



Neutral Citation Number: [2019] EWHC 897 (Comm)

Case No: CL-2018-000251

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

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

Date: 10/04/2019

**Before :**

**Andrew Henshaw QC (sitting as a Judge of the High Court)**

**Between :**

**ASTRA ASSET MANAGEMENT UK LIMITED**

**Claimant**

**- and -**

**THE CO-OPERATIVE BANK PLC**

**Defendant**

**Jonathan Davies-Jones QC (instructed by Eversheds Sutherland (International) LLP) for  
the Defendant/Applicant**

**Christopher Harrison (instructed by Simmons & Simmons LLP) for the  
Claimant/Respondent**

Hearing dates: 4 and 5 March 2019

**APPROVED JUDGMENT**

**Mr Andrew Henshaw QC :**

**(A) INTRODUCTION**

1. The Defendant (“*the Bank*”) applies for summary judgment under CPR 24, alternatively strike-out under CPR 3.4(2)(a), in respect of claims brought by the Claimant (“*Astra*”) for:
  - i) breach of an alleged contract for the sale by the Bank to Astra of certain debts and security interests (“*the Rights*”) under a £19 million credit facility between the Bank and Oxford GB Two Limited, a company in administration;
  - ii) breach of an alleged express or implied agreement to negotiate in good faith to conclude such a transaction; and/or
  - iii) restitution, founded on unjust enrichment, based on the value of services which Astra allegedly provided to the Bank and said to have resulted in a substantial benefit to the Bank.
  
2. The Court of Appeal in *The LCD Appeals* [2018] EWCA Civ 220 §§ 38-39 set out the principles to be applied to applications for summary judgment and strike-out:

“The court may strike out a statement of case if, amongst other things, it appears that it discloses no reasonable grounds for bringing the claim: CPR 3.4(2)(a). It may grant reverse summary judgment where it considers that there is no real prospect of the claimant succeeding on the claim or issue and there is no other compelling reason why the case should be disposed of at trial: CPR 24.2(a)(i) and (b). In order to defeat an application for summary judgment it is only necessary to show that there is a real as opposed to a fanciful prospect of success. Although it is necessary to have a case which is better than merely arguable, a party is not required to show that they will probably succeed at trial. A case may have a real prospect of success even if it is improbable. Furthermore, an application for summary judgment is not appropriate to resolve a complex question of law and fact.”
  
3. The Court of Appeal quoted with approval the following considerations applicable to summary judgment applications, taken from passages in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) and *Swain v Hillman* [2001] 1 All ER 91 at 94:
  - i) the court must consider whether the claimant has a “*realistic*” as opposed to a “*fanciful*” prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
  - ii) a “*realistic*” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 § 8;

- iii) in reaching its conclusion the court must not conduct a "*mini-trial*": *Swain v Hillman*;
  - iv) this does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* § 10;
  - v) however, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
  - vi) although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 3;
  - vii) on the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725"; and
  - viii) a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objective as contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose; and it is in the interests of justice. If the claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position: *Swain v Hillman* [2001] 1 All ER 91 § 94.
4. In addition to these points, Astra particularly highlights:
- i) that the burden is on the Bank to show that Astra's claims are fanciful;

- ii) that a claim is fanciful only if it is entirely without substance: see *Three Rivers District Council v Bank of England* [2001] UKHL 16 [2003] 2 AC 1, where Lord Hope stated at § 95:

“The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.”

Lord Hobhouse said at § 158 (“*The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality*”);

- iii) Nugee J’s statement in *Sharp v Blank* [2015] EWHC 3219 (Ch) at § 33 that “*it is only if the Court can at this stage say with confidence that there is nothing of substance in the claim that summary judgment can be given*”;
- iv) that even if a point of construction appears to be short, it may be better to have a trial where there are standard terms used in the market: *A C Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 [2010] Lloyd’s Rep IR 301 § 35 per Etherton LJ; and
- v) the statement of Peter Smith J in *Groveholt v Hughes* [2008] EWHC 1358 (Ch) § 29, citing Mummery LJ’s observations in *Doncaster Pharmaceuticals* §§ 4-18, that “*the Court needs to distinguish between “cocky Claimants” on the one hand and “rubbishy Defendants” on the other part*”.

## **(B) FACTUAL CONTEXT**

5. The Bank began to seek a buyer for the Rights in early 2015. Astra eventually emerged as a potential bidder in December 2016. The Bank indicated that it was prepared to offer Astra a limited period of exclusivity, and the parties executed a Non-Disclosure Agreement on 4 January 2017 and a first Exclusivity Agreement (“*EAI*”) on 9 January

2017. The Non-Disclosure Agreement was in a standard Loan Market Association (“LMA”) form, and EA1 envisaged that the transaction would involve an assignment of the Rights in accordance with “a Loan Market Association Assignment”.

6. Before outlining the key events, in section (C) below, I summarise certain aspects of the context which Astra particularly stressed. These are (a) the general practice for the execution of transactions under LMA terms, and (b) the urgency on both sides to bring about the proposed transaction in the present case. Both of these, Astra says, make it particularly likely that the parties intended to reach a binding contract by telephone at an early stage in the process, which would be followed by a second stage during which the detailed documentation would be negotiated and executed.

### **(1) Loan Market Association context**

7. A facet of Astra’s response to the Bank’s application is that this case raises the question of when an LMA trade becomes binding, a matter of importance to the market which would be addressed by expert evidence at trial. Astra’s essential case is that the transaction here was a simple distressed debt trade of the kind commonly traded, on LMA terms, by means of a binding oral (usually telephonic) contract with formal written documentation negotiated afterwards.

8. The court was provided with copies of the LMA’s “*Standard Terms and Conditions for Par and Distressed Trade Transactions (Bank Debt/Claims)*” (“**the Standard Terms and Conditions**”) dated 20 April 2016, and the LMA’s “*Guide to Secondary Market Transactions*” (“**the Guide**”) also published in April 2016.

9. Clause 2(a) of the Standard Terms and Conditions states:

“A binding contract for the sale or participation by the Seller to the Buyer of the Purchased Assets and the Purchased Obligations shall come into effect between the Seller and the Buyer upon oral or, in the absence of such oral agreement, written agreement of the terms on the Trade Date and shall be documented and completed in accordance with these Conditions.”

“*Trade Date*” is not a defined term.

10. The rubric at the top of the first page of the Standard Terms and Conditions states:

“For the avoidance of doubt, this document is in a non-binding, recommended form. Its intention is to be used as a starting point for negotiation only. Individual parties are free to depart from its terms and should always satisfy themselves of the regulatory implications of its use.”

11. The Guide explains that:

“The Loan Market Association (LMA) is the trade body for the Europe, Middle East and Africa (EMEA) syndicated loan market and was founded in December 1996 by banks operating in that market. Its aim is to encourage liquidity in both the primary and

secondary loan markets by promoting efficiency and transparency, as well as by developing standards of documentation and codes of market practice, which are widely used and adopted. Membership of the LMA currently stands at over 600, covering 50+ nationalities, and consists of banks, non-bank lenders, borrowers, law firms, rating agencies and service providers. The LMA has gained substantial recognition in the market and has expanded its activities to include all aspects of the primary and secondary syndicated loan markets. It sees its overall mission as acting as the authoritative voice of the EMEA loan market vis à vis lenders, borrowers, regulators and other interested parties.”

and:

“The purpose of this guide is to provide an introductory overview of the secondary loan market. Amongst other things, this guide shall provide a (1) target timeline for a typical secondary loan market transaction, including a brief explanation of the documentation which may be entered into by the parties; (2) description of the parties active in the secondary loan market; and (3) description of the common methods used by lenders to transfer syndicated loan participations”

12. Section 5 of the Guide is headed “*Anatomy of an LMA Trade*”, and begins: “*Assuming that a trade commences when either a prospective Seller decides to sell an asset or a potential Buyer decides that it wishes to acquire a particular loan asset, a trade breaks down into a number of relatively well-defined stages*”. These stages are then described, under the headings Identify the counterparty, Confidentiality, Due diligence, The Trade, The Confirmation, Third party consents, Transaction documentation, Settlement date, Post-settlement date and Secured Debt.
13. The part of Section 5 dealing with “*The Trade*” states:

“Once credit approval is obtained, the seller and the buyer should be in a position to carry out a trade. This will normally be done over the phone. Unless the parties explicitly stated that the trade is subject to contract, there should be a binding contract at the time of the oral trade (the Trade Date).

The key terms usually agreed orally at the time of the trade include:-

- the price paid – is it at par, a premium (i.e. above face value) or a discount;
- the facility and specific tranche – a borrower could have a number of multi-tranche facilities in the market at any one time. Parties will therefore want to ensure that they are both looking to trade the same tranche of the same facility;

- amount – whether the buyer is purchasing the whole of the seller's commitment, or just a portion of it. This could impact how any voting rights are apportioned;
- the form of purchase – whether the trade is to settle via legal transfer only, via legal transfer with a fall-back option to funded participation or directly via funded participation;
- the target settlement date - being the date on which the trade is physically settled, the default target date being as soon as reasonably practicable;
- the treatment of interest payments and fees – the treatment of any unusual fees, such as repayment premiums, should be expressly agreed as a trade specific term; and
- trade specific representations and warranties”

14. The sentence “*Unless the parties explicitly stated that the trade is subject to contract, there should be a binding contract at the time of the oral trade (the Trade Date)*” has a footnote which reads:

“In *Bear Stearns Bank plc v Forum Global Equity Ltd* [2007] EWHC 1577 (Comms), the High Court held that parties to a distressed debt trade concluded a contract during a telephone conversation, when the price for the trade was agreed but the settlement date was not; transactional documentation was to be prepared by the parties' respective lawyers following the call. The case is significant because it endorses distressed debt market practice and gives certainty to oral trades.”

15. The part of Section 5 dealing with the Confirmation reads:

“The trade confirmation (the Confirmation) is designed to record the terms of the trade as agreed orally. It is envisaged that at the time of the oral trade, the seller and buyer will agree all those matters which are required to be decided in order to complete the Confirmation, including which of the parties is to prepare it. The party charged with that responsibility is referred to as the Responsible Party. The Confirmation is to be completed by the Responsible Party and sent to the other party, usually within two business days of the Trade Date. The other party is required either to sign and return the Confirmation to the Responsible Party or to raise any disagreement with any of the terms of such Confirmation, usually by no later than the end of the second business day after delivery of the Confirmation. It should be noted that the Confirmation is intended solely to evidence the terms that were agreed at the time of the trade; it is not intended to be subject to negotiation in its own right.”

16. Section 5 also includes in tabular form “*a target time-line for a straightforward secondary loan market trade, showing the points at or by which the parties should aim to enter into the various documents to a trade*”. Date “*T*” in the table is described as:

“Trade Date – oral agreement of the trade (or, as the case may be, written agreement of the trade (e.g. by email))”

17. In the case cited in the footnote quoted in § 14 above, *Bear Stearns Bank plc v Forum Global Equity Ltd* [2007] EWHC 1577 (Comm), the main issue was whether the claimant (Bear Stearns) concluded a contract with the defendant (Forum) that Bear Stearns would acquire from Forum some distressed debt in the form of notes issued by companies in the Parmalat group. Bear Stearns said that such a contract was concluded on 14 July 2005 in a telephone conversation. The parties to the telephone conversation had agreed the price, but not the settlement date or other detailed terms. Andrew Smith J held that a binding contract had nonetheless been concluded. On the facts, he found that the parties had not agreed to contract on LMA terms, nor was there any custom or usage to the effect that they should be taken to have done so. Nonetheless, on the evidence they intended to conclude a binding contract on 14 July 2005 and the agreement they made was sufficiently certain to have contractual effect.

18. It is relevant to note that Andrew Smith J said at § 92:

“I add that neither [the trade confirmations] nor any other correspondence between the lawyers bore any annotation that they were sent “subject to contract” or with any comparable annotation.”

19. As to the settlement date, he said:

“10. There is no express requirement in the LMA terms that a settlement date must be agreed before a deal is binding, and clause 8 provides for a settlement date twenty business days after the trade date in default of the parties agreeing otherwise.”

Further:

“159. The LMA standard terms provide by clause 2 that a binding contract is made upon oral agreement of “the terms” and, as Forum submit, the expression “the terms” must mean the Agreed Terms, which are defined as “the terms agreed between the Buyer and the Seller in relation to the transaction, as evidenced by the Confirmation”. So it is argued that in order for a contract to be concluded, the parties must agree upon the various matters contemplated and referred to in the standard confirmation form, including the settlement date, the form of purchase (whether there is to be transfer or participation or some other arrangement) and other terms of the trade, including representations and warranties. The submission is that, whether or not Mr. Franzese and SP are to be taken to have agreed upon the incorporation of the LMA terms, agreement upon the terms contemplated by the standard LMA form of confirmation should



be taken to be fundamental to the completion of a contract. Otherwise, what was agreed would be too uncertain to create a binding contract or alternatively the parties cannot be taken to have intended to conclude one.

160. I cannot accept this argument. First, if I am right to conclude that Mr. Franzese and SP had not agreed to trade upon the basis of LMA terms, Forum's argument could succeed only if they could show a usage or custom of the market. No expert or other evidence that I accept supports this. Indeed the evidence of Mr. Tucker is to the contrary. I have, for example, already referred to his evidence that often agreements are concluded without a settlement date having been agreed, and the LMA documentation provides for a default settlement of 20 business days after the trade date because it contemplates that the parties might not have decided this for themselves.

161. Secondly Forum's argument proves too much. For example, the standard LMA Confirmation form provides for completion of details of the parties' Process Agents. I cannot accept that what would otherwise amount to a contract is to be taken not to be binding because the parties are yet to name Process Agents.

162. Thirdly, as a matter of construing the LMA terms, which are the basis for the argument, I see no reason to interpret "the terms" in clause 2 as referring to Agreed Terms as defined. If the defined expression had been meant, it would have been used.

**Was the agreement too uncertain to be contractual?**

163. The planks of Forum's argument that the agreement between Mr. Franzese and SP was too vague to be given contractual effect are, as I understand it, that no time for settlement was agreed, that there was no agreement about whether Forum should deliver the benefit of the notes by way of assignment or by way of funded participation or in some other way, and that there was no agreement about what warranties and representations should be given.

164. The fact that the parties did not agree when the transaction should be executed does not mean that the agreement was too uncertain to be enforced as a contract. In the absence of an express agreement, there was an implied term of the agreement that the parties would execute it within a reasonable time. In the circumstances of this case this amounts to them being under an obligation to execute the transaction promptly once the lawyers had had the time that they required to prepare the necessary documentation.

165. It would seem from Mr. Tucker's evidence to which I have referred that it would be surprising to those operating in the

market if the law did not give effect to an agreement because the parties have not specified a time for execution or settlement of a transaction of this kind. He said, and I accept, that there is no expectation or practice that a settlement date has to be agreed.”

20. Similarly, Andrew Smith J held that lack of agreement about the representations and warranties did not prevent a binding contract having been made by telephone on 14 July 2005, because “*The law will imply any terms necessary to give business efficacy to what was agreed*” (§ 169).
21. Finally on this topic, the LMA Guide also makes clear that a legal assignment of rights under a loan must be in writing in order to constitute a legal, as opposed to an equitable, assignment (citing section 136 of the Law of Property Act 1925).

## (2) Urgency of the proposed transaction

22. Astra submits that the Bank was anxious to sell the Rights as soon as possible. The debt forming part of the Rights was secured by a legal charge over a development site in Leeds (“**the Property**”). The Bank was, Astra says, under pressure from all sides to sort out the problem of an uncompleted development on a prime site in the centre of Leeds, which was seen as an embarrassment. The sticking point was a problem with Standard Life (described in more detail in § 37 below) to which no-one had been able to find a solution.
23. For example, in an email of 9 February 2017 reporting Astra’s £750,000 offer to the Bank’s Treasurer, Mr Northway of the Bank said:

“... at £750k I think this represents good value for a site with uneconomical development and onsale potential and restrictive current usage and with hugely restricting stakeholders.

We have been looking to sell this for nearly two years now and no party has found an economical way to do the deal in its current guise.

... [the Bank] has provisioned this down to £350k ...”

24. When Astra came onto the scene at the end of 2016, Mr Northway impressed the urgency upon it in a telephone conversation on 14 December 2016:

“I am sure you are very aware of the timescale here ... for us the 23<sup>rd</sup> [i.e. 23.12.16] is the completion date. ... next Friday [i.e. 23.12.16] is the date. And it will take an awful lot for me to convince my board that any sort of extension should be permitted ... I can’t keep repeating myself but I cannot emphasise enough how important it is that this gets done by next Friday.”

