Easter Term

[2016] UKPC 9

Privy Council Appeal No 0097 of 2014

JUDGMENT

Ennismore Fund Management Limited (Appellant) vFenris Consulting Limited (Respondent) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Neuberger

Lord Mance

Lord Clarke

Lord Carnwath

Lord Hodge

JUDGMENT GIVEN ON

19 April 2016

Heard on 26 and 27 January 2016

Appellant	Respondent
Mark Cunningham QC	Thomas Lowe QC
Rupert Coe	
(Instructed by Simmons & Simmons LLP)	(Instructed by Sharpe Prtichard LLP)

LORD CLARKE:

Introduction

1.

This is an appeal from an order of the Court of Appeal of the Cayman Islands ("the CICA") made on 16 April 2014 in accordance with a judgment delivered on the same day. The court comprised Sir John Chadwick P and Mottley and Conteh JJA. The principal judgment was delivered by the President, with whom the other members of the court agreed, although Conteh JA delivered a short judgment of his own. The CICA allowed an appeal from an order of Foster J ("the judge") made on 16 February 2012, which reflected his judgment of 7 February 2012. The question in this appeal, as in the courts below, turns on what is the true construction of the relevant parts of an agreement known as a clawback agreement.

The background facts

2.
The background facts can be shortly stated. The Board will call the plaintiff "Ennismore" and the defendant "Fenris". Ennismore is a company incorporated in England and Wales. At the relevant time it was the investment manager of a Cayman Islands Fund, Ennismore European Smaller Companies Hedge Fund ("the ESCF") and an Irish mutual fund, Ennismore European Smaller Companies Fund ("the OEIC"). From about October 2006 Ennismore was also investment manager for a second Cayman Islands Fund, Ennismore Vigeland Fund ("the EVF"). Mr Arne Vigeland, who is 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 for that purpose, under the terms of a letter ("the Consultancy Services Agreement" or "CSA") dated 24 June 2004.

3.
A substantial element in the remuneration paid by Ennismore to its fund managers comprised 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.

4.
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.

5.
The CSA 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, whose 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.

6.
The CSA contained no provision for the payment of bonuses; but it is common ground that it was, at the time, the practice for Ennismore to pay annual performance bonuses to its fund managers and that, following the CSA, that practice extended to Fenris in respect of the services provided by Mr Vigeland. Thus for the year ending 31 December 2004 Mr Vigeland, through Fenris, earned a bonus of £786,000 in addition to his basic salary and pension contributions, half of which was invested through Ennismore's Employee Benefit Trust ("EBT") in funds managed by Ennismore. The practice was

described in a letter dated 18 July 2005 from Ennismore to the shareholders in ESCF. 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 role as investment manager of the Fund; "and to give a few thoughts on the future of our business". The letter was signed by Gerhard Schöningh and Geoff Oldfield, who were the co-founders of Ennismore and (then) the holders of all its shares.

7.
As the President noted in para 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 as follows:

"With effect from 1 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 Ltd: Ennismore European Smaller Companies Hedge Fund", which is undated but which the President held, 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."

8.
In para 10 of his judgment the President noted that 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" and then quoted this passage from the third paragraph:

"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 on 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."

The letter added that increasing the fees would allow them to remain a highly attractive employer without sacrificing the clawback system and without re-opening the funds and that to date all their investment managers had chosen to re-invest the vast majority of their cash bonuses in the Funds.

9.
The President then summarised the position as at December 2005. In doing so, at paras 11 and 12 he referred in detail to a spreadsheet entitled "Bonuses and Salaries 31 Dec 05" which was issued to all Ennismore fund managers, including Mr Vigeland, in early 2006. The Board does not discuss the spreadsheet here because it is not necessary to do so in order to resolve the issues between the parties. However the President noted in para 14 that in the letter of 18 July 2005 there was reference

to the possibility that a fund manager might "generate a negative value-added" in one or more years but that that did not happen in the year 2005, as shown on the 31 December 2005 spreadsheet. The President nevertheless considered, by reference to the 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 a benchmark figure. In that event, as the President put it at para 16, 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.

10.
The President makes a number of references to a "benchmark figure" but it appears to the Board that the 18 July 2005 letter suggests that what was described as a high watermark replaced the notion of a benchmark figure. However, it is not necessary to focus on either because it appears to the Board that neither is material to the resolution of the issue of construction of the clawback agreement to which it now turns.

