



Neutral Citation Number: [2020] EWHC 366 (Comm)

Case No: CL 2019 000570

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 February 2020

Before :

MR. JUSTICE TEARE

Between :

**(1) ATLAS RESIDENTIAL SOLUTIONS
MANAGEMENT UK LIMITED**

Claimants

(2) ATLAS APARTMENT HOMES LLC

- and -

GREENGATE S.A.R.L.

Defendant

David Quest QC, Rajesh Pillai and Ravi Jackson (instructed by **DLA Piper LLP**) for the
Claimants

Hannah Brown QC and Veena Srirangam (instructed by **Norton Rose Fulbright**) for the
Defendant

Hearing dates: 11-13 February 2020

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.

.....
The Honourable Mr Justice Teare

Mr. Justice Teare:

1. This is the trial of the question whether two Agreements, whereby the Claimants provided services in respect of a residential building in Salford known as Anaconda Cut, were validly terminated by the Defendant on 2 September 2019.
2. This dispute was first before the Court on 14 October 2019 when the Claimants sought interim injunctive relief enforcing the two Agreements. On 16 October 2019 the court refused to grant such relief and instead ordered an expedited hearing of the issue, at the request of the Claimants. However, on 17 October 2019, and without informing the court, the Claimants accepted the Defendant's alleged breach of the two Agreements as terminating the same and when Particulars of Claim were served on 20 October 2019 the remedy sought was declaratory relief and damages. A permanent injunction was not sought. The urgency in deciding the issue as to the validity of the Defendant's action on 2 September 2019 was thus much less than if a permanent injunction were still being sought. However, the parties have prepared for the trial on an expedited basis and I accept that in those circumstances the court should now determine the issue. If the Claimants succeed damages will be assessed on another occasion.
3. The trial took place over three days with witnesses.

The Parties

4. The First Claimant is an English company and the Second Claimant is a US company. I shall refer to them together as Atlas. The business of Atlas is real estate property management. The Defendant is a Luxembourg company which owns Anaconda Cut and is owned by the London based real estate investment fund, Europa Fund V. I shall refer to the Defendant as Europa/Greengate.
5. Europa/Greengate purchased Anaconda Cut from the company which built it using finance obtained from its bankers. Europa/Greengate engaged Atlas to lease the apartments in the building with a view to selling on Anaconda Cut when it was fully let. Atlas was to assist not only with letting and managing the property but also with realising its potential by on-sale. Atlas was not only entitled to certain fees for its work but also to a share of the profit made on the re-sale.

The Agreements

6. The two Agreements were dated 14 December 2018. One was an Asset Management Agreement with the First Claimant and the other was a Consultancy Agreement with the Second Claimant. Together, the Agreements enabled Atlas to lease the apartments within the building to tenants and to manage the building on behalf of the Defendant.
7. The dispute between the parties concerns the replacement of the "Key Person". The Agreements defined the Key Person as "Jonathon Ivory (until such time as he is replaced pursuant to the terms of this Agreement and thereafter the term shall include such replacement)". Clause 4.2 provided that the Claimants "shall at all times procure that the Key Person shall devote the amount of time required to perform the Services in accordance with this Agreement, save that [Atlas] shall be able to replace the Key Person with another person of comparable expertise and experience to the Key Person

in accordance with clause 4.3, if [Europa/Greengate] has given its prior written consent.” The “Services” were defined as the Management Services, the Strategic Services and such other services as Atlas and Europa/Greengate may from time to time agree in writing. Management and Strategic Services were further defined. Clause 6.1 provided for meetings to discuss the provision of the Services and required Atlas to “procure that the Key Person shall attend each meeting.....If the Key Person is not able to attend a meeting in person, the Key Person shall be entitled to attend the meeting by telephone, video conference or other equivalent means of communication.”

8. Clauses 4.3 and 4.4 made further provision for the replacement of the Key Person in these terms:

“4.3 If the Asset Manager proposes to replace the Key Person, the Asset Manager agrees to provide reasonable notice to (and within twenty (20) Business Days) and to consult with the MidCo [the Defendant] on the progress of any endeavours to find a replacement, and if the Asset Manager intends to seek the consent of the MidCo to any individual as a proposed replacement to the Key Person, it will provide appropriate information about such individual, including a curriculum vitae and references and the Asset Manager agrees that if the Key Person is to be replaced it will hire a replacement Key Person within six (6) months of notifying the MidCo of the proposed change.

4.4 If the MidCo does not approve (such approval not to be unreasonably withheld or delayed) a replacement suggested by the Asset Manager, the Key Person has ceased to perform the Services and the Asset Manager does not obtain a replacement by the expiry of six (6) months (or such longer period as may be agreed by the MidCo), the Midco may serve a notice terminating this Agreement.”

9. Clauses 4.2 and 4.3 were also referred to in clause 2.5(d) in these terms:

“2.5 This Agreement may be terminated by the MidCo forthwith by serving written notice on the Asset Manager following:

.....

(d) if the Asset Manager fails to comply with its obligations in clauses ...4.2 and 4.3.

10. It is also necessary to note clause 13.1 which requires notices to be in writing.
11. Although the very title “Key Person” suggests that the position is of importance the Agreements did not shed much light on what was expected of him (or her) save that he was to devote the amount of time required to perform the Services (clause 4.2) and that he was to attend the monthly management meetings (clause 6.1).

12. There was some debate as to the circumstances in which a right to terminate arose under clause 2.5(d) and clause 4.4.
13. Clause 2.5(d) gave a right to terminate “if the Asset Manager fails to comply with its obligations in clauses ...4.2 and 4.3.” There are several obligations under clauses 4.2 and 4.3. The obligation under clause 4.2 is to ensure that the Key Person devotes the necessary time to ensure that the Services are provided. The obligations under clause 4.3 include an obligation, in the event that the Asset Manager proposes to replace the Key Person, to provide notice, an obligation to consult with the Defendant on the progress of any endeavours to find a replacement, an obligation to provide information about a proposed replacement and an obligation to hire a replacement Key Person within six months of notifying the Defendant of the proposed change.
14. Thus the right to terminate provided by clause 2.5(d) can arise in the event of one or more failings by the Claimants.
15. By contrast clause 4.4 provides a specific right to terminate in circumstances where (i) the Defendant does not approve a replacement suggested by the Asset Manager, (ii) the Key Person has ceased to perform the Services and (iii) the Asset Manager does not obtain a replacement by the expiry of six months.

