

JERSEY / JUDGMENT

Trico Limited v Buckingham

[2020] JCA 067 (11 May 2020)

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Court of Appeal 11 May 2020 Before : James McNeill, Q. C., President; Clare Montgomery, Q. C., and Helen Mountfield, Q. C., Between Trico Limited Plaintiff And Anthony Buckingham Defendant Advocate H. Sharp, Q. C., for the Plaintiff. Advocate J. S. Dickinson for the Defendant.

judgment

The President:

INTRODUCTION

1. Each of Trico Limited ("the Plaintiff") and Anthony Buckingham ("the Defendant") has appealed a judgment of the Royal Court, Samedi Division (Le Cocq , Bailiff, and Jurats Averty and Hughes) Trico Limited v Buckingham

[2020] JRC 009 dated 14 January 2020, on appeal from a judgment of the Master of the Royal Court (Advocate Matthew Thompson) Trico Limited v Buckingham

[2019] JRC 095 dated 29 May 2019. The issues in dispute concern an agreement contained in a letter ("the Side Letter") allegedly signed on 13 February 2014. The Plaintiff's appeal relates to the Royal Court's decision to uphold the decision of the Master that the matter proceed to trial, he having refused to grant summary judgment against the Defendant in damages for breach of the terms of the Side Letter. By his appeal, the Defendant contends that, whether the Side Letter was properly executed, on its true construction it does not apply to the transaction giving rise to the sum claimed by the Plaintiff. FACTUAL BACKGROUND 2. The factual background is set out in the judgments of the Master and of the Royal Court. For the purposes of these appeals the following summary is a sufficient introduction. 3. The Plaintiff is a Jersey company whose chairman is Terence Ruane ("Mr Ruane"). Its other directors are Matthew Corbin ("Mr Corbin") and Clare Treharne ("Ms Treharne"). 4. The Defendant is a businessman who, in the early 1990s, founded a company known as Heritage Oil Limited ("Heritage"). In 2014 the Plaintiff and Heritage signed a letter of engagement dated 13 February (the "Advisory Agreement"), whereby the Plaintiff was engaged to introduce Heritage to His Excellency Sheikh Hamad bin Jassim bin Jaber al Thani ("HBJ"), a member of the Qatari Royal Family, or to other (previously agreed)

sourced investors, with a view to Heritage obtaining outside investment. Upon the Plaintiff fulfilling its responsibilities and upon certain types of investment being made, Heritage undertook to pay the Plaintiff a success fee of an amount equal to 4.5% of the value of the subject transaction. 5. On the day on which it is alleged the Advisory Agreement was executed, the Plaintiff alleges that it and the Defendant entered into the Side Letter. This is denied by the Defendant. 6. The Side Letter was 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." 7. A 'take private' transaction was completed by June or July 2014 ("the 2014 Transaction") whereby Energy Investments Global Limited ("EIGL") acquired 80% of the share capital of Heritage for the sum of £739,187,084.80 following which Heritage was delisted from the FTSE 250 and taken private. In that transaction, the Defendant sold a personal 4.63% shareholding in Heritage; and Albion Energy Limited ("Albion") sold a 9.41% shareholding in Heritage but retained a 20% shareholding. Also, the Defendant entered into arrangements pursuant to which, among other matters, he agreed to act as a consultant to Heritage and agreed to restrictions upon the sale by Albion of its remaining shares in Heritage for 5 years. 8. After that sale, the Plaintiff sought payment of about £33M, being 4.5% of the sum paid by EIGL. Following negotiations between HBJ and Mr Ruane, the Plaintiff agreed on about 10 July 2014 to accept a payment of £16M. At the same time the Plaintiff and Heritage negotiated an instrument of termination and release which was executed on 21 July 2014 ("the Release"). The Release provided that, in consideration of the payment of the said £16M, Heritage and its shareholders, subsidiaries, employees, directors, consultants and agents were discharged from any claims and duties under, in respect of or in connection with the Advisory Agreement. It provided further that all provisions of the Advisory Agreement were terminated, including those expressly stated as surviving termination. 9. In January 2018, Albion sold its remaining 20% shareholding in Heritage to EIGL for US\$100M payable in three instalments during 2018 ("the 2018 Transaction"). EIGL failed to make full payment and Albion issued proceedings against it in the High Court of England and Wales to recover the unpaid sum of about US\$13M. We have been informed that Albion was granted summary judgment against EIGL for payment of that sum on 14 February 2020. EIGL has since sought leave to appeal. 10. By the present proceedings the Plaintiff claims

that, pursuant to the terms of the Side Letter, the Defendant owes it 3% of US \$100M, i.e. US\$3M. 11. Although the Defendant initially denied having signed the Side Letter, he later admitted that it bears his signature although he does not recall when and where it was signed and specifically denies that it was signed at the alleged meeting at his home on 13 February 2014. In its appeal, the Plaintiff contends that the only issue is whether the Defendant is bound by the Side Letter in the absence of any pleaded case of fraud or any other pleaded case that would vitiate the otherwise binding nature of the Defendant's signature. The Plaintiff says that, as there is no issue that requires a trial, it is entitled to summary judgment. The Defendant contends that nothing more than a tenable denial is required. The Defendant, in its appeal, contends that, without prejudice to whether it is binding on him, the Side Letter, on a proper construction of its terms, did not apply to the 2018 Transaction. This is contested by the Plaintiff. THE TEST ON APPEAL 12. On 14 January 2020 each party was granted leave to appeal by the Bailiff. 13. The parties are agreed that the proper construction of the Side Letter is a matter of law in which the court's function is as described by the Court of Appeal in Trilogy Management Limited v YT Charitable Foundation (International) Limited and Others

[2012] JCA 152 (at paragraph 68): "On an appeal raising a question of construction, the Court of Appeal will no doubt, as in all matters of law, give careful consideration to the views expressed by the Court below, but it must itself decide what as a matter of law the relevant words mean." 14. At this interlocutory stage, we are concerned only with the documentary evidence which has been considered both by the Master and by the Royal Court and it follows that the views expressed by the courts below carry less weight than when a lower court has had the benefit of hearing witness evidence. 15. The test to be applied by this court in relation to an appeal in respect of an interlocutory decision was set out in Abdel Rahman v Chase Bank (C. I.) Trust Company Limited

