Neutral Citation Number: [2019] EWHC 2085 (Ch)

Claim No: BL-2017-000242

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 30/07/2019

Before :

Kelyn Bacon QC
(sitting as a Deputy Judge of the High Court)

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Between :

EMAGINE FILMS LIMITED	**Claimant**
- and –	
(1) MISTER SMITH ENTERTAINMENT LIMITED **(2) ME TEEN SPIRIT LIMITED**	**Defendants**

- -
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James Pickering (instructed by **Davis Woolfe**) for the **Claimant**
Laura John (instructed by **Wiggin LLP**) for the **Defendants**

Hearing dates: 21 and 23–27 June 2019

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Approved Judgment

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

....

KELYN BACON QC

Kelyn Bacon QC (sitting as a Deputy Judge of the High Court):

Introduction

1. This is a dispute concerning the financing arrangements for the distribution of an independent film called *Teen Spirit*, directed by Max Minghella and produced by a US company called Automatik. The film was released in the US in April 2019, and is due to be released in the UK at the end of July 2019. The Claimant ("eMagine") is a company set up specifically for this project by Mr David Wong, who is its sole director. The First Defendant ("Mister Smith") is a sales agent and film distribution company. The Second Defendant ("METS") was set up by Mister Smith for the purposes of the project. No relief is sought against METS, which was joined to the proceedings solely to ensure that it was bound by any judgment made in these proceedings.

2. The claim arises from negotiations between eMagine and Mister Smith for eMagine to participate in the financing of *Teen Spirit*, which would enable the parties to secure an agreement for the international distribution rights for the film. The negotiations were eventually terminated by Mister Smith, and Mister Smith went on to secure financing from other sources. eMagine says that Mister Smith's termination of the negotiations was in breach of a contract between Mister Smith and eMagine in the form of a Term Sheet dated 13 February 2017, and seeks damages.

3. Mister Smith denies the claim in its entirety and says that the Term Sheet fell away, either because the contractual preconditions were not met, or pursuant to an implied term, or through frustration or consent. Mister Smith also denies the claim for damages in any event.

4. The Claimant's principal witness at trial was Mr Jun Tsiong ("JT") Wong, the son of David Wong. He was the authorised representative of the Claimant at all material times, and conducted the majority of the negotiations with Mister Smith. David Wong also gave evidence as to his involvement in the negotiations, albeit that he emphasised that the day to day transactional details had been the responsibility of his son. I will refer to David and JT Wong collectively as "the Wongs".

5. The Defendants' principal witness was Mr Darren Fisher, the COO of Mister Smith and a director of both Mister Smith and METS. He conducted the majority of the negotiations on behalf of Mister Smith. The other witnesses were Mr David Garrett, the CEO, founder and director of Mister Smith, and also a director of METS; Mr David Mepham, Vice President, Finance at Mister Smith; and Mr Fred Berger, a partner at Automatik, the producer of *Teen Spirit*, who gave his evidence via video link from the US.

6. The evidence of all of the witnesses was careful, measured, and helpful to the court. As will be apparent from the discussion below there was not, in the event, significant disagreement between the parties on the main facts. Rather, what was in issue was the legal characterisation of their agreements and negotiations.

7. Following the conclusion of the hearing I invited further written submissions from the parties on the impact on their respective arguments of *Walford v Miles* [1992] 2 AC 128 and subsequent cases concerning agreements to negotiate in good faith, which neither counsel had cited or commented on during the trial. I will discuss those submissions below.

Factual background

8. The chronology of the negotiations between the parties is recorded principally in a lengthy series of emails and other contemporaneous documents, with the witness evidence explaining the context of these emails as well as providing further detail of the oral discussions between the parties.

Initial discussions between Mister Smith and producer

9. The project started in August 2016 when Mister Smith was approached by the producer of *Teen Spirit* to discuss the international distribution of the film (i.e. its distribution outside the US). Mister Smith was described by Fred Berger as being "in the top echelons of sales agents for independent films". At that stage the potential options were for Mister Smith either to be a pure sales agent, receiving a specified commission, or to acquire the international distribution rights, which would give a potential for a higher return but would require significant investment on the part of Mister Smith.

10. By late 2016 the discussions were focusing on the latter option. Consistent with common practice within the industry, in order for the producer to agree to grant international distribution rights to Mister Smith, the latter was required to offer what was referred to as a "minimum guarantee", which meant a minimum payment that would be made by Mister Smith to the producer for the international distribution rights, irrespective of actual sales of the film. Once a binding agreement was reached between the producer and Mister Smith as to the terms on which Mister Smith would acquire the international distribution rights, Mister Smith would be able to conclude sub-distribution agreements for the various non-US territories.

11. On 18 November 2016 Mr Fisher emailed the producer proposing a minimum guarantee figure of around $2.25m, noting that "Of course, any offer is non-binding until completion of any long form documentation". Following some further negotiations, the producer replied with a more detailed proposal that included the $2.25m minimum guarantee figure, a budget of "no less than $4m", and preliminary details of the split of proceeds, "acknowledging that there will likely be a third party equity financier required to complete financing".

Initial discussions between Mister Smith and eMagine

12. Mister Smith did not itself have sufficient resources to offer the minimum guarantee, and therefore began looking for a third party investor to collaborate on the project. An initial approach to Aperture Media Partners was rejected in December 2016. Shortly before that, however, Mr Garrett had been introduced to David Wong who was trying to find a sales agent for a different film

project. It appeared that Mr Wong was also interested in investing in films more generally, and in December 2016 Mr Fisher started to explore whether the Wongs might be interested in providing the minimum guarantee required for *Teen Spirit*. At that time it was envisaged that the Wongs' participation would be through a company of which David Wong was chairman, MCM Capital Limited.

13. During the course of December 2016 and early January 2017 Mr Garrett and Mr Fisher put considerable pressure on the Wongs to commit to the project. Although Mr Garrett and Mr Fisher both maintained in their evidence that, absent a financier, Mister Smith would potentially have proceeded simply as the sales agent for the producer, it is clear from the evidence that they were very keen indeed to secure the international distribution rights to the film, and were concerned that if they did not make an offer to the producer to do so they would lose out on the opportunity. This was a matter of some urgency, because the European Film Market was due to take place in Berlin during the first half of February, at which they would need to start selling the film to distributors for individual territories outside the US.

