Neutral Citation Number: [2022] EWHC 1194 (Comm)

Claim No: LM-2021-000178

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

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

Date: 27/05/2022

Before:

HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

- -

Between:

KINLED INVESTMENTS LIMITED	**Claimant**
- and -	
ZOPA GROUP LIMITED	**Defendant**

- -
- -

Paul O'Doherty (instructed by **Brandsmiths SL Ltd.**) for the **Claimant**
Alex Barden (instructed by **Allen & Overy LLP**) for the **Defendant**

Hearing dates: 5-8 April 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE KLEIN

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 a.m. on 27 May 2022.

HH Judge Klein:

1. This is the judgment following the trial of a claim and counterclaim in relation to an introducer's/intermediary's fee. By the claim, the Claimant, Kinled, claims £4.2 million as a fee for having acted as an intermediary between the Defendant, Zopa, and an investor, Silverstripe. By the counterclaim, Zopa seeks to recover £345,000; the fee it paid Kinled for Kinled's initial introduction to it of Silverstripe. This case is not the first which has come to court in recent years in which intermediaries have claimed an introducer's fee (see, in particular, *Becerra v. Close Bros.*, Thomas J, 25 June 1999, *MSM Consulting Ltd. v. United Republic of Tanzania* [2009] EWHC 121 (QB), *Moorgate Capital (Corporate Finance) Ltd. v. HIG European Capital Partners LLP* [2019] EWHC 1421 (Comm) and *Premia Marketing Ltd. v. Regis Mutual Management Ltd.* [2021] EWHC 2329 (QB)). The earlier cases were decided on their facts, more or less, and, as it turns out, the outcome of this case has turned largely on its facts. This case is unusual because, by it, Kinled does not claim a fee for its initial introduction of Silverstripe to Zopa. That fee – the £345,000 which Zopa now seeks to recover – has already been paid. Rather, Kinled claims an additional, intermediary's, fee, calculated at 3% of the sum invested, because Silverstripe made a second investment of £140 million in Zopa.

2. By the conclusion of the trial, Kinled's case was being pursued on only two of the bases on which it had begun the claim; namely, that a written agreement – the engagement letter – by which it was originally engaged, had been varied so as to cover Silverstripe's second investment in the circumstances which have happened and, alternatively, that Zopa is liable to pay the sum Kinled claims as a quantum meruit, because Kinled provided intermediary services relating to Silverstripe in the second investment round in both parties' anticipation and expectation that a contract for those services would eventuate. Much of the documentary evidence and the oral evidence was directed to the other bases for Kinled's claim which it no longer pursues.

3. Zopa's counterclaim was also advanced in a number of ways, including that, in making the initial introduction of Silverstripe (and another investor, Lida) to Zopa, Kinled carried out regulated activities contrary to the general prohibition in the Financial Services and Markets Act 2000 ("FSMA"), so that, under s.26 of FSMA, the engagement letter is unenforceable and Zopa is entitled to recover the £345,000 it paid to Kinled for that introduction under the engagement letter.

4. I have come to the clear conclusion that:

    i) there was no agreement to vary the engagement letter as Kinled contends;

    ii) even if there was an agreement to vary the engagement letter as Kinled contends, it was not contractually binding because it was not supported by consideration;

    iii) the intermediary work in issue which Kinled did was not done in anticipation that a contract would eventuate. Rather, both parties proceeded on the basis that any payment for that work would be made in accordance with the engagement letter, which does not entitle Kinled to any further payment in the circumstances which have happened;

iv) the claim therefore fails.

5. I have also come to the conclusion that:

i) in making its initial introduction in this case, Kinled was carrying out regulated activities;

ii) as a result, the engagement letter is unenforceable under s.26 of FSMA;

iii) however, in the particular circumstance of this case, it is just and equitable to permit Kinled to retain the £345,000 payment under s.28 of FSMA;

iv) therefore the counterclaim fails, Zopa having accepted (perhaps with s.28(9) of FSMA in mind) that, if its counterclaim under FSMA failed in the way it has done, the alternative bases on which it has brought its counterclaim fail too.

6. In this judgment I therefore propose to set out the evidence and the parties' submissions, and consider the parties' cases, only to the extent necessary to explain the reasons for my decision, although, to be clear, I have considered all the documentary evidence to which I was referred, all the evidence I heard (to which end, I have read the entirety of the trial transcript before preparing this judgment) and all the parties' submissions.

Cast list

7. It is helpful to begin by introducing the participants in the events to which I will be referring. The corporate structures are complicated but, as it turns out, do not need to be fully explored to understand the case. Similarly, who some of the individual participants are employed by and the relationship between their employers and the key businesses in the case are also complicated but do not need to be fully explored to understand the case.

8. The Claimant ("Kinled") is, as Mr Novis explained, "a Hong Kong incorporated company which is a stand-alone part of a wider group of companies that make up a single family office". A family office is a private wealth management advisory business which serves high net worth individuals, or families. Although the picture is not entirely clear, I formed the impression at trial that Kinled is, in effect, a vehicle through which the Aisher family invests its money. Mr Novis referred to Patrick Aisher as "the principal" when cross-examined on Zopa's FSMA counterclaim. That evidence and related evidence leads me to conclude that, where Mr Novis requires direction, he takes it from Mr Aisher (particularly in relation to FSMA-related issues).

9. Rupert Novis has been Kinled's investment director since 2014. Before that, he worked in the City in derivatives. He identifies investment opportunities for the Aisher family and manages the Aisher family's investment portfolio.

10. The Defendant ("Zopa") is the holding company in a group also comprising Zopa Bank Ltd. and Zopa Ltd., both of which were FCA-regulated at the time. Zopa Ltd. was the first peer to peer lending intermediary company. On 24 June 2020, the Prudential Regulation Authority ("the PRA") granted Zopa Bank Ltd. a full retail banking licence, having granted the bank an "AWR" licence (that is an authorisation

with restrictions licence) on 3 December 2018. The period between the grant of the two licences is known as the mobilisation stage. During this period, a bank may take deposits, subject to restrictions, in preparation for the grant of a full licence after which it may trade fully. The repositioning of the Zopa business as a retail bank has apparently been successful. It was reported in the financial press in October 2021 that the business was a Dollar Unicorn (that is, it had a value of at least US$1billion), which is a significant increase in its value from the period to which this case relates.[1]

11. Jaidev Janardana is, and was at the relevant time, Zopa's CEO. He has worked for Zopa since 2014. Before that he was employed by Capital One, a bank particularly known for its credit card business.

12. Jonathan Kramer also began working for Zopa in 2014, having previously been employed by Morgan Stanley. He joined Zopa as Head of Capital Markets, becoming its President in 2018. He reported to Stephen (known as Steve) Hulme, Zopa's Chief Financial Officer, who began working for Zopa in 2018, and to Mr Janardana. He was responsible, on a day to day basis, for managing the investment rounds which are in issue in this case.

13. During the period with which I am concerned, Gordon McCallum became the chairman of Zopa's board.

14. Tajmeet (known as Taj) Kalra was part of Mr Kramer's team at the relevant time.

15. Victoria Matthews is, and was at the relevant time, Zopa's in-house lawyer.

16. IAG Silverstripe LLC ("Silverstripe") invested £10 million in Zopa in late 2018/early 2019 and a further £140 million in Zopa in June 2020.[2] As described to me by Mr Cuppage in cross-examination, for the purposes of this case in effect Silverstripe is the family office of the Hildebrand family (and possibly the family too of Chris Jones, Brett Hildebrand's business partner). Brett Hildebrand is, in effect, Silverstripe's principal (and is described as such on the agreed cast list prepared by the parties). Silverstripe and Mr Hildebrand are based in Charleston, South Carolina. Mr Hildebrand has a particular interest in the credit card business and has been actively involved in Credit One Bank, which operates one of the leading US credit card businesses. He is also interested, through corporate vehicles, in Jaja Finance Ltd., which operates Bank of Ireland's UK credit card business.

17. Nicholas Aspinall is a lawyer and an investment professional. He was heavily involved in the arrangements, on the Silverstripe side, leading to its investment in Zopa, and, I formed the impression at trial, has worked closely with Mr Hildebrand.

18. Alex Cuppage is also an investment professional. He too was heavily involved in the arrangements, on the Silverstripe side, leading to its investment in Zopa, and, I formed the impression at trial, has also worked closely with Mr Hildebrand.

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[1] Nobody distinguished, at trial, between Zopa and Zopa Bank Ltd., treating them as one and the same, at least for the purposes of the case. I do the same in this judgment.

[2] In fact, Silverstripe International Holdings LLC, rather than IAG Silverstripe LLC, invested the first £10 million, but, for the purpose of the case and this judgment, there is no distinction between the two businesses.

19. Keemia Holdings Ltd. and Beleverd Holdings Ltd. (together "Lida"), part of the Lida family office, invested £1.5 million in the first investment round.

20. Royal Bank of Canada acted for Zopa as lead advisor in the first investment round and Bank of America Merrill Lynch ("BAML") (as it was then known) acted for Zopa as lead advisor in the second investment round.

Background

21. By 2018, Zopa had decided that it should obtain a retail banking licence. As I have indicated, a licence is, or can, be obtained in two stages. At the first stage, a bank obtains an AWR licence, which allows the bank to carry out certain deposit taking activities, as I have said, and, at the second stage, a bank obtains a full licence, which allows it to carry out all deposit taking activities. At each stage, a bank must have sufficient regulatory capital. Zopa therefore decided to seek third party investment in its business in two rounds; known as "the first investment round" and "the second investment round" (or "the bank raise"). In the first investment round, Zopa hoped to raise sufficient regulatory capital to allow it to obtain an AWR licence and, in the second investment round, it hoped to raise sufficient regulatory capital to obtain a full licence.

22. For the first investment round, Zopa engaged Royal Bank of Canada as its lead advisor. By July 2018, Zopa had obtained a commitment from a lead (or cornerstone) investor, Wadhawan Global Capital ("WGC"), to invest about £50 million in the first investment round (although, as it turns out, WGC only invested about £31 million). Nevertheless, it needed or wished to raise further capital and it was against that background that it and Kinled (in particular, Mr Novis) began to have dealings in July 2018.

23. On 31 July 2018, Mr Kalra emailed Mr Novis:

> "Wanted to say that I have had a chat with the team – and we are happy to engage on a 3% fee basis for anything Kinled brings in this round – with a view to making a separate arrangement for the next round as we put together our advisor strategy for that round.
>
> Let us know if this works for you and we'd be happy to review an engagement letter."

24. On 14 August 2018, Kinled and Zopa entered into a written agreement ("the engagement letter"). The engagement letter originated from Mr Novis, who had used, as a template, an engagement letter from a previous occasion when Kinled had provided introductory services (although it was amended by Zopa on 9 August 2018 following a conversation between Mr Novis and Mr Kalra, and following suggestions from Zopa's lawyers). Perhaps because the engagement letter was not specifically drafted for this case, on both parties' cases, but in different respects, it was not obviously apt to cover the arrangement between them, at least so far as they each subjectively understood that arrangement. The engagement letter:

i) recorded the terms on which Kinled was to act "as financial adviser" to Zopa and "set out the services to be provided";

ii) listed those services, first, as "finance raising", which included:

a) assisting Zopa "to select and approach a shortlist of potential equity funders in order to establish the degree of interest from such parties";

b) sending Zopa's investor presentation to interested parties;

c) ensuring any confidentiality arrangements were satisfactory to Zopa;

d) "receiving offers together with terms and conditions [and reporting] the details to [Zopa] and [giving Zopa Kinled's] view on the potential equity funders";

e) attending presentations "and co-ordinating the provision of any additional information required by the equity funders to enable them to provide a credit approved funding offer";

iii) listed those services, secondly, as "completion", which included:

a) "reviewing the final equity investment agreement and any other legal documents" at least to a qualified extent;

b) "project managing the process to legal completion";

iv) set out a fee structure, which is ambiguous. Although the fee structure is ambiguous, the parties agreed for the purpose of this case, that, properly construed, it was as follows:

a) for any share subscription made during the 3 month "engagement term" (beginning on 14 August 2018 and ending on 13 November 2018) by an investor introduced (or deemed to have been introduced) by Kinled, Zopa would pay Kinled 3% of the sum it received by the subscription from the introduced investor;

b) for any share subscription made during the 3 months immediately following the end of the engagement term (beginning on 14 November 2018 and ending on 13 February 2019) ("the tail period") by an investor introduced (or deemed to have been introduced) by Kinled, Zopa would pay Kinled 3% of the sum it received by the subscription from the introduced investor;

c) if an investor introduced (or deemed to have been introduced) by Kinled subscribed for shares during the engagement term, and thereafter made a further investment in Zopa in the period ending on 13 November 2019 ("the extended tail period"), Zopa would pay Kinled 3% of the investment made.

The parties disagree about whether the trigger for payment was the making of an agreement by which an introduced investor subscribed for shares or an actual payment

for the shares subscribed for. I have tentatively concluded that it is the former, rather than the latter, but, as it happens, on the facts, nothing turns on that. It is important, however, to keep in mind the circumstances in which Kinled might be entitled to a payment for an investment made by an introduced investor during the extended tail period. It was a pre-condition for payment that, not only was the introduced investor required to make its investment by 13 November 2019, it had to also have originally subscribed for shares (i.e. had made an original investment) during the engagement term (i.e. by 13 November 2018).

25. In due course, both Silverstripe and Lida were deemed to be introduced investors for the purposes of the engagement letter.

26. On 1 October 2018, a meeting took place ("the 1 October meeting"). The meeting was attended by Mr Janardana, Mr Kramer, Mr Kalra, Mr Jones, Mr Aspinall, Mr Cuppage and Mr Novis. The 1 October meeting was the first time the Zopa and Silverstripe teams had met to discuss the possibility of Silverstripe investing in the first investment round. It was not the first time that Zopa had had dealings with a company in what may be described as "the Silverstripe stable". Nor was it the first time that some of the Zopa team had met with some of the Silverstripe team. Bamboo Ltd., a UK-based lender, which is part of the Silverstripe stable, had had an arrangement with Zopa since 2017 under which Zopa referred to Bamboo customers to whom it was unable to lend. The meeting participants not only discussed Zopa's banking aspirations, they also discussed the possibility of a closer collaboration between Zopa and Bamboo. The impression I formed, from all those present who gave evidence, was that the 1 October meeting was very much a "getting to know you" meeting and that the discussions which took place were, consistently with the nature of the meeting, broad brush and tentative. By all accounts, the 1 October meeting ended positively.

27. After the 1 October meeting, Mr Novis emailed Mr Janardana, Mr Kramer and Mr Kalra at 1:45 pm:

> "Many thanks for your time this morning while meeting with Silverstripe. I believe this could be a significant investment over time with strategic follow on potential. To this end, as discussed with Jonathan when we were signing our contract, I would like to agree up front that this name has a 24 month trail *(sic)* on investment and strategic transactions associated with their group (in specific Bamboo, but also other companies in their portfolio). Please confirm.
>
> Please see the marked up NDA. Some small tweaks and reciprocity on the non poach and confidentiality of discussions. Please let me know if you are ok to sign with the changes and I will arrange."[3]
>
> ("the Novis 1 October email").

