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Case No: CL-2018-000164

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

The Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 05/05/2021

Before:

MRS JUSTICE MOULDER

- -

Between:

HARBOUR FUND III, L.P.	**Claimant**
- and -	
KAZAKHSTAN KAGAZY PLC **KAZAKHSTAN KAGAZY JSC** **PRIME ESTATE ACTIVITIES KAZAKHSTAN LLP** **PEAK AKZHAL LLP**	**Defendants**

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- -

ANDREW THOMPSON QC, BEN GRIFFITHS, and MARK BELSHAW (instructed by **Harcus Parker Limited**) for the **Claimant**
RUPERT D'CRUZ QC and JAMES EGAN (instructed by **Marriott Harrison LLP**) for the **Second Defendant**

Hearing dates: 15-18 and 22 March 2021

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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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on 5 May 2021.

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MRS JUSTICE MOULDER

Mrs Justice Moulder :

1. This is the judgment in the Phase 1 trial ordered by Jacobs J on 3 April 2020 (the "Phase 1 Trial"). It concerns firstly, the validity of the alleged variations to the investment agreement (the "Investment Agreement") entered into between the Claimant ("HF3") and the Defendants pursuant to which HF3 was to provide litigation funding to continue claims against certain of their former officers which had been brought in August 2013 (the "KK Proceedings"); and secondly, whether certain heads of costs claimed by the Claimant can be recovered either under the Investment Agreement or, as damages for breach of contract or, on the basis that the Defendants have been unjustly enriched.

Parties

2. HF3 is and was a limited partnership established under the laws of the Cayman Islands carrying on the business of litigation funding. Harbour Litigation Funding Limited ("HLF") is the investment sub-adviser to HF3.

3. Kazakhstan Kagazy PLC ("KK PLC") is the ultimate parent company of a wider group of companies ("the KK Group"), including the Second Defendant ("KK JSC"), the Third Defendant, Prime Estate Activities Kazakhstan LLP ("Peak") and the Fourth Defendant, Peak Akzhal LLP ("Peak Akzhal"). KK JSC, a joint stock company registered in the Republic of Kazakhstan, does not conduct any substantive business of its own, but is instead a holding company within the KK Group.

4. The Chairman and CEO of KK PLC was and is Mr Tomas Werner and the General Counsel was at all material times Mr Hugh McGregor. Throughout this period, Mr Werner remained the CEO of KK JSC and (as referred to below) at the material times he also acted as KK JSC's Rehabilitation Manager.

5. KK PLC has filed a Defence but was not represented at (and did not take part in) the Phase 1 Trial. The Third and Fourth Defendants have not participated in these proceedings since March 2019 and were not represented at the Phase 1 Trial.

Background

6. On 31 December 2015, HF3 and each of the Defendants (the Defendants are collectively referred to as the "Funded Parties") entered into the Investment Agreement.

7. The trial of the KK Proceedings took place between 25 April and 20 July 2017. Judgment was obtained in the KK Proceedings on 22 December 2017 in favour of the Funded Parties (the "Judgment"). The order giving effect to the Judgment (the "Trial Order") was entered on 28 February 2018 and included orders for payment of damages of USD 298,834,593 (inclusive of interest) to the Funded Parties and an interim payment on account of costs of £8 million by 14 March 2018.

8. At the end of May 2018, HF3 exercised its rights under Clause 10.3 of the Investment Agreement to take over control of negotiations and proceedings connected with the Judgment. By his order dated 30 July 2018, Knowles J declared that HF3 had validly exercised those rights and had validly been appointed as the Funded Parties' attorney

to act in their names and on their behalf in relation to such negotiations and proceedings.

9. On 16 March 2016, KK JSC was declared insolvent and placed into a rehabilitation procedure in Kazakhstan by the Kazakh court. On 28 June 2016, Mr Nurzhan Zhaundyk was appointed as the Temporary Manager of KK JSC.

10. A 'rehabilitation plan' (the "Rehabilitation Plan") in respect of KK JSC was approved by KK JSC's creditors on 31 August 2016 and by the Kazakh Court on 16 September 2016. The Rehabilitation Plan terminated Mr Zhaundyk's temporary appointment as KK JSC's creditors had voted to preserve the existing management of KK JSC from the moment of the approval of the Rehabilitation Plan. As such, from that date, Mr Tomas Werner, the then Chief Executive Officer, acted effectively as the "Rehabilitation Manager" of KK JSC.

11. On 23 November 2017, one of KK JSC's creditors obtained an order from the Kazakh court terminating the rehabilitation procedure and commencing a bankruptcy procedure against KK JSC. A bankruptcy order was subsequently made by the Kazakh court at the end of December 2017.

12. In October 2018, the Kazakh Supreme Court terminated KK JSC's bankruptcy on the basis that it had been unjustified and illegal. Rehabilitation proceedings were reinstated.

Rehabilitation Plan

13. The relevant provision for the purposes of this judgment is clause 4.3 entitled "Proceeds from the proceedings at the High Court of London":

> "4.3.1. Action against the former shareholders and directors at the High Court of London (hereinafter referred to as the "London proceeding")
>
> In August 2013, KK JSC, some of its subsidiaries, including its parent company Kazakhstan Kagazy Plc (hereinafter referred to as "KK Plc" and collectively - as the "Claimants") initiated the proceeding at the High Court of London against the former shareholders and directors of the Group, Arip Maksat and Baglan Zhunus. The action is based on the assertion that the former directors with the assistance of former CFO Shynar Dikhanbaeva and other directors and managers stole more than USD 200 mln from the Group…
>
> The claimants are represented at the London Proceeding by Allen & Overy LLP ("A&O") and a team of lawyers directed by Mr. Robert Howie. According to the contract made between them and the Claimants on April 2, 2015, A&O and the team of lawyers act as instructed by Mr. Thomas Matheos Werner (Director General of KK JSC and KK Plc) and Hugh MacGregor, legal adviser of KK Plc who work under the London Proceeding on behalf of the Claimants.

> Upon approval of the Rehabilitation Plan by the creditors and the court, KK JSC undertakes to provide A&O with a copy hereof (translated to English) and inform that upon its approval, all the material decisions as to any change in the claim amount of KK JSC and its subsidiaries, procedure of transfer and allocation of the funds awarded as a result of the London Proceeding, entering into amicable settlement agreements and any additional expenses other than those mentioned in the Investment Agreement with Harbour Fund III will only be made with the consent of the creditors' committee, which will be confirmed by the minutes of the creditors' committee of KK JSC." [emphasis added]

14. In clause 4.3.4 "Financing" an explanation was provided as to how the KK Proceedings were being financed by HF3:

> "… In line with the Investment Agreement, Harbour Fund III finances legal costs only with regard to the PEAK Fraud and Land Plot Fraud, which amounts to some USD 10 mln of expenses. If the action is won at the High Court of London, Harbour Fund III will be paid a charge on success and return on investment. If the case is lost, the Claimants will be released on a need to reinstate the money spent by Harbour Fund III. The charge on success will be calculated with reference to the amount of costs incurred by Harbour Fund III and duration of the proceedings until the case is won…" [emphasis added]

It then set out a table showing the return due to HF3 (in addition to its investment) if the KK Proceedings were successful depending on the time taken from signing the Investment Agreement to receipt of the return.

Variations to the Investment Agreement

15. After it had been concluded, the Investment Agreement was purportedly amended on six occasions, namely 13 January 2016, 19 May 2016, 16 February 2017, 24 March 2017, 5 April 2017 and 21 April 2017.

16. KK JSC admits that the variation on 13 January 2016 is valid, binding and effective but it denies that any of the other variations are valid, binding and effective. The letters making these disputed variations are referred to as the "Disputed Variation Letters".

17. The key changes effected by the Disputed Variation Letters are as follows:

    i) The 24 March 2017 Disputed Variation Letter provided for an increase in the Aggregate HF3 Commitment to £9,517,000 (i.e., an increase of approximately £2.3 million on the original Investment Agreement).

    ii) The 5 April 2017 Disputed Variation Letter provided for an amendment in the terms of the causes of action covered by the Investment Agreement so as to

include the Astana II claim (relating to funds received from the Development Bank of Kazakhstan for the construction of a logistics park in Astana).

iii) The 21 April 2017 Disputed Variation Letter provided for a further increase in the Aggregate HF3 Commitment to £11 million, (i.e., an increase of approximately £2.3 million on the 24 March 2017 Disputed Variation Letter and an aggregate increase of approximately £4.6 million on the original Investment Agreement). It also altered the calculation of the HF3 Return and the waterfall under Clause 10.1, so that the HF3 Investment and HF3 Return would rank ahead of the Claimants' Incurred Costs.

Issues for the court

18. At the conclusion of this Phase 1 Trial the following issues fall for determination:

i) Actual authority: Did Mr Tomas Werner (whether as CEO or Rehabilitation Manager) have actual authority as a matter of Kazakh law to enter into each of the Disputed Variation Letters on behalf of KK JSC? (Issue 1: List of Common Ground and Issues)

ii) Ostensible authority: If the answer to Issue 1 above is 'no', did Mr. Werner nevertheless have ostensible authority to enter into each of the Disputed Variation Letters on behalf of KK JSC? (Issue 2: List of Common Ground and Issues)

iii) Intention: Did KK JSC intend to be bound by the Disputed Variation Letters when they were signed by Mr Werner? (Issue 2A: List of Common Ground and Issues)

iv) "Claimants' Legal Costs":

a) Were the Variations Payments made by HF3 in connection with the "preservation of its rights" under the Investment Agreement and accordingly constituted "Claimants' Legal Costs" within the meaning of the Investment Agreement? (Issue 4A: List of Common Ground and Issues).

b) Do the alleged KK Proceedings Payments constitute "Claimants' Legal Costs" as defined in the Investment Agreement? (Issue 5.4 : List of Common Ground and Issues).

c) Do the Alleged Enforcement Costs constitute "Claimants Legal Costs" and/or are they part of the "HF3 Investment" as those terms are defined in the Investment Agreement? (Issue 7.4 : List of Common Ground and Issues)

d) Do the alleged Harbour's Other Costs constitute "Claimants' Legal Costs" as defined in the Investment Agreement (Issue 6: List of Common Ground and Issues)

v) Breach of contract claim:

a) Was it an express term of the Investment Agreement that the Funded Parties would: (i) continue to pay the ongoing legal costs of the KK Proceedings after the 'Agreed Budget' had been exhausted; and/or (ii) negotiate in good faith with HF3 to vary the Investment Agreement so as to increase HF3's aggregate funding commitment; and/or (iii) act reasonably and commercially by entering into such a variation? (Issue 8.1 : List of Common Ground and Issues)

b) Alternatively, was it an implied term of the Investment Agreement that, if the Funded Parties incurred legal fees and expenses in excess of the 'Agreed Budget' without obtaining HF3's prior agreement to increase its aggregate funding commitment, the Funded Parties would be responsible for discharging such liabilities as and when they fell due? (Issue 8.2: List of Common Ground and Issues)

vi) In relation to the Enforcement Costs, is HF3 entitled to claim damages for any breaches of Clause 10.3 of the Investment Agreement or has any such right to damages been excluded by the Investment Agreement? (Issue 9.1: List of Common Ground and Issues)

vii) Unjust enrichment:

a) Is HF3 entitled to recover a sum equal to the Variations Payments in unjust enrichment? (Issue 4B: List of Common Ground and Issues)

b) If the Funded Parties were enriched by any of the KK Proceedings Payments, was any such enrichment unjust? (Issue 11: List of Common Ground and Issues)

Issue 3 (ratification) is no longer pursued.

19. Given the number of issues raised for determination it is not practicable, or in my view necessary in order to resolve the proceedings, to address every submission that was made orally and in writing on behalf of HF3 and KK JSC. In preparing this judgment the court had the benefit of considering the written submissions and the transcript of the oral submissions. The fact that a particular submission advanced by either party is not addressed in this judgment should not therefore be taken as a failure by the court to consider the point.

Factual Evidence

20. For the Claimant the court had written and oral evidence from:

i) Ms Ellora MacPherson who at the material time was General Counsel of HLF and is now its Chief Investment Officer; and

ii) Mr Mark King, HLF's Senior Director of Litigation Funding.

21. For KK JSC the court heard from Mr Nazym Baktybayev, a Director of the Legal Department of the 'Unified Accumulative Pension Fund' in Kazakhstan ("ENPF"), the Chair of KK JSC's Creditors' Committee.

22. The evidence of Mr Baktybayev was heard via video link.

Expert evidence as to Kazakh Law

23. The court had the benefit of expert reports of Professor Abzhanov, dated 20 November 2020 and 15 January 2021 instructed by the Claimant, and of Professor Ilyasova dated 20 November 2020 and 15 January 2021 instructed by KK JSC.

24. The experts produced a joint memorandum dated 22 December 2020.

25. Both experts were cross-examined on their reports by video link.

Issue 1: Did Mr Tomas Werner (whether as CEO or Rehabilitation Manager) have actual authority as a matter of Kazakh law to enter into each of the Disputed Variation Letters on behalf of KK JSC?

26. The first issue for determination is whether Mr Werner, KK JSC's CEO and Rehabilitation Manager, had actual authority to enter into the Disputed Variation Letters.

27. This gives rise to the following sub-issues (identified in the List of Issues):

    i) Did Mr Werner have general authority to act on behalf of KK JSC (whether as CEO or Rehabilitation Manager) on the dates of the Disputed Variation Letters?

    ii) Did KK JSC enter into each of the Disputed Variation Letters in its ordinary commercial operations/ordinary course of business?

    iii) Was entry into the Disputed Variation Letters necessary to ensure the protection of KK JSC's property and therefore within Mr. Werner's actual authority?

    iv) Were the Disputed Variation Letters envisaged by the Rehabilitation Plan that was approved by the Kazakh Court on 16 September 2016?

Did Mr Werner have general authority to act on behalf of KK JSC (whether as CEO or Rehabilitation Manager) on the dates of the Disputed Variation Letters?

28. It was common ground between the parties that the question as to the scope of Mr Werner's actual authority is governed by Kazakh law.

29. The following facts also appeared to be common ground:

    i) Prior to the commencement of the KK JSC Rehabilitation, Mr Werner had been KK JSC's CEO.

    ii) He was authorised by KK JSC's Creditors' Committee to continue managing the company's day-to-day affairs once it was placed in Rehabilitation. It was during this period that he signed the Disputed Variation Letters.

30. Certain relevant provisions of Kazakh law were also common ground:

i) The Rehabilitation procedure to which KK JSC was subject was governed by the Law of the Republic of Kazakhstan "On Rehabilitation and Bankruptcy" (the "Bankruptcy Law") in force at that time.

ii) The powers and obligations of a Rehabilitation Manager set out in the Bankruptcy Law apply equally to a CEO, such as Mr Werner, who is allowed to continue to manage the company's day-to-day affairs. Professor Abzhanov stated at paragraph 25 of his report:

> "Authority of a rehabilitation manager.
>
> At the time of the KK JSC rehabilitation procedure in 2017, Article 69 of the Bankruptcy Law allowed for one of two scenarios upon commencement of the rehabilitation procedure: (a) the debtor could be allowed to retain management of its own affairs, in which case the CEO would exercise his ordinary powers but the powers and liability of a rehabilitation manager prescribed by the Bankruptcy Law would also apply to him (although he was not appointed as a rehabilitation manager as such), or (b) a rehabilitation manager could be appointed."

iii) Article 68(2)(1) of the Bankruptcy Law provides that after a Rehabilitation Plan has been approved, transactions falling outside the ordinary commercial operations of the company require the consent of the meeting of creditors, unless those transactions are provided for in the Rehabilitation Plan.

iv) Article 71 of the Bankruptcy Law provides (so far as material):

> "Article 71. Authority of the rehabilitation manager
>
> 1. The rehabilitation manager has the right to:
>
> 1) exercise control over the debtor's property within the scope of the authority established by this Law;
>
> 2) request and receive information about the debtor from organisations, state bodies and their officials;
>
> 3) participate in relations regulated by the legislation of the Republic of Kazakhstan on rehabilitation and bankruptcy, using the information system;
>
> 4) make transactions outside of normal commercial operations by decision of the meeting of creditors, except for transactions provided for by the rehabilitation plan.
>
> 5) with the consent of the meeting of creditors, to make decisions that lead to an increase in the debtor's consumption costs, including payment of the debtor's employees.
>
> 6) request from creditors documents confirming the basis and amount of the claims filed.

> 2. The rehabilitation manager must:
>
> 1) accept the debtor's property under management and ensure the protection and control of the debtor's property;
>
> 2) enter into an agreement with the creditors committee within thirty calendar days from the date of assignment.
>
> 3) organize the implementation of the rehabilitation plan.
>
> 4) send a petition to the court for amendments and additions to the rehabilitation plan no later than five business days after approval by the meeting of creditors;
>
> 5) maintain a register of creditors' claims.
>
> …" [emphasis added]

Claimant's submissions

31. It was submitted for the Claimant that transactions by a company outside the scope of the rehabilitation plan are matters between the company and its creditors, not between the company and the third party and accordingly that whatever the consequence of a breach of Article 71(1)(4) lack of authority is not one of them (paragraph 71 of Claimant's closing submissions).

32. The Claimant submitted that a distinction needed to be drawn between:

    i) the competence to make a decision internally within the company.

    ii) authority vis a vis a third party to enter into a transaction on behalf of the company.

    iii) statutory rules to protect creditors.

33. It was submitted (paragraph 79 of Claimant's closing submissions) that Article 71(1)(4) was a statutory rule in the bankruptcy legislation designed to protect creditors and facilitate the rehabilitation process but was distinct from any question as to the authority of the rehabilitation manager.

34. It was submitted (paragraph 81 of Claimant's closing submissions) that the starting point is that a transaction concluded in breach of Article 71(1)(4) is merely voidable and that is inconsistent with the contention that the rehabilitation manager lacks authority.

35. The Claimant stressed the "practical difference" between a voidable transaction and a transaction without authority and submitted that a positive step to avoid the former is required whereas a positive step to save the latter (i.e., ratification by the principal) is required (paragraph 83 of Claimant's closing submissions).

36. The Claimant relied on the evidence of Professor Abzhanov.

The evidence of Professor Abzhanov

37. Professor Abzhanov's conclusion on this issue (paragraph 7a of his first report) was that:

> "In the context of a rehabilitation procedure, Article 68(2)(1) of the Bankruptcy Law requires the consent of the creditors' assembly for certain transactions of the debtor, however, this requirement is not a limitation on the authority of a debtor's CEO or rehabilitation manager to act on its behalf. This provision is a statutory requirement imposed on the debtor company for the benefit of its creditors during the rehabilitation procedure."

