Neutral Citation Number: [2021] EWHC 2494 (QB)

Case No: QB2013002929

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 13/09/2021

Before :

CHARLES MORRISON

(Sitting as a Deputy Judge of the High Court)

- -

Between:

TREBISOL SUD OUEST SAS	
SOLDEFI SAS	**Claimants**
- and -	
BERKLEY FINANCE LIMITED	
SAMMO ENERGY LIMITED	
DIDIER VARLOT	
MICHAEL WAYNE GULLION	
MICHEL SCHERER	**Defendants**

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Sam Neaman (instructed by **Kingsley Knapley LLP**) for the **Claimants**

The Third **Defendant** in person

Hearing dates: 28-30 July 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.

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Charles Morrison (sitting as a Deputy Judge of the High Court):

Introduction

1. This matter came before me as a trial but the essence of it is an application to enforce the terms scheduled to a consent order in Tomlin form. Argument was made before me by the Claimants on the one hand, seeking to enforce the scheduled terms, and the third defendant (**M. Varlot**) on the other, resisting, for a variety of reasons to which I will turn shortly, the notion that effect should be given to them.

2. No other defendant participated in the trial. I was informed that both the first (**D1**) and second (**D2**) defendants had been dissolved in 2015 and 2014 respectively; that the fourth defendant (**D4**) played no part in these proceedings; and that the fifth defendant (**D5**) had sent an email message to the court "declaring" that he would not be in attendance.

3. I was informed by the Claimants that on 16 July, D5 had sent a draft application to the court seeking orders in terms that the court should cancel and archive the case without judgment due to the dissolution, liquidation or insolvency of five of the six parties in the case. That application was not issued and no one appeared before me to ventilate any argument in support of it. I therefore indicated to the parties that the court would proceed to determine the issue that was properly before it, and in respect of which the parties were entitled to a judgment.

4. The dispute between the parties has a protracted and convoluted history. The background was very well explained to me in skeleton arguments lodged by Mr Neaman for the Claimants and by M. Varlot. I should say at the outset that M. Varlot is a Frenchman now residing in Romania. Although he accepted that he was in receipt of some legal assistance "behind the scenes", M. Varlot appeared before me alone. Nevertheless and having regard to the fact that English was not his first language, M. Varlot acquitted himself well and was able to communicate to the court effectively the nature of his case and in many instances the legal foundation for it. I was certainly obliged to him for his very detailed skeleton argument which was also lodged with the court before the commencement of the trial.

The background

5. It will be helpful if at this juncture I recount in outline the background to the dispute and why it is that the matter is now before the court for the enforcement of the terms of the schedule to a Tomlin Order.

6. In 2012 the Claimants were concerned to identify green energy business opportunities in Eastern Europe. In that quest they were introduced to M. Varlot who in turn introduced them to D5, and then D2. The defendants proposed to the Claimants a solar power plant project in Romania (the **Melicon Project**). D1 was put forward as the potential funder of the Melicon Project. D1 was controlled by D5 and D4.

7. D1 agreed to fund the Melicon Project with a €9m facility, but demanded an €800,000 cash deposit (the **Deposit**) by way of "guarantee" which D1 was entitled to draw upon only in limited circumstances.

8. The Melicon Project did not proceed and no loan facility was ever extended by D1. The difficulties between the parties began when the Claimants sought the return of the Deposit. Despite D2 having assured the Claimants that the Deposit would be kept "safe

and untouched", it transpired that the Deposit had been dissipated, principally to M. Varlot and D5.

9. Upon the discovery of the disappearance of the Deposit, proceedings ensued. A Worldwide Freezing Order was made by Collins J, sitting in this court on 10 June 2013.

10. The Worldwide Freezing Order was continued unopposed on the return date. No application was ever made to set it aside.

11. In February 2014, the action was settled by way of Tomlin Order and as a consequence, the Worldwide Freezing Order was discharged. The schedule to the Tomlin Order was a settlement agreement (the **Settlement Agreement**). The order itself recorded liberty to apply as to carrying out the terms of the Settlement Agreement without the need to commence further proceedings.

12. Despite the counterclaim for some €960,000, and the action claiming only €800,000, the settlement terms provided that D1, D2, M. Varlot and D5 (the **Obligors**) were to pay the Claimants €1.2 Million by way of instalments over a one year period. The Settlement Agreement contained an acceleration provision for the benefit of the Claimants if any instalment payment was not made on its due date.

13. By June 2014, the Obligors were already €400,000 in default under the Settlement Agreement, and no money at all had been paid to the Claimants. On the strength of an assurance from the Obligors of payment not only of the €1.2 million owed, but in addition, a further amount which the Obligors would realise from a "transaction" which was shortly due to complete, the Claimants were persuaded not to trigger the acceleration provision.

14. This assurance led to an agreement between the second Claimant (**C2**), M. Varlot and D5. Described as the "Agreement of Participation In Financial Transaction" (**APFT**), this agreement provided for M. Varlot and D5 to use amounts from what was explained as the monetisation of a financial instrument, to discharge the sums due under the Settlement Agreement, and in addition, allow the Claimants to retain 3% of the monetised amounts together with a "premium" of €300,000. It appears that no monies were paid to the Claimants pursuant to this agreement.

15. No amounts by then having been paid under the Settlement Agreement, in July 2014 the Claimants were again persuaded to forbear in respect of their rights, and assented to enter into a further agreement whereby additional sums were promised upon the monetisation of two financial instruments.

16. By the end of September 2014, no payment had been made under the Settlement Agreement, €800,000 was now due; and nothing had been paid under the APFT or its July addendum.

17. On 28 September 2014, a yet further addendum agreement was entered into whereby M. Varlot and D5 promised 30% of their commission on three "transactions in progress", namely the monetisation of three bank instruments: one of €250 Million, and two of €50 Million.

18. Whilst one might have thought that the Claimants' seemingly inexhaustible reserves of patience had by this point been depleted, it appears that, ever hopeful of a payment, they were persuaded to enter into a yet further agreement: the so-called "Agreement of Collaboration on financial transaction". Consistent with the by now familiar pattern, no payments to the Claimants were ever made under it.

19. Another party now entered the scene. A lady by the name of Mme. Bratkova contacted the Claimants explaining that she was a legal adviser to an American company by the name of JP Financial Development Corp (Global) (**JP**). The Claimants it seems had understood JP to be a party with the ability to provide funds to M. Varlot and D5. Mme Bratkova suggested that she would assist in reaching a satisfactory conclusion to the long-running debt saga.

20. The involvement of Mme Bratkova produced yet another agreement for the parties to enter into. This agreement was described as an "Amicable & Compromise Agreement" (**ACA**) and it was sent to M. Dubost for the Claimants in July 2015. M. Dubost signed the final version of this agreement on 30 September 2015.

21. The parties to the ACA were the Claimants as "Party A", and an English company, Northen Cross Financial Services Ltd (**NCFSL**) as Party B. The signatory for NCFSL was D5. NCFSL was incorporated on 28 September 2015, the day before the ACA document containing the names of the parties was sent to M. Dubost for signature. I am told by the Claimants that this company never traded and that it was struck off the register in 2017.

22. The ACA is a very important document for the purposes of the matters now before me. It is because of the terms of the ACA, among other grounds relied upon by him, that M. Varlot says that he is not obliged to pay any sums to the Claimants pursuant to the Settlement Agreement.

23. No monies were paid to the Claimants pursuant to the terms of the ACA, the Settlement Agreement, or as I have already indicated, any of the other agreements that followed it.

24. In due course the Claimants applied to enforce the terms of the schedule to the Tomlin Order. In accordance with various procedural orders made, Points of Claim, Points of Defence and Counterclaim, and Points of Reply and Defence to Counterclaim were filed and served.

The dispute

25. The Claimants say that M. Varlot and D5 have not paid any of the sums due under the Settlement Agreement and are therefore jointly and severally liable for the substantive sum of €1.2 Million plus interest (plus costs). On the pleadings, M. Varlot and D5 do not dispute the obligation to pay under the Settlement Agreement. M. Varlot defends the claim on the basis that:

    i) the ACA, which he terms an "Exclusion Agreement" operated to discharge him from any liability under the Settlement Agreement; and

ii) because they knew that M. Varlot would act upon the ACA, which he did, the Claimants are now estopped from enforcing the Settlement Agreement against him.

26. At the trial, M. Varlot sought to advance further grounds of defence, these being that the Settlement Agreement was executed by him in circumstances of duress and for that reason it should not be enforced against him; and that the only reason the amount provided for under the Settlement Agreement remained outstanding, was because the Claimants had refused to accept the offer of a Standby Credit from a Russian bank, which Standby Credit being the first step in a transaction that, had it been allowed to proceed, would have led to full settlement of the amount due under the Settlement Agreement.

27. Giving full latitude to a litigant acting in person, I permitted M. Varlot to advance these additional arguments without insisting on an amendment to his pleading. I took this view taking into account the desire of the Claimants to reach a conclusion to the litigation; the interests of all the parties in avoiding a further adjournment to permit amendment and pleading in reply; and the fact that Mr Neaman, by the arguments he deployed before me, had demonstrated an ability to perfectly adequately address the additional limbs relied upon by M. Varlot.