[1984] JJ 127 and approved by this court in HRCKY Limited v Hard Rock Limited and Anor

[2019] JCA 123 (at paragraph 7). This court will only interfere with the decision of the Royal Court if:- " i . The Royal Court misdirected itself with regard to the principles in accordance with which the discretion has been exercised; or ii. The Royal Court, in exercising its discretion, has taken into account matters which ought not to have been taken into account or has failed to take into account matters which ought to have been taken into account; or iii. Where the decision is plainly wrong; or iv. There has been a change of circumstances after the Royal Court made its order that would justify acceding to an application to vary it." THE MASTER'S JUDGMENT 16. The Master's judgment dealt with five different matters: (1) The Defendant's application to re-amend his answer to plead, in effect, an allegation that the Defendant was a victim of fraud perpetrated by Mr Ruane pursuant to a deception unknown to the Plaintiff whilst acknowledging that he could not plead fraudulent misrepresentation. The Master refused leave to re-amend the answer and the Defendant has not sought to appeal that decision. (2) The Master rejected an application by the Defendant for specific discovery of certain documents, the details of

which are not relevant to this appeal because the Master's decision has not been challenged. (3) The Master construed the wording of the Side Letter because of the Plaintiff's application for summary judgment. (4) The Master construed the wording of the Release because of the Plaintiff's application for summary judgment. (5) The Master dismissed the summary judgment application, having decided there was an issue to be tried which required evidence to be heard. The last two matters are the subject of this appeal. 17. In relation to the meaning of the Side Letter, the Master adopted an approach which he had considered in *De la Haye v De la Haye*

[2018] JRC 233 . He applied the principles established by this court in *Trilogy Management v YT and Others*

[2012] 2JLR [N] 19 and *Trilogy Management v YT and Others*

[2012] JCA 152 which approved views expressed in *La Petit Croatie Limited v Ledo*

[2009] JCA 221 where, at paragraph 11, Martin JA, with whom the other members of the court agreed, endorsed the principles set out in the judgment of Commissioner Page in *In Re Internine Trust*

[2005] JLR 236 at paragraph 62, and summarised them 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 meanings; 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." 18. The Master correctly identified that he had jurisdiction to construe documents on a summary judgment application where there is a short question of construction. Furthermore, the active case management provisions contained in Rule 1/6 (6) of the Royal Court Rules 2004, required him to consider whether he could construe the Side Letter or whether any construction issue required a trial. 19. Although he referred to documents exchanged between the parties (which included drafts of the Side Letter) in order to set out the surrounding circumstances, he correctly identified that evidence of drafts is inadmissible as an aid to construction (paragraph 76). E-mail exchanges showed that it was known to those negotiating the Side Letter that private sales had been excluded from the Advisory Agreement (paragraph 76). He therefore proceeded to find (paragraph 78): "The Side Letter does not therefore guarantee generally a fee payable to the Plaintiff if Heritage did not pay, but only applies to the moneys 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 moneys received by him or companies for him."

20. The Master found that the Side Letter did not only apply to a private sale by the Defendant as its terms were wide enough to include other transactions (paragraph 79). Consequently, if the Defendant (or entities he owned or controlled) received moneys under a transaction covered by the Advisory Agreement where Heritage was liable to pay a fee but failed to do so, the Plaintiff would have been able to look to the Defendant for a fee of 3% of the moneys received by the Defendant (or entities) on his behalf. That fee being less than the 4.5% fee Heritage should have paid under the Advisory Agreement, in a limited way the Side Letter operated as a partial guarantee. 21. He rejected an argument that the Side Letter was only intended to cover one transaction (paragraph 80). It was important to him that, at the time the Side Letter was executed, it was not known how many transactions might follow. Such a contention appeared inconsistent with the apparent intention that the Plaintiff receive a fee for whatever transactions followed from any introduction made by it. 22. The Master also rejected an argument that a transaction falling within the Advisory Agreement was a necessary pre-condition for the Defendant being required to pay any fee (paragraph 81). The Side Letter covered whatever type of transaction took place so long as it involved HBJ. He said that was why the Side Letter referred to "any and all transactions with HBJ" unlimited in time and unlimited in terms of the number of transactions. 23. He also held that, by reason of being unlimited in time albeit containing a notice provision that the arrangement was to continue for a further 18 months after termination, the Side Letter covered any transaction involving HBJ within that period (paragraph 82). 24. Finally, the Master rejected an argument that the 2018 Transaction was not covered by the Side Letter because it was effected through a special purpose vehicle indirectly and beneficially owned by HBJ and his family (paragraph 86). HBJ was the sole director of the company and the person the Plaintiff dealt with. The fact that the company might be owned by HBJ and his family rather than HBJ alone did not mean that a sale by the Defendant to the company is not a transaction involving HBJ. 25. However, the Master was satisfied that there was an issue to be tried because the parties were asserting alternative cases as to when the Side Letter was signed. The Plaintiff's pleaded case, supported by affidavit evidence, was that the Side Letter was signed on 13 February 2014 and it had advanced no alternative case (the pleadings were subsequently amended as we explain below). The affidavit evidence of the Defendant and his partner, Miss Sosnowska, was that no meeting took place that day. In the face of such a conflict of evidence, the Master concluded that cross-examination was required to determine what happened on 13 February 2014. He refused summary judgment but made a conditional order under Rule 7/4 (2) of the Royal Court Rules 2004 requiring the Defendant either to pay into court or to provide an irrecoverable bank guarantee or equivalent security in the sum of US\$3M. THE ROYAL COURT JUDGMENT 26. The Royal Court agreed with the Master's approach to the interpretation of the Side Letter and it agreed with his determinations and findings (paragraphs 14 to 22). However a further argument was raised by the Defendant before the Royal Court: namely that the Side Letter only applied to the 2014 Transaction, 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 was therefore no longer of application at the time of the 2018 Transaction. In the alternative, any continuing obligations arising out of the Side Letter were terminated in 2014 under the terms of the Release. This argument was permitted through the Master's order on 20 August 2019 allowing the Defendant to re-amend his amended Answer and has been referred to as the 'further construction argument'. 27. In support of that argument the Defendant referred in particular to deletions made to the Advisory Agreement between the first draft and the final version and contended that the Side Letter was intended only to fill gaps created in the Advisory Agreement as a result of such alterations made during the course of negotiations. It was argued, therefore, that the Side Letter was inextricably linked to the Advisory Agreement and so could not apply to the 2018 Transaction which post-dated the agreement to the Release terminating the Advisory Agreement. 28. In rejecting the further construction argument, the Royal Court, unlike the Master, did not place any weight on the negotiation correspondence (paragraph 31). It made a firm finding that the Side Letter was 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 (paragraph 33). It also reached the view that it was not commercially improbable that the Plaintiff would wish to reserve a fee for any transaction, unlimited in time that came out of an introduction (paragraph 44). 29. In addition, the Royal Court emphasised that the Side Letter stood as an agreement separate from the Advisory Agreement because it involved different parties and by its express terms did not automatically terminate when the Advisory Agreement came to an end nor when the Release was signed (paragraph 50). 30. On the summary judgment issue, the Royal Court took a different approach to that of the Master because the context of the matter had altered subsequent to the Master's judgment. By amendment to its Order of Justice dated 23 August 2019 the Plaintiff pleaded an alternative case that, if the court found that the Side Letter had been signed on a date other than 13 February 2014 or at a different time and place, the Plaintiff would rely on such findings as establishing that the Side Letter was in fact binding. The Plaintiff also put before the Royal Court telephone evidence to suggest that on 13 February 2014 Mr Ruane was at the same place as Ms Sosnowska. That evidence could indicate that they were present when the Side Letter was signed but it directly contradicted the affidavit evidence filed by the Defendant and Ms Sosnowska thereby undermining the credibility of both of them. 31. The effect of that amendment to the Order of Justice was that the Plaintiff's case no longer depended upon proof of when and where the Side Letter was signed. The Defendant had admitted that it bore his signature and therefore, the Plaintiff contended, he was bound by the agreement. That was said to be acknowledged by the Defendant in his re-amended answer of 21 August 2019 in which he 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." However, despite that pleading, the Royal Court said it did not agree that it was irrelevant where and when the Side Letter had been signed. The Plaintiff's case for a protracted period had been based on its having been signed at a

