

**IN THE HIGH COURT OF JUSTICE**  
**THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30/04/2020

**Before:**

**MR JUSTICE ROBIN KNOWLES CBE**

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**Between :**

**CLARK STREET ASSOCIATES LLC**  
**(a company incorporated under the laws of California)** **Claimant**

**- and -**

**NORSK TITANIUM AS**  
**(a company incorporated under the laws of Norway)** **Defendant**

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**Richard Blakeley** (instructed by **Morrison & Foerster (UK) LLP**) for the **Claimant**  
**Andreas Gledhill QC and Neil Hart** (instructed by **Charles Russell Speechlys LLP**) for the **Defendant**

Hearing dates: 11, 12, 14, 18, 21 November 2019

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**Approved Judgment**

I direct that pursuant to CPR PD39A 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

MR JUSTICE ROBIN KNOWLES CBE

## **Robin Knowles J:**

### **Introduction**

1. The broad context of this case is the provision of support by the State of New York (“the State”) for the establishment of a manufacturing operation in the State.
2. The Defendant (“Norsk”) manufactures aerospace-grade titanium structures. It has a technology known as Direct Metal Deposition (“DMD”) technology. This uses a form of 3D printing to produce titanium components for industrial applications, including in the aerospace industry.
3. The Claimant (“CSA”) provides consultancy services including to assist technology companies to identify and secure contracts and funding connected to United States government initiatives.
4. CSA claims to be entitled to percentage-based commission from Norsk under a written agreement for consultancy services effective 1 April 2014 and entitled the “Consulting Agreement”.

### **The Consulting Agreement**

5. The Consulting Agreement followed discussions between a Mr Empedocles, the CEO of CSA, and a Mr Lokke and a Ms Ryengen for Norsk.
6. Discussions between Mr Empedocles and Ms Ryengen included reference to Norsk’s plans and objectives in building a facility in the United States and the fact that it was looking to offset the capital expenditure of the facility.
7. The parties disagree whether the discussions included reference to a previous project that CSA had worked on called the Silevo deal. I accept that they did, but do not regard that as ultimately relevant to the issues in the case.
8. By the time of the Consulting Agreement, Norsk was not long established. Mr Empedocles appreciated that it was as he put it “a pre-revenue company”. That said, over and above support it could raise from government, Norsk anticipated spending around US\$30 million and that it would be able to raise the money to meet that spending.
9. The parties chose English Law to govern the Consulting Agreement. There was an entire agreement clause at Clause 12.5.
10. The material terms of the Consulting Agreement included the following:

## “1. SERVICES

1.1 Performance of Services. [CSA] will perform the services (as defined on Exhibit A (“Statement of Services”)), attached to and incorporated into this Agreement, in accordance with the terms and conditions of this Agreement and the Statement of Services.

...

## 9. INDEMNIFICATION

9.1 General Each party (the “*Indemnifying Party*”) shall indemnify the other party, its members or shareholders, present and future officers, directors, agents, employees, affiliates, suppliers and assigns (each an “*Indemnified Party*”), and undertake to defend and hold the Indemnified Party harmless from and against any claim, demand, suits, cause of action, losses, penalties, obligations, liabilities, damages, and expenses (including court costs, reasonable attorneys’ fees, interest expenses and amounts paid in compromise or settlement) (“*Claims*”) claimed by any Entity (as defined in the Statement of Services attached hereto as Exhibit A) related to, caused by, arising from or on account of the Indemnifying Party’s failure to comply with any covenant, provision or agreement of the Indemnifying Party contained in this Agreement.

...

### 10.3 Effect of Termination

...

(b) In the event that at any time prior to the expiration of twenty-four (24) months following the expiration or termination of this Agreement (the “*Tail Period*”), [Norsk] receives any Award(s) (as defined in the Statement of Services) related to the Services provided under the terms of this Agreement, then [Norsk] will pay [CSA] the Commission (as defined in the Statement of Services) within thirty (30) days of receipt of such Award.

...

12.3 Assignment Neither party may assign or transfer any of its rights or delegate any of its obligations under this Agreement, in whole or in part, without the other party’s prior written approval, which shall not be unreasonably withheld. In the event [Norsk] elects to assign any of its right, title or interest to and in any Award or any agreement (including any subcontract) arising out of or in connection with such Award to any Entity before payment of any portion of the applicable Commission to [CSA], then (a) the agreement effectuating such assignment shall include such Entity’s assumption of [Norsk’s] payment obligation to [CSA] in connection with

such Award, and (b) [Norsk] and such Entity shall be jointly and severally liable for payment of such Commission to [CSA]. For the avoidance of doubt, the restrictions on assignment described in the immediately preceding sentence will not apply to the engagement by [CSA] of any subcontractors pursuant to Section 3 above. This Agreement will be binding upon and shall inure to the benefit of the parties permitted successors and assigns. Any attempted assignment in contravention of this Section 12.3 shall be null and void.

...

12.7 Advice of Counsel EACH PARTY TO THIS AGREEMENT ACKNOWLEDGES THAT, IN EXECUTING THIS AGREEMENT, SUCH PARTY HAS HAD THE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT LEGAL COUNSEL, AND HAS READ AND UNDERSTOOD ALL OF THE TERMS AND PROVISIONS OF THIS AGREEMENT. THIS AGREEMENT SHALL NOT BE CONSTRUED AGAINST ANY PARTY BY REASON OF THE DRAFTING OR PREPARATION HEREOF.

...

## EXHIBIT A

### Statement of Services

This Statement of Services is issued under and subject to all of the terms and conditions of the Consulting Agreement ...

#### 1. Definitions

“*Award*” means the aggregate value of any

- (a) monetary grant, including, without limitation, any cash grant or cash incentive (“Cash Grants”) actually received by or granted to [Norsk] by any United States Entity, regardless of whether the work performed in conjunction with the Award is (i) performed by [Norsk] in its entirety, or (ii) subcontracted by [Norsk] to other persons in whole or in part,
- (b) monetary grant, including, without limitation, any cash grant or cash incentive (“Cash Grants”) actually received by or granted to any other Entity that, in connection with or as a result of an Award, provides any services for [Norsk’s] benefit to a monetary value equal to the grant,
- (c) non-monetary grant awarded to [Norsk] by any United States Entity that, in connection with or as a result of an Award, provides any services for [Norsk’s] benefit to a monetary value (“Cash Grants”) for [Norsk],

- (d) non-monetary grant awarded to any other Entity that, in connection with or as a result of an Award, provides any services for [Norsk's] benefit to a monetary value ("Cash Grants") for [Norsk],
- (e) loan, loan guarantee or other debt-related source of financing issued, granted or awarded to [Norsk] ("Debt Financing"). Debt Financing which is converted into grants shall be considered Cash Grants from the date of the conversion thereof.
- (f) tax credit and deduction awarded to [Norsk] in connection with or arising out of this Agreement ("Tax Credits").

