



Neutral Citation Number: [2020] EWHC 3481 (Ch)

Case No: HC-2017-001094

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 17/12/20

Before :

HIS HONOUR JUDGE HACON
(Sitting as a Deputy High Court Judge)

Between :

RECORDED PICTURE COMPANY LIMITED

Claimant/ Part
20 Defendant

- and -

(1) ALFAMA FILMS PRODUCTION
(2) PAULO BRANCO

Defendants/
Part 20
Claimants

Andrew Scott (instructed by **Lee & Thompson LLP**) for the **Part 20 Claimants**
John Critchley directly instructed by the **Part 20 Defendants**

Hearing dates: 23-26 June 2020

Approved 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.

.....
HIS HONOUR JUDGE HACON

Judge Hacon:

Introduction

1. This is the trial of a counterclaim brought by the Defendants. The First Defendant (“Alfama”) is a French film production company. The Second Defendant (“Mr Branco”) is Chief Executive Officer and a director of Alfama, through which he acts as a film producer. Alfama and Mr Branco are referred to collectively as “the Producers”. The Claimant (“RPC”) against which the counterclaim is brought is a film production company based in London.
2. The counterclaim concerns “The Man Who Killed Don Quixote” (“the Film”) a film directed by Terry Gilliam starring Adam Driver and Jonathan Price which was released in 2018. A very similar film was at one time due to be made under the terms of a deed of agreement dated 31 March 2016 (“the Deed”) by which RPC granted an option to the Producers to make the Film. Relations between the parties soured. By a written agreement dated 14 October 2016 RPC granted an option to a Spanish production company, Tornasol Films SA (“Tornasol”), on substantially the same terms as contained in the Deed. It was this option that resulted in the making and release of the Film.
3. The Producers’ case is that by entering into negotiations with Tornasol, by concluding the agreement of 14 October 2016 and by performing its terms, RPC acted in breach of the Deed. The Producers seek damages and interest.

The Deed

4. The idea of making what became the Film dates back at least to 2000 and has at all times been a project close to Mr Gilliam’s heart. Shooting started in 2000 with Johnny Depp and Jean Rochefort as principal actors. Mr Rochefort became unwell and the project had to be abandoned. This ill-fated enterprise was recorded in a documentary called “Lost in La Mancha” released in 2002.
5. The insurer of this first Don Quixote project paid out compensation and acquired the rights. The rights were subsequently sold to RPC in May 2009. Having granted options to three successive production companies, none of which took the project forward, on 31 March 2016 RPC entered into the Deed with the Producers. For simplicity I will refer to the film which was the subject of the Deed as “the Film”, as does the Deed, even though it was not strictly the same thing as the Film finally released.
6. The Deed refers to RPC as “Grantor” and the Producers as “Company”. The recitals set out its background and purpose:

“WHEREAS:

(A) Pursuant to an option and assignment agreement between Hachette Premier et Cie ('Hachette'), HDI-Gerling Industrie Versicherung AG ('Gerling') and the Grantor dated 14 May 2009 as amended by an amendment agreement dated 30 June 2011 and a further amendment agreement dated 18 September 2014 (together 'the Gerling Option') attached hereto at Exhibit 1, the Grantor is the legal and beneficial owner of an exclusive option to acquire all right, title and interest in and to a feature film project provisionally entitled 'The Man Who Killed Don Quixote' written by Tony Grisoni and to be directed by Terry Gilliam ('the 'Work');

(B) The Company intends but does not undertake to produce a theatrical feature film provisionally entitled 'The Man Who Killed Don Quixote' based on the work (the 'Film');

(C) The Grantor has agreed to grant to the Company the sole and exclusive option to purchase a one picture licence to produce the Film upon and subject to the terms and conditions of this Deed.

(D) If the Company exercises the Option (as defined below) in accordance with Clause 3 below, the Grantor will licence the Rights to the Company by executing the Licence (as defined below) in the form attached to this Deed as Exhibit 3."

7. Clause 1.2 contains the following definitions:

“(1) **'Option'**, i.e. 'the exclusive and irrevocable option for the Company to acquire the Rights from the Grantor upon the terms of the Licence'.

(2) **'Licence'**, i.e. 'the agreement (the form of which is attached hereto as Exhibit 3) to be entered into between the Grantor and the Company which shall be effective upon the exercise of the Option by the Company pursuant to the terms of this Deed whereby the Grantor irrevocably licences to the Company the Rights in the Work for the Term'.

(3) **'Rights'**, i.e. 'as defined in the Schedule to the Licence', i.e. 'a licence to develop, produce and exploit (l) feature length film based on the Work (in whole or in part) which licence includes without limitation all rights of exploitation and communication of the Film (together with all allied and ancillary rights in and to the Film) in all media now known or hereafter devised in any and all languages in any part of the Territory for the Term EXCLUDING ONLY the Reserved Rights' (such reserved rights being defined in sub-clauses (i) to (iii) of Part 1 of the Schedule).

(4) **'Film'**, i.e. 'the feature film which the Company proposes but does not undertake to produce based in whole or part on the Work and which is intended for theatrical release and/or television broadcast'.

(5) **‘Work’**, i.e. ‘the meaning given in Recital (A). In addition, reference to the Work shall be deemed to include a reference to any part or parts of the Work and to the title, themes, plots, schemes, sequences, articles, incidents, formats, characters, character names and characterisations thereof and any other material contained therein or related’.

(6) **‘Option’**, i.e. ‘the period of six (6) months from the Effective Date’ (such date being 1 April 2016 as set out in the title to the Deed).

(7) **‘Option Price’**, i.e. ‘either (i) the sum of twenty five thousand Euros (€25,000) payable in respect of the Option in the event this Deed is executed on or before the Effective Date, this sum being on account of the Purchase Price;...’

8. Clause 2.1 granted the Option:

“Upon the Company paying the Option price the Grantor irrevocably grants to the Company the Option.”

9. RPC assumed obligations under clause 7.1 including the following:

"7. OBLIGATIONS

7.1 The Grantor warrants, undertakes and agrees with the Company that:

7.1.1 the Grantor will not dispose of nor deal in any way with any of the Rights during the Option Term;

...

7.1.4 ... the Grantor ... will not during the Option Term make, any arrangement (whether written or oral) which might inhibit or restrict the Company's rights under this Deed or the Licence.”

10. Clause 16 allowed for the extension of time periods in certain circumstances, materially as follows:

“16. FORCE MAJEURE

... if there is any litigation or claims affecting the Work, the Rights or the Film, then any dates or time periods in this Deed shall be extended automatically until the Deed can be performed or its obligations fulfilled plus an additional thirty days. ...”

11. In brief, the Producers bought the option for €25,000 It was to last for a term of six months from 1 April 2016. Upon exercising the option they would acquire an exclusive worldwide licence to make the Film. Clause 7 prevented RPC from disposing of or dealing with the Rights during the option term. Clause 16 allowed for the extension of time in the event of litigation or claims affecting the Work, the Rights or the Film.

The Director Agreement

12. Mr Gilliam remained on board as a producer and on 29 April 2016 he entered into a director's agreement with Alfama ("the Director Agreement"), set out in a letter of that date signed by the parties. Mr Gilliam was to provide directing services in connection with the Film (defined in the Director Agreement as "the Picture").
13. Clauses 7 and 8 state:
 - “7. **Creative Approvals and Designations:** Director and Producer will mutually approve all key creative matters with respect to the Picture including the final script, cast, locations and production and post-production schedules, with Director's decisions to control in the event of a failure to agree and provided that any and all Director's decisions shall be made in a manner consistent with the final approved budget and with a delivery of answer print (or digital equivalent) no later than 15/08/2017. Director will have the right to designate all creative department heads, including Director of Photography, editor, costume designer, art director/set designer, composer, music supervisor, hair and makeup, provided Director's designees agree to render services for compensation consistent with the final budget.
 8. **Budget; Financial and Business Controls:** The final budget for the Picture will be mutually approved by director and Producer, provided that if the budget is at least 16,000,000€ (Sixteen Million Euros), Producer will have a tie-breaker right commencing eight (8) weeks prior to commencement of principal photography. Director will be consulted fully and meaningfully with respect to all major financial decisions regarding the Picture, prior to Producer entering into any material financing-related agreements (including rights sales, sales agency agreements, distribution agreements, investment agreements, loan agreements, etc.). Producer will provide Director and/or Director's representatives (at Director's option) on a regular basis with copies of all finance and expenditure related documents and/or records, such as the final financing plan, budgets, cost reports, sales reports, distribution and license agreements, 'soft' money arrangements (subsidies, tax rebates, co-production funds and other government provided or supported benefits), and the like.”
14. Clause 14 provided that the Director's Agreement was governed by French law and awarded exclusive jurisdiction over disputes to the courts of Paris.

