Neutral Citation Number: [2021] EWCA Civ 844

Case No: A4/2020/1181

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT
His Honour Judge Pelling QC (sitting as a High Court Judge)
CL-2019-000112

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/06/2021

Before:

LORD JUSTICE BAKER
LADY JUSTICE CARR
and
LORD JUSTICE LEWIS

- -

Between:

EMFC LOAN SYNDICATIONS LLP	**Appellant**
- and -	
THE RESORT GROUP PLC	**Respondent**

- -
- -

Derek Sweeting QC and William Chapman (instructed by **Shepherd and Wedderburn LLP**) for the **Appellant**
Scott Allen (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing dates: 19 & 20 May 2021

- -

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 10.00am 08 June 2021."

LADY JUSTICE CARR DBE:

Introduction

1. By a letter dated 12 November 2015 the Respondent, The Resort Group plc ("TRG"), engaged the Appellant, EMFC Loan Syndications LLP ("EMFC"), to provide services for the purpose of raising long-term financing for TRG in the form of senior and/or mezzanine loan facilities for up to €130 million ("the Contract").

2. Following the arrangement of two loan facilities for TRG in May 2016 from Helios Investment Partners ("Helios") in the total sum of €57 million ("the loan facilities"), EMFC claimed an entitlement to commission of €775,663. It also claimed outstanding payment for work fees totalling €70,000. TRG denied any liability to EMFC, initially on the basis that EMFC, through its agent, Mr Richard Addington ("Mr Addington"), had repudiated the Contract following a disagreement in January 2016, which repudiation TRG had accepted. TRG subsequently (re-)amended its case to deny any liability for commission on the additional basis i) that the Contract contained an implied term that EMFC was only entitled to commission if it was "an effective cause" of the loan facilities ("the effective cause term") and ii) that EMFC had not been any such cause.

3. In an oral judgment delivered remotely on 24 March 2020 ("the Judgment") following a three-day trial between 2 and 4 March 2020 under the Shorter Trials Scheme[1], HHJ Pelling QC (sitting as a High Court Judge) ("the Judge") found that EMFC had not repudiated the Contract and so was entitled to damages in respect of the work fees in the sum of €70,000. However, he rejected EMFC's claim for commission on the basis of his construction of the Contract (that the effective cause term was to be read into the Contract), alternatively on the basis that the effective cause term fell to be implied and had not been satisfied by EMFC's contribution. In a subsequent written ruling, he ordered EMFC to pay all of TRG's costs of the action.[2]

4. EMFC has permission to advance the following grounds of appeal:

   i) Ground 1: The Judge was wrong to consider that, as a matter of construction, clause 6.3 of the Contract was to be construed as subject to the effective cause term, alternatively wrong to imply the effective cause term into the Contract;

   ii) Ground 2: The Judge's decision to award TRG all of its costs fell outside the admittedly generous ambit of his discretion. EMFC should have been awarded its costs (with reduction if appropriate).

5. TRG has permission to cross-appeal on the basis that the Judge was wrong to find that EMFC did not repudiate the Contract on 16 January 2016 (which repudiation TRG accepted) and so was wrong to find that EMFC was entitled to damages in respect of the work fees.

6. As will be seen below, it is convenient to address Ground 1 first; TRG's cross-appeal secondly (even though, if successful, it would effectively dispose of the appeal on

[1] In Practice Direction 57AB
[2] Subject to an earlier costs order made in EMFC's favour by Butcher J.

liability and indeed the original claim as a whole); and finally (and so far as necessary) Ground 3.

7. For the purpose of resolving the issues on appeal the court has had the benefit of written and oral submissions from Mr Sweeting QC and Mr Chapman for EMFC and Mr Allen for TRG.

The background facts

8. The relevant facts (and the Judge's findings) are set out in some detail in the Judgment. What follows is a summary only.

9. TRG is a company incorporated in Gibraltar. Its principal business is the development of holiday resort hotels, primarily in Cape Verde, an archipelago off the West African coast. Mr Robert Jarrett ("Mr Jarrett") was (and remains) its chairman and principal shareholder. Mr Andrew Scott ("Mr Scott") was its Chief Financial Officer and Mr Charles King ("Mr King") its Chief Operating Officer.

10. Mr Addington was a self-employed consultant whose background was in investment banking and who had particular experience in the DFI market. He operated through City Torch Limited and Andraste Capital Limited. In his dealings with TRG the subject of this litigation he acted through (and for and on behalf of) EMFC. EMFC provides consultancy services to businesses seeking to raise finance for development projects. Its ultimate owner and sole manager was Ms Sophie Papasavva ("Ms Papasavva").

11. Investec Bank plc ("Investec") is an international specialist banking and asset management group specialising in the commercial lending sector which was also engaged by TRG. TRG's principal adviser at Investec was Mr Jason Green ("Mr Green"), then head of debt advisory.

12. In 2015 TRG wished to raise finance to expand and develop its business. Initially it attempted to raise equity funding by an initial public offering ("IPO") of shares. In May 2015 it entered into an agreement with North Square Blue Oak Limited ("NSBO") to assist it in that regard. NSBO was the vehicle through which another financial advisor called Mr Laurie Pinto ("Mr Pinto") operated. TRG also appointed Investec as its corporate advisor in relation to the possibility of an IPO.

13. By June 2015 TRG's focus for fund-raising purposes had switched from equity funding to borrowing. However, the possibility of an IPO remained and in any event TRG wished to maintain what was a strong relationship with Investec. Investec calculated that the level of sustainable debt for TRG was €130million. That figure became TRG's target loan figure in respect of which TRG then sought long-term senior and/or mezzanine loan facilities from one or more lenders.

14. Two sources of funding were under consideration: syndicated constitutional lending or lending by DFIs. The requirements of DFI lenders differ from commercial lenders. Amongst other things, the concern of DFIs, which are established for the purpose of lending to developing nations, is to ensure that the funding provided remains in the developing nation in question. Unlike commercial lenders, they will expect the financing to be ringfenced accordingly.

15. Following an introduction by Mr Pinto to another advisor, Africa Merchant Capital, TRG was introduced on 6 July 2015 to Helios, a private equity firm specialising in the African market. Discussions between TRG and Helios progressed. By way of example, on 29 July 2015 NSBO sent Helios an Information Memorandum on TRG and on 17 September 2015 Helios sent a draft term sheet to TRG for discussion purposes.

16. Four days after TRG's introduction to Helios, on 10 July 2015, Mr Pinto also introduced TRG to Mr Addington, who had significant experience in obtaining finance from DFIs. The Judge accepted that it was made clear to Mr Addington by TRG from the outset that he would have to work with Investec. In an email sent by Mr Scott to Mr Addington on 18 October 2015, Mr Scott wrote as follows:

> "The Investec mandate is twofold
>
> - phase 1 is an assessment of our optimal capital structure, for now through to potential IPO, and identifying potential lenders to approach;
>
> - phase 2 is to carry out the debt raise, to completion.
>
> Phase 2 is, in essence, identical to your proposal, but without the specialist African element if we seek to fish in that pool. Hence, I would need to have you work hand in hand without upsetting either.
>
> I think this is possible but we need to broach this with invested [sic] which we shall do this week…"

17. Mr Addington responded as follows:

> "I still believe that TRG is effectively doubling its fees and adding an additional layer of complexity as Investec does not have the appropriate track record and the best option would be to cancel Phase 2 of the mandate (or suspend it) so that we can raise the most appropriate funding for the Group, especially as I assume very little work has been done to date. Alternatively, TRG could carve out the list of names I provided in the PP…and we can raise the best financing for the Group without affecting the Investec mandate. That said, it is obviously TRG's choice as to how it wishes to proceed and I've held joint mandates with a number of institutions….though not Investec, which again, points to its not operating in this market and can do so on this occasion. I would recommend that we run the process through to ensure a successful close but again it is TRG's choice…"

18. On 20 October 2015 TRG entered into a commission agreement with Investec.

19. Following further negotiations between TRG and Mr Addington and Ms Papasavva, EMFC and TRG entered into the Contract.

The Contract

20. The Contract (including a short schedule) is contained in a letter dated 12 November 2015 from EMFC to TRG. It runs to 12 pages and was signed by Ms Papasavva for

EMFC and Mr Scott for TRG. The key contractual clauses are set out in full in Appendix A to this judgment.

21. By way of preamble the Contract recorded:

> "Following recent discussions between the Parties, in relation to [TRG's] intentions to raise the Facilities, we are pleased to set out in this Engagement Letter the terms and conditions under which we are prepared to offer our loan execution support services to [TRG] for the purpose of raising the Facilities."

