Neutral Citation Number: [2021] EWCA Civ 686

Case No: A4/2020/1238

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**QUEEN'S BENCH DIVISION**
**LONDON CIRCUIT COMMERCIAL COURT**
**HHJ Pearce**
**[2020] EWHC 17 (Comm)**
**[2020] EWHC 1882 (Comm)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2021

**Before:**

**LADY JUSTICE KING**
**LORD JUSTICE MALES**
and
**LORD JUSTICE ARNOLD**

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**Between:**

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| **1) DANIEL DONOVAN**<br>**2) NALED LIMITED** | **Respondents/ Claimants** |
| **- and -** | |
| **GRAINMARKET ASSET MANAGEMENT LLP** | **Appellant/ Defendant** |

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**Paul Lowenstein QC & James Kinman** (instructed by **Howard Kennedy LLP**) for the **Appellant**
**Andrew Green QC & Dominic Howells** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Respondents**

Hearing dates: 27th & 28th April 2021

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# Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 12th May 2021

**Lord Justice Males:**

1. This is an appeal from the judgment of HHJ Pearce sitting in the London Circuit Commercial Court in which he held that the first respondent and first claimant, Mr Daniel Donovan, was entitled to his share of the profits of a joint venture agreement with the appellant defendant, Grainmarket Asset Management LLP ("GAM"), notwithstanding that Mr Donovan had not performed all of his duties under the joint venture either wholly or substantially. GAM appeals, contending that Mr Donovan's right to payment was conditional on performance of his contractual obligations and, moreover, that before any right to payment accrued the agreement had been terminated. GAM contends also that the termination of the joint venture agreement meant that Mr Donovan's company, Naled Ltd, the second respondent and second claimant, was no longer entitled to the benefit of a fee exemption agreement which formed part of the joint venture.

2. The respondents support the judge's reasoning, contending that the right to payment and the duty to perform were independent of each other and that there was no repudiation of the agreement by Mr Donovan.

3. There is also an issue whether pre-judgment interest at 8% over base rate is payable pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 on part of the sum found due to the appellants.

**Background**

4. The judge's task in finding the facts was not easy in circumstances where the parties' contract was not fully recorded in writing but rather arose from their conduct in the light of the written and oral communications between them, and where neither Mr Mark Crader (the principal of GAM) nor Mr Donovan was a satisfactory witness. Nevertheless, it was common ground that there was a binding contract between the parties, albeit its terms were in dispute, and the judge's conclusions as to the obligations undertaken are not challenged on appeal.

5. In or around 2012 Mr Crader and Mr Donovan, who had worked together before, began to discuss the idea of forming a joint venture to take advantage of the opportunities presented by a change in planning law by which it had become easier to convert property from commercial to residential usage. This was referred to as the "permitted development" or "PD" business. It was separate from a distinct (and more substantial) venture between the parties referred to as "Lime Street", with which these proceedings are not concerned.

6. Eventually they agreed that Mr Donovan and GAM would enter into a joint venture agreement in which money would be raised from investors and used to purchase and convert such properties for sale. Mr Crader and Mr Donovan would both invest in these projects, together with outside investors. Thus each project undertaken by the joint venture would be purchased by a limited partnership comprising (1) GAM or other companies owned by Mr Crader, (2) Naled Ltd (Mr Donovan's investment company), and (3) outside investors. The limited partnership thus formed would enter into a Property Management Agreement with GAM pursuant to which GAM would redevelop the property and manage it. Investors would pay GAM an administration fee calculated as a percentage of their investment and a performance fee on sale of the redeveloped

property. It was agreed that GAM would retain 90% of the administration fees (reflecting the fact that it bore the greater part of the costs of managing the projects) and would pay the remaining 10% to Mr Donovan. It was initially agreed that the performance fees would be split 55%/45% in favour of GAM, but that division was later revised so that Mr Donovan's share would be 40%.

7. Since Mr Donovan (through Naled Ltd) and GAM would be liable to pay the administration and performance fees as investors in the projects, but would then be entitled to receive their shares of these fees through the arrangement just described, it was agreed that the fees payable by Naled and GAM need not be paid. This was referred to as the "fee exemption agreement". The judge found that it was a term of the joint venture agreement and not a separate contract.

8. Heads of Terms for the joint venture were set out in a document produced on 6th March 2013 but this did not contain all of the terms which the judge found to have been part of the parties' contract. In particular, it did not identify the parties' respective obligations and, while referring to the way in which the performance fees would be split, did not set out what conditions, if any, had to be fulfilled in order for them to be earned.

9. What contractual obligations were undertaken by the parties, and in particular by Mr Donovan, was disputed. The judge found that Mr Crader, along with other GAM personnel, was primarily responsible for finding sites for the joint venture to acquire and for managing the redevelopment and sale of the properties, while Mr Donovan was primarily responsible for securing investment to finance the acquisition of those sites and acting as an investment relations manager and point of contact for investors on an ongoing basis. This division reflected the parties' respective expertise. However, these were only the parties' primary responsibilities. There was no rigid division of responsibilities between them. Thus while Mr Donovan's experience and expertise lay mostly in fundraising and managing investor relationships, he also discharged from time to time a wide range of other tasks concerned with the management of the properties. Ultimately the judge's finding was that the essential obligation of each party was to work towards the success of the projects undertaken consistently with his experience and expertise.

