Neutral Citation Number: [2019] EWCA Civ 2210

Case No: A4/2019/0323

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Mrs Justice Moulder
[2018] EWHC 3496 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2019

Before:

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LADY JUSTICE ASPLIN

- -

Between:

BLACKSTAR ADVISORS LIMITED	**Appellant**
- and -	
(1) CHEYNE CAPITAL INTERNATIONAL LIMITED	**Respondents**
(2) CHEYNE CAPITAL HOLDINGS LIMITED	

- -
- -

Mr Lance Ashworth QC and Mr Matthew Morrison (instructed by **Stewarts Law LLP**) for the **Appellant**
Mr Steven Berry QC and Mr David Peters (instructed by **Cooke, Young & Keidan LLP**) for the **Respondents**

Hearing date: 28 November 2019

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Approved Judgment

Lord Justice Newey:

1. This appeal concerns a claim for fees by the appellant, Blackstar Advisors Limited ("Blackstar"), which is in the business of introducing potential investors to investment advisers and managers. Blackstar maintains that it is entitled to further sums in respect of its introduction to the first respondent, Cheyne Capital International Limited ("Cheyne"), of L'Association pour le Régime de Retraite Complémentaire de Salariés ("ARRCO"), a French pension fund. The respondents, however, assert that Blackstar has already been paid all that was due to it, and Moulder J agreed (see [2018] EWHC 3496 (Comm)). Blackstar now challenges the judge's decision in this Court.

Basic facts

2. Cheyne is a fund manager, and the second respondent, Cheyne Capital Holdings Limited ("Holdings"), is another company in the same group.

3. On 14 September 2006, Blackstar and Cheyne entered into a memorandum of understanding ("the MOU"). This included the following:

> "Blackstar has relationships and access to a number of large institutional investors and family offices (the 'Investors' or an 'Investor' in a case of a single investor), which could be interested in investing in Cheyne's existing funds as well as tailored made investment programmes typically in excess of EUR 100 million. Blackstar will develop together with Cheyne asset management solutions for the Investors that will fit with their risk/return objectives. Following Blackstar's Investors introductions, Cheyne will pay up to 25% of all its fees to Blackstar on investment introductions that lead to development of new asset management programmes on platforms (the 'Profit Sharing'). However, the individual Profit Sharing related to individual investment may be reduced to the extent that Cheyne needs to share some of its fees with the individual Investor introduced by Blackstar."

The MOU identified a number of "Investors" of which one was given as:

> "[ARRCO] (in relation to any investments that are a direct result of discussions led by Blackstar and its employees and consultants)".

The MOU further provided that it would "terminate 6 months from the date of signing without any prejudice to Blackstar's existing rights under this Agreement".

4. In December 2006, after being introduced to Cheyne by Blackstar, ARRCO made an initial investment of €220 million in Cheyne funds. The investment was effected using two Luxembourg special purpose vehicles, Société de Diversification Financière Prudentielle SA ("SDFP") and Holding de Diversification Financière Prudentielle SARL ("HDFP"). The judge summarised the arrangements as follows in paragraph 41 of her judgment:

> "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."

5. At the same time, HDFP entered into agreements with, in one case, Cheyne and, in the other, two entities associated with Cheyne. Under the former, a "Portfolio Advisory Agreement", HDFP appointed Cheyne to advise in connection with the investment portfolio derived from the swap with SDFP. The latter agreement, a "Portfolio Management Agreement", provided for Cheyne Capital Management Limited and Cheyne Capital Management Limited (UK) LLP ("LLP") to provide discretionary management services in respect of the investment portfolio.

6. Mr Alexandre Kartalis of Blackstar said in a witness statement that an investment such as ARRCO's "really was the 'holy-grail' in alternative investment management and had the potential to be a transformational deal for Cheyne". He explained that Cheyne "could not believe that [Blackstar] had been able to secure a deal which provided (a) such a long term commitment of (b) such substantial funds, which (c) provided Cheyne with complete discretion and flexibility to invest in whatever funds they thought appropriate".

