IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 174

Originating Claim No 77 of 2023

Between

Turms Advisors APAC Pte Ltd

… *Claimant*

And

Steppe Gold Ltd

… *Defendant*

JUDGMENT

[Contract — Contractual terms — Express terms]
[Contract — Contractual terms — Implied terms]
[Contract — Contractual terms — Rules of construction]
[Contract — Consideration]
[Contract — Variation — No oral modification clause]
[Agency — Rights of agent — Commission — Whether agent effective cause of transaction]

Version No 1: 08 Jul 2024 (11:29 hrs)

TABLE OF CONTENTS

Version No 1: 08 Jul 2024 (11:29 hrs)

Version No 1: 08 Jul 2024 (11:29 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Turms Advisors APAC Pte Ltd
v
Steppe Gold Ltd

[2024] SGHC 174

General Division of the High Court — Originating Claim No 77 of 2023
Wong Li Kok, Alex JC
13–15 February, 26 April 2024

8 July 2024 Judgment reserved.

Wong Li Kok, Alex JC:

Introduction

1 This case takes me into the nebulous world of project finance and development in emerging jurisdictions. The road to success or failure is marked by high risks and rewards for investors, as well as their service providers and financial advisors. Contracts are signed but their bases are often overtaken by events as timelines slip and circumstances change. In this case, the claimant seeks to enforce allegedly plain contractual promises. The defendant puts forward a different narrative that countermands any such promises. Breaches of gentlemen's agreements and conventions are introduced. I am asked to unravel the tangled web woven by the parties.

Facts

The parties

2 The claimant is a boutique corporate finance advisory firm incorporated in Singapore.[1] It is an exempted corporate finance advisor under the Securities and Futures (Licensing and Conduct of Business) Regulations (2004 Rev Ed). It specialises in private credit and complex structured transactions, primarily serving clients in emerging Asian markets.[2]

3 The defendant is a company incorporated in Ontario and is listed on the Toronto Stock Exchange.[3] It operates, develops, explores and acquires precious metals projects in Mongolia.[4] Its commercially producing mine is the Altan Tsagaan Ovoo property (the "ATO Mine") located in Eastern Mongolia.[5]

Background to the dispute

4 In 2017, the Mongolian government initiated the "Gold-2 Programme". The programme aimed to support gold producers in Mongolia and assist in the recovery of Mongolia's economy.[6] To this end, Mongolia's central bank, the Bank of Mongolia, provided loans to the gold producers in Mongolia.[7] On or around 18 September 2020, the defendant obtained, through the Trade &

---

1 4th affidavit of Antonio Víctor López Abelló dated 29 September 2023 ("AVLA") at para 4.

2 AVLA at para 8.

3 AVLA at para 5.

4 AVLA at para 5.

5 AVLA at para 5.

6 1st affidavit of Jeremy Thomas South dated 29 September 2023 ("JTS") at paras 17–18.

7 JTS at para 18.

Version No 1: 08 Jul 2024 (11:29 hrs)

Development Bank of Mongolia ("TDB"), a US$10.5m loan from the Bank of Mongolia under the Gold-2 Programme (the "2020 Gold-2 Loan"). This loan was to be used for the expansion of the ATO Mine.[8]

5 To finance the expansion of the ATO Mine, the defendant needed more funds, in addition to the 2020 Gold-2 Loan.[9] Pursuant to a contract executed on 24 October 2020 (the "Mandate Letter"), the defendant engaged the claimant as its "exclusive financial adviser in connection with the structuring, arrangement and placement of a US[$]50–80m debt financing (or a combination of financings) to be entered into by the [claimant] (the 'Transaction' or, each, a 'Transaction')".[10] All subsequent references to the word "Transaction" in this judgment refer to Transaction as defined in the Mandate Letter.

6 Under the Mandate Letter, the claimant was to provide deal advisory and deal execution services for the Transaction for a period of nine months.[11] Under cl 2.1 of the Mandate Letter, the claimant was to identify "potential lenders and / or investors" (the "Investors"), initiate discussions with short-listed Investors and implement the deal.[12] Under cl 2.2 of the Mandate Letter, the claimant had to prepare a financial model for the prospective Investors (the "Investor Financial Model") and an information memorandum (the "Information Memorandum").[13] The claimant also had to design and advise on the structure

---

8 JTS at para 25.

9 JTS at para 26.

10 Mandate Letter dated 21 October 2020 (the "Mandate Letter"), Joint Core Bundle of Documents ("CBOD") vol 1 at p 32.

11 AVLA at para 25.

12 Clause 2.1 of the Mandate Letter, CBOD vol 1 at p 33.

13 Clause 2.2.1 of the Mandate Letter, CBOD vol 1 at p 34.

Version No 1: 08 Jul 2024 (11:29 hrs)

of the Transaction in a term sheet form.[14] In return, the defendant would pay the claimant two types of fees. First, retainer fees were payable upon the occurrence of specific milestone events stipulated in the Mandate Letter. Second, a success fee equal to 2.50% of the deal value was payable "in the event of a Transaction".[15]

7 Beginning in or around November 2020, the parties discussed the potential target Investors and the financing structure for the Transaction.[16]

8 Between about 24 May 2021 and about 14 June 2021, the parties exchanged correspondence in relation to a potential financing of around US$60m to US$65m by TDB under the Gold-2 Programme.[17] It is undisputed that the claimant had no contact with TDB or the Bank of Mongolia in general or specifically in relation to the potential TDB loan facility.

9 Concurrently, around 16 May 2021 to around 17 June 2021, the parties also discussed an extension of the Mandate Letter which was due to expire in July 2021.[18] The engagement was extended for another nine months by an extension letter dated 3 June 2021 (the "Extension Letter").[19] Following the Extension Letter, the parties continued discussions on the arrangement and structuring of the Transaction.[20]

---

14 Clause 2.2.2 of the Mandate Letter, CBOD vol 1 at p 34.

15 Clause 6 of the Mandate Letter, CBOD vol 1 at p 36.

16 Statement of Claim dated 6 January 2023 ("SOC") at para 16; Defence (Amendment No. 2) dated 28 November 2023 ("Defence") at para 16.

17 AVLA at paras 43–54.

18 AVLA at paras 42–55.

19 Extension Letter dated 3 June 2021, CBOD vol 1 at p 46.

20 SOC at para 24 and Defence at para 24.

Version No 1: 08 Jul 2024 (11:29 hrs)

10 On 10 November 2021, the defendant released an official public announcement that it had secured a debt facility of US$65m advanced by TDB for the expansion of the ATO Mine (the "US$65m TDB Facility").[21] This comprised two components. The first was a US$59.7m loan pursuant to the Gold-2 Programme, facilitated by the Bank of Mongolia and provided to the defendant by TDB in the third quarter of 2021.[22] The second was a US$5m loan funded directly by TDB.[23]

11 On 8 December 2021, the claimant circulated the first draft of the Investor Financial Model to the defendant.[24] On 28 January 2022, the claimant sent Invoice No SG04-22 to the defendant for US$25,000.00. This was pursuant to cl 6(b) of the Mandate Letter which provided that the retainer fee of that amount would be payable upon the claimant's submission of the first draft of the Investor Financial Model ("Cl 6(b) Retainer Fee").[25]

12 On or around 10 or 11 March 2022, the defendant informed the claimant that it was unable to continue with the claimant's engagement under the Mandate Letter.[26]

13 On 23 March 2022, the claimant sent Invoice No SG11-22 to the defendant for the total amount of US$1.745m.[27] This was a claim for the following fees:

---

21 AVLA at para 67.

22 AVLA at para 67.

23 AVLA at para 67.

24 AVLA at para 74.

25 AVLA at para 78.

26 AVLA at para 84.

27 SOC at para 35b.

Version No 1: 08 Jul 2024 (11:29 hrs)

(a) US$120,000.00, as the retainer fee for the period between 24 November 2020 and 8 November 2021 under cl 6(e) of the Mandate Letter. That clause provided for a monthly retainer of US$10,000.00 until the defendant gave "necessary information" for the claimant's construction of the first draft of the Investor Financial Model and the Information Memorandum within 30 days of execution of the Mandate Letter ("Cl 6(e) Retainer Fee").[28]

(b) US$1,625,000.00, as the success fee in relation to the defendant's conclusion of the US$65m TDB Facility ("Success Fee").[29]

14 On 6 July 2022, the defendant paid US$25,000.00 to the claimant in satisfaction of the Cl 6(b) Retainer Fee.[30]

15 On 6 February 2023, the claimant commenced this action to recover the following sums from the defendant:

(a) unpaid Cl 6(e) Retainer Fee and Success Fee under Invoice No SG11-22; and

(b) late payment interest on the allegedly belated payment of Cl 6(b) Retainer Fee and unpaid Cl 6(e) Retainer Fee and Success Fee.

Procedural history

16 On 20 April 2023, the claimant sought a summary judgment against the defendant for the Cl 6(e) Retainer Fee, and late payment interest accrued on

---

28 SOC at para 35bi.

29 SOC at para 35bii.

30 AVLA at para 77.

Version No 1: 08 Jul 2024 (11:29 hrs)

both the Cl 6(e) Retainer Fee and on the Cl 6(b) Retainer Fee.[31] Following the filing of an amended defence by the defendant, the claimant applied for and was granted leave on 9 July 2023 to withdraw the summary judgment application.[32]

17 On 1 December 2023, the defendant sought a court order for the claimant to furnish, by way of a solicitor's undertaking or banker's guarantee, further security for the defendant's costs up to the conclusion of this suit.[33] The defendant's application was allowed on 10 January 2024.[34]

18 On 6 December 2023, the claimant sought temporary injunctions against the defendant.[35] Amongst other things, the claimant sought to restrain the defendant from pursuing or continuing to pursue the claim filed against the claimant's director, Mr Antonio Víctor López Abelló ("Mr López"), in the Sukhbaatar District Court in Mongolia, until the final determination of the suit.[36] I dismissed the claimant's application on 11 January 2024.[37]

The parties' cases

19 The claimant's case is that the terms of the mandate are clear. The defendant is an obstinate client who has failed to honour the contract.[38] The claimant makes broadly four main arguments:

---

31 HC/SUM 1174/2023.

32 HC/ORC 3074/2023.

33 HC/SUM 3746/2023.

34 HC/ORC 139/2024.

35 HC/SUM 3719/2023.

36 HC/SUM 3719/2023.

37 HC/ORC 220/2024.

38 Claimant's Reply Closing Submissions dated 19 April 2024 ("CRS") at paras 33 and 35.

Version No 1: 08 Jul 2024 (11:29 hrs)

(a) The claimant claims the Success Fee. The US$65m TDB Facility falls squarely within the definition of Transaction.[39] There is no express or implied term that the claimant must be the effective cause of that facility.[40] Even if the US$65m TDB Facility falls outside the scope of the claimant's mandate, the claimant argues that it is entitled to a reasonable sum in *quantum meruit*.[41]

(b) The claimant argues that it is entitled to the Cl 6(e) Retainer Fee. It required the defendant to provide a feasibility study of the project before it could construct the Investor Financial Model. The feasibility study was not provided within the deadline agreed under the Mandate Letter.[42] The claimant disagrees with the defendant that cl 6(e) of the Mandate Letter is a penalty clause or that the claimant provided no consideration.[43]

(c) On late payment interest, the claimant relies on the contractually agreed rate of 10% per annum.[44] The claimant contests the defendant's allegation of waiver of late payment interest[45] and reliance on the penalty rule.[46]

---

39 Claimant's Opening Statement dated 6 February 2024 ("COS") at para 62; Claimant's Written Closing Submissions dated 22 March 2024 ("CWS") at para 25.

40 COS at para 42; CWS at para 53.

41 COS at para 44.

42 COS at para 48; CWS at para 15.

43 COS at para 53; CWS at para 20.

44 COS at para 58.

45 COS at para 58; CWS at para 76.

46 COS at para 59; CWS at para 76.

Version No 1: 08 Jul 2024 (11:29 hrs)

(d) Finally, the claimant argues that, should it succeed in its claims, it is contractually entitled to a full indemnity from the defendant for costs and expenses incurred in connection with this suit and Invoices No SG04-22 and SG11-22.[47] In the alternative, the claimant seeks its costs of this suit.[48]

20 The defendant's case is that the claimant is seeking a free lunch.[49]

(a) The defendant disputes the claimant's entitlement to the Success Fee. This is mainly for two reasons. First, the claimant was not the effective cause of the US$65m TDB Facility.[50] Second, the parties have agreed to exclude the US$65m TDB Facility from the scope of the claimant's mandate.[51] Even if the US$65m TDB Facility falls within the claimant's mandate, the claimant is estopped by convention from insisting that it is within scope.[52] Further, the Mandate Letter and/or the Extension Letter is void or voidable because the defendant entered into them under a unilateral mistake.[53]

(b) On the Cl 6(e) Retainer Fee, the defendant argues that it is unenforceable because it is a penalty clause[54] and/or no consideration

---

47 COS at para 64; CWS at para 81; Minute Sheet dated 26 April 2024 at p 4.

48 COS at para 64.

49 Defendant's Opening Statement dated 6 February 2024 ("DOS") at para 1; Defendant's Closing Submissions dated 22 March 2024 ("DWS") at paras 1 and 74; Defendant's Reply Closing Submissions dated 19 April 2024 ("DRS") at para 54.

50 DOS at paras 54–55; DWS at para 5.

51 DOS at para 27; DWS at para 5.

52 DOS at para 36; DWS at para 7.

53 DOS at para 45; DWS at para 8.

54 DOS at para 59.

Version No 1: 08 Jul 2024 (11:29 hrs)

was provided for cl 6(e).[55] Even if the clause is enforceable, it is argued that the Cl 6(e) Retainer Fee had not accrued – the defendant had provided sufficient information for the claimant to begin work on the Investor Financial Model within the stated deadline.[56]

(c) On late payment interest, the defendant argues that it is an unenforceable penalty clause.[57] Specifically in relation to the Cl 6(b) Retainer Fee, the claimant has allegedly waived its claim for late payment interest.[58]

(d) Finally, the defendant avers that the claimant is not entitled to a claim for *quantum meruit*.[59]

Issues to be determined

21 The issues to be determined are as follows:

(a) whether the claimant is entitled to the Success Fee;

(b) whether the claimant is entitled to the Cl 6(e) Retainer Fee;

(c) whether the claimant is entitled to late payment interest of 10% per annum in relation to the Success Fee, Cl 6(b) Retainer Fee and Cl 6(e) Retainer Fee; and

(d) whether the claimant is entitled to the contractual indemnity for costs and expenses in this suit.

---

55 DOS at para 35.

56 DOS at paras 61–62.

57 DOS at para 64.

58 DOS at paras 67.

59 DOS at para 40; DWS at para 9.

Version No 1: 08 Jul 2024 (11:29 hrs)

Issue 1: The claimant is not entitled to the Success Fee

22 I start with the claimant's entitlement to the Success Fee. There are four sub-issues which I address in turn:

(a) first, whether the US$65m TDB Facility was a Transaction as defined in the Mandate Letter;

(b) second, whether there is an express or implied term that the claimant must be the effective cause of the Transaction to be entitled to the Success Fee, and if so, whether the claimant was an effective cause;

(c) third, whether the US$65m TDB Facility was excluded from the scope of the Mandate Letter and/or the Extension Letter; and/or

(d) fourth, if the US$65m TDB Facility fell outside the scope of the Mandate Letter and/or the Extension Letter, whether the claimant is entitled to a reasonable *quantum meruit*.