[3] None of the witnesses recalled any earlier discussion about a twenty four month tail period as the email suggests.

28. Eleven minutes later, at 1:56 pm, Mr Janardana emailed Mr Kramer:

> "I am ok with that…."

29. At 5:34 pm on 1 October 2018, Mr Kramer emailed Mr Novis, Mr Janardana and Mr Kalra:

> "Good to see you today as always!
>
> We can agree this one having a longer tail, though I believe the agreement is 12 months not 24?
>
> Taj will revert on the NDA shortly.
>
> Did you hear any feedback from Lida Family Office or Perscitus?
>
> Thx!"
>
> ("the Kramer 1 October email").

30. Ten minutes later, at 5:44 pm, Mr Kalra sent an email to Mr Novis, Mr Janardana, Mr Kramer and Ms Matthews including a marked-up draft non-disclosure agreement. The email said:

> "Rupert – some comments on the NDA for Bamboo/Silverstripe attached from our legal."

31. On 2 October 2018, Mr Novis emailed Mr Janardana, Mr Kramer and Mr Kalra:

> "Jonathan
>
> Thanks for your agreement on Silverstripe. I will call regarding period of time.
>
> I have passed NDA comments onwards.
>
> Will be following up with Perscitus, Lida and OLS Capital today or Wednesday."
>
> ("the Novis 2 October email").

32. Mr Novis and Mr Kramer then spoke the same day ("the 2 October conversation"). What was discussed and agreed during the conversation is in dispute.

33. Lida subscribed for £1.5 million of Zopa shares on 29 October 2018 and paid that sum, and was issued its shares, in December 2018.

34. Silverstripe subscribed for £10 million of Zopa shares on 31 October 2018. Silverstripe paid part of that sum on 13 November 2018 (the last day of the engagement term) and was issued some of its share allocation. It paid the balance of that sum on 9 January 2019 and was issued the balance of its share allocation on the same day.

35. Meanwhile, on 12 November 2018, Mr Novis and Mr Kramer met at The Ned, London for breakfast ("the breakfast meeting").

36. The same afternoon, Mr Novis emailed Mr Kramer:

> "Thank you for a very enjoyable breakfast and good start to the week this morning at the NED. I am delighted we have managed to get some significant strategic investors into Zopa and hope that it will result in further benefits all round.
>
> To recap briefly on the points we covered:
>
> 1. Lida KYC to be finalised – will await to hear from you, but hope we are done or almost done.
>
> 2. Payment for current round – once the money has hit your bank account, perhaps you can let me know and I will invoice you accordingly?
>
> 3. I am pleased we can continue to work on the second round together. **I suggest we use the same agreement as before and just update the raise to be current and make the initial term a suitable length for the anticipated time line. I attach the last pdf executed version and word document for your adjustment**.
>
> 4. **We agreed that the names to be carried forward with a long tail from the first agreement are Silverstripe, Lida Family Office (Beleverd Holdings, Keemia Holdings) and Perscitus Advisors**.
>
> 5**. I would like to include on my next list of potential investors the names that Alex Cuppage, Chris Jones and Nick Aspinall bring together with me. I would request that a successful investment should also result in a 3% commission**. If this is agreed, then we add names to the list in the normal way we have done historically.
>
> …I look forward to circling round on all the above" (emphasis added).

As the email suggests, Mr Novis attached a draft of the engagement letter (which included, unamended, its tail period provisions).

37. Mr Novis and Mr Kramer spoke on 19 November 2018.

38. The same day Mr Novis forwarded a copy of his 12 November 2018 email to Mr Kramer, adding:

> "Thanks for actioning / confirming the various points"

The draft of the engagement letter which had been attached to Mr Novis' 12 November 2018 email was attached to this email.

39. The PRA granted Zopa an AWR licence on 3 December 2018. The grant of the AWR licence started a twelve month clock running. A bank must be granted a full retail banking licence within twelve months after it has been granted an AWR licence, otherwise its AWR licence lapses and it has to start the process of obtaining a retail banking licence all over again, unless, exceptionally, the PRA is prepared to extend the twelve month period. (In this case, as I shall explain, the PRA did extend the twelve month period, but no-one would know that until 2 December 2019, the penultimate day of the twelve month period).

40. On the grant of the AWR licence, the first investment round closed.

41. Mr Novis emailed Mr Kramer and Mr Cuppage on 5 December 2018:

> "On the strategic front there are 2 x opportunity plays other than those already established in the agreement (Zopa/Bamboo/Click) – Price comparison domination & a credit card white label proposition from Zopa to Bamboo. I am happy to contribute and add value where deemed valuable in terms of input."

42. On 16 January 2019, Mr Novis emailed Mr Kramer asking if they could meet because, he was "keen to hear about…my contract for the second part of the money raise" amongst other matters.

43. Mr Novis, Mr Kramer and Ms Matthews met on 21 January 2019. What was discussed and agreed at the meeting is in dispute. In a follow up email of "action points" Mr Novis sent to Mr Kramer and Ms Matthews the same day, he suggested the following action point for Ms Matthews:

> "Renewal of Kinled contract for "Project Bridge" fund raise of up to £125m. Please see the soft copy attached for the last raise plus executed one for reference. **Other than the date and text in highlight yellow, there is little to be changed. I have added the 3 names to the Annex to be carried over (Silverstripe, Perscitus & Lida Family Office**. Jonathan can confirm this" (emphasis added).
>
> ("the 21 January email").

Attached to the email was the draft of the engagement letter which had been attached to Mr Novis' 12 and 19 November 2018 emails, with Silverstripe (and the two other businesses mentioned) identified in Annex 1 as deemed introduced investors. The attachment had the same unamended tail period provisions as the engagement letter.

44. On 26 February 2019, Mr Novis emailed Ms Matthews asking if they could speak and, on 1 March 2019, he emailed Ms Matthews again, referring to a discussion, and attaching "the contract" as discussed. Attached to the email was the draft of the engagement letter which had been attached to Mr Novis' 12 and 19 November 2018

emails (without any introduced investors listed in Annex 1). This was the fourth time Mr Novis had sent the draft engagement letter to Zopa. It had not been signed by Zopa on the previous three occasions when it was sent and it was not signed this time.

45. On 19 March 2019, Mr Novis emailed a US contact:

> "Once there is a lead investor and term sheet, I anticipate being engaged."

46. On 25 March 2019, a meeting took place between Mr Janardana, Mr Hulme, Mr Kramer, Mr Hildebrand, Mr Jones and Mr Aspinall ("the 25 March meeting"). Mr Hildebrand was visiting the UK and he wanted to meet the management teams in businesses in which he had effectively invested. By all accounts, the meeting was not a success. As I have said, WGC had not invested £19 million of its promised investment and it was only now that Silverstripe was told this, although Zopa had attempted to let Mr Aspinall know in advance of the meeting. Mr Hildebrand was disappointed that WGC had not invested the sums it had promised and he was disappointed that Silverstripe was only told this at the meeting. There is a dispute between the Zopa participants and the Silverstripe participants who gave evidence about whether Zopa volunteered the information about WGC's under-investment before, or after, Mr Aspinall had started to ask questions to clarify how much WGC had invested. There may also be a dispute about the extent to which relations between Zopa and Silverstripe were poor after the 25 March meeting. As it happens, nothing turns on any of this, although, if Mr Hildebrand's perception at the meeting was that Zopa had not volunteered the information unbidden, he is likely to have been disappointed about that too.

47. On the same day, Mr Novis and Mr McCallum happened to meet.

48. The following day, 26 March 2019, Mr Aspinall emailed Mr Kramer about WGC's under-investment:

> "This was a shock. It's a massive set back for Zopa and the capital raise. We should have been told. Let's chat."

Mr Kramer replied, asking if they could speak at 1 pm that day. Mr Aspinall responded, explaining that he was hosting a lunch then but the issue was "so serious" that he would interrupt his lunch to telephone Mr Kramer. Eventually, they agreed to speak later in the day.

49. On the same day, Mr Novis emailed Mr McCallum:

> "It was great to meet yesterday. I really enjoyed hearing more about your background and current roles. The transformation of the Virgin business model is an impressive story. I look forward to staying closely in touch and helping you where I can.
>
> I wonder if you can help me?....

> Yesterday, Brett Hildebrand who is the majority shareholder in Credit One Bank and who I introduced to Zopa where he invested (£10m), met with the Zopa management.
>
> It did not go particularly well as Zopa had not declared until the meeting that some of the investment commitments from the last round had not been honoured.
>
> The meeting was intended to be a "get to know" meeting and warm up for the next £100m raise where it is hoped Brett will follow on.
>
> The withholding of this news has not been well received, but I am keen to get everything back on track.
>
> Would you be able to and be prepared to meet with Brett on Wednesday [(i.e. the following day)] at 1730 or preferably Thursday at 1700?"

50. Mr Novis arranged a follow-up meeting between Mr McCallum, Mr Hildebrand, Mr Aspinall and himself on 27 March 2019, at Kinled's office ("the 27 March meeting"). The participants who gave evidence agreed that Mr McCallum listened sympathetically to the Silverstripe's concerns following the revelation a couple of days before about WGC's under-investment. The Silverstripe participants explained at the meeting that Silverstripe wanted down round protection; that is, anti-dilution rights to protect the value of its existing shareholding in the event that, in the second investment round, the price paid by new investors for Zopa's shares was less than the price paid by it in the first investment round. Mr McCallum promised to discuss this with Zopa's board of directors. As it turned out, Zopa could not provide down round protection to Silverstripe for regulatory reasons. Mr McCallum confirmed this to Mr Aspinall at a meeting on 10 April 2019 ("the 10 April meeting") which Mr Novis hosted, although Mr Kramer had sent Mr Aspinall an email to the same effect earlier.

51. It is Kinled's case that Mr Novis and Mr Cuppage spoke on 4 June 2019. Kinled contends that this was an important conversation ("the 4 June conversation"). It pleads (in paragraph 29(5) of the Amended Particulars of Claim) that, during that conversation, it was "established that [Silverstripe] would be able to subscribe for the whole amount of £140 million in the second investment round". Mr Novis' witness statement (at paragraph 67), in which he described this as a "revelation", is to the same effect.

52. The importance of the 4 June conversation was elevated even further by Mr Novis, for the first time, in his oral evidence. It is helpful to set out a discussion he and I had at the end of his oral evidence:

> "Q. …towards the end of your cross-examination, you said that the game changer was when you were told that Silverstripe was in the position, presumably financially, to be a cornerstone investor in the second round.
>
> A. Yes.

Q. Then Mr Barden put to you what he says is the time line. You said, as I understand your evidence, [that], on 4 June, there was a nine-minute call between you and Mr Cuppage and it was during that call that you discovered that Silverstripe was in a position to be a cornerstone investor?

A. Yes. They had the capability financially to do it, yes.

Q. And you said that was a game changer, according to my note, and on 11 June you briefed Mr Hulme and Mr Kramer?

A. I briefed Mr Hulme. Mr Kramer I briefed later, or separately.

Q. But then, as I understand it, at that stage Silverstripe was not intending to be a cornerstone investor?

A. They had not up until that point declared that they were looking to do so at all but there was a change in what they were thinking of doing.

Q. But they did not declare that they were going to be a cornerstone investor, did they, until after the credit card presentation?

A. Correct, but what I did was briefed the Zopa team to say that this opportunity potentially existed so they needed first of all to get the agenda correct for the meeting on the various different points, but also that this was potentially a game-changing opportunity for them to get that cornerstone investor which they had not been able to find with BAML.

Q. But at the stage you found out this piece of information, is it right that there was a possibility that Silverstripe might not invest at all in the second round?

A. Up until that point, yes, and maybe still, I mean, but I had had a very good call with Alex Cuppage, which was the nine-minute call, where he had explained their thinking and where they were going with it. I think that they were very worried that a cornerstone investor was not going to be found but if they found something of interest significantly such as the credit card business or whatever it was which they had expertise in themselves, that they might consider being a cornerstone investor. But they had the ability to do the whole round.

Q. …are you saying that, on your nine-minute call with Mr. Cuppage, he said not only that Silverstripe had sufficient financial backing to be a cornerstone investor but that they might be a cornerstone investor?

> A. That was mentioned in the call. Whether they ended up becoming a cornerstone investor or not I did not know, but what I did take away from that call was I wanted to pick the phone up immediately to the Zopa team to alert them to the fact that -- because that was a revelation.
>
> Q. So it was not just a case of Mr. Cuppage saying to you, "Oh, by the way, Rupert, Silverstripe has so much money it could cover most, if not all, the round." You are saying he went somewhat further and said, "Not only do we have enough money in the bank effectively, but we might use some of that money to become a cornerstone investor"?
>
> A. The inference. He did not say that he was going to become the cornerstone investor, he said he had the ability to become the cornerstone investor. But that was a term that we had never used between us before.
>
> Q. And you took from his statement…that he might be a cornerstone investor?
>
> A. Yes."

Mr Novis' evidence was, in short, that, based on what he was told (see the earlier part of our exchange) or based on an inference he made at, or following, the conversation (see the later part of our exchange), he deduced not only that Silverstripe had the financial ability to invest £140 million in Zopa (as Kinled pleaded), but that, if it later discovered something about Zopa's business which made an investment particularly attractive (as it turns out it did), such as that it had an impressive credit card business, Silverstripe might provide most, or indeed all, of the £140 million Zopa wished to raise in the second investment round. Mr Novis never explained in detail the basis for his inference.

53. If the 4 June conversation was as Mr Novis claimed, it would indeed have been a "revelation". As I have noted, relations between Zopa and Silverstripe had taken a downward turn in March 2019 (although the degree to which they had taken a downward turn is a matter of dispute) and, according to Mr Novis, only on 26 April 2019 had Mr Cuppage told him in a telephone conversation that Silverstripe was unlikely to invest at all in the second investment round because Zopa could not offer it down round protection.

54. Mr Cuppage's recollection of 4 June 2019 was different. In a rather lengthy explanation in cross-examination about why Mr Novis' recollection was unlikely to be right he said:

> "I do not specifically remember that phone call. When I went back through my records on my diary, it was a phone call at 4 p.m. I was flying from Dublin to London at 4:50 p.m. I am notoriously leaving flights to the last minute, so I was either at check-in or running through security. So if I took a call, of which, you know, I would not have spoken to Rupert that much

> over the previous month, I would not have been discussing an investment where you are looking at 100 million plus investment in Dublin airport where, as an Irish person, there is a strong likelihood that you could be overheard by somebody you know. It is not very professional and I was probably rushing for a flight…So I would say it is highly unlikely that a conversation of that nature was had, but that is just my word against his.
>
> The second point where that conversation could not have happened was, I reiterate ---- I will rephrase that. The unlikely nature that I said something that Rupert is alluding to my saying here is that was 4 June. My focus was not on Zopa. My focus was on trying to secure 100 million [from] Mr. Hildebrand to launch a private equity fund. So I would not be pushing the Zopa deal, just from pure selfish reasons.
>
> The second reason was Mr Hildebrand did not really care too much about Zopa at that point in time…This preceded the meeting with Jonathan Kramer on the 7th *(sic)* where we found out about the credit card business. To your point about did Silverstripe have the capability to do this round, anyone who knows Mr Hildebrand knows that he would have the capability to make an investment like that. At this stage, when you follow the chronological events, we had no appetite to put one more pound into Zopa. It [(that is, Silverstripe's first round investment)] was under water. We had no idea if the fundraising was going to be a success or not. Based on the fact that they still had not found a lead investor, it was not going to be a success. Selfishly, if Mr. Hildebrand was going to invest that sort of money, that was going to take away from the private equity fund that we had been discussing since December 2018. So I had no motivation to promote investments with Zopa at that stage."

