Neutral Citation Number: [2022] EWHC 1857 (Comm)

Case No: CL-2021-000276

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2022

Before :

MR JUSTICE JACOBS

- -

Between :

Contra Holdings Limited

Claimant/ Respondent

- and -

Mark Joseph Cyril Bamford

Defendant/ Applicant

- -
- -

Andrew Hochhauser QC and **Andrew Legg** (instructed by **Stephenson Harwood LLP**) for the **Claimant/Respondent**
Laurence Rabinowitz QC and **Alexander Polley QC** (instructed by **Slaughter and May**) for the **Defendant/Applicant**

Hearing date: 7th July 2022

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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.

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MR JUSTICE JACOBS

Mr Justice Jacobs :

A: Introduction and factual background

1. This judgment concerns an application dated 11 October 2021 ("the Application") by which the Defendant, Mark Joseph Cyril Bamford seeks to strike out the Claim Form (and in so far as relevant the Particulars of Claim) pursuant to CPR 3.4 (2) (a), on the basis that the statement of case of the Claimant ("Contra") discloses no reasonable grounds for bringing the claim. Alternatively, the Defendant seeks "reverse" summary judgment under CPR 24.2 (a) (i), contending that the Claimant has no real prospect of succeeding on the claim.

2. There are three members of the wider Bamford family who feature in the present litigation or its background. It is convenient to refer to them, without disrespect, by their first names. The Defendant ("Mark") is the younger brother of Lord Anthony Bamford ("Anthony"). They are the children of Joseph Cyril Bamford, who founded the JCB group of companies ("JCB Group") which is involved in manufacturing and distributing agricultural and other equipment. Richard Bamford ("Richard") is a second cousin of Mark and Anthony and the CEO of the Claimant company, in which he has a substantial interest.

3. There are, or at least can be, differences between the court's approach to an application to strike out under CPR 3.4 and reverse summary judgment under CPR Part 24. For example, an application under CPR 3.4 (2) (a) proceeds on the basis that the facts set out in the relevant statement of case are true. In contrast, a summary judgment application can require the court to form a view on the evidence submitted by a party, with a view to deciding whether a claim or defence has a real prospect of success: see the well-known summary of the applicable principles by Lewison J in *Easyair v Opal* [2009] EWHC 339 (Ch), para [15].

4. These differences are not, however, material on the principal issues which have featured in the parties' arguments as to the interpretation of the relevant agreement with which this case is concerned, including the implication of terms into that agreement. The agreement in issue has been referred to as the "Touch Agreement", reflecting the fact that it was concluded between Mark and Touch Worldwide Holdings Ltd, which is the former name of the Claimant. On behalf of Mark, Mr Rabinowitz QC has approached both the strike-out and summary judgment on the basis that the material facts pleaded in the Particulars of Claim, in so far as they are admissible and relevant to the issues of construction, can for present purposes be assumed to be true. I approach the case in the same way. Accordingly, on those construction issues it is not necessary to explore any differences between the court's approach to these different rules, and the parties' submissions did not do so.

5. The difference between strike-out under CPR 3.4 and summary judgment under CPR Part 24 would potentially be material if Mark's interpretation arguments were to fail. This is because Mark advances an alternative argument that, even assuming that the Claimant's interpretation of the Touch Agreement were correct, there is no sufficient factual case which would justify the continuation of the present proceedings. That argument would be difficult to sustain under CPR 3.4, since the factual assertions in the Claimant's pleading would be assumed to be true. It might, however, have a greater prospect of success under CPR Part 24, where the court is, at least to some

degree in accordance with the principles in *Easyair*, concerned with evaluating the evidence relied upon. As will become apparent, however, it is not necessary to consider that alternative argument.

6. It is common ground that the court is not presently concerned with all of the arguments which Mark may or will advance in the event that the present litigation were to proceed. In particular, there is an issue as to whether the Touch Agreement relied upon by the Claimant was legally binding at all. For present purposes, it is to be assumed that it was.

Parties and the factual background to the Touch Agreement

7. The background to the Touch Agreement, in so far as relevant for present purposes, is as follows. My description is, unless otherwise stated, taken from the Particulars of Claim, or documents referred to therein. For present purposes, these facts are assumed to be true, although they may, to some extent, be in issue in the event that these proceedings were to proceed to trial.

8. The Claimant is a company incorporated in Jersey with the primary business of providing business and marketing consultancy services. It is wholly owned by a Jersey trust, the beneficiaries of which are members of Richard's family.

9. Mark, together with his older brother Anthony, were named by Memoranda of Wishes as the principal beneficiaries of a number of trusts known as the MB Trusts and the AB Trusts respectively ("the Trusts"). The assets of these discretionary trusts comprised, amongst other things, shares and interests in the principal holding companies that controlled 100% of the JCB Group, and were split 50:50 between the AB Trusts and the MB Trusts.

10. Although the Trusts were referred to as the MB Trusts (i.e. Mark Bamford trusts) and the AB Trusts (i.e. Anthony Bamford trusts), as though each brother's trusts were entirely separate, the witness evidence indicated that each brother was in fact a beneficiary under all of the Trusts.

11. Richard is one of the principal generators of business for the Claimant. He is not a discretionary beneficiary of any of the Trusts, and has no role in the JCB Group.

12. Following the death of Joseph Cyril Bamford on 1 March 2001, there was a dispute as to the terms of his will. This was settled in 2004. In 2005, negotiations began between Mark and Anthony regarding the future ownership of the JCB Group. The negotiations envisaged that the AB Trusts were to acquire the 50% interest of the MB Trusts, leaving the AB Trusts with 100% control. From early 2006 to mid 2007, Richard provided advisory services to Mark in relation to the negotiations. Paragraph 10 of the Particulars of Claim identified some of the details of the negotiations in 2007. These included an offer in May 2007 for the AB Trusts to acquire the 50% interests of the MB Trusts and a later counter-offer for the acquisition by the MB Trusts of the interests of the AB Trusts.