25. Similarly, in a call on 19 December 2016:

“this is actually a really sensitive asset, because we were receiving weekly communications from Leeds City council on this, and the local MP is on this as well to get this up and running

and to get this development to recommence ... my senior management are pretty pissed off with this. Because we were looking to get this done by Friday [ie 23.12.16] ...”.

and on 27 January 2017:

“Time is of the essence here for both the council and the bank, and you are going to have to make a form of bid and we are going to have to proceed to documentation to get this away.”

Astra added that this latter formulation reflected the typical LMA procedure of an oral trade followed by documentation.

26. The pressure from Leeds City Council was also evident from a telephone conversation on 6 January 2017 in which Mr Northway told Astra:

“they’ve become eh sort of impatient as to what the bank is doing with this ... it doesn’t help when we’ve worked on the debt sales for however long ... it just frustrates them I think and they want this resolved ... they’ve invested taxpayer’s money in this ... there’s a half built site in the city and they want the scar removed ... it’s a very very sensitive piece of real estate to them it hurts them.”

27. Mr Northway’s second witness statement refers in addition to pressure from a local MP and from the Bank’s credit committee, formally known as the Strategic Asset Review committee (“**SAR**”). Astra makes the point that no disclosure has yet been given relating to the SAR’s deliberations, but that it is likely to support Astra’s case that Co-op needed a binding resolution as quickly as possible rather than a continuation of the ongoing uncertainty.
28. Astra says the parties’ agreement to a tight deadline for making a trade was therefore crucial; and the deadline of 15 business days under EA1 was, according to Mr Mathur of Astra, much shorter than the typical period for this sort of transaction.
29. In addition, Astra points to communications in which Mr Northway did all he could to help bring about a quick trade, for example by chasing Leeds City Council to deal with Astra quickly, stating expressly on 19 January 2017 that all parties wanted to deal with and conclude the matter as soon as possible. In a call on 3 February 2017 Mr Northway indicated that he wanted Astra’s and the Bank’s solicitors to talk out the Standard Life problem “*today*”.
30. Astra says the parties’ intention was therefore to strike a binding deal by 10 February 2017 when the exclusivity period under EA1 (as extended) expired. There would have been no point in making simply a non-binding arrangement. The Bank needed certainty that Astra was committed, otherwise Astra could pull out and the Bank would be back to square one. Equally, Astra needed certainty. If it was to embark on the task of trying to resolve the Standard Life problem, it needed to be sure that it, not someone else, would reap the rewards. Mr Northway had told Astra on 27 January 2017 that another credible bidder was in the wings, and Astra needed to be certain that Co-op

could not switch to some other bidder once Astra had done its work. By 9 February 2017 the exclusivity period under EA1 was about to expire.

31. For the purposes of the present application, I therefore proceed on the basis that both the Bank and Astra wished to reach a binding agreement as quickly as possible.

**(C) SEQUENCE OF MAIN EVENTS**

32. As noted in section (B) above, the parties executed a Non-Disclosure Agreement on 4 January 2017, and EA1 on 9 January 2017.

33. Under EA1, the Bank granted Astra a 15 business day period of exclusivity, during which Astra could conduct due diligence and the Bank would not offer the Rights to anyone else. EA1 also included the following provisions:

- i) Recital (A): *“The Buyer and the Seller intend to enter into the Transaction subject to contract”*
- ii) Recital (C): *“The Buyer and the Seller are entering into this agreement in good faith and are relying on its terms ...”*
- iii) The *“Transaction”* was defined as *“the assignment of debt and security interests held by the Seller to the Buyer secured inter alia against the Property in accordance with a Loan Market Association Assignment proposed to be entered into... on or around the date upon which the Exclusivity Period specified herein expires”*
- iv) *“Transaction Documents”* were defined as *“all security and title documentation necessary to deduce the validity and enforceability of security and to deduce title as may be requested by [Astra] or [Astra’s] Solicitors and which is in the possession of [the Bank]”*
- v) Clause 2.1 provided:

“In consideration of [Astra] undertaking and incurring expenses on completing due diligence in connection with purchase of the Property, [the Bank] undertakes:

  - (a) by 5:30pm on 6 January 2017 to instruct [the Bank’s] Solicitors;
  - (b) to send the Transaction Documents in accordance with clause 2.2 to [Astra] or [Astra’s] Solicitors on or before 6 January 2017;
  - (c) to respond promptly to all reasonable enquiries raised by [Astra’s] Solicitors relating to the Property and the Transaction;
  - (d) during the Exclusivity Period not to send or allow anyone else to send Transaction Documents to anyone other than [Astra’s] Solicitors with a view to the

assignment of the bank debt to such person and during the Exclusivity Period not encumber or deal with the security interests intended to be assigned pursuant to the Transaction or deal with title to the Property other than with [Astra].”

- vi) Clause 3 provided that Astra could terminate EA1 with immediate effect by giving written notice to the Bank.
  - vii) Clause 4 provided that if, during the exclusivity period, the Bank breached any of its obligations under clause 2, and if Astra chose to terminate EA1 as a result, then the Bank must reimburse to Astra its reasonable costs, fees and expenses incurred in connection with the Transaction during the Exclusivity Period up to a maximum of £150,000.
34. The Bank’s solicitors, Eversheds Sutherland (“*Eversheds*”), provided Astra’s solicitors Simmons & Simmons (“*S&S*”) on 11 January 2017 with *pro forma* contractual documentation for a potential sale. The draft documents ran to some 47 pages and included a draft LMA Confirmation and Assignment.
35. A phone call took place on 27 January 2017 between Mr Brougner of Astra and Mr Northway of the Bank, during which Astra sought an extension to the exclusivity period. Towards the end of this conversation, which was taped, the transcript records Mr Northway as saying:

“I have a London bidder who I said I would contact next week and they are a very credible bidders to the bank, they bought something very big off us at the [end] of last year and I have had to push back some people who wanted to deal with this in the first place ... so all I can ever envisage my committee or myself upping you is maximum two weeks extension on this without having to pay a deposit for further exclusivity. So, and then thereafter if you don’t it will go to the underbidder looking at it alongside yourselves. But I strongly suggest if after that two weeks you put forward a formal bid and we proceed to docs. OK? That is subject to credit committee so I will need to go away and explain everything to them.”

36. A further phone call took place on 3 February 2017 between Astra (Mr Brougner and Mr Mathur) and the Bank (Mr Northway) during which Mr Northway confirmed that the Bank’s SAR was prepared to provide a two-week extension to the exclusivity period to 10 February 2017, but that there would be no further extension. Mr Northway indicated that he was a member of the SAR, and confirmed that the extension could be regarded as granted, although he would not be able to sign the exclusivity letter until the following Monday. Mr Northway also stated during the conversation (which, again, was taped):

“And the request from committee and I kind of support this is that post the two week exclusivity period and obviously [due diligence] we move to ... sale and purchase docs ... with a view to completing this transaction mid-March, by mid-March”

to which the Astra representatives indicated their assent. Astra draws attention to the point that the parties were in this call willing to treat the exclusivity agreement as having been extended orally: an example of their willingness to contract orally where appropriate.

37. During the same call, reference was made (apparently for the first time between these parties) to what became known as the Standard Life issue. In simplified terms, this was that under the terms of a Sale and Leaseback Agreement, Standard Life had various rights (including a right to ground rent) over the Property, which Astra considered would materially impact the value of the Property and, as a result, of the debt for which it stood as security. Astra indicated that it believed Standard Life's consent would be required for the transaction to proceed, and that Standard Life wished to be paid out. As a result, Astra said the price of £2 million which the parties had hitherto envisaged the Bank receiving for the Rights might need to be adjusted.
38. In the course of email exchanges between Mr Northway and Mr Brougher, Mr Northway on 6 February 2017 made reference to a telephone call with Eversheds (which the overall context indicates would have related to the Standard Life problem) and said "*As we discussed, [the Bank] is prepared to offer an extension to the exclusivity to 10<sup>th</sup> February and thereafter proceed to sale and purchase documentation*". On 7 February 2017 Mr Northway asked: "*What is it you would like to discuss on Standard Life? Please can you advise that come the 16<sup>th</sup> February, you an[d] Simmons are ready to proceed to docs?*" Mr Brougher replied: "*... As for the topic for the call, we just wanted to continue from our previous conversation but now with the benefit of the Simmons/Eversheds call. We can discuss the 16<sup>th</sup> date as well*".
39. A further telephone conversation took place on 8 February 2017 between Astra (Mr Brougher, Mr Mathur and Mr Ganti) and the Bank (Mr Northway) which was not tape recorded. Astra's pleaded case, and the evidence of Mr Brougher, is that Astra offered the Bank two alternatives: either (i) Astra alone would take on the risk of the Standard Life problem and work to resolve it, but in return would pay to the Bank for the Rights a lower price of £750,000 instead of £2 million previously discussed; or (ii) Astra would work with the Bank to investigate the Standard Life problem on a longer timetable. Astra says Mr Brougher's manuscript notes of the conversation are consistent with this evidence, including as they do the entries:

*"today – to go to docs*

*or wait longer and investigate SL and may increase later"*

40. Mr Brougher says Mr Northway stated during the call that "*he would envision feed back internally and that although the £750,000 bid was not the best, if it resulted in a quick exit then [the Bank] may take a view on it and accept our bid*". Mr Brougher's notes also include the words "*submit ... an email*", which Mr Brougher says "*further notes Mr Northway's request that we send an email with our bid outlining the position setting out how we get from "A to B" and why*".
41. The following day, 9 February 2017, Mr Northway emailed two senior colleagues stating that he had "*just received a full and final offer from [Astra] of £750k*" and that Astra:

“will effectively be looking to remove Standard Life from the equation (via pay off and hence leading to a reduction from previous £2m to £750k) ...

While this is not the £2m originally quoted at the back last year, this is still a bid I would accept, especially where they have expressed a speedy transaction. I can revert requesting an increase (and happy to do so), but at £750k I think this represents good value for a site with uneconomical development and onsale potential and restrictive current usage and with hugely restricting stakeholders. We have been looking to sell this for nearly two years now and no party has found an economical way to do the deal in its current guise.

For reference, [the Bank] has provisioned this down to £350k (per the lowest previous underbidder).

I will submit this bid to SAR subject to your initial feedback.”

42. The Bank’s Treasurer replied that he would “*try for £1m on the basis that easier to get over the line. But I would settle for the lower number*”, and Mr Northway agreed to revert to Astra on that basis.
43. Mr Northway then emailed Astra (Mr Brougher) at 13.33 on 9 February 2017 to say: “*Please hold fire from submitting your formal over email. I have received some initial feedback that I will call you about...*”. That was evidently a request to refrain from sending the email bid envisaged in the call on 8 February.
44. Later the same afternoon, either one or two telephone conversations took place between Mr Brougher and Mr Northway. Astra’s pleaded case about the conversation(s) includes in particular the following:
  - i) Particulars of Claim § 10: “*... Mr Northway explained that a price of £750,000 was too low. It was agreed on the call that Astra would pay £900,000 for the Security Interests and would take on the risk of the Standard Life issue.*”
  - ii) Particulars of Claim § 27: “*By the telephone calls on 8 and/or 9 February 2017, and/or the Letter of Intent and/or the Co-Op’s confirmation that its Credit Committee had accepted Astra’s bid for £900,000, the parties entered into a binding agreement (“the Agreement”) pursuant to which, subject to resolving any issues concerning the non-core terms in the written transaction documentation, the Co-Op would transfer the Security Interests to Astra on or around 17 March 2017 for £900,000.*”
  - iii) Response to Request for Further Particulars of the Particulars of Claim § 1(c): “*Mr Brougher offered £900,000 for that option and Mr Northway accepted it. Mr Northway mentioned that the agreement would just need Credit Committee approval and a formal bid to be submitted by Astra (which followed on 10 February 2018).*”

- iv) Reply § 8: *“it is noted that the Co-Op’s case is not that Mr Northway said that the Co-Op’s acceptance of the figure of £900,000 was “subject to contract” (which he did not), but that instead he said it was “subject to Credit Committee approval and documents”. That is consistent with Astra’s case. As pleaded in the Particulars of Claim, the effect of the conversations and/or the Letter of Intent and/or the Credit Committee’s approval was that the Agreement was concluded.”*

I return later to aspects of Astra’s pleaded case.

45. Mr Brougher’s evidence about the conversation(s) is as follows:

“[9] In my professional experience, transactions of this nature can be agreed orally over the phone and subsequently documented in a written confirmation. Once the basic terms such as price and size are agreed a binding trade is in existence and in the period until settlement, lawyers negotiate the terms of the LMA assignment, confirmation and any other ancillary documents required.

[10] I recall that, on several occasions Mr Northway emphasized that there would be a two-stage process to complete the Transaction. Firstly, an exclusivity period would be granted to Astra and during such time Astra would complete its due diligence and agree the core terms, significantly the price. Secondly, once the price was agreed, the parties would formally document the transaction.

A few examples of Mr Northway’s reference to this dual stage process are set out below:

...

[29] Later [on 9 February 2017] in the afternoon Mr Northway and I had two telephone conversations about our bid. In the first call Mr Northway explained that he had a couple of discussions with more senior management/his “exec” and the price of £750,000 was “*a bit light*” (i.e., too low). Specifically, he explained that he was looking for a higher purchase price, closer to £1,000,000. ...

[31] Following [an internal meeting] I had a second call with Mr Northway to discuss the price. During the call I reiterated the risks we were running with the Standard Life Issue and the rationale behind our previous bid of £750,000. While speaking of the risks we were facing, I had the impression that Mr Northway would accept a bid lower than the £900,000 I was about to propose and I was therefore contemplating submitting a level in the £800,000-850,000 range. Ultimately, I decided to stick with what we had internally agreed at Astra before the call and indeed proposed to Mr Northway the higher purchase price



of £900,000. Mr Northway was very pleased and appreciative of the purchase price. He specifically thanked me for the bid and I recall him saying to me that he had seen what I had done. It was my impression from our discussion and his specific reaction to my bid that he would have accepted a much lower level. Despite that fact that, it never crossed my mind at any point after that call that we could or would adjust our price. In my mind, we had mutually agreed to a purchase price of £900,000.

[32] I understood that on 9 February 2017 we had reached an agreement which was binding on Astra and the Bank. The call was consistent with market practice for these types of transaction as I understood it.

[33] I understood that Mr Northway had the requisite authority to bind the Bank in the 9 February 2017 call. Mr Northway was the Head of Legacy Asset Management, was a member of the Bank's Credit Committee, was listed as the Bank's sole signatory in the Draft LMA Documents and was the sole signature on the [Non Disclosure Agreement] and the exclusivity agreements."

46. Mr Mathur of Astra did not take part in the 9 February 2017 telephone conversation(s). His evidence is that, as the transaction was to be by way of LMA assignment and would be governed by LMA terms, the oral agreement made between Mr Northway and Mr Brougher during the call was binding. Mr Mathur states that in his experience (which includes heading a proprietary trading desk whose work included regularly trading under LMA terms), where transactions are executed under LMA terms "*traders typically agree a price on a phone call at which point a trade is concluded and a binding contract is formed*". He believed that Mr Northway had the authority to conclude the contract on the Bank's behalf, and understood Mr Northway's subsequent email of 13 February 2017 (see below), stating "*we are good to proceed to docs*", to confirm that a binding contract had been made. Similarly, Mr Ganti of Astra states in his witness statement that having been informed by Mr Brougher on 9 February that Astra's offer had been accepted, he believed a binding contract was in place.
47. Mr Northway states in his witness statement that he did not take an attendance note of the 9 February 2017 conversation(s). He does not consider that he had authority to bind the Bank, and would not have agreed to any offer as Astra alleges.
48. Later on 9 February 2017 Mr Northway sent an internal email to his colleagues stating:
- "They have come back to me with £900k subject to docs.
- I have asked that we target end of February for completion – they will revert.
- I will proceed to SAR Round Robin unless there are any objections?"
49. At 5.49am on 10 February 2017, Mr Brougher emailed Mr Northway stating:

“I wasn’t able to send the letter through last night. I will get it to you this morning.”

50. At 10.40am Mr Northway sent an email to Leeds City Council (not copied to Astra) saying:

“I understand that you are meeting with Astra today.

They have made an offer to the Bank for the acquisition of the debt and this is being discussed amongst our credit committee.

We are not discussing this with any other parties now.

There is not much more to add at this stage. I will advise if the offer is acceptable to the bank next week.”