14. On 20 January 2017 a meeting took place at BAFTA between the Wongs, Mr Fisher and Mr Mepham, at which an agreement in principle was reached between the parties to the effect that MCM would back the financing of the minimum guarantee, Mister Smith would make an offer to the producers (on behalf of an SPV to be incorporated) to acquire the international distribution rights for *Teen Spirit*, and that if the offer was accepted Mister Smith would then negotiate a distribution agreement with the producer on behalf of the SPV. The receipts that the SPV was entitled to retain would then be applied in a particular order as between Mister Smith and MCM. It was also agreed that the parties would seek a bank loan (most likely with Bank Leumi, with whom initial discussions had taken place) to reduce MCM's exposure, as well as to reduce the interest rate charged on the finance for the minimum guarantee.

15. It is common ground that all parties knew that the film was, at that stage, not fully budgeted or fully financed, and that any agreement by the producer would be subject to final agreement on the budget and finance package for the film. In particular, both Mister Smith and the Wongs were aware that the likely requirement for additional equity financing would have an impact on what was called the "back end", by which the parties meant the way in which any net profits would be split as between the producer, the SPV and any other investor.

Minimum guarantee offer to the producer

16. Following the meeting at BAFTA on 20 January 2017, Mr Fisher emailed the producer with a formal offer to acquire the international distribution rights for *Teen Spirit*, on the basis of a minimum guarantee of $2.25m. The offer specified that the SPV should receive a distribution fee of 25% plus various other identified fees, and that the gross international receipts would be applied in a particular order, with the ultimate net proceeds (i.e. the back end) to be split 50:50 as between the producer and the SPV. As to the remaining terms of the agreement to be reached with the producer, Mister Smith's offer letter

specified "All other terms to be negotiated in good faith. This offer is non-binding until completion of related definitive long form documentation on terms acceptable to both parties."

17. On 27 January 2017 the producer agreed Mister Smith's proposals in principle, and authorised Mister Smith to proceed to represent *Teen Spirit* at the European Film Market in Berlin. At that stage, since final agreement had not been reached on the acquisition of international distribution rights, the producer's authorisation was merely for Mister Smith to represent the film as the producer's exclusive sales agent.

18. The producer and Mister Smith agreed that their final agreement on the international distribution rights would require, in particular, further negotiations as to the split of the back end profits if an equity investor was required (since any equity investor would require a share of the back end profits as a return on their investment). This was relayed to the Wongs in an email from Mr Fisher on the same day (27 January), which attached a draft Term Sheet for the agreement between MCM and Mister Smith, and included the following comment in the covering email:

> "As their [i.e. the producers'] equity financer is not yet in place, they request we agree in good faith to discuss the back end split of profits in the producer waterfall in good faith (after recoupment of the MG) if this is required in order to secure the equity required for the production. This should not sound onerous in any way and moreover we can all take a view on acceptability of this after Berlin based on the sales we have made and before you commit funds. It is quite customary and if we were ever to consent to sharing a portion of back end international profits with the equity partner after MG recoupment and return it would always have to be based on reciprocal sharing of domestic return and back end."

19. Mister Smith confirmed its agreement to this approach in an email sent to the producer on 9 February 2017, which included an express provision that "the parties acknowledge that the Net Proceeds allocation will be discussed in good faith in light of the requirements of the equity financier(s) of the Picture". It is common ground that the Wongs were also content to proceed on this basis. It is also common ground, in the light of these communications, that the agreement with the producer was an agreement in principle only and not a binding contract.

20. Around this time, Mister Smith learned that the Wongs' participation in the project would be through eMagine rather than through MCM.

Agreement of Term Sheet with the Wongs

21. Mr Garrett and Mr Fisher proceeded to present the film to potential international sub-distributors at the European Film Market in Berlin, which commenced on 9 February 2017. As the offers came in, they were sent to both the producer and the Wongs, seeking the Wongs' approval for the provisional

agreements that were being concluded with potential sub-distributors. Although at that point no agreement had been signed with the Wongs, Mr Garrett and Mr Fisher explained in their evidence that they were seeking approval for the distribution deals that they were provisionally concluding since they hoped and expected that their agreement with the Wongs would be concluded imminently. As Mr Garrett explained, it is common practice for films to be taken to the market on this sort of basis before the financial plan has been fully settled. On occasions, if no final agreement can be reached on the financial package, the film collapses and the provisional agreements have to be unravelled. This damages the credibility of the person presenting the film, which is why Mr Garrett and Mr Fisher wanted to make as much progress as possible on the financing package for *Teen Spirit* before it went to Berlin.

22. On 11 February Mr Garrett learned from the producer that the total budget for the film had increased to $5.25m. This was significantly larger than he had expected. Some of the shortfall was made up by a proposed equity investment from a Belgian company called Umedia, which also proposed to provide some funding through tax credits. There was still, however, a hole of $1m in the finance plan for the film, which would have to be filled with additional equity investment. This left considerable uncertainty as to how much of the back end profits would be available to share with Mister Smith and the Wongs. On 12 February Mr Fisher therefore talked to JT Wong, and asked whether the Wongs would consider providing the $1m equity investment so as to enable them and Mister Smith to retain a larger share of the profits. The Wongs were interested in considering this proposal further, but in the meantime they were keen to finalise and sign the Term Sheet. The Term Sheet was duly signed on behalf of both Mister Smith and eMagine on 13 February 2017.

23. The Term Sheet is of central important to this claim. It is therefore necessary to set out its provisions in some detail. The preamble to the clauses stated that:

> "This term sheet dated 13 February 2017 between Mister Smith Entertainment Limited ('**Mister Smith**') and eMagine Films Limited ('**eMagine**') confirms the key terms upon which eMagine has agreed to finance a minimum guarantee of US$2,250,000 ('**the MG**') for the acquisition of certain rights in relation to the proposed motion picture currently titled '*Teen Spirit*' ('**the Picture**'). Once funded by eMagine (or otherwise) in accordance with this term sheet, the minimum guarantee will be advanced by a special purpose vehicle established for the Picture ('**Distributor**') on terms more particularly set out in the term sheet dated January 20, 2017 between Mister Smith and Automatik Entertainment ('**Producer**') attached hereto as Exhibit A (the '**Producer Term Sheet**')."

24. The clauses of the Term Sheet then included the following provisions:

> "2. Distributor: Promptly following execution hereof, Mister Smith and eMagine will incorporate the Distributor in a jurisdiction mutually agreed by Mister Smith and eMagine.

Shares in the Distributor shall be owned in the following proportion: 80% by eMagine and 20% by Mister Smith. … Other terms and conditions in relation to the management and operation of Distributor shall be set out in a shareholder's agreement to be concluded in good faith between Mister Smith and eMagine ('**Shareholder Agreement**').

