Neutral Citation Number: [2020] EWHC 1616 (Ch)

Claim No. BL-2020-000124

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
B E T W E E N :

Royal Courts of Justice
Rolls Building, Fetter Lane,
London EC4A 1NL
Date: 22 June 2020

Before: ANDREW LENON Q.C. (sitting as a Deputy Judge of the Chancery Division)

SINGULARIS HOLDINGS LIMITED (IN OFFICIAL LIQUIDATION)
Claimant

- and -

CHAPELGATE CREDIT OPPORTUNITY MASTER FUND LIMITED
Defendant

APPROVED JUDGMENT

Andrew Ayres QC (instructed by **Jenner & Block London LLP**) for the Claimant

Nikki Singla QC (instructed by **Harcus Parker Limited**) for the Defendant

Hearing date: 14 May 2020

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 14.00 on 22 June 2020.

Introduction

1. Following a three week trial in November 2016, the trial judge, Rose J, as she then was, found that Daiwa Capital Markets Europe Ltd ("Daiwa"), a stock broker, was

liable to the Claimant ("Singularis") in negligence and breach of contract for the sum of US$203,741,900, which she reduced by 25 per cent to take account of Singularis' contributory negligence, resulting in an award of damages of US$152,804,925. Daiwa appealed to the Court of Appeal and to the Supreme Court but its appeals were unsuccessful. The award of damages stood.

2. Shortly before the start of the trial, Singularis had agreed on terms for the receipt of litigation funding from the Defendant ("ChapelGate"), a hedge fund ("the Funding Agreement"). Following Singularis' successful conclusion of the proceedings against Daiwa, ChapelGate has been paid US$45,841,477.50 (together with interest and other sums) pursuant to the Funding Agreement. ChapelGate's entitlement to that sum is not disputed. The issue in these proceedings has arisen because ChapelGate asserts that it is entitled to be paid a further sum of US$15,281,092.

3. That issue turns on a short point of construction of the Funding Agreement. Under the Funding Agreement, ChapelGate is entitled to a percentage share of the "Proceeds". Proceeds are defined as meaning, in broad terms, the recoveries from the proceedings against Daiwa. ChapelGate contends that, on the correct construction of the definition of Proceeds, the judge's reduction of 25 per cent to the damages on account of Singularis' contributory negligence is to be ignored and hence that its share of the Proceeds is to be calculated by reference to the unreduced damages of US$203,741,900. This would entitle it to the further sum which it is claiming. Singularis maintains that this construction is incorrect, that the Proceeds as defined are to take account of the reduction for contributory negligence and hence that ChapelGate is not entitled to any further payment.

4. Singularis' solicitors, Jenner & Block LLP ("Jenner & Block"), hold the disputed amount of US$15,281,092 as trustees for ChapelGate, having distributed the balance of the recoveries by agreement with ChapelGate and in accordance with

the terms of the Funding Agreement. Singularis issued Part 8 proceedings seeking a determination of the issue so that the monies can be correctly distributed. The claim was supported by two witness statements from Christian Tuddenham, a partner of Jenner & Block. ChapelGate responded with a witness statement from Carrie Leonard, a Portfolio Manager at Orchard Global Asset Management LLP (“Orchard”), ChapelGate’s asset manager. The trial took place remotely without oral evidence.

Background

5. Singularis is a Cayman company in Official Liquidation. ChapelGate is a hedge fund managed by Orchard, which engages in litigation funding as part of its investment activity.

6. In July 2014 Singularis brought proceedings against Daiwa to recover approximately US$204 million (“the Daiwa proceedings”). The sum claimed was the total of eight payments made by Daiwa out of Singularis’ accounts in June and July 2009 on the instructions of Singularis’ sole shareholder, a Mr Al Sanea. The money was paid to various third parties controlled by Mr Al Sanea and was lost to Singularis. In the Daiwa proceedings, Singularis alleged that Daiwa was liable to it on the basis that Daiwa had dishonestly assisted Mr Al Sanea in the making of the payments, alternatively that it had acted negligently and in breach of contract.

