7-02-12

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD: 65 OF 2009

BETWEEN:	**ENNISMORE FUND MANAGEMENT LIMITED**	**Plaintiff**
AND:	**FENRIS CONSULTING LIMITED**	**Defendant**

Coram: The Hon. Mr. Justice Angus Foster

Appearances: Mr. Mark Cunningham, QC instructed by Mr. Rupert Coe of Appleby for the Plaintiff

Mr. Thomas Lowe, QC instructed by Mr. Michael Makridakis of Ogier for the Defendant

Heard: 5th to 9th December 2011 inclusive

JUDGMENT

This is a claim by the Plaintiff, an investment management company, to the redemption proceeds of certain shares which were held by the Defendant, whose director was one of its fund managers, which the Plaintiff contends were subject to its entitlement to claw them back in respect of losses suffered in the portfolios managed by the Defendant's director in 2007 and 2008 pursuant to certain agreements. The Defendant rejects the Plaintiff's claim for various reasons.

The Parties

1. The Plaintiff ("Ennismore") is a company incorporated in England, which provides investment management services to investment funds from its offices in London. During most of the relevant period Ennismore managed three investment funds, namely:

(i) the Ennismore European Smaller Companies Fund ("the OEIC"), an Irish mutual fund; (ii) the Ennismore Smaller Companies Fund, ("the ESCF"), a Cayman Islands fund; and, with effect from late 2006, (iii) the Ennismore Vigeland Fund ("the EVF"), also a Cayman Islands fund.

2. Ennismore was founded by Mr. Gerhard Schöningh and Mr. Geoff Oldfield. Mr. Schöningh retired from the business in 2006, prior to the time the dispute in this case arose, and during the relevant period Mr. Oldfield was the Chief Executive Officer, the Chief Investment Officer and one of the two directors of Ennismore. He was closely involved in the events which are the subject matter of these proceedings. The only other director of Ennismore is, and was during most of the relevant period, Mr. Andrew Blair, the Chief Operating Officer, who was also closely involved in the matters in issue in this action. Both Mr. Oldfield and Mr. Blair submitted witness statements as their evidence in chief and they were both extensively cross-examined at the trial. For completeness, I should also mention Mr. Leo Perry, one of the fund managers at Ennismore, who also submitted a witness statement as his evidence in chief and was briefly cross-examined. The uncontroversial evidence was that during the relevant period Ennismore employed in the region of 20 to 25 people, of whom about 7 were fund managers, and at that time the company had approximately £170m of assets under management.

3. The Defendant ("Fenris") is a company incorporated in Belize in 2004. It was established by Mr. Arne Vigeland ("Mr. Vigeland") who is and always has been its sole director. Mr. Vigeland's evidence was that he was and is not the ultimate beneficial owner of Fenris, although he was extensively challenged on that in his cross-examination, to which I shall refer later. Mr. Vigeland also submitted a witness statement as his evidence in chief, on which he too was cross-examined at length.

Early background

4. Mr. Vigeland first became employed by Ennismore in 2001 as an analyst. He subsequently became more and more involved in portfolio management and by 2003 had

become one of the fund managers responsible for managing his own portfolios of investments within the OEIC and ESCF funds. I should mention that in the evidence various terms were used for fund managers. They were also referred to as investment managers and as portfolio managers but it was eventually confirmed in the course of the oral evidence that they were usually known as fund managers and I shall use that designation. As a fund manager Mr Vigeland was eligible for a discretionary annual bonus based on the investment performance of the portfolios which he was managing, as determined, initially by Mr. Schöningh and Mr. Oldfield, and latterly by Mr Oldfield and Mr Blair.

5. In respect of the year 2003 Mr. Vigeland, in addition to his annual salary, was awarded a discretionary bonus of £600,000.00 in light of the performance of the portfolios which he was responsible for as a fund manager. Pursuant to the clawback concept, as explained below, 50% of the bonus was subject to being clawed back by Ennismore, in respect of any future losses in Mr. Vigeland's portfolios and that proportion of the bonus was invested on Mr. Vigeland's behalf through the Ennismore Employee Benefit Trust ("the EBT") in the funds managed by Ennismore to be available to be clawed back if relevant. In respect of 2004 Mr. Vigeland was awarded a discretionary bonus of £786,000.00, again based upon his performance as a fund manager that year, of which 50% was subject to being clawed back in proportion to any losses in his portfolios over the next 3 years. The amount subject to such clawback was again invested on his behalf through the EBT in funds managed by Ennismore. There was no significant dispute between the parties in relation to these bonus and clawback figures in respect of the years 2003 and 2004 and the investment through the EBT on behalf of Mr. Vigeland of the portion of the bonus which was subject to potential future clawback.

The General Concept of Clawback

6. The unchallenged evidence of Mr. Oldfield was that he and Mr. Schöningh, the co-founders of Ennismore, developed the system of clawback after much thought and discussion and it was implemented right from the start of the company. 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. Mr. Oldfield said in his evidence in chief that *"having a meritocratic remuneration system based on individual performance with accountability for under performance (i.e. losing investors' money) was absolutely key to us..... The idea was to introduce a system which would install confidence in investors by demonstrating that the Funds' investments are not based on short term profits, but on the idea of creating sustainable increase in capital based on responsible investment decisions. I believed at the time, and still believe today, that one of the best methods to ensure that investments are taken responsibly is by linking an investment manager's performance to the profits he is paid in the long term. I believe that an investment manager is more likely to make sustainable profit for an investor if payment of his bonus is linked to the long term results he has achieved."* Mr. Oldfield went on to say that *"the system of clawback has the advantage that it focuses the mind of the investment manager when making investment decisions.....The point is that their* [the investment mangers'] *remuneration is based on their individual performance and not that of the team. Our culture is, and always has been, that investment is best done by individuals. Consequently, our reward system, with individual rewards and responsibilities, is built from that key principle.* Mr. Oldfield also said *"the clawback principle was specifically communicated to investors as one of the Funds' key features."* And he made reference by way of example to a letter to clients in July 2005 in which the system of clawback was explained in some detail. He said *"this letter makes it clear that the system is based on the performance of the individual portfolio manager rather than the collective performance of the team."*