51. Mr Northway then at 10.54am replied by email to Mr Brougher’s 5.49am email, stating:

“Further to their questions today, I have advised [Leeds City Council] that you made a bid yesterday and that exclusivity has fallen away. I of course did not disclose the amount and I said I would advise them of the Bank’s decision re the offer once Credit Committee had convened. ...”

There is no indication of Astra having demurred from that description of the situation.

52. At 5.17pm on 10 February 2017 Astra’s General Counsel submitted on Astra’s behalf a letter with a covering email message. The message was copied to Mr Brougher and others at Astra.

53. The email was headed “*Re: Letter of Intent Hilton Hotel Leeds*” and stated:

“It is my pleasure on behalf of Astra... to provide you with the attached Letter of Intent reflecting our desire to complete the transfer of debt and security interests held by [the Bank] secured against a property known or intended to be known as the “Hilton Hotel Leeds” in exchange for £900,000.

As you will appreciate as the terms of the Loan Market Association Assignment have yet to be negotiated, this Letter of Intent and this email is necessarily subject to contract.

Please acknowledge safe receipt and confirm that we can now proceed to documentation.”

54. The attached Letter of Intent was signed by Astra’s General Counsel and stated:

**“Re: Letter of Intent relating to the proposed assignment of debt and security interests held by the Seller to [Astra] (the “Buyer”) secured as a first legal charge against ... (“the Property”) in accordance with a Loan Market Association**

**Assignment to be entered into between the Buyer and the Seller (“the Transaction”)**

It is my pleasure to write to you representing the Buyer ... to provide the Seller with a Letter of Intent reflecting our desire to complete the transfer of debt and security interests held by the Seller secured against the Property in exchange for £900,000 to be paid by the Buyer to the Seller on a completion date to be agreed between the parties. As the Buyer and Seller have not completed all legal and contractual documentation necessary to make this Transaction valid and effectual, this Letter of Intent is necessarily subject to contract and completion of all relevant legal and contractual documentation on terms agreeable to the Buyer and the Seller.

Upon completion of the Transaction, it is the Buyer’s present policy that the debt and security interests held by the Seller in accordance with the Transaction will be transferred by the Seller to the Buyer or a Special Purpose Vehicle nominated by the Buyer.

... This letter, its contents and any dispute as to its interpretation shall be governed by the laws of England and shall be subject to the exclusive jurisdiction of the English courts.

This Letter of Intent is subject to contract and shall not give rise to a binding agreement until completion of all legal and contractual documentation on terms agreeable to the Buyer and the Seller.”

55. Astra’s General Counsel states in his witness statement that when he used the words “*subject to contract*” he understood them to mean that although the parties had agreed the price for the transaction, they had not completed all the representations and warranties and so the LMA Assignment and Confirmation was not in final agreed form. He adds “*My understanding was that there was an agreed and binding position as to the price and that only the finer points of detail on the Transaction remained to be agreed*”.
56. On 13 February 2017 Mr Brougher, in a continuation of the same email chain headed “*Re: Letter of Intent Leeds Hilton Hotel*”, followed up Astra’s General Counsel’s email of 10 February by asking where things stood on the Bank’s side. In response, Mr Northway said:

“...we have now received credit committee approval so we are good to proceed to docs.

I will advise Eversheds to make contact with Simmons. I would like to aim for completion this month Ken, and Committee have stressed that this would be ideal.”

57. On 14 February 2017, Eversheds (for the Bank) sent an email to S&S (for Astra) attaching revised versions of the draft LMA Confirmation and Assignment. The email was headed “*subject to contract*”, and among other things attached Astra’s 10 February letter of intent. The attached draft LMA Confirmation left the “*Trade Date*” uncompleted (using the placeholder “[*DATE*]”), and stated the buyer as “*Astra entity to be confirmed*”. The Settlement Date was shown as 9 December 2016, apparently a carry-over from an earlier iteration before Astra become involved. The purchase price was stated as “[*£900,000*], as varied by Clause 3 in the Annex to this Confirmation”. Clause 3 of the draft Annex provided for the price to be increased by reference to the VAT charged by the Administrators of Oxford GB Two Limited (Duff & Phelps) for their services up to and including the Settlement Date.
58. On 16 February 2017 Mr Brougher emailed Mr Northway a revised version of EA1 prepared by Astra. Mr Northway replied that he was happy with the revised draft, except that he wanted to shorten the period of exclusivity from 17 March 2017 to 10 March 2017. In the event, it was left at 17 March 2017, but Mr Northway stated that he wanted to expedite the process, that there could not be any extensions beyond 17 March, and that “*I also need to confirm that the Bank cannot tolerate any reduction in offer price*”.
59. The Second Exclusivity Agreement (“*EA2*”) was executed by the parties on 17 February 2017, and conferred a further exclusivity period to 17 March 2017. It included the following provisions:
- i) Recital (A) stated: “*In response to a Letter of Intent... on 10 February 2017, the Seller has agreed subject to contract to enter into a Transaction with the Buyer in exchange for £900,000 to be paid to the Seller on a completion date to be agreed between the Parties*”.
  - ii) Recital (B) stated: “*The Seller does not intend to enter into the Transaction with anyone other than the Buyer during the Exclusivity Period.*”
  - iii) Recital (C), like recital C of EA1, stated: “*The Buyer and the Seller are entering into this agreement in good faith and are relying on its terms...*”
  - iv) The definition of “*Transaction*” was shortened to “*the assignment of debt and security interests held by the Seller secured inter alia against the Property*”.
  - v) There was a new definition – “*Proposed Consideration*” – which was £900,000.
  - vi) By clause 2, “[*i*]n consideration of the Buyer undertaking and incurring expenses on completing due diligence in connection with the purchase of the Property”, the Bank undertook (in similar terms to those in EA1) during the Exclusivity Period to respond promptly to enquiries and not to send or allow anyone else to send Transaction Documents to anyone other than Astra’s solicitors with a view to the assignment of the bank debt to such person, nor during the exclusivity period to encumber or deal with the security interests intended to be assigned pursuant to the Transaction or deal with title to the Property other than with Astra. In addition, two new obligations on the Bank were inserted:

“during the Exclusivity Period:

...

[2.1(c)] not to initiate negotiations with any third party other than the Buyer ... or to seek, encourage or respond to any approach that might lead to negotiations with a third party other than the Buyer and to terminate or procure the termination of any negotiations with a third party and not to respond to any approach to encumber or deal with title to the Property with anyone other than the Buyer ...;

[2.1(d)] to notify the Buyer in writing within one Business Day if during the Exclusivity Period, the Seller or any person/entity affiliated with the Seller receives an indication from a third party other than the Buyer ... that they intend to submit an offer relating to the Transaction or indicates that they may wish to enter into the Transaction or acquire title to the Property.”

vii) As was the case under EA1, clause 3 provided that Astra could terminate EA2 with immediate effect by giving written notice to the Bank.

viii) Clause 4.1 was revised from the corresponding clause in EA1, and now provided:

“The Seller acknowledges that the Buyer has incurred significant costs completing the due diligence necessary to consider entry into the Transaction. If during the Exclusivity Period, the Seller breaches any of its obligations pursuant to the Exclusivity Agreement or the Seller seeks to alter the Proposed Consideration or the Seller is otherwise not ready able or willing to complete the Transaction and the Buyer chooses as a result to terminate this Agreement, the Seller shall reimburse the Buyer all reasonable costs, fees and expenses incurred by the Buyer exclusively in connection with the Transaction during the Exclusivity Period ...”.

ix) Clause 4.2 stated:

“In the event that the Seller breaches any of its obligations under the Exclusivity Agreement, the Seller shall indemnify the Buyer against all liabilities, costs and expenses (calculated on a full indemnity basis) in connection with the proposed Transaction or the acquisition of title to the Property”.

60. On 24 February 2017 the Bank reported to Leeds City Council that “*As confirmed previously, Astra have made an offer to the Bank that the Bank has accepted. Mid-March is the target for completion.*”

61. On 1 March 2017, Astra’s General Counsel emailed Mr Northway providing anti-money laundering/know your customer details for the company Astra was proposing

would be the purchaser, Elmet Capital Limited (“*Elmet*”). Elmet had been incorporated that day, 1 March 2017. The attached letter from Astra began: “*In order to facilitate anti-money laundering on-boarding for the proposed assignment subject to contract of debt and security interests... (the “Proposed Transaction”)*”.

62. On 8 March 2017, S&S (for Astra) emailed Eversheds (for the Bank) their marked-up comments on the draft LMA Confirmation and Assignment. These included the following points:
- i) In the revised draft LMA Trade Confirmation, the placeholder “[DATE]” next to the entry for “Trade Date” had been replaced by a dash, and at clause 3 of the draft Annex to the Confirmation the following words had been inserted: “*For the purposes of Condition 2(a) the Standard Terms, this transaction shall be executed in writing by this Confirmation and not by oral agreement.*”
  - ii) Next to “Settlement Date” in the draft confirmation, the otiose reference to 9 December 2016 had been removed but no new date was inserted.
  - iii) The “Purchaser” was identified as Elmet.
  - iv) The Price was shown as £900,000, in square brackets, and a footnote had been added: “*To be clarified once the commercials have been agreed...*”. This replaced the previous proposal that the Price would include VAT charged by the Administrators.
  - v) Clause 9 of the draft Annex to the Confirmation stated: “[*The Buyer undertakes to the Seller at the Trade Date to negotiate and agree a Funding Agreement with the Administrators before the Settlement Date*]”. The footnote to that clause stated: “*Note: TBD depending on whether funding agreement is already agreed at time of trade*”.
  - vi) Clauses 4 to 12 of the draft Annex included substantially new representations, warranties and undertakings which Astra was asking the Bank to give.
63. On 10 March 2017, Mr Northway emailed Mr Brougher offering to discuss the differences in commercial terms which had been revealed by the comments on the draft contractual documentation, noting among other things that “*We were surprised to see so many Reps and Warranties in here given that you have undertaken your dd and also that the “Assumed Obligation” clause has been removed in its entirety. This was particularly surprising given that it is LMA standard language.*” (The “Assumed Obligations” clause was a provision in the LMA Terms and Conditions providing for the buyer to assume, perform and comply with the seller’s obligations under the credit documentation relating to the assigned debt as from the effective date of the assignment.)
64. During this period, Astra alleges that it had been working not merely to investigate but also actually to resolve the Standard Life problem. Apparently as a result of that work, on 7 March 2017 Standard Life wrote to the Bank to give notice that it was terminating its interest under the Sale and Leaseback Agreement. On 14 March 2017, the Bank confirmed to Standard Life that it would not be exercising its step-in rights under the

Sale and Leaseback Agreement, that being one of the available steps as to which the Sale and Leaseback Agreement obliged the Bank to make an election.

65. The effect of Standard Life's decision to terminate was to resolve the Standard Life problem. That in turn greatly increased the value of the Property and, as a result, the Rights to be assigned from the Bank to Astra.
66. This led the Bank to reconsider its approach to the transaction with Astra and to the price for which it was prepared to sell the Rights. That was of course ironic given that (a) the increase in value appears to have resulted from work done by Astra in anticipation of the transaction, and (b) the proposed price for the transaction had been reduced from £2 million to £900,000 on the footing that Astra would take the risk of the Standard Life problem.
67. The upshot was a telephone conversation between the Bank and Astra on 15 March 2017, in which it appears Mr Northway told Astra that the Bank had received the notification from Standard Life that it was terminating its interest and that the Bank needed to consider the impact of that on the proposed price for the Rights.
68. Early on 16 March 2017, Astra's General Counsel emailed Mr Northway stating: "*In the light of recent developments, we will understandably need to extend the Exclusivity Agreement and extending the Exclusivity Period to 7 April in this context seems prudent*". He asked the Bank to sign an attached draft Amendment Agreement (which was not ultimately executed). The draft Amendment Agreement indicated that all the terms and conditions of EA2 would "*continue in full force and effect*", save that the exclusivity period would run to 7 April 2017.
69. Later on 16 March 2017, there were two phone calls between Astra (Mr Brougher and Mr Mathur) and Mr Northway. A transcript of the second of these records it as including the following exchange:

"Mr Mathur [of Astra]: Did you not accept the bid at a hundred eh 900,000 pounds? (silence) Did you not?"

Mr Northway: I did based on the information I had at the time.

Mr Mathur: Sorry, you're not very clear. Did you say you accepted the bid? Yes?

Mr Northway: Well of course we did, you know that we accepted the proposed consideration and that's what we were working to.

Mr Mathur: Sure. So I'm just saying that the trade is done when the bid is accepted. You can talk about a contract, you cannot renege on the price. The bid is accepted subject to contract. The contract is not subject to a renegotiated bid or an offer. (prolonged silence) Anyway, look, um unfortunately if we cannot come to a speedy conclusion on this one, then we are going to have to protect our legal position ..."

70. Following these calls, Astra’s General Counsel emailed to Mr Northway a Notice of Termination under EA2. The covering email stated: “*In light of recent developments and attempts by Co-op to change the agreed Proposed Consideration, we feel no option but to serve the attached notice.*” The notice referred to EA2 and stated: “*We hereby give you notice of termination with immediate effect as a result of the Seller seeking to alter the Proposed Consideration and accordingly the Seller is liable to us as Buyer to reimburse our costs, fees and expenses incurred in accordance with the Agreement.*”
71. The Bank accepts that, following the exercise of what it regards as having been its contractual right under EA2 clause 4.1 to seek to alter the proposed consideration or to decline to complete the transaction, Astra is entitled to claim its “*reasonable costs, fees and expenses incurred ... in connection with the Transaction during the Exclusivity Period together with any irrecoverable VAT incurred on them.*” Astra’s claims in this action include such a claim, which is not the subject of the present application. The only dispute between the parties in respect of that claim relates to quantum.

#### **(D) PRIMARY CONTRACTUAL CLAIM**

72. Astra’s primary case is that a binding contract was concluded either (a) in the call on 8 February 2017, (b) in the call (or second call) on 9 February 2017, (c) by the sending of Astra’s 10 February 2017 letter of intent and/or (d) upon the Bank’s 13 February 2017 response to that letter. The Bank says it is clear on the evidence that the parties never reached the point of intending to create legal relations in respect of the intended sale and purchase of the Rights.

##### **(1) Applicable principles**

73. In *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH* [2010] UKSC 14 Lord Clarke summarised the general principles as follows:

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.” (§ 45)

74. In order to conduct the required objective assessment, the whole course of the parties’ negotiations must be considered, both before and after the alleged date of contracting: see *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37 at §§ 28-31:

“28. It is well established that when deciding whether a contract has been made during the course of negotiations the court will



look at the whole course of those negotiations—see *Hussey v Horne-Payne* (1879) 4 App Cas 311.

29. As Earl Cairns LC observed in that case at p 316:

“You must not at one particular time draw a line and say, ‘We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond’. In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them.”

30. The rationale of this approach is that focusing on one part of the parties' communications in isolation, without regard to the whole course of dealing, can give a misleading impression that the parties had reached agreement when in fact they had not—see Lord Selborne in *Hussey* at p 323.

31. In principle, the approach in *Hussey* and its rationale apply regardless of whether the negotiations are conducted in writing, orally or by conduct or by a combination of those means of communication.”

See also *Goodwood Investments Holdings Inc v Thyssenkrup Industrial Solutions AG* [2018] EWHC 1056 (Comm) § 31.

75. As Beatson J noted in *Benourad v Compass Group* [2010] EWHC 1882 (QB) § 106(c), one situation in which it can be objectively ascertained that the continuing intention of the parties has changed is where work has begun before the formal contract is executed: see *Trentham (G Percy) Ltd v Archital Luxfer Ltd.* [1993] 1 Lloyd's Rep. 25, per Steyn LJ. In that situation it will often be unrealistic to say that there is no intention to enter into legal relations or that the performer takes the risk of the document not being executed. However:

- i) As Beatson J also noted, it does not follow that those legal relations will be contractual. In *Whittle Movers Ltd v Hollywood Express Ltd.* [2009] EWCA Civ 1189 the Court of Appeal at §15 approved Professor McKendrick's suggestion ((1988) 8 OJLS 197) that in these situations “*a court should not strain to find a contract because a restitutionary remedy can solve most if not all of the problems*” as being the “*correct approach*”.
- ii) The position differs substantially depending on whether or not the parties have proceeded on a “*subject to contract*” basis. *Trentham*, for example, was not a “*subject to contract*” case.
- iii) “*Where the case is not a “subject to contract” or “subject to written contract” type of case, the fact that the services have been rendered is a particularly important factor and there is likely to be a contract on the terms that were agreed: Pagnan SpA v Feed Products Ltd. [1987] 2 Lloyd's Rep. 601 ; Trentham (G Percy) Ltd v Archital Luxfer Ltd ., and RTS Flexible Systems Ltd. v Molkerei Alios Müller GmbH at [55]*” (Benourad § 106(d)).

