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Case No: HQ12X00272

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

25 June 2013

Before:

MR SIMON PICKEN QC
(sitting as a Deputy Judge of the High Court)

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Between:

DANIEL STEWART & COMPANY PLC

Claimant

- and -

ENVIRONMENTAL WASTE CONTROLS PLC

Defendant

- -
- -

Paul Luckhurst (instructed by **Swan Turton LLP**) for the Claimant.
Benjamin Williams (instructed by **Hill Dickinson LLP**) for the Defendant.

Hearing dates: 7, 8, 9, 10 and 20 May 2013

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APPROVED JUDGMENT

MR SIMON PICKEN QC:

Introduction

1. The Claimant, Daniel Stewart & Company PLC ("Daniel Stewart"), is an investment bank which provides corporate finance and broking services. The Defendant, Environmental Waste Controls PLC ("EWC"), is a company which manages waste services.

2. This is a claim for payment of a so-called 'abort fee', in the sum of £150,000, which Daniel Stewart alleges is due and owing from EWC in respect of EWC's engagement of Daniel Stewart in late December 2010 (the "Engagement Letter") to assist it in listing on the Alternative Investment Market (the "AIM"). Essentially, EWC having ultimately decided, on 22 May 2011, not to proceed with the planned listing, *"having regard"*, so it is said on EWC's behalf by Mr Benjamin Williams in his Opening Skeleton Argument, *"to the value of the defendant and the objectives of the defendant's owner, Mr William (Bill) Edwards, of which the claimant was always aware"*, the issue is whether the abort fee is payable or not.

3. Daniel Stewart's case is that EWC's liability in respect of the abort fee is straightforward. Daniel Stewart says that if EWC had gone ahead with the listing, it would have earned substantial commission on the sums raised (substantially more than the £150,000 agreed as the abort fee) and, in such circumstances, the parties having agreed that such a fee would be payable in the event that EWC decided not to proceed, EWC came under a liability to make the payment. EWC disputes Daniel Stewart's claim. Its position is that Daniel Stewart is not entitled to payment of the abort fee for two main reasons. First, EWC contends that because by 22 May 2011 Daniel Stewart had (in the language of the relevant contractual provision concerned with the abort fee) completed *"the marketing and book build process"* and the listing was one which *"should not proceed"*, Daniel Stewart should have agreed that the listing should not go ahead and, therefore, the abort fee is not payable. EWC's position, in the alternative, is that its decision to abort the listing was for reasons connected (or, in the language of what was agreed, not for *"reasons unconnected"*) *"to Daniel Stewart or its performance"*, and so EWC was entitled to abort without incurring liability to pay the abort fee.

4. In addition to Daniel Stewart's abort fee claim, there are also disputes over the following: a claim in respect of certain legal expenses incurred by Daniel Stewart (specifically, whether disbursements amounting to £699.30 are payable on top of legal fees, and whether Daniel Stewart can recover a further sum by way of VAT on top of the VAT charged by their lawyers, Field Fisher Waterhouse LLP ("FFW"), to Daniel Stewart); a claim in respect of certain monies incurred by Daniel Stewart in carrying out searches on EWC's existing directors (as opposed to other directors who were new to EWC); and Daniel Stewart's reliance in relation to its interest claims on the Late Payment of Commercial Debts (Interest) Act 1998. I shall come on to address these subsidiary matters after, first, considering the abort fee issue.

The abort fee

The events giving rise to the claim

5. I should start consideration of the abort fee claim by describing the events which have given rise to it. Those events are largely uncontroversial, although there are some disputes on certain matters which I need, if only for completeness, to address. In truth, however, the disputed matters of evidence have only limited, in some cases if any, significance in relation to the issue which I have to decide. That is an issue which really turns on the conclusions I reach on the proper construction of the Engagement Letter and whether any term is to be implied into the Engagement Letter requiring Daniel Stewart to act reasonably in agreeing that the listing *"should not proceed"* (or, put another way, requiring Daniel Stewart *"not unreasonably [to] withhold agreement to the transaction not proceeding"*, as EWC put it in paragraph 5A of its Amended Defence) in accordance with the third sentence of the abort fee clause. As I explain later, I am not really assisted in relation to these matters by the witness evidence which was put before me. It is nonetheless right that I say something about the witnesses from whom I heard.

The witnesses

6. There were five witnesses called by Daniel Stewart: Mr Oliver Rigby, now an assistant director at Deloitte but at the relevant times a Director in Daniel Stewart's Corporate Finance Department; Mr James Felix, an Assistant Director in Daniel Stewart's Corporate Finance Department; Mr Richard Nolan, an Equity Research Analyst at Daniel Stewart at the time of the EWC transaction but now Chief Executive Officer of Premier Gold Resources PLC; Mr Paul Shackleton, Head of Corporate Finance at Daniel Stewart; and Mr Martin Lampshire, Daniel Stewart's Head of Corporate Broking. EWC's two witnesses were: Mr Bill Edwards, EWC's Managing Director and majority shareholder; and Mr Geoffrey Griggs, EWC's Chief Financial Officer at the relevant time but no longer, having since left.

7. I am satisfied that in their evidence before the Court each of the witnesses was giving honest evidence. Although in certain respects, as will appear, I have not felt able to accept the evidence which was given by Mr Griggs and Mr Edwards, preferring that of Daniel Stewart's witnesses, I consider that Mr Griggs and Mr Edwards were not trying in their evidence to mislead but were doing their best to assist the Court with their recollection of events. I do, however, consider that in relation to one aspect, what Mr Williams described in his Closing Submissions as the 'pay them off' email sent on 17 May 2011, Mr Griggs and Mr Edwards were not entirely candid in what they were prepared to acknowledge in their evidence, and this did not reflect particularly well on them even though I am clear that it is a matter which has only limited bearing on the issue which I have to decide. I also consider that, in relation to some of the evidence which Mr Griggs and Mr Edwards gave, there was an element of the *"litigation wishful thinking"* described by Mann J in ***Tamlura NV v. CMS Cameron McKenna*** [2009] EWHC 538, [2009] Lloyd's Rep PN 71 at para. [174], in which *"regret over what happened has led to a search for those who might be blamed, and has tinted the spectacles through which the*

events are now viewed". As Mann J explained, *"This does not amount to a deliberately fabricated case, but it does not create a good one either."* That said, the *"litigation wishful thinking"* in the present case was very much tempered by Mr Griggs' and Mr Edwards' acknowledgment, to their considerable credit, that, despite how the case was put in opening, Daniel Stewart had not actually in some way promised EWC a minimum valuation or minimum fundraise. The *"litigation wishful thinking"* seemed to me really to consist of Mr Griggs and Mr Edwards attributing to Daniel Stewart knowledge concerning Mr Edwards' personal objectives, specifically in relation to the development of a castle project in North Wales, which Daniel Stewart did not have, at least at the time that the Engagement Letter was entered into.

AIM listings

8. As is well known, and was not controversial, the AIM is an established stock exchange used to list companies which may not be suitable for listing on a larger stock exchange, typically the main London Stock Exchange. As Mr Rigby explained in his first witness statement, a listing on AIM does not necessarily involve selling all of the shares in the company seeking listing in the initial listing. Indeed, the existing owners of the company are not permitted to sell all of their shares but can only sell a proportion as part of what is known as a 'vendor placing'. Typically also the listing will entail the company issuing new shares in order to raise funds for the company to invest in future growth. As Mr Rigby went on to explain, the price at which the company's shares are sold can be extrapolated to give a notional overall value of the company based on the total number of available shares in the company. This is a value which may rise or fall over time as the shares are publicly traded following the listing.

9. According to Mr Rigby, the process of listing a company on the AIM involves a team of people at an investment bank such as Daniel Stewart, each with different areas of responsibility and expertise. The Corporate Finance team performs a general advisory role in relation to the listing process, working on the structure of the flotation, dealing with due diligence issues, and liaising with the AIM as appropriate. In the EWC project, Mr Rigby, as I say a Director of Daniel Stewart's Corporate Finance Department, acted as the team leader in relation to the transaction, reporting to Mr Shackleton, the head of that department. In addition, a typical listing will also involve input from the Corporate Broking Department, performing a sales role which involves marketing the shares to potential investors. That department, again as explained by Mr Rigby, will arrange and attend pitches to potential investors and generally will liaise with potential investors in order, as Mr Rigby put it, to drum up interest and obtain feedback so that the level of interest can be gauged and a book built of investors which have a firm intention of investing. In addition to the Corporate Finance and Broking teams, support will be provided by a research analyst who will compile what is known as a broker's note for circulation to potential investors as part of the marketing process. In the present case, the research analyst was Mr Nolan and the lead broker was Mr Lampshire.

The decision to list and the pitch

10. Mr Edwards confirmed in his evidence before me that the idea of listing on the AIM was suggested to him by Mr Griggs, and it is clear that Mr Edwards relied on Mr Griggs to handle the process of listing if not entirely then, as he put it, *"almost entirely"*. This was understandable given that, as he confirmed when asked in cross-examination, Mr Griggs had had previous experience of floating another company on the AIM. He acknowledged that he had at least some understanding of the process and it is clear that that was, indeed, the case. In contrast, Mr Edwards' own knowledge of what the process involved was relatively slight. It seems that Mr Griggs was under the impression that Mr Edwards understood more than Mr Edwards was prepared to accept when he was asked about how a listing works. What matters for present purposes, however, is that I agree with Mr Paul Luckhurst, counsel for Daniel Stewart, that EWC (at least in the form of Mr Griggs and probably also Mr Shaw, who as EWC's CEO was also involved in the listing process) is to be regarded as having a reasonably sound understanding of the listing process and certainly was not ignorant of what it would entail. This, then, is the context in which Daniel Stewart was approached by EWC and invited to tender for the Nominated Adviser (or NOMAD) role which, in the event, it was contracted by EWC to perform.

11. EWC, in fact, approached several investment banks and made arrangements, it seems, for several pitch meetings to take place. In the case of Daniel Stewart, two such meetings took place, although the formal pitch which Daniel Stewart made to EWC took place on 8 December 2010. The powerpoint presentation which Daniel Stewart prepared on that occasion was very generalised. It mainly contained information about Daniel Stewart, its front page explaining that *"The purpose of this presentation is to introduce Daniel Stewart to the board of EWC..."*. Consistent with this, Mr Lampshire explained that the nature of a pitch meeting is *"a meet and greet"* and Mr Griggs himself fairly accepted that the purpose of the pitch meeting was, indeed, for Daniel Stewart to showcase itself. Further, as Mr Rigby confirmed, he had done *"little if any"* research into EWC by that stage, and the same applied to Mr Nolan as far as he knew.

12. As to what was said about EWC at the meeting on 8 December 2010, it was common ground by the end of the trial, after the evidence had been heard, that, although there were discussions about a possible valuation, these were at a very high level. EWC, therefore, did not ultimately press its case that Daniel Stewart in some way promised EWC a minimum valuation or minimum fundraise. This was a case which was advanced in opening and which was explored in the evidence by Mr Williams. However, Mr Williams made it clear at the start of his closing submissions that the case was no longer maintained. In the circumstances, I need say very little about it. Mr Williams' stance in closing was inevitable in the light of Mr Griggs' clear evidence that Daniel Stewart never made any promises before, or for that matter after, the Engagement Letter was entered into that any particular valuation or fundraise would be achieved. As Mr Griggs put it, what Mr Nolan had to say on this topic was no more than *"an off the cuff"* comment made *"in the context of*

reasonably vague discussions from each side". There was no commitment from Daniel Stewart that a particular price would be achieved. Mr Griggs agreed in cross-examination that, whilst Mr Rigby and Mr Nolan indicated that £30 million did not sound unreasonable, he understood from what they were saying that ultimately the market would decide what the price was going to be. As Mr Nolan explained in his witness statement, Daniel Stewart had no way of knowing at this stage whether EWC's statements about its current and projected performance were realistic or what view investors would form about such matters. This would have to await completion of the marketing and book building process. It appears that Mr Griggs recognised that this was, indeed, the position. Furthermore, when he came to give his evidence, which was after Mr Griggs had given his evidence, Mr Edwards similarly acknowledged that he understood that the market would ultimately set the price it was willing to pay for EWC and Daniel Stewart made no minimum price promise. In view of this evidence, the case as advanced in opening was hopeless since nowhere in the Engagement Letter was there any mention, still less any requirement, that Daniel Stewart should achieve any minimum valuation or fundraise. Nor is there anything to indicate that a minimum valuation or minimum fundraise was ever stipulated during the negotiations leading up to the Engagement Letter. Indeed, Mr Rigby was clear that this was not the case since, as Mr Shackleton was to put it when he came to give evidence after Mr Rigby, at the time of entering into an engagement letter Daniel Stewart is typically *"blind on what is in the company"*.

13. Although Mr Williams did not pursue the case that Daniel Stewart in some way promised EWC a minimum valuation or minimum fundraise, he did nonetheless maintain EWC's case that it was known from the outset by Daniel Stewart that, as Mr Williams put it in paragraph 34 of his Closing Submissions, *"this transaction was not just about procuring a valuation for the defendant which was around £26.8m, or bettering the £20m which Mr Edwards had previously been offered"* but *"was primarily about raising funds, in particular for Mr Edwards"*. (I interject here to point out that Mr Edwards had previously turned down an offer of £20 million for an out-and-out purchase of EWC.) Mr Williams suggested that there *"appears to be a complete consensus that"* Mr Edwards *"emphasised this to the claimant from the start"*. It seems to me that Mr Williams puts matters a little too high. Whilst it was, as I understood it, common ground that Mr Edwards expressed a general hope that the AIM listing would result in an initial market capitalisation of £30 million and also that he would be able to sell up to £15 million of his own shares, it is not right to say that there was a general consensus that the listing was, as Mr Williams put it, *"primarily"* about raising funds for Mr Edwards, the individual. Nor do I consider that to have been established on the evidence. Specifically, I do not accept that, as I understood Mr Williams to be suggesting, Mr Edwards explained at the pitch meeting that he needed the money for a castle in North Wales which he was wanting to develop. Mr Rigby's evidence was that he did not know about the castle project at that stage, in other words before entry into the Engagement Letter, but that he *"became aware of it"* later, and I accept that evidence. I found Mr Rigby's evidence on this issue to be more plausible than that of Mr Edwards. In my view, there is considerable force in Mr Luckhurst's

observation that Mr Edwards' recollection of what happened at the pitch meeting is unreliable. I do not mean to suggest that Mr Edwards was deliberately making up his evidence in this respect. On the contrary, I am quite clear that he was doing his best to recall what happened. It is just that I prefer Mr Rigby's evidence. I have to bear in mind, in particular, in this context, that in his witness statement Mr Edwards had placed heavy reliance on certain manuscript notes which he said were taken at the pitch meeting but which Mr Williams now accepts must have been written quite a bit later. In fairness, Mr Edwards himself acknowledged in cross-examination, after certain oddities in the notes had been put to him, that it was possible that the notes were not from the pitch meeting. This does, however, cause me to be cautious in what Mr Edwards told me about the pitch meeting. So, too, does the fact that it is now accepted that EWC was not promised a minimum valuation or minimum fundraise by Daniel Stewart. The fact that this case was put forward, presumably on the instructions of Mr Edwards, who (unlike Mr Griggs) remains at EWC, causes me to be very cautious about the reliability of his evidence generally. The truth is that, as Mr Edwards himself explained in cross-examination, *"Nobody ever tells you definitely but they in a sales environment give you an indication of how skilled they are and demonstrate their confidence"*. That, together with the enthusiasm shown by Daniel Stewart, meant that EWC decided to appoint Daniel Stewart rather than another bank. It was nothing to do with any promises or assurances given by Daniel Stewart, including as to Mr Edwards' ability to fund his North Wales castle project. It follows that, on any view, I should take no account of this matter when engaged in the contractual construction exercise to which I turn later. Nor is it relevant to the question of whether, if Daniel Stewart was under a duty to act reasonably in deciding whether to agree that the listing *"should not proceed"*, Daniel Stewart acted reasonably in not so agreeing (EWC's primary case), or the question of whether its *"performance"* brought about the decision to abort (EWC's alternative case).

