IN THE COURT OF APPEAL (CIVIL DIVISION) **Appeal No.CA-2026-000044**
ON APPEAL FROM **Claim No. CL-2022-000466**

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

Mr Justice Calver

B E T W E E N : -

ROBERT GAGLIARDI

Claimant/Respondent

- and -

EVOLUTION CAPITAL MANAGEMENT LLC

Defendant/Appellant

RESPONDENT'S REPLACEMENT SKELETON ARGUMENT – 20 October 2026

A INTRODUCTION AND SUMMARY

1 Mr Gagliardi was undisputedly successful in generating exceptional revenue and profits for his employer, Evolution Capital Management LLC ("**ECM**"). It is common ground that he generated 97% of c.$64 million of revenue during his employment in 2021, and profits of $35.9 million. Notwithstanding Mr Gagliardi's outstanding revenue generation ECM refused to pay him any performance-related discretionary bonus.

2 Mr Gagliardi brought a claim for damages to reflect his contractual entitlement to a discretionary bonus for 2021 and, following a trial held across four weeks in the Commercial Court in October 2025, Mr Justice Calver (the "**Judge**") found that the claim was established. So steeped was ECM in its antagonism towards Mr Gagliardi that its response to Mr Gagliardi's claim included: (i) a claim against Mr Gagliardi in the New York Courts which at trial the Judge found ([422]-[427] **[CB/4/177]**) contained unwarranted allegations of wrongdoing, which was halted by an ASI granted by Foxton J [2023] ICR 1377 following a breach by ECM of its undertaking to the Commercial Court ([24]) **[SB/30/226-227]**; and (ii) an abusive counterclaim seeking to recoup some $7 million purporting to represent all other sums paid to Mr Gagliardi during his employment, also alleging serious wrongdoing against him without any proper basis, which the Judge rejected (and which is not under appeal).

3 By this appeal ECM argues that the Judge was wrong to find that Mr Gagliardi was entitled to any damages. Despite ECM's numerous arguments to the contrary, the Judge reached a clear view as to the correct construction of Mr Gagliardi's employment contract under Delaware law and that ECM breached the contract by refusing to pay him any bonus for 2021, finding that a lawful exercise of discretion would have led to a discretionary bonus of $5.385 million. The Judge was right so to find for the reasons he gave in the judgment under appeal (the "**Judgment**") **[CB/4/49]** and/ or for those in the Respondent's Notice **[CB/10/309]**.

4 The Judge's clear conclusions are supported and informed by his careful analysis of the evidence and detailed factual findings which are set out at [29]-[275] **[CB/4/59-135]**, which save in respect of Ground 6 are not challenged on appeal and which vastly exceed the pared down summary referred to by the Appellant at ¶7 of its Appeal Skeleton **[CB/11/318]**.

5 The Appellant advances its appeal on six grounds, none of which evince any error or issue with the Judge's reasoning, and all should be dismissed.

5.1 By Ground 1, ECM argues that the Judge misread the contractual language that confirmed Mr Gagliardi was to be considered for a discretionary bonus pro rata if his employment terminated prior to the annual bonus payday **[CB/9/304-306]**. However, the Judge made no such error, and Ground 1 is misconceived in arguing that a separate contractual discretion applied if Mr Gagliardi was an early leaver.

5.2 By Ground 2, ECM argues that the Judge erred in finding that reliance on this pro rata provision was properly pleaded. There was no such error. The Judge properly identified the pleaded reliance on the pro rata provision in support of the claim for payment of Mr Gagliardi's discretionary bonus.

5.3 By Ground 3, ECM argues that the Judge was wrong to find that the meaning of the contract **[CB/9/304-306]** was clear that "*individual performance*" in the discretionary bonus clause referred to Mr Gagliardi's revenue contribution (such that as a matter of Delaware law it would not be permissible to refer to extrinsic evidence as an aid to construction). There was no such error, but even if there were ambiguity the extrinsic evidence does not support ECM's construction (as the Judge correctly found at [304]-[305], which is not appealed as part of Ground

3) and indeed clearly supports the Judge's construction as *per* Respondent's Notice Point 1 **[CB/10/309]**.

5.4 By Ground 4, ECM argues that the Judge miscalculated the proper bonus due to Mr Gagliardi and "*overlooked*" the fact that Profit was a defined term. The Judge made no such error. ECM's case proceeds on the wholly uncommercial and absurd basis, unsupported by contractual language, that Mr Gagliardi's bonus was to be calculated as a percentage of fee income of the fund rather than of trading profits generated from revenue.

5.5 By Ground 5, ECM suggests the Judge erred in law in finding that the existence of the SEC/ DOJ investigation into block-trading was irrelevant to the contractual discretion. This is a question of construction, not an issue of law. The Judge correctly found that the clause properly interpreted did not permit consideration of such a factor. In any event, as *per* Respondent's Notice Point 2 **[CB/10/309]**, even if it could be a valid contractual factor, ECM would be in breach in awarding a bonus of $0 and/ or failing to defer the exercise of discretion, or in failing to pay a bonus to Mr Gagliardi on conclusion of the SEC/ DOJ investigation.

5.6 By Ground 6, ECM argues (for the first time before this Court - this was not raised with the Judge) that there was a serious procedural irregularity at trial by the Court rejecting the evidence of ECM witnesses (unsupported by documents) on one narrow finding of fact, namely that consideration was given by ECM to terminating Mr Gagliardi's employment in August and October 2021. In advancing this ground, ECM seeks permission to rely on emails that were not before the Judge at trial (although they could have been) **[FEB/1/5-6 and FEB/2/9-14]**. There was no serious procedural irregularity. The Judge was entitled to make the finding he did on the evidence before him. The new evidence does not meet the test for adducing fresh evidence on appeal. In any event, as *per* Respondent's Notice Point 3, the new emails do not undermine the Judge's conclusion that ECM did not seriously consider terminating Mr Gagliardi, and importantly would have made no difference to the Judge's assessment of the evidence as to what factors were considered in the exercise of discretion in late February 2022 and his conclusion that ECM was in breach of contract, not least because ECM does not dispute that as a matter of fact the "*sole reason Mr Gagliardi was not paid a discretionary bonus*" related to the SEC/ DOC investigation (see Appellant's

skeleton ¶7(l), ¶7(j) and ¶64 **[CB/11/319 and 334]**) such that earlier thoughts of termination are neither here nor there.

B OVERVIEW OF THE CASE

6 The issue before the Judge at trial was whether Mr Gagliardi, who was hired by ECM as a money-maker on the express understanding by ECM that he wanted to "*trade and get paid*" (Judgment [32]-[35] **[CB/4/60-61]**, [50] **[CB/4/66]**), was entitled to payment of a discretionary bonus for his performance as the Appellant's employee in 2021 pursuant to the terms of his employment contract (the "**Contract**").

7 At the time of his employment, Mr Gagliardi was recognized by Morgan Stanley and Goldman Sachs as one of the top-five portfolio managers for US equity capital markets (Judgment [35] **[CB/4/61-62]**). He specialised in "*block trading*" and initial public offerings ("**IPOs**"). Block trading is a strategy which consists of privately buying large quantities of securities in bulk (or 'blocks') from financial institutions on behalf of shareholders, and then re-selling those securities. It requires skill and is high-risk (Judgment [2] **[CB/4/52]**).