22. The following terms are of particular note:

> "**1. Appointment**
>
> 1.1 By accepting the terms of this Engagement Letter, [TRG] agrees to appoint EMFC to assist in the execution of the Facilities and EMFC agrees to fulfil such appointment.
>
> 1.2 EMFC shall be working in conjunction with [TRG's] debt advisor, Investec Bank plc.
>
> 1.3 Until this Engagement Letter terminates in accordance with paragraph 14 (Termination), no other person shall be appointed to execute the Facilities without the prior written consent of EMFC.
>
> **2. Scope of Work**
>
> 2.1 EMFC's execution of the Facilities on behalf of [TRG], will entail undertaking certain tasks to be agreed with Investec…as soon as possible after the date of this Engagement Letter (the "Scope of Work"), such Scope of Work to include all tasks typical in a mandate of this type. A typical scope of work of EMFC's loan execution support services is attached as Schedule 1...
>
> 2.3 [TRG] shall, and shall ensure that the other members of the Group, give any assistance which EMFC reasonably requires in relation to fulfilling its Scope of Work including but, not limited to:…
>
> e. using best efforts to ensure that execution of the Facilities benefits from the Group's existing lending relationships…
>
> **3. Conditions**
>
> …
>
> **5. Clear Market**

5.1 During the period from the date of this Engagement Letter to the date of signing of the Facilities Documents, [TRG] shall not announce, enter into discussions to raise, raise or attempt to raise any financing in the international or any relevant domestic loan, debt, bank, capital or equity market(s) (including, but not limited to, any bilateral or syndicated facility, bond or note issuance or private placement) without the prior written consent of EMFC…

6. Fees, Costs and Expenses

For delivery of its loan execution support services, [TRG] shall pay to EMFC the following fees:

6.1 Irrevocable, non-refundable, unconditional work fees equating to €17,500…per month, first due immediately upon signing of this Engagement Letter and thereafter monthly in advance on the same calendar date…subject to a maximum of twelve monthly payments.

6.2 A one-off, irrevocable, non-refundable, conditional Information Memorandum fee equating to €125,000…(the "IM Fee")…

6.3 A one-off, irrevocable, non-refundable, conditional completion fee equating to:

1. 1.65% on the first €30,000,000…of Facilities raised; and

2. 2.00% on the remainder of the Facilities raised,

calculated on the gross amount of the Facilities as referenced in the Facilities Documents (the "Completion Fee").

6.4 The Completion Fee shall be paid net of the following fees:

1. 50% of the first six monthly Work Fees (maximum €52,500 in aggregate)

2. 80% of the next six monthly Work Fees (maximum €84,000 in aggregate)

3. 100% of the IM Fee (€125,000).

6.5 The Completion Fee shall become due on the date of signing of each and any Facilities Documents and payable at the latest, from the proceeds of first drawdown of the Facilities…

14. Termination

…

> 14.2 This Engagement Letter may be terminated by either party giving 15 Business Days' written notice to that effect to the other party in which event all obligations of the parties in relation to this appointment shall, save as referred to in paragraph 16 (Survival) terminate at 5pm (London time) on the last day of that period of notice…
>
> 14.4 If, at any time within the first 6 months after the termination of this Engagement Letter, [TRG] consummates the Transaction or another transaction which is similar in substance to the Transaction in raising the Facilities, [TRG] shall pay to EMFC the fees, costs and expenses calculated in accordance with paragraph 6…including 100% of the Completion Fee as calculated on the basis of drawn amounts with respect to such transaction or transactions, in addition to any expense reimbursement otherwise owing pursuant to paragraph 6…
>
> 14.5 If, at any time after the first 6 months but prior to twelve months of terminating this Engagement Letter, [TRG] consummates the Transaction or another transaction which is similar in substance to the Transaction in raising the Facilities, [TRG] shall pay to EMFC the fees, costs and expenses calculated in accordance with paragraph 6…including 50% of the Completion Fee as calculated on the basis of drawn amounts with respect to such transaction or transactions, in addition to any expense reimbursement otherwise owing pursuant to paragraph 6…
>
> **16. Survival**
>
> 16.1 Except for paragraphs 2 (Scope of Work), 3 (Conditions), 4 (Material Adverse Change), and 14 (Termination) the terms of this Engagement Letter shall survive and continue after the Facilities Documents are signed.
>
> 16.2 Without prejudice to paragraph 16.1, paragraphs 6 (Fees, Costs and Expenses), 7 (Payments), 8 (Indemnity), 9 (Limitation of Liability), 10 (Confidentiality), 11 (Publicity/Announcements), 12 (Conflicts), 14 (Termination), 16 (Survival) to 20 (Governing Law and Jurisdiction) inclusive shall survive and continue after termination of the obligations of EMFC under this Engagement Letter."

Post-Contract events

23. It was common ground that EMFC began performing its contractual obligations on 12 November 2015. EMFC and Investec agreed a division of tasks. Investec agreed to provide the financial modelling and EMFC agreed to provide the Information Memorandum ("the IM"). The Judge found that the work carried out by EMFC consisted primarily of preparing a financial model in conjunction with the financial

modeller engaged by Investec and preparing the IM critical to the attempt to attract lenders.

24. On 23 December 2015 Ms Papasavva presented the IM to TRG's board in Cape Verde. The Judge described the IM as a "long, formal and complex document" prepared principally by Ms Papasavva in conjunction with Mr Addington and designed to appeal to DFIs. It was well received. The board authorised the IM to be sent out to prospective lenders on the proposed launch date of 4 January 2016. Further meetings with TRG's board were planned in Cape Verde for the week commencing 18 February 2016.

25. However, having not previously made any comment of substance on the IM, in early January 2016 Mr Green indicated that he wanted amendments to the IM, to be targeted at raising facilities from commercial lenders. EMFC on the other hand wanted to target DFIs and meet their (different) requirements. The Judge described Mr Green's contribution as being made "very late in the day because the document was due to be launched to prospective lenders in the first week in January 2016. It was undoubtedly extremely frustrating for both Mr Addington and Ms Papasavva, each of whom had been working on the [IM] in highly pressured circumstances and had obtained approval of the document" from TRG's board. Mr King, however, was prepared to allow Mr Green's intervention because he valued TRG's connection with Investec and wanted to get the IM right.

26. The differences between EMFC and Investec became the source of tension in the context of an anticipated "due diligence" meeting in Cape Verde scheduled for 19 January 2016 to be attended by, amongst others, representatives of Helios. Helios was anxious to see at least part of the IM and it was considered important to keep Helios interested at that stage. The Judge accepted Ms Papasavva's evidence that it was unusual in her experience for potential lenders to attend such a meeting, and highly unusual for potential senior lenders to attend at the same time as a potential subordinated lender such as Helios. There were also arrangements for meetings to take place in Cape Verde between Investec and EMFC with senior political, regulatory and other officials between 19 and 21 January 2016.

27. The Judge put it as follows (at [26]):

> "The difficulty was the result of wanting to approach two different lending markets with different needs by reference to [a] single document using two advisors, each of which exclusively, or very close to exclusively, had experience of each different lending market. It was compounded…by Mr Green's failure to engage timeously in the process…."

28. The Judge set out in detail the events which took place between 14 January and 4 February 2016, together with his findings where necessary, at [31] to [43] of the Judgment.

29. At the heart of TRG's case on repudiation was an email sent by Mr Addington to Mr Scott on 16 January 2016 in the following terms:

> "Andrew

> The more I think about where we are the more I would like to suspend/terminate our mandate and give Investec the chance to raise the money by itself. We will of course pass on all the contact names to date and happily engage in 2/3 months when they fail.
>
> Can I please ask the team not to travel next week as it will cost me personally and I do not believe we will close carrying such a dead weight and I understand that Robert is closely engaged with Investec.
>
> I am happy tears [sic] refund payments made to date.
>
> Regards
>
> Richard"

("the 16 January email")

30. It was TRG's case below that by the 16 January email and in a subsequent conversation between Mr Addington and Mr Scott later that same day, EMFC acted in anticipatory and/or repudiatory breach of the Contract.

31. TRG's case was that it accepted EMFC's repudiation in a subsequent telephone conversation after receipt of the 16 January email, alternatively by email on 4 February 2016. It was common ground that EMFC did no further work for TRG after 16 January 2016, although it did grant TRG an irrevocable licence to use the IM on 28 January 2016.

32. Invoices for work fees rendered by EMFC to TRG under the Contract between February and May 2016 went unpaid.

33. On 5 May 2016 Helios Credit Genpar Ltd (as arranger), a company within the Helios group, and TRG (as borrower) entered in a loan facility for a total of $57million divided into Facility A (for $17 million) and Facility B (for $40 million). In the event, only Facility A was ever drawn down (on 2 June 2016) and Facility B simply lapsed (on 6 February 2017).

