Neutral Citation Number: [2026] EWHC 43 (KB)

Case No: KB-2025-001233

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/01/2026

Before:

THE HONOURABLE MR JUSTICE SWEETING

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Between:

Jonathan FRIEND	**Claimant**
- and –	
FRIEND Media Technology Systems Limited	**Defendant**

- -
- -

Andrew Legg (instructed by **Lewis Silkin LLP**) for the **Claimant**
Matthew Morrison KC and **John Eldridge** (instructed by **Addleshaw Goddard LLP**) for the **Defendant**

Hearing dates: 10th December 2025

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Approved Judgment

This judgment was handed down remotely at 1:00pm 13.01.2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE SWEETING

Mr Justice Sweeting:

Introduction

1. Pursuant to CPR 3.4(2)(a) the Court may strike out a statement of case if it appears that it discloses no reasonable ground for bringing or defending the claim. Further, a party is entitled to summary judgment pursuant to CPR 24.3 if the Court considers that the other party has no real prospect of succeeding on the claim and there is no other compelling reason for trial.

2. In the present litigation the Claimant claims, pursuant to a contractual agreement:

   i) payment of his legal fees and costs, alternatively damages for breach in respect of non-payment of his legal fees and costs;

   ii) a declaration that he is entitled to reimbursement of his legal fees and costs and any further legal fees relating to the same incurred in the future;

   iii) interest; and

   iv) such other relief as the Court may deem fit.

3. By an application dated 31 July 2025 the Claimant seeks an order:

   i) striking out the Defence on the basis that it discloses no reasonable grounds for defending the claim;

   ii) granting summary judgment in his favour;

   iii) requiring the Defendant to pay the sums claimed and the Claimant's costs of these proceedings.

4. The Defendant says that the application should be dismissed and that there should be "reverse summary judgment" in its favour because the central argument advanced by the Claimant, on which the litigation turns, is unsustainable, that this can be determined in the present application and that there is no reason why the claim should be disposed of at a trial. In the alternative it argues that there is a real dispute as to contractual construction and the court could not, on the Claimant's application, reach the conclusion that all aspects of its defence disclose no reasonable grounds for defending or have no real prospects of success.

Background

5. Mr Friend (or "the Claimant") is a founder of the Defendant company ("the Company"), registered in Jersey and its subsidiary, Friend MTS (an English company). By an Investment Agreement ("the Investment Agreement") dated 19 July 2022, the Company agreed terms with its founders, managers and investors to govern their relationship following investments by which private equity investors acquired a significant stake in the Company. The governing law of the Investment Agreement is the law of England and Wales. The parties agreed to submit to the exclusive jurisdiction of the English courts.

6. Mr Friend's relationship with the private equity investors, the Company, and Friend MTS deteriorated, resulting in multiple legal disputes. He is currently involved in four separate sets of proceedings concerning the Company and/or Friend MTS (collectively, "the Disputes"). These are:

   i) Unfair prejudice proceedings commenced in the Royal Court of Jersey on 25 October 2024 by Mr Friend and other minority shareholders. The Company is a neutral party. These proceedings remain ongoing.

   ii) Proceedings commenced in the London Central Employment Tribunal (the "Employment Proceedings") on 31 January 2025 by Mr Friend against Friend MTS and three individual employees/directors. These proceedings are currently stayed until 31 January 2026.

   iii) Proceedings brought by the Company and Friend MTS against Mr Friend and Friend TP Limited under claim number KB-2025-0001228 (the "Restrictive Covenant Proceedings"), alleging breaches of restrictive covenants in the Investment Agreement. The trial took place on 21–24 and 27 October 2025 before Constable J. Judgment was handed down on 6 November 2025 dismissing the claims and finding no breaches of duty by Mr Friend.

   iv) The present litigation in which Mr Friend seeks reimbursement of legal fees, expenses, and disbursements incurred in connection with various of the Disputes under an indemnity provided by Clause 19.4 of the Investment Agreement.

7. The sums the Claimant seeks to recover by way of reimbursement or damages include costs from these proceedings, the Restrictive Covenant Proceedings, and the Employment Proceedings. The total claimed at the time of the hearing of the application was £307,641.69 (this sum did not include certain costs relating to the Restrictive Covenant Proceedings, in respect of which costs the Claimant did not pursue his application and a stay was proposed).

