Neutral Citation Number: [2020] EWHC 878 (Comm)

Case No: CC-2019-MAN-000026

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QBD)
CAPPED COSTS LIST

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester
M60 9DJ

Judgment handed down in private at 10am on 9 April 2020

Before:

HHJ Pearce

- -

Between:

SILVERCLOUD FINANCE SOLUTIONS LIMITED t/a BROADSCOPE FINANCE	**Claimant**
- and -	
HIGH STREET SOLICITORS LIMITED	**Defendant**

- -
- -

Stephen Connolly (instructed by **TLT LLP**) for the **Claimant**
Brad Pomfret (instructed by **Smooth Commercial law Limited**) for the **Defendant**

Hearing dates: 16 and 17 March 2020

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JUDGMENT

I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

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.

Introduction

1. In this case, the Claimant seeks to recover the sum of £100,000 plus interest said to be due to it pursuant to a written contract dated 13 July 2017 by which, in specified circumstances, the Defendant was liable to pay a fee for the introduction of a lender who offered a loan to the Defendant, alternatively a sum by way of quantum meruit for such services.

2. This is the second case to have been tried as part of the Capped Costs Pilot Scheme provided for by CPR PD 51W in the Manchester Civil Justice Centre, the first being Faiz v Burnley Borough Council [2020] EWHC 407 (Ch).

3. In all, five witnesses gave oral evidence (Mr Alan Woods and Mr Paul Goodman for the Claimant, Mr Sean Rogers, Mr Ian Anderson and Mr John Coxhead for the Defendant). In addition, I received the evidence of Mr Kenvyn for the Defendant under cover of a Civil Evidence Act notice. The number of witnesses giving oral evidence exceeded the normal limit for the Capped Costs Pilot set out in CPR PD51W. Two of the witnesses (one on either side) who gave oral evidence did so by telephone because they were self-isolating during the COVID-19 pandemic. It had been hoped that they could give evidence by Skype, but this did not prove practicable. In the event, they were able to give their evidence clearly and I did not consider that the way they gave evidence in any way impaired the cogency of that evidence.

4. Of Mr Goodman's evidence, I ruled at the outset of the trial that his statement was inadmissible either as opinion evidence or as irrelevant, save for paragraphs 1 to 6, 13, 16 to 19, 21, 22, 25, 28, 33 to 35, 41, 42, 47 and 48. Numerically that is well less than half of the statement and even a lot of the material that was not excluded is simply by way of background. This is not the only witness statement parts of which offend against the principle set out at paragraph 39 of the judgment of the current Master of the Rolls, the then Chancellor, in J D Wetherspoon plc v Harris [2013] EWHC 10088 (Civ), though it is the most egregious.

5. The trial was comfortably accommodated within the two day period anticipated by the pilot. As in Faiz, the parties in this are to be commended for

the cooperation which led both to the case being listed in the pilot scheme and to it being heard within the time limits set by that scheme. They are additionally to be commended for dealing with the challenges flowing from the pandemic so efficiently.

The Background

6. The Claimant is a private limited company, which operates as a specialist financial brokerage, and an appointed representative of AFS Compliance Ltd. It is owned by Mr Alan Woods and is one of a number of companies that work under the umbrella of Synergy Commercial Finance Limited. Mr Paul Goodman is a Director of Synergy.

7. One of the lending platforms with which the Claimant worked was a peer to peer lender called ArchOver. As its COO, Mr Ian Anderson, explains at paragraph 5 and 6 of his witness statement, that company does not itself provide lending facilities but would rather vet enquiries for lending and, if they were accepted, post the investment opportunity to their platform, inviting lenders to invest. This mode of business is referred to in a contract between ArchOver and Synergy dated 3 November 2015.

8. The Defendant is limited company through which a solicitors' practice trades. The solicitors are based in the Liverpool area and specialise in personal injury and similar areas of work. At the relevant time, though not currently, the managing director of the Defendant was Mr Sean Rogers. Mr John Coxhead is a director and shareholder of the Defendant.

9. Mr Woods and Mr Rogers had met through the former's brother, James. They had become friends (or at least, in Mr Rogers' words, "friends in a business context") and had had previous professional dealings by which the Claimant had arranged funding facilities for the Defendant.

10. In 2017, the Defendant had lending facilities with NatWest secured by a first debenture, various unsecured lending, a facility with VFS Legal Funding and a facility with Novitas secured by a second debenture. In cross examination, Mr Rogers estimated the total lending to be about £2 million. He said that the company was keen to discharge the Novitas lending which was expensive but that a new lending facility would probably need to discharge the lending from

NatWest as well so that an adequate debenture could be executed. Thus, the Defendant was looking in all for about £2 million.

The relevant dealings between the Claimant and the Defendant

11. In around March 2017, Mr Woods and Mr Rogers began to speak about the Claimant seeking to secure a new funding facility for the Defendant in line with the needs identified in the previous paragraph. Suggested lenders included ArchOver, Growth Street Exchange Limited or Thincats Group. The Defendant's needs, at least as the Claimant understood them, are set out in an email of 27 March 2017 from Mr Woods addressed to Mr James Lucas of ArchOver. The oral evidence of Mr Woods indicates that this email was a draft and was not sent (because at that time the Defendant was interested in a prospective funding arrangement with a firm called Spectra) but in any event it appears fairly adequately to summarise what the Defendant was looking for. It will be noted that a significant amount of the security being offered under the debenture was the Defendant's Work in Progress ("WIP").

12. As a result of this discussion, the Claimant was authorised to approach ArchOver to investigate possible funding options. The response from ArchOver to this enquiry was to seek further information about the Defendant's financial circumstances, including greater details of the WIP. Mr Woods said in cross examination that Mr Lucas had told him that ArchOver had not previously been involved in the provision of lending facilities to a law firm but that they were interested in the legal sector.

13. By mid July 2017, the Defendant was happy to authorise the Claimant to make a formal approach to ArchOver. The Defendant had, according to Mr Woods, received the "BQ" referred to an email of 12 July 2017, this being a detailed form required by ArchOver – Mr Woods said that he remembered seeing the form that was provided, but it was not available in the bundle, nor could he recall whether it had been completed.

14. There was some suggestion that the BQ referred to related to different lending that had nothing to do with the Defendant. Rather, there is mention in an email between Mr Woods and Mr Lucas timed at 15.43 on 13 July 2017 of beer supply, and the Defendant suggested that the "B" of "BQ" stood for beer.

However Mr Woods in the same email talks of information being provided "*ahead of asking* [the Defendant] *to complete the questionnaire."* I would have thought it more probable that "BQ" stood for Borrowing Questionnaire" (or something similar) such that this could have related to the Defendant's proposed facility, though I have no evidence from which to reach a firm conclusion and it is unnecessary for me to make any finding on this issue.