The Clawback Agreement

11.
It is 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 the President said at para 17, it had been described in general terms in the letter to shareholders dated 18 July 2005. However, on 6 April 2006, Ennismore, Fenris and Mr Vigeland entered into the clawback agreement which is central to the issues in this appeal. The agreement was drafted by Ennismore without legal assistance and neither Fenris nor Mr Vigeland had any input into it. It was produced to them for signature. It makes no reference either to a benchmark figure or to a high watermark.

12.
The President set out the agreement in his judgment. In doing so he sub-divided the text as set out below for convenience of reference. He also referred to the individual terms of the agreement as "sentences". The Board will do the same. In the agreement the reference to the "Company" is a reference to Ennismore and the reference to "AVP" is a reference to Mr Vigeland.

13.
As so set out, the clawback agreement provides so far as relevant as follows:

"**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) Eg 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

(l)(i) In respect of the year ended 3l 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 3l January 2009, or three 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."

As noted by the judge in para 41 of his judgment, it was agreed between the parties that the reference to 55% in paragraph C(1)(iii) was a mistake for 50%.

14.
The President concluded at paras 20 and 28 that the meaning and effect of the clawback agreement were not open to doubt. He identified four distinct matters dealt with by the agreement: first, the amount of the discretionary fees paid or payable in respect of a given year that was to be subject to clawback in subsequent years, which he referred to as "funds subject to clawback"; second, the requirements which must be satisfied before a right to clawback could be exercised against funds subject to clawback, which he called "the conditions which give rise to the right to clawback"; third, the amount that could be recovered from funds subject to clawback when the conditions which give rise to the right to clawback are satisfied, which he called "the amount of the clawback"; and, fourthly, the priority in which the amount of the clawback in respect of any one year could be recovered from funds subject to clawback in respect of earlier years, which he referred to as "the order in which clawback is to be applied". The Board will return to these points below.

Ennismore's claim

15.
Ennismore's claim related solely to the losses attributable to Fenris for the year 2008. There had been a claim to claw back fees from Fenris' losses for the year 2007 but that claim had already been met in full and was a non-issue by the time of the trial before the judge. For the years 2005 and 2006 Ennismore had secured its ability to claw back Fenris' bonus by requiring investment of 50% of the 2005 bonus in the ESCF (£1,540,779 resulting in 8,034 shares) and 50% of the 2006 bonus in the EVF (£919,904). Between 2002 and 2008 there was no year in which Ennismore had not earned a performance fee and there were only two occasions when a portfolio manager had had his fees clawed back by reason of losses on the portfolio. Only one predated the clawback agreement. The other was Fenris' loss in 2007.

16.
In 2007 and 2008 Fenris' portfolio thus sustained losses, with the result that no bonus was earned by Fenris. Ennismore claimed to claw back the bonus in respect of both those years. Part of the bonus investment in the ESCF investment (205.88 shares) was redeemed in respect of the 2007 clawback claim and taken by Ennismore. The only claim that was live at the trial was therefore the claim to claw back the 2005 and 2006 bonuses in order to cover the 2008 losses.

Principles of construction

17.
The relevant principles of contractual construction have recently been summarised in the Supreme Court by Lord Neuberger, with whom Lord Sumption and Lord Hughes agreed, in Arnold v Britton [2015] UKSC 36; [2015] AC 1619, at paras 14 to 23. He set out the general principle at para 15:

"15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn[1971] 1 WLR 1381 at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill, and the survey of more recent authorities in Rainy Sky [2011] 1 WLR 2900, per Lord Clarke of Stone-cum-Ebony JSC at paras 21-30."

18.
Lord Neuberger then set out seven factors in paras 17 to 23, which it is not necessary to refer to in any detail in this appeal. The Board concludes that the true construction of the clawback agreement depends upon the language used, when construed in the light of factors (i) to (v) above.

Construction of the clawback agreement

19.

The critical question of construction is whether clawback depended upon a reduction in Ennismore’s own performance fee or whether clawback applied if the individual fund manager’s portfolio generated a loss regardless of the effect on Ennismore’s performance fee. That that is the critical question is not in dispute. In para 9 of Ennismore’s case it is said that a more concise articulation of the question (than that in para 12 of the judge’s judgment) was this. Was the CICA correct to find that clawback payable by Fenris is tied to Ennismore’s performance fee, whether pursuant to the clawback agreement or for any other reason?

