CL-2016-000647

Neutral Citation Number: [2018] EWHC 3496 (Comm)

Case No: CL-2016-000647

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20/12/2018

Before :

MRS JUSTICE MOULDER

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Between :

BLACKSTAR ADVISORS LIMITED	**Claimant**
- and –	
(1) CHEYNE CAPITAL INTERNATIONAL LIMITED **(2) CHEYNE CAPITAL HOLDINGS LIMITED**	**Defendants**

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Lance Ashworth QC and **Matthew Morrison** (instructed by **Stewarts Law LLP**) for the **Claimant**
Steven Berry QC and **Adam Board** (instructed by **Cooke, Young & Keidan LLP**) for the **Defendants**

Hearing dates: 13-15, 19-22, and 28 November 2018,

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APPROVED JUDGMENT

Mrs Justice Moulder :

1. This is a claim for fees which the claimant (“Blackstar”) asserts are due to it as a result of introducing clients to the Cheyne Capital group (“Cheyne”) which invested in Cheyne managed funds. The claim is brought in contract or in the alternative on the basis of estoppel.

Background

2. The first defendant (“CCIL”) and the second defendant (“Cheyne Holdings”) are both members of the Cheyne Capital corporate group.

3. On 14 September 2006 CCIL and Blackstar entered into a Capital Introduction Memorandum of Understanding (the “MOU”). The MOU was expressed to terminate six months from the date of signing.

4. In December 2006 L’Association pour le Regime de Retraite Complementaire de Salaries, a French private sector pension fund (“ARRCO”) made an initial investment of €220 million in Cheyne funds (the “ARRCO Investment”).

5. On 23 March 2007 the claimant and CCIL entered into the Capital Introduction and Fee Sharing Agreement (the "CIFS Agreement").

6. On 4 April 2008 a side letter to the CIFS Agreement was entered into (the “2008 Letter Agreement”). It provided for the issue to Blackstar of a €10 million Amortising Note in consideration for fees payable under the CIFS Agreement (the scope of such agreement being in dispute and dealt with below). Cheyne Holdings issued to Blackstar a €10 million Amortising Note due December 31, 2013 (the "Amortising Note").

7. On 22 January 2009 CCIL and Blackstar entered into a further side letter (the "2009 Letter Agreement") dealing with fees in respect of an extension beyond 31 December 2013.

8. On 20 December 2010 Cheyne served notice to terminate the CIFS Agreement.

9. On 3 December 2012 ARRCO sent a letter in effect extending the ARRCO Investment for two years from 31 December 2013 to December 2015.

10. On 31 October 2013 a term sheet was signed by ARRCO. This provided for the creation of a French fund with the assets of such French fund being managed by Darius Capital (“Darius”) with management being delegated to Cheyne. A letter was sent by ARRCO to Cheyne on 4 December 2013 which specified that the

creation of the structure using the French fund should be done by the end of the first quarter 2014.

11. In March 2014 a French fund ("FCP") was established and in April 2014 the funds invested by ARRCO in the Cheyne funds were transferred to the FCP (the "French Restructuring").

Evidence

Mr Kartalis

12. For the claimant, the court heard from Alexandre Kartalis. Mr Kartalis described himself in his witness statement as a consultant to Blackstar. In his written opening submissions, counsel for Blackstar referred to Mr Kartalis somewhat obliquely as the "principal player for the purposes of this case". At the start of the cross examination Mr Kartalis was asked about his authority to represent Blackstar. Mr Kartalis maintained that he was a consultant although no consultancy agreement has been disclosed and he maintained that his authority was confined to acting as a consultant to the company. However no other individuals appear to have had any significant role in the dealings with Cheyne on behalf of Blackstar.

13. Mr Kartalis did have a colleague Mr Cohen-Ganouna who also worked for Blackstar as a consultant and who had a good relationship with certain individuals at ARRCO and it was through these contacts that Blackstar was first introduced to the finance director of ARRCO, Mr Goubeault. Relations however with Mr Cohen-Ganouna foundered in 2014 and Mr Kartalis asserts that Mr Cohen-Ganouna acted together with ARRCO to exclude him, Blackstar and Bucephalus from ongoing commercial arrangements relating to the ARRCO investment following the French Restructuring. Mr Cohen-Ganouna was not called as a witness.

14. Mr Kartalis also acknowledged in cross examination that he was the owner and managing director of the English company, Bucephalus Capital Limited ("Bucephalus Capital") as well as a director of the company, BCP Investments Limited ("Bucephalus Guernsey"). His evidence was that he was acting primarily for Blackstar and Bucephalus Capital when he was discussing ARRCO in 2013 and 2014.

15. I make reference below to various specific instances where Mr Kartalis failed to give direct answers to questions put in cross examination instead giving lengthy responses which failed to answer the question. The inference that I draw is that Mr Kartalis was seeking to avoid giving direct answers on points which would adversely affect his case. That affects the weight which I give to his evidence as a whole.

16. The weight which I give to his evidence is also reduced in the light of the following exchanges in cross examination. In cross examination Mr Kartalis was asked whether he was aware in June 2014 that ARRCO had accused him of acting contrary to ARRCO's interests. Mr Kartalis responded:

> "no. I wasn't made aware of that until we, through a French procedure in the court in France, we got a bailiff because we couldn't get any explanation – and when I say "we", it's Bucephalus capital – we couldn't get any explanation as to what had happened as no one would explain that to us. And to the contrary what you just said, ARRCO actually in writing said they had no issues with us…"

It was then put to him:

> "So is your evidence that until then you didn't know that ARRCO had said that behaviour on your part was harmful to ARRCO?"

Mr Kartalis replied:

> "not only I didn't know that, but I had subsequent meetings with Mr Goubeault."

Mr Kartalis was asked:

> "you didn't know in say June 2014 that ARRCO was saying that you had conducted events harmful to your interest?"

Again he replied:

> "So in June 2014, as I said, I have received a communication from Darius that simply indicated that they couldn't disclose the content of the meeting that took place …but at the end of the day they were instructed that from now on I was not to be involved any more with ARRCO…"

This evidence was clearly at odds with the letter which was sent by Darius to Bucephalus Capital to the attention of Mr Kartalis which referred to behaviour "on your part" that ARRCO considered harmful to its interests and also referred to a telephone conversation during which Darius had "explained" the complaints made by ARRCO and "listened to your comments.".

17. Having been taken in cross examination to the letter itself, Mr Kartalis did not withdraw his earlier evidence merely stating that he did not get any communication from ARRCO directly and very little

information was provided. At best this exchange shows that Mr Kartalis is mischaracterising the events that unfolded in 2014 and suggests that Mr Kartalis is unwilling to acknowledge the true position, even when presented with contemporaneous documents, if it does not fit his account of what occurred.

18. Taken as a whole, Mr Kartalis did not present his evidence in a way which suggested that he was trying to assist the court and answer questions which were put to him and the weight which I give to his evidence is accordingly reduced.

19. For the defendants the following gave evidence:

    i) Mr Stuart Fiertz

    ii) Mr Jonathan Lourie

    iii) Mr Gary Ibbott

    iv) Mr Xavier Himmer

    v) Mr Christopher Goekjian

    vi) Ms Cynthia Stockum Cox ("Ms Cox"), general manager of CCIL. Ms Cox gave evidence by video link pursuant to an order granted on 19 October 2018.

Ms Cox

20. Ms Cox's responsibilities were, and are, to manage the operations of CCIL (paragraph 6 of her witness statement). Her evidence was that CCIL was responsible for the international marketing of funds managed by the Cheyne group to prospective investors and (generally) dealt with arrangements with intermediaries who introduce potential investors to the Cheyne group. As part of her responsibilities, she executed the CIFS Agreement and was involved in reviewing and commenting on the various drafts.

21. In my view Ms Cox gave evidence clearly and with apparent knowledge of the factual background. Her evidence appeared to be her true recollection with a view to assisting the court. I give weight to her evidence accordingly.

Mr Lourie

22. Mr Lourie is the founder, chief executive officer and chief investment officer of Cheyne Capital. His professional background is set out in his witness statement. He initially worked for LF Rothschild and thereafter Morgan Stanley where he was an executive director. In 2000 he founded Cheyne Capital with Mr Fiertz. In 2000 Cheyne capital had six employees, it now employs

145 people and Mr Lourie describes the Cheyne group as "a leader in the hedge fund industry" having won "Management Firm of the Year" on three occasions. In his witness statement Mr Lourie said that he was not involved in the day-to-day management of the relationship with Blackstar or in the details of the contractual arrangements.

23. In the light of his own evidence as to his professional background and success in a highly complex market, Mr Lourie made some surprising statements in cross examination. He was asked about the position which he held in Cheyne and in particular whether he was a director. To this straightforward question Mr Lourie responded initially that that was not his "tremendous area of expertise". He was then asked whether he (rather than Mr Fiertz) had the greater financial interest in the business which he acknowledged he did through interests relating to a family trust, whilst apologising that he was not "an expert in all these legal kind of structures.". This gave the impression that Mr Lourie was seeking to somehow portray a lack of understanding of basic legal matters which in my view was belied by his education and experience. Yet when Mr Lourie was asked about the CIFS Agreement and it was put to him that it was in relation to the ARRCO Investment, Mr Lourie responded that:

> "ARRCO is the beneficial investor or owner of the money. The structure with which we were dealing was LuxCo."

Thus, even though apparently unaware of his own legal position as a director of Cheyne, he was able to draw a distinction between the legal concept of a beneficial interest and the "LuxCo" structure. In my view these exchanges suggested that Mr Lourie was well aware of the case which the defendants are advancing in these proceedings (as might be expected of the person who both owns and runs the business) but that when giving evidence he might choose to advance his case rather than assist the court. This affects the weight which the court gives to his evidence particularly where he gave evidence as to the commercial context against which the rival interpretations of the documents have to be weighed and in considering whether he made the alleged representations and/or shared the common understanding relied upon by the claimant in advancing its case on estoppel.

Mr Fiertz

24. Mr Fiertz is a partner of Cheyne Capital International LP (the successor to CCIL) and one of the founding partners with Mr Lourie of Cheyne. Mr Fiertz was involved in the initial investment by ARRCO and the MOU and CIFS Agreement entered into with Blackstar. When Mr Goekjian joined Cheyne around 2009, Mr Goekjian took the lead

in managing the ARRCO relationship and also took over the day-to-day dealings with Mr Kartalis.

25. As far as the evidence of Mr Fiertz is concerned, it seemed to me that he was careful to try and advance his evidence in the light of the defendants' case. For example it was put to Mr Fiertz that it could not be said that Blackstar introduced either of the two SPVs to Cheyne. Mr Fiertz did not answer the question instead replying:

> "we worked together on the structure and our lawyers indeed set up those structures."

It was only when the question was put again, that Mr Fiertz replied, after a pause:

> "no"

It was then put to Mr Fiertz that the logical consequence of the defendants' case was that there should not ever have been a payment to Blackstar (because on the defendants' case, HDFP was the investor under the MOU and the CIFS Agreement but was not named as an investor). Again, Mr Fiertz did not answer the question, replying:

> "these agreements were intended to be living documents that were amended from time to time. So the definition of investors can be amended subject to mutual agreement. That was the fairly standard way these agreements works."

26. In my view not only did Mr Fiertz give evasive responses to questions as illustrated by these exchanges but he also sought to mis-characterise the structure to support his case. For example it was put to him that if any "input" was needed from the investor's side it always came from ARRCO. Mr Fiertz replied:

> "HDFP was our investor and so feedback from the directors of the investor, we reported to them and they had a duty to give us feedback as well…."

27. When asked by the court to clarify what Mr Fiertz meant by a duty on the directors of the SPV to give feedback to Cheyne, Mr Fiertz said that the directors would give "feedback" if Cheyne was not adhering to the management and advisory agreement. That explanation seemed to me to be an odd use of the term "feedback" and in my view, was an attempt by Mr Fiertz to bolster his case that HDFP was the "investor".

28. In my view Mr Fiertz in giving evidence in cross examination was trying to advance the defendants' case and insofar as his evidence

is relevant to any of the issues, the weight which I give to his evidence is reduced as I cannot be confident that his evidence truly reflected the factual position.

Mr Himmer

29. Mr Himmer is a partner in Cheyne Capital Management (UK) LLP and chief operating officer. He joined Cheyne in 2011. Mr Himmer was involved in events in 2013 and 2014. I found it both surprising and serious that Mr Himmer asserted both in his witness statement (paragraph 26) and in cross examination that on a phone call, a lawyer from Orrick, a well-known law firm, was reluctant to identify Blackstar as its client and was seeking to conceal the fact. Orrick was not called to give evidence so could not respond to this allegation. Mr Himmer relied on correspondence which was sent subsequently by Dechert who were acting for Cheyne but in my view such correspondence did not address or provide evidence in support of the allegation which he made which was directed at the behaviour of Orrick. In my view it is inherently unlikely that a lawyer would act in the way alleged and, without any evidence to substantiate the allegation, I treat this as an unfounded allegation. However, in the light of the seriousness of making such an allegation, I consider that Mr Himmer may be seeking to bolster the defendants' case and treat his evidence with some caution where such evidence is not supported by contemporaneous documents.

Mr Goekjian

30. Mr Goekjian was chief investment officer at Cheyne from 2009 until 2016. He is no longer working at Cheyne. He describes his role at Cheyne as being to supervise portfolio managers as well as deal with general overall management, corporate governance and structural/operational matters. He assumed responsibility for the portfolio of funds being managed for ARRCO in October 2009.