7. On 23 March 2007, Blackstar and Cheyne concluded a "Capital Introduction and Fee Sharing Agreement" ("the CIFS Agreement"). This provided for Blackstar to use its reasonable endeavours to introduce to Cheyne investors listed in the document (including ARRCO) "for the purpose of making investments in Cheyne's existing funds as well as tailor made investment programs". The agreement went on to specify payments that Cheyne would make to Blackstar by way of "Profit Sharing" in certain events. Thus, it stated for example:

> "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 thirty (30) days of Cheyne's receipt of the last relevant payment in respect of such quarter, subject to the termination provisions contained herein."

The same section of the agreement also included these provisions:

> "Both with respect to any future investments by Investors and to Existing Deals (as defined below), the Parties acknowledge

> that investment decisions must be made in the best interest of the Investor and that any asset allocation decisions within Cheyne's power or authority shall be consistent with this principle. Cheyne undertakes that it will not make any asset allocation decisions for the purpose of reducing any profit Sharing due to Blackstar"

and:

> "Blackstar is to use its reasonable endeavours to ensure that each investment made by an Investor is identified to Cheyne and Blackstar at the time thereof and will use its reasonable endeavours to procure that if such investment is made by the Investor via a nominee or other structure, Cheyne and Blackstar shall be informed how such investment is held or made so that it may accurately ensure that Blackstar receives the Profit Sharing to which it is entitled."

8. Later sections of the CIFS Agreement dealt with "Existing Deals" and "Fee on Existing Deals". The former reads as follows:

> "Prior to the date of this Agreement, Blackstar and Cheyne have already completed two deals together (the 'Existing Deals'):
>
> 1. €2.0 billion discretionary investment program for ARRCO with a seven (7) year maturity and a 100% re-investment over the life of the program of all generated profit through a dedicated newly formed SPV called 'Sociétè de Diversification Financière Prudentielle SA'. The first tranche of this program 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 affiliates.
>
> 2. €10 million investment from Holding Communal de Belgique ('Holdco') in the Cheyne Azure Fund, subject to closing of this investment. This investor may make substantial further investments in 2007 and 2008 in other Cheyne funds."

As regards "Fee on Existing Deals", this was said:

> "The initial €220 million tranche of the ARRCO program described above currently produces a management fee rebate to Blackstar of 1.39% per annum based on the invested amount (including all re-investments) (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 thirty (30) days of Cheyne's receipt of the last payment in respect of such quarter, to Blackstar for the duration of the program, which shall be a minimum of seven (7) years (corresponding to the maturity of the bonds issued by the SPV and subscribed by ARRCO)."

9. So far as "Termination" was concerned, the CIFS Agreement provided:

> "This Agreement can be terminated by either Party for any reason by giving the other six (6) months written notice of termination.
>
> Any termination shall be without prejudice to any accrued rights of Blackstar to Profit Sharing under the terms of this Agreement and as set out below."

It was then explained that the "Profit Sharing rules" could apply if an investment were made within 90 days of termination but would not generally be applicable in relation to later investments. A further provision, against the sidenote "Other", stated:

> "This Agreement supersedes and terminates the [MOU]. For the avoidance of doubt, this is without prejudice to the existing fees due to Blackstar under the previous agreement as set out hereinabove."

10. On 4 April 2008, Blackstar and Cheyne entered into a "Side Letter" to the CIFS Agreement ("the 2008 Letter Agreement"). This opened as follows:

> "Reference is made to the [CIFS Agreement], the Portfolio Management Agreement among [HDFP] (the 'LuxCo Investor'), Cheyne Capital Management Limited, and [LLP], dated 22 December 2006 and the Portfolio Advisory Agreement between Cheyne and the LuxCo Investor, dated 22 December 2006 (the Portfolio Management Agreement and the Portfolio Advisory Agreement together, the 'LuxCo Agreements'). The investment made by the LuxCo Investor pursuant to the LuxCo Agreements is hereinafter referred to as the 'LuxCo Investment'. Capitalized terms used but not defined herein have the meaning set forth in the [CIFS Agreement]."

