Neutral Citation Number: [2021] EWHC 3432 (Ch)

Case No: BL-2018-002369

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (LONDON)
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2021

Before:

MR JUSTICE FREEDMAN

- -

Between:

MUSST HOLDINGS LIMITED

Claimant

- and –

(1) ASTRA ASSET MANAGEMENT UK LIMITED
ASTRA ASSET MANAGEMENT LLP

Defendant

- and –

Claim No. BL-2019-001483

(1) ASTRA ASSET MANAGEMENT UK LIMITED
(2) ASTRA ASSET MANAGEMENT LLP

Claimants

- and –

(1) MUSST INVESTMENTS LLP
~~(2) MUSST HOLDINGS LIMITED~~
(3) MR SALEEM ANWAR SIDDIQI

Defendants

- -

Peter Knox QC and Kirsten Sjovoll (instructed by **Collyer Bristow LLP**) for the **Claimant**
Christopher Boardman QC, Tom Beasley and David Glen (instructed by Payne Hicks Beach) for the **Defendants**

Hearing dates: 27, 28, 29, 30 April, 4, 5 ,6, 7, 10, 11, 12, 20 and 21 May 2021.
Further documents submitted including: 10, 11 June, 23 August, 13 October 2021.
Draft judgment handed down on 26 October 2021.

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 17 December 2021 at 10.10am.

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MR JUSTICE FREEDMAN:

I Introduction

1. This judgment arises out of two claims heard together, one referred to as the "Contract Claim" and the other as the "Defamation Claim". In the Contract Claim (which is Claim No BL-2018-002369), Musst Holdings Limited sues Astra Asset Management UK Limited ("Astra UK") and Astra Asset Management LLP ("Astra LLP") for fees for effecting two introductions, and for access to their books and records to assess all the fees that are properly due to them or an account. The term "Musst" is used for Musst Holdings Limited. Where it is intended to refer to the Musst group of companies, the term "MUSST" is used. The term "Astra" is used collectively for the Defendants in the Contract Claim. In the Defamation Claim (which is Claim No BL-2019-001483), Astra UK and Astra Capital International Limited ("Astra Capital") sue Mr Siddiqi and Musst Investments LLP ("Musst LLP") on the basis that Mr Siddiqi, while acting on behalf of Musst LLP, made defamatory oral statements about them in Rome in June 2016. The term Astra is also used collectively in context to refer to the Claimants in the Defamation Claim. These and other statements also form the subject matter of the counterclaim in the Contract Claim.

II The background

2. Musst is an entity which is wholly beneficially owned by Saleem Siddiqi. Since 2010, he has been married to Alexandra Galligan. She too works in the financial services industry, and since 2009 she had worked for an organisation called Matrix Money Management Limited ("Matrix"), which was part of a group of companies known as the Matrix group. She reported to Mr Luke Reeves, who was the Head of Retail and Institutional Business.

3. Since the collapse of Matrix in late October or early November 2012, Ms Galligan has worked for Musst. Astra LLP was at all material times controlled by Mr Anish Mathur, who is also the ultimate beneficial owner of Astra UK through Astra Capital, a BVI company. Musst LLP is a UK LLP in which both Mr Siddiqi and Ms Galligan are partners and through which they conduct business.

4. Musst's claim is made under the Octave Contract, a written contract dated 18 April 2013, which was originally entered into with Octave LLP and Octave Limited (collectively "Octave"), under which Octave Limited agreed to pay Musst a 20% share of management and performance fees Octave received from clients whose funds Octave managed, and to whom Octave had been introduced by Musst. At the material time, Mr Mathur was a member of Octave LLP. The fees were payable in return for introducing clients who invested in an investment strategy primarily focused on "synthetic ABS", i.e. synthetic asset backed securities, a type of financial product which was trading at very low prices relative to their face value after the financial crash of 2008, but which Mr Mathur (who had considerable expertise in such investments) expected in 2011 and 2012 to increase substantially over a three-year period. The

Octave Contract defines investments made in Mr Mathur's strategy as "Eligible Investments".

5. Under this contract, Musst says that it introduced at least two clients (a) a US client, 2B LLC (hereafter "2B"), and (b) a Swiss client, Crown Managed Accounts SPC (hereafter "Crown"). 2B agreed to invest in February 2013 (i.e. before the Octave Contract was actually concluded, but after its "Effective Date"), and Crown agreed to invest in June 2013. In both cases, they invested in "managed accounts" – i.e. accounts managed by Octave but managed in turn by Astra LLP on Octave's behalf. The reason for this arrangement is that, at this point, none of the Astra entities had regulatory authority to manage the accounts themselves, so Astra LLP acted under Octave's "umbrella". 2B initially invested US$20 million for Octave to manage, and Crown initially invested $40 million for Octave to manage in synthetic asset backed securities.

6. At first, Octave LLP paid the agreed share of fees received from both clients until 10 November 2014 (in the case of Crown), and until 3 February 2015 (in the case of 2B). Shortly before the earlier date, Astra LLP obtained the necessary regulatory approvals. Musst's case is that with Musst's and Octave's consent, (a) Astra LLP took over the management of the clients' respective funds in place of Octave, (b) it received fees for doing so just as Octave had done, and (c) it asked Musst to send its invoices to Astra LLP instead of Octave, which Musst then did. In relation to Crown, it split the invoices between Octave and Astra LLP for the fees accruing before and after 1 September 2014, and in relation to 2B it sent its first invoices in February 2015. Astra LLP then paid these invoices and Octave dropped out of the picture. The fees payable in relation to 2B were payable monthly, and those in relation to Crown were payable quarterly, as this was how Octave and Astra LLP were paid.

7. By late April 2016, the management of the clients' funds had been transferred to Astra UK. Astra UK sent to Musst the invoice which it, Astra UK, had sent to 2B for its management of 2B's funds in April 2016. By reply on 13 May 2016, Musst as requested sent its invoice, but still made out to Astra LLP. Astra UK then paid this fee, and on 16 May 2016 it asked for all future invoices to be sent to itself rather than Astra LLP.

8. Astra UK thereafter did not provide the information sought for Musst to work out the precise amount of the invoices. On 28 July 2016, Musst sent to Astra UK three invoices, one in relation to Crown (for the period April to June 2016), and two in relation to 2B (for May and June 2016), which Astra UK did not pay. In August 2016, it denied it was under an obligation to pay them, since then nothing has been paid.

9. Musst claims that the Octave Contract was novated to Astra LLP (or at least Astra LLP took on its liabilities), first in relation to the Crown account (in November 2014 or February 2015) and then in relation to the 2B account (in February 2015), after Astra LLP had taken the management of these accounts from Octave; and that it was then in turn novated on to Astra UK in May 2016 (alternatively in late July 2016) in relation to both accounts.

10. Musst claims the payment of fees and access to the Defendants' books and records under the Octave Contract in return for introducing 2B and Crown who made investments in managed accounts. It also claims an account of all sums that have been received by Astra LLP and Astra UK from any other investors in addition to 2B and Crown.

11. Further or in the alternative to the contract of novation, Musst relies on an estoppel by convention precluding a denial of such a contract, because this was the basis on which all parties operated until Astra ceased paying in July 2016.

12. In addition, Musst seeks rectification of the Octave Contract if and insofar as (taken on its own) it did not cover the introductions to 2B and Crown. It also alleges that in any event, Astra UK, having taken over the management of the funds in the knowledge of the terms (and restrictions) in the Octave Contract, is obliged to pay the 20% share, either because it has an equitable interest in the same, or by way of unjust enrichment or quantum meruit.

13. Musst therefore claims an account of all sums that have been received by Astra LLP and Astra UK from 2B and Crown, pursuant to the Octave Contract (which provides for access to the books and records) or pursuant to its claims in unjust enrichment or quantum meruit.

14. Astra denies liability in summary for the following reasons:

    (1) The November arrangement: Octave and then Astra LLP and Astra UK made their respective payments in respect of 2B and Crown pursuant not to the Octave Contract, but to a voluntary oral arrangement agreed in November 2012 to pay three years' worth of fees, which it calls "the November Arrangement", which came to an end by May 2016. Thus, the Octave Contract has no application to the arrangements with 2B and Crown.

    (2) Even if the Octave Contract applies, Musst has no right to payment under it, (a) because there was no introduction by Musst: any introduction was by another entity called Matrix which introduced 2B and Crown; and anyway, (b) there were no introductions capable of giving rise to a fee because any introductions made were before the "Effective Date" of the contract, which was expressed to be 21 November 2012.

    (3) The Octave Contract was not novated to Astra LLP or Astra UK, nor did either of them take on its liabilities. A draft agreement was proposed in this regard, but it was rejected by Musst, and then withdrawn by Astra LLP.

    (4) The attempts to contend for estoppels, rectification, equitable interest and unjust enrichment are all attempts to paper over the fundamental cracks in the case, and do not save the case.

    (5) Even if the Octave Contract applied, Musst's rights came to an end in late 2014 or 2015 when the investment strategy pursued on behalf of Crown and 2B changed and ceased to follow "the Current Strategy". It is contended that under the Octave Contract, the right to fees is limited for so long as the investment strategy is following the Current Strategy.

    (6) In any event, Musst acted in breach of the US Securities and Exchange Act 1934 in introducing 2B (to be explained in more detail below), with the result that Astra do not have to pay for the 2B introduction.

(7) In 2016 and 2017, Mr Siddiqi of Musst made disparaging statements in material or repudiatory breach of the Octave Contract which entitled Astra to terminate it (if it applied), as they did by their counterclaim in January 2019. As a result, they brought to an end any continuing rights to fees, and they are also entitled to damages.

(8) In any event, Musst is not entitled to the relief claimed.

15. After complaints and pre-action protocol correspondence, Musst issued the Contract Claim in November 2018 claiming that it was entitled to unpaid fees and seeking an account of its 20% revenue share. The total sums paid by Octave and Astra to Musst were US$784,000 ($325,000 by Octave between 13 May 2013 and 3 February 2015, and about $459,000 by Astra LLP and then Astra UK between 10 November 2014 and 25 May 2016). These sums were, Musst says, its share of "management fees" due to it under the Octave Contract, that is to say 20% of the revenue which Octave and then Astra received from Crown and 2B, in return, as Musst says, for Musst's introductions. The amount of these management fees depended on the size of Crown and 2B's funds under Octave's and then Astra's management, subject to various limits.

16. Musst says that the 2B and Crown accounts are still in existence, and Astra UK is still receiving payments from them five years down the line, although it appears that, since May 2016, a number of their investments have been sold, which have resulted in Astra UK receiving at least some performance fees (a form of success fee payable when investments are realised). Astra UK accepted in July 2019 (in its Further Information) that by December 2018 it had received £6,671,813 from 2B, and that by September 2018 it was entitled to receive sums totalling £3,021,666 from Crown. It is not known whether Astra UK has received more money from Crown and 2B. Musst claims 20% of the money received whenever received, but Astra state that (a) there was no obligation to pay fees, but a voluntary arrangement as above, (b) the arrangement was only for the initial three-year period during which management fees were paid, and in any event (c) there is no liability beyond the three-year period, and there were no performance fees during the first three-year period.

17. Musst disputes all this. In particular, even if there is anything in Astra's points:

(1) There was no November arrangement. This is an important backdrop to the construction of the Octave Contract and the entitlement to fees for the introductions of 2B and Crown.
(2) There were introductions of 2B and Crown respectively by Musst under the Octave Contract. The introductions were not those of Matrix, and in any event, Musst as an introducer is entitled to management and performance fees. Astra LLP and Astra UK are estopped from denying its claims, on the basis that the parties throughout (including Octave) acted on the common basis that the Octave Contract governed the relevant introductions. (A claim for rectification is also brought on this basis.).
(3) The Octave Contract was novated to Astra LLP and then to Astra UK. Further, Astra LLP is estopped from denying the alleged novation (or assumption of Octave's liabilities), because all parties acted on the assumption that the Octave Contract had been novated to Astra LLP (or at least, Astra LLP had taken on Octave's liabilities); and further it was bound

by the same estoppels as Octave was in relation to the construction of the Octave Contract, as it knew all the relevant facts giving rise to the same. (Astra and Octave were related entities, worked in the same building and shared many of the same staff).

(4) If there is no contractual entitlement, Musst makes a claim for unjust enrichment.

(5) The defence by reference to the Current Strategy is misplaced because as a matter of construction the relevant investments were made subject to the Current Strategy, and they cannot be defeated simply because Octave or Astra subsequently departed from the Current Strategy. In any event, Astra are estopped from taking the point (if there is anything in it) that the investment strategy changed, if it did, because the parties acted on the common assumption that on a proper construction Musst was entitled to management fees unless and until the relevant investments were sold, at which point it would be entitled to performance fees.

(6) The alleged illegality according to US law is not a defence because a relevant infringement has not been proven. In any event, even if there was a breach of US law, it would not prevent Musst from claiming the sums due. Further, Astra are said to be estopped from taking the US law point (which anyway does not arise) because of Octave's representations that it was satisfied with the assurances provided by Musst's lawyers on the point before the Octave Contract was signed.

(7) Musst disputes that Mr Siddiqi made any of the statements he is alleged to have made (save two, which it says do not matter and were anyway true); and in any event, even if he did, they were immaterial and did not justify termination of the contract or the continuing right to payment of fees, or cause any loss.

(8) It follows that Musst should be given the relief sought.

III The Counterclaim in the Contract Claim

18. By way of a fuller introduction, more can be said at this stage in respect of the Counterclaim. Astra allege that Mr Siddiqi made four disparaging statements about Astra at a Goldman Sachs hedge fund conference in Rome on 23 June 2016 to Mr Ralph Plotke of Crown, namely that (a) *"Astra is a sinking ship"*, (b)*"Astra does not have enough money to pay its staff"*; (c) *"Astra [Mr Mathur] is a one-trick pony"*; and (d) *"All Astra's investors are pulling money out of funds managed by Astra and Crown should get out while it can. Don't' be the last man standing"*.

19. Mr Plotke has not given evidence in respect of this conversation, but Astra seek to prove the same both inferentially and through hearsay evidence including communications by Mr Plotke, in particular to his line manager Mr Rigter. Mr Siddiqi has given evidence. Musst admits that Mr Siddiqi spoke to Mr Plotke at lunch at the Rome conference on 23 June 2016, and that they talked about the performance of the Astra funds, but denies

that he said the alleged words (or words to similar effect): see paragraphs 151 to 152 of the Amended Reply and Defence to Counterclaim ("ARDCC").

20. Astra also allege that Mr Siddiqi repeated the *"sinking ship"* and *"one-trick pony"* statements to Dr Sunil Chander in July 2017 on the London underground on the way to Knightsbridge. Musst admits that Mr Siddiqi spoke to Dr Chander on the underground in or about July 2017 about the dispute which had by then arisen, and that he said that he considered that Mr Mathur was being *"unreliable"* and that he felt that there was a *"dark side"* to Mr Mathur, as he was now seeking to exploit his (Mr Siddiqi's) weak financial position by avoiding paying Musst's fees after Mr Siddiqi had helped put him in business: see paragraphs 154 to 158 ARDCC. Further, it alleges that these statements were true and defensible, and therefore not a breach of either clause 5.1 or 5.7 (see paragraphs 159 to 162 ARDCC).

21. Further, by an amendment made in May 2020, Astra allege that before all this, in May 2016, Mr Siddiqi had made statements to the effect that Mr Mathur was a *"one trick pony"* and *"maybe it is a good time to get out"* to Mr Albertus Rigter, also of Crown, at a J. P. Morgan conference. Musst admits that Mr Siddiqi attended the JPM Leaders Conference in London in May 2016 but denies that he said to Mr Rigter (if he met him) the words alleged: see paragraph 150A of the ARDCC.

22. If (contrary to their main case) the Octave Contract was novated to Astra LLP and Astra UK, Astra allege that Musst was in breach of clause 5.1 and 5.7, which require Musst to act in good faith and prohibit "disparaging" statements, for which Astra LLP and Astra UK are entitled to damages. Further, they allege that these amounted to repudiatory breaches of the Octave Contract, which, by the Counterclaim (served on 18 January 2019), Astra accepted, so as to bring to an end their obligations to pay relevant fees, if any, earned by and paid to Astra UK thereafter.

23. In reply, Musst denies that Mr Siddiqi made any of the other statements alleged in the conversation with Dr Chander or in the other conversations, or that this amounted to a breach of condition or repudiatory breach such as to entitle Astra to terminate the Octave Contract or that it gave rise to a contractual right to terminate; and anyway, on a proper construction, even if it did, this would not affect its continuing right to fees: see paragraphs 166 to 169 ARDCC.

IV Summary of issues in the Contract Claim

24. The main issues, therefore, are the following:

(1) Did the parties agree to the voluntary "November Arrangement" alleged by Astra, and (correspondingly) did they agree that the subsequently negotiated Octave Contract would not apply to the introductions of 2B and Crown?
(2) If the Octave Contract was the only relevant arrangement:

(a) Did Musst introduce 2B and Crown to Octave within the meaning of "Introduction" provided for in this contract (and notwithstanding the role played by Matrix)?

(b) If Musst did introduce 2B and Crown, is its claim nonetheless precluded by the "Effective Date" provision in that the introductions preceded the Effective Date?

(c) In any event, whatever the strict position on (a) and (b), was Octave estopped from denying that Musst is entitled to payment in relation to the 2B and Crown accounts, by virtue of its representations to Musst in the course of negotiations, or by virtue of the common assumption on which both parties acted in relation to 2B, and Crown thereafter, as evidenced by Octave's payments to Musst in relation to 2B and Crown? Or at least, is Musst entitled to rectification of the Octave Contract so as to provide for this?

(3) Was the Octave Contract novated to Astra LLP and then to Astra UK in relation to the 2B and Crown accounts? This includes consideration of whether the acts relied upon gave rise to an offer and acceptance required for a novation. Insofar as there was an offer, did Mr Holdom have the necessary authority on behalf of the Astra entities and/or Octave to make the same? If there was no novation, is Astra estopped by its representation and/or common assumption in denying the novation. Insofar as material, were Astra LLP and Astra UK bound by the alleged estoppels or claims to rectification as against Octave?

(4) Even if the Octave Contract was not novated to Astra UK (or even Astra LLP) in relation to the 2B and Crown accounts, is Astra UK liable on the basis that it has been unjustly enriched at Musst's expense by the transfer of the management of the Crown and 2B funds in the knowledge of Musst's rights in relation to the fees arising therefrom? And what is the position of Astra LLP?

(5) On a proper construction of the Octave Contract, does it matter if the investment "strategy" changed by December 2014 or 2015 (or later); and anyway, if there was any change, was it a material change such as to bring to an end Musst's rights to fees? And even if there was such a material change, are Astra estopped from relying on it because the parties had a common understanding that Musst's rights to payment would not be affected by it?

(6) Did Musst act in breach of section 15(a)(1) of the US Securities and Exchange Act 1934 in introducing 2B on the footing that it was acting as a "broker or dealer" without the necessary registration; and even if it did, does this affect its right to fees? In any event, are a Astra estopped from taking the point because of Astra leading Musst to believe that they were satisfied with the assurances Musst had received from its own US lawyers that there was no need for it to be so registered?

(7) Did Mr Siddiqi make the alleged disparaging statements; and if so, were they material or continuing, did they put Musst in repudiatory breach, and what are the consequences?

(8) To what relief, if any, is Musst entitled? In particular, is it entitled to inspect the books and records of all Crown's and 2B's accounts

(including those on which it has not been paid), or those relating to other investors who have made investments following the "Current Strategy"? Or at least, is it entitled to an account of all such sums received, and to provision of information for the purpose of that account under its unjust enrichment or quantum meruit claims?

V The Defamation Claim

25. The Defamation Claim is for slander, arising out of the same words as are alleged to have been spoken by Mr Siddiqi to Mr Ralph Plotke on 23 June 2016 as pleaded in Astra's counterclaim in the Contract Claim. The original Particulars of Claim was served in September 2017, before the Contract Claim was issued (the Contract Claim dispute then being the subject of pre-action correspondence). The original Particulars of Claim in the Defamation Claim alleged that Mr Siddiqi spoke the words complained of not only to Mr Plotke, but to Mr Albertus Rigter of Crown as well, but Astra have since accepted that this was incorrect, and have amended their claim accordingly.

26. The words complained of are set out at paragraphs 6.1 to 6.4 of the Amended Particulars of Claim and are to the same effect as those relied on in the counterclaim in the Contract Claim.

27. Astra set out the natural and ordinary meaning they contend for at paragraph 7 and an innuendo meaning at paragraph 8.1 of the Amended Particulars of Claim. They also bring a claim for malicious falsehood arising from the same words, which is set out at paragraphs 11 to 18, with particulars of malice at paragraphs 19 – 28 of the Amended Particulars of Claim.

28. As in Musst's defence to counterclaim, in the Defence to the Defamation Claim, it is denied that Mr Siddiqi said the words complained of to Mr Plotke on 23 June 2016. The burden, he and Musst LLP say, is on Astra to establish that the words complained of (or words not materially different) were published on the occasion pleaded, and Mr Plotke has not even provided a witness statement. The only direct evidence of what took place at the Cavalieri Hotel in Rome on 23 June 2016 comes from Mr Siddiqi.

29. Musst and Mr Siddiqi further deny, if the words were spoken, that they caused serious harm or financial loss to Astra. Section 1 of the Defamation Act 2013 introduced a higher statutory threshold which requires a claimant to establish that – in addition to the words complained of being defamatory at common law – they caused or were likely to cause serious harm to the claimant's reputation. As Astra bring the claim as a corporate entity, s. 1(2) of the Defamation Act 2013 also requires them to establish that the words complained of caused or were likely to cause them serious financial loss. Musst's position is that there is simply no evidence that this was the case. As said, there is no evidence in the disclosure that Astra suffered any serious financial loss as a consequence of the words allegedly spoken by Mr Siddiqi.

30. Much the same applies to the claim brought in malicious falsehood. Astra must establish that the words were in fact spoken on the occasion pleaded. In addition, it must establish that they were spoken maliciously and that they caused or were calculated to cause it actual financial loss. Again, if Astra fail to establish these elements, their claim, it is submitted, in malicious falsehood fails.

31. In the alternative, if the relevant words are found to have been spoken, Musst relies on the following substantive defences:

> (1) The words were spoken on an occasion of qualified privilege;
>
> (2) The words spoken were statements of opinion to which the defence of honest opinion pursuant to s. 3 of the Defamation Act 2013 applies;
>
> (3) The words spoken were substantially true and so attract a defence of truth pursuant to s.2 of the Defamation Act 2013.

32. In addition, Musst denies that the words allegedly spoken would bear the natural and ordinary meaning or the innuendo meanings contended for by Astra. Musst further denies that the words complained of were spoken maliciously. Musst also contends that the claim is an abuse of process in accordance with the principles in *Jameel v Dow Jones* [2005] QB 946.

33. There are many issues on paper in the Defamation Claim. However, the focus in the course of the trial, and especially the final submissions has been on (a) whether the words complained of (or words not materially different) were spoken at the Goldman Sachs conference by Mr Siddiqi to Mr Plotke on 23 June 2016; and (b) if the words complained of were spoken, whether they caused or were likely to cause Astra (i) serious harm to its reputation, and (ii) serious financial loss.

VI The procedural history

34. The first formal stage in the dispute was the pre-action protocol correspondence in the Contract Claim, which began in October 2016, with Musst's complaints that Astra had acted in breach of contract as from May 2016 by stopping payments on the Crown and 2B accounts, and failing to provide information, along the lines later set out in the Particulars of Claim. Pre-action protocol correspondence started not long afterwards on the defamation proceedings.

35. The Defamation Claim was issued on 1 June 2017 and served on 29 September 2017 together with the Particulars of Claim. The Contract Claim was issued on 7 November 2018, which was served shortly thereafter together with the Particulars of Claim. After the transfer of the defamation proceedings to the Chancery Division, the two claims were case managed together at a hearing before Chief Master Marsh on 12/13 December 2019. He directed that the two claims should be heard together.

VII Observations about the witnesses

(a) Case law on contemporary documents and overall probabilities

36. It is of importance in this case, having regard to the fact that the oral evidence was directed to memories of matters that occurred many years ago, for the Court to have

regard to the contemporary documents and the overall probabilities. It is useful to remind oneself of case law to the effect that the contemporaneous documentary record and the overall probabilities are usually more reliable than the content of witness statements, prepared with the assistance of a legal team after the event and for the purpose of proving a case or meeting a case against them.

37. This is a case where the Court has had to consider the recollection of witnesses. Despite the heavy documentation of this claim, this has been especially so in connection with the November Arrangement and with the Defamation Claim, which were oral and without any contemporaneous or near contemporaneous documentary record of the words used. Some of the witness statements in this regard were prepared years later. It is therefore particularly important to remind oneself of the frequently cited case law of the approach of the courts to such cases.

38. In *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] EWCA Civ 1413, Males LJ stated the following at paragraphs 48-49 under the heading "*The importance of contemporary documents"*:

> *"48. In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in The Ocean Frost [1985] 1 Lloyd's Rep 1 at p.57 is frequently, indeed routinely, cited:*
>
> > *"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case."*

> *49. It is therefore particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations."*

39. Whilst *The Ocean Frost* and *Simetra* were cases concerning fraud, the dicta in the *Ocean Frost* have been applied in numerous cases especially in commercial cases.

40. In *Grace Shipping v Sharp & Co* [1987] 1 Lloyd's Rep 207 (Privy Council) Lord Goff said at p. 215:

> *"It is not to be forgotten that, in the present case, the Judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the Judge to have regard to the contemporary documents and to the overall probabilities."*

41. In *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) Leggatt J (as he then was) said this:

> *"19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.*
> *20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through*

> *several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."*
> At [22]:
> *"In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

42. These passages were considered by the Court of Appeal in *Kogan v Martin* [2020] EMLR 4, confirming the general proposition that especially in commercial cases, the Court must adopt this approach. However, that is not to say that all the evidence including the oral evidence should not be taken into account. The Court of Appeal was there critical of a judge who said that he would take very little account of the oral evidence because of the documents. In the judgment of the court at pp.88-89 (Floyd, Henderson, Peter Jackson LJJ), it was stated:

> *"88. ...First, as has very recently been noted by HHJ Gore QC in CBX v North West Anglia NHS Trust [2019] 7 WLUK 57, Gestmin is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay The Judge as Juror: The Judicial Determination of Factual Issues (from The Business of Judging, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short*

> *cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."*

(b) The witnesses of fact

43. Considering the evidence in this case, I make the following observations in respect of the witnesses of fact. I was particularly impressed by the intellectual ability of both Mr Mathur and Mr Siddiqi. If and to the extent that there were any shortcomings, it was not due to lack of comprehension on their part.

44. Overall, I regarded Ms Galligan and Mr Siddiqi as credible and reliable witnesses, who assisted the Court by their evidence. Their evidence was reduced in value to the extent that Ms Galligan went first, whereas the more important witness was Mr Siddiqi (as the person who had been a part of Musst from its inception and as the person who was alleged to have made the defamatory statements). It was not satisfactory for Mr Siddiqi to confirm in part evidence of Ms Galligan instead of speaking from his own independent recollection. I had a concern that the superior presentational ability of Ms Galligan had led to her taking the lead.

45. Ms Galligan demonstrated a great familiarity with the documents in the case, but there were times when she appeared to have little recollection outside the documents. This was not surprising given how many years earlier the events took place. With her background in sales, she sometimes seemed to be seeking to win over by her personality rather than by the details of her evidence. There were aspects of her evidence which were unsatisfactory, notably her evidence that the role of Matrix was administrative and secretarial. Her skill in sales (representing Matrix until late October/early November 2012) must have gone significantly beyond the administrative or secretarial. On one occasion, in this strain of evidence, she referred to herself as a passive attendee which seemed unlikely.

46. Despite the defensive strategy of apparently sheltering Mr Siddiqi by calling him second, the skill of Mr Boardman QC and Mr Glen respectively and the legal team for Astra ensured that the evidence was tested thoroughly including the confirmations of Ms Galligan's evidence. There was a concern about the extent to which Mr Siddiqi embellished the extent of financial difficulties in order to persuade Mr Mathur to make payments, and how this impacted on the reliability of his evidence. It is possibly cancelled out by the fact that Mr Mathur appears to have invoked financial difficulties preventing payments at that stage, whereas, as he accepted in his evidence, Astra did not have such problems as would have prevented any payments at that stage in May/June 2016.

47. The evidence of Mr Mathur has given rise to greater concerns. He had an explanation more than once when important aspects of his evidence were missing from his witness statement, saying that his solicitors had excised large parts of his statement and casting the blame on his solicitors. He also claimed lack of recollection or lack of attention to important aspects of the case, saying that he was so busy with thousands of emails a

day and working long hours. He also referred to his being a lay person in respect of legal matters like putting things on record. The more important the matter, the less credible were these answers.

48. An example of his unsatisfactory evidence was that in the course of about 10 pages of the transcript from [T6/76] onwards, Mr Mathur took issue with the accuracy of numerous points recorded by Ms Galligan in her note of 17 June 2016 of a conversation of 14 June 2016 between Mr Mathur, Mr Siddiqi and herself. He had no documentary evidence to show what was actually said. It stretched credulity that absent invention, Ms Galligan's note should be so radically wrong, and I dismiss any suggestion of invention which Mr Mathur retreated from when asked if it was made up: see [T7/77]).

49. When there was no obvious answer to questions, Mr Mathur had a tendency to avoid the question, despite his total command of his business. Thus, when a telling question was asked about why he did not want to make a payment in respect of 2B until after the Octave Contract was signed (which appeared contrary to his case that the payment was not under the Octave Contract but under a November arrangement), he failed to answer the question [T7/22]. He started with a long explanation which did not deal with the question [T7/22-23], he then invoked legal advice for which privilege was claimed [T7/24], but that was contradicted by a different explanation in his fifth witness statement (at para. 103)[T7/28-30]. This subject matter is considered in detail below, but for the moment, this is an example of Mr Mathur seeking to avoid an important question.

50. Another example was his initial failure to answer probing questions relating to the assertion that the removal of $7.5 million in October 2016 was caused by the alleged Defamatory Statements, which was not asserted in a letter of Jones Day of February 2017. Mr Mathur retreated to the mantra that he was not responsible for what his solicitors wrote. He then sought to give a very long answer over several pages of transcript about how a decision in October 2016 to prefer the cash to rest in Deutsche Bank rather than with Astra showed something about the impact of the Statements in June 2016 [T8/34-40]. This had not appeared in his witness statement.

51. Mr Murray, in-house counsel with Astra, gave evidence which was unsatisfactory, namely how he had taken a note of being informed about the alleged Defamatory Statements, but that he had lost the note. This is dealt with in detail below. At best, this showed serious neglect that he had lost the statement. More likely is that he was wrong and there was no note: his explanations about the note were contrary to the overall probabilities. I regret that I did not find him a satisfactory witness in the way in which he dealt with the questions regarding the notebook. He also seemed to have an agenda about how the Octave Contract was forward looking which got in the way of his answering questions satisfactorily e.g. [T10/41-44].

52. Mr Reeves of Matrix gave evidence which was not satisfactory. An example is that paragraph 18 of his witness statement indicated that he had agreed a 20% commission with Mr Mathur, but then in cross-examination, he said that he did not have a positive recollection about this: T9/94-98. His evidence lacked precision about what agreement there was as regards commission at any stage and between whom.

53. Mr Rigter formerly of Crown before moving to Astra in 2019 was not particularly good at telling the case in an authoritative way. He was an important witness in the absence of Mr Plotke the publishee, to whom the alleged Statements had been related. I was not satisfied about the extent to which he was simply seeking to support a case which had been prepared and developed long before his involvement. This may not be surprising given the lateness of his statement and the fact that he had become part of Astra through employment.

54. I found Dr Chander to be a very defensive witness. For much of his evidence, he did not engage in the question and answer process required of witnesses in these courts. He did not come over as if was seeking to derail the process, but he was rather set in his very precise ways. He was often not willing to wait for the question. He then sought to analyse the question, asking questions about the questions. He was especially unsatisfactory when asked questions about the Jones Day letter insofar as it concerned him.

55. There is less to relate about Dr Adler and Mr Holdom, who were employees of Astra. Dr Adler was cautious in his answers. Mr Holdom gave evidence that was clear and understated. They were not the central witnesses. They have to be considered carefully because of their position as employees of Astra giving evidence about historic matters which were largely undocumented.

VIII The Contract Claim: the background

56. It is first necessary to consider the background to the Contract Claim and the submissions of the parties in order to make conclusions in respect of the claim.

(a) The early period in 2011 and the parties

57. In 2011, Mr Siddiqi was introduced to Mr Mathur by Dr Chander, who was a mutual acquaintance. At the time, Mr Mathur was working for Deutsche Bank as head of Winchester Capital Principal Finance, where he managed a portfolio of cash and synthetic ABS, which was a multi-billion dollar pool of ABS consisting of various different types of ABS.

58. Mr Siddiqi was a partner in Tapestry Asset Management LLP, a hedge fund adviser focussing on institutional clients, with a reputation for "seeding" (providing initial finance to hedge fund managers), and he managed the London side of the business.

59. Mr Siddiqi and Mr Mathur got along well and there were discussions about Mr Siddiqi helping Mr Mathur in a new business which would trade in synthetic ABS. According to the evidence of Ms Galligan and Mr Siddiqi, Mr Mathur would come round to Mr Siddiqi's home, where he lived with his wife Alexandra Galligan, and they would discuss business plans, strategy and how to present the opportunity to potential

investors. The first such visit appears from the documents to have been on 25 October 2011.

60. Mr Mathur intended in due course to leave Deutsche Bank and set up a new company which ran a hedge fund focussing on synthetic ABS, and in which clients would subscribe for shares in return for capital contributions. Mr Mathur would manage the company and charge management and performance fees to it.

61. On 26 October 2011, Mr Mathur sent to Mr Siddiqi a "Draft Proposed New Regulatory/Special Situation Funds" document which set out the rationale of the proposed fund and a short power point presentation. As a result of the 2008 banking crisis, banks were under pressure to get rid of credit instruments such as synthetic ABS. This created an opportunity in that the assets were complicated and unlikely to mature for some time. Mr Mathur knew from his experience in the market where to acquire them cheap with a view to holding them for a few years, and selling them at a substantial profit on maturity, by which time it was expected that the market would have recovered.

(b) Musst

62. The Claimant, Musst, was incorporated in the BVI by Mr Siddiqi on 2 February 2012, when he decided he wanted to leave Tapestry and devote himself to his own business. Mr Siddiqi is the ultimate beneficial owner of Musst, and it is a vehicle through which he (and since she left Matrix in October/November 2012, his wife Alexandra) conducts business. Musst was a part of a business group of companies through which Mr Siddiqi operated.

(c) January 2012 to late October 2012

63. The business planned by Mr Mathur was referred to as "AMCo" (standing for Anish Mathur Company, and then latterly Astra Management Company). On 16 January 2012 and 8 February 2012 Mr Siddiqi introduced Mr Reeves to Mr Mathur and, subsequently, Mr Siddiqi and Mr Mathur presented the proposed AMCO business strategy to the Matrix sales team. As a result, Ms Galligan and other members of the Matrix sales team started speaking to potential investors about the proposed AMCO business in March and April 2012.

64. There is a dispute between Mr Siddiqi and Ms Galligan on the one hand, and Mr Mathur and Mr Reeves on the other, as to what happened in this period, as to how much the introductions of prospective investors was by Matrix and how much by Musst, and as to the terms, or at least understandings, on which the parties were operating.

65. The following is to be noted from the contemporary documents:

(1) Mr Siddiqi wanted to involve Mr Reeves in discussions as to how to take things forward. Mr Reeves was keen to be involved in them as was apparent from a number of emails between 16 January 2012 and 18 January 2012.

(2) In an email of 16 January 2012, Mr Siddiqi wrote to Mr Reeves as follows:

> *"So, I had a two hour meeting with Anish and laid down a gauntlet. The net result is he will work with Musst Investments and understands how we operate. The specifics of a deal have not been decided, but the essence of the deal has been transmitted, and I think he gets it…. Hence, it is time to morph his pitch book and move the story forward.*
> *I have suggested a meeting with the three of us. I have told him, I will write his pitch book, but before that I will ascertain his competition. One of them, who is EU focused is [gives website address] and as it happens is advised by Adosh. The other is [gives website address]. I will get meetings with both of them and ascertain what they do. Will give me ideas for our pitch."*

(3) There were encouraging emails between Mr Siddiqi and Mr Mathur including on 17 and 18 January 2012 in the following terms:

i. 17 January 2012 from Mr Siddiqi: *"It was really good talking yday, Anish, and I am happy that you are comfortable involving me. From my side, let me assure you … as I mentioned to you yesterday, I would never put my name on anything that I did not completely believe in nor had an interest in. …. Most importantly, I am happy that you feel comfortable trusting me and vice versa. Looking forward to building a big business that is successful and has long term legs".*
ii. 18 January 2012 from Mr Mathur: *"As usual, I am quite amazed with your network and ability to connect dots. I hope we are able to take this forward. Not only am I pleased that you're keen to be involved, I am actually very happy that you believe in the opportunity and my abilities to capitalized it* [sic] *for all of us."*

(4) After a meeting with Mr Siddiqi, Ms Galligan, Mr Mathur and Mr Shamil Chandaria on 8 February 2012, Mr Reeves sent an email on 9 February 2012 setting out what he believed needed to be done, which involved, amongst other things, creating a *"pitch book"*, a *"product structure"*, and working out which clients to target. He also gave a few initial thoughts on a sales strategy. At a further meeting the next day, Mr Siddiqi, Mr Mathur and Mr Reeves spent a few hours working on the "pitch", which resulted in Mr Siddiqi coming up with a "one pager".

(5) In emails in February 2012 and March 2012, Mr Reeves suggested various terms which could apply as between MUSST and Matrix in relation to Mr Mathur's project, and also on another deal, which involved raising money for an equity fund backed by Mr Shamil Chandaria and run by Octave. He noted that terms needed to be agreed between MUSST and Mr Mathur before agreement could be reached between MUSST and Matrix.

(6) More particularly, on 15 February 2012, there was an email from Mr Reeves to Mr Siddiqi and Ms Galligan as follows:

> *"MUST should go for full global distribution requiring min of eg 25% fees. Must could take an override via 2 methods*

> ***1) Take 25% mandate and then pay 80% to "sales people"***
> *2) Negotiate a higher mandate eg 30% and receive the 5% spread.*
> *3) Equity component. If not palatable then x% for x around of sales.*
> *Sales people defined as Matrix, Rahul etc etc*
>
> *Next stages:*
> *1) Question is how all split at MUST level?*
> *2) Contracts need to be completed for both Must and the manager and then between Must and the sales people - I have templates*
> *3) Timescales*
> *4) Who negotiates contracts? Let me know what u think L Luke Reeves Director - Head of Retail and Institutional Business Development"* (emphasis added)

(7) On 6 March 2012 (and another on 21 March 2012), there was an email from Mr Reeves to Mr Siddiqi stating: *"MUST (sic) Fee agreement (SS to complete once completed then MUST (sic) to complete with Matrix)."* (This appears to indicate an understanding on the part of Mr Reeves as at March 2012, and contrary to Astra's case, that the fees would be paid by Octave, the manager, to MUSST and then from MUSST to Matrix.)

(8) On 11 April 2012, Mr Mathur gave a presentation to the Matrix sales team about his proposed fund, along with Mr Siddiqi. This sales team included Mr Christopher Elliott and Mr Ben Fox, as well as Mr Reeves and Ms Galligan.

66. By about mid-April 2012, Mr Mathur had decided to trade under Octave's regulatory umbrella (he had to have some umbrella until his vehicle obtained the relevant authority to trade in its own right from the (then) Financial Services Authority). He was still at the time with Deutsche Bank.

67. From mid-April 2012, the following is to be noted from the contemporary documents:

(1) Mr Siddiqi was working very intensely on the preparation of the presentations e.g. *"OK team – I spent 10 hours on this today … and will probably do the same again tomorrow. I have locked myself up until this gets done … but I would like us to have a wrap on it for Friday … I have started initiating contacts with ADIC, EIA already and will need to send them something for Sunday …. The heat is on!"* (Mr Siddiqi, 18 April 2012);

(2) *"Anish came over this morning and we spent some hours on the document. I attach its most updated incarnation including comments we discussed this am. …"* (Mr Siddiqi, 23 April 2012);

(3) *"Looks like another long night for Mr Siddiqi. Please see attached version 7 draft".* (Mr Mathur, 27 April 2012);

(4) *"The goal is to keep evolving this document as we get closer to launch and as we get more intelligence from our sales process, Hence, please keep*

shooting me comments as and when we get them … Well played team and thank you everyone! S" (Mr Siddiqi, 27 April 2012).

68. The Matrix sales team became involved in assisting Mr Siddiqi and Mr Mathur to prepare the presentations for the fund to send to prospective investors as is apparent from emails in the second half of April 2012 especially. They were also making the initial contact with investors in many cases and going on road trips with Mr Siddiqi and Mr Mathur either locally or abroad e.g. 12 April 2012 planning European trips, 8-9 May 2012 two presentations in the UK offices of Matrix in London with 12 investors at each, 14-17 May 2012 referring to a trip to Switzerland, 30 May 2012– 1 June 2012 trip to Sweden. The Matrix team assisted Mr Siddiqi and Mr Mathur in drawing up the prospectus and the "due diligence questionnaire" (the "DDQ") for Octave to send out to prospective investors about the fund (especially late June 2012 and July 2012).

69. Mr Reeves continued to suggest that agreements needed to be reached between MUSST and (now) Octave, and between MUSST and Matrix. Mr Siddiqi chased Mr Mathur to finalise the agreement which he said they had reached, given that *"the AMCo/Octave marriage is now in place and hence we need to draw up T&C's between us"* (25 June 2012).

70. By early July 2012, Simmons & Simmons had drawn up a "Summary of Principal Fund Terms" for what was now called "AMCO Special Situations Credit Fund Ltd", which noted that the fund was to pay the "Investment Manager" (i.e. Octave as then expected) 20% of net realised appreciation on investments and a 2% management fee. They had also started work, with Mr Siddiqi's assistance, on the proposed offering memorandum. Octave sent a rough draft of the first prospectus to Mr Reeves, Ms Galligan and Mr Siddiqi.

71. Three other points are to be noted about this period.

(i) The initial approaches to The Observatory and LGT

72. First, in this period, the first approaches were made to the two investors whose investments form the main subject matter of this claim, i.e. LGT Capital Partners ("LGT") (who eventually invested through Crown), and The Observatory (who eventually invested through 2B).

73. Thus, on 24 April 2012, Ms Galligan then of Matrix made the first approach to Mr Issac Septon, of The Observatory, a United States entity, and set up a teleconference with him which eventually took place on 2 July 2012 between Mr Septon, Mr Mathur, Mr Siddiqi and Ms Galligan. Musst says that it was at Mr Siddiqi's suggestion that Ms Galligan made this approach, when the two of them had a "brainstorming" session on 12 March 2012 (Ms Galligan already knew Mr Septon, but Matrix had not sold any products to him).

74. On 18-21 September 2012, Ms Galligan and Mr Mathur went to the US to visit Mr Septon as Mr Siddiqi could not go due to visa complications. It is suggested that Ms Galligan went in place of Mr Siddiqi. (On 25 September 2012, there was a trip to

Stockholm and on 16/17 October 2012 further roadshow in Switzerland. On 9 October 2012, another one was fixed for 9 December 2012).

75. As for LGT, at some point, Mr Elliott of Matrix made the first approach to them, and also arranged a first meeting with them in Pfaffikon, Switzerland, which took place on 15 May 2012, attended by Mr Mathur, Mr Siddiqi, Mr Elliott and Ms Galligan. Musst says that this again was at Mr Siddiqi's suggestion to Ms Galligan in their 12 March 2012 brainstorming session because he had met various members of LGT's investment team including Mr Rigter and Mr Plotke (the latter of whom he had met several times on the hedge fund circuit).

76. Mr Siddiqi says that he had intended that he himself should make the first contact, but Mr Elliott, without his permission, jumped in and did so. Mr Siddiqi let him continue to liaise with Crown because the "industry etiquette" is that a potential investor is contacted on a specific idea by one person. Thereafter, Mr Elliott arranged the further meetings with LGT on 16/17 October 2012 in Switzerland again, and on 13 November 2012 in London.

(ii) Mr Mathur leaves Deutsche Bank

77. Second, Mr Mathur ceased to be registered as an authorised person at Deutsche Bank on 13 September 2012 (according to the Financial Services Register). He left Deutsche Bank at some point in "September 2012". This meant at last that contracts could be drawn up with him (or, rather, his vehicle), and with Octave. As Mr Siddiqi wrote on 9 October 2012: *"We also need to put the Musst/Octave Agreement in place as I explained to you now that we are going to be in a position to do so".*

78. The departure of Mr Mathur from Deutsche Bank enabled the "Red Herring" prospectus (i.e. a preliminary prospectus) to be sent to investors who had already shown a real interest, which explained the Astra Special Situations Credit Fund Ltd and that Octave LLP was going to be the investment manager, and Astra LLP the investment adviser. On 8 November 2012, Mr Siddiqi sent to Mr Plotke of LGT the Red Herring prospectus on Astra Special Situations Credit Fund Ltd. He explained that Astra LLP will "*be investment advisor, appointed by Octave Investments Management LLP as such... Once you have had the opportunity of looking at the Red Herring prospectus, please do not hesitate to contact me if there are any questions or comments with respect to the document …. I believe we have a meeting with LGT next Tuesday at Octave's office and I look forward to it. Are you also going to be in London in which case if it is convenient for you, could I take you out for a meal or drink?".* On 5 December 2012, Ms Galligan sent by email to Mr Septon the following: *"Dear Issac, Thank you for your time yesterday. We greatly enjoyed seeing you. I have attached a prospectus. Please let me know what else you may need to complete DD."*

(iii) The setting up of Astra Capital and Astra LLP

79. Third, by September 2012:

    (1) Mr Mathur had set up Astra Capital on 24 July 2012, of which he was the 76% beneficial owner, and in which, initially, Mr Joshi had 4% and Octave

8% of the shares. Dr Adler had 5%. However, Mr Mathur did not become a director of Astra Capital until 19 October 2012.

(2) Astra UK was incorporated on 6 August 2012. Initially, its members were Mr Joshi and Mr Phillips (to March 2013 and October 2013 respectively). Mr Mathur did not become a director until 21 March 2013.

(3) Mr Mathur had also, on 7 August 2012, set up Astra LLP. Mr Mathur did not become a member of Astra LLP until 21 November 2012.

(4) Astra Capital, at least in due course, had 51% of the votes in Astra LLP (as to the rest, Mr Mathur had 29% and Mr Holdom and Dr Adler each had 10%). As of 7 August 2012, it may be that Astra UK and Octave Capital Management were members of Astra LLP.

(5) Mr Mathur had set up the Astra Special Situations Credit Fund Ltd (hereafter "ASSCFL") on 11 October 2012.

80. As for Octave, the ownership position (at least by April 2013) was that:

(1) Octave Ltd was owned as to 39.25% by Mr Joshi; 5% by Mr Phillips; 6% by a Mr Holt, and 2.5% by Mr Holdom;

(2) Octave Ltd owned 100% of Octave Capital Management Ltd, which in turn held 65% of the votes of Octave LLP (the rest being held as to 15% by Mr Joshi, 5% by Mr Holdom, 5% by Mr Holt, 5% by Mr Phillips and 5% by Mr Mathur). Mr Mathur says that it was on 6 November 2012 that he became a member of Octave LLP.

81. The various agreements necessary to give effect to the intended arrangements between Octave and Astra in relation to ASSCFL were not concluded until 29 November 2012. In the meantime, Mr Mathur was registered with the FSA to perform the controlled functions as a partner with Octave LLP on 30 October 2012, and Astra LLP became Octave LLP's appointed representative on 6 November 2012, when it moved into Octave's premises in Ironmonger Lane in the City.

