

JERSEY / JUDGMENT

Trico Limited v Anthony Buckingham

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Disputes - appeals against the judgment of the Master - reasons for the decision [2020]JRC009 Royal Court (Samedi) 14 January 2020 Before : T. J. Le Cocq Esq., Bailiff, and Jurats Averty and Hughes Between Trico Limited Plaintiff And Anthony Buckingham Defendant Advocate H. Sharp for the Plaintiff. Advocate J. S. Dickinson for the Defendant. decision the bailiff: 1. This matter arises out of two appeals from the judgment of the Master dated 29th May 2019 (see Trico Limited v Buckingham [2019] JRC 095) (“the Master’s judgment”). Those are:- (i) the appeal of Anthony Buckingham (“the Defendant”) in so far as it relates to the construction of an agreement contained in a Side Letter allegedly entered into on 13th February 2014 (“the Side Letter”); and (ii) the appeal of Trico Limited (“the Plaintiff”) against the refusal by the Master to grant summary judgment against the Defendant on the basis, in brief, that the Defendant’s signature on the Side Letter is conclusive of the issue of whether he consented to be bound by the Side Letter and is therefore liable. The Plaintiff submits that the state of the pleadings and the admitted position between the parties means that there is no issue that can proceed to trial. 2. The trial in this matter is set for three days in February 2020 and because of the urgency the Court was asked at the end of the hearing before it on 14th November to give its decision in advance of reasons. The decision of the Court was provided to the parties on 12th December 2019 and determined that:- (i) On a proper construction of the Side Letter, it could apply to the transactions underpinning the Plaintiff’s claim and the Master’s decision in that regard should be upheld; and (ii) The Master’s decision that the issue of the signing of the Side Letter should go to trial should also be upheld. 3. These are the reasons for those decisions. 4. The background of this matter can be fully understood from the Master’s judgment but, in summary, is as follows:- (i) The Defendant is a businessman who lives with his partner Anna Sosnowska (Ms Sosnowska) and their children at Portelet House (“Portelet House”) in St Brelade. He founded a company known as Heritage Oil Limited (“Heritage”) in the 1990s. (ii) The Plaintiff is a Jersey company and the chairman of the Plaintiff is Mr Terence Ruane (“Mr Ruane”) and its other directors are Mr Matthew Corbin (“Mr Corbin”) and a Miss Clare Treharne. (iii) The Plaintiff and Heritage entered into a contract contained in a letter of engagement dated 13th February 2014 (“the Advisory Agreement”). In very general terms the Advisory Agreement provided that the Plaintiff introduce Heritage to a member of the Qatari Royal family (referred to as HBJ) for business purposes and in the event that HBJ (“or any other investor introduced by [the Plaintiff] making a direct or indirect investment in Heritage as a result of the involvement of [HBJ] – a “sourced investor” –) acquired “a significant stake in Heritage” then the Plaintiff would be paid by Heritage a sum equal to 4.5% of such investment. (iv) It is the Plaintiff’s case that during the course of the negotiation of the Advisory Agreement a collateral agreement enshrined in the Side Letter was entered into on 13th

February

2014. The Defendant denies this.

- (v) A transaction under the Advisory Agreement took place in July 2014. The features of that transaction (“the 2014 Transaction”) are that Energy Investments Global Limited (EIGL) acquired 80% of the share capital of Heritage for the sum of £739,187,084.80, Heritage was delisted from the FTSE250 and “taken private”. The Defendant sold his personally held 4.63% shareholding in Heritage, Albion Energy Limited (Albion) sold a 9.1% shareholding in Heritage, and Albion retained a 20% shareholding in Heritage and the Defendant entered into arrangements pursuant to which he agreed to act as consultant to Heritage and to restrictions upon the sale by Albion of its remaining shares for a period of five years. (vi) The Plaintiff sought a substantial payment pursuant to the Advisory Agreement (approximately £33 million) and after negotiations agreed to accept a lesser payment of £16 million and a further agreement was entered into between the Plaintiff and Heritage called the “Release”. The Release provided for the termination of the Advisory Agreement “in all respects” including of any provisions “which are expressly stated in the Advisory Agreement as surviving its termination”. (vii) In January 2018 EIGL and Albion entered into a share sale and purchase agreement for the purchase of the remaining 20% shareholding for US\$100 million by way of three instalments during 2018 (“the 2018 Transaction”). EIGL has not made its payment in full and proceedings have been started by Albion before the High Court in England and Wales to recover an unpaid sum of US\$13 million approximately. (viii) In the proceedings before this Court, of which the current application is a part, the Plaintiff is claiming that pursuant to the Side Letter the Defendant owes it US\$3 million (or 3% of US\$100 million) in respect of the 2018 transaction. 5. The Side Letter is in the following terms:- “I confirm that upon successful completion of a ‘take private’ or any other transaction involving HBJ (as defined in the engagement letter between Trico Limited and Heritage Oil Plc), that I will be responsible to pay Trico Limited a fee calculated as 3% of monies or other consideration received by me (or received by entities legally or beneficially owned or controlled, directly or indirectly, by me - excluding Heritage Oil Plc itself, which is covered by the separate engagement letter between Trico Limited and Heritage Oil Plc) as a result of any and all transaction(s) with HBJ, to the extent that Trico Limited has not received a fee from Heritage Oil Plc directly in respect of the same monies received. This engagement may be terminated without cause at any time by any party giving written notice to the other party. The fee arrangement set out in this letter survives the termination of this engagement in the event that any transaction involving HBJ (as defined in the engagement letter between Trico Limited and Heritage Oil Plc) occurs within eighteen months of the date of termination of this engagement.” 6. The Side Letter contains the Defendant’s signature. For some significant period, the Defendant had maintained that what appeared to be his signature was not in fact his signature. The Side Letter was submitted to two handwriting experts but before those experts reported on their findings, the Defendant formally admitted that the signature on the Side Letter was in fact his. His case is that although it is his signature, he had appended a number of signatures to blank documents

