



Neutral Citation Number: [2021] EWHC 2141 (Comm)

Case No: CL-2020-000597

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

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

Date: 06/08/2021

Before :
CHRISTOPHER HANCOCK QC
Sitting as a Judge of the High Court

Between :
LOPESAN TOURISTIK S.A

Claimant

- and -

(1) APOLLO EUROPEAN PRINCIPAL
FINANCE FUND III (DOLLAR A) L.P
(2) APOLLO EUROPEAN PRINCIPAL
FINANCE FUND III (MASTER DOLLAR B) L.P.
(3) APOLLO EUROPEAN PRINCIPAL
FINANCE FUND III (MASTER EURO B) L.P
(4) APOLLO EPF III CAPITAL MANAGEMENT
LLC

Defendants

Huw Davies QC and David Peters (instructed by **Addleshaw Goddard LLP**) for the
Claimant

Laurence Rabinowitz QC, Richard Mott and Michael Watkins (instructed by **Latham & Watkins**) for the **Defendants**

Hearing dates: 19 and 20 April 2021

Approved Judgment

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 6 August 2021 at 2pm.

Christopher Hancock QC (sitting as a Judge of the High Court)

Introduction and background.

1. This is the trial of preliminary issues relating to the proper construction of an equity commitment letter dated 26 November 2019 (the “ECL”) pursuant to which the Defendants agreed, in certain circumstances, to provide funding to their indirect subsidiary, a Spanish company called Oldavia ITG, SLU (“Oldavia”), for the purposes of acquiring shares in a company that owned a hotel in Gran Canaria (the “Shares”, the “Company” and the “Hotel” respectively) from the Claimant (“Lopesan”) pursuant to a Sale and Purchase Agreement dated 23 November 2019 (the “SPA”). The ECL is governed by English law and is subject to the exclusive jurisdiction of the English Courts; the SPA is governed by Spanish law and subject to the exclusive jurisdiction of the Courts in Madrid.
2. Completion of the acquisition has not occurred because a dispute has arisen between Lopesan and Oldavia as to whether the SPA remains in force. Oldavia contends, in summary, that the SPA has lawfully terminated and Lopesan denies this, and this dispute is the subject of an action between Lopesan and Oldavia. It is agreed that I should proceed, for the purposes of this judgment, on the basis that that dispute is a *bona fide* one, but Lopesan wishes to reserve the right to argue to the contrary in due course if so advised.
3. It is common ground that this preliminary issues hearing is not concerned with any issues of Spanish law or fact relating to the validity of the SPA. It is concerned only with issues of English law relating to the proper construction of the ECL.

The parties

4. Lopesan is a company incorporated under the laws of Spain carrying on business in the hotel and tourism industry in various different jurisdictions. Lopesan owns the Shares.
5. The Defendants are limited partnerships established under the laws of the Cayman Islands for the purposes of making investments in Europe and elsewhere. Each of the three funds has different investors.
6. Oldavia is a company incorporated under the laws of Spain. Its business includes the purchase of Spanish real estate assets in the hotel sector, including but not limited to the Hotel.
7. As noted above, Oldavia is wholly owned (indirectly) by the Defendants through companies incorporated in Luxembourg and Spain. As would be expected, the various companies in the chain each has a board of directors.

The SPA

8. Pursuant to the SPA, Oldavia agreed to purchase Lopesan’s interest in the Company for a sum of €93 million which could be adjusted in certain circumstances set out in clauses 4 and 8.

9. As I have noted, it is not suggested that I should resolve any issues of Spanish law relating to the SPA at this hearing. However, as was common ground between the parties, the SPA does provide relevant context against which to construe the ECL, not least because the ECL adopts certain defined terms used therein. It is therefore necessary briefly to summarise the overall structure of the SPA:
- (1) Clause 2.2(b) provides that title to the Shares would transfer on the “*Completion Date, once the Condition Precedent has been fulfilled and the Completion Actions are completed*”.
 - (2) The “*Completion Date*” is defined as being a date agreed between the parties within ten Business Days following satisfaction of the Condition Precedent, failing which the Completion Date was to be the first Business Day ten Business Days from the date on which the Condition Precedent was fulfilled: clause 6.2.
 - (3) The “*Condition Precedent*” involved obtaining merger control clearance from the European Commission: clause 3.1(a). It is common ground that this condition precedent has been satisfied, but the date on which it was satisfied is not common ground. As I note below, the parties proceeded before me on the basis that it should be taken to have been satisfied by 30th April 2020, at the latest.
 - (4) The “*Completion Actions*” are set out in clause 6.3 and involve (amongst other things) payment of the purchase price, transfer of title to the Shares, and ratification or update of various representations and warranties by each party according to clause 7. Each of those actions is to be carried out “*in a single act*” and are “*essential obligations*”.
 - (5) The representations and warranties are set out in clause 7 and schedule 1. It is Oldavia’s case in Spain, and the Defendants’ case in these proceedings, that these representations and warranties were required to be true both as at the date of signing, and as at the Completion Date: see clause 7.1(c).
 - (6) Lopesan gave a series of further undertakings relating to the management of the Company in the period between the Signing Date and the Completion Date (the “**Interim Period**”), including that it would be managed in such a manner as to ensure that the representations and warranties remained true on the Completion Date: clause 5.1(b).
 - (7) Clause 8 of the SPA contains a liability regime for compensating Oldavia for Damages (as defined in the SPA) suffered as a result of a breach of contract or misrepresentation by Lopesan. Amongst other things, the parties agreed that any Damages awarded to Oldavia would operate so as to reduce the price payable to Lopesan under the SPA. However, Lopesan’s liability for Damages is stated to be limited to 20% of the Completion Payment.
10. Having identified the overall structure of the SPA, I turn to the ECL.

The ECL

11. The ECL takes the form of a letter from the Defendants to Oldavia and Lopesan. Lopesan was given the right specifically to enforce the Defendants' obligations to Oldavia under the Contracts (Rights of Third Parties) Act 1999 "*for the purposes of Completion but for no other purpose*": clause 6.2. I come back to this clause below, along with the other relevant clauses of the agreement, when I consider the preliminary issues themselves.

The dispute between Lopesan and Oldavia

12. Oldavia's case in Spain, and the Defendants' case in these proceedings, is that the implications of the COVID-19 pandemic for the Company were catastrophic: the Hotel was forced to close; tourists were prohibited from entering Spain; and restrictions on freedom of movement meant that Spanish residents could not visit the Hotel either. The Company's principal source of revenue dried up completely, and the Company faced severe disruption to its relationship with (among others) its customers, suppliers and employees.
13. Against that background, Oldavia contends, and the Defendants contend in these proceedings, that, for a variety of reasons – including that an agreement to this effect was made between the parties – there is a strong case that the SPA terminated on one of a number of alternative dates between 13 April and 21 May 2020, in circumstances which mean that Oldavia is not obliged to complete the purchase of the Shares. Among other things, Oldavia argues that the representations and warranties in the SPA, following the pandemic, could not truthfully be repeated at Completion.
14. For its part, Lopesan contends that Oldavia remained obligated to complete under the SPA on 30 April 2020. For the purposes of the argument before me, the parties were content to assume that 30 April was the relevant date.
15. This is the dispute which is being determined in Spain. However, on any view, Completion under the SPA has not occurred.

The Spanish proceedings

16. On 12 August 2020 Lopesan commenced proceedings against Oldavia before the Courts of Madrid. In those proceedings, Lopesan claims (among other things) specific performance of Oldavia's alleged obligation to effect Completion under the SPA.
17. Progress of the Spanish proceedings has been delayed by the pandemic which resulted in the Court taking longer than it ordinarily would have done to serve the claim. The Spanish Complaint was finally served on 9 March 2021. Oldavia's Statement of Defence was filed on 9 April 2021.
18. Following the hearing before me, the parties agreed a helpful summary of the Spanish disputes, which are as follows:
 - (1) Whether the SPA was validly terminated by agreement between the parties thereto on 13 and/or 19 April 2020;

- (2) Whether the SPA was validly terminated by Oldavia on 24 April 2020, 29 April 2020 or 21 May 2020 by reason of Lopesan's alleged breach thereof;
- (3) Whether the SPA was terminated by operation of law by virtue of the subject matter thereof being lost or destroyed (i.e. the principle of *Desaparicion de la base de negocio*);
- (4) Whether the SPA was terminated pursuant to the principle of *Rebus Sic Standibus*;
- (5) Whether the alleged Completion Date was ever validly fixed under the terms of the SPA;
- (6) Whether Lopesan's alleged breaches of the SPA have resulted in Oldavia's obligation to make the Completion Payment being suspended and/or terminated pursuant to the doctrine of *exceptio non adimpleti contractus*.

The English proceedings

19. On 20 August 2020, Lopesan wrote to the Defendants seeking confirmation that the funds the subject of the ECL had been transferred to Oldavia, alternatively that they would be transferred. Lopesan also sought certain undertakings from the Defendants, including an undertaking that the January Termination Date (ie the date of 1 January 2021 referred to in clause 5.1(iii), to which I make reference below) should be "*disregarded*" and have "*no legal effect*".
20. On 11 September 2020, the Defendants refused to provide the confirmations sought. They also stated, having regard to the events that had occurred, including the allegation that there had been agreement between the parties to terminate the SPA, that they disputed being under any obligation to transfer the funds to Oldavia pursuant to the ECL.
21. A few days later, on 15 September 2020, Lopesan commenced these proceedings seeking an order that the Defendants transfer the funds to Oldavia pursuant to the ECL and that they should not instruct Oldavia to return the funds.
22. In addition to issuing these proceedings, Lopesan simultaneously applied for an order that there be an expedited trial of the entire English proceedings before the end of the year, with a view to obtaining a final judgment before the January Termination Date.
23. The Defendants opposed the application for expedition on the basis (among other things) that, having regard to the number of issues arising, including the need for expert evidence as to Spanish law, a fair trial was not possible before the end of the year. The Defendants also referred to the fact that Lopesan had been guilty of unreasonable delay in commencing proceedings. The Defendants also cross-applied for an order staying the English proceedings pending the outcome of the Spanish proceedings on the basis that the claim raised serious issues of Spanish law and fact that were most appropriately dealt with by the Courts in Madrid.
24. At an expedited hearing on 30 September 2020, these applications were heard by Foxton J. In a reserved judgment handed down on 8 October 2020, the Court rejected

both parties' applications and made directions for the expedited service of the Defence and Reply with a view to the Court being able, thereafter, to consider the future management of the action at a further CMC on 23 October 2020.

25. The parties thereafter prepared expedited pleadings which were served on 12 and 20 October 2020, respectively, and (as anticipated) disclosed multiple issues of Spanish law and fact.
26. At the CMC on 23 October 2020 that followed the exchange of pleadings, Lopesan then suggested that there be a non-expedited trial of certain preliminary issues of contractual construction relating to the ECL to be heard prior to the SPA issues being resolved by the Spanish court. Despite the Defendants' opposition to this course, at the hearing on 23 October 2020, the Court granted Lopesan's application.
27. The order of Foxton J provided for the parties to exchange Statements of Fact so as to identify whether and if so to what extent factual evidence or disclosure was required in advance of the trial. In light of the relevant statements and subsequent correspondence, neither party has sought directions for service of evidence or disclosure.
28. Thereafter, Lopesan made various amendments to its pleadings, which necessitated further amendments to the list of preliminary issues which were approved by order of Cockerill J dated 16 March 2021. The preliminary issues, raising questions of interpretation relating to the scope of the Defendants' alleged obligations under the ECL, are the issues that I have to consider.