Subsequent negotiations

14. Following the pitch, EWC having decided to engage Daniel Stewart as its NOMAD, Mr Griggs and Mr Rigby set about the task of negotiating the terms of Daniel Stewart's engagement, leading to the conclusion of the Engagement Letter shortly before Christmas, on or about 21 December 2010 (with Mr Griggs signing the Engagement Letter early in the New Year, on 6 January 2011). It was during these negotiations that the question of how much Daniel Stewart would be paid was addressed.

15. I return to some of the exchanges later on when addressing the parties' submissions on the construction issue. I do not, therefore, set them all out here. However, in relation to the abort fee clause it is right at this juncture to highlight the fact that Mr Griggs tried to have it deleted, which Mr Rigby refused to allow. As he put it in his email sent to Mr Griggs on 16 December 2010: *"I cannot amend the abort fees (although I have reduced down the fee to £150k in the event you pull out for reasons unconnected to DS). If after three months of hard work you abort or get taken out, we need to be compensated fully"*. Mr Rigby's offer to reduce the size of the abort fee from

£250,000 to £150,000 was what the parties agreed. In addition, Mr Griggs proposed the inclusion of the words *"prior to completion of the marketing and book build process"* in the first sentence of the abort fee clause, along with the introduction of a third sentence which, as originally suggested by Mr Griggs, began with the words *"For the avoidance of doubt"*, rather than the *"Without prejudice to the generality of the foregoing"* wording which appears in the Engagement Letter as ultimately agreed.

Subsequent events

16. After the parties had signed the Engagement Letter, there followed several months in which Daniel Stewart personnel worked with Mr Griggs and Mr Shaw on the project. This entailed a visit to EWC in late January 2011, the putting together of a planned road show of presentations to potential investors, the preparation of the broker's note valuing EWC, and liaison with FFW and the AIM, among others. The work putting together the broker's note was primarily carried out by Mr Nolan, who used the information which Mr Griggs gave him, in particular financial projections for 2011 onwards, to produce a note on 28 April 2011 in which EWC was given a valuation of £26.8 million. It is necessary to say a little bit about this.

17. Specifically, on 1 April 2011, Mr Rigby arranged a conference call with Mr Griggs in order to deal with three matters, namely: *"1. the impact on valuation if you lose Hilton. 2. The company is heavily cash generative. Why do you need the capital? 3. Bill Edwards sell down"*. This followed an email from Mr Nolan to Mr Rigby the previous day, in which the second and third of the points (but not the first) had been raised as *"issues/question"*. (I might add that, according to Mr Rigby, in his witness statement, he and Mr Nolan discussed the third matter, concerned with Mr Edwards' vendor placing, with Mr Griggs throughout the listing process.) The same day that Mr Rigby sent Mr Griggs his email, 1 April 2011, after he, Mr Rigby and Mr Griggs had had the discussion referred to in Mr Rigby's email, Mr Nolan then emailed Mr Griggs, attaching what he described as a *"work in progress"* broker's note and asking for further information on a number of matters.

18. This was only one of a series of emails passing between Mr Nolan and Mr Griggs in the lead-up to production of the finalised broker's note at the end of the month. These included a paper which Mr Griggs sent Mr Nolan on 7 April 2011, which set out certain financial projections (known, in shorthand, as EBITDA figures) plainly regarded by Mr Nolan as inadequate judging from an internal email which he sent to Mr Rigby on 11 April 2011. Indeed, two days later, on 13 April 2011, Mr Nolan asked for Mr Griggs' assistance as to how the figures were arrived at and, after Mr Griggs had replied the same day, Mr Nolan made the point that *"there are some fairly large line items that will draw attention and thus need explanation... investors may express a degree of scepticism"*. Mr Nolan was obviously concerned, and a further, revised, draft of the note was sent by Mr Nolan to Mr Griggs on 16 April 2011 under cover of an email in which Mr Nolan explained that *"Lots has changed"* whilst warning that *"These numbers are sure to change so dont [sic] get too excited"*. The email went on to give a range of valuations from £21.4 million to £32.7 million. As for the draft note itself, this stated (after Table 18, which

had been replicated in the body of the email as it gave the range of valuations) as follows in what were essentially informal notes showing Mr Nolan's then thinking in relation to the matters discussed on 1 April 2011:

"Given the Hilton and contract profile, you could easily argue for a discount as this could raise questions about management's ability to negotiate and manage their portfolio in advance of an IPO.

You are providing me with some detail on how you are mitigating this risk.

As well, there are other ownership issues which would prompt a discussion of discounts

- *Bill Edwards selling*
- *Staffing issues*
- *Overhang.".*

The note then continued, after Table 19, as follows:

"Bill Edwards has expressed a desire to sell 50% of his shares for £13m to pursue other interests. We have misgivings in either scenario: selling 50% of his holdings or selling to achieve £13m

- *would present a significant overhang to the share price*
- *We also believe that this is a poor signal to the market for the viability of the company".*

19. This was followed by Mr Griggs sending Mr Nolan certain comments on 22 April 2011. The relevant email was not in the trial bundles, but it seems that the comments were, as Mr Nolan put it to Mr Rigby in an email the same day, *"Not much at the moment mainly some wording changes etc".* Whatever comments Mr Griggs may have made by email, what is clear is that there was a telephone discussion on 26 April 2011 because a transcript of that call exists. It was a conversation between Mr Nolan and Mr Griggs, in which a number of matters were discussed. These included: Mr Edwards' vendor placing, Mr Nolan and Mr Griggs agreeing that the part of the draft broker's note which addressed that issue would be taken out; and the fact that on valuation, as Mr Nolan put it, *"you're basically at £26m"* but *"there are going to be some numbers that come back at you".* Besides this, it is clear (and Mr Griggs did not dispute it in giving his evidence) that Mr Nolan told Mr Griggs that, in his view, EWC should consider delaying the launch of the marketing to investors until after EWC's financial year end in August 2011 when concrete results would be available. He explained, apparently repeating what he had previously told Mr Griggs, that *"you would benefit a great deal by waiting 6 months".* The telephone call was followed two days later by the final version of the broker's note, in which, as I have previously stated, the suggested valuation of EWC was given as £26.8 million. This, then, was the figure which potential investors were given by way of *"guidance"* in the broker's note (as Mr Felix

put it in cross-examination). Both Mr Griggs and Mr Edwards themselves recognised, in their evidence, that the function of the broker's note was essentially a marketing function. Mr Griggs, in particular, agreed that nothing stated in it represented any sort of promise.

20. I shall come on very shortly to deal with what was done with the broker's note and its reference to a £26.8 million valuation. First, however, I should make it clear that, although there may have been some suggestion by Mr Nolan that Mr Griggs misled him with the EBITDA figures for 2011 with which he was provided by Mr Griggs, I do not consider that it is appropriate that I find that this was the case in circumstances where it was not suggested to Mr Griggs in cross-examination that he had misled Mr Nolan. An allegation of that nature is a serious one and would need to have been put to Mr Griggs were it to be made. In any event, I do not understand it to be part of Daniel Stewart's case that Mr Griggs misled Mr Nolan. In the circumstances, I say no more about this and proceed on the basis that Mr Griggs acted in good faith in what he gave Mr Nolan.

The road show

21. After the broker's note had been prepared, the parties engaged in their road show presentations to potential investors. This started on 4 May 2011 and was led by Mr Griggs and Mr Shaw, who worked closely with Daniel Stewart's broking team. That Mr Griggs and Mr Shaw led the presentations is demonstrated by the fact that the presentation document bore their names on the front page. This was a 25 page document, which explained about EWC and which set out EWC's *"Funding Requirements"* on internal page 18. Those requirements totalled £8 million and included, importantly for present purposes, a reference to £4 million being sought in respect of *"Sell down by Bill Edwards"*. This was, of course, a reference to Mr Edwards' vendor placing. I should record that, alongside the presentation document, a lengthy so-called *"Pathfinder"* document was also provided to potential investors. In this document, it was stated that EWC hoped to raise £4 million in the sale of shares, and it was also noted that Mr Edwards intended also to raise funds through a vendor placing but there was no mention of any specific amount. It nonetheless emerged in the course of Mr Edwards' evidence that he was not aware until after the proceedings had commenced that only £4 million was being sought in respect of his shares. It appears that, although he had previously seen the presentation document, what he had been shown had the numbers missing. Why that should be so is not clear and must remain a matter for speculation. In his Closing Submissions, in a footnote, Mr Williams put the matter down to *"some sort of breakdown in communication"* between Mr Griggs and Mr Edwards, but what matters, as he recognised by what he went on to say, is that EWC is bound by Mr Griggs' agreement to approach potential investors on the basis described on the *"Funding Requirements"* page, namely on the basis that Mr Edwards would raise just £4 million for himself. Mr Williams' point is that, even on that basis and taking a valuation of £8 million as set out in the presentation, Daniel Stewart did not, as he put it, *"get close to raising even £4m for Mr Edwards"*. As this demonstrates, during the course of the trial Mr Williams' focus became increasingly on Mr

Edwards' personal position and the need for a certain level of capital for his North Wales castle project.

22. The reason why the *"Funding Requirements"* referred to only a £4 million vendor placing was, as the evidence demonstrated, that this was what the feedback received by Daniel Stewart from potential investors pointed towards being acceptable. This was discussed between Mr Nolan and Mr Griggs in their telephone conversation on 26 April 2011 in the context of their agreement that the broker's note would not have a section dealing with Mr Edwards' vendor placing. The note of that discussion records Mr Griggs as saying this: *"Well at the moment I think our conclusion at the last meeting you were at Richard was that we're going to put £4m as a potential sell down on the slide"*. That Mr Griggs understood the rationale behind the £4 million figure is, therefore, clear. In the context of the trial, however, Mr Luckhurst highlighted in his Closing Submissions that Mr Griggs appeared to have adopted a curiously inconsistent position. He made the point that in Mr Williams' Opening Skeleton it was stated as follows: *"Mr Grigg's [sic] evidence will be that when this more modest presentation was commended by the claimant's Mr Lampshire, his advice was that on this basis there was likely to be an oversubscription, which would enable Mr Edwards to sell down more of his shares. In other words, the expectation remained that the defendant would raise significantly more than £8 million"*. After Mr Lampshire had made a second witness statement, in which he stated that he had not provided any such advice (in relation to which he was not challenged in cross-examination), Mr Griggs' evidence at trial turned out not to be as it had been advertised in Mr Williams' Opening Skeleton, but that he had been told by Mr Lampshire that EWC would have to rely on an oversubscription if more than £4 million of Mr Edwards' shares were to be sold. He accepted, however, that he and Mr Lampshire did not discuss this issue in any detail.

23. I am not in a position to know how or why Mr Griggs' evidence was, in the event, different. It may be that Mr Griggs had had only limited involvement with EWC's legal team in the lead-up to trial. I should make it clear, however, that I am not prepared to assume that Mr Griggs has shown a willingness to adapt his evidence to suit EWC's case. All that really matters is that his evidence to the Court did not support a case that EWC had been told by Daniel Stewart that *"the expectation remained that the defendant would raise significantly more than £8 million"*. So it was that Mr Williams' submission became, as I say, not that EWC had been told this, but that not even £8 million (£4 million by way of the issue of new shares, and 50% in respect of the sale of Mr Edwards' shares) was, in the event, able to be achieved and, as he put it, *"the position for Mr Edwards was little short of dire"* because he would not even have received the £4 million to which the *"Funding Requirements"* page in the presentation referred after taking into account the need to use whatever funds were raised in respect of the other requirements listed such as transactional costs, investment in what was described as MRF sites and investment also in the strengthening of EWC's balance sheet and credit ratings. Mr Williams highlighted in this context that as at 19 May 2011 only £4.7 million had been raised, pointing out that, even if £5 million had been achieved, Mr Edwards would have obtained only £1.12 million after taking

account of the transactional cost (£630,000, calculated on the basis of 12.6% of the funds raised), the sums promised for the MRF sites (£1.5 million) and balance sheet related costs (£1.75 million). Mr Williams submitted, in particular, that this was so far removed from the £4 million specified as the *"Funding Requirements"* in the presentation document that this was, accordingly, a case where Daniel Stewart should, acting reasonably, have agreed that the listing *"should not proceed"*.

The 13 May 2011 meeting and its aftermath

24. The various road show presentations were followed up by Mr Lampshire's broking team at Daniel Stewart, and feedback was provided to Mr Griggs and Mr Shaw, as Mr Griggs put it, mainly on *"how we should change our presentation"*. Mr Griggs agreed that he was told, as part of the feedback which had been reported to him, that some investors *"thought the valuation was a little bit light"* (by which my understanding is that he meant, in effect, that the valuation was regarded as being too high taking account of the information with which investors had been provided), although he did not accept that this was, as he put it, *"a consistent theme"* and he insisted that there was *"nothing to ring alarm bells with me"*. It seems that this would have been in the lead-up to a meeting which took place at Daniel Stewart's offices on 13 May 2011. I refer to a single meeting, although it is right to acknowledge that actually there were two meetings, the second following after the first. Nothing turns on this, however, and so I shall continue to refer to what happened as entailing a meeting in the singular. The meeting was attended by Mr Griggs and Mr Shaw, who had been leading the road show presentations and who had received feedback over the telephone from Daniel Stewart personnel, as well as by Mr Edwards. The Daniel Stewart personnel at the meeting were, in the first instance, Mr Lampshire and Mr David Lambourn (a colleague of Mr Lampshire's in Daniel Stewart's Corporate Broking Department), and subsequently Mr Shackleton and Mr Felix, who were called into the meeting after it had begun because, as Mr Felix put it in his witness statement, *"an issue had arisen"*. Mr Rigby was not at the meeting as he was on paternity leave. The purpose of the meeting was to discuss the feedback more formally.

25. Mr Lampshire's evidence was that he made it clear that the general feedback was broadly positive but that it was considered that the valuation placed on EWC was too high. He told Mr Edwards, Mr Griggs and Mr Shaw that there was interest of approximately £2.5 million to £3 million in the valuation range of £19.5 million to £20.5 million, and that there were further calls to be made and so he was hopeful that EWC would be in a position to raise £5 million to £6 million at a valuation of around £20 million. This was unchallenged evidence, and accordingly I find that Mr Lampshire did as he said he did. Mr Lampshire went on, in his witness statement, to refer to Mr Griggs and Mr Shaw not being surprised by what he told them because they were already aware of it from the informal updates leading up to the meeting. They, therefore, did not react in a particularly disappointed or negative way. I find that what Mr Lampshire said about that was the position since, whatever precisely Mr Griggs and Mr Shaw may have been told in the lead-up to the

meeting, even if the position was as Mr Griggs described it, still they must have had some, if only very generalised, advance notice of what Mr Lampshire reported at the meeting. Mr Edwards, however, according to Mr Lampshire, was far from happy. Apparently, he wanted to be able to place more of his shares and for the valuation to be higher. It was because of this reaction and Mr Edwards' wish to speak to Mr Rigby or somebody in Mr Rigby's department that, according to Mr Lampshire, Mr Shackleton and Mr Felix were called in to meet the EWC team. Mr Lampshire was then, at some point, called away and so left the meeting.

26. Mr Felix also gave evidence about this meeting. He said that Mr Lampshire came out of the meeting which he had been having with Mr Edwards, Mr Griggs and Mr Shaw, and called Mr Shackleton and him into the meeting room for what, like Mr Lampshire, he described as a second meeting. He explained that he (Mr Felix) had met Mr Griggs previously. He went on to say in his witness statement that Mr Edwards was angry, more with Mr Griggs than with Daniel Stewart, and that he spent some of the meeting shouting at Mr Griggs and telling him to *"let me speak"*. He added that Mr Edwards was wanting to know *"what had happened to the supposed valuation of £30 million"* and was insistent on a valuation of EWC which was in that amount. According to Mr Felix, it was extremely awkward for Mr Griggs, Mr Shaw and the Daniel Stewart people in attendance. Mr Felix was also surprised, as he put it, that Mr Edwards *"did not even seem to know that Bill Shaw and Geoffrey Griggs had been on the road show marketing EWC at £26.8 million, let alone that he seemed unaware that the market would not view that as a fixed price for investment but would come to its own decisions"*. Mr Felix then went on, again in his witness statement, to refer to Mr Shackleton trying to calm matters down, including going through the terms of the Engagement Letter and pointing out that it contained no reference to a minimum valuation. Then, Mr Felix explained, Mr Edwards stated that *"there are only two certainties in life, one is death and the other is that Bill Edwards never changes his mind"*, insisting that the transaction should go ahead on the basis of a £30 million valuation or otherwise it would not go ahead at all. Mr Felix's evidence was that Mr Edwards then explained that he needed £15 million to finance the redevelopment of a hotel in Wales (the North Wales castle project, to which I have referred several times) and that was going to be his new project.