55. As Mr Novis explained, he and Mr Hulme spoke on 11 June 2019 ("the 11 June conversation"). Mr Hulme then sent an internal email, as a result of that conversation, suggesting that Zopa add to a presentation for Silverstripe a "break even analysis/path to profitability".

56. Mr Hulme and Mr Kramer exchanged emails the same day. Mr Hulme asked Mr Kramer what Zopa's "position" with Mr Novis was "if [Silverstripe] put £50m in!" Mr Kramer replied:

> "He is at 3% on follow on from Silverstripe (and Lida), so is incentivised for a deal!!"

57. The Zopa team (including Mr Janardana and Mr Kramer) and the Silverstripe team (including Mr Hildebrand, Mr Aspinall and Mr Cuppage) met on 19 June 2019 ("the 19 June meeting"). Mr Novis was not present. Mr Cuppage's recollection is that he and Mr Kramer met for lunch a little (perhaps a few days) before the meeting, when

Mr Kramer explained that Zopa had built a proprietary credit card processing platform, following which they discussed Zopa making a presentation about its credit card business at the 19 June meeting. All the participants at the 19 June meeting agree that, at the meeting, the Zopa team (principally Mr Janardana) did make a presentation about its credit card business, that Mr Hildebrand appreciated Mr Janardana's skill and expertise in that business and that, after the 19 June meeting, because of his own interest in that business, Mr Hildebrand began to contemplate Silverstripe making an investment in the second investment round.

58. Mr Novis sent Mr Kramer the draft engagement letter for a fifth time on 8 July 2019. On this occasion, a number of businesses were listed in Annex 1 as introduced investors, but Silverstripe. Lida and Perscitus Advisors were not listed. Again, Zopa did not sign it. Mr Novis' covering email said:

> "Contracts – in terms of follow on, **we are covered for Silverstripe**, Lida Family Office (Beleverd Holdings, Keemia Holdings) and Perscitus Advisors.
>
> **For the new names, I suggest we either amend the last/current agreement or replicate it**. I am relaxed either way. I attach a signed copy and word doc with the parts in yellow requiring modification" (emphasis added).
>
> ("the 8 July email").

59. On 9 September 2019, Silverstripe asked to see any written terms under which any fees were payable to introducers for investments made in the second investment round. Silverstripe was apparently particularly concerned about the payment of any fee to Kinled. Mr Kramer sent an email to Mr Janardana and Mr Hulme:

> "Attached are Kinled, BAML and Rothschild. We agreed to carry over Silverstripe, Lida and Perscitus as introduced parties to this round for Kinled – will need to dig that mail out. I think on Kinled the tail was 12 months from signing, so Aug 1 2019, so may technically be over."
>
> ("the 9 September email").

60. On 9 October 2019, Mr Novis emailed Mr Hulme and Mr Kramer:

> "It was good to see you this morning to update at a high level on how you are moving forward with Silverstripe. I understand there are others in the running, but as expressed, I believe there is a worthwhile strategic fit for Zopa with Silverstripe, even if the terms are not ideal. One step back in order to go 10 steps forward is worth it.
>
> I appreciate that there is a lot of work to do still and many hoops to jump through, but felt it was timely to see you to make sure we are on the same page regarding commissions for my introductions and raising of funds.

> As discussed, this round is the follow on "part 2" of the earlier "part 1" raise that completed at the end of 2018, all centred around the banking licence. **If Silverstripe make the investment, it is clear that they will have followed on and this will generate a commission fee of 3%**..." (emphasis added).

61. On 30 October 2019, Mr Novis emailed Mr Janardana, Mr Hulme, Mr Kramer and James van den Bergh (the existing investor in Zopa who had introduced Kinled to it) under the heading "URGENT request for meeting":

> "Dear Jaidev,
>
> We have not spoken since the summer, but throughout the year I have been in constant contact with both Jonathan and Steve.
>
> I have been working tactically and effectively to bring Silverstripe around from a position of being "unimpressed and disappointed" by Zopa where follow on investments looked unlikely, to a position where they have now submitted a proposal to subscribe to the whole of the current funding round. This is without doubt a remarkable change to have achieved and one that is potentially lifesaving for Zopa as a business.
>
> **Despite numerous calls, emails and meetings with Jonathan and Steve, other than verbally, I still do not have either:**
>
> **1. Confirmation in writing that you will honour my contract from the last round for follow on commissions from my investors i.e. Silverstripe and Lida Family Office.**
>
> **2. Or a new contract for this round.**
>
> You will see from the email below that I sent a revised contract in January. **Jonathan suggested we sign my contract once a lead investor had been found. However, since January Zopa has not been able to secure a lead investor**. As the summer and communications with Silverstripe evolved, I managed to turn them around in their views on Zopa and brought them into the running. They have changed from a position where they may not have invested further (follow on), to a position where they have made an offer for the whole raise of £125m+.
>
> Silverstripe are in due diligence, but I am aware that there are many other forces at work looking at other options. In my opinion, Silverstripe offers a great long term strategic fit, but this offer will not be around for much longer…You may have to go 2 steps back, but you will end up going 8 steps forward.
>
> **I therefore request an urgent meeting with you to either confirm you will honour "follow on" investments from my**

> **last/existing contract in terms of payments in this current asset raise, or to sign a new contract for this round. (See same attachments as sent in January)**. My engagement with you and the team at Zopa has always been at the highest level of trust and integrity, so I am confident this will not be an issue, but wish to remove an uncertainty without delay.
>
> I look forward to hearing back from you shortly" (emphasis added).
>
> ("the 30 October email").

At the same time, Mr Novis apparently forwarded to Mr Janardana the 21 January email, but he did not forward either the Novis 1 October email or the Kramer 1 October email.

62. Mr Novis received no response at all to the 30 October email. So, on 7 November 2019, he sent a chaser email. Mr Janardana replied the same day:

> "Thanks for the reminder. As you could imagine, we are all very focused on having a deal completed and are still pursuing a number of options. At this state in the process, I will not get board approval to sign any new contracts for this round.
>
> As Steve has mentioned to you before, once we are at a point when a deal is near to completion, we will evaluate all adviser fees and in case of Silverstripe or any other major new investor, we will really value their input as well in making that decision."

63. Mr Novis responded on 11 November 2019:

> "Thank you for your reply. I would like to offer one more opportunity to meet this week or next to discuss and sign an agreement between us for this raise. Without this meeting, I will have to meet with Silverstripe instead to determine a way forward for all aspects of this potential deal and will be very open with them about our (Zopa and Kinled) inability to agree terms.
>
> I would much prefer not to do this as clearly that will impact the status quo; instead we can, with a bit of work, come to a negotiated agreement with you so we are both incentivised to help get his deal over the line (or at least let it stay in contention).
>
> I look forward to hearing back from you within 48 hours from this email, otherwise I will proceed with my alternative action."

64. Mr Janardana replied twelve minutes later:

> "Thanks for the heads up. I wanted to have a few internal conversations before I got back to you. I am afraid I don't have the mandate to negotiate and sign an agreement with you right now. Both my board and current shareholders + some of the investors coming in have views on this. I have been open with Silverstripe on where we are. As mentioned before, I feel the best course of action would be to wait till we have a deal agreed. Shareholders and the board are a lot more focused on the deal right now, and are not open to having a conversation about adviser fees."

65. Mr Novis did try to meet with Mr Jones and Mr Aspinall about "an urgent matter" he wanted to tell them about "both from a historical and current standpoint regarding Zopa" but they did not meet with him.

66. On 2 December 2019, Silverstripe subscribed for £140 million of Zopa shares. In other words, it agreed to provide all the investment Zopa had sought in the second investment round. On the same day, the PRA gave Zopa an extension of time to apply for a full retail banking licence.

67. On 4 December 2019, Mr Novis emailed Mr Janardana, Mr Hulme, Mr Kramer and Mr van den Bergh an "invoice in accordance with our arrangement" in the sum of £4.2 million for "advisory on strategic investment for Silverstripe".

68. Mr Hulme wrote to Mr Novis on 17 December 2019:

> "I refer to your email of 4 December 2019 to Jaidev Janardana to which you attached an invoice for advisory services.
>
> As you are aware, the agreement dated 14 August 2018 between Kinled and Zopa has now expired. The tail period for the payment of commission was conditional on the completion of a further investment by a Kinled-introduced investor by 14 November 2019. The proposed investment by Silverstripe has not yet completed, as it is subject to regulatory approval, and is unlikely to complete until late Q1 2020. Therefore, the contract of 14 August 2018 has expired and is no longer in force.
>
> To summarise, Zopa's previous contract with Kinled has now expired and there is no new contract between us and, therefore, there is no basis for the invoice sent to Jaidev on 4 December 2019. Zopa has no outstanding liability or debt owed to Kinled."

69. In March 2020, Silverstripe paid Zopa £2 million (and was issued with Zopa shares to that value). In June 2020, Silverstripe paid Zopa £138 million (and was issued with Zopa shares to that value) and Zopa was granted a full retail banking licence.

<u>The parties' pleaded cases</u>

70. I need to set out the legal basis for Kinled's claim and Zopa's counterclaim in a little more detail than I have done already.

71. As I have indicated, Kinled now claims, first, that the engagement letter was varied. It pleads, in paragraph 17 of the Amended Particulars of Claim, that the Novis 1 October email and the Kramer 1 October email amounted to an agreement to extend the tail period in the engagement letter, so far as it relates to Silverstripe, to twenty four months expiring in November 2020. Kinled claims, alternatively, that Mr Novis, on behalf of Kinled, and Mr Kramer, on behalf of Zopa, agreed to vary the engagement letter to the same effect during the 2 October conversation.

72. Mr Paul O'Doherty represented Kinled at trial. During his opening, I mentioned that I understood that consideration is required for a contractual variation to be binding.[4] Mr O'Doherty agreed that consideration is required in this case. No consideration for Zopa's alleged promise to pay a fee during an extended, twenty four month, tail period had been pleaded. Unopposed by Zopa, I permitted Kinled to amend the Particulars of Claim to plead consideration, which it did in the following way:

> "The consideration for the extended promise by Zopa to pay Kinled in respect of follow on investments made by Silverstripe or Silverstripe's group within 24 months of 14 November 2018 was the promise made on or by the 1 or 2 October 2018 by Kinled to provide strategic follow on and introductory services with regards to Silverstripe or Silverstripe's group beyond 14 November 2018…, in circumstances where the parties had in mind that those services might be required to secure a follow on investment or otherwise" ("the Consideration").

73. Kinled now, secondly, "brings a restitutionary claim, that it is entitled to a quantum meruit for introductory services undertaken by it at [Zopa's] request". As I have indicated, in closing, Mr O'Doherty put Kinled's case for a quantum meruit on the basis that Mr Novis provided services relating to Silverstripe in the second investment round in the parties' anticipation that a contract for a 3% intermediary's fee would eventuate. Kinled relies on the following matters in support of that claim:

    i) the 21 January 2019 meeting between Mr Novis, Mr Kramer and Ms Matthews, during which, Kinled explains, "Mr Kramer said to Mr Novis that the execution of the second letter of engagement would need to wait until [BAML] had identified a lead investor for the second investment round" and, as a result of which, Kinled contends that "from at least January 2019 it was clear to [Zopa] that [Kinled] expected to act in the second investment round on the basis of the same fee arrangement as in the first investment round and that introductory services provided in respect of the second investment round would not be provided gratuitously" and that "from at least January 2019 [Zopa] continued to instruct [Kinled]";

    ii) that, it contends, Mr Novis arranged the 25 March meeting;

[4] See, for example, Cartwright: Formation and Variation of Contracts (3rd ed); paragraph 9-08.

iii) that Mr Novis arranged the 27 March meeting and hosted the 10 April meeting;

iv) that Kinled's "introductory services were critical in avoiding a complete breakdown in the relationship between [Zopa] and Silverstripe with numerous meetings, discussions and email exchanges between April and June 2019", in particular the 11 June conversation.

74. Turning to Zopa's counterclaim, s.26 of FSMA provides:

> "(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.
>
> (2) The other party is entitled to recover –
>
> (a) any money or other property paid or transferred by him under the agreement; and
>
> (b) compensation for any loss sustained by him as a result of having parted with it.
>
> (3) "Agreement" means an agreement –
>
> (a) made after this section comes into force; and
>
> (b) the making or performance of which constitutes, or is part of, the regulated activity in question…"

75. S.19 of FSMA defines "the general prohibition" as follows:

> "(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is –
>
> (a) an authorised person; or
>
> (b) an exempt person.
>
> (2) The prohibition is referred to in this Act as the general prohibition."

76. S.22 of FSMA defines "regulated activities" as follows:

> "(1) An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and –
>
> (a) relates to an investment of a specified kind;…
>
> (4) "Investment" includes any asset, right or interest.
>
> (5) "Specified" means specified in an order made by the Treasury."

77. Art.25 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the 2001 Order") provides:

> "(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is –
>
> (a) a security,[5]…
>
> is a specified kind of activity.
>
> (2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a)…is also a specified kind of activity."

78. Kinled accepted, first, that the activities it carried out in this case were carried out by way of business. It accepted, secondly, that any activities it carried out which are regulated activities were carried out in breach of the general prohibition, because it is not an authorised person. It accepted, thirdly, that, if the activities it carried out in this case constituted either (i) making arrangements for Silverstripe and Lida to acquire shares in Zopa in the first investment round or (ii) making arrangements in which Silverstripe or Lida participated with a view to them acquiring shares in Zopa in the first investment round, it will have carried out regulated activities.

79. It follows, therefore, that, if (i) Kinled made arrangements for Silverstripe and Lida to acquire shares in Zopa in the first investment round or made arrangements in which Silverstripe or Lida participated with a view to them acquiring shares in Zopa in the first investment round and (ii) the engagement letter was made in the course of carrying on that conduct, prima facie the engagement letter is unenforceable against Zopa and Zopa is entitled to recover the introducer's fee of £345,000 paid by it to Kinled.

80. Mr Alex Barden represented Zopa at trial. I raised with him, in opening, whether, because the engagement letter was made at the outset of any relevant arrangements made by Kinled, it was made in the course of carrying on those arrangements. Mr Barden suggested that it was, by reference to s.26(3) of FSMA. Mr O'Doherty did not apparently dissent from that suggestion, although I do consider the point briefly below.

81. Kinled argued that, even if s.26 of FSMA is prima facie engaged in this case, it has a defence to the claim for repayment of the £345,000 fee under s.28 of FSMA, which provides:

> "(1) This section applies to an agreement which is unenforceable because of section 26…
>
> (3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow –

[5] Security includes shares for present purposes (see art.72 of the 2001 Order).

