IN THE EASTERN CARIBBEAN SUREME COURT
IN THE COURT OF APPPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0018

BETWEEN

[1] FAIRFIELD GREENWICH LIMITED
[2] FAIRFIELD GREENWICH (BERMUDA) LIMITED

Appellants

and

[1] KENNETH KRYS
[2] CHARLOTTE CAULFIELD
(As Liquidators of Fairfield Sentry Limited and Fairfield Sigma Limited)

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Ben Mays and with him Ms. Olga Osadchaya for the Appellants
Mr. Stephen Midwinter, QC and with him Mr. Daniel Mitchell for the Respondents

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2018: July 10;
October 4.

Civil Appeal – Construction of indemnity clauses – Whether the learned trial judge erred in his interpretation of the indemnity clauses in the Investment Management Agreements

This is an appeal by Fairfield Greenwich Limited ("FGL") and Fairfield Greenwich (Bermuda) Limited ("FGBL" and together "the appellants") against the judgment and order of the Honourable Mr. Justice Chivers, QC [Ag.] dated 21st March 2018. The respondents are the liquidators of Fairfield Sentry Ltd. ("Sentry") and Fairfield Sigma Ltd. ("Sigma" and together "the Funds").

The appellants served at various times as investment managers to the Funds. Their services were provided under written investment management agreements ("IMAs") which included the right of the appellants and others to be indemnified by the Funds against "any and all

claims, demands, liability or expenses for any loss suffered by the Fund". The appellants filed creditor claims to prove in the Funds' liquidations, contending that they were entitled under the indemnity clause in the IMAs to be indemnified against the costs, losses and expenses incurred in defending seven (7) separate litigation matters relating to the Funds following the revelation of the Madoff fraud. These claims were rejected by the respondents.

On 29th June 2017, the appellants made an application under section 273 of the Insolvency Act 2003 asking the court below to (a) reverse the liquidators' decision to reject their indemnification claims under the IMAs and (b) to allow those claims to be admitted to proof. The points of principle sought to be resolved in the Application involved the true interpretation of the indemnity clauses in the IMAs and their application to the costs, losses and expenses claimed. The issue before the court was whether the words in the indemnity "… for any loss suffered by the Fund …" meant that the indemnity only responded to claims by, or on behalf, or for the direct benefit of the Fund itself, to recover its own loss, or whether the words have a wider meaning so as to encompass at least claims which have been made or intimated against the investment managers and in respect of which an indemnity is sought.

The appellants contended for the wider meaning and that the word "for" should be interpreted to mean "in relation to". This was rejected by Chivers J who held that the action had to be for the Fund's loss in the ordinary sense of the word, that is, it had to be a claim to recover the very loss which the Fund had itself suffered. Thus, in the indemnity claims against Sigma, Chivers J dismissed the appellants' claims in their entirety, while in the indemnity claims against Sentry, he dismissed all the claims, save for the those relating to the costs of the Morning Mist Holdings v FGBL, FGL litigation, a derivative action brought in the United States on behalf of Sentry for its losses that were said to have been caused by the conduct the appellants. The liquidators readily accepted that this fell within the scope of the indemnity, subject only to questions of quantification.

Being dissatisfied with the decision of the learned judge, the appellants appealed on the grounds that the judge made a series of errors in principle in coming to the findings that he did as to how the indemnity should be interpreted. The appellants sought to break the phrase "any and all claims, demands, liability or expenses for any loss suffered by the Fund" into component parts and argued that the judge simply did not engage with what "expenses for any loss suffered by the Funds" meant. The appellants further argued that the meaning that the judge had given to the word "for" in the phrase "any and all claims, demands, liability or expenses for any loss suffered by the Fund" made no sense as there could not be an expense on the part of an indemnitee "for" a loss suffered by the Fund. The appellants argued that "for" must mean "in respect of" (or similar) to make any sense at all and the word as used denotes a looser and wider relationship between the expenses on the one hand and the loss suffered by the Fund on the other. The appellants contended that once that looser and wider relationship is apparent, it must equally apply to the "claims", "demands" and "liability" as to the "expenses" as the same word "for" is used to express that relationship in each case.

Held: dismissing the appeal and awarding costs to the respondents in the court below to be assessed, if not agreed within 21 days and on the appeal fixed at 2/3 of the costs in the court below, that:

1. In considering the phrase "for any loss suffered by the Fund" the learned judge was engaging with this clause in isolation and did not consider the entire clause in which it appeared, broken down into its constituent parts. The component part "any and all expenses for any loss suffered by the Fund" has no obvious meaning. The word "for" when used in that component expression was ambiguous and permitted for at least two rival interpretations as contented for between the parties. The issue was which contention was correct.

2. The learned judge was nonetheless correct in his final interpretation. To engage the indemnity, the action in relation to which the expenses arose had to be an action for the Fund's loss in the ordinary sense of the word, that is, it had to be a claim to recover the very loss which the Fund itself suffered. In that regard, to fall within the indemnity the expenses in question must be expenses suffered or incurred in defending such a claim. This construction creates a clear, sensible, and commercially understandable allocation of responsibility. That is, if in the course of its provision of investment management services FBL or FGBL were to cause loss to the Funds, and a claim or demand were to be made against FGL or FGBL for compensation for that loss, the Funds would be obliged to indemnify FGL or FGBL. However, if FGL or FGBL cause loss to third parties and are sued by those third parties for compensation in respect of their losses, there is no right to indemnity from the Funds. The learned judge was therefore correct in his interpretation of the indemnity clause.

3. A commercial result can be rejected even if it does not rise to the level of being absurd - it need only be displaced by a more commercially sensible result. The fact that the clause did not go as far as the appellants contend cannot be used to determine the question of construction in their favour. A wider indemnity is not, without more, more commercially sensible simply because that is the result that the appellants would have preferred. If the appellants were entitled to a broad and generous indemnity by the Funds in relation to claims made against them alleging that they caused losses to third parties, that intention is expected to be spelt out very clearly in the indemnity clause. The learned judge was therefore correct in finding that the action had to be for the Fund's loss in the ordinary sense of the word, in that it had to be a claim to recover the very loss that the Fund had itself suffered. In relation to expenses, the expenses must have been suffered or incurred in such an action (i.e., a claim or demand). This satisfies the requirement to be loyal to the text of a commercial contract read in its contextual setting, while providing a commercially sensible construction.

   Rainy Sky SA v Kookmin Bank [2011] UKSC 50 applied.

4. The learned judge was correct in his finding that a claim by a shareholder seeking to recover his own loss is not within the ordinary meaning of claims "for loss suffered

by the Funds", even if the shareholder's loss is reflective of a loss suffered by the Funds. The language used simply does not cover a claim by a shareholder who brings an action for his own benefit.

JUDGMENT

[1] GONSALVES JA [AG]: This is an appeal by Fairfield Greenwich Limited ("FGL") and Fairfield Greenwich (Bermuda) Limited ("FGBL" and together "the appellants") against the judgment and order of the Honourable Mr. Justice Chivers, QC [Ag.] dated 21st March 2018.

Background

[2] The respondents are the liquidators of Fairfield Sentry Ltd. ("Sentry") and Fairfield Sigma Ltd. ("Sigma" and together with Sentry "the Funds").[1]

[3] The appellants served at various times as investment managers to the Funds. Their services were provided under written Investment Management Agreements ("IMAs") which included the right of the appellants and others to be indemnified by the Funds against certain "claims, demands, liability or expenses" as will be more particularly set out below. The appellants filed creditor claims to prove in the Funds' liquidations, contending that they were entitled under the indemnity clause in the IMAs to be indemnified against the costs, losses and expenses incurred in defending seven (7) separate litigation matters relating to the Funds following the revelation of the Madoff fraud.[2] These claims were rejected by the respondents.