7. Mr. Blair also explained the purpose and operation of the Clawback System. He said in his evidence in chief:

"At no point was it ever intended that the level of Bonuses to be received or the level of the clawback to be applied be calculated on the cumulative performances of all the portfolio managers in a fund…… it would also have completely defeated the commercial purpose of the clawback principle as promoted to investors if clawback were to be applied on the basis of the cumulative performance of all portfolio managers. The idea to increase each individual portfolio manager's awareness of the implications of his or her own investment decisions and to specifically ensure that the portfolio manager would not make high risk investment decisions which may generate a significant unrealized profit in one period, resulted in that portfolio manager receiving significant Bonuses, but which could then result in losses in subsequent periods. This effect would be significantly undermined if the portfolio manager received fees based on individual profits but was only subject to clawback based on the cumulative performance of the portfolio mangers. The remuneration structure was entirely based on individual performance which meant that a portfolio manager could not rely on the fact that, overall, the Fund may make a positive return when, individually, he or she had made a loss. It would be completely unjust to reward a portfolio manager who had made a loss in a particular performance period in the same way as rewarding a portfolio manager who had made a profit within that same period. Equally it would be completely unjust not to reward a portfolio manager who had made a profit in a particular performance fee period if the Fund overall made a negative return due to the cumulative performance of other portfolio managers…… Another part of the reason for the clawback system was to assist EFM [Ennismore] *in funding payments to successful portfolio managers in years in which it did not receive a performance fee due to negative performance by other portfolio managers. Such Bonuses for successful portfolio managers were not reduced as a consequence of losses by other portfolio managers…… The interpretation of clawback alleged by Fenris would also be inconsistent with the manner in which bonuses were determined for successful portfolio mangers which was always on the basis of their individual performance without regard to the performance of other portfolio managers. In*

particular it could result in portfolio mangers with very different negative performance suffering identical clawback penalties, and the level of penalty for any given level of negative performance would be entirely dependent on the performance of other portfolio managers."

Mr. Vigeland's return to Norway

8. In early 2004 Mr. Vigeland decided to return to live in his native Norway. However, it was agreed that he would nonetheless continue to manage from there the portfolios for which he was responsible. It was also agreed that on Mr. Vigeland's relocation it was inappropriate that he should continue to be an employee of Ennismore and that he should instead carry on his fund management for Ennismore as a consultant, which he proposed to do through an offshore company he would establish for the purpose, apparently for Norwegian tax related reasons. On that basis, Mr. Vigeland set up Fenris in Belize as a vehicle through which to continue his management of the specific portfolios he was managing for Ennismore. In the circumstances it was also decided that a consultancy agreement should be entered into between Ennismore and Fenris/Mr. Vigeland and, after various discussions, a Consultancy Services Agreement was finalized and agreed on 24th June 2004 ("the CSA"). The CSA provided that Fenris would make Mr. Vigeland available as a fund manager for Ennismore but, apart from stating that fees would be agreed between the parties from time to time, the CSA made no specific provision regarding remuneration. Mr. Vigeland subsequently moved to Norway and his employment contract with Ennismore was terminated in December 2004. He thereafter continued to manage the portfolios for which he was responsible through Fenris.

9. While Mr. Vigeland was an employee of Ennismore he was a beneficiary of the EBT and accordingly, as explained above, the proportion of his annual discretionary bonus which was subject to potential future clawback was invested on his behalf in Ennismore funds through the EBT. However, once Mr. Vigeland ceased to be an employee of Ennismore he was no longer eligible to be a beneficiary of the EBT so it was agreed between the parties that the entire amount of any discretionary bonus paid to Mr. Vigeland/Fenris,

including that proportion subject to potential future clawback, would be paid to him but that the portion of the bonus subject to clawback would be invested direct by Fenris itself in Ennismore funds but subject to an agreed restrictions on the sale or transfer of the relevant shares without the consent of Ennismore. The parties agreed that it would be appropriate to provide for this restriction and for other terms relating to remuneration and clawback in a written agreement. Consequently, Ennismore and Fenris/Mr. Vigeland entered into a second agreement on 6th April 2006 ("the Clawback Agreement"). This was the first time that the clawback concept and its operation were actually recorded in a written agreement rather than, as before, being simply understood and accepted by the fund managers and implemented by way of agreement each year, with each of the individual fund managers, of the financial calculations relating to the amount of discretionary bonus and the amount to be subject to potential clawback.

The Clawback Agreement

10. The Clawback Agreement is a central part of the dispute in this case and accordingly I set it out in full as follows:

> ***Agreement between:***
> *Ennismore Fund Management Limited (the "Company");*
> *Fenris Consulting Limited ("Fenris"); and*
> *Arne Vigeland-Paulsen ("AVP")* [Mr. Vigeland]
>
> ***Background***
>
> *Under the agreement between the Company and Fenris dated 24 June 2004* [the CSA] *the Company may pay discretionary fees to Fenris in respect of each calendar year. 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. 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.

