IN THE COURT OF APPEAL (CIVIL DIVISION) **C/A Reference: CA-2026-000044**
Lower Court Ref CL-2022-000466

ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

KING'S BENCH DIVISION

COMMERCIAL COURT

THE HONOURABLE MR JUSTICE CALVER

B E T W E E N :

ROBERT GAGLIARDI **Claimant/Respondent**

- and -

EVOLUTION CAPITAL MANAGEMENT LLC
Defendant/Appellant

APPELLANT'S SKELETON ARGUMENT FOR APPEAL

Introduction

1. The Appellant (**"ECM"**) appeals the Order of Mr Justice Calver dated 8th December 2025 **[CB/3a/45]** with permission granted on paper by Lord Justice Philips dated 3rd March 2026[1] **[CB/13/366-367]**. ECM is an investment management company which employed the Respondent (**"Mr Gagliardi"**) as a Portfolio Manager from 28th April 2021 to 7th March 2022. Mr Gagliardi's claim was in relation to ECM's decision not to pay him a **"Discretionary Bonus"**. It was common ground that the terms of Mr Gagliardi's employment were governed by a written contract of employment dated 28th April 2021 (**"the Contract"**) **[CB/9/304-306]**. It was also common ground that the Contract was governed by Delaware law. The relevant principles of Delaware law were for the most part uncontroversial, and are not controversial for the purposes of this appeal.

2. The Judge found for Mr Gagliardi and awarded him the sum of US$5,385,000 plus interest **[CB/3a/45] [CB/3b/47-48]**. ECM says that the Judge was wrong to do so. The

[1] Including the consequentials order dated 19th December 2025 but finalised and sealed on 23rd January 2026 **[CB/3b/47-48]**

Judge also dismissed a counterclaim made by ECM to recoup a different bonus paid to Mr Gagliardi [**CB/3a/45**]. There is no appeal from this part of the Judge's decision.

3. For the most part ECM's appeal concerns points of construction. However ECM also appeals in relation to one of the Judge's key findings of fact which it says was not open to the Judge because it was plainly wrong and/or unjust because of a serious procedural irregularity.

The Grounds of Appeal in Outline

A. Points of Construction

4. ECM appeals on the following grounds which are errors of law the Judge made in his interpretation of the Contract and Mr Gagliardi's statements of case:

   a. Ground 1: The Judge erred at paragraph 321 of the Judgment in finding that where a person was not "an employee in good standing as at the fiscal-year-end bonus pay day" he was nevertheless entitled "in principle" to a pro-rated Discretionary Bonus **[CB/4/150]**. The terms of the Contract provided, at best, an entitlement to consideration for a pro-rated Discretionary Bonus. **[CB/9/305]**

   b. Ground 2: The Judge erred at paragraph 324 of the Judgment in finding that ECM had breached the "pro-rata clause" where no such breach had been pleaded in Mr Gagliardi's statements of case **[CB/4/150]**. This was not simply a 'pleading point' this represented an unpleaded cause of action that had not been raised or pursued in opening or in cross-examination until the closing arguments**[SB/35/243]**.

   c. Ground 3: The Judge erred at paragraph 298 of the Judgment in finding that the reference to "individual performance" in the Contract was "plainly" restricted to Mr Gagliardi's revenue contribution **[CB/4/144]**.

   d. Ground 4: The Judge erred at paragraph 334 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" **[CB/4/152]**. The Judge overlooked that 'Profit' was a defined term referencing profit to ECM; 'the Business' was also a defined term and was referable to a separate legal entity, viz one of the funds that ECM managed. **[CB/9/304]**

B. Point of Law

5. ECM appeals the following part of the Judge's reasoning which was an error of law:

    a. Ground 5: The Judge erred at paragraphs 416, 419 and 420 of the Judgment in finding that the existence of the SEC/DOJ Investigation: *(i)* did not constitute a "valid reason" for a refusing to pay Mr Gagliardi the Discretionary Bonus; *(ii)* was not a basis for a rational exercise of ECM's discretion not to pay the Discretionary Bonus; and *(iii)* along with possible resultant financial penalties was "wholly irrelevant" to the exercise of the discretion **[CB/4/176-177]**.

C. Factual Finding

6. ECM appeals a finding of fact made by the Judge which was plainly wrong and outside the generous ambit of the Judge's range of available findings, and/or was a finding that was manifestly unfair to the Defendant.

    a. Ground 6: The Judge erred at paragraphs 127 and 162 of the Judgment in finding that there were no management discussions in around August 2021 and October 2021 about terminating Mr Gagliardi's employment **[CB/4/91] [CB/4/100].** This finding was wrong or not open to the Judge because it was unjust because of a serious procedural irregularity. Indeed this finding of fact was contrary to the case advanced by Mr Gagliardi in closing submissions **[SB/32/237-238]**.

<u>The Facts</u>

7. The following background facts are apparent from the Judgment and are accepted by ECM:

    a. Mr Gagliardi was a highly successful Portfolio Manager employed by ECM.

    b. ECM (along with a related company, Evo Capital Management Asia Limited (**"Evo Asia"**)) managed investments in two funds:
    (i) the Class A1 shares in the Evo Fund (**"Class A1 Shares"**); and
    (ii) the Evo Absolute Return Master Fund (**"EARMF"**) (Judgment at paragraphs 4-5, 7-8, 9, 11, 12). **[CB/4/52-54]**
    (Together **"the Funds"**).

    c. Mr Gagliardi was employed to trade across the Funds for ECM.

d. Relevant trading took place in the Class A1 Shares up until August 2021 and thereafter was transferred into the EARMF.

e. ECM and Evo Asia are controlled by a Mr Michael Lerch. ECM's management team consists of Mr Lerch, Mr Adrian Brindle and Mr Richard Chisholm (Judgment at paragraph 4) **[CB/4/52]**.

f. The Funds paid Evo Asia for its management services, which in turn paid ECM. Thus ECM's income came via Evo Asia, and was based on the performance of the Class A1 shares in the Evo Fund and EARMF (Judgment at paragraph 12) **[CB/4/54]**. However its income came not directly from the trading profits of the funds but indirectly by way of fees which are calculated by reference to the performance of the funds.

g. It is important to stress that ECM is a fund *manager*, it is not an investment fund (Judgment at paragraphs 4, 8) **[CB/4/52-53]**. It does not own the investments under management, although it has a shared interest in the profitable performance of the Funds.

