



Neutral Citation Number: [2024] EWHC 3311 (Ch)

Case No: HC-2014-000788

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

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

Date: 20/12/2024

Before :

MR JUSTICE ADAM JOHNSON

Between :

(1) MIREILLE RAYMOND SALEM
(2) MOUSSA (“MOUSSY”) SALEM

Claimants

- and -

(1) FARAJ (“FREDDY”) MOUSSA SALEM
(2) BENO MOUSSA SALEM
(3) SEQUENT (C.I.) LIMITED
(FORMERLY ROTHSCHILD SWITZERLAND
(C.I.) TRUSTEES LIMITED)
(4) GUERNSEY GLOBAL TRUST LIMITED

Defendants

The **First Claimant** did not appear and was not represented.
Mr David Lewis KC and **Ms Talia Zybutz** (instructed by **Rechtschaffen Law**) for the **Second Claimant**

Mr Nathan Pillow KC and **Mr James Potts** (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **First and Second Defendants**.
Mr Jia Wei Lee (instructed by **Stewarts Law LLP**) appeared for the **Third and Fourth Defendants**

Hearing dates: 12 and 13 November 2024
Further written submissions: 22, 26 and 28 November 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 20 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Adam Johnson:

I. The Central Issue

1. The central issue in this case involves the proper meaning and effect of a term in a Settlement Deed dated 15 April 2016 (the “*Settlement Deed*”). The purpose of the Settlement Deed was to give effect to what has been called the “*African Settlement*”. The African Settlement resolved certain litigation which was ongoing at the time involving what the parties called the “*African Business*”. As part of the overall arrangements the litigation was stayed by means of a Tomlin Order dated 19 April 2016 – i.e. it was stayed except for the purposes of enforcing the terms of the Settlement Deed, as to which the parties were given liberty to apply.
2. In February of this year, 2024, one of the parties, Moussa Raymond Salem (“*Moussy*”) applied to lift the stay imposed by the Tomlin Order, and to enforce the Settlement Deed. Moussy’s primary case is that such enforcement requires the process of valuing and dividing the African Business to be referred to expert determination. He argues there is a subsisting obligation to that effect, and seeks a declaration accordingly. Alternatively he asks for a declaration that there has been a breach of contract and an inquiry as to damages.
3. The principal protagonists on the other side of the debate are Moussy’s uncles, Freddy Moussa Salem (“*Freddy*”) and Beno Moussa Salem (“*Beno*”). Their position, essentially, is that the term of the Settlement Deed relied on by Moussy as the foundation of his case is no more than *an agreement to agree* on expert determination, which is unenforceable. In any event, they say that even if there was once an enforceable obligation, it was time-limited, and the period of time during which it applied was only between 1 January and 1 February 2017, and Moussy has made no proper complaint about anything that happened during that period, and neither has he shown there was any agreement to extend it. In short Freddy and Beno say that Moussy is not entitled to any relief. They have requested summary determination of that issue, and the purpose of the present hearing is to determine that request.

II. Some Necessary Background

The Salem Family

4. The background to the Settlement Deed involves a falling out between members of the Salem family.
5. Originally there were four brothers – Isaac, Raymond, Freddy and Beno – born in Lebanon between 1933 and 1951. The evidence indicates they built a vast trading and investment empire in Africa, which operated via companies incorporated in a variety of jurisdictions. There were also property investments in the UK.
6. Raymond sadly died in November 2002, but during his lifetime was married to Mireille, and they had two sons, Moussy and Robert, and a daughter, Patti.
7. In 2003, certain trusts were settled for the benefit of the families of three of the brothers: the “*R1 Trust*” or “*R1 Settlement*”, for the benefit of Raymond’s family; the “*F1 Trust*”

or “*F1 Settlement*” for the benefit of Freddy’s family; and the “*B1 Trust*” or “*B1 Settlement*” for the benefit of Beno’s family.

8. The trusts were all administered by the same two trust companies in Guernsey, namely (1) Rothschild Switzerland (CI) Limited (which has since changed its name to Sequent (CI) Limited, so I will refer to it as “*Sequent*”), and (2) Guernsey Global Trust Limited (“*Guernsey Global*”).

The Underlying Dispute

9. In 2014, a dispute arose between (principally) Isaac, Mireille and Moussy on the one hand, and Freddy and Beno on the other. A claim was issued in London (“*the 2014 Claim*”). A number of allegations were advanced, some relating to UK properties (referred to as the “*Portfolio Business*”), and others relating more generally to the African Business, which was defined in the Particulars of Claim as comprising, “*a large trading business in West Africa, which involved the distribution of food, tobacco and textiles in various countries, in particular Algeria, Benin, Ghana, Libya, Niger, Nigeria, Togo and Morocco ...*”. At the heart of the claim relating to the African Business was the proposition that it had operated as a partnership between the four brothers under either Lebanese or English law (Particulars of Claim at para. 26(a)).
10. In addition to Freddy and Beno, the Defendants to the claim also included the two trust companies involved in administering the F1 and B1 Trusts, Sequent and Guernsey Global.
11. It appears that during the course of the litigation, and likely prompted by the fact that all three family trusts whose interests were now diverging were all administered by the same two trust companies, each trust appointed a further administrator. In the case of the R1 Trust this was Rothschild Trust Guernsey Limited; in the case of the F1 Trust it was Rothschild Trust (Schweiz) AG; and in the case of the B1 Trust it was RTB Trustees AG.
12. In due course the Defendants applied to strike out the proceedings or enter reverse summary judgment, dismissing the claims. While that application was pending, on 7 April 2016, the claims relating to the Portfolio Business were compromised. The relevant claims were stayed by a Tomlin Order dated 11 April 2016. At that point Isaac dropped out of the picture, because his complaints related only to the Portfolio Business.
13. It seems it was a little more difficult to resolve the remaining allegations about the African Business, advanced by Mireille and Moussy. But an agreement – reflected in the *Settlement Deed* we are now concerned with – was reached shortly afterwards, on 15 April 2016. And as I have said, the remaining part of the English litigation was stayed by means of the later Tomlin Order dated 19 April 2016.

