Neutral Citation Number: [2025] EWHC 60 (KB)

Case No: KB-2022-004658

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2025

**Before** :

**HHJ PARFITT**
**(sitting as a judge of the High Court)**

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**Between :**

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| **DEMISSIE ASAFA DEMISSIE** | **Claimant** |
| **- and -** | |
| **KEFI GOLD AND COPPER PLC** | **Defendant** |

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**Emma Horner** (instructed by **CANDEY**) for the **Claimant**
**Edward Levey KC** (instructed by **Herbert Smith Freehills**) for the **Defendant**

Hearing dates: 5 to 11 December 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 20/1/25 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ PARFITT

## HHJ Parfitt :

### Introduction

1. The Claimant is a management consultant who advises on capital investment projects, including in Ethiopia. The Defendant is an AIM listed English registered company one of whose subsidiaries holds licences to exploit a gold mining opportunity about 360 km west of Addis Ababa in the Oromia region of Ethiopia known as Tulu Kapi ("the Project").

2. The Claimant asserts a right to commission under the terms of a consultancy services agreement between the parties dated 1 June 2018 ("the CSA"). The claim form assumes the commission is about USD 6 million but the actual relief sought at trial is a declaration as to the Claimant's rights. The Defendant says no commission is due because there was no relevant success for the Claimant during the two year term of the CSA, which expired on 4 June 2020.

3. The Defendant counterclaims USD 205,000. It is agreed that USD 105,000 was paid by the Defendant to the Claimant on 14 November 2018 and USD 100,000 was paid by the Defendant to the Claimant on 27 December 2019 ("the 105k Payment", "the 100k Payment" and together "the 205k Payments"). The Defendant says the 205k Payments were on account of commissions expected to arise under the CSA once an investment vehicle associated with the Claimant known as "ANS" made a substantial equity contribution to the Project. In fact, ANS did not exist and there was no equity contribution and consequently no right to commission. The Claimant says the 205k Payments were retainer type payments which were unconnected to ANS or any potential equity contribution and so there is no basis for recovery.

4. It is common ground that the "validity" period of the CSA came to an end on 4 June 2020, that the Claimant provided no services to the Defendant after that time and that the Project has not, as of December 2024, secured the debt financing for which the Claimant's commission claim is based. The latest update the court was given during the trial was that the Defendant expects debt financing to come through shortly, but it is not there yet. It is common ground that unless and until this potential debt financing crystallises into an agreement giving the Defendant access to funds then no commission would be due. The dispute between the parties is whether the Claimant would have any rights if there was a relevant agreement with the banks.

5. Importantly, for the Claimant's case, during the currency of the CSA the Claimant says that he caused two development banks, the Eastern and Southern African Trade and Development Bank ("TDB") and the African Finance Corporation ("AFC") to sign a term sheet dated 27 September 2019 with the Defendant and the Defendant's expected debt financing will involve those same banks. The Defendant's Mr Adams agreed that without the Claimant, TDB would not have become interested in the Project but, the Defendant says, that was not enough to trigger a right to commission under the terms of the CSA and, also, AFC was not part of the Claimant's remit in any event.

6. The court heard evidence from the Claimant ("Mr Demissie[1]") and Mr Harry Anagnostaras-Adams ("Mr Adams") for the Defendant. Mr Adams is the founder and executive chairman of the Defendant.

7. The Claimant acted without legal representation until the Autumn of 2024. With the assistance of his new legal team, the Claimant re-amended his claim to focus on the contractual payment entitlement and the parties compressed the process of amending statements of case and providing witness statements into the few weeks before the scheduled trial. All involved, lay clients and lawyers, are to be congratulated for the efficiency with which this has been done. There must have been a risk that the trial date would have been lost. In the event all relevant issues have been fully and fairly ventilated without further delay.

8. In this judgment, I identify the issues, set out the relevant factual background, describe the CSA and give my findings on the issues of construction, which are determinative of the claim, and then make factual findings about and determine the counterclaim.

## The Issues

9. The parties agreed a list of issues which, except for issue 7 which was dropped, encompass the issues which I set out here. My purpose in defining the issues again is to assist the structure and readability of the judgment. I have indicated how my issues line up with the agreed list of issues.

10. On the claim there are two decisive and related construction issues: (a) did the two year "validity period" of the agreement refer only to the Claimant's obligation to provide services or was it a long stop within which funding had to be raised by the services provided by the Claimant for the Claimant to be entitled to commission; (b) did the Claimant's obligation to "manage the relationship to ensure a successful financial close for the transaction" mean that to become entitled to his commission, the Claimant had to see the relevant transaction through to completion or was it sufficient for the Claimant to have enabled the transaction that ultimately completed (whenever that might be).

11. The answers to those construction issues determine the claim and issues 1 to 6 and 8 in the list of issues.

12. The issue on the mistake based counterclaim is whether the Defendant made the Payments on the basis that ANS existed. By trial it was common ground that ANS had never been incorporated and so never existed. The Claimant says this had nothing to do with the payments but in any event Mr Adams did not put his mind to whether ANS existed even to the extent of making a tacit assumption.

13. The issue on the payments on account based counterclaim is whether the 205k Payments were made on account of the commission income that the Claimant was to receive following the anticipated ANS investment in the Defendant or as unconditional payments following separate agreement between the parties that the

[1] When I am referring to Mr Demissie as a witness or actor within the narrative I have used his name, so that he is named in the same way as Mr Adams. When the subject is the claim or counterclaim, I have referred to him as the Claimant.

Claimant should get further payments given the time it was taking for any commission payments to become available.

14. The counterclaim covers issues numbers 9 to 12 in the list of issues. Issue 13 is interest on the USD 205,000 which I have not been addressed on but about which I make some observations pending any further argument.

**Factual Background to the Construction Issues**

15. I do not understand the material in this section to be substantially disputed except where I indicate otherwise. It is largely drawn from Mr Adams' witness statement, supplemented where necessary by Mr Demissie's witness statement. This is the shared context for the purpose of addressing the meaning of the CSA.

16. Mr Adams set up the Defendant in 2006 to identify and exploit mining opportunities in frontier market jurisdictions, in particular within the Arabian-Nubian Shield. The Defendant's activities have been focused on local partnerships in Saudi Arabia and the Project. The Defendant acquired the rights holding company for Tulu Kapi mining in December 2013. By April 2015, the Defendant group acquired the mining licence for Tulu Kapi. But further substantial financial investment remained a necessary prerequisite to the Project's success.

17. Mr Demissie's evidence emphasised the Defendant's lack of actual mining experience. This seems correct – as I understand it the Defendant is yet to receive mining income, but its projects in Saudi Arabia and Ethiopia are progressing towards that goal.

18. Mr Adams does have considerable mining business experience, mainly in Australia, which he set out in his statement. Mr Adams also summarised the stages involved in bringing a mining project to operation. In summary, this requires an opportunity to be identified and confirmed, workable licences and land titles to be obtained, infrastructure and equipment to be built and/or acquired, in-country issues to be addressed and managed (e.g. local and national government and community matters, security issues, and labour issues) and the successful extraction, processing and sale of the deposits. All of this requires substantial finance well before any profits might be realised. In my words, it is a classic risk before reward venture.

19. As relevant to the issues in this case, that financing might include "debt financing", where the mining company would get funds in return for an obligation to repay those funds, together with interest or its equivalent, or "equity financing", where the mining company would get funds in return for shares. Equity funders likely take more risk and hope to benefit from the profits to be made from the mine (e.g. dividends) or the expected profits (e.g. share value). With particular relevance to the Project, Mr Adams explained in his statement how debt financing might take the form of a bond or bank lending and that equity financing might involve both local investors and/or international investors.

20. So far as the Project was concerned, it was of particular importance to attract local equity investors because of the greater confidence that would likely give to those investing without substantial experience of Ethiopian investing conditions. Furthermore local investors are an important part of what Mr Adams referred to as

"the social licence to operate", which in my summary is a commitment to work with the Ethiopian community for the mutual benefit of all concerned.

21. Mr Adams explained how Ethiopia was a frontier market without substantial mining experience on the scale envisaged by the Project. Mr Adams also explained how the Defendant had no experience of working within Ethiopia before taking on the Project: "we were "babes in the wood" in Ethiopia". Mr Demissie referred more generally to the challenges faced by Western institutions and investors in making direct foreign capital investment into Ethiopia.