h. Mr Gagliardi was recruited by Mr Lerch in April 2021 because of his extensive network of contacts and access to the US capital equity markets (Judgment at paragraph 36) **[CB/4/62]**. Mr Lerch wanted Mr Gagliardi to help him build ECM's brand in the USA (Judgment paragraph 38) **[CB/4/63]**. Mr Gagliardi was therefore employed not merely to trade, but to build and establish a long-term viable business for ECM.

i. Mr Gagliardi's remuneration consisted of a signing on bonus of US$625,000; a salary (the greater of 10% of ECM's management fees or US$250,000), a **"New Issue Bonus"** (based on his profits from IPO trading, which was in the event US$5.9m) and a Discretionary Bonus **[CB/9/304]**. This appeal is concerned solely with the Discretionary Bonus which the Judge found had irrationally been refused.

j. Through the period April 2021 to November 2021 there were various issues with Mr Gagliardi's integration into the firm and tensions arose between him and other traders working for ECM and Evo Asia (see paragraphs 66-184 of the Judgment)

(**"the Conduct Issues"**) **[CB/4/70-108]**. A large part of the trial concerned whether these Conduct Issues were lawful reasons to refuse Mr Gagliardi his Discretionary Bonus. The Judge found that these were not reasons that Mr Lerch (the decision maker) had in his mind at the time (Judgment at paragraph 401) **[CB/4/170]**.

k. ECM exercised its discretion not to pay Mr Gagliardi a Discretionary Bonus on 28th February 2022 (Judgment paragraph 399) **[CB/4/170]**.

l. The Judge found that the sole reason Mr Gagliardi was not paid a discretionary bonus was because of his being involved in a US Department of Justice (**"DOJ"**) and Securities Exchange Commission (**"SEC"**) Investigation into insider trading from November 2021 **[CB/4/170-171]**. However the Judge found that this fact was not a rational basis to refuse to pay him the Discretionary Bonus (Judgment at paragraphs 416, 419 and 420) **[CB/4/176-177]**.

The Contract

8. It was common ground that Mr Gagliardi's entitlement to a Discretionary Bonus was governed by the terms of the Contract, which was in turn governed by Delaware Law **[CB/9/304-306]**.

Delaware Law

9. The Judge summarised the relevant principles of Delaware Law at paragraphs 279 to 294 of the Judgment **[CB/4/138-142]**. These principles were for the most part common ground and ECM accepted at trial and accepts in the Court of Appeal that the principles stated by the Judge were correct.

English Law

10. It was also common ground at the trial that the implied duty of trust and confidence (which includes a duty rationally to exercise a contractual discretion) applied by virtue of it being a non-derogable principle of UK employment law (Judgment at paragraph 295) **[CB/4/142]**. The issue of the non-payment of the Discretionary Bonus was thus governed by both Delaware and English law.

The Contract Terms

11. The relevant provisions governing Mr Gagliardi's Discretionary Bonus were contained in two paragraphs of the Contract as follows:

"For each calendar year, provided you are an employee in good standing on each fiscal-year-end bonus payday, you may receive a discretionary bonus based on your individual performance and the Profit generated from the Business (the "Discretionary Bonus"). "Profit" refers to the profit to the Company and its affiliates attributable to the Business, net of all expenses including but not limited to overhead, operating, administrative, legal, compliance, and accounting expenses allocable to the Business, salaries and benefits of employees supporting the Business, and fund expenses borne by the Company and its affiliates, such as expenses related to investments and hedging, research, market data and Bloomberg terminal fees, reasonable and documented travel expenses, legal, accounting, taxes, external valuation and audit expenses, brokerage commissions, continuing offering and operating expenses (including, without limitation, administrative fees), and extraordinary expenses, such as any litigation costs. The target range of the Discretionary Bonus will be 10%-15% of such Profit, but will be purely discretionary in order to reflect the Company's assessment of your revenue contributions. 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.

For the avoidance of any doubt, the New Issue Bonus and Discretionary Bonus payable to you in 2022 for your contributions in 2021 will be based on aggregate gross income generated from New Issues and Profit, respectively, produced after the date you commence employment with the Company. If you are not employed by the Company at the time either bonus would typically be paid in any year, unless you were terminated for Cause, the Company will (a) pay you a pro-rated portion of the New Issue Bonus, adjusted to reflect the date on which your employment ceased, and (b) consider paying a similarly pro-rated Discretionary Bonus to you."

[CB/9/304-305]

12. For convenience the first of these paragraphs may be referred to as the **"Main Discretionary Bonus Clause"** and the second the **"Pro Rata Clause"**.

13. It was common ground that the Main Discretionary Bonus Clause was subject to the following governing criteria, and that the discretion had to be exercised in accordance with these criteria (**"the Criteria"**):

    a. The person had to be "an employee in good standing as at the fiscal-year-end bonus payday".
    b. In such circumstances a Discretionary Bonus 'may' be awarded.
    c. The decision to award a Discretionary Bonus would be based on "individual performance" and "Profit generated from the Business".
    d. There was a "target range" of 10-15% of such Profit for the Discretionary Bonus.
    e. The Discretionary Bonus was to be "purely discretionary in order to reflect the Company's assessment of your revenue contributions".

Ground 1: The 'Employee in Good Standing' Point

14. This ground of appeal concerns the interaction of the Main Discretionary Bonus Clause and the Pro-Rata Clause, and whether the right to a pro-rated Discretionary Bonus was unaffected by the fact that a person had left ECM's employment at the relevant time.

15. It was common ground at the trial that Mr Gagliardi's employment terminated on 7th March 2022 **[SB/10/47]**. It was also accepted that ECM paid its traders' bonuses on 22nd March 2022, which was the 'bonus payday' in relation to the previous fiscal year (i.e. 1st January 2021 to 31st December 2021) **[CB/4/127]**.

16. It was therefore clear that Mr Gagliardi was not "*an employee in good standing on [the] fiscal-year-end bonus payday*".

17. The Judge implicitly accepted this at paragraphs 311, 312, and 320 of the Judgment **[CB/4/148-149].**

18. ECM contended that Mr Gagliardi had no *automatic* right to a Discretionary Bonus. ECM said that Mr Gagliardi's only entitlement would be to a be *considered* for a prorated Discretionary Bonus in accordance with Pro-Rata Clause.

19. The Judge appeared to accept this but found that because of the provisions of the Pro-Rata Clause Mr Gagliardi was entitled to a pro-rated Discretionary Bonus as a matter of principle and that the fact that his employment had ceased before the relevant time made no difference.

