



Neutral Citation Number: [2019] EWHC 1749 (Ch)

Case No: CH-2018-000260

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
On appeal from the County Court at Central London
(His Honour Judge Dight CBE)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2019

Before :

MR JUSTICE FANCOURT

Between :

Jas Bains

- and -

(1) Arunvill Capital Limited

(2) Hollbeach Solutions LLP

Appellant

Respondents

Mr Alec McCluskey (instructed by **Macfarlanes LLP**) for the **Respondent**
Mr Nicholas Davidson QC (instructed by **ELS Law Limited**) for the **Appellant**

Hearing date: 18 June 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE FANCOURT

Mr Justice Fancourt :

1. This is an appeal against an order of His Honour Judge Dight CBE made on 26 July 2018 in the County Court at Central London. The judge dismissed the appellant’s claim for payment by the first respondent (“Arunvill”) of contractual remuneration and payment by the second respondent (“Hollbeach”) of agreed compensation. The judge also dismissed the respondents’ counterclaim but there is no appeal against that part of the order.
2. The Judge described Arunvill as a financial services investor and a client of Hollbeach. Hollbeach was described as a financial services advisor. The appellant works as a consultant in the financial services sector, creating financial strategies and operating particularly in the field of “dividend arbitrage”.
3. On 30 September 2014, the appellant signed a consultancy agreement with Arunvill. The services that the appellant agreed to provide under that agreement were defined as:

“Structuring and implementation of various equity finance strategies within the Company or elsewhere within the Recipient group, and management of various Newly Created Strategies”.

“Newly Created Strategies” were defined as:

“strategies which are devised, created, and managed by the Consultant, or strategies which are based substantially on intellectual property produced by the Consultant, and from which the Consultant is entitled to a Profit Share in accordance with the terms of the Schedule”.
4. The appellant’s remuneration under the consultancy agreement was set out in the schedule, which specified a basic fee of £200,000 per annum, a sign-on bonus of £500,000 and a profit share. His claim is for about six months’ basic fee.
5. The judge held that the appellant was obliged to provide the Services, as defined, without any requirement for Arunvill to participate in their provision. There is no challenge on this appeal to that conclusion. In short, the appellant was expected to devise clever ways in which Arunvill could make money, including in connection with dividends receivable by shareholders, provide the strategies or intellectual property to Arunvill and then implement and manage them.
6. Clause 3.4 of the agreement states:

“This Agreement may be terminated by either Party in the event of the other Party having materially breached any of the provisions of this Agreement and not having remedied such breach within 21 days after the service of written notice by the first Party requiring the same to be remedied.”

Under clause 3.1, either party could terminate the agreement by six months written notice.

