Neutral Citation Number: [2024] EWHC 218 (Comm)

Case No: CL-2021-000398

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 7 February 2024

Before :

THE HON MR JUSTICE BUTCHER

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Between :

(1) RAJAN LEKHRAJ MAHTANI
(2) CLARKWELL LIMITED
(3) FINSBURY INVESTMENTS LIMITED
(4) JOAN CRAVEN
(5) CHEWE PUTA (as administrator of the estate of Pat Bwalya Puta)
(6) TOWA CHIHANA CHAMUNDA and NDOLANGA NACHAMBA CHAMUNDA (as joint representatives of the estate of Patrick S Chamunda) — **Claimants**

- and –

(1) ATLAS MARA LIMITED
(2) AFRICAN BANKING CORPORATION ZAMBIA LIMITED — **Defendants**

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George Spalton KC, Ben Smiley and Ian McDonald (instructed by **Omnia Strategy LLP**) for the **Claimants**
Anna Boase KC and Richard Mott (instructed by **DLA Piper UK LLP**) for the **Defendants**

Hearing dates: 22-23, 27-30 November 2023, 1, 4, 5, 8, 11, 12, 19, 20 December 2023

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APPROVED JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 7 February 2023 at 10.30am

The Hon Mr Justice Butcher :

1. This judgment relates to the trial of claims by the Claimants for damages and specific performance for alleged breaches by the Defendants of a Share and Sale Purchase Agreement dated 2 November 2015 (as amended) (the 'SPA'). By the SPA the Claimants sold the entire issued share capital in Finance Bank Zambia ('FBZ') to the Defendants.

The Parties and the SPA

2. The First Claimant ('Dr Mahtani') has been involved in the Zambian banking sector since 1986, when he set up FBZ. He was one of six sellers of the shares of FBZ. The Second and Third Claimants are corporate vehicles of Dr Mahtani, who also held shareholdings in FBZ prior to the SPA transaction. The other Claimants are successors in title to the owners or the owners of other shares in FBZ prior to the SPA. Together the sellers of the shares in FBZ under the SPA will be called 'the Sellers'.

3. The First Defendant ('ATMA') is a financial services company that was at the time listed on the London Stock Exchange. It was delisted in November 2021. It was co-founded by Robert Diamond in 2013, and at the time of the SPA transaction it had the ambition to create sub-Saharan Africa's premier financial services institution, with its goal being to own a 'top 5' bank in each market in which it operated. At the time, ATMA already owned a bank in Zambia, namely the Second Defendant ('BancABC').

4. FBZ was, at the time of the SPA, a Zambian bank regulated by the Bank of Zambia ('BoZ'). It was listed on the Lusaka Stock Exchange, though the Sellers

held the entire issued share capital. ATMA wished to acquire FBZ from the Sellers in order to merge it with BancABC.

5. FBZ had three relatively small subsidiaries with which this case is largely concerned, namely Micro Finance Zambia Limited ('MFZ'), Leasing Finance Company Limited ('LFC') and Finance Building Society ('FBS').

6. Dr Mahtani had identified microfinance as an area in which he could expand FBZ's activities in about 2009; and he had established MFZ to lead that product offering. MFZ had begun trading in 2012.

7. LFC was established in 1985, and was acquired by FBZ in December 2014. LFC began offering leasing, factoring and credit services to private companies in various industries.

8. FBS began operating in 1996. It was acquired by FBZ in July 2013. As of 2015, it principally offered mortgages, but was licensed to offer various other services.

9. In late 2014, Dr Mahtani met Mr Diamond in London and Mr Diamond expressed an interest in purchasing FBZ. ATMA made a non-binding offer to acquire FBZ on 13 January 2015. Thereafter ATMA conducted further due diligence. On 12 May 2015 ATMA made a further offer. The project for the potential acquisition of FBZ was known as 'Project Explorer'. The Sellers were represented by Faber Capital ('Faber'), an investment advisory firm based in Dubai, and by Mr Chris Lester of Latham & Watkins Dubai ('Mr Lester').

10. The SPA was executed as a Deed on 2 November 2015. The parties were the Sellers and the Defendants. Dr Mahtani was designated as the 'Seller

Representative' in the recitals. The parties initially hoped that Completion would take place before 1 March 2016. That date slipped. In late May 2016 the Sellers disclosed to ATMA that BoZ required a significant capital injection into FBS. In addition Dr Mahtani disclosed a report from BoZ about FBZ which was adverse in some significant respects. The delay and the issues arising were dealt with in several deeds of extension and amendment between February and June 2016 and in a substantial Addendum to the SPA which was executed on 30 June 2016, on which date Completion also occurred.

11. As described by the Claimants, the way in which the SPA was negotiated involved the following. There was originally a determination by the parties of the value of FBZ in Kwacha (or 'ZMW'), which was converted into US Dollars. There was then a delay in the negotiations in 2015, during which the exchange rate moved from 6 Kwacha = 1 US Dollar (in early 2015) to 13 Kwacha = 1 US Dollar (in the final quarter of 2015). This currency fluctuation meant that the price payable to the Claimants for FBZ approximately halved in the course of 2015. To help bridge the gap between the book value of FBZ in Kwacha and the price which the Claimants wanted for FBZ, the Defendants suggested an earn out, pursuant to which the Claimants would receive further consideration if Dr Mahtani ensured that certain funds were raised by MFZ and LFC.

12. On 12 May 2015, ATMA sent a 'final offer' for FBZ to Dr Mahtani. The total consideration was US$ 215.4 million, comprising US$ 135.3 million in cash and shares, and potential earn out amounts if funding were raised for MFZ and LFC of US$ 49.2 million.

13. Dr Mahtani had originally suggested that he alone would take responsibility for the raising of funds for MFZ and LFC, but the Defendants were resistant to this. In consequence the concept of a Fund Raising Agent was introduced.

14. One other feature of the pre-SPA negotiations on which the Claimants place weight is that, during those negotiations, ATMA stated that FBS was duplicative of other entities within the FBZ group, and that the Defendants were not keen on acquiring it. The parties agreed, however, that this subsidiary would not be excluded from the transaction, but would be dealt with in accordance with a special provision as to its purchase (viz, what became Clause 7.2 of the SPA).

15. By the time of execution, the SPA provided for the Defendants to purchase FBZ in exchange for, inter alia, up front consideration of US$ 60 million in cash (plus shares), later increased by US$ 1 million due to a tax adjustment; the Earn Out; and contingent consideration (in the form of 1,791,925 escrow shares to be released to the Claimants or the Defendants upon certain trigger events).

16. The terms of the SPA, as amended, are central to the present claims. Those which are most material are set out in Annex 1 to this judgment.

The Pleaded Claims in Outline

17. In this action, the Claimants advance three claims arising out of the SPA and its performance. They have been called ‘the Fund Raising Agent Claim’, ‘the Building Society Claim’ and the ‘Escrow Shares Claim’.

18. While it will be necessary to investigate the nature of these claims in considerably more detail in due course, a summary of the pleaded claims and a useful introduction to the case is provided in the Case Memorandum, as follows.

19. As to the *Fund Raising Agent Claim*:

(1) Under clause 4.1 of the SPA:

(a) The Sellers were to help MFZ and LFC raise funding by 31 December 2016. Dr Mahtani agreed to support this through a Fund Raising Agent acceptable to him and ATMA (acting reasonably).

(b) The Sellers' entitlement to payment of any Micro Finance Total Earn Out and/or Leasing Finance Total Earn Out was conditional upon the Sellers, through the Fund Raising Agent, procuring not less than KMW 100 million or more of Eligible Funds for MFZ and/or LFC.

(c) The Defendants agreed that FBZ would use reasonable efforts to assist with this fund-raising process.

(2) The Claimants contend that, pursuant to clause 4.1 (alternatively, as implied terms), the Defendants were obliged to act reasonably in connexion with the Fund Raising Agent's appointment; and to take all reasonable steps to assist with the fund raising process. The Defendants deny that there is any basis for implying any terms other than those expressly set out in clause 4.1.

(3) Clause 4.2 of the SPA further provided that the Claimants would be entitled to be paid the Micro Finance Termination Payment and/or the Leasing Finance Termination Payment in certain circumstances.

(4) On 3 August 2016 the Claimants formally nominated Faber as Fund Raising Agent.

(5) On 18 August 2016 ATMA informed Faber that it would not accept Faber's appointment, as it considered that there was a conflict of interest due to Faber's engagement in respect of a Ugandan bank that ATMA was in negotiations to acquire. It is the Claimants' case that Dr Mahtani was not made aware that ATMA apparently considered that there was such a conflict until September 2016.

(6) The Claimants and Faber informed ATMA that they did not consider that there was a conflict of interest. Faber made some proposals for avoiding any such conflict. The Defendants deny that those proposals were sufficient.

(7) Faber ultimately exited from its mandate in respect of the Ugandan bank. However, neither it nor any other entity was appointed as Fund Raising Agent, and no funding for MFZ or LFC was raised.

(8) The Claimants allege that, in breach of the SPA, ATMA unreasonably delayed, obstructed, and/or prevented Faber's appointment; rejected Faber as Fund Raising Agent; and/or failed to take the steps required (and within a reasonable time) to make its appointment effective.

(9) It is the Claimants' case that they had already taken steps to raise funding for MFZ and LFC; and that, but for ATMA's breach of the SPA, such funding would have been raised, meaning that the Claimants would have been paid the Micro Finance Total Earn Out and/or the Leasing Finance Total Earn Out (alternatively, the Micro Finance Termination Payment and/or the Leasing Finance Termination Payment). Alternatively, the Claimants contend that they lost the opportunity to be paid such payments.

(10) The Claimants seek the amounts that they would have earned (alternatively, the chance of earning them).

(11) The Defendants deny the Fund Raising Agent Claim. They allege that ATMA reasonably took the view that there was a real risk of a conflict of interest if Faber was appointed as Fund Raising Agent and, at the same time, was acting for the Ugandan bank. They further contend that, in any event, there was no real prospect that the funding would be raised by the Claimants.

20. As to the *Building Society Claim*:

(1) Under clause 7.2 of the SPA:

(a) Dr Mahtani was to purchase, or procure the purchase by a third party acceptable to the Defendants (acting in good faith) of, FBS from the FBZ group, as soon as reasonably practicable after completion (and by 31 December 2016).

(b) The Claimants were to appoint a FBS Representative acceptable to the Defendants (acting reasonably), who had sole authority to market and negotiate the sale of FBS (or wind down or otherwise recover any non-performing loans related to it).

(c) The Defendants were obliged to procure that the FBZ group provided all reasonable assistance to the FBS Representative to facilitate the sale of FBS (or wind down or otherwise recover any non-performing loans related to it).

(2) On 20 December 2016 Dr Mahtani informed the Defendants that he had appointed Mike Machila ('Mr Machila') as FBS Representative; and that Dr Mahtani himself had agreed to purchase FBS for 1 Kwacha.

(3) The Claimants allege that Dr Mahtani received regulatory approval, alternatively regulatory approval in principle, from BoZ for his acquisition of FBS. The Defendants deny this, contending that BoZ had concerns as to whether he met the 'fit and proper person' criteria (and that senior Government and BoZ officials had made it clear that they did not want him owning or operating a bank in Zambia).

(4) The Claimants allege that, in breach of clause 7.2 of the SPA, the Defendants failed to procure that the FBZ group sell FBS to Dr Mahtani, as soon as reasonably practicable after completion or at all; and that they failed to procure that the FBZ group provide all reasonable assistance to Mr Machila to facilitate the sale of FBS (by refusing to sell it to Dr Mahtani).

(5) It is the Claimants' case that, had the Defendants discharged their obligations under the SPA, Dr Mahtani would have purchased FBS and they would have received substantial profits from its ownership.

(6) The Defendants deny the Building Society Claim. They allege that the SPA did not oblige them to procure the sale of FBS to Dr Mahtani for nominal consideration; that its market value was more than 1 Kwacha; and that no, or no significant, steps were taken by Mr Machila (or anyone else) to market and negotiate its sale. They further contend that, in any event, Dr Mahtani would not have obtained or retained regulatory approval; and FBS would not have been profitable under his ownership.

21. As to the *Escrow Shares Claim:*

(1) The Claimants allege that, under the SPA, the Defendants were required to release certain Escrow Shares (namely, the Claims Escrow Shares, Ongoing Legal Claims Escrow Shares, PTA Escrow Shares, and Classified Loan Specified Escrow Shares), or pay Deferred Consideration, to the Claimants upon the occurrence of certain trigger events (or by certain dates); and that, in breach of the SPA, the Defendants have not done so.

(2) The Claimants contend that the Defendants are required to release such Escrow Shares to them. They further seek damages for the Defendants' alleged late release of the same and/or failure to pay the Deferred Consideration.

(3) The Defendants admit that the Claims Escrow Shares and certain of the Ongoing Legal Claims Escrow Shares should be released to the Claimants. Otherwise, the Escrow Shares Claim is denied. The Defendants allege that certain of the Escrow Shares should have been released to them; that the trigger events for the transfer of any other Escrow Shares to the Claimants have not occurred; and that the Deferred Consideration has already been paid as per the SPA.

(4) However, the PTA Escrow Shares and the Deferred Consideration elements of the Escrow Shares Claim were not pursued by the Claimants at trial.

The Witnesses

22. As with most commercial cases, the contemporary documents were the most important source of information as to what had occurred. This was, however, a case in which there were various matters which were not fully documented, and in which the oral evidence of those involved was of significance. There were,

in particular, a number of conflicts of evidence between the two principal factual witnesses who gave evidence, Dr Mahtani and Ms Hamza Bassey. It is therefore appropriate that I set out my assessment of the witnesses' evidence.

23. The Claimants called two factual witnesses: Dr Mahtani and Dr Ng'andu.

24. Dr Mahtani gave his evidence in a measured and polite manner. I found, however, that I could not rely on his evidence when it was not corroborated by contemporary documents. Specifically, on almost all points on which Dr Mahtani's evidence conflicted with that of Ms Hamza Bassey, I found that Ms Hamza Bassey's account, and recollection, were to be preferred.

25. It was apparent to me that Dr Mahtani did not have a good recollection of the relevant matters, and his account was heavily coloured by an appreciation of what he considered would bolster his case. He was, in relation to important matters, willing to distort the truth. One example is the change of his evidence in relation to the purpose of his letter to BoZ of 9 December 2016, which he had originally said, in his witness statement, was to request pre-approval of his reacquisition of FBS, but which in oral evidence he suggested was not to seek approval but was because the status of FBS would change from a subsidiary to being a stand-alone institution.

26. The most conspicuous example of where Dr Mahtani was prepared to distort the truth, and falsely to represent as recollection what must either have been no recall or a recall of something which did not accord with his case, was in relation to whether he had sent to ATMA the draft SPA for the purchase of FBS ('FBS SPA'). I consider this evidence in more detail in the context of the Building

Society Claim below. The nature of Dr Mahtani's evidence on this point showed him to be an unreliable witness.

27. Dr Bwalya Ng'andu was, between 2011 and 2019, Deputy Governor of BoZ in charge of Operations and Registrar of Banks and Financial Institutions. He was called to give factual evidence. He was honest and impressive. I formed the impression that, not surprisingly, he was careful both as to what he said, and as to what he left unsaid.

28. The Defendants also called two factual witnesses: Ms Beatrice Hamza Bassey and Mr Kenroy Dowers. Ms Hamza Bassey is a Nigerian- and New York-qualified lawyer. She joined ATMA as Group General Counsel, Corporate Secretary, and Chief Compliance Officer in February 2015. She was Chair of ATMA's Executive Committee between February 2017 and April 2018 and was a member of ATMA's Investment Committee from 2015 to November 2020.

29. Ms Hamza Bassey's evidence was impressive, both as to the extent of her command and memory of detail. Her oral evidence was largely consistent with her written evidence and the contemporary documents. I considered her evidence to be honest. It was, indeed, robustly and at times belligerently given; she sometimes strayed into exaggeration and dogmatism; but I formed the view that these features were the product of conviction and a feeling on her part that the case now made by the Claimants was unfair.

30. Mr Dowers has been Group Managing Director of Strategy at ATMA since 2017. He has held various roles – Head of Corporate Development, Managing Director for Corporate Development and Interim Chief Financial Officer – since joining ATMA in 2014.

31. Mr Dowers was, as the Claimants accept, an honest witness who was keen to assist the court in an appropriate manner. His evidence was careful, and based on considerable experience.

32. The Defendants also complained that some witnesses were conspicuous by their absence from those who gave evidence for the Claimants. They identified in particular that no evidence had been called from Mr Deepak Kohli ('Mr Kohli'), the CEO of Faber since 2012, or from any Faber witness; or from Mr Lester. They invited me to draw adverse inferences. In my judgment it was not necessary to draw any formal adverse inferences. The absence of these individuals from the witness box did, however, mean that the Claimants lacked supportive evidence in relation to various parts of their case.

33. Expert evidence was given in the three fields of debt financing for Zambian corporates, Zambian regulatory law, and company valuation/forensic accounting. I will consider that evidence at the appropriate points in what follows.

The Fund Raising Agent Claim

34. I have already set out an outline of the Fund Raising Agent Claim. It raises the following four broad questions which the court needs to address.

    (1) What were the relevant obligations of ATMA under the SPA?

    (2) Did ATMA act in breach of those obligations?

    (3) If ATMA acted in breach, did it cause the Claimants any loss?

    (4) If so, what is the quantum of any such loss?

I will take those points in turn.

What were the relevant obligations of ATMA under the SPA?

35. This is essentially a question of the proper construction of the SPA.

36. The Claimants' case, as put in their Opening Skeleton Argument, was that the Defendants were 'under an obligation to act "reasonably" not only in accepting Cs' nomination of Faber as Fund Raising Agent but in respect of its appointment as Fund Raising Agent, more generally, ie by not rejecting Faber without good reason; by not delaying, obstructing, or preventing its appointment; and by ensuring that Ds took all reasonable steps including, for example, the signing of a clear mandate to make that appointment effective (within a reasonable time)'.

37. The Defendants say that their obligations were specific and limited, and did not extend as far as the Claimants contend.

38. My analysis is as follows. Under Clause 4.1 of the SPA it is the Sellers who have to use reasonable efforts to help MFZ and LFC to raise the Target Funds; and it is the Seller Representative [ie Dr Mahtani] who has agreed to support this through an agent (Clause 4.1.1). From this it is apparent that the Fund Raising Agent is to be engaged by the Seller Representative. Consistently with this, in Clause 4.1.2, it is specified that the relevant funds are to be raised by the Sellers 'acting through the Fund Raising Agent'. ATMA's express obligations are limited. The obligation on ATMA in Clause 4.1.1 is to act reasonably in relation to the engagement of a Fund Raising Agent. Specifically, the obligation on ATMA in that clause is to accept or not accept the Seller Representative's nomination of a Fund Raising Agent, and to act reasonably in doing so.

39. Under Clause 4.1.4, the Defendants also have an obligation to procure that FBZ would use reasonable efforts to assist 'this process of raising Eligible Funds, including by providing Company Support'. 'This process', in my view, refers to the Sellers' raising of Eligible Funds *through the Fund Raising Agent*. It is, I consider, apparent from both the position of Clause 4.1.4 within Clause 4.1, and from its terms, and in particular the reference to assisting with 'this process', that the Defendants' obligation under Clause 4.1.4 arises only once a Fund Raising Agent has been engaged and has embarked on the process of raising Eligible Funds.

40. There is also an obligation on the Defendants, under Clause 4.1.5, to procure that MFZ and LFC should take all reasonable steps to be in a position to draw down Eligible Funds. This clearly takes effect once Eligible Funds have been raised.

41. I accept that it can be said to be implicit in the SPA that the Defendants should not delay, obstruct or prevent the appointment of a Fund Raising Agent, save insofar as ATMA, acting reasonably, was entitled to decline to accept a Fund Raising Agent nominated by the Seller Representative. I do not, however, accept that ATMA, or the Defendants, owed other positive obligations which have been alleged by the Claimants, namely: 'to act reasonably in connection with … the appointment of a Fund Raising Agent' and/or to 'take all reasonable steps to assist in the process of raising Eligible Funds'. Those alleged obligations go beyond the careful delimitation of roles and responsibilities in Clause 4.1. In particular, those alleged obligations might imply a duty on the part of ATMA to enter into direct contractual relations with the nominated Fund

Raising Agent. That was not, as I find, an obligation owed by the Defendants, or by ATMA alone, under Clause 4.1.

