Neutral Citation Number: [2022] EWHC 2935 (KB)

Case No: QB-2019-003679

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2022

Before :

MR JUSTICE FREEDMAN

- - - - - - - - - - - - - - - - - - - -

Between :

(1) TIMOTHY PIERS HORLICK
(in his personal capacity and in his capacity as trustee of the SUZANNA GAYFORD HORLICK GRANDCHILDREN'S TRUST)

(2) ROBERT MAURICE GAYFORD
(in his capacity as trustee of the SUZANNA GAYFORD HORLICK GRANDCHILDREN'S TRUST)

(3) DEVELOPMENT CAPITAL LIMITED

Claimants

- and –

(1) DIOGO JOSE HENRIQUES CAVACO

(2) JV CONSULTORES INTERNACIONAIS LIMITADA

(3) COMPANHIA MINEIRA DO CHIBUTO S.A

(4) PATHFINDER MOÇAMBIQUE SA

(5) PATHFINDER MINERALS PLC

Defendants

- - - - - - - - - - - - - - - - - - - -

Robert Anderson KC and Andrew Thomas (instructed by **The Khan Partnership LLP)** for the **Claimants**

Matthew Watson and Chinmayi Sharma (instructed by **Dentons UK & Middle East LLP**) for the **Second and Fourth Defendants**

Hearing dates: 10, 11. 12, 13 & 18 May 2022

Supplementary submissions by the Claimants: 30 May 2022 and 1 June 2022
Supplementary submissions by the Second and Fourth Defendants: 30 May 2022 and 1 June 2022

Handed down in draft: 2 November 2022

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Approved Judgment

This judgment was handed down remotely at 9.15am on Friday 18 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MR JUSTICE FREEDMAN

MR JUSTICE FREEDMAN:

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II Introduction

1. This case concerns the recovery of sums under multiple agreements entered into as part of a long-running venture concerning a mining licence for the Naburi and Moebase titanium mineral sands deposits in Mozambique.

2. The case comprises four claims:

   (i) The Trust, named in the title of the action of which the First and the Second Claimants were trustees, claims repayment from the Second Defendant JVC under the loan facility, that is the March 2012 Agreement, for £225,900 plus interest ("the March 2012 Loan Claim");

   (ii) The Third Claimant ("DCL") claims reimbursement of certain expenses from the Fourth Defendant ("PMSA") under an Engagement Agreement dated 10 April 2012 for £116,263.50 plus interest ("the Expenses Claim");

   (iii) DCL claims from PMSA for the loss of a Success Fee under the Engagement Agreement for £750,000 plus interest ("the Success Fee Claim"), alternatively related claims based on a breach of a Braganza duty which led to DCL being deprived of the Success Fee and/or breach of a contractual duty of good faith; and

   (iv) The First Claimant, Timothy Horlick, claims that PMSA was unjustly enriched by various payments made to it or for its benefit comprising a claim for £1,305,819.66 plus interest ("the Unjust Enrichment Claim").

(a) The Parties

3. Mr Timothy Horlick is an investor resident in England. He is a trustee of the Suzanna Gayford Horlick Grandchildren's Trust ("the Trust"), together with the Second Claimant, Robert Gayford. By deed of assignment dated 2 August 2019, Mr Timothy Horlick is also assignee of his cousin Richard Horlick's claims against the Defendants. From here onwards, Mr Timothy Horlick will be referred to as "Mr Horlick", his cousin will be referred to as "Richard Horlick", and they will be referred to collectively as "the Horlicks". The Third Claimant, Development Capital Limited ("DCL"), is a management consultancy company incorporated in England of which Mr Horlick at all material times was the sole director.

4. The First Defendant, Diogo Cavaco ("Mr Cavaco"), is a Portuguese lawyer and at the relevant times was a director and shareholder of PMSA, a Mozambique company which was formed in around September 2011.

5. The Second Defendant, JV Consultores Internacionais Limitada ("JVC") is a Mozambique family investment company of the Veloso family. JVC has two directors: General Veloso, a retired Mozambiquan army officer, politician, and head of Mozambique's security services; and his daughter Miriam Veloso (referred to

collectively as "the Veloso's"). Both are also shareholders; the other ultimate shareholders are other members of the Veloso family.

6. The Third Defendant, Companhia Mineira do Chibuto SA ("CMdC"), is a Mozambique company of which General Jacinto Veloso, Miriam Veloso and Mr Cavaco were all directors and shareholders at the relevant time. An unless order was granted against CMdC after it failed to exchange disclosure lists, having stated through Miriam Veloso, that it lacked the resources to participate in the proceedings. By Order of Master Eastman on 21 January 2022, judgment was entered against CMdC.

(b) History of the Mining Licences and The Pathfinder Minerals Litigation

7. JVC acquired a mining licence in 2005 to mine heavy mineral sands in an area in Naburi, Mozambique ("the Naburi Licence"). It was around this time that General Veloso met Mr Cavaco, who agreed with General Veloso to raise funding to develop the mine and to get it operational in return for a 50% interest in the licence. Mr Cavaco "handled most of the day-to-day activities on an operational level": see the second witness statement of Mr Horlick para. 50.

8. By 2007, JVC had transferred the Naburi Licence to a Mozambique company, Companhia Mineira de Naburi ("CMdN"), in which Mr Cavaco was a shareholder and a director. CMdN acquired a further research licence to mine in Moebase, Mozambique ("the Moebase Licence"). On behalf of CMdN, Mr Cavaco met potential investors in England of International Mercantile Group Limited ("IMG"), who entered into a Share Option Agreement dated 10 February 2006 under which IMG acquired an option over the shares of CMdN, agreeing an option purchase price of USD 100,000, and a further USD 10 million to acquire the shares. It was agreed that 99.9% of the shares in CMdN would be transferred to a company called IM Minerals Limited, in which the Horlicks also acquired shares. IM Minerals Limited then reversed into a publicly traded AIM shell called Pathfinder Minerals Plc ("Pathfinder Plc"). On 13 July 2011 the Mozambique Ministry amalgamated the Naburi and Moebase Licences into a fresh licence, which became "Licence 4263C" and which was issued to PMSA.

9. In around 2009, Mr Horlick and Richard Horlick were introduced to the project by a friend who knew Messrs Baldwin, Trew and Dickie. The Horlicks decided to invest in IM Minerals Limited which reversed into Pathfinder PLC as above referred to. They were also introduced to Mr Cavaco.

10. From around August 2011, a dispute arose between the Veloso's, their companies and Mr Cavaco (referred to as "the Mozambique Parties") and IMG ("the Pathfinder Minerals Litigation"). Pathfinder Plc had purported to exercise the option over the shares of CMdN. The Mozambique parties alleged that the exercise of the licence by CMdN was invalid and the option purchase price had not been paid to them. The Horlicks joined the side of the Mozambique parties.

11. Pathfinder Plc, IM Minerals Limited and International Mercantile Group Limited ("the claimants in the Pathfinders Minerals Litigation") obtained an injunction in December 2011 against Mr Cavaco, General Veloso and JVC preventing them from interfering with shares in CMdN. CMdN obtained its own anti-suit injunction in the Mozambique

courts on 15 April 2012. On 19 October 2012, the claimants in the Pathfinder Minerals Litigation obtained judgment in England and a permanent injunction regarding dealings in CMdN's shares: *Pathfinder Minerals Plc & Ors v Cavaco & Ors* [2012] EWHC 2856 (Comm). The Mozambique courts did not recognise this judgment and in October 2013 found that Pathfinder Plc had no right to CMdN's shares. In March 2015, the Mozambique authorities confirmed that Licence 4263C was validly issued to PMSA.

(c) The Agreements

12. The current proceedings concern a series of agreements entered into between the parties. The first relevant agreement is a loan agreement dated 11 July 2011 ("the July 2011 Agreement"), under which the Horlicks agreed to advance a loan facility to Mr Cavaco of up to £200,000 to incorporate a holding company of CMdC and two other proposed project companies for the purposes of a project to obtain an exploration and development licence to mine the Chibuto heavy mineral sands in Mozambique. Mr Cavaco provided security in the form of shares in Pathfinder Plc. The documentation for the July 2011 Agreement was prepared by a firm of solicitors called Smithfield Partners ("Smithfield") through their managing partner, Nick Foster.

13. Mr Horlick set out in his witness statement that as part of the July 2011 Agreement, in addition to the Horlicks lending money to Mr Cavaco, and to Mr Cavaco and the Veloso's jointly, the Horlicks were to have an option to 40% of the projects.

14. To facilitate the July 2011 Agreement, Smithfield opened a client account ledger in the name of Tim and Richard Horlick with reference "HOR002/007", into which Richard Horlick deposited £100,000 on 8 August 2011. He deposited a further £140,000 in the account on 7 November 2011. By letter dated 9 November 2011, the July 2011 Agreement was varied to increase the loan facility by £40,000.

15. The second relevant agreement is a loan agreement dated 7 March 2012 ("the March 2012 Agreement"). Mr Horlick and Robert Gayford, acting as trustees for the Trust, agreed to advance a term loan of £150,000 payable to Mr Cavaco and JVC jointly, which was to be used to provide working capital for various development projects in Mozambique, including the projects for Licence 4263C. General Veloso executed the agreement on JVC's behalf. The drawdown of the loan was made in one tranche and paid into an account of Mr Cavaco and JVC set up by Smithfield with reference "HOR002-0001". The term loan was repayable with a "Redemption Premium" of £75,000 in 12 months or upon earlier redemption ("the Redemption Premium"). Richard Horlick provided a personal guarantee ("the Guarantee") in relation to that agreement.

16. Following discussions between Mr Horlick and Mr Cavaco, a Cypriot holding company was established for PMSA into which the investors could invest called Afrinsio Holdings Limited. By a Corporate Change of Name Certificate dated 19 July 2012, that holding company became Grandover Mining Limited ("Grandover Mining"). Grandover Mining never owned any shares in any project company.

17. The third relevant agreement is an engagement agreement ("the Engagement"), under which DCL was appointed as PMSA's "advisor" in connection with an equity

fundraising "expected to be a minimum of" USD 30 million, defined in the Engagement as the "Transaction". The Engagement comprised two engagement letters, the first dated 4 April 2012 ("the First Engagement Letter") which was superseded by the second dated 10 April 2012 ("the Second Engagement Letter"). In consideration of DCL providing advisory services, a success fee of £500,000.00 ("the Success Fee") was payable upon completion of the Transaction. In addition to any fees, PMSA was also required to reimburse DCL for all out-of-pocket expenses incurred in connection with the Engagement.

18. The Second Engagement Letter provided that 60% of the shares in PMSA would be owned by JVC. However, the letter was silent as to the ownership of the other 40% of the shares. Mr Horlick brought a claim for declaratory relief against PMSA in relation to this issue, but this claim was dismissed on the ground the Court had no jurisdiction by a Consent Order dated 18 September 2020. The issue is now to be heard in Mozambique.

19. The final relevant agreement is a further loan agreement dated June 2015 ("the June 2015 Agreement") under which the Horlicks, acting in their personal capacities, agreed to advance a loan facility of up to £1,500,000.00 to Mr Cavaco, of which it was stated an aggregate amount of £1,453,020.00 had been drawn down to date.

(d) The Current Proceedings

20. By 2015, no fundraising had been secured for the Licence 4623C project and the parties' relationships started to fall apart. Ms Veloso had reviewed PMSA's accounts with an accountant and believed that Mr Cavaco had used funds that the Veloso's had paid into PMSA through JVC for his own personal benefit. Mr Horlick then informed the Veloso's that the Horlicks had been making payments to Mr Cavaco under the July 2011 Agreement.

21. Between late 2015 and early 2016, Mr Horlick and Ms Veloso negotiated to see if they could come to a deal to continue the working relationship. In March 2016, Mr Horlick sent Miriam Veloso a draft proposal for a new company called "Mozambique Titanium", a holding company for PMSA, attached to which was a proposed balance sheet for liabilities. This included the loan of £150,000 and the Redemption Premium of £75,000 under the March 2012 Agreement, which he contended JVC was to pay. The parties did not agree, and contact was broken off. The Claimants' lawyers served a pre-action letter dated 28 February 2019. These proceedings were then issued on 14 October 2019.

22. The remaining active defendants in this case are JVC and PMSA (collectively referred to as "the Defendants"). Mr Horlick and Mr Gayford, as trustees, obtained judgment against Mr Cavaco on the March 2012 Loan. Mr Cavaco did not defend the proceedings; they obtained judgment in default for £337,071.58 on 22 May 2020. Mr Horlick also obtained judgment against Mr Cavaco (as borrower) and CMdC (as guarantor) under the June 2015 Loan. Default judgment for £2,305,766 was entered against Mr Cavaco on 22 May 2020. CMdC's defence was struck out after it ceased participating in the proceedings. Judgment was entered for £1,322,368 plus

unquantified interest on 21 January 2022. The claim form has never been served on the Fifth Defendant.

23. The parties have identified various issues. They will be referred to in the course of this judgment. I shall deal with them insofar as is necessary in this judgment.

III The March 2012 Loan Claim

24. The Trust claims payment of £150,000, a "Redemption Principal" of £75,000 and interest from JVC under the March 2012 Agreement. JVC contends it is not required to pay these sums for three reasons:

    (i) The Trust is estopped from enforcing the March 2012 Agreement as a result of statements made by Mr Horlick ("The First Reason: Estoppel");

    (ii) JVC's obligations under the March 2012 Agreement were released by the June 2015 Agreement ("The Second Reason: Release"); and

    (iii) JVC is entitled to rescind the March 2012 Agreement as a result of secret commissions paid to Mr Cavaco ("The Third Reason: Secret Commissions").

(a) The March 2012 Agreement

25. The parties to the March 2012 Agreement were Robert Gayford and Mr Horlick as trustees of the Trust, which was the lender. The Borrowers were Mr Cavaco (referred to as "Borrower A") and JVC (referred to as "Borrower B"). It was signed as a deed.

26. The title page to the March 2012 Agreement includes the wording: "(The principal of £150,000 guaranteed by Richard Miles Andrew Horlick)". There is no other reference to the Guarantee within the contents of the March 2012 Agreement.

27. The March 2012 Agreement contained the following relevant definitions:

> *"**Availability Period**: the period from and including the date of this agreement to and including the earlier of 12 months from the date of this agreement or the Refinancing.*
>
> …
>
> ***Lender's Solicitors**: shall be NewLawsLegal of 21 Arlington Street, London SW1A 1RN.*
>
> …
>
> ***Projects**: the various development projects carried on by the Borrowers in Mozambique including Chibuto mineral sands,*

Naburi and Moebase mineral sands, Rovuma coal and the uranium and heavy minerals project.

***Redemption Premium**: means £75,000*

***Refinancing**: means the date upon which funds become available for repayment of the Loan by the Borrowers under the funding round of up to $30m currently being marketed in respect of the Projects;*

***Repayment Date**: means 12 months from the date of this agreement or upon a Refinancing whichever is earlier;…"*

28. The March 2012 Agreement provided so far as relevant as follows:

"2. JOINT AND SEVERAL LIABILITY

2.1. Unless expressly provided otherwise in this agreement, the Borrowers shall be jointly and severally liable for their respective obligations and liabilities arising under this agreement.

2.2. The Lender may take action against, or release or compromise the liability of, either of the Borrowers, or grant time or other indulgence, without affecting the liability of the other of the Borrowers.

3. THE FACILITY

The Lender grants to the Borrowers a guaranteed sterling term loan facility of a total principal amount of up to and not exceeding £150,000 on the terms, and subject to the conditions, of this agreement. The Borrowers' obligations, representations and warranties under this agreement are owed jointly and severally.

4. PURPOSE

4.1 The Borrowers shall use all money borrowed under this agreement for the purposes of providing working capital for the projects.

5. DRAWING

5.1 The Borrowers may drawdown the Loan in one single tranche only provided that such drawdown shall be within the Availability Period.

…

5.3 The drawdown under clause 5.1 will be made in one tranche and shall be effected by the Borrowers delivering a written notice, specifying the amount to be drawn down and paid to the Borrowers' bank account (Solicitors Client Account – Barclays Bank, Account Name: Smithfield Partners premium client account, Account Number: 30298689, Sort Code: 20-32-00, IBAN GB43 BARC 2032 0030 2986 89, Ref: HOR002-0001) to the Lender at their address as set out in clause 18.1, upon receipt of which the Lender shall arrange for the Loan to be paid to the Borrowers within 5 business days.

…

6. REPAYMENT

6.1 The Borrowers shall repay the Loan and pay the Redemption Premium on the Repayment Date or upon earlier redemption of the Loan.

6.2 If the Borrowers fail to make any payment due under this agreement, on the due date for payment, interest on the unpaid amount shall accrue daily, from the date of non-payment to the date of actual payment (both before and after judgment), at 6% above the base rate of the Bank of England.

…

9.WARRANTIES,REPRESENTATIONS AND COVENANTS

9.1 The Borrowers each warrant and represent with the Lender on the terms as set out in Schedule 1.

9.2 The Borrowers covenant with the Lender on the terms as set out in Schedule 2.

9.3 The warranties, representations and covenants given by the borrowers shall remain in force from the date of this agreement for so long as any amount remains outstanding under the Finance Documents or this agreement is in force.

13. REMEDIES, WAIVERS, AMENDMENTS AND CONSENTS

…

13.2 Any waiver of any right or consent given under this agreement is only effective if it is in writing and signed by the waiving or consenting party. It shall apply only in the circumstances for which it is given and shall not prevent the party giving it from subsequently relying on the relevant provision.

> *13.3 No delay or failure to exercise any right under this agreement shall operate as a waiver of that right.*
>
> *…*
>
> ***15. ASSIGNMENT***
>
> *The Borrowers may not assign any of its rights or transfer any of its rights or obligations under this agreement."*

(b) The Guarantee

29. The Guarantee was entered into between Robert Gayford and Mr Horlick as trustees of the Trust as the Lender, and Richard Horlick as the Guarantor. The section titled "Background" of the March 2012 Guarantee provided:

> ***"BACKGROUND***
>
> *The Borrowers require working capital to continue development of certain projects in Mozambique pending completion of a larger $30m fundraising ("the Fundraising"), currently being marketed as referred in the Loan Agreement.*
>
> *The Guarantor has agreed to guarantee the due repayment of the Loan by the Borrowers under the Loan Agreement."*

30. Clause 1 of the Guarantee defined "Guaranteed Obligations" as "the sums (excluding interest) due to the Lender from the Borrowers under the Loan Agreement". Clause 2 provides:

> ***"2. GUARANTEE***
>
> *2.1 In consideration of the Lender providing the Loan to the Borrowers the Guarantor guarantees to the Lender to pay the Guaranteed Obligations within 7 days of any demand made by the Lender.*
>
> *2.2 The Guarantor as principal obligor and as a separate and independent obligation and liability from its obligations and liabilities under clause 2.1 agrees to indemnify and keep indemnified the Lender in full and on demand from and against all and any losses suffered or incurred by the Lender arising out of, or in connection with:*
>
> *(a) any failure of the Borrower to repay the Loan; or*
>
> *(b) repayment of the Loan being or becoming totally or partially unenforceable by reason of illegality, incapacity, lack or*

exceeding of powers, ineffectiveness of execution or any other matter;

but the Guarantor's liability under this indemnity shall be no greater than the Borrowers' liability under the Loan Agreement in respect of this principal amount of the loan was (or would have been, had the relevant obligation been fully enforceable).