27. Mr Shackleton gave broadly similar evidence, although in somewhat less detail since he plainly had only a limited recollection of events. He recalled that he tried to work out a solution such as a secondary placing after six months, that Mr Edwards had referred to the North Wales castle project and that he had *"expressed some irritation with his professional management team who had allowed the process to run with an overly lower valuation"*, and that Mr Edwards had offered £5,000 *"as compensation for our wasted time"*.

28. Although it was not disputed by EWC that Mr Edwards, described by Mr Williams as *"a candid and plain speaking man"*, was robust at the meeting on 13 May 2011, it was suggested by Mr Williams that the differences in impression as to whether he was merely firm or furious can readily be

explained by the fact that Mr Griggs was used to his ways of expressing himself, whereas the Daniel Stewart attendees at the meeting were not. That may well be right, but it does not, in any event, seem to me to matter very much whether Mr Edwards was merely firm or furious. What really matters is whether he insisted on a £30 million valuation. Mr Felix, when challenged on his recollection of events, was insistent that Mr Edwards did this. Mr Edwards was equally adamant that he had not done so, and Mr Griggs' evidence was that the discussion was only as to £26.8 million. There is, therefore, a direct conflict of evidence between, on the one hand, Mr Felix (supported by Mr Shackleton) and, on the other, Mr Edwards (supported by Mr Griggs).

29. Mr Williams submitted that, whilst it was possible that Mr Edwards expressed himself forcefully at being invited to reduce the target valuation from £26.8 million to £20 million having already, as he put it, *"been prevailed upon to reduce it"* from £30 million, it is unrealistic to suppose that he demanded that Daniel Stewart should effectively re-market at an increased value of £30 million. I see force in that submission, not least because of the point made by Mr Williams that it would *"look ridiculous in the market"*. However, I have to take into account that Mr Edwards was, on any view, displeased with how things had turned out and what he was being told at the 13 May 2011 meeting. This, in circumstances where he quite obviously had left matters largely, if not exclusively, to Mr Griggs and Mr Shaw. I can, therefore, well see that Mr Edwards' reaction would not necessarily have involved his taking into account the sort of consideration identified by Mr Williams when confronted with the disappointing news which Mr Lampshire was imparting. Although plainly a very successful businessman, it is equally clear that Mr Edwards has strong views and is willing to express those views. He himself, very fairly, acknowledged this in his evidence, specifically that he did say something along the lines of *"there are only two certainties in life, one is death and the other is Bill Edwards never changes his mind"*, and that this would be *"in character"*. As Mr Griggs put it, Mr Edwards is a *"robust"* man. I need also to bear in mind that, as Mr Luckhurst reminded me, Mr Felix explained that the reason why he remembered what Mr Edwards had said so well was because he was in his first eight months in the job and was struck by what was "*Clearly a lack of information flow between a member of the board and the owner*". He also was quite obviously struck by the strength of Mr Edwards' reaction and it seems to me that he is very likely, therefore, to have a particularly good recollection of what happened. Mr Felix stated that he found the meeting, as he put it, *"saddening"*, which again suggests to me that his is a recollection which is especially vivid.

30. All in all, therefore, I prefer Mr Felix's evidence on these matters and as to the meeting generally. This is not to say that Mr Edwards and Mr Griggs gave untruthful evidence, merely that they were mistaken in what they told the Court. In my judgment, this is an instance of the *"litigation wishful thinking"* to which I have previously referred. My conclusion in this regard is strengthened by the fact that, a few days after the meeting, in an email which Mr Rigby sent Mr Griggs (copied to Mr Shaw, Mr Felix and Mr Lampshire) on 17 May 2011, Mr Rigby wrote as follows:

"...

3. IPO is not the end game. As discussed many times over the last 4 months, for investors coming in at the IPO this is just the start. IPOs are difficult to get away because fund managers have met you once. You have not established a track record with them and therefore investors attach a risk premium to the IPO price. This is the main reason for a valuation being below £30m. The good news, is that once listed and the first results are delivered (hopefully in line or ahead of expectation) you will see the stock react very positively and we can expect to be over and above the £30m valuation we are seeking now. The dilution effect is actually minimal in the long run.

...".

This was Mr Rigby giving advice as to how he considered EWC should be proceeding (the email was headed *"Advice"*). The reference to the *"valuation being below £30m"* was plainly a reference to what EWC had been told at the 13 May 2011 meeting. The subsequent reference to *"over and above the £30m valuation we are seeking now"* has, it seems to me, to be a reference not to that (sub-£30 million) valuation but to what Daniel Stewart was *"seeking now"*. There is an obvious distinction between a valuation below £30 million and a valuation over and above £30 million. Mr Rigby was clearly drawing that very distinction in this paragraph in support of the advice which he was giving. The fact that he referred, in terms, to *"seeking now"* a valuation over and above £30 million is consistent with his having been told, no doubt on his return from paternity leave, that Mr Edwards (and EWC) had instructed Daniel Stewart to do this. Mr Griggs suggested that Mr Rigby must somehow have been confused, but it seems to me that that was not the case: what Mr Rigby was doing was taking issue with the instructions which he had learned Daniel Stewart had been given by EWC at the 13 May 2011 meeting.

31. That said, there is an oddity in that, two days later, on 19 May 2011, Mr Rigby emailed the EWC board referring to *"discussions yesterday and last Friday"* (a reference to the 13 May 2011 meeting) and saying this:

"... we have now spoken to the majority of investors presented to on the roadshow. We advised the potential investors that the deal had to be done at a minimum pre money valuation of £26.8 and that Bill had to take at least 50% off the table otherwise the deal would fall away. I am afraid to say that there was no appetite at that valuation".

This seems to suggest that Daniel Stewart perhaps did not receive instructions from Mr Edwards concerning a £30 million valuation since, if those instructions had been received, it is difficult to see why the approaches to which Mr Rigby was referring, which I take to be approaches made in the week commencing 16 May 2011, were on the basis not of a £30 million valuation but a valuation of £26.8 million. That this was what happened appears, indeed, to be common ground. It may be that the explanation is that, after receiving Mr Rigby's 17 May 2011 email, there was a discussion on 18 May 2011 (hence the reference in the 19 May 2011 email to *"discussions yesterday"*) in which EWC told Daniel Stewart to proceed on the basis of a

£26.8 million valuation after all. There does appear to have been a discussion of some sort on 18 May 2011, judging from the fact that Mr Rigby asked Mr Edwards and Mr Griggs to call his mobile telephone number in an email sent that morning. What was discussed is not quite so clear, however, since I do not understand the witnesses to have given evidence directly relating to that conversation, although Mr Rigby did confirm that as at 19 May 2011, when he sent his email to the EWC board, Daniel Stewart was *"not instructed ... based on a £30 million valuation"* being required by EWC. It is of note that, whilst Daniel Stewart's pleaded case was that in a telephone call on 18 May 2011 Mr Edwards had repeated that he would not proceed with the listing unless it was based on a £30 million valuation, this was not maintained by Daniel Stewart in closing submissions, Mr Luckhurst inviting me to proceed on the basis that a revised instruction was given on 18 May 2011 to carry on marketing EWC at £26.8 million. Although this is a matter which was not expressly addressed by Mr Rigby in his evidence, it does seem to me to offer a plausible explanation why in his 17 May 2011 email Mr Rigby referred to a £30 million valuation and yet two days later, in his 19 May 2011 email, Mr Rigby referred to a £26.8 million valuation. In the circumstances, I conclude that it is, indeed, more likely than not that revised instructions were given on 18 May 2011, EWC having taken on board what Mr Rigby had to say about valuation levels in his 17 May 2011 email. I stress, however, that I primarily base my conclusion that Mr Edwards insisted on a £30 million valuation at the 13 May 2011 meeting not on the reference by Mr Rigby in his 17 May 2011 email to a £30 million valuation, but instead on my assessment of the evidence given by the witnesses who attended the 13 May 2011 meeting. I do nonetheless consider that the 17 May 2011 email tends to support the conclusion which I have reached.

32. As to the remaining areas of dispute as regards the 13 May 2011 meeting, the first concerns whether Mr Shackleton pointed out to Mr Edwards that there was no stipulation in the Agreement regarding a minimum valuation or fundraise, as both Mr Shackleton and Mr Felix said happened, but which Mr Edwards and Mr Griggs did not accept happened. This seems to me to be a point of only marginal significance, in view of Mr Williams' confirmation in the course of his closing that EWC did not maintain the case that Daniel Stewart made any promise to EWC concerning such matters. In case the point has any relevance, however, I should indicate that I consider it more likely than not that Mr Shackleton did do this. It seems to me that it was understandable that he should take this step when faced with Mr Edwards' evident dissatisfaction at how matters had turned out. I have in mind in this respect that Mr Shackleton had not had much prior involvement in the proposed listing and would very likely, therefore, have wanted to take refuge in what was or was not agreed in the Engagement Letter. Mr Shackleton was, after all, having to deal with the matter without Mr Rigby being on hand.

33. This leaves the matter of Mr Edwards' offer to pay £5,000, and whether that was intended as a one-off payment (as Mr Shackleton considered the offer to be) or a monthly payment. I agree with Mr Williams when he submitted that Mr Shackleton's evidence on this was somewhat uncertain. As for Mr Felix, he explained that he did not recall what the position was. In contrast, as Mr

Williams submitted, Mr Griggs and Mr Edwards were clear in saying that Mr Edwards was suggesting a delay to the transaction, and offering a monthly retainer of £5,000 during the interlude. I agree with Mr Williams that this is, indeed, considerably more likely to have been what Mr Edwards was offering, and that there was force in the submission that Mr Edwards was hardly likely to have thought, when making the offer, that Daniel Stewart would agree to so low a one-off payment. In short, although the relevance of the point is pretty peripheral, I accept what Mr Edwards and Mr Griggs said about the £5,000 offer. It seems to me either that at the time the offer was made Mr Shackleton misunderstood what was being offered, or that he has misrecollected the position.

34. As will already be apparent, after the meeting on 13 May 2011 (a Friday), Mr Rigby returned to the office from his break on 16 May 2011 (a Monday) and the next day sent his email headed *"Advice"*. In that email, which was sent after Mr Rigby had spoken to Mr Griggs in the morning, besides the paragraph in which he referred to an IPO not being *"the end game"*, Mr Rigby said a number of other things, including addressing the possibility raised by EWC that the listing should be delayed as Mr Edwards had suggested when making his offer to pay Daniel Stewart £5,000 a month in the meantime:

"...

I am disappointed that the float process will not come up with the results that Bill Edwards and all of us had hoped for. Having said that there have been very few IPOs in the last 12 months and almost all of those that have succeeded were in the oil and gas or mining sectors. This is a point that David Blackwell picked up in his piece in the FT a couple of weeks ago. I think it is worth noting that with Blackrock and Artemis (amongst others) keen to invest we still have the opportunity to conclude a hugely successful IPO.

Clearly our fees are almost entirely contingent on success and therefore I have to point out that I am incentivised to get a deal done! Having said that, as your adviser I am still required to give you best advice, and my advice would be to proceed with the IPO, albeit at a reduced valuation, for a number of reasons:

1. *Timing. From a timing perspective, all the information for the admission document and marketing is currently relevant, compliant and up to date. Delaying the process will have a significant effect on the IPO costs. Whilst a number of documents will only require a minor update, a number of them ... will require a major rework. When negotiating fees for additional work, cost overruns on the current deal will be taken into account and in my experience costs will probably double. There is also no guarantee that you achieve a better result in 6 months.*

2. *Momentum. All deals get a momentum to them. Once a deal loses momentum, people get nervous. This tends to mean that some indications to invest may be lost. If the deal is delayed, by say six months, investors will be more wary next time they are shown it and therefore, in my view, there will be less chance of success.*

3. ....

4. *Wider range of options.*

   a. *Once listed (tied into the point above) selling down further shares is much easier to do. Investors will start to build a relationship with Bill Shaw and yourself who are now driving the business forward. Institutions will be more wiling to buy into the story and there will be appetite to buy up stock from Bill Edwards as you move the business forward and deliver on your goals. In addition the valuation is likely to be at a significant premium to the IPO price and therefore Bill will benefit.*

   b. *As a listed company EWC will have a higher profile which is more likely to attract a trade buyer. Indeed listed companies also tend to attract a premium to private companies. If Bill is looking for a full exit then an IPO could help.*

   c. *As a listed company, EWC will have the ability to raise funds quickly, and also use listed paper for acquisitions. These are two of the main reasons for anyone joining AIM but should not be overlooked by EWC. In the long run a listing is likely to help the company to grow more quickly and build value for Bill and the other shareholders"*

...".

35. This email (to which I shall return later) was forwarded to Mr Edwards by Mr Griggs soon after Mr Griggs received it under cover of an email in which Mr Griggs said that Mr Rigby *"makes some reasonable points but they are mainly points you and I have already discussed"*. In response, within the hour, Mr Edwards emailed as follows:

"Nothing new here, too little too late, pay them off and get a new nomad.

This one has gone into iterative mode.

We'll try again when the time is right for us.

Meanwhile start the £50k per month dividends into epm and £1k for you to match me.

Another let down by advisers that are less than honest!

Its a good job I never say die."

36. Mr Luckhurst submitted that, despite the fact that the next day (18 May 2011) Mr Griggs emailed Mr Rigby saying *"For the avoidance of any doubt, we consider you should continue and finalise your book building exercise"*, this email from Mr Edwards demonstrates that the decision had been taken by Mr Edwards to walk away from the proposed listing. I agree with Mr Luckhurst about this. It seems to me that Mr Luckhurst is right that Mr Edwards' instruction to *"pay them off and get a new nomad"* and his comment *"We'll*

try again when the time is right for us" are only consistent with a decision not to proceed with the listing. In addition, Mr Griggs confirmed in cross-examination that the dividend payments to which Mr Edwards referred would not have been made had EWC proceeded to an AIM listing. It is perfectly obvious, therefore, that the reference to dividends was Mr Edwards telling Mr Griggs that the listing was no longer the route which he wanted to follow.

37. I agree with Mr Luckhurst as well that the fact that Mr Edwards had decided by 17 May 2011 to abandon the listing is further demonstrated by the email which he sent later the same day to various EWC employees and external advisers. In it he referred to an attachment which he suggested *"eloquently explains why EWC's AIM listing has been delayed, and also helps you to get useful info from the horse's mouth (me), in case you have heard what's gone on, or hear some time soon"*. The delay to which Mr Edwards was referring was the same thing as he was referring to in his email to Mr Griggs: the abandonment of the listing through Daniel Stewart and the intention to *"try again when the time is right for us"*. Although the attachment to the email was concerned with a Panorama report, on which I need not elaborate, Mr Williams rightly observed that there has been no suggestion in these proceedings by any of Daniel Stewart's witnesses that this undermined the planned listing. That observation, however, somewhat misses the point which Mr Luckhurst was making, which is that the fact that Mr Edwards sent the email at all, on the day that he did, supports the conclusion that he had decided by that stage, 17 May 2011, not to proceed with the listing. It seems to me that it obviously does just that, and that what Mr Edwards was trying to do when sending out his email to staff and advisers was to avoid having to explain that he had decided that the listing should not go ahead because EWC was valued at too low a price.

