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Case No: BL-2018-000862

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 20 June 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

BLACKLION LAW LLP	**Claimant**
- and -	
(1) AMIRA NATURE FOODS LIMITED	**Defendants**
(2) KARAN CHANANA	

- -
- -

Sebastian Kokelaar (instructed by **Richard Slade & Co**) for the **Claimant**
Anthony Jones (instructed by **Clyde & Co LLP**) for the **Defendants**

Hearing dates: 23-26 May 2022

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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.

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This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on Monday 20 June 2022.

HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of a claim brought by a claim form issued under CPR Part 7 on 17 April 2018. It is essentially a claim by a law firm against its former client for breach of contract in respect of two contracts of retainer entered into by the parties. The two retainer agreements were entered into in writing, and are dated 2 November 2016 and 3 May 2017 respectively. The first of these was a general retainer. For reasons given below, the claim in relation to this retainer is no longer live. The second retainer was in connection with a finance transaction, a proposed bond issue. This was known as Project Avatar. Although a great deal of work was done in preparation for this bond issue, it never completed. The dispute in relation to this retainer is what was before me at the trial, and is the subject of this judgment.

2. The primary issue arising out of the Avatar retainer is one of construction, and, in particular, whether the payment obligation was conditional on the bond issue completing. But, if the claimant's case on construction fails, there is an alternative claim for rectification of the contract of retainer. Thirdly, if the claimant establishes a breach of contract by the first defendant, there is a further question as to the possible liability of the second defendant towards the claimant for procuring that breach of contract. This creates some difficulty in considering the evidence and finding the facts on which these issues must be decided. I will return to this issue shortly. Finally, there is also a point about contractual interest on any debt found due. At an earlier stage, there were also arguments advanced about estoppel, but these were not pursued at trial.

Procedure

3. As I have said, the claim was commenced on 17 April 2018. A defence and counterclaim were served on 16 April 2020. A reply and defence to counterclaim were served on 22 April 2020. This for the first time raised a claim for rectification of the agreement if the claimant's construction argument failed. In August 2020 the defendants discontinued the counterclaim. Subsequently (in March 2022), the claim form and particulars of claim were amended to reflect the alternative claim for rectification. However, the defendants have not served any amended defence in response.

4. I should just say this about the claim under the general retainer. On 8 October 2020 the claimant applied for summary judgment in relation to the claims under both retainers. On 15 February 2021, Deputy Master Nurse gave summary judgment to the claimant on the claim under the general retainer, for a sum to be assessed, but dismissed the application so far as it related to the Avatar retainer. On 8 April 2022, Costs Judge Leonard assessed the sum due to the claimant as £65,000, together with £83,000 interest, making a total of £148,000, together with an award of costs of the assessment in the sum of £37,000. All of these sums were made payable by 28 April 2022. I have been told that none of them has been paid so far.

Applications at trial

5. At the outset of the trial there were two applications made to me. The first was for relief from sanction in relation to the witness statement of Simon Maxwell Ziff, dated 19 April 2022 and filed and served on the following day, although the deadline for exchange of written statements had been 21 March 2022. After hearing counsel on this matter, and for reasons then given, I gave relief from sanction and permission to rely upon that witness statement and call Mr Ziff to give oral evidence in the trial. In brief, those reasons were that, applying the well-known *Denton* criteria, it was overall in the interests of justice to admit the further evidence.

6. The second application was for the second defendant to give his oral evidence remotely by video link from California where, as I understand it, he had gone for the purposes of his children's graduation ceremonies and also for business appointments. After hearing counsel, I refused this application for reasons then given. In summary, these were that the second defendant (i) had known of the seven day trial window since last November, and of the dates of the trial once fixed within that window since before 13 May, but had not raised any question of being out of the jurisdiction until last Friday, (ii) could only be available (even remotely) after 3 pm on the last day of trial, and (iii) was relying on non-compelling reasons for being abroad. In addition, given that the second defendant and Ms Yazdani gave differing accounts of the negotiations between them, I would have to pay particular attention to their evidence. I would be put in an invidious position if I had to compare the evidence of one in court with the other by videolink.

Witnesses and evidence

Live witnesses

7. I heard evidence from the following witnesses: Simon Maxwell Ziff, Carolina Gonzalez-Salazar, Trevor Ingram and Negar Yazdani (for the claimant), and Miriam Nasralla (for the defendants). I give here my impressions of these witnesses. Mr Ziff was highly professional and fluent witness, transparently honest and seeking to assist the court. Cross-examination made no impression on him. I accept his evidence as truthful. Ms Gonzalez-Salazar was an equally straightforward and honest witness, and I accept her evidence as truthful. But it is fair to say that her evidence was more marginal than that of other witnesses from whom I heard. Mr Ingram was a professional, knowledgeable and fluent witness. I accept his evidence as truthful. Ms Yazdani was a clear, fluent and helpful witness. Cross-examination made no significant impact upon her. She came across as a professional but rather a cautious person. I accept her evidence as truthful. Ms Nasralla was a very quick and fluent witness, whose intelligence was immediately apparent. On the whole, I was satisfied that she was telling me the truth, although her absolute loyalty to the second defendant was readily apparent in her answers, and on one important point I am unable to accept her evidence at face value.

Brenda Hamilton

8. I was also pressed with statements from two witnesses who did not attend the trial. Two of these statements were from Brenda Hamilton, a US lawyer who represented the defendants in the USA. Her two witness statements were not made for trial, but instead in relation to the summary judgment application to which I have already referred. For the purposes of the trial, they were made the subject of a notice under the

Civil Evidence Act 1995, section 2, and CPR rule 33.2. However, on 5 April 2022 Deputy Master Nurse ordered that the defendants make provision for Ms Hamilton to attend the court either in person or by videolink between 7 and 10 May 2022 to be cross-examined on her witness statements. It is clear from the correspondence that the defendants' solicitors wrote on two occasions to Ms Hamilton to inform her of the order of the court, but received no reply. She has not attended at the trial, nor indeed communicated with the court, and so I have not seen or heard her.

9. Given that Ms Hamilton is not a party to the proceedings, and is not subject to the jurisdiction of the court, and so cannot be compelled to make herself available for cross-examination, the claimant did not seek to exclude her written evidence altogether. Instead, it said it would be content to make submissions in due course as to the weight which might be placed upon it and as to any inference that might be drawn against the defendants by reason of her not being called. As to that, there is first the obvious point that these witness statements were directed at defeating the application for summary judgment, rather than at giving the evidence which would be given in chief at trial. There is then the (equally obvious) second point that, unlike witnesses tendered for cross-examination at trial, her evidence is not given on oath, I have not been able to observe her demeanour, and there has been no testing of her evidence by cross-examination. All this must mean that it is of less weight than evidence given in court at trial. I accept these submissions.

10. Thirdly, there is the refusal of Ms Hamilton to engage with the defendants' solicitors or to contact the court in relation to the order of Deputy Master Nurse. There is also the further failure to give any explanation, let alone a good explanation, for not doing so. The claimant submits that the court should draw an inference that the witness is unwilling to be cross-examined on her evidence because she knows it is untrue, and this must deprive the evidence of any weight. I am not so sure about this. There is a well-known line of authorities explaining that the court may draw an inference adverse to a party where it fails without good explanation to call a witness who could be expected to give relevant evidence: see *Royal Mail Group Ltd v Efobi* [2021] 1 WLR 3863, [41]. But this is the case of the witness herself, and not (so far as the court knows) the party, refusing to engage. If the witness were within the scope of a witness summons, then the party could perhaps be criticised for not calling her. But Ms Hamilton is not. The next best thing would be a letter of request to the relevant US court. It may be that in appropriate circumstances an inference might be drawn against a party who fails to seek the issue of a letter of request. But for the reasons set out below, I need not consider that question here.

11. This is because there is a further, significant matter to take into account. That is that on certain important points Ms Hamilton's written evidence is at odds with the contemporaneous documents in the bundle, the authenticity of which is either accepted by the defendants (in disclosing them to the claimant) or deemed to be admitted (under CPR rule 32.19, in relation to documents disclosed by the claimant to the defendants). What is more, Ms Hamilton does not seek to explain away those differences. Indeed, she does not even refer to them.

12. Among these inconsistencies are the following. In paragraph [14] of her first witness statement Ms Hamilton says:

> "Project Avatar did not complete by 31 May 2017 and, as a direct result, failed altogether."

Yet there are many emails passing between Ms Hamilton and the claimant in the months following 31 May, in which Ms Hamilton at no point says that the project has failed altogether, whether as a result of passing the 31 May 2017 date or otherwise. Moreover, she and others (including Ms Yazdani) are recorded in the documents as continuing to work on the project after 31 May. So it had not failed as at that date. Indeed, the defence and counterclaim of the defendant (dated 16 April 2020, and supported by a statement of truth), asserts, at paragraph 75:

> "In or about June or July 2017, Project Avatar fell through, and it did not ultimately complete."

13. In paragraph [28] of her first witness statement Ms Hamilton says:

> "On 24 February 2017, I had an email conversation with Ms Yazdani in respect of the first draft of the Avatar Retainer".