11. The 2008 Letter Agreement continued:

> "Blackstar and Cheyne agree as follows:
>
> 1. Blackstar accepts the Cheyne Capital Holdings Limited Note, Euro 10,000,000 Amortizing Note due December 31, 2013 (the 'Note') created by the Deed of Covenant

> dated as of the date hereof 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.
>
> …
>
> 3. 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 …."

12. The deed of covenant mentioned in the 2008 Letter Agreement was made by Holdings and provided for the constitution of a note called the "Cheyne Capital Holdings Amortizing Note due December 31, 2013" with a principal amount of €10 million repayable by quarterly instalments of €500,000 each from 31 March 2009 ("the Amortizing Note"). Holdings was also to make "Special Payments" if the "profit sharing fees payable by Cheyne to Blackstar … in relation to the LuxCo Investment pursuant to the [CIFS] Agreement" exceeded the sums otherwise due under the Amortizing Note.

13. On 22 January 2009, Blackstar and Cheyne entered into a further "Side Letter" to the CIFS Agreement ("the 2009 Letter Agreement"). It opened in just the same way as the 2008 Letter Agreement. Next, there was a recital in these terms:

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

The agreement went on to provide as follows:

> "Blackstar and Cheyne hereby agree as follows:
>
> 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.
>
> …

4. The terms of the [CIFS] Agreement … shall remain in full force and effect ….”

14. By a letter dated 20 December 2009, Cheyne gave Blackstar the requisite six months' notice of its termination of the CIFS Agreement.

15. On 3 December 2012, ARRCO gave instructions for the existing structure of its investment to be extended by up to two years, from 31 December 2013 to no later than 31 December 2015.

16. On 31 October 2013, ARRCO signed a term sheet providing for "the creation of a French fund with the assets of such French fund being managed by Darius Capital … with management being delegated to Cheyne" (paragraph 10 of the judgment).

17. A restructuring ("the French Restructuring") took place in the spring of 2014. The steps that were to be taken were outlined in an email of 26 March 2014 from a solicitor acting for Cheyne. She explained that the terms of the SDFP Note were to be amended to permit its redemption in kind rather than in cash and that the SDFP Note was then to be redeemed by the novation of SDFP's portfolio swap with HDFP to "Compartiment Arrco, a sub-fund of FCP Diversification Prudentielle" ("FCP"). Following the novation of the portfolio swap to FCP, the solicitor said, "the swap will be unwound and the portfolio of cash and assets referenced by the swap will be transferred to [FCP]". The agreement in respect of the novation will, the solicitor noted, contain "an acknowledgment on the part of Arrco that the novation is in full and final settlement of the redemption of the [SDFP Note] and broad indemnity from Arrco, *inter alia*, in favour of SDFP and [HDFP]".

18. Matters appear to have proceeded as planned. On 31 March 2014, SDFP, HDFP, FCP and ARRCO entered into a Novation and Deemed Agreement under which SDFP was to transfer its rights and obligations under the portfolio swap to FCP as of the "Novation Date", which was to be the date on which a certificate of deposit of funds was issued by CACEIS Bank France ("CACEIS") "in its capacity as depositary of [FCP]". Subsequently, on 16 April, CACEIS issued a certificate stating that it had "received on 31/03/2014 from various subscribers the sum of €214,019,488.87". It is common ground, I think, that what CACEIS had in fact received was shares in Cayman Island and Irish companies rather than cash. As I understand it, it is also common ground that the certificate constituted notice of termination of the swap as well as confirming completion of the novation.

19. FCP was established by Darius Capital Partners SA ("Darius"), an asset manager. Darius designated LLP to act as "delegatee of the financial management" of the funds and to manage them "under the control of [Darius]".

The issues

20. There are essentially two issues:

    i) Did Blackstar's entitlement to fees continue beyond the French Restructuring?

ii) Did the "Fee on Existing Deals" section of the CIFS Agreement entitle Blackstar to fees equating, in total, to 1.93% of net asset value subject only to "changes in performance and allocation"?

21. Blackstar contends that both questions should be answered in the affirmative, the respondents that the response to each should be "No".

