Neutral Citation Number: [2022] EWHC 605 (Comm)

IN THE HIGH COURT OF JUSTICE Claim No CL-2020-000264
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice. Rolls Building
Fetter Lane, London, EC4A 1NL
Thursday 17 March 2022

BEFORE:

MR RICHARD SALTER QC
Sitting as a Deputy Judge of the High Court

BETWEEN:

IS PRIME LIMITED

Claimant / Part 20 Defendant

-and-

(1) TF GLOBAL MARKETS (UK) LIMITED
(2) TF GLOBAL MARKETS (AUST) PTY LIMITED
(3) THINK CAPITAL LIMITED

Defendants / Part 20 Claimants

-and-

ISFE 21 Limited

Third Party / Part 20 Defendant

- -

Mr Adam Al-Attar
(instructed by *Harbottle & Lewis LLP*)
appeared for the Claimant

Mr Farhaz Khan and Ms Kate Holderness
(instructed by *Cooke, Young & Keidan LLP*)
appeared for the Defendants

Hearing date: 25 February 2022

- -

.....

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30am on 17 March 2022.

MR SALTER QC:

Introduction

1. In this action, the Claimant ("**IS Prime**") seeks damages for alleged breaches of a "liquidity agreement" dated 19 January 2017 ("**the Liquidity Addendum**") under which the Defendants ("**Think**") undertook for a period of 3 years to "trade any Available Products" exclusively with IS Prime.

2. By their application notice issued on 16 July 2021, Think seek summary judgment under CPR 24.2 and/or the striking out under CPR 3.4(2)(a) of IS Prime's claim:

> **.. insofar as the alleged breach relates to index swaps, and the period from 18 December 2017 onwards ..**

on the basis (as Think alleges) that, by an email sent on 8 December 2017, IS Prime stated that it was transferring its index swap business to a Hong Kong affiliate with effect from 18 December 2017, and thereafter ceased itself to trade index swaps, thus discharging Think from any continuing obligation under the Liquidity Addendum in relation to that class of product.

3. Think's application is supported by the Second and Third Witness Statements of Mr Stephen Elam, a partner in the firm of solicitors acting for Think. IS Prime's opposition to the application is supported by the First Witness Statement of Mr Matthew Leverton, who is a partner in the firm of solicitors acting for them, and by the First and Third Witness Statements of Mr Jonathan Brewer, who is a director of IS Prime. At the hearing before me on 25 February 2022, Think was represented by Mr Farhaz Khan and Ms Kate Holderness. IS Prime was represented by Mr Adam Al-Attar. I am grateful to all counsel for their submissions.

Background

4. The background to this dispute can be shortly stated. I take the following summary from the updated Case Memorandum.

5. IS Prime is part of the ISAM Capital Markets group and offers full service multi-asset brokerage execution. Amongst other services, it also contracts to provide matched principal brokerage services.

6. The Liquidity Addendum was agreed and negotiated alongside an asset purchase and sale agreement agreed between US affiliates of IS Prime and of Think. In that agreement (amongst other things), one such affiliate of IS Prime agreed to buy and an affiliate of Think agreed to sell certain parts of its business and assets. The consideration for that sale included the agreement of the Liquidity Addendum.

7. IS Prime alleges that Think breached the exclusivity terms of the Liquidity Addendum between 19 January 2017 and 19 January 2020 by using the services of other brokers. The defences advanced by Think (apart from that which is the subject of this application) include a claim to set aside the Liquidity Addendum on the grounds of fraudulent misrepresentation, and a claim that IS Prime acted in breach of contract by taking risk and making a profit through the application of a spread mark-up. Think also asserts that IS Prime is not entitled to enforce the exclusivity terms in relation to certain products or in relation to certain parts of the three-year period.

The Liquidity Addendum and the Terms of Business

8. In the "Background" section of the Liquidity Addendum, it was recited that:

> **(A) IS Prime provides matched principle brokerage services.**
>
> **(B) [Think] has agreed to trade exclusivity with IS Prime on the terms set out in this document.**

9. There is a degree of dispute between the parties as to the precise nature and ambit of the "matched principle brokerage services" to be provided under the Liquidity Addendum: but some general flavour of the concept can be gleaned from the definitions (derived from MiFID article 4(1)(38)) in the FCA's Glossary:

> **matched principal trading**
>
> **a transaction where the facilitator interposes itself between the buyer and the seller to the transaction in such a way that it is never itself exposed to market risk throughout the execution of the transaction, with both sides executed simultaneously, and where the transaction is concluded at a price where the facilitator makes no profit or loss, other than a previously disclosed commission, fee or charge for the transaction.**
>
> **matched principal broker**
>
> **a firm with permission to deal in investments as principal other than: (a) a bank, a building society or an ELMI; or (b) a UCITS management company; or (c) an insurer; or (d) a local; and which satisfies the following conditions: (e) it deals as principal only to fulfil customer orders; (f) it holds positions for its own account only as a result of a failure to match investors' orders precisely; (g) the total market value of the positions is no higher than 15% of the firm's initial capital; and (h) the positions are incidental and provisional in nature and strictly limited to the time required to carry out the transaction in question.**

10. Clause 2 of the Liquidity Addendum provided (relevantly) as follows:

> **2. EXCLUSIVITY**

> **2.1 During the Applicable Period, [Think] shall, and shall ensure that each of its Affiliates, trade any Available Products exclusively with IS Prime (and not with any other person) in accordance with and subject to the terms and conditions of the Agreements and of this document, except for:**
> **(a) back-to-back transactions between [the Second Defendant] and an Affiliate;**
> **(b) trades between [Think] and a client of [Think]; and**
> **(c) trades that fall within the exceptions listed in either 2 2 to 2.5 below**
>
> **2.2 ..**
>
> **2.3 [Think] may trade all transactions that are a class of Available Product with a third party if IS Prime states that it does not trade that class of Available Product.**

