Neutral Citation Number: [2020] EWHC 3136 (Comm)

Case No: CL-2017-000245

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 20/11/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

(1) NIHL LIMITED (a company registered in the British Virgin Islands)
(2) LONDON PROPERTY ASIA LIMITED (a company registered in the British Virgin Islands) **Claimants**

- and -

(1) INFINITE LIMITED (IN LIQUIDATION) (a company registered in Jersey)
(2) G&T DESIGN LIMITED
(3) GAL ADIR
(4) TATYANA ADIR **Defendants**

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Alexander Goold (instructed by **Ince Gordon Dadds LLP**) for the **Claimants**
Jonathan Gavaghan (instructed by **Healys LLP**) for the **Defendants**

Hearing date: 23 October 2020

Approved Judgment

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Mr Justice Henshaw:

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(A) INTRODUCTION

1. The Claimants apply, by a notice dated 30 July 2020, for an order that judgment be entered against the Second to Fourth Defendants, G&T Design Limited, Gal Adir and Tatyana Adir (together, the "***Adirs***") in the amount of £3.3 million pursuant to the terms of the confidential schedule to a consent order dated 27 November 2018 (the "***Tomlin Order***").

2. The Claimants' application was supported by a witness statement of their solicitor, Mr Gareth Jones, a partner in Ince Gordon Dadds LLP. In response to the application, the Adirs disputed the Claimants' entitlement to judgment under the terms of the Tomlin Order and produced a witness statement of the Third Defendant, Mr Gal Adir, dated 20 October 2020, which gives evidence addressing the steps taken by the parties to agree a full and final settlement pursuant to the terms of § 1 of the Tomlin Order as explained in section B below. The relevance of that issue is discussed in greater detail below. The Claimants objected to the admission of Mr Adir's evidence on the ground that it was filed significantly late without explanation. Mr Jones provided, however, a second witness statement in response to Mr Adir's evidence, providing greater detail and exhibiting relevant email communications as to the steps taken by the Claimants to attempt to settle the claim.

3. At the hearing of the application, the Claimants' position was that they did not object to the admission in evidence of Mr Adir's statement, provided that Mr Jones's second statement would also be admitted. The Adirs objected to this on the basis that Mr Jones's statement referred to the substance of without prejudice negotiations between the parties. I was not persuaded by the Adirs' objection. The question of whether the Claimants had used reasonable endeavours to reach a full and final settlement had

been put in issue by the Adirs in their own responsive evidence. That made it inevitable that the court would need to have regard to the content of the parties' negotiations to reach a decision on that issue. The position is analogous to that where the court is asked to determine whether a binding settlement was reached, which is a recognised exception to the 'without prejudice' rule and permits the court to review the without prejudice materials (*Unilever Plc v The Procter & Gamble Co.* [2000] 1 WLR 2436 (CA)). I gave a short ruling to that effect at the hearing of the application.

4. The Adirs also objected to Mr Jones's evidence on the basis that it failed to identify the sources of Mr Jones's knowledge (and Mr Jones was not himself involved in the relevant negotiations). I did not accept that this was sufficient to render the statement inadmissible in its entirety, in particular given the short time available to the Claimants to prepare their responsive evidence following the belated service of Mr Adir's own evidence. This criticism is instead one that goes to the weight attributable to Mr Jones's evidence, and I have therefore taken this factor into consideration.

5. I have come to the conclusion that the terms of the Tomlin Order did not require the Claimants to use reasonable endeavours to reach a full and final settlement as a condition of becoming entitled to apply to enter judgment under paragraph 2 of the Tomlin Order. In case I am wrong in that conclusion, I have also considered whether the Claimants used reasonable endeavours to reach a settlement and I have concluded that they did. On the basis of that finding, I also reject the Adirs' alternative argument that the Claimants committed a repudiatory breach of the contract by failing to engage in settlement discussions. I have considerable sympathy for the Adirs in the difficult situation in which they find themselves. However, it follows from my findings that the Claimants' application must be granted and judgment entered for the Claimants in the proceedings in the amount of £3.3 million.

(B) BACKGROUND

6. In these proceedings, the Claimants, NIHL Limited and London Property Asia Limited, seek to recover sums in respect of loans of £1.1 million and £1.5 million (respectively) advanced to G&T John Street Limited (which is not a party to the claim) in June 2014 in connection with a property development in Central London.