Issue (i): Continuing entitlement

The parties' cases in outline

22. Mr Lance Ashworth QC, who appeared for Blackstar with Mr Matthew Morrison, argued that, correctly construed, the contractual documents provided for Blackstar's entitlement to fees to persist for so long as ARRCO remained invested in Cheyne funds, regardless of whether there was a change in the structure of the vehicle through which the investment was held. The focus of the "Existing Deals" section of the CIFS Agreement, Mr Ashworth submitted, was on ARRCO investing, not on the structure of that investment; the references to "seven … year maturity" and SDFP were merely descriptive. The "Fee on Existing Deals" section was thus to continue to apply even if the investment were structured differently. Under the 2008 Letter Agreement, Blackstar accepted the Amortizing Note in substitution for the sums that would otherwise have been due to it up to 31 December 2013 (the final maturity date of the Amortizing Note), but it retained its right to fees on ARRCO's €220 million investment after that date. Alternatively, paragraph 1 of the 2009 Letter Agreement served to revive Blackstar's fee entitlement and the French Restructuring did not bring it to an end. "LuxCo Investor" and "LuxCo Investment" have to be read as shorthand for ARRCO and its €220 million investment, so that what matters is that the investment endured, albeit through a new structure. Even if (contrary to Blackstar's contentions) HDFP needed to be involved in the French Restructuring for Blackstar to qualify for fees, it was, in that it was not until 16 April 2014 that CACEIS provided the certificate of deposit (as to which, see paragraph 18 above).

23. In contrast, Mr Steven Berry QC, who appeared for the defendants with Mr David Peters, maintained that Moulder J was correct to hold that Blackstar lost any entitlement to additional fees when the French Restructuring was carried out. The parts of the CIFS Agreement dealing with "Existing Investments" defined the relevant investments with precision, by reference to their structure. In any case, Blackstar gave up any other right to fees in respect of ARRCO's €220 million investment when it entered into the 2008 Letter Agreement and accepted the Amortizing Note. It acquired a further fee entitlement under the 2009 Letter Agreement, but only if and for so long as HDFP (as the "LuxCo Investor") extended the terms of the existing "LuxCo Investment", which meant the investment made pursuant to the "Portfolio Management Agreement" and "Portfolio Advisory Agreement" of 22 December 2006. In the event, that investment was terminated at the end of March 2014 and Blackstar had no right to any fees after that.

The judgment

24. Moulder J considered 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"

(paragraph 103 of the judgment). However, the judge thought it implicit in that conclusion that references in the 2008 Letter Agreement to the "LuxCo Investor" and the "LuxCo Investment" were "not to be read as limited to HDFP and the investment made by HDFP in the Cheyne funds" (paragraph 104). She concluded in paragraph 109:

> "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".

25. The judge none the less held that paragraph 1 of the 2009 Letter Agreement did not apply to the French Restructuring. She saw the fact that the French Restructuring did not involve SDFP as crucial here. She said in that connection (at paragraph 122 of her judgment):

> "although I accept that the reference to the 'LuxCo investor' … 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".

She had explained as follows in paragraph 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… <u>through a dedicated newly formed SPV called [SDFP]</u>.' [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."

26. In the circumstances, the judge stated in paragraph 126 of the judgment:

> "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."

27. The judge also said this, in paragraph 130 of the judgment:

> "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'."

Analysis

28. I find it convenient to approach the CIFS Agreement, the 2008 Letter Agreement and the 2009 Letter Agreement chronologically, as Mr Ashworth and Mr Berry did in their oral submissions.

29. Taking then the CIFS Agreement first, Moulder J evidently understood the "Existing Deals" and "Fee on Existing Deals" sections to apply to investment by ARRCO only if made through SDFP and with a seven-year maturity. While, however, the "Existing Deals" box speaks of "a seven … year maturity", that relating to "Fee on Existing Deals" refers to "a minimum of seven … years", tending to suggest that there need not necessarily be a seven-year term. More importantly, the construction favoured by the judge could have had surprising consequences. Suppose, for example, that ARRCO had invested a second tranche, but using a special purpose vehicle other than SDFP or a term of eight (or six) years. On the judge's interpretation of the CIFS Agreement, Blackstar would seem to have had no entitlement to any payment if Cheyne had already terminated the agreement, notwithstanding that the new investment formed part of the "€2.0 billion discretionary investment program" identified in the "Existing Deals" part of the CIFS Agreement. Further, Blackstar could on the face of it have lost any right to fees in respect of even the first, €220

million tranche if Cheyne had arranged with ARRCO for the investment to be restructured in such a way that, say, SDFP dropped out of the picture.

