



Neutral Citation Number: [2025] EWHC 234 (Comm)

Case No: CL-2022-000393

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: 10th February 2025

Before :

The Honourable Mrs Justice Dias

Between :

ABUDANTIA B.V.

Claimant

- and -

(1) FASTRON LIMITED
(2) RILLIUS HOLDINGS LIMITED

Defendants

Mr Stuart Adair (instructed by **Druces LLP**) for the **Claimant**
Mr Faisal Osman (instructed by **BCL Solicitors LLP**) for the **Defendants**

Hearing dates: 3-5, 11, 16 and 18 December 2024, 15 January 2025

Approved Judgment

This judgment was handed down remotely at 9:30am on 10th February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice Dias :

A: Introduction

1. This dispute arises out of a profit-sharing arrangement between the Claimant (“**Abudantia**”) and the First Defendant (“**Fastron**”) which was established to provide online gambling services to the Turkish-speaking market. Both Fastron and the Second Defendant (“**Rillius**”) are companies within the ambit of the international online sports betting brand, Parimatch, which operates in many jurisdictions worldwide.
2. It is not in dispute that Parimatch was looking to enter the Turkish-speaking market, but that because of perceived regulatory risks it was seeking to do so indirectly by providing its licensed branding to a local partner. Abudantia carries on business providing online gaming services to members of the public and had particular expertise in the Turkish-speaking market. Representatives of Parimatch accordingly approached Abudantia with a view to exploring options whereby Abudantia’s expertise and knowledge of the market could be deployed in combination with the well-known Parimatch brand.
3. Following discussions, a business venture between Abudantia and Fastron was brought into effect by means of three written agreements. Pursuant to these agreements Abudantia launched the website www.paribahis.com (the “**Website**”), which acted as a platform providing online gaming products to the Turkish-speaking market. The present dispute arises out of one of the agreements, namely a Trademark Licensing Agreement concluded by Abudantia and Fastron on 27 November 2020 (the “**TLA**”) by which Fastron granted Abudantia a licence to use the Parimatch trademark (the “**Trademark**”).¹
4. Central to this dispute is clause 13.1 of the TLA which provides as follows:

*“Parties agree that this Agreement will have an initial one (1) year lock-in period from the Website launch date whereby neither Party may sell, assign or terminate the arrangement (the “**Initial Term**”) which thereafter, subject to positive performance of the business venture and Parties mutual understandings of the same business goals, shall be extended to additional three (3) years term (the “**Renewal Term**”).*
5. Fastron was dissatisfied with the performance of the business and gave notice on 7 December 2021 of its decision to terminate the joint venture with immediate effect. Since the Initial Term did not expire until 9 January 2022, it is common ground that immediate termination under clause 13.1 was impermissible. However, the parties do not agree about the status of the TLA and the joint venture generally after 9 January 2022. Abudantia’s case is that the business was performing positively and that the parties shared the same business goals and that the TLA therefore automatically renewed for a further three years. Fastron, on the other hand, maintains that the performance of the joint venture was anything but positive and that the notice of termination in itself demonstrates that the parties’ business goals were not aligned. Its primary case is that the joint venture therefore came to an end on 9 January 2022 and that Abudantia’s continued use of the Trademark thereafter was unlawful and that it was entitled to seek to restrain such unlawful use.

¹ The arrangements between the parties were referred to during the hearing as a “joint venture”. For ease of reference, I will adopt that term in this judgment notwithstanding that in the light of clause 22.1 of the TLA it is probably more accurately to be described as a profit-sharing arrangement.

6. In this action, Abudantia seeks a declaration that the joint venture agreements remain in force and that it remains entitled to use the Trademark. Alternatively, it argues that if the TLA was terminated, this could only have been by virtue of a different provision which provided for payment of a termination sum (the “**Termination Sum**”). It further claims that actions taken by the Defendants in seeking to restrain use of the Trademark after 9 January 2022 were undertaken maliciously pursuant to a conspiracy between the Defendants and others to cause loss to Abudantia by unlawful means. It seeks damages (including exemplary damages) in respect of the conspiracy and a permanent injunction restraining the Defendants from asserting that Abudantia has no right to use the Parimatch brand. The Defendants deny that Abudantia is entitled to any of the relief claimed.

B: The Parties

7. Abudantia is a company incorporated under the laws of Curaçao. Its sole shareholder is a Ukrainian national, Ms Yuliia Makovska, and it has a Curaçao corporate managing director, eMoore. It is licensed to provide online gaming services in various jurisdictions and operates as both a B2C (business to customer) and B2B (business to business) provider. The services which it provides include software development, white label operations, online marketing and other solutions. It functions as both a service provider and an operator of online gambling and betting business projects. As a service provider, it supplies components to gambling/betting projects, including backend services, technology platforms and proprietary software, online games and sportsbooks, customer support, payment processing, marketing and user acquisition. As an operator, it manages consumer-facing websites, takes bets and promotes those websites. Prior to the joint venture with Fastron, it already had its own sports betting and casino website in Turkey, Bettilt. Abudantia continues to operate Bettilt, which Mr Karyagdyev described as “*big*” in Turkey, making around €1-2 million per month.²
8. Abudantia’s main authorised representative is Mr Sapar Karyagdyev, the Managing Director and founder of EG Interactive Limited, a company incorporated in the UK which provides advisory, consultancy and management services to Abudantia on a fee-paid basis. Abudantia’s Legal Counsel is a Mr Vadym Riabokin who is based in Ukraine where its legal and financial matters are mainly handled, although some of its relevant personnel moved to Cyprus following the Russian invasion in 2022.
9. The Parimatch Group (“the **Group**”) is the collective name given to a network of companies which operate under the umbrella of the Parimatch brand and provide online sports betting services and associated software. The Group has a Curaçao gaming licence and is the owner of the internationally recognised Parimatch brand which is acknowledged to be one of its main assets. It was originally established in Ukraine by a Mr Shvindlerman and his daughter, Ms Tatiana Biloruska, and many of the people associated with it are Ukrainian. One of its shareholders is Mr Sergey Portnov who was its CEO from around 2014 until April 2021, and who oversaw its expansion into an international multi-million-dollar technology and gaming enterprise. He was succeeded as CEO by Mr Maksym Liashko but returned to manage the Group after the latter left in December 2023. Mr Portnov’s evidence, which I accept, was that he was the effective controller of the Group.

² It was not entirely clear from Mr Karyagdyev’s evidence whether this figure related to gross gaming revenues or profits. I assume the former.

10. Another entity which featured largely in the proceedings is Parimatch International (“PMI”). PMI is a substantial company which grew from a startup company in Ukraine. It now has around 200 employees who were primarily based in Kyiv prior to the Russian invasion but are now located in various jurisdictions. Mr Anton Rublievskyi is the CEO of PMI, a position he has held since 2019. PMI is in the top five “post-CIS” e-gaming companies with multi-million-dollar annual revenues. It admittedly works closely with the Group as a commercial partner and promotes the Parimatch brand by developing B2C sports betting and casino operations across different markets pursuant to a franchising agreement with the Group, and providing technology, marketing and operations services for B2C gambling operations. The Defendants initially maintained that PMI is under entirely separate ownership and control from the Group, but it was clear from Mr Portnov’s evidence that he regarded himself as being in a position to influence its activities. While I accept that PMI is not structurally a corporate part of the Group but is a distinct entity with its own management and substantial day-to-day operational independence, I am nonetheless not satisfied that it operated at arm’s length from the Group. I therefore refer in this judgment to “Parimatch” compendiously without distinguishing between individual entities except where necessary.
11. Fastron was incorporated in Hong Kong on 31 July 2019 and is a nominee company with a corporate director, Executive Solutions. It was a special purpose vehicle used by PMI for the purpose of entering into the joint venture with Abudantia in the circumstances described below. Abudantia asserts that Fastron is also part of the Group and controlled by the same persons. Although this was also denied by the Defendants, I am satisfied on the evidence that Fastron was a nominee company for PMI and was, as such, if not part of the Group, at least very closely associated with it.
12. Rillius was incorporated in Cyprus on 28 November 2020 and is admittedly part of the Group. Since 16 August 2021, Rillius has been the registered owner of the Trademark. Prior to that date, ownership of the Trademark was vested in another Cypriot Group company, Ericius Investments Ltd (“Ericius”).

C: The Witnesses

13. On behalf of Abudantia, I heard oral evidence from Mr Karyagdyev. I found him to be a pleasant and straightforward witness whose testimony I largely accepted. However, in some respects I did not find his evidence altogether convincing. These principally concerned the performance of the Website and whether or not Parimatch had expressed concerns in that regard during the first year of the joint venture, and also the provision of data to Fastron. I was further troubled by his evidence regarding the precise status of Gamingtec which he insisted was a brand name used by him and not a separate corporate entity, despite evidence suggesting otherwise. However, the latter was not directly germane to the specific issues between the parties and did not affect my assessment of his quality as a witness overall.
14. It is also fair to say that while Mr Karyagdyev was the person responsible for negotiating the joint venture with Fastron, on his own admission his involvement in the project thereafter was limited to a high-level review of its performance, and participation from time to time in weekly catch-up discussions between the Parimatch and Abudantia operational teams, which took place by video or audio calls. He did not therefore play any part in the day-to-day operation of the Website which was mainly handled by Mr Riabokin, Ms Margaryta Shnyr and Ms Olga Stoyan, Abudantia’s Legal Counsel, CFO

and CMO respectively, together with Mr Yury Khramy who led its operations team. When asked by Mr Osman why he and no-one else was giving evidence on behalf of Abudantia, Mr Karyagdyev said that it was because he had brought the project to Abudantia and led the discussions at the outset and had then become involved again at the end when the relationship was breaking down.

15. No witnesses from Abudantia's operational or management teams gave evidence before me. This was despite the fact that Mr Riabokin had made a statement at an earlier interlocutory stage of the proceedings and that I had previously given permission for him to give evidence at trial remotely from Ukraine. In his earlier statement, Mr Riabokin had claimed to have first-hand knowledge of Abudantia's business and all of its dealings in relation to the present matter and it is therefore perhaps surprising that he was not called. The explanation given was that he could not usefully add to the evidence of Mr Karyagdyev.
16. No explanation at all was offered as to why no-one was called from Abudantia's operational team, in particular Ms Stoyan who was responsible for marketing. Abudantia's Disclosure Certificate stated that Ms Stoyan had left Abudantia in May 2023 but it was not suggested that she was unavailable or unwilling to give evidence. The Certificate further stated that *"before leaving she on her own initiative deleted all the data, messages and emails from her laptop and account."* There was therefore no disclosure from her either. Mr Osman did not invite me to draw any adverse inferences from these matters, but he nonetheless contended that, given the burden of proof, it was remarkable that not a single witness had been called who could testify to Abudantia's expectations for the joint venture, whether it was satisfied with the results for the first year (and, if so, on what basis), and what its plan was for taking the business forward. He submitted that the unsatisfactory nature of what he described as this "evidence vacuum" was exemplified by the fact that, when cross-examined on a schedule relied on heavily by Abudantia, Mr Karyagdyev had to accept that he was unable to explain its evident anomalies as it had been prepared for him by Abudantia's team and he had not cross-checked it himself against the underlying data.
17. The Defendants called four witnesses: Mr Rublievskiyi, Ms Ievgeniia Derbal, Ms Zuleyha Tohtayeva and Mr Portnov, each of whom had made one or more previous witness statements. Following argument on the first day of trial, I ruled on the admissibility of certain pre-contractual negotiations pleaded by the Defendants and determined that certain inadmissible passages in the witness statements of Ms Tohtayeva, Mr Rublievskiyi and Ms Derbal should be struck out along with various paragraphs of the Defence.
18. By way of general comment on the Defendants' witnesses, it was noticeable that they frequently adopted a formalistic approach, for example requiring to be satisfied that an agreement put before them had been validly signed by both parties before commenting on it and being markedly disinclined to comment on the contents of any communications in which they had not personally been involved or, in Mr Rublievskiyi's case, legal documents. To English eyes, this often appeared uncooperative and unnecessarily defensive and led to Mr Adair categorising all of the witnesses save Mr Portnov as dishonest and evasive. However, I bear in mind that many legal systems attach much greater weight to form where an English court might be more inclined to look at substance. This is a factor which I have taken into account when assessing their evidence.

19. It was also noticeable that Mr Rublievskiyi, Ms Derbal and Ms Tohtayeva were all at considerable pains to distance Fastron and PMI from the Group and Mr Portnov, and to insist that they were independent entities. None of them was entirely candid about this, but since Mr Portnov showed himself to be supremely unconcerned about such niceties and accepted blithely that he was in control of the Group and PMI, their scruples counted for nothing. As I have said in paragraphs 10-11 above, I am entirely satisfied that both PMI and Fastron were closely associated with the Group, if not technically part of it.
20. Mr Rublievskiyi: Mr Rublievskiyi answered many of the questions put to him directly and concisely, accepting much of what was put to him without demur. However, it quickly became apparent that he was unused to an English style cross-examination in which a party's case is put to a witness. Indeed, he regarded this with deep suspicion as an unfair and unjustified attempt by counsel to put words into his mouth and to ascribe motivations and views to him which he did not hold. This was unfortunate as it led to him coming across as somewhat combative, particularly when put under pressure in relation to matters with which he took issue. On the whole, I was inclined to think that this was due more to a misunderstanding of the process than any attempt to be deliberately obstructive and I accepted much of his evidence.
21. The most unsatisfactory aspects of his evidence related to the relationship between Fastron and PMI/the Group and various other matters relating to the structure of the joint venture arrangements. Despite having signed a Statement of Truth in relation to the Defendants' pleadings, Mr Rublievskiyi clearly had little, if any, personal knowledge relating to these aspects of the case and was unable to explain the position coherently when pressed. Having heard and considered all the evidence, both oral and documentary, it is my conclusion that in fact Mr Rublievskiyi had nothing more than a very high-level understanding of the legal and corporate aspects of the joint venture which he left to be handled by Parimatch's legal department. The same is true in relation to the "brand protection strategy", of which I shall have more to say later. He was not therefore an appropriate person to sign the Statement of Truth in this case, at least without having taken considerably more care to check the position than he plainly did.
22. In relation to operational and performance aspects of the joint venture, however, he spoke with knowledge and authority. He had a great deal of experience in the operation of online gaming sites, and I found his evidence on these matters both plausible and creditworthy.
23. Ms Derbal: Ms Derbal was the Chief Legal Officer of the Group at the times relevant to this dispute. Her department not only provided legal services to companies within the Group but also provided legal support to PMI whose legal department was very small. I found her to be a knowledgeable witness who was clear and concise in her answers, save in relation to the status of PMI and Fastron (see above). Where I had very significant reservations about her evidence, and that of Ms Tohtayeva, this was not so much in relation to their credibility as witnesses but rather in relation to the nature of Parimatch's brand protection strategy and the steps taken in furtherance of that strategy.
24. Ms Tohtayeva: Ms Tohtayeva is an English-qualified solicitor who at the times material to this dispute was employed in the legal department of PMI and acted as legal counsel for PMI and Fastron. When she first joined PMI in 2020, she was its only in-house lawyer and additional legal support was supplied by Ms Derbal and the Group's legal department as described above. She also worked closely with Ms Derbal on a variety of

matters in which both the Group and PMI were involved. In June 2021, Ms Tohtayeva founded her own law firm in London, SteelRose, and in November 2021 she left PMI's employment, albeit she continued to work for PMI as an external lawyer for a period thereafter. I found her to be generally clear and concise in her evidence although, as will become apparent, I had serious reservations about her role in relation to the brand protection strategy and some of the correspondence in 2022.