3. Investment/Minimum Guarantee: Subject only to satisfaction of the conditions precedent set out in Section 11 below and the terms of Section 4 below and as a material inducement to Mister Smith making available the offer under the Producer Term Sheet and representing the Picture at the Berlinale 2017, eMagine agrees to guarantee the payment of US$2,250,000 (without deduction) to Distributor (the '**eMagine Investment**') to enable Distributor to pay the MG pursuant to and in accordance with any payment schedule agreed under the Distribution Agreement. …

4. Escrowing eMagine Investment: To offer comfort to the Producer of Distributor's ability to pay the minimum guarantee when due (if required as a condition to signing the Distribution Agreement), eMagine agrees to escrow 10% of the eMagine Investment (or such other amount required by Producer and agreed by eMagine) … with Coutts & Co, Bank Leumi or another bank acceptable to eMagine and Mister Smith which, upon signature of the distribution Agreement will be advanced to Distributor and available to be applied in part payment of the MG in accordance with the Distribution Agreement. Mister Smith and eMagine acknowledge and agree that the MG shall not be paid to the Producer under the Distribution agreement until the finance plan, budget and cashflow for the Picture have been locked and approved by Mister Smith and eMagine and binding commitments to fund the full budget in respect of the Picture are in place …

5. Refinancing and Repayment: eMagine will initially guarantee payment of the full value of the MG when due and payable in accordance with the Distribution Agreement. It is anticipated that Distributor will agree sales contracts prior to the completion and delivery of the Picture, and that sub-distributors will provide deposits ('**Deposits**') which Deposits shall be used to fund part of the MG. Distributor will seek to borrow against the balance of the value of such pre-sold contracts from a bank or other suitable financier ('**Lender**') ('**Bank Financing**') unless eMagine undertakes to pay the MG itself without Bank Financing. Mister Smith and eMagine will discuss in good faith the level of Bank Financing required (up to the amount of the MG) taking into account the level of presales, the Deposits and applicable timing. …

6. Distribution Agreement: Mister Smith will negotiate a long-form distribution agreement, subject to eMagine's approval, with Producer … in connection with the Picture on industry standard terms or otherwise on terms acceptable to Mister Smith and eMagine provided that none of the terms set out in the Producer Term Sheet shall change without eMagine's approval (the 'Distribution Agreement'). The Distribution Agreement will define total gross receipts from international exploitation of the Picture ('**Total Gross Receipts**') and include a distribution fee payable to the Distributor of at least 25% of Total Gross Receipts.

7. Exploitation/Territory: Distributor will engage Mister Smith as exclusive international sales agent to represent and sell all exploitation rights to the Picture worldwide excluding only the United States. The sales agency agreement between Distributor and Mister Smith in respect of the Picture (the '**SAA**') shall be subject to eMagine's approval …

8. Recoupment: Gross receipts in respect of the Picture actually received by Distributor pursuant to Section 5 of the Producer Term Sheet or otherwise pursuant to the Distribution Agreement ('**Distributor Gross Receipts**') … shall be applied as follows:

1. First, to Mister Smith to recoup a US$50,000 flat, non-accountable market charge;

2. Second, to Mister Smith to recoup up to US$75,000 of distribution expenses incurred in connection with the Picture …;

3. Third, to recoup any bank finance obtained by Distributor in relation to the Picture …;

4. Fourth, to eMagine to recoup the eMagine Investment (to the extent advanced by eMagine and not refunded to eMagine) in full plus interest …;

5. Fifth, subsequent Distributor Gross Receipts up to a first tier (being 50% of the difference between US$3,000,000 and the sum of items 1 to 4 above) shall be applied 20% to Mister Smith and 80% to eMagine;

6. Sixth, subsequent Distributor Gross Receipts up to US$3,000,000 shall be applied 80% to Mister Smith and 20% to eMagine;

7. Seventh, Mister Smith shall be paid a fee equal to 15% of Total Gross Receipts in excess of US$3,000,000 on a prospective basis.

8. Eighth, any subsequent Distributor Gross Receipts shall be split 80% to eMagine and 20% to Mister Smith.

…

11. Conditions precedent to advance of the eMagine Investment: Notwithstanding the terms of Section 4, eMagine shall be under no obligation to advance the eMagine Investment until eMagine has received the following:

1. Evidence of due incorporation of the Distributor in accordance with the terms hereof;

2. Fully executed Distribution Agreement incorporating the terms specified in the Producer Term Sheet;

3. Fully executed Shareholder Agreement; and

4. Fully executed SAA.

…

13. Other

…

(c) In the event that any provision of part of a provision of this term sheet shall be, or shall be held to be, illegal, invalid, unenforceable or against public policy pursuant to a final adjudication by a court of competent jurisdiction such provision shall be severed herefrom and the remainder of this term sheet shall be deemed in full force and effect.

…

(g) General: Following execution hereof, the parties shall promptly proceed to the negotiation and execution of long form documentation relating to the subject matter hereof and pending execution thereof, this term sheet contains the entire understanding of the parties and replaces any and all former agreements and understandings relating to the subject matter herein. …"

25. The Producer Term Sheet attached to this Term Sheet contained the terms offered to the producer on 20 January 2017.

26. An immediate observation is that by the time the Term Sheet was signed several of its provisions had already been overtaken by events. Clause 3, for example, envisaged that the agreement set out in the Term Sheet would be a "material inducement" to Mister Smith making the offer to the producer and then subsequently representing the film in Berlin, and clause 7 envisaged that Mister Smith would represent the film on behalf of the SPV incorporated as

the distributor. In fact, however, as set out above the initial offer had been made to the producer almost a month before this Term Sheet was signed, and by the time that the Term Sheet was signed on 13 February 2017 Mister Smith had already represented the film in Berlin as sales agent to the producer (in default of any other basis on which it could do so), and had in fact already obtained sub-distribution offers for most of the territories sought. It was also clear, by 13 February, that the terms in the Producer Term Sheet would almost certainly have to change, because of the increased budget and further equity required for the finance package.

Incorporation of METS and discussions regarding equity investment by the Wongs

27. Following the agreement of the Term Sheet, METS was incorporated by Mister Smith, with the intention of using this as the SPV for Mister Smith's and the Wongs' involvement in the film. Mr Garrett, Mr Fisher, David Wong and JT Wong were appointed as directors of METS, and Mister Smith held 100% of the company's shares. Following the incorporation of the company, the parties started to discuss the terms of a shareholders' agreement between them.