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[1] The underlying facts are not in dispute and are set out in the respective skeleton arguments.

[2] The appellants filed indemnification claims in the liquidation proceedings of each of Sentry (claim 136 of 2009) and Sigma (claim 139 of 2009) for costs, losses, and expenses incurred in four litigation matters brought against the appellants: (i) Anwar/Picard I, a consolidated class-action in the United States brought on behalf of certain investors in several Madoff-feeder funds, including Sentry and Sigma, and an actions seeking to overturn the settlement of Anwar; (ii) European Claims, claims sought on behalf of certain European investors in the funds; (iii) Picard II, an adversary proceeding brought by the Madoff-trustee, Irving Picard, in a Madoff bankruptcy proceeding in the United States; and (iv) Government Agencies, various investigations of the Madoff fraud. In addition the applicants filed indemnification claims in the Sentry liquidation proceeding (claim 136 of 2009), but not the Sigma liquidation, for costs, losses and expenses incurred in three other litigations brought against Applicants; (v) Shell, an action brought in the Netherlands by an investor in Sentry; (vi) Fairfield Sentry, a claim brought by Sentry itself to recover fees paid to Applicants and for other claims; and (vii) Morning Mist, a derivative action brought in the United States on behalf of Sentry.

[4] By an application issued on 29th June 2017,[3] the appellants asked the court below to (a) reverse the liquidators' decision to reject their indemnification claims under the IMAs and (b) to allow those claims to be admitted to proof.

[5] The Application was not concerned with the detailed quantification of the appellants' claims but was limited to resolving points of principle. These in summary involved the true interpretation of the indemnity clauses in the IMAs and their application to the costs, losses and expenses claimed.

[6] In cause number 139 of 2009 (the indemnity claims against Sigma), the court below dismissed the appellants' claims in their entirety. In cause number 136 of 2009 (the indemnity claims against Sentry), the court below dismissed all of the appellants' indemnity claims, save for the indemnity claims relating to the costs of the Morning Mist Holdings v FGBL, FGL litigation.[4] The liquidators readily accepted that this fell within the scope of the indemnity, subject only to questions of quantification.

[7] The notice of appeal is limited to the question of the interpretation of the indemnity provision and the consequent application of the relevant words, on their true construction, to the claims made by the appellants. The issue before the court below was whether the words in the indemnity "… for any loss suffered by the Fund …" meant that the indemnity only responded to claims by, or on behalf, or for the direct benefit of the Fund itself, to recover its own loss, or whether the words have a wider meaning so as to encompass at least claims which have been made or intimated against the investment managers and in respect of which an indemnity is sought. The appellants contended for the wider meaning and that the word "for" should be interpreted to mean "in relation to". This was rejected by Chivers J who held that the action had to be for the Fund's loss in the ordinary sense of the word, that is, it had to be a claim to recover the very loss which the Fund had itself suffered.

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[3] Under section 273 of the Insolvency Act 2003, which provides that "a person aggrieved by an act, omission or decision of an office holder, may apply to the Court, and the Court may confirm, reverse or modify the act, omission or decision of the office holder."

[4] A derivative action brought for the benefit of the Fund.

[8] By their grounds of appeal, the appellants argue that the judge made a series of errors in principle (in law and applying the facts to the legal framework) in coming to the findings that he did as to how the indemnity should be interpreted, namely:

(1) That the judge reached the wrong conclusion, in all the circumstances as to the meaning and interpretation of the indemnity provision in the IMAs, and in particular the meaning to be given to the word "for" in the expression "… for (any) loss suffered by the Fund…" in the indemnity;

(2) In taking into account the commercial expectations of the parties the judge was wrong to conclude that the parties did not have in mind the situation that actually arose following the Madoff fraud, when the risk warnings in the Confidential Private Placing Memorandum in fact specifically covered a loss or misappropriation of the Fund's assets, which was precisely what the Madoff fraud involved;[5]

(3) In taking into account the commercial expectations of the parties the judge was also wrong to conclude that the Fund did not need the appellants as investment managers, but rather that the appellants needed the Fund.[6] There was no evidential basis for reaching this conclusion which had not been contended for by the respondents. The evidence was that the Funds had appointed the appellants as investment managers;

(4) The judge was wrong to find that the scope of the indemnity did not apply (on the judge's own construction of the word "for") to claims for reflective loss;[7]

(5) As a result of the way in which he incorrectly interpreted the indemnity, the judge was wrong to find that the respondents had correctly rejected the appellants' claims to be indemnified against the costs, losses and expenses

[5] Paras. 26 and 27 of the judgment.
[6] Paras. 29 of the judgment.
[7] Paras. 74 of the judgment.

incurred in defending against seven (7) separate litigation matters relating to the Funds following the revelation of the Madoff fraud. According to the appellants, on the proper interpretation of the indemnity, all of those claims should have been admitted to proof.

[9] At the heart of this appeal is the proper construction of the indemnification provision set out in the IMAs. Chivers J worked from the amended and restated IMA dated 1st October 2002 between Sentry and FGL contained in clause 9(b). The appellants rely on sub-clause (b) as the basis of their claims to proof but also submitted that it is helpful to consider the terms of sub-clause (a) to understand what sub-clause (b) was intended to achieve. The IMAs were materially in the same terms and the full clause read as follows:[8]

> "9(a) The Investment Manager [i.e. FGL and FGBL, respectively), its directors, officers and employees, agents and counsel (each an "Investment Manager Indemnitee"), shall not be liable to the Fund (i.e. Sentry and Sigma respectively) for any error of judgment or for any loss suffered by the Fund in connection with the subject matter of this Agreement, except loss resulting from wilful misfeasance, bad faith or gross negligence in the performance of the Investment Manager's obligations and duties, or by reason of the Investment Manager's reckless disregard of their obligations and duties here under.
>
> 9(b) Each Investment Manager Indemnitee shall not be subject to, and the Fund shall indemnify to the fullest extent permitted by law and hold each Investment Manager Indemnitee free and harmless from and against any and all claims, demands; (sic) liability or expenses for any loss suffered by the Fund arising out or (sic) any act or omission of an Investment Manager Indemnitee relating to the Fund, except to the extent such act or omission constitutes wilful misconduct, or reckless disregard of the duties of the Investment Manager or on the part of the Investment Manager Indemnitee." (emphasis added)

[10] The particular words in issue in the court below were those in clause 9(b), "the Fund shall indemnify … each Investment Manager Indemnitee … from and against, any and all claims, demands; (sic) liability or expenses for any loss suffered by the

[8] Chivers J worked from the amended and restated IMA dated 1st October 2002 between Sentry and FGL contained in clause 9(b).

Fund arising out of any act or omission of an Investment Manager Indemnitee relating to the Fund".[9] More precisely the particular words that were in issue are those in bold.

[11] Chivers J identified the short point between the parties as being, do the words "for any loss suffered by the Fund" mean that the indemnity only responds to claims by, on behalf, or for the direct benefit of the Fund itself, to recover its own loss (the liquidators' position), or do the words have a wider meaning to encompass at least the claims which have been made or intimated against FGL and FGBL and in respect of which an indemnity is sought (the appellants' position).[10]

[12] In approaching this matter, Chivers J considered that the difference could be illustrated by reference to two of the claims under consideration. The first was a claim in respect of expenses incurred by the appellants in proceedings in the court of the New York entitled Morning Mist Holdings v FGBL, FGL.[11] The Morning Mist litigation was styled as a derivative action, that is to say the plaintiffs expressly sued on behalf of Sentry to recover for Sentry itself losses said to have been caused by the conduct of the defendants including the applicants (now the appellants) in this case. It was accepted by counsel for the liquidators that the Morning Mist claim did respond to the indemnity clause 9(b) of the IMA (although the claims in the liquidation had been rejected for other reasons).