34. On 6 December 2016 EMFC sent a completion fee invoice to TRG. That also went unpaid.

35. On 18 February 2019 EMFC commenced proceedings against TRG on the invoices.

Trial and the Judge's conclusions on the issues

36. Ms Papasavva and Mr Addington gave evidence at trial, as did Mr King. A statement from Mr Scott was admitted as hearsay evidence under the Civil Evidence Act 1995.

37. Having set out the facts, the Judge considered first the question of repudiation. Having analysed the evidence, including Mr Scott's contemporaneous notes of his first conversation with Mr Addington after the 16 January email, he concluded (at [47] and [48]) that Mr Addington's position both in the 16 January email and in the

course of the first subsequent telephone conversation was (and was understood by both parties to be) conditional only. Nor was there a refusal by EMFC to travel to Cape Verde in absolute terms. This was all consistent in particular with the concluding comments in the conversation, as recorded by Mr Scott, which made it clear that the decision whether to continue with EMFC was for TRG to decide. At the end of the first subsequent telephone conversation between Mr Addington and Mr Scott, neither party considered that EMFC by Mr Addington had evinced an intention no longer to perform its obligations under the Contract. Up to that stage Mr Addington had not repudiated the Contract. The Judge stated (at [48]):

> "….That was not what he had said nor what Mr Scott understood him to have said and it is not what a reasonable person with all the knowledge of the parties to that call would have concluded him to have been saying from the language used in the email and/or by him in the subsequent telephone conversation as recorded in the notes prepared by Mr Scott."

38. There was then an internal TRG meeting between Mr Scott, Mr King and Mr Jarrett. The Judge attached importance to Mr King's evidence that at the time they felt that Mr Addington "was trying to hold a gun to our heads and force TRG to abandon Investec". This he stated was consistent with the finding that no one understood at that stage that Mr Addington had evinced an intention no longer to be bound by the Contract. Mr Scott, Mr King and Mr Jarrett decided to proceed with Investec alone.

39. As for the next telephone call from Mr Scott to Mr Addington, it was common ground that Mr Scott told Mr Addington that TRG would be proceeding from that point onwards with Investec alone. At [53] the Judge accepted Mr Addington's evidence that Mr Scott also informed him in the course of this telephone conversation that EMFC should not travel to Cape Verde:

> "…Whatever had been said by Mr Scott and Mr Addington in their earlier conversation on 16 January 2016 had been overtaken by [TRG's] internal decision to proceed with Investec alone…"

Again, the Judge found this to be consistent with his findings as to what had gone before. The final telephone conversation between Mr Addington to Mr Scott was essentially immaterial to the question of repudiation.

40. Thus the Judge concluded that EMFC had not repudiated nor had TRG accepted any repudiation as at the end of 16 January 2016. Mr Addington's email of 17 January 2016 was also consistent with that finding, as were an email from Mr Scott in response and his internal notes of 20 January 2016.

41. Accordingly, TRG's email of 4 February 2016 purporting to accept a repudiatory breach by EMFC was misconceived (albeit that, if the 16 January email had been a repudiation, the email of 4 February 2016 would have amounted to a clear acceptance).

42. In these circumstances, the Judge found that the repudiation defence failed:

> "64...I do not accept that as is alleged in…the defence, the 16 January email was a repudiation. It was not a refusal to travel to Cape Verde in absolute terms either. As I said earlier, I do not accept that in the conversation following, Mr Addington said no one from [EMFC] would travel to Cape Verde in any absolute sense. The point being made was that in Mr Addington's opinion, it was not in [TRG's] interests that [EMFC] should travel to Cape Verde unless and until the difference between Investec had been resolved. The subsequent call following the internal discussion within [TRG's] management shows that to be [TRG's] understanding. In my judgment, therefore, the repudiation defence fails."

43. As for the effective cause term, the Judge again identified the relevant legal principles of construction and implication. Having referred to the opening words of clause 6, clauses 6.3 and 6.5 of the Contract he went to hold as follows:

> "68. The opening words of clause 6 make clear that the fees set out in the following sub paragraphs were payable; 'for the delivery of its loan execution support services'. Under clause 6.3, the fee is described as a completion fee calculated on the gross amount of the facilities as referenced in the facilities documents and by clause 6.5 it becomes due on the date of signing of the relevant facilities documents and payable when the proceeds under the facility are first drawn down.
>
> 69. If the support services were not to be the or an effective cause of the transaction in respect of which payment of the completion fee was claimed, then an entirely artificial and commercially unreal situation would result in which as here a very substantial fee would become payable for performing work that had no connection at all with the transaction by reference to which payment was claimed. That is an entirely unreal and uncommercial outcome and one that would require clear express wording to achieve that result. As Mr Allen correctly submits it would have been open to the claimant to have terminated the agreement under clause 14.2 the day after it had been concluded and without having done anything significant and still claim the completion fee under clause 14.4. There is no such language nor is there anything in the language of that agreement read as a whole that suggests this outcome was intended by the parties at the date the agreement became binding between the parties. Such an outcome is contrary to business common sense when viewed at that date from the perspective of reasonable people with all the knowledge of the surrounding circumstances that each of the parties to the agreement had.
>
> 70. It necessarily follows from what I have said so far that even if I am wrong to conclude that the agreement should be construed as subject to an effective cause requirement as

> described above, there is nothing within the contract taken as a whole that contradicts or is inconsistent with the implication of a term to that effect. Mere silence does not give rise to inconsistency.
>
> 71. It follows that even if I am wrong to conclude that the agreement is to be construed as subject to an effective cause requirement, it is necessary to imply such a term in order to give the contract business efficacy or to give effect to the presumed common intention of the parties. In my judgment, the points I have made already concerning commercial absurdity means that clause 6.3 lacks commercial or practical coherence in the absence of an implied term to the effect that the completion fee would become payable only if "… the delivery of [the claimant's] loan execution support services …" were an effective cause of the facility by reference to which payment was claimed. As has frequently been observed in numerous Court of Appeal decisions in this area such a term to this effect is relatively easily implied."

44. The Judge then rejected EMFC's contention that it was a least "a real cause of the grant of the facility to TRG by Helios". He found that "plainly it was not".

45. EMFC's claim for commission thus failed. However, given the Judge's rejection of TRG's repudiation defence, EMFC was entitled to payment for the work fees.

Ground 1

EMFC's position

46. On the question of construction, EMFC submits that the construction identified by the Judge was a "fanciful" "post-hoc rationalisation of an outcome the Judge found distasteful". It was not a permissible construction of the words of the Contract. The Contract was completely silent on the question of effective cause: there was nothing to construe. Either the effective cause term was to be implied or there is nothing. EMFC also points to the "entire agreement" clause at clause 17 of the Contract.

47. As for implication of the effective cause term, the overarching submission for EMFC is that, in circumstances where Investec and EMFC were engaged under a joint mandate for a common purpose, the success of which would trigger commission, it was neither necessary nor "compatible with the business objectives of the parties" to imply the effective cause term. The Judge effectively re-wrote after the event what the parties had freely contracted, namely the payment of multiple commissions by TRG in the event that the facilities were raised. Mr Addington had warned TRG in terms on 18 October 2015 that TRG would be exposed to "doubling its fees" if it proceeded under a joint mandate. The rationale for the effective cause term did not exist here. It is said to have made no business sense for EMFC to enter the engagement if i) funding had been effectively raised already or ii) it had to work co-operatively with Investec and take the risk that Investec alone would claim the success fee.

48. More specifically, EMFC contends that the Judge failed to take sufficient account of:

    i) The parties' agreement that two commissions might be payable on success;

    ii) The commercial realities of the joint mandate;

    iii) The "clear market" clause;

    iv) The express terms of the contract; and in particular

    v) The absence of any term to exclude Helios "from the meaning of success".

49. Further, the Judge was wrong to suggest that it was open to EMFC to terminate the Contract under clause 14.2 and still claim a completion fee.

TRG's position

50. With no little forensic flourish, Mr Allen for TRG submits that EMFC was paid €177,500 for less than three months' work on a single document, more than it had ever previously earned in a year. It in fact carried out no work such as to justify even the work fees awarded in its favour. There is no basis for EMFC seeking a far larger sum by way of bonus in respect of a transaction which it did nothing to bring about.

51. TRG submits that it is the exception rather than the rule for a party to be entitled to commission when it has done nothing to earn it. As the Judge stated, very clear and unambiguous words would be required to achieve such an artificial and commercially unreal result. The fact that more than one agent was retained by TRG makes no difference. The fact that two sets of commission might be payable in the event that they were both earned does not lead to the conclusion that TRG was agreeing to pay two sets of commission regardless of whether or not they were earned. Nothing in the Contract prevented two agents from being an effective cause and entitled to commission in respect of the same facility.

