Neutral Citation Number: [2022] EWHC 2038 (Comm)

Case No: LM-2021-000281

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 2 August 2022

Before:

HIS HONOUR JUDGE KEYSER QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

GIAN ANGELO PERRUCCI	**Claimant**
- and -	
ORLEAN INVEST HOLDING LIMITED	**Defendant**

- -
- -

Steven Thompson QC and **Adam Cloherty** (instructed by **Bird & Bird LLP**) for the **Claimant**
Andrew Holden and **James Bradford** (instructed by **Grimaldi Studio Legale LLP**) for the **Defendant**

Hearing date: 21 July 2022

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Approved Judgment

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

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HIS HONOUR JUDGE KEYSER QC

His Honour Judge Keyser QC:

Introduction

1. In these proceedings the claimant, Mr Perrucci, claims damages for what he alleges is the repudiatory breach by the defendant, Orlean Invest Holding Limited ("Orlean"), of a consultancy services agreement.

2. By an application notice dated 28 April 2022 Mr Perrucci applies for summary judgment on the claim pursuant to CPR r. 24.2. (The application is also put on the basis of r. 3.4, but no different or further grounds are relied on in respect of that additional basis and I need not consider it separately.)

3. Orlean resists that application and, by an application notice dated 26 May 2022, applies for permission to amend its defence in order to raise an additional ground of defence.

4. Mr Perrucci relies on two witness statements of his own, dated respectively 27 April 2022 and 14 June 2022, and a witness statement from one Mr Harry Harrison dated 19 April 2022. Orlean relies on three witness statements from its solicitor, Mr Michael Bray, of Grimaldi Studio Legale LLP, of which the first and second are dated 26 May 2022 and the third is dated 20 July 2022. In his third witness statement, Mr Bray makes clear that the source of his information and belief is what he has been told by Mr Gianpiero Fiorani, Orlean's CEO.

5. I am grateful to counsel for their engaging and robust submissions: on behalf of Mr Perrucci, Mr Steven Thompson QC, who appeared with Mr Adam Cloherty; on behalf of Orlean, Mr Andrew Holden, who appeared with Mr James Bradford.

The procedural law

6. Many cases have explained the correct approach to applications for summary judgment, including the following: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [8]–[10] (Potter LJ); *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (Lewison J), approved by the Court of Appeal in *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37, [2017] 4 WLR 163; *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at [41]-[42] (Asplin LJ, dealing with the similar test for permitting amendment of a statement of case); *Skatteforvaltningen v Solo Capital Partners LLP* [2020] EWHC 1624 (Comm) at [3]-[4] (Andrew Baker J); *Foglia v The Family Officer Ltd* [2021] EWHC 650 (Comm) at [11]-[18] (Cockerill J); *King v Stiefel* [2021] EWHC 1045 (Comm) at [11]-[25] (Cockerill J). There are many other such cases, of course, and I was referred to some of them. I need not set out quotations from the cases, not even Lewison J's classic summary in the *EasyAir* case. I have the authorities firmly in mind.

7. It seems to me that the main points for present purposes are as follows. Summary judgment will be given against a defendant on a claim or issue only if the court is satisfied that the defence to that claim or issue has no real, as opposed to fanciful, prospect of success. A defence that is merely arguable but carries no degree of conviction will not have a real prospect of success. The court will not conduct a mini-

trial and, in circumstances such as the present, will be mindful that full disclosure has not yet taken place and that there might be more evidence to come. Accordingly, where there are disputed questions of fact, it will not generally attempt to determine where the probabilities lie. However, the court ought to carry out a critical examination of the available material and is not bound to accept the mere say-so of a witness or a party; where it is clear that a factual case is self-contradictory or inherently incredible or where it is contradicted by the contemporaneous documents, the court, after careful consideration of the evidence that is currently before it and having regard to the nature of such further evidence as might reasonably be expected to be available at trial, is entitled to reject that case even on a summary basis. The court will not be dissuaded from giving judgment by mere Micawberism, the chance that something might turn up. Where the claim turns on a point of law or construction that can properly be determined on the available evidence, the court is entitled to go ahead and determine it; though it should be very cautious before making findings of dishonesty on a summary basis. Finally, one should not lose sight of r. 24.2(b): even if the defence has no real prospect of success, the court can only give summary judgment if "there is no other compelling reason why the case or issue should be disposed of at a trial."

8. At the hearing before me, the parties were rightly agreed that the test for summary judgment should be considered with reference to the terms of the draft amended defence: as no other potentially relevant considerations such as lateness of the application to amend arise, permission for the amendment ought to be given if but only if the case advanced by the amendment has a real prospect of success. In this regard, it is helpful to note the remarks of Asplin LJ, with whom Hamblen LJ and Nugee J agreed, in *Elite Property Holdings Ltd v Barclays Bank Plc* in the context of an appeal against a refusal to permit amendment of particulars of claim:

> "41. For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 AC 1.
>
> 42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon."

Core facts and the claim

9. Mr Perrucci is an Italian citizen and resident in Switzerland. He has extensive experience in the logistics sector in the oil and gas industry in Africa. He conducts his business through companies, one of which is Finstar Holding Limited ("Finstar"), a company incorporated in the British Virgin Islands.

10. Orlean is incorporated in the British Virgin Islands. It is a holding company that, through its subsidiaries, offers logistics facilities and services. Orlean's principal subsidiary is Intels Nigeria Limited ("Intels"), which operates oil and gas industry port facilities in Nigeria and elsewhere in West Africa, including in particular Onne Port, Rivers State, Nigeria. The President and majority shareholder of Orlean is Mr Gabriele Volpi. As I have mentioned, the CEO of the Orlean Group is Mr Gianpiero Fiorani.

11. Until the matters with which this litigation is concerned, Mr Perrucci and Gabriele Volpi were longstanding business associates and close friends. On account of this connection, Finstar acquired a minority shareholding in Orlean and Mr Perrucci became a director and Vice President of Orlean. It is also relevant that, by reason of their long friendship, Mr Perrucci has been close to Gabriele Volpi's children, one of whom is Mr Matteo Volpi.

12. Orlean's case regarding Matteo Volpi is as follows. Since 2017, shortly after he left his employment with the Orlean Group, Matteo Volpi has been the CEO of a company called IO Materials Services Limited ("IOMS"), a direct competitor of Intels. Intels and IOMS have been engaged in litigation with each other in Nigeria since 2020. Matteo Volpi and Gabriele Volpi have been engaged in litigation and arbitration proceedings with each other since 2018. Mr Perrucci does not entirely accept this case—in particular, he denies that IOMS is a direct competitor of Intels—but for the purposes of this application I shall assume that what Orlean says is correct.