The applicable legal principles.

29. The applicable legal principles relating to the interpretation of a written contract were common ground.
 - (1) The "*primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage*": Bank of Commerce and Credit International SA v. Munawar Ali (No 1) [2002] 1 AC 251, §39 *per* Lord Hoffmann; and Arnold v. Britton [2015] 2 WLR 1593, §17 *per* Lord Neuberger.
 - (2) It is necessary to consider the contract as a whole checking the rival interpretations against the other clauses in the contract and investigating their commercial consequences: Wood v. Capita Insurance Services Ltd [2017] AC 1173, §12 *per* Lord Hodge.
 - (3) In an appropriate case, it may also be necessary to consider the admissible factual matrix: Wood v. Capita, §10 *per* Lord Hodge.
 - (4) The weight to be given to these considerations varies from case to case: Wood v. Capita, §§10 and 13 *per* Lord Hodge.
 - (5) Finally, although the commercial consequences of a given interpretation may be relevant, "*a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have*

agreed, not what the court thinks that they should have agreed”: Arnold v. Britton at §20 per Lord Neuberger.

30. The only factual matrix considerations relied on were three matters identified by Lopesan, as follows:
- (1) **First**, it relied on the fact that the commercial purpose of the ECL was to provide funding for the Transaction, in circumstances where Oldavia otherwise had no means of funding the Transaction. Hence, the object was to ensure that Oldavia was in funds so as to be able to complete on the Transaction.
 - (2) **Second**, it relied on the fact that Oldavia was the Defendants’ SPV for the purposes of the Transaction, and that the Defendants had control over it. It was argued that it would therefore be wrong to construe the ECL on the basis that the Defendants and Oldavia were at arm’s length from one another.
 - (3) **Third**, it relied on the close connection between the SPA and the ECL. The commercial purpose of the ECL was to provide funding for the completion of the SPA. The SPA expressly required the ECL to be issued. The ECL expressly adopted defined terms used in the SPA, and is itself expressly subject to the terms of the SPA. The two contracts were therefore intended to work in harmony with one another, and the ECL should be construed on that basis.
31. I did not understand the Defendants to challenge any of the above factual material.

The relevant contractual clauses.

32. Before turning to a consideration of the issues, it is convenient to set out the various clauses to which I was referred. Starting with the terms of the SPA:
- (1) “Completion” means “*the act in which on Completion Date (as a sole act or en unidada de acto) where a complementary public deed will be granted before the Notary, the Shares will be sold and transferred to the Buyer, the Completion Payment will be paid, and the remaining actions set out in clause 6 will be carried out.*”
 - (2) The “Completion Date” is determined by clause 6.2 of the SPA, as follows:

“The Completion Date shall take place on the date set out by the Parties within ten (10) Business Days from the date on which the fulfillment (sic) of the Condition Precedent is proved. In the case of discrepancy on the Completion Date, Completion Date will be set on the first Business Day following the termination of the above mentioned ten (10) Business Days term.”
 - (3) Pursuant to clause 3.1 of the SPA, the “Condition Precedent” was obtaining merger clearance from the European Commission. As to this:
 - a) There is a dispute between the parties as to when this Condition Precedent was satisfied, although both parties accept that it was satisfied.

- b) Lopesan contends that it was satisfied on 15 April 2020 such that the Completion Date would be 30 April 2020.
 - c) The Defendants contend the Condition Precedent was satisfied on 8 April 2020 and that the Completion Date would have been 21 April 2020, alternatively that if the Condition Precedent was satisfied on 15 April 2020 then the Completion Date would have been 28 April 2020.
 - d) This gives rise to questions of Spanish law as to when the Condition Precedent was satisfied under the SPA and how the relevant time period is to be computed.
 - e) For present purposes, however, it is sufficient to note that the Completion Date would have been 21 or 28 or 30 April 2020.
 - f) Both parties were content to adopt the latest of these dates for the purposes of argument, and I therefore follow suit in this judgment.
- (4) Clause 4 dealt with the payment of the Completion Payment, which was to be a sum calculated by reference to a formula involving the payment of the purchase price of €93m plus or minus estimated net financial debt and plus or minus estimated working capital. There was then provision for adjustment to be made post completion.
- (5) Clause 6 set out the requirements for completion under the SPA:
- “6.1 Once the fulfillment of the Condition Precedent of the Agreement has been evidenced, the Parties shall be obliged to comply on the Completion Date with all of the Completion Actions describe[d] in clause 6.
 - 6.2 The Completion Date shall take place on the date set out by the Parties within ten (10) Business Days from the date on which the fulfilment of the Condition Precedent is proved. In the case of discrepancy on the Completion Date, Completion Date will be set on the first Business Day following the termination of the above mentioned ten (10) Business Days term.
 - 6.3 Acts and Procedures to be carried out by the Parties on Completion Date. [This clause set out a series of actions which were to be carried out before the Notary Public on the Completion Date]
 - 6.4 All acts and procedures described in clause 6.3 above will be carried out on the Completion Date, in a single act. The parties acknowledge and agree that the performance of each and every one of the actions provided for in this clause are essential obligations of this Agreement, and that none of them shall be deemed to have been performed until such time as each and

every one of them has been duly executed in accordance with the terms of this Agreement.”

33. Turning to the ECL:

(1) Pursuant to clause 1.1 of the ECL, “*Completion*” and “*Completion Date*” are given the meaning ascribed to them in the SPA.

(2) Clause 2.1 of the ECL provides:

“The [Defendants] hereby agree, on the terms and subject to the conditions set forth herein and in the [SPA], to contribute or cause to be contributed to [Oldavia], through one or more entities wholly owned by the [Defendants], in cash in immediately available funds an amount equal to €93,000,000 required by [Oldavia] to complete the acquisition of the Shares at Completion in accordance with the terms of the [SPA] (such amount being in aggregate, the “Commitment”) immediately prior to the Completion Date.”

(3) Clause 2.3 stated that:

“The funding of the Commitment is, solely for the purposes of funding, and to the extent necessary to fund, that portion of the Completion Payment (net of any reductions contemplated in the [SPA]) to be paid by [Oldavia] pursuant to and in accordance with the [SPA] on the Completion Date. The [Defendants] shall not, under any circumstances, be obligated to contribute, or cause to be contributed, to [Oldavia] or to any other person or entity, an amount exceeding the Commitment. For the avoidance of doubt and notwithstanding anything that may be expressed or implied in this Letter or any document or instrument delivered contemporaneously with this letter (including, without limitation, the [SPA]), in no event shall the [Defendants] have any obligation to make (or cause one or more of their Affiliates to make) any payment or contribution under this Letter other than to fund the Completion Payment in connection with the Completion and the sale of the Shares to the Purchaser.”

(4) Clause 3 set out various conditions, as follows:

“3. Conditions

3.1 The [Defendants’] obligation to fund the Commitment described in Clause 2 (Commitment) is subject to the satisfaction, or waiver, of all of the conditions precedent to the obligations of [Oldavia] to consummate the transactions contemplated by the [SPA] which are to occur on the Completion Date (other than those conditions that by their nature are to be or can only be

satisfied at Completion or are not satisfied as a result of a breach by [Oldavia]).

3.2 In the event that [Oldavia] terminates the [SPA] in accordance with the terms of the [SPA] due to a failure of the [Claimant] to close the transactions contemplated therein, all copies of this Letter shall be immediately returned to the [Defendants].”

(5) Clause 5 dealt with termination:

“5.1 The [Defendants’] obligation to fund (or cause one or more of their Affiliates to fund) the Commitment is subject to the terms of this Letter and to (a) the execution and delivery of the [SPA] and (b) [Oldavia] becoming obligated unconditionally under the [SPA] to effect the Completion. The obligation of the [Defendants] to fund (or cause one or more of their Affiliates to fund) the Commitment will terminate automatically and immediately (at which time the Investors’ obligations under this Letter shall be discharged) upon the earlier to occur of (i) the consummation of Completion, (ii) the valid termination of the [SPA] in accordance with its terms, (iii) 1 January 2021, or (iv) the assertion by the [Claimant] or any of its Affiliates of any claim against any [Defendant] or any Party Affiliate (as defined below) thereof in connection with the [SPA] or any transaction contemplated hereby or thereby, except for (x) claims by the [Claimant] against the [Defendant] under the [SPA] and (y) claims by the [Claimant] against the [Defendants] to enforce [Oldavia’s] rights under this Letter. Clauses 4 (Confidentiality) and 10 (Limitation on Liability of Party Affiliates) of this Letter shall survive any such termination.

5.2 The only claims to be made by the Seller under this Letter shall be claims brought by it pursuant to the exercise of the Seller’s rights pursuant to Clause 6 (Third Party Beneficiaries) and Clause 12 (Governing Law and Enforcement) solely to give effect to Completion or otherwise pursuant to Clause 4 (Confidentiality), Clause 8 (Assignment) or Clause 9 (Amendments and Entire Agreement) and for no other reason.”

(6) Clause 6 then dealt with Third Party Beneficiaries, as follows:

“6.1 Except as expressly set forth in this Clause 6 (Third Party Beneficiaries), nothing in this Letter, express or

implied, is intended to confer upon any person or entity, other than the Purchaser, any right, benefit, or remedy under or by reason of this Letter pursuant to the Contracts (Rights of Third Parties) Act 1999 or otherwise.

6.2 Notwithstanding Clause 6.1 (Third Party Beneficiaries), each of the Investors, the Purchaser and the Seller acknowledge and agree that the Seller has relied on this Letter and accordingly, subject to the Contracts (Rights of Third Parties) Act 1999 the Seller is an express third-party beneficiary hereof and the Seller is entitled and shall have the right to specifically enforce the obligations of the Investors for the purposes of Completion but for no other purposes:

6.2.1 directly against the Investors (provided that, however, this paragraph shall not be understood in the sense that the Seller shall have the right to require payment of the Commitment to the Seller but only to the Purchaser); and/or

6.2.2 by requiring the Purchaser to enforce any of its rights under this Letter, in each case, to the full extent hereof (including by obtaining specific performance as contemplated in Clause 12 ... except that such rights of the Seller shall be exercisable subject to the satisfaction of the conditions to funding set forth in Clause 3 (Conditions); and

6.2.3 save as set out in this Clause 6 (Third Party Beneficiaries) Clause 8 (Assignment), Clause 9 (Amendments and Entire Agreement) and Clause 12 (Governing Law and Enforcement) neither the Seller nor any of its Party Affiliates or representatives shall have any other rights or remedies hereunder.”

Issue 1: When does Apollo’s obligation to fund the Commitment arise?

The Defendants’ contentions.

34. The Defendants argued as follows:

- (1) There is some overlap between clause 3.1 and clause 5.1(b), in that both clauses are concerned to ensure that the Defendants’ obligation to fund the Commitment is conditional upon Oldavia being obliged to consummate the transactions pursuant to the SPA. However, clause 3.1 is concerned only with satisfaction of the “*conditions precedent*” to Oldavia’s obligation to consummate the

transaction under the SPA, whereas clause 5.1(b) is concerned with the broader question whether, in any event, Oldavia is unconditionally obligated to complete under the SPA. It is however clear that both conditions must be satisfied before the obligation to fund can arise.