13. In June 2007, Mark raised various concerns as to the misuse of corporate funds and weak corporate governance of the JCB Group. There was a meeting with the Trustees of the Trusts, and an expectation that there would be either a "buy-sell" agreement

between the brothers and the respective AB and MB Trusts, or failing that a new corporate and family governance regime might be implemented.

14. During the period from early 2006 to mid 2007, Richard had been providing advisory services to Mark in connection with the above matters. Mark then asked Richard to formalise their business relationship, and this resulted in a written agreement dated 1 September 2007 between Mark and Anzere Service, being a company owned and controlled by Richard ("the Anzere Agreement").

15. Pursuant to the Anzere Agreement, Anzere Service agreed to provide the services of Richard to the Defendant to advise him in relation to the Negotiations and Transactions defined in recitals H and I of an attached confidentiality agreement. Negotiations were defined in recital H as those "presently taking place concerning the possible future direction of the JCB Business". Transactions was defined in recital I as follows:

> "The Parties recognise that the Negotiations and all transactions to which the Negotiations might give rise involving the Shares [defined elsewhere] and any other companies directly or indirectly related to the JCB Business ("the Transactions") are of a highly sensitive nature …"

16. Under the Anzere Agreement, Mark agreed to pay Anzere Service its fees on an hourly basis, as well as out of pocket expenses. As discussed in Section D below, the Anzere Agreement featured, to some extent, in the parties' arguments concerning the Touch Agreement and its factual matrix.

17. From September 2007 to June 2011, Richard continued to provide advisory services to Mark and for the benefit of the MB Trusts under the Anzere Agreement. This included advice in connection with multi-jurisdictional litigation which was commenced between 2009 and 2011. There were proceedings in (i) the Netherlands in 2009, with Mark seeking an independent review of corporate governance of the Dutch immediate parent company of the JCB Group; (ii) Bermuda in 2009, where the Trustees sought directions as to their position on corporate governance; (iii) England in 2010, for a full accounting of loan accounts to Anthony and family remunerations; and (iv) England in 2011, to establish the true ownership of the JCB Group.

18. On 14 June 2011, there was a meeting between Anthony and Mark at which a settlement of all disputes ("June 2011 settlement") was agreed in principle. The evidence indicated that Richard did not attend this meeting, and he did not at the time see a document entitled "Memorandum of Agreement for Full and Final Settlement" which was signed by Mark and Anthony a few days later, on 17 June 2011. The document itself therefore did not form part of the factual matrix against which the Touch Agreement is to be construed. However, there was no dispute that the information given by Mark to Richard as to the nature of the settlement agreement did form part of the admissible factual matrix. According to typed notes which Richard prepared of various discussions with Mark at around this time, he was told the following in relation to the discussions between the brothers on 14 June 2011:

> "14 June 2011: MB [Mark] had a 17 minute 47 second meeting with APB [Anthony] at JCB at 11am. MB called RB [Richard]

> as soon as it finished to report that they have done a deal – he drops all litigation, his directorships and employment is re-instated, there is a complete separation of his trusts, trustees, and protector, no more recharge accounts or Daylesford funding. APB had tears in his eyes, they are going forwards together brother and brother to do Project Crakemarsh. MB asked me not to report to MdR [Mishcon de Reya], and to hold off until Friday, after he has had a further meeting with APB to finalise everything."

19. This note is essentially pleaded out in the first 8 lines of paragraph 13 (6) of the Particulars of Claim.

20. The note, and paragraph 13 (6), refer to "Project Crakemarsh". In due course, the Touch Agreement did so as well, in terms which are central to the dispute between the parties. For present purposes, it is sufficient to state that Project Crakemarsh was the code name given for a possible sale of the JCB Group. Paragraph 13 (6) describes how the sale process:

> "had been given the code name "Project Crakemarsh" at an earlier attempted settlement meeting on 26 May 2011 where Mr Leadbeater had drafted a Memorandum of Agreement which the Defendant gave to RB."

21. The concluding sentence of paragraph 13 (6) adds that:

> "The Defendant used the phrase Project Crakemarsh generically with RB to refer to an exit of his interests in the JCB Group".

I shall return to that concluding sentence in due course in the context of the arguments advanced by the parties

22. A further meeting between the two brothers took place on 17 June 2011. Richard was involved in various discussions with Mark prior and subsequent to that meeting. Richard's notes indicate that Mark's legal advisers, Mishcon de Reya (or "MdR") wanted the settlement meeting to be subject to contract and without prejudice, but that Mark was resistant to this for fear of souring the situation. Richard's typed notes of 17 June 2011 describe his conversations with Mark prior and subsequent to that meeting:

> "17 June 2011: 8am I talked to MB and dictated the form of words that MdR want him to use at the close of the meeting. ("We will use our best endeavours to turn these heads of terms in to definitive contracts. Until the signing of these contracts neither party may refer to the existence of these discussions and heads of terms") MB reaffirms that his key points are he will drop the litigation in exchange for separate trusts and go forward to do Project Crakemarsh. It is all about the bigger picture now. MB agrees a settlement deal with APB at Egerton Terrace, with TL [Tim Leadbeater] in attendance."

The Touch Agreement

23. The Touch Agreement, relied upon by the Claimant in the present proceedings, is dated 1 July 2011. The document in the hearing bundles is unsigned, and I understand that there is no signed version. There is, as I have said, a dispute as to whether any binding agreement was concluded, on the terms of the Touch Agreement, or at all. However, Mr Rabinowitz accepts that I cannot resolve that dispute. I was therefore told that Mark was content for the court to assume that the Touch Agreement was a legally binding document despite never being signed.