[13] By contrast, the claim in Anwar v FGBL[12] was brought by persons who were (or who invested money through) shareholders in the Funds. The liquidators' position was that regardless of any loss suffered by the Funds consequent upon any conduct alleged in Anwar, and regardless of whether those plaintiffs' losses have come about because the Funds have suffered a loss, the claims are brought by individual claimants for their own benefit. They are claims for loss suffered by the plaintiffs.

[9] See paragraph 10 of the judgment.
[10] See paragraph 11 of the judgment.
[11] 09-601511 (Supr, Ct of NT, Co. of NY).
[12] 09-118 (SDNY.)

According to the liquidators, the Anwar litigation does not respond to the indemnity. The appellants disagreed and argued in the context of the indemnity that "for" means "relates to" and because the loss claimed by Anwar relates to the loss suffered by the Fund, the respondent liquidators were obliged to admit the claim.

[14] Chivers J then proceeded to carry out a construction exercise. In relation to the applicable legal principles, he was directed by the appellants to Arnold v Britton[13] and in particular the judgment of Lord Neuberger at paragraphs 15 to 22 and to the judgment of Lord Hodge at paragraphs 76 and 77. He noted in particular paragraph 76 where Lord Hodge quoted from Rainy Sky SA v Kookmin Bank:[14]

> "[T]he exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

[15] Chivers J also referred to Wood v Capita Insurance Services Ltd[15] noting that Lord Hodge had confirmed that this remained the correct approach in commercial contracts and had gone on to discuss the relative usefulness of textual as opposed to contextual analysis, suggesting that their utility as tools to interpretation may depend on the circumstances of the case.

[16] In proceeding to apply the foregoing principles, Chivers J noted that the question of whether clause 9(b) is capable of two (or more) possible constructions is at the heart of the dispute. This argument revolved around the meaning of the word "for" as used in the identified phrase in clause 9(b). The appellants submitted that the word "for" is ambiguous. The liquidators' position was that the meaning is clear on the face of the clause. In approaching the matter, Chivers J noted the caution by Lord

[13] [2015] UKSC 36.
[14] [2011] 1 WLR 2900, para. 21.
[15] [2017] UKSC 24.

Neuberger at paragraph 18 in Arnold v Britton that the court was not justified in "searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning". He interpreted this to mean that where the words are clear in the context of the contract, one cannot cast doubt upon their meaning simply because the words may sometimes bear a different meaning. The learned judge also considered that Arnold v Britton makes clear that any analysis which relies on the commercial nature of the contract must be conducted against the circumstances which prevailed at the time of the contract and that subsequent events are irrelevant. In this context, he concluded that the parties did not have in mind the actual collapse of the Madoff Ponzi scheme.

[17] There was no debate between the parties in the court below about the correct principles which applied to the construction of the IMA.[16] Chivers J's approach was to start with a consideration of the relevant commercial background[17] and then to consider a textual analysis,[18] followed by a contextual interpretation.[19] As stated by Lord Hodge in Wood v Capita Insurance Services Limited,[20] the order in which this is done is not important so long as the court balances the indications given by each. The appellants, through their grounds of appeal, challenge the judge's application of the principles to the facts before him as demonstrated by what I consider to be their lead ground of appeal.

The Appellants' **Submissions**

[18] In their submissions, the appellants sought to define the ambit of sub-clauses (a) and (b) of the IMA. According to the appellants, sub-clause (a) provides that every investment manager "shall not be liable to the Fund…for any loss suffered by the Fund (etc.)" save as provided (emphasis added). The argument ran that under such a provision if the Fund (Sentry or Sigma) attempted to sue an investment manager

[16] See para. 50 of the judgment.
[17] Commencing at para. 21 of the judgment.
[18] Commencing at para. 58 of the judgment.
[19] Commencing at para. 65 of the judgment.
[20] [2017] UKSC 24 at para. 13.

indemnitee for alleged loss suffered by the Fund, the investment manager would be able to rely on this clause to stay proceedings unless the claim fell within the exception to the exemption (i.e. the loss arose from wilful misfeasance, bad faith, and so on).

[19] The appellants argued however that that does not cover or exhaust all possibilities whereby an investment manager indemnitee might be sued. If loss is suffered by the Fund, there may be others who can sue in respect of that loss, notably shareholders and investors in the Fund. Such shareholders and investors are not parties to the IMAs so, as a matter of contract, it is impossible for them to be bound by the terms of the IMAs. The appellants argued that in such circumstances therefore, the IMAs provided for the investment manager indemnitee to receive an indemnity from the Fund in respect of the costs of any such third-party claims (and possibly, the expenses of any claims brought by the Fund in breach of sub-clause (a)). This, according to the Appellant, is what is provided in sub-clause (b) and as I understand it, its purpose.

[20] According to the appellants, the argument about the interpretation of the indemnity in the court below focused on the construction of the phrase "any and all claims, demands; (sic) liability or expenses for any loss suffered by the Fund" (emphasis added). The appellants sought to break this down into component parts and submitted that the indemnity thus provides for the appellants to be indemnified against the following:

(1) Any and all claims for any loss suffered by the Fund;
(2) Any and all demands for any loss suffered by the Fund;
(3) Any and all liability for any loss suffered by the Fund; and
(4) Any and all expenses for any loss suffered by the Fund.

[21] The appellants submitted that the bulk of their indemnity claims relate specifically to the expenses that they have incurred in dealing with a variety of litigation claims arising out of the Funds' collapse following the Madoff fraud. Whilst those indemnity

claims might also come within one of the "claim, demands (or) liability", they most obviously come under the heading "expenses". The appellants argued however that the judge simply did not engage with what "expenses for any loss suffered by the Fund" meant and this was a serious omission.[21] They argued further that the judge's construction of the indemnity makes no sense of that phrase, and he thereby fell into error. The word "expenses" obviously contemplates that an investment manager indemnitee may incur expenses which are to be covered by the indemnity. All that is necessary for the indemnity to apply (consistent with the above) is that (1) losses have been suffered by the Fund arising out of an act or omission of an investment manager indemnitee and (2) an investment manager indemnitee has incurred an expense as a result. The most obvious example which the parties must have had in mind are legal and other "expenses" that might arise in and from litigation which follows a loss suffered by the Fund. It is difficult to see what "expenses" could otherwise be intended to mean in sub-clause (b).

[22] According to the appellants, the meaning the judge gave to the word "for" in the phrase "claims … for any loss suffered by the Fund" simply does not work in the phrase "expenses for any loss suffered by the Fund". There cannot, (submitted the appellants) be an expense on the part of an indemnitee "for" a loss suffered by the Fund - that makes no sense in the "ordinary meaning" which the judge said applied. The appellants posited that in this second phrase the word "for" must mean "in respect of" (or similar) to have any sense at all and the word denotes a looser and wider relationship between the expenses on the one hand and the loss suffered by the Funds on the other. They argued that once that looser and wider relationship is apparent, it must apply equally to the "claims", "demands" and "liability" as to the "expenses": the same word "for" is used to express that relationship in each case. That reading would mean that "claims, demands, liability…for [i.e. in respect of] loss suffered by the Fund" covered claims etc. brought by third parties which were therefore caught by the indemnity. It also gives meaning to the provision to indemnify the indemnitees against "expenses for (i.e. in respect of) any loss suffered

[21] And this appears to be their principal textual argument.

by the Fund". According to the appellants, this is certainly one of the meanings of the word "for". In connection with this, it was also argued that the judge wrongly introduced the word "action" into the indemnity when he summarised his construction of the indemnity as "the action has to be for the Fund's Loss in the ordinary sense of the word. That is, it has to be claim to recover the very loss which the fund has itself suffered." It was argued that there was no basis for the introducing of this word and it highlighted that the judge was considering only the word "claim" in the indemnity and thus simply focusing on the word "action" against the appellants rather than more widely on the nature of the "claim, demands, liability or expenses" for which the appellants sought indemnity.