7. In July 2016, some four months before the trial was due to start, Singularis’ liquidators informed its solicitors that the cash reserves in the insolvent estate were unlikely to be sufficient to support the litigation through to its conclusion. The liquidators decided to seek funding for the claim and approached both the estate’s creditors (who declined to assist) and third party litigation funders. Ultimately only one prospective funder, ChapelGate, was prepared to offer terms.

8. Orchard, through whom all dealings with ChapelGate were conducted, was first contacted on or about 21 October 2016, about a month before the trial was due to start. Following the making of a non-disclosure agreement to allow the liquidators to share information and advice with Orchard, Orchard was provided with a pack of documents including the statements of case, a memorandum of advice prepared by Jenner & Block and Counsel regarding the merits of the claim, the witness statements and expert reports filed by the parties.

9. The Defence included a defence of contributory negligence on the part of Singularis which was elaborated on in the Amended Defence and responded to in Singularis' Reply and Amended Reply. The contributory negligence defence was also mentioned in the memorandum of advice included within the document pack. In addition to contributory negligence, the Defence and Amended Defence relied on defences of *ex turpi causa* and set-off. In support of the set-off defence, Daiwa asserted that, if it was liable to Singularis, it was entitled to set off an equivalent amount to the amount of its liability either on the basis that Daiwa had been deceived into making the payments by Singularis through its shareholder, alternatively that it was entitled to an indemnity under its terms of business.

10. A meeting took place on 1 November 2016 between representatives of Orchard, Orchard's Counsel, Singularis' Leading Counsel and Jenner & Block at which Orchard was given the opportunity to ask questions and at which the possibility of a 50 per cent discount for contributory negligence was canvassed in a discussion about settlement. Shortly after the meeting, ChapelGate agreed in principle to provide funding. On 3 November 2016 Orchard sent a first draft of the Funding Agreement which was essentially on Orchard's standard terms. The negotiation of the Funding Agreement took three weeks, the finalised version being signed on 21 November 2016.

11. The trial of Singularis' claim began on 23 November 2016. On 16 February 2017 Rose J handed down judgment. She found that the claim of dishonest assistance failed but that Daiwa's defences of *ex turpi causa* and set-off also failed and that Daiwa was liable to Singularis in negligence and breach of contract. At the conclusion of her judgment she said as follows:

> "244 I must therefore consider whether to make an apportionment under the Law Reform (Contributory Negligence) Act 1945 ('the 1945 Act'). Section 1(1) of the 1945 Act provides that where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage. The damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. Subsection (2) provides that where such a reduction is made, the court must find and record the total damages which would have been recoverable if the claimant had not been at fault.
>
> 245 The amount of damages that Singularis is claiming and for which I have found that Daiwa is liable, subject to this point, to pay is $203,741,900 plus interest. That principal sum is made up of the amount of the disputed payments being $204,494,900 less recoveries of $753,000 made so far in other proceedings relating to the same loss.
>
> …
>
> 250 My conclusion on this point is that the deduction made for Singularis' contributory negligence should be 25 per cent.
>
> …
>
> 252 In conclusion I find that:
>
> *a)* The claim in dishonest assistance fails because Mr Metcalfe and Mr Hudson were not dishonest when they approved the disputed payments.
>
> *b)* Daiwa is liable to Singularis in negligence and for breach of contract for the sum of $203,741,900.
>
> *c)* Those damages should be reduced by 25 per cent pursuant to section 1 of the 1945 Act to take account of Singularis'

contributory negligence."

12. Her Order giving effect to her judgment dated 16 February 2017 ("the Order") records the outcome in paragraph 1, which reads as follows:

> "1. Judgment is entered for the Claimant on its claim for US $152,804,925, save that the 14 day period for compliance with the Judgment as referred to in CPR Pt 40.11 is extended and the Judgment is stayed until after the Consequentials Hearing, subject to further direction of the Court either before or at the Consequentials Hearing."