1.1 "*Entity*" means, including, without limitation, any (a) Governmental Entity, or (b) individual, privately- or publicly-held corporation, general or limited partnership, limited liability company, partnership, joint venture, trust, association, unincorporated organization, regulatory body or agency or any other entity that is not a Governmental Entity.

1.2 "*Governmental Entity*" means, including, without limitation, any agency, bureau, board, commission, court, department, official, political subdivision, tribunal or program administrator of the federal, state or local government in the United States or other instrumentality of any of the above-referenced three levels of the government in the United States.

## 2. Description of Services

2.1 "*Services*" means [CSA's] efforts to support [Norsk] in its efforts to (a) perform site screening and assessment of location for [Norsk's] manufacturing facility in the United States according to predefined criteria and (b) develop and pursue federal, state and other funding opportunities, including writing of applications, negotiation and closing of the final incentive deal with the selected location (state/ community). Specific efforts will be described and updated as part of [CSA'] weekly progress update to [Norsk] ("*Weekly Reports*").

...

## 3. Payment Terms

3.1 Monthly Fee. [Norsk] shall pay [CSA] a monthly fee of ten thousand U.S. dollars (US\$10,000) (the "*Monthly Fee*"). The Monthly Fee shall be payable by [Norsk] to [CSA] after receipt of an invoice from [CSA]

...

### 3.2 Commission.

- (a) In addition to the Monthly Fee, [Norsk] shall pay [CSA] a commission (each, a “*Commission*,” and collectively, the “*Commissions*” in the amount constituting a percentage of the aggregate value of any Award(s) from any Entity in connection with any opportunity that resulted in the award of any Award as a result of the Services performed by CSA under the Agreement. The amount of the applicable Commission shall be based on the aggregate Award amount actually received by [Norsk]. For the avoidance of doubt, Commissions will only be due for Awards made in connection with opportunities that [CSA] works on as described and tracked periodically as part of the Weekly Reports.
- (b) The amount of the applicable Commission payable to [CSA] shall be calculated as follows:
- (i) zero percent (0%) of Cash Grants in the aggregate amount less than two million U.S. dollars (\$2,000,000) (the “*Threshold Amount*”);
  - (ii) five percent (5%) of Cash Grants for the Awards in the aggregate between two million U.S. dollars (\$2,000,000) and seven million U.S. dollars (\$7,000,000);
  - (iii) ten percent (10%) of any Cash Grants for any incremental amount of the Awards in the aggregate amount above seven million U.S. dollars (\$7,000,000);
  - (iv) two percent (2%) of any amount received by [Norsk] in connection with the Debt Financing;
  - (v) two and a half percent (2.5%) of the amount of the Tax Credits received by [Norsk]; and

For the avoidance of doubt and for illustration purposes only, if

- 1) [Norsk] receives four Awards, each in the amount of one million five hundred thousand U.S. dollars (\$1,500,000), then the amount of the Commission to [CSA] will (x) be calculated on  $4 \times \$1,500,000 =$  six million U.S. dollars (\$6,000,000) and (y) equal  $\$6,000,000 - \$2,000,000 = \$4,000,000 = \$4,000,000 \times 5\% =$  two hundred thousand U.S. dollars (\$200,000).
- 2) [Norsk] receives four Awards, each in the amount of three million U.S. dollars (\$3,000,000), then the amount of the Commission to [CSA] will (x) be calculated on  $4 \times \$3,000,000 =$  twelve million U.S. dollars (\$12,000,000) and (y) equal  $\$12,000,000 - \$2,000,000 = \$10,000,000 \rightarrow \$5,000,000 \times 5\% + \$5,000,000 \times 10\% =$  seven hundred and fifty thousand U.S. dollars (\$750,000).

No Commission shall be due prior to the actual receipt of an Award by [Norsk]. For any amount received by [Norsk] in connection with the Debt Financing that is convertible to cash grants, the percentage of the applicable Commission shall be as set forth in Section 3.2(b)(ii), (iii) or (iv), as applicable, of this Statement of Services at the time of the conversion. Any Commission due to [CSA] shall be paid to [CSA] within thirty (30) days following receipt by [Norsk] of the Award or receipt of benefit through other Entity as described in the definition of the “Award” in Section 1.1 [sic] of this Statement of Services.”

6. The compass of the Consulting Agreement has meant that the parties in the present case have not developed wider argument going to background and context by reference to full United States statutory materials concerning grants and incentives. Instead they have developed their arguments in the case on its particular facts.

### **Sources of evidence**

7. Both parties recognize that the case turns first and foremost on issues of contractual interpretation, in particular of the Consulting Agreement.
8. The facts I have found in this judgment are principally derived from the documents and much is common ground. The evidence of witnesses had a contribution to make only in particular areas.
9. Mr Empedocles gave evidence that was not challenged in cross examination and which the court accepts.
10. For its part, Norsk called Ms Morytko, a Chief Operating Officer within the Norsk group of companies, Mr Johnson, Senior Vice President Engineering and Chief Technical Officer within Norsk, and Mr van Aalst, former Chief Financial Officer of Norsk. It is material to note that none were involved at the time of the Consulting Agreement.
11. Expert evidence on commercial property valuation was provided to the Court by Mr Harland and Mr Mako. Both gave their professional expert opinion to assist the court, and in my judgment the opinions of both carry weight. The issue to which their opinions were principally directed involved a choice between two different forms of analysis that they both helped to explain.

### **The further facts**

12. There is no issue that CSA has provided the services required under the Consulting Agreement. It has received Monthly Fees of US\$180,000. The dispute is as to its entitlement to Commission.

13. Over time, Norsk became the parent company of three wholly-owned subsidiaries: NTi Manufacturing Holdings AS (“Norsk Manufacturing Holdings”), Norsk Titanium Equipment AS (“Norsk Equipment”) and Norsk Titanium Services Limited (“Norsk Services”). Norsk incorporated Norsk Manufacturing Holdings on 16 March 2015.

14. On 20 May 2015 a Memorandum of Understanding (“the MOU”) was executed between Norsk and the Research Foundation for the State University of New York (“the Foundation”) acting on behalf of the State University of New York Polytechnic Institute (“SUNY”). The MOU refers to the Fort Schuyler Management Corporation (“FSMC”). This was a not-for-profit agency based in New York and associated with the State.