2.3 The total amount recoverable by the Lender from the Guarantor under this guarantee will not exceed £150,000."

III The First Defence: Estoppel/Collateral agreement: understanding regarding repayment of the loan from funding to be secured or from a guarantee from Richard Horlick

Issue (1.1): Did Mr Horlick (on behalf of the Trust) represent that the March 2012 Agreement would only be repaid from funding to be secured or from the guarantee from Richard Horlick

Issue 1.2: Was JVC induced by the said representation to enter into the March 2012 Agreement?

Issue 1.3: Are the Trust, Richard Horlick and Mr Horlick estopped by representation / convention from claiming against JVC or is there a collateral contract that Richard Horlick alone would be responsible for any indebtedness?

31. JVC contends that Mr Horlick had made oral representations to Mr Cavaco which were then passed on to General Veloso to the effect that the March 2012 Agreement would only be repaid from funding to be secured, or from the March 2012 Guarantee ("the Guarantee") made by Richard Horlick. There is no contemporaneous documentation containing representations made by Mr Horlick to that effect. JVC relies on the oral evidence at trial, and two contemporaneous documents in which they say Mr Horlick previously made representations to a similar effect.

(a) The law: applicable principles

32. The relevant principles are that an estoppel arises where:

(i) a party A by words or conduct makes a clear and unequivocal promise or assurance to B that they will not enforce their strict legal rights;

(ii) that promise is intended to affect the legal relations between them or was reasonably understood by B to have that effect;

(iii) A knew or could have reasonably foreseen that B would act on it; and

(iv) before the promise or assurance was withdrawn, B acted upon it altering their position so that it would be inequitable to permit A to act inconsistently with the promise or assurance.

(Snell's Equity 34th Ed., para.12-018)

33. B's conduct need not derive its origin solely from A's promise or assurance, the issue is whether it had a sufficiently material influence to make it inequitable for A to depart from the promise or assurance. The effect of the estoppel is to prevent A asserting his legal right: Snell's Equity 34th Ed, para.12-030.

(b) The Witness Evidence

34. Mr Horlick denied that there was any representation whatsoever that the borrowers could rely on the Guarantee for repayment (Mr Horlick's second witness statement para 46). He also denied that there was any agreement that the loan would only be repaid from future funding (at para 48). He also stated that Richard Horlick was not involved in discussions with Mr Cavaco regarding funding (at para 49.2).

35. During his oral evidence, Mr Horlick was asked whether he had had any discussions with Mr Cavaco over the phone about the March 2012 Agreement, to which Mr Horlick said most of his communications with Mr Cavaco had been over the phone [T2/105/19]. He also said he expected Mr Cavaco to relay the terms of the March 2012 Agreement to General Veloso [T2/106/25-T2/107/1]. At no point did he accept in his evidence that it was ever agreed that Mr Cavaco and JVC would not need to repay the loan.

36. For there to be any valid defence of waiver, estoppel or collateral contract, there must have been an unambiguous representation or agreement by the Trust/Trustees. An examination of JVC's evidence indicates that its witnesses for this trial do not in fact give any evidence of any such representations (nor of any reliance on any alleged representations).

37. General Veloso (in his first witness statement para 10 and in his second witness statement at paras. 10-11) referred to his discussions with Mr Cavaco prior to the March 2012 Agreement. He referred to Mr Cavaco saying the loan was a "mere formality, since the loan would be repaid out of the project funding which the Horlicks would raise or Richard Horlick would repay it, one or the other". General Veloso:

(i) did not say he was told by Mr Cavaco that either of the Horlicks had said this, and

(ii) did not say that he relied upon any representation by the Horlicks. On the contrary, he goes on to refer to trusting Mr Cavaco.

38. Ms Miriam Veloso's witness statements indicate that she was not involved in any relevant discussions prior to the conclusion of the March 2012 Agreement.

39. Thus, neither of the Defendant's witnesses provided any evidence that supports JVC's pleaded case as to any express representations nor as to any reliance upon any alleged express representations. There was no evidence from Mr Cavaco. Hence, the only direct evidence about the relevant conversations came from Mr Horlick who denied the alleged representation.

40. In evaluating oral evidence on which the estoppel defence largely relied, the oft cited caution in respect of the reliability of such evidence should be recalled. The classic statement of Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at p.57 is:

> *"Speaking from my own experience, 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. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case."*

41. As indicated by the passage that was a case concerning fraud, but that statement has been cited in other contexts. More recently, in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) the Court was asked to consider, amongst other things, whether a Portuguese investment company had been induced into purchasing a high-risk investment by misrepresentation. This claim depended entirely on a witness' recollection of the events which by then had taken place 8 years' prior; there was no supporting contemporaneous documentation. Leggatt J (as he then was) commented on the unreliability of memory (at [15]-[18]) and the interference with memory in civil litigation (at [19]-[21]), before stating:

> *"22. 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."*

(c) Discussion

42. In oral argument, the Defendants made a number of submissions as to why the denials of Mr Horlick about having made the representations were to be treated with caution not due to contemporaneous documents but due to a critique of aspects of his evidence that went to his reliability. Examples were that (a) he did not give a detailed account of the conversations which preceded the agreements, (b) he made errors regarding the involvement of Smithfield solicitors in respect of the preparation of agreements who were in fact according to the documents taking detailed instructions from him, and (c) his initial evidence about the guarantee was unsatisfactory. Mr Horlick also sought to say that Mr Cavaco was shown in the June 2015 Agreement as the borrower, but it did not show who were the real borrowers: see T3/19/25- T3/21/8. It may be that he was seeking to buttress the claim for unjust enrichment. That was unimpressive evidence because it was apparent that in consultation with his solicitors, there had been a deliberate decision that PMSA should not be a borrower. In the course of this judgment, I reflect on other aspects of his evidence which were unsatisfactory, notably in respect of the expenses claim.

43. Despite these shortcomings in his evidence, I did not regard Mr Horlick as a witness who was untruthful. I take into account that there were unsatisfactory aspects of his evidence in evaluating it. Mr Kerr's evidence did not add anything significantly to the documents.

44. General Veloso was alert and helpful, and neither his age nor any illness impaired the quality of his evidence. His daughter Ms Veloso started impressively and with confidence. She was authoritative without being overbearing. However, on close examination, she had little recall of events of 2011 to 2012, at a time when she may have had less authority than she did subsequently.

45. Overall, I found that the evidence of the witnesses was based on little actual recollection, but on reconstruction from the documents. That is not surprising because the events were so long ago. Further, the events were of some complexity, piecing together who were the lenders and who the borrowers and for what reasons, and analysing what had been lent. When the focus of this case was to depart from what appeared on the documents whether by way of defences such as waiver and release or secret commissions or by way of claims such as reimbursement of expenses and unjust enrichment, the documents in the end were an important starting point.

46. The approach of the Defendants to the evidence was to suggest from identified failings of Mr Horlick that their witnesses should be preferred. There were failings on both sides, and the most common was that the events were so long ago that they were unable to recall the details without access to documents. The Defendants sought to say that their witnesses' recollection was better and therefore they should be preferred.

47. This was the wrong approach both generally and in its application to the instant case. Particularly in evaluating whether the representations were made, the Court should follow the approach of the *Ocean Frost* and start by looking at the contemporaneous documents. First, there are no documents outside the agreements confirming any alleged representation. Second, the agreements themselves are very important in this regard. The representations contended for by JVC which are said to give rise to an estoppel are wholly at odds with the clear wording of the March 2012 Agreement. Clause 2.1 made clear that Mr Cavaco and JVC as borrowers were held jointly and severally liable for their obligations. Those obligations included clause 6.1, under which the borrowers were responsible for repaying the loan and paying the Redemption Premium. The only mention of the Guarantee is on the title page, and as is clear from the wording of the Guarantee: this only covered the 2012 Loan, not the Redemption Premium.

48. JVC relies on General Veloso's evidence, who said that Mr Cavaco had relayed the representations made by Mr Horlick to him. He agreed in his oral evidence that he would have read and made sure he understood the March 2012 Agreement before signing it [T3/78/1-12], and that under the terms of that agreement the "repayment" would be made with the fundraising or the Guarantee [T3/94/24 - T3/95/2]. The alleged representation is at odds with the March 2012 Agreement. In a similar vein, the Guarantee's express wording was that it only covered the 2012 loan and not the Redemption Premium, yet General Veloso maintained he believed it covered both [T3/97/15-16]. General Veloso's interpretation of both documents cannot be supported by the express and clear wording of those documents, which begs the question as to why General Veloso would have signed the agreement if it did not include any wording which reflected the representations he is said to have heard.

49. JVC also relied on two sets of contemporaneous documentation. The first was an email from Nick Foster of Smithfield to Mr Horlick dated 16 July 2011 with reference to the July 2011 Agreement. In that email, he said: *"I may have missed the point in that you have no intentions of taking repayment of the loan and that you both see the loan amount basically as an option price. If this is the case then I think the way I have drafted both the loan agreement and call option should work ok. I have put a condition in the call option in relation to the exercise of the call which is that the loan repayment is waived by you both. Let me know this is right."* Mr Horlick appeared to accept this as an accurate recording of his intentions at the time [T2/19/6], and that Nick Foster was saying he could have a call option in place of repayment. That is very different from the representations Mr Horlick is alleged to have made in relation to the March 2012 Agreement, where no such view to a call option existed. Clause 4.3 of the July 2011 Agreement only permitted the second drawdown of the loan facility once Mr Cavaco had entered into a valid and legally binding option agreement. There was no such requirement in the March 2012 Agreement. The attempt to rely on this communication is misplaced because that was in respect of the July 2011 Agreement, whereas the issue of a pre-contractual representation arises in respect of the March 2012 Agreement, which did not contain the same reference to an option agreement. On the contrary, as noted above, there were clear provisions about the purpose of the loan being for working capital (clause 4.1), for drawdown (clause 5.1 and 5.3) and for repayment (clause 6.1). Thus, anything said about the July 2011 Agreement had no obvious application to the March 2012 Agreement.

50. The second document JVC relied on was an email sent by Mr Horlick to Richard Horlick dated 14 January 2013, in which he said in relation to the Guarantee: "*What I did say, and stand by, is that I would personally make you good IF IT WAS EVER CALLED. At this point I see absolutely no reason why that would happen.*" Mr Horlick accepted that he had said to Richard Horlick that if the Guarantee was called, he would pay it in his stead [T2/115/2-4]. However, he maintained that he did so not expecting the Guarantee to be called because he believed it would be repaid by the Borrowers [T2/115/22, T2/116/5, T2/116/24 to T2/117/1]. JVC contends that this shows Mr Horlick had intended to repay the loan all along from the fundraising. However, that undertaking and the alleged representations JVC relies on for estoppel are two separate things. That was an undertaking which he gave to Richard Horlick, not to JVC. Moreover, as is clear from the line after the undertaking and Mr Horlick's evidence, he made that undertaking with the expectation that it would never come to fruition because he understood that the borrowers under the March 2012 Agreement were responsible for repayment and would repay.

51. JVC says that the delay in the sending of the demand for payment until February 2019, whereas the March 2012 Loan was repayable within 1 year, is evidence that the real arrangement was not what had been set out in the March 2012 Loan document. JVC also relies on the fact that its first response was to say that it believed Richard Horlick had paid under the Guarantee. The answer to this point is, as Mr Horlick explained in his witness evidence, that a demand for repayment was not made earlier due to the commercial relationship that existed between the parties. In any event, delay by itself cannot operate as a waiver by reason of Clause 13.3 of the March 2012 Agreement.

52. If it is the case that the reason why the March 2012 agreement was signed was due to a misrepresentation by Mr Cavaco, or breach of duty by him, that is a matter between him and JVC. There are Part 20 contribution proceedings brought by JVC against Mr Cavaco. What happens in those proceedings does not affect the rights between the Claimants and JVC. Issue 4 is that if JVC is found liable on the March 2012 Loan, it will seek a contribution from Mr Cavaco: see the Defendants' skeleton paras. 24-25. If JVC is found liable on the March 2012 Agreement, its liability is joint with Mr Cavaco. JVC submits that is entitled to a contribution from Mr Cavaco for 50% of any sums paid to the Trust on the claim: *Chitty on Contracts* 34th Ed., para. 19-027. JVC issued a contribution notice with permission. On 22 January 2021, JVC served the contribution on Mr Cavaco by email (again with permission). JVC notified him of this trial, but he has not sought to take any part in it. Since JVC has been found liable on the March 2012 Loan, there is no reason not to make a contribution order against Mr Cavaco. The contribution claim appears to extend to restitution and/or damages so that the claim is that Mr Cavaco is liable to provide in effect an indemnity in respect of the entirety of the liability of JVC under the March 2012 Loan. The Court seeks assistance as to the form of the order sought, as to whether it is as per the skeleton argument or the contribution notice.

53. Returning to the words of Robert Goff LJ and Leggatt J cited above, and the importance of verifying oral witness evidence by reference to contemporaneous documents, there is no contemporaneous written correspondence which supports the case that the loan is not repayable. The only documents are the March 2012 Agreement and the Guarantee themselves, which are unambiguous in allocating liability for repayment with Mr Cavaco and JVC.

54. The express terms of the 2012 March Agreement do not include any of the highly significant and unusual alleged restrictions on the rights of the lender against the borrowers, despite those written terms being detailed and concluded by commercial parties represented by lawyers. If the parties had intended any such restrictions, they would have been included in the written terms. On the contrary, the express terms of the 2012 March Agreement are entirely inconsistent with the existence of such alleged restrictions. If the alleged restrictions had been agreed, they would have rendered otiose the March 2012 Agreement.

55. As regards the Guarantee itself, there has been discussion that its existence did not alter the analysis because of the ability of the guarantor to seek an indemnity or to be subrogated to the rights of the creditor against the debtor. It is not necessary to consider this further except to say that the guarantee is in the nature of a secondary liability, and the primary liability was that of the debtor, in this case JVC. The Guarantee has not been paid. It follows that the existence of a guarantee of a loan (or any representation that a guarantee exists or will be given) does not imply, whether unequivocally or at all, any representation, statement or warranty that a borrower will not be required to fulfil its explicit contractual obligations. In any event, if JVC's case were correct, it would mean that the parties agreed detailed express terms for a loan in the March 2012 Agreement with the intention that the borrowers would not be liable to repay the "loan". None of this makes any commercial sense.

56. The Claimants went on to invoke Clause 13.2 of the March 2012 Agreement, which explicitly provides that *"any waiver of any right or consent given under this agreement is only effective if it is in writing and signed by the waiving or consenting party"*. Strictly, a waiver clause may be different from a no representations clause or a no reliance on representations clause in that the former is predicated upon terms agreed at the start which are forgone usually after the agreement has been made, whereas the latter is usually based often on qualifications to the terms of the agreement from before the agreement came into existence. The Defendants note that unusually there were none of the latter clauses designed to negative representations or reliance on them. It may be that Clause 13.2 does not apply in the circumstances of this case. It does not matter. The alleged representations are fundamentally at odds with the March 2012 Agreement, it makes no commercial sense to sign such an agreement if such representations were made. It is inconceivable if such terms were made that there is no written reference to the same within the March 2012 Agreement or other contemporaneous documents.

57. I find that no representation asserted by JVC was in fact made by Mr Horlick. It follows that Issue 1.1 is resolved in the negative. The question of inducement in Issue 1.2 therefore does not arise. The alleged estoppel/collateral contract referred to in Issue 1.3 is rejected for all the above reasons.

IV The Second Defence: Release

Was there a release, waiver or discharge of the March 2012 Agreement as result of the June 2015 Agreement?

Issue 2.1: Did Mr Horlick act as the Trust's agent in entering into the June 2015 Agreement?

Issue 2.2: Was the March 2012 Agreement waived, released, discharged, satisfied or compromised by the June 2015 Agreement?

Issue 2.3: Does Clause 2.2 (of the March 2012 Agreement) apply and/or have the effect of preventing release, waiver, discharge, compromise or satisfaction of JVC's liability under the March 2012 Agreement?

(a) JVC's submission

58. JVC submits that their repayment obligations under the March 2012 Agreement were released by the June 2015 Agreement, which, it is said, subsumed the March 2012 Agreement.

59. Under the June 2015 Agreement, Mr Cavaco was named the borrower, Richard Horlick was named as Lender 1 and Mr Horlick was named as Lender 2. CMdC was named as the guarantor.

60. The June 2015 contained the following recitals:

> ***"BACKGROUND***
>
> *a) On the 29th July 2011 Lender 1 and Lender 2 agreed to provide the Borrower with a secured term loan facility of up to £200,000.00 (the Original Facility Agreement) in accordance with, and subject to, the terms of that Agreement. In consideration for the provision of the loan facility the Borrower agreed to provide security for the Loan in the form of the shares in Pathfinder Minerals Plc and in the form of an Option Agreement (as defined below).*
>
> *b) On the 9th November 2011 the parties entered a deed of variation whereby the parties agreed to increase the facility amount to £240,000 (the "First Facility Variation").*
>
> *c) During the period 8 February 2012 to 16 June 2015 further advances were made in the total aggregate amount including pursuant to the Original Facility Agreement and the First Facility Variation of £1,213,020.*
>
> *d) The Guarantor has been a beneficiary of the advances made and has agreed to act as a guarantor of the Debt in accordance with this agreement by entering into the guarantee and indemnity set out in clause 22.*
>
> *e) The parties intend to enter a deed of variation and guarantee on the terms of this agreement."*

61. The term "Original Facility Agreement" was defined as: "Original agreement signed by the Lenders and the Borrower on the 29th July 2011."

62. The June 2015 Agreement contained the following clauses so far as relevant:

> *"**2. THE FACILITY***
>
> *The Lenders have made available to the Borrower a secured sterling term loan facility of a total principal amount of up to and not exceeding £1,500,000.00 on the terms, and subject to the conditions, of this agreement.*
>
> *It is acknowledged by the parties that the Borrower has drawn down an aggregate amount of £1,453,020 as at the date of this agreement.*
>
> *It is further acknowledged by the parties that CMC has received significant benefit from the advances made to the Borrower and has therefore agreed to guarantee the obligations of the Borrower on the terms herein.*
>
> …
>
> ***4. DRAWING***
>
> *4.1 It is noted that on the date of this agreement the amount of £1,453,020 has been drawn.*
>
> …
>
> ***20. VARIATION***
>
> *20.1 With effect from the Variation Date the parties agree to amend the Original Facility Agreement. The parties intend that as of the Variation Date this deed shall supersede the Agreement and all previous variations."*

63. JVC relies upon the calculation of the aggregate amount of £1,453,020. It points to a schedule prepared by or on behalf of the Claimants. It includes a sum of £767,549.48 paid by Richard Horlick between 4 August 2007 and 10 June 2011 and a sum of £286,353.60 paid by Mr Horlick between 1 March 2008 and 13 June 2011. It includes convertible loan notes of £239,980.00 and a sum of £9,137.00 paid by Mr Angus Kerr. Finally, it refers to Suzanna Gayford Trust: £150,000. Those sums total the aggregate sum of £1,453,020. Since the sum of £150,000 was paid pursuant to the March 2012 Agreement, JVC submits that the inclusion that sum of shows that the June 2015 Agreement was intended to subsume the March 2012 Agreement.

