Neutral Citation Number: [2018] EWHC 1627 (Comm)

Case No: CL-2016-000401

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTIES COURTS
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2018

Before :

THE HON. MR JUSTICE POPPLEWELL

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Between :

Edgeworth Capital (Luxembourg) S.À.R.L.	**Claimant**
- and -	
Aabar Investments PJS	**Defendant**

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Alain Choo Choy QC and John Robb (instructed by **Stephenson Harwood LLP**) for the **Claimant**
Sonia Tolaney QC, James MacDonald and Sophie Weber (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendant**

Hearing dates: 8-11, 14-17, 23-24 May 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE POPPLEWELL

Mr Justice Popplewell :

Introduction

1. The Claimant ("Edgeworth") is a Luxembourg registered company owned by a Jersey trust of which the ultimate beneficiaries are Mr Robert Tchenguiz and his family. It was created as a special purpose vehicle for the transaction described below. Mr Tchenguiz is its moving spirit, although he is not a director or shareholder. His formal role is as Chairman of R20 Advisory Limited (and its predecessor R20 Limited) ("R20"). R20 acts as advisor to the trustees of the Jersey trust and to the companies within its control.

2. The Defendant ("Aabar") is an Abu Dhabi investment company presently a subsidiary of Mubadala Investment Company, an international investment company based in Abu Dhabi and at the material time was a subsidiary of International Petroleum Investment Corporation ("IPIC"), an investment company directly (at the time) and wholly owned by the government of Abu Dhabi.

3. The dispute arises in connection with a joint investment whose objective was to acquire ownership of the freehold interest in a large building complex outside Madrid known as the "Ciudad Financiera" ("the Property") and to monetise its rental income stream. The Property is a 400-acre site, estimated to be worth over €3bn, comprising the global headquarters of the Santander Banking Group and is let, under a 40-year lease expiring on 12 September 2048, to a subsidiary of that group. The freehold interest in the Property had been acquired in 2008 by Marme Inversiones 2007 S.L. ("Marme") a Spanish company. Marme was a wholly owned subsidiary of Delma Projectontwikkeling B.V. ("Delma"), a Dutch company, which was a wholly owned subsidiary of Ramblas Investments B.V. ("Ramblas"), another Dutch company, which was in turn jointly owned by Mr Derek Quinlan and Mr Glenn Maud. The acquisition was financed by (1) senior loans of about €1.6bn to Marme from a syndicate of eight banks and hedge funds, together with interest rate hedging from five of them (sometimes referred to as "the Brick Loan"); (2) a mezzanine loan of €200m from The Royal Bank of Scotland Plc ("RBS") to Delma (sometimes referred to as "the Block Loan"); and (3) a junior personal loan of €75m from RBS to Mr Quinlan and Mr Maud. Ramblas also entered into an Upside Fee Agreement ("UFA") with RBS under which a fee was payable by Ramblas to RBS on the occurrence of certain payment events. The junior personal loan to Mr Quinlan and Mr Maud, the mezzanine loan to Ramblas, and the UFA are referred to as "the RBS Loans". The security for the RBS Loans included pledges from Mr Maud and Mr Quinlan over their shares in Ramblas and pledges from Ramblas over its shares in Delma, together with security over the intercompany debt between Delma and Ramblas.

4. By September 2010, the RBS Loans were in default. On 30 November 2010, Edgeworth Capital Ltd, a BVI company ("Edgeworth BVI") and, Aabar Block S.à.r.l., an indirect Luxembourg registered subsidiary of Aabar, entered into an agreement with RBS for each to acquire 50% of the RBS Loans for a total sum of just over €195m. Shortly thereafter Edgeworth BVI assigned its interest to Edgeworth. Edgeworth and Aabar thereby acquired the right to enforce the security attaching to the RBS Loans with a view to obtaining control over the freehold of the Property. It is not generally necessary to distinguish between Aabar Block S.à.r.l. and Aabar and I shall refer to them both as Aabar.

5. Attempts to obtain control within the timescale originally envisaged were frustrated. The senior lending went into default in 2013 and in March 2014 Marme, Delma and Ramblas went into an insolvency process in Spain, with the result that the Property came under the control of a Spanish insolvency administrator. It remains so to this day.

6. Edgeworth's share of the investment in the RBS Loans was financed by Aabar. On 20 June 2016 Aabar made a demand for repayment of the sums Aabar had invested on Edgeworth's behalf, together with interest and other costs, under the terms of two written agreements entered into the by the parties on 19 April 2011, namely a Counter-Indemnity Deed ("CID") and a Security Assignment of Agreements ("SAA"). A right to repayment under the CID and SAA included the right to take over Edgeworth's security interests attached to the RBS Loans; indeed because of the limited recourse provisions in clause 8 of the CID, Aabar's right to repayment was confined to what could be recovered from assuming and exercising Edgeworth's rights under the RBS Loans and attached security.

7. On 24 June 2016 Edgeworth obtained an ex parte injunction from King J restraining Aabar from enforcing its rights under the CID and SAA. The interim injunction has remained in place pending the trial. Edgeworth contends that Aabar was not entitled to make demand under the CID and SAA, alleging that the written agreements do not represent the totality of the legal relationship between the parties. It relies on three alleged oral agreements whose terms are said to restrict Aabar's rights under the CID and SAA. Aabar denies that any such oral agreements were made or are binding. This is the issue at the heart of the case.

8. Edgeworth seeks declarations that the demands under the CID and SAA were not validly made and a final injunction restraining Aabar from exercising its rights under the CID and the SAA; alternatively, damages of up to €2bn. Aabar counterclaims c. €113m plus other costs and interest as due under the terms of the CID and SAA. It is common ground that if the claim fails, the counterclaim succeeds, subject to one quantum issue: Edgeworth contends that upon a true construction of the relevant written agreement its liability is capped at €91,275,000. As a result of developments in the course of the trial it was agreed that at this hearing the Court should deal only with issues of liability on the claim, but not remedies; and (if the claim fails) with the disputed issue of the alleged cap on the counterclaim.

Narrative

9. According to Mr Tchenguiz, he first met the Chairman of Aabar, HE Khadem Al-Qubaisi, during the summer of 2010 in the South of France, and they met again on several occasions that summer. In his second witness statement in these proceedings, Mr Tchenguiz describes these meetings as having given rise to "*an informal partnership arrangement*". In his oral evidence Mr Tchenguiz clarified his use of the word "*informal*": he explained that he used it "*in the sense that there was no written document setting out our respective obligations or defining the relationship*"; and that the essence of the agreement was that "*Aabar provided the finance, I identified the opportunity and did the work to make it happen*" and that the parties had "*agreed to proceed on a deal-by-deal basis*". Edgeworth characterises this agreement as "the Umbrella Agreement", but does not contend that it amounted to a legally binding agreement.

10. It was not in dispute that some sort of cooperative relationship was established prior to or in the autumn of 2010. Mr Tchenguiz's business offices in London came to display the IPIC logo, and IPIC and Aabar used those offices to hold meetings when in London. Aabar and Mr Tchenguiz cooperated on other investment ventures apart from that concerning the Property.

11. So far as the Property was concerned, Mr Tchenguiz's plan was to purchase the defaulting RBS Loans, enforce the underlying security over the Ramblas and Delma shares as a means of acquiring the Property, and then securitise the rental income once the Property had been acquired. Mr Tchenguiz hoped that the transaction, if successful, would generate a total profit of c.€1.5bn to c.€2bn. By 16 October 2010, Mr Tchenguiz had received confirmation from Citibank NA of a willingness in principle to finance the transaction if Aabar was willing to provide a guarantee for Edgeworth's share. Citibank prepared a presentation of the proposed investment, including a bond issue to securitise the rental income once control of the Property had been obtained. It was described as a presentation for Aabar and R20, and was in existence on or by 21 October 2010.