15. The MOU included an overview with these recitals:

“I.1 [The State] ... has led the U.S. in multi-billion dollar strategic investments in high technology programs that cover the entire spectrum of nanoelectronics, clean energy, information technology (“IT”), medical, and smart cities industry needs ...

I.2 [The State’s] comprehensive job creation and economic growth agenda provides strategic investments for job creation and workforce development in emerging high-tech industries across [the State] and fosters critical partnerships between [the State] government, the private sector and [the State’s] top-flight universities and research institutions. This agenda is embodied by the commitment of [the State] to and the growth of [SUNY] and [SUNY’s] facilities that [SUNY] operates throughout [the State] with [the State’s] public and private university and industry partners ...

...

I.4 [Norsk] seeks to expand and locate its U.S. headquarters and business operations in [the State]. ... [Norsk] wishes to explore participating in the unique public-private partnership model implemented by [the State] through investments at [SUNY] sites located throughout [the State].

...”

16. By paragraph II.2 of the MOU the parties set out what they termed “the Desirable Goals of the Project”, as follows:

“The Parties will work towards the accomplishments of the following goals:

- Identify, prepare, design, construct and provide for the purpose of this MOU an approximately 170,000 square feet building to house [Norsk’s] USA based manufacturing and business operations in Plattsburgh, NY area (“Facility”)



- Develop and provide a training curriculum for [Norsk] workforce needs, allowing [Norsk] to timely meet its expansion plans with a highly trained and qualified workforce, thereby creating a sustainable ecosystem for the attraction of like-minded companies to the Plattsburgh, New York area”

17. Paragraph III.1 of the MOU was in these terms:

“[Norsk] will establish its U.S. based manufacturing and business operations at the Facility. [Norsk] will lease the Facility from [the] Foundation or Foundation’s affiliate, [FSMC], for the purpose of establishing its U.S. based manufacturing and business operations. The lease shall be for a term of 10 years, at a lease rate of \$1 per year, covering both facility and capital equipment...”

18. In Section IV of the MOU the parties provided:

“IV.1 [The State] Funding for Facility

[The Foundation] will use its best efforts to generate funding from [the State], with such funding to be administered through [the Foundation] or FSMC, for the purchase of land and the design, construction and fit-up of the Facility, consistent with [Norsk’s] specifications and as agreed to by [the Foundation] or FSMC. Under no circumstance will [the Foundation’s] and FSMC’s costs associated with the design, construction and fit-up of the Facility exceed ... (\$45,000,000) nor will [the Foundation]’s and FSMC’s costs associated with the purchase of the land exceed ... (\$5,000,000) ...

If the actual cost of designing, constructing, and fitting-up the Facility, including site development, and purchasing of land is less than \$50,000,000, the difference (“Facility Savings”) shall be added to the capital equipment budget ...

IV.2 [The State] Funding for Capital Equipment

The Foundation] will use its best efforts to generate funding from [the State], with such funding to be administered through [the Foundation] or FSMC, to equip the Facility with manufacturing equipment, as specified by [Norsk] and as agreed to by [the Foundation] that is necessary for [Norsk’s manufacturing process. Under no circumstances will [the Foundation] and FSMC’s costs associated with the manufacturing equipment to be provided by [the Foundation] for Phase 1 exceed ... (\$75,000,000) plus any Facility Savings. ...”.

19. On 7 July 2015 Norsk Titanium US Inc. (“Norsk US”) was incorporated as a wholly-owned subsidiary of Norsk Manufacturing Holdings and sub-subsidiary of Norsk.

20. An agreement (“the Alliance Agreement”) dated 23 July 2015 was then concluded between Norsk US and FSMC. The Alliance Agreement was for “the establishment of a high-volume additive manufacturing technology, research, development, innovation and commercialization alliance”.

21. With the Alliance Agreement concluded, the Consulting Agreement was terminated by Norsk by notice effective from 9 September 2015.

### **The Alliance Agreement**

22. The material provisions of the Alliance Agreement are as follows.
23. Clause 1.4 provided that Norsk US sought to establish its US headquarters, DMD production facility and business operations in the State and wished to participate in a “public-private partnership model implemented by [the State] through investments at [SUNY] sites located throughout [the State]”.
24. Clause 4.1 provided that Norsk US would establish its Manufacturing Operations in or near Plattsburgh, New York at the Manufacturing Facility and would jointly commission, with FSMC, the Manufacturing Operations and related business operations as soon as possible, with a target date of October 1, 2016.
25. By Clause 4.3 Norsk US committed itself and its Affiliates to spend in the Manufacturing Operations in connection with the Manufacturing Facility over the ten years following the date of the manufacturing Equipment Commissioning, a target amount of US\$875 million, and committed to maintain operations in the Plattsburgh, New York region for at least those 10 years.
26. Clause 5.1(a) provided that subject to a limitation at Clause 5.1(e), FMSC would generate funding from the State to be administered through FSMC or its Affiliate “for the purchase of land and the design, construction and fit-up of the Manufacturing Facility consistent with [Norsk US]’s requirements and specifications as mutually agreed to by FSMC and as set forth in Exhibit B to house the Manufacturing Operations.” The Manufacturing Facility would be constructed and owned or controlled by FSMC and leased to Norsk US at a base rent of US\$1 per year for a term of 10 years, with a provision for an extension of the term.
27. Clause 5.1 (c) provided that subject to a limitation at Clause 5.1(e), FMSC would generate funding from the State to be administered through FSMC or its Affiliate “to equip the Manufacturing Facility with the Manufacturing Equipment at its sole expense”. The Manufacturing Equipment would be leased to Norsk US at a total rent of US\$10 for a term of 10 years, again with a provision for an extension of the term.
28. The limitation at Clause 5.1(e) was in these terms:

“Under no circumstance will the aggregate amount expended by FSMC or its Affiliates exceed: (i) [US\$45 million] associated with the design, construction and fit-up of the Manufacturing Facility; (ii) [US\$5 million] associated with the purchase of land for the Manufacturing Facility and (iii) [US\$75 million] associated with the Manufacturing Equipment to be provided for Phase 1. In the

event that the actual costs for designing, constructing, fitting-up, and purchasing the land are less than [US\$50 million] then the difference shall be added to the budget associated with the purchase of the Manufacturing Equipment.”