28. D5's case, at paragraph five of his Points of Defence, is that the ACA superseded the Settlement Agreement, such that the Settlement Agreement is now no longer capable of being sued upon as an enforceable contract. He also pleads a case in estoppel; as well as an ability, also claimed by M. Varlot, to rely upon the Contracts (Rights of Third Parties) Act 1999.

29. In answer to all this the Claimants say that neither M. Varlot nor D5 is entitled to rely upon the ACA because it is void for uncertainty. If it is not void for uncertainty they say that an agreement to discharge M. Varlot cannot be distilled from its terms; that the Contracts (Rights of Third Parties) Act 1999 is not operative in this instance in respect of either M. Varlot or D5; and that in any event the ACA was a conditional contract and the condition was not fulfilled.

30. Both M. Varlot and D5 counterclaim, seeking damages for the breach of an undertaking given to the court on the original Worldwide Freezing Order, namely, upon discharge of the Freezing Order, to inform those who had been given notice of it that it had ceased to have effect.

31. In respect of this matter, the Claimants say that the claim is not founded upon any known private law cause of action; to which they add that there is a complete absence of any evidence of loss suffered.

The Issues

32. In a helpful written note of his closing submissions, provided to the court on the final day of the trial, Mr Neaman set out his view of the issues requiring a decision from me. I agree with him that in regard to M. Varlot, I must consider:

i) whether the ACA is void for uncertainty, either in whole or as to the parts relevant to the defence set up by M. Varlot;

ii) the extent to which the ACA was a conditional contract, and if it was, was the condition fulfilled;

iii) whether if any relevant provision of the ACA is valid and enforceable, that provision bears a meaning consistent with the case made by M. Varlot, taking account of his submission that:

a) the unfulfilled condition, if it was a condition, had no impact on the clause 3.1 release and discharge, and

b) clause 3.1 of the ACA, objectively construed, should be seen as an absolute release and discharge.

33. The Claim against D5 will, Mr Neaman submits, and in large measure I agree with him, succeed unless I find that the ACA is valid and enforceable and that it was not a conditional contract: that is to say that mere entry by D5 into the ACA extinguished D5's liability under the Settlement Agreement.

34. Despite the point that Mr Neaman makes that even if I find that the ACA is enforceable it is nevertheless a conditional contract, and on any view the condition has not been satisfied, I will consider the extent to which an estoppel analysis, avails D5 – or M. Varlot.

35. For the reasons that I explained earlier, I will also consider:

i) the extent to which the claim of duress avails M. Varlot such that he is not liable to pay the amounts due under the Settlement Agreement; and

ii) whether there was an attempt to perform the APFT and but for its breach by the Claimants, they would have been paid in full under it, leaving no debt due under the Settlement Agreement.

The Evidence

36. I heard evidence from three witnesses. The first was M. Dubost, who was the Claimants' only witness. M. Dubost lives in Paris and appeared by way of Teams video. Four witness statements had been filed by M. Dubost however the statement dated 1 November 2019, was the most relevant to the proceedings before me.

37. In his evidence, M. Dubost explained the background to the claim and the manner in which the companies he represents came to enter into a business relationship with the defendants; and how it was that the Deposit was paid to D1. Having dealt with the original claim and the Freezing Order, M. Dubost goes on to explain the genesis of the Settlement Agreement.

38. At paragraphs 57 and 58, of his statement he says this:

> "During the discussions which led to the Settlement Agreement, Mr Varlot and Mr Scherer admitted that they owed the Deposit of €800,000, and assured me that they were going to make money and pay back to the Claimants what they owed, but that they needed time and so asked that payments be made in instalments. Given their past behaviour I was naturally cynical, but I wasn't sure

> what else I could do other than believe and hope that they were being sincere in their representations and would make payment as agreed.
>
> [58.] This was the first of numerous occasions on which Messrs Scherer and/or Varlot, faced with claims against them by me/the Claimants for money owed, used their modus operandi, namely, to admit that they owe the amount claimed, to claim they had no money but state that they were just about to make large sums of money, and then to attempt to delay matters by promising payment of a sum tantalisingly greater than the amount claimed and admitted at that point."

39. M. Dubost at para 62 and following, continues,

> "I should add that Companies House records show that in fact Sammo [D2] was dissolved on 11 February 2014 i.e. 2 weeks before the date of the Settlement Agreement. Even though Messrs Scherer and Varlot (its directors) knew that they had dissolved the company, they negotiated on behalf of Sammo and caused Sammo to (purportedly) enter into the Settlement Agreement. They did not tell me, and I was not aware of this at the time. It appears to me now to be an obvious attempt on their part to avoid liability in respect of the Settlement Agreement without raising suspicion. The fact that they entered into the Settlement Agreement on behalf of Sammo knowing full well that the company no longer existed shows to me that they had bad faith from the outset.
>
> [63.] Pursuant to the terms of the Settlement Agreement, the first instalment of €400,000 was due by no later than 27 May 2014. However, this date came and went without the Claimants receiving anything from the Relevant Defendants, as did every instalment date. To date, the Claimants have received nothing from the Relevant Defendants, who remain in breach of the Settlement Agreement."

40. Having entered into the Settlement Agreement, M. Dubost goes on to explain his continuing engagement with M. Varlot and how it was that numerous promises of payment were communicated to him. In his statement at [64] he says this:

> "I was chasing Mr Scherer and Mr Varlot for payment of the first instalment under the Settlement Agreement. Although they obviously did not want the Claimants to reopen the legal proceedings, they were not paying either, claiming financial difficulties. Mr Varlot sent me progress reports on 4 May and 1 June 2014. The first one, before default, informed me that "we have initiated several negotiations and are under the process of signing several contracts that may give us revenues enough to comply." The second one, after default, stated "As stated before we are initiating several transactions. These are progressing towards signature of contracts that will put financial instruments to our disposition to then be monetized.. ….In order to give you more visibility on the transactions and also more control, we propose you to divert one of the transaction and put one financial instrument under your control, and then, still under your control, to monetize it. In that way you will have all progress information and will have a direct payment (of possibly the whole amount) from the monetization." (sic). I had no idea what Mr Varlot was talking about, and even after speaking to him the proposal was not clear. On 5 June Mr Varlot emailed me saying "We have to sign an agreement of collaboration that: Allow us to send to your account an (or up to 2 or 3 as you want) instruments, ….the first 1.2M € goes to you then

> all exceeding goes 1/3 for you, 2/3 for us….If this is suitable for you I will prepare the document". I was still unclear what was being suggested, but assumed that it was some scheme to ensure that the Claimants were paid, and so was prepared, with some trepidation, to go along with it. Then by email on 9 June 2014 Mr Varlot provided a draft agreement. At this point I became seriously concerned that Mr Varlot was involving us in something murky, so I consulted Trebisol's French lawyer, Maître Reynes, about this draft agreement. The legal advice we received was that there was nothing that should prevent us from entering into the agreement."

41. And at [67]/[68] he continues,

> "Mr Varlot and Mr Scherer represented to me that they had lots of "deals" in the pipeline which involved them facilitating the monetization of financial instruments for third parties. The APFT recorded how Mr Varlot and Mr Scherer intended to use these deals to settle what was owed to the Claimants under the Settlement Agreement. On Soldefi's part, it was agreed that Mr Varlot and Mr Scherer could use its bank account to receive the financial instruments and, if necessary, arrange for such instruments to be transferred to the monetization bank. I had no knowledge or experience of this sort of "instrument monetisation" business, but we had comfort from our lawyers that the Claimants could enter the APFT, and as this appeared to be the only way that the Claimants were going to be repaid the money "stolen" by Varlot and Scherer, I was eager, indeed desperate, to see an end to this sorry saga.
>
> [68.] Over the next 12 months, Mr Varlot and Mr Scherer informed me of various supposed pending deals that they were about to conclude. Each of these deals was supposed to make millions of Euros/Dollars for Messrs Varlot and Scherer, from which they would then have the funds to repay their debt to Soldefi (and therefore Trebisol). The APFT was also to provide significant further independent income for Soldefi. However, and in retrospect, perhaps, predictably, none of these so-called "deals" ever materialised. I now realise that these "deals" were all bogus and possibly even unlawful."

42. At [70] – [72] M. Dubost addresses an important aspect of this case. It is important as it goes to the credit of the witnesses, the nature of the underlying transactions, and whether the terms of the Settlement Agreement were to some extent performed. He says this:

> "Of the numerous instrument monetisation so-called "deals" that Mr Varlot was to inform me of over the next year or so, in fact only two ever got as far as any communication being sent to Soldefi's bank (Credit Agricole). The rest never got past the stage of Mr Varlot's empty descriptions of the huge sums of money that would soon be received by him, Mr Scherer and, in consequence, Soldefi.
>
> [71.] In respect of the two so-called "deals" that did result in communication to Credit Agricole, Mr Varlot informed me in June 2014 that two financial instruments had been notified to Credit Agricole in the form of SWIFT message. The first SWIFT purported to come from RBS Moscow in the sum of €250M on 25 June 2014 (the "RBS Moscow deal"). The second purported to come from RBS Scotland in the sum of €500M on 26 June 2014 (the "RBS Scotland deal").