24. For its part, the Claimant pleads that the Touch Agreement was (and was only intended to be) a brief record of the key terms agreed, and that it was drafted by Richard without the assistance of advisors for either party. The present claim is, however, squarely based upon the express or implied terms of the Touch Agreement, which is alleged to have recorded the parties' agreement. The Claimant's submissions therefore acknowledged that the ordinary principles of contractual interpretation, including the principles concerning implied terms, should be applied to the Touch Agreement.

25. The Particulars of Claim contain a considerable amount of detail as to the discussions between Richard and Mark in the period between 17 June and 1 July 2011. I will not describe these in my judgment, because this detail comprises mainly, if not exclusively, inadmissible pre-contractual negotiations. The relevant principle in that regard is set out in *Lewison: The Interpretation of Contracts* (7th edition), in the text immediately before paragraph 3.43:

> "Evidence of pre-contractual negotiations is not generally admissible to interpret the concluded written agreement. But evidence of pre-contractual negotiations is admissible to establish that a fact was known to both parties […] and to elucidate the general object of the contract. Evidence that parties negotiated on the basis of an agreed meaning is only admissible in support of a claim of estoppel or rectification".

26. In his submissions, Mr Hochhauser QC rightly did not place any significant reliance on what was said in those discussions as being part of the admissible factual matrix. His factual matrix argument, discussed in more detail below, focused principally on the background to the settlement between the brothers, and what Richard was told about that settlement. That seems to me, broadly speaking, to be a legitimate approach to factual matrix. The extent to which it assists in the interpretation of the agreement is a matter which I address below.

27. The terms of the Touch Agreement were as follows. The document used various abbreviations: "MB" means Mark, "RB" means Richard, "AB" means Anthony, and "BTCL" meaning Bermuda Trust Company Limited, the trustee of the AB and MB Trusts at that time.

> "1) MB will now authorise BTCL to pay from the MB1 trust to Touch a success fee of £2,600,000 for the services of RB up to and including the settlement reached between MB and AB on 17 June 2011.

> 2) RB will now step back from advising MB as he works directly with Macfarlanes to document and implement the terms of the 17 June settlement, which is expected to be completed by 31 December 2011.
>
> 3) MB will continue to privately brief RB on progress towards that completion, and in addition the steps being taken to prepare the JCB Group for sale in 2012 ("Project Crakemarsh"). MB will also, whenever he feels it is appropriate, give assurances to AB regarding MB having used RB as a commercial advisor.
>
> 4) AB has accepted that MB will have to have his own advisors for Project Crakemarsh in due course. MB has not and will not give any form of commitment to AB that he will not appoint RB, through Touch, to be his commercial advisor for Project Crakemarsh, and at the appropriate time MB wants to do so. MB expects this to be when either an investment bank is due to be formally appointed to handle the sale of the JCB Group, or when the beneficiaries of the trusts are first consulted on the Project Crakemarsh plan, and may themselves appoint their own advisors.
>
> 5) When MB appoints RB, Touch will ensure that RB is available to MB on an exclusive basis to advise on all of MB's interests in the development, negotiation, implementation and completion of Project Crakemarsh.
>
> 6) In consideration of these services, MB will take all necessary steps to authorise BTCL (or if applicable any replacement trustee of the MB1 trust) to pay to Touch a success fee on the completion of Project Crakemarsh equal to 2% of the value attributed to the 50% shareholding in the JCB Group held by the MB1 trust and the MB2 trust, less the sum paid under paragraph 1) above."

28. The Touch Agreement therefore provides for two payments. The first payment, set out in clause (1), is a success fee for the services of Richard up to and including the settlement reached between Mark and Anthony on 17 June 2011. There is no dispute that this amount of money was paid. The second payment, set out in clause (6), was also described as a success fee. This payment related to a possible future event, and was payable "on the completion of Project Crakemarsh". The principal issue between the parties concerns whether that fee has become payable.

Subsequent events

29. It is common ground that the June 2011 settlement did not culminate in a sale of the JCB Group in 2012 or subsequently.

30. There is, however, a dispute between the parties as to whether or not some other form of restructuring has taken place. The evidence of a number of witnesses who have

served witness statements on behalf of Mark, including Mark himself, is that it has not. This is disputed by the Claimant, albeit that it is not able to produce documentation evidencing the alternative transaction for which it contends. Nevertheless, the Claimant submits that it has a sufficient case, on this factual question, to defeat both a strike-out and a summary judgment application. As far as concerns strike-out, paragraph 55 of the Particulars of Claim pleads that various filings and matters "strongly indicate that [Mark] and the MB Trusts no longer have separate 50% interests in the JCB Group from [Anthony], and have therefore entered into alternative divestment or restructuring arrangements other than a sale of the JCB Group, resulting in [Mark] and the MB Trusts obtaining substantial value". The Claimant also relies, for example, upon a conversation between Richard and Mark in March 2014. Richard had suggested to Mark that he appeared to be worse off after the settlement than when it all started. Mark's response was, according to Richard:

> "[Mark] said that, whilst that may appear to be the case, a lot had happened of which I was not aware, and he had got other things that compensated for this. I said that I hoped that they were substantial and were of even more value than all that he had fought for, but had not got. He said they were, and he was currently happy with the situation (even though the India deal had clearly troubled him) at the moment. If that changes, he will let me know, to which I offered to send him a letter summarising the JCB India deal. "

31. This factual dispute is only relevant, however, if the Claimant's construction of the Touch Agreement (including its argument on implied terms) succeeds; or at least is sufficient to overcome a strike-out or reverse summary judgment application.

32. There was also an argument by Mark that the Claimant's pleading did not sufficiently allege that there had in fact been an alternative restructuring. It seemed to me, however, that paragraph 55 was a sufficient plea in that regard: i.e. sufficient to withstand a strike-out.

