

Neutral Citation Number: [2019] EWHC 2514 (Ch)

Claim No. HC-2017-002877

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Before:

DEPUTY HIGH COURT JUDGE LANCE ASHWORTH QC

(1) SPORTS MANTRA INDIA PRIVATE LIMITED
(2) MR NEERAJ SAREEN

Claimants

- and -

FORCE INDIA FORMULA ONE TEAM LIMITED
(IN LIQUIDATION)

Defendants

Anthony Dearing (instructed by **Cheyney Goulding LLP**) for the **Claimants**
Ian Mill QC and Dominic Howells (instructed by **Solesbury Gay Limited**) for the **Defendant**

Hearing date: 29th July 2019
Judgment: 30th September 2019

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

Lance Ashworth QC:

Introduction

1. This is judgment on the application by the Defendant, Force India Formula One Team Limited (in liquidation) (“**Force India**”) against the Claimants, Sports Mantra India Private Limited (“**Sports Mantra**”) and Mr Neeraj Sareen (“**Mr Sareen**”) to strike out the Claimants’ claim alternatively for reverse summary judgment to be granted in Force India’s favour.
2. Force India have been represented by Mr Ian Mill QC and Mr Dominic Howells, Sports Mantra and Mr Sareen by Mr Anthony Dearing.

Background

3. Sports Mantra is an Indian company engaged in sports marketing and events management. It is owned and controlled by Mr Sareen and his father.
4. Force India is an English company and was the operator of a Formula One racing team until its business and assets were sold by its Administrators in August 2018, after which Force India entered liquidation.
5. Sports Mantra and Force India entered into a written agreement executed by Force India on 7 April 2009 and by Mr Sareen on behalf of Sports Mantra on 28 April 2009 (the “**Agency Agreement**”).
6. Sports Mantra was not actually incorporated until 31 October 2009, and there had been a plea raised by Force India in its Defence that the Agency Agreement was not binding. Mr Sareen had been joined as a claimant to the proceedings because of Force India’s assertion as to the lack of validity of the Agency Agreement. However, by the time this matter came before me, this plea had been abandoned, and it was accepted by Force India and therefore common ground that the Agency Agreement was valid and regulated the relationship between Sports Mantra and Force India. Mr Sareen has no separate claim.
7. In light of the arguments which have been raised, it is necessary to set out that the parties to the Agency Agreement were “*FORCE INDIA FORMULA ONE TEAM LIMITED (a company registered in England with number 2417588) whose registered office is at Dadford Road, Silverstone, Northamptonshire, NN12 8TJ (“Force India”); and SPORTS MANTRA (a company registered in India with number [] whose registered office is at 12 Pooryl Marg, Vasant Vihar, New Delhi 110057, India (“the Agent”).*”
8. The following are the material terms of the Agency Agreement for the purposes of this application:

“1.1 Force India hereby appoints the Agent to act as non-exclusive independent commercial representative of Force India with regard to a potential sponsorship opportunity for Force India’s Formula One team subject to the terms and conditions of this agreement.”

“1.4 The Agent has no authority to enter into any agreements or other commitments on behalf of Force India.

“1.6 Force India will have sole discretion as to whether or not to pursue the sponsorship opportunity with the Sponsor [defined as any potential sponsor] and the Agent will have no right to Commission or any other payment or benefit in kind if the introduction of the Sponsor does not lead to the execution or performance of a Negotiated Agreement.

“1.7 During the term of this agreement, the Agent will, with respect to the Sponsor, act with a preference for Force India in respect of the obtaining of sponsorship for a formula one team. If, however, Force India informs the Agent that it does not intend to pursue the sponsorship opportunity with the Sponsor, this agreement shall terminate with immediate effect and the Agent shall be free to offer the opportunity to third parties.

“2.1 If Force India enters into a sponsorship agreement with the Sponsor within twelve months of an introduction effected by the Agent in accordance with this agreement (a “Negotiated Agreement”), Force India will pay to the Agent a commission in respect of sponsorship fees actually received by Force India (exclusive of value added tax) in respect of such Negotiated Agreement (“Commission”), at the rates set out in clauses 2.2 or 2.3 below as applicable.

“3.2 Force India may forthwith upon notice to the Agent terminate the agreement if:

...

(c) Force India has not, for any reason whatsoever, entered into a Negotiated Agreement within 12 months of an introduction effected by the Agent.

“Upon such termination, no further commission shall be payable by Force India to the Agent”,

“3.11 No term of this agreement shall be enforceable under the Contracts (Right of Third Parties) Act 1999 by a third party.”

9. Sports Mantra says that pursuant to the Agency Agreement, on 7 July 2009 it introduced the Sahara Group of companies, a group well known in India, who sponsor (among other things) the Indian cricket team. The group included Sahara Adventure Sport Limited (“**Sahara Adventure**”). It is accepted by Force India that Sahara Adventure was a “Sponsor” as defined in the Agency Agreement.
10. Between 11 and 20 July 2009 Mr Sareen of Sports Mantra worked with Force India on preparing revised sponsorship proposals to put to Sahara Adventure. These included as alternatives (1) enhanced sponsorship rights and (2) title sponsorship rights. The proposals were for a 3-year sponsorship deal. Under the enhanced sponsorship proposals, the rights

were valued at US\$36 million and included brand rights, paddock club and grandstand hospitality, team footage and image rights, driver appearances and a demonstration run.