38. The view of Professor Abzhanov was as follows (paragraphs 21 and 22 of his first report):

    i) the CEO is the company organ that has statutory authority to enter into all transactions with third parties on behalf of the company.

    ii) The significance of the CEO's competence under Articles 59 and 60 of the Kazakh law on Joint Stock Companies (JSC Law) is that a company's CEO has sole authority to enter into transactions on behalf of the company with third parties, notwithstanding that another body within the company may be competent to take the underlying decision as a matter of the company's internal management.

    iii) Thus, where the CEO has entered into a transaction with a third party on behalf of the company, but has failed to comply with these internal rules, the transaction is nevertheless binding on the company. The transaction is only voidable on the application of a shareholder of the company, and only if the counterparty knew or should have known of the breach of the company's internal procedures.

39. The key elements for the conclusion of Professor Abzhanov appeared in summary to be as follows:

    i) Under Article 165 of the Civil Code where a transaction is entered into by a representative without authority the transaction is neither binding on the principal nor valid unless and until it is ratified by the principal. This is to be contrasted with Article 159 (11).

    ii) KK JSC wrongly conflates the concepts of authority and legality; if a company engages in a particular activity without a permit required by law that does not mean that its CEO lacked authority to act on behalf of the company but rather that the company acting through its CEO is in breach of the law. The same is true under the Bankruptcy Law. If a debtor acting through its CEO or rehabilitation manager enters into a particular transaction for which approval from the creditors' assembly is required under the Bankruptcy Law, that does not mean that the debtor's CEO or rehabilitation manager lacked authority to act on behalf of the debtor, but rather that the debtor acting through its CEO or

rehabilitation manager acted in breach of the Bankruptcy Law (paragraph 31 of his first report).

iii) The description of the rehabilitation manager's power at Article 71(1)(4) of the Bankruptcy Law merely reflects the general rule at Article 68(2)(1) which states that after the court approves the rehabilitation plan, transactions with the debtor's property outside the framework of ordinary commercial operations with the exception of those envisaged by the rehabilitation plan shall be made with the approval of the creditors assembly (paragraph 33 of his first report).

iv) This is further confirmed by court practice in disputes involving a breach of Article 71(1)(4) and the underlying rule at Article 68(2)(1). Thus, in the case of *Mikheyev v Vostokstroyzakaz LLP*, the Kazakhstani courts classified a failure to seek creditors' approval for transactions during the rehabilitation period, not as a case of a company's management acting without or in excess of its authority (in which case the transaction would not be binding on the company without subsequent ratification) but as a case of the rehabilitation manager acting in breach of a statutory rule that rendered the transaction voidable on the claim of the creditor pursuant to Article 158 (1) (paragraph 34 of his first report).

The evidence of Professor Ilyasova

40. Professor Ilyasova was of the view (in outline) that:

i) it follows from Article 71 that the rehabilitation manager can only conclude certain transactions without agreeing them with the meeting of the creditors or creditors' committee and that transactions which fall outside those categories must be agreed with the creditors' meeting pursuant to Article 71 (paragraphs 44 -49 of her first report).

ii) KK JSC has not conflated the concepts of authority and legality. A CEO or rehabilitation manager who enters into a transaction without the required consent of the creditors' assembly or creditors' committee is acting both without authority and in breach of the law (2nd report paragraph 50).

Discussion

The relative experience of the experts

41. It was submitted for KK JSC that the court should give more weight to the evidence of Professor Ilyasova because she had more experience than Professor Abzhanov. It was submitted that there was a "stark difference" in their experience, and this can be seen from the disparity in publications authored and in the extent of academic work conducted by Professor Ilyasova compared to Professor Abzhanov.

42. It was submitted for the Claimant that the court should not just look at the relative experience of the experts but should look at the cogency of the arguments that they put forward in support of their opinions.

43. I note that Professor Ilyasova is a Doctor of Jurisprudence and a Professor of Law at the Department of Private Law at the Caspian University and amongst other things has authored approximately 150 publications pertaining to a wide range of legal issues.

44. I note that Professor Abzhanov is an Associate Professor of the International Law Department, Faculty of Economics and Law of the Abylai Khan Kazakh University of International Relations and World Languages, Alma-Ata as well as Managing Partner of a law firm, Abzhanov and Partners.

45. Although Professor Ilyasova does appear to have had a more prominent legal career, I am not persuaded that based on the curriculum vitae of each expert the court can draw a meaningful distinction between them. In my view (contrary to the submission for KK JSC) there is no reason to treat Professor Abzhanov's views "with great caution" based on his apparent experience.

English law

46. The Claimant sought to draw support for its arguments on this issue from English law (Claimant's closing submissions paragraphs 84 – 86): in particular it was submitted that the distinction between a voidable transaction and a transaction without authority "represents a common legal principle and is clearly recognised in English law".

47. Given that it is common ground that the issue of authority is a matter of Kazakh law I do not propose to consider any English law provisions relating to this issue. It seems to me of no assistance in determining the position in a civil law jurisdiction and Kazakh bankruptcy law in particular, to consider the English statutory provisions concerning directors or administration (in the context of insolvency).

48. I turn then to consider the detailed arguments advanced by the parties by reference to the evidence of the experts.

Voidable contract

49. It was submitted for the Claimant that either there is a lack of authority as a result of a breach of Article 71(1)(4) or the transaction is voidable but they are mutually inconsistent: if there is no authority, there is no transaction rather than a transaction which is voidable. (Paragraph 88 of Claimant's closing submissions).

50. In support of this proposition, the Claimant submitted:

    i) Article 71 is not the source of the rehabilitation manager's authority but merely imposes rules as to how they are to be exercised.

    ii) Article 71 is not regulating the relationship between the different organs of company. It is concerned with the relationship between the debtor company and its creditors.

    iii) the rehabilitation process is intended to protect creditors' interests in relation to an insolvent company and Article 71 is intended to promote that process.

51. The Claimant further submitted that its position is supported by all of the authorities relevant to the issue of the effect of the breach which show that the consequence is the voidability of the transaction (paragraph 96, 98 of Claimant's closing submissions):

    i) *Mikheyev v Vostokstroyzakaz LLP;*

    ii) *United Construction Corporation;*

    iii) *Galkina v Granada Industrial and Commercial Firm LLP;*

    iv) *Shchudro v Makulbayev.*

52. The Claimant rejected the relevance of the cases of *Pavlodar* and *Oil and Gas Research*, the authorities relied on by KK JSC, on the basis that neither of these cases concerned a breach of the bankruptcy legislation. (Paragraphs 102 – 103 of Claimant's closing submissions).

Discussion

53. The Claimant's case on actual authority depends largely on the proposition that the voidable effect of the transaction is inconsistent with a lack of authority. The premise of the Claimant (paragraph 101 of Claimant's closing submissions) is that "*the consequence of a breach of the rule elucidates its true nature as a matter of Kazakh law*".

54. Professor Ilyasova disagrees with that premise. The relevant section of the evidence of Professor Ilyasova on this issue in cross examination was as follows:

> "Q….So I suggest that what that shows is that a breach of Article 71.1.4 of the Bankruptcy Law cannot result in a lack of authority for the rehabilitation manager as a result of the breach because if that were the case, then on day one it would not bind the debtor and it would continue not to bind the debtor unless the debtor ratified it. That's right, isn't it?
>
> A. No, I categorically disagree with this position because the authority to conclude the deal is established prior to the deal being effected, being executed, but in terms of invalidity of the deal, that is a consequence of breach when the deal is being concluded and these things cannot be mixed up or conflated. The authority is established before the deal is concluded. Authority does not occur retrospectively, depending on the consequences of a breach when the deal is being concluded. So I categorically disagree with the position of Professor Abzhanov. Authority must be established and determined and defined by the time, by the moment the deal is to be concluded.
>
> Q. But in all the cases we've looked at where claims were made that a transaction was voidable under article 158, if in fact the position had been that the rehabilitation manager simply didn't have any authority to bind the debtor as a result of that breach,

> if that had been right, then those claimants wouldn't have had to bother invoking article 158. They could simply have said, "This doesn't bind the debtor and it's completely ineffective"
>
> A. I will repeat. Authority and consequences of breaches when the deal is concluded from the point of view of Kazakhstan law are two totally different notions and things and they cannot be conflated or mixed up.
>
> Q. I suggest to you that, as Prof Abzhanov says, one has to understand the consequences of a breach in order to understand whether it goes to authority on not. That's right, isn't it?
>
> A. The consequences of a breach do not affect or influence authority. Consequences of a breach do not vest a person with authority at the time when the deal is only to be concluded in the future. I think that is a totally erroneous approach. The fact that somebody --that nobody contested the deal does not in itself mean that the person breaching a provision of the law whilst concluding a deal suddenly becomes a person vested with such authority. [Day 4 p122-123] [emphasis added]

55. I do not accept the submission (paragraph 88 of Claimant's closing submissions) that Professor Ilyasova accepted in cross examination (Day 4 67-68) that lack of authority on the part of the rehabilitation manager and voidability are mutually inconsistent. Professor Ilyasova's position is clearly set out in the extract above. In my view in the passage relied on by the Claimant, Professor Ilyasova merely accepted the proposition that a transaction cannot be both void and voidable since the former is ineffective i.e. void from the outset whilst the latter is effective until declared invalid. I do not accept that this proposition advances the argument in the Claimant's favour.

56. Whilst I accept (as did Professor Ilyasova in cross examination) that the cases (*Mikheyev* and *United Construction Corporation*) support a conclusion that a breach of Article 71(4) renders the transaction voidable, I do not accept that it follows that the rehabilitation manager had authority to bind the company. (Professor Ilyasova did not accept the Claimant's analysis of the *Shchudro* case but it is not in my view necessary to resolve that dispute as the proposition advanced by the Claimant is not dependent on that authority alone).

57. I accept the logic of Professor Ilyasova's evidence. In my view what is significant in this context is that if a voidable contract is held invalid by the court, it will be then invalid ab initio, from the time that it has been entered into. [Professor Ilyasova-Day 4 p60] If the court has held it invalid, then the legal consequences of void or voidable transactions are exactly the same. Both are invalid ab initio.

Is the authority of the CEO unlimited?

58. The second substantive argument which the court has to address is the view of Professor Abzhanov that any limit on the authority of the CEO is only a matter of internal management and that the requirement in Article 68(2)(1) for the consent of the creditors' assembly to enter into certain transactions on behalf of the company is

not a limitation on entering into such transactions. His view is that there is a difference between "authority" that is the right to act on behalf of another person and "competence" the matters on which a company makes decisions as a matter of its internal management (paragraph 34 – 40 of his second report).

59. Professor Ilyasova takes a contrary view and refers (at paragraph 42 of her second report) to:

> " "Judicial practice in Kazakhstan [which] also confirms that a CEO does not have the authority to enter into a transaction without the requisite consent of other bodies of the legal entity"

60. Professor Ilyasova referred in her report to the cases of *Pavlodar* and *Mangystau*. In oral closings counsel for KK JSC made it clear that it no longer relied on *Mangystau* as being decided on the grounds of lack of authority on the basis that there appeared to have been an error in the translation of the passage set out in its written closings (paragraph 43) as to whether there was a breach of authority or competence of the relevant body. I do not therefore propose to deal with this case.

61. This concession however does not affect the *Pavlodar* case, the details of which (so far as relevant) are as follows.

62. In May 2013, the Appellate Judicial Collegium on civil and administrative matters of the Pavlodar Regional Court found certain sale and purchase agreements in respect of immovable property to be invalid. Those agreements were entered into by the CEO of "Pavlodarlift" LLP without the consent of the company's sole member. In upholding the first instance court judgement, the Appellate Judicial Collegium stated:

> "Under para. 13.4 of the Partnership's Articles of Association, the directorate (management) shall manage the partnership's property within the limit permitted by its member. Based on the content and meaning of the said rules, any action on by the CEO must be in the interests of the partnership and in accordance with the business profile and objective of its activity, set out in its incorporation documents. At the same time, the matters relating to the core and current business are within the authority of the Directorate, they are approved by the Supervisory Board and shall be presented for the consideration of the sole member of the Partnership (p.8.1, p.9.1 of Articles of Association). However, in breach of the above rule, the CEO entered into transactions on 3 September 2011 to sell the disputed immovable property items (real estate). <u>The sole member of the LLP – the State Department "City of Pavlodar Finance Department" – did not provide its consent to the sale of this property. These transactions were entered into by the decision of the directorate of the Partnership which had no authority to do so</u>." [emphasis added]

63. I also have regard to the case of *Mikheyev*. In that case the claimants asserted that the transactions should be invalidated on the grounds set out in Article 158(1) of the Civil Code due to their having been concluded in violation of the Bankruptcy

Law, without the consent of the creditors' meeting. It appeared to be dealing with Article 68 rather than Article 71 but was dealing with the consequences of a lack of creditors' consent and the transaction was held to be voidable.

64. The court held that:

> "In connection with the fact that the sole participant of VOSTOKSTROYZAKAZ LLP had no legal grounds on which to enter into the agreement on the sale and purchase of the disputed apartment during the rehabilitation period, the transaction should be declared invalid as being at odds with the requirements of legislation."

65. It was submitted for KK JSC [day 5 p100] that in both the *Pavlodar* and the *Mikheyev* cases, although the courts invalidated the transaction because they were voidable, the analysis was that the CEO, the management, had breached its authority.

66. The Claimant rejected the authorities relied on by KK JSC, *Pavlodar* and *Oil and Gas Research***,** as being cases where a transaction was concluded contrary to the requirements of its articles of association on the basis that neither of these cases concerned the consequences of a breach of the bankruptcy legislation (Paragraphs 102 - 103 of Claimant's closing submissions). However the submissions appear to go to the Claimant's submissions as to whether a transaction was voidable not the distinction said to exist between "competence" and "authority". I note that in cross examination the evidence of Professor Abzhanov was that he did not rely on any case or academic commentary to support his view that there is a legal difference between competence and authority; his evidence was that it was "evident" that the concepts are different. [Day 4 page 8]

67. As a civil law jurisdiction the case law is of limited legal significance but in my view the absence of any case law or commentary to support the views of Professor Abzhanov is relevant and I prefer the evidence of Professor Ilyasova on this issue.

68. In closing submissions (paragraph 111) the Claimant submitted that because:

i) a CEO has power to manage the day-to-day activities of the company and has sole authority to enter into transactions with third parties; and

ii) the management is transferred to the rehabilitation manager

the rehabilitation manager therefore has authority to act as a CEO does.

It was thus submitted for the Claimant that Article 71 is not the "source" of any power but a rule as to how powers are to be exercised. It was submitted that although Article 71 is headed "powers of the rehabilitation manager" that is not because it defines them but because that is the subject matter of the provision. This submission which did not appear to be supported by evidence from Professor Abzhanov brings me to the third issue to be considered in this context namely Article 6 of the Civil Code.

Article 6 of the Civil Code

69. Article 6 of the Civil Code states:

> "Rules of civil legislation should be interpreted in accordance with their literal meaning as expressed in words."

70. The evidence of Professor Ilyasova was that judicial construction may be taken into account but only to the extent that it is not inconsistent with Article 6.1. In other words, if it is not inconsistent with the literal construction. [Day 4 p117]

71. Professor Ilyasova's view was that Article 71(1)(4) says that a consent of the committee of creditors needs to be obtained and that she did not believe that there was any reason to construe this in any other way. Her evidence was that: "*The words speak for themselves*." [Day 4 p118]

72. It was put to Professor Ilyasova:

> "Q. Just so we're clear, the ambivalence that exists, we say, is as regards the consequence of a failure to obtain creditors' assembly approval where it is required, and you would agree, wouldn't you, that there is ambivalence on that point?
>
> A. As grounds for invalidating a transaction under 71.1.4, the implications are not regarded as grounds. It is sufficient to simply say that no consent of the creditors' committee has been obtained for a transaction that goes outside of the ordinary course of business. It has nothing to do with the legal implications of this." [emphasis added]

73. The Claimant's case as put to Professor Ilyasova thus appeared to be based on the distinction between a void and voidable transaction. If that distinction is not determinative, then the evidence is that "the words speak for themselves" and I see no basis to accept the submission that Article 71 does not limit the powers of a CEO acting as a rehabilitation manager.

Conclusion on Article 71(1)(4)

74. Professor Ilyasova was of the view (paragraph 55 of her second report) that:

> "…The restriction on authority of the CEO/rehabilitation manager to enter into transactions on behalf of the company does not mean that this authority passes to another person. It means that prior to entering into a transaction on behalf of the company the CEO/rehabilitation manager must obtain the required approval for it from a temporary administrator or the creditors' assembly. The receipt of such approval is not the same as the transfer of authority to the temporary administrator or the creditors' assembly or other person to enter into a transaction. That interpretation of provisions of the RBL does not correspond to the literal interpretation of the said norms."

75. In my view the language of Article 71(1)(4) is clear. The literal meaning (applying Article 6) is that decisions outside ordinary commercial operations and the

rehabilitation plan require creditors' consent and the rehabilitation manager lacks authority to enter into such transactions if consent has not been obtained. Whilst I accept that the creditors' assembly cannot act in the name of the debtor company in place of the rehabilitation manager, it does not follow that the authority of the rehabilitation manager (including where he is the CEO) is not limited by the need to obtain consent. This appears to be the view of Professor Ilyasova as referred to above.

76. Further I do not accept that the matter can be determined by (or even that it should be the starting point) whether the transaction is void or voidable. I cannot see why this would determine the authority of the rehabilitation manager and in my view no good reason has been advanced by Professor Abzhanov to support this. In my view the better view is as expressed by Professor Ilyasova (paragraph 57 of her second report):

> "The authority of the CEO or rehabilitation manager to enter into transactions during the rehabilitation period is assessed as at the time that the transaction is entered into. It is not dependent on whether a subsequent application is made to invalidate the transaction. In other words, <u>there is a difference between: (i) the existence or absence of authority to contract on behalf of the company (which is assessed as at the date of the transaction); and (ii) the consequence to the company of a CEO or rehabilitation manager entering into a transaction without authority</u> (which is assessed at the date of an application to the court under Art 158(1) and Art. 159(11) of the RK CC, assuming that Kazakhstani law applies to that issue)." [emphasis added]

77. For all the reasons discussed I find that Mr Werner did not have "general authority" to enter into the Disputed Variation Letters.