8 During his employment, Mr Gagliardi generated 97% of the funds' c.$64m of revenue, generating net profits of $35.9m (Judgment [443] **[CB/4/182]**). By any measure, this was an extraordinary, stand-out performance. Based on the requirements and formula set out in the discretionary bonus clause in the Contract (see Judgment [278] **[CB/4/135]**), the Judge found that ECM breached the Contract by awarding $0 as a bonus and that, given Mr Gagliardi's individual performance, a rational exercise of ECM's contractual discretion would have resulted in a bonus of 15% of that profit, namely US$5,385,000 (Judgment [443]-[446] **[CB/4/182-3]**).

9 ECM's decision to award Mr Gagliardi $0, followed a deterioration in the relationship between Mr Gagliardi and ECM's principal and founder, Mr Lerch (Judgment [238]-[239] **[CB/4/124]**). ECM exhausted the substantial bonus pool generated by Mr Gagliardi by making payments to other employees (Judgment [421**[CB/4/177]**]).

10 Importantly, Mr Lerch mistakenly believed he had unfettered discretion whether to pay any bonus to Mr Gagliardi at all, or that he could justify withholding a bonus from Mr Gagliardi on the basis of a wide range of factors (e.g. Judgment [46] **[CB/4/65]**). Rather, properly construed, "*in rationally exercising its discretion to award a Discretionary Bonus, ECM would have been bound to assess Mr Gagliardi's 97% revenue contribution at the very top end of the 10-15% target range, namely at 15%, by reason of the fact that he was responsible for virtually all of*

the profit generated from the funds" (Judgment [445] **[CB/4/183]**). The Appellant's failure to do so was in breach of contract.

11 The Judge correctly found that the contractual formula for calculation of Mr Gagliardi's discretionary bonus limited the Defendant's discretion to selecting a percentage within the 10-15% target range of profit based on his individual revenue contributions. Having generated 97% of total revenue, this warranted the maximum 15%.

12 The Appellant's case is that it had a broad, unfettered discretion and could consider, when deciding whether to award a bonus, a wide range of factors. Such factors are not mentioned in the Contract, but the Appellant argues that they can be introduced through the words "*individual performance*". The Judge rejected this argument as a matter of construction at [445] **[CB/4/183]**, and ECM seeks to resurrect it in Ground 3 of its appeal. The Judge also found at [406] **[CB/4/172]** that the factors Mr Lerch alleged had motivated his exercise of discretion had not been operative and material factors considered by him at the time, and instead constituted "*meritless post hoc justifications"* for denying Mr Gagliardi a bonus.

13 Many components of the factual evidence explored at trial addressed the Appellants' sprawling allegations against Mr Gagliardi, which had been deployed to justify withholding his bonus. Save in respect of the narrow issue raised by Ground 6, none of the Judge's factual findings in respect of these matters are challenged on appeal. The comprehensive findings, carefully summarised by the Judge, provide a detailed picture of Mr Gagliardi's employment, which was not without its tensions, which flared up from time to time. Most of those tensions resulted from Mr Lerch's ambition to build a global capital markets fund, and the difficulties of integrating Mr Gagliardi and his US-focused strategy, with the existing team led by Mr Robert Toresco (CIO), whose trading focused on Asia, and was based in Hong Kong. By hiring Mr Gagliardi in April 2021, the Defendant sought to integrate US trading into its existing trading framework, despite having key staff spread across different time zones who did not have experience of the US market or its pace, and where Mr Lerch had not been upfront or candid about his expectations of Mr Gagliardi's role or position in ECM's hierarchy.[1] Nevertheless, Mr Gagliardi traded very successfully, and by September 2021 asked to be made Co-CIO, particularly as there was confusion in New York about where profit in the fund was being generated: [139] **[CB/4/95]**. This request led to plans to restructure or create a new "spin-out

[1] See, for instance, Judgment **[CB/4/49]** at [50], [99], [112], [132], [133]-[134], [139]-[146].

fund" to separate Mr Gagliardi's strategy, minimising tension but ensuring the Appellant continued to benefit from Mr Gagliardi's success.

14 Whilst pursuing different proposals for a spin-out fund during November 2021 to January 2022, Mr Gagliardi's phone was seized by US Marshalls pursuant to a subpoena **[SB/25/181-194]** and ECM received a subpoena **[SB/26/195-202]** seeking documents in connection with a wide-ranging joint investigation by the US Securities and Exchange Commission ("**SEC**")/ Department of Justice ("**DOJ**") into US capital markets trading, which included "*the names of all of the key individuals active in the US block trading market, who represent various different banks and institutions*" [192] **[CB/4/111]**. At the time ECM was supportive of Mr Gagliardi, paid for his legal costs, and conducted an internal investigation which cleared him of wrongdoing [411(vi)] **[CB/4/175]** (which it communicated to investors, also [412] **[CB/4/175]**). ECM subsequently sought to use these events to justify its refusal to pay Mr Gagliardi a discretionary bonus and in its abusive counterclaim that attempted to claw back some $7 million, which was all the sums paid to him throughout his employment.

15 A striking feature of the background is that in January and February 2022, Mr Lerch attempted to get Mr Gagliardi to sign a Memorandum of Understanding ("**MOU**") **[SB/27/203-204]** that would give ECM the right to invest up to $50m in a new fund led by Mr Gagliardi, but with a view to him giving him up the discretionary bonus in his Contract in exchange for a possible future discretionary bonus at ECM's "*absolute discretion*" (Judgment [227] **[CB/4/120]**). As the Judge noted at [228]-[229] **[CB/4/121-122]**, this was significant because:

15.1 Mr Lerch at that time wanted to "*arrogate to himself the right to refuse to pay any bonus if adverse findings were made against Mr Gagliardi [in the SEC/ DOJ investigation] (regardless of the terms of the employment contract*"); and

15.2 The fact that ECM wanted to invest in Mr Gagliardi so substantially undermines any suggestion there was a basis to terminate him for Cause.

16 On 28 February 2022, since he would not agree the terms of the MOU, Mr Gagliardi's employment was terminated (not for Cause [242] **[CB/4/125]**) as of 7 March 2022 **[SB/28/205]** and ECM decided not to pay him any discretionary bonus, which led to these proceedings.

17 The Judge found (and the Appellant accepts, see ¶7(j)&(l) and ¶64 of ECM's Appeal Skeleton **[CB/11/319-320 and 334]**) that, despite the many varied alleged factors justifying withholding Mr Gagliardi's bonus, in reality, it was only the existence of the SEC/DOJ investigation into block trading that Mr Lerch considered at the time he exercised his discretion.[2]

18 The Judge concluded that only the factors in the Contract were relevant to the Appellant's exercise of discretion. The Appellant did not have a broad and unfettered discretion to refuse to issue Mr Gagliardi a bonus. It was contractually obligated to exercise its discretion in accordance with the stated purpose in the contractual discretionary bonus clause, and to exercise that discretion lawfully – that is, not unreasonably, arbitrarily or capriciously. In failing to award him any bonus, the Defendant acted in breach of Contract. Its exercise of discretion was arbitrary and unlawful, driven by irrelevant, extra-contractual factors, and/or constituted a decision no reasonable employer in the shoes of the Defendant would have reached.

19 The Judge was right so to find. The Appellant is seeking now, on appeal, to continue to find ways to justify its deep-seated desire not to pay Mr Gagliardi anything. That is a position driven by interpersonal animus, and not by a good faith assessment of its true contractual obligations. None of its six grounds of appeal justify disturbing the Judge's careful, well-reasoned and justified findings.