> [72.] It was clearly Credit Agricole's view that these documents were at best suspicious, at worst forgeries, and in any event Credit Agricole refused to act upon them. This has recently been corroborated by Royal Bank of Scotland (a point I will return to in greater detail below). Although I am not a banker I can now see that there appear to be multiple curiosities in these documents, which do appear to be very suspicious. For instance, despite purporting to be sent from the Head Office of the Royal Bank of Scotland in Edinburgh, the documents display multiple basic spelling mistakes and, as I am now informed by my solicitors, phraseology which would not be used by anyone for whom English is a first language (phraseology which RBS has picked up on as suspicious and which would not be used by RBS). However, at the time, in good faith and under enormous pressure from Mr Varlot, I pressed Credit Agricole in late June/July 2014 in respect of these two alleged SWIFT documents. I assumed that either Credit Agricole would reveal that the transactions were fraudulent, in which case it would only taint the Defendants, or Credit Agricole would admit they were legitimate transactions which should materialise.

43. At paragraphs [74] – [76] of his statement, M. Dubost continues with his explanation of the purported SWIFT transaction:

> "On 10 July 2014 RBS Scotland purportedly sent an "answer back and acknowledgment" SWIFT message to Credit Agricole. From correspondence recently received by my solicitors from RBS (to which I shall return in more detail below) it appears that this too was a forgery. In any event neither Credit Agricole nor RBS Scotland progressed the RBS Scotland deal any further.
>
> [75.] Credit Agricole appeared reluctant to put into writing their views as to the legitimacy (or not) of the SWIFT documents. So, after attempting unsuccessfully to obtain more concrete written information from Credit Agricole and again under increasing pressure from Mr Varlot, Soldefi instructed lawyers to communicate with Credit Agricole in the hope that they would be more successful. This resulted in a letter from Credit Agricole on 18 July 2014 which stated (roughly translated by me from French to English): "To answer your questions about the operations "Swift MT 760 from RBS Moscow OJSC for an amount of 250 M €" and "Swift MT105 from RBS Edinburgh for an amount of 500 M €" we wish to bring to your attention the following elements: We received the first SWIFT message above. However, since this message could not be authenticated, according to the standards and practices of the profession, it could not be processed. As far as the 2nd SWIFT message is concerned, it has never been received live by our services, and as a result we have not been able to respond to it. We draw your attention again to the "unusual and atypical" nature of the above transactions, and you are sure that our institution has taken all necessary steps in the handling of your file".
>
> [76.] Even then, and under further pressure from Mr Varlot, Soldefi attempted by way of further lawyer's letter to persuade Credit Agricole to clarify in writing their position on the SWIFT documents. However, on 25 July 2014, and following an earlier meeting, I am told by Trebisol's lawyer, Maître Reynes, and believe, that Credit Agricole's lawyer called and informed him that the RBS Scotland SWIFT was a forged document and advised that Soldefi stop pressuring the bank for further information otherwise it could find itself in

> serious trouble. (Indeed at the end of 2014, without any prior warning and without an explanation, Credit Agricole ended its relationship with Soldefi and closed all of its accounts.)"

44. When he eventually arrives at the subject of the ACA, M. Dubost explained in his evidence how it was in May of 2015, that he was introduced to the (as she described herself) "specialist in making peace", Mme Bratkova. This lady held herself out as being independent from M. Varlot and D5. A curious set of negotiations then ensued which M. Dubost says was in reality the implementation of a plan to see him agree to release M. Varlot and D5 from their obligations to him in return for yet another fantastic payment, this time from an unrelated party. Having made out that she was on the side of M. Dubost and only trying to help him see a conclusion to his claims for payment, eventually the ACA was presented to him. Despite being unable to properly understand its language or meaning, M. Dubost in his evidence says that he was worn down by the whole affair, exhausted and deeply depressed, and even though a new party was being introduced for a purpose he did not understand, he was willing to sign on the basis that some good might come of it. Of one thing M. Dubost is clear: he was not agreeing to release M. Varlot simply on the basis of yet another mere promise to pay.

45. Nothing of any consequence to the issues in this case emerged from the cross examination or the re-examination of M. Dubost.

46. That being the Claimants' case, it turned to M. Varlot to give evidence. His four filed witness statements were treated as his evidence in chief. In his third witness statement M. Varlot gives a comprehensive account of how he was asked by D5, the President of D2, to assist the Claimants with an energy project in Romania. He explains the background to the financing by D1. In due course a second energy project was proposed however for a variety of reasons the funding from D1 was "terminated" and no project was ever acquired by the Claimants.

47. As to the Deposit paid by the Claimants as a term of the proposed financing from D1, M. Varlot explains that this amount was consumed by the legitimate transaction costs of D1, such costs being in a value in excess of the Deposit amount.

48. In due course the Settlement Agreement was entered into following the Freezing Order. It was as a result of the delay in informing the relevant banks, of the discharge of the order, and the consequent prejudice to their reputation, that "the defendants" were prevented from raising the sums due under the Settlement Agreement.

49. It is important to look carefully at M. Varlot's account of the SWIFT transaction that on his case, ought, under the terms of the APFT, to have led to a payment to the Claimants of the amount due under the Settlement Agreement. At paragraph 156 and following of his witness statement, he gives this account:

> "In this agreement, Soldefi was proposing to use his banking account to receive financial instruments that would be involved in transaction of financial trading.
>
> [157.] I am entitled to rely upon the fact that this agreement signed on June 18, 2014, as well as all its addendum signed on July 15, 2014, (Exhibit 121 page Ex 601) and September 28, 2014, (Exhibit 122 page Ex 613) or subsequent agreements signed on November 27, 2014, (Exhibit 123 page Ex 616) and the

amicable agreement signed on September 28, 2015, (Exhibit 87 page Ex 464) are successive variations of the settlement agreement, that was part of the Tomlin order, asked and agreed to by the claimants and that these addendum and agreements superseded the settlement agreement.

[158.] In the present witness statement, the term "financial instrument" represents a financial asset sent via a valid SWIFT message with a legal and financial value. Those SWIFT messages represent an actionable and irrevocable commitment to pay from the issuing bank.

[159.] In the agreement signed on June 18, 2014, (Exhibit 120 page Ex 596) the claimants confirmed that they were ready to receive financial instruments in the bank account of the second claimant (Soldefi SAS) in Credit Agricole France and take responsibility for the reception, safe-keeping and later transfer of such a financial instrument (Article 4 page Ex 597). The bank coordinates of the account of the second claimant were included in the agreement in the article 3 (page Ex 597).

[160.] The second "whereas" of the agreement (Exhibit 120 page Ex 596) describes the financial transactions contemplated and contradicts the affirmation of the claimants in item 19 of the witness statement of Mr. Nicolas Dubost dated June 30, 2016 (Exhibit 124 page Ex 620).

[161.] I was entitled, based on this signed agreement, to rely on the fact that Soldefi has already performed all necessary discussions with their bank, that they were perfectly aware of the contemplated transactions and that they were perfectly ready, willing and able to receive financial instruments from the time of the signature of this agreement in the account that they indicated in the agreement.

[162.] On June 16, 2014, I received a letter from IIG Czech A.S. Company agreeing to initiate a transaction with my company (Divco Field Services International) and agreeing on the verbiage of the stand-by letter of credit that was to be sent to the bank of Soldefi.

[163.] On June 23, 2014, I received a letter from IIG Czech A.S. Company, informing that the swift from RBS Moscow shall be sent on June 25, 2014.

[164.] On June 25, 2014, I arranged the sending of a stand-by letter of credit for a value of €250,000,000.- (two hundred fifty million Euros) from "RBS" Moscow to Credit Agricole into the account of Soldefi. The financial instrument was sent as a SWIFT message MT 760 which has a legal and financial value and constitute an actionable and irrevocable commitment to pay from the issuing bank.

[165.] I received from IIG Czech A.S. a complimentary copy of the SWIFT message from the sender and delivered this copy to Soldefi on the same day.

[166.] On June 30, 2014, Soldefi informed me that two (2) SWIFT messages were received by their bank. But later the same day, Soldefi changed their declaration and informed me that the SWIFT from "RBS" Moscow was received

in a useless format (MT 998 – a technical format without legal value) and cannot be authenticated.

[167.] On July 1, 2014 Soldefi changed again their declaration and affirmed that the SWIFT was received in an MT 999 format (a text format without legal value, but that implies that the message was authenticated). Soldefi refused to supply any evidence supporting such affirmations or to explain why they have changed their declarations from one day to another consecutively

[168.] I requested to participate to a conference call with Soldefi's bank to obtain first-hand information on the situation, but Soldefi denied me the possibility of any contact with their bank or to even receive any copy of the supposed written information from the bank regarding these transactions.

[169.] On July 2, 2014, I received from IIG Czech A.S. a copy of a SWIFT from Credit Agricole dated 1st of July where the Credit Agricole cancelled the MT 760 stating that "due to our internal policy we cannot advise a/m guarantee to the beneficiary". I gave a copy of that document to Soldefi on the same day.