25. **Mr Portnov:** Then there was the force of nature that was Mr Portnov. All that can really be said about Mr Portnov was that he was forthright, blunt, direct and – as accepted by both parties – absolutely honest and frank. What he said was entirely credible and I accept his testimony. His involvement in the relevant events was nonetheless limited, since he was responsible only for the initial introduction to Abudantia and left the Group in April 2021, being thereafter aware of what was going on only indirectly and at a very high level.

D: Factual Background

26. The following account of the background is largely uncontroversial but to the extent that particular matters were contested, it represents my findings on the evidence.
27. The Turkish-speaking market is what is known in the industry as a “grey market” which means that the regulatory regime does not comprehensively prescribe what is permitted or prohibited. In practical terms, domestic companies are not permitted to provide online gambling services but there are no regulations explicitly prohibiting the provision of online gaming pursuant to an offshore licence. However, the regulator is known to be aggressive and there is therefore a reputational risk attached to operating in the market.

Initial Discussions between Abudantia and Parimatch

28. By 2020, the Group had grown from a small Ukrainian brand into an international multi-million-dollar enterprise and was looking to enter the Turkish-speaking market which was perceived to be highly lucrative. Through mutual friends, Mr Portnov was introduced to Mr Karyagdyev, whom he knew to be a key player in that market with a very good reputation. He accordingly approached Mr Karyagdyev in mid-June 2020 to discuss potential cooperation in providing online gaming services to the Turkish-speaking market.
29. Mr Karyagdyev was initially puzzled as to why Parimatch did not simply set up its own independent operation, but it was explained to him during an online chat on 17 June 2020 with Mr Portnov and another Group representative, Mr Ilya Strah, that Parimatch could not enter the market directly: first, because of the licensing and regulatory risks to its brand if it were seen to be operating in a grey market, but also because the Group was just about to sell its business to a publicly-listed company, Entain, and he did not want any negative publicity to affect its share price adversely. For these reasons, Parimatch did not want to admit officially that it was operating in the market. Mr Portnov further made clear that if this were to be alleged by any banks (or presumably other regulatory or official bodies), Parimatch would bring proceedings for illegal use of its trademark in order to distance itself from the operation – even if this meant taking action against another group company. Mr Portnov repeated this explanation in a subsequent Zoom call which took place with Mr Karyagdyev and Mr Strah on 18 June 2020. He said that

Entain had agreed that the Group could explore the Turkish-speaking market but that it should “*just do it cleverly*”.

30. Mr Portnov then handed the deal over to PMI and negotiations with Abudantia were thereafter led by Mr Rublievskiy, Ms Tohtayeva, Ms Derbal and Mr Liashko on behalf of PMI. The initial proposal was for a “white label” arrangement between Abudantia and a PMI entity called PMSport N.V., whereby in return for a share of gross revenues Abudantia would essentially set up the website and provide payment solutions, customer and operational support, while PMSport would provide access to the brand and bear all the operational and marketing costs. This provisional arrangement was incorporated in a Memorandum of Understanding between Abudantia and PMSport dated 10 August 2020. During the course of the discussions, Mr Karyagdyev provided PMI with some indicative figures for how the business might grow on this basis. The document was referred to in argument as the “Business Plan” and I shall do so in this judgment, although it was accepted by both sides that it was not a business plan as such and had no contractual force.
31. After further consideration, PMI decided that it did not want to operate on this basis as it effectively meant that Parimatch was assuming all the investment and other risks with Abudantia bearing none at all. Negotiations therefore continued and on about 22 September 2020, Mr Rublievskiy and Mr Karyagdyev agreed instead to structure the project as a 50:50 joint venture, pursuant to which all expenses and profits would be shared equally. The joint venture partner on PMI’s side was to be Fastron. A further Memorandum of Understanding to this effect was accordingly signed between Abudantia and Fastron on 28 October 2020.

The Joint Venture Agreements

32. In due course, the joint venture was formalised in the following agreements:
- (a) The TLA dated 27 November 2020 between Fastron as Licensor and Abudantia as Licensee which set out the basis on which Abudantia was authorised to use the Parimatch brand and which contained an express warranty by Fastron that it had the right to licence the Trademark to Abudantia. Although not stated in the TLA itself, it is common ground that the Trademark was at this stage owned by Ericius;
 - (b) A Services Agreement also dated 27 November 2020 between Abudantia as Supplier and Fastron as Client which contained provisions regarding Abudantia’s operation of the Website; and
 - (c) A Marketing Services Agreement dated 1 December 2020 between Abudantia and another company in the Group called Suncast Furure N.V.
33. The TLA had been drafted initially by PMI’s legal team in accordance with their standard licensing agreement template, while the Services Agreement had been drafted initially by Abudantia. No doubt it was for this reason that the two agreements were not entirely consistent and this is a matter to which I shall have to return when considering the correct construction of the TLA. It was common ground that the Marketing Services Agreement was concluded as a means by which PMI’s share of the costs could be channelled into the joint venture without it appearing to be a Parimatch operation.

34. Abudantia launched the Website on 10 January 2021, thereby commencing the 12-month Initial Term of the TLA during which neither party could terminate. It is common ground that the Initial Term expired on 9 January 2022

The Operation of the Website

35. I will in due course have to examine the performance of the Website in more detail. For the present, it is sufficient to say that the Defendants' case is that the business was not as successful as had been anticipated and was making heavy losses. They contend that this was a matter which was raised repeatedly with Abudantia and that the parties had fundamentally different approaches to the way in which the business should develop. Abudantia's case, by contrast, is that the business was performing positively and that the parties shared a mutual goal of achieving profitability.

The Termination Notice

36. In late November 2021, Mr Rublievskyi had a call with Mr Karyagdyev. In that call he stated that PMI and its shareholders were unhappy with the performance of the Website and were considering not continuing with the joint venture. While the precise details of that call were contentious, Mr Karyagdyev accepted that he may have had a call with Mr Rublievskyi in which the latter said that revenues were below expectations and that he may have replied that Abudantia's indicators showed things picking up.
37. On 7 December 2021, Fastron served a Termination Notice on Abudantia referring to clause 13.1 of the TLA and purporting to terminate the TLA and the Services Agreement "*with immediate effect*". It was common ground that this notice was ineffective to terminate the TLA during the currency of the Initial Term, but there is a dispute as to whether it was ineffective for all purposes. On 15 December 2021, Abudantia replied, asserting that the TLA could only be terminated pursuant to clause 13.3 of the TLA, and that this would entail the payment of the Termination Sum which amounted to €1,669,957.
38. In its response on 22 December 2021, Fastron reiterated its intention "*not to renew*" the TLA upon expiry of the Initial Term (which it then incorrectly calculated would be on 21 January 2021) and denied any obligation to pay the Termination Sum. Abudantia replied on 10 January 2022, stating that the Initial Term in fact expired on 10 January 2022 and that Fastron had no contractual right to refuse the renewal of the TLA. Abudantia further asserted that termination of the TLA would breach the Services Agreement unless that was also terminated.
39. Meanwhile, Mr Rublievskyi was attempting to resolve the dispute with Mr Karyagdyev directly. On 20 January 2022, he proposed that the parties should separate amicably: Abudantia could keep the player database which had been built up during the operation of the joint venture and continue to exploit it in the Turkish-speaking market entirely for its own benefit. PMI would also allow it to use the PM brand for a further five months to give time to migrate the business to another website. He repeated this offer on 25 January 2022, but it was rejected by Abudantia which maintained its position that the TLA had not been effectively terminated and that it was therefore entitled to continue using the Parimatch trademark without restriction or to receive the Termination Sum. On 2 February 2022, Fastron stated that it stood by the Termination Notice and that the joint

venture agreements had expired. It indicated that legal action would be taken if the Website was not shut down by 14 February 2022.

Subsequent Correspondence

40. At this point, Ms Tohtayeva's firm, SteelRose, became involved. On 17 February 2022, a letter was sent to Abudantia by SteelRose on behalf of Rillius as registered owner of the Trademark. This was the first occasion on which Abudantia had been made aware of the existence or role of Rillius. Although not known to Abudantia, Ericius had transferred its right and title to the Trademark to Rillius on 16 August 2021. In the letter, Rillius stated that it had discovered in December 2021 that Abudantia had been using the Trademark on the Website purportedly pursuant to the TLA. It informed Abudantia that Fastron did not have effective authority to use or license the Trademark to any third parties and that Abudantia was accordingly in breach of Rillius's intellectual property rights. Abudantia was required to cease and desist using the Trademark and to take down the Website immediately. Rillius reserved all its rights, including the right to take legal action.
41. Abudantia responded to this letter on 23 February 2022 stating that both SteelRose and Rillius were well aware that Abudantia had been licensed to use the Trademark in the Turkish-speaking market by Fastron and expressing surprise that no reference had been made to this fact. It questioned how Ms Tohtayeva could properly have written such a letter given her involvement in the drafting of the TLA in 2020 and asserted that if indeed Fastron had no authority to licence the use of the Trademark to Abudantia, then it was in breach of various warranties in the TLA. Further arguments were advanced as to an estoppel and a claim for indemnity. A further letter was sent by Abudantia to Fastron the same day enclosing both SteelRose's letter and Abudantia's response and making essentially the same points.
42. In a further letter to Abudantia dated 1 March 2022, SteelRose responded stating that the relationship between Fastron and Rillius had changed since 2020. It denied that the two companies were associated and continued "*Fastron does not have effective authority from [Rillius] to sublicense the Trademark to you. We cannot disclosure [sic] to you the details of the relations that have transpired between the two entities due to the duty of confidentiality. However, we repeat, the Trade Mark licence issued to you by Fastron no longer bears any legal grounds. You do not have legal standing to continue using Our Client's Trade Mark or other intellectual property.*" The letter denied Abudantia's claims and repeated Rillius' demand to remove the Trademark from the Website immediately, failing which further action would be taken to take down the Website. As regards the claims for breach of warranty, SteelRose reserved Rillius' rights in relation to its legal rights and any action it was considering taking as against Fastron.
43. Further letters were exchanged but these do not take the matter much further.

Third Party Communications

44. In early April 2022, Rillius wrote to various of Abudantia's service providers (the "**Business Partners**") referring to the statement on the Website that Abudantia was authorised to use the Trademark under the TLA with Fastron. These letters informed the recipients that Fastron did not have active authority from Rillius to use or license the Trademark to Abudantia, that Abudantia was not connected to Rillius or Parimatch, and that Abudantia was effectively in breach of Rillius' intellectual property rights in the

Trademark, for which Rillius was “*in the process of taking legal action against [Abudantia].*” The Business Partners were requested to stop providing games, services and products which supported Abudantia’s infringement of Rillius’ intellectual property rights as soon as possible and to encourage Abudantia immediately to stop using the Trademark.

45. As a result, three companies proceeded to remove their games from the Website and other websites operated by Abudantia, while others refused to participate in further projects with Abudantia. Abudantia was, however, able to avoid any further damage to its business by migrating to another website. It is Abudantia’s case that these letters were untruthful and misleading and were sent by Rillius maliciously pursuant to a conspiracy between the Defendants and others to injure and damage Abudantia by unlawful means, namely malicious falsehood and unlawful procurement of a breach of contract.

The Website Complaint and WIPO Arbitration

46. On 21st June 2022, Rillius lodged a complaint with the World Intellectual Property Organisation (“**WIPO**”) Arbitration and Mediation Center, challenging Abudantia’s right to use the Website’s domain name and seeking an order transferring the domain name to Rillius (the “**WIPO Arbitration**”). The Complaint did not refer at all to the TLA or the fact that the parties had been in a joint venture but were now in dispute as to whether it had terminated. It was only in Abudantia’s response dated 29 July 2022 that these matters were raised, and on 23 August 2022 the Sole Panellist in the WIPO Arbitration, Mr Warwick A Rothnie, required further submissions on the prior relationship between the parties which were duly exchanged.
47. On 13 September 2022, Mr Rothnie dismissed the Complaint. In the light of Rillius’ failure to disclose the existence of the joint venture and the TLA, which he regarded as highly material facts, he found that the Complaint had been made in bad faith and constituted Reverse Domain Name Hijacking under the WIPO rules.
48. Abudantia contends that the WIPO Arbitration was likewise commenced maliciously with intent to cause harm to Abudantia and is a further instance of unlawful means deployed pursuant to the conspiracy referred to above. The damage sustained as a result of the WIPO Arbitration is said to amount to some €25,000 in respect of legal fees.

Removal of the Trademark

49. Abudantia continues to operate the Website but on 11 July 2022, following the commencement of the WIPO Arbitration, it voluntarily removed the Trademark pending resolution of these proceedings.

Commencement of proceedings and application for an injunction

50. The present proceedings were commenced by Abudantia by Claim Form dated 26 July 2022.
51. On 1 August 2022, Abudantia applied *ex parte* for (a) permission to serve the Claim Form and Particulars of Claim out of the jurisdiction and (b) injunctive relief restraining the Defendants from communicating with Abudantia’s Business Partners. Permission to

serve out of the jurisdiction was granted by Waksman J but the application for an injunction was adjourned to an *inter partes* hearing.