20 Before considering the points of construction raised by the appeal, it is important to note that the Contract was governed by Delaware Law. It is uncontroversial that as a matter of Delaware Law (*per* Judgment [279]-[288] **[CB/4/138-140]**):

---

2 The Appellant's skeleton at ¶48 **[CB/11/331]** repeats the detrimental and false allegation that the fact of the SEC/DOC investigation and the issuance of subpoenas meant that Mr Gagliardi "*was caught up in a DOJ/SEC investigation into insider trading*". That is incorrect: see Judgment at [271] **[CB/4/134]**, by which the Judge notes that the SEC/DOJ Staff had confirmed to Mr Gagliardi and his counsel that "*this is not an insider trading case*". The Appellant's historic and continued use of such allegations to seek to cast aspersions on Mr Gagliardi in an effort to justify withholding his payment of a bonus is redolent of the kind of improper pressure it has sought to apply throughout this litigation – including the pleading in relation to Mr Gagliardi's alleged wrongdoing that was found to be strikable during the trial in its entirety: see Judgment [462] **[CB/4/189]** which found that the Counterclaim pleaded against Mr Gagliardi (which contained "*very serious allegations of wrongdoing or disreputable conduct*") was "*abusive*", "*inadequately pleaded*", and "*objectionable*".

20.1 the Court's task is objectively to ascertain the parties' intentions by reference to the language used within the four corners of the agreement, giving effect to all its provisions in full and as situated in the commercial context; and that

20.2 where (but only where) the plain meaning is susceptible to more than one reasonable interpretation, the Court must consider all admissible extraneous evidence to ascertain the parties' intentions, which may include statements and acts of the parties, pre-contractual negotiations and even post-contractual conduct.

C RESPONSE TO GROUNDS OF APPEAL

(1) Ground 1

21 ECM's first ground of appeal contends that the Judge erred in his interpretation of the interaction of two paragraphs in the contract relating to the discretionary bonus: the first, being what ECM refers to as the Main Discretionary Bonus Clause, and the second being the paragraph which immediately follows it, and which the Judge referred to as the Pro-Rata Clause.

22 ECM's argument in support of this ground is predicated on a misunderstanding of the Judge's use of the words "*in principle"* at [320], [321] and [327] (**[CB/4/149-151]**) and disregards the content and wider context of the Judge's interpretation of the Contract, and what ECM calls the Main Discretionary Bonus Clause.

23 The Judge's use of the words "*in principle*" does not mean, as ECM appears to think, that 'as a matter of principle' Mr Gagliardi as an early leaver is entitled to a discretionary bonus automatically, come what may. Rather, 'in principle' is used in its usual sense to mean subject to other relevant factors, or is a preliminary conclusion made before having considered all relevant factors. In the context of each matter being discussed at [320], [321] and [327] **[CB/4/150–151]** ([320] and [321] refer to the context of early termination before or after the end of 2021 respectively *per* [316], and [327] considers the impact of the "*employee in good standing*" language), the Judgment finds that in principle Mr Gagliardi is not barred from a discretionary bonus by those matters, i.e. subject to consideration of the remainder of the contractual language in the usual way (which the Judge had already started to discuss in relation to performance at [298]-[310] **[CB/4/144-148]**, and continued to discuss thereafter).

24 ECM contends that the Pro-Rata Clause conferred a new, and different, discretion than that in the 'Main Discretionary Bonus Clause' – namely a separate right to determine (or

"*consider*"), afresh, via the Pro-Rata Clause, whether Mr Gagliardi should be paid a discretionary bonus if his employment terminated before the fiscal-year-end bonus payday. ECM contends that the Judge misconstrued (and then misapplied) the Pro-Rata Clause, because he concluded that as an early leaver Mr Gagliardi was "*in principle entitled to a pro-rated Discretionary Bonus Clause for the part of the 2021 calendar year that he worked for ECM*" – when in fact, Mr Gagliardi ought only to have been "*considered*" for the bonus payment.

25 The suggestion that there is a different "*discretion*" is absurd – it seeks to introduce a distinction without a difference. In reality, the Pro-Rata Clause was intended to and does operate alongside and in conformity with the remainder of the Contract and is to be read together with the paragraph preceding it, as the Judge correctly noted at [314] and [317] **[CB/4/148-149]**.

26 Indeed, the Pro-Rata Clause was intended to engage the discretionary bonus provision in the Contract for a situation where Mr Gagliardi worked during 2021, generated Profit for the Appellant, but departed from employment prior to the date on which bonuses were paid. It was intended to ensure that there was a mechanism for payment of the discretionary bonus in such circumstances, pro-rated to reflect the fact that Mr Gagliardi did not work for the whole year, which is to be considered and calculated by reference to the previous paragraph (since the Pro-Rata Clause uses the defined term "*Discretionary Bonus*", as noted at [322] **[CB/4/150]**).

27 This is precisely what the Judge found, and it is reasoning that the Appellant's ground of appeal and skeleton argument fails to appreciate:

27.1 From ¶21 of its skeleton **[CB/11/322]**, the Appellant discusses the Judge's reasoning at [318]–[320]. These paragraphs form part of the Judge's interpretative analysis, commencing at [311] **[CB/4/148]**, which addresses arguments advanced by ECM at trial. ECM argued that Mr Gagliardi was ineligible for a bonus because "*he was not in fact an employee on the fiscal-year-end bonus payday*" and he was not in good standing, and therefore not eligible for consideration for payment of the Discretionary Bonus.

27.2 The Judge rejected those submissions. His starting point at [314] **[CB/4/148]** should be uncontroversial, namely that "*the Discretionary Bonus clause has to be read together with the pro-rata clause*". That such orthodoxy is challenged on appeal speaks volumes. The Judge summarised the interaction between them at [315]–[319] **[CB/4/149]**. Specifically:

27.2.1 The contract anticipates that the fiscal year-end bonus would post-date the end of the calendar year [315] **[CB/4/149]**.

27.2.2 There was therefore a prospect that Mr Gagliardi might be employed for part or even the whole of a calendar year, and that his employment might terminate after that calendar year ended, but *before* the bonus payday in a given year [316] **[CB/4/149]**.

27.2.3 That situation "*was catered for by the pro-rata clause*" [317] **[CB/4/149]**, which provided "*for the avoidance of doubt*", that the Discretionary Bonus payable to Mr Gagliardi in 2022 for his "*contributions in 2021 will be based on aggregate gross income generated from New Issues and Profit, respectively produced after the date [he] commenced employment with [ECM].*" See also [342] point 5 and [344](3) **[CB/4/154]**.

27.2.4 The Pro-Rata Clause operated if Mr Gagliardi was <u>not</u> employed by ECM at the time that either the New Issue or Discretionary Bonus was paid in a given year. If he was not so employed, and his termination was not for Cause [318] (which it was not: see [242] **[CB/4/125]** and [328] **[CB/4/151]**), then his bonuses were to be adjusted pro rata. Such bonuses were to be paid within a month of cessation of Mr Gagliardi's employment [319] **[CB/4/149]**.

28 It is following this chain of reasoning that the Judge concluded at [320] and [321] **[CB/4/149-150]** that if Mr Gagliardi left during 2021 or in 2022 before the bonus payday he would "*in principle be entitled to a pro-rated Discretionary Bonus*". In other words, 'in principle' the fact that Mr Gagliardi was not employed did not operate as a bar to payment of the Discretionary Bonus, as defined (and considered previously at [298]-[310] **[CB/4/144-148]**, and subsequently).

29 It is obvious that the Pro-Rata Clause is referring to the mechanics of payment of the pre-existing bonus provisions that appear earlier in the Contract. They are referred to as defined terms (and are capitalised as such), as noted by the Judge at [322] **[CB/4/150]**.