In point of fact, the email conversation began two days earlier when she sent Ms Yazdani an email on this subject, and Ms Yazdani sent her a draft retainer letter. Then, at paragraph [29] of her statement Ms Hamilton says:

> "This was not acceptable for Amira and so negotiations continued. The principal reason why this was not acceptable is that it would give Amira a liability for legal costs if the offering did not succeed."

However, Ms Hamilton's emails on 24 February responding to Ms Yazdani do not say that. They make no objection to the principle of the retainer creating an absolute liability, but instead take issue with some of the mechanics of a retainer that provides for the invoices to be settled in company shares rather than cash.

14. At paragraph [33] of her statement, Ms Hamilton refers to a further draft retainer letter sent on 14 March 2017, and says:

> "This engagement letter was not agreed by Amira, again because it would have landed Amira with a legal costs liability even if the bond issue did not complete. This was unacceptable to Amira."

15. Again, this is not what the emails say. In an email from Ms Hamilton to the second defendant on 14 March 2017, she asks the second defendant to confirm that the draft retainer agreement (providing for an absolute liability) is acceptable. His assistant, Ms Nasralla, emails Ms Hamilton on 22 March 2017 to say that the second defendant did not approve it, because according to him the agreement was for a fixed sum paid in two instalments. In other words, the objection is not that the liability is absolute, but that it is payable in two instalments. Ms Hamilton then asks Ms Nasralla (in two separate emails) to confirm whether it is a retainer of two sums that the claimant "will bill against or is it a flat fee?" Either way, it is an absolute and not a contingent liability.

16. At paragraph [35] of her statement, Ms Hamilton is discussing an email from the claimant attaching a further draft retainer letter, now providing for a fixed fee. She says:

> "This engagement letter was not agreed by Amira and negotiations continued".

17. Ms Hamilton does not expressly say why the letter was not agreed, but in the context of the earlier discussion of her statement the inference is that this was because it would create an absolute rather than a contingent liability. Yet on 12 April 2017 she emailed Ms Nasralla an amended version of the draft retainer letter, asking her to obtain the second defendant's approval of the "redline" changes in it. However, the letter attached clearly provides for a fixed fee, and the redline changes relate to other matters, including the mechanics of satisfying the invoices, and how shares issued may be sold.

18. At paragraph [36] of her statement, Ms Hamilton says:

> "I had a telephone call with Ms Yazdani on around 24 April 2017 in relation to the engagement letter and Amira's requirement that the fee be contingent on a successful bond offering. It is important to note here that Amira was happy to increase the level of the fee … provided it had the protection of the contingency in the event that the bond offering did not happen."

19. In paragraph [37] she goes on to say:

> "As a result of my telephone discussions and further emails it was finally agreed with BlackLion that their engagement would be on a contingent basis, with payment being due only if the deal successfully closed by 31 May 2017 (which as I have said was an absolute, guillotine deadline)."

20. And then at [41] she says:

> "Accordingly, on the next day – 25 April 2017 – Ms Gonazalez-Salazar of BlackLion sent me a further amended draft version of the Avatar Retainer (**BH1/22**). This version of the Avatar Retainer was prepared by BlackLion, with the fee stated as £300,000 and the wording '*subject to the completion of the Matter by 31 May 2017'* [emphasis added] was introduced …"

21. I note in passing that Ms Yazdani's evidence is that the telephone call that Ms Hamilton says she had with Ms Yazdani "on around 24 April 2017" simply did not happen. I will have to come back to that. The more important point at this juncture is to note that the contingent wording referred to by Ms Hamilton as having been introduced by the claimant on 25 April 2017, *after* the alleged telephone conversation on 24 April 2017 was in fact introduced by the claimant *four days earlier* in an attachment to an email of 21 April 2017 from Ms Yazdani to Ms Hamilton. So, the introduction of the language cannot be the result of the alleged telephone conversation, and what Ms Hamilton says is simply incorrect.

22. In my view it is not possible for a person who has read the documents in the bundle to which I refer not to realise that what is written in the statements is inconsistent with those documents. In circumstances where there is no attempt to explain the

inconsistencies, I regret to say that I am left with the invidious choice between holding that Ms Hamilton signed the statement of truth in each witness statement knowing that what she was saying was untrue, and holding that she signed the statement of truth without having read the relevant documents. I am not prepared to call Ms Hamilton a liar without her having been cross-examined, and so I am driven to the conclusion that she simply did not read the relevant documents before making her statements. At all events, what this means is that, coupled with the other disadvantages of written evidence to which I alluded, I am not prepared to put any meaningful weight on these statements, and certainly not in the face of evidence to the contrary from any of the claimant's witnesses, all of whom I have seen and consider to be witnesses of truth.

The second defendant

23. In addition to the two statements from Ms Hamilton, there were also no fewer than four witness statements from the second defendant. The position in relation to them is, however, different. No hearsay notice was served in respect of them under section 2 of the 1995 Act and CPR rule 33.2. The defendants submitted that that failure did not render the witness statements inadmissible in evidence. I referred the parties to a recent decision of my own, *Axnoller Events Ltd v Brake* [2022] EWHC 365 (Ch), [87], where I had in fact so held. In the light of that decision, the claimant did not seek to argue the contrary, but applied for the witness statements to be excluded under the court's general power to exclude otherwise inadmissible evidence in CPR rule 32.1. So far as relevant, this provides as follows:

> "(1) The court may control the evidence by giving directions …
>
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
>
> […]."

24. The matter was argued before me, and I gave a short ruling. This included reference to CPR Part 33, and in particular to the commentary in the White Book at paragraph 33.2.3, which pointed out that exercising the power to exclude evidence would be a procedural sanction bringing CPR rules 3.8 and 3.9 and the so-called *Denton* criteria into play. Accordingly, I considered the court's power to relieve a party from sanction, but decided in all the circumstances of this case that, for the reasons given orally at the time, the interests of justice required that I refuse relief from sanction, and so I excluded the four witness statements from the evidence admitted at trial. For the reasons given below, I have not considered whether the court should draw an inference adverse to the second defendant under the principle referred to in *Royal Mail Group Ltd v Efobi* [2021] 1 WLR 3863, [41].

Written and oral evidence

25. This is a case where much of the communication between the parties is recorded in documentary form, mainly email. But I make a specific point about the *oral* evidence that I heard (and the evidence in admissible witness statements which represents the oral evidence given in chief). It is well known that memories are fallible, especially going back a number of years, and, once a false memory has been unwittingly

absorbed, it may be almost impossible for the witness to divest himself or herself of it. Certainly, in commercial cases like the present, where there are contemporaneous documents available, these accordingly acquire a greater significance, as being more objective: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22]. Even in such cases, however, oral evidence and cross-examination are still important. They enable proper scrutiny of the documents, and they also permit the judge to gauge the personality and motivations of parties and witnesses: *cf Armagas Ltd v Mundgas SA* [1985] 1 Lloyd's Rep 1, 57, per Robert Goff LJ.

The construction of the Avatar Retainer

26. As I have said, the primary question before the court is one of construction of the Avatar Retainer. For that purpose, the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood the words used in the contract to mean. In other words, the factual matrix in which the contract was made is relevant. On the other hand, the contractual negotiations preceding the execution of the final version are inadmissible on the question of construction: *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, HL.

27. However, for the purpose of dealing with the subsidiary question before the court of possible rectification of that Retainer, the position is different. The test for admissibility is one of relevance, and some at least of those negotiations are relevant. And, in relation to the question of the second defendant's possible liability for procuring a breach of contract by the first defendant, it is again a question of relevance, so that some of the negotiations may be admissible. As Lord Hoffmann said in *Chartbrook*, [42], the rule excluding evidence of pre-contractual negotiations does not exclude the use of such evidence for other purposes. For the sake of transparency, therefore, in this next section I find the facts relating to admissible background for the purpose of construction only.

Facts found

28. The claimant is a law firm whose founder and managing partner is Ms Negar Yazdani. She is a solicitor who trained and qualified at a major London law firm, but who later moved "in-house", and was formerly employed as legal counsel in capital markets transactions in investment banks. Accordingly, she has considerable experience in relation to the legal issues that arise in relation to bond issues and private placements. The claimant was founded in 2010, in order to specialise in litigation claims against financial institutions, although its practice developed beyond that. By 2016 the claimant was still a small law firm.

29. In late 2016 the claimant was introduced by an existing client to, and began to do legal work for, the first defendant. This is a company incorporated in the British Virgin Islands and primarily engaged in the distribution of rice and rice products. At that time the company's shares were listed on the New York Stock Exchange (they were delisted in 2020). The second defendant is a businessman of Indian origin, the chairman of the company and also its majority shareholder. A general retainer in the form of a letter from the claimant to the first defendant was entered into dated 2 November 2016. It was signed by Ms Yazdani for the claimant and countersigned by the second defendant for the first defendant.