7. On 5 April 2016, Arunvill gave the appellant written notice of a material breach of the agreement, namely that the appellant had “both verbally and in writing, advised of your intention not to perform your contractual obligations under the Agreement (namely, the provision of Services to the Company, as set forth in Clause 2.1)”. The notice required the appellant to remedy the breach within the period of 21 days from the date of deemed receipt of the notice. By the same letter, Arunvill also gave the appellant six months’ notice to terminate the consultancy agreement pursuant to clause 3.1 in any event.
8. The issue in the first part of the appeal is whether the appellant remedied the specified breach within 21 days. If he did, it is common ground that he was entitled to be paid the basic fee during the period of six months prior to termination of his services under clause 3.1 and accordingly his claim must succeed. If he did not remedy within 21 days, it is common ground that he was not entitled to be paid during that period and his claim fails. The Judge held that the appellant had not remedied the specified breach and that accordingly he was not entitled to the further remuneration claimed against Arunvill.
9. During the course of his work for Arunvill, the appellant also became involved with Hollbeach.
10. Hollbeach was in dispute with a company called Solo Capital Ltd, controlled by a Mr Sanjay Shah, who had also acquired a controlling interest in a German bank, Varengold Bank AG. Arunvill was also a shareholder in Varengold and it or Hollbeach had the benefit of a co-operation agreement with it. Mr Shah caused Varengold to terminate the cooperation agreement, thereby precipitating the dispute with Hollbeach. The appellant became aware of these matters through his work for Arunvill.
11. By April 2015, there was believed to be a real risk of litigation between Hollbeach and Varengold. Hollbeach was, as the judge found, interested in using the appellant’s services to reach a resolution of the dispute. The judge found that the view of a director of Arunvill, Mr Shields, was that there were three main potential strategies for resolving the dispute. First, that Arunvill could buy Mr Shah’s interest in Varengold. Second, that Hollbeach be compensated for loss of its cooperation agreement and that its shares in Varengold be purchased by or on behalf of Mr Shah. Third, that Hollbeach, Varengold and Solo enter into a joint venture agreement.
12. Mr Shields and the appellant sought to negotiate terms on which the appellant would receive a share of the sums realised by a resolution of the dispute. Mr Maynard was also involved on behalf of Hollbeach. Those negotiations led to an exchange of emails on 28 April 2015, which are referred to as the Hollbeach Agreement. Mr Maynard’s email of that date sets out the terms that were agreed by the appellant’s email in reply. A copy of the text of the emails is annexed to this judgment, marked up on behalf of the appellant for the purposes of exposition in argument.
13. In the event, Arunvill did not acquire Varengold but sold its shares in that bank to Mr Shah for about €5m, approximately double the market value of those shares at the relevant time. However, no joint venture agreement was concluded between Varengold and Hollbeach and their dispute was not resolved. The appellant contends that, on the true interpretation of the Hollbeach Agreement, he was entitled to be compensated by virtue of the sale of Arunvill’s shares at a premium value, which amounted to a partial settlement of the dispute. The respondents’ case is that no compensation was payable

under the Hollbeach Agreement unless there was a final settlement of the dispute between Hollbeach and Varengold/Mr Shah, removing the risk of litigation, and, moreover, unless the appellant was instrumental in achieving such a settlement. The main issue on the second part of the appeal depends principally on the true interpretation of the Hollbeach Agreement.

14. The Judge held that, on the true construction of the Hollbeach Agreement, a final resolution of the dispute with Varengold was required, thereby removing the risk of litigation, before the appellant became entitled to any compensation. He also found that the appellant was not in fact a cause of the sale of Arunvill's shares to Mr Shah.

The Arunvill consultancy agreement

15. The appellant appeals against the Judge's dismissal of his claim for an additional six months' basic pay on the following grounds:
 - i) The material breach of contract, viz. refusing to continue to provide the Services, was remedied by letter from the appellant's solicitors dated 20 April 2016, stating that he did intend to perform his contractual obligations, and that the Judge was wrong to conclude that performance of the Services was also required within the 21 day period in order to remedy the breach.
 - ii) Alternatively, if that did not amount to a remedy, the Judge was wrong to conclude that the appellant had to provide the Services thereafter, in order to remedy the breach, because Arunvill did not require him to provide any services, having rejected the strategies that he had previously devised.
16. The Judge's conclusions on what was required in order to remedy the material breach are contained in the following paragraphs of his judgment:

"130. ... A refusal to work is, in my judgment, a refusal to provide the services in clause 2.1, identified in the notice. There was, therefore, a breach of clause 3.4 of the Arunvill Agreement and it was right, therefore, that the defendant asked the claimant to remedy the breach. The proper remedy in the circumstances of this case is not merely the communication of an intention to work in an unspecified way, but it is to continue to provide the services which the claimant was contracted to provide under the Arunvill Agreement.

131. The evidence shows that the claimant did not in fact work, nor attempt to do so: he did not provide the "Services". The real cause may be that, of course, for the reasons I have already explained, it was not possible for him to provide the Services because the NCS were not capable of being effectively structured or implemented. Perhaps the truth of that suggestion lies in the fact that when Mr Davison [sic] described what the claimant had been doing in the course of his retainer, no emphasis at all was placed on the structuring or implementation of the NCS but on other things he was doing, but he did not, in any event, do those other things either in the period after the

notice of termination had been served. In those circumstances, the Arunvill Agreement terminated on 26th April, 21 days after service of the notice.”