42. More specifically, it was part of the Claimants' pleaded case that ATMA was required by Clause 4.1.1 to: (a) give a 'formal acceptance' of the nomination of Faber as Fund-Raising Agent; (b) sign a clear mandate with Faber; and (c) identify which of its representatives would be responsible for liaising with Faber. The third of these was not apparently pursued in the Claimants' closing submissions. As to the first, there was no requirement in Clause 4.1.1 (or elsewhere in Clause 4.1) for any formality either as to Dr Mahtani's nomination of a Fund Raising Agent, or as to ATMA's acceptance of a nominated Fund Raising Agent. Accordingly I do not accept this aspect of the Claimants' case.

43. As to the second, what the Claimants, in their Reply, were referring to as a 'clear mandate' was a mandate of the sort referred to in an email from Mr Rupesh Hindocha ('Mr Hindocha') of Faber to Dr Mahtani of 9 October 2016, to which I will refer further below. What that email suggested was that there should be a mandate 'signed between Faber and both MFZ and LFC appointing Faber as the arranger of the funds of each company', and that this had been 'pending for some time now'. That was a reference back to a draft engagement letter between Faber and MFZ which Faber had sent to ATMA on 15 August 2016. That draft, if entered into, would have created contractual relations between MFZ and Faber, and imposed on MFZ an obligation to pay Faber a fee. It suffices to say that Clause 4.1 did not provide, expressly or implicitly, that ATMA should procure that the subsidiaries should enter into such direct contractual relations with the Fund Raising Agent. Indeed, during the course of the trial, the

Claimants accepted that the Fund Raising Agent would be Dr Mahtani's agent and that he would be responsible for its fees. The Claimants' case, at least as developed in closing, became rather that ATMA was obliged to provide 'some written authorisation' to show that Dr Mahtani, through the Fund Raising Agent, had authority to raise funds on behalf of the subsidiaries. The Defendants did not dispute that it would have been necessary for a written authorisation to be provided, once a Fund Raising Agent had been appointed. That, they said, would have been part of what was required pursuant to the obligation in Clause 4.1.4. I consider that the Defendants are correct in this, as a matter of construction of Clause 4.1. Further, I consider that such an obligation under Clause 4.1.4 did not in fact arise because no Fund Raising Agent was appointed.

44. As identified above, ATMA undoubtedly did have an obligation to 'act reasonably' in relation to the acceptance or not of a nomination of a Fund Raising Agent by Dr Mahtani as Seller Representative. There was a certain amount of debate as to what is entailed by such an obligation to 'act reasonably'. This debate was to some extent obscured by the use of the terms 'subjective' and 'objective' reasonableness, which were not used consistently in argument (and have not been used entirely consistently by the courts), and which I prefer to avoid.

45. In my judgment, assistance is obtained in relation to a provision such as that at issue here from a number of cases arising in the landlord and tenant context which have considered obligations on a party not unreasonably to withhold consent.

46. In International Drilling Fluids v Louisville Investments (Uxbridge) Ltd [1986] Ch 513, Balcombe LJ said at 519-521:

> *'From the authorities I deduce the following propositions of law.*
>
> *(1) The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the lessor from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee: ...*
>
> *(2) As a corollary to the first proposition, a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease: ...*
>
> *(3) The onus of proving that consent has been unreasonably withheld is on the tenant: ...*
>
> *(4) It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances: ...*
>
> *(5) It may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease: ...*
>
> *(6) ... [W]hile a landlord need usually only consider his own relevant interests, there may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent to an assignment that it is unreasonable for the landlord to refuse consent.*
>
> *(7) Subject to the propositions set out above, it is in each case a question of fact, depending upon all the circumstances, whether the landlord's consent to an assignment is being unreasonably withheld.'*

47. In Ashworth Frazer Ltd v Gloucester CC [2001] 1 WLR 2180 at [5], Lord Bingham said that '*the landlord's obligation is to show that his conduct was reasonable, not that it was right or justifiable. As Danckwerts LJ held in Pimms*

Ltd v Tallow Chandlers Company [1964] 2 QB 547, 564: "it is not necessary for the landlords to prove that the conclusions which led them to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances"'.

48. In relation to Balcombe LJ's principle (4) in International Drilling Fluids v Louisville Investments, and what was said by Lord Bingham at [5] of Ashworth Frazer Ltd v Gloucester CC, the Court will focus on whether the landlord's opinion fell within the band or range of reasonable views which a landlord might form. This is apparent, for example, from:

(a) Kened Limited v Connie Investments Ltd [1995] 70 P&CR 370 at 374 *per* Millett LJ ('*It is only if no reasonable landlord could have withheld consent for the reasons stated by the landlord that a decision to withhold consent will be held to be unreasonable; the court is not entitled to substitute its own view for that of the landlord*'); and

(b) NCR Ltd v Riverland Portfolio No.1 Limited (No. 2) [2005] L&TR 25 at [31] *per* Carnwath LJ ('*It is of course the essence of a reasonable decision that there were reasons for it, which can be justified at some level, even if only by showing that they were genuine and not wholly fanciful. ... What is not required, however, is for those reasons to be justified by reference to some objective standard of correctness*').

49. These principles were applied in a commercial context in Porton Capital Technology Funds v 3M UK Holdings Limited [2011] EWHC 2895 (Comm). In that case the defendant purchasers of a business had agreed that 'without the written consent of the vendors, which shall not be unreasonably withheld' the target company would not cease to carry on business: [53]. This obligation was undertaken in circumstances where the claimant vendors' earn out payment was

an important part of the sale consideration: [233(ii)]. The vendors withheld their consent to the cessation of the business and commenced proceedings. Hamblen J said, at [219]:

> *'In relation to the issue of the withholding of consent the Claimants relied upon the principles which have been developed mainly in the context of landlord and tenant cases. The requirement for consent not to be unreasonably withheld is frequently used in leases in relation to matters such as assignment, change of use and alterations by a tenant. The same provision also appears, however, in a wide range of commercial agreements and, the Claimants submitted, it should be construed in a similar way.'*

50. In particular, the vendors there had relied upon International Drilling Fluids v Louisville Investments and Ashworth Frazer Ltd v Gloucester CC (see [220]-[221]). Hamblen J accepted (at [228]) that the principles from those cases, which he had summarised at [223], were applicable. His summary at [223] was:

> *'i) First, the burden is upon 3M [i.e. the purchaser, which had alleged the unreasonableness of the withholding of consent] to show that the Claimants' refusal to consent to the cessation of the Acolyte business was unreasonable.*
>
> *ii) Second, it is not for the Claimants to show that their refusal of consent was right or justified, simply that it was reasonable in the circumstances.*
>
> *iii) Third, in determining what is reasonable, the Claimants were entitled to have regard to their own interests in earning as large an Earn Out Payment as possible.*
>
> *iv) Fourth, the Claimants were not required to balance their own interests with those of 3M, or to have any regard to the costs that 3M might be incurring in connection with the ongoing business of Acolyte.'*

51. The clause relevant for present purposes is not identical to those which were considered in any of the cases which I have referred to. Nevertheless, I consider

that those cases are helpful guidance as to what the currently relevant obligation, on ATMA to 'act reasonably', involved. I would summarise it as follows:

(1) That it is for the Claimants to show that ATMA did not act reasonably in relation to agreeing, or not agreeing, to a Fund Raising Agent nominated by Dr Mahtani.

(2) That ATMA will not have acted reasonably if it had no reasons for it, or only reasons which had nothing whatever to do with the role which the proposed Fund Raising Agent was to play in relation to the raising of Eligible Funds.

(3) It is, however, not for ATMA to show that its refusal to accept Faber as Fund Raising Agent was right or justified, simply that it was reasonable in the circumstances; and it will have been reasonable in the circumstances if it fell within the range of responses which a reasonable person in ATMA's position might have adopted.

(4) In deciding on its response, ATMA was entitled to have regard to its own interests and was not required to balance those interests with those of the Claimants.

Did the Defendants act in breach of their obligations?

52. The question of whether the Defendants did act unreasonably in not agreeing to Faber as Fund Raising Agent involves a detailed examination of what occurred. I will first set out my findings as to the course of events, and then analyse whether, on those facts, the Claimants have established that the Defendants, or either of them, breached any relevant duty.

The Salient Facts

53. At the time the SPA was executed, there was a view within ATMA that Dr Mahtani would not be able to raise Eligible Funds. This is reflected in a board paper dated 13 October 2015, which stated, in part, 'the profit share on the subsidiaries is tied to significant amounts of funding ($200 million) the Seller purports to be able to raise which we don't expect to materialize (if the funding materialized – the share allows us to participate in the upside).' This was, as Ms Hamza Bassey gave evidence, in line with what Faber was saying to ATMA before the SPA, with its earn out provisions, was agreed.

54. Under the original SPA, the Long Stop Date for Completion was 1 March 2016, and the original fund-raising deadline in Clause 4.1.1 was 30 June 2016. By late May 2016, the Completion date had been pushed back on a number of occasions, by agreement. The Sellers had not, however, up to then made a request to push back the fund-raising deadline. That was first raised at a meeting on 25 May 2016 attended by Mr Chuma Ajene ('Mr Ajene'), who was the Corporate Development Director and Head of Strategic Investments and Financing at ATMA, Dr Mahtani, and Faber. Dr Mahtani requested a 6-month extension to the fund-raising deadline. Mr Ajene expressed the view internally, to Mr Dowers and Ms Hamza Bassey: 'They've made no tangible progress and now want to stick the blame on us suggesting that the delay in closing the transaction from Jan to July is the reason the money can't be raised. This explanation is 95% crap I tell you, note 95%!'

55. ATMA's initial position, stated in an email from Ms Hamza Bassey to Dr Mahtani on 13 June 2016, was that there had been adequate time for fund

raising, and that it would not agree to the extension of the deadline. This led to Dr Mahtani sending an email in which he said that the refusal to agree an extension 'appears to have been planned in such a way as to preclude the earn out and is most unprofessional.' Ms Hamza Bassey replied to this, on the same day, saying: '… On the extension of the fundraising period, we take exception to your suggestion and insinuations that it "appears to have been planned in such a way as to preclude the earn out." You know very well that it not the case. These issues are laid out in the SPA that we negotiated with you and your advisers in good faith. We have respected or (sic) end of the agreement with you and expect reciprocal conduct in our business dealings.' Dr Mahtani responded by involving Mr Lester, who sent an email to Ms Hamza Bassey on 14 June 2016, which said that 'ATMA has led the Sellers and their advisers to believe that ATMA would grant an extension of the subsidiary funding date', and that 'if the subsidiary funding date is not extended, the Sellers firmly believe that ATMA will be unjustly and unreasonably enriched'.

56. Completion was at this point due on 15 June 2016. On that date, the parties agreed an extension of the Long Stop Date to 17 June 2016 to allow for further discussions on the extension and one other issue.

57. It is apparent that there was, within ATMA, a debate as to whether the extension should be granted, or whether ATMA should walk away from the deal if Dr Mahtani would not complete without such an extension. It was in this context that two emails were sent by Mr Ajene of ATMA, on which the Claimants placed reliance.

58. First, on 16 June 2016, Mr Ajene, who was seeking to persuade his colleagues that they should grant the extension sought and complete the SPA, wrote to Mike Christelis (Head of Global Markets and Treasury at ATMA), cc to Ms Hamza Bassey, Arina McDonald and Mr Dowers in the following terms:

> 'Based on some recent discussion, I don't think these guys are close to raising any money. It seems like they are trying to keep Doc excited about some future value (however remote) given how greedy Dr. Mahtani is. Now remember greed is an emotion that can never be underestimated. Also remember emotions are everything in the final stages of transactions like these. Beatrice will tell you about the roller coaster we rode on the night before the SPA was signed.
>
> Now, I remember back when there was a lot of agitation at ATMA last year around the profit share that I said the same thing: THEY WILL LIKELY NOT RAISE THE MONEY, let's not worry too much and approve the deal. IC agreed with me and we had a lifeline in Zambia which we luckily we still have as of today.
>
> *The one thing to remember is that none of the lenders they dream of will lend any of the subs money without parent support of some reasonable sort - we fully hold the cards there. I will not state the obvious implication as this is email ...*
>
> The question for next week will be: do we want to kill the deal? Delay the deal at our own expense over something with such low probability? Something we can control?' (italicised emphasis added)

59. Second, on 17 June 2016, Mr Ajene wrote to the team (comprising the addressees noted above plus Richard Muller) with the subject 'Are we going to close Explorer?'. Mr Ajene wrote:

'Based on the details outlined below by Dr. Mahtani's advisers I do not believe there is any decent chance that the subs will raise any money in the next 6 months. It's a false option but one that is important to Doc in his "Oliver Twist" mind. There's no way he will raise the funding by December in light of the "progress" Faber is reporting.

Again, I remind you that this is one of the more improbable transactions we looked at, yes we overpaid, but we are where we are which is not so bad. Dr. Mahtani is a gamesman and I remember the time I first presented this to the ABC Zambia board, the warning was that he may never sell the bank and is leading us on.

To avoid the risk of losing out MORE on time and the transaction itself, I recommend we go for a simple extension of till September 30 (regardless of close date). I am thinking (along the lines Kenroy recommended) that we have certain deliverables e.g. executed term sheets that meet the fund raising criteria by Aug 15 for the September 30 extension to remain valid.

So potentially, we are only looking at an up to Aug 15 extension in reality, which is nothing in the grand scheme.

Please review the info below and make up your own mind. Zambia and the entire ABCH platform needs Explorer and each day we dither is to our OWN LOSS.

REMEMBER: Dr. Mahtani is losing nothing by wasting our time: FX and consideration are fixed at this point... He knows we need this bank, and we know we do.

Let's play ball and move on. *We pretty much hold the keys to the fund raising as the to-be-owners as I mentioned yesterday*.' (italicised emphasis added)

60. The Claimants relied on these emails, and in particular the passages which I have italicised. The case which they were said to support was put, at various times, at various different levels. Dr Mahtani, in his evidence, suggested that they indicated a 'conspiracy' on the part of ATMA that the fund raising should be unsuccessful. In the Claimants' closing submissions, the case was put in the following way: '… Mr Ajene's remarks indicate that as at June 2016 Ds were very much alive to the control which they had, under the SPA, over the raising of the Eligible Funds and the payment of any Earn-Out, given the provisions: (1) not only on "Company Support"; but also (2) on the appointment of the Fund Raising Agent (which, again, was Cs' only route to such consideration).'

61. In my judgment, Mr Ajene's emails show that he was seeking to convince his colleagues that the issue of an extension of the fund-raising deadline was not a matter of great importance. This was in part because he believed that funds would not be raised. But it was also because the Defendants had effective control over the fund-raising process, given that lenders would want some sort of parent support. In this sense, they do indicate that the Defendants were 'very much alive' to the control they had. However, I do not consider that the emails suggest that the Defendants were considering the degree of control they had through the process of the appointment of a Fund Raising Agent. Nor, most

significantly, do I consider that there is any basis for concluding that this awareness of the degree of practical control which they had over the fund raising led to them actually seeking to thwart it; or that they were motivated in their response to the issue of Faber's acting in another capacity, when it arose, by any intention to do so. It would not have been in the Defendants' interests to do that given that if, contrary to ATMA's expectations, the Sellers had been able to raise sufficient Eligible Funds, ATMA's own subsidiaries would have received 40% of the benefit and so, as Ms Hamza Bassey said, 'it would have been good for us.'

62. As I have already set out, in the event the sale was completed, on 30 June 2016; and as part of that completion, the fund raising deadline was extended until 31 December 2016.

63. On 3 August 2016, Mr Lester emailed Ms Hamza Bassey, Mr Ajene and Mr Cesar, confirming the Sellers' proposal for various representatives to be appointed pursuant to the SPA/Addendum. The Sellers proposed that Faber be appointed as Fund Raising Agent. On 5 August 2016, Faber wrote to ATMA stating that it needed to 'revalidate' its existing mandate with MFZ and planned a trip to Zambia in the second half of August ('post elections') to take steps including to 'agree new coordinating points for information' with a view to approaching lenders 'in early September'. ATMA, by Mr Ajene, responded the same day suggesting a call on the next working day, which would be 8 August 2016, 'to discuss the timelines and process you have in mind'.

64. During this period, ATMA was interested in acquiring a commercial bank based in Uganda called Crane Bank Limited ('Crane'). This proposed acquisition was

called 'Project Sky'. On 8 August 2016, Mr Alex Rezida ('Mr Rezida'), a Ugandan lawyer who acted for Crane in respect of Project Sky, wrote to ATMA saying: 'Gentlemen, We made mention of the appointment of our Transaction Advisor (TA). Its done. Permit me to introduce M/S Faber Capital as our TA. Mr Deepak Kohli and Mr Rupesh Hindocha who are the lead people need no further introduction. Suffice it to say that Faber Capital has been appraised (sic) of the project progress so far and the momentum at which it is – a momentum we want to maintain.' On the same day Mr Rezida emailed Mr Ajene (cc Mr Dowers) saying: 'Further to previous communication, selection of a Transaction Advisor was completed and FABER CAPITAL LTD. have been appointed. The contact person is Mr. Deepak Kohli….' Mr Ajene's initial (and internally expressed) reaction was: 'Oh no. Freddie Krueger returns … These guys are a pain, but they're motivated to do deals – let's see.'

65. As I find, it was on 8 August 2016 that ATMA learned that Faber was to be Crane's transaction adviser for Project Sky, by the communications from Mr Rezida referred to in the previous paragraph. While the Claimants suggested that an email exchange of April 2016 between Mr Ajene and Mr Hindocha showed that Faber was already, and to ATMA's knowledge, acting for Crane at that point, I do not accept that that was the case. In those communications Mr Ajene was trying to gauge from Faber who, at that point, were not acting for either ATMA or Crane, but who, through Mr Hindocha's knowledge of Crane's CEO, had a line of communication with Crane, what interest the owners of Crane had in selling. Faber doubtless was hoping that it might be retained by ATMA or Crane in relation to any sale, but it had not, at that stage, been retained by either.

66. Upon learning that Crane intended to appoint Faber, on 8 August 2016 Mr Dowers sent an email to Mr Rezida saying:

> ‘Dear Alex
>
> Just saw this. Before proceeding with the appointment of Faber, I am concerned they may be conflicted in this engagement, as they are currently the advisers for two of our subsidiaries of the bank we recently acquired in Zambia. Essentially they would be advisers for our subsidiaries and also advisers for our counterpart in Project Sky. We do know they are capable advisers, but worry this situation may create a conflict. Can you please discuss this situation with them before finalising? We also will take this up with our internal counsel.’

67. On that day and the next there were internal communications within ATMA about the issue. On 9 August 2016 Mr Dowers emailed Mr Ashish Thakkar, one of the co-founders of ATMA, saying ‘Terrible! B these are the same advisers from Explorer. This will not be good for us!’. In answer to Mr Thakkar’s question ‘Why won’t it be good for us?’, Mr Dowers then wrote:

> ‘For these reasons:
>
> - They are advisers on fund raising for the Explorer subs. To then be a counterpart on the other side of a negotiation with us, seems conflicted. Beatrice agrees. I have said as much to Alex.
> - Faber knows all the travails we had with Explorer/Mahtani and may contaminate the discussions bringing negativity from the past; and

- We gave up a lot in Explorer and Faber is going to advise Sky to hold out for stuff that most likely they would have accepted without a fight.

Have advised Alex about the first bullet but not the last two bullets as they are more our issues other than the conflict point. Will let you know when he comes back to me.'

Mr Thakkar replied: 'Got it. Then you should say this will be conflicted and won't be possible, don't even keep it optional, be firm.'

68. On the same day Mr Dowers emailed Mr Rezida again saying '… this choice is a conflict for us and really does not work. We are completely fine with the idea of an adviser, but do see the choice of Faber as a conflict. Let's discuss this please.' Mr Rezida replied saying that he had raised ATMA's concern with Mr Kohli, who had said that 'in his view there is no conflict.' Late on the same day, Mr Dowers replied saying that ATMA would 'reach out' to Mr Kohli.