11. Clause 1 of the Liquidity Addendum contained the following definitions:

    11.1 "Agreements" means "any IS Prime Terms of Business including applicable schedules and appendices, as amended, supplemented, restated or replaced from time to time entered into with [Think]";

    11.2 "Applicable Period" means "the period commencing on the date of this document and expiring on the date 3 years after the date of this document"; and

    11.3 "Available Products" means "any foreign exchange or metal products (including spot or rolling spot), index swaps or contracts for difference or any other financial product of a class that is traded or offered or to be traded or offered by IS Prime at the time of entering into this document or that is subsequently agreed to be an Available Product by IS Prime and [Think]".

12. Clause 3 further provided that:

> **IS Prime agrees not to charge [Think] the monthly commissions set out in the Trading Conditions of the Agreements or any other fees and charges not disclosed in the Trading Conditions of the Agreements as at the date of this document for a period of two (2) years commencing on the date of this document (the "Commission Holiday Credit") provided that the aggregate monetary value of such Commission Holiday Credit does not exceed of $1,215,000. For the avoidance of doubt, interest on cash balances, swap profit and loss and financing costs on index swaps charged by IS Prime will not be covered by the Commission Holiday Credit.**

13. Clause 9 provided that:

> **No variation to this document shall be effective unless made in writing executed by the parties hereto.**

and clause 10 provided that:

> **In all matters relating to this Agreement, the parties will act with the** [sic] **good faith towards one another.**

14. The "Agreements" referred to in clause 2.1 of the Liquidity Addendum included (inter alia) the "IS Prime Limited Terms of Business (Regulated Business)" ("**the Terms of Business**"), the Appendices to those Terms of Business (including the "Index Swaps Appendix III"), and IS Prime's "Trading Conditions - Index Swaps".

15. Clause 1.1 of the Terms of Business stated that IS Prime will provide Think:

> **.. with a matched principal brokerage service in relation to swap transactions and such other services as may be agreed between us ..**

Clause 3 then provided that:

> **3.1 We will provide brokerage services in swaps on equity and commodity indices and potentially other products ..**
>
> **3.3 When carrying out Transactions with you under the Agreement, we act as principal and therefore carry out Transactions with you in our own name. We will not act as your agent to carry out Transactions on your behalf.**

16. The Index Swaps Appendix III deemed an ISDA 2002 Master Agreement to exist between IS Prime and Think, and incorporated by reference the 2002 ISDA Equity Derivatives Definitions and the 2006 ISDA Definitions. Together with the Trading Conditions - Index Swaps, it contained the provisions that would normally be found in the Schedule to the ISDA 2002 Master Agreement, leaving only the specific terms of each particular transaction to be dealt with in the Confirmation.

17. The Terms of Business also contained, inter alia: in clause 7, an obligation on IS Prime to "comply with our Best Execution Policy and act in your best interests in accordance with our regulatory obligations relating to best execution" in relation to those transactions where a duty of best execution was owed; and, in clause 29, the following provision entitling IS Prime to amend the agreement between the parties by notice:

> **29.1 We reserve the right to amend the Agreement from time to time by notice to you in writing (including for the avoidance of doubt by writing to you using the most recent email address you have provided to us). We are not obliged to notify you in advance where it is not reasonably practicable for us to do so. It is your responsibility to review the Agreement periodically.**
>
> **29.2 Other than in respect of the Trading Conditions, all such modifications, amendments or additions shall be effective on the date of their inclusion within the Agreement and your continued use of the Service after any modifications, amendments or additions.**

> **29.3 If we give you notice of an amendment to the Trading Conditions, from the time of any subsequent transaction that you enter into with us you will be deemed to accept the revised Trading Conditions as issued to you.**

The December 2017 correspondence

18. On 8 December 2017, IS Prime sent to Think an email headed "Changes to ISAM Capital Markets Index Swap offering", the text of which read:

> **Please find enclosed details of the forthcoming changes to ISAM Capital Markets Index Swap offering. Attached are the following documents:**
> - **Client Communication Letter**
> - **IS Prime Client Acceptance Letter**
> - **IS Prime Hong Kong Terms Of Business for Index Swaps / London Arranging Terms of Business**
> - **IS Prime Hong Kong Trading Conditions**
> - **IS Prime Best Execution Policy**
> - **IS Prime Client Money Bank Account Details**

19. The attached Client Communication Letter was in the following terms:

> **We are writing to inform you that ISAM Capital Markets is moving its index swap business from London to Hong Kong. This decision has been taken as a response to growing regulatory complexity and uncertainty in Europe as a result of MiFID II ..**
>
> **.. Accordingly, as of Monday 18 December 2017, all index swap transactions will be entered with IS Prime Hong Kong Limited instead of IS Prime Ltd in London.**
>
> **We recognise that OTC derivatives are not yet regulated in Hong Kong so your margin monies will continue to be held by IS Prime Limited in London and will be held in accordance with the FCA's Client Assets Sourcebook relating to client money.**
>
> **All open index swap positions will be transitioned to IS Prime Hong Kong at the open on Monday, 18 December 2017. This will be achieved by closing your existing positions with IS Prime Limited and opening new positions with IS Prime Hong Kong Limited at the mid-price at the close of Friday 15 December 2017. There will be no cost to you for this transition. Margin monies will be moved to IS Prime Limited client money account on Friday 15 December 2017.**
>
> **Please see enclosed the new terms of business with IS Prime Hong Kong Limited for principal index swap business and an arranging terms of business with IS Prime Limited which will facilitate the holding of margin.**
>
> **ISAM Capital Markets is committed to providing clients with the most flexible and compliant solutions for their trading requirements.**