11. The title sponsorship rights under the revised sponsorship proposals were valued at US\$66 million, on the basis that Force India would change its name to incorporate Sahara's name. It was suggested that the appropriate name change would be to "*Sahara Fi formula one team.*"
12. There was then further correspondence in which the potential sponsorship by Sahara Adventure was discussed. By late February 2010, discussions were still ongoing about sponsorship. Thereafter things went quiet and there was no contact in relation to potential sponsorship by Sahara Adventure between February 2010 and February 2011. It is said by Sports Mantra that in February 2011, Force India's director asked the appropriate Force India employee/agent to contact Sports Mantra to see whether Sahara Adventure was still interested in the revised sponsorship proposals. In March 2011, Dr Mallya the principal of Force India met with Subrata Roy of Sahara Adventure, Sports Mantra having been asked to update the revised sponsorship proposals, which they did. Sports Mantra took no part in that meeting and had no, or no substantial, role after that.
13. On 12 October 2011, Orange India Holdings SARL ('**Orange**') which is the parent company of Force India, Sahara Adventure, and the two major shareholders of Orange entered into a Share Subscription Agreement pursuant to which Sahara Adventure agreed to subscribe for shares in Orange. Sahara Adventure's total subscription for shares amounted to £60 million in three tranches over three years. The parties to the Share Subscription Agreement also entered into a Shareholders' Agreement on the same date. Shortly before the execution of the Share Subscription Agreement and Shareholders' Agreement, Orange restructured its interest in Force India.
14. For the purposes of this application, Force India accepted the accuracy of the description of that restructuring set out at paragraphs 21-27 of the Particulars of Claim, which included that from 12 October 2012 the ultimate parents of Force India were Watson Limited and Sahara Adventure. In the hearing before me, the Share Subscription Agreement and the Shareholders' Agreement were together referred to by Force India as the "**Investment Agreement**", which term I will adopt for this judgment.

The Pleaded Claim

15. The Particulars of Claim (drafted by Mr Dearing) runs to some 185 paragraphs over 40 pages plus appendices and 32 annexes in which detailed evidence is set out. It is not the role of the Particulars of Claim to set out the evidence, let alone to plead (as has been done on numerous occasions) that a witness "*will say in evidence*" particular things, but rather it is to set out the material facts. The Particulars of Claim, in my judgment, do not accord with the proper principles of pleading and are too long and verbose. If this matter had been commenced in the Commercial Court, it is inconceivable that permission would have been granted to the Claimants to exceed the 25-page limit on a statement of case.
16. Albeit at much greater length than is necessary or proper, the Claimants plead that Sports Mantra effected an introduction within the meaning of clause 2.1 on 7 July 2009 when it introduced Force India to Sahara and that the Investment Agreement involved the acquisition by Sahara Adventure of '*valuable title sponsorship rights*' in Force India.

17. It is alleged by the Claimants that the difference between the nominal value of the shares acquired by Sahara Adventure and the price paid for those shares under the Share Subscription Agreement is '*referable*' to the sponsorship element of the transaction. The Claimants further contend that the Investment Agreement was therefore, in part, a '*sponsorship agreement*' within the meaning of clause 2.1 of the Agency Agreement.
18. Given that Force India was not a party to the Investment Agreement, but rather Orange, its parent company, was, the Claimants plead that on its true construction, the meaning of "Force India" in the opening words in clause 2.1 of the Agency Agreement encompasses a parent company. In the alternative it is said that a term should be implied to the same effect.
19. In order to address the fact that clause 2.1 of the Agency Agreement provides that commission is only payable where a sponsorship agreement is entered into '*within twelve months of an introduction*', the Claimants assert that from December 2009 '*time was interrupted, it was suspended while Sahara [Adventure] ... continued to consider the Revised Sponsorship Proposals*' such that time did not run again until some 15 months later in around late March or early April 2011.
20. Sports Mantra therefore says that time did not expire until on or around 12 October 2011 when the Investment Agreement was entered into.
21. Accordingly, the Claimants assert that Sports Mantra is to be entitled to payment of a commission under clause 2.1 of the Agency Agreement.
22. The Claimants also put forward alternative cases:
 - (a) That Mr Sareen was the counterparty to the Agency Agreement;
 - (b) If the services provided by the Claimants were not provided pursuant to the Agency Agreement, then such services were provided by Sports Mantra or Mr Sareen in the mistaken belief that they were provided pursuant to the Agency Agreement, which is said to give rise to a claim in restitution;
 - (c) In the further alternative, Sports Mantra or Mr Sareen entered into an agreement with Force India partly orally, partly in writing and partly by conduct pursuant to which Force India would pay '*reasonable remuneration*' to Sports Mantra or Mr Sareen (as the case may be) for an introduction giving rise to a sponsorship agreement.

The Defence

23. The defences raised by Force India which Mr Mill submits are relevant for the purpose of this application, that is to say defences which if upheld will amount to a complete defence, are:
 - (a) The Investment Agreement was not entered into by Force India. As a result, one of the pre-conditions to an entitlement to commission specified in clause 2.1 of the Agency Agreement has not been fulfilled. Force India denies that, on its true construction (or as the result of an implied term) the words '*Force India*' in clause 2.1 are to be read as including Force India's parent company. Such an interpretation or implied term would

be contrary to the express terms of the Agency Agreement. I will refer to this as the “Parties Issue”.

- (b) The Investment Agreement was not a ‘*sponsorship agreement*’ within the meaning of clause 2.1 of the Agency Agreement. The Investment Agreement was an agreement to enter into a corporate finance transaction, namely a transaction for Sahara Adventure’s subscription for shares in Orange. I will refer to this as the “Sponsorship Issue”.
- (c) The Investment Agreement was not entered into within 12 months of the introduction. The suspension of time pleaded by the Claimants is not based on any express term of the Agency Agreement and there is no implied term pleaded by the Claimants providing for the suspension of time. I will refer to this as the “Time Issue”.

24. It is said that none of the alternative cases referred to above arise, given the acceptance that the Agency Agreement was binding as between Sports Mantra and Force India. Mr Dearing did not seek to argue that they did arise in light of that acceptance by Force India.