[23] According to the appellants, their interpretation of the word "for" to mean "in respect of" must certainly be correct, in context, for the reasons:

(a) The respondents in submitting that the word "for" should be given its natural and obvious meaning (i) did not specifically state what that was and (ii) themselves (as noted by the judge) used the expression "in respect of" as a meaning of "for" in their own skeleton argument in the court below.[22]

(b) The judge held the word "for" should be given its "ordinary meaning" and did not think the word was one "of any particular ambiguity" though he acknowledged that "[u]sed as a preposition there is no doubt that the word can bear many different meanings depending on the contract." He concluded that the meaning of the relevant part of the indemnity was that "the action has to be for the Fund's loss in the ordinary sense of the word, that it has to be a claim to recover the very loss which the Fund has itself suffered".[23] The complaint here by the appellants is that, if that interpretation is right, the indemnity would notwithstanding its much broader language, apply only to the expenses of a claim brought by or for the benefit of the Fund itself, even though any such claims would have had to have

[22] See para. 41.
[23] See para. 71 of the judgment.

been brought in contravention of the release of prohibition in sub-clause (a). The appellants argue that it is not obvious why the parties should have seen fit to express themselves in (as they described it) "wide-ranging and inappropriate language of sub-clause (b) to achieve such a limited objective".[24]

[24] The appellants also sought to make a number of points about the judge's findings relating to the commercial background which they say appear to have formed a substantial part of his judgment and reasoning.[25]

(1) Firstly, the appellants argued that the judge regarded it as significant and relevant to consider whether the parties had anticipated a situation where the Funds' assets would be misappropriated, as happened in the Madoff fraud. The judge tested this question by reference to the Confidential Private Placing Memorandum ("CPPM") by which the investors in the Funds were persuaded to invest. He seemed to think that the contents of the CPPM were a legitimate aid to construction of the IMAs, and separately that the knowledge available to the investors was part of the factual background against which the indemnity between the Funds, FGL, FGBL fell to be constructed.[26] The appellants submitted that both observations are doubtful given that the CPPM would have been circulated after the IMAs were in place and to reflect what has already been agreed. But it was suggested, even accepting the judge's premise, that his conclusions from this document were mistaken.[27] The judge noted that the CPPM specifically identified a risk that "personnel of any entity with which the Fund invests could misappropriate the securities or funds (or both) of the Funds".[28]

[24] See para. 24 of the submissions.
[25] See paras. 21-32 of the judgment.
[26] See the last 2 sentences of para. 45 of the judgment.
[27] The appellants' appeal in this regard was limited to this latter point, and not whether the contents of the CPPM were a legitimate aid to construction.
[28] See para. 26 of the judgment.

(2) According to the appellants, however the judge found[29] that this express risk did not cover the possibility that the Fund's assets would be misappropriated in the way that they were and that in fact, the risk which the investors actually faced was wholly different and the situation that emerged was wholly unexpected. The appellants submit that this is obviously wrong. Whether the investors would have actually anticipated the scale or precise method of the Madoff fraud is one thing, but the CPPM specifically warns that the Fund's securities or funds could be misappropriated by the personnel of any entity with which the Fund invests. This is exactly what happened in the Madoff fraud. The judge seems to have thought it material that the risk was said to have related to the Fund's pursuit of the "split-strike strategy" when no such strategy was in fact ever pursued, but that reference does not limit the nature of the risk being undertaken, to which the CPPM was drawing express attention.

(3) The learned judge also concluded[30] that the Funds did not need the appellants as investment managers but, rather, that the appellants needed the Funds. On the basis of this conclusion, he discounted the suggestion that no one would take on the management of the Funds without a wide indemnity. However, there was no evidential basis for reaching this conclusion, which had not been contended for by the respondents. On the contrary, the evidence was that the Funds had appointed the appellants as investment managers.

(4) The learned judge also found that the requirement that there be a loss suffered by the Funds did not make commercial sense unless the loss of the appellants for which indemnity was sought arose only from a claim by the Fund itself to recover its own loss. According to the appellants, the judge overlooked or ignored that point that the obvious commercial rationale for linking the entitlement to an indemnity to a situation in which

[29] See paras. 27 and 67 of the judgment.
[30] See para. 29 of the judgment.

the Fund suffered a loss is because those are precisely the circumstances in which the appellants were likely to face claims by third parties. The appellants submit that contrary to the judge's ruling, this was perfectly logical.

(5) According to the appellants, the result of these errors in relation to the commercial background (which the appellants argued the learned judge himself viewed as significant) was that the learned judge diminished the importance and context of the indemnity, the significance of the types of claims that might be faced by the investment manager indemnitees, and the bargaining power of the appellants in and rationale for taking a wider (as opposed to a narrower) indemnity. According to the appellants, these errors informed the judge's analysis of the construction of the indemnity.

(6) Looking at the issue solely from a textual perspective, the appellants contended that the learned judge fell into error. They argued that the judge acknowledged that the word "for" can bear many different meanings depending on the context and gave different examples of different contexts where the word "for" bears different meanings. He found that the word "for" is not one of any particular ambiguity[31] and that the clause in the indemnity (at least read in isolation) "provides clarity of reasoning."[32] He also warned against substituting other different words for the word "for". The task of the judge was to identify what "for" means in the context of an indemnity which covers "claims, demands, liability and expenses". According to the appellants the judge fell into error for the following reasons:

    (a) In reaching his conclusion, the judge rejected "a construction which required the words "in respect of" to be substituted for "for"". However, the judge was not asked to substitute other words for "for". The question was what "for" meant in the indemnity clause. This was not a question of whether other words should be

[31] See para. 59 of the judgment.
[32] See para. 61 of the judgment.

substituted, but a question of what the actual words meant in the context. For the purpose of interpretation, clearly other words have to be used to explain or expound the precise meaning of the words used.

(b) Moreover, to say that "for" simply bears its obvious and natural meaning, having accepted that it can mean many different things depending on the context, is to avoid defining what it means in the particular context in question. Indeed, it was central to the judge's reasoning that he was not prepared to recognise (or therefore resolve) the ambiguity in the clause which had been introduced by the use of the word "for" notwithstanding its imprecision and lack of clarity in the context in which it was used.

(c) The judge focused principally on the meaning of the phrase "claims…for any loss suffered by the Fund". At no point in the judgment did he give any separate consideration to the meaning of the phrase "expenses for any loss suffered by the Fund". Given that the appellants were seeking to be indemnified for their costs and expenses incurred in dealing with various pieces of litigation which arose following the Funds' losses, this was a serious omission. Part of the error in this respect can be seen in the way that the judge condenses the phrase "claims, demands, liabilities or expenses" into simply "claims etc." at numerous points in the judgment.[33] The result was that the judge focused his analysis and consideration entirely on the nature of a potential litigation "claim" against the appellants, rather than on the nature of the expense that the appellants had incurred and sought indemnity against.