7. Each of the Defendants gave a guarantee of the loans advanced to G&T John Street Limited. The First Defendant, Infinite Limited, is in liquidation and plays no part in the proceedings. The Third and Fourth Defendant are directors of the Second Defendant, a limited company.

8. Trial of the Claimants' claims was due to commence in this court on 27 November 2018. The principal issues for trial included (i) whether the necessary formalities had been complied with in respect of the loans in order for the guarantees to be enforceable; and (ii) whether, as a consequence of a further agreement that had been entered into between the Claimants, G&T John Street Limited and a third party senior lender, the guarantors had been released from their guarantees. The Claimants claimed that, by the time of the trial, the amount outstanding under the loans (taking account of interest) was around £6.9 million.

9. On the first day of trial, following negotiations between the parties and their legal representatives, the parties agreed a settlement of the claim, which was embodied in

the terms of the Tomlin Order. The Tomlin Order was filed with the court in the usual manner and was approved by the trial judge, Males J.

10. The terms of that settlement are as follows:

> "1. The Claimants and the Second to Fourth Defendants shall use reasonable endeavours to reach a full and final settlement of the Claimants' claims against the Second to Fourth Defendants herein by 26 May 2020.
>
> 2. In the event that such settlement is not reached, the Claimants thereafter be at liberty to enter final judgment by consent in these proceedings against the Second to Fourth Defendants for the sum of three million three hundred thousand pounds (£3.3m) inclusive of interest and costs as at that date.
>
> 3. The terms of this Schedule remain confidential to the parties and their legal advisers and agents, save that the same may hold discussions with third parties solely for achieving the settlement referred to herein.
>
> 4. There be no further applications in these proceedings except pursuant to paragraphs 2 and 3 herein.
>
> 5. For the avoidance of doubt, the final judgment referred to in paragraph 2 would then be in full and final settlement of the Claimants' claims against the Second to Fourth Defendants and any other claims against them arising out of the subject matter of these proceedings."

11. In the immediate aftermath of the settlement it appears (from a "Chronology of Negotiations" produced by the Claimants, which is disputed to some extent by the Adirs) that the parties initially engaged in some negotiations that petered out around the end of 2018. There followed a period of relative inactivity throughout most of 2019, until the negotiations were revived in late 2019 and continued into 2020.

12. Ultimately, the settlement deadline of 26 May 2020 in the Tomlin Order passed without full and final settlement being reached.

13. On 27 July 2020, following a period during which it is said by the Adirs (and apparently accepted by the Claimants) that the Claimants did not seek to engage in further negotiations, the Claimants (through Mr Jones) wrote to the Adirs' legal representative confirming that the Adirs' proposals were considered inadequate and that the Claimants intended to apply to court to enter judgment pursuant to the Tomlin Order. The Claimants then did so on 30 July 2020.

(C) ISSUES FOR DETERMINATION

14. The Claimants issued their application on the basis that, as no settlement had been reached, they were entitled to apply for judgment to be entered by consent pursuant to paragraph 2 of the Tomlin Order.

15. In Mr Adir's witness statement and the Adirs' skeleton argument for the hearing of the application, the Adirs raise a number of alternative and overlapping arguments as to why the Claimants should not be entitled to judgment:

    i) as a matter of contractual construction, it was an express requirement, alternatively an implied term, of the Tomlin Order that the Claimants must comply with paragraph 1 before being entitled to enter judgment under paragraph 2 (i.e. paragraph 1 is effectively a condition precedent), and the Claimants had not in fact exercised reasonable endeavours to try to reach a full and final settlement with the Adirs. The paragraph 2 obligation also carried with it an implied requirement to act in good faith, with which the Claimants had not complied. As a result, the Claimants were not entitled to enter judgment, and the parties should be left to continue their negotiations;

    ii) the Claimants' failure to comply with paragraph 1 constituted a repudiatory breach of contract, which the Adirs accepted. The terms of the Tomlin Order therefore fall away and the parties revert back to the original position (i.e. the trial should be re-listed);

    iii) the Claimants are in effect seeking an order for specific performance, and the court should take into account the Claimants' conduct in considering whether to make such an order. In circumstances where the Claimants have failed to use reasonable endeavours to reach a settlement as required by the Tomlin Order, specific performance should not be granted; and/or

    iv) even if the order is not one for specific performance, the court retains a discretion as to whether to make the order sought and, in exercising that discretion, should take into account the Claimants' conduct as set out above.