particular place on a particular date. If that turned out to be wrong, the court could find that the signature had been placed at the end of the document, or that in some way by nefarious means an agreement had been superimposed over a pre-existing signature in a fraudulent manner. The court also indicated that circumstances might be such as did not amount to fraud but included "some misstep in paperwork", the legal consequences of which would have to be assessed. The Royal Court also considered that if the Plaintiff's evidence regarding the signing of the Side Letter were found to be incorrect, it could raise doubt on the credibility of other evidence. The court therefore decided that the factual question as to when and where the Side Letter had been signed remained a relevant issue that required to be determined at trial. Consequently, the Royal Court upheld the Master's decision to dismiss the Plaintiff's application for summary judgment. THE PARTIES' CONTENTIONS IN THE COURT OF APPEAL 32. As to the Defendant's appeal, Advocate Dickinson repeated the contentions which did not find favour before the Master or in the Royal Court including the further construction argument. 33. The Defendant contended that the Advisory Agreement and the Side Letter were inextricably linked, the Side Letter being parasitic upon the Advisory Agreement. It therefore needed to be construed in the commercial context and intended manner of operation of the Advisory Agreement. It was born out of the drafting of the Advisory Agreement. It was terminated by performance following the completion of the 2014 Transaction when the Plaintiff fulfilled its engagement under the Advisory Agreement. Alternatively, it was terminated when the Release was signed. It was intended only to be short lived and not to continue for an indefinite period. Consequently, as the 2018 Transaction occurred long after the Side Letter terminated and long after the eighteen month run-off period contained in the so-called sunset provision had expired, there was no room for a continuing obligation. Further, the only obligation undertaken by the Plaintiff was to introduce an investor under the Advisory Agreement: it undertook no separate obligations under the Side Letter. Therefore, there was no commercial justification for the Defendant to enter into the Side Letter if, in accordance with its terms, he was obliged to pay something to the Plaintiff in return for nothing. 34. The Defendant criticised the Master's judgment for failing to consider that the Side Letter could have been, and in the events that happened was, terminated by performance rather than by written notice. 35. In his skeleton argument, Advocate Dickinson made five specific criticisms of the Royal Court's judgment. 36. First, the Royal Court erred in holding that evidence of the negotiations that preceded the execution of the Advisory Agreement and the alleged execution of the Side Letter including previous drafts of both was not of assistance in construing the Side Letter; it should have had regard to those matters as part of the factual matrix. 37. Second, the Royal Court erred in holding that the Side Letter 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; there was no basis for so holding and the Royal Court had identified none. 38. Third, the Royal Court erred in law and/or in principle in approaching the question of whether the construction of the Side Letter advocated by the Plaintiff made commercial sense; the Royal Court should have addressed whether the