20. ECM says that in circumstances where Mr Gagliardi was not an employee as at the fiscal-year-end bonus pay day, he has a different right, namely a right to be *considered* for the pro-rated Discretionary Bonus.

21. The flaw in the Judge's logic is apparent from paragraphs 318-320 of the Judgment **[CB/4/149]**:

> *"318. The pro-rata clause then provides that if Mr. Gagliardi is not employed by ECM at the time either the IPO Bonus or the Discretionary Bonus would typically be paid in any year (i.e. on the bonus payday), then unless he was terminated for Cause (as defined in the employment contract), ECM <u>will</u> (a) pay him a pro-rated portion of the New Issue Bonus (or "IPO Bonus"), adjusted to reflect the date on which his*

employment ceased, and (b) consider paying a similarly pro-rated Discretionary Bonus to him.

319. Such pro-rated bonuses must be paid within a month following the cessation of Mr. Gagliardi's employment. ECM has no entitlement to "wait and see" in the case of an investigation such as that conducted by the SEC/DOJ in the present case.

320. It follows that if his employment were to be terminated during the 2021 calendar year (i.e. before 31 December 2021), then Mr. Gagliardi would in principle be entitled to a prorated Discretionary Bonus for that part of the 2021 calendar year that he worked for ECM." [Note: emphasis to 'will' added by the Judge]

22. The right that is conferred upon Mr Gagliardi which the Judge recognises at paragraph 318 of the Judgment is a right that ECM *consider* paying a… pro-rated Discretionary Bonus **[CB/4/149]**. But the Judge then concludes that because Mr Gagliardi had a right to be considered for such a bonus, he was therefore 'in principle' entitled to the bonus.

23. That was a non sequitur. The Judge added emphasis to the word 'will' in the extract above; but this overlooked the fact that the word 'will' is linked to the word 'consider'.

24. The Judge justified that logic at paragraph 322 of the Judgment **[CB/4/150]**:

"I reject Mr. Downes KC's submission that the reference in the pro-rata clause to "(b) consider paying a similarly pro-rated Discretionary Bonus to you" (emphasis added) means, on its proper construction, that if Mr. Gagliardi's employment has come to an end before the bonus payday but he has made revenue contributions in the 2021 year, then ECM has an unfettered discretion as to whether to consider paying him any pro-rated Discretionary Bonus at all. Rather, "Discretionary Bonus" in sub-clause (b) is being used as a defined term; the reference to "consider" simply reflects the fact that the bonus is discretionary in that it is only if Mr. Gagliardi has made a revenue contribution and the Business has generated a Profit that Mr. Gagliardi becomes entitled to a Discretionary Bonus, to be calculated in accordance with the last two sentences of the Discretionary Bonus clause."

25. The Judge's error is apparent from paragraph 327 of the Judgment **[CB/4/151]**:

"Further, it is notable that the pro-rata clause contains no reference to Mr. Gagliardi needing to be an "employee in good standing". Instead, the pro-rata clause makes clear that the pro-rated bonus will in principle be paid 'unless you were terminated for Cause'."

26. The second sentence of this quote shows that the Judge misread the clause. It does not make clear that the pro-rated bonus will in principle be paid unless Mr Gagliardi is terminated for cause. The Pro-Rata Clause makes clear that Mr Gagliardi will be *considered* for a pro-rated bonus unless he is terminated for Cause.

27. This interpretation of the Pro-Rata Clause thus renders the word 'consider' devoid of any effect.

28. This is also at odds with the words used in relation to the pro-rated New Issue Bonus, which was not similarly phrased. The phrase 'will consider' in relation to the Discretionary Bonus is to be contrasted with the phrase 'will pay' in relation to the New Issue Bonus:

*"If you are not employed by the Company at the time either bonus would typically be paid in any year, unless you were terminated for Cause, the Company **will** (a) **pay you a** pro-rated portion of the New Issue Bonus, adjusted to reflect the date on which your employment ceased, and (b) **consider paying** a similarly pro-rated Discretionary Bonus to you."* **[CB/9/305]**

29. The right of a departed employee to a pro-rated New Issue Bonus was automatic. The right to a pro-rated Discretionary Bonus was not.

30. The Judge's observation that ECM's construction was 'uncommercial' (Judgment paragraph 323) is also unsupportable **[CB/4/150]**. There is nothing uncommercial in an employer constructing an employee bonus scheme subject to the employee remaining in employment. This is especially so where the employee is being retained to build a long-term viable business. Indeed one reason why an employer might want a broader discretion in such a situation is that it may wish to take account of the circumstances of the employee's departure.

Ground 2: The Pleading Point

31. Ground 2 is related to Ground 1. If Mr Gagliardi was to succeed in a case based on the Pro Rata Clause he had to plead and prove that ECM did not 'consider' paying him a pro-rated Discretionary Bonus; or alternatively did consider it and irrationally refused to make such a payment.

32. No such case was ever advanced by Mr Gagliardi:

    a. The Particulars of Claim did not plead a cause of action based on the Pro Rata Clause (for example pleading that ECM did not 'consider' paying him a pro-rated Discretionary Bonus).

b. Mr Gagliardi's opening skeleton argument for the trial made no reference to the Pro Rata Clause or made any case based on a failure rationally to 'consider' such a payment.

c. The Defendant's witness statements thus did not address that part of the clause or the obligation to 'consider' a pro rated payment.

d. Mr Lerch was not cross-examined on the issue and it was never put to him that he failed to consider applying the Pro-Rata Clause or that he had considered it and had irrationally failed to make such a payment. He was cross examined at length on the Main Discretionary Bonus Clause, and whether he had exercised his discretion in this regard, but not at all in relation to the Pro-Rata Clause.

33. The Judge addressed this problem at paragraphs 324-325 of the Judgment **[CB/4/150-151]**:

> *"324. Finally on this aspect of construction, I must deal with Mr. Downes KC's submission that it is not open to Mr. Gagliardi to rely upon the pro-rata clause because he has not pleaded it. I reject that submission. In paragraph 27(c) of the Amended Reply, Mr. Gagliardi pleads 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'.*
>
> *325. That is clearly a reference to, and reliance upon, the pro-rata clause."*

34. It was true to say that Mr Gagliardi had referenced the Pro-Rata Clause in the Reply **[CB/8/293]**. However he had never pleaded the necessary fact to found a cause of action on that clause: namely that ECM had *not* considered paying Mr Gagliardi a pro rated Discretionary Bonus; or had considered it and irrationally refused to make such a payment.