30. On balance, it seems to me that neither "a seven … year maturity" nor the involvement of SDFP was essential. The preferable view is that the relevant "Existing Deal" was simply the "€2.0 billion discretionary investment program for ARRCO". As it happened, the first tranche of that programme was invested through SDFP and with a seven-year maturity. I do not think, however, that Blackstar's right to fees necessarily depended on either feature.

31. Coming on to the 2008 Letter Agreement, I agree with the judge that this "discharged the obligations of Cheyne under the CIFS Agreement and was not a discharge only up until the maturity date of the SDFP Note". Paragraph 1 of the 2008 Letter Agreement was expressed in general terms. It provided for Blackstar to accept the Amortizing 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, now or at any future date" and for "Cheyne's payment obligations to Blackstar in relation to the LuxCo Investor under the [CIFS] Agreement" to be "fully discharged by the issuance and transfer to Blackstar of the Note". Nothing was said in this agreement, unlike the 2009 Letter Agreement, to indicate that Cheyne's obligations were being discharged only until the Amortizing Note's final maturity date. Moreover, it is abundantly clear that the fee entitlement that Blackstar was exchanging for the Amortizing Note was that relating to ARRCO's €220 million investment.

32. As I have mentioned, the judge thought that her conclusion carried with it the implication that "LuxCo Investor" and "LuxCo Investment" were "not to be read as limited to HDFP and the investment made by HDFP in the Cheyne funds". Having regard to paragraph 3 of the 2008 Letter Agreement, the judge said at paragraph 106 of her judgment:

> "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."

As can be seen from paragraph 107, the judge further considered that taking the CIFS Agreement and the 2008 Letter Agreement together:

> "would suggest that as a matter of construction the reference to the 'LuxCo investment <u>under</u> 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".

33. Mr Berry took issue with these remarks. Taken together, he said, the CIFS Agreement and the 2008 Letter Agreement amounted to complementary contractual definitions of the essential identity of the particular investment covered by the "Existing Deals" section of the CIFS Agreement, namely, that it was both "through [SDFP]" and "by [HDFP]" "pursuant to the LuxCo Agreements". Moreover, the fact that the 2008 Letter Agreement left Blackstar able to claim fees under the CIFS Agreement in relation to *new* investments by ARRCO was not a problem but just a reflection of the "Profit Sharing" part of the CIFS Agreement. The true position, Mr Berry argued, is simply that the "LuxCo Investor" was HDFP and that the "LuxCo Investment" was that made by HDFP via the specified "LuxCo Agreements".

34. In my view, Mr Berry was right about this. Read naturally, the 2008 Letter Agreement provided for "LuxCo Investor" and "LuxCo Investment" to refer respectively to HDFP and the investment made pursuant to the "LuxCo Agreements", and there is no good reason to attribute a broader meaning to either expression. As Mr Berry pointed out, there is no difficulty about taking "LuxCo Investment" to refer to both the investment effected pursuant to the "LuxCo Agreements" and that made "with a seven … year maturity … through [SDFP]" as mentioned in the "Existing Deals" section of the CIFS Agreement: they were one and the same. Again, paragraph 3 of the 2008 Letter Agreement does not require "LuxCo Investor" or "LuxCo Investment" to be given an expanded meaning. On the one hand, it is perfectly plain, reading paragraphs 1 and 3 of the 2008 Letter Agreement together, that Blackstar was not to be entitled to double payment, from Cheyne (under the CIFS Agreement) as well as from Holdings (under the Amortizing Note). On the other hand, it makes sense for Blackstar to have retained its entitlement to fees from Cheyne in respect of any investment other than the €220 million tranche.