52. This hearing took place on 22 August 2022 but was again adjourned upon (i) an undertaking by Abudantia to give the Defendants 7 days' notice of any intention to use the Trademark on the Website and (ii) a cross-undertaking by the Defendants to give Abudantia 7 days' notice of any intention to write to any company associated with Abudantia regarding the use of the Trademark. Both undertakings are still in place.
53. On 24 November 2022, the Defendants issued an application for summary judgment/strike out in respect of Abudantia's claim to payment of the Termination Sum. The application was heard on 13 June 2023 before Mr Christopher Hancock KC who dismissed it by order dated 19 July 2023.
54. A renewed application by Abudantia for injunctive relief was dismissed by Foxton J on 3 February 2023.

The StackPath Email

55. On 6 September 2022, Parimatch sent an email to StackPath (the company hosting the Website) alleging that StackPath was hosting fake websites impersonating Parimatch's business and fishing personal data on a large scale in violation of Parimatch's trademark rights. The email described Abudantia as "*crooks*" and made no reference to the joint venture or TLA. StackPath thereupon refused to host both the Website and other domains owned and operated by Abudantia, although Abudantia was in fact able to migrate its business to a new hosting provider within one day.
56. On the face of it, the StackPath email is something of a mystery, given that Abudantia had by this time already ceased using the Trademark. However, in her first (pre-trial) witness statement Ms Derbal explained how it came to be sent. Following the conclusion of the TLA, the Website and its mirror websites³ had been "whitelisted" within the Group, meaning that the department responsible for monitoring potential intellectual property violations knew to take no action against them. The Website and its mirrors remained on the whitelist after the dispute arose regarding termination and Abudantia's continuing right to use the Trademark. However, when Abudantia removed the Trademark from the Website it replaced it with a similar *paribahis* logo. This was picked up by the Group's security team and, since it had not occurred to anyone to give instructions to whitelist any *paribahis* logo, the StackPath email was sent. This was without consultation with Ms Derbal or any of the legal team and without their knowledge. The Defendants acknowledged almost immediately that it should not have been sent, and indeed that it constituted a breach of their undertaking. It accepted that Abudantia had a legitimate claim for any loss caused as a result of the email and this was in due course settled in April 2024 for €38,258.

E: The Issues

57. The parties agreed a lengthy list of issues for determination. However, having heard the evidence and in the light of the submissions as they developed, it seems to me that they can be distilled under the following heads:

³ A mirror website is a website with a similar but not identical domain name to the main website, use of which connects a user to the same internet resources.

Termination Issues:

- (a) The correct construction of clause 13.1 of the TLA
- (b) The incidence of the burden of proof in relation to satisfaction of the subjectivities.
- (c) Whether the subjectivities were satisfied
- (d) Whether the joint venture between the parties has come to an end and, if so, when and how
- (e) Whether the Termination Sum is payable to Abudantia under clause 14.3 of the TLA and, if so, in what amount

Damages Claims:

- (f) Whether the Defendants conspired together and with others to cause loss and damage to Abudantia by unlawful means
- (g) Whether Rillius uttered malicious falsehoods in its communications with Abudantia's Business Partners
- (h) Whether Rillius induced Abudantia's Business Partners to breach their contracts with Abudantia by virtue of such communications
- (i) Whether the WIPO Arbitration was prosecuted maliciously
- (j) Whether Abudantia is entitled to be compensated in damages on any of the grounds in (f)-(i) above and, if so, in what amount

Injunctive and declaratory relief:

- (k) Whether Abudantia is entitled to injunctive relief and/or declarations that the joint venture agreements remain in force and that it remains entitled to use the Trademark and operate the Website

F: Termination Issues

58. The key issue between the parties is whether the TLA expired at the end of the Initial Term or whether it continued thereafter and, if so, for how long and with what consequences. It is common ground that the Termination Notice sent by Fastron on 7 December 2021 was ineffective to bring either the TLA or the Services Agreement to an end in so far as it purported to do so "*with immediate effect*". I consider below whether it was a complete nullity for all purposes.
59. The relevant provisions of the TLA and Services Agreement are set out in an Annex to this judgment.
60. Abudantia's case can be summarised as follows:

- (a) Abudantia was not in breach of the TLA, which could therefore only be terminated pursuant to clause 13.3. This entailed the payment by Fastron of the Termination Sum.
- (b) Termination of the TLA alone would constitute a breach of clauses 3.1, 5.4 and/or 18 of the Services Agreement. Both agreements therefore had to be terminated at the same time.
- (c) The Services Agreement could only be terminated in accordance with its own terms, which by virtue of clause 12.3 required 3 months' written notice.
- (d) Termination of the TLA pursuant to clause 13.1 accordingly likewise required 3 months' written notice, with full particulars of why Parimatch considered that performance was not positive or that there was no mutual understanding of the same business goals.

61. As against that, the Defendants' case is that:

- (a) Only clause 13.1 of the TLA is relevant in this case. The Defendants do not suggest that there was any basis to terminate for cause under either clause 13.2 or clause 13.4 and they did not seek to terminate under clause 13.3.
- (b) The TLA came to an end by virtue of clause 13.1 because the subjectivities for continuation into the Renewal Term were not satisfied and it therefore expired. No notice was required and there was no obligation to pay the Termination Sum because there had been no termination (as opposed to expiry).
- (c) There was no need to terminate the Services Agreement separately because the effect of clause 12.1.5 of the latter agreement was that it came to an end automatically on expiry of the TLA.
- (d) The burden of proving satisfaction of the subjectivities was on Abudantia and had not been discharged.

Construction of Clause 13.1

62. The relevant principles of construction are well-known and were not in dispute. They are well-summarised by Popplewell J (as he then was) in *The Ocean Neptune*, [2018] EWHC 163 (Comm); [2018] 1 Lloyd's Rep. 654 at [18] as follows:

“The court’s task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must

consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.”

63. The process of construction thus involves both textual and contextual considerations and I remind myself that different factors may pull in different directions.

Interrelationship between the TLA and the Service Agreement

64. The parties were agreed that the TLA and the Services Agreement had to be read and construed together, and it is necessary to consider the interrelationship between the two with some care. This is because it was Abudantia’s case that the only basis on which the Services Agreement could be terminated was on 3 months’ written notice under clause 12.3 and this requirement to give 3 months’ notice informed the correct construction of clause 13.1 of the TLA. Thus, Mr Stuart Adair, who appeared on behalf of Abudantia submitted that a party wishing to contend that the subjectivities were not satisfied was obliged to give 3 months’ written notice with full particulars.
65. *Prima facie* one might think that the Services Agreement was intended to be the lead agreement, since the TLA was concluded in order that Abudantia could provide services under it. On the other hand, the definition of “Services Agreement” in the TLA provides for it only to be entered into *after* the conclusion of the TLA. The following considerations are also relevant:
- (a) Clause 2.1 of the TLA grants a licence to use the Trademark “*in connection with the Licensed Services during the Term.*” “Licensed Services”, however, is not defined by reference to the Services Agreement;
 - (b) Clause 3.1 of the TLA provides that all licensed services marketed in relation to the Services Agreement shall be provided under the Trademark;
 - (c) Clause 3.1 of the Services Agreement provides that in consideration of Abudantia complying with its obligations under the Services Agreement, Fastron grants it the right to use the Trademark “*solely for the purposes of this Agreement.*”
66. The position is therefore that any services provided by Abudantia under the Services Agreement have to be provided under the Trademark and the grant of the licence to use the Trademark is tied to the performance by Abudantia of its obligations under the Services Agreement. Accordingly, if the TLA comes to an end for any reason the Services Agreement cannot be performed. In theory, the TLA could still continue even if the Services Agreement were terminated, but since the grant of a licence under the TLA was the consideration for the provision of services under the Services Agreement, it is difficult to see how the parties could objectively have intended one agreement to operate without the other.

67. The difficulty in this case, however, arises because there was no attempt to align the termination provisions of the two agreements. Each had its own bespoke clauses and there was no express clause providing for termination of one in the event of termination of the other. Mr Adair went so far as to submit that even a lawful termination of the TLA would constitute a breach of the Services Agreement unless the latter was also terminated pursuant to its own terms. I regard that as plainly uncommercial and objectively unlikely to have been intended.
68. I wondered at one stage whether the solution might lie in the implication of a term in each agreement on grounds of obviousness or business efficacy that it should terminate in the event of the lawful termination or expiry of the other. On reflection, however, I accept the submission of Mr Faisal Osman who appeared on behalf of the Defendants that there is no necessity for any such implication. His argument was that termination or expiry of the TLA automatically terminated Abudantia's licence to use the Trademark under clause 14.1(2) with the result that Abudantia became incapable of performing its obligations under the Services Agreement. The Services Agreement accordingly became terminable under clause 12.1.5 with immediate effect upon notice without entailing any breach of the Services Agreement (unless, of course, the TLA had been terminated unlawfully). Sufficient notice for this purpose was given in the letter of 22 December 2021.
69. In my judgment, this analysis is correct with the result that lawful termination or expiry of the TLA does not entail a breach of the Services Agreement. I do not accept Mr Adair's argument that Abudantia acquired an equitable interest in the Trademark by virtue of clause 3.1 of the Services Agreement and that termination of the TLA wrongfully interfered with that right. He relied on the equitable maxim that equity looks on as done that which ought to be done, but it seems to me (particularly in the light of clause 4.1 of the TLA) that clause 3.1 simply conferred on Abudantia the right to make use of the Trademark rather than any giving it proprietary right on which equity could bite.
70. I therefore reject the argument that the provisions of the Services Agreement affected the construction of clause 13.1 or necessarily required service of 3 months' written notice. In any event it is difficult to see how such a requirement could work in practice, since notice would have to be given at least 9 months before the expiry of the Initial Term, thereby depriving the other party of the opportunity to show that performance had improved in the final 3 months, or, conversely, precluding reliance on clause 13.1 if performance suddenly nosedived in the final 3 months. This difficulty could only be avoided by giving notice at the end of the Initial Term, in which case the Initial Term would *de facto* have to be extended for the duration of the notice period, contrary to the express definition providing that the Initial Term was 1 year.
71. In short, I hold that termination or expiry of the TLA depends only on the provisions of that agreement irrespective of the termination provisions in the Services Agreement which do not have to be independently satisfied in order for the TLA to come to an end.
72. Nor am I persuaded that it is necessary to imply a requirement of notice into clause 13.1 on any other basis. Clause 13 as a whole covers both "Term" and "Termination" which, as Mr Osman pointed out, are not at all the same thing. It was common ground that termination under any of clauses 13.2-13.4 required some form of written notice and triggered payment of the Termination Sum.⁴ By contrast, clause 13.1 is simply a duration

⁴ Clause 13.3 appears *prima facie* to be inconsistent with clause 13.1, but it was common ground that it should be construed as meaning that notice to terminate under clause 13.3 could be given during the Initial Term

provision. It seemed to me that Mr Adair's submissions rather ignored this fundamental distinction. Extension of the TLA beyond the Initial Term into the Renewal Term is a binary question depending only on the fulfilment of the two subjectivities and not on the actions of either party. Nor, in contradistinction to clauses 13.2-13.4, is it expressed to depend on notice.

73. Mr Adair argued that it was essential to have notice of the reasons why the subjectivities were said not to be satisfied otherwise they could not be challenged. I regard this as an illusory concern. If one party intended to rely on non-fulfilment of the subjectivities it would no doubt be commercially prudent to make that clear but the party in Abudantia's position could always ask for clarification of the reasons which would either lead to dialogue and (hopefully) agreement or, if not, legal proceedings as here. I do not consider that a requirement of notice is either necessary for business efficacy or as so obvious that it goes without saying.

Construction of the Subjectivities

74. The next question is what the subjectivities actually mean and what must be shown for them to be fulfilled. Are they enforceable at all? Or are they too vague to be given any meaningful content? with the result that they must simply be ignored so that the TLA automatically continues.

"Positive Performance"

75. The starting point is that there was no express contractual benchmark for assessing whether performance was positive or not. Nor was there any contractual requirement for the business to achieve any particular targets. Mr Adair made the valid point that it is not permissible to take account of the subjective intentions of the parties and that, moreover, clause 17 of the TLA precludes reliance on any prior agreements, promises, assurances, representations or understanding. However, that does not in my view mean that the words cannot be given sensible meaning since the subjectivities can and should be construed in the light of the relevant factual matrix and context as known to both parties at the date of the agreement.
76. I heard a lot of evidence which might have been more accurately categorised as expert evidence. However, no objection was raised on either side and since both parties were experts in the field, it seemed to me that it was proper to take it into account. On the basis of that evidence, I am satisfied that the parties were each aware of and contemplated the following at the date of the TLA:
- (a) Both parties were sophisticated and expert in the online gambling market and sports betting but they had never worked together before and this was to be a new venture – effectively a start-up.
 - (b) Parimatch was already a big name and a market leader in Ukraine and elsewhere but had never operated in the Turkish-speaking market.⁵ The market for its brand was therefore untested. Both Mr Karyagdyev and Mr Portnov agreed that it was completely unknown whether the Parimatch logo and brand and the sponsorships they

irrespective of clause 13.1, but attracted an obligation to pay the Termination Sum.

⁵ For ease of reference, I use "Turkish market" as a short-hand for "Turkish-speaking market"

had would make any big impact and that it was a gamble whether the brand would have any leverage in the Turkish market.

- (c) Abudantia, on the other hand, was already operating in the Turkish market in which it had acquired considerable expertise and had built up an excellent reputation. In particular, it had relationships with local payment systems which were critical to the success of any online gaming venture. Mr Portnov described them as the “*golden key*” to successfully working in the Turkish market.
- (d) The Turkish market was a “grey” market. Local companies were not permitted to operate online gambling sites but the position for companies (like Abudantia and Parimatch) which had offshore licences was unclear. While they were not explicitly prohibited from operating in the Turkish market, there was always a risk of intervention by the regulatory authorities and the Turkish regulator was known to be particularly aggressive in relation to online gambling.
- (e) The venture carried risks for both parties, albeit the reputational risk for Parimatch was greater. Neither was interested in an average, middle-of-the road business. There were already around 400 websites operating in the Turkish market, including Abudantia’s own website, Bettilt, which offered sports gaming and casino games. Another similar operation would therefore have given Abudantia nothing which it did not already have. For its part, Parimatch was a multi-million-dollar brand and was not interested in an unambitious operation which did not justify the effort and the risk involved. Instead, the parties were mutually aligned in the hope and intention that the combination of Parimatch’s global brand and Abudantia’s local expertise would achieve a significant market position.