<u>Whether the Disputed Variation Letters were outside the framework of the "ordinary commercial operations" of KK JSC for the purposes of Article 71(1)(4) of the Bankruptcy Law</u>

78. It was agreed between the experts (Joint memorandum paragraphs 2.1 and 2.2) that the concept of "ordinary commercial operations" is defined in cl. 16, Art. 1 of the Bankruptcy Law as "*actions related to the circulation of goods, works, services, performed in order to maintain the daily functioning of the debtor, which are regular in nature*." In the context of the provisions of cl. 16, Art. 1 of the Bankruptcy Law, "*ordinary commercial operations*" must simultaneously meet three criteria: a) pertain to actions related to the turnover of goods, works or services; b) are performed for the purpose of maintaining the daily functioning of the debtor; and c) are regular in nature.

<u>Expert Evidence</u>

79. In his report Professor Abzhanov stated (paragraph 43 of his first report):

> "I am instructed that at the time of the Disputed Variation Letters, KK JSC had already been engaged in the litigation that gave rise to the Investment Agreement for a number of years,

> and that the litigation constituted KK JSC's only substantial activity during that period. In my view therefore the Disputed Variation Letters, which provided financing to allow that litigation to continue, should be regarded as being related to "services performed in order to maintain the daily functioning of the debtor, which are of a regular nature". Viewed from this perspective the Investment Agreement and the Disputed Variation Letters secured legal services for KK JSC that were being rendered on an ongoing basis and were designed to ensure that KK JSC could continue to function." [emphasis added]

80. In cross examination his evidence was:

> "The criteria contained in this article do not apply to the deal itself. They apply to the operations undertaken within the framework of a deal or transaction. This is what should be borne in mind as a priority. So if the operations conducted under the aegis or in the framework of the deal comply with the criteria in 116, then they are ordinary commercial operations and transactions that fall under the definition of ordinary commercial operations… My premise is that the transaction is concluded within the framework of ordinary commercial operations and these operations they should comply with the criteria of 116 [Day 4 p17]"

81. He accepted, however, that in his report he did not refer to any authorities or sources. His evidence was that he was "*guided by logic*". [Day 4 p18]

Submissions

82. It was submitted for the Claimant that:

i) services provided to the debtor are included within the definition (paragraph 122 and 123 of Claimant's closing submissions);

ii) the day to day business of KK JSC was running the litigation and being a holding company (paragraph 124 of Claimant's closing submissions);

iii) the litigation was part of its daily functioning;

iv) if the litigation was part of ordinary commercial operations, funding such ordinary commercial operations (and variations thereto) must be part of the ordinary commercial operations in the same way that funding of working capital is in the ordinary course of commercial operations (paragraph 128 of Claimant's closing submissions).

83. In relation to "daily functioning" it was submitted for the Claimant that the litigation had been on foot since August 2013 and it formed at least a very substantial part of JSC's economic activity. In particular, the pursuit of the KK Proceedings represented the single biggest potential source of recovery for KK JSC (as expressly provided for

in the Rehabilitation Plan). It was taking up most, if not all, of the time of KK JSC's management. In terms of potential upside, as at December 2015 the claims in the KK Proceedings were valued by the parties at approximately £92.4 million, and they ultimately resulted in a judgment in favour of the Funded Parties for more than $300 million. Moreover, the expenditure on the litigation was substantial: by the end of trial costs in excess of £11 million had been incurred in relation to the KK Proceedings (paragraph 125 of Claimant's closing submissions).

84. It was submitted for KK JSC that the conduct of a litigation commenced to secure compensation for a fraud against a company cannot, sensibly, be characterised as forming part of the company's main activity; or its day-to-day commercial (entrepreneurial, economic) activity; or standard/usual activities of the debtor, which are of a regular nature – no matter how long the litigation has been in progress. KK JSC is a holding company. Its main activity is recorded at the beginning of the KK JSC's Rehabilitation Plan (para.1) as follows:

> "The core activity of the company is investment, issue of own securities, provision of investment services."

It was not the conduct of the KK Proceedings. Thus, Professor Abzhanov's argument that Mr Werner was authorised to enter the Disputed Variations on behalf of KK JSC because they were part of its ordinary commercial operations is manifestly wrong.

85. KK JSC referred to the decision in another case involving KK JSC and its (previous) Rehabilitation Manager. In that case Mr Mukataev had been found guilty of an administrative violation and he had an administrative fine imposed on him. The context was that he had entered into an agreement with lawyers in Cyprus to represent KK JSC in proceedings in Cyprus relating to the enforcement of the KK judgment without the consent of the creditors.

Conclusion on "ordinary commercial operations"

86. Professor Abzhanov provided no evidence of Kazakh law which supports his interpretation of this Article.

87. In my view the "*function*" of KK JSC was as a holding company. Its "*commercial operations*" and its "*day to day business*" could include litigation (and the receipt of legal services) but that in my view was not its "*function*" nor is litigation on this scale "*ordinary commercial operations*". In my view its "*function*" cannot be identified by reference to the activities that it carries out as that would be self-fulfilling. Accordingly to determine whether the activity satisfies the condition "*to maintain the daily functioning of the debtor"* in my view this cannot be measured by reference to the time expended by management or the value of the litigation to the company but by reference to its function as a holding company. The litigation may have been desirable (given the scale of the potential recovery) but that does not mean that it was within the framework of "ordinary commercial operations".

88. In relation to the other case concerning the previous rehabilitation manager, Professor Abzhanov was of the view that the point was not raised before the court in such case. [Day 4 p21] Whilst I accept that the point does not appear to have been directly addressed, in my view it can be inferred from the finding of guilt and the imposition

of a fine that the case proceeded on the basis that the contract with the Cypriot lawyers fell outside the framework of ordinary commercial operations, even though it was for services relating to pursuing and maintaining the KK proceedings or the enforcement of the KK judgment. It does therefore in my view provide some support for my conclusion above.

89. For these reasons I find that the Disputed Variation Letters were outside the framework of the "ordinary commercial operations" of KK JSC for the purposes of Article 71(1)(4) of the Bankruptcy Law.

Was entry into the Disputed Variation Letters necessary to ensure the "protection" of KK JSC's property and therefore within Mr. Werner's actual authority?

90. Article 71(2) provides that:

> "The rehabilitation manager must:
>
> 1) accept the debtor's property under management and ensure the protection and control of the debtor's property;…"

91. Professor Abzhanov is of the view that the obligation to protect the debtor's property provides authority for the rehabilitation manager to preserve and manage the company's legal claims. He states that under Kazakhstan law, the concept of "property" includes monetary claims (paragraph 54 – 55 of his first report).

92. Professor Ilyasova is of the view that the duty to protect a company's property is not expressed to be self-standing but applies to property which the rehabilitation manager has brought under his control. Taking the company's assets into administration means acquiring the right to manage the company's assets following a set procedure (paragraphs 101 and 102 of her first report). She states (paragraph 127 of her first report):

> "… The notion of "property of protection" in the context of the provisions of the Bankruptcy and Rehabilitation Law, in my view implies the adoption of measures aimed at ensuring the preservation of the property transferred into the administration of the rehabilitation manager, in order to ensure its use only within the framework of the special regime of rehabilitation procedure." [emphasis added]

93. Professor Ilyasova drew a distinction in the case of litigation, where the actionable right is disputed when in her view, before the coming into force of the court's judgment, the actionable right is not deemed to have arisen and in her view does not form part of the company's property. In her view if the court upholds such an actionable right, it then forms part of the company's property (paragraphs 121 – 122 of her first report).

94. In my view "the protection…of the debtor's property" in Article 71(2) cannot be read as self-standing but must be read in context. This is the literal meaning of the clause in my view. Further I note that the contrary view expressed by Professor Abzhanov would have the effect that a rehabilitation manager could ignore the requirement

under Article 71(1)(4) for creditor approval of the transaction if he deems it necessary to protect the debtor's property.

95. For these reasons I find that the obligation to protect and control the debtor's property does not extend to giving the rehabilitation manager powers to vary the rehabilitation plan without the consent of the creditors and thus the entry into the Disputed Variation Letters was not to ensure the "protection" of KK JSC's property within the meaning of Article 71 (2).

Were the Disputed Variation Letters envisaged by the Rehabilitation Plan?

96. Professor Abzhanov is of the view that the Disputed Variation Letters were 'transactions... envisaged by the Rehabilitation Plan', and therefore fell outside the scope of Articles 68(2)(1) and 71(1)(4). His evidence in cross examination was:

> "A. Yes, he had to seek and obtain the agreement of creditors' committee, but the fact that the rehabilitation plan envisaged the possibility of such amendments or variations means that these amendments were envisaged by a rehabilitation plan." [Day 4 p26]

97. As set out above paragraph 4.3.1 of the Rehabilitation Plan provided that:

> "…all the material decisions as to any change in the claim amount of KK JSC and its subsidiaries, procedure of transfer and allocation of the funds awarded as a result of the London Proceeding, entering into amicable settlement agreements and any additional expenses other than those mentioned in the Investment Agreement with Harbour Fund III will only be made with the consent of the creditors' committee…" [emphasis added]

98. Professor Abzhanov accepted in his report that the Disputed Variation Letters constituted a change in the procedure and transfer and allocation of funds but concludes that as a result they are "envisaged" by the Rehabilitation Plan.

99. It was submitted for the Claimant that a sufficiently explicit provision in a rehabilitation plan allowing for the amendment of the terms of an agreement referred to in the plan would in principle be effective (paragraph 138 of the Claimant's closing submissions). That appears to be accepted for KK JSC in its closing submissions at paragraph 83.

100. However that is not this case. The Rehabilitation Plan only allows for variations which relate (inter alia) to the procedure of transfer and allocation of funds awarded with the consent of the creditors' committee.

101. I accept the submission for KK JSC that Professor Abzhanov's interpretation cannot be the correct interpretation (and the issue of construction is in any event not a matter for expert evidence in circumstances where he provided no relevant rule of Kazakh law to support his interpretation). His interpretation would mean that a provision in the Rehabilitation Plan requiring creditors' approval for a future variation had the

opposite effect of authorising Mr Werner to enter such variations on behalf of KK JSC without that approval. That conclusion appears nonsensical.

102. I therefore find that the Disputed Variation Letters were not 'transactions... envisaged by the Rehabilitation Plan', and did not fall outside the scope of Articles 68(2)(1) and 71(1)(4).

Conclusion on actual authority

103. For the reasons discussed above I find that Mr Werner did not have actual authority as a matter of Kazakh law to enter into each of the Disputed Variation Letters on behalf of KK JSC.

Did Mr Werner have ostensible authority to enter into each of the Disputed Variation Letters on behalf of KK JSC: Issue 2.

104. The next issue to consider is whether Mr Werner had ostensible authority to enter into each of the Disputed Variation Letters on behalf of KK JSC.

Relevant legal principles

105. The following appeared to be common ground in relation to the legal principles:

106. 'Apparent authority' is the authority of an agent as it appears to others. The seminal explanation is that of Diplock LJ (as he was then) in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, at 503:

> "An "apparent" or "ostensible" authority…is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract."

107. The two key elements for apparent authority are thus (1) a representation made by the principal or a person authorised to make such a representation to the third party and (2) reliance upon that representation by the third party in entering into the contract.

108. It has traditionally been taken to be the position that an agent may not 'self-authorise'. However this is qualified in certain instances: in *Kelly v Fraser* [2013] 1 AC 450 (PC) Lord Sumption explained the principle in the following terms (at [15]):

> "An agent cannot be said to have authority solely on the basis that he has held himself out as having it. It is, however, perfectly possible for the proper authorities of a company (or, for that matter, any other principal) to organise its affairs in such a way that subordinates who would not have authority to approve a transaction are nevertheless held out by those authorities as the persons who are to communicate to outsiders the fact that it has been approved by those who are authorised to approve it or that some particular agent has been duly authorised to approve it. These are representations which, if made by someone held out by the company to make representations of that kind, may give rise to an estoppel. Every case calls for a careful examination of its particular facts." (emphasis added)

109. The focus of the dispute in written submissions was whether as a matter of law, reliance must be "reasonable". KK JSC referred to the decision of the Privy Council in *East Asia Company Ltd v PT Satria Tirtatama Energindo* [2020] 2 All ER 294 (PC) at [42]. However in oral closing submissions counsel for KK JSC appeared to accept that the decision of the Court of Appeal in *Quinn v CC Automotive Group Limited t/a Carcraft* [2011] 2 All ER (Comm) 584 was binding on this court. The dispute between the parties as to the legal principles thus appeared to turn on whether the reliance would be defeated only if the Claimant did not have an honest belief that the agent had ostensible authority or whether it was sufficient that the Claimant had "*turned a blind eye*".

110. In its written submissions the Claimant appeared to accept that the approach of Lord Neuberger in *Akai Holdings Ltd (in liquidation) v Thanakharn Kasikorn Thai Chamkat* was followed in *Quinn*. It was submitted (paragraph 14 of the Claimant's skeleton for trial) that:

> "A number of recent cases in the past decade have moved away from the concept of reasonableness and the issue of whether the party relying on the representation was merely put on enquiry and have focused instead on a more demanding test of whether that party turned a blind eye to evidence showing that there was no authority. Lord Neuberger, sitting in the Hong Kong Court of Final Appeal, stated that a third party is entitled to rely on a representation as to an agent's authority unless they have actual knowledge of the lack of actual authority or if their belief in the agent's authority is dishonest or irrational (which includes turning a blind eye and being reckless). In principle it is inappropriate for the concept of constructive notice to intrude into commercial transactions. See Akai Holdings Ltd (in liquidation) v Thanakharn Kasikorn Thai Chamkat (2010) 13 HKCFAR 479, at [51]-[62]." [emphasis added]

111. However in oral submissions Counsel for the Claimant submitted that it was not sufficient that the belief was "irrational" or amounted to "turning a blind eye". Counsel for the Claimant submitted relying on paragraph 23 (i) of *Quinn* that the test was limited to lack of an honest belief.

112. In *Quinn*, Gross LJ at [23] said:

> "23. Sixthly, it is a necessary condition of the employer's liability to the third party for the deceit of the employee that the representation, as to the employee's authority in respect of the transaction in question, was relied upon by the third party: Freeman & Lockyer v Buckhurst Park, at p.506.
>
> i) Plainly, there can be no reliance on such a representation if the third party did not have an honest belief in the employee's authority; so too, if the third party turns a "blind eye" to suspicions as to the apparent authority of the employee: see the discussion in Akai, at [49] – [62]. However, the touchstone is honest belief and, possibly, "irrationality" – a point conceded in Akai (ibid) and upon which it is unnecessary to express any concluded view." [emphasis added]

113. It was submitted orally for the Claimant that:

> "…there's not some separate test about turning a blind eye, which is a rather opaque phrase anyway; the touchstone is lack of honest belief. If, by turning a blind eye, a party has demonstrated a lack of honest belief, that's relevant. If turning a blind eye means something else, then it's not relevant. So it's lack of honest belief that is the touchstone" [emphasis added] [Day 5 p165-166]

However it seems to me that at [23] Gross LJ expressly contemplated either the lack of an honest belief or, in the alternative, a party "turning a blind eye". Gross LJ cross-referred to specific passages in the judgment in *Akai* and at [62] of that judgment Lord Neuberger clearly states:

> "I conclude that it is open to the Bank to rely on Mr Ting's apparent authority (if he had such authority) unless the Bank's belief in that connection was dishonest or irrational (which includes turning a blind eye and being reckless)." [emphasis added]

114. In relation to what constitutes "turning a blind eye" I note that Lord Neuberger said at [53] referring to Lord Blackburn in *Jones v. Gordon* (1876-7) 2 App Cas 616, 628-9:

> "…At the end of that last-cited passage, Lord Blackburn provided a characteristically clear explanation of what constitutes blind eye knowledge, or turning a blind eye when he said this:
>
> "[I]f the facts and circumstances are such that the [judge comes] to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking

> questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind – I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover – I think that is dishonesty."

115. I note that in its written closing submissions (paragraph 234) the Claimant submitted that the correct legal test is one of recklessness or turning a blind eye to actual suspicions (as opposed to unreasonableness or being put on enquiry) or (paragraph 221) actual knowledge of lack of authority.

116. Even if it was not necessary for the Court of Appeal in *Quinn* to decide the point, it seems to me that the written submissions for the Claimant reflect the test set out by Lord Neuberger and I reject the narrower formulation advanced in oral closing submissions by counsel for the Claimant.

117. Applying *Quinn* I proceed on the basis that the correct legal test is one of recklessness or turning a blind eye to actual suspicions (as opposed to unreasonableness or being put on enquiry) or actual knowledge of lack of authority.

Reliance

118. As noted above there are two issues: firstly whether KK JSC expressly and/or impliedly represented by its words and/or conduct that Mr. Werner had actual authority to enter the Disputed Variation Letters on behalf of KK JSC and secondly, whether HF3 relied upon any such representations when it entered the Disputed Variation Letters.

119. In considering the issue of reliance I propose to assume that there was a representation that Mr Werner was entitled to enter into the Disputed Variation Letters.

Evidence

120. In considering the evidence on this issue, I have regard to the contemporaneous documentation and the evidence of Ms MacPherson. On his own evidence, Mr King only took over as case manager in September 2017 and in my view he cannot assist the court therefore in relation to the period leading up to the execution of the Disputed Variation Letters.

121. I propose to focus on the Disputed Variation Letters entered into in 2017 as this was the focus of the submissions and the evidence and to deal separately with the Disputed Variation Letter entered into May 2016.

Contemporaneous documentary evidence

122. In my view the contemporaneous documentary evidence shows three different stages in the nature of the representations which were made by Mr Werner/KK JSC and the knowledge of HF3:

    i) The first stage comprises email exchanges in the period 4 January 2017 to 15 March 2017 which show general representations being made as to the need for

creditor approval for amendments to the Rehabilitation Plan and attempts by HF3 to meet with the Creditors' Committee and with ENPF.

ii) The second stage comprises email exchanges in the period 16 March 2017 to 6 April 2017 which suggested that some amendments could be agreed by Mr Werner but amendments to the "terms" required creditors' approval.

iii) The third stage was the correspondence in the period 7 April 2017 to 24 April 2017 which suggested that Mr Werner could sign up to amended terms (previously said to require creditor approval) but not to an amendment requiring new security or guarantees (or the creation of new obligations).

123. However before dealing with the detailed events in 2017, it is important to set these in context against the contemporaneous documentation of 2016.