The termination

16. Europa/Greengate purported to terminate the Agreements on 2 September 2019 upon the grounds that:

“Atlas has breached the Agreement including by failing to provide adequate Key Person services properly or at all, failing to procure that Jonathon Ivory fulfils the role of Key Person, failing to consult on and procure and appoint an adequate replacement within the timescales permitted or at all. As a result this letter is to notify you, Jonathon and Atlas Residential Solutions Management UK Ltd., that we have elected to terminate the Agreement with immediate effect.”
17. It is to be noted that the termination notice did not identify either clause 2.5(d) or clause 4.4 as the clause or clauses on which reliance was placed. However, although the skeleton argument of counsel for Europa/Greengate referred to all rights of termination provided by the Agreements, it appeared to be common ground during the hearing that Europa/Greengate relied upon the right of termination provided by clause 4.4.
18. Atlas’ case is that that termination was wrongful for four reasons. They were described in this way by counsel in his oral opening. First, it was said that the Europa/Greengate had accepted in a telephone call and meeting in January 2019, and/or by its conduct, that Mr. Malli replaced Mr. Ivory as the Key Person; the “agreement case”. Second, it was said that Europa/Greengate was estopped from alleging that Atlas had acted in breach of the Agreements; the “estoppel case”. Third, it was said that Europa/Greengate had affirmed the Agreements; the “affirmation case”. Fourth, it was said that as a matter of construction of the Agreements Europa/Greengate were not permitted to terminate the Agreements until six months

had expired from Atlas' letter dated 27 August 2019 proposing Mr. Malli as the Key Person; the "formal proposal case". These cases were further elaborated in counsel's oral closing.

Witnesses

19. Several witnesses were called. They gave evidence in February 2020 about events in, primarily, January 2019. In circumstances where the parties' relationship has broken down and where litigation was commenced by Atlas in September 2019, it is inevitable that there is a tendency for witnesses to view past events through eyes which are now focussed on the issues in that litigation. The contemporaneous documents are a means of testing the reliability of the oral evidence given and of indicating where the truth lies. Further, the court's findings of fact must be based upon all the evidence in the case which includes not only the oral evidence but also the contemporaneous documents and the inherent probabilities. (For some reason the parties did not prepare a Core Bundle as required by Appendix 7 to the Commercial Court Guide. This was unfortunate. Had it been prepared it would have contained no more than about 50 pages of contemporaneous documents and it would have avoided the court and witnesses having to look at isolated documents in several lever arch files.)
20. The Claimants' first witness was Mr. Ivankovich, the sole director and principal shareholder of Atlas. He was not involved in the important telephone call and meeting between the parties in January 2019. He therefore had no evidence to give about those calls and meetings. His "belief" as to what transpired in those calls and meetings was challenged (and said to be a lie) but those beliefs cannot assist in deciding what in fact was said in the call and meeting in January 2019. More importantly, he gave evidence as to reliance which was relevant to Atlas' estoppel case. But he was not cross-examined about that. Where he was challenged about matters in which he had been involved his evidence was subject to some apparent change when shown certain documents. However, some of the terms used in cross-examining him to describe certain activities in connection with Anaconda Cut were of flexible or uncertain meaning and it is possible that in some instances there was no actual change in his evidence. Rather, there was or may have been clarification by him as to what he understood those terms to mean. In so far as it is necessary to consider his evidence (which was perhaps of greater relevance to the application for an interim injunction) the view I formed was that the safe and reliable course was to base the court's findings as to the material events on the probabilities and the contemporaneous documents. The experience of the court is that they are a generally a better guide than oral evidence after the event.
21. The Claimants' second witness was Mr. Malli, who was Atlas' Director of Asset Management. He participated in the important telephone call and meeting in January 2019 but his evidence about those discussions was said to be a lie. That is not a conclusion which I could reach merely by observing him in the witness box or by considering the answers given by him to important questions. Indeed, he had volunteered in his second witness statement that he could not recall the precise words used on 11 or 15 January 2019, which might be thought an unlikely concession for a determined liar to make. However, the contemporaneous documents pose problems

for his evidence and suggest that it may not be reliable. His evidence cannot be considered on its own. It must be considered along with the probabilities and the contemporaneous documents.

22. The Claimants' third witness was Ms. Harper-Wilde. She was the regional director of Atlas in the UK. She had no involvement in the January call and meeting and indeed was unfamiliar with the term "Key Person". Counsel for the Defendant wished to question her about emails and other documents which raised questions about the management of Anaconda Cut by Atlas' executives in the US in order, I was told, to support an argument that if Atlas had asked Europa/Greengate to approve the appointment of Mr. Malli as Key Person Europa/Greengate would not have done so. Ms. Harper-Wilde gave her answers with precision and clarity. She gave no reason to think that her evidence was unreliable. Indeed, she had the unique distinction for a witness called by Atlas that it was not suggested that she was lying. Although the contemporaneous documents raised questions about the US management it was abundantly clear from the evidence of Ms. Harper-Wilde that whilst she had complaints about the lack of training for certain software she had no complaint about Mr. Malli. Her dissatisfaction related to Mrs. Malli who was also involved in the US management.
23. The Defendant called Mr. Black, a partner in Europa which manages the investment fund which indirectly owns Greengate. He was involved in the January call and meeting and said that the question of who would replace Mr. Ivory as Key Person was not discussed. He answered questions on that topic with clarity but it was suggested that his evidence made no sense because the probabilities and the contemporaneous documents indicated that that question was likely to have been discussed. Whether his evidence is reliable can only be determined after considering the probabilities and the contemporaneous documents. There was perhaps one topic on which Mr. Black did not, at any rate initially, give a ready and clear answer. That was the question whether the position in reality was that Europa/Greengate, having decided to terminate the Agreements on the grounds of a failure to appoint a Key Person, did not complain to Atlas about their failure to appoint a Key Person because to do so might have given the Claimants the opportunity to put matters right. This topic was relevant to the Claimants' estoppel argument.
24. The Defendant also called Mr. Adams, a senior associate at Europa. He took part in the monthly management meetings which the Key Person was required to attend by the terms of the Agreements. He was also very clear in his answers. Unlike Mr. Black who, I infer, was somewhat uncomfortable in answering the question whether Europa/Greengate had deliberately not alerted the Claimants to the risk that the Agreements might be terminated on the grounds that there was no Key Person, Mr. Adams was frank in his response. "It was not our job to tell them".

The roles of Mr. Ivory and Mr. Malli

25. Mr. Ivory was the managing director of the First Claimant, Atlas UK, and was accepted by Europa/Greengate as the Key Person. Europa/Greengate had requested that Kroll carry out due diligence upon him and nothing adverse was found. He was based in the UK and was well regarded by Mr. Black. He was entitled to a 50% share of the profit achieved on the resale of Anaconda Cut. Mr. Black said that

Europa/Greengate was anxious to ensure that Mr. Ivory was incentivised to develop and manage the property.