15. This interest from the Defendant led to the Claimant submitting a contract ("the CBIN") dated 13 July 2017 headed "Credit Broking Information Notice." The Defendant (through the agency of Mr Rogers) signed it.

16. The CBIN provides in the relevant clauses as follows:

> ***1. Appointment of the Broker***
>
> *This document sets out how we will deal with you in the provision of services for Credit Broking. Broadscope and Broadscope Finance are trading styles of Silvercloud Finance Solutions Ltd which is an Appointed Representative of AFS Compliance Limited, which is authorised and regulated by the Financial Conduct Authority (FCA). The firm will be acting as a Credit Broker on your behalf and is not a Lender.*
>
> *2.* ***Appraisal and arrangement fees***
>
> *2.1* ***Appraisal fee***
>
> *In consideration of the appointment you will pay to the Broker an appraisal fee of £0.00 for the purposes of assessing and preparing the Lending Proposal; the appraisal fee shall be paid on the commencement of this agreement.*
>
> *2.2* ***Arrangement Fee***
>
> *2.2.1 If a finance offer is made by a Lender to whom the Broker presented the Lending Proposal You will pay in addition to the fee payable pursuant to clause 2.1 a fee of 5% of the Loan Amount. Payment of the arrangement fee shall be made within 14 days of issue of the Finance Offer.*
>
> *2.2.2 The arrangement fees shall not be payable or shall be repaid if:*

2.2.2.1 A condition set out in the Finance Offer cannot be satisfied.

2.2.2.2 The Lender withdraws the Finance Offer or seeks to make a material variation to the terms of the Finance Offer such that you are no longer able to proceed to Completion.

2.2.2.3 And, in either case, Completion does not occur and the Loan Amount or any part of it is not advanced or paid by the Lender.

2.2.2.4 If after a period of six months your Finance Offer has not completed, you will be entitled to a full refund of the Arrangement Fee less a £5.00 administration charge.

3. ***Client consent***

You consent that:

3.1 You are in agreement to pay the Appraisal Fee as stated in Section 2.1 of this agreement.

3.2 You are aware that the Broker may receive commission Lender for the arrangement of this agreement and you have no objections to the Broker receiving this amount.

(It should be noted that this quotation copies the original text, including the capitalisation and the apparent grammatical error in clause 3.2)

17. The CBIN concludes with a declaration that the signatory agrees to the charges stipulated. It also contains a repeat of the declaration as to the Claimant's trading styles and that it is an Appointed Representative of AFS Compliance Limited, a company authorised and regulated by the Financial Conduct Authority under firm number 625035.

18. As to setting the appraisal fee at zero, Mr Woods statement indicates that he did not consider that an appraisal fee was appropriate because he "regarded and trusted [Mr Rogers] as a friend."

19. In cross examination, Mr Rogers said of the agreement that he understood it to mean that, if Mr Woods raised funding of £2 million for the Defendant from ArchOver or another source, the Claimant would be entitled to £100,000.

20. On the same day, 13 July 2017, Mr Woods emailed Mr Lucas at ArchOver, attaching two documents which related to the Defendant's funding application. The first is described in the email as being "*a comprehensive business plan and summary of their activities,"* the second as a WIP report. The email also contains further information that might assist in valuing the WIP, assessing the solvency of the Defendant and understanding its lending needs. This is the primary document relied on by the Claimant as "*the lending proposal*" for the purpose of the CBIN and its entitlement to payment. As Mr Woods put it in cross examination, "I am saying, here is the details of the firm, here is what they do, this is what they want to do, please give them finance. It is asking the lender to ask for finance for them… This is going to be a proposal." Whilst Mr Woods acknowledged that the email said that the information was being provided "*to gauge interest,"* he intended to mean that he wanted to see if they would lend the money; he acknowledged that it was likely that further information would need to be provided. Following this email, Mr Woods' evidence was that he understood ArchOver to have had no reservations about the operation or the finances of the Defendant. They simply needed to do "due diligence" on whether they would commit to the lending.

21. Thereafter, there was a series of efforts by the Claimant and the Defendant to provide further information to ArchOver:

    i) On 18 July 2017, Mr Lucas emailed Mr Woods asking for "*the load of information you have to take it forward."* This request was in turn passed over to the Defendant's financial director, Ms Helen Rehm. She forwarded accounts (probably draft year end 2017 and final year end 2016).

    ii) On 18 August 2017, Mr Woods forwarded to Mr Lucas financial projections that had been prepared by the Defendant.

    iii) On 29 September 2017, Mr Woods forwarded to Mr Lucas further information, including an up to date WIP report and more detailed analysis of certain types of case (housing disrepair and holiday claims).

    iv) In late September 2017 (possibly it was Friday 29 September – see reference in the email timed at 05.01.05 pm on 2 October 2017), a

conference call took place between Mr Lucas, Mr Woods and Mr Rogers. Mr Woods said in evidence that, during this call, Mr Rogers had given an overview on how the firm was "monetised." This meeting appears to have led to the Claimant wishing to get Mr Andrew Baker, who had a specialism in lending to solicitors' firms, involved in the negotiations.

v) At the same time, Mr Woods continued to provide information to ArchOver in support of the proposed lending, as demonstrated by an email on 2 October 2017, into which Mr Baker was copied.

vi) On (probably) 11 October 2017, a further conference call took place about the prospective lending, this time involving Mr Woods, Mr Lucas and Mr Baker. Mr Woods stated that this involved a discussion about the Defendant's WIP.

vii) Following a chaser email from Mr Rogers on 18 October 2017, Mr Woods emailed Mr Lucas on 24 October 2017. He stated that the Defendant "*understand that this will not be a quick process, however they are keen to help you understand how they might provide suitable security and would like to send you some information which might assist you. To this aim, could you please confirm the below points are relevant to getting comfortable:*

- *More detailed insight in to how funders operating in the sector take security*
- *Insight in to industry typical settlement values, cost awards, win rates, and times to progress for different case types*
- *Any other questions/concerns you need to address?"*

We can try and answer as much of the above as possible and if necessary perhaps we could point you in the direction of independent parties to provide the answers."

In cross examination, Mr Woods said of this email that Mr Lucas had repeatedly told him that he was under a huge amount of time pressure and that he could not respond to the enquiry in a timely fashion.

viii) Again following an email chasing matters up from Mr Rogers, Mr Woods emailed Mr Lucas on 13 November 2017, to follow up his email of 24 October 2017. Mr Lucas responded, "*Yes, that seems to cover it although I must stress that this will not get much attention before the end of the year."* In this context, "*that"* appears to mean the material referred to in the email of 24 October 2017.

ix) On 17 November 2017, Mr Rogers emailed Mr Woods with a further detailed analysis of the Defendant's business and explanation of WIP. This was forwarded by Mr Woods to Mr Lucas on 21 November 2017.

22. Mr Woods was asked in cross examination about the reference to *"numerous"* phone discussions between him and Mr Lucas at paragraph 25 of his witness statement. He thought there were perhaps five or six such calls up to the end of October 2017.