13. In late 2019 Mr Perrucci resigned as a director and the Vice President of Orlean and Finstar agreed to sell its shareholding in Orlean to that company. The terms on which Mr Perrucci and Finstar would end their existing relationships with Orlean had been discussed and agreed in principle between Mr Perrucci and Mr Fiorani at several meetings at the Hotel Rosa Grand in Milan and, in particular, at a final meeting in November 2019 ("the November Meeting"). The central terms of the arrangement were these: Mr Perrucci would resign from Orlean but would be appointed as a consultant for a four-year term on a remuneration of US $75,000 per month (which was the same as his remuneration as a director); and Finstar would sell its shareholding to Orlean for US $150,000,000, but payment would be deferred for three years and meanwhile Finstar would receive quarterly payments of interest on the purchase price.

14. Several instruments were executed to give effect to this agreement, including the following:

    1) A Share Transfer Agreement dated 29 November 2019 between Finstar and Orlean ("the STA"): Finstar agreed to sell its shares in Orlean in consideration of the issue by Orlean to Finstar of loan notes in the sum of US $150,000,000. The STA was to be governed by and construed in accordance with the law of England.

2) A Convertible Note Agreement dated 29 November 2019 between Finstar and Orlean ("the CNA"): Finstar agreed to lend Orlean US $150,000,000 with a repayment date ("the Maturity Date") of 31 December 2022 and payments of quarterly interest at 9% per annum in the meantime. Again, the CNA was to be governed by and construed in accordance with the law of England. The CNA is the most technical of the various documents and, although it is not itself central to the case, it will be necessary to consider some of its detailed provisions in connection with one particular issue that arises (see paragraphs 56 and 57 below).

3) A Consultancy Services Agreement dated 2 December 2019 between Mr Perrucci and Orlean ("the CSA"): this is the central document in these proceedings and its relevant terms are set out in paragraph 15 below.

4) A letter from Mr Perrucci, by which he resigned from the boards of directors of Orlean and of its subsidiaries.

5) A letter dated 28 November 2019 from Mr Gabriele Volpi to Mr Perrucci ("the Side Letter"): see paragraph 16 below.

15. The CSA recited (A) Mr Perrucci's "extensive experience in the logistics sector in the oil and gas industry in Africa", (B) his recent resignation as director and Vice President of Orlean, (C) Orlean's wish "to take advantage of the collaboration of Mr Perrucci as an external consultant to the Orlean Group given the many years of experience in the sector and the deep knowledge of the African continent", (D) Mr Perrucci's agreement to collaborate as an external consultant, and (E) the parties' desire to enter into an agreement pursuant to which Mr Perrucci (referred to there, though not consistently, as "GAP") would provide Orlean, at its request, all consultancy services that it may need with particular reference to the new "Oil and Gas Service Centre" projects to be developed in Africa. The operative parts of the CSA included the following:

> "*Article 1 – Services*
>
> GAP shall provide Orlean, upon request of this latter, any kind of consultancy services in the logistics field to the oil and gas industry, in particular for the development of some projects that Orlean intends to implement in Africa. Such services shall include, but not limited to [sic], the following:
>
> a) Assistance in giving commercial information about the market evolution of the oil and gas industry, particularly with respect to the African continent;
>
> b) Assistance in the analyses and development of market strategy in the logistics field to the oil and gas industry;
>
> c) Assistance in giving advice of any kinds for the development and implementation of new 'Oil and Gas Service Centre' projects in Africa and in particular for reaching joint-venture agreements with multinational

companies involved in production, marketing and other services in the Oil & Gas industry."

"*Article 2 – Remuneration*

The Parties agrees [sic] that the consideration amount for the services rendered by GAP to Orlean shall be USD 75,000.00 per month to be paid by Orlean to GAP by the end of each month, starting from the month of December 2019 onwards."

"*Article 3 – Duration – Termination*

This Agreement shall commence on 2nd December 2019 and, unless otherwise terminated in accordance with the provisions of this Agreement, shall continue until 2nd December 2023."

"*Article 6*

(a) Access to Confidential Information

Orlean hereby agrees that in the course of his performance of services during the period of this Agreement Mr Perrucci will have access to confidential and private information of Orlean ('Confidential Information')

(b) No disclosure of Confidential Information

Except as may be required in rendering the Services, GAP hereby agrees to maintain confidential and secret and never directly or indirectly use, disseminate, disclose, sell, lecture upon or publish articles relating to any confidential information, without the prior written consent of Orlean, to or for any other individual or company not a Party to this Agreement. GAP agrees that all confidential information that he may give, develop or produce during the period of this Agreement will become and shall be the property of Orlean.

Immediately upon the termination of this Agreement, GAP shall return to Orlean all documents containing Confidential Information, including all copies thereof, in Orlean's possession or control."

"*Article 7 – Governing Law and Jurisdiction*

This agreement shall be governed by and construed in accordance with the law of England and the parties hereby submit to the exclusive jurisdiction of the English courts."

16. The Side Letter was written in Italian, which was also the language in which all relevant conversations were conducted. I have been provided with translations of the communications and, though these are not formally agreed, the hearing before me

proceeded on the basis that they were adequate for the purpose of consideration of the applications; accordingly, I shall refer to the English translations. The Side Letter was in the following terms:

> "In relation to your resignation from the board of directors of the companies listed in the margin, a copy of which is attached for your signature, I hereby grant you a mandate for strategic and management consulting for the period 1.1.2020 – 31.12.2022, at a monthly fee of USD 75,000 to be paid into the account in your name that you will kindly indicate to us.
>
> This assignment[1] is related to the status of bondholder held by the company appointed by you (Finstar Holding Ltd) and will be automatically terminated, without prior notice, if the bonds in question (USD 150 million – maturity 31.12.2022 – interest rate 9% per annum) are redeemed or sold before the established maturity date."

17. It is common ground that Mr Perrucci did not provide any consultancy services under the CSA. There is a dispute between the parties as to whether he was ever asked to provide such services.

18. By a letter dated 28 January 2021 Orlean purported to terminate the CSA with immediate effect. The body of the letter was in the following terms:

> "With reference to the contract signed by you on 2 December 2019, we are forced, with regret, to terminate this contract early with immediate effect, both in relation to the lack of services performed by you and due to obvious states of conflict between the role of consultant that you were supposed to perform for our Group and the support and backing that, as far as we understand, you continue to provide to Mr Matteo Volpi, as indicated below.
>
> The latter, through the company Interoil Material Services Limited (formerly Interoil Global Projects Ltd, the name of which, inter alia, corresponds to companies which you incorporated at the time and still hold), of which Mr Matteo Volpi owns 99% of the share capital, carries out systematic arbitrary and abusive actions against our company Intels, thereby creating considerable damage to the image and income statement of our Group. We are also obliged to instruct you to remove from the Interoil Int Group website, as well as from any advertising material and/or presentations of your companies and your Group, all the photographic references of the Onne base run by Intels, as this, in addition to causing confusion for

[1] The word translated "assignment" was "incarico" in the Italian original. This clearly has the sense of task, job or responsibility. The meaning would perhaps be more clearly conveyed by "appointment".

> our potential customers, it [sic] is false and seriously damaging the image of our Group.
>
> We are taking legal action to certify the absolute illegitimacy of the initiatives launched by Mr Matteo Volpi, with contextual reservation to quantify the damages for the relative compensation.
>
> The actions we have taken are still in progress and the scope may be further extended to those who, directly and indirectly, promoted, collaborated and supported these initiatives.
>
> Finally, again as far as we know, Mr Matteo Volpi and some of his staff alongside him are still linked by a consulting agreement with one or more companies linked to you."