64. Mr Horlick accepted in his evidence that the sum of £150,000 must have been a reference to the loan facility under the March 2012 Agreement [T3/16/4-13]. The relevant part of his evidence was as follows:

> *"At 280G we see the total: 1453020.08; do you see that?*
>
> *A. Yes.*
>
> *Q. And that sum includes the 150,000 that is recorded as being from the trust, doesn't it?*
>
> *A. It does, yes.*
>
> *Q. So the figure that appears in the June 2015 loan, about what is an agreed draw down, includes the 150,000 that had been paid under the trust loan, doesn't it?*
>
> *A. It does, yes."*

65. JVC submits that although the Trust was not a party to the June 2015 Agreement, Mr Horlick, one of the trustees was a party. As one of two trustees, he is able to discharge a debt subject to the terms of the trust deed which has not been produced. Absent this, the Court should assume that he had that authority. It does not matter that Mr Horlick's capacity as trustee was not mentioned in the June 2015 Agreement. The acknowledgment of the indebtedness of the sum of £1,453,020, and the supporting documentation showing that this includes the sum of £150,000 shows that Mr Horlick has as trustee rolled over this sum into the June 2015 Agreement.

66. JVC submits that the effect was to discharge the March 2012 Agreement and to subsume it into the June 2015 Agreement. Whilst JVC, the joint borrower under the March 2012 Agreement was not a party to the June 2015 Agreement, it relies upon law to the effect that a joint or a joint and several debtor is automatically discharged if there is a release of the other debtor by the creditor. The law is summarised in Chitty on Contracts 34th Ed. at paras. 10-017 - 19-020 in a chapter written by Lord Burrows. Paras. 19-017 and 19-020 read as follows:

> *"19-017: The discharge of one joint debtor by a release in a deed or by accord and satisfaction discharges all, in accordance with the general principle that joint liability creates only one obligation; and the same is true, illogical though it may seem, if one joint and several debtor is so discharged. On the other hand, a covenant not to sue one joint or joint and several debtor does not discharge the others, though it may leave the covenantee liable to pay contribution to the other debtors, and thus deprive the covenant of some of its apparent effect.*
>
> *...*
>
> *19-020: In practice the difficulty normally arises from the fact that, in making the agreement, the parties have overlooked the*

> *position of co-debtors, and it is not clear whether the creditor intends to reserve their rights against them or not. If the agreement appears from its words to be a release and there are no words reserving rights against the other debtors, nor anything in the circumstances to rebut the prima facie meaning of words used, the agreement will release all the debtors; but it would seem that the courts lean in favour of other debtors not being discharged by construing the agreement as a covenant not to sue or as a release but subject to an implied reservation of rights against other debtors.*

67. JVC say that there was no reservation of rights in the June 2015 Agreement. Further, it says that Clause 2.2 of the March 2012 Agreement has no application because it merely gave permission to the Trust to invoke it, and that did not occur. Accordingly, upon making the release, there was no statement to the effect that the liability of JVC was not affected. It followed that the liability of JVC was discharged in accordance with the law set out above about the effect of a release on a joint or joint and several debtor.

68. As regards the wording of Clause 20.1 of the June 2015 Agreement, this refers to the "Agreement" being superseded. The word "Agreement" is not defined in the June 2015 Agreement. Clause 20.1 does refer to the Original Facility Agreement which is defined as the March 2012 Agreement. JVC submits that the term "the Agreement" is not limited to the Original Facility Agreement. The Court can and should interpret "the Agreement" as meaning "all of the previous loan agreements". In the context of how the figures were worked out for the purpose of the acknowledgment of indebtedness, the Agreement included the March 2012 Agreement.

(b) The Claimants' submission

69. The Claimants submit that the there was no release of the liability of JVC by the June 2015 Agreement for the following reasons or any of them.

70. First, the trustees on behalf of the Trust were the lenders under the March 2012 Agreement, but they were not the lenders under the June 2015 Agreement. Although Mr Horlick was a lender under the June 2015 Agreement and was one of two trustees in the March 2012 Agreement, there was nothing in the June 2015 Agreement to indicate that he was acting in anything other than a personal capacity. Thus, he did not on behalf of the Trust release or vary the liability of any debtor under the March Loan Agreement. The alleged acknowledgment of the indebtedness was nothing of the sort. It was a schedule of internal workings between the Horlicks: it is not a part of the June 2015 agreement, and the inclusion of the sum of £150,000 did not affect the liability under the March 2012 Agreement.

71. Second, JVC was not a party to the June 2015 Agreement. There was no release agreed with JVC nor did the Lenders under the March 2012 Agreement communicate with JVC in such a way as to discharge them from liability or otherwise waive the liability. In that regard, the Claimants point to Clause 13.2 of the March 2012 Agreement which imposed formalities on any waiver which also has not occurred.

72. Thirdly, the June 2015 Agreement superseded the July 2011 Agreement expressly in Clause 20.1, but it did not supersede the March 2012 Agreement. The word "Agreement" in the second sentence of Clause 20.1 was in context a shorthand for the Original Facility Agreement, that is to say the July 2011 Agreement, mentioned in the first sentence of Clause 20.1. It was not a reference to the March 2012 Agreement. If it had been intended to supersede the March 2012 Agreement, it would have said so expressly.

73. Fourthly, the rule about the discharge of the other joint or jointand several debtors on the release of one of the debtors has no application because of Clause 2.2 of the March 2012 Agreement. This entitled the lenders of the March 2012 Agreement to release or compromise a liability of Mr Cavaco without affecting the liability of JVC. The suggestion that this is a permission, which was not exercised on the discharge of Mr Cavaco, is wrong. It does not require any further action because it has the effect that if there is a release it does not affect the liability of JVC.

(c) Discussion

74. It is important in order to consider this defence to consider first who were the parties to the various agreements. The three critical agreements are the July 2011 Agreement, the March 2012 Agreement and the June 2015 Agreement. The parties were named as follows:

    (i) July 2011 Agreement: Richard Horlick as Lender 1, Mr Horlick as Lender 2 and Mr Cavaco as the Borrower;

    (ii) March 2012 Agreement: Mr Gayford and Mr Horlick as trustees of the Trust were the Lender and Mr Cavaco was Borrower A and JVC was Borrower B, and their liability was expressed to be joint and several as set out above;

    (iii) June 2015 Agreement: Richard Horlick as Lender 1, Mr Horlick as Lender 2, Mr Cavaco as the Borrower and the Third Defendant CMdC as guarantor.

75. It is therefore to be noted that the parties to the July 2011 Agreement and the June 2015 Agreement were the same, save only that there was added to the June 2015 Agreement a guarantee by CMdC. However, the parties to the March 2012 Agreement were different. There are two differences, namely:

(i) The lenders under the March 2012 Agreement were Mr Gayford and Mr Horlick as trustees of the Trust, whereas the lenders under the other agreements were Richard Horlick and Mr Horlick personally;

(ii) JVC was a borrower (on a joint and several basis) under the March 2012 Agreement, but was not a party to the other agreements.

76. Despite this lack of commonality of parties, the effect of the argument of JVC is the following:

(i) Although it was not named a party to the June 2015 Agreement, it was released from the obligations under the March 2012 Agreement;

(ii) Although the trustees were not named as parties to the June 2015 Agreement, Mr Gayford not being a party and Mr Horlick being named only in a personal capacity, Mr Horlick was able to and did release the obligations under the March 2012 Agreement.

77. The June 2015 Agreement expressly refers to the July 2011 Agreement entered into with Mr Cavaco as the "Original Facility Agreement", and is mentioned at recitals (a)-(b). Clause 20.1 is specific in the first sentence that the parties intend to amend the Original Facility Agreement (that is the July 2011 Agreement). When in the second sentence, there is a reference to superseding the Agreement, the following is to be noted. The term "Agreement" by itself is not a defined term of art. In context, "the Agreement" is a reference to "the Original Facility Agreement" which is mentioned earlier in clause 20.1. The intention of the parties was by the first sentence to amend the Original Facility Agreement (that is the July 2011 Agreement), and by the second sentence for it and any variations to it to be superseded by the June 2015 Agreement. If it had been the parties' intention for the June 2015 Agreement to subsume the March 2012 Agreement as well, the June 2015 Agreement could and would have provided for this expressly as it did in respect of the July 2011 Agreement. The absence of any express reference to the March 2012 Agreement indicates that the June 2015 Agreement was not intended to have this effect.

78. It is also a natural construction because of the commonality of parties in the July 2011 Agreement and the June 2015 Agreement, the Horlick cousins as the two lenders and Mr Cavaco as the borrower (albeit with the addition of the guarantee in the June 2015 Agreement). By contrast, the March 2012 Agreement had a different lender, namely Mr Gayford and Mr Horlick as trustees of the Trust, and it had an additional borrower, namely JVC (in addition to Mr Cavaco).

79. On the subject of a different lender, since the Trust was not a party to the June 2015 Agreement, it did not agree to its rights under the March 2012 Agreement being waived or compromised or subsumed through the June 2015 Agreement. JVC contends that the Trust was able to release its obligations because Mr Horlick was a lender under the June 2015 Agreement. Assuming that that was the case, on the face of the June 2015

Agreement, and indeed the July 2011 Agreement, Mr Horlick was acting as a lender in his personal capacity, not as a trustee of the Trust.

80. It is therefore not an answer that there are circumstances where a trustee can act by themselves without the other trustee (e.g. pursuant to a term of a trust deed or if there is acquiescence of a fellow trustee). It is also the case that a joint creditor can release a debt and bind the other creditor: see Chitty on Contracts 34th Ed. para. 19-046. Even assuming that Mr Horlick did have the authority of his fellow trustee, Mr Gayford, or could effect a release of the debt under the March 2012 Agreement by himself, there is no indication that he was doing this by the June 2015 Agreement. That is apparent from the following matters, namely when he was acting on behalf of the Trust in the March 2012 Loan Agreement, he did so (a) naming the Suzanna Gayford Horlick Grandchildren's Trust, and (b) together with his fellow trustee Mr Gayford. By contrast, when Mr Horlick executed the June 2015 Agreement: (a) there was no reference to the Trust, (b) Mr Gayford was not a party, and on the contrary, (c) Mr Horlick was named as a lender in a personal capacity with his cousin Mr Richard Horlick, just as he was in respect of the July 2011 Agreement (referred to as being varied by the June 2015 Agreement). It follows that any principles of law of the ability of a single joint creditor to make a release or the ability of a trustee to act in certain circumstances without their fellow trustee have no application to the facts of the instant case.

81. JVC was not a party to the June 2015 Agreement. Mr Cavaco was a borrower, but JVC was not named as such. Thus, even if, contrary to the foregoing, the Trust released Mr Cavaco from the March 2012 Agreement, it did not release JVC which was not a party to the same. There has to be consideration as to whether a release of a joint and several debtor gives rise to a release of the other debtor: see Chitty on Contracts 34th Ed. at para. 17-017 – 17-020. This did not occur because of the agreement in Clause 2.2 of the March 2012 Agreement referred to above, namely that the lender may release either of the borrowers without affecting the liability of the other borrower. Hence, if, contrary to the foregoing, the Trust released Mr Cavaco from the March 2012 Agreement, this did not affect the liability of JVC under that agreement.

82. The response to this point by the Defendants is that Clause 2.2 says that the lender may release either of the borrowers without affecting the liability of the other borrower, but there is no evidence here that the Trust did not here release both. I reject that submission. The natural meaning and effect of Clause 2.2 is that a lender is given the power to release or compromise the liability of one of the borrowers, without affecting the liability of the other borrower. The lender does not then at the time of a subsequent release of one borrower have to seek a further agreement to this effect from either borrower. Nor does the lender have to say expressly that "I am releasing borrower A, but I am not releasing borrower B". Clause 2.2, which contains wording commonly found in loan agreements, makes this unnecessary, such that the liability of one borrower is not discharged or otherwise affected by the release of or the compromise with the other. Accordingly the Defendants' suggested construction of Clause 2.2 is rejected.

83. If the Defendant's case were correct, then the effect would be that at least in respect of the obligation to pay the sum of £150,000, that was kept alive for Mr Cavaco, but that the obligation vanished as regards JVC. It would have been an odd consequence. In fact, there was no such windfall for JVC for all of the above reasons including:

(i) the fact that there was no release of the March 2012 Agreement since due to Clause 20.1, it was only the July 2011 Agreement that was subsumed;

(ii) in any event, the Trust did not make a release because it was not a party to the June 2015 Agreement;

(iii) even if there had been a release of the obligation of Mr Cavaco under the March 2012 Agreement, it did not affect the obligation of the joint borrower, JVC, due to the wording of Clause 2.2 of the March 2012 Agreement.

84. I also reject the submissions that as regards Mr Cavaco at least, the March 2012 Agreement must be subsumed by the June 2015 Agreement because otherwise he might be liable both under the March 2012 Agreement and for the same sum of £150,000 under the June 2015 Agreement. The answer to this would be that if the schedule was excessive because it included in error the sum of £150,000 despite the fact that that sum remained due under the March 2012 Agreement, then the sum payable or enforceable by Mr Cavaco under the June 2015 Agreement might require adjustment so as to prevent double recovery of the same sum. In any event, there are a number of points lacking clarity even after a trial including:

(i) The schedule is referring to further advances from 8 February 2012 to 16 June 2015 in the sum of £1,213,020 including under the Original Facility Agreement and the First Facility Variation, but the schedule lists payments between 4 August 2007 and 13 June 2011. The schedule does not evidence how these payments were made, or how it relates to the sums identified above from the schedule.

(ii) There are other sums contained in the schedule which are not brought into the calculation comprising hundreds of thousands of pounds of interest. It is not apparent what happened to those sums.

(iii) The sum of £150,000 was not the entirety of the sums due under the March 2012 Agreement: by the time of the June 2015 Agreement, there was also due the Redemption Premium of £75,000 and interest at 6% above base rate of the Bank of England from a year after the March 2012 Agreement, namely from 7 March 2013 both on the Repayment of £150,000 and on the Redemption Premium.

(iv) There is no evidence that the schedule was anything other than an internal document between Mr Horlick and Richard Horlick or that it crossed the line to Mr Cavaco. The schedule was not a part of the June 2015 Agreement.

85. It therefore follows that there was no release, waiver or discharge of the March 2012 Agreement as result of the June 2015 Agreement. In respect of the three issues referred to above, the answers are the following. First, in respect of Issue 2.1, Mr Horlick did

not act as the Trust's agent in entering into the June 2015 Agreement. In respect of Issue 2.2, the March 2012 was not waived, released, discharged, satisfied or compromised by the June 2015 Agreement. In respect of Issue 2.3, Clause 2.2 of the March 2012 Agreement applies and has the effect of preventing the release, waiver, compromise or satisfaction of JVC's liability under the March 2012 Agreement.

V The Third Defence: Secret Commissions

Did the payments amount to a secret commission and if so, is JVC entitled to rescission?

Issue 3.1: Did Mr Cavaco owe JVC a fiduciary duty of loyalty or was he otherwise someone to whom the bribery rule applied?

Issue 3.2: Were Mr Horlick/Richard Horlick aware of facts giving rise to the alleged fiduciary duty or the application of the said rule by Mr Cavaco to JVC?

Issue 3.3: Was JVC actually aware, or should knowledge of the payments be imputed to it? If unaware, did the Claimants know or ought to have known?

Issue 3.4: Did the payments amount to a secret commission? If so, is JVC entitled to rescission?

(a) The payments

86. By way of amended counterclaim in 2021, a claim for rescission of the March 2012 Agreement was made. It relates to the payments being made from the Smithfield's ledger for client account HOR002/007 from the July 2011 Agreement which are said to amount to secret commissions. These payments specifically were as follows:

(i) £10,000.00 and £30,000.00 made to Mr Cavaco's wife, Sandra Cavaco on 10 August 2011 and 11 November 2011 respectively;

(ii) £21,606.21 and £9,500.00 made to José Figueiredo, an associate of Mr Cavaco, on 10 August 2011 and 11 November 2011 respectively;

(iii) £27,782.84 and £63,000.00 made to Gil de Freitas, another associate of Mr Cavaco, on 10 August 2011 and 11 November 2011 respectively; and

(iv) £10,000.00 each made to Mr Cavaco on 13 September 2011 and 3 February 2012.

87. JVC seeks to say that prior to the March 2012 Agreement, these were private payments made by the Claimants to Mr Cavaco and his associates which were not declared to JVC. It is submitted that they are to be treated as secret commissions entitling JVC to rescind the loan.

88. JVC submits that Mr Cavaco occupied a position in which he was under a duty to provide information, advice or recommendation to JVC, albeit that he was not a director. It was submitted by JVC that he was 'akin to an agent', acting as a representative of JVC. This appears to be based on General Veloso's evidence that he trusted Mr Cavaco and he was expected to act for the family. There is evidence from Mr Kerr that Mr Cavaco was a trusted advisor of the Veloso's and that General Veloso had a trusted relationship with him, and that he was the trusted adviser of the Veloso's. I am not satisfied that this is the full story.

89. The fuller background is as follows:

(i) The July 2011 Agreement under which Mr Cavaco was the sole borrower provided that the money borrowed was for the purposes of incorporating new companies to pursue the mining projects. It was known when this agreement was made that Mr Cavaco was or was to be a 50% shareholder together with the Veloso's.

(ii) On 13 January 2012, JVC signed the legal services engagement letter with Smithfield Partners which states *"You hereby agree and confirm that we shall take your instructions relating to the Dispute from Diogo Cavaco only and such instructions from Mr Cavaco will be deemed instructions from all of you"*.

(iii) The March 2012 Agreement made specific reference back to the July 2011 Agreement. Under the March 2012 Agreement, the moneys lent were paid to an account of the borrowers, namely Mr Cavaco and JVC jointly in a designated account of Smithfield.

(iv) The moneys lent were intended to be used for the litigation and/or the mining projects.

90. It was therefore known to the Veloso's that the capacity in which Mr Cavaco was entering into the various agreements was as borrower. Further, in connection with PMSA, the Veloso's and Mr Cavaco each had 50% interests of their own.

91. Mr Cavaco was a party to the various loan agreements, as a principal and as borrower. As regards the March 2012 Agreement, both JVC and Mr Cavaco were acting for their own financial benefit (and at their own financial risk).

92. Mr Cavaco was also a director and a significant shareholder in the project companies, including the company which originally held the relevant mining licence (CMdN) and the company to which the licence was transferred (PMSA). Mr Cavaco was directly involved in all aspects of developing the commercial opportunity, fundraising and day to day management of the project - for his own benefit, not solely that of JVC. All of this was known to the Veloso's who together with Mr Cavaco, were equal shareholders in PMSA.