The claim in the present proceedings

33. The Claimant's principal claim in the present proceedings is, pursuant to clause (6) of the Touch Agreement, for payment of the 2% fee, based upon the value of the interests of the MB Trusts in the JCB Group upon their alleged divestment or restructuring. This claim depends upon the Claimant's argument that the contract is to be interpreted (including on the basis of an implied term) so as to provide for payment of the 2% fee notwithstanding that there has been no sale of the JCB Group.

34. In addition to a straightforward claim for the fee, the Particulars of Claim also include a claim for damages for repudiation. This was addressed in Mr Rabinowitz's skeleton argument, where he submitted that the repudiation claim could not succeed if the construction argument failed. In the event, the repudiation case did not feature in the written or oral submissions of Mr Hochhauser on behalf of the Claimant. There was no suggestion that if the Claimant failed on construction, there was a separate repudiation claim which should go to trial.

35. The Claimant's alternative case is that if no fee is payable, it is entitled to be paid for the work performed, on the basis of an implied term. Although the Particulars of Claim refer to work performed both prior to and subsequent to entry into the Touch Agreement, I understood the claim to be advanced in relation to the work after 17 June 2011, since the payment under clause (1) of the Touch Agreement covered the period up to that date.

B: The parties' arguments on the Application

Submissions on behalf of Mark

36. On behalf of Mark, Mr Rabinowitz submitted in summary as follows.

37. First, Project Crakemarsh was defined to mean a sale of the JCB Group, and (a) no such sale has taken place and (b) there can be no implied term that the 2% fee would be paid even if "some other form of restructuring took place" as it would contradict the express terms and is neither necessary nor obvious.

38. Second, Project Crakemarsh contemplated completion in 2012 and (a) nothing (whether a sale or any other form of restructuring) happened in 2012, and (b) no implied term that the 2% Fee would be paid even if the sale/restructuring occurred "on a different timescale" was sustainable in view of the express terms of the document, and because the alleged implied term is neither necessary nor obvious.

39. Third, there was no implied term which entitled the Claimant to be "made whole" for any services rendered pursuant to the Touch Agreement. Liability for payment in respect of work after 17 June 2011 could only arise if there was "success", in the sense that Project Crakemarsh was brought to a successful completion. If there was no success, there was no entitlement to payment.

40. It was also submitted that even if it were correct that a sale of the JCB Group was not necessary in order to trigger the 2% payment, there was no sufficient pleaded or factual case that there had been some alternative restructuring which would trigger a right to that payment. As I have said, I do not accept that the pleading is deficient.

Contra's submission

41. On behalf of Contra, Mr Hochhauser submitted that all issues should proceed to trial.

42. On the proper construction of the Touch Agreement, the Defendant agreed to pay the Claimant the 2% fee (and the Claimant agreed to provide ongoing services) if the divestment of the assets or separation of the interests of Mark in the MB Trusts also took a different form than the anticipated sale of the JCB Group in 2012 or on a different timescale, e.g. whether Anthony or the AB Trusts acquired the assets of the MB Trusts, or whether some other form of restructuring took place.

43. Further or alternatively, he submitted that there is an implied term of the Touch Agreement to the same effect, the implication of such a term being necessary to give business efficacy to the contract and/or to represent the obvious intention of the parties at the time of entering the contract.

44. As set out above, he submitted that if he were correct on either of those submissions, the Claimant had a sufficient factual case to defeat a strike-out or summary judgment application.

45. He also submitted that it was an implied term that (if Project Crakemarsh or some other form of divestment or restructuring would or could no longer take place, for example) the Claimant would in any event be "made whole" in respect of the services rendered, the implication of such a term being necessary to give business efficacy to the contract and/or to represent the obvious intention of the parties at the time of entering the contract.

C: Legal principles

Principles of interpretation

46. The basic legal principles as to the interpretation of contracts were not in dispute. They are conveniently summarised in the judgment of Popplewell J. in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm), which is quoted in *Chitty on Contracts* 33rd edition paragraph 13-047:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court 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 the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

47. This summary is a synthesis of the principles that have been authoritatively stated in a trilogy of Supreme Court decisions in the past 10 years: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

48. In *Rainy Sky*, Lord Clarke described the exercise of construction as being essentially a "unitary exercise" in which the court must consider the language used and ascertain what a reasonable person, with the relevant background knowledge, would have understood the parties to mean. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Where the parties have used unambiguous language, the court must apply it: *Rainy Sky* at [23] and [25].

49. Whilst this unitary exercise of interpreting the contract requires the court to consider the commercial consequences of competing constructions, commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party. This is clear from the judgment of Lord Neuberger in *Arnold v Britton* at [15] – [22]. At [20], Lord Neuberger said:

> "Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party".

50. In *Wood v Capita,* Lord Hodge set out the applicable principles following *Rainy Sky* and *Arnold v Britton* as follows:

> "[10] The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court 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. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H-1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen – Tangen)* [1998] 1 WRL 896, 912-913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle,

which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

[11] Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnold* case [2015] AC 1619 all of the judgments confirmed the approach in the *Rainy Sky* case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

[12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

[13] Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to

> which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 ALL ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of the disputed provisions."

51. There is discussion in the case-law as to the circumstances in which consideration of the factual matrix or context may lead to an interpretation of words which is not, according to conventional usage, an "available" meaning of the words or syntax which the parties had actually used, and the correction of an obvious drafting mistake by interpretation. I refer to that case-law in context below.