19. Mr Perrucci responded by a letter dated 12 February 2021. He expressed disappointment at Orlean's letter and raised a question as to the identity of the signatory of the letter. He continued:

> "2. The article 1 of the Consultancy Agreement provides that 'GAP shall provide Orlean, upon request of this latter, any kind of consultancy service (…)' Please consider that I have never been provided by any request from Orlean even if I have been at complete disposal of Orlean to provide my service and assistance. For this reason, it is rejected that Orlean has the right to terminate the Consultancy Agreement for the lack of services by my side.
>
> 3. I do not know what kind of investigations you are making in relation to the business of Mr Matteo Volpi and—to be honest—I am not interested to receive more information about it since you need to consider that:
>
> i. I am not a partner—directly or indirectly—of Mr Matteo Volpi in any kind of business initiative or companies owned by him;
>
> ii. I am not involved—directly or indirectly—in any manner in the business run and or managed by Mr Matteo Volpi;
>
> iii. In any case I want to point out that the Consultancy Agreement does not bind me to any non-compete obligation vis-à-vis Orlean."
>
> Considering the above I strongly reject that Orlean has the right to terminate the Consultancy Agreement for the 'state of conflicts (…)'. Moreover, please let me know: where is the conflict?

> 4. With reference to the pictures published on Interoil web site, as well as on advertising material or presentation, I do not understand why you are writing to me. I am not shareholder (directly or indirectly) nor member of the board of directors or manager of any company you are referring to. In any case, to demonstrate once again to collaborate with Orlean, since I have a direct relationship with the management of Interoil Int Group I will inform them of your request if you require me to do it."

20. Having received no response to that letter, Mr Perrucci wrote again on 3 March 2021, asking for a response by 9 March 2021. There is no evidence before me that any response was sent to that letter.

21. The particulars of claim, dated 24 December 2021, aver that the letter of 28 January 2021 was an unlawful repudiation of the CSA and that in breach of contract Orlean had thereafter failed to make any payments to Mr Perrucci in respect of his contractual remuneration under Article 2 of the CSA. By paragraph 16 of the particulars of claim Mr Perrucci purported to accept Orlean's repudiation of the CSA and thereby to terminate the CSA. The claim is for US $2,700,000 in respect of the total remuneration Mr Perrucci should have received under the CSA from the date of the latest payment until the expiration of the term.

22. Orlean filed a defence dated 4 March 2022. The statement of truth was signed by Mr Bray. The grounds of defence will be considered below.

23. Mr Perrucci filed a reply dated 25 March 2022.

24. As mentioned above, Mr Perrucci made his application for summary judgment on 28 April 2022 and Orlean made its application for permission to amend its defence on 26 May 2022. The statement of truth on the draft amended defence is again signed by Mr Bray.

The Defence and the draft Amended Defence

25. The defence and the draft amended defence set out a number of grounds of defence to the claim. I shall deal with them in turn.

(1) Oral/Implied/Collateral Terms

26. The first ground of defence appears in paragraphs 8, 12, 13, 19, 20, 25, 26 and 28 of the draft amended defence; it is also present in the original defence. It may be summarised as follows:

    1) At the November 2019 Meeting it was orally agreed between Mr Fiorani, on behalf of Orlean, and Mr Perrucci, as a condition of Orlean entering into the suite of agreements that included the STA, CNA and CSA, that Mr Perrucci and any company connected to him would (a) not provide funding to Matteo Volpi personally or to any company associated with him and (b) not compete with

Orlean or Intels. (The defence sets out the actual words said to have been spoken in Italian.) These are the "Oral Conditions".

2) By reason of the background, nature and purpose of the CSA and the "overarching agreement", it was an implied term of the CSA, alternatively of the larger contract comprising the CSA and the Side Letter and the Oral Conditions, that Mr Perrucci would act in good faith and would not harm Orlean's interests. This is the "Implied Term".

3) In the first half of 2020 IOMS entered into partnership with a company called International Container Terminal Services ("ICTSI"), a ports operator, to acquire a lease in relation to three berths and some 20 hectares of land at Onne Port, thereby obtaining for ICTSI the right to operate logistic activities in those berths for a term of five years ending on 28 May 2025. Those berths had previously been under the control of Intels; ICTSI's acquisition of the berths directly prejudiced the interests of Intels and Orlean. ICSTI and IOMS subsequently developed the berths into a container terminal at Onne Port, which began operations in May 2021.

4) It is to be inferred that the funding connected with the development of the container terminal at Onne Port was provided by Mr Perrucci or one or more of the companies associated with him and that he was thereby in breach of the Oral Conditions and the Implied Term. The inference arises from the following facts:

    a) At a meeting in 2019, before the November 2019 Meeting, Mr Perrucci told Mr Fiorani that (a) he was providing monthly payments of US $20,000 to Matteo Volpi and (b) he intended to provide Matteo Volpi or companies associated with him with funding of up to US $2,000,000 to undertake various logistical projects, including the development of a container terminal at Onne Port.

    b) The agreement of the Oral Conditions.

    c) Matteo and his associated companies went ahead with the Onne Port project.

5) Accordingly, Orlean was entitled to and did terminate the CSA.

27. I shall deal separately with the Oral Conditions and the Implied Term, although they are for practical purposes different ways of putting the same case.

The Oral Conditions

28. The facts relied on by Orlean are verified by Mr Bray, on the basis of his instructions from Mr Fiorani.

29. In his first witness statement, Mr Perrucci denies that the Oral Conditions were agreed; he describes Orlean's case in this regard as a "complete fabrication". He also denies the allegation that he has funded Matteo Volpi's operations as alleged:

> "42. This allegation is completely false. I categorically have not funded Matteo or his companies to undertake this port project.

> Indeed, neither I nor any of my companies has made any payment to Matteo or any of his companies since 18 April 2019, long before the CSA (and the other agreements related to my departure from Orlean).
>
> 43. The suggestion that I have funded Matteo / his companies in this way is laughable. In my experience, the development of a container port requires huge amounts of funding—often running into hundreds of millions of dollars. I am fond of Matteo, as I am of all Gabriele's children, and I have known him since he was a baby. However, the idea that I would give him the sort of funds that would be required for a project of that nature is absurd."

30. Mr Perrucci further relies on the witness statement of Mr Harry Harrison, who is one of two directors of IOMS; the other director is Matteo Volpi. He states:

> "6. I have been a director and shareholder of IOMS since 2017. In my role as director, I am fully aware as to how the company has been funded.
>
> 7. IOMS has been funded by shareholder loans. Mr Perrucci is not and has never been a shareholder of IOMS and the company is not indebted to Mr Perrucci in any way.
>
> 8. I confirm that at no time has IOMS received monies from Mr Perrucci or any entity connected with him."