(d) Points in dispute in the period between January and October 2012

82. There are disputes between the parties including about the following three points:

(1) the nature of Matrix's role and responsibilities;
(2) what was the intention as regards payments to Matrix: Astra say that there was an agreement/arrangement between Matrix and Mr Mathur in early 2012 as regards a share to be paid by Mr Mathur to Matrix for its distribution efforts (what has been called "the Matrix arrangement"), whereas Musst says that an agreement would be made between Mr Mathur/Octave and Mr

Siddiqi/MUSST and a separate agreement between MUSST and Matrix to pay a part of the moneys received from MUSST;

(3) the dispute about whether there was a November arrangement in the nature of a voluntary arrangement: according to Astra, following the November arrangement, Matrix agreed that the voluntary payments would be made by Mr Mathur/Octave to Musst/MUSST which in turn would make payments to Matrix. This will be considered further when discussing the first issue.

83. As regards the first of the above points, Musst says that Matrix was acting at all times under the direction and control of Musst such that Matrix was no more than an administrator taking instructions from Mr Siddiqi/Musst. Thus, any investor who was approached or introduced would have been upon the initiative and/or at the instigation of Mr Siddiqi/Musst, because the initiative/instigation was that of Mr Siddiqi/Musst and Matrix was simply acting on instructions. However, Astra say that Matrix designed the distribution strategy from its database of investors (which included The Observatory and LGT), and worked out who to contact, albeit that there was coordination between Musst and Matrix. In no sense was Matrix acting on the instructions of Musst.

84. As regards the second of the above points, Musst says that there was no agreement or arrangement between Mr Mathur or his vehicle and Matrix, but that it was intended at all times that there would be one binding agreement between Musst and Mr Mathur or his vehicle: separately, Matrix would look to Musst/Mr Siddiqi for payment for its efforts out of moneys received by Musst/Mr Siddiqi from Mr Mathur or his vehicle. Astra say that although the relationship became tripartite (that is to say Mr Mathur/Octave, Matrix and Siddiqi/MUSST after 21 November 2012), in early 2012 the arrangement was that Mr Mathur/Octave would pay Matrix directly for its introductions, and the parties discussed a 20% fee in respect of management fees and performance fees.

85. As regards the third of the above points, Musst says that there was no November arrangement between Musst and Octave of a voluntary nature and in respect only of introductions made before 21 November 2012. The parties reached an agreement in principle in November 2012 on the basis that any agreement would be made in writing thereafter. The parties then negotiated the agreement which was made on 18 April 2013. By contrast, Astra say that there was an arrangement to pay to MUSST for its efforts up to 21 November 2012 by a voluntary payment. There would then be negotiated a forward-looking written agreement in addition to the November arrangement. Thereafter, the voluntary arrangement was modified to involve Matrix, so that all three parties would become parties to the November arrangement whereby the voluntary payments would be made to MUSST in respect of any introductions before that time, and MUSST would be responsible to pass on payments to Matrix as would be negotiated between MUSST and Matrix.

86. The position of Musst is that Matrix was always acting under MUSST'S direction and control, and it had no discretion of its own to approach investors or indeed to discuss arrangements with Mr Mathur. In particular:

(1) It contends that it was Mr Siddiqi's role to co-ordinate *all* sales efforts. In the context of a possible overlap, Ms Galligan wrote to Mr Mathur on 11 September 2012 that *"As we have discussed I believe Saleem to coordinate all sales efforts for AMCO."*

(2) Mr Siddiqi was the *"product specialist and key presenter"*, and he attended the majority of the key meetings, sometimes with Mr Mathur, sometimes without.

(3) It was at Mr Siddiqi's instigation that The Observatory and LGT were first approached, albeit that it was Ms Galligan and Mr Elliott who then made the first contact.

(4) Although, as had been agreed, Matrix generally made the initial approach, this was only to 58% of the 178 investors identified on a list sent by Mr Siddiqi to Mr Mathur on 28 November 2012, and the other 42% were first contacted initially by Mr Siddiqi. Where clients expressed interest following an initial approach by Matrix, Mr Siddiqi would step in, as the product specialist, to talk about the proposal in more detail with the decision makers. He also approached over 100 potential clients, many of which he met in London, Geneva, Zurich, New York and Stockholm.

(5) Musst says that the work Matrix did was essentially administrative (e.g. making initial contacts with the potential investors, arranging meetings and printing presentations, and sending presentations to target clients).

87. Astra accept that Mr Siddiqi was the "co-ordinator" of the distribution effort in that there had to be someone ensuring that there was a united strategy and especially that potential investors were not approached by different people. It is also accepted that Mr Siddiqi made the introduction of Mr Reeves to Mr Mathur. That is not surprising in view of the fact that he is married to Ms Galligan, who at the material time, namely early 2012, worked for Matrix. The case of Astra, especially through the evidence of Mr Reeves, is that it was Matrix that took the lead and was the "capital introducer" for the fund. They contend that Mr Mathur often had direct contact with them without Mr Siddiqi being there. Likewise, it was Matrix, Mr Reeves says, that designed the distribution strategy from its database of investors (which included The Observatory and LGT), and worked out who to contact, pursuant to which it contacted over 200 potential investors. It involved its compliance and legal teams and its risk committee and new business committee.

88. In my judgment, starting with the contemporaneous evidence, this shows that Matrix was more than an administrator or a secretary. This is for the following reasons. First, it had a bank of contacts itself to whom it could reach out. Second, it made contact with potential investors which indicates much more than an administrative role. Third, Ms Galligan in particular presented as a person with 'the gift of the gab' and the charm that the best salespersons have. Until October/November 2012, she was acting for Matrix and not for MUSST, despite her being married to Mr Siddiqi. In that capacity, she was doing more than simply administrative tasks. Fourth, when Mr Elliott reached

out to LGT (without the prior approval of Mr Siddiqi), he was doing more than being an administrator, but seeking to get the business of a prospective investor.

89. The key points relied upon by Musst do not make the contact of Matrix merely administrative. Matrix lacked the technical know-how in the credit instruments relating to synthetic ABS, such that any investment depended on contact between Mr Mathur and/or Mr Siddiqi and the prospective investor. However, that does not relegate the contact of Matrix to a secretarial role. The co-ordinator was Mr Siddiqi, but the fact that there was supposed to be liaison before and after contact took place between Matrix and prospective investors does not mean that the extensive personal contact including meetings of Matrix with them was not important. This is particularly evident as regards the meeting attended in the US by Ms Galligan in September 2012. The absence of Mr Siddiqi would not mean that an administrator would be a substitute: it reflected on her abilities that she deputed for her husband, and at that stage she deputed as an employee of Matrix rather than as a representative of her husband.

90. It does not follow from the fact that Matrix was taking a part of the distribution role that Matrix was taking the entire distribution role. I accept the evidence of Mr Siddiqi and Ms Galligan that they had a brainstorming session together on 12 March 2012 about their contacts including LGT and Crown. Mr Siddiqi did have the overall coordinating role, and this is not affected by the fact that Mr Elliott made the approach to LGT without prior reference to Mr Siddiqi. Mr Siddiqi had a major role in respect of distributions, preparing technical material, compiling names of potential investors, attending meetings and speaking with and writing to them. Likewise, after she ceased to act for Matrix, Ms Galligan immediately continued her distribution role, but this time for MUSST.

91. Musst says that:

(1) It was agreed (albeit the specifics had not been worked out) at a meeting between Mr Siddiqi and Mr Mathur on 16 January 2012 that Mr Siddiqi's business would get 25% of all fees charged by Astra to investors on capital which he raised; and this was mentioned at other times in 2012. There was nothing which was set out in writing at that stage containing or evidencing the terms of the deal.

(2) In subsequent emails, the following was set out. On 25 June 2012,

1. "11.47: Mr Siddiqi *"Dada, I wanted to see if we could sit down and finalise everything relating to our deal please? The AMCo/Octave marriage is now in place and hence we need to draw up T&Cs between us. Do you want to do it post the AMCo meeting at Matrix on Wednesday? Hope all is well, S"*.
2. 12.01: Mr Mathur *"Do you want to revisit T&Cs for us!!!!"*.
3. 12.01 Mr Siddiqi *"No revision, just finalisation. Want to put it down on paper, there have been some changes at your end, that affect me and now that you have clarity, we need to noterise [sic] it. I need to have that for Musst/Matrix too … they need to see that I have a written up deal with AMCo…."*

(3) On 23 September 2012, in an email of Mr Siddiqi to Mr Kaushnik Ghosh, he wrote:

"In terms of Anish, AMCo and MUSST, we are about to start drawing up contracts. Whilst he was at DB it was difficult to do so, but I have spoken to [Chris Hilditch of Schulte Roth and Zabel]…In essence what we have is a 25% revenue share. Matrix who are helping will have a capacity constraint around them and hence their amounts are limited. Anish is quite keen on MUSST becoming a Partner of this business and there is a conversation in the ether that is along the lines of MUSST only taking 20% and the remaining 5% can be used for equity in AMCo. He was with Alexandra last week in the US and we meet on Monday for a meeting with a family office in London and thence I am with him in Sweden on Tue .. by which point I would have a clearer understand on where the deal finally closes …. However, the deal (which was eventually going to have to be with Octave) could not be finalised until Mr Mathur had left Deutsche Bank".

(4) It was agreed that Musst would come to an arrangement with Matrix for its assistance, but only after Musst had agreed fees with Mr Mathur; and so the matter was left to be discussed later.

(5) The witness statements of Ms Galligan and Mr Siddiqi respectively in this regard read as follows:

(a) *"Mr Reeves said we would see how it went and then discuss what terms MUSST and Matrix should work together on, which would also account for the help Saleem had already given Matrix and continued to do. Mr Reeves accepted that MUSST would direct Matrix with respect to AMCo/Astra and which potential investors MUSST wanted Matrix to contact."*: Ms Galligan's third witness statement para. 54

(b) *"Because the whole arrangement was rather provisional and it was unclear how it would go (Mr Mathur had not even left Deutsche Bank yet), there was no deal between MUSST and Matrix about any payment or cut of potential future fees. MUSST did not have anything agreed firmly with Mr Mathur/Astra either (he was still at Deutsche Bank). It was all too early and we were all agreed that MUSST and Matrix would talk about a potential agreement once the arrangement and work scope had become clearer and MUSST had formally agreed terms with Astra. We also wanted any future terms to be discussed with Matrix to include my separate work helping with Matrix. In particular, I needed to know where MUSST stood (with Astra) before thinking about what deal might be appropriate between MUSST and Matrix."*: see Mr Siddiqi's fourth witness statement para. 35.

92. Astra dispute that there was any such agreement with Mr Siddiqi in January 2012 or otherwise. On the contrary, they say:

(1) By 15 February 2012, Mr Reeves had agreed with Mr Siddiqi that Matrix and Musst (or MUSST) *"would split the fees received 80/20. I wanted Matrix's fees to equate to 20% of the total fees"*. He adds: *"I believe we proceeded on the basis that Mr Siddiqi would negotiate to receive 5% (whether by way of equity and/or commission"*: see Mr Reeves' statement paras. 18 - 21.

(2) Correspondingly, Mr Mathur agreed in principle to give Matrix 20% of fees received. When it turned out on 27 February 2012 (contrary to what Mr Mathur says he had previously understood) that Mr Siddiqi was not going to be in a position to advance working capital, Mr Siddiqi asked him nonetheless for a 5% override on top of Matrix's 20% in cash or equity. Mr Mathur, however, declined, as Matrix *"had already negotiated a 20% share with me over 3 years …"*: see Mr Mathur's fifth statement at paras. 30-32.

(3) In about March 2012, Mr Siddiqi said that he could obtain commission from Matrix, which Mr Mathur had no problem with, as long as he did not have to pay any more fees than the 20% already agreed with Matrix. That Mr Siddiqi was going to get 20% from Matrix was subsequently confirmed to him in June 2012: see Mr Mathur's fifth witness statement paras. 33, 66.

(4) Subsequently, Mr Mathur and Mr Reeves agreed around 3 April 2012 that Matrix should begin to market the fund on a non-exclusive basis, including identifying potential investors, contacting them and having initial discussions to gauge their interest before bringing Mr Mathur in to present the detailed strategy to them: see Mr Mathur's fifth witness statement at para. 25.

(5) Mr Reeves and Mr Mathur say that they had at least reached the above agreement in principle for 20% during the initial three-year period (to include both management and performance fees) by or in May 2012, with Mr Mathur to pay Matrix directly: see Mr Mathur's fifth witness statement at paras. 26, 65. It was also agreed at dinner on 6 August 2012: see Mr Reeves' witness statement paras. 32-33.

(6) The exception to this, say Astra, is that it was agreed in principle that Mr Siddiqi would be paid 25% of management fees, but no performance fees, on investors with whom he, Mr Siddiqi, had a particularly close relationship and whom he introduced directly without any assistance from Matrix. Again, the sum was to be payable over a three-year period. This is what the Defence calls "The Siddiqi Understanding": see Mr Mathur's fifth witness statement at paras. 34, 67.

(e) Events from late October to 21 November 2012

93. This period starts with the decision of Matrix's parent company to go into administration, and ends with the meeting which, it is common ground, took place between Mr Mathur, Mr Siddiqi and Ms Galligan on 21 November 2012 to discuss terms with them.

94. On 24 October 2012, Matrix (or the parent company, Matrix Group Limited) gave notice of intention to appoint administrators. On 25 October 2012 or shortly after this, Mr Mathur was informed of this at a meeting between himself, Mr Reeves, Mr Siddiqi and Ms Galligan at MUSST's premises. Mr Mathur was shocked, and very concerned that an abrupt stop to the distribution of the fund would have a detrimental effect on the launch of ASSCFL. He disputes that he had been told of Matrix's difficulties in Switzerland on their trip in May 2012, but says that, in any event, going into administration was of a different order.

95. Musst says that there was then a further meeting between the same participants on 5 November 2012, at which Mr Mathur was told that Matrix was on its last legs and was about to make a statement that it was going into administration, which it did the next day. Mr Mathur, it says, expressed concern that Matrix could not continue helping MUSST's marketing efforts, and he was angry with them for withholding the information about Matrix's difficulties.

96. There then ensued the discussions over the next two weeks or so in which according to Astra's case, the November Arrangement was negotiated between Mr Mathur, Mr Reeves, Mr Siddiqi and Ms Galligan. As noted above, this is disputed by Musst which says that no arrangement was made, and it was always understood that the introductions so far effected (including in particular those of 2B and Crown) would be covered by the contract that was eventually negotiated, that is the Octave Contract.

97. The contemporaneous documents during this period are informative. In an exchange on 8 and 9 November 2012, Mr Siddiqi identified to Mr Holdom of Octave 28 entities to whom *"we want to send prospecti urgently"*: Mr Holdom agreed with the list. This list included The Observatory and LGT.

98. On 11 to 16 November 2012, Mr Mathur and Ms Galligan went on another roadshow to the US (Ms Galligan was now working for MUSST, as she had been made redundant by Matrix on 6 November 2012). Ms Galligan accepted in cross examination the proposition that Mr Mathur met Mr Septon without her, that meeting was without her (if that was what Mr Mathur said [T3/52/1-11]). In fact, Mr Mathur's evidence was unclear in respect of the same because he did not recall whether she was there. In any event, she appears to have set up the meeting and she was in New York at the relevant time: see Mr Mathur's fifth witness statement at paras. 40.4 and 54. -.

99. In the meantime, on 13 November 2012, a further meeting with LGT took place, this time at Octave's offices, attended by Mr Rigter and Plotke of LGT, Mr Siddiqi, Mr Elliott (apparently now of LGBR), Mr Thomas of Octave and Dr Adler. Mr Mathur (who was in the US) attended by telephone.

100. It is clear also that arrangements were now being made to get a contract signed between MUSST and Octave. By this time, over 100 potential clients had already been approached, but none of them had yet committed to making an investment.

101. Thus:

(1) On 13 November 2012, Mr Siddiqi had a meeting with Mr Phillips, Octave's Chief Financial Officer, in which Mr Phillips said that the relationship needed to be finalised.

(2) On the US road trip, Ms Galligan says that she told Mr Mathur that they needed to formalise arrangements. Later, while they were in a Starbucks café in Chicago, Mr Mathur complained again about being misled over Matrix, but after calming down he said that he no longer thought MUSST should receive 25% of all fees, but just 20%. He said that he would consider whether to give them equity: see Ms Galligan's third witness statement at para. 128. Mr Mathur made it clear during the course of the trip that any future relationship needed to be sorted out as soon as they got back to the UK.

(3) On 16 November 2012, Mr Siddiqi gave instructions to Mr Christopher Hilditch of Schulte Roth & Zabel LLP ("SRZ") to draft a contract and provided a draft which Mr Phillips had provided to him. Musst has, unlike Octave, made available its correspondence with its lawyers in relation to the negotiations for the Octave Contract.

102. At 9.33am on 19 November 2012, Mr Siddiqi sent an email to Mr Mathur which stated among other things:

> *"Given time is nigh & we want to close this Fund ASAP, we need to come up with the T&C's for our agreement … I need financing and this document needs to be in place for Musst to achieve that. Hence, I have put my lawyer on call to start drafting once we have met and finalised our agreement which I would also like to achieve on Wed please."*

103. Mr Mathur did not answer this request, but later, at 11.28 pm Ms Galligan sent another email to Mr Mathur, after passing the draft across to Mr Reeves for his comments, to whom she copied in the email as sent (along with Mr Siddiqi). This repeated that ***"Heads of terms between Amco and Musst need to be signed****. Musst needs this as soon as possible to be able to get financing."*

104. She continued:

> *"Our understanding of the terms for our contract are as follows –*
>
> - *Musst to receive 25% of Management and Performance fees on all assets raised on Funds managed by Anish Mathur. There continues to be ambiguity on the treatment of 5% of the 25% Performance and Management Fee.*

- *You had initially suggested that the 5% be reinvested to obtain equity, at a valuation metric derived by you. We had requested that we maintain some flexibility on this given our financial predicament. We had suggested that 25% of this 5% could be reinvested for equity and that 2.5% be paid out in order to facilitate the agreement. In terms of the equity component, you have said you would give this some thought …*

- *When we initially started our dialogue you had agreed that Musst have 1% equity in AMCO, after Saleem told you that it was imperative that he have even a small interest. It is vital that Musst have equity in Amco to maintain with investors that we have spoken to and continue to speak to that Musst is not merely a placement agent but has a strategic partnership with AMCO ….*

- *It is something Musst has been saying at every meeting, as you know. We believe this is beneficial to all parties in aiding asset raising. Many doors have been used to open doors with personal introductions due to Saleem's reputation and network within the industry. This is what has greatly facilitated conversations and this is something that will be of great use in the future. Now with me sitting at Musst, this becomes much easier.*

- *Musst has exclusivity on the marketing of Amco. We are happy to discuss Amco using other 3rd party distributors should you feel it necessary. Third party conversations are to be co-ordinated with Musst to ensure efficiency and duplication issues."*

105. At 23.54, Mr Mathur replied (copied to Mr Reeves and Mr Siddiqi):

> *"Dear Alexandra,*
>
> *This is not my understanding. it would have been useful to have agreed the T&C draft below as it creates more ambiguity than not. please freeze the sales effort at the moment before we discuss the terms and conditions further.*
>
> *rgds*
>
> *anish"*

[All lower case as in original. The "draft below" would appear to be a reference to Ms Galligan's email.]

106. By reply sent just after midnight, on Tuesday 20 November 2012, Ms Galligan apologised if this was not Mr Mathur's understanding *"and I think it would be good idea to discuss what your understanding is before we draft a contract"*. She suggested a meeting for Wednesday 21 November. Mr Reeves, who was copied in on these emails, expressed concern that Mr Mathur had the contact details of the clients, to which Mr Siddiqi replied, just the list of company names, although he had met individuals. Mr Reeves replied observing:

> *"He plays Risky game then unless he has something in reserve"*.

107. A meeting then took place between Mr Siddiqi, Ms Galligan and Mr Mathur at MUSST's offices on Wednesday 21 November 2012:

(1) According to Musst, Mr Mathur repeated that he was upset about not being told about Matrix's difficulties and said that he thought MUSST should receive only 20% of Astra's fees. It was agreed that this was to be 20% on all management and performance fees received in relation to investors they introduced as long as they remained invested: see Ms Galligan's third witness statement at paras.149 – 152.

(2) According to Mr Mathur, the meeting was *"to discuss the prospect of Saleem and Alexandra taking equity by reinvesting future commissions, but no agreement was reached"*. Although the Defence originally said that Mr Reeves was present at the meeting, and that what he now calls the "November Arrangement" was agreed at it (hence it was originally called the "21 November Arrangement"), Mr Mathur now appears to accept that it was not discussed at this meeting.

108. Later on the same day, Mr Mathur discussed the matter with Mr Phillips and told him to send over a draft contract to Mr Siddiqi and in the late afternoon, Mr Siddiqi invited Mr Mathur to dinner with his wife, which Mr Mathur later accepted. He wrote:

> *"It was good talking earlier! It means and meant a lot to us."*

(f) Events after 21 November 2012 to the end of 2013

(i) The negotiation of the Octave Contract

109. Having regard to principles of contractual construction, the court is not entitled to look at what the parties said or did in the course of negotiation of the contract or at the earlier drafts for the purpose of drawing inferences as to what the contract means: see *Chartbrook v Persimmon Homes* [2009] UKHL 38. That is not to exclude consideration of the following:

(1) The issue as to whether there was a "November Arrangement". If there was a November Arrangement, it would inform as to the contractual matrix against which the Octave Contract falls to be considered, which in turn

might be relevant to the question as to whether the Octave Contract could have been intended to apply to the contracts with 2B and Crown:

(2) Any other aspects of the factual matrix to the contract;

(3) The question of whether the Octave Contract should apply to any introductions to 2B and Crown under the alternative claims of estoppel and rectification.

110. The chronology of the negotiations may be summarised as follows. On 28 November 2012, Mr Phillips sent to Mr Siddiqi and Ms Galligan a draft contract, which noted that the contract discussion had started on 13 November (that is the date when Mr Siddiqi and Mr Phillips had met).

111. This removed the reference, which had been present in the previous draft provided by Mr Phillips, for Matrix to be a sub-introducer. It provided for commission at 20% of fees (both management and performance), less £50,000, evidently referring to the expenses which Mr Mathur had had to pay to cover Ms Galligan's trip to the US after Matrix went into administration.

112. No distinction was made between introductions already made to Mr Mathur (or Octave) before 21 November 2012 and those made afterwards, nor was there an "Effective Date" provision. The agreement was to last initially for one year, with a three-year run off period for commissions after termination. Mr Mathur says that the purpose of the contract was to enable Mr Siddiqi and Ms Galligan to raise finance on the basis that they had a written contract entitling them to commission in respect of *future* introductions by Musst.

113. After a discussion on Friday 14 December 2012, Mr Phillips sent a further draft, which accepted that *"the fee obligation will continue for so long as the funds are in place"* (by contrast with the three year cut-off provision in the previous draft); and that although the contract would have a six month period, *"post termination, we can meet you in the middle and allow a 9 month period after termination for investments to come in".*

(ii) The Effective Date provision

114. On 19 March 2013, Mr Murray, who had joined Octave as legal counsel and compliance consultant on 27 February 2013, sent to SRZ a revised draft which for the first time introduced an "Effective Date" provision, which provided that 21 November 2012 was the "Effective Date".

115. He says that this was introduced after discussions with Mr Phillips and Mr Mathur in which Mr Mathur said that, before this date, introductions had been made by Matrix. Musst says that the provision was not communicated to Mr Siddiqi and Ms Galligan, who say that they assumed that this was the date on which they finalised the commercial terms of the deal with Mr Mathur.

(iii) The broker/dealer issue

116. In the meantime, in late February 2013, Octave had received advice from their US lawyers, Seward & Kissel, to the effect that if Octave was to use a third party marketer to market its proposed fund to US investors, then the marketer would need to be registered in the US as a "broker-dealer", although there were a number of ways in which that could be achieved; and that US investors could claim rescission of their investments if Octave used an unregistered broker dealer.

117. This advice was emailed on to Musst's lawyers, who evidently advised that there was nothing in the point, which in turn led to Mr Siddiqi complaining to Mr Mathur. Mr Mathur replied that he wanted to work in a *"framework that was legit"* and it was better to be safe than sorry.

118. A considerable amount of correspondence then followed on the issue between Mr Mathur, Mr Murray, SRZ, Mr Siddiqi and Ms Galligan. In the course of this:

(1) Ms Galligan and Mr Siddiqi looked for and found a broker dealer who was willing to provide the necessary cover.

(2) They took the view (on 19 March 2013), however, that *"our first client, although US has invested via a managed account and hence, I would argue is not effected"*. This was a reference to The Observatory, who had invested on 19 February 2013 (see further below). This view about managed accounts was confirmed by SRZ's US lawyer, Mr Elovitz, which Mr Siddiqi emailed on to Mr Mathur.

(3) Mr Murray continued to press the point (he said it was a *"core element"* of the deal), to which SRZ replied that broker dealer registration *"is not required for managed accounts"*. This repeated reference to *"managed accounts"*. Musst submits, shows that the issue was being discussed because it was assumed that the 2B investment was to be covered by the contract.

(4) The discussions rumbled along in late March and early April 2013, with Mr Murray insisting on broker dealer cover (or at least a certificate from SRZ that the services of a broker dealer were not required); and SRZ and Mr Siddiqi and Ms Galligan insisting that it was not required for managed accounts.

(5) Eventually, on 5 April 2013, Ms Galligan complained to Mr Mathur about Mr Murray's request for an opinion from SRZ, given the likely cost. Mr Mathur, she says, said that he could not see why it should be a problem, and he would work it out with Mr Murray.

119. After an interval of ten days, Mr Murray, on 15 April 2013 at 15.04, sent through to Mr Siddiqi and Ms Galligan an "Execution version of the Introduction Agreement", and wrote (in an email chain that appears to have been copied to Mr Mathur on 15 April 2013):

> *"As discussed, I am happy to rely on the expertise of [SRZ], subject only to receiving a letter of comfort from SRZ headed paper certifying that:*
>
> > *"Having reviewed the terms of the Introduction Agreement (the "Agreement") between Octave Investment Management Limited, Octave Investment Management and [Musst], [SRZ] are satisfied that as a matter of US law:*
> >
> > 1. *The retention by Musst of the services of a US broker dealer are not required for performance of contractual obligations to managed accounts*
> >
> > 2. *the performance by Musst of the contractual obligations contemplated by the Agreement to 2BLLC will not infringe US legal or regulatory requirements."*
>
> *Once the letter of comfort is received, we can then attend to execution of the documentation and get matters completed."*
>
> [Emphasis added.]

120. To similar effect, on 16 April 2013, Mr Phillips wrote to Mr Murray, Ms Galligan and Mr Siddiqi, copied to Mr Mathur:

> *"Re the below [i.e. Mr Murray's 15.04 email] pls note we are not looking for a formal legal opinion. I think we simply need some comfort from SRZ that an introduction that leads to the entry into an advisory agreement, rather than the issue of a security to the investor, does not constitute brokerage for the purpose of the SEC regulations and would not require broker/dealer cover, and hence that the introduction of 2B LLC would not require broker/dealer cover."*
> [Emphasis added.]

121. Accordingly, at 17.27 on the next day, 17 April 2013, Ms Galligan wrote to Mr Mathur, Mr Phillips and Mr Murray, under the heading "Subject Execution Version of the Introduction Agreement":

> *"Dear all, please find attached the letter from SRZ"*
> *"Dear Saleem,*
>
> *We are writing to confirm that a person such as Musst who introduces an investor to another party who enters into an advisory relationship with such investor is not acting as a broker for the purposes of the Securities Exchange Act of 1934 and thus does not require registration as such.*

> *We understand that you may share this letter with Octave Investment Management LLP. However, nothing herein shall create an attorney-client relationship between this firm and Octave Investment Management LLP, or any of its affiliates, and we assume no responsibility for advising any such person as to the adequacy of this letter for its purposes."*

122. There then followed at 17.46 (same subject): Mr Phillips, Ms Galligan, Mr Mathur, Mr Murray cc Mr Siddiqi: *"Alexandra, Many thanks, Let's sign! P"*. The parties accordingly signed on 18 April 2013.

123. After, but only after, the parties had signed, Octave (or in fact Astra LLP on its account) paid the 20% share of the fees which it had already received from 2B, who had invested US$20 million with it in a managed account.

(g) The nature of the Octave Contract

124. The terms of the Octave Contract are discussed in detail below, but in essence, by it, Octave Limited appointed Musst, from the "Effective Date" of 21 November 2012, to introduce to it "Prospective Investors", in return for a 20% share of all fees earned and received by Octave and its affiliates from their management of "the Funds", which share was to be paid to Musst by Octave Limited. The "Funds" were defined as "The Astra Special Situations Credit Fund Limited", and other funds and managed accounts with similar risk profiles which substantially followed the "Current Strategy", which was *"to invest primarily in synthetic asset backed securities, on a buy and hold basis with limited or no direct leverage, and such that the investments were intended as if they were closed-ended investment pools with capital committed on a locked up basis for several years to be returned to the investors in such funds following realisation of the investments therein"*.

125. Octave Limited was designated the "Manager", and Octave LLP the "Investment Manager", to whom Octave Limited was entitled to delegate any functions under the contract (see clause 3.6). Although this does not appear from the Octave Contract itself, it was always intended that the funds were to be managed by Astra LLP, as Octave's appointed representative, at least until Astra LLP obtained its own authorisation to act as manager.

(h) The investments

(i) The initial investments in ASSCFL and ASCIL

126. While the Octave Contract was being negotiated, the various agreements necessary to get ASSCFL launched (i.e. the hedge fund company in which investors could subscribe for shares) were put in place on 29 November 2012 and the fund launched in late December 2012. At the same time, Mr Mathur also set up and put in place the arrangements for another fund, called ASCIL, which appears to have followed the same or a very similar strategy as ASSCFL.

127. By the end of the first quarter of 2013, it would appear that US$5 million had been invested in ASSCFL, and US$32 million in ASCIL. Mr Chandaria had by now made an investment of US$15 million, as had his friend Mr Edwards. This appears to have been invested in the ASCIL fund.

128. In the meantime, discussions continued with The Observatory and LGT, which eventually resulted in The Observatory agreeing in February 2013 to invest US$20 million, and LGT agreeing in June 2013 to invest US$40 million with Octave in managed accounts.

(ii) The investment made by The Observatory

129. In the case of The Observatory, on 4 December 2012, Mr Septon came over to London and had a meeting at Octave's offices with Mr Mathur, Mr Siddiqi, Ms Galligan and the wider investment management team (including Dr Adler, although the latter had not yet left Deutsche Bank). On 5 December 2012, Ms Galligan sent him the AMCo Red Herring prospectus. From that point on, the focus of discussions, Mr Siddiqi says, was on the logistical side of setting up the managed account for 2B, the vehicle through which The Observatory eventually invested. On 11 December 2012 he said he was ready to *"open an SMA for Anish at DB"*, that is a separately managed account held at Deutsche Bank, which Mr Siddiqi and Ms Galligan (they say) took the lead in setting up, although the bank was changed to UBS. Subsequently, Mr Siddiqi, with Mr Mathur's assistance, dealt with various questions which Mr Septon raised.

130. On 15 January 2013, Octave, through Mr Phillips, explained how the managed account was to work, that is that it was intended to operate on the basis of an investment management agreement *"which will give Octave power to manage the assets of a sub-account in your name at UBS, following a strategy in substantially the same terms as the Astra Special Situations Fund. As with the fund, we envisage the IMA [investment management agreement] lasting for a minimum period of 3 years to allow Octave to follow a buy and hold strategy, as for the Fund".*

131. After further discussions, 2B agreed to invest US$20 million in *"cash and synthetic asset backed securities"* and other structured credit products by a contract dated 11 February 2013 ("the 2B Contract"). Octave sent over a copy to Musst shortly before it was executed on 13 February 2013. Mr Septon also sent over a copy to Musst.

132. Under the 2B Contract, 2B agreed to pay to Octave, in return for management of its funds, (a) a management fee assessed (to put it simply, although the formula is more complicated) by reference to the net asset value of the fund invested (see clause 13.1 of schedule 4), and (b) a "performance fee" on the net profits it made from the fund (see

clause 13.3 and clause 2 of schedule 4). Shortly afterwards, 2B invested US$20 million and Octave sent it invoices for its February and March 2013 services.

(iii) The investment made by LGT

133. LGT took longer to make their investment and carried out more due diligence during which there were further meetings and discussions. Mr Siddiqi and Ms Galligan dealt with LGT's due diligence questions, acted as conduit between LGT and Octave/Astra, and assisted in the negotiation of fees.

134. Eventually, LGT, through its vehicle Crown entered into a "Trading Advisory Agreement" dated 13 June 2013 ("the Crown Contract"), under which it agreed to invest US$40 million with Octave. As with the 2B Contract, Octave (through Mr Mathur) sent to Musst a copy of the contract in final unsigned form, on 13 June 2013. Mr Murray sent it to Musst in signed form on 23 July 2013, and an amended agreement on 3 June 2014.

135. The Crown Contract provided, amongst other things that:

(1) *"The investment objective is to generate attractive returns by investing in structured credit products. The principal investments of the Segregated Portfolio will be in cash and synthetic asset backed securities (including mortgage backed securities) and their derivatives and other structured credit products"*;

(2) Although Octave had the *"maximum flexibility to invest in a wide range of instruments and will not be subject to any limitations with respect to the types of investments that it may make …"* , nonetheless *"it is expected that the focus of the portfolio will be on the US and European asset-backed securities market … in both cash and synthetic form and derivatives of such instruments. The Trading Manager … may also invest in other structured credit products, such as CDO's, CLO's and similar instruments, as well as composite debt securities";*

(3) Crown acknowledged that the total amount contributed was subject to a three-year lock in period;

(4) An "Advisory Fee" was payable – i.e. a management fee - of 2% a year of the value of the funds under management, if their value was US$86.67 million or more; but if not, then the lesser of 2% of their value or US$650,000. On top, it agreed to pay 0.75% a year of the value of these funds, as long as it exceeded US$86.67 million; and

(5) A "Success Fee" – i.e. a performance fee - of 20% of the net profits made by the fund, subject to certain deductions. (See clause 10.)

136. Pursuant to this contract, Crown made its first investment in the fund in about October or November 2013, and Octave received its first payment on 19 November 2013. The first payment of Musst's 20% share was made shortly afterwards.

(iv) The fees paid by Octave to Musst from 2B and Crown

137. The total fees invoiced to and paid by Octave in relation to 2B and Crown (including the first US$10,000 paid by Astra LLP) were about US$221,000 in relation to 2B; and about US$124,000 in relation to Crown.

(i) The length of time for which marketing continued

138. Mr Siddiqi's email to Mr Mathur of 28 November 2012 identified the potential investors already approached in three ranks. Rank 1 comprised 16 with a very strong possibility of investing on whom MUSST was spending most of its time now (which included The Observatory and LGT); rank 2 comprised 40, for whom *"there is hurdle to overcome"*, mainly timing or understanding the strategy; and rank 3 comprised 41 who were most unlikely to invest. (There were also 9 who were *"No's"*.)

139. In addition, there were 73 potential investors, being *"firms we are in conversation with. We have sent them materials/spoken to them and are working on getting meetings with any that we feel can allocate very quickly should they understand the opportunity. Given the timing, they more are likely second tranche investors"*.

140. At the time, it was proposed that there be a second tranche of investments to get the fund's total capital raised up to its planned US$300 million. It was marketing to these 73 potential investors, Mr Mathur appears to suggest, that was to be covered by what became the Octave Contract: see Mr Mathur's fifth witness statement at paras. 91-93.

141. From November 2012, MUSST continued its marketing efforts, but by 26 April 2013, Mr Mathur had indicated to Ms Galligan (as indicated in her email to Ms Imiolek) that *"he will soon stop marketing/asset raising (end of June) as it consumes too much time and he wants to focus on investments. Therefore it is likely he will close at circa $200m but will take additional subscriptions from existing investors. Based on assumption of assets at $200m AMCO needs $3m of management fees to cover the costs of running the business"*.

142. Subsequently, in about mid-2013, Mr Mathur told Ms Galligan, she says, that Astra had to stop raising capital, as they were struggling to deploy what they had raised. As a result, MUSST ceased actively to introduce investors, and its day-to-day contact with the Astra team was markedly reduced, but Mr Siddiqi and Ms Galligan (she says) would still visit them about once a month or every six weeks.

(j) The position as between Musst, Mr Reeves and Mr Mathur after 21 November 2012

143. Musst says something about this, because it goes to whether or not the alleged November Arrangement ever existed, and to the related question, what arrangements if any had been made between Musst and Matrix before November 2012.

144. The day after administrators were appointed over Matrix's parent company, on 6 November 2012, Mr Reeves set up LGBR. Almost all the sales team from Matrix (except Ms Galligan) joined him, he says, and he soon arranged a buyout of Matrix Bermuda, the investment manager of various hedge funds for which Matrix had provided distribution services.

145. Mr Reeves says that the ex-Matrix sales team then continued to help Mr Mathur and organised various meetings with potential investors, although Mr Siddiqi continued in his coordination role. However, there was no arrangement, he says, between Musst and LGBR in relation to new introductions, so it did not engage with new investors.

146. Musst accepts that, after Matrix's administration, Mr Elliott was expected for a while to keep in touch with clients he had contacted, and that he continued to have dealings with LGT. In fact, this came to an end in February 2013, and Mr Elliott did not play any further role in the negotiations with Crown or its due diligence exercise.

147. There appears to have been some discussion as to LGBR and Musst working together in a strategic relationship, which might involve Mr Reeves being a non-executive director of Musst, but nothing came of this.

(k) Mr Reeves' discussions with Mr Siddiqi and Ms Galligan about fees for LGBR

148. After LGBR's acquisition of Matrix Bermuda, Mr Reeves, he says, worked with Begbies Traynor, Matrix's administrators and then liquidators (as from 3 December 2012) to obtain recoveries. This included fees in relation to the introductions which, he says, Matrix had made for Mr Mathur's fund. He says of this:

> *"LGBR's arrangement with the Liquidators was that recoveries would be split with the result that there would be compensation available to the Matrix sales team then at LGBR":*

149. There were various communications over the next 12 months (including on 19 and 20 February 2013, 1 and 12 August 2013 and 17 December 2013) in which Mr Reeves raised the question of fees in relation to Mr Elliott's work in relation LGT, to be paid either to Mr Elliott direct, or to LGBR. On 19 August 2020, Mr Reeves, through his vehicle Matrix Receivables Ltd ("MRL"), took an assignment from Matrix (i.e. Matrix Money Management Limited) of its causes of action. MRL then issued a claim form on 4 September 2020 alleging that in March 2012, Musst had reached an agreement with Matrix to split its fees 80/20 in Matrix's favour (it also alleged a quantum meruit).

150. The claim of MRL does not arise for determination in the trial before the Court, and MRL has not appeared in the trial. MRL applied to have its claim joined to the current

proceedings, so there would in effect be three claims that would have to be decided at trial. This late application was supported by Astra. However, the application was dismissed by the Chief Master on 2 November 2020.

(l) Communications between Mr Mathur and Mr Reeves

151. Mr Mathur and Mr Reeves kept in touch with each other. Particular attention was drawn to the following communications, namely

(1) In early March 2013, Mr Reeves *"as promised"* did some work on a sales plan and distribution strategy for the existing fund and for some new ideas. He added: *"However, as discussed, I feel that we should only be considered if/once you make your decision with Musst as although we have different target audiences, I wouldn't want to be involved in any turf wars"*. (According to Mr Mathur, this was said in the context of "future" introductions.)

(2) Mr Mathur, he says, kept Mr Reeves and Mr Elliott updated on progress *"for example, in relation to LGT's due diligence, on the basis they had an economic interest as well …"*.

(3) On 8 August 2014, Astra LLP entered into a Marketing and Distribution Agreement with LGBR, appointing it to act as *"distributor in relation to the Fund(s)"* with effect from 11 August 2014, with an initial period of six months, at a monthly fee of £6,666 plus expenses, with Astra LLP to pay 10% of performance fees received over five years from the effective date, with a maximum of $2 million. The fund was the "Astra European Opportunities Fund ", and the agreement applied to any contract entered into not later than three months after the termination date.

(4) According to Mr Mathur, no work was ever done "*in relation to future introductions"*.

IX The background to the alleged novation claim

(a) The transfer from Octave to Astra LLP

152. On 22 July 2014, Astra LLP ceased to be an appointed representative of Octave LLP (Octave had disposed of its 8% shareholding in Astra Capital on 23 May 2014). On 23 July 2014, Astra LLP obtained FSA authorisation, and Astra Capital was appointed manager and Astra LLP as investment manager in relation to ASSCFL and ASCIL.

153. By an agreement dated 14 August 2014, it was agreed between Octave LLP and Astra LLP that all investment management services under investment management agreements would transfer from the management of Octave LLP to Astra LLP; and all fees payable to Octave Ltd would transfer, subject to the agreement of contracting parties to Astra Capital.

154. On 5 September 2014, Astra LLP and Crown entered into an "amended trading advisory agreement" which replaced and was on the same terms (or materially the same terms) as the Crown Contract (in particular for a US$40 million investment at the same fees). The payments were to be made to Astra LLP.

(b) The alleged novation to Astra LLP in relation to the Crown Contract

155. On 5 November 2014, Mr Holdom, writing on behalf of Octave, informed Musst that there had been *"a change of Trading Advisor from Octave to [Astra LLP] effective on 1 September"*, and said that the fees invoiced to Crown had been split as to US$107,782.80 from Octave, and US$52,175.70 from Astra LLP (which reflected the respective periods of management before and after 1 September 2013). He asked Musst to split its own invoices (i.e. to Octave and Astra LLP) accordingly.

156. Musst then sent out to Octave two invoices as requested, for US$21,565.96 and for US$10,435.14, which Octave and Astra LLP respectively paid. Thereafter, Musst sent all its invoices on the Crown contract to Astra LLP, and Astra LLP paid them, up to and including a payment on 4 May 2016.

157. By a further exchange on 4 February 2015, Mr Holdom (this time from Astra LLP) informed Ms Galligan that the amounts expected to be received were *"$3,579.06 (Crown II) $160,256.56 (Crown 1)"*. Ms Galligan asked what was the difference between Crown I and Crown II. She received no reply on this point, save for Mr Holdom confirming that as the account was paying its maximum fee, she could invoice US$32,500 per quarter to Astra LLP, which Musst duly did.

158. Subsequently, when the next quarterly payment came round, Mr Holdom on 30 April 2015 told Miss Imiolek that he had sent her a Crown II invoice by mistake. He wrote:

> *"Hi Agatha,*
> *My apologies, I sent you the Crown AAM 2 invoice in error. The Crown 2 account was set up for a new strategy (primarily CLO and CRE) and therefore is not covered by the Introduction Agreement "as it does not substantially replicate the investment securities and risk profile of ASSCF".*
>
> *I will settle the [other invoice] once the client has made their payment."*

159. Musst rely upon this as an indication of the belief of Mr Holdom that the payments were being made not under the November Arrangement, but under the Octave Contract. On the question of who provided Mr Holdom with this information, he said that *"I was assisted in the drafting of this email by a member of the Investment Team."*

(c) The alleged novation to Astra LLP in relation to the 2B Contract

160. As for the 2B account, Musst continued for a while to send invoices to Octave, and Octave paid them, on 24 November 2014, 16 December 2014, and 3 February 2015. On 3 February 2015, Astra LLP entered into an "Amended and Restated Investment Management Agreement" with 2B in place of Octave, again on the same terms as the previous 2B Contract. On 11 February 2015, Mr Holdom, writing on behalf of Astra LLP, sent to Musst the latest invoice to 2B, which had been sent by Astra LLP rather than Octave. In response on the same day, Musst asked Mr Holdom: *"Just to confirm that we bill Astra as opposed to Octave for 2B LLC"*, to which Mr Holdom, again writing on behalf of Astra LLP, replied: *"Yes please"*. (That he wrote these emails on behalf of Astra LLP is apparent from the footer to the emails.)

161. In total, from now on Astra LLP paid to Musst about US$230,000 on the 2B account up to 26 April 2016, and about US$220,000 on the Crown contract up to 4 May 2016.

(d) The draft contract providing for a change to Astra LLP and Astra Capital

162. Shortly after Mr Holdom's request to invoice Astra LLP on the 2B account, Mr Murray, on 19 February 2015, wrote on its behalf to Ms Galligan at Musst, saying that: *"We have moved to our new offices ... today and we are completing some final documentation in connection with the investment manager migration from [Octave LLP] to [Astra LLP]"*. Accordingly, he sent an amended version of the Contract, showing Astra Capital as *"Manager"* in place of Octave Ltd, and Astra LLP as *"Investment Manager"* in place of Octave LLP. He explained that the amendment was *"to facilitate the investment manager migration. There are no substantive changes ... and you will note that this is effectively a name changing exercise with [Astra Capital] acting as Manager and [Astra LLP] as investment manager*". He asked Ms Galligan to confirm that she was satisfied with the amended agreement, and he would arrange execution at his end *"to complete matters"*.

163. The amended agreement was in all respects the same as the Octave Contract, save that it altered the names as Mr Murray had explained, and it also altered the *"Effective Date"* from 21 November 2012 to 20 February 2015. In response to Ms Galligan's email of 20 February 2015 acknowledging receipt and saying she would get back next week, Mr Murray reassured her that the draft contained *"no substantive amendments"*.

164. Ms Galligan did not revert. By an email of 27 April 2015, Mr Murray for Astra LLP asked Ms Galligan to return an executed version of the agreement, this time referring to a draft dated 4 March 2015, with this date, rather than 20 February 2015, made the *"Effective Date"*. Mr Murray then chased Ms Galligan for a response on 1 May 2015. She replied on the same day that she was waiting to hear from Musst's directors and asked Mr Murray to send her a copy signed by Astra, which Mr Murray did, again on the same day (sending the 4 March 2015 version).

165. When Musst's directors looked at the replacement contract, they were concerned, it seems, that by changing the *"Effective Date"* to 4 March 2015, the contract would exclude liability on the part of Astra to continue to make payments for the two

introductions which had so been effected to 2B and Crown, because they had been introduced well before 4 March 2015. Accordingly, on 6 May 2015, Ms Galligan telephoned Mr Murray and explained this to him.

166. The call was taped, and there is a transcript, in which Mr Murray reassured her that this was not the intention, and that rather, the intention was to *"novate the relationship but erm existing contractual entitlements with Octave up until the effective date remain in place"*. At the end of the conversation, Mr Murray promised to send a letter of termination which confirmed that the existing contractual relations in the Octave Contract remained valid up to the termination date, and all the other provisions that were intended to survive termination would do so.

167. The matter then went quiet for almost a year, although Astra LLP now managed both the 2B and the Crown Contracts, and paid Musst's invoices in relation to them. However, on 11 April 2016, Mr Murray, again writing on Astra LLP's behalf, returned to the subject, noting that he had been going through *"our agreements"*, but he had not yet received a copy of the fully executed replacement agreement. He asked Ms Galligan to send one back *"to tidy up our records"*.

168. In response, Ms Galligan appears to have sent through the original Octave Contract. In reply, Mr Murray by email of 12 April 2016 asked again for execution of the replacement agreement. By return, Ms Galligan replied that Musst had not signed this agreement, and (apparently overlooking their conversation the previous year) asked what was the reason for the amendment. Mr Murray replied the same day that the amendment was necessary, as *"[Octave LLP] is no longer the manager, [Astra LLP] is, none of the terms have changed this is a change of name exercise and I am trying to ensure our files our [sic] fully tied up"*. Mr Murray chased for the executed replacement again a week later, on 19 April 2016. Ms Galligan replied on 20 April 2016 that she had sent it to Musst's directors and lawyer.