38. I have to say that I found Mr Griggs' and Mr Edwards' denials on this issue somewhat unconvincing. I found the suggestion, in particular, that Mr Griggs was, in effect, his own man and as such was free to ignore what Mr Edwards had told him to do especially implausible. Whilst I do not doubt that Mr Griggs brought his own skills to the CFO role which he performed, I see no suggestion in Mr Edwards' email that Mr Griggs was free to disregard the instructions he was given by Mr Edwards. In short, I do not accept their evidence and conclude that Mr Edwards had, indeed, decided by 17 May 2011 that the listing should not proceed. However, it is less obvious to me that Mr Edwards should be regarded as saying in his email that Daniel Stewart should be paid the abort fee, which is perhaps a more relevant consideration for present purposes. Clearly he thought that something needed to be paid to Daniel Stewart, hence his reference to paying Daniel Stewart off. That seems to me, however, probably to be no more than Mr Edwards saying that Daniel Stewart should be paid whatever Daniel Stewart may be owed. That would include payment of disbursements and might also include other fees about which Mr Edwards may have had only limited knowledge, given his lack of day to day involvement in the project.

39. Returning to the chronology, as I have indicated, it appears to be common ground that on 18 and 19 May 2011, as directed by Mr Griggs in his 18 May

2011 email, Daniel Stewart continued to contact potential investors to investigate whether there was appetite for purchasing shares at a valuation of £26.8 million. This resulted in Mr Rigby's email on 19 May 2011, to which I have previously referred. Again, I shall come back to this email later on when dealing with the question of whether the marketing and book building process had by that stage been completed, and the related question of whether EWC was entitled to conclude from Mr Rigby's email that that was the case even if it was not, in fact, the case.

40. The weekend then intervened, with no further broking activity, only for Mr Griggs, on 22 May 2011 (a Sunday), to email Mr Rigby in the following terms:

"I understand you have now completed your marketing and bookbuilding exercise whivh [sic] has sadly produced no orders at a 26.8m valuation (our target price based on your brokers note).

I also acknowledge receipt of your two emails of advice to the board.

On the basis of the above it is with regret that we hereby abort the transaction by reason of a current inability to list and I believe for the sake of good order we also need to give notice of immediate termination of the current agreement between us to stop the 15k pcm charge envisaged therein begining [sic] to accrue, which I hereby give.

I am conscious that we need to meetup following my return to discuss a number of matters including possible future cooperation between us.

My thanks to you and your colleagues for your efforts on this project.

...".

Daniel Stewart's entitlements under the Engagement Letter

The Engagement Letter

41. I turn now to the terms of the Engagement Letter. The opening paragraph was in the following terms:

"This Engagement Letter sets out the terms on which Daniel Stewart has agreed to act as Nominated Adviser and Broker to the Company [EWC] for an initial public offering to the AIM Market of the London Stock Exchange ("Admission") and a placing of new shares in the Company [EWC] and existing shares in the Company [EWC] (the "placing") of up to £20 million (together the "Proposed Transaction"). The terms and conditions of this appointment (the "Terms") are set out in the Appendix attached and these Terms are expressly incorporated into this Engagement Letter. ...".

42. Clause 2 went on to set out what Daniel Stewart agreed to do pursuant to the Engagement Letter. This included the following: acting as Nominated Adviser to EWC for the Proposed Transaction (as defined); acting as Broker to EWC for the Proposed Transaction; assisting EWC in the structuring and overall co-

ordination of the Proposed Transaction; and, subject to the entering into of a placing agreement between EWC, the Directors, and Daniel Stewart, using its reasonable endeavours to procure placees pursuant to the Placing (again as defined). I should add here that *"Services"* is defined in the Daniel Stewart's standard term definitions (incorporated into the Engagement Letter) as meaning *"the services which Daniel Stewart will provide to the Company pursuant to the Engagement Letter as specified in the second paragraph of the Engagement Letter"*.

43. Clause 3 then dealt with *"Fees and Expenses"*, as follows:

"The Company [EWC] agrees that Daniel Stewart's fee for its provision of Services under this Engagement Letter shall be as follows:

- *an Initial Fee of £25,000, plus VAT where applicable, payable within 14 days of the date of this Engagement Letter;*

- *any expenses and disbursements not included herein and reasonably incurred by Daniel Stewart in the course of carrying out the Services, which will not exceed £1,000 in total without the prior consent of the Company [EWC]. In addition to this the Company [EWC] will bear the cost of third party intelligence searches on any new directors, which is estimated (but not capped) at £1,000 per director. Such sums will be paid within 14 days after the issue of the invoice in respect thereof (together with any applicable VAT thereon as against delivery to the Company [EWC] of a VAT invoice). Amounts over £1,000 in total (other than the costs of third party intelligence searches) will be agreed with the Company [EWC] in advance and such disbursements and expenses to be paid 14 days after receipt of the invoice;*

- *the fees of Daniel Stewart's lawyers; and*

- *In the event that Admission does not occur by 30 May 2011, a further £15,000, plus VAT where applicable, per month or part thereof will be payable monthly in advance from 1 June 2011 until Admission unless notice of termination of this agreement has been given by the Company [EWC] prior to that date.*

Upon Admission

- *a corporate finance fee of £100,000 plus VAT as applicable, less any amounts paid or payable pursuant to the Initial Fee;*

- *commission of 4 per cent of funds raised by Daniel Stewart pursuant to the Placing; and*

- *commission of 1 per cent of funds introduced by [EWC] pursuant to the Placing.*

Following Admission

- *a Retainer Fee of £50,000 per annum, plus VAT where applicable, which fee shall accrue on a daily basis from Admission until the date of termination and shall be paid monthly in advance ...*

...

If Admission does not proceed

Fees will be payable in the event that the Company [EWC]:

- *aborts the transaction for reasons unconnected to Daniel Stewart or its performance prior to completion of the marketing and the book build process which Daniel Stewart confirms will be targeted to enable admission by no later than 28 April 2011. In these circumstances, in addition to the Initial Fee, the fees payable will be £150,000 plus VAT as applicable. Without prejudice to the generality of the foregoing, if upon completion of the marketing and book build process both parties agree that admission cannot or should not proceed, no abort fee will be payable.*

- *completes admission of its shares to AIM within twelve months of the date of this agreement using another firm to act as Nominated Adviser and Broker, the fees payable will be £150,000, plus VAT as applicable; or*

- *sells a majority stake in its business or its entire issued share capital to a third party within 12 months of the date of this Engagement Letter. In these circumstances, in addition to the Initial Fee, the fees payable will be £150,000, plus VAT as applicable".*

44. Clause 8 then addressed *"Termination"*, providing first for termination by either party on the giving of three months notice, and then going on as follows:

"Either party may terminate this Engagement Letter immediately by serving a notice in writing in the event of any material breach of the terms of this Engagement Letter by the other party of its obligations under this Engagement Letter, which breach is either not capable of remedy or has not been remedied within five Business Days of its occurrence having been required to do so by written notice, but such termination shall be without prejudice to the payment to Daniel Stewart of any fees or sums accrued or due on the Date of Termination".

Admissible evidence

45. As I have previously made clear, the dispute concerning the abort fee primarily entails the determination of an issue of construction, combined with consideration of a suggested implied term. The parties both recognised that, to some considerable extent, they were putting evidence before me which was either not admissible at all or which was only marginally relevant to the question I have to decide. As Mr Luckhurst reminded me (without demur from Mr Williams), although the court may have regard to the background facts for the purposes of construing the objective meaning of a contractual document in

its commercial context, evidence concerning statements made in negotiations or evidence of previous contract drafts is not admissible (***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] UKHL 38, [2009] 1 AC 1101 at [42] and [69]). In short, evidence of pre-contractual negotiations should not be used to elucidate detailed points of construction. The same applies to evidence concerning the parties' subjective intentions prior to entry into the contract (*Chitty on Contracts*, 31st Ed., at para. 12-119) and to evidence as to what the parties may have said or done post-contract (***James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd*** [1970] AC 583 per Lord Reid at 603E; and see also ***Excelsior Group Productions Limited v Yorkshire Television Limited*** [2009] EWHC 1751 (Comm) per Flaux J at [18]).

46. As I say, Mr Williams did not dispute that this is the correct legal position. He nevertheless suggested that it is, as he put it, *"a striking feature"* of this case that both Mr Rigby of Daniel Stewart and Mr Griggs of EWC, the people who negotiated the terms of the Engagement Letter, believed that at the end of the book building exercise it was open to EWC to walk away from the transaction without paying an abort fee. As he went on to explain in his Closing Submissions when dealing with his implied term case, Mr Williams meant that both Mr Griggs and Mr Rigby believed that Daniel Stewart was obliged by the Engagement Letter to act reasonably when deciding whether or not to agree that the listing should not go ahead in accordance with the abort fee clause.

47. Mr Williams placed much reliance, in this context, on the fact that the abort fee was an individually negotiated part of the Engagement Letter, Mr Griggs having proposed the addition of the last sentence when Mr Rigby insisted on the Engagement Letter providing for payment of an abort fee, as well as on the fact that Mr Rigby apparently himself considered that Daniel Stewart's remuneration was contingent on EWC's listing taking place. Mr Williams relied in particular on two emails from Mr Rigby, one in the context of the negotiations leading up to the Engagement Letter and the other sent by Mr Rigby shortly before EWC communicated its decision to abort the listing.

48. The earlier email, sent by Mr Rigby to Mr Griggs on 10 December 2010, was in the following terms:

"We are thrilled that you would like to work with us and we are really excited about the opportunity.

Having said that, I am afraid that your fee suggestions are a long way from our existing quote. Our fees are fully conditional on success. This is not something that we would normally offer. We have done so on the basis that we believe in your business and our ability to deliver. Our existing quote provides value for money and is in line with the market".

Mr Williams placed special reliance on Mr Rigby's statement that Daniel Stewart's *"fees are fully conditional on success"*. His submission was that this demonstrates that Daniel Stewart did not expect to be paid anything at all unless there was a successful listing. The second email on which Mr Williams relies is the *"Advice"* email which Mr Rigby sent Mr Griggs on 17 May 2011. I have already set out the terms of that email and, therefore, I do not do so

again. In the present context, reliance is placed by Mr Williams on Mr Rigby's statement that *"Clearly our fees are almost entirely contingent on success and therefore I have to point out that I am incentivised to get a deal done!"*.

49. I do not consider that I am assisted by either of these emails. They seem to me to fall squarely within the category of material which is not admissible on the construction issue which I have to determine. However, even if I am wrong about that, it does not seem to me, in any event, that the emails support the case advanced by Mr Williams. As regards the 10 December 2010 email, I am clear that, as Mr Rigby explained when he was asked about the matter in cross-examination (although actually I base my decision not so much on what Mr Rigby had to say in evidence but on my own reading of the email in its proper context), the reference to fees being *"fully conditional on success"* was a reference to what was envisaged at the time when the email was sent, namely that there would be no upfront or initial fee but instead Daniel Stewart would be paid £140,000 plus commission amounting to 5% on the funds which were raised on listing. It was only later on that, having negotiated further, the parties agreed that £25,000 was to be paid on Daniel Stewart's engagement, with payment of reduced fees being agreed on listing.

50. It seems to me that Mr Williams' submission also overlooks the fact that Mr Griggs himself clearly understood that what Mr Rigby was referring to was the absence of an initial fee, as matters then stood in the negotiations, since on 13 December 2010 Mr Griggs reported to Mr Edwards that he had *"reached the following alternatives"* after his negotiations with Mr Rigby, and those alternatives included, as the first, an *"All contingent"* option, followed by two other options, each of which was expressed as being *"All contingent apart from £25k below"*. It was the third of these alternatives which Mr Griggs then reverted to Mr Rigby with on 15 December 2010 (*"All contingent apart from £25k below. £100k payable on admission (assuming all admission costs at least covered by a placing) of which £25k paid up front plus 4% on funds raised"*) and which found its way into the Engagement Letter at Clause 3.

51. Mr Williams nevertheless submitted, as I understand it, that the reference by Mr Rigby to fees being *"fully conditional on success"* still demonstrates that Daniel Stewart appreciated that (but for the initial fee which came subsequently to be agreed) fees would only be payable in the event of *"success"*, by which was meant a successful listing. In one sense, that must obviously be right given Clause 3's references to *"Upon Admission"* and *"Following Admission"*. Indeed, Daniel Stewart has not sought to recover the fees covered by those parts of Clause 3. If Mr Williams' submission is to have any relevance to the present dispute, however, he needs it to extend beyond those fees so that it applies to all fees, including the abort fee. The abort fee clause, after all, expressly contemplates that the listing will not take place but an abort fee will be paid.

52. I have real difficulty with the submission which Mr Williams has advanced based on the 10 December 2010 email. I do not consider that it at all follows from what Mr Rigby stated in his email that he understood, still less that he and Mr Griggs should be taken as agreeing, that Daniel Stewart would come under an obligation, pursuant to a duty to act reasonably implied into the

Engagement Letter, to agree that a listing should not go ahead in the events which happened in the present case, with the consequence that no fee (including the abort fee) beyond the initial fee of £25,000 would be payable from EWC to Daniel Stewart. That seems to me to be reading far too much into Mr Rigby's statement that Daniel Stewart's fees were *"fully conditional on success"*. I struggle to see how, in these circumstances, any meaningful reliance can be placed on what Mr Rigby had to say in the 10 December 2010 email.

53. This brings me to Mr Williams' reliance on Mr Rigby's 17 May 2011 email. I consider that that is also misplaced. First, I can hardly lose sight of the fact that this is a communication which came some 6 months after the parties' entry into the Engagement Letter. As such, it seems to me that it is of no real value in the construction exercise in which I am engaged. It is not admissible evidence and, therefore, I do not consider that I should be influenced by it. Secondly and in any event, I am clear that the reference by Mr Rigby in the email to Daniel Stewart's fees being *"almost entirely contingent on success"* was nothing more than an acknowledgment that, unless the listing were to go ahead, Daniel Stewart would find itself without any right to be paid the fees which were covered by those parts of Clause 3 concerned with *"Upon Admission"* and *"Following Admission"*. Those were the fees which would have seen Daniel Stewart fully remunerated, in accordance with the parties' agreement, whereas if the listing were not to proceed and EWC were to decide to abort, Daniel Stewart would instead merely be paid a lesser amount, namely the abort fee. That is the explanation, as I see it, for Mr Rigby saying *"almost entirely"*: he was contrasting the position where Daniel Stewart would be fully paid with the situation where Daniel Stewart would be paid significantly less. Therefore, I do not consider that the email supports the submission made by Mr Williams.

54. I have focused on the 10 December 2010 and the 17 May 2011 emails because they were prominently relied on by Mr Williams in support of his submissions both as to the construction of the Engagement Letter and in relation to the case which he advanced before me in support of his implied term case. I should nevertheless make it clear that I have had regard more broadly to the evidence which I heard when considering the submissions made by Mr Williams on these issues. I am satisfied that there is no other evidence which supports Mr Williams' submissions. Put differently, I have reached the clear view that the exercise of construction which I must perform in relation to the abort fee clause is one which it is appropriate for me to embark upon by looking not at emails such as those identified by Mr Williams but by considering the language used by the parties in the Engagement Letter against the broad backdrop of the position in which the parties found themselves when entering into the Engagement Letter.