- (2) Here, Oldavia, for a number of different reasons, contends that as at 23:59 on 29 April 2020 (when the Claimant alleges that the funding obligation arose) it was not unconditionally obliged to complete the acquisition. These include the following:
 - a) The parties terminated the SPA by agreement prior to 29 April 2020.
 - b) To the extent that there was any doubt about that, Oldavia terminated the SPA on 24 April 2020 by reason of Lopesan's breaches of contract.
 - c) Further, to the extent that there was no termination in accordance with (a) or (b) above:
 - i. Oldavia was in any event not obliged to complete in circumstances where Lopesan was itself in breach of contract; and/or
 - ii. the SPA had terminated by operation of law.
- (3) It is plain that if any of these contentions (relating to the position under the SPA) is upheld, then the obligation to fund will not even have arisen. It is for this reason that, the Defendants argued, none of the preliminary issues are capable of finally resolving this claim in Lopesan's favour.
- (4) On the other hand, if the SPA had not already been terminated for one or more of the reasons identified above, then the Defendants do not dispute that if, as at 23:59 on the day before the Completion Date, the Condition Precedent had been satisfied and Oldavia's obligation to complete under the SPA was subject only to conditions that would be satisfied at Completion itself, or which were not satisfied by reason of a breach of contract by Oldavia, it would in those circumstances follow that, by reason of clause 3.1 of the ECL, the obligation to fund the Commitment would nonetheless have arisen.
- (5) However, what does not follow, is that anything that happens on the Completion Date, or thereafter, would be irrelevant especially if and insofar as these are or were matters capable of falling within the circumstances described by clause 5.1 of the ECL. In particular, and for the reasons explained in more detail in relation to Issue 2, the obligation to fund the Commitment, even if it may have arisen prior to this, would subsequently have lapsed if Oldavia was, for whatever reason, not obliged to complete on the Completion Date itself, or if, again for whatever reason, the SPA terminated on that date, or thereafter. That is because it makes no sense for the Defendants to remain subject to an obligation to provide funding for the purposes of a transaction that will no longer occur or conclude.

- (6) The second precondition for any funding obligation even to have arisen is that the ECL must not have terminated pursuant to clauses 5.1(i) to (iv) prior to the date on which the obligation to fund otherwise falls due.
35. The answer to issue 1, in the Defendants' submission, was that the obligation to fund the Commitment arises (no earlier than) immediately before the Completion Date, provided that:
- (1) the conditions referred to in clauses 3.1 and 5.1(b) have been satisfied; and
 - (2) the ECL has not, prior to that time, otherwise terminated under clause 5.1(i) to (iv).

Lopesan's contentions.

36. As to the date of the accrual of the obligation under clause 2.1, Lopesan argued that the important part of the clause is the phrase "*immediately prior to the Completion Date*". As to this, they said:
- (1) In context, there is only one function which these words could be fulfilling – namely, specifying the point in time by which the Defendants were required to put Oldavia in funds by paying the Commitment.
 - (2) The clause provides (a) for the parties to agree a Completion Date within ten Business Days of the date on which the satisfaction of the relevant condition precedent (i.e. obtaining merger control clearance) was "proved"; and (b) in the event that the parties cannot agree such a date, for a long-stop Completion Date 10 Business Days after the merger control clearance had been obtained.
 - (3) Whilst, on the pleadings, there is a dispute between the parties as to how to apply clause 6.2 to the particular facts of this case, (as I have already noted), that dispute does not arise for determination at this stage. What matters for present purposes is that clause 6.2 clearly operates to set a particular calendar day as "the Completion Date".
 - (4) It follows that, when clause 2.1 of the ECL stipulates that the Defendants shall pay the Commitment "*immediately prior to the Completion Date*", it is requiring that the Defendants make the payment immediately prior to the relevant calendar day – i.e. by no later than 11:59pm on the preceding day.
 - (5) As well as being the only realistically available construction of the words used in the ECL, this construction also makes commercial sense. In order for Oldavia to proceed with Completion of the Transaction on the Completion Date, it needed to be in funds. It did not have (and the parties never expected it to have) any funds of its own, or any means to raise funds other than via the ECL. One would therefore expect that payment under the ECL would have to be made in advance of the Completion Date in order for the Transaction to proceed in accordance with the terms of the SPA.
 - (6) Whilst clause 6.3 of the SPA requires the parties to carry out a series of actions **on the** Completion Date to effect Completion, which are itemized at sub-clauses

(a) to (j), and which the SPA defines as “the Completion Actions”, there are two key points to note about this clause:

- a) **First**, certain of the actions specified therein would only be capable of being fulfilled **after** the Defendants had paid the Commitment to Oldavia. These include the actions at sub-clause (d) (Oldavia making the Completion Payment – see also clause 4.2 of the SPA), and those at sub-clause (f) (the parties granting a supplementary deed which was to include *inter alia* evidence of the Completion Payment having been made by Oldavia).
 - b) **Second**, the clause creates no temporal (or other) hierarchy as between the various actions identified in sub-clauses (a)-(j), or any order of priority as between the parties. As clauses 4.2 and 6.3 of the SPA make clear, all of these Completion Actions are to be made on the Completion Date.
- (7) Further, both the definition of “Completion” and clause 6.4 of the SPA (set out above) point away from the idea that Completion under the SPA was to proceed as a series of sequential steps. Clause 6.4 is particularly clear on this point.
- (8) Accordingly, it is not realistic to speak of a particular moment in time at which, as a result of Lopesan undertaking a series of acts, Oldavia became “*unconditionally obliged to effect completion*”. Instead, if and when the Completion Date was set in accordance with the SPA, both Lopesan and Oldavia were unconditionally obliged to attend before the Notary on that date and, “in a single act”, undertake the actions identified in clause 6.3 of the SPA. None of those actions would be deemed to be completed until they were all completed. Once that had happened, Completion under the SPA would have occurred. That is precisely what clause 6.1 of the SPA provides.
- (9) Oldavia obviously needed to be in funds in order for the Completion Actions to be undertaken in accordance with clauses 4.2 and 6.3 of the SPA.
- a) This leads to the question – what is the proper construction of the words: “[Oldavia] becoming obliged unconditionally under the [SPA] to effect the Completion” in clause 5.1 of the ECL? Lopesan submits that the only sensible construction of these words, given the terms of clauses 4.2 and 6 of the SPA and the points raised above is: “*Oldavia becoming obliged unconditionally to attend upon the Notary and, together with Lopesan, carry out the Completion Actions identified in clause 6.3 of the SPA*”.
 - b) As well as being the only construction which makes sense, given the terms of the SPA, this construction also has the following virtues:
 - i. It is entirely consistent with clause 2.1 of the ECL – which requires the Defendants to pay the Commitment “*immediately prior to the Completion Date*”.
 - ii. It corresponds precisely with clause 6.1 of the SPA, set out above.

37. For the reasons set out above, Lopesan submitted that the correct analysis is that the Defendants' obligation to pay the Commitment accrued by no later than 11:59pm on the date prior to the Completion Date (as set pursuant to clause 6.2 of the SPA); whenever that might be. Lopesan accepts that a necessary corollary of this analysis is that if (as the Defendants contend) the Completion Date was never validly set pursuant to the terms of the SPA (because, for example, the SPA was terminated prior to that date), the Defendants' liability to pay the Commitment to Oldavia would not arise. As indicated above, the question of whether the Completion Date was in fact set pursuant to the terms of the SPA is contested, and will be determined on another occasion.

Discussion and conclusions.

38. I can be very brief in relation to this issue. That is because, as will be apparent from the above account of the arguments, the parties, by the time of the conclusion of the oral argument, were in truth in agreement as to the answer, an agreement with which I am in complete agreement myself. The answer to issue 1 is thus that the Defendants' obligation under the ECL to pay the Commitment accrued by no later than 11.59 on the date prior to the Completion Date (whatever that date was, which is not a matter that I am called on to determine), unless the SPA was validly terminated prior to that date.

Issue 2: If Apollo's obligation to fund the Commitment has arisen, will that obligation be discharged upon the occurrence of any of the following events?

- a) **if Oldavia is not obliged unconditionally to effect Completion pursuant to the SPA;**
- b) **the valid termination of the SPA (for whatever reason); and/or**
- c) **on 1 January 2021 if Completion has not occurred by that date?**

The Defendants' contentions.

39. The Defendants submitted that, as a matter of its natural wording, and by reason of commercial considerations, if Oldavia ceased to be obliged to effect completion, the Defendants' obligation would be discharged. The Defendants argued as follows:
- (1) Clause 5.1(b) provides that the Defendants' "*obligation to fund (or cause one or more of their Affiliates to fund) the Commitment is subject to the terms of this Letter and ... (b) [Oldavia] becoming obligated unconditionally under the [SPA] to effect the Completion.*" (emphasis added);
 - (2) The natural and ordinary meaning of these words is that the Defendants' obligation to fund the Commitment is contingent upon Oldavia being unconditionally obliged to effect Completion under the SPA, with the result that the Defendants' obligation to fund the Commitment does not arise if, prior to the time at which it might otherwise have arisen, Oldavia is no longer unconditionally obliged to effect Completion. Similarly, even if the obligation to fund has arisen, but then, for whatever reason, Oldavia ceases to be under an obligation to effect Completion, the obligation to fund will lapse and be discharged.

- (3) Not only is this what the words of the ECL actually provide, any other interpretation makes no commercial sense. In particular, it makes no sense to say that, once the obligation to fund has arisen, nothing thereafter can cause it to lapse or be discharged. In this regard, the Defendants put forward various scenarios in which it was suggested that the result that it contended for would obviously follow:
- a) At midnight on 29 April 2020, Oldavia was unconditionally obliged to complete the transaction, such that the funding obligation arose, but the very next day – before Completion could be effected – the Spanish Government enacted measures which made it unlawful to close.
 - b) The funding obligation arose immediately prior to the Completion Date, but Lopesan, because of a pandemic event, was unable to perform one of its essential obligations on the Completion Date itself¹. In those circumstances, Oldavia would not be obliged to perform its obligations on the Completion Date and would be entitled to terminate the SPA.
- (4) In either of the scenarios posited above, it makes no sense for the Defendants’ accrued obligation to remain enforceable, such that either Oldavia, or Lopesan, could sue the Defendants requiring them nonetheless to pay over the funds in relation to a transaction that was no longer to conclude.
- (5) Moreover, such a result would be directly contrary to the terms of ECL (in particular, clauses 2.3, 5.2 and 6.2) which make it clear that the funds can only be used for the purposes of Completion, and that (in the case of clause 2.3) “*in no event shall the Defendants have any obligation to make*” a payment other than for that purpose. Completion plainly will not happen if Oldavia’s obligation under the SPA to complete does not arise, or is discharged, and it can make no difference whether the events that lead to this outcome occur before midnight on the day before the Completion Date, or a few minutes later, on the Completion Date itself.
40. The conclusion suggested above is also consistent with the general law relating to performance of conditional obligations:
- (1) It is well established that money which falls due under a contract can generally be recovered if it is paid subject to a condition which subsequently fails.
 - (2) It is clear that, in the scenarios described above, the Defendants would be entitled to recover the funds if the Defendants had paid the funds to Oldavia on 29 April 2020, but Oldavia’s obligation to complete was subsequently discharged, such that Completion never occurred. Indeed, this would appear to be common ground. If the funds had been paid prior to discharge of Oldavia’s obligation, then it is common ground that those funds would be liable to be returned. It must follow that if the obligation to fund the Commitment had technically arisen, but the funds had not been paid prior to discharge of

¹ This is indeed a contention that is put forward by Oldavia in the Spanish proceedings.