[170.] This message of the bank contradicts the previous declarations made by Soldefi: a. The Credit Agricole makes reference in this message to a MT 760 (which has both legal and of financial value) that they received and gives the exact reference of the original message. This also contradicts the affirmations of Soldefi that the received message was in the format of a MT998 or, later on, in the format of a MT 999 - (These two formats of message have no legal or financial value). A bank cannot make reference to a message format that they didn't actually receive as this has legal and financial implications. b. Soldefi affirmed that their bank was unable to authenticate the message received. If a SWIFT message is not authenticated, if not rejected by the SWIFT system, it is usually disregarded by the receiving bank. A bank cannot answer a non-authenticated SWIFT message, they would not know who to send an answer to.

[171.] On July 3, 2014, Soldefi affirmed again that their bank never received any MT 760 swift from "RBS" Moscow, but somehow confirmed that their bank sent an answer to "RBS" Moscow. I answered on July 7, 2014 asking for clarification, but unfortunately never received any until today.

[172.] On July 4, 2014, I received an email from Soldefi stating that the use of financial instruments was a failure and requesting that I bring other means to pay them. This email was received after the confirmation from their bank that they received a swift message to which they answered. I believe it was an attempt to escape from their responsibility through the actions of their bank.

[173.] On July 7, 2014, I sent an email to Soldefi demanding answers to my interrogations, but I only received a refusal to supply any answer and an attempt to refuse any responsibility to what was happening.

[174.] Apparently on July 9, 2014, the lawyers of Soldefi sent a letter to Credit Agricole requesting clarification on the situation.

> [175.] Apparently on July 18, 2013, Credit Agricole sent a letter to Soldefi acknowledging the reception of the Swift message from "RBS" Moscow. Their letter acknowledged the reception of an MT760 Swift from "RBS" Moscow which was in contradiction to all the previous declarations of Soldefi.
>
> [176.] On July 21, 2014, I received from IIG Czech A.S. a copy of a SWIFT message originated by Credit Agricole asking "RBS" Moscow to re-send the instrument and in which they were confirming their readiness to receive the financial instrument. This message referred to Divco Field Service International which is my company and was the cobeneficiary of the original financial instrument. I never gave any authorization to Soldefi to use the name of my company, nor have said anything that could have allowed Soldefi to believe that they were authorized to request the re-emission of the stand-by letter of credit.
>
> [177.] When asked to explain how a SWIFT could be sent requesting a second emission of the financial instrument without my knowledge and using without authorization the name of my company, Soldefi affirmed that their bank was acting without their knowledge and refused to comment further.
>
> [178.] As far as I know, banks need the formal agreement of the beneficiary of the stand-by letter of credit to issue a SWIFT message. Banks are not allowed to request the emission of a stand-by letter of credit in favour of a company without a written agreement of the beneficiary company or being ordered to make this request by their clients and account holders.
>
> [179.] I believe that Soldefi was in breach of Article 4 of the Agreement of participation in a financial transaction the claimants were "responsible for the good receipt of the instrument, its safe keeping" and had a key responsibility in the loss of this stand-by letter of credit and the failure of the transaction. I believe that Soldefi were caught red handed and for such deed were responsible for the actions of their bank."

50. M. Varlot explains more about "financial instruments" at paragraph 185, and following, in the same witness statement.

> "On June 26, 2014, I arranged the sending by the company Alpha Xenia International Resources Inc of a financial instrument in the value of €500,000,000 (five hundred million Euros) from Royal Bank of Scotland to Credit Agricole into the account of Soldefi. The financial instrument was sent as a SWIFT message MT 103 which has legal and of financial value and constitutes an actionable and irrevocable commitment to pay from the issuing bank. I sent a complimentary copy of the SWIFT message to Soldefi on the same day.
>
> [186.] On June 30, 2014, Soldefi informed me that two (2) SWIFT messages were received by their bank.
>
> [187.] On July 1, Soldefi changed their declaration made on the 30th of June and affirmed that the SWIFT from Royal Bank of Scotland was not received. Soldefi refused to give any evidence to support this change of declaration.

[188.] On July 10, 2014, I received a letter from Alpha Xenia International Resources Inc stating that they requested from their bank to reconfirm the first swift sent

[189.] On the 10th of July, I received from Alpha Xenia International Resources Inc a copy of a SWIFT message sent to Credit Agricole in the format of a SWIFT MT 202 which is a "confirmation of transfer and advice to release the funds" and is legally and financially binding on the issuing bank. The copy was given to Soldefi which refused to comment.

[190.] On July 10, 2014, I signed with First Commercial Trust Company AG a contract for organizing a financial trading session based on the financial instrument supplied by Alpha Xenia International Resources Inc.

[191.] On July 11, 2014, I sent an email to Soldefi to ask them to confirm whether the swift was actually received by Credit Agricole or not. Soldefi seemed to have transferred this request to Credit Agricole. In such situation, only the bank account holder in the receiving bank can obtain information and confirm the reception. The incoherence's of the declaration of Soldefi left the situation unclear. Soldefi sent me on the same date a copy of the email they sent to Credit Agricole about the phone conversation they allegedly had with their bank.

[192.] On July 12, 2014, I received a letter from Alpha Xenia International Resources Inc confirming the coordinates of the bank that according to them was able to send a confirmation swift message.

[193.] On July 13, 2014, First Commercial Trust Company AG sent a letter to Soldefi to confirm their commitment to pay them a fee that was corresponding to their service of reception, verification and safe keeping of the financial instrument supplied by Alpha Xenia International Resources Inc.

[194.] On July 13, 2014, I sent to Soldefi the coordinates where the swift from Alpha Xenia International Resources Inc shall be sent if and when it is confirmed in the account of Soldefi.

[195.] On July 15, 2014, I received a letter from Alpha Xenia International Resources Inc stating that they confirmed that the swift for reconfirmation was sent.

[196.] On July 15, 2014, I received from Soldefi an email where they stated to their bank that they presume that the swift was received by their bank, and that they will notify as soon as they have a confirmation of the reception. I am entitled to believe that Soldefi based their statement from the conversation they had with their bank. Later the same day, Soldefi changed again their declaration and stated that their bank didn't give them any information.

[197.] Apparently on July 18, 2013, Credit Agricole sent a letter to Soldefi stating about a "Swift MT 105 from RBS Edinburgh" that it was never received directly by their services and were not able to give any treatment. This is, once again, in contradiction with all the previous declaration of their personnel and of Soldefi and brings forth the following comments: a. The swift allegedly sent by Alpha Xenia International Resources Inc was a MT103 not a MT105. A MT 105 is absolutely

> not the same nature of message and it is unusual that a bank makes such a confusion. b. By stating that they were not able to treat a swift message, the bank somehow seems to confirm that the swift message was received but not by their international department. c. Once again the declarations of the bank and of Soldefi were incoherent and contradicting the information that we were receiving from the financial instrument issuer.
>
> [198.] On July 20, 2014, I received a power of attorney for my company Divco to represent Soldefi in the transaction based on the financial instrument from Alpha Xenia International Resources Inc. Strangely, this document was made on a paper stating "letterhead", and where the letterhead of Soldefi was erased; however it was not on the letterhead of Soldefi. I was entitled to believe that if Soldefi prepared such a power of attorney, this is because they had information about the reception of the swift that they didn't communicate to me.
>
> [199.] On July 21, 2014, I received from Alpha Xenia International Resources Inc a copy of a SWIFT message sent to Credit Agricole in the format of SWIFT MT N95 which is the cancellation of the previously sent financial instrument. The copy was given to Soldefi which refused to comment.
>
> [200.] On July 21, 2014, I received from Mr. Bernardo Martini who was the intermediary with Alpha Xenia International Resources Inc an email stating that the Credit Agricole refused the cancellation of the swift message."

51. Despite the failure of the "SWIFT transactions", M. Varlot continued with his efforts to see the Claimants paid what was owing to them. Having no access to his bank accounts, it was impossible to conclude any successful transaction. This in due course led on to the mediation process which M. Varlot asserts was commenced by the Claimants. It was also, he says, agreed "early during the mediation" by the Claimants and D5, that M. Varlot would be released from the ACA.

52. When cross examined, M. Varlot explained that he had been told by Mme Bratkova that he should not be part of the ACA. He was surprised to see a new company involved but had been told it was a company through which Mr Scherer was willing to perform his transaction. M. Varlot was not part of decision-making as to who would be parties.

53. M. Varlot only discovered the name NCFSL when he first saw it in a draft of the ACA. He had not had any dealings with NCFSL and had "no idea" who had set it up.

54. When pressed about how it came about that the Settlement Agreement was executed two weeks after D2 had been dissolved, M. Varlot explained that he was not aware of this when the Settlement Agreement signed; nor did he know that D2 had been dissolved two weeks before. He had not been involved in any administration work for D2. His view was that it had been dissolved for lack of filing of required documents.

55. Accepting that he was a director of D2 along with D5, M. Varlot's evidence was that D5 directed the company and that "for [him] in a company there is only one boss". When it was put to M. Varlot that he had in fact been the CEO of D2, no real response was offered.