The applicable principles

- 25. The applicable principles on striking out and summary judgment are well known and were not in dispute between Mr Mill and Mr Dearing. They were set out at some length in Mr Dearing’s 59-page Skeleton Argument at paragraphs 53 to 64 as regards summary judgment and paragraphs 65 to 75 as regards striking out. I do not intend to set out all of that detail here, rather I only briefly summarise the principles as conveniently done in Mr Mill’s skeleton argument at paragraphs 19 to 21.
- 26. The court may strike out a claimant’s Particulars of Claim if they ‘disclose no reasonable grounds for bringing ... the claim’: see CPR, r 3.4(2)(a). Practice Direction 3A at paragraph 1.4 gives examples of strikable claims, including those which rely on facts which, even if true, do not disclose any legally recognisable claim against the defendant.
- 27. The court may give summary judgment against a claimant on its claim if the claimant has ‘no real prospect of succeeding on the claim’ and there is no other compelling reason why the case should be disposed of at trial: see CPR, r. 24.2. Guidance from case law on the ‘no real prospect’ test is summarised in the White Book at paragraph 24.2.3.
- 28. Mr Mill says that the following principles relevant to the application before me can be distilled from the authorities:
 - (a) On an application for summary judgment, the court must consider whether the claimant has a ‘realistic’ as opposed to a ‘fanciful’ prospect of success: *Swain v Hillman* [2001] 1 All ER 91. 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];
 - (b) It is not uncommon for an application for summary judgment to give rise to a short point of law or construction. 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: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 at [12].

29. Mr Dearing did not dissent from this and in my judgment he was right not to do so.
30. The application before me was presented very much as an application for summary judgment and, in particular, was focussed on the construction of the Agency Agreement. Mr Dearing did not submit that there was further evidence which might be relevant over and above that which was before me, so that it would be inappropriate for me to grasp the nettle and decide the issues of construction. This is, in my judgment, a case where precisely the same points of construction would have to be decided at trial on the basis of the same evidence, so that I am equally well-placed to determine those issues at this stage, which may well obviate the need for a trial. Accordingly, being so satisfied that I do have before me all the evidence necessary for the proper determination of the questions of construction and that the parties have had an adequate opportunity to address me on these matters in argument, I will determine those issues.
31. In doing so, I take the following to be the relevant principles of contractual construction conveniently set out by Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (the "Ocean Neptune")* [2018] EWHC 163 (Comm) at [8], in which he reiterated that the Court's task in construing contractual documentation is "*to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement*". Having referred to the recent Supreme Court cases in which the principles of construction have been considered, Popplewell J held that in so doing the Court should apply the following principles:
- (a) The Court must consider the language used and ascertain what a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time would have understood the parties to have meant;
 - (b) The contract must be considered as a whole and, depending on the nature, formality and quality of drafting of the contract, the Court will give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used;
 - (c) 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;
 - (d) The court is to approach interpretation as a unitary exercise. As such, the quality of the drafting of the clause is to be taken into account and recognition is to be given to the fact that a party may have agreed something which with hindsight did not serve his interest. Further, a unitary approach entails:

"...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."

32. As noted by Popplewell J, the weight to be given to the wider context may depend on the nature, quality and formality of the drafting. This principle is derived from paragraph [10] of Lord Hodge’s speech in *Wood v Capita* [2017] AC 1173. Lord Hodge went on at [13] to observe that some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals (albeit that even in the case of a detailed professionally drawn contract there may be provisions which lack clarity so that the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type).
33. Mr Mill referred me to the decision of the Supreme Court in *Arnold v. Britton* [2015] AC 1619 at [16]-[18] for the principle that where the meaning of the words used in a written agreement is completely clear, particularly in a formally drafted legal document, there is no scope for “*purposive interpretation*” in pursuit of some commercial common sense result to which the parties might have agreed, but to which *ex hypothesi* they do not appear to have agreed by their words.
34. He also relied on what Lord Clarke said in *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 at [23], namely that when the parties have used unambiguous language, the Court must apply it, even if this leads to the “*most improbable commercial result.*”
35. The textbook modern approach to interpretation of contracts is, in my judgment, exemplified by the recent Court of Appeal decision in *National Bank of Kazakhstan v Bank of New York Mellon* [2018] EWCA Civ 1390 at [39]-[72]. Hamblen LJ approached the construction of the contract by considering first the words of the contract to arrive at an initial view of what the text required and whether it was ambiguous, before going on to consider where there was any justification for departing from that construction on the basis of contextual considerations and commercial sense.
36. As to the implication of terms into a contract, the relevant principles (extracted from Lord Neuberger’s judgment in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [18] – [21]) were summarised by Lord Hughes in *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2:

“It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, ‘Oh, of course’) and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.”