30. In part, this retainer provided as follows:

> "I enclose our Terms of Business that apply to all the services which we provide to you as our client.
>
> […]
>
> **Retainer**
>
> We have agreed that we will charge the Company a minimum retainer fee of £25,000 per month for three months subject to review at the end of this period. Any time incurred about the retainer will be invoices [sic] separately with supporting time recording.
>
> **Fees**
>
> We usually charge clients on the basis of hourly charging rates. The applicable hourly rates (exclusive of VAT) are set out in the Terms of Business … I will reduce the Partner's hourly rate to £600 and that of assistants and paralegals to £150.
>
> **Invoices**
>
> The Company will be invoiced for our fees monthly by reference to the time spent in the previous month. …
>
> Our invoices are payable immediately upon receipt. …
>
> **Satisfaction of Invoices**
>
> At our discretion, we have agreed that payment of the Firm's invoices may be satisfied by way of payment in the equivalent value of treasury shares of the Company under the Amira Nature Foods Ltd 2012 Omnibus Securities and Incentive Plan Employee Share Award Agreement (the Shares) to an account designated by the Firm.
>
> We understand from you that we will be able to sell the Shares freely in the open market at any time subject to regulatory nominal closed trading periods. In the event that there is any shortfall in the value of the Shares once sold to satisfy the Firm's invoices, the Company agrees to issue further Shares immediately upon notification of the same to satisfy full payment on the relevant invoice."

31. It will be seen that the retainer for present purposes has three features of note. First, invoices will be based upon hours worked at specified hourly rates. Secondly, there will be a minimum fee of £25,000 per month for three months with a review thereafter. Thirdly, the invoices may be satisfied by the issue of shares in the first defendant. In answer to a question from the defendants' counsel, Ms Yazdani said that the inclusion of the words "at our discretion" in the paragraph headed "Satisfaction of Invoices" reflected the wish of the second defendant to pay invoices by way of issue of shares in the first defendant, but for the claimant to have the option at any time to revert to cash payments.

32. From the beginning of the retainer, there were a number of cases which the claimant worked on for the defendants. These involved commercial litigation, corporate and employment law cases. But, in January 2017, the second defendant proposed that the claimant should be involved in work intended to lead to the issue of high-yield bonds in the first defendant in order to raise further capital for the company. As I have said, this was known as Project Avatar. The claimant's involvement would be a kind of transaction management work, overseeing and managing the progress of the bond issue. The claimant would have to find and instruct lawyers, review and comment on documents, oversee work streams and act as a conduit between the company and the other parties and advisers. Ms Yazdani agreed to take on this assignment, but she and the second defendant agreed that it would be the subject matter of a separate retainer agreement, the Avatar Retainer.

33. From the claimant's point of view, the work on Project Avatar began immediately, but the first draft of the Avatar Retainer was only sent to the first defendant on 24 February. It then took some weeks to negotiate, so that the final version was not signed by both parties until early May 2017. At this time the second defendant had an assistant, Miriam Nasralla, who was employed in a largely administrative role. As I have said, she gave evidence before me. The second defendant also had a US securities lawyer, based in Florida, called Brenda Hamilton. She operated rather like in-house US counsel. As I have said, she did not give evidence before me, although there are two witness statements from her in the bundle.

34. In the meantime, on 6 February 2017, there was a meeting at the first defendant's office with representatives of Barclays Bank, Shearman & Stirling and White & Case. Barclays Bank, as the bank underwriting the bond issue, and the first defendant, as the company issuing the bonds, would each need lawyers, and the purpose of the meeting was essentially a kind of "beauty parade". There was discussion of the governing law of the proposed issue, but no discussion as to the terms on which the lawyers would be engaged. After the meeting, the second defendant asked Ms Yazdani to research and review law firms, which she did in liaison with Brenda Hamilton.

35. On 8 February 2017 there was a series of meetings at the second defendant's home in Eaton Place to discuss the appointment of the lawyers for the bond issue and the fees they would charge. In one of these meetings Ms Yazdani was persuaded to accept that the claimant would be paid for its work on the project in the shares of the first defendant (as in the general retainer). There was also a consideration of materials that would be needed for the so-called "kick-off" meeting which was scheduled for the next day. Both the second defendant and Ms Hamilton were present.

36. On the same day the second defendant and Ms Yazdani had a meeting with Mr Ziff. He qualified as an accountant, but later became a senior banker, and subsequently founded a restructuring advisory firm in 2014, of which he remains chief executive officer. Ms Yazdani had earlier explained to Mr Ziff that the first defendant needed to raise finance urgently and was pushing for the issue of a high yield bond. Mr Ziff had told her that in his view the issue of such a bond by this company would be very difficult, and that a better course would be a negotiated deal with a small group of alternative investors. Ms Yazdani arranged for Mr Ziff to meet the second defendant at his home to discuss this. In the event, however, the second defendant was called away to another meeting, and so they arranged to meet on another occasion.

Ultimately, they met at a French ski resort about a week later, on 15 or 16 February 2017. I will come back to that.

37. On 9 February 2017 there was a meeting at Home House in Berkeley Square, commonly referred to as the "kick-off" meeting. The purpose of the meeting was to introduce the details of the proposed transaction and its timetable to the participants. In addition to the second defendant, Ms Nasralla, and Ms Yazdani, it was attended by Trevor Ingram of Shearman & Stirling, who were appointed as the company's lawyers for the bond issue, Na Wei of Barclays Bank, and a representative of White & Case, appointed as the bank's lawyers. It was agreed that the bond would be issued in New York and would be subject to New York law and the jurisdiction of New York courts. Ms Hamilton said that the retainers of the law firms involved were agreed similarly to be subject, but on the evidence I find that that was not the case. They were governed by English law and subject to English jurisdiction. I also find that there was no discussion at this meeting of the basis upon which the lawyers would charge for their services.

38. As to timetable, the initial backstop date for the proposed bond issue was 15 May 2017, being 135 days after the date of the last financial statements of the company, which were dated 31 December 2016. This was known as the "stale date" because the financial statements would thereafter become "stale" for the purposes of giving investors the necessary comfort about the company's financial position. The parties hoped to complete the bond issue in April, well before the "stale date". However, it was known that there were ways in which comfort could be given to investors at least for a limited period after that date, without the necessity of producing more recent audited financial statements. This might involve the compiling of a new quarterly report, or reliance on management accounts, for example.

39. In her first witness statement, Ms Hamilton suggested that it was "common practice for lawyers working on New York bond issues to be engaged on contingent fees (i.e. fees payable only in the event of a successful bond issue)." I heard evidence on this issue from three live witnesses with relevant professional experience of the provision of legal services to bond issues in New York, namely Ms Yazdani, Mr Ziff and Mr Ingram. The latter two of these are of course independent of the parties in this claim. All three were clear that there was no such practice, and I find that there was not. Fees might be a minimum sum, a capped sum, or a fixed sum, perhaps coupled with a contingent success fee on top, or subject to a discount (a "busted deal" discount) in the event of an unsuccessful issue. But lawyers working on New York bond issues were not remunerated on a wholly contingent basis.

40. In the following days, Ms Yazdani was heavily engaged in telephone calls (including conference calls), email correspondence, reviewing documents and generally managing the proposed transaction. She worked very long days on this matter. For example, on 14 February 2017 she recorded nearly 11 hours of time, on 15 February she recorded 10.5 hours, on 16 February she recorded nearly 11 hours, on 21 February she recorded 12 hours, with a further 10 hours on each of the 22 and 23 February, and on 24 February she recorded 14 hours. In February alone, she recorded more than 192 hours against this matter. This included weekends. For example, over the weekend of 18-19 February, she recorded seven hours, and over that of 25-26 February, she recorded 15 hours. This pattern of work continued in March and April. It was much less intensive from the claimant's point of view in May and June, and then there are

just three time entries in July 2017, amounting to a little over an hour. The charging rate value of the total time recorded by Ms Yazdani for the period from January to July 2017 is £424,680, equating to some 708 hours at an hourly rate of £600. Of those hours, only about 65 were recorded in May to July.

41. Ms Yazdani was cross examined on behalf of the defendants, but the accuracy of the time entries in the timesheets was not challenged. I have already said that I found her to be a truthful witness, and I am therefore satisfied that she did indeed work the long hours recorded in the timesheets in the bundle. I also find that she is an experienced and conscientious solicitor who takes her role seriously.

42. I did not have the similar advantage of seeing or hearing the second defendant in person at this trial, for the reasons already given. Nevertheless, there are a great many emails and other communications from him in the bundle which give a flavour of his character and way of working. These include a transcript of many hundreds of text messages between the second defendant and Ms Yazdani, sent via the WhatsApp mobile application, covering the period from November 2016 to November 2017. It is clear from these materials that the second defendant is a hard-nosed businessman who uses strong language, who likes to get his own way on everything, who demands immediate attention from his advisers, and who has to approve everything, from even minor changes in documents, right down to the question whether to pay a particular bill or not. In addition, there are several instances in the bundle of the second defendant telling his assistant or advisers to reject invoices, including from lawyers, not because there is anything wrong with them, but simply because he does not want to pay.