35. This was not a technical pleading point. The case had not been advanced on that basis until the closing arguments. It was manifestly unfair to allow such a case to be advanced in closing where the case had not been pleaded; the case had not been opened on that basis and where Mr Lerch had not been cross-examined or challenged on the point.

Ground 3: The "Individual Performance" Point

36. The Judge found that the criteria for the Discretionary Bonus were concerned only with Mr Gagliardi's financial performance, viz the Profit generated from the Business and his own revenue contribution.

37. The Judge found (correctly) that Delaware law stipulated that the meaning of the contract must be ascertained, in the first instance, within the four corners of the agreement; but that where that meaning was "fairly susceptible of different interpretations or may have two or more different meanings" (Judgment at paragraphs 285-286) the Court could resort to extrinsic evidence to interpret the provision **[CB/4/139]**.

38. The Judge went on to find that the Contract unambiguously provided that ECM was required *only* to have regard to the profit generated by the Business and Mr Gagliardi's contribution thereto. It therefore followed that the Conduct Issues that were collateral to such financial considerations would be irrelevant.

39. This was an error of construction. The following wording of the Contract (at the very least) was fairly susceptible of meaning that Mr Gagliardi's wider performance of his contractual obligations was relevant:

    a. ***"…you may receive a discretionary bonus"***: The use of the word 'may' as opposed to 'must' included a discretion to pay nothing. To the extent that English law is of assistance (given the fact that English law governed the implied duty of trust and confidence) in *Cantor Fitzgerald International v Horkulak* [2004] EWCA Civ 1287 Potter LJ observed at paragraph 46:

    "The use and positioning of the word 'may' attaches the discretion to the obligation to pay a bonus at all rather than to the assessment of the amount payable…"

    b. ***"based on your individual performance"***: individual performance could be referring to financial performance; but it could equally be read as referring to wider aspects of Mr Gagliardi's performance. In the case of *Clark v Nomura* [2000] IRLR 766 at paragraph 36 Mr Justice Burton had to consider an identical phrase and came to the opposite conclusion:

    "I turn then to the meaning of 'individual performance'. It is quite clear that the most important aspect of the trader's performance is his profitability – he is, as has been described, a 'profit machine'. However, I do not accept the claimant's submission that profitability is the only yardstick, and that individual performance

must be exactly identified with, and limited to, profit performance. I consider that 'individual performance' means 'performance of his contract'… 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'… If he is employed as a senior trader, then his individual performance must be assessed against his contractual performance as a senior trader, with all its responsibilities, but not his capacity or enthusiasm for some additional or different responsibility."

The Judge addressed Mr Justice Burton's interpretation at paragraph 303 of the Judgment **[CB/4/145-146]** and sought to distinguish that case because there was explicit reference to "*corporate contribution, team working, capital usage and due regard to risk*" in Appendix A to the employment contract in that case, which set out the terms of the bonus scheme. However this was not a sound basis to distinguish *Clark*:

(i) The terms of the employment contract in *Clark* provided:

"Nomura operates a discretionary bonus scheme, which is not guaranteed in any way, and is dependant [sic] upon individual performance and after the first 12 months your remaining in our employment on the date of payment. ***As discussed, for the first 12 months of your employment, you will be eligible for payment as per Appendix A****..."* [emphasis added]

Thus the explicit reference to team working etc in Appendix A was only relevant insofar as the first 12 months of the contract was concerned. Mr Clark's contract was dated 13th June 1995 and the bonus dispute was in relation to the period 1st July 1996 to 31st March 1997.

(ii) In any event the reference to 'individual performance' was not linked to the criteria in Appendix A; it was a general statement and Burton J interpreted it as such.

(iii) In the present case the Contract also contained explicit references to Mr Gagliardi's duties which were non-financial in nature:

"You will report to Michael Lerch." **[CB/9/304]**

"For each calendar year, provided you are… in good standing…" **[CB/9/304]**

"While you are employed by the Company, your relationship with the Company will be subject to all of the Company's then current rules, regulations and practices including, but not limited to, the Employee Rules

Handbook, the Compliance Policy, the Valuation Policy, and the Risk Policy." **[CB/9/305]**

"You will also be required to enter into the Company's standard non-disclosure agreement for employees." **[CB/9/305]**

"You agree to the best of your ability and experience that you will at all times loyally and conscientiously perform all of the duties and obligations required of and from you pursuant to the express and implicit terms hereof, and to the reasonable satisfaction of the Company." **[CB/9/305]**

"During your employment, you further agree that you will devote all of your business time and attention to the business of the Company, the Company will be entitled to all of the benefits and profits arising from or incident to all such work services and advice, you will not render commercial or professional services of any nature to any person or organization, whether or not for compensation, without the prior written consent of the Company, and you will not directly or indirectly engage or participate in any business that is competitive in any manner with the business of the Company" **[CB/9/305]**

There was in truth no meaningful distinction between the discretionary bonus clause in the *Clark v Nomura* case and the present case and there are now two identical phrases being given very different meanings by two first instance judges.

c. ***"The target range of the Discretionary Bonus will be 10%-15% of such Profit"***. The use of the word "target" clearly indicated that the payment of a bonus in that range was not guaranteed (or at least could fairly be read as having that meaning). **[CB/9/304]**

d. ***"… but will be purely discretionary in order to reflect the Company's assessment of your revenue contributions"***. The use of the word "purely" and the reference to ECM's assessment (which denoted a qualitative as well as quantitative process) both point to a more holistic approach to the bonus than merely an automatic entitlement based solely on financial performance. **[CB/9/305]**

40. At paragraphs 304 to 305 of the Judgment the Judge briefly considered the wider evidence, in the event that the term "individual performance" was ambiguous, concluding that **[CB/4/146-147]**:

"I do not find any of this persuasive. Mr. Gagliardi's evidence in these respects simply concerned some of the ways in which he said he would be able to bring about his considerable individual revenue contribution to ECM, such as by his introducing ECM to his prestigious US counterparts in order that ECM could start generating profit from

those contacts for itself. In other words, these were all means to an end, that end being the generating of Profit for the funds and ultimately for ECM. Accordingly, I do not consider that any of this evidence supports ECM's construction of the employment contract, nor does it detract from the plain meaning of the employment contract in any event."