23. Towards the end of 2017, it is apparent that Mr Woods was exploring other potential lending opportunities for the Defendant. There was some evidence addressed to the issue as to how urgent the funding requirement was. Certainly Mr Woods referred to the cost of the Novitas funding to the Defendant and Mr Coxhead referred to there being financial difficulties in November 2017, albeit that his concern was to raise finance for expansion, not for day to day cashflow issues.

24. In any event, on 17 November 2017, Mr Woods emailed Growth Street, to explore possible lending on behalf of the Defendant. He also appears to have raised a similar query of a lender called D & D Leasing on 23 November 2017 and to have pursued an enquiry with a lender called RateSetter which was declined, this being evidenced by an email from Mr Woods to Mr Rogers on 24 November 2017. In cross examination, he said that such enquiries were being made because the Defendant was in "desperation" to sort out its lending facilities. He agreed that the enquiry to GrowthStreet was comparable to that being pursued with ArchOver.

25. Mr Rogers gave evidence that, around the end of November 2017, he and Mr Woods had a conversation in which the latter had said that the anticipated deal with ArchOver was "dead." Mr Woods denied any such conversation saying

that he had said no more than that the negotiations were "*on hold"* by which he meant that Mr Lucas had told him that he was too busy to deal with it at that time.

26. Meanwhile, Mr Coxhead, as a director of the Defendant, approached a broker called Norman Kenvyn at VFS Legal Limited to investigate funding arrangements. He proposed an approach to ArchOver. The circumstances of this contact and the implications of the previous dealing by the Defendant via the Claimant with ArchOver were explored in cross examination of Mr Coxhead. He denied that the contact was merely an attempt to get the previous negotiations with ArchOver "over the line." Mr Coxhead said that it happened to be the case that Mr Kenvyn had himself obtained funding through ArchOver and that they were therefore his obvious first point of contact. Mr Coxhead accepted that there were no internal documents within the disclosure that showed the circumstances in which Mr Kenvyn was approached but denied that this was the result of a deliberate attempt to suppress relevant documentation which would prove embarrassing to the Defendant in that it would show that the decision to approach Mr Kenvyn and, through him, ArchOver was made in the full knowledge of the previous efforts made by the Claimant to secure funding from ArchOver and in the belief that a deal to get the funding proposal on their platform was nearly secure.

27. Mr Rogers said in cross examination that he had told his fellow executive directors, Mike Wilson and Tom Hardwick, about the approach to ArchOver, including the discussion with Andrew Baker, though he could not say whether they would have known of Mr Woods' (and therefore the Claimant's) involvement in the approach.

28. Mr Coxhead's evidence, both in his witness statement and in cross examination, was that he did not know of the previous contact with ArchOver when he approached Mr Kenvyn. Mr Kenvyn's statement was to the like effect that he had not known of the previous contact between the Defendant and ArchOver through the Claimant.

29. On 25 January 2018, Mr Kenvyn emailed Mr Angus Dent at ArchOver, stating that "*a long standing and reliable client"* (meaning the Defendant) wished to

work with ArchOver to "*restructure their funding".* The intended structure was *"ideally to replace Novitas and/or other whilst giving them additional working capital."* Various documents were attached including accounts.

30. Mr Dent replied in an email of 25 January 2018, the material parts of which are:

"*Alex has had an initial look at the numbers and from a security perspective it looks as though we could fund. However, we're a bit concerned about the turnover, currently less than last year and massively below budget. This may be reflected in the WIP, professional office pressure of billing prior to the year end doesn't help when trying to make a loan. Doesn't mean we can't do it, just makes it harder. …*

Novitas have the first charge and at end Dec had advanced £933k, the first raise would need to be £1m, minimum, to take them out and take the first charge. Thereafter its NatWest and then half a dozen or so other lenders (the loan stacking needs to be addressed and will give Charlotte/credit committee the hebeegeebees). Feels to me like a series of loans over the platform in say an eight week period (quicker if we can) to replace all of the borrowing and thereafter provide some additional working capital. As you'll gather not an instant fix and a situation we've dealt with successfully before."

31. Thereafter there were a series of communications between the Defendant and ArchOver providing material that had been requested:

i) On 7 February 2018, Ms Rehm emailed Mr Dent and Mr Alex Taylor twice, attaching year end accounts for April 2017, management accounts for December 2017 and financial projections.

ii) On 14 February 2018, Ms Rehm met Mr Dent and thereafter emailed to him the management accounts for January.

iii) On 19 February 2018, Ms Rehm gave Mr Dent the details necessary for him to log into the Defendant's case management system. On the same day, she provided further information relevant to the valuation of WIP.

32. In March 2018, a Project Funding Request was finalised for uploading to ArchOver's platform. Shortly after this, on 29 March 2018, a facility

agreement was entered into between the Defendant and unidentified lenders through the ArchOver platform. The facility agreement is signed by ArchOver Limited which is described both as "*representative"* and "*security trustee*" and is said to represent each lender. This is one of a series of five such agreements, each containing a maximum drawdown amount of £400,000, such that the total facility was £2,000,000. The Directors of the Defendant were required to invest 10% of each tranche through the ArchOver platform. The terms of the lending are set out at paragraph 26 of Mr Anderson's statement.

33. Mr Anderson was unable to say in cross examination whether the information that the Defendant had provided to ArchOver via Mr Kenvyn's lead was materially different to that provided via Mr Woods. However he maintained (as stated in paragraph 21 of his statement) that there was a change in ArchOver's approach to lending on the security of WIP in early 2018 as a result of the launch of what he described as "*a new secured service*." This followed from various lending proposals for lending secured on WIP that had been submitted to them over previous few years by accountants and solicitors.

34. During the period that the contact between the Defendant and ArchOver via Mr Dent was taking place, Mr Woods maintained that he had continued to have contact with Mr Lucas. In particular:

    i) In late January or early February 2018, they had had a conversation during which Mr Lucas had mentioned that ArchOver were negotiating with another law firm.

    ii) In a conversation about one week later, Mr Lucas had told him that, after speaking to his CEO, the position was that "*they could not resume looking at the lend to* [the Defendant] *or accept any new instructions, as they were still undertaking due diligence on the legal sector"* (see paragraph 28 of his witness statement).

35. In cross examination, Mr Woods accepted that these conversations were not mentioned in the Particulars of Claim. He said that this was a consequence of how his solicitor had chosen to prepare the document rather than an indication that his account had been inconsistent.