Implied terms

52. The principles concerning the implication of terms are discussed in the judgments of the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, in particular paragraphs [15] – [21]. Those principles are conveniently summarised in the judgment of the Privy Council (the leading judgment being given by Lord Hughes JSC) in *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2:

> "It is not necessary here to rehearse the extensive learning on when the court may properly imply a term into a contract, for it has only recently authoritatively been restated by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* … It is enough to reiterate that the process of implying a term into the contract must not become the rewriting of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their

> minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

Strike-out and summary judgment

53. The decision of Picken J provides a recent and helpful summary of the relevant principles in the case of *ArcelorMittal North America Holdings LLC v Ravi Ruia et al* [2022] EWHC 1378 at [26]-[29]:

> "[26] The principles in relation to a defendant's summary judgment application were set out in *Easyair Ltd v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15]. Those principles have been recited in many subsequent cases, including perhaps most recently by me in *JJH Holdings Ltd v Microsoft* [2022] EWHC 929 (Comm) at [11]:
>
> > "(i) the Court must consider whether the claimant has a 'realistic' (as opposed to a 'fanciful') prospect of success; (ii) a 'realistic' claim is one that carries some degree of conviction, which means a claim that is more than merely arguable; (iii) in reaching its conclusion the Court must not conduct a 'mini-trial', albeit this does not mean that the Court must take at face value and without analysis everything that a claimant says in statements before the court; and (iv) the Court may have regard not only to the evidence before it, but also the evidence that can reasonably be expected to be available at trial. Furthermore, where a summary judgment application turns on a point of law and the Court has, to the extent necessary, before it 'all the evidence necessary for the proper determination of the question,' it 'should grasp the nettle and decide it' since the ends of justice are not served by allowing a case that is bad in law to proceed to trial."
>
> [27] As to (iv), the Court will "be cautious" in concluding, on the evidence, that there is no real prospect of success; it will bear in mind the potential for other evidence to be available at trial which is likely to bear on the issues and it will avoid conducting a mini-trial: *King v Stiefel* [2021] EWHC 1045 (Comm) at [21] (per Cockerill J).
>
> [28] Furthermore, as Fraser J also recently put it in *The Football Association Premier League Limited v PPLive Sports International Ltd* [2022] EWHC 38 (Comm) at [25], on a summary judgment application the Court must "always be astute, and on its guard" to an applicant maintaining that particular issues are very

> straightforward and simple, and a respondent attempting to dress up a simple issue as very complicated and requiring a trial.
>
> [29] As to strike-out applications, under CPR 3.4(2)(a), the Court may strike out a statement of case if it appears that it discloses no reasonable grounds for bringing the claim. When considering an application to strike out, the facts pleaded must be assumed to be true and evidence regarding the claims advanced in the statement of case is inadmissible (*King* at [27]; and *Allsop v Banner Jones Limited* [2021] EWCA Civ 7 at [7]); consideration of the application will be "confined to the coherence and validity of the claim as pleaded" (*Josiya v British American Tobacco plc* [2021] EWHC 1743 (QB)).”

D: Discussion

54. I begin with the issues concerning interpretation of the Touch Agreement. These raise short questions of construction against a factual background which, for present purposes, is not substantially disputed by Mark. They are issues which in my view can properly be determined on a summary judgment or strike-out application. If they are resolved in favour of Mark, then there is no other compelling reason why there should be a trial. If they are resolved in favour of the Claimant, then further questions will need to be considered.

Construction of the express terms

55. I start by considering the text of the Touch Agreement, whilst recognising that (as is clear from the above authorities) it is also important to consider the factual matrix and the commercial consequences of the parties’ rival constructions. It is necessary to start somewhere, and I therefore begin with the text.

56. I bear in mind, however, that I am concerned with a short “home-made” (as Mr Hochhauser described it) agreement which was drafted by Richard and then discussed with Mark. The textual analysis of the Touch Agreement is important, but I accept Mr Hochhauser’s point that the factual matrix in the present case may possibly be more significant than in cases which involve a detailed agreement drafted by lawyers. Even so, it is important to note it was drafted by a professionally qualified person (Richard was a chartered accountant) who was capable of performing services, in relation to complex matters, worth several million pounds.

57. As a matter of analysis of the contractual text, there can be no doubt that “Project Crakemarsh” refers, and refers only, to the proposed sale of the JCB Group. It does not refer to a possible transaction taking some different form. Thus, clause (3) defines Project Crakemarsh as “the steps being taken to prepare the JCB Group for sale in 2012”. The transaction there described is a sale of the JCB Group, and nothing else. That conclusion is reinforced by the further clauses of the Touch Agreement.

58. Thus, clause (4) deals with a number of matters including the timing of the appointment of the Claimant as Mark’s “commercial advisor for Project Crakemarsh”. That appointment was an appointment which Mark wanted to make “at the appropriate time”. The last sentence identifies the time when this was expected to happen. Mark expected this moment to be “when either an investment bank is due to be formally appointed to handle the sale of the JCB Group” or “when the beneficiaries

of the trusts are first consulted on the Project Crakemarsh plan, and may themselves appoint their own advisors". The former point in time reiterates the previous definition or description of Project Crakemarsh as being the sale of the JCB Group, with an investment bank being formally appointed for that process. The second point in time, which appears to envisage an earlier possibility, refers to beneficiaries being consulted on the Project Crakemarsh plan. That can only be a reference, in context, to consultation on the sale described and defined earlier.

59. Clause (6) is also clearly referable to the proposed transaction involving a sale of the JCB Group. It provides for a success fee "on the completion of Project Crakemarsh", and quantifies the success fee as "2% of the value attributed to the 50% shareholding in the JCB Group" held by the two trusts which were regarded as Mark's trusts. This was therefore a simple formula that could easily be applied to the circumstances of the proposed sale. The timing for payment was upon completion of the sale. The success fee was a straightforward 2% (less the deduction for the sum paid under clause (1)) of the 50% of the shares held by Mark's two trusts in the JCB Group: the context being, consistent with the rest of the Touch Agreement and in particular clause (3), that there would be a sale of 100% of the Group.

60. Accordingly, as a matter of textual analysis, it is unsustainable for the Claimant to contend (as pleaded in the Particulars of Claim) that on a proper construction of the Touch Agreement, the 2% fee was payable if "the divestment of the assets or the separation of the interests of [Mark] in the MB Trusts also took a different form than the anticipated sale of the JCB Group […]; e.g. whether [Anthony] or the AB Trusts acquired the assets of the MB Trusts, or whether some other form of restructuring took place." The language of the Touch Agreement is clearly concerned with 2% being paid on a sale of the JCB Group, and not some different form of transaction.