12. Mr Tchenguiz's evidence was that on 23 October 2010 he travelled from London to a meeting with HE Al-Qubaisi in Paris at the George V Hotel, at which they agreed to pursue the transaction on express terms which constitute the first oral agreement relied on ("the 2010 Oral Agreement"). The only other person said to be present was HE Al-Qubaisi's assistant, Racem Haoues. The terms of the 2010 Oral Agreement as pleaded in the Particulars of Claim and supported by Mr Tchenguiz in his evidence were the following:

    (1) *Aabar and Edgeworth would acquire the Santander Loans from RBS, which they would hold equally in divided shares. Aabar's share would be held by a subsidiary of Aabar incorporated under the laws of Luxembourg, Aabar Block S.a.r.l. ("Aabar Block").*

    (2) *Mr Tchenguiz would be responsible for negotiating with RBS to purchase the Santander Loans; and would negotiate and manage the securitisation of Aabar' s and Edgeworth' s interests in the Property if and when those were acquired.*

    (3) *Aabar and Edgeworth would each finance the purchase of their respective 50% share of the Santander Loans; and Aabar would provide cash security in respect of the borrowings raised by Edgeworth in order to fund or assist in the funding of Edgeworth's purchase of its 50% share of the Santander Loans.*

    (4) *Aabar and Edgeworth would act as partners in relation to the Santander Transaction, including acting in good faith towards one another and in joint co-operation and consultation with one another for the purpose of promoting the completion of the Santander Transaction. In particular, Aabar and Edgeworth would co-operate as aforesaid in taking enforcement action in respect of the Santander Loans insofar as that was necessary in order to complete the Santander Transaction.*

    (5) *Neither Aabar nor Edgeworth would seek to sell its interest in the Santander Loans (and/or in the Ramblas Shares, once acquired) without providing the other party with the right of first refusal in respect of that interest.*

(6) *Neither Aabar nor Edgeworth would seek to sell its interest in the Santander Loans (and/or in the Ramblas Shares, once acquired) to a party deemed hostile by the other party.*

(7) *All significant decisions and actions taken in relation to the Santander Loans and the Santander Transaction would require the consent of the other party to the Santander Transaction JV.*

13. Mr Tchenguiz's evidence was that all these terms were expressly agreed between himself and HE Al-Qubaisi at the George V Hotel meeting, save for the detail in (3) of Aabar providing the financing by way of cash security, which was only agreed in the context of Citibank's later proposals for structuring the finance. In his evidence Mr Tchenguiz was unable to say when or how term (3) was agreed. It appears that Citibank's first indicative terms were provided on 18 November 2010 and that the suggestion of a cash collateral account was first raised on 19 November 2010. It is worth emphasising that it is not Edgeworth's case that any of the terms relied on arise by way of implication; it is that they were expressly agreed in discussions between Mr Tchenguiz and HE Al-Qubaisi.

14. Aabar does not accept that the meeting took place, and in any event denies any agreement in the terms alleged.

15. Two days later, on 25 October 2010, HE Al-Qubaisi sent a short letter on behalf of Aabar to Edgeworth BVI. I infer that it was to be used by Mr Tchenguiz to advance negotiations with Citibank. Its operative content reads:

> *"This letter confirms our agreement to work exclusively with you towards the acquisition of the RBS Debt and the Property. We look forward to receiving further information on the RBS Debt and the Property and to successfully executing this exciting transaction".*

16. The following day, 26 October 2010, Mr Mohamed Al-Husseiny, Aabar's CEO, travelled to London and attended various meetings with Edgeworth BVI and with Citibank.

17. Mr Tchenguiz's evidence was that he had further meetings with HE Al-Qubaisi in Abu Dhabi on 11 and 12 November 2010. This too is denied by Aabar.

18. In November 2010 a price was negotiated with RBS and the parties received legal and tax advice from Linklaters LLP ("Linklaters") and PricewaterhouseCoopers ("PWC"), each of whom was jointly instructed. The price was negotiated by Mr Tchenguiz with RBS at €195,005,000 and confirmed in an email from RBS on 19 November 2010. Liaison with the advisers from Linklaters and PWC was primarily carried out by Mr Al-Husseiny on the Aabar side and, on the Edgeworth side by Mr Timothy Smalley and Mr Aaron Brown, both of R20.

19. The tax advice from PWC made clear that in order to avoid the risk of a liability to some €150m in Spanish Real Estate Transfer Tax ("RETT"), Edgeworth and Aabar would have to acquire the RBS Loans separately in individual tranches (rather than, for example through a single SPV owned by both parties), and be acting as commercially

independent entities. So far as the financing was concerned, the agreed structure was that identified in an email of Mr Brown of R20 on 9 December 2010:

> *"Citi make a loan to Aabar. Aabar deposits the borrowed monies with Citi to cash collateralize two loans it makes to the Luxcos. This way Citi have an Aabar loan to syndicate, Aabar hasn't made a loan to anyone that may fall foul of the Abu Dhabi banking rules and the Luxcos have borrowed from Citi from a Spanish RETT perspective. It's a bit more involved from a documentation perspective, but manageable according to [Linklaters]."*

20. In the event the financing of the acquisition of the loans took place in two stages because RBS were keen to conclude the transaction before the year end, but the Citibank finance could not be put in place by that time. On 30 November 2010, Edgeworth BVI and Aabar Block S.à.r.l. each acquired a 50% share of the RBS Loans under a Transfer and Assignment Agreement ("TAA") with RBS. Aabar paid a €10 million deposit. At that stage, Edgeworth had not been incorporated and there was no other suitable Luxembourg entity on the Edgeworth side. The TAA provided for a completion date of 17 December 2010. Edgeworth was incorporated on 10 December 2010 in time for completion of the purchase of the loans, and on 17 December 2010, by a Transfer and Assignment Agreement Transfer Deed ("TATD"), Edgeworth BVI novated its rights and obligations under the TAA to Edgeworth.

21. On completion Aabar paid the balance of the full purchase price to RBS, including Edgeworth's 50% share which was agreed to be treated as a loan from Aabar to Edgeworth of €91,252,500. Although drafts of a loan agreement recording that loan were circulated from shortly after completion on 22 December 2010, the written loan agreement was not finalised and signed by Aabar and Edgeworth until 27 January 2011. The loan was therefore in place without a signed written agreement for a period of several weeks.

22. Almost immediately thereafter Aabar's funding of Edgeworth's share was transformed from a loan between the two parties to the format envisaged in Mr Brown's 9 December email as a result of the Citibank financing being put in place by a series of agreements dated 28 January 2011. They included an agreement between Citibank and Edgeworth ("the Citibank Loan Agreement"), under which Citibank loaned Edgeworth €91,275,000 at an interest rate of 3-month EURIBOR less 16bps, with capital and interest repayable at the end of a 3 year term ("Citibank Loan"). Aabar provided security in the form of a Cash Collateral Account Charge ("CCAC"), by which Aabar paid a sum equal to the amount of the loan (i.e. €91,275,000) into a blocked deposit account earning interest at the rate chargeable on the loan, which could be called on if Edgeworth defaulted on the loan. Since the capital and interest were repayable by Edgeworth at term, Aabar's financing of Edgeworth's share of the investment in this way was expected to last 3 years, although there were specified repayment events in the Citibank Loan Agreement which might have given rise to earlier default by Edgeworth resulting in Citibank enforcing the security of the CCAC before the end of three years. As a result of this arrangement, Aabar was still in the same position of having assumed the entire credit risk for the transaction, but the form of funding had changed from one of loan to one of cash collateral for a third party loan.