Plaintiff's construction of the Side Letter made commercial sense from the perspective of each party rather than solely from the perspective of the Plaintiff. 39. Fourth, the Royal Court erred in holding that the Side Letter stood as a separate agreement between the parties when it was inextricably linked to and parasitic upon the Advisory Agreement. 40. Fifth, the Royal Court erred in law in accepting the Plaintiff's submission that the clear and unambiguous language of the Side Letter excluded the construction for which the Defendant contended. The Side Letter was, unarguably, infelicitously worded. The approach adopted by the Royal Court produced a result that is commercially nonsensical and profoundly unjust. 41. Consequently, the Defendant asked this court: to construe the Side Letter as not applying to the 2018 Transaction; to dismiss the proceedings; and to order that the money paid into court be repaid to the Defendant. 42. In response, Mr Sharp QC for the Plaintiff, argued that the termination provisions in the Side Letter were clear and unambiguous; this provided an insurmountable difficulty for the automatic termination argument unless the clause was merely to be ignored. 43. Before the Defendant could assert a commercial common-sense argument, there had to be an alternative construction of the second paragraph of the Side letter, which there was not. The Court could not rewrite the agreement. 44. That said, there was commercial rationale: a private sale or sales of the Defendant's shares at any time was a very real possibility and, in short, the Defendant needed the introduction to HBJ, which the Plaintiff was uniquely placed to provide. The Defendant's liability was not open-ended. 45. In support of the Plaintiff's appeal, Mr Sharp QC contended that in the absence of any pleaded allegation of fraud, and as a result of the Defendant's admission that the Side Letter bears his signature, there is no issue to be tried. The Royal Court was wrong to explore circumstances in which his signature might have been placed on the Side Letter when fraud had not been alleged and where Paul Atherton ("Mr Atherton"), a former CEO and CFO of Heritage, has been exonerated by the Defendant of having any involvement in placing his signature on the Side Letter. 46. The Plaintiff argues that the Royal Court was in effect inviting the Defendant to go on a fishing expedition to see whether any evidence might emerge which could support an allegation that the Defendant's signature on the Side Letter was procured by fraud where fraud had not been pleaded. Such an approach was said to be wholly improper and conflicted with the fundamental principles of pleading fraud which is that it must be distinctly alleged and that at trial the court will not normally allow proof of primary facts which have not been pleaded and will not do so in a case of fraud (Brakspear v Nedgroup Trust (Jersey) Limited

[2018] JRC 121 quoting the House of Lords decision in *Three Rivers DC v Bank of England (No 3)*

[2003] 2 AC 1). 47. Mr Sharp QC placed particular reliance on fresh evidence in the form of an affidavit from Thomas Stefan Harris dated 7 April 2020 that was considered *de bene esse* by the Court. Mr Sharp contended that the fresh evidence established that the Defendant's evidence as to the existence of pre-signed documents raising the possibility one had been used for the Side Letter could be entirely discounted. 48. The purpose for which the Plaintiff wished to introduce Mr Harris's evidence was to exhibit contemporaneous

records which, it was said, so obviously contradicted the Defendant's evidence as to possible ways that his signature could have appeared on the Side Letter without his consent that they could be admitted even on an application for summary judgment, on the basis of the principle in *Optaglio v Tethal*

[2015] EWCA Civ 1002 at paragraphs 34-35, and be used to reject the Defendant's evidence without the necessity to hear it. 49. For reasons we now set out we have concluded that this fresh evidence was not admissible in this appeal. 50. Firstly, the Royal Court in *Campbell v Campbell*

[2016] JRC 190 at paragraph 7 has approved the principles in *Ladd v Marshall*

[1954] 1 WLR 1489 as to circumstances in which fresh evidence may be admitted on an appeal. Evidence may only be admitted on appeal if it could not have been obtained with reasonable diligence for use below; the evidence is such that, if given, it would probably have an important effect on the result of the case; and it must be apparently credible. In relation to Mr Harris's affidavit, the second of the *Ladd/Campbell* criteria is not made out. Our judgment on the appeal as to construction of the Side Letter could only be altered by this material if we could decide, at this stage, that, without being tested by cross-examination, the evidence in Mr Harris's affidavit so incontrovertibly proved that a pre-signed document could not have been used for the Side Letter that the only explanation for the Defendant's signature being on the Side Letter was that he had agreed to its terms. In our judgment, the terms of Mr Harris's affidavit do not take matters that far. They contain an interesting examination of various documents and comparison of the location of the Defendants signature; but they do not lead to a conclusion which is all but ineluctable. Whether to admit Mr Harris's evidence, and the weight to be afforded to it will be a matter for a trial judge. 51. Secondly, the *Optaglio* principle applies only in circumstances where (undisputed) contemporaneous records so obviously contradict witness evidence contained in an affidavit that there is no real prospect of that evidence being accepted. That is a very long way indeed from the circumstances of this case, where what we have seen, albeit *de bene esse*, is further competing speculation as to how likely it is, or is not, that there is some explanation other than his consent for the Defendant's signature appearing on the Side Letter without his having consented to its terms. This is not a matter which we could possibly seek to determine at an interlocutory stage, and so it is not a proper basis upon which we, as an appellate court, could admit fresh evidence. 52. Mr Sharp QC also sought to argue (as he had in the Royal Court) that, given the Defendant had admitted that if (which was denied) he had signed the Side Letter and consented to be bound by its terms, the validity of the Side Letter would be unaffected by when or where he did so. Accordingly, Mr Sharp contended that the evidential dispute as to where and when the Side Letter came to be signed was no longer a pleaded issue and thus irrelevant. According to the Plaintiff, the only relevant pleaded issue was whether the Defendant had signed the Side Letter to which the only answer could be a claim of fraud against Mr Ruane or Mr Atherton, neither of which was advanced by the Defendant. 53. As to the

issue of summary judgment, the Defendant relied on the views expressed below. In addition, Advocate Dickinson submitted that the Plaintiff was wrong to present the choice on summary judgment as being between fraud and enforceability. He contended that there were sufficient doubts raised by the anomalous circumstances surrounding Mr Ruane's evidence about how and when the Side Letter came to be signed for it to be open to the Court to conclude after trial that the Plaintiff had not discharged the burden of proof even without a counter allegation of fraud. 54. Advocate Dickinson relied on the approach of the House of Lords in *Rhesa Shipping Co SA v Edmunds*