31. In his submissions on behalf of Mr Perrucci, Mr Thompson accepted that the defence based on the Oral Conditions was in principle capable of availing Orlean as a matter of law. However, he submitted that, both as regards the existence of the Oral Conditions and as regards the alleged breach, it had no real prospect of success on the facts.

32. Regarding the existence of the Oral Conditions, Mr Thompson submitted that no credible explanation had been advanced or could be imagined for the omission of the terms supposedly agreed from the contractual documents that had been executed. Both parties were represented by lawyers. The agreement reached in principle at the November 2019 Meeting was intended to be embodied in formal documents. The first versions of the documents were prepared by the lawyers acting for Orlean. The Oral Conditions were purely for the benefit of Orlean. Yet there was no mention of the matters said to be comprised in the Oral Conditions. And there is no supporting documentation of any kind making reference to them. The matter rests solely on the instructions of Mr Fiorani to Mr Bray and his stated intention to make a witness statement and give evidence at trial. Neither Mr Fiorani nor Mr Bray has offered any explanation for the omission of the Oral Conditions from the contractual documents.

33. These are very powerful points. Yet I am not persuaded that they are so powerful as to justify summary rejection of Orlean's contention that there were Oral Conditions as alleged. The questions of what was spoken between Mr Perrucci and Mr Fiorani and whether it was intended to have contractual effect are questions of fact. In his reply, Mr Perrucci admits that he had previously, on an unspecified date, told Mr Fiorani that he made payments from time to time to Matteo Volpi, though he denies saying anything

about any particular project and asserts that such payments did not continue after April 2019. In view of what is clearly a bitter dispute between Gabriele Volpi and Matteo Volpi, there is nothing implausible in the idea that Orlean required, or at least sought, an assurance that Mr Perrucci would not provide further financial support to Matteo Volpi. Indeed, as Mr Perrucci's former payments to Matteo Volpi and their personal closeness were known, it might have been more surprising if no such requirement had been mentioned. The fact, as it may be, that US $2,000,000 would be but a drop in the ocean as regards the funding of work to develop a container port is of limited weight when considering this issue: the provision of funding is not necessarily the same as the provision of all necessary funding; I do not know details of what the funding was required for; Mr Fiorani might be expected to know how adequate or inadequate that level of funding was, and it is he who makes the allegation, so he at least does not seem to have found the allegation absurd; and Mr Harrison's witness statement does tend to confirm that Matteo Volpi (who is said to own 99% of the shares in IOMS and who had certainly been receiving funds from Mr Perrucci at some point) has personally made funds available to IOMS. Although the fact remains that the written documents did not make mention of the prohibition on payments to Matteo Volpi and competitive activity, it is possible that such matters would have been regarded as falling outside the scope of the more technical matters that needed to be written down.

34. The point can still be made that, in the absence of any supporting documentation, and without embarking on a fishing expedition, the case on the Oral Conditions rests solely on the oral evidence that is promised from Mr Fiorani. However, the case, though obviously facing significant difficulties, is neither inherently implausible nor rebutted by the documents. It seems to me that to reject it on a summary basis would be to stray into a mini-trial on the merits.

35. There remains, however, the question of breach of the Oral Conditions. If that question were to be considered in isolation, Orlean's pleaded case would not have a real prospect of success, because it amounts to saying that, because Mr Perrucci had previously stated an intention to fund IOMS' project and the project was indeed funded, it is a reasonable inference that the funding came from Mr Perrucci. Taken in those terms, the inference would plainly not be reasonable and the contention that the matter should proceed to the exchange of documentary and witness evidence would be an invitation to a fishing expedition or Micawberism: the hope that something might turn up.

36. If the matter is considered in the round, though, I think it goes a little further. For reasons that I have indicated, Orlean's contention that there were Oral Conditions cannot be rejected summarily. However, Mr Perrucci expressly denies that any such terms were agreed. If his evidence in that respect is false (and, of course, I make no such finding), it is highly likely that it is deliberately false and that he has a reason for giving it. It follows, in my view, that an unresolved conflict of fact, going both to the terms agreed and to Mr Perrucci's credit, is material when weighing the inferences that may be drawn as to any financial assistance that may have been given to Matteo Volpi after November 2019.

37. I conclude that the defence based on the Oral Conditions and the breach of them ought to be allowed to proceed. In reaching this conclusion I do not rely on the further points advanced by Mr Holden—that Mr Harrison's witness statement is carefully worded and rather coy; that the witness statement came from Mr Harrison rather than from Matteo Volpi, although the latter would have been the more obvious person to make it and was

the addressee of a letter of indemnity given by Mr Perrucci to IOMS in respect of the provision of the witness statement; the oddity of the provision of such an indemnity; and the fact that Mr Perrucci has not given evidence of a search exercise, conducted by his solicitors, relating to communications with Matteo Volpi and (perhaps) to financial records and to an absence of relevant documentary evidence—though they do tend to add confidence to a conclusion reached on other grounds. However, it remains a distinct possibility that, after a properly conducted disclosure exercise, this ground of defence will be capable of summary determination.

The Implied Term

38. The case in respect of the Implied Term probably adds nothing of significance: if Mr Perrucci gave no financial assistance to Matteo Volpi and IOMS, it goes nowhere; if he did give such assistance and has falsely denied doing so, it is surely probable that Orlean's case as to the Oral Conditions will be accepted. Even so, I shall discuss the case on the Implied Term briefly.

39. In *Yoo Design Services Ltd v Iliv Realty Pte Ltd* [2021] EWCA Civ 560, Carr LJ, with whom Coulson and King LJJ agreed, gave a convenient summary of the principles concerning the implication of contractual terms at [51]:

> "(i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;
>
> (ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;
>
> (iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;
>
> (iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;
>
> (v) A term will not be implied if it is inconsistent with an express term of the contract;
>
> (vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;

> (vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;
>
> (viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."

40. The implied term for which Orlean contends is that Mr Perrucci would act in good faith and would not harm Orlean's interests. This is pleaded as a single term, but in his submissions Mr Holden rightly treated the two limbs as distinct terms. I shall take them in turn.

41. The contention that the CSA or overarching agreement contained an implied term that Mr Perrucci would act in good faith towards Orlean relies on the developments following the influential judgment of Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526. In a subsequent case, *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm), Leggatt LJ himself stated at [167]:

> "I have previously suggested in *Yam Seng Pte Ltd v International Trade Corp*, at [142], that it is a mistake to draw a simple dichotomy between relationships which give rise to fiduciary duties and other contractual relationships and to treat the latter as all alike. In particular, I drew attention to a category of contract in which the parties are committed to collaborating with each other, typically on a long term basis, in ways which respect the spirit and objectives of their venture but which they have not tried to specify, and which it may be impossible to specify, exhaustively in a written contract. Such 'relational' contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination by one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith."

42. In the course of a lengthy review of the authorities, Fraser J said in *Bates and others v Post Office Ltd (No. 3)* [2019] EWHC 606 (QB):

> "711. … I consider that there is a specie of contracts, which are most usefully termed 'relational contracts', in which there is

implied an obligation of good faith (which is also termed 'fair dealing' in some of the cases). This means that the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. An implied duty of good faith does not mean solely that the parties must be honest.