77. In my judgment, “positive performance” has to be construed in this context and, given that context, I would be reluctant to find that the words were so vague as to be altogether meaningless. The initial lock-in period of 1 year was clearly designed to provide Abudantia with some protection, but equally clearly in my judgment it was objectively intended to act also as a trial period leading to a longer-term arrangement thereafter if both parties were satisfied that the business was going in the right direction. As Mr Rublievskiy put it in his witness statement, “*Good performance without a good working relationship is luck. A good relationship without good performance is unfortunate. Neither is acceptable.*”

78. Unless some meaning is to be ascribed to the subjectivities, therefore, the consequence would be that the parties were automatically tied into a further 3 years even if the performance of the venture was dismal. This strikes me as commercially implausible. Both parties agreed that the venture was something of a gamble and I am satisfied that neither objectively intended to commit itself to investing for 4 years in a business which was either failing to achieve its purpose or where they were not aligned on how to take it forward. Indeed, Mr Karyagdyev accepted as much in his oral evidence when he said that “*nobody committed money for four years of 100k. The commitment was only for 12 months*”. While his subjective views are inadmissible as such, they nonetheless confirm my view of the parties’ objective intention which was to allow a clean break exit after one year if things were not working out. Clause 13.1 was the means by which this was achieved.

79. In fact, neither side seriously contended that the words were altogether devoid of sensible meaning. Instead, Mr Adair submitted that the court should simply adopt what he submitted was the natural and ordinary meaning of the words, namely that performance is “positive” if it improves on what went before. On his case, the business was performing positively if it was moving towards breaking even and subsequently making a profit.
80. There are at least three problems with such a construction. First, it means that a business is potentially performing positively even if it is growing at only a glacial rate. Secondly, it begs the question where performance is fluctuating throughout the period of review. For example, performance in November may have been better than in October but may well have been lower than in January or April. Thirdly, whether or not the business will break even and make a profit in the future is wholly speculative and can only be confirmed with hindsight. However, the assessment of positive performance has to be made on the basis of the information and data available at the time the assessment falls to be made, i.e., at the end of the Initial Term. This of course includes reasonable and realistic forecasts available contemporaneously.
81. But in any event, I reject this construction given the context of the agreement. The objective purpose and aim of the collaboration was to become a major player with a significant long-term market share. In my judgment, “positive performance” is therefore to be construed as meaning a healthy and consistent pattern of growth commensurate with achieving such a market share. I emphasise (and I return to this later) that this does not mean that the business should necessarily have been showing a profit or demonstrating exponential growth by the end of the Initial Term (although no doubt either or both would have been very welcome). To that extent, I agree with Mr Adair. Nonetheless, I do not regard it as sufficient on its own that the business is moving towards breaking even at whatever pace.
82. In this context, there was some debate as to whether Mr Karyagdyev told Mr Portnov that he was confident that the business would “skyrocket” or words to that effect. In cross-examination, he said that he could not recall using these words, although he accepted that Parimatch was a big brand and that he did tell Mr Portnov that he understood the Turkish market and what was needed to drive it. It is therefore not implausible that he said something to the effect that the Turkish market did not have any big brands and that big growth could therefore be expected with the Parimatch brand. Ultimately, however, it is unnecessary to find whether he articulated this expressly or not. For the reasons already stated, I find that the parties objectively intended that the business should achieve a significant market position irrespective of anything specific that Mr Karyagdyev said.
83. I should also make clear at this stage that I do not regard the so-called Business Plan as relevant to the construction of the words “positive performance”. I accept Mr Karyagdyev’s evidence that this was prepared as an indication of how the business might typically be expected to grow on certain assumptions. It had no contractual force whatsoever. Where it is potentially relevant, however, is in relation to an assessment of whether performance was in fact positive and I return to it in that context.

“Mutual understandings of the same business goals”

84. These words do not seem to me to present any particular problem of construction, being ordinary English words which are really only susceptible of one meaning. If any joint

venture is going to be successful, it is important that the parties are pulling in the same direction and share the same vision and concept for its development, otherwise the relationship becomes unworkable. This subjectivity therefore requires the court to determine on the basis of the evidence what business goals each party had at the end of the Initial Term and whether or not they were aligned.

Burden of Proof

85. As indicated above, I accept the distinction drawn by Mr Osman between “term” and “termination”. Clause 13.1 is not in truth a termination provision at all. It is a provision which defines the duration of the TLA. The definition of “Term” in the agreement clearly distinguishes between the Initial Term and the Renewal Term. The TLA is therefore very definitely *not* a 4-year agreement and the express provision for a lock-in period necessarily presupposes that the parties are not automatically locked into the Renewal Term.
86. Abudantia asserts that the TLA did not come to an end at the expiry of the Initial Term but continued. It is therefore an essential and necessary part of that case that the subjectivities were satisfied and there can be no doubt that Abudantia bears the legal burden of proof in that respect. However, Abudantia nowhere pleaded that performance was satisfactory or that the parties shared mutual business goals. Instead, it merely asserted that the Termination Notice of 7 December 2021 was ineffective to terminate the TLA with immediate effect and (in its Reply) that Fastron had failed to give 3 months’ written notice as it was obliged to do.
87. In those circumstances, the Defendants were under no obligation to plead or prove that performance was unsatisfactory, or that there was no mutual understanding of business goals: see *Phipson on Evidence* (20th ed.) (Sweet & Maxwell) §6-03. Accordingly, Mr Adair rather missed the mark with his trenchant criticism that the Defendants’ case on termination was fatally flawed because it was unpleaded. The Defendants bear nothing more than an evidential burden and the ultimate legal burden is firmly on Abudantia to satisfy me on a balance of probabilities that there was both positive performance and mutual understanding of business goals.

Satisfaction of the Subjectivities

Conspiracy or Brand Protection Strategy?

88. Before proceeding to consider whether Abudantia has discharged this burden, it is necessary first to address its submission that Parimatch and the Defendants were engaged in an overarching conspiracy from at least April 2021 to steal the Website from Abudantia and to harm Abudantia’s business. Clearly if I find that there was such a conspiracy, it will materially affect the weight I attach to the Defendants’ evidence as to whether the subjectivities were satisfied or not.
89. The alleged conspiracy was ambitious in its scope, encompassing the Group, Fastron, Rillius, Mr Portnov, Mr Rublievskiyi, Mr Liashko, Ms Derbal and Ms Tohtayeva. All are said to have conspired together to steal Abudantia’s business by unlawful means, namely (i) inducing Abudantia’s Business Partners to breach their contracts with Abudantia; (ii) uttering malicious falsehoods in the Business Partner letters and in the Stackpath email; and (iii) malicious prosecution via the WIPO proceedings.

90. These allegations are strenuously denied by the Defendants, who say that actions which may on the face of it have appeared to be directed aggressively towards Abudantia were in fact nothing of the sort, but were merely part of a “brand protection strategy” designed to allow Parimatch to distance itself from the Turkish operation by creating the impression that the business was unauthorised and that Parimatch was making genuine complaint about this. A large part of the oral evidence was devoted to exploring this aspect of the case and I find the relevant facts to be as follows.
91. The standard practice of Parimatch when faced with breaches of its intellectual property rights was to take one or more of the following actions:
- (a) Institute legal proceedings against the infringer;
 - (b) Complain to any appropriate regulator;
 - (c) Contact service or gaming providers;
 - (d) Take steps to transfer the domain name in question to prevent further misuse;
 - (e) Consider whether any criminal offence had been committed.
92. As discussed in paragraph 76.(d) above, the Turkish market was a “grey” market with an aggressive regulator. Parimatch was therefore taking a risk in operating there. There was also a concern that banks and other authorities might ask questions about whether Parimatch was receiving income for the use of its Trademark and software in an unregulated market. For this reason, the Group developed a brand protection strategy designed to manufacture an evidence base which could be deployed as necessary so as to give the impression that the use of Parimatch’s intellectual property was unauthorised and that Parimatch was taking active steps to prevent such use, even to the extent of requiring one group company to sue another. The strategy is confirmed in an email dated 11 August 2020 – well before the joint venture agreements in this case were concluded – sent by Ms Derbal to Ms Tohtayeva and another member of the legal department, Mr Bohdan Skrypachov. This stated as follows:
- “There is a task to collect evidence that our company is fighting against violators of our rights in regions where we do not have licenses. We are talking about offenders such as Pari-Match N.V., Paru-Match N.V., PM Sport and jurisdictions in which they operate. This is India, Brazil, Russia, China, Turkey, Nigeria, Pakistan.*
- The task is to collect, having previously created, an evidence base for provision to banks, financial institutions, as a confirmation of our fight against violators. ... Involvement of local consultants/lawyers is welcome if necessary to create such a struggle.”*
93. In mid-April 2021, Ms Derbal asked Ms Tohtayeva to prepare a note on whether the use of the Trademark by Abudantia could entitle Parimatch to take action against Abudantia in the UK. Ms Tohtayeva gave evidence that this was because of concerns about geoblocking and mirror websites but since there had been no mention of any such concerns in any of the witness statements or documents, I have some doubt as to whether this was an entirely candid explanation. However, I have no doubt that Ms Tohtayeva was giving truthful evidence when she said that she was asked to review the domains being operated by Abudantia and carry out some basic research on how to protect the

Trademark. The results of her research were summarised in a Research Note which she sent to Ms Derbal on 21 April 2021, concluding that Parimatch would have a strong case to restrain use of the Trademark if Abudantia did not stop using it.

94. On receipt of this Research Note, Ms Derbal suggested to Ms Tohtayeva that a formal letter should be sent to Abudantia informing it that the Trademark was being infringed and setting out the action that Abudantia was requested to take. Ms Derbal noted that some casinos had already started to contact Parimatch proposing to disable their games for Abudantia's sites because "*in their understanding*" the sites were using the Parimatch brand illegally. Ms Derbal further noted that Parimatch had hitherto responded that it was dealing with the "*violators*" itself (quotation marks used in the original). Ms Tohtayeva acknowledged receipt of this response and queried whether it would be worth getting Ericius to start making enquiries of Fastron, asking Fastron to investigate and check the position. She suggested sending notices every 3-4 months "*just to start building an email correspondence trail internally*". Ms Derbal replied, agreeing that Ericius should send a letter of claim immediately to the infringer. In further exchanges, she agreed that the first letter should not be aggressive in tone, but simply a warning.
95. Ms Tohtayeva also prepared a subsequent Research Note at the request of Ms Derbal dealing with the procedure for blocking domains in Turkey. The domains referred to related to the Website.
96. On 3 June 2021, Ms Tohtayeva's English firm, SteelRose, wrote a formal letter on behalf of Ericius to Fastron asserting that Fastron appeared to be acting in collusion with Abudantia to breach Parimatch's intellectual property rights and requiring it to cease using the Trademark and take down the offending sites immediately. The letter reserved all Ericius's rights, including the right to seek an injunction, and recommended that Fastron take independent legal advice. On 14 July 2021, Fastron sent a response to this letter. In fact, however, the response had been drafted for Fastron by SteelRose and approved by Ms Derbal. It denied the allegation, asserting that the websites referred to were not owned or operated by Fastron and inviting Ericius to address its grievances to the owner/operator of the sites.
97. It is quite clear from the contemporaneous documents that Ms Derbal and Ms Tohtayeva had considered carefully how this correspondence could be exchanged without it being apparent that it was all being orchestrated by Parimatch. Since Fastron did not have any publicly available website or email address, SteelRose could not email the letter to Fastron without obtaining an email address from Fastron's corporate managers which would immediately give the lie to any suggestion that it was an independent firm. It should also be noted that Ms Tohtayeva was at this time still employed by PMI as well as running her own firm. In an email to Ms Derbal sent on 2 June 2021, Ms Tohtayeva pointed out that the letter of complaint could alternatively be sent directly to Abudantia but that "*I think that will upset SK*".
98. On 6 September 2021, Ms Derbal sent an email to Mr Liashko (who by then had succeeded Mr Portnov as CEO of the Group) referring to a new plan "*on the deployment of new domains with the product, which we will then dispute. In addition to that claims to the Curacao regulator just in case.*" She denied that this was about blocking Abudantia's websites and I accept that evidence. Rather I find that what was being proposed was to set up new websites as Aunt Sallies which could then be knocked down.

99. Ms Derbal was the person primarily in charge of the brand protection strategy, although I do not accept that Ms Tohtayeva was simply following instructions. On the contrary, it is clear that she took a proactive role at some points. Both she and Ms Derbal were uncomfortable and evasive when cross-examined on this correspondence. Ms Derbal bridled at the suggestion that she was creating evidence or fabricating intellectual property infringements. She denied that the communications were a fiction or that the trail of emails was dishonest. She described it as “*preparing confirmation*” that Parimatch was protecting its intellectual property rights and “*building up a protection strategy*”.
100. There comes a point, however, when it is necessary to call a spade a spade. The entire strategy was designed to create the appearance that there had been a real infringement of Parimatch’s intellectual property when in fact there had been no such thing. In other words, Parimatch was laying a paper trail to be deployed in the event that awkward questions were asked about its involvement in the Turkish market, so that it could plausibly claim, falsely, that any dubious activity was entirely without its authority or knowledge. I strongly suspect that it was the fear of exposing the brand protection strategy for what it was that explained the reticence of all the witnesses apart from Mr Portnov to deny that Fastron was controlled by the Group.
101. This was plainly a misleading position and wholly disingenuous on the part of Parimatch. It is surprising and disheartening (to say the least) that an English solicitor should have been a willing party to such a strategy, and it is perhaps fortunate that in the event it never became necessary to deploy this “evidence” vis-à-vis third party banks or regulators. Had that happened, the inescapable conclusion is that Parimatch would have been dishonestly attempting to mislead those third parties with commensurately serious consequences. As it is, I wish to make it quite clear that the court does not and will not condone such behaviour which it regards as a serious breach of professional ethics.
102. So far as relevant, I find that neither Mr Portnov nor Mr Rublievskiyi was concerned with the details of the brand protection strategy. Both understood that it was important for Parimatch to adopt a position of deniability which might involve apparent threats to take action against Abudantia and others (even other group companies), but I am satisfied that neither was personally involved in the details of the strategy or authorised or approved any specific steps or communications. That was left to Ms Derbal and Ms Tohtayeva.
103. Ms Derbal, Ms Tohtayeva and Mr Rublievskiyi all gave evidence that Mr Karyagdyev had been expressly warned that steps of this nature might be taken. In his witness statement, Mr Karyagdyev effectively confirmed as much, accepting that Mr Portnov had told him that if any issues or enquiries arose regarding Parimatch’s involvement in the venture, it would deny involvement and pursue legal action claiming that the Trademark was being used without authorisation – even if authorisation had been given. Mr Portnov also told him that one group company might sue another for the sake of public appearances. Mr Karyagdyev said that he was not concerned because he was assured that this would just be “*for show*”.
104. The Defendants’ witnesses also gave evidence of a specific conversation that they had with Mr Karyagdyev during which he was asked whether it would be acceptable to send a letter of complaint directly to Abudantia. According to them, Mr Karyagdyev said that he did not regard this as appropriate because it would come as a shock to the Abudantia

team. Mr Adair complained that it was not put to Mr Karyagdyev directly that such a conversation had taken place, and while it would have been better if it had been, it is consistent with Ms Tohtayeva's reference to not wanting to "upset SK" (paragraph 97 above) and explains why the letter of 3 June 2021 was instead sent to Fastron. It is by no means implausible that such a conversation took place.