43. On 15 or 16 February 2017, the second defendant met Mr Ziff in a French ski resort where they were both on holiday. They discussed the problems faced by the first defendant, and how Mr Ziff could help. The second defendant asked Mr Ziff whether he would be prepared to work on a success fee only basis. Mr Ziff explained that, in the case of distressed companies, restructuring firms typically worked on the basis of a fixed monthly retainer, plus a success fee. The second defendant said that paying fees was a problem for the first defendant because it was short of cash. Mr Ziff told the second defendant that he was aware that the claimant was being paid in shares. He said he would be prepared to work on the basis that he was paid in shares, but only on a fixed retainer plus success fee basis, and not on a contingent success fee only. The second defendant told Mr Ziff that it was one thing to pay a legal adviser for their time working on a deal, but another to do the same for bankers, who he thought should be paid on success only.

44. On 22 February 2017 the second defendant agreed with Ms Yazdani that shares in the company would be issued and held on account of the claimant's fees in the transaction. A proposed retainer agreement was sent by Ms Yazdani to Ms Hamilton on 24 February 2017. However, it was not until 25 April 2017 that the second defendant signed a letter on behalf of the first defendant, addressed to the Continental Stock Transfer and Trust Company ("Continental"), instructing Continental as transfer agent and registrar of the company's ordinary common shares to issue 73,391 restricted shares to the value of US$384,570 to be held in the name of Ms Yazdani. At that date, US$384,570 would be the equivalent of £300,000. On the same day, Ms Yazdani signed a letter addressed to Continental, acknowledging (amongst other things) that the shares were being issued to her pursuant to a written agreement for

services and that the proceeds of sale of these shares were intended "solely as compensation for services rendered".

45. By early March 2017, Ms Yazdani was becoming concerned that the bond issue was taking longer than originally envisaged. She had been working long hours on this transaction since January. There were discussions between the parties as to how to address this, resulting in suggested changes to the draft retainer agreement. In this connection, I find as a fact that, by the end of April 2017, more than 90% of the work which the claimant would carry out on this transaction had already been done. As I have said, only about 65 of the 708 hours spent by Ms Yazdani were recorded after April. The final form of the retainer agreement was counter-signed by the second defendant with the date of 3 May 2017, but only returned to the claimant some days later.

46. The relevant parts of this retainer read as follows:

> "**Retainer**
>
> We have agreed that the Firm will charge the Company a fixed fee of £300,000 ("Fixed Fee") for the Services plus disbursements ("Disbursements") in connection with this Matter, subject to the completion of the Matter by 31 May 2017. And, it is agreed that the Company shall give irrevocable instructions to its transfer agent to issue an equivalent of its ordinary shares to the Firm and/or its designee to satisfy the Fixed Fee upon execution hereof. If the Fixed Fee is paid in the Company's Ordinary Shares (as set forth below) then such Shares shall be issued by the Transfer Agent as book entry restricted shares on or before May 4, 2017.
>
> **The Fixed Fee**
>
> The Company shall have the option of paying the Fixed Fee in either cash or its ordinary shares. If paid in shares, the Company shall cause its transfer agent to issue £300,000 equivalent of its ordinary shares (the "Shares") to the Firm upon execution hereof. …
>
> The Fixed Fee represents payment for Services previously rendered and the services to be rendered in connection with the Matter. …
>
> The Firm will be able to sell the Shares freely in the open market at any time after six months from the date that services are rendered. Upon the sale of the Shares by the Firm, if the share proceeds ("Proceeds") are less than the Fixed Fee, The Company shall pay to the Firm, the difference between the Fixed Fee and the Share Proceeds, at its option either in cash or additional ordinary shares immediately upon notification of the same … "

47. It will be noted that this retainer differs from the general retainer in a number of respects. First of all, there is no reference to the claimant's Terms of Business. Secondly, the retainer provides for a *fixed* fee of £300,000 (plus disbursements), rather than for a *minimum* fee at hourly rates. Thirdly, and (given the arguments in this case) most importantly, the fixed fee provision is qualified by the words "subject to the completion of the Matter by 31 May 2017". Fourthly, the fee can be paid in

shares, as with the general retainer, but in this case it is at the option of the company rather than the claimant. Fifthly, the company is obliged to instruct its transfer agent to issue shares to the value of the fixed fee upon execution of the agreement.

48. In summary, the defendants say that the words "subject to the completion of the Matter by 31 May 2017" mean that, if the matter did not complete by 31 May 2017, then nothing would be payable to the claimant for its work on the project. The claimant, however, says that those words do not qualify the concept of *the fee* itself, but instead its *fixed quality*. In other words, if the matter completes by 31 May 2017, then the claimant receives the fixed fee and no more. If on the other hand the matter does not complete by 31 May 2017, then the fixed fee is payable for the work done by then, but work done after 31 May 2017 is separately chargeable. (In fact, the issue did not complete by 31 May 2017. Indeed, it did not complete at all. But work continued on the project in June and July at least.)

The law

49. There was no real difference between the parties on the law applicable to the construction of a commercial agreement of this kind. As I have already indicated, the court asks itself the question what a reasonable person having all the background knowledge which would have been available to the parties would have understood the words used in the contract to mean. In addition to the background knowledge which would have been available to the parties, the court takes into account the natural and ordinary meaning of the words, in the context of the whole document, the purposes of the provision or provisions of which the words form part, and commercial common sense. The court will also take into account the sophistication and legal expertise of the parties. However, the court will disregard the subjective evidence of any party's intentions: *Arnold v Britton* [2015] AC 1619, [15]. As Lord Clarke (with whom the rest of the court agreed) said in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, [21], "if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other" On the other hand, "where the parties have used unambiguous language, the court must apply it". (*Rainy Sky*, [23]).

The rival submissions

50. Not surprisingly, the claimant says that there is more than one possible construction, whilst the defendants say that the language used in the retainer is clear and unambiguous. The defendants say that *everything* in the sentence preceding the words "subject to the completion of the Matter by 31 May 2017" is made conditional on that completion. So, no completion, no fee. The defendants supported this by a number of further submissions, which I summarise as follows.

51. The first is that the parties were commercially sophisticated, and indeed it was Ms Yazdani, an experienced solicitor, who first introduced the "subject to" wording. Secondly, the reasonable reader would prefer the actual wording used to a version glossed by superseded preliminary discussions. Thirdly, the claimant could easily have specified a fixed fee for a certain period, followed by hourly rate charging, but did not do so (compare the general retainer). Fourthly, it was important to the first defendant to complete the transaction by 31 May 2017, and that importance was underlined by a conditional fee arrangement requiring completion by that date in

order to earn the fee. Fifthly, the claimant was already earning an income stream from the general retainer, and the addition of a contingent success fee for Project Avatar would add up to the model of retainer plus success fee, which both Mr Ziff and Mr Ingram had accepted was a possible remuneration model for a bond issue. Sixthly, the parties had replaced the concept of a minimum fee of £250,000 with a higher fixed fee of £300,000. This is consistent with a change in the nature of the fee from guaranteed one to a contingent one. Lastly, £300,000 would represent (they said) "generous potential remuneration given the very limited role that Ms Yazsdani was actually going to play."

52. The defendants further submitted that the claimant's construction of the disputed wording would do violence to the language of the agreement, and moreover would have strange consequences. One would be that the parties would be contemplating that the deal would *not* complete by 31 May 2017, instead of knowing that it needed to complete by then. A second would be that, despite the conditional language, payment of the fee would not be conditional at all. The third would be that, although the parties had deliberately removed reference to a minimum fee, it would in effect be put back by this construction. A fourth point would be that the claimant could invoice for work done after 31 May 2017 without any agreement having been reached on this. And a fifth point (not, I think, really a *consequence* at all) is that, whilst this construction would entitle the claimant to invoice for work after 31 May 2017, in fact the claimant has never done so.

53. On the other side, the claimant accepted that the parties were sophisticated, but said that this was simply part of the factual matrix. Secondly, there was no gloss to be put on the words used by the superseded preliminary discussions. Thirdly, comparisons with the method of charging in the general retainer were wrong, because the method set out in the general retainer was not used as a template in the Avatar Retainer: the fee structure was fundamentally different, like chalk and cheese. Fourthly, the suggestion that 31 May 2017 was particularly important to the first defendant was also wrong. The "stale date" was *15* May 2017, and that is part of the factual matrix. So, the problem of what to do about that date would arise in exactly the same way if the bond issue completed on 16 May 2017, 31 May 2017 or 1 June 2017. Fifthly, the general retainer and the Avatar Retainer could not be read together to produce an overall success fee on top of retainer. The work being done under the two retainers was quite different and not, as with Shearman & Sterling, all on Project Avatar. Sixthly, the suggestion that there was an explicit rejection of a minimum fee in favour of a fixed amount came from inadmissible evidence of prior negotiations, and could not be supported. Lastly, the claimant carried out a huge amount of work on the project, amounting to some 88 eight-hour person-days. As the WhatsApp messages showed, the defendants were very demanding clients.