17. Mr Davidson QC, appearing for the appellant, criticises that conclusion as failing to have regard to the extent of the material breach that was specified and as giving an impractical effect to clause 3.4 of the consultancy agreement. He submits that the notice of material breach complained only of the appellant having stated his intention not to perform his contractual obligations in future, not that the appellant had not performed in the past or was not performing at the date of the notice. The only breach specified was therefore remedied by the appellant sending the letter dated 20 April 2016 to Arunvill, stating that “Mr Bains confirms that he does intend to perform his contractual obligations under the Consultancy Agreement and therefore you should consider a breach (if any) remedied.” That, he submits, makes it clear how the material breach issue is resolved and therefore how the consultancy agreement stood as from the date of the letter and by the end of the 21-day period.
18. Mr Davidson submits that it was not necessary for the appellant to remedy other breaches that the Judge found proved, since these were not specified in the breach notice. Had remedy of the breach depended on the appellant doing such work as he was required to do, when called upon to do it, it would not be clear by the end of the 21-day period whether the breach had been remedied or not, and therefore whether the consultancy agreement was still on foot or not.
19. Mr Davidson gave the example of a jockey who is retained and paid by a trainer to ride his horses whenever requested to do so. (It was assumed that their contract contains the same material breach clause as in the consultancy agreement.) The jockey states that he will not ride horses for the trainer any longer. Having taken legal advice, the jockey recants and states that he will continue to ride for the trainer whenever asked to do so. Mr Davidson submits that the breach is remedied by the assurance given by the jockey. It is not necessary, nor is it appropriate, to wait until the jockey is next invited to ride for the trainer to see whether he does so. If he does not do so he is again in breach of contract, but it is a new breach following the remedy of the previous breach, and – if it is not a repudiatory breach – it would require another breach notice to be served.
20. I reject the argument that the letter of 20 April 2016 remedied the breach and do not accept the equestrian analogy. The background to the breach notice as found by the Judge was the following. First, the obligation of the appellant to provide the Services was not dependent on any cooperation or input of Arunvill. Second, Arunvill had declined to make use of the NCS that the appellant had devised, on the ground that they amounted to a fraud. Third, the appellant had been doing other work for Arunvill, since the rejection of the NCS, though Arunvill had refused to accept that the expenses of his trip to Hong Kong in early 2016 were their responsibility on the ground that he went there for his own purposes. Fourth, Arunvill had decided by early 2016 that it was unwilling to continue to employ the appellant. Fifth, the reason why the appellant said that he would not perform his contractual obligations was that Arunvill would not pay his bonus, a profit share and/or his expenses. Sixth, the appellant made an unequivocal statement in a meeting of 24 February 2016 that he would not provide any more Services to either of the respondents until he was paid the sums that he claimed were due. The Judge found that he “plainly showed an intention no longer to perform his

obligations for either Hollbreach or Arunvill unless he were paid ...” There is no challenge by the appellant to any of these conclusions.