> (a) the agreement to be enforced; or
>
> (b) money and property paid or transferred under the agreement to be retained.
>
> (4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the court must –
>
> (a) if the case arises as a result of section 26, have regard to the issue mentioned in subsection (5);…
>
> (5) The issue is whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement…"

82. Zopa advanced its counterclaim in a number of ways, but, as I have noted, Mr Barden accepted that, if I conclude that the engagement letter was made in the course of Kinled carrying on the activities in issue, those alternative ways take Zopa's counterclaim no further and, in such circumstances, they stand or fall with Zopa's FSMA counterclaim.

83. In the light of my conclusions (which I have summarised above) and the parties' respective concessions, in relation to the counterclaim I need to consider only three issues in this judgment; namely:

    i) Did Kinled make arrangements for Silverstripe or Lida to acquire shares in Zopa in the first investment round, or make arrangements in which Silverstripe or Lida participated with a view to them acquiring shares in Zopa in the first investment round? (I may need to determine whether this question should be resolved by reference to the activities set out in the engagement letter which Kinled thereby promised to carry out (which is Zopa's primary case) or by reference to the activities Kinled actually carried out (which is Zopa's alternative case));

    ii) Was the engagement letter made in the course of carrying on that conduct?

    iii) If the answers to (i) and (ii) are yes, is it just and equitable to allow Kinled to retain the £345,000 fee?

84. Helpfully, there was a measure of agreement about what activities Kinled actually carried out which might amount to "arrangements" in relation to the first investment round for the purposes of art.25 of the 2001 Order and the first question I have to answer. Mr Barden identified the following activities, which he contended Kinled actually carried out, and which Mr O'Doherty accepted were actually carried out, subject to the qualifications I set out:

    i) identifying and putting forward potential investors;

    ii) making contact with those potential investors;

iii) facilitating the provision, and negotiation, of non-disclosure agreements for potential investors;

iv) providing general information to potential investors about Zopa and its fundraising;

v) identifying specific issues and questions raised by potential investors, and discussing them with Zopa and the investors (but only, Mr O'Doherty contended, as a messenger);

vi) arranging and attending meetings between investors and Zopa;

vii) working through proposed terms of, and changes to, legal documents (but only, Mr O'Doherty contended, as a messenger);

viii) procuring provision of adequate Know-Your-Client information for potential investors (but only, Mr O'Doherty contended, as a messenger).

Mr Barden also contended, but Mr O'Doherty disputed, that Kinled provided advice to Zopa on the position of investors and proposed agreements to invest.

85. I now consider the witness evidence, setting out in the case of each witness, evidence they gave.

Mr Novis

86. Mr Novis said that he met Mr Janardana, Mr Kramer and Mr Kalra at Zopa's offices for the first time on 23 July 2018. He said that he was told at the meeting that the first investment round was fairly advanced, with about £50 million secured, but that further investment of about £20-30 million was required to close the round. He said that he was also told that Zopa intended to raise capital to support its application for a banking licence in two rounds and the reasons for that; that is, the two stage approach, over a twelve month period (that is, a short period of time), adopted by the PRA for the grant of retail banking licences. He said that those present at the meeting agreed that Kinled and Zopa would enter into a written agreement, after which Mr Novis would introduce several families to Zopa and he deduced, from the fact that the first and second investment rounds were linked, that Zopa wanted him to introduce investors in both investment rounds. He accepted that no engagement term was agreed at the meeting.

87. He said that the purpose of the tail period in the engagement letter was to capture investments in the second investment round which was expected to complete in the first half of 2019 and, given the timescales, he considered the tail period and the extended tail period "to be ample time to capture the second round of investment".

88. He accepted that, under the engagement letter, if a further investment by an introduced investor was made after the end of the extended tail period, "technically" Kinled would not be entitled to payment but, he suggested, that is not what the parties intended to agree. Rather, he suggested, the parties intended to agree that a fee would be paid if there was a further investment before the second investment round closed whenever that might be.

89. He explained that he made contact with Mr Cuppage on 11 September 2018 and they met on 21 September 2018. He then arranged a meeting between Mr Cuppage and the Zopa team for 1 October 2018, which he joined, together with Mr Jones and Mr Aspinall, as well as Mr Cuppage, on Silverstripe's behalf. He, Mr Novis, made the initial introductions but then did not actively participate in the meeting. The 1 October meeting was successful.

90. Mr Novis explained the provenance of the Novis 1 October email thus in his witness statement:

> "It was clear to me from the meeting that there were potential synergies between Zopa and Silverstripe. Zopa were still aiming at this stage to complete the second round in H1 2019, well within the tail period set out in the Agreement, so I believed at this time that the Agreement would be sufficient to cover any second round investment. Because of these long term synergies between Zopa and Silverstripe, I thought there was potential for a longer term strategic relationship and further investment by Silverstripe beyond Zopa's fundraising for its banking licence. I wanted to ensure that such further partnerships and investments would be covered by the Agreement. It was for that reason that I emailed Jonathan, Taj and Jaidev on the same date seeking to agree a longer tail of 24 months specifically in respect of Silverstripe. I specifically referred in the email to the potential for strategic transactions associated with Silverstripe's group, including Bamboo."

91. He explained, in cross-examination, that, in return for Zopa agreeing to extend the tail period under the engagement letter to twenty four months, he was offering to introduce Zopa to other businesses in the Silverstripe stable.

92. He said that he "understood…straightforwardly" the Kramer 1 October email as agreeing to extend the tail period in the engagement letter to twenty four months and he added that, "from that moment on, [he] was satisfied that a 24 month tail period was in place in respect of Silverstripe". It turns out that Mr Novis understood the Kramer 1 October email as agreeing to a twenty four month tail period because he, Mr Novis, was not asking for a twelve month tail period; that having been agreed, he understood, in the engagement letter. In other words, he interpreted the Kramer 1 October email, and the agreement in it to "a longer tail period", against the background of the engagement letter, and because, in any event, that is not what he sought by the Novis 1 October email.

93. Mr Novis said in his witness statement, of the 2 October conversation:

> "I clearly remember that I called Jonathan the following morning, on 2 October 2018, to clarify what was in the Agreement in terms of the period of time as Jonathan indicated he had not looked at the agreement recently in his email, whereas I had. It was therefore a courtesy call to refresh and explain to Jonathan the 3 month initial engagement, after which a 3 month tail period applied generally, extended by a further 9

> months for introduced parties who invested in the first round. I therefore agreed with him that the Agreement already provided for a tail period of 12 months. That's why I'd asked specifically for 24 months for Silverstripe. He confirmed that he agreed that the tail period was extended from that 12 months so that the overall period for triggering a commission in respect of Silverstripe was 24 months."

94. Mr Novis' evidence in cross-examination about the 2 October conversation may not have been so certain. This exchange took place between him and Mr Barden:

> "Q. Now, if you had understood his previous e-mail as agreeing with you, i.e. it was to be 24 months, done and dusted, it would have been unnecessary to call him, would it not?
>
> A. No, because the interpretation, understanding and the conversation that followed, was that he was not sure whether what the length of the tail period was, and how that was constructed. So when we spoke the next day, I explained to him exactly what we have been discussing today, which is that it had a three-month initial period followed by an additional three months, which was extended to 12 in total. But this was for a 24-month period.
>
> --- The reason I called him was to clarify what the original agreement was.
>
> Q. The original agreement is written down. It did not need a call to tell him what it said, did it?
>
> A. Well, all I can tell you now is that at the time he did not recall what the original agreement was, and therefore that is why I called him, because he was not familiar with it, and I called him to tell him what it was.
>
> --- [T]he conversation was a short conversation for a couple of minutes or so where I called him, reminded him of the construct of the actual agreement, three months plus three months plus nine, and therefore I already had 12 months, so I was never ever requesting to have what I already had. I was requesting to have something longer, which was 24 months."

The following exchange between Mr Novis and me also took place:

> "Q: Sorry, just so I can follow, are you saying that when you called Mr. Kramer it became apparent that he thought you were asking for confirmation that you had what was already in the agreement?
>
> A: Yes, my Lord.

> Q: When I called Mr Kramer, it was apparent that he thought I was asking for confirmation that I could have what was already in the agreement?
>
> A. No, that is not correct, my Lord. When I called Mr Kramer, called him to re-explain what the current contract had, which was the total of three months plus 12 months. Therefore I would never have requested the same, because I already had it. Hence I asked for 24 months, which was a longer period than what had already been agreed. He did not need to agree to the 12-month extension because it was already in the contract.
>
> --- I was just ringing up to clarify with him how the original agreement --- the call was purely to explain to him what the original agreement was, three months plus three months plus nine months, but to my mind we did on that call as well agree the 24 months. It was agreed already in the e-mail exchange that had happened the day before."

95. When Mr Barden pointed out that, from 2 October 2018 until Kinled's pre-claim letter in July 2020, there was no mention of a twenty four month tail period or the 2 October conversation, Mr Novis said that they were "inherently referred to".

96. Mr Novis agreed, in answer to a question from me, that he did not discuss, during the 1 October meeting, how he might contribute to facilitating the strategic investments mentioned in the Novis 1 October email. He agreed too that the Novis 1 October email did not mention anything about how he might contribute to facilitating strategic investments, but, he said, "the inference was that there were going to be more opportunities which [he] could help introduce, nurture for the companies on a separate basis". When I asked Mr Novis how I, or Mr Kramer, might infer from the Novis 1 October email that Mr Novis might be willing to contribute to strategic investments, at first he did not answer the question, but then said that the inference should be made from the sentence in the email: "I believe this could be a significant investment over time with strategic follow on potential". Mr Novis agreed that, during the 2 October conversation, there was no discussion about how he might contribute to strategic investments, but he then said that he could not remember if there was such a discussion. When I asked Mr Novis if he could remember any occasion when he discussed with Mr Kramer how he, Mr Novis, could contribute to facilitating strategic investments, he said that he could not specifically recall one.

97. Mr Novis explained, in his witness statement, that the breakfast meeting was "a chat over breakfast" which had been arranged to thank him for his work during the first investment round and to discuss the second investment round. He said:

> "Jonathan confirmed to me that Silverstripe, Lida and Perscitus would be carried forward and named in a new contract to replace the existing one and assured me that Zopa would sign and honour its agreement to pay commission for a second investment by Silverstripe or Lida."

He continued:

> "The [engagement letter] remained in place and effective, but Jonathan and I discussed having a new contract for new investors, because the engagement term in the [engagement letter] had expired so a new contract would be needed to cover newly introduced investors. It made sense to name Silverstripe, Lida and Perscitus in a new contract as I expected it, once signed, to replace the existing [engagement letter]."

98. In cross-examination, the following exchange took place:

> "Mr Barden: …But the engagement term was not discussed at the NED meeting nor were the commission terms discussed at the NED meeting?
>
> A. I cannot recall.
>
> …Q: …[Y]ou did not even discuss what the commission would be.
>
> A. We did discuss the terms that we were working on and that is why I submitted exactly the same agreement because it was the same 3% as before. There was no objection from Jonathan during that meeting that anything would be any different and so that is why I said the same commission basis because he had not objected to anything. He said just send me the same agreement again.
>
> Judge: So your evidence is that at the NED meeting Mr Kramer said to you in terms with regard to a new agreement for the second round send me the same agreement again?
>
> A. I do not remember the words specifically but he said send something over.
>
> --- I sent him what I had because that was a starting point from which we would work."

He later described the draft engagement letter he sent under cover of his 12 November 2019 email (i.e. on the same afternoon as the breakfast meeting) as "a proposal to [Zopa] to repeat much the same as we had done before".

99. One of the purposes of the 21 January 2019 meeting, Mr Novis said, was to find out what was happening with Kinled's contract for the second investment round. Mr Novis recalled that Mr Kramer told him that, before Kinled was engaged, Zopa wanted BAML to secure a cornerstone investor. One reason, according to Mr Novis, that he was not troubled by the delay was because Kinled "was covered for any further investment by Silverstripe…because of the tail set out in" the engagement letter, including the "long tail agreed specifically for Silverstripe". He only included Silverstripe's name in the draft engagement letter he sent to Ms Matthews the same day, he said, "for belt and braces, particularly as [he] expected this agreement to replace the original contract once signed". He said, in cross-examination, that he did

not expect Zopa to sign a new engagement letter before a lead investor had been found and that he sent the draft engagement letter to Ms Matthews to "[tee] up something for the future that [he] hoped to be signed when or if a lead investor was found". He continued that his email he sent that day with the draft engagement letter was "an opening discussion to agree a new contract".

100. Mr Novis repeatedly said in cross-examination that the draft engagement letter which he kept sending to Zopa to be signed in relation to the second investment round was intended to secure Kinled's fee for investments made by new introduced investors (i.e. other than Silverstripe, Lida and Perscitus) and that the engagement letter was "there and valid" to cover further investments by Silverstripe.

101. Mr Novis accepted in cross-examination that Silverstripe's view about whether or not to invest in the second investment round was "turned around" by Zopa's presentation, at the 19 June meeting, relating to its credit card business and that that presentation was "the real clincher"; although, he added, that meeting and presentation were "prefaced" by the 4 June conversation.

102. Mr Novis felt that he was "being cut out of things", at least by Silverstripe, after the 19 June meeting. He continued that, at a meeting with Mr Kramer on 27 September 2019, Mr Kramer told him that decisions about commission payments had "now been taken to a higher level of authority and [were] out of his hands". Mr Novis said that this was extremely concerning. By about this point, he felt that Zopa was "looking to cut [him] out of the process".

103. Mr Novis concluded his witness statement by saying:

> "I had worked on the second round in the full knowledge that I had the [engagement letter] in place to be paid for my efforts if the investment came off…I repeatedly requested a new contract in the second round because I wanted to make sure that if any of the new investors I was approaching invested that I would get paid. I saw a new contract as replacing the original so I therefore wanted to include Silverstripe, Lida and Perscitus for a belt and braces approach. However, so far as I was concerned and was clearly agreed and understood by Zopa, it had always been intended and agreed that I would be paid commission on investment by those parties on the second round, in particular with Silverstripe and its 24 month long tail…"

104. Mr Novis was cross-examined about the experts' agreement (see below), with which he did not agree. He did accept, however, that, because Kinled had an indirect interest in Zopa through an investment it had made in Trufin (Mr van den Bergh's business), Kinled and Zopa had a common interest in ensuring that Zopa was sufficiently capitalised. He also accepted that speculative work can be done by introducers to build goodwill with companies for the future, and to improve relations with other family offices, and that intermediaries' actions may be motivated by more than one consideration. He accepted, finally, that it was in Kinled's interests to maintain good relations with Silverstripe and to provide "aftercare" to it even if Kinled was not engaged in the second investment round, because family offices "help each other out where [they] can".

105. Mr Novis was also cross-examined about FSMA. In that regard, he gave the following evidence:

i) he was aware at the relevant time that financial services businesses are regulated and that a person carrying out certain activities has to be authorised, which comes with a regulatory burden and cost;

ii) Kinled has never sought advice about whether it requires authorisation for its introductory services;

iii) Mr Aisher (who Mr Novis described as "the principal") "was happy that the activity that [Kinled was] doing did not need to be regulated";

iv) Mr Novis did not know "what informed the principal's decision" that Kinled did not need to be regulated;

v) he did not consider whether Kinled's services in this case were regulated activities;

vi) no-one has ever complained that Kinled is not regulated;

vii) whether or not Kinled required authorisation is "a very grey area".