The US$65m TDB Facility was a Transaction under the Mandate Letter

23 I found that the US$65m TDB Facility was a Transaction as defined under the Mandate Letter.

24 The purpose of contractual interpretation is to give effect to the objectively ascertained expressed intentions of the contracting parties as it emerges from the contextual meaning of the relevant contractual language (*Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [30]). The starting point of contractual interpretation is the text of the contract (*CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 ("*CIFG*") at [19(a)]). Relevant

Version No 1: 08 Jul 2024 (11:29 hrs)

context may be considered in contractual interpretation as long as the contextual points are clear, obvious and known to both parties (*CIFG* at [19(b)]). Ultimately, the meaning ascribed to the contractual terms must be one which the expressions used by the parties can reasonably bear (*CIFG* at [19(d)]).

25 Turning to the text of the Mandate Letter, I reproduce the definition of Transaction below (see also [5] above):

> This letter agreement (the "**Mandate Letter**") confirms the appointment of [the claimant] as exclusive financial advisor in connection with the structuring, arrangement and placement of a USD50-80m debt financing (or a combination of financings) to be entered into by the [defendant] (the "**Transaction**" or, each, a "**Transaction**") on the terms and conditions set forth herein.
>
> …
>
> … In order to finance the ATO Expansion …, [the defendant] wishes to raise debt as a result of the Transaction …
>
> The [defendant] has approached [the claimant] to act as exclusive financial advisor in connection with the Transaction.
>
> …

26 The defendant contends that on a plain reading, Transaction refers to a US$50m to US$80m debt financing which the claimant is required to structure, arrange and place.[60] The various services the claimant had to perform in the "structuring, arrangement and placement" of that financing are detailed in cl 2 of the Mandate Letter – *eg*, the preparation of the Investor Financial Model and the Information Memorandum (see [6] above).[61] In other words, on the defendant's interpretation, a Transaction is a US$50m to US$80m debt

60 DWS at para 11; DRS at para 39.

61 DWS at para 12.

Version No 1: 08 Jul 2024 (11:29 hrs)

financing for which the claimant had carried out the work envisaged in cl 2 of the Mandate Letter.

27 I disagree with this reading. The parties entered into the Mandate Letter and the Extension Letter *so that* the claimant would act as the "exclusive financial advisor in connection with the structuring, arrangement and placement" of the Transaction. As the claimant points out, it is illogical for a debt financing to only qualify as a Transaction where the claimant has acted as an exclusive financial advisor and was engaged in its "structuring, arrangement and placement".[62] The definition of Transaction was unambiguous. I agree with the claimant that Transaction simply refers to a debt financing (or a combination of financings) for an amount of US$50m to US$80m to finance the ATO Mine expansion.[63]

28 The claimant also contends that the Mandate Letter only contains two express carve-outs from the definition of Transaction, and that the US$65m TDB Facility does not fall under either carve-out.[64] The first was equity-type financings described in cl 3 of the Mandate Letter as "listing on secondary stock exchanges, placement of either primary and / or secondary listed equity to be undertaken by [the defendant] and / or [its] shareholder".[65] The second was financings stated in cl 4 of the Mandate Letter – financings that fall within the tail of "an expired financial advisory agreement that has led to a completed stream financings with Triple Flag Mine Finance … and / or [its] affiliates".[66]

---

62 CRS at para 11.

63 COS at para 28; CWS at paras 22 and 26a.

64 CWS at para 26b.

65 Clause 3 of the Mandate Letter, CBOD vol 1 at p 34.

66 Clause 4 of the Mandate Letter, CBOD vol 1 at p 35; CRS at para 22.

Version No 1: 08 Jul 2024 (11:29 hrs)

29 The defendant disagrees. On equity-type financings, the defendant refers to an email from Mr Jeremy Thomas South ("Mr South") to Mr López dated 21 October 2020. It states that "clearly if you [*ie*, the claimant] bring us [*ie*, the defendant] an equity deal we will pay you on that".[67] According to the defendant, this suggests that equity-type financings were not actually excluded from the claimant's mandate. On Triple Flag Mine Finance ("TF"), the defendant contends that, as conceded by Mr Carl Dunton ("Mr Dunton"),[68] cl 4 of the Mandate Letter does *not* carve out TF tail financings. Rather, cl 4 addresses a situation where a Transaction is caught by the tail of a previous advisor who had closed the TF facility.[69] According to the defendant, cl 4 assures the claimant that it would be paid a success fee, even if the defendant has to pay a commission to its previous advisor.[70]

30 As neither party argues that the US$65m TDB Facility is an equity financing or a TF-related financing, it is unnecessary for me to determine whether the Mandate Letter had carved out these two types of financings.

31 For completeness, I address the claimant's reliance on the oral testimony of Mr South, the defendant's Senior Vice President and Chief Financial Officer. Mr South admitted on the stand that the US$65m TDB Facility fell within the definition of Transaction under the Mandate Letter.[71] I do not place any significant weight on this testimony. I agree with the defendant's counsel that a witness's interpretation of a contract on the stand has little or no bearing on its

---

67 CBOD vol 1 at p 254.

68 Transcript dated 13 February 2024 ("Day 1 Transcript") at p 165 lines 2–18.

69 DRS at para 9.

70 DRS at para 9.

71 Transcript dated 15 February 2024 ("Day 3 Transcript") at p 26 line 25 and p 27 lines 1–13.

Version No 1: 08 Jul 2024 (11:29 hrs)

legal meaning and effect, which is a question of law. As observed in *Pacific Autocom Enterprise Pte Ltd v Chia Wah Siang* [2004] 3 SLR(R) 73, the court takes an objective view based on the language of the contract and is "not guided by the subjective understanding of either party unless there is clear evidence that the agreement was to be interpreted in accordance with a particular subjective intention" (at [31]). There is no such clear evidence suggesting that the Mandate Letter be interpreted based on the parties' subjective intention.

32 For the above reasons, I find that the US$65m TDB Facility was a Transaction within the meaning of the Mandate Letter.

The claimant was not required to be the effective cause of the US$65m TDB Facility

33 I turn to the issue of whether the Mandate Letter requires the claimant to be the effective cause of a Transaction to be entitled to a success fee.

The law on effective cause

34 The genesis of the effective cause term is the English Court of Appeal's case in *Millar, Son & Co v Radford* (1903) 19 TLR 575 ("*Millar*"). In *Millar*, the plaintiff, an agent employed by the defendant, found a tenant who later purchased the property. The plaintiff claimed commission on the sale even though he was not involved in the sale. Lord Collins MR disallowed the plaintiff's claim for commission because it was "necessary to show that the introduction [of a tenant or purchaser] was an efficient cause in bringing about the letting or the sale" and "the mere fact that agents had introduced a tenant or purchaser" was insufficient (cited in *Emporium Holdings (Singapore) Pte Ltd v Knight Frank Cheong Hock Chye & Baillieu (Property Consultants) Pte Ltd* [1994] SGCA 147 ("*Emporium*") at [22]). The modern equivalent of "efficient"

Version No 1: 08 Jul 2024 (11:29 hrs)

cause is "effective" cause (*Watersheds v Christopher Simms* [2009] EWHC 713 (QB) ("*Watersheds*") at [16]).

35 The case of *Millar* led to the following modern restatement of the law, as expressed in *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006) ("*Bowstead*") at para 7-027 (cited in *Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd* [2007] 2 SLR(R) 230 at [70]):

> Subject to any special terms or indications in the contract of agency, where the remuneration of an agent is a commission on a transaction to be brought about, he is not entitled to such commission unless his services were the effective cause of the transaction being brought about.

36 It is undisputed that the above principle is part of Singapore law. The applicable principles are summarised in the Court of Appeal case of *Goh Lay Khim and others v Isabel Redrup Agency Pte Ltd and another appeal* [2017] 1 SLR 546 ("*Isabel Redrup*"):

> (a) The relationship between an agent and his principal is a contractual one with any entitlement to commission being governed by the contractual terms (at [28], citing *Deans Property Pte Ltd v Land Estates Apartments Pte Ltd* [1994] 3 SLR(R) 804 ("*Deans Property*") at [17]).
>
> (b) Where there is an "absence of an *express* contractual term governing the agent's right to commission, the agent is only entitled to commission if his services were the effective cause of the transaction, this being an implied term of the agency contract" [emphasis in original] (at [28], citing *Deans Property* at [17]).
>
> (c) There is no precise definition of what "effective cause" means, as the inquiry is fact-specific and requires a holistic assessment of all the

Version No 1: 08 Jul 2024 (11:29 hrs)

relevant facts of each case (at [37]). To be an effective cause, the agent would have to show that it was "the critical cause"; it is insufficient to be "one of the causes" of the transaction (at [37], citing *Grandhome Pte Ltd v Ng Kok Eng* [1996] 1 SLR(R) 14 at [7]).

37 In the UK, the Court of Appeal in *EMFC Loan Syndications LLP v The Resort Group plc* [2021] EWCA Civ 844 ("*EMFC*") noted that the principle in *Bowstead* may not apply outside the residential estate agency context (at [64]). Similarly, the Hong Kong Court of Final Appeal in *Eminent Investments (Asia Pacific) Limited v Dio Corporation* [2020] HKCFA 38 ("*Eminent*") observed that "there is little to be said for a presumption, and nothing to be said for an implied term" of effective cause outside the sphere of estate agents, "especially in the residential consumer context" (at [72]). Under Singapore law, most of the cases addressed the effective cause term in the context of real estate agency (see *eg*, *Emporium*, *Isabel Redrup*, *Deans Property*). However, the Court of Appeal in *SAR Maritime Agencies (Pvt) Ltd v PCL (Shipping) Pte Ltd* [2020] 1 SLR 896 ("*SAR Maritime*") clarified that effective cause term is not limited to the real estate agency context (at [30]). *SAR Maritime* itself involved a ship broking contract, and *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] 3 SLR 666 (which found an implied effective cause term) involved an agent engaged to secure housing construction projects. Hence, the fact that the present case concerns a financial advisory contract does not preclude me from finding that there is an effective cause term.

The claimant was engaged as the defendant's agent

38 As a preliminary point, the claimant argues that the Mandate Letter was not a commission-based contract of agency which attracted the doctrine of

Version No 1: 08 Jul 2024 (11:29 hrs)

effective cause.[72] In *Edmond De Rothschild Securities (UK) Ltd v Exillon Energy plc* [2014] EWHC 2165 (Comm) ("*Rothschild*"), Exillon engaged Rothschild as its exclusive financial advisor in relation to Worldview's shareholder requisition. In considering whether an effective cause term should be implied into the contract between Exillon and Rothschild, the English High Court found that there was no contract of agency. In the court's view, there was "a contract to provide strategic and financial advice", and the contract "[did] not contemplate, as a typical agency contract would, that Rothschild will introduce or seek to introduce counterparties who will enter into contracts with Exillon" (*Rothschild* at [25(a)]). The claimant contends that it was engaged as a financial advisor to secure a Transaction, not as an estate agent or financial broker whose job was to look for interested counter-parties in the market and introduce them to the principal.[73]

39 I distinguish the claimant's mandate from that in *Rothschild*. An agency relationship simply refers to a relationship, often undergirded by a contractual agreement, where one party is able to act for another party (Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2nd Ed, 2017) at para 01.008). In the present case, the claimant was engaged to find a prospective Investor and negotiate on the Transaction with and on behalf of the defendant. Unlike in *Rothschild*, the claimant was not engaged *solely* to provide financial advice. As the defendant's counsel submitted during the hearing on 26 April 2024, this made the Mandate Letter akin to a quasi-brokerage agreement. I agree with this characterisation.

---

72 CWS at para 57a.

73 CWS at para 57a.

Version No 1: 08 Jul 2024 (11:29 hrs)

There is no express effective cause term under the Mandate Letter

40 I turn to the issue of whether there is an express effective cause term under the Mandate Letter.

41 The clause that deals with the claimant's Success Fee is cl 6 of the Mandate Letter, which provides as follows:[74]

> Fees shall be as follows:
>
> - A retainer fee to be paid in cash as follows consisting of the following milestone-related payments:
>
> (a) USD25,000 upon execution of the Mandate Letter; plus
>
> (b) USD25,000 upon submission of the first draft of the Investor Financial Model (provided sufficient information for the construction of the first draft of the Investor Financial Model is delivered by the Client to Turms within 30 days of Mandate Letter Execution Date); plus
>
> (c) USD50,000 upon submission of the first draft of the Information Memorandum (provided sufficient information for the construction of the first draft of the Information Memorandum is delivered by the Client to Turms within 30 days of Mandate Letter Execution Date); plus
>
> (d) USD25,000 upon execution with 5 reputable financial institutions of a nondisclosure agreement granting them access to the Marketing Materials; plus
>
> (e) In the event (b) or (c) are not accrued due to non-provision of the necessary provision of information by the Client to Turms within 30 days of Mandate Letter Execution Date, as determined by Turms, a monthly retainer of USD10,000 until such provision occurs.
>
> (a), (b), (c), (d) and (e), together, the "**Retainer Fee**".
>
> Plus
>
> - A success fee payable in cash in the event of a Transaction, denominated in USD, to be calculated as follows:

---

74 Clause 6 of the Mandate Letter, CBOD vol 1 at p 36.

Version No 1: 08 Jul 2024 (11:29 hrs)

> (a) In respect of amounts related to any form of debt capital raised, a success fee equal to 2.50% * deal value (see below), subject to a minimum of USD1,000,000 (the "**Success Fee**").

The success fee clause is unambiguous. It simply provides that "success fee [is] payable in cash in the event of a Transaction", *ie*, a US$50m to US$80m debt facility for the purposes of financing the ATO Mine expansion.

42 The defendant disagrees, arguing that on a contextual reading of cl 6, the effective cause term can be read into in the Mandate Letter. For clarity, this argument is not a matter of implication (which is addressed below) but a matter of interpretation – *ie*, whether on a true construction of the express terms, the Mandate Letter required the claimant to be an effective cause of the Transaction to be entitled to the Success Fee (see *eg*, *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd and others and another appeal* [2018] 1 SLR 180 ("*GPK Clinic*") at [40]).

43 First, the defendant argues that on a plain reading, a Transaction refers to a US$50m to US$80m debt financing for which the claimant is required to "structure[e], arrange[] and place[]".[75] I have dismissed this interpretation above (see [27]) and say no more on this point.

44 Second, the defendant relies on the fee structure in cl 6.[76] The defendant argues that cl 6 sets out milestone payments that lead up to a success fee which can only be earned after the claimant had achieved all the prior milestones.[77] I disagree with this reading. The claimant rightly points out the absurd outcome

---

75 DWS at para 11; DRS at para 39.

76 DWS at para 13.

77 DWS at para 13.

Version No 1: 08 Jul 2024 (11:29 hrs)

that would follow from such a construction.[78] For instance, if the claimant executes a non-disclosure agreement with less than five reputable financial institutions, the claimant would have failed to achieve milestone (d) of cl 6 above (see [41]). In such a situation, even if the defendant manages to secure a Transaction, the claimant would not be entitled to a success fee for failure to complete milestone (d). This is not a commercially reasonable construction of cl 6. Instead, I read the part of cl 6 which deals with the success fee as independent from the earlier parts of cl 6 that address the retainer fees. Clause 6 uses the word "Plus" (see [41] above), indicating that the success fee is a form of remuneration which is separate from and in addition to the retainer fees that the claimant may earn.