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. 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 thereon) 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.

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"). However, any valuation of the portfolio at the Date of Cessation shall be subject to reasonable adjustments by the Company for the actual or potential cost of liquidating any investment positions in the portfolio which are held at the Date of Cessation.

Amounts subject to Clawback in respect of 2005

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"). The Shares will be registered in the name of Fenris. 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.

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.

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.

11. 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. I will return to consider these two principal issues in due course.

12. I should also at this stage mention the section of the Clawback Agreement entitled "Amounts subject to clawback in respect of 2005". 2005 was, of course, the year after Mr. Vigeland ceased to be an employee of Ennismore and the first year in which he acted as an investment manager through Fenris pursuant to the CSA and therefore, according to the CSA, fees fell to be agreed by the parties. In fact, as appears from the figure in the CSA, clawback was applied in the same way in respect of 2005 as it had been previously, save only that instead of the amount of his bonus subject to potential future clawback being invested on his behalf through the EBT, it was invested by Fenris directly in shares of the OEIC but with the agreed restriction on sale or transfer of the shares, as provided for in the penultimate paragraph of the agreement. The precise figures, based on a 20% bonus (together with an additional one-off bonus of £280,000.00 that year only), of which 50% was paid to Mr. Vigeland free and clear and 50% was subject to the clawback system, are admitted in Fenris' Defence and were accepted by Mr. Vigeland in his evidence. The sums in respect of bonus and potential clawback were, as in respect of the years 2003 and 2004, calculated by Ennismore on the basis of Mr, Vigeland's own individual investment performance in respect of the portfolios he was managing. In May 2006 Fenris, through Mr. Vigeland, invested the sum subject to clawback (plus interest) agreed in respect of 2005 in the OEIC and made it clear to the administrator of the OEIC that the restriction on sale or transfer of the shares concerned provided for in the Clawback Agreement applied.

The year 2006

13. Between August and December 2006 Mr. Oldfield and Mr. Vigeland also discussed setting up a new Ennismore fund to be managed solely by Mr. Vigeland himself as investment manager through Fenris, and marketed under Mr. Vigeland's own name. According to Mr. Oldfield in his evidence in chief the establishment of this new fund by Ennismore was primarily motivated by the desire to retain Mr. Vigeland's services for Ennismore in light of his previous successful investment performance in 2003, 2004 and

2005. Accordingly, a new Cayman Islands investment fund was established in December 2006 as the EVF, which then commenced trading under Mr. Vigeland's management. The evidence of Mr. Oldfield and of Mr. Blair was that at the same time as discussing the establishing of the EVF, they, on behalf of Ennismore and Mr. Vigeland on behalf of Fenris negotiated and agreed certain supplemental provisions missing from the Clawback Agreement to provide for more specific remuneration terms, particularly the necessary clawback percentages ("the Supplemental Agreement"). In particular they contend that, as well as a discretionary bonus based on profits, Fenris was also to be entitled to 50% of the EVF management fee and, furthermore that in the event of losses in the EVF the clawback would first be deducted in full from any management fees paid to Fenris in the previous 3 years. However, Mr. Vigeland denied that the provisions of the Supplemental Agreement, which, although put in writing, was not signed by Mr. Vigeland were agreed by him/Fenris. Ennismore contends that the terms of the Supplemental Agreement were accepted and agreed by the conduct and performance of the parties.

14. The year 2006 was another profitable year for Mr. Vigeland's portfolios and the methodology used by Ennismore for determining the proportion of the overall discretionary bonus to be paid to Fenris/Mr. Vigeland to be subject to potential future clawback was the same as that used in 2005 (with the exception that in respect of 2006 there was no additional bonus of £280,000.00). Once again the total bonus was based on 20% of the total performance-based profits of £18.33m on Mr. Vigelands's portfolios, 20% thereof being £3.667m with his total bonus being 50% of that figure, namely £1.833m. In turn 50% of that bonus, namely £916,904, out of his total bonus was to be subject to potential clawback. Subject to a minor arithmetical error £3,000.00 on the part of Ennismore, these figures are accepted by Fenris in its Defence and it is admitted that in February 2007 Mr. Vigeland acknowledged that the sum of £916,904 was subject to potential clawback by Ennismore in respect of any future losses on his portfolios in the following 3 years. The sum of £919,904.00, (i.e. reflecting the slight arithmetical error) was then invested by Fenris in the EVF. On 8th February 2007 Fenris wrote to Citco, the administrator of the EVF, confirming that the agreed restriction on the sale or transfer of

the relevant shares without Ennismore's consent applied. In his evidence Mr. Vigeland accepted this and agreed that the restriction on sale or transfer applied. Fenris wrote to Citco, the administrator of the EVF, on 8th February 2007 confirming that restriction.

The Year 2007

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 thoses 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.

The Years 2008 and 2009

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, totalling £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]

The Construction Issue

23. 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. It was also submitted on behalf of Ennismore that the Court has to determine whether the Clawback Agreement comprised the entirety of the terms agreed between Ennismore and Fenris in relation to clawback or whether there were

further supplementary contractual arrangements agreed and acted upon subsequently (the Supplemental Agreement).

24. Fenris relied upon two phrases 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. Firstly, and principally, the sentence under the heading "Amounts subject to Clawback in respect of 2005" stating:

> *"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"* [my emphasis].

Secondly, Fenris also relied upon the earlier passage in the Clawback Agreement under the heading *"Principles of Clawback"* starting "E.g. if….." referring to discretionary fees or bonuses as 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."* [my emphasis]

It was submitted that these 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.