(b) The law

93. The legal definition of a bribe was identified by Slade J (as he then was) in *Industries & General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573 as follows:

> *"For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent. Those three are the only elements necessary to constitute the payment of a secret commission or bribe for civil purposes."*

94. In *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm), Christopher Clarke J (as he then was) commented on the character of a bribe as follows:

> *"106. The essential character of a bribe is, thus, that it is a secret payment or inducement that gives rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal. The bribe may have been offered by the payer or sought by the agent. There is no need to establish dishonesty or corrupt motives. This is irrebuttably presumed - Re A Debtor [1927] 2 Ch 367 at 376 (per Scrutton LJ – "the court ought to presume fraud in such circumstances"). A bribe encompasses not just a payment of money but the conferring of any advantage or benefit, and may be an actual benefit or merely the promise of a benefit held out by the payer or an expectation of one[].The motive for the payment or inducement (be it a gift, payment for services or otherwise) is irrelevant. In Fiona Trust v Privalov [2010] EWHC (Comm) at para 73 Andrew Smith J contemplated that moonlighting for a person engaged in transactions with the principal might well give rise to a conflict between the agent's interest and duty and that the reward for his services might count as a bribe."* (emphasis added)

95. The Court of Appeal recently considered the circumstances in which a civil remedy is available upon the finding of a payment of secret commissions and/or bribery in *Wood v Commercial First Business* [2021] EWCA Civ 471; [2021] 3 WLR 395. The Court was asked to consider whether a borrower was entitled to rescission of a loan contract and its accompanying mortgage where the broker who had arranged the secured loan had received an undisclosed commission from the lender to the contract. David Richards LJ stated as follows:

> *"47. The present cases do not involve relationships, such as trustee and beneficiary or director and company, which without more clearly qualify as fiduciary. They fall within a broad and common set of relationships which involve a contractual or other legal duty to provide information or advice or recommendations. The precise scope of the duties of the brokers in the present cases, as in all cases, will require examination by reference to the terms of their engagement.*
>
> *48. To ask in cases of this kind whether there is a fiduciary relationship as a pre-condition for civil liability in respect of bribery or secret commissions is, in my judgment, an unnecessarily elaborate, and perhaps inaccurate, question. The question, I consider, is the altogether simpler one of whether the payee was under a duty to provide information, advice or recommendation on an impartial or disinterested basis. If the payee was under such a duty, the payment of bribes or secret commissions exposes the payer and the payee to the applicable civil remedies. No further enquiry as to the legal nature of their relationship is required.* (emphasis added)
>
> …
>
> *51. I should add that in most of the cases the law on bribery and secret commissions is referred to as applying to payments to "agents", whether or not they are said to owe fiduciary duties. As will appear, I doubt whether the law on bribery is restricted to an "agent" properly so called, by which I mean a person authorised or ostensibly authorised to act on behalf of another. It is enough, in my view, that the person who is offered or paid a secret commission is, as Christopher Clarke J put it in Novoship (UK) Ltd v Mikhaylyuk [2012] EWHC 3586 (Comm) at [108], "someone with a role in the decision-making process in relation to the transaction in question e.g. as agent, or otherwise someone who is in a position to influence or affect the decision taken by the principal"."*

(c) Discussion

96. Mr Horlick did not make the above payments to Mr Cavaco personally for his benefit but for the purposes of the mining project. This was contained in the July 2011 Agreement in Clause 3 which read "*The Borrower shall use all money borrowed under this Agreement for the purposes of incorporating the Newco and two additional companies or entities to pursue the Projects, including for the purposes of the CMC Project*." Similar wording was used in the March 2012 Agreement and in the June 2015 Agreement. From the facts known to the Claimants, the payments were not such as to give rise to a conflict of Mr Cavaco's personal interest and his duty to JVC. I therefore reject the submission of the Defendants (Supplemental Closing Submissions

para. 5) that the fact that Mr Cavaco was a borrower meant that the moneys were being paid to Mr Cavaco for his personal benefit.

97. Mr Horlick was asked about correspondence in which he was copied where Mr Cavaco had requested Smithfield to make payments of the loan facility to his wife and associates. Mr Horlick said that this seemed something Mr Cavaco was entitled to do as a director of CMdC for the mining project [T2/133/20 - T2/134/2, T2/143/14-17, T2/144/8-14]. He believed that the above mentioned payments were not gifts or unauthorised payments but comprised reimbursements or moneys otherwise due to be paid to Mr Cavaco, his wife and associates. It is submitted on behalf of the Defendants that it was implausible that Mr Horlick believed that moneys were paid to Mr Cavaco in respect of remuneration apparently on behalf of project companies, and that the answers show that he had no real basis for that belief and were an after-the-event invention. I reject that submission. I accept the evidence, and it came within the umbrella of the purpose of the loans, even if in fact Mr Cavaco actually misappropriated money for himself.

98. Mr Watson on behalf of the Defendants in closing submitted that the way Mr Cavaco had arranged these payments was *"incredibly unorthodox"* [T5/148/15], such that either Mr Horlick knew those payments were being made to Mr Cavaco personally, or he shut his eyes to what was going on [T5/149/5]. I do not accept this submission. Mr Horlick believed that this was part of the business arrangement for applying the loan facility to the mining project. If it was the case that the payments were being misappropriated by Mr Cavaco and his associates and did not arise out of expenses incurred or services carried out for the mining projects, this was not known to Mr Horlick or the Claimants, nor did he turn a blind eye to the nature of the payments.

99. In the light of the above, the payments in question were not secret commissions for the following reasons or any of them:

(i) The Claimants and Mr Horlick in particular believed that the payments were not intended for Mr Cavaco and his associates other than as part of the mining project from their principals for expenses incurred and/or services rendered. On this basis, the Claimants believed that the payments were for the benefit of principals discharging liabilities to Mr Cavaco and associates.

(ii) As regards the various loan agreements, Mr Cavaco was a borrower, and as regards the March 2012 Agreement, he acted as a joint borrower with JVC. Mr Cavaco did not act or appear to Mr Horlick to act as an agent of JVC in respect of the above agreements.

(iii) Even assuming that the Veloso's did not know of the specific payments until a later stage, they knew about the structure of the agreements and about the role of JVC in respect of the March 2012 Agreement. They knew that there were payments relating to the mining project and the litigation.

100. The Defendants have relied on Chapter 7 of Civil Fraud by Grant and Mumford. In that chapter, there is reference to the following:

   (i) "*The principal seeking a remedy as against the third party briber must establish that the third party knew that the recipient (or offeree) of the payment was the agent of the principal and that the payment was not going to be passed on to his principal. Knowledge here means actual knowledge or wilful blindness as to the true position…*" (para. 7-033).

   (ii) *"…There may be no covert relationship between the third party and the agent at all; indeed the third party's connection or means of communication with the principal may be solely through the agent. In such a case the third party may make a payment which he believes is for the benefit of the principal but which is in fact diverted by the agent to himself. In such a case, if the principal is to obtain any form of relief against the third party, then he must establish that the third party had actual knowledge of (or was wilfully blind to) the fact that the payment was not for the benefit of the principal…."* (para.7-034).

101. I am not satisfied that Mr Cavaco was an agent of JVC (Issue 3.1). In any event, if there was an agency, in view of the evidence of Mr Horlick about his knowledge and belief as regards the purpose of the payments which I accept and the evidence as a whole, I am not satisfied that the Claimants had any knowledge of payments behind a principal's back or of unauthorised dealings. From the perspective of the Claimants, there was no question of disclosure being required and the payments referred to above all appeared to be in respect of reimbursements of expenses and for services in connection with the mining project, and which the Claimants believed to be authorised (Issue 3.2).

102. The Defendants suggest that the July 2011 Agreement was a personal loan to Mr Cavaco to which Mr Horlick was a party and it was not a loan to project companies. It is therefore suggested that this was sufficient to give rise to any payments being secret commissions. I do not accept that submission. As noted above, the payments were not intended for Mr Cavaco and his associates other than as part of the mining project and payments made to them were for expenses incurred and/or services rendered.

103. I therefore conclude that the payments are not to be characterised as secret commissions. JVC is not entitled to rescind the March 2012 Agreement. It follows that I do not need to consider JVC's knowledge of the payments, affirmation or counter-restitution. However, there are matters raised in connection with rescission which provide further factual support for the absence of secret commission on the facts.

104. It is apparent from the evidence of JVC's witnesses that the existence of payments to Mr Cavaco came to the attention of JVC during 2015 e.g. the second witness statement of Ms Veloso paras. 58-60. General Veloso and Ms Veloso maintained that the first time they learned of the secret commissions was at an in-person meeting with Mr Horlick in General Veloso's office in Maputo in 2015 [T4/93/11-13]. In his evidence Mr Horlick maintained he had not visited Maputo in 2015, as shown by the lack of any stamp on his passport confirming he had been to Mozambique that year. I accept Mr Horlick's evidence and find that this meeting did not take place. Nevertheless, I accept

both the General's and Ms Veloso's evidence that they first learned of the July 2011 Agreement in 2015.

105. In cross-examination, Ms Veloso accepted that Mr Horlick had been open about payments to Mr Cavaco of USD 15,000 per month (although Mr Cavaco had not informed her or her father about this) [T4/95/1-15]. The practice of payments continued thereafter and there was no document instructing Mr Horlick to stop making such payments to Mr Cavaco or other persons [T4/97/1-18]. Despite this, JVC did not seek to rescind the March 2012 Agreement at that time: indeed, it was not until 4 March 2021, that is six years later, that rescission was claimed.

106. The Claimants go on in their skeleton arguments to say that after knowledge of alleged secret commissions, the relationship was continued whereby the borrowers, JVC and Mr Cavaco, continued to hold on to the moneys advanced, and further moneys were advanced by the Claimants to Mr Cavaco. Despite claiming to have been shocked when they discovered the existence of a loan to Mr Cavaco (e.g. the second witness statement of General Veloso para. 18), General Veloso and Ms Veloso continued to work with Mr Horlick and his cousin, instructing Mr Horlick to seek to find funding for the mining project without saying that the March 2012 Agreement was over. Ms Veloso allowed the payments to Mr Cavaco and/or his wife to stand, despite being told in an email dated 5 October 2015 that Mr Horlick was (i) paying USD 10,000 to PMSA; and (ii) paying USD 5,000 to Mr Cavaco's wife. Whether or not this amounted to an affirmation barring rescission, the fact that the Veloso's continued to work with the Claimants and did not seek rescission is supportive of the case that there was no secret commission.

107. There is a further point to add. The Defendants claim rescission on the premise that only the secret commission defence applies. Normally on a rescission, there must be provided counter-restitution, which is the disgorging of benefits received under the rescinded contract. JVC have only offered to repay £23,469.92 plus interest. JVC contends that since the Trust has the benefit of a judgment against Mr Cavaco and the benefit of Richard Horlick's Guarantee, its counter-restitution should be limited to the sum of £23,469.92 plus interest. JVC also submits that these limited payments were received by JVC and accordingly, only a limited amount should be repaid. This analysis is wrong. There was an advance to the borrowers, that is to JVC and to Mr Cavaco jointly. The fact that Mr Cavaco might have utilised the money for himself is a matter between him and JVC as joint borrower and was not within the knowledge of the Claimants. Further, there is no reason to impose the burden of the loan upon Mr Richard Horlick in the circumstances. Rescission should mean an unscrambling of the position, and not converting the secondary liability (the guarantee) into the primary liability. If the question of rescission had arisen, which it has not, JVC has failed to offer the repayment in full of the sum of £150,000 or to demonstrate that it has the resources to make this payment.

108. It therefore follows that I am satisfied that the payments were not secret commissions and that JVC is not entitled to rescission (Issue 3.4). The foregoing sufficiently answers the questions in Issue 3 to reject the defence based on secret commissions and rescission. For all of these reasons, each of the alleged defences is rejected, and the March 2012 Loan Claim succeeds.

VII The Expenses Claim

Is DCL entitled to claim reimbursement of certain expenses from PMSA under the Engagement Agreements?

Was the Engagement Agreement concluded on 12 March 2013? (Issue 5)

Are any expenses incurred after 12 March 2014 not in connection with the Engagement? If so, are such expenses irrecoverable (Issue 6)

Are any expenses incurred prior to 12 March 2012 not in connection with the Engagement? If so, are such expenses irrecoverable? (Issue 7)

Are claims in relation to any alleged expenses incurred prior to 14 October 2013 barred by s.5 of the Limitation Act 1980? (Issue 8)

Did DCL incur the expenses claimed and were they incurred in connection with the Engagement? (Issue 9)

109. DCL claims reimbursement of certain expenses from PMSA under an Engagement Letter dated 10 April 2012 ("the Second Engagement Letter") for £116,263.50 plus interest. DCL submitted a schedule of the expenses claimed. The expenses are from a period starting 1 January 2011 and ending 1 November 2015.

110. Clause 2 of the Second Engagement Letter required PMSA to reimburse DCL "*according to the invoices issued by DCL*" for all out-of-pocket expenses incurred by DCL "in connection with [the] Engagement". The full terms of Clause 2 were as follows:

> *Clause 2.1* ***"In addition to any Fees and regardless of whether any transaction is proposed or completed, [PMSA] shall reimburse DCL according to the invoices issued by DCL for all out-of- pocket expenses*** *(and any associated VAT which is not recoverable by DCL)* ***incurred by DCL in connection with our Engagement****. These expenses generally include, but are not limited to, costs associated with business class, travel and accommodation, document production, charges levied by regulators and stock exchanges and the fees and disbursements of lawyers and professional advisers retained by DCL with the prior approval of [PMSA] (which consent shall not be unreasonably withheld or delayed).*
>
> *Clause 2.2* ***"DCL will issue [PMSA] an invoice for such expenses incurred on completion of the Transaction, and DCL will, as soon as reasonably practicable, on the request of [PMSA], provide [PMSA] with reasonable substantiating documentation in respect of such expenses incurred at that date. These expenses will be reimbursed at Completion of the Transaction from the proceeds of the Transaction or if the***

> ***engagement is terminated in accordance with paragraph 11 of Schedule 1 within fifteen days of Termination.”*** (emphasis added)

111. PMSA objects to this claim. First, there are timing issues in that PMSA says that some of the expenses (a) predate the Engagement or (b) post-date the Engagement, and therefore are not covered by the Engagement Agreement. Second, there is a limitation issue in that some of the expenses are said to be time-barred for limitation. Third, the Engagement Agreement was in connection with an equity fundraising expected to be a minimum of US$30m for PMSA (“the Transaction”). The expenses to be paid were for all out-of-pocket expenses incurred by DCL “*in connection with [DCL’s] Engagement*”. The Engagement was “*the terms of [DCL’s] engagement in respect of the Transaction*.” PMSA says that DCL has failed to prove the expenses were incurred in connection with the Engagement or the Transaction.

(a) Timing of the expenses

112. At the outset, one issue (Issue 5) which arose in connection with the timing of the expenses was when the Second Engagement Letter was actually concluded. This is because the date of General Veloso’s and Mr Cavaco’s signatures is printed as 12 March 2013. During the course of the trial, it seemed to become common ground that this must have been the date that the Second Engagement Letter was concluded, and I find as such.

(b) Are any expenses incurred prior to 12 March 2012 not in connection with the Engagement? If so, are such expenses irrecoverable? (Issue 7)

Expenses said to pre-date the Engagement

113. PMSA contends that DCL’s expenses prior to 3 April 2012 pre-date the first Engagement Letter and so cannot be expenses incurred “in connection with [the] Engagement”. I do not accept this submission. The first paragraph of the 3 April 2012 Engagement Letter sets out the purpose of the letter, which was “to confirm the terms of our engagement in respect of the Transaction (“the Engagement”)”. That wording presupposes that there was already an engagement, and the letter is confirming the precise terms of that engagement. It does not act as the commencement of the Engagement.

114. Further, that interpretation is consistent with the nature of the Engagement. The Engagement was for DCL to act as PMSA’s advisor, which DCL had already been doing since 2011. Indeed, clause 1.4 of the 3 April 2012 Engagement Letter, in defining the Success Fee, states that the Success Fee was payable “in lieu of financial advice provided by DCL from the period 24 October 2011 to date and until completion of the Transaction”. PMSA submits that this does not say that this financial advice was a part of the “Engagement”. I do not accept that point. Elsewhere in the Engagement

Agreement at Clause 1, it is provided that that "during the term of our Engagement DCL will provide the Company with financial advice and assistance in connection with the Transaction…" There is no reason to believe that the financial advice referred to in Clause 1 was any different from the financial advice in Clause 1.4.

115. It follows that expenses claimed before the date of the Engagement Agreement are not on this timing ground rejected, provided that they were not before 24 October 2011. There were three expenses before that time, which are rejected on this ground. They were as follows:

(a) "Azul Claro invoice", 1 January 2011 - £3,960.00

(b) "Diogo dinner", 1 June 2011 - £336.19

(c) "Millennium Hotel", 22 June 2011 - £472,50

Total: £4768.69

116. They are also rejected because they precede the incorporation of PMSA in September 2011. That having been said, it is necessary to scrutinise with care at the character of expenses particularly before the formalisation of the Engagement Agreement in order to ensure that they are in connection with the Transaction and are part of the Engagement by PMSA of the Claimants. The burden is on DCL to demonstrate that this is the case.

(c) Are any expenses incurred after 12 March 2014 not in connection with the Engagement? If so, are such expenses irrecoverable (Issue 6)

Expenses said to post-date the Engagement

117. PMSA also contends that expenses incurred after 12 March 2014 post-date the Engagement because of the provisions in the Engagement Agreement regarding termination. This provides as follows: Schedule 1, Paragraph 11.1 "*This Engagement, unless previously terminated or extended in writing, will expire twelve months after the date this Letter is countersigned by the Company.*" The letter was counter-signed by PMSA on 12 March 2013. PMSA submits that there was no extension in writing, and accordingly termination was one year after 12 March 2013, namely on 12 March 2014.

118. PMSA also invokes Schedule 1, Paragraph 14.4 which provides as follows:

"Amendments and waivers of the terms of this Letter shall only be effective if executed in writing by both parties." It submits that there is no scope for inferring an extension, absent an extension in writing.

119. The Claimants' case is that the Engagement continued by conduct in that PMSA knew that work by DCL to arrange financing continued after 12 March 2014 and encouraged such continuing work. Alternatively, PMSA is estopped from relying on the expiry of the Engagement because the parties operated on a shared assumption that the

Engagement continued and it would be unconscionable to resile from a shared assumption: see paras. 3b and 3c of the Amended Reply to the Defence of the PMSA.

120. PMSA say that this informal continuation of the Engagement Agreement was excluded by Schedule 1, Paragraph 11.1 and Paragraph 14.4, requiring an extension to be in writing and precluding an informal extension by conduct or estoppel: see Chitty 34th Ed., para. 25-047. PMSA also says that an informal extension requires unequivocal conduct on DCL's part. The conduct after March 2014 can be seen as an attempt by Mr Horlick to receive a valuable stake in the project.

121. I accept the Claimants' case in this regard to this extent, namely that the Engagement Agreement continued by conduct and/or that there was an estoppel. If and to the extent that DCL continued putting time and expense into fundraising for PMSA, PMSA knew that work to arrange financing continued after 12 March 2014 and encouraged such continuing work. During cross-examination, General Veloso was asked about Mr Horlick's continuing efforts in 2015 to raise funding. General Veloso accepted that it was *"my understanding was that he was still working to try to get funding for the project"* [T4/84/11 – T4/85/11]. As for the argument that an informal extension was not available due to the terms of the Engagement Agreement, the matters referred to in Chitty on Contracts 34th Ed., para. 25-047 cited by PMSA include a recognition that in an appropriate case, *"…there may come a point where actions of the parties in reliance upon the non-compliant oral variation are such that they will trigger the operation of an estoppel the effect of which will be to prevent a party from relying upon a contract term which lays down conditions for the formal validity of a variation."* [The Editors cite *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] A.C. 119 at para. 16].

(d) Limitation

Are claims in relation to any alleged expenses incurred prior to 17 October 2013 barred by section 5 of the Limitation Act 1980? (Issue 8)

122. PMSA also contends that expenses incurred prior to 14 October 2013 are not payable because they are barred by section 5 of the Limitation Act 1980. In order to contextualise the importance of this issue, the majority of the expenses claimed were incurred prior to 14 October 2013. If PMSA's contention is correct, the claim for the majority of the expenses incurred and/or paid by the Claimants from time to time was statute barred.