[1985] 1 WLR 948 in emphasising that the burden of proving a case on a balance of probabilities remains throughout on a plaintiff. Although it is open to a defendant to suggest and seek to prove an alternative case there was no obligation on them to do so. Moreover, in the event of the defence choosing to do so, there is no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case. DISCUSSION Construction of the Side Letter 55. Counsel for both parties have urged us to adopt English principles governing the interpretation of contracts as laid down by the English courts. We are not aware of any decision in which a Jersey court has held that Jersey Law is different. The Master's judgment in *De la Haye*, in which he drew upon the Court of Appeal's decisions in *Trilogy*, is authority establishing that, save where otherwise specified, the English principles will be followed in this Island even though the decisions of the English courts are not binding. There is no reason for us to disagree. 56. We consider it incontrovertible that the terms of the Side Letter are not felicitously drafted and it is unsurprising that the proper construction is disputed, on the bases summarised above. In proceeding to approach a question of the construction of the terms of a contract, we have noted the views of the Supreme Court, as set out by Lord Hodge in *Wood v Capita Insurance Services Ltd*

[2017] AC 1173. He said this: "10 The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H-1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society*

[1998] 1 WLR 896, 912-913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as

signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the Rainy Sky case

[2011] 1 WLR 2900 , para 21f. In the Arnold case

[2015] AC 1619 all of the judgments confirmed the approach in the Rainy Sky case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the Rainy Sky case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* (No 2))

[2001] 2 All ER (Comm) 299 , paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing *In re Sigma Finance Corp*n

[2010] 1 All ER 571 , para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines

which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn*

[2010] 1 All ER 571 , para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions." 57. We are perfectly content to adopt this thorough and considered exegesis as part of the law of Jersey. A constant, to which Lord Hodge adverts, is that many issues in the construction of contracts are subtly different. Here, the creation of the Side Letter and the Advisory Agreement as part of the same negotiations may add an unusual complexity. For the reasons which we now address, we consider that the creation of the Side Letter falls squarely within Lord Hodge's category of contracts, the correct construction of which may be achieved by a greater emphasis on the factual matrix, because of their informality, brevity or the absence of skilled professional assistance. As we shall also identify, this approach is engaged because of specific areas of concern which we have as to the proper construction of certain elements of the Side Letter. 58. It seems appropriate to commence by noting an e-mail chain which has been exhibited to us and to the courts below; and which shows that the principal authors of the Advisory Agreement and Side Letter were Mr Corbin, a Chartered Accountant and director of the Plaintiff and Mr Atherton, also an accountant, and CFO of Heritage. Both, in our view, would be classed as skilled professionals; but it is nonetheless significant that the Advisory Agreement and the Side Letter were drafted by persons who were not legally trained. In proposing to follow the approach in *Wood* , therefore, we would use the unitary exercise of considering both the words of the text and the factual matrix, not - we emphasise - to attempt to have some unfocussed enquiry into the subjective intentions of either party, but rather so that matters in doubt as to the construction which a fair, informed and objective bystander would place upon those words can be analysed with the full facts in mind. 59. As to dubiety in construction, there is a significant lack of clarity in numerous aspects of the text in which the Side Letter was expressed which deserves to be recorded in full. In our judgment the following parts of the text are readily capable of conflicting verbal interpretations. 60. The principal paragraph of the Side Letter provides:- "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." 61. This shows the following. First, the identity of HBJ must be ascertained from an "engagement letter between Trico Limited and Heritage Oil Plc" about which the parties are expected to know

but as to which the bystander is given no directions. Second, the brevity of this reference may indicate a direct link of unknown importance between the Side Letter and an agreement between parties other than the parties to the Side Letter. Third, how are the words "involving HBJ" to be construed? Fourth, what might be included within the provision "as a result of any and all transaction(s) with HBJ,...."? On its face this latter phrase could include matters of any nature whatsoever. 62. Moreover, the Side Letter provides:- "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 termination of this engagement". 63. Linguistically, this latter section of the Side Letter begs further questions. These appear to include the following: (a) Given that the Side Letter does not expressly require any object or consideration on the part of the Plaintiff, what is meant by "this engagement" which may be terminated at any time? Is it the same engagement as that defined in the Advisory Agreement, or is it some other engagement (undefined) between the Plaintiff and the Defendant? (b) If "this engagement" is the same as the engagement in the Advisory Agreement, does termination of the engagement in the Advisory Agreement therefore count also as "notice" which triggers the eighteen months period during which the fee arrangement in the Side Letter may continue, even if express notice of termination of obligations in the Side Letter is not given separately? Or does the fee arrangement set out in "this letter" (ie the Side Letter) terminate only when express written notice is given by one of the parties to the Side Letter itself? (c) If "this engagement" is something other than that set out in the Advisory Agreement, of what separate obligations upon the Plaintiff does the separate engagement consist? (d) In either case, who are the parties, referred to in the words "any party" , who may give written notice of termination without cause? Is this only the parties to the Side Letter (ie the Plaintiff and Defendant), or others, such as Heritage, or some other entity controlled by the Defendant also? (e) Is the right to terminate without cause exclusive - ie the only way in which the arrangement may be terminated - or is it permissive? (f) Finally, does the fee arrangement set out in "this letter" survive the termination of the Advisory Agreement or does it continue until some separate act of termination of the Side Letter, and if so, what? 64. This lack of linguistic clarity means that examining the text alone does not easily yield a clear answer as to the objective meaning of the Side Letter. The queries which we have identified are so numerous and diverse that it is not easy to categorise any one (or, indeed, any others) as either an individually ambiguous term or as an individual juristic relationship which can be accorded a precise characteristic without reference to other materials. 65. We therefore disagree with the Royal Court's approach that the drafting history is irrelevant; provided that any such evidence is used to construe the Side Letter from the standpoint of the informed bystander. 66. To the contrary, in the particular circumstances of this case, a full examination of the circumstances and commercial context in which the Side Letter was agreed may prove to be an important element leading to an objective construction of the