69. On 14 August 2016 Mr Dowers notified Mr Ajene of a conversation he had had with Mr Rezida. A number of points about Project Sky had been discussed. The last bullet of his summary was:

'I mentioned to him that Beatrice is still due to call Deepak and its on us to resolve it. He is fine switching if we and Faber come to an understanding. But until then, they have to press forward. I saw your note earlier to Beatrice and I agree that this should be soon. Am skeptical (sic) she will do this quickly or able to convince them it's a conflict, so we should start preparing for life with Faber.'

70. By 18 August 2016, therefore, although Faber knew, via Mr Rezida, that ATMA had a concern, it had not withdrawn. On that day, Ms Hamza Bassey wrote directly to Faber, giving them formal notice of ATMA's objection to their acting on both engagements. She wrote (to Mr Kohli):

> 'Dear Deepak
>
> I hope you are doing well.
>
> We received notice from Crane Bank that Faber Capital will be representing them in connection with our potential acquisition. As you know, given the role that Faber Capital continues to play in Atlas Mara operations as Fundraising Agent for our subsidiary Finance Bank Zambia, we view your role in Crane as a direct conflict with your role on behalf of our business. As a publicly listed company, we take these matters very seriously. We are writing to formally inform you of our objection to Faber Capital's joint representation of Crean Bank and FBZ. Accordingly, we request that you inform us which one of the two representations – Crane or FBZ – you intend to proceed with by Friday in view of Faber's request this week to sign a mandate on Finance Bank fundraising. The FBZ and subsidiary Boards met yesterday and were briefed on this. They have asked for clarity on this.'

71. On the same day, Mr Kohli responded that Faber took conflict very seriously; but they had a different view. He said he would like to table the following:

> '- In terms of fund raising for MFZ (and potentially LFZ) it is for a sub four levels away from ATMA. 1 ATMA > 2. ABC> 3. FBZ> 4.MFZ whereas we will be analysing ATMA in Uganda

- We did not seek any confidential information on ATMA during FBZ as sellers did not want detailed analysis of ATMA exposure.

- Zambia deals are small size debt deals and we will not need any confidential information at the parent level.

- We have separate teams working on execution of MFZ/FBS (led by Rupesh). Obviously at the top it will come into me as Global CEO.'

These points indicate, in my view, that Faber understood the nature of ATMA's concerns as to the risk of its confidential information being inappropriately used or disclosed, but considered that it had answers to those concerns.

72. Ms Hamza Bassey forwarded this response to Mr Ajene, commenting 'FYI. Fun times ahead.' The Claimants sought to argue that this 'flippant communication is again not consistent with ATMA taking the matter seriously or being truly concerned about a purported conflict of interest.' I do not read it like that. In my view it meant simply that Ms Hamza Bassey foresaw a serious argument with Faber. It is the sort of ironical internal comment which is familiar in such situations. I accept her evidence that it was written in circumstances where she saw no merit in any of the points which Mr Kohli had raised in his email.

73. Between 18 and 22 August 2016 there were further email and telephone communications between Faber and ATMA on the conflict issue. On 22 August 2016, Mr Ajene emailed Mr Dowers and Ms Hamza Bassey, to say:

'Alex from Sky called. He said he spoke with Faber and they told him they're still finalizing but will drop the fundraising so they can carry on with Sky.

Now, I won't be surprised if tactically they still show up at Beatrice's office tomorrow and still say they want to do both. This is just FYI to let you know what they're telling Sky.'

Ms Hamza Bassey responded to Mr Ajene: 'Unbelievable! Tell Sky that they are contractually bound by FBZ and so do not see how they can drop that!'

74. On the same day, Dr Mahtani was copied in on an email from Mr Ajene to Mr Surey of Faber which said: 'You may not be aware, but there's a larger issue Beatrice is discussing with Deepak that's holding this up. Once that's cleared, we can proceed one way or another.' Mr Kohli replied to this, copied to Dr Mahtani, that he had waited for the call from ATMA for more than 10 days, and that 'I had not informed Doc as we do not see an issue, but I shall do so today.' This communication from Mr Kohli was not fully transparent. It shows that, notwithstanding that he had received the formal notification of ATMA's position on 18 August 2016, he had not told Dr Mahtani. He did not mention the email of 18 August 2016, and his justification for not having told Dr Mahtani about an issue of the potential conflict of his firm was simply that Faber itself considered that there was no issue.

75. It is apparent that on 24 August 2016, Dr Mahtani had a call with Faber, and that he was told during it that ATMA took the view that there was a conflict. On the same day, Ms Hamza Bassey had a call with Faber and Mr Lester. Mr Kohli had wanted this call, in order to attempt to persuade her that there was no conflict. She was not persuaded. It is clear from her, relevantly unchallenged and uncontradicted evidence, that during this call Mr Lester was made aware of ATMA's position.

76. Ms Hamza Bassey had taken the view that it was not for her to tell Dr Mahtani about the conflict issue: it should be Faber which did so, and ATMA was constrained as to what it could reveal as to its interest in a Ugandan asset. However, she concluded that Faber were not being forthright with him, and therefore, on 30 August 2016, mentioned the issue to Dr Mahtani directly.

77. On 7 September 2016 Mr Rezida wrote to Mr Kohli indicating that Crane could not 'comment or form an opinion on the conflict of interest story', but asked Faber to 'consider a relook at our engagement with a view to exiting the mandate'. On 12 September 2016, Mr Kohli replied with an update, saying that Faber had not been able to connect with 'the Zambian client', which must have meant Dr Mahtani, as he accepted. On 13 September 2016 Mr Lester wrote a letter to ATMA which, amongst other things, complained about ATMA's failure to approve the appointment of Faber as Fund Raising Agent. This was written on the premise that there remained a conflict.

78. This letter clearly indicates that the Sellers were beginning to contemplate a case that 'ATMA is unreasonably refusing to approve Faber Capital as the Fund Raising Agent, which refusal appears designed to frustrate any subsidiary fund raising and deny the Sellers' entitlement to any earn out.'

79. On 24 September 2016, an internal email was sent between Mr Hindocha and Mr Kohli of Faber. Mr Hindocha wrote:

'I think we have a call with Doc and tell him we don't think we can successfully close sub financing before 31st December with the current constraints imposed by ATMA with regards to travel, information supply, mandate letter,

cooperation etc. He has indicated on many occasions that he can do it himself anyway.

Once agreed with Doc, we should formally write to him and ATMA thereafter and notify them that whilst Doc nominated us in early August as arrangers of the sub financing, given the reluctance of ATMA to work with us, give us a formal mandate, etc we are withdrawing our offer to be arrangers and that they should work together to find an alternative.

We will then write to Alex and inform them that whilst there should no longer be any issue of perceived conflict in ATMA's mind as we have dropped Zambia, we have decided to also resign from advising Crane, as a TA, on the project Sky transaction as we don't feel that we will be able to add value given ATMA's reluctance to work with us. In this letter we should make it clear that we don't accept there was any conflict between Zambia and Uganda transactions and are resigning from the TA mandate for the above reasons….'

Mr Kohli replied that he completely agreed.

80. It is apparent from this communication that, as at this point, Faber had not yet resigned from either role. I also consider it clear that Faber was planning to invent excuses for a proposed withdrawal from the fund raising role . There was no true basis, as I find, for what Faber proposed to tell Dr Mahtani, namely that the 'current constraints imposed by ATMA' were the reason why financing could not be obtained by 31 December 2016.

81. At some point between 24 September 2016 and 27 September 2016, Faber communicated to ATMA that it would be withdrawing from the Crane

engagement. On 27 September 2016 Dr Mahtani met Ms Hamza Bassey for dinner. It was mainly a social occasion, but there was a discussion of some of the outstanding issues. Ms Hamza Bassey's evidence, which was unchallenged on this point, which is borne out by the Faber email of 9 October 2016 to which I refer below, and which I accept, was that she told Dr Mahtani that now that Faber was no longer involved in the Uganda mandate, ATMA had no objection to Faber's appointment as Fund Raising Agent.

82. Notwithstanding this development, as the Claimants plead in paragraph 32 of RRAPoC, Faber was not appointed as Fund Raising Agent, and nor was any other entity so appointed. The most salient events in what happened are as follows. On 3 October 2016, Faber had a call with Dr Mahtani. I agree with the Defendants' submission that it is possible to infer the nature of the discussion not only from Dr Mahtani's limited evidence on it, but especially from what happened next. Specifically, I find that Dr Mahtani reacted adversely to Faber's proposal that they should cease to act as Fund Raising Agent, and he persuaded them to seek to tie acting as Fund Raising Agent to an extension of the fund raising deadline. I also infer that it was agreed that Faber would present the need for such an extension as being due to ATMA's uncooperativeness.

83. I consider it probable that, in pursuance of this, in the following days, there was liaison between Faber and Dr Mahtani or his representatives as to the terms of an email which Faber would send to Dr Mahtani seeking an extension of the deadline and laying down conditions for Faber's acting, slanted towards blaming ATMA for the delay. The email was sent on 9 October 2016. It contained a somewhat tendentious account as to what had occurred up to this

point, and included certain inaccurate assertions including that Faber had resigned from the Crane mandate in the first half of September, and that Faber was informed only in 'late August' of ATMA's view that there was a conflict.

84. The email said that Faber would not be able to accept the Fund Raising Agent role 'unless some issues are cleared up first', and named six. One was an extension of the fund raising deadline until 31 March 2017 or later. Another was 'a clear mandate to be signed between Faber and both MFZ and LFC appointing Faber as the arranger of the funds for each company.' This was said to have 'been pending for some time now'. As I have set out above, this was clearly, or at least would have been understood as, a reference back to the proposed mandate letter sent by Mr Surey of Faber to ATMA on 15 August 1016. A third was 'We need ATMA to accept your instructions of 3rd August … nominating Faber as the Fund Raising Agent.' A fourth was for ATMA to appoint a 'point person' to liaise with Faber as Fund Raising Agent. A fifth was 'we cannot be hampered for travels to Zambia or meeting potential investors'. The sixth was 'we need clarity on appointment of lawyers.' It was said that the second to sixth points had not been an issue before FBZ was owned by ATMA, and that ATMA had been slow to respond to mandates, travel requests, and making time available.

85. I consider it likely that it had always been Dr Mahtani's wish to have an email which was capable of being shown to ATMA. That is what happened on 20 October 2016, when he quoted its text in a letter to Ms Hamza Bassey and John Vitalo of ATMA. I accept the Defendants' submission that the delay between his receipt of the email of 9 October 2016 and its deployment vis-à-vis ATMA

on 20 October 2016, and the fact that he had not taken any other active steps in the meantime to appoint Faber as Fund Raising Agent, are indicative of Dr Mahtani's focus, by this stage, being not on getting Faber appointed as Fund Raising Agent as quickly as possible, but rather on seeking an extension of the fund-raising deadline, and if that was not granted, to make a claim against ATMA.

86. Dr Mahtani's letter of 20 October 2016, after referring to 'the apparent dispute between Atma and Faber', sought that 'the time lost between 1st July 2016 to 31st October 2016 be compensated in the extension of time from 31st December 2016 for the loss period.' It is difficult to see how, given that ATMA had indicated on 27 September 2016 that it would not have an objection to Faber acting as Fund Raising Agent, there was, by this juncture, a 'dispute' between ATMA and Faber. Moreover, the period of extension sought was clearly excessive, on any tenable view of the facts. On no plausible view had ATMA delayed the appointment of a Fund Raising Agent during July or October.

87. After the letter of 20 October 2016, Dr Mahtani, on 5 November 2016, sent an email asking for ATMA's 'acceptance of [Faber's] terms and conditions'. Ms Hamza Bassey did not reply to that email, but at a meeting on 14 November 2016 between Ms Hamza Bassey and Dr Mahtani he raised, amongst others, the question of an extension of the deadline, and Ms Hamza Bassey said that a number of issues were to be raised with ATMA's Executive Committee. On 20 November 2016 Dr Mahtani emailed again, saying 'If the impasse of Faber continues then I requested (sic) that I be appointed in Faber's place and the period be extended to give me a complete period of six months to cover this

exercise. If this cannot be accepted, then we shall be left with no alternative, but to seek redress.'

88. Ms Hamza Bassey's evidence was that the position of Mr Vitalo and of ATMA's Board and management was that 'the pattern of reopening of closed issues would not stop and they were not prepared to entertain any reopening of closed issues'. There was a meeting between Ms Hamza Bassey and Dr Mahtani on 19 December 2016 at which a number of issues were discussed, but it is unclear whether the issue of an extension of the fund raising deadline was one of them. On 21 December 2016 Latham & Watkins' London Office sent a letter to the Defendants in accordance with the Practice Direction on Pre-Action Conduct and Protocols, raising a number of alleged breaches of the SPA, including, at paragraphs 2.4-2.9, an allegation of breach of the obligation to agree to a Fund Raising Agent. The complaint was summarised in paragraph 2.9 as follows:

'In breach of clause 4.1 of the SPA ATMA has unreasonably refused to approve Faber Capital as the Fund Raising Agent, such refusal being designed to frustrate any subsidiary fund raising and deny the Sellers' entitlement to any earn out under clause 4.5.1 of the SPA.'

Did the Defendants believe there to be a conflict?

89. Before considering the issue of whether the Defendants were in breach of the SPA by acting unreasonably, I will consider first whether, as a factual matter, ATMA had a genuine belief that, in acting both as Transaction Adviser on the Crane deal and as Fund Raising Agent in relation to the SPA, Faber would have a conflict of interest.

90. This is a matter which it is necessary to consider because, as I have already indicated, at various points in the pleading and presentation of the Claimants' case, it was or appeared to be part of that case that ATMA's representatives had had no genuine belief that there would be a conflict of interest, and that their suggestion that there would be was simply a device designed to frustrate any subsidiary fund raising. This appearance continued even into the Claimants' written closing submissions, where, in paragraph 111, it was stated that 'ATMA used Faber's engagement by Crane Bank in early August 2016 as a bogus basis for rejecting Cs' nominated Fund Raising Agent.' Mr Spalton KC, however, in his oral closing submissions disclaimed the word 'bogus', and said that his case was not that there had been bad faith on the part of ATMA, but was simply that ATMA had behaved unreasonably.

91. I am clearly of the view that ATMA's representatives did honestly believe that Faber's accepting the two roles would give rise to a conflict of interest. Ultimately, moreover, in his closing address, Mr Spalton KC accepted that the Claimants were 'not advancing a case that she [ie Ms Hamza Bassey] did not hold some form of belief genuinely'. I am sure, having heard her evidence, that she did, and that the 'form of belief' she had was that Faber would be putting itself into a position of conflict, which might risk the inappropriate disclosure of information confidential to ATMA. That was also a belief of Mr Dowers, as is clear from paragraph 37 of his witness statement, which was not relevantly challenged on behalf of the Claimants in cross-examination.

Was ATMA's conduct a breach of the SPA?

92. I turn, in light of my findings as to the obligations imposed by the SPA, and as to the facts of what happened, to consider whether the Defendants were in breach of the SPA in relation to the appointment, or rather non-appointment, of a Fund Raising Agent.

No reasonable basis for the objection?

93. The Claimants' principal argument was that the Defendants were wrong in saying that there was a conflict. They argued that Faber's work on Project Sky would have been different from and unrelated to its work as a Fund Raising Agent.

94. The Defendants' answer was that there was a conflict, or at least, that they reasonably believed that there was a conflict. They contended, and it was Ms Hamza Bassey's and Mr Dowers' evidence, that, as Fund Raising Agent engaged by Dr Mahtani to raise funds for MFZ and LFC, Faber would have had to obtain and provide to prospective lenders commercially sensitive information from ATMA. This was because, in order to lend to MFZ/LFC, whose balance sheets would not support significant borrowing in their own right, lenders would have wished to see robust information about the parent companies, to assess their financial strength and whether they were likely to step in if MFZ or LFC encountered financial difficulties. Meanwhile, as the adviser to the sellers of Crane, Faber would have been advising on all aspects of the deal, including commercial aspects such as price. Sensitive confidential information about ATMA obtained in the course of the MFZ/LFC engagement would inform Faber, for example, as to how badly ATMA wanted to acquire Crane, and the price it might be prepared to pay. Faber would be under an obligation to Crane

to share with it any information about the Defendants which Faber knew which was of relevance to Crane, and/or Faber might itself have used such information to ATMA's detriment and for the benefit of Crane in the Project Sky negotiations.

95. The Claimants denied that there was any risk of the Defendants' confidential information being inappropriately used or disclosed. They also contended that, in any event, any danger of inappropriate use could have been met by the erection of an information barrier within Faber.

96. In my judgment, the Defendants did not act unreasonably in objecting to Faber acting as Fund Raising Agent if it was also going to be Transaction Adviser for Crane in Project Sky. This is for the following reasons:

(1) The Defendants' objection to the nomination of Faber was not without reasons. Furthermore, the principal reason for that objection was what was frequently summarised by the term 'conflict of interest', which was used to embrace the concern that confidential information divulged to Faber in one capacity might be used by Faber, or become known to its proposed principal, Crane, in the other capacity. That was a reason connected with Faber's proposed role as Fund Raising Agent, and not, in the language of the authorities, something which had nothing to do with that role.

(2) It was not unreasonable for the Defendants to consider that there was at the least a real risk of confidential information being divulged to Faber if it was Fund Raising Agent. This is so because it was likely, or at least very possible, that prospective lenders to MFZ and/or LFC would be looking into the position of the parent company, seeking assurance, not only that the counterparty could

repay, but that the parent would not allow it to fail. Mr Dowers' evidence was that what they would be looking for would have been likely to include information on ATMA's net asset value and future financial projections, approach to fund raising and value creation, views on creating business synergies, approach to acquiring assets, strategy for future growth and future fund raising plans. By reason of Clause 4.1.4, the Defendants would arguably have been under an obligation to ensure that FBZ used reasonable steps to ensure that such information was made available. Further and in any event, the practical realities were that the Defendants would have felt obliged to produce such information. Ms Hamza Bassey said that a suggestion that ATMA could have refused information going to whether the parent would not allow the subsidiaries to fail was 'not how fundraising works'. Mr Dowers gave evidence that lenders would want to know about what some in the credit world call the 'umbrella' or 'halo effect': 'the willingness to stand behind a particular entity'. This was supported by part of the evidence given by Mr Siakachoma, the Claimants' fundraising expert, who said in his second report, that 'any assessment by prospective funders in the period from 30 June 2016 to 31 December 2016 would therefore be incomplete without conducting some due diligence on the new holding company and analysing both the specific borrowing entity as well as the group as a whole.' Mr Higenbottam, the Defendants' fundraising expert, said in evidence: 'The lender will consider all relevant facts, including the reputation, the capitalisation, the profitability of the parent company. Of course they do. It would be negligent not to consider all those facts.'

(3) As a matter of English law, Faber, even if appointed and retained as Fund Raising Agent by Dr Mahtani would have owed an obligation to the Defendants not without permission to disclose confidential information of the sort referred to in the previous sub-paragraph otherwise than to prospective lenders for the purposes of the fund raising. Indeed, this obligation might well have been made explicit in a Non Disclosure Agreement. Yet, if appointed as Transaction Adviser for Project Sky Faber would, prima facie, have had an obligation to disclose to its principal, Crane, any information which it held which was relevant to its retainer by Crane: see the summary in Hollander & Salzedo: *Conflicts of Interest* (6th ed), 6-001 – 6-002. While English law might not, in fact, have been the law applicable to the relevant obligations, there was no evidence as to any different content of another law, and I would not, without evidence, accept that any other potentially relevant system of law would have been different in material respects from what is stated above.

(4) There was therefore the real prospect of Faber having conflicting duties if retained both as Fund Raising Agent to raise funds for MFZ and LFC and Transaction Adviser on Project Sky. It was not unreasonable for the Defendants to consider that this issue would not have been satisfactorily addressed by separate teams within Faber working on the two projects, as suggested by Mr Kohli's email of 18 August 2016. As Ms Hamza Bassey said in evidence:

'The entire Faber team was a very small shop. There were few individuals working in that. Everyone knew what everybody was doing. We saw that when we were doing the FBZ transaction … It was a very small team. So the idea they could separate the teams just was not – it didn't make sense, because we

knew they couldn't. They would still have access to our information. They don't have the kind of systems you will see in a traditional advisory firm or an investment bank; they were a small shop based out of Dubai. It was impossible to have any meaningful separation and it was very telling, because Deepak [Kohli] was still saying [sc in his email of 18 August 2016], "And at the top I'm going to get information from both." Well, Deepak is the one that's dealing with Crane, and Deepak will be wanting to help his client, Crane, get the best deal possible from Atlas Mara.'