which he left with his colleague Mr Atherton. He denies that he signed the Side Letter and surmised, therefore, that the Side Letter had been typed in above his signature and his signature did not reflect his consent to the Side Letter. 7. It was accepted by both parties, however, that if the Defendant had knowingly put his signature on the Side Letter, then for it to be legally binding, it did not need to have been signed at a particular time or place or date nor indeed did he need to have read it. 8. It is also of significance to note that the Defendant had sought to allege fraud against Mr Atherton and subsequently Mr Ruane. The Master refused to permit any allegations of fraud against Mr Ruane to be pleaded by the Defendant and the allegations against Mr Atherton had been withdrawn. The Master's decision has not been appealed by the Defendant. Accordingly, as matters stand, fraud has not been pleaded and is not before the Court. 9. It is in that context that the issues dealt with in the Master's judgment fell to be determined and he dealt with each of the arguments put before him. We will come on to aspects of the Master's customarily thorough judgment shortly. We are, of course, exercising a "de novo" jurisdiction although giving due weight to the decision of the Master. The context of the matter before us had altered, somewhat, however, from that which obtained when the Master heard the argument. Those changes are:- (i) The Plaintiff had originally pleaded that the Side Letter was executed at Portelet House on 13th February, 2014, at which time it was alleged that the Defendant had signed it. By amendment to its Order of Justice dated 23rd August, 2019, the Plaintiff pleaded in the alternative that if the Side Letter had been signed, as found by the Court, on a date other than 13th February, 2014, or at a different time and place then the Plaintiff would rely on such findings as establishing that the Side Letter was in fact binding. (ii) The Plaintiff placed before us certain telephone evidence which suggests that, on the 13th February 2014 Guernsey mobile roaming information indicates that Mr Ruane was at the same place as Ms Sosnowska in the region of Portelet House. If that evidence does mean what it is suggested by the Plaintiff, namely that Mr Ruane and Ms Sosnowska were at Portelet House when the Side Letter was allegedly signed, which is at direct odds to the contents of affidavit evidence filed by the Defendant and Ms Sosnowska, then that would undermine the Defendant's credibility and indeed that of Ms Sosnowska and would go some way to establishing the circumstances in which the Side Letter was, so it is alleged, signed. (iii) The Defendant before the Master raised certain arguments as to the construction of the Side Letter to the effect that it no longer had any effect and did not cover the transaction which underpinned the Plaintiff's claim which construction arguments the Master rejected. Before us, however, a new construction argument was raised which had not been before the Master and which, on the Master becoming aware of it, he had declined to consider on the grounds that he was by that time "functus officio". The Master's judgment

10. The Master's approach to construction was as set out in *De la Haye v De la Haye* [2018] JRC 233 at para 43 where the Master said:- "The Corefocus decision was based on a previous incarnation of Rule 7 by Royal Court which was replaced by a Rule 7 in 2017 (see amendment No.20 to the Rules). The 2017 amendments were based on the summary judgment procedure introduced by the Civil Procedure Rules in England and Wales in Part

24. In relation to questions of construction, paragraph 24.2.3 of the CPR states as follows:-

“Where a summary judgment application gives rise to a short point of law or construction the court should decide that point if it has before it all the evidence necessary for a proper determination and it is satisfied that the parties have had an opportunity to address the point in argument.” 44. In other words the ability to construe documents on a summary judgment application still applies, notwithstanding the changes to Rule 7 in Jersey in 2017.

45. As to how I should approach questions of construction, this was established by the Court of Appeal in Trilogy Management v YT & Ors [2012] 2 JLR Note 19 and Trilogy Management v YT & Ors [2012] JCA 152. Paragraphs 37 to 40 of the unreported judgment state as follows:-

“37. In La Petit Croatie Limited v Ledo [2009] JCA 221 this Court considered the approach in this jurisdiction to the construction of documents generally. It endorsed the principles set out in the judgment of Commissioner Page in In Re Internine Trust [2005] JLR 236 at paragraph 62. At paragraph 11, Martin JA, with whom the other members of the Court agreed, summarised those principles as follows:- “The aim is to establish the presumed intention of the parties from the words used; but the words used must be construed against the background of the surrounding circumstances, which means the circumstances that must be taken to have been known to the [parties] at the time. These circumstances include anything that would have affected the way in which the language would have been understood by a reasonable man, except that evidence of subjective intention is ordinarily inadmissible. The words must also be read in the context of the document as a whole, and should so far as possible be given their ordinary meaning; but a different meaning may have to be given to them if a reading of the document as a whole and common sense so require.””

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11. As we have already indicated the Master’s judgment was in our view full and thorough and, in so far as it deals with the points in issue before us, we agree with its conclusions.
 12. In addition to setting out the background to this matter, the Master also referred to the pleadings and, specifically, the allegations of fraud. He explained why he had rejected an application to amend pleadings on the part of the Defendant to allege fraud against Mr Ruane (which as we have said has not been appealed) and also refers to the fact that allegations of fraud were initially made against Mr Atherton but are now withdrawn with no explanation.
 13. Paragraph 60 of the Master’s judgment describes the context in which the Side Letter was created:- “The context of the Side Letter being created was that Mr Atherton by an email sent on 9th February, 2014, amended the draft Advisory Agreement so that it did not apply to any acquisition by HBJ of up to 20% of the shares from the defendant (referred to as the “current major shareholder”). The email from Matthew Corbin in response sent on 11th February, 2014, attaching a draft of the Side Letter was intended “to cover off on matters that you excluded from the Heritage/Trico agreement”. Mr Atherton’s response by email of 12th February, 2014, at 11:58am stated “many thanks, v minor comments highlighted in the attached”.

