

CAYMAN ISLANDS GRAND COURT

Ennismore Fund Management Limited -v- Fenris Consulting Limited Cause No. FSD 65 of 2009, per Foster J (7 February 2012)

CONTRACT - CONSTRUCTION - CLAWBACK AGREEMENT

The Plaintiff is an investment management company and the Defendant is a consultancy company set up to provide fund management services to the Plaintiff. The compensation agreement between the two parties was based on a system of bonuses which would be subject to claw back in respect of losses attributable to the relevant portfolios, a system that was memorialized in a badly drafted claw back agreement prepared by a non-lawyer. After catastrophic losses in the financial crisis, the Plaintiff brought an action on the claw back agreement which required the Court to determine its true meaning and construction and in particular whether, as a matter of interpretation, claw back was based upon and limited to the amount of reduction in the overall performance fee or on the individual performance of the portfolios managed by the Defendant.

Further, the Court was required to determine the meaning of the words, "attributable to" in the context of the claw back agreement. The Court held that an agreement must be interpreted in light of all the background circumstances reasonably known by or available to the parties, which 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.

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, and the market in which the parties were operating. The poorer the quality of the drafting, the less weight should be given to semantic niceties that attribute to the parties an improbable and

unbusinesslike intention. Having regard to these principles, the operation of claw back under the agreement was based upon and related to the individual performance of the Defendant in the management of the particular portfolios for which it was responsible and the profits and losses on those portfolios.

Furthermore, while in some circumstances, "attributable to" may well require that the Court consider the notion of blame or fault, in this case, based on the overall construction of the contract, there is no inference to that effect to be drawn from the agreement. Here, "attributable to" means only that the investments in question were part of the Defendant's portfolio. Judgment was given for the Plaintiff.

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