Neutral Citation Number: [2019] EWHC 1655 (Comm)

Case No: CL-2017-000486

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 28/06/2019

Before :

MR JUSTICE BUTCHER

- -

Between :

MACQUARIE CAPITAL (EUROPE) LIMITED	**Claimant**
- and -	
NORDSEE OFFSHORE MEG I GMBH	**Defendant**

- -
- -

Daniel Toledano QC, Nehali Shah and Henry Hoskins (instructed by **Travers Smith LLP**) for the **Claimant**
Andrew Spink QC and Matthew Watson (instructed by **Enyo Law LLP**) for the **Defendant**

Hearing dates: 1, 2, 7, 8 and 10 May 2019

- -

Approved Judgment

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

.....

MR JUSTICE BUTCHER

Mr Justice Butcher:

Introduction

1. This action involves a claim by the Claimant, Macquarie Capital (Europe) Ltd ("MCEL") for fees. The Defendant, Nordsee Offshore MEG I GmbH ("NOMEG"), denies that any fees are payable.

2. MCEL is an investment banking firm that provides financial advisory services, including as to mergers and acquisitions, restructuring, debt structuring and project finance. It is incorporated in England. It is part of the Macquarie group of companies, a global provider of banking, financial, advisory, investment and fund management services.

3. NOMEG was incorporated in Germany on 23 June 2009. Its shareholders are and have at all material times been Windreich AG ("Windreich")[1] and FC Windenergy GmbH ("Windenergy"), which is wholly owned by Windreich. The Windreich group was founded in Germany in about 1999 by Willi Balz. Its business involved the design, construction, operation and sale of onshore and offshore windfarms.

Chronology

4. Most of the facts giving rise to the present dispute were entirely uncontentious. The following is a summary of the main events.

5. On 31 August 2009, NOMEG obtained a permit from the German Federal Maritime and Hydrographic Agency (the Bundesamt für Seeschifffahrt und Hydrographie or "BSH"). That permit approved "the installation and operation of 80 wind turbine generators including subsystems in the area of the German Exclusive Economic Zone in the North Sea" in accordance with detailed conditions set out in the permit. At that stage the permit envisaged use of wind turbine generators with a rotor diameter of 116m. On 23 May 2011, TenneT TSO GmbH ("TenneT"), a German Transmission Systems Operator or "TSO"[2], granted NOMEG an unconditional grid connexion commitment.

6. A project was developed by Windreich which initially envisaged that NOMEG would enter into engineering, procurement and construction (or "EPC") contracts with multiple suppliers. By about summer 2012 Windreich favoured having most of the EPC contracts under a "turnkey" arrangement, with a consortium consisting of Areva Wind GmbH ("Areva") (as turbine supplier), and Hochtief Solutions AG ("Hochtief") (for the "Balance of Plant"). Under this proposed arrangement, the consortium would be responsible for sub-contractors.

7. By 2012, consideration was also being given by Windreich to securing finance for the project. During the summer of 2012, Deutsche Bank, which had been mandated to raise debt for the project, contacted MCEL as a potential equity investor, but MCEL was not at that point interested in an equity investment.

[1] Windreich changed its legal form from Aktiengesellschaft (AG) to Gesellschaft mit beschränkter Haftung (GmbH) on 6 March 2013.

[2] TSOs were at the time responsible for establishing grid connexions between windfarms and the German national grid.

8. Windreich had engaged other advisers in relation to the financing of the project. One of these was Fraser Finance LLP ("FF") appointed by an engagement letter dated 15 October 2012. MCEL was contacted in September 2012 through FF. Windreich and MCEL entered into a Non-Disclosure Agreement signed on 23 October 2012 in relation to "the offshore wind farm project MEG I". By a side letter to the 15 October 2012 engagement letter, MCEL was appointed to act jointly with FF as co-financial advisers in relation to the "Offshore Wind Farm MEG I in German North Sea".

9. On 17 December 2012, however, Windreich notified FF and MCEL that their joint finance-raising mandate was at an end. Windreich was hoping that an equity commitment from MCEL might attract other investors. On 21 December 2012, MCEL informed Windreich that internal approval had been given for it to underwrite 30% or €250 million of the necessary equity finance at financial close of the project.

10. These discussions led Windreich and Macquarie Capital Group Ltd ("MCGL"), MCEL's parent company, to sign an indicative and non-binding term sheet ("the first term sheet") on or about 3 January 2013. The first term sheet stated, amongst other things:

    (1) That MCGL or affiliates (defined as 'Macquarie') would be appointed to manage an equity raising process targeting new equity investors to provide up to €720 million "for the construction of MEG I", and as debt advisor to the equity consortium "to review on an ongoing basis the proposed structure and terms of the project finance debt providers with a view to ensuring the optimum capital structure and market terms and conditions on terms to be separately agreed, reflecting market conditions."

    (2) In the event that "MEG1" was capable of Financial Close except for the quantum of Construction Equity required, "It is Macquarie's intention to subscribe an amount of equity up to the lower of EUR 250 million or 30% of the equity value of MEG1 at Financial Close…", subject to a number of conditions.

    (3) "Macquarie" would receive 2% of all Construction or Sponsor Equity "raised with respect to MEG1, whether such investment is provided by Macquarie or other investors", and debt advisory fees of 0.5% of "all debt project finance raised with respect to MEG1".

    (4) Provision was made for Construction Equity (up to €600 million), Sponsor Equity, Sponsor Performance Bonus, and Capital raise process.

    (5) The terms were said to be for "discussion purposes only and do not contain any legally binding provisions."

11. MCGL and Windreich entered into a further term sheet ("the second term sheet") on 18 January 2013. This was in similar terms to the first term sheet, but with certain amendments, including:

    (1) There was a reduction in the back-stop equity subscription to the lower of €216 million or 30% of the equity value of MEGI at Financial Close.

    (2) A statement that the backstop equity subscription was subject to approval by the Principal Investment Committee and Executive Committee and amendment to certain conditions.

(3) Agreement that the second term sheet was confidential and could not be disclosed, save that partial disclosure to certain parties, including the proposed construction consortium, was permitted.

(4) The removal of the wording regarding the terms being for discussion purposes and non-binding and its replacement with a provision that "The Equity raising advisory, Debt raising advisory and Back-stop equity subscription terms above will only become legally binding upon entry into definitive legal agreements at the appropriate point in the transaction as relevant for each term."

12. On the same day, 18 January 2013, MCEL and Windreich entered into an Engagement Agreement. The Engagement Agreement comprised an Engagement Letter, which was signed on behalf of MCEL and of Windreich, and MCEL's Standard Terms of Engagement. The Standard Terms of Engagement were incorporated into the Engagement Agreement by the third paragraph and clause 8 of the Engagement Letter.

13. The terms of this Engagement Agreement are at the heart of the dispute between the parties, and I will set out the most relevant of those terms in due course.

14. After the conclusion of the Engagement Agreement, difficulties were caused to the finance-raising process by a number of matters. In particular, first, on 5 March 2013, the German public prosecutor carried out an unannounced dawn raid on Windreich's offices. The allegations related to Windreich's financial management and accounting practices. Secondly, there was a suspension of the public trading of Windreich's bonds because of unpaid interest.

15. By letters of 1 March and 19 March 2013, MCEL warned that as a result of these recent developments "a capital raising is now extremely unlikely under the currently proposed project structure", and recommended that that structure should be amended to ring fence the project company from the Windreich group. MCEL worked on the ring-fencing proposals. But progress was slowed because of the situation regarding Windreich.

16. In June 2013, Windreich, MCEL and NOMEG entered into a novation agreement by which NOMEG assumed all Windreich's rights and obligations to MCEL under the Engagement Agreement.