97. Given these matters, I do not consider that the Claimants have established that the Defendants' refusal to accept the nomination of Faber as Fund Raising Agent if it was also going to be Transaction Adviser on Project Sky was outside the range of reasonable responses.

98. The Claimants made, in addition to their primary case that there was no potential conflict of interest and no risk of the Defendants' confidential information being inappropriately used or disclosed, and thus that the rejection of Faber on such grounds was unreasonable, two further cases as to how the Defendants had acted unreasonably: namely that the Defendants had delayed, obstructed or prevented Faber's appointment; and that they had failed to take all reasonable steps to make Faber's appointment effective within a reasonable time. I will consider these in turn.

Did the Defendants delay, obstruct or prevent the appointment?

99. The case that the Defendants delayed, obstructed or prevented Faber's appointment raised a number of allegations, some of which were also deployed as part of the Claimants' case that the Defendants had rejected Faber's

nomination without good reason (considered above), and their case that the Defendants had failed to take reasonable steps to make Faber's appointment effective (considered below). It is, however, convenient to consider certain of the allegations which are relied upon for those overlapping reasons under this head.

100. One aspect was a criticism of ATMA for having delayed a response to Mr Lester's email of 3 August 2016 proposing Faber as Fund Raising Agent. As a matter of fact, it appears that Ms Hamza Bassey did not see that email until later. That, however, is a minor point. Of more significance is that, in the immediate aftermath of Mr Lester's email, ATMA started to liaise with Faber. Thus Mr Ajene was suggesting, on 5 August 2016, that there should be a discussion about the 'timelines and process' that Faber had in mind. Thus, though there was no formal response to Mr Lester's email, ATMA started to liaise with Faber. What then occurred to interrupt this process of mutual engagement between ATMA and Faber was ATMA's learning, on 8 August 2016, that Faber had been appointed Crane's Transaction Advisor on Project Sky. As I have already found, the Defendants' response to that, to the effect that it created a 'conflict of interest' which was unacceptable to them, was, in itself, not unreasonable.

101. A second aspect, as I understood it, was a criticism that ATMA had delayed too long in raising the issue of conflict directly with Faber, and in telling Dr Mahtani about it. As to the former, this can only, with any plausibility, relate to the period between 8 and 18 August 2016. What happened in that period was that ATMA had initially, by Mr Dowers' email to Mr Rezida of 8 August 2016, asked Crane to raise the issue with Faber. Mr Dowers said in his evidence that

he thought, at this point, that it was for Mr Rezida to raise it with Faber because it was Crane which had appointed Faber, not ATMA. He thought that if Mr Rezida raised it with Faber, Faber would step aside from the Project Sky role. That seems to me not unreasonable as an initial approach. It can be said that there was a delay between 9 (or more fairly, 10) August 2016, after Mr Rezida had told Mr Dowers that Faber did not think there was a conflict and Mr Dowers had told Mr Rezida that ATMA would speak to Mr Kohli, and 18 August 2016, when Ms Hamza Bassey notified Faber formally of ATMA's position. That is not pleaded by the Claimants as itself a breach of contract, and I do not accept that that delay amounted to a breach of the SPA on ATMA's part, given: (i) that the nature of the issue was such as justified the involvement of ATMA's general counsel; (ii) that the issue had arisen unexpectedly and at a time not of ATMA's choosing; and (iii) that it had arisen at a time when Ms Hamza Bassey was particularly busy and travelling extensively.

102. As to the latter, namely the complaint of a delay in the Defendants' informing Dr Mahtani of the issue, the Claimants criticised Ms Hamza Bassey for not mentioning the conflict to Dr Mahtani when they had dinner together on 17 August 2016. Ms Hamza Bassey's evidence was that she did not, at this point, consider that it was for her to tell Dr Mahtani, and that Faber should do so; and further that she was inhibited in discussing with Dr Mahtani ATMA's interest in buying a Ugandan asset, which was confidential information. Again, this appears to me to be a reasonable initial position to adopt. The fact that, by 17 August 2016, Dr Mahtani did not know of the issue can fairly be said to be because Faber had not mentioned it to him. In any event, as I have set out above,

Dr Mahtani and Mr Lester were made aware of the issue at latest by 24 August 2016.

103. A third aspect was the Claimants' complaint that ATMA was to be criticised for its 'confused and unreasonable stance' in relation to the conflict of interest which it alleged. Emphasis was placed on the fact that ATMA had, in particular by Ms Hamza Bassey's email on 18 August 2016, asked Faber to choose which mandate it wished to proceed with. The Claimants' case was that, to the extent that the issue of a conflict was a real one for them, the Defendants should have insisted that Faber drop the Project Sky mandate. I did not consider that this criticism was a cogent one. Both proposed mandates were at an early stage and Faber's withdrawal from either should not have been particularly disruptive. Further, as Ms Hamza Bassey said in evidence, she was not in a good position to dictate which role Faber should perform: 'I didn't have any contractually binding document with Faber that I could [use to] say to Faber, "Based on this document I have with you, you have to do what I tell you."' Given this, I consider that her suggestion to Faber was not an unreasonable one. As she said in evidence, she fully expected Faber to opt for acting for Dr Mahtani, given that it had worked extensively for him before. That her proposal did not bear fruit was because of Faber's response, not the unreasonableness of the Defendants' stance.

104. A fourth aspect was the suggestion that ATMA did not do enough, after raising the issue, to explain or justify their concerns as to conflict to Faber. As I have said above, I consider that Mr Kohli's email of 18 August 2016 shows that Faber did understand the nature of the concerns. Furthermore, there was a discussion

on the call on 24 August 2016. It was Ms Hamza Bassey's evidence in her witness statement that she and Mr Ajene had expressed their disagreement with Faber's arguments; and that she had repeated that a Chinese wall would not work, given Faber's small size and that the same people would be involved in both mandates. Her account of this meeting was not challenged in cross-examination and was therefore unshaken. Given these matters I considered that it was implausible that Faber were unaware of the basis of ATMA's objection to their acting on both mandates, and that Ms Boase KC's comment to the effect that their protestations of lack of understanding were 'a classic case of saying you don't understand something when you just don't agree with it' was a fair one.

105. A fifth aspect was that the Claimants contended that Dr Mahtani was not informed until the second week of October 2016 that ATMA had withdrawn its objections to Faber acting as Fund Raising Agent. As I have set out above, however, I find that Ms Hamza Bassey had told Dr Mahtani of this on 27 September 2016.

Failure to make the appointment of Faber effective?

106. The Claimants' case that ATMA had failed to take all reasonable steps to make Faber's appointment effective concentrated, at least in their closing submissions, on the period after ATMA's objection to Faber had been withdrawn. This case was that neither Faber nor any other entity had actually been appointed as Fund Raising Agent prior to 31 December 2016, and that this was due to the Defendants' failure to take certain steps which they should have taken and their failure to act promptly. The steps which it was said that the

Defendants should have taken were: (1) 'formal acceptance by ATMA of the Claimants' nomination of Faber as Fund Raising Agent'; (2) 'the signing of a clear mandate between Faber and MFZ and LFC'; and (3) the grant of 'a short extension of the fund raising deadline to 31 March 2017.'

107. Significant parts of this case fail on the basis that the Defendants owed no relevant obligation under the SPA to do what the Claimants criticise them for failing to do.

108. As to (1), I have already held in paragraph [42] above that there was no obligation imposed by the SPA to give any 'formal acceptance' of Faber as Fund Raising Agent. As I have set out, Ms Hamza Bassey did tell Dr Mahtani on 27 September 2016 that, now that Faber had withdrawn from Project Sky, ATMA had no objection to Faber's appointment as Fund Raising Agent.

109. As to (2), I have already dealt with this point in paragraph [43] above. What was being sought by Faber at the time (in particular in the email from Mr Hindocha of 9 October 2016) was, or would reasonably have been understood to have been, a signed mandate creating contractual relations between Faber and MFZ / LFC. That was not something which the Defendants were under any obligation to procure that the subsidiaries should enter into. The case, as developed by the Claimants in closing, that what ATMA had to provide was a written authorisation showing that the Fund Raising Agent had authority to raise funds on behalf of the subsidiaries, did not reflect what Faber was, contemporaneously, asking for or would reasonably have been understood to be asking for. Furthermore, as Faber was not, in the event, actually appointed as Fund Raising Agent, no obligation arose on the Defendants, under clause 4.1.4,

as part of their obligation to procure that FBZ would use reasonable efforts to assist in the fund raising process, to provide such a document. In any event, Faber did not request such a (more limited) document from ATMA or MFZ/LFC, or provide a draft of such a document. For that additional reason, I do not consider that the Defendants can be said to have been in breach of the SPA in not providing one.

110. As to (3), the Defendants were under no contractual obligation to agree to a variation of the contractual terms of the SPA as to the fund raising deadline, and were not in breach of contract in not doing so. Clause 4.1.1 cannot, in my judgment, be read as imposing on the Defendants an obligation to agree an unspecified, variation of the contractual deadline. Nor can any such obligation be implied. There would be no need for such an implication. If the Defendants' objection to a nominated Fund Raising Agent was not reasonable, then they would be in breach of contract. If the objection was reasonable, then there would be no reason for them to be bound to extend the fund raising deadline.

111. Further, the extension which the Claimants contend ought to have been granted was for a period of three months. That is, on my findings, longer than any period of delay which can with any degree of plausibility be attributed to the 'conflict of interest' issue. Even if there were no other objections to this aspect of the Claimants' case, I would not consider that the Defendants were in breach of contract in failing to agree an extension for a longer period than that which was attributable to the Defendants' having raised that issue.

Conclusion on Breach

112. For those reasons I do not consider that the Claimants have shown any breach of the SPA by the Defendants in connexion with the appointment of a Fund Raising Agent.

Causation

113. Given my findings on breach, the issue of causation of loss does not arise. It was, however, the subject of extensive evidence and argument, and I will express my conclusions on the points argued.

Introduction

114. The Claimants' case is that, had it not been for the Defendants' breach of contract, Faber would have been appointed as Fund Raising Agent and Eligible Funds would have been procured by 31 December 2016, with the result that Earn Out would have been payable to the Claimants.

115. In the second expert report of Mr Siakachoma, served on behalf of the Claimants, he put forward the opinion that MFZ and LFC could have raised substantial funds in the market generally. That was not pursued by the Claimants at trial; instead the Claimants' case was that the Eligible Funds would have been procured from African Export-Import Bank ('Afrexim'), as envisioned under the Afrexim Term Sheets.

116. By the Afrexim Term Sheets the Claimants here meant, as set out in paras 35-38 of their opening Skeleton Argument:

(1) An indicative term sheet for a US$ 20 million revolving factoring line of credit in favour of MFZ, bearing the date 1 September 2015. It was not signed on behalf of Afrexim, but was signed by MFZ on 15 September 2015; and

(2) A draft indicative term sheet for a US$ 50 million receivables backed mining services finance facility in favour of LFC issued by Afrexim on 21 December 2015; and then issued in revised versions on 2 February 2016 and 22 March 2016.

117. The Claimants also made an alternative claim that the Defendants' breach had deprived them of Termination Payments on the basis that Eligible Funds would have been raised and, if Earn Out was not payable because an event in Clause 4.2.2 – 4.2.4 of the SPA had occurred, then the Claimants would have been entitled to Termination Payments instead. They made further alternative arguments that the Defendants' breach had deprived them of the opportunity to receive Earn Out payments, or alternatively Termination Payments.

118. Before considering the evidence in relation to whether a breach of the SPA on the part of the Defendants was the cause of relevant funding not being raised, it is important to note that this might depend on the exact nature of any breach established. My finding is that there was no breach by the Defendants. If I were wrong about that, it would not however follow that the breach was of the nature and consequence contended for by the Claimants. By way of example, unless it were held that it was unreasonable for the Defendants to have taken an objection to Faber on the grounds of 'conflict of interest' at all, then any breach would probably only be in relation to the way, and length of time, that the matter took to be resolved. In considering causation, the focus would then be on

whether any such breach as might (contrary to my findings) be established, was causative. The Claimants' case on causation was not one which was 'fine-tuned' to cater for the possibility that any breach(es) might be more limited in nature and significance than alleged by way of their primary case.

119. With that caveat, I turn to consider the details of the Claimants' causation case. What this involves is a consideration of the question of whether, had Faber been appointed as Fund Raising Agent shortly after nomination on or about 3 August 2016, Eligible Funds would have been raised from Afrexim by 31 December 2016. Alternatively, had Faber been so appointed, would there have been a real or substantial prospect of such Eligible Funds being raised by that date?

120. In relation to this case, there was some factual evidence given by Dr Mahtani, Ms Hamza Bassey and Mr Dowers, but none from a representative of Afrexim or from those who had principally dealt with Afrexim on behalf of MFZ / LFC such as Mr Ali, Ms Sakala or Mr Ramesh. There was also expert evidence from Mr Siakachoma and Mr Higenbottam.

The status of the Afrexim Term Sheets

121. The first matter to consider is as to the status of the Afrexim Term Sheets, and to what extent they represented agreements by Afrexim to lend on the terms set out in them.

MFZ

122. The Afrexim Term Sheet relating to MFZ dated 1 September 2015 had apparently been the subject of discussions since about March 2015. As part of these discussions, Mr Ngidjol of Afrexim had, on 6 July 2015, sent to MFZ 'for

discussion purposes' a term sheet for a US$ 10 million facility. Although MFZ had previously sought that FBZ should not be asked to provide a guarantee, this draft term sheet included such a requirement. On 7 July 2015, Barkat Ali of FBZ went back to Afrexim saying '… we can not provide guarantee due to BOZ requirements' and asking Afrexim to consider a letter of comfort instead.

123. It appears that in July 2015, Afrexim was encouraged to increase the level of funding to US$ 20 million, on the basis that it would be the 'sole arranger'. The 1 September 2015 term sheet did increase the proposed funding to US$ 20 million, but still required, as part of the security '100% Bank guarantee from Finance Bank of Zambia'. On 9 October 2015 Ms Sakala informed Mr Ngidjol that MFZ could not provide a guarantee and asked him to advise on the 'way forward … in view of this development'. Mr Ngidjol replied: 'Reduction of your request to align it to your current shareholder funds.' On 5 December 2015, Mr Simwaka, Afrexim's Regional Manager Southern Africa, confirmed that what Mr Ngidjol meant was that 'the facility limit will be US$5 mil given the reduced capital amount'. After that Afrexim sent a draft term sheet for US$ 5 million, bearing the date 15 January 2016, which provided for FBZ 'or any bank located in Zambia and acceptable to Afreximbank' to be Local Facility Agent, with a variety of responsibilities including in relation to reviewing draw-down requests, and providing a letter of comfort. A further term sheet for a US$ 5 million factoring line of credit of 30 March 2016 again stipulated for a Local Facility Agent, being FBZ or other bank in Zambia acceptable to Afrexim, to have a variety of responsibilities, including avalizing promissory notes issued by MFZ, but not including the provision of a comfort letter. This was signed by Ms Sakala for MFZ on 22 April 2016.

124. On 27 July 2016, Mr Ngidjol sent Ms Sakala an email, which stated:

‘… Our credit department needs the following information to finalize this file.’

There then appeared 7 questions, which had apparently been copied into this email (doubtless from one received from the credit department), as follows:

1. Why has there been a huge increase in impairment figure;

2. Breakdown of Npls [ie non-performing loans] by sector;

3. There is a huge liquidity gap in payable on demand period – please explain why and how will the Bank resolve this;

4. Why was the Micofinance making losses in 2013 and how did they manage this in 2014 and 2015;

5. Kindly simply describe MFZ process;

6. How much of the income relates to factoring;

7. Please send us the financials of FBZ as at the end 2015? And management account as at 30/06/2016?’

Then, in the same text as the opening lines, the email concluded ‘We are almost there and your soonest action would oblige.’

This email appears clearly to indicate that Afrexim had, even by this stage, not carried out any detailed due diligence; and the basic nature of some of the requests and the terms in which they are expressed suggests, despite the

hortatory last sentence, which appears to have been added by Mr Ngidjol, that Afrexim was not 'almost there'.

125. What this history indicates, in my view, is that the draft term sheets issued by Afrexim in relation to lending to MFZ were essentially vehicles for negotiation. That this was their role is consistent with their not bearing the signatures of any representatives of Afrexim. Moreover, it appears clear that Afrexim was not, by 2016, contemplating extending MFZ a credit facility of US$ 20 million, but only of US$ 5 million. I have seen no contemporary document to support Dr Mahtani's suggestion that Afrexim nevertheless remained very keen to disburse an additional US$ 15 million upon provision of a comfort letter, and do not accept it.

126. Furthermore, whether Afrexim would have proceeded to enter into a loan agreement involving funding of US$ 5 million, would have depended, as Mr Higenbottam said, on substantial financial due diligence being satisfactorily completed. I consider below the likelihood that matters would have proceeded to Afrexim actually making funds available to MFZ.

LFC

127. There must, by December 2015, have been discussions between Mr Ali and Mr Simwaka in which Mr Ali sought a facility for LFC. On 21 December 2015, Mr Simwaka wrote to Mr Ali attaching a 'draft terms sheet' in respect of a US$ 50 million receivables backed lease finance facility 'that could be utilized to fund its clients with service contracts from Mining Majors and Oil Marketing Companies.' That term sheet envisaged that Afrexim would be the 'Mandated Lead Arranger', and that the 'Lenders' would be Afrexim 'and other Lenders'.

Internally within FBZ, at least, this draft term sheet was marked up with a suggestion that the Arrangement and Facility fees be reduced 'to avoid a huge cash out flow (of USD 1,700,000 ie 3.4% of USD 50,000,000) in the initial stage of the facility and this is being partially compensated by the increase in the Disbursement fee.'

128. On 2 February 2016 Mr Simwaka sent Mr Ali a 'revised term sheet' and asked him to 'provide your input/comments'. This was again marked up internally within LFC/FBZ with various proposed changes and comments. One of these was to propose that the Arrangement Fees and Facility Fees would be paid as per draw down in tranches of US$ 5 million. It is not clear whether this mark up was shared with Afrexim. On 23 March 2016 Mr Simwaka sent a further 'revised term sheet' for a proposed US$ 50 million mining services receivables backed finance facility, and said 'we await your feedback'. Consistently with the previous draft term sheets it specified that Afrexim would be the Mandated Lead Arranger, and that the Lenders would be Afrexim and other Lenders; and that there would be an Arrangement Fee of 1% of the facility amount and a Facility Fee of 1.50% of the facility amount, each due on signature of the facility agreement but payable on first drawdown or within 30 days of signature date.

129. On 25 March 2016 Mr Ali shared with Mr Simwaka comments from Mr Ramesh including a suggested change to: 'Facilities and arrangement fees will be paid as per draw down in tranches of US$5 Million each. Note: 1 This is a VERY huge amount to take from our Working Capital at one go. Hence our proposal … above. We had proposed this in our mid-Feb 2016 comments as well.' Mr Simwaka replied: 'I note the comment on the large size nature of the facility.

May I propose that we make this a financing program to which leasing companies, including LFCL with eligible customers can access the facility. This is the balance. FBZ will also prevent the facility from facing utilization challenges in addition to the fee paying challenges to upfront fees. The fee wording is standard as such it may not be possible to change it. In this regard, LFCL could access say USD20 million while other Leasing Companies could share the balance. FBZ comfort letter will be for LFCL's portion and other leasing companies to bring their own form of parental support/guarantees. However, FBZ will be the Facility Agent for the entire facility.'

130. This sequence of events shows, in my view, once again that draft term sheets were being supplied by Afrexim as vehicles for negotiation. It also shows that, as at March 2016, there was a significant difference between the position of Afrexim and of FBZ / LFC in relation to whether LFC should be able to draw down in tranches and pay fees upon draw down and not upon execution; and that Afrexim was seeking to accommodate these difficulties by a significant restructuring of the arrangement, to involve other leasing companies alongside LFC. There was no agreement, even in principle, in relation to the terms on which there should be a US$ 50 million facility to LFC.

Would Eligible Funds have been made available by 31 December 2016?

131. I turn to the question of what prospect there was, assuming the appointment of a Fund Raising Agent, of matters being developed from the position with Afrexim as set out above (both in relation to MFZ and LFC) to Eligible Funds having been made available by 31 December 2016. It was in relation to this

issue that the expert evidence of Mr Wallace Siakachoma and Mr Edmund Higenbottam was principally useful.