23. Although the loan agreement between Aabar and Edgeworth of 27 January 2011 notionally remained in place, it took a little while for the parties to document the

consequences of the new funding format. On 7 March 2011, Aabar wrote to Linklaters pressing for the arrangements between the parties as regards the CCAC to be documented. This ultimately resulted in the CID and SAA being executed by the Edgeworth directors on 19 April 2011. Under clause 2.1 of the CID Edgeworth agreed upon first written demand to indemnify Aabar in respect of any losses arising out of the cash collateral being called on by Citibank. Clause 2.6 of the CID provided that Aabar was not able to exercise its rights under the CID until the Citibank Loan had been repaid, which failing an earlier repayment event would only be after three years. At the time of the CID Edgeworth and Aabar believed that three years was a sufficient length of time for Edgeworth and Aabar either to have acquired the Property or repayment of the RBS Loans. Either scenario would have enabled Edgeworth to refinance or repay the Citibank Loan and release the security provided by Aabar on Edgeworth's behalf. Under the SAA, Edgeworth transferred its interest in the RBS Loans to Aabar as security for the indemnity contained in the CID.

24. Edgeworth's case, and Mr Tchenguiz's evidence, was that around the time the CID and SAA were entered into a second oral agreement was reached between Mr Tchenguiz and HE Al-Qubaisi ("the 2011 Oral Agreement"), in which it was expressly agreed that "*Aabar would not demand repayment from Edgeworth under the CID unless and until either: Aabar and Edgeworth both agreed a sale of the Santander Loans (or Ramblas Shares) to a third party as part of a larger bid for the acquisition of the Property; or if Aabar wished to be repaid the amount owed by Edgeworth pursuant to the CID, Edgeworth had obtained replacement finance from a third party."*

25. This was not reflected in the terms of the CID or SAA, and indeed directly conflicts with the written terms. In particular:

(1) Under clause 2.1 of the CID Edgeworth "***unconditionally*** *and irrevocably undertakes to indemnify and keep Aabar indemnified* ***upon first written demand****.*…"

(2) Clause 2 of the SAA contains an undertaking by Edgeworth to pay the liabilities when due under the CID.

(3) Clause 7.2 of the SAA contains a warranty that the obligations expressed to be assumed by Edgeworth in the SAA, which would include that in clause 2 of the SAA to fulfil the unconditional indemnity on first written demand under clause 2.1 of the CID, were valid, binding and enforceable.

(4) Clause 7.3(c) of the SAA contains a warranty by Edgeworth that the entry into and performance of the SAA (which again would include the obligation under clause 2 of the SAA to fulfil the unconditional indemnity on first written demand under clause 2.1 of the CID) did not and would not conflict with "*any agreement….binding upon it or any of its assets*".

(5) Under clause 3 of the SAA Edgeworth "*absolutely*" assigns all its rights under the RBS Loans, including the security attached to the RBS Loans, and by clauses 9 and 13.1 grants Aabar an irrevocable power of attorney and unrestricted power of sale to enforce those assigned rights.

26. The strategy to acquire control of the Property ran into difficulties. It is not necessary to recite the history in detail. The enforcement proceedings in the Dutch Courts were unsuccessful. A deal was struck with Mr Quinlan but not Mr Maud, against whom bankruptcy proceedings were eventually commenced, which have not yet resulted in any order. In September 2013, Marme had begun to default on the senior loan, making the prospect of refinancing more problematical.

27. In the second half of 2013, with the maturity date of the Citibank Loan approaching, Aabar begun to consider its plan for exiting the transaction. On 7 September 2013, Mr Tappendorf, then a senior associate at Aabar, emailed more senior colleagues at Aabar and IPIC confirming that Mr Tchenguiz and Mr Smalley had been informed of Aabar's intention to exit the transaction within a year and that the latter had understood Aabar's intention.

28. On 27 February 2014, Edgeworth negotiated a short extension of the term of the Citibank Loan to 20 March 2014 but Citibank were not willing to provide continued longer term financing. Edgeworth and Aabar worked together to explore alternative financing to avoid Citibank calling on the CCAC. They approached Morgan Stanley, Deutsche Bank and Credit Suisse. Morgan Stanley and Deutsche Bank were unwilling to lend; Credit Suisse were willing, but on terms which were regarded as uncommercially expensive. It was agreed that Citibank would be permitted to take its repayment from the CCAC, and Aabar's financing of Edgeworth would revert to the form of a loan. An agreement was executed by Edgeworth in the form of a countersigned letter dated 20 March 2014, ("the Letter Agreement"), under which Edgeworth agreed to pay the amount due under the CID on first written demand, with the loan carrying continuing interest at 3% per annum. On or about that date €92,943,947.34 (comprising €91,275,000 principal and €1,668,947 interest) was transferred from Aabar's cash collateral account to discharge the Citibank Loan ("the Aabar Repayment").

29. Edgeworth's case, and Mr Tchenguiz's evidence, was that around the time of this repayment and the Letter Agreement, he concluded a third oral agreement with HE Al-Qubaisi ("the 2014 Oral Agreement") in which they expressly agreed the same terms as in the 2011 Oral Agreement, namely that Aabar would not demand repayment under the CID or the SAA until one of two conditions was satisfied, namely (i) both parties had agreed a sale of their interests in the RBS Loans as part of a larger bid for the Property, or (ii) Edgeworth had obtained replacement financing.

30. This alleged agreement is not reflected in, and directly conflicts with, the terms of the Letter Agreement. In particular, clauses 2(b) and 2(c) of the Letter Agreement expressly confirmed that following Citibank's exercise of its rights to recoup Edgeworth's loan out of the cash collateral, Edgeworth would owe Aabar that sum and that it would be "*immediately repayable on first written demand by [Aabar]*".

31. The pursuit of the project to its intended conclusion faced a further set back when on 4 March 2014, Marme, Ramblas and Delma filed a request in Madrid to open voluntary insolvency proceedings (*Concurso Voluntario*) and an insolvency administrator ("the IA") was appointed by the court. The IA subordinated the mezzanine loan to rank pari passu with the shareholder loans by Mr Maud and Mr Quinlan to Ramblas (although its right to do so was subsequently challenged by both Aabar and Edgeworth in Spain). On 4 March 2015 Marme, Delma and Ramblas went into liquidation. Since then Aabar,

Edgeworth and other parties, in various combinations, have submitted bids to the IA in the hope of acquiring the Property. In parallel, Edgeworth and Aabar (both together and separately) entertained offers from each other, and from third parties, to sell their interests in the RBS Loans.

32. In early 2015, HE Al-Qubaisi was implicated in an alleged fraud arising out of transactions between IPIC and a Malaysian sovereign wealth fund, 1 Malaysia Development Berhad ("1MDB"). This led to a change in senior personnel at Aabar. The board was replaced. HE Al-Qubaisi was replaced by Mr Al-Mazrouei as Chairman, and Mr Al-Husseiny was later in 2015 replaced by Mr Al-Mehairi as CEO.

33. On 20 June 2016 Aabar issued its letters of demand under the CID and the SAA, calling for payment within three business days (i.e. by 27 June 2016). On 23 June 2016, Edgeworth applied out of hours for an interim injunction restraining Aabar from exercising its rights under the CID and the SAA, and shortly after midnight on 24 June 2016 that application was granted by King J. On 28 June 2016, these proceedings were issued and served. On 29 July 2016, it was ordered, by consent, that the interim injunction should continue to trial.