Amy Gilliam's Agreement

15. There was an agreement dated 27 April 2016 between Alfama and Amy Gilliam, Mr Gilliam's daughter, set out in a letter of that date and signed by the parties. Broadly, in return for a payment of €100,000 and a "Produced by" credit in the main titles, Ms Gilliam was to render customary services as producer during pre-production, production and post-production of the Film, as reasonably required by Alfama.

The French proceedings

16. On 30 August 2016 Mr Hunter, in his capacity as Mr Gilliam's attorney, wrote to Christian Valsamidis of Alfama notifying Alfama of Mr Gilliam's contention that Alfama was in breach of the Director Agreement. The letter said that on 6 August 2016 Alfama, through Mr Branco, had cancelled production of the Film and constructively terminated Mr Gilliam's employment. The letter also alleged that Alfama was further in breach of the Director Agreement by (i) attempting to impose terms on Mr Gilliam's employment in contravention of the terms of the Director Agreement and (ii) failing to pay Mr Gilliam compensation to which he had become entitled 8 weeks before the commencement of principal photography.
17. Mr Gilliam's claim as foreshadowed in the breach letter of 31 August 2016 went to trial in Paris. The claim failed before the Tribunal de Grande Instance in a judgment dated 19 May 2017. An appeal was dismissed by the Cour d'Appel in a judgment dated 15 June 2018. A further appeal is pending before the Cour de Cassation.

The Tornasol Deed

18. On 30 September 2016 Alfama sent a letter to RPC requesting an extension of Alfama's option term which, absent a reason for extension, was due to expire at the end of that day. On 6 October 2016 RPC gave Alfama notice that the option had expired.
19. On 14 October 2016, RPC granted Tornasol an option to acquire the rights to the Film from RPC by a deed of that date ("the Tornasol Deed"). No sum was charged for the option.
20. Shooting of the Film began in March 2017 with Tornasol as producer and ended in June 2017. The Film was released in 2018.

The English claim

21. After entering into the Tornasol Deed, RPC came to realise that Alfama's option might not have expired on 30 September 2016. Mr Hunter's breach letter of 31 August 2016 may have caused clause 16 of the Deed to be engaged, resulting in an extension to Alfama's option term.
22. On 13 April 2017 RPC issued the claim form in this action, seeking a declaration that Alfama's option had expired at midnight on 30 September 2016. The claim was heard at trial before Ms Lesley Anderson QC sitting as a Deputy High Court Judge, the present counterclaim having been adjourned to a later trial. In a judgment dated 5 December 2017 Ms Anderson dismissed the claim: the judge found that the dispute between Mr Gilliam and Alfama and the French proceedings fell squarely within clause 16. It followed that the option term did not end on 30 September 2016 but would continue until the resolution of the French proceedings. The Court of Appeal dismissed RPC's appeal in a judgment dated 13 April 2018.

The Producers' counterclaim

23. Consequently RPC and Tornasol entered into the Tornasol Deed while Alfama's option term under the Deed was still running. In this counterclaim the Producers allege that:
- (1) In breach of clause 7.1.1 of the Deed, RPC disposed of or dealt with the Rights during the Option Term by negotiating, entering into and performing the Tornasol Deed.
 - (2) In breach of Clause 7.1.4 of the Deed, during the Option Term RPC made an arrangement which might inhibit or restrict Alfama's rights under the Deed or the Licence, namely by entering into the Tornasol Deed.
24. The Producers' claim:
- (1) their pre-production costs of €500,418.03, or a proportion thereof on the basis of the loss of a chance; and
 - (2) the balance of Mr Branco's claimed producer's fee of €400,000, or a proportion thereof on the basis of the loss of a chance.
25. RPC denies that it has acted in breach of the Deed. Alternatively, if it did, its defence to the counterclaim rests on the following propositions:
- (1) According to the terms of the Deed, the Film could only have been made with Mr Gilliam as director; Mr Gilliam would not have agreed to continue working with Mr Branco, so the Film would never have been made with Mr Branco as producer.
 - (2) Even if Mr Gilliam had agreed to continue as director, the Producers would not have been able to raise the finances to enable the Film to be made.
26. In RPC's skeleton argument a defence of frustration was raised. This was not pleaded and the argument was not pursued in closing.

The issues

27. The issues in summary are these:
- (1) Was RPC in breach of the Deed by negotiating with Tornasol and entering into the Tornasol Deed?
 - (2) If so, what would have happened if RPC had not entered into the Tornasol Deed with Tornasol. Specifically:
 - (a) Would Mr Gilliam have settled his differences with Mr Branco sufficiently to make the Film with Mr Branco as producer?

- (b) If so, would Mr Branco have been able to raise the necessary finance for the Film?
- (3) If the answers to both questions under (2) is yes, to what extent, if any, are the Producers entitled to sums under the two heads of damage claimed?

Whether RPC was in breach of the Deed

- 28. RPC argues that at the time the new option was granted by RPC to Tornasol on 14 October 2016 all concerned believed that Alfama's option had expired.
- 29. That seems to be the case and even to have included Alfama, but I fail to see how it assists RPC. The Court of Appeal has found that the Alfama's option had not expired on 14 October 2014. Even on the assumption that there was never a prospect of Alfama making the Film at any time from August 2016 onwards, I have no doubt that by entering into the agreement with Tornasol RPC disposed of and dealt with the Rights as defined by the Deed, namely the licence to develop, produce and exploit a film based on the Work (as defined in Recital A of the Deed: a feature film project provisionally entitled "The Man Who Killed Don Quixote" written by Tony Grisoni and to be directed by Terry Gilliam). This was in breach of clause 7.1.1 of the Deed. The whole point of the Deed was to guarantee Alfama's exclusive right to exploit the Work until its option term expired.

The law on damage arising from a breach of contract

- 30. The Producers have framed their claim to damages in the form of the loss of a chance. I recently considered the law on loss of a chance in *Sprint Electric Ltd v Buyer's Dread Ltd* [2020] EWHC 2004 (Ch) at [71]-[121]. I will quote only the summary:

"[117] The loss of a chance approach to the assessment of damages for breach of contract applies to a claim in which the claimant's case on causation depends on the hypothetical conduct of one or more third parties, with or without the claimant, if there had been no breach of contract, i.e. in the no breach counterfactual.

[118] According to that approach, the head of damage is the loss of the chance which the claimant had to attain a beneficial outcome, i.e. to obtain a benefit or avoid a loss. The claimant must prove, on the balance of probability, that the breach of contract caused the loss of that chance – not that it caused the loss of the beneficial outcome itself. If proved, and provided the chance was substantial and not merely speculative, the court will go on to quantify the value of the chance lost and thus the damage suffered. Quantification will involve the valuation of the beneficial outcome and the application of a discount commensurate with the likelihood that the chance would have led to the beneficial outcome.

[119] Where the claimant relies on more than one hypothetical event in a no breach counterfactual to establish causation, the events in the chain must be separately assessed. Only an event which involves the actions of one or more third parties is to be assessed by reference to a chance – so that the assessment becomes whether on the balance of probability there would have been a significant *chance* of that event occurring.

[120] Subject to a qualification, the foregoing loss of a chance approach must be adopted when causation depends in whole or in part on the hypothetical action of one or more third parties; it is not optional.

[121] The qualification is that if on the evidence there is a 100% likelihood that the breach of contract has caused the claimant to be deprived of the beneficial outcome, the net effect will be that the damage, i.e. the value of the hypothetical beneficial outcome, can be quantified in the usual way. That is because the value of the chance is the same as the value of the beneficial outcome.”