35. Mr Ashworth relied on the 2008 Letter Agreement's reference to "Profit Sharing" as indicating that it had not been drafted with precision. The term "Profit Sharing", Mr Ashworth said, was used in the CIFS Agreement to denote fees that would be payable in relation to new introductions, not those for the "Existing Deals". However, the MOU used "Profit Sharing" to refer to Blackstar's fee entitlement generally, and the provision in the CIFS Agreement by which Cheyne undertook that it would "not make any asset allocation decisions for the purpose of reducing any Profit Sharing due to Blackstar" arguably extends to the "Profit Sharing" in respect of "Existing Deals" carried forward into the CIFS Agreement. Even assuming, however, that the expression "Profit Sharing" was used loosely in the 2008 Letter Agreement, that could not, to my mind, make it right to give broader meanings to "LuxCo Investor" and "LuxCo Investment".

36. Mr Ashworth also placed reliance on the recital to the 2009 Letter Agreement set out in paragraph 13 above (in particular, the words "up until the final maturity date of the Note"). This, he argued, involved an acknowledgment that the Amortizing Note was to serve as consideration for amounts payable to Blackstar only "up until the final maturity date of the Note". However, Mr Ashworth did not suggest that the 2009 Letter Agreement had either varied the 2008 Letter Agreement in this respect or given rise to an estoppel. Moreover, the parties' subsequent conduct cannot generally be used to interpret a written agreement (see Lewison, "The Interpretation of Contracts", 6th ed., at 179). In any case, the recital to the 2009 Letter Agreement can potentially be explained, not on the basis that the parties never intended the discharge effected by

the 2008 Letter Agreement to extend beyond the expiry of the Amortizing Note (as Mr Ashworth would have it), but on the basis that the 2009 Letter Agreement would not have been needed unless the 2008 Letter Agreement had wiped the slate clean (as Mr Berry suggested). It is, on the face of it, possible that the point of the 2009 Letter Agreement was to encourage Blackstar to broker an extension of the "LuxCo Investment" in circumstances in which (because the 2008 Letter Agreement had effected a complete discharge) it would otherwise have had no incentive to do so. I do not therefore think that the 2009 Letter Agreement casts any doubt on the conclusion that Blackstar lost any right to further payment in respect of ARRCO's €220 million investment when it accepted the Amortizing Note pursuant to the 2008 Letter Agreement. It follows that any claim that Blackstar might have to fees for the period after the French Restructuring must be derived from the 2009 Letter Agreement.

37. Turning to the 2009 Letter Agreement, paragraph 1 of this provided for Cheyne to have payment obligations to Blackstar "in relation to the extended LuxCo Investment" "[i]f the LuxCo Investor extends the term of the LuxCo Investment beyond the final maturity date of the [Amortizing] Note (December 31, 2013)". In the event, the "LuxCo Investment" was plainly extended to 31 March 2014, with the result that Blackstar became entitled to fees up to that point. Mr Ashworth, however, submitted that Blackstar's right to fees continued after that. His arguments depended in large part on the proposition that "LuxCo Investor" and "LuxCo Investment", as used in paragraph 1 of the 2009 Letter Agreement, have to be taken to refer to ARRCO and its €220 million investment. In my view, however, there is no more reason to read "LuxCo Investor" and "LuxCo Investment" in that expansive way here than with the 2008 Letter Agreement. The expressions are defined in the 2009 Letter Agreement to refer respectively to HDFP and to the investment made by HDFP pursuant to the "LuxCo Agreements" (i.e. the Portfolio Management Agreement and Portfolio Advisory Agreement of 22 December 2006), and those definitions are not obviously inapt or contrary to "business common sense" (for the significance of which, see *Wood v Capita Insurance Services* [2017] UKSC 24, [2017] AC 1173, at paragraphs 10-14). It follows that Blackstar's fee entitlement will have come to an end on 31 March 2014 unless HDFP's investment pursuant to the "LuxCo Agreements" can be said to have lasted longer than that.