Mr Janardana

106. Mr Janardana said that Mr Kramer and Mr Kalra were principally responsible for agreeing the engagement letter, adding, in cross-examination, that Zopa's lawyers would have reviewed it.

107. He said that he did not conclude, from the 1 October meeting, that there were "significant synergies" between Zopa and Silverstripe, but he did recognise that there were "tactical opportunities" which might uplift Zopa's revenues by one or two percent but not by as much as five percent.

108. He said that, when he replied to Mr Kramer, following receipt of the Novis 1 October email, saying "I am ok with that", he was referring to the amended draft non-disclosure agreement which Mr Novis had also forwarded, because that "was the immediate action point" in the email. He explained, in cross-examination, that he was particularly concerned about the terms of the non-disclosure agreement Silverstripe was proposing to sign because of the correlation of their businesses. In effect, he explained, Silverstripe was, or might become, a competitor in some aspects of Zopa's business. He added that, even though he had responded positively to Mr Kramer within a few minutes of receiving the Novis 1 October email, on his case in relation to the draft non-disclosure agreement Mr Novis had forwarded, he, Mr Janardana, still expected Zopa's lawyers to check the draft non-disclosure agreement and propose any suitable amendments to it and he expected Mr Kramer to liaise with the lawyers without being told expressly to do so. He also said that he would not have agreed a twenty four month tail period, a twelve month tail being on "the longer side", and that Mr Kramer knew, and did not need to be told, that.

109. He said that there was no commercial rationale for agreeing a twenty four month tail period, which could lead to further fees being paid.

Mr Kramer

110. Mr Kramer no longer works for Zopa, although he retains shares in the business which he acquired through an employee share incentive scheme.

111. He acknowledged that he, and Mr Kalra, who reported to him, were principally responsible for agreeing the engagement letter, but he added that it is likely that he would have sought approval of its terms from Zopa's lawyers and Mr Janardana or Mr Hulme.

112. Mr O'Doherty put to Mr Kramer in cross-examination that Kinled provided the finance raising services listed in the engagement letter. Mr Kramer agreed that Kinled did provide those services. Mr Kramer added that Kinled partly carried out the "completion" services listed in the engagement letter. He felt that Kinled did provide some project management-related services in relation to Silverstripe's first round investment because there was "back and forth" in connection with it.

113. Mr Kramer was cross-examined in detail about the events of 1 and 2 October 2018. He repeatedly made the point, indeed he was keen to emphasise (as he did about other events), that he could not recall them and that his answers were based on what he had read more recently in the contemporaneous correspondence and on how he now thinks he is likely to have acted. So, for example, in relation to his thoughts on receipt of the Novis 1 October email, he said that he could not "remember [his] thinking at the time" and, of 2 October 2018, he said that he could not "remember with any clarity that day" or the 2 October conversation at all. On that basis, Mr Kramer gave the following evidence about the events of 1 and 2 October 2018:

    i) by the Kramer 1 October email, he agreed a longer tail period but "clearly…[pushed] back" against (i.e. rejected) a twenty four month tail period;

    ii) it is very unlikely that he would have agreed a twenty four month tail period during the 2 October conversation.

114. Mr Kramer was not cross-examined about any quid pro quo Kinled (that is, Mr Novis) proposed in return for Zopa's agreement to a twenty four month tail period. Nor was he cross-examined about any quid pro quo Zopa had requested from Kinled in return for Zopa's agreement to a twenty four month tail period.

115. The following exchange took place between me and Mr Kramer:

> "Q. …[W]ill you look at your email on C145 where you say: "We can agree this one having a longer tail..."…[T]he word "longer" is a relative term, longer than something else. When you were saying "We can agree this one having a longer tail", [you meant a] longer tail than what?
>
> A. So the engagement letter with Silverstripe prescribed for a three month tail, a three month engagement term plus a three month tail, so 12 months would be longer than three months.

> Q. Just so I understand it, are you saying that…[w]hat you were referring to was a situation where [Silverstripe] did not invest during the engagement term but [did] invest within 12 months?
>
> A. Correct.
>
> Q. So the proposition that you were discussing was effectively removing the pre-condition that, in order for Silverstripe's investment within…a 12-month tail period to lead to remuneration, Silverstripe had to have invested within the engagement term?
>
> A. Correct, and we did the same with Perscitus, who did not invest, but we said we were including in that longer period Silverstripe, Lida and Perscitus."[6]

116. Mr Kramer had said in his witness statement that twelve months was a fair tail period and was consistent with the regulatory time frame for Zopa to receive a full retail banking licence. He said that his recollection has always been that the extended tail period under the engagement letter was twelve months.

117. Mr Kramer could not remember "the particulars" of the breakfast meeting but he did "have a memory of Silverstripe, Lida and Perscitus being carried forward".

118. He explained that, whilst Mr Novis was keen for Zopa to sign the draft engagement letter he sent from November 2018 relating to the second investment round, Zopa was unwilling to sign it because its focus was on finding a lead investor through BAML's efforts. Until a lead investor had been found, he said, Zopa would not know if, or the extent, it needed Kinled's services, so that Zopa did not want to enter into what might be an unnecessary contract. He said that Mr Novis appreciated what Zopa was focused on, because he and Mr Novis discussed this many times.

119. He believes that, during much of the second investment round, Mr Novis was more seeking a role to play rather than being requested by Zopa to play a role. Further, he does not believe that Mr Novis was an effective cause of Silverstripe's investment in the second investment round (and he explained why in his witness statements and in cross-examination, when he said, for example, that, before Zopa's credit card business presentation to Silverstripe at the 19 June 2019 meeting, no thought had been given by Zopa to Silverstripe being a cornerstone investor in the second investment round).

Mr Aspinall

120. Mr Aspinall's evidence was directed principally to his view that Mr Novis had no role in bringing about any investment by Silverstripe in the second investment round. He also gave evidence (i) about the discovery, during the 25 March 2019 meeting, about WGC's under-investment in the first investment round and (ii) as other witnesses before him had done, that it was Zopa's credit card business presentation at the 19 June 2019 meeting which was the immediate cause of Silverstripe's investment in the second investment round.

[6] To be clear, it was not otherwise suggested that the pre-condition for payment was waived in relation to Lida or Perscitus.

121. Mr Aspinall explained that, in September 2019, he discovered that Kinled had been acting as a fee-paid intermediary, whereas, before that he had understood that Kinled was acting as an investor in Zopa concerned to ensure that the investment rounds were successful. Mr Aspinall was troubled that the true position had, according to him, not been made apparent beforehand. He explained why in cross-examination, as follows:

> "[Mr Novis] again portrayed himself as being closely involved in Zopa as an investor or representative of Kinled as an investor via its portfolio investments and had a clear relationship with Zopa where he was able to effect meetings and introduce us to them, and also at the same time he was very clear in his commentary to us and just casual conversation and very clear in his emails --- from time to time talked about we, as a shareholder community, we, as an investor community, and on a number of occasions particularly talked about we, Kinled, Silverstripe, Trufin and how we might do things together, which gave the strong impression that he acted and was actively involved and a proponent of Zopa to us as a prospective investor in Zopa and a proponent as a shareholder. Shareholders like to be brought in by other shareholders because there is a very close alignment and a natural affinity, you share a common agenda most of the time...
>
> I believe firmly that there is a strong moral obligation, strong market obligation to tell anybody if they are not as they represent themselves, a shareholder who has exactly the same perspective as you and not someone who is likely to earn money within an investment and therefore could have a diametrically opposed interest to you and not be full, fair and frank in all of their conversations with you."

122. Mr Aspinall was cross-examined about one of the reasons he gave in his witness statement for his view that Kinled played no role in bringing about Silverstripe's investment in the second investment round; that is that Mr Novis "was not sufficiently sophisticated to assist [Silverstripe] in any way". Mr Aspinall said, of that remark:

> "I think that might be a slightly gratuitous comment in the sense that in putting the witness statement together I think we were displeased with the fact that he had not explained what his role was as a placing agent…"

Mr Cuppage

123. Mr Cuppage's evidence covered much the same ground as Mr Aspinall's evidence.

124. Mr Cuppage too said that his view about investing in Zopa was influenced by his belief that Mr Novis was acting as a concerned investor who wished to make the investment rounds a success, rather than as a paid intermediary, and that he was "really unhappy that [Mr Novis] had lied…by positioning himself as an investor".

125. He too made the point that it was Zopa's credit card business presentation at the 19 June 2019 meeting which was an immediate cause of Silverstripe's investment in the second investment round. He accepted that there had been an earlier reference in a written presentation to Zopa's credit card business, but, he explained, that business had not been sufficiently promoted to Silverstripe and that it was only at a lunch with Mr Kramer (as it turns out, on 7 June 2019),[7] which he, Mr Cuppage, arranged, that he appreciated the significance of Zopa's credit card business. He added that it was he and Mr Kramer who prepared the presentation for the 19 June 2019 meeting and it was they who decided that the credit card business should be promoted at the meeting. He said that Mr Novis had no role in any of this.

Expert Evidence

126. Both parties rely on the reports of experts; for Kinled, Ausaf Abbas a former merchant banker who "practises as an expert witness in investment banking and wealth management cases based on his historic experience" and, for Zopa, Dominic Hughes, a partner in an FCA-regulated corporate finance advisory business. Neither expert gave oral evidence.

127. They agreed the following propositions ("the experts' agreement"):

i) for any intermediary, their contract or engagement letter defines the scope of work;

ii) the market is sharply commercial because companies and their investors wish to protect cash;

iii) intermediaries commonly carry out work for no agreed remuneration as a marketing exercise in the hope of obtaining an engagement, including providing speculative services or additional capacity;

iv) where an intermediary provides services without a clear agreement as to scope of work and fees, a market participant would ordinarily assume the work is being done on a speculative basis;

v) an intermediary who acts without contractual protection is working "on risk" and would not expect to be paid unless formally engaged;

vi) tail periods are customarily included in engagement letters as a protection to ensure that intermediaries are rewarded when/if deals close after formal termination of an agreement or engagement;

vii) tail periods provide a clear cut-off point after which there is no liability for either party, and reflect an agreed compromise on the amount of time that can elapse;

viii) it would be unusual for a tail period to be longer than twelve months, although specific periods for specific investors can be agreed in certain circumstances;

[7] See Mr Cuppage's email to Mr Kramer sent on 10 June 2019, timed at 16:40.

ix) companies are usually reluctant to pay twice in respect of the same investor, particularly where they have formed a direct relationship with the investor. Investors are similarly reluctant to see their funds used for this purpose but may be obliged to accept payments according to contractual provisions.

128. Much of Mr Abbas' report is taken up with an analysis of the factual evidence followed by a series of conclusions about what the factual evidence establishes.[8] Mr Abbas then says:

> "…Based on my 25 years of investment banking experience, remuneration for capital raising is based on a percentage of the capital actually raised, with or without a fixed fee on top, and never on the number of hours worked…
>
> The Zopa transaction was a non-underwritten private placement. In such transactions, placement agents make introductions to potential investors, and in the event such introductions result in an investment of capital, the fees payable to them can vary between 2 to 4 percent. As previously noted placement agents operate on a no-success no-fee basis.
>
> My opinion is that the only basis for determining the quantum meruit in this case should be as a percentage of the amount Silverstripe invested in the Second Round. Zopa and Kinled had agreed a 3% placement fee for the First Round, which Zopa had paid without any issue. Mr Novis had sought to duplicate the same figure in Kinled's engagement letter for the Second Round. It is also notable that when Zopa appointed Scott Harris (Rothschild) as a Placement Agent, the fee was also fixed at 3%. This supports my opinion that 3% is the appropriate figure to apply to the £140 million investment made by Silverstripe in the Second Round…
>
> Equity raising is compensated based on the amount of capital raised. Zopa paid Kinled 3% for its fundraising in the First Round and that would have been the same figure in the Second Round, had Zopa signed Kinled's Engagement Letter.
>
> With respect to quantum meruit, it is my opinion that Kinled is entitled to a fee given that both Zopa and Silverstripe requested Kinled to provide them with various services. In this case I believe, based on my market experience, that the fee should be 3% of £140 million, and it would be a normal precedent in international corporate finance for this fee to be paid for the introduction service provided by Kinled. However, since Kinled was never formally engaged, there is a case to suggest a

[8] It is not clear, from his report, that Mr Abbas was sent a comprehensive letter of instruction (or, indeed, any letter of instruction at all). He was apparently simply asked to express an opinion about "the amount of [the] quantum meruit" Kinled would be entitled to if the court concluded it is entitled to a payment and "the basis on which that amount should be calculated".

> small discount, say of up to 10%, which Zopa could have sought to negotiate in the circumstances.
>
> In the context of the actual work performed by Kinled in the Second Round, £4.2 million or so might seem a rather large sum of money, but without Kinled's introduction, Silverstripe would not have first invested in Zopa, nor undertaken the follow-on £140 million investment. Kinled deserves to be paid for the introduction, not for the other services it performed. Kinled operated on a no-success no-fee basis: in this case it got "lucky" and, in my opinion, deserves to be paid accordingly."

129. As I read Mr Abbas' report, he puts forward a number of bases for his conclusion that any quantum meruit should be valued at £4.2 million (3% of £140 million) (perhaps subject to a 10% discount); namely:

i) because the quantum meruit can only be valued as a percentage of Silverstripe's investment (perhaps because contractually agreed introducers' fees are calculated as a percentage of an investment), and because, by the engagement letter, the parties had agreed 3% and the same percentage "would" have been agreed had the parties signed the draft engagement letter which Mr Novis kept sending to Zopa in relation to the second investment round (and perhaps because that is the rate Zopa agreed with another advisor);

ii) because, based on his "market experience", that is the correct fee (although, it is to be noted that Mr Abbas does not identify, by reference to comparables or some other aspect of the market, why, in the particular circumstances of this case, parties operating in "the market" are likely to have agreed such a fee);

iii) because Kinled "deserves to be paid" having got "lucky".

130. Mr Hughes was asked to answer the following question:

> "In circumstances where an investment has been made (the "Investment"), in the context of capital raising in the financial services industry, and with no other contractual arrangement in place, would a person ordinarily be remunerated for providing introductory services in relation to the Investment, where the Investment is made by a person originally introduced by the person seeking remuneration, but made:
>
> (a) outside of the contractual tail period; and
>
> (b) where the investor made a previous investment on which commission was paid in accordance with contractual arrangements in force at the time?
>
> (c) If so, on what basis would any remuneration be calculated? Please explain any remuneration structure (for example, if on a % basis, a typical %; if on an hourly basis, a typical hourly rate)."

In answer to (c), he said:

> "As to paragraph (c), it is difficult to assess any payment in the absence of a contract, because it would be a goodwill payment which, in my experience, is very unusual in the industry. Any goodwill payment for a later investment would be likely to be calculated on a percentage basis, with reference to the total amount raised and would likely be at a significant discount to the fee paid for the original transaction. This discount would depend on a range of quite subjective measures, not least of which would be a judgement as to what level of remuneration would be likely to satisfy the individual involved. Any amount would have to be justifiable to shareholders who had contributed the capital to the company. In these circumstances, it is difficult to give a definitive number, but I would find it hard to justify an amount greater than 10% of the agreed fee percentage with respect to the initial investment. Thus I would expect a range of something between 0.1-0.6% but capped at the amount paid for introduction of the earlier investment. Alternatively, since such a goodwill payment would be entirely discretionary, it might simply be a lump sum, the amount of which would be decided by the Company taking all the circumstances into account."