13. Daiwa subsequently appealed to the Court of Appeal and then to the Supreme Court but the appeals were unanimously dismissed in their entirety. ChapelGate provided funding to Singularis for each of Daiwa's appeals pursuant to two supplemental funding agreements, ultimately contributing total funding for the Daiwa proceedings of approximately £3.35m. The returns due to ChapelGate under the supplemental agreements are not in dispute.

The litigation funding market

14. Carrie Leonard's witness statement contains evidence about the litigation funding market. She describes litigation funding as having an important role in providing access to justice but notes that it is high risk and typically provided on a non-recourse basis so that a funder runs the risk of losing the entirety of its investment if it invests in a case which is unsuccessful. Funders also take the risk of the damages awarded being lower than expected and of it being impossible to recover the full amount of any award. In addition funders assume certain risks in relation to adverse costs. The risks associated with litigation funding are compounded by the fact that funders have no control over the litigation process; they have only a limited sense of the day-to-day ebb and flow of a case or of shifts in the merits when they occur and are reliant on solicitors and the funded party making accurate

disclosures as to the underlying facts and the potential returns from the case before the funder makes a decision to fund.

15. Ms Leonard states in her evidence that funders seek to protect themselves from these risks through commercial terms agreed in the funding agreement. This includes seeking undertakings from the claimant and the solicitor and imposing commercial consequences when claimants damage their own case or act or have acted in such a way as to reduce the amount of damages they are awarded. In exchange for taking such significant risks, funders also earn outsized returns, typically calculated by reference to a multiple of the money at risk or to a percentage of the proceeds, whichever is the higher. It is in a funder's interest to ensure that the level of potential recoveries far exceed the amount of funding required so there are sufficient funds to pay all stakeholders and importantly the claimant in situations in which the recovery is lower than anticipated. However, it is not unusual (however undesirable this may be for all parties) for a funder to be entitled to the entirety of any award and for the claimant to be entitled to nothing. If a case is not successful, a funder will lose the entirety of its investment and if recoveries are low it may recover only a fraction of its investment. Only in exceptional circumstances, such as a court finding that the claimant committed fraud or intentionally engaged in misleading conduct against the funder or in connection with the claims, is there provision for full recourse.

16. Ms Leonard goes on to state that many funders have rules of thumb as to the sorts of cases they are prepared to fund and many will not even consider investing at the eve of trial. The ideal time to begin funding a case is at the outset when there is a prospect of settlement. Funders recognise that trials significantly increase the risk as trials have a way of producing unexpected results. The funding proposition in the Daiwa proceedings was very high risk.

The Funding Agreement

17. The Funding Agreement was made between Singularis as the "Claimant", ChapelGate as "the Funder", the Official Liquidators of Singularis and Jenner & Block.

18. The issue of construction relates to the contractual definition of the term Proceeds. The definition of Proceeds is important because, pursuant to Schedule 2 of the Funding Agreement, ChapelGate's Profit Share is calculated by reference to the amount of the Proceeds.

19. The definition of Proceeds is as follows, with underlining added to the clauses which are in dispute in this case:

> **Proceeds** means all gross revenues and any other value (excluding VAT and <u>disregarding any netting, set-off or other reduction including, without limitation, by reason of a counterclaim or costs order against the Claimant</u>) received by, on behalf of, or in lieu of payment to, the Claimant, the Liquidators or the Solicitor (or any Affiliate or Representative of, or person related to or acting as agent of, the Claimant, the Liquidators or the Solicitor) in respect of any
>
> (i) legal costs, disbursements, uplift, profit share, the Legal Costs Agreement and/or any equivalent in respect of the Claim and/or the Proceedings;
>
> (ii) damages, settlement, compromise or other similar arrangement or agreement in respect of the Claim and/or the Proceedings
>
> whether in monetary or non-monetary form, present, future, actual or contingent.
>
> For the avoidance of doubt, "Proceeds":
>
> (i) includes (without limitation) cash, real estate, negotiable instruments, intellectual or intangible property, choses in action, contract rights, membership