26. Mr. Malli was employed by the Second Claimant, Atlas US, as the Head of Asset Management. He was based in the US but had worked with Mr. Ivory since about 2014 and had frequently visited the UK so that he had knowledge of the UK market. On 14 November 2018 he had been introduced to Europa/Greengate by email as the person who would “oversee the mobilisation” and would be travelling to London frequently throughout that process. “Mobilisation” was not a contractual term but appeared to be understood by the parties as the work involved in letting the apartments and of making them (and the common facilities) ready for occupation by the tenants. Mobilisation was sometimes referred to as “onboarding”. By a further email on 21 November 2018 Europa/Greengate was informed that Mr. Malli would be “running point on the mobilisation.” It was presumably in that capacity that he met representatives of Europa/Greengate in London on 3 January 2019. Mr. Ivory did not attend that meeting.

The resignation of Mr. Ivory

27. Mr. Ivankovich accepted when cross-examined that he knew shortly before the Agreements were executed on 14 December 2018 that Mr. Ivory was to resign. This was the subject of adverse comment during the hearing, perhaps unsurprisingly, but the matter was not at the heart of the case and was not explored.
28. It is necessary to note a number of emails concerning the consequences of Mr. Ivory’s resignation.
29. An email dated 5 January from Mr. Ivory to Mr. Ivankovich and entitled “Replacement/handover” mentioned two persons, one of whom would be a “good cultural fit” and another of whom would be “very capable”. In a postscript Mr. Ivory said that he had discussed “various handover items” with Mr. Malli.
30. An email dated 6 January 2019 from Mr. Malli to Mr. Ivankovich referred to “a list of items which need to be transitioned” from Mr. Ivory. He said that “most of these I am OK taking on”. But he added that there were “several “MD” items which I believe someone in London should take on”. He said that some “operating items could be passed on to” Hugh Nelson (who was the Head of Global Operations in the US). Finally, he said: “however from a capital partner management perspective should be Jon’s successor. Hugh nor myself would be appropriate given distance and time zones.”
31. An email dated 7 January 2019 from Mr. Ivankovich to Mr. Malli and entitled “Re: UK transition items” referred to a job description which was entitled “Atlas UK Office. Managing Director Job Description.”
32. On 8 January 2019 Mr. Ivory emailed Mr. Malli and said that he had told “Eric” that “you”, that is Mr. Malli, “would be responsible for oversight and coordination until permanent UK MD replacement found.”
33. Precisely what is being discussed in these emails is not stated with clarity. But it is more likely than not they envisaged a successor being found for Mr. Ivory as

managing director of Atlas UK and that pending a replacement being found various of his functions as managing director would be handed over to Mr. Malli. Mr. Malli thought that some functions required to be “transitioned” to someone in London. It does not appear that any particular or express consideration was given to Mr. Ivory’s role as Key Man under the Agreements, though the reference to “capital partner management perspective” may have encompassed that role.

34. On 8 January 2019 Mr. Ivory arranged to see Mr. Black on 9 January 2019 at 10 o’clock.
35. On Wednesday 9 January 2019 there was an email and telephone discussion between Mr. Ivankovich, Mr. Ivory and Mr. Malli as to what Europa/Greengate and, it appears, the Claimants’ staff, were to be told about Mr. Ivory’s resignation and what action the Claimants were to take in the light of it. Mr. Ivory informed Mr. Ivankovich and Mr. Malli that he had spoken to two contract or “capital” partners and would be “doing Europa in 45 minutes, and the staff via conf call later this AM.” Mr. Malli then requested to speak “before the call”. Mr. Ivory agreed to that and it appears that they spoke between 0403 US time and 0607 US time. At 0607 Mr. Malli emailed Mr. Ivory as follows:

“Just want to ensure message is correct

-JI has resigned and is moving on. Last day is end of month.

-RM will maintain until proper replacement is found. Not looking to make any changes however just move projects ahead and keep the status quo

-SVI is in the process of finding permanent MD and will have this done by (x) date.

Just need to provide some direction so the crew has stability.

36. When Mr. Malli was asked about this exchange in cross-examination he said that his recollection was that the message he set out was to be given to Atlas’ staff. It was suggested to him (before a less redacted copy of the email exchange was provided) that his evidence was untrue but he explained that the reference to “crew” was a reference to Atlas’ staff. It seems to me that “crew” is more likely to be a reference to Atlas’ own staff than to Europa as a capital partner so that Mr. Malli’s evidence is more likely than not to be correct. However, it also seems likely that Mr. Ivory had the same message in mind before speaking to Europa.
37. Mr. Black gave evidence that Mr. Ivory informed him on the same day that he had resigned. Mr. Black said that this was a shock and grave disappointment. He also said that Mr. Ivory informed him that he believed Atlas would replace him with another UK managing director.

The evidence as to the alleged agreement on 11 and 15 January that Mr. Malli was accepted as Key Person in place of Mr. Ivory

38. On Thursday 10 January 2019 Mr. Black emailed Mr. Malli asking for a “catch up tomorrow to talk though a few things, especially about Jonathon.”
39. That catch up call took place on Friday 11 January 2019. There is a dispute as to whether the question of a replacement for Mr. Ivory as Key Person was discussed.
40. Mr. Malli’s account of the meeting in his first witness statement dated 13 September 2019 was as follows:

“The discussion centred around who from Atlas would be replacing Mr. Ivory as Key Person. I informed Mr. Black that Mr. Ivory’s expertise was in acquisitions and that, now the funding was secured, I would be taking over as Key Person as I had done for two other projects which Atlas managed in England at the time. Mr. Black asked about my qualifications and what role I had on the other two projects; I shared these with him. We then discussed my onboarding plan for Anaconda Cut for the next thirty minutes or so; in particular, how I foresaw leasing up the property. Mr. Black asked various general questions and appeared to be satisfied with my answers. He raised no objection to me assuming the role of Key Person.”

41. Mr. Black accepted that the mobilisation of Anaconda Cut was discussed in detail but said that there was no mention of the role of Key Person.
42. In his second witness statement dated 9 October 2019 Mr. Malli said:

“I cannot remember the precise words that I used but the purpose of the discussions and their substance was as set out at paragraphs 16 and 17 of my first witness statement.”

43. When cross examined as to whether the words key man or key person were used in the call, he said:

“We talked about Mr. Ivory’s responsibilities and who would be taking his role”.

44. When asked whether the role was of Key Person he said:

“Yes, because all the questions that were asked of me pertain to the Anaconda Cut project. There was no discussion of who was overseeing capital markets, who was overseeing acquisitions, who was overseeing the administration function of the managing director of the London office. Those questions were not gone into. But the focus of the conversation was focused on how soon are we going to be ready to let the units, how soon are we going to finish the fit-out, how soon are we getting facilities done, how is marketing going, and all those items are part of what the key man is to oversee or execute as part of the agreement...”