17. In August 2013, Bank Sarasin applied to the German courts to put Windreich into insolvency. However, on 5 September 2013, Windreich filed for self-administered insolvency. Windreich's CEO, Willi Balz, resigned on or about 9 September 2013, and was succeeded by Werner Heer, whose background was in restructuring distressed and insolvent energy projects. On 1 December 2013, Windreich entered regular insolvency, and as a result Windreich and all the companies in the group it owned came under the control of an insolvency administrator, Holger Blümle from the firm Schultze & Braun. Mr Blümle had to realise assets for the benefit of Windreich's creditors, and Schultze & Braun considered that the best way of realising value from NOMEG was to try and bring the windfarm project to financial close, which would see Windreich's shares sold and cash generated.

18. By the end of January 2014, a Memorandum of Understanding ("MOU") had been entered into regarding the acquisition of NOMEG and the provision of funding for the

offshore wind project between a proposed equity consortium consisting of MCGL, Arcus Infrastructure Services LLP ("Arcus"), State General Reserve Fund of the Sultanate of Oman, Areva, and CEE Clean Economic Energy AG. A subsequent MOU effective as of 10 March 2014 was entered into between a revised proposed consortium of MCGL, Arcus, Areva and EnBW Energie Baden-Württemberg AG ("ENBW").

19. On 9 April 2014 Reed Smith LLP, which had been the firm engaged on behalf of the equity consortium, informed MCEL that it could not continue to work beyond 1 June 2014 without some provision being made for its fees. On 14 April 2014, Hochtief, on behalf of itself and Areva, stated that it had "decided to stop all activities with regard to the preparation of the project" unless upfront payments were made to Hochtief and Areva totalling €10.25 million by 15 May 2014. On 11 June 2014 Hochtief emailed stating that it would shut down all design activities, cancel contracts and disperse staff to other projects if it did not receive €2 million by 30 June 2014.

20. ENBW then withdrew from the proposed equity consortium in mid-July 2014 and, following that, the remainder of the equity consortium withdrew as well citing the absence of development funding and consequent postponements of Financial Close as reasons.

21. Shortly thereafter, in August 2014, Hochtief pulled out of the EPC consortium. This appears to have been, at least in part, because Hochtief had made a more general decision that it did not wish to be involved in offshore projects in future. There was a proposal, however, that the DEME Group ("DEME"), which was in the process of buying Hochtief's offshore assets, should join a proposed equity consortium with Arcus, MCGL and Areva. DEME also indicated that it would be willing to replace Hochtief in the EPC consortium.

22. In about September 2014, Mr Heer had developed a proposal to try to progress the windfarm project. That proposal was, in essence, for NOMEG to transfer the BSH Permit and the grid connexion granted in 2011 to a new SPV company in return for equity in that SPV; for contractors (envisaged initially as being Areva and DEME) being given equity in the SPV in return for funding the necessary development work; and for the redemption or sale of NOMEG's shares in the SPV. That proposal was discussed at a meeting in London on 26 September 2014 which was attended, amongst others, by Windreich, NOMEG, Deutsche Bank, Areva, Arcus, DEME and MCEL.

23. DEME was interested in this proposal, but Areva was more sceptical. Ultimately the Areva group withdrew, both as potential equity investor and as EPC contractor and wind turbine supplier.

24. On 15 October 2014, Windreich sent Notice of Termination of the Exclusivity Agreement with the proposed equity consortium dating from March 2014, though it had already broken down.

25. On 26 March 2015, NOMEG and DEME entered into heads of terms, in furtherance of the proposal which Mr Heer had developed. The recitals to these heads of terms stated that "[NOMEG] currently holds the assets listed in Annex 1 hereto (hereafter the 'Project Rights') in view of the turnkey construction and installation of the offshore windpark Nordsee Offshore MEG I (hereafter 'the Project')", and that "The Parties intend to jointly bring the Project to financial close by combining the Project

Rights and the commitments of DEME, as set out in these HOTs, in a special purpose vehicle (hereafter the 'ProjectCo') that will be incorporated for the purposes of the Project." The heads of terms provided that NOMEG would contribute the Project Rights to the new company and receive shares in it; and that DEME would also receive shares in that entity but would have to fund development expenses.

26. On 1 April 2015, "MEG I Project Co" and DEME entered an agreement, which was acknowledged by NOMEG, with Amsterdam Capital Partners BV ("AmsCap") "to provide senior advisory services in respect of the late stage development and financing of the 'MEG1' offshore wind Project". AmsCap's team was led by Michael van der Heijden. DEME also engaged, on the technical side, ONP Management GmbH ("ONP"), with a team led by Holger Grubel. From April 2015, as a matter of fact, the project was taken forward in particular by Holger Grubel, Michael van der Heijden and Kristoff von Loon from DEME.

27. At a meeting on 22 April 2015 with the BSH attended by, amongst others, Mr Heer and DEME, the BSH was informed of the new proposed ownership structure, and also of the fact that the wind turbines would now not be supplied by Areva or Adwen "due to limited capacity". The BSH observed that it had not yet granted the amendment of the permit which NOMEG had applied for in January 2014 to permit the use of Areva M5000-135 (with a rotor diameter of 135m). The BSH advised that it would be easiest to get approval if it were to grant the earlier, though now redundant, amendment, and then a new amendment could be applied for.

28. At a meeting on 28 April 2015 between DEME, Mr Heer and others (but not MCEL), it was agreed that the project name should be changed, and that the SPV should have a distinct name from the current entity. On 10 June 2015 DEME and NOMEG acquired IMCAFI211 Verwaltungs GmbH as the new SPV. On the same day, DEME chose the name "Merkur Offshore" for the project, and the SPV's name was changed accordingly to "Merkur Offshore GmbH".

29. On 10 June 2015, DEME, NOMEG and Merkur Offshore GmbH entered into an Investment and Shareholders' Agreement ("the ISA"). It recorded that the purpose of the company was "the development, erection and operation of the offshore wind energy project 'MEG Offshore I' (hereinafter 'the Project') and the marketing of the produced electric energy". The ISA provided amongst other things that:

    (1) NOMEG would receive 18,739 shares in Merkur Offshore GmbH (ie 75% less one share). NOMEG would make a contribution to the capital of Merkur Offshore GmbH of certain "project rights" as listed in Annex 1.3 to the ISA. Those rights included the BSH Permit and the 2011 grid connexion commitment. The ISA provided that if the project reached financial close, NOMEG would either sell its shares in Merkur Offshore GmbH to an equity investor or have them redeemed by Merkur Offshore GmbH for a price.

    (2) DEME would receive 6251 shares in Merkur Offshore GmbH (ie 25% plus one share). DEME would make cash contributions to the capital of Merkur Offshore GmbH of up to €3 million.

    (3) Four contracts would be novated to Merkur Offshore GmbH.

(4) A supervisory board would be created to govern Merkur Offshore GmbH, on which NOMEG was permitted representation (in the event, Mr Heer and Mr Blümle).

30. The ISA was then carried into effect. On 14 June 2015, NOMEG entered into a contribution and transfer agreement with Merkur Offshore GmbH, by which it transferred to Merkur Offshore GmbH the project rights and contractual obligations set out in the ISA. NOMEG sent notifications of the transfer of the 2011 grid connexion and of the BSH permit to TenneT and BSH respectively. On 19 June 2015, the BSH granted the amendment to the permit which NOMEG had applied for in January 2014, though the permit, as amended, was now issued in the name of Merkur Offshore GmbH. This amendment allowed changes to the turbine technical specifications (from 116 to 135m), to the foundations (from tripod to monopile), and to the coordinates of the outermost turbines (rearranging three wind turbines in order to comply with the required minimum distance between the turbines and the windfarm's cable systems).