> **So that we can complete the transition of your positions to IS Prime Hong Kong Limited and set up the new relationship with IS Prime Hong Kong Limited please forward to us a signed copy of this letter and the client acceptance letter.**
>
> **If you have any questions or would like to discuss any of the above, please contact us ..**

20. The Client Acceptance Letter which was also attached to that email said this:

> **Enclosed with this letter are the IS Prime Limited and IS Prime Hong Kong Limited terms of business for Professional Clients.**
>
> **Your agreement with IS Prime Hong Kong Limited consists of:**
> **i. this Client Acceptance letter;**
> **ii. the IS Prime Hong Kong Limited Principal Terms of Business and any applicable appendices to the Terms of Business; and**
> **iii. our Trading Conditions.**
>
> **Your agreement with IS Prime Limited consists of:**
> **i. this Client Acceptance letter; and**
> **ii. the IS Prime Limited Arranging Terms of Business;**
>
> **If you do not agree with any of the contractual terms contained in these documents, you are required to notify IS Prime prior to carrying out business with us. Your consent to our contractual terms will be given upon, the earlier of, you signing and returning this letter or giving dealing instructions to us.**
>
> **Enclosed with this letter is IS Prime Limited's Best Execution Policy. In addition, IS Prime Limited's Conflicts of Interest policy is available on request.**
>
> **If there is any aspect of our documentation or policies that you would like to discuss, please do not hesitate to contact us ..**
>
> **Also, enclosed with this letter are IS Prime Limited's bank account details.**

21. The Client Acceptance Letter ended with a space for signature on behalf of Think: but it is common ground that Think did not sign the Client Acceptance Letter, did not trade index swap products with IS Prime at all during the exclusivity period, and did not trade index swap products with IS Prime Hong Kong after receipt of the 8 December 2017 email.

22. This decision by ISAM Capital Markets to move its index swap business from London to Hong Kong was subsequently reflected in IS Prime's Best Execution Report for 2017 dating from April 2018. Under the heading "Index Swap MiFID II RTS 28 Disclosures", that Report stated:

> **IS Prime may, if requested by a client, execute an index swap order on behalf of a client with IS Prime Hong Kong Limited.**
>
> **IS Prime only acts on specific instructions received from clients to execute transactions with IS Prime Hong Kong Limited and IS Prime executes any order according to clients' specific instructions.**
>
> **The following Top 5 report reflects the set-up of the IS Prime Index Swap business from December 2017. Prior to December 2017, IS Prime offered a different execution service in respect of Index Swaps, however as this business line is now no longer available to any client, this report does not take account of such historic trading activity.**
>
> **IS Prime Hong Kong Limited is an affiliate of IS Prime.**

The evidence

23. The Witness Statements of Mr Leverton and Mr Brewer on behalf of IS Prime explain that, in IS Prime's view, trading in index swaps continued to be "offered" by IS Prime, even after ISAM Capital Markets moved its index swap business from London to Hong Kong, on the basis (as stated in paragraph 15 of Mr Leverton's witness statement) that:

> **.. [F]ollowing the change in the venue of execution for index swap trading to Hong Kong, [IS Prime] continued to provide the regulated service of 'Arranging' in relation to the trading of index swaps by its clients (including being able to accept orders for such trades to be executed by [IS Prime Hong Kong] as the sole venue), and to perform a number of critical functions in relation to its clients' trading of index swaps ..**

24. In Mr Brewer's words (in paragraphs 4, 7 and 8 of his First Witness Statement):

> **[IS Prime] did not make any statement in December 2017 to the effect that index swaps were no longer offered by [IS Prime]. [IS Prime] continued to offer index swaps from that time, albeit on terms that it would act and receive client orders as an arranger and that the sole venue of execution would be via its affiliate, IS Prime Hong Kong Limited ..**
>
> **After the execution of index swap trading moved to Hong Kong, [IS Prime] continued to perform a regulated activity in relation to the relevant trading activity. Specifically, [IS Prime] was (and is) 'arranging (bringing about) deals in investments' and 'making arrangements with a view to transactions in investments' in that it was making arrangements which enabled and facilitated the trading of index swaps and, where requested, receiving and transmitting trading orders on behalf of a client to [IS Prime Hong Kong] .. In conjunction with undertaking this regulated activity, [IS Prime] continued (and continues) to hold client money for clients trading index swaps with [IS Prime Hong Kong].**
>
> **In practice, [IS Prime's] activity in relation to index swaps involves performing a variety of services which for convenience could be divided into**

> **three categories: (i) client-facing or client relationship services relating to the trading of index swaps .. (ii) providing the means by which index swaps trading could be effected .. and (iii) holding and reconciling client money in relation to the trading of index swaps ..**

25. For Think, Mr Elam's Third Witness Statement draws attention (in paragraphs 33 and 34) to what he says were the additional risks for Think of trading with IS Prime Hong Kong rather than IS Prime in London:

> **.. There are risks and potential adverse consequences for a brokerage firm in the position of the Defendants agreeing to execute trades with a counterparty in Hong Kong which is not regulated (and where the trades themselves are not regulated products) .. Linked to this is monitoring risk. It would have been harder for the Defendants to monitor an unregulated HK counterparty than it would a FCA-regulated firm in a 'home' jurisdiction ..**
>
> **In addition to the regulatory risk above, the increased risks associated with IS Prime Hong Kong as a trading counterparty (by comparison with IS Prime) included additional credit risk ..**

26. Mr Brewer's Third Witness Statement expresses the view that these risks are overstated by Mr Elam. According to Mr Brewer, these were not matters that were raised at the time. Had Think done so, these elements of additional risk could readily have been addressed.