29. By Clause 11.6:

“Failure of State Funding

FSMC is reliant on the allocation of [the State] funds to satisfy FSMC’s contribution obligations under Section 5.1 of this Agreement. In the event that the requisite [State] funding of the full \$125,000,000 obligation required under this Agreement is not allocated to FSMC within a period of 180 days following the Effective Date [Norsk US] shall have the right to terminate this Agreement upon thirty (30) days written notice to FSMC. Termination under this section 11.6 ... shall be considered termination by reason of impossibility. ...”

30. Much later, on 16 November 2018 an amended Alliance Agreement was executed by FSMC and Norsk US.

### **Appropriation of funds by the State and release of appropriated funds**

31. Meanwhile, and pursuant to the arrangements described above, on 13 April 2016 the State appropriated US\$125 million. The description given in the relevant bill was for “services and expenses of an industrial scale research and development facility operated by SUNY Polytechnic Institute Colleges of Nanoscale Science and Engineering in Clinton County”.

32. Empire State Development (“ESD”) is the chief economic development agency to the State and the umbrella organization for the State’s two principal economic development financing entities. It had responsibility for approving the release to FSMC of the appropriated monies. ESD did so in tranches, each the subject of a Grant Disbursement Agreement. It had approved the release of the full US\$125 million by 29 June 2017.

33. There is no material to confirm the dates when FSMC received the money. Mr Andreas Gledhill QC and Mr Neil Hart for Norsk described Norsk’s overall project as effectively stalled by 2017. It is possible, but not productive, to debate that description, but even if it is an accurate description I consider the probabilities higher that once ESD approved the release of public money to FSMC (an associate of the State and affiliated to the Foundation) that money would be released rather than that the money would still be held back by ESD from FSMC.

34. Allowing a short time for the administration involved, for the final tranche the date of receipt would be by the end of August 2017. To have held otherwise in the circumstances of this case, I would require evidence to show that despite approval the money still did not reach FSMC in timely fashion. No such evidence was led.

## **The Manufacturing Equipment**

35. Alongside these events, on 12 August 2015 Norsk Equipment was incorporated as a wholly-owned subsidiary of Norsk.
36. A “Master Equipment Purchase Agreement” dated July 2016 and an amendment to that dated May 2017 (respectively “MEPA 1” and “MEPA 2”) were agreed between Norsk Equipment and FSMC.
37. Pursuant to MEPA 1 and MEPA 2 FSMC ordered from Norsk Equipment and took delivery of 21 Rapid Plasma Deposition machines (“RPDs”) to the value of US\$48.3 million, as part of the Manufacturing Equipment.
38. By 10 September 2017 FSMC had paid US\$40.618 million to Norsk Equipment under the terms of the MEPAs.
39. A further 11 RPDs were ordered from Norsk Equipment by FSMC under MEPA 2 to the value of US\$25.3 million, again as part of the Manufacturing Equipment.
40. The present position is that Norsk Equipment has invoiced FSMC for US\$73.6 million of which FSMC has paid US\$72.22 million. 30 RPDs have been delivered.
41. The price charged by Norsk Equipment to FSMC for each RPD has been US\$2.3 million. Of that sum US\$400,000 reimburses Norsk for research and development costs. Norsk Equipment’s profit is US\$200,000.
42. Mr Johnson gave evidence of a useful life of RPDs of 20 years, and I am prepared to accept that evidence. However that was not the basis on which FSMC and Norsk US proceeded, which was a relevant useful life of 10 years.

## **The Manufacturing Facility**

43. The Alliance Agreement anticipated that the Manufacturing Facility and all related infrastructure would occur in the third quarter of 2016 with an initial batch of Manufacturing Equipment installed and operational. In the event there were appreciable delays.
44. To start with, on 1 September 2016 two separate leases were entered into for the Plattsburgh Development and Qualification Center (the “PDQC”). This was a temporary arrangement.
45. The leases were between the Development Corporation Clinton County, New York as landlord and Norsk US as tenant. They concerned Building 21, Suite 100 for an initial term of 5 years and Building 21, Suite 200 for an initial term of 1 year. In

September 2016 Norsk US took formal occupation of the PDQC. On 1 September 2018 a further lease was entered into of Suite 200 for a term of 3 years.

46. RPDs were shipped and held at the PQDC. Commercial operations did start at the PQDC but not until 14 May 2018. A state of the art Manufacturing Facility (the “PPC”) is under construction but is not likely to see occupation until this year.
47. Around US\$40 million of construction costs had been incurred on the PPC by the time of the trial, and on the balance of probabilities the final figure will be US\$42.5 million. Taken with the costs of the PDQC a full US\$50 million will have been spent on the Manufacturing Facility by the time the PPC is in full use.

### **Approach to interpretation**

48. There was no material issue between the parties as to the approach to interpretation. The decisions of the Supreme Court in Rainy Sky AS v Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900, Arnold v Britton [2015] UKSC 36; [2015] AC 1619, Marks & Spencer plc v BNP Securities Services Trust Co [2015] UKSC 71; [2016] AC 742 and Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173 were cited.
49. For the purposes of this judgment it is sufficient to set out the following passage from the most recent of those decisions. At [9] to [15] in Wood v Capita, Lord Hodge JSC said:

“10. The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause, but that 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 that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H-1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties’ contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extra-judicial writing, “A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision” (2018) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnold* case [2015] AC 1619 all of the judgments confirmed the approach in the *Rainy Sky* case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76; and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, 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 (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); 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: the *Arnold* case, paras 20, 77. 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.

12. 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: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. 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. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and 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. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.

...

15. The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation.”

### **CSA’s primary case**

50. CSA’s primary case is that it is entitled to Commission because there was an Award within the meaning of paragraph 1(b) of Exhibit A to the Consulting Agreement on 4 August 2015 or 13 April 2016 or “at the very latest, when each tranche of funding cleared the approval process and could be drawn down by FSMC”.

### **Analysis of CSA’s primary case**

51. Paragraph 1(b) of the Exhibit A to the Consulting Agreement is concerned with a monetary grant, and the situation where the monetary grant is received by or granted to “any other Entity”, meaning an Entity other than Norsk. A monetary grant received by or granted to Norsk is the subject of paragraph 1(a)).

52. “Entity” is given a broad meaning at paragraph 1.1: “including, without limitation, any (a) Governmental Entity, or (b) ... any other entity that is not a Governmental Entity”. “Governmental Entity” is itself broadly defined at paragraph 1.2. FSMC was plainly an Entity and an Entity other than Norsk.