22. In 2014, the Defendant engaged an external consultant, Endeavour Financial, who specialise in finding mining finance. This led to negotiations with a South African bank, but by Spring 2018 these had fallen through. In addition to private banks, the Defendant was also considering, with Endeavour Financial's assistance, investment from development banks. Mr Adams explained that development banks are typically country owned institutions formed to provide "early-stage support" to countries who are developing their economies towards models which would be more attractive to typical commercial banks and investors. Mr Demissie substantially agreed with this description in cross-examination.

23. Mr Adams explained that by 2017, the Ethiopian government had made an investment commitment to the Project. As I understand matters, this remains the case notwithstanding various periods of political instability which are also described in Mr Adams' statement and occurred in general terms from about 2016 and included what Mr Adams refers to as "a terrible civil war which lasted from around late 2020 to late 2022". For present purposes this is an example of the type of instability that makes for a challenging investment environment. The potential for such instability is part of the background and context for the CSA as another factor which feeds into how difficult it might be to raise the relevant finance.

24. As of Spring 2018, the Defendant had raised and invested tens of millions of USD to further the Project, including work directed at proving the potential resources and other technical aspects, but had yet to find the external finance, then estimated at about USD 130 million, which was required to build and operate the proposed mine.

25. Mr Demissie knew a former British ambassador to Ethiopia, who had been on the board of the previous rights holding company for Tulu Kapi and retained an involvement with the Defendant. Mr Demissie said he had a chat with this person about the Project in 2015, which, after an introduction between Mr Demissie and Mr Adams, did not go anywhere. A further meeting between Mr Demissie and Mr Adams was brokered in the Spring of 2018.

26. Mr Adams sent Mr Demissie an email on 18 April 2018 which attached a memorandum summarising the Project for potential equity investors. Mr Adams told Mr Demissie this memo would also be useful for debt finance. The email stated a target closing of 1 October 2018. In his cross-examination, Mr Demissie agreed that he considered that raising debt finance using his structure was doable within 6 months. In particular, Mr Demissie accepted a potential timetable of 4 weeks for a term sheet and 6 months to close a deal. Of course, these were hopes rather than commitments but the evidence is relevant context and, as will be seen, a short potential timescale is reflected in the CSA.

27. Mr Demissie contacted TDB. TDB was not familiar with mining investment. Mr Demissie explained to the court that he persuaded TDB to become interested in the Project. On 25 April 2018, TDB and Mr Demissie entered into a confidentiality agreement and, on 26 April 2018, Mr Demissie sent them information about the Project. On the same day, Mr Demissie emailed Mr Adams to say that TDB were very interested and he hoped for an expression of interest within days and a term sheet following about 4 weeks later (in the event an expression of interest did come on 18 January 2019 and non-binding heads of terms in September 2019).

28. On 8 May 2018, TDB sent to Mr Demissie a brief letter asking for more information – while the heading of this letter is "Subject: Letter of Intent" and it is described in Mr Demissie's statement as "a letter of intent", the contents do not bear this out since they contain no expression of intention. However, it must follow from the letter that TDB were interested enough to ask a few questions seeking further information about the Project. I have no doubt that TDB were genuinely interested and that this interest was sparked and fostered by Mr Demissie. Mr Adams accepted as much in his cross-examination.

29. On 11 May 2018 the Defendant and Mr Demissie entered into a confidentiality agreement related to Project information which might pass between them.

30. Mr Demissie was reluctant to agree during cross-examination that he considered just prior to signing the CSA that the period from financing to production might be doable within 2 years, which was an assumption made in the memorandum emailed on 18 April 2018. Mr Demissie did confirm that he sent that memorandum to TDB and so it is likely that he thought that timescale was at least potentially achievable. Mr Demissie avoided answering the direct question by referring to the memorandum being based on a different financing structure, which it was, but the general question about timing between finance and production could have been answered regardless of how the money was raised or by providing an explanation about why it would have made any difference. It seemed to me that Mr Demissie was avoiding answering the question in case it had some significance that might harm his case.

31. My impression of Mr Demissie's witness statement was that he downplayed the potential significance of local equity investment being discussed between himself and Mr Adams prior to the signing of the CSA in favour of potential debt financing. Mr Adams' witness statement focused on the local equity as being of particular importance.

32. From both perspectives, I suspect those choices were presentational as much as anything else. It is clear that local equity was discussed between Mr Adams and Mr Demissie as it was the subject of a short email from Mr Adams dated 8 May 2018 which emphasised that the Defendant was prepared to take equity in birr – a benefit for local investors – and that Mr Adams wanted Mr Demissie to consider this as a matter of priority. Mr Demissie agreed in cross-examination that he was positive with Mr Adams about his ability to get in local equity.

33. In his oral evidence, Mr Demissie did not agree with a statement made by Mr Adams in a Regulatory News Service ("RNS") announcement dated 10 June 2018 which said that a local investment syndicate had agreed, subject to terms, to invest USD 30 million in Birr into the Project. The Defendant's point was that this was likely to

reflect something Mr Demissie would have told Mr Adams and it would point to an exchange which could have taken place prior to the 4 June 2018 signing of the CSA. Mr Demissie said he had not met any syndicate members by then, although I was referred to no document to support that.

34. I agree with Mr Levey that it is unlikely that Mr Adams would put something in an RNS which was unjustifiable (I note that Mr Demissie does not accept this). I assume the general purpose of an RNS includes putting out good news where possible and giving notice of and explaining bad news where required. I am less confident that the discussion inferred from the 10 June 2018 announcement would necessarily have happened prior to the CSA – although it is at least not unlikely and the USD 30 million value is consistent throughout the history which followed (including when a promised USD 9 million was added in 2019/20).

35. However, in the circumstances of considering what might be relevant context for the purpose of construing the CSA, it is sufficient for me to find that there was a shared hope that Mr Demissie would shortly be able to find local equity investment. The likelihood of this conclusion is also supported by what happened subsequently during 2018 in terms of promises / agreements from the Mr Demissie / ANS side.

36. In relevant summary, drawing the threads of evidence together in a manner which sets out the context within which the CSA needs to be construed, and reminding myself that context must be common between the parties to be relevant: the Defendant needed debt and equity finance and had done for some years; securing finance was essential to the Project; the sooner workable finance was obtained the better; the Defendant's difficulties in obtaining finance included those presented by a proposed large scale commercial mine in Ethiopia; Mr Demissie offered the in-country experience and contacts that could mitigate those difficulties and had in part already done so by the progress made with TDB; and there was a shared hope that financing could be obtained in respect of debt and equity within a relatively short window and once financing was obtained, it could take about 2 years to get to profitable production.

37. This contextual framework is all reflected to some extent in the language of the CSA. I have no doubt it was information that was known to both Mr Demissie and the Defendant.

**The CSA – The Law on Interpretation**

38. There was no dispute about the relevant law on construction. It has been set down and summarised in a number of well-known cases. I was taken in particular to *Arnold v Britton* [2015] UKSC 36, Lord Neuberger at [14] – [23] with emphasis on the references to quality of drafting at [18] and how commercial commonsense can assist in identifying the parties' intention but cannot be used to rewrite the bargain [19] – [20]. I cite the concise summary given in *Sara & Hossein Assets Holding v Blacks Outdoor Retail* [2023] UKSC 2, Lord Hamblen at [29]:

> The relevant general principles are authoritatively explained by Lord Hodge in his judgment in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at paras 10 to 15. So far as relevant to the present case, they may be summarised as follows:

(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.

(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.

(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated.

**The CSA – wording**

39. The CSA is a short contract. Except for one or two clauses added by the Defendant, it was drafted by Mr Demissie. It was generally assumed within the submissions that because of those facts the court should necessarily treat it as a contract where the quality of the drafting would justify greater use of contextual tools. I agree that contextual tools have a role to play in the proper construction of the CSA but as will be seen from the analysis that follows, in context, the natural meaning of the language used in the CSA answers the issues which the parties have raised without much difficulty and well within the parameters referred to in the *Sara* summary.

40. However, largely for Mr Demissie's benefit, I do make some additional observations about the drafting. While the CSA is not a "detailed professionally drawn contract" (*Wood v Capita* at [13]), in my view, it is a reasonably well written contract which at the time was sufficient for its purposes and whose brevity should be seen as a virtue or as Mr Adams said at the time: "it is a lot simpler than I'm used to". The fact that the parties are presently in dispute about its meaning does not undermine this. Whilst the CSA would be different and longer if it was drafted by lawyers it might not necessarily be better or more fit for purpose or provide better answers to the problems now raised. I am not suggesting this makes any difference to the process by which the outcome of the construction issues are decided but, for example, this is not one of those cases where something has obviously gone wrong with the language or where the contract contains inherent contradictions.