16. The Claimants say that paragraph 1 is not a condition precedent to paragraph 2, but that in any case they did use reasonable endeavours to reach a settlement and are therefore entitled to judgment in accordance with the terms of the Tomlin Order.

17. It was common ground before me that the Claimants' application is akin to one for summary judgment. As such, the relevant question for determination is whether the Adirs have a real prospect of succeeding in any of the arguments set out above or whether there is some other compelling reason why judgment should not be entered for the Claimants under the Tomlin Order. If I am not satisfied to the summary judgment standard of the merits of the Claimants' position, it might well be necessary to list a trial of the Claimants' application to enforce the Tomlin Order.

(D) CONSTRUCTION OF THE TOMLIN ORDER

(1) Express terms

18. The principles applicable to the interpretation of the parties' contract as set out in the Tomlin Order were not the subject of specific dispute or detailed submission by the parties. Those principles have, of course, been the subject of significant judicial attention at the highest levels in recent years. It is now accepted, as recently summarised by Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm) at § 8 that:

> "[t]he court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. 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 the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

19. The Claimants submit that the proper construction of the wording of the Tomlin Order is that the sole requirement for paragraph 2 to be engaged is that no full and final settlement has been reached; there is no other link between paragraphs 1 and 2. The words "*such settlement*" in paragraph 2 therefore mean "*a full and final settlement*".

20. The Adirs, on the other hand, submit that paragraph 2 flows from paragraph 1 and so it is necessary to read the two paragraphs together. Paragraph 2 should therefore be read as meaning "*in the event that a full and final settlement is not reached after the parties have used reasonable endeavours in an attempt to do so…*". In their submissions, the Adirs also put their case on the basis that it was a condition precedent that the Claimants must use their reasonable endeavours to reach a settlement before they could enter judgment under paragraph 2. The Adirs add that their interpretation is supported by the principle that a party cannot rely on its own wrong.

21. It could not realistically be suggested that the Claimants' contingent right to judgment under paragraph 2 depends on the *Defendants* using reasonable endeavours to settle pursuant to paragraph 1, as that would enable the Defendants to prevent the

entitlement from arising. The real question is thus whether the paragraph 2 right arises only if the *Claimants* have complied with paragraph 1.

22. The Claimants submit that if it had been the parties' intention to make the Claimants' right under paragraph 2 conditional on their satisfaction of paragraph 1, the parties could and would have included clear wording to that effect. There is some force in that submission. The suggestion that the Claimants (though not the Adirs) must meet the requirements of paragraph 1 before proceeding to paragraph 2 is not a natural reading of the language used by the parties; if this were the intention of the parties, it is likely that they would have included much clearer wording to that effect.

23. The Adirs say that the meaning contended for by the Claimants would essentially deprive paragraph 1 of any effect, and that that cannot be the case since paragraph 1 is the only element that the Adirs get out of the bargain (the Claimants otherwise being entitled to enter judgment under paragraph 2). I am not persuaded that either of those points is correct. Beginning with the latter point, the effect of the Tomlin Order is that even if the Claimants become entitled to enter judgment under paragraph 2, the Adirs will have had the benefit of a grace period in which they were able to negotiate the terms of the settlement without incurring further contractual interest, and a substantial reduction in the size of the claim against them: from £6.9 million (the claim as put forward at the start of the trial) to £3.3 million.

24. Nor is it the case that the Claimants' proposed meaning leaves paragraph 1 entirely without effect. If the Claimants had merely sat on their hands and refused to engage in any settlement negotiations at all, that might well have been a repudiatory breach that, once accepted by the Adirs, would result in a discharge of the settlement (and indeed, the Adirs have raised such an alternative argument on this application). I am satisfied that paragraph 1 can therefore have some effect as a separate, freestanding obligation without being a condition precedent to paragraph 2.