53. The reference in paragraph 1(b) to “any ... monetary grant” is, within the scheme of Exhibit A, in contrast to a “non-monetary grant” (paragraph 1 (c) and (d)), a “debt-related source of financing” (paragraph 1(e)) and a “tax credit and deduction” (paragraph 1(f)).

54. Eurofi Ltd v Teletech UK Ltd (unreported, 31 July 2000, CA) also concerned contractual commission referable to advice and consultancy in relation to the obtaining of grants. In Eurofi Peter Gibson LJ referred to the judgment of Cattanach J in the Federal Court of Canada in GTE Sylvania Canada Ltd v R [1974] 1 FCR 726 at page 736 for the ordinary meaning of “grant”. However, the question in any particular case (and Eurofi itself was no exception) will be whether the ordinary meaning was used by the parties in their agreement.

55. That Cattanach J was not suggesting otherwise in GTE Sylvania is clearer still if one takes a slightly fuller quotation from his judgment than is set out in Eurofi. At page 735-6 he said:

“The etymological meaning of a word is not necessarily the meaning of the word which the context requires and dictionaries may be resorted to for the purpose of ascertaining the use of a word in popular language.

...

Again referring to the dictionary meanings of the words “grant” and “subsidy” there is one common thread throughout, that is a gift or assignment of money by government or public authority out of public funds to a private or individual or commercial enterprise deemed to be beneficial to the public interest. Subject to minor refinements the words “grant” and “subsidy” appear from the dictionary meanings to be almost synonymous.”

56. It is already established above that in the Consulting Agreement a monetary grant could be even to a Governmental Entity, as an “other Entity”. Further, the reference to “grant” in paragraph 1(b) of Exhibit A to the Consulting Agreement is broad: it is to “any” monetary grant and “including, without limitation, any cash grant or cash incentive”. Indeed, as mentioned, other parts of paragraph 1 contemplated grants that were non-monetary rather than “of money”.
57. On 13 April 2016 US\$125 million was allocated by the State to FSMC. In my judgment and in the circumstances of the case the allocation by the State to FSMC readily comes within the broad reference “any ... monetary grant” to “any other Entity”.
58. The monetary grant is required to be “actually received ... or granted ...”. Clearly on 13 April 2016 the grant was “granted” or “actually ... granted”. However Mr Gledhill QC argues that in paragraph 1(b) commission is only due in respect of cash grants that are “actually received”. This confines the words “granted” or “actually ... granted” to cash incentives, leaving the words “actually received” to apply to cash grants. In my judgment it is debatable whether the language is to be compartmentalised in that way, but even if the parties did require grants but not incentives to be “actually received”, what has to be (and was) “actually received” is the grant.
59. The receipt of the grant by the grantee is one thing; the transfer of money to the grantee pursuant to the grant is another. I found a review of the Eurofi decision helpful in prompting illustrations, from the facts of that case, of a grant on the one hand (which may be conditional or unconditional) and payment pursuant to it on the other. In the Consulting Agreement it is an “award” that is being defined throughout paragraph 1.
60. To take in a point of context here, CSA had done the work the parties contemplated it would do by the point of the actual receipt (or grant) of the grant. As Mr Richard Blakeley, appearing on behalf of CSA, pointed out, had the future transfer of money pursuant to the grant or the spending of the grant been the key point one would expect CSA and Norsk, as commercial parties to have provided complementary obligations on the part of Norsk and to CSA to report, monitor and account.



61. Mr Gledhill QC argues that another point of context, namely that Norsk was a “pre-revenue company” bears on the meaning of “actually received”. He contends that the word “actually” points to a two-fold distinction, first between receipt by Norsk or a Norsk group entity and receipt by third parties, and second between the award of a grant or other commissionable benefit by the grant-making body and its receipt by the grantee.
62. As to the first aspect of the two-fold distinction he describes, in relation to paragraph 1(b) Mr Gledhill QC argues that “the repeated references [in the Consulting Agreement] to the need for “actual” receipt “by [Norsk]” reflect the point that quantification of the separate benefit to [Norsk] is critical to any case said to be within [paragraphs] 1(b)-(d)”. Whilst I accept that paragraph 1(b) requires there to be benefit to Norsk, and will consider this below, I do not accept the word “actual” adds to that requirement. The reference in paragraph 1(b) to “actually received or granted” is in respect of the grant or incentive to the “other Entity”.
63. In connection with the second aspect, Mr Gledhill QC draws attention to clause 3.2(a) of the Consulting Agreement and the phrase “shall be based on the aggregate Award amount actually received” and to the phrase “[n]o Commission shall be due prior to the actual receipt of the Award ...” in Exhibit A. The former is concerned with the amount of the Award by reference to which commission is calculable. The latter is concerned with when commission is due. I accept that both contemplate that the award must be received by the grantee, but not that money must have been paid under the award.
64. Under paragraph 1(b) of Exhibit A to the Consulting Agreement the “other Entity” must also be an Entity “that, in connection with or as a result of an Award, provides any services for [Norsk’s] benefit”. The Alliance Agreement imposed obligations on FSMC to provide. That provision is “in connection with or as a result of” the monetary grant. The appropriation by the State itself removed any conditionality for those obligations that resulted from the termination provision at Clause 11.6 of the Alliance Agreement.
65. But were the obligations to provide “services”? And was any provision of services “for Norsk’s benefit” when it was Norsk US rather than Norsk that was the contracting party to the Alliance Agreement? I take these two questions next.
66. The second question can be disposed of shortly. In my judgment the provision of services to Norsk US was for Norsk’s benefit. Norsk US was its wholly owned subsidiary. The drafting clearly goes beyond the narrow word “to” as in “to Norsk”, and this contemplates that services not provided to Norsk may be to Norsk’s benefit. I deal separately below with the monetary value of services.
67. But first, as to the first of the two questions just posed, of course in some contexts services may have a narrow meaning, as most obviously where “services” is used in contrast to “goods”. It is context that is important in the present case. In paragraph 1(b) itself, the reference to “any services” is not used in contrast to anything else. Given what the Consulting Agreement was all about, in my judgment the word attracts the broadest meaning.