10. Five projects were undertaken by the joint venture, for the redevelopment of properties in Slough, Farnborough, Elstree, Reading and High Wycombe. A company called York Capital was an investor in all but the first of these projects. By early 2015, when Mr Donovan ceased to have day-to-day involvement in the joint venture, none of these projects had been completed, although finance for them had been secured.

11. By the end of 2014 and the beginning of 2015 the relationship between Mr Donovan and Mr Crader was breaking down. Because there is an issue whether the joint venture was terminated by GAM's acceptance of a repudiation by Mr Donovan, it is necessary to set out the parties' communications at this time in some detail.

12. I begin with an email sent by Mr Crader on 11th December 2014, which acknowledged that the relationship was not working well and appears to have been the first suggestion that the parties should terminate the joint venture. Mr Crader was concerned that difficulties between him and Mr Donovan should not affect their Lime Street venture.

His proposal was that Mr Donovan should buy him out of the permitted development joint venture if they could not agree some other solution:

> "I have thought about this overnight and below are my thoughts. They are only that. It is really important that this rather minor issue doesn't spoil what I think can be profitable for us both though the vast majority of the profits will come from Lime. It's also really important for personal reasons you and I don't fall out -- I really have had enough of angst. …
>
> First and foremost as it is you that want to change it [the joint venture agreement concerning permitted development] the suggestions should come from you. I accept you say you don't know how to do this but the onus is on you to try. Therefore what follows below is not a solution but maybe a path to one.
>
> Firstly if we can't both be happy we should try and separate the PD business and take it out from my office as a first step. This way any costs that it incurs will be clear and it will have to pay them. …
>
> Following on from that if you want to take the PD business on your own and I don't want this to be the case I am happy to discuss a price for you buying me out. …
>
> I do think this would give us a problem with York because we did agree to see the schemes through but perhaps your relationship with them could persuade. I certainly don't want to deal with York without you. I also accept that this would be a draconian solution and I put it first so that we are both aware that this must be the natural solution if we can't agree. …
>
> I am sorry I haven't had any eureka moment. I am also open to any compromise you can think of. …"

13. The potential "problem with York" arose because the terms of York Capital's funding agreement enabled them to walk away if either Mr Crader or Mr Donovan ceased to be involved in the joint venture. It was therefore critical, if this were to happen, to ensure that York Capital did not exercise this right.

14. Mr Donovan did not respond to this email until 26th January 2015, when Mr Crader chased him for a response, reiterating that Mr Donovan should buy him out:

> "Have you any further thoughts on this -- if we are to change the agreement we should try and do so -- if not we just let the agreement continue but I was under the impression you were not happy with that.
>
> I would reiterate that my suggestion that you buy me out (at a to be agreed fair price) should be considered by you."

15. At 13.13 on the same day Mr Donovan rejected the suggestion that he should buy Mr Crader out, saying instead that it was he who should leave:

> "You are right, I should have responded on this sooner.
>
> You are right that I agreed to change the terms but I don't feel that they are fair to me. You think differently and I can't do anything about that and thus can't and won't ask for any changes.
>
> We could move the office, I have looked into it. Andrew Rice has space that will cost pretty nothing – However, this is hardly the point is it?
>
> The real issue is that this doesn't suit either of us. I don't have the expertise on the build phase; you do; so it is logical that I should leave.
>
> If you think what I have done, to date, merits compensation that would be nice but as it isn't documented, so clearly I can't ask for anything.
>
> I will finish off working out the loan drawdown payments to York etc."

16. Mr Crader's response, sent at 14:46, was as follows:

> "Thanks for this but you leaving doesn't address the issue we have with York. … I don't say this can't be addressed but the point is we have to get York comfortable and happy as we all agreed to see out the schemes. York is very much your relationship and I really think they would be happier with you than me. I don't want you to discount carrying it on your own as the build has commenced on Farnborough and Reading. We have PD consent on Elstree. HW [High Wycombe] won't be an issue. What about your architect friend?
>
> However if the above doesn't suit you and if I take over I certainly want and expect you to make return – I don't think we have a situation where nothing is documented – it is – see attached. This would have to be adjusted in the same way as it would if I left but hopefully given the sums involved we must be able to work that out.
>
> Above all I don't want this to be acrimonious but let's face it you and I don't work together well and we have to keep a relationship going for Lime St's sake.
>
> Perhaps when you are next over we can work out the exit."

17. The judge was unable to identify the attachment to this message.

18. At 15:06 Mr Donovan sent a further email reiterating his view that it would be best for him to leave:

> "Mark, it is best that I leave. I hope York will be ok with it. They understand that you are the person with the build expertise. I am happy to speak with them.
>
> I really doubt an entire switch would work with York or indeed be possible.
>
> My point re documentation isn't that there isn't any agreement per se rather that it would be nice to be paid for the work I have done to date but I know I can't ask/enforce it. …"

19. It is GAM's case that this message was a repudiation of the joint venture by Mr Donovan and that this repudiation was accepted by Mr Crader's immediate response, sent at 15:08:

> "OK then let's discuss how we tell York about it."