The Settlement Deed

14. The parties to the Settlement Deed included a number of individuals and entities beyond those who were either Claimants or Defendants in the proceedings.

15. As regards the Raymond or “R” branch of the family, Robert, Moussy’s brother, also became a party to the Settlement Deed, together with the three trust companies by then involved in the administration of the R1 Trust: Sequent, Guernsey Global, and Rothschild Trust Guernsey Limited.
16. On the Freddy and Beno side, the parties to the Settlement Deed are Freddy and Beno themselves, plus the companies involved in administering the F1 and B1 Trusts, i.e. Sequent and Guernsey Global (common to both), and then also Rothschild Trust (Schweiz) AG (for the F1 Trust) and RTB Trustees AG (for the B1 Trust).
17. The Settlement Deed used the defined terms “Party” and “Parties” to refer to the wider group of 10 persons or entities I have mentioned, extending beyond the litigating parties, who executed its terms - i.e. Mireille, Moussy, Robert, Freddy, Beno, Sequent, Guernsey Global, Rothschild Trust Guernsey Limited, Rothschild Trust (Schweiz) AG and RTB Trustees AG.
18. Although the Settlement Deed contains some elaborate and detailed provisions, its basic scheme was simple enough. Its overall purpose (Clause 2) was fully and finally to settle the remaining “Claims” (as defined) made in the “English Litigation” (as defined), as to which Recital (B) said the following:

“In the English Litigation the Claimants allege that elements of the African Business were carried on in partnership and that assets relating to that business which are now held in the R1 Settlement, the B1 Settlement and the F1 Settlement belong to and should be held for that partnership.”
19. Clause 3 is headed “Acknowledgment”, and deals definitively with the central contention underlying the claims regarding the African Business:

“The Parties each acknowledge that there is not and never has been a partnership over or in relation to the African Business.”
20. Clause 4 sets out mutual releases. The remaining Claimants in the 2014 Claim (Moussy and Mireille), plus Robert, agreed that the “Defendant Released Parties” were to be “released and forever discharged from the Claims”. The “Defendant Released Parties” were Freddy, Beno and (amongst others) the trustees of the F1 and B1 Trusts. Likewise, Freddy and Beno gave releases in favour of (amongst others) the “Raymond Parties”, meaning Moussy, Mireille and Robert and other persons connected with them.
21. Clause 5 is a detailed provision setting out mutual covenants not to sue, given as between the Parties and certain others.
22. Clause 6 then sets out the substance of the settlement arrangement arrived at in order to compromise the ongoing litigation.
23. The present dispute centres of Clause 6, and in particular Clause 6.5. I will set out the text of Clause 6 below, but it is helpful at the start to note the overall scheme of the Clause. This falls into two parts. The first part was to be a “Conciliation Process”, meaning a “process of dividing the African Business on the terms of the letter set out at Schedule 2”.

24. The next (possible) part of the process was to be engaged if the Conciliation Process failed (which in fact it did). This is set out in Clause 6.5. It is this aspect which is at the heart of the present issue between the parties, because it is Clause 6.5 which Moussy now wishes to enforce, and which Freddy and Beno say is no more than an agreement to agree, and therefore of no legal effect.
25. The overall heading of Clause 6 is “***DIVISION OF THE AFRICAN BUSINESS***”. Clauses 6.1 to 6.4 deal with the Conciliation Process, as follows:

“ 6.1 Freddy, Beno, Moussy, Robert and Mireille each agree to enter into the Conciliation Process with or without Patty (albeit which it is currently Intended shall include Patty), and to execute and deliver to all other Parties a copy of the letter at Schedule 2, which is to be signed by each of Freddy, Beno, Moussy, Robert and Mireille.

6.2 The Parties each agree that the costs of the Conciliation Process shall be borne one third by Beno and the B1 Trustees, one third by Freddy and the F1 Trustees and one third by Moussy, Robert, Mireille and the R1 Trustees.

6.3 Freddy, Beno, Moussy, Robert and Mireille each agree that any determination or proposal for settlement put forward by Ezra Marcos as part of the Conciliation Process shall be put to the F1 Trustees, B1 Trustees and R1 Trustees for approval.

6.4 The F1 Trustees, B1 Trustees and R1 Trustees each agree to consider and, if considered by them in their absolute discretion to be appropriate, approve any determination or proposal for settlement put forward by Ezra Marcos as part of the Conciliation Process.”

26. Pausing there, it is convenient to mention the letter, a draft of which was set out in Schedule 2. This is headed “*Without Prejudice*”, and is addressed to Mr Ezra Marcos of Geneva, Switzerland. It starts “*Dear Ezra*”, and then continues in the first two paragraphs as follows:

“Differences have arisen among us regarding several commonly held business interests and real estate in Africa, held through various companies and trusts. We have agreed to separate and divide these common business interests, but have not been able to agree on the terms and price.

Our confidence in your extensive international business experience, and the many years that we have all known each other, lead us to ask you to serve as conciliator to help us to reach an amicable settlement of our dispute. We undertake to cooperate in furnishing any documents or other information you feel would be helpful in giving you an understanding of our situation.”

27. The Conciliation Process as described in the letter was to involve Mr Marcos making “*proposals for a settlement*” of the parties’ dispute, in doing which Mr Marcos was to be “*guided by principles of fairness and justice, giving consideration to any relevant trade usages*”. The Conciliation Process might be brought to an end by the parties reaching agreement, or by “*a written declaration either from you to us or from any of us to you, stating that further efforts at conciliation are no longer justified*”. The process was to be confidential, and while ongoing the parties undertook “*not to initiate any arbitral or judicial proceedings in respect of our dispute, or to take any step in those proceedings currently underway*”.
28. Clause 6.5 then goes on to deal with what was to happen, in the event of the Conciliation Process not being successful. I should set it out in full. It provides as follows:

6.5 If the Conciliation Process does not result in an agreed division of the African Business approved and effected by the F1 Trustees, B1 Trustees and R1 Trustees by 1 January 2017, including if by reason of Ezra Marcos being unable to act or unable to reach a conclusion, then, unless an extension is agreed by the Parties in writing, by 1 February 2017 the Parties agree to use reasonable endeavours to agree a binding process for an expert determination to value and divide the African Business. It is currently anticipated that such an agreement might include the following terms and steps:

6.5.1 to refer the division of the African Business to an independent expert;

6.5.2 the independent expert to be appointed jointly by the Parties;

6.5.3 in the event the identity of the expert cannot be agreed between the Parties, the expert to be appointed by the President of the Institute of Chartered Accountants in England and Wales;

6.5.4 each Party to be entitled to make written submissions to the expert if they so wish;

6.5.5 the expert to duly consider the written submissions and, to assist him in his deliberations, the Parties to provide such information as the expert reasonably requests;

6.5.6 once the expert has completed his deliberations it is envisaged that he would prepare a valuation of the African Business;

6.5.7 the Parties to then express whether they have a desire to purchase or sell each and any assets of the African Business;

6.5.8 if the Parties cannot agree to buy or sell the assets of the African Business between them then the Parties would put the African Business as a whole, or any part that is not sold between the Parties by agreement, up for sale on the open market; and

6.5.9 the costs of the expert to be borne one third by Beno and the B1 Trustees, one third by Freddy and the F1 Trustees and one third by Moussy, Robert, Mireille and the R1 Trustees.”

The Conciliation Process

29. As one can see from Clauses 6.1-6.4 of the Settlement Deed, the Parties who committed themselves to engage in the Conciliation Process were Moussy, Robert, Mireille, Freddy and Beno, although any agreed terms were then to be subject to approval by the R1, F1 and B1 Trustees. At any rate, the relevant Parties (representing a sub-group of the 10 *Parties* to the Settlement Deed) effectively gave themselves to the year-end to try and make progress.
30. It seems that only limited progress had been made by mid-December 2016. On 23 December 2016, however, in an email to Mr Andrew Penney of Rothschild Trust Corporation in London, who it is said sometimes acted as a channel of communication between the family members, Robert recorded having spoken to Beno, who was *“happy to move forward and will do so in early January given that it is now late in December”*. Robert suggested *“extending the deadline till the first week of February to see what progress can be made”*.
31. By 1 February 2017, however, Robert was writing again to Mr Penney, and saying that nothing had been heard *“from the uncles with regards to the Africa separation”*. He therefore asked Mr Penney to *“communicate with all the parties to prepare for the formal mediation/arbitration as stipulated in the signed agreement in 2016”*. Mr Penney responded on the same day, to say that the next step was really for Robert, Moussy and Mireille to *“agree with your uncles on a binding arbitration process”*.

Later Events

32. The limited correspondence relied on for the purposes of the present hearing gives only a sketchy picture of later events, but that is enough to show continuing but sporadic attempts being made to make progress by one means or another. I can summarise the position as follows:
- i) It seems that in the Summer of 2017 Clifford Chance, who were acting for the R1 Trustees, suggested that as an alternative to *“attempting to agree a binding expert determination process, which would no doubt be costly and time consuming”*, their clients *“would be willing to consider a reasonable offer for their one-third share of the ‘African Business’”*, but would need a considerable amount of information to be able to value that share. (This position is set out in a later letter from Clifford Chance, sent in March the following year, 2018).
 - ii) Later correspondence from Clifford Chance dated 18 September 2017 pressed for up-to-date information about the *“African businesses”*, but also indicated that their clients had not given up on the expert determination route, and suggested it would be useful to arrange a meeting to *“discuss how the expert determination process might be conducted”*.

- iii) In a letter dated 23 October 2017, Latham & Watkins, by then acting for Freddy and Beno, set out an offer, “... *to acquire the whole R Share for a total of US\$32 million*”.
 - iv) In letters sent in November 2017 Quinn Emanuel Urquhart & Sullivan LLP, acting for the F1 and B1 Trustees, said that their clients would work together with Freddy and Beno to provide sufficient information to allow their offer to be considered; and proposed that the parties “*wait and see*” what happened about the offer before pursuing expert determination (“*we suggest that we wait to see if those discussions resolve matters through agreement rather than through the expert determination process if at all possible*”).
 - v) Clifford Chance disagreed, and in their response of 9 November 2017 said they wanted to press ahead and have a meeting on the expert determination issue anyway, to keep matters moving.
 - vi) Nothing much had happened by March of the following year, 2018, and so Clifford Chance sent a long letter setting out the chronology to date and threatening proceedings. That is the letter referenced at the end of (i) above.
 - vii) It seems that at least some information about the African businesses had been supplied by September of the following year, 2019, but Clifford Chance thought this was not detailed enough and queried it. In response, however, Freddy and Beno said that enough information had been supplied and refused to engage further.
 - viii) A further clip of correspondence dates from the Summer of 2023. It shows Moussy having been in direct contact with his uncle Beno, for the first time in a long time. Moussy’s email of 6 July 2023 refers to them “... *trying to agree on the value of a business, agree on the value of the stock [and] the cash*”. But what is also apparent from these exchanges is that no agreement had yet been reached. There is no mention of expert determination.
33. Finally, I note that as part of his presentation of the background, Mr Pillow KC for Freddy and Beno said there is presently other litigation ongoing which appears in one way or another to relate to the African Business. This includes an action in this jurisdiction referred to as the “*Monline Claim*” – Monline International Limited being a BVI company which is said to have assigned certain causes of action to Moussy. The Monline Claim is listed for trial in a window in March 2025. There are related proceedings for discovery ongoing in the United States, under the machinery in Title 28 U.S.C. §1782.

III. The Present Application

- 34. The present Application is made by Moussy alone, although his mother, Mireille, has indicated she is content to adopt the points made by him and his brother Robert has also indicated he is supportive of Moussy’s position.
- 35. The Respondents to the Application are Freddy, Beno, Sequent and Guernsey Global – i.e., the Defendants to the 2014 Claim.