31. On 29 June 2015, Merkur Offshore GmbH entered into a turbine supply agreement with ALSTOM Renewable Germany GmbH and ALSTOM Wind France SAS. This was for the provision of 66 Haliade 150-6MW wind turbines. On the same date it also entered into an EPCI FIDIC Yellow Book Contract for the balance of the plant with GeoSea NV (a subsidiary of DEME, which had acquired Hochtief's offshore assets).

32. On 30 June 2015, Merkur Offshore GmbH applied to the BSH to make the further necessary amendments to the permit given the now confirmed technical specifications.

33. In late July 2015 an equity "teaser" was sent out to potential investors. DEME sent this to MCEL on 27 July 2015. That "teaser" stated, amongst other things, that: "The Merkur project comprises the design, construction, operation, maintenance and financing of a permitted 400MW offshore windfarm located in the [German Exclusive Economic Zone] at approximately 50km distance from shore (the 'Project')"; "The Project was originally developed by German developer Windreich … through a special purpose company, [NOMEG]"; "Earlier this year, DEME Concessions Wind entered into a partnership with [NOMEG] to co-develop the Project"; "Project received its construction permit … in August 2009"; "An update of the permit has been issued in June 2015 based on an application of changed turbine type, foundation type and layout"; and "Another (minor) change of turbine type and layout has been applied for in June 2015 and is pending."

34. The minutes of a meeting of the Supervisory Board of Merkur Offshore GmbH on 7 August 2015 state "MvdH [Mr van der Heijden] enquired on status Macquarie. WHe [Mr Heer] mentioned that no letter has been received from Macquarie, and furthermore that the mandate is not (yet) terminated. But the internal process of getting this terminated has been started." It is common ground, however, that the Engagement Agreement was not terminated by NOMEG at any point.

35. The minutes of a further meeting of the Supervisory Board on 21 August 2015 refer to a request by TenneT to change grid access from the DolWin1 to the DolWin3 connexion line. This was further discussed at a meeting on 28 September 2015, and the conclusion was that Merkur Offshore GmbH would support TenneT's application to reallocate.

36. In the meantime, on 1 September 2015 MCGL (under its new name Macquarie Corporate Holdings Pty Ltd), made, with Arcus, a "non-binding offer" to acquire up to 75% of the equity required successfully to construct and commission the project. On 13 November 2015, MCGL made a revised non-binding offer alone (ie without Arcus). Negotiations broke off around November / December 2015 as rival bids (from Partners Group AG and InfraRed Capital Partners) were preferred.

37. On 2 October 2015, the ISA was amended to add a new party and shareholder in Merkur Offshore GmbH, namely ALSTOM Renewable Holding BV. Under the amended ISA, ALSTOM Renewable Holding BV held 12.5% of Merkur Offshore GmbH, DEME 12.5% plus one share, and NOMEG 75% less one share.

38. A Reallocation Agreement between Merkur Offshore GmbH and TenneT signed on 11 and 13 November 2015 referred to the fact that Merkur Offshore GmbH was the holder of a permit from the BSH dated 31 August 2009. It provided that TenneT would submit to the Bundesnetzagentur (or "BNetzA") an application for reallocation of the offshore wind farm from DolWin1 to DolWin3. On 28 January 2016, the BNetzA issued a decision that the connexion capacity of the proposed windfarm should be reallocated to the DolWin 3 connexion line. The decision noted that Merkur Offshore GmbH had "an unconditional grid connexion commitment", which remained valid. The reallocation to DolWin 3 meant that a new physical cabling layout was required. The grid connexion date was postponed from 2015 to 2018 as the DolWin 3 converter station was still under construction.

39. On 15 January 2016, MCEL had sent a letter to NOMEG which stated, in part: "[MCEL] will be pleased to continue to provide services to the Company pursuant to the Engagement Agreement, which remains in force and has not been terminated. However, irrespective of whether the Company chooses to continue to use Macquarie's services, then pursuant to clause 6 of the engagement letter and clauses 8, 9 and 13 of the standard terms of engagement, please provision accordingly so that the Project at financial close is adequately capitalised to ensure that the Company's obligations to reimburse out of pocket expenses (currently at around Euro 200,000) and pay the Completion Fee under the Engagement Agreement can be fulfilled". NOMEG did not respond to that letter.

40. On 22 March 2016, Partners Group AG and InfraRed Capital Partners entered into a binding equity term sheet with Merkur Offshore GmbH, NOMEG, DEME and GESF Credit BV, for the acquisition of shares in Merkur Offshore GmbH in return for provision of finance to fund construction and operation of the "Merkur Offshore Project". GESF Credit BV was part of GE (General Electric) which had acquired ALSTOM and so took over its role on both the technical and the investment sides. The Merkur Equity Term Sheet provided for NOMEG to surrender its shares in Merkur Offshore GmbH, whether by transfer of its shares or their redemption, in return for payment of €85 million.

41. From April 2016, Deutsche Bank oversaw a debt finance raising process, beginning with the circulation of a detailed preliminary information memorandum to potential lenders. MCEL had no involvement in this process.

42. On 20 April 2016, the BSH issued a further amendment permit, allowing additional changes to the project specification, to cater in particular for the reduced number and larger rotor dimensions of the turbines which ALSTOM had agreed to supply in June 2015. This, "the 2016 Permit", stated, in part: "the identity of the project has not

changed. The identity of the project does not change if, in terms of type, size, purpose and operating method, the project essentially remains the same. According to the Planning Consent dated 19.06.2015, the project is defined as the construction and operation of the Merkur Offshore [Wind Farm]. The reduction of the number of turbines or the change to the WT [wind turbine] do not of themselves represent a change to the size of the project that changes the overall design of the project…. The changes are changes of negligible significance, i.e. where the scope, purpose and impact of the project essentially remains the same and only certain parts are changed which can be defined in time and fact."

43. On 22 April 2016, Mr Nancarrow of MCEL resent to NOMEG the letter of 15 January 2016, "reminding" NOMEG of the "outstanding and future fees" which MCEL said would be due. On 29 July 2016 MCEL sent NOMEG a letter saying that the Engagement Agreement had not been terminated, that Completion and Advisory Fees would be payable irrespective of whether MCEL had been responsible for raising the financing, and that it expected NOMEG fully to comply with its payment obligations.

44. On 29/30 July 2016, an Investment Agreement relating to the project was concluded between Merkur Offshore GmbH, NOMEG, PG Merkur Holding GmbH, InfraRed Infrastructure III Investments Ltd, DEME Concessions Merkur BV, ALSTOM, Coriolis FOAK SAS, GeoSea and GE Renewable Germany GmbH; and a Shareholders' Agreement was concluded between Merkur Offshore GmbH, DEME Concessions Merkur BV, Coriolis FOAK SAS, PG Merkur Holding GmbH, Partners Group Merkur Investment II Sarl and InfraRed Infrastructure III Investments Ltd.

45. On 10 August 2016, Merkur Offshore GmbH redeemed those of its shares owned by NOMEG for €85 million, to be paid in two tranches. Financial close took place on 10-11 August 2016. The amount of the financing raised was €506,897,864.33 by way of equity finance, and €1,232,967,000 by way of debt finance.

46. On 24 August 2016, NOMEG responded to MCEL's letter of 29 July 2016, saying that Completion and Debt Advisory Fees were not due to MCEL, because there had been no transaction as contemplated by the Engagement Agreement because there had been no financing raised for NOMEG, and because the "Merkur Project" was a "fundamentally different" project from that referred to in and contemplated by the Engagement Agreement.