(d) This omission is particularly startling given that the result of the judge's interpretation (as he recognised it) is that no primary liability

[33] See paras. 13, 36, 45, 58, 72, 74 and 78 of the judgment.

of the appellants under a litigation claim of any sort would actually be covered by the indemnity. On his construction, "the effect of clause 9(b) was to indemnify against costs and expenses associated with claims which were barred by clause 9(a)".[34] It is hard to discern why the indemnity should be expressed to cover "claims" as well as "expenses" if (as the judge found), it did not cover or need to cover claims at all and actually covered only expenses. The judge found that he could only avoid this limited outcome if he felt able to conclude that "such a result cannot have been intended by the parties." But this was because he did not recognise the ambiguity inherent in the word "for" which he was being asked to resolve.

(e) The appellants also complained that the judge commented that the word "for" in the indemnity, should be treated as meaning "to recover" which was he said, the "ordinary sense" of the word "for" in the indemnity. This, the appellants argued, was against his own stricture against using or substituting different words, particularly ones that are not synonymous.[35] Respectfully, it cannot be said that "to recover" is an ordinary meaning of "for". The appellants argued that having to introduce the words "to recover" into the clause instead of "for" to explain its meaning demonstrates that the word does not have the clarity and obviousness of meaning that the judge said it had. Further, that it certainly is not an apt way of expressing the meaning of "expenses" in the clause: "expenses to recover the loss suffered by the Funds" is a meaningless (and therefore wrong) explanation.

(f) The appellants also argued that independently of the textual considerations, the judge failed to have any or adequate regard to

[34] See para. 52 of the judgment.
[35] See paras. 61 and 62 of the judgment.

the context. These factors included the wide language of the rest of the clause ("shall not be subject to", "to the fullest extent permitted by law", "held free and harmless", "from and against all and any claims [etc.]", "claims, demands, liability and expenses"), the absence of any definition or thus limitation on the claimants who may be making the claims or demands or to whom the liability or expenses should be owed (meaning that could be anyone) and the fact that sub clause 9(a) already prevented claims and demands by and liability to the Funds. According to the appellants, these contextual considerations point away from the judge's conclusion and point in favour of an interpretation which captures claims etc. by third parties and expenses consequently incurred in circumstances where loss has been suffered by the Funds.

(g) The appellants also argued that in consequence of his error as to the proper construction of the indemnity clause, but also on his own construction, the judge was also wrong to find that the scope of the indemnity did not apply to claim for reflective loss. According to the appellants, reflective loss claims are claims by a shareholder or investor for precisely the same loss that the company in which they held shares has suffered, which in the reason they are barred under English Law. It is in substance a claim for compensation in respect of the same loss to which the company has a claim. According to the appellants, since the claim under the indemnity clause is only triggered by a claim for "loss suffered by the Fund" without regard to the person by whom the claim is made, the correct conclusion must be that a reflective loss claim is caught by the clause.

The Respondents' Submissions

[25] The respondents' position is that the construction of the IMA indemnity is straightforward. In order for an indemnity to arise there must be a claim, demand,

liability, or expense for a loss suffered by the Funds, arising out of an act or omission of the person seeking to be indemnified relating to the Funds. That is the natural and ordinary meaning of the words used. There is no need to apply any gloss to the words or to give the phrase "for a loss suffered by the Funds" any alternative meaning: it means what it says. If any gloss is to be provided, it is simply that provided by the judge: a claim or demand for loss suffered by the Funds is a claim or demand that seeks to recover loss suffered by the Funds. A liability or expense for loss suffered by the Funds is a liability or expense incurred in making good a loss suffered by the Funds.

[26] According to the respondents, this construction produces a commercially sensible result and ensures that the clause achieves a coherent purpose. It means that if while its provision of investment management services FBL or FGBL were to cause loss to the Funds, and a claim or demand were to be made against FGL or FGBL for compensation for that loss, the Funds would be obliged to indemnify FGL or FGBL. If however FGL or FGBL cause loss to third parties and are sued by those third parties for compensation in respect of their losses, there is no right to indemnity from the Funds. That is a clear and sensible division of responsibility. According to the respondents, it gives the indemnity a broad and significant effect- it ensures that the appellants can recover costs and expenses that they incur on an indemnity basis if the Funds were (misguidedly) to launch a claim against them for breach of duty, and also means that if any party seeks to pursue the appellants for losses suffered by the Funds, the Funds are obliged to hold the appellants harmless against such claims. That would include any derivative claims and the Morning Mist litigation represents one instance of such a claim.

[27] Construing the indemnity in accordance with its natural and ordinary meaning also ensures that it is consistent with the exclusion of liability that immediately precedes it. In the 2004 IMA for example, the indemnity clause 10(b) follows clause 10(a) which provides that "the Investment Manager shall not be liable for any error of judgment or for any loss suffered by the Funds in connection with the subject matter

of this Agreement…" except for loss resulting from wilful default or gross negligence. Thus, as between FGL/FGBL and the Funds, liability for losses suffered by the Funds is excluded by 10(a). Clause 10(b) then complements that exclusion by providing an indemnity in the event that any claim is made against FGL/FGBL or their directors, officers, employees, agents and counsel, for losses suffered by the Funds. It is a coherent and sensible contractual scheme.

[28] The respondents further contended that, contrary to the impression that the appellants seek to give in their skeleton argument, merely replacing the word "for" with the phrase "in respect of" in the clause would not itself be sufficient for the appellants to succeed in their claims. A claim, demand, liability or expense "in respect of" loss suffered by the Funds would still, on an ordinary and natural reading, require the appellants to identify a claim, demand, liability or expense for a loss suffered by the Funds. As becomes clearer when one considers the application of the indemnity to the claims and expenses that the appellants seek to recover, in order to succeed, the appellants have to make the clause go much further than this, to cover claims by third parties for losses that those third parties have suffered, and claims by regulatory authorities investigating the Madoff fraud generally, and claims to reverse unjust enrichment gained by the appellants or to recover overpaid fees. The appellants can only do that by both changing the word "for" to "in respect of" and then giving that phrase "in respect of" an extremely expansive meaning that covers claims, demands, liabilities and expenses that are plainly not "for losses suffered by the Funds" but which are for different things entirely. In other words, the appellants' attempt to re-write the clause as though it said that an indemnity is available "for any claim, demand, liability or expense where the funds have suffered loss and as a result of the same or related breaches of duty, whether the claim, demand, liability or expense is for that loss or for the loss of a third party or for something else". That argument was obviously wrong and was rightly rejected by the judge.

[29] The respondents also argued that the appellants' construction makes no commercial sense. If FGL or FGBL is sued by a third party for loss inflicted on that third party, why should the availability of an indemnity depend on whether or not the Funds have suffered a loss? There is no commercially sensible reason to base the availability of the indemnity on that criterion.

[30] The respondents further argued that the indemnity contended for by the appellants is a broad and generous one and if the intention really had been that FGL and FGBL should be entitled to look to the Funds to indemnify them in relation to claims made against them alleging that they caused losses to third parties, one would expect to see that intention spelt out very clearly. Additionally, the indemnity set out in the CPPM distributed to potential investors included the words requiring any claim, liability or expense to be "for any loss suffered by the Fund". It would have been seriously misleading to investors to include the IMA Indemnity in these terms if in fact the indemnity provided extended to claims for losses suffered by the investors personally. The investors would be astonished by the suggestion that, in the event that they sued FGBL for loss they suffered as a result of breaches of duties owed directly to them, FGBL would indemnify from the Funds, thereby effectively meaning that the investors would be depleting their own funds by bringing proceedings. If that were the intention, the CPPM would have had to spell it out clearly.

[31] The respondents concluded that the IMA Indemnity is clear. It applies where, and only where, an indemnitee faces a claim, demand, liability or expense for loss suffered by the Funds.

[32] The respondents also went on to specifically address and refute as unmeritorious the appellants' various criticisms of the judge.