36. Mr Woods also gave evidence of a discussion that he had had with Mr Rogers over a meal in Chester on 9 April 2018, Mr Lucas mentioned that the Defendant *"had approached ArchOver direct due to a contact of theirs being a friend of ArchOver's CEO"* (paragraph 39 of his witness statement). Mr Woods goes on, "*Sean knew that I had been person who was responsible for introducing* [the Defendant] *to ArchOver. He could see I was alarmed at learning then of direct contact that had been made at CEO level. Therefore, Sean went out of his way to assure me that I would still be paid fees due by* [the Defendant] *under our contract. Further and because of this assurance he asked me to let* [the Defendant] *travel the course with ArchOver and not get back in touch with them. The words he used were that he wanted me to 'take a back seat' as* [the Defendant] *were apprehensive that matters were at a critical stage in their high level discussions with ArchOver and they didn't want to muddy the waters in case it caused the deal to collapse"* (paragraph 40).

37. In cross examination, Mr Rogers said that he recalled having a meal with Mr Woods in Chester. He maintained that he had not said that the Claimant would be paid in any event and had not asked Mr Woods to take a back seat – as he put it, "there was no back seat to be taken."

38. In an email dated 2 July 2018, Mr Anderson stated two matters of potential significance on behalf of ArchOver:

    i) That the approach for lending by the Defendant in 2017 had been rejected by ArchOver. This assertion seems to be based on an email to like effect from Mr Lucas to Mr Dent and Mr Anderson dated 26 June 2018.

    ii) That "*In March 2018* [ArchOver] *were independently approached by another broker that was acting on behalf of* [the Defendant]." Mr Anderson accepted in cross examination that the reference should have been to January 2018.

The Issues

39. The Claimant contends that it contracted as principal; that it prepared a lending proposal and presented it to ArchOver; that ArchOver was a lender or

at least the agent of lenders; and that ArchOver, or its principals if it was acting as agent, made a finance offer to the Defendant. None of the exceptions to the arrangement fee becoming payable arise. In those circumstances, the Claimant contends that it is entitled to 5% of the loan amount (£2 million) namely £100,000 plus statutory interest for late payment. In so far as the Defendant persuades the court that it is necessary to show that the Claimant's actions were the effective cause of the loan agreement being completed, which the Claimant disputes, the Claimant contends that it is apparent that the requirement is met.

40. In closing submissions, the Defendant identified the issues in the case as follows:

i) Whether the Claimant was deprived of the right to bring the claim because it had entered into the contract as agent not principal.

ii) Whether, if the Claimant was entitled to bring a claim under the contract, it had no right to the fee claimed because:

a) The Claimant did not prepare what can properly be called a "lending proposal" therefore no lending proposal was presented;

b) No finance offer was made by the Defendant as a result of any lending proposal that may have been presented;

c) The body to whom the lending proposal was presented was not in fact a lender therefore its response was not a finance offer;

d) The finance in fact offered was in any event different to that in the proposal; and/or

e) The finance offer was not in fact made within the time scale provided for in the contract.

iii) The Claimant's actions, however categorised in terms of the contractual terminology, were not in fact causative of the offer of lending that was made.

iv) There is no separate basis for an award on a quantum meruit

41. It is common ground that this correctly identifies the issue that arise. I shall therefore analyse the case based on this, beginning though with an analysis of the reliability of the witnesses from whom I received evidence, in so far as that is relevant to resolving the issues before the court.

The Claimant's case on the issues

(i) **Evidence**

42. The Claimant contends that Mr Woods was a reliable witness upon whose evidence the court can place reliance. In contrast:

i) Mr Rogers was clearly not telling the truth about the contents of the conversation during the meal in Chester. This casts doubt upon his reliability more generally.

ii) Mr Anderson's evidence is tainted by his assertions in the email of 2 July 2018 that the lending had been rejected by ArchOver in 2017 (whereas in fact there never was a point at which ArchOver rejected the proposals put via the Claimant) and that the fresh approach was in March 2018, when in fact it was in January of that year, therefore much closer in time to the Claimant's involvement. The inference to be drawn from these two erroneous assertions is that Mr Anderson is trying to support the Defendant's case that the introduction that gave rise to the lending was not effected by the Claimant.

iii) Mr Coxhead, the only current director of the Defendant to give evidence, could not adequately explain why documents had not been produced explaining the circumstances of the approach to Mr Kenvyn. This should lead the court to the conclusion that there has been a lack of candour from which can be drawn the reasonable inference that the Defendant is failing to reveal the true circumstances of why Mr Kenvyn was approached.

iv) Little reliance can be placed on Mr Kenvyn's evidence, given that he not called to give oral evidence and therefore his account was untested by cross examination.

(ii) **Claimant was agent not principal**

43. The Claimant contends that, on the face of the contract, it is clearly contracting as principal. Nothing about the wording of the contract indicates otherwise.

44. Whilst the Claimant acknowledges that Section 1 of the Financial Services and Markets Act 2000, relied on by the Defendant in support of its submissions referred to below, creates an additional liability in the manner of principal and agent, it does not create a relationship of principal and agent for the purpose of the law generally. In this regard reference is made to paragraphs 61 and 62 of the judgment of Ouseley J in R (ex p TenetConnect Services Ltd) v Financial Ombudsman [2018] EWHC 459, citing Judge Waksman QC as he then was in Ovcharneko v Investuk Ltd [2017] EWHC 2114.

(iii) **Claimant has no right to fee under the contract**

45. The Claimant's case is that its conduct fulfilled all the conditions for payment under the contact, namely that a "finance offer" was made by "a Lender" and the broker had "presented" to that lender the "lending proposal."

46. First, its work in preparing the email of 13 July 2017 and in subsequently sending information as required by ArchOver clearly amounted to making a "lending proposal." It provided detailed material in support of borrowing. What more could be required to meet the definition?

47. Second, whilst not accepting that it has to prove that the finance offer was made as a response to such lending proposal, the Claimant contends that it is clear that in reality the finance offer was a consequence of the contact that the Claimant had with ArchOver. In my judgment, this issue is indistinguishable from the third issue identified by the Defendant, that of "effective cause" and for reasons apparent from my conclusions on this issue, it is better considered under that heading.

48. Third, whilst not a lender itself, ArchOver was the agent for other lenders. This is apparent from its mode of operation, as described in Mr Anderson's witness statement and in the agreement between ArchOver and Synergy dated

3 November 2015, as well as being clear in the terms of the facility offer. There is nothing in the terms of the contract to require the lender to receive the proposal directly from the Claimant rather than through an agent such as ArchOver. Accordingly this condition is made out.

49. Fourth, whilst the actual facility differed in some details from the terms being proposed on behalf of the Defendant, there is no requirement that the finance offer be in the same terms as the lending proposal and in any event, the terms were sufficiently similar to meet any realistic need for the terms of the offer to match those of the proposal.

50. As to the Defendant's fifth point about the timing of the finance offer, the Claimant rejects the suggestion that there is any restriction in the contract on the time within which the lending offer needs to be made.