52. TRG also submits that the "clear market" clause, and the absence of any term excluding a loan from Helios from the "clear market" clause, add little if anything to the discussion. EMFC had the opportunity to be an effective cause of a facility from Helios. If the clause adds anything, it supports TRG’s position – because, if there were no effective cause requirement, such a clause would not be necessary.

53. The primary construction of the Contract as found by the Judge accorded with the obvious intention of the contracting parties. Under clause 6.3 the completion fee was not simply due when the facilities were signed, but was expressly payable "for delivery of [EMFC's] loan execution support services". Those services were an express pre-requisite to the right to payment under clause 6.3. None of those services post-dating the IM (as identified in the schedule to the Contract) were provided. No criticism can be made of the omission of the effective cause term in the light of the requirement that EMFC provide the loan execution support services in order to be entitled to payment.

54. The Judge's reasoning as to the implication of the effective cause term mirrored that which applied to the construction debate. TRG submits that the Judge was right for the reasons that he gave.

55. Finally in this context, TRG draws attention to the outstanding dispute that would arise in the event that EMFC's appeal were to succeed (and TRG's cross-appeal fail). EMFC claims commission by reference to the combined figure of $57 million under Facility A and Facility B. TRG has always contended that any completion fee payable should be calculated by reference to Facility A only ("the Facility A/B issue"). EMFC did not address this question below and the Judge did not rule on it. TRG's written position was that this court should remit the Facility A/B issue to the Judge, were it to arise.

The law

56. The relevant well-known legal principles of contractual construction are non-contentious and to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.

57. In summary only then, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood the language in the contract to mean. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of the natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense, but disregarding evidence of the parties' subjective intention. While commercial common sense is a very important factor to be taken into account, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed. The meaning of a clause is usually most obviously to be gleaned from the language of the provision. Where the parties have used unambiguous language, the court must apply it; if there are two possible constructions, the court is entitled to prefer the construction consistent with common sense and to reject the other (see *Rainy Sky (supra)* at [21] and [23]).

58. In *Wood v Capita Insurance Services Ltd (supra)* at [9] to [11]) Lord Hodge JSC described the court's task as being to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise focused solely on a "parsing of the wording of the particular clause"; the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated.

59. The relevant legal principles in relation to the implication of contractual terms are also non-contentious (see *Marks & Spencer plc v BNP Paribas Securities Services* [2015] UKSC 72; [2016] AC 742 (at [15] to [31]) and the recent overview in *Yoo Design Services Limited v Iliv Realty Pte Limited* [2021] EWCA Civ 560 (at [47] to [51])). For present purposes, it suffices to repeat that a term will not be implied

unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test. Whilst those tests are alternative, it will be a rare (or unusual) case where one, but not the other, is satisfied. The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test.

60. The position of an agent's entitlement to remuneration under commission agreements has received attention both in the textbooks and authorities. Where an agent is entitled to remuneration upon the happening of a future event, that entitlement does not arise until the event has occurred: see *Bowstead & Reynolds on Agency* (22nd ed) at Article 56 (at 7-013). Article 57 goes on (at 7-027):

> "Subject to any special terms or other indications in the contract of agency, where the remuneration of an agent is a commission on a transaction to be brought about, the agent is not entitled to such commission unless the services performed were the[3] effective cause of the transaction."

61. This principle has been illustrated variously in the authorities, most obviously in the residential consumer context. As Lord Neuberger stated in *Foxtons v Pelkey Bicknell and another* [2008] EWCA Civ 419 ("*Foxtons*") at [18], an effective cause term will "relatively readily be implied into an estate agency contract". Lord Neuberger drew the relevant strands from the authorities together as follows (at [20]):

    i) The term in Article 57 is very readily implied, especially in a residential consumer context, unless the provisions of the particular contract or the facts of the particular case negative it;

    ii) The main reason for implying the effective cause term is to minimise the risk of a seller having to pay two commissions;

    iii) It is not entirely clear whether the test is "an effective cause" or "the effective cause;

    iv) Whether an agent was the effective cause is a question whose resolution turns very much on the facts of the particular case;

    v) While two commissions are to be avoided, there will be cases where the terms of the relevant contracts and the facts compel such a result;

    vi) Where the term is implied, the burden is on the agent seeking the commission to establish that he was the effective cause.

62. However, as Lord Neuberger expressly recognised in *Foxtons* (at [18]), the issue of whether or not an effective cause term is to be implied is to be resolved by reference

[3] There is a debate as to whether the rule can be more accurately formulated by requiring the agent's act to be "an" as opposed to "the" effective cause (see the commentary at 7-030 in *Bowstead & Reynolds* (22nd ed). But that question is immaterial for present purposes.

to the normal rules relating to implication of terms. As Viscount Simon stated in *Luxor, Eastbourne Ltd and others v Cooper* [1941] AC 108 ("*Luxor*"), the leading case on estate agents' commission, (at 119 to 120):

> "There is, I think considerable difficulty, and no little danger, in trying to formulate general propositions on such a subject, for contracts with commission agents do not follow a single pattern and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion, and then to consider whether those express terms necessitate the addition, by implication, of other terms…in contracts made with commission agents there is no justification for introducing an implied term unless it is necessary to do so for the purpose of giving to the contract the business effect which both parties to it intended it should have."

63. *Luxor* has been considered judicially on many subsequent occasions, including in *Brian Cooper & Company (a firm) v Fairview Estates Investments Ltd* [1987] 1 EGLR 18 (a case dealing with commercial property development) and *County Home search Co (Thames and Chilterns) Limited v Cowham* [2008] 1 WLR 909 (a residential consumer case). In neither instance was an effective cause term implied, in the former because it was not necessary to do so, and in the latter because of inconsistency with the express terms of the contract.

64. Thus the authorities stress that there are commission contracts to which the principle enunciated in Article 57 may not apply, particularly outside the residential estate agency context: see for example *Freedman v Union Group plc* [1997] EGCS 28; *Raja v Rollerby Ltd* [1997] 74 P & CR D25; *Watersheds Ltd v Simms* [2009] EWHC 713 (QB) ("*Watersheds*") at [23] to [27]; *Edmond De Rothschild Securities (UK) Ltd v Exillon Energy plc* [2014] EWHC 2165 (Comm) ("*Rothschilds*") at [25]. At the same time, where an agency is not exclusive and there might be multiple agents working independently to secure a transaction, the implication of an "effective cause" requirement may be necessary to provide business efficacy: see for example (in the context of a finance introducer) *Silvercloud Finance Solutions Ltd (t/a Broadscope Finance) v High Street Solicitors Ltd* [2020] EWHC 878 (Comm) at [93].

65. The general principle in Article 57 is therefore always subject to any special terms of indications in the Contract (as Article 57 states on its face). Ultimately, everything will turn on the particular circumstances and terms of each contract by reference to the application of normal contractual principles of construction and relating to the implication of terms.

Discussion and analysis

66. Ground 1 has twin limbs, namely whether the Contract contains the effective cause term as a matter of i) primary construction or ii) implication. It raises issues that are distinct in principle but which overlap.

67. As set out above, the Judge dealt with these two issues only briefly. He rehearsed the opening words of clause 6 (which referred to fees being payable "for the delivery of [EMFC's] loan execution support services") and referred to the terms of clause 6.3

and 6.5. He then concluded that it would be commercially unreal for a very substantial fee to be payable for work which had no connection at all with the transaction by reference to which payment was claimed. He adopted TRG's suggestion that EMFC could have terminated the Contract under clause 14.2 on day 2 and still have claimed the completion fee under clause 14.4. of the contract. Such an outcome was contrary to business sense. Thus, in his judgment the Contract "should be construed as subject to an effective cause requirement", alternatively it was necessary to imply such a term to give the Contract business efficacy or to give effect to the presumed common intention of the parties. He concluded by stating that, as numerous Court of Appeal decisions had shown, such a term was "relatively easily implied".

68. I disagree with the Judge's analysis both on the question of construction and implication. In particular, once due consideration is given to the relevant factual matrix and to the terms of the Contract as a whole, it can be seen that this is not a case where the general principle in Article 57 is engaged.

69. First, the Contract contains no express effective cause requirement, when it clearly could have done if that was what the parties had intended. In terms of construing the Contract (as opposed to considering the question of implication), it is relevant to note that the Contract contained an "entire agreement" clause (see clause 17).