41. The construction points involve the familiar problem where issues have arisen which enable the parties to argue for particular constructions of their agreement. Perhaps, if this particular problem had been addressed expressly between the parties at the time they might have agreed on a particular solution. In a similar way, if they had instructed lawyers then those lawyers might have asked questions which would have flushed out the potential issues which have arisen and arrived at language to resolve them or tried to and only come up with a compromise that left the issue unresolved since both parties thought the language used protected their interest. All this is speculation. The general point is that the construction of the CSA does not present any particular challenge: its language and structure is neither opaque nor confused; its subject matter and general purpose is clear; the commercial drivers and context at the time are not difficult to understand; and, a commission contract is a familiar arrangement in the commercial and legal world which the parties inhabited.

42. In all relevant respects, for the reasons I explain below, the language of the CSA provides the answers to the present dispute. This reflects my overall view that it was sufficient for its purpose.

43. In whatever I say below I have taken the entirety of the contract into account. I have attached a copy of the CSA text, in full, as an annex to the judgment.

44. The CSA is structured much like the definitions clause of a longer contract. The left-hand column is a list of subjects: "KEFI"; "DAD"; "Transaction"; "Financing Structure"; "Roles and Responsibilities" (for each party); "Timeframe"; "Consultancy Fee"; "Confidentiality" and "Validity". The right-hand and larger column sets out what the parties agree under the relevant heading.

45. These subject headings are reasonably comprehensive at a general level. They address who the agreement is between, the immediate context in which they wish to make an agreement, what they are each expected to do, payment, one additional obligation (confidentiality) and duration (the impact of which is disputed). These are the core obligations which the parties needed to set out between them in the circumstances.

46. I set out the most relevant language from the second column in the CSA in the order it appears (I add and underline the first column subject if it is not otherwise in the language quoted):

    i) *KEFI is currently developing the Tulu-Kapi Gold mine project in Ethiopia.*

    ii) *DAD is an investment advisory services provider…*

    iii) *Transaction KEFI requires debt financing of US$160m…private equity financing of US$20-30m…KEFI has asked DAD to advise it on a strategy to raise the necessary capital and secure international and local financiers for the Tulu-Kapi project.*

    iv) *Financing Structure* [reference to existing bond proposal]*…the private equity is to be sourced from a local group of investors through an investment vehicle organised and managed by DAD.*

    v) *Roles and Responsibilities… DAD will identify suitable debt financing institutions and manage the relationship to ensure a successful financial close for the transaction…DAD will be responsible for organising and managing a local equity investors group through a suitable investment vehicle and ensure the successful financial close for the transaction.*

    vi) *Roles and Responsibilities… KEFI will be responsible for facilitating the provision of all available company and project information. KEFI will also deploy sufficient resources to engage (through meetings, presentations and communication) with potential financiers and investors.*

    vii) *Timeframe The financial close is October 2018.*

    viii) *Consultancy Fee KEFI agrees to pay DAD…on the successful completion of the transactions…1. 3% of the debt financing amount 2. 5% of the equity*

*financing amount from international equity groups 3. 7% of the equity financing amount from the local equity pool.*

*Payment of the commissions will be 30 days from the date of financial close… To be clear any such commissions relate solely to funds raised by DAD…*

*KEFI also agrees to pay DAD a mobilization fee of US$10,000 per month for three months, to cover the expenses to be incurred during the fund raising effort…*

ix) *The validity period of this agreement will be two years from the date of signing this agreement.*

**CSA – the Parties' Arguments**

*(1) The Claimant's case*

47. The Claimant's case is that he is entitled to 3% commission for the debt financing that is likely to be raised from both TDB and AFC because of the 27 September 2019 term sheet and because he remained available to assist with the banking relationships during the term of the CSA. This involves two assertions by the Claimant about the proper construction of the CSA: one, that the two year "validity period of this agreement" meant Mr Demissie was bound to make available his services for at least two years but not that "financial close" had to occur within the validity period; and, two, that to earn his commission, Mr Demissie only had to enable a transaction during that validity period, such commission becoming payable whenever completion might occur.

48. The Claimant's starting point in respect of the meaning of "validity period" is that it would be commercially absurd for any consultant to do all the work necessary to cause these banks to enter into a financing deal with the Defendant but then be precluded from getting paid because "financial close" happened to fall the wrong side of the two year cut-off. Ms Horner identified four reasons in support of the Claimant's construction:

i) Nothing in the consultancy fee section of the contract refers to the validity period and nothing in the validity period section refers to the consultancy fee section and if that was intended it would be easy to say so.

ii) Since the validity period must have been included for a reason, commercial commonsense can be applied to provide the answer that it refers to the duration of Mr Demissie's consultancy services. It would be key for Mr Demissie to know for how long he had to provide those services. It makes much less sense if the payment obligation had to occur within those two years because that would be unfair to Mr Demissie who might work hard for two years and then miss out because financial completion occurred, for example, on 5 June 2020.

iii) Commercial commonsense also points to it being unfair for Mr Demissie not to be rewarded for his two years of work if the outcome of that work did not occur within the two year period. Mr Demissie has agreed to provide two years

of work and he should get the remuneration for that commitment even if the fruits of his work do not become available until after the period.

iv) In a similar way if financial close had to happen within two years there would come a point when it would be clear to Mr Demissie that this was not going to happen within the two years and so there would be no point in carrying on to provide the two years' worth of services.

49. As an alternative to the construction argument, Ms Horner argued that the court should imply a term that the payment right arising at "financial close" could occur after the two year validity period. Ms Horner accepted that such an argument cannot work if the court considered that the Defendant was right about the construction of the agreement because then the implied term would contradict an express term of the contract.

50. Ms Horner's second construction point was that the CSA only obliged Mr Demissie to exercise the roles and responsibilities set out in the CSA for the purpose of furthering the goal of the transaction rather than to achieve the transaction. It would be wrong to describe Mr Demissie as having an obligation to "ensure" that financial close took place if "ensure" went further than "enable" or "facilitate". Mr Demissie could not close a deal because he had no authority to do so and any such deal would most likely require the performance by the Defendant of conditions precedent to closure ("CPs") that Mr Demissie would have no ability to help with. Accordingly, the Claimant's case is that while he continued to make himself available to provide relationship management services after the 27 September 2019 term sheet, essentially by that agreement he had done enough to earn his commission, so long as those banks ended up getting to financial close but that was a matter for the banks and the Defendant, not Mr Demissie but he was always available to help, if required, during the two year term of the CSA.

51. This construction point also tied in with Ms Horner's argument that it was necessary, but only necessary, for the exercise by Mr Demissie of his roles and responsibilities, as set out in the CSA, to satisfy a but/for causation test so far as the obtaining of the funding was concerned. It was the Claimant's case that this was satisfied because, as Mr Adams accepted at the end of his oral evidence, if it were not for Mr Demissie's efforts the transaction with the banks which the Defendant hopes will complete within the next few months would not exist.

*(2) The Defendant's Case*

52. The Defendant's case is that the validity period of the CSA was two years and that applied to the agreement as a whole. Among other things, it was necessary for Mr Demissie to be managing the relationship with the relevant debt or equity investor at the time of financial close and if that had not happened by the end of the validity period then there was no right to commission.

53. In my summary of the points I regard as most relevant, Mr Levey supported this conclusion by making the following points of detail:

i) It was common ground that the CSA was not a commission agreement where the right to commission only depended on an introduction being made or even

an introduction being the effective cause of a transaction. Both sides accepted that it was necessary for Mr Demissie to have "raised" the relevant funds and that such "raising" would include by the provision of the services set out in the "Roles and Responsibilities" section of the CSA.

ii) It was also common ground that the "Validity" section created something akin to a long-stop. The gist of the dispute was whether that applied only to Mr Demissie's services obligation or whether it extended to all primary obligations and, most relevantly, the time within which financial close had to occur.

iii) The starting point must be the language of the CSA and the Claimant's arguments barely focused on the language but rather side-stepped the language for a Claimant centric focus on commercial commonsense. But commercial commonsense cannot be used to make a different bargain (see the analysis and outcome in *Arnold v Britton*).

iv) Focusing on the language means recognising that "the validity period of this agreement" means what it says which is that after two years the agreement would no longer be valid. This also makes sense given that the CSA expressly envisages financial completion by October 2018. If this is what was hoped for then allowing an extra 18 months for uncertainties provides far greater clarity than the Claimant's competing construction which necessarily leads to an argument about what would be sufficient to amount to having "raised" the funds or the extent to which "raising" might have to modify "ensure… successful financial close".