(iv) **Claimant was not the effective cause of the lending**

51. The Claimant's starting position is that it is not necessary for it to show that its actions were the effective cause of the transaction. It accepts the principle set out at Article 57 of Bowstead & Reynolds on Agency (21st edition) that, "*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, he is not entitled to such commission unless his services were the effective cause of the transaction being brought about."* However on the facts of this case, the Claimant contends that the wording of the contract excludes the requirement of "effective cause":

    i) The term in clause 2.2 sets the conditions for payment without requiring the presentation of the lending proposal to be the effective cause of the finance offer;

    ii) Whilst clause 2.2.2 qualifies when the fee is payable, the express qualifications do not include the requirement that the proposal be the effective cause of the offer and therefore impliedly displace the rule in Article 57.

52. The Claimant draws my attention to the judgment of the Court of Appeal in Nahum v Royal Holloway and Bedford New College [1999] EMLR 252,

especially pages 259 to 261 of the judgment of Waller LJ (with whom the remainder of the court agreed) where he drew the distinction between those cases involving consideration of which of two agents who were both involved in seeking to ensure the execution of the same transaction was entitled to commission (in which cases the court required the agent to show that they were the effective cause of the transaction) and those where the event entitling the agent to commissions was the introduction of a party who in fact entered into a transaction (where it was not incumbent on the agent to bring about the ultimate execution of the transaction, since control of contractual negotiations did not lie in the agent's hands).

53. The Claimant draws attention to the fact that the principle in Article 57 comes about as a result of implying a term into the contract. The court should be cautious about implying a term to give business efficacy to an agreement, following the judgment of the Supreme Court in Marks & Spencer plc v BNP Paribas [2015] UKSC 72. The high hurdle set by that case is not met where, as here, parties have agreed terms that are inconsistent with a requirement that the acts of the Claimant be the effective cause of the transaction.

54. In the alternative, the Claimant contends that its actions plainly were the effective cause of the finance offer.

    i) It is clear that Mr Woods had provided a wealth of material to ArchOver in support of its proposal;

    ii) As at the end of 2017, the only thing standing in the way of a finance offer being made was Mr Lucas' assertion that he could not deal with the issue until the New Year;

    iii) The Claimant denies that Mr Woods said the agreement was dead and in any event, the facts are inconsistent with such being the case – if Mr Rogers had been told that a deal with ArchOver was dead, he would have taken more proactive steps to pursue funding options elsewhere;

    iv) The Defendant's failure to disclose documentation explaining how it came about that Mr Kenvyn was approached shows a lack of candour and is material from which the court can infer that Mr Kenvyn was

approached on the back of Mr Woods' work, in the knowledge that a deal was close to being achieved;

v) That Mr Kenvyn's contact with Mr Dent led very quickly to an offer being made is an indication that he had done no more than push over the line a deal that was going to come to fruition in any event;

vi) Mr Rogers assertion at the time of the meal in Chester that Mr Woods should "take a back seat" in the dealings with ArchOver but that he would be paid are both indications that Mr Rogers believed that the Claimant's actions were the effective cause of the anticipated finance deal.

(v) Unjust enrichment

55. The Claimant's pleaded case for an award pursuant to the doctrine of unjust enrichment is effectively on the basis of a quantum meruit for the services that it provided. This was not pursued either in the Claimant's skeleton argument nor in closing submissions. For the sake of completeness I deal with the issue below.

The Defendant's case

(i) The evidence

56. The Defendant's starting point is to contend that the evidence of Mr Woods is obviously unreliable. In several respects his oral evidence was said to be at odds with his written evidence or at least to include detail that was not present in the written evidence of his statements of case. Further, the account of emails in his oral evidence suggested that there had not been full disclosure and/or that he had failed to take care in preparing his account of them in his written statement.

57. In so far as Mr Woods referred to conversations at paragraphs 37 and 38 of his witness statement in early 2018, these are not mentioned in either the Particulars of Claim or the Reply, and are, the Defendant contends, a clear attempt to rebut the inference from the chronology that once Mr Kenvyn

became involved, the proposal led quickly to a completed deal. Mr Woods' explanation that they were not mentioned because this was how his solicitor had chosen to draft documents was a convenient excuse that he resorted to on other occasions when he had difficulty with dealing with inconsistencies. I should reject as unreliable Mr Woods' evidence of these conversations and, perhaps more significantly, his denial of a conversation with Mr Rogers in late 2017 during which he is said to have described the deal with ArchOver as "dead" and his account of the meal with Mr Rogers in Chester in April 2018 when he claims he was told to take a back seat but that the Claimant would be paid in any event.

58. The Defendant urges me to place greater weight on the written documents than on the oral evidence. That demonstrates, they suggest, that there was no great interest or excitement about the proposed lending from ArchOver. Indeed, Mr Woods himself showed no great urgency in progressing matters in late 2017 and had to be chased by Mr Rogers. This is indicative of the fact that the lack of a firm agreement by then coupled with ArchOver's procrastination was indicative of the fact that the proposed deal was not likely to progress. This would be consistent with Mr Rogers' account of a conversation when Mr Woods had described the deal as "dead" and the approach to Growth Street and other lenders, to seek out an alternative route to achieve the lending.

59. In so far as the Claimant seeks to place reliance on the lack of documentary evidence (or at least of disclosed documents) of the circumstances of Mr Kenvyn's instruction, the Defendant counsels me against placing any great reliance on this when there has been no application for specific disclosure; the director of the company cross examined on the issue, Mr Coxhead, was a non-executive director; and in any event one might not be surprised at the absence of such material in the context of a small solicitors' firm such as the Defendant.

(ii) **Claimant was agent not principal**

60. The Defendant contends that a party who contracts as agent cannot bring a claim as principal – it would have no standing to bring the claim. This is

consistent with Article 97 of Bowstead and Reynolds on Agency (21st edition) where, it is stated:

> "*In the absence of other indications, when an agent makes a contract, purporting to act solely on behalf of a disclosed principal, whether identified or unidentified, he is not liable to the third party on it. Nor can he sue the third party on it."*

61. If one looks at the contract, one sees that it refers to "the firm" acting as credit broker. The only definition of "the firm" arises by implication from the concluding words of the contract, where AFS Compliance Limited's firm number is given. Thus, "the firm" is a reference to that company.

62. Further, the Claimant is described as an "appointed representative" of AFS Compliance Limited. That is a clear reference to the concept of "appointed representative" in Section 39 of the Financial Services and Markets Act 2000. Section 39(2)(a) defines an appointed representative as including "*a person who is exempt as a result of subsection (1)".* Subsection (1) provides:

"*If a person (other than an authorised person) -*

(a) is a party to a contract with an authorised person ("his principal") which –

(i) permits or requires him to carry on business of a prescribed description, and

(ii) complies with such requirements as may be prescribed, and

(b) is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing,

he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accept responsibility."

63. Section 39(3) provides:

"The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility."

64. The Defendant draws from this that the relationship of and AFS Compliance Ltd and the Claimant is clearly one of principal and agent and, construed objectively, the Claimant has contracted as agent and therefore does not have standing to sue. The court is bound to give effect to that (see Sports Mantra India Private Limited v Force India [2019] EWHC 2514 (Civ)).