20.
The judge held that the effect, if any, on Ennismore’s performance fee was irrelevant. Moreover he did so after a detailed consideration of the oral evidence. Based on this, he reached conclusions about the parties’ common understanding, which, for reasons which will appear (paras 32-33 below) do not have either the relevance or weight in relation to construction which he attributed to them. In these circumstances, it was submitted on behalf of Fenris that the issue depended wholly or substantially upon the true construction of the clawback agreement, which made it clear that the effect on Ennismore’s performance fee was critical. It was further submitted that oral evidence given by Mr Blair of Ennismore explaining how he saw the clawback as operating was of little, if any, relevance, in resolving the issues of construction. It is important to note that, as Lord Neuberger observed in his point (vi) in para 15 of his judgment in Arnold v Britton quoted above, subjective evidence of any party’s intentions must be disregarded. Indeed, oral evidence of the subjective intentions or understanding of the parties is not relevant or admissible when the issue is what is the true construction of the agreement in the light of Lord Neuberger’s factors (i) to (v). In the opinion of the Board the judge fell into error in focusing on the oral evidence as he did.

21.
The Board concludes that the submissions on the true construction of the agreement made on behalf of Fenris are to be preferred to those made on behalf of Ennismore and that the appeal should be dismissed. The Board would not, however, go so far as the President did when he said that the meaning and effect of the clawback agreement were not open to doubt. That is because there is a tension between the language of sentences A(ii) and B(1)(ii) on the one hand and sentences B(1)(iii) and C(1)(iii) on the other.

22.
As the Board sees it, the position is as follows. The primary agreement is stated in sentence A(ii), namely that discretionary fees or bonuses would be subject to clawback against “net investment losses attributable to the investment advice received by Ennismore from Fenris or AVP in the subsequent three years”. However sentence A(ii) does not contain a sufficient statement of the conditions giving rise to clawback because there is no formula for the relevant calculation. It does not state what proportion of the prior year’s bonus is liable to be repaid in a subsequent year and how, if it is less than the whole of the bonus, that proportion is to be calculated. Sentence B(1)(i) defines the order in which clawback is applied and sentence B(1)(ii) defines generally the amount of clawback by creating the principle of equivalence. Then, critically, it is sentences B(1)(iii) and C(1)(iii) that contain the formula for the calculation of the amount of clawback. In each case, they indicate that the amount is to be ascertained by applying the percentage multiplier to the “reduction in the performance fee earned by [Ennismore]”. The word “attributable” in sentences A(ii), B(1)(iii) and C(1)(iii) describes the causal link between the reduction in Ennismore’s performance fee and the net losses on Fenris’ portfolio within the three year period during which the funds are earned. The reference to “net investment losses” in sentences B(1)(iii) and C(1)(iii) must refer back to the phrase in sentence A(ii)

where it means "any net investment losses attributable to the investment advice received by [Ennismore] from [Fenris] in the subsequent three years".

23.
The Board accepts the submission made on behalf of Fenris that it was not necessary to define the "investment losses" as "the amount by which the value added to the Funds falls short of the benchmark". It accepts the submission that "investment losses" simply means a loss on a portfolio over the relevant period.

24.
The judge ignored the requirement that Fenris' investment losses must be causative of "a reduction in Ennismore's performance fee". As explained above, the agreement expressly so provided in two places and the Board can see no justification for ignoring those provisions. The Board accepts the President's conclusion in para 67 that that is essentially what the judge did. Moreover, viewing the provisions of sentences B(1)(iii) and C(1)(iii) by themselves, there is no ambiguity in the sentences which might justify such an approach. On the contrary, their provisions are clear. Mr Blair said that their formulation was a "mistake", and the judge said that he "accepted this evidence". But there was and is no explanation as to how such a mistake could have been or was made by someone who understood that the clawback system operated as Mr Blair contended. This is furthermore not a case in which it can fairly be said that the construction advanced by Fenris is unworkable. It seems to the Board to make sense to include a provision requiring Ennismore to demonstrate how its performance fee was reduced by losses caused by Fenris' advice before it was required to forfeit Fenris' earlier bonus. In this way the agreement answers the questions posed by the President in para 14 above.