47. On 12 September 2016, MCEL wrote to NOMEG again enclosing an invoice for €18.5 million in fees, expenses and VAT. MCEL chased payment on 22 September 2016 and NOMEG replied on 28 September 2016 saying again that no sums were due under the Engagement Agreement. After correspondence between the parties' solicitors, MCEL issued the present claim on 1 August 2017. MCEL initially claimed fees (the "Completion Fee" and the "Debt Advisory Fee"), out of pocket expenses, VAT and interest. NOMEG paid the out of pocket expenses. Accordingly, MCEL's claim at trial was for fees, VAT and interest.

The Issue between the Parties as to Fees

48. In broad terms the issue as to fees is simple to state: do the terms of the Engagement Agreement provide for NOMEG to pay the fees claimed by MCEL or not? It is, however, necessary to see, in rather more detail, how the case is put by the parties.

49. MCEL's case is that "the Project" was an offshore windfarm with a capacity of up to 400MW located in the German Exclusive Economic Zone, in the area permitted by the BSH approximately 45km north of the island of Borkum and covering an area of approximately 46 sq km. If there was financial close on a "Transaction" in relation to the Project, that is to say if there was financial close on an arrangement in relation to the Project which involved equity financing or senior debt being raised for the Project, then, assuming that MCEL's engagement had not been terminated more than 12 months beforehand, Completion and Debt Advisory Fees were payable, irrespective of whether MCEL was responsible for the raising of the equity financing or debt. MCEL contends that there was indeed financial close on such a "Transaction" relating to the "Project".

50. NOMEG's case has undergone some development. In its Amended Defence, it pleaded that "the Project" as the term was used in the Engagement Agreement was "defined by a series of complete or near complete detailed agreements, permits and other rights vested in, or to be vested in [NOMEG]", and as particularised in Schedule A to the Amended Defence. Schedule A contained a list of matters, including as to the Project Company, Turbine Specifications, Location, and principal contracts, permits and other rights. A "Transaction" had to be understood by reference to the "Project" as thus defined; and in any event meant "the specific finance raising exercise contemplated in relation to [the Project as thus defined] in January 2013 as broadly contained in the [second] Term Sheet". Further or alternatively, there could be no "Transaction" unless there was a sale of at least part of the then existing shares of NOMEG. NOMEG pleaded further that, if the terms "Transaction" and "Project" did not have the meanings for which it contended, then the term "Transaction" was "wholly uncertain", and too uncertain to allow MCEL to enforce a claim for fees dependent on the occurrence of such a "Transaction".

51. In its opening Skeleton Argument, NOMEG contended, as its first point, that a "Transaction" did not take place because it "was a necessary element of any 'Transaction' that there be (1) some dealing in [NOMEG's] shares (its 'equity'); and (2) lending to [NOMEG]". This first argument was summarised (at paragraph 138) as being that "MCEL's claim fails in its entirety because no 'Transaction' ever took place. No equity or debt was ever raised for [NOMEG]. Equity and debt finance was raised for [Merkur Offshore GmbH] but not by MCEL. The raising of finance for that entity was not something ever contemplated in the Engagement Agreement." Secondly, it was said that the project which had gone to financial close, involving Merkur Offshore GmbH was not the "Project" contemplated in the Engagement Agreement, because what was then contemplated were the various arrangements as to "technical specifications, the identity of the contractors, the contracting structure, the identity of the developer, the financial model and proposed financing structure", subject only to such "modest changes of the sort expected in any project over the final 3 months down to financial close". The parties did not contemplate "substantial changes" to (1) technical specifications, (2) the identity of contractors, (3) the contracting structure, (4) the identity of the developer, (5) the financial model, or (6) the equity investment structure. The project which went to financial close had been substantially different from that contemplated at the time of the Engagement Agreement in all these respects.

52. In oral opening submissions, Mr Spink QC for NOMEG somewhat modified the emphasis of NOMEG's case. He said that it was not NOMEG's case that it was a

condition of MCEL's entitlement to fees that there should be either debt or equity raising for the particular corporate entity NOMEG. He also indicated that the specific case pleaded in paragraph 25 of the Amended Defence, to the effect that there could be no "Transaction" without the sale of at least part of the then existing shares in NOMEG, was not pursued. NOMEG's case was that the nature of the "Transaction" contemplated was one of equity and senior debt raising for NOMEG, and that the financial arrangements of the project which went to financial close were not within what the parties had contemplated as a "Transaction". In its written Closing, NOMEG toned down the clear distinction between the "no Transaction" and the "different Project" points made in its written opening, and said that the issues of what constituted the "Transaction" and the "Project" could not be viewed in isolation from each other, and that "there is a degree of overlap and interplay between them". The essential case made was that, given what was contemplated by the parties at the time of entering into the Engagement Agreement, the arrangements which ultimately went to financial close were sufficiently different as to be neither a "Transaction" nor to relate to the "Project" as those terms had been employed in the Engagement Agreement.

53. Mr Toledano QC for MCEL pointed out that this case rested on a detailed examination of what was contemplated by the parties at the time of entry into of the Engagement Agreement, what might be called the "factual matrix" to that agreement, in circumstances where NOMEG had not properly pleaded its case on that matrix. That complaint seemed to me to have some force. Mr Toledano QC did not, however, suggest that the case which was put by NOMEG at the hearing was one which was not open to it. In the result, it has been fully developed and explored.

The Trial

54. Much of the time at trial was taken up with factual witness evidence. MCEL called Simon Wilde, Adam Nancarrow and Tim Jaeschke; NOMEG called Werner Heer and Michael Görike.

55. The purpose of the evidence was essentially to provide the background against which the Engagement Agreement was entered into, the sequence of events thereafter, and the nature of the arrangements which ultimately went to financial close.

56. Much of what was given by way of witness evidence was apparent from the documents. What was not apparent from the documents had, on occasion, a tendency to be argument. With that said, I considered all the witnesses to have given honest evidence which was intended to be of assistance to the Court. Insofar as the evidence went to the nature of the discussions and the state of arrangements for the projected windfarm, before the Engagement Agreement was entered into, MCEL's witnesses were better placed to comment because Mr Heer did not join Windreich until the end of March/beginning of April 2013, and Dr Görike was not involved in the discussions with MCEL at that point, and was not materially involved in the negotiations with Hochtief or Areva.

57. There was also evidence given of German law, in relation primarily to the permitting of offshore windfarms. MCEL relied on the evidence of Felix Fischer; NOMEG relied on that of Dr Wolf Spieth. Both were highly qualified and impressive experts. There was, in fact, little difference between most of their evidence. In particular they agreed that the permit issued by the BSH on 19 June 2015 was an amendment of that

granted on 31 August 2009, rather than being a wholly new permit; and that the 2016 permit was an amendment of the 2015 permit. The BSH had not regarded the changes made as sufficient to change the identity of the project as far as it was concerned. Equally, they were agreed that the 2011 grid connexion commitment was unconditional, and the BNetzA decision on 28 January 2016 to reallocate the grid connexion capacity was not a new unconditional grid connexion commitment. The experts disagreed, to some extent, as to the significance of these matters.

58. As I indicated during the hearing, it appeared to me that both the points on which the experts agreed and those on which they disagreed were of only limited significance in resolving the issue which the Court had to decide. Whether the "project" remained the same for the BSH's purposes, or the grid connexion remained the same for BNetzA's, did not necessarily show whether, for the purposes of the Engagement Agreement, the arrangement which went to financial close in 2016 was a "Transaction" or was in connexion with the "Project" as those terms are used in that agreement.