30 It is not correct, as ECM submits, that the Judge wrongly treated the Discretionary Bonus in the Pro-Rata Clause as "*automatic*". In truth, the requirement to "*consider*" paying a Discretionary Bonus invokes (by definition) the same discretionary assessment mandated by the previous paragraph of the Contract governing the Discretionary Bonus. It

is only when that assessment is to be undertaken that it is affected by the Pro-Rata Clause (as well as empowering ECM to pro-rate the quantum). The Judge specifically considered and rejected the substance of Ground 1 at [322]-[323] **[CB/4/150]**.

31 This is put beyond any doubt by Judgment [329] **[CB/4/151]**, where the Judge clearly did not find that Mr Gagliardi was automatically entitled to a bonus as an early leaver, but that "*he was entitled to a good faith* ***consideration*** *by ECM of whether it should pay him a Discretionary Bonus*". This is unimpeachable.

32 There is no textual basis nor was any evidence of pre-contractual intent or extraneous evidence elicited by ECM, to support the view that the Pro-Rata Clause was intended to operate as an entirely separate and distinct form of (unfettered) discretion, that was only to operate *after* a person stopped working for ECM, but *before* their contractual bonus entitlements had been determined (on ECM's own internal calendar), and where they *remained* in good standing at the time of their termination and had not been fired for cause.

33 The only plausible explanation for ECM's interpretation is to permit it to resurrect its familiar refrain (rejected by the Judge): that Mr Lerch considered he had absolute and unfettered discretion whether or not to pay a discretionary bonus, and that having otherwise failed to advance that argument this provides a potential new home for ECM to seat that argument. Such an interpretation is entirely without lawful basis or support within the framework of the Contract. It is transparently a bolt-on by ECM to seek to maintain some semblance of a contractual basis on which to contend it was not obliged to discharge its discretion in accordance with the fetters to which it voluntarily undertook to be bound in the Contract, and to continue to hold onto the very significant profits that Mr Gagliardi generated for ECM and its senior management.

34 This Ground should be rejected.

(2) Ground 2

35 **Ground 2** is a pleading point, connected to the substance of the first ground of appeal. If ECM's contention that the Pro-Rata Clause is a different and separate discretion to the defined Discretionary Bonus provision fails, this Ground must similarly fail. ECM contends that the Judge's conclusion that the Respondent had properly pleaded the Pro-Rata Clause was wrong. This Ground appears designed to bootstrap resistance to the substance of the Judge's finding on this provision by seeking to preclude it altogether as a matter of pleading.

36 The Judge's findings in response to this contention provide a clear answer to this issue: he rejected it entirely at [324] **[CB/4/150]**. The Judge specifically quoted ¶27(c) of Mr Gagliardi's Amended Reply [**CB/8/293]**, which provides as follows:

> *"Even if, contrary to the Claimant's principal case, he was no longer an employee as at the relevant date, he was not dismissed for Cause. The Defendant was therefore required to consider paying him a Discretionary Bonus, and such consideration was subject to the constraints set out in paragraphs 13 and 14 of the PoC and could only lawfully be exercised as set out in the PoC".*

37 The Judge concluded, correctly, at [325] **[CB/4/151]** that this is "*clearly a reference to, and reliance upon, the [Pro-Rata Clause]"*. Mr Gagliardi's pleaded claim was for his discretionary bonus. One of ECM's many arguments in defence was that Mr Gagliardi was not entitled to such a bonus as he was no longer an employee or in good standing at the relevant date. The answer to that is clear from the Contract and was pleaded in the Reply as set out above. The necessary facts as to ECM's consideration of the discretionary bonus and the rationality of its refusal were pleaded and explored thoroughly at trial.[3]

38 It is evident from the Judge's own determination that he considered that the Respondent's statements of case were sufficient to properly define the issues which the Court had to decide, and to ensure that the parties knew the case each had to meet.[4] That is plainly correct. ECM's appeal skeleton seeks to distinguish artificially between 'considering' and 'whether to exercise his discretion' in respect of the discretionary bonus (see ¶32(d) **[CB/11/325]**). There can be no suggestion that the Appellant was not prepared to address it: ECM raised and addressed the operation of the Pro-Rata Clause (including the pleading point) in its skeleton for trial[5] and in its written closing submissions at ¶444 **[SB/16/117]**.

39 Importantly, the Judge clearly considered that the matter was properly pleaded and in issue before him – and indeed, that it was *necessary* for him to properly construe the Contract before him in determining whether or not ECM was in breach of its contractual obligations in failing to award Mr Gagliardi a discretionary bonus. If the reverse had

---

3 See, for example, Judgment at [218]-[248] **[CB/4/117-126]**, [395]-[427] **[CB/4/169-178]**, [441]-[449] **[CB/4/182-184]**.

4 See *Ventra Investments Ltd v Bank of Scotland Plc* [2019] EWHC 2058 (Comm) at [21], citing *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 at [21].

5 ECM's trial skeleton, ¶¶55 and 166(6); and ¶234 (where it raised, for the first time, the suggestion that the Claimant's argument that Mr Gagliardi was still entitled to be paid under the Pro-Rata Clause was an "*unpleaded fall-back case"* which was "*plainly impermissible without an amendment" cf.* Reply to Defence to CC ¶12(d) **[CB/8/303.8]**, which made no complaint about ¶27(c) of the Reply **[CB/8/294]**.

been true (namely, if he had (a) considered that the matter was not properly pleaded and (b) exercised his case management discretion to decline any application to grant an amendment mid-trial) then that decision would be the kind of discretion to which significant deference would be accorded on appeal, especially where he has not "*exceeded the generous ambit within which a reasonable disagreement is possible*".[6]

40 The Judge plainly did not consider that an application to amend was necessary. There is every likelihood that, even if he had required one, he would have exercised his discretion to grant such an amendment, central as it was to the key pleaded issues on the Contract before him. There is nothing about the Judge's finding on this point that is incorrect, and it should remain undisturbed.

(3) Ground 3

41 In its **Ground 3,** ECM argues the Judge was wrong to find at [298] that the reference to "*individual performance*" in the Contract was "*plainly*" restricted to Mr Gagliardi's revenue contribution. ECM contends that this is an error of construction, as a matter of Delaware law. Specifically, ECM says that the Judge was wrong to reach his conclusion on the basis it could be ascertained from within the "*four corners of the agreement"* (or, that as a matter of Delaware contract law that the meaning of the words is "*unambiguous*"). Rather, ECM says that the words were "*fairly susceptible of different interpretations or may have two or more different meanings"* such that regard ought to have been given to extrinsic evidence.

42 However, Ground 3 does not argue that such extrinsic evidence would have supported its construction, nor does it challenge (and nor could it) the Judge's clear factual findings at [304]-[305] **[CB/4/146-147]** that the evidence at trial (discussed also at [56] **[CB/4/68]**, [347], [350], [355]-[356] **[CB/4/155-158]**) did not support ECM's construction. There is no basis by which ECM can properly seek to cherry-pick extracts of evidence or 'island hop' to seek to undermine these factual findings: see *LZ Labs GmbH & Ors v IBM UK Ltd* [2026] FSR 4 at [20]-[22] and *Volpi v Volpi* [2022] 4 WLR 48 [65]-[66]. Accordingly, this Ground can go nowhere.