45. At the end of his evidence he said that he told Mr. Black that he would be taking over Mr. Ivory's role in response to Mr. Black's question.
46. Mr. Black's evidence, when cross-examined, was that he wished to find out what Mr. Ivory would be doing in the period before he left and that the main thing on his mind was whether Mr. Malli would be able to do the mobilisation. He said that he had been told by Mr. Ivory that there would be a new managing director within 6 weeks and he understood that Mr. Malli would be holding the fort until the new UK managing director arrived. He regarded the Key Person and the UK managing director as "effectively the same role". He accepted that he asked Mr. Malli about his qualifications and his experience in mobilising buildings. He said that he was happy with that from a mobilisation perspective.
47. After that call Mr. Malli emailed Mr. Keeble (then of Atlas) and also Mr. Ivory. He reported that he had "just come off a call with Hugo [Mr. Black]" and he said that Mr. Black was "very much concerned about" a particular matter and asked to be advised about any issues with the builder. It is to be noted that Mr. Malli did not inform Mr. Ivory that he had discussed with Mr. Black the taking over of Mr. Ivory's role by Mr. Malli. However, the email was obviously not a full report of what had been discussed between Mr. Malli and Mr. Black. Later that evening Mr. Malli suggested to Mr. Black by email that they meet in London on Tuesday (15 January) to "discuss further in person our conversation from earlier today". He also sent Mr. Black (copied to Mr. Ivory and others) an email entitled "Anaconda Cut onboarding update/week ending 11.01.19". It detailed a large number of matters over three pages.
48. On Monday 14 January 2019 Mr. Malli emailed Mr. Ivory and said:

"I tried to make it as clear as possible on Friday the onboarding team point is myself, then Georgie. Hugh is focussed on existing assets and will transition to AC post handover."
49. Again, there is no specific mention of Mr. Malli having informed Mr. Black on Friday, 11 January 2019, that he would be taking over Mr. Ivory's role. However, being "the onboarding team point" is perhaps not inconsistent with an intention on Mr. Malli's part to do so.
50. Mr. Malli met Mr. Black in London on 15 January 2019. His account of that meeting in his first witness statement was:

"We again discussed the role of Key Person. The conversation covered much the same topics as the telephone conversation on 11 January 2019. Mr. Black confirmed that Europa and Greengate were content for me to assume the role of Key Person in place of Mr. Ivory."
51. Mr. Black said that the role of Key Person was not raised at the meeting.
52. Mr. Malli explained in his second witness statement that the meeting was with Mr. Black alone. After that meeting there was a discussion with Mr. Adams about operational matters (or as the minutes describe them, "items relating to onboarding Anaconda Cut"). When cross-examined Mr. Malli said:

“The words key person were not mentioned, but who was taking over Jon’s role, that was what was mentioned as pertains to this project.”

53. It was suggested to him that there was no agreement by Mr. Black that Mr. Malli would replace Mr. Ivory as key person. He replied that there was no objection either. It was again suggested that there was no agreement and he replied “not that I can recall”.

54. Mr. Malli made no report in writing to either Mr. Ivory or Mr. Ivankovich about this meeting. Mr. Black did make a report to the investment committee of Europa on the evening of 15 January 2019. It read as follows:

“We learnt earlier this week that our Greengate Key Man, Jonathon Ivory, resigned earlier this week.

We have spent some time this week with the operational team and it seems that Jonathon is not particularly involved with the lease up or operationsWe would rather not change JV partner at this critical time of lease up (PC is forecast for the end of Feb/mid March) but we are reviewing ways that we can defer our key man clause until a later date to keep our options open.

.....Atlas are proposing to replace him within 6 weeks.”

55. It is to be noted that Mr. Black makes no mention of Mr. Ivory being replaced as Key Person by Mr. Malli.

Discussion and conclusion as to the alleged agreement

56. In circumstances where Mr. Malli does not maintain that there was a discussion about the Key Person in terms there is no foundation for any finding that the question of Key Person was discussed in terms with Mr. Black on either 11 or 15 January 2019. However, Mr. Malli does maintain that there was a discussion about him taking over the role of Mr. Ivory with regard to Anaconda Cut, which Mr. Malli understood to refer to Mr. Ivory’s role as Key Person. He appears to have regarded Mr. Black as agreeing to this notwithstanding that he accepted when cross-examined that he could not recall such an agreement.

57. Both counsel submitted that the probabilities supported their clients’ case. Thus counsel for Atlas submitted that given that Mr. Black regarded the position of Key Person as of great importance, that he had stated in his email on 10 January 2019 that he wished to talk “especially about Jonathon”, that the project was about to enter into its most important phase (mobilisation) and that he was to have a discussion with a senior Atlas executive it is most unlikely that he did not enquire of Mr. Malli who was to take over Mr. Ivory’s role. Conversely, counsel for Europa/Greengate submitted that given that Mr. Black had no authority to accept a Key Person without referring back to the Investment Committee (of Europa), given the importance of the role of the Key Person in overseeing all aspects of the business plan, given the need for due diligence on any alternative Key Person, and given the formalities involved in clause

4.3 when a new Key Person is proposed and approved it is improbable that Mr. Black would have himself approved the replacement of Mr. Ivory as Key Person by Mr. Malli on the first occasion that he had met Mr. Malli alone. Both submissions were cogent. Because each was equally cogent neither view of the probabilities has enabled me to determine, by reference to the probabilities alone, what is likely to have passed between Mr. Malli and Mr. Black. It is necessary to look closely at what is common ground, at what Mr. Malli and Mr. Black were saying to others both before and after their discussions with each other and what the probabilities suggest in the light of such matters.