The Law

8. As far as summary judgment is concerned the relevant legal principles were summarised by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], a formulation subsequently approved by the Court of Appeal in *AC Ward and Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098:

> "15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely

arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which

> would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

9. Both parties relied on the uncontroversial proposition that there is often an overlap between the power to strike out or to give summary judgment with the former focusing on the pleaded case. Given the nature of the dispute the Claimant submitted that the application could be determined on either basis and that "the court should grasp the nettle and determine the claim at this stage". The Defendant took essentially the same position although arguing for the opposite outcome.

10. In relation to declaratory relief sought on a summary judgment application, the correct approach is that set out in *Abaidildinov v Amin* [2020] 1 WLR 5120 at [47]-[50]. The court must proceed in two stages.

11. First, it considers whether the defendant has a real prospect of success on the underlying facts or matters relevant to the declaration sought, rather than on the discretionary question of whether a declaration should be granted. If the defendant does, then summary judgment should not be granted.

12. Secondly, if the defendant does not have a real prospect of success, the court then determines whether to grant the declaration by applying the usual principles under CPR 40.20, as summarised at [35]-[36] of *Abaidildinov*. Those principles require consideration of whether granting the declaration would do justice between the parties, whether it would serve a useful purpose, and whether there are any special reasons affecting the exercise of discretion.

13. The principles applicable to the proper interpretation of commercial documents were summarised by Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune")* [2018] 1 Lloyd's Rep. 654 at [8] as follows:

> "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."

14. The Defendant also drew my attention to the well-established principle of contractual construction that a contract should, so far as possible, be construed to prevent a party from taking advantage of its own wrong, meaning that a party cannot assert rights or claim benefits arising solely from its breach (see *Prosight Global Inc v Randall & Quilter II Holdings Ltd* [2021] EWHC 228). In addition, English law favours an interpretation that upholds the validity of a transaction or a significant clause rather than one that renders it invalid or ineffective, a principle of long standing (*Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 W.L.R 4117). Finally, legal drafting practice presumes that different words in a contract convey different meanings, as draftsmen aim for consistency and avoid synonyms, equally, uniformity in language signals uniformity in meaning and concept (*Prestcold (Central) Ltd v Minister of Labour* [1969] 1 W.L.R 89).

The Investment Agreement

15. Clause 19.4 appears in a section of the Investment Agreement headed "FEES AND EXPENSES" and provides:

> "19.4 The Company shall reimburse the Investors, the Fund Manager and the Founders in respect of all fees, expenses and disbursements (including any VAT to the extent not recoverable as input tax) incurred in connection with subsequent variations, consents and approvals relating to this agreement, the Articles and all advice relating to the interpretation and/or the enforcement of the terms of this agreement, the Articles or any other Transaction Document. Such fees, expenses and disbursements (plus VAT to the extent not recoverable as input tax) shall be reimbursed on demand following presentation of the relevant invoice."

16. The "Transaction Documents" are defined as "this agreement, the Articles, the Service Agreements and the Acquisition Documents".

17. The Articles are themselves defined as: "the articles of association of the Company in the Agreed Form (and as amended or replaced from time to time) and any reference in this agreement to an article shall be to an article of those Articles".

18. The definition of the Service Agreements suggests that they were yet to be entered into: "the service agreements in the Agreed Form to be made between the *company* and each of the Managers".

19. Clause 14.2.4 was also referred to in argument. It is to be found under the sub-section heading "Enforcement of Rights" and provides:

> "14.2.4 The Investors agree among themselves that the following provisions shall (unless they subsequently agree otherwise amongst themselves in writing) apply in relation to the enforcement of any of the obligations of the Company and/or the Founders and/or the Managers (including the Warranties) owed to the Investors under this agreement (the Obligations):
>
> (a) no claim in respect of any breach of the Obligations shall be brought by any of the Investors without the prior consent of the Fund Manager;
>
> (b) the costs incurred by any Investor in bringing a claim in respect of any breach of the Obligations (a Relevant Claim) shall, to the extent not borne by the Company and/or the Founders and/or the Managers, be borne by all of the Investors in proportion to the number of Shares held by each of them; and
>
> (c) any damages obtained as a result of any Relevant Claim will, after deduction of all costs and expenses, be divided amongst the Investors in proportion to the number of Shares held by each of them."