The law and issues on the claim

34. The law in relation to the alleged oral agreements is not substantially in dispute. The party asserting the existence of a contract with the other party must show that (i) the terms alleged were agreed (ii) between it and the other party or between third parties through whom it is entitled to rely against the other party (iii) the parties intended the agreed terms to be legally binding (iv) the agreement relied on is supported by consideration and (v) the terms are sufficiently certain and complete. The application of these principles in the context of oral contracts was recently considered by Leggatt J, as he then was, in ***Blue v Ashley*** [2017] EWHC 1928 (Comm) at paragraphs [49]-[64]. I respectfully agree with those observations. I would also associate myself with the views in paragraph [65], which are of particular relevance in this case, that the absence of a contemporaneous written record by those with business experience may count heavily against the existence of an oral contract, because in the twenty-first century the prevalence of emails, text messages and other forms of electronic communication is such that most agreements and discussions which are of legal significance, even if not embodied in writing, leave some form of electronic footprint. Moreover where parties contemplate that they will instruct lawyers to draft detailed written agreements between them, there is a presumption that they intend the terms of their bargain to be those reflected in such carefully drafted agreements, not those in any prior or contemporaneous oral conversation, even in the absence of a boilerplate entire agreement clause. As Mr Tchenguiz himself put it at one point in his evidence, "*the things that are mentioned that are important get documented, the things at the time that are not important do not get documented as such.*" It is one of the striking features of Edgeworth's case that despite a myriad of written communications between the parties and substantial internal documentation about the transaction over a number of years, there is no record of any articulation of the terms of the alleged Oral Agreements prior to the issue of proceedings.

35. Aabar advanced a number of arguments in relation to the 2010, 2011 and 2014 Oral Agreements, cumulatively or in the alternative, which can be summarised as follows: the terms alleged were never expressly agreed; there was no intention that any oral

agreement should be legally binding, it being the parties' intention and practice to record their contractual relationship in detailed and legally drafted written agreements; the alleged terms are not sufficiently certain to be legally binding; the alleged agreements are not supported by consideration; the alleged agreements are inconsistent with, and have been superseded by, the terms of the CID, SAA and Letter Agreement; Mr Tchenguiz did not have authority to conclude the alleged agreements on behalf of Edgeworth, and Edgeworth has not ratified them or otherwise become entitled to be treated as a party to them; Edgeworth has itself repudiated the alleged agreements if made; and in any event Aabar has not breached the alleged agreements if made.

36. Before setting out my findings it is convenient to say something about the witnesses.

The witnesses

37. Edgeworth called as witnesses Mr Tchenguiz, Mr Smalley, Mr Tappendorf, Mr Shaked and Mrs Whitford.

38. Mr Tchenguiz was not a good witness. He seemed to take little care in his language or the accuracy of his evidence, often contradicting something he had said previously. It was apparent that he had no real recollection of the detail of much of what he purported to recall, including the critical Oral Agreements at the heart of Edgeworth's case. His answers were often discursive and evasive. To some extent this was the result of his not listening to the question and wanting to use cross-examination as an opportunity to make the points which he wanted to get across on the general topic being addressed. On occasion, however, the evasion in his answers was the result of his having no satisfactory explanation for the many inconsistencies between his answers and (i) the contemporaneous documents (ii) his previous accounts and (iii) the inherent probabilities. He was unwilling to accept the obvious when faced with such inconsistencies, a number of which were not capable of being explained by mistaken recollection. On some occasions he admitted that what he had previously said was untrue (e.g. as to what was said at the 15 June 2016 meeting between Aabar and Mr Tchenguiz to discuss the terms of an offer from AGC Equity Partners ("AGC") to purchase the RBS Loans), in what can only be categorised as lying; and other lies were apparent from the documentation, for example in saying diametrically opposed things about the value of the Property in these proceedings from what he said in the Maud bankruptcy proceedings, because his interests on the point differed as between the proceedings. I am afraid that I was driven to the conclusion that he was prepared to say whatever he thought would assist Edgeworth's case, without any regard for its truth. Accordingly I have not felt able to place any reliance on his evidence save where it is supported by documentary material or the inherent probabilities.

39. Mr Smalley was at the material times an employee of R20, and Mr Tchenguiz's right hand man (together with Mr Brown until 2011). By contrast with Mr Tchenguiz, he was a measured witness, who was on top of the detail, as was to be expected from his role. Where Mr Tchenguiz was the deal maker, Mr Smalley's role was in documentation and execution. He was a details man. It was he who was responsible for the written agreements entered into by Edgeworth in relation to this project; it was he who liaised with Linklaters over the drafting of the agreements in this case and it was he who was charged with ensuring that they reflected what had been agreed and that they protected Edgeworth's interests. Whilst his long serving loyalty to Mr Tchenguiz meant that he would portray matters as favourably to Edgeworth's cause as

he felt able to, sometimes using characterisations which in some respects I felt unable to accept, he was for the most part a careful witness who was endeavouring to assist the court. In many ways his evidence undermined Edgeworth's case on the critical issues.

40. Mr Tappendorf was an employee of Aabar until he left in September 2015. He was not directly involved in the transaction in dispute in 2010 or 2011, but he became involved in about 2012 and was from 2013 promoted to the position of senior adviser to the Chairman and asked to take over responsibility for the project. In that capacity he had a good deal of contact with Mr Tchenguiz as the person on the other side of the deal, and they developed a personal friendship. They have since socialized together and Mr Tchenguiz provided a reference in support of Mr Tappendorf's application to join an MBA programme. Following the board changes in early 2015 Mr Tappendorf was removed from responsibility. He resented this, and it was the cause of his leaving in September. Whilst still at Aabar, he fed Mr Tchenguiz information about Aabar's internal approach in what was a clear breach of his duties of loyalty to his employer, although he purported not to see anything wrong in doing so. My assessment is that he was partisan and wanted to help Mr Tchenguiz as a friend and out of resentment at being sidelined by Aabar. He proved himself a thoroughly unreliable witness, prepared to give evidence which was contradicted by contemporaneous documentation, and on occasion volunteering new evidence in the witness box which was not foreshadowed in his witness statements in circumstances where it would have been if true. I felt unable to place any weight on his evidence.

41. Mr Shaked's and Ms Whitford's evidence went to issues which in the event I have felt it unneccessary to decide, and I need say no more about them.

42. On Aabar's side I heard from Mr Andrew Thornber and Mr Grant Campbell. Mr Thornber is Aabar's Chief Financial Officer. He was not closely involved in the transaction at any stage and he was not in a position to have had first-hand or contemporaneous knowledge in relation to the question of whether the Oral Agreements were made. The only relevant evidence which he had to give was in relation to the accounting treatment of the transaction. The value of such evidence was diminished by the fact that it was given on the basis of how a "joint venture" in the abstract would have been treated in accounts, without reference to the particular terms being alleged by Edgeworth of which he was unaware. I have not found his evidence of any assistance in resolving the issues in the case.

43. Mr Campbell was Head of Diversified Investments at IPIC. He first became involved in the transaction in May 2015 after the alleged Oral Agreements. His evidence was of no assistance on the issues I have found it necessary to decide.

44. Edgeworth invited me to draw adverse inferences from the fact that Aabar did not seek to adduce evidence from HE Al-Qubaisi, Mr Al-Husseiny or Mr Haoues. I decline to do so. As to Mr Haoues, Mr Tchenguiz did not suggest in any of his witness statements that Mr Haoues was party to any of the Oral Agreements; he was in any event of junior status with no identified executive role which might make him likely to have noted or remembered the terms of discussions between Mr Tchenguiz and HE Al-Qubaisi; he is not employed by Aabar and is out of the jurisdiction. As to HE Al-Qubaisi and Mr Al-Husseiny Mr Tchenguiz did not assert the terms of the Oral Agreements he now relies on at any time whilst they were still employed by Aabar, so they cannot reasonably have been expected to give an account of the disputed events prior to leaving under a

cloud. They are now both in prison in Abu Dhabi. There is no property in a witness and I have no reason to infer that they would be any more available to Aabar than to Edgeworth or any more willing to give evidence to assist Aabar than Edgeworth. Indeed if anything one might infer the contrary from the circumstances of their dismissal from Aabar and current incarceration.

Findings

45. I have concluded, without any real hesitation, that there was no express agreement on the terms of any of the three alleged Oral Agreements.