31. Mr Goekjian in cross examination also appeared to promote the defendants' version of events. He did acknowledge that the investor introduced by Blackstar was ARRCO and the use of HDFP and SDFP was merely a structure. However, when asked whether he had a meeting with ARRCO because ARRCO was the investor he was careful to respond that ARRCO was the "beneficial owner of the note". He also seemed to try and deflect questions towards Mr Ibbott: when asked about the disagreements on the percentages shown in schedules which were sent out, Mr Goekjian said that Mr Ibbott would have been dealing with it and if Mr Kartalis had questions he should have gone to Mr Ibbott because he made the payments and was "ultimately" responsible for the calculations.

Mr Ibbott

32. Mr Ibbott is the chief financial officer of Cheyne Capital Management (UK) LLP. His evidence (paragraph 6 of his witness statement) is that he was responsible for overseeing the financial accounting and fund accounting functions within Cheyne. He stated that this involved:

> "oversight of a number of operational processes… overseeing financial reporting, including some of the reporting to Cheyne's investors and intermediaries."

He described his role as:

> "comparatively less focused on investment management and client relationships. My focus is comparatively more operational than some of my other senior colleagues."

Although he was involved in some correspondence with Mr Kartalis over fees, notably he sent quarterly spreadsheets to Mr Kartalis showing the fee calculation, it is clear on his evidence that he was not responsible for agreeing the commercial terms of the agreement with Blackstar which was done by the "investor relations" team who had the contact with the clients and intermediaries; he merely reviewed the calculations of the fees that had been agreed by others.

Missing witnesses

33. Counsel for the claimant submitted that the defendants had deliberately not called certain witnesses who would have been able to give "highly material evidence" pertaining to the issues in dispute. Counsel therefore submitted that the court should draw an adverse inference that these witnesses could not or would not give evidence to cast any doubt on Mr Kartalis's evidence or to support the claims made by Cheyne.

34. One of the missing witnesses was Mr Lieber. Mr Lieber was and remains a consultant to Cheyne and the claimant relies on the fact that Mr Lieber was "heavily involved" in the negotiation, drafting and agreement of the CIFS Agreement and the 2008 and 2009 Letter Agreements. In particular it was submitted for the claimant that Mr Lieber was the person who had "agreed the benchmarks" which were then memorialised in the CIFS Agreement and that Mr Lieber could give evidence as to the "aims and genesis" of the CIFS Agreement.

35. In my view (as discussed below) the task of the court in the interpretation of the CIFS Agreement, the 2008 Letter Agreement

and the 2009 Letter Agreement is to ascertain the objective meaning of the language. No oral agreement with Mr Lieber is pleaded and whilst the factual background known to the parties is of potential relevance, evidence of the prior negotiations is not, except for the limited exceptions discussed below. Accordingly, for the reasons discussed further below, in my view any evidence which Mr Lieber would have provided in relation to the commercial negotiations including the "aims and genesis" of the CIFS Agreement was largely, if not wholly, inadmissible and irrelevant. To the extent that Mr Lieber could have provided evidence in relation to the factual background, evidence was given by other Cheyne witnesses, including Ms Cox and Mr Fiertz who were involved in the negotiation of the CIFS Agreement and therefore in my view the absence of Mr Lieber does not in the circumstances warrant the court drawing any adverse inference.

36. The other "missing" witnesses were Mr Bordage and Ms Wittmann. The claimant submits that Mr Bordage was relevant in that according to the evidence of Ms Cox, he was the individual at Cheyne who exercised the discretion to determine what pay Blackstar. However as discussed below, this is not an issue which is relevant for the court to determine and therefore in my view his absence was not material. As to Ms Wittmann, she was and is an in-house lawyer at Cheyne and I am not persuaded that her evidence as an in-house lawyer would have been material in providing the commercial background (as distinct from evidence of negotiations) to issues of construction, given the other witnesses who appeared for Cheyne.

Expert evidence

37. Permission was given for oral expert evidence from Ms Martine Samuelian and Professor Gaudemet as to French law on the legal personality of the French FCP and the consequential effect on the beneficial ownership and control of the invested assets. However, prior to trial the parties agreed that the experts' attendance in order to give oral evidence was unnecessary and the French law issues were not an issue at trial. The French law evidence was raised by the claimant in closing submissions in the context of the interpretation of the 2009 Letter Agreement. Accordingly, I note (and take into account below) from the experts' joint memorandum that the FCP has no legal personality and that ARRCO has an ownership right on the FCP's invested assets. I do not however need to deal further with the French law evidence.

The Issues

38. The issues which in my view fall to be determined based on the pleaded issues that were pursued at trial are as follows:

i) in respect of the ARRCO Investment:

a) the construction of the CIFS Agreement and whether Blackstar had:

i) either a fixed entitlement to fees in respect of the period to 31 December 2013 under the "Existing Deals" provision; or

ii) an entitlement under the first paragraph of the "Profit Sharing" provision and an entitlement under the seventh paragraph of that provision to 100% of "Topco" fees;

b) in the alternative whether Cheyne is estopped from asserting that Blackstar did not have a fixed entitlement to fees;

c) the construction of the 2009 Letter Agreement, and the amount due to Blackstar after the French Restructuring in respect of the period from 31 March 2014;

d) in the alternative whether Cheyne is estopped from asserting that Blackstar did not have an entitlement to fees post the French Restructuring; and

e) the amount of "Special Payments" due to Blackstar under the Amortising Note;

ii) in respect of an investment by Holding Communal SA in a €70 million 10 year note guaranteed by Goldman Sachs (the "Goldman Sachs Note"):

a) the construction of the CIFS Agreement and whether Blackstar had an entitlement to fees under the first or third paragraph of the "Profit Sharing" provision in the CIFS Agreement; and

b) in the alternative whether Cheyne was estopped from denying that Blackstar was entitled to fees under the CIFS Agreement;

iii) in respect of Generali, the construction of the CIFS Agreement and whether Blackstar had either an entitlement to fees in respect of the period to 31 December 2013 under the first or third paragraph of the "Profit Sharing" provision in the CIFS Agreement.

39. In respect of the issue at (i)(a) above Cheyne have not pleaded a case based on variations having occurred as a result of reallocation and the defendants' application to amend their pleadings to

introduce such case was dismissed on the first day of trial for the reasons set out in the ruling given that day. Accordingly, the issue of the fixed fee having been subsequently varied by allocations does not arise for determination.

40. The written closing submissions made extensive reference to the evidence both written and oral. This judgment does not deal with every submission which was raised but it should not be inferred that submissions or evidence have not been considered in reaching a conclusion merely because it has not been expressly referred to in the judgment.

The ARRCO Investment

41. It is common ground that Blackstar introduced ARRCO to CCIL leading to an investment of €220 million in Cheyne funds. The structure of the investment was that two Luxembourg special-purpose vehicles were used, Holding de Diversification Financiere Prudentielle Sarl ("HDFP") and Societe de Diversification Financiere Prudentielle ("SDFP"). SDFP issued a bond (the "SDFP Note") which was held (beneficially) by ARRCO. SDFP entered into a swap with HDFP pursuant to which the net proceeds of the SDFP Note (€220 million less expenses) were paid under the swap by SDFP. HDFP then invested the net proceeds in various Cheyne funds. The return on the SDFP Note was linked to the return on the swap. At maturity of the swap (31 December 2013 coinciding with the maturity of the SDFP Note) the swap provided for the underlying investments in the Cheyne funds to be liquidated and the cash amount realised paid over to SDFP to fund redemption of the SDFP Note.

Construction of the CIFS Agreement

Relevant Legal Principles

42. The approach of the court to the construction of contracts has been set out most recently in the Supreme Court decision in *Wood v Capita Insurance Services Ltd* [2017] AC 1173. In that case the court stated that it did not accept the proposition that the decision of the Supreme Court in *Arnold v Britton* [2015] AC 1619 had altered the guidance given in in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900. Giving the judgment, with which the other Supreme Court justices agreed, Lord Hodge stated that it was not appropriate to reformulate the guidance given in *Rainy Sky* and *Arnold*.

43. The principles are set out at paragraphs [8] to [15] of the judgment of Lord Hodge. From that I derive the following summary:

    i) The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement.

ii) This is not a literalist exercise focused solely on a parsing of the wording of the particular clause but the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.

iii) Of potential relevance to the task of interpreting the parties' contract is the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations.

iv) The unitary exercise of interpretation involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

v) Textualism and contextualism are not conflicting paradigms but tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance.

vi) Where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

Discussion

44. The section headed “Fee on Existing Deals” in the CIFS Agreement states:

> "The initial €220 million tranche of the ARRCO programme described above currently produces a management fee rebate to Blackstar of 1.39% per annum based on the invested amount (including all reinvestment) (the "Outstanding Amounts") as well as an incentive fee currently equivalent to 0.54% per annum of the Outstanding Amounts (together, the "First Tranche Fees"), in each case subject to changes in performance and allocation. While the percentage amounts of the First Tranche Fees may vary in the event that Cheyne uses its discretion, in the best interest of ARRCO, to reallocate its investments, Cheyne shall not make any reallocation decision for the purpose of reducing the First Tranche Fees. The First Tranche Fees are payable quarterly, within 30 days of Cheyne's receipt of the last payment in respect of such quarter, to Blackstar for the duration of the programme, which will be a minimum of seven years (corresponding to the maturity of the bonds issued by the SPV and subscribed by ARRCO)." [Emphasis added]

45. Blackstar’s case (paragraph 14 of the Re-Re-Amended Particulars of Claim) is that the effect of the “Fees on Existing Deals” provision was to give Blackstar a contractual entitlement to a proportion of the fees received by Cheyne in respect of the ARRCO Investment amounting to a management fee of 1.39% per annum of the net asset value (the “NAV”) of the Cheyne funds from time to time and a performance fee of 0.54% of the NAV. The fee could vary if the total percentage management fee or total percentage incentive fee received by Cheyne was higher or lower than the percentage amounts being received by Cheyne at the date of the CIFS Agreement where such change was due solely to the making of a reallocation decision by Cheyne. In those circumstances the annual fee entitlement Blackstar would be adjusted up or down in the same proportion. However, as Cheyne have not pleaded a case based on variations having occurred as a result of reallocation, the claimant submits that Blackstar’s entitlement has remained fixed at 1.93% of NAV.

46. It is the defendants’ case that, although the MOU was terminated on 23 March 2007, under the CIFS Agreement termination of the MOU was without prejudice to the existing fees due under the MOU. Accordingly, under the “Fees on Existing Deals” section it is the

defendants' case that Cheyne agreed to continue to pay fees to Blackstar in relation to the ARRCO Investment on the same basis as before, and the MOU provided for Cheyne to pay fees to Blackstar of "up to" 25% of Cheyne's fees. Thus, it was submitted that the fees were not fixed percentages but might vary and the references to percentages in the "Fees on Existing Deals" section were to record what was "currently produced".

47. Applying the principles referred to above, the task of the court is to determine the objective meaning of the language. I do not therefore propose to deal with the evidence or submissions to the extent that such evidence or submissions go to the parties' subjective intention.

48. It seems to me that the natural meaning of the words "currently produces" and "currently equivalent to" suggests that this is a representation as to the current position and not a statement of a fixed entitlement.

49. I accept however that an alternative interpretation is possible and the references to "currently" could be interpreted as providing for a fixed fee subject to adjustment in the future for "changes in performance and allocation". For the claimant it is submitted that this is an adjustment mechanism to cater only for the reallocation of investments in the future. However, the wording is not limited to an adjustment arising out of a change in allocation but refers to "changes in performance and allocation". The reference to a change in performance would suggest that the performance fee is not fixed at 0.54% but would vary as the performance of the underlying funds varied. Whilst the relevant clause then states that the percentage amounts may vary in the event that Cheyne reallocates its investment, this does not as a matter of language override the previous sentence that the fees are percentages "subject to changes in performance and allocation". In my view, the second sentence deals with a different issue, namely an undertaking that Cheyne is not permitted to make any reallocation decision for the purpose of reducing the fees due to Blackstar. In construing the language, the court therefore seeks to give meaning to the concept both of adjustments for changes in allocation and changes in performance.

50. Although counsel for the defendants submitted that the meaning of the language was clear, as was made clear by Lord Hodge in *Wood*, construction is not a literalist exercise and the court must consider the contract as a whole and the factual background.

51. The extent to which the context will assist the court varies according to the circumstances of the particular agreement. The CIFS Agreement was not an informal document. It was drafted for Cheyne by Mr Lieber who was described by Mr Fiertz (paragraph 25 of his witness statement) as having a "legal background". Mr

Kartalis did not instruct lawyers but had the agreement reviewed by "friendly lawyers". Whilst those lawyers were from a recognised and well established firm, in my view having the agreement reviewed in this way is not necessarily going to produce the same precision of drafting as if the document had been drafted and negotiated by lawyers. Mr Kartalis was however a sophisticated businessman with a background in investment banking and private equity. He was familiar with the subject matter of the agreement which was at the heart of Blackstar's business namely the introduction of investors by Blackstar to asset managers and the remuneration of Blackstar in exchange for the creation of those relationships. In these circumstances, having regard to the sophistication of the parties, this is a case where the court will place more emphasis on the language which was used by the parties whilst at the same time having regard to the fact that the agreement was not drafted by external lawyers which may have affected the precision of the drafting.

52. It was submitted for Blackstar that the defendants' interpretation has the result that the words have no contractual effect but were merely descriptive. It seems to me relevant in this regard that it was being negotiated between Mr Kartalis and Ms Cox/Mr Lieber and the language was not drafted by external lawyers: although there may have been little commercial value in including a representation as to the position which the fee entitlement would produce as at the date of entry into the agreement, the court has in mind the observations of Lord Hodge in *Wood* that provisions may be the result of a negotiated compromise.