The Dispute in Summary

20. The parties disagree as to the proper construction of Clause 19.4 of the Investment Agreement. The Claimant says it includes the right to reimbursement of all legal fees, expenses and disbursements incurred subsequently (that is after contractual formation) in connection with advice as to the interpretation and/or enforcement of the Transaction Documents (as defined in the Investment Agreement) on demand, on presentation of the relevant invoice. This extends to the costs of the enforcement of contractual rights under the Investment Agreement and Transaction Documents by way of legal proceedings. The purpose of the clause in this respect is to put the Founders, including the Claimant, in the same position as the Investors and Fund Managers and was an important aspect of the overall bargain which involved handing majority control to new business owners. This construction turns, in particular, on the meaning of "advice" as to "enforcement". Whatever the construction of the term, all of the parties who have the benefit of Clause 19.4 will be in the same position.

21. The Company argues that Clause 19.4 is limited to reimbursement for legal fees, expenses and disbursements incurred in connection with:

    i) Subsequent variations, consents and approvals relating to the Investment Agreement and the Articles (as defined); and

    ii) Advice relating to the interpretation and/or enforceability of the terms of the Transaction Documents (as defined) insofar as such advice is obtained in the context of the entry into or variation of those documents.

22. The provision does not, the Company argues, provide any right of reimbursement in respect of costs incurred in seeking to enforce rights under the Transaction Documents or of the costs of conducting litigation, whether for the purpose of defending proceedings relating to the Transaction Documents or of pursuing claims based upon them.

23. The Company argues that on the Claimant's construction the clause would be unenforceable and inconsistent with the principle that costs cannot be recovered in respect of breaches of obligations by Mr Friend and would improperly fetter the exercise of the costs discretion of the Employment Tribunal or the High Court.

24. The Defendant therefore says that the fees claimed are not recoverable at all under Clause 19.4 of the Investment Agreement. The entitlement to, and amount of the recoverable costs of the various proceedings in which they arise will fall to be assessed in the usual way at their conclusion.

The Arguments

25. The Claimant says that he is entitled to reimbursement of fees, expenses, and disbursements which relate to "advice" given in relation to "enforcement". This does not mean "enforceability" (which does not appear in Clause 19.4), but the steps which are needed to enforce rights under the Transaction Documents, including, in the Claimant's case, his service agreement with Friend MTS. The Claimant is entitled to the benefit of Clause 19.4 as a "Founder" whereas other "Managers", including those with service contracts, are not so entitled. The Claimant says this is simply the bargain that the Company struck. The term "enforcement" also appears in Clause 14.2.4 where, the Claimant argues, it must refer to the costs of litigation and should therefore be construed as having a consistent meaning where it appears in Clause 19.4.

26. As to any suggestion that "advice" (which does not appear in Clause 14.2.4) imposes a limitation, the Claimant argues that advice is a central feature of litigation. Mr Legg, on behalf of the Claimant, submitted that a legal adviser was plainly required in litigation of the type in which the Claimant was involved so that the term "advice" was to be construed widely and would naturally cover all the activities which the legal adviser carried out on behalf of their client.

27. The Claimant's solicitors have rendered regular invoices to the Company in the course of the litigation. Although the detail given on the invoices is sparse, and many do little more than refer to Clause 19.4, it is evident that they cover work other than that which might usually be characterised as the giving of advice. Mr Morrison, King's Counsel, argued on behalf of the Company that given the size of the overall bill to date and the unlikelihood that advice as to enforcement requires to be given every month the inference must be that the Company is being invoiced for the Claimant's litigation costs.

28. In the course of the hearing Mr Legg submitted that the conduct of litigation was squarely within the ambit of the indemnity provided by Clause 19.4. The Company's suggestion as to what the invoices in fact cover appears therefore to have a firm foundation. As the Company submitted the effect of this was that the Company was being asked to fund the litigation being brought against the Company (or its subsidiary) as the litigation progressed. The Claimant argued that this was nevertheless the plain

meaning of the clause and that there were plausible commercial reasons why this must have been the intention of the parties.

29. The Company argued that the Claimant's construction led to an uncommercial result potentially prohibited by statutory provisions since Section 232 of the Companies Act 2006 and Article 77 of the Companies (Jersey) Law 1991 both prevented reliance on any provision which would indemnify a director against their own wrongdoing.

30. Section 232 of the Companies Act 2006 provides, relevantly:

> (1) Any provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void.
>
> (2) Any provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of the company, or of an associated company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director is void, except as permitted by—
>
> a. section 233 (provision of insurance),
>
> b. section 234 (qualifying third party indemnity provision), or
>
> c. section 235 (qualifying pension scheme indemnity provision).
>
> (3) This section applies to any provision, whether contained in a company's articles or in any contract with the company or otherwise.