28. More importantly, Mister Smith also started to discuss with the Wongs and the producers the terms on which the additional $1m equity required to finance the film might be provided by the Wongs. Initially, Mister Smith and the Wongs appear to have believed that if they did not contribute any equity they would still get a share of the back end profits, albeit not the 50:50 split set out in the Producer Term Sheet. By the end of February 2017, however, the understanding of both Mister Smith and the Wongs was that unless they made an offer to invest equity they would probably not get any share of the back end at all, and that the 25% distribution fee might also be at risk. Mr Fisher explained in his oral evidence (which was unchallenged on this point) that this would have made the deal no longer commercially viable for Mister Smith. The original proposal of only offering a minimum guarantee was therefore effectively abandoned, with the discussions thereafter focusing entirely on the incorporation of an equity offer into the package.

29. Those discussions, however, raised a number of issues that proved difficult to resolve. The first was the question of the terms of any bank financing that could be obtained. As noted above, discussions had begun with Bank Leumi, with a view to the bank providing cashflow for the minimum guarantee, collateralised against the provisional pre-sales agreements that had by then been concluded. The Wongs wanted to explore whether Bank Leumi would be prepared to lend more than the minimum guarantee in order to finance part of the additional equity investment, or at least whether it would permit some of its loan to be used as equity funding. Mr Fisher's understanding, from his conversations with Bank Leumi, was that Bank Leumi was unwilling to lend any more than the value of the minimum guarantee, and would not allow the loan to be used for the purposes of funding any equity investment.

30. As an alternative, therefore, JT Wong asked whether the deposits paid pursuant to the contracts with sub-distributors could be used to part-fund the Wongs' equity investment. Bank Leumi had apparently initially suggested that

this would be possible, but then decided that it would not allow deposits to be used towards payment of equity ahead of its recoupment of the loan.

31. That, however, led to an issue as to whether the Wongs' equity investment should be channelled through the SPV or provided separately to the producer. Initially, the suggestion had been that $500,000 would be channelled through METS and the remaining $500,000 provided directly to the producer. This was in part premised on the idea that there would be a cash flow advantage to investing through METS, through the use of the deposits from sub-distributors to part-fund the equity. That cash flow advantage disappeared if Bank Leumi was not willing to allow the deposits to fund the equity, leading the Wongs to suggest that the equity should all be provided directly by them to the producer rather than through METS. That, however, was not agreed by Mister Smith. Nor was it acceptable to the producer. Although Mr Berger had initially indicated that a split of the equity investment between METS and the Wongs might be agreed, the producer subsequently appears to have decided that it would want the entirety of the equity investment to be channelled through Mister Smith/METS. Mr Berger explained in his evidence that he would not have accepted investment in *Teen Spirit* directly from the Wongs since they were an unknown third party, but would have accepted their investment if it came through Mister Smith, which he knew and trusted.

32. Another problem related to the requirements of the producer was a stipulation that various additional amounts should be deducted from the international receipts for the film, to go to the producer and the cast/crew for the film. This would have the effect of reducing the profits available to Mister Smith and the Wongs. Mister Smith was not happy with this proposal but ultimately felt that this was a term that would have to be accepted. To reflect the additional deductions, Mr Fisher and Mr Mepham proposed an adjustment of the terms of the "waterfall" setting out the sequence in which the receipts from the picture received by METS would be allocated to Mister Smith and the Wongs respectively. That adjustment was not initially agreed by the Wongs, although JT Wong later suggested that it might be workable.

33. A final issue arose in relation to Mister Smith's 15% "secondary fee" (as referred to in clause 8.7 of the Term Sheet). JT Wong asked whether Mister Smith would be willing to defer this fee, to be recovered after some of the equity investment had been recouped. On 22 February 2017 Mr Fisher said that this was not something that Mister Smith could consider. There is a factual issue as to whether, in a subsequent telephone conversation with JT Wong on 24 February, Mr Fisher suggested that Mister Smith might in fact be prepared to agree this proposal. Mr Fisher denied ever agreeing this (and indeed denied that the telephone call even took place). I do not need to decide the point, however, because it is not disputed that by the start of April Mr Fisher's position was categorically that Mister Smith would not agree to defer its secondary fee behind recoupment of the equity investment.

Termination of the negotiations by Mister Smith

34. By mid-April 2017 no agreement had been reached on the terms of the shareholders' agreement for METS, nor had the outstanding issues concerning

the Wongs' investment been resolved. The question of whether the equity investment would be provided through METS had by then become a particular sticking point. On 13 April JT Wong said that from the Wongs' perspective, if they could not use the bank finance and/or deposits to assist with cashflow for the equity investment, then there was no advantage to them of putting the equity through METS. Mr Fisher's response was to say that this would not work for Mr Smith, and that the producers "continue to insist … that all the equity comes from the same single entity as the MG [i.e. minimum guarantee] does".

35. On 18 April JT Wong replied saying that "[t]he equity investment would have to be negotiated separately by us. I can't see that working otherwise." Mr Fisher emailed JT Wong shortly thereafter suggesting a call for the following day "to resolve the matter", and saying that

> "We also must move forward in financing the deals Mister Smith has concluded at Berlin as well as in securing the facility we have negotiated with Leumi which we are on a deadline for close of play tomorrow. The producers are becoming anxious to conclude our deal and Mister Smith is committed to executing the deal with them and financing through Leumi which we will confirm close of play Wednesday [i.e. 19 April] to secure our deal."

36. JT Wong replied on 19 April with a series of points that were partly statements of the Wongs' position and partly objections to the way that Mister Smith was handling the negotiations. These included the following comments:

> "- The original deal which had 50% of the international back end in the SPV was around the MG and international acquisition only. This was supposed to be premised on a deal structure which was agreed with the producers. We were able to analyse this deal structure and agreed to back you guys quickly as a favour on that basis prior to Berlin.
>
> - After the sales were achieved, the MG deal evaporated and the back end went to 0. We were told that this was down to pressure from umedia on the producers, and that the 25% commission was also under pressure now. You asked us then to save the deal and secure the 25% fee going into the SPV by backing the $1m equity. You repeatedly told us that there was no way to recover the international backend from the producers for the MG.
>
> …
>
> - We've always been clear that we would use the combination of deposits and Leumi funding to cashflow the MG and part fund the equity. … This was a specific reason that we were willing to invest in the full equity amount and specifically

> through the SPV. Excluding the deposits changes this significantly.
>
> - … the equity element was not part of [the original deal structure] and was something that we were asked to do to save the whole deal. We specifically split this in half so that only part would be shared with MS as there were only some cashflow benefits of including it within the SPV (which are now gone)."