36. Moussy's Application, made originally on 23 February 2024 but amended on 12 July 2024, is for an Order:
- i) lifting the stay imposed by the Tomlin Order of 19 April 2016, and then either
—
 - ii) making (a) a declaration that the "*parties to the Settlement Deed shall use reasonable endeavours to agree a binding process for an expert determination to value and divide the African Business*", and (b) a related Order that Freddy, Beno, Sequent and Guernsey Global agree to the appointment of one of four experts proposed in the evidence of Moussy's solicitor, Mr Rechtschaffen, or "*make alternative proposals*"; or alternatively
 - iii) making a declaration that Freddy and Beno are in breach of the Settlement Deed and ordering an inquiry into the damages "*owed by Freddy and Beno to Moussy*".
37. Moussy's Application was not preceded by any pre-action correspondence. Mr Pillow KC said it "*came out of the blue*".
38. Naturally enough, correspondence followed, in consequence of which Moussy served a document referred to as his "*Position Statement*" (now "*Amended Position Statement*"), explaining the basis for the Application.
39. The gist of Moussy's reasoning is that, the Conciliation Process under the Settlement Deed having failed, "*the parties remain subject to the obligation to continue to use reasonable endeavours*" to "*agree a binding process for Expert Determination*" (Amended Position Statement paras 3 and 4). It is said that that obligation subsists today, either as a matter of construction of clause 6.5 or alternatively because any relevant time limit has been extended by agreement. That being so, Moussy says he is entitled to a declaration accordingly. If for any reason he is denied a declaration in that form, he says he should at least be entitled to a declaration that Freddy and Beno are in breach, with an inquiry as to damages to follow (such damages being designed to put him in the position he would have been in had his uncles acted reasonably and had an expert determination therefore taken place).
40. I have mentioned Freddy and Beno's main points above: they argue that Clause 6.5 of the Settlement Deed is not binding, alternatively that it was time-limited and operated only between 1 January and 1 February 2017, and no proper case is made out as to any default during that period. They deny that such time limit was ever extended. They say that in any event no properly pleaded case is advanced about anything happening (or not happening) during later periods, including the period following service of the present Application. And even if that is all wrong and there has been a breach, Freddy and Beno say that Moussy has not made out any proper case that he has been caused a loss.

IV. The Present Hearing

41. Freddy and Beno seek summary dismissal of Moussy's Application, effectively by way of either strike out or summary judgment. It was accepted by both parties that, given the context, neither CPR, rule 3.4(2)(a) and/or (b) (strike out), nor CPR, rule 24.3(a)

and (b) (summary judgment) have direct application. However, in SerVaas Inc v Rafidain Bank [2010] EWHC 3287 (Ch) Arnold J (as he then was) applied CPR, rule 24 by analogy in similar circumstances. Freddy and Beno have submitted that I should do the same here with both rules and Moussy, while not positively adopting that position, has not seriously objected to it. That is the approach I will therefore take, and thus the questions to address are:

- i) by analogy with CPR 3.4(2)(a) and/or (b), whether or not the Amended Position Statement discloses reasonable grounds for bringing Moussy's Application and/or it is otherwise an abuse of the Court's process; and/or
- ii) by analogy with CPR 24.3(a) and (b), whether or not Moussy's Application has a real prospect of success.

42. I propose first to ask whether Moussy has reasonable grounds for arguing that Clause 6.5 is enforceable and on its proper construction imposes a *continuing* (not a time-limited) obligation, and/or can show a real prospect of success in advancing that case. I will address the other issues canvassed by the parties in light of my answers to those basic questions.

V. Is Clause 6.5 enforceable, and does it impose a time-limited obligation?

Agreement to agree?

43. Resolving the dispute as to Clause 6.5 gives rise to a familiar problem: the search for meaning in contractual language.
44. A core feature of Clause 6.5, as Mr Pillow KC pointed out, is that much of it is a description of matters which have *yet* to be agreed. It describes what the parties wish to *try* to agree on, using their reasonable endeavours, the Conciliation Process having failed. Necessarily, such matters are *not* agreed and, implicit in the language of the Clause, is the idea that they might not be. The language of Clause 6.5 is thus essentially aspirational (“... *the Parties agree to use reasonable endeavours to agree*”) and tentative (the matters identified at sub-paragraphs 6.5.1 to 6.5.9 are only the points which it is “*currently anticipated*” an agreement on a binding process “*might include*”). The meaning conveyed by these linguistic signals is that everything was still up for grabs. That seems obvious, because if it was not, then the Parties would simply have set out what they had already agreed.
45. Such an apparently open playing field for future negotiation is not a promising platform for Moussy's argument that enough *had* been agreed to give Clause 6.5 binding effect. Mr Lewis KC though argued that clauses imposing an obligation to use *reasonable endeavours* are routinely enforced, provided certain criteria are fulfilled, and he said that those criteria are fulfilled in this case. He identified them by reference to the judgment of Longmore LJ in Jet2.com Ltd v Blackpool Airport Ltd [2012] EWCA Civ. 417, [2012] 2 All E.R. (Comm) 1053 at [69]:

“... an obligation to use best endeavours should usually be held to be an enforceable obligation unless (i) the object intended to be procured by the endeavours is too vague or elusive to be itself a matter of legal obligation; or (ii) the parties have ... provided

no criteria on the basis of which it is possible to assess whether best endeavours have been, or can be used ...”

46. Mr Lewis KC said that here, the *object* intended to be procured was neither too vague nor elusive: it was “*a binding process of expert determination*”. And neither was there any doubt about the *criteria* to be used for assessing their endeavours – first, there was the standard of reasonableness itself, and second there were the “*terms and steps*” referenced in sub-clauses 6.5.1–6.5.9, which acted as “*benchmarks against which to assess reasonableness*”.
47. In developing his submissions, Mr Lewis KC relied in particular on Astor Management A.G. v. Atalaya Mining plc and others [2017] EWHC 425 (Comm), [2018] 1 All ER (Comm) 547. There, the obligation was to use reasonable endeavours to secure senior debt finance and related guarantee facilities from third party funders, sufficient for the restart of mining operations at a dormant mining project in Spain, on or before 31 December 2010. Leggatt J held both that (1) the object of the endeavours was sufficiently certain, and (2) there were sufficient objective criteria by which to evaluate the reasonableness of the endeavours – and thus the obligation was enforceable. The critical aspect of Leggatt J’s reasoning is in the following passage from paragraph [67]:

“There is no problem of uncertainty of object, as there is no inherent difficulty in telling whether an agreement with a third party has been made. Whether the party who gave the undertaking has endeavoured to make such an agreement (or used its best endeavours to do so) is a question of fact which a court can perfectly well decide. It may sometimes be hard to prove an absence of endeavours, or of best endeavours, but difficulty of proving a breach of a contractual obligation is an everyday occurrence and not a reason to hold that there is no obligation. Any complaint about lack of objective criteria could only be directed to the task of judging whether the endeavours used were ‘reasonable’, or whether there were other steps which it was reasonable to take so that it cannot be said that ‘all reasonable endeavours’ have been used. Where the parties have adopted a test of ‘reasonableness’, however, it seems to me that they are deliberately inviting the court to make a value judgment which sets a limit to their freedom of action.”

48. To my mind, however, the present case is quite different to Astor Management, where the object of the reasonable endeavours was an agreement with a third party. In the present case, the object of Clause 6.5 was a further agreement between the Parties to the Settlement Deed themselves as to a “*binding process for an expert determination*”. Even assuming that that object was itself sufficiently certain (on the basis that there is no inherent difficulty in telling whether an agreement on a “*binding process*” has been achieved or not), there is still a major problem in identifying sufficiently objective criteria by which to evaluate the reasonableness of the Parties’ endeavours *to try and reach* such an agreement. Walford v. Miles [1992] 2 A.C. 128 makes it clear, on the highest possible authority, that the business of negotiation is an essentially selfish activity. At p. 138D-F, Lord Ackner said as follows (my emphasis added):

“How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined ‘in good faith.’ However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms.”

49. This guidance has relevance here. The question of what is reasonable depends on the context. If the context is the pursuit of self-interest in an essentially adversarial contest of negotiation, it seems to me it is reasonable for a party to take whatever position he or she likes, so long as there is no misrepresentation. If it is reasonable to act selfishly and solely in pursuit of one’s own interests, then the undertaking to act reasonably has no real meaning: acting reasonably affords the relevant party such wide latitude that it is essentially content free.

50. That conclusion is consistent with existing authority, including Little v Courage Limited [1995] CLC 164 at 169, where Millett LJ said that the addition of such words as “best endeavours” made no difference if the essence of the obligation was in the nature of an agreement to agree:

“An undertaking to use one’s best endeavours to agree ... is no different from an undertaking to agree, to try to agree, or to negotiate with a view to reaching an agreement; all are equally uncertain and incapable of giving rise to an enforceable legal obligation.”

51. That dictum has been cited with approval many times since, including by the Court of Appeal in Philip Morris v. Swanton Care & Community Limited [2018] EWCA Civ. 2763 at [32(i)]. That case involved a contractual provision for the payment of consultancy fees, for an initial period of 4 years, plus “such further period as shall reasonably be agreed”. This commitment to agree a further period was unenforceable. After quoting from Millett LJ in Little v. Courage, Gloster LJ went on to say the following at [32(ii)] (my emphasis added):

“Where a party is required to use ‘reasonable endeavours’ or ‘reasonably agree’ some matter, it remains permitted to negotiate in accordance with its own commercial interests. This principle is illustrated by Phillips Petroleum Co UK Ltd v Enron Europe Ltd [1997] CLC 329, where the parties to a series of gas sales agreements were to use ‘reasonable endeavours’ to agree as much in advance as possible the dates on which the seller would commence deliveries of gas to the buyer (with a fall-back date specified if the parties were unable to agree). The seller contended that each party was obliged to use its best endeavours

to reach agreement on the dates having regard only to technical and operational practicality. The Court of Appeal (per Kennedy and Potter LJ) disagreed: the buyer was not required to disregard its own financial position, and if the parties had intended that, the contract would have needed to state it expressly. Thus, if a party judges that its own commercial interests militate against agreeing the relevant matter, it is entitled to take that stance and there is, for this reason as well, no enforceable legal obligation to the contrary.”

52. This discussion illustrates the essential nature of the problem: a commitment to use reasonable endeavours to try and reach an agreement is meaningless, because it imposes no real limit to the parties’ freedom of action. Even applying a value judgment (to use Leggatt J’s phrase) only leads to the conclusion that the parties can reasonably do whatever they want in their own interest, provided they do not mislead each other. That is the same as saying there is no meaningful yardstick against which their behaviour can be assessed. If that is right, there is no enforceable contractual obligation between them. The problem is obviously magnified in a case like the present where Clause 6.5 required agreement by all 10 Parties to the Settlement Deed, each of whom was entitled to act in their own self-interest in deciding what to do.
53. Arguing against this, Mr Lewis KC for Moussy said it would make no sense to construe Clause 6.5 in a manner which rendered it unenforceable, given its centrality to the compromise struck by means of the Settlement Deed. To do so would be to say that Moussy and Mireille, and likewise Robert and trustees of the R1 Trust, had all agreed to wide-ranging releases of their existing rights in exchange for nothing. Mr Lewis KC said that this conclusion was reinforced by the structure and text of Clause 6 looked at as a whole. One only gets to clause 6.5 if there has already been an attempt to settle via the Conciliation Process which has failed. That being so, it makes little sense to say that the next phase of the Parties’ dispute resolution structure was itself only intended to work if (in effect) there was a further agreement between the Parties, which had to be reached by means of a new and separate process. That is just the same as saying that the next phase could be entirely derailed by any one of the Parties at will – and that would strip Clause 6.5 of any meaningful content.
54. These are attractive points, but I am not persuaded by them. They rely too heavily on the idea that because words appear in a contract, they must have been intended to have binding effect. Certainly there is a judicial impulse in that direction, especially if (as here) the contract has been drafted by experienced solicitors (see for example Petromec Inc. v Petrolio Bristlier SA [2005] EWCA Civ 891, [2006] 1 Lloyd’s Rep. 121, at [120]-[121]). But the impulse is only a starting point, and does not always provide a reliable answer. Sometimes the wording in a contract is inelegant and of questionable effect because the parties were not able to agree anything better. To my mind, the language of Clause 6.5 embodies just this form of compromise: it was not possible to agree on an immediately “*binding process for an expert determination*”, and the best that could be achieved was a commitment at least to try and agree on one in the future, if it became necessary to do so. The parties took their chances on what this might or might not mean. At the very least it provided a prompt for a future attempt at negotiation. As Potter LJ put it in Phillips Petroleum Co UK Ltd v Enron Europe Ltd [1997] CLC 329 (a case about a long term energy supply contract), at p. 342g:

“It is not unknown in contracts of this kind for the parties to adopt a ‘best endeavours’ or ‘reasonable endeavours’ clause for the very reason that they wish to make clear a future cooperative intention without providing for an enforceable legal obligation which in negotiation one or other may have refused to agree.”