The statements of case

27. The Amended Particulars of Claim set out the contractual background and make general allegations of breach. They do not (except in one narrative paragraph) refer specifically to index swaps until the Schedule giving particulars of loss.

28. Turning to the Amended Defence and Counterclaim, paragraph 10 pleads (inter-alia) that Think's obligation to trade exclusively with IS Prime was:

> **(a) .. subject to the following conditions precedent:**
>
> **(i) The relevant product "is traded or offered to be traded" by IS Prime.**
>
> **(ii) The Available Product is offered to the Defendants by IS Prime exclusively in its capacity as a matched principal broker.**
>
> **b. In the present case each condition precedent was not satisfied, because:**
>
> **(i) IS Prime did not trade or offer to trade Index Swap products with TF entities from at the latest 8 December 2017 and, accordingly, the Defendants could not and in any event were not obliged to trade exclusively with IS Prime in respect of such products.**

> **(ii) IS Prime did not operate as a matched principal broker in respect of trades executed with the Defendants and, accordingly, the Defendants were not obliged to trade exclusively with IS Prime in respect Available Products.**

The substance of this allegation is repeated at greater length in paragraphs 39 and 40.

29. Paragraph 10(c) then asserts that:

> **The Defendants also rely upon cl 2.3 and/or contractual waiver, forbearance and estoppel defences in respect of alleged Relevant Transactions in respect of Index Swap products at the latest from on and around 7 February 2017.**

The date of 7 February 2017 given in paragraph 10(c) is not linked to the December 2017 correspondence identified in paragraphs 18 to 21 above.

30. This plea in relation to clause 2.3 is repeated at greater length in paragraph 42, again by reference to correspondence in February 2017, rather than in reliance upon the December 2017 correspondence relied upon for the purposes of this application.

31. Paragraph 18 of the Amended Reply and Defence to Counterclaim responds to paragraphs 39 and 40 of the Amended Defence and Counterclaim as follows:

> **(1) Paragraph 39a misdescribes and misstates clauses 2.1 of the Liquidity Addendum and the definition of Available Products:**
>
> **(a) The definition of Available Products includes "…any other financial product of a class that is traded or offered to be traded or offered by IS Prime at the time of entering into this document…" ..**
>
> **(b) Clause 2.1 of the Liquidity Addendum bound the Defendants to trade any Available products with IS Prime in the Applicable Period save for the specified trades in clause 2.1(a) to (c) or, relevantly, upon a statement by IS Prime pursuant to clause 2.3 that it does not trade "…that class of Available Product".**
>
> **(2) There was therefore no condition precedent to the exclusivity obligation in clause 2.1 of the Liquidity Addendum, and the definition of Available Products was fixed in time by reference to the date of that agreement.**
>
> **(3) Index swaps were at all material times an Available Product offered by IS Prime and IS Prime did not state otherwise to the Defendants. The Defendants were not, therefore, released from the exclusivity obligation under clause 2.1 of the Liquidity Addendum in respect of index swaps.**
>
> **(4) The terms of IS Prime's letter to the Defendants dated 8 December 2017, which was addressed to Mr Nauman Anees, required the Defendants to sign the appended terms to accept the same or, alternatively, provided for the deemed acceptance upon the issue of further trading instructions. The Defendants did not sign the same, nor did the Defendants (ever) issue a trading instruction in respect of index swaps.**

> **(5) Paragraph 40c is therefore wrong in its assertion of a purported assignment of "…right and obligations…" without consent (and one cannot, in any case, assign an obligation). Paragraphs 40c, 40d. and 40g are also wrong in their assertion that the appended terms superseded the Liquidity Addendum and / or excepted index swaps from the definition of Available Products. The terms appended to the letter of 8 December 2017 did not come into effect.**

32. Finally, paragraph 28 of the Amended Reply to Defence to Counterclaim pleads as follows:

> **28.1. IS Prime's construction of the Liquidity Addendum is denied including because it leads to the absurd result that the Defendants would be obliged to exclusively trade index swaps with IS Prime even where (as in the present case) IS Prime notified the Defendants that it no longer traded such products and offered that the Defendants may elect to trade index swaps with a third party affiliate not party to the Liquidity Addendum (IS Prime Hong Kong).**
>
> **28.2. It is denied that index swaps were at all material times an Available Product offered by IS Prime. Paragraphs 40a and 40b of the Defence are repeated.**
>
> **28.3. The letter from IS Prime dated 8 December 2017 amounted to a statement from IS Prime to the Defendants for the purposes of clause 2.3 of the Liquidity Addendum that, with effect from 18 December 2017, it would no longer be trading index swaps as a class of Available Product.**
>
> **28.4. Accordingly, index swaps were not Available Products within the meaning of the Liquidity Addendum and the Qualified Exclusivity Agreement from at the latest 18 December 2017 and the Defendants could not and in any event were not obliged to trade exclusively with IS Prime in respect of such products.**

33. As may be seen, it is only in this paragraph of the Amended Reply to Defence to Counterclaim that Think finally relies on the December 2017 email as a notice under clause 2.3 of the Liquidity Addendum.

The arguments of the parties

34. On behalf of Think, Mr Khan advanced three arguments in support of his overall contention that, in relation to the period after 18 December 2017, IS Prime's claim insofar as it relates to index swaps has no real prospect of succeeding.