53. The claimant's case is that the entitlement of Blackstar was for a fixed fee based on the NAV. However, the clause expressly provides that the fees are payable:

> "quarterly within 30 days of Cheyne's receipt of the last payment in respect of such quarter". [Emphasis added]

It is difficult to see why payment to Blackstar should be linked to "receipt" by Cheyne of its fees if Blackstar's entitlement to fees was a fixed amount of the NAV.

54. In cross-examination Mr Kartalis suggested that the reason for the link to receipt by Cheyne was cash flow. Mr Kartalis said:

> "I think it's a funding issue. Once they receive the fees, then they make the payment that is due to Blackstar."

However, one of the funds at the time of the CIFS Agreement (and representing around 20% of the total portfolio) was the Cheyne

Total Return Credit Fund for which the performance fee due to Cheyne was deferred for a number of years. Counsel for the claimant submitted that in this specific case, the fee would accrue but would not actually be payable. Counsel submitted that the fixed percentage would be applied to the total NAV for a quarter and then a deduction would be made of the fixed percentage of the NAV of any fund where payment was deferred. The deducted amount would then be paid as and when Cheyne received its performance fee on the relevant fund. There is no basis for this interpretation on the language of the provision in the CIFS Agreement. Further it would have the result that Cheyne would be agreeing to pay a performance fee which bore no relation to the fee (ultimately) received by Cheyne in that the amount due to Blackstar would be determined as a percentage of the NAV of the total fund on an ongoing quarterly basis, rather than the NAV of the particular fund at the (deferred) date on which Cheyne's performance fee was actually calculated. (It is not clear to me that this submission accorded with the explanation provided by Mr Kartalis in cross-examination as to how this deferred fee would operate but to the extent that it was his subjective interpretation of the provision, it is in any event irrelevant.)

This all militates against the claimant's interpretation which in my view is inconsistent with both the language of "receipt" and business common sense. To the extent that counsel for the claimant in closing submissions sought to rely on exchanges between Mr Kartalis and Cheyne in May 2007, these are in my view irrelevant to the objective construction of the agreement and being subsequent to the CIFS Agreement being entered into, are not part of the factual context.

55. In my view on a literalist interpretation, the natural meaning of the language does not support a fixed fee of NAV. However, the rival interpretations need to be tested against the other provisions of the contract. Under the heading "Other" it states:

> "This Agreement supersedes and terminates the agreement between the Parties dated September 12, 2006. For the avoidance of doubt, this is without prejudice to the existing fees due to Blackstar under the previous agreement as set out hereinabove." [Emphasis added]

56. It is submitted for the claimant that the MOU had terminated by this stage, being only a six month agreement and that the provision under "Other" in the CIFS Agreement should be construed as referring only to fees which have fallen due prior to the CIFS Agreement being entered into.

57. The section "Other" refers to the previous agreement "as set out hereinabove". In my view the words "as set out hereinabove" are to be construed as a reference to the section under the heading "Existing Deals" which states:

> "1. Prior to the date of this agreement, Blackstar and Cheyne have already completed two deals together… €2 billion discretionary investment programme for ARRCO with a seven year maturity… through a dedicated newly formed SPV called [SDFP]. The first tranche of this programme of €220 million was invested on December 22, 2006. At this stage it is expected that further tranches will be invested in 2007 and 2008 by ARRCO and its affiliate.
>
> 2 €10 million investment from Holding Communal de Belgique in the Cheyne Azure fund…" [Emphasis added]

58. I accept that the MOU is expressed to terminate six months from the date of signing (which would be six months from 14 September 2006 and thus March 2007) but the termination of the MOU by its terms is expressed to be "without any prejudice to Blackstar's existing rights under this Agreement". Although the section "Existing Deals" refers to the expectation of further tranches being invested, nevertheless I note that the CIFS Agreement describes the investment programme for ARRCO through the SPV as a deal which has been "completed". This reference to "completed" would suggest that the entitlement to fees for the introduction which has led to the investment programme for ARRCO has already arisen and accordingly the reference under "Other" to "fees due" to Blackstar under the previous agreement should be construed to refer to the fees to which Blackstar is entitled in relation to the investment of the first tranche of €220 million which in the section "Fee on Existing Deals" is defined as the "First Tranche Fees".

59. The claimant has sought to rely on the evidence of Mr Kartalis that he wanted the fixed percentages to be a "clearly documented contractual entitlement" and agreed with Mr Lieber in discussions that that the NAV percentages would be the benchmark. Counsel for the claimant also sought to rely on the spreadsheet that was produced by Cheyne internally which demonstrated how the percentages of 1.39% and 0.54% were arrived at. It was submitted for Blackstar that these were not merely illustrative but were the culmination of a detailed process which showed that Cheyne was keen to get the figures right.

60. I do not accept that this evidence is anything more than evidence for the purpose of drawing inferences about what the contract

meant and thus inadmissible in the context of contractual interpretation (*Chartbrook Limited v Persimmon Homes Limited* [2009] 1 A.C. 1101 at [42]). The purpose of this evidence of Mr Kartalis is not in my view to establish an objective fact which may be relevant as background known to the parties but evidence of statements in the course of pre-contractual negotiations. In my view the spreadsheet has little probative significance as it could support either party's interpretation. It does not establish an objective fact which may be relevant as background and therefore is inadmissible as merely evidence of negotiations.

61. Blackstar also seeks to rely on the evidence of Mr Fiertz (para 25 of his witness statement) that Mr Fiertz supported the idea of the CIFS Agreement in order to avoid future disagreements with Mr Kartalis. It was submitted for Blackstar that it made no sense to perpetuate a discretionary entitlement if his intention was to remove uncertainty. The evidence of Mr Fiertz was that the CIFS Agreement would deal with the relationship between Cheyne and Mr Kartalis going forward. I am not persuaded that any desire to avoid future disagreements provides any real evidence that the parties intended to renegotiate the arrangement that had already been reached in relation to the ARRCO Investment and where the investment had already been made.

62. Where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. However, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that in the negotiations the parties were not able to agree a more precise term.

63. It was submitted for Blackstar that fixing management and performance fees at this time as a percentage of NAV rather than as a percentage of fees received by Cheyne could have led to a better or worse result for Cheyne or Blackstar depending on how the various funds performed. Mr Kartalis suggested that his formulation gave Blackstar more security and more certainty. Further it was submitted that the risk that a fund might collapse was simply a facet of the deal that Cheyne had agreed to do and did not render the interpretation contended for by Blackstar unworkable.

64. Whilst as acknowledged by Mr Fiertz in cross-examination, a percentage of NAV would be "rather easy to calculate" and would avoid "lots of delving into the fees paid on each of the funds every month", Mr Fiertz also stated that it did not make that the right interpretation. The evidence of Ms Cox as to the commercial implications was in my view also significant. It was put to her in cross-examination that it would be very easy to work out what the fees would be if expressed as a percentage of NAV. She replied:

> "sorry, with all due respect, that would be a nightmare… You can't just establish that and then back into the individual ones. It is just not how any fund manager works… At least that's not how Cheyne works… It is just not how we have ever done anything…"

65. Whilst Blackstar's interpretation does provide Blackstar with security and certainty, such an interpretation makes no allowance for changes in the underlying fees payable to Cheyne of both management and performance fees caused by performance i.e. the change in the valuation of the NAV of an underlying fund which, given the different weighting of the underlying funds, would not be reflected in the fee payable to Blackstar if it were a fixed percentage of the NAV of the funds. It is not necessary for there to have been the complete collapse of a fund in order for the fixed percentage to be uncommercial from Cheyne's perspective. As the performance of the underlying funds with their different fees changed in any quarter, the amount of management and performance fees received by Cheyne and the contribution of such fees as a percentage of the overall fees would change, but on Blackstar's case, the percentage entitlement received by Blackstar would be unchanged and thus the amount which Blackstar received would not bear any relation to the fees received by Cheyne.

66. I note that under a separate agreement in respect of Holding Communal's investment in a Cheyne SIV, the agreement referred to a fee calculated as a percentage of the notional amount. However, that was a single investment in the form of a note rather than a percentage of net asset value and in my view is not therefore comparable.

Conclusion on fixed entitlement under the "Existing Deals" provision

67. In my view the language of the clause, for the reasons discussed above, clearly supports a conclusion that the reference to 1.39% and 0.54% was merely a statement as to the position at the time the CIFS Agreement was entered into. That reflects the natural meaning of the words "currently produced" and "currently equivalent to". The fact that the contract was drafted internally and only reviewed (for Blackstar) by external lawyers on an informal basis tends to support a conclusion that the natural meaning of the language is the correct objective interpretation. As discussed above, the other provisions of the contract support this conclusion as does the commercial context.

68. Accordingly, I find that the objective meaning of the language in the CIFS Agreement under the section "Fee on Existing Deals" is that the 1.39% management fee and 0.54% incentive fee was a

statement of what the fee arrangements currently produced at that time and was not a fixed entitlement to 1.39% and 0.54% of NAV.

Blackstar's alternative case under the CIFS Agreement

69. In the light of my finding on Blackstar's primary case under the CIFS Agreement, the court has to consider Blackstar's alternative case. The alternative case (at paragraph 15 of the Re-Re-Amended Particulars of Claim) is that the first paragraph of the "Profit Sharing" provision in the CIFS Agreement applies and Blackstar was entitled to fees in respect of the ARRCO Investment under that paragraph together with 100% of any other fees negotiated in addition. It is Blackstar's case that Blackstar's rights under the MOU were replaced by new rights under the CIFS Agreement and the terms of the MOU are irrelevant to Blackstar's claim. (Paragraph 13 of the Amended Reply).

70. It is the defendants' case that the provisions under the heading "Profit Sharing" do not apply to the ARRCO Investment and that under the MOU fees were calculated at Cheyne's discretion in percentages of Cheyne's fees which varied as between investments in different funds.

71. Under the heading "Profit Sharing" the CIFS Agreement provided:

> "In the event that as a result of Blackstar's introduction and efforts, an Investor actually invests in one of the tailor-made investment programs developed by Blackstar in cooperation with Cheyne, then Cheyne will pay to Blackstar 25% of all the fees (including all management fees and incentive or performance fees) that Cheyne receives from the relevant Investor with respect to such investment ("Profit Sharing") on a quarterly basis, within 30 days of Cheyne's receipt of the last relevant payment in respect of such quarter, subject to the termination provisions contained herein."

72. The section "The Investors" defines the term "Investors" as including ARRCO and its affiliates. Further I note that the description of the "Services" under the CIFS Agreement is as follows:

> "Blackstar shall use its reasonable endeavours to introduce to Cheyne the large institutional and corporate investors and family offices set out in the section The Investors below… for the purpose of making investments in Cheyne's existing funds as well as tailor-made investment programs… Blackstar may develop, in cooperation with

> Cheyne, asset management solutions for the Investors ...(collectively, the "Services"). "

Directly under that section there is then provision for Cheyne to pay fees described as "Profit Sharing" if as a result of Blackstar's introduction and efforts, an investor invests in one of the tailor-made investment programs developed by Blackstar in cooperation with Cheyne.

73. It seems to me therefore that the language "In the event that as a result of Blackstar's introduction ..., an Investor actually invests ..., then Cheyne will pay..." suggests that the "Services" with which the CIFS Agreement is concerned is future investments introduced by Blackstar to Cheyne. The natural meaning of the language is confirmed by the other provisions of the contract namely the section "Fees for Existing Deals" which indicates that the position in relation to existing investments, specifically the ARRCO Investment, is dealt with by that section and not under "Profit Sharing". Taken as a whole, the CIFS Agreement clearly indicates that the existing introduction of ARRCO and the fees due to Blackstar for such introduction are not within the section "Profit Sharing" but governed by the section "Fee on Existing Deals".

74. Thus, as a matter of objective construction the fees payable under the heading "Profit Sharing" are to be construed to refer only to new investments after the date of the CIFS Agreement and not to the fees for the existing ARRCO Investment which is expressly stated under "Existing Deals" in the CIFS Agreement to be a deal which has already been completed and for which a separate section is included headed "Fee on Existing Deals".

75. It was submitted for the claimant that it would not have made sense for Blackstar's entitlement to fees in respect of existing deals to be such percentage "up to 25%" as Cheyne elected to pay in the exercise of its discretion. It was submitted that this would mean that Blackstar was to have a far less certain and less valuable discretionary fee entitlement in respect of existing deals than it would become entitled to under the Profit Sharing provisions of the CIFS Agreement in respect of future deals.

76. The explanation provided by Mr Fiertz (paragraph 19 of his fourth witness statement) as to why Cheyne could not pay the maximum "up to" percentage fees to Blackstar was that fees received by Cheyne were split with their internal teams and certain funds would not accept capital that came with introducers' fees attached. Therefore, the MOU provided for flexibility to avoid a perverse incentive where capital could only be allocated to funds that accepted the payment of introducers fees (paragraph 22 of the fourth witness statement of Mr Fiertz). The absence of such a discretion in the "Profit Sharing" provisions of the CIFS Agreement

was put to Mr Fiertz in cross examination. The explanation offered by Mr Fiertz was not wholly satisfactory. He replied initially that it was unnecessary in the circumstances where it was a single overall fund at the top and Cheyne has the discretion amongst different assets having the same fee structure. This seemed on the evidence of the current investment by ARRCO in the Cheyne funds and the varying fees for each fund, an unlikely scenario. Mr Fiertz then said that by the time the CIFS Agreement was entered into (March 2007), the financial markets were "already starting to melt down" with the effect that the fund managers were no longer likely to turn investments away if introducer fees had to be paid. I note so far as the timing of the Credit Crisis is concerned, that Mr Lourie only referred to the position in April 2008 as being "in the crosshairs of the beginning of a credit crisis." Nevertheless, whether or not this was the explanation for the absence of any discretion in the "Profit Sharing" provision, the fact that in relation to future deals a fixed percentage was agreed, is not in my view sufficiently persuasive to counter the language of the provision read in the context of the whole agreement.