37. JT Wong confirmed, however, that he was available for a call at various times that day, and also requested a call with Bank Leumi to clarify its position.

38. At that point Mr Garrett and Mr Fisher discussed the matter further. Their evidence was that they considered that an impasse had been reached and they did not feel that they were going to be able to reach agreement with the Wongs in time for the film to go ahead. The director of the film, Max Minghella, had a particular window of time available for filming during the summer of 2017, with principal photography due to start on 10 July, and the financing arrangements needed to be in place by then. Mr Garrett and Mr Fisher therefore decided not to go ahead with the proposed call with the Wongs but to terminate the negotiations and try to find another investment partner. Mr Fisher communicated this in an email to JT Wong sent later on 19 April, explaining that the Wongs' position made no commercial sense to Mister Smith. On that basis, he said that:

> "right now we have no agreed basis on financial cooperation between ourselves on the deal as it now stands and have to pursue alternative options …
>
> We have enjoyed working with both you and David and wish you well in all your future endeavours but it is clear that we are at an impasse here over the equity issue and share of back end and will move forward today on our own."

39. Mr Fisher and Mr Garrett then removed the Wongs as directors of METS. The Wongs did not respond to Mr Fisher's email, either on 19 April or at all.

Subsequent agreement with Aperture

40. After writing to the Wongs, Mister Smith began to call and email various industry contacts to try to find someone else to invest in the film. Among those was Aperture, who Mister Smith had initially approached (unsuccessfully) to invest in the project in 2016. This time, Aperture expressed interest in the project, and proposed to provide a loan of $3.25m to METS, which would effectively provide the finance for the minimum guarantee plus $1m of equity.

41. During the final negotiations with the producers and other financiers significant further amendments were made to the other aspects of the financing package. In particular, the producer agreed to reduce the film's

budget slightly, and Mr Garrett (personally) and Mister Smith agreed to invest additional equity in the film. Mr Garrett said that the decision to make those investments was taken with considerable reluctance, and was only agreed because Mister Smith was running out of time to put together a financial package for the film. Notwithstanding those concerns, it is not disputed that the final financial package agreed with the producers and Aperture in July 2017 was, in some respects, more favourable to Mister Smith than the various proposals that Mister Smith had been discussing with the producer and the Wongs in April 2017.

Commencement of proceedings

42. Meanwhile on 12 May 2017 eMagine's solicitors wrote to Mister Smith saying that eMagine continued to rely on the Term Sheet signed on 13 February 2017 and would be looking to Mister Smith and/or METS to make payments to eMagine in accordance with those terms.

43. Mister Smith's solicitors replied on 16 May 2017 denying liability on various bases that are essentially replicated in Mister Smith's defences to the claim.

44. On 31 October 2017 eMagine's claim form and particulars of claim were served, and on 21 December 2017 Mister Smith served its defence. On 15 August 2018 eMagine served an amended claim form adding METS as the second defendant and making various consequential amendments to the particulars of claim. The defence was subsequently amended in respects that are uncontroversial.

Summary of the parties' arguments

45. eMagine's claim is that the Term Sheet survived the negotiations set out above, and continued to bind the parties on 19 April 2017 when Mister Smith brought the negotiations to an end. Mr Pickering, representing eMagine, said that his primary case was that all the negotiations between the parties took place in accordance with and pursuant to the provisions of the Term Sheet, and that no further term needed to be implied. In the alternative, he contended that a term could if necessary be implied into the Term Sheet that:

> "although clause 6 of the Term Sheet set out the terms on which it was hoped that a distribution agreement would be reached with the Producer or its single purpose vehicle (including a distribution fee of at least 25% of total gross receipt), in the event of the Producer only [being] willing to enter into a distribution agreement which was not strictly in accordance with the terms envisaged by the above clause 6, the First Defendant and the Claimant would negotiate in good faith to reach a distribution deal with the producer or its single purpose vehicle as anticipated in the discussions surrounding the [27 January 2017 email]."

46. Mr Pickering submitted that the parties were still negotiating on 19 April 2017 and could have reached agreement. He therefore said that Mister Smith's

termination of negotiations amounted to a repudiatory breach of the Term Sheet. He argued that an appropriate quantification of damages would be the sums that eMagine would have received if it had provided the minimum guarantee on the terms set out in the Term Sheet, assuming as the "worst case" scenario that Mister Smith and eMagine would not have received any share of the back end profits.

47. In his further written submissions following the hearing Mr Pickering, for eMagine, contended that these arguments were unaffected by the *Walford v Miles* line of cases. In particular, he submitted that neither the express terms of the Term Sheet nor the implied term for which eMagine contended (as its alternative case) were void for uncertainty.

48. Mister Smith in response advanced a series of defences. The first was that the conditions precedent to the obligations under the Term Sheet were not met, such that there was no obligation on either party to perform their obligations under the Term Sheet and Mister Smith was entitled to withdraw from the negotiations.

49. In the alternative, Ms John, representing Mister Smith, contended at trial that the following term should be implied into the Term Sheet:

> "In the event that the Producer was only willing to enter into a distribution agreement which was not in accordance with the terms envisaged in the Producer Term Sheet and/or clause 6 of the Term Sheet, Mister Smith and eMagine would thereafter negotiate in good faith to reach a revised agreement between themselves and a distribution deal with the Producer (or its single purpose vehicle), but in the event that such good faith negotiations failed the Term Sheet/agreement between eMagine and Mister Smith would fall away."

Ms John said that the producer was indeed not willing to enter into a distribution agreement on the original terms proposed, and the negotiations between the parties, albeit conducted on good faith, were unsuccessful. The Term Sheet therefore fell away.

50. In the further alternative, Ms John contended that the agreement in the Term Sheet was either terminated by consent by the parties or frustrated, following the changes to the budget and funding requirements.

51. Irrespective of those arguments, Ms John argued that the claim to damages was entirely hopeless, in particular given that it was essentially a loss of chance claim that was not supported by any evidence whatsoever (expert or otherwise) as to the counterfactual case being advanced.