…

725. What then, are the specific characteristics that are expected to be present in order to determine whether a contract between commercial parties ought to be considered a relational contract? I consider the following characteristics are relevant as to whether a contract is a relational one or not:

1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.

2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.

3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.

4. The parties will be committed to collaborating with one another in the performance of the contract.

5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.

6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.

7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.

8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.

9. Exclusivity of the relationship may also be present.

726. I hesitate to describe this as an exhaustive list. No single one of the above list is determinative, with the exception of the first one. This is because if the express terms prevent the

> implication of a duty of good faith, then that will be the end of the matter. However, many of these characteristics will be found to be present where a contract is a relational one. In other cases on entirely different facts, it may be that there are other features which I have not identified above which are relevant to those cases."

I respectfully consider that Fraser J's remarks at [711] are consistent with authority and that his remarks at [725]-[726] are helpful, provided that they are read as useful guidance and not treated like provisions in a statute.

43. In my judgment, Orlean has not shown a case with a realistic prospect of success for the implication of an obligation of good faith.

1) The CSA was, in my view, manifestly not a relational contract in the relevant sense. It was a contract for the performance of specific services upon request. The obligations of Mr Perrucci were positive not negative: that is, they were not obligations to refrain from acts but rather to perform acts. The specific acts to be performed were defined by Article 1 and the terms of any request pursuant to that Article. The more particular incidents of the obligations to which Mr Perrucci was subject, such as a duty to provide the specific services requested and to exercise reasonable skill and care in doing so and to provide true information, are all matters of general law and do not require the implication of any obligation of good faith. Anyway, despite the language of collaboration in recitals B and C, there was no general requirement of collaboration or cooperation or loyalty and there were no negative stipulations that would prevent the provision of services to third parties. If and to the extent that any consideration of good faith could arise, it would relate to good faith *in the provision of the contractual services.* The fact that Article 4 of the CSA, which I have not set out, required Mr Perrucci to perform the services personally, without delegation or assignment, just shows that the contract concerned his personal services; it does not show that the contract was a relational contract.

2) One can see the central point by considering that Orlean was under no obligation at all to request that Mr Perrucci do anything under the CSA (he, of course, says that it made no such request) and that, if he received no request, Mr Perrucci had no substantive obligations under the CSA. The effect of Orlean's current argument is that in such circumstances, despite the absence of any negative stipulations in the CSA and the absence of duties under Article 1, Mr Perrucci was subject to obligations that restricted his activities with third parties although the activities did not relate to any of his contractual functions under the CSA. This just goes to show that the implied obligation of good faith is being used as a vehicle for importing the substance of the Oral Conditions, if it should be found that they were not in fact agreed.

3) For essentially the same reason, it is also clear, in my view, that, whether Orlean made no request at all of Mr Perrucci or made a request in the terms alleged (see below), a payment to Matteo Volpi could not reasonably be constitutive of a lack of good faith in the performance of the obligations of the CSA.

44. In support of an implied term that Mr Perrucci would not harm Orlean's interests, Mr Holden referred to the factual context (including the ongoing dispute with Matteo Volpi), the personal nature of Mr Perrucci's obligations under the CSA, and the specific provisions of the CSA, in particular the provisions relating to confidential information in Article 6. However, in my judgment the term contended for by Orlean is too vague and imprecise to be either necessary or obvious and is therefore not to be implied into either the CSA or any overarching contract between the parties. The very existence of the confidentiality provisions in the CSA militates against, not in favour of, the implication, because it precisely specifies Mr Perrucci's obligations in respect of confidential information; no further implication is required to give effect to Article 6. The CSA does not contain any further provisions restricting Mr Perrucci's activities concerning business within the scope of Orlean's operations and, while it might have been advantageous to Orlean to seek to include such provisions, that is no reason for implying them in their absence. An implied term that Mr Perrucci would not "harm Orlean's interests" obviously offends against Carr LJ's seventh principle, in that it has no clear prospective content but appears attractive only in the light of a particular issue that has arisen. In fact, what Orlean is interested in is establishing an alternative route to a prohibition on "funding Matteo" (Orlean's skeleton argument paragraph 62). But an obligation not to fund Matteo is not necessary to give business efficacy to the parties' contract and is not so obvious that it goes without saying. If such an obligation was expressly agreed, well and good. If not, it cannot be implied.

(2) Failure to provide services under the CSA

45. This is a new ground of defence, found for the first time in the draft amended defence: in particular, paragraphs 15, 21, 22(b)(ii), 24 and 27. Mr Bray has signed the statement of truth on the draft amended defence and has also verified the relevant factual content in his second witness statement. The new ground of defence may be summarised as follows:

    1) The provision by Mr Perrucci of services upon request, pursuant to Article 1 of the CSA, was a condition of the CSA (or of the larger agreement of which the CSA was a part). Therefore Orlean was entitled to terminate the CSA for any breach of Article 1.

    2) After the execution of the CSA, Mr Fiorani and Mr Perrucci spoke by telephone "on a couple of occasions". On "at least one such occasion" Mr Fiorani asked Mr Perrucci "to inform him of further opportunities for the development of Orlean's business and for further client contacts" and Mr Perrucci agreed to that request and said that "he would do his best to achieve it."

    3) This was a request for services under Article 1 of the CSA.

    4) At no time between the execution of the CSA (2 December 2019) and the letter of termination (28 January 2021) did Mr Perrucci provide the requested services to Orlean.

    5) Mr Perrucci's failure to provide the services as requested was a repudiatory breach of the CSA and justified the termination of the CSA by Orlean.

46. It is common ground on the facts that Mr Perrucci never provided any services to Orlean under the CSA. He says that he was never requested to provide any services.

47. In my judgment, permission for the amendments setting out this defence must be refused, for the following reasons.

    1) It is not reasonably arguable that Mr Perrucci's obligation in Article 1 of the CSA was a condition, such that any breach of it gave Orlean a right to terminate the contract. The obligation is not expressed to be a condition and its nature is quite unsuited to being analysed as such. Orlean's case acquires a purely specious plausibility because no services at all were provided. However, it cannot in my judgment be correct that any and all failures to provide services as requested would amount to a repudiatory breach. The obligation created by Article 1 is a classic example of an innominate or intermediate term, such that the effect of a breach of the obligation will depend on the seriousness of the breach.

    2) Orlean's proposed pleading of the facts creating a concrete obligation and constituting a breach of that obligation is manifestly deficient and fails to satisfy the requirements set out in *Elite Property Holdings Ltd v Barclays Bank Plc.* This is no mere pleading point. Mr Holden stated in argument that Orlean's case is that the alleged conversation with Mr Fiorani imposed on Mr Perrucci an obligation to use his best endeavours to provide the requested services. Although the draft amendment does not make that clear, one can accept the clarification. However, the pleading and evidence regarding the alleged request are in the vaguest of terms. All that we are told is that there was a conversation to the effect alleged at some time after the execution of the CSA and before the purported termination of the CSA. Therefore no case is set out as to how long elapsed between the alleged request and the purported termination. This is sufficient to show that the proposed amendment is incapable of showing a repudiatory breach of an innominate term of the CSA. Indeed, the pleading would not even set out the facts necessary to establish a breach of condition by Mr Perrucci, because he would have been entitled to a reasonable time after the request in which to provide the requested services.