46. There probably was a meeting between Mr Tchenguiz and HE Al-Qubaisi in Paris on 23 October 2010. Despite the conflicting evidence casting some doubt on this, the timing of the presentation dated 21 October 2010, the letter of 25 October 2010, and Mr Al-Husseiny's immediate enthusiastic email messages and visit to London to meet Edgeworth and Citibank shortly thereafter, makes it likely that there was some discussion at around that time in which Aabar expressed enthusiasm for taking the project forward; and evidence of a Eurostar booking in Mr Tchenguiz's name for a return train journey from London to Paris on 23 October 2010, booked only shortly before that, makes Paris a plausible location for such a discussion. Mr Smalley's evidence supports such a meeting having taken place in Paris. However, my assessment is that this meeting involved no more than agreement in principle to work together on the project, on the understanding that there would be a 50/50 acquisition of the loans and that Aabar would finance all or most of Edgeworth's 50% investment. The substance of the agreement was that set out in HE Al-Qubaisi's letter of 25 October 2010 and no more. There was much which remained to be done, including due diligence on the Property and the project, negotiation of a price for acquisition of the RBS Loans, the taking of legal and tax advice, and negotiation of the third party financing. It was always envisaged, as indeed subsequently occurred, that the agreement between the parties would be reduced to writing in formal signed agreements. It was what might loosely be called a joint venture or partnership, only in the sense of an agreement in principle to work together to acquire joint 50% interests in the RBS Loans, with a view to making money from that investment by acquiring control of the Property and securitising its income stream, or failing that by securing repayment of the loans at par or at least a higher value than the discounted price at which they could be purchased. So far as concerns the financing of Edgeworth's share of the investment by Aabar, the terms were intended to be, and were, reflected in the written agreements drawn up and signed by the parties, albeit that for short periods the documentation was not finalised until after the money flows occurred. When the written agreements were executed they were intended to reflect the totality of the agreement between the parties. Nothing was said by way of oral agreement which contradicted those terms, and nothing was agreed which was inconsistent with those terms. There simply never were any agreements in the terms alleged as constituting the 2010, 2011 or 2014 Oral Agreements and there was never any intention that anything said between the parties should have legal effect without in due course being reflected in legally drafted written agreements between them. The Oral Agreements alleged are an ex post facto creation for the purposes of these proceedings designed to meet the current circumstances in which Mr Tchenguiz finds himself.

47. I have reached this conclusion for a number of reasons. First, it was clear from Mr Tchenguiz's evidence that he had no genuine recollection of agreeing the terms alleged.

Even before he went into the witness box, this was already the strong inference to be drawn from the terms of Edgeworth's statements of case and his witness statements; and his oral evidence left me in no doubt about it.

48. As to the alleged 2010 Oral Agreement, he first gave an account in a witness statement dated 22 May 2014 in proceedings brought by him and R20 against the SFO, in which he was anxious to establish that his arrest by the SFO on 9 March 2011 as part of its investigation into the collapse of Kaupthing Bank, and subsequent search warrants, had caused him substantial damage, including damaging the prospects of his successful investment with Aabar in the transaction currently in dispute. In that statement he referred to the Paris meeting in these terms: "*I travelled to Paris to meet with Mr Al-Qubaisi, provide him with [the Citibank 21 October presentation] and explain the rationale of the proposed transaction. He seemed pleased and soon after the meeting he told me that he was happy to proceed*." This suggests no agreement at the meeting itself, and no greater agreement after the meeting than being happy to proceed. In his first witness statement of 23 June 2016 in support of the ex parte injunction application, Mr Tchenguiz did not identify the Paris meeting or indeed any meeting where the agreement was said to have been made but rather used the term "the Agreement" to, as he put it, "*refer to the whole series of agreements over this period*". In the skeleton argument in support of the injunction the 2010 Oral Agreement was said to have been made "*from about late 2010 to mid-2011*". In paragraph 10 of the Amended Particulars of Claim the agreement was said to have been made "*during the summer and autumn of 2010*". In that paragraph the agreement was said to have been reached with Mr Al-Husseiny as well as HE Al-Qubaisi, although in evidence Mr Tchenguiz said that Mr Al-Husseiny had not been at the Paris meeting. A response to a Request for Further Information stated that Mr Tchenguiz was unable to remember the words used and mentioned the Paris meeting as the occasion on which the (non-binding) Umbrella Agreement had been reached. A further response stated that the agreement was made in the autumn of 2010 at discussions and meetings which included a meeting at the George V Hotel in Paris on 24 October 2010 and a meeting in Abu Dhabi on or around 31 October 2010. In his second witness statement, exchanged for the trial, Mr Tchenguiz described the Paris meeting as having been at the Ritz Hotel. He did not there suggest that the essential terms of the 2010 Oral Agreement alleged were expressly agreed. The case was opened on behalf of Edgeworth at trial on the basis of an agreement at the Ritz Hotel in Paris. When it came to Mr Tchenguiz's oral evidence under cross-examination, Mr Tchenguiz did not volunteer the pleaded terms of the 2010 Oral Agreement when asked. He was pressed several times to identify the terms he said were agreed at the Paris meeting, and after several discursive non-answers his evidence was simply "*We are doing this together. They put the money up. I bring the deal*." He only averred what was in the pleaded case when taken to it. Even then he appeared unfamiliar with the terms. At one point later in his evidence he said that the seven terms pleaded "*went without saying*" because they were part of any 50/50 joint venture.

49. As to the 2011 Oral Agreement, this was pleaded as having been made with HE Al-Qubaisi, in "*a period of time around the time of execution of the CID and SAA*" but Mr Tchenguiz was unable to say whether the agreement "*was made by telephone or at a face to face meeting or both; nor whether the agreement was made during one conversation or over a series of conversations*". His second witness statement gave no detail of when, where, how or by whom the agreement was made, merely asserting that

it was "*clearly understood and agreed by the Aabar team*…." In his oral evidence he could not say when or how it had been made, initially putting it in "*2010, early 2011*" and oscillating between it having been made before and after the CID and SAA were signed. He was hopelessly vague about its terms and when and how it was said to have been agreed, and again I was left in no real doubt that he had no genuine recollection of any such agreement.

50. As to the alleged 2014 Oral Agreement, again the position prior to his oral evidence already suggested that he had no real recollection of any such agreement. It was pleaded as having been made at some point in the first 20 days of March 2014 with Mr Al-Husseiny as well as HE Al-Qubaisi, although Mr Al-Husseiny's involvement was later disavowed. Again it was said that Mr Tchenguiz was unable to say whether the agreement "*was made by telephone or at a face to face meeting or both; nor whether the agreement was made during one conversation or over a series of conversations*". Again the evidence in Mr Tchenguiz's witness statement for trial was just as vague, asserting simply that "*This agreement* [ie the 2011 Oral Agreement] *was confirmed when the Citibank loan matured in 2014 and the recommendation was made by Mr Tappendorf to HE Al-Qubaisi that instead of Edgeworth refinancing with Credit Suisse (who were prepared to do so) that Aabar allow the cash collateral amount to be used to repay the Edgeworth loan to Citibank and that Edgeworth become a debtor. The express agreement was that when the asset was sold, funds from the sale could be used to repay the loan at that time.*" His oral evidence before me did nothing to dispel the impression of an inability to recall any agreement in the terms alleged.

51. Secondly, Mr Smalley's evidence did not support the alleged oral agreements, and was in large measure inconsistent with their existence. He said that when Mr Tchenguiz came back from Paris in October 2010, he was told something along the lines of "*we have a deal with Aabar. It is a 50/50 deal; they are going to provide the financing. We are going to run the due diligence and we are going to negotiate with RBS*." It was, as he understood it, an agreement in principle, which he explained meant something which at that stage was not legally binding because it was subject to a raft of due diligence and negotiation of a price with RBS. He confirmed that he was not told that the terms of the 2010 Oral Agreement now relied on were agreed at the Paris meeting (save insofar as they overlap with the generic description of the "deal" he was told about as quoted above). Linklaters were never asked to document any such agreement. Mr Smalley characterised the arrangements as "*embryonic*" at this stage.