52. In her further written submissions following the hearing Ms John agreed with Mr Pickering that the express terms of the Term Sheet were enforceable, although she also submitted that, if found to be unenforceable, the requirements for good faith negotiation in clauses 2 and 5 of the Term Sheet could be excised while leaving the remainder of the Term Sheet intact. She

submitted, however, that the good faith negotiation element of both parties' versions of the implied term was unenforceable on the basis of the *Walford v Miles* principle. She therefore said that her implied term should be modified as follows:

> "In the event that the Producer was only willing to enter into a distribution agreement which was not in accordance with the terms envisaged in the Producer Term Sheet and/or clause 6 of the Term Sheet, ~~Mister Smith and eMagine would thereafter negotiate in good faith to reach a revised agreement between themselves and a distribution deal with the Producer (or its single purpose vehicle), but in the event that such good faith negotiations failed~~ the Term Sheet/agreement between eMagine and Mister Smith would fall away."

53. The result, Ms John submitted, would be the same as on her case at trial, save that it would no longer be necessary to consider whether the negotiations had been conducted and terminated in good faith.

Agreements to negotiate in good faith: the law

54. Before discussing the parties' arguments summarised above, it is necessary to start with some consideration of the law on the enforceability of agreements to negotiate in good faith. Since this was not addressed by their parties until their written submissions after the trial, this is not an exhaustive analysis of the issue, but rather focuses only on the essential points relevant to this case.

55. In *Walford v Miles* the claimant sued on a "lock-out" agreement under which the defendant, the prospective vendors of a business, agreed to negotiate only with the claimants, the prospective purchasers. All the negotiations were subject to contract, and the claimants contended that it was an implied term of the agreement that the defendants would negotiate in good faith with the claimants for as long as they continued to wish to sell the business. The House of Lords held that the agreement was too uncertain to be unenforceable. Lord Ackner, in particular, said this at 138C–G:

> "The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. … This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, *subjectively*, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith'. However 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."

56. In *Petromec v Petroleo Brasileiro* [2005] EWCA Civ 891, Longmore LJ summarised (at §116) the traditional objections to enforcing an agreement to negotiate in good faith as being:

> "(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."

57. He nevertheless distinguished *Walford v Miles* on the basis that in that case there was no concluded agreement at all since everything was subject to contract, and there was no express agreement to negotiate in good faith. In the *Petromec* case, by contrast, the disputed obligation to negotiate was an express contractual clause, which was part of a complex agreement, and was not a bare agreement to negotiate. Longmore LJ considered, in those circumstances, that the Court was not bound by *Walford v Miles* to hold that the obligation to negotiate was unenforceable.

58. The comments of Longmore LJ in *Petromec* were, however, *obiter* since the point did not strictly arise given the Court's other conclusions on the relevant ground of appeal. In the more recent case of *Morris v Swanton* [2018] EWCA Civ 2763, the Court did have to address the point directly, in relation to a contractual provision given an option to provide consultancy services for a period of four years "and following such period such further period as shall reasonably be agreed" between the parties. Giving the judgment of the Court, Dame Elizabeth Gloster considered that the disputed provision left the issue of any extension to the period to be agreed between the parties. Applying *Walford v Miles*, that provision was void for uncertainty, since the length of the extended period was an essential matter, and there was as a matter of law no obligation on the parties to negotiate in good faith about that point (§§29–31).

59. *Morris v Swanton* therefore confirms that the *Walford v Miles* principle extends to a case where the agreement to negotiate is contained with an express contractual provision, at least in a case where the relevant issue is an essential part of the parties' agreement. It is on this basis that the enforceability of the Term Sheet and the parties' proposed implied terms must be considered.

Enforceability of the Term Sheet and the parties' proposed implied terms

60. Three provisions of the Term Sheet envisaged further negotiations on specific issues. Clauses 2 and 5 provided for the parties to negotiate in good faith regarding the detailed terms of the shareholders' agreement and the level of bank financing required. I do not need to consider those provisions further, since nothing turns on them and, as Ms John submitted, to the extent that those were void for uncertainty they could be excised without impacting upon the remainder of the Term Sheet.

61. Clause 6 is, however, less straightforward since the agreement with the producer as to the terms of the distribution agreement lay at the heart of the Term Sheet: absent an agreement between Mister Smith, eMagine and the producer as to those terms there would be nothing upon which the remainder of the provisions of the Term Sheet could bite.

62. The first part of clause 6 provided for Mister Smith to negotiate a long form agreement with the producer, subject to eMagine's approval. As Mr Pickering pointed out, the clause went on to contemplate that those negotiations might lead to changes in the Producer Term Sheet, by providing that "none of the terms set out in the Producer Term Sheet shall change without eMagine's approval". On that basis, Mr Pickering's primary position was that the Term Sheet catered for the course of the negotiations between the parties in this case, without the need to consider any implied term.

63. I do not, however, consider that clause 6 can properly be interpreted as providing for substantial changes to the Producer Term Sheet. The clause must be read together with the other provisions of the Term Sheet, in particular the preamble and clause 11, both of which envisaged a distribution agreement that reflected the terms specified in the Producer Term Sheet. Clause 6 itself also included a requirement that the distribution agreement should provide for a 25% distribution fee, as per the Producer Term Sheet. Taking all of this together, I consider that the purpose of clause 6 was to require Mister Smith to negotiate with the producer the detailed terms of a distribution agreement that reflected the headline provisions set out in the Producer Term Sheet, while allowing – if eMagine agreed – some departure from the specific terms of the Producer Term Sheet, which did not change the fundamental substance of the provisions in the Producer Term Sheet. I do not consider that this, in itself, would have been void for uncertainty: the key provisions of the distribution agreement as agreed between Mister Smith and eMagine were set out in the Producer Term Sheet, and the extent of the negotiation would have been, in this situation, essentially confined to the detail of the long-form documentation.

64. What clause 6 did not, however, envisage was the situation that emerged in the weeks after the Term Sheet was signed, when it became clear that unless an equity investment was provided by Mister Smith and the Wongs, the back end profit share would disappear altogether, and the 25% distribution fee might also be at risk. If the distribution agreement had been pursued on that basis, it would have been a wholly different proposition to that which was envisaged in the Term Sheet, and clause 6 (read with the other provisions of the Term Sheet) did not contemplate a fundamental renegotiation of the distribution agreement. Indeed, if it had done so it would have been unenforceable on the basis of the case-law referred to above. Contrary to Mr Pickering's submissions, the uncertainty that would have arisen in such a case would not have been avoided by the use in clause 6 of the mandatory expression "will negotiate"; the point is still that there would have been (on that construction) a requirement to negotiate as to the key terms of the tripartite agreement between the producer, Mister Smith and eMagine, in circumstances where each party should have been entitled to withdraw from those negotiations for any reason. I note that in *Morris v Swanton* the relevant contractual term provided in similar vein that the disputed option period would continue for such further period as "shall reasonably be agreed", but was nevertheless found to be unenforceable.