25. I accept that the result of this interpretation would be that the Claimants could make some attempt to reach a settlement, falling short of reasonable endeavours but not significant enough to amount to a repudiatory breach, and then proceed to enter judgment under paragraph 2. In such a situation, the Adirs' only recourse would be to claim for damages for breach of the reasonable endeavours obligation. Damages for such a claim would likely be almost impossible to assess. However, I do not consider that the difficulties of enforcing the reasonable endeavours obligation weigh sufficiently strongly as to overrule the conclusions I have reached above. Despite such enforcement difficulties, the inclusion of a 'reasonable endeavours' obligation can have value in acting as a statement of common intention to encourage the parties to reach a consensual settlement.

26. I therefore conclude that the express terms of the Tomlin Order do not make the Claimants' rights under paragraph 2 contingent on their compliance with paragraph 1.

(2) Implied terms

27. The Adirs say that, if there was no express term that the Claimants must satisfy paragraph 1 as a condition precedent to applying for judgment under paragraph 2, there is an implied term to that effect.

28. There was no dispute between the parties as to the relevant principles applicable to the implication of terms into contracts. Those principles have been considered and developed in a number of recent cases including by the highest authority in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72.

29. More recently, the principles as re-stated by the Supreme Court in *Marks and Spencer* were summarised by Lord Hughes sitting in the Privy Council in *Nazir Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 at § 7:

> "It is not necessary here to rehearse the extensive learning on when the court may properly imply a term into a contract, for it has only recently authoritatively been re-stated by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 . It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

30. The Adirs put their case under this head both on the basis that:

i) to adopt the Claimants' interpretation would rob paragraph 1 of its business efficacy, since it would allow the Claimants to take no part in settlement negotiations and then proceed directly to an application under paragraph 2; and

ii) had an officious bystander asked them, the parties would not have considered that the contract permitted the Claimants to ignore their obligations under paragraph 1 and nonetheless enter judgment under paragraph 2.

31. Many of the reasons considered above in respect of the submissions as to express terms apply equally in this context.

32. In particular, I repeat that paragraph 1 is a valid and potentially useful obligation in itself, and further has the effect that, if the Claimants completely refused or failed to

engage, the Adirs would be able to treat the settlement agreement as discharged on grounds of repudiatory breach. I do not therefore consider that the express meaning of the contract would deprive paragraph 1 of its business efficacy such that the implication of a condition precedent was necessary. Nor, had an officious bystander raised the point, would it have been considered so obvious that it went without saying that paragraph 1 must be a condition precedent to paragraph 2. On the contrary, there are good reasons why the parties might not have wished to make the obligations interdependent, such as the potential uncertainty that might arise as to whether paragraph 1 had been complied with and the prospect of satellite litigation on that issue. As a result, the implication of the term sought by the Adirs is neither necessary nor obvious.

33. I therefore conclude that the Tomlin Order did not require the Claimants to use reasonable endeavours to agree a full and final settlement as a precondition to applying for judgment under paragraph 2 of the Tomlin Order.

(E) COMPLIANCE WITH THE REASONABLE ENDEAVOURS OBLIGATION

34. In light of the conclusions I reach above, the question of whether the Claimants have complied with the requirements of paragraph 1 does not arise for determination, save insofar as it is said that the Claimants have failed to engage to such a degree that they have committed a repudiatory breach.

35. However, in case I am wrong in my conclusions in section (D) above, I now consider whether the Claimants committed a breach (whether repudiatory or not) of paragraph 1 of the Tomlin Order.

36. There was no dispute before me as to whether the obligation in paragraph 1 to use reasonable endeavours to reach a full and final settlement was capable of being a binding obligation. The only issue is whether the steps taken by the Claimants satisfied the obligation.

(1) Negotiations between the Claimants and the Adirs

37. The content of the negotiations between the Claimants and the Adirs was put before the court in Mr Adir's witness statement and the second witness statement of Mr Jones, and summarised in the Claimants' "Chronology of Negotiations". A number of email exchanges were also produced to accompany that evidence. As I have explained above, I ruled at the hearing that this evidence was admissible to prove whether the Claimants had used reasonable endeavours to reach a full and final settlement. I do, however, bear in mind when considering the Claimants' evidence the criticisms raised by the Adirs as to the source of Mr Jones's knowledge.

38. The key chronological events in the negotiations between the Claimants and the Adirs, as detailed in the evidence, are as follows.