Conclusion on Blackstar's entitlement under the first paragraph of the "Profit Sharing" provision

77. Accordingly, for these reasons I find that Blackstar's alternative case fails. The fees due to Blackstar in respect of the ARRCO Investment are therefore those due under the MOU which provided that:

> "Cheyne will pay up to 25% of all its fees to Blackstar on investment introductions that lead to development of new asset management programs or platforms."

Discretion under the MOU

78. In relation to any discretion held by CCIL, Blackstar pleaded that the discretion had to be exercised honestly and rationally and having regard only to changes in performance and where it was exercised as a result of a reallocation decision, in the best interests of ARRCO. However no specific allegations have been made that the discretion was exercised irrationally or improperly and thus it seems to me unnecessary to consider on the pleaded case who was responsible for the exercise of the discretion or evidence of adjustments that were made over time.

79. In closing submissions counsel sought to advance a case that once the percentage for management fees and performance fees had been fixed, those percentages could not change so long as monies remained invested in that fund. This is not Blackstar's pleaded case which (at paragraph 15(b) of the Amended Reply) acknowledged that CCIL was permitted in exercising its discretion to have regard to

both changes in performance and changes as a result of a reallocation decision. Accordingly, I do not propose to address this submission.

80. To the extent that in the light of the findings in the judgment the parties are unable to agree the amounts due and outstanding to Blackstar under the MOU then the question of whether there should be an order for an inquiry and account to be taken will be determined at the consequential hearing following hand down of the judgment.

Entitlement under the seventh paragraph of "Profit Sharing" to 100% of "Topco" fees

81. Blackstar also claims an entitlement to 100% of "Topco fees" that is the fees charged by HDFP. Blackstar relies on the provision in the CIFS Agreement under the seventh paragraph of "Profit Sharing" which states:

> "in addition to the management and incentive or performance fees listed above, any other fees negotiated with any individual Investor in addition to the existing and usual Cheyne fees for the relevant fund (which additional fee shall be subject to Cheyne's consent as to reasonableness) shall be payable in full to Blackstar."

82. I cannot see that a "Topco fee" is within the scope of this paragraph. It does not seem to me to be a fee "negotiated with an individual Investor" as in my view HDFP is not be regarded as the Investor (ARRCO being specifically named in the CIFS Agreement as an "Investor" and not HDFP) nor has it been shown on the evidence to be a fee which is "in addition to" the "existing and usual" Cheyne fees for the relevant fund.

83. Irrespective therefore of whether Cheyne took a decision to pay 100% of the "Topco" fees in respect of the Cheyne Multi-Strategy Leveraged Fund instead of the fees on the underlying funds (as suggested by the evidence of Ms Cox), the pleaded case advanced by Blackstar relies on the paragraph cited above under "Profit Sharing" and in my view, for the reasons set out above, that is not the objective construction of the language of that provision.

The construction of the 2009 Letter Agreement, and the amount due to Blackstar after the French Restructuring in respect of the period from 31 March 2014

84. It was submitted for Blackstar that Blackstar had the same entitlement to fees after the French Restructuring as it had prior to the French Restructuring. In particular it was submitted that:

i) as a matter of construction of the 2009 Letter Agreement, Blackstar had an entitlement to ongoing fees in respect of the first tranche of the ARRCO Investment under the "Fees on Existing Deals" provision of the CIFS Agreement. The interposition of the FCP had no impact upon the ongoing existence of the ARRCO programme. (This was referred to in the claimant's closing submissions as "Route 1");

ii) There was an extension in December 2012 which triggered, or lifted the suspension of, the entitlement of fees for Blackstar under the CIFS Agreement (referred to as "Route 2");

iii) because of the staged way in which the restructuring took place, Blackstar's rights were perpetuated or revived as soon as the novation of the swap took place (referred to as "Route 3");

iv) in order for the 2009 Letter Agreement to make this sense, the references in the 2009 Letter Agreement to the "LuxCo Investment" have to be construed as referring to the first tranche investment under the ARRCO programme and the French Restructuring was simply a further extension of this investment (referred to as "Route 4").

85. Route 1 and 4 are in my view in essence arguments on the construction of the 2008 and 2009 Letter Agreements taken together with the CIFS Agreement. I will deal with the question of construction first.

Construction of the 2008 Letter Agreement and 2009 Letter Agreement

86. It is the claimant's case that the combined effect of the first recital and clause 4 of the 2009 Letter Agreement is that after the final maturity of the Amortising Note on 31 December 2013, such accrued entitlement to fees as Blackstar had under the CIFS Agreement in respect of the first tranche of the ARRCO programme was to continue.

87. For the defendants it was submitted that the position in 2009 was that the 2008 Letter Agreement had discharged the CIFS Agreement but that by virtue of clause 4 of the 2009 Letter Agreement, the CIFS Agreement was kept alive for new business until the CIFS Agreement was terminated in 2011. Further that the only extension of the "LuxCo Investment" by the "LuxCo Investor" terminated on 31 March 2014.

Discussion

88. It seems to me that before one can construe the 2009 Letter Agreement, one has to look at the 2008 Letter Agreement.

89. It was submitted for Blackstar that the 2008 Letter Agreement had the effect of Blackstar accepting the Amortising Note only in consideration for the amounts due in the period to the maturity of the SDFP Note and thereafter the entitlement to fees under the CIFS Agreement continued.

90. It is the defendants' case that Cheyne's liability for fees under the CIFS Agreement was fully discharged by the 2008 Letter Agreement and the Amortizing Note. It was submitted for the defendants that there was no legal justification to go behind the clear and precise language used.

91. Paragraph 1 of the 2008 Letter Agreement provided:

> "Blackstar accepts the [Amortising Note] created by the Deed of Covenant… as full and fair consideration for any and all Profit Sharing payable by Cheyne to Blackstar in relation to the LuxCo Investor in relation to the LuxCo Investment under the [CIFS Agreement], now or at any future date, and Cheyne's payment obligations to Blackstar in relation to the LuxCo Investor in relation to the LuxCo Investment under the [CIFS Agreement] shall be fully discharged by the issuance and transfer to Blackstar of the Note."

92. In the 2008 Letter Agreement the "LuxCo Investor" is defined as HDFP, the "LuxCo Agreements" are defined as the portfolio management agreement and the portfolio advisory agreement entered into in December 2006 between Cheyne and HDFP and the "LuxCo Investment" is defined as the investment made by the LuxCo Investor pursuant to the LuxCo Agreements.

93. Blackstar expressly accepted the Amortising Note:

> "as full and fair consideration for <u>any and all</u> Profit Sharing payable by Cheyne to Blackstar in relation to the LuxCo Investor in relation to the LuxCo Investment under the [CIFS Agreement], <u>now or at any future date</u> and <u>Cheyne's payment obligations to Blackstar</u> in relation to the LuxCo Investor… <u>under the [CIFS Agreement] shall be fully discharged</u> by the issuance and transfer to Blackstar of the Note." [Emphasis added]

94. On a literal interpretation of the language, the payment obligations of Cheyne under the CIFS Agreement are "fully discharged" by the issue of the Amortising Note.

95. However, counsel for the claimant submitted that reference to fees payable to Blackstar "now or at any future date" should be construed as references only up to the maturity of the note held by ARRCO and the corresponding maturity of the Amortising Note. Counsel referred to the fact that the reference to "Profit Sharing…under the [CIFS Agreement]" could not be construed literally as this is not the sense in which it is used in this letter agreement. Counsel relied on the evidence that at the time the 2008 Letter Agreement was executed there was no prospect of the ARRCO Investment being extended and although the evidence of Mr Lourie was that by buying out Blackstar's fee entitlement, Cheyne were buying the option on the residual interest at the end of the seven year term, it was submitted that there was no residual interest after the maturity of the SDFP Note.

96. Although the language is very broad referring to "any and all" amounts payable "now or at any future date" under the CIFS Agreement, the process of construction of a contract is not a literalist exercise and the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.

97. As is evident from the use of the term "Profit Sharing", in my view the 2008 Letter Agreement was not as "carefully drafted" as was submitted for the defendants. The term "Profit Sharing" in the phrase "as full and fair consideration for any and all Profit Sharing payable by Cheyne to Blackstar in relation to the LuxCo Investor in relation to the LuxCo Investment under the [CIFS Agreement]" cannot be construed literally as a reference to the entitlement to fees under the "Profit Sharing" section of the CIFS Agreement in the light of the fact that, as held above, Blackstar's entitlement to fees in relation to the LuxCo Investment arose under the "Fee on Existing Deals" and not under "Profit Sharing". Whilst I note that "Profit Sharing" is a defined term under the MOU, there is no express reference in paragraph 1 of the 2008 Letter Agreement to the MOU but rather paragraph 1 refers to "Profit Sharing payable by Cheyne …under the [CIFS Agreement]".

98. In considering the quality of the drafting, I take into account the fact that although Mr Kartalis said that he carefully considered the letter and it was looked at by some lawyer "friends" at SJ Berwin, the drafting may not have been as precise as if lawyers for Blackstar had been specifically instructed to draft or formally review the agreement and thus whilst the agreement has the appearance of a formal legal agreement and the parties are sophisticated and experienced, the agreement does not necessarily use precise language.

99. Further in considering paragraph 1 of the 2008 Letter Agreement, I have regard to the other provisions of the 2008 Letter Agreement, in particular paragraph 3, which states:

> "The terms of the [CIFS Agreement] shall remain in full force and effect as they relate to any Investor other than the LuxCo Investor with respect to the LuxCo investment. For the avoidance of doubt, any other future investments by the LuxCo investor shall be subject to the terms of the [CIFS Agreement]." [Emphasis added]

Paragraph 3 supports the construction that the 2008 Letter Agreement was intended as a matter of objective construction, to supersede the CIFS Agreement in relation to the fees payable by Cheyne in respect of the LuxCo Investment since it expressly provides that the CIFS Agreement will remain in force for other investors and other investments.

100. In construing paragraph 1 the court also has regard to the factual context. The evidence of Mr Lourie in cross examination was that in return for the Amortising Note, Cheyne were buying the option on the residual interest at the end of seven year term of the Amortising Note. However, that evidence did not appear to me to provide a satisfactory explanation, given that the parties at that point did not anticipate any extension of the SDFP Note so it is difficult to understand how there was any residual interest and thus "upside" Cheyne could take into account as value Cheyne would or might be receiving after the maturity of the SDFP Note.

101. When asked for clarification about the residual interest, Mr Lourie said that Cheyne were buying out the relationship with the client which I understood to be a reference to ARRCO. This alternative explanation does not appear to sit well with the defendants' interpretation of the 2008 Letter Agreement as dealing with fees due under the CIFS Agreement in relation to the LuxCo investor and the defendants' submissions that the references to LuxCo should be construed literally as referring to HDFP. I also take into account the issues going to credibility in relation to his evidence discussed above and this reduces the weight which I give to this alternative explanation, which was only provided when Mr Lourie was asked to clarify his original explanation.

102. However, I also bear in mind the factual context that at the time of entering into the 2008 Letter Agreement, the parties did not anticipate any extension of the SDFP Note beyond the maturity of the Amortising Note.

103. On balance I find that the objective construction of paragraph 1 of the 2008 Letter Agreement is that it discharged the obligations of

Cheyne under the CIFS Agreement and was not a discharge only up until the maturity date of the SDFP Note. Notwithstanding the imprecision in the use of the term "Profit Sharing", in my view the literal meaning of the language "now or at any future date" and "shall be fully discharged" is supported by the other provisions of the contract namely the preservation of the CIFS Agreement in relation to other investors and other LuxCo investments, and the factual context that at the time of entering into the 2008 Letter Agreement, the parties did not anticipate any extension of the SDFP Note beyond the maturity of the Amortising Note. Accordingly, the obligations of Cheyne to Blackstar in respect of the first tranche of the ARRCO Investment under the CIFS Agreement was superseded by the 2008 Letter Agreement and the issue to Blackstar of the Amortising Note.

104. It is implicit in my conclusion that in finding that Blackstar's entitlement to fees under the CIFS Agreement was superseded by the 2008 Letter Agreement and the issue to Blackstar of the Amortising Note, that the references in the 2008 Letter Agreement to the "LuxCo investor" and the "LuxCo Investment" is in my view not to be read as limited to HDFP and the investment made by HDFP in the Cheyne funds.

105. It was submitted for the defendants that there was no basis to delete or interpolate the words "LuxCo Investor" and if the terms are different in the 2008 Letter Agreement, the 2008 Letter Agreement amended the CIFS Agreement and thereafter the defined investment is what was governed by the CIFS Agreement.