Oldavia's obligation, then the obligation to fund the Commitment would fall away.

- (3) However, it is also the case that an obligation to pay money that has fallen due but has not yet been performed is discharged if the condition fails before the money is in fact paid. That is because it makes no sense to order one party to pay money and then immediately to order the recipient to repay it: Rover International Ltd v. Cannon Film Sales Ltd [1989] 1 WLR 912 (the "Proper Appeal"), Kerr LJ at 928E-932-H; Dillon LJ at 935H-937H; and Nicholls LJ at 938A; summarised in Burrows, The Law of Restitution (3rd Ed; OUP), p. 355.
 - (4) It follows that if the Defendants' funding obligation had arisen, but the funds had not already been paid on 29 April 2020, and Oldavia's obligation to complete was subsequently discharged, such that Completion never occurred, then the obligation in clause 2.1 would also be discharged. It makes no sense for Oldavia, or Lopesan, to be able to sue the Defendants for the purposes of forcing the Defendants to pay funds to Oldavia in circumstances where those funds would immediately be recoverable.
 - (5) In short, clause 5.1(b) does no more than spell out what would otherwise be the position at common law.
41. The Defendants noted that Lopesan relied heavily on what Foxton J said, in his judgment, as to the merits of what he termed the "lapse argument". Foxton J dealt with the matter as follows:

"11. I formed the impression that the Lapse Argument is weak for the following reasons.

12. First, Apollo's obligation under the ECL arises not when Completion actually takes place (indeed that would be too late), but is an obligation to provide the funds required "to complete the acquisition", and to do so "immediately prior to the Completion date" (clause 2.1 of the ECL). Similarly clause 5.1 refers to Apollo's obligation "to fund the Commitment", and is said to be subject to the conclusion of the SPA and "the Purchaser becoming obligated unconditionally under the Sale and Purchase Agreement to effect the Completion". That might suggest that it is Oldavia's obligation unconditionally to effect completion which triggers the performance of Apollo's obligation to fund.

13. Apollo's argument appears to be that the words "required by the Purchaser to complete the acquisition" in clause 2.1 have the effect that if Oldavia decides not to complete, Apollo's obligation to fund does not arise. Mr Davies, in his witness statement, explained:

"On a true construction of the ECL, the obligation to fund the Commitment only arose if Oldavia required the funds to

complete under the SPA, and the funds were not required for that purpose because completion did not occur ...

The Defendants also observe that on the Claimant's own case, there is no prospect of that state of affairs changing at any point prior to 1 January 2021 when the ECL will terminate in accordance with its own terms. Oldavia has refused to complete, and it is the Claimant's own case that there is no prospect of the Madrid Court ordering Oldavia to do so before that date".

14. *While the ultimate merits of that argument are a matter for another day, it might be thought a commercially surprising outcome if, by a simple decision not to perform its contractual obligations under the SPA, Apollo (through its SPV) could prevent its funding obligation arising, and it might be thought that the words "required by the Purchaser to complete the acquisition" mean required by Oldavia to perform its contractual obligations, whether it wants to or not. Apollo's argument might be thought to become even more surprising when:*

i) clause 3.1 expressly provides that Apollo's funding obligation arises when all condition precedents have been satisfied other than those "not satisfied as a result of a breach by the Purchaser" (something scarcely consistent with Apollo's funding obligation not arising if Oldavia wrongfully refused to complete); and

ii) consistently with that, clause 3.2 provides for the position when the SPA is terminated "due to a failure of the Seller to close the transactions contemplated therein" but says nothing about such a failure by Oldavia.

15. *I also had some difficulty in understanding how far the argument based on the words "required by the Purchaser" went. Mr Rabinowitz QC (who, to be fair to him, had not come to court to argue this point, and was merely providing an initial reaction in response to impromptu questioning from the court) explained Apollo's position as follows:*

i) If Oldavia disputed that its obligation to complete had arisen, Apollo's funding obligation did not arise because there would be no completion.

ii) If the Spanish court ordered Oldavia to complete, Apollo's funding obligation would then arise, but only if the ECL had not lapsed.

iii) If the Spanish court ordered Oldavia to complete, but Oldavia refused to complete that would give rise "to a very interesting question".

iv) If the Spanish court (on the unproven hypothesis that it is able to do so) refused to order specific performance but only the payment of damages, Apollo's funding obligation would not arise even if Oldavia had come under an obligation to complete.

16. The distinction drawn between the position where Oldavia owes a primary obligation to complete, and one where that primary obligation has been supplemented by a tertiary obligation arising from a court order, might be thought to appeal only to the most devoted rights theorist. In so far as the touchstone of Apollo's obligation is when completion would take place in fact, it would seem to follow that a contemptuous refusal by Oldavia to complete in defiance of a court order would help "run down the clock" so far as Apollo is concerned.

17. If Apollo's obligation to fund had accrued before 1 January 2021, then conventional principles of construction would suggest that clear words would be required for that obligation to lapse on 1 January 2021 – whether by applying the principle in [Modern Engineering \(Bristol\) Ltd v Gilbert Nash \(Northern\) Ltd \[1974\] AC 689](#), an argument based on the fact that Apollo was the proferens of the ECL (if that survives as an independent rule of construction) or the possible application, given Oldavia's status as an SPV through which Apollo effected its investment, of the presumption when interpreting a contract that a party cannot take the benefit of its wrong.

18. Approached from that perspective, it might well be thought that the provision for the ECL to terminate automatically on 1 January 2021 was intended to address the position when Oldavia's obligation to complete had not arisen by that date, because conditions precedent to completion had not been satisfied. In this regard, the SPA itself contains no long stop date for completion, save such as would follow from the deadline for addressing the clause 3.1 condition of European Commission approval for the acquisition, which was to be satisfied by 28 February 2020 "unless the Parties agree to an extension of the said term". In this regard, it might prove to be of some relevance that in another contract entered into between the same economic interests as part of the same overall transaction, relating to the acquisition of another Spanish hotel (the Hotel Faro), the date of 1 January 2021 was the date by which certain conditions precedent had to be satisfied, and was also the termination date in the ECL for that transaction (in which context, the date would appear to be addressing the date by when the obligation to fund

must first arise, rather than when it would terminate in all circumstances and for all purposes).

19. Finally, clause 5 carves out from those circumstances in which the ECL will automatically terminate if Lopesan commences proceedings against either Apollo or Oldavia, proceedings to enforce the SPA or the ECL. It does, therefore, appear to have been within the parties' contemplation that legal proceedings might have to be brought under either or both contracts. In those circumstances, it might be thought that any provision by which the ECL would terminate during the course of such proceedings if they had not reached fruition by 1 January 2021 would have been clearly stated.

20. By contrast, if Apollo's argument that nothing other than completion under the SPA can trigger its obligation under the ECL is correct, then it is not clear how Lopesan will be any better off by obtaining a determination before 1 January 2021 that Oldavia is obliged to complete under the SPA. Whatever else the English court might do, it cannot order Oldavia (who is not before it) to complete under the SPA (a dispute over which the Spanish court has exclusive jurisdiction). It seems clear from Mr Davies' witness statement that it is indeed Apollo's position that determination of Lopesan's claim before 1 January 2021 will not take the Lapse Argument off the table if specific performance has not been ordered in the Spanish proceedings by that date."

42. The Defendants pointed out, quite correctly, that, as Foxton J himself very properly acknowledged, the views he expressed were no more than provisional and, significantly, had been arrived at without having heard any argument on the point.
43. The starting point for any consideration of Foxton J's provisional analysis, they said, is to acknowledge his concern that "*it might be thought a commercially surprising outcome if, by a simple decision not to perform its contractual obligations under the SPA, Apollo (through its SPV) could prevent its funding obligation arising ...*" In other words, the Court was concerned that the Defendants' interpretation would enable the Defendants to instruct Oldavia not to complete and deliberately "*run down the clock*" to the January Termination Date at which point the funding obligation would be discharged.
44. The Defendants submitted that it is relevant to note that this particular concern appears to have been one predicated on the funder being a related party to those involved in the transaction itself, and, indeed, on a concern not to allow bad faith conduct to undermine the contractual bargain made by the parties. But leaving to one side the concern about bad faith conduct (and, as already noted, no suggestion of any such conduct is currently made in the present case), it is difficult to see that concerns of that type would come into play in interpreting this provision had the contract to fund been made with arms-length third party funders. In that event, there could be no reason not to give the words used by the parties in clause 5.1(iii) their natural meaning, as set out above. This being

so, it is submitted that (subject to the point below, addressing the concern about bad faith conduct) there is no reason why the words in clause 5.1(iii) should be taken to have some different meaning simply because the Defendants happen to own (indirectly) the shares in Oldavia.

45. The Defendants do not however dispute that an outcome by which one party could deliberately and in bad faith frustrate an obligation to which they were subject is one that parties are unlikely to have agreed. However, avoiding this outcome (even in a case where there was an allegation of bad faith conduct) would not require the Court to depart from the natural meaning of the language in clause 5.1(iii), whether for reasons of commercial common sense or otherwise. English law has in its armoury other more appropriate and direct ways to achieve the same objective. In particular, a concern of the sort identified by Foxton J is adequately addressed by the implication of a term preventing the Defendants from acting in bad faith so as to prevent their funding obligation arising. In this regard:
- (1) Such obligations are often implied into contracts which contain conditional obligations. As the editors of Lewison, The Interpretation of Contracts (7th ed) observe:

“16.40 There is imposed on parties to a contract a general duty to cooperate in the performance of the contract. This duty includes a duty not to prevent the fulfilment of conditions. ...

16.42 Where the condition to be fulfilled is one which is dependent on the discretion of one party to the contract, or even of a third party, it will be an implied term that that person must act in good faith, and in some cases reasonably”.²
 - (2) The question of whether such a term is to be implied, and its scope, is to be assessed on the basis of the particular contract in question and its express terms: see The Law Debenture Trust Corpn Ltd v Ukraine [2018] EWCA Civ 2026, [2019] QB 1121, paragraph 207.
 - (3) This implied term would meet the concern identified in Foxton J’s judgment without having to do violence to the natural and ordinary meaning of the words used by the parties in the ECL. Here, no such term is pleaded and no allegation of bad faith is made.
46. The Defendants also submit that Foxton J’s analysis overstates a reasonable person’s understanding of the Defendants’ ability to influence the conduct of their wholly owned subsidiary and, consequently, the need for the type of implied term referred to above. Here, a reasonable person would have understood that the directors of Oldavia would not be entitled to refuse to perform under the SPA simply because the Defendants wished them to do so. The directors of Oldavia would be required to form their own

² See, to similar effect, Chitty on Contracts (33rd ed) at paragraphs 14-023 and 14-024.

view about such matters consistently with their fiduciary duties to act in Oldavia's best interests.