    3) In the light of these inadequacies in the pleading, it is also relevant to note the evidential implausibility of the proposed case. First, as I have mentioned, the details of the all-important request are very vague. Second, the matters now relied on were not mentioned in the original defence. This omission has not been explained and seems to me not readily explicable, if indeed Mr Perrucci had ignored a serious request for services. Mr Holden sought support from the mention of "the lack of service performed by you" in the letter of 28 January 2021, but this is not a strong point: (a) there is no mention of a request for services; (b) the words relied on are equally capable of indicating that Orlean simply begrudged paying money to someone who (as is common ground) was doing nothing for it; (c) in his letter of 12 February 2021 Mr Perrucci stated that he had never received a request to provide services, and Orlean did not respond to that assertion or to his chasing letter of 3 March 2021. Third, Orlean has not advanced any case as to how it responded to Mr Perrucci's alleged inactivity, save by purporting to terminate the CSA. Supposedly, Mr Fiorani asked Mr Perrucci to inform Orlean of further business opportunities and client contacts,

> and Mr Perrucci agreed to do so. One would expect, therefore, that when he had heard nothing from Mr Perrucci Mr Fiorani would make a telephone call or send an email to enquire, "Any progress?" Of such a follow-up there is not a word in Orlean's draft amended defence or evidence. This is striking, because Mr Perrucci's letter of 12 February 2021 made it very clear that the existence of any request was in issue.

(3) Construction of the CSA: contractual right to terminate

48. The next ground of defence appears in paragraph 20(b)(i) of the defence:

> "On a true construction of the CSA, Orlean was entitled to terminate the CSA without cause if and to the extent that the said termination did not breach any other term of the CSA."

This raises a point of construction that can and ought to be determined now.

49. The general principles of contractual construction are well-known and not in dispute. They have been expounded in detail in a series of recent cases, including in particular: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36, [2015] AC 1619; and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. And they have been conveniently summarised by Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 at [17]-[19]. I shall not set out these familiar passages or attempt yet another summary of the principles. For present purposes, the finer points of the law may be taken to be commentary on the basic point that was expressed as follows by Lord Bingham of Cornhill in *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215 at [12]:

> "The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed."

50. The argument advanced on behalf of Orlean is that in Article 3 of the CSA the words "unless otherwise terminated in accordance with the provisions of this Agreement" must be taken to indicate that the CSA itself confers a right, though unexpressed, to terminate the contract and that, in the absence of any further qualification on the right to terminate, it must be exercisable at will, provided at least that the party purporting to exercise the right is not itself in breach of the CSA. Mr Holden submits that this construction "makes perfect commercial sense", because it provided the flexibility to enable Orlean to terminate the contract if it found that it did not require Mr Perrucci's consultancy services; to suppose that Orlean had no such right "is not a commercially sensible construction" (Orlean's skeleton argument, paragraph 46).

51. In my judgment, this argument is plainly wrong. Termination at will without cause is not "in accordance with the provisions of [the CSA]", because there are no provisions in that regard. I do not think that it is necessary to say more. If more is desired, however, it is well established that contractual words with no contractual referent ought

properly to be ignored as being, in their context, meaningless. (Some further remarks on the possible, if doubtful, meaning of these words in Article 3 are set out below.)

(4) Construction of the CSA: quantum

52. A different construction argument appears in paragraph 30(c) of the original defence:

> "[O]n a true construction of the Side Letter, which was incorporated into the CSA or alternatively formed part of the parties' agreement, the parties agreed that the CSA would terminate in any event upon repayment of the Convertible Note Agreement loan. Accordingly, even if Orlean wrongly terminated the CSA (which is denied), the maximum sum that Mr Perrucci is entitled to upon his claim being successful is USD 1,800,000, this being the amount that would be payable pursuant to the CSA prior to the Convertible Note Agreement being repaid."

This ground of defence raises an issue concerning the construction of the CSA (dated 2 December 2019) when read alongside the Side Letter (dated 28 November 2019). The relevant parts of the texts of these documents have been set out above.

53. For Orlean, Mr Holden submits that the Side Letter contains an express provision that, if the bond is redeemed or sold, the CSA will forthwith terminate automatically. Therefore Orlean could always have limited the amount payable to Mr Perrucci under the CSA by redeeming the bond, and any damages payable for repudiation of the CSA should be quantified on the basis that Orlean would have redeemed the bond. Reliance is placed on paragraph 29-092 of *Chitty on Contracts,* 34th edition, (references omitted):

> "A contingency may depend on whether the contract-breaker would have acted in a certain way. Damages cannot be claimed for the defendant's failure to do something that it had no obligation to do. If the defendant fails to perform, when he had an option to perform the contract in one of several ways, damages are traditionally assessed on the basis that he would have performed in the way which would have benefited him most, e.g. at the least cost to himself. So damages were assessed against charterers on the basis that they would have used their contractual entitlements to produce the least profitable result for the owners. A similar situation arises where the contract-breaker had an option to terminate the contract: if the claimant accepts the anticipatory breach of the defendant as a ground for terminating the contract, but the defendant could have exercised his option to terminate the contract so as to extinguish or reduce the loss caused by the anticipatory breach, the court will assess the damages for the breach on the assumption that the defendant would have exercised the option."

54. In his reply, Mr Perrucci admitted (paragraph 21) that "the Side Letter contained terms to which the parties had agreed" (he confirmed this also in paragraph 20 of his first witness statement) but averred (paragraph 15) that it "merely recorded the parties' agreement that the CSA would be terminated if the loan notes (issued under the Convertible Note Agreement) were redeemed or sold before the contractual maturity date thereof (31 December 2022)." Mr Thompson submitted that the construction contended for by Orlean made no commercial sense, because it would be absurd to specify that the contractual termination date of the CSA was 2 December 2023 (Article 3) if in fact it was due to terminate on repayment of the loan 12 months earlier. Rather, effect should be given to the plain words of the Side Letter: the CSA will terminate only if the bonds are redeemed or sold "before" the established maturity date, not if they are redeemed or sold on the maturity date itself.

55. As I shall explain, my conclusion is close though not identical to that proposed by Mr Holden, though my reasoning is rather different from his.