41. It is worth pointing out that the Judge's interpretation of Mr Gagliardi's evidence denoted a misunderstanding as to what he was saying. In cross-examination, Mr Gagliardi explained that his 'individual performance' was not just related to profit and loss, but included "intangibles", see {Day2/175:19}-{Day2/176:11} **[SB/25/214]**:

"*Q. "based on your individual performance". Now, did you give any thought -- I don't want to know -- I don't want to hear argument about what it means, but did you give any thought to what was being expected of you in relation to your individual performance?*

A. Yes. ***It was not just P&L related. It was also -- I was directed to the best I could to try to elevate Evo amongst the US counterparts, of which I clearly did because he was meeting a lot of the counterparts. So there was some intangibles in there as well, outside of just P&L.***

Q. Yes. Then we agree about that. The ***individual performance is wider than the pure financials. I think you agree?***

A. Yes." [emphasis added]

42. The Judge then specifically questioned Mr Gagliardi about this part of his testimony **[SB/27/217]**:

"*MR JUSTICE CALVER: I just want to ask you two questions. Is that something that -- I mean, the way you expressed that was that you gave thought to that point. But did you have a discussion, can you recollect whether you had a discussion with Mr Lerch about what was included in that phrase "your individual performance", or was that simply what you thought?*

A. So we discussed elevating his brand. He called it his Evolution brand in the United States and in New York, which was the biggest global thing.

MR JUSTICE CALVER: I know you discussed that, but did you discuss that in the context of the wording that we see in the contract based on your individual performance or not?

A. We discussed what individual performance outside of profit or loss meant.

THE JUDGE: Right. And what was that discussion? Just give it to me --

A. The thing that attracted me towards Michael was his ambitions were aligned with mine, and I'm very competitive and I have never had the luxury of working at a big firm, ***so taking a very small firm like Evo and elevating it in the biggest market in the world where they were viewed as a top 5 counterparty, to me because I'm so competitive was***

something I discussed with Michael. *And he wanted to be well known in New York because he was saying that they wrote a book about him in Japan and that no one in New York really knew about his achievements. And so this all was talked about as we were factoring this in.*

MR JUSTICE CALVER: So you say you had a discussion with him as to what was meant by individual performance outside of profit of loss, and what that meant other than profit and loss was what you just mentioned?

A. And also introducing my colleagues when they went to New York to a lot of the counterparts. *Also why I talked about the IPOs and the SPAC business before about three ways a company can go public was before I joined Evo, Michael was very involved in launching a SPAC, which at the time was a reverse merger which was very lucrative to people that, like Michael, they call it promote, where he was to find a target company, but what he needed also was interactions and introductions to a lot of the banks in New York.*

So on my first business trip to New York, I brought Michael into three or for or five different banks that do these type of transactions separate, and I wasn't expecting to be paid on that at all, ***and I was trying to just show that I'm a good team player and this would be a way for me to elevate not only the strategy I was doing but also the other businesses that Michael had that had nothing to do with me at all outside of the introductions.***

MR JUSTICE CALVER: So is it fair to say that other than profit and loss per se, the other things that you were discussing in the context of your individual performance were related to seeking to increase the profits of Evo?

A. Seeking to put Michael in a position, or his firm, where they can have access to things like I was getting in ECM. Because if I was getting such amazing access with the banks for the strategy I was doing, I was going to try to leverage that to help him and his existing business, of which was the SPACs. Because the SPACs and the ECM, we all speak to the same people at the time. Even though I wasn't doing it, I went out of my way, and there's a lot of instances where you can see him asking me to make introductions for him. And then on top of that, I have also facilitated many meetings with my colleagues in Asia in New York." [emphasis added]

43. The Judge failed to appreciate that there are two different concepts at play in relation to financial performance:

    a. Historical trading profit and Mr Gagliardi's contribution thereto.

    b. 'Intangibles' (Mr Gagliardi's own word) which could have an impact on *future* profits (viz the strength of the ECM brand etc).

44. In one sense any aspect of an employee's performance has a financial aspect: for example 'team working' can be said to improve productivity and hence profit. The Judge's

confusion in this regard is apparent from his final comment in the course of Mr Gagliardi's evidence {Day2/193:9}-{Day2/193:14} **[SB/27/218]**:

"*MR JUSTICE CALVER: But all of those things you're referring to, they all go to the question of your financial performance.*

A. Correct. If I wasn't performing, if I was losing money, I would have been fired, and if I wasn't making money I think it would have been harder for them to attract money as fast as they did. …"

45. The Judge therefore was misled by a false syllogism: because all 'performance' contributes to profit, ergo 'performance' means only profit.

46. The true position was, as Mr Gagliardi volunteered in cross-examination; his 'performance' was not simply concerned with his trading in the financial year in question; but was also concerned with his building the brand that ECM had employed him to deliver. This was a long-term project and strongly supported ECM's case that the Discretionary Bonus was justifiably linked to Mr Gagliardi's wider performance.

47. Being caught up in a DOJ/SEC investigation into insider trading would obviously be toxic for the brand he was seeking to build; but the Judge's conclusions mean that this issue should have been ignored by ECM in deciding on his Discretionary Bonus.

Ground 4: The "Profit Attributable to the Business" Point

48. It was common ground that 'Profit' was an important factor in determining whether Mr Gagliardi should receive a Discretionary Bonus and if so how much. The interpretation of the word 'Profit' was thus relevant to both liability and quantum.

49. The Contract provided **[CB/9/304-305]**:

"For each calendar year, provided you are an employee in good standing on each fiscal-year-end bonus payday, you may receive a discretionary bonus based on your individual performance and the ***Profit generated from the Business*** *(the "Discretionary Bonus").* ***"Profit" refers to the profit to the Company and its affiliates attributable to the Business****, net of all expenses including but not limited to overhead, operating, administrative, legal, compliance, and accounting expenses allocable to the Business, salaries and benefits of employees supporting the Business, and fund expenses borne by the Company and its affiliates, such as expenses related to investments and hedging, research, market data and Bloomberg terminal fees, reasonable and documented travel expenses, legal, accounting, taxes, external valuation and audit expenses, brokerage commissions, continuing offering and operating expenses (including, without limitation, administrative fees), and extraordinary expenses, such as any litigation costs. The target range of the Discretionary Bonus will be 10%-15% of such Profit, but will be purely*

discretionary in order to reflect the Company's assessment of your revenue contributions. 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." [emphasis added]

50. Because 'Profit' and 'Business' were both defined terms, the phrase *"Profit generated from the Business"* meant: *"Profit [to the Company] generated from the Business"*. 'Business' was defined as EARMF, which was a separate legal entity (Note: the Judge found that ECM was estopped from relying on the definition of 'Business' as being limited to the EARMF but instead it was referable to both EARMF and the A1 Shares. There is no appeal from this finding, which is not relevant to this proposed Ground of appeal).