47. Next, the Defendants submit that it is necessary to deal with a number of other points made by Foxton J about this issue.

- (1) First, they referred to the contrast between clause 3.1 and clause 3.2, noting that the latter confirmed that the ECL would terminate if the Claimant wrongly refused to close, whilst clause 3.1 did not contain a similar provision relating to a breach by Oldavia. They submitted that this should not make a difference to the proper meaning and effect of clause 5.1(iii). In particular, neither clause says anything about the circumstances in which the funding obligation might be discharged under clause 5.1, nor does either clause suggest a need to give clause 5.1 anything other than its ordinary meaning.
- (2) Second, the Defendants made reference to the suggestion, at paragraph 17 of the judgment, that if the funding obligation had arisen, then "*conventional principles of construction would suggest that clear words would be required for that obligation to lapse on 1 January 2021.*" It was their case that, in relation to the three separate principles of construction relied on by Foxton J, namely the principle in Modern Engineering (Bristol) Ltd v. Gilbert Nash (Northern) Ltd [1974] AC 689; the contra proferentem principle, and "*the possible application, given Oldavia's status as an SPV through which Apollo effected its investment, of the presumption when interpreting a contract that a party cannot take the benefit of its wrong*", the short answer to these points is that the words of clause 5.1(iii) are **clear**: the obligation is discharged automatically and immediately upon the occurrence of the relevant event. In other words, clause 5.1 is plainly concerned with circumstances in which Lopesan and Oldavia would give up otherwise valuable rights as against the Defendants. They argued that the learned Judge did not address the question whether, or in what way, the words were unclear, which they are not. In these circumstances, the canons of construction referred to do not provide any basis for departing from the clear words of the contract. In any event, the Defendants contended, such principles are rarely decisive as to the meaning of provisions in a commercial contract, especially where the language of the contract is clear: K/S Victoria Street v. House of Fraser (Stores Management) Ltd [2012] Ch 497, at §68 *per* Lord Neuberger MR (giving the judgment of the Court). Finally, the Judge's reliance on the principle against construction of a document so as to excuse one party from its own wrong is also incorrect because the Judge focussed on Oldavia's alleged breach of contract under the SPA and the principle does not apply where the relevant wrong is a breach of a separate contract by a third party: Lewison, §7.117. Whilst Lopesan seeks to argue that the relevant "wrong" is the Defendants' failure to pay the money, if the Defendants had paid the money, Completion would still not have taken place because of the dispute between Oldavia and Lopesan, and that dispute would not have been resolved by the January Termination Date. The Defendants are not seeking to rely on their failure to pay the funds as a reason for termination of the ECL under clause 5.1(iii).

- (3) At paragraph 19, Foxton J noted that clause 5.1 expressly permits proceedings between the parties under the ECL and the SPA and that it would be surprising if the parties intended that the obligations under the ECL could be discharged before those proceedings had concluded. As to this:
- a) Foxton J was referring to sub-paragraphs (x) and (y), which come at the end of clause 5.1(iv). Clause 5.1(iv) provides for the immediate and automatic termination of the ECL if Lopesan asserted any claim against the Defendants. Sub-paragraphs (x) and (y) constitute a carve-out to clause 5.1(iv), excluding the application of this limb of the termination events to claims by Lopesan against Oldavia under the SPA and claims to enforce Oldavia's rights under the ECL. The purpose of that carve-out is to make it clear that the assertion of such claims will not, without more, bring the ECL to an end.
 - b) The carve-out does not indicate any intention that any such dispute could be freely litigated thereafter without the ECL expiring in the meantime. The mere fact that the assertion of a claim against the Defendants under the ECL did not, in and of itself, cause the automatic termination of the ECL under clause 5.1(iv), says nothing about the circumstances in which the ECL would terminate under the other termination events in clauses 5.1(i) to (iii), especially when clause 5.1 provided that the ECL would terminate on the "*earlier to occur*" of those dates. Moreover, when the SPA was executed in November 2019, there was more than a year before the January Termination Date. There is no evidence to suggest that when the parties entered into the relevant contracts, this would have been regarded as an unreasonable period of time in which for any such disputes to be resolved.
48. Turning to issues 2(b) and (c), these issues again turn on the proper construction of clause 5.1, which has been set out above. The Defendants make four preliminary points in relation to this clause.
- (1) First, each of the events identified in clauses 5.1(i) to (iv) leads to the automatic and immediate termination of the "*obligation of the [Defendants] to fund ... the Commitment*". For good measure, clause 5.1 also says in terms that the Defendants' obligations under the ECL will be "*discharged*". There can be no dispute about what is meant by the word "*discharged*". Nor can there be any dispute about what is being discharged: "*the [Defendants'] obligations under [the ECL]*." The natural and ordinary meaning of those words is that all of the Defendants' obligations are discharged (save for those obligations identified in the final sentence). There are no words in clause 5.1 to suggest that some obligations would nonetheless survive, or (as Lopesan apparently suggests) that the parties intended there to be any distinction between obligations that had arisen (which would survive) and those that had not arisen (which would come to an end).
 - (2) Second, the ECL is discharged upon "*the earlier to occur*" of each of the termination events. The first termination event in the list is "*consummation of Completion*". That point in time (i.e. consummation of Completion) then

determines the application of the other termination events in the list. If the other events occur before the consummation of Completion, then the obligation to fund the Commitment terminates and the obligations arising under the ECL are discharged. Conversely, if consummation of Completion occurs first, then the other termination events become irrelevant. It follows that the proper construction of the January Termination Date is clear: if consummation of Completion has not occurred before 1 January 2021, then the “*obligation to fund the Commitment will terminate automatically and immediately (at which time the Investors’ obligations under this Letter shall be discharged)*.” Notably, the application of the clause 5.1 termination events is not qualified in any way by reference to whether or not, for example, any other event may (or may not) have occurred. There is nothing to suggest that the clause will not operate in the way suggested if, for example, the Condition Precedent has been satisfied; nor, if the obligation to provide funding has previously accrued.

- (3) Third, and by way of a related point, it is obviously the case that if the Court is satisfied that any one of the events identified operates to discharge an obligation that had previously arisen, then the same must be true of the other events identified. That is because there is no language whatever in clause 5.1 to support an interpretation whereby some of the termination events operate to discharge accrued obligations, but others do not.
- (4) Fourth, as already noted above, the tailpiece to clause 5.1 expressly confirms which obligations are to survive termination. Notably, clause 2.1 (which contains the funding obligation) is not one of them. The obvious inference from this is that the obligations in clause 2.1 were intended to be among those obligations which were “*discharged*”.

49. Looking in more detail at each of the events identified, the first termination event is “*consummation of Completion*”.

- (1) First, as already noted above, “*Completion*” under the SPA occurs on the Completion Date itself. It follows, therefore, that, in circumstances where, if the funding obligation arises, it arises immediately prior to the Completion Date, Completion is an event that will inevitably occur after the funding obligation has arisen.
- (2) Most obviously, this provision is concerned with a situation in which the funding is advanced prior to the Completion Date, and the transaction completes, and is ‘consummated’ the following day. In short, the parties wished to make it clear that the purpose of the funding obligation having thereby been achieved, the ECL would terminate and any obligations under it would be discharged.
- (3) It is also possible that this provision could apply if Oldavia completed the transaction using other funds, for example, from a different fund or from a bank. In that situation, although unlikely to be how the parties envisaged Completion was most likely to be consummated, it would also make perfect sense for the ECL to terminate, and for the funding obligation to be discharged, because there

would be no need for the funding, “*consummation of Completion*” having taken place.

- (4) Either way, however, it is significant to note that the first termination event in the list is “*consummation of Completion*” itself; it is not the occurrence of the day on which the obligation to fund accrues, nor (which is the same thing) the occurrence of the day immediately before the Completion Date. And, critically, it is that event, viz., consummation of Completion itself, by reference to which the other termination dates operate. This being so, and absent any language that would support any such approach, it would not make sense to qualify the potential application of the various termination events by reference to the occurrence of some other, non-stated event.
50. Similar points fall to be made in relation to the second termination event identified in clause 5.1, namely (at (ii)), the “*valid termination of the [SPA] in accordance with its terms.*”
51. Again, the clear words of the provision suggest that if this event occurs before (e.g) the “*consummation of Completion*” (and none of the other clause 5.1 events have yet to occur), then this will be the event that has occurred earliest in time, and it is the date when this event occurs that leads to the Commitment being terminated and all obligations under the ECL being discharged. This all makes perfect sense.
52. Significantly, there is again nothing in either clause 5.1(ii) or clause 5.1 as a whole that would qualify the application of this sub-clause to bring about the termination of the ECL and discharge of obligations thereunder, depending, e.g., on whether the SPA is terminated after (as opposed to before) the occurrence of the Condition Precedent, or the day immediately prior to the Completion Date.
53. Nor does it make any sense to read anything in to the provision that would limit clause 5.1(ii) so that it would apply only to obligations that had not yet arisen, leaving in place obligations that may have arisen but not yet been performed. It is very unlikely to have been the intention of the parties that the funding obligation would be enforceable if, the day after the funding obligation arose, the SPA validly terminated, such that Completion never occurred and could never occur.
54. As already noted above, the third termination event, as identified by clause 5.1(iii), is “*1 January 2021*”. Similar points again fall to be made in relation to this sub-clause and its application.
55. Thus, and again as noted when addressing clause 5.1(i), the natural meaning of clause 5.1(iii) (read with clause 5.1(i)) is that the funding obligation is discharged if “*consummation of Completion*” had not occurred before 1 January 2021. As with the other termination events, this is not qualified by any language found within clause 5.1(iii) or clause 5.1 more generally. There is certainly no language that would limit its application otherwise than by reference to whether or not it occurred prior to, e.g., “*consummation of Completion*” (and the other events identified in clause 5.1(i) to (iv)). Nor, as with clause 5.1(ii), is there language that would limit the scope of its operation to obligations that had not yet arisen, leaving in place obligations that, although they had arisen, had not yet been performed.