58. There does not appear to me to be any dispute between Mr. Malli and Mr. Black that they discussed the impending mobilisation of Anaconda Cut, Mr. Malli's role in that regard and his qualifications and experience for that role. Mobilisation was the immediate task ahead and it was important. It is to be expected that Mr. Black would want to know who would be overseeing that work and it is to be expected that Mr. Malli would wish to assure Mr. Black that he, Mr. Malli, would be overseeing it. After all, he had been introduced to Europa/Greengate in November 2018 as "running point on the mobilisation."
59. There is no reason to doubt that Mr. Black saw the UK managing director and the Key Person as one and the same. Until the resignation of Mr. Ivory they had indeed been one and the same person. Similarly, there is no reason to doubt that Mr. Black expected that Atlas were to find a replacement managing director within 6 weeks. That appears to be what he had been told by Mr. Ivory on 9 January. Moreover, on 8 January 2019 Mr. Ivory had emailed Mr. Malli telling him that he "would be responsible for oversight and coordination until permanent UK MD replacement found." Thus it seems more likely than not that neither Mr. Ivory nor Mr. Malli saw any need to raise the subject of who would perform Mr. Ivory's role after a replacement managing director had been found. It is more likely than not that on 11 and 15 January 2019 Mr. Black and Mr. Malli had discussed who would be overseeing the immediate and important work of mobilisation before a replacement of managing director was found. Mr. Malli, in the Atlas internal emails between 6 and 9 January 2019, had not focussed on the issue of the Key Person and so it is unlikely that he did so on 11 or 15 January 2019.
60. These considerations suggest that Mr. Black's evidence that the Key Person following Mr. Ivory's resignation was not mentioned on 11 and 15 January 2019 is likely to be correct. Moreover, had it been suggested that Mr. Malli would replace Mr. Ivory as Key Person under the Agreements it is very likely that Mr. Black would have reported that to the Investment Committee on 15 January 2019. Yet he did not. It is also likely, it seems to me, that if Mr. Malli had put himself forward as the Key Person and had been accepted as such, he would have confirmed that in writing to Mr. Ivory and Mr. Ivankovich. Mr. Malli himself said that he sends emails "recapping the conversation to memorialise it". Yet he did not.
61. Thus it seems likely, in circumstances where this litigation has put the spotlight on the replacement of the Key Person, that Mr. Malli's role in mobilisation, Mr. Ivory's plan that Mr. Malli would be responsible for oversight and coordination until a replacement managing director had been found, Mr. Black's acceptance that Mr. Malli was qualified and experienced for that role and the overlap between the roles of managing director and Key Person have caused Mr. Malli to have a mistaken

recollection or understanding of what transpired between him and Mr. Black on 11 and 15 January 2019. Since it was suggested to him that he had lied in his evidence it is only fair that I should state that I do not accept that he did so.

62. For these reasons I have concluded that it is more likely than not that there was no agreement between Mr. Malli and Mr. Black on 11 and 15 January 2019 that Mr. Malli was accepted by Mr. Black as a replacement Key Person for Mr. Ivory.
63. This conclusion is consistent with later events.
64. From at least May or June Mr. Black and Mr. Adams were discussing the termination of the Agreements when six months had elapsed from 9 January 2019 (see below paragraphs 77-79). It is unlikely that they would have done so had Mr. Malli been proposed (and accepted) as the Key Person. It was suggested that what in fact happened was that Mr. Black, having agreed to accept Mr. Malli as Key Person, then looked at the Agreements, noted the requirement for formal written notice and realised that there was an opportunity to consider termination. I considered that suggestion contrived and unrealistic.
65. When Mr. Ivankovich turned his attention to the question of the Key Person in August 2019 he texted Mr. Malli on 26 August 2019 in the following terms:

“We need to send a key person replacement notice under the management agreement with Europa. It is the only basis on which they can seek to terminate the agreement. So want to make you the key man if that is OK.”

66. That message is inconsistent with any understanding on the part of Mr. Ivankovich that Mr. Malli had been performing the role of Key Person and had been accepted as the Key Person. It was suggested that it was no more than Mr. Ivankovich recognising that a “formal” key person replacement notice had to be sent. I was not persuaded that it should be understood in that way. I accept that when notice was given on 27 August 2019 Mr. Ivankovich stated that Mr. Malli had been acting as the “de facto” Key Person since Practical Completion. However, Practical Completion was stated in the notice as 8 March 2019 so that this notice also did not suggest an agreement accepting Mr. Malli as Key Person from 11 or 15 January 2019.

Agreement by conduct and estoppel

67. The alternative argument advanced by Atlas was that it is to be inferred from the conduct of Europa/Greengate that it had agreed to accept Mr. Malli as the Key Person. This argument is based upon the same facts which are relied upon to establish an estoppel. I shall therefore recount the facts and matters relied upon before discussing and reaching a conclusion on these alternative arguments.
68. I have already noted that on 15 January 2019 Mr. Black said this to the Investment Committee:

“We would rather not change JV partner at this critical time of lease up (PC is forecast for the end of Feb/mid March) but we

are reviewing ways that we can defer our key man clause until a later date to keep our options open.”

69. It seems clear to me that Mr. Black, at this very early stage, had in mind that Europa/Greengate may wish to terminate the Agreements. It would be termination which would bring about a change in the JV partner. But he did not consider it advisable to do so at that time, so close to practical completion (the date Europa/Greengate took possession of an empty building).

70. A member of the Investment Committee, Mr. Oram, replied:

“We should also reflect on whether we should still be working with Atlas. What are the termination and key man provisions in the AM agreement?”

71. Mr. Black replied:

“We can terminate if we don’t approve their replacement.....Our proposal is to delay the confirmation of the key man until we have made substantial progress on the leasing. We are just in the process of launching the building so it couldn’t be a worse time to change manager. We have been impressed with the operations teams so far

Dinner on 13 February 2019

72. On 13 February 2019 Mr. Black and Mr. Ivankovich met at a dinner. Mr. Black’s recollection was of a heated discussion in which he raised the poor state of Atlas’ UK business, the fact that there was no Key Person and that Europa/Greengate would terminate should Atlas not appoint a new managing director whom Europa/Greengate would need to approve. Mr. Ivankovich accepted that there had been a discussion but did not recollect a heated discussion or any reference to the Key Person or to any threat of termination. As will become apparent Mr. Black and his colleague Mr. Adams took care not to mention to Atlas any possibility of termination. It is therefore unlikely that Mr. Black would have given notice of a possible termination on account of the absence of Key Person at a dinner. Moreover, had he done so it is likely that Mr. Ivankovich would have taken action to appoint a Key Person and he did not do so. I therefore consider it more likely than not that Mr. Black’s recollection in this regard was mistaken.

The Meetings

73. It will be recalled that the Agreements provided for the Key Man to attend regular meetings either in person or by telephone. Before Mr. Ivory left the Claimants he emailed Mr. Black and Mr. Adams on 24 January 2019 (and copied in Mr. Malli) and asked: “Would you like me to attend next week’s progress meeting? Per our mgmt. agreement it is a requirement for the key man to attend but am conscious that you may prefer that I do not (my last day is the following day).” Mr. Adams replied: “No need to attend”.

74. Mr. Malli attended the meetings in person from January to April 2019 but from May to July 2019 he attended by way of a conference call. At no time was there any complaint that Atlas had failed to appoint a Key Person to attend these meetings.
75. Indeed, the absence of a replacement Key Person does not appear to have created problems for Europa/Greengate. On 31 March 2019 a minute to the Investment Committee from Mr. Adams noted as follows:

“HA [Mr. Adams] noted that Jonathon Ivory, who is a Key Man, recently left Atlas to join Henley Investment Management. No substitute Key Man has been put forward by Atlas. HA noted that this should not impact on leasing and that the local leasing team is being productive and responsive.