31. The Claimant's construction of Clause 19.4, it was said, did not differentiate between litigation in which the Claimant was the defendant or alleged to be in breach of duty so that the effect of Section 232 was therefore to make any such clause, which gave an indemnity against costs which would otherwise be payable by the Claimant, void and incapable of being preserved by the "saving" provisions in the Investment Agreement.

32. Article 77 of the Companies (Jersey) Law 1991 contains similar provisions, Article 77(1) – 77(2) provide:

> "Subject to paragraphs (2) and (3), any provision, whether contained in the articles of, or in a contract with, a company or otherwise, whereby the company or any of its subsidiaries or any other person, for some benefit conferred or detriment suffered directly or indirectly by the company, agrees to exempt any person from, or indemnify any person against, any liability which by law would otherwise attach to the person by reason of

> the fact that the person is or was an officer of the company shall be void.
>
> Paragraph (1) does not apply to a provision for exempting a person from or indemnifying the person against –
>
> (a) any liabilities incurred in defending any proceedings (whether civil or criminal) –
>
> (i) in which judgment is given in the person's favour or the person is acquitted,
>
> (ii) which are discontinued otherwise than for some benefit conferred by the person or on the person's behalf or some detriment suffered by the person, or
>
> (iii) which are settled on terms which include such benefit or detriment and, in the opinion of a majority of the directors of the company (excluding any director who conferred such benefit or on whose behalf such benefit was conferred or who suffered such detriment), the person was substantially successful on the merits in the person's resistance to the proceedings;
>
> (b) any liability incurred otherwise than to the company if the person acted in good faith with a view to the best interests of the company;
>
> (c) any liability incurred in connection with an application made under Article 212 in which relief is granted to the person by the court; or
>
> (d) any liability against which the company normally maintains insurance for persons other than directors."

33. The Company argued that there was no mechanism by which the invoices could be challenged, so that in practice the Company would be required to bring an action to recover moneys which should not have been paid over. The commercial reading of the clause on the Company's submission was that the obligation to pay under Clause 19.4 only arose in relation to costs which fell within the clause that is to say, "such fees". It cannot have been intended, it was submitted, that the Defendant had to pay any invoice it was presented with without question and on the assertion that they fell within Clause 19.4.

34. The Claimant argued that the potential difficulties raised by the Company were avoided since Clause 19.4 was subject to implied terms that fees, expenses and disbursements had to be reasonable and invoices could not be rendered inconsistently with the relevant statutory provisions or in relation to a director's own defaults (subject only, it was argued, to the ability of a director to take advice on whether or not they were in default). These implied terms were in fact pleaded in the Defence and admitted in the Claimant's Reply.

35. As far as the on-demand nature of the obligation to pay was concerned, this simply meant that questions of reasonableness did not arise at the point of payment by way of reimbursement and the Company had not in fact suggested that any costs were unreasonable. The Claimant characterised the Company's stance as being more consistent with a general desire to avoid payment or to take bad points which were later abandoned. Mr Legg gave a number of examples of what, he said, illustrated this approach by reference to the correspondence and pleadings. He said that there had been no request for further information in relation to the fees. He argued that the Company was making too much of the practical difficulties of operating Clause 19.4 in the way the Claimant suggested; an invoice could be queried in correspondence followed by a claim being made if necessary.

36. The Claimant submitted that the rationale for the requirement to pay on presentation was that:

    i) It assisted with cash flow;

    ii) It provided for prompt payment;

    iii) It allowed timely advice to be obtained;

    iv) It did not require detailed invoices because of the effect of legal professional privilege;

    v) The burden was on the Company to demonstrate a prima facie case of unreasonableness and, if it did, the burden would then shift to the Claimant to justify the invoice;

    vi) The Company could always consider a challenge after payment had been made and indeed was required to do so rather than withholding payment.

37. The Company's contention is that the fees and expenses which are covered by Clause 19.4 are essentially "non adversarial". This reading, it was argued, is consistent with the part of the agreement in which the clause is to be found and the section heading. In essence, Clause 19 in its entirety requires the Company to bear the transaction costs leading up to the execution of the Investment Agreement and those which were subsequently to be incurred if changes were required. In addition, it provided for advice as to the construction of terms relating to how and to what extent obligations under the contract could be enforced. It did not cover the taking of legal action to enforce the terms of a contract or cover the conduct of litigation. If that had been intended it could have been provided for expressly, as it is in Clause 14.2.4. which refers to "the costs incurred...in bringing a claim".