Discussion

[33] I will first address a number of what I consider to be ancillary points made by the appellants. Firstly, I find nothing in the argument of the appellants that any error

was made by the judge in his approach when he considered that he was being asked to "substitute"[36] the words in "respect of" for the word "for", rather than simply to interpret "for" to mean "in respect of". Whether this was considered a substitution of words or an interpretation of words by utilising other words is in my opinion immaterial. In substance, the effect would be the same. Secondly, it is not correct to suggest[37] that the judge avoided defining what "for" meant in the particular context in question. It is impossible to argue that the judge did not define what "for" meant in the particular context on the one hand, and then to also argue (as the appellants have done) that the meaning the judge gave to the word "for" in the phrase "claims…for any loss suffered by the Fund" simply does not work in the phrase "expenses for loss suffered by the Fund", as the latter argument inherently acknowledges that a meaning was in fact ascribed by the judge to the word "for." Additionally, by the appellant's own submissions,[38] the judge had commented that "for" should be treated as meaning "to recover". I also do not agree with the appellants that simply having to introduce the words "to recover" into the clause instead of "for" to explain its meaning necessarily demonstrated that the word "for" did not have the clarity and obviousness of meaning that the judge said it had. I do not agree that the utilisation of other words to define what a particular word means necessarily means that the meaning of the defined word is not clear and obvious. This submission by the appellants runs headlong into their earlier argument at paragraph 34(i) of their submissions that "For the purposes of interpretation, clearly other words have to be used to explain or expound on the precise meaning of the words used." Similarly, it must be somewhat questionable that the judge could be criticised for going against his own stricture against using or substituting different words, when this very stricture was itself criticised by the appellants as being incorrect. Finally, the appellants[39] argued that the judge did not pay sufficient regard to the wide language used in clause 9(b). I agree with the judge's disposition of this point. An indemnity clause which uses very wide words in one part may necessarily

[36] See para. 61 of the judgment.
[37] See para. 34 (ii), p. 11 of the appellants' skeleton arguments.
[38] See para. 34(vii) of the appellants' submissions.
[39] See para. 34(viii) of their submissions.

require words of narrowing effect in the other, or it may simply be written that way. For my part the use of wide words in one part of a clause, does not necessarily infer an intended width in relation to words of another part. Neither is any result brought about thereby necessarily commercially unsound. However, these observations are all in relation to approach only, and I make no comment at this stage on the correctness of any resultant determinations by the judge.

[34] I would also address at this point the argument made by the respondents that the indemnity set out in the CPPM distributed to potential investors included the words requiring any claim, liability or expense to be "for any loss suffered by the Fund" and that it would have been seriously misleading to investors to include the IMA indemnity in these terms if in fact the indemnity provided extended to claims for losses suffered by the investors personally. The difficulty I have with this argument is that it seeks to rely on a position allegedly clearly established in the CPPM that limited claims to only the kind envisaged by the liquidators and then to suggest that the words in dispute in 9(b) should be read so as to bring them into conformity with that position. But the words sought to be relied on in the CPPM[40] ("…any and all claims, liability and expenses for any loss suffered by the Fund" with the substitution of the word "or" for "and" before "expenses" and the omission of the word "demands") are exactly the same as those in dispute and therefore must themselves also suffer from any claimed ambiguity. Understandably, the focus in the court below was on the words "for any loss suffered by the Fund" and not on "Any and all expenses for any loss suffered by the Fund" and looked at in isolation there may be no apparent ambiguity. But when the words "Any and all expenses" are introduced, as will be explained below, I am of the opinion that textually an ambiguity arises.

[35] The main thrust of the appellants' argument (commencing with a purely textual approach) is that the meaning the judge gave to the word "for" in the phrase "any and all claims… for any loss suffered by the Fund" simply does not work in the component phrase "any and all expenses for loss suffered by the Fund". There

[40] See para. 23 of the judgment.

cannot be an expense on the part of an indemnitee "for" a loss suffered by the Fund. According to the appellants, that makes no sense at all and the word denotes a looser and wider relationship between the expenses on the one hand and the loss by the Fund on the other. Once that looser and wider relationship is recognised, it must equally apply to the "claims", "demands" and "liability", as to the "expenses" as the same word "for" is used to express that relationship in each case.

[36] In the judgment, the judge focused on the phrase "for any loss suffered by the Fund".[41] Although the judge recognised that the appellants sought to claim in respect of "expenses" incurred by them in the Morning Mist litigation,[42] there was no separate analysis of the indemnity when, in relation to "expenses" it was expressed as "any and all expenses for any loss suffered by the Fund." There was an acceptance by counsel for the respondents that the Morning Mist claim responds to the indemnity in clause 9(b) of the IMA. The Morning Mist litigation is styled as a derivative action. The judge's ultimate conclusion at paragraph 71 of the judgment that the action had to be for the Fund's own loss in the ordinary sense of the word, that is, it had to be a claim to recover the very loss which the Fund has itself suffered (which is the basis upon which counsel for the respondents accepted in principle the Morning Mist claim), clearly indicates that although the judge may not have directly addressed the indemnity when expressed as "any and all expenses for any loss suffered by the Fund", he was clearly of the position that to fall within the indemnity, any expenses incurred by an investment manager indemnitee had to be incurred in a claim for recovery of the Funds' loss.[43] That was his conclusion. However, in coming to that conclusion, the judge did not recognise any ambiguity in the word "for". At paragraph 59 of the judgment he stated:

> "It does not strike me that the word "for" is one of any particular ambiguity. Used as a preposition, there is no doubt that the word can bear many different meanings depending on the context, but when seen in context the word does not generally leave the ordinary reader in any doubt as to the meaning that it does bear".

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[41] See para. 11 of the judgment.
[42] See para. 12 of the judgment.
[43] Or as described by counsel for the applicants in the court below, in para. 38 of the judgment, "expenses suffered in defending such a claim".

At paragraph 61 the judge continued:

> "Burns was a case where the statute provided the connection between "for" and "in relation to". But from a textual analysis I cannot see any reason to substitute "in relation to" for "for" in the context of a clause that, at least read in isolation, provides clarity of reasoning".

It appears that the judge was here making the statement that the clause in question, read in isolation, provided clarity of meaning.[44] The difficulty that I have with that conclusion is that, textually, the judge was engaging with the clause in isolation, and was apparently not considering the clause broken down into its component parts. The judge clearly had not considered the clause when read as "Any and all expenses for any loss suffered by the Fund". Had he done so, I think he would have been compelled to find that as expressed that phrase has no obvious meaning. Consequently, I agree with the appellants that the word "for" when used in that component expression was ambiguous and permitted for at least two rival interpretations as contended for between the parties. The question is which interpretation was correct.[45]

[37] Having considered the submissions of the parties, although I am of the opinion that the judge erred in not recognising any ambiguity in the word "for" as used in the phrase "any and all claims, demands, liability or expenses for any loss suffered by the Fund", he was nonetheless correct in his determination that the action had to be for the Fund's loss in the ordinary sense of the word, that is, it has be a claim to recover the very loss which the Fund has itself suffered. In that regard, expenses to fall within the indemnity must be expenses suffered or incurred in defending such a claim. I set out my reasons below which are for the most part, (other than in relation to the textual analysis at the end) the same as those of Chivers J.[46]

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[44] See para. 61 of the judgment.

[45] In defence of the learned judge, it does not appear that the appellants had presented their case in the court below with an emphasis on linking the phrase "for any loss suffered by the Fund" with expenses, and so the fact that the judge may not have focused on that is understandable.