The evidence

37. The application was supported by a 9-page witness statement of Force India's solicitor, Mark Gay, dated 4 March, 2019. In addition, there is a signed but undated 2-page witness statement from Dr Mallya.
38. In response, the Claimants served a 38-page witness statement dated 19 July 2019 from Graham Young, the Claimants' solicitor, a 74-page witness statement of Mr Sareen and 2 witness statements from Fraser Castellino dated 8 October 2017 (running to 30 pages) and 19 July 2019 (running to 19 pages and incorporating the earlier statement). Mr Castellino was a former employee of United Spirits Limited, a company controlled by Dr Mallya, and which was involved in sponsorship issues.
39. Mr Young's witness statement complained that "*notably*" Mr Gay had elected in his witness statement "*not to trouble the Court with the law applicable to his client's application*". He then included recitation of the principles applicable to strike out applications and summary judgment applications and then made detailed legal submissions. These were, in my judgment, completely inappropriate matters to be contained in a witness statement. This witness statement was served in breach (or perhaps in ignorance) of paragraph 19 of the Chancery Guide, which was expressly endorsed by Sir Terence Etherton C (as he then was) in *JD Wetherspoon plc v Harris and ors* [2013] WLR 3296. The purpose of a witness statement is to set out the facts, not to engage in matters of argument, expressions of opinion or submissions about the issues. Far from criticising Mr Gay's witness statement, Mr Young should have been adopting the same approach that Mr Gay had done.
40. Further, the very lengthy witness statements of Mr Sareen and Mr Castellino contained a large amount of material that could not have been relevant to the issues of construction which I was going to have to determine. While I had pre-read these as I had been asked to do so, very few references were made to these witness statements in the course of submissions.
41. I raise these matters because of two points. First, when the Court is asked to pre-read materials, it will do its best to do so. In this case, Force India gave a pre-reading estimate of 2.5 hours and Sports Mantra one of 5 hours. In fact, due to the volume of material that Sports Mantra asked me to pre-read (including its 59-page Skeleton Argument) it took me substantially longer than even the 5-hour estimate. Given that this matter was only listed for 1 day, which was meant to include pre-reading, the hearing and judgment, to require 5 hours pre-reading time makes no sense. Secondly, a respondent to a summary judgment application should not think that simply by deploying large amounts of material, that will necessarily lead the Court to the conclusion that there must be, buried somewhere in that material, issues that need to be dealt with at a trial.
42. I shall deal with each of the issues identified above separately.

The Parties Issue

Arguments

43. Mr Mill argued that where the phrase “*Force India*” occurs in the Agency Agreement, it refers to the Defendant, Force India, and that is completely clear from the very beginning of the Agency Agreement which sets out the “Parties”. He said that this is a case where there is a formally drafted document where there is no ambiguity. Accordingly, he submitted that there is no room for a “*purposive interpretation*”. The parties have used unambiguous language and the court must apply it, even if this leads to a most improbable commercial result, albeit that he did not accept that the result is improbable.
44. Accordingly, he submitted that where “*Force India*” is used in clause 2.1 of the Agency Agreement, this refers to Force India only and does not extend to its parent company. There is no agreement between Sahara and Force India, let alone a sponsorship agreement, and therefore Sports Mantra has no right to commission.
45. As to the question of an implied term, Mr Mill pointed out that in paragraph 76 of the Particulars of Claim it is merely asserted that there was an implied term, being the insertion of the words “and/or a parent company” after the words “Force India” in clause 2.1 of the Agency Agreement, but no basis is put forward as to why such a term should be implied. Therefore, he submitted this is plainly strikable.
46. In reply to Mr Dearing’s submissions on the question of the implied term (which I deal with below), Mr Mill submitted that although the point had been taken in the Defence as to there being no proper basis pleaded for an implied term, no attempt had been made to address this in a Reply. As will become apparent later in this judgment, at the time of the hearing before me, there was no Reply. Mr Mill also submitted that to imply such a term would be inconsistent with the express terms of the agreement, so that was a further bar to an implied term and that in any event the Agency Agreement worked perfectly well and what Sports Mantra was trying to do was to re-write the contract, having made an improvident business decision.
47. Mr Dearing’s written submissions on this topic are to be found in paragraphs 120 to 152 of his Skeleton Argument. He abandoned before me the suggestion that the matter could only be determined at a trial and, in my judgment, was correct to do so. He cited a number of authorities which pre-date *Arnold v. Britton*, *Rainy Sky* and *Wood v. Capita Ltd* (each *supra*). I do not address those as I am bound by the above cases.
48. He submitted that it would be a commercially absurd outcome if Force India were not to be liable to pay commission to Sports Mantra where someone that had been introduced by Sports Mantra, namely Sahara Adventure, invested very substantial sums (£60 million) in Force India’s parent company, but at the same time obtained important rights, such as naming rights in respect of the formula one team, with the money invested by Sahara Adventure being used for the benefit of Force India and its formula one team.
49. He submitted that under the Agency Agreement, the structure of the investment and the identity of the contracting parties were of no concern to Sports Mantra, which had no power to bind Force India. It was further submitted that one should look at the effect of what

happened, namely that Force India received all of the proceeds of the investment, which was the purpose of Sports Mantra's involvement.

50. Mr Dearing submitted that Force India's position was "*uncompromisingly literal*" and would lead to a commercially absurd result whereby Force India could avoid payment of commission "*simply by transacting through a member of the group to which it belongs or, even more simply, by temporarily changing their registered office.*"
51. Mr Dearing further submitted that Force India's interpretation was also inconsistent with other provisions within the Agency Agreement that expressly envisage that reference to "*Force India*" includes "*any member of the group of companies to which Force India belongs*" and drew my attention to clause 3.7 of the Agency Agreement dealing with confidential information.
52. Mr Dearing accepted that the expression "*Force India*" had to be read in the same way wherever it appeared in the Agency Agreement but submitted that it should be read as meaning "*Force India or any member of the group of companies to which Force India belongs*" as expressly set out at clause 3.7 of the Agency Agreement.
53. However, he then backtracked from this somewhat in respect of the second and third occasions that "*Force India*" appears in clause 2.1 of the Agency Agreement, which he accepted did mean only Force India, the Defendant. That is to say that the obligation to pay the commission lay on the Defendant, Force India, and the commission was only payable when the Defendant, Force India, actually received sponsorship fees. Had Orange, the parent company, held onto the investment monies, there would have been no commission due to Sports Mantra. Accordingly, on his submissions clause 2.1 would be read as saying:

"If Force India or any member of the group of companies to which Force India belongs enters into a sponsorship agreement with the Sponsor ... Force India will pay to the Agent a commission in respect of the sponsorship fees actually received by Force India ... in respect of such [agreement]."