132. Mr Siakachoma is the Country Director of Indiqua Consulting (Pty) Ltd in Johannesburg, South Africa. Indiqua is a business advisory firm. Prior to joining Indiqua Mr Siakachoma held various positions in a regional banking group which had operations in Zambia, Zimbabwe, Botswana, Mozambique and Tanzania, ending in a senior finance role under the CFO. Before that he had worked with PwC in Zambia and Kenya.

133. Mr Higenbottam is the founder and Managing Director of Verdant Capital Ltd, a specialist investment bank and investment manager operating on a pan-African basis, with its main office in Johannesburg, South Africa. Verdant Capital specialises in the lower middle market, and is probably now the largest entity of its sort operating in that market in Africa. In the years 2014-2018 Mr Higenbottam negotiated 39 term sheets for microfinance institution (or 'MFI') clients with prospective international lenders. Before setting up Verdant Capital Mr Higenbottam had worked for Renaissance Capital in Lagos, Nigeria and Johannesburg, South Africa; and before that for Morgan Stanley in Dubai, UAE, and for Deutsche Bank in London.

134. The relevant evidence which the two experts gave can be summarised as follows. In significant part this evidence dealt with a question of whether Eligible Funds could have been raised in the wider market (ie not only from Afrexim as envisioned by the Term Sheets), notwithstanding that this was not a case which the Claimants ultimately pursued at trial. Nevertheless some of that evidence was of assistance in assessing the case which was maintained.

135. Mr Siakachoma gave evidence:

(1) That the Afrexim Term Sheets were for structured finance facilities, which were ‘pretty much agreed by Q1-2016’; and which could have been concluded by 31 December 2016.

(2) That in assessing what funding LFC and MFZ could have raised, it was not correct to look at those entities on a standalone basis. Lenders would have looked at them in the context of the ATMA Zambia group, whether or not there was a parent guarantee. The ATMA group could have raised an amount of some hundreds of millions of dollars ‘which could have comfortably covered the combined amount of USD 200 million which was planned to be raised as the maximum Eligible Funds under the SPA.’

(3) Whilst acknowledging that a lender would look only to lend a sum which the borrower had a good prospect of being able to deploy profitably, his opinion was nevertheless that LFC could have deployed the funds under a US$ 50 million facility and MFZ could have deployed the funds under a US$ 20 million facility in the first quarter of 2017. As was made very clear in his oral evidence, this was based on the premise that funds advanced to MFZ and LFC would effectively be deployed by FBZ, and would have involved the assistance of sister companies in the ATMA group in making additional personnel available to MFZ/LFC for the purposes of effecting loans.

136. Mr Higenbottam’s evidence included the following:

(1) That, before considering the Afrexim Term Sheets, and considering fund raising in the wider market, MFZ could not have raised ZMW 100 m of Eligible

Funds in 2016. This was because of MFZ's relatively small size; the poor macro-economic environment in Zambia at the time; MFZ's poor portfolio performance; MFZ's low solvency on a post money basis; the fact that ZMW 100 million would have represented a very significant expansion of MFZ's loan portfolio; the absence of a parent guarantee; and the absence of a recent record of assessing debt from international lenders.

(2) This was his view despite the fact, on which Mr Higenbottam was pressed in cross-examination, that Verdant Capital had successfully arranged borrowing of US$ 10 million (equivalent) in 2014/15 for a Zambian client called Madison Finance, which is a Zambian micro-SME and consumer lender, and in a significant number of respects comparable to MFZ. That was debt financing arranged with two lenders, the EIB and Symbiotics. Mr Higenbottam said that the fund-raising for Madison Finance itself had been 'a very, very difficult deal'; but that there were a number of features which made it less difficult than fund raising for MFZ in 2016 would have been. Those were: (i) that macroeconomic conditions in 2016 in Zambia were more difficult than in 2013/14, when the Madison Finance placement was being negotiated; (ii) that MFZ's portfolio at risk was worse than Madison Finance's had been at the corresponding time; and (iii) that MFZ's solvency was too low for lending of that order.

(3) That LFC was a better proposition than MFZ. In terms of fund raising in the market, and not confining this consideration to fund raising as envisioned by the Afrexim Term Sheets, it is conceivable that LFC could have raised ZMW 100 m Eligible Funds in 2016; although it would not have been straightforward given (i) LFC's relatively small size, (ii) the poor macroeconomic conditions in

Zambia at the time, (iii) the fact that ZMW 100 m would have represented such a significant expansion of LFC's loan portfolio, and (iv) the absence of a parent guarantee.

(4) It was highly unlikely that MFZ or LFC could have negotiated a term sheet, completed due diligence and entered into binding loan agreements for ZMW 100 m of Eligible Funds in the period between 3 August 2016 and 31 December 2016. Further, due to investor single exposure limits, MFZ and LFC would likely have needed to secure loans from three separate investors to raise ZMW 100 m of Eligible Funds. It would not have been possible for either MFZ or LFC to complete three investor processes, including due diligence, in parallel between August and 31 December 2016.

(5) The draft Afrexim Term Sheet for MFZ relied on by the Claimant (by which he meant that dated 1 September 2015 for a US$ 20 million facility) was not credible and would not have resulted in a loan agreement with Afrexim. It had, in any event been superseded by an unsigned term sheet for US$ 5 million, which was 'more aligned with' a plausible investment amount.

(6) The draft LFC Term Sheet relied on by the Claimant (by which he meant that dated 22 March 2016 for a US$ 50 million facility) did not appear to be serious, and would not have led to a loan agreement. This was in part because it envisaged LFC growing its lease portfolio business by 33.6x, and deploying US$ 50 million into the leasing finance sub-sector, which would have more than doubled the total size of loans and advances in that sub-sector at that time; would have required LFC to originate and underwrite a sharp loan portfolio expansion to utilise the funds, which it did not have the means to do; and would have

required a significant outlay in upfront fees. He also considered that the LFC Term Sheet contained a number of unusual terms.

(7) Even if MFZ and LFC had raised US$ 20 million and US$ 50 million respectively, it would have been impossible to deploy those amounts in the first quarter of 2017.

137. I considered that, on the points on which they differed, the evidence of Mr Higenbottam was distinctly more reliable than that of Mr Siakachoma. It was based on greater and more relevant experience; was more detailed and analytical; and was more realistic.

138. Taking account of that expert evidence, I reach the following conclusions:

(1) No loan agreement with Afrexim for a facility for MFZ of US$ 20 million along the lines suggested by the Term Sheet of 1 September 2015 would have been agreed, whether by 31 December 2016 or at all. That was too large a sum for a lender to advance to MFZ. This had been appreciated by Afrexim which had sent subsequent term sheets for an amount of US$ 5 million. Furthermore, as Mr Higenbottam said in para. 11.2 of his first report, most international investors have an exposure limit representing their maximum exposure to an institution compared to its total equity or total assets; and for most investors the limit is 20% or 10% of total assets and 100% or 50% of equity. Taking the larger of those two measures, that would have implied, for MFZ, a single investor exposure to MFZ of ZMW 50,103,856 (using 100% of equity) or ZMW 43,130,423 (using 20% of total assets). These were more in line with a US$ 5 million loan to MFZ.

(2) I accept and agree with Mr Higenbottam's evidence (para. 13.13 of his first report) that it was highly unlikely that Afrexim, having replaced the term sheets for a facility of US$ 20 million with ones for US$ 5 million would have revised its proposed investment back to US$ 20 million. Specifically, I agree with his further evidence that the offer of a comfort letter from FBZ, ie something falling short of a guarantee, if it had been made during the period after 3 August 2016, was not, contrary to Dr Mahtani's suggestion, something which would have led Afrexim to increase the proposed funding to FBZ above the US$ 5 million amount, and 'would certainly not have led Afrexim to double that amount to USD 10 million' (Second Report, para. 3.2.3).

(3) That there might have been a facility of US$ 5 million for MFZ is not the case which the Claimants pleaded or pursued. Furthermore a sum of US$ 5 million, or some ZMW 49.65 million (using an exchange rate of $1 = ZMW 9.93) would not have met the condition of not less than ZMW 100 million by way of Micro Finance New Funding specified in clause 4.1.2 of the SPA. It is therefore not necessary to consider further whether a facility for US$ 5 million might have been concluded by 31 December 2016. I will say only that I consider it likely that it would not have been. I note that, in 2017, Norsad provided a term sheet for a credit facility for MFZ of only US$ 3 million and required a guarantee from FBZ in respect of the senior secured debt element of US$ 2 million; while a draft loan agreement dated 28 April 2017 contemplated a loan from Afrexim to MFZ of US$ 5 million, but on the basis that both a parent guarantee and credit insurance was required. Given that there was no obligation on the Defendants under the SPA to procure that FBZ should give such a guarantee, these facts suggest that it would not have been possible for there to

have been an agreement even on a funding facility for US$ 5 million, but not involving such a parent guarantee, by 31 December 2016.

(4) In the case of LFC, there would have been no mutually agreed term sheet, and no loan agreement on terms the same or similar to those in the draft term sheets of 21 December 2015, 2 February 2016 or 23 March 2016. Negotiations for a US$ 50 million facility as envisaged by those term sheets had come to an impasse. This was, in particular, for two related reasons. The first was that Afrexim was proposing Arrangement and Facility Fees totalling 2.5% payable on signature of any facility agreement or shortly thereafter. This was, as Mr Simwaka wrote, standard wording. Mr Higenbottam explained why such fees would be charged, namely that (i) the level of due diligence undertaken by the prospective lender would be commensurate with the total amount of the facility, because it would be conducted on the assumption that the entire amount of the facility would be drawn; and (ii) some lenders have a capital charge against their own balance sheet in respect of undrawn commitments. The second was that LFC did not wish to draw down the entire US$ 50 million at once (and was rather seeking to agree to tranches) because it could not have deployed US$ 50 million. I consider this aspect further below, but here note Mr Higenbottam's evidence, which I accept, as follows:

'I don't believe Leasing Finance Company can lend $ 50 million in the parameters of the Afrexim term sheet. That view is based on a few things, but the most important thing that's based on is the size of those activities as reported in the audited accounts at the end of 2016. Those activities, depending on how

you look at it, you might be a million or $2 million of relevant activities, so I don't think they can go [from] a million or 2 to 50 million.

So let's say for argument's sake Leasing Finance Company trebles the size of the relevant book and takes it from 1.5 to 4.5 million. It's then using 3 million out of 50. The problem is you're paying fees on 50 million and that fee is 1.25 million. It's 2.5% of the 50. The 2.5% is okay. I can pay that fee if I'm lending out the full 50. I can get that back in terms of my margin. I'm charging all my customers a fee when they borrow from me.

But if I'm only lending out 3 million, 1.25 million is actually a big chunk of the amount I'm lending …'

This impasse was such that, by March 2016, what Afrexim was suggesting was that the parties might look at a significantly different arrangement, which involved other leasing companies. Had that been pursued, it would have been an arrangement markedly different from that which formed the only case pursued by the Claimants at trial, which was that there would have been funding essentially on the terms envisaged by the draft term sheets I have referred to.

(5) A further difficulty in the way of arriving, in the period after 3 August 2016, at any mutually agreeable structure for debt finance for LFC from Afrexim was that the type of facility which had been envisaged in the term sheets would have imposed a range of obligations on the 'Local Agent Bank', viz FBZ. These included obligations: to ensure that all security documents were received and perfected to Zambian law; to report to the Lender any potential threats to the transaction and advise on action to be taken by the Lender; if applicable, to obtain BoZ Exchange Control and any other related approvals; to ensure that all

financial and operational reports of the Borrower were prepared and sent to the Lender promptly; to receive and pass on to the Lender any notice of events of default and potential events of default; and to provide such information as the Lender might reasonably require. As Mr Higenbottam said, these were unusual, some very unusual, obligations to be imposed on a parent company. Because they were unusual, I consider that they went beyond what was 'customary support' and were thus not 'Company Support' for the purposes of the SPA. Nor, given that, do I consider that it would have been possible to say that FBZ had failed to use reasonable efforts to assist in the raising of Eligible Funds, if it had not agreed to assume such obligations. Nor was there evidence suggesting that FBZ would, in the period after August 2016, have agreed to such obligations notwithstanding that there was no contractual obligation on the Defendants to secure that FBZ should do so.

(6) For these reasons I am of the clear view, as I have said, that no funds would have been made available to LFC by Afrexim on terms the same or similar to those in the draft term sheets whether by 31 December 2016 or at all. Given this, it is probably unnecessary to consider further whether any funds might have been raised from Afrexim under arrangements of a different type and/or in a different amount by 31 December 2016. I will however record my conclusion that no funds of at least ZMW 100 million would have been made available for draw down by 31 December 2016. The process of arriving, even in principle, at a mutually acceptable facility amount and structure, which did not involve the provision by the Defendants or FBZ of support which they were not obliged to provide would, had it been possible at all, have taken some considerable time to achieve. Even assuming, which seems to me an assumption very favourable

to the Claimants, that this might have been achieved, and a term sheet agreed, by the beginning of September 2016, I consider it to be highly unlikely that a loan agreement would have been concluded by 31 December 2016. Mr Higenbottam's experience of Verdant Capital debt transactions between 2014-2018 indicates that of 39 term sheets issued, 17 resulted in closed deals. Of the 17, the median and modal number of months from term sheet to a final loan agreement was seven months. Given that what appears to have been in contemplation in relation to LFC was some sort of syndicated lending by Afrexim and other lenders, this would have been likely to have lengthened the process. Furthermore, the period would have included December. As Faber wrote in the email of 9 October 2016, 'December is at best a half month before people start to take time off.'

139. The Claimants made an alternative case that the Defendants' breach had deprived them of an opportunity to receive Earn Out payments: that is to say a case based on 'loss of a chance'. Ms Boase KC objected that no such case was available as a matter of law or on the pleadings, on the basis that what was pleaded was a lost opportunity of the Claimants' procuring Eligible Funding, that that was something which involved actions of the Claimants themselves, and that that was to be judged on the balance of probabilities, rather than loss of a chance. I was not persuaded that this submission was correct, and I am of the view that it was open to the Claimants to contend that they lost the chance of obtaining Eligible Funding. However, given the way in which their case was limited at trial to whether funding could have been obtained as envisioned by the Afrexim term sheets, it appeared to me that the relevant question was whether the Defendants' assumed breach had deprived the Claimants of a

substantial chance of obtaining such funding. Consistently with the approach in PCP Capital Partners LLP v Barclays Bank Plc [2021] EWHC 307 (Comm) at [554]-[561], I consider that a chance of less than 11% is not to be considered to be a 'real and substantial chance'.

140. For reasons I have already given, I consider that there was no chance of Eligible Funding on the terms of, or substantially similar to those in the Afrexim Term Sheets on which the Claimants relied being raised, whether by 31 December 2016 or at all. If, contrary to my view, it is relevant to ask whether Eligible Funding could have been raised from Afrexim on materially different terms or in materially different amounts, I consider the position as follows. Irrespective of any breach of the SPA by the Defendants:

(1) There was no real and substantial chance of such Funds in an amount of at least ZMW 100 million being raised for MFZ by 31 December 2016 (ie any such chance was well below 11%). ZMW 100 million would have been an amount approximately double that suggested by the most recent MFZ term sheets, and there was no good reason why Afrexim should have agreed to lend such larger amount, especially in circumstances where it would have been highly improbable that such an amount could have been deployed. I accept that there was a chance of over 11% (though less than 50%) of funds of approximately US$ 5 million being available for draw down by that date, but given that that would not have constituted sufficient Micro Finance New Funding to give rise to any Micro Finance Earn Out, I do not consider that it is necessary or appropriate to attempt to quantify that chance more precisely.

(2) There was no real and substantial chance of funding of at least ZMW 100 million being available for draw down by LFC by 31 December 2016 (ie any such chance was distinctly below 11%). Taking Mr Higenbottam's Verdant Capital debt transactions 2014-18, of 39 term sheets, only 17 resulted in closed deals, and in only 2 of those cases was the period between term sheet and loan agreement 4 months. In all other cases it was more. One of the 2 cases was, for various reasons, clearly not comparable to the present situation (for the reasons given in para. 10.92(b) of Mr Higenbottam's first report). This suggests that only 1 or perhaps 2 of 39 cases proceeded from term sheet to a concluded loan agreement in a period of 4 months. While this exercise has, of course, a number of limitations, the court has no better indication of typical timescales and success rates. Furthermore, as I have already identified in paragraph [138(6)] above, in the case of fund raising for LFC in the period August – December 2016, there were a number of features which meant that the timescale was unlikely to be at the short, and the probability of a concluded loan agreement resulting was unlikely to be at the more certain, end of the spectra.

141. For these reasons I consider that the Claimants' causation case in relation to the Fund Raising Agent claim would fail, even were I wrong in my findings as to breach.

Could MFZ/LFC have deployed Eligible Funds?

142. The issue of whether MFZ or LFC could have deployed funds in the amounts of US$ 20 million and US$ 50 million respectively, had they been available, was addressed by the experts as a separate question. Initially this evidence was put forward with a primary view to providing inputs in relation to the

quantification of the Claimants' claims for Earn Out. But it is equally if not more significant because it is clear, and was effectively common ground between Mr Siakachoma and Mr Higenbottam, that the issue of what funds the two companies could have deployed was relevant to the question of what funds would have been lent them in the first place, because a lender would be unlikely to lend funds which the borrower had no good prospect of deploying. This consideration is therefore of relevance to the causation issues I have addressed above, and I took it into account in reaching the conclusions I have expressed above. It is nevertheless helpful to set out, here, my conclusions in relation to it in more detail.

143. In relation to this question, I again found Mr Higenbottam's evidence cogent and helpful. I consider that he was correct to say that the key test would be whether the borrower could realistically grow its relevant loan book from the existing level to the proposed new level upon the deployment of the funding. For each subsidiary, Mr Higenbottam examined this by reference to two particular matters: first, operational considerations related to the growth in the respective loan portfolios; and second the size of the market for lending of the relevant type which it was contemplated that the subsidiaries should engage in with the funds raised.

144. In relation to MFZ, the purpose of the lending in the Afrexim term sheet relied on by the Claimants was 'to enable [MFZ] to offer factoring services to pre-qualified Suppliers under the Recourse or Non-Recourse Factoring Agreement signed between [MFZ] and the Suppliers', and the commitment period was specified as 'an initial period of 3 years', though the Bank could cancel its

commitment after 12 months. At the time, ie pre-funding, invoice discounting was a minority activity for MFZ: the bulk of its business was salary-backed loans to individuals. A typical tenor for invoice discounting facilities (ie the term until the buyer pays the invoice) is 60 days. Applying this, Mr Higenbottam calculated that as at August 2016, MFZ was disbursing an average of ZMW 294,937 (or c. US$ 30,851) per month in invoice discounting. To deploy US$ 20 million in the first quarter of 2017, as Mr Siakachoma considered possible, would have required MFZ to increase its invoice discounting activities by, in the order of, 300 times. Even assuming a longer tenor for MFZ's loans it would still have required a great increase in disbursement levels. That would have required a very considerable increase in its human and institutional capacity. As Mr Higenbottam said, that would, if possible at all, have taken a lengthy time to have put in place: there is a finite pool of skilled workers in the MFI sector in Zambia, and invoice discounting is a particularly specialised form of lending, and so recruiting the necessary staff could not have been done quickly. These operational considerations alone lead me to the conclusion that it would have been impossible for MFZ to have deployed an amount of US$ 20 million within the first quarter of 2017. I also agree with Mr Higenbottam's evidence in his supplemental report (para. 3.1.5) that even if the amount of funding raised had been in the order of US$ 5 million, it is unlikely that MFZ would have been able fully to deploy it even within a single year.

145. The second metric in relation to MFZ is a comparison with the size of the market. MFZ's existing net loan book in 2016, for all types of loans was ZMW 158.2 million (or approximately US$ 16 million). The total amount of loans

and advances made by all MFIs in Zambia, from figures in the BoZ annual report of 2016, was some ZMW 2.93 billion (or some US$ 295 million). MFZ's existing market share was thus some 5%. To have deployed US$ 20 million would have increased MFZ's loan book by US$ 20 million, which would imply a further 7% of Zambia's 'collective loan book', and would have represented a more than doubling of MFZ's market share. I accept Mr Higenbottam's evidence that this would have been impossible within the first quarter of 2017, and that, even if funding of US$ 20 million had been raised, MFZ's new lending activities would not have been materially greater at the end of that quarter than they were at the end of 2016.