[46] I have also considered that an appellate court is entitled to take account of the fact that an experienced judge of the Commercial Court reached a particular conclusion on the issue of whether a particular construction, and

Commercial Background Factors

(a) The Risk factor

[38] In relation to the commercial background considerations, there were three main factors identified by the appellants in their grounds of appeal and submissions which they argued influenced the judge in arriving at the wrong decision. The first had to do with the risk contemplated by the parties that the Funds' assets could be misappropriated.[47] At paragraph 21 of the judgment, the judge referred to the fact that he had little material before him in relation to the commercial background to the contract. He referred to the fact that there was some evidence of the particular risks which the parties may have had in mind that might cause loss to the Fund because the CPPM referred to in clause 1 of the IMA contained a list of risk factors associated with an investment in the Fund. The judge remarked that neither counsel addressed him in relation to these specific risks but he nonetheless made some reference to them. Clearly, the judge was alive to the point that a consideration of the types of risks that the parties envisaged could be faced by the Funds and the investment managers might be of some assistance in determining the breadth of the indemnity they would most likely agree to. He considered that[48] any consideration of the factual and commercial background against which the indemnity was to be construed must be those matters which objectively were known not only to the Fund and FGL, but also generally to the body of investors to whom the CPPM was given and that would include matters set out in the CPPM itself. The judge set out the single identified risk factor that could have a bearing on the case as:

> "17. Possibility of Misappropriation of Assets. When the Fund invests using the "split-strike conversion" strategy…it will not have custody of the assets so invested. Therefore, there is always the risk that the personnel of any entity with which the Fund invests could misappropriate the securities of funds (or both) of the Fund."

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have given the requisite amount of weight to that conclusion. See Lord Clarke in Rainy Sky v Kookmin Bank [2011] UKSC 50, para. 41.

[47] See paras. 25-28 of the appellants' submissions.

[48] Para. 25 of the judgment.

[39] The judge found that expression of risk was wholly inapt to cover the possibility that the whole split strike conversion strategy in which the Fund would invest was a sham and that the money was going into a giant ponzi scheme. According to the judge, it illustrated that in the context of the CPPM and therefore the IMA the risk which the investors (and indeed the investment manager) actually faced was wholly different from the risk that they anticipated. It was not a risk objectively known to any of the parties (although it was in existence they were unaware of it) and is not a matter against which the IMA could be construed. The implied recognition here is that if that type of risk was in fact contemplated, it would point to the investment managers wishing to obtain and possibly having obtained a much wider indemnity than that contended for by the liquidators. The appellants in their submissions challenge the judge on whether the contents of the CPPM were a valid aid to construction and the knowledge available to investors was part of the factual background against which the indemnity between the Funds, FGL and FGBL fell to be construed, on the basis that the CPPM would have been circulated after the IMAs were in place and to reflect what had already been agreed. I do not think that the determining factor is whether the CPPM would have been circulated after, but whether it was to the knowledge of the Funds, FGL and FGBL in existence or to be brought into existence and what were its proposed contents. But I think that is irrelevant in any event (i.e., whether it was a valid aid to construction) as it was not part of the appellants' actual appeal.

[40] The specific appeal on this point was that accepting the judge's premise, his conclusions from that document were wrong, in that he was wrong to conclude that the risk that the investors actually faced was wholly different and the situation that emerged was wholly unexpected and that he seemed to have thought it material that the risk was said to have related to the Fund's pursuit of the split-strike strategy when no such strategy was in fact ever pursued.[49] I do not agree with the appellants. Firstly, I do not understand the judge to have considered material that the risk was said to have been related to the Funds' pursuit of the split strike

[49] See para. 8, ground (2) on p. 3 above.

strategy. The judge was simply describing the risk as it was stated in the CPPM. Secondly, I agree with the respondents that neither the Funds, nor the appellants nor the investors had in mind[50] that the entire operation was a fraudulent Ponzi scheme when they did business with each other. This means, as the judge held, that the fact that it turned out that the entire arrangement was a ponzi scheme is not a relevant part of the factual matrix to bear in mind when construing the IMA. Thirdly, I agree with the judge that the expression of risk was wholly inapt to cover the possibility that the whole strategy into which the Funds would invest was a sham.[51] I consider this to be not just a difference in degree or scale but a difference in substance. I do not think that any reference to the possibility of the funds being misappropriated would immediately bring to mind the possibility that the entire scheme was a total sham from the get-go.

(b) Whether the Funds Needed the Investment Managers

[41] The appellants also criticise the judge for concluding that the Fund did not need the appellants as investment managers, but rather, that the appellants needed the Funds.[52] On the basis of this conclusion, the appellants argued that the judge discounted the suggestion that anyone would take on the management of the Fund without a wide indemnity. According to the appellants, there was no evidential basis for reaching this conclusion, which had not been contended for by the respondents. On the contrary, the evidence was that the Funds had appointed the appellants as investment managers. Here again I am not in agreement with the appellants. The discussion here arose from the appellants' submission that one of the commercial factors to be considered was the size of the fees received by the investment manager relative to the size of the potential loss to the Fund (and therefore the potential claim against the investment manager). The judge addressed this at paragraphs 28 and 29 of the judgment where he explained the basis for his coming to that conclusion and what he meant by it:

[50] See para. 30(a) of the respondents' submissions.
[51] See para. 27 of the judgment.
[52] See para. 29 of the appellants' submissions.

> "[28] Mr. Pymont submitted that one of the commercial factors I should take into account, as an aid to construction, was the size of the fees received by the Investment Manager under the IMA relative to the size of the potential loss to the Fund (and therefore the potential claim against the Investment Manager.) He said that a fee of 1% was so small compared to the potential loss of an entire investment-i.e. 100%-that no person would take on the management of the Fund without a wide indemnity."
>
> [29] I think that is to misunderstand the relationship between the Fund and the Investment Manager. This is not a case where an entity raises (or is about to raise) money and then goes to market to find some person to manage that money for them. The Fund has no independent purpose; it is the creation of the Investment Manager (or those behind the Investment Manager) as a legal entity to channel money from third party investors to an underlying investment - in this case a Madoff entity. Its sole purpose - from the perspective of those who promoted or engaged it - is to allow the Investment Manager to earn fees. It is the Investment Manager which needs the Fund, not the other way around. It is the Investment Manager that has the contracts at both ends of the investment chain - the Fund is merely a conduit."

[42] I can find no flaw in the judge's reasoning and the conclusion he drew. I agree with the respondents[53] that the fact that the Funds appointed the investment managers does not alter the fact that the entire structure was the creation of the Fairfield Greenwich group and the principals behind that group.[54] The Funds were vehicles with no employees of their own. But in any event, any finding by the judge that the investment managers needed the Funds does not appear to have figured prominently in the judge's final interpretation of the clause in question. At paragraph 67 of the judgment, Chivers J stated:

> "Before I could conclude that the commercial risk undertaken by FGL (was absent any particular form of indemnity) disproportionately high compared to the reward they were to receive I would need evidence as to the real nature of the objectively perceived risk at the time the IMA was signed. Beyond the terms of the CPPM there is none. It is no aid to interpretation that, when a wholly unexpected situation was exposed, FGL suffered a blizzard of claims."

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[53] See submissions at para. 30(b)

[54] See para. 30(b) of the respondents' submissions, relying on Mr. Krys' 99th statement at paras. 11-26, and his 105th statement paras. 4-6.

[43] I am therefore inclined to agree with the respondents that these points (relating to both the risk and the fees) appear to have had little impact on the judge's construction of the indemnity.