124. The material evidence of the contemporaneous documentation relating to the position in 2016 is as follows:

i) On 16 February 2016, Mr McGregor emailed Ms Emerson with a summary of the situation regarding KK JSC's potential rehabilitation and how it may impact the KK Proceedings. At paragraph (c) of that summary, Mr McGregor explained that, once a rehabilitation plan is in place, a company is bound to follow it and corporate resolutions are to be taken by a majority vote of the company's creditors. However, at paragraphs (d) to (e), Mr McGregor went on to explain that it was likely that KK JSC's management would remain in place under the rehabilitation plan, which would be a good thing for the KK Proceedings as it would allow them to focus on the litigation.

ii) Mr McGregor attached to that email a note from Grata Law Firm dated 7 February 2016. That note stated that, following the introduction of a rehabilitation plan, transactions must be approved by the creditors' committee if they are not approved by the plan or if they are outside the scope of ordinary commercial transactions.

<u>The first stage (January – 16/18 March 2017)</u>

125. In my view the material contemporaneous documentation in this first period can be summarised as follows:

i) On 9 January 2017, Mr McGregor emailed Ms Emerson (Director of Litigation Funding at HLF and the case manager at the material time), attaching his comments to a proposed amendment to the Investment Agreement. Mr McGregor stated that the amendment required the approval of the Creditors' Committee.

ii) On 2 March 2017, Mr McGregor emailed various people within HF3 and A&O in relation to the possibility of HF3 funding the Astana 2 claim, stating that: *"the provisions of [the Rehabilitation Plan] are sufficiently broad to include Harbour Funding Astana 2 on the same investment terms, but <u>any amendments to [it] would require approval at a full creditors' meeting</u>*". [Emphasis added]

iii) On 3 March 2017, Ms Emerson sent an email to, among others, Mr McGregor, proposing an agenda for a conference call scheduled for that afternoon. The agenda included "Process and timings on KK JSC creditors' approval of any change of terms and budget increase". [emphasis added]

iv) On 4 March 2017, an email from Mr McGregor to, among others, Ms Emerson and Ms MacPherson makes reference to section 4.3 of the Rehabilitation Plan (which was again attached). In the same email, Mr McGregor also recommended that HF3 make direct contact with the Creditors' Committee:

> "Looking ahead, we think it would be very helpful for Harbour to have direct contact with KKJSC's creditors' committee. In our view they would respond best to a letter, which could then be followed-up with a call or even visit to Almaty. We would suggest the letter includes the following points:
>
> 1. Harbour is aware of KKJSC's rehabilitation plan, and has previously met with ENPF's representatives in London. Harbour also understands that ENPF has been provided, under a confidentiality agreement, with a copy of Harbour's Investment Agreement with KK.
>
> 2. Trial of KK's proceedings is scheduled to commence on 25 April 2017, and to run until July 2017. Harbour understands from KK's legal team that the build-up to trial (including disclosure, preparation of expert reports and witness statements and interlocutory hearings) has been enormously busy, and therefore expensive.
>
> 3. The budget for the proceedings has therefore increased to [GBP12m], from an original budget of GBP8.2m (including GBP1.1m cofunding from KK). In order to continue, the additional funds have to provided – this funding could, potentially, come from KK's operations, creditors, investors or from Harbour.
>
> 4. If Harbour are to provide any further funding, this will be on amended terms.
>
> 5. Harbour understands that certain minority creditors have suggested that KKJSC's management (Tomas Mateos Werner and Victoria Gorobtsova) be replaced with a court-appointed rehabilitation manager. Harbour strongly recommends that such potentially destabilising action is not taken before or during trial, when it is vital that KK's management and legal team able to concentrate on the proceedings.
>
> 6. In the event that KK's management were to be replaced, and KK's legal advisers considered that this would have a material adverse effect on the prospects for the LHC proceedings, Harbour would immediately withdraw funding for the

> proceedings under either Clause 15 (Termination for Fault) or Clause 16 (Termination for Material Adverse Decline) of the Investment Agreement.
>
> 7. Harbour would welcome the opportunity to discuss these matters further with the Creditors' Committee."

v) On 6 March 2017 Mr Tonnby, (at that time Chairman of HLF) sent an internal email copied to Ms Dunn (then Head of Litigation at HLF) and Ms MacPherson stating that:

> "…I am VERY unhappy about being in this position at this time
>
> - apparently needing to increase the budget by 3.8m (I do not buy the re-allocation argument as I have not seen anything to suggest that we will not need to spend money on enforcement post a win)
>
> - not being able to improve our terms or get the claimants to share the costs as they are in a procedure where they are subject to bureaucratic claimants
>
> Given the above I think that how we present any decision to continue funding will be paramount as I want better terms and I want to maximise the chance that the bureaucratic claimants participate.
>
> For example I do not think we should tell them what we approve but just what they need to know (their own tactics) to continue for now whilst we reach a better overall agreement. So perhaps all we say is that we pay the security for costs for now by re-allocating budget but that to complete the litigation we will need agreement re terms and funding to be reached with claimants in next week or two (we should be happy to call a meeting with all relevant claimants and get on a plane to a suitable destination: London, Almaty....)… " [emphasis added]

It is clear that the references in that email from Mr Tonnby to the "bureaucratic claimants" are to the Creditors' Committee and not to Mr Werner as Rehabilitation Manager.

vi) On 7 March 2017, Ms Emerson emailed a letter from Ms Dunn to the Creditors' Committee. That letter stated that HLF had been approached to consider providing funding for the £3.5 million additional costs and that:

> "[HLF] wish to discuss this with you because if HF3 is to provide any further funding this will have to be on amended terms to reflect the additional risk to HF3".

vii) On 10 March 2017, Ms Emerson and Mr McGregor exchanged emails in order to discuss the possibility of Ms Dunn travelling to meet the Creditors' Committee in Almaty in mid-March (in furtherance of the discussions alluded to in the letter to the Committee dated 7 March 2017).

viii) On 10 March 2017 Mr Werner wrote to HF3. He sent a signed copy of the amendment letter dated 9 March 2017 but stated that he did not have the authority to bind KK JSC to the terms in an amendment letter because:

> "material contracts that diverge from KKJSC's rehabilitation plan can only be signed after approval from KKJSC's creditors." [emphasis added]

He continued:

> "As KKJSC's rehabilitation manager, I do not have authority to bind the company or its subsidiaries to these amended terms, nor can I validly convene a creditors meeting and seek approval from them within the timeframe set in your letter.
>
> "KK's PLCs board and management will nevertheless undertake to work in good faith to obtain the approval of KK JSC's creditors as soon as possible, because we accept that obtaining extended funding is in the best interest of KKPLC and the rest of the claimants… It is a fundamental term of the rehabilitation plan that Harbour's funding is provided on a "no-win, no fee" basis. We anticipate creditors insisting that any additional funding remains without recourse". [emphasis added]

ix) Between 13-15 March 2017, Ms Emerson and Mr McGregor exchanged a number of emails concerning the proposed meeting between HF3 and the Creditors' Committee. In particular, it is clear from these emails that HF3 were eager to meet with the Committee that week (and in particular ENPF, which accounted for more than 50% of the voting power within the Creditors' Committee) to discuss the proposed amendment to the Investment Agreement in the 9 March letter. It is also clear from these exchanges that the reason the meeting did not take place that week was because ENPF was not ready to meet with HF3 as it needed more time and more information, as referred to in an email of 14 March 2017 from Mr McGregor to Ms Emerson and Ms Dunn:

> "…I spoke today with Nazim Baktibaev (deputy director of ENPF's legal department). He told me that he and his team are reviewing the letters and preparing a report for ENPF's board, and that they anticipate providing a response to Harbour's letter by Thursday. Clearly this does not leave time for a meeting in Almaty this week.
>
> I emphasised the importance of ENPF meeting with Harbour as soon as possible, preferably in person or alternatively by video conference. Nazim acknowledged this, but stated that ENPF's

> new management first wanted to understand more about the claims and arrangements with Harbour, including the increased budget, prior to the meeting. Nazim told me that he had some questions for KK regarding the claims and the budget, and that he would write to me directly regarding these. It is apparent from our discussion that Nazim has been reviewing the letters and other materials provided – it appears that ENPF's management are taking this seriously, but that they want time to understand the issues before meeting with Harbour…".

x) On 15 March 2017, Ms Emerson and Mr McGregor exchanged drafts of a proposed letter to the Creditors' Committee which was intended to "hurry a response from ENPF" and stated, inter alia,

> "Following discussions with the current management of the Company about the Company's ability or otherwise to meet its co-funding obligations under the Investment Agreement, HLF writes to impress upon the Creditors' Committee the urgency of meeting to agree the basis on which the London Proceedings should continue and be funded…
>
> To assist in reaching agreement, it is essential that HLF are able to meet with the members of the Creditors' Committee as soon as possible." [emphasis added]

126. In my view the evidence of this first period supports the conclusion that HF3 understood the need for creditors' approval for amendments to the Rehabilitation Plan and this is evidenced by the attempts by HF3 to meet with the Creditors' Committee and with ENPF.

The second stage

127. In my view the position adopted by HF3 (namely to seek consent from the Creditors' Committee for the amended terms) changed from around 16/18 March 2017 when it became apparent to HF3 that a meeting with ENPF would not be possible in the short term and consent was not likely to be obtained in the desired timeframe.

128. On 16 March 2017 Ms Emerson emailed Mr McGregor stating:

> " we understood from your letter of 10 March that material contracts that diverge from KK JSC's rehabilitation plan can only be signed after approval of KK JSC's creditors. We require the attached Amendment Letter to the Investment Agreement to be executed as an interim measure, while the process for obtaining such approvals is underway. " [emphasis added]

129. On 18 March 2017 Ms Emerson received an email from Mr Baktybaev:

> "…The EPPF is studying your proposal for financing a budget increase. However, you should understand that, being a quasi

> state structure, we, unfortunately, can not make such decisions in a short time, without appropriate approvals.
>
> Nevertheless, I hasten to inform you that on 24.03.2017. We have a meeting of the committee on problem assets, which will consider this issue and, most likely, the date of the meeting with you will be indicated…" [emphasis added]

130. On 22 March Ms Emerson responded to Mr Baktybaev:

> "We understood from KK that you have asked for an explanation for why the budget has increased. To respond to this, we have attached to this email a letter from us and a letter from Allen & Overy explaining the reasons for the budget increase.
>
> We have also provided information to KK JSC in relation to our terms and requirements. KK JSC will be providing this information to you before your meeting on the 24th March 2017."

131. Against the background of these ongoing attempts to meet with the Creditors' Committee and to get ENPF on side, HF3 proceeded to exchange emails with Mr McGregor to finalise the amendment letter dated 16 March 2017:

i) On 20 March 2017, in relation to the Amendment Letter dated 16 March, Mr McGregor emailed Ms Emerson, Ms Dunn and Ms MacPherson stating:

> "Please find attached our comments on the amendment letter. There are a couple of points we would like to clarify, and a couple of corrections/notes for Harbour.
>
> The Law on Rehabilitation is a new one, and there is room for interpretation regarding many of its provisions, including the scope of the rehabilitation manager's powers.
>
> Once we have addressed these points, Tomas is ready to sign on behalf of KKJSC and KKPLC…" [emphasis added]

ii) On 22 March 2017, in the context of these email exchanges, Mr McGregor emailed Ms Emerson, Ms Dunn and Ms MacPherson. In relation to proposed amended terms, Mr McGregor stated:

> "1. Security – given that we still have to work out the details here, could we please remove this provision from the amendment letter? It will of course stay in the annexed terms to be negotiated with creditors, as signed by KKPLC. As KKJSC's rehabilitation manager, Tomas does not have the right to grant new creditors security over KKJSC's assets.
>
> 2.Astana 2 SFC – agreed". [emphasis added]

iii) The next day, Ms Emerson acknowledged this email and asked for the relevant terms to be removed from the Amendment Letter.

132. On 24 March 2017, the Disputed Variation Letter was executed on behalf of KK JSC by Mr Werner.

133. On 29 March 2017, Ms Emerson emailed, among others, Mr Tonnby, Ms MacPherson and Ms Dunn with an update explaining that the Variation Letter dated 24 March 2017 had been signed by all the KK entities. She went on to state that:

> "Despite our asking for additional terms now, KK JSC could not agree to those terms without the agreement of the creditors. The attached amendment letter brings the additional amounts into the budget on the current terms of the Investment Agreement, but also sets out (in Annex 1) the terms that we will seek to negotiate with the creditors of KK JSC." [emphasis added]

134. A further email exchange between Ms Emerson and Mr McGregor on Tuesday 4 April 2017 discussed arrangements for Ms Dunn to meet with ENPF in Almaty that Friday (7 April) after a meeting of the Creditors on the same day. Mr McGregor explained that ENPF were at that point still reviewing the relevant information in relation to the proposed amended terms.

> "This would be an introductory meeting– we expect ENPF's management to be friendly and take note of what Susan has to say, but they have not yet reached a final position on Harbour's amended terms. The ENPF team is still studying the information provided earlier this week on the amended terms (including the example return calculation), as well as more detailed information on incurred costs." [emphasis added]

135. On 5 April 2017, the Disputed Variation Letter (which provided for an amendment in the terms of the causes of action covered by the Investment Agreement so as to include the Astana II claim) was executed by Mr Werner on behalf of KK JSC.

136. On 6 April 2017, an email exchange took place between Ms Vaswani of Allen & Overy and Ms MacPherson. Ms MacPherson asked whether Mr Werner would be entitled to accept a settlement offer in the KK Proceedings, and Ms Vaswani advised that she thought such acceptance would require the approval of the Creditors' Committee but that Mr Werner and Mr MacGregor were best placed to respond.

137. On 7 April 2017, Ms Dunn attended (as an observer) a Creditors' meeting in Almaty, but ENPF then refused to meet with her separately afterwards.

138. The day after the Creditors' meeting, that is on 8 April 2017, Ms Dunn emailed Mr Tonnby and Ms MacPherson with an update following her attendance at the Creditors' meeting and ENPF's refusal to meet with her. In that email she wrote:

> "…Yesterday did not go as I expected because ENPF refused to meet me…

> As you can imagine that did not make me happy…
>
> We have three principal …issues which flow from this. The first is around terms, the second around how settlement is discussed and the third how it is approved.
>
> Tomas and Hugh think this should be used to our advantage. Off the record ENPF say they are supportive of what we are doing and want the proceedings to carry on.
>
> As you know [Mr Werner] has signed certain of the documents we have produced in our discussions. He is saying he would sign up to what we have asked for though I question whether security could be offered i.e. he is suggesting he would sign up to the increase in terms we have sought.
>
> He also says he would then agree settlement…
>
> The creditors meeting was farcical. $500 creditors filibustering and doing everything they can to make life difficult for the company, bog them down with inane questions and requests for pointless information…" [emphasis added].

Stage 3

139. Having reached if not an impasse, certainly a major setback with the events on 7 April, the position of Mr Werner and of HF3 moved significantly at this time.

140. What then followed has, in my view, to be seen against the background of that Creditors' meeting and the email from Ms Dunn of 8 April:

    i) On 14 April 2017, Ms Dunn spoke to Mr Werner and Mr McGregor and shortly afterwards emailed several people within HF3 (including Mr Tonnby, Ms MacPherson and Ms Emerson). In her email, Ms Dunn explained that Mr Werner and Mr McGregor had said they would not be able to sign a variation letter because the recourse provisions would put them in breach of the rehabilitation plan:

    > "So I have asked them to propose what they think is achievable…".

    ii) On 18 April 2017, Mr McGregor emailed Ms Dunn, Ms MacPherson, Ms Emerson and Mr Yam (all of HF3) in relation to a draft amendment letter dated 11 April. He repeated the position stated on 14 April that KK JSC would not be able to "approve new security arrangements or guarantees without the consent of KKJSC's creditors". He also included a link to the Kazakh Law on Rehabilitation (in English), drawing attention to Sections 68(2) and 71.

141. Also on 18 April 2017, Mr Werner wrote to the Creditors' Committee and copied in Ms Dunn. In that letter, Mr Werner stated that he considered himself entitled to agree to the amended terms on behalf of KK JSC, essentially on the basis that ENPF were

not acting promptly enough to allow urgent decisions to be made in relation to the KK Proceedings. He said:

> "Harbour requested urgent meetings with ENPF and EBRD, as the major creditors of KKJSC, to discuss the amended budget, revised terms, and conduct of the Proceedings generally. Harbour's Head of Litigation Funding, Susan Dunn, then travelled to Almaty in order to secure a meeting with ENPF and attended the meeting of KKJSC's creditors held on 7th April 2017. Unfortunately ENPF has not been able to confirm the date of the meeting with their management and was not able to meet with Ms Dunn. There is no further information up to date.
>
> Management of the Proceedings frequently requires important decisions to be taken on an urgent basis, including decisions relating to expenditure and settlement. As the majority creditor, holding over 50% of KKJSC's debt, ENPF should play an important role in these decisions. However, it is apparent that ENPF is not prepared to promptly consider and take important decisions relating to the Proceedings. In these circumstances, as the CEO of KKJSC, I consider that I am entitled to continue to manage the Proceedings on behalf of KKJSC and take any decisions necessary to ensure a successful outcome for KKJSC's creditors. This includes negotiating and agreeing to the amended terms required by Harbour for their additional funding." [emphasis added]

142. The email of 18 April 2017 from Mr Werner was copied to Ms Dunn. Ms Dunn did not give evidence to the court but in my view it is clear to any reader of the letter with knowledge of the previous attempts to engage the Creditors' Committee and ENPF (and would have been clear to Ms Dunn) that Mr Werner purported to assume the power to agree the amended terms but without any apparent basis other than the failure by ENPF to respond promptly and take decisions.

143. The correspondence between HF3 and Mr Werner and Mr McGregor then continued, culminating in the execution of the Disputed Variation Letter dated 21 April 2017. This letter provided for a further increase in the Aggregate HF3 Commitment to £11 million and also altered the waterfall under Clause 10.1 of the Investment Agreement, so that the HF3 Investment and HF3 Return would rank ahead of the Claimants' Incurred Costs. The relevant emails were as follows:

i) On 20 April 2017, Ms Emerson emailed Mr Werner and Mr McGregor, suggesting that two amendment letters be executed: one concerning amendments which Mr Werner had agreed to execute, and another with terms which Mr Werner had indicated he did not have the authority to execute without the consent of the creditors, with the latter letter subject to Mr Werner obtaining the necessary consent.

> "Following your email of 18 April we discussed your position with the Board and they are not willing to forego the provisions relating to new security arrangements and the guarantee.

As a result, we propose executing two documents, as set out below.

