reasons stated therein for setting aside the learned judge's orders. The principal and decisive issue for determination was the meaning and effect of the parties' Claw Back Agreement. Parole evidence which the judge entertained in the circumstances for him to arrive at his conclusions as to which of the parties' witnesses he believed or preferred, was not determinative of the meaning and effect of that agreement. Its meaning was unambiguous; the only issue was to which scenario brought the right to claw back into play. Chadwick P correctly analysed the events contemplated by the agreement, and I agree that the judge was not correct to have made it applicable to the years that he did. I accordingly agree that the appeal should be allowed.