61. However, textual analysis is not the only consideration and I must also consider both the relevant factual matrix and the commercial consequences of the rival constructions.

62. In some cases, there may be a significant factual dispute concerning the factual matrix, with the possible consequence that the court feels unable to resolve a construction argument on a summary judgment or strike-out without resolution of that dispute. For present purposes, however, there is no significant factual dispute. Mr Rabinowitz on behalf of Mark was content to proceed on the basis that all admissible matters of factual matrix relied upon in the Particulars of Claim were true or at least assumed to be true. His submission was that none of those matters actually advanced the Claimant's argument, and that in fact they positively assisted Mark's case. Mr Rabinowitz for that purpose correctly focused on the pleaded case, because the Commercial Court Guide requires factual matrix, where relied upon, to be pleaded with precision: see paragraph C1.3 (h) of the Commercial Court Guide (11th edition). This is an important requirement of the Guide, since it enables the parties and the court to have a clear description of the matters of factual matrix relied upon, thereby enabling the court to understand the facts which are said to provide the relevant context for the interpretation of the contractual language.

63. The Particulars of Claim plead a number of background matters, including many that are clearly inadmissible pre-contractual negotiations. I shall therefore focus, as did Mr Hochhauser, on those features of the background which are, at least arguably, relevant

factual matrix. I was also referred to some documents, including notes made by Richard of his conversations with Mark in June and July 2011, at around the time when the Touch Agreement was concluded. However, I did not think that these documents really carried the matter any further forward beyond the facts relied upon in the Particulars of Claim.

64. Before considering the relevant factual matrix, it is important to note there is no claim for rectification, on the basis that Project Crakemarsh was wrongly or too narrowly described in the Touch Agreement. On the contrary, paragraph 13 (6) of the Particulars of Claim pleads, consistently with the Touch Agreement, that the "sale process" – i.e. that "steps would be taken to prepare the JCB Group for sale" – had been given the code name "Project Crakemarsh" at a settlement meeting on 26 May 2011. Paragraph 22 of the Particulars of Claim accepts that there was no discussion of the 2% success fee applying to any arrangement other than a sale of the entire JCB Group.

65. Accordingly, as Mr Rabinowitz submitted, no claim for rectification could be pleaded, and I therefore proceed on the basis that Project Crakemarsh was correctly defined in the Touch Agreement.

66. That conclusion and approach is reinforced by other materials to which I was referred. In July 2012, the Claimant's solicitors sent draft Particulars of Claim relating to a claim under the Touch Agreement. Paragraph 10 pleaded, consistently with the Touch Agreement, that:

> "Concurrent with the settlement of the JCB Proceedings, a decision was made to sell the JCB Group. In 2011, the sale process was given the code name and is herein referred to as "Project Crakemarsh"".

Similarly, a 2017 draft Particulars of Claim stated that the "sale process was given the code name "Project Crakemarsh"".

67. There is also, unsurprisingly in the light of these matters, no plea of estoppel, based upon any "private dictionary" meaning of Project Crakemarsh alleged to have been agreed by the parties.

68. In the absence of any plea of rectification or estoppel, the plea (to which I have previously referred in Section B above) at the end of paragraph 13 (6) of the Particulars of Claim – that Mark "used the phrase Project Crakemarsh generically with [Richard] to refer to an exit of his interests in the JCB Group" – leads nowhere. It is, as Mr Rabinowitz submitted, inadmissible evidence of pre-contractual negotiations which do not assist on the issue of construction. In fact, Mr Hochhauser's oral submissions sensibly did not place any reliance on this sentence in the Particulars of Claim. If significant reliance had been placed by the Claimant upon this sentence, I would in any event have disregarded it in the context of the reverse summary judgment application. That is because the assertion that Mark used the phrase "Project Crakemarsh generically [etc]" carries no "degree of conviction" (to use Lewison J's phrase in *Easyair* paragraph [15 (ii)]) in the light of the contemporaneous and other

documents, including the Touch Agreement itself, which show that Project Crakemarsh referred to the proposed sale of the JCB Group.

69. In my view, the following matters are significant in relation to the admissible factual matrix and the arguments advanced by the Claimant in that regard.

70. First, the submissions on behalf of the Claimant emphasised that the proposed "Project Crakemarsh" sale of the JCB Group was one of a number of possibilities that had been discussed over the years as a possible resolution of the dispute between Anthony and Mark. This point was encapsulated in paragraph 27 (5) (a) of the Particulars of Claim:

> "A sale of the JCB Group materialised as the front-runner amongst a variety of potential options to settle the various disputes and litigation between *inter alia* [Mark] and [Anthony] (see paragraphs 9 – 10 above)."

Paragraphs "9 – 10 above" concerned the background to the family disputes, including the possible acquisition by Anthony's trusts of the 50% interest of Mark's trusts and an offer and counter-offer made by which each trust might buy the interests of the other.

71. In my view, this aspect of the factual matrix did nothing to advance the Claimant's case that the Touch Agreement should be read more widely than a reference simply to the proposed sale of the JCB Group. Indeed, I agree with the submission of Mr Rabinowitz that it assisted Mark's case that the language of the Touch Agreement was to be given its ordinary meaning. If, to the knowledge of the parties, there had been other possible transactions contemplated in the past, then significance is to be attached to the fact that, in their written agreement, the parties identified only one future transaction (Project Crakemarsh, being the proposed sale of the JCB Group) as giving rise to the success fee.