20. Mr Donovan in turn replied at 15:17:

> "I haven't thought about it but I think I will, in the first instance, speak with Diego. I don't think much commentary is needed. Simply my work is done as all the projects are in the build phase. Susanna, I presume will deal with their reporting needs. I need to concentrate on the loan issue so unless you really disagree with that approach I need to focus on this for the next few hours."

21. The "loan issue" referred to a loan which Mr Crader had drawn down without prior notice to Mr Donovan, which had caused friction between them.

22. Two days later, on 28th January 2015, Mr Crader emailed Mr Donovan, saying that, "further to your decision to leave … there are some issues that we should address prior to informing York". These included "How do we address any potentially accrued performance fee?" Mr Crader suggested that Mr Donovan should be "entitled to something" in addition to his share of accrued administration fees, but that he had not thought through what form it should take. He ended by proposing a discussion. He followed this on 3$^{rd}$ February 2015, commenting that it was in no one's interests to leave these issues in limbo.

23. However, no meeting had taken place by 19$^{th}$ February 2015 when Mr Crader pressed again for a meeting "to finalise your exit from the pd project". He added that it had become apparent that his concern that York Capital would want both Mr Crader and Mr Donovan to stay involved appeared to be unfounded and that, as a result, "we can either work to 28$^{th}$ Feb or earlier as an official exit depending on what you prefer". Mr Donovan responded that:

> "Ok whatever we agree will be dated to 28$^{th}$ Feb then. I will formally write to York next week just to dot the 'i'."

24. In fact it was Mr Crader who wrote to York Capital on 22nd February 2015 to advise that "Dan is going to reduce his involvement in the residential schemes to that of passive investor" and that the schemes would continue to be run by Mr Crader's team.

25. It is common ground that Mr Donovan did no further work (in fact he was not asked to do any further work) on the joint venture after the end of February 2015. He did offer, in an email of 26th March 2015, to attend quarterly meetings with York Capital, but there was no response to this offer.

26. Unfortunately the parties were unable (save in relation to administration fees) to agree what performance fees should be payable to Mr Donovan and the issue was therefore left unresolved.

27. The first project to be completed was in Reading, where the properties were successfully sold on various dates between August and November 2015. Other sales took place as projects were completed, with the final sales taking place in 2020. The venture proved profitable and distributions were made to the investors, including GAM and Naled. At first, GAM paid over to Naled its full share of these distributions, without deducting any performance fee, thus giving Naled the benefit of the fee exemption agreement. Subsequently, however, it deducted performance fees from Naled's share of the profits, contending that the fee exemption agreement no longer applied as a result of its termination of the joint venture for repudiation by Mr Donovan. GAM declined to pay to Mr Donovan any part of the performance fees received from investors on sale of the properties.

## The claims and counterclaim

28. By these proceedings, Mr Donovan sought to recover:

(1) 40% of the performance fees received by GAM from the investors in the joint venture projects, on the grounds that he was unconditionally entitled to such fees; alternatively

(2) 40% of these fees on the ground that he had wholly or substantially performed the work upon which payment to him was conditional; alternatively,

(3) a *quantum meruit* award in respect of the services that he provided to GAM; and in any event,

(4) the sum of £12,500, being the balance of the total sum that he contended to have been agreed to be due as administration fees.

29. The second claimant, Naled, contended that it was entitled to recover the performance fees which had been deducted by GAM from its share of the proceeds of sale of the joint venture investments.

30. GAM denied liability, contending that Mr Donovan had repudiated the joint venture agreement without performing all of his duties thereunder, so that he was not entitled to any share of the performance fees received, and that the termination of the joint venture agreement had also terminated Naled's right to the benefit of the fee exemption agreement. It counterclaimed to recover from Naled in those cases where Naled had

been credited with the benefit of the fee exemption agreement, saying that the sums should have been deducted from distributions to Naled as the fee exemption agreement no longer applied once the joint venture was terminated.

## The judgment

31. The judge began by considering what Mr Donovan's obligations under the joint venture agreement were, this being the principal factual issue at trial, and reached the conclusions which I have already set out. He then addressed the issue whether Mr Donovan's right to payment of the performance fees was conditional on performance of his own obligations. He identified four general principles:

> "157. On the issue of the alleged conditionality of Mr Donovan's entitlement to fees under the contract, the relevant law can be summarised as follows:
>
> (a) Whether the fulfilment of a contractual obligation by one party is a condition precedent to the contractual liability of another party is a matter for construction of the contract (*Stavers v Curling* (1836) 3 Bing NC 355);
>
> (b) In order to show that the right to remuneration is conditional on prior complete performance of under the contract requires positive evidence of an intention to create such a situation (*Appleby v Myers* (1866-67) LR 2 CP 651;
>
> (c) Such an intention is relatively uncommonly found in contracts of retainer for professional services (*Smales v Lea* [2011] EWCA Civ 1325);
>
> (d) Where payment is found to be conditional upon performance of the entirety of a party's obligations under the contract, the potential severity of this is mitigated by the rule that, where the contract has been substantially performed, a party may recover the contractual sum due subject to abatement or set off as allowed by the law (*Sim v Rotherham* [1987] Ch 216 and *Wiluszenski v Tower Hamlets LBC* [1989] ICR 493."