rights, extinguishment of liabilities, subrogation rights, annuities, claims, refunds, rights to an account and any other rights to payment of cash and/or transfer(s) of things of value or other property (including property substituted therefor), whether delivered or to be delivered in a lump sum or in instalments, in relation to any claim or negotiation with any person in relation to any Proceedings, and shall include any award of recessionary, punitive, consequential, treble, aggravated or exemplary damages or penalties and any restitutionary award and any equitable compensation assessed against any adverse party from time to time; but

(ii) does not include any final non-appealable recovery (whether monetary or otherwise) that is obtained by the Claimant and/or the Liquidators in the proceedings against Maan Al Sanea in the Grand Court of the Cayman Islands (Cause No. FSD 123 of 2012 (AJEF)) and in any action to enforce that claim in the Cayman Islands, Saudi Arabia or elsewhere, the proceedings against Saad Specialist Hospital Company in Saudi Arabia (Case No. 34915680) to the extent that that recovery is obtained after the date on which the Claim (as defined in Schedule l) is Won, discontinued or otherwise concluded; and

(iii) does not include the Security for Costs Amount.

There shall be added to the amount of Proceeds the amount of any reduction in the amount of any award by reason of a set-off for any reason, including counterclaims, or as a result of a costs order against the Claimant or as a result of any other quantifiable order.

If any negligence, misfeasance or similar derivative action is Won against the Solicitor or any other person or entity in respect of the Claim and/or the Proceedings, all amounts received by or on behalf of the Claimant and/or the Solicitor, or respective agents, will also constitute Proceeds.

20. A "Win" is defined elsewhere in the Funding Agreement as meaning a non-appealable judgment, award or settlement pursuant to which the Defendant or

any third party is obliged to pay Proceeds to the Claimant, the Liquidators or the Solicitor and "Won" is to be construed accordingly.

21. Clause 5 of the Funding Agreement provides for the Proceeds to be applied in a specified order as soon as practicable after receipt, namely first to ChapelGate to repay the Outstanding Principal Amount (defined as meaning, in effect, the amount advanced to fund the litigation), secondly to pay the Solicitors' disbursements, thirdly to pay ChapelGate's Profit Share in accordance with Schedule 2, fourthly to pay amounts due to the Solicitors, the Liquidators and Counsel and fifthly any residual amount to the Claimant. By Clause 7, subject to certain "full recourse triggers" including fraud or misleading conduct on the part of Singularis or the Liquidators, ChapelGate's entitlement to payment of its Profit Share was limited to any Proceeds.

22. Schedule 2 provided as follows:

SCHEDULE 2

FUNDER'S PROFIT SHARE.

Provided that the Funder has not exercised its rights to terminate this Agreement the Funder's Profit Share shall be fixed on the date on which the Claim is Won, as follows:

Date of win	Funder's Profit Share
On or after the Signing Date but prior to the start of first instance trial (the **"Stage 1 Date")**	300% of the Outstanding Principal Amount or, if greater, 15% of the Proceeds
On or after the Stage 1 Date but prior to the date on which first instance judgment (including on embargoed judgment) is handed down (the **"Stage 2 Date**")	400% of the Outstanding Principal Amount or, if greater, 20% of the Proceeds
On or after the Stage 2 Date but less than 3 months after that date (the **"Stage 3 Date")**	500% of the Outstanding Principal Amount or, if greater, 25% of the Proceeds
Any time on or after the Stage 3 Date.	600% of the Outstanding Principal Amount or, if greater, 30% of the Proceeds.

23. The relevant percentage of the Proceeds to which ChapelGate is indisputably entitled, given the date on which the claim was finally "Won", is 30 per cent.