55. In this context, I would observe that, in much the same way as I have found unhelpful Mr Williams' reliance on the 10 December 2010 and 17 May 2011 emails, I have not taken into account, still less have I been influenced by, various matters on which Mr Luckhurst has placed reliance. I have in mind, specifically, the fact that two of the witnesses called by Daniel Stewart at trial

(Mr Rigby and Mr Felix) explained that the purpose of the abort fee was to protect Daniel Stewart against circumstances in which Daniel Stewart has invested time and resources in progressing the transaction only for EWC to decide that it no longer wishes to continue with the listing. Whilst it seems to me that that is the obvious purpose of an abort fee clause, Mr Rigby's and Mr Felix's evidence on the issue is inadmissible and I ignore it. Similarly, although both parties highlighted the fact that Mr Griggs tried to have the abort fee clause deleted, only for Mr Rigby to insist on its inclusion, that seems to me to be an irrelevant consideration. The same applies to Mr Rigby stating in his 16 December 2010 email as follows: *"I cannot amend the abort fees (although I have reduced down the fee to £150k in the event you pull out for reasons unconnected to DS). If after three months of hard work you abort or get taken out, we need to be compensated fully"*. Likewise, Mr Rigby's views on the type of circumstances which would come within the ambit of the phrase *"cannot or should not proceed"*, as it appears in the abort fee clause, do not amount to admissible evidence, although what he had to say about needing to sell around 10-15% of shares in order to be admitted to AIM does seem to me to be admissible evidence. It would also have been potentially relevant to the issue which I have to decide if EWC's case had been that the listing could not proceed (which it was not) rather than that it *"should"* not proceed (which was EWC's case). The same observation applies to Mr Rigby's evidence that EWC would have to generate interest of at least £2-3 million for admission to be viable. That is evidence which Mr Rigby was entitled to give, given his experience as an investment banker. It is not, however, evidence which really assists me in resolving this dispute. Nor do I find of assistance Mr Rigby's further evidence that, in his view, the reference to *"should not"* in the abort fee clause related to the fact that *"as Nomad a lot of the work you do is to make a judgment call on suitability"* and the language used would cover *"a scenario when I felt it should not proceed"*. This is nothing more than Mr Rigby's opinion as to the construction of the clause. As such, it is inadmissible, and I pay no heed to what he has to say. I also take no account of Mr Griggs' views on the construction issue, specifically his opinion that the purpose of the first sentence of the abort fee clause, as he put it in his evidence, was to allow Daniel Stewart to be given *"a fair crack of the whip"*, by which he meant, as Mr Williams put it in his Closing Submissions, if, before Daniel Stewart had had the chance to bring the transaction to fruition, EWC wished to withdraw, then Daniel Stewart would be paid the abort fee, namely a fee for the work it had done. Mr Griggs' views are as irrelevant as those of Mr Rigby.

EWC's primary case based on the third sentence of the abort fee clause

56. I turn now to the parties' submissions on the third sentence of the abort fee clause. I have already referred to certain authority on the question of admissibility of evidence. I now need briefly to refer to some further authority and certain other legal principles associated with the task of contractual construction and the ascertainment of implied terms. Again, the relevant principles are well-known and were largely agreed between the parties.

57. First, it was accepted by both parties that, in construing a commercial contract, it is necessary to ascribe to the words a meaning that would make good commercial sense and not some meaning that no business man would be willing for the contract to have (***Miramar Maritime Corp v Holborn Oil Trading Ltd*** [1984] AC 676 at 682E-F, cited in *Chitty* at para. 12-057). If there are two possible constructions of a contract (each of which may be arguable), then the court is entitled to prefer the construction that is consistent with business common sense and to reject the other, and in adopting this approach there is no requirement that the court should conclude that a particular construction would have an absurd or irrational result before having regard to the commercial purpose of the agreement (***Rainy Sky SA v Kookmin Bank*** [2011] UKSC 50, [2011] 1 WLR 2900 at [21], [30] and [43]).

58. Secondly, in order for a term to be implied into a contract, the court needs to be satisfied that both parties, as reasonable men, would have agreed to the particular term had it been suggested to them. Furthermore, the court will be particularly reluctant to imply a term where the parties have entered into a carefully drafted written contract containing detailed terms agreed between them (*Chitty* at para. 13-008). A cautious approach is to be adopted and if the implied term is not strictly necessary, it is unlikely to be implied (***Socimer International Bank Ltd v Standard Bank London Ltd*** [2008] EWCA Civ 116, [2008] Bus LR 1304 at [105-106] and [108]). Specifically, in ***Phillips Electronique Grand Public SA v. British Sky Broadcasting Limited*** [1995] EMLR 472 (the case to which Rix LJ referred in the ***Socimer*** case at [105]) Sir Thomas Bingham MR (as he then was) said this at 480-482:

"The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is potentially so intrusive that the law imposes strict constraints on the exercise of this extraordinary power. There are of course contracts into which terms are routinely and unquestionably implied. ... It is much more difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue. Given the rules which restrict evidence of the parties' intention when negotiating a contract, it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision; if the parties appreciate that they are unlikely to agree on what is to happen in a certain not impossible eventuality, they may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur. The question of whether a term is to be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. For, as Scrutton LJ said in ***Reigate v Union Manufacturing Co (Ramsbottom) Limited*** *[1918] 1 KB 592 at 605, 'A term*

can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case', they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear'. Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties have not themselves expressed....".

59. In ***Attorney General of Belize v Belize Telecom*** [2009] UKPC 10, [2009] 1 WLR 1988, at [21], Lord Hoffmann framed the relevant question as being: *"is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"*. He went on to make it clear, at [27], that the traditional list of requirements set out in previous cases for the implication of a term:

"is best regarded not as a series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually meant, or in which they have explained why they did not think that it did so".

Further, as pointed out in *Chitty* at para. 13-005:

"Lord Hoffmann's statement has subsequently been endorsed by the Court of Appeal and applied or referred to in a number of cases at first instance. As a result, the principles that traditionally govern the implication (or non-implication) of terms and which are set out in the paragraphs which follow should now no longer be regarded as 'tests' to be applied to determine whether or not a term should be implied but rather as guidelines to assist the court to answer the single question: Is that what the instrument, read as whole against the relevant background, would reasonably be understood to mean? Nevertheless, the generality of this question entails, it is submitted, that the principles developed by the courts, which have stood for many years, must still be regarded as of importance in assisting the court to arrive at a conclusion. Indeed they may very often be more helpful in this respect than an unassisted direct resort to the meaning of the contract. In any event, it is clear that Lord Hoffmann did not intend in his broader approach to herald any fundamental change of attitude so as to enable terms to be more easily implied."

60. Besides these considerations, which are applicable to implied terms generally, Mr Luckhurst in addition submitted that, if any term is to be implied into a contract which limits a party's power to take a decision under the contract, this would ordinarily be a requirement that any such power is exercised in good faith and not arbitrarily or capriciously, and not anything more than that. It is in relation to this aspect that Mr Williams and Mr Luckhurst were in disagreement, since Mr Williams' contention (not accepted by Mr Luckhurst) was that a term is to be implied requiring that the parties should act reasonably in deciding whether or not to agree that the listing *"should not proceed"*. In support of his position, Mr Luckhurst again referred me to the ***Socimer*** case and in particular to Rix LJ's apparent acceptance of the approach adopted in ***Gan Insurance Co Ltd v. Tai Ping Insurance Co Ltd (No 2)*** [2001] EWCA

Civ 1047, [2001] 2 All ER (Comm) 299, in which the Court of Appeal were considering an argument that a claims co-operation clause in a facultative reinsurance policy which required the prior approval of the reinsurers for any settlement or compromise of an underlying loss should have implied into an obligation that reinsurers could not withhold such approval unless they had reasonable grounds for doing so. In that case Mance LJ (as he then was) said this:

"64. I gain some assistance by analogy from these cases. In all of them, it seems to me that what was proscribed was unreasonableness in the sense of conduct or a decision to which no reasonable person having the relevant discretion could have subscribed...

67...I would therefore accept as a general qualification, that any withholding of approval by reinsurers should take place in good faith after consideration of and on the basis of the facts giving rise to the particular claim and not with reference to considerations wholly extraneous to the subject-matter of the particular reinsurance...

73. If there is any further implication, it is along the lines that the reinsurer will not withhold approval arbitrarily, or (to use what I see as no more than expanded expression of the same concept) will not do so in circumstances so extreme that no reasonable company in its position could possibly withhold approval. This will not ordinarily add materially to the requirement that the reinsurer should form a genuine view as to the appropriateness of settlement without taking into account considerations extraneous to the subject matter of the reinsurance...".

61. Mr Luckhurst highlighted the fact that Rix LJ went on in the ***Socimer*** case to state as follows at [106]:

"The judge made no mention of such doctrine or of any cases which discuss it. Implications of good faith and rationality, and of lack of arbitrariness or perversity, are standard, for they represent the very essence of business (and other) relationships. Once one goes beyond them, however, the matter becomes much more uncertain."

Rix LJ then at [108] rejected the implied term contended for as being *"not necessary or sufficiently certain"*.

62. Mr Luckhurst also submitted that the court will not uphold an express or implied contractual term where key elements, such as the amount to be raised or the proportion to be sold, are undefined. He relied in this context on three cases. First, he pointed out that in ***Lee Parker v Izzet (No.2)*** [1972] 1 WLR 775, Goulding J held at 779F-H that the term *"subject to the purchaser obtaining a satisfactory mortgage"* was void for uncertainty because *"the concept of a satisfactory mortgage is too indefinite for the court to give it a practical meaning. Everything is at large, not only matters like rate of interest and ancillary obligations on which evidence might establish what would be usual or reasonable, but also those two most essential points – the amount of*

the loan and the terms of repayment". Secondly, Mr Luckhurst cited ***Stabilad v Stephens & Cater Ltd*** (25 May 1999), in which Peter Gibson LJ explained at page 7 of the report before me, that *"to require the completion to be satisfactory raises as many questions as it answers, which is no doubt why it has so often been held to be a term void for uncertainty in phrases such as 'subject to... a satisfactory mortgage' (see **Lee-Parker v Izzet (No 2)** [1972] 1 WLR 775), 'subject to a satisfactory survey' (**Astra Trust Limited v Adams and Williams** [1969] 1 Lloyd's Rep 81); and 'subject to satisfactory references' (**Wishart v National Association of Citizens Advice Bureaux** [1990] ICR 794). What is important for the party other than the person to be subjectively satisfied is whether or not that person decides to go ahead with the transaction. This he may choose to do as a matter of commercial decision even if he is not wholly satisfied."* Thirdly, Mr Luckhurst referred to ***Schweppe v Harper*** [2008] EWCA Civ 442, in which Dyson LJ (as he then was) refused to imply the term contended for, holding at [72] that *"The concept of reasonable finance is too uncertain to be given any practical meaning... It is impossible for the court to determine the amount of loan and the terms of repayment that would be reasonable for Mr Harper to accept"*.

63. Mr Luckhurst submitted that the ***Schweppe*** case is particularly instructive because the implied term which was rejected by the majority in that case (Dyson LJ and Sir Robin Auld, with Waller LJ dissenting) was *"that Mr Schweppe would provide reasonable finance or finance on terms to which Mr Harper could not reasonably object"* (see [71]). Mr Luckhurst suggested, correctly in my view, that the implied term for which Mr Williams contended in the present case is similar. He submitted that, in the circumstances, I should reach the same conclusion in relation to the implied term urged upon me by Mr Williams as Dyson LJ did in the ***Schweppe*** case. Mr Luckhurst also reminded me, in this context, that an 'agreement to agree' is ordinarily invalid (see *Chitty* at para. 2-137).

64. For his part, in support of his submission that there was no lack of certainty precisely because of the implied term for which he contended, Mr Williams sought to draw a distinction between an 'agreement to agree' case, in which the parties' stipulation that there should be a further agreement shows that they did not yet intend to create legal relations, and a case (such as the present, he submitted), in which the Engagement Letter was clearly an enforceable contract and indeed has been substantially performed. As he put it in his Closing Submissions: *"it is manifest that the parties here intended there to be a binding agreement, within which the terms of the abort fee clause would be effective to achieve their commercial ends"*. On that basis, Mr Williams submitted, this is not a case in which there would be any lack of certainty were it to be concluded that there was the implied term for which he was contending. In that context, he relied on the proposition that a court should be all the more reluctant to find contracts ineffective for want of certainty where the contract has been substantially performed (see *Chitty*, para. 2-142), and there is plainly an intention to create legal relations, and in such circumstances the court will strive to find meaning and give effect to the contract, for example through the implication of terms, or the importation of criteria such as reasonableness (see *Chitty* at paras. 2-129 and 2-130).

65. As to authority, Mr Williams placed heavy reliance on the principles set out by Rix LJ in ***Mamidoil-Jetoil Greek Petroleum v Okta Crude Oil Refinery*** [2001] EWCA Civ 406, [2001] 2 Lloyd's Rep 76 at [69]:

"In my judgment the following principles... can be deduced... but this is intended to be in no way an exhaustive list:

(i) Each case must be decided on its own facts and on the construction of its own agreement. Subject to that:

(ii) Where no contract exists, the use of an expression such as 'to be agreed' in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the principle that 'you cannot agree to agree'.

(iii) Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty.

(iv) However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the Courts are willing to imply terms, where that is possible, to enable the contract to be carried out.

(v) Where a contract has once come into existence, even the expression 'to be agreed' in relation to future executory obligations is not necessarily fatal to its continued existence.

(vi) Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the Courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. Certum est quod certum reddi potest.

(vii) This is particularly the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long term relationship, or has had to make an investment premised on that agreement.

(viii) For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the Courts are prepared to imply an obligation in terms of what is reasonable.

(ix) Such implications are reflected but not exhausted by the statutory provision for the implication of a reasonable price now to be found in s 8(2) of the Sale of Goods Act 1979 (and, in the case of services, in s 15(1) of the Supply of Goods and Services Act 1982).

(x) The presence of an arbitration clause may assist the Courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the

assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute."

66. Mr Williams also referred me to the following passage in the judgment of Chadwick LJ in ***BJ Aviation Ltd v Pool Aviation Ltd*** [2002] EWCA Civ 163, [2002] 2 P&CR 25 at [23]-[24]:

"[23]... where the court is satisfied that the parties intended that their bargain should be enforceable, it will strive to give effect to that intention by construing the words which they have used in a way which does not leave the matter to be agreed in the future incapable of being determined in the absence of future agreement. In order to achieve that result the court may feel able to imply a term in the original bargain that the price or rent, or other matter to be agreed, shall be a "fair" price, or a "market" price, or a "reasonable" price; or by quantifying whatever matter it is that has to be agreed by some equivalent epithet. In a contract for sale of goods such a term may be implied by section 8 of the Sale of Goods Act 1979. But the court cannot imply a term which is inconsistent with what the parties have actually agreed. So if, on the true construction of the words which they have used, the court is driven to the conclusion that they must be taken to have intended that the matter should be left to their future agreement on the basis that either is to remain free to agree or disagree about that matter as his own perceived interest dictates there is no place for an implied term that, in the absence of agreement, the matter shall be determined by some objective criteria of fairness or reasonableness.

[24] ... if the court concludes that the true intention of the parties was that the matter to be agreed in the future is capable of being determined, in the absence of future agreement, by some objective criteria of fairness or reasonableness, then the bargain does not fail because the parties have provided no machinery for such determination, or because the machinery which they have provided breaks down. In those circumstances the court will provide its own machinery for determining what needs to be determined—where appropriate by ordering an inquiry...".

67. I prefer Mr Luckhurst's submissions on these matters. The difficulty with the submissions which Mr Williams advanced is that, as I see it, any uncertainty is actually caused by the implied term which he urged upon me, and not from the language used and the implied term (referred to below) that the parties should act in good faith and not capriciously. Put shortly, if a term were to be implied to the effect that the parties should act reasonably in agreeing that the listing cannot or should not proceed (or, as it is put in paragraph 5A of EWC's Amended Defence, to the effect that Daniel Stewart should *"not unreasonably withhold agreement to the transaction not proceeding"*), there would be precisely the uncertainty which Rix LJ in the ***Socimer*** case at [106] considered unacceptable. This is not a case in which it is possible to identify *"some objective criteria of fairness or reasonableness"* (per Chadwick LJ in the ***BJ Aviation*** case); it is not a case in which expert evidence could assist, as plainly it could in relation, say, to the ascertainment of a reasonable price in the sale of goods context. The expert, like the Court, would have nothing objective against which to gauge what would be reasonable and what would not be

reasonable. Furthermore, since it is the implied term contended for by EWC which would itself create uncertainty which, in my judgment, is otherwise not present, it seems to me quite inappropriate to countenance making the suggested implication.

68. The fact is that the relevant part of Clause 3 is perfectly enforceable and workable if (again as Rix LJ put it in the ***Socimer*** case) it is understood as being subject to *"Implications of good faith and rationality, and of lack of arbitrariness or perversity"*. Beyond that, *"the matter becomes much more uncertain"*, and no additional implication should therefore be made. Had the parties intended that there should be an obligation to act reasonably, I would have expected that to have been spelt out expressly. However, had this been done, in my view, there would then have been very real difficulties as to what the parties had actually agreed would dictate what was or was not reasonable when considering whether to agree that the listing *"should"* not take place. I acknowledge that the position may not be so problematic in relation to whether the listing could take place, but the focus of Mr Williams' submissions in this context was (rightly) on the former rather than the latter, since it was accepted that the listing could have taken place. In such circumstances, I cannot see that the implication of the term contended for is necessary nor that the parties are obviously to be taken as having agreed it even though not expressly. Indeed, although I do not base my conclusion on this, I am bound to note that, in its original Defence, EWC did not suggest that such a term fell to be implied and it was only fairly shortly before trial that such a case was put forward.