v) Likewise, focusing on the language means recognising that "manage the relationship to ensure a successful financial close" envisages Mr Demissie providing a management service for the benefit of the relevant debt financing institution and the Defendant which will continue and be directed at bringing about financial close. Again, the Claimant's construction creates uncertainty about the point at which the management obligation might come to an end if it only meant "enable" compared to the clarity and business benefit of the management obligation continuing until the point at which successful financial close is reached.

vi) Those two constructions support each other. There are two separate events which could bring the CSA to an end: either, successful financial close in which case the Claimant gets his commission, or the end of the two year validity period, in which case the Claimant has failed to earn his commission because he has not managed the relationship to financial close within that time.

vii) The context and the language support a conclusion that the expectation of the parties was a financial close within about 6 months: "October 2018" is stated. The two year validity period was another 18 months again. This itself allowed for the uncertainties around the hoped for date for financial completion. The expectation of relatively early completion is supported by the three month expenses provision.

viii) As to the four points made by Ms Horner: there was no focus on the text; it is not enough to assert that the validity period relates only to the management period there must be a persuasive reason for that; it is artificial to separate the period of management from the purpose of the management; long-stop dates provide cut-offs sometimes that can mean a near miss failure; there is nothing commercially absurd in the parties choosing to structure the commission opportunity in this way. The possible existence of other ways to do it does not mean the parties did not settle on the way set out in the natural meaning of the language used in the CSA.

**CSA – Further Discussion and Conclusion**

54. I agree with the Defendant substantially for the reasons given by Mr Levey and which I have summarised above. The short version is that the CSA is clear on its own terms about what Mr Demissie needed to do to earn his commission and the timeframe within which that needed to happen and in neither respect has Mr Demissie earned his commission in the circumstances.

55. Mr Demissie seeks payment of commission related to the debt finance and so it makes sense that the parties have focused on that aspect. It is worth pointing out that potential rights to commission would have arisen from any or all of debt financing, international equity and local equity. Each of those had separate commission rates, albeit the roles and responsibilities section did not refer to the international commission.

56. The Defendant's main obligation, so far as Mr Demissie was concerned, was its agreement *to pay DAD the following commission on the successful completion of the transactions*. Such commissions were payable 30 days from the date of *financial close*.

57. Similar language appears in the roles and responsibilities section for Mr Demissie: *manage the relationship to ensure a successful financial close…*, regarding the banks, and *organising and managing a local equity investors group…and ensure the successful financial close for the transaction*.

58. The natural meaning of this language, so far as the right to commission is concerned, is that if you manage through to the Defendant having a right to its money then you will get your commission. I see nothing in this conclusion that lacks commercial commonsense. On the contrary it seems entirely commercial and in the interests of both parties: the Defendant wants the money and is prepared to pay Mr Demissie accordingly and Mr Demissie wants the chance to earn the significant commission.

59. In argument Mr Levey identified that the Claimant's case, whether as put by Ms Horner or as described by Mr Demissie in evidence, involved diluting the word "ensure" with words or phrases that are not natural synonyms of ensure: "enable"; "but/for"; "off the back of"; "get the deal in place"; "establish or build"; and "comfortable" (as in get the banks and the Defendant "comfortable" with each other). But, Mr Levey stressed, this is not what "ensure" means. Ensure carries with it a sense of bringing about or making sure.

60. Ms Horner's argument was, as I understood it, a little more nuanced than Mr Levey suggested. Ms Horner said that since it was not possible for Mr Demissie to "ensure" that a financing agreement was reached with the bank because he did not have authority to sign up to any agreement or to fulfil the likely CPs then the extent of his obligation must necessarily be something different than "ensure" hence for the purpose of the CSA "ensure" is better construed as "enable".

61. The starting point for Ms Horner's argument is correct, it was not possible for Mr Demissie to do all the things that might be required for financing to be secured (that much is obvious) but the next step does not follow and, as Mr Levey demonstrated, ignores the actual language of the CSA in favour of rewriting the agreement to try and give the Claimant a plausible claim for commission for getting TDB and AFC (he says) to a non-binding term sheet.

62. It is perhaps a trite observation, certainly neither counsel mentioned it, but it is obviously wrong to assert that Mr Demissie was obliged to the Defendant to ensure financial close. It is the nature of a commission arrangement that while, if you want your commission you have to meet the relevant preconditions, if you cannot do so or chose not to do so generally there is no question of being in breach of obligation to the other party so much as simply not having the chance to earn commission (Mr Levey did refer to Mr Demissie being free to choose to stop at any time). In this respect, the typical commission contract has unilateral type elements. To put a similar point in a different way, the Defendant was not buying Mr Demissie's time for two years, it was buying the chance that Mr Demissie's efforts would bring about financial close in respect of debt and/or equity and agreeing to pay him if they did within a two year period.

63. The nature and extent of what is meant by "ensure" is controlled by the management obligation (seen also in the light of the need to *raise the necessary capital* and *secure…financiers*). This is what Mr Demissie was agreeing to do. The relevant meaning of the CSA is to be found in the expressions *manage the relationship to ensure a successful financial close* and *ensure the successful financial close for the transaction*. The key subject is the obligation to manage, the purpose and duration of that obligation is then to ensure successful financial close. The work of management is directed at achieving a particular result. It will have ensured that result to the extent relevant by the result occurring during the currency of the management and so the management is no longer required. What that might entail will be dependent on circumstances. The history of the Defendant's financing journey, summarised by Mr Adams in his witness statement, provides an illustration of the myriad of different and difficult issues that might arise. The opportunity provided Mr Demissie under the CSA was to earn his commission by managing the relevant relationship so as to bring about financial close. The Defendant would get its financing and Mr Demissie would earn his commission. Mr Demissie did not have to bring it about, he had to manage the relationship towards that end.

64. It was common ground between Mr Levey and Ms Horner that this was not an introducer's fee type contract where the only requirement to earn commission would be putting forward a potential buyer who then does buy. Mr Demissie's role, for debt finance, included *identification of suitable debt financing institutions* but was not limited to that because it also included the requirement to manage the relationship. I agree with Mr Levey that the "ensure" = "enable" argument ignores this and in

substance comes down to rewriting the CSA as if causative introduction was sufficient to earn the payment. This is not the case and it is impermissible as a matter of construction since it ignores the natural meaning of the language in the CSA in favour of rewriting the bargain.

65. The language of the CSA also gives a clear answer to the meaning of the validity period. There are two compelling points. First, the parties choose to use the word "validity", which is a strong word in this context because it presupposes only two conditions for the relevant subject matter: valid or invalid. Something that is valid will be active in some way. Something that is invalid will no longer have the qualities it previously had or will not have the qualities it was meant to have and, in either scenario, will be defined only by what it is not, for example an invalid certificate or invalid pass or invalid patent and so on. In a legal context something which is "valid" will be effective to have the legal consequences intended by its existence but if that thing does not have the status of being "valid" it will not have those consequences.

66. Second, the answer to the question about what is the "something" which either has the status of being valid or not when the word is used in the relevant part of the CSA is expressly stated: *The validity period of this agreement will be two years…*It is *this agreement* not a limited part of the agreement and so the CSA as a whole.

67. For all the reasons given by Mr Levey and summarised above there is nothing commercially absurd about this result and nor does it fly in the face of business commonsense. On the contrary, in my view it represents a clear and workable balance of the parties' respective interests starting from a context where there was a hope for financial close by October 2018 but all realised there was a considerable degree of uncertainty about that and so a long stop date would be sensible. In the balance of risk and reward, two years was agreed for such a date.

68. The size of the potential commission reflects this agreement about risk and reward. The CSA envisages debt financing of USD 160 million and equity financing of USD 20 – 30 million. The specific identification or organising and management responsibilities of Mr Demissie are for debt and local equity. Success at the numbers stated would have led to commission percentages of 3% for debt and 7% for local equity. A potential commission of USD 6.9 million. This would be a high reward for perhaps between six months and two years of work (and of course the local equity might have come in within six months and the debt financing taken longer and so on) but it would have been worth it for the Defendant because these funds were essential to the success of the Project. But a longstop gave both sides certainty as to the window within which "successful financial close" had to happen and the potential maximum duration of the rights and obligations set out in the CSA.

69. Successful financial close is agreed by the parties to at least represent a time when there were contractual commitments entitling the Defendant to receive finance. It is common ground that such a moment has not yet arrived some six and a half years after the making of the CSA. This is outside the two year validity period of the CSA. It follows that the Claimant's claim for commission fails.