- (1) As reflected in the language used in clause 5.1(i) to (iv), the January Termination Date with which clause 5.1(iii) is concerned, was intended to operate as a ‘drop dead’ date in respect of the Defendants’ funding obligation. In other words, if there had been no consummation of Completion by this date, then the obligation to fund would cease.
 - (2) In this way, the January Termination Date provided the Defendants with a measure of certainty as to the latest date on which they could be required to advance the funds to Oldavia. Upon expiry of this date, the Defendants would be free to use those funds for other purposes.
 - (3) It is not understood to be in dispute (nor could it be) that provisions of this sort are commonly found in funding agreements; that is because it is not reasonable (and can be expensive) to expect a funder to provide an open-ended funding commitment: see for example Travelport Limited v. WEX Inc [2020] EWHC 2670 (Comm), § 3.
 - (4) Where funding obligations are made the subject of a ‘drop dead’ date, it does not matter (subject to the point made below) to the funder why Completion has not occurred by the relevant date. Rather, what matters to the funder is simply that, by that date, there has not been any Completion and, therefore, no call on the funding.
 - (5) This, however, must be made subject to the parties not deliberately and in bad faith obstructing Completion simply with a view to frustrating the obligation to fund.
56. The fourth termination event concerns the commencement of certain legal proceedings against the Defendants or their related parties. Again, if this occurs before the occurrence of the other termination events, including consummation of Completion, the occurrence of this event will bring about termination of the ECL and discharge of any obligations thereunder (save for those expressly identified at the end of clause 5.1).
57. Once again, there is nothing in this sub-clause that would qualify its ability to apply depending upon whether, e.g., another event or date (not specified in clause 5.1 itself) has occurred, such as, e.g., the arising of the funding obligation, or the occurrence of the day immediately prior to the Completion Date. Nor is there anything that would limit the scope of operation of this termination event to obligations that had not yet accrued, leaving in place around the otherwise terminated contract, obligations that although they had arisen, had not yet been performed. If that were what was intended, it would have been said.
58. For the reasons referred to above, the answer to issue 2 is “yes” in each case: the obligation to fund the Commitment will be discharged if any of the events identified in issues 2(a) to (c) occur. That is so whether or not that obligation had previously arisen. The answer to issue 2(c) (relating to the ‘drop dead’ date) is a complete answer to the claim. For this reason, the claim should be dismissed.

Lopesan's contentions.

59. When addressing the discharge (and the accrual) of the Defendants' obligations under the ECL, Lopesan submitted that it is important to recognise that the word "obligation" can be used in two different senses:
- (1) **First**, it can refer to the obligations created by the ECL from the moment it was issued by the Defendants. In this instance, those obligations included a contingent obligation on the Defendants to fund the Commitment, subject to the terms of the ECL itself. When the word "obligation" is used in this sense, the Defendants can be said to have been under an obligation (albeit a contingent obligation) to pay the Commitment since November 2019.
 - (2) **Second**, it can refer to the immediate, non-contingent, obligation on the Defendants to actually pay the Commitment. That obligation (a) represents the crystallisation of the pre-existing contingent obligation referred to above; and (b) accrues (on Lopesan's case) immediately prior to the Completion Date.
60. In relation to the issue of whether the Defendants' liability to pay the Commitment has been discharged, the key provision is clause 5.1, which has been set out above. The critical question in relation to the clause is the proper construction of the words at the beginning of the second sentence: "*The obligation of [Apollo] to fund... will terminate automatically and immediately (at which time [Apollo's] obligations under this Letter shall be discharged) upon...*"
61. Lopesan argues that it is the Defendants' case that those words would apply to terminate **any** accrued liability on its part to pay the Commitment - even if it was in breach of the ECL by failing to discharge that liability. It submits that this cannot have been the intention of the parties as it is incompatible with the wording of the clause, and leads to an objectionable and uncommercial result:
- (1) Clause 5.1 provides *inter alia* for the termination of the Defendants' "obligation" to fund the Commitment on 1 January 2021.
 - (2) On the Defendants' case, the effect of this provision is to relieve it of the liability to pay the Commitment, even if its failure to pay the same by 1 January 2021 was attributable to the Defendants' own breach of an accrued liability to pay under the ECL.
 - (3) The ECL ought not to be construed so as to permit the Defendants to take the benefit of their own wrongdoing in that way: see *Alghussein Establishment v Eton College* [1988] 1 WLR 587 at p.594B-F. Moreover, such a construction would involve reading clause 5.1 as an exclusion of any remedy which Lopesan might otherwise have in respect of a breach of contract by the Defendants. Clear and unequivocal wording would be required if the clause were to have that effect: see *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 *per* Lord Diplock at 717H and *Filatona v Navigator Equities* [2020] EWCA Civ 109 *per* Simon LJ at [63]-[67]. Clause 5.1 does not contain any such wording.

- (4) Further, reading clause 5.1 in the manner for which the Defendants contend would risk creating a situation in which compliance with the ECL was, from the Defendants' perspective, optional. Faced with a liability to pay, they could simply withhold payment and "run out the clock" on Lopesan (and on Oldavia, assuming that Oldavia wished to complete on the Transaction).
 - (5) Further, clause 5.1 expressly envisages (at (iv)) that the Defendants' obligations will **not** terminate as a result of claims brought by Lopesan under either the SPA or the ECL. It would be extraordinary if clause 5.1 was read as, on the one hand, leaving the Defendants' liability to pay intact in the face of claims under the SPA and ECL whilst, on the other, extinguishing that very liability because claims happen not to have been resolved by 1 January 2021.
 - (6) Finally, construing clause 5.1 in a manner which permitted the Defendants to rely on their breach of the ECL and/or Oldavia's breach of the SPA as a means of avoiding payment of the Commitment would be inconsistent with clause 3.1 of the ECL. That clause makes clear that the Defendants would be liable to pay the Commitment even where Completion failed to occur by reason of breach of the SPA by Oldavia.
62. This part of the Defendants' case (which was, at the time, referred to as the "lapse argument") was subject to provisional analysis by Foxton J at [14]-[21] of his Judgment of 8 October 2020. He rightly concluded that it was weak, and Lopesan relies on his analysis as further supporting its current submission that the argument is, in fact, wrong.³
63. Lopesan accordingly submits that clause 5.1 ought not therefore, on any view, to be read as having the effect for which the Defendants contend. There is, it says, a perfectly workable alternative approach to the interpretation of that clause:
- (1) It makes perfect sense if it is construed as being applicable to the Defendants' contingent obligation to pay the Commitment if and when certain conditions are met; but **not** applicable to the Defendants' immediate liability to pay the Commitment (if and when that liability arises).
 - (2) On that reading, the clause would prevent the Defendants' contingent obligation from ever crystallising into an immediate liability to pay if the SPA was validly terminated before then, or if such crystallisation had not occurred by 1 January 2021.
 - (3) It also avoids a situation in which clause 5.1 can operate to shield the Defendants from the consequences of their own breach of the ECL, or enable the Defendants positively to benefit from such a breach.
64. A consequence of Lopesan's construction of clause 5.1 is that once the Defendants have become subject to an accrued liability to fund the Commitment, there is nothing in the ECL which can relieve them of that liability. There is nothing wrong with that. The Commitment is to be paid to Oldavia (not to Lopesan), and once the Defendants have

³ I have set out the relevant passages of Foxton J's judgment above.

paid the Commitment to Oldavia, there is nothing to stop the Defendants from seeking to recover the monies it has paid if Oldavia no longer requires them for the purposes of the Transaction. Indeed, in circumstances where Oldavia is the Defendants' SPV for purposes of the Transaction, the Court should proceed on the basis that, in such a scenario, it would return the Commitment to the Defendants as a matter of course.

65. Lopesan therefore submits that, on its true construction, clause 5.1 of the ECL has no effect at all on the Defendants' liability to pay the commitment once that liability has been triggered in accordance with clause 2.1 of the ECL.

Discussion and conclusions.

66. In my judgment, the answer to this issue is as follows:

- (1) For the reasons already noted, Oldavia will become obliged to complete on the completion date as defined (whatever that date may be – for present purposes, as I have noted, the parties have been content that I take that date to be 30th April 2020), and the Defendants will be obliged to put them in funds to do so immediately prior to that completion date.
- (2) It is common ground that, if the SPA validly terminates prior to that date, the obligation to provide funding will not arise.
- (3) However, in my judgment, once the obligation has arisen, then it must be fulfilled. A failure to provide funding will be a breach on the part of the Defendants.
- (4) If the obligation to complete is, thereafter, rendered moot (for example because the SPA is, to use an English term, frustrated, or because Lopesan cannot perform, ie the two scenarios put forward by the Defendant to which I have made reference above) then there would be an obligation on the part of Oldavia to repay monies to the Defendants. This does not detract from the fact that the Defendants would have been obliged to pay those monies to Oldavia prior to the completion date.
- (5) I agree with Foxton J that the reference to Oldavia becoming unconditionally obliged to complete is a reference to the satisfaction of the condition precedent in the contract. Once that condition was satisfied, the obligations of Oldavia were indeed unconditional, albeit that there were other obligations on the part of Lopesan which fell to be satisfied at the same time as Oldavia performed its obligations.
- (6) I am also in agreement with Foxton J's various other points, which are set out above. As regards the Defendants' suggested answers to those points:
 - a) In my judgment, the distinction between clause 3.1 and clause 3.2 is indeed instructive. It is clear that the funding obligation will cease if the SPA comes to an end by reason of a breach by Lopesan (as to which see clause 3.2) but there is no similar provision in relation to a breach by Oldavia. That is entirely consistent with the conclusion that the funding

obligation will remain in being notwithstanding the fact that, by reason of a breach on the part of Oldavia, completion has not been consummated.

- b) Secondly, I agree that the wording of clause 5.1 is not sufficiently clear to overcome the normal principle that a party cannot rely on a provision to terminate a contract if that provision has only been triggered by virtue of the wrongful conduct of that party. In this connection, I take the view that the passage from Lewison, para 7.117 which was relied on by the Defendants is not in fact of assistance in the circumstances of this case, where the breach would be by the Defendants' wholly owned subsidiary, incorporated for the purposes of the transaction. I am reinforced in this conclusion by the terms of clause 3.2, to which I have already made reference, which distinguish between the situation where the funding obligation ceases due to a breach by Lopesan, and the lack of a similar provision in relation to a breach by Oldavia. The whole scheme of the transaction is that completion should take place before 1 January 2021, and that each party should play its part in enabling this to happen.
- c) As to the third point relied on by Foxton J in paragraph 19 of his judgment, I again agree that it would be very surprising if, in circumstances in which the obligations under the ECL were kept alive where proceedings were brought to enforce the SPA, those obligations would nevertheless fall away by virtue of the simple effluxion of time during the pendency of those proceedings. Contrary to the Defendants' submissions, it is my view that the existence of the carve out in relation to court proceedings does indeed shed light on the meaning of the other termination provisions, including that in clause 5.1(iii).

67. Overall, I would answer these preliminary issues as follows, although I would not answer them in the order in which they are posed:

- (1) If the SPA is validly terminated in accordance with its terms, for reasons other than a breach by Oldavia, then the funding obligation will also come to an end. If this occurs before 1st January 2021, then the issue of termination due to effluxion of time will not arise. If the SPA is validly terminated after 1st January 2021 in accordance with its terms, for reasons other than a breach by Oldavia, then the funding obligation will, likewise, either come to an end (if the Completion Date has not arrived as at that stage) or will be reversed (in the sense that Oldavia will be obliged to repay the money to the Defendants). This is the answer to issue 2(b).
- (2) If, as at 1st January 2021, the funding obligation has arisen, and not been terminated, then the mere effluxion of time will not bring it to an end. This is the answer to issue 2(c). In my judgment, clause 5.1(iii) is intended to cater for the situation where the funding obligation has not arisen at all, either because the condition precedent has not been satisfied, or because Lopesan is not in a position to complete as at that date. It will not apply so as to bring an end to the obligation where completion should have taken place but has not.

- (3) As regards Issue 2(a), then in my judgment, the answer to this question will depend on why Oldavia has ceased to be unconditionally obliged to effect completion. As I have indicated, if, by way of example, the SPA has been frustrated (to use the English term) then Oldavia will no longer have to complete, and thus the Defendants will be entitled to their money back (if they have, or should have, already paid it) or will not have to pay that money. Since this will depend on Spanish law and the decisions of the Spanish Court, I do not propose to answer this question definitively.