54. As to the implied term (which is to be noted is in different terms, in that it is restricted only to a parent company of Force India), he contended it was justified as it was so obvious that it went without saying. He submitted that clause 2.1 might work without implying such a term, but that it would lack commercial coherence.

Discussion

55. In my judgment, Mr Mill's submissions are undoubtedly correct on this issue. Sports Mantra (and Mr Sareen) have no real prospect of succeeding on this issue and therefore on the claim.
56. In my judgment, if one starts with the express words of the contract, one arrives at the initial view of what the text requires. It is not ambiguous, and therefore one does not need to go on to consider where there is any justification for departing from that construction on the basis of contextual considerations and commercial sense.

57. The Agency Agreement is clear and unambiguous. In my judgment “*Force India*” is a defined term under the identification of the parties and that definition is of the Defendant and only of the Defendant. What is there identified is the company numbered 2417588. It is that company which is bound by the terms of the Agency Agreement.
58. Mr Dearing’s objection to this interpretation on the grounds that Force India could change its registered address and it would cease to be under the obligation to pay commission is without foundation. A company can change its name and/or its registered address, but by doing so does not change its identity. It remains the same legal person. Therefore, Force India could not avoid liability in the manner suggested.
59. Similarly, Force India could not avoid liability by simply transacting through a member of the group to which it belongs. If this is what it did, that other member of the group would almost certainly be acting as Force India’s agent and therefore any such transaction would be held to have been by Force India. It is no part of the Particulars of Claim in this matter that Orange acted as agent for Force India in entering into a sponsorship arrangement with Sahara Adventure.
60. I further reject Mr Dearing’s submissions as to how the words “*Force India*” are to be read in the Agency Agreement. He ended up in the position of having to argue that they meant different things in different lines of clause 2.1. It would be a highly unusual construction of an agreement to hold that the same phrase meant 2 different things when used 3 times in 4 lines of a clause of an agreement. It would also make little sense, as it would follow on this analysis that if Orange had not passed any money to Force India but rather had kept the money, using it to enter into deals which Force India could have done, such that Force India did not actually receive the monies, albeit that it benefitted indirectly from them, there would be no payment of commission due either.
61. Further, the reliance he sought to place on clause 3.7 did not assist him. Rather this shows that where the drafters were concerned to ensure that obligations extended to “*Force India or any member of the group of companies to which Force India belongs*”, this was expressly set out. The parties chose not to use the same phraseology in clause 2.1. In my judgment, that is a good indication that the parties did not intend “*Force India*” in clause 2.1 to refer to anything other than Force India, the Defendant.
62. In the event, I do not accept that this interpretation would lead to a “*most improbable commercial result*”. It may not be the commercial result that Sports Mantra wished for, but it is a commercial result.
63. As to the question of an implied term, although it would have been better had the legal basis for the implication of the term been pleaded, given that the only bases for implying a term are well-known, that would not be fatal to this claim at this stage. Therefore, I do not consider the case is strikable in this respect.
64. However, in my judgment there is no room for an implied term here. The term contended for is neither (a) necessary in the sense of being necessary for the Agency Agreement to have business efficacy such that the contract lacks commercial or practical coherence without it nor (b) sufficiently obvious to go without saying and such as to have provoked a testy “oh, of course” response from the parties to a notional officious bystander asking about it. The requirements for implication of a term are not to be watered down and it is

not sufficient that the court concludes that a particular term would be sensible, reasonable, or desirable.

65. Mr Mill's submission that what Sports Mantra was trying to do was to re-write the contract, having made (what has turned out to be) an improvident business decision is one which I accept. Sports Mantra is, with the benefit of hindsight, seeking to use an implied term to extend the applicability of clause 2.1 to cover the situation that has occurred, the express terms not covering it. While one can fully understand its motive in seeking to do this and to avoid what they see as Force India receiving the benefit of their work without having to pay for it, that would amount to impermissible re-writing of the contract. The Agency Agreement as drafted has commercial and practical coherence and such a term is not obvious. It is to be noted that the implied term argued for is not even in the same terms as how it was submitted by Mr Dearing in argument that the express term should be construed, as set out above. It is difficult in those circumstances to see how it could be said that this particular implied term would have been regarded as obvious.

The Sponsorship Issue

66. In light of my finding on the Parties Issue and the effect that has on the claim, it is not strictly necessary to go on to consider this issue, however, lest I am wrong on the Parties Issue I will do so.

Arguments

67. Mr Dearing on behalf of Sports Mantra submits that the Investment Agreement was in part, a '*sponsorship agreement*' within the meaning of clause 2.1 of the Agency Agreement.

68. The phrase "*sponsorship agreement*" is not defined in the Agency Agreement. Both parties have referred to the Oxford Living Dictionary (sic) definitions which define:

(a) a "sponsor" as "*a person or organisation that pays for or contributes to the costs involved in staging a sporting or artistic event in return for advertising*" and

(b) "sponsorship" as "*the position of being a sponsor*".

69. Mr Dearing submits that if one compares what was being offered under the revised sponsorship proposals put forward by Sports Mantra with the benefits that Sahara Adventure got under the Investment Agreement, there is a very considerable overlap such that the Investment Agreement should be considered a "*sponsorship agreement*". At paragraphs 381-382 of Mr Sareen's witness statement, he seeks to identify what he describes as "*similarities which are striking*". He contends that these include naming rights, the logo positions on the F1 car for Sahara Adventure, the format of the Sahara approved logo and hospitality and tickets. I was taken to various clauses of the Share Subscription Agreement and of the Shareholders Agreement to demonstrate this. It is correct, for example, that under the revised sponsorship proposals the proposed new team name was to be "*Sahara Fi Formula One Team*" and as a result of the Investment Agreement, the name was "*Sahara Force India Team*". This name change was a condition precedent to the completion of the purchase of the shares in Orange.