• The first document is an amendment letter incorporating those changes that you have agreed to, namely the additional funding being provided in return for a HF3 recovery of 4 times the investment after repayment on that money only. This includes £575,000 paid as security for costs for Astana 2, £918,000 ATE premium, and the additional £2,348,246 litigation budget.

• The second document is an amendment letter including those provisions which you have indicated you do not currently have the authority to sign and therefore we have made these provisions conditional on conditions precedent being met, those conditions relating to the various consents necessary to give you authority to sign the letter."

ii) On 24 April 2017, Mr Werner replied to Ms Emerson's email of 20 April and copying Ms MacPherson, stating:

"I will proceed with signing the first amendment letter, as soon as I have access to a printer.

Through correspondence sent to creditors over the past month you have made it clear that you were providing additional finance based on new terms. You also made clear that you would not provide additional finance if these terms were not approved. Without this additional funding the company would have been unable to continue proceedings. I therefore think that it is the best interest of the creditors to sign the first amendment letter.

I wrote then that I anticipated it would be very challenging for creditors to accept that you provide this finance with recourse.

The Rehabilitation Plan and the Law on Rehabilitation do not allow me to create new obligations. The terms of the letter are also in breach of our loan agreements with EBRD.

Recourse is additionally against the spirit of our arrangement with creditors, especially EBRD. Creditors have allowed the company to fund the proceedings with funds that should have gone to repay their debt, in the understanding that the new funding we obtained was without recourse. It is my understanding that they would prefer to forego potential recovery from London proceeds if this creates new obligations.

For these reasons I am not going to bind Creditors as proposed by your second letter amended even as if you propose this is subject to their approval." [emphasis added]

144. Although it appears from the email of 24 April 2017 that Mr Werner was advancing a new limitation on his power to sign up to amended terms on behalf of KK JSC i.e. if it did not "create new obligations" I think the significance of this lies only in the fact that it is clear that he has assumed the power to sign the first letter on the basis that he was of the view that it was in the best interests of the creditors to continue with the proceedings and obtain the additional funding.

145. In my view it would have been clear to HF3 from the correspondence that the position regarding the need for consent from the Creditors' Committee was in reality unchanged.

The evidence of Ms MacPherson

146. The evidence in her first witness statement (at paragraph 24) was as follows:

> "I wish to say at the outset that at the time I never had any doubt about the validity of any of the Disputed Variations or Mr Werner's authority to agree them on behalf of KK JSC. I expected the Funded Parties would honour their obligations under them and that, if the KK Proceedings were successful, HF3 would be repaid in full together with a return. Similarly, from the Harbour team's discussions with the Board (at meetings at which I was present), I believe the Board did not have any doubt about Mr Werner's authority in respect of the Disputed Variations. This is because it was never told there was any question about Mr Werner's authority in respect of those variations, and therefore rightly assumed that the variation would be executed with authority. Under no circumstances would additional monies have been released if the Board, myself or any member of the Harbour team had any doubt over the validity of the Disputed Variations or unless we believed that a return applied to that funding." [emphasis added]

147. The first point to note is that Ms Emerson and Ms Dunn played a prominent part in the transaction as is evident from the emails set out above. Neither of them gave evidence. It is therefore possible that Ms MacPherson did not have full knowledge of how the issue of authority developed and she genuinely did not have any doubts about the validity of the Disputed Variation Letters or the authority of Mr Werner. However her own evidence (paragraph 28 of her first witness statement) is that she became "closely involved in the case" again in March 2017 and was "brought up to speed on developments" by Ms Emerson and other team members.

148. At paragraph 32 of her first witness statement she said:

> "As I explain further below, in March 2017 Harbour made a concerted effort to establish a direct line of communication with the Creditors Committee (and with ENPF and EBRD in particular) at the suggestion of Mr Werner and Mr McGregor. This was to determine whether additional funding would be provided by KK JSC and/or KK JSC's creditors as to

> whether recourse and security would be provided by KK JSC in the event HF3 funded certain budget increases. In those instances, Harbour was only seeking to engage with creditors on issues which we had been told by Mr Werner and Mr MacGregor required creditor approval (primarily, as explained below, the provision of security and recourse terms) or which obviously required action by creditors (such as the provision of further funding by creditors themselves). We continued to believe that otherwise Mr Werner had general authority to act for KK JSC." [emphasis added]

149. In my view this evidence of Ms MacPherson as to the limited nature of the engagement sought with the Creditors' Committee in March 2017 is not supported by the contemporaneous documentation set out above. In my view the contemporaneous documentation is a more reliable source of evidence and the documents speak for themselves. I do not therefore accept Ms MacPherson's evidence on this issue as accurately reflecting what happened.

150. Similarly Ms MacPherson's evidence concerning what happened after the meeting of the Creditors on 7 April 2017 is in my view not supported by the contemporaneous emails. Ms MacPherson said (at paragraph 71 of her first witness statement):

> "I was incredibly frustrated by [what happened at the meeting on 7 April]. The only solace I took from Ms Dunn's update was that ENPF had apparently informed Mr Werner and Mr McGregor that they supported what HF3 was doing and wanted the KK proceedings to continue. She said that Mr Werner had stated that, if funding was not going to be provided by the creditors, he was prepared and able to agree to it being provided by HF3 on the terms that we desired. I understood this at the time to mean that he now considered himself able to agree the security and recourse provisions that he had previously been unable to agree, though as I explain below that was ultimately not the case. Mr Werner had also apparently said that, if the opportunity presented itself, he was prepared and able to enter into a settlement agreement on behalf of KK JSC in the KK Proceedings, and EBRD was supportive of this position. Nothing that Ms Dunn reported back to the Harbour team caused me to question Mr Werner's authority to execute the variation letters which he had executed up to that date, nor did it give me cause for concern going forwards. [emphasis added]

151. However there is no suggestion in the email of 8 April 2017 from Ms Dunn (set out above) that the change in the authority of Mr Werner at that point was that he could agree the security and recourse provisions. Ms Dunn reported that Mr Werner had said that:

> "he would sign up to what we have asked for… i.e. he is suggesting he would sign up to the increase in terms we have sought."

152. Insofar as Ms MacPherson seeks by this evidence to suggest that HF3 understood that Mr Werner had authority to agree to the terms and had no reason to doubt his authority, this evidence is in my view not supported by the contemporaneous emails.

153. These two material passages in her written evidence when viewed against the contemporaneous documentation call into question the reliability of the evidence of Ms MacPherson as a whole. In preparing this judgment I have re-read the transcript of her evidence and cross-examination. In her oral evidence she sought to explain the interpretation to be drawn from the contemporaneous documentation in a way which supported HF3's case. One example was the exchange in relation to the board minutes of a meeting of the board of directors of HLF on 31 March 2017. The relevant minute read:

> "It was noted that meetings were being held with the major creditors of the claimant companies to discuss a way forward in securing the agreement of the creditors' committee to the increased funding by Fund3 on improved terms."

154. Her evidence in cross examination was as follows:

> "Q. You see there's no reference there to seeking its agreement on recourse. It's seeking their agreement on all of the approved terms. That's what the board understood was taking place.
>
> A. This is purely a summary of the board -- this is a summary note. It doesn't reflect every single thing that was discussed about the KK matter at the board meeting. It's simply a summary.
>
> Q. Yes, but your case is, well, this was all a very simple issue, the authority point was a very simple issue because all we were concerned with was recourse. If it was that simple, this note would have said: there is a discussion about the way forward in securing agreement on recourse. And it doesn't. It says: on increasing funding by the fund on improved terms, that means all the terms.
>
> A. Well, I know what followed this. What followed this was the next variation letter, which was about recourse…" [Day 2 p24]

155. In my view the Board minute whilst brief, refers only to securing improved terms and this is consistent with Ms Dunn's email of 8 April 2017. As the Chief Investment Officer of HLF, Ms MacPherson has an obvious motive to support the case of HF3. In light of the fact that I find key statements of Ms MacPherson's evidence on matters which are covered by the contemporaneous emails, as described above, inconsistent with the plain reading of those emails, this calls into doubt her other evidence notably concerning discussions with Mr Werner and Mr MacGregor. Although KK JSC did

not invite the court to draw adverse inferences from the absence of Ms Emerson and Ms Dunn as witnesses in these proceedings, Ms MacPherson's evidence is not corroborated by other witnesses. For these reasons I find her evidence unreliable and prefer the evidence of the contemporaneous documentary evidence.

Claimant's submissions

156. It was submitted for the Claimant (amongst other things) that:

i) close scrutiny of the Rehabilitation Plan would not have told HF3 that Mr Werner lacked authority (paragraph 235 of the Claimant's closing submissions);

ii) the documents in January 2017 related to an early draft of an agreement which was never executed and referred in "vague and general terms" about the need for creditors' approval and was irrelevant to the question of alleged recklessness at the date of execution of the Variation Letters (paragraph 236);

iii) the contemporaneous documentary evidence shows that Mr Werner and Mr McGregor were specific about what Mr Werner had authority to agree to – Mr Werner and Mr McGregor took the position that he could not agree to security and recourse provisions (paragraph 238);

iv) Mr Werner was aware of the scope of his authority and could be relied on to express that accurately. Similarly Mr McGregor was the Group General Counsel and had an understanding of both Kazakhstan bankruptcy law and the rehabilitation procedure which HF3 did not have (paragraph 238.7).

157. In my view one cannot consider the position at the date of execution of the Variation Letters without having regard to the background leading up to the execution of the Letters. Therefore although the January agreement was never signed, the correspondence from January 2017 in particular, is part of the background to show what HF3 were being told about the need for approval from the Creditors' Committee. Whilst ultimately Mr Werner took the position that he could agree to some but not all of the amended terms sought by HF3, it is clear that this position developed over time and against the background that HF3 were unable to get the Creditors' Committee to engage and ENPF in particular were proving slow to respond.

158. It was submitted for HF3 (paragraph 231 – 232 of the Claimant's closing submissions) that Mr Werner was clear about what he could agree to on behalf of KK JSC and that his authority to manage the KK Proceedings continued subject to specific exceptions in relation to agreeing to recourse and security provisions. In my view this is not borne out by the contemporaneous documentary evidence as discussed above. In particular the submission that in the email of 10 March 2017 Mr Werner was referring to the limitation on his power to agree recourse and security, in my view is not a fair reading of the email of 10 March 2017. Similarly the reliance by HF3 (paragraph 232.7) on the references to recourse and security in the emails around 14 April 2017 have to be read in context, namely in the light of the stance adopted by Mr Werner after the Creditors' meeting on 7 April 2017.

159. Whilst Mr McGregor may have had an understanding of the relevant law, the evidence suggests that HF3 did not rely on an assertion by Mr McGregor or Mr Werner as to the relevant law but, in any event, the evidence clearly shows that Mr Werner took it upon himself to assume the relevant power to sign when the Creditors' Committee were delaying.

160. It was submitted for HF3 that it was not plausible that HF3 would have advanced funding if it did not have a belief that Mr Werner had authority to enter into each of the Variation Letters (paragraph 229 of the Claimant's closing submissions).

161. In my view the evidence of the contemporaneous documentation shows that, in relation to the Disputed Variation Letters executed in March and April 2017, the need for additional funding was urgent, that substantial sums had already been invested at that point and HF3 did not want to bring the proceedings to a halt. The position was encapsulated by Mr Tonnby in his email of 6 March 2017: there was a need to increase the budget by 3.8m in circumstances where HF3 knew it was unable to improve its terms or get the claimants to share the costs as they were in a procedure where they were subject to "bureaucratic claimants"; the best that they could do was try to "present any decision to continue funding" in a way which would secure better terms and to maximise the chance that the "bureaucratic claimants" participated. When it became apparent after the meeting of 7 April that nothing would be forthcoming from the Creditors' Committee in the short term, HF3 were content to take whatever they could and ignore the sudden change in the apparent authority of Mr Werner.

162. In my view therefore it is plausible and understandable that notwithstanding the fact that HF3 knew that the consent of the Creditors' Committee was required for the amended terms, given the difficulties and delay being encountered and the pressure of time, HF3 chose to accept the offer by Mr Werner to sign up (at least in part) to the proposed amended terms.

Conclusion on Disputed Variation Letters

163. In relation to the Disputed Variation Letter executed in May 2016 the court did not have evidence from Ms Emerson who was the principal point of contact at that time. Further for the reasons set out above, the court finds the evidence of Ms MacPherson unreliable.

164. In my view, on the evidence before the court, HF3 has not established the element of reliance in relation to the Disputed Variation Letter executed in May 2016. It had the Rehabilitation Plan and it had legal advice as to its effect and the need for creditors' approval.

165. In relation to the Disputed Variation Letters executed in 2017 for the reasons discussed above, I conclude that HF3 did not have an honest belief that Mr Werner had power to sign up to the Disputed Variation Letters in 2017. If I were wrong on that, I find that HF3 "turned a blind eye".

166. Accordingly I find that Mr Werner did not have ostensible authority to enter into each of the Disputed Variations Letters on behalf of KK JSC.

Did KK JSC intend to be bound by the Disputed Variation Letters when they were signed by Mr Werner? (Issue 2A)

167. In the light of my conclusion on the issue of ostensible authority, it is not necessary for me to deal with this alternative issue advanced by KK JSC.

Were the Variations Payments made by HF3 in connection with the "preservation of its rights" under the Investment Agreement and accordingly constituted "Claimants' Legal Costs" within the meaning of the Investment Agreement? (Issue 4A)

168. The "Variations Payments" are sums totalling approximately £4.6 million which were paid by HF3 pursuant to the terms of the Disputed Variation Letters, after HF3 had already provided in full the Aggregate HF3 Commitment under the Investment Agreement. The sums were paid by HF3 between about March 2017 and late August 2017.

169. It was submitted for HF3 that the Variations Payments were costs incurred in connection with the preservation of its rights under the Investment Agreement: the circumstances were that, shortly before the commencement of trial in the KK Proceedings, the Funded Parties were failing to fund the KK Proceedings in breach of their obligations under the Investment Agreement to "co-fund" and to "fund generally" under Clause 5.2(d) and Clause 8.1(e); and without funding, the trial in the KK Proceedings would inevitably have been unable to proceed and the claims would have been lost, and with them HF3's rights under the Investment Agreement.

170. In the Investment Agreement "Claimants' Legal Costs" is defined as follows:

> "Claimants' Legal Costs" means all or any of the following:
>
> (a) the reasonable costs incurred by the Claimants in the conduct of the Proceedings consistent with the Agreed Budget and any accepted variation thereto agreed by the Claimants and HF3 in writing including:
>
> (i) the standard costs of the Legal Representatives as set out in the Agreed Budget for each stage of the Proceedings and payable pursuant to, and as defined in, the Legal Costs Agreement;
>
> (ii) the standard costs of the Barristers as set out in the Agreed Budget for each stage of the Proceedings;
>
> (iii) expert fees up to the amounts set out in the Agreed Budget for each stage of the Proceedings;
>
> (iv) disbursements;
>
> (v) out of pocket costs incurred by HF3 in contemplation of this Agreement, including (1) any counsel's opinion, background check fees and valuation advice, (2) the amount of all costs and expenses (including legal fees) reasonably incurred by HF3 in connection with any amendment, waiver or consent

> requested by or on behalf of the Claimants or specifically allowed by this Agreement, to this Agreement, and (3) the amount of all costs and expenses (including legal fees) incurred by HF3 in connection with the enforcement of, or the preservation of any rights under, this Agreement including the taking of any action pursuant to the Security (if any); and
>
> (vi)VAT or equivalent local tax where applicable.
>
> (b) any Adverse Costs Order made against the Claimant in relation to the Causes of Action…" [emphasis added]

171. Clause 8.1 of the Investment Agreement reads:

> "For the duration of the Proceedings the Claimants undertake to:"
>
> (a) Instruct the Legal Representatives to conduct the Proceedings reasonably and with due regard to the overriding objective set out at rule 1.1 of the English Civil Procedure Rules;
>
> (b) Instruct the Legal Representatives to take all commercially reasonable steps to avoid or minimise Adverse Costs, including taking all steps reasonably required to obtain Adverse Costs Insurance consistent with the Agreed Budget;
>
> I Instruct the Legal Representatives to comply with all orders made by the Court in the Proceedings and the Civil Procedure Rules;
>
> (d) Provide all information, evidence and documents required by the Legal Representatives in order to comply with the above instructions and shall deal promptly (which for purposes of this clause shall mean within seven calendar days unless the Proceedings require response within a shorter time period) and diligently and in good faith with requests by the Legal Representatives to provide statements of truth, witness statements and to search for disclosable documents;
>
> I Devote adequate resources in terms of finance and manpower and otherwise act in good faith to enable the Legal Representatives to conduct the Proceedings efficiently;
>
> (f) Co-operate generally with the Legal Representatives in the conduct of the Proceedings; and
>
> (g) Consult with and keep HF3 appraised of each and every step in the Proceedings, including instructing and requiring the

> Legal Representatives to copy HF3 on any communications and emails relating to costs, strategy and decision making and any other correspondence it may request to be disclosed from time to time in relation to any step or document in the Proceedings.
>
> (sub-clauses 8.1(a) through 8.1(g) being the "Overriding Objective").
>
> For the avoidance of doubt, breach of this clause 8 shall amount to a fundamental breach of this Agreement."

172. Clause 5 "Claimants' Undertakings" read (so far as material):

> "5.2… Accordingly the Claimants undertake that they will, and will direct their Legal Representatives… to:
>
> (a) provide, by email, either by their Legal Representatives or otherwise, a written report to [HLF] at least every month…
>
> (b)…give HF3 free access and when requested promptly provide or cause the Legal Representatives promptly to provide copies to HF3 of all material documents produced by or for the Claimants in relation to the Proceedings and any legal and other advice received by the claimants relating to the Causes of Action…
>
> I…
>
> (d) act reasonably and commercially in the prosecution of the Proceedings and listen carefully to the advice of the Legal Representatives
>
> I change the Legal Representatives or Barrister only with the prior written agreement of HF3…
>
> (f) during the conduct of the Proceedings and if considered appropriate by the Legal Representatives, propose mediation with the Defendants…
>
> (g.)…
>
> (h) in the event they receive an offer of Settlement… immediately notify the Legal Representatives and HF3…
>
> (i)…
>
> (j)…
>
> (k)…"

173. It was submitted for KK JSC that:

i) To qualify as "Claimants' Legal Costs" the costs in question must be:

> "reasonable costs incurred by the Claimants in the conduct of the Proceedings consistent with the Agreed Budget and any accepted variation thereto agreed by [the Funded Parties] and HF3 in writing". [emphasis added]

ii) The requirement that such costs be incurred "consistently with the Agreed Budget and any accepted variation thereto" involved a critical protection for the Funded Parties in the form of control over HF3's investment to which the multiplier would apply.

iii) The Variations Payments were payments made in excess of "the Agreed Budget" in the original Investment Agreement. If the Disputed Variation Letters are deemed invalid, the Variations Payments could not qualify as "Claimants' Legal Costs" because they would not be costs incurred "consistently with the Agreed Budget and any accepted variation thereto agreed by the Claimants and HF3 in writing".