146. In relation to LFC, the operational considerations can be illustrated as follows. The relevant lending under the Afrexim term sheet relied on by the Claimants had to be to customers needing leasing finance, who had US Dollar revenues and who were to be lent funds in US Dollars. Although there is some ambiguity in the term sheet, reflecting no doubt the more general point that it was far from final even as an agreement in principle, the Purpose was specified as being that 'the proceeds of the Facility will be used for financing the acquisition of equipment and capital goods including but not limited to importation into Zambia, of mining equipment, trucks and petroleum carrying tankers to be leased to sub-borrowers under Lease Agreements to be entered into between the sub-borrowers and FBZ', ie is limited to funding to participants in the mining and petroleum industries. From LFC's audited accounts for 2016, note 10, it is apparent that as of December 2016, LFC had ZMW 13,144,892 (or about US$ 1.324 million) by way of loans receivable made to the mining sector (there being no separate category for petroleum). The total of LFC's loans receivable

advanced to clients in US Dollars was the dollar equivalent of ZMW 16,661,398, ie about US$ 1.679 million (note 22). In respect of leasing finance, LFC had an exposure of ZMW 15.235 million (or approximately US$ 1.53 million) (none of which was to the mining sector) (note 11). The total of LFC's investments in finance leases denominated in US Dollars was the dollar equivalent of ZMW 470,000 (ie about US$ 47,000) (note 22).

147. Whether looked at from the point of view of ramping up its finance leasing, or its lending to the mining sector, or its lending in dollars, to have deployed US$ 10 million (or the approximate equivalent of ZMW 100 million), and *a fortiori* US$ 50 million, would have required a very significant expansion of LFC's operations. Neither could have been achieved within the first quarter of 2017.

148. As to the size of the market, the total amount of loans and advances made by leasing finance institutions in Zambia in 2016 was equivalent to about US$ 42 million. Thus, the amount of US$ 50 million, which the Claimants contend would have been advanced as envisioned in the Afrexim draft term sheet, would have been an amount almost 1.2x the total size of loans and advances in the leasing finance sub-sector. To have deployed that would have required LFC to take all the existing business from its competitors and to have grown the market as well. That is unrealistic. Even considering the position on the assumption that a smaller amount of funds had been available by the end of 2016, I would agree with Mr Higenbottam's assessment that, given the need to put in place relationships with equipment suppliers, it is unlikely that the amount of LFC's new lending activities would have been materially greater as at the end of the first quarter of 2017 than they were as at 31 December 2016.

149. To a very large extent, Mr Siakachoma's evidence that funds of the order of US$ 20 million and US$ 50 million could have been deployed by MFZ and LFC respectively in the first quarter of 2017 was based on the premise that such lending would be approached on a group-wide basis (that is to say, taking the whole of ATMA's Zambian operations together), and that resources would have been deployed to MFZ/LFC from sister companies to permit the making and disbursement of loans. Mr Siakachoma was, however, unable to give a reason as to why, if that was how the funding was going to be deployed, the lending should have been to MFZ/LFC rather than to FBZ. Furthermore, in my judgment, the degree of support from ATMA / BancABC in disbursing funds raised which was assumed by Mr Siakachoma was not something which ATMA or BancABC was obliged to provide under the SPA. Clause 4.1.4 deals with the raising of funds. Clause 4.1.5 provides that the Buyers are to procure that MFZ and LFC should take all reasonable steps to be able to draw down under the Eligible Funds. Neither lays an obligation on the Buyers or either of them to take steps after the raising of Eligible Funds to use the resources of other companies in the ATMA group for the purpose of assisting in the deployment of Eligible Funds. Nor was there any evidence that that was something which ATMA / BancABC were planning to do, irrespective of any contractual obligation in that regard. Accordingly I consider that the premise of Mr Siakachoma's evidence in relation to deployment lacked a basis.

Quantum

150. Given my above conclusions both on breach and causation, the Claimants' Fund Raising Agent claim fails. In the circumstances, it is unnecessary to consider

the issues which might have arisen in relation to the quantum of the Claimants' claim if my conclusions as to breach and causation been different.

The Building Society Claim

151. I have already set out a summary of the nature of the Building Society Claim. Before I turn to consider the specific issues which arise, it is necessary to set out the context and nature of the relevant provisions of the SPA, and the essential chronology of material events, as I find them to be.

The Treatment of BFS in the SPA

152. FBS was a subsidiary acquired by ATMA when it purchased FBZ. As I have already recorded and as was common ground between the parties, ATMA was not keen to acquire FBS, but it had formed part of the FBZ package. The book value of FBS in late 2015 was approximately ZMW 4.377 million. Dr Mahtani was confident that he could sell it for more than that figure. Against that background, the parties agreed a set of provisions in the SPA by which, after Completion, FBS would be sold or wound down.

153. The original SPA provided that ATMA would deposit certain of its own shares in escrow pending specified outcomes. This was a mechanism used to deal with various different issues, including FBS.

154. The 'Building Society Escrow Shares' were certain ATMA shares, the number of which would be determined at Completion by reference to a formula, and referable (but not equal) to ZMW 18.6 million. The Building Society Escrow Shares deposited were equivalent to the net book value of FBS on 2 November 2015: 112,727 shares worth, at Completion, about ZMW 4.412 million.

155. The original deal specified what would happen to the Building Society Escrow Shares depending on whether FBS was sold for more or less than a figure of ZMW 18.6 million, or was not sold at all, by 31 December 2016. This scheme was set out in Clauses 6.6.2 and 6.6.3, and was to the following effect:

Scenario	**Buyers to receive:**	**Sellers to receive:**
Building Society sold for more than ZMW 18.6m	• Sale proceeds of over ZMW 18.6m.	• All Building Society Escrow Shares (worth c. ZMW4.4m on 30.6.16).
Building Society sold for less than ZMW 18.6m	• Sale proceeds of up to ZMW 18.6m • "Building Society Shortfall Shares" (defined as the number of shares corresponding to the amount by which the sale price was less than ZMW18.6m). E.g. if the sale price was ZMW15m, the Buyers would receive a proportion of Building Society Escrow Shares referrable to a shortfall of ZMW3.6m (calculated as: (112,727 / 18.6m) x 3.6m = 21,818 shares).	• Any remaining Building Society Escrow Shares (after payment of Building Society Shortfall Shares to Buyers)
Building Society not sold	• Some or all of the Building Society Escrow Shares – the number corresponding to the amount of any new or additional provisions or write-offs taken by the Company from 31 December 2014 to 31 December 2016 on the non-performing loans of FBS.	• Any remaining Building Society Escrow Shares.

156. Under these provisions, if FBS was sold for the price of ZMW 18.6 million (which might perhaps be described as the index or reference price), the Sellers would receive a pot of ATMA shares worth (at Completion) slightly under a quarter of the index price. If FBS was sold for nothing, the Buyers' recovery would have been limited to the same pot. It was the Sellers collectively, and not just Dr Mahtani, who would benefit from the receivables set out in the right-hand column of the table.

157. Clauses 7.2.2 and 7.2.3 set out the provisions dealing with how FBS was to be sold or attempted to be sold. I will return to these below.

158. On 22 March 2016, BoZ wrote to FBS raising concerns regarding its financial condition. There was a capital deficiency of ZMW 30 million; and BoZ required a significant capital injection into FBS, in this amount. The Claimants, as Sellers, and ATMA, as a Buyer, were each to be responsible for approximately half the capital injection. The issues arising were dealt with by an Addendum to the SPA executed on 30 June 2016. Under the Addendum, the whole of the capital sum would be paid by FBZ; and the Sellers would provisionally sacrifice a pot of 363,636 ATMA shares worth just under half of the capital sum (namely ZMW 14,187,550 at Completion), which they would otherwise have received as consideration, and which were called the 'Additional Building Society Escrow Shares'.

159. The revised deal identified a revised index price for FBS of ZMW 48.6 million (ie the original ZMW 18.6 million plus ZMW 30 million) and stipulated what would happen to the Building Society Escrow Shares and the Additional Building Society Escrow Shares if FBS (i) was sold for more than the revised index price, (ii) was sold for less than the revised index price but for more than the capital injection of ZMW 30 million, (iii) was sold for less than ZMW 30 million, or (iv) was not sold at all by 31 December 2016. The scheme was to the following effect:

Scenario	**Buyers to receive:**	**Sellers to receive:**
Building Society sold for more than ZMW 48.6m	• Sale proceeds of over ZMW 48.6m	• All Building Society Escrow Shares (worth c. ZMW4.4m) • All the Additional Building Society Escrow Shares (worth c. ZMW14m)
Building Society sold for between ZMW 30 and ZMW 48.6m	• Sale proceeds of ZMW 30-48.6m • Building Society Shortfall Shares (i.e. the number of Building Society Escrow Shares which corresponds to the amount by which the sale price paid is less than ZMW 48.6m)	• The balance (if any) of Building Society Escrow Shares • All the Additional Building Society Escrow Shares (worth c. ZMW14m)

Building Society sold for less than ZMW 30m	• Sale proceeds of up to ZMW 30m • All Building Society Escrow Shares (worth c. ZMW4.4m) • Some or all of the Additional Building Society Escrow Shares (the number corresponding to the amount by which the sale price paid is less than ZMW 30m)	• The balance (if any) of Additional Building Society Escrow Shares
Building Society not sold by 31.12.16	• Some or all of Building Society Escrow Shares (the number corresponding to new/ additional provisions or write offs from 31.12.14 to 31.12.16 on non-performing loans, plus other factors) • Some or all of the Additional Building Society Escrow Shares (depending on whether ATMA succeeds in divesting within 12 months)	• The balance (if any) of Building Society Escrow Shares • The balance (if any) of the Additional Building Society Escrow Shares

160. The wording of Clause 7.2 was unchanged by the Addendum.

The Sequence of Events

161. On 17 December 2015 ATMA sent a letter of application to BoZ for regulatory approval to acquire FBZ and to merge FBZ with BancABC. The letter identified the approval sought and attached a 'Regulatory Submission Document' and draft SPA.

162. By letter dated 2 March 2016, and signed by Dr Ng'andu, BoZ granted 'conditional approval for Atlas Mara to acquire [FBZ] and to merge it with BancABC Zambia'. Conditional approval was subject to six matters, including the submission by BancABC of the details of the remaining proposed directors. The letter also expressly approved the appointment of Mr Vitalo, Ms Bott, Mr Odhiambo and Mr Libakeni as Directors.

163. As already stated, Completion under the SPA occurred on 30 June 2016.

164. By letter dated 9 December 2016, marked as received on 15 December 2016, Dr Mahtani wrote to BoZ seeking approval for his repurchase of FBS. The letter was in these terms:

'FINANCE BUILDING SOCIETY

As you are aware, Finance Building Society is a wholly owned subsidiary of Finance Bank Zambia Plc. I was an accredited representative of the Sellers in the negotiations with Atlas Mara/Bank ABC. The Share Purchase Agreement (SPA) provides that the Sellers have a right through me to repurchase Finance Building Society on or before 31st December 2016.

In seeking full compliance of the SPA we have decided to exercise our rights in repurchasing Finance Building Society subject to your approval. The SPA provides that the purchase should be construed in the name of the Sellers' Representative ie myself.

The purpose of this letter is to seek your approval for the repurchase of Finance Building Society on the understanding that within 90 days of the purchase we shall restructure the ownership to comply with the Banking and Financial Services Act to your satisfaction. Within 90 days period we shall also ensure that the capital of Finance Building Society will meet the capital requirements stipulated by yourselves in the earlier letters of instruction.

Would you pleas confirm your acceptance to this request to enable us to ensure that the option is exercised in good time pursuant to the Share Purchase Agreement.'

165. Dr Mahtani met Ms Hamza Bassey on 19 December 2016. The occasion was primarily a social one, at which Dr Mahtani's wife was present. Ms Hamza Bassey was under the weather. Dr Mahtani did, nevertheless, as they were saying goodbyes, refer to the fact that he would be purchasing FBS, and that he had written to BoZ to seek regulatory approval. I find that he did not on this occasion mention the price, or what would happen to the Building Society Escrow Shares or the Additional Building Society Escrow Shares. Ms Hamza Bassey's evidence was that she was somewhat stunned by Dr Mahtani's saying that he had written to BoZ without the Defendants having agreed to sell FBS to him and without notifying them beforehand; and that she had said that he would not be able to get approval from BoZ without a share purchase agreement (for FBS) in place. She said in evidence: 'I frankly at that stage didn't take him seriously.'

166. On 21 December 2016, Dr Mahtani sent an email to Ms Hamza Bassey, enclosing, by way of two image files, a letter dated 20 December 2016. That letter named the addressees as Ms Hamza Bassey, giving her BVI address, cc ATMA, giving its Dubai address, and Twaambo Kalegna Chirwa, BancABC's Country Legal Manager ('Ms Chirwa'), giving the BancABC address in Lusaka. The letter was as follows:

'**Sale of Building Society to Seller Representative**

Dear Beatrice and Twaambo,

I refer to the sale and purchase agreement amongst the former shareholders of Finance Bank Zambia, ATMA and Bank ABC relating to the sale and purchase

of 85% of the shares in Finance Bank Zambia dated 2 November 2015 (as amended on multiple occasions prior to 30 June 2016 (the "**Addendum**").

Except where defined in this letter, capitalised terms shall have the meanings given them in the SPA or Addendum.

1.Appointment of FBS Representative

The Sellers hereby appoint Mike Machila as the FBS Representative pursuant to clause 7.2.2 of the SPA.

2.Sale of the Building Society to the Seller Representative

As you are aware, clause 7.1 of the SPA provides that "The Seller Representative shall purchase or procure the purchase by a third party acceptable to the Buyers (acting in good faith) of the Building Society from the relevant member of the Group as soon as reasonably practicable after Completion and in any event completion of such sale shall occur by 31 December 2016".

The Seller Representative hereby notifies the Buyers that the Seller Representative, agrees to purchase the Building Society for ZMW 1 and otherwise on the terms of the attached sale and purchase agreement (the "**SPA**").

The consequences of effecting the sale of FBS for ZMW 1 is that pursuant to clause 6.6.3(d) of the SPA (as amended by the Addendum), all of the Building Society Escrow Shares and all of the Additional Building Society Escrow Shares shall be released from the Escrow Account to the Buyers.

As Beatrice is aware, a request has recently been made to the Bank of Zambia seeking the approval of the Bank of Zambia to the proposed sale of the Building Society to the Seller Representative.

3.Next Steps

The Seller Representative is ready and willing to execute the SPA and expects that Bank of Zambia approval should be provided in the next few days.

It is important from the Seller Representative's perspective that both the SPA be signed and that completion of the transfer of the Building Society to the Seller Representative occur prior to 31 December 2016.

Please confirm within three Business Days that ATMA is willing to procure that the Company executes the SPA takes all reasonable steps to complete the SPA by 31 December 2016.'

Given the date on which this was sent, there were by then only 5 remaining Business Days (as defined in the SPA) before 31 December 2016.

167. I will return below to the highly contentious issue of whether a draft FBS SPA was provided to the Defendants at or about this time. What is, as I understood it, uncontentious, is that the FBS SPA which had been drafted by Mr Lester, and which, if any FBS SPA was sent would have been what was provided, contained the following:

'3. **CONSIDERATION**

The purchase price for the sale of the Shares shall be ZMW 1 …

4. CONDITIONS

4.1 Completion shall be subject to receipt by the Vendor of the Bank of Zambia's approval of (or no objection to) the sale of the Company or the Shares to the Purchaser.

4.2 If the Condition is not satisfied by 29 December 2016 this Agreement shall cease to have effect immediately except for the provisions of Clauses 1, 4.2, 7, 9 to 17.1 and any rights or liabilities that have accrued prior to that time.

5. COMPLETION

5.1 Completion shall take place on the next Business Day after the Condition is satisfied….'

168. Also on 21 December 2016, Dr Ng'andu, the Deputy Governor of BoZ, telephoned ABC-FBZ's CEO, Mr Benjamin Dabrah ('Mr Dabrah'). Dr Ng'andu's own account of what happened, which I entirely accept as far as it goes, was that he asked Mr Dabrah whether he was aware of Dr Mahtani's letter of 9 December 2016, and Mr Dabrah had said that he was not. Dr Ng'andu had then asked him what was his position as to whether the right of buy back in the SPA could be exercised; and Mr Dabrah had said that it could be exercised under certain conditions, including that both parties had to agree to it. But, Mr Dabrah said, he had not seen the letter. Accordingly, Dr Ng'andu arranged for Dr Mahtani's letter to be sent to Mr Dabrah, so that the Defendants could review it, and with the hope that there could then be some agreement as to how to proceed. From the fact that Mr Dabrah did not have a copy of the letter, Dr Ng'andu recognised that there was the possibility that there might arise a dispute

between Dr Mahtani and the Defendants as to whether the right to buy back could be exercised. I further find that, on this call, Mr Dabrah suggested to Dr Ng'andu that he should speak directly to Ms Hamza Bassey.

169. After his call with Dr Ng'andu, Mr Dabrah spoke to Ms Hamza Bassey, and thereafter forwarded the letter of 9 December 2016, which had been received from BoZ, to her. I also find that, as Ms Hamza Bassey recalls, she spoke to Dr Ng'andu on the next day. Her account of that conversation in her witness statement is, I consider, somewhat coloured by her subsequent thinking about the case, but is I believe correct in saying that on that call Dr Ng'andu had asked whether ATMA / ABC-FBZ had struck a deal with Dr Mahtani in respect of FBS; that she told him that no deal had been done, and that she was surprised that Dr Mahtani had contacted the regulator without informing ATMA first; and that she had asked whether Dr Mahtani had submitted any documentation in support of his request for approval and had been told that he had not.

170. On 23 December 2016 Dr Ng'andu signed a letter to Dr Mahtani. That letter was actually not received by Dr Mahtani or any of his staff until after 31 December 2016, because it needed to be collected by his staff when the BoZ offices reopened early in January 2017. That letter was in these terms:

'Dear Dr Mahtani

PURCHASE OF FINANCE BUILDING SOCIETY

Reference is made to your letter dated December 9, 2016 seeking the prior written approval of the Bank of Zambia … to repurchase Finance Building Society (FBS).

Please note that the decision to exercise your right under Clause 7.2 of the **Share Sale Purchase Agreement (SPA)** is a matter of agreement between the two parties to the SPA.

However, for Finance Building Society to operate as a separate financial institution, it will be required to comply with all the provisions of the Banking and Financial Services Act (BFSA) and subsidiary legislation particularly, the following:

1. Recapitalisation of Finance Building Society to meet the minimum capital requirement of K50 million within 90 days of the purchase of shares as prescribed by the New Capital Adequacy Framework;

2. Compliance with the voting control limit of 25 percent as prescribed by section 23(2) of the BFSA within 90 days of the purchase of shares; and

3. The shareholders of Finance Building Society meeting the fitness and propriety test.

Kindly be advised accordingly.'

171. On 29 December 2016 ATMA replied to Dr Mahtani's letter dated 20 December 2016 by email attaching a letter from Ms Hamza Bassey dated 28 December 2016. That letter was in these terms:

'We confirm receipt of your letter dated December 20, 2016 communicating your intention, as Seller Representative, to acquire 100% of the share capital of Finance Building Society (FBS). We have reviewed the letter and wish to highlight the matters set out below.

1. As you know, the June 30, 2016 Sale and Purchase Agreement among the former shareholders of 85% of Finance Bank Zambia on the one hand, and Atlas Mara and African Banking Corporation of Zambia on the other ("SPA"), as amended by the Addendum of the same date ("Addendum"), sets out clearly the manner in which the sale of FBS shall be effected.

2. With respect to your proposal that the Seller Representative acquire FBS, we welcome your comment on how your proposal would not contravene the non-compete provision of Clause 12.1.1 of the SPA.

3. Finally, we wish to express our concern that on December 9, 2016 you made a request for approval to the Bank of Zambia regarding your intention to acquire FBS and only informed us on December 19, 2016 during your meeting with the undersigned in Dubai. It remains unclear to us why such a request was made to the regulator without first discussing with us, and, without first reaching an agreement on terms for such sale. We wish to be advised regarding the outcome of your communication with the regulator in this regard.