In short, Mr Hughes' view is that, absent a binding contract, any payment to an introducer or intermediary, in the present context, would be purely an ex gratia payment, with the amount being entirely within the gift of the payer, which might take into account, for its own reasons, the interests of the introducer/intermediary.

The witness evidence – discussion

131. Much has been said, and written, about the fallibility of human memory and recall, and the role contemporaneous documentary evidence and probabilities can play in helping a first-instance judge reach a decision. Perhaps the most comprehensive, and well-known, exposition was given by Leggatt J in *Gestmin SGPS SA v. Credit Suisse (UK) Ltd.* [2013] EWHC 3560 (Comm) where the Judge said, at [15]-[22]:

> "An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to

be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called "flashbulb" memories, that is memories of experiencing or learning of a particularly shocking or traumatic event…External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he

> or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.
>
> …In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

132. Leggatt J was not the first, or only, judge to speak of the centrality of contemporaneous documents and probabilities in factual determinations. By way of example, in *Khakshouri v. Jimenez* [2017] EWHC 3392 (QB), Green J adopted the same approach to witness evidence and made the following point, at [15], about "the relevance of documentary evidence and the overall logic of a case in the context of potentially inconsistent oral evidence":

> "The credibility of witness evidence should be evaluated against the contemporary documentation and overall probabilities: see e.g. per Robert Goff LJ in *Armagas Ltd. v. Mundogas SA* [1985] 1 Lloyd's Rep 1 at pages [56]-[57]:
>
> > "…I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives and

> to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.""

133. More recently, in *Simetra Global Assets Ltd. v. Ikon Finance Ltd.* [2019] 4 WLR 112, Males LJ said, at [48]:

> "…I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including e-mails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence."

The Judge then referred to what Robert Goff LJ had said in *Armagas* as the "classic statement".

134. None of this is to say that witness testimony should simply be ignored and the factual issues determined solely on the contemporaneous documents and probabilities. Leggatt J did not say as much, and nor did Green J or Males LJ, or Robert Goff LJ before them.[9] Rather, all those judges had in mind, and in the case of Leggatt J gave a warning about, the fallibility of memory, and suggested that, in a case such as this one, a trial judge should test a witness's assertions against the contemporaneous documents and probabilities and, when weighing all the evidence, should give real weight to those documents and probabilities.

135. I do not ignore Mr Novis' evidence, but I treat it with caution, accepting it only when it is corroborated by contemporaneous documents or when it is consistent with what otherwise probably happened, because I have come to the clear conclusion that Mr Novis' evidence was significantly affected, albeit probably unconsciously, by his belief in the merits of Kinled's (and, in truth, his) case and by matters of which he could not have been aware at the time.

136. A clear example of what I have in mind is Mr Novis' evidence about the 4 June conversation. As I have noted, until Mr Novis gave oral evidence, Kinled's case was consistently that, on 4 June 2019, Mr Novis discovered that Silverstripe was financially able to be a cornerstone investor in the second investment round. Whilst, in oral evidence, Mr Novis initially maintained that case, when it was drawn to his attention that, even if Silverstripe could have been a cornerstone investor on 4 June 2019, it might still not invest at all in the second investment round (so possibly rendering the 4 June conversation significantly less important than is Kinled's case), Mr Novis went further and said that Mr Cuppage said, during the 4 June conversation,

[9] See also *Martin v. Kogan* [2020] ECDR 3 at [88]-[89].

that Silverstripe was contemplating being a cornerstone investor, and Mr Novis supported that claim by suggesting that, on 4 June 2019, Silverstripe was contemplating the possibility that it might find out "something of interest" such as Zopa's credit card business. When Mr Novis was pressed about whether Mr Cuppage did actually say, during the 4 June conversation, that Silverstripe was contemplating being a cornerstone investor, he resiled from his earlier evidence and suggested, instead, that that claim had to be inferred from the conversation.

137. It is improbable that Mr Cuppage gave any indication, during the 4 June conversation, that Silverstripe was contemplating being a cornerstone investor.

138. Relations between Zopa and Silverstripe were not good following the 25 March meeting. They did improve after, but there is no evidence, and no witness other than Mr Novis suggested, that they had improved so far that Silverstripe was contemplating being a cornerstone investor by the beginning of June 2019. Indeed, as I have noted, Mr Novis' own evidence was that, even in late April 2019, Silverstripe's position appeared to be that it would not invest at all in the second investment round.

139. There is no evidence that Mr Novis appreciated the significance of Zopa's credit card business on 4 June 2019. The uncontroverted evidence is that Silverstripe (and, in particular, Mr Cuppage) did not appreciate the significance of Zopa's credit card business then. Its significance only first emerged three days later on 7 June 2019, when Mr Cuppage and Mr Kramer met for lunch. On 4 June 2019, there was apparently no possibility that Silverstripe would discover something so significant about Zopa's business that might lead it to being a cornerstone investor. It is most probable that, by referring, in his oral evidence, to Zopa's credit card business, Mr Novis was reconstructing the 4 June conversation from material he did not know at the time.

140. That it is improbable that Mr Cuppage gave any indication, during the 4 June conversation, that Silverstripe was contemplating being a cornerstone investor is reinforced by the plausibility, indeed the probability, of Mr Cuppage's version of the conversation. It was not disputed that Mr Cuppage was at Dublin Airport during the phone call. It is unlikely that a conversation about high value investments would be conducted in such a public place. Nor was it disputed that Mr Cuppage had his own self-interested reason for not encouraging Mr Hildebrand to make a significant further investment in Zopa at that time, which too supports the improbability of Mr Novis' oral evidence about the 4 June conversation.

141. There are further examples when Mr Novis' evidence was based on reconstruction, influenced by Kinled's case and later events.

142. In his witness statement, Mr Novis apparently said that he clearly recalled Mr Kramer agreeing a twenty four month tail period during the 2 October conversation. His oral evidence, on the other hand, was that he called Mr Kramer on 2 October 2018 to remind him about what the engagement letter had provided, that the conversation lasted only a couple of minutes, and, it seems to me, that they must have then agreed to vary the engagement letter by extending the tail period to twenty four months (even though Mr Novis cannot specifically recall what was said) because the extended tail period already extended the tail period overall to twelve months. (As it happens, I do not accept Mr Novis' evidence on the subject, as I have noted and as I shall explain).

143. As I have said, when it was suggested to Mr Novis that there was no mention of a twenty four month tail period or the 2 October conversation, between 2 October 2018 and July 2020, he responded that they were "inherently referred to". That makes no sense on the evidence. The fact is that they were not referred to and no-one suggested that Zopa could have inferred either of those facts from the available material. Mr Novis' response was an attempt to reconstruct events with Kinled's case in mind.

144. Mr Novis' oral evidence about whether there was a discussion during the 2 October conversation about how he might contribute to strategic investments changed, probably because he appreciated that his initial answer, that there was no discussion on the subject, was not helpful to Kinled's case.

145. Mr Novis suggested, first, that, at the breakfast meeting, Mr Kramer had said that Mr Novis should use the engagement letter as the basis for a further contract for the second investment round. When I pressed him on that evidence, he resiled and said that Mr Kramer had merely said that Mr Novis should send something over and that he, Mr Novis, had elected to send a draft of the engagement letter as a starting point.

146. The conclusions that I have reached about Mr Novis' evidence, and the approach I take in relation to it, are significant, because the only witness who gives any evidence (unsupported by contemporaneous documents) about what was actually discussed during the 2 October conversation is Mr Novis and because only Mr Novis has given evidence in support of Kinled's claim that the work he did relating to Silverstripe in the second investment round was in anticipation of a contract.

147. It is convenient to say a little now about other witnesses.

148. Mr Kramer was a notably impressive witness. He reflected on questions in cross-examination before he answered them and his answers were measured. As I have noted, he was alive, and keen, to emphasise the limits of his recollection and to point out that some of his answers were based on a reconstruction of events. In weighing his evidence, I do bear in mind though, that he was the only witness who suggested that the pre-condition for the extended tail period to operate was waived in relation to Lida and Perscitus, and that I was not taken to any contemporaneous documentary evidence to support that.

149. Mr Aspinall had sufficient insight to acknowledge that his view about Mr Novis' omission to inform Silverstripe that Kinled was a paid intermediary did affect his evidence. In the light of that acknowledgment, I do need to approach Mr Aspinall's evidence cautiously.

150. Mr Cuppage too expressed unhappiness that Mr Novis did not tell him that Kinled was a paid intermediary. I have borne that in mind in weighing Mr Cuppage's evidence. As I have explained, his version of the 4 June conversation is probable and that conclusion is not undermined by the fact that Mr Cuppage was unhappy about Mr Novis' conduct. The other relevant evidence he gave, about the circumstances in which the credit card business presentation at the 19 June meeting actually came about, was not controversial.

<u>Was there an agreement, in October 2018, to vary the engagement letter, to extend the tail period to twenty four months?</u>

151. As I have indicated, I have come to the clear conclusion that the parties did not agree, in October 2018, to vary the engagement letter, to extend the tail period to twenty four months, whether by an exchange of the Novis 1 October email and the Kramer 1 October email or during the 2 October conversation. I now explain why.

152. The background to the exchange of emails and the 2 October conversation is important.

153. The experts' agreement makes clear that (i) the market is sharply commercial, because companies and their investors wish to protect cash, (ii) a tail period of longer than twelve months is unusual and (iii) companies are usually reluctant to pay twice in respect of the same investor and investors are reluctant for their investments to be used to pay intermediaries. By 1 October 2018, the engagement letter had only recently been agreed, and it provided for an extended tail period ending only twelve months after the end of the engagement term. By 1 October 2018, the engagement term only had about six weeks to run. If Silverstripe did not invest during that six week period, Zopa would not be obliged, under the engagement letter, to pay Kinled in relation to any further investment made by Silverstripe during the extended tail period. The 1 October meeting was the first meeting between Silverstripe and Zopa relating to investment in the first investment round. It was very possible that Silverstripe would not invest at all in the first investment round or, if it did, that it would invest outside the engagement term (so that any further investment in the extended tail period would not trigger a liability for Zopa to pay Kinled). (As it happens, Silverstripe only subscribed for shares in the first investment round on 31 October 2018 and only paid the first part of its first round on 13 November 2018 (the last day of the engagement term)). Zopa's focus in October 2018 was very much on obtaining a retail banking licence, the process for which was generally time-limited, at the mobilisation stage, to twelve months. In October 2018, there was no reason to suppose that the mobilisation stage would be extended beyond twelve months or that an investment by Silverstripe in the second investment round would be made after the end of the extended tail period.

154. It is improbable therefore that, by the exchange of emails or the 2 October conversation, the parties agreed a twenty four month tail period.

155. Whether or not there was an agreement to extend the tail period by the exchange of the two emails depends on their proper (objective) construction; in particular, the proper construction of the Kramer 1 October email.

156. The plain reading of the Kramer 1 October email is that, by it, Mr Kramer was agreeable to a longer tail period, but that he was not agreeing the longer (twenty four month) tail period Mr Novis was proposing. Mr Kramer said, in terms, that he could ("we can") agree "a" longer tail period. He did not say that he did ("we do") agree "the" longer tail period Mr Novis had proposed. Indeed, that Mr Kramer could not agree the longer tail period Mr Novis had proposed is emphasised by his use of the word "though" to qualify his proposal for a longer tail period.

157. As it happens, it is probable that, contrary to his evidence, Mr Novis appreciated that, by the Kramer 1 October email, Mr Kramer had not agreed the twenty four month tail period Mr Novis had proposed because Mr Novis responded, by the Novis 2 October email, that he would "call regarding period of time". He did not only say that he

would speak to Mr Kramer about the length of the tail periods in the engagement letter, and, bearing in mind their use of email, clarification of the length of the tail periods in the engagement letter could easily have been provided by a short email. It is more likely that Mr Novis felt he needed to speak with Mr Kramer about something more substantial; that is, the length of the "longer tail" to which Zopa was apparently agreeable.

158. Only Mr Novis gives evidence that a twenty four month tail period was agreed during the 2 October conversation. I have already indicated that I will only accept his evidence if it is corroborated by contemporaneous documents or consistent with what otherwise probably happened. Mr Novis' evidence about the 2 October conversation is not supported by any contemporaneous documents, and, as I have explained, an agreement of a twenty four month tail period is improbable.

159. The parties' conduct after 2 October 2018 is inconsistent with a twenty four month tail period having been agreed on 1 or 2 October 2018:

    i) Mr Novis repeatedly proposed an engagement letter for the second investment round, and repeatedly sent a draft of the engagement letter, under which the extended tail period in relation to an investment by Silverstripe would have been limited to twelve months from the end of the engagement term and under which Silverstripe was treated no differently to other introduced investors;

    ii) Mr Novis did not mention at all a twenty four month tail period between October 2018 and July 2020, even after 19 June 2019, when, on Mr Novis' evidence, he felt that, to a degree, he was being excluded from involvement in the second investment round. He did not distinguish between Silverstripe and Lida in his 8 July 2019 email to Mr Kramer. He did not suggest to Mr Janardana, in the 30 October email, that a twenty four month tail period had been agreed. Indeed, he did not distinguish between Silverstripe and Lida and, although he forwarded the 21 January email at the same time, he did not forward the Novis 1 October email or the Kramer 1 October email. That is a notable omission because the 30 October email was sent not only to Mr Janardana but also to Mr van den Bergh, who Mr Novis was hoping, no doubt, to enlist to his cause;

    iii) by 9 September 2019, Mr Kramer, in an email to Mr Janardana and Mr Hulme, was recording his belief that Silverstripe, and equally Lida, had the benefit of a twelve month (not a twenty four month) tail period.

160. For all these reasons, as I have said, I have concluded that there was no agreement to vary the engagement letter, to extend the tail period to twenty four months. Rather, probably Mr Kramer proposed, in the Kramer 1 October email, and Mr Novis and Mr Kramer agreed during the 2 October conversation, that the pre-condition for payment under the engagement letter for an investment by Silverstripe in the extended tail period – that is, that it must have made an initial investment during the engagement term – was waived, so that any investment by Silverstripe in the twelve months after the end of the engagement term would result in Zopa being liable to make a payment.

As matters stood at the beginning of October 2018, this might have proved a very beneficial concession to Kinled.[10]

161. Before reaching my decision, I bore in mind Mr Janardana's response to the Novis 1 October email, which was sent to Mr Kramer before Mr Kramer sent the Kramer 1 October email, and so is likely to have been in Mr Kramer's mind when he wrote that email.