Issue 3: are the Defendants obliged to fund the Commitment if the same is not to be used for the purposes of funding Completion pursuant to the SPA?

The Defendants' contentions.

68. Clause 2.1 provides that the Defendants would advance an amount "required by [Oldavia] to complete the acquisition of the Shares at Completion in accordance with the terms of the [SPA]."
69. Clause 2.3, which has been set out in full above, makes it clear that the Defendants are to pay no more than the Commitment, and that there is no obligation other than to fund the Commitment.
70. To similar effect, clause 5.2 grants the Claimant the right to enforce the Defendants' obligations under the ECL in certain circumstances but "solely to give effect to Completion ...and for no other reason."
71. The same point is made in clause 6.2 which sets out the Claimant's right in further detail, making it clear that it was being conferred "for the purposes of Completion but for no other purposes" and that save as specified in clause 6, the Claimant had no "other rights or remedies hereunder".
72. Accordingly, it is clear that the only purpose for which the Defendants were obliged to provide funds under the ECL was in order to enable Oldavia to make the Completion Payment at Completion in return for title to the Shares, i.e. if Completion takes place. It is equally clear that the Claimant could only bring a claim against the Defendants for the purposes of giving effect to Completion, and for no other purpose.

Lopesan's contentions.

73. Lopesan argues that the Defendants' case is wrong in this regard, for the following reasons:
- (1) That case assumes that these clauses are, in effect, further conditions precedent to the Defendants' liability to pay the Commitment. There is no basis for that assumption – particularly in circumstances where clause 3 of the ECL identifies conditions upon the Defendants' liability to pay. It ignores the fact that the ECL is a tripartite agreement, to which Oldavia is a signatory. If the Defendants paid the full Commitment to Oldavia, and Oldavia did not ultimately require the full sum of €93m for the purposes of the Transaction, then the Defendants would have a claim to recover any balance from Oldavia. It is in the context of such a claim that the clauses quoted above would be most likely to come into play.

- (2) Both the wording of the ECL and the commercial context require that the Defendants put Oldavia in funds **prior to** the Completion Date – and therefore at a point in time when Oldavia might well be uncertain as to whether it would need the full amount of the Commitment. This is consistent with clause 4.3 of the SPA, which expressly provides for adjustments to the total sum payable to Lopesan **after** Completion.
- (3) This position is particularly stark if (as Lopesan submits is the case here) Oldavia wrongfully refused to proceed with Completion of the SPA. In that scenario (in accordance with clauses 2.1 and 3.1 of the ECL - see above) the Defendants would be liable to pay the entire Commitment to Oldavia at a time when: (a) there was inevitable uncertainty as to what Oldavia would be required to do with the Commitment; and (b) the resolution of that uncertainty would necessarily have to await the determination of Spanish proceedings between Lopesan and Oldavia under the SPA.

Discussion and conclusions.

74. In my judgment, the answer to this issue is, as Lopesan contends, that the obligation to provide the funding arises prior to the Completion Date (as I have found in relation to Issue 1, and as was effectively common ground between the parties), but that that obligation would only arise if, at that moment, there was still an obligation to complete; and would “lapse” thereafter, if, without breach on the part of the Defendants or Oldavia, the obligation to complete fell away. In the latter case, however, the funding would have to be provided, but might have to be repaid by Oldavia. By way of example, therefore:
- (1) If the SPA came to an end before the Completion Date, so would the Defendants’ obligation to provide funding;
 - (2) If the obligation to complete was, for example, frustrated, or the SPA was validly terminated on account of Lopesan’s breach after the Completion Date, then, whilst the obligation to provide funding would have accrued and should have been performed, Oldavia would be obliged to repay the Defendants since Completion would now not complete.
75. It follows, in my judgment, that this issue cannot be answered definitively yes or no. It is clear that the funding cannot be used for some purpose other than completion. However, it is also my view that the funding has to be provided if, as at the moment immediately prior to the Completion Date, the obligation to complete remains in being.

Issue 4: Are the Defendants obliged to fund the Commitment in circumstances where there is a bona fide dispute between the Claimant and Oldavia which has not yet been resolved by the Spanish Courts, whereby Oldavia has indicated that it does not intend to effect Completion under the SPA because it contends that it is not obliged to do so?

The Defendants’ contentions.

76. The Defendants argued as follows:

- (1) It is clear from the language of the ECL (quoted above) that the funds could only be provided for the purposes of Completion. It follows that the Defendants' obligation to provide the Commitment under clause 2.1 did not arise unless Oldavia "*required*" the funds in order to effect Completion under the SPA. Since the funds are not presently required for this purpose, the funding obligation has not yet arisen (and did not arise prior to 1 January 2021).
- (2) Moreover, that interpretation is consistent with clauses 2.3, 5.2 and 6.2 of the ECL which (as explained above) tie the obligation in clause 2.1 (and its enforcement) to the act of Completion, not the existence of an obligation on Oldavia's part to complete (which is separately addressed by clauses 3.1 and 5.1 of the ECL).
- (3) It is unsurprising that the Defendants' obligation should ultimately depend on Completion taking place. In particular, it is unlikely that the parties reasonably intended that the Defendants should be obliged to pay Oldavia the funds in circumstances where a dispute had arisen between the Claimant and Oldavia, such that Completion was unlikely to occur for a significant period of time. That would give rise to considerable uncertainty as to Oldavia's duties in relation to the funds during that period. For example, it would be unclear whether those funds formed part of Oldavia's assets, available to its other creditors and, if not, what steps Oldavia should take to safeguard those funds and/or earn a return pending determination of the underlying dispute.
- (4) Moreover, it would give rise to uncertainty as to the circumstances in which the funds would subsequently be repaid. Lopesan acknowledges that the consequence of its interpretation of the ECL is that the funds may be paid over in circumstances where Completion ultimately never occurs, or occurs on different terms. Lopesan also acknowledges that in certain circumstances, the funds might fall to be repaid.
- (5) In his judgment dated 8 October 2020, Foxton J expressed the same concern in relation to this point as he did in relation to the January Termination Date, namely that the Defendants would be able to procure a situation in which Oldavia refused to complete, thereby preventing the Defendants' funding obligation from arising. Any such concern (had it been relevant) is one that might have been addressed by reference to an implied term aimed at a bad faith attempt to frustrate any funding obligation that might otherwise arise, as already noted; but there is no allegation of bad faith.
- (6) Lopesan also argues that the interpretation identified above would subject the Defendants' alleged obligations to "*an additional layer of complexity*" that cannot have been intended. It is difficult to see why this is so: there can be no real doubt as to what is meant by bad faith in this context and, in any event, no allegation of bad faith has been made.
- (7) For these reasons, the answer to issue 4 is "no": the Defendants are not obliged to provide the funds in circumstances where there is a *bona fide* dispute between the Claimant and Oldavia that has yet to be resolved by the Spanish Court.

Lopesan's contentions.

77. It is the Defendants' case that its liability to pay the Commitment is either suspended or discharged in the event that Oldavia raises a *bona fide*, but unresolved, dispute in relation to its obligation to proceed with Completion under the SPA. The relevance of this point is that, if correct, it would enable the Defendants to avoid liability to pay the Commitment, even in circumstances where Oldavia had (acting misguidedly, but allegedly in good faith) breached the SPA by wrongfully refusing to proceed with Completion thereunder.
78. The Defendants' case on this point only has independent force in a scenario in which Oldavia raises a dispute which, albeit *bona fide*, is in fact misguided. If Oldavia's dispute were to be well-founded, such that it was not obliged to proceed with Completion under the SPA, then the Defendants would have no need to rely on the mere fact that Oldavia had raised a dispute – the substantive grounds underpinning that dispute would themselves be sufficient for the Defendants' purposes.
79. There is nothing in the wording of the ECL which provides a cogent basis for such an argument. The correct analysis is as follows:
 - (1) Oldavia either was obliged to proceed with Completion under the SPA in April 2020, or it was not. If it was so obliged at that time, it has been in breach of the SPA since April 2020.
 - (2) The existence of Oldavia's obligations under the SPA, and any breach thereof, are matters of objective fact. They do not owe their existence to any ruling by the Spanish Court (or this Court). The effect of such a ruling would be to provide an authoritative statement of what the true position had been all along.
 - (3) On Lopesan's case, the Defendants' liability to pay the Commitment is triggered by reference to the setting of the Completion Date in accordance with the SPA. On the Defendants' case, the relevant trigger is Oldavia becoming "*unconditionally obliged to effect completion pursuant to the SPA*". Those conditions share a key feature – they both depend upon what Oldavia's obligations under the SPA actually were at the relevant point in time. Neither case can justify the suspension or discharge of the Defendants' liability to pay the Commitment by reference to Oldavia raising a dispute under the SPA which is said to be *bona fide*, but is in fact misguided.
 - (4) In fact, this part of the Defendants' case is a variant of its argument that, when clause 2.1 of the ECL refers to the Commitment being "required" by Oldavia, it means that Oldavia itself must actually be pressing for payment of the Commitment. That construction of the word "required" is wrong. The correct construction is that "required" means "needed in order for Oldavia to comply with its obligations under the SPA".
 - (5) Accordingly, all that matters for the purposes of determining the accrual (and/or the subsistence) of the Defendants' liability to pay the Commitment is the actual state of Oldavia's rights and obligations under the SPA.

80. Further, if the Defendants' case on this point was correct, any dispute between it and Lopesan under the ECL which depended (in whole or in part) upon the outcome of a dispute raised by Oldavia under the SPA would necessitate an inquiry into **both** the substantive merits of the dispute raised by Oldavia **and** Oldavia's mental state in connection with that dispute. In the absence of clear words (which the ECL does not contain on any view), the Court should reject the suggestion that commercial parties such as Lopesan, Oldavia and the Defendants would agree that the liability of the Defendants to fund the Commitment under the ECL would be subject to that additional level of complexity (involving, as it would, a detailed enquiry into Oldavia's subjective intentions in raising the alleged dispute, and the extent of the Defendants' control over Oldavia's actions/intentions).

Discussion and conclusions.

81. Again, I can be relatively brief in relation to this issue, since it seems to me clear, on the wording of the contract, that the existence of disputes (*bona fide* or otherwise) as to Oldavia's obligations cannot determine the Defendants' obligations. Instead, it seems to me that the correct analysis is as follows:
- (1) The Defendants' obligation to fund arises when Oldavia becomes unconditionally obligated under the SPA.
 - (2) In my judgment, that moment came when the condition precedent to Oldavia's obligations was satisfied. I agree with Foxton J in this regard.
 - (3) The time at which that obligation was to be satisfied – ie the moment at which it accrued due – was immediately before the Completion Date. This was the subject of Issue 1, which I have dealt with above.
 - (4) The Defendants are not able to justify a failure to comply with their obligation by reference to the fact that Oldavia has raised a dispute as to its obligation to complete on the Completion Date. Instead, the Defendants must put Oldavia in funds to enable it to complete prior to that date; and if, in fact, Oldavia can establish that it is not obliged to complete, then Oldavia will have to return the funds to the Defendants, since the funds in question were not to be used for any purpose other than completion: see issue 3 above.