45 Third, the defendant relies on cl 4 of the Mandate Letter which provides that if any potential Investor approaches the defendant directly, the claimant is to "assist [the defendant] in subsequent negotiations and closure of each Transaction with such potential Investor(s)".[79] This clause does not assist the defendant. It requires the claimant to provide services for the securing of the Transaction. But it does not suggest that a transaction only qualifies as a Transaction for which success fee is payable, if the claimant was the effective cause.

46 Finally, the defendant refers to the tail-gunner provision in cl 4 which states as follows:[80]

> [The defendant] will reserve the right to decline any proposal brought to it by [the claimant]. However, if within 15 months from the expiry / termination of this Mandate Letter (or any

---

78 CRS at para 14.

79 Clause 4 of the Mandate Letter, CBOD vol 1 at p 35.

80 Clause 4 of the Mandate Letter, CBOD vol 1 at p 35.

Version No 1: 08 Jul 2024 (11:29 hrs)

> extensions thereof), a transaction is consummated between [the defendant] and *any Investor with whom [the claimant] has had any contact whatsoever*, whether or not introduced by [the claimant], the success fee [under cl 6] shall be immediately payable by [the defendant] to [the claimant].
>
> [emphasis added]

The defendant argues that based on this clause, the claimant is only entitled to a success fee post-termination if, amongst other requirements, the claimant had previously come into contact with and worked with an Investor to provide a proposal to the defendant.[81] I agree with this reading. However, this clause applies where the claimant is seeking a success fee where a transaction is consummated *after* the termination of the claimant's mandate, which is not the case here. The relevant clause in the circumstances is cl 6, which does not state that the claimant is only entitled to a success fee if it had worked with an Investor to provide a proposal to the defendant. It simply states that "success fee [is] payable in cash *in the event of a Transaction*" [emphasis added].

47 I agree with the claimant that it would have been easy for the parties to include further requirements such as those in the tail-gunner provision if they had intended to impose such qualifications to cl 6.[82] The failure to do so means that the claimant may be entitled to a success fee so long as a Transaction is concluded *during* its engagement, even if it has not done any work. By contrast, if a Transaction is concluded *after* the expiry or termination of the Mandate Letter, the claimant is only entitled to a success fee if the above tail-gunner provision requirements are met. I do not consider this an absurd outcome. During the claimant's mandate, the intended structure of the Mandate Letter was for the defendant to engage the claimant to assist with any introductions the

---

81 DWS at para 17.

82 COS at para 42; CWS at para 59.

Version No 1: 08 Jul 2024 (11:29 hrs)

defendant could provide with respect to Investors to the ATO Mine expansion. Whether or not introductions were made, the defendant should engage the claimant to work on closing the Transaction in question. If the defendant chose not to engage the claimant to carry out such work, the claimant would still be entitled to the success fee.

48 In light of the above, I agree with the claimant that there is no contractual language which points towards an express effective cause term, nor any room to read an effective cause term into the Mandate Letter.

49 The parties made extensive written and oral arguments on foreign authorities where the courts have read in an effective cause term in the context of financial advisory agency. For completeness, I address the salient cases.

50 In *Crema v Cenkos Securities plc* [2010] 2 All ER (Comm) 1 ("*Crema*"), Mr Crema, an investment banker, was engaged as a sub-broker by Cenkos in relation to a fundraising for Green Park Ventures Ltd. The interpretation of the following written communications was in issue:

> In relation to your proposed participation in the fund raising for VFuels, pending our agreement with the company, *we would pay you 5% of funds raised by yourselves.*
>
> …
>
> Your Introduction Fee *for raising the funds* is as follows:
>
> 1. A one off payment of £882,000, this is based on 70% of the final commission of 7% of the final commission *raised.*
>
> [emphasis added]

The court read in an effective cause term because "it [was] clear from the written communications between Mr Crema and Cenkos that he was to be paid commission on investments 'raised' by him", which "[meant] that Mr Crema had to be the effective cause of the investment" (*Crema* at [40]).

Version No 1: 08 Jul 2024 (11:29 hrs)

51 In *Wollenberg v Casinos Austria International Holdings GmbH* [2011] EWHC 103 (Ch) ("*Wollenberg*"), Mr Wollenberg was engaged as an exclusive consultant for Casinos Austria International Holdings GmbH to identify appropriate sites for the operation of casinos, negotiate the terms for the occupation of those sites, and liaise with regulatory authorities to implement the company's business plans. The contract entitled Mr Wollenberg to a "right to acquire 4% of the equity held by Casinos Austria International Holding GmbH or any affiliate of the Casinos Austria Group of Companies of each UK project introduced by [him]". The English High Court held that the word "introduced" in the phrase "each UK project introduced by you" carried "an effective causative element" which required the agent's actions to "really [bring] about the relation of buyer and seller" (*Wollenberg* at [160]). Hence, the "natural reading" of this provision was that the success fee is payable if "Mr Wollenberg (not anybody else) introduces a project (not a person who knows about a project); and Mr Wollenberg was the (or an) effective cause of the introduction of the project in question" (at [163]).

52 In *Cavendish Corporate Finance LLP v KIMS Property Co Ltd* [2014] EWHC 1282 (Ch) ("*Cavendish*"), Cavendish was engaged by Nome Properties LLP under a contract (later novated to KIMS) to find an investor for construction projects. Cavendish's task included giving advice as to the corporate structure for the project and the financial model, preparing information documents, providing assistance in presentations, and reviewing offers made by potential investors. The relevant clauses provided as follows:

> *In the event of a successful fundraising from the Cavendish exercise*, a fee of 3.5 per cent of new monies raised ('success fee') from the investor ('Investor').
>
> …

Version No 1: 08 Jul 2024 (11:29 hrs)

> In the event that, within a period of 6 months from the date of termination of our appointment, a sale is concluded with *a party with whom discussions have taken place during the period of our appointment* (irrespective of whether that party had expressed initial interest in the Company or *whether they were initially contacted by Cavendish*) or to a party whom we were prevented from contacting by you, we would charge our full success fee based on the total fund raised.
>
> [emphasis added]

53 In construing the success fee clause, the English High Court considered that the contract was an agency agreement providing for a commission, such that the principle in *Bowstead* (see [35] above) was applicable (*Cavendish* at [162]). The court also noted that the statement in *Bowstead* "is only a principle" and that "the actual meaning of the contract depends on the words used and their factual context" (*Cavendish* at [164]). On the facts, the court held that it had no difficulty concluding that the words "successful fundraising *from* the Cavendish exercise" [emphasis added] meant that the success fee was payable if Cavendish's work was an effective cause of the deal (*Cavendish* at [164]).

54 The above cases are distinguishable from the present case. An effective cause term was read into the contract in those cases because the plain reading of the express words of the contract clearly supported a causal link between the agent and the consummated transaction. Clause 6 of the Mandate Letter expressly states that a success fee is payable "in the event of a Transaction" *simpliciter*. I note that it also contains the following phrase – "[i]n respect of amounts related to any form of debt capital *raised*" [emphasis added]. This can be interpreted as a reference to debt capital raised *by the claimant*. However, I do not place any significant meaning to the word "raised" in this context. Unlike *Crema* which explicitly referred to "funds raised by yourselves [*ie*, the agent]", intimating a substantive fund-raising obligation, there is no such express language in cl 6 of the Mandate Letter.

Version No 1: 08 Jul 2024 (11:29 hrs)

55 The defendant relies heavily on the Hong Kong case of *Eminent* ([37] *supra*). There, Eminent was engaged as the "sole and exclusive" financial adviser of DIO to provide "international financial advice on fundraising with a view to DIO raising additional capital to expand its overseas business" (*Eminent* at [48]). Eminent introduced a prospective investor (Dentsply International Inc) to DIO, and a fundraising transaction was entered into between Dentsply and DIO after the termination of Eminent's advisory agreement. Eminent claimed for a success fee in respect of the transaction.

56 The Hong Kong Court of Final Appeal started with the success fee clause which applied to transactions completed during the currency of the advisory agreement. It provided that:

> … Upon completion of any transaction for the Company[,] [t]he Company agrees to pay the Financial Advisor a success fee including and not limited to a three percent (3%) [sic] of the total transactional amount tied to any financial transaction related to Fund Raising or Private Placement or Shareholder restructuring, or Mergers & Acquisition for the Company …

57 The court interpreted the above clause to mean that Eminent was required not just to introduce a third party but "to put in work towards achieving the successful completion of the actual fundraising transaction" (*Eminent* at [53]). That the clause made "a *completed transaction* pivotal for entitlement to" [emphasis in original] a success fee was evident from the following (*Eminent* at [52]):

(a) the heading of the success fee clause was "TRANSACTION FEE";

(b) the fee was a "success fee" payable "[u]pon completion of any transaction for the company";

Version No 1: 08 Jul 2024 (11:29 hrs)

(c) the amount of the success fee was a percentage of the "total transactional amount"; and

(d) the qualifying transaction – *ie*, "any financial transaction related to Fund Raising or Private Placement or Shareholder restructuring, or Mergers & Acquisition for the Company" – was linked to the services that Eminent was expressly required to provide under the contract.

58 Additionally, the addendum to the advisory agreement provided for milestone payments which supported the finding of an effective cause term. Eminent was entitled to an additional "fixed retainer" to be paid in instalments (a) on signing; (b) on completion of specified events (*eg*, acceptance of the term sheet for the transaction); and (c) on completion of the transaction (*Eminent* at [58]). According to the court, this provided compensation to Eminent "in stages as work [was] done and progress [was] made" and "demonstrate[d] that Eminent [was] intended to be actively involved in bringing about completion of the transaction and compensated for its services at each stage" (*Eminent* at [59]). There was no provision that attached a fee entitlement merely to the "introduction" of a counterparty (*Eminent* at [59]).

59 The court then turned to the tail-gunner clause which applied to transactions completed after the termination of the advisory agreement. It stated:

> The Company agrees that within a period of two (2) years after the termination of this Agreement, should the Company complete a transaction including and not limited to an [sic] secondary listing or fund raising with any third parties or receive funds from a financing source introduced by the Financial Advisor, the Company shall pay Financial Advisor its fees according to this Agreement …

Based on the phrase "according to this Agreement…", the court concluded that the success fee under the tail-gunner clause was to be calculated on the same

Version No 1: 08 Jul 2024 (11:29 hrs)

basis as during the currency of the advisory agreement (*Eminent* at [62]). The words "introduced by the Financial Advisor" was thus read to mean that it was "the *transaction* which [was] successfully completed that Eminent [had] to introduce" [emphasis in original] (*Eminent* at [64]). In other words, if Eminent introduced a party but "play[ed] no part or an insignificant part in bringing about the fundraising transaction", there would be no entitlement to a success fee (*Eminent* at [64]).

60 At first glance, the analysis in *Eminent* appears to be applicable to the present case. Some of the factors that pointed towards an effective cause term (see [57]–[58] above) are also present in this case. For instance, a success fee is calculated as a percentage of the deal value, and the claimant was engaged to provide services in relation to a Transaction. There were also milestone payments which envisaged the claimant's active involvement in the securing of the Transaction. Despite these similarities, the analysis in *Eminent* is of limited value. Whether an effective cause term should be read into the contract ultimately turns on the interpretation of its terms. I agree with the following observations made in *Eminent*:

> 71 … Article 57 [of *Bowstead*] is no more than a particular example of the wider principle stated in the preceding Article 37 that where an agent is entitled to remuneration upon the happening of a future event, the entitlement does not arise until that event has occurred; and *the event upon which the agent's entitlement to remuneration arises is to be ascertained from the terms of the agency contract. Everything depends on the contract's construction and it is inappropriate to regard Article 57 as stating a substantive legal rule as to the existence of either a presumption or an implied term in favour of an "effective cause" requirement.*
>
> 72 It follows that there is no special approach to the construction of contractual terms governing post-termination payments to financial advisers. *All depends on the application of the established rules on construction of contracts to the particular case.*

Version No 1: 08 Jul 2024 (11:29 hrs)

> …
>
> 89 Outside the sphere of estate agents, where (especially in the residential consumer context) there is a common understanding of the agent's duties and the consequences of the absence of a presumption or of an implied term, there is little to be said for a presumption, and nothing to be said for an implied term. *All will depend on the construction of the term in question in the context of the agreement as a whole and the purpose of the transaction.*
>
> [emphasis added]

61 Whether there is an effective cause term is essentially a fact-sensitive inquiry that turns on the principles of contractual interpretation. In that regard, I note that the factors at [57]–[58] above went towards the issue of whether a mere introduction of an investor sufficed for Eminent to be entitled to a success fee (although the work done by Eminent was not the effective cause of the eventual transaction). It was undisputed that Eminent's mandate required Eminent to have *introduced* the financing source to DIO. That is distinguishable from the present case, where the claimant is not even required to be an introducer. Clause 4 of the Mandate Letter contains a deeming provision, providing that "irrespective of the source of such Investor [the claimant] will be paid the success fee as if the Investor was contacted directly by [the claimant]".[83] The issue is thus whether the claimant, who is deemed to have introduced the Investors to the defendant, nevertheless had to be an effective cause of the Transaction to be entitled to a success fee. As noted above repeatedly, there is no express language that can be interpreted to that effect. Even in *Eminent*, the success fee was stated to be payable "upon completion of any transaction *for* the Company" [emphasis added], which was accepted by Eminent as an effective cause term (*Eminent Investments (Asia Pacific) Limited v DIO Corporation* [2019] HKCA 606 at [6.4]). Clause 6 of the Mandate Letter does

---

[83] Clause 4 of the Mandate Letter, CBOD vol 1 at p 35.

Version No 1: 08 Jul 2024 (11:29 hrs)

not condition the success fee upon the claimant having completed any specific work.[84]

62 For the above reasons, I find that an effective cause term is not expressly provided in the Mandate Letter and cannot be read into the contract as a matter of construction.

An effective cause term cannot be implied into the Mandate Letter

63 I turn to the defendant's alternative argument that an effective cause term should be implied. The claimant contends that the need for implication does not arise in an exclusive agency like the present.[85] This is because the main reason for implying an effective cause term is to minimise the risk of the principal having to pay double or multiple commissions (*EMFC* ([37] *supra*) at [72] and [78]). Accordingly, an effective cause term provides business efficacy in non-exclusive contracts of agency where multiple agents are engaged to secure a transaction.

64 While the risk of double commission is a primary rationale behind implying an effective cause term, it is not the sole rationale. The court in *Crema* ([50] *supra*) explicitly rejected the argument that an effective cause term "only arose where there was a risk of the client having to pay more than one commission" (at [40]). For instance, as expressed in *Foxtons Ltd v Pelkey Bicknell* [2008] EWCA Civ 419 in the context of real estate agency, "it is by no means apparent why [the sole agent] should be entitled to commission on a purchaser for which he had no responsibility" (at [26]). In other words, the exclusive nature of the claimant's mandate is not fatal to implying an effective

84 CRS at para 20a.

85 CWS at para 56b; CRS at para 18b.

Version No 1: 08 Jul 2024 (11:29 hrs)

cause term. However, that the key rationale (of double commission) for implying such a term does not apply in the present case, is a relevant factor weighing against such implication.