56. When asked about the undertaking offered to the Claimants by the defendants' then solicitors Clifford Chance, M. Varlot explained that he did not control the instructions given to that firm by D5. Nor could he explain why, despite the Clifford Chance undertaking, $235,000 was paid to him from the Deposit.

57. When he signed the Settlement Agreement, M. Varlot recalled how he had been totally desperate and late on his rent and school fees for his daughter; he could not pay for food for his family and had no lawyers; he also experienced pressure from Mr Scherer. It all amounted to duress; he told the court.

58. As a result of pressure from M. Dubost, M. Varlot decided to "exit from [his] zone of competence" and "tried to raise money to get out of the situation and satisfy Mr Dubost."

59. Having been taken to a number of transactions involving so-called financial instruments, M. Varlot was eventually asked about the standby letter of credit (**SBLC**) that had been purportedly advised by SWIFT to the French bank Credit Agricole. He did know why the RBS offer of a standby credit was rejected by Credit Agricole. So far as he was concerned this amounted to a transaction in performance of the APFT and to pay the amount due under the Settlement Agreement.

60. Throughout his cross examination, M. Varlot was at pains to stress that he had only been an employee following the directions of D5. He had known very little about the financial world or the trade finance elements of it, save for an involvement with the financing terms for the acquisition of items of plant and machinery that he had purchased as an engineer. He continually offered the view that he was doing his best to learn what to do in order to make money to pay the harassing M. Dubost. The difficulty with this evidence was, as Mr Neaman put to M. Varlot, the extent to which he had plainly been at the heart of the discussions with M. Dubost and it appeared to be him who was explaining how the financial transaction, such as it was, would operate so as to give rise to the settlement payment. "It was not my competence, I only did it because Scherer was not doing anything and Dubost was putting pressure on me", M. Varlot claimed.

61. When asked about the letter purporting to come from the then Chief Executive of Standard Chartered Bank, Mr Peter Sands, M. Varlot made it plain that he did not know it was fraud, despite the obvious misspelling of the bank's name. But he said it had been bothering him. He "failed to open the documentation to lead to a good transaction". He vehemently denied ever giving fraudulent documents to the Claimants: "never! I was trying my best. The documents were always in the state that I received them."

62. M. Varlot claimed he had no way of knowing that the message from Mr Sands was not genuine. The person sending it to him said that he had a large account with the bank and was dealing directly with Mr Sands.

63. Turning to the ACA, M. Varlot explained that he had given updates to Mr Dubost every day. Whilst he could not speak for Mr Scherer, he was in copy of nearly everything and was pushing him – telling him to work harder.

64. Being unclear as to his evidence on the nature of the financial transactions that were being proposed or which would lead to payment of a sum in settlement of the amount due to the Claimants, I invited M. Varlot to explain the details. His evidence was that someone who has non-liquid assets such as a stock of parts, finds a bank that wants to issue a SBLC, "and based on this, the bank issues a SBLC for a duration of one year; and then when companies purchase this instrument for a fixed amount, sometimes 60% of the value or 20%, a standard fee is payable at the rate of 5% of the monetised value." M. Varlot suggested that it was like factoring.

65. His first employment however did not involve arranging transactions: it was renewable energy and military projects. He knew about SBLCs as he had been issuing SBLCs for large amounts when he had been dealing with diesel engines. He thought that something called UDP 900 applied to SBLCs and that "the ICC has some documents that specify how it works".

66. M. Varlot was also asked why there were no documents in the trial bundle where mention is made of problems with his banks in relation to the freezing injunction. After June 2014 he agreed that the existence of the order had no longer been a problem.

67. The court then heard from Jean-Aime Medici. His statement of 24 October 2019 was admitted as his evidence in chief. Mr Medici was the president and CEO of JP, a company that is "now inactive".

68. Mr Medici explained that he had worked continuously with Mr. Didier Varlot since 2014. JP was acting in the market of trading financial instruments including Bank Guarantees and SBLCs. On 26 May 2015, JP had received a request from the second Claimant asking JP to secure the payment of a certain amount of money from the fees that were to be paid to D5 and / or M. Varlot as a result of a particular financial transaction. On Mr Medici's evidence, Mme Bratkova was his legal adviser and she had been instructed to carry out due diligence on the second Claimant.

69. Thereafter, Mr Medici explained how a transaction that D5 had presented to JP involved only D5. M. Varlot had not been involved; "no fees were forecasted to be paid to Mr Didier Varlot for the same transaction". So far as Mr Medici was concerned, from June to September 2015, Mme. Bratkova had "managed the negotiations between Soldefi / Trebisol and Mr. Michel Scherer. These negotiations resulted in a document named 'Amicable & Compromise agreement".

70. Touching on the terms of the ACA, Mr Medici explained in his statement that:

> "via the mediator, Soldefi and their partners requested us to enforce the limitation upon the activities of Mr. Didier Varlot for 2 more years; which was a sine qua non condition to his release from the case. I can confirm that, in compliance with the demands of Soldefi and Trebisol: a. from September 2015 until now, Mr. Didier Varlot received only hourly remuneration as Quality Assurance on a medical project while consulting for the government of Qatar medical system but he never worked for JP financial nor did her ever receive a fee in or for any financial transaction whatsoever; b. from September 2015 until now, Mr. Didier Varlot didn't participate to any financial transaction nor planned any. c. These limitations were clear to us as such reciprocity was for the definitive exclusion of Mr. Didier

> Varlot from the case. Such limitations were enforced independent of the outcome of the transaction of Mr. Scherer."

71. When describing the "mediator" doubtless Mr Medici was referring to Mme Bratkova.

72. According to Mr Medici, the Claimants were first obliged to "supply a set of documentation to allow the transaction of Mr Scherer to be initiated with our organization". He expected a confirmation that the UK court case had been stopped and execution by the Claimants of the "Master Fee Protection Agreement". Because JP did not receive a "copy of any such orders from the UK court stopping the case between Soldefi / Trebisol and Mr. Scherer or Mr. Varlot", and because no one executed the Initial Master Fee Protection Agreement (the **IMFPA**), so far as he was concerned, there had been a material breach of the procedure of "the transaction of Mr. Scherer and, therefore the transaction of Mr. Scherer was discarded and was never taken onboard."

73. So far as Mr Medici was concerned D5 was "a fly by night". "We have to have credibility or we have to protect ourselves" he told the court, however "D5 did not do the things we needed." This view had been arrived at as a matter of his own judgment and had not come from M. Varlot, whom he trusted and considered only an employee.

74. As to the ACA with the accompanying IMFPA, Mr Medici explained that he did not feel good about the deal and he had a negative attitude. This document he would have signed if "everything was ok" however there might have been a problem with it as other signatures were missing.

Legal Framework

75. It is necessary to have in mind the procedural framework within which this trial has been conducted. It has taken the form of an action to enforce the terms agreed by the parties and set out in a schedule to a consent order in Tomlin form. This process of enforcing the terms agreed and scheduled to a Tomlin order was considered by Goff J (as he then was) in *E. F. Phillips & Sons, Ltd. v Clarke* [1969] 3 All ER ChD. In that case the agreed terms included a provision that the defendant was obliged to pay £100 (and agreed costs) to the plaintiffs as damages. The question before the court was whether the Plaintiffs were able to recover the amounts due by a motion in the original action. The central issue for Goff J was whether these sums were amounts not properly recoverable by the original action and so not recoverable by way of Tomlin enforcement. The court's attention was invited to a number of cases in which the question of the mode of enforcing a Tomlin order has been considered, and to a statement in *Daniell's Chancery Practice* , 8th ed. (1914), at p.646, which stated: "... a consent order, embodying a new agreement between the parties beyond the scope of the action, can only be enforced in a fresh suit," for which the authority cited was *In re Hearn [1913] W.N. 103, (1913) 108 L.T. 452* & 737.

76. At [711] C, Goff J observed:

> "There is no express authority that a Tomlin order can be enforced by an application in the same action. It is clearly settled by *Dashwood v. Dashwood [1927] W.N. 276* , that it cannot be enforced directly by committal proceedings; it is first necessary to obtain an order requiring the party in breach to perform his obligation

under the compromise. But the question is, can such an order be obtained in the original action? In the absence of authority I would have thought it clearly could have been even where, as in the present case, a compromise goes outside the ambit of the original action - which compromises often do - because it is part of the form of order that the proceedings are not absolutely stayed but are stayed except for the purpose of carrying the terms into effect, and liberty to apply as to carrying the terms into effect is expressly reserved. In *Dashwood v. Dashwood* Tomlin J. himself appears to have visualised that that might be enforced either independently or in a new action.

There are strong dicta in *McCallum v. Country Residences Ltd. [1965] 1 W.L.R. 657* . In that case there was not a Tomlin order. Danckwerts L.J. thought there was an implied term that the compromise should be embodied in such an order but the majority of the Court of Appeal thought otherwise. The views expressed as to the mode of enforcement are therefore in any event dicta, and in that case the compromise was not outside the ambit of the original action. But both Lord Denning M.R. and Danckwerts L.J. clearly thought that terms embodied in a Tomlin order could be enforced in the original action, and Danckwerts L.J. in particular said this, at p. 661:

> "I do not think it is decisive of this matter that a compromise may result in a fresh cause of action which, if it has to be enforced, will require a writ and fresh proceedings. It seems to me that the procedure in the present case was designed to do away with further proceedings and the issue of a fresh writ. It was precisely to secure that that the Tomlin form of order was evolved."

