Prosight Global, Inc. v Randall & Quilter II Holdings Limited, Andall & Quilter Underwriting Management Holdings Limited


No Substantial Judicial Treatment

Court
Queen's Bench Division (Commercial Court)

Judgment Date
8 February 2021

Case No: CL-2021-000022

High Court of Justice Queen's Bench Division Commercial Court

[2021] EWHC 228 (Comm), 2021 WL 00534958

Before: Mr Simon Rainey QC (sitting as a Deputy Judge of the High Court)

Date: 8th February 2021

Hearing date: 3rd February 2021

Representation

Richard Waller QC and Jason Robinson (instructed by Cooley (UK) LLP) for the Claimant.
Philippa Hopkins QC (instructed by Bryan Cave Leighton Paisner LLP) for the Defendants.

Approved Judgment

Mr Simon Rainey QC:

Introduction and Background

1. This is an application pursuant to CPR Part 24 by the Claimant, ProSight Global Inc (to whom I shall refer as ProSight) for summary judgment in respect of claims for declarations.

2. It arises in the following way.

3. ProSight Specialty European Holdings Limited ("PSEHL") owned ProSight Specialty (ECUCM) Limited and ProSight Specialty (TSMC) Limited ("the Original Corporate Members") who were the two members of the 2015, 2016 and 2017 Years of Account of Lloyd's Syndicate 1110 ("the Syndicate"). On or about 5th February 2019, ProSight Global Inc. merged with its subsidiary PSEHL.

4. The Defendants, Randall & Quilter Holdings II Limited and Randall & Quilter Underwriting Management Holdings Limited (to whom I shall refer collectively as "R&Q"), are companies which specialise in acquiring discontinued books of insurance and reinsurance companies in run-off.

5. In introducing the parties ("the Parties"), I should also mention R&Q Managing Agency Limited ("RQMA") which became the managing agent of the Syndicate with effect from 27th October 2017. RQMA became Coverys Managing Agency Limited by change of name. On 25th October 2019, the management of the Syndicate was transferred to Capita Managing Agency Limited ("CMA").

6. The dispute between the Parties arises out of a transaction in October 2017 by which R&Q purchased the shares in the Original Corporate Members and took over the management of the Syndicate. The Syndicate was, at that time, owned and managed by companies in the ProSight group (as set out above) and was in run-off; the relevant years of account were the 2015, 2016 and 2017 years of account ("YOAs"). ProSight (I use the term where necessary to refer to the Claimant and other ProSight companies) wished to exit the Lloyd's market.

7. The Parties concluded a number of agreements, all dated 27th October 2017, which included a contract described as the Framework Agreement, designed to "set out the overarching terms" relating to the transaction: see its Recital (F). Thereafter the Original Corporate Members were renamed as R&Q companies, respectively R&Q Capital No. 6 Ltd and R&Q Capital No. 7 Ltd ("the Corporate Members").

The Disputed Issue before the Court

8. Of the various agreements entered into to give effect to the overall transaction, ProSight's claim concerns only the Framework Agreement ("the Agreement"). ProSight's application for

summary judgment seeks declarations as to the true construction and effect of one provision in the Agreement, namely Clause 13.8(a).

9. In a nutshell, the dispute between the Parties is as follows.

10. As required by the rules and bylaws of Lloyd's, ProSight posted "funds at Lloyd's" ("FAL") to support the Syndicate's underwriting business. Clause 13.8 in broad terms provides, inter alia, for an obligation on R&Q to exercise best endeavours to procure that the Syndicate managers (now CMA) take steps to replace the FAL and thereby to bring about the return or release to ProSight of the sums which it put up as FAL (which are in the region of £25,785,343.70). The issue between the Parties is as to when and in what circumstances that obligation upon R&Q takes effect.

11. ProSight's position is that clause 13.8 of the Agreement required R&Q to exercise its best endeavours obligation on and from 30 June 2020.

12. R&Q disputes that. It contends that it was not obliged to exercise such endeavours to have ProSight's FAL replaced with its own unless and until the closing of the 2017 YOA has taken place, such closing to be by way of reinsurance to close ("RITC"). That is so irrespective of the date of 30th June 2020 having been attained. It contends that it is not obliged to exercise its best endeavours to procure that CMA take steps to substitute ProSight's FAL with its own FAL until such time as R&Q elects to effect, and/or Lloyd's agrees to, the closing by RITC of the 2017 YOA.

13. R&Q further contends that ProSight owes debts in respect of the 2017 YOA and that these debts have prevented R&Q closing the 2017 YOA by way of RITC given that they give rise to "material uncertainty" for the purposes of Lloyd's bylaws and practices, such that Lloyd's will not allow closure by RITC and will require a far greater replacement FAL to be provided by R&Q.

14. ProSight's claim has been brought under CPR Part 8 and there is a further issue given that R&Q submits that this was inappropriate given the factual and evidential issues which it alleges arise and which it contends mandated the bringing of the claim under CPR Part 7 . For present

purposes, that issue is not live given that ProSight has chosen to apply for summary judgment in respect of its claim.

Relevant summary judgment principles

15. I remind myself of the relevant principles involved in a summary judgment application where, in particular, a question of construction is in play and it is on that question that the Court's summary determination is sought. I do not repeat the relevant general test which is set out in CPR Rule 24.2 at para. (a)(ii) as to the defence having no realistic prospect of success and at para. (b) as to there being no other compelling reason for a trial. R&Q contends that ProSight's claim and application fails at one or both hurdles.

16. In the particular context of construction issues, I bear in mind the numerous cases which state that the Court should "grasp the nettle and decide it" if all the evidence necessary for its proper determination is before it and the parties have had an adequate opportunity to address the arguments (CPR note 24.2.3(vii), citing *ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725* , §12 per Moore-Bick LJ; see also *Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)* , §15 per Lewison J).

17. I bear in mind also that, as R&Q submits, it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration: *Arcadia Group Brands Ltd. v. Visa Supermarkets plc [2014] EWHC 3561 (Comm)* , per Simon J at [19].

R&Q's preliminary objection

18. Ms Philippa Hopkins QC, who appears for R&Q, submits first that that the issues raised by ProSight are simply not suitable for summary determination (skeleton, para. 44). This is said to be because the Agreement does not fall to be construed in isolation. It is a complex agreement, itself forming part of a wider transaction, which was in turn concluded against the background of business and relationships at Lloyd's.