38. I do not think it can. The French Restructuring which took place at the end of March 2014 meant that HDFP dropped out of the picture and money ceased to be invested pursuant to the "LuxCo Agreements". While money may still have been invested in the same underlying assets, there was a new and distinct structure. Since FCP has no legal personality, ARRCO was now in effect investing direct, not via SDFP, HDFP or any other special purpose vehicle, with LLP acting as Darius' "delegatee" and managing the funds "under the control of [Darius]". At trial, Mr Kartalis accepted in cross-examination that Darius could veto investments and had a responsibility to monitor investments made by LLP. Two of the features which Mr Kartalis identified as belonging to the "'holy-grail' in alternative investment management" (viz. "such a long term commitment" and "complete discretion and flexibility" – see paragraph 6 above) had gone.

39. Mr Ashworth pointed out that the CACEIS certificate was not given until 16 April 2014 (see paragraph 18 above). It followed, he argued, that HDFP was still involved with the investment structure after 31 March and that, for that reason, the French

Restructuring represented an extension of the "LuxCo Investment" for the purposes of paragraph 1 of the 2009 Letter Agreement. Blackstar was therefore, he submitted, entitled to fees for as long as the arrangements put in place in the French Restructuring continued.

40. I cannot accept this contention. The fact that the CACEIS certificate was not issued until 16 April 2014 may well have prevented the novation of the portfolio swap and its unwinding from taking final effect before then. That, though, would mean that the French Restructuring had not been completed before 16 April, not that HDFP had any role in the new structure. In any case, there can be no question of Cheyne's obligations to Blackstar under paragraph 1 of the 2009 Letter Agreement outlasting HDFP's involvement. Even supposing, therefore, that HDFP could be said to have been involved until 16 April, Blackstar's entitlement to fees must have come to an end at that stage, and we were told by Mr Berry that no fees would in practice have become due in respect of the 16-day period between 31 March and 16 April.

41. In short, I agree with the judge that Blackstar's entitlement to fees did not survive the French Restructuring.

Issue (ii): Fee calculation

The parties' cases in outline

42. Blackstar's case is founded on the "Fee on Existing Deals" section of the CIFS Agreement. As can be seen from paragraph 8 above, this stated that ARRCO's €220 million investment "currently produces a management fee rebate to Blackstar of 1.39% per annum based on the invested amount (including all re-investments) (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". Mr Ashworth argued that, taken in conjunction with the reference to Blackstar's fees being "payable quarterly, within thirty … days of Cheyne's receipt of the last payment", these words gave Blackstar a non-discretionary entitlement to fees amounting to 1.93% (i.e. 1.39% plus 0.54%) of net asset value. While the MOU had provided for Blackstar to receive fees of "up to 25% of all [Cheyne's] fees", it was now to have a right to set amounts of net asset value, subject only to "changes in performance and allocation", with the further protection that Cheyne was "not [to] make any reallocation decision for the purpose of reducing" Blackstar's fees. The CIFS Agreement thus involved, Mr Ashworth said, a crystallisation reducing the scope for future disagreements between the parties. If, Mr Ashworth submitted, the intention had been to leave Cheyne with a broad discretion as to what it paid Blackstar, there would have been no need to say that Blackstar's entitlement was "subject to changes in performance and allocation" nor to bar Cheyne from making reallocation decisions for the purpose of reducing Blackstar's fees.

43. Mr Berry, on the other hand, maintained that Blackstar's construction of the "Fee on Existing Deals" section of the CIFS Agreement is both contrary to the wording of the agreement and commercially nonsensical. According to Mr Berry, the CIFS Agreement carried over the mechanism for determining Blackstar's fees that had been set out in the MOU. Blackstar was still, therefore, to be entitled to a percentage of the fees that Cheyne received. Mr Berry suggested that his contentions were supported by

the "Other" section of the CIFS Agreement which, as previously mentioned, provided for the termination of the MOU to be "without prejudice to the existing fees due to Blackstar under the previous agreement as set out hereinabove". Mr Berry argued that the only prior wording of the CIFS Agreement which could possibly contain a reference to these "existing fees" was that contained in the "Fee on Existing Deals" section identifying the level of fees which the €220 million investment "currently produces".

The judgment

44. Moulder J concluded in paragraph 77 of her judgment that the "fees due to Blackstar in respect of the ARRCO Investment are … 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.'"