70. Secondly, it is important to examine the scope of EMFC's appointment. That was clearly stated at clause 1.2:

> "…[TRG] agrees to appoint EMFC <u>to assist</u> in the execution of the Facilities and EMFC agrees to fulfil such appointment". (emphasis added)

In clause 2.1 the position is confirmed: EMFC's "execution of the Facilities" was to "entail certain tasks…such Scope of Work to include all tasks typical in a mandate of this type", as illustrated in the schedule. The schedule again indicates that EMFC's services are to assist and support, not deliver the Facilities themselves. Mr Allen pointed to the repeated references to "execution" in the Contract, for example the reference in the preamble to EMFC's offer of its "loan execution support services". However, nowhere do those references take the scope of EMFC's appointment outside the provision of support services, albeit that those services of course always had ultimate execution of the Facilities by TRG as their aim.

71. Thus this was not a typical introducer's agreement (let alone comparable to an estate agency contract). EMFC was not engaged to bring about execution or to execute. In these circumstances it is simply not possible to construe the words of clause 6 - and EMFC queries which words the Judge could in fact have been construing in any event - as meaning in some way that EMFC's entitlement to payment was subject to an effective cause requirement. In particular, the opening words of clause 6, indicating that EMFC was to be paid for delivery of its services, point in the opposite direction. The completion fee was tied to the delivery of services and not completion.

72. Thirdly, and fundamentally, whether or not EMFC was contractually obliged to work "in conjunction with" Investec, a topic discussed further below, it was clearly understood by all, and part of the relevant factual matrix, that Investec and EMFC

would both be working to assist TRG in raising the financing sought. I accept the point made for TRG that the mere fact that a principal chooses to engage two agents and so exposes itself to the possibility of paying two commissions does not necessarily mean that it agrees to pay two commissions "no matter what". However, the position remains that the primary reason for implication of an effective cause requirement as identified in the authorities does not exist on the facts here. Further and materially, in this case each agent had an entirely different skill set: Investec in the commercial market and EMFC in the DFI market. It was wholly plausible, for example, that TRG would raise all the finances that it needed through Investec in the commercial market. The Contract was not set up to deny EMFC its commission entitlement in such circumstances, particularly where it was clearly understood that EMFC and Investec were to be working in conjunction with each other. There was, for example, no suggestion of any apportionment of commission between the two agents by reference to the source of financing.

73. It would therefore be very far from commercially absurd in these circumstances for there to be no effective cause requirement.

74. Fourthly, I do not consider the Judge's analysis (by reference to what was in any event the hypothetical scenario of EMFC terminating the Contract on day 2) to be sound. He appears to have assumed without more that (by reason of clause 16.2) clause 6 would survive upon termination of EMFC's obligations by EMFC (as well as upon termination of those obligations by TRG). A far more natural (and obvious) reading would be for the payment obligations in clause 6 to survive only upon termination of EMFC's obligations by TRG; that construction sits logically with the post-termination payment provisions in clauses 14.4 and 14.5. At its lowest, this is a perfectly tenable construction of Contract which, in fairness to the Judge, does not appear to have been drawn to his attention at any time.

75. This leads neatly to the fifth point which arises directly out of clauses 14.4 and 14.5. Those clauses are simply inconsistent with the existence of an effective cause requirement providing, as they do, for a purely mechanical payment exercise by reference to the timing of any Facilities executed within 12 months of termination of the Contract. There is no hint of an effective cause requirement which would in any event be quite at odds with the imposition of time limits.

76. Sixthly, EMFC's position is further supported by the existence of the "clear market" clause (clause 5). Clause 5 guaranteed that any facility raised would be the result of the efforts of EMFC and Investec (and no-one else). As set out above, Mr Allen suggested that the presence of the clause in fact supported TRG's case, since without an effective cause term there would be no need for it: EMFC would be welcoming as many other agents into the fold as possible so as to maximise the opportunity to earn commission. However, as Mr Sweeting remarked, that is by no means obvious: first, EMFC and Investec presumably believed in their own abilities to assist TRG in such a way as would enable TRG to be successful in raising the financing. They would not want anyone else operating in potentially delicate markets; secondly, there would be an intrinsic commercial value for EMFC as a result of having been associated with any facilities secured by TRG. As a separate matter, EMFC can also point to the fact that there was no carve-out in the Contract to exempt payment of commission on any financing deal with Helios, even though at the time of contracting Helios was already in TRG's sights as a potential lender.

77. Seventhly, it is right that difficulties of proof can be relevant in considering whether the parties would have intended a clause to exist (see for example *Rothschilds* at [23]). Here one could readily foresee difficulties in establishing whether or not one of the two agents engaged was an effective cause of a transaction, particularly in circumstances where they were to work collaboratively with each other. The fact that, as it turned out, it could apparently easily be demonstrated in this case that EMFC was not an effective cause of the financing raised with Helios is not necessarily an answer. In circumstances where Helios was introduced to TRG before EMFC was even on the scene and where EMFC did not continue its services beyond 16 January 2016, that may be unsurprising. However, in different circumstances, the problems could be very real.

78. Finally, the Judge failed to consider the obvious differences between the residential consumer cases where an effective cause requirement had been established by implication (and upon which he appears to have relied) and the facts of this case. Thus, unlike the position in *Foxtons*, for example: EMFC was not a sole agent; EMFC was not engaged to introduce a lender; the rationale for implication of an effective cause requirement in the estate agency cases, namely the avoidance of payment of two commissions, did not exist here. TRG always accepted exposure to an obligation to pay double commissions.

79. In conclusion, for the reasons set out above, on the facts of this case the implication of the effective cause term is not necessary to give the Contract commercial or practical coherence, nor does an effective cause requirement arise as a matter of obviousness. To the extent that this result could be said to produce a windfall for EMFC, as the authorities make clear[4], the test is not one of fairness or reasonableness but rather a question of what, objectively viewed, the parties are to be taken as having agreed.

80. I would therefore allow the appeal on Ground 1. In these circumstances, the Facility A/B issue arises, namely the question of to what commission EMFC is entitled: by reference to Facility A only, or Facility A and B. I return to this below.

TRG's cross-appeal

TRG's position

81. TRG submits in summary that the Judge's legal finding on repudiation ignores his factual finding that one of EMFC's core contractual obligations (in clause 1.2 of the Contract) was to work for TRG in conjunction with Investec. Accordingly a refusal to work with Investec, which was what the Judge effectively found that EMFC had indicated, was a clear breach of a condition of the Contract, alternatively a fundamental breach of an innominate term. The fact that the refusal was framed as a choice for TRG, or that TRG understood it as something other than a renunciation, or that TRG was the party to choose for EMFC not to perform any further contractual obligations, does not mean that it was not a renunciation by EMFC. EMFC breached a condition of the Contract by putting TRG to an election, something which it had no right to do. It was illogical and wrong for the Judge to find that, in understanding that

[4] So, by way of example only, in *Watersheds* the claimant received commission on the sale of a business in circumstances where it was common ground that it did no work whatsoever in connection with the sale and was not an effective cause of the sale.

it was wrongfully having a gun held to its head, TRG believed that EMFC had not evinced an intention not to be bound by the Contract. In short, the correct finding as a matter of law would have been that, in refusing to perform a condition of the Contract, namely to work with Investec, EMFC renounced the Contract on 16 January 2016.

82. TRG contends that the Judge confused the factual question of what Mr Scott understood Mr Addington to be saying as a matter of fact in respect of EMFC's position with the question of what Mr Scott understood the legal consequences of that position to be, and operated on the incorrect legal assumption that for a renunciation by EMFC to have taken place on 16 January 2016 EMFC had to have refused to carry out any further services for TRG.

83. TRG invites this court to identify for itself what EMFC's position was on 16 January 2016, in particular by reference to Mr Scott's contemporaneous notes, and then consider the legal consequences. Adopting this approach,:

    i) There can be no doubt that EMFC evidenced an intention on 16 January 2016 not to comply in the future with clause 1.2, which is properly to be construed as a condition of the Contract;

    ii) Alternatively, even if clause 1.2 was not a condition, the manner in which it was breached by EMFC (which refused not only to work with Investec but also to travel to Cape Verde to assist with and be present at key meetings) had consequences so profound as to deprive TRG of substantially the whole benefit of the services which remained unperformed and amounted to a repudiation.

84. It is said that the Judge ought to have found that EMFC was effectively refusing to perform all further services unless Investec's retainer was cancelled by TRG. Alternatively, the threatened difference in performance was a repudiatory one.

EMFC's position

85. EMFC submits in summary that the question of whether or not EMFC repudiated the Contract was a matter of fact for the Judge, who considered the evidence in detail and was entitled to reach the conclusions that he did. He did not misapply the law to the facts as he found them.