43 In any event, there is no substance to this ground for the reasons given at [298]-[310] **[CB/4/144-148]**, which answer each of the points made by ECM on appeal. In reality,

---

6 See *Eurasian Natural Resources Corporation Ltd v Dechert LLP* at [32], citing *ABP Technology v Voyetra Turtle Beach Inc* [2022] EWCA Civ 594 at [21] (citing *Azam v University Hospital Birmingham NHS Foundation Trust* [2020] EWHC 3384 (QB) at [50].

ECM simply disagrees with the Judge's construction and asserts that the words are "*fairly susceptible"* of a different meaning which it prefers.

44 The Appellant's skeleton points at ¶39(b) to the Judge's treatment (at [303] **[CB/4/145]**) of its submission about the findings in *Clark v Nomura* [2000] IRLR 766 **[CB/11/326]**. The Judge concluded that "*I do not consider that the court's construction of the differently worded contract in that case assists"*. It was a different contractual provision, and it was governed by English law (not Delaware law). In any event, the Judge considered the content of the contractual discretion in *Clark,* noting correctly that unlike in the Contract, a separate part of the *Clark* contract specifically defined the *wider* aspects of the relevant employment duties, that expanded performance beyond merely financial in that case.

45 ECM's attempts to impugn the Judge's analysis of *Clark v Nomura* go nowhere. First, the Judge's analysis was entirely correct.[7] Secondly, the Judge emphasised at [303] **[CB/4/145]** that Burton J saw the financial performance as a significant factor in the context of the discretion, and that the generation of profit was the "*primary contractual obligation*" and that the wider factors relied on by ECM were held to be irrelevant to the discretion in *Clark v Nomura* .

46 In any event, the interpretation of a similar, albeit different contractual clause by an English Court of a contract applying English law does not give rise to any error by the Judge. The submission at ¶39(b) of ECM's skeleton that the Judge did not invoke "*a sound basis to distinguish Clark"* is misconceived: he did not need any basis to *distinguish Clark* (which, in any event, he did not do); he properly had regard to the interpretation of similar contractual wording, in a similar context, which supported his own conclusion discerned from the four corners of the Contract. The Contract fell to be construed (as it was) on its own terms.

47 At [304] **[CB/4/146]**, the Judge went further than merely concluding that the contractual wording was unambiguous, and tested his position by reference to extrinsic

---

7 The Appellant's contention that "*individual performance"* in *Clark v Nomura* was not linked to the criteria in Appendix A and that Burton J interpreted it as a "*general statement*" is flatly incorrect: see *Clark v Nomura* at [34.3]. But in any event, the point goes nowhere: in *Clark* the real issue was whether the employer could have regard to factors *outside* of the employee's individual performance (which was the contractual wording), such as (at [37]) "*Nomura's legitimate business needs and … the need to retain and motivate Mr Clark".* Burton J was clear that "*individual performance*" meant the performance required by the contract – which was in turn a question to be determined with reference to the contract in question. That is precisely how Calver J applied the principles in *Clark v Nomura.*

evidence. He nevertheless did not find the analysis of the evidence contended for by ECM persuasive. ECM's response to the Judge's evaluation of the evidence is to reiterate the same case it advanced at first instance on Mr Gagliardi's evidence[8] which was rejected by the Judge, and to contend now (skeleton ¶42) **[CB/11/329-330]** that the Judge's findings are as a result of "*misunderstanding"* what Mr Gagliardi was saying. This Court is ill-placed to second-guess the Judge's evaluation of the evidence and there is no proper basis for it to do so.

48 There was in any event no such misunderstanding: ECM seeks to rely (impermissibly "*island-hopping*" the evidential terrain) on Mr Gagliardi's reference during cross-examination to his understanding that he should try to elevate the ECM brand. In the course of Mr Gagliardi's testimony, the Judge clarified this with him directly, and he confirmed that he understood the various components of his role to come back, ultimately, to his role in increasing ECM's profits, as cited at ¶44 ECM's appeal skeleton **[CB/11/330]**. The Judge recorded his assessment of Mr Gagliardi's evidence at [305]: "*these were all means to an end, that end being the generating of Profit for the funds and ultimately for ECM"*. This is in the context of the universe of evidence considered by the Judge, including contemporaneous exchanges relating to the Contract terms (e.g. [52]-[65] **[CB/4/67-70]**), as well as the totality of the oral evidence, including from Mr Gagliardi (see Claimant's Written Closing at [106]-[112] **[SB/15/110-113]**). There was no evidential failure on the Judge's part, but rather careful and considered evaluation of the evidence. The Judge does not fail to understand the difference between "*historical trading profit*" and *"intangibles … which would have an impact on future profits"*, but rather discerned that the latter was of no contractual effect.

49 ECM's position on construction is instead a tendentious interpretation that strains the plain, ordinary and obvious meaning of "*individual performance*" and does not reflect the evidence that demonstrated clearly that ECM understood that Mr Gagliardi just wanted to "*trade and get paid*" on a typical "*eat what you kill*" basis (see [32]-[65] **[CB/4/60-70]**), nor Mr Gagliardi's clear evidence that no factors other than his trading profit were to impact his bonus – he was clear that this was a firm point of negotiation for him (RG WS4 ¶5.4 and 5.6 **[SB/10/21-22]** and {Day2/182:25} -{Day 2/183:1-15} **[SB/2/5]**). The Judge was entitled to find on his assessment of all the evidence that elevation of the

8 Defendant's Written Closing at ¶418.

Evo brand was a means of generating revenue, and that Mr Gagliardi's revenue contributions were what was relevant to the meaning of "*individual contribution*" in the Contract.

50 Further, not only should this ground be rejected for the reasons the Judge himself gave, but as *per* Respondent's Notice point 1, even if (which is not accepted) there were ambiguity as to the meaning of "*individual performance*" so as to warrant reference to extrinsic evidence, the Judge's reasoning is supported by further, additional matters not traversed directly in the Judgment but which were submitted to the Judge (see e.g. Claimant's Closing Argument ¶105 **[SB/15/108]**) and are entirely consonant with (and add further weight to) the Judge's conclusion such that the Court ought to find that the wealth of extrinsic evidence at trial not only pointed against the Appellant's preferred interpretation, but in fact positively supported the construction the Judge reached. Specifically:

50.1 The Contract does not set out any specific responsibilities. The evidence as it emerged at trial (see [34] **[CB/4/61]**) was clear that he did not have managerial responsibilities (other than working with Mr Murphy who came to be employed by ECM with Mr Gagliardi) and the wording of the Contract does not indicate any other factors that would be relevant to his "*performance"* that would extend to anything beyond trading.

50.2 While Mr Gagliardi was always going to leverage his contacts, this was essential to successfully trading this strategy, and Mr Gagliardi expected to be paid for his trading performance (Judgment [32]-[37] **[CB/4/60-62]**). Mr Gagliardi's efforts to introduce Mr Lerch and senior colleagues to his network in the New York financial services community, to increase the brand and profile of ECM, and to assist ECM to grow its assets under management (Judgment [37]-[38] **[CB/4/62-63]**), all in turn would enable Mr Gagliardi to increase the positions he could take and the profits he might deliver. In other words, this activity all led to growth of the bottom line and revenue generation. Unlike in the *Clark v Nomura* contract, none of these "*wider"* intangible aspects of what Mr Gagliardi did for ECM were set out, defined or prescribed in his Contract,[9] and they all related to revenue generation *per* [305] **[CB/4/146]**.