45. The judge had said this earlier in her judgment:

> "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 [i.e. net asset value]."

Analysis

46. In my view, the judge arrived at the correct conclusion.

47. First, and crucially, the words "currently produces" and "currently equivalent to" are not apt to impose an obligation to pay. Read naturally, they merely described a state of affairs. They did not obviously import any promise on Cheyne's part.

48. Secondly, Blackstar has not provided a satisfactory explanation for the reference to the 1.39% and 0.54% being "subject to changes in performance". While "changes in performance" could doubtless affect net asset value, and so the *size* of Blackstar's fees, it is hard to see how they could be thought to bear on the *percentages* of net asset value to which, on Blackstar's case, it was entitled. Further, there was nothing in the CIFS Agreement to explain quite how and to what extent "changes in performance" could have an impact.

49. That leads to a third point: that the CIFS Agreement provided no explanation, either, of how "changes in … allocation" could be significant. The judge summarised Blackstar's case in this respect as follows in paragraph 45 of her judgment:

> "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 [of] Blackstar would be adjusted up or down in the same proportion."

However, the CIFS Agreement neither specified that Blackstar's fee entitlement was to be adjusted "in the same proportion" as Cheyne's own fees had altered nor spelt out any other mechanism for re-calculating Blackstar's entitlement.

50. Fourthly, evidence given by Ms Cynthia Cox, Cheyne's general manager, suggests that the approach espoused by Blackstar would have been uncommercial. When it was put to Ms Cox in cross-examination that it would be very easy to work out what Blackstar's fees would be if expressed as a percentage of net asset value, 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…"

The grounds of appeal do not include a challenge to that evidence, which the judge considered "significant" (see paragraph 64 of the judgment).

51. Fifthly, the "Other" section of the CIFS Agreement fits Cheyne's case better than Blackstar's. Mr Ashworth suggested that the reference to the MOU being terminated "without prejudice to the existing fees due to Blackstar under the previous agreement as set out hereinabove" could be accounted for on the basis that Blackstar was to retain its entitlement to sums that had already become due under the MOU. In my view, however, the more natural interpretation of the words is that they preserved generally Blackstar's right to receive fees in accordance with the MOU's terms as regards the €220 million investment the subject of the earlier "Fee on Existing Deals" section.

52. Sixthly, I do not think that Blackstar is helped by evidence which, Mr Ashworth argued, shows that the purpose of the CIFS Agreement was to create a greater degree

of certainty. In this connection, Mr Ashworth referred us to passages in the judgment in which the judge referred to evidence from Mr Kartalis that he wanted fixed percentages as a "clearly documented contractual entitlement" and from Mr Stuart Fiertz, a co-founder of the Cheyne group, that he "supported the idea of the CIFS Agreement in order to avoid future disagreements with Mr Kartalis". The judge regarded such evidence as inadmissible, citing *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, where Lord Hoffmann explained in paragraph 42 that "evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant" is excluded. Mr Ashworth countered that evidence of the "genesis" and "aim" of either a contract or a particular provision in it is admissible (see in this context *Merthyr (South Wales) Ltd v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526, at paragraphs 43, 44 and 50-55). However, the evidence on which Mr Ashworth wished to rely did not comprise pre-contractual materials at all. In any event, the fact that the parties might have had a general desire to achieve great certainty would not show Blackstar's contentions as to the construction of the CIFS Agreement to be well-founded, especially when Ms Cox's evidence was that its approach would be a "nightmare".

53. In the circumstances, like the judge, I do not consider that the CIFS Agreement gave Blackstar a fixed entitlement to the percentages of net asset value mentioned in the agreement.

Conclusion

54. I would dismiss the appeal.

Lady Justice Asplin:

55. I agree.

Lord Justice Lewison:

56. I agree with Newey LJ that the appeal fails on each of the two issues. In relation to the question whether Blackstar's entitlement to fees survived the French Restructuring, it is not necessary to decide whether the CIFS Agreement bears the interpretation that the judge adopted, or that favoured by Newey LJ at [30]. I express no view either way.