123. The opening words of Clause 2.1 of the Engagement Agreement made clear that *"regardless of whether any transaction is proposed or completed",* PMSA *"shall reimburse".* PMSA submitted by reference to a number of cases that subject to contrary wording, the invoice is not a condition precedent of the cause of action. The starting point is that the cause of action accrues on the service being provided or in the instant case upon the expenses being incurred or paid by the Claimants. The submission of PMSA is that there was nothing sufficiently clear in Clauses 2.1 and 2.2 of the Engagement Agreement to rebut this starting point.

124. The Claimants submit that the reference to invoices in Clause 2.1 has as its effect that a condition precedent to payment was the issue of invoices, and that the invoices were all within the limitation period, being issued in 2016. In the alternative, the Claimants submit that the effect of Clause 2.2. is that payment was not due until the events set out therein, namely completion or the termination of the Engagement Agreement in accordance with paragraph 11 of the Schedule.

125. Attention was drawn by PMSA to recent cases which had ruled about the starting point. The case law was summarised by Jacobs J in the recent case of *Consulting Concepts International Inc v Consumer Protection Association* [2022] EWHC 461 (Comm) *"Consulting"*) (Permission has been given to appeal, but the legal summary is a useful summary of the case law cited.) At paras. 57-58 of *Consulting*, Jacobs J said the following:

> *57. "The essential question which arises is whether CCI's cause of action was complete (i) at the time when the work covered by each invoice was performed, as CPA contends; or (ii) once an invoice had been issued and 90 days thereafter had elapsed, as CCI contends. On that issue, I was referred to the following authorities by the parties: Coburn v Colledge [1897] 1 QB 702 (CA); Sevcon Ltd v Lucas CAV Ltd [1986] 1 WLR 462 (HL); Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [2005] EWCA Civ 814; Legal Services Commission v Henthorn [2011] EWCA Civ 1415; JJ Metcalfe v Dennison (6 December 2013, [2013] 12 WLUK 224, HHJ Raynor QC in the Manchester County Court); ICE Architects Ltd v Empowering People Inspiring Communities [2018] EWHC 281 (QB) (Lambert J) ("Ice"); Hirst and others v Dunbar and others [2022] EWHC 41 (TCC) (Eyre J) ("Hirst"). I have also considered the judgment of HHJ Coulson QC in Birse Construction Ltd v McCormick (UK) Ltd [2004] EWHC 3053 (TCC), which is referred to in some of these cases.*
>
> *58. The judgments of Lambert J in Ice and Eyre J in Hirst contain a detailed review of the authorities in this area, and it is not necessary for me to carry out a similar exercise. The significant points which emerge from those judgments, and the preceding case-law, can be summarised as follows.*
>
> > *i) There is an established principle that, in the absence of any contractual provision to the contrary, a cause of action for payment for work performed or services provided will accrue when that work or those services have been performed or provided. In such circumstances, the right to payment does not depend upon the making of a claim for payment by the party that provided the work or services.*
> >
> > *ii) It is a question of construction whether the terms of the contract produce a different result. The date of the accrual of a cause of action for sums due under a contract for work or*

> *services will therefore ultimately depend upon the terms of the contract.*
>
> *iii) Contracts will frequently contain terms which require something to be done before a creditor is contractually entitled to payment or to enforce his right to payment. The cases consider in that context, for example, provisions which relate to: obtaining certification from a third party; making a demand; submitting an invoice; and the lapse of a period of time after making the demand or submission of the invoice.*
>
> *iv) When considering such provisions, it is necessary to distinguish between (i) terms which are conditions precedent to the right to payment arising, and (ii) terms which impose conditions for the bringing of proceedings and which are concerned with limiting the right to bring an action to enforce an entitlement to payment: see Hirst para [102]. The latter are regarded as procedural conditions which affect the right to bring proceedings for a period of time in respect of a complete cause of action which already exists. Thus, as Lord Mackay of Clashfern said in Sevcon (at 467G): "bars to enforcement of accrued causes of action which are merely procedural do not prevent the running of time unless they are covered by one of the exceptions provided in the Limitation Act itself".*
>
> *v) In deciding whether a particular term falls within one or other category, the cases have attached importance to the need for certainty in the context of limitation, and inclining against a result whereby the running of time is wholly within the control of the creditor. Thus in Hewthorn, Lord Neuberger MR said:*
>
> *"save where it is the essence of the arrangement between the parties that a sum is not payable until demanded (e g a loan expressly or impliedly repayable on demand), it appears to me that clear words would normally be required before a contract should be held to give a potential or actual creditor complete control over when time starts running against him, as it is such an unlikely arrangement for an actual or potential debtor to have agreed."*
>
> *vi) A related issue is the undesirability of the court becoming embroiled in collateral issues, such as the questions of the reasonableness or otherwise of any delay in rendering an invoice."*

126. In *Ice*, the contract in that case related to architect's services, and the relevant provision concerned the provision of an invoice and an obligation of the employer to endeavour to make payment within 30 days. The relevant letter of appointment set out the

following under the heading "Basis of Payment": *"You will invoice EPIC on a monthly basis for work completed to date. The basis of payment proposed in the appendix to the document described above is acceptable. EPIC Ltd will endeavour to make payment within 30 days of receipt (unless otherwise stated)".*

127. At para. 22, Lambert J rejected a submission that the effect of the foregoing was an agreement that the entitlement to payment did not arise until 30 days after receipt of an invoice. She said:

> *"A reasonable person in the position of the parties would have understood the words in the letter to be an agreement concerning only the process of billing and payment, namely the monthly provision of an invoice with payment within 30 days thereafter. This construction arises from a plain reading of the section of the letter under scrutiny. Further, in the context of the letter, it is common sense that both parties would have wished to reach some agreement concerning the billing and payment arrangements; the design work was not a single piece of work, but a rolling design project which was to be ongoing over a period of many months. In these circumstances, some agreement concerning billing and payment would have been important and on an objective construction of the intention of the parties the payment terms of the letter reflect just such an agreement."*

128. In *Ice*, the court considered whether the cause of action for services arose when those services were performed or when an invoice was issued. Lambert J held at [24]: *"clear words are needed if the Court is to construe an agreement between the parties in such a way as to give the creditor control over the start of the limitation period and/or to avoid the Courts becoming engaged in determining satellite issues [such as when invoices should have been rendered] which deprive the limitation provisions of their central purpose: certainty and the avoidance of stale claims"*

129. In amplification of the distinction made in *Hirst* by Eyre J referred to in para.58 (iv) of the judgment in *Consulting* (quoted above), Eyre J referred at para. 101-102 of his judgment to contractual terms (or statutory provisions) such as those in *Henry Boot Construction* which are conditions precedent to a right to payment arising. In *Henry Boot Construction*, payment depended on the issue of an engineer's certificate which was a condition precedent to the contractor's entitlement to payment. It was only then when the contractor's right or entitlement to payment arose. This displaced the normal rule that payment arose at the time of the completion of the work. Eyre J at para. 102 said that those which are conditions precedent to the bringing of an action (as in *Henry Boot Construction*) affect the date when the cause of action accrues. By contrast, those which are provisions imposing conditions for bringing an action have no impact on the cause of action even though they may mean that the period in which a potential claimant can commence proceedings is less than the full limitation period running from the date of accrual of the cause of action.

130. In *Consulting*, a commercial consultancy contract made no provision for specific remuneration, but stated that the consultant would submit invoices, which would be

paid within 90 days. This was not sufficiently clear to displace the established principle that the cause of action arose when the work was completed.

131. Applying the above law to the facts of the case:

(i) The starting point is that the cause of action to be reimbursed accrues at the time of the incurring or payment of the expense, and it cannot be deferred by the timing of the invoice unless there are words of the contract which postpone the accrual of the cause of action.

(ii) If the postponement of the right to payment were simply about billing and payment following billing, then this might, subject to the precise contractual words, on the above cases amount to simply a procedural condition precedent and therefore not postpone the accrual of the cause of action from the time of the incurring or payment by the Claimants of the expenses.

(iii) The wording of Clause 2.1 makes clear that the obligation of reimbursement does not depend on completion of a transaction and even the proposal of one. This is consistent with the obligation to reimburse not arising on completion. Further, the clause refers to invoices appearing to indicate that invoicing will incur following the expenses being incurred and/or paid by DCL. There is no indication in Clause 2.1 that the accrual of the cause of action is postponed to a later time or that it should only run from the time of invoices.

(iv) Prior to the Engagement Agreement being signed in March 2013, an invoice had been sent out (albeit addressed to Grandover Mining) in respect of expenses now claimed as part of the expenses in this action. (The invoice was after the Engagement Agreement was drafted on 10 April 2012 but before it was in March 2013.) If and insofar as these were a part of the expenses, as the Claimants submit, this indicates that there was no prior intention to suspend any invoices until completion of the transaction.

(v) Clause 2.2 is not well drafted. It does not contain words delineating how it is to relate to Clause 2.1. It refers to an invoice on completion, but it does not state what is to happen in respect of expenses where no Transaction is proposed or completed. The last sentence does provide for a time for a reimbursement of expenses, but it does not contain language expressly stating that until completion or termination, DCL has no entitlement to reimbursement.

(vi) Clause 2.2. does not provide the only circumstances in which payment may arise. If it did, it might exclude (a) a completion where there are no proceeds or insufficient proceeds to pay the expenses, or (b) a termination for repudiatory breach outside clause 11, or (c) arguably, an expiry, as opposed to a termination of the agreement in accordance with clause 11. On the contrary, the reimbursement of expenses are payable without exception once they have been incurred and paid by the Claimants, and are not limited by Clause 2.2. In the instant case, there was not a

completion or a termination under Clause 11. This is an indicator that Clause 2.2 had a more limited role than being definitive of when invoices could be rendered, and still less of when an obligation to payment could arise.

(vii) Reading Clause 2.1 together with Clause 2.2, the latter clause appears to make completion and termination the latest point in time for invoicing rather than the only time when invoicing can take place. In this way, Clause 2.2 provides a potential mechanism for moneys to be taken out of the completion moneys: it does not consider what is to happen if no moneys are available on completion for this payment because it is a mechanism for the event only that there are such moneys. Clause 2.2 also provides a latest time after termination for an invoice of outstanding money to be issued. Viewed this way, it is a part of the billing and payment mechanism.

(viii) This is not a case where contractual wording postpones the usual time for the accrual of the cause of action from the time of the provision of the services or the incurring or payment of the expenses from time to time.

132. It therefore follows that unless there has been an acknowledgment within the limitation period (sections 29 and 30 of the Limitation Act), the claims are barred by section 5 of the Limitation Act in respect of expenses incurred and paid more than six years prior to the commencement of the action, that is prior to 14 October 2013.

133. The Court must now consider the effect of sections 29 and 30 of the Limitation Act 1980, the relevant parts of which read as follows.

> *"29: Fresh accrual of action on acknowledgment or part payment.*
>
> *...*
>
> *(5) Subject to subsection (6) below, where any right of action has accrued to recover—*
>
> *(a)any debt or other liquidated pecuniary claim; or*
>
> *(b)any claim to the personal estate of a deceased person or to any share or interest in any such estate;*
>
> *and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgment or payment."*
>
> *Section 30*

> ***30Formal provisions as to acknowledgments and part payments.***
>
> *(1)To be effective for the purposes of section 29 of this Act, an acknowledgment must be in writing and signed by the person making it.*
>
> *(2) For the purposes of section 29, any acknowledgment or payment—*
>
> *(a) may be made by the agent of the person by whom it is required to be made under that section; and*
>
> *(b) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made."*

134. The Claimants rely upon the following documents, namely:

    (i) An email dated 29 September 2015 from Mr Cavaco (on behalf of PMSA), which acknowledged an obligation to pay expenses ("… money you will receive in the future…") but stated that an invoice from a third party had to be paid first.

    (ii) An email dated 31 March 2016 from Miriam Veloso (on behalf of PMSA). That email was sent in the context of a previous lengthy oral telephone discussion while Mr Horlick was at Munich airport in late 2015. In that discussion, Miriam Veloso orally acknowledged to Mr Horlick that expenses validly expended should be repaid (Horlick's third statement para 34). It was, she said at the time, a matter of verifying the costs. She promised to revert on this. In the context of that oral discussion, the email amounted to an acknowledgment for the purposes of Section 29(5) of the Limitation Act 1980 that valid expenses would be paid.

135. I reject these submissions in that there is nothing sufficiently specific in these communications to amount to an acknowledgment in writing of the obligation to make payments of expenses. As regards the emails:

    (i) The email dated 29 September 2015 is not an acknowledgement of any present right to expenses under the Engagement Agreement. The full words used were "*Richard, as I told you all this money must be considered part of the investment, so is money that you will receive in the future*". The discussion relates to money that the Horlicks had been paying Mr Cavaco, not expenses that had been incurred by DCL.

    (ii) The email dated 31 March 2016 is part of a chain of emails. This was a negotiation between Mr Horlick and Ms Veloso about a new structure for the project and a process by which all the shareholders could agree the

expenses that would be recognised in the new project company. No present expenses were acknowledged as being due to anyone. Insofar as references were made to oral conversations at the time, there are two answers: first, they do not affect the construction of the particular email, and second, if there was an oral acknowledgment, that is not a written acknowledgment which is required under section 30 of the Limitation Act 1980.

136. I therefore find that insofar as the expenses were incurred and paid more than 6 years prior to the issue of proceedings that the claim is barred by section 5 of the Limitation Act 1980. There was no acknowledgment of indebtedness such as to extend the limitation period. Consequently, any expenses incurred prior to 14 October 2013 are statute-barred.

(e) Evidential issues in respect of the expenses claimed

Did DCL incur the expenses claimed and were they incurred in connection with the Engagement? (Issue 9)

137. PMSA submit that both in respect of expenses prior to 14 October 2013 and after 14 October 2013, DCL has failed to adduce sufficient evidence to show that the expenses claimed were incurred "in connection with [the] Engagement" and are not recoverable. Although I have concluded that the claim for expenses prior to 14 October 2013 is statute-barred, this section of the judgment is to consider the question of whether the claim to the expenses have been proven as if the limitation defence had been rejected.

138. The expenses have been provided in an unsatisfactory manner, reflecting a casual approach to expenses on the part of DCL, as was apparent from the way in which Mr Horlick gave his evidence in this regard. It is not for the Court to have to delve into what occurred, unless that is unavoidable on the facts of a particular case. It should not be for a defendant to demonstrate invoice by invoice what are the defects of the claim. In some cases, that might be to reverse the burden of proof. In the first instance, a claimant should be able to present a cogent account of what is due under such an agreement. I shall now refer to various respects in which I found the evidence of Mr Horlick and DCL to be unsatisfactory.

(i) Expenses prior to September 2011

139. First, PMSA was only established in September 2011, yet three expenses claimed predate this. Those are:

(a) "Azul Claro invoice", 1 January 2011 - £3,960.00

(b) "Diogo dinner", 1 June 2011 - £336.19

(c) "Millennium Hotel", 22 June 2011 - £472.50

Total: £4,768.69

Those expenses could not have been incurred in connection with the Engagement because PMSA did not exist at that time. In any event, as previously noted, the Engagement had not started by that time.

(ii) Grandover Mining

140. Another issue which arose was that there appears to be an overlap between the expenses Mr Horlick claims against PMSA, and the expenses listed in an invoice to Grandover Mining, the holding company of PMSA, dated 3 August 2012. The expenses which overlap are as follows:

(a) Diogo dinner, 22 June 2011 - £336.19 (also an expense before the time of the Engagement)

(b) Boodles dinner, 30 November 2011 - £1800.00

(c) Millennium hotel, 30 November 2011 - £472.50 (perhaps overlapping with the expense of 22 June 2011 before the time of the Engagement)

(d) Shareholder mailing - £3,000.00

(e) Boodles lunch (Diogo/Richard) - £250.00

(f) Vaccination etc Dr Pao, 16 May 2012 - £345.00

(g) Mozambique visa, 27 April 2012 - £110.00

(h) Serena Polana Maputo, 30 April 2012 - £274.83

(i) Serena Polana, 25/26 June 2012 – £183.65

(j) Serena Polana, 30/1 July 2012 - £356.69

(k) Maputo flights, 23 April 2012 – £2,702.07

(l) Maputo flights, 1 June 2012 – £3,692.94

(m) Maputo flights, 30 July 2012 - £6,644.08

(n) Edmund Cumming-Bruce expenses and fees November 2011 to March 2012 – £7719.45

(o) Hotel Cardoso, 2 August 2012 - £378.29

Total: £28,265.69

141. When shown the invoice dated 3 August 2012 in his evidence, Mr Horlick maintained that despite being billed to Grandover Mining those expenses were ultimately incurred for the same project as that for which the Engagement was entered into, that is the equity fundraising of the Licence 4623C project. He said:

> *"It was all part of the same project. I mean it's -- it's pretty clear. The only thing that Grandover Mining was doing was it was a topco which was formed for the purposes of holding the shares of Pathfinder Moçambique, raising money for that project and developing that project. To me they were one and the same thing, which I don't think is unreasonable."* [T2/189/7-13].

142. When asked whether Grandover Mining had paid those expenses, he said he did not know because he did not have the data [T2/189/23-25]. When he said that he would need to check the bank accounts, he was reminded that the bank accounts had not been provided in the large number of documents disclosed, evidently because they were no longer available.

143. Mr Horlick was unable to give a satisfactory explanation as to why the invoice was to Grandover Mining in the first place. There was a problem which had to be extracted in cross-examination. It was that there was an invoice for monthly consultancy expenses of DCL to Grandover Mining dated 5 May 2013 for a sum of £60,000 comprising monthly fees of £10,000 between October 2012 and April 2013 (which confusingly comprises seven and not six months). That could not have been covered by Engagement Agreement in that it did not have a provision about consultancy fees. That suggests that there was some other arrangement between Grandover Mining at the time of the invoices concerned. On that basis, the inference is that the invoice to Grandover Mining about expenses (in addition to the invoice about consultancy fees) was intentional and pursuant to an arrangement between DCL and Grandover Mining. On this basis, in my judgment, DCL has failed to prove on the balance of probabilities that the expenses charged from DCL to Grandover Mining are expenses covered by the Engagement Agreement between DCL and PMSA.

144. It follows that despite Mr Horlick's evidence about trips to Maputo in his evidence, he has failed to prove sufficiently his case for these expenses. The answers provided to the above questions were not sufficiently cogent to prove this part of the case. It therefore follows that in the event that in addition to being statute barred, I find that the case in respect of the expenses which had been invoiced to Grandover Mining have not been proven as expenses payable under the Engagement Agreement.

(iii) Overheads

145. Another issue concerns a group of expenses titled "TH Office Costs", which total £64,281.53 and are for the period November 2011 to November 2015. PMSA submits that these are not recoverable as there is no evidence to support them, and, in any event, these are overheads not business expenses. In my judgment, that is correct; clause 2.1 of the Second Engagement Letter only extends to "out-of-pocket expenses", which did

not extend to overheads. Different wording would have been required in order to claim overheads. This attempt to claim overheads is a further unsatisfactory aspect of the claim for expenses.

(iv) Bundle G

146. After the conclusion of evidence and on the day before the exchange of skeleton arguments, on 16 May 2022, the Claimants served a supplemental bundle of documents (labelled Bundle G). As to this:

(i) Bundle G contains previously undisclosed bank statements belonging to DCL and Mr Horlick. They appear to be served in support of the expenses claim and some of the unjust enrichment payments.