105. But whether it did or not, I am nonetheless satisfied that there was no overarching conspiracy on the part of Parimatch to steal the business from Abudantia. Rather, all the steps to which I have referred above were taken in pursuance of this highly dubious and duplicitous brand protection strategy in order to allow Parimatch to avoid any public admission of involvement in the project. Ms Derbal, Ms Tohtayeva and Mr Rublievskiy all knew perfectly well that Abudantia was lawfully using the Trademark during the Initial Term as a sub-licensee with the authorisation and consent of Ericius as owner and Fastron as licensee.⁶ Not only that, but they intended Abudantia to continue doing so pursuant to the terms of the joint venture agreements. This explains why the word "violators" was put in inverted commas in the internal correspondence and why Parimatch was at pains to assure third parties that it was dealing with supposed violations itself. There were of course no violators and while Ms Derbal quibbled at the suggestion that the reference to "violators" was a fiction, that is exactly what it was.

106. The purpose of the Research Notes was therefore to indicate the sorts of action that Parimatch would need to pretend it was taking as part of the brand protection strategy and this no doubt explains Ms Tohtayeva's acceptance that some of the correspondence with third parties was based on them. I am satisfied that they were not prepared for the purpose of actually blocking Abudantia's websites in Turkey, merely to demonstrate, however disingenuously, that Ericius and Parimatch were taking active steps to protect the Trademark.

107. The absence of any conspiracy is further supported by the fact that the parties continued to operate the joint venture and that Fastron continued to pay its share of the funding until November 2021. No legal action has ever been taken by Parimatch against Abudantia, nor has there been any attempt to take over the Website apart from trying to recover the domain name in the WIPO proceedings. The present action was commenced by Abudantia, not Parimatch. In fact, it is common ground and was accepted by Mr Karyagdyev that, following Fastron's indication that it did not wish to continue the joint venture, Mr Rublievskiy attempted to negotiate an amicable separation which involved Abudantia retaining the player database (where the value of the business resided) and continuing to use the Trademark for a further 5 months until it could migrate its business to a different domain. The suggestion floated by Mr Karyagdyev that Parimatch had now commenced operating in Turkey was denied by Mr Portnov and unsupported by any solid, let alone direct, evidence.

108. In any event, there is considerable force in the evidence of both Mr Rublievskiy and Mr Portnov that there was no plausible reason why Parimatch would want to steal the

⁶ I do not accept that it was necessarily untrue or misleading to describe Fastron in the TLA as the "owner" of the Trademark. As a matter of contract, it undertook obligations as owner vis-à-vis Abudantia, even though it was itself only a licensee. This is not unknown in commercial contracts (for example, string charterparties) and does not in my judgment give rise to any legitimate ground of complaint. It was not in dispute that at all times prior to expiry of the Initial Term, Fastron had authority, first from Ericius and subsequently from Rillius, to sub-licence the Trademark to Abudantia despite not being the legal owner, and there was no breach of warranty in that respect.

Website or Abudantia's business. First, Parimatch was not an expert in the Turkish market, hence the approach to Mr Karyagdyev in the first place and the abandonment of the original white label proposal. It did not know about the proper marketing strategy to adopt and did not know any of Abudantia's back office functions. There was therefore no basis for thinking it would be capable of operating the Website at all, let alone do any better than Abudantia. Even if Parimatch had been biding its time until Abudantia had established the operation, it could not have successfully operated the business on its own because it did not have the necessary relationships with payment providers, without which the business would be crippled. Secondly, given the way in which the business was performing (as to which see further below), why would a multi-million-dollar concern like Parimatch want to steal a rather average business in a market where there were already 400 other websites? It could easily have bought Abudantia out if it had wanted to continue operating the Website on its own account.

109. The position was neatly encapsulated by Mr Portnov in his evidence as follows:

"We cannot run it. There is no money, there is no business. It's an external software, external employees. You cannot— It's not a car on the street, you cannot take it. It's like to absorb someone else's culture... You cannot even steal it. This business dissolves in one day... It's a human-driven business... You cannot take it ... it is a human business because if we talk specifically about Turkey, it's a very concrete case of human-driven business because it all comes down to payment systems and your personal agreements, and Sapar is the key of local payment systems... If we had taken anything from him, he just, with one click of a button, switched off all payment streams and the business is gone."

110. In support of the alleged conspiracy, Mr Adair relied strongly on the following correspondence sent and steps taken by Parimatch in 2022 after the expiry of the Initial Term. However, these fall into a different category since by this stage there was a dispute between the parties as to whether the joint venture had come to an end or not.

111. The first communication complained of was the Cease and Desist letter sent by SteelRose to Abudantia on behalf of Rillius on 17 February 2022. This claimed that Rillius had discovered in December 2021 that Abudantia was using the Trademark and claiming authority to do so under the TLA. The letter continued that Fastron did not have "effective authority" to license the Trademark and that Abudantia was therefore using it in breach of Parimatch's intellectual property rights. It is to be noted that the letter did not explicitly state that Abudantia had never had authority to use the Trademark and, given that Parimatch was asserting that the TLA had come to an end, it was no doubt true that Rillius (which by now owned the Trademark) had withdrawn authority from Fastron at that point. Undoubtedly, however, the letter was economical with the truth. Those in control of Rillius knew very well that use of the Trademark by Abudantia had initially been properly authorised under the TLA and, despite protestations by SteelRose and Ms Tohtayeva in correspondence and evidence respectively that the relationship between Fastron and Rillius had changed since she drafted the TLA in 2020, I find that she was perfectly well aware when this letter was sent that use of the Trademark had been authorised at least up to the end of the Initial Term.

112. Mr Adair suggested that it was also disingenuous to assert that Rillius had only discovered in December that Abudantia was using the Trademark. On this particular point, however, I am prepared to give Parimatch the benefit of the doubt, as only after

December 2021 would it have been apparent that Abudantia was intent on continuing to use the Trademark despite (as Parimatch saw it) authority having been withdrawn. The correspondence from SteelRose was thus very carefully crafted to state that Fastron did not have “*effective authority*” to sub-license the Trademark and that the licence granted by Fastron “*no longer bears any legal grounds*” because it “*no longer has that authority.*” This position was substantially repeated in SteelRose’s letter of 25 April 2022 where it was said that there was no continuing business relationship between Fastron and Rillius.

113. Nonetheless, while there may not have been any positive misstatements, the letters undoubtedly did not tell the full story and Ms Derbal and Ms Tohtayeva’s efforts to explain and justify the position were unconvincing. I have no doubt that the real reason why they were drafted in this way was because setting out the whole history would have involved admitting publicly that Parimatch had authorised the operations in the Turkish market from which it was trying so hard to distance itself.
114. A further deeply unsatisfactory aspect of this correspondence was the assertion by SteelRose in its letter of 25 April 2022 that it did not act for Fastron and, indeed, that Rillius was considering taking legal action against Fastron. Clearly SteelRose had acted on behalf of Fastron up to the end of December 2021. Ms Tohtayeva accepted this and also that SteelRose was continuing to advise Fastron in relation to matters where it had previously acted for it, such as the drafting and non-renewal of the TLA, albeit apparently without any formal retainer. Taken at face value, there was therefore the clearest possible conflict of interest in now acting for Rillius whose interests were ostensibly opposed to those of Fastron. Ms Tohtayeva did not deny this but said that she would not have done it if there had been any actual legal proceedings between the companies. She sought to justify her position on the basis that it was “*a very difficult time in Parimatch because of the war, and I didn’t want to bother them with all the nuances and formalities.*” She said that she subsequently obtained a waiver although neither this nor the position had a waiver not been granted was explored further in evidence. I remind myself that Ms Tohtayeva is not on trial in this case.
115. Next, complaint was made about the Business Partner letters. These likewise stated that Fastron had “*no active authority*” to license the use of the Trademark without disclosing that Fastron had previously had authority which Rillius was now asserting had been withdrawn. The WIPO Complaint also failed to refer to the fact that there had been valid authorisation under the TLA but that the parties were in dispute as to whether it had been terminated.
116. It is clear from the contemporaneous evidence that these omissions were deliberate. Mr Adair pointed to a Slack exchange between Mr Skrypachov (who had signed the Complaint) and Ms Derbal on 23 August 2022 immediately after Mr Rothnie had required service of further submissions on the prior relationship between the parties. Mr Skrypachov acknowledged that the chances of succeeding in the Complaint were now lower since “*there are doubts about the bad faith of the registration (let me remind you that, among other things, in the UDRP proceedings, it is necessary to prove that the domain was registered by - *And* - was used in bad faith), even if the bad faith of use is proven, as we have already said, we do not really need their domain now.*”
117. Mr Adair submitted that this was clear evidence that Parimatch had until then been wanting to steal the domain but that something had now changed. This, he said,

supported Abudantia's case that there had been a conspiracy from the outset. I disagree. To my mind, it is tolerably clear what had happened, at least on a balance of probabilities. On the previous day, the hearing had taken place of Abudantia's application for an injunction which had been adjourned by Waksman J on the basis of, amongst other things, Abudantia's undertaking to give 7 days' notice of any intention to deploy the Trademark. In those circumstances, the urgency of taking back the domain name in order to restrain the allegedly unlawful use had evaporated.⁷

118. Mr Adair levelled further criticisms at certain formal aspects of the Complaint, for example, that it stated the respondent to be "unknown". However, I discount these as I accept Ms Derbal's evidence that in the particular circumstances of the case the Complaint was required by the WIPO rules to be issued in that form.

119. In short, I find that Parimatch's actions from and after January 2022 were undertaken in the context of a continuing dispute as to termination of the joint venture. On Parimatch's case, the joint venture had terminated and, along with it, any authority granted to Abudantia to use the Trademark. Parimatch therefore believed itself entitled to restrain continued use of its intellectual property. The WIPO Complaint was only intended to recover the domain name. The business itself, in the sense of the player database and Website, remained with Abudantia and Parimatch was content for Abudantia to exploit that as it chose under another domain name, provided that it did not make use of Parimatch's intellectual property. In other words, the WIPO Arbitration was designed to recover the domain name, rather than the business itself.

120. Mr Adair submitted that Mr Rothnie's express finding of bad faith on the part of Rillius gave rise to an issue estoppel not only as against Rillius but also against Fastron as a privy. The finding was made in the context of the WIPO rules which provided in Rule 15(e) that:

"If after considering the submissions the Panel finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain name holder, the Panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding."

Rule 1 defined "Reverse Domain Name Hijacking" as *"using the Policy in bad faith to attempt to deprive a registered domain name holder of a domain name."*

121. I have some doubts as to whether it can properly be said that Fastron is a privy of Rillius. Mr Adair submitted that it was because both companies were nominees of the same people. He did not elaborate on this beyond asserting it as a bald proposition and I am not persuaded that it is sufficient in itself to make the companies privies of each other. If an award had been made against Parimatch, it might have bound both Fastron and Rillius as privies of Parimatch, but Parimatch was not a party to the WIPO proceedings. In any event, the finding only creates an estoppel as to the fact that the WIPO Arbitration was commenced in bad faith and thus constituted Reverse Domain Name Hijacking within the meaning of the WIPO rules. It is not a finding that there was an attempt by Rillius to take over Abudantia's entire business, let alone as part of a conspiracy hatched

⁷ In fact, following Mr Rothnie's request for further submissions, Parimatch asked for the proceedings to be stayed, no doubt because it wanted to avoid having to explain the true position for the reasons already given, but this was refused.

as far back as April 2021. It is to be noted that Mr Rothnie expressly accepted that Rillius might be vindicated at the ultimate hearing of the English proceedings. He was clearly therefore not intending to make any findings relevant to the substance of the dispute, merely that the *procedure* had been invoked in bad faith. In my judgment, this takes the matter no further so far as concerns the matters that I have to decide.

122. Finally, there is the StackPath email. The way in which this email came to be sent has been explained in paragraph 56 above and Ms Derbal was not cross-examined on this. It was acknowledged almost immediately to have been a mistake and a breach of the Defendants' undertakings, and appropriate compensation was paid. I accept Ms Derbal's evidence that she did not know it was to be sent or that it had been sent until after the event since I do not believe that she would have authorised such a patent breach of the undertaking if she had known. Again, therefore, I find that the sending of the email was not the manifestation of any conspiracy but an egregiously misguided attempt to get Abudantia to stop using the Trademark in circumstances where Parimatch's position was that authority had been withdrawn.
123. Before leaving this matter, I must address Mr Adair's submission that the Defendants are precluded from denying the existence of the alleged conspiracy because of the failure to cross-examine Mr Karyagdyev on certain passages in his witness statement. The passages in question expressed a view that with hindsight Parimatch's actions could all be seen to be part of a strategy when entering a new market to partner with an independent entity, allow it to establish operations and then deny all prior association, terminate the partnership and assume control of the business. Mr Adair argued that since these and other similar passages had not been challenged in cross-examination, the court was bound to accept that evidence and it was not open to the Defendants to assert any contrary case.
124. I do not accept this submission. The passages of Mr Karyagdyev's evidence relied upon are not evidence of objective fact but rather comment and speculation by Mr Karyagdyev based on his subjective perception of the facts. Mr Adair argued that they supported the documentary evidence on which he relied. That may be so, but it is a completely different matter. Either the direct evidence supports the existence of a conspiracy or it does not. Mr Karyagdyev's personal views as to whether Parimatch was deliberately setting out to damage Abudantia and take its business do not take the matter further one way or the other. I cannot regard myself as bound to find that this is what Parimatch was in fact doing simply because Mr Karyagdyev says that this is what he now thinks it was doing. I was referred by Mr Adair to *Phipson (op. cit.)* §12-12 but this emphasises that the principle on which he relies is based on fairness and is not inflexible. I accept that there is no basis for challenging Mr Karyagdyev's evidence as to what he believed and thought (which no doubt explains why he was not cross-examined about it) but there is nothing in *Phipson* or in any of the other authorities cited to me which binds me to hold, despite my findings on the primary evidence, that what he believed and thought was in fact true.
125. In summary, I conclude that all the actions which were alleged to evidence the supposed conspiracy were taken by Parimatch in pursuance of the brand protection strategy (of which Mr Karyagdyev had been forewarned prior to entering into the joint venture) or, after January 2022, to protect Parimatch's intellectual property in the context of the ongoing dispute while avoiding so far as possible admitting to the prior involvement of Parimatch in the business. There was no purpose or intention to harm Abudantia or to steal its business.