51. Such a provision was to be expected. ECM did not earn the trading profits that the Funds did, and the profit of the Funds was not the profit of ECM. If Mr Gagliardi profitably bought and sold shares – that profit went to the investors in the Funds. ECM's income was by way of management fees (calculated by reference to the Funds' assets under management (**"AUM"**)) and a performance fee (calculated by reference to the trading in the funds). The management fee was 2% of the AUM; the performance fee was 20% of the Funds' increase in value.

52. The Judge however misread the clause as is apparent from paragraph 332 of the Judgment **[CB/4/152]**:

"I consider that the proper construction of this part of the Discretionary Bonus Clause is also clear: ***the Discretionary Bonus is calculated upon the "Profit generated from the Business"*** *(being EARMF). The last two sentences of the clause are consistent with that fact: if the "Business generates a Profit" in 2021 then the Discretionary Bonus will be calculated so as to reflect the revenue contributions of Mr. Gagliardi to the Business in 2021 after the commencement of his employment."* [emphasis added]

53. The Judge had overlooked that the term 'Profit' was a defined term. One could not properly read the phrase 'Profit from the Business' as meaning profit generated by the Funds, where in the next sentence of the Contract the term 'Profit' is defined: *""Profit" refers to the profit to the Company and its affiliates attributable to the Business…"*.

54. The error was then repeated and compounded at paragraph 334 of the Judgment **[CB/4/152]**:

"The Discretionary Bonus clause then provides that "Profit" in this context refers to the profit to ECM and Evo Asia "attributable to the Business" (EARMF) and nothing else –

again making clear that it is the profit generated by the trading of the Business which matters. The Business does not generate fee income; it generates revenue. From that revenue EARMF is then charged fees by the investment managers – those fees are an expense to EARMF."

55. This part of the Judge's reasoning appears confused. If the Business is the Funds and the Company is ECM, the clause is referencing profit to ECM (and Evo Asia) attributable to the Funds. In other words, the profit that ECM and Evo Asia earned that came from its management of the Funds (as opposed to any other funds).

56. Then at paragraph 336 of the Judgment the Judge also misread the reference to 'expenses' in the clause **[CB/4/153]**:

*"This construction is reinforced by the fact that it is fund expenses, that is expenses of EARMF, which are deducted from the trading revenue in order to arrive at the profit of EARMF. Thus, the clause reads: "net of all expenses including but not limited to overhead, operating, administrative, legal, compliance, and accounting expenses allocable to the Business, salaries and benefits of employees supporting the Business, **and fund expenses borne by the Company** and its affiliates"* [emphasis added]

57. The Judge overlooked the words "borne by the Company" after "fund expenses" **[CB/9/304]**. The clause is therefore not referring to expenses that the fund has paid in arriving at the profit; but rather expenses that might otherwise be paid by the fund, but which are in the final event "borne by the Company" (i.e. ECM/Evo Asia).

58. This was explained by one of ECM's witnesses, Mr Gerald Tsai in the evidence as follows {Day8/130:1}-{Day8/130:9} (in relation to the Contract wording that was taken from the Private Placement Memorandum or **"PPM"**) **[SB/30/224]**:

"So the simple explanation is the expenses that are identified in the PPM are expenses that the manager can elect to have the fund pay. So that is the universe of expenses that the fund can pay. But in many instances, the manager may say: well, you know, we don't think it's fair to burden the investor with a particular expense; like even though we can charge reasonable travel to the fund, you know, investors don't like that, they don't like the look of that, and so the manager will bear that expense."

59. In other words, there were instances where certain expenses could legitimately be charged to the Funds, but the investment managers would take the view that it would be more appropriate for those expenses to be borne by the fund manager, hence the words "fund expenses borne by the Company".

60. In any event, the Judge ignored the crucial words "borne by the Company" to support his already erroneous interpretation of the definition of "Profit".

61. As to quantum, the Judge made no findings as to the appropriate figure for "Profit" to the "Company" (on the basis that ECM's position was correct). The Claimant's forensic accounting expert, Mr Gene Deetz, did not address what the profit to the "Company" was, instead he opined on the profit to the Funds **[SB/23/197-198]**. ECM's expert provided three different figures for the profit to the "Company" as follows: *(a)* the profit was a loss of US$1,232,522.87 if discretionary bonuses were deducted as a cost; *(b)* the profit was US$4,104,967.71 if discretionary bonuses were not so deducted and the portion of a performance fee to which the Chief Investment Officer, Mr Robert Toresco, was contractually entitled but had in fact waived was not deducted as a cost; *(c)* the profit was US$1,139,120.21 if discretionary bonuses were not deducted as a cost and the full sum to which Mr Toresco was contractually entitled was deducted as a cost: see paragraphs 3.10 **[SB/22/176-177]** and 6 **[SB/22/190]** of the report of Mr Hamish Russell dated 23rd July 2025.

62. Mr Deetz said in cross-examination that profit would be calculated without deducting discretionary bonuses, but after deducting other contractually required bonuses, see the transcript at Day 9, p.174, lines10-13 **[SB/32/227]**:

"*A. … profit would be computed before discretionary bonuses, but profit would not be computed before other contractually required bonuses. That's just my view.*
Q. Performance fees, that's a contractual liability, isn't it?
A. Yes.
Q. So therefore it's an expense?
A. Performance fees are an expense. …"

63. The Judge found at paragraph 447 **[CB/4/183]** of the Judgment that profit should be calculated without making a deduction for discretionary bonuses. The appropriate figure for "Profit" to the "Company", based on the Judge's finding at paragraph 447 of the Judgment and the oral evidence of the Claimant's expert forensic accountant, is therefore US$1,139,120.21 because it not include the discretionary bonuses but does include the full sum to which Mr Toresco was contractually entitled.

Ground 5: Relevance of the SEC/DOJ Investigation

64. The Judge found that the discretion not to pay a Discretionary Bonus was made on 28th February 2022 (Judgment paragraph 399) **[CB/4/170]**, and that the only reason that Mr

Gagliardi was denied a Discretionary Bonus was because of the existence of a DOJ/SEC investigation into insider trading, which included Mr Gagliardi's trading while employed by ECM (Judgment at paragraph 401) **[CB/4/170]**. This ground of appeal is premised on the Judge being correct in this finding.