25. I was referred by Leading counsel for Ennismore to *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 in which Lord Clarke, who gave the judgment of the UK Supreme Court, said at para. 14:

> *"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."

He continued at para. 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 1103, 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."

26. It was argued for Ennismore that the whole of the Clawback Agreement should be considered rather than relying on individual passages of the agreement in isolation. It was submitted that, if the whole document is considered, it is plain from the principal provisions 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. In particular reference was made to the second sentence under the heading *"Background"* namely:

> *"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* [Mr. Vigeland] *in the subsequent three years"* and also under the heading *"Principles of Clawback",* the first two sentences, namely: "C*lawback 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."*

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.

27. 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.

28. 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.

29. Leading counsel for Fenris referred to the judgment of Lord Hoffman in <u>*Investor Compensation Scheme Ltd v West Bromwich Building Society*</u> [1998] 1WLR 896 where he explained the principles by which contractual documents are to be construed as follows:

> "*(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having 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.*

(2) *The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

(3) *The law excludes from the admissible background the previous negotiations of the parties and their declaration of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

(4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax; see Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 949.*

(5) *The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from*

the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191, 201:

"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense"

30. I was also reminded of the words of Lord Wilberforce in Reardon Smith v Yngvar Hansen-Tangen [1976] 1WLR 989 at p. 996. However, in my view, an earlier passage in that judgment at page 995 is also helpful:

"no contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the "surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

And then the passage to which I was referred at p. 996:

"It is often said that, in order to be admissible in aid of construction, these extrinsic facts must be within the knowledge of both parties to the contract, but this requirement should not be stated in too narrow a sense. When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable

people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties".

31. Leading counsel for Fenris also submitted that in construing the Clawback Agreement it is not legitimate to consider evidence of what was said or done by the parties after the date of the Agreement. I was referred in this respect to *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners* [1970] AC 583 at 603 where, in the context of considering what was the proper law of the contract concerned, Lord Reid said:

> *"It has been assumed in the course of this case that it is proper, in determining what was the proper law, to have regard to the actings of the parties after their contract had been made. Of course the actings of the parties (including any words which they used) may be sufficient to show that they made a new contract. If they made no agreement originally as to the proper law, such actings may show that they made an agreement about that at a later stage. Or if they did make such an agreement originally such actings may show that they later agreed to alter it. But with regard to actings of the parties between the date of the original contract and the date of Mr. Underwood's appointment I did not understand it to be argued that they were sufficient to establish any new contract, and I think they clearly were not. As I understood him, counsel sought to use those actings to show that there was an agreement when the original contract was made that the proper law of that contract was to be the law of England. I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of a the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later."*

32. In *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 Lord Reid said at page 552:

> *"I must add some observations about a matter which was fully argued before your Lordships. The majority of the Court of Appeal were influenced by a consideration of actings subsequent to the making of the contract. In my view, this was inconsistent with the decision of this House in Whitworth Street Estates (Manchester) Ltd v. James Miller and Partners Ltd."* [ibid] *We were asked by the respondent to reconsider that decision on this point and I have done so. As a result I see no reason to change the view which I expressed..... There may be special reasons for constructing a title to land in light of subsequent possession had under it but I find it unnecessary to consider that question. Otherwise I find no substantial support in the authorities for any general principle permitting subsequent actings of the parties to a contract to be used as throwing light on its meaning. I would therefore..... repeat my view expressed in Whitworth with regard to the general principle".*

Analysis and comment

33. As the authorities cited make clear, the Clawback Agreement must be interpreted in light of all the background circumstances reasonably known by or available to the parties, which in the words of Lord Hoffman in *ICS v West Bromwich*, includes absolutely anything which would affect the way in which the language of the document would have been understood by the reasonable person having all such background knowledge. Further, as Lord Hoffman said:

> *"The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax."*

34. The overall import of the evidence of Mr. Oldfield, Mr. Blair and Mr. Perry was 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. The totality of their evidence was that, although the clawback system was not set out in writing in fund managers' employment contracts, the concept and its purposes was fully understood by them and the details of the amounts to be invested on their behalf through the EBT as subject to potential future clawback were also discussed with them each year. While such discussions with each fund manager would focus on the calculation of the bonus and the clawback amounts the principle behind the concept and the calculations was fully understood and accepted. 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. It was also the evidence of Mr. Perry in particular but also of Mr. Blair, that all investment managers at Ennismore were treated in the same way as far as the basis for and the application of clawback was concerned.

35. In my view, the relevant background circumstances in this case are that the concept of clawback as devised by Mr. Oldfield and Mr. Schöningh and as operated at Ennismore from the start was known to, understood and accepted by all of the fund managers there and, in particular they knew and understood its rationale and that it was based upon the investment results achieved by each individual fund manager and was not linked to the performance of Ennismore as a whole. The overall evidence of Ennismore's witnesses, was in my assessment clear, in this regard. 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. It seems to me that this background, and particularly the intention of and basis on which the clawback system was operated, would have been well understood by the reasonable person having all such background knowledge. Furthermore, insofar as inconsistent with that background and understanding of it, it seems to me reasonable and appropriate to conclude that the two specific phases in the Clawback Agreement referring to the performance fee of Ennismore, on which Fenris now relies, insofar as possibly inconsistent with this and with the other principal parts of the Agreement had been wrongly and mistakenly used in the sense referred to by Lord Hoffman in *ICS v Bromwich* (ibid) and did not reflect the true intention and understanding of both parties at the time.