- iv) “Where the terms were agreed to be “subject to contract” or understood to be, a court will not “lightly” hold that the parties have waived reliance on the “subject to contract” term or understanding, although it may do so: *RTS Flexible Systems Ltd. v Molkerei Alios Müller GmbH* at [56]. Where all the essential or important terms have been agreed and substantial services have been rendered, however, a court is likely to find that there is a contract without the necessity for a formal written agreement. In such circumstances the fact the services have been rendered is “a very relevant factor pointing in that direction”: *RTS Flexible Systems Ltd. v Molkerei Alios Müller GmbH* at [54].” (*Benourad* § 106(e)).
- v) The reference in the above passage to the rendering of substantial services means the performance of services due to be performed under the intended contract. The relevant part of Steyn J’s reasoning in *Trentham*, discussed in *RTS* §§ 50 and 54, was based on the transaction being executed rather than executory, given that the fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations.
76. The cases make clear that dealing on a “subject to contract” basis negates contractual intention, and that an offer “subject to contract” is incapable of being accepted to conclude a contract: see e.g. *Global Asset Capital* §§ 40 and 42:
- “40. The Offer Letter was “subject to contract”. It is well established that dealing on such a basis negates contractual intention—see, for example, *London & Regional Investments Ltd v TBI plc* [2002] EWCA Civ 355 at [38]–[39].
- ...
42. Since the Offer Letter was “subject to contract” acceptance of it could not make a contract. As Christopher Clarke LJ stated when giving permission to appeal:
- “What is pleaded is that Mr Al-Husseiny said in the telephone conversation that the Board had accepted Mr Maud's offer. Mr Maud's offer, being subject to contract, was not, however, open for acceptance or, at best, would, if accepted, amount to no more than an agreement to agree. Acceptance of that offer would not remove the subject to contract condition.””
77. The Court of Appeal in *Generator Developments Ltd v Lidl UK GmbH* [2018] EWCA Civ 396, a claim for an equitable interest in land, stated:
- “The meaning of “subject to contract” is well-known. What it means is that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) that each party reserves the right to withdraw until such time as a binding contract is made. ... [I]n negotiating on that basis [the parties] took the commercial risk that one or other of them might

back out of the proposed transaction. ... In short, a “subject to contract” agreement is no agreement at all.” (§ 79)

and:

“... it cannot be unconscionable to exercise a right which has been expressly reserved to both parties by means of the "subject to contract" formula; and which Generator had even more clearly reserved to itself in the draft lock-out agreement. As Lord Walker said in *Cobbe* (and as Arden LJ said in *Crossco* ), it cannot be unconscionable for one party to follow a course which the other party has insisted was open to itself.” (§ 85)

78. Males J in *Goodwood* after citing § 79 of *Generator Developments* added:

“The same applies to an agreement which is stated to be subject to the board approval of one or both parties. When a person concludes an agreement on behalf of a company which is stated to be subject to its board approval, he makes clear that he does not have authority, or at any rate is not prepared, to commit the company unless and until the approval is given (cf. *Warehousing & Forwarding Co of East Africa Ltd v Jafferli & Sons Ltd* [1964] AC 1 ). Since the directors are required to exercise an independent judgment whether the transaction is in the best interests of the company, it is very hard to see how there could in such circumstances be any implied promise binding the company to the effect that approval will be forthcoming or that it is a mere formality or a "rubber stamping" exercise. Even an express promise would be problematical. If the negotiator makes clear that he is not authorised to commit the company, he can hardly be authorised to commit the board of directors to commit the company. Accordingly, when an agreement is concluded which is subject to board approval, neither party is bound until the approval is given.” (§ 33)

79. The commonest way to achieve “*subject to contract*” status is expressly to stipulate for it, but that is not necessary if it can be implied: see *Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH* [2018] EWHC 2765 (Comm) § 142.

80. “*Subject to contract*” status can be waived, but it has been held that any such waiver must be unequivocal and that the court will not lightly find such a waiver: see *Global Asset Capital* at § 45 citing *RTS* §§ 56 and 67. This matter was touched on more recently by Lord Briggs in his dissenting judgment in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24 §§ 29-30:

“29. By contrast I fully agree with Lord Sumption's proposition that parties who orally agree the terms of a variation of the substance of their contractual relationship do not thereby (and without more) impliedly agree to dispense with the NOM clause. There is to my mind a powerful analogy with the way in which the law treats negotiations subject to contract. Where parties

agree to negotiate (or declare that they are negotiating) under the subject to contract umbrella and, at the end of those negotiations, reach consensus ad idem supported by consideration sufficient (but for the umbrella) to give rise to a contract, no binding obligations thereby ensue unless or until they have made a formal written contract, or expressly agreed to dispense with that umbrella. Its abandonment will not be implied merely because they have reached full agreement, unless such an implication was necessary. Cumming-Bruce LJ provides a concise summary of this principle in *Cohen v Nessdale Ltd* [1982] 2 All ER 97, 103-104 by reference (via a citation from *Sherbrooke v Dipple* (1980) 41 P & CR 173) to embedded dicta of Brightman J in *Tevanon v Norman Brett (Builders) Ltd* (1972) 223 EG 1945, 1947 in the following terms:

"Brightman J said that 'parties could get rid of the qualification of 'subject to contract' only if they both expressly agreed that it should be expunged or if such an agreement was to be necessarily implied. ...' '[W]hen parties started their negotiations under the umbrella of the 'subject to contract' formula, or some similar expression of intention, it was really hopeless for one side or the other to say that a contract came into existence because the parties became of one mind notwithstanding that no formal contracts had been exchanged. Where formal contracts were exchanged, it was true that the parties were inevitably of one mind at the moment before the exchange was made. But they were only of one mind on the footing that all the terms and conditions of the sale and purchase had been settled between them, and even then the original intention still remained intact that there should be no formal contract in existence until the written contracts had been exchanged."

Cumming-Bruce LJ then quoted Templeman LJ in *Sherbrooke* as saying: "Brightman J thought parties could get rid of the qualification of 'subject to contract' only if they both expressly agreed that it should be expunged or if such an agreement was to be necessarily implied."

30. Necessity is in this context a strict test. ..."

## (2) Analysis

81. The logical starting point in the present case is EA1, because it established the basis on which the parties proceeded in their ensuing discussions, subject to any later agreed alteration of that basis.
82. Recital (A) to EA1 stated that "*The Buyer and the Seller intend to enter into the Transaction subject to contract*". The Bank submits that that phrase has its usual meaning, viz that the parties do not intend to be bound unless and until a written contractual document has been executed.

83. Astra submits that “*subject to contract*” is not a term of art. Its usual meaning is not its invariable meaning, and as with any term, the meaning will depend on the relevant context. The parties to an LMA trade will have in mind that the trade will be followed by documents. In this sense the documentation is “*the contract*” and so the trade may be seen as “*subject to contract*”. But the fact that there will be a *documented* contract does not negate the fact that there is already a *binding* contract made in an oral exchange between the parties.
84. In my judgment the expression “*subject to contract*” used in EA1 bore its usual meaning, and it is not arguable that it had any other meaning.
85. First, as the cases cited above make clear, the expression is indeed a legal term of art, with an established meaning. It is widely used in commercial transactions, both within and outside the property world. To disapply or depart from its established meaning without a very good reason would be liable to disappoint the reasonable expectations of parties engaged in commercial discussions. The “*subject to contract*” basis of proceeding serves an important purpose by enabling parties to control and be certain about the stage at which they become legally bound. Among other things, it protects them from the risk that a contract is inadvertently made during the course of discussions – whether face to face, by telephone or by letter/email –in the course of negotiations: i.e. from the risk that a party says something which objectively construed amounts to a binding offer or acceptance but which that party did not in fact intend to result in a contract. The “*subject to contract*” basis avoids the need for negotiating parties to take care over every word or phrase used in discussion/negotiations in order to avoid becoming prematurely contractually bound, and to avoid prolonged and expensive litigation about whether or not a contract has been made.
86. Secondly, that established meaning of “*subject to contract*” is also the way in which the expression is used in the LMA Guide: see § 13 above. In stating that “*Unless the parties explicitly stated that the trade is subject to contract, there should be a binding contract at the time of the oral trade*”, the Guide clearly adopts the standard, accepted meaning of “*subject to contract*”: no contract arises until a written contract is executed. Thus Astra’s submission that “*subject to contract*” should be construed in its LMA context does not indicate that it should have a different, more restricted, meaning: quite the reverse.
87. Thirdly, Astra’s approach involves construing the words “*The Buyer and the Seller intend to enter into the Transaction subject to contract*” as in fact meaning “*The Buyer and Seller intend to make a binding oral agreement to enter into the Transaction, followed by subject to contract discussion about the written detailed terms of the Transaction*”. That would, however, be a highly strained reading of the parties’ words, and one which finds no support in any part of the text of EA1.
88. The “*subject to contract*” basis established in EA1 provided the essential context for the telephone conversations on 8 and 9 February. Unless the parties by words or conduct agreed to waive that basis, it continued to govern their exchanges during those conversations. Even taking Astra’s witness evidence at its highest, there is no evidence that Mr Northway of the Bank said anything during those calls that could be construed as an express or implied waiver of or departure from the “*subject to contract*” basis of dealing. Although Mr Brougher states in his witness statement that to his mind he made a binding deal on 9 February, he does not suggest that anything was said by either party

during the telephone conversation(s) on 9 February to the effect that they were no longer dealing on a “*subject to contract*” basis. Thus any consensus reached as to price (as to which Mr Brougher does not state in terms that Mr Northway accepted the revised bid, as opposed to expressing appreciation for it) was at most a non-binding agreement in principle which remained subject to contract.

89. Moreover, as indicated in § 44(iii) above, Astra accepts that the parties to the 9 February call left matters on the basis that there still needed to be:
- i) provision by Astra of a written offer, and
  - ii) approval by the Bank’s SAR.
90. That is entirely consistent with the contemporary documents:
- i) The upshot of the 8 February call, in which Astra offered £750,000 for the Rights, was that Astra was to provide a formal offer in writing: see §§ 40 and 43 above. This set the pattern for the call the following day.
  - ii) Mr Brougher’s email of 5.49am on 10 February (§ 49) shows that the telephone conversation(s) the previous day was/were left on the basis that a letter from Astra would follow (“*I wasn’t able to send the letter through last night. I will get it to you this morning.*”)
  - iii) A few days later, recital (A) to EA2 stated: “*In response to a Letter of Intent... on 10 February 2017, the Seller has agreed subject to contract to enter into a Transaction with the Buyer in exchange for £900,000 to be paid to the Seller on a completion date to be agreed between the Parties*” (my emphasis). The parties’ common position was accordingly that such consensus as had been reached by that date resulted from the combination of Astra’s letter of 10 February and the Bank’s response. EA2 contained no suggestion that a binding contract had been made over the telephone on 9 February.
91. Astra’s letter of 10 February was thus a critical element of the process, because even on Astra’s case, and quite apart from the “*subject to contract*” basis of the discussions already established in EA1, no agreement could have been concluded save as a result of Astra’s letter.
92. However, Astra’s letter of 10 February, quoted in § 54 above, was explicit in stating that it could not give rise to a binding contract until the formal documentation was in place. Astra submits that the words “*subject to contract*” in that letter should, as with EA1, be read as envisaging a binding deal reached by telephone followed by a ‘*subject to contract*’ negotiation of detailed written terms. It draws attention to the references in the letter and covering email to Astra’s “*desire to complete*” the transaction, indicating that it was completion, rather than contract, which had yet to occur. However, the letter made no mention of any binding contract having been made by telephone, with only the ensuing formal documentation process being ‘*subject to contract*’. Most clearly of all, the last sentence of Astra’s letter stated “*This Letter of Intent is subject to contract and shall not give rise to a binding agreement until completion of all legal and contractual documentation on terms agreeable to the Buyer*

*and the Seller.*” As a result, it is impossible to construe Astra’s letter as constituting or containing a contractual offer capable of acceptance.

93. Mr Northway’s email of 13 February responded to Astra’s email of 10 February attaching its 10 February letter (see § 56 above). As the latter was expressly *“subject to contract”* as explained above, Mr Northway’s response cannot have resulted in the formation of a binding contract.
94. Astra points out that Mr Northway’s witness statement referring to his 13 February email states: *“This meant that SAR had sanctioned Astra’s offer, allowing us to proceed to the negotiation of the other contractual terms and to document them with a view to entering into an agreement by the end of February 2017”*. Astra suggests that Mr Northway thereby implies that some contractual terms had already been agreed. However, Mr Northway’s statement is equally consistent with the parties having reached an agreement in principle as to price, as part of a process which remained *“subject to contract”*. The same applies to Mr Northway’s later statement, quoted in § 69 above, that he had accepted Astra’s bid. In any event, the critical question is whether the parties had, objectively, concluded a contract.
95. Astra makes the further point that an email from Mr Northway on the morning of 10 February 2017 indicates that the Bank’s SAR committee was already discussing Astra’s bid before the Bank received Astra’s 10 February letter of intent. Thus, Astra submits, disclosure may reveal that the committee decided to approve the bid even before Astra’s letter of intent was received; it may also show that the committee was keen to have a binding deal quickly given the lack of a solution to the Standard Life problem. A binding contract may thus, Astra submits, have been concluded independently of receipt of the letter of intent. I do not accept this submission. The Bank’s acceptance of the bid on 13 February followed and responded to Astra’s 10 February letter of intent. Astra submitted that that letter merely *“formalised”* the bid made by telephone on 9 February 2017. However, it did so in a form which made clear that the bid was expressly *“subject to contract”*.
96. Furthermore, both Astra’s 10 February letter and Mr Northway’s 13 February response must be viewed in the context of the continuum of the parties’ previous exchanges (including EA1) and their subsequent exchanges as summarised below. These were also inconsistent with the parties having concluded a binding contract either by telephone on 9 February, or as a result of Astra’s 10 February letter of intent and/or Mr Northway’s 13 February response, or any combination of those communications.
97. The next relevant communication was the Bank’s solicitors’ email of 14 February (§ 57 above), which now included the price in square brackets but was expressly *“subject to contract”*.
98. This was followed on 16 February by Astra’s revised draft exclusivity agreement (§ 58 above), which was essentially in the form executed by the parties the following day as EA2 (§ 59 above). Recital (A) of EA2 (i) repeated the *“subject to contract”* wording which the parties had used in recital (A) to EA1, and (ii) stated the *“subject to contract”* agreement as having arisen from Astra’s 10 February letter of intent and the Bank’s response to it.

99. Astra submits that "*subject to contract*" in the context of EA2 again had a special or restricted meaning, and was not inconsistent with the parties having already concluded a binding deal. I do not accept that submission:
- i) As noted earlier, the expression "*subject to contract*" has a clear and accepted meaning, and it should be interpreted in accordance with that meaning unless there is good reason to do otherwise.
  - ii) Also as previously noted, the LMA Guide uses the expression in accordance with its usual meaning, and the parties were intending to enter into a transaction using documents based on LMA standard forms.
  - iii) EA2 referred to the Bank's "*subject to contract*" agreement as having been "[i]n response to" Astra's 10 February letter of intent. That letter made clear that it was sent on a "*subject to contract*" basis and would not give rise to a binding agreement until completion of all legal and contractual documentation. The letter of intent thus used "*subject to contract*" in its usual sense, and recital (A) to EA2 must be read in the same way.
  - iv) Recital (B) to and clauses 2 and 4.1 of EA2, significant parts of which were new compared to EA1, were inconsistent with the view that a binding deal had already been concluded. They prevented the Bank from engaging with potential third party rivals to Astra during the exclusivity period, but (by implication) not thereafter. Clause 4.1 set out consequences that would arise if the Bank either breached EA2 "or" sought to alter the proposed consideration "or" was otherwise not ready, able or willing to complete the transaction. Those provisions would have made no sense if the Bank was already bound to proceed with Astra. Moreover, clause 4.1 implied that for the Bank to seek to alter the price, or to walk away from the deal, would not constitute a breach of EA2.
  - v) Clause 2 of EA2 referred to Astra incurring expense on completing due diligence. That wording also appeared in EA1, but its continued presence made little sense if Astra was already bound to transact with the Bank at the agreed price.
  - vi) The fact that EA2 was entered into at all is inconsistent with a binding deal already having been done: there would in those circumstances have been no need for exclusivity, because the Bank would have been contractually bound to sell to Astra.
100. Astra's solicitors' mark-up of the draft documentation (§ 62 above) was also plainly inconsistent with a binding contract having been made by telephone, or by the exchange of messages on 10 and 13 February. On the contrary, it stated explicitly that no oral contact had been made, and that the transaction would be executed in writing by the Confirmation once agreed.
101. Astra submits that the parties' conduct during the period from 9 February 2017 onwards shows that they acted on the deal, (a) by Astra taking significant actions with the Bank's knowledge and encouragement (or at least acquiescence) to resolve the Standard Life problem, (b) by the Bank treating Astra as if it were the owner of the Rights, in that Mr Northway allowed persons including Duff & Phelps to work with and take directions



from Astra regarding the property, and (c) by the Bank refraining from talking to other bidders even though the exclusivity period had expired. However:

- i) such actions cannot be said to have been consistent only with a binding contract having been made, as opposed to an agreement in principle with a view to an envisaged binding contract;
- ii) they did not involve performance by either party of obligations which they would have under the intended contract; and
- iii) in any event, the exchanges between the parties discussed in §§ 81-100 above in my view leave no room for any realistic doubt that the parties did not conclude a binding contract for the sale and purchase of the Rights.