65. For the same reason, both eMagine's version of the implied term and Mister Smith's original version of the implied term are, I consider, unenforceable. Both of those versions of the implied term would have required the parties to negotiate in good faith to reach a revised agreement between themselves and the producer. But implying a requirement of good faith does not assist with the problem that the fact of a negotiation necessarily means that the parties must be free to agree or disagree, and to walk away if they so choose.

66. The rationale for refusing to enforce a requirement for good faith negotiations is, indeed, exemplified by the position taken by the parties in this case as to the outcome of the negotiations between Mister Smith and the Wongs. Mister Smith's case is that it was entitled to terminate the negotiations since Mr Garrett and Mr Fisher considered, in good faith, that those negotiations had reached an impasse. eMagine's case is that Mister Smith should have continued negotiating with the Wongs because a deal was in sight. This raises precisely the difficulty adverted to by Lord Ackner in *Walford v Miles*: given that each party was entitled to pursue its own interest in the negotiations, how was Mister Smith to determine the point at which it was entitled to terminate the negotiations as having failed?

67. Ms John is therefore in my view right to acknowledge, in her written submissions after the hearing, that to be enforceable the requirement of good faith negotiations would have to be removed from Mister Smith's version of the implied term, so that it provided simply that if the producer was only willing to enter into a distribution agreement that was not in accordance with the terms envisaged in the Producer Term Sheet and/or clause 6, then the agreement between eMagine and Mister Smith would fall away. That would both resolve the lacuna in the Term Sheet (as to the situation if the agreement between the parties required a significant renegotiation) and would avoid the

element of uncertainty that would arise if the implied term were to provide for good faith negotiations between the parties as to the terms of a revised agreement.

68. As to whether Mister Smith's revised implied term to that effect meets the requirements for the implication of a term into a contract, in *Marks and Spencer v BNP Paribas* [2016] AC 743, §15, Lord Neuberger identified an implied term as being "a term which is implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract is made". He went on to cite (at §18) the test set out by Lord Simon in the Privy Council case of *BP Refinery v Hastings* (1977) 52 ALJR 20, as follows:

> "[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

Lord Neuberger then added (at §21) that a term can only be implied "if, without the term, the contract would lack commercial or practical coherence".

69. I consider that the revised implied term contended for by Mister Smith meets all of those conditions. It is clearly expressed, and is both obvious and necessary to give practical coherence to the agreement. As I have already said, the Term Sheet was predicated on the producers accepting an offer in broadly the terms set out in the Producer Term Sheet, which reflected the 20 January offer. The parties cannot have intended that they would be bound by the terms in the Term Sheet if a quite different financial package was ultimately negotiated. That would have made neither commercial nor practical sense.

70. Mr Pickering argued that Mister Smith's revised implied term would have the nonsensical result that the Term Sheet could never have come into effect, since it was already known that the producer would not agree to the terms on the Producer Term Sheet when the Term Sheet was signed. I do not accept that submission. The provisions of clause 6 allowed some departure from the provisions of the Producer Term Sheet. That made perfect sense in the context of the discussions that were taking place when the Term Sheet was originally sent to the Wongs (on 27 January 2017) and in the weeks thereafter leading up to and including the date on which the Term Sheet was signed. At that time the parties appear to have believed that it would be possible simply to agree to some revision of the Producer Term Sheet so as to share some of the back end profits with an equity investor, while leaving the basic structure of the proposed distribution agreement in place. A revision of the Term Sheet along those lines (which Mr Fisher had described in his 27 January email as "not … onerous in any way") might have been possible within the terms of clause 6. The lacuna arose, however, once a fundamental renegotiation of the agreement was required, which was the situation provided for by the implied term. It was

not clear to the parties, when the Term Sheet was signed, that this would be the case.

71. That point also answers Mr Pickering's suggestion that Mister Smith's revised implied term would have contradicted the express provisions of clause 6. I do not accept that submission. The term applied only in the situation where the renegotiation went beyond what could be done under the ambit of clause 6. It was therefore complementary to clause 6 and, as explained above, resolved the lacuna in the Term Sheet as to the consequences if a significant renegotiation of the structure of the agreement was required.

72. I therefore find that the Term Sheet took effect subject to Mister Smith's revised implied term, and was on that basis enforceable.

The operation of the Term Sheet and the implied term

73. As I have said, by the end of February 2017 it was clear to both Mister Smith and the Wongs that unless they made an equity investment in the film they would not be able to retain any share of the back end profits, and also might not be able to obtain the 25% distribution fee specified in the Producer Term Sheet and clause 6 itself. The producer was, in other words, not willing to accept an offer that broadly reflected the terms of the Producer Term Sheet and/or clause 6 of the Term Sheet. The Term Sheet therefore fell away pursuant to the revised implied term, and the parties were thereafter negotiating for a new agreement between them.

74. I do not accept Mr Pickering's suggestion that the parties could thereafter have reverted to the original deal which involved only the provision of a minimum guarantee. As Mr Pickering recognised, this would have inevitably involved the loss of most or all of the back end profit share. That would have been a fundamentally different agreement to the agreement envisaged in the Producer Term Sheet, and upon which the Term Sheet was predicated. For the reasons already given, Mister Smith was not willing to enter into a distribution agreement on those terms, and I do not consider that anything in the Term Sheet bound Mister Smith to accept such an arrangement.

75. Nor did the parties conduct themselves as if they believed that they were bound by all of the provisions of the Term Sheet, once it was clear that an equity investment would have to be made in order to retain any share of the back end profits. As JT Wong put it in his email of 19 April, the original deal which had 50% of the back end flowing to the Wongs/Mister Smith was premised on the original deal structure agreed with the producers, but that deal then "evaporated". The Wongs did not thereafter ever suggest that it should be resurrected. Instead, they went on to try and agree the terms of a new agreement. That is illustrated by the fact that there was, during the course of March and April 2017, considerable discussion of a revised waterfall for receipts from the film: for example JT Wong's email of 11 April 2017 attaching an amended waterfall with the comment that "our position has been much more significantly impacted due to the deal changes with Automatik than yours. However, we are keen to move forward and get a workable deal struck." There was, during these discussions, no suggestion by either eMagine

or Mister Smith that they were bound to adhere to the waterfall set out in clause 8 of the Term Sheet. That is consistent with the operation of the revised implied term for which Mister Smith now contends.