35. First, Mr Khan submitted that, on the true interpretation of the Liquidity Addendum, index swaps were not an "Available Product" after that point, since they were no longer "traded or offered or to be traded or offered by IS Prime".

36. In that connection, Mr Khan submitted that it was necessary to give a purposive construction to the definition of "Available Product". In Mr Khan's submission, the purpose of clause 2.1 of the Liquidity Addendum was to ensure that Think should trade exclusively with IS Prime those classes of product which could in practice be traded with IS Prime. As is made clear (inter-alia by clause 3.3 of the Terms of Business) "traded or offered or to be traded or offered" in this context means traded or offered as principal. It does not include classes of products in relation to which IS Prime only acts or offers to act as arranger or agent in connection with a trade with a third party (as suggested by Mr Leverton and Mr Brewer). It followed, Mr Khan submitted, that a class of product which IS Prime was no longer prepared itself to trade as principal could not be considered an "Available Product" for the purposes of clause 2.1. To hold otherwise would be to produce the commercially absurd situation that Think could be unable to trade particular classes of product either with IS Prime or with anyone else.

37. Secondly, Mr Khan submitted that, regardless of whether index swaps arguably continued to fall within the definition of "Available Products" after 18 December 2017, they were no longer within the scope of the exclusivity obligations enclosed by clause 2.1, since it was no longer possible for Think to trade index swaps with IS Prime as principal.

38. Thirdly, Mr Khan submitted (again regardless of whether index swaps arguably continued to fall within the definition of "Available Products") that IS Prime's email dated 8 December 2017 and its enclosures amounted to a statement for the purposes of clause 2.3 of the Liquidity Addendum in relation to index swaps that IS Prime "does not trade that class of Available Product".

39. Mr Khan submitted that these issues were matters of contractual interpretation which did not involve any relevant disputed facts. As such, they were entirely suitable for summary determination, and doing so would save considerable costs (not least in relation to disclosure) and considerable court time.

40. On behalf of IS Prime, Mr Al-Attar responded to Mr Khan's first argument by submitting that the interpretation contended for by Think was inconsistent with the plain words of the definition of "Available Product", which fixed the class of such products by reference to "the time of entering into this document".

41. As to Mr Khan's second argument, Mr Al-Attar submitted that the definition of "Available Products" recognised that, in providing its services under the Liquidity Agreement, IS Prime might trade either as a counterparty or offer a product other than as a counterparty, including as an arranger. That was what IS Prime's 8 December 2017 email and its enclosures offered to do. Although the natural meaning of the word "traded" in the definition might, on its own, have connoted trading as a counterparty, the words in the definition are "traded or offered or to be traded or offered": and trading

as a counterparty is not the only means by which a broker can offer a financial product. This construction (according to Mr Al-Attar) (i) makes sense of the parties' agreement as a whole without reducing to mere surplusage any part of the terms, and (ii) is consistent with IS Prime as arranger owing duties of best execution, which regulatory obligation acknowledges the broad meaning of what it is for a broker to trade or to offer financial instruments to its clients.

42. In Mr Al-Attar's submission, the fact that IS Prime was providing "matched principal brokerage services" supports that interpretation. From Think's perspective as counterparty, there would have been very little practical difference between contracting with IS Prime as principal and contracting with IS Prime Hong Kong through IS Prime as arranger. Although, when trading as a counterparty, IS Prime was trading as a principal, it was simply interposed as a link in the transaction between Think and ISFE 21, an affiliate of IS Prime, which in turn traded with the pool of market counterparties. That would have remained the case in relation to trading with IS Prime Hong Kong. The derivation of prices from the market would therefore have remained the same. IS Prime and IS Prime Hong Kong are both entities within the same group, trading under the same international brand and reputation. In all the circumstances, the proposed transfer was not a substantial change

43. Mr Al-Attar's principal submission, however, was also his answer to Mr Khan's submission based upon clause 2.3 of the Liquidity Addendum. It was that, properly construed, the 8 December 2017 email and its enclosures were simply an offer to change the terms of trading. The Client Communication Letter stated that the proposed variation would not have effect unless clients either (i) signed the Client Communication Letter and appended Client Acceptance Letter, or (ii) instructed a transaction on the new terms proposed. Think did not accept that offer. Think had no open positions to close and never instructed an index swap transaction with IS Prime or IS Prime Hong Kong. The existing terms of trade between IS Prime and Think therefore continued in full force and effect.

44. In Mr Al-Attar's submission, IS Prime retained the required regulatory permissions in the UK to transact index swaps, and was therefore bound to accept index swap instructions from Think, which it was able lawfully to perform. These undisputed facts, Mr Al-Attar submitted, were fatal to Think's application.

45. Mr Al-Attar also submitted that the issues between Think and IS Prime were in any event unsuitable for summary determination. A judge at trial would have the advantage of expert evidence as to the meaning of "matched principal brokerage services", which would shed light on the interpretation of the definition of "Available Product" in the context of the Liquidity Addendum. Such expert evidence would also assist in resolving the dispute in the evidence currently before the court as to whether there was in fact a

qualitative difference in what was offered to Think before and after the 8 December 2017 email.

Strike out and summary judgment

46. The first matter that I must consider is whether it is right for me to resolve any of the issues raised by this application summarily. The two provisions of the CPR which have been invoked by Think in this application are CPR 3.4(2) and CPR 24.2. CPR 3.4(2) gives the court power to strike out the whole or any part of a claimant's statement of case which discloses no reasonable grounds for bringing the claim. Under CPR 24.2, the court may give summary judgment against a claimant on a claim or on a particular issue if the claimant has no real prospect of succeeding on the claim or issue, and there is no other compelling reason why the matter should be disposed of at trial.