65 Ultimately, it is trite that under Singapore law, a term would only be implied into an agency contract if the parties did not contemplate the issue at all and so left a "gap" (*Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") at [94]–[95]). Here, there is an express clause (*ie*, cl 6 of the Mandate Letter) that unambiguously governs the claimant's entitlement to commission. There is no "gap" to address, and the implication of the effective cause term is unnecessary (*Isabel Redrup* ([36] *supra*) *at* [29]).

66 The English cases that the parties relied on support this conclusion. As the claimant argues, they suggest that an effective cause term would not be implied into an otherwise clear and workable contract.[86]

67 In *Watersheds* ([34] *supra*), Watersheds was engaged by Simms as a financial advisor to raise finance for a waste business (phase I) and then to assist him in its sale (phase II). It was undisputed that Watersheds did not do any work in connection with the sale. The relevant clause on fee entitlement for phase II provided as follows:

> … Watersheds becomes entitled to a fee if:
>
> i. a disposal of the whole or part of the share capital or business or assets of the company acquired to a purchaser introduced by us is completed by the Client and/or the

[86] COS at para 39.

Version No 1: 08 Jul 2024 (11:29 hrs)

> company at any time, during or after the Engagement Period; and/or
>
> ii. any disposal of the whole or part of the share capital or business or assets of the company is completed by the Client and/or the company during the Engagement Period.

68 Simms sought to imply an effective cause term into cl (ii). The English High Court refused to imply an effective cause term as it was inconsistent with the express terms of the contract. It was "quite impossible" to imply such a term into cl (i) because the agreement envisaged that such an introduction might take place years before any serious work leading to an eventual sale (*Watersheds* at [24]). Since it was inconsistent with the express terms and the nature of the engagement to imply an effective cause term into cl (i), an effective cause term could not be implied into cl (ii) either (*Watersheds* at [24]). The court observed that cl (ii) did not even require Watersheds to have introduced the client, suggesting that it was meant to provide "protection to Watersheds in circumstances where [Simms] chooses to exclude it from the process even if he has not formally terminated the agreement" (*Watersheds* at [24]).

69 In *Seymour Pierce Limited v Grandtop International Holdings Limited* [2010] EWHC 676 ("*Seymour Pierce*"), Seymour Pierce was engaged as a financial adviser of Grandtop in connection with an acquisition of an English football club. Seymour Pierce sought a success fee for a successful acquisition. The English High Court refused to imply an effective cause term as there was "no need as a matter of business efficacy" (*Seymour Pierce* at [45]). The success fee clause provided that "the Company shall pay to Seymour Pierce the Success Fee in full" if there is a successful acquisition within 12 months after Seymour Pierce's termination. It was held that this clause was "entirely comprehensible without any such implication" and did not require Seymour to be the effective cause (*Seymour Pierce* at [45]–[46]).

Version No 1: 08 Jul 2024 (11:29 hrs)

70 In *Rothschild* ([38] *supra*), the contract entitled Rothschild to a success fee where one of the five events occurred, including when "Worldview has reduced its shareholding in [Exillon] to below 5%". The English High Court held that a success fee was payable "without further inquiry" when one or more of the five events have materialised (*Rothschild* at [20] and [25(d)]). It was also relevant that the contract entitled Rothschild to a success fee even if the transaction was concluded some considerable time after termination, at a time when Rothschild's work was unlikely to have constituted an effective cause (*Rothschild* at [20] and [25(d)]). Given this "natural meaning" of the clause (*Rothschild* at [22]), there was no need and scope to read into or imply an effective cause term.

71 The defendant distinguishes *Watersheds* and *Rothschild*. The defendant points out that in *Watersheds*, it was relevant that implying an effective cause term in that case would have left Watersheds vulnerable to receiving no fees (at [25]–[26]). By contrast, there is a tail-gunner provision under the Mandate Letter.[87] This meant that the claimant was protected from a situation where the defendant terminates the claimant (despite it having done useful work) and then securing the Transaction. As for *Rothschild*, the defendant argues that it was relevant that there would have been evidential difficulty in proving that the agent was an effective cause of the sale (at [22]). By contrast, it is contended that the claimant's role in securing the Transaction (had it done so) would have been self-evident.[88] The defendant rightly points out that these factors were relevant to the courts' determination that an effective cause term should not be implied. However, the central reason for non-implication in both cases was that

87 DWS at para 22a.

88 DWS at para 22d.

Version No 1: 08 Jul 2024 (11:29 hrs)

an implied effective cause term would be inconsistent with other terms of the contract.

72 The position under Singapore law is similar. The term to be implied cannot contradict any express term of the contract (*Sembcorp Marine* ([65] *supra*) at [98]). In the present case, it would be inconsistent with the express terms of the Mandate Letter to imply an effective cause term. As the claimant points out,[89] cl 4 of the Mandate Letter contains a deeming provision (see [61] above).[90] Such a deeming provision was interpreted in *The County Homesearch Co (Thames & Chilterns) Ltd v Cowham* [2008] 1 WLR 909 ("*County Homesearch*"), which concerned an estate agency contract, as being inconsistent with any implied effective cause term. The following reasoning by the English Court of Appeal at [19] applies equally to the present case:

> … if the contract goes to the trouble of defining the concept of the requisite introduction by reference to matters which would otherwise not constitute an introduction at all …, it must follow that there may be cases where commission is due following a situation where there is no true introduction by County Homesearch at all. *If even the limited causation inherent in an introduction is unnecessary, it makes no sense to say that nevertheless there must be an effective cause before the agent can recover his commission. The deeming provision would then be written out of the contract.* … [emphasis added]

73 The defendant argues that *County Homesearch* is distinguishable.[91] The agent in that case had to cooperate with the principal in finding a property. According to the defendant, that gave rise to difficulties in attribution, making the deemed introduction provision necessary and the implication of an effective cause term inappropriate. The defendant contends that no such

---

89 CWS at para 58b.

90 CBOD vol 1 at p 35.

91 DRS at para 46.

Version No 1: 08 Jul 2024 (11:29 hrs)

inappropriateness arises in this case. I disagree. The above paragraph from *County Homesearch* is not confined to the specific facts of that case. I interpret it as an explanation of the effect of deemed introduction provisions, and hence being of broader applicability. The effect of the deemed introduction provision in cl 4 is that the claimant would still get paid even if it has not introduced the Investor to the defendant (and was hence not the effective cause of the Transaction with that Investor). This is an unambiguous and explicit term of the Mandate Letter. Implying an effective cause term into the Mandate Letter would hence be inconsistent with its express terms.

74 The outcome of this interpretation is that the claimant would be entitled to a free lunch. But it is not for the court to imply an effective cause term to prevent that outcome. In the absence of any vitiating factors, courts will give effect to a contract voluntarily entered into by the parties, especially for contracts negotiated between two sophisticated commercial parties as in the present case. In *Rothschild*, the English High Court dismissed Exillon's argument that Rothschild would be provided with a windfall or that it would be contrary to business common sense. According to the court, where the desired event had in fact been achieved, there was "nothing contrary to business common sense" in entitling Rothschild to its fee regardless of whether it was an effective cause of that event – in fact, "there [was] much to be said for simplicity and certainty" in doing away with evidential issues of proving an effective cause (*Rothschild* at [25]). In *EMFC* ([37] *supra*), the English Court of Appeal noted that while the refusal to imply an effective cause term may produce a windfall for *EMFC*, "the test is not one of fairness or reasonableness but rather a question of what, objectively viewed, the parties are to be taken as having agreed" (at [79]). I could not agree more with the decisions in *Rothschild* and *EMFC*. It is not for this court to stand in the way of an agreement freely entered into between

Version No 1: 08 Jul 2024 (11:29 hrs)

the parties. In this case, the express language of cl 6 of the Mandate Letter is that the claimant is entitled to a success fee upon the occurrence of a specified event – *ie*, the consummation of the Transaction.

75 In light of the above, there is no express or implied effective cause term that qualifies the claimant's entitlement to the Success Fee.

The parties agreed to exclude the US$65m TDB Facility from the Mandate Letter

76 The next issue is whether there was an agreement by the parties to exclude the US$65m TDB Facility from the scope of the Mandate Letter and/or the Extension Letter. This gave rise to the following sub-issues:

(a) first, whether the Extension Letter was a separate contract;

(b) second, whether the no oral modification clause precluded reliance on an alleged subsequent oral contract to exclude the US$65m TDB Facility;

(c) third, whether there was an oral contract to exclude the US$65m TDB Facility; and

(d) fourth, whether the evidence of the alleged oral agreement was admissible.

The Extension Letter was a separate contract to extend the Mandate Letter

77 The defendant's case is that the Extension Letter is a new mandate agreement which is separate from the Mandate Letter[92] and carves out the

[92] DWS at para 23; DRS at para 2.

Version No 1: 08 Jul 2024 (11:29 hrs)

US$65m TDB Facility.[93] The claimant's case is that the Extension Letter simply extends the life of the existing Mandate Letter.[94] For reasons explained below, I find that the Extension Letter is a separate standalone contract merely to extend the duration of the Mandate Letter.

78 I reproduce the salient parts of the Extension Letter dated 3 June 2021 from Mr López to Mr South below:[95]

> RE: Extension of [the Mandate Letter] (the "Mandate")
>
> …
>
> This letter (the "Extension Letter") is in relation to the Mandate.
>
> As per our conversations during the last weeks, we would like to request an extension of nine (9) months of the Mandate from the end of the original validity period (the "Extension of the Mandate"). The Extension of the Mandate is necessary due to (i) the impact of the COVID-19 pandemic has had on the Client [*ie*, the defendant]'s operations and expansion plans and (ii) the resulting and unavoidable delays in compiling and processing certain Client information required by prospective lenders.
>
> Please confirm your acceptance of the Extension of the Mandate as set forth above by signing below.
>
> We would like to thank you for your interest in continuing to work with [us] and look forward to a successful completion of the Transaction.
>
> The Extension Letter shall be governed by and construed in accordance with English Law.
>
> …

79 On 16 June 2021, Mr South sent the following email attaching the counter-signed Extension Letter:[96]

---

93 DOS at para 72.

94 CWS at para 32.

95 CBOD vol 1 at p 46.

96 CBOD vol 2 at p 52.

Version No 1: 08 Jul 2024 (11:29 hrs)

> Please find attached the counter-signed mandate extension letter.
>
> We recognise that the effective start of your mandate has been delayed due to events outside our control.
>
> However, as mentioned we are committed to completion of the international lender syndicated project facility as contemplated in the mandate letter.
>
> We hope to be able to restart the process when our DFS [*ie*, draft feasibility studies] is in final drafting stage, hopefully mid-July. The completion of this project debt facility by Q1 2022 and the planned HK listing are critical objectives for [the defendant] in the next 12 months.
>
> *As mentioned on our regular calls, we are planning to source some short term debt capital from our regular lender, TDB, which we agreed is out of scope of your mandate.*
>
> [emphasis added]

80 The claimant relies on the words of the Extension Letter which state that it is "an extension of nine (9) months of the Mandate [Letter] from the end of the original validity period".[97] The claimant also emphasises Mr South's concession on the stand that the meaning of "extension" is to "prolong" or "lengthen" the life of the contract.[98] I repeat my observation (at [31] above) on the relevance of a witness' interpretation of the contract. Based on a plain reading of the phrase quoted by the claimant, I agree with the claimant that it points towards the parties' intention to simply lengthen the duration of the existing Mandate Letter. I do not see how the Extension Letter can be interpreted as a new advisory contract that incorporates the terms of the Mandate Letter.

81 I now turn to the question of whether the Extension Letter is a separate agreement from the Mandate Letter. I find that various factors point towards the former being a standalone contract. First, cl 4 of the Mandate Letter entitles the

---

97 CWS at para 32.

98 Day 3 Transcript at p 13 lines 4–8.

Version No 1: 08 Jul 2024 (11:29 hrs)

parties to extend the duration of the claimant's mandate. I reproduce cl 4 below:[99]

> **4. Validity of Contract**
>
> …
>
> (i) [The defendant] shall have the right to extend contract on a bi-monthly basis subject to the same terms and conditions stipulated in the Mandate Letter; and
>
> (ii) [The claimant] shall have the right to extend contract on a bi-monthly basis in the event non-binding expression of interests are received by any Investor totaling in aggregate equal to or in excess USD25 million
>
> …

82 It is undisputed that neither party relied on cl 4 of the Mandate Letter to extend the claimant's mandate.[100] No convincing explanation was given as to why the claimant had failed to invoke its contractual right to extend the duration of the Mandate Letter. Mr Dunton, the claimant's external legal counsel and senior adviser who drafted the Extension Letter,[101] testified that he considered "the simplest way of extending the mandate letter is a separate letter rather than invoking clauses within the letter".[102] This was notwithstanding that he was aware of cl 4 of the Mandate Letter.[103] The claimant's failure to utilise the existing contractual mechanism to extend the duration of the Mandate Letter points towards the Extension Letter being a separate agreement. In fact, the claimant's own case is that it is irrelevant that the parties did not rely on the

---

99 CBOD vol 1 at pp 34–35.

100 Day 1 Transcript at p 93 lines 19–23 and p 148 lines 18–21.

101 Day 1 Transcript at p 147 line 15.

102 Day 1 Transcript at p 148 lines 18–21.

103 Day 1 Transcript at p 148 lines 1–11.

Version No 1: 08 Jul 2024 (11:29 hrs)

extension provisions in cl 4 because they were "free to enter into a separate agreement to extend the duration of their existing contract".[104] In other words, while the claimant contends that the practical effect of the Extension Letter is merely to lengthen the duration of the Mandate Letter, the claimant appears to accept that the Extension Letter is nevertheless a separate standalone contract.

83 Second, unlike the Mandate Letter which was governed by Singapore law,[105] the Extension Letter was stated to be governed by English law (see [78] above). The claimant contends that just because the Extension Letter was governed by a different law from the Mandate Letter does not mean that the Extension Letter is a separate agreement.[106] Mr Dunton's explanation on the stand was that English law was stated as the governing law out of "muscle memory" and that it was unintentional.[107] The choice of a different governing law may indeed have been unintentional. However, the very fact that Mr Dunton, "a lawyer for 25 years",[108] considered it necessary to include a governing law clause suggests that he knew the Extension Letter was a separate standalone agreement. It also makes more legal sense to have a standalone extension governed by English law and the extended Mandate Letter would continue to be governed by Singapore law as per the parties' original agreement.

84 All the elements of a contract – offer, acceptance, consideration and intention to create legal relations – are present (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at

---

104 CRS at para 23.

105 Clause 15 of the Standard Terms of Engagement, CBOD vol 1 at p 44.

106 CWS at para 36.

107 Day 1 Transcript at p 149 lines 18–21.

108 Day 1 Transcript at p 149 lines 15–25.

Version No 1: 08 Jul 2024 (11:29 hrs)

[46]). The Extension Letter from Mr López to Mr South on 3 June 2021 was an offer by the claimant to enter into a contract that (a) extends the length of the Mandate Letter by nine months from the expiry date of 24 July 2021; and (b) is governed by English law. This offer was accepted by the defendant, evident in the counter-signed Extension Letter on 16 June 2021.