106. The difficulties with the defendants' literal interpretation of the defined terms are that firstly it would cast doubt on the meaning of paragraph 3 of the 2008 Letter Agreement. Paragraph 3 provides for the terms of the CIFS Agreement to remain in full force and effect in relation to any investor other than the LuxCo Investor. To apply a literal meaning to the "LuxCo investor" and "LuxCo investment" would have the result that the CIFS Agreement would remain in force in relation to ARRCO as it would fall within the definition of "any Investor other than the LuxCo Investor" and would thus appear to give Blackstar an entitlement to fees under the CIFS Agreement in relation to ARRCO notwithstanding the issue of the Amortising Note and the payments which would be made to Blackstar through the Note in respect of fees due to Blackstar.

107. Further in addition to the contradiction which would be thrown up by paragraph 3, reference is made in paragraph 1 to the payment obligations to Blackstar in relation to the LuxCo investor "under the [CIFS Agreement]" being discharged by the Amortizing Note. Accordingly, in order to interpret the scope of the payment obligations which are discharged by virtue of paragraph 1 of the 2008 Letter Agreement, it is necessary to read the 2008 Letter

Agreement together with the CIFS Agreement. The CIFS Agreement does not use the term "LuxCo investor" but under the section "Existing Deals" refers to a programme "for ARRCO" and made "through" SDFP. Taking the agreements together therefore would suggest that as a matter of construction the reference to the "LuxCo investment under the [CIFS Agreement]" [emphasis added] must be a reference to the deal described under "Existing Deals" namely the programme established for ARRCO and for the purposes of the 2008 Letter Agreement this must be construed as the investment under the CIFS Agreement.

108. The subjective intention of the parties to the construction of the 2008 Letter Agreement is irrelevant and I do not therefore propose to consider the explanations advanced by various Cheyne witnesses as to the meaning of the terms "LuxCo Investor" and "LuxCo Investment". However, the evidence is clear that the factual context is that ARRCO was the investor in the sense of providing the funds for HDFP to invest in Cheyne funds and, as described above, the funds invested by ARRCO were passed through the structure of the two SPVs, SDFP and HDFP in order to invest in the Cheyne funds

109. For these reason therefore, although on a literal interpretation, paragraph 1 of the 2008 Letter Agreement is limited to amounts payable by Cheyne to Blackstar in relation to HDFP as the "LuxCo investor" and the LuxCo investment, I find that this is not the objective meaning of the language which is to be interpreted as to the "LuxCo Investor" as a reference to the investment by ARRCO in the Cheyne funds and as to the "LuxCo Investment" as the investment of the €220 million through the SPV, SDFP.

2009 Letter Agreement

110. Counsel for Blackstar submitted that:

i) the combined effect of the first recital and clause 4 of the 2009 Letter Agreement is that after the final maturity of the Amortising Note on 31 December 2013, such accrued entitlement to fees as Blackstar had under the CIFS Agreement in respect of the first tranche of the ARRCO programme was to continue;

ii) The effect of the 2009 Letter Agreement was to confirm that the effect of the 2008 Letter Agreement had been limited to the period until 31 December 2013 and to confirm that in the event of the first tranche investment under the ARRCO program remaining invested in Cheyne funds, Blackstar would continue to be entitled to be paid fees under the CIFS Agreement;

iii) the commercial purpose of the 2009 Letter Agreement was to reflect the position originally provided in the CIFS Agreement that Blackstar should continue to receive fees for so long as the investments remained with Cheyne, whatever structure was used and the references to the extension of the LuxCo investment should be construed as referring to the first tranche under the ARRCO program.

111. For the defendants it was submitted that the plain and obvious meaning of the 2009 Letter Agreement was that if HDFP extended the term of the LuxCo Investment beyond the final maturity date, CCIL would make payments to Blackstar in relation to the extended LuxCo Investment according to the terms of the CIFS Agreement but no wider revival or expansion of the earlier agreement was intended.

112. The 2009 Letter Agreement stated, so far as material:

> "1. If the LuxCo Investor extends the term of the LuxCo Investment beyond the final maturity date of the [Amortizing] Note (December 31, 2013), Cheyne's payment obligations to Blackstar in relation to the extended LuxCo Investment shall be subject to the terms of the [CIFS Agreement]."
>
> 2. Beginning with the calendar quarter following the calendar quarter in which the Holding Note has reached its final maturity date, Cheyne's payment obligations to Blackstar in relation to the Capital Guaranteed Investment shall be subject to the terms of the [CIFS Agreement].
>
> 3. If both Cheyne and Blackstar mutually agree, any future Profit Sharing payable by Cheyne to Blackstar pursuant to the [CIFS Agreement], whether in respect of the LuxCo Investor, Holding, or any other investor, may be converted into note form, similar to the note or into any other mutually agreed-upon form.
>
> 4. The terms of the [CIFS Agreement], the Note and the Holding Note shall remain in full force and effect."

113. As in the 2008 Letter Agreement, in the 2009 Letter Agreement the “LuxCo Investor” is defined as HDFP and the “LuxCo Investment” is defined as the investment made by the LuxCo Investor pursuant to the portfolio management agreement and the portfolio advisory agreement.

Discussion

114. Paragraph 1 of the 2009 Letter Agreement suggests that Blackstar's entitlement to fees for an extension of the LuxCo investment beyond the final maturity date of the Amortising Note is governed by the CIFS Agreement.

115. Counsel for Blackstar relies on para 4:

> "The terms of the [CIFS Agreement], the Note and the Holding Note shall remain in full force and effect.""

and the recitals to the 2009 Letter Agreement recording that Blackstar has accepted the Amortising Note:

> "as full and fair consideration for any and all Profit Sharing payable by Cheyne to Blackstar in relation to the LuxCo Investor in relation to the LuxCo Investment under the CIFS Agreement up until the final maturity date of the Note." [Emphasis added]"

116. Whilst the provisions of paragraph 1 of the 2009 Letter Agreement expressly provides for Cheyne's payment obligations to Blackstar in respect of the "extended LuxCo Investment" to be subject to the terms of the CIFS Agreement, insofar as the claimant seeks to rely on paragraph 4 as importing some more general obligation to pay fees in respect of the first tranche of the ARRCO programme I do not accept that submission. The 2009 agreement is not "confirming" the position under the 2008 Letter Agreement but dealing with the position in relation to fees if "LuxCo" extended the term of the LuxCo Investment beyond the final maturity date.

117. The issue is then whether as a matter of construction the literal interpretation of paragraph 1 of the 2009 Letter Agreement represents the objective intention of the parties and thus the provision applies only to an extension of the "LuxCo Investment" being defined as the investment made by HDFP pursuant to the portfolio management agreement and portfolio advisory agreement.

118. As noted above, there is no definition of "LuxCo Investor" or "LuxCo Investment" in the original CIFS Agreement, and accordingly in order to establish the fees that are payable on an extension "subject to the terms of the [CIFS Agreement]" as referred to in paragraph 1, one would have to interpret the language (which would on a literal reading of the 2009 Letter Agreement be construed as a reference to the investment by HDFP) by reference to the entitlement which arises in relation to "Existing Deals" under the CIFS Agreement which makes no reference to HDFP. As discussed above in relation

to the 2008 Letter Agreement, this supports a construction that the term "LuxCo" should not be construed as confined to HDFP but should be construed in the case of the "LuxCo Investor" as a reference to the investment by ARRCO and in the case of the "LuxCo Investment" as the investment of €220 million through the SPV, SDFP.

119. There is no basis on the language of the CIFS Agreement for the submission that the CIFS Agreement originally provided that Blackstar should continue to receive fees for so long as the investments remained with Cheyne, whatever structure was used. Further there is no basis on the language for construing the ARRCO programme as having the more extended meaning of "any investment by ARRCO" or for the ARRCO programme being construed as extending to any investment in Cheyne funds even if it is not through the SDFP structure. The "Existing Deals" in the CIFS Agreement defines the deal as "€2 billion discretionary investment programme for ARRCO with a seven year maturity… through a dedicated newly formed SPV called [SDFP]." [Emphasis added] Thus, reading the 2009 Letter Agreement together with the CIFS Agreement, paragraph 1 of the 2009 Letter Agreement would not extend to the French Restructuring as an extension of the investment described under "Existing Deals" since it was a different structure not through SDFP but through FCP.

120. Such an interpretation would be consistent with the interpretation reached on the 2008 Letter Agreement which was also a side letter to the CIFS Agreement. Further it would be consistent with the factual context that:

    i) any extension of the investment in the Cheyne funds is more accurately described as an extension by ARRCO of the maturity of the SDFP Note held by it, given that ARRCO was the beneficial owner of the Note and it was ARRCO which took the decision to extend or restructure the investment; and

    ii) the underlying investment in the Cheyne funds were not in a form which had a fixed maturity and thus it was inaccurate as a legal matter to say that HDFP could "extend" its investment in the funds.

121. It was submitted for the claimant that given that Blackstar's entitlement to fees arose as a result of introducing ARRCO to Cheyne, there is no commercial rationale why Blackstar should only retain its fee entitlement if the ARRCO Investment carried on using precisely the same structure. Whilst when considering rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense, when the wording of the provision is considered together with the factual context, the

evidence does not support the submission that as a commercial matter, the parties intended in the CIFS Agreement to provide for the continuation of the fee entitlement not only if the term of the SDFP Note was extended, but also in the event that the investment through SDFP was brought to an end but the investment by ARRCO continued through a different structure. I also take into account that, in January 2009 there was no suggestion at that time that ARRCO required the investment to be restructured.

Conclusion on construction of the 2009 Letter Agreement

122. Thus although I accept that the reference to the "LuxCo investor", for the reasons discussed above, should be construed as a reference to ARRCO, I find that the objective meaning of paragraph 1 of the 2009 Letter Agreement was that if ARRCO extended the term of the investment through SDFP, the fee obligations to Blackstar would be subject to the terms of the CIFS Agreement, but the 2009 Letter Agreement is not to be construed as conferring or continuing any entitlement to fees if the ARRCO Investment is not through SDFP.

There was an extension in December 2012 which triggered, or lifted the suspension of, the entitlement of fees for Blackstar under the CIFS Agreement (Route 2)

123. It was submitted for Blackstar that once the extension was triggered, the fee entitlement under the CIFS Agreement revived and it would be artificial to read into the 2009 Letter Agreement a limitation that it would only revive as long as the investment structure remained unchanged.

124. This submission seems to me to turn on the construction of paragraph 1 of the 2009 Letter Agreement and the meaning to be given to the phrase of "extend[ing] the term of the LuxCo investment". For the reasons given above, in my view the term "extended LuxCo investment" should be construed by reference to the CIFS Agreement and the definition of the "Existing Deals" in the CIFS Agreement and there is nothing artificial in such a construction.

125. Insofar as it is relevant to this argument, I note that the extension agreed by the letter of 3 December 2012 was effected by extending the period for liquidation of the portfolio (the underlying investment in the Cheyne funds) to 31 December 2015 and providing for the proceeds of the liquidation to be reinvested into the existing structure. The letter expressly refers to Cheyne working with ARRCO to "review any means of transferring the funds in a medium that is different than the current structure." It seems therefore to me that the "extension" contemplated by the letter of 3 December 2012 was only for the existing structure and was not of wider application.

126. Accordingly, I find that the "LuxCo Investment" was extended within paragraph 1 of the 2009 Letter Agreement but only until the end of the first quarter of 2014. Thereafter upon the establishment of the FCP structure and transfer of the assets, the "LuxCo Investment" ended and Blackstar did not have the right to fees on the FCP structure.

Because of the staged way in which the restructuring took place, Blackstar's rights were perpetuated or revived as soon as the novation of the swap took place (Route 3)

127. Counsel for the claimant submitted that on the French Restructuring, the FCP was set up but at that point the investments with Cheyne were unchanged and held by ARRCO through FCP in precisely the same way as they had been when the first tranche of the ARRCO programme was invested through HDFP. Accordingly, the restructuring was an extension because ARRCO through FCP continued to invest by HDFP. In particular Blackstar points to the fact that FCP has no separate legal personality so the investments with Cheyne were held directly by ARRCO and that it was a feature of the restructuring that ARRCO did not have to obtain board approval for the restructuring.

128. In my view the fact that as an internal matter, ARRCO did not have to obtain board approval for the restructuring has little bearing on the interpretation of the 2009 Letter Agreement. As referred to above, the definition of "Existing Deals" expressly refers to the programme being "through SDFP" and thus the fact that FCP does not have separate legal personality seems to be of little relevance to the construction of the 2009 Letter Agreement. The new structure clearly uses a different structure and is not a programme "through SDFP". In my view neither of these factual matters weigh sufficiently against the construction which objectively is suggested by the language of the 2009 Letter Agreement read together with the CIFS Agreement which limits the term "LuxCo investment" to the investment through SDFP.

129. I also do not see that it is relevant for the court to consider on the exercise of construction of the agreement entered into in 2009, whether after the restructuring, Cheyne can be said to be in a worse or better position as a result of the restructuring. Neither the evidence of Mr Kartalis nor the evidence of individuals from Cheyne as to their subjective views on the structure have in my view any relevance.

130. Finally, I deal with the submission that at the time of the introduction of FCP, ARRCO continued to hold the assets (through FCP) in the same way as they had been when the first tranche of the ARRCO programme was invested through HDFP and accordingly the Restructuring was an extension of the "LuxCo Investment" because

ARRCO continued to invest by HDFP, the "LuxCo Investor". For the reasons set out above, in my view the reference to the "LuxCo Investor" has to be read by reference to the CIFS Agreement as a reference to ARRCO and the "LuxCo Investment" as the programme for ARRCO through SDFP. On the evidence of the documentation effecting the French Restructuring, the swap between SDFP and HDFP pursuant to which HDFP held the interest in the Cheyne Funds was novated such that SDFP as swap counterparty transferred its rights and obligations under the swap to FCP. Accordingly at that point SDFP ceased to be part of the structure and was replaced by FCP. There was no period during which the assets held by FCP were held through SDFP so as to fall within the language of "Existing Deals".