174. It was further submitted for KK JSC that the Variations Payments did not meet the other pre-conditions in the definition:

i) "incurred by the Claimants": these are costs incurred by HF3;

ii) "(v) out of pocket costs incurred by HF3 in contemplation of this Agreement…": these are costs incurred in preservation of its rights not in contemplation of the Agreement.

175. In response it was submitted for HF3 that:

i) Subparagraph (v) would be nugatory if it was restricted to costs incurred by the Claimants; it was obvious that it was intended to catch "potentially something";

ii) The costs identified in (v) such as variations and enforcement cannot be costs "in the conduct of the Proceedings consistent with the Agreed Budget (as varied)";

iii) "in contemplation of this Agreement" means costs "in relation to" the Agreement.

Relevant legal principles

176. In my view the starting point is the decision of the Supreme Court in *Wood v Capita Insurance Services Limited* [2017] UKSC 24 and the judgment of Lord Hodge. The key passages (so far as relevant to this case) are as follows:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as

a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning…

11. …Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77)…

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571 , para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or

> deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions." [emphasis added]

177. The Claimant also relied on *Chartbrook Ltd and another v Persimmon Homes Ltd* [2009] UKHL 38 at [25]:

> "25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied." [Emphasis added]

Discussion

Preservation of rights

178. HF3 submitted that it was preserving its rights by "stepping in and doing what the Funded Parties are contractually obliged to do". This raises two issues, firstly whether HF3 is correct that it was doing "what the Funded Parties are contractually obliged to do" and secondly whether by funding the proceedings in this way it can be said to be preserving its rights under the Investment Agreement.

179. Clause 8.1 deals with the obligations of the Funded Parties in essence to give proper instructions to the legal representatives and to cooperate with those representatives including providing information and documents. Subclause (e) of Clause 8.1 in my view has to be read in the context of Clause 8.1 and in my view the meaning of subparagraph (e) "to devote adequate resources… to enable the Legal Representatives to conduct the Proceedings efficiently" does not (contrary to the submissions for HF3) create a broad and freestanding obligation to fund the proceedings to the extent necessary above and beyond the funding agreed to be provided by HF3. The context is that clause 8.1 is dealing with the mechanics of the relationship with the legal representatives. There are other provisions in the Investment Agreement which deal expressly with the obligation to fund and for example clause 10.3 which deals expressly with a failure by the Funded Parties to enforce a judgment.

180. Similarly in my view the reliance by HF3 on Clause 5.2(d) is misplaced. In my view subclause (d) has to be read as a whole and in the context of clause 5.2 as a whole. Subclause (d) imposes an obligation "to act reasonably and commercially in the prosecution of the Proceedings and listen carefully to the advice of the Legal Representatives". Read in that context it is an obligation as to the way in which the Funded Parties should act in pursuing the Proceedings and in acting reasonably and

commercially, it should be paying regard to the advice of its lawyers. It is not a general obligation to provide unlimited funding. This interpretation is confirmed when one considers Clause 5.2 in its entirety: it is dealing with the mechanics of the relationship with the legal representatives and the involvement of HF3 in the dealings with the legal representatives. Whilst the literal meaning of the words in subclause (d) "to act reasonably and commercially" is broad, when the language is considered in context, in my view the objective meaning is not that the Funded Parties thus undertook a general obligation to fund or co-fund the prosecution of the proceedings where necessary.

181. In my view therefore HF3 is incorrect that it was doing "what the Funded Parties are contractually obliged to do".

182. The second issue is whether by funding the proceedings in this way it can be said to be preserving its rights under the Investment Agreement and within the scope of "Claimants' Legal Costs".

183. In my view a narrow interpretation of the words "preservation of rights" is consistent with the commercial context namely that the purpose of defining Claimants' Legal Costs is to set the figure for the "HF3 Investment" which HF3 was entitled to recover if the proceedings which it funded were successful and in respect of which it was entitled to claim a multiplier by way of a return on its investment. The contrary interpretation would increase HF3's return by an indirect way: I take into account that this was a professionally drafted contract and that such a consequence would in my view have been spelt out if it had been the intention.

184. Considering the literal meaning of the words and the contract as a whole, it seems to me consistent with the commercial rationale that the objective meaning of the language is that the reference to "preservation of rights" in subparagraph (v) should be narrowly construed and does not extend to HF3 "stepping in" and funding the proceedings.

185. Even if I were wrong on that and the words "preservation of rights" do extend to the situation where HF3 decides to step in and fund the proceedings, the Variation Payments are in excess of the Agreed Budget. This therefore raises the issue of the preconditions which KK JSC submitted have to be satisfied.

<u>The preconditions</u>

186. As noted above there are several apparent preconditions to be satisfied:

i) "incurred by the Claimants";

ii) "consistent with the Agreed Budget";

iii) "out of pocket" costs and "in contemplation of" the Agreement.

187. I accept the submission that if one takes the literal interpretation of the opening words "incurred by the Claimant" none of the costs in subparagraph (v) could be recovered under that provision as they are costs incurred by HF3 and not the Funded Parties.

188. The words "incurred by HF3" appear three times in subparagraph (v). There is thus a clear conflict between the opening words of the definition and the words in subparagraph (v) itself. If subparagraph (v) is read as limited to costs incurred by the Claimant then subparagraph (v) will be rendered nugatory in its entirety. That tends to suggest that this is not the objective meaning of the clause. The objective meaning in my view is that the words "incurred by the Claimant" were not intended to prevent any claim for costs under subparagraph (v) and in effect should be disregarded in relation to subparagraph (v).

189. However in my view this is not the case in relation to the words "consistent with the Agreed Budget or agreed variations". The application of this limit would give effect to the natural meaning of the words and would not render subparagraph (v) nugatory or redundant.

190. It was submitted for HF3 that the language only requires the costs to be "consistent with" the Agreed Budget and thus where the Agreed Budget makes no provisions for costs which were unpredictable it can be said that the Variations Payments were "consistent with" the Agreed Budget. It seems to me that the literal and natural meaning of the word "consistent with" is that it should be "in agreement with" or "in accordance with" the Agreed Budget. Even if the literal meaning of the words could be interpreted as HF3 contend, this would not extend to the Variations Payments as these were not by their nature unpredictable as might be the case on say, costs of enforcement, but were costs of funding the proceedings which could and should have been incurred consistently with the Agreed Budget and any agreed variations.

191. Looking at the commercial consequences of the rival interpretations, on the one hand one could say that costs incurred in the preservation of rights might be expected to be over and above the Agreed Budget incurred in the conduct of the Proceedings. However the definition of Claimants' Legal Costs feeds into the definition of "HF3 Investment" which attracts a return on the amount funded for the benefit of HF3. The commercial consequence would therefore tend to support a narrow rather than a broad interpretation.

192. In balancing the literal meaning of the words as well as the commercial consequences of the rival interpretations, I also take into account that this was a professionally drafted contract.

193. The highest that HF3 put its case in oral submissions is that it was obvious that subparagraph (v) was intended to catch "potentially something". However applying *Chartbrook,* it is not enough that "something has gone wrong with the language" unless it is clear what a reasonable person would have understood the parties to have meant.

194. It seems likely that "something has gone wrong with the language" in aspects of the definition. In my view the objective meaning of the language of subclause (v) is limited by the words "consistent with the Agreed Budget and any accepted variation thereto" and a reasonable person would not have understood the parties to have meant sub-clause (v) to allow HF3 to claim the Variations Payments.

Conclusion on Claimants' Legal Costs- Variations Payments

195. For the reasons discussed above I find that the Variations Payments made by HF3 were not made in connection with the preservation of its rights under the Investment Agreement and in any event did not constitute Claimants' Legal Costs.

Do the alleged KK Proceedings Payments constitute 'Claimant's Legal Costs'? (Issue 5.4)

196. The "KK Proceedings Payments" are sums HF3 provided primarily between about late August 2017 and 23 April 2018 by way of additional funding for the KK Proceedings. Thus they encompass amounts incurred after the trial had ended but before judgment was sent out in draft on 11 December 2017 and handed down on 22 December 2017, as well as costs incurred following the hand down of the judgment.

197. It is submitted for HF3 that the payments were made to preserve HF3's rights under the Investment Agreement at a time when the Funded Parties were in breach of their obligation to fund the proceedings under Clause 5.2 (d) and Clause 8.1 (e) and in the later period to fund enforcement action under Clause 10.3.

198. For the reasons discussed above in relation to the Variations Payments in my view these do not fall within the definition of Claimants' Legal Costs. To the extent that these were costs incurred pursuant to the exercise of its rights under Clause 10.3 these are expressly covered under Clause 10.3 and do not constitute Claimants' Legal Costs for the reasons discussed below.

Do the alleged Enforcement Costs constitute 'Claimants' Legal Costs' and/or are they part of the 'HF3 Investment' as those terms are defined in the Investment Agreement? (Issue 7.4)

199. The enforcement costs (the "Enforcement Costs") represent the payments made by HF3 after it took control of the enforcement action in the KK Proceedings pursuant to Clause 10.3 of the Investment Agreement.

200. Clause 10.3 of the Investment Agreement provides:

> "The Claimants warrant and undertake that they shall in a timely manner take all reasonable steps and actions (including pursuing judicial proceedings) to enforce any judgment, award or order or settlement agreement resulting from a Success in Proceedings to receive the Proceeds in full (to include but not be limited to any order for costs) so that they are able to discharge their obligations to HF3 under this clause 10 or clauses 11, 12, 15 and 16. If for any reason whatsoever the Claimants breach this clause 10.3, to the extent HF3 is not aware of such breach at that point in time, the Claimants shall promptly notify HF3 of such breach and HF3 shall be entitled (and the Claimants shall allow HF3) to take over sole conduct and control of all negotiations and proceedings in the event that the Claimants fail to remedy such breach (if it is remediable) within ten (10) calendar days of HF3 requesting such remedy. The Claimants shall provide HF3 with all

> assistance and cooperation reasonably requested by HF3 and they shall be liable for all expenses, including legal fees and expenses that HF3 incurs pursuant to its exercise of its rights under this clause which shall be an amount recoverable under clause 10.1(c) of this Agreement…" [emphasis added]

201. Clause 10.1 in turn provides (so far as material):

> "The Claimants shall apply or instruct the Legal Representatives to apply any Proceeds received as a result of Success in the Proceedings, and which it holds on trust ,in the following order immediately upon receipt of such Proceeds:
>
> (a) deduction of all stamp duties, bank charges and currency exchange costs (if any) payable by the Claimants relating to or arising out of any such Success in the Proceedings;
>
> (b) pay to the Claimants, the Claimants' Incurred Costs to be recovered from the Costs Award (if any); where there is no Costs Award the Claimants' Incurred Costs will be recovered under clause 10.1(g).
>
> (c) pay to HF3, the HF3 Investment, first exhausting any remaining Costs Award (if any) and then the remainder proportionately from the Peak Claim Proceeds and Remaining Proceeds. Where there is no remaining Costs Award or no Costs Award, the HF3 Investment shall be recovered proportionately (in accordance with the allocated values) from the Peak Claim Proceeds and the Remaining Proceeds. Where there is only Peak Claim Proceeds, HF3 shall receive the HF3 Investment in its entirety from the Proceeds;
>
> (d) pay to HF3 and the Banker, in their capacity as Trust Beneficiaries, from Peak Claim Proceeds less the HF3 Investment (calculated pursuant to clause 10.1(c)above), the HF3 Peak Claim Return and the Banker Entitlement on a £ for £ basis;…
>
> (e) pay to HF3, in its capacity as Trust Beneficiary, the HF3 Return (less any sums recovered pursuant to clause 10.1(d) above) from any remaining Peak Claim Proceeds (if any) and Remaining Proceeds;
>
> (f) pay to the Success Fee Beneficiaries, in their capacity as Trust Beneficiaries, the amounts due under their respective Success Fee Agreements;

> (g) pay to the Claimants any remaining amount of Proceeds, which each Claimant shall receive directly in their capacity as Trust Beneficiaries..." [emphasis added]

202. It was submitted for HF3 (paragraph 46 of Claimant's closing submissions) that the Enforcement Costs fall within the definition of Claimants' Legal Costs:

    i) they are costs and expenses incurred in connection with the "preservation of rights" under the Investment Agreement in that they preserve HF3's rights to have all reasonable steps and actions taken to enforce the judgment in circumstances in which the Funded Parties were in breach of Clause 10.3;

    ii) they are costs and expenses incurred in connection with the enforcement of the Investment Agreement in that HF3 is enforcing its rights to take over sole conduct and control of the KK Proceedings pursuant to Clause 10.3.

203. In my view the Enforcement Costs were not incurred "in connection with the enforcement of [the Investment] Agreement". HF3 was not enforcing the Investment Agreement but was exercising its rights specifically and expressly provided for in clause 10.3 to take over conduct of the proceedings to enforce a judgment.

204. I also reject the submission that the Enforcement Costs were incurred in connection with "the preservation" of any rights. In my view HF3 was not "preserving" its rights but was exercising its rights under and in accordance with the provisions of the Investment Agreement.

205. Further even if the Enforcement Costs fell within the literal meaning of the language in subparagraph (v), the language of Claimants' Legal Costs has to be considered against the other provisions of the contract. In particular Clause 10.3 has its own regime for costs and expenses to be recovered in the event that HF3 takes over conduct of the proceedings and expressly provides that it is "an amount recoverable under Clause 10.1(c)". It was submitted for HF3 (paragraph 48 of Claimant's closing submissions) that the fact that Enforcement Costs constitute Claimants' Legal Costs is "confirmed" by Clause 10.3 itself. However this is not what the language of Clause 10.3 says. The language used is that it is an amount recoverable "under Clause 10.1(c)" and not that these costs constitute Claimants' Legal Costs. Given that they are expressly dealt with by reference to Clause 10.1(c) there is no commercial rationale to infer that the meaning of the language is that the costs should be recoverable both as Claimants' Legal Costs and separately under Clause 10.1(c).

206. Even if the Enforcement Costs did fall within the language in subparagraph (v)(3) the costs would not satisfy the preconditions in "Claimants' Legal Costs" discussed above, in particular that "Claimants' Legal Costs" are expressed to be limited to costs "consistent with the Agreed Budget." Even if I were wrong that these words operated as a limitation on costs incurred in subparagraph (v), there are the additional limitations in the language of subparagraph (v) itself to "out-of-pocket" expenses and "in contemplation of" both of which need to be ignored and/or rewritten to give effect to HF3's construction.

207. In my view therefore the Enforcement Costs do not constitute "Claimants' Legal Costs".

208. In the alternative it was submitted for HF3 (paragraph 50 of Claimant's closing submissions) that the Enforcement Costs constitute part of the HF3 Investment "because that is what Clause 10.3 provides". That is not what the language of Clause 10.3 says. Rather the language provides that it is "an amount recoverable under Clause 10.1(c)". When this language is considered in the context of Clause 10.1, Clause 10.1 is dealing with the order of distribution of payments to the various interested parties and Clause 10.1 (c) is thus placing HF3 in the order of distribution of payments (commonly referred to as the "waterfall").

209. Clause 10.1(c) does refer to the HF3 Investment but "HF3 Investment" is a separate definition and could have been used in Clause 10.3 if that was the intention. The fact that the defined term was not used in Clause 10.3 in a professionally drafted contract tends to support the interpretation that the meaning of the language in Clause 10.3 was to position these particular costs and expenses in the appropriate place in the waterfall.

210. Alternatively the defined term "HF3 Investment" could have expressly referred to enforcement expenses under Clause 10.3 if that was the intention.

211. The definition of "HF3 Investment" reads:

> "HF3 Investment" means the aggregate amount of the Claimants' Legal Costs and Adverse Costs Orders that HF3 has paid or incurred or, in the case of Adverse Costs, provisioned a liability in respect thereof under this Agreement, PROVIDED that for purposes of calculating the 2 to 3.5 times multiple in Schedule 2, the HF3 Investment shall be equal to the aggregate gross amount of the Claimants' Legal Costs so paid, incurred or provisioned by HF3 without giving effect to any subsequent payments received by HF3 (including following an interim recovery under clause 12) or prior discharge of any such amounts or liabilities by the Claimants or any other person."

212. It was submitted for HF3 (paragraph 51 of Claimant's closing submissions) that it is "inherently improbable" that the parties would have intended that HF3 should not receive any form of return on expenses it incurs in pursuing enforcement action in the KK Proceedings and that would be a "commercially unreal" result.

213. In my view the interpretation advanced by KK JSC is consistent with commercial common sense. HF3 takes the risk of funding proceedings and if such proceedings are successful, HF3 is entitled both to the reimbursement of the amounts expended and a return on that investment to reflect the risk that they have taken in funding the proceedings. The risk that HF3 takes and for which it receives a return is the pursuit of the claim in the proceedings. Once judgment has been obtained and the proceedings move to the enforcement stage, the proceedings have in my view been successful even though there may be associated risks with enforcement. In my view therefore the interpretation which would be consistent with the commercial rationale is that whilst HF3 is entitled to be repaid Enforcement Costs where they are incurred pursuant to Clause 10.3, it was not intended that they should receive a return on those expenses.

214. I do not accept the submission for the Claimant (paragraph 51 of Claimant's closing submissions) that the construction advanced by KK JSC "rewards it for its breach of contract". HF3 has the entitlement pursuant to Clause 10.3 to recover costs incurred in the event that HF3 takes over control of enforcement following a breach by the Funded Parties. The clause is specific to this situation and if it was intended to operate in the way in which HF3 contends, this could have been spelt out. Whilst the failure to use clear language is of course not determinative, the court has to balance the literal meaning of the language used against the context of the other provisions of the contract as well as having regard to what is said to be the commercial consequences. The court bears in mind that, as Lord Hodge said in *Wood*, the court must be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest.

215. Weighing the literal meaning of the language of Clause 10.3 against the rest of the contract and considering the commercial consequences of the rival interpretations, I find that the objective meaning of the language is that Enforcement Costs do not constitute 'Claimants' Legal Costs' and are not part of the 'HF3 Investment'.