(ii) The Claimants do not explain why this disclosure is late. It was in the face of PMSA seeking supporting documentation under Clause 2.2 of the Engagement Agreement and requests for particularisation in correspondence and in a Part 18 Request.

(iii) The Claimants need permission to rely on these documents: CPR r.31.21. None was sought, and none would have been granted well after the close of the evidence in the cases, and where the documents did not speak for themselves, but would have required careful examination and the recall of evidence.

(v) Inadequate evidence

147. There has been identified a problem regarding the invoices addressed to Grandover Mining. That is a part of a more general problem with the claim. There is inadequate evidence that the expenses claimed are referable to the engagement, that is that they were in connection with the Engagement Agreement as opposed to the other engagements that Mr Horlick and DCL had. There were at least the following other engagements:

(i) Mr Horlick was assisting JVC, General Veloso and Mr Cavaco in the Pathfinder Minerals Litigation. He said that his email dated 28 October 2011 was in that regard. Any expenses in that regard would not be in connection with the Transaction or the Engagement.

(ii) There may have been other expenses attributable to the engagement of DCL with Grandover Mining outwith the amounts which had been billed to Grandover Mining. The attempt to suggest that Grandover Mining was just a topco and had no identity other than in connection with the Engagement has not been proven. On the contrary, it is apparent that Grandover Mining was marketed distinctly. In a letter from Travers Smith in January 2013, they asserted that their clients were in receipt of material originating from DCL that was *a "a financial promotion issued*

by Grandover Mining Limited ("Grandover"), purporting to induce investors to finance its acquisition of a company called Pathfinder Mozambique". When thereafter Grandover did not proceed with an investment, it may have been that Mr Horlick merged in his mind Grandover and PMSA, but that is not an answer to the possibility that at a point in time, the expenses were being incurred for Grandover Mining and not for PMSA.

148. DCL has not delineated between these different engagements on which Mr Horlick was working, both personally and through DCL. It is not satisfactory simply to gather receipts and assert that they are to do with the Engagement Agreement (as opposed to the other engagements). That does not discharge the evidential burden on DCL to prove the expenses claimed were incurred "in connection with the Engagement" under clause 2.2.

149. I considered whether the Maputo flights might be treated as established in the light of Mr Horlick's evidence about his trips to Mozambique. However, having regard to the trips which were invoiced to Grandover Mining and my findings there, I find that the evidence is not such as to prove on the balance of probabilities that these invoices were by reference to expenses in connection with the Engagement. PMSA has prepared a schedule about the expenses, and in my judgment, even as regards the Maputo flights after those charged to Grandover Mining, the Claimants have not adequately proven their case.

150. It is for the Claimants to prove their case about the claim to the expenses. Many of the expenses sought in the schedule lacked supporting documentation, and this was a repeated refrain in PMSA's comments. Some of the expenses have no explanation at all e.g. restaurant bills and taxis. Without any or any reliable commentary, they could have been incurred as personal costs, or in connection with his other engagements. The burden is on the DCL to show that the expenses are payable. In my judgment, they have not discharged that burden and I consider that therefore find that they are not recoverable.

151. For all of these reasons, the claim for expenses must fail.

VIII The Success Fee Claim

On its true construction, does the Engagement Agreement require a Transaction to raise a minimum of US$30m? (Issue 10)

Termination of the Engagement Agreement (Issue 11)

152. DCL claims £750,000, plus contractual interest, from PMSA in relation to a Success Fee under the Engagement Agreement ("the Engagement") dated 10 April 2012.

(i) The Engagement

153. By Clause 1.4(a) of the Engagement, PMSA agreed to pay a "success fee" of £750,000 upon completion of a "Transaction". That fee was expressed to be payable "*in lieu of financial advice provided by DCL from the period 1 November to 10 April 2012 and until completion of the Transaction*". The "Transaction" was defined as "an equity fundraising expected to be a minimum of US$30m" for PMSA.

154. Paragraph 1.6 of Schedule 1 to the Engagement included the following:

> *"The Company acknowledges that it is sophisticated and experienced in transactions similar to any contemplated Transaction. In providing the Services, the Company acknowledges that DCL's advice does not constitute a personal recommendation. The decision as to whether or not the Company enters into the Transaction (and the terms thereof) will be made by the Company in light of its own commercial assessments and DCL will not be responsible for such assessments…"*

155. Schedule 2 provided an indemnity clause under which PMSA was required to indemnify DCL for:

> *"any and all Losses suffered…by reason of or arising directly or indirectly out of or in connection with anything done or omitted to be done in relation to this Engagement or otherwise in connection with the Transaction…"*

156. Clause 1.6 provided as follows:

> *"If, during the course of our Engagement, a materially different transaction other than the Transaction, or a series of events occurs other than is initially envisaged in respect of the Transaction, DCL and the Company agree to renegotiate in good faith a transaction fee to reflect the time and effort spent and to be spent by DCL in respect of such transaction."*

(ii) The Indemnity Claim

157. DCL claims that they are entitled to be indemnified for the Success Fee, which they lost because Mr Cavaco, acting on behalf of PMSA, carried out an irrational commercial assessment leading him to reject a proposal put forward by Renova Group. But for Mr Cavaco's irrational behaviour, a Transaction would have been entered into, entitling DCL to the Success Fee. In effect, DCL is claiming the loss of a chance to earn the Success Fee.

(iii) The Renova Proposal

158. An email dated 20 February 2015 from Mr Dimitri Gordine (Director of Mining Projects at the Renova Group) provided an outline of a proposal from the Renova Group in the following terms. The "Mozambican party" (that is, PMSA) would receive "10M" for total settlement and 10% of a new company which would hold licences and rights; Renova would receive 70% and the remaining 20% would go to a group referred to as the "British" parties. Renova would provide 70% of CAPEX and carry the 10% of CAPEX of PMSA ("the Proposal").

159. Mr Cavaco's first response to the Proposal was by email dated 20 February 2015 which included:

> *"From our point of view or even from any person with common sense, the proposal you did cannot be considered a serious and honest proposal and not even be considered a starting point for any possible negotiation."*

The Renova Group responded in an email dated 23 February 2015, that this statement by Mr Cavaco was "absolutely UNACCEPTABLE and UNPROFESSIONAL" (emphasis in original email from the Renova Group).

160. In a further email dated 24 February 2015 Mr Cavaco said that Renova was using *"pseudo legal risk"* to *"downplay the project for strategy reasons, and thus attempt to obtain the best possible negotiation price"*. He said that from PMSA's point of view there was no legal risk. This was based on the fact that whatever happened in the English litigation, there was nothing that could be done in Mozambique to remove the licence to mine in Naburi and Moebase from PMSA.

161. It is this correspondence which DCL contends breached the Engagement and entitles them to the Success Fee. DCL relies on a scoping report they commissioned by TMZI of the Licence Project to demonstrate that the Proposal was a reasonable one that ought to have been accepted. That report presented various calculations as at June 2014 contending that the Net Present Value of 10% of NewCO was - on alternative options for development - between US$ 29.3 million and US$ 50 million, and the value of the carry of 10% of CAPEX was between US$ 20 million and US$ 71 million. On this basis, the total value to PMSA of the Renova Group's offer was between US$ 61.7 million and US$ 131.4 million. The Claimants' case is that this was the best deal available and should not have been summarily rejected. They submitted that the dismissal of legal risk was unrealistic in that there was complex litigation in the English Courts and in Mozambique which impaired legal title and made funding for the project difficult. This was borne out by contemporaneous documentation referred to at para. 66 of the Claimants' closing submissions.

162. DCL contends that they are entitled to payment of the Success Fee in the following ways:

    (i) because the Proposal was rejected, DCL suffered the loss of the Success Fee which they are required to be indemnified for under schedule 2;

(ii) in the alternative, there was an implied term for PMSA to act rationally in conducting their commercial assessments and deciding whether or to accept an offer of funding, which they breached;

(iii) in the alternative, clause 1.6 was an enforceable good faith clause which PMSA breached in failing to negotiate an alternative success fee.

(iv) Was the Success Fee payable?

On its true construction, does the Engagement Agreement require a Transaction to raise a minimum of US$30m (Issue 10)

163. As to DCL's first argument, the Success Fee only became payable "on completion of the Transaction". "Transaction" was defined in the Engagement as "an equity fundraising expected to be a minimum of US$30m" for PMSA. There was no Transaction; the wording of "an equity fundraising" must mean "a contract for an equity fundraising", and "completion" envisages that contract having been entered into and performed. There was no such contract here, and so the Success Fee cannot have become payable.

164. Further, there is no wording in the Engagement which placed an obligation on PMSA to accept an offer of funding. Paragraph 1.6 of Schedule 1 only provides: *"The decision as to whether or not the Company enters into the Transaction (and the terms thereof) will be made by the Company in light of its own commercial assessments and DCL will not be responsible for such assessments…".* It does not provide that PMSA must make a decision to enter into a Transaction by accepting an offer of funding. Accordingly, I reject the submission that by rejecting the Proposal PMSA has breached any express term of the Engagement.

(v) Termination of the Engagement Agreement (Issue 11)

165. This issue is similar to the issue referred to above as to whether the Engagement Agreement had terminated in March 2014 precluding on that ground alone the claim for any expenses incurred from March 2014 onwards (Issue 6). The effect of termination in this connection would be that the claim to the Success Fee or to any breach of a Braganza duty or of a duty of good faith could not arise because by the relevant time, namely after March 2014, the Engagement Agreement had expired by reason of the expiry of the Engagement Agreement as per Clause 20.1 thereof. For the reasons set out above, on the basis that the Engagement Agreement did not expire at that time but continued by conduct and/or the related estoppel case, the claim for the Success Fee and related claims are not barred.

IX A Braganza Duty

The Renova Offer (Issue 12)

Was PMSA contractually obliged to perform a commercial assessment and/or act rationally in relation to the offer? (Issue 12.1)

Was Mr Cavaco's "no legal risk" email a breach of any such obligation? (Issue 12.2)

Would Renova's offer, if concluded, have amounted to a "Transaction"? (Issue 12.3)

Would a binding agreement amounting a Transaction have been concluded with Renova but for PMSA's statement that there was no legal risk? (Issue 12.4)

Is DCL entitled to be indemnified in the amount of the Success Fee or any other amount? (Issue 12.5)

166. In the absence of any express term requiring PMSA to accept an offer of funding, DCL submits that there was nevertheless an implied term that PMSA would not act arbitrarily or irrationally when deciding whether or not to accept such offers.

(a) The law

167. The leading case on the implication of terms of rationality or reasonableness as a constraint on the exercise of contractual discretion is *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 1 WLR 1661 ("*Braganza*"), in which Lady Hale (with whom Lord Kerr agreed) stated:

> *"18. Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. <u>Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest</u>. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.*
>
> …

> *30. It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable - for example, a reasonable price or a reasonable term - the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the Wednesbury formulation in the rationality test. Indeed, I understand Lord Neuberger PSC (at para 103 of his judgment below) and I to be agreed as to the nature of the test."* (emphasis added)

168. The basis for this implied term proceeds from the construction of express terms and is founded on the test of necessity (per Leggatt LJ in *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718; [2020] QB 418 at [149]-[150]). That test for necessity is whether, without the term, the contract would lack commercial or practical coherence or whether it is necessary to imply the term "in order to make the contract work" (*Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 at [21] and [77]).

169. A distinction is drawn between the exercise of discretion, where such a term may be implied, and the exercise of an absolute contractual right, where no such term is required. In *Mid Essex Hospital Services NHS Trust v Compass Group* [2013] EWCA Civ 200; [2013] BLR 265 ("*Mid Essex*"), Jackson LJ reviewed the authorities then available in respect of a contractual provision entitling the trust to award service failure points, distinguishing the contractual terms with which those cases dealt from so-called "absolute contractual rights" at [83] as follows:

> *"An important feature of the above line of authorities is that in each case the discretion did not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term. The precise formulation of that term has been variously expressed in the authorities. In essence, however, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner…."* (emphasis added)

170. In *Equitas Insurance Limited v Municipal Mutual Insurance Limited* above, Males J emphasised the necessity for the relevant provision to be construed as part of the contract before determining whether the provision was one to which any implied term would apply:

> *"113. ... Although the Mid Essex case uses the expression "absolute contractual right" that is the result of a process of*

> *construction which takes account of the characteristics of the parties, the terms of the contract as a whole and the contractual context, not a starting point intrinsic to the term itself. It is only possible to say whether a term conferring a contractual choice on one party represents an absolute contractual right after that process of construction has been undertaken."*

171. The notion of the contractual purpose behind the discretion was explored by HHJ Waksman QC (as he then was) in *Watson and others v Watchfinder.co.uk* [2017] EWHC 1275. That case was concerned with a clause which stipulated that an option could only be exercised with the consent of a majority of the board of directors. At [105], the Judge envisioned a "target" of the contractual discretion, stating:

> *"105. In order to assess whether there has been compliance with the Braganza Duty in connection with any particular contractual discretion it is necessary to know what the "target" of that discretion is, in the sense of what the decision-maker is meant to be considering when deciding whether or not to exercise it. In many cases this is straightforward and is stated as part of the discretion. That is so, for example, if the discretion relates to one party's opinion as to what is a "reasonable value" or its judgment or opinion as to whether a particular event has happened, for example whether the deceased in Braganza had committed suicide. Alternatively, the Court has explained the ambit of the discretion by reference to its ostensible purpose..."* (emphasis added)

172. HHJ Waksman QC cited that passage in his later judgment in *Shurbanova v Forex Capital Markets Limited* [2017] EWHC 2133, which concerned whether a clause in an agreement between a foreign exchange broker and a retail customer gave the broker a right to revoke a transaction due to abusive trading or whether the broker was constrained by a Braganza duty. It had been submitted that because there was a range of contractual options open to the broker in the event of abusive trading, this rendered the power a discretion. This submission was rejected at [93]:

> *"...none of that turns FX's power into a discretion of the Braganza type which is concerned with a determination of a substantive matter, or a judgment about or evaluation of some state of affairs which one party makes as the decision-maker, but which affects the interests of both, hence giving rise to a potential conflict of interest. See, for example, paragraphs 18-22 of the judgment of Lady Hale in Braganza. The need to find a "target" for the determination in question (see paragraph 105 of my judgment in Watson v Watchfinder [2017] EWHC 1275 (Comm) supports this. It is meaningless to talk of FX's determination of its consequential or secondary contractual powers including revocation (arising in effect by reason of a*

> *defined contractual wrong on the part of Mrs Shurbanova) as a discretion of the relevant kind. If it were otherwise, then it could be said that a party's choice as to whether or not to rescind a contract for misrepresentation as opposed to seeking damages (one of which may be very much more to the advantage financially of the party in default) was itself a contractual discretion subject always to a Braganza Duty. That cannot be right."*

173. In *TAQA Bratani Ltd v RockRose* [2020] 2 Lloyd's Rep 64, HHJ Pelling QC (sitting as a High Court Judge) cautioned against unnecessary interference with the contractual freedom of the parties in commercial contracts:

> *"53. Absolute rights conferred by professionally drawn or standard form contracts including but not limited to absolute rights to terminate relationships and roles within relationships are an everyday feature of the contracts that govern commercial relationships and extending Braganza to such provisions would be an unwarranted interference in the freedom of parties to contract on the terms they choose, at any rate where there is no fiduciary relationship created by the agreement…"*

174. It is trite following *Walford v Miles* [1992] 2 AC 128 that an agreement to agree is not enforceable. As Lord Ackner held at 138E-H:

> *"...the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. Mr Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question – how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an "agreement"? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a "proper reason" to withdraw."*

175. From the above authorities, the following propositions can be discerned:

(1) The test for the implication of a Braganza duty is one of necessity (*Equitas* at [149]-[150]) and at [158] so as to make *"the contracts work as consistently, as is possible, with the parties' presumed intention and reasonable expectations"* (per Leggatt LJ with whom Patten LJ agreed).

(2) It might be necessary to imply a Braganza duty to contractual discretions where those decisions affect the rights of both parties to the contract, giving rise to a conflict of interest (*Braganza* at [18]). Examples include a contractual right to form opinions about whether facts exist (*Braganza*) or a contractual right to value something (*Socimer International Bank Ltd v Standard Bank Ltd* [2008] EWCA Civ 116)

(3) Conversely, it will not be necessary to imply a Braganza duty to absolute contractual rights because the party exercising those rights is not required to take the interests of both parties into account (*Mid Essex* at [83]).

(4) The process of determining whether a contractual term confers an absolute contractual right or a contractual discretion is a process of construction which takes account of the characteristics of the parties, the terms of the contract as a whole and the contractual context, not a starting point intrinsic to the term itself (*Equitas* at [113]).

(5) To determine whether a contractual discretion has been exercised consistently with the contractual purpose of that discretion, it is necessary to know what the "target" of that discretion is (*Watchfinder* at [105], *Shurbanova* at [93]).

(6) The absence of an identifiable "target" is a factor which points to the relevant power not being a contractual discretion, but rather an absolute contractual right (*Shurbanova* at [93]).

(7) The courts are cognizant of the fact that absolute contractual rights conferred by professionally drawn or standard form contracts are an everyday feature of contracts and an expression of the parties' freedom of contract which should not be readily interfered with (*TAQA Bratani* at [53]).

(8) Agreements to agree are not enforceable, because each party to negotiations must be allowed to pursue his (or her) own interest, which includes being able to withdraw from those negotiations (*Walford v Miles* at 138E-H).

(b) Discussion

176. In my judgment, a Braganza duty cannot be implied in this case, because the Engagement conferred on PMSA an absolute contractual right commercially to accept offers to enter into a "Transaction", not a discretion to which a Braganza duty can be implied. I have come to this conclusion for the following reasons.

177. First, as propositions (2) and (3) make clear, contractual discretions concern decisions under which the interests of both parties must be taken into account. It is this feature of contractual discretions which gives rise to the necessity for the Braganza duty, in order to avoid abuse or oppressive conduct arising from conflicts of interest. It is clear from the wording of paragraph 1.6 of Schedule 2 of the Engagement that DCL's interests were not engaged by the decision to enter (or not to enter) into a "Transaction". PMSA could, but was not required to, enter into a "Transaction" based on its own commercial assessments, and DCL bore no responsibility for those assessments. This was, as Mr Anderson KC accepted, so that DCL would avoid liability in the event of a Transaction going wrong. That supports the proposition that DCL had no interest in these decisions, from which it follows that PMSA had an absolute contractual right to enter into a Transaction to which no Braganza duty can apply.

178. The Claimants submitted that the word "commercial" in relation to an assessment implies that the assessment will be performed in a business-like manner and not irrationally. In context, there is no necessity for the words to bear that implication. The wording as a whole makes it plain that DCL is not responsible for the business decisions and judgments of PMSA which are for PMSA alone.

179. It follows that the Engagement Agreement did not contain a contractual discretion or power of the kind contended for by the Claimants. The Engagement Agreement was simply a conditional contract in the sense that DCL's right to the Success Fee is conditional on an event occurring, namely a "Transaction". PMSA exercised no contractual discretion under the Engagement Agreement. It simply decided for itself independently of the Engagement Agreement whether it entered into arrangements with third parties. Only if that occurred, which it did not, was the Success Fee payable.