(e) The transfer to Astra UK

169. However, on 20 April 2016, at 14.24, Mr Murray sent Ms Galligan another email, still on behalf of Astra LLP, withdrawing the draft replacement agreement. He explained that, in the light of tax advice, Astra UK were going to be taking over, in that week, the regulatory permissions and authorisations previously held by Astra LLP. He said that: *"The management and Risk Committee of [Astra LLP] and [Astra UK] will remain identical."* In consequence, *"contracts will be novated to [Astra UK]. [Astra LLP] and [Astra Capital] expressly withdraws [sic] the Introduction Agreement dated 4 March 2015 .... which has not been executed by Musst"*.

170. Accordingly, although Astra LLP paid two more invoices from Musst, by payments made on 26 April 2016 and 4 May 2016, Mr Holdom started writing on behalf of Astra UK on 10 May 2016. From this point onwards, his emails were written on behalf of Astra UK, as appears from their footers, although his actual email address remained the same.

171. Thus, by email of 10 May 2016 on Astra UK's behalf, he sent to Musst a copy of Astra UK's invoice to 2B for the management fees due to it in relation to April 2016 (totalling

US$75,692.82). In response, Ms Agatha Imiolek on 13 May 2016 sent to Mr Holdom at Astra UK Musst's invoice for its share of these fees (i.e. US$15,138.56), which invoice, Musst says inadvertently was made to Astra LLP rather than Astra UK. By email of 16 May 2016, Mr Holdom replied that this had now been paid. It is understood that it was Astra UK which paid this fee (everything had been transferred over to it). The payment was not received until 25 May 2016, but nothing appears to turn on this.

172. Mr Holdom's email of 16 May 2016 also said: *"Going forward can you please address invoices to [Astra UK]"*. By this stage, Astra UK had entered into revised agreements with 2B and Crown to replace those with Astra LLP, again on the same terms, on 21 March 2016 and 30 March 2016. It had also entered into a revised agreement with Crown in relation to the "Crown II" account on 30 March 2016 mentioned above, and which it told Musst on 30 April 2015 was following a different strategy. The entirety of Astra LLP's business was transferred to Astra UK on 29 April 2016.

173. The next email on the subject was sent by Ms Imiolek for Musst on 16 June 2016, to Mr Holdom, asking *"Have you received May invoice for 2B LLC? If not when do you anticipate invoicing them?"*. In other words, when did Mr Holdom anticipate invoicing 2B for May 2016, so Musst could then send on its own invoice for its share of the fees? Mr Holdom replied on the same day that he understood discussions were taking place between Mr Siddiqi, Ms Galligan and Mr Mathur on the subject.

X The discussions between Mr Mathur, Mr Siddiqi and Ms Galligan on 14 June, 27 June and 13 July 2016

174. These discussions then took place on 14 June 2016 (a meeting at Astra's offices), 27 June 2016 (a meeting at Astra's offices, and a telephone call), and 13 July 2016 (a telephone call).

175. In essence, Mr Siddiqi had cashflow problems, and so he needed fees to be paid to Musst, in particular, the performance fees which he understood were due from 2B and Crown. However, Mr Mathur maintained that he himself was having difficulty getting paid, and there was nothing to pay over yet. On one occasion, he suggested that instead that they just settle on a figure now, regardless of what the performance should turn out to be in future. On another, he suggested he make an advance against performance fees now, another £250,000 next year, and then the balance when he was paid. However, no such payments were made.

176. In the light of these discussions, it would seem, Mr Holdom calculated the performance fees which had so far accrued to Musst on an "accrual" basis, that is taking the current value of 2B's assets in the 2B Contract and Crown's in the Crown 1 Contract, although no performance fees had yet been paid by either 2B or Crown. Hence after the 14 June 2016 meeting, at 18.55, he emailed himself:

> *"Calculate p fee due to Musst and a deal for final settlement."*

177. Later the same evening, he wrote to Mr Mathur:

"Hi,
One quick thought ….

We can state that our view is that they are not due a share of management or performance fees post the 36 month term. But as a gesture of good will we could continue to pay them the same monthly/quarterly amounts (as calculated from the management fees) but deducted from their eventual performance fee payment.

As of 31st March 2016
Crown I has an accrued performance fee of $5,064,535 giving Musst $1,012.907

2B has an accrued performance fee of $8,487,069 giving Musst $1,697,413

For a total fee accrued to Musst of $2,710,320."

178. Similarly, the day after the 27 June meetings, Mr Holdom emailed Mr Mathur and Dr Adler:

"Subject: "Musst Accrued P Fees

	P Fee Accrued ($)	*Musst Payment ($)*
Crown 1 – 31 Mar 16	*5,064,535.64*	*1,012,907.13*
2B – 31 May 16	*8,964,500.78*	*1,792,900.16*
		2,805,807.28"

XI Astra's written proposal in late July 2016

179. On 19 July 2016, Mr Murray on behalf of Astra UK, emailed Mr Siddiqi saying he had received instructions to prepare an agreement *"which remains subject to contract relating to some outstanding matters"*. By reply of 22 July 2016, Mr Siddiqi said that Musst wanted its *"outstanding fees due for May, June, and any ongoing fees due to MUSST to continue to be settled until such a stage that a mutually agreeable proposal is reached"*. By reply of 26 July 2016, Mr Murray, for Astra UK, writing under the heading *"Subject to Contract/Contract Denied"*, said he was still working on the agreement; to which Mr Siddiqi replied on 28 July 2016 that *"in relation to our contract dated 18 April 2013 …. you are obliged to pay management and performance fees"*. He complained that in breach of contract, the fees due for May and June had not been paid and asked for payment immediately. He attached three undated invoices, each made out to Astra UK, (a) one for US$32,500 for management fees on the Crown Contract for 1 April to 30 June 2016, and (b) two for US$15,125.96, for management fees on the 2B Contract for May 2016 and June 2016.

180. These invoices were all made out to Astra UK, and the figures, as the email itself notes, were estimates worked out on the basis of previous information already known to Musst. Thus:

(1) The invoice for US$32,500 was the quarterly amount due to Musst (at an annual rate of US$130,000) being 20% of the previously notified annual management fee paid by Crown under the Crown Contract of US$650,000; and

(2) The two invoices for US$15,125.96 were worked out on the basis of the funds figure of US$75,692.82 contained in Astra UK's invoice for 2B of 9 May 2016 for April 2016, but, by mistake, transposing this figure to US$75,629.82 (i.e. getting the "2" and the "9" in the wrong order). Hence, they invoiced for the slightly lower figure of US$15,125.96 than the US$15,138.56 which had appeared in Musst's invoice for April 2016, and which had by now been paid.

181. The email sought information about the relevant net asset values of the funds under management under clause 4.1 and said it would provide adjusted invoices as and when this was provided.

182. By reply of 3 August 2016 marked *"Without Prejudice, Subject to Contract/Contract Denied"*, Mr Murray professed surprise at Mr Siddiqi's email, and denied the existence of any contract with Astra UK or Astra Capital (he said nothing about Astra LLP), and any breach. He also attached a draft deed of release between Astra UK and Musst (and Musst Investments LLP), and a draft deed of guarantee by Mr Siddiqi and Ms Galligan to Astra UK:

(1) The draft deed of release claimed that Astra UK had paid Musst the sum of US$458,701.66 *"without admission of liability to pay"* and offered to pay it (a) a further US$250,000, plus (b) 20% of all performance and success fees received over US$325,000 from each of Crown and 2B for the first three years of each of the Crown and 2B Contracts.

(2) The draft guarantee provided that in the event Astra UK did not receive success fees of US$325,000 Mr Siddiqi and Ms Galligan would personally have to reimburse any shortfall.

183. Musst did not accept this offer. Nor did Mr Siddiqi nor Ms Galligan. In the meantime, it seems, Astra UK has been continuing to manage 2B's and Crown's funds and continued to receive management and performance fees for doing so. It has made no attempt to account for any of them to Musst. Nor has Astra LLP. The total amount paid to Musst by Astra LLP and Astra UK combined has been about US$459,000, with the last payment on 25 May 2016.

XII Pre-action protocol correspondence

184. By pre-action protocol letters to Astra dated 9 October 2016, Musst's solicitors set out Musst's claims against Astra, and asked them to provide the information provided for by clause 4.1 of the Contract to enable Musst to work out the fees due to it since May 2016. Astra denied liability, on the bases that (a) Musst did not affect the introductions, and (b) there was no agreed transfer of liability to any Astra entity. Nor did they provide the requested information under clause 4.1, or indeed any information or documentation at all. They maintained that Astra, in making the payments they did, were just being generous. (Similar allegations were made by Octave in answer to pre-action letters to Octave.)

185. On 17 October 2016, Astra's solicitors suggested, for the first time in writing, that defamatory or disparaging statements had been made by Mr Siddiqi, but without giving any specifics (Mr Mathur had hinted in the conversation on 13 July 2016 that some such statements had been made). The first time the alleged statements were spelt out was in Astra's solicitors' correspondence of 23 February 2017.

XIII The First Issue: the November Arrangement issue

(a) Introduction

186. The first question is whether there was a November Arrangement under which Mr Mathur agreed with Mr Siddiqi and Ms Galligan a voluntary arrangement under which all introductions made (including those of 2B and Crown) would be the subject of a revenue share of 20% for three years from the date of 2B's and Crown's investments. Musst says that the November Arrangement did not take place, and that the written agreement applied to introductions of 2B and Crown. If there was a November Arrangement, then Astra are able to rely upon the same as an important part of the factual matrix to the written Octave Contract. Its existence would assist an argument that the payments made subsequently in respect of 2B and Crown which were made over the period of three years from the date of execution of the written agreement are not referable to the written agreement, but to the November Arrangement. This would assist Astra in being able to contend that the written agreement was intended only to be forward looking and not to look to introductions before 21 November 2012 including 2B and Crown. The force of this argument might be reduced if there was no November arrangement.

187. The evidence of the witnesses in respect of the November Arrangement is predominantly from Mr Mathur and Mr Reeves whose written evidence supported the existence of the November Arrangement and Mr Siddiqi and Ms Galligan, whose evidence denied the existence of the arrangement. The November Arrangement was not in a vacuum. It was, according to the evidence of Mr Mathur and Mr Reeves, to be seen in the context of what was called the Matrix Arrangement (under which Mr Mathur had agreed to pay Matrix 20% of fees for its introduction for three years) and the Siddiqi Understanding (under which Mr Mathur had agreed to pay Mr Siddiqi 25% of management fees over a three-year period on investments which he introduced directly without assistance from Matrix).

188. According to both Mr Mathur's and Mr Reeves' oral evidence, this was a tripartite agreement reached at a meeting at which Mr Siddiqi was present at some point in early 2012: see T8/168-9, T9/99, T9/106/12-19 and the statement of Mr Reeves at para. 180. Mr Mathur said that it was an agreement in principle. Mr Reeves said it amounted to *"our commercial terms of engagement"* [T9/106/23-25 and T9/110-111]. By contrast, the evidence of Ms Galligan was to the effect that there was an oral arrangement made on 16 January 2012. The contractual chain of arrangement was to be between Musst and Mr Mathur and then between Musst and Matrix. The arrangement was 25% but there was fluidity in respect of the last 5% because it was to be worked out whether Musst would obtain an equity in the business of 5%: see Mr Siddiqi's evidence at [T4/168/9-170/8] and Ms Galligan's evidence at [T2/127/3-10, T2/158/14-159/14, T3/116/7-118/10, T3/137/19-21].

189. If the evidence for Astra were accepted, it would be a significant building block of the alleged November Arrangement. The reason for this is that it would establish that, as of November 2012, there was at least an agreement in principle between Matrix and Octave. This would, if accepted, contradict Musst's case that there was a contractual chain of arrangements between Musst and Mr Mathur's companies, and then between Musst and Matrix. If the primary deal was between Mr Mathur and Matrix, then that would make more plausible the alleged Siddiqi Understanding (giving rise to a very limited entitlement and predicated upon those instances where investments had been introduced by Mr Siddiqi directly and without any assistance by Matrix).

(b) Astra's case

190. It is said that the November Arrangement occurred in the weeks after the news of the administration of Matrix had been passed on to Mr Mathur. Mr Reeves had told Mr Mathur that a new vehicle, LGBR, would take on the old sales team of Matrix and would continue to provide the same support as Matrix had done.

191. In his fifth witness statement at para. 78, Mr Mathur said:

> *"Based on Luke and Saleem's assurances that on-going support would be provided in respect of Matrix's introductions, I agreed to compensate them on essentially the basis that I had previously agreed in principle with Matrix, i.e. 20% of all fees that Astra would receive during the first three years of the investment, if any of Matrix's introductions came to fruition, would be paid to Luke (or LGBR as his vehicle) for him to make onward distribution, including to the members of the Matrix team and Musst on terms agreed between them, which I understood to be 80:20 split (between former Matrix team and Musst) - this was the "November Arrangement".*

192. At paras. 83-84 of Mr Mathur's witness statement, he said the following:

> *"83. … The November Arrangement was therefore predicated on confirmation from both Luke and Saleem that all individuals would be compensated in accordance with that arrangement for their efforts and that no legal action would be taken against me or my firm as a result. Everybody agreed this point and understood that our arrangement should be kept informal as Luke's negotiations in respect of LGBR had not concluded and there was uncertainty about what might ultimately happen with Matrix and what action might be taken by its representatives given the amount of work undertaken and expense incurred in connection with marketing my fund. The question of further introductions remained but it was not critical for me to address these at this stage.*
>
> *84. There were several subsequent meetings. I do not recall when, but sometime after the November Arrangement, Saleem and/or Alexandra requested that I pay Saleem/Musst instead of Luke/LGBR under the November Arrangement. Saleem was concerned that, if the payment was made to Luke/LGBR, he may not receive his fair share. He also confirmed to me that Luke did not object to his proposal. As I understood that Luke had no issue with this change, I was content to proceed this way and assumed it was to protect Saleem's interest because Musst was simply a one-person company whilst Luke was already in the process of setting up a significant operation."*

The precise sharing of the fees received would be agreed between Mr Siddiqi, Ms Galligan and Mr Reeves.

193. The case of Astra is that this was to be seen in the light of various arrangements made earlier in the year including the following:

(1) Between Mr Mathur and Mr Reeves a commission for Matrix for introducing investors of 20% of management and performance fees paid over the anticipated three-year period of investment i.e the Matrix Arrangement referred to above. This was the arrangement said to have been previously agreed with Matrix. The case of Astra is that Matrix was introduced to Mr Mathur by Mr Siddiqi around the beginning of 2012 with a view to carrying out distribution work. Matrix had the resources, contacts, experience and regulatory cover to do this job.

(2) No figures were discussed according to Astra in January 2012. However, by May at the latest, Mr Mathur had agreed to pay Matrix 20% of fees on its introductions for 3 years under the Matrix Arrangement. Mr Mathur found out in about June 2012 that there was an arrangement for this to be shared between Musst and Matrix as to 80% to Matrix and as to 20% to Musst. Around this time, Astra say that Mr Mathur agreed in principle the Siddiqi Understanding, namely to pay Mr Siddiqi a commission on

investments he introduced directly without Matrix assistance, at 25% of management fees only, over a three-year period.

(3) There was an arrangement between Mr Mathur and Mr Siddiqi that he would receive a commission of 25% of management fees for three years for any investors that he introduced separately from Matrix.

194. The November arrangement was summarised in the Re-amended Defence and Counterclaim ("RADCC") as follows:

> *"83. As a result, at the 21 November Meeting (and reflecting what had been said in various discussions in November 2012 involving Mr Mathur, Mr Reeves, Mr Siddiqi and Ms Galligan):*
>
> *(1) Appreciating the efforts of the Matrix sales team who had all lost their jobs, and were therefore unlikely to be compensated by Matrix for the efforts that they had put in to make introductions over the course of the year, Mr Mathur said that he would ensure that they were all compensated for the work that they had done in the past (or words to that effect).*
>
> *(2) Mr Mathur said that he was happy for them all to continue the existing marketing efforts and that he would see to it that they would receive commission on the same basis as he had agreed with Matrix (under the Matrix Arrangement) (or words to that effect).*
>
> *(3) In other words, in relation to any investors who had been introduced by Matrix and who subsequently invested, they (i.e. all of them) would receive commission equal to 20% of the fees paid over the first three years of the investment, and that such commission would be shared between the Matrix sales team and Mr Siddiqi (or Musst, as his vehicle) on terms agreed (or to be agreed) between themselves, Astra believe in an 80:20 division (80 for the Matrix sales team and 20 for Mr Siddiqi (or his vehicle)).*
>
> *(4) Mr Mathur said that he did not want to be involved in their discussions as to how any commission should be distributed, but that he wanted confirmation that nobody would later pursue him for any additional commission in respect of any introductions (or words to that effect).*
>
> *(5) All parties present accepted this proposal and expressed their gratitude to Mr Mathur.*

> *(6) This arrangement will be referred to as the '21 November Arrangement' (even though it was in fact reached over various meetings in November).*
>
> *84. It had initially been proposed at the 21 November Meeting that any commission that was to be paid as a result of the 21 November Arrangement should be paid to Mr Reeves (or LGBR as his vehicle) and then distributed to the members of the Matrix team.*
>
> *85. A short time after the 21 November Meeting, Mr Mathur was told orally by Mr Siddiqi or Ms Galligan) that any commission the subject of the 21 November Arrangement should be paid to Musst, which would then be responsible for disbursing it to all interested parties, and he understood from them that this had been agreed by Mr Reeves. It was expressly agreed and understood that Musst would distribute the total commission in accordance with the 21 November Arrangement.*
>
> *86. The 21 November Arrangement was made orally, was not formally documented and was not, and was not intended to be, legally binding. Mr Mathur was or would have been prepared to enter into a binding written agreement to reflect this arrangement and other detailed terms to be agreed between them as to the commission to be paid as a result of the 21 November Arrangement and as a result of the introductions made by Matrix prior to 21 November 2012 but neither Mr Siddiqi, Ms Galligan, Musst or Mr Reeves pressed him do so and this never took place."*

(c) Musst's case

195. Musst denies the existence of the November Arrangement. The evidence of Mr Siddiqi is that he agreed on 16 January 2012 that his business would get 25% of all fees charged by Astra to investors on capital which he raised, and that this was mentioned at other times. This was not evidenced at the time in writing. There was the email on 16 January 2012 of Mr Siddiqi to Ms Galligan and Mr Reeves timed 18:42 saying *"So, I had a two hour meeting with Anish and laid down a gauntlet. The net result is he will work with Musst Investments and understands how we operate. The specifics of a deal have not been decided, but the essence of the deal has been transmitted, and I think he gets it... Hence, it* [sic] *time to morph his pitch book and move the story forward... I have suggested a meeting with the three of us."* This by itself does not confirm an agreement or arrangement of the kind contended for by Mr Siddiqi.

196. Musst contends that by November 2012, there had been agreed in principle between Musst by Mr Siddiqi and Octave by Mr Mathur an arrangement whereby Musst would be paid 20% of any monies Mr Mathur received both in respect of management and performance fees whilst the monies sat there without limitation in time (that is contrary to the three-year limit contended for by Astra). This agreement was with the consent of Mr Reeves with whom there would be sharing of the moneys received by Musst.

The primary agreement would be as between Musst and Octave, and Musst would agree with Mr Reeves some sharing of moneys received by Musst with Mr Reeves for himself and/or LGBR and/or those behind Matrix. Musst's case is that with that agreement, there were then negotiations with a view to having an agreement in writing. This culminated in the agreement in writing dated 18 April 2013. This was not a separate agreement from that which had been agreed in November 2012. There was not an agreement in respect of previously made introductions and introductions thereafter. Nor was the former a voluntary arrangement, whereas only the latter was the subject of a binding agreement. Nor as between Octave and Musst was there a distinction between introductions made by Matrix and those made by Musst without the involvement of Matrix.

197. Musst's case is that the written agreement is to be construed as applying to all of those introductions: alternatively, that it was agreed between the parties by convention that it applied to the same. Likewise, although there was not a signed novation to apply to the Astra parties, the written agreement was novated with Astra and/or the parties agreed by convention that the written agreement was to be treated as novated as between Musst and Astra. This was at least the case as regards 2B and Crown Contracts.

(d) Discussion

198. This is a case where the contemporaneous documents contradict substantially Astra's account. I have considered the conflict of oral evidence having regard to this. I find that there was no Matrix arrangement as contended for by Astra, nor was there a Siddiqi understanding. The critical stage was November 2012 when there was an agreement in principle between Mr Mathur for Octave and Mr Siddiqi for Musst. It was agreed that the parties would record their agreement in writing, and it was at this point that the parties embarked on negotiations which went on up to the written agreement dated 18 April 2013. In my judgment, the contemporaneous written evidence at all times strongly suggests that there was no oral or voluntary arrangement of the kind comprised in the November Arrangement.

199. The overall probabilities are also of great importance in this case. In particular, the following aspects of the case make commercial sense as regards Musst's case, unlike Astra's case which is implausible in this regard, namely that:

(1) Musst would not be satisfied with a voluntary arrangement under which Astra could decide whether they wanted to pay anything, and if so what, for the work undertaken up to November 2012. This might have made sense after some limited work based on trust of friends, but in this case the documents evidence that Mr Siddiqi had by November 2012 carried out a very large amount of work. The likely amounts of money involved based on the intended management and performance fees if 2B and Crown would invest was capable of giving rise to fees of hundreds of thousands of pounds or more.

(2) Musst would wish to have a written agreement to provide to its financiers which would give it valuable rights in respect of the introductions hitherto made, particularly in circumstances when the introductions of 2B and Crown were expected to be of more value than anything else. If in fact

the written agreement would exclude 2B and Crown, then the most tangible value would be removed and instead there would be the hope value of future prospective clients which might or might not occur.

(3) Given the recognition that it was necessary to have an agreement in writing, it makes no sense for either party to have an arrangement for the payment obligations to be recorded in a formal legal contract and the remainder to be oral and without any written record. If the distinction is said to be that one was binding and the other is not, that is not an obvious answer, because it only adds to the difficulty in understanding why some part of the arrangement between commercial parties should be binding and other parts voluntary. In any event, it is not an answer to say that there was no need to have a document because there were no binding obligations to record: it was important to differentiate between what was the subject of a binding agreement and what was not. That could have been done as part of the written agreement, or as part of a memorandum of understanding, or otherwise in written form.

200. Further, in such a heavily documented case, one would expect that there would be contemporaneous documentary evidence that would support Astra's case. There is a dearth of such documents. However, such documents as there are provide more support for Musst's case than Astra's case. Documents prior to November 2012 were to the effect that Musst/Mr Reeves were keen to have an agreement in writing between MUSST and Octave/Astra with a view thereafter to an agreement being made between Matrix and MUSST: see the emails of 15 February 2012, 6 and 21 March 2012 and 23 September 2012 above referred to. Likewise, the documents at the time of the alleged November Arrangement are inconsistent with a November Arrangement: see the email of 16 November 2012 by Mr Siddiqi to his solicitor seeking to protect the interests of MUSST in respect of the work done to date including reference to "two closes" which appear to have been 2B and Crown. They are singled out as if they are the most likely to bear very substantial fruit. The privilege has been lifted as regards these emails, but not as between Octave and their solicitors.

201. The above-mentioned documents of 19-21 November 2012 were all about having an agreement. It was important from a financing point of view for Mr Siddiqi to be able to show them to financiers, but that is not to say that the written agreement was to be only in respect of work done from 21 November 2012. On the contrary, it was to show the financiers that there was to be reward from all efforts carried out by Musst.

202. It is apparent from the foregoing that there was nothing in writing to say that there was to be no binding agreement in respect of 2B or Crown or anybody previously introduced. In the words of the Opening Skeleton of Musst, the above emails preceding the meeting of 21 November 2012, copied to Mr Reeves, make it plain that Mr Siddiqi was very anxious to get a contract in place to cover the work he had already done and the contacts he had already introduced. In the way in which it was put in the opening skeleton for Musst at para. 160(5), not once did Mr Mathur, or Mr Reeves, say: *"But Saleem, we have already agreed we shall pay Matrix on a voluntary basis for three years for all that*".

203. Astra's amendment to the pleading is also important because the case that the November Arrangement was made on 21 November 2012 has been abandoned or replaced with a case that it was made in several communications. There is no evidence that it was made after the 21 November meeting. It is therefore significant that the alleged November arrangement was not mentioned in the email correspondence of 19 and 20 November 2012.

204. Documents in 2013 also provide further support to Musst's case and are inconsistent with Astra's case. First, exchanges with Mr Phillips and Mr Murray of 15 and 16 April 2013 about the need for broker dealer cover to deal with the 2B introduction (to which Mr Mathur was copied in) make it plain that it was intended that the Octave Contract should cover the introductions to 2B and, by inference, any other investors such as Crown, whenever introduced. If the Octave Contract had nothing to do with 2B, it is difficult to understand why Mr Mathur would have insisted on 22 April 2013 to have *"a binding agreement with a director's signature"* before authorising the payment of Musst's 20% share of the fees that had already been received from 2B.

205. Second, open communications in 2015 suggest strongly that the parties treated the payments in respect of 2B and Crown as legal obligations rather than a voluntary arrangement. There were emails of 30 April 2015 which were consistent with the moneys paid in respect of 2B and Crown being paid under the written agreement. Mr Holdom had first said (11.51am) that the *"2B invoice is not yet available. LGT have not yet settled their invoice".* Later (17.00) he said that a Crown 2 invoice had been sent in error: *"The Crown 2 account was set up for a new strategy (primarily CLO and CRE) and therefore is not covered by the Introduction Agreement "as it does not substantially replicate the investment securities and risk profile of ASSCF". I will settle the [other] invoice once the client has made their payment."* This judgment will revert later to the question whether Crown 2 was a new strategy such that Musst was not entitled to payment in respect of the same. The important point here is that the *"error"* of sending the Crown 2 invoice was an acknowledgment that payment in respect of the Crown Contract was covered by the written agreement (referred to as the Introduction Agreement) and not under the November Arrangement. On the same premise of operating under the written agreement, at 17.45, Mr Holdom wrote saying:

> *"Hi Agatha [Agatha Imiolek of Musst],*
>
> *I did not complete my explanation earlier. I should have asked you to reissue the first invoice using the capped annual fee of $650,000 as you did last quarter"*

206. Insofar as Mr Mathur recalls that he entered into a voluntary November Arrangement, I reject his evidence. Mr Mathur was unable to provide any satisfactory explanation for the absence of anything in writing to record or confirm the November Arrangement (even a short email) whether for the benefit of the liquidator of Matrix or LGBR or Octave. In particular:

(1) He claimed that he received an oral assurance that there would not be different people making claims for the same introductions, but the

informality of this, contrasted with the written agreement, was unconvincing. He said at [T9/66]:

> *"I had a concern, yes. I did explicitly mention to them, saying: I don't want ten people coming to me asking me for payments at a later date, saying, "I introduced you to LGT or I introduced you to (inaudible) and so on and so forth". So there were quite a few other light conversations going on at that point of time that I thought had different sales people involved, but both Mr Reeves and Mr Siddiqi confirmed to me that they will make sure that they will never come back to me and if I make one payment and I did not want to make a payment to multiple parties, if anybody came to me, they will take care of it. They assured me of that, that nobody is going to sue me legally for these payments."*

(2) He then went on to say at [T9/67-68] that Mr Reeves was going to take over the Matrix distribution platform and the sales and infrastructure people were going to work under his umbrella.

(3) Mr Mathur was given many opportunities to provide a satisfactory explanation why there was nothing in writing, but he was unable to do so: see [T9/65-69]. At [T9/68], he said:

> *"I asked myself this question every day, but I wish I had done that at that point of time. My overriding idea at that point of time was to make sure that Mr Siddiqi's financing is in place and the idea was for Mr Siddiqi to obtain financing. That was the rush to get it sorted out."*

207. None of the explanations were illuminating. Insofar as the financing of Mr Siddiqi needed to be in place, the most promising source of finance was anything that would result from the introductions already made and in particular in respect of 2B and Crown. Without this, it is difficult to see how the written agreement fulfilled Mr Siddiqi's aspiration to have something to get the financing in place.

208. Mr Mathur had difficulty in explaining why the payments, when made, were to Musst, and not to LGBR or Mr Reeves' corporate vehicle. He said that he was told that there "compliance issues" and so the payment was diverted to Musst: see [T9/63/1-7]. This was not mentioned in Mr Mathur's explanation at para. 84 of his witness statement where he said that Mr Siddiqi and/or Ms Galligan asked for the payments to be made to Musst because of a concern that Mr Siddiqi would not get his fair share, and that Mr Reeves did not object. The inconsistency in these explanations seems at odds with their veracity.

209. It was put to Mr Mathur that the communications of 19/20 November 2012 seem to be predicated upon the basis that the payments would be to Musst, his explanation at [T8/203-204] that this was to be a second tranche of investments was obviously wrong because the emails were talking about a deal relating to all the investors thus far approached. Mr Mathur's suggestion that the email in reply to Ms Galligan saying *"please freeze the sales effort"* was saying only not to contact new investors but did not refer to existing investors is rejected. When pressed about this, he said *"I don't recall what I meant at that time, to be honest, and if you ask me what that honestly I don't know."*

210. Further, the evidence of Mr Reeves on this point was unsatisfactory. It was intended that he would corroborate the evidence of Mr Mathur and prove the Matrix Arrangement. When cross-examined, his evidence suggested strongly that there was no Matrix Arrangement. Nor was there an arrangement where Matrix would receive money in the first instance and pass on something to Musst. In particular:

(1) It was apparent from the conversations of 19/20 November 2012 as recorded in contemporaneous documents that Mr Reeves was leaving it to Musst to negotiate with Octave. He was unable to provide a satisfactory explanation as to why he did not simply tell Ms Galligan that a deal had already been reached in relation to previous introductions with Mr Mathur.
(2) Likewise, he was unable to explain why he did not tell the liquidators of Matrix about the arrangement which Matrix is alleged to have had with Octave. On the contrary, he could not remember telling Begbies Traynor about any alleged arrangement: see [T9/162-168]. He was also unable to explain why he did not tell them about the alleged change by which Mr Siddiqi became the payee: see [T9/168-170].
(3) If there had been an agreement for Matrix to receive 80% of the introductions, Mr Reeves would have pressed Musst far harder than he did, and his explanations as to why this did not take place were inadequate [T9/186/9-189/12]. Despite knowing as at 1 August 2013 that LGT had agreed to put in $40 million into Mr Mathur's fund, (a) he did not inform the liquidators [T9/184/2-16], and (b) he did not chase Musst, save to contact Ms Galligan in December 2013 and to ask her *"whether you intend to pay us on LGT or think you need to"*, and to suggest that nothing be paid on the management fees *"and just a percentage of the performance (if/when it becomes payable) to us."*

211. For all of these reasons, the Court rejects the arguments of Astra about the existence of the alleged November Arrangement and accepts the arguments of Musst to the contrary. The reasoning thus far is without reference to the communications said to have been without prejudice. There will be a ruling below on whether the communications were indeed without prejudice, and if and to the extent that the Court considers that they were not without prejudice, it will be necessary to consider whether this modifies the above conclusion concerning the alleged November Arrangement.

XIV Alleged without prejudice discussions

212. There were discussions between Mr Siddiqi and Ms Galligan of the one part, and Mr Mathur of the other part, between June and August 2016. There is a dispute between the parties as to whether these discussions were without prejudice and therefore privileged. The parties agreed that instead of resolving this question of admissibility of evidence prior to the trial, it should in fact be resolved at the same time as the issues in the trial. The parties are to be commended for this course of action because the evidential issues were intimately connected with the substantive issues in the action.

213. The evidential dispute can be summarised as follows. Musst through the evidence of Ms Galligan and Mr Siddiqi submits that there was no reference to the conversations being *"without prejudice"* until August 2016. Further there was no dispute between the parties until, at earliest, late July 2016. The failure to pay did not evidence a dispute but was simply a non-payment that had to be resolved. Mr Mathur says that the discussions were agreed to be without prejudice, in particular those of 27 June 2016 and 13 July 2016. Further, there was a dispute as to whether there was a contractual obligation to make any payment. Astra also say that the transcripts were the result of furtive recordings without the knowledge or consent of Mr Mathur which reflects a lack of integrity on the part of Musst. Further the recordings are incomplete, which suggests that those conversations or parts of the conversations which do not suit Musst's case have been edited out or withheld.

214. Musst says that nothing in the contemporary documents or transcripts of the discussions prior to late July 2016 supports the notion that there was a dispute of legal right or an agreement to conduct discussions on a without prejudice basis. In particular there was no reference to the alleged November Arrangement. The transcripts were sent between solicitors on 12 January 2017 in support of the claim and the first allegation by Astra that the conversations were without prejudice was almost 2 years later on 7 November 2018.

215. In the fifth witness statement of Mr Mathur at paragraph 136, it is stated in vague terms *("during June 2016")* that an agreement was reached to have without prejudice conversations. No specific time was provided for this agreement. From Mr Mathur's sixth witness statement, he claims that he mentioned the words *"without prejudice"* just before the meeting of 27 June 2016. This came after the meeting of 14 June 2016. However, Astra rely upon the statement of Ms Galligan in her third witness statement that Mr Mathur muttered under his breath *"you don't even have a contract"*. Subsequently, in her fourth witness statement, she said that she thought that this might have been said during the 27 June 2016 meeting.

216. Subsequent to the 14 June 2016 meeting, there were notes that were written by Ms Galligan on 17 June 2016. This does not indicate that the conversation was without prejudice or that there was a dispute. Mr Mathur said that although he was receiving fees from 2B and Crown, he would not pay Musst its percentage of management fees because he was having cashflow problems. Due to reduced management fees, Mr Mathur said that he would no longer be in a position to pay all his staff and costs. He would no longer be in a position to pay Musst or Mr Chandaria. There was no dispute about the contractual entitlement of Musst, but Mr Mathur required breathing space. His primary focus was to ensure that Astra met its FCA capital adequacy requirement.

217. Mr Mathur's evidence is that he had suggested a payment in relation to performance fees even though they had not crystallised. Mr Siddiqi asked for details of the performance fees which had accrued on Crown and 2B. The email to himself on 14 June 2016 referred to the above saying: *"calculate fee due to Musst and a deal for final settlement."* Mr Holdom said that he understood that there was a dispute that might result in litigation.

218. Similarly, the day after the 27 June meetings, Mr Holdom emailed Mr Mathur and Dr Adler:

> *"Subject: "Musst Accrued P Fees*
>
> | | *P Fee Accrued ($)* | *Musst Payment ($)* |
> |---|---|---|
> | *Crown 1 – 31 Mar 16* | *5,064,535.64* | *1,012,907.13* |
> | *2B – 31 May 16* | *8,964,500.78* | *1,792,900.16* |
> | | | *2,805,807.28"* |

219. Astra say that Musst knew that there was a dispute. On 19 June 2016, Mr Siddiqi wrote an email that is regarded by Astra as *"the most telling document"* in which he talks about being in the *"Combat Zone"* and that he needed help *"in barrister land"*. He acknowledged that he had spoken to advisors prior to the meeting of 14 June 2016 but she denied a dispute. She referred to *"alarm bells going"* and *"a lack of trust"*. Musst submitted that the reference to *"barrister land"* centred around a failure to pay rather than a dispute.

220. As regards the evidence relating to the conversations of 27 June 2016, I accept the evidence of Ms Galligan that at that stage, it was not stated that the conversation was without prejudice. Her oral evidence was as follows [T4/3/24 – T5/3/14]:

> *"Q. I suggest that in the half an hour that is not actually recorded in the transcript , Mr Mathur has made a proposal and that at the beginning of the meeting before making the proposal, Mr Mathur has said to you that this is a without prejudice conversation?*
>
> *A. That is not correct. Mr Mathur never said the words "without prejudice". I actually quite embarrassingly did not know the term" without prejudice". The first time I saw it was when Mr Murray sent us an email in August that was headlined "Without Prejudice" and I recall Googling what "without prejudice" meant. So no, he most definitely did not say "without prejudice" at the start of the meeting. My recollection is that there is nothing missing from this record except for, as I said yesterday, pleasantries. He had by no means explained any proposal at this stage."*
>
> (see also Ms Galligan's fourth witness statement para. 42).

221. Mr Mathur has said that following a discussion with Mr Murray (which Mr Murray has said took place on 24 June 2016), he said at the outset of the 27 June 2016 conversation that the discussions would be without prejudice. The evidence of Mr Murray was that he advised that the conversation should be without prejudice. As will be set out below as regards the case about defamation, his evidence was unsatisfactory as regards his failure to have a note about the alleged defamation. There was no contemporaneous record to support this evidence. Further, although in emails of 19 July and 26 July 2016, he wrote that the intended contract was subject to contract and he wrote *"contract denied"*, his use of the term *"without prejudice"* was not until 3 August 2016.

222. Further, there was no indication in the recording that there was a dispute between the parties. The absence of the first part of the conversation is explained by Ms Galligan as being about pleasantries, and the suggestion that this has not been produced smacks of an allegation of concealment. It is not proven, and in any event, having seen the witnesses, the Court has no reason to believe that they would have sought to conceal such evidence. In any event, if it were the case that there was something in the early part of the conversation which showed that it was about a resolution of dispute, it would be expected that the contents of the conversation which was transcribed would indicate that it was about the resolution of a dispute. It does not. Rather it is that the moneys were said not yet to be due because they had not been received by Astra. There was a discussion about bringing forward the time for payment of such money as would become due. If in fact there was a dispute about the money ever being due (on the basis that Musst had no rights and there was only a voluntary arrangement), one would expect that this would have been stated expressly. It was not.

223. More specifically, the recording referred to Mr Mathur saying, on the morning of 27 June 2016, that: *"I can terminate your contract but that'll only be if you agree to it. Otherwise I won't terminate it".* This was inconsistent with the November Arrangement because, on his evidence: (a) the arrangement was voluntary, and anyway (b) it had come to an end. In answer to Mr Siddiqi saying, *"In terms of our contract, …You are saying you want to get rid of that contract to give you breathing space"*, he says *"Yes"*. It made no sense that he needed breathing space if the November Arrangement applied; or why he never mentioned the fact that there was simply a voluntary arrangement and not a contract in any of the transcribed conversations [T6/142/12-143/1, T6/159/23-160/4]. He also used the term *"liability"* in respect of management fees, but this term presupposed a legal liability, and he was unable to explain why he said this. [T6/119/1-120/4]:

224. Likewise, Mr Mathur had no explanation for why he offered to pay performance fees on 27 June 2016 and on 13 July 2016 which were likely to be a very large sum, even after the first three-year period. He said that it did not seem honourable to walk away, because it had originally been expected that they would be paid in three years: see [T6/100/24-101/9; T6/109/5-16; T6/110/7-20, T6/140/11-19] (*"I accepted that the fair and most generous thing to do was to pay even when it arises at ten years' time").* Likewise, he said in re-examination that in conversations between April and June 2016, he informed Mr Siddiqi and Ms Galligan that he would pay the performance fees when he was himself paid *"crystallisation of the performance fee will happen and once you get paid - - once I get paid, you will get paid.*" [T9/25/19 – T9/26/16].

225. This was in contradiction of Mr Mathur's written evidence where he said that in March 2016, he had informed Mr Siddiqi and Ms Galligan that there would be nothing payable after the first three years (that is after April 2016) even if the performance had not become due by then: see Mr Mathur's fifth witness statement at paras. 134 – 135 and his initial oral evidence to like effect: [T6/89/17-20]. The recorded conversation is entirely consistent with the fact that there was no dispute at that stage as to whether there was an obligation to pay the performance fees: neither was there a point taken as to the absence of any contractual obligation or as to the expiry of three years.

226. There are other indicators that there was no agreement on 27 June 2016 that the discussion would be without prejudice and nor were they intended to settle a dispute. Mr Mathur knew about the tape recordings from January 2017 when he received the transcript (he was shocked). Yet he did not say that the conversations were without prejudice. It was not mentioned in a letter by his then solicitors Jones Day on 17 February 2017, complaining only of various telecommunication breaches and the like.

227. Further, if the conversations had been without prejudice, then the 13 July 2016 transcript would not have been attached to Mr Mathur's first witness statement. The attempt to cast the blame at solicitors for this was unconvincing, not least because Mr Murray had assisted in the drafting of the statement.

228. In my judgment, there was no agreement that the conversation of 27 June 2016 was without prejudice. Further, there was no dispute at that stage about whether there was a contractual obligation to pay.

229. The discussion of 13 July 2016 went along with the discussion of 27 June 2016 and there is no reason to separate the discussions. However, there is reason to separate the discussion of 3 August 2016, because this was preceded by an email from Mr Murray dated 19 July 2016 which had stated that he was preparing a *"subject to contract"* agreement. Of greater significance, on 26 July 2016, Mr Murray sent the email referred to above to Mr Siddiqi and Ms Galligan headed *"Subject to Contract/Contract Denied"*. When the draft was sent on 3 August 2016, it had the same heading and also *"Without Prejudice"*. I am satisfied that, by this stage there was a dispute as to whether there was a contractual relationship and that the draft contract sent on 3 August 2016 was not only subject to contract, but that it was without prejudice. However, I conclude that the earlier discussions were not without prejudice.

230. There is a useful summary of the two bases of the without prejudice rule, public policy and contractual, by Lewison LJ in *Avonwick Holdings Ltd v Webinvest Ltd* [2014] EWCA Civ 1436 at para. 17:

> *"My conclusions are these. There are two bases for the operation of the without prejudice rule. The first rests on public policy and that policy is to encourage people to settle their differences. However, in order for that head of public policy to be engaged there must be a dispute. The concept of dispute is given a wide scope so that an opening shot of negotiations may fall within the policy even though the other party has not rejected the offer. That is the explanation for Standrin. In order to decide whether this head of public policy is engaged, the court must determine on an objective basis whether there was in fact a*

> *dispute or issue to be resolved. If there was not then this head of public policy is not engaged. On facts of this case, in my judgment the judge was right to say there was no dispute at the time the communications took place. The other basis for the rule is contractual, that is by contract the parties may extend the usual ambit of the without prejudice rule. In Cutts v Head the dispute was over so the justification was purely in terms of contract. In Unilever the possibility of extending the scope of the rules expressly envisaged and the decision in Unilever is treated as an authoritative exposition."*
>
> (emphasis added of the two bases for the rule)

231. In the instant case, there was not a dispute or issue at the time of the conversations prior to 3 August 2021, nor was there an agreement that any of the conversations before 3 August 2021 should be treated as without prejudice.

232. It follows that, in respect of the application of 22 March 2021 of Astra, the application is refused to treat as inadmissible on the ground of without prejudice privilege the material at paras. 1-11 of Schedule 1 to the ninth witness statement of Lucas Julian Moore. However, the application in respect of paragraphs 12-15 of Schedule 1 and paragraphs 1-3 of Schedule 2 is allowed.

233. Those documents which have not been found to be inadmissible support the case that there was no voluntary arrangement of November 2012, and that the parties treated as binding whatever had been agreed before then in respect of management and performance fees from 2B and Crown. Even if these conversations had been excluded, the Court would still have concluded, contrary to Astra's case, that there was no voluntary November Arrangement.

XV The second issue: did Musst introduce 2B and Crown to Octave?

234. The first issue (was there a November Arrangement) and the second issue (was there an introduction of 2B and Crown such as to trigger an entitlement under the Octave Contract) are not entirely separate and distinct. The parties' cases on the construction of the Octave Contract as regards what constituted an introduction are predicated, in part, upon a factual matrix that as per Astra there was a November Arrangement, and as per Musst there was no November Arrangement. Further, Musst's alternative case on rectification and/or estoppel is predicated upon there having been no November Arrangement and the payments which were made being thought by the parties to be referable to the Octave Contract alone (even if as a matter of construction of the Octave Contract, the same were not payable).

235. The above needs to be considered as if Octave had remained the vehicle of Mr Mathur throughout and as if the Astra parties had never existed. If there was an entitlement as against Octave, then the question arises as to whether the entitlement passed over to the

Astra parties through novation or through an estoppel precluding a denial that the entitlement passed over to the Astra parties.

236. Astra's case is that the Octave Contract was forward looking whereas the November Arrangement was backward looking. Thus, the November Arrangement applied to introductions which had been effected prior to the Effective Date, that is to say 21 November 2012. The structure of the Octave Contract was forward looking from the Effective Date. Since there was a period of about 5 months of negotiation of the Octave Contract which went through numerous iterations, the parties agreed an Effective Date, said by Astra to be from the time of the agreement of the backward-looking November Arrangement. To that limited extent to the time to the Effective Date, even on Astra's case, the Octave Contract too was backward looking.

237. Musst's case has a wider construction of the meaning and effect of the term *"introduction"* in this case. There are also differences between the parties as a matter of fact about the role of Musst as regards the introduction of 2B and Crown. Astra's case is that any introduction was not by Musst: to the extent that there was an introduction by anyone, it was by Matrix. Musst says that it effected the introductions and to the extent that Matrix was involved, it was in an administrative or secretarial role.

(a) Musst's submissions

238. Musst says that whereas the first part of the definition of *"Introduction"* is by reference to the time of the initial meeting, the second part is by reference to the time when the investment is ultimately made. By clause 2.1 of the Octave Contract, Octave Limited appointed Musst to be the Introducer *"from the Effective Date … to introduce Prospective Investors and make introductions to Octave"*, but bearing in mind the wide definition of *"Introduction"* all this means is that Musst's appointment ran from 21 November 2012: it does not mean that the initial introduction itself, in the sense of a meeting or discussion, had to take place after this date as well: only the investment had to take place after it, as happened.

239. The Octave Contract has to be construed in the light of the "factual matrix" known to both parties in which the Contract was concluded. The relevant law from Lord Hoffman's speech in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 898 at 912-3 is considered further below. Objectively, the reason for the choice of 21 November 2012 as the Effective Date was that this was when the parties agreed in principle the main part of the deal, namely Musst's entitlement to 20% of Octave's fees, which led to the production of the Octave Contract.

240. By this stage, MUSST through Mr Siddiqi had been heavily engaged in identifying prospective investors and effecting introductions and making or preparing presentations. Musst submits that it would be absurd to suppose that it was intended that Musst would have no right to fees for any of these potential investors, but only a right for new investors whom Octave met for the first time to discuss the fund after 21 November 2012. Likewise, it would be very surprising if it was intended to exclude Musst's right to payment under the Contract in relation to investments by 2B and Crown given the nature of the discussions with and about them before and after 21 November

2012, and there were, as at the date of the contract on 18 April 2013, no other likely investors on the horizon.

(b) Astra's submissions

241. Astra say that the Octave Contract would apply to new introductions which might occur after the Effective Date of 21 November 2012, but that the November Arrangement would apply to those investors who had previously been introduced. In considering the factual matrix of the Octave Contract, the question as to whether the November Arrangement existed is of importance. On Astra's case, there was a Matrix Arrangement and thereafter a November Arrangement. The effect was that the introductions were to be done by Matrix who would be paid directly by Mr Mathur or his vehicle. By the November Arrangement, this was converted into a three-way arrangement whereby payments would be made on a voluntary basis by Octave to Musst for the benefit of Matrix/LGBR/Mr Reeves and for Musst.

242. Astra say that the previous introductions were by Matrix and not Musst. Matrix was principally responsible for the marketing strategy until November 2012. The initial introductions of The Observatory (2B) and LGT (Crown) were by Matrix to Octave. The subsequent relationship with Octave was not through Musst's initiative, nor was any investment made by them at the instigation of or on the initiative of Musst.

243. Astra say that the effect of the Effective Date was that Musst did not become the *"Introducer"* until its appointment as such which was not until 21 November 2012. This therefore excluded any introduction done before that date. If it had been intended that either 2B or Crown should comprise a *"Prospective Investor"* for the purposes of Clause 3.1, the Octave Contract would have said so expressly.