38. The court, it was submitted, should proceed on the basis that consistency was used in drafting (see *Prestcold* above) and that where the agreement intended the costs of litigation to be covered it said so in terms, as it did in Clause 14.2.4. The sort of queries and challenges which might arise in relation to advice about a variation, for example, were very different from the sort of challenges that might arise in relation to litigation costs, as the general experience of costs assessment demonstrates.

39. It was in the Company's interests to have investors and founders take advice where changes were proposed to the Investment Agreement but that rationale did not apply to the Company agreeing to provide an indemnity against the costs of a party suing it or its subsidiary, irrespective of what the outcome of the litigation was and without any mechanism to challenge costs for which it was invoiced as the litigation proceeded, not least because the Claimant relied upon legal privilege as a reason for providing only the barest of details.

40. Mr Morrison pointed out that Clauses 19.4 and 14.4 do not refer to each other but on the Claimant's argument they must overlap, covering the Investors' costs under two separate provisions. He argued therefore that the clauses are plainly intended to be separate and to apply to quite separate circumstances. Equally there was no obvious reason why Mr Friend should be the only manager of the three who could use Clause 19.4 to sue on his service agreement, producing an asymmetry between parties to the Transaction Documents; an asymmetry which in fact applied more widely. No rights of reimbursement are conferred generally on the shareholders or Managers of the Company, whereas Founders who no longer have any continued involvement do have such a right.

41. By contrast with the Claimant's construction, the Company's construction of the clause meant that there was no difficulty in reconciling Clause 19 with Clause 14 since they would not overlap. There was no privilege problem or at least at best a very limited one. Whilst it made good business sense to fund advice as to terms of the investment agreement both initially and if there were later changes it was business nonsense to require the company to pay for litigation against it.

42. Since the Claimant was seeking an order for payment by way of summary judgment or strikeout it was unclear what effect this would have on the Restrictive Covenant Proceedings' costs. Mr Morrison pointed out that there was no reference in the draft order provided by the Claimant to a declaration and the abbreviated declaratory wording set out in the Particulars of Claim was plainly inadequate, he submitted, to reflect the legal arguments or propositions of law on which the applications turned.

Conclusions

43. Clause 19.4 appears in a part of the Investment Agreement dealing with "Costs", as referred to in Clauses 19.1 and 19.2, incurred in entering into the agreement and then where subsequent changes to the agreement were proposed. "Costs" are defined as:

> "(i) the <u>professional and related costs, fees and expenses</u> incurred, borne or to be borne by the Investors and/or the Fund Manager in connection with the negotiation, preparation or execution of the Acquisition Documents or arising in connection with the negotiation, preparation or execution of this agreement and (ii) the professional and related costs, fees and expenses incurred, borne or to be borne by the Company in respect of the Reorganisation;" (my emphasis)

44. "Costs" in this context are the transactional fees and expenses of the Investors and Fund Manager but not the Founders. There was an obvious expectation that legal advice might be required as to later variations just as it would undoubtedly have been required

before the agreement was entered into and was provided for in respect of the "Costs" of the Investors and Fund Manager, who were counterparties and would have required independent advice.

45. Clause 19 is concerned with advice as to the terms of the agreement and the associated costs of entering into it and subsequently making changes. It refers to "Costs" which are contractually defined. Whilst the Claimant is correct to point out that Clause 19.4 itself is forward looking, the overall scheme of Clause 19 deals with the pre-contractual and post-contractual position. The fact that "advice", under Clause 19.4, relates to the "interpretation" of the Transaction Documents reinforces that conclusion. The Claimant's argument is essentially built upon the inclusion of the term "enforcement". Without this word it is clear, in my view, that the clause allows for reimbursement of costs associated primarily with changes to the contractual terms. I would also be prepared to accept that the clause is capable of encompassing advice where a difference of view emerges as to the meaning and effect of a contractual provision. However, the addition of "enforcement" does not mean that the door is open to the general recovery of costs by way of an indemnity from the Company in respect of litigation between the parties to the agreement. Enforcement is, I consider, a short reference to the respective obligations of the parties. That is to say, those terms which appear in the Transaction Documents and impose obligations and duties. Enforcement is used in this context in Clause 28.9 in relation to the exercise of a right or remedy.