Were each of the alleged Harbour's Other Costs, costs which HF3 has incurred in connection with the enforcement and/or preservation of its rights under the Investment Agreement? Do the alleged Harbour's Other Costs constitute 'Claimants' Legal Costs' as defined in the Investment Agreement? (Issues 6.1 and 6.4)

216. These are sums which HF3 claim on the basis that they have been incurred in connection with proceedings related to the Investment Agreement and in connection with the enforcement and/or preservation of its rights under the Investment Agreement.

217. For the reasons discussed above, in my view these do not constitute costs which can be recovered pursuant to subparagraph (v) of the definition in subparagraph (a) of Claimants' Legal Costs: in particular such costs are limited by the Agreed Budget and to the extent that HF3 relies on Clauses 5.2 and 8.1 as the basis for the claim in relation to the alleged enforcement and/or preservation of its rights, for the reasons discussed above, I reject that submission.

Breach of contract claims: Was it an express term of the Investment Agreement that the Funded Parties would: (i) continue to pay the ongoing legal costs of the KK Proceedings after the 'Agreed Budget' had been exhausted; and/or (ii) negotiate in good faith with HF3 to vary the Investment Agreement so as to increase HF3's aggregate funding commitment; and/or (iii) act reasonably and commercially by entering into such a variation? (Issue 8.1)

218. HF3 rely (paragraph 60 of Claimant's closing submissions) on Clause 5.2(d) and Clause 8.1 (e) and in particular the obligation to "devote adequate resources in terms of finance".

219. Clause 5.2(d) contains an obligation to "act reasonably and commercially in the prosecution of the Proceedings and listen carefully to the advice of the Legal Representatives".

220. Clause 8.1 (e) provides that the Funded Parties shall:

> "(e) Devote adequate resources in terms of finance and manpower and otherwise act in good faith to enable the Legal Representatives to conduct the Proceedings efficiently"

221. There is no express term to negotiate in good faith with HF3 to vary the Investment Agreement so as to increase HF3's aggregate funding commitment.

222. As to the alleged express term that the Funded Parties would: (i) continue to pay the ongoing legal costs of the KK Proceedings after the 'Agreed Budget' had been exhausted and/or (ii) act reasonably and commercially by entering into such a variation, there are no such express terms. As discussed above, in my view, to determine the meaning of the obligation in Clause 8.1(e) to "devote adequate resources in terms of finance", the court has to consider both the language used and the subclause in the context of Clause 8 as a whole. For the reasons discussed above (in relation to Claimants' Legal Costs) in my view this is not a freestanding obligation to fund the proceedings to the extent necessary above and beyond the funding agreed to be provided by HF3. Further in my view, for the reasons discussed above, Clause 5.2(d) read in context does not impose an obligation to act reasonably and commercially in respect of variations of the Investment Agreement and the funding commitment in particular.

Alternatively, was it an implied term of the Investment Agreement that, if the Funded Parties incurred legal fees and expenses in excess of the 'Agreed Budget' without obtaining HF3's prior agreement to increase its aggregate funding commitment, the Funded Parties would be responsible for discharging such liabilities as and when they fell due? (Issue 8.2)

223. In my view HF3 has not shown that such an implied term was "necessary" or "so obvious that it goes without saying". *Marks & Spencer plc v BNP Paribas Securities Services Trust Company* [2016] AC 742 at [23].

224. Clause 3 of the Investment Agreement clearly sets out the express agreement between the parties as to funding. It provided (so far as material):

> "3.1 The total amount of the Agreed Budget produced by the Legal Representatives and Barristers is £8,361,048.20."
>
> "3.2 Subject to the terms and conditions of this Agreement and in consideration of:
>
> …
>
> HF3 agrees to invest in respect of the Claimant's Legal Costs as follows:
>
> (e) in January 2016 HF3 shall pay an amount equal to £330,352 in respect of currently unpaid invoices that fall to be paid within the Agreed Budget (the "Initial Invoices");
>
> (f) in respect of all of the Claimants' Legal Costs that fall within the Agreed Budget and that fall to be paid on or after 1 February 2016 other than the Initial Invoices, HF3 and the

> Claimants shall jointly fund such sums by paying a percentage of the total of the Agreed Budget respectively, of the same promptly when due.
>
> (i) HF3's payments shall be up to a maximum aggregate amount equal to £7,200,000 less sums paid pursuant to preceding paragraph (e).
>
> (ii)The Claimants' payments shall be up to a maximum aggregate of £1,161,048.20 (the "Co-Funding Commitment")
>
> (iii) Each invoice shall be pro-rated, with each of HF3 and the Claimants paying their portion calculated by the product of (A) the value of the invoice and (B) each parties' maximum aggregate as set out at 3.2(f)(i) and 3.2(f)(ii) respectively, divided by the total Agreed Budget less sums paid pursuant to preceding paragraph (e)(the "Co-Funding Arrangement").
>
> The sums payable by HF3 pursuant to this paragraph (f) and the preceding paragraph (e) shall total no more than £7,200,000 and are collectively referred to herein as the "Aggregate HF3 Commitment."

225. Given the express provisions concerning funding in the Investment Agreement including the express provisions concerning the extent of the co-funding commitment on the part of the Funded Parties, it cannot be said that without the alleged implied term, the contract lacks commercial or practical coherence. Further I note that a term should not be implied merely because it is fair or because one considers that the parties would have agreed if it had been suggested to them: *Marks & Spencer* at [21].

226. Accordingly I find that no such implied term has been established in the circumstances.

<u>Is HF3 entitled to claim damages for any breaches of Clause 10.3 of the Investment Agreement or has any such right to damages been excluded by the Investment Agreement? Issue 9.1</u>

227. It was submitted for HF3 (paragraph 56 of Claimant's closing submissions) that Clause 10.3 expressly provides for the Funded Parties "to be liable for all expenses, including legal fees and expenses, that HF3 incurs pursuant to its exercise of its rights under this clause" and notwithstanding the provisions for such expenses to be recoverable from the Proceeds, the two provisions are not mutually exclusive but complementary, as is to be expected given that they arise specifically in response to a breach of contract by the Funded Parties. It was submitted that the Funded Parties are therefore directly liable for the Clause 10.3 costs incurred by HF3, in addition to HF3's right to recover those sums in the waterfall of payments out of Proceeds.

228. The relevant provision in Clause 10.3 provides:

> "The Claimants shall provide HF3 with all assistance and cooperation reasonably requested by HF3 and they shall be liable for all expenses, including legal fees and expenses that HF3 incurs pursuant to its exercise of its rights under this clause which shall be an amount recoverable under clause 10.1(c) of this Agreement". [emphasis added]

229. As set out above, Clause 10.1 sets out the order of distribution of the payments out of the proceeds of successful proceedings. The clause is silent as to what should happen if the proceeds are insufficient to recover these costs incurred under Clause 10.3. It is submitted for HF3 (paragraph 57 of Claimant's closing submissions) that "there is no logic to it being required itself to take the risk that the Proceeds may not be sufficient to recover all its costs in full."

230. The natural meaning of the language in the sentence in Clause 10.3 is that the expenses incurred under 10.3 are recoverable in accordance with the provisions for the distribution of the proceeds set out in Clause 10.1. The language is mandatory not permissive in the use of the word "shall". The alternative construction for which HF3 contends would make the words "which shall be an amount recoverable under Clause 10.1(c) of this Agreement" arguably redundant as on HF3's construction they would be recoverable in any event. If it was intended that the expenses should be recovered under Clause 10.1 only to the extent that the Proceeds were sufficient, that is not what the language says. HF3 contends that it should not as a matter of "logic" take the risk that the Proceeds may not be sufficient. However the "logic" is unclear as to why the clause should only address the position where, if the Proceeds are sufficient, these expenses are expressed to be claimed through the waterfall and subject to the priorities set out, but if they are not sufficient, the clause is silent but nevertheless they are capable of being claimed directly without regard to the provisions of the waterfall setting out the priorities for payment.

231. In my view balancing the literal meaning and the context, the objective meaning of Clause 10.3 is that HF3 is not entitled to claim damages for any breaches of Clause 10.3 of the Investment Agreement.

Is HF3 entitled to recover a sum equal to the Variations Payments in unjust enrichment? Issue 4B

232. It was common ground that there are three necessary elements for a claim in unjust enrichment: (1) the defendant has been enriched or received a benefit; (2) that enrichment was at the expense of the claimant; and (3) the enrichment is unjust: *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227 (per Lord Steyn).

233. It was also common ground that the second element is established in respect of both unjust enrichment claims.

234. For the purposes of this judgment I propose to assume that the first element is also satisfied and consider only whether the enrichment was unjust.

Submissions

235. It was submitted for HF3 (paragraph 254 of Claimant's closing submissions) that the Variation Payments constituted an enrichment that was unjust for four reasons. In summary these were:

i) if the Disputed Variation Letters are held to be invalid, the Defendant's enrichment would have been unjust because there would have been a total failure of consideration for the Variations Payments.

ii) if the Disputed Variation Letters are held to be invalid, the Claimant's payment of the Variations Payments would have been caused by a mistake of fact, thereby rendering the Defendant's enrichment unjust.

iii) The Defendant did not object to the Variations Payments despite having a reasonable opportunity to do so, and they therefore constituted an unjust enrichment.

iv) The Variations Payments discharged the Defendants' debt, and were paid at the request of KK JSC (via Mr Werner and Mr McGregor).

The ground of "commercial compulsion" is no longer pursued (paragraph 74 of the Claimant's skeleton for trial).

236. HF3 accepted (paragraph 6 of Schedule 3 to its skeleton for trial) that for these purposes (its first ground) failure of the consideration for a payment means that:

> "the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself." (*Sharma v Simposh Ltd* [2013] Ch 23 (CA) at [24])

237. As to the principles of mistake (its second ground), HF3 accepted (paragraphs 10-12 of Schedule 3 to its skeleton for trial) the criteria set out in *Dextra Bank v Bank of Jamaica* [2002] 1 All ER Comm 193 (PC), at [28]:

> "To succeed in an action to recover money on that ground, the plaintiff has to identify a payment by him to the defendant, a specific fact [or law] as to which the plaintiff was mistaken in making the payment, and a causal relationship between that mistake of fact [or law] and the payment of the money.."

238. In the light of my findings above concerning the knowledge of HF3 and the lack of ostensible authority, the first and second grounds cannot be sustained on the facts of this case. In my view this is not a case of HF3 having "doubts" - the position considered by Flaux J with reference to the authorities in *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2010] 1 Lloyd's Rep 631.

239. In relation to the third and fourth grounds it was submitted for KK JSC that:

i) the Claimant would have made the payments regardless of whether the Disputed Variation Letters had been signed.

ii) the Defendant did not "freely accept" the Variations Payments because: it did not request them; it had no opportunity to consider rejecting them; and it reasonably believed that the Claimant knew the payments fell outside the scope of the Investment Agreement but proceeded to make them anyway to protect its investment.

Would the Claimant have made the payments regardless of whether the Disputed Variation Letters had been signed?

240. The evidence relied upon by KK JSC in this regard is the email dated 6 March 2017 from Mr Tonnby who at the material time was the Chairman of HLF. He said:

> "- Assuming you and Peter remain happy on merits I wish to continue funding
>
> -I am VERY unhappy about being in this position at this time
>
> - apparently needing to increase the budget by 3.8m (I do not buy the re-allocation argument as I have not seen anything to suggest that we will not need to spend money on enforcement post a win)
>
> - not being able to improve our terms or get the claimants to share the costs as they are in a procedure where they are subject to bureaucratic claimants
>
> Given the above I think that how we present any decision to continue funding will be paramount as I want better terms and I want to maximise the chance that the bureaucratic claimants participate…" [emphasis added]

241. At the time the evidence is that HF3 had already incurred substantial amounts in the proceedings and had it not continued to fund the proceedings to enable them to continue, it would have lost both the investment and the prospect of a return on that investment.

242. The Claimant submitted that Ms MacPherson's evidence on this in paragraph 24 of her first witness statement was that under no circumstances would additional monies have been released if the Board, Ms MacPherson herself or any member of the Harbour team had any doubt as to the validity of the Variations Letters or that a return applied to that funding. However for the reasons discussed above I have already rejected the evidence of Ms MacPherson in this regard.

243. I prefer the evidence of the contemporaneous documentation and in my view the email of Mr Tonnby is clear: he wished to continue funding even though he was unhappy that the budget needed to increase and he could not get improved terms approved by the Creditors' Committee. His email shows that HF3 wanted to secure improved terms but (contrary to the submission for HF3) in my view it does not show that HF3 would only advance further funds on improved terms. As set out above, his email says:

> "…I want better terms and I want to maximise the chance that the bureaucratic claimants participate…"

However he expressly stated that he wanted to continue funding.

Did KK JSC "freely accept" the Disputed Variations Payments?

244. The court was referred to the statement in *Goff & Jones: The Law of Unjust Enrichment* at 17-03:

> "[A defendant] will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the claimant who rendered the services expected to be paid for them, and yet did not take a reasonable opportunity open to him to reject the proffered services. Moreover, in such a case, he cannot deny that he has been unjustly enriched."

245. The submissions did not address the criticisms of the principle referred to in *Goff & Jones* at 17-05 and I proceed on the basis that this represents the relevant law.

246. It was submitted for the Claimant that:

i) KK JSC was plainly aware through Mr Werner and Mr McGregor, whose knowledge in relation to the KK Proceedings and their funding is to be attributed to KK JSC that HF3 was making the Variations Payments at the time, and indeed they had positively requested HF3 to make those payments. Mr Werner and Mr McGregor at least had power on behalf of KK JSC to object to those payments and request that HF3 cease making them but they did not do so. KK JSC therefore had a reasonable opportunity to reject those payments.

ii) even if the Creditors' Committee were also required to have such knowledge, it is clear that as a matter of fact they did.

247. It was submitted for KK JSC (paragraph 179 (3) of its closing submissions) that:

i) KK JSC did not request those payments given neither Mr Werner nor Mr McGregor had actual or ostensible authority to request them on its behalf, having regard to the terms of para.4.3.1 of the KK JSC Rehabilitation Plan.

ii) KK JSC was not provided with a reasonable opportunity to consider whether to accept or reject the Disputed Variations Payments as payments on its behalf. The evidence of Mr Baktybayev's in cross-examination was that they were awaiting detailed information from Mr Werner, Mr McGregor and/or HF3 about the Disputed Variation Payments.

248. I do not accept that in circumstances where they had no actual or ostensible authority, the knowledge of Mr Werner and Mr McGregor that HF3 was making the Variations Payments at the time is to be attributed to KK JSC. Even if I were wrong on that I do not accept that there could have been "free acceptance" by KK JSC without the consent of the Creditors' Committee.

249. As to whether there was "free acceptance" by the Creditors' Committee on behalf of KK JSC, I have referred above, when considering the issue of ostensible authority, to the relevant documentary evidence concerning communications with ENPF and the Creditors' Committee.

250. The following correspondence is of particular relevance in this context.

251. In the letter of 7 March 2017 from HLF to the Creditors' Committee HLF informed the Creditors' Committee that the trial of the KK Proceedings was scheduled to commence on 25 April 2017 and that the build up to trial had involved significantly more work than was initially anticipated and costs had therefore increased. The letter stated that the budget for the KK Proceedings had increased to £11.8 million from an original budget of £8.3 million. Thus in order to continue an additional £3.5 million "must be found". The three options put forward were that:

i) the creditors funded the additional cost;

ii) the creditors and HF3 each funded an amount of the additional cost;

iii) HF3 funded the additional cost.

The letter stated that if no funding was obtained the London proceedings will discontinue and the claimants may also become liable for the defendants' costs. The letter then continued:

> "HLF have been approached to consider providing funding for the £3.5 million additional costs…
>
> We wish to discuss this with you, because if HF3 is to provide any further funding this will have to be on amended terms to reflect the additional risk to HF3…
>
> HLF would like the opportunity to discuss these matters further with the creditors committee please let us know your availability to meet in person in the next two weeks. We are happy to travel to Kazakhstan to do so."

252. On 18 March 2017 Ms Emerson received an email from Mr Baktbayev:

> "…The EPPF is studying your proposal for financing a budget increase. However, you should understand that, being a quasi state structure, we, unfortunately, cannot make such decisions in a short time, without appropriate approvals.
>
> Nevertheless, I hasten to inform you that on 24.03.2017. We have a meeting of the committee on problem assets, which will consider this issue and, most likely, the date of the meeting with you will be indicated…" [emphasis added]

253. As referred to above, on 7 April 2017 a meeting of the Creditors was held which was attended by Ms Dunn although ENPF refused to meet her separately.

254. The relevant evidence of Mr Baktybayev in cross examination concerning the refusal to hold a separate meeting was as follows:

> "Q. And you appreciated, didn't you, that at this stage the trial was due to start in two weeks' time?
>
> A. We understood that we were placed in a very uncomfortable corner in a very uncomfortable position, and we were left with no time to take a well-thought-out decision. Nevertheless, we would have been willing to look at the documents, had they been provided to us. I think that the key point was for us to even look at something, but we weren't given the opportunity to look at the documents.
>
> Q. So is it a fair summary of your position at the time that you appreciated that the situation was urgent, but you were not able to deal with it urgently?
>
> A. Yes, we understood that in the absence of sufficient information, it would be very hard for us to analyse the situation and to take a well-thought-out decision, especially as in the final analysis we were never given any materials, any documents. Perhaps there was never any intention for us to be provided with any documents." [Day 3 p13-14]

255. In her email of 8 April 2017 following the Creditors' meeting Mr Dunn observed that:

> "Off the record ENPF say they are supportive of what we are doing and want the proceedings to carry on."