131. For these reasons I find therefore that the claimant has not made out its case on this alternative basis.

In respect of the period to 31 December 2013, Cheyne Holdings has failed to pay to Blackstar the amounts due to it under the Deed of Covenant and/or the Amortising Note

132. The Amortising Note was issued by Cheyne Capital Holdings Ltd with a principal amount of €10 million. It was expressed to be repayable without interest in equal quarterly instalments of €500,000. In addition, the Note provided for "Special Payments" being defined as the amount by which the Blackstar fees exceed €3 million at 31 December 2008 or €2 million as at 31 December 2009 to the final maturity date, 31 December 2013.

133. It seems to the court that insofar as Blackstar's claim to "Special Payments" under the terms of the Amortising Note was not agreed during the course of the trial, it should be possible for the matter to be resolved between the parties in the light of the court's findings. Should this however prove not to be the case, the court will consider at the consequential hearing following hand down of the judgment whether to order an inquiry and account to be taken.

Estoppel

134. In the alternative to its case in contract, Blackstar pleads that Cheyne represented to Blackstar that Blackstar would continue to receive fees in respect of ARRCO's investment or that this was the common understanding between the parties.

135. Blackstar pleads that in reliance on the representation and/or common understanding, Blackstar expended a significant amount of time in assisting Cheyne to devise the alternative structure and liaising with the interested parties to procure its implementation. In

the circumstances therefore, Blackstar alleges that it would be unconscionable for Cheyne to resile from its representation and the parties' common understanding.

Relevant legal principles

136. The relevant legal principles for estoppel by representation are largely common ground and the only issue which was raised in submissions concerned representations as to private rights to receive fees. This is not a matter which needs to be resolved by the court for reasons which will be apparent from the discussion below of the pleaded case.

137. The requirements of estoppel by convention are set out by Briggs J in *HMRC v Benchdollar Ltd* [2010] 1All ER 174 at [52]:

    i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.

    ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

    iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

    iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

    v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

138. In submissions counsel for the claimant stressed that a common assumption can exist if in fact it is held only by the claimant and the defendant acquiesced in such common assumption.

Representations relied upon by Blackstar

139. Blackstar's case concerning the representations which found the alleged estoppel as set out in the pleadings is as follows:

    i) In the Re-Re-Amended Particulars of Claim (paragraph 42) a representation that if Blackstar was able to procure the continuation of the existing investment by ARRCO through a

new French investment structure, Blackstar would continue to receive fees in respect of ARRCO's investment pursuant to the contract which governed Blackstar's entitlement immediately prior to the restructuring taking place;

ii) Blackstar identifies specifically a spreadsheet sent Blackstar by Mr Himmer by email dated 13 March 2014;

iii) In the response to the defendants' Request for Further Information (paragraph 22.1) Blackstar relied on oral representations by Mr Lourie that:

a) following the French Restructuring Blackstar should regard its fee entitlement under the CIFS Agreement as a floor and thus expressly or impliedly represented that the existing fee entitlement would continue unchanged;

b) in February 2014 that if a mutually satisfactory agreement on the increase of the fee entitlement could not be agreed, such that Mr Kartalis took ARRCO to another fund manager, Mr Lourie would be disappointed but would respect Blackstar's decision and that was an express or implied representation that if ARRCO remained an investor, fees would continue to be due to Blackstar under the CIFS Agreement;

iv) an implied representation (paragraph 22.1 of the claimant's response to the RFI) that if Cheyne and Blackstar were successful in implementing the French Restructuring so that ARRCO remained an investor in Cheyne funds, the result would not be to bring to an end CCIL's obligation to pay fees to Blackstar in respect of the ARRCO Investment under the contract which governed Blackstar's entitlement to fees immediately part of the restructuring;

v) a call with Mr Himmer (paragraph 83 of Mr Kartalis' second witness statement) in which Mr Himmer is alleged to have "confirmed" that Mr Lourie had indicated that there may well be additional payments made to Blackstar each year, however this would have to be taken on trust.

140. The pleaded case is (in part) a general representation that if Blackstar was able to procure the continuation of the existing investment by ARRCO through a new French investment structure, Blackstar would continue to receive fees in respect of ARRCO's investment pursuant to the contract which governed Blackstar's entitlement immediately prior to the restructuring taking place.

141. On the evidence it seems to be inherently unlikely that Cheyne would have made a representation concerning fees which was

dependent on Blackstar "procuring" the continuation of the investment through the new structure. The evidence of Mr Kartalis (paragraph 30 of his third witness statement) is that he:

> "could not and did not persuade ARRCO (a large and powerful organisation) to restructure its investments nor did I set the timetable for such restructure."

142. I note that in the response to the RFI, the alleged representation is expressed differently: the response refers to Cheyne having "relied heavily" on Blackstar and "sought its assistance in devising" a replacement investment structure and "in the circumstances CCIL impliedly represented that if it and Blackstar were successful in implementing the French Restructuring" so that ARRCO remained an investor in Cheyne funds the result would not be to bring an end to CCIL's obligation to pay fees to Blackstar under the CIFS agreement .

143. The case advanced by the claimant as to the representations which are alleged has been difficult to identify by reference to the pleaded case and I propose to deal with the representations alleged to have been made by specific individuals first.

Alleged oral representations by Mr Lourie

144. The following are the alleged oral representations by Mr Lourie:

i) Mr Lourie represented that following the French Restructuring Blackstar should regard its fee entitlement under the CIFS Agreement as a floor and thus expressly or impliedly represented that the existing fee entitlement would continue unchanged; [emphasis added]

ii) the alleged conversation in February 2014 referred to above concerning what would happen if Mr Kartalis took ARRCO to another manager

iii) in his third witness statement (paragraph 39) Mr Kartalis refers to general representations that so long as the ARRCO funds remained invested in Cheyne funds, Blackstar's entitlement to fees continued. Mr Kartalis describes this as a "basic principle of profit sharing in the fund management industry" and says "this was acknowledged many times, particularly by [Mr] Lourie".

145. In closing submissions, counsel for the claimant focused on "repeated assurances" made by Mr Lourie that Blackstar's fee entitlement under the CIFS Agreement would continue

notwithstanding the restructuring of the ARRCO Investment and referred to paragraph 80 of Mr Kartalis' second witness statement.

146. In his second witness statement (paragraph 80), Mr Kartalis identified "assurances" specifically by Mr Lourie that he would arrange for Cheyne to pay a certain rate on particular funds and was told "not to worry". Mr Kartalis does not say in that context that there was a representation that Blackstar would continue to receive fees "at least equivalent to what was due under the CIFS (being 1.39% plus 0.54% of the NAV)" but says that this was a fact which was "not in question".

147. The submission for Blackstar that Mr Lourie made "repeated assurances" is not consistent either with the claimant's pleaded case or paragraph 80 of the witness statement of Mr Kartalis quoted above. The pleaded case is that Mr Lourie represented that the fee entitlement under the CIFS Agreement was a "floor" and paragraph 80 refers to an assurance that Cheyne would pay "a certain rate". Further, as noted above, in paragraph 80 Mr Kartalis does not say that there was a representation that Blackstar would continue to receive fees at least equivalent what was due under the CIFS but says that this was a fact which was "not in question". Thus, his own witness statement suggests that this was not the subject of a representation.

148. In cross-examination Mr Kartalis referred to Mr Lourie reassuring him that they would find an arrangement but when it was specifically put to him that Mr Lourie had denied (paragraph 22 of his witness statement) making any statement that the fees under the CIFS Agreement were to act as a "floor" Mr Kartalis referred to Mr Himmer having made a representation rather than Mr Lourie. Mr Kartalis said:

> "no, so again what I said is that Mr Himmer told me that the 35% could be complemented at the sole discretion of [Mr] Lourie on a yearly basis at the end of the year… So that's what I said Mr Himmer represented to me"

Mr Kartalis said that:

> " Mr Lourie said that ARRCO is an investor that is my investor or Blackstar's investor and at the end of the day he wanted that investor to continue to be invested with Cheyne for obvious reasons and therefore Blackstar would continue to receive fees …"

When it was put to Mr Kartalis that he did not say in paragraph 80 of his witness statement that Mr Lourie said Blackstar would continue to receive fees, Mr Kartalis responded

> "because, as I said, this has been throughout all the statements, the fact that as long as ARRCO remained an investor, Blackstar is entitled to fees under the CIFS."

149. It was put to Mr Kartalis that it was "never said" to which he replied:

> "that was always clear for all the parties: as long as ARRCO remained an investor, Blackstar would be entitled to its fees. That was the basis on which we started working with Cheyne."

These responses from Mr Kartalis in my view undermine Blackstar's case that a representation was made by Mr Lourie that Blackstar should regard its fee entitlement under the CIFS agreement as a "floor".

150. The claimant pleaded that there was a representation by Mr Lourie in February 2014. Although in cross examination Mr Kartalis stated that assurances had been made when Mr Lourie came to Mr Kartalis' house in Switzerland in February 2014, it is notable that no such detail was provided in his witness statements. I do not accept the submission by counsel for the claimant that the failure to mention the circumstances in which the alleged representation was made in February 2014 can be explained by the limit imposed by the Commercial Court on the length of witness statements. This was one of only two specific oral representations which were pleaded and relied upon as having been made by Mr Lourie and there is no good reason why such detail would not have been provided in the written evidence.

151. To the extent that Mr Kartalis asserted that there was an implied representation or that there were many assurances by Mr Lourie on unspecified occasions that Blackstar would continue to receive fees pursuant to the CIFS Agreement, the claimant has in my view undermined its case by the changing nature of Mr Kartalis' evidence of the alleged representations.

152. It was submitted for Blackstar that the court should not draw any inference from Mr Kartalis's failure to provide "chapter and verse" of each and every occasion he had a conversation with Mr Lourie, however the pleaded case (as set out in the RFI) did identify two specific occasions and it is only in my view subsequently that Mr Kartalis sought to rely on more general statements.

153. The evidence was that Mr Lourie does not tend to use email, but in any event the alleged representations by Mr Lourie are not supported by any documentary evidence. Mr Lourie denies having made such representations and notwithstanding the concerns expressed in relation to his evidence, it is for the claimant to prove that the representation was made and for the reasons discussed above, I find that the claimant has not established that the pleaded representations were in fact made by Mr Lourie.

The spreadsheet sent Blackstar by Mr Himmer by email dated 13 March 2014/oral representations by Mr Himmer

154. The spreadsheet sent on 13 March 2014 by Mr Himmer set out the basis for a 35% flat fee to be paid to Blackstar going forward. Mr Kartalis was not happy with the proposal because, according to him, it represented a discount on the fees due under the CIFS Agreement (paragraph 81 of his second witness statement). In cross-examination Mr Kartalis said that the spreadsheet was sent by Mr Himmer as part of the negotiations that were ongoing to solve the outstanding issues between Blackstar, himself and Cheyne.

155. On the evidence of Mr Kartalis therefore the spreadsheet relied upon is not consistent with Blackstar's pleaded case that there was a representation that Blackstar would continue to receive fees pursuant to the CIFS Agreement. Mr Kartalis did not regard the 35% as acceptable because it was a reduction on what Blackstar was entitled to under the CIFS Agreement.

156. In his third witness statement (paragraph 40) Mr Kartalis, rather than relying on the spreadsheet itself as amounting to a representation that Blackstar would continue to receive fees pursuant to the CIFS Agreement (as pleaded), referred to Mr Himmer giving "clear representations" that the figures in the spreadsheet should be viewed as a "guaranteed minimum" and "indicated that Cheyne would make provision for at least this amount to be paid to Blackstar quarterly on its balance sheet."

157. In cross-examination Mr Kartalis said that 35% (as indicated in the spreadsheet) was the percentage that was going to be paid as a minimum and any additional payment would be subject to Mr Lourie's discretion but it was how he intended to bridge the gap between the 35% and the 50% (sought by Blackstar). Mr Kartalis said that it was something that he did not include in his first witness statement because it was something that he remembered afterwards and the important thing for him was the fact that there was a proposal made with such percentage and there "wasn't any dispute about that fees were due to Blackstar but the percentage that we couldn't agree."

158. It is significant in my view that the reliance on oral representations by Mr Himmer is not pleaded and only advanced in the third witness statement of Mr Kartalis dated 31 May 2018. It is not referred to in the claimant's response to the RFI dated 23 January 2017 even though Blackstar was specifically asked in the RFI about the representations including the representation by the spreadsheet.

159. However, in any event it seems to me that on the evidence of Mr Kartalis's own witness statements, it is clear that there was no representation by Mr Himmer that the fees going forward would be the fees payable under the CIFS Agreement. In his second witness statement Mr Kartalis, referring to the spreadsheet, describes the fee of 35% as a reduction on what Blackstar was entitled to under the CIFS agreement. He then refers to a call with Mr Himmer in which Mr Himmer is alleged to have made it clear that the "maximum" Cheyne would offer in writing was 35% but that there may well be additional payments which would have to be taken on trust. Thus, his evidence is that he was offered by Mr Himmer less than he believed he was entitled to under the CIFS Agreement and any additional payment was a non-contractual entitlement.

160. In cross-examination however, the nature of the representation changed again. It was not put to Mr Himmer that the figures in the spreadsheet should be viewed as a "guaranteed minimum" but rather that Mr Himmer told Mr Kartalis that:

> "the existing fee entitlement under the CIFS would accrue unless and until a new fee agreement was put in place."