55. In any event, it would be a mistake to think that holding Clause 6.5 to be an unenforceable agreement to agree would leave Moussy with nothing of value. As Mr Pillow KC indicated, Moussy was a beneficiary of the various releases and covenants not to sue, and quite apart from any other consequences flowing from that, was able to withdraw from the pending litigation on a “*drop-hands*” basis as to costs. That had value to him, especially given the concession reflected in Clause 3 of the Settlement Agreement that the premise of the 2014 Claim was mistaken – i.e., the “*Acknowledgment*” that there never had been any partnership in relation to the African Business.

Was there at least an agreement on expert determination?

56. Faced with all this, Mr Lewis KC said there was another way of looking at things. He relied on Clause 14.2 of the Settlement Deed, which provides (my emphasis added):

“If any invalid, unenforceable or illegal provision would be valid, enforceable and legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the Parties.”

57. On the face of it, this provision reflects an agreement between the Parties to disregard some part of an offending provision, if by doing so, and with whatever modifications are necessary, the remainder of the provision can be made to work.
58. Mr Lewis KC said that one could apply this technique to Clause 6.5. He put the point in a number of different ways, but they all reflect the same basic proposition, which is that even if the parties’ agreement to seek to agree on a “*process for an expert determination*” was unenforceable, that part of Clause 6.5 could be disregarded; but even if it was, it was clear that the parties had nonetheless agreed that there should be an “*expert determination to value and divide the African Business*”, and that was an enforceable obligation, even if the commitment to try and agree on a “*process*” for it was not.
59. Although initially attracted by this submission, on reflection I have come to the view that I cannot agree with it.
60. The reason is that I do not think the language of Clause 6.5 can be divided up as Mr Lewis KC suggests, so as to salvage from it a commitment to engage in expert determination come what may. The relevant language of the Clause reflects an agreement to “*agree to use reasonable endeavours to agree a binding process for an expert determination to value and divide the African Business*”. In my view, the correct reading of that language is that the Parties accepted there would be an expert determination to value and divide the African Business only if they could agree on “*a binding process*” for it, but not otherwise.

61. A number of features of the language of the Clause support that conclusion.
62. To start with, there is the natural emphasis on the object of the Clause being the prospective agreement on “*a binding process for expert determination*” (my emphasis). The reference to agreement on a “*binding process*” being a possible future event shows that, whatever level of enthusiasm for expert determination was presently being expressed, it had not yet reached the level of firm conviction. If it had, the parties could easily have said so. Instead they signalled that more was needed for a binding commitment to be reached.
63. That view is reinforced by sub-Clause 6.5.1, which says that one of the matters it was “*currently anticipated*” a future agreement “*might include*” was “*to refer the division of the African Business to an independent expert*”. That sounds the same as saying the parties were still undecided about whether expert determination was what they actually wanted.
64. Similarly, sub-Clauses 6.5.2 and 6.5.3 make it clear that even the basic question of how to appoint any expert was still up for discussion. That would have been an easy matter to resolve if there had *already* been an agreement on expert determination. Instead, even the uncontroversial idea of the President of the Institute of Chartered Accountants acting as appointing authority was left up in the air, as one among a number of “*currently anticipated*” matters that any future agreement on expert determination “*might include*”. The fact that the Parties were too hesitant even to agree on such basic points is a strong indicator that they either were not able to, or did not wish to, agree on anything. The whole tenor of the Clause is that everything, even the basic concept of expert determination, was being left up in the air.
65. The same goes for the other sub-Clauses of Clause 6.5, some of which deal with more complex matters - for example sub-Clauses 6.5.7 and 6.5.8 which deal with the principles to be applied in effecting any potential division of the African Business (should parts of it be transferred to relevantly interested Parties, or should the whole of it be sold and the proceeds of sale divided?). The same logic applies. Parties can appoint an expert and require him to apply such principles as they have agreed on in carrying out his mission, or appoint him on the basis that it will be up to the expert to decide what principles to apply (which sometimes happens, for example when an expert is appointed to value a parcel of shares on an exit from a business: see Mercury Communications Ltd v. Director General of Telecommunications & Anor [1994] C.L.C. 1125, per Hoffmann LJ at p.1139). Here, as I see it, the parties did neither. The intention expressed was only that they themselves *might* wish to direct the expert how to approach the exercise of division, if one were appointed. But they had not yet reached the point of agreeing to have one, and wished only to reserve their right to say something about the principles to be applied, if and when they did. Again, this is all too inchoate to suggest the existence of any present agreement.
66. As part of his case, Mr Lewis KC relied on the wording of the draft letter to Mr Marcos, contained in Schedule 2 to the Settlement Deed (see above at [26]). On this point, however, although I accept that in principle the draft letter may be used to inform the proper construction of Clause 6.5 (in my opinion it is plainly part of the factual matrix), I agree with Mr Pillow KC that when properly analysed it does not really help Mr Lewis KC’s position.