The issue

24. It is common ground that the sum of US$152,804,925 awarded to Singularis, together with interest and recovered costs, is to be included in the calculation of the Proceeds. The present dispute has arisen because ChapelGate argues that the contributory negligence reduction of 25 per cent to the damages awarded needs to be added back to this sum for the purposes of calculating the Proceeds and the Funder's Profit Share. The upward adjustment to the Proceeds contended for by ChapelGate is in the sum of US$50,936,975, 30 per cent of which is US$15,281,092 which is the sum in issue between the parties.

25. ChapelGate contends that the reduction for contributory negligence falls within the underlined words in the first paragraph of the definition of Proceeds quoted above ("… *disregarding any netting, set-off or other reduction including, without limitation, by reason of a counterclaim or costs order against the Claimant*") and/or within the words in the penultimate paragraph ("*There shall be added to the amount of Proceeds the amount of any reduction in the amount of any award by reason of a set-off for any reason, including counterclaims, or as a result of a costs order against the Claimant or as a result of any other quantifiable order*."). I will refer to the first set of words as the "disregarding" clause and the second set of words as the "adding" clause.

Contractual interpretation

26. There was no dispute as to the applicable principles. The Court must construe the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 per Lord Neuberger PSC at [15].

27. In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract and (b) the parties must have been specifically focusing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see *Arnold v Britton* (ibid.) per Lord Neuberger PSC at [17].

28. In determining the objective meaning of the language used, the Court is not just analysing the words used but must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent– *Wood v Capita Insurance Services Limited* [2017] UKSC 24 per Lord Hodge JSC at [9] to [13] and *National Bank of Kazakhstan v Bank of New York Mellon* [2018] EWCA Civ 1390 per Hamblen LJ at [39-40].

29. Singularis submitted that the "*contra proferentem*" principle remains operable in all types of case, including commercial cases: *Goldman Sachs International v Procession House Trustee Ltd* [2018] EWHC 1523 (Ch) per Nugee J at [60-62]. The rule can be invoked after all the other cannons of construction have been utilised; it requires ambiguity, if it exists, in a provision to be resolved against the party who put the clause forward and who relies upon it. In *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128 Briggs LJ (as he then was) held as follows at [14]:

> "… and the contra proferentem rule in its classic form was by no means limited to, or even mainly about, exclusion clauses. It was a rule designed to resolve ambiguities against the party who prepared the document in which the clause appeared, or prepared the particular clause, or against the person for whose benefit the clause operates: see *Lewison*, (op. cit.) [then *The Interpretation of Contracts* (5th ed., 2011)] at paragraph 7.08(b) at page 391 and the admirable historical introduction which precedes it."

30. In response to Singularis' submission that, if the parties had intended that a reduction in damages for contributory negligence was to be taken into account when quantifying the Proceeds, they would have said so, ChapelGate adopted the following statement of principle in *Lewison on the Interpretation of Contracts,* 6th Edition paragraph 2.13 under the heading "Why not say it?":

> "Since almost any dispute about the interpretation of a contract involves rival meanings, it is seldom helpful to ask why the parties did not adopt one of those rival meanings in their contract."

The parties' submissions

31. ChapelGate submitted, in summary, as follows.

31.1 Contributory negligence is a partial defence which, if successful, reduces the damages to which a claimant has proved its entitlement and which would otherwise have been awarded to it. Thus, s.1(1) of the Law Reform

(Contributory Negligence) Act 1945 ("the 1945 Act") provides that, where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. Where the damages are reduced pursuant to s.1(1), s.1(2) obliges the Court to find and record the total damages which would have been recoverable if the claimant had not been at fault, as Rose J did in her judgment.