HA provided an update on leasing, noting that the leasing velocity and rental levels are above business plan.”

76. The same minute noted that under “Issues Arising” there was “Replacement of Key Man”. It was suggested to Mr. Adams that “whilst there were no operational difficulties there was a contractual issue about the key man.” Mr. Adams agreed that that was “a good summary of the assumption we’re trying to get across.”

Europa/Greengate prepare the ground for termination

77. On 1 May 2019 an email exchange between Mr. Black and Mr. Adams indicated that they were discussing ways of terminating the Agreements. Mr. Black asked “Can we refresh the key man dates ?” Mr. Adams replied “I don’t have his actual resignation date but assuming it was 1st Jan then we are looking at end of June. If they haven’t renewed their PI cover then we could terminate now but no way of knowing if they have or not without flagging it.” Mr. Black replied “let’s keep pushing on - not far until the end of June.” When cross-examined about this Mr. Adams accepted that at this time Europa/Greengate was giving Atlas the impression that everything was going well.
78. On 5 June Mr. Adams prepared a Follow-On Investment Report for the Investment Committee. Its purpose was to recommend the termination of Atlas as Asset Manager and the creation of a new UK operating company to take over the management of the property. The report recorded that 68% of units had been leased and that the updated business plan assumed that the property would be fully occupied by May 2020 which was in line with the business plan. Rents were 5% above the original business plan and the “local team” hired by Atlas was “working well together and leasing has been efficient to date”. However, it was also noted that Mr. Ivory had left and that “no further key man has been suggested and the main direction from Atlas has been led by Ravi Malli who is based in Chicago.” There was said to be a “general lack of oversight given the geographical and time zone differences between Chicago and the UK.” There were said to have been “several operational issues that Atlas have not been forthcoming with” and “in general, Atlas have little to offer at this stage and are more of a hindrance than a help”. It was concluded: “This presents an opportunity for Europa to take control of the asset and run the operations in house, whilst keeping the local team in place to ensure leasing momentum is maintained and continuity with the existing tenants.”

79. The report then addressed the procedure for termination as follows:

“Atlas have six months from the resignation of a key man to recommend a new person for the role, which Europa have the right to decline. To date, no new key man has been put forward by Atlas to Europa and therefore, in line with the Asset Management Agreement (“AMA”), this enables Greengate Sarl to terminate the AMA agreement on the six-month anniversary of the departure of the key man. The estimate of this date is the 8th July.”

80. It is to be noted that, although this report speaks of a lack of oversight from Atlas, of a loss of support from Atlas and of there being operational issues, at no stage did Europa/Greengate complain of such matters to Mr. Malli who, it was noted, was providing the “main direction” following the resignation of Mr. Ivory. Much evidence has been given (at least in writing) as to how well, or not, the property was managed by the Claimants. Such issues do not appear to be directly relevant to the issues which the court must decide. They appear to be no more than the context in which Europa/Greengate decided to terminate the Agreements. Mr. Black accepted when cross-examined that he wished to terminate the Agreements before Atlas found out that that was what he was trying to do. He also accepted that he did not wish to give Atlas the opportunity to improve matters because he wished to terminate the Agreements. Mr. Black said that he regarded Atlas as a “troubled” or “failing” business.

81. At some stage in June 2019 (I was not given the exact date) Mr. Sutherland was appointed managing director of Atlas UK. He visited Anaconda Cut and raised certain questions. In the email exchange which followed Mr. Malli said on 20 June 2109:

“It seems he is taking over for me on AC. If so I need to know so I can transition stuff to him.”

82. On 22 July 2019 Europa/Greengate approached their bankers, whose consent to any termination was required, and confirmed their intention to terminate Atlas as property manager. It was accepted that leasing had been “efficient” and that the team was “working well together” but it was said that no replacement Key Man had been identified or proposed, that Atlas had lost its remaining UK-based head office staff and that only the local on-site team remained.

83. On 23 July 2019 Mr. Adams informed Mr. Hudson-Davies (who was to manage the property after Atlas’ services had been terminated) that his goal was to terminate Atlas on or before the monthly management meeting on 31 July 2019.

84. By 31 July 2019 Mr. Adams accepted that Europa/Greengate had had the approval of the Investment Committee and of their bankers to the termination. But in the event the meeting of 31 July 2019 went ahead (with Mr. Malli attending by telephone) and without any termination.

85. Following the meeting Mr. Adams told Ms. Harper-Wilde that Mr. Hudson-Davies would like to meet her on 7 August. He asked her to keep the meeting to herself but in fact she told Mr. Malli. Mr. Adams did not recollect telling her to keep the meeting to

herself but her evidence was not challenged and I accept it. The meeting took place in the Hotel du Vin in Winchester and Mr. Hudson-Davies had questions about practical matters concerning the management of the building. He also requested her to keep the meeting private. Ms. Harper-Wilde later informed Mr. Adams that she was concerned about the meeting and the information that was being asked of her. She said that if Mr. Adams was unhappy with Atlas he should raise points of concern at a higher level. She was told to keep the matter “very tight”. But Ms. Harper-Wilde very properly informed Atlas.

86. On 21 August 2019 the board of Greengate resolved to terminate the Agreements.
87. On 26 August 2019 Mr. Ivankovich sent the following email to Mr. Malli:
- “We need to send a key person replacement notice under the management agreement with Europa. It is the only basis which they can seek to terminate the agreement. So want to make you the key man if that is OK.”
88. On 27 August 2019 Mr. Ivankovich sent Mr. Black a “Notice of Replacement of Key Man.” The notice stated that Atlas was proposing that Mr. Malli be formally approved as the Key Man. In addition to the qualifications in his CV and his ongoing relationship with Europa/Greengate it was stated that he had been “acting as the de facto Key Person since Practical Completion” and that he had “attended all scheduled meetings either in person or by telephone “acting in the capacity of the de facto Key Person.” This letter was not considered by the board of Greengate or by the Investment Committee of Europa.
89. On 2 September 2019 Greengate sent a letter of termination. (It was addressed to Mr. Ivory but no point was taken about that.) The letter stated:
- “Atlas has breached the Agreement including by failing to provide adequate Key Person services properly or at all, failing to procure that Jonathon Ivory fulfils the role of Key Person, failing to consult on and procure and appoint an adequate replacement within the timescales permitted or at all. As a result this letter is to notify you, Jonathon and Atlas Residential Solutions Management UK Ltd., that we have elected to terminate the Agreement with immediate effect. ”

The Claimants’ alternative case of an agreement by conduct

90. Atlas’ alternative case is that Europa/Greengate, by scheduling and participating in the clause 6.1 meetings without objection to Mr. Malli’s attendance at those meetings as senior representative of Atlas and without suggesting that Mr. Ivory or some other person should have attended as Key Person, thereby “approved the replacement of Mr. Ivory”.
91. It was submitted that not only can an offer be accepted by conduct but that an agreement can be inferred from conduct even if there has been no express offer. The authority relied upon was *RTS Ltd. v Molkerei Alois Muller GmbH* [2010] 1 WLR 753 at paragraphs 50-54 per Lord Clarke. I am prepared to accept that submission,

although the precise submission does not appear to be supported by the express words of Lord Clarke. But I do not consider that the facts of the present case enable the court to infer that Europa/Greengate accepted Mr. Malli as a replacement for Mr. Ivory as Key Person.