47. It was common ground that the burden of establishing for these purposes that IS Prime has no reasonable grounds for bringing this aspect of its claim and/or that it has no real prospect of succeeding on it (and that there is no other compelling reason why the case should be disposed of at a trial) is on Think.

48. There was also no dispute that the relevant principles that the court should apply on applications such as this by a defendant under these provisions of the CPR are those explained by Lewison J in the cases of *JD Wetherspoon Plc v Van de Berg & Co Ltd*[1] and *EasyAir Ltd (trading as Openair) v. Opal Telecom Ltd*[2]. The first six of those principles are stated in materially identical terms in both judgments:

> **The correct approach on applications [under CPR Part 24] by defendants is .. as follows:**
>
> **i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success ..**
>
> **ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable ..**
>
> **iii) In reaching its conclusion the court must not conduct a "mini-trial" ..**
>
> **iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual**

[1] [2007] EWHC 1044 (Ch), [2007] PNLR 28 at [4],

[2] [2009] EWHC 339 (Ch.) at [15]; approved by the Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098, [2010] Lloyd's Rep IR 301 at [24], per Etherton LJ, and in *Global Asset Capital Inc and another v Aabar Block SARL* [2017] EWCA Civ 37, [2017] 4 WLR 163 at [27], per Hamblen LJ. See also *TFL Management Services Ltd v. Lloyds TSB Bank plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006 at [26]-[27] per Floyd LJ.

> **assertions made, particularly if contradicted by contemporaneous documents ..**
>
> **v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial ..**
>
> **vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without a fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.**

49. In paragraph (vii) of the summary given in the *JD Wetherspoon* case, Lewison J observed that:

> **vii) The court should be especially cautious of striking out a claim in an area of developing jurisprudence, because in such areas decisions on novel points of law should be decided on real rather than assumed facts.**

In the *Easy Air* case, however, paragraph (vii) was as follows:

> **vii) It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it ..**

50. As I noted in *Hall v Saunders Law Ltd*[3], there is no tension between these different concluding paragraphs. The issue of whether a case can properly be disposed of without a trial is one of proper case management and procedural justice. In cases where the relevant law is in a state of incremental development or of uncertainty, a court will for sound practical reasons usually be reluctant to come to any final conclusion on the basis of assumed rather than actual facts. However, where a point of law or construction which is not fact-sensitive (or where the court can be confident that it is seized of all the relevant facts) is both short and likely to be determinative of the whole (or at least of a substantial part) of the case, the overriding objective under CPR 1.1(1) of dealing with cases justly and at proportionate cost will usually favour summary determination.

[3] [2020] EWHC 404 (Comm) at [17] – [18].

51. As Andrew Baker J recently observed in *Skatteforvaltningen v Solo Capital Partners llp*[4]:

> .. **there is often a careful judgment to be made whether it is the occasion for "grasping the nettle", so as to decide a point that seems at the interlocutory stage to be clear-cut, or for allowing an arguable claim or defence, but one assessed at the interlocutory stage to be weak, to proceed to trial precisely because that is but an interlocutory assessment, the claim or defence is none the less arguable not completely hopeless, and (if relevant) the court has to have an eye, as best it can, to whether realistically there may be materially different or additional evidence available at a trial** ..

52. In opening the application, Mr Khan put at the forefront of his argument the application under CPR Pt 24, and did not press the strike-out aspect. That seemed to me to be a sensible and pragmatic approach, given that the Application Notice does not identify the particular paragraphs or sections of the Amended Particulars of Claim to be struck out: and the only specific references to index swaps in the Amended Particulars of Claim are in paragraph 35 (which is mainly a narrative of alleged admissions of breach), at points in the list of Available Products in Schedule 1, and in paragraphs 6 to 8 of Schedule 2 (which gives an estimate of Index Swap Losses).

53. In my judgment, Mr Khan is correct in submitting that the issues which arise on this application are issues of contractual interpretation which are suitable for summary determination. These issues are, in substance, simply points of law, in relation to which I am satisfied that I have before me all the evidence necessary for their proper determination. For the reasons which I shall explain when I come to consider these issues of interpretation individually, I do not accept that expert evidence is either necessary or would be useful in order to decide these issues. Any facts material to my decision on these issues should already have been pleaded[5].

The meaning of "Available Products"

54. The terms of clause 2.1 of the Liquidity Addendum are set out in paragraph 10 and of the definition of "Available Products" in sub-paragraph 11.3 above.

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4 [2020] EWHC 1624 (Comm), [2020] 4 WLR 98 at [3]. In that ruling, Andrew Baker J (inter alia) refused an application for reverse summary judgment in relation to claims on duty of care and unjust enrichment grounds against one of the many defendants to these actions by the Danish Customs and Tax Administration.

5 "Where proceedings involve issues of construction of a document in relation to which a party wishes to contend that there is a relevant factual matrix that party should set out in its statement of case each feature of the matrix which is alleged to be of relevance, following the approach identified in C1.1(e)-(h) and (k). The "factual matrix" means the background knowledge which would reasonably have been available to the parties in the situation in which they found themselves at the time of the contract/document": *The Commercial Court Guide* (11th edn, 2022) at C1.3(h).