31. The Producers’ overall case is that RPC’s breach of the Deed caused the Producers to lose the profits they would have made from making the Film. It was not in dispute that RPC’s case on causation depends on the hypothetical conduct of third parties: (a) Mr Gilliam and whether he would have continued to be director of the Film with the Producers still in place, and (b) the individuals who took decisions on behalf of the sources of finance; whether they would have committed to the payment of enough money for the Film to go ahead. In fact it depends further on the hypothetical conduct of others, such as the lead actors, who would certainly have influenced the acts of both Mr Gilliam and the financiers, but it is enough to consider primarily Mr Gilliam and the financiers.
32. It follows from this that the assessment of damages for breach of the Deed must be assessed according to the loss of a chance.
33. Neither was it in dispute that RPC’s breach of the Deed caused the Producers to lose the chance to make the Film and thereby benefit financially.
34. I have to decide three matters. First, whether the Producers’ chance was substantial and not merely speculative. Secondly, if so, the valuation of the beneficial outcome, i.e. the sums that the Producers would have received from the project had it gone ahead. Thirdly, the likelihood that the chance would have led to the beneficial outcome and from this the appropriate discount to be applied to the beneficial outcome.

The witnesses

The reliability of recollections

35. Both counsel submitted that I should give consideration to the fallibility of witnesses’ recollection of events, see *Gestmin SGPS SA v Credit Suisse (UK)*

Ltd [2013] EWHC 3560 (Comm) as qualified by the Court of Appeal in *Kogan v Martin* [2020] EMLR 4 (CA).

36. The events in question happened four years before the trial. In the interim the Film had been made and released with Tornasol as producer, there has been litigation in France between Mr Gilliam and Alfama – essentially Mr Branco – which has now reached the Cour de Cassation. There has also been RPC’s claim in this jurisdiction which reached the Court of Appeal. There is a real possibility that all of this has led to entrenched views on both sides of the present counterclaim and on the part of Mr and Ms Gilliam. It is possible that this has distorted recollections – not so much recollections of what happened in 2016 but the more elusive recollections of attitudes held at the time. I therefore take the view that my primary guide to those attitudes should come from contemporaneous documents. However, those documents do not provide a complete and direct record; likely inferences must be drawn and in drawing them I bear in mind what the witnesses have said.

Mr Branco

37. Mr Branco was a voluble witness. Mr Critchley submitted that this volubility was motivated by an intention to avoid giving direct answers. My impression was that this was occasionally true.
38. Mr Branco produced a finance plan for the Film on 5 August 2016 and submitted it to Mr and Ms Gilliam on 8 August 2016 in support of his contention that the Film could be financed to meet the minimum then contemplated: €16m. The plan included the sum of \$US2,466,000 from sales to Amazon, marked “to be signed”. This was a significant sum, about twice the size of the next largest figure for sales to a party. As I will discuss in more detail below, in fact Amazon had withdrawn its proposed financing in May 2016 and had commented adversely on Mr Branco’s conduct. When challenged about this in cross-examination, Mr Branco said that his lawyers had told him that there was a binding contract with Amazon. I was not shown any final contract with Amazon. Nor was there evidence of even a letter before action from Alfama to Amazon in the period since May 2016.
39. I am forced to the view that the entry for Amazon in the finance plan was intended to mislead Mr and Ms Gilliam. I must assume that in relation to financial matters at least, Mr Branco is capable of inaccuracy if that is convenient to his case at the time.

Mr Gilliam

40. Mr Gilliam was to be the director of the Film to be produced by Mr Branco and was the director of the Film as released with Tornasol as production company. His evidence was central because it was RPC’s case that after Mr Branco cancelled pre-production of the Film, there was never any further prospect that Mr Gilliam would make the Film with Mr Branco.

41. In closing Mr Scott made a lengthy and detailed submission that Mr Gilliam was an unsatisfactory witness on whom the court could not rely. Several reasons were presented in support.
42. Mr Scott's first and major point was that Mr Gilliam had said that in his first witness statement that his action in France had been unsuccessful both at first instance and on appeal solely because of a technicality, namely that Mr Hunter's letter of 30 August 2016 did not give proper notice of termination under French law. Mr Scott submitted that Mr Gilliam had misrepresented the position by failing to state that the Cour d'Appel also found that Mr Gilliam had lost on substantive grounds.
43. In cross-examination Mr Gilliam said that he had not read the French judgments that carefully and that his understanding came from what his French lawyers had relayed to him. Mr Scott submitted that Mr Gilliam well knew that he had lost in the French proceedings on more than a technicality and that this revealed a casual approach to the truth and a willingness to make factual assertions without reading or alternatively understanding the relevant documents.
44. On my reading of the French appeal judgment (in translation) the primary ground for the dismissal of Mr Gilliam's appeal was that the letter of 30 August 2013 did not have the effect of terminating the Director Agreement. There were two reasons. One was that it did not meet the formalities required and the other was that the content of the letter did not demonstrate the serious contractual breaches likely to result in the unilateral termination of the Director Agreement. In other words, the primary ground for dismissing the appeal concerned only the inadequate content of the letter.
45. However, Mr Gilliam also advanced what the Cour d'Appel called a "subsidiary request": that there should be "judicial termination" of the contract. I understand this to have been an argument that even if the letter of 30 August 2016 did not have the effect in law of terminating the Director Agreement, the facts supported termination. This subsidiary request was also rejected.
46. By leaving out the Cour d'Appel's finding relating to the subsidiary request Mr Gilliam did not fully present the judgment in his witness statement. While that was not satisfactory, I can believe that Mr Gilliam's understanding of the judgment came from his French lawyers and not from a careful reading the judgment himself. I cannot say whether the French lawyers chose to gloss the grounds of dismissal of the appeal to their client. However, I think it shows that Mr Gilliam is not a details man when it comes to legal documents.
47. Mr Gilliam's understanding of the content of the Director Agreement was also shown to be incomplete. His evidence in his witness statement was that he had a veto over budgetary and creative matters. That was true, with the important proviso that Mr Gilliam's decisions were to be made in a manner consistent with the final approved budget and with a delivery of answer print (or digital equivalent) no later than 15/08/2017 (clause 7). When challenged about this in cross-examination, Mr Gilliam said:

“Fine. Well now I have been revealed to be a fraud. Thank you. I was writing -- I wasn’t writing this with a lawyer over my shoulder, I wrote it as I understood it, thank you.”

48. On the whole, I think that writing a witness statement without a lawyer over the witness’s shoulder is to be commended. Where there are omissions or inaccuracies it does not automatically follow that the witness is being dishonest. It will depend on what they are.
49. In cross-examination Mr Gilliam said he thought his witness statement “was to try to present a rough covering of the facts”. Mr Scott submitted that this fell well short of what the court can expect. Mr Gilliam’s remark followed a suggestion put to him that he had failed to mention an attempt by Mr Branco to renegotiate a deal with Amazon and I think that Mr Gilliam was indicating only that he had not thought to put in every detail or that he had not appreciated what should and should not go in.
50. Unlike Mr Branco in relation to the finance plan of 5 August 2016, I do not believe that Mr Gilliam was trying to mislead in any part of his evidence. His incomplete accounts of the judgment of the French appeal court and the Director Agreement concerned documents that the legal team for the Producers and the court were sure to read with care. The inaccuracies were bound to emerge, so I doubt that they were calculated. I would go no further than saying that I think that Mr Gilliam’s recollections of events may tend to take on a favourable gloss over time.
51. I do not accept, as Mr Scott suggested, that Mr Gilliam was evasive. It is true that he resorted to humour more than is usual in a witness under cross-examination, but my impression was that this is his habitual reflex. I detected no deliberate intent to conceal anything.
52. Mr Scott’s final criticism was that Mr Gilliam failed to focus on detail. I have already said that Mr Gilliam is not a details man when it comes to legal documents and I would hesitate to rely on Mr Gilliam for the detail of an event which happened four years earlier. But in my view Mr Gilliam was doing his best to answer questions put to him as honestly and accurately as he could. He was also a witness who readily conceded what he did not know.

Ms Gilliam

53. Mr Scott submitted that Ms Gilliam, like her father, was heavily invested in the Film and that this meant that she lacked objectivity.
54. Neither Ms Gilliam nor her father has any financial interest in the outcome of this counterclaim. On the other hand, neither seems to have been well disposed towards Mr Branco since some point fairly early in their collaboration. As I have discussed, it is possible that the recollection of all or any of the main witnesses may be coloured and that I bear this in mind.
55. My impression of Ms Gilliam was that like her father she was trying to state her views as honestly as she could.