25.
So far as the Board is aware, it is not in dispute that, on the facts, the investors' losses in 2008 easily eliminated the profit on which a performance fee could otherwise have been earned by Ennismore. As noted on behalf of Fenris in paragraphs 41 and 42 of its case, the result was that there was no performance fee in 2008. It also means that, as against any one loss making portfolio manager, Ennismore could not show that it would have made a profit in 2008 but for the loss made by that portfolio manager; indeed, any such manager could have said in 2008 that the total loss for that year from the other portfolio managers would have eliminated Ennismore's performance fee. This is however a factor that cuts both ways. Ennismore can rightly say that it cannot have been intended that the worse all fund managers' performance, the less possible clawback.

26.
To this Fenris can respond that, in the event that more than one fund manager generated an investment loss, with the overall result that Ennismore received less or no performance fee from its clients, the performance fee thereby lost would have to be apportioned between fund managers in proportion to their contribution to its loss on that portfolio. In fact Ennismore did not seek to apportion the reduction in its performance fees in 2008 as between the various loss making portfolios, or even to show that such reduction would not have been possible. So it never sought to establish what reduction in Ennismore's performance fee was attributable to the losses on Fenris' portfolio. Its case was simply that it was entitled to calculate a negative bonus on Fenris' portfolio irrespective of any loss it may have suffered.

27.
Ennismore further submits that, even in years when there were losses on all portfolios (so that that neither individually nor together could any manager be said to have caused Ennismore any loss of

performance fees in that year), such losses would put Ennismore further below the “high watermark” referred to in the quotation set out in para 7 above. In order to begin to earn any performance fee in some future year, Ennismore would have to climb back up to the watermark, by making further profits for its clients. Such profits would bring individual portfolio managers bonuses, but would bring Ennismore no performance fees from its clients, until it was once again above the watermark. Ennismore drew the attention of the Court of Appeal in this regard to, and the court in para 9 quoted without further comment, a passage in Ennismore’s Fund Information dating it appears from 2006. This stated, against “Charges paid by the Fund”:

“Performance Fee: 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.”

28.
Although this particular Fund Information document appears to have been issued after the clawback agreement was entered into, it may be that similar documentation was issued in prior years. Even assuming that this particular piece of information was within the actual or assumed knowledge of Fenris when the clawback agreement was made, the Board does not consider that it demonstrates that the terms of sentences B(1)(iii) and C(1)(iii) were an unexplained mistake. There are no findings as to what the parties had in mind or should be taken to have had in mind as background to the way in which the benchmark operated.

29.
The Board adds that Ennismore did not advance any case to the effect that any amount by which Ennismore was put further below the watermark because of losses on individual portfolios could be treated as itself a “reduction in the performance fee earned” by Ennismore, or that possible reductions of any performance fee in future years (because of the need to climb back up again to the watermark) could be regarded as such a reduction under the clawback agreement. Ennismore would not necessarily succeed in climbing back up at all in the next year, the Fund might even be closed, and it would be unclear how many future years could be taken into account. The natural reading of the clawback agreement is that, just as the net investment loss is “calculated separately for each performance period” (sentence B(2)), so is likely to be any reduction in the performance fee earned which is attributable to such net investment loss.

30.
The Board does not in these circumstances accept the judge’s conclusion that the construction of the clawback agreement proposed by Fenris is absurd, extraordinary, unreasonable or contrary to commercial common sense. As submitted on behalf of Fenris, it has the effect that Fenris compensates Ennismore when it shows that it has suffered a clearly established loss in the relevant year because of Fenris’ bad advice and not otherwise. It has the effect that Ennismore does not suffer a loss so long as it proves that the loss has been caused by Fenris. On the other hand, Ennismore’s construction has the effect that a portfolio manager is penalised when Ennismore suffers no clearly established loss from the advice given by that particular portfolio manager and recovers the bonus as a potential windfall with no obligation to pass it on to the investors who in that event have suffered the loss.

31.
The judge held in para 36 of his judgment that the concept of clawback was well understood by all those concerned with both Ennismore and Fenris from the start. He held that 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 entitling Ennismore to claw back a portion of an individual discretionary bonus payments in the event of future losses in the portfolios being managed by the particular individual. He held that all the fund managers knew and understood the system. In particular he held that Mr Vigeland was well aware of the clawback system. In reaching these conclusions he accepted the evidence of the Ennismore witnesses and preferred it to that of Mr Vigeland.