32. Applying these principles, the judge said at [199] that it was "not obvious why the payment of the performance fee should be dependent upon continuing to perform duties, when some of the duties had already been performed". He concluded, therefore, that:

> "200. On the evidence before me, the promises of performance of contractual duties on the one hand and payment of fees on the other were independent, at least in respect of the so-called performance fee."

33. The judge considered next whether Mr Donovan had repudiated the joint venture agreement as a result of one or both of (1) his email timed at 15:06 on 26th January 2015 and (2) his failure to continue working on the joint venture from around

January/February 2015. As to the email, the judge held that Mr Donovan was not refusing to perform his obligations. As to the fact that he did no further work, the judge held at [206] and [207] that this was not a refusal to perform either but rather "a case of Mr Donovan stepping down from his day-to-day role in agreement with Mr Crader". It was "a jointly agreed position in which Mr Donovan withdrew from all but his passive duties in the joint venture".

34. What then, in the judge's view, was the contractual position after this withdrawal? The judge said at [209] that there were two possibilities: either (1) the joint venture continued to exist "with an understanding that Mr Donovan would not have day-to-day involvement" or (2) "there was consensual termination of the JV agreement". But the question which of these was correct "might be thought academic" as, in either event, there was no change to Mr Donovan's right to performance fees on completion of each project in view of the judge's conclusion on the issue of conditionality.

35. After the judgment stating this conclusion was sent out in draft, GAM asked the judge to decide which of the two possibilities which he had identified was correct, as this might be relevant in the event of a successful appeal on the issue of conditionality. However, the judge declined at [211] to provide this clarification. He did so for two reasons. The first was that Mr Donovan had not had an opportunity to make any submissions on this issue and to request such submissions would cause further delay (preparation of the judgment had already taken six months). The second was because he took the view that all necessary primary facts had been found and that if (contrary to his view) the issue mattered, this court would be as well placed as he was to determine it.

36. In declining to provide this clarification, the judge appears to have overlooked the fact that elsewhere in the judgment he appeared to have formed a view whether the joint venture agreement had come to an end. In fact he had done so twice, but unfortunately in opposite ways. Thus in making his findings of fact he said at [13] that "In around February 2015, the joint venture came to an end", while at [229] when dealing with the fee exemption agreement he said that:

> "… I reject the argument that Mr Donovan was in repudiatory breach of the JV agreement. Consequently, the putative acceptance of that alleged breach cannot have terminated the contract. Further, I find no other evidence that the JV agreement was terminated. It follows that, on my findings, the fee exemption agreement continued."

37. The judge held next that, if he was wrong about the issue of repudiation, the repudiation was accepted by GAM so as to bring the joint venture to an end. If the premise is right, that conclusion is not challenged.

38. The next issue concerned the alternative way in which Mr Donovan had put his case, that (on the assumption that the right to payment was conditional on performance) he was entitled to performance fees because he had wholly or substantially performed his obligations under the contract. The judge rejected this way of putting the case, finding as a fact at [215] that Mr Donovan had not performed his obligations, either wholly or substantially. There appears to be some tension between this conclusion and the judge's earlier finding at [199] that "the reality was that Mr Donovan's experience and expertise

lay mostly in fundraising and managing investor relationships, which had been mostly performed". Taking these findings together, however, the judge must be understood as having found that Mr Donovan had made a significant contribution to the success of the joint venture and had performed most of the obligations for which he was primarily responsible, but that he had nevertheless not done enough to entitle him to payment under the doctrine of substantial performance of entire contracts. As the judge put it at [215], the joint venture involved identifying and securing investment, identifying and purchasing properties, and redeveloping and selling them. By the time Mr Donovan ceased to play any part, much work remained to be done to redevelop and sell the properties, even though the investment has been secured. The judge's rejection of this way of putting Mr Donovan's case is not challenged on appeal.

39. The judge then dealt with Mr Donovan's alternative claim for a *quantum meruit* payment. Because he had already held that the primary claim for the performance fees succeeded on the basis that the right to payment was independent of performance, this issue did not arise. However, the judge held that (1) there was no implied term entitling Mr Donovan to remuneration on a *quantum meruit* basis, (2) it would not be right to deal with the claim based on unjust enrichment without giving the parties an opportunity to make submissions about the decision of this court in *Barton v Gwyn-Jones* [2019] EWCA Civ 1999, which had been decided while the judgment was under preparation, and (3) if Mr Donovan was entitled to a *quantum meruit*, the appropriate figure for the value of his services was £252,570. There is no Respondent's Notice before us claiming any *quantum meruit*. Accordingly we have heard no argument on whether remuneration for the value of Mr Donovan's contribution to the joint venture is a possibility in this case.

40. Finally so far as Mr Donovan's claims were concerned, the judge found that the parties had reached agreement in relation to the administration fees and that Mr Donovan was entitled to payment of a further £12,500. This conclusion is not challenged.

41. The judge dealt next with the claim by Naled, holding that the fee exemption agreement was part of the joint venture agreement and not distinct from it, so that termination of the joint venture would also operate to terminate the fee exemption agreement. As already noted, however, the judge went on to say in this part of his judgment at [229] that the joint venture had not been terminated, with the consequence "that, on my findings, the fee exemption agreement continued".