Ms Besuievsky

56. Mariela Besuievsky is a film producer working for Tornasol. With Gerardo Herrero, she was the main producer of the Film. Ms Besuievsky was a good witness.

Mr Watson

57. Peter Watson is chief executive of RPC. He was also a good witness. There were some minor inaccuracies in his witness statement which Mr Watson readily acknowledged when drawn to his attention. My impression was that Mr Watson gave honest answers to the best of his knowledge.

The period before the involvement of Alfama

58. Mr Watson gave evidence about the financing an independent film, i.e. a film not made by an established film studio. He said that independent films with budgets of US\$10m or more cannot be set up without pre-sales. More than any other factor, it is lead actors that drive pre-sales and the sums paid in advance by distributors.
59. Mr Watson discussed the early years of the project when RPC was to produce the Film. RPC had acquired the rights in the script for the earlier ill-fated Don Quixote film in 2009 from the German insurer of that film, HDI-Gerling Industrie Versicherung AG. The conception for what was to become the Film was launched at Cannes in 2011 with Ewan McGregor and Robert Duval attached as the lead actors. The response was unenthusiastic, not enough to sustain the proposed budget of €16m.
60. There was a meeting later in 2011 at RPC's offices in Soho between Mr Watson, Jeremy Thomas, the owner of RPC and Jenne Casarotto, Mr Gilliam's agent. RPC agreed to option the rights to the Film to third party producers. Between 2012 and 2017 RPC optioned the rights to five different producers, the final two being Alfama by the Deed in 2016 and Tornasol later in 2016.
61. In early 2016 Mr Gilliam persuaded Adam Driver to be named as proposed lead actor in the Film, replacing Jack O'Connell. Mr Driver had worked with directors Martin Scorsese, Spike Lee, Jim Jarmusch, the Coen brothers and Clint Eastwood, and he was the star of a new Star Wars trilogy. Mr Watson described Adam Driver's attachment as transformative to the funding of the Film. Mr Driver at that time had a very brief window during which he could work on the Film: he was available in 2016 but not in 2017, introducing a new urgency.
62. In February 2016 Mr Gilliam met Mr Branco for the first time. They discussed the possibility of Mr Branco producing the Film through Alfama.
63. Mr Gilliam was advised against working with Mr Branco. Mr Watson's evidence was that everyone told Mr Gilliam that it was a bad idea. He said this in cross-examination:

“We had a meeting some time, probably, I think we met Mr Branco in February, and some time probably early March, I know it was cold and I was standing outside on the balcony of our building with Jeremy Thomas and Terry Gilliam, and Jeremy, who has got a very good instinct and an emotional intelligence said to Terry, ‘It will be atomic war’, ... he said that because he knows Terry well and he knows that Terry, who is an artist, has to be dealt with, with great delicacy. As a final cut director he needs to be provided with respect and a structure that can hold him, and that can enable him to be creative . He needs to - - he needs a huge amount of reassurances to be creative and we didn’t believe that, certainly based on my experience of Mr Branco, my one and only meeting, and Mr Thomas’ opinion about Mr Branco, we didn’t believe that they were compatible.”

64. Alfama acquired the rights by the Deed on 31 March 2016 in relation to the ‘Work’ which was defined so as to require the hiring of Mr Gilliam as director. Notwithstanding the advice he had received, on 29 April 2016 Mr Gilliam signed the Director Agreement.

The search for finance

65. The search for finance began in about April 2016. Mr Branco had been informed of the proposed minimum €16m budget and according to Mr Gilliam, Mr Branco told him that raising €16m would be no problem.
66. On 9 May 2016, Alfama reached an agreement to share production of the Film with its Portuguese parent Leopardo Filmes (“Leopardo”) and also with Tornasol. Alfama, Leopardo and Tornasol agreed to contribute 60%, 10% and 30% respectively to the budget. There was later a further co-production agreement with a Belgian company, Entre Chien et Loup.
67. Alfama, Leopardo and Tornasol all worked to secure finance. Amazon was a potentially valuable source. At one point in April 2016 Amazon was discussing an advance of US\$2.2m for exclusive US distribution rights over 25 years and further payments if preferred stars were cast.
68. However, Mr Branco’s negotiating style did not sit well with Amazon. On 17 May 2016 Matthew Heintz, Senior Corporate Counsel for Movies and TV at Amazon, emailed Gabrielle Christiansen, a lawyer acting for Alfama, to say Amazon was not proceeding with the project. Mr Branco responded, asking for clarification. Mr Heintz’s answer was sent to Ms Chrisitansen late on 17 May 2020. Mr Heintz said that Alfama should not have disclosed Amazon’s involvement in the project before finalising an agreement. He continued:

“Moreover, although we admire Paulo's taste and track record, based on interactions we have had with him across multiple areas of our organization, we do not want to pursue further negotiation with him. We have standards of professionalism that we expect both our employees and our vendors to meet and his conduct did not meet those standards.”

69. On 5 August 2016 Mr Branco prepared a finance plan. Alfama, Tornasol and Leopardo had together concluded sales and been offered tax credits in Spain and Portugal which led to a total sum of about €7.7 million by the unchallenged calculation of Mr Watson.
70. As I have said, the plan included a contribution from Amazon of about €2.2, which did not exist. The plan claimed a “Total Confirmed” figure of about €10.4m, which was not at all accurate.

Deterioration in relationship between Mr Gilliam and Mr Branco

71. Between April and August 2016 the relationship between Mr Gilliam and Mr Branco deteriorated. There were several points of dispute. Among the more serious was Mr Branco’s refusal to finance the cost of Mr Gilliam’s preferred Assistant Director, Lee Grummett, and his UK-based team. Ms Gilliam pressed Mr Grummett’s case on Mr Gilliam’s behalf. In an email to Ms Gilliam dated 6 June 2016 Mr Branco said:

“If you insist in maintain this autistic behaviour its better to stop our collaboration right now. I warned you, a week ago, that, despite my many attempts, I didn’t get an agreement with Lee.

...

Ps: Im not ready to produce a film which is hostage to an assistant, or of any other person, besides the director”

72. Mr Branco repeated his refusal to hire Mr Grummett in an email to Mr Gilliam later on 6 June 2016 and made it clear that if any individuals Mr Gilliam wanted on the Film did not meet Mr Branco’s conditions, they would be replaced. He added:

“I do not will interfere with the artistic decisions. In fact I never do it. but I can not accept situations that go beyond my financial capacity.”

73. There followed a dispute about the costume designer to be used. On 14 June 2016 Ms Gilliam proposed Bina Daigler as a name that had been suggested to Mr Gilliam. Mr Branco responded on the same day. He said that it was for his team to suggest alternatives:

“what you are doing is not correct. I'm shocked. I'm really starting to lose all desire to work with you.”

Mr Branco added that before he had worked with a famous director who trusted him to choose the crew and cast and apparently viewed this as the way forward for the Film.

74. On 24 June 2016 Mr Branco emailed Mr Gilliam to complain that Mr Gilliam had not agreed to meet him. He added:

“I will not be complice in a situation of disregard, and arrogance, towards the crew we (mariela and I) are providing you. I will not be complice in an adventure to end like your previous one.

I cannot admit any interference in the role of producer from people who are not and that should only do their specific job. To be clear, I am talking about nicola, amy and you.”

75. Emails were exchanged throughout June and July 2016, often acrimonious.
76. By the start of August 2016 Mr Gilliam was very unhappy about Mr Branco’s overruling Mr Gilliam’s choices of team and failure to provide Mr Gilliam information about the Film’s financing. Mr Branco’s position was that the project had to be kept on budget and that Mr Gilliam’s proposals undermined his efforts in that regard; he made repeated threats to end the project if his wishes were not met.

Cancellation of pre-production on 6 August 2016

77. Pre-production was due to start in full on 8 August 2016. Mr Watson described this as the moment in the production of a film when the project starts haemorrhaging huge amounts of money, when people would be hired, offices opened and location agreements signed.
78. At 12:33 on 6 August 2016 Mr Branco sent an email to Mr Gilliam.