31.2 The reduction for contributory negligence made by Rose J falls within the "disregarding" clause either as a "*netting*" or a "*set-off*" or as an "*other reduction*". The words "*netting*" and "*set-off*" are being used in a non-technical sense to denote the existence of a claim, liability or apportionment of responsibility which reduces the amount of damages to which Singularis had proved its entitlement and which would otherwise have been awarded, but for the reduction. The category of "*counterclaims*" is wider than the category of "*set- off*". The words "*by reason of a counterclaim*" located after the words "*other reduction including, without limitation,*" denote that the "disregarding" clause is intended to capture reductions other than set-offs in a strict sense.

31.3 ChapelGate accepts that the words "*other reduction*" must mean something other than simply a reduction resulting from a failure by Singularis to prove its case. If, for example, Singularis had failed to prove negligence or causation in relation to one or more of the eight payments, that would have been a successful defence, not a material "*reduction*". The word "*reduction*" refers to a reduction from a claim that has been made good. In this case, there was a judgment upholding Singularis' claim in negligence in relation to the eight payments which was then reduced.

31.4 Singularis' construction of the "disregarding" clause, according to which it is limited in scope to nettings, set-offs and "*such other reductions*", is inconsistent with the wording of the clause which does not include the word "*such*" and fails to give proper weight to the words "*without limitation*".

31.5 The critical part of the definition of Proceeds is the "adding" clause. This clause clarifies "*for the avoidance of doubt*" what is meant by the earlier part of the definition. The correct meaning of the clause is best demonstrated by the addition of sub-paragraph numbers to the clause as follows:

> "*There shall be added to the amount of Proceeds the amount of any reduction in the amount of any award*
> *(1) by reason of a set-off for any reason, including counterclaims, or*
> *(2) as a result of a costs order against the Claimant or*
> (3) *as a result of any other quantifiable order*."

31.6 Thus, sub-paragraphs (1)-(3) are separately identified things that are to be added back to "*the amount of Proceeds*" if there has been any "*reduction in the amount of any award*" by reason or as a result of any of them. Full weight should be given to the words "*any reduction*" and "*for any reason*".

31.7 The reduction for Singularis' contributory negligence is a reduction in the amount of the award of damages as a result of "*any other quantifiable order*". The word "*other*" must mean other than a set-off or costs order. The word "*order*" should be guided by the editorial observations in the commentary to Part 40 of the CPR in the White Book according to which the meaning of terms such as "judgment" and "order" depends on the context and no basis for distinguishing between these terms can be derived from the rules themselves. The words "*any other quantifiable order*" do not require a formal order specifying that contributory negligence be assessed at a certain level.

They require a determination of contributory negligence, as was made by Rose J.

31.8 Further or alternatively, the words "*any reduction*" and "*set-off for any reason*" are in the widest possible terms and refer to reductions in damages resulting from something done by Singularis (e.g. by incurring a debt or generating some other liability to Daiwa). A reduction for contributory negligence is of the same kind: Singularis was found through its actions to have contributed to its losses and the extent to which it was itself responsible was set off against the damages.

32. Singularis submitted, in summary, as follows:

32.1 Where ChapelGate's Profit Share is to be measured by reference to the Proceeds, the actual recoveries are the starting point for that measurement. The "disregarding" clause and the "adding" clause exclude the risks of a reduction in recoveries attributable to counterclaims and costs orders, both examples of set-offs in a broad sense.

32.2 The "disregarding" clause refers to "*netting*" and "*set-off*" before giving two non-exhaustive examples of "*other reductions*", namely reductions by reason of "*a counterclaim*" and "*costs order against the Claimant*" which are both reductions by set-off. In context the words "*any ...other reduction ... without limitation*" mean any other reduction falling within the category of reductions caught by the clause, i.e. these words should be read as "*any other such reduction without limitation*".

32.3 The "adding" clause should be construed consistently with the "disregarding" clause and is similarly limited in scope to reductions by reason of set-off in a broad sense. The words "*set-off for any reason*" are a marker for the rest of

the sentence. Counterclaims, costs orders or any quantifiable order are all examples of liabilities giving rise to legal or equitable set-offs.