162. I have concluded that, whatever Mr Janardana meant by his email, Mr Kramer probably interpreted it as Mr Janardana's agreement to the alterations Mr Novis was proposing to the draft non-disclosure agreement, taking into account the background to the receipt of the Novis 1 October email, which I have already set out, and for the following further reasons:

    i) the Novis 1 October email asked for confirmation that Zopa agreed to extend the tail period to twenty four months but asked if Zopa was "ok" to sign the draft amended non-disclosure agreement;

    ii) the request for Zopa to confirm that it was "ok" to sign the draft amended non-disclosure agreement was towards the end of the Novis 1 October email;

    iii) Mr Janardana responded very quickly (eleven minutes later) to the Novis 1 October email. He responded that he was "ok" "with that". If he had read the email briefly and was responding urgently, it is likely that he had Mr Novis' latter request (in relation to the non-disclosure agreement) in mind, particularly because he mirrored the language Mr Novis had used in the Novis 1 October email;

    iv) obtaining a signed non-disclosure agreement was more pressing than agreeing a variation of the engagement letter and was, as Mr Janardana explained uncontroversially, a sensitive matter;

    v) as I have already explained, on a plain reading of the Kramer 1 October email, Mr Kramer did not agree an extension of the tail period to twenty four months.

163. Mr O'Doherty suggested that Zopa would suffer no disadvantage by agreeing to a twenty four month tail period. He said that "it was no skin off Zopa's nose" to agree an extension to the tail period. The fact that Zopa may not have been disadvantaged by agreeing that extension does not mean that it probably did agree the extension. In fact, agreeing that extension could be to Zopa's disadvantage because it would put Zopa at risk of having to pay Kinled for a longer period than the agreed period in the engagement letter. Even if agreeing that extension did not disadvantage Zopa (because it did not trigger a payment which would not otherwise have been due), as matters stood in October 2018 agreeing an extension was not commercially sensible, as Mr Janardana pointed out (and was improbable as I have found).

164. Mr O'Doherty also suggested that Kinled (Mr Novis) needed to be incentivised in October 2018, so there was a commercial rationale for Zopa agreeing an extension of

[10] The conclusions I have reached about whether there was consideration for any agreement to extend the tail period reinforce this conclusion.

the tail period to twenty four months. I do not accept that Kinled did need to be incentivised then, for the following reasons:

i) the engagement letter had only been agreed recently;

ii) the parties' focus was on the investment rounds;

iii) Silverstripe was already a potential investor;

iv) under the engagement letter, if Kinled introduced investors to fully complete the first investment round, it could receive 3% of possibly £20 million (£600,000);

v) under the engagement letter, Kinled could benefit from investments made up to twelve months after the end of the engagement term, which Mr Novis believed ended after the mobilisation stage was likely to have been completed;

vi) if Kinled provided a good service to Zopa, there was every possibility that it could be called on in the future, for a fee;

vii) any further incentive needed was provided by the agreement which I have found was made during the 2 October conversation.

Was any agreement, in October 2018, to vary the engagement letter, to extend the tail period to twenty four months, supported by consideration?

165. It is necessary to understand what services Kinled claims it was proposing to provide as consideration for what it claims was Zopa's agreement (promise) to pay it a fee during a twenty four month tail period. The Amended Particulars of Claim refer to those services as "strategic…services". What Kinled means by that becomes clearer by reference to the following:

i) the engagement letter, which sets out the services Kinled promised to provide with respect to a potential investment by Silverstripe in Zopa;

ii) the Novis 1 October email, in which Mr Novis distinguished between investment and strategic transactions and referred to strategic transactions with other companies in the Silverstripe stable;

iii) Mr Novis' 5 December 2018 email to Mr Kramer and Mr Cuppage, in which Mr Novis mentioned two strategic transactions – price comparison domination and a credit card white label proposition – between Zopa and other companies in the Silverstripe stable;

iv) Mr Novis' evidence, that the quid pro quo for an extended twenty four month tail period was his introduction of other companies in the Silverstripe stable to Zopa, and in which he distinguished between Silverstripe's investment in the investment rounds and "a longer term strategic relationship" between Silverstripe and Zopa.

Kinled therefore means, by "strategic services", services aimed at bringing about a relationship between Zopa and Silverstripe or other companies in the Silverstripe

stable unconnected with Zopa's quest for a retail banking licence or the investment rounds.

166. Professor Cartwright explains as follows how the doctrine of consideration operates, including in the context of agreements to vary contracts, in paras.8-15 and 8-16 of Formation and Variation of Contracts:

> "The doctrine of consideration gives to the common law contract the essential feature of a bargain between the parties. The reason that the claimant can enforce the agreement – enforce the defendant's promise – is that he has promised, done, or forborne to do something in exchange for, or in return for, the defendant's promise: he has done what the defendant asked of him. It is not therefore sufficient that the defendant's promise caused the claimant to act in a way that he might otherwise not have done, if his so acting cannot be linked back to the promise by finding that the action was done for the defendant. In a broad sense, the consideration is the price of the defendant's promise: but it is the defendant who sets the price; it is not for the promisee to decide to make a gratuitous promise binding by acting on it in a way that was not what the promisor requested.
>
> The general approach to the formation of contracts is to assess the parties' intentions objectively, rather than purely subjectively. Whether a promisor has requested something in return for his promise, and whether the promisee responds in return for the promisor's request, is therefore also to be judged objectively. The claimant need not be consciously aware of what consideration he is giving for the promise he accepts, as long as it appears to the claimant that the defendant made his promise in order to secure a particular form of conduct from the claimant in return, and the claimant in fact responds as intended by the defendant, or as he could reasonably understand the defendant to have intended.
>
> Not only is the promisor's request to be interpreted objectively; the request itself need not be express but may be implied. In many cases it is obvious on the facts that the promisor was making his promise for the purposes of securing a particular act or forbearance from the promisee in return. However, there may sometimes be difficulties in determining whether the particular act or forbearance which the promisee claims as the consideration was (impliedly) requested by the promisor as the return for his promise, or whether he was really making the promise without any requirement of anything in return. This is a context where the courts may be able to make a purposive application of the test for an implied request: if the promisor appears seriously to intend to be bound by his promise, and the claimant has taken it as such and has acted on it in a way that might reasonably have been expected in the circumstances, it

> might not be difficult to say that the action was impliedly requested, so as to find consideration and avoid the defendant being able to resile from the promise."

167. The point can be made that Mr Kramer was not cross-examined about any quid pro quo which was proposed, or which Zopa requested, for Zopa's agreement to an extended twenty four month tail period. Kinled's case on consideration was not put to the one Zopa witness who might have been able to respond to it. It is difficult to see, therefore, how Kinled can maintain a case that any agreement to extend the tail period was supported by consideration.

168. In any event, I have concluded that the quid pro quo claimed to have been proposed by Kinled, or requested by Zopa, for Zopa's agreement to extend the tail period was an after-the-event construct advanced to support Kinled's claim of a contractual variation, and that any agreement to vary the engagement letter was not supported by consideration. Indeed, I have concluded that Mr Kramer never knew that Kinled was proposing any quid pro quo for Zopa's agreement to extend the tail period, so that a claim that Zopa requested such a quid pro quo cannot be maintained. I have reached the conclusions for the following reasons:

i) Mr Novis did not apparently propose, during the 1 October meeting, that Kinled might provide strategic services;

ii) the Novis 1 October email did not expressly propose any quid pro quo for Zopa's agreement to extend the tail period (and, contrary to Mr Novis' suggestion, I simply do not see how any proposal of a quid pro quo can be inferred from the email). Mr Kramer had no reason to think, from the Novis 1 October email, that Kinled might be proposing any quid pro quo. It is unreal to suppose that he requested such a quid pro quo following receipt of the Novis 1 October email. The Kramer 1 October email makes no mention of strategic services. It is likely to have done so if Mr Kramer understood that there was to, or might, be any quid pro quo for any agreement to extend the tail period;

iii) there is no evidence of any discussion, during the 2 October conversation, about the provision of strategic services;

iv) there is no evidence that Zopa expressly requested a quid pro quo for its agreement to vary the engagement letter;

v) it was not suggested, and there is no evidence, that Kinled provided any, or any meaningful, strategic services, even though their provision would have been expected if there had been a quid pro quo for Zopa's agreement to extend the tail period;

vi) even if Kinled did provide strategic services, in the light of the experts' agreement (and Mr Novis' own evidence when cross-examined about that agreement), it is not probable that Zopa (or any other market participant) would have concluded that they were being provided as a quid pro quo for any agreement to extend the tail period;

vii) at no point after October 2018 did Mr Novis ever suggest that Kinled had promised to provide strategic services. To the contrary, whenever Mr Novis commented that an investment by Silverstripe in the second investment round was already covered by the engagement letter, or on the occasions Mr Novis discussed a draft engagement letter for the second investment round and sent a draft engagement letter, there was no suggestion that Kinled had agreed to provide strategic services;

viii) Mr Novis said, in his 5 December 2018 email to Mr Kramer and Mr Cuppage, that he was "happy to contribute and add value" in connection with the two strategic transactions he identified. If any quid pro quo for Zopa's agreement to extend the tail period had been proposed or requested in October 2018, Mr Novis' offer to contribute would not have been so tentative. Rather, it would have been a given and would not have had to be repeated in December 2018.

169. That Mr Kramer had no expectation, on 1 or 2 October 2018, that Kinled might provide services outside the ambit of the engagement letter means that it is less likely that he would have agreed to vary the engagement letter, to extend the tail period to twenty four months, and reinforces the conclusions I reached in the previous section of this judgment.

Has Kinled made out its quantum meruit claim; namely, that Mr Novis provided services relating to Silverstripe in the second investment round in anticipation that a contract for those services would eventuate?

170. When considering Kinled's quantum meruit claim, it is important to have in mind that the services for which it claims payment are not strategic services, but services relating to Silverstripe in the second investment round.

171. In *MSM Consulting*, Christopher Clarke J explained, at [170]-[171]:

> "In *Countrywide Communications Ltd. v. ICL Pathway Ltd.* [1996] C No 2446, Mr Nicholas Strauss QC 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 [them], 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 LJ 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."

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)…;
>
> (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…;
>
> (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."

172. It is perhaps instructive to note that, in *MSM Consulting*, a reason for the Judge's rejection of part of the claim was that the claimant had provided services in the hope that it would be awarded a contract it might, or might not, receive. The terms it proposed were never accepted, but were rejected, and the defendant sent revised terms. The Judge held that the claimant was not entitled "to assume that it would get a contract. It was trying…to commend itself to [the defendant] so as to secure that it did. But it was at risk of failing in that endeavour." In rejecting a second part of the claim, the Judge took into account that the defendant did not return a signed written agreement after the claimant had indicated that it would not continue to provide services if a signed agreement was not returned.

173. More recently, in *Moorgate* HH Judge Keyser QC drew attention to what Goff J had said in *British Steel Corpn. v. Cleveland Bridge and Engineering Co. Ltd.* [1984] 1 All ER 504. Judge Keyser said, at [89]:

> "In the *British Steel Corp* case, negotiations over the terms of a contract were progressing but had not been completed when, in order to keep the project to schedule, the plaintiff carried out some of the works at the defendant's request. Goff J found that there was no contract but held that the plaintiff was entitled to payment, for reasons stated at 511:
>
> > "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.""

174. Mr Novis' written and oral evidence was to the effect that the services he provided relating to Silverstripe in the second investment round were to be remunerated under the engagement letter and that it was only for administrative convenience (i.e. so that all remuneration terms were contained in one document) that Silverstripe was to be mentioned ("carried forward") in any new engagement letter for the second investment round. The contemporaneous documents corroborate this evidence (and, in any event, that is what Mr Kramer believed (see his 11 June 2019 email to Mr Hulme and the 9 September email)). Indeed, it is not disputed that Kinled would have been entitled, under the engagement letter, to payment if Silverstripe's investment in the second investment round had been made during the extended tail period.

175. In light of the fact that any services Kinled provided relating to Silverstripe in the second investment round were provided by Kinled (Mr Novis) in the belief (of both parties) that those services would be remunerated under the engagement letter, Kinled (Mr Novis) ought to have appreciated, and it took the risk, that, if Silverstripe's investment in the second investment round was made too late to trigger a payment under the engagement letter (as turned out to be the case), Kinled's services would, or might, be unremunerated. I cannot see, therefore, how any benefit Zopa has enjoyed from the provision of those services has been unjust even if Kinled is unremunerated.

176. Even if it is wrong to conclude that whether or not Kinled should be remunerated should turn on the provisions of the engagement letter, Kinled's claim does not become stronger, as I now explain.

177. Repeating a point I have already made, as the experts' agreement makes clear, the market expectation is that any services Kinled provided relating to Silverstripe in the second investment round would be provided on a speculative basis, and for free, in the absence of a concluded contract, with the Kinled taking the risk that a contract will

not eventuate. To similar effect is Mr Novis' evidence in cross-examination that Kinled could have had its own reasons for providing services in the second investment round without expecting to be remunerated.

178. Zopa never assured Kinled that it would enter into a further contract for the second investment round. To the contrary, on Mr Novis' own oral evidence, Zopa made no commitment to a new contract at the breakfast meeting, after which Mr Novis sent the draft engagement letter to Zopa as "a proposal", and, after that, Zopa's consistent position was that it would not agree to any engagement letter for the second investment round before a lead investor had been identified. Mr Novis was told, and appreciated, that at the 21 January 2019 meeting (see, for example, the 30 October email and Mr Novis' oral evidence). Zopa's position was reinforced by its failure to sign the draft engagement letter on any of the occasions when Mr Novis sent it to Zopa. (Mr Novis is likely to have had Zopa's position in mind when he wrote his 19 March 2019 email to a US contact, in which he says only, somewhat tentatively, that he anticipated being engaged once a lead investor had been found.)

179. In the circumstances, any services Kinled provided in the second investment round were provided speculatively, at a time when a lead investor had not been identified and key terms of any engagement letter, such as the amount of remuneration, had not been agreed. Indeed, Mr Novis admitted, in cross-examination, that, when he sent the draft engagement letter to Ms Matthews after the 21 January 2019 meeting, he only "hoped" that it would be signed following the identification of a lead investor.

180. There was no reason therefore for Zopa to assume that Kinled would expect to be remunerated otherwise than under a concluded contract, and the evidence does not support the conclusion that both Kinled and Zopa "confidently expected a formal contract to eventuate" and no fault can be attributed to Zopa for the fact that a contract was not made.

181. For all these reasons, as I have already indicated, Kinled ought to bear the risk of remaining unremunerated and any enrichment from which Zopa benefited by Kinled's services relating to Silverstripe in the second investment round has not been unjust.

<u>What is the value of Kinled's services relating to Silverstripe in the second investment round on a restitutionary basis?</u>

182. I do not need to answer this question. It is convenient sometimes for a trial judge to determine issues which do not in fact require determination to assist the parties, and the appeal court if an appeal is heard. In this case, however, it is not appropriate to answer this question, and lengthen this judgment significantly, for the reasons I now set out.