21. The breach notice was therefore given to the appellant at a time when he had already ceased to perform his contractual obligations and was refusing to provide the Services. He should have been, but was not, providing the Services to Arunvill. The notice stated that, by his actions, the appellant was in material breach, in particular by advising of his intention not to perform his contractual obligations. The material breach specified is therefore not, properly construed, simply that the appellant had indicated that he would not work in future. It is that the appellant was refusing to resume work for Arunvill. In those circumstances, a remedy of the breach required the appellant not just to write a letter saying that he would perform in future, and then wait to be asked to do something, but to resume work within the 21-day period. The letter was a statement intended to countervail previous contrary statements and was asserted to be a remedy of the breach, but it was at best (if taken at face value) an indication that the appellant would work if and when asked to do something.
22. There was a live issue at trial as to whether the appellant was only obliged to provide the Services with the input or cooperation of Arunvill or whether his obligation was freestanding. The appellant’s case was the former, but the Judge found for Arunvill. Accordingly, to remedy the refusal to work, the appellant had to start providing the Services, not wait for Arunvill to instruct him to do something.
23. Mr Davidson’s equestrian analogy can therefore be seen to be a false analogy. The true analogy is with a jockey whose contract obliges him to exercise the trainer’s racehorses on a daily basis, not just to ride in races as and when requested to do so. In such circumstances, the jockey would not remedy his breach of contract by stating that he would perform but not in fact doing so. By the end of the 21-day period, it would be apparent that the letter was no more than a piece of paper and that the breach had not been remedied at all.
24. Mr Davidson further argued that the appellant could not be expected to perform any services in circumstances in which it was clear that the NCS had been rejected by Arunvill and so Arunvill would not accept the appellant’s work or require him to do anything. There was nothing for the appellant to do. The difficulty with this argument is that the “Services” that the appellant was obliged to provide are defined much more widely than the failed NCS that he had devised. In para 2.2 of his Particulars of Claim, the appellant himself described what he was obliged to do as falling into two broad categories, only one of which related to the NCS. Arunvill’s non-acceptance of the NCS did not mean that the appellant could not provide the Services, only that he could not implement and manage the NCS. The fact that the appellant had done other work for Arunvill after its rejection of the NCS and before his refusal to work further shows that he could still perform his obligations. If the appellant had been released by Arunvill from further performance, or from the provision of all Services, then the argument would be sound, but the Judge did not find that Arunvill had released the appellant. He only found that the NCS could no longer be provided and that, prior to his refusal, the appellant was doing other things for Arunvill.
25. In the absence of an assertion and a finding that Arunvill had released the appellant from his obligations, or told him that he was not required to do anything further unless so instructed, this alternative way of challenging the Judge’s order must fail. If rejection

of the NCS had put an end to the appellant's usefulness to Arunvill, it would surely have terminated his contract, or claimed that it had necessarily come to an end, at an earlier time. Instead, in early 2016, the appellant and Arunvill were in dispute about whether expenses were incurred by the appellant in the course of working for Arunvill, and the appellant was threatening to stop work until he was paid the sums he was claiming. Those matters are inconsistent with the notion that the rejection of the NCS had left the appellant with no contractual obligations to perform.

26. There is no pleaded case of release or of a request to await instructions. What is pleaded, at para 2.3.9 of the Reply, is that the appellant *was not* provided with any instructions by Arunvill to carry out work from January 2016 onwards, and that it followed that there was no material breach of the consultancy agreement. The Judge rejected the appellant's case that his work was dependent on some input or instructions from Arunvill and there is no appeal against that conclusion. Accordingly, there is no basis for saying that the letter of 20 April 2016 required no further remedy because the appellant was not required to perform any Services.
27. In my judgment, subject to one small point, the Judge was right for the reasons he gave. Remedy of the specified breach required the appellant to resume provision of the Services, not just to write a letter of intent to do so. The small point is that, in para 131 of the judgment, the Judge suggests that it was not or may not have been possible for the appellant to provide the Services because the NCS were not capable of being implemented. For the reasons I have given, that wrongly treats the Services and the NCS as being co-extensive, so far as the appellant's obligations were concerned, when the Services were a broader category.

The Hollbeach Agreement

28. The appellant's case on this part of his appeal is that the Judge misinterpreted the Hollbeach Agreement in requiring there to be a final resolution of the dispute with Varengold before he would be paid compensation. Mr Davidson QC advanced the appellant's argument on three different but connected levels: as a matter of contractual interpretation of the words used; as a matter of common sense, given what the appellant had done before the Hollbeach Agreement was made, and in light of the other background facts found by the Judge to exist at the time that the contract was made.
29. It is appropriate to start by identifying the parties' cases as they were before the Judge at trial, as revealed by the amended statements of case.
30. The appellant identified the dispute between Mr Shah and Varengold on one side and Mr Mora and Hollbeach and another company on the other side as being one about the circumstances in which Mr Shah had improperly acquired an interest in Varengold, to the prejudice of Mr Mora/Hollbeach. A demand had been made for €100m in compensation to be paid by Mr Shah/Varengold, which caused the relationship between the two sides to deteriorate further. As a result of these matters, the appellant, who had had a previous business relationship with Mr Shah, was asked by Mr Shields to act as an intermediary to help to resolve that dispute, and as a result the Hollbeach Agreement was made.