“Dear Terry

In the follow-up of all that has been going, and after this morning conversation between Ana Pinhão and Terry Bamher, I stopped, as you may already know, all of the preproduction work. In order to give the green light to the coming of the actors, and for the continuity of this project, its absolutely necessary your acceptance by writing of the following points:

1/ all team members (any department) are the choice and responsibility of the producer Paulo Branco.

2/ the organization of production is complete and exclusive competence of the producer Paulo Branco.

3/ The members chosen by the director, already accepted and traded will have to respect all the decisions of the producer. The constitution of their teams will also be decided by the producer.

4/ In case of, in particular Nicola Pecorini, disrespect of the choices of the producer, or their teams, and if the producer concludes that there are no conditions for he’s continuity in the project, he may be replaced by another director of photography, chosen by the producer Paulo Branco.

In case of not having an answer from your until the middle of this afternoon, I will be forced to ask the line producer Ana Pinhão, to cancel all trips of the actors, and take care of your return flights for tomorrow.”

79. Ana Pinhão was Ana Pinhão Moura, Mr Branco’s assistant. Nicola Pecorini was Mr Gilliam’s chosen director of photography.
80. At 16:28 Mr Branco sent another email to Mr Gilliam:

“Terry,

In the absence of a reply I must deduce that you have no intention to continue on with this collaboration.

Therefore I copy Ana Pinhão to whom I ask that immediately cancel all flights and notify the cast and crew (Adam Driver, Michael Palin, Olga Kurylenko, Kirstin Chalmers, Paul Bennett James) and to take care of changing your return travels for tomorrow the latest.”

81. Mr Gilliam did not respond to Mr Branco until 18:26 (Mr Gilliam was in Lisbon, so all emails are timed according to CET). He said:

“All of your demands are completely inconsistent with and in breach of my signed, written contract. You actually signed the agreement on behalf of Alfama and were personally involved in its negotiations so it is difficult to comprehend how you can be so unfamiliar with its clear and certain terms. I have faithfully honoured the terms of our agreement and remain fully committed to doing so, despite your attempts to circumvent it. I ask that you do the honourable thing and comply with the terms of our agreement as well, so that we can get on with the business of making a great film.”

82. Mr Branco answered almost immediately at 18:38:

“I was very clear. I send you an email at 12.33 with the essential points to go forward if you dont agree with my BASIC requests there's no conditions to further collaboration. Up to you

Paulo

ps: Im on the way to the office to contact everyone”

83. Mr Gilliam replied at 19:40:

“Paulo,

You are not entitled to dictate essential points to go forward that are not consistent with my contract. That is why we have a contract to set forth our respective rights and obligations. Demanding that I comply with demands inconsistent with those term ‘or else’ amounts to nothing more than extortion, which I will not accede to. As I wrote previously,

I will continue to honour the terms of our agreement and will continue to work diligently to prep this film. If you choose to work contrary to that goal in order to satisfy some personal need for complete and total control, and for everyone to surrender to your whims, there is nothing I can really do. Take whatever steps you feel are necessary to satisfy your personal needs. After all, you want to be totally in charge. It is up to you.

Terry”

84. Mr Branco answered at 20:01:

“Terry,

From the start and in all my emails I was very clear that the film to exist must be produced my way. The points I clarified today I was telling you for months. At this moment I have all the elements to understand that our collaboration is impossible. At the same time I dont want to be responsible for another ‘industrial disaster’, to me more clear, ‘lost in la mancha II’, that your every day behaviour will conduct to. You are not ready to change and I will not be acumplice of that. Nothing else to say.

Paulo

Ps: I wish you better luck with another producer

Ps2: lawyers dont make films happen”

85. The last in this exchange on 6 August 2016 was a long email from Mr Gilliam sent at 21:31 from Amy Gilliam’s email address. I quote it in full because I think it provides a reliable guide to Mr Gilliam’s attitude and views at the time:

“Paulo,

I have taken a lot from you, but I will not stand by and let you defame me. If you watched ‘Lost In La Mancha’ (apparently you haven't) you would know that, despite one disaster after another (a flash flood, Spanish military aircraft flying overhead), none of which were of my making and all of which were totally beyond anyone’s control, we were able to craft creative solutions and work arounds, and were continuing with the production. The one disaster we could not overcome, and the only reason the picture shut down, was the loss of the actor we cast to play Quixote, who took ill and was ordered by his physician to take to his bed and stay there. Is it your point of view that Jean Rohefort taking ill, being unable to ride a horse and ordered to bed by his doctor was my fault? If so, you truly are mad, which I have suspected all along.

Let's look at what it has meant to 'produce the film your way.' For months we have been asking, pleading, begging to see a budget. One cannot responsibly produce a film without a budget, don't you agree? I certainly will not and cannot make a film without a budget – that would be folly and completely irresponsible. As the director, I have a contractual right to approve the budget, but you have steadfastly refused to produce one for our (or anyone's) review. We are just over 8 weeks from the scheduled commencement of principal photography, and we still do not have a budget, because, as we both know, no budget exists. That is irresponsible and unprofessional in the extreme, and yet the last time we asked you to see a budget – and budget – you not only refused to give us one, you said that if we ever asked to see a budget again you would shut the production down. Is that what 'producing the film your way' means?

Even worse, you do not even have a general finance plan for the raising of the funds required to produce the picture, despite promising for many months that you could accomplish that as an experienced producer. We have asked countless times for you to show us a finance plan – any finance plan (I also have a contractual right to see all documents related to the financing of the picture), and just like with the budget, you have steadfastly refused. It is abundantly clear that, just as there is no budget, there is no finance plan – facts that you have been deliberately hiding from everyone involved because of your inability to confront your own failures. This is also irresponsible and unprofessional in the extreme. I see now, at last, what it is like to 'produce the film the Great Paulo Branco's way.'

Contrary to your email, the points you raised today are new, violate my contract, are ridiculous in the extreme and amount to blackmail, plain and simple. In a desperate attempt to hide your utter failure to do the single most fundamental thing any legitimate producer must do – secure the finance to produce the picture – you have imposed for the first time terms you know it is impossible for me to comply with, and that you know I would never have agreed to before committing to do this picture with you. To top it off, you have threatened to shut everything down and send everyone home (including me) unless I comply. This is nothing but a pathetic attempt to deflect to me your obvious failures and inability to uphold your end of the bargain and do the one thing you were brought on to do – provide the financing you promise. Every person on this picture relied on that promise in good faith, including me – the word of the Great Paulo Branco – to their significant financial and personal detriment. I will not participate in your charade. I will not let you force me into quitting so that you can portray to the world that you did what you could but that the director let you down. Every person connected with this picture knows that is a lie. If you have even an ounce of integrity you will admit that the real reason for your list of absurd demands is that you have been unable to raise the funds necessary to make the picture, and now you need to bail

out to save your own skin and set this up so that you can blame everyone else.

As I have said before, I remain ready, willing and able to carry out my obligations under our agreement, my obligations to this picture and to the people here who are here working (and those yet to come) and I will perform to the very best of my ability, despite your disingenuous and deceitful behaviour, until you make it impossible for me to continue. As you like to say, 'it's up to you.'

Terry”

86. On the same day and over the following days emails were being sent between others involved in the Film. These included an email sent by Amy Gilliam at 20:01 on 6 August 2016. Ms Gilliam was responding to the cancellation of flights to Lisbon by Mr Branco. In particular, she contacted Mr Branco's assistant regarding an email Ms Moura had sent to Kirstin Chalmers, the intended hair and make-up designer for the film (Head of Department or HOD for that function), with whom Mr Gilliam was due to start work shortly in Lisbon:

“Ana,

It has been hectic with all the correspondence today, so I am just getting around to responding you your email below [to Ms Chalmers]. As the line producer, I am sure you knew that postponing the travel of HOD will cause us to fall behind schedule, and ultimately will cause cost overruns that we should be trying to avoid. I am sure you have a good reason for this decision, but I feel that Terry and I should have been consulted about it, because Terry was hoping to start work with Kirstin at the top of the week. When do you now plan to have her travel so I can adjust Terry's schedule? We are all trying to keep on schedule so that the picture is adequately prepped and can be produced efficiently throughout. I know that as a responsible producer you share in that common goal.”