61. The changes introduced by Mr Atherton on 12th February were the second and third paragraphs of the Side Letter. ... The effect of the changes added in by Mr Atherton were therefore that both the Advisory Agreement and the Side Letter could be terminated at any time by any party giving written notice to the other party and that fees and expenses were still payable for any transaction occurring within 18 months of the date of termination. However Mr Atherton did not dispute Mr Corbin's rationale for drafting the Side letter in the first place."
14. In paragraphs 76 to 84 of the Master's judgment the Master deals with the arguments put before him on construction of the Side Letter. As we agree with the points and conclusions made in the Master's judgment in this regard, we set out parts of these paragraphs at length:- "76. While therefore drafts produced are not admissible to construe the Side Letter, what led to its production namely modification of the Advisory Agreement to exclude private sales of shares in the name of the defendant or held by entities owned or controlled by him is a relevant circumstance. In particular, the email of Mr Corbin 11th February, 2014, referred to above shows the background of the surrounding circumstances to put the Side Letter in context. It was known to both the plaintiff and the defendant representatives negotiating the Side Letter that private sales had been excluded from the Advisory Agreement. The plaintiff through Mr Corbin then immediately set out that this was the justification for the Side Letter. That justification was not challenged by Mr Atherton in providing comments in response by his email of 12th February, 2014. In addition his email of 12th February, 2014, sent at 16:03 p.m. Mr Atherton set out a scenario:- "If Tony rolls his shares into bid co and then bids to acquire us on a take private, but receives part cash as consideration of say \$100 million, then Tony would pay Trico 3% of \$100 million and Heritage would pay Trico a fee on the cash paid to the 3rd party shareholders of Heritage."
77. ... this scenario because it is inconsistent with the arguments advanced by Advocate Dickinson that the Side Letter was simply to ensure that the plaintiff was paid by the defendant if it was not paid by Heritage. The example put forward by Mr Atherton clearly recognises that the defendant's obligation would then be to pay a fee for monies he received and Heritage's obligation would be to pay a fee on monies paid to other shareholders of Heritage.
78. I reach the same conclusion by looking at the wording of the first paragraph of the Side Letter. The obligation to pay a fee only arises in respect of monies or consideration received by the defendant or entities owned or controlled by him, to the extent that the plaintiff has not received a fee from Heritage. The Side Letter does not therefore guarantee generally a fee payable to the plaintiff if Heritage did not pay, but only applies to the monies received by the defendant or entities on his behalf. If the defendant or entities did not receive anything under any transaction then the plaintiff had no right to look to the defendant for any fee payable under the Advisory Agreement which Heritage failed later to pay. The defendant was only liable in respect of monies received by him or by companies for him.

79. ... the Side Letter does cover more than a private sale by the defendant; it also covers monies received by the defendant or entities he owned or controlled under any transaction covered by the Advisory Agreement where Heritage failed to pay a fee at all under the Advisory Agreement. If Heritage did not pay the plaintiff at all in respect of any transaction covered by the Advisory Agreement where, as part of that transaction the defendant or entities he owned or controlled had received monies (as in fact occurred), the plaintiff would have been able to look to the defendant for a lower fee (3% rather than 4.5%) in respect of monies received by the defendant or entities on his behalf. However the plaintiff could not look to the defendant to pay a fee for all shares sold in Heritage but only those he owned or controlled. The Side Letter therefore operated as a partial guarantee for sales of the Defendant's shares (or through companies for his benefit) under the Advisory Agreement. To that extent, the Side Letter both placed an obligation on the defendant to pay for transactions falling outside the Advisory Agreement where he received monies from HBJ and also covered the situation where the defendant received monies under a sale covered by the Advisory Agreement but where the plaintiff did not receive any fee from Heritage in respect of monies received by the defendant or entities on his behalf as part of such a sale.
80. In relation to the argument that the Side Letter was only intended to cover one transaction arising out of the engagement letter, a construction that the Side Letter only extends to monies received under any transaction covered by the Advisory Agreement means that the Side Letter would have to be construed as only being a partial guarantee of the fees due to the plaintiff, if Heritage did not pay extending to monies received by or for the defendant. Such a construction however ignores the context of the Side Letter being produced set out above namely that private sales to HBJ were excluded by the Advisory Agreement and so is not a construction I am prepared to accept. It was also not known at the time the Side Letter was executed what transaction or transactions might follow from any introduction. A construction limiting the Side Letter to one transaction only is therefore inconsistent with the intention of Trico receiving a fee for whatever transactions followed from such an introduction.
81. The context of the Side Letter being produced referred to in paragraph 76 above is also inconsistent with the argument that a transaction falling within the Advisory Agreement is a necessary precondition for the defendant to be required to pay any fee. Again, this is because at the time of the Advisory Agreement being executed and assuming the Side Letter was executed on the same date, what transaction might take place was not known to the parties. What was going to transpire could be one of the transactions described in Clause 2 of the Advisory Agreement, could have been an acquisition of the defendant's shareholdings only including shares held through companies for him, or any combination of the two. The construction of the Side Letter that makes sense is that it was designed to cover whatever type of transaction took place, and, as long as it involved HBJ, a fee was payable by the defendant for any monies or consideration he received. This is why the Side Letter referred to "any and all transactions with HBJ" and was both unlimited in time and unlimited in terms of the number of transactions it caught. The fact that what took place in 2014 was one acquisition of 80% of Heritage is irrelevant. To focus on the 2014 transaction is to look at matters with hindsight and after the specific transaction concluded.

The correct approach is to look at what the parties had in mind when they executed the Side letter before any transaction had been negotiated or completed. This is the relevant context. 82. In relation to the Side Letter being unlimited in time, the second paragraph contains a notice provision. Even on giving notice the arrangement was to continue for a further 18 months which applies to any transaction involving HBJ. The Side Letter therefore recognises on its face that it applies to transactions post termination. I have already found that it also did not apply only to one transaction arising under the advisory agreement. In any event the defendant could have given notice to take any later transactions outside the terms of the Side Letter. The defendant (through Mr Atherton) could also have excluded later transactions or inserted a long-stop date but did not do so. 83. The defendant's argument would also mean that if a sale took place falling within the Advisory Agreement and at the same time, as a result of the introduction effected by the plaintiff, a separate transaction to acquire the defendant's shareholdings (or those held through companies on his behalf) was agreed with HBJ then the plaintiff would receive nothing for the latter transaction. Again, I cannot accept this construction. In particular, it would be inconsistent with the Side Letter to apply to "any and all transactions with HBJ". 84. Finally, there is nothing unfair in the conclusion I have reached. The plaintiff introduced the defendant to HBJ who has now bought (through Al-Mirqab) the entire issued share capital of Heritage. All it seeks is a fee for that introduction. That was the context for the Side Letter when it was produced.