85 For completeness, it is assumed that Singapore law applies to the Extension Letter even though the governing law of the Extension Letter is English law.

86 As the Court of Appeal in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT*") held, it is for the party who wishes to assert an applicable foreign law to plead that foreign law (at [61]). Where foreign law is not pleaded, Singapore courts will simply apply Singapore law (*EFT* at [58]). This is unless "a mandatory pleading of foreign law is required as a matter of law" (*EFT* at [58] citing *Goh Chok Tong v Tang Liang Hong* [1997] 1 SLR(R) 811). As none of the parties had pleaded the applicability of English law, I assume that Singapore law applies.

87 I also note that the presumption of similarity need not be considered in this case. The presumption of similarity is a rule of evidence concerned with what the content of foreign law should be taken to be (*Ollech David v Horizon Capital Fund* [2024] SGHC(A) 8 at [55]). The Court of Appeal in *EFT* clarified that where foreign law has not been pleaded at all – as distinguished from situations where proof of foreign law has failed or not been attempted (despite foreign law having been pleaded) – the presumption of similarity is irrelevant (at [63]). Hence, I do not have to consider the applicability of the presumption of similarity of laws.

Version No 1: 08 Jul 2024 (11:29 hrs)

88 Based on my finding above, the operative contract under which the claimant brings its claims is the Mandate Letter (as extended by the Extension Letter, which is a standalone extension agreement but not a new advisory contract).

The no oral modification clause in the Mandate Letter does not preclude a finding of a subsequent oral agreement

89 The key issue is whether, as the defendant argues, the Mandate Letter excluded the US$65m TDB Facility from the scope of a Transaction. It is clear that there are no express words in the Mandate Letter that may be interpreted to mean that the US$65m TDB Facility is excluded. However, the defendant relies on a purported oral agreement between Mr López and Mr South to carve out this facility. This allegedly took place over phone calls in June 2021,[109] including on 4 June 2021 when Mr López agreed that the US$65m TDB Facility was out of scope.[110] This alleged oral agreement was recorded in Mr South's email attaching the counter-signed Extension Letter (see [79] above).[111]

90 The starting point is the no oral modification clause in cl 14 of the Standard Terms of Engagement which form part of the Mandate Letter.[112]. Clause 14 provides as follows:[113]

> This Mandate Letter, together with these terms of engagement, contains the entire agreement of the parties hereto and is in lieu of all other compensation arrangements, and supersedes all prior understandings between the Advisor [*ie*, the claimant] and the Client [*ie*, the defendant] with regard to the Services.

---

109 JTS at para 67.

110 DWS at para 27.

111 CBOD vol 2 at p 52.

112 CBOD vol 1 at p 32.

113 CBOD vol 1 at p 44.

Version No 1: 08 Jul 2024 (11:29 hrs)

> *The agreements herein may be changed only by written agreement signed by the party against whom enforcement of any waiver, change, modification, extension or discharge is sought.*
>
> [emphasis added]

91 The first sentence of cl 14 is an entire agreement clause, while the second sentence is a no oral modification clause. While the parties' submissions address the application of the former, it is the latter that is of relevance in the present case. The effect of an entire agreement clause is that it nullifies *prior* agreements and gives effect to the latest expression of the parties' intentions (*Charles Lim Teng Siang and another v Hong Choon Hau and another* [2021] 2 SLR 153 ("*Charles Lim*") at [48]). A no oral modification ("NOM") clause nullifies a *later* agreement by giving effect to an earlier manifestation of the parties' intentions as to formal requirements (*Charles Lim* at [48]). In the present case, the alleged oral agreement was concluded on 4 June 2021. This came *after* the date of 24 October 2020, which was when the Mandate Letter (which is the operative contract in the present case) was executed (see [5] above).

92 The NOM clause in the present case provides that parties may amend the terms of the Mandate Letter "only by written agreement signed by the party against whom enforcement of any … modification … is sought". There is no such written document signed by the claimant, providing that the US$65m TDB Facility is excluded from the scope of the Mandate Letter. However, this does not preclude this court from finding that there was a valid and binding oral agreement to exclude the US$65m TDB Facility.

93 The Court of Appeal in *Charles Lim* noted in *obiter* that a NOM clause "merely raises a rebuttable presumption that in the absence of an agreement in writing, there would be no variation" (*Charles Lim* at [38], citing *Comfort*

Version No 1: 08 Jul 2024 (11:29 hrs)

Management Pte Ltd v OGSP Engineering Pte Ltd [2018] 1 SLR 979 ("*Comfort Management*") at [90]). The Court of Appeal was of the view that the benefits of commercial certainty (which support a rigorous enforcement of a NOM clause) do not provide a legitimate reason to prevent parties from making an oral variation where it can be proved (*Charles Lim* at [37]). The perceived difficulty in proving an oral variation could be suitably addressed by evidential principles and not contractual principles (*Charles Lim* at [50]). The approach expressed in *Comfort Management* was preferred because it upheld the parties' collective autonomy to *together* agree to depart from the NOM clause either expressly or by necessary implication (*Charles Lim* at [51] and [61]).

94 For the court to infer that parties had by necessary implication agreed to depart from a NOM clause, the test is "whether at the point when parties agreed on the oral variation, they would necessarily have agreed to depart from the NOM clause had they addressed their mind to the question" (*Charles Lim* at [54]). In other words, to rebut the presumption that there is no variation, "compelling evidence" or "cogent evidence" is required to prove an oral variation (*Charles Lim* at [56]).

95 I thus turn to the question of whether there is compelling evidence before me that there was an oral agreement to exclude the US$65m TDB Facility from the scope of the Mandate Letter.

There is compelling evidence of an oral agreement to exclude the US$65m TDB Facility

96 I start with the law on oral contracts. The substantive requirements of an oral agreement are the same as those of a written contract, namely (a) offer and acceptance; (b) intention to create legal relations; (c) certainty of terms; and (d) consideration (*Tan Swee Wan and another v Johnny Lian Tian Yong* [2018]

Version No 1: 08 Jul 2024 (11:29 hrs)

SGHC 169 at [222]). In determining whether the substantive requirements of an oral agreement are satisfied, the court must consider objectively the relevant documentary evidence and the parties' contemporaneous conduct at the material time (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [39]–[40]).

97 I start with Mr South's email to Mr López on 4 June 2021. In the email, Mr South requested for "a call on the engagement letter [*ie*, the Extension Letter]". This was so as to "clarify [the claimant's] role and fees on this loan [*ie*, the US$65m TDB Facility] within the context of the main objective of the international syndicated loan", since the "TDB deal won't really involve a lot of [the claimant's] time - terms are not flexible and the documents are already being drafted".[114] During cross-examination, Mr López testified that this was merely "a unilateral statement" by Mr South and that he "never agree[d] to any changes to the terms of variation of the Mandate Letter".[115] Mr South disagreed and testified that there *was* an agreement with Mr López to exclude the US$65m TDB Facility.[116]

98 I note that Mr López did not deny that a call with Mr South had taken place. Taken together with Mr South's email above which specifically requests for a call, I find that it is more likely than not that there was a call between Mr López and Mr South after this email on 4 June 2021.

99 As to the conflicting oral testimonies by Mr López and Mr South in relation to the existence of an oral agreement, the Court of Appeal in *OCBC*

---

114 JBOD vol 2 at p 45.

115 Day 1 Transcript at p 97 lines 5 and 14–16.

116 Day 3 Transcript at p 28 lines 12–14.

Version No 1: 08 Jul 2024 (11:29 hrs)

Capital Investment Asia Ltd v Wong Hua Choon [2012] 4 SLR 1206 ("*Wong Hua Choon*") cautioned that the "first port of call" is the relevant documentary evidence, and where the issue is whether a binding contract exists between the parties, "a contemporaneous written record of the evidence is obviously more reliable than a witness's oral testimony given well after the fact, recollecting what has transpired" (*Wong Hua Choon* at [41]). I hence place little weight on Mr López and Mr South's oral testimonies and place significant weight on the contemporaneous documentary evidence in the form of Mr South's email on 16 June 2021 (see [79] above).

100 Mr South's email on 16 June 2021 supports the finding that the call took place and that there was such an agreement as alleged by the defendant. What is recorded in Mr South's email is specific and contemporaneous – it states that the parties had "agreed" that the US$65m TDB Facility was out of the scope of the claimant's mandate. Mr South's email also states that the defendant is "committed to completion of the international lender syndicated project facility as contemplated in the mandate letter", but does not identify the US$65m TDB Facility as the relevant facility "contemplated in the mandate letter". Mr South further states that he "hope[s] to be able to restart the process [in] mid-July" and that "[t]he completion of this project debt facility by Q1 2022" is a key goal for the defendant for the next 12 months. If the US$65m TDB Facility was indeed within the claimant's mandate, it is unclear why Mr South would have expressed his hope to "restart the process" of finding a prospective Investor for the "project debt facility".

101 Next, I turn to the Extension Letter sent by Mr López to Mr South on 3 June 2021 (see [78] above). By that date, the claimant had already seen the draft TDB term sheet relating to the US$65m TDB Facility, as Mr South had

Version No 1: 08 Jul 2024 (11:29 hrs)

forwarded it to Mr López on 29 May 2021.[117] However, the Extension Letter is completely silent on the US$65m TDB Facility. The Extension Letter even states that the claimant "look[s] forward to a successful completion of the Transaction". The choice of the word "Transaction" (and the lack of any reference to the US$65m TDB Facility), and the forward-looking language used, are consistent with the defendant's case that the parties did not consider the US$65m TDB Facility as a Transaction under the Mandate Letter.

102 The parties' contemporaneous conduct also suggests the existence of an oral agreement to exclude the US$65m TDB Facility. In the Extension Letter, the claimant did not invoke cl 4(i) of the Mandate Letter (see [81] above) to extend its mandate. This is notwithstanding that the US$65m TDB Facility satisfies the condition for extension under cl 4(i) (*ie*, "non-binding expression of interests … received by any Investor totalling in aggregate equal to or in excess of USD25 million"). Mr Dunton, a practising lawyer, was aware of cl 4(i) of the Mandate Letter (see [82] above). The fact that this clause was still not invoked suggests that the claimant knew cl 4(i) was inapplicable, as the US$65m TDB Facility was not within its mandate and not a Transaction within the meaning of the Mandate Letter.

103 Looking at the above evidence in totality, I find that there is compelling evidence establishing the substantive requirements of an oral contract. The terms of the alleged oral contract are certain – *ie*, the US$65m TDB Facility would be excluded from the scope of the Mandate Letter. Consideration was provided by the defendant in the form of a promise to extend the claimant's mandate. I am also persuaded that the parties intended to create a legally binding contract in agreeing to such terms. It is more likely than not that the parties had,

---

117 CBOD vol 1 at p 347.

Version No 1: 08 Jul 2024 (11:29 hrs)

by necessary implication, agreed to depart from a NOM clause and concluded a valid oral agreement to vary the Mandate Letter.

104 The parties' subsequent conduct buttresses my finding that an oral agreement had been reached. In *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravonon* [2019] 1 SLR 696 ("*Simpson Marine*"), the Court of Appeal declined to express definitive views on the admissibility, relevance and probative value of subsequent conduct for the purpose of either contract formation or interpretation (at [79]). However, the Court of Appeal considered that the parties' post-contract communications and conduct did aid the court in objectively ascertaining whether an agreement was reached, especially as such post-contract conduct involved both parties (*Simpson Marine* at [79]). In a similar vein, the Court of Appeal in *GPK Clinic* ([42] *supra*) noted that subsequent conduct is relevant where such conduct "provides *cogent evidence* on the parties' agreement at the time when the contract was concluded" [emphasis in original] (at [51]). In the present case, the subsequent conduct relied on by the defendant provides cogent evidence that supports a finding that there was an agreement to exclude the US$65m TDB Facility from the scope of the Mandate Letter.

105 First, the claimant did not object to Mr South's email on 16 June 2021, which recorded the purported oral agreement between the parties. When questioned on the stand, Mr López explained that he took a "commercial decision" not to respond to Mr South's email because it was a stressful time for the defendant.[118] This does not offer a credible explanation. In the ebb and flow of a commercial transaction, I agree that there are times when a service provider should sensibly decide not to place additional and unnecessary pressure and

[118] Day 1 Transcript at p 98 lines 21–25 and p 99 line 1.

Version No 1: 08 Jul 2024 (11:29 hrs)

stress on a client. However, the statement that the US$65m TDB Facility is excluded unequivocally takes away the claimant's entitlement to any success fee in relation to that transaction. This goes to the very heart of the claimant's deal with defendant. It is implausible that the claimant would allow this statement to stand and not make *any* response to Mr South's email. Mr South stated in his cross-examination that he would have responded immediately if he had received such an email from a client.[119] I agree that this would be the most plausible course of action.

106 Mr López also explained that no objection was made because based on his discussion with Mr Dunton, he knew that a unilateral email from one party to vary the contractual terms would be invalid.[120] I do not find this a convincing explanation either. Further, Mr Dunton testified that he does not even recall having had any discussion with Mr López in relation to Mr South's email.[121] If both Mr López and Mr Dunton were of the view that the US$65m TDB Facility was excluded, I find it implausible that they had nothing to say to each other about this, particularly bearing in mind Mr Dunton's position as a practising solicitor for 25 years.[122] The inconsistent testimonies by Mr López and Mr Dunton in relation to this purported discussion between them did not assist the claimant's case.

107 Second, consistent with the existence of the oral agreement, the claimant did not ask to be involved in the negotiations of the US$65m TDB Facility.[123]

---

119 Day 3 Transcript at p 31 lines 11–13.

120 Day 1 Transcript at p 98 lines 17–20.

121 Day 1 Transcript at p 156 line 1.

122 Day 1 Transcript at p 149 lines 15–25.

123 DOS at para 26b; DWS at para 28b; DRS at para 16.

Version No 1: 08 Jul 2024 (11:29 hrs)

As the defendant points out,[124] Mr López's handwritten notes (which record his discussions with Mr South post-execution of the Extension Letter) do not indicate any interest on the part of the claimant to participate in the negotiations with TDB.[125] To this, Mr López gave a convenient explanation that he had asked Mr South orally but that such requests were not documented in the handwritten notes because he only recorded what Mr South had told him.[126] I am not convinced by this explanation.

108 Third, a kick-off call took place between the parties on 23 November 2021 in relation to a senior secured financing.[127] During that call, the claimant referred to the marketing materials it had prepared. The first page of the marketing materials states that the defendant was looking for "Expansion Capex / USD 90-100m".[128] I agree with the defendant's submission that if the US$65m TDB Facility was part of the financing that formed the Transaction (*ie*, the US$50m to US$80m debt financing), then the defendant should only be seeking US$15m from the Investors, not US$90m to US$100m.[129] The marketing materials thus reflect the claimant's own understanding that the US$65m TDB Facility was excluded from the scope of the Mandate Letter.