92. Mr. Malli began his attendance at the monthly management meetings as the person who, pending the appointment of a successor to Mr. Ivory as managing director, would be dealing with the mobilisation of the property. No managing director was appointed until Mr. Sutherland was appointed (according to the dramatis personae) in June 2019. Thus there was an explanation for Mr. Malli's attendance at the monthly management meetings other than his being a replacement for Mr. Ivory as the Key Person. In those circumstances one would not expect Europa/Greengate to object to Mr. Malli's attendance. On the contrary they would want him to attend.
93. Given the requirement in the Agreements that the Key Person attend the monthly management meetings it is, I accept, arguable that by failing to complain that there was no attendance at those meetings by a Key Person in place of Mr. Ivory, Europa/Greengate were not objecting to the absence of a replacement Key Person. But that is not the same as accepting that Mr. Malli was the replacement Key Person. It had not been suggested that he was and in the absence of any such suggestion I am unable to infer from Europa/Greengate's conduct that they had accepted Mr. Malli as the Key Person.
94. After the appointment of Mr. Sutherland as managing director in June Mr. Malli continued to attend the monthly management meetings in June and July. But leasing, an important part of mobilisation, was continuing. By 22 July 2019 74% of the apartments had been leased. Therefore there remained a good reason for Mr. Malli's attendance at the monthly meetings. There is no evidence that when Mr. Sutherland was appointed managing director Atlas indicated to Europa/Greengate that Mr. Malli was the replacement Key Person. That being so, I do not feel able to infer that Europa/Greengate accepted him as the replacement Key Person thereafter.

Estoppel

95. Atlas' next case is that Europa/Greengate are estopped from disputing that Mr. Malli had assumed the role of Key Person and from asserting that they had a valid right to terminate the Agreements. This case is based on the allegation that Europa/Greengate represented that Mr. Malli had assumed the role of Key Person and that they had no valid right to terminate the Agreements.
96. It is said that Mr. Ivankovich relied upon these representations because, as he said in his fourth witness statement dated 20 January 2020 and in respect of which he was not cross-examined, he understood

“that Greengate were content with Mr. Malli taking over Mr. Ivory's role and acting as the Key Person by attending the monthly management meetings. As a result and believing that Greengate had no problem with or objection to Atlas' performance of the contractual obligations relating to the Key Person, I did not take any formal or documented steps in that respect prior to my letter to Greengate dated 27 August 2019. If

I had known.....that Greengate regarded Atlas as in breach of the Agreement and liable to termination as a result of the departure of Mr. Ivory, I would certainly have taken formal, documented steps to replace him, either with Mr. Malli or, if Greengate had reasonable grounds for not accepting him, someone else.”

97. The starting point of any case on estoppel must be a representation of fact. I do not regard Europa/Greengate as having represented to Atlas that Mr. Malli had assumed the role of Key Person. My reasons are the same as those I have just given for not accepting the submission that Europa/Greengate had agreed by conduct that Mr. Malli had replaced Mr. Ivory as Key Person.
98. The alternative representation relied upon is that Europa/Greengate had no valid right to terminate the Agreements.
99. There was no such express representation but the question is whether such a representation was made by conduct, namely, their failure to object to the lack of a replacement Key Person at or after the monthly meetings which the Key Person was to attend.
100. The relevant principle was discussed in *The Lutetian* [1982] 2 Lloyd’s Reports 140 at pp.157-159 by Bingham J. The judge referred to *Spencer Bower and Turner on Estoppel by Representation* and then to a statement of principle by Lord Wilberforce in *Mercantile Co. Ltd. v Twitchings* [1977] AC 890 at p.903 that
- “the duty necessary to found an estoppel by silence or acquiescence arises where a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations.”
101. Bingham J. said that
- “one must be careful not to impute unrealistically onerous obligations to those who may choose to conduct their relations in a tough and uncompromising way. There is nonetheless a duty not to conduct oneself in such a way as to mislead.”
102. In the present case the fact that Mr. Ivory, the Key Person, had resigned was known to both parties. Both parties must also have known that the Key Person was required to attend the monthly meetings. Yet the monthly meetings took place from January until July 2019 without a replacement Key Person in attendance. Mr. Black appreciated as early as 15 January 2019 that the resignation of the Key Person may give rise to an option to terminate the Agreements. But he was not anxious to exercise any such right at that early stage. By May or June 2019 Mr. Black and Mr. Adams were discussing between themselves how to terminate the Agreements. They appreciated that they might well have such a right once six months had expired from Mr. Ivory’s resignation. But they were anxious not to “flag up” the possibility to Atlas. Mr. Adams accepted that they were keen to give the impression that everything was going

well. No complaints were made to Atlas and Mr. Black accepted that he wished to terminate the Agreements before Atlas found out that that was what he was trying to do. He also accepted that he did not wish to give Atlas the opportunity to improve matters because he wished to terminate the Agreements. Mr. Ivankovich's evidence shows that in this respect Mr. Black and Mr. Adams succeeded. Throughout all of this the important work of leasing the apartments was being carried out by Atlas with success and on schedule.