15. Furthermore the Master in his judgment considered the effect of the Release referred to in paragraph 4(vi) above. The Master determined for the reasons set out in his judgment that the Release was not applicable to the Side Letter.
16. The Release sets out the background of and makes express reference to the Advisory Agreement between the Plaintiff and Heritage. Specifically, at paragraph (c), the Release provides:- "Each party agrees to discharge and release the other party from its obligations and liabilities under or in respect of the Advisory Agreement on the terms and conditions set out in this instrument."
17. There is no express reference to the Side Letter. Neither does it appear that the parties to the Release are the same as the parties to the Side Letter in that the Defendant was not a party in his personal capacity.
18. The operative terms of the Release are as follows:- "... Each party hereby agrees to fully and irrevocably release and discharge the other party, and each of their respective shareholders, subsidiaries, subsidiary undertakings, and each of their respective employees, directors, consultants and agents (together, the relevant parties and each, a relevant party from any and all:
 - (a) claims and/or demands ... duties, obligations and/or liabilities that any relevant parties has or may have ... in respect of or in connection with the Advisory Agreement whether arising before, on or after the date hereof."

19. The Defendant's argument is that if, which is not accepted, the Side Letter was executed by him and is a valid agreement, then the Release extends to claims under the Side Letter and there can be no claim by the Plaintiff. The Master concluded partly as a result of the construction that he had given the Side Letter that the Release could not apply to it. The Side Letter extended beyond the partial guarantee of the Advisory Agreement and therefore the Release did not of itself apply to the Side Letter.
20. For the reasons set out by the Master we agree with that interpretation.
21. If, after the matter is dealt with at trial, the Side Letter is found not to constitute an agreement between the Plaintiff and the Defendant then the question of the Release becomes irrelevant as nothing can be claimed pursuant to the Side Letter. If, however, the Side Letter does constitute a valid and binding contract between the Plaintiff and the Defendant it seems to us that inevitably the Side Letter both as to its purpose and indeed in terms of the Release itself fell outside the Release.
22. We agree with the determinations and findings made by the Master. The arguments deployed by the Defendant above were not repeated as such before us.
23. The matter does not on this point end there however, as the Defendant deployed before us a further construction argument. The Defendant's further construction argument
24. In the Defendant's skeleton argument it is explained that the Defendant's contention was originally that the Side Letter only applied to the 2014 transaction, it was only intended to operate as a partial guarantee in circumstances where Heritage failed to make a payment to the Plaintiff under the Advisory Agreement and it was therefore no longer of application and, in the alternative, any continuing obligations arising out of the Side Letter were terminated by the Release. These arguments were of course advanced without prejudice to the Defendant's case that the Side Letter did not comprise a valid agreement between himself and the Plaintiff.
25. The Defendant goes on in his skeleton to relate the findings of the Master in the Master's judgment and then to explain that after the draft judgment was circulated further advice had been taken as a result of which the Defendant had appealed to this Court against the decision of the Master "in order to advance the case in relation to the construction of the Side Letter that is as outlined ... below."
26. The further construction argument is to the effect that a proper construction of the Side Letter means that it could not apply to the 2018 Transaction. The Defendant deployed the following matters by way of background to this argument, in summary, as follows:- (i) The first draft of the Advisory Agreement was sent on 4th February 2014 by Mr Corbin. With regard to that first draft the primary objective on which Heritage employed the Plaintiff was "to facilitate the introduction of an investor who will make an offer, directly or indirectly for the purchase of a significant stake in Heritage"; (ii) An investor who made such an investment was defined as a "sourced investor"; (iii) The target timeline to complete the

transaction was one of six months; (iv) It referred to HBJ as being the interested party and agreed that for the purposes of the Advisory Agreement, HBJ or another investor making a direct or indirect investment in Heritage through the involvement of HBJ would be a sourced investor;

- (v) There was provision for the payment of an investment success fee on completion of an investment by a sourced investor at a percentage not then specified; (vi) In the event that the sourced investor did not initially make a public offer to acquire the entire issued share capital of Heritage but acquired a stake of up to 29.9%, then Heritage would pay a success fee to the Plaintiff equal to 3% of the total value of any subsequent transactions with the sourced investor if those transactions successfully completed. This is referred to in the skeleton argument as the “additional fee provision”; (vii) The agreement could be terminated at any point by any party giving written notice but the fee provisions survived the termination in the event that a transaction occurred within two years of the date of termination of the Agreement. (viii) Mr Atherton had provided comments on the first draft of the Advisory Agreement which reduced the target line to completion from six to three months and amended the draft to reflect the success fee payable by Heritage to the Defendant would equal 4.5% of the amount of the gross value of the investment but did not provide in the case of a share sale and purchase for a fee with regard to the retained or unsold shares and therefore the additional fee provision was removed. Mr Atherton expressed the view that it had been covered by the terms of the above and by the sunset provisions. (ix) The Advisory Agreement went through two further drafts until it reached its final signed form.
 - (x) The Defendant’s reaction to the deletion of the additional fee provision was the creation of the Side Letter which did not in first draft contain any notice provisions. Under cover of a further email sent between Mr Atherton and Mr Corbin, Mr Atherton produced the final draft of the Side Letter into which he had introduced notice provisions which reflected those set out in the Advisory Agreement.
27. The Defendant argues that the Side Letter is poorly drafted and that it was inextricably linked to the Advisory Agreement and that it was impossible to consider the commercial context and intended manner of operation of the Side Letter without first considering the same with regard to the Advisory Agreement.
28. It seems to us that the Side Letter is connected with the Advisory Agreement as it quite clearly arises as a result of alterations in the drafts of the Advisory Agreement. That does not, of course, of itself, mean that it rises or falls with the Advisory Agreement. There is nothing in principle to prevent a collateral agreement surviving the original agreement – many collateral agreements are prepared precisely to deal with matters which of their nature occur outside of original agreements.