102. Finally, Astra's pleaded case, as to the relationship between the deal said to have been concluded between 8 and 13 February 2017 and the documentation process as whole, is inconsistent with there having actually been a binding deal. Paragraph 27 of Astra's Particulars of Claim, quoted in § 44 above, alleges that under the binding agreement concluded during that period, the Bank would transfer the Rights to Astra on or around 17 March 2017 "*subject to resolving any issues concerning the non-core terms in the written transaction documentation*". Astra reiterates this point in further particulars and its Reply:

- i) Response to Request for Further Particulars of the Particulars of Claim § 6: "*... as pleaded in the Particulars of Claim (paragraph 27), the parties had agreed that the completion of the Transaction was subject to the resolution of any issues concerning the non-core terms in the written transaction documentation*".
- ii) Reply § 9.2: "*Had the parties (acting in good faith) not reached agreement on the non-core terms in the written documentation, the transaction would not have completed and the price would not have become payable.*"
- iii) Reply § 12: "*... By the Letter of Intent, Astra communicated (consistently with its case) that the Transaction was not yet complete as it was subject to agreement on the non-core terms in the written documentation. The Letter did not mean (and the Co-Op would not have understood it to mean) that the Agreement itself was not binding*".

103. However, if the transaction was "*subject to*" agreement on the non-core terms, and in the absence of such agreement it would not have completed and the price would not have been payable, then it was no agreement at all.

104. For all the reasons set out above, I have reached the clear conclusion that there is no tenable argument that a binding contract was made for the sale and purchase of the Rights. Even taking Astra's evidence at its highest, the dealings between the parties are incapable in law of having given rise to such a contract. Notwithstanding whatever urgency either side felt to conclude a transaction as quickly as possible, both chose to proceed on an expressly "*subject to contract*" basis; and that remained the position at the time the negotiations broke down. Astra's claim has no real prospect of success.

105. I do not consider there to be any other compelling reason why this claim should proceed to trial.
- i) The essential facts are not complex, nor is any difficult or novel point of law involved.
  - ii) This case does not raise any point of general application or interest regarding LMA market practice. The authoritative LMA materials referred to above make clear that whilst the usual practice is for a binding agreement to be made by telephone, it is up to the parties to choose whether or not to adopt that route, and that an explicit statement that the trade is "*subject to contract*" will indicate that they have not done so. The question is whether on the particular facts of the present case, the parties chose to adopt the usual procedure or not. That is a question of fact, not of market practice or opinion.
  - iii) As noted in § 85 above, the benefits which should flow from indicating that discussions are taking place on a "*subject to contract*" basis include enabling parties to control and be certain about the stage at which they become legally bound. Where, as in the present case, discussions have taken place on that express basis, it is undesirable for a party to have to incur the cost and delay of a full trial in order to establish the position.
106. Astra submitted that in circumstances where part of the claim has to continue to trial in any event, it would be inappropriate to grant summary judgment in relation to another part of the claim. In the present case, it is common ground that Astra's claim for compensation under EA2 clause 4 must go to trial. As explained below, I have also concluded that Astra's restitution claim should not be summarily disposed of. Lord Hope in *Three Rivers District Council v Bank of England* [2001] UKHL 16 [2003] 2 AC 1 said:
- “I have taken one other factor into account. The decision which your Lordships are being asked by the Bank to take is to give summary judgment in its favour on the entire claim. It would only be right to strike out the whole claim if it could be said of every part of it that it has no real prospect of succeeding. That would mean that even the latest depositors who were entrusting their money to BCCI SA up to the very end of the final period would be left without a remedy. I think that that is too big a step to take on the available material. Conversely, I consider that if one part of the claim is to go to trial it would be unreasonable to divide the history up and strike out other parts of it. A great deal of time and money has now been expended in the examination of the preliminary issues, and I think that this exercise must now be brought to an end. I would reject the Bank's application for summary judgment.” (§ 107)
107. I do not understand Lord Hope there to have been expressing any general principle or presumption that it is inappropriate to strike out (or grant summary judgment) in respect of part of a claim. There may be cases where such a course would be inappropriate. However, in other cases, of which I consider the present case to be one, summary judgment on part of a claim may serve the useful purpose of saving time and costs on

an element with no realistic chance of success, and also of increasing the prospects of the parties reaching a compromise where the quantum of the surviving claim is significantly lower than that of the original claim.

### **(E) ASTRA'S GOOD FAITH CLAIM**

108. Astra's first alternative case is that on the proper construction of EA2 and/or by an implied term, the parties agreed that they would negotiate in good faith to conclude the transaction for £900,000; and that it was a breach of that duty for the Bank not to complete it for the price agreed on the basis that Astra had resolved the Standard Life problem.
109. By way of context, Astra makes the point that there were references to good faith in the parties' oral discussions, for example Mr Mathur's statement during the 3 February 2017 telephone conversation "... *I'm very pleased to see that you have been very open, honest and transparent*", to which Mr Northway replied "*Pleasure. It's all good there is no point in hiding anything you will always be found out ...*". Astra also refers to the statement of Mr Mathur of Astra in a telephone conversation on 16 March 2017 that "*because we had a good faith agreement with Co-op to sell this asset to us ... we started working on the asset ... the reason this outcome came about [i.e. the resolution of the Standard Life issue] is because of our efforts ... we expected Co-op to act in good faith ... to execute deals in good faith ... so by stepping back right now, you are breaching that good faith here*".
110. Astra contends that the express obligation to negotiate in good faith arose from recital (C) to EA2, which stated:
- "The Buyer and the Seller are entering into this agreement in good faith and are relying on its terms..."*
- Recital (C) to EA1 had been in the same terms.
111. However, recital (C) did not amount to an agreement to negotiate in good faith to conclude a contract at the price of £900,000.
112. First, it is not expressed to be an obligation, as distinct from a statement of the parties' general approach to the obligations set out in the body of EA2.
113. Secondly, those obligations did not include an obligation to negotiate in good faith to conclude a transaction at the price of £900,000. Rather, they provided for a negotiating space during which the parties could seek to reach a deal, in circumstances where the Bank would not take any steps with a view to selling the Rights to a third party instead.
114. Thirdly, to construe recital (C) in the way Astra suggests would make it inconsistent with the "*subject to contract*" basis on which recital (A) made clear the parties were proceeding. As the Court of Appeal said in *Generator Developments* §79, by negotiating subject to contract the parties "*took the commercial risk that one or other of them might back out of the proposed transaction*". Negotiating on a "*subject to contract*" basis meant that *either* party could walk away at any point until a deal were concluded. For instance, both EAs referred to the fact that Astra was carrying out due diligence. The outcome of that exercise might have resulted in Astra wishing to walk

away from the proposed transaction, or to negotiate a lower price. By negotiating "*subject to contract*", Astra retained the ability to do so without having to justify its decision by reference to an unpredictable good faith standard.

115. Fourthly, clause 3 of EA2 provided that Astra could terminate the agreement with immediate effect by giving written notice to the Bank. That provision is wholly incompatible with a mutual obligation upon the parties to negotiate in good faith to conclude a contract at a price of £900,000. Nor is it conceivable (and Astra does not allege) that recital (C) imposed a unilateral obligation on the Bank to negotiate in good faith.
116. Fifthly, to construe recital (C) as Astra suggests would also make it inconsistent with EA2 clause 4, which by the use of the disjunctive "or" in the phrase "[i]f during the *Exclusivity Period*, the Seller breaches any of its obligations pursuant to the *Exclusivity Agreement* or the Seller seeks to alter the *Proposed Consideration* or the Seller is otherwise not ready able or willing to complete the *Transaction* ..." indicates that the Bank could, without breaching EA2, seek to alter the price or decide not to proceed with the transaction.
117. Sixthly, and for completeness, recital (C) would on Astra's approach have amounted to an unenforceable "*agreement to agree*": see *Walford v Miles* [1992] 2 AC 128 § 138: "*the concept of a duty to carry on negotiation in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations...*" and "*unworkable in practice.*" The same is true of an agreement to negotiate/agree another agreement in good faith: *Barbudev v Eurocam Cable Mgt* [2012] EWCA Civ 548 at §§ 43-46 and *Shaker v Vistajet Group Holding* [2012] 2 LR 93 at § 7.
118. The Supreme Court in *Wells v Devani* [2019] UKSC 4 emphasised that where it is found that the parties had the intention of being contractually bound and have acted on their agreement, the court will be reluctant to find the agreement too vague or uncertain to be enforced (§ 18). In *Wells* the allegedly missing term was the time at which at estate agent's commission would fall due: the court found the parties would naturally have understood that to occur on completion of the transaction; alternatively such a term could be implied (§§ 27-29, 33 and 35). In a concurring judgment, Lord Briggs made the point that the conduct of the parties can sometimes be at least as informative as the words used (§§ 59-61).
119. In certain circumstances the court can uphold an agreement to agree where the contract contains a mechanism or objective criteria by which any missing terms can be settled: see, e.g., *Petromec Inc v Petroleo Brasileiro* [2006] 1 Lloyd's Rep 121 at § 115-121, where the Court of Appeal was willing (*obiter*) to uphold an express term requiring the parties to negotiate the cost of upgrading a vessel, in accordance with an amended specification, over and above the costs of the original specification. However, the term in *Petromec* specified objective criteria by which the extra costs could be assessed in the absence of agreement, and the Court of Appeal distinguished *Walford v Miles* on the basis that in *Walford* there was no express term to negotiate and no contract at all because all negotiations in that case had been "*subject to contract*".
120. In the present case there was a contract, in the form of EA2, and there was on Astra's case an express agreement to agree. However, given the ongoing due diligence and the contents of EA2 clause 4, the price could not be regarded as having been set in stone,

and in any event other important terms remained to be settled as the later negotiations regarding representations and warranties demonstrated.

121. Leggatt J in *Knatchbull-Hugessen v SISU Capital Ltd* [2014] EWHC 1194 stated:

“23. It is open to parties entering into negotiations to depart from that default position by making a binding contract which will regulate their negotiations. Such a contract may impose an obligation not to negotiate with anyone else during a specified period. Notwithstanding the decision of the House of Lords in *Walford v Miles* [1992] 2 AC 128, it is also now generally accepted that such a contract may impose an obligation on one or both parties to conduct negotiations in good faith, see eg *Petromec Inc v Petroleo Brasileiro SA Petrobras (No 3)* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep 121. Such a contract may also confer a right to recover from the other party costs and expenses incurred in negotiations which prove abortive.

24. The parties in this case made a contract which contained provisions of all those kinds. However, it is important when construing the contract to bear in mind the default position which applies, except to the extent that the parties have agreed otherwise.

25. As I have indicated, the parties agreed to a period of exclusivity during which the Charity undertook, first, not to negotiate with anyone or allow anyone else to conduct due diligence investigations in relation to ACL other than SISU and, second, to conduct negotiations with SISU in good faith with a view to concluding a legally binding share purchase agreement. In return for that contractual undertaking by the Charity, SISU undertook to reimburse costs incurred by the Charity up to a specified maximum limit if the negotiations failed for any of certain specified reasons.

26. It seems to me impossible to imply into that agreement an undertaking by the Charity to conduct negotiations with SISU in good faith after the end of the Exclusivity Period. Such a term would be inconsistent with the parties' agreement.”

122. *Knatchbull* was, however, a case where the defendant had expressly agreed to conduct negotiations in good faith with a view to agreeing and executing legal agreements within an exclusivity period; and Leggatt J did not address the distinction made in *Petromec* between cases such as *Walford v Miles* where parties are expressly proceeding on a "subject to contract" basis and cases where they are not.

123. Even if the 'agreement to agree' issue might be regarded as arguable, the first five reasons set out above make it unarguable in my view that recital (C) should be construed in the manner Astra contends.

124. Astra alternatively alleges that a similar obligation arose as an implied term of EA2. That contention is in my view also unarguable, for two reasons.
125. First, the proposed implied term would be inconsistent with the express terms of EA2, for the reasons given in §§ 114-116 above.
126. Secondly, there are no arguable grounds on which such a term should be implied, applying the tests set out in the case law culminating in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72. In that case the majority of the Supreme Court:
- i) reiterated (at §18) the test set out by the majority of the Privy Council in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20, 26:

“[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that ‘it goes without saying’; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract”;
  - ii) cited (at §19) Sir Thomas Bingham MR’s statement in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 482 that:

“The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. ... [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred ...”;
  - iii) further cited (at §20) Bingham LJ’s conclusion in *The APJ Priti* [1987] 2 Lloyd’s Rep 37, 42 that a warranty to the effect that the port declared was prospectively safe could not be implied into a voyage charter-party. “*because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter*”; and
  - iv) approved these formulations and conclusions, adding (§21) the following additional commentary:

“First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a

term was “*not critically dependent on proof of an actual intention of the parties*” when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting.

Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term.

However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable.

Fourthly, ... although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied.

Fifthly, if one approaches the issue by reference to the officious bystander, it is “*vital to formulate the question to be posed by [him] with the utmost care*”, to quote from Lewison, *The Interpretation of Contracts* 5th ed (2011), para 6.09.

Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of “absolute necessity”, not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.” (paragraph breaks interpolated)

127. Quite apart from the point that the proposed implied term would be inconsistent with the express terms of EA2, it is unnecessary in order to give business efficacy to EA2, which is perfectly coherent (commercially and practically) without it, and it is not so obvious that ‘it goes without saying’. EA2 is a straightforward exclusivity arrangement whereby the selling party, in consideration of the work being done by the counterparty with a view to entering into a purchase contract, agrees for a limited period to refrain from offering the asset to, or soliciting interest from, any third party. It is neither obvious nor necessary to imply into such a contract an obligation to negotiate in good faith, the effect of which would be to preclude either party from walking away or

seeking a price variation at their discretion: especially (though not only) when the agreement envisaged ongoing due diligence. On the contrary, it is perfectly consistent with an exclusivity arrangement for each party to retain the right to do so.

128. For these reasons, I conclude that Astra's claim based on breach of a duty of good faith has no real prospect of success.

**(F) ESTOPPEL**

129. Astra submits that in addition to breaching a duty of good faith, the Bank acted unconscionably, giving rise to an estoppel by convention. The parties shared an assumption that Astra had assumed the risk and rewards of the Standard Life problem and that the Bank would not be entitled to change the price in the event that Astra managed to resolve the issue. Thus even if the Bank was contractually entitled to seek to change the price, it was estopped from doing so. the Bank acted unconscionably in seeking to vary the price in circumstances where the increase in value arose from the matter on which Astra had taken on the risk and rewards.

130. Astra cites *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023 [2017] Ch 389 at §§ 72-75, the most material paragraphs of which stated:

“73. Estoppel by convention is not founded on a unilateral representation, but rather on mutually manifest conduct by the parties based on a common, but mistaken, assumption of law or fact: its basis is consensual. Its effect is to bind the parties to their shared, even though mistaken, understanding or assumption of the law or facts on which their rights are to be determined (as in the case of estoppel by representation) rather than to provide a cause of action (as in the case of promissory estoppel and proprietary estoppel); and see Snell's Equity 33rd ed at 12-012. If and when the common assumption is revealed to be mistaken the parties may nevertheless be estopped from departing from it for the purposes of regulating their rights inter se for so long as it would be unconscionable for the party seeking to repudiate the assumption to be permitted to do so (and see, for example, The “Vistafjord” [1988] 2 Lloyds Rep 343 at 353 in the judgment of Bingham LJ, as he then was).