183. It is helpful to understand how Kinled's services ought to be valued. In *Benedetti v. Sawiris* [2013] UKSC 50, Lord Clarke explained:

> "13. The basic principle is that a claim for unjust enrichment is "not a claim for compensation for loss, but for recovery of a benefit unjustly gained [by a defendant]...at the expense of the claimant"…

> 14. …it is clear that the enrichment is to be valued at the time when it was received by [the defendant]…the question is what is the value of the services themselves, not of any end-product or subsequent profit made by the defendant…
>
> 15. In my view, the starting point in valuing the enrichment is the objective market value, or market price, of the services performed by [the claimant]…
>
> 17. …However I agree with Etherton LJ (at para.140) that the test is "the price which a reasonable person in the defendant's position would have had to pay for the services"…
>
> 18. The question then arises whether it is permissible to reduce the objective market value in order to reflect the subjective value of the services to the defendant. In my opinion, it is…A defendant, in my view, is entitled to prove that he valued the relevant services (or goods) provided by the claimant at less than the market value…It is important to note that subjective devaluation is not about the defendants' intentions or expectations but is an ex post facto analysis of the subjective value of the services to the defendant at the relevant time...
>
> 25. If the principle of subjective devaluation is accepted, it can be defeated by a claimant proving that:…(ii) the defendant requested or freely accepted the benefit…"

184. Silverstripe was introduced as an investor in Zopa in the first investment round. In reality, what Zopa was paying for, under the engagement letter, in the first investment round and what it was keen to have in the first investment round was, as more the one witness put it, access to Mr Novis' rolodex. Silverstripe did not need to be re-introduced in the second investment round. It was already, in a sense, a captive investor to the extent of its investment in the first investment round.

185. Any services which Kinled provided relating to Silverstripe in the second investment round were intermediary services. There is a dispute between the parties about what intermediary services Kinled actually provided relating to Silverstripe in the second investment round. Much more significantly, whether or not those services benefited Zopa meaningfully, or, indeed, at all, is controversial, because there is no dispute that the immediate cause of Silverstripe's investment in the second investment round was the presentation about Zopa's credit card business at the 19 June meeting in which Mr Novis played no part, and because I have rejected Mr Novis' version of the 4 June conversation which he said was the "preface" to the presentation. So, before valuing Kinled's services, I would have to determine what those services were and whether they benefited Zopa.

186. Even if Kinled's services did benefit Zopa, what their market value is and the extent to which that can properly be subject to subjective devaluation is very difficult to determine.

187. The engagement letter does not help to determine this issue, because (i) as I have explained, what Zopa was paying for, in reality, under the engagement letter in relation to the first investment round, was Kinled's introductory, rather than intermediary, services, (ii) the services Kinled actually provided relating to Silverstripe in the second investment round were different to, and more limited than, those it provided in the first investment round, more limited than those the parties had contemplated in relation to the first investment round and more limited than the engagement letter provided and (iii) (to the extent that this can be taken into account) Zopa never agreed any engagement letter for the second investment round.

188. Nor is the expert evidence helpful about any market for intermediary, non-introductory, services. In fact, the experts' conclusions about the value of Kinled's services in the second investment round are significantly flawed (probably because their instructions were not detailed and accurate enough) and of no assistance.

189. I have set out above the three ways Mr Abbas justified his valuation.

190. The first justification is that a valuation can only be made as a percentage of Silverstripe's investment. He puts forward no sound basis for that opinion and, to the extent that he has taken into account what was agreed by the parties in the engagement letter, I have already explained why the engagement letter is no guide to the value of the services Kinled actually provided. A similar flaw was made by the expert for the unsuccessful claimant in *Moorgate*. In that case, the expert valued the claimant's services by reference to a contract which the parties did not in fact make. Indeed, in that case the hypothetical contract the expert commented on would have covered a broader range of services than were actually provided, as the draft engagement letter does in this case. In that case, reliance by the expert on the hypothetical contract was subject to sustained criticism by Judge Keyser QC at [106] at [114], for similar reasons to those which have led me to conclude that the first justification for Mr Abbas' opinion is flawed.

191. The second justification for Mr Abbas' valuation is said to be his market experience but, as I have already noted, this justification is unreasoned.

192. The third justification for Mr Abbas' valuation is that Kinled "deserves to be paid", but he cannot sustain this assertion, and it should not have been advanced by him acting as an expert. It is not for him to make any moral (or, indeed, legal) assessment about whether or not Kinled deserves to be paid.

193. Mr Hughes' valuation assumes that Zopa would have no obligation to make any payment to Kinled for the services it provided in the second investment round, so that any payment would be in the nature of an ex gratia payment. That is wrong. If Zopa was held liable to make a payment to Kinled on a restitutionary basis, Zopa would be legally obliged to make such a payment (having been held liable to do so) and the amount of the payment would be determined objectively (subject to any permissible subjective devaluation). It would not be determined, as the amount of an ex gratia payment is, solely by reference to the payer's self-interest.

194. Even if I had reached a decision about the value of Kinled's services on a restitutionary basis, I would then have had to resolve the difficult question about

whether Zopa has an illegality defence to any payment, because Kinled is (and was) not authorised to provide FSMA-regulated activities.

Has Zopa established that the engagement letter is unenforceable under s.26 of FSMA and, if so, should it recover the £345,000 fee it paid Kinled?

195. I have already set out the three questions I need to answer in relation to Zopa's FSMA counterclaim.

196. The first question I need to answer is: Did Kinled make arrangements for Silverstripe or Lida to acquire shares in Zopa in the first investment round, or make arrangements in which Silverstripe or Lida participated with a view to them acquiring shares in Zopa in the first investment round?

197. As I have indicated, Zopa's primary case is that, in answering this question, I should take into account the services set out in the engagement letter. I did not hear any detailed submissions about FSMA's purpose or about how it (or the 2001 Order) should be construed. I do not need to determine whether, as a matter of statutory construction, in judging whether arrangements were made, I should take into account the services set out in the engagement letter, or the services Kinled actually provided (i.e. Zopa's alternative case) and, because of the parties' limited submissions, I do not do so.

198. There is a dispute between the parties about precisely what services Kinled actually provided, which is not assisted by the fact that, in Mr Kramer's cross-examination, Kinled's case may have been that it provided a broader range of services than Mr O'Doherty accepted, in closing, it did provide. However, precisely what services Kinled provided does not need to be determined. Most favourably to Kinled, I proceed on the basis that it provided the services which Mr O'Doherty accepted it provided, to the extent he accepted it provided them.

199. In *FCA v. Avacade Ltd.* [2021] EWCA Civ 1206, Popplewell LJ explained as follows, at [47]-[48], about art.25 of the 2001 Order:

> "There are three relevant differences between articles 25(1) and 25(2), each of which is concerned with "making arrangements" in relation to the buying and selling of securities (among other things). The first is that 25(1) applies to making arrangements "for" the buying and selling of securities, whereas 25(2) applies to making arrangements "with a view to" that activity. The second is that for article 25(1) the buying or selling may be conducted by anyone, whereas for article 25(2) it must involve a person who participates in the arrangements. I agree with the Trial Judge that both the language of the article ("a person") and the decision of this Court in *SimplySure* make clear that the relevant transactions contemplated need only involve one of the parties to the arrangements, not both. The third difference is that article 26 provides an exception to article 25(1) but not article 25(2).

> Article 26 excludes from the operation of article 25(1) arrangements which do not or would not bring about the transactions to which the arrangements relate. The words "would not" make clear that even article 25(1) is not concerned only with arrangements which successfully result in a relevant transaction; a person may contravene article 25(1) by making arrangements "for" such a transaction which does not in fact take place. Nevertheless article 26 introduces an actual or notional test of causation ("bring about") in relation to arrangements for the purposes of article 25(1). In *Adams* the court held that the degree of causal potency required was that for arrangements to "bring about" a transaction they must play a role of significance but need not involve a direct connection (see [97]). Importantly, however, article 26 is expressly confined by its terms to article 25(1) and other articles; it does not apply to article 25(2), as this court confirmed in *SimplySure* at [26]. There is no need to introduce any test of causation into 25(2) by reference to the language of the inapplicable article 26 because by using the words "with a view to", article 25(2) makes clear that it is concerned with the purpose of the arrangements. An intended purpose, an end in view, must be that a relevant transaction take place, but the arrangements do not need to bring it about by way of an actual or notional test of causation. These are wide words which suggest that all that is necessary is that a relevant transaction is part of the purpose of making the arrangements. A person may have a relevant transaction as an end in view where the arrangements do no more than create or facilitate a situation which provides the opportunity for it to take place. That may be an intended result notwithstanding that the arranger is powerless to ensure that it takes place or even influence the decision which leads to it taking place. You cannot make the proverbial horse drink, but taking it to water involves making arrangements with a view to it drinking."

200. Kinled's (Mr Novis') aim in providing the services which were provided was that Silverstripe and Lida would acquire shares in Zopa. Its goal was to bring about a situation in which such transactions could take place. Silverstripe and Lida (and Zopa) participated in those services. Taking into account the breadth of art.25(2) of the 2001 Order, and against the background of the limited submissions which were made, I have concluded that Kinled did make arrangements in which Silverstripe or Lida (and Zopa) participated with a view to Silverstripe and Lida acquiring shares in Zopa in the first investment round.

201. The second question I need to answer is: was the engagement letter made in the course of Kinled carrying on regulated activities?

202. As I have noted, Mr Barden suggested that, even though the engagement letter was made before Kinled actually provided services in the first investment round, by reference to s.26(3) of FSMA the engagement letter was made in the course of Kinled

providing those services (i.e. carrying on a regulated activity). As I have also noted, Mr O'Doherty did not dissent from that suggestion. On the limited submissions made, I accept Mr Barden's submission and hold that the engagement letter was made in the course of Kinled carrying on regulated activities. S.26(3) of FSMA defines a relevant agreement as including an agreement "the making or performance of which constitutes…the regulated activity in question…" As a matter of plain English, if the making of an agreement itself can be the regulated activity, an agreement made at the outset of regulated activities must be capable of being an agreement made in the course of carrying on a regulated activity. Even more so, if the performance of an agreement can constitute the regulated activity, it must follow, as a matter of plain English, that the agreement can be made in the course of a person carrying on a regulated activity even if it precedes the carrying on of any regulated activities.

203. It follows that the engagement letter made in the course of Kinled carrying on regulated activities, and is unenforceable against Zopa and s.26 of FSMA is engaged.

204. I turn now to consider the third question I need to answer, which is: is it just and equitable to allow Kinled to retain the £345,000 fee?

205. Mr Barden suggested that, in deciding whether it is just and equitable for money transferred under an agreement to be retained, the court should actually ask which party, the service provider or customer, should bear the risk of the service provider's activities being regulated activities. I do not think that there is any need to re-frame the question which arises from s.28(3) of FSMA. In any event, there would be a danger, in doing so, that too much attention would be given to the activities themselves and what the parties knew, did, or should have known or done, before the service provider performed those activities and that insufficient attention would be paid to what may be other relevant matters, including the parties' positions after the activities had been carried out.

206. The parties referred me to two cases on the operation of s.28 of FSMA, which necessarily turn on their particular facts, but do provide some assistance.

207. In *Helden v. Strathmore* [2010] EWHC 2012 (Ch), Newey J noted that, in *Re Whiteley Insurance Consultants* [2009] Bus LR 418, David Richards J observed, at [37], that the fact that a service provider knew, ought to know, or should have known that it was acting in breach of the general prohibition (or, to put it another way, the fact that a service provider did not have a reasonable belief that they were not contravening the general prohibition) was "a weighty factor against the grant of relief". However, in *Helden*, the Judge granted relief under s.28 of FSMA, amongst other reasons because:

i) the customer had made full use of, and obtained full benefit from, the funds which had been advanced under the agreement in question;

ii) the property which the customer had bought with the funds advanced had increased substantially in value;

iii) the customer had not been taken advantage of;

iv) the customer had not explained how he might have benefited had the service provider been an authorised person;

v) the service provider had not realised that the general prohibition might apply and it was reasonable for them not to believe that it did apply.

A theme running through the Judge's reasoning is that there had been no real risk of the customer suffering a detriment, either as a result of the transaction in question itself or because the service provider was not an authorised person.

208. More recently, in *Jackson v. Ayles* [2021] EWHC 995 (Ch), Chief ICC Judge Briggs drew attention to the fact that, in *Helden*, in the Court of Appeal, Lord Neuberger MR said, obiter, that "people who carry on regulated activity and are ignorant of the law, even if reasonably so, should be more at risk because they are more of a danger to the public".

209. In this case, Kinled has not established that it reasonably believed that it was not contravening the general prohibition. Mr Novis did not consider, at the time, whether Kinled was carrying on regulated activities. He cannot have reasonably believed that regulated activities (in contravention of the general prohibition) were not being carried on. In any event, on the evidence, what Kinled believed turns on what Mr Aisher believed. Although Mr Aisher apparently believed that Kinled was not carrying on regulated activities (and I have no reason to doubt that that was an honest belief), Mr Novis could not tell me why Mr Aisher had that belief, so Kinled cannot establish that Mr Aisher's belief was reasonable.

210. That Kinled has not established that it reasonably believed that it was not contravening the general prohibition (by carrying on regulated activities) weighs heavily against it being permitted to retain the £345,000 fee. However, as I have indicated, I have concluded, in what are likely to be the unusual circumstances of this case, that it is just and equitable for Kinled to retain that fee for the following reasons, which outweigh factors tipping the balance the other way.

211. Zopa was a sophisticated customer; as a bank, perhaps the most sophisticated customer a service provider is likely to have. In reality, as I have said, what it was paying for and what it was keen to have was access to Mr Novis' rolodex. It was paying for introductions to potential investors who Mr Novis might know but Zopa might not. It is fanciful to suppose that Zopa was ever at risk of being harmed by the mere fact of an introduction by Mr Novis to it of a potential investor. Any due diligence which was appropriate was never, in practice, expected to be carried out by Kinled. Such due diligence was always expected to be carried out by Zopa. Mr Novis never provided financial advice to Zopa and Zopa never expected him to do so. By all accounts, Zopa has benefited significantly from investments in the first investment round, whether directly (because of the price per share paid by Silverstripe), or indirectly, because of where those initial investments, in particular Silverstripe's investment, eventually led, and Zopa has taken full advantage of the introduction of Silverstripe in the first investment round. No-one has suggested how Zopa might have benefited if Kinled had been authorised to carry on regulated activities. Finally, in relation to the first investment round, Kinled was never a danger to the public.

212. Mr Barden submitted that, on Mr Novis' evidence, taking into account (i) his knowledge of the regulatory regime and the attendant regulatory burdens, (ii) that Kinled never sought advice about whether its introductory services required it to be authorised and (iii) that whether Kinled required authorisation is "a very grey area", Kinled was reckless about whether it required authorisation, and that, if a reckless service provider is permitted to retain money paid under an unenforceable agreement, there would be no incentive for others to be authorised and incur the burden of being so. In short, Mr Barden effectively submitted that, to permit Kinled to retain the £345,000 fee would open the floodgates, to service providers, who are a danger to the public, operating unregulated. I bore in mind Mr Barden's submission, so far as it goes, before reaching my decision. Too much can be made of the submission, for the following three reasons. First, as I have indicated, it is likely that the circumstances of this case are unusual. Secondly, my decision has been reached on the particular facts of this case. Thirdly, in any event, I have decided that the services Kinled provided are regulated activities, so that, if this decision is publicised, service providers (particularly those in what Mr Novis described as the small family office world) will be more aware of the possibility that they require authorisation and will be less able to rely on s.28 of FSMA.

Disposal

213. As I indicated at the outset of this judgment, for the reasons I have given I dismiss both the claim and the counterclaim.

214. I will hear further from counsel about the form of order to give effect to this decision and on all costs and consequential matters.