Discussion and analysis

86. The Judge correctly identified the relevant principles of law in relation to contractual repudiatory breach, affirmation and waiver at [4] and [44] of the Judgment, those principles having been agreed between the parties. Specifically, he recorded:

> "1. If one party evinces an intention not to perform or declares his inability to perform some but not all of his obligations under the contract, then the right of the other party to treat himself as discharged depends on whether the non-performance of those obligations will amount to a breach of the condition of the contract or deprive him of substantially the whole benefit

> which it was the intention of the parties that he should obtain from the obligations of the parties under the contract then remaining unperformed…;
>
> 2. The innocent party has a choice whether to accept the repudiatory breach or affirm the contract. He must "elect" or choose between these options….;…
>
> 7. If a repudiatory breach of contract is accepted, then the innocent party is relieved of any further performance of his primary obligations under the contract - see *Chitty Volume One* at paragraphs 13.019 and 24-001 and the cases cited therein."

87. At [44] the Judge stated that repudiation occurs when a party to a contract evinces an intention no longer to perform his principal obligations under the contract concerned. The test for repudiation involves asking whether there has been an express refusal to perform or, if not, whether the actions of the party concerned are such as to lead a reasonable person to conclude that he no longer intended to be bound by the terms of the contract. Renunciation can occur if the party in default may intend to fulfil the contract but is determined to do so in a manner substantially inconsistent with his obligations (see *Ross T. Smyth & Co v Bailey, Son & Co* [29140 3 All ER 60 at 72). It is particularly important to note in the circumstances of this case that, in order to be a renunciation, the renunciation must be "made quite plain" (see for example *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 at 288 and 299).

88. Whether or not clause 1.2 was a condition of the Contract does not appear to have been argued as a discrete issue before the Judge, who did not address it in the Judgment. However, TRG's contention that it was a condition loomed large in TRG's submissions on appeal.

89. The question of whether a clause is a condition is a matter of construction. The court must look at the contract, in light of the surrounding circumstances, and decide whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the particular promise as a warranty sounding only in damages or a condition in respect of which the failure to perform relieves the innocent party of further performance under the contract. Thus it is a question of identifying the intention of the parties on the true construction of the contract. Where, upon the true construction of the contract, the parties have not made the term a condition, it will be innominate if a breach may result in trivial, minor or very grave consequences. Unless it is clear that a term is intended to be a condition or (only) a warranty, it will be innominate. The courts should not be too ready to interpret contractual clauses as conditions. The modern approach is that a term is innominate unless a contrary intention is made clear. (See generally *Chitty on Contracts* 33rd Edition at 13-025, 13-026 and 13-035 and for example *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711 at 719 and 725; *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2016] EWCA Civ 982; [2017] 4 All ER 124; [2017] 2 All ER (Comm) 701; [2016] 2 Lloyds's Rep 447 at [52].)

90. EMFC's ability and willingness to work with Investec was, on the Judge's findings, seen as important by the parties in pre-contractual discussions. That does not,

however, mean that it became a contractual term of the Contract that EMFC would work with Investec, let alone a condition of the Contract.

91. In my judgment, on a true construction of the Contract, clause 1.2 is not properly to be classified as a condition. My reasons are as follows:

i) Clause 1.2 appears in the opening "Appointment" section of the Contract. It does not expressly impose any obligation on EMFC. Rather it reads as a record of the factual background:

> "EMFC shall be working in conjunction with…Investec.."

This is not clearly a contractual obligation of any sort (even without considering problems of lack of clarity and certainty considered further below);

ii) Even if clause 1.2 is to be read as amounting to a contractual obligation, it is not expressed to be a condition and appears as an innominate term. There is no contrary intention made clear anywhere in the Contract;

iii) Clause 1.2 does not appear in the list of conditions expressly identified in section 3 of the Contract;

iv) Clause 1.2 does not carry the clarity or certainty to be expected of a condition, given the consequences of breach. It is not at all clear what is meant by "working in conjunction with" Investec. It would appear to encompass working directly together on a certain task or, for example, working entirely separately but in sequence:

v) Allied to this, given the breadth of clause 1.2, breach could have trivial, minor or very grave consequences. It could have no consequences. This is contra-indicative of a condition.

92. The conclusion that clause 1.2 is not to be classified as a condition leaves a large dent in the cross-appeal; it means that, in order to succeed on repudiation, TRG must establish that (what is said to be) an outright refusal by EMFC to work with Investec and refusal to go to Cape Verde for the series of important meetings in the week of 18 February 2016 amount to repudiatory breaches. However, it does not seem to me that:

i) either a refusal to work in conjunction with Investec; and/or

ii) a refusal to go to Cape Verde in February 2016,

would have deprived TRG of substantially the whole benefit which it was the intention of the parties that it should obtain from the obligations of the parties under the Contract then remaining unperformed. Nor would it have amounted to an indication of an intention by EMFC to fulfil its obligations under the Contract but in a manner substantially inconsistent with those obligations:

i) EMFC could have provided all of its services under the Contract without "working in conjunction with Investec". It is true that tasks were to be agreed

with Investec under clause 2.1 of the Contract, but such agreement was to be reached "as soon as possible" after 12 November 2015. It appears to have been reached very early on as anticipated. Certainly, EMFC had carried out most or all of the tasks identified in Parts I, II and III of the indicative work schedule by mid-February 2016. EMFCs' role was to assist TRG in seeking finance in the DFI market, something which it could do alone (as demonstrated by the fact that it was able to present and get sign-off on the IM from the TRG's board without Investec);

ii) a refusal by EMFC to attend the meetings in Cape Verde, however important those meetings were, cannot be said to have been so fundamental as to have deprived TRG of substantially the whole benefit under the Contract to which TRG was entitled.

93. In any event, putting these difficulties for TRG to one side, and despite the skilful manner in which Mr Allen presented the cross-appeal, TRG cannot escape the Judge's clear conclusions on the facts that at no stage on 16 February 2016 did Mr Addington ever express, by his words or conduct, any unequivocal refusal to work with Investec or to go to Cape Verde in the following week.

94. In this regard, each side was guilty to an extent of attempting to re-run the substantive arguments on repudiation on the facts and in particular by reference to an analysis of the 16 January email and Mr Scott's attendance notes. However, the cross-appeal proceeds by way of review and not re-hearing. The Judge had the full benefit of seeing and hearing the witnesses. This court has nowhere near that advantage and must resist the temptation of placing its own interpretation on the documents available. That said, the more that I looked at the documents in detail, the more it appeared obvious how the Judge could have reached the conclusions that he did. In particular, the 16 January email could not arguably (by itself at least) have amounted to a renunciation of the Contract. It appears to have been a sharing of Mr Addington’s reflections that he wanted to “suspend/terminate” EMFC’s involvement in order to allow Investec to attempt to raise the financing alone for a few months. When Investec did not succeed, EMFC would pick up the reins again. Mr Addington was asking Mr Scott if he could stand his team down for the imminent trip to Cape Verde. As for the subsequent telephone conversation, the Judge laid significant weight on the conditional nature of the closing exchanges between Mr Addington and Mr Scott: it was up to TRG to decide whether or not to use EMFC, an issue on which Mr Scott would revert to Mr Addington after he had had further discussions.

95. It is not necessary for me to rehearse the Judge's analysis of the facts and findings in detail. In summary only, he found the material contents of the 16 January email and the first subsequent conversation between Mr Scott and Mr Addington to be in conditional terms only. By the end of that first conversation, applying an objective test, Mr Addington (for EMFC) had not repudiated the Contract (and in fact Mr Scott did not understand him to have done so). In the next conversation between Mr Scott and Mr Addington, Mr Scott informed Mr Addington that TRG had been forced to make a decision, given the depth of feeling on both sides and irreconcilable differences. Mr Scott then asked EMFC to step aside; TRG would be proceeding from that point on with Investec alone. The Judge also found that in this conversation Mr Scott asked EMFC not to travel to Cape Verde.

96. Much was made for TRG of the suggestion that EMFC presented TRG with an ultimatum which it had no right to do, and that the Judge fell into error in proceeding on the basis that, provided that TRG had a choice, there could be no repudiation. I do not consider this to be a fair criticism: the Judge's finding was that EMFC never issued an ultimatum to TRG in any absolute sense. Rather TRG had a genuine choice as to how it wished to proceed. Once that is understood, it can be seen how the fact that TRG had a decision to take (notably apparently because of deep unhappiness on the part of Investec as well) was consistent with no prior repudiation on the part of EMFC having occurred.