74. The Judge began the relevant part of her Judgment by setting out the passage from Chitty on Contracts (31st ed.) para 3-107 where the editors state that estoppel by convention arises when the parties have acted on an assumption:

“the assumption being either shared by both or made by one and acquiesced in by the other. The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable to allow them (or one of them) to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any representation or promise. It can arise by virtue of a common assumption which was not induced by the party alleged to be



estopped but which was based on a mistake spontaneously made by the party relying on it and acquiesced in by the other party.”

75. The Judge reminded herself that the parties must have conducted themselves on the basis of the shared assumption and that the shared assumption must have been communicated between them. It is not sufficient for one or (even) both parties to have acted on the assumption if there is no communication of that assumption, but she pointed out, on the authority of *The Vistafjord* [supra at 533], that the necessary communication may be effected by the conduct of one party which is known to the other, provided that such conduct is

“very clear conduct crossing the line ... of which the other party was fully cognisant.”

She might well have added that such communication could, a fortiori, be effected when both parties conduct themselves towards each other on the basis of the assumption. She further reminded herself that the estoppel could only operate if it was unconscionable for one or other party to seek to rely on the true position contrary to the parties' assumption.”

131. The Bank responds that:

- i) estoppel by convention requires clear and unequivocal communication, and an intention to affect a legal relationship: see *Baird Textiles v Marks & Spencer* [2002] 1 All ER (Comm) 737 at §§ 83-84 and 92;
- ii) there cannot have been any clear and unequivocal communication nor any intention to affect a legal relationship in circumstances where (i) everything was subject to contract, and (ii) the terms of the EA2 made clear that the Bank could seek to alter the “*Proposed Consideration*” and gave Astra rights of cost reimbursement to cater for that situation;
- iii) all estoppels require unconscionable conduct by the party against whom the estoppel is asserted, yet as the Court of Appeal recognised in *Generator Developments* at § 85, it cannot be unconscionable for a party to exercise a right which has been expressly reserved by the “*subject to contract*” formula; and
- iv) estoppel cannot create a cause of action where none existed before: see *Baird Textiles* § 87. So, even if (contrary to the point above) the Bank were estopped from asserting that it could alter the proposed price, Astra would still not have a cause of action.

132. The latter point requires some elucidation, since there is a difference between creating a cause of action in circumstances where a party would otherwise have none, and relying on an estoppel in order to pursue an extant cause of action on which the party would otherwise (but for the estoppel) fail. Brandon LJ in *Amalgamated Investment & Property Co. Ltd. (In Liquidation) v Texas Commerce International Bank Ltd* [1982] Q.B. 84, 131-132 stated “*the true proposition of law*” as being “*that, while a party*

*cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed.”* The case before the court there was of the latter kind: the cause of action was founded on a guarantee which the plaintiff had provided to the defendant bank, and the only question was as to its scope: specifically, whether it applied to a loan made by the bank’s subsidiary.

133. Astra in its oral submissions did not really attempt any substantive response to the points made by the Bank summarised above. The alleged estoppel, to the effect that the Bank would not be entitled to seek to renegotiate the price if Astra managed to solve the Standard Life problem, is tantamount to an allegation that if Astra did solve the problem then the Bank could no longer walk away from the intended transaction at all. It would make no sense to conclude that the Bank could not seek to renegotiate the price but could decide to walk away altogether. Astra would thus need to be able to establish a clear common understanding, communicated between the parties, that the Bank would be bound to transact at £900,000 if Astra solved the Standard Life problem: despite the facts that (a) the parties were proceeding on an expressly "*subject to contract*" basis and (b) EA2 clause 4 specifically contemplated that the Bank might walk away from the transaction or seek to renegotiate the price. There is no evidence providing an arguable case of any such understanding. Indeed, it is very difficult to see how any such understanding could exist at all unless the parties had expressly or impliedly agreed to waive their "*subject to contract*" basis of proceeding, something which as already noted the court will not lightly conclude, and of which there is no allegation or evidence in the present case.
134. Moreover, Astra’s estoppel argument is, in my judgment, an example of a claim to found a cause of action on an estoppel, rather than merely to preclude an argument against a claim brought on an extant cause of action. On the necessary assumption that there was no binding contract between the parties to buy and sell the Rights, and there was no obligation under EA2 to negotiate in good faith for that purpose, the effect of the alleged estoppel would be to create a cause of action from nothing.
135. As a result, I do not consider Astra’s estoppel allegation to have any real prospect of success.

### **(G) RESTITUTION CLAIM**

136. As an alternative to its claims in contract, Astra alleges that in reliance on the Bank’s assurances that it would complete the transaction, and/or in expectation of the transaction being completed, Astra worked to resolve, and successfully did resolve, the Standard Life problem with the result that the value of the Rights increased from £900,000 to £7.4 million. Astra accepts that the Bank did not request this work, but alleges that the Bank facilitated and encouraged it.
137. Because the transaction was not completed (and Astra did not intend to carry out this work for free) Astra alleges that the basis on which it did the work has failed and/or there was a total failure of consideration in respect of its services. Further, the Bank greatly benefitted from the work and it would, Astra says, be unjust in those circumstances for the Bank to retain that benefit without paying Astra for the value of Astra’s services. Had Astra charged the Bank a fee for its services in dealing with and resolving the Standard Life problem, it says it would have charged (a) a fixed fee of

£258,800 (exclusive of VAT) and (b) a success fee of £1,300,000 (exclusive of VAT) representing 20% of the increase in value of the Rights as a result of Astra's actions in resolving the Standard Life issue.

138. The evidence I was shown, in the form of witness statements and correspondence, indicates that there is an arguable case that the Standard Life problem had been viewed as an intractable one which had caused previous bidders to pull out; that the Bank did indeed encourage and facilitate Astra in working to resolve it; and that it was probably Astra's work that led to the resolution of the problem.
139. The Bank indicated that for the purposes of this application only, it was prepared to proceed on the basis of the factual propositions Astra has pleaded: (i) that it worked to resolve the Standard Life Issue; (ii) that it did so successfully; and (iii) that its actions can be characterised as valuable services. The Bank's submission was that none of that amounted to a cause of action on the facts of this case.
140. The Bank did not accept, for the purposes of the application, that it facilitated or encouraged Astra's work on the Standard Life problem. However, there is on the evidence an arguable case that it did so. For example:
  - i) on 3 February 2017 Astra liaised by telephone with the Bank's solicitors, Eversheds, and Astra's own solicitors about the Standard Life problem. It appears that Eversheds acted both for the Administrators of Oxford GB Two Limited and for the Bank, its major secured creditor. This followed a call between Astra and Mr Northway earlier the same day in which, after an early discussion of the Standard Life problem, Mr Northway had indicated he would put Astra's solicitors in touch with Eversheds and that "*I would like them to talk this out today*";
  - ii) in a telephone conversation on 14 February 2017 Mr Brougher reported that Mr Northway had expressed himself happy to apply whatever approvals or pressures were necessary with a view to Astra receiving certain information about the Standard Life problem;
  - iii) Astra prepared a draft letter to Standard Life's solicitors, Addleshaws, which Eversheds reviewed indicating on 21 February 2017 that they had nothing to add to it;
  - iv) on 22 February 2017 Mr Northway provided to Astra, at its request, information about a bank account held with Barclays that was relevant to the Standard Life problem;
  - v) Leeds City Council agreed to approach Standard Life at Astra's request subject to receiving a 'hold harmless' letter from Astra, Duff & Phelps and the Bank. The Bank provided such a letter on 24 February 2017 and asked to be kept informed: "*Please advise how the discussions progress*";
  - vi) on 27 February 2017 Eversheds participated in a long telephone conversation with Astra and Duff & Phelps about the Standard Life problem;

- vii) Astra identified the need to speak with the solicitors, Clarion, who had acted for the Bank on the Standard Life transaction in the first place, obtained their details from Mr Northway on 28 February 2017 and spoke with them on 2 March 2017;
  - viii) there are indications that Eversheds participated in discussions during March 2017 with Astra about correspondence to be sent to Addleshaws with the aim of resolving the Standard Life problem.
141. There may be room for argument about the extent to which the Bank's actions constituted acquiescence, facilitation or indeed encouragement to Astra to seek not only to investigate the Standard Life issue as part of its due diligence, but also to resolve the problem. However, that is not a matter which can be resolved summarily short of a trial. It is certainly arguable that the steps Astra took to resolve the problem went well beyond the type of enquiries that would be expected to form part of normal due diligence, and that the Bank encouraged it in that regard.

### (1) Applicable principles

142. As to the principles to be applied, it is convenient to consider broadly chronologically the materials cited by the parties, including certain earlier authorities mentioned in the cases cited.
143. A useful starting point is the general statement in Goff & Jones, *"The Law of Unjust Enrichment"* 9th Ed. § 16-01 that:
- "Where benefits are transferred in anticipation of a contractual agreement which is intended to provide for payment for those benefits, and the contractual agreement does not materialise, the general principles of failure of basis apply. The same principles that govern liability where the contract is void or unenforceable would seem to be equally applicable where the contract does not come about."
144. In *William Lacey (Hounslow) Ltd. v. Davis* [1957] 1 W.L.R. 932, the defendant owned premises that had been damaged during the war and which he proposed to rebuild. The claimant builders submitted their estimate for the reconstruction work, and although no binding contract was concluded, they were led to believe that they would receive the contract. In this belief and at the request of the defendant's surveyors, the claimants prepared calculations and estimates, including in particular an estimate for the purpose of negotiating a 'permissible amount' with the War Damage Commission. After a considerable amount of work had been done, the defendant sold the premises instead of proceeding with the reconstruction. The claimants succeeded in a claim for remuneration on a *quantum meruit* basis, based on an implied promise by the defendant to pay reasonable remuneration for the work carried out at its request.
145. Barry J indicated that the claimants had rightly conceded that in the ordinary case where a builder is invited to tender – and may have to do a very considerable amount of work in arriving at his price – there is nonetheless no implication that he will be paid. The cost of such work is part of the overhead expenses of his business, which he hopes will be met out of the profits of such contracts as are made as a result of tenders that do prove to be successful. However, the claimant submitted that the position was different

where the builder's tender is sought and used not to ascertain the cost of erecting or reconstructing some genuinely contemplated building project, but for some extraneous or collateral purpose for which the building owner may require it. Barry J agreed, saying:

“Now, on this evidence, I am quite satisfied that the whole of the work covered by the schedule fell right outside the normal work which a builder, by custom and usage, normally performs gratuitously, when invited to tender for the erection of a building. In the absence of any evidence called by the defendants, I can only find that the earlier estimates were given for work which it was never intended to execute. ...” (p935)

146. Barry J referred to *Craven-Ellis v. Canons Ltd.* [1936] 2 K.B. 403, where the Court of Appeal had held that the fact that a claimant did the work for which he claimed compensation purportedly under a contract that was in fact void did not disentitle him from recovering on a *quantum meruit* basis, and stated:

“I am unable to see any valid distinction between work done which was to be paid for under the terms of a contract erroneously believed to be in existence, and work done which was to be paid for out of the proceeds of a contract which both parties erroneously believed was about to be made. In neither case was the work to be done gratuitously, and in both cases the party from whom payment was sought requested the work and obtained the benefit of it. In neither case did the parties actually intend to pay for the work otherwise than under the supposed contract, or as part of the total price which would become payable when the expected contract was made. In both cases, when the beliefs of the parties were falsified, the law implied an obligation — and, in this case, I think the law should imply an obligation — to pay a reasonable price for the services which had been obtained. I am, of course, fully aware that in different circumstances it might be held that work was done gratuitously merely in the hope that the building scheme would be carried out and that the person who did the work would obtain the contract. That, I am satisfied, is not the position here. In my judgment, the proper inference from the facts proved in this case is not that this work was done in the hope that this building might possibly be reconstructed and that the plaintiff company might obtain the contract, but that it was done under a mutual belief and understanding that this building was being reconstructed and that the plaintiff company was obtaining the contract.” (p939)

147. Thus *William Lacey* was a case where the defendant had asked the claimant to do the work; the claimant's work went beyond merely putting itself in a position to obtain and perform the contract; and there was a mutual understanding that the claimant would in due course obtain the contract. The decision was not based on the defendant having obtained a benefit from the work.

148. In a case decided by the Supreme Court of New South Wales, *Sabemo Pty. Ltd. v. North Sydney Municipal Council* [1977] 2 N.S.W.L.R. 880, Sabemo had tendered for a building lease of land on which the defendant council wished to carry out development. The council accepted Sabemo's tender and negotiations for the lease followed. During this period, Sabemo carried out detailed work on plans for the proposed development, and at one point raised (apparently inconclusively) with the council the question of compensation. Eventually the council decided to abandon the proposed development. Sabemo was awarded a sum representing the cost of work done. Sheppard J. stated:

“In a judgment of this kind it would be most unwise, and in any event impossible, to fix the limitations which should circumscribe the extent of the right to recover. It is enough for me to say that I think that there is one circumstance here which leads to the conclusion that the plaintiff is entitled to succeed. That circumstance is the fact that the defendant deliberately decided to drop the proposal. It may have had good reasons for doing so, but they had nothing to do with the plaintiff, which, in good faith over a period exceeding three years, had worked assiduously towards the day when it would take a building lease of the land and erect thereon the civic centre which the defendant, during that long period, has so earnestly desired. In the *William Lacey* case, [1957] 1 W.L.R. 932 too, the defendant made a unilateral decision not to go on, but to sell its land instead. I realise that, in looking at the matter in this way, I am imputing a degree of fault to the defendant. To some this may seem to be, at least in English law, somewhat strange. It has long been the law that parties are free to negotiate such contract as they may choose to enter into. Until such contract comes about, they are in negotiation only. Each is at liberty, no matter how capricious his reason, to break off the negotiations at any time. If that occurs that is the end of the matter and, generally speaking, neither party will be under any liability to the other. But the concept that there can be fault in such a situation was adopted both by Somervell and Romer L.JJ. in the *Brewer Street* case [1954] 1 Q.B. 428, 434, 438, 439 the latter, so it seems to me, basing his judgment upon it. Denning L.J. [1954] 1 Q.B. 428, 435, 437 did not in fact find fault in that case, but it would seem that he thought it could sometimes exist in negotiating situations, as distinct from contractual ones, although there had not in fact been fault in the case with which he was immediately concerned. To my mind the defendant's decision to drop the proposal is the determining factor. If the transaction had gone off because the parties were unable to agree, then I think it would be correct, harking back to the expressions used by the judges in the *Jennings v. Chapman* case [1952] 2 T.L.R. 409, 413, 414, 415, and in the *Brewer Street* case [1954] 1 Q.B. 428, 436, 437, 438, to say that each party had taken a risk, in incurring the expenditure which it did, that the transaction might go off because of the bona fide failure to reach agreement on some point of substance in such a complex transaction. But I do not

think it right to say that that risk should be so borne, when one party has taken it upon itself to change its mind about the entirety of the proposal.” (pp900-901)

149. Sheppard J. concluded:

“In my opinion, the better view of the correct application of the principle in question is that, where two parties proceed upon the joint assumption that a contract will be entered into between them, and one does work beneficial for the project, and thus in the interests of the two parties, which work he would not be expected, in other circumstances, to do gratuitously, he will be entitled to compensation or restitution, if the other party unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into, but for reasons which, however valid, pertain only to his own position and do not relate at all to that of the other party.” (pp902-903)

150. The decision in *Sabemo* was thus based essentially on the unconscionable nature of the defendant’s conduct in walking away from the transaction. That approach did not find favour in *Regalian*, as described below. On the other hand, the summaries of the principles set out in *Countrywide Communications* and *MSM*, also discussed below, suggest that the unconscionability of a defendant’s conduct in refusing to compensate the claimant may play a part in the decision as to whether a claim lies for restitution.