---

[9] See, by analogy, Burton J's reasoning in *Clark v Nomura* when he referred to the "*wider*" aspects of performance that were set out in Mr Clark's contract, following which he concluded at para. 36: "*I conclude that an employer is entitled to consider as part of individual performance the issues there set out as "corporate contribution, team working, capital usage, and due regard to risk"… However, the significance of those matters must obviously be set in the*

50.3 It was established as a matter of fact that Mr Gagliardi was recruited by ECM, that ECM intended to attract and incentivise him to join the firm and it was eager to do so: Judgment [36], [39] **[CB/4/62-63]**. The Discretionary Bonus was part of the resulting remuneration package designed to do that. It was found as a fact that the IPO Bonus had not been intended, nor would it have been sufficient to, operate as the sole incentive. Rather his performance in the block trading part of his strategy (the harder, "*treacherous*" part of his trading) was what was intended to be captured by the "*individual performance*" in the Discretionary Bonus Clause: [42]-[47] **[CB/4/64-66]**.

50.4 The contemporaneous pre-contractual negotiations confirmed that the principals of ECM who were engaged in recruiting Mr Gagliardi agreed and intended to recruit him to deliver the US strategy. Mr Lerch's evidence that he and Mr Gagliardi discussed more or wider factors relevant to performance was specifically rejected (see Judgment at [49] **[CB/4/66]**: "*I … do not accept that these negotiations between Mr Lerch and Mr Gagliardi about the discretionary bonus suggested anything other than that the bonus would be based on Mr Gagliardi's trading activity"* (emphasis in original) and [50] "*it is clear that Mr Lerch saw Mr Gagliardi as a money-making machine and was firmly set on employing him on a highly attractive package of remuneration"*.

50.5 The record of negotiations and amendments to the Contract makes it clear they were intended to reflect Mr Gagliardi's requirements and to include worked examples to put beyond doubt that the formula would calculate the Discretionary Bonus by reference to his revenue contribution alone: Judgment [52]-[65] **[CB/4/67-70]**. The example reads: "*For further clarity, if the Business generates a Profit of $10,000,000 in a year, the target range of your Discretionary Bonus would be $1,000,000 to $1,500,000*".

50.6 The post-contractual conduct of *both* parties was consistent with the fact that Mr Lerch and Mr Gagliardi understood and accepted Mr Gagliardi's performance was concerned with generating profit, for which he would be paid, see the matters at Claimant's Written Closing at [105.5] **[SB/15/110]**.

---

context of the requirements for, and the performance, in the sense of profitability, by the "profit machine" or "prima donna", ***and his actual obligations must be taken into account … If he is employed as a senior trader, then his individual performance must be assessed against his contractual performance as a senior trader …".***

51 The Respondent invites the Court to reject this Ground for the reasons given by the Judge as well as for the further, additional reason that the Judge's conclusion is supported by the extrinsic evidence and the findings of fact in the Judgment.

(4) Ground 4

52 By **Ground 4** ECM contends that the Judge erred at [334] **[CB/4/152]** of the Judgment, by interpreting the words "*Profit [to the Company] attributable to the Business"* in the Contract as meaning "*profit generated by the trading of the Business"*. ECM argues that the Judge "*overlooked*" that Profit was a defined term or "*ignored"* words when rejecting ECM's case that Profit was based on fee income rather than trading profit. He did no such thing.

53 The Judge set out his reasoning clearly at [330]-[339] **[CB/4/151-153]**. His reasoning was in no way confused as suggested by ECM's Appeal Skeleton at ¶55 **[CB/11/333]**. He did not "*overlook*" any words – he analysed them in giving his clear view as to their proper construction (including Profit, as a defined term) and their operation within the Contract. He made no error in doing so.

54 Further, and importantly, which is not addressed by ECM in its Appeal, the Judge also tested his conclusion against the "*extrinsic evidence"* relevant to the issue in accordance with Delaware law at [340]-[357] **[CB/4/153-158]**. Importantly, the Judge found, as a fact, that Mr Lerch was, at the time of negotiating the Contract, telling Mr Gagliardi that his discretionary bonus was based on all trading activity and that Mr Lerch accepted in cross-examination that the target-range set out in the Discretionary Bonus Clause equated, financially, to 50-75% of the performance fee – such that it was 10-15% of the Profit of the Fund, *not* the fees paid by the Funds to their Managers.

55 As part of that discussion, the Judge specifically rejected the evidence of Mr Tsai that sought to support ECM's construction of Profit at [348] **[CB/4/155-156]**. There is no basis to interfere with this finding of fact, and ECM cannot properly rely on the far-fetched and disapproved evidence referred to at ¶58 of its Appeal Skeleton **[CB/11/333]**.

56 Thus, not only did the Judge clearly reject the interpretation that ECM now advances on the basis of analysing the contractual language within the four corners of the agreement pursuant to Delaware law, he also carefully analysed all the extrinsic evidence, rejecting the evidence of ECM's witnesses which purported to support that interpretation, and found that the evidence clearly supported Mr Gagliardi's construction of Profit. He rightly noted that ECM proposes a "*commercially absurd construction*" [351] **[CB/4/156]**.

57 The inescapable conclusion is that ECM now asks this Court to overturn the Judge's conclusion on construction of "*Profit*", against the weight of the extrinsic evidence which he considered and upheld and which contradicts the finding ECM now advances. ECM has not sought (and could not seek) to overturn the factual conclusions the Judge reached about the pre-and post-contractual evidence that supported his conclusion on the proper meaning of Profit in the Contract. In such circumstances, there is no basis to disrupt the Judge's finding (and clear evidential reasons *not* to).

58 The Respondent invites the Court to dismiss this Ground.

(5) Ground 5

59 **Ground 5** relates to the Judge's findings regarding the role that the SEC/DOJ Investigation played in the exercise of discretion. ECM refers to this in its skeleton at ¶72 **[CB/11/336]** as a "*question of law*": it is not. It is rather a further issue going to the construction of the Contract and specifically what factors could, contractually, be relevant to the discretion conferred by the discretionary bonus clause.

60 The starting point for the analysis is [396] **[CB/4/169]**. On a proper construction of the Contract, ECM was obliged to consider only Mr Gagliardi's 2021 revenue contributions to Profit. No other factors were relevant.

61 The next stage of the analysis is at [416] **[CB/4/176]**, where the Judge found (which ECM does not challenge) the SEC/ DOJ investigation did not constitute proof of any wrongdoing by Mr Gagliardi, or justify terminating him for cause. If it did, there would have been a contractually valid basis for denying Mr Gagliardi a discretionary bonus. This is not open to ECM.

62 Finally, at [418]-[419] **[CB/4/176]**, the Judge found correctly that there was no contractual basis to defer the discretionary bonus or "*wait and see*" what the outcome of the SEC investigation might be. (Importantly, this finding is not appealed – ECM's case on appeal is that the investigation justified paying Mr Gagliardi a bonus of $0: see ECM Appeal skeleton ¶75) **[CB/11/337]**. Since the discretionary bonus could not be deferred, the Judge found that it was to be paid at the fiscal year end based on the numbers for 2021. ECM could either terminate Mr Gagliardi if there was a basis to do so, or pay his discretionary bonus based on his revenue contributions. That was the agreed contractual scheme.

63 Importantly, there is no clawback provision in the Contract, in respect of future eventualities, entitling ECM to recoup bonus payments if there were future findings of wrongdoing.