36. Having regard to the earlier passage in the judgment of Lord Wilberforce in the *Reardon Smith* case [ibid] to which I have referred above, it is also appropriate in interpreting such an agreement that the Court should know and take account of the commercial purpose of the agreement, which itself *"presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties were operating"*. The genesis of the Clawback Agreement, it seems to me, was Mr. Vigeland's initial position as an employee of Ennismore as a fund manager operating in the context and being remunerated on the basis of the clawback system, of which he was well aware, which, as a result of his subsequent move to Norway, and later the establishment of the EVF, resulted in the need for, first, the CSA and then, the Clawback Agreement and, Ennismore would say, the Supplemental Agreement thereafter. There was no objective evidence to suggest to me 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. As Mr. Blair said in

evidence, when Mr. Vigeland became a consultant instead of an employee the substance did not change, just the form. 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.

37. In my opinion, in the circumstances it is clear that 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. I am satisfied that this was the agreed purpose and commercial intent of the agreement by both parties at the time and that Mr Vigeland's attempts to say otherwise in late January of 2009, some 3 years later, were simply an attempt to avoid complying with what he well-knew was the intent of the Clawback Agreement to which he had agreed in 2006. Mr. Oldfield said in evidence that Mr. Vigeland's interpretation of the clawback as provided for in the Agreement would have been *"pure madness from a business point of view"*. Mr. Blair was also very firmly of the view that Mr. Vigeland's current interpretation of the Clawback Agreement *would not make any commercial sense and would contravene the entire purpose of the clawback arrangement"*. Insofar as the specific phrases in the Clawback Agreement on which Fenris now relies are, arguably, inconsistent with the other principal parts of the Agreement and incompatible with the clear commercial purpose of the Agreement, it seems to me that I should interpret the Agreement so as to resolve the inconsistency and incompatibility in a way that gives effect to that clear commercial purpose.

38. It seems to me also relevant to take into account the poor drafting of the Clawback Agreement. The document was drafted by Mr. Blair, who is not a lawyer and there was no legal input into it. He said several times in evidence that the document was poorly drafted. A certain amount was made on behalf of Fenris of the fact that in an earlier draft of the Clawback Agreement, which was not sent to Mr. Vigeland but which was produced on discovery, Mr. Blair had not used the specific phrases referring to the

performance fee earned by Ennismore yet he had used those phrases in the final version of the agreement. In my view not too much should be made of that in the overall context. I agree with Leading Counsel for Ennismore that the Clawback Agreement as a whole must be considered in interpreting its meaning having, as I have said, regard to the background circumstances and the commercial purposes which I am of the view, were shared and intended by both parties at the time.

39. As was said by Lord Bridge in the *Mitsui Construction case* [ibid]:

> *"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."*

In my opinion the subsequent interpretation of the Clawback Agreement belatedly put forward on behalf of Mr. Vigeland/Fenris in the circumstances does not represent the parties' business intention when they entered into the Agreement. Furthermore I consider that the interpretation put forward by Fenris does attribute to the parties an improbable intention. In my judgment the interpretation argued for on behalf of Ennismore more probably and correctly represents the true intention and meaning of both parties at the time of entering the Agreement and the overall Clawback Agreement is to be interpreted in that way.

40. I accept the principle urged upon me by Leading Counsel for Fenris in light of the *Whitworth Street Estates* [ibid] and *Schuler v Wickman Machine Tool* [ibid] cases that the subsequent actions of the parties to a contract may not be used to assist in interpreting its meaning and I do not seek to do so. However, as Lord Reid said in the *Whitworth Street Estates* case [ibid], the actions of the parties after the date of their agreement may be sufficient to show that they made a new contract in relation to some aspect not included or catered for in the original contract or that the parties agreed later to alter some provision in the original contract. In the present case the Clawback Agreement refers to a multiplier of 55% and yet the subsequent actings of the parties clearly demonstrate that

they in fact proceeded by agreement on the basis of a multiplier of 50% and varied the term in the Clawback Agreement by their subsequent conduct. The reference to 55% was a mistake in the Clawback Agreement which the parties ignored. This was accepted by the parties and by their counsel at the trial.

41. 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 contempranous 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.

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.

43. I have already briefly mentioned what happened in respect of the further loss-making year, 2008. The clawback methodology used by Ennismore was the same as had been used consensually, as I consider, in respect of the three previous years, the last of which, 2007, was also of course, a loss-making year. Ennismore's position is that, although the clawback amount in respect of 2008 was relatively large based upon Mr. Vigeland's portfolio losses, it was arrived at using the same calculation and methodology basis and was in accordance with the agreed applicable percentages, which applied equally to the share of losses as they had in earlier years to the share of profits. In fact Mr. Vigeland appears to me not to have disagreed with that initially.

44. Mr. Oldfield, in his e-mail dated 2 January 2009 to Mr. Vigeland made it quite clear, although the figures were not finalized, that a substantial clawback was payable by Mr. Vigeland/Fenris in respect of 2008 and I am satisfied that that must have been obvious to Mr. Vigeland, despite his protestations to the, contrary which I did not find convincing in his cross-examination. 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. In fact Mr. Blair's evidence was that he had discussions with Mr. Vigeland as early as December 2008 about likely clawback and Mr. Vigeland's concern at that time was solely with his Norwegian tax problem. In my assessment, Mr. Vigeland must have been well aware already and certainly knew at least from early January 2009 that he/Fenris was going to be subject to a substantial clawback claim, yet his sole reaction to Mr. Oldfield's email in his reply email 3 days later was simply to say that hewas obtaining a second opinion from his tax adviser. 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). The only issue he raised was his own tax problem. 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 and his concern was not with the principle or applicably of clawback, which he knew he would be obliged to pay but solely with his tax problem, which might impact on his ability or wish to pay. This was, I consider, exemplified by his attitude shortly after that in simply refusing to pay the clawback amount due pursuant to the agreements between the parties rather than making any challenge to Ennismore's contractual entitlement.