161. As is the case with the representations alleged to have been made by Mr Lourie, the claimant's case seemed to shift from specific allegations of representations having been made by Mr Himmer as to specific matters to general assertions that representations had been made that Blackstar's fee entitlement would continue notwithstanding the French Restructuring. Whilst it would have been open to the claimant to advance such a case, the changing nature of the case advanced by Mr Kartalis fatally undermines the claimant's case in this regard.

162. For all these reasons therefore, I find that the claimant has not established that the alleged representations were made by the spreadsheet or Mr Himmer.

<u>Meeting on 19 May 2014</u>

163. In his third witness statement (paragraph 40) Mr Kartalis also asserts that further representations were made at a meeting on 19 May 2014 which he attended with Mr Lourie, Mr Himmer and Mr Fiertz. These allegations were not pleaded specifically and although

Mr Kartalis refers back to the meeting having been mentioned at paragraph 88 of his second witness statement there was no assertion in the earlier witness statement that the representations upon which Blackstar now rely for the purposes of estoppel, had been made. Given that these alleged representations have been asserted only at a later stage and were not pleaded, I reject any estoppel based on these alleged representations.

An express or implied representation that if Cheyne and Blackstar were successful in implementing the French restructuring, CCIL's obligation to pay fees under the CIFS Agreement would continue.

164. Finally, dealing then with the general assertion (as reformulated) that there was a representation in the circumstances of Cheyne having "relied heavily" on Blackstar and "sought its assistance" in devising the new structure. In my view the factual basis is not made out on the evidence:

    i) it seems to me that Blackstar/Mr Kartalis chose to "assist" in matters pertaining to the French Restructuring which as an introducer it would not normally have been involved in: Cheyne had put in place the LuxCo structure using its own lawyers, Dechert, who were also involved in the restructuring. However, Mr Kartalis sought to involve his own lawyers, Orrick.

    ii) Whilst it appears on the evidence that Cheyne was on occasion happy to use Mr Kartalis to progress aspects of the transaction and thus accepted Mr Kartalis's involvement, the evidence does not support the assertion that Cheyne sought his assistance in devising the structure.

165. I have dealt above with the general assurances alleged to be made by Mr Lourie and Mr Himmer. I find that the claimant has not established its pleaded case that representations were made to it by Cheyne in the circumstances alleged.

Estoppel by convention: Common Understanding

166. The pleaded common understanding is that if Blackstar was able to procure the continuation of the existing investment by ARRCO through a new French investment structure, Blackstar would continue to receive fees in respect of the ARRCO investment pursuant to the contract which governed Blackstar's entitlement to such fees immediately prior to the restructuring taking place (paragraph 42 of the Re-Re-Amended Particulars of Claim).

167. In the claimant's response to the defendants' RFI, it was pleaded that Mr Kartalis had the understanding for Blackstar and Blackstar identifies Mr Lourie, Mr Fiertz, Mr Himmer and Mr Goekjian as having the common understanding for Cheyne.

168. The claimant relied on an email dated 27 March 2013 from Mr Goekjian to Mr Kartalis which read so far as material:

> "I understand that at yesterday's lunch with Jonathan and Xavier you said that I had agreed to certain rebate levels payable to Blackstar on transactions with ARRCO following the maturity of the CCHL note.
>
> To be clear, I have not agreed to anything in relation to fees on future deals of any sort between CCIL and Blackstar. On the ARRCO program, my understanding is that this investment is governed by the "Existing Deals" paragraph in the terminated March 2007 Capital Introduction Agreement between CCIL and Blackstar." [Emphasis added]

169. In his witness statement Mr Goekjian said that the reference to the "ARRCO program" in that email was a reference to the "Lux portfolio" which he described as a reference to the investment by HDFP for the ultimate benefit of ARRCO. He said (paragraph 24 of his witness statement) that at the time of this email, the French fund did not exist and was at most a possibility in the future so that he "did not mean to suggest" that the new French fund was covered by the CIFS Agreement. Mr Goekjian expressly rejected any "common understanding" for his part that Blackstar would receive fees in respect of the French fund or having been informed of any such common understanding being reached between either Mr Lourie or Mr Himmer and Blackstar.

170. In seeking to establish a common understanding, Blackstar also rely on an email from Mr Brocas of Orrick to Mr Himmer of 2 July 2013. This email related to the draft agreement between Bucephalus Guernsey and Cheyne regarding fees for future introductions (the "BCP Agreement") in which Mr Brocas stated:

> "we understand your point that the ARRCO and its affiliates are covered under the [CIFS Agreement] (the 2007 Agreement)… In this context, we agree to leave aside the ARRCO from the new agreement we are currently discussing, subject to your confirmation that any new investment by the ARRCO or its affiliates shall be subject to the terms of the 2007 Agreement (including the Profit Sharing section…) in accordance with section 3 of the Side Letter to the 2007 Agreement dated April 8, 2008." [Emphasis added]

171. It is submitted for Blackstar that this email demonstrates the common understanding and that when subsequently the spreadsheet was sent to Blackstar in March 2014, Cheyne was negotiating terms for the future but at that point there was no dispute about the common understanding of Blackstar's entitlement to fees.

172. Blackstar rely on the email from Mr Goekjian in March 2013. By that time (as referred to above) the existing investment had been extended to December 2015 but Cheyne had only been tasked to look at transferring the funds into a different structure. It was only in July 2013 that Mr Goubeault sent a letter confirming ARRCO's interest "in principle" to a transfer of the funds into a new investment vehicle regulated under French law in the form of a dedicated fund of funds. Thus, Mr Goekjian's evidence (that at the time of this email in March 2013, the French fund did not exist and was at most a possibility in the future so that he did not mean to suggest that the new French fund was covered by the CIFS Agreement) is supported by the contemporaneous documentation.

173. In addition, if Mr Kartalis had understood from the email in March 2013 that Blackstar was entitled to continuing fees, it is difficult to understand why in June 2013 ARRCO was included as an "investor" in the draft BCP agreement. In his witness statement (paragraph 25 of his third witness statement) Mr Kartalis stated that ARRCO was included "given the uncertainties referred to above regarding the future form of the investment and the possibility of additional investment by ARRCO". When asked in cross-examination about the "uncertainties" he was referring to regarding the future form of the investment, Mr Kartalis replied:

> "well, because clearly ARRCO--to the extent that ARRCO would decide--so one thing was to convert the existing investment into a structure that would be compliant with their internal regulations, ARRCO had already indicated they would be willing to invest more, which in theory should have applied to the same investment, but we just wanted to make sure that we were just not limited on the existing investment but we could freely discuss with ARRCO future investment without having to worry whether they would be covered or not" [emphasis added]

174. Mr Kartalis was pressed on the point that he was not referring to additional investment but the "future format" of the investment. Mr Kartalis responded:

> "I think it was more in the... as I said, my concern was to make sure that once you have a new

> structure with multiple opportunities, that they would be covered. That was the purpose of the agreement. And I believed ARRCO would be covered but I certainly was not concerned about the existing investment but I was concerned about the future additional investment given the form of the structure we're going to put in place."

175. Although Mr Kartalis asserted in cross-examination that he was concerned about future additional investment, his answer did not address the question which was thrown up by his witness statement.

176. Further in July 2013, the evidence would suggest that Mr Kartalis was not confident of an ongoing entitlement fees under the CIFS Agreement and it seems likely that Mr Kartalis believed that the ARRCO investment was covered by the agreement between Cheyne and Bucephalus Guernsey entered into on 11 July 2013. It seems to me that, far from demonstrating a common understanding, the carefully worded email from Mr Brocas sought to establish the terms of the fees payable in accordance with the 2008 Letter Agreement. It did not acknowledge or evidence a common understanding that the fees payable in respect of any new investment by ARRCO were covered under the CIFS Agreement but sought a confirmation which was never forthcoming.

177. This conclusion is supported by a letter from Clifford Chance LLP, who at that time were acting for the claimant and Bucephalus, dated 22 August 2014, which noted that Cheyne did not respond to the email from Mr Brocas and stated:

> "In the circumstances, BCP had to take a view as to whether its interests were adequately covered by the BCP agreement. This it did"

178. Further, in that letter of 22 August 2014, Clifford Chance asserted that the shared understanding was that the ARRCO Investment was covered by the agreement between Cheyne and Bucephalus entered into in 2013.

179. When this was put to Mr Kartalis in cross-examination, Mr Kartalis said that Blackstar's view was that it was entitled to receive fees from Cheyne as long as the ARRCO Investment continued and the question from Clifford Chance's perspective was “which of the contracts they felt was most relevant” for such entitlement to be paid. This answer was in my view incomprehensible as the response to a question concerning common understanding rather than a contractual entitlement. When pressed, Mr Kartalis's evidence was that the sentence in Clifford Chance's letter was factually incorrect. By contrast in his third witness statement (paragraph 29) Mr Kartalis

attributed the stance taken by Clifford Chance as attributable to different lawyers having a different focus or approach. This ignores the fact that what was asserted by Clifford Chance was a statement of fact rather than a position based on the legal analysis and I infer that this would only have been stated on instructions from Mr Kartalis.

180. Accordingly, for the reasons discussed above, I reject the submission for Blackstar that when subsequently the spreadsheet was sent to Blackstar in March 2014, Cheyne was negotiating terms for the future but at that point there was no dispute about the common understanding of Blackstar's entitlement to fees.

181. It was submitted for Blackstar that Cheyne would not have offered Blackstar 35% of fees payable to Cheyne from the funds in which ARRCO's money was invested unless Blackstar had an existing fee entitlement after the restructuring took place. A draft agreement was circulated in March 2014 to be entered into between Blackstar and Cheyne relating to fees and Blackstar relies on clause 10 in the draft agreement which provided:

> "in particular, and for the avoidance of doubt, Blackstar acknowledges and agrees that it shall have no claims or rights whatsoever in relation to investments in the Funds by the French Fund under the terminated Capital Intro Agreement."

182. In cross-examination it was put to Mr Kartalis that the new fee agreement was intended to settle the dispute on outstanding fees to which Mr Kartalis responded that this was:

> "by no means in lieu of the entitlement that Blackstar had under the CIFS on the continuing ARRCO Investment, but to the extent that this would become the new agreement then of course it would have to replace it."

183. It was put to Ms Cox in cross-examination that the clause was included because it was common ground that but for the new agreement, the CIFS Agreement was still in place. Her response was that it was just confirming that it was not applicable. In the light of the ongoing disputes with Mr Kartalis this is a plausible explanation.

184. It seems to me on the evidence that Cheyne were prepared to pay fees to Mr Kartalis going forward not on the basis that there was an existing entitlement but in order to preserve the relationship with ARRCO and the possibility of future investments by ARRCO. The term sheet which ARRCO signed on 31 October 2013 provided for subsequent investments of €400 million over and above the initial €220 million. It was clearly therefore in Cheyne's interest to

maintain its role in the new structure and Blackstar had positioned itself through the agreement with Darius in a position of influence, if not control (as discussed below).

185. It was also submitted for Blackstar that Mr Kartalis would have ensured that he had an agreement in place by the date of the restructuring had he thought that he did not have a continuing entitlement to fees.

186. The contemporaneous documentation shows that on 27 March 2014 Mr Kartalis sent the draft fee agreement back to Ms Cox with substantial amendments. The covering email asked her to send a signed copy if she didn't have any further comments. It would seem therefore that Mr Kartalis was seeking to get an agreement signed around the time of the restructuring taking effect but was unable to do so because he failed to reach agreement with Cheyne on the terms of such agreement. The evidence of Ms Cox in cross-examination was that this proposal was "an attempt to work with him" but "he kept wanting more and he threatened pulling the mandate." The fact that the agreement was not signed therefore is not evidence that Mr Kartalis had an understanding that he had a continuing entitlement to fees.

187. Counsel for the claimant sought to rely on the legal proposition that it was enough if Cheyne "acquiesced" in the common understanding. However, in my view for the reasons discussed above I find that Blackstar have failed to establish on the evidence that Blackstar (through Mr Kartalis) had the common understanding which is alleged.

Reliance

188. If I were wrong on the above and there was a representation or a common understanding, then the claimant still needs to show that it acted to its detriment in reliance on the representation or common assumption.

189. Mr Kartalis stated (paragraph 60 of his second witness statement) that there was no obligation on Blackstar to organise and implement the restructuring but:

> "…on Cheyne's request and in reliance on our mutual understanding that Blackstar would continue to receive fees Blackstar expended a huge amount of time and effort in assisting Cheyne in this regard."

He stated that it was "incomprehensible" that he would have invested so much time and energy in the restructuring process if the result was ultimately to cut Blackstar's entitlement to fees.

190. In his witness statement (paragraph 67 of his second witness statement) Mr Kartalis stated that from mid-2013 Blackstar, together with its legal advisers Orrick, "played a central role" in leading the process of investigating the best way to structure the French platform and ultimately setting up the French FCP and preparing the novation of ARRCO's investment. Mr Kartalis stated that Blackstar was involved in every stage of the process and the work included: assisting Darius in securing regulatory authorisation, assisting Darius in creating the structure, consulting with tax advisers to ensure the tax efficiency, preparing initial drafts of the documentation, coordinating all the parties concerned, meeting with ARRCO to ensure that its requirements were taken into account and communicating with ARRCO and interacting with it on Cheyne's behalf.