67. Mr Lewis KC relied in particular on the second sentence of the first paragraph as reflecting a concluded agreement to divide the African Business: “*We have agreed to separate and divide these common business interests, but we have not been able to agree on terms and price*”. I can see that if there *was* such a concluded agreement, that would provide a powerful reason for upholding the commitment to expert determination, as a means of holding the parties to their bargain.
68. In my opinion, however, Mr Pillow KC was correct to say that the language of the draft letter does not really reflect a concluded agreement at all, because to say that you have agreed to separate and divide a pool of assets is meaningless if you have not agreed on any terms for doing so including (crucially) the price. Thus, the true meaning of the draft is that there was a commitment to the idea of separating and dividing the African Business, but *only if* suitable terms including as to price could be agreed; but not otherwise. That does not assist Mr Lewis KC. If anything it does the opposite, because then both the Conciliation Process and the possible process for expert determination work consistently: the one requiring an actual agreement on terms including price, and the other requiring at least an agreement on a binding process designed to get to the same place, but neither having binding effect without some degree of further consensus.

Was Clause 6.5 time limited?

69. I can deal with this point shortly. In my opinion even if Clause 6.5 was binding, it was time-limited as Freddy and Beno suggest.
70. To begin with, I think the language of the Clause is clear on this point: it provides that if the prior Conciliation Process fails to produce a result by 1 January 2017, “... *then, unless an extension is agreed by the Parties in writing, by 1 February 2017 the parties agree to use reasonable endeavours to agree a binding process ...*”, etc.
71. The natural stress of the language is on the objective of agreeing a “*binding process*”. That was the target the parties were to aim at, and in the absence of written agreement to the contrary, 1 February 2017 was the cut-off point for achieving it.
72. Mr Lewis KC’s main point in response was to argue that whilst the Clause obliged the parties to *commence* their reasonable endeavours by 1 February 2017, they were not entitled immediately to *cease* using their reasonable endeavours after that date.
73. To my mind, that reading cuts across the natural meaning of the language used. Mr Lewis though said that imposing a cut-off on 1 February would lead to uncommercial results – for example, it would mean that the parties would have settled their ongoing litigation and entered into extensive releases and covenants not to sue in return for a temporary right that, once expired, left no (or little) recourse. Relatedly, it would mean that a *wrongdoer* might be able cynically to manipulate the position and avoid reaching any agreement, and be rewarded by the relevant obligation falling away after only a few weeks. The innocent party would be left in a very unsatisfactory position, unable then to press for specific performance, and (at best) only able to claim damages, which would have to involve a complex “*but for*” inquiry before the Court as to what would have happened had the wrongdoer properly complied with his obligations under the Clause.

74. None of these points persuades me that one should read the Clause in a manner which cuts across its natural meaning, not least because there are also compelling commercial reasons why it should be read in a manner consistent with that meaning. For example, under the general scheme of Clause 6, by January 2017 the relevant parties would already have been engaged in the Conciliation Process for about 8 months (the Settlement Deed was dated 16 April 2016). Viewed in that light, a one-month period starting on 1 January to seek to agree a process for expert determination as a back-up does not look ambitious or unrealistic. Instead it looks entirely sensible. One might expect responsible parties to anticipate well in advance of 1 January the likelihood of needing to make use of the back-up. Moreover such parties, having arrived at the year-end with no agreement after eight months of trying would be entitled to expect the viability of the back-up then to be tested quickly. Mr Lewis KC's points about the fragility of an undertaking which lasted only a short time are well made, but really add nothing to his points about the illogicality of labelling Clause 6.5 an agreement to agree, which I have addressed above: the answer is that that was the nature of the compromise the parties struck, and they were prepared to take the gamble that something might be agreed since that was better than having nothing at all.
75. In this context, Mr Lewis again relied on the decision of Leggatt J in the Astor Management A.G. decision (see above at [47]), where the agreement required the defendants to “*use all reasonable endeavours*” to obtain a senior debt facility and “*to procure the restart of mining activities on or before 31 December 2010*”. Leggatt J concluded that that obligation continued after 31 December 2010. At [75], he said that “[w]hen a contract imposes an obligation to do something by a particular date, this does not usually mean that the obligation expires on that date”.
76. That made good commercial sense in the context of that case: the nature of the endeavour – the restart of mining operations – was complex and difficult, and given the many factors in play it was sensible to construe the relevant clause as stating an aspirational target date, and not a drop-dead date.
77. The present context is different, as mentioned above. The relevant endeavour was a more straightforward one, and no doubt achievable – if it was ever going to be achieved – in the month-long period allowed. It makes good commercial sense to think that, after an eight month period of prior negotiation, the parties would have wanted to bring matters to a head and to know for certain within a specified time whether the prospective expert determination was going to get off the ground or not. Moreover, there is no getting away from the precise language of the Clause: “*unless an extension is agreed by the Parties in writing, by 1 February 2017 the Parties agree ...*”. These words are emphatic: whatever was to be done *had* to be done by 1 February and no later, unless the deadline was extended.
78. The guidance given by Leggatt J at para. [75] of his Judgment in Astor Management was general guidance only, and has to give way to any contrary intention expressed by the parties in any particular case. In my view, for the reasons given, there is such a contrary intention expressed in this case.

VI. Other Issues

79. My conclusions to this point are enough to dispose of Moussy's Application, and to accede to Freddy and Beno's request to summarily dismiss it.