76. It follows that Mister Smith's termination of the negotiations was not in breach of the Term Sheet or indeed any other agreement between the parties.

Other arguments on liability

77. Given the conclusion that I have reached above, it is not necessary for me to consider Mister Smith's alternative defences of termination by consent and frustration. As to the condition precedent argument, it follows from what I have said above that I do not think that this is the correct way of interpreting the Term Sheet. My conclusion is *not* that the Term Sheet never came into force (which is effectively what the condition precedent argument would entail), but rather that it fell away once it was clear that the producer would only accept an arrangement that was (one way or the other) on substantially different terms to those set out in the Producer Term Sheet.

78. For the reasons given above, the issue of whether the negotiations were conducted and terminated in good faith also does not now arise. It may, however, be helpful for me to add some observations on this point, since it was the subject of extensive debate and evidence at the hearing.

79. It is common ground that a duty to act in good faith is a "modest requirement", which "does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people": Leggatt LJ in *Astor Management v Atalaya Mining* [2017] EWHC 425 (Comm) at §98. To establish bad faith, therefore, the conduct relied upon must be improper, commercially unacceptable, or unconscionable: *Yam Seng v International Trade Corp* [2013] 1 All ER (Comm) 1321, at §138.

80. eMagine contended that Mister Smith did not act in good faith. The basis for this allegation was a claim that Mister Smith had realised that, with the benefit of the various provisional sub-distribution agreements that had been concluded at or shortly after the European Film Market in Berlin, it would be able to negotiate an investment agreement with a new partner that was far more favourable to it than the agreement that might be negotiated with the Wongs. That was the real reason, eMagine said, that Mister Smith proceeded to terminate its negotiations with the Wongs.

81. I have no hesitation in rejecting the suggestion that Mister Smith's conduct was in any way improper, commercially unacceptable or unconscionable. Quite the contrary, the contemporaneous documentary record shows that Mister Smith went to considerable efforts to find a solution that was financially viable for all parties, with lengthy negotiations with both the producer and the Wongs throughout the period from the signing of the Term Sheet on 13 February 2017 to the termination of the negotiations on 19 April 2017. Even by 18 April 2017, by which time the tone of the email exchanges

had become more than a little fractious, Mr Fisher wrote to JT Wong emphasising Mister Smith's wish to conclude a deal and suggesting a call "to resolve the matter". Nothing in any of this suggests that Mr Fisher was, in fact, not genuinely intending to conclude a deal with the Wongs but was trying to extricate itself in order to pursue a more profitable opportunity elsewhere.

82. Indeed, there is no evidence that Mister Smith had any notion of what sort of alternative financial arrangement it might be able to put in place, prior to the termination of negotiations with the Wongs. As I have said, the initial approach to Aperture in 2016 had been rebuffed, and there is no suggestion that Mister Smith went back to Aperture (or any other potential investor) before 19 April 2017. As it turned out Mister Smith was indeed eventually able to secure the investment of Aperture, but the structure and terms of the final financial package were quite different to the package being discussed with the Wongs, and could not have been predicted by Mister Smith during the course of its negotiations with the Wongs between February and April 2017.

83. As to Mister Smith's decision to terminate the negotiations on 19 April 2017, as I have already noted the difficulty of determining when one party is entitled to walk away is precisely one of the reasons why the courts will not enforce a requirement to negotiate in good faith. Had I nevertheless been required to carry out that task, contrary to my conclusions above, the evidence before me indicates that Mister Smith had entirely legitimate reasons to consider that an impasse in the negotiations had been reached.

84. It is evident from the face of the emails exchanged between the parties on 13–19 April 2017 that on at least one issue, namely the question of whether the Wongs' equity investment would be put through METS or negotiated and provided separately by the Wongs, there was a clear conflict between the parties, with no indication from either side that they were willing to shift their position. JT Wong had said explicitly that the equity investment "would have to be negotiated separately by us"; Mr Fisher's position was equally unambiguous that this was (for various different reasons) unacceptable both to Mister Smith and the producer, and that the equity would therefore have to be provided through METS.

85. Mr Pickering attempted to portray the Wongs' statements on this point as a negotiating stance, notwithstanding the robust terms in which the Wongs' position was expressed in the exchange of emails between JT Wong and Mr Fisher. But even if the Wongs might have eventually been willing to compromise on this point if pushed, the evidence showed that Mr Garrett and Mr Fisher took what they said at face value. In the circumstances, even if there had been an enforceable requirement to negotiate in good faith, that cannot be taken as requiring Mister Smith to persevere with negotiations on the speculative possibility that the Wongs might not have meant what they said. That is particularly the case when one takes into account that there was considerable time pressure on Mister Smith by April 2017, given the limited window of time available to make the film and the requirement to have the financial package in place in advance of that. This meant that Mister Smith could not prolong the negotiations indefinitely in the hope of finding a resolution to the issues of disagreement.

86. Had it been necessary to reach a view on this, therefore, I would have found that Mr Fisher and Mr Garrett were acting in good faith when they decided on 19 April 2017 to terminate the negotiations on the grounds that an impasse had been reached.

Damages

87. The issue of damages does not, therefore, arise. Suffice it to say that I see considerable force in Ms John's objection that eMagine's claim to damages was insufficiently formulated and particularised. Given that the claim was based on the loss of a chance of profiting from investment in *Teen Spirit*, the counterfactual basis for the claim needed to be set out properly so that it could be addressed in the witness evidence and cross-examination. In the event, however, the basis for the claim did not really emerge until Mr Pickering's closing submissions. That meant that eMagine's witnesses had not been properly cross-examined on this, nor was it put to Mister Smith's witnesses. That was unsatisfactory and, even had I needed to decide the point, I do not consider that it would have been appropriate to proceed on the basis of assumptions (even "worst case" assumptions) that had not been tested on the evidence.

Conclusion

88. For the reasons set out above, I find that the Term Sheet signed by the parties on 13 February 2017 took effect subject to the implied term that if the producer was only willing to enter into a distribution agreement which was not in accordance with the terms envisaged in the Producer Term Sheet of 20 January 2017 and/or clause 6 of the Term Sheet, then the agreement between eMagine and Mister Smith would fall away. In the event that is what occurred. The Term Sheet therefore fell away pursuant to the implied term, and there was no breach of contract by Mister Smith when it terminated the negotiations. eMagine's claim therefore fails.