87. On 7 August 2016, Mr Branco met Ms Gilliam. Ms Gilliam said in cross-examination that she attended in Mr Gilliam's place because he felt “incredibly broken” by the film apparently collapsing. Ms Gilliam said that she took a note of the meeting, which was sent to Mr Gilliam's lawyer, but the note was not in the documents before the court. Mr and Ms Gilliam both gave evidence that Mr Branco wanted among other things to use his own Spanish and Portuguese production team, only to shoot in Portugal, to replace Michael Palin who had been retained as a member of the cast.
88. Mr Branco's position is best assessed from his emails at the time. He wrote on 9 August 2016:

“Dear Amy and Terry

tonight I was working out on a proposal to present to you that will allow us to keep the film in progress on the planned dates. It must involve the complicity of everyone to accept big changes, but it will not Interfere with the key creative points. And so the film will be made on schedule. But for that I need to explain you what I'm thinking about and whether you accept those points. this has to be decided this morning to stop the wrap of the production.

Looking forward to hear from you”

89. Mr Gilliam did not respond. Ms Gilliam’s evidence in cross-examination was that she and her father were waiting for Mr Branco’s proposal in writing.
90. Mr Branco wrote again on 14 August 2016. There was a clear intent to smooth relations with Mr Gilliam and to look for a way that the project could be taken forward. But despite the length of the email, there was nothing in the way of detail as to how this was to be done. The nearest Mr Branco came was in the suggestion that there should be a delay in production because of difficulties in financing the project and so that he and Mr Gilliam could come up with “creative solutions” rather than repeating mistakes of the earlier Quixote project:

“Terry,

I think after a week we had already all the time to reflect, and a final clarification is important. I am writing you because last Sunday I asked you for a meeting, to trying together to find a solution for the continuation of the project and you did not come and you sent Amy. I’m almost certain that she pass you my idea, but I think it is also my duty to do so. I can understand your resistance to any change. All the ghosts of the attempts of the last years are still alive in your head. But time passes, everything changes, and that's why I want to propose you something that can turn this Quixote into reality and even better.

I’m afraid that how the project is, with your kind of requirements, the film will never exist. As you know, in recent months I hit all doors and all parties have stated that the problem with this movie is (among others) the deja vu. You repeat here, and in excess, all the fireworks, special effects and solutions of your previous films. And it no longer interests them. you're surrounded by loyal and dedicated people but they do not have enough distance to realize that something new has to happen. You may forgive my pretension and frankness on those comments but I have to do that because I still believe in you and in the project. You are based on a very strong story, a myth of Western culture that thou knewest with intelligence give a huge modernity.

Great movies have to give space to the imagination of the viewer, instead of fill them with effects and images that make them in simple passive spectators of a ‘tour de force’ permanent. With time, this script simplified, great actors, and a mise-en-scene really inventive (and for sure you have talent for it) we can make a great film. The rest (wigs,

prosthetics, digital manipulation, the photography itself) is secondary, and movies are not judged for it, on the contrary. The sets and the wardrobe, all that which is called production-value, are only even important when the mise-en-scene failure. With your culture and experience, you know that. With the crew is the same: people with energy and passion, even if they have not yet strong resumes at imdb do miracles that others can not. The success of a film does not depend on the budget, the names of the actors as you have proof of that. It just depends on the way you can innovate. Reinvent yourself, amazed them, and the success will be at your door. that's how I think and if you want it, you can count on me.

But the big mistake I made was to have accepted, since the first moment, your urgency to be filming in early October. I say this not only by the issue of financing and to have found more obstacles than I had anticipated. Of course that I should have realized and you should have informed me that the project had already circulated everywhere in recent years, without success.

As you must know, by now, I had a long talk with Jeremy Thomas in locarno this week and he explained me that he also tried, doors were closed and that's why he gave up producing this film. I did not know that.

So I feel we should have had more time, not for me to find money but, and above all, to stop and reflect on the project and think about creative solutions, instead of having jumped immediately and started doing it. following the same path, locations, people and falling into the same errors of the past. It would be sad if you lose again the opportunity to do it.

Im sure you still can give an unexpected quixote, surprising, different, human and simple. Maybe you are not ready for something like this but now it is all I have to offer you. Thank you for keeping this email confidential”

91. There was no response, so Mr Branco tried again on 19 August 2016

“Terry,

I hope that you have reflected this week, especially about why this project as it is, can not be done, since 27 years.

Under the terms I proposed you in my last email, I am willing to a last attempt to reach an agreement with you for a new ‘The man who killed don quixote’. As you may imagine, making this film is more important for you than it is for me. I am not an artist, I'm just a producer. And for a producer its just a film more or a film less. But as I like to be at the service of artists and I dedicate my life to that, I did you my last proposal.

I wait for your news.”

Approach to Tornasol

92. Shortly after Mr Branco had stopped pre-production work on 6 August 2016, Tom Hunter, Mr Gilliam’s US attorney in Los Angeles, was informed. There followed an email discussion between Mr Gilliam, Ms Gilliam, Mr Hunter, Peter Watson, Chief Executive of RPC, Jeremy Thomas, owner of RPC, and others. The discussion largely concerned whether Mr Branco intended a postponement or a cancellation of the project and whether there should be a press announcement. Consideration was also given to writing a letter to Mr Branco alleging breach of the Director Agreement. On 8 August 2016 Mr Hunter said:

“I support a press announcement, but it needs to be timed to a breach letter. Paulo has been clever in one respect, which is except for the notice to the Spanish crew from Maria (who appears to be the line producer's assistant), he has never ‘cancelled’ the film. His last ditch effort to propose an alternative in the Spring is an attempt to stave off a breach claim.”

93. On the same day Mr Gilliam spoke on the phone to Tornasol. He reported the phone call to Mr Hunter and others by email in the evening of 8 August 2020:

“I just got off an hour-long phone call with the Spanish producers. They have stopped production on their side, trying to assess their pain. Paulo never used the words ‘the film is cancelled’. I'm not exactly sure what he said, but ‘postponement’ was possibly used, and he is insisting they start making cuts to their budget. Like me, they have never been shown a budget or financing plan. They have been spending all their money, not his. The windmill is already built. They are hurting. I've told them everything I know and left them incredibly depressed.

Paulo and Ana are arriving in Madrid tomorrow to sort things out. The Spanish and I have agreed the phone call never happened and they will call me after the meeting. I think we should wait on issuing the breach letter. Maybe we can turn this into a class action.”

94. In cross-examination Mr Gilliam said that his agreement with Tornasol that the call never happened was because Tornasol did not want to feel that they had betrayed Mr Branco.

95. In the morning of 9 August 2016 Mr Watson reported to the others a discussion he had had with Grégoire Melin, President of Kinology, a French film production company:

“Gregoire will be writing to us all with a plan for saving the film later today. He's suggested an inter-party meeting either in London 15th or 16th or in Madrid 18th or 19th. Ideally Gerrardo would join as well. The purpose of the meeting is to assess the viability of remounting the production without Paolo. What do you think? I've asked Mark to try

and arrange this meeting. Lastly we need to try and keep all of this under wraps. We have to handle the distributors with great care as they are losing confidence.”

96. Gerrado was Gerrado Herrero, co-owner of Tornasol; Mark was Mr Watson’s PA.

97. Later on 9 August 2016 Ms Gilliam reported to the others that Mr Branco wanted to make a proposal to Mr Gilliam to save the film. There was email discussion as to whether Mr Gilliam should engage with Mr Branco or send a “breach letter” and also whether to pursue the “Grégoire option”.

98. Mr Gilliam was aware that there was a difficulty in that Mr Branco still had the option to make the Film bought from RPC, stated in an email circulated on 9 August:

“The Gregoire option is intriguing but how can it work with Paulo still controlling the rights?”

99. Mr Watson was asked about this. He said:

“Well, poor old Terry thought he was still going to be making the film, because of course at that point, as far as he was concerned he wouldn’t be able to make the film with Driver in 2017, so I imagine that Terry was still imagining that he might be able to make the film later in the year, but he couldn’t have made the film without Paulo. That’s quite clear.”

100. There was no response to Mr Gilliam’s email. Mr Watson said in cross-examination that if Mr Gilliam asked him, Mr Gilliam would have been told that Mr Branco had the option which still had another six weeks to run (in fact expiring on 30 September 2016).