The Approach to Construction

59. Whether MCEL is entitled to the disputed fees depends on the proper construction of the terms of the Engagement Agreement.

60. The principles of construction which should be employed in determining which of the parties' cases in relation to the Engagement Agreement is correct are well-known, and were not significantly in dispute between the parties. They were helpfully summarised by Popplewell J in Lukoil Asia Pacific PTE Ltd v Ocean Tankers (PTE) Ltd [2018] EWHC 163 (Comm) at [8], as follows:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of the drafting of the clause and it must also be alive to the possibility that one side may have agreed something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms."

The Terms of the Engagement Agreement

61. The most relevant terms are as follows:

> "
>
> [In the Engagement letter]

"We refer to our recent discussions in relation to the Nordsee Offshore MEG I GmbH ('MEG I' or the 'Project') involving managing an equity raising process targeting new equity investors to provide sufficient equity capital for the construction of the Project, and advising the equity consortium on the proposed structure and terms of the project senior debt, including the sale of part or all of the existing equity shares of MEG I (collectively 'the Transaction').

We are pleased to confirm the terms upon which Windreich AG ('Client') has engaged the Macquarie Capital business group of [MCEL] ('Macquarie') to act as Client's exclusive financial adviser in relation to the Transaction ('Engagement').

1. MACQUARIE'S ROLE

Client has engaged Macquarie exclusively to act as its financial adviser in connection with the Transaction. In connection with this Engagement, Macquarie shall provide financial advice and assistance in relation to the Transaction, which may include:

Equity raising

- Developing an equity raise and sale strategy plan and timetable;
- Identifying and assessing potential investors with interest in the Project;
- Engaging with potential investors to conduct due diligence with the aim to securing commitment prior to financial closing of the Project;
- Assisting the Client in the preparation and provision to interested parties of an information memorandum and other information as required;
- Using documentation and financial models prepared by the Client or its advisers to facilitate discussions with potential investors;
- Assisting in managing key aspects of the due diligence process and issues resolution;
- In conjunction with Client's legal advisers, development of terms that apply to incoming investors, and liaising with Client and Client's legal advisor to ensure that terms are satisfactory;

- Dealing with initial expression of interest from prospective investors, including distribution and receipt of confidentiality agreement;

- Assisting Client's legal advisers with negotiating key terms and conditions with potential investors, subject to the Client's overall control, and any other relevant documentation;

- Providing other general financial advice and assistance in relation to the Transaction as may be agreed from time to time.

Debt Advisory

- Interfacing with Deutsche Bank AG to formalise the project financing structure;

- Reviewing debt terms and pricing received from the project senior lenders and advise Client and the equity consortium on the optimal capital structure achievable;

- Providing such other general advice and assistance in relation to the Transaction as may be agreed from time to time.

…

3. FEES

In consideration for Macquarie's services as set out in this Engagement Agreement, Client agrees to pay Macquarie the following fees:

a) Completion Fee

In the event a Transaction is completed, a Completion Fee, payable on financial closing of the Transaction, equal to 2.00% of all equity raised or sold as part of the Transaction, irrespective of whether Macquarie was responsible for raising such equity financing. For the avoidance of doubt, 'equity raised or sold' means the amount of equity, mezzanine capital or junior capital committed by any purchaser or transferee, including any shareholder loans or consideration for the existing shares of the Project.

b) Debt Advisory Fee

In the event a Transaction is complete, a Debt Advisory Fee equal to 0.5% of all senior debt raised with respect to the Project, payable on financial close, irrespective of whether

Macquarie was responsible for raising such senior debt financing. For the avoidance of doubt, 'senior debt raised' includes the amount of any contingent or stand-by facility committed to the Project.

Client will pay for all reasonable costs, expenses and fees, including but not limited to, legal fees and third party diligence fees incurred by Macquarie in connection with this Project. …

Client confirms that in the event that no Transaction occurs during the period of our engagement but that a Transaction occurs within 18 months of termination of our appointment (unless such termination is a consequence of Fault on the part of Macquarie …) involving a party with whom Macquarie had been in discussions or to whom Macquarie had send (sic) information in connection with the Transaction during the term of its engagement, Macquarie will be entitled to the fees as set out above.

…

6. EXCLUSIVITY

Macquarie will be appointed as exclusive financial adviser with respect to the Project for a period until at least 30 September 2013 (the 'Exclusivity Period'). In any event, Fees will be payable for a Transaction occurring during a period 12 months following the later of the termination of Macquarie's engagement and the end of the Exclusivity Period, unless such termination is a consequence or (sic) fault on the part of Macquarie …

7. OTHER

The Engagement relates to advisory services in relation to the Transaction only. Macquarie and its related bodies corporate provide a broad range of other equity and debt financing services. Should Macquarie assume further responsibilities as the Transaction proceeds, Client will negotiate separate fees in respect of those matters at the time.

[In the Standard Terms of Engagement]

…

8. OUT-OF-POCKET EXPENSES

Macquarie's reasonable out of pocket expenses incurred in connection with the Engagement will be reimbursed by Client on a monthly basis, regardless of whether the contemplated Transaction is completed.

…

9. FEES, TAXES AND PAYMENTS

All fees and other amounts payable under this Engagement Agreement shall be paid in Pounds Sterling or such other currency (if any) specified in the Engagement Letter, …

In all cases, if applicable, the total invoiced amount will include VAT calculated in accordance with the relevant legislation.

…

Payment is due within seven days of receipt of Macquarie's invoice. Overdue amounts will attract interest at Macquarie's standard variable lending rate.

…

13. TERM AND TERMINATION

The appointment of Macquarie under the Engagement shall commence on the earlier of:

(a) the date of the Engagement Letter; or

(b) the date Macquarie commenced the provision of services for any member of the Client Group in connection with the Transaction.

The Engagement will terminate on financial close of the Transaction.

The Engagement may also be terminated by either Party at any time, by giving written notice to the other Party.

Any notice to terminate the Engagement shall be in writing, signed by or on behalf of the Party giving notice to terminate and shall take effect on receipt by the other Party, unless otherwise specified therein.

Notwithstanding any other provision of the Engagement Agreement, should Client terminate the Engagement, Macquarie shall be entitled to receive or retain any amounts then paid or payable to Macquarie up to the date of termination and out-of-pocket expenses in connection with services rendered to the date of termination.

Should Client terminate the Engagement … Macquarie will be entitled to the full amount of any fee(s) as set out in the Engagement Letter if at any time within the following 12 months Client (or any member of the Client Group) reaches

financial close (or enters into an agreement which later reaches financial close) on the Transaction (or a transaction substantially comparable to the Transaction).

If at any time the Engagement is terminated or Client informs Macquarie that it does not intend to proceed with the Transaction, nothing in the Engagement will restrict Macquarie from acting for any person on any matter or transaction similar to the Transaction or involving one or more of the parties to the Transaction …

…

16. ENTIRE AGREEMENT

This Engagement Agreement constitutes the entire agreement between the Parties relating to the Engagement and the Transaction and the Engagement Agreement supersedes and extinguishes any prior drafts, agreements, undertakings, representations, warranties and arrangements of any nature, whether or not in writing.

…

17. SPIRIT OF THE ENGAGEMENT

Should any of the matters contemplated by the Engagement Agreement take some presently unanticipated course, which nonetheless is to Client's advantage, the Parties agree to negotiate in good faith a basis of remuneration within the spirit of the Engagement. The Parties agree that should such a negotiation appear necessary, it will be undertaken as soon as practicable and that the revised agreement will be documented in a form similar to the Engagement Agreement.