39. In the immediate aftermath of the trial adjournment and the Tomlin Order, there were some exchanges over WhatsApp between Mr Adir and Mr Peter Yip, who was not a director or officer of either of the Claimants but appears to have acted as their representative. The content of the WhatsApp messages was summarised in Mr Jones's evidence but the messages themselves were not produced to the Court. This is one of

the stronger examples of uncertainty as to the source of the information in Mr Jones's evidence. Consequently, I do not place great weight on those communications in determining whether the Claimants complied with the reasonable endeavours obligation. In any event, as I indicated to the parties at the hearing of the application, I regard the more important communications as those in the lead up to the 26 May 2020 deadline in the Tomlin Order.

40. During the course of 2019, it appears that there was little communication between the parties regarding the settlement.

41. The negotiations then re-started late in 2019, with an email from Ms Chu (a director of the Claimants) to the Adirs referring to the reasonable endeavours obligation under the Tomlin Order and inviting their settlement proposals. The Adirs subsequently indicated that they were working on proposals and would provide Ms Chu with a detailed plan in due course.

42. On 25 February 2020, Mr Adir emailed Ms Chu (copying the solicitors for the Claimants and for the Adirs) with the financial information requested by Ms Chu and a proposed payment plan for settlement of the Claimants' claim. The Adirs' payment plan proposed the payment of £3.3 million in total over the course of a nine-year period through a combination of quarterly instalments and semi-annual "bulk" top-up payments every June and December, with the payments increasing in amount over the course of time. Mr Adir explained that this plan was "*the absolute maximum [the Adirs] can offer at this stage".*

43. Ms Chu responded on 27 February 2020 indicating that the Claimants would consider the proposed plan and requesting further documentation in relation to the Adirs' finances. There followed a series of email exchanges regarding that requested documentation. The Claimants raise an issue regarding the adequacy and completeness of the information provided by the Adirs; however, I do not consider that bears directly upon the determination of the Claimants' compliance with the reasonable endeavours obligation.

44. In their emails of 9 and 18 March 2020, the Adirs sought feedback from the Claimants on the proposed payment plan. Ms Chu responded on 23 March 2020 in the following terms:

> "I have studied your proposals to repay our money, but it does not take account of any interest. Do you not intend to pay any interest on the £3.3m even though you plan to take another 10 years to repay that amount? Would [a named third party] be prepared to lend you any sums to front-load the payments? Like that, the interest would be lower for you in the long run. The interest on a judgment debt would be 8% per annum, so how does your proposal take account of the interest that we would otherwise receive?"

45. Mr Adir responded on 3 April 2020 reiterating that the payment plan was as much as the Adirs could pay. Mr Adir suggested that the terms of the payment plan could be reviewed again after 18 months, by which point the Adirs might be "*in a position to increase the payments and shorten the maturity*". Mr Adir also alluded to the severity

of his financial difficulties. As regards the question of interest, Mr Adir's explanation was that:

> "Our proposals did not account for any interest as we have offered to pay the full sum of £3.3m. In our settlement negotiations it was agreed this would be the maximum figure but an agreement to agree later would govern the amount (up to the maximum of £3.3m) and duration of repayment. Hence instead of looking to negotiate the total capital sum or going back to the original £2.6m advanced we put together a proposal that gets the full £3.3m paid."

46. There was no substantive response from the Claimants to Mr Adir's email. On 25 April, Mr Adir followed up with Ms Chu to provide further documents and requesting a response, noting that only a month remained until the Tomlin Order deadline. Follow-up emails were also sent to Mr Jones by Mr Adir on 24 April 2020 and the Adirs' legal representative, Mr Ben Parr-Ferris, on 29 April 2020. Mr Jones acknowledged receipt to Mr Parr-Ferris, explaining that he was discussing Mr Adir's emails with his clients.

47. No further response was provided and the deadline of 26 May 2020 in the Tomlin Order passed without an agreement being reached.

48. On 27 July 2020, Mr Jones emailed Mr Parr-Ferris stating:

> "I regret that the proposals put forward by your clients are inadequate. Are they in a position to make any improved proposals?
>
> We intend to apply to Court to enter judgment."

49. The Claimants issued their application on 30 July 2020.

(2) Analysis of the attempts by the Claimants to reach a settlement

50. The Adirs did not argue that the account of the negotiations presented by the Claimants was selective or misleading in any way. At the hearing of the application, they accepted that to an extent the negotiations took place as shown by the documents. The question is as to the interpretation of those negotiations.