101. On 10 and 11 August 2016 Mr Gilliam and Tornasol, specifically Mariella Besuievsky, co-owner of Tornasol, discussed by email changes to the way in which the Film could be made. On 11 August Mr Gilliam reported back to Mr Hunter, Mr Watson, Ms Gilliam, Mr Thomas and others:

“This is from Tornasol, the Spanish co-producers who, apparently, have already spent €300,000. 3 weeks ago they brought on a very good production supervisor and his team who have been sacked for asking questions. It seems they didn't get many answers. Does anyone think this is responsible or intelligent film co-producing? And now they would like to continue, possibly next year, with themselves as The Producer while Paulo lurks in the background in the Portuguese/France undergrowth.

Paulo certainly knows how to play people for suckers. Tom, How is your literary work coming on?”

102. In cross-examination Mr Gilliam confirmed that the “literary work” was the draft of a breach letter.
103. Mr Branco’s letter of 14 August 2016 was forwarded to Mr Hunter and the others on the same day. Mr Gilliam said:

“Dear all,

He never gives up, clearly he's the man to make the impossible possible. And it's heartening to know the main problem is deja vu and nothing to do with his reputation.

Clearly the road ahead is to stay with Paulo, and (since financiers and distributors don't bother to read the script) we just change the title and the names of the main characters.. et voila! ... no deja vu no more. No deja vu no more. Ng deja vu no more.

Or maybe we throw away the script and start from scratch and make Paulo's simplified film, whatever that is? He clearly has no idea how simplified, different, and much reduced this script is from the Hachette version.

Perhaps I am the delusional one... or maybe just worn out without the will to reimagine the film and make it with mud pies, sand castles and coconuts.”

104. At about this time Mr Watson of RPC and Grégoire Melin of Kinology exchanged emails discussing the possibility of going forward without Mr Branco. On 18 August 2016 RPC arranged a telephone conference attended by Mr Watson, the Gilliams, Mr Herrero and Mr Melin. There was a meeting in London attended by the same people on 24 August 2016. No minutes or other record of what was discussed were in the court documents. Ms Gilliam’s evidence was that at the meeting on 24 August everyone was trying to find a solution to make sure that the Film did not collapse. She described it as “a massive jigsaw puzzle”. Ms Gilliam said that there had been no decision to replace Alfama with Tornasol. Mr Watson thought that by the time of that meeting the plan to have Tornasol as producer would have been materialising.
105. On 25 August 2016, Thomas Mann, Business Affairs Executive of RPC, sent an email to Ms Besuievsky in which he said that he would begin drafting a new option agreement, by inference for RPC to sell option rights in the Film to Tornasol.
106. On 31 August 2016 Mr Melin circulated a revised presentation for the Film, a colour booklet for presentation to potential investors. Among these was Amazon. Mr Melin was keen to inform Amazon that Mr Branco was no longer involved:

“Amazon: as discussed at the end of our meeting of last week, I strongly advise that Peter + Jenne call them to explain that Paulo is OUT, that the field is sane again, we're aiming at shooting November-

March etc and that I'm very happy to sit down with them in Toronto. They must feel that the film is real and production under full control by Tornasol.”

107. On 30 September 2016 Alfama sent a letter to RPC requesting an extension of the Producers’ option term which, absent an extension, was due to expire that day. On 6 October 2016 RPC gave Alfama notice that the option had expired.
108. On 14 October 2016 RPC granted Tornasol the option to acquire the rights to the Film from RPC by the Tornasol Deed. No sum was charged for the option. Shooting of the Film began in March 2017 with Tornasol as producer and ended in June 2017. Ms Besuievsky’s unchallenged evidence was that Tornasol raised €16.7m to finance the Film.

Whether the Film would have been made with Mr Branco as producer

The Producers’ case

109. The Producers argue that the deal with Tornasol was finalised either during the phone conference of 18 August 2016 or at the meeting of 24 August. Once the new producer was in place, Mr Gilliam sanctioned the breach letter of 30 August 2016 purporting to terminate the Director Agreement. It had not occurred to anyone at that stage that this engaged clause 16 of the Deed and thereby extended the Producers’ option term.
110. The communications of 6 and 9 August 2016 are consistent with Mr Branco suspending pre-production work but not cancelling the project as whole. On 6, 7, 9 and 14 August 2016 Mr Branco made proposals to either Mr Gilliam or Ms Gilliam in an effort to ensure that pre-production was re-started.
111. Mr Gilliam repeatedly reaffirmed the Director Agreement and so stood ready, willing and able to make the Film with Mr Branco. Mr Gilliam was desperate to make the Film. If there had been no breach of the Deed, i.e. if RPC had not granted a new option to Tornasol, Mr Gilliam and his team would have pursued the project with Mr Branco as producer. This would have required Mr Gilliam to compromise his vision but that is what he did anyway when making the Film with Tornasol.
112. The only reason Mr Gilliam did not take Mr Branco’s proposals of early and mid-August 2016 further was that he saw an escape route with Tornasol as producer and assumed that RPC could grant an option to Tornasol after the end of September 2016.
113. Mr Driver would have rescheduled his time to shoot the Film in 2017, as happened, and with Mr Driver on board, the necessary finance would have been raised by Mr Branco. Tornasol raised the finance so that shooting could begin in spring 2017, without the assistance of Amazon. Mr Branco would have done likewise.
114. Mr Scott made a further point. The alternative route for Mr Gilliam of working with Tornasol only came about because everyone believed at the time

that the Producers' option had expired on 30 September 2016. In cross-examination Ms Besuievsky was very clear that had she known that Mr Branco continued to control the rights to the Film, Tornasol would not have agreed to take over the production. Mr Watson gave similar evidence.

Discussion

115. Beginning with Mr Scott's final point, I do not see that the universally held but false belief in October 2016 that the Producers' option term had expired makes any difference. First, the relevant counterfactual must be assessed on the basis that there was no breach of the Deed. Save for that, all the facts of the real history of events stay in place. Secondly, even if it were to be an assumed part of the counterfactual that everyone realised that the Producers' option had not expired, the essential element of the counterfactual would remain unchanged: there would have been no breach of the Deed. The only question under this head is what Mr Gilliam would have done if the Tornasol alternative had not become open to him.
116. By the end of his exchanges with Mr Branco on 6 August 2016, Mr Gilliam was plainly angry. I think he had good reason to be. Mr Branco's email timed at 12:33 set out an ultimatum. Either Mr Gilliam agreed to Mr Branco having complete control over every decision regarding the project including the choice of team members or the project would end.
117. Mr Branco did not act in breach of the Director Agreement. Subject to a further appeal, the courts in France have made that finding and I do not go behind it. But it is important to note what the French courts decided. The Tribunal de Grande Instance said (in translation):

“Terry GILLIAM provides no example of an artistic constraint imposed upon him by the producer, neither in the choice of team, nor in the options retained regarding the decor, wardrobe or make-up of the actors. And the breaches alleged in this regard are also not able to reside in the requests made by Paulo BRANCO on 6 August 2016 since they precisely resulted in refusal from Terry GILLIAM motivating the discontinuation of the pre-production which is, thirdly, held against ALFAMA FILMS for the alleged contractual breaches.”

118. The Cour d'Appel said:

“The court has already ruled that no contractual fault was noted or justified in the letter of 30 August 2016.

Moreover, as indicated above, Alfama has, since the signing of the production contract, worked to surround itself with producers to permit financing of the film budget set at 16.000,000 euros, and has notably established contracts with companies Leopardo Filmes, Tomasol Films and Entre Chien et Loup.

It is also justified by Alfama and undisputed that it had, by the month of August 2016, committed more than 300,000 euros for production of the film.

In addition, it is for accurate and relevant reasons that the court agrees that the judgment found that improper retention of information relating to the financing prospects of the film cannot be held against Alfama. Similarly, the court also adopts the exact reasons of the judgment which note that the choices of the creative directors of the film, were, indeed taken by Mr. Gilliam.”