(c) The relevant terms of the Octave Contract

244. It is necessary at this stage to consider in detail the Octave Contract. The recitals describe Octave LLP's and Octave Ltd's role in relation to *"the Funds"* (i.e. ASSCFL and managed accounts designed to replicate ASSCFL's risk strategy etc) (Taken together Octave Ltd and Octave LLP were *"Octave"*). They then provide:

> *"C. The Introducer [i.e. Musst] is willing to introduce Octave to potential investors in the Funds (or any of them) or managed accounts.*
>
> *D. The parties wish to enter into this agreement ("the Agreement") in respect of the appointment of the Introducer to introduce Octave to potential investors as aforesaid".*

245. The rules of interpretation of the Octave Contract are set out in clause 1, relevant parts of which and other relevant terms of the Octave Contract are set out below:

"Interpretation
1.1 The definitions and rules of interpretation in this clause apply in this Agreement"

"Current Strategy" is to invest primarily in synthetic asset backed securities and on a buy and hold basis with limited or [no] direct leverage, and such that the investments are intended to operate as if they were closed-ended investment pools with capital committed on a locked up basis for several years to be returned to investors in such funds following realisation of the investments therein.

"Funds"	*The Astra Special Situations Credit Fund Limited [ASSCF] and other funds and managed accounts designed to substantially replicate the investment securities and risk profile of [ASSCF] and following substantially the same strategy as set out under the Current Strategy below, howsoever structured, ... to which Octave or Manager acts as investment manager. It is understood for the purposes of interpretation of the definition of a Fund that the strategy remains substantially the (sic) similar to the Current Strategy.*
"Effective Date"	*means the 21st November 2012;*
"Excluded Investor"	*a person with whom Octave or the Manager (or their agents and employees) has had a prior substantive relationship and agreed as such by the Introducer (such agreement not to be unreasonably withheld);*
Introduction	*"the initial introduction, by means of the arrangement of a face-to-face meeting or conference call for the purposes of discussing the Fund or Octave at which the Introducer is present (or which has been arranged at the instigation of the Introducer), to Octave of a Prospective Investor. Introduction shall also include any circumstance where a Prospective Investor ultimately makes an investment for the Current Strategy in a Fund or a managed account at the instigation or on the initiative of the Introducer or commences a relationship with Octave through the initiative of the Introducer. For the avoidance of doubt, Introduction shall not include the mere passing on of a list of contact details to Octave or Prospective Investors who Octave might wish to call or contact at its own initiative but who have not otherwise been informed of Octave and the Fund by the Introducer. "Introduce", "Introduces" and "Introduced" shall be interpreted accordingly."*

(Emphasis in underlining added.)

"Prospective Investor" "any person introduced by the Introducer other than an Excluded Investor".

2. Introductions

2.1 Manager appoints the Introducer from the Effective Date and subject to the terms of this Agreement on a non-exclusive basis to introduce Prospective Investors and make Introductions to Octave on the terms of this Agreement."

2.2 Octave acknowledges that the Introducer may, with prior notice, to and with the prior written consent of Octave (such consent not to be unreasonably withheld if any such delegate is an affiliate of the Introducer), delegate any of the functions to be undertaken by the Introducer pursuant to this Agreement (and references herein to the Introducer shall accordingly include a reference to any such delegate as to the context requires). The Introducer shall be responsible for the acts or omissions of any delegate as for its own. The Introducer shall undertake to provide details of any such delegate as may be reasonably requested by Octave. Octave hereby acknowledges that the Introducer intends to delegate (at its own cost) some or all of the functions under this Agreement to Musst Investments LLP, and subject to the representation made in clause 10.3 being correct. Octave hereby consents to such delegation. Octave retains the absolute right to withdraw consent to the delegation of the functions to any other delegate appointed by the Introducer pursuant to this Agreement for whatever reason upon furnishing written notification to the Introducer that Octave are no longer consenting to the delegation. On receiving notification that the consent of Octave is withdrawn, the Introducer shall immediately cease to retain the services of the delegate.

…

2.3 The Introducer shall:

…

2.3.2 notify Octave in advance of making any Introductions of the identity of any party that it may approach with the aim of making an Introduction, and, if so requested by Octave, cease further contact with any party in relation to the Funds and Octave if Octave determines in its sole discretion for whatever reason that it prefers the Introducer not to make an Introduction to such party;

…

2.6 The Introducer must disclose to each Prospective Investor that it is an introduction agent of Octave.

…

3. Revenue Share

3.1 The Introducer shall be entitled to share in all management and performance fees (howsoever described) earned and received by Octave (or any of Octave's affiliates ...) in respect of each Prospective Investor who makes (directly or indirectly) an investment in a Fund managed or advised by Octave (an ***Investor****) for the Current Strategy on or before the Cut-off Date, each such investment being an* ***Eligible Investment****.*

...

3.5 For the avoidance of doubt, no Investment shall be regarded as an Eligible Investment in the event that a payment of Revenue Share thereto would contravene any law or other regulation applicable in the jurisdictions in which the Investor, Octave and Introducer operate (and in particular any regulations that require authorisation, registration or regulation of the Introducer which is not held by the Introducer or its delegate in order for such payment not to contravene securities law applicable in such a jurisdiction). The parties hereby agree that in the event of a dispute arising in connection with clause 3.5 exclusively, the parties will endeavour to work together in good faith to come to a practical mutually agreed solution.

3.6 The Parties hereby acknowledge that the sole obligor for payment of any costs, fees expenses or liabilities of an Octave party under this agreement shall be Manager, and the obligations of Investment Manager hereunder are limited to a) the performance of such actions as may be required by Manager to be undertaken to facilitate the operation or administration of this Agreement, and b) the performance of any such actions or functions as may be delegated to Investment Manager under any Investment Manager Agreement between Investment Manager and Manager or any Fund ..."

3.7 The parties hereby agree that a) any new investments made by an investor in a fund under the management of Octave or the Investment Manager following a strategy other than the Current Strategy (a "New Fund") and deriving from the redemption of investments originally made in a Fund following the Current Strategy will not be treated as Eligible Investments under this agreement and this includes a restructuring of ASSCF to turn into a liquid open ended fund following;
...
...
5. Obligations of the Introducer

5.1 The Introducer shall at all material times act in good faith towards Octave.

5.2 The Introducer shall comply with all applicable laws, statutes, regulations and codes relating to the Introducer's business and procure any licences, certificates, insurance (including but not limited to professional indemnity insurance) and all or any regulatory approvals required in any jurisdiction in which the Introducer operates including, but not limited to, financial services laws and regulations (including the Financial Services and Markets Act 2000 (FSMA), the Financial Services Authority Handbook) and anti-bribery and anti-corruption laws and regulations ... and the US Securities Exchange Act 1934. Without prejudice to the generality of the foregoing where required under the US Securities Exchange Act

1934 or any other applicable legislation the Introducer shall not proceed with any Introduction to a potential investor domiciled in the United States of America unless the Introducer or a duly authorised delegate of the Introducer (at the Introducers own cost) is, or is acting under the supervision of, a broker licensed to act as such in the United States of America.

…

5.6 Without prejudice to any of the foregoing, the Introducer will not, and will ensure that none of its contacts or intermediaries will:

5.6.1 distribute any Materials;

5.6.2 use any Materials;

5.6.3 promote any of the Funds or Octave to any person without the prior written consent of Octave. The Introducer, its contacts or intermediaries will not proceed with any distribution of Materials or promotion of Funds where such distribution, use or promotion is likely to contravene any law, code or regulation of any jurisdiction.

5.7 The Introducer agrees that it will not, and shall procure that its employees, officers, members, directors and agents will not, disparage, slander, comment maliciously or make any accusation of any nature whatsoever against or in relation to the business of Octave, the Manager or their affiliates, or any officers, members, directors or employees of the foregoing, and, without limiting the generality of the foregoing, will not procure anyone to do the same or acquiesce in anyone's doing so on its behalf.

…
10. Representations and Warranties

10. Each party hereby represents and warrants to the other parties as follows at all times whilst this Agreement is in force:

…

10.1.2 Prior to the performance of any obligations under this Agreement, in any specific jurisdiction, it has obtained all authorisations of any governmental or regulatory body required in connection with this Agreement in such jurisdiction and such authorisations are in full force and effect.

…

12. Termination

…

12.2 Without prejudice to any rights that have accrued under this Agreement or any of its rights or remedies, any party may at any time terminate this Agreement with immediate effect by giving written notice to the other parties if:

…

12.2.2 another party commits a breach of any term of this Agreement (other than failure to pay amounts due under this Agreement) and (if such breach is remediable) fails to remedy that breach within a period of 14 days after being notified in writing to do so (it being specifically acknowledged by the Introducer that any continuing or repeated (after warning) breach on more than one separate occasion by the Introducer of its obligations under Clause 2 shall provide ground for termination of this Agreement by Octave);

…

13. Consequences of termination
…

13.2 The Introducer shall continue to be entitled to the revenue share in respect of all Eligible Investments (as defined in Clause 3) for so long as such Eligible Investments in the Current Strategy are maintained by the Investor; provided that, notwithstanding the foregoing, should this Agreement be terminated following a repeated (after written notification) material breach of the Introducer's obligations hereunder including a sustained failure to comply with its obligations under Clause 2.3, the right of the Introducer to receive revenue share will terminate as of the Termination Date.
…

15. Entire agreement

15.1 This Agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous drafts, agreements, arrangements and understandings between them, whether written or oral, relating to its subject matter.
15.2 Each party acknowledges that in entering into this Agreement it does not rely on, and shall have no remedies in respect of, any representation or warranty (whether made innocently or negligently) that is not set out in this Agreement.

16. Variation

No variation of this Agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

17. Assignment

This Agreement is personal to the parties and neither party shall assign, transfer … subcontract, or deal in any other manner with any of its rights and obligations under this Agreement without the prior written consent of the other party."

246. In addition, Clause 4 provided for the payment mechanisms. This included Clause 4.1 which required Octave to provide a statement on request to provide the particulars of all Eligible Investments in the previous calendar month, the fees due and payable to Octave in respect of such month and the Introducer's revenue. The amounts payable

were to be paid by Octave Limited within 10 days of first receipt of fees by it, without set-off, counterclaim, withholding or deduction. (Clause 4.5.) Any dispute as to the amount payable was to be resolved by referring it to Octave's auditors (Clause 4.6.) If Octave Limited failed to make any payment on or by the due date, it would pay (without prejudice to Musst's other rights and remedies) interest, both before and after judgment, on the late payment at the rate of 2% above base rate of Musst's bank from time to time (Clause 4.7.)

247. Octave was to do all such things as within its power to ensure that: (a) responsibility for the management of the Funds (as defined) and any managed account was retained by Octave and (b) the spirit of the Contract was given full force and effect. (Clause 9.4, first part.) In particular, Octave was to do all such things and exercise its rights as reasonably within its power so as to ensure that the responsibility for the management of the Funds or any managed account was not transferred to another party without Musst's consent, unless such party offered in good faith to enter into an agreement with Musst whereby Musst continued to receive its said 20% revenue share on the same terms as in the Contract. (Clause 9.4, second part.)

248. Octave was to keep (and to maintain for five years after termination) full, accurate and up to date books, accounts and records of its activities relating to the Contract, including recording any Eligible Investments, their ongoing value, and the payments due to Musst. (Clauses 11.1 and 11.2.) Musst was entitled on reasonable notice to attend premises where such records were kept (and Octave was to procure access to the same), and to access them and to take copies to ensure that the correct amounts had been paid to it. If on an audit Musst identified any shortfall, "Octave", Octave Limited was to pay that shortfall, interest calculated as above, and Musst's costs and expenses of the audit within seven days of the shortfall being notified. This right survived termination of the Contract. (Clauses 11.3 to 11.4 and 11.6.)

249. Therefore, in order to be entitled to a revenue share, Musst has to show in relation to any given investor such as 2B and Crown that:

    (1) the investor was a *"Prospective Investor"* that is to say *"a person introduced by the Introducer other than an Excluded Investor"*; and **either**

    (2) it made *"the initial introduction, by means of the arrangement of a face-to-face meeting or conference call for the purposes of discussing the Fund or Octave at which the Introducer is present (or which has been arranged at the instigation of the Introducer), to Octave of a Prospective Investor"* – i.e. the first part of the definition in *"Introduction"*; **or**

    (3) *"any circumstance where a Prospective Investor [i.e. the person introduced] ultimately makes an investment for the Current Strategy"* in a relevant account *"at the instigation or on the initiative of [Musst] or commences a relationship with Octave through the initiative of [Musst]"* – i.e. the second part of the definition in *"Introduction"*.

(d) The law regarding construction of contracts

250. Before considering the facts relating to the alleged introductions and whether or not the introduction fees are payable, it is first necessary to consider the law relating to interpretation of contracts. The particular issue is the extent to which construction is about textualism or contextualism. To what extent is one bound by the words themselves, or the extent to which textual meaning yields to a construction which is consistent with business common sense.

251. In the last decade, there have been a number of cases of the Supreme Court considering principles of construction. Particular focus in the submissions before this court was on three cases, namely:

(1) *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 *("Rainy Sky").*

(2) *Arnold v Britton* [2015] AC 1619 (*"Arnold v Britton")*

(3) *Wood v Capita Insurance Services Limited* [2017] UKSC 24; [2017] AC 1173 *("Wood")*

252. The starting point has, for a long time, been the emphasis of Lord Wilberforce on the factual matrix in *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), and on the five principles set out by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ("ICS"). In *Wood*, it was stated (at para.10) how Lord Wilberforce had *"affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations."*

253. In commercial cases in the last decade, there were often rival propositions upon which the precise words should be emphasised, or the commercial sense of the particular construction contended for. There was not necessarily a contradiction between these approaches, because of an emphasis for an iterative approach which took into account both textualism and contextualism, as they would be referred to by Lord Hodge in *Wood*. It had, prior to these cases, been said that an iterative approach was required, involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences: see i*n Re Sigma Finance Corporation (in administrative receivership)* [2009] UKSC 2; [2010] 1 All ER 571, per Lord Mance at para. 12.

254. In *Wood*, the Court summarised the principles in the following terms. The case is of particular use because of submissions made in that case (and indeed commonly) that there was a difference in approach between *Rainy Sky* and *Arnold v Britton.* There were passages of *Rainy Sky* which were often used bythose championing the importance of the commercial consequences of the words used. Likewise, there were parts of *Arnold v Britton* which were used by those saying that the words used were more important than commercial consequences, bearing in mind that the parties could control the words and the Court was not there to protect a party against an improvident bargain.

255. The constitution of the Court in *Wood* comprised judges in both of those cases. In *Rainy Sky*, the Supreme Court justices were Lords Phillips, Mance, Kerr, Clarke and Wilson. In *Arnold v Britton*, the Supreme Court justices were Lords Neuberger, Sumption, Carnwath, Hughes and Hodge. The Supreme Court in *Wood* contained judges from both cases Lords Mance and Clarke from *Rainy Sky* and Lords Neuberger, Sumption and Hodge from *Arnold v Britton*. Collectively, they did not regard any difference in approach between *Rainy Sky* and *Arnold v Britton.* Various parts of the judgments are worth quoting.

(i) Rainy Sky

256. In *Rainy Sky*, Lord Clarke gave a speech with which the other justices agreed. He said the following:

> *14."…those cases show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the Investors Compensation Scheme case at page 912H, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."*
>
> *21. "The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."*
>
> *…*
>
> *23. Where the parties have used unambiguous language, the court must apply it. This can be seen from the decision of the Court of Appeal in Co-operative Wholesale Society Ltd v. National Westminster Bank plc [1995] 1 EGLR 97. The court was considering the true construction of rent review clauses in a number of different cases. The underlying result which the landlords sought in each case was the same. The court regarded*

it as a most improbable commercial result. Where the result, though improbable, flowed from the unambiguous language of the clause, the landlords succeeded, whereas where it did not, they failed. The court held that ordinary principles of construction applied to rent review clauses and applied the principles in The Antaios (Antaios Compania Naviera SA v Salen Rederierna AB) [1985] AC 191. After quoting the passage from the speech of Lord Diplock cited above, Hoffmann LJ said, at p 98:

> *"This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement."*
>
> *…*

25. In 1997, writing extra-judicially ("Contract Law: Fulfilling the reasonable expectations of honest men") in 113 LQR 433, 441 Lord Steyn expressed the principle thus:

> *"Often there is no obvious or ordinary meaning of the language under consideration. There are competing interpretations to be considered. In choosing between alternatives a court should primarily be guided by the contextual scene in which the stipulation in question appears. And speaking generally commercially minded judges would regard the commercial purpose of the contract as more important than niceties of language. And, in the event of doubt, the working assumption will be that a fair construction best matches the reasonable expectations of the parties."*

I agree. He said much the same judicially in Society of Lloyd's v Robinson [1999] 1 All ER (Comm) 545, 551:

> *"Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language".*

> *27. ...In Re Sigma Finance Corporation (in administrative receivership) [2009] UKSC 2; [2010] 1 All ER 571, where Lord Mance said at para. 12 that the resolution of an issue of interpretation in a case like the present was an iterative process, involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences.*
>
> *....*
>
> *29. Finally, it is worth setting out two extracts from the judgment of Longmore LJ in Barclays Bank plc v HHY Luxembourg SARL [2010] EWCA Civ 1248; [2011] 1 BCLC 336, paras 25 and 26:*
>
> > *"25. The matter does not of course rest there because when alternative constructions are available one has to consider which is the more commercially sensible. On this aspect of the matter Mr Zacaroli has all the cards. ...*
> >
> > *26. The judge said that it did not flout common sense to say that the clause provided for a very limited level of release, but that, with respect, is not quite the way to look at the matter. If a clause is capable of two meanings, as on any view this clause is, it is quite possible that neither meaning will flout common sense. In such circumstances, it is much more appropriate to adopt the more, rather than the less, commercial construction."*
>
> *30.In my opinion Longmore LJ has there neatly summarised the correct approach to the problem. That approach is now supported by a significant body of authority. As stated in a little more detail in para 21 above, it is in essence that, where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense…"*

(ii) Arnold v Britton

257. In *Arnold v Britton*, the first and most oft cited speech was that of Lord Neuberger. Some of what he said was supportive of an emphasis on the words used. In particular, he said the following:

> *"17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in*

Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into

> *arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."*

(iii) Wood v Capita Insurance Services Limited

258. In considering the submission that the cases had different emphases as to contractual construction, the Court in *Wood* saw no contradiction. In particular, Lord Hodge giving the speech, with which the other justices agreed, stated:

> *"10. **The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.** In Prenn v Simmonds [1971] 1 WLR 1381 (1383H-1385D) and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of **interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations.** When in his celebrated judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, A new thing under the sun? The interpretation of contracts and the ICS decision Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.*
>
> *11. Lord Clarke elegantly summarised the approach to construction in Rainy Sky at para 21f. In Arnold all of the judgments confirmed the approach in Rainy Sky (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in Rainy Sky (para 21**), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival***

constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause *(Rainy Sky para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 paras 13 and 16);* ***and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: Arnold (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.***

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 10 per Lord Mance. To my mind ***once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.***

13. ***Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement.*** *The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements.* ***Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals.*** *The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance.* ***But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be***

> ***particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type.*** *The iterative process, of which Lord Mance spoke in Sigma Finance Corpn (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.*
>
> *14. On the approach to contractual interpretation, Rainy Sky and Arnold were saying the same thing.*
>
> *15. The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation* (emphasis added)*."*

259. With the above in mind, the Court must now embark upon the iterative process, balancing the suggested indications of a close examination of the language of the contract with the factual background and the implications of the rival constructions.

(e) The facts relating to the introduction of 2B

260. Musst's case on how the introduction of 2B came about is that in early 2012, Mr Siddiqi put Mr Reeves, the manager of Ms Galligan, at Matrix, in touch with Mr Mathur, on the basis that Matrix was authorised by the FSA to market and sell financial products. On 16 January 2012 and 8 February 2012, Mr Siddiqi introduced Mr Reeves to Mr Mathur and, subsequently, Mr Siddiqi and Mr Mathur presented the proposed AMCO business strategy to the Matrix sales team. As a result, Ms Galligan and other members of the Matrix sales team started speaking to potential investors about the proposed AMCO business in March and April 2012. Potential investors were suggested to them as such by Mr Siddiqi on behalf of Musst.

261. There was a brainstorming session between Mr Siddiqi and Ms Galligan in March 2012 which led to a list of target customers being compiled. Among them, Mr Siddiqi for Musst suggested to Ms Galligan that Matrix should contact The Observatory as a potential investor. Ms Galligan had known Mr Issac Septon and others at The Observatory since around 2010.

262. As a result, Ms Galligan and other members of the Matrix sales team in March and April 2012 started speaking to potential investors about the proposed AMCO business. This then enabled direct contact with customers by Mr Mathur and Mr Siddiqi. Mr Siddiqi had technical know-how of the credit instruments relating to synthetic ABS which enabled him to make detailed presentations of the product, which was particularly important for a sophisticated investor including 2B and Crown.

263. In about June 2012, Ms Galligan organised a conference call between Mr Siddiqi (of Musst), Mr Mathur, and Mr Septon of The Observatory at Musst's offices, and a call then took place between the three of them on 2 July 2012. On the same day, Ms Galligan emailed Mr Septon an "AMCO" marketing presentation. On 20 September 2012, Ms Galligan, still at Matrix, and Mr Mathur, still at Deutsche Bank, met Mr Septon in New York. Subsequently, in October 2012, Ms Galligan left Matrix (which shortly afterwards went into insolvency) and joined Musst. She was made redundant by Matrix on 6 November 2012. There was a meeting on 13 November 2012 in New York with Mr Septon to which reference has been made above. Mr Mathur did not know if Ms Galligan had been there, and Ms Galligan accepted that she was not there if that was what Mr Mathur said.

264. After 21 November 2012 (i.e. the "Effective Date" in the Octave Contract), Mr Septon came to London to do his and The Observatory's first (or first proper) due diligence on the proposed business on behalf of 2B (or at least in anticipation of an investment by 2B or a vehicle such as 2B). At Ms Galligan's instigation (now of Musst having left Matrix since its insolvency), he attended a long meeting on 4 December 2012 with herself, Mr Siddiqi, and Mr Mathur (now of Octave) at Octave LLP's offices at 23 Ironmonger Lane, London EC2V 8EY, at which he said he wanted to invest in the proposed AMCO fund, as he confirmed by email later that day to Musst. At that meeting, Mr Septon not only carried out operational due diligence, but enquired into the underlying strategy, and what types of trade would be carried out, and what underlying collateral there was for the synthetic ABS and what there would be in the portfolio if he were to invest.

265. Subsequently, on 11 February 2013, at Mr Septon's or The Observatory's direction, 2B entered into a contract with Octave LLP ("the 2B Contract"), under which it agreed to invest and thereafter invested (at least) US$20 million in "cash and synthetic asset-backed securities" and their derivatives, and other "structured credit products" controlled by Octave. 2B agreed to pay (a) a management fee assessed (to put it simply) by reference to the net asset value of the fund invested; and (b) a "Performance Fee" on net profits it received from the fund.

266. After Musst and Octave entered into the Octave Contract on 18 April 2013, Ms Galligan, by an email exchange on 19 and 22 April 2013, asked Mr Michael Holdom (of Octave LLP) when Musst's share of revenue thereunder would be paid to it; to which Mr Holdom, in reply, sent on Octave LLP's March 2013 invoice to 2B, and asked Ms Galligan in turn to send him Musst's invoices to Octave (i.e. for this agreed 20% share).

267. Accordingly, from this point on, Musst invoiced Octave in relation to 2B, and Octave duly paid in accordance with the Octave Contract (until the novation to Astra LLP mentioned below), save that the first payment of US$10,000, was paid by Astra LLP on 13 May 2013. The total sum paid by Octave to Musst in relation to 2B (including the said first payment of US$10,000) was US$221,974.78.

(f) Was the investment of 2B introduced by Musst under the Octave Contract?

268. Musst's case is that there was a variety of ways that the 2B Contract was an introduction of Musst. Astra say that on the true construction of the Octave Contract, the only source of legal obligations, the introduction was not covered for the following reasons:

(1) The introduction occurred prior to the Effective Date. The meetings of July 2012 (remotely) and/or September 2012 (face to face in New York) were the critical dates, such that the introduction had already occurred by 21 November 2012. There was a further follow up meeting on 13 November 2012 in New York attended by Mr Mathur and Mr Septon. Although Ms Galligan accepted in cross-examination the proposition that that meeting was without her (if that was what Mr Mathur said [T3/52/1-11]): in fact, Mr Mathur's evidence was unclear in respect of the same because he did not recall whether she was there. In any event, she appears to have set up the meeting and she was in New York at the relevant time: see Mr Mathur's fifth witness statement at paras. 40.4 and 54. Even on the basis that Ms Galligan was by this stage working for MUSST, this was a meeting prior to the Effective Date. The case of Astra is that the introduction was at the meetings of July and September 2012, and the fact that there was follow up and subsequent due diligence (which was organised by Ms Galligan in October 2012 whilst still working for Matrix) and/or that the 2B Contract made was after the time of the introduction did not postpone the time of the introduction of 2B until after the Effective Date;

(2) If there was an introduction at all, it was by Matrix through Ms Galligan in particular prior to her joining Musst by the time that she was made redundant by Matrix on 6 November 2012. She had known Mr Septon and others at The Observatory since around 2010. She had joined Matrix in November 2008 and had acquired and/or retained that relationship in her capacity as an employee of Matrix (or one of its affiliates). Independently of Mr Siddiqi, Matrix had its own extensive network of contacts. It was Ms Galligan who arranged the call on 2 July 2012 even if Mr Siddiqi attended remotely, and it was she (still an employee of Matrix) who with Mr Mathur attended on Mr Septon in New York, and without Mr Siddiqi who was unable to travel to the USA.

(3) The allegation of a brainstorming session in March 2012 between Mr Siddiqi and Ms Galligan is to be treated as an undocumented afterthought which should be rejected. Even if it took place, it was not that which caused the introductions, but the subsequent contact of Ms Galligan on behalf of Matrix.

(4) The role of Mr Siddiqi was not that of an introducer. He did not reach out to the customer. If he wrote presentations and knew the technical details, this did not qualify him as such. The role of Musst did not qualify in that no investment was made *"at the instigation or initiative"* of Musst.

(5) It is Musst which is the party to the Octave Contract, and any activity by a MUSST entity up to 21 November 2012 was by Mr Siddiqi or Musst Investments LLP and not by Musst.

269. The case of Musst is that the second limb of the definition of *"Introduction"* applies as follows. 2B was a *"Prospective Investor"* because it was not an *"Excluded Investor"* as neither Octave nor its agent or employees had a *"prior substantive relationship"* with the Observatory (or Mr Septon) as at the Effective Date of 21 November 2012. Mr Mathur had spoken to Mr Septon and met him on the trip to New York in September 2012, and again in New York on the 11 to 16 November 2012 trip, but that was not a *"substantive relationship"* – it was an attempt to persuade him to invest; and in any event Musst never agreed that 2B was an Excluded Investor, as required by the definition.

270. Musst submitted that 2B was a *"Prospective Investor"* because it was introduced to Octave by Musst, that is to say, by Mr Siddiqi operating on behalf of the MUSST business, of which Musst was a part. He did that in the *"brainstorming"* session in March 2012 which he had with Ms Galligan. That led to Ms Galligan contacting Mr Septon and arranging the first discussion with 2B on 2 July 2012, which in turn ultimately led to further meetings and his decision to invest. Whilst Ms Galligan was then an employee of Matrix, the instigation or initiative was that of Mr Siddiqi and Musst was responsible for co-ordinating approaches.

271. In my judgment, there was an introduction by Musst of 2B to Octave. It came within the second limb of the definition of introduction which is very broad.

272. As a matter of textual analysis, the two limbs of the definition of Introduction are to be contrasted. The first limb concentrates on the initial face-to-face meeting or conference call. It is necessary to consider whether this occurred only before 21 November 2012. However, the second limb concentrates on the time when the Prospective Investor *"ultimately makes an investment"* where the investment occurred "*at the instigation or on the initiative of the Introducer".* The wording is broader than the wording in the first limb of the definition. That is clear from the opening words saying that *"Introduction shall also include any circumstance…".* It is not by reference to the initial meeting, but it fastens on the time when the investment was made. At the point in time when the investment was made, the question is whether that was at the instigation or initiative of Introducer. That is not limited in time to after 21 November 2012. The circumstance does not arise until and unless an investment is ultimately made. At that point, one looks retrospectively and considers if it was *"at the instigation or on the initiative of the Introducer"*.

273. If the Effective Date has to be given an effect as regards when the introduction takes place, it is not until the investment on this second limb. It must follow as a matter of construction that if the introduction has to be after the Effective Date, this is satisfied at least for the second limb provided that the Effective Date precedes the making of the investment. In the case of 2B, the investment was not made until February 2013, that is after 21 November 2012.

274. Astra say that there are obligations in the Octave Contract as regards whom the Introducer must approach and surrounding the solicitation of customers. They submit that these could not have meaning and effect in the event that the solicitation could take place prior to the Effective Date. I do not accept this. Applying a textual approach, I am satisfied that even if all or a part of the instigation occurred before the Effective Date, for the purpose of the second limb of the definition of *"Introduction"*, it sufficed if the investment was made after the Effective Date.

275. If, contrary to the above, the construction is not that clear, then at highest for Astra, the words would not by themselves be sufficiently clear to fit with the construction of Musst. In my judgment, if it was intended to exclude from the purview of the contract approaches or solicitation or instigation or initiatives prior to the Effective Date which had not led to the making of an investment at the Effective Date, then it would have been necessary to say so explicitly. Neither was this said in the Octave Contract nor outside the contract in communications between the parties at the relevant time. In the iterative approach commended above, it would be necessary then to consider a contextual approach and to consider the contract in the light of the factual matrix and to consider which of any competing constructions bears a meaning most consistent with commercial common sense.

276. On the basis that there was no November Arrangement of the kind contended for by Astra, the effect of Astra's submissions would have been that there would be no remuneration for the extensive work done by MUSST throughout 2012 comprising on Musst's case contacting over 100 prospective investors, and, in many cases, arranging meetings or discussions between them and Mr Mathur to discuss the AMCO fund. They included especially 2B and Crown. There is nothing in the factual background to suggest that there has been excluded any work carried out prior to the Effective Date. A construction that the words indicate that the approaches prior to the Effective Date would be paid for provided that the investments were made thereafter accords with the factual matrix and is consistent with commercial sense. This would not be the case if Musst had no right to fees other than for potential investors approached for the first time after 21 November 2012. Going back from the contextual approach to the textual approach, even on the basis that the construction was not clear, there is nothing in the words used which precludes the construction that the investments are covered by the Octave Contract provided that they were made after the Effective Date, even if the customer was solicited prior to the Effective Date.

277. This does not yet suffice because it is necessary to consider whether there was an introduction for the purposes of the Octave Contract. The questions arise as follows, namely

(1) Whether the investment occurred at the initiative or instigation of Musst;

(2) Whether in fact the investment was at the initiative or instigation of Matrix and not of Musst;

(3) Whether in fact the investment was made at the initiative or instigation of Musst Investments LLP and not Musst?

278. An argument of Astra is that the introductions were those of Matrix rather than Musst. As part of the way of seeking to meet this argument, Musst submits that the role of Matrix was merely administrative or secretarial. If this were the case, then the role of Matrix was just to put in touch the customer with Musst so that Musst could seek to solicit the custom. I have noted above that I do not accept that the role of Matrix can be characterised fairly as being merely administrative or secretarial.

279. In my judgment, it does not follow from the fact that the role of Matrix was greater than portrayed by Musst that Musst was not an introducer. A question which arises is whether a qualifying introduction must be at the sole instigation or on the sole initiative of the introducer. In a different kind of contract, namely that of estate agents, a question arises on the particular contracts before the Court whether the implied term that the estate agent be the effective cause is to be interpreted as *"the"* or *"an"* effective cause: see Bowstead and Reynolds on the Law of Agency 32nd Ed. para. 7-030. This is a different kind of contract from an estate agent, bearing in mind not least the obligations on Musst. The words of the clause do not state that the instigation or initiative has to be the sole or predominant instigation or initiative of Musst. I therefore prefer the construction that this is not required so long as in the case of the instigation, it was substantial.

280. The textual point is not easy, and so it is prudent to move on to a contextual approach. I am at least satisfied that this is not a case where the textual approach shows that there is not a qualifying introduction without a sole instigation or initiative of Musst. Accordingly, I turn to the iterative process referred to above. When testing what at highest was an uncertain meaning against the factual matrix, or looking at the matter contextually, there are important contextual matters to take into account relevant to the construction of the contract.

281. One way in which Musst can be seen to be the introducer notwithstanding a more than secretarial or administrative role of Matrix is by the clause being capable of operating where Matrix and Musst/MUSST are acting together. I am satisfied that when the words are construed contextually the words are broad enough to include a case where both Matrix and Musst are acting together as introducers. Prior to the making of the Octave Contract, Mr Siddiqi introduced Matrix to Mr Mathur to provide distribution services. To this end, Matrix reached out to customers in distribution services generally under the coordination of Musst. In my judgment, the services of Matrix by themselves were not sufficient to open the door to the customers even those whom they approached, but a critical part of which was the presentations to the clients and the documentation prepared by Mr Siddiqi with his detailed appreciation of the technical details of the product. Further, the parties organised their affairs on the basis that payment for introductions would be made by Octave/Astra to Musst and that Musst would make their arrangement with Matrix. On this basis, vis-à-vis Octave it is an entirely logical construction that an introduction of Musst in circumstances where Matrix was acting jointly or taking a part of the introduction, is still an introduction of Musst.

282. This can be applied as regards 2B. Ms Galligan had known Mr Septon for some time, and a suggestion of Mr Siddiqi was Mr Septon as a possible investor, following which Ms Galligan got in touch with Mr Septon. I accept the oral evidence that there was a brainstorming session, and I do not treat it as a retrospective invention even though there is no contemporaneous written evidence. The July meeting was joint between Mr Siddiqi and Matrix, or in part one and in part the other. The September meeting would

have been joint but for the visa problem of Mr Siddiqi. The evidence was equivocal as to whether Ms Galligan attended the 13 November meeting with Mr Septon, but she appears to have organised the meeting with Mr Septon. She was in New York at the time, by then being part of Musst. The 4 December meeting was in large part Musst. On this basis, I conclude that the instigation or the initiative was that of Musst or of Musst jointly with Matrix or of Musst in part and Matrix in part. Any of those formulations suffice in my judgment to qualify so that the 2B Contract was on the instigation or initiative of Musst.

283. I conclude that the words used seen in their contextual analysis provide support to Musst being the Introducer as regards 2B. The commercial common sense was that the fees were or would become due to Musst. The context or factual matrix included (without limitation) (a) the way in which the contract was drawn up between Octave and Musst with the expectation of a separate arrangement or negotiation between Musst and Matrix, (b) Mr Siddiqi's overall coordinating role including bringing Matrix into the distribution process, (c) the critical role of Mr Siddiqi in preparing the documentation and making technical presentations to clients with his detailed appreciation of the technical details of the product. It would be surprising if it was intended to exclude Musst's right to payment under the Octave Contract in relation to the investments by 2B (and Crown), which is the consequence of Astra's construction, given that at the time of the contract 2B had already invested and Octave was discussing payment to it. At the date of the Octave Contract, there were no other likely new investors on the horizon. By then, Crown had already done a considerable amount of due diligence on AMCO and expressed considerable interest in investing. It is much more appropriate to adopt the construction of Musst than that of Astra in that its construction is more consistent with business common sense.

284. If a joint or partial instigation or initiative did not suffice, I conclude that the introduction of 2B was that of Musst. The reason for this is that the activities of Mr Siddiqi were sufficient to amount of themselves to the instigation or the initiative of Musst. This includes the following, namely

(1) Mr Siddiqi's suggestion in March 2012 that Ms Galligan contact Mr Septon;
(2) the fact that Mr Siddiqi coordinated the distribution activity;
(3) the critical role of Mr Siddiqi in preparing technical literature and other documentation;
(4) making technical presentations to clients by Mr Siddiqi with his detailed appreciation of the technical details of the product, and his ability to address the concerns of the prospective client;Mr Siddiqi's technical expertise more than the salesmanship was responsible for instigating the business from 2B;
(5) the direct participation of Mr Siddiqi at the meetings of 2 July 2012, 13 November 2012 and 4 December 2012.

285. I do not accept as a matter of construction that the instigator conduct relied on must be after the Effective Date since, on the second limb of the definition of Introduction, there is no introduction without an investment being made. However, if, contrary to the above, the instigatory conduct relied on must be after the Effective Date, then Musst is able to rely on its conduct and especially of Mr Siddiqi in and around the meeting of

4 December 2012 either by itself or in conjunction with the conduct prior to the Effective Date. The reason for this is that prior to 21 November 2012, Mr Septon had not decided that he would invest. That depended on the due diligence of and around the 4 December 2012 meeting. That was not a box ticking exercise, but a detailed appraisal with very substantial input from Mr Siddiqi on behalf of Musst in providing detailed technical information. That therefore satisfied the second limb of the definition of introduction in that the investment was instigated by the detailed satisfaction of the queries of Musst and by his showing that the product would be a suitable investment for 2B.

286. It does not alter the analysis that the initial approach was to The Observatory and the ultimate investor was 2B. 2B acted at the behest of The Observatory and so the introduction was still at the initiative or on the instigation of Musst.

287. What of the argument that the conduct of Mr Siddiqi was at all material times personal or on behalf of Musst Investments LLP and not Musst? Astra point to emails which show Mr Siddiqi acting in a personal capacity or for Musst Investments LLP. They contend that the use of Musst as a corporate vehicle thereafter does not mean that the conduct of Mr Siddiqi was on behalf of Musst and therefore no introduction was made by Musst. Given the factual matrix of the agreement that the parties intended to capture the introductory conduct of Mr Siddiqi prior to the Octave Contract being made, to the extent that his conduct was for Musst Investments LLP, it must have been the intention of the parties to treat the same as carried out as delegate on behalf of Musst. This is consistent with Clause 2.2 of the Octave Contract. This refers to the delegation of functions by Musst to Musst Investments LLP to which Octave consented and could not revoke. In the context of this agreement, such delegation of functions can be by retrospective adoption as much as by prospective appointment. If and to the extent that the relevant introductory conduct was that of Musst Investments LLP, Musst adopted that conduct as carried out on its behalf. Likewise, the point was never taken at the time of the payments being made because it was understood by the parties concerned that Musst was adopting acts of Musst Investments LLP as its delegate.

288. For all these reasons, I am satisfied in the circumstances that Musst introduced 2B to Octave as per the second sentence of "Introduction" in the second limb of that definition. I reach this conclusion starting off with a textual analysis and reaching that conclusion. Even if the construction of the Octave Contract on a textual analysis did not without more support the construction set out above, this is not a case where the language used in the Octave Contract and the natural meaning of the words used supports a conclusion that there was no qualifying introduction in this case. However, applying a contextual analysis, I am satisfied that the Musst is to be regarded as an Introducer of 2B. Returning in the iterative process on this alternative footing to the textual analysis, I am satisfied that this is not a case where the language used and the natural meaning of the words used support the construction of Astra.

(g) The facts relating to the introduction of Crown

289. Mr Siddiqi knew various members of LGT's investment team, including Albertus Rigter (whom he has known since 2006) and Ralph Plotke. In the brainstorming conversation with Ms Galligan on 12 March 2012, Mr Siddiqi on behalf of Musst suggested to Ms

Galligan that she should contact Mr Rigter and Mr Plotke of LGT as a potential investor. Although the introductions were supposed to be coordinated through Mr Siddiqi, Mr Christopher Elliott of Matrix sent AMCO marketing documents to Mr Plotke of LGT without prior reference to Mr Siddiqi. Subsequently, Mr Elliott contacted LGT and set up a meeting on 15 May 2012 in Pfaffikon, Switzerland, between Mr Siddiqi of Musst, Ms Galligan, Mr Reeves and Mr Elliott of Matrix, Mr Mathur (still at Deutsche Bank), and Mr Plotke of LGT.

290. Thereafter LGT acted on behalf of Crown using Crown as the vehicle to consider and ultimately make the investment. On 13 November 2012 Mr Siddiqi, with Mr Elliott of Matrix and Messrs Plotke and Rigter of LGT, attended a meeting at Octave's offices. At this meeting, Mr Plotke and Mr Rigter had a conference call with Mr Mathur (who was in New York)

291. After the Effective Date (i.e. 21 November 2012), Mr Siddiqi, or Ms Galligan, for Musst arranged the following meetings or conversations for Octave with LGT:

(1) a meeting in Pfaffikon Switzerland on 22 January 2013 organised by Mr Elliott and attended by Mr Siddiqi, Mr Mathur, Mr Plotke and Mr Rigter;

(2) a due diligence meeting on 4 April 2013 at Octave's offices with the same attendees as the 22 January 2013 meeting, together with Dr Adler (for Octave) and with Ms Galligan and (for LGT) Mr Raymond Seeholzer;

(3) conference calls on 22 and 26 April 2013 to discuss fees, attended by Mr Siddiqi and Ms Galligan (of Musst), Mr Rigter (of LGT), and (in the earlier call) Mr Thomas and Dr Adler for Octave. These calls took place after Musst had provided further information to LGT on Mr Mathur by email of 12 April 2013, and in a telephone conference (Mr Siddiqi and Ms Galligan) with Mr Seeholzer and Mr Rigter on 17 April 2013;

(4) a conference call between Mr Jan Friedhof (of LGT), Mr Siddiqi and Mr Mathur on 30 April 2013, in which LGT carried out operational due diligence;

(5) a further conference call between Mr Plotke of LGT, Mr Siddiqi, and Mr Mathur on 7 May 2013.

292. Crown entered into a 'Trading Advisory agreement' dated 13 June 2013, (i.e the Crown Contract), by which it agreed to invest US$40 million into a fund which dealt in synthetic ABS controlled by Octave for Octave to manage. In return, Crown agreed to pay Octave:

(1) an "Advisory Fee" – i.e. a management fee – of the lesser of (i) US$650,000 and (ii) 2% a year of the value of the funds under management, if their value was less than US$86.67 million, but if their value was US$ 86.67 million or more, 0.75% a year of the value of those funds; and
(2) a "Success Fee" – i.e. a performance fee – of 20% of the net profits made by the fund, subject to certain deductions.

293. On 13 June 2013, Octave sent an unsigned form of this Crown Contract to Musst, and a signed contract was sent to Musst on 23 July 2013. Crown invested about US$35 million in November 2013 in a fund of synthetic ABS managed by Octave LLP, which sent invoices to Crown for its services. As in the case of 2B's investment, investment advisory services were provided on Octave LLP's behalf by Astra LLP as its appointed representative. From this point on, Octave sent to Musst its invoices to Crown (albeit not in relation to all quarters); Musst invoiced Octave for its 20% share of the revenue which Octave said it had received from Crown; and Octave paid those invoices without complaint in accordance with the Octave Contract until the novation to Astra LLP. The total amount paid by Octave in relation to Crown to Musst was US$103,690.19.

294. Musst's case is that there was a variety of ways that the Crown Contract was an introduction of Musst. Astra say that on the true construction of the Octave Contract, the only source of legal obligations, the introduction was not covered for the following reasons:

(1) The introduction occurred prior to the Effective Date. The meetings of 15 May 2012 and/or 13 November 2012 were the critical dates, such that the introduction had already occurred by 21 November 2012. The case of Astra is that the subsequent follow up and due diligence did not postpone the time of the introduction of Crown until after the Effective Date.
(2) If there was an introduction at all, it was by Matrix through Mr Elliott. If there was a breach of protocol by Mr Elliott in reaching out to Crown, that did not affect the fact that the custom was obtained at the instigation or upon the initiative of Mr Elliott.
(3) Even if there was a brainstorming session in March 2012 between Mr Siddiqi and Ms Galligan, it was not that which caused the introductions, but the subsequent contact of Mr Elliott on behalf of Matrix.
(4) The role of Mr Siddiqi was not that of an introducer. He did not reach out to the customer. If he wrote presentations and knew the technical details, neither that nor his attendance at meetings made him an introducer.
(5) It is Musst which is the party to the Octave Contract, and any activity by a MUSST entity up to 21 November 2012 was by Mr Siddiqi or Musst Investments LLP and not by Musst.

295. As in the case of 2B, the case of Musst is that the second limb of the definition of *"Introduction"* applies as follows. Crown/LGT was a *"Prospective Investor"* because it was not an *"Excluded Investor"* as neither Octave nor its agent or employees had a *"prior substantive relationship"* with Crown/LGT as at the Effective Date of 21 November 2012. Any attempt of Mr Mathur to persuade Crown/LGT to invest was not a *"substantive relationship"* – it was an attempt to persuade him to invest; and in any event Musst never agreed that Crown/LGT was an Excluded Investor, as required by the definition. It was at Musst's instigation or initiative that Crown ultimately made this investment because it was at Mr Siddiqi's suggestion on behalf of Musst that there was an approach of Crown and/or that there were the subsequent meetings with Crown culminating in Crown's decision to invest with the critical participation of Mr Siddiqi.

296. As in respect of 2B, in my judgment, there was an introduction for the purposes of the Octave Contract by Musst of Crown to Octave. It came within the second limb of the definition in the sense of concentrating on the investment being made. It looks to any circumstance where its being made has been at the instigation or on the initiative of the Introducer. In the case of Crown, the investment was not made until June 2013. As in respect of 2B, for the reasons set out above, I do not accept that the solicitation of customers had to start after the Effective Date. I adopt the same iterative approach of construction. As in respect of 2B and for the same reasoning, it did not negate the instigation or initiative of Musst that it acted with Matrix in the securing of the custom of Crown.

297. This can be applied as regards Crown. The contact was advanced by Mr Siddiqi in the brainstorming session. He had known the representatives of LGT for years before. The fact that Mr Elliott jumped in and made the first approach to Crown, and that thereafter pursuant to industry etiquette Mr Elliott was not removed as the point of contact, does not prevent Musst from qualifying as introducer under the Octave Contract. This follows from the fact that the overall arrangement was still that Musst was the overall co-ordinator and Mr Siddiqi was creating the technical literature, presenting technical information and participating directly at meetings. The reasoning above in respect of 2B has application as regards the textual and contextual approaches and the iterative process.

298. Mr Siddiqi attended the meeting in Switzerland on 15 May 2012 with Matrix representatives in attendance including Mr Elliott who was taking a leading role. Mr Siddiqi attended the meeting of 13 November 2012 with representatives of Musst in London together with representatives of Matrix including Mr Elliott and others. There were many points of contact after the Effective Date in which Mr Siddiqi and Ms Galligan participated as set out above.

299. If a joint instigation or initiative did not suffice, I would still conclude that the introduction of Crown was that of Musst. The reason for this is that the activities of Mr Siddiqi and Ms Galligan from the time that she started to work for Musst were sufficient to amount of themselves to the instigation or the initiative of Musst. This includes the following, namely

    (1) the connection which Mr Siddiqi had with LGT over many years and his part in initiating contact by the brainstorming session in March 2012;

    (2) the critical role of Mr Siddiqi in preparing the technical literature and other documentation;

    (3) the presentations and answering questions on the part of Mr Siddiqi to Crown with his detailed appreciation of the technical details of the product, and his ability to address the concerns of the prospective client. Mr Siddiqi's technical expertise more than the salesmanship was responsible for instigating the business from Crown;

    (4) the direct participation at the meetings of 15 May 2012, 13 November 2012, 22 January 2013 and 4 April 2013 and conference calls on 22 and 26 April 2013 and 30 April 2013 and 7 May 2013.

300. As in respect of 2B, I do not accept as a matter of construction that the instigatory conduct relied on must be before the Effective Date: at least on the second limb of the definition, there is no introduction without an investment being made. However, if, contrary to the above, the instigatory conduct relied on must be after the Effective Date, then the conduct of Musst and especially of Mr Siddiqi in and around the meetings and calls after 21 November 2012 sufficed either by itself or in conjunction with the conduct prior to the Effective Date. The reason for this is that prior to 21 November 2012, Crown had not decided to invest. That depended on the further meetings, consideration and due diligence thereafter. That involved a detailed appraisal with very substantial input from Mr Siddiqi on behalf of Musst in providing detailed technical information and showing that the product would be a suitable investment for Crown.