65. Mr Gagliardi had flown from the UK to the USA on 15th November 2021 and upon landing was taken aside by FBI agents who seized his mobile telephone and handed him a Grand Jury subpoena which named him as one of the individuals who were caught up in the investigation **[SB/7/23-36]**.

66. The Judge found (correctly) that being the subject of an investigation does not, of itself, amount to any evidence of wrongdoing (Judgment at paragraph 416) **[CB/4/176]**. However his deduction that this therefore did not provide a valid reason for refusing to pay the Discretionary Bonus was wrong.

67. The Judge listed the factors that were known to ECM at the time of the decision at paragraph 411 of the Judgment **[CB/4/174-175]**. However the one factor that was missing from this list was the evidence that the existence of the DOJ/SEC investigation raised the possibility that the entirely of the Fund's profits would be claimed by the DOJ/SEC by way of a disgorgement of profits order. This was accepted by Mr Gagliardi at paragraph 102 of his closing submissions as being a relevant factor when considering whether Mr Lerch was entitled to 'wait and see' what the outcome of the Investigation was **[SB/33/230]**:

"In the alternative, there may be situations where unexpected circumstances might arise which bear on the Defendant's proper exercise of its discretion, ***in the sense they are relevant to the basis on or criteria according to which the discretion must be exercised (such as, the possibility that the Defendant's individual performance might cause or entail fines or a requirement of disgorgement****, such that deferral permits proper assessment of that factor). In the event that route was not in fact adopted; and if it was, then the DBC was breached at the point that the Defendant, having deferred its discretionary decision, did not exercise its discretion upon the confirmation by the SEC that it was not taking enforcement action against the Claimant. The fact that did not happen indicates that i) any deferral was not a good faith exercise of the discretion; and ii) having deferred the discretion, the failure to grant the Claimant a discretionary bonus after March 2024 was unreasonable, arbitrary and capricious."* [emphasis added]

68. Even on the Judge's reading of the Discretionary Bonus being entirely linked to the profit generated by the Funds (and therefore on the assumption that Ground 3 failed), it cannot

have been immaterial to that discretion for an employer to consider the *possibility* that those profits (however defined) may turn out to be zero.

69. The Judge referenced the point at paragraph 420 of the Judgment **[CB/4/177]**:

"The possibility that ECM might ultimately be subjected to a fine by the SEC or that its reputation might thereby be harmed is wholly irrelevant to the proper exercise of the discretion."

70. This was wrong. The risk of substantial financial penalties to ECM was obviously something that a hypothetical reasonable employer might legitimately consider. All the more so given the specific risk that all of Mr Gagliardi's profits might be disgorged **[SB/11/50]**, which factor the Judge made no reference to at all.

71. If the hypothetical reasonable employer is entitled to take into account the existence of a regulatory investigation (albeit where the outcome of the investigation is unknown and unknowable) the issue comes down to what weight the employer is entitled to give to that factor and the risks associated with it. ECM submits that it is well established that the weight to be attached to relevant factors is for the decision-maker as opposed to the Court, as the Judge correctly accepted, see Judgment at paragraph 296 **[CB/4/142-144]** citing *Braganza v BP Shipping Ltd* [2015] UKSC 17 and *Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at 764G-H per Lord Keith.* Thus once it is accepted that the DOJ/SEC Investigation was a potentially relevant factor it was for ECM and ECM alone to evaluate the risks associated with that factor and thus what weight it should be given in the evaluation of Mr Gagliardi's bonus.

72. A finding that an employer has acted irrationally in connection with a discretionary bonus requires a finding that no reasonable employer in that situation would have made the same decision, see per Burton J in *Clark v Nomura* [2000] IRLR 766 at paragraph 40. That is a question of law.

73. Lord Sumption described the test of rationality in *Hayes v Willoughby* [2013] UKSC 17 at paragraph 14 as follows:

"Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions.... A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the

decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

74. ECM submit that a realistic risk that the totality of its profits would be lost as a result of the DOJ/SEC Investigation would be something that the hypothetical reasonable employer could, and almost certainly would, take into account. In the words of Lord Sumption, it would be a factor having "*some logical connection between the evidence and the ostensible reasons for the decision*".

75. The result is that on the Judge's approach, the hypothetical reasonable employer is faced with a binary decision: pay everything or pay nothing. In such a situation it cannot be said to be irrational or perverse for the employer to evaluate the weight to be attached to the existence of the DOJ/SEC Investigation so as to pay nothing.

Ground 6: Early Consideration of Terminating Mr Gagliardi's employment

76. This Ground of Appeal stands with Ground 3. If the appeal fails on Ground 3, this Ground also falls away.

77. Ground 6 concerns a finding of fact and as such the Court of Appeal will not entertain an appeal unless persuaded that the decision was "plainly wrong", see for example *Volpi v Volpi* [2022] EWCA (Civ) 464 per Lewison LJ at paragraph 2.

78. The Judge found that there had been no management discussions regarding the termination of Mr Gagliardi's employment prior to the DOJ/SEC Investigation. This was highly material to his finding that the only factor that had been in the mind of Mr Lerch when he exercised his discretion on 28th February 2022 was the DOJ/SEC Investigation.

79. The Judge's finding that no termination discussions took place in August and October 2021 was based on the absence of contemporaneous documents; and that Mr Lerch had not mentioned this to Mr Gagliardi at the time (Judgment at paragraphs 127 **[CB/4/91]** and 162 **[CB/4/100-101]**).

80. The Judge's finding that the non DOJ/SEC Investigation factors were not in Mr Lerch's mind on 28th February 2022 was also because he had not referred to them in his call with Mr Gagliardi on 21st January 2022 (Judgment paragraphs 399-400) **[CB/4/170]**.

81. If Mr Lerch was in fact considering terminating Mr Gagliardi's employment in August 2021 and again in October 2021, it demonstrates that he did in truth regard the Conduct Issues as far more serious than the Judge found. This is sufficient to undermine the Judge's overall conclusion that Mr Lerch did not give any weight to the 'non-DOJ/SEC Investigation' issues.