72. Mr Hochhauser submitted that this would potentially produce unfairness to the Claimant. The essential argument was that Richard had been informed by Mark that the resolution of the disputes with Anthony would involve Project Crakemarsh. The Touch Agreement had been drafted on that basis, because of the information provided by Mark. The Claimant should not now in effect be penalised as a result of the way in which the Touch Agreement had been so drafted. He referred in that connection to typed notes made by Richard of his conversations with Mark in June 2011, and in particular to the typed notes for 14 and 17 June 2011. These are set out in Section B above, but for convenience I set out their material parts again:

> "14 June 2011: MB had a 17 minute 47 second meeting with APB at JCB at 11am. MB called RB as soon as it finished to report that they have done a deal - he drops all litigation, his directorships and employment is re-instated, there is a complete separation of his trusts, trustees, and protector, no more recharge accounts or Daylesford funding. APB had tears in his eyes, they are going forwards together brother and brother to do

> Project Crakemarsh. MB asked me not to report to MdR, and to hold off until Friday, after he has had a further meeting with APB to finalise everything."
>
> …
>
> "17 June 2011: … [Mark] reaffirms that his key points are he will drop the litigation in exchange for separate trusts and go forward to do Project Crakemarsh."

73. I do not accept that there is any unfairness, and certainly none that would in some way impact upon the construction of the Touch Agreement including the question of implied terms. There is, as Mr Hochhauser made clear, no allegation of fraud made in the present proceedings. It is not therefore alleged that, at the time when Mark told Richard of the intention to go forward with Project Crakemarsh, that did not represent Mark's genuine intention at the time.

74. I accept (as indicated earlier in this judgment) that the information passed by Mark to Richard as to the nature of the settlement reached between Mark and Anthony does form part of the relevant factual matrix. However, as Mr Rabinowitz submitted, it completely explained why the contract was in the terms that it was. There was the proposed "Project Crakemarsh" sale, and the success fee related to the sale which was contemplated would happen in the future. That aspect of the factual matrix again therefore does nothing to advance the Claimant's case that the Touch Agreement should be read more widely than a reference simply to the proposed sale of the JCB Group. Again, it reinforces the conclusion that the language of the Touch Agreement was to be given its ordinary meaning, since the transaction contemplated at that time was indeed a sale of the JCB Group.

75. Secondly, Mr Hochhauser emphasised in his submissions one of the points made in Richard's typed note of the 14 June 2011 conversation, namely the plan and intention that there should be a "complete separation of his trusts". He submitted that the central thrust of the June 2011 settlement between the brothers was that Mark would cease all litigation in exchange for the complete separation of his interests in the trusts. He submitted that, on its proper construction, and in light of the information known to the parties at the time of entering into the contract, its purpose and commercial common sense, the 2% fee in the Touch Agreement was not limited to a completion of a sale of JCB in 2012, but also to "another form of separation of Mark's interests in 'his' trusts". Success was to be defined as separation of and/or protection of Mark's interests. Project Crakemarsh was the intended means by which the separation objective was to be achieved. However, that did not rule out alternative means being adopted to achieve the same objective.

76. In my view, this argument is very similar to, if not in substance identical with, the Claimant's point that a range of potential options for settlement had been discussed in the past. Again, it does not carry the Claimant's case any further forward and, if anything, it assists Mark's case. Mr Hochhauser accepted that there were a variety of ways in which the separation of interests could be achieved, and he identified some of

them in the course of his oral argument. For example, there could have been a buy-out of Mark's trust interests by Anthony's trust interests, this being one of the possibilities which had (as pleaded in paragraph 10 of the Particulars of Claim) been considered in the past. However, the significant point is that the parties, in the Touch Agreement, referred only to a particular type of transaction which would result in practical separation, namely the sale of the JCB Group. Whilst there were indeed other ways of effecting a separation, the Touch Agreement did not refer to any of them and indeed did not use the language of separation at all.

77. Thirdly, Mr Hochhauser also referred to the earlier Anzere Agreement. As described in Section B, this was an agreement for the provision to Mark by Anzere Service of Richard's services. The evidence indicates that the value of some of the services provided pursuant to the Anzere Agreement were included within the payment to be made under Clause (1) of the Touch Agreement. The services to be provided under the Anzere Agreement were defined in the two recitals in an attached confidentiality agreement. I set them out again for convenience:

> "(H) Negotiations are presently taking place concerning the possible future direction of the JCB Business ("the Negotiations");
>
> (I) The Parties recognise that the Negotiations and all transactions to which the Negotiations might give rise involving the Shares and any other companies directly or indirectly related to the JCB Business ("the Transactions") are of a highly sensitive nature and that the discussions taking place could, if not treated with the strictest of confidence, give rise to adverse publicity or even cause damage to the JCB Business. The Parties therefore wish to enter into this Confidentiality Agreement to govern the confidential basis on which the Negotiations and the Transactions are taking place."

78. Again, I did not consider that this assisted the Claimant's case. The Anzere Agreement was with a different company, and had been concluded some years earlier, in September 2007. That was nearly 4 years before the expression "Project Crakemarsh" came to be used. Furthermore, the Anzere Agreement was in different and wider terms to the Touch Agreement. Whilst both agreements related to services to be provided, the Anzere Agreement obviously did not refer to Project Crakemarsh, and it did not provide for a success fee referable to a particular event. Indeed, the Anzere Agreement provides marginal support for Mark's case, since it can be said that Richard (through Anzere Service) and Mark had here entered into an agreement which was more broadly drawn than the Touch Agreement.

79. For the above reasons, I did not consider that the Claimant's reliance on the factual matrix assisted its case that the Touch Agreement was to be construed in the way for which it contends. If anything, the factual matrix assists the conclusion for which Mark contends.

80. I also consider that the Claimant's argument, based upon the factual matrix, seeks to give a meaning to the relevant language of the Touch Agreement which it cannot

reasonably bear. In that regard, *Lewison: The Interpretation of Contracts* 7th edition, paragraphs 3.167 – 3.168, states:

> "Fourthly, reliance on background must be tempered by loyalty to the contractual text. It is not permissible to construct from the background a meaning that the words of the contract will not legitimately bear.
>
> ...
>
> Fifthly, the background should not be used to create an ambiguity where none exists. The court must be careful to ensure that the background is used to elucidate the contract, and not to contradict it".