70. I was also taken to clause 6.7 of the Shareholders Agreement, which Mr Dearing submitted showed that Sahara Adventure was not only treated as a “*Major Shareholder*”, which it was defined as, but also as an “*internal sponsor*”. In fact, there is no reference to “*internal sponsor*” within that clause, but there are references to “*external sponsors*” in contradistinction to the “*Major Shareholder*”.
71. Mr Dearing referred to the difference in the book value of the shares that Sahara Adventure was acquiring in Orange and the sum paid for the shares, and submitted that some or all of that difference amounting to £57 million was referable to the value of the Title Sponsor Rights.
72. Reliance was also placed on clause 4.3 of the Shareholders Agreement which provided for a pre-payment of £10 million in 2 tranches of £5 million each within 3 and 15 months respectively of completion of the purchase of the shares “*in each case as a pre-payment for any sponsorship value due to be paid by Sahara [Adventure] in respect of its obligation pursuant to clause 14.4*”. Clause 14.4 provided that if Sahara Adventure were to default in its obligations to pay the second and third tranches of the share subscription price (of £20 million each) and failed to remedy the default within 5 days, upon being given 20 days notice to do so, Sahara Adventure was to “*reimburse the Company [i.e. Orange] in cash for the sponsorship value attributable to the inclusion of the “Sahara Force India” logo or name on the Formula 1 racing car operated by the Group [i.e. Orange and its subsidiary undertakings] up to the date of the Breach Notice in accordance with the Rate Card [which set out the rates applicable for sponsorship] less the amount, if any, paid to [Orange] pursuant to clause 4.3*”.
73. While Mr Dearing accepted that as a result of the Investment Agreement, Sahara Adventure obtained ownership rights, he submitted that it also obtained sponsorship rights which are entirely different from ownership rights. The Investment Agreement could not confer only one or the other set of rights, but was a mixture of both.
74. Mr Mill referred to the Defence at paragraph 10 which sets out 9 reasons why the Investment Agreement was not a sponsorship agreement within clause 2.1 of the Agency Agreement. Rather, he submitted it was an agreement for Sahara Adventure to subscribe for shares in Orange. The Investment Agreement was overall and predominantly a corporate finance and investment agreement. As a part owner of Orange, Sahara Adventure obtained rights qua owner, which included the right to have the team name changed to include its name. All of the rights so acquired were the normal incidents of co-ownership of a sports team.
75. As to the clause 4.3 point, Mr Mill submitted that it was clear from clause 14.4 that this was intended to, and did, cover the situation where Sahara Adventure failed to come up with the later tranches of the equity investment it was to make into Orange. In those circumstances, it would have received a publicity windfall. The pre-payment in clause 4.3 was to ensure that Orange had security against the non-payment of the equity due, in which event Sahara Adventure would be treated as if it had been a sponsor, not an owner. However, if Sahara Adventure did pay the sums due in return for the shares, it did not have to pay for the publicity, that publicity being an ordinary incident of co-ownership of a sports team.

76. Mr Mill was not able to assist as to whether the £60 million or approximately US\$100 million said to have been received by Orange as a result of the Sahara Adventure investment was passed down to Force India.

Discussion

77. In my judgment, the Investment Agreement was not a “*sponsorship agreement*” under clause 2.1 of the Agency Agreement. It was an agreement to purchase shares in Orange, Force India’s parent company. It was not suggested that Sports Mantra had any role at all in causing the Investment Agreement to come about, so much so that it only became aware of the Investment Agreement when it was announced to the public.

78. An agreement to purchase shares is by its nature very different from an agreement to sponsor a sports team. It is true that as part of the Investment Agreement, Sahara Adventure did achieve a name change to the Force India team, so that it became Sahara Force India, and that it also got to have its logo attached to the racing car, as well as achieving hospitality and ticket rights. However, while these are things which were similar to matters in the revised sponsorship proposals, I accept Mr Mill’s submission that they were an incident of part ownership of Orange as opposed to a sponsorship right.

79. Further, the following matters, some of which are those set out in paragraph 10 of the Defence, in my judgment, show that this was far from being a sponsorship agreement:

- (a) the Share Subscription Agreement was an agreement to take equity, the taking of which an agreement to sponsor would not involve;
- (b) the Investment Agreement gave Sahara Adventure significant rights to be involved in the management of Orange, again not something a sponsorship agreement would generally include;
- (c) an equity investor in a company has an expectation to an entitlement to a share of the profits made, whereas a sponsor would not;
- (d) the Shareholders Agreement provided at clause 7.3 for excess working capital requirements to be provided by the Major Shareholders. A sponsor could not be required to contribute to excess capital working requirements;
- (e) an equity investor has rights as a matter of company law arising out of its status as a shareholder which would not be available to a sponsor.

80. It is in my judgment plain that when the parties entered into the Agency Agreement, a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time would not have understood the parties to have meant that clause 2.1 of the Agency Agreement covered the purchase of shares in the parent company of Force India or to have covered such an agreement which additionally created entitlements similar to those which might have been achieved in the event of a sponsorship agreement being entered into. It would be doing too much violence to the language of that clause so to hold.

81. Again, this is, in my judgment, Sports Mantra trying to re-write the Agency Agreement after the event and with the benefit of hindsight to extend it to cover what actually happened. That is impermissible.
82. Accordingly, the Claimants have no real prospect of succeeding on this issue either. As with the Parties Issue, failure on this issue alone is fatal to the claim. It follows that the Claimants have no real prospect of succeeding on the claim. It is, however, not a part of the claim which is strikable.