55. There was no dispute between the parties as to the principles of interpretation which I should apply to these provisions and to the 8 December 2017 email and its enclosures. Those principles have been elucidated in the familiar line of decisions of the House of Lords and the Supreme Court, beginning with *Investors Compensation Scheme Ltd v West Bromwich Building Society*[6] and culminating (at least for the time being) in *Wood v Capita Insurance Services Ltd*[7]. In *Trillium (Prime) Property GP Limited v Elmfield Road Limited*[8] Lewison LJ said of these authorities that he would:

> **.. not attempt to distil or paraphrase that learning. As Lord Hodge said at [9], the legal profession has sufficient judicial statements of that nature ..**

I propose respectfully to adopt the same approach.

56. The Liquidity Addendum bears the hallmarks of professional drafting, particularly in the more "boilerplate" provisions which appear in clause 4 onwards. The operative provisions of clauses 2 and 3 are, however, obviously transaction-specific. They do not have quite the same clarity of architecture or expression. In that connection, I must therefore bear in mind (inter alia) the second of the seven factors identified by Lord Neuberger of Abbotsbury PSC in *Arnold v Britton*[9], that:

> **.. when it comes to considering the centrally relevant words to be interpreted, .. the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it ..**

As Lord Hodge JSC later said in *Wood*[10]:

> **.. in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause ..**

57. It is asserted in the Particulars of Claim that it was a "condition precedent" to Think's obligation of exclusivity that the relevant product was an "Available Product". In my judgment, that is not an accurate description of the position[11]. The correct analysis is simply that Think's obligation under clause 2.1 to trade exclusively with IS Prime applies only to "any Available Products", and not to any other classes of product.

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6 [1998] 1 WLR 896, HL
7 [2017] UKSC 24, [2017] AC 1173.
8 [2018] EWCA Civ 1556 at [9]
9 [2015] UKSC 36, [2015] AC 1619 at [18]
10 See fn 7 above, at [11].
11 "Contingent conditions may be precedent or subsequent. A condition is precedent if it provides that the contract is not to be binding until the specified event occurs": Beale (ed), *Chitty on Contracts* (34th edn, Sweet & Maxwell 2021) para [4-196].

58. It was part of Mr Khan's first submission that the class of "Available Products" varied from time to time, depending upon whether that class was in fact "traded or offered or to be traded or offered" by IS Prime at that time. Mr Khan submitted that an interpretation which fixed the class by reference to the date of the Liquidity Agreement would not accord with business common sense, since it could leave Think wholly unable to trade particular classes of product if IS Prime thereafter ceased to trade them.

59. I do not accept that aspect of Mr Khan's first submission. The point which Mr Khan makes by reference to commercial common sense does not seem to me to be as straightforward as he suggests. First of all, the terms of the Liquidity Addendum may themselves provide a solution to the problem which he identifies, since the duty of good faith imposed by clause 10 would probably require IS Prime to give notice under clause 2.3 in the event that IS Prime in fact ceased to trade a class of Available Product which Think wished to trade. Secondly, an absolute refusal by IS Prime to trade a class of Available Products which Think instructed IS Prime to trade might well (depending on the facts) amount to a renunciatory or repudiatory breach of the Liquidity Addendum.

60. There are also two strong indications against this aspect of Mr Khan's first submission in the terms of the Liquidity Addendum itself:

    60.1 First, as Mr Al-Attar submitted, the ordinary and natural meaning of the words of the definition plainly indicates an intention that the class of "Available Products" should be fixed "at the time of entering into this document", subject only to any subsequent agreement. That is simply what the definition says.

    60.2 Secondly, the exceptions to exclusivity in clauses 2.2 and 2.3 are themselves drafted on the basis that the class of "Available Products" is fixed at the outset. Those clauses do not say that, if the conditions which they lay down are met, products of that particular class shall cease to be "Available Products". Instead, those clauses lay down circumstances in which Think may trade particular classes of "Available Products" with third parties. It is implicit in that that those classes of products nevertheless remain classes of "Available Products".

61. That commercial and contractual context, in my judgment, reinforces the correctness of the natural meaning of the express words of the definition, and means that I cannot reject that interpretation simply on the basis that another construction might (at least from the point of view of Think) be more consistent with business common sense.

62. That conclusion is, of itself, a complete answer to Mr Khan's first submission, that index swaps were no longer an "Available Product" after 18 December 2017.

63. For similar reasons, I also cannot imply some unexpressed limitation into the definition of "Available Products". I therefore also cannot accept Mr Khan's second submission,

that index swaps ceased to be an "Available Product" because IS Prime was no longer prepared to trade them.

64. Even so, I must nevertheless address one further aspect of Mr Khan's first two submissions, which was that the definition of "Available Products" is concerned only with products of a class traded or offered by IS Prime in transactions to which IS Prime is itself the counterparty *as principal*.

65. Mr Al-Attar submitted that such an interpretation would fail to give any or any proper effect to the words "or offered" in the phrase "of a class that is traded *or offered* or to be traded *or offered* by IS Prime at the time of entering into this document"[12].

66. In that connection, I have given careful consideration to Mr Al-Attar's related submission that the court would be assisted, in interpreting that phrase, by expert evidence concerning the market understanding of "matched principal brokerage services", and that the court should therefore not decide these issues of interpretation summarily in the absence of such evidence.

67. There is undoubtedly an issue raised in the statements of case as to the relevance of the definitions in the Glossary to the FCA Handbook[13]: but that issue is raised in the statements of case in the context of duties in relation to pricing and mark-up, not in relation to the interpretation of the definition of "Available Products". No market practice relevant to the interpretation of that definition is pleaded, nor did Mr Al-Attar suggest the existence of any such market practice in the course of his submissions.