32.4 Contributory negligence is a form of causation and apportionment defence. It is not a set-off.

32.5 Even if ChapelGate is correct to compartmentalise the language in the "adding" clause into three parts, so that the "adding" clause is not exclusively concerned with set-off, this does not assist ChapelGate because a finding of contributory negligence (i) does not result in a set-off (ii) does not result in a costs order and (iii) does not result in any other quantifiable order which reduces the damages award. The clause only captures reductions which are separate from the process of quantifying damages. Reductions which are intrinsic to that process are not within the clause.

32.6 The phrase "*any reduction in the amount of any award … as a result of any other quantifiable order*" is intended to be a catch-all with respect to any "*set-off*" not already caught in the express examples given (counterclaims or a costs order). The reduction for contributory negligence was not by reason of an "*other quantifiable order*". The terms of Rose J's judgment are not an "order" but instead recorded the process by which Rose J quantified the damages payable by Daiwa, which then became a legal obligation under the terms of the Order.

32.7 There is no ambiguity in the definition of Proceeds. But, if there were ambiguity, it should be construed against ChapelGate which had a fair and proper opportunity to put forward a definition which made the position clear.

32.8 A contextual analysis supports the textual analysis. Both parties were well aware that the defence of contributory negligence was a significant part of Daiwa's defence and one in relation to which Daiwa had extensively

amended its Defence. Had the parties intended that a reduction in damages on account of contributory negligence would be disregarded in the calculation of the Proceeds, they would have included an express provision to that effect.

33. Singularis accepted that the fact that ChapelGate was being handsomely rewarded for its investment was irrelevant to the interpretation of the Funding Agreement.

Discussion

Textual analysis

34. Taking first the "disregarding" clause, the focus of the clause is on reductions to receipts resulting from the setting off of crossclaims or liabilities. In the context of recoveries from legal proceedings, the terms "*netting*" and "*set-off*" are being used synonymously and refer to the situation in which a judgment debtor reduces the amount payable to the Claimant by offsetting a debt which the Claimant owes to the debtor.

35. The two examples of an "*other reduction*" given, namely "… *by reason of a counterclaim or costs order against the Claimant*", are both examples of reductions arising from a liability owed to another party by the Claimant, either as the defendant to a counterclaim or as the paying party under a costs order. These reductions are similar in nature to reductions by netting or set-off. I therefore agree with Singularis' submission that, read in context, the words "*other reduction ... without limitation*" should be read as "*other <u>such</u> reduction*" and that the words "*without limitation*" mean without limitation within the category of reductions resulting from set-offs.

36. A reduction by reason of contributory negligence is fundamentally different from the reductions specified in the "disregarding" clause in that a finding of

contributory negligence is not based on a claim against the Claimant and does not denote any liability on the part of the Claimant to anyone else. As Lord Simon, who, as Lord Chancellor was largely responsible for the drafting and passing into law of the 1945 Act, held in *Nance v British Columbia Electric Railway Co* [1951] A.C. 601 at 6:

> "When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove … that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the claimant's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate, but instead requires the court to undertake an apportionment exercise as part of the assessment of the "damages recoverable", in order to reduce those damages to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

37. This analysis is supported by what actually happened in this case. Daiwa did not plead its extensive defence of contributory fault on the basis that it was a set-off and Rose J did not characterise Singularis' contributory fault as set-off. As noted above, Daiwa did expressly plead a defence of set-off of an equivalent amount to its liability to Singularis based on an allegation of deceit and on a right to a contractual indemnity although that defence, if successful, would have been a complete answer to the claim so that there would have been no Proceeds and the "disregarding" and "adding" clauses would have been irrelevant.

38. The "adding" clause is, as Counsel for Singularis put it, "pulling in the same direction" as the "disregarding" clause and should be construed consistently with it. There is no obvious reason for including two equivalent provisions saying approximately the same thing in slightly different terms and they appear to be an example of "torrential" drafting. I agree with Singularis' submission that the

"adding" clause is, like the "disregarding" clause, primarily concerned with set-off and that "*counterclaims*", "*result of a costs order*" and "*result of any other quantifiable order*" should be construed as subsets of reductions "*by reason of a set-off*" rather than, as ChapelGate submitted, examples of "*any reduction in the amount of any award*".