64 ECM could have, but chose not to, cater for such future eventualities in the Contract. It cannot now (as it continues to try to do) seek to shoehorn a clawback provision into the discretionary bonus clause where one does not exist. It did not argue at trial that such a term should be implied into the Contract, doubtless reflecting that such an argument would have been bound to fail. What is even more invidious, is that ECM is seeking to deny any bonus to Mr Gagliardi, despite the absence of a clawback clause, in circumstances where there would in fact be no basis to rely on such a clawback clause to recoup the bonus in any event – since the SEC/ DOJ confirmed they were not going to bring any enforcement action against Mr Gagliardi or ECM (see [421] **[CB/4/177]**).

65 The Judge was thus right to find at [420] that the mere "*possibility*" of a future fine was, contractually, irrelevant to the proper exercise of discretion. It was not open to ECM to terminate Mr Gagliardi and pay him no discretionary bonus for 2021 in circumstances where he made 97% of c.$35.9m of Profit because of future uncertainty from a regulatory investigation where there was no contractual provision relating to the clawback of bonuses or permitting it to defer payment. To deny him a bonus in these circumstances was irrational and in breach of contract (see [419] **[CB/4/176]**).

66 At ¶67 of its Appeal Skeleton ECM argues that the Judge missed out the hypothetical possibility of a future fine from his list of facts known about the SEC/ DOJ investigation as at the date ECM exercised its discretion **[CB/11/335]**. But, of course, that is not a known fact that could properly be included in such a list, and so there was no failure on the part of the Judge. Moreover, the Judge did carefully consider this point repeatedly (see his references at [409(1)] **[CB/4/173]** to ¶71(f) of the Re-Amended Defence **[CB/7/267]**, [409(2)], [410] and [420] **[CB/4/174 and 177]**).

67 Also at ¶67 of its Appeal Skeleton **[CB/11/335]** ECM seeks to marshal a point taken (out of context) from Mr Gagliardi's Written Closing at ¶102 **[SB/15/107]**. That addressed a fall-back, alternative position on ECM's case (no longer pursued) that the Contract permitted ECM to "*defer*" the exercise of discretion and adopt a "*wait and see*" approach (which ECM did not in fact do). That is misguided. It also ignores Mr Gagliardi's *primary* position on the scope and proper operation of the discretion that was accepted by the Judge at ¶100-1 **[CB/4/83]**: "*The Claimant's primary position is that Mr Lerch was*

clear that he did not defer his decision… Whether there was a power to defer, on what terms and for how long is, primarily, a question of construction. … The position that the Defendant can defer when it exercises its discretion, indefinitely, is part and parcel of the Defendant's position that its discretionary power is unfettered. It is not."

68 ECM's conclusion on this Ground in its Appeal Skeleton at ¶75 **[CB/11/337]** misstates matters: "… *the hypothetical reasonable employer is faced with a binary decision: pay everything or pay nothing"*. That is simply not true – the hypothetical reasonable employer was not in this case permitted to elect to pay nothing. Every case must be situated in its relevant contractual framework, including the scope and wording of the discretionary bonus clause, and any clawback provisions or absence of clawback provisions (which the evidence showed Mr Lerch preferred *not* to include in ECM's contracts: see {Day6/128:1}-{Day6/131:10}) **[SB/4/9-10]**.

69 Further, ECM's apparent attempt to elevate the interpretation and application of a single contractual provision in the Contract as to the factors relevant to the exercise of discretion to some broader statement of principle of law is misguided.

70 In any event, even if on a proper construction of the Contract the existence of the SEC/DOJ investigation constituted a valid factor to consider (which is not accepted), that would have made no difference to the outcome *per* Respondent's Notice point 2 **[CB/10/309]**:

70.1 Even if ECM had been concerned by the risk of financial penalties that might follow from the outcome of the investigation, it would still have been a breach of the Contract to flatly award a bonus of zero (see [420] and [442] **[CB/4/177 and 182]**), or merely by that risk alone to have refused to pay and not to have deferred the exercise of discretion: as *per* the above, the Appellant did not, in fact, defer its discretion to a later point in time where it had full information.

70.2 Even so, if the Appellant was permitted to and had deferred the exercise of discretion, it was clear by the time the SEC/DOJ confirmed that they would not take enforcement action against the Respondent in March 2024 **[SB/34/236]** and/ or by the time the SEC/DOJ concluded its investigation into the Appellant in May 2024 that the Discretionary Bonus was due and payable **[SB/35/238]**. Again, when that time came, the Appellant *still* did not pay anything, suggesting that it would never have paid anything, even if it had formally deferred until the end of the SEC/DOJ investigation [421] **[CB/4/177]**, which would in such

circumstances have amounted to a breach of the Contract. In any case, there was never any submission nor any evidence from ECM that, upon receiving the 'all clear' from the SEC/DOJ, they reconsidered their position. Mr Lerch had made up his mind and had no intention of paying Mr Gagliardi any discretionary bonus at all unless ordered to do so.

70.3 It is also highly material to note that the Judge found that *even if* ECM's approach to construction was accepted (such that other factors beyond revenue contribution could be considered, including the SEC/ DOJ investigation), it would nevertheless have been a breach to award Mr Gagliardi a discretionary bonus of nothing: see [442] **[CB/4/182]** (which is not challenged on Appeal). It is not correct to say weight is purely a matter for ECM alone even if (which is denied) the existence of the SEC/ DOJ investigation were a relevant consideration. The Judge would still be permitted to determine that giving this factor decisive weight leading to a bonus of zero was irrational: see [296], footnote 75 **[CB/4/143]**.

(6) Ground 6

71 By **Ground 6**, ECM seeks to appeal narrow findings of fact that ECM did not consider terminating Mr Gagliardi's employment in August [127] **[CB/4/91]** or terminating him for cause in October 2021 [162] **[CB/4/100-101]**, months before the exercise of discretion on 28 February 2022. The principal answer to this ground of appeal is captured in the very same sentence which ECM appeals at [162] **[CB/4/100-101]**: "*I do not accept this evidence, but in any event Mr Gagliardi's employment was not in fact terminated for cause at this or at any time by ECM"* (emphasis added).

72 In other words, the Judgment makes clear that even if the Judge had accepted ECM's evidence and concluded that it did consider terminating Mr Gagliardi's employment in August or October 2021, it would not "*in any event*" have made any difference. This conclusion is supported by the additional points made in Respondent's Notice point 3 **[CB/10/309]**.

73 The fact that such a finding would have made no difference is also made good by the Judge's clear findings that no other matters other than the SEC/ DOJ investigation were in Mr Lerch's mind when he considered his discretionary bonus in January and February 2022 e.g. [28], [223], [226], [246]-[247], [399]-[401], [406] – which findings ECM expressly does not challenge on appeal: see Appellant's skeleton ¶7(l), ¶7(j) and ¶64 **[CB/11/319-320 and 334]**.

74 That is sufficient to dispose of this ground of appeal.

75 ECM seeks impermissibly, by challenging these narrow findings by the Judge, to cast doubt on the Judge's wider conclusions about the weight given to the "*non-DOJ/SEC Investigation"* issues by Mr Lerch in the exercise of his discretion (see Appellant's skeleton ¶78-¶81, ¶87) **[CB/11/337-338 and 340.1]**. This is not open to ECM, since there is no challenge to those findings, and it has expressly accepted them. This is a further reason to dismiss this ground.