301. What of the argument that the conduct of Mr Siddiqi was at all material times personal or on behalf of Musst Investments LLP and not Musst? The same arguments apply as regards 2B, such that any conduct of Musst Investments LLP was to be treated as the conduct of Musst for the same reasons as identified in respect of 2B above.

302. It does not alter the analysis that the initial approach was to LGT and the ultimate investor was Crown. Crown acted at the behest of LGT and so the introduction was still at the initiative or on the instigation of Musst.

303. For all these reasons, I am satisfied in the circumstances that Musst introduced Crown to Octave as per the second limb of the definition of *"Introduction"*. I have applied the iterative process in substantially the same way as in respect of the 2B investment as described above.

XVI Rectification and estoppel by convention

304. In the event that the arguments of Musst prevail that there was no November Arrangement, but do not succeed on the construction issue, Musst has alternative arguments based on estoppel and rectification.

(a) Facts relevant to estoppel and rectification

305. In both instances, Musst relies on a common understanding. The relevant matters include the following before the time of the Octave Contract, namely:

(1) Octave sent over the draft 2B Contract to Musst shortly before it was executed on 13 February 2013. It is said that it should be inferred that on each occasion this was done by the sender with Octave's authority. There was no point in so doing (on the basis that there was no November Arrangement) unless Octave understood that the then intended Octave Contract applied to the introduction of 2B, and that Musst should have an entitlement to a share of the fees payable thereunder.

(2) In respect of the first tranche of management fees, Mr Mathur refused to authorise any payment by Octave to Musst until the Octave Contract had

been signed by the parties, as evidenced by the email exchange between himself and Mr Holdom dated 22 April 2013. This must have been (on the basis that there was no November Arrangement) because the intention of the parties was that right to the management fees was intended to be by reason of provisions of the Octave Contract.

(3) Octave insisted on receiving assurances that there was no need for US broker dealer cover, in the context of the 2B investment. If in fact, Musst was not acting as an introducer in respect of 2B, this was not required. The need for this is apparent in particular from an email of 16 April 2013 timed 15:41 in the following terms from Octave (Mr Phillips) to Musst (Ms Galligan):

> *"Re the below [i.e. Murray's 15.04 email] pls note we are not looking for a formal legal opinion. I think we simply need some comfort from SRZ that an introduction that leads to the entry into an advisory agreement, rather than the issue of a security to the investor, does not constitute brokerage for the purpose of the SEC regulations and would not require broker/dealer cover, and hence that the introduction of 2B LLC would not require broker/dealer cover."*

306. There is also reliance on post-contract conduct including:

(1) Octave requested that Musst send invoices to it relating to Musst's share in respect of 2B under the Octave Contract, which Musst did. Fees were subsequently paid pursuant to those invoices reflecting the intention of the parties that the same were payable under the Octave Contract.

(2) Octave sent over the draft Crown Contract just before it was executed on 13 June 2013, in signed form on 23 July 2013 and in amended form on 3 June 2014, likewise indicating that Octave intended that the Contract applied to the introduction of Crown.

(2) Fees were subsequently paid in respect of the Crown Contract reflecting the intention of the parties that the same were payable under the Octave Contract.

(3) In emails of 30 April 2015 timed 11.51 and 17.00, Mr Holdom admitted that the Crown I payments were being made under the *"Introduction Agreement"* (being a reference to the Octave Contract), whereas in distinction, he said, that the Crown 2 account was not covered since it was a new strategy.

Although especially as regards the Crown Contract, there is reliance on post-contract conduct, it is conduct of a very similar nature to the pre-contract relied upon as regards the 2B Contract.

(b) Estoppel by convention

(i) The law

307. In *Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878, at 913E-G, Lord Steyn summarised the relevant legal principles as follows:

> *"It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption … It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."*

308. The principles were further explained by Briggs J in *HM Revenue & Customs v Benchdollar* [2009] EWHC 1310 (Ch), [2010] 1 All ER 174 at [52], *("Benchdollar")*, as amended by Briggs J in *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] EWHC 1805 (Ch); [2010] Pens LR 411 *("Stena Line")*. Those amended principles were then approved by the Court of Appeal in *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023; [2017] Ch 389 *("Blindley Heath")*and by the Court of Appeal in *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, [2017] Ch 389, at [90]-[91]. Since the hearing concluded, the Supreme Court gave its judgment in *Tinkler v HMRC* [2021] UKSC 39 in which Lord Burrows, giving the lead judgment, said the following at para. 45 approving Briggs J's formulations as amended:

> *"(1) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. The assumption must be shown to have crossed the line in a manner sufficient to manifest an assent to the assumption.* [In *Stena Line*, Briggs J said that his first principle should be amended to include that *"the crossing of the line between the parties may consist either of words, or conduct from which the necessary sharing can properly be inferred"*, as quoted by Lord Burrows at para. 49].
>
> *(2) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the*

> *sense of conveying to the other party an understanding that he expected the other party to rely on it.*
>
> *(3) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.*
>
> *(4) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.*
>
> *(5) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."*

309. In *Seakom v Knowledgepool* [2013] EWHC 4007 (Ch)[1], at paras 112-116, Carr J summarised the relevant principles and noted that silence or mere inactivity will not suffice (para 114). Referring to para 43 of *Benchdollar*, she noted "*an estoppel can only operate for the period of time and to the extent required by the equity which the estoppel has raised*" (para 115).

310. A conventional estoppel can arise not only by virtue of conduct after the entry into a contract, but by virtue of conduct before the entering into of a contract in relation to the meaning of a clause in the contract: see *Chartbrook Limited v. Persimmon Homes Limited* [2009] 1 AC 1101 at paragraph 47 per Lord Hoffman; and *Dubai Islamic Bank PJSC v. PSI Energy Holding Company BSC* [2011] EWHC 2718 at paragraph 72 per Hamblen J.

(c) Application to the facts – estoppel by convention

311. The same five factors will now be considered. They are as follows:

(1) There was a common assumption that the Octave Contract applied to confer rights to payment in respect of the 2B and Crown Contracts. The parties therefore proceeded on a conventional basis that Musst had made the relevant introductions to 2B and Crown, and so was entitled to the 20% share of fees under the Octave Contract, in reliance on which Musst arranged its affairs and did not seek earlier clarification of the Octave Contract. The assumption crossed the line in a manner to manifest an assent to the assumption in the passing over of the 2B and Crown Contracts, the refusal to pay fees until the Octave Contract was signed and the assurances being provided and received regarding the lawfulness of the broker/dealer issue. After

the 2B and Crown Contracts, Musst sent its invoices accordingly and it agreed to send them to Astra LLP and Astra UK.

Astra submit that none of these matters evidence a common understanding, and the true reason why this occurred was pursuant to the November Arrangement and not the Octave Contract which was concerned with the future. I have rejected the arguments about the November Arrangement. Absent that, there is no commercial sense in the payments that were made other than as reflecting the common assumption and understanding of the parties.

Astra submit that neither the directors of Octave Ltd (who did not include Mr Mathur) nor Octave LLP nor indeed the sole director at Musst Holdings, Mr Saksena, could have held the relevant common assumption. There is no evidence about such directors, but the relevant directing minds who were entrusted with the conduct of the companies clearly did have the relevant common assumption. They were in effect de facto directors or authorised representatives running the companies, and the companies were attributed with their knowledge and intention.

(2) There was an expectation that Octave and then Astra would assume an element of responsibility to make the payments as if they were due under the Octave Contract.

(3) Musst relied upon the common assumption believing both prior to the Octave Contract and thereafter that the Octave Contract was drafted in such a way as to give effect to its entitlement to management and performance fees.

(4) This occurred in connection with the organisation of the terms of the contract, the payments made thereunder and the assent to the Astra parties respectively taking over from Octave.

(5) As regards detriment, Astra say that Musst was simply the recipient of money for no effort on its part during the relevant period, and therefore Musst has suffered no detriment. Its inadequately pleaded case on this matter reveals the absence of basis to prove that it suffered any required detriment: it "*arranged its affairs and did not seek earlier clarification of the [Octave] Contract*" (RAMPOC/56). There would therefore be nothing unjust in allowing Octave/Astra to go back on any common understanding, even if one could be established.

312. There is enough to establish detriment. If in fact the communications were corrected so as to say that the contract as drafted did not specify that there should be any sharing of fees in respect of 2B and Crown (or other introductions made before the Effective Date), the matter at that stage would have been put right so that, if it did not do already, the terms of Octave Contract would have made it explicit that the fees would become

payable. Mr Mathur accepted in cross-examination that he would have agreed to have the contract altered to reflect the parties' true intentions if he had thought that there was a mistake in the Octave Contract [T7/42/8 – T743/8]. Further, following the drafting of the Octave Contract, when the requests were made to agree to Astra LLP and then Astra UK taking over the obligations, if the matter had been put that the Octave Contract did not provide an obligation to pay the fees, it can be inferred that the parties would have tidied up the written contract so as to give effect to the common assumption of the parties. In the event that Octave/Musst had resiled from the assumption before the summer of 2016, then, although it is put in very general terms, it can be inferred that Musst would have arranged its affairs in a different way and would have sought clarification both at the time of the Octave Contract and the arrangements subsequently with Astra LLP and Astra UK. If that had been indicated at an earlier stage, then Musst would have sought to amend the contract to reflect the common understanding of the parties. On the basis of my findings above, there would or ought to have been no argument to the contrary. It is now inequitable in the circumstances to resile from that state of affairs.

313. The parties therefore proceeded on a conventional basis that Musst had made the relevant introductions to 2B and Crown, and so was entitled to the 20% share of fees under the Octave Contract, in reliance on which Musst arranged its affairs and did not seek earlier clarification of the Octave Contract. The common assumption was a convention in respect of 2B and Crown which overrode an argument of construction that there was no contractual entitlement due to the Effective Date clause or the involvement of Matrix or otherwise. Notwithstanding any argument of construction, the convention of the parties was that the introductions in respect of 2B and Crown were understood to be effected by Musst. It would be unjust or unconscionable for Octave or Astra to resile from an agreement on the basis that it applied to the 2B and the Crown Contracts.

(d) The law on rectification

314. The requirements for rectification were summarised by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71, 74, para 33 (as approved in the House of Lords in *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38 ("*Chartbrook*") per Lord Hoffmann):

> *"The party seeking rectification must show that:*
>
> *(1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;*
>
> *(2) there was an outward expression of accord;*
>
> *(3) the intention continued at the time of the execution of the instrument sought to be rectified;*
>
> *(4) by mistake, the instrument did not reflect that common intention."*

315. As set out in the recent decision of *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, [2020] Ch 365, at para 6, *"Rectification is an equitable remedy by which the court may amend the terms of a legal document which, because of a mistake, fails accurately to reflect the intention of the parties to it."* In the same case, the Court of Appeal confirmed that it is the parties' subjective intentions that are relevant for this purpose, but it is also necessary to establish that there has been some *"outward expression of accord"* to that effect (see paras 60-61, 72-73).

316. In *Chartbrook* supra, at para. 65, Lord Hoffmann stated that in establishing a prior consensus, evidence of subsequent conduct may be of some evidential value, albeit that where the prior consensus was expressed entirely in writing, it was likely to carry very little weight, but it was not inadmissible. The actions after the Octave Contract therefore provide some assistance to shed light on what was intended by the parties at the time of execution of the Octave Contract. It will be borne in mind that although especially as regards the Crown Contract, there is reliance on post-contract conduct, it is conduct of a very similar nature to the pre-contract conduct relied upon as regards the 2B Contract.

317. The arguments of Astra against rectification are in large part predicated upon the following:

    (1) The parties had agreed between themselves, albeit in a non-binding manner, that there was a November Arrangement referable to introductions prior to 21 November 2012. On this basis, there was no reason to construe the contract as having any application to any activities prior to that date.

    (2) The Octave Contract was said to be forward looking, and the November Arrangement was backward looking, thereby showing that there was no contrary intention of the parties.

    (3) The actions in connection with 2B and Crown and relied upon as the outer expression of an accord do not reflect the same. Instead, they reflect the November Arrangement and are not inconsistent with the Octave Contract.

    (4) The Octave Contract was the product of detailed negotiation with lawyers on both sides, and the notion that it did not reflect that which was agreed is a matter which the Court should not reach lightly.

    (5) In the event, none of the arguments reflect a common intention requiring rectification, but an agreement which is not as favourable to Musst as it would now wish. The source of that problem is the terms of the contract, which could have been negotiated differently, albeit that any different terms proposed by Musst may not have been accepted.

318. In reaching the conclusion that there was no November Arrangement, the Court takes into account the submission of Astra that the Octave Contract was forward facing only, thereby making it more likely that a November Arrangement was made. However, even

taking this submission into account, the Court rejects the submission that there ever was a November Arrangement in the light of the discussion in this judgment about the same. For the avoidance of doubt, this submission of Astra does not affect the overall result. The effect is that the factual matrix of the Octave Contract is very different from that on which the arguments of Astra are premised. In part, this informs or reinforces the conclusion on construction above, which renders the questions of rectification/estoppel otiose. However, if in fact rectification is required in order to give rise to an obligation to pay management/performance fees in respect of 2B/Crown, in my judgment, the requisite requirements have been satisfied, and the Octave Contract should be rectified so as to reflect the intention of the parties that the 2B and Crown Contracts are subject to the same fees in favour of Musst as if they too were introductions as defined in the Octave Contract.

319. The rejection of the November Arrangement is an answer to the first three of the points of Astra. I have taken into account the fourth point. If, contrary to that which I have held, the agreement is to be construed as per Astra's submissions, then notwithstanding the involvement of lawyers on both sides, this mistake has occurred, and it should be corrected. There is nothing specific in the communications between the lawyers that indicates that the agreement as contended for by Astra was intended to have subjectively the meaning contended for. As regards the fifth point, this is a not an *Arnold v Britton* point of a party who has entered into an agreement which was not as favourable as Musst would now wish. The rectification, an alternative finding in this judgment, would be to reflect the terms of the agreement as the parties intended it to be.

320. It therefore follows that the primary findings are of construction of the Octave Contract that Musst is entitled to introduction fees in respect of both the 2B and Crown Contracts. Alternatively, the argument that no fees are due in respect of 2B or Crown would be barred by an estoppel by convention. In the alternative, and to like effect, if the findings of construction were wrong, then the agreement would be rectified so as to give rise to liabilities as regards the introductions of 2B and Crown. In fact, it is not necessary to make declarations about an estoppel by convention or to order rectification in view of the primary findings of construction of the Octave Contract.

XVII The third issue: novations to Astra LLP and then to Astra UK

(a) Introduction

321. The written contract in this case is the Octave Contract between Musst, Octave Limited and Octave LLP (referred to in this judgment collectively as 'Octave'). However, the contractual claim in this case is against two Astra entities, namely Astra UK and Astra LLP (referred to in this judgment collectively as 'Astra'). The very names of the entities evidence how at its inception, the Astra companies were intended to carry out the same functions of manager and investment manager respectively as the Octave companies. The issue to consider is whether the original contracts were novated from Octave to Astra LLP and from Astra LLP to Astra UK.

322. In this case, it is claimed that the Astra entities took over the function of the Octave entities, and that Musst agreed to this taking place. The Octave Contract was therefore carried out by the Astra entities, such that any breach of contract taking place after that take-over of functions is actionable against the Astra entities. Astra deny that there was ever such a take-over of functions. On the contrary, a draft contract was sent to Musst, but it was never agreed. There was an issue as to an effective date provision which was never resolved. Hence, no novation was ever agreed, and there was no contract between Musst and the Astra entities. For this reason (in addition to the other grounds of defence), Astra deny liability to Musst.

323. The novation questions require a close examination of the facts, which has already been undertaken. In the light of that, the law will be stated and then the parties' submissions will be considered.

(b) The law

324. A novation will occur when the parties to an existing contract agree that a third person, who also agrees, shall take the place of one of them in an existing contract. The principles applicable to the formation of contracts apply to the existence of any novation: *Chitty on Contracts* (33rd edition), para 19-0872, which also notes: "*There is a new contract and it is therefore essential that the consent of all parties shall be obtained … in this necessity for consent lies the most important difference between novation and assignment.*". Accordingly, the normal contractual rules as to offer and acceptance, the requirement of certainty of terms, consideration and the parties' intention to enter into legal relations all apply to novations as they do to the formation of any contract.

325. A contract can be novated by conduct. It can also be novated in part or in whole (see *Chitty on Contracts* 33rd Ed. paras. 19-088 and 19-090):

> *"19-088 Main examples of novation*
>
> *Many of the reported cases in English law have arisen either out of the amalgamation of companies, or of changes in partnership firms, the question being whether as a matter of fact the party contracting with the company or the firm accepted the new company or the new firm as his debtor in the place of the old company or the old firm. That acceptance may be inferred from acts and conduct, but ordinarily it is not to be inferred from conduct without some distinct request. Thus where a banking firm consisted of two partners and one died, the acceptance by a customer from the surviving partner of a fresh deposit note for a balance of a debt due was held sufficient evidence of novation to discharge the estate of the deceased partner, as the customer took the money out of a current account and placed it on deposit at the request of the surviving partner.*

> …
>
> *19-090 Novation of part of a contract*
>
> *In principle, there seems no reason why there cannot be a novation of part of a contract while leaving the rest of the contract to survive, although this may require some variation of the original surviving terms. Whether that is what is being achieved in any particular situation will largely turn on the intention of the parties. In principle, it further follows that there can be a novation of the whole or part of a multiparty contract with the original contract being left in place entirely as regards some parties while there is a whole or partial novation as regards other parties."*

326. In *CEP Holdings v Steni* [2009] EWHC 2447 (QB) it was claimed that an exclusive distribution agreement with the defendant had been novated from one of the claimants to the other. The evidence included a notice sent by the claimants to the defendant informing it that the relevant cladding business had been transferred and that invoices should be addressed to the second claimant in place of the first claimant. Gloster J found that the evidence did not get "*anywhere near to establishing that the DA was novated*" (para 26) and endorsed an earlier version of the part of *Chitty* cited above at para 28: "*Novation, which involves the extinguishing of the original contract and the creation of a new contract between different parties, requires the consent of all parties; see Chitty on Contracts (2008) paragraph 19-086.*"

327. In *The Tychy (No.2)*, David Steel J also said*:*

> *"(a) Novation involves the creation of a new contract where an existing party is replaced by a new party. (b) Thus, novation requires the consent of all parties, including in particular the party which is thereby accepting a new person as his debtor or as his counterpart under an executory contract. (c) The consent may be apparent from express words or inferred from conduct. (d) The consent must be clearly established on the evidence as being only consistent with the intent of achieving a novation".*

328. Steel J's decision on the facts was overturned on appeal, but the above quotation was referred to without criticism at paragraph 24 by the Court of Appeal. It added: "*We believe that he* [Steel J] *was indicating that, where there is an established contract in existence, clear evidence of an intention to produce a novation is likely to be needed if that standard of proof is to be discharged. With that proposition we would agree.*"

329. The Court of Appeal also noted at paragraph 24 that Steel J had *"declined to pay any regard to written and oral evidence of witnesses, as to their understanding of the implications of the contemporary correspondence. We have followed his example. Such evidence is of no assistance to the Court's task of making an objective assessment of the implications of what the representatives of the parties wrote at the time."*

330. Further, at paragraph 29, the Court of Appeal emphasised the need to distinguish, as with all contracts, between the admissible background evidence concerning the nature and object of the novation and inadmissible evidence of the terms contended for. In particular, at paragraphs 33-34, the Court emphasised that while the conduct of parties after an alleged contract may be relevant to an estoppel, it was not legitimate to have regard to the subsequent conduct of the parties as an aid to construing the meaning of the words used.

331. After setting out the above points of principle, the Court of Appeal summarised the position in a manner apt to this case:

> "i) *If the exchange of faxes in March 1996 (a) did not, on their true construction, constitute an agreement to a novation or (b) were ambiguous as to whether or not such an agreement was reached, POL* [the Appellant] *can only establish that a novation occurred if they can demonstrate that the conduct of the parties after March 1996 has given rise to an estoppel by convention."*

332. Further, as to the continued effect of any rectification and estoppel claims and the way consideration arises, *Chitty at* 19-089 states as follows:

> *"The effect of a novation is not to assign or transfer a right or liability, but rather to extinguish the original contract (between A and B) and replace it by another (between A and C). It is therefore necessary that consideration should be provided for the new contract. As novation is different from assignment, it follows that the rule that assignment is "subject to equities" does not apply to novation. Say, for example, a contract was induced by a misrepresentation and there has then been an assignment by the person making the misrepresentation: the debtor can rely on the misrepresentation vis-à-vis the assignee. In contrast, it is irrelevant to a novation that the original contract was induced by a misrepresentation. Once there has been a novation, the original contract has been extinguished and with it the power to rescind for the original misrepresentation. Note also that, under a novation, it would appear that the new party (C) cannot recover in an action for a pre-novation breach of contract against A for pre-novation losses that were suffered by the original contracting party (B)."*

(c) Musst's submissions

333. In analysing the parties' conduct, it is important to bear in mind that Astra and Octave were closely related entities working from the same address and were evidently seen by all parties as such. There was an overlap of staff between Octave LLP and Astra LLP; they shared the same offices at the date of the novations: and Mr Holdom and Mr Murray then moved over to Astra LLP [T7/64/18-66/24].

334. Hence, the lack of formality is not surprising. Further, it was always anticipated by Musst in early 2012 that Mr Mathur would in due course *"spin out"* of Octave's regulatory umbrella and provide management services under his company's own authorisation. That was reflected in the Octave Contract which provided at clause 9.4 as follows: *"Octave shall do all such things as may be within their power to ensure (i) that responsibility for the management of the Funds and any managed account is retained by Octave and (ii) that the spirit of this Agreement is given full force and effect. Without limiting the generality of the foregoing, Octave shall to (sic) do all such things and exercise all such rights as may be reasonably within their power so as to ensure that responsibility for the management of any Fund or managed account is not transferred to another party without the consent of Introducer unless such party offers in good faith to enter into an agreement with the Introducer whereby the Introducer continues to receive the revenue share payable hereunder in respect of Eligible Investments on the same terms as (or such of the same terms as remain in force at the relevant time following the Termination Date of this agreement) are contained in this agreement (in which event the consent of Introducer shall not be unreasonably withheld)."*

335. The evidence supported this intention to spin out of Octave. In 2012, Mr Mathur had discussed the possibility of his vehicle spinning out of Octave with Mr Tarun Joshi and Mr Siddiqi (T7/60/5-19); and the point had been discussed again in February 2013 when the contract was being negotiated (T7/59/15-23 and Ms Galligan's evidence at T3/165/22-24; T3/168/12-25; T3/173/8-24, T3/176/9-15; T3/177/19-25; T4/92/10-93/5). As far as Musst was concerned, and relying upon what was related by Mr Mathur, it would deal in effect with the same people, and it was no different from a name change so that Astra would replace Octave. Further, the evidence was that Mr Mathur knew that under clause 9.4 of the Octave Contract, Octave was not entitled to transfer over the management of the 2B and Crown funds. (T7/54/7-55/23)

336. Musst points to the conduct referred above comprising:

(1) Before Astra LLP took over the management of the 2B and Crown Contracts, Astra LLP had agreed with Octave LLP that it should do so. (Mr Mathur at T7/78/15-79/7)

(2) It was agreed between Octave LLP, Octave Ltd and Astra LLP that Octave LLP and Octave Ltd would play no further part in the management. (Mr Mathur at T7/67/11-18, T7/74/21-75/1, and Mr Murray at T10/56/6-57/2). Mr Murray did not believe there would be any issues in relation to the transfer of the managed accounts from Octave LLP to Astra LLP, and he did not think about this. (T10/63/21 to 64/19).

(3) Astra LLP took over the management of the 2B Contract on 1 September 2014, something which it was not entitled to do without Musst's consent unless it offered to enter into an identical agreement with Musst as per clause 9.4 quoted above;

(4) After doing so, Mr Holdom, in his email of 5 November 2014, informed Musst of the transfer, and asked Musst to split its own fees in relation to the 2B Contract, and to invoice Octave for the period before 1 September 2014, and Astra LLP for the period afterwards. Mr Holdom was authorised to write this email not only on behalf of Octave LLP, but also on behalf of Astra LLP, of which he was (as he accepted) then a partner and employee (Mr Holdom at T11/22/4-23/4)

337. Musst submits that in context this was an offer to Musst by both Octave and Astra LLP through Mr Holdom to have Octave's rights and liabilities under the Octave Contract in relation to the Crown Contract transferred to Astra LLP. This is said to be a natural construction of the email in the context of the transfer of the funds to Astra LLP, and therefore the right to the fees to Astra LLP in respect of which Musst was entitled to a 20% share. Although Mr Holdom wrote as *"Partner, Octave Investment Management LLP"*, he must have had Astra LLP's authority to write this email on its behalf as well, albeit that Astra deny that he had authority to novate the Octave Contract. That is not the point: the question is, did he have authority (or ostensible authority) to make the communication which he did, to which the answer is plainly 'yes'. If, in context, that amounted to an offer by Octave and Astra LLP, that is the end of the matter.

338. As mentioned above, two invoices were split in the requested amounts, one to Octave, the other to Astra LLP, without complaining that the transfer amounted to a breach of its (Musst's) rights under clauses 9.4 and 17 of the Octave Contract to prevent the transfer of the management. This conduct, looked at objectively, was an unequivocal waiver of its rights under these clauses, and an unequivocal acceptance that Astra LLP, as the new manager of the funds and therefore the new recipient of fees from Crown, was now the party responsible for paying 20% of them to Musst. Even if Octave was not a party to this exchange, Astra LLP still agreed with Musst (i.e. on a two-part basis rather than tripartite basis) to take on Octave's liabilities in relation to the Crown Contract.

339. On 4 February 2015, Mr Holdom again asked Musst to send Astra LLP the next invoice in relation to Crown, which Musst did. One analysis is that this is evidence of a novation which had already taken place. If a novation had not yet taken place, Musst submits that this was an offer by Octave and Astra LLP to have the benefit and burden of the Octave Contract in relation to Crown Contract transferred to Astra LLP (Mr Holdom must realistically have had both Octave's and Astra LLP's authority to ask for this). Musst then accepted this offer by conduct by sending the invoice to Astra LLP shortly afterwards and accepting the consequent payment.

340. Astra say that this was barred by clause 16 of the Octave Contract (which provides that no variation was to be effective unless it was in writing and signed by the parties). However, Musst says that this has no application, as the novation (or Astra LLP's taking on of the liabilities) was not a "variation", but a new contract involving different parties.

341. The same analysis applies in relation to the 2B Contract. In his first email of 11 February 2015, Mr Holdom made it plain that the management of 2B's Contract had also been transferred to Astra LLP. In his second email of that date, he offered on Octave's and Astra's behalf to transfer the benefits and burdens of the Octave Contract in relation to 2B Contract to Astra LLP, by asking Musst to invoice Astra LLP in relation to the 2B Contract. Musst accepted this offer by sending the relevant invoice to Astra LLP shortly afterwards and accepting payment.

342. Accordingly, Musst's case is that the effect of these communications was to novate the Octave Contract in relation to the Crown and 2B Contracts to Astra LLP, with Octave dropping out of the picture; alternatively, Astra LLP in any event agreed to take on Octave's liabilities in relation to the Crown and 2B Contracts, whatever the position with Octave was. Further, the parties then proceeded for the next year or so on the footing that the Octave Contract had been novated to Astra LLP (or at least Astra LLP had taken on Octave's liabilities) in relation to both the 2B Contract and the Crown Contract, because from now Astra LLP, with Musst's consent, was managing Crown's and 2B's funds pursuant to those contracts, receiving the fees there from, and paying over to Musst its 20% share.

343. This was confirmed by Mr Holdom's said email of 30 April 2015, in which he said that *"The Crown 2 account was set up for a new strategy (primarily CLO and CRE) and therefore [Crown 2] is not covered the Introduction Agreement"*- i.e. the Crown Contract was covered by it.

344. As stated above, Astra LLP entered into contracts with Crown and 2B. Astra say that there could be no novation because if any contracts had been introduced, it was not these contracts. Musst submits that it makes no difference that these were not the same contracts since they were replacement contracts on the same terms and the payments received were from the management of 2B's and Crown's funds pursuant to these contracts: the basis of the claim is the original introduction and the continued management by Astra LLP and then Astra UK of these 2B and Crown funds: see paragraphs 5, 118 and 130 ARDCC.

345. Astra point to the abortive communications in April/May 2015 and April 2016 between the parties (Ms Galligan for Musst and Mr Murray for Astra) negotiating the terms of a novation as evidence that the parties had not yet made a novation and understood this to be the case. However, Musst says that the parties were already acting on the common assumption that it had been novated, and Musst had changed its position in reliance on this (i.e. by accepting the transfer of management from Octave to Astra without complaint). Further, the draft proceeded upon the premise that Octave was no longer a party, as it was not a party to the draft; and its purpose, as said by Mr Murray to Ms Galligan on 6 May 2015 was: *"just to ensure that there was you know a transitioning of accounts and that payments would be made directly from Astra rather than from Octave from the effective date so … existing contractual entitlements with Octave up until the effective date remain in place"* (see para 138 ARDCC). As said, in the event it was not signed and Astra LLP withdrew the draft on 20 April 2016, but Musst submits that this was only because the parties' rights and obligations were now to be novated to Astra UK.

(d) The onward novation to Astra UK

346. A similar but not identical analysis applies to the onward novation to Astra UK. This is dealt with in paragraphs 85 to 101 of the RAMPOC, paragraphs 170 to 178 of the RADCC, and paragraphs 137 to 139A ARDCC.

347. As said, by the email of 20 April 2016, Mr Murray on behalf of Astra Capital and Astra LLP informed Musst that the management of both funds was going to be transferred that week to Astra UK, and that: *"As part of the Change of Legal Status Application, contracts will be novated to [Astra UK]".* Accordingly, it withdrew the draft agreement. As also said, the transfer then took place on 29 April 2016, and Astra UK entered into replacement contracts with 2B and Crown, again on the same terms (or materially the same terms) as the contracts entered into by Octave. The transfer to Astra UK was confirmed by Mr Holdom's email of 10 May 2016.

348. Musst submits that the novation to Astra UK (or its taking on of the Astra LLP's obligations) then occurred in one or other of the following ways, as pleaded in paragraphs 98 to 101 of the RAMPOC, namely:

(1) On 10 May 2016, Mr Holdom, for Astra UK, sent the 2B invoice to Musst, thereby offering to take over the benefits and burdens of the Octave Contract in relation to the 2B Contract from Astra LLP (or Astra LLP and Astra Capital). In the context of Mr Murray's 20 April 2016 email and the announcement that Astra UK was taking over all Astra LLP's contracts, this was an offer in relation to the Crown Contract as well as the 2B Contract. This offer was accepted by Musst by sending the invoice for 2B to Mr Holdom's Astra UK email address (albeit by mistake made out to Astra LLP) on 13 May 2016, which Astra UK then paid, which payment Musst accepted by 25 May 2016.

(2) Alternatively on 16 May 2016, Mr Holdom, for Astra UK (and by necessary implication for Astra LLP), by asking for all future invoices to be sent to Astra UK, again offered on Astra UK's behalf to take over (or to take on) the benefits and burdens of the Octave Contract in relation to the Crown and 2B Contracts. This offer was accepted by Musst by sending to Mr Murray, on behalf of Astra UK, the three invoices for the periods from April 2016 onwards (two in relation to the 2B Contract, one in relation to the Crown Contract) on 28 July 2016. It did not happen earlier because Astra UK did not provide the necessary information for Musst to prepare and send invoices. In the meantime, Astra UK continued to manage the funds and to receive fees from 2B and Crown in lieu of Astra LLP.

349. In paragraph 178 of Astra's RADCC, Astra dispute the novation to Astra UK pleaded in paragraphs 98 to 101 of the Re-Amended Particulars on the following ground:

> *"As to paragraphs 98 to 101, it is admitted and averred that Astra UK had not sent to the Claimant since 10 May 2016 the invoices which it had been sending to 2B and Crown (nor had*

any other Astra entity). It was or should have been clear from this that Astra UK had not offered to take over (or take on) any obligations under the Octave Contract, or that, even if it had done so, such offer had been withdrawn. Paragraphs 98 to 101 are otherwise denied. Paragraphs 140 to 169 above are repeated."

350. As to this, Musst submits as follows:

(1) Paragraphs 140 to 169 of the RADCC, referred to in paragraph 178 of the RADCC, take matters no further (this is just a general repetition of points made in answer to the claim in relation to the novation to Astra LLP).

(2) Once Astra UK had offered, as said above, to take over or to take on the obligations under the Octave Contract by Mr Holdom's emails of 10 May 2016 or 16 May 2016, the offer remained in place unless and until it was withdrawn.

(3) The mere fact that Astra UK had not in fact sent on to Musst any more invoices in relation to the 2B or Crown Contracts is neither here nor there in that:

(a) As far as the Crown Contract was concerned, the invoices were rendered quarterly, and Astra UK (or Astra LLP) had already paid up to 1 April 2016 in any event; so there were no invoices to send on in any event, or at least, if there were, Musst had no reason to suppose that the offer had been withdrawn.

(b) As far as the 2B Contract was concerned, the invoices were rendered monthly, but the only invoices which had not been sent were those for the May 2016 and June 2016 management fees, the earlier of which would not normally have been rendered until some point in June, and the latter of which at some point in July 2016. But the mere delay in sending these invoices was not a withdrawal of the offer, given that Astra UK had now taken over the management of the two accounts and the receipts therefrom.

351. Accordingly, Astra UK's offer remained in place, and Musst's 28 July 2016 letter of demand constituted an acceptance thereof.

(e) Astra's arguments on novation

352. Astra say that there was no contractual relationship at any stage between Musst and the Astra companies. They point to the following, namely:

(1) Octave LLP and Octave Limited were the counterparties of Musst under the Octave Contract, not Astra.

(2) Further, when the Astra companies made their replacement contracts with 2B and Crown, they were not the contracts which had been introduced (if there had been any introduction which Astra deny) by Musst.

(3) There was a carefully drafted agreement involving several iterations and legal advice on both sides before it was made between Musst and Octave. If there was an intention to have an agreement to replace this agreement, it would be expected that the parties would replace the same in writing and expressly provide how it was intended to do so.

(4) The possibility of having such an agreement was canvassed, and to that end, a draft was prepared, and then submitted for consideration. Musst had a long time to approve the same, but instead objected to the Effective Date provision. As noted above, Astra rely upon the communications between Ms Galligan and Mr Murray in April/May 2015 and April 2016 for the replacement contract with Astra Capital and Astra LLP and say that these show that the parties understood that there had not yet been any novation to Astra LLP. The parties were not in agreement about the terms of the same. Before any agreement was made, Astra withdrew the draft and refused to proceed.

(5) Clause 16 of the Octave Contract provides (as quoted above) that no variation was to be effective unless it was in writing and signed by the parties. Astra say that the effect of Musst's argument is that there was at least for the future intended to be a variation in the nature of Astra LLP or Astra UK taking over liabilities of Octave under the Octave Contract. This could only be effective if it was in writing and signed by the parties, and this was not done.

353. Astra say that this is not a case about a wholesale novation of the Octave Contract. The pleadings refer to two alternative ways in which the change was to operate at paras. 64 and 78 of the RAMPOC, namely that the emails showed:

> *"…an offer by Astra LLP and Octave to Musst for Astra LLP (1) to* ***take over*** *Octave's rights and liabilities under the Contract, (2) alternatively to* ***take on*** *its rights and liabilities (i.e. in addition to Octave) in relation to the Crown Contract from that date, and in particular for Astra LLP to pay Musst's 20% share of the fees which Astra LLP was now going to be receiving from Crown in place of Octave. (3) In the alternative, it was at least an offer to take on these liabilities in addition to Octave"* (alternative cases numbered and emphasis added).

The common feature is to fix on Astra LLP and then Astra UK a liability (if any) of Octave Limited under the Octave Contract.

354. Astra say that the reference in the pleadings to a novation of "*Octave's*" rights and liabilities relating to the Crown Contract and the 2B Contract simplifies the fact that it was Octave Ltd that had the obligations under the Octave Contract whereas it was Octave LLP that had the rights under the Crown Contract and 2B Contract.

355. Astra submit that the communications relied on by Musst as a novation offer, taken at their highest, simply request Musst to address particular invoices to Astra LLP or Astra UK in place of Octave LLP and are not offers to found a novation of any contract either to Astra LLP or to Astra UK.

356. They submit that the fact that there were emails from Mr Holdom and Mr Murray informing Musst that Astra LLP and Astra UK have taken over from Octave LLP as the Investment or Trading Adviser does not assist Musst because this role is much more limited than the role of Manager under the Octave Contract. All they were doing was entering into the position of Investment or Trading Adviser under the Second and Third 2B Contracts and the Second and Third Crown Contracts.

357. They also submit that this was, at its highest, an offer to take over the position of Octave LLP and not Octave Ltd. It is said that it is necessary to distinguish between the position of Octave LLP which had the rights under the 2B and Crown contracts, whereas it was Octave Ltd which had the obligations under the Octave Contract. Without taking over the position of Octave Ltd, there were no relevant obligations to be enforced under any novated contract.

358. In this regard, Astra rely upon Clause 3.6 of the Octave Contract set out above under which Octave Limited was designated the "Manager", and Octave LLP the "Investment Manager", to whom Octave Limited was entitled to delegate any functions under the contract. The obligations of Octave LLP were limited to performance of such actions as may be required by Octave Ltd as Manager in connection with the Octave Contract and for the performance of any actions or functions delegated by Octave Limited.

359. Astra submitted that an offer, if any, by Astra LLP and in turn Astra UK to take on the administrative role formerly carried out by Octave LLP under the Octave Contract, was simply to issue invoices and make payments. It was not to offer to take on the obligations of Octave Ltd.

360. Further, Astra say that Musst has to show that all the relevant parties have consented to the alleged novation. It is said that there is nothing in the emails that can reasonably be understood to indicate that Octave Ltd was making any offer to Musst nor that Mr Holdom or Mr Murray were intending or authorised (or could be reasonably understood as such) to alter the legal relations of the Octave companies or the Astra companies.

361. Mr Holdom was engaging in an administrative activity, passing on copy invoices and asking Ms Galligan and/or Agatha Imiolek (Mr Siddiqi's administrative assistant) to submit invoices so that payment would be made. These invoices formed no part of the contractual machinery (Clause 4). Further, Mr Murray was attempting to get Musst to agree to a new form of agreement involving Astra Capital taking the place of Octave Ltd as Manager going forward, which was different from what was proposed by the emails.

362. The emails from Mr Holdom are also inconsistent with Astra LLP taking on Octave's liability under the Octave Contract in relation to the Crown Contract. The whole point of the split invoices that Mr Holdom provided on 5 November 2014 was to make clear that Octave LLP would only pay 20% of the fees that were earned by it from Crown under the Crown Contract and that Musst should invoice Astra LLP thereafter. This had nothing to do with Octave Ltd's obligations under the Octave Contract.

363. Further, Astra submitted that any offer did not involve any consideration for the offer but was simply to receive money from Astra LLP or Astra UK without any concomitant obligation to either of them.

364. Astra also challenged the acceptance of the offers in the following regards:

(1) Musst was unable to show how Ms Galligan or Ms Imiolek had any authority to alter its contractual relations or that this was understood by the Octave companies and the Astra companies. On the contrary, Ms Galligan made clear in her email exchanges that Mr Saksena would need to sign any new introduction agreement with Astra Capital (as Manager) and Astra LLP (as Investment Manager), and so there was no reason to believe that the acceptance could be made other than through Mr Saksena.

(2) The actions said to amount to acceptance were not by express communication but by simply sending invoices and/or accepting payment "*without complaint*" (RAMPOC paras. 67,70) and para.80). They could not reasonably be construed as acceptance just as the conduct in connection with the requests for invoices to be sent could not reasonably be construed as offers. The absence of "*complaint*" is simply explained by the fact that Musst did not consider that it had any basis to complain. Musst was happy to invoice Astra LLP rather than Octave LLP in order to receive payment. There is nothing in the evidence to suggest that any "*complaint*" was communicated or compromised by either party.

(3) The communications relied upon do not sit comfortably within the alleged framework of offer and acceptance. Musst relies upon a number of alternatives and there is lack of certainty about when the novation is supposed to have occurred. This recalls a comment made in *Tito v Waddell* [1977] Ch 106 by Megarry VC at 288: "*such uncertainties do not provide favourable soil for a rich crop of novations*".

(4) The billing and payment process employed was informal and did not follow the process in Clause 4 of the Octave Contract for the production of Statements in any event. Neither the emails nor the invoices upon which Musst relies make any reference to the Octave Contract. Indeed, communications between Mr Murray and Ms Galligan between February 2015 and April 2016 relating to the proposed Introduction Agreement between Musst and Astra LLP are inconsistent with any prior novation of the Octave Contract to Astra LLP and proceed as if the Octave Contract was still in place.

365. Without affecting the fact that these arguments apply also to the alleged novation to Astra LLP, the submissions are made as regards the alleged novation to Astra UK that:

(1) If there was any offer, it was not accepted because the invoice was sent to Astra LLP and not to Astra UK as sought.

(2) The subsequent invoices sent to Astra UK was after the event and when there was obvious conflict between the parties, such that any offer had by then expired.

366. There have been set out above the anti-variation and transfer provisions at Clauses 16-17 of the Octave Contract. Astra say that the alleged novations would fall within both of the above clauses. It is settled law that no oral modification clauses operate to prevent any variation to a contract being effected other than in writing: *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2019] AC 119, at para 10. Musst's argument that a novation does not fall within clause 16 because: "*it is not a "variation" of the Octave Agreement, but a new agreement involving different parties*" (ARDCC paras. 125(1), 136(1)) ignores the termination of the existing agreement. Musst's claim that it waived the need for consent under Clause 17 (paras. 125(2) and 136(2)) is without foundation, but even if this were the case, it does not establish that Octave Ltd and Octave LLP waived their consent or latterly Astra LLP (especially given that this is required to be given beforehand in writing and the formal communication requirements that are expressly set out at Clause 20.1 (para.125(3)). In *CEP Holdings v Steni* [2009] EWHC 2447 (QB) at para 37 Gloster J observed the importance of complying with the formal requirements of a similar clause at para 35 and noted the difficulty of establishing a waiver of such a clause:

> *"In my judgment there is nothing in the evidence which supports either a waiver of the requirements of clause 7.4, or any estoppel which precludes Steni from denying the alleged novation and assignment…Moreover, clause 7.4 of the EDA requires the clear consent of Holdings. Its effect cannot be avoided by mere vague assertions of estoppel …"*

367. The alleged novation extends only to the rights and obligations of the parties to the Octave Contract in relation to the 2B Contract and Crown Contract. The extent of such a claim is to the fees earned by Octave LLP under the 2B Contract and Crown Contract and not to fees in contracts subsequently entered into with Astra LLP or Astra UK, to which neither Octave LLP nor Octave Ltd are entitled . All the monies that might have been due to Musst in relation to the Crown Contract and 2B Contract have been paid. The claim advanced by Musst against Astra UK and Astra LLP is, on this basis, misconceived. Novation concerns the transfer of contractual rights and obligations held by the original obligor A to a new obligor B and not with contracts B has entered into independently.

368. Finally, as identified by the editors of *Chitty* (19-089), quoted above: a novated contract is not subject to the equitable claims that bite upon the original discharged contract. If Musst's rectification and estoppel arguments concerning the inclusion of introductions to 2B and Crown are correct, they would not carry forward into any novated contract (RAMPOC 73, 84).

(f) Discussion

369. The Court has well in mind the submissions of Astra, not least, that absent an express agreement about novation, it is wrong lightly to infer a novation. The release from obligations on the part of one party and the replacement of another party in its stead is a matter of grave consequence for the three parties concerned and for others affected. Even in the context of the released party and the new party being closely associated, it is a matter of serious consequence for the third party concerned and for third parties such as creditors. Further, there is Astra's submission that the language of novation was not used, and that the agreement contended for is at highest only a partial novation. It is said that the language is so imprecise that at highest there was simply a request for payments to be directed to Astra companies, and that this by itself does not alter the identity of the contracting parties or to whom obligations are owed.

370. Astra submit that the case law supports their case, but all cases are dependent on their facts. The starting point of the facts in this case is that Astra and Octave were closely related entities. There was also the anticipation that Mr Mathur would 'spin out' of the umbrella of Octave, and Clause 9.4 of the Octave Contract.

371. In analysing the parties' conduct, it is important to bear in mind that Astra and Octave were working from the same address at the date of the novations, there was an overlap of staff. Mr Holdom and Mr Murray then moved over to Astra LLP [T7/64/18-66/24]. I accept the evidence especially of Ms Galligan as to how she accepted the position related by Mr Murray that it was in effect a name changing exercise. The lack of formality is therefore not surprising. As far as Musst was concerned, and relying upon what was related by Mr Murray, it would deal in effect with the same people, and it was no different from a name change so that Astra would replace Octave.

372. The context was as follows. The business of Mr Mathur formerly conducted through the vehicle of Octave with the advantage of its regulatory registration would from August 2014 be conducted by Astra LLP. This was the context of the termination of the Crown Contract and a new contract between Crown and Astra LLP. Likewise, there was a termination of the 2B Contract and a new contract between 2B and Astra LLP. All fees payable to Octave Ltd would transfer, subject to the agreement of contracting parties, to Astra Capital. Likewise the fees earned by Octave would henceforth be charged by Musst to Astra LLP instead of to Octave LLP. The summary of facts above sets this out in more detail.

373. In this context, the request on the part of Astra LLP to Musst to be invoiced the money instead of Octave was not administrative but substantive. Astra LLP was not acting as agent for Octave in and about the receipt of the moneys. It was acting for itself as a consequence of the transfer of business from Octave to Astra LLP. There are no documents showing that the moneys received by Astra LLP were accounted for

between Astra LLP and Octave which would have happened if they had been received by Astra LLP as agent on behalf of Octave. With this transfer from Octave to Astra LLP and then to Astra UK went a transfer of the relevant income stream. The request to Musst to send its invoice to Astra LLP instead of to Octave LLP reflected an intention that the company receiving the income stream (Astra LLP and then Astra UK) should pay the agreed percentage of the moneys to Musst. This was the corollary of the transfer from Octave to Astra LLP and then to Astra UK.

374. Musst ought to have been asked to consent to the transfer in advance of its being effected: see Clause 9.4 of the Octave Contract as set out above. It was not asked. By the time that Musst was asked to send the invoices to Astra LLP instead of to Octave, the matter was a fait accompli. Astra say among other things that if anything this would have given rise to a right to damages for a failure to seek consent in advance. On that analysis, the claim would have been to damages against Octave, but it did not give rise to a contractual claim against Astra LLP and subsequently Astra UK. The fallacy of this argument is that subsequent to the transfer and in the light of the same, the invoicing chain was altered by agreement so that the customer (Crown/2B) paid to Astra LLP instead of to Octave and Musst was asked to send its invoices from a point of time to Astra LLP instead of to Octave in effect to follow the money.

375. It is this context which provides the answers to the arguments of Astra. The fact that there was no express agreement of novation does not preclude an agreement by conduct. The fact that the possibility of an express agreement was canvassed but not finalised does not show that no agreement was made. In my judgment, the draft agreement was intended not to create a new agreement but to reflect and formalise an agreement which had already been made. The stumbling block to the finalisation of that agreement was a concern about the Effective Date. In the light of the issue between the parties about the significance of the Effective Date in the Octave Contract, this may have been an issue of substance. It was important at least from the perspective of Musst that this provision should not have as its effect that only introductions made after the new Effective Date should be caught by the new written agreement.