(iii) **Claimant has no right to fee under the contract**

65. The Defendant contends that, however one looks at the obligations under the contract, the Claimant does not show that it is entitled to payment. In particular:

i) The Claimant did not prepare what can properly be called a "lending proposal" therefore no lending proposal was presented;

ii) If it is properly described as a lending proposal, no finance offer was received as a result of it;

iii) The body to whom the "lending proposal" was presented was not in fact a lender therefore its response was not a "finance offer";

iv) The finance in fact offered was in any event different to that in the proposal.

v) The finance was not offered within the time scale provided for in the contract.

66. The Defendant agrees with the Claimant's description of the contract as unhappy. In so far as there is ambiguity, this should lead to any doubt as to the meaning being resolved against the person proposing the document and the meaning on which it seeks to rely to its benefit, in this case the Claimant (see Chitty on Contracts, paragraph 13-05 and Nobahar-Cookson v Hut Group Ltd [2016] EWCA Civ 128 though note in each the doubt expressed about over-reliance on the rule, in particular in the context of commercial contracts).

67. First, the Defendant contends that the document relied on by the Claimant, the email of 13 July 2017, intended, in Mr Woods words, to do no more than "*gauge interest"* in the lending opportunity, ahead of a detailed questionnaire being prepared. Thus, it was not a lending proposal in any meaningful sense of the phrase.

68. Second, the finance offer made was in response to Mr Kenvyn's introduction, not that of the Claimant.

69. Third, ArchOver is a peer to peer lending platform rather than a lender and so any offer made was not a finance offer. It did not negotiate individual offers of finance on behalf of the lenders and was not itself a lender and cannot be said to have made a finance offer.

70. Fourth, the lending offer that was made was not what the Claimant had canvassed in its email of 13 July 2017. Whereas Mr Woods was advancing a proposal for a single loan with no investment from the Defendant's directors, in fact what was achieved via Mr Kenvyn's introduction was a series of five loans of £400,000 each with investment from the Defendant's directors equivalent to 10% of the lending.

71. Fifth, for the CBIN to make commercial sense, there must be a time limit within which any finance offer must be made. Since clause 2.2.2.4 allows for a full refund of the arrangement fee if a finance offer has not completed within six months, it follows that the there is no entitlement to the arrangement fee if the finance offer is not made within 6 months of the lending proposal. The time scale here exceeds six months and hence the fee is not payable.

(iv) **Claimant was not effective cause of lending**

72. The Defendant's starting point is the principle set out at Article 57 of Bowstead & Reynolds on Agency (21st edition): "*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, he is not entitled to such commission unless his services were the effective cause of the transaction being brought about."* This principle can be drawn from cases

such as Millar, Son & Co v Radford (1903) 19 TLR 575, cited at paragraph 7.029 of Bowstead & Reynolds.

73. The Defendant contends that it is clear that Claimant's actions were not the effective cause of the finance offer made through ArchOver for the following reasons:

i) The email correspondence shows no request from Mr Lucas for material from the Claimant and/or the Defendant at any time later than 18 July 2017.

ii) In late 2017, Mr Woods had acknowledged that his negotiations with ArchOver were "dead".

iii) Even on the Claimant's evidence, ArchOver were expressing caution about lending secured on WIP during 2017.

iv) Mr Woods himself had shown no particular enthusiasm in pursuing ArchOver after the conference call on or about 11 October 2017, as demonstrated by the fact that Mr Rogers had had to chase him up to deal with matters.

v) There was no email traffic at all between Mr Woods and Mr Lucas between 13 November 2017 and the making of the finance offer by ArchOver.

vi) In the meantime, Mr Kenvyn had become involved and had speedily attracted Mr Dent's interest.

74. The Defendant invites me to reject Mr Woods' evidence of contact with Mr Lucas in early 2018 as being a recent invention intended to bolster the case that, as far as Mr Lucas was concerned, a deal was still on the cards then.

(v) **Unjust enrichment**

75. The Defendant denied that the Claimant was entitled to any sum for unjust enrichment. The only basis for it to be rewarded was under the contractual terms.

Discussion

(i) The evidence

76. There are four significant issues of primary fact in this case, all relevant to whether the Claimant was the effective cause of the finance offer being made:

    i) Whether Mr Woods told Mr Rogers that the deal with ArchOver was "dead" in late 2017;

    ii) Whether Mr Coxhead caused or allowed Mr Kenvyn to approach ArchOver knowing of the previous communications with them via the Claimant;

    iii) Whether the involvement of Mr Coxhead and/or Mr Kenvyn provided significant additional input to the decision by ArchOver to support the Defendant's request for facilities;

    iv) Whether, in the conversation over a meal in Chester, Mr Rogers said that Mr Woods could take a back seat over further dealings with ArchOver but would be paid in any event.

77. There might be suggested to be a fifth relevant issue, namely whether Mr Woods had the two conversations with Mr Lucas that he asserts took place in January/February 2018. Certainly, if I thought he were obviously wrong about these events, that might affect his credibility on other issues. However, notwithstanding that they are not referred to in more contemporaneous documentation, I do not think that they are obvious inventions – their potential significance is only likely to have become apparent as the issues in the case became more clearly defined and it is therefore understandable that they may not have been mentioned at the outset. If on the other hand I were to accept Mr Woods' evidence on these conversations, it seems to me that it would not greatly advance his case. If Mr Lucas knew that the Defendant had approached ArchOver through another broker than the Claimant but that the Claimant was still interested in pursuing the deal on behalf of the Defendant, he had every reason to be cautious in his dealings with Mr Woods and to avoid discussing what was really going on. His behaviour is consistent with that. Without

having heard from Mr Lucas, I could not draw any clear inferences from the conversations as to why he said what Mr Woods recounts. In those circumstances, it is not necessary for me to determine this issue.

78. The first and fourth of these issues involve a direct conflict of evidence between that of Mr Woods and that of Mr Rogers. The second and third involve a consideration of the inherent plausibility of the evidence of Mr Coxhead and Mr Kenvyn in the light of other circumstances (including the alleged failings in disclosure).

79. In assessing the evidence in this case, I am conscious that one of the consequences of the time limits contained in the Capped Costs Pilot is that there is less opportunity to explore the reliability of witnesses than might otherwise be the case. That said, where there are factual disputes the court has to make findings of which evidence is to be preferred and, where appropriate should not shy away from making findings that people have been dishonest with the court.

80. I also bear in mind on the disclosure issue that the costs limits within the pilot mean that disclosure may have taken place on a more limited basis than might otherwise be the case; equally a party dissatisfied with the other's disclosure may be more hesitant to make an application to provide specific disclosure.

81. During the course of their oral evidence, none of the witnesses struck me as being obviously untruthful, notwithstanding that counsel for both parties conducted forceful, if necessarily brief, cross examination. I was particularly struck that Mr Rogers gave evidence in a straightforward fashion and I found no reason on the face of that evidence to disbelieve what he had to say.