70. Finally, these conclusions make it unnecessary to make any further factual findings about what took place during the duration of the CSA but in short summary I would not have held, in any event, that TDB and the Defendant signing the 27 September

2019 term sheet, which was of no legal consequence, marked any sort of success for the purposes of the CSA. If anything such a document might in CSA terms have marked the end of the "identification" period and the start of the "management" role or perhaps the moment at which the management role would become predominant (on the basis that having got that far with TDB it became less important to identify other banks who might provide the debt finance given TDB had indicated a serious wish to do so).

71. The substantial point was that if Mr Demissie wanted his commission then the relevant funding had to get over the line during the validity period of the CSA and since that did not happen in any respect (not debt, not international equity nor local equity) there is no benefit in speculating whether there might have been circumstances in which funding would arrive in time but Mr Demissie might nevertheless not have been entitled to commission. My own view is that assuming such funding was from a party being managed by Mr Demissie then he would have been entitled without it being appropriate to lift the bonnet on how it occurred, but these things are necessarily fact and circumstance dependent.

72. I would not have held that Mr Demissie was authorised to deal with AFC or was responsible for raising any AFC contribution within the meaning of the CSA. The over-to-you invitation in Mr Adams' email regarding AFC relied on by the Claimant in this respect was not intended to have any legal significance and marked the point at which Mr Demissie's work with TDB would include making the TDB / AFC relationship work so that TDB's financing could be brought home. I found wholly unpersuasive Mr Demissie's attempts to characterise his dismissive first approach to AFC as part of a wider strategy designed to draw them in.

**The Counterclaim - Facts**

73. There are two alleged facts at the heart of the alternative ways in which the counterclaim has been argued between the parties. Those facts can be encapsulated in one question: were the 205k Payments made on account of commission which would become due to Mr Demissie following ANS making an equity investment in the Defendant?

74. The Defendant's case is that the 205k Payments were made when it appeared that ANS was to provide equity finance. This financing was an ANS obligation contained in the first ANS Subscription Agreement, dated 28 September 2018 ("ANS1), and then, after ANS1 was not performed, in a further agreement described as an Amendment and Restatement Deed dated 5 January 2020 ("ANS2"). The Defendant says the 205k Payments were made on account of the commission that would be due to Mr Demissie once those agreements were performed. Neither ANS1 nor ANS2 were performed and no commission became due to Mr Demissie, accordingly there is a right to recover the two payments made on account. Moreover, ANS did not exist because it had never been incorporated. Since the payments were made premised on the validity of the ANS subscription agreements that was an operative mistake giving rise to a claim in unjust enrichment.

75. The Claimant accepts that ANS never existed but says such existence was not an operative cause of the 205k Payments being made and says that the agreements for the 205k Payments were not related to the CSA commissions but rather further expense

payments which should be treated in the same way as the USD 30,000 provided as "mobilization fees" in the CSA. Essentially, these were non-refundable retainer type payments that were made in recognition of the hard work being done by Mr Demissie and the longer time frame for his work than was hoped for at the time of the CSA.

76. Mr Demissie and Mr Adams gave different narrative accounts of the relevant events. As often in commercial disputes I can best make the findings of fact which I need to make substantially from the relevant documents which largely consist of email exchanges between the parties supplemented, where appropriate, by the oral evidence. I have based this narrative on the relevant documents to which my attention was drawn by both Counsel during closing submissions.

77. The background to this narrative is the CSA with its envisaged financial close date of October 2018, the 3 x USD 10,000 monthly "mobilization fee" payments, and the commission payment of 7% for equity financing from the local equity pool. The predominant issue, which I bear in mind throughout, is the proper characterisation of the 205k Payments: on account of commission or fee payments unrelated to commissions and/or ANS1 and ANS2.

78. On 3 September 2018 Mr Demissie emailed Mr Adams and opened up the possibility of being given a monthly retainer. He said: "it is probably fair that I'm also compensated adequately for it…I would keep it simple and have a monthly fixed fee of say 10k…". Mr Adams responded to say: "Need to balance between fees and the biggest incentive/success fees I have ever offered", to which Mr Demissie emailed back: "I'm happy to repay it all from the success fee. But until that happens, there are bills to pay…". Mr Adams said he would "raise at board as your deal is now high profile and had terms ratified".

79. I have referred above to how the parties and their representatives compressed amended pleadings and witness statements and did well to get the case on without losing the trial date. I suspect that a knock-on consequence of this was that each morning during the trial a few extra documents would get added to the trial bundle. The email exchange on 3 September 2018 summarised above was included in additions to the bundle made on the day of closing submissions. Mr Demissie was offered the chance to go in the witness box to be examined by either or both counsel about that document but no request was made for this to happen.

80. I take into account that I heard no oral examination on these emails, but nevertheless the email exchanges on 3 September 2018 at least show that at the outset of the discussions that led to the Payments (a) the need to discuss at board level was clear; and, (b) Mr Demissie suggested that he would be happy to make repayments from the success fee.

81. Until Ms Horner's reply submissions, the Claimant's case was that any references to repayment in the documents or linkage to the payments and ANS commission were all part of a plan on the part of Mr Adams to pull the wool over the board's eyes and dress up retainer type payments (unacceptable to the board) as payments on account (acceptable to the board). Since Mr Demissie also said that his own invoices in 2018 and 2019 were issued to further that plan, it concerned me that he might be asking me to find, as part of his defence to the counterclaim, that he and Mr Adams were engaged in an unlawful means conspiracy against the Defendant. It seemed of no real

benefit to Mr Demissie for him to succeed on a defence only in a way which would necessarily give the Defendant a damages claim to recover the money which was in dispute. In addition, it concerned me that there might be other reputational issues for Mr Demissie if he succeeded on that basis. After I raised these concerns during reply submissions, Ms Horner took instructions and the upshot was Mr Demissie withdrew from the court's consideration the assertion that Mr Adams was attempting to mislead the Defendant's board. I did not raise it at the time, but I suggest the Amended Reply and Defence to Counterclaim be re-amended in this respect (a less satisfactory alternative would be my striking out the paragraphs of the statements of case raising the withdrawn issue).

82. It remains necessary to make a finding about the basis upon which the 205k Payments were made and the 3 September 2018 emails are the best starting point in that respect. I bear in mind that just because discussions started in one way does not mean that the operative basis for the 205k Payments remained the same at the time they were made.

83. On 13 September 2018 Mr Demissie and Mr Adams were planning to meet and Mr Demissie asked for an agenda. Mr Adams' agenda included "review fee structure" and Mr Adams added in an email the next day: "As regards your fees, I have some ideas but would like to discuss with you please to ensure fair and effective all-round".

84. In his oral evidence, Mr Demissie said that an agreement for him to receive USD 105,000 on a retainer type basis and certainly not on account of commission payments, was reached on 18 September 2018, five days after the email exchange about a proposed meeting. I find that a meeting did take place on 18 September 2018 involving Mr Demissie, and Mr Adams and Mr Leach of the Defendant, and that Mr Demissie's fees were discussed during that meeting. The best evidence for the substance of those discussions are the emails which followed it.

85. In an email on 19 September 2018, Mr Demissie thanked Mr Adams and Mr John Leach for the meeting and "discussions on my fee structure". Mr Demissie's email continued, "…it is straightforward for me to accept your proposal to align my fee structure also to the key project milestones". Pausing there it is clear from that sentence alone that no agreement had been reached at the meeting on 18 September but rather at most a proposal had been put to Mr Demissie for his consideration. At best it might have been argued that Mr Demissie was accepting in his email an offer that had been put to him at the meeting. But that is not what was argued nor do the emails support such a conclusion. Matters had not got that far – at most Mr Demissie was saying that the idea of aligning fee structure to project milestones was acceptable.

86. The email continued to set out what Mr Demissie was putting forward as how to do this and which, if it was "ok" with Mr Adams, could be put in a short amendment to the CSA. It is not necessary to say much about the proposal beyond that it was nothing to do with a new payment of USD 105,000 but rather restructured the local equity commission payment so that (a) it would be paid in shares, and (b) those shares would be allotted to Mr Demissie in tranches over a series of defined milestones, the first of which was "successful signing of the subscription agreement with ANS", when 10% of the shares would be allotted, and the last of which was "financial close" when the balance of 60% of shares would be allotted.

87. Mr Adams' response was some way off from recognising any sort of commitment in what was being discussed, i.e. in contractual terms there is no indication of any offers having been made. Mr Adams said: "This is philosophically along the lines we discussed". Which I take to mean that the parties might be moving closer to a potential agreement but nothing further.