51. The Adirs rely primarily on the Claimants' silence after the email from Mr Adir on 3 April 2020. It is said that the reasonable endeavours obligation, as it has been interpreted by the courts, required the Claimants to continue in the negotiations until all reasonable endeavours had been exhausted and that, in failing to continue the negotiations after 3 April 2020, the Claimants have not complied with their obligation.

52. Further, in the Adirs' submission, the key question for the court is why the negotiations did not continue after 3 April 2020. As Mr Jones's evidence does not address that key question, there would need to be further evidence and cross-

examination as to why the Claimants did not continue the negotiations and, as a result, the application is not appropriate for determination on a summary basis.

53. In support of their submission, the Adirs rely on the judgment of Lewison J (as he then was) in *Yewbelle v London Green Developments* [2006] EWHC 3166 (Ch), at § 123:

> "I come back to the question: for how long must the seller continue to use reasonable endeavours to achieve the desired result? In his opening address, Mr Morgan said that the obligation to use reasonable endeavours requires you to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted. You would simply be repeating yourself to go through the same matters again. I am prepared to accept this formulation, subject to the qualification that account must be taken of events as they unfold, including extraordinary events."

54. In *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm) at § 35, Julian Flaux QC (sitting as a Deputy Judge of the High Court) accepted Lewison J's formulation:

> "Subject to one caveat, I would agree with this analysis. The caveat is that, where the contract actually specifies certain steps have to be taken (as here the provision of a direct covenant if so required) as part of the exercise of reasonable endeavours, those steps will have to be taken, even if that could on one view be said to involve the sacrificing of a party's commercial interests."

55. Further support for this approach can also be found in the judgment of Leggatt J *Astor Management AG v Atalaya Mining* [2017] EWHC 680 (Comm) at § 67:

> "Far from being 'exceptional', I would say that it should almost always be possible to give sensible content to an undertaking to use reasonable endeavours (or 'all reasonable endeavours' or 'best endeavours') to enter into an agreement with a third party. There is no problem of uncertainty of object, as there is no inherent difficulty in telling whether an agreement with a third party has been made. Whether the party who gave the undertaking has endeavoured to make such an agreement (or used its best endeavours to do so) is a question of fact which a court can perfectly well decide. It may sometimes be hard to prove an absence of endeavours, or of best endeavours, but difficulty of proving a breach of a contractual obligation is an everyday occurrence and not a reason to hold that there is no obligation. Any complaint about lack of objective criteria could only be directed to the task of judging whether the endeavours used were 'reasonable', or whether there were other steps which it was reasonable to take so that it cannot be said that 'all reasonable endeavours' have been used. Where the parties have

> adopted a test of 'reasonableness', however, it seems to me that they are deliberately inviting the court to make a value judgment which sets a limit to their freedom of action." (My emphasis)

56. The Claimants, on the other hand, suggest that the Adirs' interpretation would import an obligation to use '*all* reasonable endeavours' when the parties have only agreed to the lesser obligation to use 'reasonable endeavours'. They point out that Leggatt J in *Astor Management* was actually considering an 'all reasonable endeavours' obligation. The same can be said of Lewison J in *Yewbelle.* There was also some disagreement between the parties at the hearing of the application about whether these statements of principle were binding on this court.

57. I do not think it necessary to resolve the question of how the above statements apply in the context of an obligation to use only 'reasonable endeavours' as applies here. The instant case is not one where it is suggested that there were multiple paths open to the Claimants to achieve the required result, such that they might have needed to exhaust them all before the obligation would be deemed satisfied; there was really only one course of action open to them, namely to engage in negotiations in an attempt to reach a resolution to settle the Claimants' financial claims, including giving genuine consideration to the Adirs' proposals. I do not think that the position would have been any different in practice here even if the obligation had instead been to continue until all reasonable endeavours had been exhausted.

58. In my view, the key points in the chronology are these:

    i) the Claimants invited compromise proposals from the Adirs;

    ii) the Adirs produced a proposal that involved payments over a protracted period, with no provision for interest to mitigate the delay in payment, and was said to be the maximum they could offer;

    iii) the Claimants communicated that this was unacceptable, and asked whether the Adirs would be willing to pay interest; and

    iv) the Adirs maintained their position that no interest would be paid and that the payments would be made over a nine-year period (albeit subject to an option to review after 18 months, which in reality would likely have added little value to the overall proposal).