In the meantime, from me and all of my colleagues at Atlas Mara, we wish you a very happy, healthy and prosperous New Year.'

172. On 29 December 2016, Dr Mahtani sent two further emails to Ms Hamza Bassey. One was as follows:

'Dear Beatrice,

Blessings to you and all the immediate family at Atma. …

I return to London on the morning of the 4th and would be available for any discussions or meetings you may propose (assuming your internal discussions have been completed) to enable us to finalise all outstanding matters and to make 2017 a prosperous and fruitful year.

I will officially respond to your enquiry upon my return to London but in the meantime for the purpose of clarity will advise the sections of the SPA that clarifies the enquiry.

…’

173. Later on the same day he sent a short email to Ms Hamza Bassey, referring to Clause 12.4.1 of the SPA as containing an express carve-out from the non-compete provision in the event of his acquiring FBS in accordance with clause 7.1.

174. Nothing else material appears to have occurred before the end of the year. There had, in particular, been no completion of any sale of FBS by that date.

175. On 7 January 2017, Dr Mahtani sent an email to Ms Hamza Bassey, attaching BoZ’s letter dated 23 December 2016, and saying:

‘Bank of Zambia approval on the matter pertaining to Finance Building Society was awaiting our collection as our offices were closed for the festive period. Please find this now attached.’

The Issues

176. As I have already set out, the Claimants have subsequently taken the stance that the Defendants were in breach of the SPA in not having sold FBS to Dr Mahtani prior to 31 December 2016, and the Defendants deny that this is the case.

177. The following are, on my analysis, the principal issues which require to be addressed.

1. On a proper construction of the SPA, was Dr Mahtani entitled (subject to taking necessary steps to do so) to buy FBS for the consideration of KMW 1, in the circumstances in which he claimed to be entitled to do so?

2. If so, were the Defendants in breach of the SPA in not selling it to him by 31 December 2016?

3. If there was a breach of the SPA by the Defendants, did it cause loss to Dr Mahtani, and if so, in what amount?

Construction of Clause 7.2 of the SPA

178. As to the first question, the Claimants' case is that Clause 7.2 of the SPA is straightforward, and means that Dr Mahtani had a choice under Clause 7.2.1 namely whether to repurchase FBS himself or procure its purchase by a third party by 31 December 2016; if he elected prior to 31 December 2016 to reacquire FBS, the Defendants were under an obligation to sell it to him by that date; and, given that no minimum sale price was specified, he could set that price as he chose, including at KMW 1.

179. In my judgment, Clause 7.2, judged as a whole, and in context, does not have this meaning or effect. My reasons for that conclusion follow.

180. Clause 7.2.1 provides that the Seller Representative [ie Dr Mahtani] is to purchase or procure the purchase by a third party of FBS 'as soon as reasonably practicable' after Completion.

181. Clauses 7.2.2 and 7.2.3 set out the mechanics for how FBS is to be sold. Under Clause 7.2.2 'the Sellers' 'will' appoint a representative acceptable to the Buyers, to have sole and irrevocable authority to market and negotiate the sale of FBS, or wind down or otherwise recover non-performing loans. That is an obligation, and it is one which is to be performed by the Sellers collectively, not merely by Dr Mahtani. A FBS Representative, who would thus be being appointed to market an asset belonging to the Buyers, or to wind down loans owing to it, would clearly, in my view, have owed duties to the Buyers (and to the Sellers collectively), to perform the specified tasks with reasonable diligence. This would, in the ordinary course, mean obtaining the best achievable price on a sale; and if a sale could not be achieved, winding down or recovering non-performing loans to limit losses as far as reasonably possible. Under Clause 7.2.3 the Buyers are to procure that FBZ and its subsidiaries provide all reasonable assistance to the FBS Representative to facilitate his performance of these tasks.

182. I do not consider it to be an available construction of Clause 7.2 as a whole that Clauses 7.2.2 and 7.2.3 have no application if it is Dr Mahtani who is to be the purchaser under Clause 7.2.1. Clause 7.2.2 is not expressed in such a qualified way. Furthermore, that the Clause 7.2.2 mechanism is applicable in every case makes good sense and is not inconsistent with the language of Clause 7.2.1. Thus, what Clause 7.2, on this basis, requires, is that a FBS Representative

should be appointed as soon as reasonably practicable after Completion, should then seek to market FBS, but, in the performance of that task, can sell it to Dr Mahtani.

183. It is significant that it is not only ATMA which would have an interest in the Clause 7.2.2 process being applicable whether the sale was to Dr Mahtani or to a third party. The Sellers collectively had such an interest. If FBS was sold for less than its value, the other Sellers would have received fewer Building Society Escrow Shares and/or fewer Additional Building Society Escrow Shares than they would otherwise have been entitled to. There is no reason to read Clause 7.2 as producing that unlikely outcome. On the contrary, the mandatory requirements of Clause 7.2.2 are, in my view, inconsistent with it.

184. The Claimants' case in relation to Clause 7.2 is thus subject to these objections:

(1) That it fails to read Clause 7.2.1 in the context of the clause as a whole and in particular the unqualified terms of Clause 7.2.2.

(2) That, in particular, it does not fit with Clause 7.2.2 as a matter of timing. Clause 7.2.1 does not provide for Dr Mahtani to have a right to decide whether to purchase, himself, within a circumscribed time, after which FBS will be put on the market. The Claimants' case is that Dr Mahtani can exercise his option to purchase FBS up to very shortly before 31 December 2016. But under Clause 7.2.2 the Sellers have an obligation to appoint an FBS Representative; and there is no stipulation that they can wait to do so until Dr Mahtani has exercised his option. In effect, the Claimants' construction involves saying that Clause 7.2.2 would, in effect, be retrospectively disapplied, if Dr Mahtani subsequently decided to buy FBS himself. That is inconsistent with the need for the parties

to know what their obligations are under Clause 7.2.2 (and 7.2.3) during the period from Completion under the SPA until the point, if any, at which Dr Mahtani decided to purchase.

(3) That it is inconsistent with the detailed terms of Clauses 6.2.2 to 6.2.4, with their careful allocation of entitlements depending on whether FBS is sold and if so at what price. The existence of this elaborate scheme is not consistent with the notion that Dr Mahtani could simply choose the price which he wished to pay.

(4) That it gives insufficient weight to the fact that Clause 7.2.1 provides that Dr Mahtani shall either 'purchase' or 'procure the purchase by [an acceptable] third party'. A purchase by an acceptable third party would clearly have to be one made after operation of the procedure in Clause 7.2.2. There is no reason why the same should not apply to a purchase by Dr Mahtani. Specifically, Clause 7.2.1 gives no indication that it is intended that Dr Mahtani's 'purchase' should be on preferential terms. Nor does Clause 7.2.1 say, as on the Claimants' case it might have, that Dr Mahtani is simply to 'take the transfer' of FBS, or the like.

(5) That it fails to recognise the interests of the other Sellers, which are protected by Clause 7.2.2 and 7.2.3.

185. Accordingly, I consider that the SPA did not entitle Dr Mahtani, without there having been the prior appointment of a FBS Representative, and a marketing process, to purchase FBS for KMW 1. That conclusion is sufficient to mean that the Building Society Claim fails.

Was there a Breach of the SPA?

186. I turn to consider whether, assuming that I am wrong in relation to the issue of construction of the SPA considered above, and Dr Mahtani did have the right to purchase FBS for a price he nominated, the Defendants were in breach of the SPA. The Defendants say that, even on this assumption, they were not in breach because Dr Mahtani had not taken all the steps reasonably necessary to effect a purchase by 31 December 2016 and in particular (i) he had not provided a draft FBS SPA, and (ii) did not have regulatory approval.

187. While the Claimants sought to characterise these issues as ones of causation (Closing Submissions, para 206), the Defendants clearly opened and argued these points as going to whether the Defendants were in breach of the SPA. I consider that that is the right analysis. Even if the Claimants are correct in relation to their case as to an entitlement on the part of Dr Mahtani to purchase without the Clause 7.2.2 procedure having been put into effect, whether the Defendants were in breach must depend on whether the Defendants bore some contractual responsibility for the fact that no purchase came about. In the present case, it appears to me that this would not be the case unless one of the following applied: (i) the Defendants were responsible for the fact that Dr Mahtani did not seek to initiate the purchase until the time that he did; (ii) Dr Mahtani, having obtained all necessary approvals, made an offer to purchase FBS which was capable of acceptance and the Defendants failed, within a reasonable time, to accept it; (iii) the Defendants made clear that they would not accept such an offer even if made; (iv) the Defendants were in some other way

responsible for the fact that Dr Mahtani did not, having raised the issue, make an offer which was capable of acceptance.

188. This taxonomy of the circumstances in which the Defendants might have been in relevant breach was not one advanced, expressly, by either party. It nevertheless seems to me to embrace all the cases made by each, and to be accurate. I will deal with each of situations (i) to (iv), below.

Situation (i)

189. I did not understand it to be suggested that situation (i) applied, and I am of the view that there was no support for the idea that it did. There is no basis for saying that it was as a result of obstruction or interference by the Defendants that Dr Mahtani had not taken any steps to make an offer to purchase FBS until the second half of December 2016. Dr Mahtani could, on his case, have initiated the process at any time after Completion. Furthermore, he was under an obligation, under Clause 7.2.1 to make or procure the purchase 'as soon as reasonably practicable' after Completion. His initiation of the process was not 'as soon as reasonably practicable', and was, given that there had been a period of 6 months available, very late indeed. Whether that was as a result of a 'deliberate choice' on his part, as contended by the Defendants, does not perhaps matter greatly: on any sensible view it left little time for the conclusion of the purchase. This was exacerbated by the season of the year at which it was initiated. The sort of problems which the impendence of the Christmas and New Year holidays may give rise to is well illustrated by the fact that the Claimants' representatives were unable to collect Dr Ng'andu's letter of 23 December 2016 until BoZ's offices reopened in the new year.

Situation (ii)

190. This raises the question of whether Dr Mahtani had taken all necessary steps to make an offer capable of acceptance.

Was a FBS SPA needed and was one supplied?

191. The Defendants say that he had not taken all such necessary steps, and rely, in the first place, on the fact that he had not supplied a draft FBS SPA. In my judgment, the Defendants are right to say that, for there to be an offer which was capable of acceptance, it was necessary for Dr Mahtani to have provided to the Defendants all the essential terms on which he was proposing that the repurchase should occur. Given that he had not raised the matter earlier, and had established no other channels or means by which such terms might be agreed, that meant, in the circumstances and in practice, that he needed to supply the Defendants with a draft FBS SPA. It is doubtless for that reason that he thought it was necessary to provide a draft FBS SPA, and why his letter dated 20 December 2016 is drafted on the basis that one was being provided.

192. I therefore turn to what was a hotly contested factual issue of whether Dr Mahtani had actually sent a copy of the draft FBS SPA to the Defendants by 31 December 2016. I have reached the conclusion that he had not, and that the Defendants had received no copy of a draft FBS SPA by that date. My reasons follow.

193. The draft FBS SPA was not attached to Dr Mahtani's email which sent his letter of 20 December 2016. There is no copy of such a FBS SPA in the Defendants' records, and the first time that ATMA received a copy of such a draft FBS SPA

was during the course of these proceedings. Ms Hamza Bassey's evidence, which I accept, is that she had not received a copy of such a draft FBS SPA. Had such a draft FBS SPA been received by the Defendants at the time, it is likely that it would have generated some documentation evidencing this, but it appears that there is none.

194. Nor is there any document emanating from the Claimants' side evidencing that a draft FBS SPA was sent. The only evidence to the effect that a draft FBS SPA was actually sent was Dr Mahtani's evidence that he sent a hard copy. That evidence was, in my judgment, not capable of being relied upon.

(1) In the first place, Dr Mahtani's evidence on the matter was the subject of repeated changes. The Defendants identified six versions of this case. That may overcount somewhat. But there were certainly a number of different cases made. These must be seen against a basic chronology under which Dr Mahtani was in Dubai (as was Ms Hamza Bassey and where ATMA had its offices), until early on 20 December 2016, when he flew to London. Initially, a case was made that the draft had been sent in hard copy 'by way of FedEX' on 20 December 2016; it was then said that it would have been Dr Mahtani's personal assistant at the time, who had since died, who would have made the arrangements for the couriering of the letter; then, in Dr Mahtani's witness statement, it was said that the document had been sent on 21 December 2016 'by overnight courier from London'; then just before Dr Mahtani gave evidence, it was said in a letter from the Claimants' solicitors (which Dr Mahtani adopted in his oral evidence) that Dr Mahtani had on 21 December 2016 asked his cook in London to courier the envelope, and DHL might have been used; and then in oral evidence Dr Mahtani

added that he had given his cook (Mr Khalid) £50 in cash to effect the sending, and that he had called his PA in Zambia asking her to obtain the soft copy of the draft FBS SPA from Mr Lester and email it to Ms Chirwa of BancABC.

(2) Secondly, Dr Mahtani's evidence that he had arranged for a hard copy to be sent from London was itself inherently improbable. He was seeking to send a document to a recipient in another country whom he had repeatedly emailed over the previous year, and with whom he remained in email contact. Email was the obvious method by which to send such a communication, rather than, as was his evidence, collecting a hard copy of it in Dubai, flying to London and there asking someone to courier it back to Dubai. This was the more improbable as he accepted in his evidence that he had received a soft copy of the FBS SPA from Mr Lester, and he could therefore have sent it in that form; or he could have sent it as jpg attachments from his phone, as he did with the letter of 20 December 2016 itself. Sending it by courier would also be slower, in circumstances where time was already very short.

(3) If Dr Mahtani had been seeking to send the draft FBS SPA to Ms Hamza Bassey, it is improbable that he would have asked his domestic cook in London to do so. He had a PA at the time, and, on his evidence, it was she he asked to obtain the draft FBS SPA and email it to Ms Chirwa. It is more plausible that he would have asked her to courier a document to Ms Hamza Bassey. Alternatively, he might have asked Mr Lester, who, he said, had already delivered the draft FBS SPA to his hotel in Dubai on 19 December 2016, and had emailed him the draft SPA on 20 December 2016.

195. I therefore conclude that a FBS SPA was not sent to the Defendants, or either of them, before 31 December 2016, and, for that reason, the Defendants had not failed to accept an offer capable of acceptance.

Had Dr Mahtani all necessary regulatory approvals?

196. The Defendants made the further case that no completion could have taken place by 31 December 2016 because Dr Mahtani had not obtained, and did not have, regulatory approval by that date.

197. The statutory background to this argument is s. 23 of the Zambian Banking and Financial Services Act 1994 ('the 1994 Act'), which was in force at the material times. That section provided, in part:

'(1) Shares issued by a bank or financial institution shall be only of such classes or series as may be approved by the Bank of Zambia.

(2) That person or another person shall not, without the prior approval in writing of the Bank of Zambia-

(a) acquire any beneficial interest in the voting shares of a financial service provider; or

(b) enter into any voting trust or other agreement,

that would enable the person to control more than twenty-five per centum of the total votes that could be cast on any general resolution at a general or special meeting of the financial service provider. Provided that this subsection shall not apply to a company which is publicly listed on a securities exchange in a jurisdiction outside the Republic acceptable to the Bank of Zambia.

…

(3) A financial service provider shall not register any transfer of its voting shares to any person if, as a result of the transfer, the person would contravene subsection (2).

…

(6) Any person acting in contravention of this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one hundred thousand penalty units or to imprisonment for a period not exceeding five years, or to both.'

198. The Defendants contend, and I accept, that it is implicit in the SPA that the only sale which there is any obligation (whether on sellers or purchasers) to complete, pursuant to Clause 7.2.1 of the SPA, is a sale which is not illegal, and which would not involve a contravention of s. 23 of the 1994 Act or a possible criminal sanction under s. 23(6) of that Act.

199. The Defendants say that Dr Mahtani did not have the prior written approval of BoZ to acquire shares, or enter into an agreement, that would have enabled him to control more than 25% of the shares of FBS. His proposed acquisition of FBS would have involved him doing so, and therefore it would have been illegal.

200. The Claimants contend that Dr Mahtani did have such prior written approval, or did not need it. Their case in this area underwent significant changes during the course of the case, including during and after the evidence.

201. The Claimants' initial case, in their original POC, and APOC, original Reply and RAR, was that BoZ's letter of 23 December 2016 constituted regulatory approval. This was consistent with the evidence in Dr Mahtani's witness statement, which said that his letter of 9 December 2016 was a request for regulatory approval, and that the letter from BoZ of 23 December 2016 was such an approval, subject to conditions.

202. In light of the position of the Claimants' expert in this area, Ms Wamulume, in their RRAPOC served on 19 October 2023, the Claimants changed their case to say that the BoZ letter of 23 December 2016 was not itself a document approving the purchase of FBS, and advanced instead the case that BoZ had, by approving the SPA including its Clause 7.2, given approval, or approval in principle, to Dr Mahtani's acquisition of FBS. In closing, the Claimants put forward a further case that, if approval had not been given, it was not required, and the shares in FBS could and should have been transferred to Dr Mahtani.

203. In my judgment, the simplest answer to this aspect of the case is that, whatever might otherwise have been the position, the re-purchase which Dr Mahtani was proposing to the Defendants in December 2016 was one which was explicitly subject to the receipt of an express approval or statement of non-objection from BoZ in response to his request for such approval in his letter of 9 December 2016.

204. In this regard it appears to me that his letter of 9 December 2016 was clearly asking for such approval. It was seeking approval for the purchase of FBS by Dr Mahtani, and saying that, if such approval was given, then after the purchase there would be a restructuring of the shareholdings in FBS; and it was asking

for confirmation of BoZ's acceptance of that request in good time to allow the option to be exercised in accordance with the SPA, ie by 31 December 2016. When, as I think predictably, that letter was passed to the Defendants, it would have been understood in the sense I have outlined. Furthermore, I consider that it was also clear from Dr Mahtani's letter of 20 December 2016, sent to Ms Hamza Bassey on 21 December 2016, that what was being proposed was a purchase, once BoZ approval, which had recently been asked for, had been obtained, and which, the letter stated, was expected in the next few days.

205. Had the FBS SPA been sent and received, the matter would have been even clearer. I have already set out the terms of clauses 4 and 5 of that draft FBS SPA. They make it express that the purchase that Dr Mahtani was proposing was one on terms that if there had been no 'receipt by the Vendor of the Bank of Zambia's approval of (or no objection to) the sale' by 29 December 2016, then the agreement should immediately cease to have effect. It is apparent from the phrasing 'receipt … of … [BoZ's] approval (or no objection to) the sale' by a certain date, that what was envisaged was a communication from BoZ expressing either approval of or that there was no objection to the sale; and it was also made clear that that communication must have been received by the Vendor by 29 December 2016.

206. No communication of BoZ approval (or of no objection) was received by 29 December 2016 (or by 31 December 2016). That is so even if BoZ's letter of 23 December 2016 can be so regarded - which is a case which, as I have said, the Claimants did not in the event pursue – because the Claimants only received that letter in the new year.

207. Thus the condition which Dr Mahtani had himself set for there to be a sale – whether regard is had only to the letters of 9 and 20 December or to the clearer position if the draft FBS SPA was sent – had not occurred, and the Defendants could not have been in breach of SPA in not completing the sale.

208. If for some reason that analysis is wrong, it is necessary to consider the Claimants' pleaded case that approval of BoZ had already been given by way of the letter of BoZ dated 2 March 2016, to which I have referred above. The Claimants relied on the expert evidence of Ms Sandra Ndemanga Wamulume, who is a Zambian qualified legal practitioner, who was called to the Zambian Bar in 2005. Her opinion was that in approving ATMA's acquisition of FBZ, which was on the terms of the SPA which BoZ had been sent, BoZ approved Dr Mahtani's repurchase of FBS as provided for in Clause 7.2.1 of that SPA. The Defendants denied that BoZ had given any approval to the repurchase in this way. They relied on the expert evidence of Mr Sylvester Mutale Kabwe, who worked for BoZ from 2004-2020 primarily within the Non-Bank Financial Institutions Supervision Department, including as Principal Examiner – Examinations and Surveillance.

209. Both experts sought to assist the court. I did not consider that it was only a lawyer, such as Ms Wamulume, who could assist on the issue in question. There was no issue as to the relevant provisions of Zambian law. The real question was whether an approval had been given, which was informed by the practice and procedures of BoZ. This is indeed implicit in Ms Wamulume's own first report, paragraphs 33 (in its reference to her experience of BoZ's approval process) and 35-38 (in her reference to the views, as she saw them, of Dr

Ng'andu). On such matters Mr Kabwe's evidence was of considerable assistance.