88. This is also proves that no agreement was reached on 18 September 2018. I reject the case presented by Mr Demissie in oral evidence about an agreement on 18 September 2018 which established the basis of the £105k Payment as unrelated to commission. On the contrary, no agreement had been reached by that time but the parties were discussing a change in the payment structure of Mr Demissie's cash commission sum to shares and to introduce a spread of commission triggers. These discussions led eventually to the 105k Payment but that had not been agreed at this point.

89. By 27 September 2018, Mr Leach had prepared and circulated an addendum to the CSA along the lines suggested by Mr Demissie in his 19 September 2018 email. The addendum provided for the previously agreed 7% commission to be paid in Defendant shares on the happening of various events. The first was the signing of the ANS Subscription Agreement (which in fact took place the next day, 28 September 2018) and the value of shares to be allotted to Mr Demissie would be USD 105,000 (being 1/6 in value terms of the commission arising from the first USD 9 million of ANS equity funding). This draft addendum demonstrates that by this time the parties were discussing value transfer, in shares, premised on ANS equity and that the first tranche would be valued at USD 105,000 and be allotted on the signing of the ANS Subscription Agreement.

90. There was an email exchange between Mr Demissie and Mr Adams later on 27 September 2018 when Mr Adams told Mr Demissie the Defendant's board approved the change in the commission structure and asked Mr Demissie if he was happy with that. Mr Demissie queried the monthly cap on his share sales after allotment but otherwise was happy at that time to amend the CSA in the terms proposed. This shows that the parties were much closer to reaching an agreement, although not a potential agreement that provided for the 105k Payment to be made, but had still not reached agreement as at 27 September 2018.

91. For the mistake based claim it is relevant to note that ANS1 was entered into by "ANS Mining Share Company established in accordance with the Commercial Code of Ethiopia…". ANS1 plainly assumed that ANS existed as a matter of law otherwise ANS1 would have been commercially pointless. The background recitals included at (C), "ANS has been established", and at (I), "ANS has agreed…", and the substance of the agreement included among many other actual promises by ANS, at clause 7.1 a warranty by the parties, so including ANS, that it had "the full power and authority to execute, perform and observe this Agreement".

92. Mr Demissie's case was that Mr Adams and the Defendant through Mr Adams at all times knew that ANS was not incorporated. There was no document to support this contention and no factual detail in Mr Demissie's evidence that supported it, just the asserted conclusion.

93. There was a document, also late to the bundle, which related to the reservation or registration of the name of ANS dated 24 August 2018. There was no evidence about

this document but on the face of the unagreed translation it appears to provide for a six month window within which the name "ANS Mining S.C." was cleared as available for registration and the letter would need to be taken to the business registration office within 6 months to get the company registered (although it is possible the visit to the registration office is referring to registering the name with the letter as a separate matter from having the company registered).

94. In any event, on the basis of this document it was suggested that when Mr Adams amended an RNS about the ANS1 signing on 28 September 2018 to replace "renamed" with "since registered" he must have been referring to this document rather than asserting in the RNS that ANS had been incorporated. Mr Adams accepted that he must have been told about ANS having a new name but said he assumed an incorporated company with a new name. I accept the evidence that Mr Adams assumed that ANS had been incorporated. The contrary is inherently unlikely. I reject the assertion by Mr Demissie that Mr Adams or the Defendant otherwise, knew that ANS had not been incorporated. There is no evidence to support that assertion beyond Mr Demissie's say so which is not evidence of anything beyond, at best, his belief in his own case.

95. It was put to Mr Adams that he did not put his mind to ANS having been incorporated at this time. Mr Adams' answer was that he did not think that he was being duped about the status of ANS and that he was led to believe that ANS had been incorporated. I accept this evidence and I accept that the statement in the RNS demonstrates that Mr Adams believed that ANS had been incorporated and so was able to enter into ANS1. That is rather the point about this RNS, it updated the market that the hoped for subscription agreement reflected in the heads of terms of 20 August 2018 had come about. This required ANS to have signed ANS1 which required ANS to have come into being so that it could make the promises to make the equity contributions.

96. On 3 October 2018 there was a series of relevant emails. Mr Demissie pressed Mr Adams for a signed agreement varying the CSA: "Is it time to suspend all activities until we have a signed agreement"; and, later "I need a signed amendment letter today…"; and, then "I won't be able to join you tomorrow for the trip". Mr Adams queried the distrust after they had discussed and said it was ok a few days ago. Mr Demissie replied with "I need a signed agreement before 8pm. I'm sure dinner is not as important". This prompted Mr Adams to send a spreadsheet, at page 911 of the bundle, which provided for the USD 105,000 to be paid in cash "at next placing by KEFI, expected in one month". Mr Demissie said it was not acceptable and raised two points. One was that the USD 105,000 in cash was to be paid "at next placing but before 31 October 2018". In the final and signed version this just became "by 31 October 2018".

97. In reply Ms Horner drew my attention to an email exchange of 29 October 2018 which immediately preceded the signing of the annexure to the CSA on 31 October 2018. Mr Demissie said his fee was overdue by a month now and wanted the payment in two days.

98. I remark in passing that Mr Demissie's assertion that the fee was overdue by a month places the alleged right to be paid around 29 September 2018, which, contrary to Mr

Demissie's case being addressed by the court, aligns the alleged payment right chronologically, to the signing of ANS1.

99. Mr Adams apologised for the delay and said the Defendant would pay it when money came in. Mr Demissie said that was not acceptable and that Mr Adams should be good on his word. There were further brief exchanges. In one of these Mr Adams said "I think you pretty well know everything I am up to. No secrets". It was suggested in cross examination that this referred to Mr Adams and Mr Demissie having reached a different agreement than was apparent from other documents. Mr Adams disagreed. I agree with Mr Adams. In context it is clearly a remark aimed at explaining why money was not then available – Mr Adams is being frank about why payment cannot be made in the timescales Mr Demissie wants and is distinguishing himself / the Defendant from the type of debtor who might string a creditor along while available money was used for other purposes.

100. The annexure to the CSA comprised a summary table which set out Mr Demissie's 7% commission on USD 30 million (which was the equity sum raised under ANS1) in the sum of USD 2,100,000 and splits it into 2 tranches: USD 630,000 on USD 9 million; USD 1,470,000 on USD 21 million. Tranche 1 is to be "Paid in 3 Stages and in KEFI shares", the first of which is "on signing of the ANS Investment Agreement 105,000", after which is stated: "$105K to be paid in cash at next placing by KEFI, by 31 October 18". The signed annexure is plainly more consistent with the Defendant's case that the 205k Payments were linked to the subscription agreement rather than the Claimant's case that the payments were unrelated retainer type payments similar in kind to the USD 30,000 "mobilization fee".

101. One point made by Mr Demissie in his written and oral evidence was that it was clear that the USD 105,000 Payment was not linked to ANS1 because the payment was made on 14 November 2018 well after that agreement was signed. The emails discussed above show this to be a bad point: the mutual intention that Mr Demissie should get 1/6 of the commission due on the first USD 9 million tranche of ANS investment is clear from the emails discussed above. The 105k Payment was clearly linked to the anticipated receipt of equity from ANS1.

102. The 105k Payment was paid by the Defendant to Mr Demissie on 14 November 2018. Mr Demissie's invoice was dated 12 November 2018. The invoice described the USD 105,000 as "Tranche 1 bonus payment of Consultancy Services to KEFI Minerals plc as per our annexure agreement signed October 3rd 2018". The wording on the invoice is consistent with the Defendant's case and inconsistent with the Claimant's case. I find the wording on the invoice was an accurate description of the reason for the 105k Payment.

103. ANS (or perhaps those who would have formed ANS if they wished to make any payments) did not make any of the payments provided for in ANS1. It is not necessary for the purpose of determining the issues on the counterclaim to make findings about the reasons for this.

104. 2019 was a difficult year for the Project, in particular because there was an attack at the mine area in May 2019. This reflected an uncertain political climate generally.

105. TDB did sign an expression of interest on 18 January 2019 and then the non-binding term sheet and proposal of 27 September 2019.

106. One of TDB's expressed conditions to a potential agreement to lend was that there should be substantial equity investment. Also, no doubt, the Defendant remained interested in the commercial benefits associated with local equity investment. There were, therefore, particular drivers in favour of renewing the ANS equity deal after the failure to achieve any payments in respect of ANS1. This led to ANS2 which was signed on 5 January 2020. ANS2 provided for ANS to make subscription payments first on 31 January 2020 and, finally, by 31 May 2020. Again, no payments were made but the negotiations leading to ANS2 and the hope that the ANS deal would finally come together, provides the background to the 100k Payment.