68. To amplify that a little, the context was “federal, state and other funding opportunities” (paragraph 2.1 of Exhibit A). That is what brought the various parties together and what all had been working on throughout. Even where (as here) the economic support included a lease of land and machinery (to Norsk US and Norsk Equipment), those arrangements were, in context, vehicles for the provision of support rather than as complete and freestanding commercial propositions, as the nominal rental levels clearly indicate. The language of “services” seems broad enough to involve the provision of economic support seen in the present case.
69. However Paragraph 1(b) also refers to services “to a monetary value equal to the grant”. Here, Mr Gledhill QC argues the value of the “services” is not “equal to” the grant, on the expert evidence. Indeed he goes further and argues that the value has to be precisely equal.
70. He develops his argument in this way. FSMC has or will confer on Norsk US the right to the intermediate use of the Manufacturing Facility, and the RPD machines as Manufacturing Equipment, pursuant to leases. That value is not “equal to” the amounts ESD has paid FSMC (US\$125 million in my judgment, as explained above). This is demonstrated, Mr Gledhill QC’s argument holds, by the disparity between the US\$50 million appropriated to the Manufacturing Facility, and the value to Norsk US of the lease of the PPC. Neither of the two experts supports a conclusion that the lease was worth US\$50 million to Norsk US. Similarly, on the factual evidence of Mr Johnson the RPD machines’ useful life is likely to be double the 10-year lease term prospectively agreed between Norsk US and FSMC. On that basis the benefits to Norsk US do not equate to the US\$75 million FSMC received from ESD for Manufacturing Equipment. The disparity is equivalent to the value of FSMC’s reversionary interest in the RPD machines, which on Mr. Johnson’s evidence, is likely to be significant. FMLC would also have a reversionary interest in the PPC.
71. It is to be noted that Mr Gledhill QC’s arguments centre on benefit to Norsk US rather than Norsk. It is benefit to Norsk to which paragraph 1(b) refers, and that is material.
72. In my judgment the enquiry is not limited by or to the value of the leases granted to Norsk US. Further, in my judgment paragraph 1(b) of Exhibit A to the Consulting Agreement does not contemplate the type of expert and factual enquiry Mr Gledhill QC suggests. Rather, paragraph 1(b) works reasonably straightforwardly, and without a complexity that the parties cannot have intended.
73. The wording recognises that, under paragraph 1(b), the monetary grant itself is not received by or granted to Norsk but by or to the “other Entity”. The grant qualifies to the value of the services the “other Entity” provides for Norsk’s benefit “in connection with or as a result of” the Award (the grant). In the present case the grant to FSMC as the “other Entity” was of US\$125 million and all of that (rather than some of it) was to be spent by FSMC in providing for Norsk’s benefit.
74. This approach also meets the further point argued by Mr Gledhill QC, for the value is precisely equal.

75. Mr Gledhill QC argues that the reference in paragraphs 1(b) to (d) to benefit “to a monetary value” may have the result that real commercial advantages conferred on Norsk are non-commissionable if they do not measurably augment Norsk’s balance sheet.

76. He identifies a rationale for this approach in the point made by Peter Gibson LJ in Eurofi in these terms (at [35]):

“... I of course accept that Eurofi was engaged to obtain incentives which included but were not confined to [Regional Selective Assistance], but it does not follow that Eurofi chose and TeleTech agreed to give Eurofi commission on the basis that the commission was a percentage of all the incentives which TeleTech secured through Eurofi’s advice and assistance. The advantage of measuring commission by reference to grants alone (if the term is given its ordinary meaning of grants of money) is certainty and the avoidance of dispute. It would make practical sense for Eurofi to limit its commission claim to a percentage of any monetary awards, that percentage taking account of the fact that benefits in kind might also be achieved but the valuation of which might be open to dispute. Whether that is what Eurofi did, I do not know. All I am saying is that it is not contrary to commercial common sense to find a provision for fees limited to a percentage of monetary grants. On any footing RSA was the most important and largest incentive or “core funding” (as Mr Talbot described it) which an applicant would seek to obtain. I therefore agree with the judge on the necessity for a grant to be of a sum of money. ...”

77. Mr Gledhill QC accepts that the position differs in the present case to the extent that the parties expressly agreed in the present case that there would be commission on non-monetary grants as well as monetary grants. However, subject to that, he says Peter Gibson LJ’s point applies equally. He suggests that is exemplified by the fact that Norsk’s obligation is to pay commission within 30 days. Here it is Mr Gledhill QC who points to the absence of agreed valuation mechanisms and disclosure requirements. This all indicates, he argues, that “the “benefit” must not only be quantifiable in money, but was envisaged by the parties as being fairly readily so.

78. As will be clear already, I agree with Mr Gledhill QC that the parties should not be taken to have contemplated elaborate valuation. Indeed, even his balance sheet reference does not go far enough as it would not avoid argument and 30 days would often not help. I respectfully consider the features highlighted by Mr Gledhill QC point rather to the conclusion I have indicated above.

79. CSA had urged that “it cannot be right that to constitute an Award under section 1(b) the services provided by the other Entity must have a monetary value precisely equal to the grant to the other Entity”. Mr Gledhill QC understandably responds that, subject to qualifications inapplicable to the facts of this case, the parties to a contract are free to make whatever bargain they want. If they impose a pre-condition to the creation of some right, or to its exercise, the court has no power to dispense with that pre-condition, on the basis of some notion of substantive compliance or general fairness.

80. Although a rationale is not required, the rationale for the requirement in clause 1(b) is both readily apparent, and perfectly rational, argues Mr Gledhill QC and he says it is this. Paragraph 1(b) is, in effect, a deeming provision. On the one hand, if the “monetary value” of the “services for [Norsk’s] benefit” is “equal to” to the original “monetary grant”, paragraph 1(b) deems Norsk to have received the original grant, and it pays commission on that. It is treated as if it had received the cash directly, even though it has only in fact had services to an equivalent value from the “other Entity”. On the other hand, if the agreed conditions for that deeming are not satisfied, Norsk pays commission not on the original grant, but on what Mr Gledhill QC would term a ‘derivative grant’, pursuant to paragraphs 1(c)-(d): and to the extent that ‘derivative grant’ is of a lesser value, it pays commission on that lesser value, and not on the greater value received by the “other Entity”, pursuant to the original grant. It poses an implied question, to which the answer is binary: either the “monetary value” is “equal”, or it is not. There is no scope for a middle ground, not least because the middle ground is brought into charge separately by clauses 1(c)-(d).
81. Attractively though it was put, I cannot accept Mr Gledhill QC’s exposition just summarised. The argument is a careful construct, but not one that is suggested by the language used by the parties. The structure of paragraph 1 as a whole is to provide six categories, with the “aggregate value” to be taken. There are no persuasive signs that paragraph 1(c) and (d) are there to catch what falls out of paragraph 1(b) because the “services for [Norsk’s] benefit” are not “to a monetary value equal to the grant”. In contrast to paragraph 1(b), paragraphs 1(c) and (d) concern, in terms, grants that are awarded to Norsk and as “non-monetary grants”. Paragraph 1(b) does not claim to be a deeming provision, and paragraphs 1(c) and (d) do not claim to be concerned with ‘derivative grants’.
82. The consequence of the analysis so far is that Norsk may be under an obligation to pay commission where the Norsk group has not received cash. Norsk argues that the parties knew that Norsk would not be able to pay a substantial commission before the receipt of cash in its account, and that this is relevant context.
83. On the evidence at trial I do not accept that CSA did know this. I agree with Mr Blakeley that it is relevant that Mr van Aalst’s evidence was that originally Norsk was planning itself to spend US\$30m, as was relayed to CSA in information sent to it prior to the Consulting Agreement and would pay for this by raising funds including by issuing shares. He acknowledged that to pay the commission although debt could not be used, equity could be raised.
84. Further, returning to the decision in Eurofi, and to points already brought out, in the present case the parties clearly did not use the ordinary meaning of “grant”. They included the concept of “non-monetary grant” rather than simply “money”. They provided that a “grant” could be received by or made to an Entity, including a Governmental Entity rather than simply “to a private or individual or commercial enterprise”.
85. Mr Gledhill QC however draws close attention to the way in which the Court of Appeal in Eurofi dealt with the question whether the payment of fit-out costs was commissionable. Peter Gibson LJ (at [34]) had held these were “not offers of