39. ChapelGate's primary submission under the "adding" clause was that a reduction for contributory negligence is a reduction resulting from "*any other quantifiable order*". In my view, this construction is not compatible with the ordinary and natural meaning of the words. A finding of contributory negligence does not entail a "*quantifiable order*" reducing the amount of damages. The judge's determination, pursuant to the 1945 Act, of the level of Singularis' contributory negligence was not an "*order*", even accepting ChapelGate's submission that the terms "order" and "judgment" are used interchangeably in the CPR. The Order dated 16 February 2017 has only one relevant paragraph making an award of US$152,804,925 in Singularis' favour. There is no reference to a reduction and no other "order". Read in context, the words "*other quantifiable order*" are plainly referring to an order requiring the Claimant to pay a quantifiable amount to another party. As already noted, a finding of contributory negligence does not involve a liability to pay an amount to anyone else.

40. ChapelGate's alternative submission that the term "*set-off*" should be construed in a broad, non-technical sense as encompassing any reductions resulting from Singularis' actions or fault is not supported by the language of the clause and is far too broad as it would encompass reductions resulting from any of Daiwa's defences at trial and advanced on appeal. This cannot have been intended as it would make no commercial sense.

41. In short, the language used by the parties in the Funding Agreement leads clearly to the conclusion that, on the correct construction of the "disregarding" and

"adding" clauses, a reduction in damages for contributory negligence is not to be ignored in the calculation of the Proceeds and ChapelGate's Profit Share.

The wider context

42. This conclusion is supported by a consideration of the wider factual context. The ostensible function of the "disregarding" and "adding" clauses is to protect ChapelGate from the risk of recoveries being reduced by reason of liabilities of the Claimant arising under separate claims or court orders. It is readily understandable that ChapelGate would seek to build into its Funding Agreement protection against this type of extraneous risk. The risk of a counterclaim emerging out of the blue or of an adverse costs order being made against the Claimant, perhaps by reason of the conduct of the Claimant or its lawyers, is separate from the risk of a claim failing on its merits and may not be detectable as part of ChapelGate's due diligence. This would particularly be the position if the Funding Agreement was entered into at a much earlier stage in the proceedings than happened in the Daiwa proceedings, as would normally be the case. In contrast, the risk of a defence, including the partial defence of contributory negligence, succeeding and reducing the recoveries is inherent in an agreement to fund a claim in exchange for a share of the proceeds.

43. Furthermore, it was known to both parties at the time the Funding Agreement was entered into that Daiwa was running a defence of contributory negligence. The risk of the damages awarded to Singularis being substantially reduced as the result of a finding of contributory negligence was foreseen. It must have been obvious to the parties that adding back the amount of any reduction for contributory negligence in the quantification of the Proceeds would potentially have a major impact on the Profit Share payable to ChapelGate and on the residual amounts payable to Singularis and its lawyers. Had it been intended that the amount of a reduction for contributory negligence would be added back, it is to be expected that the parties

would have included an express provision to that effect, rather than relying on a strained construction of the "disregarding" and "adding" clauses.

44. In these circumstances, the question "Why did the parties not say it?" is, in my view, a pertinent one. The fact that the parties did not include an express provision to the effect that the amount of any reduction in damages for contributory negligence would be added back in the quantification of the Proceeds reinforces the conclusion that, on the correct construction of the Funding Agreement, no such adding back was intended.

Conclusion

45. Singularis is entitled to a declaration that the reduction applied in the judgment of Rose J of 16 February 2017 by reason of contributory fault or negligence is not to be added to the Proceeds, including for the purposes of calculating the Funder's Profit Share under the Funding Agreement.