82. The one witness whose reliability (though not necessarily honesty) I had concern about was Mr Woods. As the Defendant pointed out, on several occasions Mr Woods had to deal with questions about apparent inconsistencies between what was said in his statement and what was said elsewhere. His response was to attribute any inconsistency to the manner in which his solicitor had drafted documents. However, this fails to have regard to the fact that the Claimant acknowledged that he had read or approved the various documents (the Particulars of Claim, the Reply and his witness statement.)

83. I have weighed these assessments of Mr Woods and Mr Rogers in the balance when considering the important factual questions identified above. I have also had regard to what seem to me the inherent probabilities in the light of other material available to the court.

(ii) **Claimant was agent not principal**

84. In my judgment, the Claimant is correct to contend that it contracted as principal not agent:

i) The mere fact that a firm number is provided for AFS Compliance Ltd does not define that company as the contracting party. It is not obvious that the word "firm" is being used at the beginning of the contract to mean anything other than the contracting company. The contract more generally speaks not of "the firm" but of "the Broker". That is defined as being the Claimant at the head of the contract. Thus on its face the contract identifies the Claimant as the contracting party.

ii) I do not accept that the Financial Services and Markets Act 2000 renders every "appointed representative" in the position of the Claimant as an agent for the purpose of the law of contract when contracting with potential clients. The word "agent" is not used in that Act, nor is any such unqualified modification of contractual status asserted in Section 1 of the Act. Such a radical change in substantive and well-established law would require clear words. I agree with Ouseley J in R (ex p. TenetConnect Services Ltd) v Financial Ombudsman [2018] EWHC 459 and Waksman J in Ovcharneko v Investuk Ltd [2017] EWHC 2114 that the result of the statutory scheme in section 1 is to create an additional liability on the part of the "principal" as defined in that Act without more generally affecting the rights and obligations of third parties.

(iii) Claimant has no right to fee under the contract

85. In considering the Defendant's five arguments as to why the Claimant is not entitled to payment under the contract, I bear in mind that the burden lies on the Claimant to prove that it has met the conditions of payment.

86. As to the first argument, that what the Claimant presented to the Defendant was not a lending proposal, it is clear that the court is not assisted by the lack of proper definition within the contract of what amounts to a lending proposal. For example, is a "lending proposal" within the meaning of the contract supposed to include all of the terms of the lending which the proposed lender can then either accept or reject? Whilst it would be possible to define the phrase in that way, it would be a difficult definition. It seems to me unlikely that prospective borrowers usually approach lenders with a detailed menu of the terms that they are willing to agree. On the other hand, is it enough to meet the definition that the broker simply states to the prospective lender that its client wants to borrow a specified sum of money? It is implausible that a lender would lend on such limited information, yet if "lending proposal" were given this very broad definition, the broker would be entitled to payment for very limited work. Indeed, as was pointed out in submissions, the canny broker might simply send an enquiry to every possible lender and sit back to get its arrangement fee as and when one of them agreed a facility.

87. It is clear that the definition of the term "lending proposal" might give rise to a difficult task of construction of this contract. But given my finding on the issue of effective cause below, it is sufficient to conclude that "lending proposal" means an approach to a lender (either directly or via an agent) for the loan of money. Any narrower construction of the phrase is unnecessary because the need for the proposal to be the effective cause of the lending adequately filters lending proposals that might otherwise be excluded by the further definition.

88. The second, fourth and fifth of the Defendant's arguments under this head are equally resolved by similar reasoning. The express terms of the contract do not require the finance offer either to be made as a result of the lending proposal, the offer to be in the same terms as the lending proposal or the offer to be

made within any particular time of the proposal. Either by arguments of construction or, more likely, by the implication of appropriate terms, such conditions for payment could be created. However, either approach is rendered unnecessary (and therefore inappropriate) by the effective cause condition referred to below.

89. The third point, that ArchOver is not a lender and therefore, whatever the true nature of its response to the Claimant, this cannot be said to be "*a finance offer made by a Lender to whom the Broker presented the Lending Proposal"*, is not resolved by the issue about effective cause. The Claimant cannot evade the need to show that there was such an offer made by a lender to whom such a proposal was made.

90. In order to make out its case that a "finance offer" was made, the Claimant relies on the sample facility agreement dated 29 March 2018. That is signed on behalf of each (anonymous) lender by ArchOver. It argues that each such agreement when proposed to the Defendant amounted to a "finance offer."

91. It is true that the lending proposal in the form of the original email of 13 July 2017 or that email together with the additional information provided by the Claimant on the Defendant's part, was presented in the first place not to the anonymous lenders but rather to ArchOver. It is also self-evident that ArchOver was the lenders' agent rather than the lender itself in entering into the facility agreement. But whether the lending proposal were to be defined as the original email of 13 July 2017 or the totality of that and the other communications, then, if that material were the cause of ArchOver accepting the funding invitation, it was in turn presented through the agency of ArchOver to the lenders and a finance offer was made by those lenders. There is nothing in the contract to exclude an obligation to pay the arrangement fee if the broker presents the lending proposal to the lender through an agent and (again) any possible abuse is tempered if not altogether prevented by the need for the lending proposal to be the effective cause of the finance offer.

92. It follows in my judgment that, so long as the Claimant was the effective cause of the lending, it will show that it meets the contractual conditions for payment

of the arrangement fee. I am bolstered in this conclusion by the Defendant's concession that the "effective cause" argument is the nub of its case.

(iv) **Claimant was not effective cause of lending**

93. In considering whether the Claimant' actions were the effective cause of the lending, I deal first of all with the legal context. I am satisfied that it is necessary to give business efficacy to this agreement that it be implied in the agreement that the Claimant was only entitled to payment if it was the effective cause of the finance offer being made. I say so for the following reasons:

i) Such a requirement is well-established in contracts of this nature, as demonstrated by Article 57 of Bowstead & Reynolds;

ii) In so far as there are cases where no such requirement is to be implied, that is most obviously the case where there is a very limited market of important players whose identities are unknown save to a limited number of specialist agents, a good example being the art market considered in Nahum v Royal Holloway. In contrast, the financial markets involve many players whose identities are easily ascertainable, the specialist skill of the agent lying in steering a deal through with a particular contact.

iii) The absence of such an implied term would render this contract difficult to construct, absent the consideration of other implied terms as to the circumstances in which payment was due. For example, if there were no necessary causation link, the court would for reasons identified above be required to consider the implication of terms as to the entitlement to payment if the finance offer differed from the lending proposal and the time within which a finance offer had to be made in order to entitle the Claimant to payment. It would also have to address difficult questions as to the proper construction of terms in the contract.

iv) As counsel for the Claimant conceded in submissions, the contract would lack business efficacy if there were truly no link between the lending proposal and the finance offer other than that the person who

> made the finance offer was made aware of the lending proposal. That could lead to a situation in which the broker simply emailed the lending proposal to every lender it could identify, then sat back to claim its arrangement fee as and when lending took place, regardless of the fact that such lending might in truth have required considerable input from others. That is not the nature of finance brokering and such a contract would not give effect to how the parties in fact deal.