54. The claimant also replied to the submission by the defendants that the claimant's construction would do violence to the language of the agreement, and have strange consequences. It said that the language of the clause did not contemplate that the issue would not complete by the stated date. Secondly, the conditional language related simply to the period for the work covered by the fixed fee, so that work done after that period would be charged for in addition. The third point made by the defendants, about the removal of the reference to a minimum fee, was inadmissible as an aid to construction. Fourthly, the fact that there was no agreement at that stage as to the

basis of charging for work done after 31 May 2017 did not take the matter anywhere. And, lastly, the claimant explained the failure to invoice for the work that actually was done after 31 May 2017 as simply being that, in all the circumstances, it just seemed too much trouble to invoice for the relatively small amount of work done after the end of the period.

55. In my judgment, the language used in the basis of charging section in the Avatar Retainer is not clear and unambiguous. It is clear enough that the words "subject to" introduce an element of conditionality. But the problem is that it is entirely unclear which part or parts of the preceding clause they qualify. The different constructions relied on by the parties depend on which words are being qualified. Accordingly, I look to construe the agreement in the factual matrix. In particular, I look to see if there is a construction which is consistent with business common sense. In my judgment, the construction argued for by the claimant is consistent with business common sense, and that argued for by the defendants is not.

56. In the first place, the defendants already knew from the general retainer what were the approximate levels of hourly rate charging by the claimant, and therefore approximately what the claimant would expect to charge for a piece of work taking a certain amount of time. In this context, as I have found, there was no expectation that lawyers working on a New York bond issue would be paid solely on a contingency basis. Secondly, the work began in January 2017, and continued into July 2017, although the retainer itself was not finally signed until early May 2017. By the end of April 2017, the claimant had already recorded over £385,000 worth of time on this matter, and Ms Yazdani was becoming concerned at the lack of a signed agreement, and was pressing the defendants to deal with this. It was also clear to all concerned by that stage that the proposed bond issue would be difficult to complete successfully.

57. In my judgment, it is not likely that a small law firm such as the claimant, with all its cash-flow needs, would be prepared to tie up a huge proportion of its available human resources on a project to be paid only if it was successful. But let me suppose that I am wrong about that, and that Ms Yazdani (who as I say came across as a cautious person) was in effect prepared to "bet the firm". In my judgment it would make no commercial sense whatever for the claimant in early May 2017 to agree to a contingent fee arrangement under which it would be paid a fee of *far less* than its recorded time so far, in the event of success of the bond issue by 31 May 2017 (which by then was not looking good), but *nothing at all* if it failed, or indeed if it completed successfully *after* 31 May 2017.

58. On the other hand, an arrangement under which the claimant would receive a fixed fee of £300,000 if the matter completed by 31 May 2017, and could charge in addition for work done *after* that date, does make business sense. The claimant is still giving the defendants a good deal, but is putting a cap on that "good deal", and not leaving itself open to not being paid at all if the bond issue did not complete. Contrary to their submissions, the end of May was *not* significant to the defendants, in the way that 15 May might have been (as the stale date). On the other hand, it *was* significant to the claimant, as a convenient cut-off for the fixed-fee period of work. Lawyers usually work and bill in monthly periods.

59. As for the particular submissions made by the defendants, the fact that the parties are commercially sophisticated does not mean that the language they use cannot be

ambiguous. Indeed, sophisticated people make more complicated agreements, involving exceptions and carve outs which protect particular interests which have arisen during the negotiations. The more complicated the agreement, the harder it will be to find unambiguous language which precisely expresses it. The parties could certainly have found clearer wording to express their agreement in the present case, but it is not an argument of great weight, and such weight as it has applies equally to the defendants' construction as to the claimant's. I agree with the claimant that the method of charging adopted in the general retainer is irrelevant, because they were dealing with quite different things. And for that reason too I also agree that one cannot take the two retainers together, so that the claimant could be said to be being paid both an income stream and a success fee. I have already said that I do not accept that it was important to the first defendant to complete the transaction by 31 May 2017. If there was an important date, then it was 15 May 2017, the so-called "stale date". Nor do I agree with the defendants that £300,000 would represent "generous potential remuneration" for a "very limited role". On the contrary, it does not even cover the cost of the time by then recorded.

60. Nor do I agree that the claimant's construction of the retainer does any violence to the language of the agreement. It is a perfectly natural thing to say that the fee for a particular piece of work will be £X, provided it is completed by such and such a date, carrying the obvious implication that it is not completed by that day there will be further charges made for work done thereafter. That does not contemplate completion taking place at any particular time. The conditionality introduced by the words "subject to" relates to the capping of the fee, and not to whether or not there will be a fee at all. I am not impressed by the fact that no express arrangement was put in place for work done after 31 May 2017. The defendants were existing clients of the claimant and were being charged for other work under the general retainer. It would be open to the parties to agree either that the hourly rates in the general retainer should apply, or that a new fixed fee arrangement should apply, or something else entirely. And the fact that the claimant did not *in fact* invoice for work done after 31 May 2017 does not demonstrate that the fixed fee of £300,000 was contingent on completion before 31 May 2017. It is easily explained by the circumstances in which the claimant found itself, and the fact that the work done after May was only a tiny fraction of the work done on the whole project.

61. For all these reasons, I prefer the construction of the claimant to that of the defendants.

Contractual interest

62. There is a supplemental matter of construction, relating to contractual interest. The retainer as signed by both sides does not provide for contractual interest on unpaid invoices. The claimant nevertheless claims interest on its claimed debt at the rate shown in its standard Terms of Business. Clause 35 of those terms provides for interest at 1.5% per month from 30 days after the date of the unpaid invoice in question. The Avatar Retainer does not refer to the Terms of Business. But the general retainer *does* refer to those Terms, and a copy had been supplied to the defendants as part of that general retainer. The general retainer in fact says that the Terms "apply to all the services which we provide to you as our client". The Terms of Business themselves say, in clause 1, "These terms will apply to all dealings between us unless supplemented or varied by other terms of business issued by us, or otherwise varied in

writing." The claimant submits that the Terms of Business, and in particular clause 35, apply to the work carried out under the Avatar Retainer as well as under the contractual retainer.

63. The SRA Code of Conduct 2011 (replaced in 2019) required solicitors in inform their clients of a great many things which were and are not commonly put in retainer letters, but instead were and are hived off into a separate document, usually called Terms of Business or some similar expression. These matters included providing clients with the information they needed to make informed decisions about the services they needed, how these would be delivered and how much they would cost. They would also include information ensuring that if clients were not happy with the service they have received they would know how to make a complaint and that all complaints were dealt with promptly and fairly. The claimant's Terms of Business included information on the claimant's contractual position, estimates of cost and its method of charging, interim and final bills, monies on account, interest on client monies held, commissions received, limitation of liability, complaints procedures, intellectual property rights in work product, storage of documents, money-laundering, termination of retainer, client communications, and governing law, amongst other matters.

64. The factual matrix is such that the whole of the contractual relationship between the solicitor and client is not contained in the retainer letter, although that will normally contain the most important terms, and in particular those which vary from case to case. It is supplemented by a further document such as the claimant's Terms of Business in the present case. I proceed on the basis that the claimant, like any solicitors' firm, sought to comply with the regulatory requirements of the SRA to supply prescribed information to clients, and that it did in fact supply that information to the defendants as part of the general retainer and its Terms of Business. Those terms made clear (as must be obvious if the claimant is to comply with the regulations) that the Terms applied to all business done by the claimant with its clients. Accordingly, I am in no doubt that, unless varied or excluded by express or necessarily implied agreement, those Terms of Business apply just as much to work done under the Avatar Retainer as to work done under the general retainer.

65. There is certainly no express agreement in the Avatar Retainer to exclude any of the Terms of Business. And the claimant could not have agreed to their total exclusion without being in breach of regulatory requirements. I see no basis for any necessarily implied exclusion either. Accordingly, in my judgment the contractual interest provisions of clause 35 of the Terms of Business apply to the invoices rendered under the Avatar Retainer, just as they did to those rendered under the general retainer. In my judgment, therefore, the claimant is entitled to charge contractual interest under clause 35 on unpaid fees.

Rectification

66. In these circumstances, the claimant's claim for of rectification of the Retainer strictly speaking does not arise. However, in case this matter goes further, and my construction of the disputed wording in the Retainer is held to be wrong, I will go on to consider whether, if I had preferred the defendants' construction of that wording, I would have rectified the retainer as sought by the claimant in its claim. That means that I need to find the facts which would be relevant for such a decision. As I have

already indicated, this involves taking account of evidence which was inadmissible on the question of construction. (For the sake of completeness, I make clear that there is no similar claim the defendants for rectification of the parties' agreement in the event that – as is the case – I find that there is provision for contractual interest in the Terms of Business, which apply to the Avatar Retainer as to the general retainer.)