107. Mr Demissie's evidential case on the 100k Payment is contained in paragraph 66 of his witness statement. It relies on an exchange of emails dated 9 December 2019 between himself and Mr Adams in which, he says, they agreed that such a payment would be made by mid-December.

108. It is clear from Mr Adams' first email of 9 December 2019 that Mr Adams and Mr Demissie had already been discussing a further payment to him. Mr Adams said "… have a look at the attached which seeks to reflect what I believe you suggested as your preferred scenario." Mr Adams asked Mr Demissie to annotate where necessary and told him that he would need to get "…board approval of the refined split of cash vs shares and timings…". The attached was a spreadsheet, similar to the annexure to the CSA agreed in October 2018, but updated. For present purposes, it is sufficient to note that the format of commission on funds raised creating a credit in Mr Demissie's favour which is then satisfied by a schedule of payments in cash or shares is maintained (but increased because USD 38 million is anticipated as coming in), the 105k Payment was marked as "paid" and what was to become the 100k Payment is stated as being payable "upon ANS getting signed subscription letters to $9.5M" with a note saying "paid on signing subscription letters and subscription agreement".

109. As relevant, in response to this schedule Mr Demissie said in an email of 9 December 2019: "…two things we have already agreed on but I don't see here: First…locking the share price…Second…$100k by mid-December as soon as you got your working capital funding sorted out as we have expected the share subscriptions would be signed by then…I still need the funds for working capital requirements…as I received the last $100k over a year ago and I am out of cash. I think you tried to characterise it as an 'advance' the other day but that is wrong. You can call it an upfront payment for the subscription letters if you wish but caused by your lack of progress…".

110. Mr Adams replied and addressed cash and share split, when the shares would vest vs when money would come in and on the USD 100,000 said: "…see attached elaboration in cell shaded yellow. I have asked the guys to put it in the cashflow for dec but it assumes we will sign the subscription agreement…and you get your letters back. We simply must achieve that otherwise we will have huge problems with the whole structure."

111. Mr Demissie's email in return started: "I don't think any of this works for me. I need to have a retainer fee of $100k mid-December that will be offset from my fees as before…".

112. In closing, Ms Horner suggested this "offset…as before" referred to the separate agreement with Mr Adams (i.e. the Claimant's retainer case) in contrast to the agreement reflected in the documents (i.e. the Defendant's case). I take this possibility into account when reaching my conclusion on the nature of the payment issue below. Certainly, Mr Demissie's email saying Mr Adams calling it an "advance" would be "wrong" is the highpoint of his case so far as the documents are concerned but even the potential weight of that is undermined by his saying in his subsequent email that the payment being discussed "will be offset from my fees as before" – all of which points to the 205k Payments being made on the basis that they would be a credit against fee income to be earned rather than separate payments unrelated to and independent of any fee income.

113. There was one further exchange of emails on 9 December 2019. Mr Demissie responded in bracketed capitals to Mr Adams' reply to the email quoted in the preceding paragraph. As relevant: "…as regards the 100k…can we sign the letter of intent please [ALREADY AGREED TO DO SO]…I can pay a smaller fee within my designated authority and need board approval for $100k. I will send board papers out tonight and seek approval by end of week…[PLEASE DO]…". There followed Mr Adams seeking confirmation that Mr Demissie was confident about ANS2 and the payments from the local equity investors. Mr Demissie confirmed.

114. It is clear from those exchanges that Mr Demissie was saying he wanted USD 100k because he was short of cash but expressly on the basis that it would be off-set from his commission "as before". It is also clear that there would be no agreement from the Defendant's side unless Mr Adams got board approval.

115. It is possible, seeing things in the most benevolent way towards Mr Demissie, that the need to get board approval became the platform from which Mr Demissie's recollection built the idea that Mr Adams and he reached agreements that were different from what the board agreed and so the board had to be misled. I have no doubt from the documents set out above and listening to the cross-examination that there was no substance to this allegation. It is fanciful. At all times Mr Adams made clear when any agreements would require board approval and explained that he would need to and, when relevant, had obtained board approval.

116. It is also fanciful for Mr Demissie to assert and maintain that the 205k Payments were not linked to the ANS agreements and/or the equity contributions to be made by ANS which would trigger substantial commission payments being owed to Mr Demissie. Not only were both payments offered and agreed to be made with conditions linked to ANS but it is not coincidental that the payments were sought and then made in the context of ANS1 and ANS2 being agreed. There was confidence from both sides that commission would become due to Mr Demissie. The parties' agreements to the payments were bound up with the expectation that subscription monies would be coming in.

117. I note, as a generality from the emails I have seen, that Mr Adams wanted to accommodate Mr Demissie whenever possible. It was apparent from Mr Adams' oral evidence that he had been close to Mr Demissie, valued his contribution to the Project (and still did), and defended him to less positive colleagues at the time. From my brief experience of Mr Demissie in the witness box, I can understand Mr Adams' enthusiasm for Mr Demissie. He is subjectively persuasive, impressive and likeable.

118. However, for the reasons which are contained in this judgment, I do not find objectively his evidence merits much weight when balanced against the documents. In this respect, I consider Mr Demissie typical of many party witnesses in that any possibility of genuine and accurate recall gets swamped by the imperative of winning the litigation and the engagement in a process designed to achieve that end.

119. On 19 December 2019, Mr Demissie emailed his invoice for the 100k Payment and said: "As per our discussion and agreement, please find attached the invoice due for payment on Monday 23rd of December 2019". There followed emails pressing for the payment to be received as quickly as possible. The invoice described the payment to be made as: "Upfront payment for Consultancy Services to KEFI minerals plc as per our agreement via email exchanges on 17th and 18th December 2019". I was not taken to any of those emails and Mr Demissie did not refer to them in his witness statement. They do not appear to be in the bundle.

120. On 27 December 2019 the 100k Payment was made.

121. I find that the description in Mr Demissie's invoice was an accurate record of what the 100k Payment was for.

122. In early January 2020 Mr Demissie and Mr Adams exchanged emails about the share aspect of the commission payment structure. Mr Levey relied on one of those emails dated 2 January 2020 and timed at 23.11 as supporting the Defendant's case because Mr Demissie said: "If the money does not flow to TKGM then I don't get anything…". I agree with the submission made by Ms Horner that this addresses a different subject, which is the share aspect, not the cash payment that has already been made. The subject of this exchange is the price at which the shares will be fixed (Mr Demissie wanted a price fixed as at 2 January or 1.25p a share and for that to apply across the entire allocation).

123. One way to test this is to ask if the email exchange would be any different depending on if the parties had agreed that the USD 100k was repayable or not repayable or on account of commission or an irrecoverable retainer and so on. The answer is no. This exchange would have been just as it was because it was about something that was not yet done, the share allotments in lieu of commission, not something that had been done, the cash payments. Emails are not contracts – language is used informally and quickly.

124. On 5 January 2020, ANS2 was signed. Mr Demissie signed for ANS, which was said to be a share company established in accordance with the commercial code of Ethiopia. The capacity of ANS was said to be the same as in ANS1. ANS2 provided for a first tranche completion date of 31 January 2020. This did not happen for reasons which are not relevant. Again despite the subscription agreement no payments were made by or on behalf of ANS.

125. Finally, on the relevant evidence regarding the nature of the 205k Payments, I should refer to the first iteration of the invoice sent by Mr Demissie prior to the issue of the proceedings and in which he asserted the right to claim which, in broad terms, is the subject of these proceedings. This was dated 27 June 2022, asserted a right to be paid commission on 3% of USD 140 million (i.e. USD 4.2 million) and deducted "advance payments" of USD 200,000. While that is 5,000 less than the payments actually made,

the Defendant's point is that there are no other possible payments it could relate to and it is more likely than not to be a reference to the 205k Payments but with an error in the figure. Subsequently, the 27 June 2022 invoice was replaced with one dated 12 September 2022 (they both bear the same invoice number). This sought commission on 3% of USD 200 million and made no reference to payments on account.

126. The existence of the two invoices, in my view, further illustrates that Mr Demissie's evidence on these issues developed as he refined his case for the purpose of maximising what he understood to be his best path to potential victory. The first invoice reflected his understanding when he wrote it and the subsequent invoice reflected a revised position which was better for the dispute more generally.