19. In so far as this is a submission that the application should not be entertained *in limine* given the issue of construction involved and because there is a dispute as to factual matrix, I

reject it. In so far as the submission was more realistically scaled down in oral argument by Ms Hopkins QC to be an injunction that this is a case where the Court should exercise extreme caution before embarking on a summary determination of the question of construction raised, I am still unable to accept it.

20. In my view, the question of construction in the present case, however it is decided, turns solely on the Agreement and the language of a small number of provisions and cannot be described as complex. No reliance is placed by R&Q on any of the other agreements (and Clause 30.8 of the Agreement provides that it is "the entire and only agreement and understanding between the parties and supersede and extinguish any previous agreement or understanding relating to the subject matter of this Agreement"). While the Agreement was concluded against the background of what may be complex Lloyd's procedures relating to FAL, as experienced players in the industry both parties, objectively, can be taken to have had that complexity in mind when they drafted the long and detailed contract between them.

21. The real issue is as to the true effect of Clause 13.8: that turns on its language approached against the background such as is alleged to be relevant by the parties. If there is a dispute as to that background, that may, if the disputed element of background or matrix is on analysis potentially relevant to construction, militate against the Court reaching a summary determination. It does not militate against the Court undertaking the exercise of assessing whether the Claimant has shown that the Defendant has no real prospect of success. There will be cases when the Court appreciates, almost at first blush, that the claim is simply not one that should have been brought by way of Part 24 application or is one which is on the borderline of what is and is not appropriate for a Part 24 . In my view, that is not this case.

(1) the Construction Issue

22. I therefore consider first the construction of Clause 13.8.

The separate questions

23. This proceeds in two stages. First is the primary issue between the Parties as to when the obligation on R&Q is triggered under Clause 13.8, as I have summarised it above.

24. Second, R&Q advance a secondary argument that, even if ProSight is right at the first stage, on its true construction, Clause 13.8 should not be construed so as to allow ProSight to take advantage of its own wrong and if it has prevented the closing of the YOA by the RITC, then Clause 13.8 will not be triggered as ProSight contends. While this has been put forward at all times prior to the service of R&Q's skeleton as turning on the express construction of Clause

13.8, Ms Hopkins QC now seeks, in the alternative, to put it on the basis of an implied term to the same effect.

25. For the purposes of testing the case on construction (but for these purposes only), Mr Richard Waller QC, for ProSight, correctly accepts that the Court must approach the matter on the basis that R&Q's allegations that ProSight owes debts in respect of the 2017 YOA and that these debts have prevented R&Q closing the 2017 YOA by way of RITC are correct (although Mr Waller QC makes clear that these allegations are strongly contested).

Relevant principles

26. There is no issue between the Parties as to the applicable principles of construction. The Court's approach to the construction of commercial contracts is now well known and was not in dispute. The principles have been re-stated in *Arnold v Britton [2015] UKSC 36, [2015] AC 1619* and *Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173* and need not be repeated *in extenso* here. In short, the court's task is to ascertain the objective meaning of the contract, read as a whole in the light of the background knowledge reasonably available to the parties at the time when it was concluded. The Parties, as is usual, sought to emphasise particular passages in support of their respective arguments, but I remind myself of the content of the speeches of Lord Hodge in *Wood* and Lord Neuberger in *Arnold* in full.

27. Given that R&Q's case emphasises the relevance of factual matrix in arriving at what it says is the correct construction, I particularly bear in mind at the outset the nature of the Agreement in overview.

28. The Agreement is 114 pages long, of which the main text (in which Clause 13.8 is to be found) is 67 pages long, and is plainly a heavily negotiated text, with the involvement of lawyers and those highly experienced in the insurance industry, making it a highly detailed and sophisticated document which has all the hallmarks of good and careful drafting. This has obvious relevance to the role which factual matrix may play and may reduce its relevance: see Lord Hodge in *Wood at 11 and 13* and Lord Neuberger in *Arnold* at [17].

29. However, I also bear in mind that no drafting, even of the most complex and heavily lawyered text, is perfect. As Lord Collins stated in *Re Sigma Finance Corp. [2009] UKSC 2* , even in such documents there are likely to be "ambiguities, infelicities and inconsistencies" [35]. To like effect is Lord Hodge's statement in *Wood* that negotiators of formal complex contracts "may not often achieve a logical and coherent text" [13]. In other words, while in a complex heavily lawyered text, the language used may have a special primacy, one needs always to guard against over-literalism and a purely black-letter approach.

30. Given that the exercise of construction is iterative, as the Supreme Court stated in *Wood* (at [12]) "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."

First Stage: When is R&Q's Obligation under Clause 13.8 engaged?

31. As I have said, the Agreement is a lengthy, detailed and professionally drafted contract for the purchase of an insurance syndicate which has been negotiated and agreed between skilled and sophisticated commercial parties, well-versed in the industry and of equal bargaining power. For that reason (as the Court did in *Wood*) I start, first, by considering its text and the particular language which the Parties have used. I then go on to consider the factual matrix and test and assess the language and the meaning indicated by it against that background.

The text of the Agreement and of Clause 13.8

32. I start by considering the background to the Agreement as it is stated in the Agreement itself in its recitals, which are contained in an introductory section of the Agreement headed "Background".

33. In objective terms, recitals are potentially an important starting point since this is where parties agree upon and seek to express in words what they see the background as being and what, in general terms, the purpose of their contract is. Here, in the Agreement, ProSight and R&Q set out their agreed statement for contractual purposes of what the background (and their own summary of the purpose and effect of their Agreement) is.

34. Recital (E) is relied upon by ProSight and provides in so far as relevant as follows:

(E) In connection with the Transaction, the parties have agreed, subject to the terms of this Agreement and the Transaction Documents, that:

[…]

(f) until:

(i) 30 June 2020, any FAL in respect of the ECA Requirement (including any FAL loading) shall be provided by the Sellers' Group or the Buyers' Group or by a combination of the two (and if provided by the Buyers' Group PSEHL shall pay, or shall procure that another member of the Sellers' Group pays, to the Buyers (or to any member of the Buyers' Group, as directed by the Buyers) a fee of 9.5% per annum of the amount of FAL provided by the Buyers' Group), in each case provided that the additional loading is not attributable to any R&Q Group Acts; and

(ii) Reinsurance to Close of the last of the Open Years, any Solvency FAL loading (including any Lloyd's loading for "red status" or "run-off status") shall be provided by the

Sellers' Group provided that the additional loading is not attributable to any R&Q Group Acts; […]

(F) The purpose of this Agreement is to set out the overarching terms

under which the transactions and the matters referred to in Recital (E) above will be effected."