42. The result of these conclusions was that Mr Donovan was entitled to recover his share of the performance fees (amounting to £705,450) and to a further £12,500 in respect of administration fees, and that Naled was entitled to payment of £510,438 in respect of performance fees deducted from distributions made to it.

43. In a separate judgment the judge held that Mr Donovan was entitled to interest pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 on the performance fees on the basis that the joint venture was a "contract for the supply of services" and that the obligation to pay them was a "qualifying debt" within the meaning of section 3(1) of the Act; but that Naled's claim did not fall within the terms of the Act as it was simply a claim for the balance of its share of the profits of the joint venture.

## The appeal

44. Mr Paul Lowenstein QC for GAM advances six grounds of appeal:

(1) first, that the judge was wrong to find that Mr Donovan's right to receive the performance fees was independent of his obligations under the joint venture agreement;

(2) second, that the judge was wrong to find that Mr Donovan had not renounced the agreement by sending his email at 15:06 on 26th January 2015;

(3) third, that the judge was wrong to find that Mr Donovan was not in repudiatory breach of the agreement for failing to continue to work after the end of January/February 2015;

(4) fourth, that the judge's findings as to whether the agreement had been terminated were inconsistent, and that inconsistency should be resolved by finding that it had been terminated;

(5) fifth, that the judge was wrong to find that GAM was liable to pay interest to Mr Donovan under the 1998 Act; and

(6) sixth, that the judge was wrong to dismiss GAM's counterclaim to recover fee rebates given to Naled in January and March 2016.

**Ground 1 – was the right to receive performance fees conditional on performance of Mr Donovan's obligations under the joint venture agreement?**

45. It is common ground between the parties that the question whether a party's right to receive contractual payment is conditional on performance of its obligations under the contract must depend upon the true construction of the contract in question. But that creates difficulties in a case like the present, where the contract is not contained in a written instrument, but instead has to be pieced together from a combination of writing, oral communications and the parties' conduct. In the typical case when a contract is entirely in writing, the process of construction will focus on the language of the relevant contractual terms, set in the context of the contract as a whole and its commercial background. Where the contract is partly in writing, but also to be found in oral communications and the parties' conduct, the process is likely to be less clear-cut.

46. It is common ground also that the question of construction must be determined as at the date when the contract is concluded. To the extent that the judge's reasoning on this question depended on the fact that Mr Donovan had performed some of his obligations, Mr Andrew Green QC for the respondents did not seek to support that reasoning.

47. For GAM Mr Lowenstein submitted, relying on cases such as *Cutter v Powell* (1795) 6 TR 320 and, in more recent times, *Tito v Waddell (No 2)* [1977] Ch 106 at 297, *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] EWHC 2178 (Ch), [2003]2 All ER (Comm) 823 at [52] and the Australian case of *Sydney Attractions Group Pty Ltd v Shulman* [2013] NSWSC 858 at [45], that there is a presumption that obligations are conditional or dependent, rather than independent. He submitted that the judge was wrong to take the opposite starting point and in particular that there was no support in *Appleby v Myers* for so doing. He accepted, however, that the application of any such presumption will be fact sensitive and cited *Segnit v Cotton* (Court of Appeal, 9th

December 1999) as an example of a joint venture case where the facts were, in some respects, similar to those of the present case.

48. Applying these principles to the circumstances of the present case, Mr Lowenstein submitted that the object of the joint venture was to redevelop and sell the properties and to split the profits thereby earned, so that the right to any performance fee could only accrue once the properties were sold, that is to say at the conclusion of each project. Each party's fundamental obligation as found by the judge was to work towards the success of the joint venture, that being what would generate a profitable sale and hence the accrual of a right to performance fees, and it was inherent in this obligation that in order to earn a right to a split of the performance fees payable by investors each party had to remain involved in seeing the project through to a successful conclusion.

49. For Mr Donovan, Mr Green did not seek to support the judge's approach that there was a presumption, in the absence of "positive evidence", that a payment obligation is unconditional; nor did he suggest that *Appleby v Myers* is authority for such an approach. (In fact it addresses a different question, whether a party is entitled to part payment when a contract is terminated prematurely without fault). Mr Green recognised that there are certain categories of case in which it has been held that payment is conditional on performance, but submitted that the present case does not fall within those categories. Rather, it was necessary to focus on the terms of the particular contract. In the present case, that led to the conclusion that the right to payment of performance fees was not conditional on substantial performance by Mr Donovan of his obligations under the joint venture agreement.

50. In circumstances where it is common ground that the issue is one of construction and that, if any presumption exists either way it can readily be displaced on the particular facts of the case, I do not find it helpful to analyse the cases cited to us. To the extent that they illustrate any general rules, they must be seen against the factual background with which they were concerned. The present case does not fall into any recognised category in which it can be said that there is a presumption one way or the other. Even *Segnit v Cotton*, although a case about a joint venture, does not in my view give rise to any presumption about how such contracts should be interpreted. I prefer to focus on the nature and terms of the parties' joint venture agreement in this case.