97. The crucial concluding paragraph of the Judge's consideration of TRG's defence of repudiation deserves repetition:

> "64...I do not accept that as is alleged in…the defence, the 16 January email was a repudiation. It was not a refusal to travel to Cape Verde in absolute terms either. As I said earlier, I do not accept that in the conversation following, Mr Addington said no one from [EMFC] would travel to Cape Verde in any absolute sense. The point being made was that in Mr Addington's opinion, it was not in [TRG's] interests that [EMFC] should travel to Cape Verde unless and until the difference between Investec had been resolved. The subsequent call following the internal discussion within [TRG's] management shows that to be [TRG's] understanding. In my judgment, therefore, the repudiation defence fails."

98. I cannot identify any error of principle in the Judge's approach to the facts, or in his application of the law to the facts as he found them to be. He correctly identified (when setting out the relevant law in [4] of the Judgment) that it was not necessary for there to be a refusal to carry out all services under the Contract in order for there to be a repudiation. He understood that the test that he had to apply was an objective one. There can be no objection to that objective assessment being tested against the subjective beliefs of the parties as he found them to be, provided that the test that he ultimately applied was the objective one.

99. In summary, the Judge was entitled to find that there was no repudiation by EMFC on the facts. There is no basis for interfering with those factual findings which cannot be said to be perverse or plainly wrong.

Ground 3

100. In the light of my conclusion on Ground 1 of the appeal, the costs order below falls to be revisited in any event and the appeal against the Judge's costs ruling is academic. I therefore deal with it briefly only.

101. The Judge concluded that "in substance and reality" it was TRG that had succeeded and EMFC that had failed. In those circumstances, applying the general rule set out in CPR 44.2.(2)(a), TRG was entitled in principle to be paid its costs by EMFC. He would have reduced the costs to be recovered by TRG by 10% but for what he found to be EMFC's unsatisfactory conduct.

102. In short, and even bearing in mind the very limited scope for interference by an appellate court on what was an exercise of discretion (as summarised neatly in *Atlasjet Havacilik Anonim Sirket v Kupeli* [2018] EWCA Civ 1264 at [5]), I would not have upheld the Judge's decision not to award EMFC any of its costs whatsoever and to award TRG all of its costs.

103. The Judge was entitled i) to take the view that in broad terms TRG was the successful party overall; ii) to form a dim opinion of EMFC's position (maintained until mid-trial) that Mr Addington did not have authority to bind EMFC; and iii) to bear in mind the level of the parties' various offers to settle. However, his conclusion fundamentally failed to reflect:

    i) The fact that on any view EMFC achieved a substantive recovery of a significant sum of money (even if far less than the full value of the claim);

    ii) The fact that in order to do so, EMFC had to defeat the defence based on repudiatory breach advanced by TRG. This was the issue to which the witness evidence of fact was directed. It formed a heavy and expensive part of the litigation and occupied a large amount of time at trial. (Consistent with this, the cross-appeal has occupied as much if not more time than the appeal.);

    iii) The fact that it was not established that EMFC had failed to beat TRG's Calderbank offer (which was costs inclusive). More importantly, TRG's Calderbank offer was made at a time when TRG's defence based on the effective cause term had not yet been raised, let alone pleaded. At the time for acceptance of that offer, only TRG's defence based on repudiatory breach by EMFC stood in the path of success by EMFC on its commission claim.

104. The Judge relied on three specific aspects of what was said to be "unsatisfactory conduct" on the part of EMFC to justify his decision not to reduce TRG's costs recovery even by a fraction:

    i) The fact that EMFC started and persisted with a claim for a success fee by reference to an event for which it knew it had not been an effective cause;

    ii) The fact that EMFC failed to accept or otherwise reasonably engage with TRG at any stage around the offer that it had made in circumstances where it "knew very well" that it had not been "the effective or indeed any cause" of the transaction for which it claimed commission, that point being taken no later than 5 December 2019;

    iii) The pleading of and persistence in the denial of Mr Addington's authority.

105. However, the first and second reasons ignore the fact it was EMFC's position (rightly as it turns out) that there was no scope for the existence (as a matter of construction or implication) of the effective cause term in the first place. As for pursuit by EMFC of the misconceived issue on Mr Addington's authority, that was no doubt relevant but not on any reasonable view sufficient to justify ignoring altogether EMFC's undoubted success on its claim for the work fees (and the route to that success).

106. For these reasons, I would have held that the Judge's decision on costs fell outside the generous ambit of decisions within which reasonable disagreement was possible. TRG was at least not entitled to 100% of its costs. I would have reduced TRG's costs recovery to reflect EMFC's success and the factors identified above. It is not necessary for me in the circumstances to indicate the precise level of any such reduction but it would been a reduction of substance.

The Shorter Trials Scheme and remission of the Facility A/B issue

107. There remains one troubling aspect of the appeal to address, namely the outstanding Facility A/B issue. The issue is significant: if TRG's position is correct then the value of the claim for commission is reduced from €770,000 to €120,000.

108. In this context, as set out above, it is to be noted that EMFC started its claim in the Shorter Trials Scheme. TRG did not object to that allocation. Trial under the Shorter Trials Scheme can carry a number of advantages, including speed, the reduction of litigation costs, the promotion of proportionality and the appropriate use of court resources.

109. The Shorter Trials Scheme is not suitable for trials lasting more than four days including reading time. Nor is it normally suitable for cases which are likely to require extensive disclosure and/or reliance upon extensive witness or expert evidence: see PD57AB 2.2 and 2.3.

110. If this claim was suitable for the Shorter Trials Scheme at all, it was at the outer edges of suitability (at least by the time that the matter reached trial). The scope of the issues between the parties had expanded with time, not least as a result of TRG's re-amendments of its Defence by reference to the effective cause term. There were six trial bundles of disclosure, in addition to trial bundles containing statements of case and witness statements. There were three witnesses of fact who gave oral evidence. Mr Scott would have been a fourth witness of fact to give oral evidence but his witness statement was admitted as hearsay at the last minute. There were detailed findings of fact to be made and knotty points of contractual interpretation and construction to address. It was an ambitious exercise for the Judge to deliver an oral judgment in a case like this.

111. It is important to emphasise that, if a claim is commenced in the Shorter Trials Scheme, the appropriateness of that allocation needs to be kept under review; it can be revisited and the court has jurisdiction to transfer out under CPR 3.1(2)(m) (see *Spirit Electric Ltd v Buyer's Dream Ltd* [2019] EWHC 1853 (Ch) at [10] and *Excel-Eucan Ltd v Source Vagabond System Ltd* [2018] EWHC 3864 (Ch) at [17]). The abridged procedures in the Scheme are not an excuse for cutting corners in a manner which conflicts with the overriding objective of dealing with cases justly (and at proportionate cost). Unless wisely used, adoption of the Shorter Trials Scheme has the potential to be a false economy.

112. The tension in this case may have led to a number of difficulties in the long run. By way of example:

i) The question of whether or not clause 1.2 was a condition, which has been an important feature of this appeal, does not appear to have been pressed on the Judge. He certainly did not rule on it;

ii) EMFC appears completely to have ignored the Facility A/B issue below.

Once it was apparent that EMFC would be seeking permission to appeal (with the possibility of a cross-appeal by TRG), it would have been sensible to invite the Judge to make findings on any potentially material outstanding issues (even if only in brief form). Had they done so, this court might have had the benefit of those findings and, more importantly, all relevant issues would have been ventilated properly at trial.

113. Instead, this court has found itself unable to dispose of the Facility A/B issue and so unable to resolve the litigation overall. TRG's position on the Facility A/B issue had been set out in its written and oral submissions below. The Judge recognised TRG's argument at [10] of the Judgment, indicating that he would return to it if it was necessary for him to do so. In the event it was not necessary for him to do so and he left the matter there.

114. TRG maintained its position on the Facility A/B issue in its skeleton argument on appeal. However, no attempt was made to provide the relevant facility documents (or any other relevant documents) to this court for the purpose of addressing those submissions. For reasons which have not been explained, EMFC did not address the Facility A/B issue at all before the Judge and said nothing about it in writing on appeal at any stage. Mr Sweeting sought to make oral submissions on the issue for the first time during the course of the appeal, but it became readily apparent that the issue could not fairly be resolved on the materials and arguments provided to date.

115. In these circumstances, it is necessary to remit the Facility A/B issue, as TRG anticipated might be the case. This is highly regrettable, not least given the objectives of the Shorter Trials Scheme.

Conclusion

116. For these reasons, I would:

i) Allow the appeal;

ii) Dismiss the cross-appeal;

iii) Remit the Facility A/B issue to the Judge.

The parties should agree all outstanding matters, including costs, so far as possible, together with directions on the remitted Facility A/B issue.