Facts found

67. In addition to the facts which I have already found to form part of the factual matrix for the purposes of construction, and which I take into account here also, I find the following further facts in relation to the question of rectification. First, at the meetings at the Second Defendant's house on 8 February 2017, having persuaded Ms Yazdani to accept payment in company shares, Ms Hamilton also sought to persuade Ms Yazdani to enter into a success-basis retainer, *ie* to be paid only on the contingency that the issue was successful. She indicated to Ms Yazdani that the success fee would be in the region of £600,000 to £700,000. But Ms Yazdani refused, as there was a significant risk (which she was not in a position to estimate) that the claimant would not be paid at all. And whether the issue succeeded or not was beyond her control. She told them instead that the claimant would work on the basis of hourly rates, a capped fee or a fixed fee, but that there were no circumstances in which the claimant would work for a contingent fee. I find that, as Ms Yazdani says, this position on behalf of the claimant was accepted, and the matter was not raised again on behalf of the defendants.

68. Originally, Ms Yazdani agreed with the second defendant that the claimant would charge on the same basis as under the general retainer, that is, at hourly rates with a minimum monthly charge of £25,000 and a review after three months. But by 17 February 2017 Ms Yazdani was becoming concerned that she would have to wait a long time to be paid, with no security. She spoke to the second defendant on 22 February 2017, who agreed that shares worth £250,000 would be issued to be held on account of the claimant's fees, though not to be sold for six months because of regulatory requirements. When Ms Yazdani told Ms Hamilton of this agreement later the same day by email, the latter by return asked for a written agreement to deal with the issuing of shares, so that she (Ms Hamilton) could prepare the necessary issuance documents. On 24 February 2017 Ms Yazdani sent her one, embodying the agreement reached between herself and the second defendant, for hourly rates with a minimum monthly fee and a three month review, together with a provision for the issue of £250,000 worth of shares on account of costs. There was no contingency arrangement.

69. Ms Hamilton commented on it, suggesting revisions. Thereafter, until 11 April 2017, the claimant circulated further drafts of the Avatar Retainer to the defendants and Ms Hamilton, who further reviewed and commented upon them, and sought amendments to each of them, chiefly concerned with the mechanism for payment of invoices by means of the issue of shares. Up to 8 March 2017 each draft of the retainer was seeking to charge on the basis of hourly rates. By 14 March 2017, Ms Yazdani was again concerned about the amount of work being done. She gave evidence (which I accept) that she agreed with the second defendant that the charging mechanism would now involve a *minimum* fee of £250,000, with £125,000 worth of shares to be issued on account of costs. A retainer letter on this basis was sent to Ms Hamilton on that day. She sent it to the second defendant for approval. The second defendant

responded via his assistant Ms Nasralla on 22 March that the agreement was £250,000, to be paid in two instalments. Ms Hamilton sought clarification of this from the second defendant, asking whether it was a retainer to be billed against, but payable in two instalments, or a flat fee. There was no suggestion, either by the second defendant or Ms Hamilton, that it was *contingent.*

70. Ultimately, the defendants proposed that instead of a *minimum* fee there should be a *fixed* fee, of £300,000. This was agreed by Ms Yazdani and put into a draft retainer of 11 April 2017, providing for an equivalent value of shares to be issued to the claimant on execution. There were then further revisions to the retainer, but none to the provision for a fixed fee. On 19 April Ms Hamilton told Ms Yazdani by email that the draft attached, as further amended, was now in a form acceptable to the second defendant. But none of the drafts so far put forward and reviewed contained a provision for a contingent fee, and none of the amendments sought by or on behalf of the defendants or agreed to by the claimant included such a provision. From this point on, however, it was always described as a *fixed* fee.

71. However, on 20 April Ms Hamilton sent a further draft retainer to Ms Yazdani with further changes (not previously discussed, but once again not involving any contingent fee arrangement). Ms Yazdani tried to speak to the second defendant about these changes, but he did not return her calls. She was concerned that she had already spent a great deal of time on this project, and did not want to go on working on it for an indefinite period for the same fixed fee. She therefore instructed her assistant, Carolina Gonzales-Salazar, to amend the retainer letter by including the date 12 May 2017 as a "long stop date", so that if any work was required after that date, it would be separately charged and paid for. The method of amending the draft retainer adopted by Ms Gonzales-Salazar was to add, after the words "a fixed fee of £300,000 … for services rendered in connection with this Matter" the words "subject to completion of the Matter by 12 May 2017". That amended draft was sent back to Ms Hamilton on 21 April 2017. So, the disputed wording was added by the *claimant*, and not by the *defendants*. I find that it was indeed intended to introduce a long stop to the fixed fee arrangement, rather than to introduce a contingent fee arrangement. Indeed, it is impossible to see a commercial motive on the claimant's side for changing a *fixed* fee of £300,000 (established some 10 days earlier, in the draft of 11 April 2017) into a *contingent* success fee of £300,000, because no other advantage was being given to the claimant at that point.

72. Ms Hamilton replied by email later the same day, asking for a copy of the claimant's Terms of Business, which were referred to in the draft retainers so far circulated. This was supplied by return. On 24 April Ms Hamilton told the claimant that the first defendant "requests that the flat fee be extended to May 31". This on its face refers to the fee as a "flat fee", and not as a "contingent fee". In her witness evidence Ms Hamilton said, first of all, that she had a telephone conversation with Ms Yazdani on 24 April 2017, in which it was "finally agreed by [the claimant] that their engagement would be in a contingent basis, with payments being due only if the deal successfully closed by 31 May 2017". She also said in that written evidence that she appreciated that she should have written "flat contingent fee" in her email of 24 April 2017. Ms Yazdani, however, denied having any such telephone conversation with Ms Hamilton.

73. As I have already said, I prefer Ms Yazdani's evidence to that of Ms Hamilton. I find that no such telephone conversation took place. Apart from the clear language used in

Ms Hamilton's email, and the confidence I have in the evidence given orally before me of Ms Yazdani, and fully tested by cross-examination, as against the inherent weakness of the written evidence of the absent Ms Hamilton, it seems to me improbable that the defendants would have sought to *extend* the period in which a contingent fee could be earned from them, as opposed to seeking to extend the period *which a flat fee would cover*. The latter would be to the defendants' advantage. The former would be to their disadvantage. But it was they who asked for the change.

74. The claimant agreed to the extension from 12 May 2017 to 31 May 2017. On 25 April 2017 Ms Gonzales-Salazar sent a revised retainer in the same terms as the previous one, except for changing the date to from 12 to 31 May 2017, to Ms Hamilton. Later the same day, Ms Hamilton replied, asking for the reference in the retainer to the claimant's Terms of Business to be deleted. She did not refer to the use of the term "fixed fee" in that draft, nor did she suggest that it had been expressly agreed, just the day before, that in fact the fee was now to be contingent. A revised version was sent the same day to Ms Hamilton, omitting the reference to the Terms of Business. This was sent on to the second defendant, Ms Hamilton saying "They have agreed to our changes. Please execute and return to me."

75. It will be recalled that, on the same day, 25 April, in accordance with its option in the retainer agreement, the second defendant gave a written instruction to Continental to issue shares worth £300,000 to Ms Yazdani, and the latter signed an acknowledgment that the shares were restricted securities. The following day, Ms Hamilton wrote to the claimant confirming that the shares were with the transfer agent. On the same day, Ms Nasralla sent to Ms Hamilton a signed version of the 25 April draft, though with yet further (minor) manuscript amendments from the second defendant. (Again, those amendments were not about the fee structure.) On 3 May 2017 Ms Hamilton sent the retainer letter back to the second defendant for execution, but also sent it to Bruce Wacha, the first defendant's managing director, who in fact was the person who finally executed it on that day on behalf of the first defendant. On 12 May Ms Nasralla sent the executed retainer to Ms Yazdani, who signed it on behalf of the claimant. On 23 May Ms Hamilton asked the claimant to supply time sheets so as to set up a chart for the necessary legal opinions to remove the restrictions on selling the claimant's shares at six month anniversary dates. On 1 June 2017, in response to a request from the claimant, Ms Hamilton confirmed that the shares relating to the Avatar Retainer had been lodged with the transfer agent.

76. On 13 June 2017 the claimant invoiced the first defendant for £30,000 for work done between 11 and 15 January 2017. Ten days later Ms Nasralla replied saying that shares relating to work done up to 15 January would not be available before 15 July, and asking for the invoice to be reissued. It was so reissued and sent to Ms Hamilton on 4 July 2017. Ms Hamilton wrote on 6 July asking for the time sheets "for this time". There was then a correspondence between the claimant and Ms Hamilton and Ms Nasralla, in which the claimant queried the need for timesheets, Ms Hamilton insisted upon it, and the timesheets sought were provided. In September there were further email exchanges between Ms Yazdani and Ms Hamilton, in which the former asked what further documentation was needed, and Ms Hamilton replied "We need the time sheets for all the periods. Please provide them to us."

77. A further invoice, for £270,000 was sent to Ms Hamilton on 25 September 2017. On 4 December 2017 Ms Hamilton emailed Ms Yazdani saying "please provide us with the

timesheets for Project Avatar for all periods as previously requested. Karan would like to wrap up the invoices before the end of the year." The timesheets were provided to Ms Hamilton on 18 December 2017. In January and February 2018 Ms Hamilton queried various items included in the outstanding invoices and accused the claimant of inflating them. The claimant responded to these queries. After correspondence between the claimant and Grosvenor Law (solicitors instructed by the first defendant), the present proceedings were issued on 17 April 2018. But it is to be noted that in none of the correspondence following 31 May 2017 until the issue of the proceedings was there any suggestion that the fees were not due because they were contingent on the success of the issue.