…

25. NOVATION

If Client establishes a Special Purpose Vehicle to act on its behalf in connection with the Transaction, then the Engagement Agreement may be novated to the that Special Purpose Vehicle with the prior consent of Macquarie …

26. ACCESSION

If Client (in this Clause 26, the 'Original Client') forms a consortium in connection with the Transaction with one or more other parties ('Consortium Members'), each Consortium Member may accede to this Engagement Agreement with the prior written consent of Macquarie, provided that each such party executes a copy of the Engagement Agreement in which

> it undertakes to be bound by all the terms of this Engagement Agreement as if it were a party to it. Following such accession:
>
> (a) the Consortium Member(s) and the Original Client shall jointly be treated as if they were the Client under this Engagement Agreement;
>
> (b) the obligations of, and the scope of service to be provided by Macquarie under this Engagement Agreement shall not be increased over the obligations and scope that would have applied had this Engagement Agreement continued to only be with the Original Client; and
>
> (c) Macquarie's work under this Engagement Agreement shall only deal with a Consortium Member or the Original Client in their capacity as a member of the consortium in connection with the Transaction, and shall not be required to take account of any different interests and objectives in relation to the Transaction or otherwise which any Consortium Member or the Original Client may have.
>
> …
>
> 29. GOVERNING LAW
>
> This Engagement Agreement will be governed by and construed in accordance with the laws of England and Wales.
>
> …"

The "Factual Matrix"

62. It was not in issue that the Engagement Agreement has to be given the meaning which it would have been understood to have by a person having "the background knowledge which might reasonably have been available to the parties in the situation in which they were at the time of the contract". This may be, and was, referred to by way of shorthand as the "factual matrix".

63. As I have already indicated, much of the time at trial and much of the evidence was devoted to establishing what this "factual matrix" was, with each party seeking to emphasise different aspects. MCEL, for its part, sought to demonstrate that, at the time of the contract, various aspects of the intended project were not "set in stone", and were capable of significant change. NOMEG, by contrast, sought to show that matters were in a relatively advanced and mature state of development, and that the parties did not contemplate any significant changes thereto.

64. Before considering the various aspects of the "factual matrix" which were the subject of debate, and my findings relating to each, it is necessary to express a word of caution. Where arrangements had got to by the time of the Engagement Agreement, and what the parties thought was likely to happen to the project at that stage, does not of itself determine the effect of the Engagement Agreement. It is not suggested that the background allows terms to be implied into the Engagement Agreement which are

not expressed therein. The background or matrix provides material which may be useful in deciding what a reasonable person would have understood the parties to have meant by the language which they used.

65. On the basis of the documents presented and the oral evidence called at the hearing, I have come to conclusions and make the following findings in relation to the "factual matrix".

66. First, that at the time of the conclusion of the Engagement Agreement, both parties considered that the most important and valuable aspects of the project were the BSH Permit and the grid connexion. This was essentially common ground, but appeared to me to be apparent from the evidence given.

67. Secondly, at the time of the conclusion of the Engagement Agreement, based on their knowledge of what had been done and remained to be done, the parties contemplated it to be possible that Financial Close to the project could occur within three months. But on the other hand, they did not regard it as definite that it would; there was undoubtedly a possibility that it would not.

68. In relation to this point, it is significant that in a joint letter to the proposed EPC consortium of 18 January 2013, Windreich and MCEL expressed "confidence" that financial close would be achieved by April 2013. I consider that this reflected the parties' reasonable view that, given the circumstances, and with a fair wind, such a timescale could be met. But it appears to me clear that the facts were such that that timescale could not have been regarded as guaranteed. It was, as Mr Wilde and Mr Jaeschke were both inclined to accept, ambitious but by no means impossible. Meeting that timescale would depend on a number of matters, including, as Mr Wilde explained, Deutsche Bank starting a debt-raising process within a short period after the date of the Engagement Agreement and that in turn depended on the obtaining of equity finance.

69. Thirdly, given what had happened up to that point, the clear contemplation of both parties was that the project would be likely to involve the use of Areva M5000-116 turbines. A turbine supply agreement had been concluded between Windreich and Areva in 2011. Nevertheless, the involvement of Areva could not be regarded as finally determined. The proposed use of Areva turbines was not seen as wholly without risk. Thus, the Lahmeyer Technical Due Diligence report of November 2012 had recognised that, while the project concept involving Areva 116 turbines was at a "very advanced development stage", nevertheless "the operational experience of the turbine is limited", Areva's ability to ramp up to serial production was unproven, there were potential gearbox and blade problems, and the proposed tripod foundation had a "limited track record". The identity of the turbine supplier was a matter on which potential investors might have their own views. It appears, moreover, that the parties should reasonably have contemplated, as at 18 January 2013 that, because financing would not have been completed by 31 January 2013, each of Areva and Windreich would become entitled to terminate the turbine supply agreement. A change in turbine supplier would doubtless have been reasonably regarded by the parties as very unlikely to have been agreed if the project remained on track for financial close by April 2013 or shortly thereafter, but it would not have been regarded as impossible for there to be agreement on turbines of a different manufacturer to be used if that timetable was materially departed from. The parties would have regarded as rather more likely that there might be a decision to use Areva

135 rather than Areva 116 turbines, even within the shorter timescale. This was a matter which had been the subject of discussion with at least one potential investor.

70. Much the same position applies to the involvement of Hochtief for the balance of plant. A change to this supplier would have been regarded as very unlikely to be a possibility if the project remained on track for financial close by April 2013. There was no indication that it would be necessary to change the balance of plant supplier. But on the other hand, the final agreements had not been made, and could not be regarded as set in stone unless and until there had been input from the investors.

71. Fourthly, as to contractual structure, this was the subject of ongoing debate. Various stakeholders had supported the idea of a multi-contract structure. Indeed, contracts with various suppliers had been negotiated. Mr Balz, however, had been strongly in favour of an EPC structure. The proposed structure of a turnkey EPC contract with a consortium consisting of Hochtief and Areva Wind, which would be liable for the delivery of the entire project was, by the time of the Lahmeyer report, the intended structure. The EPC contract had not, however, been concluded by the time the Engagement Agreement was entered into. There had not by then been agreement on the price, or on the level of the consortium's total liability. The contracts originally negotiated by NOMEG with multiple suppliers had not been transferred to the consortium. Whether there should be an EPC contractual structure was a matter on which potential investors might have views, and certainly the EPC contract terms could not be finally agreed without the input from investors. It was nevertheless considered to be possible, even likely, that an EPC contract could be agreed by April 2013 if all went smoothly.

72. Fifthly, as to the corporate structure which would be employed, it was envisaged that the equity investment and debt should be made available to NOMEG. But this was a matter on which there would have been room for considerable flexibility. In this regard, I accepted that the evidence of Mr Wilde represented what would have been reasonably within the contemplation of both parties as at 18 January 2013, namely: (a) that by that time the specific corporate structure had not been finalised; (b) that it was "not uncommon for shareholders to actually come in at a company level above the licence-holder"; and (c) that, provided Windreich got the money, it would have been "neutral to the structuring, and … [was] hiring [MCEL] to advise on the structuring."

73. Sixthly, Windreich was looking to obtain Sponsor Equity with a minimum base value of €120 million. That was regarded as a realistic aspiration, but was not guaranteed, because it would depend on the terms come to with investors.

Construction – Language and Terms of the Engagement Agreement

74. The Engagement Agreement commences by referring to "recent discussions" in relation to the Project. It has not been pleaded by either party that this was a reference to specific discussions which need to be identified and isolated in order to construe the Engagement Agreement. I consider that it is a general reference to the entirety of the communications between Windreich/NOMEG and MCEL. I do not consider that the effect of the reference is different from construction of the Engagement Agreement having regard to the factual matrix as I have found it to be.