45. There is, again, a clear conflict of evidence as to what Mr. Vigeland did or did not say at the meeting with Mr. Oldfield on 13 January 2009. Mr. Oldfield was adamant under cross-examination that Mr. Vigeland had said "can't pay, won't pay", in relation to the 2008 clawback claim. When cross-examined about this Mr. Oldfield became emotional and tearful. Mr. Oldfield's answer when asked about the conversation with Mr. Vigeland

was *"When you've had a relationship of trust with someone, ... for a long period of time and you work on that basis, if you get a situation where for the sake of what is a relatively small amount of money in our industry, someone turns around to you and says can't pay, won't pay, when you know full well that the honourable thing to do is to pay, you don't forget that."* In my assessment Mr. Oldfield's reaction and demeanour was not contrived and was a genuine and truthful piece of evidence which I found plausible and convincing. In my view, if Mr. Vigeland did simply say he would not pay the clawback amount, as Mr. Oldfield claimed, that did, as Mr. Oldfield obviously saw it, amount to Mr. Vigeland reneging upon the agreements made between the parties as opposed to being a contention by him that the agreements had been misapplied. Mr. Vigeland strongly denied that he had said any such thing to Mr. Oldfield and suggested that Mr. Oldfield had become emotional in giving his evidence because he was upset that Mr. Vigeland was disagreeing with him. However, having seen and heard Mr. Oldfield I did not find Mr. Vigeland's explanation of his reaction plausible or convincing. In my view, it is much more probable that Mr. Oldfield's reaction was because he was genuinely upset and distressed by Mr. Vigeland's refusal to honour his obligations pursuant to what had been agreed and which Mr. Oldfield had trusted Mr. Vigeland to do. The inference which I draw from the evidence generally is that Mr. Vigeland's concern about payment of the clawback agreement and his subsequent outright refusal to pay it coincided with the emergence of a Norwegian tax problem for Mr. Vigeland, which would cause him potential difficulty in paying or at least an unwillingness to pay the clawback amount of almost £3m. Furthermore, according to Mr. Oldfield's evidence, which I accepted as true, Mr. Vigeland notably failed to mention any of the arguments concerning the interpretation of the Clawback Agreement, the existence of the Supplemental Agreement and the attribution of the losses which he now puts forward, which is, to say the least, very surprising in light of the forceful position which he now takes.

The Attribution Issue

46. The first issue concerning the phrase "attributable to" as used in the Clawback Agreement in the context of losses relates to the meaning of attributable in this context.

Leading Counsel for Fenris contended that "attributable to" not only meant caused by but that an element of fault or blame is to be implied. He argued that losses were only attributable to Mr. Vigeland's/Fenris' investment advice if that advice was clearly wrong or bad or negligent but not otherwise. Accordingly, he submitted, the relevant losses were only attributable to Mr, Vigeland's advice if his advice was clearly wrong or negligent in some way and there was no evidence to support that, although neither was I referred to any authority for that proposition. On the other hand I was referred by Leading Counsel for Ennismore to the case of *Ho Soo Fong and Another v Standard Chartered Bank* [2007] 2 SLR 181 in the Singapore Court of Appeal in which the Court interpreted the meaning of the words "attributable to" as used in a statute which referred to *"pecuniary loss that is attributable to an act, refusal or failure referred to in paragraph……."*. In the course of the judgment reference was made to the Australian case *Lee v Ross (No.2)* [2003] NSW SC 507 in which the Court had to consider the meaning of "attributable to" in a similar statute. The Court set out the terms of that statute and then said:

> 25. *Palmer J* [in the Australian case] *held that a " practical common sense approach" to the identification of compensable loss "attributable" to the wrongful lodgment of a caveat is what is required..... He explained at [40] of his judgment:*
>
> > *I do not think it is necessary to show that the precise loss suffered by an owner of land as a consequence of the wrongful lodgment of a caveat is known to or foreseeable by the caveator at the time of lodgment. So to hold would be to introduce into the statutory remedy..... notions of causation and loss which are highly developed in the law of tort and contract. The section itself does not use words which invoke or suggest those notions: it seems deliberately to avoid the use of the words "caused by" and uses, instead, the more general word "attributable".....*

26. *We agree with Palmer J that there is a need to attach significance to the legislature's use of the word "attributable"..... The word "attributable" has been judicially interpreted in English cases. In Walsh v Rother District Council [1978] 1 All ER 510, in deciding whether the applicant's loss of employment was "attributable to" the provisions of the Local Government Act 1972..... Donaldson J in the English High Court held that "attributable" means capable of being attributed, the essential element of which is connection of some kind. Further, this connection need not be that of a sole, dominant, direct or proximate cause and effect. A contributory causal connection is quite sufficient.....*

27. *In Central Asbestos Co Ltd v Dodd [1973] AC 518, ... Lord Reid held at 533 that:*

> *["Attributable"] means capable of being attributed. "Attribute" has a number of cognate meanings; you can attribute a quality to a person or thing, you can attribute a product to a source or author, or you can attribute an effect to a cause. The essential element is connection of some kind."*