109 Finally, as the defendant points out, the claimant did not invoice for the Success Fee even after the defendant made a public announcement that it had

---

124 DRS at para 17.

125 CBOD vol 1 at pp 145–154.

126 Day 1 Transcript at p 105 lines 6 and 7.

127 CBOD vol 2 at p 197.

128 CBOD vol 2 at p 198.

129 DWS at para 32f.

Version No 1: 08 Jul 2024 (11:29 hrs)

secured the US$65m TDB Facility.[130] The claimant only invoiced the defendant for the Cl 6(b) Retainer Fee (for the submission of the first draft of the Investor Financial Model),[131] and this is consistent with the understanding that the US$65m TDB Facility was not part of the claimant's mandate. Mr López's explanation on the stand was that the claimant made a "commercial decision" not to invoice the defendant, as the latter was in financial difficulties.[132] I am not persuaded by this explanation (see [105] above). The claimant could have at the very least, indicated to the defendant that the success fee had accrued but that the claimant would not be sending an invoice as it understands the defendant's financial situation. That the claimant only issued an invoice for the Success Fee after the termination of its engagement in March 2022 suggests that this was an afterthought post termination of the engagement and not a not a genuine belief as to its entitlement as part of the engagement.

110 For the above reasons, I find that there was an oral agreement to exclude the US$65m TDB Facility from the scope of the Mandate Letter.

The evidence of the oral agreement is admissible

111 The next issue is whether evidence of the oral agreement is admissible for the purpose of varying the terms of the Mandate Letter.

112 The starting point is the parol evidence rule that a written contract articulated in precise terms cannot be varied or qualified by extrinsic evidence (*Lee Chee Wei v Tan Hor Peow Victors and others and another appeal* [2007] 3 SLR(R) 537 at [23]). This is statutorily codified in ss 93 and 94 of the

130 DWS at para 28c.

131 CBOD vol 1 at p 93.

132 Day 1 Transcript at p 108 line 17 to p 111 line 6.

Version No 1: 08 Jul 2024 (11:29 hrs)

Evidence Act 1893 (2020 Rev Ed) (the "Evidence Act") which provide that where the terms of a contract have been reduced to the form of a document, no evidence of any oral agreement or statement shall be admitted "for the purpose of contradicting, varying, adding to, or subtracting from" the terms of a written contract. Relying on the entire agreement clause in the Mandate Letter (see [90] above), the claimant submits that no extrinsic evidence may be proved to vary the terms of the Mandate Letter pursuant to ss 93 and 94 of the Evidence Act.[133]

113 I dismiss the claimant's objection. An entire agreement clause invalidates collateral agreements made *prior* to the contract, but "do[es] not prevent parties from *subsequently* entering into an agreement to modify the contract containing the entire agreement clause" [emphasis in original] (*Charles Lim* ([91] *supra*) at [48]). In that regard, the parol evidence rule is subject to certain exceptions set out in s 94 of the Evidence Act. Proviso (*d*) of s 94 is applicable and provides as follows:

> (d) the existence of any distinct *subsequent oral agreement*, to rescind or *modify* any such contract, grant or disposition of property, may be proved *except* in cases in which such contract, grant or disposition of property is *by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents*
>
> [emphasis added]

The Mandate Letter is not required by law to be in writing, nor has it been registered according to the law in force as to the registration of documents. As the oral agreement on 4 June 2021 is a "distinct subsequent oral agreement" to vary the terms of the Mandate Letter, it falls within the ambit of proviso (*d*). There is thus no evidential issue arising from the proof of the oral agreement.

---

133 COS at para 27.

Version No 1: 08 Jul 2024 (11:29 hrs)

The claimant is estopped from denying that the US$65m TDB Facility is excluded

114 My finding above suffices to dispose of the claimant's entitlement to the Success Fee. For completeness, I address the defendant's case on estoppel by convention. Even if the US$65m TDB Facility is within the scope of a Transaction in the Mandate Letter, I find that estoppel by convention applies to estop the claimant from insisting that the US$65m TDB Facility is within the scope of its mandate.

115 The doctrine of estoppel by convention operates to hold parties to a certain agreed interpretation of the contract (*Day, Ashley Francis v Yeo Chin Huat Anthony* [2020] 5 SLR 514 at [200]). The requirements are well-established: (a) first, the parties must have acted on an incorrect assumption of fact or law in the course of dealing; (b) second, the assumption was either shared by both parties pursuant to an agreement (or something akin to an agreement), or made by one party and acquiesced to by the other; and (c) third, it is unjust or unconscionable to allow the parties or one of them to go back on that assumption (*Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] 2 SLR 200 at [49], citing *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 at [31]).

116 The incorrect assumption in the present case is that the US$65m TDB Facility is excluded from the scope of a Transaction under the Mandate Letter, when it was not actually excluded. This assumption was made by the defendant and acquiesced to by the claimant. For instance, the claimant stayed silent despite Mr South's email on 16 June 2021 (see [79] above) stating that the parties had "agreed" the US$65m TDB Facility "is out of scope of [the

Version No 1: 08 Jul 2024 (11:29 hrs)

claimant's] mandate". Both parties also acted on this incorrect assumption of fact (that the US$65m TDB Facility is excluded) throughout the course of the parties' dealing. The claimant did not request to be involved in the negotiations of the US$65m TDB Facility post-execution of the Extension Letter (see [107] above); the marketing materials dated 23 November 2021 state that the defendant was still looking for US$90m to US$100m (see [108]) above); and the claimant only invoiced for the Success Fee after the termination of its engagement (see [109] above). The first two requirements of estoppel by convention are thus satisfied.

117 The final requirement is also satisfied. It would be unjust to allow the claimant to go back on this assumption that the parties had operated on. Relying on the assumed state of affairs acquiesced to by the claimant, the defendant did not engage the claimant in the negotiations for the US$65m TDB Facility nor instructed the claimant to carry out any substantive work in relation to this facility.

118 I thus find that even if the US$65m TDB Facility fell outside the scope of the claimant's mandate, the claimant is estopped from insisting that it was excluded. In light of my findings above, it is unnecessary for me to deal with the defendant's alternative argument on unilateral mistake.

The claimant is not entitled to a claim for quantum meruit

119 The claimant argues that even if the US$65m TDB Facility fell outside the scope of its mandate, it is entitled to a reasonable *quantum meruit* for the services it has provided.[134] Specifically, the claimant alleges that inputs

[134] COS at para 44.

Version No 1: 08 Jul 2024 (11:29 hrs)

provided on the draft term sheet (at the defendant's request) was a service falling outside of the Mandate Letter.[135]

120 There are two alternative approaches regarding the award of a reasonable sum for work done by a claimant: the first is contractual in nature and the second is premised on restitution or unjust enrichment. The difference between the two has been summarised in *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 655 ("*Rabiah*") as follows (at [123]):

> … Where there is an express or implied contract which is silent on the quantum of remuneration or where there is a contract which states that there should be remuneration but does not fix the quantum, the claim in *quantum meruit* will be contractual in nature. Where, however, the basis of the claim is to correct the otherwise unjust enrichment of the defendant, it is restitutionary in nature. …

121 A claim in contractual *quantum meruit* fails. As held in *Eng Chiet Shoong and others v Cheong Soh Chin and others and another appeal* [2016] 4 SLR 728 ("*Eng Chiet Shoong*"), a claim in contractual *quantum meruit* is generally premised on an implied contract – *ie*, there is no express contract (at [28]). This is unless the express contract "does *not* contain an *express term* with regard to the remuneration that ought to be paid for work done by the plaintiff" [emphasis in original] (*Eng Chiet Shoong* at [30]). It is in such a situation that the court would imply a term that a reasonable sum be paid by the defendant to the claimant, if the requirements of an implied term are satisfied (*Eng Chiet Shoong* at [30]).

122 In the present case, there is a valid express term in the Mandate Letter that governs the claimant's remuneration for additional services (*ie*, services that do not relate to a Transaction). The defendant refers to cl 2.3 of the Mandate

---

135 COS at para 44.

Version No 1: 08 Jul 2024 (11:29 hrs)

Letter.[136] It is titled "Other Services" and provides that the defendant may "request in writing any services beyond those stated in the scope that [the claimant] at its discretion may offer and [the defendant] shall pay fees to be agreed between [them]".[137] In light of cl 2.3, there is no basis for this Court to imply a term that a reasonable sum be paid by the defendant to the claimant. As the claimant does not rely on cl 2.3, I need not consider its applicability further.

123 I also dismiss the claimant's case on restitutionary *quantum meruit*. A claim in *quantum meruit* may be mounted where there is no express contract (*Eng Chiet Shoong* at [41]). In particular, there cannot be a claim in restitution which exists in parallel with an inconsistent contractual promise (*Rabiah* at [123]). The presence of cl 2.3 of the Mandate Letter, which provides that the quantum of fees to be paid would be agreed between the parties, suffices to dispose of this head of claim.

124 For completeness, I accept the defendant's submission that the claimant did not render any services that resulted in the defendant being enriched.[138] One of the three elements that the claimant must prove is that the defendant has been enriched (*Higgins, Danial Patrick v Mulacek, Philippe Emanuel and others and another suit* [2016] 5 SLR 848 at [54]). This is not made out. The defendant argues that the claimant "went on a frolic of its own" in drafting its own term sheet in a template form,[139] and that this input was not only unsolicited but also unusable.[140] Mr South stated that the term sheet was "not really a term sheet"

---

136 DOS at para 41.

137 Clause 2.3 of the Mandate Letter, CBOD vol 1 at p 34.

138 DOS at para 40; DWS at para 56.

139 CBOD vol 2 at pp 23–27.

140 DWS at para 56.

Version No 1: 08 Jul 2024 (11:29 hrs)

but a "template" that was "pretty basic".[141] I agree with Mr South. The claimant's work on the term sheet was not a complex legal or commercial work product. It was a document that could have been easily derived from other precedent term sheets and did not require the seniority of either Mr López's or Mr Dunton's inputs. The claimant prepared the term sheet to show that something had been completed but not that something of value or worth to the defendant had been completed.

Issue 2: The claimant is entitled to the Cl 6(e) Retainer Fee

125 There are three sub-issues to be determined:

(a) first, whether cl 6(e) of the Mandate Letter is a penalty clause;

(b) second, whether the claimant has provided consideration for cl 6(e) of the Mandate Letter; and

(c) third, whether the requirements of cl 6(e) of the Mandate Letter are satisfied.

Clause 6(e) of the Mandate Letter is not a penalty clause

126 The preliminary issue is whether cl 6(e) of the Mandate Letter is an unenforceable penalty clause.

127 Under Singapore law, a contractual provision will be held to be an unenforceable penalty where: "(a) it creates a secondary obligation triggered by a breach of contract … that (b) requires the defaulting party to pay an amount of money that seeks to hold the defaulting party *in terrorem* to their primary

[141] Transcript dated 14 February 2024 ("Day 2 Transcript") at p 74 lines 22–24.

Version No 1: 08 Jul 2024 (11:29 hrs)

obligations" (*Ethoz Capital Ltd v Im8ex Pte Ltd and others* [2023] 1 SLR 922 ("*Ethoz Capital*") at [33]).

128 I turn to the threshold issue of whether cl 6(e) of the Mandate Letter imposes a secondary obligation, thereby attracting the penalty doctrine (*Ethoz Capital* at [1]). As explained in *Ethoz Capital*, a primary obligation is the "essential purpose" of the contract and is imposed to procure whatever the party to the contract has promised to do (at [51]). By contrast, a secondary obligation is merely "incidental to" the primary obligation (*Ethoz Capital* at [51]). Under the penalty doctrine, "the specific category of secondary obligation that the law is concerned with is an obligation to pay money upon a breach of contract" (*Ethoz Capital* at [51]).

129 However, the distinction between the two may not always be clear. To address the parties' attempt to circumvent the penalty doctrine through clever drafting, the court will take a substance-over-form approach and analyse the entire contract (*Ethoz Capital* at [53]). The following non-exhaustive factors are considered in determining whether the obligation is primary or secondary in nature (*Ethoz Capital* at [52]):

(a) the overall context in which the bargain in the clause was struck;

(b) any particular reasons for the inclusion of the clause; and

(c) whether the clause was contemplated to form part of the parties' primary obligations to secure some independent commercial purpose, or was only to secure the affected party's compliance with his primary obligations.

Version No 1: 08 Jul 2024 (11:29 hrs)

130 I turn to cl 6(e) of the Mandate Letter, reproduced below:[142]

> • A retainer fee to be paid in cash as follows consisting of the following milestone-related payments:
>
> …
>
> (b) USD25,000 upon submission of the first draft of the Investor Financial Model (provided sufficient information for the construction of the first draft of the Investor Financial Model is delivered by the [defendant] to [the claimant] within 30 days of Mandate Letter Execution Date); plus
>
> …
>
> (e) In the event (b) or (c) are not accrued due to non-provision of the necessary provision of information by the [defendant] to [the claimant] within 30 days of Mandate Letter Execution Date, as determined by [the claimant], a monthly retainer of USD10,000 until such provision occurs.
>
> (a), (b), (c), (d) and (e), together, the "**Retainer Fee**". …

131 Taking a substance over form approach, I disagree with the defendant's submission that its obligation to pay a monthly retainer fee is a secondary obligation.[143]

132 Reading cl 6 of the Mandate Letter as a whole (see [41] above), the retainer fees provide for milestone payments. The parties thus envisaged that the claimant would receive its remuneration at each significant stage leading towards the Transaction. However, if the defendant fails to provide the requisite information to the claimant within 30 days of the execution of the Mandate Letter, the claimant's entitlement to US$25,000.00 under cl 6(b) would be delayed through no fault on the claimant's part. In such situations, cl 6(e) kicks in to provide continuous remuneration to the claimant until the defendant supplies the requisite information to the claimant. Mr López's unchallenged

---

142 Clause 6 of the Mandate Letter, CBOD vol 1 at p 36.

143 DOS at para 59; DWS at para 60.

Version No 1: 08 Jul 2024 (11:29 hrs)

evidence was that during this interim period, the claimant still had to stand ready to act on the defendant's instructions in relation to the Mandate Letter.[144] Clause 6(e) hence imposes a conditional primary obligation on the defendant to remunerate the claimant for its continuing retainer services upon the occurrence of an event (*ie*, non-provision of the requisite information by the deadline). It is not a secondary obligation to compensate the claimant for the defendant's breach of the Mandate Letter.

133 Further, the obligation to pay the Cl 6(e) Retainer Fee goes towards the "essential purpose" of the Mandate Letter, which is to keep the claimant engaged as the defendant's exclusive financial advisor. Looking at the factor at [129(c)] above, the claimant's continuous availability and engagement secures an independent commercial purpose of the defendant, *viz*, to have an exclusive financial advisor for the defendant to call on at any point of the engagement. This is the key commercial purpose behind a "retainer" arrangement – *ie*, the claimant is already onboarded and will be able to advise and assist the defendant "on-demand" without having to clear further hurdles such as conflicts checks or know-your-client checks. It cannot be said that cl 6(e) was put in place "only to secure the [defendant]'s compliance" with his obligation to provide the requisite information within the stipulated time.

134 For the above reasons, I agree with the claimant's submission that the penalty rule is not engaged because cl 6(e) of the Mandate Letter imposes a primary, not secondary, obligation.[145] This suffices to dispose of the defendant's contention that cl 6(e) is unenforceable.