35. It will be noted therefore that, at the very outset of the Agreement, the Parties draw a distinction for the purposes of the Agreement between two distinct types of FAL, namely "FAL in respect of the ECA Requirement (including any FAL loading)" and, separately, "Solvency FAL loading (including any Lloyd's loading for "red status" or "run-off status")".

36. The obligation to provide each different type of FAL is similarly defined by the Parties by reference to different cut-off points or dates. For the former type of FAL, which is effectively the basic FAL, the obligation is expressed to last up to and to end upon a fixed date: "until 30 June 2020" (Recital (E)(f)(i)). However for the later type of FAL, the Solvency FAL, no date is fixed but the obligation to provide is expressed to last until and to end upon the happening of an event, namely "until … Reinsurance to Close of the last of the Open Years" (Recital (E)(f)(ii)).

37. That lends support to ProSight's argument that the Parties have agreed and have intended to put in place two different temporal regimes in relation to basic FAL and Solvency FAL, and that they have chosen not to define the obligation in relation to basic FAL by reference to the same cut-off point as used for Solvency FAL, and not to link it to the RITC of the open YOAs. R&Q's case did not address the Recitals at all, still less grapple with the difficulties which they posed for its construction, in terms of immediate contractual context to the terms of Clause 13.

38. Clause 13 deals with "Funding Arrangements" and in so far as is relevant for present purposes, after an initial section containing provisions relating to the "Balance Statement", sets out two sections: the first is headed "ProSight CIL Requirement" which is addressed by Clauses 13.7 and 13.8 and the second is headed "Solvency II FAL Adjustment Requirement" containing Clauses 13.9 to 13.11. The remainder of Clause 13 provides for R&Q's "CIL Requirement" and "Other Obligations".

39. Clause 13.8 provides:

"Upon the expiry of the CIL Requirement FAL Obligation Period:

(a) RQMA shall use reasonable endeavours to (and the Buyers shall use best endeavours to procure that RQMA shall) substitute and/or replace all of the ProSight Current CIL FAL with FAL of the Buyers (or any member of the Buyers' Group, as applicable) to support the underwriting business of the Corporate Members in order to secure the full release of the ProSight Current CIL FAL to PSEHL or to any member of the Sellers' Group which has

provided some or all of the ProSight Current CIL FAL (as may be directed by PSEHL or any member of the Sellers' Group by notice in writing to RQMA), subject to the approval of Lloyd's (as applicable);"

40. The term "CIL Requirement FAL Obligation Period" is defined by Clause 1.1 as follows: " **CIL Requirement FAL Obligation Period** means the period commencing on the Completion Date and ending on 30 June 2020" (bold in original).

41. As a matter of language, Clause 13.8(a) is clear in my view. Upon the expiry of the CIL Requirement FAL Obligation Period RQMA's "reasonable endeavours" obligation and R&Q's "best endeavours" obligation under Clause 13.8(a) are thereupon engaged. The expiry date of that Period, and accordingly the date when the RQMA and R&Q obligation commences is fixed as 30th June 2020. The Parties have employed a set or fixed date as the expiry of the Period and as the date on which RQMA and R&Q must take steps to replace ProSight's CIL FAL.

42. Highly relevant in my view to the correct construction of Clause 13.8(a) is how the Parties have dealt, and dealt differently, with the obligation on RQMA and R&Q in relation to the Solvency FAL. In relation to this, Clause 13.11 provides:

"Upon the expiry of the Solvency II Adjustment FAL Obligation Period:

(a) RQMA shall use reasonable endeavours to (and the Buyers shall use best endeavours to procure that RQMA shall) substitute and/or replace all of the ProSight Current Solvency II FAL with FAL of the Buyers (or any member of the Buyers' Group, as applicable) to support the underwriting business of the Corporate Members in order to secure the full release of the ProSight Current Solvency II FAL to PSEHL or to any member of the Sellers' Group which has provided some or all of the ProSight Current CIL FAL (as may be directed by PSEHL or any member of the Sellers' Group by notice in writing to RQMA), subject to the approval of Lloyd's (as applicable);"

43. The term "Solvency II Adjustment FAL Obligation Period" is differently defined by Clause 1.1, not by reference to the date of 30th June 2020, but as follows (bold as in original): " **Solvency II Adjustment FAL Obligation Period** means the period commencing on the Completion Date and ending on the date upon which all of the Open Years have been closed by way of RITC" (bold in original). Here, a very different concept has been employed of looking at the final closing of all YOAs by way of RITC, rather than by reference to a date.

44. This distinction between the two types of FAL and the two different periods mirrors the position in the recitals at Recital E(f)(i) and E(f)(ii). This very strongly suggests, objectively speaking and having in mind the very sophisticated and detailed drafting, that the Parties were very well aware of the difference between choosing a period ending in a date fixed and choosing one by reference to the ultimate closing of all open YOAs by the RITC of all of those years.

While it is not usually fruitful to ask why, had the Parties intended the result to be the same for each type of FAL, the Parties had not worded the Clauses differently, in my view it is difficult to see the Parties having intended the 30th June 2020 date to be nominal only and subject to the closing of the YOAs by way of RITC. This is contradicted by the Recitals, the definitions in Clause 1.1, the separation of CIL FAL from Solvency II FAL and the separate treatment of those types of FAL using differently defined "Obligation Periods".

45. Pausing here, looking at the particular text of Clause 13.8, as part of the other provisions of Clause 13 and with the Recitals, R&Q's case is effectively unarguable on the language.

46. However, it is necessary to widen the scope of the linguistic enquiry, conscious of the need to construe the Agreement as a whole.

47. Ms Hopkins QC places reliance on Clause 12.1 of the Agreement which provides for the carrying on of "Syndicate Business" by RQMA as the syndicate managers. In that context it contains an obligation on RQMA to seek to close the 2017 Year of Account by 30th June 2020. Clause 12.1 provides:

> "RQMA, as the Managing Agent of the Syndicate shall:
>
> (a) (following consultation with PSEHL (or any member of the Sellers' Group, as notified by PSEHL to RQMA in writing)) use best endeavours to reinsure to close consistent with its fiduciary obligations and the Lloyd's Obligations:
>
> (i) each of the 2015 and 2016 Years of Account of the Syndicate after 36 months from the date of commencement of such Year of Account into the following Year of Account of the Syndicate; and
>
> (ii) the 2017 Year of Account of the Syndicate by 30 June 2020;"

48. Ms Hopkins QC therefore, correctly in my view, submits that it was therefore *anticipated* by the Parties that the date of the RITC of the 2017 YOA and the expiry of the CIL Requirement FAL Obligation Period would be one and the same and that RQMA would seek to achieve that. Mr Waller QC accepted that the Parties' obvious "ambition," when concluding the Agreement on 27th October 2017 was to close the 2017 YOA by way of RITC by 30th June 2020.