151. In *British Steel Corporation v. Cleveland Bridge and Engineering Co. Ltd.* [1984] 1 All E.R. 504 the defendant had successfully tendered for the fabrication of steelwork to be used in the construction of a building. It entered into negotiations with the claimant for a sub-contract, and asked the claimant to start work immediately “*pending the preparation and issuing to you of the official form of sub-contract.*” No contract was entered into because the parties failed to agree certain terms. The claimant had by this time produced and delivered to the defendant almost all of the subcontracted goods. Robert Goff J held that no concluded contract had been made, but upheld the claimant’s *quantum meruit* claim:

“In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi-contract or, as we now say, in restitution. Consistently with that solution, the party making the request may find himself liable to pay for work

which he would not have had to pay for as such if the anticipated contract had come into existence, e.g. preparatory work which will, if the contract is made, be allowed for in the price of the finished work (cf. *William Lacey (Hounslow) Ltd. v. Davis* [1957] 1 W.L.R. 932 ).” (p511)

152. *British Steel* was accordingly a case where the defendant had requested and accepted accelerated performance by the claimant of the intended contract, and presumably benefitted from it (though this latter point does not appear to have formed part of the decision).
153. In *Marston Construction Co. Ltd. v. Kigass Ltd.* (1989) 15 Con.L.R. 116 the claimant tendered for the rebuilding of a factory that had been burned down, and its tender was accepted. The defendant made clear that no contract would be entered into unless and until the defendant had succeeded in obtaining from an insurance claim sufficient money to finance the rebuilding. Both parties confidently expected this to occur, and the claimant carried out substantial preparatory works the cost of which, if a contract had materialised, would have been included in the contract price. At one point the claimant sought an assurance from the defendant that its pre-contract costs incurred would be met but no such assurance was forthcoming; however, the defendant was well aware that the claimant would have to carry out the preparatory work before the contract was signed. The insurance claim did not produce sufficient funds and no building contract was entered into. Judge Peter Bowsher Q.C. nonetheless decided in favour of the claimant. He said:

“I find that the facts of the present case, although different in important respects are similar in kind to the facts in *William Lacey (Hounslow) Ltd. v. Davis* [1957] 1 W.L.R. 932 . There was a request to do the work, though the request in respect of the bulk of the work was implied rather than express. It was contemplated that the work would be paid for out of the contemplated contract. Both parties believed that the contract was about to be made despite the fact that there was a very clear condition which had to be met by a third party if the contract was to be made. The defendants obtained the benefit of the work in my judgment ...” (p127)

and:

“The preliminary works requested were undoubtedly done for the benefit of the defendants and were only done for the benefit of the plaintiffs in the sense that they hoped to make a profit out of them. ... Whether the defendants decide ultimately to build a factory or to sell the land, they have a benefit which is realisable.

*Conclusion* . ... I find that there was an express request made by the defendants to the plaintiffs to carry out a small quantity of design works and that there was an implied request to carry out preparatory works in general and that both the express and the implied requests gave rise to a right of payment of a reasonable sum.” (p129)



154. Thus *Marston Construction* was a case of preparatory works which were found to have been done for the defendant's benefit and at its express or implied request.
155. These cases were distinguished, and in part doubted, by Rattee J in *Regalian Properties v LDDC* [1995] 1 WLR 212, a case on which the Bank places particular emphasis. The defendant in that case accepted, "*subject to contract*", the claimant's tender for a licence to build on development land as and when the defendant obtained vacant possession of it. The acceptance was also subject to other conditions including detailed planning consent. Delays occurred for various reasons, following which market value falls made the development uneconomic for the claimant on the terms agreed. No contract was concluded, but the claimant sought reimbursement of money it had paid to professional firms in preparation for the intended contract. Rattee J concluded (at p225) that the work the claimant had done produced no benefit for the defendant. He reviewed the cases summarised above, concluding as follows:

- i) *William Lacey* was distinguishable by reason *inter alia* of the nature of the work done by the claimant:

“In my judgment, one important distinction between the facts in that case and those in the present case is that the work for which the plaintiffs claimed in that case was not work done for the purposes of the expected contract, but was rather ... “for some extraneous or collateral purpose.” It was for the wholly separate purpose of enabling the defendant to negotiate a claim made by the defendant to the War Damage Commission. In the present case, by contrast, the expenditure for which Regalian claims recompense was, I find, all for the purpose either of satisfying the requirements of the proposed contract as to planning permission and the approval of the designs for the development by L.D.D.C., or of putting Regalian into a position of readiness to start the development in accordance with the terms of the proposed contract. In other words it was expenditure made for the purpose of enabling Regalian to obtain and perform the expected contract.

Although I have to say, with respect, that I do not find the reasoning of Barry J. entirely easy to follow, the result seems to me to make perfectly good sense on the facts of that case. At the request of the defendant the plaintiffs had done work which had clearly benefited the defendant, quite outside the ambit of the anticipated contract, and had only not charged for it separately, as one would otherwise have expected them to do, because they thought they would be sufficiently recompensed by what they would be paid by the defendant under the contract. In those circumstances it is not surprising that the law of restitution found a remedy for the plaintiffs when the contract did not materialise. I do not consider that the decision lends any real support to the claim made by Regalian in the present case for compensation for expenditure incurred by it for the purpose of enabling itself to obtain and perform the intended contract at a time when the parties had in effect expressly agreed by the use of the words

“subject to contract” that there should be no legal obligation by either party to the other unless and until a formal contract had been entered into. ...” (pp224-225)

- ii) *Sabemo* was distinguishable because the breakdown of negotiations between L.D.D.C. and Regalian was their inability to agree on an essential term of the intended contract, namely the price. It was not because one party “*unilaterally decided to abandon the project*” as had been the case in *Sabemo* (p227).
- iii) In addition, Rattee J doubted *Sabemo* should be followed. First, whilst *Sabemo* cited *William Lacey*, it was in Rattee J’s view distinguishable from that case because in *William Lacey* the work had been outside the ambit of the intended contract (p227). Secondly and in any event:

“... the principle enunciated by Sheppard J. ... is not established by any English authority. I appreciate that the English law of restitution should be flexible and capable of continuous development. However I see no good reason to extend it to apply some such principle as adopted by Sheppard J. in the *Sabemo* case to facts such as those of the present case, where, however much the parties expect a contract between them to materialise, both enter negotiations expressly (whether by use of the words “subject to contract” or otherwise) on terms that each party is free to withdraw from the negotiations at any time. Each party to such negotiations must be taken to know (as in my judgment Regalian did in the present case) that pending the conclusion of a binding contract any cost incurred by him in preparation for the intended contract will be incurred at his own risk, in the sense that he will have no recompense for those costs if no contract results. In other words I accept in substance the submission made by Mr. Naughton for L.D.D.C., to the effect that, by deliberate use of the words “subject to contract” with the admitted intention that they should have their usual effect, L.D.D.C. and Regalian each accepted that in the event of no contract being entered into any resultant loss should lie where it fell.” (pp230-231) (my emphasis)

- iv) *British Steel* was also distinguishable:

“I can well understand why Robert Goff J. concluded that, where one party to an expected contract expressly requests the other to perform services or supply goods that would have been performable or suppliable under the expected contract when concluded, in advance of the contract, that party should have to pay a quantum meruit if the contract does not materialise. The present case is not analogous. The costs for which Regalian seeks reimbursement were incurred by it not by way of accelerated performance of the anticipated contract at the request of L.D.D.C., but for the purpose of putting itself in a position to obtain and then perform the contract.” (p230)

- v) The decision in *Marston Construction* was “surprising”, not least because the claimant had requested and been refused an assurance that it would be compensated for the preparatory work. In any event, it was distinguishable because (a) in *Regalian*, even if a contract had materialised no part of any costs incurred or work done by Regalian in connection with the contract would have been paid for by L.D.D.C., whose only obligation would have been to grant the building lease, and (b) Rattee J was not satisfied that the preparatory works resulted in any benefit to L.D.D.C..
156. *Regalian* was thus decided on the express basis that no benefit had been conferred on the defendant, and that the claim being considered – as highlighted by the passages I have underlined in the quotation in subparagraph (iii) above from Rattee J’s judgment – was unrelated to any alleged benefit but simply concerned the claimant’s own costs.
157. In *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55 [2008] 1 WLR 1752, the claimant orally agreed with the defendant to purchase for £12m a property comprising a number of flats for redevelopment into town houses. The arrangement was that the defendant would obtain vacant possession of the property and would develop it and keep any profit, subject to overage whereby each party would have 50% of the gross proceeds of the property over £24m. Acting in the belief that the property would be sold to him, the claimant spent the next 18 months engaging architects and other professionals in applying for planning permission. The defendant encouraged the claimant to expect the contract and to do the work. Immediately after the grant of planning permission the defendant withdrew from the agreement, demanded £20m as the price for the sale of the freehold and suggested that the defendant should receive 40% of the amount by which the proceeds exceeded £40m.
158. The House of Lords rejected a claim based on estoppel, but held that these circumstances gave rise to a restitutionary claim based on unjust enrichment, *quantum meruit* and/or total failure of consideration. Lord Scott (with whom Lords Hoffman, Brown and Mance agreed) said:

*“Unjust enrichment*

40. There is no doubt but that the value of the property will have been increased by the grant of planning permission and that the defendant company has, accordingly, been enriched by the grant of the permission for which it has had to pay nothing. Since the planning permission was obtained at the expense of Mr Cobbe it is very easy to conclude that the defendant company has been enriched at his expense and, in the circumstances that I need not again rehearse, unjustly enriched. So, in principle, he is entitled to a common law remedy for unjust enrichment.

41. But what is the extent of the unjust enrichment? It is not, in my opinion, the difference in market value between the property without the planning permission and the property with it. The planning permission did not create the development potential of the property; it unlocked it. The defendant company was unjustly enriched because it obtained the value of Mr Cobbe’s services without having to pay for them. ...

*Quantum meruit*

42. It seems to me plain that Mr Cobbe is entitled to a quantum meruit payment for his services in obtaining the planning permission. He did not intend to provide his services gratuitously, nor did Mrs Lisle-Mainwaring understand the contrary. She knew he was providing his services in the expectation of becoming the purchaser of the property under an enforceable contract. So no fee was agreed. In the event the expected contract did not materialise but a quantum meruit for his services is a common law remedy to which Mr Cobbe is entitled. The quantum meruit should include his outgoings in applying for and obtaining the planning permission, which should be taken to be reasonably incurred unless Mrs Lisle-Mainwaring can show otherwise, and a fee for his services assessed at the rate appropriate for an experienced developer. To the extent, of course, that Mr Cobbe's outgoings included the fees of planning consultants whom he employed, there must not be double counting. The amount of the quantum meruit for Mr Cobbe's services would, in my opinion, represent the extent of the unjust enrichment for which the defendant company should be held accountable to Mr Cobbe.

*Consideration which has wholly failed*

43. Where an agreement is reached under which an individual provides money and services in return for a legal but unenforceable promise which the promisor, after the money has been paid and the services provided, refuses to carry out, the individual would be entitled, in my opinion, to a restitutionary remedy. The consideration in return for which the money was paid and the services were provided would have wholly failed. In such a case the money paid, with interest thereon, could be recovered, together, in my opinion, with a fee for the services. The remedy would be, in my opinion, co-extensive with the quantum meruit discussed in the previous paragraph.”

159. *Cobbe* was therefore a case where the defendant had encouraged the claimant to do the work, and had received a benefit from it.
160. It appears that the negotiations in *Cobbe* had not been on an expressly "*subject to contract*" basis, a matter which was not discussed in the context of the restitution claims though it was considered in the context of the claimant's primary claim based on proprietary estoppel. Lord Walker (giving a concurring opinion with which Lord Brown agreed) referred to *Attorney General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114, where in rejecting an argument based on estoppel the Privy Council had placed reliance on the use of the phrase "*subject to contract*". However, that was in Lord Walker's words "*simply a routine acknowledgement of what both parties knew very well in any event: that they were involved in a complex process of negotiation which might come to nothing*" (§ 62); and Lord Scott made the point that "*debate about subject-to-contract reservations has only*

*a peripheral relevance in the present case, for such a reservation is pointless in the context of oral negotiations relating to the acquisition of an interest in land. It would be an unusually unsophisticated negotiator who was not well aware that oral agreements relating to such an acquisition are by statute unenforceable and that no express reservation to make them so is needed” (§ 27).*

161. In *MSM Consulting v Tanzania* [2009] EWHC 121 Christopher Clarke J provided the following summary of the applicable principles, drawing on an earlier review of the case law by Nicholas Strauss QC in 1996, which though fairly lengthy needs to be set out in full:

“170. In *Countrywide Communications Limited v ICL Pathway Ltd* [1996] C No 2446 Mr Nicholas Strauss, Q.C., considered the authorities bearing on the question of whether or not a claim can successfully be made for work done in anticipation of a contract which does not materialise. Having considered *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932; a number of academic writings; *Jenning and Chapman Ltd v Woodman Matthews & Co* [1952] 2 TLR 406; *Brewer Street Investments Ltd v Barclay Wool & Co Ltd* [1954] 1 QB 428; *British Steel Corporation v Cleveland Bridge and Engineering* [1984] 1 AER 504; *Regalian Plc v London Docklands Development Corporation* [1995] Ch 212; *Marston Construction C Ltd v Kigass Ltd* [1989] 15 Con L.R.116, he concluded:

“I have found it impossible to formulate a clear general principle which satisfactorily governs the different factual situations which have arisen, let alone those which could easily arise in other cases. Perhaps, in the absence of any recognition in English law of a general duty of good faith in contractual negotiations, this is not surprising. Much of the difficulty is caused by attempting to categorise as an unjust enrichment of the defendant, for which an action in restitution is available, what is really a loss unfairly sustained by the plaintiff. There is a lot to be said for a broad principle enabling either to be recompensed, but no such principle is clearly established in English Law. Undoubtedly the court may impose an obligation to pay for benefits resulting from services performed in the course of a contract which is expected to, but does not, come into existence. This is so, even though, in all cases, the defendant is ex hypothesi free to withdraw from the proposed contract, whether the negotiations were expressly made “subject to contract” or not. Undoubtedly, such an obligation will be imposed only if justice requires it or, which comes to much the same thing, if it would be unconscionable for the plaintiff not to be recompensed.

Beyond that, I do not think that it is possible to go further than to say that, in deciding whether to impose an obligation and if so its extent, the court will take into account and give appropriate weight to a number of considerations which can be identified in the authorities. The first is whether the services were of a kind

which would normally be given free of charge. Secondly, the terms in which the request to perform the services was made may be important in establishing the extent of the risk (if any) which the plaintiffs may fairly be said to have taken that such services would in the end be unrecompensed. What may be important here is whether the parties are simply negotiating, expressly or impliedly “subject to contract”, or whether one party has given some kind of assurance or indication that he will not withdraw, or that he will not withdraw except in certain circumstances. Thirdly, the nature of the benefit which has resulted to the defendants is important, and in particular whether such benefit is real (either “realised” or “realisable”) or a fiction, in the sense of Traynor CJ’s dictum. Plainly, a court will at least be more inclined to impose an obligation to pay for a real benefit, since otherwise the abortive negotiations will leave the defendant with a windfall and the plaintiff out of pocket. However, the judgment of Denning L.J. in the Brewer Street case suggests that the performance of services requested may of itself suffice amount to a benefit or enrichment. Fourthly what may often be decisive are the circumstances in which the anticipated contract does not materialise and in particular whether they can be said to involve “fault” on the part of the defendant, or (perhaps of more relevance) to be outside the scope of the risk undertaken by the plaintiff at the outset. I agree with the view of Rattee J. that the law should be flexible in this area, and the weight to be given to each of the factors may vary from case to case.”

171. I regard this as a helpful analysis of the authorities from which I also derive the following propositions:

(a) Although the older authorities use the language of implied contract the modern approach is to determine whether or not the circumstances are such that the law should, as a matter of justice, impose upon the defendant an obligation to make payment of an amount which he deserved to be paid ( quantum meruit ): Lacey ; for that reason it does not seem to me that section 18 of the Estate Agents Act 1989 has any application to this claim;

(b) Generally speaking a person who seeks to enter into a contract with another cannot claim to be paid the cost of estimating what it will cost him, or of deciding on a price, or bidding for the contract. Nor can he claim the cost of showing the other party his capability or skills even though, if there was a contract or retainer, he would be paid for them. The solicitor who enters a “beauty contest” in the course of which he expresses some preliminary views about the client’s prospects cannot, ordinarily expect to charge for them. If another firm is retained; he runs the risk of being unrewarded if unsuccessful in his pitch.