127. Mr Adams was cross-examined about his state of mind regarding the existence of ANS at the time of ANS1 and ANS2. He said: we would not have paid money over if we knew the whole thing was a charade and that he "was led to believe that this was all being incorporated, instalments coming by certain dates…I certainly would not have been paying over, you know, advance payments of commissions if I had thought this was all not real" and, as for December 2019, that he would not have paid over money if he knew he was being duped.

128. This evidence needs to be set against Mr Demissie's case in his own oral evidence that it did not matter whether ANS was incorporated because this was equity finance and ANS would have been brought to life once the money was there and payments needed to be made. It was sufficient that there was a managing company in existence for ANS, which there was.

129. I prefer Mr Adams' evidence on this issue. It is consistent with the existence and substance of ANS1 and ANS2, the email exchanges between the parties, and the RNS announcements. It is also far more likely as a matter of inherent probability than Mr Demissie's argument that it did not matter when ANS was incorporated so long as it was there to receive the shares. In my view, it mattered to the Defendant that ANS1 and ANS2 were genuine agreements.

130. I make the following core findings in the light of the evidence I have referred to and commented on above:

    i) The 205k Payments were made to Mr Demissie on account of commission payments which were expected to be payable to him. This is the overwhelming conclusion to be drawn from the totality of the evidence. The only indication otherwise might be Mr Demissie's contrasting reference to "retainer" not "advance" but even this was said in the context of Mr Demissie also saying "an upfront payment". It also related to the agreement from a year before and that agreement is best established by the documents exchanged at the time, which included the signed annexure to the CSA, which puts the issue beyond doubt, since the 105k Payment is expressly part of the sum which comprises the 7% commission.

    ii) The Payments were not made independently of the sums anticipated to come into the Defendant via the ANS subscriptions. On the contrary, were it not for those anticipated sums, the 205k Payments would not have been made. Contrary to Mr Demissie's case, there is express linkage between the

payments and ANS1 and ANS2 and they were expressly presented between Mr Demissie and Mr Adams and to the Defendant's board and by Mr Demissie's own invoices as being payments made in respect of the anticipated commissions to be payable by the Defendant to Mr Demissie under the CSA as amended by the annexure.

iii) I accept Mr Adams' evidence that the 205k Payments were made on the assumption that ANS had been incorporated. It is true that the first payment was made sometime after ANS1 and the second payment before ANS2. But the commercially important point is that Mr Demissie leveraged, entirely appropriately (I assume), the momentum in respect of the ANS equity subscriptions and his key involvement in that, and how important the obtaining of those funds was to the Project, to get those payments. I accept Mr Adams' evidence that if he had known that ANS was not incorporated then those payments would not have been made because, as he put it, the whole local equity subscription narrative would have been a charade – constructed on the premise that there were real agreements being offered and entered into with a real company. Mr Demissie may have thought himself that it did not matter if ANS was incorporated until the money was going to flow, or perhaps even until the shares were due to be allotted, but for Mr Adams and the Defendant having ANS1 and ANS2, with their legal commitments from a company who would be providing the relevant funds and taking up the shares, was significant and would been understood as significant on an objective basis. I accept that the RNS announcements demonstrate this.

131. It follows from these findings that the Defendant makes out its counterclaim on either alternative.

132. So far as mistake is concerned: (i) the 205k Payments were made by the Defendant premised on ANS existing as a legal entity, that being Mr Adams' actual state of mind; (ii) ANS did not exist as a legal entity; (iii) this was a failure of basis so far as the Payments to Mr Demissie were concerned; (iv) this enabled Mr Demissie to be unjustly enriched at the expense of the Defendant; (v) Mr Demissie has not asserted any restitutionary defences to that unjust enrichment and, given, (vi) Mr Demissie, but not Mr Adams or the Defendant, knew at all material times that ANS did not exist, this is not surprising.

133. So far as payment on account is concerned: (i) the payments were made expressly on the basis that they were an advance payment that would be off-set from the fees arising from the ANS subscriptions; (ii) those fees were never earned and were not payable; (iii) consequently, the Defendant had a right to recover them as from 4 June 2020.

134. I repeat that the dispute between the parties on the payment on account issue has been between the Defendant's case that the payments were bound up with the commission sums payable under ANS1 and ANS2 and the Claimant's case that the payments were nothing to do with commissions or the local equity subscriptions but were irrecoverable expense or retainer fee type payments. Between these two alternatives, the Defendant's case is far more likely than not to be true on the basis of the evidence put forward and in particular the emails, relevant agreements and invoices.

135. It might have been arguable in respect of the "no commission earned" basis of counterclaim that the express agreements leading to the 205k Payments did not envisage repayment in the event that no commissions became payable (that being a risk that would lie with the Defendant). However: (a) this was not the Claimant's case and (b) this would be irrelevant to the mistake based claim. For the avoidance of doubt, the mistake based claim is a logically prior and complete in itself basis for the counterclaim to succeed.

136. I have not heard submissions about interest but I would encourage the parties to reach an agreement in that respect and in doing so the Defendant might want to bear in mind that for understandable commercial reasons it made no attempt to recover these sums until after Mr Demissie had brought his claims. I would think that might be relevant to when interest should start to run in the circumstances.

**Overall Conclusion**

137. The claim is dismissed and the counterclaim succeeds in the sums claimed.

ANNEX TO DEMISSIE V KEFI JUDGMENT 20/1/25

June 1st 2018

Kefi Minerals plc
27/28 Eastcastle Street
London W1W 8DH
United Kingdom

# Consultancy Services Agreement

| | |
|---|---|
| *KEFI* | Kefi Minerals plc ("KEFI") is a gold exploration and development company focusing on the Arabian-Nubian Shield region. KEFI is listed on the Alternative Investment Market (AIM) within the London Stock Exchange. KEFI is currently developing the Tulu-Kapi Gold Mine project in Ethiopia. |
| *DAD* | Demissie Asafa Demissie ("DAD") is an investment advisory services provider based in London, United Kingdom. |
| *Transaction* | KEFI requires debt financing of US$160m to finance the acquisition and construction of the Tulu-Kapi processing plant and machinery. In addition KEFI requires private equity financing of US$20-30m for the development of the project. KEFI has asked DAD to advise it on a strategy to raise the necessary capital and secure international and local financiers for the Tulu-Kapi project. |
| *Financing Structure* | The debt financing is currently being structured as a finance lease having a repayment period of 9 years with a grace period of 2.5 years. The private equity is to be sourced from a local group of investors through an investment vehicle organised and managed by DAD. |
| *Roles and Responsibilities - DAD* | DAD will identify suitable debt financing institutions and manage the relationship to ensure a successful financial close for the transaction. In addition, DAD will be responsible for organising and managing a local equity investors group through a suitable investment vehicle and ensure the successful financial close for the transaction.<br><br>DAD will approach no 3rd parties without the written consent of KEFI in order to ensure no breach of existing advisory mandates and in order to ensure a controlled communication process. |
| *Roles and Responsibilities - KEFI* | KEFI will be responsible for facilitating the provision of all available company and project information. KEFI will also deploy sufficient resources to engage (through meetings, presentations and communication) with potential financiers and investors. |
| *Timeframe* | The financial close is October 2018. |
| *Consultancy Fee* | KEFI agrees to pay DAD the following commission on the successful completion of the transactions:<br><br>1. 3% of the debt financing amount<br>2. 5% of the equity financing amount from international equity groups<br>3. 7% of the equity financing amount from the local equity pool<br>Payment of the commissions will be 30 days from the date of financial close.<br><br>To be clear, any such commissions relate solely to funds raised by DAD and |

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|---|---|
| | DAD shall be responsible for the payment of any sub commissions that may need to be paid to others assisting DAD in the process. *[manuscript initials]*<br><br>KEFI also agrees to pay DAD a mobilization fee of US$10,000 per month for three months, to cover the expenses to be incurred during the fund raising effort.<br><br>Payment of the mobilization fee will be due 14 days from the date of signing this agreement. |
| *Confidentiality* | As per the Confidentiality Agreement already signed, KEFI and DAD agree to keep the information exchanged between them confidential at all times. They also agree to keep this agreement confidential unless they mutually agree to do otherwise in writing. |
| *Validity* | The validity period of this agreement will be two years from the date of signing this agreement. |

*Signatures* - Having agreed the above terms and conditions of the agreement:

| | |
|---|---|
| On behalf of: KEFI Minerals plc. | On behalf of: Demissie Asafa Demissie |
| *[manuscript signature]* | *[manuscript signature]* |
| _____ | _____ |
| Name: John Leach<br>Title: Director | Name: Demissie A. Demissie<br>Title: Mr. |
| Date: 4 June 2018 | Date: 04/06/2018 |