The law of rectification

78. In *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71, [33], Peter Gibson LJ summarised the requirements for rectification on the grounds of common mistake as follows:

> "The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention".

That summary of the law was approved by Lord Hoffmann in the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, [48], and on this point at least, the whole House agreed with Lord Hoffmann.

79. In the more recent decision of the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2020] Ch 365, the Court of Appeal considered the concept of the 'outward expression of accord', and held (in this respect differing from the *obiter* view of Lord Hoffmann in *Chartbrook*) that:

> "176. … it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an 'outward expression of accord' – meaning that, as a result of communication between them, the parties understood each other to share that intention."

80. In addition, the Court said:

> "81. … the communication necessary to establish an outwardly expressed accord or common intention which each party understands the other to share need not involve declaring that agreement or intention in express terms. The shared understanding may be tacit."

Application of the law to the facts

81. As I have already said, the question of rectification does not arise on the construction that I have put on the retainer. But I must now proceed on the alternative hypothesis that I had held that, on its true construction, the retainer provided for the claimant's fee to be contingent on a successful bond issue taking place by 31 May 2017. The question then is whether, despite that construction, the parties shared a common intention continuing up to the execution of the Avatar Retainer that the claimant would be paid a *fixed* fee of £300,000 for work done on the project up to and including 31 May 2017, a fee that was *not* contingent on the issue completing by then. If that were so, then the retainer agreement, by a mistake, would not reflect the parties' true intentions. In my judgment, the answer to that question is Yes.

82. At the meeting on 8 February 2017, the question of a contingent fee was raised by the defendants but dismissed categorically by the claimant. After that, there was no further attempt by the defendants to introduce a contingent fee arrangement, although they made numerous amendments to other aspects of the retainer. The fixed fee of £300,000 was clearly agreed between the parties before 11 April. None of the many drafts of the retainer included contingent fee language, before the disputed wording was included on 21 April *by the claimant*, anxious to limit the period of work to be covered by the fixed fee. I have found that there was no telephone conversation between Ms Hamilton and Ms Yazdani on about 24 April in which (the defendants said) Ms Yazdani agreed to a contingent fee. On the other hand, on 24 April Ms Hamilton asked for the fixed fee (which she called "flat fee") period to be extended to 31 May from 12 May. And on 25 April, the first defendant instructed the issue of £300,000 worth of shares to be held in the name of Ms Yazdani, without in any way suggesting that any contingency had to be satisfied before they could be treated as compensation for services rendered. Ms Yazdani signed an acknowledgment the same day that they were indeed "compensation for services rendered".

83. Indeed, there are very many written communications between the parties both before and after 31 May 2017. None of them refers to the claimant's fee as being contingent. The communications after 31 May from or on behalf of the defendants are particularly significant, because by then it was clear that the issue had not taken place, and yet there was nothing from the defendants' side to indicate that no fee was payable. On the contrary, work continued to try to bring the issue out. Ms Hamilton sought and obtained copies of the claimant's timesheets, in order to be able to certify that six months had elapsed since the work was done. This would be quite unnecessary if no fee was due at all. Even when the claimant sought payment of its invoices, the replies from the defendants were still concerned with showing that six months had elapsed from the date the work was done, rather than that the fee had not been earned. Ms Nasralla in cross-examination suggested that the defendants hoped the project would still go ahead, and therefore wanted to keep a good relationship with the claimant. But she candidly accepted that she did not know the second defendants or Ms Hamilton's thinking at the time. I reject this as speculation, as indeed Ms Nasralla agreed it was.

84. I have accordingly found that that parties' common intention of a fixed fee of £300,000 continued at least from 11 April until the execution of the retainer in early May, although the period of work that it covered was slightly extended by agreement. But for rectification in this case there needs also to be an "outward expression of accord". I am satisfied that the email from Ms Hamilton to the claimant of 24 April asking for the "flat fee" to be extended to 31 May, and the email from Ms Gonzales-

Salazar to Ms Hamilton of 25 April agreeing to this constitute such outward expression. So too do the first defendant's direction to Continental to issue and hold £300,000 worth of shares in the name of Ms Yazdani and her acknowledgment to Continental the same day. In my judgment the requirements for a claim of rectification of the retainer agreement are amply satisfied in this case. There is no factor, such as undue delay or the creation of third-party rights, that would make it inequitable to award rectification, and accordingly, had it been necessary to do so, I would have ordered it. I add only that, because of this conclusion on the evidence, I have not needed to consider the application of the authorities explaining that the court may draw an inference adverse to a party where it fails without good explanation to call a witness (here the second defendant) who could be expected to give relevant evidence: see *Royal Mail Group Ltd v Efobi* [2021] 1 WLR 3863, [41].

Breach of the retainer agreement

85. On the footing that the claimant is entitled to the fixed fee of £300,000, either as originally executed or as rectified, the next question is whether there has been a breach of the retainer agreement by the first defendant. Although the first defendant by its defence in this claim argues that no fee is due at all to the claimant, the first defendant also (and somewhat paradoxically) argues that it has complied with any obligation to pay a fixed fee of £300,000. This is because it has caused shares in itself to be issued to the value of £300,000 (at the time of issue) in the name of Ms Yazdani. The first defendant was permitted to discharge invoices in this way, by the express terms of the retainer agreement. However, the claimant has not received any of that value, because the shares remain blocked and unsold, pursuant to the US regulatory regime under which they were issued.

86. The claimant says that it understands that the shares can only be released and sold on the market (so as to pay the claimant in cash) if the issuing company's US securities lawyer certifies that the requirements of the regulatory regime have been met. The claimant further says that the company's US securities lawyer in this case, Ms Hamilton, has failed to provide the relevant legal opinion. The first defendant says that the relevant opinion may be given by any US securities lawyer, and not only by the company's US securities lawyer. Hence, if the claimant has not received any of the value it expected, that is because it has not arranged for another US securities lawyer to provide the relevant opinion. In the meantime, as both sides agreed, the market value of the company's shares has been greatly reduced, so that the same shares in February 2021 would only have fetched about US$10,000 on the open market. (More up to date information was not put before the court.) The first defendant says that the claimant is therefore the author of its own loss.

87. As I have said, pursuant to the retainer agreement the first defendant had the "option of paying the Fixed Fee in either cash or its ordinary shares". It chose to do the latter, the relevant direction being given on 25 April 2017. The agreement further provided that the claimant "will be able to sell the Shares freely in the open market at any time after six months from the date that services are rendered." In order to give business efficacy to this provision, there must be implied a term that the first defendant will do all such things as are reasonably necessary to enable the sale of the shares in the open market.

88. On this point the defendants plead:

> "47. … (6) The Issued Shares remain issued to Ms Yazdani. They have not been claimed by Ms Yazdani or the Claimant. In order to do so, Ms Yazdani (or the Claimant) must follow the procedures as required by US securities law, including the provision of a legal opinion from a US counsel practicing [sic] securities law to the Continental Stock Transfer & Trust Company (the SEC registered transfer agent and registrar of the shares); that opinion would be required to state that the sale of the shares held by Ms Yazdani had been registered with the SEC, or that Rule 144 of the Securities Act was available for her resale.
>
> (7) The First Defendant understands that Ms Yazdani and the Claimant have not provided any such an opinion."

89. It will be noted that there is no pleading of US or other foreign law, despite the reference to a US securities lawyer. There was no permission for expert evidence of foreign law to be adduced, although in her witness statement of 12 February 2021, Ms Hamilton made a statement which could be interpreted as intended to provide evidence of some rules of US law. In fact, she does not refer to any particular provisions of that law. However, if this were intended to be expert opinion evidence, it would be inadmissible without the permission of the court. And no such permission has ever been given. There was however certain evidence of fact. This included documentary evidence of an enquiry made by Ms Yazdani by email of Continental on 14 May 2020, in order to ascertain the position.

90. Ms Yazdani asked:

> "What procedure needs to be followed for the shares to be released. In particular, what information you would have needed to release the 73,391 following their deposit in the account on 2 June 2017. I understand that the only means by which they could be released is a legal opinion from the company itself or its general counsel. Is that correct? Would there have been any other way of releasing them? And, what do you need to release the shares currently in the account?"

91. A lady called Michele Jones of the Compliance Department of Continental replied by email the same day, saying:

> "yes we would require the opinion from the issuer's counsel, representation letter and letter of instructions. I have put counsel's information below…"

And there then follow contact details for Ms Hamilton. No evidence was called from Continental by the defendants to rebut Ms Jones' statement, which was accordingly unchallenged, even though strictly hearsay. I accept what Ms Jones said.

92. I was also shown a copy of a print-out from a page on the website of the US Securities and Exchange Commission which was to the same effect:

> "Even if you have met the conditions of rule 144, you cannot sell your restricted securities to the public until you have gotten the legend removed from the certificate. Only a transfer agent can remove a restrictive legend. But the transfer agent will not remove the legend unless you have obtained the consent of the issuer – usually in the form of an opinion letter from the issuer's counsel – that the restrictive legend can be removed."