376. The argument of Astra that Musst did not make an introduction to Astra LLP is not an answer to the claim. The agreement occurred in circumstances where Astra LLP had acquired from Octave the income stream of which a percentage was payable to Musst to the extent that it had introduced the same. The invoicing was so that the percentage, where applicable, should be paid by Astra LLP as the recipient of the income stream to Musst. It made commercial sense for the obligation to pay the percentage to go with the receipt of the income. That was not administrative: it was substantive, and it involved Astra LLP, and latterly Astra UK, taking on the obligation to pay the same percentage which Octave had agreed to pay under the Octave Contract.

377. It is right to say that this was not a wholesale novation of the Octave Contract in that it did not go back to the inception of the Octave Contract. The alternative ways in which the case is put, that is to say taking over Octave's rights and liabilities or taking on its rights and liabilities in addition to Octave are said to be inconsistent with the certainty required for inferring a novation. The point does not undermine Musst's case. It suffices for either case to be correct provided that it is one case or the other.

378. Astra say that the novation case involved an over-simplification of the fact that Octave Ltd had the obligations under the Octave Contract whereas Octave LLP had the rights under the Crown Contract and the 2B Contract. It is right to say that there was a greater precision in the Octave Contract where Octave Ltd was designated the Manager and Octave LLP the Investment Manager to whom Octave Ltd was entitled to delegate any functions. The submission of Astra is that Astra LLP was simply taking over the administrative role formerly carried out by Octave LLP under the Octave Contract, and it was not to take on the obligations of Octave Ltd.

379. These submissions do not reflect the evidence. The evidence is not that Octave Ltd remained in place as Manager and Octave LLP divested its position as Investment Manager to Astra LLP. The evidence in chief of Mr Murray (paras.24-32) referred to Astra LLP's migration from Octave LLP's regulatory umbrella. Astra Capital was authorised by the Cayman Islands Monetary Authority and was appointed as the manager of Astra's funds (ASSCFL and ASCIL), and Astra LLP was appointed as the Investment Manager to the Astra Funds. This was not an arrangement that Astra LLP would act as the Investment Manager to Octave Limited as Manager or that Octave Limited would delegate powers to Astra LLP. It was that Octave Limited and Octave LLP would drop out of the picture and that Astra Capital as Manager and Astra LLP as Investment Manager would take over. Hence the new agreements with Crown and 2B respectively.

380. Mr Murray says that it did not occur to him at the time that the agreements would place Octave in breach of Clauses 9.4 and 17 of the Octave Contract. He says that the Octave Contract was not seen as a priority during the negotiations. However, it was appreciated that there was a potential consequence in connection with the Octave Contract, and hence the above-mentioned email was sent from Mr Murray with an amended introduction agreement. This was referred to by Mr Murray as "*effectively a name changing exercise with [Astra Capital] acting as Manager and [Astra LLP] as investment manager*". In the taped conversation of 6 May 2015, Mr Murray's words were that the intention was to novate the relationship but that existing contractual entitlements would remain in place until an effective date. Mr Murray wrote to Ms Galligan, as noted above, on 11 April 2016 saying that a fully executed replacement agreement was required in order *"to tidy up our records"*. Mr Murray again used the same expression about a *"change of name exercise"* on 12 April 2016 in answer to a question as to why a replacement agreement was required.

381. Mr Murray in his witness statement was contending that that agreement would not take effect until such time as it had been executed with the effect that there could be no contractual agreement with Astra until the written agreement had been executed. It is common for the parties not to intend to enter into an agreement if a formal agreement is contemplated until such agreement has been executed. It is not conclusive that there is no agreement between the parties in the event that a draft written agreement has not yet been executed.

382. There are cases where the parties have agreed in principle, but not yet agreed all the terms, and the Court has to decide whether they intended to enter into a binding agreement. There are cases where the parties had agreed subject to contract, but the question is whether they have waived the subject to contract stipulation. This was considered in the speech of Lord Clarke in *RTS Flexible Systems Limited (Respondents) v Molkerei Alois Müller Gmbh & Company KG (UK Production)* [2010]

UKSC 14. Where a contract has been performed on terms that were agreed to be subject to contract, that might, dependent on the circumstances, indicate an intention to enter into a contract. The parties may intend to enter into an agreement when other terms remain to be negotiated dependent on their objective intention and the importance of the terms remaining outstanding: see *Pagnan SPA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601. However, in other cases, a problem is that it is common for important terms to be inserted at a late stage, such as exemption and limitation clauses where there would be no intention to enter into a contract without such terms: see Robert Goff J in *British Steel Corporation v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 from p.510G onwards.

383. At para. 50, Lord Clarke referred to a judgment of Steyn LJ in *Percy Trentham* v *Archital Luxfer Ltd* [1993]1 Lloyd's Rep 25 who had drawn attention to four particular matters summarised by Lord Clarke as follows:

> *"(1) English law generally adopts an objective theory of contract formation, ignoring the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest sensible businessmen. (2) Contracts may come into existence, not as a result of offer and acceptance, but during and as a result of performance. (3) The fact that the transaction is executed rather than executory can be very relevant. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations and difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. This may be so in both fully executed and partly executed transactions. (4) If a contract only comes into existence during and as a result of performance it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance."*

384. It is a question of fact in each case. In my judgment, the defining points here include the following, namely:

(i) the terms of the contract had been agreed through the Octave Contract;

(ii) Octave had dropped out and, in effect, Astra had stepped in: it was more than a name change because it was not the same company, but the company change was with Mr Mathur who used the relevant companies as his vehicle from time to time;

(iii) by acceding to the request for the invoices to be addressed to Astra LLP and by Astra LLP paying, the contract was performed through the changed companies;

(iv) there were no significant terms to negotiate, and the lack of understanding about what was the date when Octave's involvement and obligation ceased and Astra's started was of no importance, especially following and as a result of performance.

385. In this case, in my judgment, as soon as Octave stepped out of the picture, and Musst agreed to this by addressing invoices to Astra LLP and Astra UK respectively at the request of Astra, there was a relationship at least between Musst and Astra LLP (it is immaterial for the purpose of the instant claim if this was in addition to or instead of Octave). Mr Holdom and Mr Murray were right to refer to a change of name exercise. The agreement being required to tidy up records reflects the fact that the written agreement was a record of what had been agreed rather than the making of a new agreement.

386. The argument that the income stream transferred to Astra LLP and the 20% payments were made by Astra LLP to Musst, but the Octave Contract remained without the substitution or addition of Astra LLP is contrived and commercially unrealistic. I am satisfied in the circumstances that the expressions of name change and tidying up the position were well made and reflected the intention of the parties that an agreement in the nature of a company change had already taken place, whether Astra LLP was in addition to or instead of Octave. It did not require formalisation to take effect, but that was confirmatory of an existing agreement.

387. There are other arguments of Astra which stand to be rejected. It is said that the offer was not to take on the obligations of Octave Ltd, but simply to issue invoices and make payments. That ignores the context of Astra Capital and Astra LLP respectively becoming Manager and Investment Manager instead of Octave Ltd and Octave LLP respectively. The suggestion then that Astra LLP was acting in simply an administrative capacity also ignores this context. If it had been, it would have been acting on behalf of Octave as principal, but the evidence is clearly that it did not do so but must have been acting for itself. Receiving hundreds of thousands of pounds and paying over 20% to Musst for a period and not passing it on to a principal is not an administrative exercise. The attempt to sideline Astra and not to see it in the context of the transfer from Octave to Astra is to ignore the context in which the arrangement between Musst and Astra LLP and then Astra UK was created.

388. The analysis of Musst of an offer and acceptance around the issuing of invoices and the receipt of moneys so as to create a contractual relationship between Musst and Astra is a fair characterisation of what occurred. The submission that there was nothing in the emails to indicate such an analysis is again to ignore the context of the transfer from Octave to Astra. A challenge is made about the authority of Mr Holdom and Mr Murray to alter the legal relations of Octave and Astra companies but it can be inferred that they did have such authority.

389. In the case of Mr Holdom, I accept the submissions that he must have had the authority to write the emails which he did. It is to be noted that he worked for Octave LLP and then he transferred his work to Astra LLP. He was a minor shareholder in Octave Ltd and through that company in Octave LLP. He was also a minor shareholder in Astra LLP. Although one of the emails was signed off in an Octave LLP capacity, it was apparent that he was acting by then for Astra either in addition to, or instead of, Octave. Mr Murray's work as legal adviser was clearly for Astra, and he must have had actual, or at least apparent, authority to represent Astra LLP and Astra UK in his communications.

390. At times in his evidence, Mr Mathur suggested that he was not particularly hands on since he was exceptionally busy working every day for 18 hours a day. I accept that Mr Mathur was very busy, but in my judgment, he was more hands on than he acknowledged. I find that he knew, authorised and intended the transfer from Octave to Astra which was fundamental to his business strategy of being able to control the business without having to use Octave which he did not control. He must also have been involved in the engagement of Mr Holdom and Mr Murray, and he relied upon them to effect the transfer from Octave to Astra. The emails relied upon by Musst and the offer and acceptance identified by Musst were part and parcel of this transfer. It follows that the suggestions of lack of authority are rejected, as is the attempt to relegate the importance of the communications to mere administrative acts in connection with specific payments.

391. As regards the question of consideration for the liabilities of Astra LLP and Astra UK, the payments that were made were not in a vacuum. The payments and the obligations were made in order to discharge the liabilities of Octave under the Octave Contract. They were also part of the price for Astra acquiring the income stream from specifically Crown and 2B from Octave that these liabilities would be discharged. Further, from the perspective of Musst, the moneys were received in consideration of Musst treating the obligations of Octave to it as discharged to the extent of the moneys received. Going forward, Musst either accepted the liability of Astra LLP and Astra UK as being in discharge of the liability of Octave or as being additional to Octave with the promise that Musst would accept payments pursuant to the same in discharge of any ongoing liability of Octave to the extent of the moneys received.

392. The defence that the partial novation did not work because it offended against the anti-variation and transfer provisions at Clauses 16-17 of the Octave Contract is rejected. Those clauses did not prevent any of the above analysis. As regards Clause 16, this is not about a variation between the same parties of the same agreement. The introduction of new parties is not a variation as between the new parties and the old parties, but a new contract. This has no application, as the novation (or Astra LLP's or Astra UK's taking on of the liabilities) was not a "variation", but a new contract involving different parties.

393. It therefore has no application either to a total or a partial novation to the extent that it creates a relationship between the new parties and the old parties. As regards Clause 17, this might be relevant to whether Octave could transfer its obligations to Astra without the prior written consent, but it does not affect the ability of Astra to take on liabilities of Octave. It is therefore not necessary to consider whether in fact written consent was waived in the circumstances of this case. It is simply necessary to consider

whether there were obligations assumed by Astra LLP/Astra UK on which Musst could sue. For all the reasons stated above, this is answered in the affirmative.

394. As regards the novation to Astra UK, I accept the submissions of Musst. In particular, when asked to charge Astra UK instead of Astra LLP, there was no objection from Musst. There was an administrative error to send the bill to Astra LLP, but in context that was a clear mistake and understood as such. Had it not been, the invoice would have been accompanied by protest, but there was none. Further, the subsequent payment would not have been made at all until this point had been sorted. Since there was nothing to sort, the payment was made by Astra UK, and it was accepted by Musst. Thereafter, albeit at a time when no information about receipts was provided, in July 2016, invoices were made out by Musst to Astra UK, confirming that it had no objection to the transfer from Astra LLP to Astra UK. This acceptance of the transfer to Astra UK is to be seen in the context of the earlier transfer from Octave to Astra LLP. It was a matter of no significance in that the infrastructure of the business was moving over as was the income stream. There was no reason to object: it would have been objectionable had it been the case that the business was moved to Astra UK, Astra LLP had given up the income stream and Astra UK was not taking over its position vis-à-vis Musst. That was not the case: this was a second novation.

395. If the first way of putting the case had not occurred, then the combination of those matters and the subsequent invoices would have sufficed. The allegation of a withdrawal of any offer of novation is rejected. I accept Musst's submission relating to the timing of the invoices, and despite concern that Astra might not honour its obligations, this did not bring to an end the ability of Musst to commit to accept the offer of novation and that all further invoices would be to Astra UK. There was no termination either of the offer or of the novated Octave Contract.

396. Finally, I reject the final argument of Astra referred to above that the novated contract is not subject to the equitable claims that bite upon the original discharged contract and in particular that Musst's rectification and estoppel arguments concerning the inclusion of introductions to 2B and Crown are correct, and they would not carry forward into any novated contract. This is for the following reasons, namely:

    (1) Astra LLP and/or Astra UK were, like Octave, bound by the estoppels alleged against Octave, because they knew of the relevant facts which gave rise to the estoppels and realised that Astra LLP and Astra UK were bound to pay under the Octave Contract. They acted in this regard, and as evidenced by Mr Holdom's email of 30 April 2015 on behalf of Astra LLP on the basis that the Crown 1 Contract was covered by the Octave Contract.

    (2) In any event, Astra LLP and/or Astra UK, through Mr Mathur, Mr Holdom and Mr Murray at all material times knew the relevant facts which entitled Musst to rectification and gave rise to the conventional estoppel. They were not entitled, as against Musst, to take the benefit of Octave's rights under the Contract without the burden of the claims affecting Octave's rights.

397. It is also pleaded on behalf of Musst that there is an estoppel barring Astra LLP from denying the novation because there was an assumption that there was a novation: see

RAMPOC para. 71. The matters there set out are largely evidence that there were novations. It is unlikely that this adds anything to the argument in that it is difficult to see the circumstances in which there would not be a novation by conduct, but the estoppel would still exist.

398. Nonetheless, for the purpose of completeness, if there were no novations, I find that there were estoppels by convention. Musst and Astra LLP and Octave or Musst and Astra LLP acted on the common assumption that, in relation to the Crown and 2B Contracts and the fees receivable thereunder, the Octave Contract had been novated from Octave to Astra LLP from 5 November 2014. The common assumption was manifested by Astra LLP asking Musst to make out invoices to Astra LLP in place of Octave and by Astra LLP providing information to enable this to take place. It was manifested by the email of 30 April 2015 from Mr Holdom referred to above to the effect that payments would continue to be made under the Crown Contract, but not under the Crown 2 account. It was also manifested by Musst making out invoices to Astra LLP in place of Octave and accepting payments made by Astra LLP in place of Octave. The common assumption thereby crossed the line from which its being shared can be properly inferred. Astra LLP conveyed to Musst that it expected Musst to rely on it.

399. From this point onwards, without challenge from the Claimant, Astra LLP continued to control and to manage the 2B and Crown Contracts in place of Octave. Both Musst and Astra LLP continued to operate on the basis of the Octave Contract. Musst acted in reliance upon the same by making out invoices and accepting the payments made by Astra LLP. Further, Musst did not chase Octave for payment or complain about Octave's breach of clause 9.4 of the Octave Contract or about Astra LLP procuring such breach by agreeing to receive the transferred assets. In this context, the draft written novation agreement was or was understood to be simply an attempt to formalise that which had already been agreed by conduct.

400. It would be unconscionable for Astra LLP to deny that the agreement contained in correspondence and/or by conduct was a novation of the Octave Contract in relation to the Crown Contract and the 2B Contract and the fees receivable thereunder (or at least, that by that agreement it took on Octave's liabilities thereunder in relation to Crown) and so it is estopped from denying such novation or assumption of liabilities. It would be unconscionable because Astra LLP enjoyed the benefit of the transfer agreements from Octave (including the income stream that went with it) and Musst changed its position by its above-mentioned reliance upon the common assumption.

401. The same applies also to the transfer from Astra LLP to Astra UK. Against the background of the transfer to Astra LLP, this was more of the same. Musst, Astra LLP and Astra UK acted on the common assumption that, in relation to the Crown Contract and the fees receivable thereunder, the Octave Contract had been novated from Astra LLP to Astra UK from April/May 2016. The common assumption was manifested by Astra UK asking Musst to make out invoices to Astra UK in place of Astra LLP. When asked to charge Astra UK instead of Astra LLP, there was no objection from Musst. Musst made out an invoice in May 2016 (albeit in obvious error to Astra LLP), and payment was duly made by Astra UK and accepted by Musst. Astra UK reminded Musst that the payee should be Astra UK and there was no protest. Thereafter, in July 2016, albeit when no further information about revenue was being provided by Astra UK, further invoices were made by Musst to Astra UK, which was further confirmation

that there was no objection to the latest transfer. The sharing of the common assumption takes its character in the context of the transfer from Octave to Astra LLP: this was a further transfer this time from Astra LLP to Astra UK which was also accepted by conduct. Musst acted in reliance upon this common assumption by sending invoices without protest and accepting the money from Astra UK and not insisting on its rights against Astra LLP. It would be unconscionable for Astra UK to resile from the common assumption having taken the benefit of the income stream on the latest transfer and in view of the reliance by Musst.

XVIII The fourth issue: what if there was no novation to Astra UK?

402. This fourth issue is said to arise if there had been a novation to Astra LLP, but not to Astra UK. Although there are complexities in the argument about unjust enrichment, the matter would be considered in the context of the business of Astra LLP being transferred to Astra UK in a contract dated 29 April 2016 signed by Mr Mathur on both sides and providing obligations in the nature of (a) an assumption of liabilities in the widest terms of Astra LLP by Astra UK (Clauses 3.1 and 3.2), and (b) an undertaking by Astra UK to perform the obligations of Astra LLP and an indemnity arising out of any failure to perform (Clauses 6.4 and 6.5. It would also be considered in the context of the argument of MUSST that receipt of fees by Astra UK was sufficient to give rise to a claim for those fees against Astra LLP. This was on the basis that Astra UK was an affiliate, as per the Octave Contract, of Astra LLP. This would then found an entitlement to an indemnity against Astra UK under the deed of transfer dated 29 April 2016.A long and detailed consideration is not proportionate in circumstances where if an argument in restitution failed, it appears that ultimately the liability would be enforced to the advantage of Musst, if necessary, through Astra LLP's rights against Astra UK. Having determined the issue of novation in favour of Musst and against Astra LLP and Astra UK, then it is not necessary to reach any findings in respect of the fourth issue.

XIX The fifth issue: the Current Strategy defence

(a) Introduction

403. There is an issue between the parties as to whether the right to management and/or performance fees in respect of "Eligible Investments" ceases in the event that the funds no longer followed the "Current Strategy", i.e. investing primarily in synthetic ABS on a *"buy and hold basis with limited or on direct leverage"* [Clause 1.1]. (The word *"on"* is presumably a typo for *"no"*.) In the submission of Astra, in that event, the right to fees ceased, but Musst submits that the critical time for assessing whether an investment is following the Current Strategy is the point when the investment is made.

404. In the event that Astra are correct, there ensues a difficult issue regarding at what point the Current Strategy ceased to be followed in respect of a given investment. This has given rise to a considerable amount of controversy between experts who have given evidence with many points of disagreement as to whether the Current Strategy

remained, and if it did not, when it ceased and the reasoning as to how it was ceased and by what it was replaced.

(b) Relevant contractual provisions

405. The provisions relevant to the Current Strategy issue include the following:

> *Clause 3.1: "The Introducer shall be entitled to share in all management and performance fees (howsoever described) earned and received by Octave (or any of Octave's affiliates), provided that there shall be no double counting of revenues earned by one affiliate and paid on to another affiliate by whatever means) in respect of each Prospective Investor who makes (directly or indirectly) an investment in a Fund managed or advised by Octave (an* ***Investor****) for the Current Strategy on or before the Cut-off Date, each such investment being an* ***Eligible Investment****. For the avoidance of doubt, additional investments made for the Current Strategy directly or indirectly by an Investor into a Fund whether before or after the Cut-off Date are also Eligible Investments."* [Bold as in the original.]

> *Clause 3.2: "Unless otherwise agreed between the parties, the revenue share shall be 20% of all fees earned by Octave (or its affiliate(s)) in respect of any Eligible Investment. Notwithstanding the generality of the foregoing, the revenue share in respect of performance fees shall be reduced (but not below zero) by an amount equal to £50,000 in aggregate in consideration of the undertaking in Clause 3.4 to reimburse expenses of the Introducer."*

> *Clause 3.7: "The parties hereby agree that a) any new investments made by an investor in a fund under the management of Octave or the Investment Manager following a strategy other than the Current Strategy (a "New Fund") and deriving from the redemption of investments originally made in a Fund following the Current Strategy will not be treated as Eligible Investments under this agreement and this includes a restructuring of ASSCF to turn into a liquid open ended fund following; …"*

> *"Clause 13.2: "The Introducer shall continue to be entitled to the revenue share in respect of all Eligible Investments (as defined in Clause 3) for so long as such Eligible Investments in the Current Strategy are maintained by the Investor; provided that, notwithstanding the foregoing, should this Agreement be terminated following a repeated (after written notification) material breach of the Introducer's obligations hereunder including a sustained failure to comply with its obligations under*

Clause 2.3, the right of the Introducer to receive revenue share will terminate as of the Termination Date."

(c) Definitions

Clause 1.1: "Current Strategy" is to invest primarily in synthetic asset backed securities and on a buy and hold basis with limited or [no][3] direct leverage, and such that the investments are intended to operate as if they were closed-ended investment pools with capital committed on a locked up basis for several years to be returned to investors in such funds following realisation of the investments therein.";

Clause 1.1: "Funds" The Astra Special Situations Credit Fund Limited and other funds and managed accounts designed to substantially replicate the investment securities and risk profile of The Astra Special Situations Credit Fund Limited, and following substantially the same strategy as set out under the Current Strategy below … to which Octave or Manager acts as investment manager. It is understood for the purposes of interpretation of the definition of a Fund that the strategy remains substantially the similar to the Current Strategy."

(d) Musst's case

406. Musst submits that once an "Eligible Investment" was made for the "Current Strategy" (whether a synthetic ABS, or a non-synthetic instrument bought as part of the original portfolio), it remained such unless and until it was redeemed. At that point, the performance fee, if any, would be received by Octave, who in turn would pass on the relevant percentage to Musst. Clause 3.1 is the governing clause, and it entitles Musst to all fees in relation to any Prospective investor *"who makes"* an Eligible Investment. There is no requirement that the strategy must continue thereafter to be the same.

407. If there was a redemption consequent upon the investment being sold and the proceeds being put into a *"New Fund"*, the redemption request would trigger a performance fee payable. However, the Octave Contract specifically provided that in the event that there was an investment of the proceeds in a New Fund following a different strategy from the Current Strategy, there would be no fees triggered: see clause 3.7. Musst submit that it is therefore to be inferred or a necessary implication that in the event that the proceeds were reinvested without a redemption and used to buy another instrument not for a *"New Fund"*, but for the same fund as before, the funds (or the new instrument) continued to be an *"Eligible Investment"* regardless of the nature of that investment. Were it otherwise, it would not be necessary to say anything regarding the New Fund since the position would be obvious: if it was already the case that the fees would no

[3] There is an obvious typographical error, where "on" should be "no".

longer be triggered on investment into an old fund, then it would have been unnecessary to provide the same in respect of investment into a *"New Fund"*.

408. A part of Musst's written opening argument [para. 229] is put as follows:

> *"If this were not the case, then Octave could sell instrument X (a synthetic ABS) for which $10 million had been paid, for, say $30 million; use the $30 million to buy (say) stocks and shares; put those stocks and shares back into the same fund; and then turn round and say "I don't have to pay you any performance fees on the previous sale as I have reinvested the proceeds in the same fund, but because the fund, as a result, is no longer following the Current Strategy I don't have to pay you for that either". That would be an absurd construction, which cannot have been the parties' objective intention under the contract."*

409. Therefore, reinvestment of funds deriving from *"Eligible Investments"* into the same fund did not deprive Musst of the right to payment of fees, even if (say) the fund as a result consisted mainly of stocks and shares, rather than synthetic ABS.

(e) Astra's case

410. Astra's case is that on the true construction of the Octave Contract, the entitlement of Musst to a share in fees came to an end when the investment ceased to be in a Fund following the Current Strategy. By reference to Clause 3.1 and the Octave Contract as a whole, it says that Musst's continuing entitlement depended upon all parts of the definitions in the Octave Contract being satisfied. Musst's entitlement under the Octave Contract to a share of fees applies, in respect of an investment, only so far as it was and remained (a) "*an investment in a Fund managed or advised by Octave … for the Current Strategy*" (for the purposes of clause 3.1); and (b) a "*Fund*" (falling within the definition contained in clause 1.1) namely a managed account "*designed to substantially replicate the investment securities and risk profile of the ASSCF, and following substantially the same strategy as set out under the Current strategy*"

411. The Revenue share in Clause 3.2 is specified to be 20% of all fees earned by Octave or its affiliates "*in respect of any Eligible Investments*". The definitions of Fund and Current Strategy in Clause 1.1 specify that for an Investment to be one for Current Strategy, it has to satisfy the characteristics as regards both (a) the securities, and (b) the strategy.

412. Astra submit that *"It is <u>axiomatic</u>* (emphasis added*) that Current Strategy is something ongoing which is capable of changing. The purpose of the definition is to capture what Musst Holdings was being appointed to sell and to tie its fee entitlement to the pursuit of it"*: Astra's opening skeleton argument para. 201c.i. Astra also place emphasis on

the definition of Fund, saying that *"it is axiomatic that this is ongoing"* (emphasis added) such that if the Fund is no longer following the Current Strategy that something which was a Fund may cease to be such. Accordingly, the investment may cease to be an Eligible Investment and with that change, Musst's entitlement to share fees in respect of it comes to an end.

413. It is said that if the parties had wished Musst to share fees indefinitely, they would have said so. The purpose of the clauses was to limit Musst's entitlement in a way that could be applied by the parties to changing circumstances. This produced a sensible commercial result, whereas Musst's interpretation was said to *"produce an absurd or uncommercial result.*

414. An alternative submission of Astra is that the relevant contract dates (for assessing whether the Current Strategy was being followed) were not from the time of the Octave Contract, but (a) from the Second Crown Contract and the Second 2B Contract (with Astra LLP instead of Octave) from 1 September 2014 and 2 February 2015 respectively, and (b) from the Third Crown Contract and the Third 2B Contract (with Astra UK instead of Astra LLP from 1 April 2016 and 21 March 2016 respectively). They submit that by these times, the investment strategy was no longer the Current Strategy. Thus, even if the Current Strategy issue is to be judged by reference to the time of the investment being made, by the time of these contracts, the investment was no longer an Eligible Investment because it was not following the Current Strategy.

415. They also submit that if the relevant date were the making of the investment, the investments were made by Astra LLP at the time of the transfer to it. Before that, the investment had been made by Octave. Likewise, the making of the investment occurred in respect of Astra UK at the time of the transfer to it. By those times, Astra submit that the investments had moved away from the Current Strategy. Accordingly, there was no continuing right thereafter to fees, and accordingly the claim of Musst fails because the investments with Astra LLP and Astra UK respectively were not on the Current Strategy.

(f) Discussion

(i) The key question of construction

416. The key question of construction is whether the Fund has to remain on the Current Strategy, or whether it suffices if at the point when the original investment or an additional investment was made that it was for the Current Strategy.

(ii) Textual approach

417. The words used in Clause 3.1, which provides for the entitlement to share in management and performance earned and received by Octave, are that it is in respect of each Prospective Investor *"who makes an investment in a Fund managed or advised by Octave for the Current Strategy on or before the Cut-off Date* (emphasis added)." The last words of Clause 3.1 are also significant referring to "*additional investments made for the Current Strategy (*emphasis added) *directly or indirectly by an Investor into a Fund whether before or after the Cut-off Date are also Eligible Investments."*

Both as regards the original investment and the additional investments, the clause refers specifically to the making of the investment. This indicates that the investment has to be for the Current Strategy at the time of the making of the investment in order to qualify for a share of fees.

418. In my judgment, it is telling that the submission of Astra is that the share of fees applies in respect of an investment only *"so far as it was and remained"* an investment in a Fund managed or advised by Octave for the Current Strategy. The wording in Clause 3.1 is about the point of the making of the original investment and any additional investments. It does not contain words that in the event that the investments cease to be managed according to the Current Strategy, the entitlement to the fees would cease from then onwards. If that had been intended, the Octave contract would have provided for that expressly. It did not do so.

419. I accept the submission of Musst that the wording of Clause 3.7 assists its case on construction. On Astra's construction, whether it was a new fund or an old fund, whether at the time of the making of the investment or at any time thereafter, in the event that it no longer followed the Current Strategy, the right to fees thereafter would cease. If that had been the case, it would not be necessary to refer to the case of the New Fund. It was necessary to do that because the emphasis is on the time of the making of the investment, the original investment and the new investment. Clause 3.7 says that it is not sufficient that the investor makes a new investment arising out of redeemed funds of an investment which was made for the Current Strategy. The next investment must be for the Current Strategy for it to be an Eligible Investment. I accept the submission of Musst that Clause 3.7 supports the construction that the key time for an entitlement to fee is the point of the making of the investment, and not what happens thereafter. There is a necessary implication or inference from Clause 3.7 that, provided that the investment was at its inception for the Current Strategy, it remains an Eligible Investment attracting fees.

420. There are points of textual interpretation said to go the other way which need to be considered. The last sentence of the definition of Fund in Clause 1.1 contains the words that "*the strategy remains substantially the similar to the Current Strategy* (sic)*."* Astra submit that this means that the strategy has to remain substantially similar to the Current Strategy, so that the point is not static by reference to the time of the making of the investment. Likewise, it is said that the opening words of Clause 13.2 show that the Eligible Investment must follow the Current Strategy, not just when the investment was made but thereafter. Astra draw attention especially to the emphasised words "*"The Introducer shall* ***continue to be entitled*** *to the revenue share in respect of all Eligible Investments (as defined in Clause 3)* ***for so long as such Eligible Investments in the Current Strategy are maintained*** *by the Investor*."

421. The Octave Contract is not particularly well drafted, but as a matter of textual interpretation, I do not accept the interpretation of Astra. As regards the definition of the Fund, the reference does not in context appear to mean that the strategy has to remain as per the Current Strategy, such that it is no longer eligible as an investment if this ceases. In my judgment, the provision in context was saying that the other funds and securities were still similar to the Current Strategy. If it had been intended to say that it had to remain as such in order to qualify as an Eligible Investment, much clearer words would have been required, especially bearing in mind the consequences of such construction.

422. The words at the start of Clause 13.2 come a little closer, namely: *"The Introducer shall* ***continue to be entitled to the revenue share*** *in respect of all Eligible Investments (as defined in Clause 3)* ***for so long as such Eligible Investments in the Current Strategy are maintained by the Investor..."*** There is a limitation in time to so long as they are maintained by the investor. The question is whether this might mean, as Astra contend, for so long as the Eligible Investments are in the Current Strategy. In my judgment, the words are not sufficiently clear to bear that meaning. It is possible that if the words had been transposed to say that it was for so long as the Eligible Investments were maintained in the Current Strategy that there would be a better textual argument. As written, Clause 13.2 appears to be saying that the words are to emphasise that, for so long as the investment is maintained by the investor, there is an entitlement to the revenue share. However, there is a qualification, namely that this comes to an end if the Octave Contract is terminated for material breach including continued breach.

423. In any event the words in these clauses must be seen in the context of the Octave Contract as a whole. This includes the points above regarding Clauses 3.1 and 3.7. I have taken into account the fact that the most important matter is still what the words mean. In this regard, I have well in mind the words of Lord Neuberger in *Arnold v Britton* above at paras. 17 - 20. In particular, I have had full regard to the importance of the words used in that the parties can choose the words (para. 17), and the importance of being very slow to reject the natural meaning of a word because it gives rise to an imprudent term for one of the parties (para. 20). In the instant case, that might mean that, even if the meaning of Astra which with hindsight did not serve the interest of Musst, Musst is still saddled with the interpretation (*Arnold v Britton* at para. 19). I also take into account that the wording has been drafted with lawyers on both sides who can be taken to have approached the matter to give effect to the intentions of the parties due to the assistance of skilled professionals.

424. In my judgment, the points on textual interpretation as a whole lead to the conclusion that the Octave Contract bears the interpretation that the critical time is the time of the investment and that the entitlement to fees does not cease because the Current Strategy is modified or not maintained.

425. However, if the textual construction is not as I have found above, this is not a case where there is clear meaning to opposite effect to bear out the construction of Astra. In this regard, I have regard to that which was said by Lord Hodge in *Wood* at para. 13 cited above. The highest that the matter could be put on this alternative footing is that the words themselves are not clear, and that there are rival constructions. It is at that point that consistent with the unitary exercise of construction the Court can give weight to the implications of rival constructions by reaching a view which is more consistent with business common sense. This can be considered as a factor in order to ascertain the objective meaning of the provisions.

(iii) Contextual approach and iterative approach

426. In line with the authorities on contractual construction, the parties have emphasised the commercial sense of their respective constructions. I reject the submission of Astra that Musst's construction leads to an absurd or uncommercial result. The payment is

for an introduction. The terms of the Octave Contract were clear that payment does not become due until fees have been earned and received by Octave. That may be a long period of time. There is the original lock up period which may be three years, that is the period of time during which the investor is unable to release the investment. Thereafter, the investor may choose not to release the investment. In the event that the investments were a success, the main fee would be likely to be the performance fee.

427. On Astra's construction, that fee could be removed from that point onwards by Musst moving away from the Current Strategy. That could happen because Octave would rather keep the benefit from future performance for itself. The sensible commercial result is that the determining factor should be at the point of the making of the investment, and it is not a sensible commercial result to be deprived of a future performance fee as a result of a modification or change of the strategy in the years prior to the performance fee ever becoming due.

428. That is not an unlikely scenario. On the case of Astra, it is axiomatic that the Current Strategy was capable of changing. On the case of Astra, over a period of years, there was scope for that change, and it must be inferred, by reference to their expert evidence, that it was likely that there would be change. On that case, it was then likely that no future performance fees would become payable.

429. This is not the case of an improvident bargain for Musst. It is a result that is not easy to discern and does not arise from the wording of the Octave Contract. It is so difficult to discern that the payment of the management fees until 2016 is a strong indicator that Octave/Astra did not see the point. Their case is that the payments were made pursuant to the November Arrangement, but on the basis of the analysis above, I have found that the payments were made pursuant to the Octave Contract. This defence, like others, in this case, appears only to have come following non-payment and as a retrospective attempt to justify the non-payment. I shall say more about this in connection with the convention estoppel answer to the Current Strategy defence.

430. Astra say that there is an absurdity about the liability continuing for ever. In fact, the liability is contained. It is only in respect of the original investment or any additional investment if they are made for the Current Strategy at the point that they are made. The agreement can be terminated for breach under Clause 13, and Clause 13.2 would then provide for the fees ceasing to be payable. In the ordinary course, the investment would be the subject of a redemption, and the nature of strategies changing would be that future investments may not follow the Current Strategy at inception. The Octave Contract does not require a payment in respect of any further investments (not emanating from the original investment) in the event that the further investment is not following the Current Strategy. Likewise, it does not require a payment in respect of an investment in a new fund (emanating from the original investment) where there has been a redemption of the old fund.

431. There is a further point. The nature of the controversy in this case illustrates the virtual unworkability of the construction of the clause on the construction of Astra. It is straightforward to be able to ascertain at the inception of a fund that the investment is for the Current Strategy: that was intended from the start, and unsurprisingly, this is not the subject of controversy that, at their inception, the investments of 2B and Crown were for the Current Strategy. It might be more difficult in respect of a new investment

(not being the proceeds of the original investment) at a future time, but it is a binary question at the point in time when the original investment is made.

432. However, having to consider over a period of time in respect of a fund which starts off for the Current Strategy whether it remained for the Current Strategy is extremely complex. So it has turned out with the calling of expert evidence in this case and the numerous points of dispute between the experts. That evidence is accepted to be complex by the parties in the context of a court case. The construction of Astra presupposes that there would have to be consideration at any point in time whether the investment was subject to the Current Strategy without experts being enlisted and a court case in which the evidence of the experts was tested. Even in this case, the submissions of the parties are not particularly precise as regards each point of time when it is said that the investments were following or were departing from the Current Strategy. Hence, the formulations of Astra that the investments had moved out of the Current Strategy at various alternative points of time.

433. A further pointer to the lack of commerciality of this construction is the difficulty of Musst (without disclosure in a court case) of having access to the records of Astra sufficiently so as to enable it to do an analysis of whether at any point of time the Current Strategy was or was not being followed. All of this provides a reason contextually for the interpretation that the relevant time for determining whether there was an Eligible Investment for the purpose of an entitlement to management/performance fees was at the time of the making of the investment and not from time to time thereafter.

434. All of these matters show that, at lowest, the construction of Musst makes more commercial sense than the construction of Astra. Astra have sought to pitch its case higher and to say that in fact the construction of Musst produces an uncommercial or absurd result. In my judgment, the construction of Astra does produce an uncommercial result, whereas the construction of Musst is a commercially sensible result.

435. Adopting the unitary process of going back from the commercial consequences to the close examination of the words used, the words of the Octave Contract need to be revisited. Considering those words again, the words do not indicate that Astra's construction is correct. Further, revisiting the words in the light of the commercial consequences, and seen as a whole and balancing textualism and contextualism, I am satisfied that the investments at the start satisfied the Current Strategy, and that investments once made under the Current Strategy did not cease to attract fees simply because the strategy changed.

(iv) Further argument regarding the date of the making of the investments

436. It remains to consider that if Musst's argument is correct that the date of the making of the investments is the operative date for considering whether an Eligible Investment has been made, and it is necessary to consider the dates of the Second and Third 2B and Crown Contracts, then by that time the Current Strategy was not being followed as a result of which no fees were payable. In my judgment, that is to ignore the nature of the Second and Third 2B and Crown Contracts and the nature of the novation. There was not a new investment which was made at the point when the Second and Third

Contracts were made. Those contracts were headed "Amended and Restated Investment Management Agreement". They were substantially in the same terms as the Crown Contract and the 2B Contract. Their purpose was that there was a change of investment manager from Octave to Astra LLP and then from Astra LLP to Astra UK. In my judgment, the operative date for considering whether the Current Strategy was being operated was the time when the investment was made. Otherwise, the change in the corporate vehicle used by Mr Mathur would have an effect beyond what was intended. It was intended that there would be a seamless transition of companies. This is reflected in the reasoning and conclusions above in respect of novations. It was not intended that there would have to be a question as to whether the introductions were made in respect of the investments transferred to Astra LLP and then to Astra UK. The original investments had been made in 2013 and whenever they were made thereafter. The amended and restated agreements or the taking over of the management of the investments by Astra LLP and then Astra UK was not the making of the investments all over again.

(g) Estoppel by convention

437. In case the construction is different from the above, I consider the argument about an estoppel by convention, and the application of the test as recently confirmed by the Supreme Court in *Tinkler*. The argument of Musst is that if it is not the case that the Octave Contract is to be construed as per Musst's primary argument, the parties acted on the common assumption that the right of Musst to management and performance fees would continue in relation to each Eligible Investment. This would be until and to the extent that it (or an asset acquired by it) was sold or converted into a non-Eligible Investment, at which point a right to performance fees would accrue: see RAMPOC para. 113C. It is pleaded that the reason why they did this was because they realised that the Claimant's right to fees continued to subsist even if the accounts had ceased to follow the Current Strategy (if that was the case): see RAMPOC para.113D. In addition to payment of fees, Musst also relies on conversations in April 2015 and June and July 2016 referred to in paragraph 5 of Appendix 1 RAMPOC, because the premise of all of those conversations was that the Claimant was entitled to management fees and performance fees even though (according to the Defendants' Defence) the managed accounts had ceased by then to follow the Current Strategy. It is also evidenced by Mr Holdom's emails to Mr Mathur of 14 June 2016 and 28 June 2016 disclosed by the Defendants, which proceed upon the same premise.

438. Appendix 1 RAMPOC in summary, reads as follows:

(i) On 30 April 2015, Mr Mathur sought to explain non-payment in that Astra LLP had not been paid and had no liability until paid, and that Astra LLP would pay as soon as possible. He suggested that Mr Siddiqi sell the Claimant's rights to revenue to Mr Shamil Chandaria;

(ii) At a meeting on 27 June 2016 between Mr Siddiqi, Ms Galligan and Mr Mathur, Mr Mathur accepted that management fees were payable. The Octave Contract could not be terminated by Astra UK , and it would not do so. He said that on converting the funds

to a different investment, the performance fees would be payable to the Musst. He assured Ms Galligan and Mr Siddiqi that he was not going to cheat the Musst out of any performance fees.

(iii) In a telephone call on 27 June 2016 between Mr Siddiqi and Mr Mathur, Mr Mathur accepted that Musst had a continuing entitlement to performance fees.

(iv) In a telephone conversation on 13 July 2016, Mr Mathur assured Mr Siddiqi that there was no reason why the Musst should not be paid. He said the whole agreement was that as soon as he was paid, Musst would get paid, and he really wanted it to get paid the performance fee that was due to it. He offered to make an advance of $250,000 against performance fees in each of the next two years (subject to a guarantee to repay any overpayment).

439. Astra challenges the existence of an estoppel by convention both as regards the facts and the law. Factually, at [T6/176 – 181], Mr Mathur said that he communicated his view that the fees should only be payable when the funds were invested in the Current Strategy, and that Mr Phillips and Mr Siddiqi then came to an agreement about this *"that it would only be applicable so long as the funds are invested in the current strategy"*. Mr Mathur then expanded on this evidence in re-examination at [T9/45-46]. I reject this evidence. Had it been true, then it would have been a part of the pleadings and Mr Mathur's witness statements, particularly following a detailed pleading in paras. 113A – 113E of RAMPOC setting out the common assumption. The evidence of Mr Mathur contradicted an email of Mr Phillips of 14 December 2012 copied to Mr Mathur telling Musst that the fee obligation would continue to subsist for as long as the funds are in place, on which Mathur commented: *"Looks like we are there now on the agreement"*. There was no email or other communication from Mr Phillips or Mr Mathur backtracking on this. Although the internal communications between Mr Siddiqi and Ms Galligan and SRZ have been disclosed, there is no internal communication recording any discussion by Mr Mathur to the effect that the introduction of the phrase "the Current Strategy" meant that Musst's rights would expire upon a change in the strategy, even in relation to investments already made. The evidence of Mr Mathur suited the case of Astra, and it matters not for this purpose whether his evidence was divined at this later stage consciously or unconsciously. It is not credible.

440. Astra's argument as to the law is that the elements of the estoppel by convention are not satisfied. The case of Musst is summarised in the skeleton argument in the following terms, namely for the reasons set out in paragraphs 113A to 113E of the RAMPOC that all parties acted on the common assumption that the Octave Contract meant that the Current Strategy was only by reference to the time of the making of the investments and/or that the 2B and Crown managed accounts continued to follow the Current Strategy, in reliance on which Musst made no alterations to the Octave Contract before it was signed. Musst says: *"Why else did Octave and then Astra keep paying Musst right up to May 2016, when on Astra's (now) interpretation, the Octave Contract did not require them to do so?"*

441. In my judgment, there was no common assumption about the meaning of the Current Strategy in the sense that there is no evidence that the parties applied their minds to it, or communicated their understanding of the phrase. When the phrase first appeared in the travelling draft, there was no explanation as to what it meant, nor was there some specific accord as to what it meant. The reason for the payments was not then because of a specific assumption about the meaning of the Current Strategy. It is likely that the parties never applied their mind to this alleged defence until after the inception of the dispute. It is possible that they did not think that there was any change in the Current Strategy and so they never had to apply their mind to the construction argument. In my judgment, the common assumption that the fee would be payable because a possible defence (if that is what it was) had not occurred to Astra is not specific enough to give rise to a relevant common assumption.

442. Likewise, there is no specific case as to how Musst acted on the common assumption to its detriment. It does not suffice to say that Musst entered into the Octave Contract without seeking to change its terms because there is no relevant common assumption in respect of the words "Current Strategy" before the Octave Contract. As regards the understanding that there would be payments thereafter and the course of conduct of making payments of management fees and making admissions in respect of what would be paid, it is difficult to see how this gave rise to a detriment. Again, it is not sufficiently specific to the "Current Strategy" terms so as to indicate that had it been pointed out, Musst would have insisted that the relevant contractual clauses would have been amended. There is an argument that in the event that the admissions about payment had not been made, Musst would not have consented to the transfers to Astra LLP and Astra UK respectively, but I am not satisfied that that is sufficiently specific to give rise to an estoppel by convention about the meaning of the Current Strategy. Likewise, it does not indicate that the parties believed that they were following the Current Strategy, since it is perhaps more likely that they did not consider what was the strategy at the relevant time or that this might afford the basis of a defence.

443. What then is the position about the conduct after the time of the Octave Contract? There are three points to make. First, for the above reasons, there is no estoppel by convention. Second, as a matter of law, such conduct after the contract, and absent an estoppel, cannot be an aid to construction of the contract. Third, it is possible that the behaviour of Astra in connection with payments is evidence that the paying party did not understand that the Current Strategy had been altered. However, this is far from conclusive evidentially, because it may simply be that, at the material time, Astra did not apply its mind to the Current Strategy point.

444. Despite the rejection of the alternative estoppel argument, I am satisfied that the contract is to be construed so that, once the investment has been made on the basis of the Current Strategy, a change in strategy prior to redemption giving rise to a fee does not bring to an end the entitlement of Musst to a share of the fee.

(h) The expert evidence

445. Having regard to the above, it is not necessary to make a determination of the evidence as regards whether the Current Strategy had been followed and implemented throughout, or at what time or times it was no longer followed. The Court has heard expert evidence from Mr Aldama for Musst and Mr Finkel for Astra. I shall make some remarks which are not intended as a detailed analysis of the voluminous evidence. They also do not bind the Court in considering other issues which might arise where the expert evidence needs to be revisited. The following is noted, namely

(1) in the joint report at para. 2.1.3, it is stated that the experts *"agree that synthetic ABS are complex structured instruments and can exist in fully funded or unfunded form, and that fully funded ABS can be synthetic or non-synthetic depending of (sic) its structural characteristics"*. The complexities of the instruments are reflected by the difficulties (a) in assessing the relevant characteristics of complex financial instruments held within the Managed Accounts during the material time period, and (b) in ascertaining how and when investments cease to be managed on the Current Strategy. This is referred to as Issue 2 in the opening skeleton of Astra at para. 212 et seq. It will be noted that the experts could not agree the classification of 10 out of 33 securities. A list of points of disagreement between the experts would be vast. The exercise would involve the various features which give rise to the investments being operated on the Current Strategy and then comparing this with the way in which the investments have been operated at each stage over the period of many years.

(2) On the analysis of Mr Finkel, the expert for Astra, the analysis as to what distinguishes synthetic from non-synthetic assets has three most significant characteristics. They are the primary characteristics, namely predominance of CDS credits or Funded Credits in the asset pools; the second characteristic, namely active management of pools versus static pools; and the third characteristic, namely liabilities issued as unfunded or funded tranches. These are only the most significant characteristics. It is therefore a multi-factorial and evaluative analysis. By its nature, it admits of different and uncertain analyses as to whether the fund is at any one time to be regarded as synthetic asset-backed securities or not.

(3) This uncertainty is evident even in Astra's analysis. There are particular difficulties in assessing a point in time when the investments ceased to be made *"primarily"* in synthetic asset-backed securities. Likewise, in assessing a point in time when the investments ceased to be made primarily on a *"buy and hold basis"*. It may be that the difficulties of precision are reflected by Astra's alternative dates as to when the Current Strategy was no longer followed. The lack of certainty and precision is a factor in the contextual part of the construction submission of Musst above, and the submission that the relevant time when an investment was following the Current Strategy was the time of making the investment and not from time to time thereafter.

(4) There was something to be said for the approach of Astra to expert evidence through Mr Finkel in avoiding any opinion by reference to the meaning of the Octave Contract and considering matters of Current Strategy from the perspective of an expert in the trade rather than a contract lawyer. There were times when Mr Aldama was less rigorous not to trespass into the territory of construction which is for the Court.