29. The Defendant points out that the Master found in this judgment that the Side Letter did, however, operate as a partial guarantee and as we have indicated we agree with the Master's determination to that effect. The Defendant argues that the Side Letter, drafted as it was during the negotiations concerning the Advisory Agreement was drafted not by lawyers but by business men. It was produced in response to proposed deletions made by Mr Atherton when amending the first draft of the Advisory Agreement. The Defendant points out in an email of 11th February between Mr Corbin and Mr Atherton concerning the Side Letter that:- "The letter is designed to cover off on matters that you excluded from the Heritage/Trico agreement"
30. It is clear, so it is argued, that the Side Letter was intended to fill the gap created by Mr Atherton's deletion of the additional fee provision.
31. Pausing at that point, it seems to us that the process for the negotiation of the Advisory Agreement and the genesis of the Side Letter were fluid. Both documents had more than one draft and it was clear that Mr Atherton's alterations to the first draft of the Advisory Agreement were unacceptable to the Plaintiff. It does not seem to us to be evident that Mr Corbin's comments were meant to suggest that the wording of the Side Letter was designed to produce an exact equivalent to those parts deleted. This was part of an ongoing discussion and negotiation and it is to the final form of the Advisory Agreement and indeed the Side Letter to which we must have regard. Drafts are not of assistance, particularly where they are altered as they are, quite simply that, drafts.
32. The Defendant goes on to argue that once the sourced investor had been introduced to Heritage and made an investment the Plaintiff's work under the Advisory Agreement was done and the Advisory Agreement contemplated an investment taking place within a target time to complete in three months. It is argued that the only "objet" given by the Plaintiff in return for the Defendant's promise to pay a fee under the Side Letter was the promise to perform the Plaintiff's obligations under the Advisory Agreement. It was, so it is argued, therefore the case that the Side Letter was entirely parasitic on the Advisory Agreement and inextricably connected with it.
33. We do not think that those contentions are correct. The Side Agreement was in general terms designed to provide that the Defendant would pay a 3% fee in connection with any additional investment by the acquisition of the shares in Heritage. It is not on its surface limited in time.
34. The Defendant argues that the Advisory Agreement and the Side Letter were conceived and executed to operate alongside one another and points out that both contain a sunset provision. It is argued that it follows that in the event that the Advisory Agreement was terminated by notice before the Plaintiff had performed its obligations and if within 18 months an investment was made by a sourced investor then Heritage would be obliged to pay a fee under the Agreement. It was also argued that if Heritage had failed to pay such a fee and the Defendant and/or Albion had received payment as a result of that investment,

then the Defendant would be obliged to pay 3% of the monies received under the Side Letter. The argument continues that in the event that yet further investment took place within an 18 month period then Heritage would be liable to pay to the Plaintiff a fee for the further investment and the Defendant would be potentially liable for a further fee on any monies Albion received as a result in the event of a default by Heritage on paying the fee that it owes. However, so the argument continues, if an investment with a sourced investor occurred outside the 18 month run off period, then Heritage would not be obliged to pay a fee under the Advisory Agreement. In the circumstances, the Defendant's guarantee obligation under the Side Letter would also have fallen away.

35. The Defendant further argues that it logically follows that the 18 month run off period in the Side Letter was automatically triggered once the investment was made. Accordingly, on a proper construction of the Side Letter it automatically terminated and the 18 month run off period began when the 2014 transaction under the Advisory Agreement was successfully completed.
36. The Defendant further argues that this construction is made clear by the Release because the Release terminated the Advisory Agreement for all purposes and all duties and obligations of all the parties "under in respect of or in connection with" the Advisory Agreement were brought to an end.
37. It is argued that the inextricable connection between the Advisory Agreement and the Side Letter is the most consistent with the express wording of the Advisory Agreement and the Side Letter, the most commercially sound and is fair and consistent with what the parties appear to have set out to achieve.
38. In response the Plaintiff, in its skeleton argument, relied upon paragraphs 80 to 84 of the Master's judgment which, for the reasons we have stated, we have set out above.
39. The Plaintiff characterises the new construction argument as, in essence, the submission that the contract was automatically terminated as a result of the 2014 investment and/or the signing of the Release. The Plaintiff argues that it is part of the normal rules of construction that where unambiguous words are used this should be applied and the clearer the language the parties have used, the slower the Court should be to displace that meaning. In reliance on that submission the Plaintiff relies on the case of *Arnold v Britton* [2015] UKSC36 in which the Court said:- "For the present purposes, I think it is important to emphasise seven factors. First, reliance is placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook* paras 16 – 26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is more obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over a language they use in a contract. And, again, save perhaps in a very unusual case, the parties must have been specifically

focusing on the issue covered by the provision when agreeing the wording of that provision. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.”

40. The Plaintiff points out that the contract, specifically the Side Letter, was intended to cover ‘any and all transactions with HBJ’ which must include any private sale by the Defendant of his shares set outside the terms of the Advisory Agreement. This, so the Plaintiff argues, is clear wording and demonstrates that the agreement contained in the Side Letter might be triggered by more than one transaction and therefore over a period of time beyond the lifespan of the Advisory Agreement.
41. Furthermore, it is argued that the Advisory Agreement is described in the Side Letter as ‘a separate engagement letter’ and this suggests that the Side Letter is a separate contract which provides in clear language the basis on which it might be terminated (by a written notice) and this is at odds with the suggestion that the Side Letter could be terminated automatically in the way suggested by the Defendant. No written notice was given under the Side Letter and the Release on its terms terminates the Advisory Agreement but does not deal with the Side Letter.
42. The Plaintiff also points out that the suggestion that the Side Letter was automatically terminated by Heritage, which is not a party to the Side Letter, discharging its obligations in respect of an entirely distinct agreement, namely the Advisory Agreement, is outside the clear terms of the Side Letter. Heritage is not a party to the Side Letter and it would be strange, so it is argued, if Heritage were to be in a position by its actions to cancel the effects of the Side Letter unless its ability to do so was plainly within the terms of the Side Letter itself.
43. The Plaintiff also meets head on the allegation that the Defendant’s interpretation is the only one that makes commercial sense. It points out that such an argument means that the Plaintiff would only receive a fee in respect of a private sale if it took place before an investment was made under the Advisory Agreement but not afterwards even if the private sale took place an hour after the other investment completed.
44. We do not, in connection with this aspect of the Agreement, think it is at all commercially improbable that the Plaintiff would wish to reserve for itself a fee in connection with any transaction, not limited in time, that came out of its introduction of the Defendant to HBJ.