81. I recognise that, applying the judgment of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, the relevant background "may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax". However, I see no reason to conclude in the present case that the parties used the wrong words or syntax. Indeed, this was not a point which featured in the Claimant's submissions. For reasons given previously, the concept of Project Crakemarsh, as the potential sale of the JCB Group, was correctly described and defined in the Touch Agreement. In reality, the Claimant invites the court to rewrite the Touch Agreement rather than to interpret the agreement which the parties have actually made.

82. Against this background, I turn to consider the commercial implications of the rival constructions. I can deal with this briefly. In short, there is nothing uncommercial about the construction for which Mark contends. On that construction, there was a clearly defined event which would trigger the success fee which, potentially, could be very substantial indeed. Since the quantum of the success fee is based upon the price achieved on sale, the calculation of the amount of the fee is straightforward. A success fee, calculated as a percentage of the price achieved for the shares of the JCB Group on sale, also makes commercial sense and indeed is a well-known form of remuneration when there is a possible sale of an asset.

83. By contrast, as Mr Rabinowitz submitted, a success fee calculated by reference to the value of the shareholding makes far less sense in the context of the wide variety of possible restructurings that might take place. He submitted, and I accept, that there may be many forms of restructuring arrangements where it would or might not be relevant to value the 50% shareholding.

84. Nor do I consider that there is anything uncommercial in the success fee being geared to the proposed sale. It was for the parties to decide upon the event which would trigger the fee. I can see that it might have been sensible for Richard (on behalf of the Claimant) to try to negotiate or draft a different and wider trigger. However, I have to construe the agreement which the parties actually made, not an agreement that they might have made. For the reasons given, I accept Mark's case as to construction.

The first implied term

85. The Claimant contends for an implied term to similar effect as its case on construction; i.e. an implied term that the 2% fee was payable if the divestment of the assets or separation of the interests of Mark in the MB Trusts took a different form than the anticipated sale of the JCB Group in 2012, e.g. whether Anthony or the AB Trusts acquired the assets of the MB Trusts, or whether some other form of restructuring took place.

86. In my view, the term proposed is not necessary to make the contract work. It is neither so obvious that it goes without saying, nor is it necessary to give the contract business efficacy.

87. The Touch Agreement is efficacious as a contract: it captured the transaction (Project Crakemarsh) which was then understood to be the front-runner, and provided for the success fee to be payable on completion. It is, as Mr Rabinowitz submitted, unnecessary to extend the scope of the trigger event, so as to capture other circumstances, in order to give efficacy to the contract. Indeed, to do so would simply involve substituting the agreement which the parties have in fact made by their express terms (as discussed above) with a different and wider trigger event which they have not agreed.

88. Nor is the proposed implied term so obvious that it goes without saying. If the notional officious bystander had raised the point with the parties, they would not have told him "Oh of course". The response of one or other party would have been: that is not what we have agreed. If the point had been raised, whether by the officious bystander or one or other of the parties, it would have resulted in thought having to be given to the possible alternative structures which might be involved, the extent to which Richard would be involved in advising on those structures, and the fair remuneration for that work including how it was to be calculated. It is far from obvious that the 2% (of 50%) would have been readily agreed as appropriate, whatever the form of restructuring.

89. Accordingly, the implied term fails the test of necessity on those grounds. It also fails the test of necessity because the express terms are inconsistent with it. Those terms are clear in defining the transaction which will give rise to the success fee. An implied term which provides for the fee to be payable in different circumstances is to make a different agreement for the parties.

The second implied term

90. The Claimant advances an alternative implied term which operates in circumstances where, as is common ground, there has been no sale of the JCB Group. It is alleged that it was also an implied term that (if Project Crakemarsh or some other form of divestment or restructuring would or could no longer take place, for example) the Claimant would in any event be "made whole" in respect of the services rendered by Richard. On this basis, the Claimant could charge an appropriate rate for the work actually performed.

91. I cannot accept this argument. The payment in clause (6) was a "success fee on the completion of Project Crakemarsh". The concept of a success fee is straightforward,

at least in the absence of any qualifying or supplemental terms. In short, a party is paid for success, as defined by the agreement. If there is no success, then there is no payment. If there is no express agreement on payment in the event of failure (i.e. the agreed trigger for the success fee does not happen), then there is no basis for implying a term. It is not necessary to make the contract work: it works perfectly well without it. It is not so obvious that it goes without saying. Indeed, the response of the parties to the officious bystander would have been: "Of course not - a substantial payment is only to be made in the event of success".

Conclusion

92. It is common ground that, in the 11 years after the Touch Agreement was made, there has been no sale of the JCB Group.

93. For the reasons given above, the express terms of the Touch Agreement do not, on their true construction, provide for payment of the success fee in circumstances where there has been no sale of the JCB Group. There are no implied terms, as alleged by the Claimant, which produce a different result.

94. Furthermore, there is no term which entitles the Claimant to remuneration for work performed, except where the event which triggers the success fee has occurred. It has not occurred in the present case, and the Claimant has no entitlement to be "made whole".

95. Accordingly, the Claimant's case must be dismissed, pursuant to CPR 3.4 (2) (a). Alternatively, this would be an appropriate case for reverse summary judgment pursuant to CPR 24.2 (a) (i).

96. In the light of my conclusions on the issues of construction (including implied terms) as set out above, it is not necessary for me to address Mark's argument that the Touch Agreement required the completion of Project Crakemarsh in 2012 (or possibly within a reasonable time thereafter). Nor is it necessary for me to address the question of whether, if the Claimant had established his case that the Touch Agreement applied to forms of restructuring other than a sale of the JCB Group, there is a sufficient case on the facts to defeat the present application.