180. Second, as regards propositions (5)-(6) above, one should know what the "target" of the discretion in question is to assess the reasonableness or rationality of any decision taken within that discretion; if no "target" can be ascertained, this suggests there is no discretion. A target ensures that there is an objective framework against which the Court can consider the particular decision. Mr Anderson KC was asked in closing what target or factors could be used to ascertain whether a commercial assessment was conducted rationally. His answer was that the general background to the Engagement provided for this, namely the fact that the Pathfinder Minerals Litigation was causing problems in fundraising, that PMSA did not have the finances to fund the project itself, and that DCL had already expended its resources in seeking fundraising to date. With respect, those factors do not lead to a "target" of the discretion which is close to being sufficiently certain. Those factors certainly point to a need for fundraising to be obtained but tell nothing about how much that fundraising needed to be, to what extent the risk needed to be allocated between the parties, the amount of CAPEX needed to be borne by each respective party, and so on.

181. It is no surprise that no "target" to the discretion can be ascertained; following proposition (8) above, there can be no enforceable agreement to agree and as such a concluded agreement could not have been the target of the discretion, then it is difficult to understand what else the target of the discretion could be. That in my judgment further supports the conclusion that there is no target, because paragraph 1.6 provides an absolute right, not a contractual discretion.

182. Moreover, proposition (7) above ought to be borne in mind in the present case. The fact that DCL might have entered into a bad bargain in which PMSA had a right to accept (and conversely not to accept) offers to enter into a Transaction, the result of which was a risk that no success fee may be paid, is not a reason for the court to read implied terms into the Engagement. This was a case in which both parties to the Engagement were commercially sophisticated, and the court must respect their freedom to contract on the terms they chose. This was amplified by the Defendants in their skeleton closing argument (para. 83(3)) to the effect that a Braganza duty usually involves an objective standard being available to the Court such as forming a reasonable view about a valuation (*Socimar*) or whether certain facts exist (*Braganza*). This is not the case in subjecting commercial negotiations to the question as to whether a party acted irrationally or arbitrarily, which is to question a quintessential commercial judgment, which the Court is not usually in a position to second-guess. This does not form a sound basis on which to found an objective duty.

183. For all of those reasons, PMSA had an absolute right and not a discretion to which a Braganza duty can be implied. I therefore find that PMSA was not obliged contractually to perform a commercial assessment and/or act rationally in relation to the offer. (Issue 12.1).

184. The foregoing is dispositive of the claim in respect of the Renova offer (Issue 12), and it is therefore not strictly necessary to decide the remaining parts of Issue 12. If, contrary to the above, there was a Braganza duty, the Claimants have failed to establish a breach in the light in particular of Mr Horlick's approval of the position adopted by Mr Cavaco at the time. There were emails in which Mr Horlick said that the responses of Mr Cavaco were *'good'.* He expanded upon this, saying that *"This is – in my opinion, an attempt to negotiate. He's trying to lay out the legal case saying there isn't a legal risk, so that extent its good"* [T2/173/11-24]. Only two days later, on 26 February 2015, Mr Horlick stated in an email to Renova that *"as we have made clear we do not believe that there is any realistic legal threat".* Mr Horlick's oral evidence to say that this was in the heat of the moment [T2/167/20-23], and that it was the "best deal" that was presented which should have been accepted [T2/181/18-182/7] smacks of hindsight. The approval in February 2015 is a powerful indicator against a finding that the course taken by Mr Cavaco lacked rationality or was not in good faith. Close examination thereafter in the context of preparing a legal case is relatively uninformative because hindsight is no guide.

185. Mr Horlick contended in oral evidence that Mr Cavaco would not enter into a deal that involved the English parties receiving money under a settlement. There was no contemporaneous documentary evidence to support this belief, as Mr Horlick expressly accepted in evidence. There was no pleaded case to this effect. The evidence is that the real reason why the Renova deal was rejected because its financial terms were regarded as unsatisfactory [T2/182/8-T2/183/3].

186. More specifically, Renova's deal valued 70% of the shares in PMSA at US$10 million (assuming no premium for total control being equivalent to US$14.2 million for the whole company). This was very far removed from an internal valuation US$100 million for the whole of PMSA) referred to by him in an email to his private banker in October 2012. Indeed, Mr Horlick's counter- proposal to Renova that he made a couple of days later on 26 February 2015 was based on a valuation of $90 million for 100% of PMSA (and so entailed a payment of US$63 million for 70% of the shares). Renova was not

prepared to pay that much. The parties were very far apart. Mr Horlick's assessment was that Renova perceived that PMSA was desperate in that PMSA had been unsuccessful in raising funds between 2012 and 2015. In March 2015, Mr Horlick made a presentation in which he referred to the valuation of PMSA as being US$80 million (for 90% of the shares) which he contrasted with Renova's proposal of US$10 million (followed by an exclamation mark to show how unacceptable the proposal was.)

187. It follows that the alignment at the time of Mr Horlick with Mr Cavaco's position and the rejection of the proposal and the perception that the shareholding was worth so much more is without more a complete answer to the allegation of a breach of any Braganza duty (Issue 12.2). There was nothing more. The Defendants have explained in paras.89-91 of their written closing argument why the additional terms to the payment of US$10 million added nothing to the proposal from the perspective of PMSA[1]. It is evident from Mr Horlick's approach at the time of the proposal that he then shared that those additional terms did not add anything to the proposal from the perspective of PMSA. I do not have to consider whether those terms did add anything to the proposal, rather whether the views to reject the same were reasonably tenable. I accept that it was tenable that they did not significantly add to the terms of the proposal. This analysis is not changed by any acceptance by General Veloso of matters put to him in cross-examination about the course adopted by Mr Cavaco on the basis that the communications at the time, particularly of Mr Horlick, are more to the point that some retrospective being put in cross-examination so many years later to General Veloso. In my judgment, this is an answer to the allegation that the rejection of the Renova proposal was a breach of a Braganza duty.

188. Renova's proposal of US$10 million was a long way from a *"Transaction"* which was by reference to "*an equity fundraising expected to be a minimum of US$30m for the Company*". It did not have to be a sum of US$30 million because it was an expected minimum, but a sum of US$10 million was not in the ballpark, and as noted Mr Horlick and Mr Cavaco were entitled to be dismissive of the proposal. I refer again to the closing submissions of the Defendants in this regard at paras. 87 – 94 (Issue 12.3).

189. It is unnecessary to decide causation (Issue 12.4) and quantum (Issue 12.5) in the light of the above findings. I simply observe that the Claimants appear to have very significant obstacles to establish either causation or quantum, and, insofar as there are any damages, to show that any more than a speculative chance has been established.

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[1] The 10% carry which Renova proposed for the "Mozambican" parties was merely a loan which had to be repaid from dividends. The 10% shareholding to remain with the "Mozambican" party was not a part of the Transaction which was an equity fundraise for PMSA and how much would be received for its 70% shareholding.

X The Good Faith Claim

Is clause 1.6 of the Engagement Agreement enforceable? (Issue 13.1)

If so, had an obligation to negotiate arisen (Issue 13.2)

Did PMSA seek to negotiate a transaction fee in accordance with clause 1.6 in good faith? (Issue 13.3)

No loss from any failure to negotiate in good faith (Issue 13.4)

190. Alternatively, DCL claims that as a Transaction did not take place, DCL and PMSA were obliged under clause 1.6 of the Engagement to negotiate a new success fee in good faith, which PMSA failed to do. Clause 1.6 of the Engagement Agreement provides the obligation to negotiate in the event of a "materially different transaction other than the Transaction" or "a series of events occur other than the was initially envisaged in respect of the Transaction". The Transaction did not occur, but it is said that in the event it has not been shown that a materially different transaction or a series of events other than those originally envisaged occurred. It therefore follows that even if the obligation to negotiate in good faith was binding, the circumstances in which this would have arisen have not been proven to exist.(Issue 13.2)

191. Had a good faith negotiation taken place, DCL submits that PMSA would have agreed to pay £750,000.

(a) The law

192. Obligations to negotiate in good faith will generally be unenforceable for want of certainty. However, an express obligation can be enforceable in certain circumstances, where the traditional objections to enforceability are not met (Chitty on Contracts 34th Ed at 4-168 - 4-172). This is particularly where there is matter not viewed as essential by the parties which was left to be negotiated and would be a duty to negotiate in good faith an outstanding detail or details only. However, at the end of the above passage in Chitty, it is stated:

> *" A promise to negotiate in good faith, on the other hand, would oblige a party not to take unreasonable or exorbitant positions during the negotiations; and it is the difficulty of giving precise content to this obligation, while maintaining each party's freedom to pursue their own interests, that makes such a promise too uncertain to be enforced."*

193. The usual objections to an obligation to negotiate in good faith were summarised by Longmore LJ in *Petromec Inc v Petroleo Brasileiro SA Petrobras* (No 3) [2005] EWCA Civ 891 ("Petromec") as follows:

> *"116. The traditional objections to enforcing an obligation to negotiate in good faith are (1) that the obligation is an agreement to agree and thus too uncertain to enforce, (2) that it is difficult, if not impossible, to say whether, if negotiations are brought to an end, the termination is brought about in good or in bad faith, and (3) that, since it can never be known whether good faith negotiations would have produced an agreement at all or what the terms of any agreement would have been if it would have been reached, it is impossible to assess any loss caused by breach of the obligation…"*

194. In that case Petromec agreed to carry out certain work to a vessel and Brasileiro agreed to pay to Petromec the "reasonable cost" of doing so. The relevant clause went on to say Brasileiro agreed to negotiate the costs with Petromec in good faith (albeit the clause was rather more complex, but that was the essence). So there was a substantive obligation on the part of Brasileiro to pay Petromec's reasonable costs, and the agreement to negotiate them in good faith was a matter of machinery for quantifying them. Longmore LJ observed (at [117]) that the cost to Petromec was comparatively easy to ascertain; that if agreement was not reached, the court would itself have to ascertain the reasonable cost; and that if the court was able to conduct the exercise of finding the reasonable cost, there should be no difficulty in deciding what the result of good faith negotiations was likely to have been. Unless there were special factors present, it was likely to be the same as the reasonable cost.

195. Although the requirements of good faith are sensitive to context, the test of good faith is objective in the sense that it depends not on either party's perceptions of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people. It follows that the content of the duty is established by a process of construction based on an objective principle (per Leggatt J (as he then was) in *Yam Seng Pte v International Trade Corp* [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep. 526 at [144]; cited in Mid Essex at [150]).

196. In *Rosalina Investments v New Balance Athletic* Shoes (UK) Ltd [2018] EWHC 1014 (QB), the court was asked to enforce a clause which required negotiation in good faith with respect to the terms of a renewal of an already existing contract. It was contended that this clause had been breached when one of the parties asked the others to sign a renewal contract, and months later withdrew from negotiations having not signed the contract. That argument was rejected on multiple grounds, including the following:

> *"48. Second, the duty to negotiate was not open-ended; it lasted only until the 2012 Agreement expired and possibly up to 90 days thereafter. If it were otherwise then the clause would be void for uncertainty: per Mance LJ in Petromec Inc v Petroleo Brasileiro SA Petrobras (No 3) [2005] EWCA Civ 891 at [120], discussing Walford v Miles [1992] 2 AC 128. Even if clause 9.1 did impose mutual obligations to negotiate in good faith, by January 2017 when NB decided to cease sponsoring Mr Fellaini and declined*

to sign the agreement, any obligation arising under clause 9.1 had long-since ended.

49. Third, if clause 9.1 of the 2012 Agreement is to be widely construed in the way contended for by Mr Onslow, it is invalid for the reasons given by Lord Ackner in Walford v Miles at 138E-H…" [This part of *Walford v Miles* has been set out above.]

(b) Discussion

197. I consider that in this case, reliance on the good faith clause will not assist the Claimants for the following reasons, namely:

(i) A materially different transaction, other than the Transaction did not take place. That was because no transaction of any kind took place. Nor did "a series of events occur other than that which was initially envisaged in respect of the Transaction." Accordingly, Clause 1.6 of the Engagement Agreement was not engaged, and accordingly an obligation to negotiate under Clause 1.6 did not arise.

(ii) If Clause 1.6 was engaged, an agreement to negotiate in good faith is generally unenforceable for the reasons identified in *Petromec*;

(iii) In commercial negotiations, there is no objective basis upon which to evaluate negotiations. A person may take an extreme position to exact concessions or because of a view about the perception of the relative bargaining position of the parties even if this turns out to be inaccurate. It would be difficult to ascertain the circumstances in which the termination of negotiations would be brought about in good or bad faith, bearing in mind that parties are entitled to negotiate in their own interests. Ultimately, the ability to withdraw from negotiations is almost invariably an essential part of the negotiating dynamic.

(iv) It is very difficult to know whether good faith negotiations would have produced an agreement at terms would have arisen if the negotiations had continued. If it would have been reached, it is very difficult to know what sum would have agreed. A success fee is difficult to ascertain objectively (unlike the costs of carrying out work to a vessel in *Petromec*, which can be assessed from the costs actually incurred).

(v) Those costs are not made significantly easy to assess by reference to "*the time and effort spent and to be spent by DCL in respect of such transaction*."

(vi) This is not a case where there were simply outstanding details. Although the parties were already in a contractual relationship, there are too many uncertainties about this obligation to negotiate in good

faith in the circumstances of this case for there to be an enforceable obligation, let alone a breach of such an obligation if it existed. Issue 13.1 is therefore resolved that Clause 1.6 did not give rise to an enforceable obligation: alternatively, no obligation to negotiate had arisen in the circumstances of this case (Issue 13.2).

198. The above suffices to dispose of this part of the case. Without making any final findings about Issues 13.3 and 13.4 which are unnecessary, I am not satisfied that it has been established that there was a breach of any obligation to act in good faith, particularly bearing in mind the approval of Mr Horlick of the correspondence of Mr Cavaco, which is a strong indicator against breach of any Braganza or good faith duty (Issue 13.3). Even if there was a breach, there would have been very significant obstacles for the Claimants to establish more than a speculative chance of entering into a contract with Renova. It will be noted that this would have depended both on Renova achieving a settlement with the claimants in the English Pathfinders Litigation and then that a contract would have been negotiated that resulted ultimately in a Transaction (Issue 13.4).

XI The Unjust Enrichment Claim

199. Mr Horlick contends that he is entitled to recover sums from PMSA as unjust enrichment. Such payments are categorised in the Particulars as follows:

(i) Para 30(a)(i) - Direct payments to PMSA consisting of £162,901.40 paid by Mr Horlick, and £67,314.00 paid by the Grandover Mining client account;

(ii) Para 30(a)(ii) - Payments discharging liabilities of PMSA to Mr Cavaco in relation to salaries and/or other liabilities to Mr Cavaco set out in para 29(a) of the Particulars, in the sum of £468,838.72;

(iii) Para 30(a)(iii) - Payments made by Richard Horlick discharging liabilities of PMSA to TZMI, in the sum of £59,880.24;

(iv) Para 30(a)(iv) – Payments made by DCL discharging liabilities of PMSA in relation to a legal opinion obtained from Professor Cordeiro, in the sum of £37,068.56;

(v) Para 30(a)(v) – Payments made by Mr Horlick discharging liabilities of PMSA in relation to Portuguese legal services, in the sum of £68,736.04;

(vi) Para 30(a)(vi) – Payments made by DCL discharging liabilities of PMSA in relation to Damian McCrystal for PMSA's blog, in the sum of £15,000.00; and

(vii) Para 30(a)(vii) - Payments to defend the Pathfinder Litigation, in the sum of £426,080.70

200. A claimant must show four things for an unjust enrichment claim to succeed: (1) that the defendant has been benefited in the sense that the defendant was enriched; (2) that the enrichment was gained at the claimant's expense; (3) that the enrichment at the claimant's expense was unjust; and (4) that no defence applies (per Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, at 227).

201. PMSA's primary defence is that the payments claimed were made pursuant to the June 2015 Agreement or earlier agreements and are contractually contained and therefore fail as a matter of law. In order to consider this, it is necessary to consider the following:

(i) Whether the payments were made under these agreements;

(ii) If so, the law about how an unjust enrichment claim cannot generally live side-by-side with an agreed contractual framework identifying who is obliged to pay to whom;

(iii) Any reason to depart from the general rule set out above in this case.

202. PMSA contends that all of the sums claimed in the Unjust Enrichment Claim were payments made from loans under the June 2015 Agreement. It follows that they are contractually contained by the June 2015 Agreement. On this basis, PMSA's argument is that an unjust enrichment claim cannot be pursued in those circumstances.

203. At para 30(c) of the Particulars, Mr Horlick pleaded that PMSA's enrichment "was unjust because of a total failure of consideration and/or the non-payment to Claimants of sums due under the aforesaid agreements." "Aforesaid agreements" is a reference to the June 2015 Agreement. PMSA takes this to mean that the sums claimed in the unjust enrichment claim are "sums due under the June 2015 Agreement", meaning the loan drawdowns under the June 2015 Agreement.

204. The Claimants submit that there has been a failure of consideration in this case because the money has not been paid under the 2015 Loan Agreement. They draw attention to the dictum of Lord Simon LC in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32 at para 48 (referred to in Goff & Jones "The Law of Unjust Enrichment", 9th Edition, paras 13-01) that:

> *"... when one is considering the law of failure of consideration ... it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise."*

205. Asked to specify the consideration that had totally failed, the response was: *"[CMdC] has denied…"that is lawfully bound by and/or obligated under and/or lawfully a party to the June 2015 Agreement". Further or alternatively, [CMdC] has denied any liability under the June 2015 Agreement and/or the agreement of guarantee set out therein and/or failed to satisfy its obligations thereunder. In the premises, the consideration provided by [CMdC] in respect of the June 2015 Agreement and/or the agreement of guarantee therein has failed."*

206. It therefore is common ground that the payments which are sought by way of the unjust enrichment claim were advanced under the June 2015 Agreement and other agreements to which PMSA was not a party. PMSA submits that where, as here, there are contracts between the Claimants and a third party (PMSA not being a party to any of the loan agreements) a claim in unjust enrichment cannot succeed where it would contradict the express terms of the contracts or interfere with the rights and obligations and risk assumptions made between the Claimants and third parties.

207. The issues which have been identified are as follows:

Was PMSA enriched by the claimed payments (Issue 14)

Were the payments at Tim Horlick's or Richard Horlick's expense? (Issue 15)

Were the payments unjust (Issue 16)?

(a) The law

208. As a general rule, where there is a contract between the parties relating to the benefit transferred, no claim in unjust enrichment will lie while the contract is subsisting (Goff & Jones (9th Edn) at 3-13). The fact that this is a general, but not absolute, rule was noted recently by Carr LJ in *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149 at [72]-[73]. Examples of exceptions might exist for example because allowing restitution does not conflict with the allocation of risk in the contract or does not conflict with the contract because there is good reason for the contract not to be enforced because it is not enforceable or has been validly terminated. There would then be no inconsistency between contract and unjust enrichment.

209. In *Costello v MacDonald* [2011] EWCA Civ 930; [2012] QB 244, the claimant builders had entered into a contract with a company for the construction of houses on land owned by the shareholders and directors of the company personally. The builders had been informed that the contract was being made with the company rather than the individuals for tax reasons. The company failed to pay the builders' invoices and judgment was given against the company for the amount due. The company being unable to pay, a monetary restitutionary award for unjust enrichment was made against the shareholder/directors.