45. We accept also the Plaintiff's argument that the Defendant's new construction argument starts from what transpired under the Advisory Agreement and then looks back to determine what the Advisory Agreement was meant to achieve and how it was meant to achieve it. The fact is that no one when they executed the Advisory Agreement or the Side Letter was aware that there would be a 2014 transaction or a 2018 transaction or how the Defendant's majority shareholding in the company might be sold.
46. It is argued that the parties agreed by the termination clause in the Side Letter that termination of the agreement in the Side Letter is not automatic but is to be affected by a written notice which had not been given. This is unambiguous language and for the Court to find in favour of the Defendant's new construction argument would require it to ignore the presence of and the clear sense of the termination provision.
47. Further on the 'commerciality' argument put forward by the Defendant – which is in effect that he would not have signed an agreement having the effect argued for by the Plaintiff as it was not commercially sensible for him to do so, it is of course always open to a party not properly to consider the contents of a contract that he has signed (if indeed that proves on the evidence to be the case) and to make a bad bargain. In the face of unambiguous terms in the Side Letter then the issue of commerciality does not fall to be determined.
48. The Plaintiff also contested the Defendant's argument that there is an 18 month run off period once written notice of termination is given. This so the Plaintiff argues would be at odds with the third paragraph of the Side Letter in as much as the 18 month period written into the Side Letter is linked to when a transaction takes place. It is a question of, so the Plaintiff argues in its skeleton argument, if the arrangement survives but not for how long. If the arrangement survives, then it survives indefinitely unless, of course, notice is given under the Side Letter.
49. The Plaintiff also argues against the submissions made before us (although not contained within the grounds of appeal) that the Side Letter was not intended to apply to private transactions. We have set out that part of the Master's judgment which dealt with those arguments specifically see paragraph 76 and 78 thereof, which seems to us to meet the point raised in submission before us by the Defendant. The Plaintiff observes that the Defendant was only ever going to receive 'monies or other consideration' in respect of the sale of his shares including the private sale of his shares. That, so it is argued, is the context of 'any and all transactions', was broader in scope than describing a transaction as 'an investment as defined by the Advisory Agreement' as, in slightly different terms, referred to in the third paragraph of the Side Letter. That broader ambit must logically apply to private sales.
50. We agree with the Plaintiff's arguments on the construction of the Side Letter. We also agree with the analysis of that document by the Master set out in the paragraphs of his judgment quoted above. As we have said, when the Advisory Agreement and Side Letter were being negotiated, no one knew precisely how the transactions hoped for by the Advisory Agreement were going to be carried into effect if, indeed, at all. It seems entirely sensible to

us that the Plaintiff would seek to secure a return for the introduction to HBJ no matter how the sale of the shares in Heritage might take place and whether they were by private sale or otherwise. We see no reason why the Plaintiff would not have sought such an arrangement and in our judgment the Side Letter, whilst referencing the Advisory Agreement and arising out of the draft of the Advisory agreement, stood as a separate agreement between different parties. It did contain the agreed provisions by which it might be terminated and it did not in our judgment automatically terminate when the Advisory Agreement came to an end nor, indeed, is it covered expressly or otherwise within the Release.

51. In our judgment the Side Letter on a proper construction can apply to private transactions, and whilst in effect it may well have operated as a partial guarantee of Heritage's obligations under the Advisory Agreement, it was not restricted in ambit to that and could cover other transactions as well.
52. Accordingly we endorse the reasons of the Master and do not accept the new construction argument put forward by the Defendant. The Master's judgment in that regard stands. The summary judgment application
53. The second matter that falls to be considered is the Plaintiff's appeal against the decision of the Master that the issue of the signing of the Side Letter should go to trial for evidence. The Defendant's argument, as stated above, is in summary that on the state of the pleadings and acknowledged facts there is no issue for the Court to determine.
54. The position on the pleadings is unusual and not entirely satisfactory. As indicated above, the Side Letter contains what appears to be the Defendant's signature but the Defendant has throughout denied that he signed the Side Letter.
55. Originally he had in effect stated that the signature, whilst appearing to be his, was not in fact his but as we have indicated above, his position has changed and it is now accepted that the signature on the Side Letter is in fact his. There is no positive case pleaded as to how the signature got there and at paragraph 9.7.5 of the re-amended answer the Defendant states:- "Mr Buckingham is not bound by his signature on the Side Letter as he does not recall ever agreeing to enter into an agreement with Trico on the terms of the Side Letter or agreeing to be bound by its terms and he would not have been willing to enter into such an agreement."
56. The fact that the Defendant does not remember executing the Side Letter, if in fact he did, does not of itself mean that he did not do so.
57. The real area of dispute on which the Master determined that there was an issue to go to trial is in the circumstances allegedly surrounding the signing of the Side Letter. As indicated above, the Plaintiff has throughout maintained that the Side Letter was signed on 13th February, 2014, at Portelet House whereas the Defendant, and his partner Ms Sosnowska, maintain that no such meeting and accordingly signature took place. Irrespective of the state of the pleadings, therefore, there was and continues to be a direct conflict in the evidence submitted by the Plaintiff, specifically Mr Ruane, and the Defendant

and his partner.