51. This was a contract in which the parties agreed to work together with a view to a profitable sale of the properties, which would generate performance fees payable by investors. Those fees would then be split between the parties in the agreed division. Although their general obligation was to work towards the success of the venture, they chose not to allocate specific responsibilities to either party, though no doubt contemplating that each party would contribute primarily in accordance with his area of particular expertise. They must have contemplated that the joint venture would continue, with each party participating actively until the properties were sold, albeit with Mr Donovan's day-to-day involvement likely to reduce to some extent once the outside investors with whom he was particularly concerned had been secured.

52. That said, Mr Green was right to point out that there is nothing in the express written terms of the agreement, that is to say in the Heads of Terms dated 6$^{th}$ March 2013, to suggest that the right to a share of the performance fees was to be conditional on performance or substantial performance of either party's obligation. Nor was it suggested (and certainly there is no finding) that anything was ever agreed orally about

this. Rather, the only express contractual term relating to performance fees was that the fees received from investors would be split, with 55% (later increased to 60%) for GAM and 45% (later reduced to 40%) for Mr Donovan. Mr Green submitted, therefore, in my view with some force, that any term to the effect that Mr Donovan's right to his agreed share of performance fees received from investors was conditional on substantial performance of his obligations would have to be implied.

53. In my judgment there is no necessity to imply such a term. The agreement works well enough without it. Moreover, such a term would be likely to generate disputes about whether what might be relatively minor failings meant that a party had not substantially performed its obligations and had thereby lost its right to its share of the performance fees. Mr Lowenstein sought to avoid that problem by limiting any conditionality to what he referred to as the "core obligation" and by drawing a distinction between what he described as cases of nonfeasance (where the obligation was not performed at all) and misfeasance (where it was performed badly). To my mind, however, that compounds the likelihood of dispute rather than avoiding it.

54. Rather, I would hold as a matter of construction of the agreement that, provided that the joint venture continued up to the time when a property was sold at a profit, a party's right to a share of the performance fees thus generated was unconditional. I add the proviso because it seems to me that it goes without saying that the parties would have intended that there would be no right to a performance fee if the joint venture terminated for repudiation by one of the parties before the properties were sold. Any sale thereafter would not be a sale by the joint venture.

55. This seems to me to be a commercially sensible construction. If the joint venture continued to completion, the performance fees generated would be split in accordance with the parties' agreement. If it terminated because one of the parties repudiated its obligations before any right to a performance fee had accrued, that party would have no right to participate in those fees. If there was a breakdown in the parties' relationship but the agreement nevertheless continued, the right to performance fees would not be affected but any party who had caused loss as a result of failing to perform its obligations would be liable in damages.

56. It is, therefore, critical to consider whether Mr Donovan was in repudiation of his obligations under the joint venture agreement as a result of the exchanges in January 2015. This is the subject of grounds 2 and 3.

## Ground 2 – Renunciation

57. It is GAM's case that the email sent by Mr Donovan at 15:06 on 26th January 2015 was a repudiation by renunciation of his obligations under the joint venture agreement, which was accepted by Mr Crader's response at 15:08, thereby bringing the agreement to an end.

58. The applicable principles are agreed to be as stated by the judge:

> "158. As to the argument of repudiation/renunciation, the relevant principles are:

> (a) Repudiation by renunciation arises where a party evinces an absolute intention not to perform its duties under a contract (*Spettabile Consorzio Veneziano v Northumberland Shipbuilding Co* (1919) 121 KT 627, approved in *Woodar Investment Development v Wimpey Construction* [1980] 1 WLR 277).
>
> (b) The aggrieved party accepts a repudiation by clear and unequivocal conduct showing that it is treating the contract [as being] at an end (*Vitol SA v Norelf Ltd* [1996] AC 800)."

59. To this I would add that, as explained in *Chitty on Contracts*, 33rd Ed (2019), Vol 1, para 24-019, the renunciation must be clear and unequivocal.

60. The consequences of termination for repudiation were explained by Justice Dixon in the Australian case of *McDonald v Denny Lascelles Ltd* (1933) 48 CLR 457, 476-7 in a passage approved by the House of Lords in *The Dominique* [1989] 1 AC 1056, 1098-9:

> "When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected."

61. Mr Lowenstein submitted that Mr Donovan's email at 15:06 on 26th January 2015 was a renunciation: the parties' relationship had broken down over disagreements about the cost sharing arrangements; Mr Donovan was making clear that he was not prepared to continue with the current agreement, would not be suggesting different arrangements, and insisted on leaving the joint venture; this was not merely a suggestion, but a firm position which was not open for discussion.

62. I agree with the judge that Mr Donovan's email was not a renunciation of the agreement, but was part of a discussion as to the appropriate way forward. The background was that both parties recognised that the joint venture agreement was not working as they had hoped that it would and that the two men were not working together well. It was important to them to find a solution which did not jeopardise their ongoing investment in the Lime Street project. As Mr Crader put it in his email dated 11 December 2014 which initiated this discussion, "It is really important that this rather minor issue doesn't spoil what I think can be profitable for us both though the vast majority of the profits will come from lime".