69. Mr Williams nonetheless argued that to construe this part of the provision as only being subject to a duty to act in good faith and not capriciously is, as he put it, *"not consistent with any commercial construction of the provision"*. He pointed out that the ability to reach an agreement that the listing *"should"* proceed was *"to provide solace"* to EWC and, on that basis, it *"would be totally inconsistent with this intention for the claimant to have an unfettered right to veto a decision not to proceed, on penalty of the abort fee"*. He suggested that that would provide EWC with no solace at all. I do not agree. Daniel Stewart did not have an unfettered right but was required to act in good faith and not capriciously. That, in my view, gave EWC the protection which this part of the provision was intended to afford EWC and as such it made perfectly good business common sense without any need for the further implied term for which Mr Williams contended. I do not accept, in particular, that Mr Williams was right when he went on to submit that because agreement that the listing should not proceed would entail Daniel Stewart foregoing its £150,000 abort fee, there would only ever be few circumstances in which Daniel Stewart would be required to agree by virtue of its obligation to act in good faith and not capriciously. I do not consider that this submission can be right: the obligation to act in good faith and not capriciously must, as I see it, leave out of account, on Daniel Stewart's part, the knowledge that, if it agrees, then it will not receive its abort fee. I do not, therefore, think Mr Williams was right when he submitted that, while acting in good faith, Daniel Stewart would always be entitled to have regard to what he described as the *"hugely detrimental commercial consequence to itself of agreeing to abortion"*. I

consider that the opposite is actually likely to be the case. If I am right about this, it follows that Mr Williams' follow-on submission, that the protection afforded to EWC by the provision is nugatory, loses the force it might otherwise have had. I simply do not agree that, as submitted by Mr Williams, the provision is ineffective without the implication of the additional term for which he contended. It seems to me, as I have previously explained, that there is no difficulty with the effectiveness of the provision, and that any such difficulty would only arise if Mr Williams' suggested implied term were somehow to be introduced.

70. It follows from my rejection of this aspect of EWC's case that its primary case before me must fail, since there is no suggestion by EWC that Daniel Stewart acted in bad faith or capriciously in declining to agree that the listing *"should not proceed"*. In the circumstances, I do not need to address the question of whether Daniel Stewart acted reasonably in not agreeing with EWC that the listing *"should not proceed"*. As Daniel Stewart was not under an obligation to act reasonably, whether Daniel Stewart acted reasonably in not agreeing with EWC that the listing *"should not proceed"* is irrelevant. In these circumstances, whether or not Mr Edwards' personal position was, as Mr Williams submitted, *"dire"* is nothing to the point. Nor is it necessary to consider what either Mr Edwards' own personal or EWC's *"commercial objectives"* may or may not have been (a matter to which I return briefly later in the context of EWC's alternative case based on the first sentence of the abort fee clause). Nor am I swayed by Mr Williams' reliance on the view which Mr Nolan (Daniel Stewart's lead analyst) was expressing internally within Daniel Stewart that Daniel Stewart should itself terminate the listing. Indeed, even if the reasonableness of Daniel Stewart's conduct had been material, I would not have concluded that Mr Nolan's internal views established that Daniel Stewart acted unreasonably in taking the position that the listing should proceed. First, Mr Nolan was only one member of the Daniel Stewart team working on the EWC listing and, unlike Mr Rigby, who was the team leader with responsibility for deciding how to proceed, Mr Nolan had no such responsibility. Mr Nolan was clear also that Mr Rigby's view that the listing should proceed was a reasonable stance for him to have taken, and Mr Luckhurst rightly reminded me that Mr Griggs' own evidence, when addressing the question of the discussions which took place concerning a possible delay in listing, that it was Mr Rigby's views which mattered more than any views held by Mr Nolan in view of Mr Rigby's position as team leader. As Mr Griggs fairly put it, *"Oliver Rigby was the guy that should be making that sort of call"*. It is right, as Mr Luckhurst submitted, that as far as Mr Griggs was concerned he accepted that the reasons which Mr Rigby gave in his 17 May 2011 email, in which he advised that the listing should go ahead, were *"genuine"*, *"sensible"* and *"valid"*. In any event, Mr Nolan's view was one which he expressed because of concerns about reputational risk for Daniel Stewart and for himself, rather than because he considered either that the listing could not or should not proceed.

71. EWC's primary case fails for other reasons, too. In the circumstances, I need only set out those reasons quite briefly. First, in order for EWC's case in respect of the failure to agree that the listing *"should not proceed"* to succeed,

it is necessary that *"the marketing and book build process"* should have been completed. I am not satisfied that this was the case, notwithstanding Mr Williams' submissions to the contrary. He submitted that because Daniel Stewart had ascertained that the transaction could neither raise the £8 million sought by EWC at any reasonable price, nor obtain offers for shares which equated to a value of £26.8 million, I should take it that the marketing and book building process had come to an end. That, he contended, is why Mr Rigby sent his email on 19 May 2011, in which he essentially tendered advice to EWC's board of directors as to how to proceed and sought instructions accordingly. Mr Williams additionally highlighted the fact that as recently as 10 May 2011, in an email circulated by Daniel Stewart, it had been envisaged that the book building process would be completed by the time that Mr Rigby sent his 19 May 2011 email and, importantly, before EWC aborted through Mr Griggs' email on 22 May 2011, an email in which Mr Griggs clearly stated (without Daniel Stewart ever contradicting him) that, as he understood it, *"you have now completed your marketing and bookbuilding exercise"*.

72. I am not persuaded by Mr Williams' submissions on this issue. It seems to me, in particular, that he has placed far too much store by the contents of Mr Rigby's email on 19 May 2011. As I have explained, this was an email which was sent to EWC's board of directors (Mr Edwards, Mr Griggs and Mr Shaw). In it Mr Rigby reported on the most recent feedback from investors, explaining that Daniel Stewart had spoken to the *"majority"* of the investors who had been seen on the road show and that there was *"no appetite"* at a £26.8 million valuation. Importantly, however, Mr Rigby stated that there was *"still a deal to be done"* and recommended that EWC should proceed, likely raising £5 million to £6 million at a total valuation of around £20 million. Nowhere did Mr Rigby state in this email that the marketing and book building process had been completed, and when asked in cross-examination Mr Rigby insisted that it had not been completed. I consider that that must obviously have been the position and that Mr Rigby was right to point out when giving his evidence that, if the marketing and book building process had been completed, then he would not have referred in his email to the *"majority"* of investors but would instead have said that all of the investors who had been seen on the road show had been spoken to. Similarly, it seems to me that (again as Mr Rigby explained in his evidence) the reference to £5 million to £6 million, as opposed to a single (and firmer) number, is consistent with the process not yet having been completed, since if it had been completed there ought to have been more precision in what Mr Rigby was reporting to EWC's board.

73. Furthermore, whatever EWC may have understood Mr Rigby to have been saying about the completion of the marketing and book building process, even if Mr Griggs and Mr Edwards thought that Mr Rigby was saying that it had been completed, the fact is that, at the time that Mr Griggs sent his email on (Sunday) 22 May 2011 aborting the listing, Daniel Stewart's witnesses were adamant in their evidence before me that the marketing and book building process had not been completed. I accept their evidence. Specifically, Mr Lampshire said that Daniel Stewart *"had 10 institutions with an interest registered and 8-10 undecided or who had not yet had a meeting"*. He also

explained that *"people [were] sitting on the fence and momentum allows you to bring others in, including our own private investors"*. The implication was that, as at 22 May 2011, it was intended that other investors would, or might, still be found and, therefore, that the marketing and book building process was not by then complete. He also stated that, had less than £8 million been raised, there would have been a *"discussion"* with investors about how to accommodate Mr Edwards' vendor placing. He thought that *"institutions would be comfortable provided a balance was struck"*, again indicating that the marketing and book building process cannot have been completed. Mr Lampshire pointed out, in addition, that Daniel Stewart's Corporate Broking Department call list demonstrates that there were still further calls to investors to be made at the point when the Broking Department was told to stop its work. Further, when it was put to Mr Rigby that Mr Edwards was potentially going to raise £2 million only in his vendor placing, Mr Rigby explained that this was only *"at the time it was aborted but I do not know as it was not completed"* referring to completion of the marketing and book building process. Mr Rigby was equally insistent that the marketing and book building process had not been completed, something which he stated, in particular, when explaining that he did not know, as at 22 May 2011, whether *"we were going to get to"* £8 million and £4 million (by way of vendor placing) *"because we had not completed the bookbuild"*. Both he and Mr Felix also explained that the book building is completed only once Daniel Stewart has assembled a final *"placing list"* and presented this to its client, not something which happened in the present case.

74. In these circumstances, it seems to me inevitable that, even if EWC might have formed the impression that the marketing and book building process had been completed by the time that Mr Griggs sent his 22 May 2011 email, nonetheless that process had not actually been completed. Since that is my conclusion, it follows that I need not make a finding as to what EWC's understanding was on this matter. However, as I heard evidence from Mr Griggs and Mr Edwards and in case I am wrong that what matters is not what EWC believed was the position but what was actually the position, it is appropriate that I address the issue very briefly. In my judgment, Mr Griggs and Mr Edwards cannot have been in any real doubt that the marketing and book building process had not yet been completed by the time that Mr Griggs sent his 22 May 2011 email. For the reasons set out above, it seems to me that it should have been, and more importantly on this point would have been, obvious to experienced businessmen, which is what Mr Griggs and Mr Edwards are and were at the relevant time, and all the more obvious to Mr Griggs given his previous involvement in an AIM listing and given also that he was closely involved in the efforts to have EWC listed, that the reason why Mr Rigby was speaking in the imprecise terms which he was in his 19 May 2011 email was because marketing and book building had still to be completed.

75. The third reason why, in my judgment, EWC's case based on the third sentence of the abort clause cannot succeed is that, even if I am wrong in relation to the above conclusions, nonetheless Daniel Stewart was never, in fact, asked by EWC to agree that the listing *"should not proceed"*. The fact

that EWC never even asked Daniel Stewart to enter into the agreement which EWC now complains that it was unreasonable of Daniel Stewart not to enter into seems to me to be fatal to EWC's present case. It is wholly unclear to me how Daniel Stewart could have been expected to know that EWC wanted to enter into an agreement that the listing *"should not proceed"* without EWC itself raising the matter with Daniel Stewart. It is elementary that if a party is later to complain, in effect, that its counterpart has failed to reach agreement with it about something, that party needs, at a minimum, to have asked the counterpart to agree that something. Indeed, it is telling that not only did EWC not ask Daniel Stewart at the time to agree that the listing *"should not proceed"*, but it also does not appear that internally within EWC anybody considered that Daniel Stewart was withholding such agreement. Nowhere in the exchanges between Mr Griggs and Mr Edwards is there any mention of Daniel Stewart needing to come to agreement with EWC to that effect. Nowhere is there any complaint that Daniel Stewart was refusing to agree. Nowhere is there any reference at all to the third sentence of the abort fee clause. Moreover, it seems to me that Mr Luckhurst was right to observe in closing that Mr Griggs, who had by the time of the trial left EWC, appeared to be oblivious to the fact that EWC was arguing before me that Daniel Stewart was at fault for not agreeing that the listing *"should not proceed"*. Indeed, as I have previously pointed out, as far as Mr Griggs was concerned he accepted that the reasons which Mr Rigby gave in his 17 May 2011 email were *"genuine"*, *"sensible"* and *"valid"*. He also specifically agreed that he did not view Mr Rigby's advice to proceed as constituting a breach of the Engagement Letter. Given this, it is impossible to see how Mr Griggs could have thought, when he sent his 22 May 2011 email, that Daniel Stewart had (as EWC would have it) unreasonably refused to agree that the listing *"should not proceed"*. It is quite clear to me that Mr Griggs did not think this at the time. On the contrary, I consider that he recognised that, in making the decision to abort, EWC was making a decision with which Daniel Stewart did not agree for reasons which were reasonable, even though they were reasons with which, it seems, EWC did not itself agree. I am wholly satisfied that Mr Griggs did not consider that Daniel Stewart was acting unreasonably. The same applies for Mr Edwards. I am equally clear that neither Mr Griggs nor Mr Edwards, nor anybody else at EWC, had in mind the case which EWC now advances before me as its primary case. I regard it as significant, in this context, that this was not a case which was put forward in EWC's original Defence, a document which was supported by a statement of truth signed by Mr Griggs. It was only after Mr Griggs had left EWC, in the lead-up to trial (in fact, after the start of the trial had had to be adjourned) that the case was formally advanced by way of a late amendment to the Defence, albeit that it was foreshadowed in the Opening Skeleton Argument which Mr Williams served ahead of the original trial date. It is perfectly obvious that it was a lawyer's afterthought and not something which occurred to Mr Griggs or anybody else at EWC when the decision to abort was communicated to Daniel Stewart in Mr Griggs' 22 May 2011 email. This is a further demonstration, as I see it, that EWC's primary case is really quite hopeless.

76. For all these reasons, I reject this aspect of EWC's case. In the circumstances, I need not take up time addressing the submissions which were advanced as to

the reasonableness or otherwise of EWC's conduct in deciding to abort the listing, a matter which Mr Williams addressed at some length in his Closing Submissions. I have concluded that there was no obligation on Daniel Stewart to act reasonably in deciding whether to agree that the listing *"should not proceed"*. The same must apply to EWC. In each case the obligation was to act in good faith and not capriciously but no more than that. It follows that whether, as Mr Williams submitted, EWC made a reasonable decision when deciding to abort is neither here nor there.

EWC's case based on the first sentence of the abort fee clause

77. As I have previously explained, EWC's alternative case entails reliance on the first sentence of the abort fee clause and the contention that EWC's decision to abort the listing was for reasons connected (or not for *"reasons unconnected"*) *"to Daniel Stewart or its performance"*. In the circumstances, submitted Mr Williams, EWC was entitled to abort without incurring liability to pay the abort fee. Although until the amendment to which I have referred was made, this was EWC's main case at trial, the case assumed a far less significant role, certainly in Mr Williams' Closing Submissions, so much so that it merited just one paragraph in a section which consisted of 69 paragraphs in all.

78. Mr Williams' position, as explained in his Closing Submissions, was that, in agreeing the abort fee clause, the parties were, as he put it, *"legislating for the position at two distinct junctures"*. He explained that the first of these concerned the period before the completion of the marketing and book building process, whereas the second concerned the period after completion of the marketing and book building process. He added that, again as he put it, *"Different criteria for the abort fee were applicable depending upon the stage which had been reached"*. On Mr Williams' approach, therefore, the first sentence has no application after completion of the marketing and book building process. That is the reason why the alternative case advanced by EWC, again on Mr Williams' approach, is only relevant if (contrary to EWC's case) the marketing and book building process has not been completed by the time that Mr Griggs wrote to Daniel Stewart on 22 May 2011 aborting the listing

79. In my judgment, Mr Williams' approach to the first sentence of the provision is too restrictive. It seems to me that this sentence applies to the period both before and after completion of the marketing and book building process. Indeed, I sensed that in his oral closing submissions Mr Williams himself recognised that, as a matter of the language used in the first sentence, this is the case. Specifically, I read the words *"prior to completion of the marketing and the book build process"* as applying not to the time when EWC was able to abort (Mr Williams' approach) but as applying to the immediately preceding word *"performance"*, so that EWC is able to abort (without incurring liability to pay the abort fee) at any time *"for reasons"* connected *"to Daniel Stewart or its performance prior to completion of the marketing and the book build process"*. I cannot see why the parties would have agreed that, whereas EWC would be able to abort prior to completion of the marketing and book building process *"for reasons"* connected *"to Daniel Stewart or its performance prior to completion of the marketing and the book*

build process", EWC should not be able to do so after completion of that process (but before EWC entered into the Sale and Placing Agreement which would have been entered into upon listing and which would have taken over from the Engagement Letter in dealing with EWC's liability to pay Daniel Stewart) and would instead have to secure Daniel Stewart's agreement in accordance with the third sentence. As I see it, there would be little sense in such an agreement. It seems to me that the third sentence was intended to cover a different situation: one where EWC cannot abort without incurring liability to pay the abort fee under the first sentence because Daniel Stewart has done nothing wrong in the sense that the abortion of the listing is, indeed, *"for reasons unconnected to Daniel Stewart or its performance"*, but notwithstanding this the parties agree, after completion of marketing and book building, that the listing *"cannot or should not proceed"*.