Issue 5: Does the Claimant have the right to require the Defendants to fund the Commitment for the purposes of enabling Oldavia to meet any claim for damages made against Oldavia in the Spanish Proceedings?

The Defendants' contentions.

82. The question hereunder is whether, in relation to the ECL, the Defendants' obligations under the ECL require the Defendants to put Oldavia in funds not simply for the purposes of enabling Completion, but also (if Completion is not going to take place) for the purposes of meeting a damages claim against Oldavia should one ever arise.
83. The Defendants submit that the short answer to this question is "no". The Defendants' obligation under the ECL to advance the funds is tied, and limited, to Completion; the Defendants are not obliged to provide Oldavia with funds for any other purpose,

including so as to provide the Claimant with security for a damages claim. In this regard, there is an obvious distinction between Completion having happened, and compensating Lopesan for the fact that Completion has not happened. The ECL was not intended to be a form of guarantee of the Defendants' obligations under the SPA. The sole purpose of the ECL was to put Oldavia in funds to enable it to complete the acquisition. If, under the applicable Spanish law, Lopesan cannot compel Oldavia to complete the transaction, then the Defendants are not required to advance the funds to Oldavia.

Lopesan's contentions.

84. Lopesan contended that this issue was based on a false premise, and that the only question was whether the Defendants were obliged to fund the commitment. The question, it said, of whether that money could be used to fund a damages liability did not arise.

Discussion and conclusions.

85. In my judgment, Lopesan is right in saying that the Defendants had to fund the Commitment, and by so doing put Oldavia in a position to complete.
86. I do not think that, beyond this, it would be sensible or desirable for me to answer this issue, because this is likely to depend on the arguments and decision in Spain, and I do not wish to trespass in any way on the Spanish Court's freedom of action.

Issue 6: Is the Defendants' obligation to fund the Commitment limited to a sum equal to the net amount required to be paid by Oldavia in connection with Completion? In particular (without prejudice to the generality of the above):

- a. **Does the amount payable by the Defendants fall to be reduced if and to the extent that Oldavia is entitled to damages as against the Claimant and if and to the extent that such damages are to be set-off against any amounts payable by Oldavia under the SPA?**
- b. **Does the amount payable by the Defendants fall to be reduced if and to the extent that the terms of the SPA fall to be amended under Spanish law so as to reduce the amount payable by Oldavia under the SPA?**

The Defendants' contentions.

87. This issue arises because the Defendants contend (in the alternative) that if the SPA has not come to an end, such that Oldavia is obliged to complete, the price payable under the SPA is less than €93 million because:
- (1) Oldavia has a counterclaim in damages that falls to be set-off against the purchase price; and
 - (2) under Spanish law, the terms of the contract can be amended by the Court, including so as to reduce the price that is payable thereunder.

88. The starting point for consideration of this issue is clause 2.1 which obliges the Defendants (in certain circumstances) to advance €93 million “*required by [Oldavia] to complete the acquisition of the Shares.*” If, in fact, Oldavia only requires a lesser amount in order to complete, then the Defendants are only obliged to pay over that lesser amount.
89. This interpretation is confirmed by clause 2.3 which expressly provides that the funding is “*solely for the purposes of funding, and to the extent necessary to fund, that portion of the Completion Payment (net of any reductions contemplated in [the SPA]) to be paid by [Oldavia].*”
90. The SPA expressly contemplates a reduction in the purchase price arising by reason of a damages claim: see clauses 8.1(b) and 8.6(b) of the SPA. In any event, it is common ground that a set-off under Spanish law operates so as to extinguish the relevant debt in proportion to the set-off with the result that only the net amount is payable under the SPA. The same analysis applies if the Spanish Court subsequently orders that the SPA be amended so as to reduce the purchase price payable thereunder. In that situation, the price payable under the SPA is the lower amount as amended by the Court.
91. Finally, clause 11.2 provides that the “*maximum liability*” of each Defendant shall be the amount of its Individual Commitment, thereby confirming that in certain circumstances the Defendants could be obliged to provide a lower amount.
92. The interpretation set out above makes evident commercial sense given the fundamental purpose of the funding obligation (as described above). It makes no sense for the Defendants to be required to advance more funding than is required in order to effect Completion.
93. Again, Lopesan’s case on this issue depends upon its contention that the obligation to fund depends only upon Oldavia’s obligations under the SPA, and not on whether Completion actually takes place, and if so on what terms, which the Defendants submitted was wrong.
94. Lopesan, so the Defendants said, also submits that the amount of money to be paid under the ECL necessarily falls to be calculated prior to Completion itself. The Defendants do not disagree with this basic proposition but it does not follow that the amount that the Defendants were required to pay would always be equal to €93 million on that date. In particular, the funds could be reduced in accordance with clause 4.2 of the SPA (which applies prior to the Completion Date) and, in any event, the amount payable thereunder could be reduced as a matter of law for the reasons identified above.
95. The answer to issues 6(a) and 6(b) is, therefore, “yes”: in each case the amount payable under the ECL would fall to be reduced and only the net amount would be payable thereunder.

Lopesan’s contentions.

96. Lopesan argued that these questions are again based on a false premise. If the Defendants’ liability to pay the Commitment has accrued under clause 2.1 of the ECL, then it must pay the Commitment in full. Since the Commitment is defined as the sum

of €93m, this is the amount that must be paid, even though this may lead to the necessity for Oldavia to repay any amount which in fact is not needed for completion.

Discussion and conclusions.

97. I agree with Lopesan on this issue. The Commitment, as it says, is a defined term, and is defined as €93m. Whilst clause 2.3 makes clear that this sum is to pay the purchase price and nothing else, and whilst that purchase price may be greater or less than the €93m, then in my judgment that does not affect the obligation to pay the defined sum. Of course, there may need to be an accounting between Oldavia and the Defendants in due course, but that is another matter, and will depend on the amount to be paid by Oldavia to Lopesan. In my judgment, this will have the net effect of ensuring that the Defendants, after the appropriate accounting by Oldavia, do not pay more than the net amount, after taking account of appropriate deductions.

Issue 7: Pursuant to the terms of the Commitment Letter:

- a. **Does the Claimant have the right to require the Defendants to pay the Commitment to anyone other than Oldavia?**
- b. **Does the Claimant have the right to sue the Defendants for damages for breach of the obligation to fund the Commitment or is the Claimant limited to a claim for specific performance (if available under the general law)?**

Issue 7(a)

The Defendants' contentions.

98. The first issue is whether Lopesan is entitled to an order requiring the Defendants to pay the funding to anyone other than Oldavia. The answer to this issue is contained in clause 6.2.1 which provides that Lopesan is entitled to claim specific enforcement of the Defendants' obligations to Oldavia "*provided that, however, this paragraph shall not be understood in the sense that the [Claimant] shall have the right to require payment of the Commitment to the [Claimant] but only to [Oldavia]*" (emphasis added).

Lopesan's contentions.

99. Lopesan now accepts that the answer to this issue is no.

Discussion and conclusions.

100. Since it is common ground that the answer to this issue is no, I so find.

Issue 7(b)

The Defendants' contentions.

101. The second issue is whether Lopesan is entitled to sue the Defendants for damages, as opposed to for specific performance of their obligation to advance funds to Oldavia. Although this issue is academic because Lopesan makes no such claim, it is obvious from the terms of clause 6.2.1 (quoted above) that no such claim arises. Lopesan's only

right under the ECL is to sue for specific performance of the obligation to advance funds to Oldavia: see clauses 5.2, 6.1, and 6.2.

102. Lopesan makes two points in its skeleton argument in relation to this argument, neither of which is correct.

(1) First, it is said that clear words would be required in order to exclude any claim for damages for breach of clause 2.1. However:

a) Lopesan ignores clause 6 altogether which says (at clause 6.2) that Lopesan is entitled to “*specifically enforce the obligations of the [Defendants] for the purposes of Completion but for no other purpose*” and (at clause 6.1) that save as set out in Clause 6 “*nothing in this Letter, express or implied, is intended to confer upon any person or entity, other than [Oldavia] any right, benefit or remedy under or by reason of this Letter pursuant to the Contracts (Rights of Third Parties) Act 1999.*”

b) These words plainly exclude any “*right, benefit or remedy*” other than the right to claim specific performance under clause 6.2.

c) This point is reinforced by clause 6.2.3 which provides (so far as relevant) that save as set out in clause 6, neither Lopesan, nor its Party Affiliates, “*shall have any other rights or remedies hereunder.*”

(2) Second, Lopesan says that a failure to pay under the ECL would be a repudiatory breach of contract that Lopesan could accept so as to bring an end to the contract and that, upon termination of the ECL, clause 5.2 would be discharged by reason of the final sentence of clause 5.1. A number of points can be made about this submission:

a) Lopesan does not have the right to terminate the ECL in any circumstances: see clause 6.1 and 6.2.

b) In any event, termination for repudiatory breach by the Defendants is not one of the termination events governed by clause 5.1.

c) If (contrary to the above) clause 5.1 were to govern such a claim, then it would follow that on Lopesan’s own case, clause 5.1 operates to discharge obligations in the ECL after the alleged obligation to pay the Commitment has arisen. That is scarcely consistent with Lopesan’s case as to the proper construction of clause 5.1.

Lopesan’s contentions.

103. Lopesan contended that the question which arises under this heading is whether, on the assumption that the Defendants have breached the ECL by failing to pay the Commitment to Oldavia, Lopesan has the right to bring a common law claim for damages in respect of that breach. The short answer, it said, is that Lopesan will have the right to bring such a claim, unless it is excluded by sufficiently clear and unequivocal wording contained within the ECL.

- (1) Clause 5.2 does not purport to exclude a common law claim for damages sufficiently clearly or unequivocally. It purports to regulate claims brought “under this letter”. A common law claim for damages does not fit that description. It is a claim that is brought “under” the general law, and which happens to arise as a result of the terms of the ECL.
- (2) In any event, a failure by the Defendants to pay the Commitment would inevitably be a repudiatory breach of contract, entitling Lopesan to terminate the ECL. Clause 5.2 would not survive such termination (particularly given the final sentence of clause 5.1 – which does not identify clause 5.2 as one of those which would survive termination). It would be odd to construe clause 5.2 as excluding a claim which Lopesan could easily bring in any event by simply terminating the ECL for breach.

Discussion and conclusions.

104. In my judgment, the Defendants are correct on this point. I reach this conclusion for a number of reasons.
- (1) The language of clause 6 is, in my view, only consonant with an obligation on the part of the Defendants to provide funding, with a right given to Lopesan to require specific performance of that obligation.
 - (2) The imposition of this obligation is quite sufficient to ensure that Lopesan are given the protection that, as a matter of the commercial construction of the contract viewed in its context, would be expected. Thus, Lopesan’s primary contract is with Oldavia, and their interest in ensuring that the Defendants’ obligations towards Oldavia are fulfilled so as to ensure that Oldavia is in funds to meet its obligations to Lopesan is perfectly adequately addressed by means of a right to specifically enforce those obligations owed to Oldavia.

Final comments.

105. I hope that the above judgment is sufficient to enable the parties to agree an order setting out specific answers to the preliminary issues, and I would ask them to liaise with a view to achieving this. In the absence of agreement, I will rule on the answers.
106. It only remains for me to thank all Counsel and their respective teams for their very helpful and interesting submissions.