75. The Engagement Agreement uses the significant term "the Project". That is the subject of a definition which at first blush is unclear and unhelpful. It appears to define the Project as being the same as NOMEG (ie the GmbH), and to indicate that

that entity is also to be called "MEG 1" in the Engagement Agreement. A reading of the entirety of the Engagement Agreement indicates, however, that this is not, or not all of, what was intended. While on occasion "the Project" is used in the sense of referring to a corporate entity, as in clause 3(a) ("existing shares of the Project"), in other places it is used to refer to the planned windfarm, as in the phrase in the Introduction "... for the construction of the Project". The fact that the word "the" appears before "Nordsee" in the first line of the Introduction suggests that there may be a missing word, "project", outside the definitional parentheses. Be that as it may, because of the particular term chosen, because of the use of "Project" to mean the projected windfarm in the third line of the Introduction, and in light of the factual matrix, I consider that the term "Project" when it is found in the agreement, save where the context dictates that it applies to NOMEG as a corporate entity, means the windfarm project in which NOMEG was involved at the time of entry into of the Engagement Agreement. This appears to me to be the most natural interpretation of the phrases in which the term appears in Clause 1, Equity Raising, bullets 2 and 3; in Clause 3(b) and the following paragraph; and in Clause 6.

76. It may be noted that, although clearly there were numerous aspects of the potential windfarm project under consideration at the time of entry of the Engagement Agreement, to many of which I have already referred, the parties, while they could have done so, did not in the Engagement Agreement actually specify any as being necessary constituents of a "Project" for the purposes of that agreement.

77. Turning to "the Transaction", this again is poorly and unhelpfully defined. It might appear from the Introduction that it is intended to mean the *managing* of an equity raising process and *advising* the equity consortium on project senior debt. That is not what is really intended, however, as is apparent from Clause 1, Equity Raising, final bullet; Clause 1, Debt Advisory, bullet 3 (which is clearly not seeking to refer to advice and assistance in relation to managing the equity raising process and advising the equity consortium); Clause 3(a) and (b); Clause 3, last paragraph; and Clause 6. Instead, what those paragraphs indicate is that the "Transaction" is intended to refer to an equity and debt raising process in relation to the "Project". Moreover, Clauses 3 (last paragraph) and 6 show that, at least for the purposes of those provisions, a Transaction is regarded as "occurring" when an equity and debt raising process for the Project has reached a particular point, which must be the same as when a Transaction is regarded as "completed" in Clauses 3(a) and (b). This must be financial close, and this is confirmed by clause 13 of the Standard Terms of Engagement.

78. The effect of the first paragraph of the Introduction is not, in my view, to make the sale of part or all of the existing shares of NOMEG a necessary part of a Transaction in the sense that there could not be a Transaction without such a sale. While, again, the clause is poorly drafted, it seems clear, especially when the factual matrix is considered, that "the sale of all or part of the existing shares of MEG I" was one of the matters which might be part of an equity raising process or on which MCEL was to advise, and in that sense "included", rather than its being an essential feature of a Transaction.

79. A further significant feature of the Engagement Agreement is what it says, and does not say, about the timescale for the engagement. What is provided for in Clause 6 is an Exclusivity Period "until *at least* 30 September 2013" (my emphasis), and for a period in which Fees are payable of 12 months following 30 September 2013 or the termination of MCEL's engagement. Termination can be at any time by either party

by giving notice (clause 13 of the Standard Terms of Engagement), but in the absence of notice the engagement runs on until financial close of the Transaction. Further, as specified in clause 3 of the Engagement Agreement, if a Transaction occurs within 18 months of the termination of the engagement "involving a party with whom [MCEL] had been in discussions or to whom [MCEL] had send (sic) information in connection with the Transaction" during its engagement, then MCEL would still be entitled to fees.

80. A number of matters arise from this. One is that the parties contemplated and provided for MCEL to be engaged in work on the Transaction until at least 30 September 2013, that is some 8 ½ months after the entry into of the Engagement Agreement. Clearly, in such a period, there would be time for more changes to be made in relation to how the project – using the term in an ordinary and undefined sense – would be structured and who its participants would be, than if a shorter period had been set. Secondly, the provisions for fees to be payable for 12 months after the end of termination of MCEL's engagement or of the Exclusivity period, whichever should be later, and for fees to be payable if a Transaction should occur within 18 months following termination if it involved a party with whom MCEL had been in discussions or to whom it had provided information, indicate that it was contemplated that there might be steps being taken to complete the Project and conclude a Transaction for a significantly longer period than that between the date of the Engagement Agreement and the end of the Exclusivity Period. Given the practical reality that, in putting together complex arrangements such as would be involved here, there would be bound to be modifications and changes to the plan over such a period, this tends to indicate that the concept of a Transaction, and thus of the Project, was one which embraced arrangements which might be significantly altered or developed from those which were in active contemplation at the time of entry of the Engagement Agreement.

81. The terms of clause 1 of the Engagement Agreement also indicate that there was flexibility as to the way in which the Project could be brought to fruition. MCEL's role included advising as to the development of "an equity raise and sale strategy plan and timetable". The strategy, and not merely the tactics, of the equity raise were thus for consideration and determination. Equally, MCEL (by the second bullet under "Debt Advisory") was to advise on the "optimal capital structure achievable" indicating that the capital structure was not fixed, and that it would have to be determined in light of what was actually found to be capable of implementation, this doubtless being in part determined by what investors and lenders there might be and what their requirements were.

82. The same contemplation of possible changes to the arrangements which were anticipated at the time of the entry into of the Engagement Agreement is indicated by clauses 25-27 of the Standard Terms of Engagement, in that those clauses provide for the introduction of an SPV to act on behalf of the Client, and the formation of a consortium "in connection with the Transaction" by the Client.

Commercial sense

83. Considerations of commercial common sense favour an interpretation of the Engagement Agreement by which MCEL's entitlement to fees exists notwithstanding significant changes to the way in which the proposed project is brought about. Were this not the case MCEL might have an incentive to advise in favour of a particular

way in which matters might be arranged which ensured that it fell within the terms of the entitlement to fees, rather than in favour of a different arrangement which, although more advantageous to the client, did not.

Was the transaction which reached Financial Close a Transaction within the Engagement Agreement?

84. This, ultimately, is the point which separates the parties.

85. NOMEG's pleaded case[3] is that the term "Project" is "defined by [what were as at 18 January 2013] a series of complete or near complete detailed agreements", and that "Transaction" has to be understood by reference to the "Project" as thus "defined". It is NOMEG's case that the arrangements which ultimately went to financial close did not accord with those "complete or near complete detailed agreements."

86. The terms of the Engagement Agreement themselves provide for broad definitions of both "the Project" and the "Transaction". There is no reference, as necessary parts of either, to any of the various specific "complete or near complete detailed agreements" which NOMEG contended existed, and I do not consider that any such reference can be implied. Furthermore, as I have said, the Engagement Agreement contemplates a potential timescale of considerably more than 2-3 months, which would have given time for significant changes and developments of the arrangements. There are, in addition, considerations of commercial sense which militate in favour of giving a comparatively wide meaning to the terms "Project" and thus "Transaction".