52. Equally Mr Smalley confirmed that in 2011 he was responsible for checking the drafting and approving the terms of the CID and SAA, and that he was not aware at the time of any restrictions on Aabar making a demand beyond those set out in the written agreements themselves. He was not aware of the terms of the alleged 2011 Oral Agreement, and confirmed that had he been he would have regarded it as something which needed to be recorded in writing. There is no reason why Mr Tchenguiz would not have told him about the 2011 Oral Agreement if those terms had been agreed; on the contrary it would have been natural to tell him so that the terms could be recorded in the written agreements which were to be drafted and signed. The obvious inference is that no such agreement was made by Mr Tchenguiz.

53. When it came to the arrangements in March 2014 under which Aabar's funding once more reverted to the form of a loan, the written correspondence shows that Mr Smalley specifically noted at the time that the proposed draft of the Letter Agreement provided

for the loan to be repayable on demand, and that he sought to have it converted to a term loan with a period before repayment might become due; but in this he was unsuccessful. Again he did not suggest that he was told by Mr Tchenguiz of the existence of the terms allegedly agreed in the 2014 Oral Agreement, and if he had been he would have had them recorded, given his contemporaneous concern over the on demand nature of the loan. Again it would have been natural for Mr Tchenguiz to tell Mr Smalley about the 2014 Oral Agreement if those terms had been agreed, and the natural inference from his not doing so is that no such terms had been agreed.

54. Thirdly, there is the inconsistency between the terms of the alleged Oral Agreements and the written agreements between the parties. Linklaters could not have drafted the agreements in the form they did had they been told of the Oral Agreements. It is not conceivable that they would not have been told had such terms in fact been agreed. Indeed at one stage of his evidence Mr Tchenguiz asserted that he had told Linklaters of the 2014 Oral Agreement, although this cannot be true: had he done so they could not conceivably have drafted the Letter Agreement in the form they did. The inconsistency with the written agreements points strongly away from the existence of any agreement on the terms of the alleged Oral Agreements. Mr Tchenguiz suggested that the failure to document the Oral Agreements was on the advice of PWC and Linklaters. It is inherently implausible that professional advisers at these firms would advise their clients to document such a transaction misleadingly in order to evade a significant tax liability. Such a serious allegation is not supported by any evidence and I reject it. The documented advice and correspondence from PWC and Linklaters suggest that the clear advice from those firms was that the parties should act independently in order to avoid a significant potential tax liability. The logical inference that can be drawn from that advice and correspondence is that the legal position between the parties was entirely consistent with it i.e. that the parties were acting independently and were free to deal with their interests in the RBS Loans as they wished.

55. Fourthly, the contemporaneous documents tell strongly against the existence of the alleged Oral Agreements. There is no documentary support for the existence of any of the three Oral Agreements in any of the contemporaneous documentation, either internal or passing between the parties. This would be very surprising if there had indeed been agreement on such terms, given the vast quantity of written communication between the parties and substantial volume of internal written material on each side. There were occasionally references to Aabar and Edgeworth being in a "joint venture", and "partners", but as has been observed on a number of occasions (see for example ***Ross River Ltd v Waveley Commercial Ltd*** [2013] EWCA Civ 910 per Lloyd LJ at [34]; ***Sheikh Tahnoon v Kent*** [2018] EWHC 333 (Comm) per Leggatt J at [151]; ***Winton v Rosenthal*** [2013] EWHC 502 (Ch) per Mann J at [77]) these are terms often used loosely to cover a variety of arrangements; they are epithets which businessmen might naturally apply to the cooperative relationship between the parties on terms recorded and defined in the written transaction documents, in which Aabar and Edgeworth were investing 50/50 in the RBS Loans and Aabar was financing Edgeworth's investment. There is nothing in any of the very considerable body of contemporaneous documentation between 2010 and 2016 which reflects or supports the detailed and specific terms which Mr Tchenguiz suggests were orally agreed.

56. In fact, the allegedly agreed terms were not articulated by Mr Tchenguiz at any time prior to the commencement of proceedings, despite there having been a number of occasions on which it would have been natural to do so had such terms in fact been agreed. The first reference by Mr Tchenguiz to anything which resembles any of the contentious terms of the Oral Agreements was on 7 May 2015. The context was a phone call the previous evening in which Mr Tchenguiz had offered to buy out Aabar's interest. Aabar had responded with an email setting out its detailed requirements in relation to any such offer in order to enable it to be considered. Mr Tchenguiz's responsive email opened with: "*We have an agreement that either party would be able to match any offer assuming one party wishes to sell. The party has to be acceptable and that there is not a conflict of interest."* Aabar's immediate response was to point out that it did not understand the suggestion because Mr Tchenguiz had said during the phone call that it was Aabar's right and prerogative to sell if it wished. Mr Tchenguiz did not take issue with the suggestion that this was indeed what he had said during the phone call, and did not persist in any suggestion that there was a restriction on Aabar's right to sell its interest. In his email of 15 July 2015 shortly thereafter, and in the context of the change in personnel at the top of Aabar, Mr Tchenguiz set out a "*chronology*" of events because there was "*no one at Aabar who is aware of the full background*". Yet this contained nothing about the existence or alleged terms of the alleged Oral Agreements. A further example is afforded by the meeting between Aabar and Mr Tchenguiz on 15 June 2016 at which Edgeworth was being asked to accept the terms of an offer by AGC. In his witness statement, Mr Tchenguiz asserted that there had been no suggestion at the meeting that if Edgeworth did not accept the offer Aabar would demand repayment of the financing. In his oral evidence he ultimately accepted that this was untrue and that Aabar had indeed made just such a threat. Yet it was common ground that Mr Tchenguiz had not then asserted the terms of the alleged Oral Agreements as grounds why Aabar would not have been entitled to do so, as he surely would have if they had been agreed. The absence of any mention in Edgeworth's solicitors' letters of 20 and 22 June 2016, following Aabar's demands under the CID and SAA on 20 June 2016, is similarly telling.

57. Edgeworth's directors were regularly asked to sign documents, approve payments, and pass board resolutions authorising Edgeworth's entry into transaction documents, but there is no hint of their being told of the existence or any of the terms of the alleged Oral Agreements.

58. The point goes further than the mere absence of documentary support. A number of documents, quite apart from the written transaction agreements, are positively inconsistent with the alleged Oral Agreements. For example Mr Tappendorf's memo to HE Al-Qubaisi of 20 March 2014, and Mr Smalley's correspondence with Linklaters at the time, are quite inconsistent with HE Al-Qubaisi having agreed the terms of the alleged 2011 or 2014 Oral Agreements; and the lengthy discussion by the Aabar working group on 3 and 4 May 2015 when considering its exit strategy options is inconsistent with the restrictions said to be imposed by the Oral Agreements. Edgeworth's draft 2014 accounts were drawn up with a note indicating that the Aabar loan was repayable on demand, and although the note was subsequently removed there was no satisfactory explanation in the evidence, or proper disclosure, of how that came about.

59. Fifthly, the terms of the oral agreements are such that it is improbable that anyone in Aabar's position would agree to them or that Aabar did so. The allegation is essentially that Aabar committed itself on an open ended basis to underwrite all the credit risk on the transaction without having the freedom even to sell its own share of the investment without Mr Tchenguiz's permission, and was committed to this position for an indefinite period of potentially very many years; and this notwithstanding that in October 2010 the project was, as Mr Smalley described it, embryonic; that at the time of the alleged 2011 Oral Agreement Mr Tchenguiz had recently been arrested by the SFO and as he himself said had much less contact with HE Al-Qubaisi because of the latter's wariness of being seen to be dealing with a suspected criminal, so that he dealt more through Mr Al-Husseiny; and that by the time of the Letter Agreement in 2014 it was clear that HE Al-Qubaisi wanted to extract Aabar within a matter of months. The alleged Oral Agreements would therefore be most surprising, and no cogent reason was advanced why Aabar would have wanted to or been prepared to enter into them or agree to such terms.