77. And further on at I, Goff J continued, citing the Master of the Rolls in *Hearn*:

> ""But apart from that, although that alone is a sufficient ground for dismissing this appeal, there is also this further ground - namely, that this is an attempt to enforce, not a title under the will, which alone was dealt with by the trustees' summons, but an entirely new and independent bargain between the husband and the wife, and that could not be done in the old proceedings."

That is not a dictum: it is expressly a ground for the decision, albeit one which the court thought unnecessary because of the strength of their first ground. That being so, in a case on all fours, it is binding upon me. But *In re Hearn*, in my judgment, is distinguishable from the ordinary form of Tomlin order case by the circumstance to which I have already adverted, that there was an unqualified stay and no liberty to apply, and it is also distinguishable from this particular case, and, I apprehend, from most applications to enforce a Tomlin order, in that the relief sought in *In re Hearn* was not mere enforcement but variation. I, therefore, distinguish it on those grounds.

That being so, in my judgment it is not an authority for the bald proposition stated in *Daniell's Chancery Practice* , at p. 646, which I have read. In my judgment, provided an order is in the normally appropriate form with a qualified stay and a liberty to apply, and provided the application is strictly to enforce the terms embodied in the order and the schedule, and does not depart from the agreed terms, an order giving effect to the terms may be obtained under the liberty to apply in the

> original action, notwithstanding the compromise itself goes beyond the ambit of the original dispute and the provision sought to be enforced is something which could not have been enforced in the original action and which, indeed, is an obligation which did not then exist but arose for the first time under the compromise."

78. So far as I am concerned, the succinct reasoning of Goff J provides ample and clear guidance to me for the purposes of the proceedings now before the court. I am satisfied that I may enforce the terms of the Schedule embodied in the Settlement Agreement, by way of the liberty to apply provisions in the Tomlin order; and I am not concerned by the fact that the amount agreed therein may have gone beyond what might have been directly recoverable in the original action.

79. I now turn to the law in relation to the interpretation of contracts. In order to guide me in this task, I have considered two of the well-known authorities in this area. The first case is *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 W.L.R. 896, where at 912 Lord Hoffman said:

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

80. Further guidance on this subject is provided in the more recent decision of the Supreme Court in *Arnold v Britton* [2015] AC 1619 at [15], where Lord Neuberger said:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions […]".

81. In Volume one of the current (33RD) edition of *Chitty on Contracts*, the following view is expressed by the learned authors at [13.083]:

> "However, in *Chartbrook Ltd v Persimmon Homes Ltd*, Lord Hoffmann cautioned that "it clearly requires a strong case to persuade the court that something must have gone wrong with the language" in order to justify a meaning which departs from

> the words actually used. Not only must it be clear that "something has gone wrong with the language", it must also be "clear what a reasonable person would have understood the parties to have meant": in other words, both the "problem" and the "solution" must be clear if the court is to give to the words a meaning other than that which they ordinarily bear. It is thus "only in exceptional cases" that commercial common sense can "drive the court to depart from the natural meaning of contractual provisions". It is no part of the court's function to rewrite the contract for the parties so that, where the draftsman has not thought through the consequences of his own drafting, he will not be permitted to say that "something has gone wrong with the language" in order to save himself from the consequences of his own poor or inadequate drafting. But in the case where from the language of the contract the court can discern that an event has occurred which was plainly not intended or contemplated by the parties and it is clear what the parties would have intended in the circumstances which have occurred, the court may give effect to that intention even if that intention is not consistent with the primary meaning of the words of the contract. It is, however, important to note the limits on the latter principle. The event must "plainly" not have been contemplated by the parties and it must also be "clear" what the parties would have intended in the circumstances which have occurred. The principle does not "extend to re-formulating or altering the parties' bargain"."

82. There can be no doubt that a court will, particularly in a commercial setting, do its utmost to give effect to a bargain reached and committed to in writing.

83. Chitty [at 2-149] explains:

> "The courts do not expect commercial documents to be drafted with strict legal precision. The cases provide many examples of judicial awareness of the danger that too strict an application of the requirement of certainty could result in the striking down of agreements intended by the parties to have binding force. The courts are reluctant to reach such a conclusion, particularly where the parties have acted on the agreement. As Lord Wright said in *Hillas & Co Ltd v Arcos Ltd*:
>
> > "Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as they are appropriate implications of law."

In addition, so long as there is no "conceptual uncertainty", it is no bar to finding a binding agreement that the matter may be difficult "to resolve in practice"; the latter is "a matter for interpretation". Rix L.J. said:

> "… it is simply a non sequitur to argue from a disagreement about the meaning and effect of a contract to its legal uncertainty … For that to occur—and it very rarely occurs—it has to be legally or practically impossible to give to the parties' agreement any sensible content … that is certain which can be rendered certain …""

84. At [2-153], *Chitty* turns to meaningless and self-contradictory phrases:

> "The court will make considerable efforts to give meaning to an apparently meaningless phrase; but even where these efforts fail, the presence of such phrases does not necessarily vitiate the agreement. In *Nicolene Ltd v Simmonds* steel bars were bought on terms which were perfectly clear except for a clause which provided that the sale was subject to "the usual conditions of acceptance". There being no such usual conditions, it was held that the phrase was meaningless, but that this did not vitiate the whole contract: the phrase was severable and could be ignored. A self-contradictory clause can be treated in the same way. Thus, where an arbitration clause provided for arbitration of "any dispute" in London and of "any other dispute" in Moscow the court disregarded the clause and determined the dispute itself. Such cases show that the question whether the inclusion of a meaningless clause vitiates the contract, or can be ignored, depends on the importance which the parties may be considered to have attached to it. If it is simply verbiage, not intended to add anything to an otherwise complete agreement, or if it relates to a matter of relatively minor importance, it can be ignored. But if the parties intend it to govern some vital aspect of their relationship its vagueness will vitiate the entire agreement."

85. Mr Neaman invited my attention to a decision of Megarry J (as he then was) in which he considered the ways in which uncertainty might be established. In *Brown v Gould* [1972] Ch 53, in a case concerning an option to renew a lease in circumstances where the renewal mechanism was not at all clear, the learned judge said this:

> "Furthermore, it does not seem to me that Mr. Scamell has been able to demonstrate that this is a case of uncertainty in either of the two main ways in which that can be done. A provision may be void for uncertainty because it is devoid of any meaning. As some critics of certain modern writings might testify, there may be an unintelligible collocation of ordinary English words, or there may be mere gibberish, such as the phrase " Fustum A funnidos tantaraboo" cited in *Fawcett Properties Ltd. v. Buckingham County Council* [1961] A.C. 636, 647. The present case manifestly does not fall under this head. The other main head is where there is a variety of meanings which can fairly be put on the provision, and it is impossible to say which of them was intended. Mere ambiguities may sometimes be resolved by the application of legal presumptions, JJ and so on: but where the language used is equally consistent with a wide range of different meanings, it may be impossible to discern the concept, which the provision was intended to enshrine. If a case is to be brought under this head, the attack will usually start with the demonstration of a diversity of meanings which are consistent with the language used; and if this is not done, the attack will usually fail."

86. I was also invited by Mr Neaman to consider the judgment of the Court of Appeal in *Beddow v Cayzer* [2007] EWCA Civ 644. In this case there were competing agreements reached for the purchase of shares in a venture to see Veterinary Surgeons' practices owned not by the veterinary surgeons themselves, but by a public company. One of the agreements was held by the judge at first instance to be enforceable despite two of the principal terms being struck down by him on the footing that they were too vague to be enforced. This analysis was challenged by leading counsel on the appeal which came before Mummery LJ (sitting with Keene and Jacob LJJ).

87. Mummery LJ at [56] dealt with the submission in this way:

> "Once, however, it is found that the terms relating to the financing of the joint project or venture in which the parties were to participate and to what their interests in the project were to be, were too vague and uncertain to constitute a binding agreement, it becomes very difficult, in my judgment, for Mr Beddow to contend for a binding contract between the parties. This is so whether the relationship is described as a partnership at will, joint venture or otherwise. There is nothing on which to base a contractual claim to shares in the Company or to damages for breach of contract.
>
> [57] There can be no contract without some terms, express or implied. If the express terms that are pleaded are significant, but are too uncertain and vague to be legally enforceable, there can be no concluded and binding agreement creating a partnership or joint venture."

88. Thus Mr Neaman submits, that if I find the material terms of the ACA vague and uncertain such that they are unenforceable, I am driven perforce to the conclusion that the whole agreement must be struck down.