47. In fact the phrase "net investment losses attributable to the investment advice received..... from Fenris [or Mr. Vigeland] [my emphasis] only appears once in the Clawback Agreement. Where the phrase "net investment losses" appears in the Clawback Agreement in the second sentence of the section headed *"Principles of clawback"* it is not limited or qualified by the words "attributable to investment advice", nor, significantly, is the mirror reference to "net investment profits" so qualified. Furthermore, under the heading *"Amounts subject to clawback in respect of 2005"* the reference in the third sentence to *"any net investment losses"* is again unqualified by any reference to being attributable to investment advice. I agree with Leading Counsel for 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. In my view it is correct that the only issue in this respect is whether the investments in question were part of the investment portfolios managed by Mr. Vigeland/Fenris and whether their performance gave rise to profit or loss. This appears to be consistent with the *Ho Soo Fong and Another v Standard Chartered Bank* case [ibid] in that "attributable to" means no more than that there is a connection between the losses (or profits) and Mr. Vigeland's portfolios and that issues of either blame for losses or credit for profits are not applicable or relevant. This is, in my opinion substantiated by the point made above that in two places in the Clawback Agreement the references to investment losses are not qualified by any requirement of being attributable to Mr. Vigeland's advice at all, in other words the only requirement is that the investment losses occurred at all.

48. In this regard also it was pointed out that the Clawback Agreement treats profits and losses as mirrors of the same concept, which is why Ennismore contends that the outcome in relation to losses on the portfolios managed by Mr.Vigeland is to be the mirror of the outcome in relation to profits. This was consistent with the methodology and approach adopted by Ennismore in the profitable years of 2005 and 2006 and equally in the loss making years of 2007 and 2008. If the profits on the portfolios managed by Mr. Vigeland amount to sufficient connection to Mr. Vigeland/Fenris, then equally so must the losses.

49. I now turn to the second aspect of the "attributable to" issue which is whether, in light of the meaning of "attributable to", which I have accepted above, Ennismore has sufficiently established that there was the necessary connection between the £31m losses on Mr. Vigeland's portfolios in 2008 and the investment advice of Mr. Vigeland. There is no doubt that the shares concerned were in Mr. Vigeland's/Fenris' portfolios but Mr. Vigeland argued that the losses were not attributable to him/Fenris. Initially he 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.

50. It was, I think legitimately, pointed out that this latter proposition was not pleaded by Fenris, nor was it obviously foreshadowed from Mr. Vigeland's witness statement. Nonetheless it was given considerable emphasis by Mr. Vigeland in his evidence and by his Leading Counsel in his closing submissions and they both sought to support this argument from the documents produced by Ennismore. The evidence of Mr. Vigeland was that in light of the considerable number of redemption requests received by Ennismore during 2007 and 2008, which necessitated share values to be reassessed on a regular basis in order to set up-to-date NAV's, and due also to the need to raise cash to meet such redemption requests, Mr. Oldfield not only intervened in the management of Mr. Vigeland's portfolios but also procured significant reductions in the valuation of shares within those portfolios, which consequently resulted in apparent losses. It was accordingly argued that the losses within Mr. Vigeland's portfolios were not attributable to him but to the actions of or procured by Mr. Oldfield on behalf of Ennismore.

51. There was considerable debate about the fact that in its defence Fenris averred that it *"does not admit losses totaling 31 million, or of any amount, were attributable to the investment advice of Fenris"*. In fact, during the course of his cross-examination Mr. Vigeland, having so pleaded did eventually concede that at least some of such losses were attributable to him, although he was, he said, unable to put a figure on the amount because the relevant documentation was not available.

52. Ennismore's position was that Mr. Oldfield did no more than was proper for him as Chief Investment Officer and that in no sense did he take over the management of Mr. Vigeland's portfolios. Mr. Oldfield's evidence was to the effect that Mr. Vigeland remained the manager of his portfolios with responsibility for all investment related decisions and that all suggestions were discussed with him. The connection between Mr. Vigeland and the losses on his portfolios remained, such that it is properly said that the losses were attributable to Mr. Vigeland/Fenris in the sense of "attributable" determined above. I was not satisfied on the evidence that Mr. Oldfield did other than advise as Chief Investment Officer nor that the portfolios did not remain in any relevant sense under the management of Mr. Vigeland. 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. With regard to Mr. Oldfield's involvement, I was invited to consider the situation if such involvement had resulted in profits instead of losses on Mr. Vigeland's portfolios; the point being that Mr. Vigeland was happy to take the full benefit of bonuses in respect of all profits on his portfolios, whether generated by market conditions generally or by luck or as a result of the advice or guidance of Mr. Oldfield, and it was inconceivable that Mr. Vigeland would seek not to so benefit from all such profits, even though, as argued by him in respect of losses, such profits were not entirely or solely attributable to his own investment advice. Equally, it was argued, all losses on Mr. Vigeland's portfolios were to be in practice attributed to him in the same way as profits were (and had been in 2005 and 2006). Put simply, Ennismore's case is that "attributable to" in this context means that the relevant profits or losses arose on the portfolios of which Mr. Vigeland was the manager and that accordingly Mr. Vigeland is stuck with that connection both for better (2005 and 2006) and for worse (2007and 2008). This is consistent and in accordance with the Clawback Agreement and, in my opinion, with the intentions of the parties when they entered into it.

53. As I have briefly indicated already, it also seems to me significant that Mr. Vigeland did not contend that the losses on his portfolios were not attributable to him

in January 2009, either in response to Mr. Oldfield's e-mail of 2 January or at the meeting with Mr. Oldfield on 13 January. It seems to me probable that if Mr. Vigeland held a genuine conviction that the 2008 losses should not be attributable to him, he would and should have said so as soon as it was apparent that Ennismore intended to make a clawback on that basis in respect of those losses. In fact the first occasion on which Mr. Vigeland made this argument was in Fenris' Defence dated 20 April 2009, almost four months later, after Ennismore had commenced legal proceedings. It was submitted on behalf of Ennismore that this delay on the part of Mr. Vigeland in claiming that the losses on his portfolios were not attributable to him demonstrates that it is an after-thought made in an attempt to answer Ennismore's case in this respect. Having heard the evidence of Ennismore's witnesses and of Mr. Vigeland, I am inclined to accept and agree with that analysis.