32.
However, the difficulty with that approach is that, as the CICA correctly held at para 69, there was no course of dealing between Ennismore and any of its employees which would have prepared them for the very serious problems which befell the markets in 2008. In normal years the question whether Ennismore would be paid irrespective of any loss was never tested. The CICA accepted Fenris' submission that (as stated above) not only had there been virtually no actual clawback in the history of the company (only two instances over six years for seven or more fund managers) but Ennismore had never ended up with a cataclysmic event which caused most fund managers to earn nothing. That had not occurred before 2008; so that no practice existed which would assist on any of the issues of construction. As the President said, no-one 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.

33.
In short, although the judge's findings show that there was a well-established background from the start that both bonuses and clawback would be based on individual portfolio performance, (a) it is not shown or found that there was any understanding about the precise basis on which or way in which such clawback would then be achieved; on the contrary it is quite conceivable that it might depend on a further condition that it should cause Ennismore loss, (b) that there was no such understanding or finding in this respect is not surprising when there had been no past history of losses on any portfolio which could clarify, or generate experience of, the operation of clawback and, moreover, (c) the internally contradictory and unexplained language of the clawback agreement which the Board now has to construe is itself suggestive of a lack of clarity in any understanding in this particular respect.

34.
In all the circumstances the Board accepts the submission that the CICA was correct to conclude that it was wrong to dismiss the clawback agreement on the basis that it was a poorly drafted document, at any rate in the respect with which this appeal is concerned. As the President said in para 68, the judge gave no explanation why he thought that the parties should have intended to impose an obligation on Fenris to pay moneys to Ennismore in circumstances where Ennismore had not suffered any clearly established loss in consequence of the Fenris portfolios, but that is the effect of the construction which Ennismore advanced and the judge accepted.

35.
Much of the evidence relied upon by the judge was not relevant to the issue of the true construction of the clawback agreement. Some of it might conceivably have been relevant to an argument that the agreement should be rectified but no claim for rectification was advanced on behalf of Ennismore.

Conclusion

36.

For the reasons summarised above, the Board concludes that the resolution of the appeal depends upon the true construction of the clawback agreement and that, applying the principles summarised by Lord Neuberger in Arnold v Britton in para 17 above, there is no warrant for giving no meaning or effect to sentences B(1)(iii) and C(1)(iii). The point is well encapsulated in paragraph 34 of Fenris' case as follows. The question is whether the formula to compute the clawback fees is a percentage "of the reduction in the performance fee earned by the Company attributable to any net investment losses". That expression is used both in sentence B(1)(iii) and in sentence C(1)(iii), where it expressly relates to the amounts subject to clawback in respect of 2005 and 2006 bonuses in order to cover the 2008 losses. Sentence C(1)(iii) is therefore particularly in point.

37.
On Ennismore's case, those sentences (which were used twice) were redundant and should be ignored. The judge accepted this, and, as Fenris submitted, gave no meaning at all to them. It appears to the Board that, in the words of Lord Hoffmann, a reasonable person in the position of the parties would have given the words their ordinary meaning. Moreover, their inclusion cannot be said to have been inconsistent with the overall purpose of the agreement.

38.
It follows that, save in the case of the CICA's order for costs, the appeal must be dismissed. As to costs, Fenris accepts that the CICA's order for costs on an indemnity basis must be set aside and replaced by an order on a standard basis. As to the costs of the appeal to the Board, subject to any submissions received in writing within 21 days of the judgment being handed down, the Board concludes that Ennismore must pay Fenris' costs of the appeal.

Postscript

39.
The attention of the Board was drawn to the fact that there was a very long delay between the hearing of the appeal and the delivery of the judgment of the CICA. The hearing was on 23 and 24 July 2012, whereas the judgment was not handed down until 16 April 2014, nearly a year and nine months later. The Board is of the view that, in the absence of some exceptional justification in or accompanying the judgment, that was a wholly unacceptable delay and wishes to emphasise the importance of the CICA delivering judgments as soon as reasonably practicable after a hearing. It was accepted on behalf of Fenris that the delay was excessive. However, the question is whether it would be unfair or unjust to allow the decision of CICA to stand. Given that the issues in the appeal have been resolved on the true construction of the clawback agreement, the Board is satisfied that, in the particular circumstances of this case, it would not be unfair or unjust to dismiss the appeal.