31. The Defence asserts that it was in fact Arunvill that had become a shareholder in Varengold, and that it was the respondents rather than Mr Mora personally who were in dispute with Mr Shah. Otherwise, the respondents essentially agreed with the appellant's characterisation of the dispute with Mr Shah and Varengold, though they added that one of the possible resolutions of the dispute that had been discussed between the parties (but not the appellant) was a revenue sharing arrangement with a term of 5 years.
32. The Judge found that there were two issues "in the settlement mix" at the stage shortly before the Hollbeach Agreement was made: purchase by the other side of Arunvill's shares in Varengold and a joint venture pursuant to which €100m would be advanced by the Shah side to the respondents for investment on a joint venture basis.
33. A few days before the Hollbeach Agreement, the appellant had sent an email to an advisor on his side saying "It looks like we are heading for an indirect joint venture with [Mr Shah]. There will be no formal agreement but we will have to sign a doc to drop allegations against [Mr Shah]". The Judge referred to that email in his judgment. Although it was not sent to Hollbeach, it is some evidence of the stage that the negotiations involving Hollbeach had reached, which must have been known to Hollbeach as well as to the appellant.
34. Against that factual background, the Judge proceeded to interpret the Hollbeach Agreement. In short, he rejected the appellant's case that a partial settlement, falling short of a final settlement that removed the risk of litigation with Mr Shah/Varengold, was a "resolution" or "settlement" that could trigger payment of a share of upfront profit arising from the sale of Arunvill's shares in Varengold for €5m.
35. The following paragraphs of the judgment contain the main reasons for so concluding:

"149 ... Standing back, what one has to recognize that the purpose of the agreement was to ensure that the claimant was intended to assist Hollbeach in settling its dispute with Varengold. There was a real risk, it was thought, of litigation with Varengold.

150. The intention lying behind the agreement, as expressed by the words used in it, was to buy off that risk of litigation. The sale of shares by Arunvill, which was not a party to the agreement, may have one of the features of the settlement [sic], but that was a collateral part. In my judgment the key objective of the agreement could not be achieved unless the risk inherent in the continuing existence of potential litigation was brought to an end.

151. When one looks at the contract itself, one can see the basis for that conclusion. Paragraph 1, which I set out above, refers to the fact that there has to be some sort of "acceptable resolution". "Acceptable" is a word which perhaps is less than clear, but what has to be resolved is perfectly clear, namely, "the dispute with Varengold/Solo".

152. The dispute with Varengold/Solo is referred to elsewhere in the document. There was a risk that there would be litigation in respect of that dispute, which Hollbeach wanted to avoid. The fact that Hollbeach wanted an overall settlement is also apparent from the part that I have already referred to and which is described by Mr Davidson as the “third section”: “As per your discussion with Martin, we would also propose to pay you 25% of any up-front profit generated from settlement with Solo or others in relation to the dispute.” One has to give meaning to both of the words “settlement” and “the dispute”.

153. It seems to me that the only proper meaning is that the parties intended there to be an overall settlement of the dispute which gave rise to the risk of litigation because the settlement would thereby remove that risk. Simply settling one issue would not, in my judgment, fulfil the intended purpose expressed by the agreement. ”