94. For these reasons, I am satisfied that the Claimant cannot recover without proving that it was the effective cause of the lending.

95. I turn then to the factual issues identified above.

96. As to whether Mr Woods told Mr Rogers that the deal with ArchOver was "dead" in late 2017, I bear in mind my concern over Mr Woods' reliability referred to above. I also look at the context and the other material before the court. After an initial flurry of activity when Mr Woods first approached ArchOver, the picture is of considerably less activity in later 2017. Mr Woods provided information, particularly when prompted by Mr Rogers. But the picture given by the various meetings and communications is not of a deal that is on the brink of happening. To the contrary, the very limited communication from Mr Lucas gives the impression that these negotiations had stalled. The reference to his not being able to look into matters until 2018 does not give the impression that a deal was nearly at fruition, but rather that he was playing for time.

97. I am not persuaded that Mr Rogers' behaviour was inconsistent with being told that the deal was dead. Again there are contrary indications, in particular in the approaches made to other lenders toward the end of 2017.

98. Taking these factors together, I conclude that it is more likely than not that Mr Rogers' account of being told that the deal was dead was probably correct. I do not consider that I should necessarily draw the inference from this that Mr Woods' evidence to this court has been untruthful. It is perfectly plausible that Mr Woods has forgotten saying this with the passage of time and has persuaded himself that he would not have said it because of a belief that, given

that ArchOver did eventually propose a lending offer to the Defendant, his own actions must have been influential in that.

99. On the second issue of whether Mr Coxhead caused or allowed Mr Kenvyn to approach ArchOver knowing of the previous communications with them via the Claimant, it is necessary to weigh in the balance the evidence of Mr Coxhead and Mr Kenvyn that this was not so with a failure of the Defendant to give disclosure of documents that would support this conclusion. I accept that it may well be the case that there were no documents detailing the basis for the decision that Mr Coxhead approach Mr Kenvyn. In a small firm, a relatively informal approach such as this might well go undocumented. In those circumstances, I see nothing to cause me to disbelieve the evidence of Mr Coxhead and Mr Kenvyn that neither knew of the previous approaches. I am not dissuaded from this conclusion by the mistaken assertions by Mr Anderson in his email of 13 July 2018. Those comments may have been made simply as a result of a misunderstanding, due to information communicated by Mr Lucas or because Mr Anderson deliberately misstated the position so as to cover up the close connection in time between the involvement of the Claimant and the offer made through ArchOver. However even if I made a finding that Mr Lucas and/or Mr Anderson had deliberately misstated the position in order to discourage the Claimant or Synergy from seeking payment from the Defendant, this would not lead me to the conclusion that I should reject the clear evidence of Mr Coxhead and Mr Kenvyn, since such conduct would be consistent with an attempt to bolster a true case that the Defendant had no such liability.

100. In considering whether the involvement of Mr Coxhead and, through him, Mr Kenvyn provided significant additional input to the decision by ArchOver to support the Defendant's request for facilities, I have had regard to the fact that there is no absolutely clear and compelling evidence before the court of what it was that caused ArchOver to agree to promote the funding opportunity in 2018 when it had not agreed to do so in 2017. It would appear probable that there was a change of policy over WIP funding in 2018, but the positive response to Mr Kenvyn's enquiry suggests that he had a better relationship with Mr Dent than Mr Woods had with Mr Lucas.

101. It is not possible to discern why this was so. It may well have been that Mr Dent trusted Mr Kenvyn and that he had a greater degree of influence over ArchOver's decisions than Mr Lucas. It is certainly difficult to accept that the positive response to Mr Kenvyn's approach was simply the result of Mr Woods' earlier work with Mr Lucas. If this were so, I would expect it to have been mentioned in correspondence, yet it is not. It follows that it is probable that Mr Kenvyn's involvement did bring some additional input to these negotiations. It is also possible that the further information provided in 2018 was influential in the ultimate decision, though it is not obvious what it was about the additional information that led to this.

102. Nevertheless, it follows that I am satisfied that the involvement of Mr Coxhead and Mr Kenvyn did bring additional input into the lending decision of ArchOver.

103. Finally, I consider whether, in the conversation over a meal in Chester, Mr Rogers said that Mr Woods should take a back seat over further dealings with ArchOver but would be paid in any event. On this issue, unlike the first of the factual issues, it is necessary to consider whether Mr Woods had constructed an account of a conversation in his mind which had not taken place, rather than forgotten one that did take place. Whilst it is possible to reconstruct events wrongly without meaning to tell lies, this is perhaps improbable and therefore I must bear in mind the inherent implausibility that a witness would lie in giving evidence. Further, Mr Woods' account of the conversation was given in a straight-forward fashion without any apparent embellishment.

104. On the other hand, my findings about the first factual issue coupled with my doubts about Mr Woods' reliability lead me to the conclusion that it is more likely than not that his account of such a conversation was incorrect. It is unnecessary for me to make a finding as to whether it is more likely that he was mistaken or that he was telling lies.

105. It is for the Claimant to prove that its lending proposal was the effective cause of the borrowing. In my judgment, given these findings of fact and the inherent plausibility of the situation, the Claimant fails to discharge the burden for the following reasons:

i) Whilst the Claimant undoubtedly provided significant information to the Defendant, it is apparent that the Defendant was sceptical about the proposed borrowing because of the issue of the WIP;

ii) Such scepticism is evident from Mr Woods' conclusion that the proposal was "dead";

iii) Once Mr Kenvyn became involved, further information was provided. He had a good relationship with Mr Dent at ArchOver and, coupled with a change in policy over lending secured on WIP, a lending facility was swiftly agreed.

iv) I reject the suggestions that the Defendant and/or Mr Kenvyn took advantage of information previously supplied to ArchOver by the Claimant or that Mr Rogers acknowledged that the Claimant was entitled to payment notwithstanding the involvement of Mr Kenvyn

Unjust enrichment

106. Given my finding on the issue of "effective cause", the Claimant cannot succeed in a claim for unjust enrichment. The parties contracted on the basis that the Claimant was entitled to a relatively generous sum but only in circumstances in which it brought about the desired outcome. If it did not cause the outcome, there is nothing remotely unjust about it not being compensated for its services. Accordingly this claim cannot succeed.

Conclusion

107. For these reasons, the claim must fail.

108. The parties have lodged a draft order. In accordance with paragraph 3.10 of PD 51W they have anticipated the summary assessment of costs by filing relevant documents. Unfortunately there has been insufficient time for the court to deal with the summary assessment before handing down this judgment, so that will be dealt with on paper as soon as practicable.