49. However this is a point which, on analysis, is against R&Q's case on construction.

50. True it is that the Parties assumed and intended that RQMA would exercise best endeavours so as to bring about the RITC of the 2017 YOA by 30th June 2020. However, it was entirely possible that in full compliance with its obligations under Clause 12.1(a), RQMA was unable to achieve that closing obligation. The framing of the obligation as one of best endeavours rather than as an absolute obligation recognised that the achievement of that date might not ultimately be possible. When framing the separate obligations on the part of RQMA and of R&Q in relation

to the return to ProSight of FAL under Clause 13, and objectively conscious of the fact that the target date for the closing of the 2017 YOA by the RITC of that year was 30th June 2020, the Parties chose two wholly different temporal cut-off points as the triggers for the inception of the RQMA and R&Q obligations to replace FAL. One was by reference to the date of 30th June 2020, without any qualification, and the other was by reference to the final closing of the YOAs by way of RITC, without any date being fixed for that trigger, which was simply defined by reference to the occurrence of that event, whenever it was. Had the two been intended to go hand-in-hand together, to mirror the anticipation and intention in Clause 12.1(a), linguistically this is, to my mind, an inconceivable way of doing so. (It is not suggested that the language did not reflect what the parties intended and no claim for rectification is advanced by R&Q.)

51. The thrust of R&Q's case in terms of construction rests however upon Clause 6.1 of the Agreement. The relevant portion of this is in the following terms:

> "6. Post-Completion matters
>
> 6.1 Regulatory arrangements
>
> Upon the reasonable request of any of PSEHL or any member of the Sellers' Group from time to time, RQMA and the Buyers will provide all reasonable assistance (but, save (a) as provided in Clause 13 and until completion of the RITC of all Open Years, this shall not impose on the Buyers or RQMA any obligation or liability, including without limitation to incur any Losses or contribute any FAL or other capital or funds or to provide any security, covenant or undertaking to Lloyd's or any other person and/or (b) …) (i) to support any application by the Sellers, PSEHL, or any member of the Sellers' Group (as applicable) and/or (ii) to make any application and sign or execute any related documents on behalf of the Corporate Members …
>
> (a) to substitute any FAL supporting the underwriting business of the Corporate Members (or any of them) with any other assets acceptable to the relevant Competent Authority;
>
> (b) to secure:
>
> (i) subject to Clause 13, the partial or full release of the ProSight FAL;
>
> (ii) using best endeavours, the partial or full release of any and all ProSight Existing FAL,
>
> in each case supporting the underwriting business of the Corporate Members …"

52. The words relied upon by R&Q are those in parentheses, viz. "(but, save (a) as provided in Clause 13 and until completion of the RITC of all Open Years, this shall not impose on the Buyers or RQMA any obligation or liability, including without limitation to incur any Losses or

contribute any FAL or other capital or funds or to provide any security, covenant or undertaking to Lloyd's or any other person […]", and the reference therein to "until completion of all Open Years".

53. R&Q submits that as part of any exercise in contractual construction it is necessary for the Court to construe the words in Clause 13.8 in the context of the contract as a whole (citing *Re Sigma Finance Corp [2009] UKSC 2*) and that ProSight's case effectively considers Clause 13.8 in isolation and stripped of context. I accept of course the starting point that Clause 13.8 must be read together with and in the context of the other provisions of the Agreement. I do not consider that ProSight disagrees: see its skeleton argument at paras. 36 and 37.

54. R&Q then submits that "Clause 13.8 must be read subject to Clause 6.1 of the FA" (see Ms Hopkins QC's skeleton argument at para. 53(v)). Here I do not agree.

55. Certainly Clause 13.8 must be read *together with* (I stress) Clause 6.1, just as Clause 6.1 must be read together with Clause 13.8, 13.11 and Recital E. In her oral argument, Ms Hopkins QC accepted that "subject to" was perhaps an "infelicitous" way of expressing her submission which was that one had to read the two terms "harmoniously". That I certainly accept. It is only when reading them altogether and in their common context that one can identify whether the Parties intended to qualify the unqualified words in (a) the definition in Clause 1.1 of the term "CIL Requirement FAL Obligation Period" as "the period commencing on the Completion Date and ending on 30 June 2020", so that that date is to be taken as subject to a qualification that that Obligation Period in fact runs "until completion of the RITC of all Open Years" and ends on 30 June 2020 only if there has been "completion of all Open Years" and, (b) in the words in Clause 13.8 "Upon the expiry of the CIL Requirement FAL Obligation Period: (a) RQMA shall use reasonable endeavours [etc.]", so that this obligation is subject to the proviso that even if the date has been reached, there must also have been "completion of the RITC of all Open Years".

56. Attractively as Ms Hopkins QC put her submission, I do not consider that the words in Clause 6.1 "(but, save (a) as provided in Clause 13 and until completion of the RITC of all Open Years [etc]") can support the construction and effect on Clause 13.8 which is sought to be placed upon them. There is no language which supports a construction that would make Clause 6.1 an overriding provision. Clause 13.8 is not expressed to be subject to Clause 6.1. However, significantly, Clause 6.1 is expressed to be subject to Clause 13. This fits with the structure of the Agreement and the nature of Clause 6 dealing with general obligations and Clause 13 dealing specifically with "Funding Arrangements" and the specific obligations of the Parties in relation to FAL. By subjecting the general obligation in Clause 6.1 to those specific obligations (all of them) in Clause 13, the Parties make it clear that they are not intending to derogate from the specific FAL obligations set out in Clause 13.

57. In this context, the reference in Clause 6.1 to "and until completion of the RITC of all Open Years" means no more than that the Parties have accommodated the general obligation in Clause 6.1 (which concerns supporting applications as to FAL etc) to the regime in Clause 13.11 as well as to that that in Clause 13.8. As ProSight submits, this reference "means that this obligation

cannot be used to accelerate the duty to substitute or replace ProSight's Solvency II FAL which does not accrue under clause 13.11 until there has been an RITC" (skeleton, para. 37.3) or as Mr Waller QC put it in argument, to place a fetter on the general obligation by limiting it to what was set out in Clause 13. I agree.