58. In paragraph 108 of the Master's judgment the Master sets out his conclusion with regard to the summary judgment application as follows:- "In my judgment, there is an arguable factual dispute namely whether or not the Side Letter was signed on 13th February, 2014, as the plaintiff alleges or whether or not no meeting occurred on 13th February which is the case advanced by the defendant supported by the affidavit filed by his partner. I am unable to resolve this conflicting evidence on a summary judgment application. I also regard this factual dispute as one that requires a trial firstly because cross examination is required to resolve the factual dispute for the reasons set out in Long v Farrer & Co cited above. A trial is also required because there is no alternative case on execution advanced by the plaintiff. Either the plaintiff satisfies the Royal Court that the Side Letter was signed on 13th February, 2014 or the evidence of the defendant and his partner is preferred. If the evidence of the defendant and his partner is preferred, the plaintiff's claim must then fail as there is no alternative case advanced by the plaintiff that the Side Letter was signed on some other occasion. Indeed the evidence filed in support of the summary judgment application is quite clear in that Mr Ruane deposes on three separate occasions in three different affidavits that the Side Letter was signed on 13th February, 2014. I therefore also do not accept the plaintiff's argument that when the Side Letter was signed did not matter. This submission is inconsistent with the plaintiff's own pleaded case and affidavit evidence about when and where the Side Letter was signed. I cannot grant summary judgment in favour of a party contrary to that party's own pleaded case and evidence."
59. The Plaintiff's position has, as we have already indicated, changed since the Master's judgment in as much as whilst its primary case remains that the Side Letter was signed on 13th February, 2014, there is now a pleading to indicate that the Plaintiff will rely on any other finding by the Court that signature happened at a time and place other than Portelet House on 13th February, 2014, to say that the Side Letter constitutes a binding contract.
60. The pleadings now provide in effect that if the signature was signed by the Defendant then he would be bound by its terms. This is specifically pleaded at paragraph 10d.1 of the re-amended answer of 21st August, 2019, in which the Defendant said:- "It is admitted that if (which is denied) Mr Buckingham had signed the Side Letter and consented to be bound by its terms, the validity of the Side Letter would be unaffected by when and where he did so."
61. Furthermore, also as indicated above, the Plaintiff refers to the telephone evidence which provides support for its primary case.
62. The Plaintiff urges, in essence that taking the pleadings, the acceptance of the veracity of the signature and the inability to plead fraud together means that there is no issue that need go before the Court in February.
63. The Plaintiff referred us to a number of cases in support of the proposition that the presence of the party's signature is in general terms determinative of the binding nature of a contract. In particular the Plaintiff refers to the case of L'Estange v F Graucob Ltd [1934] 2 KB at p403

in which the Court said:- “In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not. ... In this case the plaintiff has signed a document headed ‘Sales Agreement’ which she admits had to do with an intended purchase, and which contained a clause excluding all conditions and warranties. That being so, the plaintiff having put her signature to the document and not having been induced to do so by any fraud or misrepresentation, cannot be heard to say that she is not bound by the terms of the document because she did not read them.”

64. This principle was echoed in the case of *Gallie v Lee* [1971] AC1004 HL in which their Lordships said at para 41:- “How then ought the principle, on which a plea of non est factum is admissible, to be stated? In my opinion, a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, that is, more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. Many other expressions, or adjectives, could be used – “basically” or “radically” or “fundamentally”. In substance, the test does not differ from that which was applied in the leading cases of *Thoroughgood* (1582) 2 Co Rep 9b and *Foster v Mackinnon* (1869) LR 4 CP 704, except in moving from the character/contents distinction to an area in better understood modern practice. To this general test it is necessary to add certain amplifications. First, there is the case of fraud. The law as to this is best stated in the words of the judgment in *Foster v Mackinnon* (1869) LR 4 CP 704, 711 where it is said that a signature obtained by fraud ‘is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, the he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.’ In other words, it is the lack of consent that matters, not the means by which this result was brought about. Fraud by itself may do no more than make the contract voidable. ... I must, however, deal specifically with the broad principle stated by the Master of the Rolls as his conclusion from his investigation of the law, at pp 36-37: ‘... whenever a man of full age and understanding, who can read and write, signs a legal document which is put before him for signature – by which I mean a document which, it is apparent on the face of it, is intended to have legal consequences – then, if he does not take the trouble to read it, but signs it as it is, relying on the word of another as to its character or contents or effect, he cannot be heard to say it is not his document. By his conduct in signing it he has represented, to all those into whose hands it may come, that it is his document; and once they act upon it as being his document, he cannot go back on it, and say it was a nullity from the beginning.”

65. Although these last two authorities are English, the Plaintiff points to the extract from Pothier – *Traité des obligations* Part IV Chapter I which, (in translation) says:- “Article II Private documents
742. There are different kinds of private documents: ordinary privately signed documents, those from public archives, census and burrowed papers, merchant journals, household papers, unsigned writings: tallies also have some resemblance to private documents. §I Ordinary privately signed documents
743. Ordinary privately signed documents are binding for those who signed them, their heirs, or successors, as authentic documents: but there is this difference between these documents and authentic documents, that the latter are not subject to any recognition; whereas the creditor is not able, by virtue of a privately signed document, to obtain any conviction against the person who subscribed it, his heirs or successors, unless he has previously concluded that the document be recognised, and has this recognition endorsed in a judgment; see edit of December 1684. In this respect, there is a difference between the person who has himself subscribed to the document and his heirs or successors. The latter, when they are required to recognise the signature of the deceased person whose heirs they are, may not recognise it, are not obliged to recognise it, or to deny it specifically; and on the declaration that they do not recognise it, the judge orders a verification. Whereas the person who has himself subscribed to the document, who is unable to ignore his own signature, has to recognise it or deny it specifically; and unless he denies it, the judge pronounces the recognition of the document as subscribed by him.
744. In consular jurisdictions, when the defendant disavows the truth of the signature, the consular judges must refer the matter to the ordinary judge to proceed to the recognition; and in the meantime, the document under private signature is not considered authentic. But there is that particularity in these courts, that as long as the defendant has not yet contested the truth of the signature, the private signature document is considered authentic and the plaintiff may, without being required to have it recognised in advance, obtain under this document a judgment of conviction; declaration of 15 May 1703.”
66. This principle echoes in more modern Jersey case law in that in *Prestige Properties Ltd v Styles* [1989] JLR 96 this Court said:- “Now, the plaintiffs did not ask the defendants to sign anything at all and as a result have to rely in these proceedings upon an oral agreement evidenced by their own subsequent letter to their client “confirming” their instructions. Had the plaintiffs asked the defendants to sign a copy of the letter they sent to them, the defendants would then have been bound by it (see *L’Estrange v. F. Graucob Ltd.* (5) where Scrutton, L.J. laid down a general rule which is, in our view, equally applicable to estate agent cases ([1934] All E.R. Rep., at 19): “When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he reads the document or not”).”