119. The point I am addressing here is a different one. It is not whether Mr Branco in fact acted in breach of the Director Agreement but whether, if his ultimatum had been pushed through, this would have been inconsistent with the Director Agreement. In my view it would have been. Under clause 7 Mr Gilliam and Mr Branco were mutually to approve all creative matters with respect to the Film and Mr Gilliam’s decisions, including the choice of all department heads, was to prevail provided that they were consistent with the final approved budget. Mr Branco’s ultimatum proposed the arrogation of all decisions to himself.
120. Despite this being the case, in Mr Gilliam’s final email of 6 August 2016 he showed himself willing to pursue the project. But I think it is significant that his offer was to carry out his obligations under the contract. He made no sign of accepting Mr Branco’s terms.
121. On 9, 14 and again on 19 August 2016 Mr Branco offered a way forward, subject to “big changes” which he wanted to discuss. These were left unspecified save that shooting of the Film should be postponed. His ultimatum of 6 August was not withdrawn.
122. On 9 August 2016 Mr Gilliam was presented with the idea of continuing the Film with another producer. As I have discussed, this idea took hold over the course of August and September. It seems clear that by the date of the breach of the Deed, which in my judgment was on 14 October 2016, the date of the grant of the option by RPC to Tornasol, Mr Gilliam had become committed to Tornasol as producer.
123. Mr Critchley accepted that Mr Gilliam was desperate to make the Film, but not at any price and not at the price demanded by Mr Branco.
124. After his ultimatum of 6 August 2016 Mr Branco never enlarged on what his price was. Nor, though, did he draw back from the four terms sought in his first email to Mr Gilliam of that date. This was confirmed by his position at trial, which was that all the points upon which he had been insisting were accepted by Mr Gilliam in his subsequent dealings with Tornasol, so his insistence had been justified.
125. I think this is true up to a point. The Film was shot in the spring of 2017 and it is likely that Mr Gilliam would have agreed to a similar delay with Mr Branco. This would have been subject to the crucial condition that Mr Driver was available in 2017 but it turned out that he was. There was email evidence that neither Mr Driver nor his agent were happy with the way Mr Driver had been treated by Mr Branco but I will assume that this would have been smoothed over. Mr Gilliam may also have accepted a higher proportion of the crew

coming from Spain and Portugal rather than using a predominantly English crew, thus saving money.

126. However, I find it difficult to envisage Mr Gilliam accepting the principal condition required by Mr Branco: that henceforth all decisions would be taken by Mr Branco. For instance, as Mr Gilliam said, he had never been averse to a multi-national crew provided they were of a professional standard acceptable to Mr Gilliam, as opposed to the possibility of Mr Branco imposing his own friends, family and upcoming assistants should he have chosen to do so. Mr Gilliam called Mr Branco a bully and I find it easy to believe that this was (and is) Mr Gilliam's view. If Mr Gilliam had acquiesced to Mr Branco's terms he would have been in a very weak position regarding all matters to do with the Film, given the nature of those terms and given that both of them would have known that Mr Gilliam had acquiesced.
127. In my judgment, there was only a very low chance that if Mr Gilliam had had no option other than to continue to work with Mr Branco, his desperation to make the Film was such that he would have tried to make the best of working with Mr Branco.
128. This is to leave out an important consideration which would have been in the mind of Mr Gilliam, namely whether he was convinced that Mr Branco could raise the finance for the Film.

Whether Mr Branco could have raised sufficient finance

129. There are in fact two distinct issues to be considered. The first is objectively whether Mr Branco could have raised sufficient finance. If he could not, there was going to be no Film with him as producer. The second is Mr Gilliam's perception in October 2016 as to whether Mr Branco could raise sufficient finance and its influence on Mr Gilliam's willingness to continue with Mr Branco as producer. I will assume that if Mr Branco could have raised the finance, Mr Gilliam would have appreciated that he could.

The Producers' case

130. The Producers' starting point is that Tornasol was able to raise the money for the Film and there is no good reason to suppose that Mr Branco would have been in a worse position. In the no breach counterfactual Tornasol would not have been granted an option and everyone would have come to realise that Alfama's option had not expired. The Producers argued that shooting would have been put back to spring 2017, Mr Driver would have been available which would have encouraged investors and the money would have been raised. Mr Scott put Mr Branco's chances at 85%.
131. Mr Scott also submitted that the French courts had found that Mr Branco was capable of raising finance for the Film.
132. Mr Scott invited me to take note of Alfama having spent €500,000 in pre-production costs and Mr Branco having spent three or four months on the

project; that would not have happened unless Mr Branco had had a realistic expectation of making the Film and recovering the money plus a profit.

Discussion

133. I am not persuaded that Tornasol's ability to raise €16.7 means as a matter course that Mr Branco was sure to be able to do the same. That would imply that no knowledge or skill is required on the part of a film producer when it comes to raising money, particularly no skill in impressing sources of finance into parting with their money. No witness said that.
134. I did not find Mr Branco's assertion that he would have raised the finance for the Film in time for a spring 2017 shoot convincing. Mr Watson's witness statement addressed Mr Branco's claims that he had had on-going discussions with nine parties interested in financing the film over and above those referred to in the finance plan of August 2016. Mr Watson reviewed Mr Branco's correspondence with these parties and showed that five of them had actively said that they would not invest. As to the others, the correspondence chain had either ended in silence or had never suggested any investment. Mr Branco was asked about this correspondence in cross-examination and provided no satisfactory answers.
135. Mr Watson was ready to amend one point he had made in his witness statement. He conceded in cross-examination that his statements regarding Mr Branco's ability to obtain €500,000 from a Council of Europe fund may have been too pessimistic.
136. However, Mr Watson went on to state his overall view. He thought that if shooting had started in 2017 Mr Branco may have raised some further finance but did not believe that Mr Branco could have recovered from the loss of Amazon:
- “... having lost Amazon, as I said before, I think the game was up at that moment. That was a huge blow. I don't think there was any way to recover from that. It must have been very humiliating for Mr Branco. He announces the film with Terry in Cannes, after 27 years the film that no one else could make gets made, and then a few days later Amazon pull out. I mean, that was -- must have been a horrendous moment for him, I mean, an absolutely awful moment, and a terrible moment for the film, because that critical cornerstone that galvanised all the other parties , that would have given huge confidence to prospective financiers, and guaranteed distribution in North America, that was gone, and that was one of the things that Terry brought into the deal in the first place , and it was gone in less than three months, so I cannot see how, under any scenario , he would have been able to recover , even if he had had another year to do so. I don't think he would have got there.”
137. I have no reason to doubt Mr Watson's evidence on this, in particular that Mr Branco would not have recovered from Amazon's rejection, which would have become known to other prospective financiers.

138. I do not read the judgments of the French courts as including a finding that Mr Branco would have raised €16m. It was not necessary for the French courts to make such a finding. The Cour d'Appel found that Mr Branco had surrounded himself with producers to permit raising a budget of €16m, notably by entering into co-production contracts with Leopardo, Tornasol and Entre Chien et Loup. The Court had to decide whether, up to the moment of his alleged breach of the Director Agreement, Mr Branco had done enough finance raising to be compliant with his obligations under that Agreement and found that he had. The Court did not have to speculate as to whether Mr Branco would in fact have raised €16m.
139. I am sure that Mr Branco hoped and expected to make the Film and would not have invested time and money unless he did. But that is not to the point. The question is whether on the evidence I have seen events would in fact have led to the Film being made with Mr Branco as producer.
140. In my view not. As I have said, I think that even if Mr Gilliam had believed that Mr Branco had the finance in place, the chance of his being willing to continue working with Mr Branco was very low. Even if desperation had driven him to try, in such a counterfactual he would, well before any prospect of the start of shooting, have come to realise that Mr Branco was never going to raise sufficient money to make the Film that Mr Gilliam wanted to make. At that point he would have left and there would have been no Film. Any chance Mr Branco had of making the Film would have fallen to zero.

Conclusion on the Producers' chance of making the Film

141. For the foregoing reasons, in my judgment the Producers never had a substantial chance, nothing above a speculative chance, of making the Film if RPC had not been in breach of the Deed.

Quantum

142. Given that finding, I will take the issues of quantum briefly.
143. Alfama's pre-production costs of €500,000 were independently audited by a firm of accountants, Mariquito, Correia & Associates. Ms Busuievsky challenged the costs but in cross-examination admitted that she had no qualifications as an auditor and had no reason to doubt the abilities of that firm. I would have accepted the sum of €500,000 as being correct.
144. Mr Branco was not challenged on his claim to a producer's fee of €400,000. I would also have accepted that sum as being correct.