59. It is clear that the parties were effectively at an impasse. From 3 April 2020, the Claimants were in my view entitled to regard the negotiations as having run their course and to take the position that, unless the offer could be improved, they would not be agreeing to a settlement over and above the compromise already reflected in paragraph 2 of the Tomlin Order itself.

60. That this was the Claimants' view is clear from Mr Jones's email of 27 July 2020. Whilst this post-dates the deadline of 26 May 2020 for settlement under the Tomlin Order, it is clear evidence of the Claimants' position in response to the Adirs' proposal. Nothing had changed in the interim to suggest their original position had changed by 27 July 2020.

61. The obligation on the Claimants to use reasonable endeavours (or even to continue to exhaust all reasonable endeavours) did not impose on them an obligation to accept an offer that they found commercially unacceptable, nor to continue to go over the same ground in the hope that the offer would be improved. It is notable in this regard that, even with the 26 May 2020 deadline approaching and no response having been received from the Claimants, the Adirs did not attempt to improve their offer (presumably because, as they had stated in their email correspondence, there was no further room for improvement). The parties remained far apart in their negotiating positions.

62. The Adirs further criticise the Claimants for failing to communicate their rejection of the offer between 3 April 2020 and 26 May 2020. They say that no explanation has been given for the Claimants' silence. I am not persuaded that it was incumbent upon the Claimants to provide an explanation, given the stage the parties had reached in their negotiations.

63. In any event, whilst there was no direct evidence of their reason for not communicating the rejection, the Claimants' position was that the reason self-evidently could have ranged from an inadvertent error to a deliberate negotiating tactic, and in neither case can it be said there was a failure to use reasonable endeavours. I accept that submission. At the extreme end of the spectrum, once the Adirs had persisted with their original offer, which was unacceptable to the Claimants, the Claimants were entitled to use silence as a negotiating technique to see if the offer would be improved. Similarly, if the Claimants had inadvertently failed to communicate their rejection of the Adirs' offer, that error should not be regarded as a failure to use reasonable endeavours at a point in time when the negotiations were, from the Claimants' perspective, effectively coming to an end.

64. In light of the above, I do not agree that this is a case in which further evidence or cross-examination is required to determine whether the Claimants exercised reasonable endeavours. The decision can properly be made by reviewing the exchanges of correspondence between the parties. On the basis of that evidence, I have come to the conclusion that the Claimants did make attempts to engage in negotiations with the Adirs, but ultimately considered that the proposed payment plan was unacceptable and that a settlement would not be reached. It cannot be said that the Claimants have not exercised reasonable endeavours to reach a full and final settlement. Therefore, if satisfaction of paragraph 1 were a condition precedent to an application under paragraph 2, I would find that the Claimants had satisfied the condition precedent by 26 May 2020.

65. The Adirs also submitted, relying on the decision of Teare J in *Emirates Trading Agency LLC v Prime Mineral Exports Private ltd* [2014] EWHC 2104 (Comm), that the obligation to use reasonable endeavours to reach an agreement brought with it (either as part of those reasonable endeavours or as a separate implied duty) a duty of good faith. The Claimants did not seek to dispute that such a duty existed, but suggested that there had been no lack of good faith.

66. I do not see any grounds for suggesting that the Claimants acted in bad faith in their negotiations with the Adirs. In particular, in light of my finding that the Claimants did in fact use reasonable endeavours to reach a settlement, I do not consider that if there

were a separate good faith obligation, it would alter my conclusion that the Claimants complied with paragraph 1 of the Tomlin Order.

(F) ALTERNATIVE CONDUCT-RELATED ARGUMENTS

67. The Adirs also raised a number of alternative arguments arising in connection with their submission that the Claimants did not use reasonable endeavours to reach a settlement. As a result of my conclusion that the Claimants did in fact use reasonable endeavours in accordance with the requirements of the Tomlin Order, these arguments also fail. Nevertheless, I address them briefly below.