Lord Justice Lewis:

117. I agree.

Lord Justice Baker:

118. I also agree.

APPENDIX A
Engagement Letter

In this letter:…
"Facilities" means circa €130 million in senior and/or mezzanine loan facilities entered by one or more Lenders for the purpose of providing long-term financing to the Group.
"**Facilities Documents"** means the facility loan agreement(s) and related documentation (such as an intercreditor agreement) pertaining to certain senior loan facilities and/or a mezzanine loan facilities [sic] to be entered into by [TRG] or a member of the Group.

1. Appointment

1.1 By accepting the terms of this Engagement Letter, the Company agrees to appoint EMFC to assist in the execution of the Facilities and EMFC agrees to fulfil such appointment.

1.2 EMFC shall be working in conjunction with the Company's debt advisor, Investec Bank plc.

1.3 Until this Engagement Letter terminates in accordance with paragraph 14 (Termination), no other person shall be appointed to execute the Facilities without the prior written consent of EMFC.

2. Scope of Work

2.1 EMFC's execution of the Facilities on behalf of the Company, will entail undertaking certain tasks to be agreed with Investec Bank plc as soon as possible after the date of this Engagement Letter (the "**Scope of Work**"), such Scope of Work to include all tasks typical in a mandate of this type. A typical scope of work of EMFC's loan execution support services is attached as Schedule 1.

2.2 EMFC's Scope of Work shall explicitly exclude the provision of regulated activities as defined by the Financial Conduct Authority. Such excluded activities include but are not limited to:

a. arranging deals in investments;
b. managing investments;
c. safeguarding and administering investments; or
d. advising on investments

2.3 The Company shall, and shall ensure that the other members of the Group, give any assistance which EMFC reasonably requires in relation to fulfilling its Scope of Work including, but not limited to:

a. the preparation of confidentiality agreements. The Company shall approve the confidentiality agreements before such are distributed to potential Lenders;
b. the preparation of the marketing materials. The Company shall approve the Information Memorandum, Financial Model and any supporting presentations before such are distributed to potential Lenders;
c. providing any information reasonably requested by EMFC or potential Lenders in connection with the Facilities, including providing copies of relevant files such as a working version of a business plan (model), technical diagrams, pictures, logos and other necessary materials in commonly-used soft copy formats (.xls, .doc, .jpg, .ppt);
d. making available the senior management and representatives of the Company and other members of the Group for the purposes of giving presentations to, and participating in meetings with, potential Lenders at such times and places as may reasonably be requested of them; and
e. using best efforts to ensure the execution of the Facilities benefits from the Group's existing lending relationships.

5. Clear Market

5.1 During the period from the date of this Engagement Letter to the date of signing of the Facilities Documents, the Company shall not announce, enter into discussions to raise, raise or attempt to raise any financing in the international or any relevant domestic loan, debt, bank, capital or equity market(s) (including, but not limited to, any bilateral or syndicated facility, bond or note issuance or private placement) without the prior written consent of EMFC.

5.2 Paragraph 5.1 does not apply to the Facilities; and

5.3 Paragraph 5.1 does not apply to the bond programme that the Group has already launched

5.4 Paragraph 5.1 does not apply to the equity raising discussions that the Group has already entered into with third parties prior to signing this Engagement Letter and which discussions shall remain ongoing with existing or additional third parties.

6. Fees, Costs and Expenses

For delivery of its loan execution support services, the Company shall pay to EMFC the following fees:

6.1 Irrevocable, non-refundable, unconditional work fees equating to €17,500 (seventeen thousand, five hundred euros) per month, first due immediately upon signing of this Engagement Letter and thereafter monthly in advance on the same calendar date (the "Work Fees") subject to a maximum of twelve monthly payments.

6.2 A one-off irrevocable, non-refundable, conditional Information Memorandum fee equating to €125,000 (one hundred and twenty-five thousand euros) (the "IM Fee") payable in two equal instalments as follows:

1. €62,500 (sixty-two thousand, five hundred euros) paid upon delivery of the final Information Memorandum to the Company; and
2. €62,500 (sixty-two thousand, five hundred euros) paid 30 calendar days after the payment referenced in paragraph 6.2.1.

6.3 A one-off, irrevocable, non-refundable, conditional completion fee equating to:

1. 1.65% on the first €30,000,000 (thirty million euros) of Facilities raised; and
2. 2.00% on the remainder of the Facilities raised,

calculated on the gross amount of the Facilities as referenced in the Facilities Documents (the "**Completion Fee**").

6.4 The Completion Fee shall be paid net of the following fees:

1. 50% of the first six monthly Work Fees (maximum €52,500 in aggregate)
2. 80% of the next six monthly Work Fees (maximum €84,000 in aggregate)
3. 100% of the IM Fee (€125,000).

6.5 The Completion Fee shall become due on the date of signing of each and any Facilities Documents and payable at the latest, from the proceeds of first drawdown of the Facilities.

6.6 The Company shall directly incur all business class travel and subsistence costs relating to any travel required by EMFC personnel while executing the Scope of Work, such travel to be pre-agreed with EMFC but booked and paid for directly by the Company.

6.6.1 EMFC's stipulated carrier shall in all instances be British Airways for flights departing from the United Kingdom and for flights arriving into the United Kingdom. EMFC shall retain the right to choose a carrier of travel for flights originating and terminating in territories other than the United Kingdom.

6.7 Reimbursements for all printing, meeting room bookings, phone charges and other out-of-pocket expenses incurred in relation to the services provided under this Engagement Letter (the "**Out of Pocket Expenses**"). The Out of Pocket Expenses shall be invoiced by EMFC from time to time and shall become due and payable immediately by the Company.

6.7.1 Significant Out of Pocket Expenses such as purchase of independent market, equity or other research reports shall require pre-approval by an authorised representative of the Company, which shall be deemed to have been granted upon EMFC receiving written confirmation from such authorised representative in electronic mail format.

14. Termination

14.1 This Engagement Letter automatically terminates on the date of first drawdown under the last of the Facilities Documents entered into by any member of the Group in connection with the €130 million Senior and Mezzanine Loan Facilities.

14.2 This Engagement Letter may be terminated by either party giving 15 Business Days' written notice to that effect to the other party in which event all obligations of the parties in relation to this appointment shall, save as referred to in paragraph 16 (Survival) terminate at 5pm (London time) on the last day of that period of notice.

14.3 EMFC may terminate its obligations under this Engagement Letter with immediate effect by notifying the Company if:

a. in its opinion, any of the conditions set out in paragraph 3 (Conditions) is not satisfied; or

b. the Company fails or has failed to disclose to EMFC information which could impede the Company's ability to raise the Facilities.

14.4 If, at any time within the first 6 months after the termination of this Engagement Letter, the Company consummates the Transaction or another transaction which is similar in substance to the Transaction in raising the Facilities, the Company shall pay to EMFC the fees, costs and expenses calculated in accordance with paragraph 6 (Fees, Costs and Expenses) including 100% of the Completion Fee as calculated on the basis of drawn amounts with respect to such transaction or transactions, in addition to any expense reimbursement otherwise owing pursuant to paragraph 6 (Fees, Costs and Expenses).

14.5 If, at any time after the first 6 months but prior to twelve months terminating this Engagement Letter, the Company consummates the Transaction or another transaction which is similar in susbstance to the Transaction in raising the Facilities, the Company shall pay to EMFC the fees, costs and expenses calculated in accordance with paragraph 6 (Fees, Costs and Expenses_ including 50% of the Completion Fee as calculated on the basis of drawn amounts with respect to such transaction or transactions, in addition to any expense reimbursement otherwise owing pursuant to paragraph 6 (Fees, Costs and Expenses).

16. Survival

16.1 Except for paragraphs 2 (Scope of Work), 3 (Conditions), 4 (Material Adverse Change) and 14 (Termination) the terms of this Engagement Letter shall survive and continue after the Facilities Documents are signed.

16.2 Without prejudice to paragraph 16.1, paragraphs 6 (Fees, Costs and Expenses), 7 (Payments), 8 (Indemnity), 9 (Limitation of Liability), 10 (Confidentiality), 11 (Publicity/Announcements), 12 (Conflicts), 14 (Termination), 16 (Survival) to 20 (Governing Law and Jurisdiction) inclusive shall survive and continue after any termination of the obligations of EMFC under this Engagement Letter.

17. Entire Agreement

17.1 The Engagement Letter sets out the entire agreement between the Company and EMFC as to executing the Facilities and supersedes any prior oral and/or written understandings or arrangements relating to the Facilities.

17.2 Any provision of this Engagement Letter may only be amended or waived in writing signed by the Company and EMFC.