80. Had it mattered, however, I would have been more sympathetic to the argument that the contractual deadline was extended by agreement in writing, at least to the extent of conceding reasonable grounds for advancing that case and/or a real prospect of it succeeding.
81. Moussy's argument on this issue was focused on two sets of correspondence:
- i) First, certain exchanges between Robert (Moussy's brother) and Mr Penney between 8 December 2016 and 1 February 2017 (some are referenced at [30]-[31] above).
 - ii) Second, the exchanges between Clifford Chance and Quinn Emanuel between September and November 2017 (see [32] above).
82. Moussy relied on the fact that in the former exchange, not only did Robert reference having spoken to Beno, who appeared happy in principle to extend time for the Conciliation Process into January 2017; but also, Mr Penney is shown saying, as late as 1 February 2017 (i.e., at the *end* of what should have been the one month period of reasonable endeavours under Clause 6.5), that it was now necessary for Robert, Moussy and Mireille to "*agree with your uncles on a binding process*". That is all consistent, argued Moussy, with the parties having come to some sort of understanding that there would be flexibility as regards the intended deadline.
83. Moussy relied on the later exchanges between Clifford Chance and Quinn Emanuel as reflecting a similar understanding, not least because in November 2017 it was Quinn Emanuel (acting for the F1 and B1 Trustees) who were encouraging Clifford Chance to "*wait and see*" what happened about the ongoing sale negotiations before pursuing expert determination – that being consistent with the idea that expert determination was regarded as still live as an option at that stage.
84. In response, Mr Pillow KC said that even so, it was simply not possible to identify in these exchanges any agreement in writing to extend time, as between all *10 Parties* to the Settlement Deed, which is what Clause 6.5 required. That is because:
- i) Mr Penney in 2016-2017 was Head of Wealth Planning at Rothschild Private Wealth, part of Rothschild Trust Corporation. No clear case is made out as to who he was acting for in saying what he said, and one cannot make any assumptions about the true extent of his authority.
 - ii) In the exchanges in late 2017, Clifford Chance were acting solely for the R1 Trustees, and Quinn Emanuel solely for the F1 and B1 Trustees. So Freddy and Beno were not bound by their exchanges, and neither (for that matter) were Moussy, Mireille or Robert.
85. It seems to me, though, that resolving these issues (were it necessary to do so) would require further factual investigation and could not safely be done summarily. As to Mr Penney's role, his email of 12 December 2016 shows him apparently acting as an intermediary between Moussy's branch of the family and Freddy and Beno (he says, "*... it seems that was a misunderstanding and I will pass that back [to Freddy and Beno]*"). As to the Clifford Chance/Quinn Emanuel exchanges, it is true that at the time Freddy and Beno were instructing Latham & Watkins not Quinn Emanuel, but it is

plainly arguable that there was co-ordination between the two, because Quinn Emanuel's suggestion that the parties "*wait to see*" about expert determination was based on the idea that what they should "*wait to see*" about was the outcome of the offer Latham & Watkins had put in train. As to Moussy, Robert and Mireille, Clifford Chance's second letter of 18 September 2017 (concerning expert determination) said that the "*R1 Trustees, together with their beneficiaries, now wish to embark on the expert determination process*" (my emphasis), and consistently with that Moussy in a Response to an RFI dated 24 May 2014, said that the proposals put forward by Clifford Chance in late 2017 reflected his position. If that is so, it seems at least arguable that they reflected Robert and Mireille's position as well.

86. All this leads me to conclude both that (i) arguably there *was* an ongoing understanding which continued beyond the end of February 2017, that expert determination remained an option, and (ii) arguably the written exchanges which have been produced *did* demonstrate assent on behalf of *all* relevant *Parties* – the question whether they actually do or not depending on more detailed examination of matters such as the precise nature of Mr Penney's role, the precise manner in which (in practice) the R1, F1 and B1 Trustees interacted with their beneficiaries, and the extent of the co-ordination (in practice) between those acting for the F1 and B1 Trustees, and those acting for Freddy and Beno individually. Had they been legally relevant, I would have held that such matters were not suitable for summary determination.
87. Likewise, had the issue arisen, I would have said that both (i) any questions of breach by Freddy and Beno, and (ii) any questions of causation, were not matters suitable for summary determination at this stage.
88. As to (i), it seems to me that whether reasonable endeavours have been used is a fact-sensitive inquiry. So is (ii), which depends on understanding the precise nature of the breach alleged, and what it is said would have happened but for its occurrence.
89. Mr Pillow KC argued that causation here is especially complicated because of the passage of time. The breaches alleged by Moussy are breaches by Freddy and Beno, but addressing the issue of causation also involves asking what all the other *Parties* to the Settlement Deed would have done had expert determination been on the table. Would reasonable endeavours have required them to agree to it? It is only if the answer is yes that Moussy has any recoverable loss, because his case depends on showing that but for any breach by Freddy and Beno, there would have been an expert determination and it would have resulted in a favourable division of the African Business. If any of the other *Parties* to the Settlement Deed would reasonably have been entitled to veto it, then there is no loss, whatever Freddy and Beno may have done.
90. This presents some conceptual problems, argued Mr Pillow KC. Thinking about the *Parties* who in 2016 undertook by Clause 6.5 to use their reasonable endeavours, there have been some significant changes. The Trustees of the R1 Trust, for example, have changed completely. The sole trustee is now Aquitaine Trustees Limited. What obligation can it possibly owe? Moreover, Rothschild Trust (Schweiz) AG, and RTB Trustees AG have now retired as trustees of the F1 and B1 Trusts respectively, although they remain in existence and thus on the face of it remain *Parties* to the Settlement Deed. What would a continuing obligation to use reasonable endeavours mean for them, if they presently have no beneficiaries with an interest in the outcome of any expert determination?

91. These are serious points, but if anything only serve to emphasise the fact specific nature of any inquiry into breach and causation, which the Court is not properly in a position to resolve now, not least because Moussy's primary claim as set out in his Amended Position Statement is not for damages for breach but instead for a declaration that the Clause 6.5 obligation persists. He has given only an outline case on alleged historic breaches, in the Annex attached to the Amended Position Statement. Had it been relevant to do so, I would at least have been inclined to allow Moussy to spell out that case in further detail. I acknowledge there are shortcomings in the way questions of breach and causation are presently dealt with, but on the hypothesis that Clause 6.5 gave rise to an enforceable obligation which persisted beyond 1 February 2017, I consider the proper response would have been to require appropriate clarification rather than to determine the claim summarily. (I note there was also an issue between the parties about whether any claim for damages should be brought by way of Part 7 proceedings rather than by lifting the stay on the 2014 Claim. That point does not arise for determination and in any event is a matter of form not substance, so I will not comment on it further).

VII. Conclusion and Result

92. For the reasons given above I accede to Freddy and Beno's request for summary determination of Moussy's Application. The Application to lift the stay on the 2014 Claim is therefore dismissed: there is no good reason for it to be lifted. I would ask the parties please to consult with a view to agreeing the terms of an Order reflecting this Judgment and dealing with costs. If agreement is not possible then any outstanding matters can be dealt with at a short hearing.