68. In the absence of any suggestion of any relevant market practice, it seems to me that expert evidence would not be likely to be of any assistance. Furthermore, what I have to decide relates not to the market in general, but to the particular obligations agreed between the particular parties to the Liquidity Addendum. In my judgment, the nature and extent of those obligations are primarily to be found in the terms of the relevant contractual documents.

69. The difficulty which Mr Al-Attar's submission faces is that clause 3.3 of his clients' Terms of Business[14] expressly states that "we act as principal" and "will *not* act as your agent to carry out Transactions on your behalf"[15]. Indeed, IS Prime itself pleads in paragraph 4(1) of the Amended Reply and Defence to Counterclaim that:

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12 Emphasis added.
13 See, for example, paragraphs 15 and 16 of the Amended Defence and Counterclaim and paragraph 4 of the Amended Reply and Defence to Counterclaim.
14 See paragraph 15 above.
15 Emphasis added.

> **IS Prime agreed to provide [Think] "matched principal brokerage" services on the terms pleaded in the Particulars of Claim, in particular, its Terms of Business, its FX Terms of Business and the Liquidity Addendum thereto.** ***As a matched principal brokerage, IS Prime was required to (and did) contract with [Think] as principal and to (and did) contract as principal with a counterparty equal and opposing trades to those contracted with [Think], as opposed to acting as agent for [Think].***[16]

70. In that context, it seems to me to be quite unlikely that the parties would have intended, simply by use of the words "or offered", to expand the exclusivity obligations agreed under the Liquidity Addendum to transactions in which IS Prime did not act as principal, but merely as agent or arranger. A much more likely interpretation is that those words were intended to cover classes of products which IS Prime was prepared to trade, even if it did not in fact do so. That, in my judgment, is the natural meaning of these words in their context.

71. In my judgment, that meaning also makes better commercial sense than the alternative put forward by Mr Al-Attar, in that it fixes the universe of "Available Products" by reference to IS Prime's capacity to do business as principal with Think as at the date of the Liquidity Addendum – ie by reference to whatever products IS Prime either traded or was prepared to trade with Think on their usual principal to principal basis as at that date.

72. That brings me to Mr Khan's third submission, which was that the 8 December 2017 email and its enclosures amounted to a statement, for the purposes of clause 2.3 of the Liquidity Addendum, that IS Prime does not trade index swaps as a class of "Available Product".

73. For the reasons which I have just explained, I do not accept Mr Al-Attar's submission that index swaps nevertheless continued to be "offered" by IS Prime, in the sense that it was thereafter able, willing and prepared to arrange such transactions with IS Prime Hong Kong. In my judgment, that was not something that was contemplated by the terms of the Liquidity Addendum. Such a change would have required the agreement of Think, which was not forthcoming.

74. I also do not accept Mr Al-Attar's submission that the 8 December 2017 email and its enclosures did not amount to a statement by IS Prime "that it does not trade that class of Available Product", because it was only an invitation (which was not accepted) to agree new terms. Mr Al-Attar is, of course, right in his submission that a contractual change cannot (in general) be forced on an unwilling party. An offer of new terms is not of itself necessarily a repudiation of the old terms, nor (unless it is accepted) does it prevent those old terms from continuing. Mr Al-Attar is therefore also right in his

[16] Emphasis added.

submission that, if Think had instructed IS Prime to trade an index swap and IS Prime neglected to do so or routed the transaction to IS Prime Hong Kong, IS Prime might well have been in breach of contract.

75. That, however, is not the point. Under clause 2.3 of the Liquidity Addendum, Think "may trade all transactions that are a class of Available Product with a third party if IS Prime *states that it does not trade that class of Available Product*".[17] All that is required, therefore, is such a statement. In my judgment, the necessary statement is to be found in the Client Communication Letter, which says in unequivocal terms that "as of Monday 18 December 2017, all index swap transactions *will* be entered with IS Prime Hong Kong Limited instead of IS Prime Limited in London"[18]. That statement is not conditional upon any action by Think. Nor does it contain any offer on the part of IS Prime to continue on the same terms as before, if Think does not want to change. It is simply a statement of what is going to happen.

76. In my judgment, a reasonable commercial party in the position of Think would have interpreted that as a statement that, from 18 December 2017, IS Prime would not itself trade that class of product. That is so, notwithstanding the accompanying request to Think to sign up to new terms with IS Prime and IS Prime Hong Kong. Any other interpretation would, in my view, fly in the face of commercial common sense.

Conclusion

77. I have accordingly come to the conclusion that the claim by IS Prime, insofar as it relates to the trading of index swaps after 18 December 2017, has no real prospect of succeeding. IS Prime has no real prospect of overcoming the defence pleaded in paragraph 28(3) of the Amended Reply to Defence to Counterclaim. There is no other compelling reason why the matter should be disposed of at trial. I will therefore give summary judgment under CPR Part 24 in favour of Think on that issue.

Disposition

78. For these reasons, I allow Think's application for summary judgment in relation to that issue.

79. I invite the parties to attempt to agree the terms of a Minute of Order giving effect to this judgment and dealing with all consequential matters. In the event that agreement cannot be reached by 4pm on Friday 25 March 2022, the parties should so inform the court and should lodge written submissions in relation to the points of disagreement by 4pm on Wednesday 30 March 2022. I will then either give a ruling by email or direct a short further hearing by video conference. Pursuant to CPR PD 52A 4.1(a), I adjourn

[17] Emphasis added.
[18] Emphasis added.

any application for permission to appeal together with all other consequential applications to be determined in that way and extend time under CPR 52.12(2)(a) until 21 days after that determination.

80. In accordance with the Covid-19 Protocol, this judgment will be handed down remotely by circulation to the parties' representatives by email and release to BAILII. No attendance by the parties is necessary.