(5) Having said that, the experts' views about the meanings of the words in abstract may not provide the answer to the questions before the Court. In the oft-cited words of Lord Hoffmann in *Investors' Compensation Scheme v West Bromwich BS [1998]* 1 WLR 896, 912-913: *"The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean."* If, contrary to the above analysis of construction, the Current Strategy must be assessed from time to time, so as to determine whether an investment has ceased to follow the Current Strategy, then that itself might affect the objective meaning of the Current Strategy. It might make the Court cautious about a narrow approach to the ambit of the Current Strategy. This may be an indicator that the Current Strategy was rather broader than that allowed for by Mr Finkel.

(6) In the joint report, a disagreement of the experts is summarised as follows (para. 1.3.10):

> *"Mr. Aldama considers Octave/Astra's approach, as it relates to the investments to be evaluated and measured, to require an assessment of the total portfolio composition at any point in time and not just newly entered trades after that point in time (which leaves out investments acquired before that point in time but that are still held in the portfolio). Mr. Finkel disagrees with Mr. Aldama's approach as Mr. Finkel views an investment approach to be evolving over time and not strictly bounded by initial investments. And while Mr. Aldama and Mr. Finkel understand and respect each other's approach, they both feel their own analytical approaches are the more appropriate ones to use relative to addressing the Court's instructions."*

(7) I make no criticism of Mr Finkel in adopting the approach which he has done. However, if the Current Strategy is not to be determined in respect of an investment at the time of the investment, then it may well be that the construction that the assessment of the mix of the portfolio composition is a better guide than an analysis of the most recent trades.

(8) If the construction above that the time of the making of the investment is the critical time is not correct, and one has to appraise whether the Current

Strategy was being followed from time to time, in the context of this agreement, it may be that the character of the investment as a whole is a more probative indicator than the character and objectives of the most recent trades. If, for example, more of it was held in synthetic asset-back securities than in other investments, then that might be an indicator that the investment was following the Current Strategy. Likewise, if a majority had not been reinvested in non-synthetic asset-back securities, then that might be consistent with a buy and hold strategy despite a substantial number of trades away from synthetic ABS.

(9) I do treat the matters set out in Mr Aldama's report at paras. 74 and following about the nature of the investments as likely to be of importance for the purpose of assessing whether there was a change in Current Strategy. It is, in my judgment, a significant indicator in favour of the Current Strategy remaining that the overall balance of the investment and therefore the risk remained at any time in synthetic asset backed securities.

446. I have also given consideration to the statements of Mr Mathur and Dr Adler as regards their evidence of what was the Current Strategy. The weight to be attached to this evidence is reduced for the following reasons. Since the Current Strategy was either disregarded or analysed differently at the time by Astra, and hence the payments continued to be made and this point did not arise until the litigation, the evidence as to the Current Strategy appears to be based on reconstruction. Dr Adler has given evidence that he was not concerned with the terms of the Octave Contract at the time. It follows that he was not considering the Current Strategy at the time. Mr Mathur has given evidence that he was concerned with the Current Strategy at the point when the contract was being negotiated, and he has given evidence about this. However, for the reasons set out above, I have not accepted that evidence. This does not form a sound start to consideration of his evidence about Current Strategy. Just as his evidence which has been rejected has been self-serving, so too there is the risk of his analysis being after the event and tailored consciously or unconsciously to the case. For these reasons, this evidence does not weigh heavily with the Court.

(i) Conclusion

447. I am satisfied as a matter of construction of the contract that the operative date for considering whether the Current Strategy was being operated was the time when the investment was made. It follows that there is no need to reach final conclusions in respect of this aspect of the expert evidence as to whether and when there may have been a change in the Current Strategy. Without reaching final conclusions, the Court has made some remarks about the evidence before it.

XX The sixth issue: is Musst's claim in relation to fees received from 2B barred because it acted illegally in introducing it?

(a) Introduction

448. Astra have raised a further defence by way of amendment, namely, (a) under the US Securities and Exchange Act 1934 ("the 1934 US Act"), Musst required broker dealer cover to effect the introduction to The Observatory (as it was based in the US), and (b) if Astra were now to pay Musst, it would be *"at risk of … being held liable for aiding and abetting a breach of Section 15 of the 1934 Act"*: see paragraph 118 of the RADCC and paragraphs 111A to 111K ARDCC.

449. S.15(a)(1) of the 1934 US Act provides:

> *"It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a natural securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce, the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section."*

450. Astra's argument is that, by introducing The Observatory (or 2B) to Octave so that it invested in a managed account, Musst induced the purchase or sale of a *"security"* within the meaning of this section.

451. With the Court's permission pursuant to the order of Chief Master Marsh dated 25 November 2020, the parties have therefore obtained reports from experts on US law to address the following three issues:

(i) the interpretation of ss.15(a)(1) & 20 of the 1934 US Act, including whether the term "*security*" encompasses (i) managed accounts and in particular 2B's managed account, and (ii) the underlying bonds and swaps held within managed accounts and in particular 2B's managed account;

(ii) whether a contractual obligation to pay a share of management or performance fees, including Clause 3.1 of the Octave Contract resulting from an introduction in breach of s.15(a)(1) by not being *"registered"* would be enforceable as a matter of US law, including under s.29 of the 1934 US Act;

(iii) whether a party that makes payment of a share of management or performance fees to an Unregistered Introducer, pursuant to an

agreement to do so including Clause 3.1 of the Octave Contract, would be at risk of contravening US law, in particular, for aiding and abetting a breach of s.15 of the 1934 US Act, pursuant to s.20 of the 1934 US Act.

452. The relevant expert evidence adduced in this regard was by Professor Steven Thel dated 3 February 2021 ("the Thel Report") called by Musst and the report of Mr Charles Riely dated 3 February 2021 ("the Riely Report") called by Astra. Following a meeting on 19 February 2021, Professor Thel and Mr Riely produced a joint report dated 19 March 2021 ("the Joint Thel/Riely Report"). They both attended by video link in the trial and gave oral evidence.

453. This is a case where the Court has been assisted by having the issues of foreign law pleaded and evidenced by US lawyers whose evidence has been tested in detailed cross-examination. It has had the advantage of lawyers who evidently specialised in the field, and advocates who had prepared fully for the cross-examination and were therefore able to prepare their questioning impressively.

454. In one sense, the Court is at an advantage when deciding foreign law. It is that, with the assistance of experts in foreign law, although it is deciding a question technically of fact (because foreign law has been treated as such), it has the advantage of being familiar with the subject matter. This is very different from many areas of expert evidence where the court is asked to go into more unfamiliar fields. On the other hand, in a case such as the present where it is said that there are conflicting decisions, and the Court would have to treat itself as if it were the Supreme Court of the United States of America, the task is considerable.

455. There are limitations imposed on the witnesses in such cases. Primarily the role of the expert is to inform the Court as to the contents of the foreign law by reference to legislation and case law. In an appropriate case, where there is no definitive final authority, the expert is entitled to predict what the foreign court would decide. This was stated in the Court of Appeal in the case of *MCC Proceeds v Bishopsgate Investment Trust plc* [1998] EWCA Civ 1680 per Evans LJ who gave the judgment of the whole court at paras. 23-24:

> *"23. In our judgment, the function of the expert witness on foreign law can be summarised as follows:-*
>
> *(1) to inform the Court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign Court's approach to their construction.*
>
> *(2) to identify judgments or other authorities, explaining what status they have as sources of the foreign law; and*

> *(3) where there is no authority directly in point, to assist the English judge in making a finding as to what the foreign Court's ruling would be if the issue was to arise for decision there.*
>
> *24. The first and second of these require the exercise of judgment in deciding what the issues are and what statutes or precedents are relevant to them, but it is only the third which gives much scope in practice for opinion evidence, which is the basic role of the expert witness. And it is important, in our judgment, to note the purpose for which the evidence is given. This is to predict the likely decision of a foreign court, not to press upon the English judge the witness's personal views as to what the foreign law might be. Thus, in G. & H. Montage G.m.b.H v Irvani [1990] 1 W.L.R. 667 (C.A.), Mustill L.J. said this:-*
>
> > *"The fact that the plaintiffs' expert was not able to do more than assert, in this novel situation, his own view on how the German court would react when faced with a similar problem does not disqualify his evidence from being relied upon. There are many fields of law in which the books provide no direct answer and where the skill of the lawyer lies precisely in predicting what answer should be given. If the judge concludes that the expert's prediction is reliable, he is fully entitled to give effect to it" (684G).*
>
> *This passage emphasised that the expert witness is entitled to give opinion evidence in the absence of direct authority, but we would underline the restrictions which it places upon him. His role is to "predict" what the foreign court would decide, and only in this sense should he say "what answer should be given".”*

456. As regards the expert evidence, both experts Professor Thel and Mr Riely were knowledgeable in the areas on which they gave evidence. They were helpful in providing to the Court considerable material to assist in the issues before the Court. There were times when the evidence of Professor Thel went beyond that which was referred to the Court e.g. the application of the 1934 US Act. In cross-examination, it was shown how he had relied on his own academic treatise/article rather than authorities. This therefore might have indicated his opinion of the direction in which the law should travel rather than the test articulated by the courts.

457. Mr Riely impressed particularly by confining himself generally to elucidating the law and not giving views which depended on the analysis of the facts. For example, he identified areas of fact which would be taken into account in connection with the topic of equitable defences, recognising that it was for the Court in any case to apply the law to the facts. He explained in a nuanced way when a person might or might not be a broker/dealer, especially in cases where acts were carried out both within and outside the USA.

(b) The facts relevant to the sixth issue

458. In late February 2013, Octave received advice from US lawyers, Seward & Kissel, that if Octave was to use a third party marketer to market its proposed fund to US investors, then the marketer would need to be registered in the US as a "broker-dealer", although there were a number of ways in which that could be achieved; and that US investors could claim rescission of their investments if Octave used an unregistered broker deal.

459. This advice was emailed on to Musst's lawyers, who advised that there was nothing in the point. Mr Siddiqi complained to Mr Mathur, who replied that he wanted to work in a *"framework that was legit"* and it was better to be safe than sorry.

460. A considerable amount of correspondence then followed on the issue between Mr Mathur, Mr Murray, SRZ, Mr Siddiqi and Ms Galligan which has been set out above.

(c) US Law – relevant terms of the Octave Contract

461. The Octave Contract had the following terms:

> Clause 3.5: *"For the avoidance of doubt, no Investment shall be regarded as an Eligible Investment in the event that a payment of Revenue Share thereto would contravene any law or other regulation applicable in the jurisdictions in which the Investor, Octave and the Introducer operate (and in particular any regulations that require authorisation, registration or regulation of the Introducer which is not held by the Introducer or its delegate in order for such a payment not to contravene securities law applicable in such a jurisdiction). The parties hereby agree that in the event of a dispute arising in connection with clause 3.5 exclusively, the parties will endeavour to work together in good faith to come to a practical mutually agreed solution."*
>
> Clause 5.2: *"The Introducer shall comply with all applicable laws, statutes, regulations and codes relating to the Introducer's business and procure any licences, certificates, insurance … and all or any regulatory approvals required in any jurisdiction in which the Introducer operates including … the US Securities Exchange Act 1934. Without prejudice to the generality of the foregoing where required under the US Securities Exchange Act 1934 or any other applicable legislation the introducer shall not proceed with any Introduction to a potential investor domiciled in the United States of America unless the Introducer or a duly authorised delegate of the Introducer at the Introducers own cost) is, or is acting under the supervision of, a broker licensed to act as such in the United States of America."*
>
> Clause 5.6: *"Without prejudice to the generality of the foregoing, the Introducer, its contacts or intermediaries will not proceed with any distribution of Materials or promotion of funds*

> *where such distribution, use or promotion is likely to contravene any law, code, or regulation of any jurisdiction."*
>
> "Clause 10.1.2: *"Each party hereby represents and warrants to the other parties as follows … Prior to the performance of any obligations under this Agreement, in any specific jurisdiction, it has obtained all authorisations of any governmental or regulatory body required in connection with this Agreement in such jurisdiction and such authorisations are in full force and effect."*

462. These terms: (1) obliged Musst to comply with the 1934 US Act, (2) prohibited it from introducing a potential investor in breach of its terms, and (3) represented that Musst had and would comply with it.

(d) US Law

(i) The pleadings

463. Astra's pleaded case is that:

(i) the introduction to 2B alleged in RAMPOC/35-37 (including Ms Galligan's alleged instigation of the 13 November 2012 meeting) was a breach of s.15(a)(1) of the 1934 US Act, which provides that it "*shall be unlawful for any broker or dealer … to induce or attempt to induce the purchase or sale of any security … unless the broker or dealer is registered*" (RADCC para. 118(1A)(2));

(ii) any contractual obligation to pay a share of any fees earned as a result of such obligation would be unenforceable under US law (RADCC para. 118(1A));

(iii) Musst was in breach of Clauses 5.2, 5.6 and/or 10.1.2 of the Octave Contract, and, on the proper construction of Clause 3.1, there is no obligation to pay a share of any fees earned by such instruction (RADCC para. 118(2));

(iv) the payment of "*Revenue Share*" in respect of 2B's investment would contravene the 1934 Act, so if Astra LLP and/or Astra UK were to make such payment they would be at risk of being held liable for aiding and abetting under s.20 of the 1934 (RADCC para. 118(3));

(v) accordingly, 2B's investment did not constitute an "*Eligible Investment*" for the purposes of Clause 3.1 of the Octave Contract (RADCC para. 118(4)).

464. Musst denies these allegations (ARDCC paras.111A, B and H) on the grounds that:

(i) Ms Galligan and Musst were not seeking to induce 2B to make the "*purchase or sale of a security*", but to induce it to appoint Octave to be its manager of a managed account (ARDCC/111A(b));

(ii) any breach of s.15(a)(1) is of no consequence because (i) in the event, 2B did not purchase a "*security*" but appointed Octave to be the manager of its account, and (ii) Musst's claim based on the 13 November 2012 meeting is alternative to its main claim based on the 4 December 2012 meeting or the original initiative of Mr Siddiqi (ARDCC/111A(c));

(iii) Musst was not seeking to induce 2B to purchase a security in other discussions; rather Ms Galligan knew from her past dealings with Mr Septon that his practice was to invest through a separate managed account, as opposed to purchasing an interest in funds, and he made this clear from the beginning (ARDCC/111B);

(iv) even if there was a breach of s.15(a)(1), this would not render Clause 3.1 or the other obligations in the Octave Contract unenforceable as a matter of US law and, even if it did, this would not entitle Octave to withhold payment (ARDCC/111B(3), 111H);

(v) by entering into the Octave Contract after the provision of a letter of comfort from US attorneys, SRZ, Octave represented and agreed that it would accept that confirmation that Musst did not require to be registered, in reliance on which Musst entered into the Octave Contract without removing clauses which might prejudice its rights or procuring the services of a US broker. Further, Octave and subsequently Astra kept fees from 2B, so it would be unconscionable and Astra is estopped by representation or convention from asserting otherwise (ARDCC/111C-G);

(vi) a risk of being held liable under s.20 of the 1934 US Act is insufficient to engage Clause 3.5 and withhold payment (ARDCC/111I);

(vii) by receiving and keeping the fees earned from 2B, Octave and Astra approbated the transaction with 2B and so are not entitled to reprobate it by withholding from Musst its agreed share of fees (ARDCC/111J).

(e) Musst's submissions

465. Even if Musst did act in breach of s.15 by introducing 2B, nothing in the Octave Contract entitles Astra to withhold payment from Musst merely on the footing that

Astra will be *"at risk"* thereby of being held liable for a breach, or aiding and abetting a breach, of a foreign law. In order to found an aspect of the defence of illegality, it is necessary to prove not just a mere *"risk"*, but that payment of the 20% share would contravene the law. It submits that there is no evidence that the payment would contravene the law. Even that, according to Musst, does not suffice, as mentioned below.

466. As to the clauses Astra relies on:

(i) Clause 5.2 requires compliance with all applicable laws, but it does not provide that if there has not been, that of itself entitles Astra to withhold payment of the 20% share (at least if Astra itself has received it and kept it). The most it would give rise to is a claim in damages, but no such damage has been alleged.

(ii) The same applies to clause 5.6 (which prohibits promotion where this is likely to contravene any law of any jurisdiction).

(iii) The same applies to clause 10.1 (by which Musst represented that it had obtained all authorisations required in connection with the agreement).

467. To establish liability for aiding and abetting under s.15 of the 1934 Act, it is necessary to show that the payer (i.e. Octave) acted *"knowingly or recklessly".* As noted above, Octave, in the course of the negotiations for the Octave Contract, required and obtained confirmation from SRZ on 17 April 2013 that Musst did not need broker dealer cover in relation to the 2B introduction. Further, the exchanges between the parties, and the internal correspondence from SRZ (and its US lawyers) to Musst, show that the firm view was taken that inducing a person to enter into a managed account was not to induce the sale or purchase of a *"security"*.

468. The test as to whether the 2B Contract is an *"investment contract"* and therefore a *"security"* within s.15 of the 1934 US Act is set out in the US Supreme Court's judgment in *SEC v Howey Co.* 328 U.S. 293 (1946). This emphasises that the phrase *"investment contract"* was used against the background of previous decisions by state courts which had applied the phrase *"to a variety of situations where individuals were led to invest money in a common enterprise with the expectation of profit solely through the efforts of the promoter or of someone other than themselves"*. Musst submitted that the test was not satisfied because: (1) 2B participated in the performance of the investment, and (2) on a plain and natural meaning of s.15, the US Supreme Court would not extend the meaning of investment contract beyond, at most, cases involving fraud.

469. As regards the first of those propositions, Mr Riely accepted that this background would be looked at by the Supreme Court were the facts of this case (i.e. the 2B Contract) to be considered [T10/197/5 to 198/8]. Further, he accepted, on *"solely"*, that the statement in *SEC v. Infinity Group Co.,* 212 F.3d 180 (2000) the question is *"whether*

the purchaser has meaningfully participated in the management of the partnership in which it has invested such that it has more than minimal control over the investment's performance" was a reasonable summary of the law [T10/203/1-22].

470. As regards the facts of the case in this regard, Mr Mathur's and Mr Holdom's witness statements are to the effect that: (a) neither Octave nor Astra owned or controlled the bonds or swaps in question, (b) The Observatory *"retained full visibility and control in respect of"* the managed account (emphasis in underlining added), and (c) it provided *"only limited authority to [Astra] as outlined under the relevant contracts"*. Further, information was provided to The Observatory on a day-to-day basis by email by records of trades, position statements with invoices setting out the loans, net asset value statements and reports setting out the prices of bonds: Mr Holdom's first witness statement paras. 9-10 and Mr Mathur's fourth witness statement at para.13.

471. Mr Riely referred to not eliminating the possibility that the 2B Contract was still an investment contract [T10/199/9 – T10/200/17], and that the court would look past the technical retention of control to see the economic realities [T10/201/16-20]. He accepted that each of the points set out in Mr Holdom's statement would be important and relevant factors in deciding what The Observatory's level of control and participation actually was [T10/204/20-T10/207/19] and [T10/210/10–T10/211/1]. Although he said that Mr Mathur's evidence on the point *"doesn't necessarily mean that they controlled the ultimate decisions"* [T10/209/16-24], he did accept that the fact that full control was retained, with only limited authority. This counted against the notion that The Observatory's participation was just minimal.

472. Musst submits that it follows from Mr Mathur's and Mr Holdom's evidence that 2B did participate in the management at least to some degree, and that it had more than *"minimal control"* over its investments' performance.

473. There is a conflict of authority in the federal courts, both at first instance and in the appellate courts [see T10/214/5-215/9], on whether the doctrine of *"vertical commonality"* applies (such as would cover the 2B Contract). Astra say that the judgments in the courts of New York have said that it does apply. Musst says that an overall analysis is that it should not apply based on other decisions and the fact that it has been applied only in cases of fraud, which this one is not.

474. It is common ground that a breach of s.15 does makes a contract voidable rather than void, to which the broker has equitable defences (see T10/236/7-19). It submits that on the facts of this case, Musst has a good defence in US law to a claim by Astra UK for the following reasons.

(1) The parties relied on proper professional advice, and 2B has not sustained any loss. (Mr Riely accepted that this would be "a good argument" for Astra UK against recission by 2B [T10/238/6-13]).
(2) Musst consulted with a lawyer, and although there is speculation [T10/240/22-241/16] there is no evidence that SRZ were not aware of the relevant facts in relation to the 2B introduction. (Mr Riely accepts that advice from lawyers, especially if apprised of all relevant facts, would be relevant [T10/242-3].
(3) It is inconsistent for Astra on the one hand to repudiate the transaction with Musst but then on the other to affirm it as against 2B and thereby

keep all the fees paid by 2B. (Mr Riely accepted that this would be relevant to the equitable analysis: [T10/241/17-242/10].)

475. Musst submits that save in cases involving fraud, a managed account is not a security within s.15 of the 1934 Act; and therefore no breach was involved by Musst in introducing 2B to Octave as a manager to manage its account for it. Mr Septon always made it plain to Musst that he was interested in investing only through a managed account.

476. Further, it is in any event submitted that, as pleaded by Musst, Octave and Astra are estopped from taking any point on illegality, because it is based on a mere risk of illegality (rather than actual illegality) and/or the parties acted on the shared understanding and/or a representation of Octave that there was no illegality on the basis of the SRZ letter, in reliance on which Musst did not obtain the broker dealer cover which it could have obtained had Octave insisted upon it: see paragraphs 111D-F ARDCC.

477. Further, by receiving and keeping (and indeed continuing to keep) the fees received from 2B, Astra have approbated Musst's introduction of 2B, so in any event they are not entitled at the same time to reprobate it on the basis that the transaction was not lawfully entered into (see paragraph 111J ARDCC): see for example, *Express Newspapers v. News (UK) Ltd* [1990] 1 W.L.R. 1320 at 1329E to 1330C where Browne Wilkinson J (as he then was) said:

> *"There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance."*

(f) Astra's submissions

478. Mr Riely first considers what is said to be the first issue, namely whether section 15(a)(1) has been violated by Musst. He opines that two forms of "*security*" under the 1934 US Act exist in this case: (1) the 2B managed account; and (2) the underlying bonds and swaps.

479. As to the first of these (managed account):

(i) Mr Riely refers to the definition of "*security*" in s3(a)(10) which includes "*investment contract*" and refers to the explanation in *Howey* above. This definition puts function over form and "*embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek to use the money of others on the promise of profits."*

(ii) Mr Riely explains that, when evaluating whether an investing agreement is an "*investment contract*", there is not uniformity on what "*common enterprise*" means. He says that many US courts: "*have modelled the concept of common enterprise around fact patterns in which an investor's fortunes are tied to the promoter's success*". This is known as "*vertical commonality*", in contrast to the term "*horizontal commonality*," *ie "the pooling of assets from multiple investors so that all share in the profits and risks of the enterprise*". However, he says that a few US courts have held that "*horizontal communality*" is required, and others accept both approaches (Riely para.8);

(iii) Mr Riely identifies the Federal Court in New York City as the most likely venue for an action, as that is where The Observatory is based and first met Mr Mathur (Riely para.9). He explains that these courts have consistently held that agreements for paid-for-performance managers like Astra to run a managed account and invest its funds in third party securities are themselves "*securities*" because they are "*investment contracts*". Mr Riely cites three New York authorities to support this: *In re Jeanneret Associates* 769 F. Supp. 2d 340 (S.D.N.Y. 2011), *Savino v EF Hutton & Co* , 507 F. Supp. 1225 (S.D.N.Y. 1981) and *Walther v Maricopa International* 1998 WL 186736 (S.D.N.Y. 1998). He explains that, doctrinally, these cases embrace "*strict vertical commonality"* whereby *"common enterprise"* is met *"when the fortunes of the investor are tied to the fortunes of the promoter".* Each case involved managed accounts said to be similar to the 2B Contract.

480. As to the second of these (underlying assets):

(i) Mr Riely states that these same decisions recognise that, irrespective of the "*investment contract*" concept, the 1934 US Act can regulate a separately managed account because of its holdings. Thus, in *Jeanneret* the court held that "*Madoff's purported buying and selling of securities is sufficient in itself to satisfy"* the *"in connection with the purchase or sale of securities*" requirement. And in *Savino,* the court held that the plaintiff's plea included "*securities*" because "*the common stocks and stock options that [the managers] purchased and sold for the accounts undoubtedly constituted* securities" (Riely para.10);

(ii) Mr Riely states that the Chief Master Marsh's order states that 2B's managed account held "*bonds and swaps*". Relevant to those assets, the 1934 US Act's definition of "*securities*" explicitly includes bonds and swaps (Riely para.11).

481. Mr Riely opines that a US court would be likely to conclude that the 2B's managed account comprised "*securities*" under the 1934 US Act. First, many US courts including the Federal Courts of New York, would consider the 2B's Contract itself a "*security*" because it provided for Octave LLP to manage the funds and be compensated in part by the account's profits, and is therefore an "*investment contract*". Second, any US court would conclude that the account's underlying swaps and bonds are securities, for these are paradigmatic securities under US law.

482. The Joint Thel/Riely Report states (at para 8) that:

(i) Prof Thel believes a US court would likely to conclude that the 2B managed account is not a common enterprise because the vast majority of court decisions have held that a managed account advised by an investment adviser is not a security and because (i) investment management arrangements are extensively regulated under other statutes, in particular the Investment Advisers Act (ii) a few cases have held managed accounts to be securities when fraud is involved and (iii) the cases decided by the district court for the Southern District in New York represent a minority of cases overall;

(ii) Mr Riely believes that a US court would be likely to conclude that the 2B managed account is a common enterprise for the reasons in his report and he notes that: (i) the investment manager for the 2B managed account had discretionary authority and was to be paid according to performance (ii) the Federal Court of New York have repeatedly embraced vertical communality and repeatedly found managed accounts to be "*securities*" on that basis; (iii) he disagrees with Prof. Thel's statement that the New York federal cases represent a minority view but, either way, the case law of the Southern District of New York is important; (iv) he does not agree with Prof. Thel's statements that the vast majority of decisions have held that a managed account is not a security or that this is the case because they are regulated under the Investment Advisers Act; and (v) he does not agree that the cited cases are entitled to less weight because they involve fraud;

(iii) as for the bonds and swaps within the managed account, Mr Riely believes that they are securities and Prof. Thel assumes that they are but believes that Musst did not serve as broker-dealer in connection with bond and swap transactions.

483. Mr Riely opines in his report (Riely paras.16-19) that:

(i) the 1934 US Act requires an investment professional to register as a broker or dealer if they "effect any transactions in, or induce or attempt to induce the purchase or sale of, any security." The concept of "effecting transactions in securities" has "been interpreted broadly" and the SEC take a case-specific "totality of

the circumstances" approach to evaluating whether an intermediary is a broker: see Cornhusker Energy Lexington, LLC v. Prospect St. Ventures, 2006 WL 2620985 (D. Neb. 2006) ("Cornhusker");

(ii) factors articulated by courts differ in particulars, but are broadly similar. Courts and the SEC emphasise the importance of the intermediary receiving "*"transaction-based compensation" like commissions or a share of management fees, which are the "hallmark of a salesman""* and go to the core concern of the 1934 US Act because they incentivize professionals to increase sales: *Cornhusker*;

(iii) each case is specific to its facts, but through lines emerge. At one end of the spectrum, an amateur "*finder*" who does no more than introduce two parties is likely safe from registration; but, at the other end, unregistered professionals who take an active role in shepherding an investment are frequently found to be in violation of the 1934 US Act. It is a matter of reviewing the specific conduct and experience of the funder, including their involvement, background, relationship to the issuer and compensation. Two paradigmatic examples are *SEC v Ranieri*, where an investment manager asked an unregistered intermediary to raise money for two investment funds and paid him a percentage of funds raised (where the violation of s15a was admitted) and *SEC v Kramer* where the defendant received commission for recommending family and friends (where the violation was not made out).

484. The submissions of Astra then moved on to what was called the second issue, namely whether the Octave Contract was unenforceable. Section 29 of the 1934 US Act provides:

> *"Every contract made in violation of any provision of this chapter or of any rule of or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship of practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract …".*

485. Mr Riely opines in his report (Riely paras.14-15):

(i) as interpreted by the courts, s.29 of the 1934 US Act means a contract is not automatically void, but instead invests in an "*innocent party*" the "*right to have it judicially set aside*": *Cornhusker*;

(ii) US courts therefore undertake a careful inquiry when a sponsor or issuer seeks to void a contractual obligation to pay an unregistered intermediary. The court first considers whether broker-dealer registration is required (see above). If yes, the court considers any equitable defences. If equitable defences are raised, the court generally considers whether the s.29 remedy is appropriate.

486. Mr Riely further opines (Riely paras. 20-21, 26-28):

(i) if a party seeking to void an obligation to pay an unregistered intermediary establishes that the intermediary violated s.15, the inquiry turns to whether the party has "*standing to seek rescission*". As the Supreme Court explained in *Salamon*, s.29's "*language establishes that the guilty party is precluded from enforcing the contract against an unwilling innocent party*".

(ii) these standards mean that US courts focus on the complicity of the party seeking recission in the underlying violation. Once again, this is a fact sensitive inquiry requiring an assessment of whether Astra were an "*unwilling innocent*" in any registration violation by Musst;

(iii) in evaluating the parties' positions, a US court would consider the parties' February to April 2013 dialogue about Musst's eligibility to solicit US investors, whether Octave would not agree to the Octave Contract unless Musst provided assurances via its US counsel and, even so, Octave's insistence on making compliance with the 1934 US Act a term of the Octave Contract;

(iv) when evaluating these events, a US court may consider whether the parties' intention regarding the Octave Contract's US law provisions was for Musst to bear responsibility for complying with the 1934 US Act.

487. In the Joint Thel/Riely Report, neither Prof. Thel or Mr Riely suggest that Astra is not entitled to seek the remedy or that Musst would prevail on equitable defences against rescission.

488. Then the submissions of Astra considered what was called the third issue, namely whether payments by Astra LLP or Astra UK would be at risk of being held liable for aiding and abetting a breach of Section 15 of the 1934 US Act. Section 20(e) of the 1934 US Act provides:

> *"any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided".*

489. Mr Riely, at paras. 31-33 of his report, relies on the decision in *Apuzzo*. The Second Circuit held that for a defendant to be liable as an aider and abettor in a civil enforcement action, the SEC must prove: (1) the violation by the primary violator, (2) knowledge of this violation on the part of the aider and abettor, and (3) substantial assistance by the aider and abettor. The court applied the test of "*substantial assistance*" in criminal cases of aiding and abetting as stated by Judge Learned Hand: "*that he in some sort associate[d] himself with the venture, that [the defendant] participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed.*" (at 212).

490. In the Joint Thel/Riely Report:

(i) Prof. Thel and Mr Riely agree that a party that hires an intermediary who is unregistered in violation of s.15 and pays them a share of management or performance fees as compensation, is at risk of being held liable for aiding and abetting (paragraph 19);

(ii) Prof. Thel and Mr Reily agree that a court would find Astra liable only if they "*knowingly or recklessly*" assisted a s.15 violation by Musst; and that, for this purpose, recklessness means "*conduct whereby the actor does not desire the harmful consequence but nonetheless foresees the possibility and consciously takes the risk"*;

(iii) Prof. Thel opines that it is almost inconceivable that a court would find Astra acted knowingly or recklessly in the light of SRZ's letter dated 17 April 2013. Mr Riely opines that this is not dispositive and points to the expansive potential of aiding and abetting demonstrated by *Ranieri.*

491. Astra submit that a US court is unlikely to find that Octave aided and abetted Musst to breach s.15 by introducing 2B. However, if the Court finds in favour of Astra on issue 1, Astra is at risk of being held liable for aiding and abetting under s.20 if it makes payment to Musst: see para. 19 of the joint report, and Astra also rely on the test applied in *Apuzzo*.

(g) Additional matter raised in Mr Thel's report: application of 1934 US Act

492. There was an attempt on the part of Professor Thel, at the conclusion of his report, to question whether the 1934 US Act applied to all given activities outside the United States. In the joint report at paras. 24-27, Prof Thel and Mr Riely agreed that some conduct leading to the formation of the 2B Contract took place in England and some conduct took place in the United States. In the event, this does not appear to be an issue here for consideration.

(h) Discussion

493. In my judgment, Musst's claim in relation to fees received from 2B is not barred for illegality. The reasons for this are as follows:

(1) The 2B Contract has not been shown to be an investment contract and therefore a security within section 15 of the 1934 US Act.

(2) A breach of section 15 would make the contract voidable rather than void, to which the broker has equitable defences and accordingly Musst has an equitable defence in US law to a claim by Astra.

(3) The case against Musst is that there is a risk of aiding and abetting under section 20(e) of the 1934 US Act, but it does not suffice that there is a risk of aiding and abetting: it must be shown that there has been or would be knowing or reckless assistance in a violation of the 1934 US Act.

(4) In any event, it has not been shown that there has been or would be (upon payment) a violation of the 1934 US Act.

494. It also alleged that there is an estoppel against Astra treating the investment as not an eligible investment or asserting that there was a contravention of the law, but this allegation is not made out.

495. Before considering these factors, it is necessary to consider a preliminary matter about the evidence adduced. There are two procedural points. First, the pleaded case referred to in sub-paragraph (3) above is that there is a risk of aiding and abetting, and it is not sufficient to base the case on a risk: the question is whether there was or would be a violation not whether there may have been or might be a violation, and a mere risk is not sufficient. This could be dispositive of this part of the case against Astra, so I have gone on to consider the issue whether there has been or would (upon payment) be a violation. This might go further than the pleading, but the relevant evidence is before the Court, and the issue should be dealt with.

496. Second, whilst it was denied that there was a breach of section 15 of the 1934 US Act, the written expert evidence was by reference to whether there was a common enterprise. However, in the course of the oral evidence of Professor Thel, he referred to what he called a fourth element of the *Howey* test, namely that the expectation of profit had to be solely through the efforts of the promoter [T10/125/1-127/19]. He said that whilst

he had not put it in his report, there may be a question as to whether this was entirely a discretionary account despite what the 2B Contract said. In detailed cross examination, it was put to Mr Riely that the profits may be coming not solely from Octave and Astra, but only partly from them [T/10/198/17 - T10/211/1]. In re-examination, Mr Riely gave further evidence about the meaning of control, that the key was which party was generating the profits [T10/247/17 – T10/248/18].

497. In final oral submissions, Astra relied on Professor Thel having previously agreed that the issue was about common enterprise and not adverting to the "solely" issue until oral evidence. In fact, there was relevant evidence before the Court in this regard from the experts, and the factual evidence was from Mr Mathur and Mr Holdom on behalf of Astra and was not controversial. In these circumstances, it is fair for the Court to consider the control issue, and it would be artificial to exclude it as an issue.

(1) The 2B Contract is not an investment contract

498. I apply the definition of an "investment contract" in *Howey* as set out in the section of Musst's submissions above. The evidence of Mr Holdom (first statement paras. 9-10, corroborated by Mr Mathur's fourth statement para.13) was as follows:

> *"It is important to note that, in contrast to the position with funds, Octave and Astra performed investment management services in respect of the Managed Accounts but at no point owned or controlled them or the bonds and swaps purchased within them. 10. Accordingly, The Observatory, LGT and their representatives retained full visibility and control in respect of the Managed Accounts. In addition, LGT retained at least one third party (NAV Consulting) to undertake on-going monitoring and both The Observatory and LGT appointed custodian banks for the Managed Accounts at which bonds and swaps purchased were held."*

499. Although the 2B Contract contained terms that the management was on a discretionary basis involving complete discretion, the effect of that evidence was that 2B participated in the performance of the investment, and therefore this was not the case that the expectation of profit was solely through the efforts of persons other than 2B. Mr Riely accepted that this evidence constituted important and relevant factors in deciding what The Observatory's level of control and participation actually was.

500. Mr Riely said in his evidence [T10/201/11 – T10/202/5] that:

> "Q. *Yes, but what do you say to my point about "solely". Because if you focus on the word "solely", it is plain that the profits are not going to come solely from the efforts of Octave and Astra. They are going to come partly from Octave and Astra, aren't they?*
> *A. Yes, so courts have dealt with the issue of an investor*

> *retaining some level of control, and what they have done is looked past the technical retention of control and looked to see what the economic realities of the situation are.*
> *Q. If we are dealing here with a very sophisticated investor indeed, that would obviously be a factor in favour of saying that the sophisticated investor is indeed retaining a reasonable degree of control over the account, isn't it?*
> *A. That would be a factor, yes.*
> *Q. Can I suggest quite a significant factor?*
> *A. It would be a factor but what actually occurred in the day-to-day management of the account would also be an important factor."*

501. Based on the evidence adduced by Astra, and the evidence of the experts, it is not established that the expectation of profit was solely through the efforts of Octave/Astra. I take into account the words of the 2B Contract, but the evidence was about the economic realities of the situation. On the basis of the evidence, it is more likely that 2B and at least one third party did participate in the management to some degree and that it had more than *"minimal control"* over its investments' performance. In the circumstances, it has not been shown that the 2B Contract was an investment contract, irrespective of the issue of whether there was a common enterprise.

502. On this basis, but also on the basis of the other factors which are against Astra's case and in favour of Musst's case, it is not necessary to rule on whether there was a common enterprise, part of the definition of an investment contract in *Howey*. As noted above, there is a conflict of authority in the federal courts, both at first instance and in the appellate courts on what a "*common enterprise*" means [T10/214/5 – T10/215/9]. There is a question as to whether the doctrine of "vertical commonality" applies. As noted above, there is not consistency in this regard because many court decisions (according to Professor Thel, the majority) have held that a managed account advised by an investment adviser is not a security, whereas there is a consistency of the courts of the Southern District of New York to contrary effect. Professor Thel says that the cases relied on by Mr Riely are limited to cases where the investment was obtained by fraud both of the introducer and the investment manager. Mr Riely says that the cases do not say that they hinge on fraud in finding a common enterprise, and so there is no distinction between a case with or without fraud. Attention is drawn to *SEC v Ranieri* which has been referred to as a case where fraud had not been established, but which Professor Thel regards as an *"outlier"*.

503. The parties are agreed that the question is, how would the U.S. Supreme Court resolve this conflict (see Dicey & Morris, 15th edition, at 9-020, note 17, and *Blue Sky One Ltd v. Mahan Air* [2010] EWHC 631 at para 88). Both experts accepted that the question could go to the Supreme Court: (T10/187/18-188/15, cf T10/222/18-223/1.)

504. I am impressed by the point of Professor Thel emphasising that cases of fraud are on their own. That is to be seen in the context of the *Howey* test being applied as (at p.298 of *Howey*) itself as "*a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek to use the money of others on the promise of profits."* When it comes to fraud, the law of

many countries is at its most flexible, without being unprincipled, in the fight against fraud. Further, as Professor Thel said, when the independence is broken between the introducer and the investment manager, there is no independent manager to make the decision to invest. However, since there are other routes to get to its conclusion without having to act as if this Court is the U.S. Supreme Court (a task not to be undertaken if not necessary) I prefer not to reach a concluded view.

505. In my judgment the 2B Contract does not satisfy the part of the test of having no more than *"minimal control"* over its investments' performance, but, in any event, there are other reasons to reject the defence which forms the subject of the sixth issue. It is to the other reasons why this defence is rejected that I now turn.

(2) Equitable defences

506. If there was a breach of contract, in US law, it is common ground that this gives rise only to a right to seek to avoid the contract if equity will allow this. It does not have as its effect that the contract is void. I accept the submission of Musst that the Court is likely in this case to prevent rescission from taking place on the following grounds.

507. Octave/Astra have enjoyed the benefit of the introduction of 2B, which they have not sought to surrender. This is related to the concept of blowing hot and cold in a broader sense than the concept of election embodied in the doctrine of approbation and reprobation. It is inequitable for Octave/Astra to take the benefit, and then to refuse to pay the agreed fees for receiving the benefit. Mr Riely accepted that this would be a relevant factor as a bar to rescission. Mr Riely accepted that this would be relevant to the equitable analysis, albeit that a part of the balance would be whether Octave was getting what it bargained for, namely that the services complied with US law [T10/241/17 - T10/242/10].

508. Octave/Astra have acted in good faith at the time by taking advice before entering into the Octave Contract. There was no reason to believe that the advice was not correct. The advice was accepted by both Octave and Musst at the time, and 2B has not sustained or alleged any loss. Mr Riely accepted that this would be *"a good argument"* for Astra UK in respect of the 2B Contract. This is an extract of what he said in oral evidence, namely:

> *"Q But even if they could theoretically show that, surely Astra would have a perfectly equitable defence to the effect they acted in good faith, they had acted in reliance on advice, and there was no faint suggestion that 2B had suffered a penny or a dime's worth of loss. Wouldn't that be a good equitable defence to a claim for rescission?*
>
> *A. That would be −− that correctly would be Astra's argument. I'm sure there would be arguments on the other side.*
>
> *Q. But it would be a good argument, wouldn't it, by Astra? That argument would be a good argument?*

> *A. So in −− if you're asking me to accept all of the facts included in the question, then it would be a good argument that they acted in good faith along the way."*
>
> [T10/237/24 – T10/238/13].

509. Mr Riely accepted that advice from lawyers, especially if apprised of all relevant facts, would be relevant [T10/242-3].

510. As for the speculative suggestion [T10/240/22-241/16] that full instructions were not provided, there is no evidence that SRZ was not aware of the relevant facts in relation to the 2B introduction.

511. In my judgment, there are no countervailing indicators which have any real prospect of tilting any balance against the equitable defence. For example, the suggestion that Octave was not getting what it bargained for, namely compliance with US law, does not carry much weight, absent loss. It bargained for business obtained for it, and it is likely that it has enjoyed large sums from the relationship from 2B.

512. There were terms of the contract about compliance with US law. They would sound in damages, but there is no evidence of even an allegation of breach by 2B, let alone any loss being suffered by Octave/Astra. In all the above circumstances, taking into account the assistance of both Professor Thel and Mr Riely, I am satisfied that the equitable defence would succeed.

(3) Risk of aiding and abetting not sufficient to give rise to a defence

513. As said before, on a proper construction of the Octave Contract, the central provision is clause 3.5, but this does not entitle Astra to withhold payment from Musst merely on the footing that Astra would be *"at risk"* of thereby being held liable for a breach or aiding and abetting a breach of foreign law. Payment under this clause can be withheld only if it *"would contravene"*, not just *"might contravene"* the 1934 Act.

514. Even if the Court had found that Musst did act in breach of s.15 by introducing 2B, nothing in the Octave Contract entitles Astra to withhold payment from Musst merely on the footing that Astra will be *"at risk"* thereby of being held liable for a breach, or aiding and abetting a breach, of a foreign law. As to the clauses Astra relies on:

(1) Clause 5.2 requires compliance with all applicable laws, but it does not provide that if there has not been, that of itself entitles Astra to withhold payment of the 20% share, especially where Astra itself has received it and kept it. It might give rise to a claim in damages, but there has been no damage and no damage has been alleged.
(2) The same applies to clause 5.6 (which prohibits promotion where this is likely to contravene any law of any jurisdiction). It is not sufficient where there is a risk of being held liable for breach.
(3) The same applies to clause 10.1 (by which Musst represented that it had obtained all authorisations required in connection with the agreement).

515. As to clause 3.5, in order to come within this, it is not sufficient that there is a mere risk that payment of the 20% share *"would contravene any law…"*. It would be necessary for the payment to contravene the law.

(4) Payment as a knowing or reckless breach?

516. As I have indicated, despite the way in which the case has been put by reference to risk, I should consider whether a payment would contravene the law if the 2B Contract were to be treated as an investment contract. In my judgment, even if it were the case that the 2B Contract were to be treated as an investment contract, I do not accept that a payment by Astra to Musst would contravene the law. The suggestion is made for Astra that even if there was no knowing or reckless breach at the time of the 2B Contract, at this stage, the payment would amount to a knowing or reckless breach. It is suggested that this point is accepted in the joint experts' report at para.19 which reads as follows:

> *"We agree that a party who hires an intermediary who is unregistered in violation of Section 15, and pays them a share of management or performance fees as compensation, is at risk of being held liable for aiding and abetting the Section 15 violation—provided that the legal test for aiding and abetting liability under Section 20 of the 1934 Act is otherwise satisfied."*

517. This does not support the proposition that the payment would amount to a knowing or reckless breach. The proposition in paragraph 19 is upon the premise that the legal test for aiding and abetting liability under section 20 of the 1934 Act is otherwise satisfied. If in fact there was no knowing or reckless breach at the time of the 2B Contract because of taking the legal advice, the legal test would not be otherwise satisfied. Second, (and possibly a different way of expressing the same thing as the first point) a payment made subsequently, that is after the Octave Contract and following the introduction would not be to effect *"any transactions in, or to induce or attempt to induce, the purchase or sale of, any security"*. It would simply be a reward after the event for the introduction. A knowing or reckless breach either at the time of the 2B Contract or thereafter is not established.

(5) Estoppel

518. Although the facts come close to amounting to a shared assumption that the performance by Musst does not require registration of the contractual investment of 2B, I am not satisfied that an estoppel by convention or an estoppel by representation are made out. The context of the letter of comfort could be understood as follows. Octave was saying *"we will not proceed without a letter of comfort because we do not wish to expose ourselves to liabilities."* This does not mean that Octave was necessarily saying that the various terms of the contract requiring an investment not to contravene the law were to be modified. In particular, if notwithstanding the letter of comfort, the investment was not regarded as an Eligible Investment due to payment of the Revenue

Share contravening the law, there is no clear and unequivocal promise that the agreement to accept the letter of comfort overrides those words. That being the case, the estoppel by representation and estoppel by convention are not established.

519. As for the suggestion that Musst is approbating and reprobating, I am not satisfied that this founds the equivalent of an estoppel for the same reasons as the previous paragraph. The premise of the argument is that at the point of the transaction with 2B and the Octave Contract, it believes that there is no contravention. Years later, when it comes to payment, it asserts that there is a contravention by the payment itself. If that is true, it has in particular Clause 3.5 to deal with that, the consequence of which is (according to Astra) that the investment is not to be treated as Eligible Investment and so no payment would be due. In fact, the answer is in the paragraphs above such that the payment of the Revenue Share does not contravene any law. Further and in any event, the broader concepts of the inequity of having the benefits of the introduction without having to pay the fees for the introduction still resonate in connection with the equitable defences.

(i) Conclusion

520. In view of the success on the primary arguments (estoppel being an alternative secondary argument) I am satisfied for all of the above reasons that this defence based on an alleged contravention of US law is not well founded.

XXI The Defamation Claim

521. It is convenient to set out the factual analysis of the Defamation Claim separately from the Contract Claim despite the fact that the facts of the two claims are intimately connected in time and in content. They nevertheless give rise to different claims. The Defamation Claim is brought by Astra, and it is against Mr Siddiqi in addition to Musst. The alleged disparaging remarks are also relied upon as a defence to the Contract Claim on the ground that it is said to be a ground for termination of the Octave Contract. In one sense, it is logical to complete consideration of the Contract Claim before going on to the Defamation Claim. However, since there is a large overlap between the two claims, it makes sense to consider the Defamation Claim first and then to revert to the Seventh Issue in the Contract Claim.

(1) The facts

(a) Introduction

522. Although a number of allegedly similar statements are alleged to have taken place, the Defamation Claim relates to a single conversation in the Rome Conference on 23 June 2016 between Mr Siddiqi and Mr Plotke of LGT. Mr Glen in his final closing submissions for Astra referred to the question of whether the Statements were made as being the *"first and primary issue of dispute between the parties"*. Mr Glen referred to *"diametrically conflicting factual accounts"* of what took place at the Rome conference on 23 June 2016 between Mr Siddiqi and Mr Plotke. The second issue is the correct

approach to the issue of serious harm and damage for the purpose of the malicious falsehood claim and the evidential issues in this regard. There were issues other than publication and damage, but rightly the parties concentrated especially on publication and damage in the closing submissions.