The Time Issue

83. Having decided the other 2 issues in Force India's favour, on one view this issue does not arise.

The Arguments

84. Mr Mill submitted that the pleaded and admitted date for the introduction of Sahara Adventure was 7 July 2009. The Investment Agreement was entered into on 12 October 2011, some 2 years and 3 months later. Clause 2.1 of the Agency Agreement provides for payment of commission to be made if a sponsorship agreement is entered into "*within 12 months of an introduction effected by*" Sports Mantra. So even if (contrary to my findings above) the Investment Agreement was a sponsorship agreement with Force India, it was not entered into within the 12 months and therefore no commission is payable. That is the plain and unambiguous meaning of the clause.

85. In the Particulars of Claim, it is pleaded (at paragraph 158(3)) that:

'The "twelve months" time limit in clause 2.1 started to run from 7 July 2009. Some five months later, on and from 11 December 2009, time was interrupted, it was suspended while Sahara and, in particular, Subrata Roy continued to consider the Revised Sponsorship Proposals. Time, for the purposes of clause 2.1, did not start to run again until some 15 months later on a date in or around late March or early April 2011 (yet to be established pending disclosure), on which Dr Mallya met with Subrata Roy to discuss the Revised Sponsorship Proposals.'

86. Mr Mill pointed out that there is no reference to any express or implied term of the Agency Agreement or to any general principle of law under which this alleged suspension of time is said to operate. Therefore, he submitted that this is plainly a strikable plea.
87. Mr Mill noted that there was no alternative claim based on a fresh contract in early 2011 and that had Sports Mantra wanted to be paid for work done after July 2010 they could have said when contacted in February 2011 that they were not going to do anything in the absence of a new deal.
88. He acknowledged that the express wording of clause 2.1 might have unattractive consequences, but submitted that it did not follow from that that the plain meaning of the wording should be departed from.
89. Mr Dearing submitted that the literal construction of clause 2.1 that a sponsorship agreement had to be entered into within 12 months of the introduction was "*absurdly literal*

and is devoid of good commercial sense". The negotiations over a sponsorship agreement were not within the control of Sports Mantra, whose role was to effect the introduction. Sports Mantra had no power to bind Force India, so they could have no influence over whether the sponsorship agreement would be entered into within 12 months.

90. He further submitted that it was clear that on the facts of this case, the parties did not understand that the 12 months from introduction was an absolute limit on the entering into a sponsorship agreement, it not being in dispute that Sports Mantra continued to do work after 10 July 2010, the expiry of the 12 months. In particular, Mr Dearing relies on Force India's director having asked in February, 2011 for the appropriate Force India employee/agent to contact Sports Mantra to see whether Sahara Adventure were still interested in the revised sponsorship proposals.
91. Had Force India thought that the time had passed for a sponsorship agreement to be entered into so that Sports Mantra's entitlement to commission had come to an end, it was submitted that Force India, pursuant to clause 1.7 of the Agency Agreement, should have informed Sports Mantra that Force India no longer intended to pursue the sponsorship opportunity with Sahara Adventure, so that Sports Mantra were free to offer the opportunity to third parties. Force India did not do so.
92. Further, it was submitted that given the terms of clause 3.2 of the Agency Agreement (which is set out above), notice should have been given if Force India was no longer to be bound to pay commission.
93. In paragraph 206 of his Skeleton Argument, Mr Dearing had submitted that Force India's conduct after 8 July 2010 revealed that Force India were estopped from asserting that the 12 months should be construed strictly or narrowly.
94. There was no plea of estoppel raised in the Particulars of Claim, nor had Sports Mantra served a Reply at any stage prior to the hearing before me, despite the time for serving a Reply having expired at the latest on 16 July 2018 over 12 months previously.

Further Submissions

95. It therefore came as somewhat of a surprise when on 14 August 2019 in the middle of vacation and more than 2 weeks after the hearing (and while I was abroad), I was sent a copy of a letter of that date from Sports Mantra's solicitors to Force India's solicitors enclosing a Reply to the Defence "*pleading an alternative case based on estoppel in relation to the 12 month time limit under the Agency Agreement. The points were raised and dealt with at the hearing, both in written and oral submissions, however we are also covering the points in the Reply for completeness*". The attached Reply is 6 pages long.
96. I invited further short submissions in writing as to whether in the circumstances it was appropriate for me to consider the Reply.
97. Force India, through Mr Mill, took the position that while I should consider the Reply, Sports Mantra needed permission to serve it out of time and that it should make an application to do so under CPR Part 3.1(2)(a) to extend time for compliance with CPR Part 15.8. The principles in *Denton v. White* [2014] EWCA Civ 906 need to be considered. Mr Mill says applying those principles it is too late for the Reply to be served. Further, he says

that if this case were to be advanced it should be in the Particulars of Claim, not in a Reply, as it is not permissible to make a claim in a Reply. Yet further, he says that the proposed Reply is embarrassing for want of particularity, nothing being said as to the species of estoppel, nor is there any statement of what the unequivocal representation is (if that is the basis for the estoppel). Additionally, he submits that reliance on silence or inactivity is hopeless as the meaning of silence can never be clear.

98. By contrast, on the application of the *Denton* principles, Sports Mantra submitted that the proceedings are at a very early stage, there still having been no CCMC. Accordingly, despite the delay, the service of a Reply does not imperil future hearing dates or otherwise disrupt the conduct or efficient progress of the litigation. Therefore, it was said, the breach is at the very bottom end of the seriousness and is not significant.
99. While there is no witness evidence to support an application for permission (no application having been formally made), it was said in Sports Mantra's written submissions that it was not reasonably possible to file and serve a properly pleaded Reply before the Application. Further, it is submitted that in all the circumstances of the case, the Reply should be permitted even at this stage.
100. As to the merits, it is said that the Reply is supported by credible evidence, being that set out in the witness statements adduced on the summary judgment application and therefore it potentially could keep the claim alive and allow Sports Mantra continued access to justice.
101. Sports Mantra's submissions as to the reasons for the delay caused Force India's solicitors to send me correspondence showing that the parties agreed in October, 2018 to lift the stay on the proceedings imposed automatically when Force India went into administration in July, 2018.