Conclusion on the claim

60. In the light of these conclusions it is not necessary to consider any of the other grounds on which Aabar challenged the existence or enforceability of the alleged Oral Agreements. There was an application by Edgeworth in the course of the trial to re-amend its Particulars of Claim, was opposed on the grounds that it was too late and that the averments were unsustainable as a matter of fact and law. The proposed amendment to paragraph 10 concerned the way in which the 2010 Oral Agreement was allegedly made. In the light of my findings, those allegations are unsustainable and I refuse permission to amend. The remaining amendments relate to the manner in which Edgeworth claims to be a party to or be entitled to take advantage of the 2010 Oral Agreement if made. I have felt it unnecessary to address those issues, and accordingly I decline to make a determination of those aspects of the amendments because my findings render them otiose. The claim fails and will be dismissed.

The Counterclaim

61. The counterclaim is for the following sums:

    (1) €92,943,947.34. This is the amount of the Aabar Repayment. It is claimed under clause 2.1 of the CID and/or clause 2(a)-(c) of the Letter Agreement.

    (2) €13,875,906.77. This is the interest on the Aabar Repayment at 3.0% per annum, up to and including 21 May 2018. It is claimed under clause 2(d) of the Letter Agreement.

    (3) €4,683,474.00. This is the total paid by Aabar on behalf of Edgeworth in connection with Linklaters' legal fees, plus interest of 3.0% per annum up to and including 21 May 2018. It is claimed under clause 3.3 of a Linklaters' engagement letter dated 14 April 2016 ("the Linklaters Engagement Letter") and clause 2(d) of the Letter Agreement.

    (4) €2,573,232.39. This is the total paid by Aabar on behalf of Edgeworth in connection with other expenses, plus interest of 3% per annum up to and

including 21 May 2018. It is claimed under clause 3.3 of the Linklaters Engagement Letter and clause 2(d) of the Letter Agreement.

(5) A further unparticularised sum for Aabar's enforcement costs claimed pursuant to clause 17 of the SAA.

62. The issue between the parties is whether the sums claimed are capped at €91,275,000 by reason of clause 2.5 of the CID and clause 3 of the Letter Agreement. I observe that both Mr Tchenguiz and Mr Smalley in their evidence accepted that the sums due were not so capped. This is a lawyers' point taken on behalf of Edgeworth, although it may be none the worse for that.

63. Clause 2.1 of the CID provides:

> *"Subject to Clauses 2.5, 2.6 and 8 [Edgeworth] unconditionally and irrevocably undertakes to indemnify and keep Aabar indemnified upon first written demand from and against (i) any loss or diminution in the value of the Credit Balance which Aabar may suffer or incur as a result of the proper enforcement by or on behalf of [Citibank] of the security rights granted pursuant to the Cash Collateral Account Charge; or (ii) any direct losses, costs or expenses which Aabar may suffer or incur in connection with or as a result of any payment which may properly be payable by or claimed or demanded from Aabar pursuant to Cash Collateral Account Charge; in each case as a result of or as a consequence of the non-performance or breach by [Edgeworth] of its obligations under [the Citibank Loan Agreement]."*

64. The Credit Balance is defined under clause 1.1 of the CID as:

> *"…the credit balance at any time and from time to time on the Cash Collateral Account, including all interest accrued on that balance."*

65. Clause 2.5 of the CID states:

> "*Notwithstanding any other provision herein, the obligations and liabilities of [Edgeworth] under this counter-indemnity shall be limited in aggregate to an amount equal to €91,275,000.*"

66. The Letter Agreement provides:

> "…
>
> *This letter is intended to evidence and acknowledge [Edgeworth's] obligations to [Aabar] under the [CID] and is not intended to amend the provisions of the [CID].*
>
> …
>
> *2. Acknowledgements*
>
> (a) *[Edgeworth has] been informed [by Aabar] that [Citibank will exercise its powers on 20 March 2014 to take payment from the cash collateral] of the sum of €91,275,000 together with any accrued interest on that balance*

> *("the Indemnified Amount") which will settle all of the outstanding indebtedness owed by [Edgeworth] pursuant to [the Citibank Loan Agreement].*
>
> *(b) [Edgeworth] acknowledge[s] that, pursuant to the operation of Clause 2.1 of the [CID], following exercise of [Citibank's recoupment from the cash collateral], Aabar will suffer a loss in the value of the Credit Balance (as defined in the [CID]) and that [Edgeworth] will have an obligation pursuant to the [CID] to indemnify [Aabar] for the full amount of the Indemnified Amount (together with any further amounts that become payable).*"
>
> (c) [*Edgeworth] confirm[s] in accordance with the CID that the Indemnified Amount is owed by [Edgeworth] to [Aabar] and that such sum is immediately payable on first written demand by [Aabar]."*
>
> (d) *Interest will accrue on the Indemnified Amount at 3.0% per annum, which will be capitalised on and added to the principal amount at the end of each 365 day period*."
>
> 3. *Miscellaneous*
>
> *This letter shall not modify or amend in any way the obligations under the [CID] which shall remain in full force and effect on the terms of the [CID].*

67. Clause 3.3 of the Linklaters Engagement Letter dated 14 April 2016 reads:

> *"Aabar and Edgeworth have previously agreed that the transaction and enforcement-related costs and expenses in connection with the "Assets" (as defined in the Counter-Indemnity dated 19 April 2011 between Aabar Investments and Edgeworth) that have or may be paid by Aabar on Edgeworth's behalf have been and will continue to be treated as costs and expenses for the purposes of clause 2 1(ii) of the Counter-Indemnity. In particular (without prejudice to the generality of the foregoing) 50% of the sums that have been paid and are paid by Aabar pursuant to the terms of this letter have been and will be paid by Aabar on this basis".*

68. Edgeworth's submissions on the point can be summarised as follows. The plain meaning of clauses 2.1 and 2.5 of the CID is that its liability under clause 2.1 was to be capped at the amount of the principal of €91,275,000, and that it was not to be liable for the interest accruing on the cash collateral account (which matched that accruing due from Edgeworth to Citibank under the loan) or sums in excess of that which fell within clause 2.1(ii), such as the legal expenses. The rationale was that as a joint venturer Edgeworth's liability was to be limited to its capital contribution. The introductory language and clause 3 of the Letter Agreement made plain that it was not intended to alter or modify the terms of the CID, including the cap in clause 2.5. Whilst the definition of the "Indemnified Amount" included the interest, and so the language

of clauses 2(b) and (c) appeared to acknowledge an obligation to pay more than the capped amount, those clauses must yield to clause 3, especially since clause 2 is by its heading said to contain merely "acknowledgements" so as not to be intended to create new or different obligations from those which previously existed. This argument is supported by reference to correspondence between Mr Smalley and Linklaters prior to the Letter Agreement, copied to Aabar, in which, in the context of Mr Smalley's request for a term loan rather than an on demand obligation, Linklaters said: "*Just to clarify, the letter is not intended to create a new obligation between Aabar and Edgeworth, it is simply an acknowledgement of Edgeworth's existing obligations under the [CID]*".

69. Aabar contends that there is no conflict in the provisions of the Letter Agreement because clause 2.5 of the CID does not upon its true construction cap all liabilities at €91,275,000; it is only a cap on the principal for which Edgeworth is to be liable. Alternatively, the potential conflict in the Letter Agreement is to be resolved by giving the terms of clauses 2(b), (c) and (d) their plain meaning applied to "the Indemnified Amount" which is expressly defined to include the interest element of the cash collateral deposit. If clause 2.5 were to impose a cap of €91,275,000 those provisions could not be given content because they expressly acknowledge an obligation to pay a larger amount. In the further alternative, Aabar argues that Edgeworth is estopped by convention from asserting any other construction or effect of the Letter Agreement as a result of subsequent conduct.