191. It seemed to be accepted for Cheyne that Mr Kartalis did involve himself in the restructuring but it was submitted for Cheyne that his conduct was driven by his realisation that he would not or might not have any fee entitlement under the French Restructuring and he therefore sought to get "control" over the new investment and the parties. Cheyne rely on the email exchange between Mr Kartalis and Mr Cohen-Ganouna in September 2013 discussing a draft of a text being prepared for ARRCO to sign to confirm ARRCO's interest in transferring the assets under management by Cheyne into the FCP. In an email of 27 September 2013, Mr Kartalis wrote to Mr Cohen-Ganouna:

> "preferably, Cheyne must NOT (sic) be copied in on this, it's merely a show of interest."

192. In a further email exchange concerning the proposed text on 29 September 2013, Mr Kartalis commented that he did not want to mention Cheyne and when Mr Cohen-Ganouna queried this, Mr Kartalis responded:

> "mention in the first paragraph! I don't want to make Cheyne disappear, I want to control them and PG too…"[Emphasis added]

193. When asked about this email in cross-examination and specifically what he meant by "control them", Mr Kartalis said [T2/138]:

> "I think this is just reference, I guess, to the fact that what ARRCO wanted is to have a structure that would basically be under the control of the IMF, of the French regulator, which is effectively the FCP structure and to the point is that the intention is not replace Cheyne of course but it's to make sure that they are compliant, therefore they are under the supervision of a French

> regulated entity, which is effectively what ARRCO and Goubeault wanted, to their request. ”

This response did not in my view answer the question as to why Mr Kartalis said in that email that he wanted to “control” Cheyne.

194. Mr Kartalis, through his company Bucephalus Capital, signed an agreement with Darius in July 2013 concerning the establishment of the FCP to be established by Darius and Bucephalus and with a view to signing a partnership agreement between Darius and Bucephalus. The memorandum of agreement was signed on 5 September 2013 and then a project agreement was signed on 8 November 2013. The latter agreement provided for the creation of a “supervision committee” to oversee the implementation of the project. The project was defined as the establishment of the FCP and the delegation of the financial management to Cheyne. The supervision committee was to be composed of representatives of both Darius and Bucephalus. The powers of the supervision committee included the appointment of a new manager and the termination of the contract of delegation to Cheyne. Thus, the terms of this agreement supports the defendants’ submission that Mr Kartalis was seeking to “control” Cheyne.

195. It is also noteworthy in this regard that the agreement between Blackstar and Darius in September 2013 appears to have been signed before Cheyne was aware of the involvement of Darius which on the evidence was not until around October 2013.

196. Mr Kartalis involved his own lawyers in the restructuring. When asked about this in cross-examination, Mr Kartalis said that Orrick worked for Bucephalus, that they worked on the agreements that were put in place with Darius and they continued to be involved with the set-up of the FCP in coordination with Darius. Mr Kartalis said that the lawyer involved at Orrick was known to be an expert in these kind of structures and he was happy for the lawyers he had instructed to continue to be involved coordinating the process.

197. It was suggested for Cheyne that Mr Kartalis had deliberately presented Orrick as acting for ARRCO. Mr Kartalis was asked in cross-examination whether he accepted that he had not informed ARRCO that he had instructed Orrick. Mr Kartalis responded that Mr Goubeault was aware later on of Orrick’s involvement because some of the drafts came from Orrick. It was put to Mr Kartalis that the parties were under the false impression that Orrick represented ARRCO. Mr Kartalis said:

> “no, I think all the parties worked together on a project that was the setup of the FCP and the transfer of the funds that ARRCO had invested into the Luxembourg structure… And they all worked

> together and provided all their comments for their clients and in fact interacted with each other directly,… I hear you saying there was some confusion but at the end of the day these are professional firms who are used to working with each other and when everybody has his own adviser providing his own comments to arrive at a finished product or at an end result."

198. Mr Kartalis was pressed on the point and asked whether he knowingly permitted the other parties to believe that Orrick represented ARRCO. Mr Kartalis responded:

> "I mean, again, the role of Orrick was really to facilitate the drafting, in full cooperation with Darius… You could say that Orrick was the closest to ARRCO in the sense that ARRCO didn't have external counsel and therefore they were relying on the work being done by all the parties and obviously having their own internal reviews and therefore Orrick was the closest in terms of getting some feedback from Mr Goubeault."

199. Mr Kartalis was then asked whether he had permitted the misunderstanding because it made no sense for an introducer like BCP or Blackstar to instruct a lawyer to consider transaction documents. Mr Kartalis responded that he:

> "facilitated the transaction, we made it possible through the introductions, I mentioned earlier, and facilitated conversations. There were several advisers around the table all talking to each other… So I think Orrick actually provided and Pierre-Yves Denez, as I said, was recognised as an expert in setting up FPS, they have done a lot of work but this was again reviewed by all the advisers and at the end of the day signed off by all the parties with their advisers."

Eventually he acknowledged that Orrick was not formally instructed by ARRCO.

200. The answers provided by Mr Kartalis in this regard were very unsatisfactory. I have referred to some of the exchanges at length in order to illustrate the way in which Mr Kartalis failed to give clear evidence. There is no reason in my view why he could not have answered the questions directly unless by failing to do so he sought to avoid acknowledging the true position. In reaching a conclusion overall on the issue of reliance and the evidence of Mr Kartalis in particular, that he would not have involved himself unless he

believed that his entitlement to fees was continuing, I take into account the way in which Mr Kartalis failed to answer questions as well as the matters referred to above on the general issue of his credibility.

201. I do not propose to deal with the evidence of the Cheyne witnesses (other than Ms Cox) concerning the actions of Mr Kartalis in the process of establishing the French Restructuring as I have already indicated the concerns that I have in relation to that evidence. It is for the claimant to establish reliance and in my view for the reasons discussed above on the evidence, I find that the claimant has failed on the evidence for the reasons set out above to establish reliance. In my view on the evidence Mr Kartalis was anxious to avoid finding himself in a position where he was no longer receiving his fees and for this reason sought to involve himself as much as possible in the Restructuring and to achieve a position of control in order to protect his own position.

Conclusion on reliance

202. Accordingly, even I am wrong and there was a representation capable of founding an estoppel or a there was a common understanding, I find that there was no reliance by Blackstar on any representation or common understanding that if Blackstar was able to procure the continuation of the existing investment by ARRCO through a new French investment structure, Blackstar would continue to receive fees in respect of the ARRCO Investment.

Holding Communal

203. Holding Communal SA invested €12.5 million in a Cheyne structured investment vehicle, Cheyne Finance. Cheyne Finance collapsed in 2007 leading to the loss of Holding Communal's money. Holding Communal then agreed to invest €50 million in a €70,000,000 10 year note issued by a Cheyne vehicle and guaranteed by Goldman Sachs (the "Goldman Sachs Note"). Cheyne agreed in effect to rebate its management fees by issuing a separate note to Holding Communal in respect of the first five years of the term of the Goldman Sachs Note. Holding Communal went into administration in December 2011 and Cheyne purchased the interest then held by Holding Communal (through a swap) in the Goldman Sachs Note from the administrators of Holding Communal.

204. Blackstar claims fees in respect of the Goldman Sachs Note under the first paragraph of the "Profit sharing" section of the CIFS Agreement as an investment in a "tailor-made investment programme". It is the claimant's case that as a matter of construction of the CIFS Agreement, Blackstar was entitled to fees, regardless of whether the Goldman Sachs Note was held by a

person who was not an "Investor" within the meaning of the CIFS Agreement.

205. In the alternative the claimant relies on oral representations from Mr Himmer that the acquisition of the Goldman Sachs Note by Cheyne would not affect Blackstar's entitlement to fees and in reliance on those representations or common understanding, Blackstar spent time and effort assisting Cheyne in the purchase of the Goldman Sachs Note.

206. It is the defendants' case that the first paragraph of the "Profit Sharing" section does not apply as the investment was not a "tailor-made investment programme" and it was not "developed by Blackstar in cooperation with CCIL". The defendants say that the third paragraph of the "Profit Sharing" section applies in that Blackstar was entitled to fees for an investment directly in a Cheyne fund but that if the relevant investor ceased to hold the investment then Blackstar's entitlement to fees would cease.

207. In relation to the alternative case based on estoppel, the defendants deny that there were any such representations or common understanding.

208. In my view this was not a "tailor-made investment programme" and therefore did not fall within the first paragraph of "Profit Sharing" of the CIFS Agreement. Mr Kartalis in cross-examination was asked what he said the "investment programme" was to which he responded that it was a "tailor-made investment". His evidence on this point was lengthy but in essence he did not identify any features which would amount to a "programme", referring only to it being a "tailor-made investment". The fact that the note was for 10 years does not indicate that it was a "programme". It was a tailor-made solution for a particular investor but it has not been established that this note was part of a programme.

209. Cheyne accepts that at the outset this introduction by Blackstar fell within paragraph 3 of "Profit Sharing". However, the entitlement to fees is expressed as "25% of all management fees and 12% of all incentive or performance fees that Cheyne receives from the relevant Investor with respect to such investments…"

210. The reference in paragraph 3 to "Investor" is to the defined term "Investor" and thus the objective construction is that Blackstar is only entitled to fees for so long as the fees are received from that investor. There is no commercial reason why a contrary construction against the literal meaning of the language should be adopted. There is no commercial reason why the parties would intend an introducer to continue to earn fees after the investor has ceased to hold the product. This point was put to Mr Kartalis in cross-examination who claimed that it was a "different case" but his

explanation that this was different because of the guaranteed nature of the note failed to provide a satisfactory explanation.

211. As to the alternative case in estoppel Mr Kartalis asserts in his witness statement that he was given assurances by both Mr Himmer and Mr Lourie that he would receive fees. There is no documentary evidence to support the claims of Mr Kartalis. When the absence of any documentation was put to Mr Kartalis, he replied that Cheyne was "in a hurry" and the urgency at that point in time was to make sure that the Note did not get acquired by another investor. However, this explanation is not supported by the documentation which shows that Cheyne was invited by the liquidator to make an offer to purchase the interest in the Goldman Sachs Note in November 2012. Cheyne put forward a proposal in early January 2013 and negotiations continued into February 2013 resulting in a bid in March 2013. That bid was refused in April and an increased bid was submitted in response. The interest in the Goldman Sachs Note was eventually acquired in June 2013.

212. I therefore have to decide whether Mr Kartalis has established his case on the balance of probabilities and in the absence of any documentary support and in the light of my overall assessment of his credibility as a witness, I find that he has not established his case on estoppel in relation to the Goldman Sachs Note.

Generali

213. The claim in relation to Generali relates to the amount paid to Blackstar by Cheyne in respect of an investment in Cheyne funds of around €50 million. Fees were paid pursuant to the third paragraph of the "Profit Sharing" section of the CIFS Agreement. It is Blackstar's case that the investment was pursuant to a "tailor made investment programme" and Blackstar should therefore have been paid fees pursuant to the first paragraph of the "Profit Sharing" section of the CIFS Agreement.

214. It is accepted for Cheyne that Generali invested €32 million in three Cheyne funds. However, it is Cheyne's case that the investment was a direct investment in Cheyne funds and not a "tailor-made programme".

215. Mr Kartalis in cross-examination accepted that Generali invested in three separate Cheyne funds although he said that it was put together for them "as an investment proposal".

216. In the light of this evidence it seems to me that the claimant has not established that this was a "programme" and the entitlement to fees arose pursuant to the third paragraph of the "Profit Sharing" section of the CIFS Agreement rather than the first paragraph of that section and I find accordingly.

217. It was submitted for the claimant that the CIFS Agreement provided for 25% of all fees that Cheyne received and that therefore Cheyne is obliged as a matter of construction to pay out 25% of the gross fees it received on both the management and performance fees.

218. It was submitted for the defendants that the "Profit Sharing" clause requires any rebate due to Blackstar to be calculated on the basis of the fees "Cheyne receives from the relevant Investor" and this means the amount actually received not a gross figure.

219. Cheyne paid fees to JPMorgan in respect of Generali pursuant to a letter agreement dated 10 February 2011. On the evidence (paragraph 14 of the fourth witness statement of Mr Fiertz) fees on investments in funds were not paid directly by the investor such that they could be received by Cheyne "from the investor" but were paid by the fund. The language of the provision cannot therefore be interpreted literally and should be understood as fees earned from the investor or paid indirectly. It seems to me that it would be consistent with the commercial purpose of the provision that it should be construed to mean that Cheyne should pay to Blackstar as the introducer, part of its fees earned by it, but that insofar as the fees receivable by Cheyne were reduced by payments to a third party, those should be construed not to be part of the fees "received" by Cheyne. If the parties had intended to capture the gross fees paid (indirectly) by the investor rather than the net amount received by Cheyne, one would expect to see language such as "fees payable" or "paid" used rather than "received". As discussed above, the parties were sophisticated with regard to the subject matter, namely fees payable to Blackstar, and I take this into account in arriving at this construction.

220. Accordingly for these reasons I find that as a matter of objective construction, the amount of fees due to Blackstar is the amount received by Cheyne, net of any payment to JPMorgan.

Defendants' counterclaim

221. The counterclaim advanced by the defendants in relation to an alleged overpayment of fees would only appear to be relevant if Blackstar had succeeded on its primary case. In the light of the findings above, I do not therefore need to deal with the counterclaim.

Addendum

After sending the judgment to counsel in draft in the usual way, counsel for the claimant raised two matters: firstly the significance of the absence of Mr Goubeault and secondly a question in relation to quantum on Generali. I have not made any amendment to the judgment to deal with the absence of Mr Goubeault as in my view any evidence which he would have given would have had little or no relevance to the issues which fell to be determined by the court. In relation to the second question I have inserted paragraphs 217-220 above to address the issue.