210. In my judgment, Ms Wamulume and the Claimants are wrong in saying that approval had been given by BoZ to the repurchase of FBS by Dr Mahtani for the purposes of s. 23 of the 1994 Act. This is for a number of related reasons, of which the following are the most important:

(1) The application which was made to and considered by BoZ was ATMA's acquisition of FBZ and the subsequent merger of FBZ with BancABC. This is how ATMA's letter of 17 December 2015, which had made the application, had summarised it. That letter made no reference to seeking BoZ's approval for the potential future reacquisition of FBS by Dr Mahtani, and was not sent jointly with him or copied to him. The accompanying Regulatory Submission Document made no reference to seeking approval for such a possible reacquisition of FBS by Dr Mahtani, and made only a single reference to 'the divestment of FBZ from Finance Building Society', without referring to whom FBS might be divested.

(2) BoZ's letter of 2 March 2016 communicating its decision stated that it granted conditional approval of ATMA's acquisition of FBZ and of merging it into BancABC. It made no reference to an approval of Dr Mahtani's subsequent reacquisition of FBS and was not copied to him.

(3) There was no dispute between the experts that the purpose of s. 23(2) of the 1994 Act was to ensure diversified ownership of Zambia's financial institutions. For BoZ to depart from the 25% threshold would require some justification or

rationale, but the application made by ATMA by its letter of 17 December 2015 had not provided any such justification.

(4) It is unrealistic to suggest that, in deciding on an application such as ATMA's of 17 December 2015, BoZ can be said to have approved the contents of all the supporting documents supplied, or to have approved all the terms of a long SPA such as the one here, so that there can be said to have been approval of a particular provision even though no attention was called to it in the application. That would, as the Defendants submit, be an onerous burden for the Zambian Parliament to have placed on BoZ, in circumstances where there is no apparent practical or regulatory reason why such a burden should be imposed.

(5) If it were right that BoZ had given prior approval to the sales which might take place pursuant to clause 7.2 of the SPA it would mean that it had given prior approval to a sale which might take place several months later, and in circumstances which had materially changed. It is implausible that a regulator would do that, and I accept Mr Kabwe's evidence that he was not aware of BoZ ever having granted regulatory approval in principle in respect of a transaction that might or might not occur at an unidentified future date. It would also mean, according to Ms Wamulume's evidence, that BoZ had given approval to a sale to a third party acceptable to the buyer, without that third party being identified to BoZ. I regard it as most implausible that a financial regulator would do that.

(6) Consistently with the above, Dr Ng'andu gave the following evidence:

'[Q] You're not saying in this paragraph, are you, that by your March 2016 letter, the Bank of Zambia was granting regulatory approval for any future

potential acquisition of FBS by Dr Mahtani regardless of the future circumstances?

[A] That would be difficult to say. I don't think that is a commitment one would make at that point in time, no.'

(7) It is apparent from Dr Mahtani's letter of 9 December 2016, and from the terms of the draft FBS SPA that he, and his advisers, did not at that stage consider that he had the necessary prior approval from BoZ. While it may largely be a forensic one, I considered as well taken the Defendants' point that it was surprising that he and they should be unaware that he already had the relevant approval.

211. BoZ's letter of 23 December 2016 cannot in my view be read as a confirmation that any necessary approval for the purchase had already been obtained or was dispensed with, and that the only matters necessary to comply with would operate after the sale. The BoZ letter was guarded. It did not say that no further approvals were necessary for there to be a sale. The reference to a decision to purchase being a matter for the parties to the SPA is, as I read the letter, a way of reserving BoZ's position, in that it is saying that whether or not there is an agreement to sell FBS is a matter for the parties, not BoZ.

212. In closing the Claimants made a further case to the effect that if there had not been approval given by BoZ, it was not required. The argument, as I understood it, was that completion of the sale could have gone ahead; the transaction would not have been void but merely voidable; and that there would have needed to be an application to set it aside, which either would not have been made or would have been refused. This argument appeared to me to have no merit. If there

had been no prior approval, entry into of the sale to Dr Mahtani would have been a criminal offence, by Dr Mahtani, and quite possibly also by ATMA as an accessory. The SPA must be construed as requiring only lawful transfers under Clause 7.2.1, and not ones which involved the commission of a crime under applicable Zambian law.

213. For these reasons, I conclude that there had not been prior approval from BoZ for the purchase of FBS by Dr Mahtani, and that for that reason he was not in a position to make an offer for FBS which was compliant with the SPA (which implicitly required any such offer to be one of a purchase which did not contravene Zambian law) and/or made no offer which was capable of acceptance. For those reasons there was no breach of the SPA on the part of the Defendants in not selling it to him. Because I have reached that conclusion on the grounds I have given, it is not necessary for me to consider whether Dr Mahtani was or would have been accepted by BoZ as a 'fit and proper person' to be a shareholder of FBS.

Situation (iii)

214. The Defendants had not, prior to 31 December 2016, stated that they would not sell to Dr Mahtani or would reject, if made, an offer capable of acceptance. Their letter of 29 December 2016 neither accepted nor rejected the proposal in Dr Mahtani's letter dated 20 December 2016. Nor did Ms Hamza Bassey's covering email. Dr Mahtani's two emails of 29 December 2016 did not suggest that he considered that ATMA had refused to comply with the SPA; but envisaged, instead, further discussions in the new year.

215. Furthermore, if the Defendants are to be regarded as having, by their conduct after he had broached the subject, indicated that they would refuse to accept any offer for FBS if made, the Claimants would still have faced what I considered an insurmountable causation obstacle. Given my findings that Dr Mahtani required but did not have regulatory approval, he could not have made an offer for FBS which accorded with the SPA in any event.

Situation (iv)

216. There was a suggestion made by the Claimants that the Defendants were to blame for Dr Mahtani not having supplied a FBS SPA in that they should, if a copy was not sent to them, have asked for one, given that such a document had been referred to in the letter of 20 December 2016. This appeared to me to be a hopeless contention. It is difficult to see what contractual obligation the Defendants owed in this regard. In any event, the absence of an attachment is the type of matter which may or may not be promptly queried by a recipient of an email. That it was a problem for Dr Mahtani in this instance was because of the late date on which he had initiated the process, which did not give time to allow such mishaps to be sorted out.

217. Once again, if I am wrong about that, there would be the same issue as to causation, by reason of the necessary regulatory approval having not been obtained as I have referred to in relation to situation (iii).

218. For these reasons I conclude that, even if the Claimants are correct in their case on construction of the Clause 7.2 of the SPA, there was nevertheless no breach of the SPA by the Defendants.

Quantum

219. The issue of the quantum of loss which the Claimants have suffered in respect of the non-transfer of FBS does not arise. It was, however, the subject of detailed expert evidence. I will briefly express my conclusions on this material.

220. The Claimants' case was that, if Dr Mahtani had purchased FBS at the end of 2016, he would then have 'substantially improved' its financial position within two to five years; and would have sold it if a 'sufficiently attractive' offer had been received for it, and would in any event have sold it at latest by about 31 December 2021. The Claimants relied on the valuation evidence of Mr Joe Skilton.

221. The Defendants contended that the Claimants had only pleaded claims based on the value of FBS as at 31 December 2018 and 31 December 2021. The value of FBS as at 31 December 2016 had been pleaded only in the context of a 'baseline' value from which Dr Mahtani would have improved FBS's value, and there was no claim for the value of FBS as at 31 December 2016. The Defendants contended further that the Claimants had shown no factual basis for the court to order damages either at 31 December 2018 or 31 December 2021, and the claim must fail for that reason. Insofar as it was necessary to look at the value of FBS on any of the dates 31 December 2016, 31 December 2018 or 31 December 2021, the Defendants relied on the evidence of Dr Min Shi.

222. Had it been necessary to decide the issues as to quantum, I would have concluded that the Defendants were correct to say that there was no pleaded case of loss on the basis of the value of FBS as at 31 December 2016. Further there was no factual basis on which the court could be satisfied that damages

should be assessed by reference to the value of FBS as at 31 December 2018 or 31 December 2021. In relation to the case as to 31 December 2018 or 31 December 2021, there was no evidence from Dr Mahtani that he would have put FBS up for sale, either at a particular time or at all. There was no factual evidence that Dr Mahtani would have received any offer to purchase FBS. And there was no evidence as to what offer Dr Mahtani would have regarded as 'sufficiently attractive'.

223. If that were wrong, and the Claimants could rely, for the purposes of their claim to damages, on any of the three valuation dates mentioned, there was a difference, as a result of the expert evidence, as follows:

All Figures US$

Date	**Actual**		**Counterfactual**	
	Mr Skilton	**Dr Shi**	**Mr Skilton**	**Dr Shi**
2016	4m-5m	3.2m	N/A	N/A
2018	10m	7.6m	10m	2.8m
2021	0.4m	0.4m	8m	1.9m

224. I considered that, where they disagreed, the approach and conclusions of Dr Shi were generally to be preferred, as her analysis was, in my view, superior and her approaches more realistic.

225. Specifically, as to the valuation of FBS at 31 December 2016, I considered Dr Shi's approach of taking the value of the company as implied in the actual acquisition of FBZ as a starting point, to be sound. She had derived applicable multiples from the whole transaction and then applied them to FBS's financial data. This approach has the advantage of putting out of account ATMA's subjective lack of enthusiasm for purchasing FBS as part of the transaction because it gives FBS's valuation the benefit of the multiple applied to FBZ which ATMA was keen to acquire. The resulting figure applying the implied P/BV multiple was US$ 4.6 million, and that applying the implied P/E multiple was US$ 2.1 million, giving an average of US$ 3.4 million. To allow for FBS's regulatory capital deficit at 31 December 2016 of ZMW 11.7 million, Dr Shi concluded that taking an average of US$ 3.4 million and ATMA's capital injection of approximately US$ 3 million, was likely to be conservative. I consider that that approach, which starts from an actual and recent arms' length transaction, is more reliable than Mr Skilton's reliance on a comparable companies method, especially as Mr Skilton's comparable companies were selected for the original purpose of assessing the value of FBS as at 31 December 2018.

226. In relation to the actual value of FBS as at 31 December 2018, the experts agreed that it was appropriate to consider a comparable companies analysis, and the offers made for FBS during ATMA's attempt to sell it in 2017/18. As to the former, Dr Shi had used a smaller pool of companies, on the basis that they were more comparable than various of those in Mr Skilton's pool. I accepted her evidence that 'it is not the more the better'. Dr Shi had also used only P/E and P/BV multiples, and not P/R which Mr Skilton had used in addition to the other

two. I found persuasive her evidence that a revenue-based multiple is not helpful in the context of valuing a financial services company, as it ignores its costs. As to the latter, ATMA received offers, of which the last four in 2018 from Letshego Botswana, Lanka Orix, Innovate Holdings and Integral Initiatives, included three at ATMA's reserve price of US$ 9 million. However, none of the offers proceeded to a transaction, and Dr Shi gave cogent evidence as to why the offers were not reliable indications of FBS's value as at 31 December 2018.

227. In relation to the valuation of FBS on the counterfactual as at 31 December 2018, Mr Skilton's estimate of US$ 10 million is susceptible to criticism in that it is based on assuming that FBS's costs in Dr Mahtani's hands would have remained the same as they were in ATMA's. This, however, depends on saying that FBS could and would have been operated as part of a wider group, but it was unpleaded and not properly evidenced that this would have occurred. It would, in any event, have required regulatory approval. If that assumption is not made, and it is assumed that FBS would have been operated on a stand alone basis, then its costs would have been higher than in the actual. Dr Shi's approach was to assume that FBS would have had the same revenues as in the actual, and that FBS's cost to income ratio would have been the same as that of an average bank in Zambia, and then to use valuation multiples of comparable companies. Using that methodology, and averaging the results of P/BV and P/E multiples, gives the figure of US$ 2.8 million. In the absence of it being established that, in the counterfactual, FBS could have had a lower cost to income ratio, that is a reasonable approach. Another reasonable estimate would have been to apply an index based on the movement in the value of comparable

companies, or on the value of the relevant equity markets, to the value of FBS as at 31 December 2016. This would have produced a figure in the same region as that under Dr Shi's approach based on average costs.

228. As to the actual value of FBS as at 31 December 2021, this was agreed between the experts. This was explained by Dr Shi on the basis that FBS had been incorporated into MFZ as at 1 July 2019 and that after the merger FBS ceased to extend loans in its own name, and the outstanding loans were gradually repaid/written off. The net loan book value had decreased. The net book value as at the end of 2021 was approximately US$ 0.4 million. Mr Skilton concurred.

229. In relation to the value of FBS as at 31 December 2021 in the counterfactual, Dr Shi took a 'but for book value' of equity and earnings based on the assumptions set out in her first report (para. 4.48), and multiplied them by valuation multiples of comparable companies, taking an average between the results of the P/BV and P/E multiples. That gives a counterfactual valuation of US$ 1.9 million. That appears to be a reasonable approach. Again, it may be cross-checked against another approach, of taking the change in the market value of comparable companies from 31 December 2016 to 31 December 2021, which would have yielded a result of between US$ 2.2 – US$ 2.7 million (Shi 2, 3.64). I consider that to support the reasonableness of the valuation of US$ 1.9 million.

The Escrow Shares Claim

230. The points at issue in relation to this claim had narrowed considerably by the end of the trial, including by reason of the Claimants' decision not to pursue a claim in respect of the 'PTA Escrow Shares'.

231. What remained in issue was what was termed the Claimants' Late Release Claim. This was a claim that, in respect of three categories of Escrow Shares, the Defendants breached an obligation to release them sooner, and are liable to pay damages as a result.

232. Specifically, this claim relates to the release of the following:

(1) 1,065,155 Claims Escrow Shares;

(2) 62,169 of the 162,263 Ongoing Legal Claims Escrow Shares (the Defendants being entitled to the remaining 100,094); and

(3) 33,331 of the 380,001 Classified Loan Specified Escrow Shares (the Defendants being entitled to the remaining 346,670).

There was no dispute that the Claimants were entitled to these Escrow Shares, nor that the relevant categories of Escrow Shares have been released to the Claimants (and the Defendants) since the commencement of the present proceedings (the Claims Escrow Shares having been released to the Claimants in April 2022, and the Ongoing Legal Claims Escrow Shares and Classified Loan Specified Escrow Shares having been released to the Claimants and the Defendants in November 2023).

233. The Claimants' claim is that these various Escrow Shares should have been released to them earlier: viz. on 30 June 2020 for the Claims Escrow Shares, and on 16 July 2019 for the Ongoing Legal Claims Escrow Shares and the Classified Loan Specified Escrow Shares.

234. The parties were also agreed that if, which they denied, the Defendants had any liability for the late release of these Escrow Shares, the Claimants' damages were to be calculated on the following basis:

(1) The difference between (i) the value of such Escrow Shares on 30 June 2021 (in the case of the Claims Escrow Shares) or 16 July 2020 (in the case of the Ongoing Legal Claims Escrow Shares and Classified Loan Specified Escrow Shares), which are the dates at the end of the lock-in periods and those on which the Claimants contend that such shares would have been sold, and (ii) their value today.

(2) The value of all those shares now is nil, following the delisting of ATMA from the LSE in November 2021.

(3) That the damages, if any are recoverable, would be US$ 343,064 in relation to the Claims Escrow Shares, US$ 27,690 in relation to the Ongoing Legal Claims Escrow Shares, and US$ 14,846 in relation to the Classified Loan Specified Escrow Shares.

235. The Defendants contended there was no obligation on them, alone, to ensure that relevant Escrow Shares should be released to the Claimants. The terms of Clauses 6.5.3 and 6.6.1 required there to be a joint instruction to the Escrow Agent by ATMA/the Buyers and the Seller Representative. Neither party had the power unilaterally to instruct the Escrow Agent to release Escrow Shares; and neither could be in breach unless there had been a request from the counterparty for a joint instruction to the Escrow Agent. In any event, the Claimants had failed to prove that they had suffered any loss.

236. In my judgment, the Claimants' pleaded case is unsustainable. There would be no breach simply because relevant Escrow Shares were not released on the relevant date. Release would have required a joint instruction. In the absence of a request by Dr Mahtani (or by ATMA/the Buyers) to the counterparty for such an instruction, then I do not consider that either can be said to be in breach of the SPA simply because Escrow Shares were not transferred.

237. I can see that there is an argument that the Defendants (or the Claimants) might have a liability if they had done or failed to do something necessary to allow the other party to seek or give a joint instruction. In particular, that might be the case if one party had failed to give the other party information which the other party required in order to know whether to seek or give such an instruction. Such a case was adumbrated by the Claimants in their opening submissions, including by reference to Clause 18.2 of the SPA. The Defendants contended, in opening and in closing that such a case was unpleaded.

238. What is pleaded in para. 51 of the RRAPoC differs to some extent between the three relevant categories of Escrow Shares. In relation to the Claims Escrow Shares it is pleaded only that ATMA did not give a written notice of a relevant claim for breach of warranty or under the Tax Deed, and that the time for doing so had expired. Given the nature and definition of Relevant and Outstanding Claims (which are claims against the Claimants), the Claimants (including Dr Mahtani) would have known whether such Claims had been made and, if so, their status. This affords no basis for saying that the Defendants were at fault by disabling Dr Mahtani from seeking or giving a joint instruction to the Escrow Agent.

239. In relation to Ongoing Legal Claims Escrow Shares, the Claimants pleaded that the Defendants had been required to provide written confirmation up to and including 16 July 2019 of a range of information, but that no such confirmations were provided by the Specific Release Date. The Defendants denied that any obligation to provide such information was set out in the SPA; to which the Claimants replied that the obligation was set out in Clause 18.2 of the SPA, construed alongside the provisions of the SPA in relation to Ongoing Legal Claims Escrow Shares.

240. While this area of the case was the subject of only limited investigation at the trial, I do not consider that the Claimants' pleaded reliance on Clause 18.2 supports a contention that the Defendants were (a) obliged to supply all the information set out in paragraph 51.2.1 of RRAPoC, or (b) to provide it up to 16 July 2019. As to the point in (a), 'further assurance' clauses of which Clause 18.2 is an example, provide for assistance in the performance of an obligation which is imposed by the agreement. But they do not generally assist in identifying what that obligation is: see Takeda Pharmaceutical Co Ltd v Fougera Sweden Holding 2 AB [2017] EWHC 1995 (Ch) at [128], and Fraser Turner Ltd v PricewaterhousCoopers LLP [2019] EWCA Civ 1290 at [64]. Here, the clause is being prayed in aid, as I see it, to identify and add to what obligations there were. As to the point in (b), the obligation in Clause 18.2 is limited to a period of up to two years after Completion, the appearance of the word 'months' apparently being an error and in any event making no difference to the sense. As there is no other pleaded case on the source of an obligation on the Defendants, or as to its breach, I conclude that the Claimants' case on this point is unsustainable.

241. In relation to the Classified Loan Specified Escrow Shares, the Claimants' pleading was that the Defendants did not give them 'notice of any legal basis that would entitle them to retain the shares owed to the Claimants', nor had they provided reasons in correspondence for the failure to release the shares. No source in the SPA of an obligation to provide 'notice of a legal basis' or to provide reasons in correspondence is specified. Insofar as reliance is intended to be placed on Clause 18.2 it is subject to the same objection, in relation to the temporal scope of that clause, as arises in relation to the Ongoing Legal Claims Escrow Shares.

242. I would therefore conclude that the Claimants' pleaded cases on duty and breach on this aspect of the case are limited, and unsustainable.

243. I would also have found, as the Defendants submitted, that the Claimants have not proved any loss. The Claimants now have the relevant shares. They would have suffered loss only if they would have sold those shares before they lost value. The Claimants did not adduce evidence of that, however. While paragraph 114 of Dr Mahtani's witness statement refers to the lock in period, it does not say that he would have sold relevant shares at the end of it, and gives no evidence as to what the other Sellers would have done. The Defendants' counterclaim as pleaded only arises if the Claimants' Late Release Claim succeeds. Accordingly, I conclude that the Defendants' counterclaim does not arise and is dismissed.

Conclusion

244. For the reasons I have given, each of the Claimants' claims fails and the Defendants' counterclaim is dismissed.