126. I consider below how these findings impact Abudantia's damages claims. At this juncture, however, it is sufficient simply to note that the Defendants' evidence as to the performance of the joint venture is not to be approached on the basis that they had any ulterior motive in bringing the operation to an end.

Positive Performance

127. Debate under this head mainly concentrated on (i) the actual profit and loss statements for the business (although in light of its Termination Notice, Parimatch was not provided contemporaneously with any statements for the period after November 2021), (ii) the Business Plan provided by Mr Karyagdyev at the outset of the venture and (iii) some updated projections prepared by Abudantia in October 2021.

128. It is undisputed on the figures that:

- (a) The business made losses during the Initial Term in all months bar one. The losses increased slightly in February and then decreased from March to April, before making a significant profit in May. However, both parties accepted that May was an outlier and that the results for that month had been skewed by the impact of one particularly big player. Losses in June were marginally lower than in April but then steadily increased, doubling in July and increasing by a further 50% in August when the business made its biggest loss since the start. There was then some decrease but by the end of November, the losses were more or less back to the same level as in February, notwithstanding continuing investment by the parties meanwhile. Mr Karyagdyev was unable to explain why losses in August 2021 were so large.
- (b) Cumulative losses by the end of November were €469,511.88 increasing to €511,419.06 by the end of December.
- (c) The business broke even in February 2022 and continued to make a profit thereafter save in May 2022.
- (d) Cumulative losses by the end of February 2022 had risen to €517,857.38 and were finally extinguished by the end of December 2022.

129. The question for the court is whether this amounted to "positive performance" as I have construed those words above. In this regard, one cannot focus on one metric to the exclusion of others. All aspects of the business including user numbers, turnover, first time deposits, margin, return on marketing investment ("ROMI"), return on investment ("ROI"), average revenue per user ("ARPU"), have to be considered holistically because they all interrelate. As Mr Rublievskyi said, the business could have millions of users but if it cost as much to acquire them as they generated in revenue then it would make zero profit. Likewise, user numbers and first time deposits might be growing but if revenues were not also increasing then there was a problem and the parties might end up putting in more money than they could ever hope to recover. In order to increase profits, he said it would be necessary to achieve either a higher revenue per user, or to increase user numbers at the same revenue per user but with no increase in costs, or (ideally) both. Pointing to strong growth on one metric without taking account of the impact of others therefore only tells part of the story.

130. Timescale is also important in this context. It was common ground that the business was not expected to be showing a profit in the first year but there is a real difference commercially between reaching break-even after 12 months or 2 years. Furthermore, breaking even means only that income and expenses balance out *at that point*. Vast losses may have been incurred to reach that point and consideration obviously needs to be given to how and when (if at all) they will be recouped. This all forms part of the overall assessment and the time taken to turn profitable depends on the particular market. Mr Rublievskiy's evidence was that in some markets this might take 2, 3 or even 5 years but it was nonetheless necessary to see the business positively growing. If he was not seeing growth from which he could project worthwhile profits in a reasonable timeframe, he would be wasting time and money just chasing losses and if it was not possible to arrest those losses, then it was better to call a halt and get out. *"Profit always comes from revenue and positive trends of growth and proper structure of expenses."*
131. The same point was reflected in his evidence about ROMI and ROI. These were metrics which he said that Parimatch regarded as critical. For a business to be regarded as worth pursuing, they would expect their marketing investment to be recovered in revenue (ROMI) within 2-3 months in a good market or 6 months in a bad market, with overall investment being recouped in revenue (ROI) in roughly double that timescale, i.e., 6 months in a good market and 1 year in a bad market. He explained in his witness statement that if the business was not on course to achieve this, then it could never hope to achieve ROMI at scale because of the churn factor. In other words, acquisition of users who were not bringing in any return on the marketing investment meant that the business would never be profitable. When it was put to him in cross-examination that customers could be acquired more quickly by spending more money on marketing, he replied *"That's completely right, but businesses work in a little bit differently. You don't acquire users that are not bringing you in positive ROMI and ROI. So return of marketing investment is the main metric that any business should consider to scale marketing. If you are spending \$1 and you are not getting return of this \$1 in 12 months, this business will never become profitable. If you spend \$300,000 and your business is... constantly not growing, that means that something is wrong with this business and the business model in this particular market."* His evidence was that one year was sufficient to tell whether a business was performing positively or not.
132. Mr Rublievskiy was cross-examined at length on figures for ROMI by reference to a table which had been compiled by Ms Stoyan. He was unwilling to accept these figures as accurate and was heavily criticised in Abudantia's closing submissions for being argumentative in his refusal to take them at face value. However, I have to say that I too was confused as to precisely what the figures represented and I therefore invited further post-hearing written submissions on what the table showed. In the light of those submissions, I conclude as follows:
- (a) The figures in the Stoyan table are broken down by monthly cohort. The figures for each cohort included a figure for first month ROMI (i.e., the amount of the marketing expenditure incurred in that month which was returned in revenue in that month) and a figure for ROI. Although Mr Adair's written submissions presented this latter figure as the amount of that expenditure recovered in the following 12 months, that is demonstrably incorrect. It in fact refers to the amount of the expenditure recovered over the balance of the first year. On any view, July 2021 was the last month for

which it was possible to calculate a 6-month ROMI figure prior to the end of the Initial Term.

- (b) The table did not show 6-month ROMI figures as such but they can be calculated for January to July 2021 (in round figures) as follows: 110%, 162%, 732%, 103%, 168%, 107% and 100%. By comparison, according to the table, ROMI by the end of the first year for the same months was: 148%, 277%, 818%, 125%, 192%, 112% and 100%. While the parties were agreed that May 2021 was an atypical month, no explanation was offered as to why March was an outlier in terms of ROMI and ROI.

133. In his post-trial written submissions, Mr Osman pointed out the following potential difficulties with the Stoyan table:

- (a) The figures assumed that every cohort contained a unique user group and that no further marketing costs had been incurred in relation to a particular cohort after the first month. Neither assumption could be verified so that it was impossible to determine what the costs of acquiring and retaining a particular user were and what revenue that user had generated in his or her lifetime on the platform.
- (b) The figures had not been calculated in accordance with the formulae for ROMI and ROI which Mr Adair had put to Mr Rublievskiy as the established correct definitions. If correctly applied, the picture was drastically different with ROMI and ROI figures in round terms over the first 12 months as follows. I have added my own calculations of 6-month ROMI on this basis for good measure:

<u>ROMI</u>	<u>ROI</u>	<u>6-month ROMI</u>
48	(97)	10
177	(77)	62
718	(51)	632
25	(38)	3
92	82	68
12	(27)	7
(0.28)	(43)	0

(c) Furthermore, the figures in the Stoyan table for GGR and bonuses did not correspond to the figures in the profit and loss statements.

134. I bear in mind that Abudantia bears the burden of proof in respect of positive performance and that these are all points which Mr Osman would have wanted to explore with Ms Stoyan. But she was not called as a witness and, moreover, had deleted all her data leaving behind her no clue as to the basis on which she had compiled this table. I therefore find myself in a position where I cannot safely rely on these figures for what they purport to show and I do not hold it against Mr Rublievskiyi that he was likewise unwilling to do so. Accordingly, I do not accept that Abudantia can demonstrate that performance was positive simply by reference to ROMI and ROI.
135. But even if I were to take the Stoyan table at face value and accept that the marketing spend was being recovered in more or less 6 months, the fact remains that the business must still be looked at overall, and user numbers were not growing significantly as a result. Indeed, the player count was erratic over the first 12 months to say the least. This was one of Mr Rublievskiyi's main complaints: if the marketing spend was indeed being recovered in 6 months, then the business should have been growing but it was not. On the contrary, as noted above, net losses for July-September were greater than in any of the preceding months (May always excepted) and the loss for November 2021 was greater than it had been in February, albeit having recovered somewhat from the all-time low in August.
136. In these circumstances, Parimatch did not regard the business as performing positively, and in evidence Mr Rublievskiyi repeatedly referred to performance being about 50% below that shown in the Business Plan. Mr Adair submitted that the Business Plan was wholly irrelevant because it had been prepared for a differently-structured white label arrangement when in fact the parties had entered into a profit-sharing agreement. He suggested that this represented a sea change. With respect, I do not accept this. The change from white label to profit-sharing joint venture undoubtedly affected the way in which costs were allocated but the proposed business itself was identical. In this respect I agree with Mr Rublievskiyi and Mr Portnov: the market was the same, the partners were the same and it was only the allocation of costs and profits that was different. If anything, performance might have been expected to be better than under a white label arrangement because Abudantia rather than Parimatch was in charge on the operational side and was also now risking its own money giving it a vested interest in making the venture a success.
137. In cross-examination, Mr Karyagdyev agreed that the Business Plan had been prepared based on his knowledge of the Turkish market but he said that it was purely indicative and depended on a number of ball-park assumptions. I accept that entirely but, as he also accepted, it was still an indication of how the business might typically be expected to grow on the basis of his expertise and knowledge and there was no suggestion that any of the assumptions adopted was unrealistic. Indeed when he first sent the Business Partner to Mr Portnov on 29 June 2020, he described it as a "*pessimistic option*".
138. I note that in Telegram exchanges between Ms Oleksandra Kalchuk of Parimatch's operations team and Mr Khramy of Abudantia's operations team on 25 October 2021, Mr Khramy sent Ms Kalchuk a copy of the Business Plan at her request, confirming that

there had been no updates apart from the updated projections prepared that month (as to which see further below). He did not suggest that the Business Plan was irrelevant.

139. In these circumstances, I regard it as permissible when assessing whether performance was positive or not to take account of the fact that actual performance was about 50% below what could *typically* have been expected. This is not to say that the Business Plan represented a fixed benchmark such that any shortfall automatically meant that performance was not positive. On the contrary, I accept that a shortfall – even a significant shortfall – could well be consistent with positive performance if there were indications of a growth trajectory showing that the business would make up ground. Nonetheless a significant divergence raises a legitimate question as to whether something may be wrong and in this case the actual profit and loss statements showed that there was a very significant shortfall from the typical case (itself said to be pessimistic) of around 50%.
140. Mr Adair made the fair point that the Business Plan contemplated a higher marketing spend from July 2021 onwards than was provided for under the joint venture agreements. However, the force of that point is rather undermined by the fact that Abudantia underspent even the agreed marketing budget without ever suggesting that growth was being constrained because it needed to be higher. In fact, Mr Karyagdyev’s explicit evidence was that Parimatch was not asked to pay its full contractual commitment because Abudantia was pursuing a gradual build-up and did not want to spend money just for the sake of it. Mr Portnov gave evidence in cross-examination that if Abudantia had asked for more, it would have been provided since Parimatch had almost unlimited capital for growth.
141. Mr Osman submitted that a possible explanation of the lacklustre performance of the business was an inadequate marketing strategy. He pointed to Ms Stoyan’s monthly marketing reports which contained the same “cut and pasted” comments for each month, suggesting that the same strategy was being pursued without material change from month to month, contrary to Mr Karyagdyev’s evidence that the marketing strategy was being constantly refined and tweaked. Mr Adair pointed out that none of this had been put to Mr Karyagdyev but his complaint rang hollow in circumstances where Mr Karyagdyev himself had said in evidence that questions about the nuts and bolts of what was happening on the Website and about Abudantia’s marketing strategy and whether it was working would need to be put to Ms Stoyan and the rest of the technical team. There is at least a plausible argument that something was amiss with the marketing strategy but the absence of Ms Stoyan and the lack of any disclosure from her made it impossible to explore these matters further. It is, of course, Abudantia not the Defendants who bears the burden of proof.
142. Mr Karyagdyev denied that any concerns about performance had ever been raised with him prior to November 2021. As I indicated at the outset, I had some concerns about this aspect of his evidence. He said in his witness statement and in cross-examination that his involvement and participation in calls with Parimatch tailed off as the project went on and that he left Abudantia’s operations team to get on with day-to-day operations. However, Mr Rublievskyi’s Google calendar appointments show that there were regular calls with Mr Karyagdyev to discuss the project and when challenged by Mr Osman as to whether Mr Rublievskyi or any of the Parimatch team had ever raised a concern about performance, his answer was phrased very carefully. He said that there was no ‘yes or no’ answer and that it was important to identify which conversation was

referred to and which indicators Parimatch had been looking at. This seemed to me to acknowledge at least implicitly that concerns had indeed been raised about aspects of performance and while Mr Karyagdyev claimed not to remember any specific expressions of concern, the fact that concerns were being raised and discussed is borne out by the contemporaneous Telegram records, including the following:

- (a) On 6 April 2021, Mr Khramy indicated that there had been a slowdown in growth since the end of March. There was the same number of active players, but the big players were making smaller deposits. He said that Abudantia was working on the issues and “*plan to achieve sustainable growth by the end of this week*” (by which I understand him to mean that a plan would be in place by the end of the week).
- (b) On 14 June 2021, Mr Khramy acknowledged to Ms Kalchuk that if one VIP player were excluded (presumably the player skewing the May figures) growth had been “*moderate*”.
- (c) On 5 July 2021, Ms Kalchuk said that she was “*a little worried*”, to which Mr Khramy responded by enquiring whether this was because of the drop in KPIs, thereby acknowledging that there had been a drop.
- (d) On 13 September 2021, Ms Kalchuk stated that the business was far behind the GGR plan in terms of indicators. She asked whether there was an action plan to improve the situation. Mr Khramy replied that they were working on it and making technical changes and that in general terms an improvement might be seen in a month.
- (e) On 27 September 2021, Ms Kalchuk asked for a forecast as she needed to justify the performance of the project at an internal budget meeting.