63. In that context it was Mr Crader who first suggested termination of the joint venture, with the proposal that Mr Donovan should buy him out. (The judge was mistaken to say at [205] that "the first suggestion of the possibility of Mr Donovan leaving the joint venture came from Mr Crader", but as Mr Crader was the first to suggest terminating the joint venture, this mistake was immaterial). Thereafter the discussion was about

who should leave: Mr Donovan said that it was logical that he should leave because it was Mr Crader who had the expertise in property development which would be needed during "the build phase", while Mr Crader was urging that Mr Donovan should buy him out. This was the context for Mr Donovan's email at 15:06. It was not a statement that he was abandoning the joint venture come what may. Rather it was a reiteration of his view that it would be best if he were the one to leave, combined with the recognition that there would need to be a discussion with York Capital to ensure that they were comfortable with the new situation.

64. It is apparent from Mr Crader's response at 15:08 ("Ok then let's discuss how we tell York about it") that he did not view Mr Donovan's email as a renunciation of the agreement. If he had thought that it was, his response would have been in much stronger terms. As it was, he accepted the suggestion that it would be Mr Donovan who would leave, but acknowledged that there were issues, in particular what to say to York Capital, which would need to be worked out. Although the judge concluded that Mr Crader's response would have been an acceptance of the repudiation *if* Mr Donovan's email had amounted to a renunciation, it is artificial to view Mr Crader's response in that way when considering whether Mr Donovan's email did amount to a renunciation. In considering that question, it is legitimate to view the parties' exchanges as a whole. In circumstances where the parties clearly did not regard the particular messages at 15:06 and 15:08 as a renunciation which had been accepted with the result that the joint venture was there and then terminated, it would be remarkable for the court to impose that analysis upon them.

## Ground 3 – Repudiation

65. GAM's alternative case on repudiation is that Mr Donovan was in repudiatory breach of the joint venture agreement because he ceased to perform his work under the joint venture "from January/February 2015". In my judgment this way of putting the case adds nothing to the case on renunciation. The exchanges on 26th January 2015 and thereafter established (to put it neutrally) that Mr Donovan would step back from day to day involvement, that he would become "a passive investor", and that his "exit" would take effect from 28th February 2015. The judge found at [206] that "the failure to perform was simply a case of Mr Donovan stepping down from his day-to-day role in agreement with Mr Crader" and that GAM "has been unable to identify a single instance of Mr Donovan being asked to perform work and his declining to do so". Those findings are fatal to a case of repudiation based on ceasing to perform work. They do potentially raise a question as to the status of the joint venture agreement once Mr Donovan stepped down in this way, but that is the subject of ground 4, to which I now turn.

## Ground 4 – Inconsistent findings whether the joint venture agreement remained in force

66. I would accept that the judgment contains inconsistent statements as to whether the joint venture agreement remained in force once it was agreed that Mr Donovan would step down from day to day involvement. As I have already pointed out, the judge stated at [13] that the joint venture came to an end in around February 2015 and at [229] that it (including the fee exemption agreement) continued. To my mind these statements are contradictory. However, it is important to note that the *only* case as to termination of the joint venture agreement advanced by GAM in the court below was that it terminated as a result of the acceptance by GAM of repudiation by Mr Donovan. Mr Donovan's

case was that the joint venture continued in being, or alternatively, if it was terminated, was terminated consensually. GAM denied both of these possibilities, but never suggested that it would make any difference to Mr Donovan's claim which of them was correct. On the contrary, counsel then appearing expressly accepted that in order to defeat Mr Donovan's claim for performance fees GAM needed to succeed on the issue of repudiation.

67. Accordingly, when the judge stated at [209] that it "might be thought academic" to determine which of the two possibilities (continued existence of the joint venture or consensual termination) was correct, he was correctly reflecting the way in which the case had been argued before him. Nobody had suggested that it did matter once GAM's case on repudiation had been rejected and neither party had made any submissions about this. The fact that nobody had suggested this may well explain the contradictory statements made by the judge: it was not an issue on which he had needed or had been asked to focus. The judge was therefore right, in my judgment, not to decide the issue: it had not been argued before him; it could not fairly be decided without giving Mr Donovan an opportunity to make submissions; and it is not the purpose of sending out a draft judgment to invite new submissions on a point not argued.

68. GAM now submits on appeal that this court should determine the issue which the judge declined to decide, and should do so by holding that there was a consensual termination of the joint venture. It does so in order to argue that, even if there was no repudiation by Mr Donovan, nevertheless the joint venture terminated before his right to performance fees accrued. I would not permit GAM to advance this argument, to which Mr Green objected strongly. The normal rule is that a party must advance its whole case at trial. In the memorable phrase of Lewison LJ in *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114], "The trial is not a dress rehearsal. It is the first and last night of the show". Although new points are sometimes permitted to be advanced for the first time on appeal, that will not be so where the new point may cause unfair prejudice. In my judgment it would be unfair to allow GAM to argue that Mr Donovan lost (or gave up) his right to performance fees as a result of consensual termination of the joint venture agreement. Precisely how, when and on what terms the joint venture terminated, if it did, was never explored in the evidence at trial and even now the only case advanced by GAM, which I would reject, is that there was a consensual termination on 26th January 2015 as a result of the exchanges which, primarily, are said to have amounted to an acceptance of repudiation.