payment of monies to [the defendant], but offers of the provision of benefits on which [Locate in Scotland] has placed a value”. Chadwick LJ (at [54]) had held that “there is no basis for construing the word “grants” to include money laid out by Glasgow Development Agency in improving land or buildings owned by Glasgow City Council for use by the respondent”.

86. Mr Gledhill QC points out that on the facts in Eurofi the fit-out costs were a cash payment in an agreed amount, actually made, and from which the defendant derived benefit. He highlights that the claimant was unsuccessful on this aspect because the money was spent by the Glasgow Development Agency improving a building owned by Glasgow City Council. He describes the payments as “(in effect) just preliminary spending to facilitate subsequent assistance of [the defendant] by the local authority, in the form of rent-free occupation of specially-adapted premises.” He argues that the claimant “fell between two stools”: the Glasgow Development Agency had made a grant of a commissionable nature (a money grant) but to the local authority not to the defendant; the local authority had made what Mr Gledhill QC describes as a “derivative grant” to the defendant, but of a non-commissionable nature because it was of a benefit in kind.

87. This leads Mr Gledhill QC to offer the following conclusions:

“To the extent FSMC spent monies acquiring land in Plattsburgh, and building and fitting-out a factory to meet Norsk US’s needs, it has not made any grant to Norsk US (still less [Norsk]), whether monetary or non-monetary. The only grant Norsk US has ever in fact stood to get is the occupation of FSMC’s facility, once actually constructed, and the intermediate use of the RPD machines which will be situate in it, in both cases, at sub-market rentals.

The consequence of this, furthermore, is that only a portion is the US\$125m allocated to FSMC by [the State]/ESD flowed through to Norsk companies by way of sub-grant from FSMC.”

88. I cannot with respect accept this argument. So far as paragraph 1(b) specifically is concerned, the grant with which it is concerned is one “actually received by or granted to” someone other than the person in the position of the defendant in Eurofi. Where that person in the position of the defendant comes in, under paragraph 1(b), is as a beneficiary of services provided by the grantee in connection with or as a result of the grant. “The occupation of FSMC’s facility, once actually constructed, and the intermediate use of the RPD machines which will be situate in it, in both cases, at sub-market rentals” are not, contrary to Mr Gledhill QC’s argument, the grant but rather are bound up in the services for the benefit of Norsk. The grant is to FSMC.

89. The proposition that “only a portion of the US\$125m allocated to FSMC by [the State]/ESD flowed through to Norsk companies by way of sub-grant from FSMC” is not a consequence of the Eurofi decision, which was concerned with whether there had been a grant to the defendant and not with a question of sub-grants to the defendant by a grantee other than the defendant. The question of “monetary value

equal to the grant” that does arise in the present case is a question I have addressed above.

## **The Tail Period**

90. Under Clause 10.3(b) of the Consulting Agreement, the obligation to pay Commission applies only where Norsk “receives any Award(s) (as defined in the Statement of Services)” related to the Services provided under the terms of the Consulting Agreement prior to the expiration of 24 months following the termination of that agreement.
91. This, argues Mr Gledhill QC, operates as a further partial defence, even to CSA’s primary case. Mr Gledhill QC develops his argument as follows.
92. First, he points out that it is not suggested by CSA that either the State’s budget appropriation or the four ESD resolutions constituted what is termed a “*cash incentive*” within paragraph 1(b). In the circumstances, he argues (second) that there was no paragraph 1(b) grant by the State to FSMC until the point of “*actual receipt*”, which he says is the point at which monies actually passed from ESD to FSMC.
93. He says, third, all it is possible to say on the evidence before the court is that prior to the end of the Tail Period, FSMC may have received from ESD up to US\$40.618 million because it had paid that sum to Norsk Equipment by that date, under the terms of the MEPAs. He argues there is no basis for concluding that FSMC received any further sums by that date. The consequence is that at most, Norsk is liable for commission on the US\$40.618 million which was the most FSMC had “actually received” from ESD, prior to 10 September 2017.
94. In my judgment the argument breaks down principally because it reads into paragraph 1(b) what is not there, and also on the facts.
95. The first stage confines the words “granted to” to the words “cash incentive” so as to attach the words “received by” to the words “cash grant”. In fact paragraph 1(b) is concerned with “any ... monetary grant” “without limitation”, and whilst a “cash grant or cash incentive” are included within that broad term they do not set its limits. To distinguish the “monetary grant” that is the subject of paragraph 1(a) from the “monetary grant” that is the subject of paragraph 1(b) the words “actually received by or granted to” accompany the words “monetary grant” and the reference to Norsk in paragraph 1(a) and to “any other Entity” in paragraph 1(b).
96. It is hard to attribute to commercial parties an intention that a “cash incentive” need only be “granted” or “actually ... granted” but a “cash grant” is required to be “actually received”, unless “actually received” refers to receipt of the grant rather than the receipt of the money to be paid pursuant to it. It is at the second stage of Mr Gledhill QC’s argument that he reads in “the point at which monies actually

passed from ESD to FSMC”. Those words are not in paragraph 1(b), nor Clause 10.3(b).