89. I also need to have in mind the law that relates to the assertion by M. Varlot that the ACA at clause 3.1, operated as a release, and discharged him from the liability he had under the Settlement Agreement. Once again *Chitty* provides some useful guidance, this time at [22.005] where is it said that:

> "No particular form of words is necessary to constitute a valid release, and any words which show an evident intention to renounce a claim or discharge the obligation are sufficient. The normal rules relating to the construction of a written contract also apply to a release, and so a release in general terms is to be construed according to the particular purpose for which it was made. In order to ascertain the intention of the parties, the court will have regard to the terms of the contract as a whole:
>
> > "… giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties."
>
> The scope of a release drafted in general terms may be limited either by the existence of a dispute between the parties or by the parties' knowledge, at the time of entry into the release, of the existence of the claim. Where the parties have a particular dispute in mind when entering into the release, the scope of the dispute "provides a limiting background context to the document". Even where the parties

do not have a particular dispute in mind, the circumstances in which the release was given may suggest that the release should only apply to a particular subject matter. The parties' knowledge of the existence of the claim at the time of entry into the release is more equivocal. The fact that the existence of the claim was unknown to both parties does not mean that such a claim falls outside the scope of the release. Parties who enter into a release frequently want to achieve finality and so the:

> "… wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims."

It would appear that a person will not be allowed to rely upon a release in general terms if he knew that the other party had a claim and also knew that the other party was not aware that he had a claim. But the construction of any individual release will necessarily depend upon its particular wording and phraseology."

90. I must now deal with the law in regard to estoppel. Reliance is placed by both M. Varlot and D5 in their pleaded case, upon an estoppel arising from the ACA which they say operates so as to prevent the Claimants pursuing such legal rights as they may have against them under the Settlement Agreement.

91. I accept Mr Neaman's submission that the principles of estoppel by representation were helpfully set out by Coulson J (as he then was) in *Costain Ltd v Tarmac Holdings Ltd* [2017] 1 CLC 491, where at [99], the learned judge said:

> "In accordance with numerous authorities (such as ***Steria Ltd v Ronald Hutchison*** [2006] EWCA Civ 1551), the ingredients of estoppel by representation can be articulated as follows:
>
> a) One party to a contract makes a clear and unequivocal representation to the other;
>
> b) That representation is intended to effect the legal relations between the parties;
>
> c) The representation is that the promisor's legal rights under the contract will not be enforced or will at the least be suspended; and
>
> d) The promise, to the knowledge of the promisor, in reliance on the representation, alters its position to its detriment."

92. I have also had regard to *Snell's Equity (34 Edn)*, and in particular to the passage at [12-012] where in regard to Estoppel by Convention, the learned authors say:

> "As a result of the decision of the Court of Appeal in Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd, estoppel by convention is now more often regarded as a variant of equitable estoppel and seen as defining a particular set of circumstances in which it is "unjust", or unconscionable, to allow a party to go back on an underlying assumption that formed the basis of a transaction."

Discussion

93. The starting point for the analysis of the issues in this case must be the proposition that I hold to be correct, that the ACA was a contract between NCFSL and the Claimants. It also seems to me to be perfectly clear that the subject matter of the ACA was the litigation between the Claimants, D5 and M. Varlot. It was plainly the intention of these parties that the ACA would address that litigation and the liability that M. Varlot and D5 had to the Claimants. It was certainly concerned with the obligations arising out of the Settlement Agreement. All of this is clear from:

    i) the language of the ACA which at 1.1 described the action number and referred to the Tomlin Order;

    ii) the fact that the Tomlin Order appeared as Appendix A and was initialled by M. Dubost for the Claimants; and

    iii) the reference at 2.1 to the action and the intention of the parties to reach a full and final settlement of it.

94. As Mr Neaman points out, the ACA is littered with vague and difficult to understand clauses. It is unlikely that the first language of the draftsperson was English: it was probably Mme Bratkova. The provisions are nevertheless on the whole, capable of an understanding in light of the principles of interpretation that I must apply; and to the extent that any are unenforceable for vagueness, in my judgment that does not in itself mean, on the facts of this case, that the contract as a whole must be struck down. As has been noted, courts strive to give effect to the bargains of those engaged in the commercial world and that is what I propose to do here.

95. What however am I to give effect to? It seems to me that if there was an agreement between the Claimants and NCFSL, its terms were that upon payment of two million Euros to the Claimants, NCFSL would have a full discharge from the Claimants in respect of prior claims. The prior claims could only have been the claims against, inter alios, M. Varlot and D5, with which claims of course, NCFLS has no obvious connection. The value of such an agreement is not for me to divine. That seems to me however to be the only sensible construction of clause 7.1, and in my judgment what the parties must have intended.

96. It follows therefore that in order to secure the discharge, the condition had first to be satisfied. On the evidence before me it has not been. Accordingly any suggestion that NCFSL, let alone M. Varlot or D5, has been discharged from liability, such as they had, under the Settlement Agreement on this basis must fail, save to any extent that the claim that the amount due would have been paid by M. Varlot/D5, but for the Claimants refusal to accept it, succeeds, and it is to that argument, despite my finding that that the ACA benefitted only NCFSL, I shall for completeness now turn.

97. It is, as has been seen, M. Varlot's case that a Russian bank attempted to advise a SBLC to the Claimants' bankers but that that bank unreasonably or irrationally, at any rate without good reason, declined to accept it. Accordingly he argues, the Claimants would have been paid under the APFT, this being, it will be recalled, one of the series of curious agreements entered into by the parties during the period subsequent to the Tomlin Order in February 2014 and the ACA in September 2015.

98. Thus it was argued that the ACA in any event could not give rise to a liability for M. Varlot because the amount due under the Settlement Agreement would have been paid under the APFT were it not for the Claimants.

99. Whether or not the APFT:

i) could have resulted in the discharge contended for by M. Varlot; and

ii) was in fact binding on the Claimants,

I am not on any basis prepared to accept that a valid SBLC was advised to Credit Agricole by any of the defendants. I am not even satisfied that M. Varlot knows what a SBLC is and how such documents operate, despite his seemingly detailed evidence on the operations of, and message numbers used by, the SWIFT inter-bank messaging system which at once might seem at odds with his evidence of lack of experience in the world of finance. He nevertheless seemed to be entirely unaware of the well-known ICC publications ISP 98 and UCP 600, which typically govern such documents let alone how they inter-relate or might be chosen to apply. His explanation to me of how it was that a standby credit might be advised and how its value could be relied upon by the Claimants was uninformed, if not to say unintelligible. No proper explanation was given to the court of how what is essentially a guarantee could be utilised by the Claimants in order to secure payment of the amount due to them. Nor was it explained why a SBLC was needed in the first place rather than a simple transfer of the funds required. It was never properly explained how the Claimants could preserve a SBLC advised to their bankers and be "responsible for its safe-keeping", let alone how it was that a SBLC in a much higher value would eventually lead to a payment to the Claimants of the amount due to them. The evidence was difficult to follow and gave rise to an anxiety as to the probity of those involved.

100. In consequence I can see no basis for a finding that the amount due to the Claimants under the Settlement Agreement should not be paid by virtue of any provision of the ACA or because of some defence along the lines of tender or howsoever otherwise arising out of the supposed SBLC.

101. I must also deal with D5's case that the Settlement Agreement was superseded or varied by the ACA; or that it was novated to NCFSL. I heard no evidence from D5 in support of these assertions. Nor am I in any event attracted to them. I do not accept that it was the intention of the Claimants to enter into an agreement with a third party and on the faith of its promise pay an amount, admittedly greater than the amount due under the Settlement Agreement, without more and thereby, to discharge D5 from liability under the Settlement Agreement. I do not accept that this is the proper interpretation of the ACA.

102. I also do not accept that the ACA had the effect of novating the Settlement Agreement, in a varied form, such that NCFSL became the only obligor under it in place of the Obligors. That on the evidence that I have heard, was not the intention of the parties. For completeness I should add that there was self-evidently no agreement between the parties to the Settlement Agreement to vary its terms in the manner contended for by D5.

Discharge

103. Whatever might be the effect of the ACA, I am not prepared to hold that the language used took effect as a release or agreement to discharge M. Varlot from liability under the Settlement Agreement. If there is to be a release of a liability to pay, documented under a Settlement Agreement and separately scheduled to a Tomlin Order, in my judgment the language necessary to achieve that end must be clear and the intention of the parties plain. The same applies to a covenant not to sue. I accept that no particular form or words is necessary and that any words that show an evident intention to discharge an obligation are sufficient.

104. M. Varlot makes his case on the use of the phrases "*Mr Didier Varlot must be excluded from the Party B side and kept immune from the date of the Present Agreement signing and this fact shall be honoured by all the parties, their associates, mandates or their shareholders or by any other parties related to the original claim or associated to the original claim.*"

105. The drafting and language used is as exorbitant as to its claims to its effect on a variety of related parties, as it is extraordinary, all within the context of an agreement with an unheard of third party, NCFSL. I am not prepared to hold that this clause can be taken to reflect the intention of the Claimants to discharge M. Varlot from his Settlement Agreement liability. The words "kept immune" and "excluded from the Party B side" were in my judgment insufficient in a context where there is the added difficulty of the engagement being with a third party, that is to say NCFSL.

106. Attempting to construe the language used by the parties and applying the approach laid down in *ICS/Arnold v Britain*, in my judgment it was not the intention of the parties to release M. Varlot from his Settlement Agreement liability, in the faith only of a yet further promise of funds to be paid *in futuro* by a third party of whom the Claimants knew nothing. In all the circumstances, this would have been a remarkable act of commercial folly and I do not judge the Claimants, despite their perhaps surprising and to say the least naïve dealings with the defendants, to be guilty of it.