69. The judge expressed the view at [211] that, if necessary, this court would be in a position to decide whether the true analysis was that the joint venture continued in existence or that it terminated consensually, on the ground that this would be "a matter not of primary fact finding but of inference and legal interpretation from other findings that have already been made". I do not agree. Since the findings of fact made by the judge were made by reference to a case of accepted repudiation, which was the only case then being advanced, it would not be safe for this court to embark on the exercise of drawing inferences from findings of fact which were made with no reference to a case of consensual termination when that case had not been addressed in evidence or submissions.

70. Accordingly, once the only case on termination advanced by GAM at trial (i.e. accepted repudiation) is rejected, it has not been shown that the joint venture terminated, with the consequence that Mr Donovan did not lose his right to performance fees.

### Ground 6 – the fee exemption agreement

71. It is common ground that GAM applied the fee exemption agreement in respect of payments to Naled from the Farnborough and Reading projects in January and March 2016, but not thereafter. GAM counterclaimed for the value of the fee exemption in respect of Farnborough and Reading. It was accepted on both sides, however, that Mr Donovan's claim and GAM's counterclaim relating to the fee exemption agreement would follow the outcome of the appeal in relation to the performance fees. It is therefore unnecessary to say anything further about this ground.

### Disposal – liability

72. For these reasons I would dismiss the appeal from the judge's liability judgment.

### Ground 5 – Interest

73. In a separate judgment the judge held that Mr Donovan was entitled to interest pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 on the performance fees which GAM ought to have paid to him. GAM contends that he was wrong to do so.

74. Section 1 of the 1998 Act provides that it is an implied term in a contract to which the Act applies that any qualifying debt created by the contract carries simple interest subject to and in accordance with Part 1 of the Act. It is common ground that the obligation to pay performance fees to Mr Donovan was a qualifying debt and that the joint venture agreement was a contract for the supply of services to which the Act applied.

75. Section 4 of the Act provides that:

> "(1) Statutory interest runs in relation to a qualifying debt in accordance with this section (unless section 5 applies).
>
> (2) Statutory interest starts to run on the day after the relevant day for the debt, at the rate prevailing under section 6 at the end of the relevant day.
>
> (3) Where the supplier and the purchaser agree a date for payment of the debt (that is, the day on which the debt is to be created by the contract), that is the relevant day unless the debt relates to an obligation to make an advance payment. The date so agreed may be [a] fixed one or may depend on the happening of any events for the failure of an event to happen. …
>
> (4) Where the debt relates to an obligation to make an advance payment, the relevant day is the date on which the debt is treated by section 11 as having been created."

76. Section 11 provides that:

> "(1) A qualifying debt created by virtue of an obligation to make an advance payment shall be treated for the purposes of this Act

> as if it was created on the day mentioned in subsection (3), (4) or (5) (as the case may be).
>
> (2) In this section '*advance payment*' means a payment falling due before the obligation of the supplier to which the whole contract price relates ('the supplier's obligation') is performed, other than a payment of a part of the contract price that is due in respect of any part performance of that obligation and payable on or after the day on which that part performance is completed.
>
> (3) Where the advance payment is the whole contract price, the debt shall be treated as created on the day on which the supplier's obligation is performed. …"

77. This part of the appeal was argued on behalf of GAM by Mr James Kinman. Mr Kinman accepted, as I have said, that the obligation to pay performance fees was a qualifying debt to which the Act applied. It followed, therefore, that the debt carries statutory interest subject to and in accordance with the provisions of the Act. Mr Kinman submitted, however, that interest under the Act never began to run because (1) on the basis that performance fees were payable even though Mr Donovan had not performed all of his obligations under the joint venture agreement, the debt related to an obligation to make an advance payment, (2) accordingly, the debt was treated as created on the day on which his obligation was performed, and (3) because his obligation never was performed, there never was any "relevant day" and interest under the 1998 Act never started to run.

78. I would reject this analysis which, if correct, would plainly defeat the purpose of the Act. The obligation to pay the performance fees to Mr Donovan arose, as the judge found, at or around the time the fees were received by GAM. That was "the happening of an event" within the meaning of section 4(3). Interest ran under the Act from that time pursuant to section 4(1). The "advance payment" provisions had no application: by the time when the performance fees were received by GAM and the obligation to pay Mr Donovan accrued, he had done everything necessary on his part to be entitled to payment.

79. Accordingly I would also dismiss the appeal against the judge's award of interest.

**Lord Justice Arnold:**

80. I agree.

**Lady Justice King:**

81. I also agree.

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## ORDER

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**UPON** the Defendant's appeal by notice filed on 10 July 2020 against the Orders of HHJ Pearce dated 8 and 24 June 2020

**AND UPON** Permission to Appeal having been granted by order of the Court on 26 October 2020.

**AND UPON** hearing Paul Lowenstein QC and James Kinman for the Defendant and Andrew Green QC and Dominic Howells for the Claimants

**IT IS ORDERED THAT**

1. The Defendant's appeal be dismissed

2. The Defendant do pay the Claimants' costs of the appeal, to be assessed if not agreed

3. The Defendant may, if so advised, file any application for permission to appeal accompanied by short written submissions in support by no later than 4pm on 19 May 2021

4. The Respondents need not respond to any such application unless directed to do so by the court.

Dated 12th May 2021