58. At bottom, R&Q's case would either render the express opening words of Clause 13.8 "Upon the expiry of the CIL Requirement FAL Obligation Period" otiose (as it recognised: skeleton, para. 53.vi) or require them to be heavily supplemented by some sort of 'provided always that the YOAs had been closed by RITC' etc. In a carefully drafted contract as the Agreement is, that is not a convincing approach. Clause 6.1 and Clause 13 can however be read perfectly well together and so as to make good sense of all parts of the drafting if they are read as ProSight contends.

59. It follows that looking at the language R&Q's suggested construction of Clause 13.8, is, purely textually, wrong and in my view plainly so. That is not an overliteral approach. It is simply the unstrained and straightforward reading of Clause 13.8, together with Recital E(f), Clause 6.1, Clause 12.1 and Clause 13.11.

Text in the light of the Factual Matrix

60. I now expand the exercise of construction to encompass the factual matrix relied upon by R&Q, conscious of the fact that construction is an iterative exercise and that the background and purpose of the Agreement and of Clause 13.8 (and 6.1 and 13.11) must be taken into account. The Court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant.

61. However I bear in mind that it is important to divorce from factual matrix, one or other party's subjective intentions or commercial intentions. The Parties have exchanged a considerable volume of material and (particularly on the part of R&Q) this has strayed considerably beyond what would be properly admissible as evidence of relevant factual matrix. Similarly, while much of R&Q's evidence has focussed on how matters have turned out since, the cut-off point for admissible factual matrix is the date of the Agreement, 27th October 2017: subsequent conduct and events are irrelevant to construction: *James Miller & Partners Ltd v Whitworth Street Estates Ltd [1970] A.C. 583* .

62. ProSight does not pray in aid any particular aspect of the factual matrix. However R&Q does.

63. In accordance with the requirements of the Commercial Court Guide at paragraph C.1.3(h), R&Q as the party relying upon factual matrix was required to plead out each of the particular matters relied upon. Paragraph 6 of R&Q's Amended Defence sets out six matters which it alleges were matters known to and understood by all parties to those agreements at the time of their conclusion:

"(1) All three years of account for the Syndicate – 2015, 2016 and 2017 – were still open.

(2) Obtaining reinsurance to close of those years of account required co-operation between R&Q and PSEHL.

(3) It would not be possible for a year of account to reinsure to close, and Lloyd's would challenge any attempt to reinsure a year of account to close, in the event that there was material uncertainty about the recoverability of assets outstanding to that year of account.

(4) Lloyd's economic capital analysis ("ECA") requirements for a syndicate, and the amount of CIL FAL required by Lloyd's in relation to each year of account, vary depending on whether the year of account in question is still active, has been reinsured to close or is in run-off.

(5) Specifically, Lloyd's does not require corporate members who are in run off to commit FAL to the full value of the ECA that would be required if that member were still active. However, in the event that an application is made for substitution of funds where a year of account is in run off and has not been reinsured to close, Lloyd's requires FAL to be committed up to the full ECA amount.

(6) The effect is thus that, where funds are to be substituted, FAL of a higher value is required from corporate members whose syndicates' participations (i.e. years of account) are in run off, as opposed to having been reinsured to close."

64. It will be seen that the first of these matters is reflected in the provisions of the Agreement itself and that the remaining five matters relied upon all in broad terms concern what Ms Hopkins QC referred to as the "complex position" in relation to FAL under Lloyd's bylaws and market practices.

65. In response to a request for clarification by me, Ms Hopkins QC sought in advance of the hearing to refine and add to these matters. First she proposed a reformulation to para. 6(6) in light of a recent exchange of evidence so that it reads "(6) FAL of a higher value is required in relation to the liabilities of corporate members whose syndicates' participations (i.e. years of account) are in run off, and even more so if they are treated as part of a corporate group with an active member as opposed to having been reinsured to close." In addition, R&Q sought to add a seventh aspect: "(7) It would be less costly for R&Q to replace or substitute ProSight's FAL after an RITC than before." No objection was made by ProSight to these amendments.

66. On reading the skeleton arguments and various witness statements, prima facie it appeared that while some of these aspects were common ground, others were said to be disputed (although the actual extent of the dispute in the statements seemed almost imperceptible, cf. the statements

of Mr Everiss for ProSight and Mr King for R&Q). Fortunately, at the hearing it became clear that there was really little difference at all between the Parties and Mr Waller QC effectively accepted the seven matters (save that the second, with its reference to "cooperation", meant no more than that, if ProSight disputed a debt alleged by R&Q, this would prevent an RITC).

67. The position can therefore be tested by taking matters at their highest and testing the position reached just looking at the language on the assumption that R&Q is correct on its factual matrix aspects.

68. In essence taking the alleged factual matrix collectively at face value what is said by R&Q is that closing a YOA by way of RITC requires cooperation on the part of ProSight and that if there were debts owing in respect of that year, then Lloyd's would not allow the RITC to take place. Further, Lloyd's requirements for the level of FAL to be put up are said to be higher for a year of account which is in run off and has not been closed than it would be for a year of account which has been closed by way of RITC. In other words, if ProSight owes debts, then R&Q cannot close the relevant YOA affected by the debts by way of an RITC and if it is obliged to replace the CIL FAL without having been able to close the YOA by RITC, then it will have to put up a greater FAL than it should or would have had to do if it had been able to close the YOA by an RITC.

69. It was unclear from Ms Hopkins QC's argument how these matters, even if taken as they are alleged to be by R&Q and at face value, assist or shed light on the question of construction and what I have found to be the Parties' clear linguistic choice between different concepts of FAL and different chronological definition of the "Obligation Periods", with differently defined triggers.

70. The difficulty with R&Q's case is that it seeks effectively to argue that the words cannot mean what they say, because this would leave R&Q coming under an obligation to replace the CIL FAL even though the YOA had not been closed by way of RITC and that would mean that R&Q would be economically disadvantaged. In other words, viewed from R&Q's perspective, the Agreement should be read so that R&Q never comes under an obligation to replace FAL until and unless the YOA has been closed by way of RITC.

71. I am unpersuaded that this background informs, still less compels, a different reading of Clause 13.8 from that which is arrived by simply reading its clear and well-expressed terms. In my view, R&Q's argument based on factual matrix, to echo Mance J's words in *Roar Marine Ltd v Bimeh Iran Insurance Co [1998] 1 Lloyd's Rep 423, 429* , seeks to "construct from the background a meaning that the words of the contract will not legitimately bear".