(c) The court is likely to impose such an obligation where the defendant has received an incontrovertible benefit (e.g. an immediate financial gain or saving of expense) as a result of the claimant's services; or where the defendant has requested the claimant to provide services or accepted them (having the ability to refuse them) when offered, in the knowledge that the services were not intended to be given freely;

(d) But the court may not regard it as just to impose an obligation to make payment if the claimant took the risk that he or she would only be reimbursed for his expenditure if there was a concluded contract; or if the court concludes that, in all the circumstances the risk should fall on the claimant: Jennings & Chapman ;

(e) The court may well regard it as just to impose such an obligation if the defendant who has received the benefit has behaved unconscionably in declining to pay for it”

(my emphases)

This summary was essentially repeated by Beatson J in *Benourad* § 106.

162. A number of points relevant to the present case may be drawn from these statements, in particular from the passages I have underlined:
- i) The law remains in a state of uncertainty, lacking a clear general principle.
  - ii) There may well be a significant difference between cases where the defendant has received a clear benefit, and cases where the claim is merely for costs or losses incurred by the claimant.
  - iii) It is possible (having regard to the word “or” in § 171(c) of *MSM Consulting*) that a claim will lie where the defendant has received an incontrovertible benefit even without having actually requested or freely accepted it. Thus (I observe) it might be sufficient that the defendant has encouraged or facilitated the claimant’s performance of the work that produced the benefit.
  - iv) Relevant factors may include the circumstances in which the anticipated contract did not materialise, including whether they include ‘fault’ on the defendant’s part (or - perhaps more relevantly - something outside the scope of the risk undertaken by the claimant at the outset), and whether a defendant who has received a benefit has behaved unconscionably in declining to pay for it.

As to point (iv) above, I note that *Goff & Jones* takes a different view, doubting the statements in these cases as to the relevance of fault and/or unconscionability (see §§ 16-12 to 16-16).

163. More recently, in *Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH (formerly GAT Microencapsulation AG)* [2018] EWHC 2765 (Comm), Butcher J upheld a fallback claim for unjust enrichment arising from an intended contract for the

production of a plant protection product. Rotam sought to recover money it had paid to GAT for registration data and in relation to the costs of a patent. The payments were made by Rotam in the expectation that a contract would be concluded whereby it would acquire the ownership of the registration data, and Rotam told GAT that it was making the payments on that basis (Judgment § 189). The judge held that the payments had enriched GAT at Rotam's expense, and the enrichment was unjust because there had been a failure of consideration. He elaborated as follows:

“194. Rotam also relies, however, on a failure of consideration as an "unjust factor". In this regard, Rotam contends that, in the present context, a failure of "consideration" means that the "state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself", for which definition it refers to *Sharma v Simposh Ltd* [2011] EWCA Civ 1383 . It is helpful to cite paragraphs [21]-[25] of that case, where Toulson LJ said:

"21. The agreement between the parties lacked formal validity and so had no contractual effect. It was no more than a mutual declaration of intent. An important part of the law of restitution is concerned with money paid or benefits conferred in respect of legally ineffective transactions. Goff & Jones' text book on the Law of Restitution 7th. Ed. 2007, begins its treatment of the subject with this important statement of general principle (para. 19-001):

'Transactions may be or become ineffective for a variety of reasons. But the reason the courts will award restitution is in each case fundamentally the same, namely, that the plaintiff's expectations have not been fulfilled.'

22. In relation to money paid, the authors continue (para. 19-002):

'If money has been paid under a contract which is or becomes ineffective, the recipient is evidently enriched. It is a distinct question whether that enrichment is an unjust enrichment ... In most of the situations, however, the ground of recovery is that the expected return for the payment, or consideration, as it is confusingly called, has failed.'

23. The confusion is caused by the fact that the term 'consideration', when used in the phrase 'total failure of consideration' as a reason for restitution, does not mean quite the same thing as it does when considering whether there is sufficient 'consideration' to support the formation of a valid contract. Viscount Simon LC, explained this in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 , 48:



'In English law an enforceable contract may be formed by the exchange of a promise for a promise or by the exchange of a promise for an act ... but when one is considering the law of failure of consideration and the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise that is referred to as the consideration but the performance of the promise.'

24. A succinct summary of the meaning of failure of consideration was given by Professor Birks in his Introduction to the Law of Restitution (1989), page 223:

'Failure of consideration for a payment ... means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist has failed to sustain itself.'

195. I was also referred to Burrows, A Restatement of the English Law of Unjust Enrichment (2015), section 15. Prof. Burrows there states the following propositions:

“15(2) The usual consideration that fails is a promised counter-performance: see the classic formulation by Viscount Simon LC in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 , 48. Failure of consideration, used in that sense, has therefore been applied to where there was once a valid contract but that contract has been terminated for breach [citations omitted] or for frustration. It has been used in the same sense where the contract was void or unenforceable or anticipated.

...”

“196. In my judgment there was a failure of consideration in the sense described in these authorities and commentaries. The state of affairs contemplated by *Rotam* (and *GAT*) as the basis for the payments, which were that there should be a commercial collaboration agreement or at least a data transfer agreement under which *Rotam* would acquire ownership or exclusive use of the regulatory data, did not materialise. I consider that *Rotam's* expectations were not fulfilled.”

164. Thus the judge in *Rotam* treated failure of basis, in the sense explained above, as a ground for restitution, without apparently making it contingent on the defendant having requested or freely accepted the relevant services.
165. A particular instance of a claimant taking a risk as to the being able to recover anything for his work arises where the parties have made an agreement which regulates the position. The Bank drew attention to the following passage from *Goff & Jones*, “*The Law of Restitution*” (9<sup>th</sup> ed):

*“(e) - Displacement of Unjust Enrichment Claim by Contractual Provisions*

*(i) - The General Rule*

3-28

If the parties to a contract have made express or implied provision for the return of payments where the basis for those payments has failed, the contractual remedy excludes a remedy in unjust enrichment. In *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* the time charterer of a vessel had paid an instalment of hire in advance (as required by the charterparty) to the defendants, to whom the right to receive the hire had been assigned by the disponent owners as part of a financing arrangement. The vessel was off-hire for the entire period, and the claimants sought to recover their payment from the defendants. The charter provided for the disponent owners to repay any overpaid hire immediately, and Lord Goff (with whom Lord Lowry agreed) commented that, since there was a contractual regime which legislated for the overpaid hire:

“[T]he law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate.”

Lord Woolf (with whom Lord Slynn and Lord Keith agreed) preferred to emphasise that the assignee was never intended to be under an obligation to supply the vessel, and could not, therefore, be made liable to return a payment when the vessel was not supplied. His speech is perhaps best interpreted as meaning that the basis of the payment to the assignee was understood by both the charterer and assignee to be unconditional (with any recourse lying against the disponent owners). Whilst, on the facts of the case, the unjust enrichment remedy against the disponent owners was identical to the express contractual remedy against them, and could therefore be said to be “unnecessary”, other situations can easily be imagined where contractual rights to recover benefits are limited, or, indeed, nonexistent. These situations raise the question as to what Lord Goff meant by his comment that a remedy in unjust enrichment would be “inappropriate”. The most likely interpretation is that he was referring to the potential for a remedy in unjust enrichment to undermine the parties’ contractual allocation of risk. If so, Lord Goff’s reasoning would extend beyond express or implied contractual provisions for the return of benefits, to situations where it can be inferred from the parties’ agreement that no claim in unjust enrichment should be available.” (footnotes omitted)

166. On the facts of *Pan Ocean Shipping*, the parties had legislated for the same type of payment (overpaid hire) as actually occurred. *Goff & Jones* suggests that the same logic should apply in a broader range of cases where it can be inferred from the parties' agreement that no claim in unjust enrichment should be available.

**(2) Analysis**

167. The Bank submits that there is no arguable claim for unjust enrichment because:
- i) where a claimant's activity consists not in accelerated performance of the anticipated contract but in preparations for a hoped-for contract which does not materialise, the claimant is treated as having acted at its own risk (see *Goff & Jones* § 16-06 citing *MSM Consulting* and *Regalian*);
  - ii) whatever Astra did was not done by way of accelerated performance of the anticipated sale contract: the proposed contract did not relate to any service to be provided by Astra to the Bank. It related to the sale of assets by the Bank to Astra, and the proposed consideration of £900,000 was a reduced price reflecting the fact that it was for Astra to decide what, if anything, it did subsequently to resolve the Standard Life Issue for its own benefit;
  - iii) there will be no failure of basis where the claimant was acting for his own account; nor where the defendant did not know or ought to have known that the claimant expected to be paid for the relevant service (*Goff & Jones* §§ 17-11 to 12);
  - iv) Astra was not acting at the Bank's request or on its behalf, and Astra does not plead that the Bank knew or ought to have known that Astra expected to be paid for doing whatever it was doing (and nor was Astra doing it for the Bank, and all was "*subject to contract*");
  - v) nor does Astra plead that the Bank freely accepted a benefit: the Bank had no option - Standard Life's decision to terminate its interest was unilateral, irrevocable and an out-of-the-blue *fait accompli*;
  - vi) where the parties are negotiating on a "*subject to contract*" basis, each party is taken to know that pending conclusion of the contract it will be acting at its own risk (*Goff & Jones* § 16-08 citing *Regalian*);
  - vii) by negotiating on a subject to contract basis, Astra took the risk that the Bank could seek to alter the "*Proposed Consideration*" and/or simply walk away from the transaction, subject only to the protections it bargained for under clause 4.1 and 4.2 of the EA2: so Astra was necessarily acting at its own risk throughout the period;
  - viii) it is not the role of the law of restitution to subvert a contractually-agreed allocation of risk or trespass onto an area regulated by contract (*Goff & Jones* § 3-28 citing *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161 at 164); and

ix) in agreeing the terms of EA2, the parties expressly turned their minds to what should happen in the event that the transaction did not complete and they contractually allocated the risks of that between them. In particular: (i) it was agreed that Astra would have a right to the reimbursement of costs, fees and expenses under clause 4.1; (ii) the parties removed the £150,000 cap on clause 4.1 that had previously existed in EA1; (iii) they specified further circumstances in clause 4.1 (beyond simply breach of the Bank's exclusivity obligations) in which the protection would be available to Astra (including the Bank altering "*the Proposed Consideration*" or simply not wanting to complete); and (iv) they included the brand new "*indemnity*" reimbursement rights in Clause 4.2 for the first time. This was a carefully considered contractual scheme and a significant improvement on Astra's position under EA1 or at common law. The fact that Astra seeks the £258,800 fixed fee both in its unjust enrichment claim and in its claim under EA2 clause 4.1 illustrates that its unjust enrichment claim is an attempt to trespass onto an area which, on Astra's own case, is regulated by contract.

168. Points (i) and (ii) above concern the basis on which Astra undertook the work it did in relation to the Standard Life issue, and seek to draw a contrast between (a) accelerated performance of the contract and (b) work done in preparation for the contract. However, it is arguable that Astra's work did not neatly fall into either of these categories. The passage from *Goff & Jones* on which the Bank relies in this regard cites the statement in *MSM Consulting* that:

"Generally speaking a person who seeks to enter into a contract with another cannot claim to be paid the cost of estimating what it will cost him, or of deciding on a price, or bidding for the contract. Nor can he claim the cost of showing the other party his capability or skills even though, if there was a contract or retainer, he would be paid for them."

and the statement in *Regalian* (p230) to the effect that there should be no liability for preparatory work by the intended lessee developer for the purpose of putting itself in a position to obtain and perform the building lease. It is arguable that Astra's work was not of this nature, and that Astra did not need to solve the Standard Life problem in order to obtain the contract with the Bank. On the contrary, both parties anticipated that the risk of resolving that problem – and the benefit should Astra succeed in doing so – would be Astra's. However, the effect of the Bank's withdrawal from the transaction without compensating Astra was that the benefit of Astra's work operated to the Bank's advantage and Astra's detriment.

169. More generally, the cases I have summarised above support the view that instances where a defendant has received an incontrovertible benefit are more likely to lead to restitution, and it is not clearly established (nor, in my view, obvious) that restitution should lie only where the claimant has provided accelerated performance of obligations which he would have under the anticipated contract.

170. The Bank's points (iii)-(v) are based, at least in large part, on the requirements summarised in *Goff & Jones* chapter 17 §§ 17-11 and 17-12 for claims based on free acceptance of a benefit. However, the discussion in that chapter is focussed on free acceptance as a distinct head of restitution and does not indicate that such requirements

necessarily apply in other cases e.g. where an unjust enrichment claim is based on failure of an anticipated contract to materialise. Thus *Goff & Jones* § 17-02 states:

“The principle of free acceptance has a (unique) dual role in the law of unjust enrichment, since it provides both a test for assessing enrichment, and also articulates an independent unjust factor. This chapter is concerned solely with free acceptance as a ground of liability. The principles of free acceptance applicable to enrichment and to free acceptance as an unjust factor are not necessarily interchangeable”

171. I do not consider that the case law summarised earlier establishes that, in a case of an anticipated contract, a claim for unjust restitution based on a benefit conferred on the defendant can arise only where the defendant knew or ought to have known that the claimant expected to be paid for his services, or freely accepted the benefit. Moreover, even if free acceptance could be regarded as a pre-requisite in such a case, the question would arise whether is it sufficient if, as was arguably the position in the present case, the defendant acquiesced in and facilitated the claimant’s work.
172. The Bank’s points (vi) and (vii) are based on the parties having proceeded on an expressly "*subject to contract*" basis. Whilst that may be a material factor, it is not clear that it will necessarily be decisive. Rattee J in *Regalian* concluded that proceeding on a "*subject to contract*" basis precluded the recovery of costs incurred by the claimant, because he knew he was incurring them at his own risk. The same logic might apply in the present case. However, in *Regalian* it was expressly held that the work conferred no benefit on the defendant. It is not obvious that the same reasoning would apply in a case where, whilst negotiating on a "*subject to contract*" basis, a defendant encourages and facilitates work being done by the proposed counterparty to increase the value of the asset, which under the proposed transaction will benefit the counterparty, but then treats the counterparty’s success in its endeavours as a ground for resiling from the intended deal and instead demanding a higher price.
173. Moreover, the passage from *Countrywide Communication* quoted by Christopher Clarke J in *MSM Consulting* (§ 161 above) includes the statement:
- “Undoubtedly the court may impose an obligation to pay for benefits resulting from services performed in the course of a contract which is expected to, but does not, come into existence. This is so, even though, in all cases, the defendant is ex hypothesi free to withdraw from the proposed contract, whether the negotiations were expressly made “subject to contract” or not. Undoubtedly, such an obligation will be imposed only if justice requires it or, which comes to much the same thing, if it would be unconscionable for the plaintiff not to be recompensed.” (my emphasis)
174. If so, then the fact that the parties have negotiated on a "*subject to contract*" basis would not necessarily preclude a restitutionary claim, nor a finding that (to the extent relevant) it could be unconscionable for the claimant not to be recompensed.

175. To the extent that unconscionability may thus be relevant, it is arguable that the circumstances in which the Bank here declined to proceed on the basis of the terms that had been agreed (subject to contract), thus taking the benefit of Astra's work, would make it unconscionable for the Bank not to compensate Astra for its work.
176. The Bank's points (viii) and (ix) above, based on the parties having regulated what would happen if the transaction did not proceed, have significant force. On the other hand, it could cogently be argued on behalf of Astra that EA2 clause 4 regulated the position where Astra had incurred costs. It did not regulate – because neither party appears to have anticipated – that Astra might not merely incur costs (whether in due diligence or in trying to address the Standard Life problem) but might actually solve the problem during the negotiation process itself and thereby cause a very large increase in the value of the Rights.
177. It is arguable, based on *Goff & Jones*' commentary on *Pan Ocean Shipping* quoted in § 165 above, that this situation should nonetheless be regarded as falling within the purview of EA2 clause 4 (precluding any restitutionary remedy) even though not specifically addressed. However, I do not consider it to be settled law – and *Goff & Jones* does not state it to be such – that an express provision by the parties for specified consequences if an intended transaction fails to materialise automatically precludes a restitutionary claim when circumstances arise that were not clearly contemplated by that provision. In my view, that is an issue which should not be resolved on a summary basis, but only at trial after full argument in the light of the facts as a whole. Despite the doubts expressed by *Goff & Jones*, the case law outlined above indicates that questions of unconscionability may remain relevant to the outcome, and it would be undesirable for the court to decide the point without having first found all the potentially relevant facts.
178. For these reasons, I do not consider it appropriate to strike out, or grant summary judgment in respect of, Astra's unjust enrichment claim.

#### **(H) OVERALL CONCLUSIONS**

179. The Bank is entitled to summary judgment in respect of Astra's claims for breach of contract (including breach of an alleged obligation to negotiate in good faith) and its estoppel argument. As regards Astra's unjust enrichment claim, the Bank's application will be dismissed.