Discussion

102. I have no hesitation in concluding that clause 2.1 should be construed literally. It sets out quite clearly a time within which an introduction must be effective in order to earn commission. In order for a commission to be earned a sponsorship agreement must be entered into by Force India with the sponsor within 12 months of the introduction. There is no ambiguity in the words, nor is there any ambiguity elsewhere in the Agency Agreement which would lead to a contrary conclusion.
103. While it might be thought harsh that on the facts of this case, in light of it now being known that matters appeared to go to sleep for some time, Force India should take the benefit of the introduction but not pay for it, in my judgment, that is just a feature of how the clause works. That was the agreement the parties entered into. At the time that the Agency Agreement was entered into, there were perfectly good commercial reasons for placing a time limit on when commission should be payable, namely to prevent stale claims for commission, as Mr Dearing accepted on behalf of Sports Mantra. The apparent harshness only arises with the benefit of hindsight.
104. Clause 3.2(c) of the Agency Agreement is permissive and, in my judgment, unnecessary. The fact that it gives a power to terminate the agreement, does not mean that until termination there is a right to commission. The provision applying to there being no

right to commission once the agreement has been terminated applied to all of sub-paragraphs (a) to (c) and, in respect of sub-paragraph (c), cannot be used to enlarge the scope of the obligation in clause 2.1.

105. I note, in passing, that in a later unsigned version of the Agency Agreement, which passed between the parties in November 2009 clause 3.2(c) had been deleted. However, that was not the Agency Agreement that the parties entered into and what happened in later drafts cannot affect what a reasonable person having all the background information would have understood the parties to have meant by the Agency Agreement.
106. The argument based on clause 1.7 of the Agency Agreement takes Sports Mantra nowhere. It was not necessary for Force India to tell Sports Mantra that they were not interested in progressing the possibility of sponsorship from Sahara Adventure. Rather, Force India plainly were. It was just that in so doing, Force India were not obliged to pay a commission in the event of a sponsorship agreement being entered into more than 12 months after the introduction.
107. Accordingly, but for the late service of what I should treat as a draft Reply, I would have no hesitation in holding that the current pleaded case is strikable and/or that the Claimants have no real prospect of succeeding on this issue and therefore on the Claim.
108. However, I have now been supplied with the draft Reply and it is well known that directing amendments to pleadings can be an alternative to striking out a claim. Similarly an application for summary judgment can be met by an amended pleading which can have the effect of showing that there is some issue to be tried.
109. There is still no formal application before me to extend time to allow the Claimants to serve this Reply and were this matter to be going any further, I would require a formal application to be made.
110. If this matter was going forward I would, albeit with some reluctance, have granted an extension of time to allow a Reply to be served. While it is a long time since the Reply would have been due, there was a stay in place for 2-3 months at least. There was nothing, as far as I can see, which would have stopped the Claimants from putting in this Reply sooner and I reject the submissions to the contrary. However, all that has happened since the stay was lifted is this Application. Accordingly, the service of a Reply has not altered the course of the litigation to this point. I think it can therefore be considered as being relatively not very serious under the first limb of the test in *White v. Denton*.
111. I do not accept that there is a good reason for the late service of the Reply. It has been plain and obvious on the pleadings, including in the Claimants' own Particulars of Claim, that there was an issue about the 12-month time limit. If a Reply was the right way to advance the estoppel argument, it could and should have been served at the appropriate time. Even if for some reason it could not have been served earlier, there is no proper explanation as to why it was not served when this Application was made. It is very unsatisfactory that it was only served after the Application was heard and, I suspect, only as a result of my having pointed out in argument that an estoppel argument could not be run without it having been pleaded.

112. However, applying the third limb of the test in *White v. Denton* in all the circumstances of the case I would have been prepared to extend time to allow a Reply to be filed. It would be wrong to shut out Sports Mantra from running an estoppel argument if that would have otherwise saved the case. To do so would not have been in accordance with the Overriding Objective.
113. I would, on the other hand, have required the Reply to have been more fully particularised setting out the precise nature of the estoppel. I accept the force of Mr Mill's criticisms in that respect.
114. I am not persuaded on the very limited submissions that I have received, because of the way that this matter has arisen, that it is necessary for the estoppel to have been pleaded in the Particulars of Claim. The claim is clearly pleaded as being for commission said to be due under the Agency Agreement. The defence (on this limb) is that the sponsorship agreement was entered into outside of the 12-month limit. It seems to me that it would be open to plead the estoppel in a reply to answer that defence. It is not in itself the basis for the claim.
115. A properly particularised Reply would, on the basis of the evidence, put before me give rise to issues to be tried, such that I could not have been satisfied that the Claimants would have had no real prospect of succeeding on the Claim.
116. Given, however, that I have decided that the Claimants do not have any real prospect of succeeding on the Claim on the other 2 grounds, it would serve no purpose to allow the Reply to be served as it does not affect those 2 grounds, either of which would be sufficient to lead to the conclusion that judgment must be entered for Force India. Accordingly, I refuse the prospective application for permission to serve the Reply.

Conclusion

117. For the reasons set out above, I grant Force India's application for summary judgment. In so far as it adds anything, I would order paragraph 158(3) of the Particulars of Claim be struck out. However, the remainder of the Particulars of Claim is not strikable on the basis of the arguments advanced before me.
118. I will invite counsel to agree an order reflecting this judgment. If the parties are unable to agree the order or any part of it, I will deal with such matters when this judgment is handed down, or if no one from the parties' legal representatives can make that date, or on a date which is convenient to them.