107. In addressing this interpretation exercise I must also take account of M. Varlot's submission as to the effect of clause 3.2 of the ACA. He submits that this clause operated so as to prevent him receiving fees from JP for a period of one year after the execution of the ACA. He claims he has performed this covenant. He says that he is entitled to the benefit of the clause 3.1 discharge because he has kept to his side of the bargain.

108. It will be observed immediately that M. Varlot was not a party to the ACA. He was neither Party A (the Claimants), nor was he Party B (NCFSL). In these circumstances, how could it have been enforced? The provision cannot easily be construed as a procuring obligation; is it otherwise to be interpreted as the Claimants agreeing with NCFSL that they would discharge M. Varlot provided that he was not seen to be receiving fees from JP for a period of a year? In my judgment this is all too vague and unclear. I cannot say that I am satisfied as to the intention of the parties. I am thus not prepared to allow M. Varlot to pray in aid the provisions of clause 3.2, in support of his version of the meaning of clause 3.1.

Duress

109. I of course recognise the force of Mr Neaman's submission that duress was not raised on the pleadings and the Settlement Agreement was admitted. Nevertheless recognising M. Varlot's position as a litigant in person, I was prepared to extend to him a degree of latitude in respect of the matters I was willing to hear him upon: in this instance however that indulgence does not avail him.

110. I am not prepared to hold that duress in any of its forms has the slightest relevance to this case. Leaving to one side the absence of any pleading in this regard, the evidence from M. Varlot appeared to suggest that he now rather regretted having entered into the Settlement Agreement and felt that it was all really the business of D5. Despite being only an employee, somehow he had been dragged into the affair to a much greater extent than he would have liked, all because of the pressure placed upon him by D5.

111. I am afraid that I am not prepared to find that there is any, or any sufficient evidential basis, for a claim of duress. Indeed in my judgment, M. Varlot was very far from being a mere employee as he attempted to make out. The evidence clearly reveals that he was fully immersed in the business of the defendants and their attempts to avoid liability for the Deposit that had been dissipated. There would have been no sense at all for M. Varlot to enter into the Settlement Agreement if it was the case as was at one stage suggested, that the Deposit was exhausted in defraying the legitimate costs and expenses of a financing due diligence exercise. In my assessment of the evidence M. Varlot was fully and freely involved in all the business arrangements of the defendants as principal and not merely as a "some way down the pecking order" employee who was kept informed from time to time of dealings with the Claimants. I do not accept that he was as he claimed naïve and nor do I accept his suggestion that he entered into the Settlement Agreement "at gunpoint".

112. I should add that I was not impressed by Mr Medici as a witness. I found his explanations of the financial transactions in which he and the other defendants and Mme Bratkova were involved, hard to follow and again, not a little concerning. I am not prepared to accept his evidence that M. Varlot was a mere employee. This assertion goes against the enormous weight of the documents; the plain evidence of M. Varlot's deep involvement in the material dealings with the Claimants; and M. Varlot's concession that he had a senior executive role in D2.

113. I have to say that I found the IMFPA and the evidence surrounding it troubling. Why such a document would be executed by someone purporting to act as a lawyer to one of the parties in the transaction was never properly explained. Nor in my judgment was it properly explained either by Mr Medici or M. Varlot, what its purpose was. On the face of it, and on Mr Varlot's case, it was the means by which the Claimants were to be paid if they agreed to promise to release their rights under the ACA. But how was that to happen? This is the language of it:

> "Taking into consideration that both Advisers applied Mediator to arrange the deals they agreed to pay to him 2,5% from their total fees sharing this value 50:50 among both Advisers, 1,25% from total fee from each side. Mediatory fees to be deducted from fees payments to Advisers and to be paid directly at his nominated account by JP Financial Development Corp. It is mutually agreed that the fee to be shared via 3 Adviser's Parties as follows: Party A as Investor and Consultant to receive €2,000,000.00 (Two Million) EUROS minus 1,25% of mediatory fees##and Party B to receive €3,000,000.00 (Three Million)

> EUROS##minus 1,25% of mediatory fee from total fee face value of €2,000,000.00 (Two Million) EUROS. Party B to be also Sub-paymaster to all others Consultants and Advisers involved in this Project. Party A shall receive their part of fee without additional obligations. The parties agree that the commission fees stated is compensation for services rendered and commission fees will be free of legal impediment and free of any deductions, excluding bank transfer fees, for this and all subsequent transactions between the parties. In consideration of the mutual benefits to be derived by the associates or affiliated individuals, agents, companies, designees, trustees or executors, it is understood and agreed that the parties hereto are mutually desirous of effecting this business transaction in co-operation with one another for their mutual benefit and all signatory parties agree to abide by the following terms and conditions: All parties hereby agree that FEES SHALL BE PAID IN FULL VALUE BY WIRE TRANSFER (MT103) BY "JP FINANCIAL DEVELOPMENT CORP." (Paying Bank to be advised 3 days before payment execution) TO THE BELOW MENTIONED ACCOUNTS OF THE BENEFICIARIES, TO BE SPLIT AND PAID TO THE FOLLOWING PAYMASTERS/BENEFICIARIES: PARTY A ACCOUNT TO RECEIVE €1,975,000.00 EUROS FULL FACE VALUE"

114. And later in the IMFPA, after some forms which purport to have a formal appearance and function, the following is provided:

> "This IMFPA is irrevocable and valid upon commencement of the transaction related to Collateral providing via MT760 SWIFT confirmation and successful verification via nominated by JP Financial Development Corp., and shall follow generally recognized International Standards of Non Circumvention and Non-disclosure are applicable for a period of One (1) Year from the date of this document or the last date of the contract(s) including any renewals, extensions, additions and secondary contract(s) are fully completed and we agree to respect those."

115. What was all this supposed to mean? How were the Claimants to be paid? Was it through some complex financial transaction in which large fees were to be generated: if it was, no one has in this case been able to offer me an adequate explanation as to how. And was it also the case that someone, perhaps JP, was prepared to share those large fees, for a reason that again no one could quite explain?

116. All of this serves to confirm my finding set out earlier in this judgment to the effect that the ACA could not have had the effect contended for by M. Varlot and D5. I cannot accept that the Claimants intended by that document to release their rights under the Settlement Agreement for a vague promise under the ACA accompanied by the IMFPA.

Estoppel

117. M. Varlot's pleaded case in respect of estoppel is that by agreeing to the ACA, the Claimants represented to him that they would not enforce the terms of the Settlement Agreement against him. The difficulty with this argument is that no representation was made to M. Varlot. Leaving that impediment to one side, it is supremely difficult to assert that any representation that was made was clear and unequivocal to the extent required for an estoppel by representation defence to get off the ground.

118. In my view no such representation as suggested by M. Varlot was made by the Claimants to him and it certainly was not made in clear and unequivocal terms. Such a construction cannot on any basis be placed upon the relevant terms of the ACA which I have set out in this judgment.

119. Insofar as the point might be argued as an estoppel by convention, applying the guidance from *Snell*, in my judgment we are a long way from any understanding between the parties from which it would be unjust for them to be permitted to depart.

120. D5 pleads that he has acted to his detriment inasmuch as he has given effect to the terms of the ACA. To the extent that this point adds anything to the analysis that I have already recited and which applies equally to him in my view, *mutatis mutandis*, I would point out that I have heard no evidence from D5 as would persuade me that this limb of the argument has any merit whatsoever.

The Counterclaim

121. M. Varlot and D5 have each counterclaimed in respect of the Claimants' failure to give notice of discharge to those who had notice of the grant of the Freezing Order. M. Varlot makes his claim specifically in respect of the banks who had received notice of the grant of the order. He gave evidence in relation to this claim as I have recounted earlier in this judgment.

122. Whilst I take the view that I would have been entitled to order an enquiry into the damage sustained as a result of the admitted breach of the undertaking given to the court by the Claimants, I am not going to do so for the following reasons. I did not hear any evidence from D5 in support of his demand for an enquiry; the evidence I did hear from M. Varlot was insufficient to persuade me that he suffered any identifiable loss, a point that he eventually conceded in cross-examination. If M. Varlot was unable to conclude "financial transactions" with the banks to which he referred, I am not at all satisfied that the reason was in any way whatsoever connected to the delay on the part of the Claimants in communicating the fact of the discharge of the freezing order. Insofar as it is relevant, I take into account too the fulsome apology from M. Dubost and I am satisfied that the default was inadvertent: I cannot see how it would have been to the Claimants advantage to delay informing the very banks who might have been involved in a solution to their problems, of the lifting of the freezing order.

Conclusions

123. For the reasons that I have set out, I am satisfied that the Claimants are entitled to enter judgment in the sum claimed, that is to say Euro 1,200,000, to which interest must be added at the rate provided for under the Settlement Agreement.

124. I am also satisfied that the counterclaims must fail.

125. I will hear the parties on the form of Order required, which must provide for the Claimants to have their costs, unless a draft can be agreed and submitted to me for approval.