36. The grounds of appeal against this conclusion are the following:
- i) The Judge misinterpreted the Hollbeach Agreement as requiring a comprehensive settlement of all issues before compensation was payable to the appellant;
 - ii) The Judge was wrong to conclude that the payment of €5m was not a trigger for payment of compensation;
 - iii) The Judge was wrong to conclude that the appellant was not instrumental or effective in resolving the dispute to that extent, and
 - iv) In any event, the Judge was wrong to conclude that instrumentality or effect was a condition of payment of compensation.
37. Mr Davidson QC submits, as his primary argument, that the judge failed to give any proper meaning to the words “some sort of acceptable resolution” in paragraph 1 of the Hollbeach Agreement. Clearly, in the absence of the words “some sort of acceptable”, it would have been tolerably clear that compensation was to be paid when the dispute was resolved, i.e. when there was no longer a dispute that carried a risk of litigation. What is suggested is that the presence of those words, together with the way in which the Hollbeach Agreement is divided into three separate substantive parts, compels a different interpretation, namely that compensation could be payable under each of the parts separately upon a partial settlement with Varengold/Solo being reached, whether that was a joint venture or a share sale.
38. Mr Davidson submits that paras 2 to 5 of the Hollbeach Agreement, as numbered in the marked up version attached, are concerned with the expected joint venture agreement; paras 6 to 10 are concerned with upfront profit generated from settlement in relation to the dispute, and para 11 is concerned with the future use of “technology” brought to the table by the appellant. He therefore submits that a partial “settlement” with

Varengold/Solo was achieved (under para 6) when Arunvill sold to Mr Shah (or one of his companies) its shares in Varengold and that accordingly paras 6 to 10 of the Hollbeach agreement apply to calculate the appellant's share of the "upfront profit generated" from the partial settlement, viz. the immediate profit on sale of Arunvill's shares. He further submits that, given that the Hollbeach Agreement recognised that the appellant had already brought value to the table such that an agreement to compensate him was made, it would be a surprising conclusion that the appellant was to receive no compensation at all despite having provided value that then led to a partial settlement of the dispute.

39. These arguments were very persuasively developed and there is no doubt that they are an "available" and not an impossible interpretation of the Hollbeach Agreement, but I have come to the conclusion that the Judge was right to reject them.
40. Dealing first with Mr Davidson's linguistic argument, the words of the Hollbeach Agreement have to be interpreted in their factual context as known by or reasonably available to the parties. The authorities establishing this proposition are too well-known to require citation and in any event no dispute about the applicable principles exists. The context was that the dispute arose from Mr Shah's indirect acquisition of an interest in Varengold, which prejudiced the respondents' interests, and that there was an expectation that a large sum of money would have to be paid by Mr Shah in order to resolve it. A joint venture involving a very substantial investment by Mr Shah had been discussed as the possible basis of a resolution of the dispute. But whether there would be a resolution and if so on what terms was not clear. The appellant was being used to facilitate it and the Hollbeach Agreement was made on the basis that the appellant would continue to assist in achieving a settlement.
41. In that context, the reference to "some sort of acceptable resolution" is not naturally to be read as a reference to a partial resolution. The word "resolution" strongly implies putting an end to the dispute. This was not a dispute that had separate parts to it, each of which needed to be resolved separately. It is not suggested that "settlement with Solo", referred to in para 6 of the Hollbeach Agreement, was something different from the resolution of the dispute with Varengold/Solo referred to in para 1. The words "some sort of acceptable resolution" more naturally reflect the fact that, at the date of the Hollbeach Agreement, the final shape of the resolution was uncertain, rather than that something short of resolution of the dispute would be sufficient to trigger compensation. The resolution had to be "acceptable" to Hollbeach, otherwise there would be no settlement, but the sort of settlement that it would turn out to be was not at that stage certain. Accordingly, I consider that the word "acceptable" does no more than indicate that a resolution has to be acceptable and be accepted by Hollbeach before the appellant's entitlement arises.
42. Two possible components of a settlement were live, as the Judge found: a share sale and a joint venture agreement. The settlement might comprise one or the other or both, so the Hollbeach Agreement dealt with them both. I do not read the Hollbeach Agreement as comprising independent parts, one catering for a joint venture resolution and the other for an upfront payment settlement. Paras 7 to 10 are clearly drafted on the basis that both the joint venture net profits and any upfront profit derived from settlement would be used in computing the annual net profits for the first two years of the joint venture, which in turn would be used to calculate the appellant's share. The fact that "any upfront profit" is only one component of the formula for calculating the

net profit and the appellant's share in years one and two is an indication that supports the Judge's conclusion that an overall settlement was required. That is not to say that any settlement had to comprise both parts, because the parties at the time could not know for sure what sort of resolution would be achieved. But that does not mean that something that fell short of a settlement of the dispute would give rise to the payment of compensation.