linguistically ambiguous terms and import of the Side Letter. 67. In this appellate exercise we adopt the iterative approach in Wood , and have examined the numerous affidavits and exhibits before us to consider whether they offer sufficient evidence of the context in which the Side Letter arose to enable us to determine this issue on an interlocutory basis. For the reasons which we now set out, we have concluded that they do not. 68. We start by recording the details of the drafting process described in the e-mail chain between Mr Corbin and Mr Atherton. 69. The first e-mail which we have seen, sent on Tuesday 4 February 2014 by Mr Corbin, explained that he was attaching the first draft of an engagement letter (to become the Advisory Agreement) reflecting the discussions between Mr Atherton, the Defendant (who, of course, may have been representing the interests of Heritage or his own or both) and Mr Ruane over the preceding fortnight. There is no indication either in pleadings or affidavits as to the nature or details of such discussions as are said to have taken place. 70. Under the heading "Our Responsibilities", the draft Advisory Agreement recorded a meeting between Mr Ruane and HBJ: the latter being said to be interested in acquiring a strategic stake in Heritage. However, the draft is not limited to the introduction of HBJ. The first objective of the engagement then under negotiation was to "Source an Investor(s) (sic) who will acquire a significant stake in Heritage, for strategic purposes and to create shareholder value." Throughout the draft there is reference to Investors in the plural both in the defined term "Sourced Investors" and elsewhere as "investors" and "investor(s)". The paragraph headed "Our Responsibilities" stated in parentheses: "(for the purposes of this Engagement Letter it is agreed that HBJ, or any other investor making a direct or indirect investment in Heritage as a result of the involvement of HBJ will be a Sourced Investor)". This indicated that a specific purpose of the Plaintiff's engagement with Heritage was to attract investment from HBJ or persons whom HBJ might introduce. However, other terms used in the agreement were not limited to HBJ and included potential investors wholly unconnected with HBJ. Nor, on the language of the text, did the engagement appear necessarily to be linked to a single transaction. The Advisory Agreement, at that stage of negotiation, was silent on this matter. 71. Whilst the target time-line in the Advisory Agreement for completing the transaction was six months, the termination provisions provided for the engagement to be terminated "without cause at any time by any party giving written notice to the other party" and made provision for the remuneration (fees and expenses) payable to the Plaintiff to survive the termination of the engagement "in the event that any transaction with a Sourced Investor occurs within two years of the date of termination of this engagement." Again, the agreement may appear - but it is not clear - to have contemplated more than one transaction. The success fee was proposed at "[3/5]%" of the value of any offer to Heritage. The draft included special provisions in the event of an offer to acquire 29.9% of the shares in Heritage which would not trigger Stock Exchange regulations requiring a public offer. In those circumstances, the draft provided for the same fee to be payable by Heritage; but in order to protect the Plaintiff as regards shareholders who had not taken advantage of the private offer it said that "it is the sole responsibility of Heritage to settle the fee to Trico in these circumstances, and therefore it is the responsibility of

Heritage to put in place back to back fee arrangements with shareholders who may sell under a private offer from the Sourced Investor(s), if applicable." 72. That last quoted provision was deleted by Mr Atherton when he responded in an e-mail on Sunday 9 February 2014. He made other proposed changes including specifying that the fee would be 4.5%. He reduced the period during which the remuneration obligations would survive termination from two years to one year. Further changes proposed by him are not material to the issues before us. 73. Mr Corbin replied two days later, on Tuesday 11 February, accepting the majority of Mr Atherton's proposals, subject to a few changes, including amending the one-year period to eighteen months. He attached a first draft of the Side Letter. The terms of that draft are substantially the same as the final version with which we are concerned save for the termination provisions which were inserted by Mr Atherton in an e-mail sent on Wednesday 12 February. They are identical to the termination provisions in the Advisory Agreement. 74. In the covering e-mail of 11 February Mr Corbin said "Also, we have attached a simple letter that we would like to put in place between [the Defendant] and Trico, and we should be grateful if you would obtain comments on this - this letter is designed to cover off on matters that you excluded from the Heritage/Trico agreement." The only relevant provision to which he could have been referring was the requirement that Heritage be responsible for putting in place back to back fee arrangements with shareholders who may sell under a private offer which did not trigger the requirement for a public offer. If the sole purpose of the Side Letter was to reflect the deletion of that provision, it does not explain why the terms of the Side Letter do not relate solely to a private placement of shares but, on their face, extend to any other transaction involving HBJ where the Defendant might receive a payment but the Plaintiff would not be paid by Heritage. We do not know, on the current state of the evidence, what comments, if any, were made, in response to Mr Corbin's e-mail. 75. These exchanges display a not unusual type of commercial negotiation where there is a degree of understanding between those engaged and where immediate solutions are found to changes of position. As the Royal Court put it, the process was somewhat fluid. 76. The commercial relationship in the agreement being negotiated in the Advisory Agreement between the Plaintiff and Heritage was clearly intertwined in some way with the commercial relationship which was being proposed between the Plaintiff and the Defendant, on which Mr Atherton's views were being sought on 12 February 2012; and evidence on what the parties meant by the "engagement" between the Plaintiff and Heritage ought to cast light on whether or not there was any further engagement between the Plaintiff and Defendant, the circumstances in which the duty in the Side Letter upon the Defendant to make payment might arise, and the circumstances in which the engagement might terminate. 77. To the interested bystander, the answering of these queries might be thought to gain some assistance from consideration of the "engagement letter between Trico Limited and Heritage Oil Plc" for three reasons. First, this cross-reference was used as appropriate short-hand rather than being specifically restated. Second, the words in parentheses seem to suggest not only a relationship between the Defendant and Heritage but also an interrelatedness of the obligations under the Side