56. It is convenient to proceed in stages. I begin with the STA and the CNA, both of which are dated 29 November 2019. The STA was simple and fixed a completion date for the transfer of Finstar's shares on 29 November 2019 (later varied to 9 December 2019). The CNA provided in clause 2 for the loan of $150,000,000 from Finstar to Orlean "for a period of three (3) years commencing on the 1st day of December 2019 (the 'Effective Date') to 31st December 2022 (the 'Maturity Date'), subject to clause 4." Clause 2.6 provided that, at Finstar's sole discretion, the loan could be extended for a further three years from 31 December 2022, provided that Finstar gave at least 90 days' notice of such extension. Clause 4.6 provided:

> "Notwithstanding the provisions of clause 2.6 above, the Company [Orlean] may give notice to the Investor [Finstar] of its intention to redeem in cash, prior to the maturity date, all or part of the Loan Amount plus Accrued Interest on any date prior to the Maturity Date (the 'Redemption Notice'), without penalties or charges for early redemption of the Loan Amount, provided that the Investor does not object in writing to the Redemption Notice within 7 days following to the receipt of such Redemption Notice. The Company shall repay such portion of the Principal and Accrued Interest covered by the Notice within Seven (7) days after the expiration of the notice period."

The effect of the earlier provisions of clause 4 of the CNA was (a) that at any time after 29 November 2020 Finstar could give 60 days' notice requiring Orlean to convert the loan into fully paid new shares and (b) that Finstar could require repayment of the loan on the Maturity Date or in other specified circumstances, including an Event of Default as defined in clause 6.

57. The effect of the CNA, so far as it is relevant for present purposes, appears to be as follows. The loan was repayable on 31 December 2022. Before that date, Orlean could make repayment only if Finstar did not object; it had no unqualified right to make early repayment (clause 4.6). Finstar could require early repayment only in specified circumstances, but it did have a right to require the conversion of the loan into shares. Further, Finstar had a unilateral right to extend the loan period for a further three years (clause 2.6), although the effect of such an extension is not immediately clear.

58. The Side Letter was dated 28 November 2019; this is the day before the STA and the CNA were executed, though their execution was envisaged in the Side Letter, as was that of the CSA, which was not executed until 2 December 2019. The Side Letter conflicts with the CSA in two related respects: first, the mandate for consultancy services was for a period ending on 31 December 2022, whereas the term of the CSA ran until 2 December 2023; second, according to the Side Letter Mr Perrucci's consultancy "assignment" would automatically end if the bonds were redeemed or sold before the established maturity date, though there is no corresponding provision in the CSA. It is unclear why the term of the consultancy in the CSA extended beyond the Maturity Date. In his first witness statement, Mr Perrucci states that the four-year term was agreed at the November 2019 Meeting (i.e. before any of the documents were drawn up); he continues: "I recall thinking that I would have been [content?] with a consultancy period that matched the timeframe for the buyout of the Shares (i.e. 3 years) but it was Mr Fiorani who suggested pushing it out for a year after and I was content to agree that." However, Mr Perrucci's further evidence is that he subsequently agreed to the terms of the Side Letter.

59. In these circumstances, my reasoning and conclusions regarding paragraph 30(c) of the defence are as follows:

1) The Side Letter cannot be made to cohere fully with the CSA. One must face up to the fact that the various documents do not hang well together and do the best one can to make sense of all that was agreed. In doing so, one must note that, according to Mr Perrucci's evidence, the CSA reflected the duration of the consultancy agreed between him and Mr Fiorani, but that he nevertheless agreed to the terms of the Side Letter in the meantime.

2) The Side Letter was internally coherent. Importantly, it stated that the consultancy was related to Finstar's status as bondholder. It identified the maturity date of the bonds as 31 December 2022, and it identified the same date as the end of Mr Perrucci's appointment as a consultant. And it provided that, if the bonds were redeemed or sold before that date, the consultancy would end forthwith upon payment or redemption. The words "before the established maturity date" have to be read in context: according to the terms of the letter, the appointment would automatically terminate <u>on</u> the maturity date by effluxion of time. It is wrong to read the Side Letter as though it meant that the consultancy would end if payment were made prior to the maturity date but would continue if payment were made on the maturity date.

3) Although in certain circumstances other outcomes were possible, including early repayment of the loan or an extension of the loan, the default position under the CNA was that Orlean would repay the loan on 31 December 2022 (the Maturity Date). This is consistent with the Side Letter.

4) The problem is simply that the CSA has a termination date nearly one year after the maturity date in the CNA (and after the termination date envisaged in the Side Letter). Therefore the default position under the CSA appears to be that the consultancy extends until 2 December 2023, whereas the default position under the Side Letter is that it extends only until 31 December 2022 and can be brought to an end even before that by early repayment.

5) Clearly, something has gone wrong. But in my view sufficient sense can be made of the agreement as a whole without undue difficulty. The term of the CSA is until 2 December 2023. However, as is clear from the Side Letter, the consultancy is linked to Finstar's status as bondholder under the CNA and (despite the terms of the CSA) it will terminate upon redemption of the bonds. It is entirely irrelevant whether redemption takes place on or before the Maturity Date specified in the CNA. Finstar has the power to prevent early repayment (clause 4.6 of the CNA), so Orlean could not unilaterally accelerate the redemption of the bonds. Under clause 4 of the CNA, there were circumstances in which early repayment of the loan might be required by Finstar, and early repayment in those circumstances would terminate the consultancy in accordance with the Side Letter; however, the circumstances have not arisen and no one has suggested that Finstar will require repayment before the Maturity Date. In the event that repayment is not made on or before the Maturity Date, whether because Orlean defaults or because the term of the loan is extended, the consultancy will continue; however, it will in any event end on 2 December 2023.

6) The result is the same as it would be if the words "unless otherwise terminated in accordance with the provisions of this Agreement" in Article 3 of the CSA referred to the wider agreement that included the Side Letter. Such a construction may not strictly be possible, because the CSA uses the words "this Agreement" to refer to itself. However, if all matters acknowledged to have been agreed between the parties are read together and an effort is made to give them a sensible commercial meaning, the outcome is no different, as the Side Letter does identify a clear intention that the consultancy shall terminate upon repayment.

60. The construction point has been argued before me. Neither party has made any suggestion that further facts constitutive of the relevant factual matrix exist or might be subject of further evidence. There is no claim for rectification of any document. Evidence of negotiations is inadmissible on a point of construction. Accordingly, I see no reason why I should not determine the point of construction now, and I do so in accordance with paragraph 59 above.

61. Where this leaves things is, I think, that (subject to the outstanding ground of defence to the claim) Mr Perrucci is prima facie entitled to damages for the loss of his consultancy fees until 2 December 2023, but there remains a question for assessment of damages as to whether the damages ought to be reduced to take account of the probability of repayment of the loan (and therefore termination of the consultancy) on the Maturity Date of 31 December 2022. The practical position is that, if the loan is repaid on the Maturity Date, the damages will presumably be limited to compensation for the loss of consultancy fees to that date.

Conclusion as to the application for summary judgment

62. The ground of defence based on the Oral Conditions has a realistic prospect of success, though it faces obvious difficulties.

63. The ground of defence in respect of quantum of damages has a realistic prospect of success, and damages are to be assessed on the basis of the construction set out in paragraph 59 above.