43. As the Judge held, the substantial payments to be made to the appellant were dependent on resolution of the dispute – removing the risk of litigation. That was the benefit for Hollbeach that justified the substantial compensation that was to be paid. It was found by the Judge that the expectation at the time of the Hollbeach Agreement was that the dispute would be resolved by means of a joint venture agreement involving a very substantial payment by Mr Shah or one of his companies. It is improbable, in those circumstances, that the parties meant that compensation should be paid to the appellant when the main aspect of the intended resolution had not been achieved.
44. Although it can be said to make sense that the appellant, having brought value to the table already, as the Agreement recognises, might expect to be compensated, it equally makes sense that Hollbeach, being desirous of a resolution of its potentially litigious dispute with Varengold/Solo, would not pay compensation unless and until that objective was achieved. I am therefore not persuaded that the acknowledgment that the appellant had already made a valuable contribution is an indication that the parties must have meant compensation to be paid on a partial settlement only, especially one that did not involve Hollbeach (sc. the purchase of Arunvill's shares by Mr Shah).
45. I do not accept that the appellant was being treated as having already earned his compensation, as a result of the information about Mr Shah that he had already provided. Payment was contingent on a resolution of the dispute, and the Hollbeach Agreement was made in order to incentivise the appellant to facilitate it and thereafter to participate in the expected joint venture as coordinator and supplier of "technology". It is notable in that regard that the appellant's pleaded case was that he:

"... agreed to act as an intermediary between [Hollbeach/Argon and Varengold/Shah] and to assist in helping to facilitate a settlement of the Dispute. In the event that the Claimant managed to facilitate a settlement, [Hollbeach] would pay the Claimant 25% of the value of the upfront profit of the settlement sum."
46. In short, I am not persuaded by Mr Davidson's arguments that the Judge came to the wrong conclusion. Based on the unchallenged findings of fact that he made, his interpretation of the Hollbeach Agreement is the more natural interpretation, particularly in view of his finding that the important matter for Hollbeach was to remove the risk of litigation.
47. That conclusion makes it unnecessary for me to address in detail the separate question of whether the Judge was right to conclude that the appellant did not in any event facilitate a partial settlement and so had not earned his compensation.
48. That question arose on this appeal in a rather roundabout way because, as Mr McCluskey for the respondents pointed out, the appellant's pleaded case was that he agreed to act as an intermediary to assist in facilitating a settlement of the dispute (see

the quotation above). The respondents denied that he did in fact facilitate any settlement or partial settlement and the Judge found for the respondents on this factual issue. The Judge therefore, understandably, did not address the question of whether, as a matter of interpretation of the Hollbeach Agreement, the appellant had to be instrumental in achieving a settlement.

49. In those circumstances, the appellant had to argue either that the Judge's factual conclusion was wrong (which approach he disclaimed) or that, as a matter of interpretation of the Hollbeach Agreement, no causative requirement existed (which was not argued in the lower court) or the value that he had already provided was sufficient to satisfy it (which the Judge rejected).
50. It is not appropriate in the circumstances for me to reach a decision on an issue that was not live at trial and I decline to do so. If, as was common ground at trial, the Hollbeach Agreement did impose a causative requirement, it cannot be interpreted as meaning that the requirement had already been satisfied. It would make no sense for the parties to agree in their contract that the appellant had to facilitate a settlement and would be paid if he did so if they considered that he had already done what he was required to do and that he would be paid if a settlement eventuated. Moreover, the appellant's pleaded case clearly shows that he recognised that he had to facilitate after the date of the contract.
51. For the reasons given above, I therefore dismiss the appellant's appeal against the Judge's decision on the claim based on the Hollbeach Agreement.