In addition, Mr Jones for the defendants, testing the submission in the claimant's skeleton for trial, asked Ms Yazdani in cross examination whether she had asked any other US lawyer. Rather to his surprise, she said that she had – Mayer Brown – and with the same result.

93. In my judgment, if in practice the transfer agent refuses to release shares for sale in the market without the issuer's own legal opinion, the reality is that, unless the registered holder (here Ms Yazdani) is prepared to take legal action against that agent, the shares will only be released with the co-operation of the first defendant, which has been refused. This is a breach of the implied term to which I referred above, and leads to the further conclusion that the first defendant is in breach of the retainer agreement, in neither paying the Fixed Fee nor making the issued shares available for sale.

The claim against the second defendant

94. I now turn to consider the claim against the second defendant. He was not a party to the contract of retainer between the claimant and the first defendant. But he was and is a director of, and majority shareholder in, the first defendant, and in practice controlled its day to day business. Indeed, paragraph 14.4 of the defence and counterclaim pleads:

> "It is admitted that the Second Defendant has *de facto* control over the First Defendant."

The case against him is that he knowingly induced or procured the first defendant's breach of its contract with the claimant.

The law

95. The elements of the tort of inducing a breach of contract are set out in the speech of Lord Hoffmann (with whom on this point the whole House agreed) in *OBG Ltd v Allan* [2009] 1 AC 1, as follows:

> "39. To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so. …
>
> 40. The question of what counts as knowledge for the purposes of liability for inducing a breach of contract has also been the subject of a consistent line of decisions. In *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691, union officials threatened a building contractor with a strike unless he terminated a sub-contract for the supply of labour. The defendants obviously knew that there was a contract - they wanted it terminated - but the court found that they did not know its terms and, in particular, how soon it could be terminated. Lord Denning MR said (at pp 700-701)
>
> > 'Even if they did not know the actual terms of the contract, but had the means of knowledge - which they deliberately disregarded - that would be enough. … '

> […]
>
> 42. The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. Mr Gye would very likely have preferred to be able to obtain Miss Wagner's services without her having to break her contract. But that did not matter. …
>
> 43. On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. …
>
> 44. Finally, what counts as a breach of contract? … I think that one cannot be liable for inducing a breach unless there has been a breach. No secondary liability without primary liability. … ”

96. So far as concerns the position of the director of a company, *Clerk & Lindsell on Torts* (23rd edition, 2020) says (at [23-39]):

> “Moreover, if a director has ordered or procured the breach by the company he may be liable in tort given that he possesses the requisite knowledge and intention.”

None of the three authorities cited for this proposition is a case of a director inducing or procuring a breach of contract. One is about the attribution of knowledge of an officer to the company, and two are cases of a director procuring the company to commit a tort. But I see no reason why a director cannot in principle be liable for the tort of inducing or procuring a breach of contract by the company in an appropriate case.

The defence

97. The second defendant says that there is nothing in the evidence to suggest that the second defendant did not actually hold the belief that the fee was contingent on the issue being completed by 31 May 2017. Accordingly, he says that the mental element for liability (that is, actually realising that the act will cause a breach of contract to be committed by the company) cannot be satisfied. It is therefore necessary for me to find the relevant facts for this purpose.

Facts found

98. I have already found that Ms Yazdani and the second defendant agreed originally on hourly rates, and then a minimum fee, and thirdly a fixed fee arrangement. The wording of the retainer approved by the second defendant before 21 April 2017 did not include any contingent language, nor even the disputed wording relied on now by the defendants. Since the wording now relied on by the defendants was not in the retainer before that date the second defendant could not have relied on it as showing that the claimant’s fees were to be contingent. Accordingly, the second defendant

must have believed that the fees agreed (whether by hourly rates, minimum fee or fixed fee) were payable in any event. Further, I have already found that the second defendant caused shares in the first defendant to be issued to the value of £300,000 (at the time of issue) in the name of Ms Yazdani. As I have said, the first defendant was permitted to discharge invoices in this way, by the express terms of the retainer agreement.

99. On 21 June 2017, after both the introduction of the disputed wording into the retainer, and the passing of 31 May 2017 without the issue having been completed, Ms Yazdani emailed Ms Hamilton asking for an update on the outstanding invoices. Ms Hamilton's email response the same day was that the invoices have been passed to the first defendant, which had to approve them. Ms Yazdani responded immediately to say "I saw [the second defendant] yesterday and he said he approved them a month ago". Ms Yazdani's further evidence, which I accept, was that in early September 2017 she had lunch with the second defendant, who assured her that he had signed off on the unpaid invoices "some months ago", and indeed "was surprised that the invoices were still outstanding". Accordingly, I find that the second defendant had assured Ms Yazdani on two separate occasions that the invoices had been approved by him for payment.

100. On 5 September 2017 she and the second defendant had a long text chat via WhatsApp, exchanging 23 texts in just under half an hour. In this text chat Ms Yazdani raised the matter of the unpaid Avatar invoices, and asked the second defendant to confirm that he had authorised Ms Hamilton to pay them. Instead of answering the question, and in particular instead of saying that he believed that nothing was due because the fees were contingent on the issue being completed by 31 May 2017, the second defendant embarked upon a tirade against Ms Yazdani and her firm, accusing her of lying to him. I find that this was simply a smokescreen, to divert attention from Ms Yazdani's legitimate enquiry. There is one further WhatsApp message from the second defendant to Ms Yazdani, dealing with the Avatar invoices, dated 28 November 2017. In that message, the second defendant says this:

> "on avatar your shares were issued and you can sell them once the deal happens hence your payment on that is as per agreement already done."

So the second defendant has shifted his ground. There *is* a contingency, but it is a different one from that which is now put forward.

101. Ms Nasralla, however, gave evidence at the trial that she clearly recalled the second defendant in late April 2017 explaining the meaning of the disputed wording to her. She said that he told her that it meant that no fee would be payable to the claimant if the issue did not complete by 31 May 2017. Significantly, this evidence did not appear in her witness statement dated 5 April 2022. I do not accept this evidence, at least not at face value. I observed Ms Nasralla closely during her evidence, and she did not give this part of her evidence with the same confidence as the rest. I am willing to accept that there was a conversation between her and the second defendant about the agreement. It may even be that it was she who suggested that the disputed wording might be read in the way now relied upon by the defendants. But I cannot accept that the second defendant said that. He knew that it was the *claimant* that put that form of wording forward and that he merely agreed to it. Her evidence that *the second defendant told her* that the disputed wording encapsulated a contingent fee

arrangement is flatly inconsistent with all the other evidence of his state of mind at that time and afterwards.

102. On the evidence taken as a whole, I am entirely satisfied that second defendant had no basis to and did not believe in late April 2017 that the claimant's fees were dependent on the issue being completed by 31 May 2017. On the contrary, I am satisfied that the second defendant knew that the claimant's fees were *not* so dependent. I am further satisfied that he knew that the shares in the name of Ms Yazdani could not be sold without authorisation from the first defendant, and that he knew very well that, by not authorising Ms Hamilton either to write the opinion that would release the shares to the claimant or to pay the invoices in cash, he was causing the company to commit a breach of its contract with the claimant. Again, in the light of this conclusion on the evidence, I have not considered whether I should draw an inference adverse to the second defendant on the basis that he has failed without good explanation to call a witness (that is, himself) who could be expected to give relevant evidence.

103. In fact, he had also rejected invoices without cause in relation to work done by the claimant under the general retainer, where there was no question of any contingency arrangement. In response to invoices sent by the claimant to Ms Hamilton in the period January to March 2017, the second defendant sent her an email on 15 May 2017 saying

> "please reject the invoices for now as we need to evaluate their hours".

Moreover, he had previously rejected invoices from a Mauritian law firm in relation to a previous aborted bond issue. Indeed, Ms Yazdani was instructed to handle communications with them on this issue. (I note in passing that the first defendant also failed to pay the fees of Shearman & Stirling in connection with the Avatar project. That firm also took proceedings to recover their fees. Those proceedings were settled before reaching trial.)

Conclusion in relation to the second defendant

104. In consequence, I hold that the second defendant is liable to the claimant in tort for procuring a breach of the first defendant's contract with the claimant.

Remedies

105. The fixed fee of £300,000 for work done by 31 May 2017 is a debt payable by the first defendant to the claimant. I will order the payment of that sum, together with contractual interest at the rate of 1.5% per month from 30 days after the date of the invoices rendered in respect of the fixed fee. The whole sum will be payable 14 days from hand down of this judgment. So far as concerns the second defendant, I will order him to pay damages of £300,000 for procuring the first defendant's breach of contract, causing the claimant loss in that sum. No credit need be given for any value remaining in the shares in the name of Ms Yazdani, as without the authorisation of the first defendant they cannot be sold and any proceeds realised. I should be grateful to receive a minute of order, preferably agreed between the parties, to reflect the terms of this judgment.