87. In my judgment, the "factual matrix" as I have found it to be does not provide a basis for saying that the terms "Project" and "Transaction" have to be given the narrow meaning for which NOMEG contends in its Amended Defence. That "factual matrix" was one in which, while the major aspects of the projected windfarm and its financing had been progressed to a point where, if all went well, financial close could take place within a period of a few months, nevertheless was also such that there was the possibility that that time scale would not be adhered to, and where most aspects of the project could not be regarded as "set in stone", not least because their ultimate form would depend on the views of the investors who might be involved.

88. For these reasons I reject NOMEG's argument that those terms can be regarded as "defined" by a series of near complete agreements which were under discussion at the time the Engagement Agreement was entered into.

89. NOMEG's second main argument, however, was that even if those terms cannot be said to have been defined by reference to complete or nearly completed agreements as at January 2013, but have rather wider meanings, nevertheless what actually happened still cannot be considered as falling within them, but was instead simply too different from anything which was contemplated at the time of the Engagement Agreement to fall within the concepts of "Project" and "Transaction" for which it provided. In this regard NOMEG pointed to an extensive list of arrangements which were not the same as those contemplated as most likely to be put in place at the time the Engagement Agreement was entered into. At this stage of its argument, it contended, as I understood it, that though some, or perhaps many, of those changes might not mean that there was no "Project" or "Transaction" within the Engagement Agreement,

[3] Amended Defence, paragraphs 12, 23.1.

taking them all into account it could be seen that what eventuated did not fall within those terms. It pointed in particular to the changes to the contractors; to the contract structure; to the make, type, number and specifications of the turbines; to the change to DolWin3; and to the structuring of the financing with NOMEG becoming a shareholder in an SPV which held the rights and which received the equity and debt financing.

90. This is a significant argument, but I cannot accept it. In my judgment taking into account the points as to the language used in the agreement as a whole, and the consideration of commercial sense I have mentioned, what was intended by "the Project" as that term appears in the Engagement Agreement was the projected windfarm in a particular area of the North Sea, for which a BSH permit had already been obtained. That was the economic opportunity, and it was the existence of that economic opportunity which provided the reason for raising finance and for engaging MCEL. I consider that any equity and debt raising, which was sufficient to allow the construction of that windfarm and the exploitation by the Client of that economic opportunity would constitute a "Transaction"; and in particular I consider that the arrangement which ultimately went to financial close fell within that concept.

91. Unless a wide meaning of the type I have set out is given to the relevant terms, there would be considerable difficulties in knowing at what point there had been sufficient changes to the contemplated arrangements for there no longer to be a "Project" or a possible "Transaction". This would produce uncertainty as to whether MCEL remained bound by the Engagement Letter and/or would be paid for work that it did. That cannot have been the intention of the parties.

92. Furthermore the width of the terms "Project" and thus "Transaction" is counterbalanced, commercially, by the fact that the Client was able to terminate the agreement at any time. It would then only be liable for fees if a Transaction took place within a set time after such termination. By way of example, in the present case, had NOMEG terminated the Engagement Agreement in late 2014 when Mr Heer developed his proposal to transfer the BSH Permit and grid connexion to a new SPV, it would not have been liable to pay MCEL any fees. NOMEG chose, for whatever reason, not to terminate the Engagement Agreement at any time. Coupled with the express provision in the Engagement Agreement that, if a Transaction took place in the relevant period, fees were payable whether or not MCEL was responsible for the raising of the debt and equity concerned, this fact has had the consequence that NOMEG is liable for MCEL's fees.

Uncertainty

93. As I have already mentioned, NOMEG made the alternative case that, if "Project" and "Transaction" did not have the effect for which it contended, the term "Transaction" was too uncertain for MCEL to have an enforceable right to fees.

94. A conclusion that a contractual provision is too uncertain to be enforceable is, as was said by Leggatt J in Astor Management AG v Antalaya Mining Plc [2017] EWHC 425 (Comm) at [64], (approved in Openwork Ltd v Forte [2018] EWCA Civ 783) "a last resort or, as Lord Denning MR once put it, a 'counsel of despair'".

95. I reject the argument that any of the relevant provisions of the Engagement Agreement are too uncertain to be enforced. As is not uncommon, their proper construction has been the subject of argument. But when the background to the

Engagement Agreement and its terms are construed in the manner approved by the authorities I consider that they can be given a clear meaning, and one which can be applied to the factual situation which arises in this case.

96. On this basis MCEL's alternative claims for a reasonable sum or in unjust enrichment, which are put forward only if the relevant terms of the Engagement Agreement are too uncertain to be enforced, do not arise.

Conclusion on Entitlement to Fees

97. For the reasons given above, I hold that MCEL is entitled to recover both the "Completion Fee" and the "Debt Advisory Fee" specified in the Engagement Agreement.

Quantum

98. NOMEG has accepted that the "Completion Fee" should be calculated as 2% of the equity finance raised for Merkur Offshore GmbH, which should be taken as €506,897,864; and that the "Debt Advisory Fee" should be calculated as 0.5% of the senior debt raised for Merkur Offshore GmbH, which should be taken as €1,232,967,000.

99. There is however an issue as to the currency in which fees are payable. MCEL's position is that fees are payable in Euros, because the equity and debt was raised in Euros, and the fees are a percentage of the amounts raised. NOMEG by contrast contends that the fees are calculable in sterling. It refers to clause 9 of the Standard Terms of Engagement, which provides:

"All fees and other amounts payable under this Engagement Agreement shall be paid in Pounds Sterling or such other currency (if any) specified in the Engagement Letter, free and clear of, and without deduction or withholding of any kind, so that the net amount received by Macquarie is the same as the gross amount payable if no withholding or deduction were made."

100. In my judgment NOMEG is correct on this point. Sterling is stipulated as the currency of payment of fees unless there is some other currency specified in the Engagement Letter. No other currency is specified in the Engagement Letter. There is simply no mention of any currency.

101. There is also an argument as to the appropriate rate of pre-judgment interest. Although there is a provision in MCEL's Standard Terms of Engagement as to the payment of interest, Mr Toledano QC accepted that the rate there referred to does not, in fact, exist and indicated that MCEL pursued its claim simply on the basis of section 35A Senior Courts Act 1981. The rates at which it claims are the rates that Macquarie Group Treasury charges MCEL on the amount of outstanding debt owed to it to fund the receivables on MCEL's balance sheet, and the costs that Macquarie Group Treasury would have to incur in raising funding in respect of the receivables in the external market. It is said that these rates are a useful proxy for the costs to a bank such as Macquarie of borrowing money from within an international group. They approximate to 2% over base.

102. NOMEG contends that these rates are inappropriate. It refers to Assetco plc v Grant Thornton UK LLP [2019] EWHC 592 (Comm) and Fiona Trust & Holding Corporation v Privalov [2011] EWHC 664 (Comm). It contends that the appropriate

rate of interest is usually taken by the Commercial Court to be the cost of short-term borrowing by an entity with similar characteristics to the claimant, and that the exercise is a broad brush one. It contends that the Commercial Court generally takes a rate of 1% over the short-term lending rate, though this is not a fixed or default rate. In the present case the appropriate rate is 1% over 6 month Sterling LIBOR.

103. I accept NOMEG's submissions that an appropriate rate is 1% over 6 month Sterling LIBOR, given that MCEL is an investment banking firm which is part of a substantial global banking group.

104. There is also an issue as to whether MCEL is entitled to charge VAT on the fees to which it is entitled. It has been agreed between the parties that this issue should be resolved after I have delivered this judgment on the issues of liability for the fees. I accept that that is the sensible course.

Conclusion

105. There will be judgment for MCEL in respect of the fees claimed, and interest on the basis I have set out. The issue of an entitlement to VAT will be determined at a later stage. I trust that the parties can agree the terms of an order. If not, I will receive further submissions on it.