The Witnesses

54. As I have already identified there are two important issues in relation to which the evidence of Mr. Oldfield and Mr. Blair on the one hand and Mr. Vigeland on the other hand is entirely contradictory. In particular there is the conflicting evidence of Mr. Blair and Mr. Vigeland as to whether they agreed the clawback payable in respect of 2007. There is also the complete disagreement between Mr. Oldfield and Mr. Vigeland as to whether Mr. Vigeland told Mr. Oldfield that he would not pay the clawback in respect of 2008. Although I have already indicated above whose evidence I prefer in relation to these particular issues, I consider it appropriate that I should say something more about my assessment of the credibility and reliability of the witnesses concerned, having seen them give evidence in person and being subjected to a rigorous cross-examination in each case.

55. I found Mr. Blair to be a frank and reliable witness of integrity. He was unable to explain how the references to the performance fee earned by the company appeared in his final draft of the Clawback Agreement when they had not appeared in an earlier draft but I accepted his evidence that this was a mistake (although I cannot, of course, and do

not, seek to use his subjective evidence as to what he meant, in seeking to interpret the Clawback Agreement) but, as I have said, I bear in mind that he is not a lawyer and there was no legal input into the drafting of the Clawback Agreement. That did not deter me from accepting his evidence generally in relation to the agreement of the 2007 clawback with Mr. Vigeland, which I found convincing and persuasive, particularly having regard to the fact that it was supported by his contemporaneous note and subsequent schedule. In my view there was no reason to doubt him and I did not.

56. I also found Mr. Oldfield to be a reliable witness whose evidence I accepted, notwithstanding his tendency to try to make speeches from the witness box. His emotional reaction to the questions put to him in cross-examination concerning his evidence that Mr. Vigeland had said "can't pay, won't pay" or words to that effect on 13th January 2009 was, in my view, a genuine reaction in light of what he clearly considered to be a breach of trust and dishonourable conduct by Mr. Vigeland in refusing to pay the 2008 clawback. I did not accept Mr. Vigeland's scathing, and, in my view inappropriate, comments about Mr. Oldfield whose own evidence I considered to be honest and believable.

57. My assessment of Mr. Vigeland, having seen and heard him and considered his demeanor attitude and responses in the witness box was that, while he appeared courteous, intelligent and confident and is obviously completely fluent in English, his own self-interest was pre-eminent regardless of anything else and he was willing to slant or omit things in whatever way was necessary in pursuit of that interest. He was unwilling to make any concessions at all and I was not convinced that he was always telling the whole truth. He was cross-examined at some length about the beneficial ownership of Fenris and the description by Leading Counsel for Ennismore of his evidence as *"the careful non-disclosure of the beneficiary of the Dominion Trust"*, is one with which I agree. My distinct impression was that Mr. Vigeland was unwilling to disclose any more than was absolutely necessary and I found his evidence with regard to what he, as sole director, procured Fenris to do with the substantial management fees and bonuses it was paid by Ennismore to be convoluted and unconvincing. I found his

whole evidence in relation to Fenris to be generally evasive and less than full and frank. also found his comment about Mr. Oldfield's evident distress during his oral evidence as "frivolous" to be a most surprising and inappropriate description and indicative of his rather supercilious and arrogant attitude to Ennismore and its claims generally. His description in January 2009 of the contractual agreement pursuant to the Clawback Agreement that the shares representing amounts potentially due to Ennismore under the principle of clawback could not be sold or transferred without the consent of Ennismore as a "self-imposed restriction" was, in my view, clearly misleading and self-serving. Overall I found Mr. Vigeland's evidence unreliable and unconvincing and unpersuasive. Where his evidence conflicted with that of Mr. Blair and Mr. Oldfield on significant issues I found them to be more compelling and open and I preferred their evidence to his.

Conclusions

58. 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.

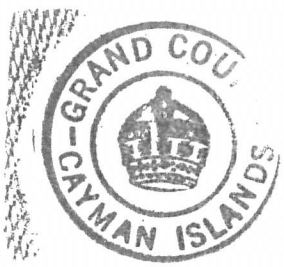
59. It is also my opinion that the Clawback Agreement did not and did not purport to legislate for every aspect of the bonus and clawback system as agreed between the parties to be

applicable to Fenris/Mr. Vigeland. The parties' contractual relationship developed as circumstances required and they agreed necessary supplemental terms regarding, in particular, the relevant percentage multipliers to be applied for clawback purposes, which they agreed by their subsequent actings and course of dealings in respect of the year 2006 and, as I have found, the year 2007, and which Ennismore, in reliance upon such supplemental agreement, endeavoured to apply in respect of 2008 but which Mr. Vigeland for Fenris refused to honour, in breach of what he had originally agreed by the Clawback Agreement as subsequently supplemented.

60. 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

61. In the particular circumstances of this case and for the reasons which I have set out above I therefore give judgment for Ennismore in respect of its current claims for payment against Fenris. I propose to hear counsel for the parties further on the questions of interest and of costs and on the appropriate form of order.

Dated 7th February 2012



The Hon. Mr. Justice Angus Foster
Judge of the Grand Court