---

144 AVLA at para 27c.

145 COS at para 54; CWS at para 20.

Version No 1: 08 Jul 2024 (11:29 hrs)

135 For completeness, I proceed to the second stage of the inquiry, which is whether cl 6(e) of the Mandate Letter is an unenforceable penalty clause. The test is whether the payment of money is stipulated as "*in terrorem* of the offending party", as distinguishable from "a genuine covenanted pre-estimate of damage" (*Ethoz Capital* at [65], citing *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co, Ltd* [1915] AC 79 ("*Dunlop*") at 87).

136 The defendant argues that the monthly retainer fee of US$10,000.00 holds it *in terrorem* to its primary obligation – *ie*, to provide sufficient information to the claimant within 30 days of executing the Mandate Letter for it to prepare the Investor Financial Model.[146] According to the defendant, it is clear that cl 6(e) is a penalty, as the claimant has failed to explain how that figure of US$10,000.00 is a genuine pre-estimate of the loss the claimant would suffer monthly if it does not receive the requisite information.[147] However, as noted in *Ethoz Capital*, it is uncontroversial that the party that asserts that a provision is a penalty (*ie*, the defendant in this case) bears the legal burden of proof (at [69]).

137 I find that the defendant has failed to discharge its burden of proof. I do not see how the monthly payment of US$10,000.00 is "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach" of the defendant's obligation to supply the requisite information within the stipulated deadline (*Ethoz Capital* at [67], citing *Dunlop* at 87). The parties are sophisticated commercial parties who have voluntarily agreed that a fixed amount would be paid to the claimant under cl 6(e). Further, by committing itself to continuous availability every month, the claimant's capacity to take on other projects with

146 DOS at para 59; DWS at para 60.

147 DOS at para 60.

Version No 1: 08 Jul 2024 (11:29 hrs)

other clients would necessarily be hindered (see [141] below). I thus consider the sum of US$10,000.00 to be a genuine pre-estimate of the claimant's loss for the delay occasioned by the defendant.

138 I hence find that the Cl 6(e) Retainer Fee does not offend the "essence" of a penalty and cl 6(e) of the Mandate Letter is a valid and enforceable clause.

The claimant has provided consideration for cl 6(e) of the Mandate Letter

139 Another preliminary objection by the defendant is that the claimant has not provided consideration for cl 6(e) of the Mandate Letter.[148]

140 Consideration refers to a legally recognised return given in exchange for the promise sought to be enforced (*Gay Choon Ing* ([84] *supra*) at [66]). This may consist in "some right, interest, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other" (*Gay Choon Ing* at [67]). Notably, consideration need not amount to a legal benefit or detriment – "a *practical* benefit or detriment" [emphasis in original] could constitute sufficient consideration in law (*Gay Choon Ing* at [70]).

141 The defendant argues that no consideration has been provided because the claimant is not required to do anything under the Mandate Letter to be entitled to the Cl 6(e) Retainer Fee.[149] However, as mentioned earlier (see [132]–[133]), the nature of the retainer was that the claimant had to stand ready to assist the defendant as and when the defendant needed. The defendant did in fact call on the claimant between 28 May 2021 and 14 June 2021 to seek advice

148 DOS at para 35; DWS at para 61.

149 DOS at para 35.

Version No 1: 08 Jul 2024 (11:29 hrs)

on the TDB term sheet.[150] As Mr López also explained, the exclusive and open nature of the mandate meant that the claimant's capacity to take on other mandates or projects with other clients was limited.[151] There were thus practical benefits conferred on the defendant and detriments suffered by the claimant, which amounted to sufficient consideration for cl 6(e) of the Mandate Letter.

The requirements of cl 6(e) of the Mandate Letter are satisfied

142 I turn to the key issue of whether the requirements of cl 6(e) of the Mandate Letter are satisfied, thereby entitling the claimant to the Cl 6(e) Retainer Fee. Based on cll 6(b) and 6(e) of the Mandate Letter (reproduced at [130] above), the issue turned on what amounted to "sufficient information for the construction of the first draft of the Investor Financial Model", and when that information was provided by the defendant to the claimant.

143 The claimant argues that in order to start on the first draft of the Investor Financial Model, it needed the draft feasibility study for the ATO Mine expansion in its final form.[152] The final form of the draft feasibility study was only sent to the claimant on 8 November 2021.[153] According to the claimant, the start date on which the Cl 6(e) Retainer Fee accrued was 24 November 2020 (30 days from the execution of the Mandate Letter) and the end date was 8 November 2021.[154] As the monthly retainer fee amounts to US$10,000.00, the claimant argues that the total quantum of the Cl 6(e) Retainer Fee owed to the claimant for the 12 months is US$120,000.00.

---

150 CBOD vol 1 at pp 347 and 353; CBOD vol 2 at pp 14, 19–22, 29–30, 34, 40 and 45.

151 AVLA at para 27c.

152 COS at para 48; CWS at para 15.

153 COS at para 48; CWS at paras 15 and 18.

154 COS at para 6 and CWS at para 1b.

Version No 1: 08 Jul 2024 (11:29 hrs)

144 The defendant's case is that the Cl 6(e) Retainer Fee never accrued. According to the defendant, the claimant had sufficient information to construct the first draft of the Investor Financial Model by 23 November 2020 (which is before the expiry of 30 days from the execution of the Mandate Letter).[155] The sole evidence that the defendant relies on for this argument are the slides prepared by the claimant for a meeting between the parties on 23 November 2020.

The "sufficient information" that the claimant needed was the final draft feasibility studies

145 The first issue is what amounted to "sufficient information" for the construction of the first draft of the Investor Financial Model.

146 I disagree with the defendant that the slides used on 23 November 2020 indicate that the claimant had sufficient information to construct the first draft of the Investor Financial Model.[156]

147 Firstly, on the slide titled "DRAFT TRANSACTION GANTT CHART",[157] the claimant stated that it would start constructing a "Basic [Financial] Model Framework Built with Estimated Data" between 23 November 2020 and 21 December 2020. The model was then to be "Populated with Preliminary Data Provided by [the defendant]" from 21 December 2020 to 18 January 2022. Finally, the model would be "Populated with Feasibility Study Data" from 25 January 2022 to 22 February 2022. This supports the defendant's case that the feasibility study was not required for the first draft of the Investor

155 DWS at para 62; DRS at para 51.

156 DWS at para 64.

157 CBOD vol 1 at p 284.

Version No 1: 08 Jul 2024 (11:29 hrs)

Financial Model, as the parties contemplated that the results of the feasibility study would be added to the Investor Financial Model *later*.[158] However, this slide does not support the defendant's case that the claimant had sufficient information to construct the first draft of the Investor Financial Model. The claimant required "Estimated Data" from the defendant, but the slides are silent as to whether such data was provided to the claimant.

148 The defendant also relies on the slide titled "FINANCIAL MODEL".[159] I reproduce the relevant parts of the slide below:

> **PROPOSED NEXT STEPS**
>
> - [The defendant] to provide [the claimant] with existing financial model for internal purposes (if any)
> - [The parties] to decide on whether to build model from scratch or adapt [the defendant]'s internal model
>
> - [the claimant] to start work immediately by building or adapting a flexible model to incorporate operational inputs when feasibility study and capital expenditure elements are clear (with placeholders that enable a model structure); and
> - [the claimant] to start compiling a legal due diligence list;

149 The defendant relies on the third bullet point (which records the claimant's intention "to start work immediately") to argue that the claimant already had the requisite information. I disagree. This must be read in the context of the earlier bullet point which contemplates that the parties would first discuss and decide whether the Investor Financial Model would be built from scratch. There is no evidence that such a discussion took place during that meeting.

---

158 DWS at para 64; DRS at para 53.

159 CBOD vol 1 at p 285.

Version No 1: 08 Jul 2024 (11:29 hrs)

150 Finally, the defendant relies on the slide titled "IM – Information Request".[160] The defendant points out that under the column titled "Available to [the claimant]?", the claimant indicated "Yes" to each piece of information it had sought from the defendant. According to the defendant, this is a clear confirmation from the claimant that it had all the information needed. The defendant's reliance on this slide is misplaced. As Mr López explained on the stand, "IM" refers to Information Memorandum, not Investor Financial Model.[161] This slide is hence irrelevant.

151 Based on the above, I reject the defendant's argument that the claimant had sufficient information to construct the first draft of the Investor Financial Model on 23 November 2024.

152 I turn to the claimant's case that "sufficient information" refers to the *final* draft of the feasibility study.[162] The defendant challenges this on two grounds. First, the claimant has allegedly never indicated to the defendant that it needed the finalised draft feasibility study to construct the first draft of the Investor Financial Model. Second, the first draft of the Investor Financial Model submitted by the claimant only made a fleeting reference to the finalised draft feasibility study, suggesting that the latter was not actually necessary for the first draft of the Investor Financial Model.[163] For reasons explained below, I accept the claimant's case that "sufficient information" refers to the final draft of the feasibility study.

---

160 CBOD vol 1 at p 289.

161 Day 1 Transcript at p 65 lines 2–7.

162 AVLA at paras 27b and 32.

163 DOS at para 31.

Version No 1: 08 Jul 2024 (11:29 hrs)

153 First, I note that there is no evidence from the parties as to what the first draft of the Investor Financial Model should look like – *eg*, how detailed or sparse it should be, either based on the industry standard or any specific agreement between parties. However, I consider it significant that cl 6(e) of the Mandate Letter contains the phrase "as determined by [the claimant]". This phrase indicates that it was for the *claimant* to determine whether sufficient information had been provided by the defendant. In other words, the claimant's view of what the sufficient information was (*ie*, the finalised draft of the feasibility study) should *prima facie* prevail over the defendant's view.

154 Second, the defendant's position on the Investor Financial Model was inconsistent. I set out the relevant evidence below:

(a) As noted above (at [144]), the defendant claims that the claimant had sufficient information by 23 November 2020.

(b) But two weeks later on 7 December 2020, Mr South sent a WhatsApp message to Mr López, stating that there was "[n]o real point building [the Investor Financial Model] out too much until [the parties] have the definitive data".[164] When questioned on the stand, Mr South explained that the "definitive data" he was referring to "was not related to the feasibility study final".[165] However, Mr South accepted that what he meant in his message was that the claimant should "hold off [on the building of the Investor Financial Model] until the data comes".[166] This contradicts the defendant's position above that sufficient information to construct the first draft was available by 23 November 2021.

---

164 CBOD vol 1 at p 310.

165 Day 2 Transcript at p 112 lines 4–14.

166 Day 2 Transcript at p 112 lines 19–22.

Version No 1: 08 Jul 2024 (11:29 hrs)

(c) As to when exactly "the data" became available, Mr South explained that it started coming in during March 2021 and then became "available in chunks, at various different times of the year".[167] Mr South further testified that the data was "finally available in its complete form" in July 2021, but that the claimant could still have built the first draft of the Investor Financial Model without the final data.[168] To summarise, Mr South's evidence is that the claimant would have had sufficient information to build the first draft after March 2021 but before July 2021. However, Mr South is unable to point to a specific date or a narrower range of dates by which the claimant would have had sufficient information.

(d) Further, Mr South's oral testimony that sufficient information was available before July 2021 contradicts the contemporaneous documentary evidence at the material time. In Mr South's email on 16 June 2021 (see [79] above), Mr South "recognise[d] that the effective start of [the claimant's] mandate has been delayed" and that he "hope[d] to be able to restart the process when [the defendant's] DFS [*ie*, the draft feasibility studies] is in final drafting stage". Further, Mr South's WhatsApp message to Mr López on 13 July 2021 reads: "We are getting close on the model [for the draft feasibility study]. Time for your team to get started I think".[169] In Mr South's own words, the claimant's mandate was "delayed", and it did not have sufficient information to "get started" on the Investor Financial Model as of 13 July 2021. Moreover, Mr South's evidence is that the draft feasibility study and the

---

167 Day 2 Transcript at p 120 lines 21–25 and p 122 lines 11–13 and 15.

168 Day 2 Transcript at p 121 lines 1–12, p 122 lines 17–25 and p 123 lines 1–2.

169 ABOD vol 3 at p 58.

Version No 1: 08 Jul 2024 (11:29 hrs)

draft financial model for the feasibility study provided to the claimant on 9 August 2021 "would suffice for [the claimant] to *begin drafting* both the Investor Financial Model and the Information Memorandum" [emphasis added].[170] Hence, even on the defendant's own case,[171] the claimant did not have sufficient information before 9 August 2021.

155 I then turn to the issue of whether the draft feasibility study provided on 9 August 2021 amounted to "sufficient information", as alleged by the defendant. The claimant disagrees, pointing out that it was still chasing the defendant for the *finalised* feasibility study even in September and October 2021.[172] For instance, on 18 October 2021, Mr López sent a WhatsApp message to Mr South, noting that Mr South "mentioned [that the] model [for the draft feasibility study] would be ready". [173] To this, Mr South replied that he would "try and send [Mr López] a version of the model" in two days' time.[174] I find that Mr López, unlike Mr South, was consistent in his view as to what was required to prepare the first draft of the Investor Financial Model. Notwithstanding that the draft feasibility studies and the draft model (containing 12 pages of detailed financial information relating to the defendant)[175] were provided on 9 August 2021, Mr López was still chasing Mr South for the final draft of the feasibility studies. This suggests that the claimant needed that final draft to have a more complete picture. The claimant was entitled to do so, since

---

170 JTS at para 76.

171 DWS at para 69.

172 CWS at para 17c.

173 CBOD vol 2 at p 121.

174 CBOD vol 2 at p 121.

175 CBOD vol 2 at p 105–116.

Version No 1: 08 Jul 2024 (11:29 hrs)

the sufficiency of information was to be "determined by [the claimant]" (see [153] above).

156 For the above reasons, I find that the final draft of the feasibility study was the "sufficient information" needed for the construction of the first draft of the Investor Financial Model.

157 The claimant did not know for certain, at the time the Mandate Letter was executed, if the final draft of the feasibility study was required for the construction of the first draft of the Investor Financial Model. At the time the Mandate Letter was executed, the claimant would not have known exactly what information or progress the defendant had at hand with respect to the ATO Mine expansion. Information could have been provided by the defendant in many ways and over a varied period of time. This is what likely prompted the drafting of cl 6(e) and the reference to "as determined by [the claimant]". In other words, the claimant knew (in the context of a financing in an emerging jurisdiction like Mongolia) it was going to be a moving target in terms of what information was available for preparation of the first draft of the Investor Financial Model as well as when that information would be available. Clause 6(e) of the Mandate Letter was put in place order to protect the claimant's interests such that it was not engaged on retainer in the Mandate Letter indefinitely without payment. As circumstances evolved, it emerged that whilst some piecemeal information had been provided by the defendant, only the final draft of the feasibility study would have provided sufficient information for the claimant to carry out its task of preparing the first draft of the Investor Financial Model.

Version No 1: 08 Jul 2024 (11:29 hrs)

The Cl 6(e) Retainer Fee started to accrue on 24 November 2020 and stopped accruing on 8 November 2021

158 I now turn to the start date and the end date for the accrual of the Cl 6(e) Retainer Fee.

159 The defendant argues that even if the Cl 6(e) Retainer Fee started to accrue, the starting date would be 20 July 2021.[176] This is because this was allegedly the date when the claimant first sent its information request list to the defendant.[177] Prior to this, the claimant allegedly never stated what information it required to prepare the Investor Financial Model.[178] This argument is without any merit. First, as the claimant points out,[179] the information request list sent on 20 July 2021 did not even relate to the Investor Financial Model – the information request list was in relation to the Information Memorandum.[180] More crucially, the wording of cl 6(e) was patently clear. It states that a monthly retainer would start to accrue if there is "non-provision of the necessary provision of information by the [defendant] to [the client] *within 30 days of Mandate Letter Execution Date*" [emphasis added].