143. I find as a fact that in response to this request, the updated projections referred to in paragraph 127 above were prepared by Abudantia in early October 2021 with the help of Ms Shnyr because of concerns that the business was not performing as well as had been expected. These projections reflected an “optimistic” and a “pessimistic” scenario. Whether or not they were ever shown to Mr Rublievskyi, the Telegram records show that they were sent to Ms Kalchuk with Abudantia indicating it was following the optimistic scenario, albeit expressing concern about the decline in the value of the Turkish lira.

144. Given these documented concerns by the Parimatch operations team, I find it inconceivable that Mr Rublievskyi did not mention this during the calls to which Mr Karyagdyev was a party. Quite apart from anything else, I would have expected Mr Karyagdyev to be kept abreast of events by his team. I am not at all surprised that there was virtually nothing in writing, since it is clear that most of the substantive discussions between the teams took place by Zoom or calls, whether because of a concern to maintain deniability as far as possible or simply for convenience. As already noted, when pressed, Mr Karyagdyev admitted that Mr Rublievskyi may have expressed concern about revenues and that he may have replied that Abudantia’s indicators were improving.

145. Be that as it may, the updated projections are contemporaneous evidence of Abudantia’s own assessment of the business. They were shared (as I find) with Parimatch and I regard it as appropriate to take them into account when assessing whether performance was positive or not. The projections were prepared up to August 2022

(based on actual figures from the profit and loss statements up to the end of August 2021) and contained the following forecasts:

- (a) On the optimistic scenario, net losses for December 2021 were projected to decrease to €54,5000 - slightly less than the previous month (€58,000) and marginally better than February (€57,000). The business was forecast to break even in April and show monthly profits thereafter, although on that basis, cumulative losses by the end of August 2022 were projected to be €336,847 - about 71% of the cumulative loss as at the end of December 2021.
- (b) On the pessimistic scenario, the loss for December 2021 was projected to be €58,700 with break even in June 2022 and cumulative losses by the end of August 2022 of €641,217 – worse than in December 2021.

146. What was never satisfactorily explained was the basis on which the updated projections forecast an apparently significant improvement after April 2022 (optimistic scenario) or June 2022 (pessimistic scenario). Mr Karyagdyev could not assist on this point at all.
147. Mr Adair attempted to demonstrate that these figures (which he could not really gainsay) did not give the full picture. He referred to the evidence of Mr Karyagdyev that it was necessary to look at trends and for this purpose relied on certain graphics and tables exhibited to Mr Karyagdyev's statement. However, reliance on one of those tables had to be abandoned when it became apparent that it could not be reconciled with available data from the profit and loss statements and Mr Karyagdyev was unable to explain how it had been compiled. As to the other graphics, they do not appear to me to show any marked growth trend during the Initial Term. On the contrary, the player count was fluctuating throughout the year, ARPU was at an all-time low in October 2021 and GGR was increasing very slowly.
148. Mr Adair further submitted that the landscape was dramatically improved if one looked at a 6-month rolling average which Mr Karyagdyev said was the best way to detect a trend. I was therefore presented with a number of graphs showing such averages but they did not persuade me that the business was growing in a way that suggested it was on track to become a market leader. On the contrary, the abiding impression as at the end of the Initial Term is that the business was flat-lining and, whatever hopes for improvement Mr Khramy may have expressed in April 2021, I find it impossible to discern anything more than the most anaemic trend towards growth.
149. The Telegram records show that a "*frank conversation*" took place between Ms Kalchuk and Mr Khramy on 25 November 2021. The clear inference is that Ms Kalchuk relayed serious concerns as Mr Khramy indicated that Abudantia would wait for an official letter from Parimatch regarding its future plans "*according to the terms of our cooperation.*" This was then followed by a call between Mr Rublievskiy and Mr Karyagdyev. Mr Karyagdyev accepted that Mr Rublievskiy said that Parimatch's shareholders were concerned, that the returns were "*not great*", that the regulatory risks were high, and that a meeting would take place when a decision would be made. On 7 December 2021, the Termination Notice was sent formally expressing dissatisfaction with the performance of the business. Clearly, therefore, Parimatch did not subjectively consider the business was performing well enough to justify continuation.

150. Given the context and background against which the joint venture was concluded, I find that on an objective basis as well, the business was not performing positively in the sense of demonstrating a healthy and consistent pattern of growth commensurate with achieving a significant long-term market share. At best it was flat-lining, but the fluctuations were such that it was difficult to discern any unequivocally positive trends or solid basis for anticipating such trends in the future. As we now know, of course, the business in fact broke even ahead of schedule in February 2022, but this could not have been known at the time the assessment fell to be made. I therefore hold that the positive performance subjectivity was not satisfied.
151. Before leaving positive performance, I should say something about the question of Parimatch's access to raw data – a matter which attracted probably more attention during the hearing than it deserved since, in truth, it was something of a red herring.
152. Under clause 4.19 of the Services Agreement, Abudantia undertook to *“provide possibility and all necessary support for the integration of the DWH (Data Warehouse, Tableau Server) of the Client to the Website platform for tracking all main business indicators such as: registrations, transactions, active players, bet, GGR etc.”* It was not in dispute that Parimatch had its own DWH database and Tableau server, and wanted the facility for live or “raw” data to be fed in directly from the Website so that it could run its own analytics programmes and identify any problems based on its extensive experience in other markets. It was also not in dispute that there were problems in achieving integration and that Parimatch was constantly pressing for this to happen. However, there was a dispute as to whether integration was ever provided prior to service of the Termination Notice.
153. On the evidence, I find that:
- (a) At the outset, there were a number of teething problems, for example regarding payment solutions, and a lot of queries about discrepancies in the data provided by Abudantia. This is hardly surprising in a new venture. The data was not in the same format that Parimatch used and Parimatch clearly had difficulty in understanding and reconciling the figures it was receiving.
 - (b) In particular, there seem to have been continuing discrepancies between the data contained on Abudantia's own Core software platform and the reports it sent to Parimatch. There were also problems with data not updating and Abudantia acknowledged that there were errors in its reports from time to time until at least October 2021.
 - (c) On 14 June 2021, Ms Kalchuk complained about the Abudantia technical team's slow response to queries about integration and updates and a separate technical team chat group was established on 22 July 2021 *“to help in solving the issue with the correct display of data in the database.”*
 - (d) Although the immediate problem was then fixed, another problem emerged later in July which turned out to be more pervasive than first thought and was not apparently solved until late August.
 - (e) Yet further discrepancies were identified on 5 October 2021 between the Abudantia and Parimatch databases which Abudantia was initially unable to explain and which

were only fixed on 19 November 2021.

154. It is not entirely clear whether any of these issues concerned the integration of Tableau as opposed to practical difficulties in reconciling figures. In his witness statement, Mr Karyagdyev stated that although the two teams were in discussion, the format of data delivery was never finalised. In the light of this evidence, I find on a balance of probabilities that integration of Tableau was never in fact achieved and that Parimatch never had direct access to the raw data that it had requested.
155. What was uncontroversial was that Parimatch had access to Abudantia's back office where it could access all the spreadsheets and analysis carried out by Abudantia. However, Mr Rublievskyi pointed out that relying on figures and analysis presented by Abudantia when Parimatch had no direct access to the underlying data and no ability to run its own analytics on that data was very different from being in a position to interrogate the raw data for itself. While there was no suggestion that Abudantia was in fact manipulating the data in any way, it is clear that errors were regularly occurring and Parimatch could not therefore have total confidence in what was available to it in the back office.
156. Be that as it may, I agree with Mr Adair that none of this ultimately makes any difference to the question of whether the business was objectively performing positively or not.

Mutual Understanding of Business Goals

157. As already stated, it is important in any joint venture that the parties are mutually aligned in their vision for the development of the business. Mr Adair submitted that profitability was the only business goal and that this was a goal shared by both parties. Having heard the evidence, I do not accept the premise of this submission. By November 2021, Mr Rublievskyi was having serious doubts as to whether the business would ever take off. Parimatch had considerable experience of online gambling and sports betting and I accept his evidence that if it was aiming to become a market leader, it needed to capture and keep as much market share as possible early on. If the business was not forecast to reach the position Parimatch was aiming to achieve, then it would never catch the market leaders and would be spending more to chase a smaller share of the market. Accordingly, while there was no expectation that the business would be in profit (let alone showing exponential growth) by the end of the Initial Term, the almost complete absence of growth to date needed at least a proactive plan which identified the problems and proposed realistic solutions if it was ever going to achieve a significant market share.
158. There was a dispute between the parties as to whether, during his call with Mr Rublievskyi in November 2021 or at any other time, Mr Karyagdyev told Parimatch in response to their concerns that it should just wait and see and give the business time. Mr Karyagdyev denied having used these words but whether he did or not, I am satisfied that he said something to the effect that the business was growing and would in time achieve profitability. In his witness statement he said that he maintained that the project would soon break even according to Abudantia's forecasts, and in cross-examination he said that he would have referred Parimatch to indicators which showed that the business was growing. I regard this as tantamount to giving the impression that Abudantia was content with the way in which the business was developing and that the results would

come. It is therefore hardly surprising that Mr Rublievskiy perceived Mr Karyagdyev's attitude to be that "*if we kept at it for long enough, it will make money.*" There was certainly no suggestion that Mr Karyagdyev proposed any other approach.

159. By contrast, Parimatch's approach was altogether more aggressive, and this was appreciated by Mr Karyagdyev who accepted in cross-examination that Mr Rublievskiy and Mr Portnov's goal was growth. He summarised their approach as "*We go into market. We invest millions in the market. We want to be straight away number one, and then we start generating profits. That might take two, three years.*"

160. Timescale is important here too. In a general sense obviously both parties were concerned to make profits. The question is when. Parimatch's goal was to achieve a trend towards significant growth by the end of the Initial Term, whereas Abudantia was adopting a "*gradual buildup*" and clearly saw no need to change anything very much about the business model. In my judgment, the parties did not have a shared strategy or vision for moving forward and did not share a mutual understanding of business goals. On the contrary, Abudantia was content with a far more modest enterprise than Parimatch was aiming for.

When and how the TLA came to an end

161. On the basis of my findings above, neither of the subjectivities to continuation of the TLA was satisfied. As I have already held, it was not an express pre-condition to the operation of clause 13.1 that notice be served. Nonetheless, whatever its deficiencies in terms of drafting, I am satisfied that the Termination Notice sufficiently informed Abudantia that Fastron did not consider performance to be positive for the purposes of the clause. That can only reasonably have been interpreted by Abudantia as an indication that the subjectivities were not met.

162. In these circumstances, I hold that the TLA expired at the end of the Initial Term and (so far as necessary) that the Services Agreement terminated by virtue of clause 12.1.5 at the same time.

163. If I am wrong about that, the question arises as to whether the TLA nonetheless came to an end subsequently and, if so, when and how. Abudantia's case on this point can best be described as undeveloped. Mr Adair's rather plaintive submission was that it was all very difficult because of the way in which matters had developed but he eventually settled on the commencement of the WIPO Arbitration on 12 June 2022 as an effective notice of termination under clause 13.3 such that the TLA came to an end 12 months later on 11 June 2023.

164. In my judgment, however, if the TLA did not expire at the end of the Initial Term, it came to an end in 2022 on the basis that – even if inadequately drafted in other respects – the Termination Notice of 7 December 2021, alternatively Fastron's letter of 22 December 2021, sufficiently evinced a clear intention not to continue with the joint venture. I do not consider that the erroneous reference to immediate termination or the incorrect calculation of the Initial Term precluded either letter from taking effect as a notice under clause 13.3. I am satisfied that those errors were due in the one case to inadvertence and in the other to uncertainty within Parimatch as to when exactly the Website had gone live. Clause 13.3 does not prescribe any particular form of notice and to hold that the letters were a complete nullity and ineffective for all purposes would to

my mind fly in the face of commercial reality. On that basis, the TLA terminated on either 6 June 2022 or 21 June 2022.

Termination Sum

165. It is common ground that if the TLA expired by virtue of clause 13.1, no Termination Sum was payable by the Defendants whereas it was if the TLA was terminated under clause 13.3. Calculation of the correct figure was contentious and while the point is now moot, I heard full argument on it and it is right that I express my views briefly.

166. Clause 14.3 of the TLA provides for the Termination Sum to be calculated:

*“in accordance with the following formula: **Licensee Share** x (A x 3), where ... “A” is 6 months GGR (as defined above) for the preceding financial period (the “**Termination Sum**”)...”*

167. “Licensee Share” is defined in Annex 2 to the TLA as “fifty per cent (50%) of the NGR” but both parties ultimately agreed that the formula was unworkable if the full definition was adopted and that the words “Licensee Share” should be construed as simply meaning 50%. The Defendants had not always been of this view. Their initial pleaded contention was that clause 14.3 meant precisely what it said and that there had been no mistake in the drafting of the clause. They abandoned that case at the summary judgment hearing when they instead suggested for the first time that the definition of “A” should refer to NGR rather than GGR. They sought consent from Abudantia to amend their Defence to raise this alternative case, but consent was refused and a formal application to amend was issued on 28 November 2024. Notwithstanding that it raised a pure question of construction, Abudantia resisted the application on the basis that it had no real prospect of success. After debate on the first day of trial, I directed that since the point did not impact on any witness evidence, it should be argued *de bene esse* in the ordinary course and that I would rule on the application after hearing the substantive arguments.

168. There is no ambiguity in the wording of the clause and the Defendants do not advance a case for rectification. Accordingly, the only basis for making the amendment sought is if the court is satisfied that (i) something has gone wrong with the drafting; (ii) there is a clear mistake; and (iii) it is clear what correction ought to be made to give effect to the parties’ intention: *Chartbrook Homes Ltd v Persimmon Homes Ltd*, [2009] UKHL 38; [2009] 1 AC 1101 at [22]-[25]; *LSREF III Wight Ltd v Millvalley Limited*, [2016] EWHC 466 (Comm) at [40]. It is not sufficient that it is only possible that a mistake has been made: *Altera Voyageur Production Ltd v Premier Oil E&P Ltd*, [2020] EWHC 1891 (Comm) at [67].