72. Further I bear in mind that, on the assumption that the factual matrix is as R&Q alleges, then this was well known to both parties and, in particular, R&Q at the time of drawing up what is a highly sophisticated and detailed insurance industry text. This is a case where, in making the distinction which the Parties did between the CIL FAL and the Solvency II FAL regimes, the Parties were specifically focussing, when viewed in objective terms, upon whether or not the Obligation Period should be defined by the YOA being closed by RITC or simply by reference to

a fixed date. In Lord Neuberger's words in *Arnold v Britton* at [17] "the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision".

73. In truth, the factual background of how FAL is dealt with at Lloyd's as described by the witnesses is against R&Q's position rather than in favour of it. If it had been intended to make the obligation to make replacement of ProSight's FAL, both 'basic' CIL FAL and Solvency II FAL. Contingent upon all open YOAs having been closed by RITC, then objectively one cannot contemplate experienced industry parties, having separated up the two types of FAL and the adoption of different Obligation Periods.

74. While R&Q may have assumed that the dates would work out in the same way (see Clause 12.1), it took the risk that this might not occur, if for example closure of a YOA was not possible or was prevented. Again, to my mind, given the complaint which is really being made in the witness statements served by R&Q (summarised by Ms Hopkins QC in her skeleton as follows: "the inability to effect an RITC has led to an increase in the FAL requirements imposed on R&Q by Lloyd's in respect of the open year: R&Q has had to put up additional funds of its own, and will have to put up yet further funds if the release of ProSight's FAL is to be effected": see para. 7), the words of Lord Neuberger in *Arnold* are apposite. He stated at [20]: "The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

75. I was not assisted in construing Clause 13.8 by the Parties' competing arguments on commerciality.

76. While R&Q suggested that the result contended for by ProSight which would allow it to refuse to pays its debts and sabotage the closure to RITC of an open year but leave R&Q obliged to replace ProSight's FAL was "absurd", that was met by ProSight's counter-argument that ProSight would always have an interest in bringing forward the RITC so as to receive payment of deferred reinsurance premiums. As so often in the cases (and as the Court has frequently remarked), "commerciality" was of little or no assistance against the clear text and the dichotomy between CIL FAL and Solvency II FAL chosen by the Parties. Further, it cannot be looked at only from the interests of one party (see *Lamesa Investments Ltd v Cynergy Bank Ltd [2020] EWCA Civ 821* per Sir Geoffrey Vos C at [22]) and in a highly complex lawyered contract "commerciality" may have little room to operate in any event (see *British Gas Trading Ltd v Shell UK & Esso Exploration [2020] EWCA Civ 2349 at [62]* per Males LJ).

77. R&Q's position was effectively, in my view, no more than it saying that, if Clause 13.8 was construed as ProSight contended, that would be a bad deal for R&Q to have concluded given how matters later turned out and did so unexpectedly and in a highly complex way (see Mr King's evidence for R&Q). The matter can be looked at in the same way, as Mr Waller QC pointed out, from ProSight's perspective, given that if R&Q were right, then R&Q could block the return of FAL by alleging debts and thereby preventing closure by RITC. Against these arguments and counter-arguments, this case is a paradigm case where the language the Parties have used is the best guide to where, in Lord Hodge's words in *Wood* [28], "the centre line marking on the tug o'war rope" of commercial negotiation ended up.

Conclusion

78. I therefore find that ProSight has made good its case on construction and that R&Q's primary defence based on it being necessary for the YOA to have become closed by way of RITC has no realistic prospect of success. This is so, even if the factual matrix for which it contends was fully made out.

Second Stage: Prosight taking advantage of its own wrong

79. R&Q contends that even if ProSight is right, generally and against the factual matrix on which it relies, Clause 13.8 is nevertheless subject to a restriction, either on the true construction of the Clause itself (or latterly by way of an implied term) as follows "clause 13.8 of the FA must be construed and interpreted so that ProSight is not entitled to require R&Q to substitute ProSight's FAL, at increased cost to R&Q, where ProSight has wrongly prevented a RITC. To construe the clause otherwise would be to entitle ProSight to take advantage of its own wrong […]": see Ms Hopkins QC's skeleton argument at para. 58.

80. I accept the general principle that "A contract will be interpreted so far as possible in such a manner as not to permit one party to it to take advantage of his own wrong": Lewison: The Interpretation of Contracts (7th Edn.) at section 7.108, see also *The "Bonde"* *[1991] 1 Lloyd's Rep. 136* . However in my view that principle has no application to Clause 13.8.

81. It is necessary to focus on precisely what the content of that maxim is. As it is summarised in Lewison on Interpretation of Contracts, 7th Edn, para. 7.117, it is necessary "to show that the contractual rights or benefits which the party in question is seeking to assert or claim arise as the direct result of that party's prior breach".

82. I was referred by Mr Waller QC to the decision of the Hong Kong Court of Final Appeal in *Kenland Realty Ltd v Whale View Investments Ltd* [2002] 1 HKLRD 87 at paras. [91], [95], [96] and [100], cited and applied in England in *Rother District Investments Ltd v Corke [2004] L & T R 21* per Lightman J. at [12] to [14] and *Cargill International Trading Pte Ltd v Uttam Galva Steel Ltd [2018 EWHC 2977* per Teare J. at [19]. From these cases, I take the principle to be that a party is prevented from asserting rights or claiming benefits which arise in consequence of his breach and that the enquiry is into whether the party is seeking an advantage that he was

only able to gain by reason of his breach of contract. While Ms Hopkins QC contended that it was or should be enough that the gain is "linked" more loosely to the party's breach of contract, she readily accepted that this was to go "a little further" than the decided cases supported.

83. Once Clause 13.8 has been construed as triggering the obligation on the part of R&Q to replace the CIL FAL on a fixed date of 30th June 2020 being reached, and wholly irrespective of whether or not R&Q has closed the 2017 by way of RITC by that same date, then it is irrelevant why R&Q has failed or been unable to close the YOA by the RITC. Given that the obligation on R&Q depends solely on a temporal trigger, the closure of the YOA by RITC plays no part in the obligation upon R&Q. Even if ProSight has "wrongly prevented a RITC" as R&Q alleges and accepting that as correct for present purposes, that plays no part in the reason why R&Q becomes obliged to do what Clause 13.8 requires. ProSight is not taking advantage of its own wrong when it relies upon the date of 30th June 2020 having been attained, for that is the only trigger of R&Q's obligation, it is simply taking advantage of the operation of the express terms as agreed, to which its breach is legally and factually irrelevant.