67. Lastly in *Home Farm Developments Ltd and others v Le Sueur* [2015] JCA 242 at para 46 the Court said:- “The consequences of holding that the misunderstanding of a contract by one party is sufficient *erreur* to invalidate the contract would be startling. Let us take a simple case where a plaintiff and defendant disagree over the meaning of a contract. The plaintiff argues for interpretation X and the defendant for interpretation Y. Applying the approach set out in §32 above, the court rules that interpretation X is correct. If an *erreur* as to interpretation by the defendant were held to be sufficient to avoid the contract, he would have lost the battle but won the war, because his interpretation of the contract would have been rejected but notwithstanding the defeat he would be entitled to have the contract declared void on the basis of his own misunderstanding of its effect. Conversely, the plaintiff would be in a lose-lose position, despite having correctly understood the contract and being unaware of the defendant’s misunderstanding. That cannot be the law.”
68. It seems to us from these cases, which we accept, to be clear that the signature of a party to a contract is evidence of the agreement by that party to be bound by its terms whether or not the party had read the agreement provided there were no suggestion of fraud and of course the signing party is capable of reading it and has the requisite capacity.
69. This, so it seems to us, is entirely consistent with the well-known Jersey law maxim *la convention fait les lois des parties*.
70. In its skeleton argument and in submissions of counsel before us, the Plaintiff pointed to the position of parties at various times on affidavit and also listed a number of factors which might be said to undermine the credibility of the Defendant. The Plaintiff further argues that it is now irrelevant as to whether the contract was signed on 13th February, 2014, or not given that it is accepted that the contract will have legal effect no matter where and when signed provided the signature is that of the Defendant.
71. We do not agree. It is quite clear that the Plaintiff’s case for a protracted period has been based on the fact that the Side Letter was signed at a particular place on a particular date. It is only to meet the fact that a challenge to that case has been raised that the pleadings have been varied.
72. The Plaintiff argues that the only possibility for the Court, in the event that the Court accepts the evidence of the Defendant and Ms Sosnowska that the Agreement was not signed on 13th February as alleged by the Plaintiff or was not signed by the Defendant at any other time, must be that a fraud had been involved. Either his signature had been fraudulently placed at the end of a document or in some way by nefarious means an agreement had been superimposed over a pre-existing signature of the Defendant in a fraudulent manner.
73. As the Master indicated in his judgment, of course, it is not necessarily the case that a bona fide dispute as to whether or not something has been signed or a contract has been entered into must mean that one or the other party has acted fraudulently. The Court could, by way of example, find that the Defendant’s evidence is to be preferred and that the agreement was not signed by the Defendant but rather was superimposed on an otherwise blank piece of

paper which had the Defendant's signature on it as referred to in paragraph 6 above for reasons and in circumstances that do not amount to a fraud but rather some misstep in paperwork. We make no observations about what the legal consequences of such a misstep might be.

74. Furthermore, were the Court to prefer the evidence of the Defendant about the 13th February then that may have an impact on the view that the Court takes of evidence more generally in this case.
75. We make no observations about the strength of any case that might be put forward by the Defendant although we have of course considered the various points set out in the later part of the Master's

judgment.

76. That being so, we cannot say that the matter is so certain that the factual circumstances should not be tested before a court and that the court could not conclude, in some circumstances, that the Side Letter may not be held to constitute a binding agreement between the Plaintiff and the Defendant.
77. In summary, we agree the position reflected in paragraph 108 of the Master's judgment. It was not open to the Master to resolve a substantial factual dispute before him on a summary judgment application. That factual dispute is still relevant and we cannot ignore the fact that it still forms part of the Plaintiff's primary case on the signature of the Side Letter. The Court will have other evidence, including telephone evidence, to consider and it will be open in the usual way for the evidence of all witnesses to be tested. The amendment to the Plaintiff's pleadings does not in our view solve this difficulty and the Court will be left with the uncomfortable feeling that it did not have the full evidential picture before it should it make a determination, in the face of an express denial, to the effect that the Defendant was bound by the Agreement. We accept the Master's earlier determination, and indeed it has not been appealed, that there is no basis on which fraud can be expressly alleged or pleaded. That is not to say, however, that the Court is not in a position, should the evidence come out in that way, to find that the Defendant did not knowingly sign the agreement even though it is his signature. There are other factual possibilities. We respectfully agree with the cautious view taken by the Master in his approach to the summary judgment application in this case. It may be that the Plaintiff will prevail in the version long put forth of the circumstances in which the Side Letter came to be signed but it is not inevitably so. The Court will, of course, be in a position to assess the reasonableness of either party's stance following final determination and that can be, if appropriate, reflected in whatever order for costs the Court might then make.

78. For those reasons, and because there is clearly a substantial dispute as to the factual circumstances, we accepted the Master's view and echo it that that aspect should proceed to trial. Authorities Trico Limited v Buckingham [2019] JRC 095. De la Haye v De la Haye [2018] JRC 233. Arnold v Britton [2015] UKSC36 Gallie v Lee [1971] AC1004 HL Pothier – Traité des obligations Part IV Chapter I L'Estrange v F Graucob Ltd 1934 2 KB Home Farm Developments Ltd and others v Le Sueur

[2015] JCA 242

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