256. In the letter from Mr Werner of 18 April 2017, Mr Werner said:

> "….Management of the Proceedings frequently requires important decisions to be taken on an urgent basis, including decisions relating to expenditure and settlement. As the majority creditor, holding over 50% of KKJSC's debt, ENPF should play an important role in these decisions. However, it is apparent that ENPF is not prepared to promptly consider and take important decisions relating to the Proceedings. In these circumstances, as the CEO of KKJSC, I consider that I am entitled to continue to manage the Proceedings on behalf of KKJSC and take any decisions necessary to ensure a successful outcome for KKJSC's creditors. This includes negotiating and agreeing to the amended terms required by Harbour for their additional funding." [emphasis added]

257. On 31 May 2017 Mr Werner wrote to the Creditors' Committee:

> "We send to your attention the signed changes to the agreement with Harbour Fund III (further Harbour) of March 7 and April

> 22, 2017. Since March 7, 2017, Kazakhstan Kagazy and Harbour Fund III have asked the management of United Savings Pension Fund to organize a meeting and discuss issues of increasing Harbour's budget and funding, but the answer was received only on May 25, 2017, while the hearings in the case began on April 25, 2017. In order not to harm the course of the court hearings, we were forced to sign this agreement on behalf of Kazakhstan Kagazy and Kazakhstan Kagazy PLC, as Harbour could decide to terminate the financing. The plaintiffs would not have been able to continue to participate in the trial without additional funding. As stated in the letter on 18 April 2017, a decision had to be taken under these circumstances and I felt it was in the interests of the creditors to accept additional funding for Harbour" [emphasis added]

258. The documentation then shows that a letter was sent on 26 June 2017 in which Mr Werner informed HLF that the Creditors' Committee wished to meet with representatives of HF3, the purpose of the meeting being to discuss the terms of the additional financing of the KK Proceedings. In a letter dated 3 July 2017 HLF indicated that it would be happy to attend a meeting but noted that the terms of the additional financing "have been agreed by the parties to the Investment Agreement". In a further letter on 11 July 2017 however Ms Emerson told Mr MacGregor that:

> "…, due to heavy work schedules it will not be possible for any representatives of HLF or HF3 to travel to Almaty to meet ENPF at this time, or for the next few months. We remain keen to meet with ENPF, and would welcome them at a meeting at our offices in London. Alternatively, we would be happy to hold a meeting via Videocon, if ENPF are amenable to this."

Discussion

259. It was submitted for HF3 that at the time of the trial in the KK Proceedings, the Creditors' Committee would have known:

i) the budget under the original Investment Agreement had been exhausted;

ii) the trial was going ahead and the Funded Parties were being represented by Allen & Overy ("A&O"), acting on the instructions of Mr Werner and Mr McGregor; and

iii) the trial was being funded by additional funds provided by HF3, or at least if they did not know that then it was the only reasonable inference in the circumstances (paragraph 262 of Claimant's closing submissions).

260. I note that the Creditors' Committee is not the same as the body of the creditors. It is an elected body to represent the interests of the creditors and oversee the actions of the Rehabilitation Manager and the rehabilitation process generally. At the time of the Disputed Variation Letters there were three members of the Committee: the European Bank for Reconstruction and Development, ENPF and IC London-Almaty JSC.

261. It is clear that the Creditors' Committee were told in the letter of 7 March 2017 (referred to above) that the original budget had been exceeded. However the letter of 7 March 2017 merely asks for an opportunity for HLF to discuss the three options which are set out in that letter.

262. In this regard it was put to Mr Baktybayev:

> "…you knew that KK JSC could not afford to pay extra funding?"
>
> A. We knew that KK JSC had problems with financings yes.
>
> Q. And it would then take several more weeks, wouldn't it, or the creditors' committee of KK JSC to meet and take a decision?
>
> A. Probably yes, but given the situation Harbour put us in, we had no other way. This shotgun decision that was expected from us, I mean, nobody asked us to take it, but it was expected, it was described but nobody asked us to take a specific decision and to call the creditors' committee, but perhaps this is what it looked like in Harbour's eyes but ENPF cannot take decisions so frivolously without appropriate analysis and Harbour should have understood that. Harbour was aware of the composition of the creditors' committee and it also knew what ENPF was". [emphasis added] [Day 3 p5]

263. It is notable that in the email of 18 March 2017 to Ms Emerson Mr Baktybayev referred to ENPF as a "quasi state structure".

264. In his oral evidence Mr Baktybayev explained that ENPF were not in a position on 7 April 2017 to take a decision, notwithstanding the imminence of the proceedings and Ms Dunn in her email of 8 April referred to the fact that the support of ENPF was "off the record". It is clear from the rest of the email (set out above) that the Creditors' Committee had not given the go-ahead for HF3 to provide the additional funding for the proceedings.

265. In relation to the letter of 31 May it was put to Mr Baktybayev in cross examination that if he had read that at the time, he would clearly have understood that Mr Werner was going to agree to amended terms required by Harbour in order to acquire their additional funding.

266. Mr Baktybayev's evidence was:

> "We understood that Mr Werner might be minded to make some independent decisions if and when he provided information about that to the committee of creditors, and we also understood that for some reason he was saying that ENPF should be doing something that ENPF should not be doing, ie by suggesting that the committee of creditors and ENPF were the same thing, which was not the case" [Day 3 p19]

267. It was then put to Mr Baktybayev:

> "So when you read this letter, you realised he had signed, and so if you hadn't known before, you knew then that the trial that was going on was being funded by new funding from Harbour pursuant to agreed variations agreed by Mr Werner with Harbour in March and April, correct?"

268. Mr Baktybayev replied:

> "A. Yes, we became aware from reading that letter that actually behind our backs Harbour and Mr Werner had executed those documents or they exchanged some letters" [Day 3 p24]

269. Even if the Creditors' Committee knew that the budget under the original Investment Agreement had been exhausted; the trial was going ahead and additional funding had been provided by HF3, knowledge of these matters does not establish that KK JSC "freely accepted" the Variations Payments or that the Variation Payments were paid at the request of KK JSC (via Mr Werner and Mr McGregor).

270. In my view the Creditors' Committee did not have a reasonable opportunity to object to the Variations Payments. The evidence of the email of 18 March 2017 (quoted above) is that ENPF was studying the proposal but highlighted its inability to make decisions in a short timeframe. The evidence of Mr Baktybayev is that at the time of the meeting on 7 April, although it was urgent because there were only 2 weeks before the trial started, ENPF lacked sufficient information. Further as noted above ENPF is not the same as the Creditors' Committee. The fact that the Creditors' Committee became aware from Mr Werner's letter of 31 May 2017 that HF3 were providing the funding pursuant to the Disputed Variation Letters does not mean that it had a reasonable opportunity to object to the Variations Payments in circumstances where the request for detailed information remained outstanding. The letter of 26 June 2017 shows that the Creditors' Committee wanted to meet with HLF to discuss the terms of the additional financing but the correspondence in early July suggests that HLF was in no hurry to meet with the Creditors' Committee. On the evidence KK JSC had reasonable grounds to believe that HF3 knew the payments fell outside the scope of the Investment Agreement but proceeded to make them anyway to protect its investment.

Conclusion on unjust enrichment in relation to the Variations Payments

271. I find on the evidence that KK JSC did not "freely accept" the Variations Payments and the Variations Payments were not paid at the request of KK JSC.

272. For the reasons discussed above, I find that HF3 is not entitled to recover a sum equal to the Variations Payments in unjust enrichment.

Unjust enrichment -KK Proceedings Payments

273. As in relation to the Variations Payments I propose to focus on the issue of whether the enrichment was "unjust" and assume for these purposes that the other requirements have been met.

274. It was submitted for HF3 (paragraph 272 of Claimant's closing submissions) that the KK Proceedings Payments were unjust because:

i) KK JSC freely accepted the KK Proceedings Payments. For the same reasons as set out above in relation to the Variations Payments, KK JSC was aware through Mr Werner and Mr McGregor that HF3 was making the KK Proceedings Payments. Mr Werner and Mr McGregor had a reasonable opportunity to reject those payments on behalf of KK JSC, but did not do so.

ii) Even if the Creditors' Committee also had to accept the KK Proceedings Payments, it would have been obvious to all the members of the Creditors' Committee that (1) the legal action in the KK Proceedings was continuing, (2) A&O expected to be paid for their services, (3) HF3 was paying those costs and (4) HF3 expected (at the least) to be reimbursed for those costs.

275. It was submitted for KK JSC (paragraph 202 of its closing submissions) that HF3 knew the approval of the Creditors' Committee would be required in relation to any new liability over and above the level of the "Agreed Budget" and Co-Funding Commitment, and that such approval had not been obtained.

276. I reject the submission for HF3 that because the Creditors' Committee is not a body of KK JSC, it is Mr Werner and Mr McGregor's acceptance of the KK Proceedings Payments which is relevant. The contemporaneous documentation during this period (set out below) makes it clear that HF3 knew that the approval of the Creditors was required.

277. On 4 October 2017, Ms MacPherson wrote to ForteBank JSC in relation to a Cooperation Agreement dated 4 September 2014 between ForteBank, KK Plc, KK JSC, Peak and PEAK Logistics LLP. Ms MacPherson wrote that HF3 disputed the validity of a Priority Agreement which had been purportedly entered into between ForteBank and KK Plc, and which granted ForteBank the same priority as HF3. It was in that context that Ms MacPherson wrote:

> "The proposed terms of the Priorities Agreement have now been superseded by events and, in particular, the Rehabilitation Plan of Kazakhstan Kagazy JSC. The terms previously contemplated are inconsistent with the Rehabilitation Plan and are therefore no longer capable of being agreed by Kazakhstan Kagazy JSC, without the consent of its majority creditors".

278. On 9 November 2017, Mr McGregor emailed HF3 stating, inter alia, that ENPF's managing director had noted that the amended terms "had not been approved by KK's creditors" and that:

> "His view is that Harbour's return should be capped at the level of the original Investment Agreement"

279. On 15 November 2017, Mr King sent an update to the Board of HF3. That note stated, inter alia, that HF3 had instructed Baker & McKenzie (Kazakhstan) to advise on Kazakh law. The contents of that advice from Baker & McKenzie is privileged. The note to the Board stated that HF3:

> "understand the Claimant must get the Creditors' approval to things it now agrees with Harbour which includes the terms of any further funding which HF3 may provide."

280. On 17 January 2018, Baker & McKenzie (Kazakhstan) provided further advice to HF3, in which it stated that:

> "Amendments to the Investment Agreement signed after the date of the Rehabilitation Plan were subject to certain approvals under the Bankruptcy Law. We are not aware if such approvals were obtained."

281. I also note the evidence of Mr Baktybayev in his witness statement:

> "7.3 From March 2017 onwards, UAPF became increasingly cautious about being rushed into any decisions because of the limited information Harbour, Mr Werner and Mr McGregor were willing to provide to the Creditors' Committee as a whole. Despite my repeated requests for further information outlined above, most of the information provided to the Creditors' Committee was in summarised form. Further, much documentation was simply not provided either to UAPF or the Creditors' Committee until many months after the event (if at all); for example, when UAPF received the remainder of the Disputed Variation Letters in February 2018 (after the bulk of the costs had been incurred), these were provided under strict confidentiality so that UAPF could not share them with the Creditors' Committee…
>
> 7.5 Furthermore, by late 2017 in November and December, a series of orders had been obtained which had the effect of terminating the rehabilitation procedures and placing KK JSC into bankruptcy. As such, given the potentially catastrophic effect bankruptcy might have on KK JSC's creditors (in contrast to KK JSC continuing in rehabilitation), UAPF was more focused from that point on getting KK JSC out of bankruptcy and back into rehabilitation…"

282. He was asked in cross examination about a meeting in December 2017. His evidence was:

> "A. The question of funding was not reviewed, was not discussed. Because it was Allen & Overy that achieved certain positive results, we naturally supported the idea that they should continue. But if prior to this not everything depended on ENPF, at this stage very little depended on ENPF. Because, as far as I understand … this was the bankruptcy stage.
>
> Q. But leaving that to one side, you must have assumed that Allen & Overy were being paid from somewhere?

> A. Yes, I think so.
>
> Q. And you knew that until that point, they were being paid from Harbour's funding because the briefing note had told you that?
>
> A. Yes, we understood that.
>
> Q. So you must have assumed that going forward Harbour were going to continue to fund A&O?
>
> A. Yes, we assumed that they were going to try and obtain what they believed that they had the right to under the investment agreement.
>
> Q. So you assumed that they were going to fund the lawyers' fees to continue the proceedings?
>
> "A. They did want to get a return on their investment. " [Day 3 p37]

283. The position of the Creditors at that time was said by Mr Baktybayev to be as follows:

> "Q… so far as you're aware, no other creditors discussed the question of funding with Harbour, and in particular told Harbour not to fund until the bankruptcy manager's letter on 23 April?
>
> A. As I understand it, the creditors were proceeding on the understanding that the funds originally set out in the investment agreement were more than enough for Harbour to receive a handsome return and a profit on its investment." [Day 3 p38]

284. Asked about the basis of which the money was being advanced after the handing down of the judgment, the relevant evidence of Mr Baktybayev was as follows:

> "Q. And you knew that Harbour was not advancing that further money after the handing down of judgment as a gift; it was expecting reimbursement and a return, wasn't it?
>
> A. I'm not sure I entirely understood what you said when, you referred to a gift, sir.
>
> Q. Well, it was expecting that any further money it advanced would be reimbursed to it, at least, and that it actually wanted a return on top of that as well, didn't it?
>
> A. I'm not in a position to tell you what Harbour were expecting to happen. The way I see it, they had to proceed on the basis of the budget with a view to reducing one's expenses and the return investment is decided upon from day one and when they see that their investment is approaching a limit

> beyond which they will not be able to receive any return investment, they would presumably just stop funding. If Harbour continued doing something, without sharing with us details as to how the money has been spent, then they expect that all the expenses would be covered by the original compensation plan." [Day 3 p40] [emphasis added]

285. In the alternative it was submitted for HF3 that if HF3 was mistaken as to the fact that the KK Proceedings Payments did not constitute Claimants' Legal Costs, it made the payments by reason of such mistake. It was submitted that if it had not been under this mistaken view, it would have exercised its rights under Clause 10.3. HF3 rely on the evidence of Mr King as to the belief of HF3 that the KK Proceedings Payments fell within Claimants' Legal Costs.

286. The evidence of Mr King has to be considered in the light of the contemporaneous documentary evidence. As referred to above, in November 2017 there was a Board paper/briefing note prepared by Mr King. In my view if Mr King had been of the view that the additional funding then required was covered by Claimants' Legal Costs under the Investment Agreement, this would have been made clear to the Board when the options were presented to the Board and the risks of each option analysed. Instead the Board paper indicated that there were risks in having to provide additional funds but that the alternative was that the proceedings would come to a halt. There was no suggestion in the Board paper that the costs were recoverable in any event under the Investment Agreement. The sections of the Board paper which are of particular relevance in this context are as follows:

> "…Current status
>
> Trial has been completed and Judgment is due imminently (it is anticipated mid-late November)…
>
> KK have informed us that notwithstanding the budget agreed, there are outstanding fees of £1.2m (of which £380k is for Robert Howe QC and £400k is for Allen & Overy). KK had sought to address this by requesting permission from its Creditors Committee to use a portion of the operating profits of the business to pay the outstanding amount (KK JSC have currently been overpaying amounts owed to the creditors pursuant to the payment plan set out in the Rehabilitation Plan). We were advised by email last Friday and a subsequent discussion (14.11.17) that ENPF (the largest creditor, owed c£62.3million), with the casting vote with the authority to bind the remaining creditors, has refused this request.
>
> Counsel and A&O have confirmed this week they will not do any further work until these outstanding invoices are settled. It is also likely that they will require payments on account for further work done in relation to handing down of judgment, enforcement and appeals.
>
> KK's Rehabilitation

The dominant creditors are ENPF and EBRD although ENPF is the majority creditor who has the casting vote at any creditors meetings and is able to bind the remaining creditors. ENPF are a Kazakh pension fund and are reluctant for the Claimant to self-fund going forward because of a political risk of being associated with funding the claim. We are informed that in addition to refusing the request of KK management (referred to above), ENPF have further indicated that they:

(a) want HF3 to provide further funding but it is not clear on what terms they would agree to do so; and

(b) do not accept the terms of the previous amendments which have been executed by the Rehabilitation Manager; and

(c) want to meet with HF3 in Kazakhstan to discuss this.

We understand the Claimant must get the Creditors' approval to things it now agrees with Harbour which includes the terms of any further funding which HF3 may provide…

Considerations for a way forward

The key objectives are to ensure that (1) Harbour's rights are fully recognised by all other stakeholders and (2) enforcement of a successful judgment is not compromised.

It seems unlikely that the Claimant could fund costs going forward in light of ENPF's position which means that the only feasible solution is for HF3 to provide further funding. Including the outstanding invoices and enforcement action, we expect that further funding in the region of £3-£3.5m would be required.

We are not seeking approval for further funding at this stage but simply raise this as a key factor given the current situation. While the requirement for more funding from HF3 is extremely disappointing, it does provide valuable leverage which HF3 can use to protect its position. Specifically:

• It has prompted ENPF to agree to meet with HF3 (they had previously refused to engage at all with HF3 even when Susan travelled to Almaty) – we consider that HLF should do this.

• We consider as a condition of providing further funding, HF3 should seek agreement from the Claimant and its creditors recognising its rights (including funding provided after the original funding agreement and priority over the creditors), giving HF3 power of attorney to conduct the enforcement proceedings on its behalf and agreement that any proceeds are

> paid into a bank account of HF3. However, we recognise there are difficulties in achieving this…
>
> We consider that an agreement with the Claimant and creditors would be the best solution to move forward before having to consider more extreme measures. Our views have also considered advice on HF3's position from Byrne & Partners and Baker & McKenzie…" [emphasis added]

287. In cross examination Mr King sought to draw a distinction between what he had been told by Mr McGregor as to the need for creditors' approval and what he understood the position to be. Mr King's interpretation of the briefing note was that it was only setting out what he had been told by Mr McGregor. [Day 2 page 123]. In my view his evidence did not accord with the natural inference to be drawn from the contemporaneous document. If in fact Mr King did not understand that there was a need for creditors' approval for further funding, in my view, this would have been made clear in evaluating the risks of advancing future funds which was the purpose of the briefing note. I therefore do not accept the evidence of Mr King on this point. Further his approach to this issue in his oral evidence calls into question the credibility of his evidence on other issues notably his evidence that at the material time, he believed that the additional funding was covered by the existing provisions of the Investment Agreement namely Claimants' Legal Costs.

Conclusion on unjust enrichment -KK Proceedings Payments

288. In my view on the evidence the enrichment was not unjust as there was no "free acceptance" by KK JSC. In my view the Creditors' Committee knew that HF3 were making the payments but had not agreed to such payments. In circumstances where ENPF had not received the information it requested and HF3 knew that the consent of the Creditors' Committee was required, it cannot be said that the Creditors' Committee knew that HF3 expected to be paid by KK JSC for the sums advanced by it or that KK JSC had a reasonable opportunity to reject the KK Proceedings Payments. Further for the reasons discussed above, I find that there was no mistake on the part of HF3 that the KK Proceedings Payments were covered by "Claimants' Legal Costs" such that any enrichment was unjust.