84. R&Q's second stage case is not improved by seeking to recast it at the hearing (but not previously) on the basis of an implied term, since such an implied term would neither be necessary nor permissible on well settled principles, as it would contradict the express terms of Clause 13.8 and it is not necessary to make the Agreement work: see generally *Marks & Spencer plc v BNP Paribas Security Services [2015] UKSC 72* .

85. I therefore further find that R&Q's secondary defence to ProSight's case as to the construction of Clause 13.8 also has no realistic prospect of success.

(2) Some other compelling reason for a trial?

86. Ms Hopkins QC argues that even if the Court were persuaded in favour of ProSight's case on construction, it should decline to grant the declarations sought because there was a connection with a wider dispute between the Parties and this meant that there are compelling reasons why the issue should be disposed of at a trial and not on a summary basis, and/or because it is not appropriate as a matter of the Court's discretion to grant the declarations sought.

87. This argument rests upon the fact that there are issues between the Parties as to (a) the alleged debts owed by ProSight in respect of the 2017 YOA and their effect on R&Q in terms of its having to put up more in the way of FAL and (b) other contingent claims, even if the debts are not due. Much of R&Q's witness evidence goes to these matters.

88. Leaving aside what I see as R&Q's separate objection to the grant of declaratory relief in the form sought by ProSight, if my construction of Clause 13.8 is correct, I do not see that these other matters have any bearing on the obligation on R&Q thereunder having been engaged on and from 30th June 2020. They will have to be litigated in due course in whatever is the appropriate forum, whether by way of arbitration, as ProSight contends, or by court proceedings by way of a Part 20 claim in the present proceedings, as R&Q contends. They are not a reason for not determining and declaring that ProSight's construction of Clause 13.8 is correct and for

not carrying into effect the consequences of that declaration, provided that those consequences themselves do not give rise to further issues which are inappropriate for summary determination or which should not be made the subject of declaratory relief at this stage.

89. Accordingly, I conclude that there is no other compelling reason for a trial of the construction issues surrounding Clause 13.8 of the Agreement.

Declaratory relief if Prosight's construction of Clause 13.8 is correct

90. By its Application Notice, ProSight, if it is correct on construction (as I have held that it is), seeks five declarations as set out in paragraph 19 of its Amended Particulars of Claim, now set out in ProSight's draft Order at para. 1.

91. I have well in mind the guidance in the cases (e.g. *Financial Services Authority v. Rourke [2002] CP Rep. 14* , cited by R&Q) that in granting declaratory relief, the court has to consider whether, in all the circumstances, it is appropriate to make such an order. Such relief must serve a useful purpose and caution must be exercised that they extend only as far as necessary and do not shut out matters which remain for determination.

92. I take each of the declarations sought by ProSight in turn. For this purpose, they fall into two groups.

Declarations 1.1, 1.2 and 1.3

93. "1.1. [R&Q] were required, on 30 June 2020, to exercise their best endeavours to procure that the managing agent uses reasonable endeavours to substitute the ProSight Current CIL FAL with R&Q's FAL". Subject to it being understood that this refers to the obligation arising on that date and thereafter being a continuing obligation on the part of R&Q, there can be no proper objection to this declaration. Mr Waller QC confirmed that this was so. While R&Q contends that it has complied with the best endeavours obligation or could not comply with it, that goes to the different issue of whether R&Q was or was not in breach of its obligation, which came into effect on that date. The first declaration correctly in my view reflects the fact that once the date was reached the obligation was engaged. What that required is a different matter. However (although I will hear Counsel), I would replace "on 30 June 2020) with "on and from 30 June 2020 for added clarity.

94. "1.2. [R&Q's] obligation to use best endeavours to procure the substitution or replacement of the ProSight Current CIL FAL is not subject to the prior completion of the RITC of the Syndicate's 2017 year of account" and "1.3. [R&Q's] obligation to use best endeavours to

procure the substitution or replacement of the ProSight Current CIL FAL is not subject to the qualification alleged in paragraph 27 of the Defence [viz. R&Q's 'own wrong' argument]". I take these two declarations together as they both correctly reflect the dismissal of R&Q's construction arguments. Again, these simply reflect the findings which I have made as to the correct construction of Clause 13.8.

95. Pausing here, these declarations simply define the true construction and effect of Clause 13.8 and plainly serve a useful purpose as defining the Parties' rights and obligations on and from 30th June 2020. Although not conceding the point, in reality Ms Hopkins QC effectively accepted this, reserving her principal objections for declarations 1.4 and 1.5.

Declarations 1.4 and 1.5

96. Declaration 1.4 deals with whether R&Q's contention that it has performed its Clause 13.8 obligation by having committed funds called for Lloyd's as at November 2019. A convenient summary of R&Q's case is at para. 63 of its skeleton ("R&Q did in fact take serious and concrete steps to obtain the release of ProSight's FAL in December 2019, which ought to have led, shortly thereafter, to that release. That was with reference to the FAL figure then provided by Lloyd's, which was on the basis that the 2017 YOA would be reinsured to close into the 2019 YOA. R&Q did obtain confirmation from Lloyd's as to the arrangements, including the amount of FAL required; and did make funds available which would have resulted in ProSight's FAL being released.")

97. As sought by ProSight, declaration 1.4 is therefore in the following terms: "[R&Q's] obligation to use best endeavours to procure the substitution or replacement of the ProSight Current CIL FAL was not discharged by the commitment of funds called for by Lloyd's as at November 2019."

98. Ms Hopkins QC submits that in a situation where, but for the RITC having been prevented by ProSight's failure to settle the alleged debts, ProSight's FAL would have been released, the Court should hold that R&Q has used or has a sufficiently arguable case that it has used its best endeavours and complied with its obligation under Clause 13.8.

99. Declaration 1.5 deals with R&Q's current and continuing obligation to exercise best endeavours under Clause 13.8 and seeks a declaration that R&Q must take the necessary steps to comply with its obligations thereunder which are defined (in part) by making its own FAL available to allow the replacement of ProSight's FAL. It is in the following terms: "[R&Q's] obligation to use best endeavours to procure the substitution or replacement of the ProSight Current CIL FAL requires them to make the necessary FAL available to enable the managing agent to procure the substitution and/or replacement of ProSight's Current CIL FAL and then to instruct the managing agent to effect that substitution and/or replacement."