(1) Repudiatory breach of the Tomlin Order

68. It was said that, even if satisfaction of paragraph 1 was not required as a condition precedent (either as an express or an implied term of the Tomlin Order) to the Claimants' application under paragraph 2, the Claimants committed a repudiatory breach by failing to engage in settlement negotiations. The Adirs were therefore entitled to treat the Tomlin Order as discharged, and have now done so, so that the Claimants are not entitled to judgment.

69. I have found that the Claimants did in fact use reasonable endeavours as required under the Tomlin Order. It cannot therefore be said that there was any repudiatory breach of the contract that could allow the Adirs to treat it as discharged. Further, even if the Claimants did not fully comply with the reasonable endeavours obligation, their conduct in attempting to comply fell well short of conduct amounting to a repudiation of the contract. The evidence does not show that the Claimants either walked away from their obligations under paragraph 1 or were in such serious breach of them as to justify the Adirs in treating the contract as having come to an end. On the contrary, over the period in question the Claimants took a number of steps in compliance with their paragraph 1 obligations.

70. In the event that I am incorrect in that conclusion, there would remain the question of whether the repudiatory breach had the effect of discharging the Claimants' right to enter judgment under paragraph 2. At the hearing of the application, it was accepted in principle that, if the Claimants had unconditionally acquired the right to apply under paragraph 2 before the repudiation was accepted by the Adirs, then the Claimants would still be entitled to seek judgment (see Chitty on Contracts, 33rd ed., volume 1, para 24-053).

71. There was some disagreement between the parties as to whether the repudiatory breach (if it existed) had been accepted by the Adirs. Looking back at the written evidence, it is clear that the breach was accepted at the latest on 16 October 2020 (by way of a letter from Healys LLP to Ince Gordon Dadds LLP).

72. A source of greater disagreement, however, was the question of the point in time at which the Claimants' right under paragraph 2 would have become 'unconditionally acquired'. The Claimants say this took effect when they applied to enter judgment on 30 July 2020; the Adirs say not until judgment is entered. No specific authorities were cited as to the meaning of 'unconditionally acquired' (although it may fairly be said that the issue arose for the first time only in oral submissions).

73. As a result of my conclusions on the other issues, it is not necessary to reach a firm conclusion on this issue; however, if it were, I would have agreed with the Claimants on this point. The only requirement under the contract for paragraph 2 to be engaged was that no settlement had been reached by 26 May 2020. Once that happened, the Claimants "*thereafter be at liberty to enter final judgment*". I accept that, once the Claimants had made the election to proceed under paragraph 2, the right to enter final judgment became unconditional. Therefore, acceptance of the repudiatory breach after 30 July 2020 would not have divested the Claimants of the right to enter judgment under paragraph 2.

(2) Specific performance

74. The Adirs submit that the court is essentially being asked to order specific performance and, in deciding whether to do so, should consider the Claimants' conduct in failing to use reasonable endeavours. Alternatively, the Adirs say that the court in any case retains a discretion as to whether to issue the judgment sought and, in deciding whether to do so, should take into account the Claimants' conduct.

75. No authority was cited in support of the submission that the order sought is one for specific performance and I do not agree that the order should be characterised in this way. It is true that paragraph 2 of the Tomlin Order envisages the judgment being expressed to be by consent, though it will be necessary to hear argument on whether in the circumstances that have arisen that remains appropriate. In any event, I consider that the Claimants' conduct is far removed from what would have been required for me to refuse to grant specific performance or the judgment sought as a matter of discretion.

(G) CONCLUSION

76. I have concluded that:

i) the Claimants' right under paragraph 2 of the Tomlin Order, to enter judgment in the absence of a settlement by 26 May 2020, was not contingent on the Claimants having complied with their paragraph 1 obligation to use reasonable endeavours to reach a full and final settlement;

ii) in any event, the Claimants did comply with their paragraph 1 obligation;

iii) *a fortiori*, any breach by the Claimants of paragraph 1 did not amount to a repudiatory breach of the Tomlin Order; and

iv) the Claimants are therefore entitled to enter judgment pursuant to paragraph 2 of the Tomlin Order.

77. I am satisfied that the Adirs' defence to the Claimants' application has no real prospect of success. I also consider there to be no other compelling reason why this application should go to trial.

78. Accordingly, the Claimants' application for judgment is granted and judgment shall be entered in the amount of £3.3 million.