169. Mr Adair submitted that there is no clear mistake in this case because:

- (a) The formula works perfectly well as drafted. While it would clearly give rise to a much lower figure on the Defendants’ case, that is not the same thing.
- (b) There is an analogy between clause 14.3 and the calculation of the compensation to be paid to Abudantia on the exercise of a Share Buy-Out Right under paragraph 4.1 of Annex 2 to the TLA. The latter requires the total value of the joint venture to be calculated by applying a multiplier to GGR with compensation being paid at an

appropriate percentage of that value. It is not at all obvious why the Termination Sum under clause 14.3 should not similarly be calculated by reference to the value of the joint venture.

170. In response, Mr Osman argued that:

- (a) In a profit-sharing arrangement such as the joint venture, the parties would have intended any compensation to be tied to net profit. He submits that the error crept in when the structure of the joint venture was changed from white label to profit-share. At that point “GGR” should have been changed to “NGR” since the unamended clause failed to reflect the fact that Abudantia’s interest in the business was now in a share of net profits, not revenues.
- (b) There is a critical difference from the Share Buy-Out provisions because, under the latter, the purchaser acquires a share in the player database which is valued by reference to GGR, whereas the Termination Sum presupposes that the database stays with Abudantia.
- (c) There is no justification for requiring an exiting party to pay compensation when the business is loss-making. It was never intended to compensate Abudantia for inadequate performance.
- (d) A formula based on GGR does not account for the fact that PMI injected cash capital into the business whereas Abudantia’s contributions were largely operational rather than financial.

171. It is no doubt *possible* that a mistake was made for any or all of the reasons given by Mr Osman, but I am not satisfied that it is obvious. It is important to recognise that the Termination Sum is payable by Fastron to Abudantia irrespective of which party terminates or for what reason. It can therefore appropriately be regarded as the price of exit rather than compensation properly so called.

172. Accordingly, this is not a case where the clause can be amended as a matter of construction on the grounds of obvious mistake and, since Mr Osman expressly eschewed any case based on rectification, the inescapable conclusion is that the application has no reasonable prospect of success and must be refused.

173. It follows that had it been payable the Termination Sum would have fallen to be calculated in accordance with Abudantia’s revised calculations (not themselves challenged) in the sum of €1,667,957.

G: Damages Claims

174. Until 5 November 2024, Abudantia’s alleged losses for which it claimed damages were wholly unparticularised. Only following my order at the PTR was any attempt made to quantify them with the following outcome:

- (a) Business Partner letters - nil
- (b) StackPath email - €38,258 (already settled)
- (c) WIPO proceedings - €25,000.

175. In other words a total sum of €25,000 is sought (excluding exemplary damages). This compares starkly with nearly £400,000 that I allowed the Defendants in their costs budget for disclosure, the vast majority of which was attributable to the conspiracy and other tort claims. Truly it might be said that the mountains laboured mightily and brought forth a mouse, and the court is entitled to query whether the cost and effort of maintaining these claims for such a paltry sum was consonant with the overriding objective. Nonetheless, maintained they have been, and I must deal with them.

Conspiracy

176. The claim for conspiracy is pleaded at paragraph 77 of the Particulars of Claim and Mr Adair confirmed that this remained Abudantia's case. The allegation is (in essence) that the Defendants and others, knowing that such conduct was unlawful, agreed to conspire and combine together with the intention of injuring and causing loss and damage to Abudantia by unlawful means, including:

- (a) Malicious falsehood by virtue of the Business Partner letters;
- (b) Inducing a breach of contract also by virtue of the Business Partner letters;
- (c) Malicious prosecution by means of the WIPO proceedings.

The StackPath email is relied upon (in Abudantia's Reply) as evidence of malice. It is not put forward as an independent ground of claim.

177. In order to establish a conspiracy, the claimant has the burden of proving each of the following elements: *Kuwait Oil Tanker Co. SAK v Al Bader*, [2000] 2 All ER (Comm.) 271 at [132]:

- (a) An agreement, combination or understanding involving two or more persons;
- (b) To take action which is unlawful;
- (c) With the intention (but not necessarily the predominant purpose) of injuring the claimant;
- (d) Damage caused to the claimant by the unlawful means.

178. The only unlawful means relied upon in relation to the alleged conspiracy are the independent torts of malicious falsehood, inducing breach of contract and malicious prosecution. It is therefore convenient to consider first whether any of these torts is made out since, if not, the claim for conspiracy cannot succeed. The starting point is, of course, my primary finding that the joint venture expired at the end of the Initial Term. Thus, Abudantia had no legitimate right to use the Trademark thereafter and cannot complain about Parimatch's attempts to restrain it unless these were unlawful for other reasons and caused damage beyond merely preventing Abudantia from operating the Website.

Malicious Falsehood

179. The ingredients of this tort are: (i) a published falsehood; (ii) malice; and (iii) damage.

180. The contents of the Business Partner letters have been summarised at paragraph 44 above. In his closing submissions, Mr Adair argued that:

- (a) It was untruthful to state that Parimatch had “discovered” that Abudantia was using the Trademark;
- (b) It was misleading to state that Fastron did not have active authority to license the Trademark without further stating that, with the full knowledge of Parimatch, the TLA represented Fastron to be the owner of the Trademark and warranted that it had the right to licence Abudantia to use it;
- (c) It was misleading to state that Abudantia was not connected to Parimatch;
- (d) It was untruthful to say that Rillius had not permitted Abudantia to use the Trademark;
- (e) It was untruthful to state that Rillius was in the process of taking legal action against Abudantia at a time when no legal proceedings were on foot.

181. However, the fact that the Business Partner letters undoubtedly did not tell the whole story does not necessarily mean that they were untrue and in order to succeed Abudantia must prove actual falsity. If the letters can be read in more than one way, the Defendants are only liable if it is demonstrated that they intended the incorrect meaning.

182. As I have said in paragraph 113 above, it is difficult to say that there were any positive misstatements in the letters. Authority to use the Trademark had been withdrawn on expiry of the Initial Term and it could plausibly be said that Parimatch only appreciated in December that Abudantia was nonetheless determined to continue using the Trademark, thus “discovering” the unlawful use at that point. As to the remaining complaints, it was not untrue to say that Fastron had no current authority to license the Trademark to third parties or that Abudantia was not connected to Rillius or Parimatch, or that Rillius had not permitted it to use the Trademark at the date of the letter. As to taking legal action, it is true that no legal proceedings had actually been commenced, but that is not necessarily inconsistent with them being in contemplation.

183. The thrust of the Business Partner letters was to assert that Abudantia’s current use of the Trademark was unlawful and should be stopped. What the position had been in the past was strictly irrelevant so far as the present was concerned. On the other hand, if I am wrong about the termination of the TLA upon expiry of the Initial Term, then it was clearly wrong to assert that Abudantia’s use of the Trademark was unlawful prior to 2 or 21 June 2022 (see paragraph Error: Reference source not found above) - at least without making clear that there was a genuine dispute between the parties. I am prepared to assume that falsity would be sufficiently established in that scenario.

184. However, even then I am not satisfied that the requirement of malice is satisfied. Malice can be inferred if the falsehood is calculated to cause damage and is known to be untrue but honest belief in a claim, even if unfounded, cannot be malice: *Greers Ltd v Pearman & Corder Ltd* (1922), 39 RPC 406, 417. Given my findings in paragraphs Error: Reference source not found-Error: Reference source not found above, it cannot be proved that Parimatch did not honestly believe that the joint venture had come to an end and that authority to use the Trademark had been validly withdrawn.

185. In any event, Parimatch never intended to harm Abudantia's business. Rather, I accept the evidence of Ms Tohtayeva on this point, namely that the purpose was to encourage Abudantia to stop using the Trademark which, if the TLA had ended, was an entirely legitimate aim. The allegation of malice also completely ignores the undisputed evidence that Mr Rublievskyi made considerable efforts to find an amicable solution to the dispute which involved Parimatch writing off its costs and Abudantia keeping the database and continuing to use the Trademark for a further 5 months until it could migrate its business elsewhere. None of the actions now complained of was taken by Parimatch until after all these proposals had been rejected by Abudantia.
186. In support of his argument on malice, Mr Adair relied on an email sent by Mr Liashko to Mr Sudyr on 11 July 2022 in which he referred to *"bastards who have stolen our brand and are unwilling to take down their sites voluntarily. They are operating in Turkey using our brand. Can we take down the sites, database, etc.? How quickly?"* However, this takes the matter no further since Abudantia would still have to prove that at that date Parimatch did not believe that the joint venture had ended and that Abudantia's use of the Trademark was unauthorised. On my findings that was not the case.
187. Finally, Abudantia has wholly failed to establish any damage flowing from specific alleged falsehoods in the Business Partner letters. For example, even if Parimatch was not *"in the process of taking legal action"* against Abudantia, it is not said that any damage flowed from that specific assertion. Indeed, no attempt was made to plead or prove any quantifiable damage caused by the Business Partner letters. Mr Karyagdyev's evidence was that Tom Horn Enterprises asked Abudantia to remove its games from the Website and that Abudantia voluntarily agreed to do so. He also stated that Booming and Relax removed games, but there was no evidence as to what, if any, actual loss was caused to Abudantia as a result.
188. For all these reasons, the claim for malicious falsehood cannot succeed.

Introducing Breach of Contract

189. The ingredients of this tort are:
- (a) A breach by a third party of a contract with the claimant;
 - (b) Procured by the defendant;
 - (c) Knowing and intending such breach (this being sufficient even without malice);
 - (d) Damage caused by the breach.
190. For this tort to be committed, there must be an actual breach of contract. However, the evidence established that in this case the majority of service providers continued to provide services to Abudantia once the full position had been explained to them. So far as concerns Tom Horn Enterprises, it is difficult to discern any breach of contract in circumstances where Abudantia agreed voluntarily to remove its games. Nor was there any pleading or evidence as to how or why the removal of games by Booming or Relax amounted to a breach of contract. The terms of the contracts between Abudantia and its Business Partners were not in evidence and, for all I know, may well have contained provisions entitling suppliers to withdraw services if they had grounds for believing that

there might be an infringement of a third party's intellectual property. Mere interference with Abudantia's business short of breach is not sufficient for this tort.

191. Furthermore, even accepting that the Business Partner letters constituted sufficient "procurement" or "inducement", it is still necessary for Abudantia to establish that the Defendants *intended* to procure a breach. It is not enough simply to show that a breach would be the natural consequence of their actions: *Clerk & Lindsell on Torts* (24th ed., 2023) (Sweet & Maxwell). Abudantia did not seek to rely on the separate and distinct tort of intentionally causing loss by use of unlawful means and on the material before me, Abudantia comes nowhere near establishing the requisite knowledge sufficient to support an intention to procure a breach.
192. Finally, the absence of any pleaded or proved damage resulting from the alleged breaches is equally fatal to any claim based on this tort.

Malicious Prosecution

193. The Complaint lodged by Rillius in the WIPO Arbitration is said to be untruthful and misleading for much the same reasons as the Business Partner letters, the main complaint being the failure to disclose the prior relationship between the parties and the dispute between them as to the termination of that relationship.
194. In order to establish malicious prosecution, Abudantia must prove the following:
- (a) That the proceedings were set in motion against it by Rillius. There is no specific authority on whether commencement of arbitration proceedings amounts to a prosecution for these purposes, but since the tort is designed to restrain abuse of process I am content to assume that it does.
 - (b) The proceedings must have been determined in favour of Abudantia. This requirement is clearly satisfied.
 - (c) Rillius acted without reasonable and probable cause and with malice.
195. Abudantia's difficulty here is in establishing a lack of reasonable and probable cause. As was expressly recognised by Mr Rothnie when dismissing the Complaint, Rillius might ultimately be vindicated in the English proceedings – as indeed it has been. It is therefore impossible to say that it had no reasonable or probable cause for bringing the Complaint at all. Mr Rothnie's concern was rather the manner in which the Complaint had been pursued and the lack of full and frank disclosure relating to the prior relationship. However, those are matters which might more appropriately have been dealt with by an award of costs in the arbitration. Abudantia could alternatively have relied on a claim for abuse of civil process, but it would then have had to allege that the WIPO Arbitration, although having a reasonable basis, had nonetheless been commenced for a wholly collateral reason. I have found that Rillius almost certainly failed to disclose the full story for the collateral purpose of avoiding having to admit publicly that it had authorised activities in Turkey, but it did not *commence the proceedings* for that collateral purpose.
196. In those circumstances, even if I were persuaded that Mr Rothnie's findings gave rise to an issue estoppel on the question of malice, it would not assist Abudantia where lack of

reasonable and probable cause could not be shown.

197. Accordingly, the claim based on malicious prosecution also fails.

Conspiracy (reprise)

198. Having rejected all the separate torts relied upon as unlawful means, it follows that the allegation of conspiracy must likewise fall away and I will not dwell on it further, save to say that in my judgment Abudantia would have faced difficulty in establishing the requisite intention and damage. So far as intention is concerned, it is not sufficient for the defendant to do an act which in fact causes loss. Nor is mere foreseeability sufficient: *OBG v Allan*, [2007] UKHL 21; [2008] 1 AC 1 at [62]. The act must be done with the *intention* that it will cause loss, even if such loss is merely the means to an end rather than the end in itself. Belief in a lawful right to do what you are doing is a defence to a claim in unlawful means conspiracy: *Meretz Investments NV v ACP Ltd*, [2007] EWCA (Civ.) 1303; [2008] Ch. 244 at [127], [174]. In this case the Defendants believed that the joint venture had been terminated and it cannot be said that this was an unreasonable position to adopt. In relation to damage, as I have said above, the only loss alleged to have been suffered as a result of the conspiracy is €25,000 in respect of legal fees in the WIPO Arbitration and it is unclear to me why these could not be recovered in the arbitration. Neither of these questions was really explored at trial.

199. An interesting question might have arisen as to what the position would have been if I had concluded that the Renewal Term took effect but that no effective notice of termination was ever served so that the joint venture continued as Abudantia contended. Since it would by now have expired by effluxion of time in any event, it is difficult to see how Abudantia could in those circumstances have claimed the Termination Sum. Mr Adair submitted that it was entitled to claim an equivalent sum as damages for being deprived of the right to use the Trademark over the balance of term, but the case was not pleaded in this way and no attempt was made to justify the Termination Sum as the correct quantification of any damages. There is accordingly no need to dive down this particular rabbit hole.

Injunctive and Declaratory Relief

200. In the light of my findings above, the claim for declaratory relief fails as does the claim for an injunction. Quite apart from anything else, the claim for a permanent injunction cannot succeed in circumstances where on any view the TLA has now expired.

H: Conclusion

201. The claims fail and are dismissed.