Letter and those under the "separate engagement letter between Trico Limited and Heritage Oil Plc". Third, and separate from those two points, is that the matters covered by the Side Letter are directly related to arrangements through which the Plaintiff may have "received a fee from Heritage Oil Plc directly in respect of the same monies received [by the Defendant]." 78. Each of these reasons militates against the idea that this Side Letter was unconnected with the Advisory Agreement. To the contrary they show that the two agreements were, at least in some respect, inextricably linked. The question for the court, therefore, is whether, notwithstanding the individual and clear termination provisions of the Side Letter, the latter remains independently applicable to transactions notwithstanding the Advisory Agreement having reached its demise. 79. The answer to this question depends on whether "this engagement" as referred to in the Side Letter was objectively intended to mean some engagement other than that between the Plaintiff and Heritage set out in the Advisory Agreement. If so, it would appear to us that the termination provisions of the Side Letter are best read as separate from those in the Advisory Agreement, and to require a separate service of written notice by the Plaintiff or Defendant. But if not, then it would appear to us that the Defendant's separate obligation to pay the Defendant 3% of the monies received by him or entities controlled by him would terminate eighteen months after the termination of the engagement by any party to the Advisory Agreement or the Side Letter. 80. In the end, and not without a degree of hesitation, we have concluded that which of these competing constructions of the words "this engagement" constitutes the objective meaning of these words in the Side Letter is not one which can properly be determined on an application for summary judgment, rather than after the testing of evidence in cross-examination. The following considerations arise. 81. Whilst the exchange of correspondence during negotiation makes it clear that the Side Letter had emerged as a direct response to an exclusion from the Advisory Agreement, this does not, on its own, offer full evidence concerning to what the word "engagement" in the Side Letter was intended to refer. As we have noted above, if the sole purpose of the Side Letter was to reflect the deletion of the responsibility of Heritage to put in place back to back fee arrangements with shareholders who might sell under a private offer, it is curious that the terms of the Side Letter do not relate solely to a private placement of shares. Equally curious, however, is that, on the face of the Side Letter, the obligation of the Defendant is of the greatest possible width. It emerges upon him or entities in which he is interested (except Heritage) receiving "consideration". What does that consideration relate to? It is restricted to something arising "as a result of any and all transaction(s) with HBJ". Such a phrase, taken on its own, might include the sale of a mansion, jewellery or any other asset. 82. There are hints in the language of the Side Letter that the Defendant's obligations under the Side Letter arise only in relation to monies or consideration which arise as a result of the "engagement" of the Plaintiff by Heritage and which are subsequent to the "successful completion of a 'take private' or any other transaction involving HBJ". The latter part of the phrase might still extend to any other transaction whatsoever involving HBJ, but the oblique reference to a 'take private' transaction would suggest to the commercially astute reader that the type of transaction in

the mind of the parties was one relating to the transfer of shares in a company. Even so, this could be any shares in any company at any time. The second restrictive phrase is that the obligation does not arise "to the extent that Trico Limited has not received a fee from Heritage Oil Plc directly in respect of the same monies received." The third is that the Defendant is to be "responsible to pay [the Plaintiff] a fee". 83. Even with those restrictions, the intelligent reader is left with an unexpected lack of clarity. Does the obligation, properly construed, apply to the receipt of consideration arising out of the transfer of any shares in any company at any time? To the answering of that query the Side Letter provides two signposts. The first is that the obligation is to pay a "fee". In other words, the transaction or transactions in question are limited to those in respect of which the Plaintiff has already done something - that which is involved in "this engagement". Second is the indication that the transaction or transactions might include those where the Plaintiff has received a "fee" from Heritage in respect of the same monies received by the Defendant. The curious bystander is therefore left with language which is undoubtedly imprecise in that the obligation is to pay a fee but the work in respect of which that fee is due is not specified. 84. To construe what the engagement to which the Side Letter refers appears to us to involve, necessarily, a consideration of the factual matrix in order to find whether the work to be undertaken by the Plaintiff can be identified with a reasonable degree of precision. The factual matrix takes one immediately to the Advisory Agreement; and that is also a specific link in the Side Letter. But even that does not provide the full evidence of what the parties objectively agreed that the Plaintiff's engagement to the Defendant (if any) should be. 85. Clarification of this may emerge as a result of examination of Mr Ruane, Mr Corbin, or the Defendant at trial. That examination will involve an exploration of all matters that are relevant to determine the factual background to the Side Letter, including the events in relation to the termination of the Advisory Agreement, insofar as they cast light on the relevant background knowledge. We have concluded, therefore, that findings of fact by a trial court are required in order to obtain the full factual context within which the objective meaning of the text can be ascertained. This is not an exercise which, in our view, can properly be undertaken on an interlocutory basis on an application for summary judgment. In particular, we do not consider that the exercise with which we are faced must necessarily be constrained by the pleadings of parties. The courts are well aware that, in adversarial - as opposed to investigatory - processes, parties may choose whether to plead matters which they consider might not be of use in their litigation objectives. That legitimate approach by parties cannot constrain the courts when, in an adversarial process, they are obliged to consider matters of the proper construction of private contracts. At that point it is the obligation of the court to make pronouncements on law and fact which are applicable both to the present litigants and, so far as it may be worth, to those others who look to the courts for guidance. 86. To return to the words of Lord Hodge in paragraph 10 of Wood, the appropriate approach may not be 'a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of

the wider context in reaching its view as to that objective meaning.' 87. For the reasons which we have set out, we are in no doubt but that there is a lack of clarity and that recourse to the factual matrix is not only permissible, but necessary; and that the full factual matrix can only be ascertained at trial. Without this, it is not possible to answer the question of whether, notwithstanding being a separate contract between different legal persons, the "engagement" referred to is one and the same, with the result that, upon the co-relative obligations of the Advisory Agreement having come to an end, the same juristic approach should be applied to the Side Letter. In other words, the full evidence as to the objective meaning of "this engagement" in the Side Letter is necessary to determine the question of whether termination of the Advisory Agreement results in termination of the Side Letter; or that, in the whole circumstances, the Side Letter may survive termination of the other. 88. We therefore conclude that the Royal Court was right to refuse to grant summary judgment, but that, in fidelity to the principles in *Wood*, it ought also to have declined to have given its decision on the construction issue on an interlocutory basis. 89. If, however, we had not taken that view, we would still have held that, contrary to the Plaintiff's submissions on its cross appeal, the Royal Court was right to refuse summary judgment, for the reasons to which we now turn. Question of whether to refuse summary judgment. 90. The Plaintiff's appeal depends upon the correctness of its contention that it was not necessary to have a trial to establish the existence of a contract as contained in the Side Agreement and rested upon its submission that in this case there was a stark choice between fraud and enforceability. We do not agree that this is the correct analysis of the case as pleaded. The case as pleaded involves a denial by the Defendant that he signed the Side Letter at all, on the grounds that it could not have been signed by him on the date it bears and he would never have been willing to enter into such an agreement. His evidence of his movements on 13 February 2014, relevantly corroborated by the evidence of his partner Anna Sosnowska, is in our judgment sufficiently specific evidence supporting the pleaded denial to satisfy the court that there is an issue to be tried, in accordance with the principles identified in *Amy v Amy*