46. Clause 19.4 concerns advice about enforcement, not the indemnification by the Company of costs incurred in enforcement. Whilst the term "enforceability" appears elsewhere in the Investment Agreement, but not in Clause 19.4, and may be regarded as conceptually different from "enforcement", as the Claimant argued, the second limb of Clause 19.4 is concerned solely with "advice." The Claimant did not argue otherwise, as demonstrated by his submissions in relation to the meaning to be given to "advice" in this context and the invoices themselves. Thus, the construction contended for by the Claimant involves ascribing a significantly extended meaning to "advice" in a sub-clause which makes no reference at all to "costs" or "Costs" and does not refer directly to bringing a claim.

47. There is no obvious commercial reason to read the clause in this way and indeed it would make little sense for the Company to provide an indemnity against the costs incurred by a party litigating against it (or other parties) regardless of the merits of litigation or the outcome. There can have been no basis for an expectation that the Claimant's interests would always align with those of the Company and no good reason for the Company to fund the costs on both sides of litigating disputes between the Investors and the Managers and/or Founders.

48. The agreement makes limited provision for litigation costs in clause 14.2.4 which is concerned with the apportionment of "costs" (not "Costs") and the sharing of the proceeds of litigation amongst the Investors. The use of the term "enforcement" in Clause 14.2.4 is in the context of "bringing a claim". There is no limitation to "advice". The inclusion of the words "to the extent not borne by the Company" in that clause is a reference to unrecovered litigation costs since the clause is premised on the enforcement of the obligations of the Company, Founders or Managers. The paradigm case might be an action by the Investors on a contractual warranty. Clause 14.2.4 would have no purpose if costs were to be borne by the Company under Clause 19.4 in any event.

49. It does not seem to me, as the Claimant argues, that "advice as to enforcement" can be read as equivalent to "costs incurred...in bringing a claim". Confining Clause 19.4 to essentially non contentious costs (save perhaps for initial advice where a dispute emerges) does no damage to the contractual language and avoids the practical and legal difficulties which otherwise arise in extending it to litigation. There were good commercial reasons for the Company agreeing to fund advice. It is not uncommon for one party to fund the obtaining of advice by another where changes are to be made to contractual terms. That often arises in the context of employment. It ensures that all parties are on an even footing and that differences in the interpretation of terms are identified. The purpose is broadly to avoid disputes and litigation. The requirement for payment on demand in these circumstances ensures that an invoice rendered in respect of that advice can be met by the party receiving the advice within the contractual payment period stipulated by their adviser. This is consistent with the term "reimbursement" whether or not the payment is yet to be made since it arises upon the obligation to pay being incurred.

50. Whilst I accept that an indemnity in respect of costs is not necessarily an ouster of the court's jurisdiction under Section 51 of the Senior Courts Act 1981 and it might still be possible to submit the costs for assessment in accordance with an implied term as to reasonableness, I can identify no good business reason for the parties agreeing that the costs of litigation by one or more of the other parties to the agreement should inevitably be borne by the Company, nor as a matter of construction do I conclude that this is the effect of Clause 19.4. The Investment Agreement does not, in my view, provide for such costs to be paid by the Company so that if any intention at all is to be imputed to the parties it is that litigation costs are to be dealt with in the normal way under the rules of court where the court may determine their incidence and make an assessment of what is reasonable and proportionate. The parties have not framed a declaration which encapsulates such a result nor would simply inverting the declaration set out in abbreviated terms in the particulars of claim suffice. I leave it to the parties to consider whether there would be any utility in a declaration and to make further submissions as to the form of an order carrying the judgment into effect.

51. Whilst I have reached a firm conclusion as a matter of construction as to what Clause 19.4 does and does not mean, if I were to have had any doubt then I would still have come to the conclusion that the Defence does disclose reasonable grounds for defending the claim and cannot be said to have no real prospect of success.

52. It follows that I refuse the Claimant's application. That leads to the question of whether, as the Defendant argues, the claim should itself be struck out or subject to summary judgment in favour of the Defendant. I think the answer at this stage must be no, because there was no such application other than by way of reliance on the court's inherent jurisdiction and because, more fundamentally, it is at least conceivable that some of the earlier invoices relate to "advice" which does concern the interpretation or enforcement of the Investment Agreement. It was implicit in Mr Morrison's submissions that whilst repeated invoicing for "advice" was essentially camouflaging the costs of litigation, the same might not be true of the initial invoices, a possibility which I have acknowledged. Again, I think it would be sensible, in the first instance, to allow the parties to consider an appropriate draft order and the cost consequences.

END