80. There is nothing in the first sentence which limits the timing of the decision to abort in the manner suggested by Mr Williams. As Mr Luckhurst pointed out, the sentence does not, in particular, have the words *"prior to completion of the marketing and the book build process"* after *"aborts the transaction"* and before *"for reasons unconnected to Daniel Stewart or its performance"*. Had that been where the words appeared, the position would then clearly have been as Mr Williams submitted. Although I appreciate that the words appearing where they do is not inconsistent with what Mr Williams submitted, nonetheless I consider that the more natural reading of the abort fee clause as a whole is one which does not restrict the time when EWC can abort without liability under the first sentence. My conclusion in this regard is strengthened by the fact that the third sentence begins with the words *"Without prejudice to the generality of the foregoing"*. This is a strong indication that the third sentence is intended to apply to a time period to which the first sentence also applies (i.e. after completion of the marketing and book building process). If that were not the case, there would be no reason to refer *"to the generality of the foregoing"* since *"the foregoing"* would be irrelevant, as would its *"generality"*. It must be, therefore, that the period referred to in the third sentence, the period after completion of the marketing and book build process, is included also in the ambit of the first sentence.

81. It follows that Mr Williams cannot be right in his submission that the first sentence applies only to abortion in the period before completion of the marketing and book building process, but must include that period as well as the prior period. In view of this conclusion, it is necessary (contrary to the primary position adopted by EWC before me) to go on to consider the alternative submission made by Mr Williams that EWC was entitled to abort the listing without liability to pay the abort fee because its reasons for doing so arose out of the performance of Daniel Stewart, in particular (as Mr Williams submitted) its failure to raise the money for which it had been tasked to raise. I reject the case which EWC advances in this respect for the reason which follows.

82. Mr Williams submitted that the reference to *"performance"* (as it appears in the first sentence of the abort fee clause) should be taken as applying to something broader than breach of contract, even to cover the performance of

activities other than the *"Services"* defined in the Engagement Letter. Mr Williams' essential submission was that the fact that the abort fee clause refers to *"performance"*, and not *"material breach of the terms of this Engagement Letter"* as referred to in Clause 8 (*"Termination"*), demonstrates that the parties intended that the first sentence of the abort fee clause should apply more generally to Daniel Stewart's conduct. He submitted that the different usages of language must have been deliberate and that it cannot have been intended that the one should be equated with the other. He pointed out that, had that been the intention, the draftsman could easily have used the same language as that used in Clause 8. He submitted, in particular, that since the Engagement Letter was, as he put it, *"founded on the shared intention that the claimant's right to payment would be conditional on the flotation of the defendant succeeding"*, it must have been intended that EWC would be entitled to abort the listing *"when it became clear that the claimant was not getting, and could not get, the required funds in"*.

83. I am not persuaded by Mr Williams' submissions on this point. In my judgment, it does not follow that simply because Clause 8 refers to *"material breach"* and the abort fee clause refers to *"performance"*, the latter should be treated as though it embraces conduct which does not amount to a breach of contract, i.e. a failure to perform, or to perform properly, the *"Services"*. Clause 8 is concerned with a breach of contract which is *"material"* and which would entitle a party to terminate the Engagement Letter altogether. Clearly this would also fall within the ambit of *"performance"* but it does not follow from this that *"performance"* extends beyond a breach of contract which is not material. It seems to me that there is a middle ground, short of material breach, namely a simple (non-material) breach of contract and that this would be covered by the first sentence of the abort fee clause (along with any *"material"* breach) but not covered by Clause 8. That would explain the different language used, although I acknowledge that the position would have been somewhat clearer had the reference not been to *"performance"* but to *"breach of contract"*, so covering material and non-material breaches of contract. However, I agree with Mr Luckhurst that it is necessary to identify what it is that Daniel Stewart agreed to do under the terms of the Engagement Letter. This is because, as I see it, the reference to *"performance"* in the first sentence of the abort fee clause must surely be referring to what Daniel Stewart had agreed with EWC it would do. I regard this as obvious since it seems to me that a performance requires something to be done which it has been agreed would be done. That something must be the *"Services"* defined in the Engagement Letter, the provision of which EWC agreed to pay Daniel Stewart for under Clause 3. In the circumstances, I reject the submission made by Mr Williams that the abort fee clause applies more generally, essentially to any activities carried out by Daniel Stewart, not limited to *"Services"*.

84. This conclusion means that EWC's alternative case cannot succeed. This is because EWC accepts, as it must, that Daniel Stewart was not in breach (material or otherwise) of the Engagement Letter. It is not disputed, in particular, that Daniel Stewart used reasonable endeavours to procure placees pursuant to the Placing. In fairness, EWC has never suggested that Daniel Stewart failed to use such reasonable endeavours, and even in his email on 22

May 2011 aborting the listing Mr Griggs thanked Mr Rigby and his colleagues *"for your efforts on this project"*. Indeed, Mr Griggs agreed, when asked in cross-examination, that the Daniel Stewart broking team had worked hard and achieved some results. Furthermore, as I have previously explained, EWC did not ultimately press its case that Daniel Stewart in some way promised EWC a minimum valuation or minimum fundraise, and so there is no basis for a contention that any such promise somehow reflected the performance which Daniel Stewart was required to give in relation to the Engagement Letter. EWC nonetheless maintained its case, as introduced by amendment at the start of trial, that Daniel Stewart failed to bring about a situation in which the listing would meet EWC's *"other commercial objectives"* and, therefore, its *"performance"* brought about the decision to abort. By *"other commercial objectives"*, EWC apparently meant its requirement to raise *"sufficient funds"* (Amended Defence, para. 6(d)(ii)), which was closely allied with a requirement that Mr Edwards would be in a position where he could dispose of *"substantial" or "significant"* proportion of his shares (Amended Defence, paras. 2, 6(d)(ii) and 9(f)(vi)). I reject this case, which seems to be in the category of hopeless. It seems to me that to speak in terms of *"other commercial objectives"* and *"sufficient funds"* entails a vagueness and imprecision to which it is next to impossible to accord legal significance. I would add that to the extent that, in support of the case he was advancing, Mr Williams was seeking to rely upon the suggestion that Daniel Stewart had been informed about Mr Edwards' need for money for his North Wales castle project prior to entry into the Engagement Letter, I do not accept that it was open to him to do this since, as I have previously explained, I do not accept that this was something about which Daniel Stewart knew at that stage. In such circumstances, even allowing for the fact that Daniel Stewart did know, when entering into the Engagement Letter, that Mr Edwards wanted to raise money for himself, I consider that I am not really afforded any further assistance in attributing any particular, still less clear, meaning to the phrases *"other commercial objectives"* and *"sufficient funds"*. More generally, I reject the proposition that it is somehow appropriate, when measuring Daniel Stewart's *"performance"*, to attribute to Daniel Stewart knowledge of Mr Edwards' personal business dealings which at the time that the Engagement Letter was entered into Daniel Stewart did not have.

Conclusion

85. In short, for these various reasons, I reject EWC's alternative case based on the first sentence of the abort fee clause. It follows, given my earlier rejection of EWC's primary case based on the third sentence of the abort fee clause, that EWC has no legitimate defence to Daniel Stewart's claim for payment of the £150,000 abort fee, and I now turn to the various subsidiary issues which exist between the parties.

Legal expenses

86. The first of these subsidiary issues concerns Daniel Stewart's claim for payment of its lawyers' fees, namely those of FFW, Daniel Stewart's solicitors. The fees concerned amount to £36,699.30 and, as appears from the invoice which FFW issued to EWC on 11 July 2011, they comprise £30,000 in

respect of *"Provision of Legal services"* (£36,000 including VAT) and £582.75 in respect of *"Printing"* (£699.30 including VAT).

87. I should explain that the £30,000 figure was the result of Daniel Stewart having agreed a cap with FFW after Mr Griggs had asked Mr Rigby of Daniel Stewart to agree such a cap. There is no issue that that cap was exclusive of VAT and that that was the intention of both Mr Griggs and Mr Rigby when they discussed Daniel Stewart agreeing the cap with FFW. Accordingly, it is not disputed that Daniel Stewart is under an obligation to pay EWC £36,000. There is, however, a dispute as to whether EWC is entitled to recover the £699.30 in respect of printing costs, and also as to whether EWC is entitled to be paid VAT on what it was charged by FFW over and above the VAT which FFW itself charged EWC (I shall call this 'the additional VAT issue'). That latter dispute applies as much to the £36,000, which EWC does not dispute it came under an obligation to pay and which I understand EWC has already paid (inclusive of £6,000 by way of VAT), as it does to the £699.30 of printing costs.

88. It is convenient to start consideration of this issue with what was agreed in the Engagement Letter, Clause 3 (third bullet point) of which stipulated that EWC was responsible for paying *"the fees of Daniel Stewart's lawyers"*. The question, in these circumstances, even before coming on to consider the matter of the cap which was subsequently agreed, is whether the reference to *"the fees of Daniel Stewart's lawyers"* takes in not only the fees charged for the professional services rendered by FFW but also the costs which FFW incurred in the printing of documents.

89. Although I did not understand Mr Williams to have been arguing the contrary, it seems to me clear that (subject to the question of what was agreed as between Daniel Stewart and EWC in relation to the cap) the obligation to pay *"the fees of Daniel Stewart's lawyers"* was one which applied to all fees charged to Daniel Stewart by FFW in relation to the listing. I see no justification for reading the language used in the Engagement Letter as being limited to any particular category of FFW's fees. Indeed, I venture to suggest that it would be surprising had Daniel Stewart been willing only to be reimbursed some of the fees charged by FFW and not others. I cannot see why Daniel Stewart would have done that and I am confident that EWC would not have understood Daniel Stewart to have been doing so. I should say that, since this is an issue of construction, I am equally confident that the objective construction of the provision concerning FFW's fees is as I have described it above.

90. This conclusion leads on to consideration of what was agreed between Mr Rigby and Mr Griggs concerning the cap of £30,000. The evidence on this is not altogether satisfactory since it really consists of little more than EWC requesting that Daniel Stewart seek to agree with FFW a fee cap of £30,000, and Daniel Stewart successfully doing that. It is clear that there was no discussion about disbursements such as printing costs, still less agreement that such things should either be included in the cap or excluded from it. What appears to have happened, quite simply, is that Mr Rigby and Mr Griggs agreed that there should be a cap, nothing more and nothing less than that.

91. In these circumstances, I am faced with a choice. I could take the view that, in the light of my conclusion that the obligation to pay *"the fees of Daniel Stewart's lawyers"* contained in the Engagement Letter covered both professional fees and disbursements, the failure to deal expressly with disbursements when agreeing that there should be a cap means that the obligation to pay the printing costs which are claimed remains intact. Alternatively, I could conclude that the fact that no mention of disbursements (as opposed to professional fees) appears to have been made when Mr Rigby and Mr Griggs were agreeing the cap is explained by the parties proceeding on the basis that they were agreeing a cap in relation to whatever was covered by the obligation to pay *"the fees of Daniel Stewart's lawyers"* contained in the Engagement Letter.

92. Either of these conclusions would be legitimate. On balance, however, it seems to me that the second is the more likely to reflect what Mr Rigby and Mr Griggs were agreeing in their discussions concerning the cap. I consider that there is considerable force in Mr Williams' submission in this context that, whilst the distinction between fees and disbursements may well be important to solicitors, it is not as important to clients (at least until such time as their solicitors point it out to them) and it was, therefore, entirely understandable that neither Mr Rigby nor Mr Griggs should have addressed the matter specifically as between themselves (and Daniel Stewart and EWC). I consider it more likely than not that both Mr Rigby and Mr Griggs had as their focus an overall cap on what would have to be paid, and objectively speaking it seems to me that that is how the agreement concerning the cap should be viewed. I conclude that Mr Williams was right when he submitted that what EWC wanted, and what Daniel Stewart was willing to give it, was certainty as to the overall sum payable. The sum which Mr Griggs specified, and Mr Rigby agreed, was £30,000.

93. The position might have been different had it been appreciated that FFW would likely incur substantial disbursements on top of the fees for the legal services which they were to render, but there is no evidence to indicate that the level of disbursements were expected to be substantial and so I do not consider that this is a relevant consideration in this case.

94. My conclusion, in short, is that the cap which the parties agreed was a cap which is to be regarded as being applicable to all fees charged to Daniel Stewart by FFW, subject only to VAT being added to the £30,000 cap. Accordingly, I do not consider that the £699.30 which Daniel Stewart claims in respect of the printing costs charged by FFW are recoverable from EWC in these proceedings. The same applies to the element of VAT which Daniel Stewart has added to that (inclusive of VAT) printing figure, regardless of the issue concerning VAT to which I now turn.

95. As I have explained, the fees which EWC was charged by FFW consist of £36,000 in respect of *"Provision of Legal services"* (£30,000 plus £6,000 of VAT) and £699.30 in respect of *"Printing"* (£582.75 plus VAT) – a combined total of £36,699.30. In passing these charges on to EWC, in its invoice dated 15 July 2011, Daniel Stewart sought to charge additional VAT on the £36,699.30 (as well as on the £150,000 abort fee and £4,806.59 in respect of

other *"Expenses and disbursements"*). The result is that the total amount claimed in respect of FFW's fees includes a substantial additional amount in respect of VAT on top of that which appears in FFW's invoice: £7,339.86 or £7,200 in respect of the *"Provision of Legal services"* charge and £139.86 in respect of the *"Printing"* charge.

96. It was explained by Mr Luckhurst in both his Opening Skeleton Argument and in his Closing Submissions, in each case in a footnote, that *"Because this VAT is treated as a cost by [Daniel Stewart], the [Daniel Stewart] invoice to EWC properly charged VAT on the gross amount paid by EWC for legal services. The latter VAT charge is, presumably, recoverable by EWC"*. Mr Williams acknowledged in closing submissions that he had not appreciated that what Daniel Stewart is seeking to do is to recover additional VAT in this way. In the circumstances, I permitted Mr Williams to deal with the point in writing subsequent to conclusion of final speeches. Mr Luckhurst then submitted a response to Mr Williams' further submissions and Mr Williams a response to Mr Luckhurst's submissions on the issue. I need to set out the rival submissions of the parties in a little detail.

97. Mr Williams submitted that it is not open to Daniel Stewart to recover the additional VAT or, as he put it, 'VAT on VAT'. He submitted that VAT is a *"tax on the final consumer"* (as it is put by, for example, the editors of *Halsbury's Law of England* (5th Ed, 2012), Volume 99 at paragraph 3). He gave the example of a transaction involving a chain of suppliers in which each supplier is VAT registered. He submitted that for both the intermediate suppliers and the revenue authorities the transaction will be tax neutral, since, while each intermediate supplier will pay VAT to its predecessor by way of the latter's output tax, it will immediately reclaim that outlay by way of its own input tax, and only when the transaction reaches the final consumer will that not be the case, at which point that consumer is itself able to reclaim the VAT it pays as input tax. Mr Williams' submission was that what does not happen in such a situation is that each business in the chain charges VAT in what he describes as *"an astonishing 'crescendo' effect"*. Mr Williams submitted that, as FFW was a supplier of services to Daniel Stewart, Daniel Stewart is entitled to recover the VAT which FFW have charged it as input tax but must, in re-billing FFW's fees to EWC, add VAT on its own account as output tax. That way, Mr Williams explained, EWC is only billed for VAT once – and can then itself reclaim the VAT as input tax.