97. On the facts in my judgment whilst US\$40.618 million may have been the figure that FSMC had paid to Norsk Equipment by 10 September 2017, the ESD had approved the release to FSMC of the full US\$125 million by 29 June 2017. As I find above, on the balance of probabilities FSMC received the money shortly after the approval of each tranche and before September 2017.
98. Mr Gledhill QC argues that it is a “more natural inference” that the parties did not intend the benefits under the Alliance Agreement to be commissionable without any time limit. The Tail Period provision was intended to preclude this, he argues, with a hard cut-off at 2 years following which Norsk and CSA could go their separate ways “with [Norsk] not having to concern itself with the possibility of further claims, and CSA not having to continue to police its commission entitlement”. This is powerfully corroborated, he argues, by the point that the Consulting Agreement contains, at Clauses 2.1 and 3.2(a) what he characterizes as “a very low causation threshold for CSA’s entitlement to commission to arise in the first place”.
99. For my part I do not consider this an area in which inference has a material part to play. The parties have made a decision on cut-off. The language they have used provides a cut-off for awards (related to the Services provided by CSA) that are received within 24 months of termination of the Consulting Agreement. That is a perfectly understandable decision.

### **CSA’s alternative claims**

100. In light of the conclusions reached above, CSA’s alternative claims do not arise. I will however deal with them for completeness.

#### Claims 2, 4, 6 and 7

101. Each of these Claims argued that there was a paragraph 1(a) award or a paragraph 1(c) award. Each fails because paragraphs 1(a) and (c) deal with awards to Norsk, not Norsk Equipment or Norsk US.
102. Thus, Claim 2 argued that the payments of US\$72.22 million by FSMC to Norsk Equipment in respect of RPDs are paragraph 1(a) awards. Claim 4 argued that “the RPDs or their use with FSMC’s permission are a non-monetary grant to Norsk ... by FSMC” and paragraph 1(c) awards. However the RPDs are made available by FSMC to Norsk US not Norsk. Claim 6 argued that “the 10-year lease for Norsk to occupy” the PPC constitutes a paragraph 1(c) award. However the lease is for Norsk US to occupy, not Norsk. Claim 7 argued that capital costs reimbursed by FSMC in respect of PDQC were a paragraph 1(c) award, but the claim as formulated recognizes that these were reimbursements to Norsk US not Norsk.

103. CSA argued for an interpretation of paragraphs 1(a) and (c) that would include awards to Norsk Equipment or Norsk US. Again, the point does not ultimately arise given my conclusions on CSA's primary case. However for completeness, in the present case I cannot see that CSA's interpretation is a permissible interpretation. Given the presence of paragraphs 1(b) and (d), and the language the parties used in Clause 9.1, the language of the contract does not support the interpretation of paragraph 1(a) and (c) urged by CSA.
104. It was suggested Clause 12.3 assisted CSA, but that is concerned with assignment or transfer of any award before payment of commission and there has not been such an assignment or transfer. It was suggested that a term should be implied "to prevent Norsk circumventing its obligation to pay commission", but in the present case I am not satisfied that the requirement of necessity is met. As Mr Gledhill QC argued, and I agree, "[i]t is not 'reasonable and equitable', let alone necessary 'for business efficacy' (Marks & Spencer plc v BNP [above, at [21]]), to imply a term preventing Norsk US or Norsk Equipment being party to relevant agreements with FSMC otherwise than on terms rendering them jointly and severally liable for CSA's commission, in circumstances where their interposition between FSMC and [Norsk] does not, of itself, preclude CSA from claiming commission from [Norsk]."
105. In other cases concerning other contracts there may be far more room for the type of argument that CSA seeks to develop. In the present case the contract in question both refers to Norsk and does not fail to deal with Norsk Equipment or Norsk US; rather, the drafting offers a suite of sub paragraphs within paragraph 1 including those that deal separately with any Entity other than Norsk and that would include companies like Norsk Equipment or Norsk US.
106. Claim 6 would have raised the question of the monetary value of the 10-year lease. Although the question does not arise I state shortly my conclusions. Rather than advance a case that the value is equal to the sums invested in the PPC (US\$42.5 million) CSA elected instead to argue for what was termed a feasibility rent, whereas Norsk argued for what was termed a market rent. There is no true market comparison for the PPC; the 10-year value of the PPC is to the Norsk group alone and lies in its unique purpose-built nature, at Norsk's instruction. Norsk argued that without the agreement with FSMC, Norsk would not have sought the building of the PPC but I do not accept that. Norsk pointed to its rental of the PDQC but I do not consider that a sure guide as it was only an interim choice. In the circumstances of the case I resist the market rent analysis of Mr Mako and prefer Mr Harland's feasibility rent analysis. This produced a figure of US\$22,476,851. If I am wrong to prefer the feasibility rent analysis then I would accept Mr Mako's figures for market rent analysis, despite CSA's criticism that they "came in too low".

#### Claim 3 and Claim 8

107. Each of these Claims argued that there was a paragraph 1(b) award.
108. Claim 3 argued that the payments of US\$72.22 million by FSMC to Norsk Equipment in respect of RPDs are paragraph 1(b) awards. However it is FSMC as



purchaser, not Norsk Equipment, that then makes the RPDs available to Norsk US. If Norsk Equipment is the “other Entity” it does not meet the requirement that it “provide[s] services for [Norsk’s] benefit”.

109. Claim 8 argued that capital costs reimbursed by FSMC to Norsk US in respect of PDQC were a paragraph 1(b) award. This is capable of being a “monetary grant” to Norsk US. If however, as here argued, the award is the reimbursement to Norsk US of capital costs incurred by Norsk US, I am not persuaded that “in connection with or as a result of” that award, Norsk US “provides any services” whether for Norsk’s benefit or otherwise.

#### Claim 5

110. I did not understand CSA to pursue what was termed Claim 5 (US\$50 million spent or to be spent on construction of the PPC and refurbishment of the PDQC) separately from its primary case under paragraph 1(b), addressed above, and on which it succeeds.

#### **Conclusion**

111. In my judgment, and by reason of its primary case, CSA was entitled to Commission calculated by reference to US\$125 million. I believe the calculation to be agreed at US\$12.05 million.

112. The Commission was due on 13 April 2016. With the removal of any conditionality resulting from the termination provision at Clause 11.6 of the Alliance Agreement, the date of “receipt of benefit through other Entity” (paragraph 3.2 of Exhibit A to the Consulting Agreement) is also 13 April 2016. The Commission was therefore payable within 30 days after that.