64. The other grounds of defence do not have a realistic prospect of success. I have considered whether the defence based on the Implied Term might be permitted to remain in play, as it raises no further evidential points. However, in circumstances where it has no realistic prospect of success, is unlikely to avail Orlean if the defence based on the Oral Conditions fails and would involve what I consider an undesirable distraction in respect of the currently fashionable topic of relational contracts, I consider that there is no compelling reason why this unmeritorious defence should be permitted to proceed and, in the exercise of my discretion under Part 24, I shall accordingly determine it against Orlean.

65. The practical effect appears to be that the following parts of the existing defence ought to be struck out: paragraph 18; paragraph 20(b)(i); the words "and in breach of the Implied Term" in paragraph 24; the words "either pursuant to its right to do so without cause, or" in paragraph 25. Paragraph 30(c) need not be struck out, but it is to be read subject to the determination in paragraph 59 above, which means that the limitation on damages proposed by Orlean is not axiomatic.

66. The remaining question is whether the limited refusal of Mr Perrucci's application for judgment (what, in the old terminology, is equivalent to the grant to Orlean of leave to defend the claim on limited grounds) ought to be made conditional on the payment of money into court.

67. The jurisdiction to impose such a condition arises from r. 3.1 (3) and (5) and r. 24.6 and is mentioned as follows in the Practice Direction to Part 24:

> "4. Where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order, as described below.
>
> 5.1 The orders the court may make on an application under Part 24 include:
>
> (1) judgment on the claim,
>
> (2) the striking out or dismissal of the claim,
>
> (3) the dismissal of the application,
>
> (4) a conditional order.
>
> 5.2 A conditional order is an order which requires a party:
>
> (1) to pay a sum of money into court, or
>
> (2) to take a specified step in relation to his claim or defence, as the case may be, and provides that that party's claim will be dismissed or his statement of case will be struck out if he does not comply."

68. In *Gama Aviation (UK) v Taverelas Petroleum Trading DMCC* [2019] EWCA Civ 119, in the context of a slightly different issue, Males LJ, with whom Hamblen LJ and Dame Elizabeth Gloster agreed, said:

> "42. As the Rules make clear, on an application for summary judgment the court may make a conditional order (CPR 24.6). A typical condition will be to require the defendant to pay a sum of money into court or to provide security in some other form. Such an order may be made, as CPR 24 PD para 4 states, 'where it appears to the court possible that a … defence may succeed but improbable that it will do so'. It is not necessary to show that a defence is 'shadowy' or 'dubious in its bona fides' (expressions which were sometimes used in considering whether to give conditional leave to defend under the pre-CPR regime), although if a defence is shadowy or of doubtful good faith that will no doubt be a relevant consideration in exercising the power to make a conditional order and deciding the amount of any security which should be ordered.
>
> 43. It follows that there is a category of case where the defendant may have a real prospect of success, but where success is nevertheless improbable and a conditional order for the provision of security may be made. This is the typical case where a conditional order may be made requiring the provision of security for the full sum claimed or something approaching that sum.
>
> …
>
> 54. Fifth, the court's power to make a conditional order on a summary judgment application is not limited to a case where it is improbable that the defence will succeed. Such an order may be appropriate in other circumstances, for example (and without being exhaustive) if there is a history of failures to comply with orders of the court or there is a real doubt whether the party in question is conducting the litigation in good faith. However, the court needs to exercise caution before making a conditional order requiring a defendant who may have a good defence to provide security for all or most of the sum claimed as a condition of being allowed to defend.
>
> 55. A related issue arose in *Huscroft v P & O Ferries Ltd* [2010] EWCA Civ 1483, [2011] 1 WLR 939 where the question was whether a conditional order should be made requiring security for costs to be provided by the claimant in circumstances where the defendant was unable to satisfy the requirements for such an order set out in CPR 25. This court held that in principle there were circumstances in which such an order could be made, but that it was important that it should not be sought as a way of circumventing the defendant's inability to obtain an order for security for costs under CPR 25. Moore-Bick LJ emphasised at

> [18] that it was important for the court 'to focus attention on whether the condition (and any supporting sanction) is a proper price for the party to pay for the relief being granted'. He continued at [19]:
>
> > '… before exercising the power given by rule 3.1(3) the court should identify the purpose of imposing a condition and satisfy itself that the condition it has in mind represents a proportionate and effective means of achieving that purpose having regard to the order to which it is to be attached.'
>
> 56. The same approach is necessary when the court is considering the imposition of a condition requiring a defendant to make a payment into court of some or all of the sum claimed. I would accept that there will be some circumstances in which such an order may be justified, but it is always necessary to identify the purpose of imposing such a condition and to ensure that the condition (including any sanction for non-compliance) represents a proportionate and effective means of achieving that purpose. Moreover, a conditional order requiring payment of something close to the full sum claimed into court should not be seen as a way of circumventing the criteria for making such an order in CPR 24 PD para 4 (i.e. that it appears improbable that a defence will succeed) or for that matter for making a freezing order (which, although not strictly security, represents in some ways the next best thing)."

69. For Mr Perrucci, Mr Thompson submitted that, if (contrary to his primary submission) summary judgment were refused, a condition of payment of the full amount of the claim into court ought to be imposed because the defence was at best unlikely to succeed.

70. For Orlean, Mr Holden submitted that there was no proper basis for any such condition but that, if any such condition were imposed, it ought in turn to be conditional on an undertaking in damages on the part of Mr Perrucci, on the ground that the interest payable on moneys in court would in no way compensate Orlean for being kept out of its money. Counsel knew of no precedent for such an order. Nor do I. Mr Holden invited me to create such a precedent, on the basis that every good practice has to start somewhere. But I think that, if such a practice has not commended itself to the courts until now, I ought not to commence it.

71. I am satisfied that I have the power to make such an order, because the remaining ground of defence, though having a realistic prospect of success, is in my view unlikely to succeed. However, the existence of the power does not mean that it ought to be exercised. If a defendant has a case that cannot be summarily rejected, it is in my view wrong that payment into court should automatically be exacted as the price for advancing that case just because the court, on a summary hearing, considers that the case is unlikely to succeed. The information before me gives no particular cause for concern either as to Orlean's likely manner of conduct of the proceedings or as to its ability to meet any judgment, and no such concerns have been urged before me. On the other hand, there is something to be said for Mr Holden's point that the tying up of

money at an uncommercial rate of interest is unattractive. In the exercise of my discretion, I decline to make a conditional order.

The application for permission to amend the defence

72. The application for permission to amend the defence is refused. Of the proposed substantive amendments, paragraphs 21, 24 and 27 all relate to the defence concerning the request for services. I am not entirely sure of the point of paragraphs 14 and 15; if they are not mere narrative background, they presumably relate either to the same defence or, possibly, to the Implied Term, but for reasons already appearing they do not contribute to consideration of the remaining issues.

Conclusions

73. The application for summary judgment is refused in respect of the claim but is successful in respect of certain grounds of defence. I also summarily determine an issue of construction as it relates to quantum of damages.

74. The application for permission to amend the defence is refused.

75. I shall be grateful if counsel will agree appropriate terms of order for my consideration. If those terms can address matters of case management, so much the better. Any consequential matters that require further determination will be considered either on paper or at a short further hearing.