103. Had Europa/Greengate terminated in, say June 2019, on the ground that Atlas had, in breach of clause 6.1 of the Agreements, failed to procure that the Key Person attended the monthly meetings in circumstances where they had attended such meetings without the Key Person and without objecting to the absence of the Key Person they might well have found themselves estopped from terminating upon that ground. Indeed there may be other reasons why such an argument would fail, for example, the absence of a notice requiring the breach to be remedied (see clause 2.5(a) and the definition of an event of default) or affirmation of the Agreements. But in the present case Europa/Greengate wish to rely upon the right to terminate pursuant to clause 4.4 of the Agreements which arises if three conditions are satisfied, the last of which is that there has been no replacement Key Person appointed within 6 months of the proposed change. It is clear that this is the right which Mr. Black and Mr. Adams had determined to exercise if and when the opportunity arose and to which they did not wish to alert Atlas. I do not consider that Europa/Greengate, acting honestly and responsibly, were obliged to inform Atlas that it was their intention to terminate the Agreements pursuant to clause 4.4, once (which had not yet occurred) 6 months had elapsed without a replacement having been appointed. Although Mr. Black felt, I thought, some sensitivity about keeping quiet about his intentions (because, I would suggest, Atlas was being lulled into a false sense of security), I consider that Mr. Adams was right to say "it is not our job" to tell Atlas. It is not dishonest or irresponsible to plan to exercise a contractual right to terminate if and when such right arises without informing your counterparty that that is your intention. That being so there is no basis for suggesting that Europa/Greengate had represented that they had no valid right to terminate. For these reasons the estoppel by representation argument must also fail.
104. An estoppel by convention was also relied upon. But for the same reasons I have given for saying that there was no representation capable of supporting an estoppel I further conclude that there was no material assumption of fact or law capable of supporting an estoppel by convention. If there was an assumption by Atlas before 9 July 2019 that Europa/Greengate had no valid ground to terminate which was acquiesced in by Europa/Greengate then, in circumstances where the right to terminate pursuant to clause 4.4 only arose on 9 July 2019, it was not unjust to allow Europa/Greengate to exercise that right once it arose.

Affirmation

105. In the event that Atlas lose on the agreement and estoppel cases counsel submitted that Europa/Greengate were unable to terminate the Agreements because, by participating in the monthly meeting on 31 July 2019 without terminating the Agreements, they had affirmed them.

106. Affirmation is an election between two rights, one to terminate a contract and the other to continue the contract notwithstanding there being cause to terminate. An election to affirm requires knowledge both of the facts giving rise to the breach and of the legal right to choose between the two alternatives. Affirmation may be express or it may be implied from conduct. For the latter to be established there must be an unequivocal act from which it may be inferred that the party intends to continue the contract notwithstanding the breach; see generally *Chitty on Contracts* Vol.1 at paragraph 24-003.
107. Any examination of an allegation of affirmation must commence with the breach or event which gives rise to the election between the right to terminate and the right to affirm.
108. In the present case the events which give rise to the right to terminate pursuant to clause 4.4 of the Agreements are the three events set out in that clause, the last of which is the expiry of six months without the appointment of a replacement Key Person. There was a dispute as to the date from which the six months ran. Counsel for Atlas submitted that it ran from the date of the notification of the proposed change, namely, 9 January 2019. He said that clauses 4.3 and 4.4 must be read together, that clause 4.3 identifies the six months as running from the date of the notification of the proposed change and that, although clause 4.4 does not, the clause must be read as a whole and on that basis the meaning which clause 4.4 would reasonably convey is that the six month period in clause 4.4 also ran from the said notification. Counsel for Europa/Greengate submitted that the six months in clause 4.4 ran from the date on which the Key Person had ceased to provide his services, namely, 31 July 2019. Counsel pointed out that the reference in clause 4.4 to six months came immediately after the reference to the Key Person having ceased to perform the Services. This is a short point of construction but in my judgment it is necessary to read clauses 4.3 and 4.4 together and on that basis the six months in clause 4.4 runs from the date on which notification of the proposed change was given. That is not reading into clause 4.4 words which are not there. It is simply construing clause 4 as a whole.
109. Notification of the proposed change was given on 9 January 2019. Thus the right to terminate arose on 9 July 2019. The question is whether the fact that Europa/Greengate participated in the monthly meeting on 31 July 2019 without terminating the Agreements amounted to an affirmation of the Agreements, that is, an election to continue them, not to terminate them. It was accepted that Europa/Greengate was entitled to a reasonable time to consider their position but it was submitted that they plainly had sufficient time given that they had been planning to exercise this very right of termination.
110. Europa/Greengate knew of the fact giving rise to the right to terminate and that they had a right to terminate. Europa/Greengate had secured the approval of the Investment Committee and of their bankers to the termination. But they did not secure board approval until 21 August 2019 and it was shortly after that the right to terminate was exercised. In response counsel for Atlas submitted that in the absence of some reason why the board's decision could not have been obtained earlier this should not stand in the way of a finding of affirmation. However, whilst it is likely that board approval could have been obtained earlier than 21 August I am not persuaded that the delay in doing so from 9 July until 21 August 2019 was so long that it was unreasonable. I have noted from *Chitty* Volume 1 at paragraph 24-003 that the "law does not require

an injured party to snatch at a repudiation” and that (see footnote 27) “the courts should generally be slow to accept that the innocent party has committed itself irrevocably to going on with the contract”. In the light of that guidance I am not persuaded that Europa/Greengate affirmed the Agreements before they terminated on 2 September 2019.

111. I should mention a further point raised by counsel at the very end of his submissions, namely, that the first condition in clause 4.4 was not satisfied because Europa/Greengate had no reasonable ground to withhold their approval to Mr. Malli, essentially because Atlas’ proposal to appoint Mr. Malli as Key Person on 27 August 2019 was never considered by the board or by the Investment Committee. However, the right to terminate arose on 9 July 2019. By that time there had been no approval of a replacement Key Person because no replacement had been suggested. Therefore the first condition had been satisfied. If it is necessary to decide whether in such circumstances a refusal to consider the proposal of a replacement Key Man made after the expiry of the relevant six months was unreasonable I do not consider that it was unreasonable.

The formal proposal case

112. The final argument advanced by counsel for Atlas was that the notice of the proposed change required by clause 4.3 and 4.4 was a notice in writing; see clause 13.1. That notice was not given until 27 August 2019 and so the six month period did not commence running until that date.
113. This argument has the unlikely consequence that Atlas, by giving notice of the proposed change orally, can delay the commencement of the six month period by failing to confirm the notice in writing. In my judgment this argument cannot assist Atlas. Atlas chose to give notice orally of the proposed change on 9 January 2019. It expected the notice to be relied upon and it was. Two days later Mr. Malli and Mr. Black met to discuss the consequences of the information imparted on 9 January 2019. It does not lie in Atlas’ mouth to say that the notice of the proposed change given on 9 January 2019 should now be ignored. Europa/Greengate did not insist on the notice being given in writing and must be taken to have waived the requirement for it to be in writing. Thus, although the Agreements provided for notices to be given in writing neither party, having acted upon an oral notice of the proposed change, can say that that oral notice should be regarded as never having been given.

Conclusion

114. Notwithstanding the skilful advocacy of counsel for Atlas I have concluded that the termination of the Agreements by Europa/Greengate on 2 September 2019 was valid.