210. One point which arose was whether a restitutionary claim should be allowed in the face of the contract between the company and the claimants. On this point, Etherton LJ stated as follows:

> *"21. The second point of principle is whether a restitutionary claim should be allowed to undermine the contract between Oakwood and the claimants, that is to say, the way in which the parties chose to allocate the risks involved in the transaction. The parties arranged the transaction as one in which legally enforceable promises were made only between Oakwood and the claimants, even though the benefit of the contract was to be conferred on Mr and Mrs Costello. The obligation to pay for the*

> *claimants' services, and so the risk of non-payment, was contractually confined to Oakwood. If a claim was permitted directly against Mr and Mrs Costello it would shatter that contractual containment. It would also alter the usual consequences of Oakwood's insolvency, which was one of the risks assumed by the claimants in contracting with Oakwood, since a direct claim against Mr and Mrs Costello would improve the claimants' position over Oakwood's other unsecured creditors.*
>
> *…*
>
> *23. I am clear, on the other hand, that the unjust enrichment claim against Mr and Mrs Costello must fail because it would undermine the contractual arrangements between the parties, that is to say, the contract between the claimants and Oakwood and the absence of any contract between the claimants and Mr and Mrs Costello. The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation…*
>
> *…*
>
> *31. Further, as Mr Darton pointed out, the existence of two remedies, one in restitution and one in contract, is capable of producing anomalous results. Contractual damages are calculated by reference to the contract price and terms. Compensation for unjust enrichment as a result of the plaintiffs' services is calculated by reference to the value of the services (generally at the date of their receipt) which may or may not be the same as the contractual rate. This raises the possibility of compensation in restitution at a higher rate than the contractual rate, so enabling a claimant to improve on a bad bargain, and with consequential implications for contribution by the defaulting contracting party."*

211. The policy concern regarding insolvency regimes which Etherton LJ identified and addressed in Costello at [21] is noted by the authors in Goff and Jones at para. 3-76 which cites the Hong Kong Court of Appeal's decision in *Yew Sang Hong Ltd v Hong Kong Housing Authority* [2008] HKCA 109; [2008] BLR 563 at [13]:

> *"[T]he law of restitution will not normally cut across long-established statutory regimes regulating creditors' rights against insolvent debtors. Otherwise, the law of restitution may*

> *undermine the pari passu principle whereby unsecured creditors share rateably in the assets of an insolvent debtor. To allow a creditor a restitutionary remedy in the interests of 'doing justice' in a specific case would only lead to that creditor jumping the queue of unsecured creditors and so bring about injustice in everyone else's case."*

212. The courts have been prepared to allow an unjust enrichment claim even where there is a subsisting contract in place in certain circumstances. Indeed, in *Yew Sang Hong Ltd v Hong Kong Housing Authority* above, Reyes J said at [19] that he had "*deliberately stated the principle in qualified terms"* because he was prepared to accept that *"restitution will not always be excluded*" in cases where a plaintiff makes payment to the defendant pursuant to a contractual obligation owed by the plaintiff to a third person. In *Barton v Gwyn-Jones* [2019] EWCA Civ 1999; [2020] 2 All ER (Comm) 652 (for which permission to appeal to the Supreme Court was granted), the Court of Appeal considered whether a contract for a specified introduction fee, payable to an agent if a property was sold at a particular price, left no room for, amongst other things, an unjust enrichment claim to be made. At [31]-[35], Asplin LJ (with whom Males LJ agreed) distinguished Costello on the basis that in Barton, the contract was completely silent on the allocation of risk in the particular circumstances that occurred (that being the sale of a property for £6 million, when the contract only addressed the sale of a property for £6.5 million). The Court of Appeal concluded that it would not undermine the contractual allocation of risk negotiated by the parties in allowing the unjust enrichment claim, and so the restitutionary claim did not conflict with the contract. The facts of the case are very different from the instant case, not least because it was a two-party case, without the complications of double liability, interfering with the insolvency regime and undermining contractual arrangements which occurs especially in a three-party case.

213. Therefore, from the above authorities the following propositions can be distilled:

    (i) It is a general, not absolute rule, that where there is a contract between the parties relating to the benefit transferred, no claim in unjust enrichment will lie while the contract is subsisting (*Dargamo Holdings* at [72]-[73]).

    (ii) A claim in unjust enrichment will fail where it would undermine the contractual arrangements between the claimant and a third party and there is the absence of a contract between the claimant and the defendant (*Costello* at [23]).

    (iii) That rule reflects a sound legal policy which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty (*Costello* at [23]).

    (iv) In determining whether an unjust enrichment claim would undermine those arrangements, the court will look to the way in which the parties chose to allocate the risks involved in the transaction under the contract (*Costello* at [21]).

(v) The court will also look to the wider context in which the parties entered into the contract, to determine what the parties understood when choosing to allocate the risks under the contract as they did (*Costello* at [32]).

(vi) The rule in Costello does not apply where the contract is completely silent on the allocation of risk for the transaction giving rise to the unjust enrichment claim (*Barton* at [31]-[35]).

(vii) It has been noted in this jurisdiction and other jurisdictions that were an unjust enrichment claim to be allowed where such a contract exists, this may undermine the pari passu principle in insolvency law as well as having the undesirous effect of allowing a creditor to ”jump the queue” of unsecured creditors (*Costello* at [21], *Yew Sang Hong Ltd* at [13]).

(viii) Another justification for this rule is the possibility of a claimant being able to improve on a bad bargain where the sums they are able to recover in an unjust enrichment claim would exceed those they can recover in a contract claim, with consequential implications for contribution by the defaulting contractual party (*Costello* at [31]).

(b) Discussion

214. I have concluded that this is a case to which the general rule applies. Pursuant to proposition (2) above, the general rule is that a claim in unjust enrichment will fail where it would undermine the contractual arrangements between the claimant and a third party and there is the absence of a contract between the claimant and the defendant. The contractual arrangements in this case are the June 2015 Agreement (which subsumed the July 2011 Agreement) and the March 2012 Agreement, to which agreements PMSA was not a party.

215. Pursuant to propositions (3)-(5), the general rule acknowledges the parties’ autonomy to configure the legal relations between them, including the way in which the parties choose to allocate risk. The March 2012 and June 2015 Agreements both provide elaborate contractual schemes of risk allocation.

216. As for the March 2012 Agreement, as has already been established under the March 2012 Loan Claim, the Trust loaned £150,000 for which Mr Cavaco and JVC were jointly and severally liable as the borrowers. In return, the Trust was able to negotiate favourable repayment terms; on top of the repayment of the loan facility, they would also receive the Redemption Premium, and an interest calculated at a rate of 6% per annum. The Trust was able to mitigate that risk by negotiating for security in the form of their Guarantee with Richard Horlick.

217. As for the June 2015 Agreement, the Horlicks loaned £1,500,000 for which Mr Cavaco was liable as the borrower, and CMdC as the guarantor. As stated in recital (a), the lenders were able to negotiate security in the form of shares in Pathfinder Plc, and an option agreement for 40% of the shares in a holding company for CMdC. In return for the risk of not being repaid, the lenders were able to negotiate an interest rate of 8% above the base rate. The decision to make CMdC the guarantor under the June 2015

Agreement was evidently thought out; recital (d) of the June 2015 Agreement states: "*The Guarantor [CMdC] has been a beneficiary of the advances made…*". Therefore, the June 2015 Agreement is also a clear, intentional contractual scheme of risk allocation.

218. Mr Horlick's own evidence also supports the conclusion that the allocation of risk under both agreements was deliberate and well-thought out. In his evidence, Mr Horlick said that he had discussed with Mr Cavaco the possibility of making PMSA a guarantor under the June 2015 Agreement. He said that Mr Cavaco was adamant for PMSA not to enter into an agreement owing to the ongoing Pathfinder Minerals Litigation, which Mr Horlick accepted "sort of made sense in the context" of the difficulties in getting the Ministry of Mines to confirm PMSA's ownership of Licence 4623C [T3/9/12 - T3/10/15]. Therefore, the decision not to make PMSA a guarantor was an informed risk allocation decision between the lenders and the borrower to that agreement.

219. Mr Horlick also gave evidence about the payment arrangements for the Pathfinder Minerals Litigation. He accepted that he deliberately structured those payments as loans to Mr Cavaco from the HOR002/007 client account, rather than as direct payments to Smithfield, because there was a concern about champerty [T2/26/9-15, T2/26/23 - T2/27/12]. Once again, that shows there was a deliberate allocation of risk in how the loan payments were made. He accepted the risk that Mr Cavaco may not repay those loans but obtained the benefit of avoiding the risk of adverse costs orders if Mr Horlick was found to be a litigation funder.

220. Those considerations make this a case where the above legal policies are engaged, such that an unjust enrichment claim cannot succeed insofar as the payments claimed were made pursuant to those agreements. Were the Unjust Enrichment Claim to be accepted, PMSA would in effect become a quasi-guarantor to the June 2015 Agreement, which the parties had already decided not to do, and which would undercut their contractual arrangements. It follows that the Unjust Enrichment Claim should be dismissed on that basis in relation to all of the payments claimed except for the remaining direct payments to PMSA.

221. Whether there was a direct or an indirect payment to PMSA, the factor of insolvency is a further problem about an Unjust Enrichment Claim. If Mr Cavaco were to go into an insolvency, then the problem about an unjust enrichment claim is that there might at the same time be a claim in contract by the equivalent of the trustee in bankruptcy of Mr Cavaco if he lent the money on to PMSA and a claim in unjust enrichment on the part of the Claimants. This could lead in theory to a double recovery against PMSA on the basis that the recipients of the claims would be different potentially, in the contractual claim the creditors of Mr Cavaco (of whom the Claimants may only be a part) and in the restitutionary claim, the Claimants. This scenario underlies the caution of subverting the contractual analysis in proposition (7) above. It is a further factor against an unjust enrichment claim.

222. In any event, the failure of repayment of the loans is according to the Claimants sufficient to make the agreements fall away so as to open up a restitutionary claim. That does not work. Far from treating the agreements as discharged, the Claimants made claims on the basis of the agreements. They obtained an order that the defence of CMdC be struck out and Mr Horlick obtained judgment against it. Further, Mr Horlick

obtained a default judgment against Mr Cavaco. Pursuing a contractual claim to judgment is not a failure of basis but is an enforcement of the agreements themselves.

223. Bearing in mind the contractual context, and the facts of the instant case, the Claimants' claim in unjust enrichment fails.

(c) Direct payments to PMSA not the subject of drawdown under the June 2015 Agreement

224. I shall now consider the payments identified above in the seven categories in para. 30(a)(i – vii) and whether these were payments made at Mr Horlick's expense. Since PMSA has succeeded on the issue to the extent that such payments are loans not made to PMSA and therefore not recoverable, this issue is strictly unnecessary to be decided, but the Court will go on to consider each of the categories as an alternative to the contractual bar to unjust enrichment.

(d) Para 30(a)(i) - Direct payments to PMSA consisting of £162,901.40 paid by Mr Horlick and DCL between August 2012 and November 2015 , and £67,314.00 paid by the Grandover Mining client account to PMSA between December 2012 and November 2015

225. In my judgment, there is no reason to conclude that the payment of £67,314.00 allegedly made by Grandover Mining was made at Mr Horlick's expense and that is sufficient to dispose of the issue. Grandover Mining was a separate legal entity. There is no evidence to the effect that it paid as agent for Mr Horlick and no reason to pierce the veil of incorporation.

226. In any event, this aspect of the claim must be dismissed as there is no evidence of these payments having been made. In his reply to JVC's and PMSA's Part 18 request, Mr Horlick confirmed that he was not able to obtain evidence of those payments because Grandover Mining's account was with Newlawslegal and he did not have access to a copy of that account, and Newlawslegal had ceased trading. He contended that those payments would show in PMSA's bank accounts. I cannot see such payments being recorded on the ledger for PMSA's account throughout the 2012 to 2015 period. Despite having been shown those accounts before writing his second witness statement, Mr Horlick fails to point out where such payments can be found in his statement. Therefore, the Claimants have not proven that these payments were in fact made.

227. As regards the payments of £162,901.40 made by Mr Horlick and DCL, they formed part of the sums shown as having been drawn down under the June 2015 Agreement, under which Mr Cavaco and not PMSA was the borrower. Initially, the PMSA accounts had shown that it was the borrower of some of these sums because the information about the loans to Mr Cavaco had not been presented to the accountants, but this was subsequently corrected to reflect these sums as contributed by Mr Cavaco: see the second witness statement of Ms Veloso paras. 64-65 and her evidence at [T4/103/19 – T4/104/9 and T4/112/5 – T2/113/11]. I accept this evidence of Ms Veloso as to how this occurred.

228. There was some reliance on statements of Mr Cavaco who was never cross-examined. He had said that the moneys were for PMSA's benefit, but in an earlier statement, he said the opposite, namely *"PMZ, has never had any direct or indirect relationship with the Horlicks. PMZ is a completely illegitimate party to this action."* Anything that comes from Mr Cavaco has to be viewed with great caution, but it appears that the parties managed their affairs so that Mr Cavaco and not PMSA was the borrower.

(e) Para 30(a)(ii) - Payments discharging liabilities of PMSA to Mr Cavaco in relation to salaries and/or other liabilities to Mr Cavaco set out in para 29(a) of the Particulars, in the sum of £468,838.72

229. Disbursements of £126,530.08 comprise payments to Gil de Freitas, Sandra Cavaco and Jose Figueirido respectively. They are disbursements of the March 2012 Agreement to which PMSA was not a party, and therefore the claim for unjust enrichment is inconsistent with the contractual arrangements. Indeed, the whole of the sum lent by the Trust under the March 2012 Loan claim is claimed in the Unjust Enrichment claim.

230. Of the remaining payments, there are questions as to what part of these payments were payments at the expense of Mr Horlick as opposed to other payers including Richard Horlick and DCL, and indeed of the part which has been said to have been by Mr Horlick, whether he has been able to prove the same.

231. In any event, in addition to the claim failing because of the contractual claims, the claim also fails because it has not been proven that the payments were made for the benefit of PMSA. It is said that the payments enriched PMSA because they discharged its liabilities to Mr Cavaco. There are the following problems about that plea, namely (a) it is in contradiction to a plea at para. 29(a) of the Amended Particulars of Claim that the same payments enriched CMdC because they discharged liabilities owed to Mr Cavaco by CMdC, and (b) although Mr Horlick believed at the time of the payments that the reason for payments to Mr Cavaco was to discharge corporate indebtedness, the evidence subsequently obtained appears to indicate that Mr Cavaco was dishonest and it was his way of misappropriating money. On this premise, there was no benefit to PMSA, but only to Mr Cavaco and his associates, and hence the analysis that it was he who was to repay under the various loans accords not only with the allocation of risk but with the factual analysis of who benefited from the payments.

(f) Para 30(a)(iii) - Payments made by Richard Horlick discharging liabilities of PMSA to TZMI, in the sum of £59,880.24;

232. This appears to have been a PMSA liability. PMSA says that there has been nothing other than assertion from Mr Horlick without any supporting document to prove that the invoice was paid. It seems likely that the invoice was paid because otherwise one would expect that TZMI would be complaining (assuming that it was at arm's length). Nevertheless, in order to prove the claim, Mr Horlick ought to have been able to show how it was his money which paid for this. In any event, the claim fails because of the overlap with the agreements which are inconsistent with the unjust enrichment analysis.

(g) Para 30(a)(iv) – Payments made by DCL discharging liabilities of PMSA in relation to a legal opinion obtained from Professor Cordeiro, in the sum of £37,068.56;

233. The invoice was addressed to PMSA, and it appears to have been commissioned by Mr Cavaco for PMSA. It is doubtful that it ought to have been for PMSA because it was in respect of the Pathfinder Minerals Litigation to which PMSA was not a party. The defendants in that litigation were Mr Cavaco, General Veloso and JVC. It appears that Mr Cavaco who was held out as having authority to bind PMSA must have caused it to incur this liability. There was therefore an enrichment of PMSA to the extent that this liability was discharged, even if the liability should have been incurred by those who were the defendants in the Pathfinder Minerals Litigation. However, the payment was made on behalf of DCL: I do not accept that this equates to a claim by Mr Horlick, and there has been no alternative plea that it is owed to DCL. In any event, the claim fails because of the overlap with the agreements which are inconsistent with the unjust enrichment analysis.

(h) Para 30(a)(v) – Payments made by Mr Horlick discharging liabilities of PMSA in relation to Portuguese legal services, in the sum of £68,736.04

234. There is no documentary evidence in the work summary of the lawyers of this work or invoices for this work to PMSA or any explanation as to why PMSA should be liable for the work rather than the defendants in the Pathfinder Minerals Litigation. The evidence of Ms Veloso and Mr Horlick is that the legal advice was provided for the Pathfinder Minerals Litigation. That did not enrich PMSA for reasons which are given in more detail in respect of the payments identified in respect of para. 30(a)(vii) below. There is also no evidence that Mr Horlick paid for anything, although there is evidence that DCL paid for £10,319. Accordingly, the claim in unjust enrichment fails for this reason too.

(i) Para 30(a)(vi) – Payments made by DCL discharging liabilities of PMSA in relation to Damian McCrystal for PMSA's blog, in the sum of £15,000.00

235. There is an issue as to whether this was not a payment made by Mr Horlick. The payment was made by DCL and there is no attempt in the pleading to collect it by DCL. If the only point was whether there was a benefit to PMSA, I should have inferred that there was a benefit to PMSA in that Mr Cavaco was held out as having power to enter into contracts with third parties such as Mr Damian Crystal. As a result, Mr Crystal appears to have contracted with PMSA. An invoice was issued to PMSA, so that the discharge of that invoice was a benefit to PMSA. However, the claim in unjust enrichment fails because it has not been shown to be at the expense of Mr Horlick and in any event the contractual analysis defeats the restitutionary claim on the facts of this case.

(j) Para 30(a)(vii) - Payments to defend the Pathfinder Minerals Litigation, in the sum of £426,080.70

236. This claim for unjust enrichment shows the danger of a loose interpretation of enrichment. PMSA was not even a party to the Pathfinder Minerals Litigation, which was brought against Mr Cavaco, General Veloso and JVC. The pleaded case is that defending the Pathfinder Minerals Litigation conferred a benefit on PMSA because it was about control of CMdN and with control of CMdN, there could have been pursued restoration in Mozambique of the licences from PMSA. PMSA summarises difficulties in fact and in law with those assertions, but the fundamental point is that this benefit is indirect and intangible. There is no quantifiable financial value attributable to any benefit to PMSA, which is a pre-requisite of a claim for unjust enrichment: see Goff & Jones on the Law of Unjust Enrichment 9th Ed. para. 4-03. This does not found a basis for saying that PMSA should be liable for the costs of defending the Pathfinder Minerals Litigation. In any event, to the extent that the expenses were those of the Trust or DCL, they were not at Mr Horlick's expense. In any event, the payments were advanced pursuant to loan agreements to which PMSA was not a party.

237. In view of these conclusions, it follows that it is unnecessary to reach any conclusions on Issue 17 (whether any change of position barred unjust enrichment claims) or Issue 18 (whether any such claim was time barred).

238. For these reasons, the Unjust Enrichment Claim is dismissed in its entirety.

XII Conclusions

239. It therefore follows that the Claimants succeed against JVC in respect of the claim under the March 2012 Agreement.

240. The remaining claims are dismissed, notably (a) the claim for a success fee and related claims based on a breach of *Braganza* duty and/or of a contractual duty of good faith, (b) the claim for expenses, and (c) the claim for unjust enrichment.

241. It remains to thank Counsel for their detailed preparation of this case and for the quality of their written and oral submissions.