160 Based on my finding above (at [156]–[157]), "sufficient information" was not available to the claimant within 30 days from the execution of the Mandate Letter (*ie*, 23 November 2020). It follows that the Cl 6(e) Retainer Fee started to accrue from 24 November 2020, as submitted by the claimant.

---

176 DWS at para 69.

177 DOS at para 30; DWS at para 69.

178 DOS at para 30.

179 CRS at para 32.

180 CBOD vol 2 at p 92.

Version No 1: 08 Jul 2024 (11:29 hrs)

161 As to the end date, "sufficient information" (in the form of the final draft feasibility studies) was provided to the claimant on 8 November 2021.

162 Finally, the claimant points out that the defendant had admitted liability to the Cl 6(e) Retainer Fee.[181] This admission was made in the open pre-litigation correspondence from the defendant's Canadian lawyers dated 12 June 2022. The letter states that the defendant "has always been prepared to pay" the retainer fee which is "comprised of $25,000 (section 6(b) of the Mandate Letter) plus *$120,000 (section 6(e) of the Mandate Letter)*, plus the $25,000 already paid by [the defendant] to [the claimant] upon execution of the Mandate Letter (section 6(a) of the Mandate Letter)" [emphasis added].[182] There was no reasoned response from the defendant in relation to this correspondence throughout this suit. The defendant's concession is thus relevant to my decision to award the full amount of the Cl 6(e) Retainer Fee claimed by the claimant.

163 For the above reasons, I find that the total quantum of the Cl 6(e) Retainer Fee that had accrued from 24 November 2020 to 8 November 2021 was US$120,000.

Issue 3: The claimant is entitled to late payment interest

164 The claimant argues that it is entitled to late payment interest at the contractually agreed rate of 10% per annum on the Cl 6(b) Retainer Fee and Cl 6(e) Retainer Fee.[183] The contractual interest rate is stipulated in cl 6 of the Mandate Letter, as reproduced below:[184]

---

181 COS at para 51.

182 CBOD vol 2 at p 276.

183 COS at para 57.

184 Clause 6 of the Mandate Letter, CBOD vol 1 at p 37.

Version No 1: 08 Jul 2024 (11:29 hrs)

> All fees payable under Section 4 (Validity of Contract) and Section 6 (Fees) shall be payable within five (5) days of becoming due to a bank account designated by [the claimant] and shall thereafter accrue interest at a rate of 10% per annum.

The contractual interest rate for late payment is not a penalty clause

165 The defendant raises a preliminary objection that the contractual interest rate is an unenforceable penalty clause.[185]

166 It is uncontroversial that the obligation to pay interest on outstanding fees is a secondary obligation (*Hong Leong Finance Ltd v Tan Gin Huay and another* [1999] 1 SLR(R) 755 at [27]). In the present case, the obligation to pay interest at a rate of 10% per annum arises upon the defendant's breach of its primary obligation to pay the fees under cl 6 "within five (5) days of becoming due to a bank account designated by [the claimant]". This clause hence attracts the doctrine of penalty.

167 The issue is whether this contractual interest rate is a penalty. The defendant refers to the default interest rate for moneys due under a delivered judgment, which is stated as 5.33% per annum under the Rules of Court 2021.[186] The defendant points out that the contractual interest rate of 10% per annum is almost double this interest rate. To the extent that the defendant relies on this to advance its argument on penalty, it is without merit. In *Ethoz Capital* ([127] *supra*), Ethoz referred to the Moneylenders Act (Cap 188, 2010 Rev Ed) and the accompanying subsidiary legislation which provided that a licensed moneylender must not enter into a contract for a loan under which the late interest charged exceeds 4% per month (at [100]). Relying on this, Ethoz argued

185 DOS at paras 64–66; DWS at para 71.

186 DOS at para 66.

Version No 1: 08 Jul 2024 (11:29 hrs)

that the impugned default interest rate of 1.95% per month was not extravagant or unconscionable (*Ethoz Capital* at [101]). The Court of Appeal rejected this argument (*Ethoz Capital* at [101]):

> … To begin with, it misses the entire point of the penalty doctrine. A clause will be held to be an unenforceable penalty where it stipulates a payment of money that is *in terrorem* of the defaulting party – *that* is the relevant inquiry, not whether the payment of money is in line with statutory provisions.
>
> [emphasis in original]

168 In the present case, I do not place any significant weight on the default interest rate of 5.33% for Singapore judgments. I agree with the claimant that just because the contractual interest rate is nearly double the default interest rate for Singapore judgments does not make the former "an extravagant and unconscionable amount" in comparison with the claimant's greatest conceivable loss (*Ethoz Capital* at [67(a)], citing *Dunlop* ([135] *supra*) at 87).[187] There is insufficient evidence adduced by the defendant to prove that the contractual interest rate of 10% per annum was extravagant and unconscionable. In fact, as the claimant points out, the base interest rates for the 2020 Gold-2 Loan and the US$65m TDB Facility started from 11% per annum[188] and 9% per annum[189] respectively.[190] In determining whether the contractual interest rate is a penalty, it is relevant to look at the prevailing interest rate at the place where the contract is being carried out. This is especially so where evidence has been produced on the same. Hence, while it is not determinative, the interest rates of 11% and 9% per annum in Mongolia is relevant to my finding that the contractual interest rate of 10% is not a penalty.

---

187 CWS at para 78.

188 CBOD vol 1 at p 16.

189 CBOD vol 1 at p 51.

190 CWS at para 78.

Version No 1: 08 Jul 2024 (11:29 hrs)

The claimant is entitled to late payment interest on the Cl 6(b) Retainer Fee

169 For late payment interest on the Cl 6(b) Retainer Fee, the defendant does not dispute that the payment was made late but argues that the claimant waived its right to claim for this interest.[191]

170 The principles on waiver by estoppel are set out in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") at [57]: (a) the claimant made an unequivocal representation that he will not enforce his legal rights against the defendant; and (b) the defendant relied on that representation, rendering it inequitable for the claimant to go back upon his representation.

171 I accept the claimant's argument that element (a) in *Audi Construction* at [170] is not satisfied. The defendant argues that there was an unequivocal representation. The claimant, despite knowing that it was entitled to the late payment interest, had failed to enforce that claim for more than 9 months (*ie*, from 6 July 2022, when the defendant had paid the Cl 6(b) Retainer Fee to the claimant, to date).[192]

172 It is well-established that mere silence or inaction will not amount to an unequivocal representation, unless there is a duty to speak (*Audi Construction* at [58]). There would be a duty to speak where silence "would lead a reasonable party to think that the other party … will forbear to enforce a particular right in the future" (*Audi Construction* at [61]). In the present context, I do not see how the claimant's failure to pursue the defendant for late interest payment would have reasonably led the defendant to believe that it does not have to pay the late

191 DWS at para 72.

192 DOS at para 67.

Version No 1: 08 Jul 2024 (11:29 hrs)

interest payment. This is especially since the claimant had engaged a lawyer and sent a letter of demand to the defendant on 28 July 2022, demanding payment of "all interest accrued".[193] I hence find that the claimant's inaction could not have amounted to an unequivocal representation that it was waiving its claim for interest on the Cl 6(b) Retainer Fee.[194] In any event, I do not see why it would be inequitable for the claimant to insist upon its legal right to claim late payment interest.

173 For the above reasons, I find that the claimant is entitled to claim late payment interest on the Cl 6(b) Retainer Fee from 3 February 2022 to 5 July 2022, at a contractually agreed interest rate of 10% per annum.

The claimant is entitled to late payment interest on the Cl 6(e) Retainer Fee

174 I have found above (at [163]) that the claimant is entitled to the Cl 6(e) Retainer Fee. It follows that the claimant is also entitled to late payment interest on the unpaid Cl 6(e) Retainer Fee from 29 March 2022 to the date of this judgment, at a contractually agreed interest rate of 10% per annum.

175 Looking at the late payment interest provision in the Mandate Letter (see [164] above), there is no clear intention by the parties that the defendant's obligation to pay late payment interest is "an independent covenant expressed in a way that did not merge with the judgment" (*Tengku Aishah and others v Wardley Ltd* [1992] 3 SLR(R) 503 at [27] and [37]). Accordingly, the claimant is entitled to post-judgment interest at a statutory interest rate of 5.33% from the date of this judgment to the date of payment.

---

193 CBOD vol 2 at p 279.

194 COS at para 58.

Version No 1: 08 Jul 2024 (11:29 hrs)

Issue 4: The claimant is partially entitled to contractual indemnity for costs and expenses incurred in connection with this suit

176 The claimant argues that pursuant to cl 5 of the Standard Terms of Engagement, it is contractually entitled to a full indemnity from the defendant for all costs and expenses (including legal fees) incurred in connection with this suit.[195] The defendant pleads a bare denial in its defence.[196]

177 A party may assert its entitlement to indemnity costs in two alternative ways: (a) by directly invoking its contractual rights under the indemnity costs clause; or (b) by relying on the court's statutory discretion to award costs and urging the court to consider the costs agreement as a relevant factor in awarding costs (*Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA (Yeh Mao-Yuan, third party)* [2015] 4 SLR 1019 ("*Telemedia Pacific*") at [24]). A costs agreement between two commercial parties would generally be upheld (*Telemedia Pacific* at [35]). The party which wishes to rely on the former option – *ie*, directly enforcing its contractual rights under the costs agreement – must plead this cause of action (*Telemedia Pacific* at [30]–[31]). I note that this cause of action was explicitly pleaded by the claimant in its statement of claim.[197]

178 Clause 5 of the Standard Terms of Engagement provides as follows:

> **5. Indemnity / Liability**
>
> For the purposes of these terms "**Indemnified Persons**" means the [claimant] and all directors, officers, employees, partners and agents of the [claimant].
>
> (a) The [defendant] agrees with the [claimant] that the [defendant] shall indemnify and hold harmless the Indemnified Persons from and against *all claims, actions, proceedings,*

195 COS at paras 60–61; CWS at para 81.

196 Defence at para 44.

197 SOC at paras 43–44.

Version No 1: 08 Jul 2024 (11:29 hrs)

> *demands, liabilities, losses, damages, costs and expenses (including without limitation, legal fees)* arising out of or in connection with the [claimant]'s roles as lead advisor and arranger in connection with the Transaction (the "Engagement") or any other matter or activity referred to or contemplated by the Mandate Letter or *which arise out of any breach by the [defendant] of any of their obligations, duties or any warranties it may be deemed to have given under the terms of the Mandate Letter*, which any Indemnified Person may suffer or incur in any jurisdiction and all costs and expenses incurred by any Indemnified Person shall be reimbursed by the [defendant] promptly on demand, including those incurred in connection with the investigation of, preparation for or defence of, any pending or threatened litigation or claim within the terms of this indemnity or any matter incidental thereto *provided that the [defendant] will not be responsible for any liabilities, losses, damages, costs or expenses finally determined by a court of competent jurisdiction to have resulted from the wilful default or gross negligence on the part of an Indemnified Person*;
>
> …
>
> [emphasis added]

179 In *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd and others (Chris Chia Woon Liat and another, third parties)* [2017] SGHC 22, this court explained the purpose and the operation of contractual indemnity clauses in the following terms (at [69]–[70]):

> 69 It is not disputed that Clause 12.1 is an indemnity clause, namely an undertaking by the defendants to keep the plaintiff 'harmless against loss' arising from particular transactions or events (see *China Taiping Insurance (Singapore) Pte Ltd (formerly known as China Insurance Co (Singapore) Pte Ltd) v Teoh Cheng Leong* [2012] 2 SLR 1 at [28]).
>
> 70 Such an indemnity often takes the form of a promise by one contracting party (Y) to the other contracting party (X) that if X suffers a loss, whether due to the acts of Y or a third party who is not privy to the contract, then Y is to indemnify X against such loss *as long as the loss falls within the scope of the indemnity*. …
>
> [emphasis in original]

Version No 1: 08 Jul 2024 (11:29 hrs)

180 Whether the claimant's indemnity claim falls under the indemnity clause turns on the construction of the latter. The principles of contractual interpretation (see [24] above) apply in construing an indemnity clause (*CIFG* ([24] *supra*) at [19]). Courts are especially wary of broad indemnity clauses, as passing liability from the indemnified party to the indemnifying party carries "extremely onerous effects" (*HSBC Institutional Trust Services (Singapore) Ltd (as trustee of AIMS AMP Capital Industrial REIT) v DNKH Logistics Pte Ltd* [2022] SGHC 248 ("*HSBC Institutional*") at [30]). It is also improbable that a reasonable party would agree to indemnify his/her contractual counterparty for losses suffered by the latter without any fault on the former's part (*HSBC Institutional* at [30]).

181 In the present case, the claimant's counsel accepted during the hearing on 26 April 2024 that the contractual indemnity clause would not apply if it does not succeed in this suit. In other words, the claimant is not seeking indemnity for losses suffered which are not attributable to the defendant or the defendant's breach. The interpretation advanced by the claimant is supported clearly by the words of the indemnity clause – the defendant agreed to indemnify the claimant "from and against all claims, actions, proceedings … costs and expenses (including without limitation, legal fees) … which arise out of any breach by the [defendant] of any of their obligations … given under the … Mandate Letter".

182 I have found above that the claimant is entitled to the Cl 6(e) Retainer Fee. It follows that the defendant has breached its obligation under cl 6 (see [164] above) to pay the fees to the claimant within five days of it being due. That being the case, the costs and expenses associated with the issues on which the claimant succeeded – *ie*, the Cl 6(e) Retainer Fee and late payment interest – are due on an indemnity basis to the defendant.

Version No 1: 08 Jul 2024 (11:29 hrs)

Conclusion

183 Having unwound the tangled web, the results are shared between the parties. My judgment is summarised below:

(a) The claimant is not entitled to the Success Fee or any claim for *quantum meruit*.

(b) The claimant is entitled to the Cl 6(e) Retainer Fee.

(c) The claimant is entitled to late payment interest on both the Cl 6(b) Retainer Fee and Cl 6(e) Retainer Fee.

(d) The claimant is entitled to contractual indemnity for costs and expenses incurred in connection with the Cl 6(e) Retainer Fee and late payment interest.

184 Unless agreed between them, I will hear the parties on interest and costs on the basis determined in this judgment.

Version No 1: 08 Jul 2024 (11:29 hrs)

185 Both parties have much to offer in project finance and development, and I encourage them to continue their endeavours on development work in emerging jurisdictions where their diligence and expertise can be put to positive effect.

Wong Li Kok, Alex
Judicial Commissioner

Chew Kei-Jin, Samantha Ch'ng, Teo Jim Yang (Ascendant Legal LLC) for the claimant;
Poon Kin Mun Kelvin SC, Devathas Satianathan, Timothy James Chong Wen An (Rajah & Tann Singapore LLP) for the defendant.

Version No 1: 08 Jul 2024 (11:29 hrs)