76 However, even on its substance the ground has no merit:

76.1 ECM suggests the Judge made a factual finding that was "*plainly wrong and / or unjust because of a serious procedural irregularity*" (Appellant's skeleton ¶3, ¶77 **[CB/11/317 and 337]**). As the Court knows, see e.g. *LZ Labs* and *Volpi*, there is a high bar to making such a finding, which cannot be surmounted here. The Judge correctly noted at [127] there were no contemporaneous documents supporting Mr Lerch's and Mr Chisholm's evidence on this point, and that it was inconsistent with Mr Lerch's written communications with Mr Gagliardi (this is not challenged). The Judge was also right at [163] **[CB/4/101]** rejecting Mr Lerch's evidence that he felt he had cause to terminate Mr Gagliardi in October 2021.

76.2 There is no basis on the evidence before the Judge to say he made any mistake that was "*plainly wrong and/ or unjust because of a serious procedural irregularity*", particularly given his observations as to the importance of the contemporary documents and his circumspection as to the witness evidence at [28] **[CB/4/59]** (see also [19] **[CB/4/57]**).

76.3 The Appellant is wrong to suggest it was not open to the Judge to reject the evidence at ¶82 of its skeleton and at ¶83 to say it was implausible to consider the accounts to be incorrect **[CB/11/338-339]**. Mr Gagliardi was in no position to comment on purported internal conversations to which he was not party, so an absence of challenge to those accounts is neither here nor there. It was for ECM to prove its case on matters it says justified withholding a bonus, particularly where these matters were only within its own knowledge. Its decision not to waive privilege over any documents relevant to such matters for trial was a choice (made as part of a thorough disclosure process) that ECM must be held to, there is no manifest injustice as suggested at ¶85 of its skeleton [**CB/11/340]**.

Indeed, during the trial itself ECM disclosed documents on another topic it had previously claimed privilege over.

76.4 ECM is also incorrect at ¶84 of its appeal skeleton to say it was "*common ground*" in closing that these conversations took place. Indeed, the extract cited from the Claimant's Written Closing states expressly that evidence was not accepted and advances an alternative submission if ECM's case on this was accepted at trial **[CB/11/339-340]**.

76.5 ECM now seeks at ¶82(e) of its skeleton to apply for permission to adduce fresh evidence on Appeal **[CB/11/339]**. Pursuant to the Order of Phillips LJ granting permission to appeal dated 3 March 2026, this application is to be listed with the appeal **[CB/13/366]**. The Court has discretion to admit fresh evidence on appeal pursuant to CPR 52.12(2), upon consideration of the well-established criteria for doing so in *Ladd v Marshall* [1954] 1 WLR 1489, together with the overriding objective (*per Kei Kin Hung v Hua She Asset Management (Shanghai) Co Ltd* [2023] EWCA Civ 1483 at [44]). ECM does not address the relevant criteria, which are (1) the evidence could not have been obtained with reasonable diligence for use at the first instance hearing; (2) if given, the evidence would probably have had an important influence on the result of the case, though it need not be decisive; and (3) the evidence is such as is presumably to be believed. As to each of these:

76.5.1 These documents were ECM's and were intentionally withheld from deployment at trial, and privilege was not waived, notwithstanding that it was for ECM to prove its case, and notwithstanding that ECM considered and disclosed other documents previously withheld as privileged during trial (see correspondence on behalf of the Appellant dated 11 October 2025) **[SB/14/103-104]**. Accordingly, the first criterion is not met, and the fresh evidence should not be admitted on this basis.

76.5.2 As to the second and third *Ladd v Marshall* criteria, while the fresh evidence is presumably to be believed, and would have resulted in different findings about whether termination was considered by ECM in August and October 2021, it would not have had any influence on the result of the case, let alone an important influence (see below). For this reason too the evidence should not be admitted, and the ground should fail.

77 Even if the fresh evidence **[FEB/2/9-14]** were considered, it does not change anything about the Judge's conclusions on ECM's exercise of discretion relevant to the result of the case. It is likely the Judge would have confirmed this, if the matter had properly been raised with him. Whilst the Judge would have recorded the discussion in those emails, it would not have affected his conclusions based that in August there was no serious consideration given to terminating Mr Gagliardi (e.g.) [131] **[CB/4/92]** and that as at October Mr Lerch did not consider he had cause to terminate Mr Gagliardi [163] **[CB/4/101]**. Further:

77.1 In the first new email in August, Mr Chisholm refers to consideration of a "*potential termination*" of Mr Gagliardi which would not be simple **[FEB/2/9-10]**. The new issue bonus is referred to as a liability, to which Mr Gagliardi would be entitled unless terminated for cause. Arguments for cause were referred to loosely, along with reference to the possibility of negotiating an exit. The discretionary bonus was incorrectly referred to as "*purely discretionary*". In a reply, Mr Lerch planned to discuss with Mr Gagliardi "*how this is going to work*" and suggests if that is not accepted "*we are done*". In fact, Mr Lerch did not have such a conversation with Mr Gagliardi, but instead focussed on how to make it work. Termination was plainly not seriously contemplated as the Judge correctly found at [131] **[CB/4/92]**.

77.2 The October email **[FEB/2/11]** does not support ECM's evidence or case that consideration was given to terminating Mr Gagliardi for cause resulting from events in October 2021. It simply shows Mr Chisholm re-sending his initial August email and *asking* whether to take the view this was for cause or to just pay the new issue bonus. Again, the mistake was made by Mr Chisholm that regarding the discretionary bonus they could simply "*take the view this was discretionary and he gets zero*". There is thus no support in this email for the evidence recorded at [162] **[CB/4/100]** that Mr Lerch felt he had "*cause*" to terminate Mr Gagliardi.

77.3 It is common ground that ECM did not consider the issues sufficiently serious even to discuss with Mr Gagliardi, and the Judge found (which is not challenged) they would have needed to be if they were of any relevance to the exercise of ECM's discretion (which they were not): see [406]-[408] **[CB/4/172-3]**.

77.4 On the contrary, ECM continued to encourage Mr Gagliardi to work and to make money from which he expected to be paid a discretionary bonus, which as

the Judge correctly found (and is not challenged on appeal) belied the suggestion termination or refusing his bonus was being considered at these times, or had any impact on the exercise of discretion on 28 February 2022, as *per* Respondent's Notice point 3 **[CB/10/309]**: see [128], [131], [137], [138], [145], [146], [158]-[163], [182]-[184], [226], [229], [258], [399]-[406], all of which findings stand.

77.5 Not only was Mr Gagliardi not warned, nor terminated; rather, throughout his employment Mr Lerch affirmed the Contract and confirmed he continued to want to work with Mr Gagliardi and provide funds for him to trade.

77.5.1 Specifically, after the date of the first new August 2021 email, Mr Gagliardi continued to trade and delivered the majority of his profit to ECM (his new issue bonus was more than double the amount mentioned in those emails), and he was promoted to the Risk Committee [145-6] **[CB/4/96-7]**.

77.5.2 Further, after the new email in October 2021 the Appellant proceeded to explore a spin-out fund to continue benefitting from the Respondent's trading strategies (Judgment [182] and [183] **[CB/4/107]**); and

77.5.3 Mr Lerch proposed an MOU **[SB/27/203-204]** entitling ECM to invest up to $50 million in a new fund led by Mr Gagliardi, which was discussed in January-February 2022 (see Judgment [228] **[CB/4/121-2]**).

78 Accordingly, on its substance this ground has no merit, and is very far from justifying a retrial in view of the Judge's clear findings of fact as to the matters that were considered by ECM on 28 February 2022, none of which could be disturbed by this new evidence.

D CONCLUSION

79 For the foregoing reasons, the Court is respectfully asked to refuse the appeal.

DAN OUDKERK KC
ANDREW LEGG
GRETTA SCHUMACHER
Essex Court Chambers

20 October 2026