(c) The Requirement of a Loss Being Suffered by The Fund as a Trigger for the Indemnity

[44] The appellants also took issue with the judge for finding that the requirement that there be a loss suffered by the Fund (in order to trigger the indemnity) did not make any commercial sense unless the loss of the appellants for which indemnity was sought arose only from a claim by the Fund itself to recover its own loss. The appellants argued that the judge overlooked or ignored the point that the obvious commercial rationale for linking entitlement to an indemnity situation in which the Fund suffered a loss is because those are precisely the circumstances in which the appellants were likely to face claims by third parties and that contrary to the judge's ruling this was perfectly logical. The judge dealt with this argument at paragraph 68 of the judgment in this manner:

> "[68] I can also test the construction of clause 9(b) with regard to Mr. Midwinter's argument that for the indemnity to respond to any claim at all, provided only that the Fund has suffered some loss arising out of the same facts, was arbitrary. There is force in this point. Put another way, why does the indemnity only respond when the Funds has suffered loss. There is no evidence from which the court can determine some overall commercial purpose which requires the indemnity to exist at all let alone take any particular form. But there is at least some internal logic in a construction which requires the Fund to have suffered loss if the protection is intended to extend only to claims to make that loss whole again. A construction which requires the Fund to protect against claims which will not contribute towards making the Fund whole again renders the requirement for the Fund to have suffered loss without any apparent commercial logic."

[45] I find this reasoning by the judge to be compelling. Why would the indemnity not merely be triggered by, but also be limited to, cases where the Fund suffered a loss, if its intention was to give wide cover to the investment managers indemnitees? I agree with the respondents that the construction which engages the indemnity only

when the claim, demand, liability or expenses is made or incurred where the activity in question is to recover loss suffered by the Fund creates a clear and sensible (and in any event a commercially understandable) allocation of responsibility in that the Funds are responsible for any loss they suffer (assuming no wilful default or gross negligence on the part of the appellants) while the appellants are responsible for any loss they cause to third parties.

Contextual Analysis

[46] From a contextual approach, construing the indemnity in the manner set out in paragraph 36 also ensures that it is consistent with the release/exclusion of liability that immediately precedes it in clause 9(a). Sub clause (b) then complements that release/exclusion by providing an indemnity in the event that any claim is actually made in contravention of same. There was nothing in the context to suggest that clause 9(b) must have been intended to go further than indemnifying for claims already barred by 9(a). There is also nothing commercially unsound in this result. This position was adequately addressed by the judge at paragraphs 51 and 52 of the judgment where he stated that in his opinion this was more than a belt and braces approach and that the indemnity certainly added something more than mere braces to the belt of the 9(a) waiver. The question asked by the judge was whether the limited scope of that "something more" should lead the court to conclude that such a result cannot have been intended by the parties. That result is by no means absurd. I am in full agreement with the judge when he stated[55] that the fact that clause 9(b) did not go as far as the Applicants contend cannot be used to determine the question of construction in their favour. I am fully cognizant that a commercial result can be rejected even if it does not rise to the level of being absurd - it need only be displaced by a more commercially sensible result.[56] In this case, I find the result to be commercially sensible and to be supported by the context of 9(a) as explained above. I am unable to find, without more, that the wider indemnity would be more commercially sensible simply because that is the result that the appellants

[55] See para. 64 of the judgment
[56] Rainy Sky v Kookmin Bank [2011] UKSC 50 at para. 41, per Lord Clarke.

would have preferred. That simply engages a tug-of-war between what each of the appellants and the respondents would have preferred. In this regard, I am cognisant of the inherent limitations of utilising business commercial sense in interpreting commercial contracts. It may involve an attribution to the parties of an intention that may be somewhat precarious because the court proceeds to make a conclusion being unaware of the various factors that may have led the parties to agree to a certain clause. This was acknowledged by Lord Hodge who stated in Wood v Capita Insurance Services that:[57]

> "Business common sense suggest that Capita had an interest in obtaining as broad an indemnity against the adverse consequences of mis-selling as it could obtain … Business common sense is useful to ascertain the purpose of a provision and how it might operate in practice. But in the tug o' war of commercial negotiation, business common sense can rarely assist the court in ascertaining on which side of the line the centre line marking on the tug o' war rope lay, where the negotiations ended."

[47] In that case, Lord Hodge found it necessary to examine the clause in question in more detail, before returning to the commercial context. I find myself in the same position in relation to this case and am of the opinion that greater assistance can be had by reference to the text and context.

The Text

[48] When broken down into its constituent parts as done by the appellants, the provision under review provides for the appellants to be indemnified against the following:

(1) Any and all claims for loss suffered by the Fund;

(2) Any and all demands for any loss suffered by the Fund;

(3) Any and all liability for any loss suffered by the Fund;

(4) Any and all expenses for any loss suffered by the Fund.

[49] Textually, the meaning and intent of (1), (2) and (3) above, individually, are pellucid. There is no ambiguity in the word "for" or in the phrase "for any loss suffered by the Fund." It is only (4) that presents an ambiguity. I find it rather difficult to accept the

[57] [2017] UKSC 24 at para. 28.

argument of the appellants that the clear and unambiguous language, meaning and intent in relation to (1), (2), and (3) are to be automatically supplanted and rendered ambiguous by the ambiguity that presents itself solely in relation to (4). In Arnold v Britton, Lord Neuberger cautioned that save in the most unusual case the meaning is most obviously to be gleaned from the language of the provision: [58]

> "Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

If the appellants are to break down the phrase in the way that they have done, (which does appear to be correct) then they must be prepared to deal with the context thereby created or at the very least highlighted. I am unable to accept the appellants' proposition that the result is that it is necessary to interpret "for" in (4) so as to make it read as the appellants contend, (to mean "in respect of") and then to apply that looser or wider interpretation back to (1), (2) and (3). The very fact that (1), (2) and (3) are clear and unambiguous suggests to me that the proper course is to interpret "for" in (4) so as to bring (4) into conformity with the clear intention of (1), (2) and (3). (1), (2) and (3) provide the immediate context or at least a very important part of the context in interpreting (4).

[50] In support of this position, if the intention really was that the appellants should be entitled to look at the Funds to indemnify them in relation to claims made against them, alleging that they caused loss by breaches of duties owed directly to third parties, or claims for unjust enrichment gained by them at the expenses of those third parties, or costs incurred in connection with regulatory investigations such as the investigation into the Madoff fraud, I agree with the respondents that one would expect to see that intention spelt out very clearly. I therefore conclude that Chivers J was correct when he stated that the action had to be for the Fund's loss in the ordinary sense of the word, in that it had to be a claim to recover the very loss that the Fund had itself suffered. In relation to expenses, the expenses must have been

[58] [2015] AC 1619 at para. 17.

suffered or incurred in such an action (i.e., a claim or demand). This, in my opinion, satisfies the requirement to be loyal to the text of a commercial contract read in its contextual setting, while providing a commercially sensible construction.[59]

Reflective Loss

[51] The appellants finally suggest that the judge was wrong to find that a claim by a shareholder seeking to recover his own loss is not a claim "for loss suffered by the Funds" where the shareholder's loss is reflective of a loss suffered by the Funds. The short answer to this is that the judge was right for the reason that he gave. A claim by the shareholder for its own loss, even if reflective of the Fund's own loss, is not within the ordinary meaning of claims "for any loss suffered by the Fund." The language used simply does not cover a claim by a shareholder for its own loss. The shareholder is bringing the action for his own benefit.

[52] In the circumstances, the appeal is dismissed. Costs are awarded to the respondents in the court below to be assessed, if not agreed within 21 days and on the appeal fixed at 2/3 of the costs in the court below.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

[59] See Lord Clarke in Rainy Sky SA v Kookmin Bank at para. 25, citing with obvious approval Lord Steyn in Society of Lloyd's v Robinson [1999] 1 All ER (Comm) 545, 551.

Chief Registrar