98. In making these submissions, Mr Williams drew a distinction between that situation and the situation involving so-called *"VAT disbursements"* (as referred to in paragraph 25 of the VAT Guide, HMRC Notice 700, May 2012, although my understanding is that *"VAT disbursements"* pre-dated May 2012). Such a disbursement is a payment made by a supplier to a third party where, although the supplier pays the third party, it does so simply as the agent of a client which has a direct liability to pay the third party as principal. Mr Williams seems to me to be right when he observes that this is not a case which involves a *"VAT disbursement"* as so characterised in that FFW acted for Daniel Stewart, not EWC. As a result, so Mr Williams submitted, this is not a case in which Daniel Stewart can simply pass on to EWC the VAT

charged by FFW. Daniel Stewart may instead reclaim FFW's output tax as input tax, and if it does so Daniel Stewart must add its own output tax when recharging the net amount to EWC. Mr Williams pointed out that, either way, whether it is a case concerning a *"VAT disbursement"* or not, EWC is only obliged to pay VAT once, and is not charged VAT on VAT.

99. In response, Mr Luckhurst made a number of points. First, he observed that the invoice which Daniel Stewart had rendered to EWC is, as he put it, *"consistent with the practice adopted by the Claimant over several years and with the advice that the Claimant has previously received from HMRC on this issue"*. Secondly, he submitted that the present type of case differs from the type of cases to which Mr Williams refers (including the chain of suppliers case), in that, as Mr Luckhurst explained, although Daniel Stewart is registered for VAT, and is accordingly required to apply VAT to all invoices rendered to its clients, Daniel Stewart's method of accounting to the revenue authorities for the various transactions in which it engages is on what is known as a *"partial exempt"* basis. As a result, apparently Daniel Stewart is not entitled to recover up to 90% of the total VAT that it is charged by its own suppliers, and as such the VAT charged by FFW in this case is, as Mr Luckhurst put it, *"a cost to the Claimant's business that the Claimant is not able itself to reclaim from HMRC in its own quarterly VAT returns"*. Hence, I was told that Daniel Stewart's ordinary practice is to charge its client for the full costs to Daniel Stewart of engaging lawyers to support the transaction, namely the underlying fees and the (irrecoverable) VAT levied on Daniel Stewart. I was also informed by Mr Luckhurst that Daniel Stewart has previously been advised by the revenue authorities that this, as he put it, *"'second' levying of VAT is necessary and appropriate"*. Mr Luckhurst went on to observe that, inasmuch as Mr Williams was relying on Daniel Stewart not having discharged the burden of proof in relation to this aspect of the claim, the practice which Mr Luckhurst had described and which is set out above *"was evident on the face of the original invoices tendered by the Claimant and was clearly flagged in the Claimant's opening submissions"*. He went on to say that, had there been an issue concerning the incidence of VAT, *"then the Claimant would have been in a position to provide evidence on the issue"* whereas *"Instead, the Claimant is restricted to outlining the facts and matters set out above by way of instructions to its representatives"*.

100. Mr Williams took the opportunity of replying to Mr Luckhurst's submissions, making two points essentially. First, he pointed out that it was for Daniel Stewart to make good its case, and that merely referring to the VAT issue in a footnote, both in opening and in closing, was not good enough: Daniel Stewart should have explained its position with greater clarity and should, in any event, have adduced proper evidence to make good its case in this respect. The fact that EWC had not appreciated that additional VAT was being claimed until late in the day does not relieve Daniel Stewart of this obligation. Secondly, Mr Williams submitted that, in any event, the agreement as to the cap precludes Daniel Stewart from claiming the additional VAT monies: Mr Griggs and Mr Rigby agreed that EWC would be charged £30,000 for the work performed by FFW, and although that excluded (as EWC accepts) what might be termed the 'ordinary' incidence of VAT, it could not have been

mutually contemplated at the time that the agreement as to the cap was entered into that there would be an additional amount payable by way of VAT. Certainly, Mr Williams submitted, it was never explained to EWC that that is what Daniel Stewart would be doing when it came to billing EWC in respect of FFW's fees.

101. Having considered these various submissions in some detail, I have concluded that it is not open to Daniel Stewart to recover the additional VAT for the two reasons which Mr Williams put forward in response to Mr Luckhurst's submissions. It seems to me that, even had I been minded to adopt a more relaxed approach to the evidential/burden of proof issue which I come on to address below, Mr Williams was, in any event, right in his submission concerning the cap which Mr Griggs and Mr Rigby agreed. There is no evidence to support the suggestion, even assuming it is made (which I do not understand it to be), that Mr Griggs knew that Daniel Stewart would be charging EWC additional VAT in respect of FFW's fees. As I have previously explained, the evidence as to what was agreed is very scant indeed and I would be very surprised if there had been such a discussion. In the circumstances, I consider that the agreement as to the £30,000 cap is one which precludes the recovery of anything more than the 'ordinary' incidence of VAT. Therefore, even if the matters relied on by Mr Luckhurst, based on the instructions he has received but not on any evidence which has been adduced, were established, Daniel Stewart would, in any event, be unable to recover the additional VAT: the agreement was that fees would be capped at £30,000 net of VAT on that amount but only that amount, not some other amount which already included a VAT element.

102. In the circumstances, my conclusion on the additional VAT issue does not hinge on the evidential/burden of proof issue. I do, however, consider that, whilst what Mr Luckhurst had to say concerning the particular position of Daniel Stewart may well be the case, the fact remains that what he told me was based not on evidence adduced at trial but merely on instructions which Mr Luckhurst has received since the conclusion of the trial. There is an important difference between being told something on instructions and hearing evidence on the topic concerned. In the latter case the evidence can be tested and the other party is also in a position to adduce its own evidence on the matters to which the evidence is directed. That is not possible where what is being put before the court is based not on evidence but on instructions. It may be that there can be some relaxation of the strict position if the subject matter of the instructions is uncontroversial or if the issue to which the instructions are directed is not of major importance. However, that is not the position in the present case, where there is a very real issue between the parties as to the incidence of VAT and as a result EWC's liability in respect of VAT. Mr Williams explained in some detail what he would have wished to explore had Daniel Stewart adduced the relevant evidence, and whilst I am not in a position to say whether the various points he raised would have been made out by him, equally I am not in a position to conclude that what he stated is wrong or that, when Mr Luckhurst asserted that Daniel Stewart has *"partial exempt"* status, that is right and the consequence is as he told me it is. Had there been evidence on these various matters, I would be in a different position and could

have made appropriate determinations. Since that is not the case, I am not prepared to adopt the approach which Mr Luckhurst urged upon me.

103. I might add that, since this is a topic in relation to which Daniel Stewart very obviously bears the burden of proof, I do not consider it an adequate answer for Mr Luckhurst to say that it would be unfair to deny Daniel Stewart recovery of the additional VAT. This is not a case where EWC can be said to have conceded the issue. As such, it remains incumbent upon Daniel Stewart to make good its entitlement in relation to the additional VAT. Nor do I find persuasive Mr Luckhurst's submission that, EWC having overlooked the fact that Daniel Stewart was seeking to recover the additional VAT and that this has been the case from the time when the relevant invoice was issued on 15 July 2011, Daniel Stewart is somehow to be excused the obligation to prove its case in the ordinary way, namely with evidence. The fact is that Daniel Stewart has not adduced the evidence necessary to establish its entitlement and it should have done so, whether in the form of witness evidence (fact or expert) or in some other admissible form. This should have been done before exchange of opening skeleton arguments and, in any event, before the conclusion of the evidence at trial. It was not done and I do not consider that EWC is responsible for that.

104. In conclusion, Daniel Stewart is not entitled to recover from EWC either the printing costs amounting to £699.30 or the additional VAT claimed over and above the £36,000 (inclusive of VAT) in respect of FFW's *"Provision of Legal services"*.

Disbursements and expenses

105. I turn now to consider the dispute concerning Daniel Stewart's entitlement to recover expenses and disbursements totalling £4,120 (exclusive of VAT) under Clause 3 (second bullet point) of the Engagement Letter. Under that provision, EWC agreed to pay Daniel Stewart:

"any expenses and disbursements not included herein and reasonably incurred by Daniel Stewart in the course of carrying out the Services, which will not exceed £1,000 in total without the prior consent of the Company [EWC]."

The provision went on:

"In addition to this the Company [EWC] will bear the cost of third party intelligence searches on any new directors, which is estimated (but not capped) at £1,000 per director".

106. The total amount claimed by Daniel Stewart in its invoice dated 15 July 2011 was £4,806.59, consisting of £1,686.59 by way of expenses and £3,120 in respect of disbursements. Daniel Stewart accepts that, in view of the fact that there is no record of EWC giving its prior consent to the amount exceeding £1,000, its claim should be limited to £1,000 rather than the full £1,686,59 for which Daniel Stewart invoiced EWC and which EWC has paid on a without prejudice basis. Accordingly, credit will need to be given to EWC for the

balance of £686.59, EWC having taken no issue that it is indeed liable for the £1,000 which Daniel Stewart now accepts it is limited to recovering from EWC.

107. That leaves Daniel Stewart's claim for £3,120 in respect of the *"cost of third party intelligence searches on any new directors"*. There is no issue that this money was incurred: there were searches carried out in respect of EWC's five directors at the time of the proposed listing. The issue is as to whether it is open to Daniel Stewart to recover in respect of the searches which were performed in relation to Mr Griggs, Mr Shaw and Mr Edwards given that these were all existing directors. Mr Williams' simple submission was that the obligation to bear the cost of third party intelligence services related only to *"any new directors"*, and Mr Griggs, Mr Shaw and Mr Edwards were not *"new directors"*. As a result, so Mr Williams submitted, Daniel Stewart is only entitled to be paid the costs incurred in relation to Mr Gannon and Mr Bell, who were the two proposed new directors. Those costs amount to just £1,150 (or £575 each), to which VAT needs to be added.

108. Mr Luckhurst's response to this submission was to suggest that Mr Williams and EWC misunderstood the point of the directors searches, namely that they are necessary in respect of all of the directors of a company seeking admission to the AIM. He submitted that, in view of this, the reference in Clause 3 (second bullet point) to *"new directors"* should be taken as applying to all directors, whether they are existing directors of EWC or new directors of EWC, since both existing and new directors of EWC would be *"new"* to the AIM. In support of this submission, Mr Luckhurst relied on the fact that EWC paid the full cost of the directors searches without making the point which is now made, and also on the fact that Mr Griggs accepted in cross-examination that he was fully aware that there would need to be checks on all of EWC's directors prior to admission to the AIM. That is indeed what Mr Griggs accepted. It was also submitted by Mr Luckhurst that Mr Griggs accepted that it was his understanding of the Engagement Letter that EWC would need to pay the cost of these searches. That is also right. However, I am not at all sure that Mr Griggs was accepting that EWC was contractually obliged to pay all such costs, both in relation to existing directors and in relation to directors who were new to EWC. In the exchanges between Mr Griggs and Mr Luckhurst, which came at the very end of the cross-examination, the distinction between existing and new directors was not made. In the circumstances, I am not inclined to accept that Mr Griggs' understanding of what had been agreed as regards the costs of third party searches is as Mr Luckhurst and Daniel Stewart contend before me.

109. In any event, even if Mr Griggs did go as far as Mr Luckhurst suggested, the question of whether EWC is liable in respect of the searches carried out on Mr Griggs, Mr Shaw and Mr Edwards is a question of construction of the Engagement Letter. It is, therefore, a matter for me to determine whether Mr Luckhurst was right in his submission or whether Mr Williams was right. I am not assisted in making that determination by Mr Griggs' views on the matter. Those views are inadmissible, and so, even if he did say in cross-examination what Mr Luckhurst submitted he said, I ought not to be influenced by this. It is

my very clear view, approaching the matter objectively as I must, that the obligation to bear the cost of third party intelligence searches *"on any new directors"* is confined to directors who were new to EWC. It seems to me that that is the natural meaning of the words used. If Mr Luckhurst were right in his alternative construction and the reference to *"new directors"* was intended to be a reference to directors who were new to the AIM, irrespective of whether they were new to EWC, the provision could very easily have stated this. The fact that it did not do so is, in my view, telling.

110. In conclusion, therefore, Daniel Stewart is entitled to £1,000 in respect of expenses and £1,150 in respect of the cost of third party searches on Mr Gannon and Mr Bell but not in respect of Mr Griggs, Mr Shaw and Mr Edwards. To these sums must be added VAT in the sum of £430, but not additional VAT for the reasons set out above. Credit, therefore, needs to be given for any over-payment, whether in respect of additional VAT or as regards the £686.59 (plus VAT) which EWC has previously paid in respect of expenses.

Interest

111. The final matter which I need to address is interest and Daniel Stewart's contention that interest should be payable under the Late Payment of Commercial Debts (Interest) Act 1998, namely 8 per cent above base rate. I have to decide whether interest should be awarded in that amount or, as EWC invites me to approach matters, on the basis that interest is payable only at the contractual rate of 3 per cent above the base rate of the Bank of Scotland from time to time (Clause 14.3 of Daniel Stewart's Terms and Conditions for Retail Clients, as incorporated into the Engagement Letter).

112. Daniel Stewart's position is that the contractually agreed interest rate does not provide a *"substantial remedy"* for the purposes of section 8(2) of the 1998 Act, given that the current base rate is only 0.5 per cent, and that has been the position for some time. Daniel Stewart says in its Closing Submissions that, in such circumstances, an award of interest at 3.5 per cent *"does not provide a sufficient deterrent to EWC to avoid payment or sufficient compensation to DS for the period in which it has been deprived of these funds"*.

113. I do not find this submission at all compelling and I have no hesitation in rejecting it. As Mr Williams pointed out, Daniel Stewart is an investment bank which chose to include in its contractual terms the interest provision which it did. In so doing, Daniel Stewart is to be taken as having satisfied itself that 'base rate plus 3 per cent' is an adequate, indeed a suitably substantial, remedy in the event of non-payment by EWC (and for all I know other clients in the position of EWC) having regard to its commercial interests and commercial characteristics. In these circumstances, I consider the position adopted by Daniel Stewart to be untenable.

114. I might add that Mr Williams submitted that I should be fortified in this conclusion by the knowledge that the approach adopted by the Commercial Court is to award interest at a lower rate, namely 1 per cent above base rate. I

see some force in that submission in view of the fact that the Commercial Court Guide states as follows at paragraph J14:

"Historically the Commercial Court has generally awarded interest at base rate plus one percent unless that was shown to be unfair to one party or the other or to be otherwise inappropriate."

However, it is right to acknowledge that paragraph J14 goes on as follows:

"In the light of recent interest rate developments there is no presumption that base rate plus one percent is the measure of a commercial rate of interest".

It is clearly envisaged that it would be open to a party to persuade a Commercial Court judge that some other rate represents a commercial rate of interest. In the circumstances, I prefer to base my decision on the point addressed in the previous paragraph rather than on any comparison with the approach which is adopted in the Commercial Court: Daniel Stewart has not sought to adduce evidence in support of its contention that the contractually agreed base rate plus 3 per cent is not a commercial rate of interest (in the language of the Commercial Court Guide) nor (more pertinently in view of Mr Luckhurst's reliance on the 1998 Act) its contention that that rate would provide it with an insubstantial remedy. I am not prepared simply to assume that this is the position. In consequence, I am clear that Daniel Stewart should be restricted to the contractually agreed interest rate of 3% above the base rate of the Bank of Scotland from time to time.

Conclusions

115. In conclusion:

(1) EWC is liable to pay £150,000 (plus VAT) by way of the abort fee agreed in the abort fee clause contained in Clause 3 of the Engagement Letter.

(2) EWC is liable in respect of £36,000 by way of FFW's fees, but is not liable in respect of the printing costs amounting to £699.30 or the additional VAT claimed over and above the £36,000 (inclusive of VAT) in respect of FFW's *"Provision of Legal services".*

(3) EWC is liable in respect of £1,000 by way of expenses and £1,150 in respect of the cost of third party searches on Mr Gannon and Mr Bell but not in respect of Mr Griggs, Mr Shaw and Mr Edwards. To these sums must be added VAT in the sum of £430 but not additional VAT.

(4) Credit will need to be given for any over-payment, whether in respect of additional VAT or as regards the £686.59 (plus VAT) which EWC has previously paid in respect of expenses.

(5) Daniel Stewart is entitled to recover interest on these various sums at the contractual rate of 3 per cent above the base rate of the Bank of Scotland from time to time.