82. The Judge rejected evidence from three witnesses that there had been discussions about terminating Mr Gagliardi's employment in August and October 2021. This finding was not open to him:

a. The Judge found that all witnesses were giving their evidence honestly (Judgment at paragraph 28) **[CB/4/59]**. The Judge's rejection of the evidence of Mr Lerch, Mr Brindle and Mr Chisholm must therefore amount to a finding that they were mistaken. The Judge said at paragraph 28 **[CB/4/59]**:

"The reality is that the witnesses on both sides were entrenched in their views: Mr. Gagliardi in his view that he has been wrongly deprived of his bonus and Mr. Lerch in his view that he should be entitled to award Mr. Gagliardi no bonus at all. Each of them has convinced himself of the fairness of his position and each was determined to hold that position throughout. This led both of them, and the factual witnesses they called to support their respective cases, at times to be evasive or to give evidence which was inconsistent with the documentary record, having convinced themselves of the truth of their evidence. But I do not consider any of the witnesses to have been dishonest. Ultimately, I consider that most of this witness evidence was either unhelpful or irrelevant in light of the proper construction of the contract and the established documentary record."

b. The Judge's reason for rejecting the recollection of Messrs Lerch and Chisholm (in respect of the August 2021 discussions) was because of the absence of any documentary record, as opposed to anything they said in the witness box, or his assessment of their oral evidence (Judgment at paragraph 127) **[CB/4/91]**:

"I do not accept Mr. Lerch's evidence on this point and nor do I accept Mr. Chisholm's evidence on it; their evidence is not supported by any contemporaneous documentary evidence and is inconsistent with Mr. Lerch's written communications to Mr. Gagliardi at the time."

However this observation must be weighed against the fact that both witnesses had given unchallenged evidence that their management discussions were not documented [2nd Lerch paragraph 5.2] **[SB/20/115]**. The fact that these discussions had not been raised with Mr Gagliardi is hardly surprising given that self-evidently they did not result in any action being taken.

c. The Judge overlooked the fact that Mr Brindle (the third member of the management team) also gave evidence that there were such discussions in August 2021 at paragraph 15.4 of his second witness statement **[SB/19/94]**.

d. In respect of the discussions in October 2021, the Judge at paragraph 162 of the Judgment **[CB/4/100-101]** noted that Mr Lerch's evidence was that he considered firing Mr Gagliardi and felt that he had 'cause' to do so and that Mr Lerch's evidence was supported by Messrs Brindle and Chisholm, but the Judge said simply "*I do not accept this evidence.*"

e. None of Mr Lerch, Mr Chisholm or Mr Brindle was challenged on their recollections in the witness box. This was important since had it been the case that Mr Gagliardi was advancing a case that their evidence was mistaken or untrue there would have been an opportunity to consider waiving privilege in documents that did support their recollection. The Defendant now wishes to waive privilege in the documents, which it would have previously done had it been on notice that this fact was challenged on the basis of the absence of a contemporaneous documentary record. ECM refers to the sixth witness statement of Mr Lloyd dated 9th January 2026 in this regard **[FEB/1/2-8].**

83. Assuming the Judge was correct to find that the oral testimony of Messrs Lerch, Chisholm and Brindle was honestly given, he was faced with two alternatives: *(i)* they had collectively and individually been mistaken in their recollections (without any collusion or the like); or *(ii)* they were being truthful. The first is implausible; the absence of a documentary record was unsurprising in the circumstances; and the absence of challenge meant that the Judge was bound to find the accounts truthful; or at the very last give a far more compelling reason to reject their testimony.

84. However, and quite apart from the foregoing, this finding was not open to the Judge in any event, because by the time of closing arguments it appears to have been common ground that there had been such discussions between Messrs Lerch, Chisholm and Brindle regarding a termination of Mr Gagliardi's employment in August and October 2021 (although it was apparently not common ground that there was cause for termination). Mr Gagliardi's initial position on the pleadings was a non-admission that

these discussions had taken place (see Reply at paragraph 15) **[CB/8/288]**. However by the time of closing arguments Mr Gagliardi relied on the fact that such discussions had taken place in support of his case on waiver. Specifically at paragraphs 223-224 of his written closing argument the following was stated **[SB/33/237-238]**:

"At various times, explicitly, the Defendant met via three of its senior managers and considered whether to fire Mr Gagliardi for "cause". On these occasions it was expressly considered, on the Defendant's evidence (which for the avoidance of doubt is not accepted)[2]*, that there were grounds to fire Mr Gagliardi for cause:*

… In August 2021 Mr Lerch states that he considered there were "a litany" of reasons to fire Mr Gagliardi for cause in relation to "his behaviour and attitude", "the amount of time I and Rob Toresco had to spend managing him given his attitude", "his threatening and bullying behaviour to other members of the EMC team".

… In late October 2021, Mr Lerch states again that he considered firing Mr Gagliardi and that he had cause on the basis of: "the various breaches of his risk limits"; "abusive behaviour towards other members of ECM staff"; "disregarding instructions from his risk manager" and the compliance flag generated at BAML as a result of his transactions".

…

On each occasion, after considering whether to fire Mr Gagliardi for cause, Mr Lerch chose not to do so. In the light of the knowledge of the right (said to exist) to terminate for cause and thereby extinguish Mr Gagliardi's entitlement to a bonus, and the conscious consideration of whether to exercise it, the decision not to do so is a voluntary and intentional relinquishment of that right in respect of the reasons given in each case, as they relate to the right to terminate for Cause and to refuse payment of a discretionary bonus. That election is unequivocal and irrevocable."

85. It was manifestly unjust for the Judge to make such findings against ECM where the point was not put to its witnesses and where Mr Gagliardi himself apparently accepted that such discussions took place. It was also manifestly unjust for such a course to be adopted without prior warning to ECM, such that an informed decision could have been taken as to waiving privilege in the contemporaneous documents that supported the evidence of Messrs Lerch, Chisholm and Brindle.

Ground 6: Consequences

86. If the appeal succeeds on Ground 6 the Judge's finding that the only factor that ECM took into account was the DOJ/SEC Investigation must be regarded as unsafe. If, as ECM contends, serious consideration was being given to terminating Mr Gagliardi's

[2] This caveat appears to have been referable to the specific content of the discussions as opposed to whether they took place at all.

employment before the DOJ/SEC Investigation surfaced the other Conduct Issues must have been regarded as of far more gravity than the Judge was prepared to countenance.

87. In those circumstances the only way forward is for there to be a retrial of the sole issue as to whether ECM did in fact take into account the Conduct Issues and whether the decision to pay no bonus was rational in the light of those findings.

88. Whilst it is recognised that a retrial is less than ideal from everybody's perspective, the retrial would be of a far more limited scope than the original trial, with live evidence only being required of Mr Lerch and possibly also some of ECM's other witnesses who gave evidence of the Conduct Issues.

PAUL DOWNES KC

EMILY SAUNDERSON

19th March 2026

Re-filed with cross-references at 20th October 2026.

Re-filed with updated cross-references at 30th October 2026.