70. There is an abundance of recent high authority on the principles applicable to the construction of commercial documents, including ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 WLR 896; ***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] 1 AC 1101; ***Re Sigma Finance Corp*** [2010] 1 All ER 571; ***Rainy Sky SA v Kookmin Bank*** [2011] 1 WLR 2900; ***Arnold v Britton*** [2015] AC 1619; and ***Wood v Capita Insurance Services Ltd*** [2017] AC 1173. In ***Lukoil Asia Pacific Pte Ltd v Ocean Tankers Pte Ltd*** [2018] EWHC 163 (Comm) I endeavoured to summarise their effect as follows:

> "[8] The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked

> against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

71. I start with clauses 2.1 and 2.5 of the CID. Clause 2.1 plainly envisages that the indemnity which it imposes will potentially be for more than €91,275,000, both because the "Credit Balance" is defined to include interest accruing on the cash collateral and because additional sums may fall due under clause 2.1(ii). It is expressly made subject to clause 2.5, which imposes a limitation on the obligations and liabilities under the CID "in aggregate" of €91,275,000, "*notwithstanding any other provisions herein*". The language is clear, and cannot be construed as anything other than a cap on the liabilities under clause 2.1. Ms Tolaney QC sought to draw support for Aabar's construction from the use of the word "aggregate" in the Citibank Loan Agreement, where it was used in defining "Total Commitments" as the figure of €91,275,000, but I am afraid I do not understand how that provides any real support for the suggestion that clause 2.5 was using the word aggregate to mean principal only. It refers to the aggregate of all liabilities under the CID. Nor can one bend the plain language by a contextual argument that it would be a commercial construction to require Edgeworth to indemnify the full extent of the funding being provided by Aabar in the cash collateral account. That might have been the bargain which Aabar would have wished, but it is not what the language of the document provides for, and it is no part of the process of construction to rewrite the bargain in the terms the Court might think fair. If Aabar's construction were correct it would not only run counter to the plain language but would substantially deprive clause 2.5 of any effect: the amount comprising the principal sum in the cash collateral account was fixed at €91,275,000; if, as Aabar argues, it was to operate as a cap on the capital element only, it would only have effect if the capital element were increased; yet that capital element could not be increased without Aabar agreeing and providing further funds, which was not something which either party contemplated and which would, in any event, have provided the opportunity for further agreement in the new circumstances.

72. Against that background, the Letter Agreement contains provisions which appear to conflict. Clauses 2(a), (b) and (c) expressly treat the liability under the CID as exceeding the cap in clause 2.5. The introductory language and clause 3 expressly preserve the terms of the CID including, prima facie, the cap in clause 2.5.

73. The key to unlocking this apparent conflict lies in a recognition that the Letter Agreement was not merely reflective of existing obligations but was intended to create some new obligations, despite the language of acknowledgement. That is clear from clause 2(d) which contains a newly negotiated term that interest was thereafter to accrue at 3% per annum. This was not part of the CID rights and obligations, because whilst the financing had taken the form of cash collateral at Citibank, the accrual of interest was governed by the Citibank terms. However they would come to an end with the recoupment by Citibank from the cash collateral. It was necessary therefore for the parties to agree whether interest should accrue thereafter, and if so on what sum, and at what rate. Those were specifically agreed new terms which were contained in the Letter Agreement. The 3% was defined as accruing on "the Indemnified Amount" i.e. the whole of the Aabar Repayment, not just the capital element of €91,275,000. That is a

powerful indication that the clear terms of clauses 2(b) and (c) were intended to mean what they say, requiring repayment on demand of the whole Aabar Repayment including interest which had accrued in the cash collateral account.

74. Moreover, the obligation under clause 2(d) to pay interest is on any view an obligation which arises only under the Letter Agreement, not the CID, and so would not fall within the terms of the cap in clause 2.5, because clause 2.5 of the CID is expressed to apply to obligations and liabilities "*under this counter-indemnity".* If Edgeworth's construction arguments were correct, therefore, the effect would be to make Edgeworth liable for €91,275,000 (under clauses 2.1 and 2.5 of the CID) and interest at 3% (under clause 2(d) of the Letter Agreement), but the 3% interest would not be calculated on the principal sum of €91,275,000 but on the larger Aabar Repayment amount. This would be commercially anomalous and is unlikely to have been intended.

75. Moreover the words in clause 2(b) recognise that there will be an obligation not just in respect of "*the Indemnified Amount*" but also for "any further amounts that become payable". This recognises that the indemnity against sums falling within in clause 2.1(ii) is equally to be unaffected by any cap.

76. This conclusion is supported by the recognised principle of construction that where there is a conflict between the express terms contained in a contract and those which are incorporated by reference from another document, the terms of the contract will ordinarily prevail over those from the incorporated document (see *Chitty on Contracts* 32nd edn at 13-082 and the cases there cited). This reflects the fact that the parties are more likely to have had in mind and given attention to the express terms of the contract itself when negotiating and signing it than to the terms of a different document which is merely referred to: see per Longmore J, as he then was, in ***Metalfer Corporation v Pan Ocean Shipping Co Ltd*** [1998] 2 Lloyd's Rep 632 at p. 637. It applies with considerable force in this case, where the operative parts of the Letter Agreement were short and clear: it is much more likely that the parties intended there to be a liability in excess of €91,275,000 which was clearly provided for in the terms of clause 2 than that they had in mind referentially an unidentified term of the CID which would only apply by virtue of general wording in the introduction and clause 3. On that basis, the parties are more likely to have intended that the cap in clause 2.5 should not apply.

77. I would also be inclined to treat clause 2 of the Letter Agreement as an agreed understanding of the effect of the CID so as to give rise to a contractual estoppel in accordance with the principles confirmed by the Court of Appeal in ***Springwell Navigation Corporation v J P Morgan Chase Bank*** [2010] EWCA Civ 1221 (Comm) at [143]. The view I have taken about the effect of clause 2.5 is not necessarily the view the parties took at the time. The evidence of Mr Tchenguiz and Mr Smalley suggests that it is not the view they take now. But even if they had in mind at the time of the Letter Agreement that clause 2.5 would have capped the liability to the principal of the loan, they were free to agree that that was not its effect, and clauses 2(a) to (d) of the Letter Agreement suggest that that is indeed what they agreed. I do not rest my conclusion on this basis, however, because it was not developed in argument.

78. For similar reasons, when agreeing in the Linklaters Engagement Letter to treat transaction and enforcement-related costs and expenses in connection with the RBS Loans, which were known to be substantial, as falling within clause 2.1(ii) of the indemnity, at a time when it was known that under clause 2.1 and the Letter Agreement

Edgeworth was liable on demand for a sum already in excess of €91,275,000, the parties must have intended that such indemnity was unaffected by clause 2.5. The clear intention was that there should be a liability for those sums in any event, in addition to the amount of the financing by Aabar of the investment, whether that be treated as €91,275,000 or that sum plus interest. Again, although the parties used the device of treating the liability as one which fell under the CID, no doubt to ensure attachment of the security rights under the SAA which are linked to the CID, if for no other reason, the cap cannot have been intended to apply. If the cap were to apply, it is difficult to see how liability for the costs would ever arise under the Linklaters Engagement Letter without reducing Edgeworth's liability for the loan to less than €91,275,000, which was plainly never intended (and Edgeworth did not so suggest).

79. For these reasons the cap in clause 2.5 of the CID does not apply to the sums due from Edgeworth. That renders it unnecessary to consider Aabar's argument based on estoppel.

Conclusion

80. There will be judgment for Aabar on the claim and the counterclaim. I will hear the parties on the form of order.