[2011] JLR 603 at paragraph 28 91. Whilst the Defendant is not able to evidence any alternative case that might explain how his signature came to be on the Side Letter, we do not consider that he is obliged to do so. Provided there is some evidence to support the facts that are pleaded and underpin his denial, there is a legitimate basis for refusing to enter a summary judgment against him on the basis that the Plaintiff may fail to establish that the reason the Defendant's signature appears on the Side Letter is that he knowingly signed it and thereby agreed to be bound by it. But in our judgment, for reasons summarised in paragraph 54 above, the Defendant is entitled to put the Plaintiff to proof in circumstances where there are relevant evidential issues that have to be determined between the parties including when, where and in what circumstances the Defendant's signature came to be on the Side Letter. The Defendant is entitled to test these issues in cross examination even if he is not permitted to put a positive alternative case in the course of his examination. 92. The fact that there is no longer a pleaded dispute as to where and when the Side Letter

came to be signed, if the Defendant's pleaded denial fails, does not mean that the circumstances of signature have ceased to be evidential issues between the parties. The trial court is required to determine whether the Plaintiff has proved, in the face of the denial, that the Defendant agreed to be bound by and signed the Side Letter. It can only do this by considering the credibility and reliability of the competing accounts of the parties and their witnesses as to how, when and why the Side Letter came into existence. 93. The need for a trial on this issue is not materially diminished by the state of the evidence as to the availability of documents pre-signed by the Defendant. Whilst we accept that the fresh evidence together with the information supplied by Heritage Oil renders the evidence of the Defendant that there were such pre-signed documents available in the Jersey offices of Heritage Oil less credible, it does not allow us to dismiss the Defendant's evidence that such documents existed. Although the Defendant's account has changed between his second affidavit and his tenth affidavit, he nevertheless maintains that there were documents pre-signed by him. 94. The Plaintiff's additional argument, based on the fresh evidence, that there were no suitable pre-signed documents that could have been used for the Side Letter depends upon the correctness of the assumption that the documents (if they existed) were all signed in exactly the same place. The Defendant is entitled to test that assumption.

Conclusion

95. Accordingly, there remain in our judgment triable evidential issues as to whether (i) there were pre-signed documents at the Heritage Oil office, (ii) the positioning of the signatures on the pre-signed documents (if any) was uniform and unvarying, (iii) whether there is any likelihood that a pre-signed document may have been used as the Side Letter; and (iv) if there was a contract in the form of the Side Letter, the full factual matrix within which the proper objective meaning of the phrase "this engagement" in the Side Letter, the consequent obligations of the parties to it, and the means by which those obligations could be terminated. 96. Although we accept that on the fresh evidence the room for evidential exploration in relation to the availability of pre-signed documents has narrowed, it has not removed the requirement for a trial of the first three of these issues. 97. We should add that having regard to the construction issues which we have identified above we would not regard this as an appropriate case in which to grant summary judgment in any event. Evidence as to the wider context and the factual matrix in which the Side Letter was agreed and (possibly) in which the Advisory Agreement was negotiated, agreed and terminated will have to be determined by the trial court in any event. 98. It follows that although we accept the Defendant's submission that, this being an interlocutory case management decision, made by the Master and affirmed by the Royal Court, where we could only allow an appeal if we were satisfied the decision fell within one of the four categories identified in *HRCKY Limited v Hard Rock Limited and Anor*

- [2019] JCA 123 at [8], we would independently have come to the same conclusion as the courts below that this is not a case for summary judgment, albeit for slightly different reasons. We should add that we see no error in the approach of either of the courts below and there is no material change in circumstances. The new and fresh evidence may have altered the balance of credibility and reliability between the parties. It has not however allowed us to conclude that any evidential issue has been expunged. *Authorities Trico Limited v Buckingham*
- [2020] JRC 009 . *Trico Limited v Buckingham*
- [2019] JRC 095 *Trilogy Management Limited v YT Charitable Foundation (International) Limited and Others*
- [2012] JCA 152 . *Abdel Rahman v Chase Bank (C. I.) Trust Company Limited*
- [1984] JJ 127. *HRCKY Limited v Hard Rock Limited and Anor*
- [2019] JCA 123 . *De la Haye v De la Haye*
- [2018] JRC 233 . *Trilogy Management v YT and Others*
- [2012] (2) JLR Note 19. *Trilogy Management v YT and Others*
- [2012] JCA 152 . *La Petit Croatie Limited v Ledo*
- [2009] JCA 221 . *In Re Internine Trust*
- [2005] JLR 236 . *Royal Court Rules 2004. Brakspear v Nedgroup Trust (Jersey) Limited*
- [2018] JRC 121 . *Three Rivers DC v Bank of England (No 3)*
- [2003] 2 AC 1 . *Optaglio v Tethal*
- [2015] EWCA Civ 1002. *Campbell v Campbell and Ors*
- [2016] JRC 190 . *Ladd v Marshall*
- [1954] 1 WLR 1489 . *Rhesa Shipping SA v Edmunds*
- [1985] 1 WLR 948 . *Wood v Capita Insurance Services Limited*
- [2017] AC 1173 . *Amy v Amy*
- [2011] JLR 603 . *HRCKY Limited v Hard Rock Limited and Anor*
- [2019] JCA 123 . Page Last Updated: 02 Jun 2020 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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Prepared on 28 October 2026 · Esheria