100. Ms Hopkins QC submits that in the light of what has occurred in relation to the FAL thus far, and given ProSight's conduct in relation to the indebtedness (which must be assumed against it) and the prevention of R&Q from closing the 2017 YOA by RITC, the Court should not hold

that Clause 13.8 now or still requires R&Q to put up more funds to effect the replacement of ProSight's FAL and that (as I understood Ms Hopkins QC's submission) R&Q is by reason of the present situation, created by ProSight's indebtedness, discharged from any further obligation to exercise best endeavours, because (a) it is entitled to take into account in the exercise of best endeavours its own commercial interest; (b) it is obliged, even in the context of a best endeavours obligation, to exhaust only reasonable courses of action and to have to put up more FAL would not be reasonable and, (c), the Court will or should have regard to what R&Q has already done, viz. the putting up of funds in 2019. It was submitted that even if the Court does not so hold, R&Q has a sufficiently arguable case to this effect, so that the declaration should not be made.

101. R&Q's objections to both declarations 1.4 and 1.5 were founded on what it contended was the correct legal starting point as to the nature and content of the obligation upon R&Q under Clause 13.8 to exercise best endeavours.

102. It is convenient to restate the relevant part of the Clause: "Upon the expiry of the CIL Requirement FAL Obligation Period: (a) RQMA shall use reasonable endeavours to (and the Buyers shall use best endeavours to procure that RQMA shall) substitute and/or replace all of the ProSight Current CIL FAL with FAL of the Buyers" (my emphasis).

103. It is to be noted that the Parties have used two different "endeavours" terms, one requiring *reasonable* endeavours (on the part of RQMA, now CMA) and one *best* endeavours (on the part of R&Q). R&Q accepted that this meant that the higher and more stringent obligation of "best endeavours", as considered by Julian Flaux QC (as he then was) sitting as a High Court Judge in *Rhodia International Holdings Ltd v Huntsman International LLC [2007] 1 CLC 59 at 76, para. [33]* , applies to R&Q. As it was there put: "An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can.". Ms Hopkins QC emphasised that the courses must be reasonable ones for the obligor to take.

104. However, R&Q further submitted that it was relevant for the obligor to take into account its own commercial interests as part of exercising best endeavours. It relied upon the decision of the Court of Appeal of Singapore in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16 in which the Court carried out an exhaustive analysis of Singaporean and English jurisprudence on the various species of the 'endeavours' genus of obligation.

105. By reference to this decision, Ms Hopkins QC relied on the following propositions in the judgment of V K Rajah JA (delivering the judgment of the Court):

i. The obligor has a duty to do everything reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed. This involves taking all those reasonable steps which a prudent and determined man, acting in the interests of the obligee and anxious to procure the contractually-stipulated outcome within the available time, would have taken: [47]. (I note: see also to like effect *IBM UK Ltd v Rockware Glass Ltd [1980] FSR 335* per Buckley LJ at 343, cited by ProSight: "bound to take all those steps in their

power which are capable of producing the desired results, namely the obtaining of planning permission, being steps which a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve that result, would take.")
ii. A "best endeavours" obligation is not a warranty to procure the contractually-stipulated outcome. [47]
iii. Where breach of a "best endeavours" obligation is alleged, a fact-intensive inquiry will have to be carried out. [47]
iv. The obligor can take into account its own interests in fulfilling its "best endeavours" obligation. [52]
v. The test is an objective one. [47]
vi. Past actions of the obligor in attempted part fulfilment are relevant to the assessment [87]-[88].

106. The Singapore Court of Appeal pointed out that there may be an issue as to whether, in relation to the proposition that the obligor can look to its own commercial interests, that represents English law, or whether Singapore law has added that consideration following the decision in *Travista Development Pte Ltd v Tan Kim Swee Augustine and others [2008] 2 SLR(R) 474* : see *BR Energy* at [52].

107. However, I consider that the English Court of Appeal decision in *Jet2.com Ltd v Blackpool Airport Ltd [2012] 1 CLC 605* and earlier cases support the *potential* relevance of that aspect, but lays down an important relevant qualification. Moore-Bick LJ in *Jet2* stated at [32]: "I think the judge was right in saying that whether, and if so to what extent, a person who has undertaken to use his best endeavours can have regard to his own financial interests will depend very much on the nature and terms of the contract in question."

108. Applying these principles to the present case. I consider that R&Q has no realistic prospect of succeeding at trial in defeating the relief sought by declarations 1.4 and 1.5.

109. The starting point is that R&Q has done nothing whatsoever after 30th June 2020 to "use best endeavours to procure that RQMA shall" […] "use reasonable endeavours to" […] "substitute and/or replace all of the ProSight Current CIL FAL with FAL of the Buyers" (re-ordering the relevant text). No steps of any sort have been taken by R&Q vis-à-vis CMA in this regard.

110. Declaration 1.4 addresses the legal irrelevance of what R&Q did in 2019, as part of its preparations for bringing the 2017 YOA to closure by RITC. Those actions are irrelevant to the absence of steps which R&Q took after 30th June 2020 to comply with its obligation as matters then stood. While past preparatory steps might be relevant to the discharge of the obligation by subsequent acts in response to the obligation once it applies, or if they have, as it were, 'pre-discharged' the obligation by attaining the stipulated result and done so early, they cannot be an arguable defence to the complaint 'what have you done after the obligation applied?' There is no arguable basis upon which R&Q could contend at trial that it has fully and effectively

met its obligations by what it did in 2019. Those actions have done nothing to comply with the obligation as it stood on 30th June 2020.

111. Declaration 1.5 addresses the steps which as a minimum R&Q should take in compliance with the best endeavours obligation as defined above, i.e. "everything reasonable in good faith with a view to procuring the contractually-stipulated outcome". R&Q's argument that it is entitled to take into account its own commercial interests comes to this: that R&Q should not have to put up more money as part of the replacing of ProSight's FAL either because it has put up a considerable sum already (in 2019) or because the debts of ProSight have made the unavailability of an RITC and the higher sums needed by way of FAL necessary or a combination of the two. However, the RITC aspect is irrelevant on the true construction of Clause 13.8 (as I have held) and it follows that this 'commercial interest' is no more than R&Q seeking to rely upon matters which are irrelevant to its contractual obligation and which irrelevant matters make the cost of performing that obligation more expensive for R&Q.

112. Bearing in mind the importance of focussing on the nature and terms of the contract in question (see *Jet 2*), R&Q's legitimate commercial interests do not and could not amount to a basis for doing nothing further to comply with Clause 13.8.

113. It follows that ProSight is entitled to the relief sought in these two declarations and, I would add, plainly so.

Disposal

114. For the reasons I have given, ProSight's application for summary judgment succeeds. ProSight is entitled to the declarations sought in paragraph 1 of its draft Order by way of summary judgment.