523. There is a related issue as to whether there was a breach of contract on the part of Musst. The clause of the Octave Contract required Musst not to disparage, slander, comment maliciously or make any accusation whatsoever against Octave or its affiliates. Whether the precise words complained of were used, the breadth of the concept of disparaging statements was such that Musst might have been in breach of contract due to what was said by Mr Siddiqi.

(b) Background to conversation of 23 June 2016

524. There is a background to the conversation. LGT was one of Astra's most important investors. It is important to consider the background because Astra say that the concerns which Musst entertained about the Defendant at this stage provides a motive for Musst to make disparaging remarks in connection with Astra especially to LGT. This makes it more likely, Astra submit, that Musst did make the remarks, and the less likely that the anodyne account of Mr Siddiqi of the conversation was correct. Further, a false denial would raise obvious question marks as to what did take place.

525. On 13 June 2013, the Crown Contract had been entered into between Crown and Octave LLP, as set out in detail above. On 5 September 2014, Astra LLP entered into the Second Crown Contract with Crown. There were further Crown Contracts. On 1 December 2014, Astra LLP entered into a further Trading Advisory Agreement with Crown acting for Crown/AAM/2 Segregated Portfolio. On 30 March 2016, Astra UK subsequently entered into its own Trading Advisory Agreement with Crown (the Third Crown Contract).

526. Astra UK was paid by way of advisory or management fees (ranging from 0.75% to 2% per annum). In addition, success or performance fees (20% for Crown AAM) became payable to Astra by Crown when money was redeemed from the accounts. The latter fees were calculated by reference to a percentage of the return which Astra achieved on the investment, subject to performance hurdles being met.

527. As regards performance fees, in 2015 and 2016 there was the prospect of performance fees crystallising in respect of the Crown and 2B contracts. Neither Crown nor 2B chose to redeem their investment at the end of the initial three-year period (during which they were unable to redeem) and therefore the question arose as to whether and when the fees might crystallise in the future. The performance fees were of importance to the finances of Musst, Mr Siddiqi and Ms Galligan.

528. In March 2016, Mr Mathur informed Mr Siddiqi and Ms Galligan that commission payments would shortly be coming to an end. No fees were paid from May 2016 onwards, and there ensued discussions over the next 6 weeks between the parties about the entitlement to fees. Musst expressed concerns about the financial consequences of no further payments. On 14 June 2016, Mr Siddiqi and Ms Galligan attended a meeting

with Mr Mathur, and an internal note of it was taken by Ms Galligan and circulated internally within Musst by email on 17 June 2016.

529. During the course of the meeting, the evidence of Mr Siddiqi is that Mr Mathur said that despite him continuing to receive fees from the two investment funds 2B and Crown/LGT, he would no longer be able to pay Musst its percentage of management fees. The reason given was that he had cashflow problems and that staff were upset that Musst was being paid so generously. Mr Mathur went on to say that he had received redemption requests from two other investors, Mr Chandaria and Mr Edwards. He told Mr Siddiqi and Ms Galligan that after that, the only other investors and assets which remained were Crown and 2B and that the latter was only paying fees on a diminished account: see fourth statement of Mr Siddiqi at para. 91.

530. It is clear from the note of that meeting that Mr Siddiqi and Ms Galligan were concerned that Mr Mathur was *"emotionally volatile"* and that any next steps would need to be carefully managed. They were also asked not to mention the situation to the remaining investors, including LGT and that Mr Mathur did not want the remaining two to put in redemption requests at that stage.

531. Astra say that the fact that investors were seeking to redeem their investments at the end of the initial three year *"lock up"* period did not come as a surprise to Mr Siddiqi or to Ms Galligan. This was expected and had been part of the original investment proposal: Mr Siddiqi's fourth witness statement at para. 93. However, the sudden refusal to pay money did come as a shock and Mr Siddiqi decided to call Dr Chander for advice: he had introduced him to Mr Mathur. There is a dispute as to what was said during the course of that phone call. Dr Chander says in his witness statement that he did not wish to get involved in any dispute between Mr Mathur and Mr Siddiqi. He says that he hoped *"they would resolve matters amicably"*. Mr Siddiqi's recollection of the phone call is that Dr Chander expressed surprise that Mr Mathur was acting in this way and offered to assist in an informal *"mediator"* role in an attempt to resolve matters amicably: see Siddiqi's fourth witness statement para. 95.

(c) The June 2016 Goldman Sachs Hedge Fund Conference in Rome

532. The Rome conference was the annual Goldman Sachs Hedge Fund Conference in Rome, Italy. Mr Siddiqi and Ms Galligan attended it between 21 and 24 June 2016. While travelling on a bus on the way to the dinner reception on 22 June 2016, Mr Siddiqi and Ms Galligan bumped into Mr Plotke. He was attending the conference that year without Mr Rigter. There was a brief conversation on the bus, during which they all agreed that Astra had done well with LGT's investment. According to the evidence of Mr Siddiqi, Mr Plotke mentioned the investment with Astra in superlative terms to another attendee on the bus, Tom Cahill: Siddiqi fourth witness statement para. 102.

533. On 23 June 2016, Mr Siddiqi said that he again bumped into Mr Plotke and Mr Siddiqi during a coffee break in the morning session at the conference. They agreed to have a quick lunch together at the pool restaurant at 12.45pm. Mr Plotke was concerned about lengthy queues for taxis and making his flight in time. The lunch was therefore a quick affair, lasting only around 40-45 minutes: see fourth witness statement of Mr Siddiqi at paras.106-7.

534. The only direct evidence of the conversation which took place at the Cavalieri Hotel on 23 June 2016 between Mr Plotke and Mr Siddiqi comes from Mr Siddiqi. Mr Plotke has not provided any witness statement in these proceedings. There were no other conference attendees present. Mr Rigter was not present at the conference, contrary to the case of Astra as originally pleaded.

535. Mr Siddiqi's evidence is that the topics of conversation included small talk about the finance course Mr Plotke was taking, his family, wife and home. They then spent about 20-25 minutes discussing the markets in general terms. Mr Plotke and Mr Siddiqi spent the final five minutes of their lunch, while Mr Plotke was waiting for the bill and about to get a taxi to the airport, discussing LGT's investment in Astra's synthetic asset-backed strategy ("ABS") via their Crown vehicle: see Mr Siddiqi's fourth statement paras. 109-112.

536. According to Mr Siddiqi's evidence, he mentioned that he thought the ABS had done well and LGT would be happy with how it had performed. However, he said that it would not continue to maintain the level of excellent performance that it had in the past, but that this was no surprise – it was an inevitability in the current market: see Mr Siddiqi's fourth statement at para. 115. Mr Plotke indicated that he intended to continue with the investment and that, as he was the analyst, he had received some credit for having sourced it for the organisation.

537. According to Astra (who are the claimants in the Defamation Claim), Mr Siddiqi made the statements which form the subject of the Defamation Claim during his lunch on 23 June 2016 with Mr Plotke a senior analyst and portfolio manager at LGT, and LGT's primary liaison with Octave and subsequently with Astra.

538. Astra's case (Amended Particulars of Claim para. 6) is that Mr Siddiqi made the following statements to Mr Plotke on 23 June 2016:

a. '*Astra is a sinking ship'*.
b. *'Astra does not have enough money to pay its staff*'.
c. *'Anish* [Mathur] *is a one trick pony*'.
d. 'All Astra's investors are pulling money out and Crown should get out while it can. Don't be the last man standing.'

(the 'Statements')

539. Astra say that the decision of Mr Siddiqi to publish the Statements was driven by a desire to provoke LGT into redeeming Crown's investments under Astra's management to trigger the premature payment of performance fees in respect of then Crown AAM account. This would in turn allow commission payments to become payable which form the subject of the Contract Claim.

(d) The evidence in support of the Statements

540. Astra do not have evidence from Mr Plotke to which further reference will be made in due course. However, they rely upon evidence from Mr Albertus Rigter, a partner and member of the Investment Committee at LGT until 2019, as well as the Co-Portfolio Manager of various Crown investment funds controlled by LGT. He was the line

manager of Mr Plotke at LGT, but since 2019, he has worked for Astra. His evidence is that upon the return of Mr Plotke from the Rome Conference, Mr Plotke submitted a report of the conversation which he had had with Mr Siddiqi. The conversation was *"sometime in June 2016"*. At para. 20 of his witness statement, he related each of the Statements.

(e) Statements on other occasions

541. Astra also rely on other similar allegations being made by Mr Siddiqi on other occasions not as the subject of further claims, but as evidence of the likelihood that the Statements were made. Astra say that what was said on the other occasions comprised words to like effect, and that they show an intent of Mr Siddiqi to defame and disparage Astra. They rely on an approach from Mr Siddiqi to Mr Rigter at a previous conference where he is alleged to have said that Mr Mathur was a *"one trick pony"* and "*implied*" that now was a good time for LGT to get out of its investment with Astra: see para. 19 of the witness statement of Mr Rigter. Dr Chander gave evidence of a chance meeting in the underground on 23 June 2017 when Mr Siddiqi said that Mr Mathur was *"unreliable"* and had a *"dark side"* and he also used the expression *"one trick pony"* and that Astra was a *"sinking ship"*. There were also related to Mr Mathur, according to his evidence, instances of reports of what Mr Siddiqi had said, namely: (a) on 7 July 2016, Mr Septon related to Mr Mathur that Mr Siddiqi had made *"inappropriate statements about Astra"*, and he asked if anything was wrong, and, (b) another investor mentioned that he had heard similar disparaging remarks to *"one trick pony"*.

(f) Conversation with Mr Rigter

542. Reference was made to a conversation of Mr Siddiqi with Mr Rigter before the Rome Conference in 2016. Mr Rigter's evidence as to what was said does not correspond with what is pleaded at paragraph 5.2 of the Reply. The Reply alleges that Mr Siddiqi alleged: *"in identical terms to the words complained of that Mr Mathur was a 'one trick pony' and that 'maybe it is a good time to get out'".* Paragraph 19 of Mr Rigter's witness statement makes clear that he does "*not recall exactly what was said*" although he does say that Mr Siddiqi used the phrase *"one-trick pony"* in relation to Mr Mathur.

543. Even if Mr Rigter took there to be an *"implication"* that it might be time for LGT to "*get out of its investment with Astra*", there is nothing inherently disparaging about that suggestion. The three-year lock-up period was almost at an end, and other redemptions were likely (and entirely normal). However, the basis of the *"implication"* cannot be tested because Mr Rigter does not recall what exactly was said which apparently implied this. Again, despite this apparently being reported further within LGT, there are no records or notes which have been disclosed of what was said. It does not appear that it was raised with anyone else at the time, or at the meeting in July 2016 when he says that he told Mr Mathur of the statements set out at paragraph 20 of his witness statement.

544. Further, the reference to an *"implication"* that LGT should redeem its investments is not the same as suggesting they *"get out now"* so as not to be *"the last man standing"*. Mr Rigter's statement does *not* allege that Mr Siddiqi spoke in *"identical terms"* to the words complained of. Mr Rigter's evidence, many years later and without the benefit of any contemporaneous note or record, should be viewed with caution. There is no ability to contextualise the words without knowing the words that was said. Further, there is a considerable risk of contamination, as a consequence of subsequent discussions about the statements in issue in these proceedings.

545. Astra have not expressly pleaded either in its Amended Particulars of Claim or in its Reply (served in 2020) the subsequent conversation between Mr Siddiqi and Mr Rigter in November 2016 in support of its case on publication. This is a factor to be borne in mind when considering the weight to attach to this conversation as evidence that the words complained of were spoken in June 2016.

546. Mr Siddiqi sent an internal email summarising his conversation with Mr Rigter in November 2016. His account was that Mr Rigter had asked him about his conversation with Mr Plotke in Rome and Mr Siddiqi had replied *"All I had said to Ralf (sic) was LGT were the last remaining investor and since Musst was integral to the deal construct and coupled with our fiduciary responsibility to LGT, we knew Shamil had redeemed and 2B was in the process of redeeming."* The point is made by the Defendants that if the conversation of 23 June 2016 was as entirely as per the evidence of Mr Siddiqi, it would not have been recalled five months later. That is a point of comment, but it does not bear out the construction that the conversation must have involved disparaging remarks. The email records that Mr Siddiqi was not negative about Astra. Mr Rigter disputed the accuracy of *"some"* of the contents of that email but does not say what, other than that he and Mr Siddiqi had not known each other for "*a near-decade*". Mr Rigter does not bring up any allegedly disparaging statements, nor does he suggest that such statements were made. Mr Rigter's witness statement at para. 28 is carefully worded in relation to the November 2016 encounter and is silent as to what exactly was said, and the context of the discussion.

547. It was suggested to Mr Siddiqi that his account of what he told Mr Rigter he said was *"tantamount"* to saying that *"Astra's investors were pulling their money out … don't be the last man standing"* [T5/230/8-14]. Mr Siddiqi explained that this was not the case: it was not a reference to *all* of Astra's investors, but to that particular strategy. Mr Siddiqi's evidence was that his email was not clear that he was explaining the position as of June 2016 or November 2016 [T5/230/15-19; 232-234]. Mr Siddiqi's explanation was credible; what was said in the internal email of 30 November was not a disparaging comment of the sort alleged in the Defamation Claim. It does not suggest that Astra cannot pay its staff, that Mr Mathur is a *"one-trick pony"*, or that the business is about to *"go under"* so LGT should *"get out while it can"*. I accept the submission that this does not enable the Court to draw an inference after the fact as to what was said during the lunch in Rome in June 2016, still less that the disparaging words alleged were used.

548. Nevertheless, Astra submit that there was an obvious question why Mr Rigter and LGT would have taken the measures that they did, as described in paragraphs 22-24 of Mr Rigter's witness statement, if something serious had not been said about Astra shortly before the 7 July. He says that he carried out an on-site due diligence exercise on Astra and used a pre-arranged meeting for this purpose. He says at para. 24 that he and Mr Plotke asked: *"detailed questions of Mr Mathur and Dr Adler about the business,*

portfolio, new investment opportunities and the overall performance". Mr Rigter was broadly satisfied with the answers, and he reported this to the next meeting of LGT's Investment Committee. These were referred to as *"extraordinary measures"* in the concluding oral submissions for Astra. In my judgment, this characterisation is not justified. There is nothing from that description to show that the questions that were being asked were significantly greater than a routine current updating about the investment and current performance. If, in fact, the Statements had just been made, one would have expected a real escalation including questions in writing, requiring written responses. It is also difficult to see how Mr Rigter and Mr Plotke would have been satisfied by information provided orally in this way, without wishing to go through precisely what had been said. Far from demonstrating a likelihood of disparaging remarks, this evidence undermines rather than supports the case of Astra. It also dovetails with the failure on the part of Musst to confront Mr Siddiqi with the allegations as soon as they were reported on 7 July 2016. It therefore calls into question whether the Statements were reported in the manner alleged, and whether the Statements were made in the terms alleged.

549. While Mr Siddiqi denies that he spoke the words complained of or words materially the same, *even if* something was said which prompted the additional scrutiny at the meeting on 7 July 2016 (which was arranged before the alleged words were spoken and lasted, according to Dr Adler, 1-1.5 hours [T8/110/2]), this does not suffice to discharge Astra's burden in respect of publication. It does not assist the Court in its task of determining – with a degree of precision – what was said on 23 June 2016. Mr Rigter could give no evidence as to the context in which the words were apparently spoken, or whether Mr Plotke reported them in full. There is no contemporaneous note or recording that assists in that task. Musst therefore had no opportunity to test these crucial aspects of the evidence.

(g) The Chander Statement

550. There is also evidence from Dr Chander who gave evidence about being approached by Mr Siddiqi when both were boarding a tube on 23 June 2017. Astra do not rely upon this as a slander, but upon the correlation between the terms which Mr Siddiqi used on that occasion to describe Astra and Mr Mathur and the Statements. Dr Chander says that it was said that Mr Mathur was *"unreliable"* and had a *"dark side"*, and that Mr Siddiqi used the expression *"one trick pony"* and claimed that Astra was a *"sinking ship"*.

551. Mr Siddiqi himself admits seeking out Dr Chander when he saw him at Green Park station on 23 June 2017, and that he sought to enlist the assistance of Dr Chander to exert influence over Mr Mathur to pay fees which he considered were due to Musst. He did believe that Mr Mathur was unreliable and that he had a dark side: see the fourth statement of Mr Siddiqi para. 184.

552. The evidence of Dr Chander was unsatisfactory. He was a defensive witness who found it difficult to engage with the question and answer process. He said that he was a friend of both Mr Mathur and Mr Siddiqi, but he seemed much closer to Mr Mathur. They worked together at Deutsche Bank and were connected through Apeiron Securities. After the statement, he claims that he immediately reported his conversation with Mr

Siddiqi (although not the details) to Mr Mathur, but he did not take them up with Mr Siddiqi. This did not seem the action of a neutral party. There was no contemporaneous note about the meeting in the tube. The evidence did not feature in the pre-action correspondence in 2017, nor in the pleadings before amendment. He made his first statement in October 2018, that is more than one year after the conversation. There is no plausible reason for the delay in committing to writing the precise words alleged to have been spoken until 2018.

553. The submission that strikingly similar words were used to Dr Chander as to Mr Plotke does not carry weight. In the light of the above findings regarding the partisan approach of Mr Mathur and Mr Murray, and the way that the other witness statements were prepared as regards the words complained of in the Statements, it is probable that Dr Chander was aware of the precise words *complained of before* he wrote his witness statement, which contaminated his recollection of events that had taken place some considerable time earlier, and in respect of which he has no written note. If the words which he said in 2018 had been said on 23 June 2017, namely *"one trick pony"* and *"sinking ship"*, he would have in all probability related those words in 2017. The fact that he did not made it likely (despite his evidence to the contrary) that he was shown these words by Astra: see [T11/77/6-21]. I therefore find that nothing in connection with Dr Chander makes more likely that the offending words were said on 23 June 2016 to Mr Plotke.

(h) The dinner with Mr Septon

554. As regards the dinner with Mr Septon of 7 July 2016, in the course of which Mr Septon suggested that Mr Siddiqi '*had made similar inappropriate statements about Astra*' and '*asked me if there was anything wrong*' (Mr Mathur's fifth witness statement at para. 147), this does not provide any confirmation of the words alleged to have been said to Mr Plotke. On the contrary, Mr Mathur accepted that he passed on Mr Septon's complaints to Mr Siddiqi before the 13 July meeting but alleged that Mr Septon asked him to do so [T7/147]. This begs the question as to why, if he was prepared to pass on the comments of Mr Septon, Mr Mathur did not also pass on the comments of LGT on 13 July 2016. Mr Mathur was unable to give a proper explanation why his allegations on 13 July 2016 fail to mention even the gist of what was allegedly said to LGT. It is not credible to suggest, as Mr Mathur did, that he did not put even a gist of the allegations to Mr Siddiqi because he did not wish to confront him, but to make him stop making disparaging statements. If that were the true position, then there was all the more reason to let Mr Siddiqi know that he had been found out [T7/147-158].

(i) Another unnamed investor

555. A further instance seemingly relied on by Astra is that another of Astra's European investors mentioned that "*he had heard similar disparaging statements to* "*one-trick pony*" *from Saleem"* prior to 7 July 2016 *but* declined to get involved as he was only interested in informing him "*who my friends are and who are not"*: see Mr Mathur's fifth witness statement at para. 150. This contains either no or minimal detail, not providing information as regards the recipient of the information, the identity of the person, the context of the discussion. It provides no opportunity to Mr Siddiqi to defend

himself. It provides no basis for confirming what might have been said on another occasion.

556. It was alleged for the first time in cross examination of Mr Siddiqi that he had made further disparaging remarks about LGT to Luc Huyghebaert, when seated at a lunch at the Rome Conference in 2016. This is not part of Astra's pleaded case, but was said to be because in a witness statement, Mr Siddiqi had mentioned Mr Huyghebaert. Mr Huyghebaert is connected with Astra, having been listed on their website in 2015 as a salesman [T5/195/22-25]. He also had an investment fund with Astra [T5/195/14-21]. It was put to Mr Siddiqi that he must have made disparaging remarks to Mr Huyghebaert, otherwise Mr Siddiqi would not have brought up his name during the 13 July phone call. It was submitted by Astra that so anodyne was Mr Siddiqi's account of the conversation with Mr Huyghebaert that he would not have had any concerns about Astra. It followed that something must have been said by Mr Siddiqi to the effect that Astra was in danger of collapse, and he needed to take urgent steps to protect his investment.

557. It is not pleaded by Astra that such remarks were made. There is no evidence from Mr Huyghebaert about this. There is no proper basis upon which to infer that Mr Siddiqi either repeated the words complained of or made substantially the same remarks to him at lunch. Mr Siddiqi denied that he made disparaging remarks, but he did refer to the investment with Astra and he said that "*we seemed to be getting to the end of the journey with Astra on the synthetic ABS strategy*", referring to the expiry of the 3-year lock-up period. Instead of adducing evidence, the case that Mr Huyghebaert was anxious about the safety of his investment due to what he had been told by Mr Siddiqi is a case based on speculation and conjecture, and not inference. This non-pleaded case neither establishes that disparaging remarks were made by Mr Siddiqi to Mr Huyghebaert, still less that the Statements which were pleaded were made by Mr Siddiqi to Mr Plotke.

558. Musst's position is that Mr Siddiqi did not make the Statements. The conversation in relation to Astra was brief, and confined to the synthetic ABS, as those investments were coming to the end of the three-year lock up period. At no stage did Mr Siddiqi advise that LGT should redeem its investment: Mr Siddiqi's fourth statement at para. 118.

(j) Subsequent events

559. On 27 June 2016, Mr Siddiqi and Ms Galligan met with Mr Mathur at Astra's offices. Mr Siddiqi sent a contemporaneous note of the conversation by email the same day, which documents that, as part of a discussion about a *"solution"* to the non-payment of fees, Mr Mathur wanted: *"LGT to transfer assets to another low vol vehicle. When the transfer is paid made [sic] fees will crystallise."*

560. On 28 June 2016, Mr Siddiqi followed up on his conversation with Mr Plotke by email. The email referenced the result of the Brexit Referendum, and a book recommendation. Mr Siddiqi also sought to set up a time to follow up on their discussion by phone in the coming days. In the event, the call was delayed, and subsequent email correspondence made reference to the distraction that the outcome of the referendum was having and the impact on the markets. There is no reference to Astra or of any concerns in relation

to LGT's investments with Astra in the subsequent emails between Mr Siddiqi and Mr Plotke.

(k) Conversations on 7 July 2016 and Mr Murray's note

561. Mr Mathur says that Mr Rigter and Mr Plotke told him at a meeting on 7 July 2016 what Mr Siddiqi had said in Rome on 23 June 2016. The discussion started at the offices of Astra and ended in the Anthologist public house where Mr Mathur relates that Mr Rigter informed him about the Statements: see the fifth witness statement of Mr Mathur paras. 143-147 and the third statement of Dr Adler paras. 26-29. The Statements are set out word for word the same in both statements and in accordance with the Amended Particulars of Claim.

562. If the Statements had been related in the terms alleged on 7 July 2016, it defies commercial logic that Mr Mathur did not confront Mr Siddiqi with the evidence immediately, if only to prevent the repetition of the Statements. Mr Mathur was unable to explain why he waited so long before getting the defamatory words on the written record when it was obviously important to do so as soon as possible [T7/185]. The oral evidence of Mr Mathur bears more extensive reference. It went as follows:

> *"Q: Surely you would have appreciated, Mr Mathur, that the sooner your solicitors can get on to the record in writing an allegation relating to an oral conversation, and precisely what was said in that conversation, the sooner you do that the better, actually?*
>
> *A. I didn't know actually.*
>
> *Q. Well, it is obvious?*
>
> *A. Not to me. But okay.*
>
> *Q. I suggest to you that it would have been obvious then that if you are relying on slanderous statements of which there is no actual record then the sooner you get these statements on to the record, the better your case is, if ever you need to prove it later. That's right, isn't it?*
>
> *A. I am enlightened now but I didn't know that before.*
>
> *Q. I suggest you are a highly intelligent man and it would be absolutely obvious to you that it would be a good idea to get these statements in writing as soon as possible.*
>
> *A. I am an intelligent man, I accept that. But the point is I had no intention of following it through, through a litigation, at that point of time. I told my solicitors I would like to stop, please do whatever you can in your power without identifying the identity of the investors to make it stop."*

563. I do not take this evidence at face value. A man of the intelligence of Mr Mathur would know how important a written record was. He is, on his own evidence, experienced in litigation [T6/57:10 – 6/59:5]. In any event, Astra employed a lawyer in house, namely Mr Murray. Further, Astra were already in a dispute with Musst in respect of the contractual dispute. It is therefore not an answer to say that it was only with the advantage of hindsight that the importance of documentary evidence was apparent to him. Further, on Musst's evidence, there was an existential aspect. If it were true that the evidence of the Statements was known by Mr Mathur, then there is no reason for not confronting Mr Siddiqi with the full detail of what had been said immediately. It would have been necessary to obtain undertakings not to repeat any of these statements. The fact that this did not occur for months goes strongly against the case that, on 7 July 2016, Mr Mathur was in the receipt of the Statements in the terms alleged.

564. Mr Murray's evidence was that he was informed of the conversation by Mr Mathur and Dr Adler, and he took a note of the conversation, but he has mislaid his note. This evidence arose in the following way:

(1) Mr Mathur was asked if he made a contemporary note of the conversation. In response, he said:
"I told our legal counsel straight after the meeting […] as soon as we come back from – in fact, both me and Dr Adler, when we came back the first thing we did is reached out to legal counsel and told him exactly what we both heard, straightaway, and he took a contemporaneous note." [T7/125/17-23]

(2) It was put to him that this was the first mention of such a note: it was not in his witness statement. He said that he: "*did not know whether [the notes] exist or not. My understanding is we may not have been able to find them"* [T7/126/2-6]. He confirmed that the legal counsel who took the note was Mr Murray who had not given any evidence in his witness statements about a note. Mr Mathur said that he *saw* Mr Murray take a note in his notebook. [T7/127/12-13]

(3) Mr Murray said that he only realised about 7 weeks prior to trial, during a conversation with Dr Adler, that the alleged note had been "*irretrievably lost*" [T10/6/19-25]. His evidence was that the last place he had seen it was in a drawer in Astra's offices and that certain (unspecified) steps had been taken to preserve it for the purposes of disclosure. He accepted that there had been no break-in or act of God which might have resulted in its loss or destruction. He posited that someone could have taken it out of the drawer. When asked if any other notebooks had gone missing, he confirmed that they had not [T7/31/5-25]. His only explanation for the omission of the note from his witness statement was that Astra's lawyers, Payne Hicks Beach, had not included the information [T10/4/6-25 and T10/5/1-12].

(4) Not only was Mr Murray not listed as custodian for documents in the Contract Claim counterclaim, PHB resisted with considerable force the suggestion that he should be a custodian in the Defamation Claim, on the basis that he was not involved with any of the issues in that claim.

565. If the note existed, the absence of reference to it in the evidence and its emergence for the first time in cross-examination are unsatisfactory. The note was potentially important, if it existed, because it might have corroborated the passing on of information about the Statements two weeks later. This was not something that would be omitted from a witness statement on the ground of marginal relevance. It cannot be explained sensibly by reference to the information not being considered relevant to mention to the solicitors (which Mr Murray did not suggest) or by a selection process of information by the solicitors (which Mr Murray did suggest).

566. Mr Murray claimed that he told Mr Lucas Moore of Jones Day about the note's existence and that he gave some contents of the note. It is inherently improbable, if that were the case, that the note was not then requested and that the solicitors did not preserve it for disclosure. If it had been mentioned to solicitors, then it would have been incumbent on them to give disclosure of the document even if it could not be located, and it would have been a serious dereliction of professional duty not to have done so.

567. A much more likely conclusion is that the note did not exist. The story about its disappearance is truly remarkable given that Mr Murray was an inveterate note taker, and his other notes were preserved. It is far-fetched that of all the notes, this note would disappear or be removed. If it had existed, the following would have occurred:

(1) it would have been produced to solicitors and they would have complied with their obligations as solicitors by disclosing it;
(2) if it had been mislaid, the solicitors would have been informed and would have mentioned it in disclosure;
(3) in any event, it would have been mentioned in the witness statements of Mr Murray, Mr Mathur and Dr Adler.

568. The fact that none of this occurred indicates strongly that the note never existed. I am not persuaded to the contrary by the fact of the evidence of Mr Murray because the above factors indicate so strongly to the contrary. His evidence was challenged in cross-examination, and he was unable to give sensible answers in cross-examination when these points were put to him.

569. Was the evidence of Mr Murray saved by the evidence of Mr Mathur who gave evidence that Mr Murray was taking a note? The answer is in the negative because that evidence was undermined by the same points as are made above as to why the note never existed. It makes no sense in the light of those objective facts that the note was not produced or identified at an earlier stage. Mr Mathur was unable either to answer these objective points or to explain why this did not form a part of the witness statements or the disclosure. He was seeking to bolster the case that the Statements were made. The Court does not have to find that the evidence was dishonest, but in my judgment the fact that he was wrong in his evidence and that he was seeking to bolster the case of Astra (whether consciously or sub-consciously) shows that his recollection was strongly influenced by a desire to support Astra's case. This indicates that the evidence of Mr Mathur must be viewed with particular caution.

570. Was the evidence that there was a note saved by the evidence of Dr Adler? His evidence was in tentative terms as to whether a note was taken. Dr Adler, who had been present in Court for the latter part of Mr Mathur's evidence, said that they had gone to see Mr Murray after the words complained of were allegedly relayed to him. He said that he believes Mr Murray made a note, but he does not *"recall with 100% certainty. I am, as I said, 99% sure"* [T8/113; T8/129]. He was more equivocal as to whether he had seen the note: *"I might have asked to see the note. But I don't think I've ever seen it"* [T8/133]**.**

571. The evidence was not referred to in Dr Adler's witness statement. The inference is that he does not recall a note, but he has been insufficiently certain to contradict the evidence which he heard from Mr Mathur. In my judgment, this tentative evidence does not indicate that there was a note, and it does not provide any answer to the powerful points above which indicate that there was no note.

572. If the Court had held that there was a note, then it would have been necessary to consider whether to find that the note had been concealed and/or to draw negative inferences from its non-production. However, in my judgment, since the probability is that the note never existed, I do not draw the inferences that would otherwise be required for such a finding.

573. The above is damaging to Astra's Defamation Claim generally. The evidence of Mr Mathur and Mr Murray are to be treated with considerable caution at least in respect of their evidence as to whether they ever received information relating to the Statements. The fact that they have both sought to bolster the evidence about the Statements by evidence about a note, irrespective of whether they did or did not believe that there was such a note, makes their evidence generally regarding the Statements unreliable. In the case of Mr Murray, his evidence went beyond identifying the making of the note, but extended to the information being provided to lawyers and his realising 7 weeks before his oral testimony that the note had been lost without this point being pointed out to the solicitors for Musst. If it were otherwise, and there had not been produced a note which existed, Mr Murray, despite being a lawyer, has failed to preserve this critical evidence, to ensure that it was disclosed and to mention this in his witness statement. In either event, his reliability as a witness was severely undermined.

574. Away from the note itself, the supposed corroboration of the witnesses about the precise words complained of has not enhanced Astra's case. First, if they each had an independent recollection, it is nigh on impossible that each would quote the identical words. Second, the unsatisfactory nature of the evidence of Mr Mathur and Mr Murray, who were trying to prove a case and whose evidence was unreliable as to the Statements, is such that their corroboration, far from enhancing the case, adds to the likelihood of contamination by discussions and recollections from others. Dr Adler accepted he would have spoken "*at some point*" about the words to Mr Mathur [T8/114]. This was confirmed by Mr Mathur, who said there was a *"high likelihood"* they spoke to each other [T8/166]. Dr Adler also accepted that what he used to refresh his memory is *"the first or the earlier legal communications"* which set out the words complained of: *"I wouldn't say I looked at it to remind myself, but when I had to put the witness statement later, that would obviously be then, the recollection at that point two years ago, the only reference I had to the statements."* [T8/132].

575. When asked whether he could recall independently the words complained of today, he accepted that the only phrases he had any recollection of were the reports from Mr Rigter (not Mr Plotke) that Mr Siddiqi had said that Astra as a sinking ship and that Mr Mathur was *a "one trick pony"* [T8/140; 162]. Dr Adler could not, today, remember the word *"All"* before Astra's investors. [T8/138]. Dr Adler further accepted that the reference to *"last man standing*" was "*contaminated as well"* [T8/139].

576. Dr Adler accepted that he did not take a note of the conversation that took place between him, Mr Mathur, and Mr Plotke in October 2018. Dr Adler has no recollection of this conversation **[**T8/129]. He accepted that his first statement in 2018 was probably drafted by *"the lawyers"* and when put that there is a sense of cut and paste between the statements in relation to the words complained of, he said "*I see what you are saying"* [T8/130/8-25].

577. Of the witnesses who gave evidence, it then remains to consider the evidence of Mr Rigter. In my judgment, his evidence was unsatisfactory for the following reasons, namely:

(1) The first time that he provided a written account of the words complained of was in January 2021, that is more than 4½ years after the alleged Statements of June 2016.

(2) Mr Rigter is not an objective or independent witness. He worked closely with Mr Mathur and Astra when at LGT and has, since 2019, been employed by Astra. It was only after he became an Astra employee that he provided any witness statement in support of the Defamation Claim. Without finding that he was deliberately manufacturing evidence, being in the camp of Astra by the time of his preparation of a witness statement means that his evidence lacked independence.

(3) His recollection of the words was not by reference to any note at the time whether of Mr Plotke or anyone else.

(4) His evidence as regards the critical conversation was second-hand hearsay, namely what Mr Plotke related to him about what Mr Siddiqi said to Mr Plotke. Mr Rigter could give no evidence as to the context in which the words were apparently spoken, or whether Mr Plotke reported them in full. Musst therefore has no opportunity to test these crucial aspects of the evidence.

(5) The risk of contamination by conversations with others involved in these proceedings, including Mr Mathur, and by being made aware of the words complained of in the Defamation Claim and/or Contract Counterclaim undermines the reliability of his evidence on publication. Mr Rigter accepted that he had discussed the statements with Mr Mathur and Dr Adler *after* the meeting at Astra's offices on 7 July 2016 [T10/82-3]. He accepted that he had been given a draft of his statement by PHB and that he had not written it himself [T10/83]. This increases the risk that the words are *put* to Mr Rigter, rather than independently recalled by him. Hence, the reason why the words quoted by each witness are the

same, despite the same being oral, is because the words complained of are placed verbatim from the pleaded case into the statements. As noted by Musst, in the case of Dr Adler, his first witness statement is a copy and paste from the statement of Mr Mathur to such extent that paras. 7.1-7.4 of paragraph 7 of the latter are copied into paragraph 6 of the former and still numbered paras. 7.1 – 7.4 (instead of 6.1 – 6.4) [T8/130/8-25]. Misnumbering sometimes occurs, but in this case, it is evidence of direct copying and absence of independence of recollection.

578. This risk of contamination is particularly severe in view of the part taken by Mr Mathur and Mr Murray in gathering the evidence about whom criticisms have been made as above. Thus, the concern about contamination was particularly serious in this case. The evidence about the conversation of 7 July 2016 is already odd with a meeting of about 1.5 hours according to Dr Adler, and the reference to the alleged words only at the end and thereafter. All of this affects the ability to test properly what exactly was said and/or its full gist. Overall, the discrediting of the evidence of Mr Mathur and Mr Murray undermines the evidence of the recollection of the alleged conversations of 7 July 2016 of Mr Mathur with Mr Rigter and Mr Plotke, and of Mr Murray with Mr Mathur and Dr Adler. Just as the evidence about the note is, in my judgment, false (whether intentionally or unintentionally), they both have been shown to have had a demonstrable desire to support the case that the Statements were made. To this end, the falsity of the evidence of the note taints also the recollection about what was said in these conversations of Mr Mathur and Mr Murray respectively.

579. There are a number of significant matters which weigh against Astra's case on the publication issue. The first is the time which elapsed before the Statements were put to Mr Siddiqi. If the Statements had been made, then it would be expected that they would be passed on as a matter of urgency to Astra and from Astra to Musst in order to prevent the publication of further statements. However, the evidence is that this did not occur. In fact, the chronology is that it was over 7 months before the earliest written record in evidence of any (and, even then, not all) of the words allegedly spoken. There was a delay of over a year before any attempt was made to put Musst on notice of the precise words complained of. The claim was issued close to the end of the one-year limitation period and issued near the maximum 4-month deadline.

580. Even in late 2016 and early 2017, after he had decided to instruct external lawyers in response to the Contract Claim, neither Mr Mathur nor Mr Murray could explain the tentative tone of Jones Day's October 2016 correspondence and why they only said that Mr Siddiqi *"may"* have made (unparticularised) defamatory statements, not even confirming to whom such statements were alleged to have been made or whether such statements were alleged to have been oral or in writing. That is notwithstanding Mr Mathur's admission that he read the correspondence [T7/166-167, T7/172-173]. Again, Mr Mathur blamed his lawyers and sought to absolve himself of any responsibility for this omission.

581. This explanation is further undermined by Mr Murray's evidence that he was apparently in possession of a note confirming that defamatory statements had been made [T10/16/17-20], but signed off on two letters from Jones Day on 17 October 2016 and 24 October 2016, the latter of which also expressly stated that they were not asserting any "*wrongdoing*" by Musst, but "*sought confirmation as to the absence of*

wrongdoing". In Boodle Hatfield's letter for Musst of 18 October 2016, they stated that Musst assumed that Jones Day's reference to "*existing and/or prospective investors*" was to 2B and/or Crown, on the basis that they were introduced by Musst to Astra. "*We note the confirmations provided on behalf of your clients as regards of 2B LLC and/or Crown Managed Accounts SPC. Your assumption is, however, incorrect…*" This is inconsistent with the accounts of Astra's witnesses as to the events in June/July 2016. Boodle Hatfield went on to deny any (then unknown) defamatory statements had been or would be made to those parties.

582. Neither Mr Murray nor Mr Mathur could give any satisfactory explanation as to why the first letter of claim from Jones Day only said that defamatory statements *may* have been made by Mr Siddiqi. If it really was the case that Mr Mathur and Mr Murray were not only aware of the precise nature of those statements, but had an almost contemporaneous written note which documented them, they would have instructed Jones Day to make this explicit in correspondence.

583. Mr Mathur said that he did not take the October 2016 letter before action in the Contract Claim seriously [T7/128]. It was obviously a serious letter threatening litigation against someone he had considered his best friend, which required a full response, using all the arguments at his disposal. Mr Mathur is an intelligent man. His suggestion that he omitted what he now relies upon as the basis upon which he brings significant litigation from pre-action correspondence because he *"didn't take it seriously"* does not stand scrutiny.

584. Mr Mathur was unable to explain why Jones Day's November 2016 letter did not refer specifically to the terms of the defamatory or disparaging statements or terminate the contract on account of them [T7/181-2]. For the purpose of completeness, the force of these points is not diminished by the failure of Ms Galligan in a letter of 31 March 2017 in which she did not deny the words complained of, but asked questions about the evidence to prove what was said. That was not a substantive response, but a non-lawyer's further holding response, and I decline to draw an inference that it is significant that she did not in fact respond substantively, at that stage, by denying that which had been alleged.

585. In the circumstances, it is more likely than not that the true position is that there was no report to Mr Murray and no note was taken. If and to the extent that there was a report to Mr Murray and a note taken, which I find there was not, then it would be necessary to consider whether the Court should or could infer that it was withheld because it does not support Astra's case on publication. Either way, Astra's case on publication and the credibility of their key witnesses is undermined substantially.

(l) The Absence of Mr Plotke

586. It is not impossible for a case in slander to be proven without the evidence of the publishee, but it is not easy to establish or to imagine circumstances in which this can occur. Astra have not provided any explanation as to why Mr Plotke, the only person to whom the words were allegedly spoken, was not called as a witness. His absence is particularly surprising given that his name appeared in the directions' questionnaire in January 2019. His evidence is central to one of the most important issues in dispute.

It is not suggested that he was unavailable, or that they had no means of contacting him. Mr Mathur's evidence was that he *"expected"* him to give oral evidence as of 2018, which is the reason he did not bother to make any note of his conversation with Mr Plotke on 2 October 2018 [T8/4:18]. No information has been given as to the basis for that expectation or why or when it changed.

587. In the absence of any explanation as to the absence of Mr Plotke, Astra have tried to downplay the significance of the decision not to call any direct evidence of publication. It said, through the note provided by its counsel, Mr Glen, after opening, that it was open to Musst to call Mr Plotke if they thought it necessary. I do not accept this point. Firstly, in the Defamation Claim, the onus of proof is on Astra and not on Musst. Second, if Musst were to call him, it would have been unable to cross examine him on his evidence, and given his continued employment with LGT, still a client of Astra, it seems unlikely that he would have been cooperative. In light of the ongoing dispute, it was reasonable for Musst not to approach Mr Plotke directly.

588. The judgment of Sharp J (as she then was) about the burden of proof in *Miller v Associated Newspapers* [2012] EWHC 3271 (QB) at para. 37 has a particular resonance to this case and the way that Astra have sought to approach the case without Mr Plotke**:**

> *"It seems to me that selective snippets of hearsay from individuals who have not been called, particularly where it has been 'cherry picked' from material which casts it in a different light, provides an obviously unsatisfactory evidential basis upon which to invite a court to find facts and/or draw adverse inferences. In a sense, it is Hamlet without the Prince. There may be cases where hearsay evidence and/or the contemporaneous documents in combination provide persuasive evidence but in my judgment, they did not do so here. It is no answer to the problematic nature of the hearsay evidence relied on in this case for the Defendant to suggest as Mr Warby did that it was open to Mr Miller either to call the relevant individuals himself, or require their attendance for cross-examination. The burden is on the Defendant to prove its case; and the tendering of hearsay evidence which lacks weight for various reasons doesn't cast any burden on a claimant to require the witness concerned to be called for cross-examination let alone to call the person concerned as his or her own witness."* (emphasis added)

589. The burden rests on Astra to prove publication with the necessary degree of precision. Astra have not even sought to adduce any written evidence from Mr Plotke via a witness summary or statement. While that would still have been problematic, it is a major deficiency at the heart of the Defamation Claim that there is no evidence from Mr Plotke at all and no explanation through evidence as to why he has not been called.

590. The point about who should call Mr Rigter can be amplified as follows. Musst is entitled to test the evidence of the only person to whom the words were allegedly spoken. Mr Plotke is the only other person who could give evidence as to the context of the conversation, the way in which the words, if spoken, were relayed, and any other

parts of the conversation which may undermine Astra's case. Musst and Mr Siddiqi have been deprived of the right to test the primary evidence, without explanation. By contrast, Astra have had the opportunity to question Mr Siddiqi, who has given an account of his lunch with Mr Plotke.

591. Astra has developed this submission by the following, namely that it was said by Mr Rigter during cross-examination that he believes Mr Plotke would have taken a note of the conversation [T10/75/14]. This was the first time that this suggestion was made. If such a contemporaneous note does exist, it has not been disclosed, and its contents cannot be tested. Musst is forced to meet a case based entirely on oral hearsay accounts. These accounts are necessarily a 'snapshot', provided a long time after the making of the alleged Statements, of what is alleged to have happened. They refer only to the words complained of, in most cases simply repeating them verbatim from the amended claim form and pleadings. They do not offer any context to the words spoken, as, contrary to the case as initially pleaded, none of the witnesses in this claim were even present at the lunch between Mr Plotke and Mr Siddiqi. In short, it is not for Musst to seek to prove Astra's case that there was a publication at all, and, if there was, to prove the necessary degree of precision.

(m) The evidence of Mr Siddiqi and Ms Galligan

592. The evidence in favour of publication must obviously be weighed against Mr Siddiqi's denial of what is alleged to have taken place in the conversation of 23 June 2016. The attempt to make out what Mr Siddiqi said is, in large part, based on the motivation of Mr Siddiqi. As of 23 June 2016, it is apparent that Mr Siddiqi had had conversations with Mr Mathur which made him concerned that Astra did not intend to pay to Musst the sums claimed to be due to alleged cash flow difficulties of Astra.

593. Astra's case is that this led to desperate measures including provoking LGT to terminate their investments with a view to triggering the performance fees. Hence, it is contended that Mr Siddiqi had a motive for disparaging statements, which make it likely that he made the disparaging remarks contended for by Astra. It is also apparent that there was a conversation between Mr Siddiqi and Mr Plotke from which Astra seek to infer that the disparaging remarks were made.

594. Astra also rely upon the fact that after the receipt of Mr Holdom's email of 16 June 2016 (which made clear that Astra could no longer be relied upon to make any further payments), Mr Siddiqi and Ms Galligan considered themselves in the '*combat zone'* with Astra (to adopt the words Mr Siddiqi's email to *'Moni'* of 19 June 2016). Moreover, Ms Galligan's email of 17 June 2016 reveals that they *'all agreed'* that the '*best solution',* at that stage, was to approach LGT directly and request that they withhold Musst's share of the fees payable in respect of the two managed accounts. This is relied upon as evidence of a mindset in which Astra were prepared to cause grave damage to Astra's relations with its key investors in order to improve their own precarious commercial position. It is also relied upon that Mr Siddiqi initiated the conversation of 23 June 2016.

595. Astra also pointed to the recorded conversation of Mr Mathur with Mr Siddiqi and Ms Galligan of 13 July 2016 with the suggestion that answers of Ms Galligan indicated

guilty knowledge about the conversation of 23 June 2016 having been more significant than acknowledged by Mr Siddiqi.

596. The attempts to find that the evidence of Mr Siddiqi and Ms Galligan supported Astra's case fail. First, the submissions were based on insinuation and speculation rather than on direct evidence of anything which Mr Siddiqi said or on inference. Second, insofar as the insinuation and speculation was put to Mr Siddiqi and/or Ms Galligan, this was answered in a way that was credible and plausible. I accept the evidence that the email of 17 June 2016 was not evidence of a series of decisions taken or action subsequently undertaken, rather it was a list of points for consideration. The evidence of Ms Galligan and Mr Siddiqi was that they formed the view that to agree with LGT for them to hold back Musst's share of the fee would have been inflammatory and would have damaged significantly the relationships of Astra with its key investors. It was an idea which was not implemented. Likewise, I accept the explanations given regarding the matters of statements allegedly made to third parties, which is an answer both to the allegations that the statements were made or that they evidence the alleged Statements made to Mr Plotke. Although there was a context for Musst to be dissatisfied about Astra due to the fact that it appeared that their contractual rights would or might not be honoured, this does not suffice on the evidence as a whole to find that the positive case of Astra in the Defamation Claim is established.

(2) Proof required about the words used

597. The claim against Musst and Mr Siddiqi is brought as a claim in slander. There is no written publication complained of, and the Amended Particulars rely on a single conversation between Mr Plotke and Mr Siddiqi on 23 June 2016 in Rome. There was no-one present at the time. The only direct evidence has been given by Mr Siddiqi and none by Mr Plotke. It is therefore necessary to review the law as to the extent to which evidence of a slander can be proven by hearsay evidence or otherwise without any evidence of the publishee.

598. The general principle is accurately stated in *Gatley on Libel and Slander*, 15th ed., at para. 32.13:

> *"Where there is no admission by the defendant that he spoke the words complained of or words to like effect, the claimant must call evidence of what the defendant said and of who heard him… The witnesses will usually be those who were present, but hearsay evidence is in principle admissible of what the witness was told by someone present that the defendant said."*
>
> (Emphasis added)

599. This general proposition is confirmed by decided cases on the point. In *Pannu v Carter* [2017] 3270 (QB), the defendant was the owner of a taxi firm, who heard a rumour that the claimant (who drove for another taxi firm) had been arrested for the suspected supply of drugs. The slander was established without evidence from the publishee or her line manager, who in turn contacted the claimant about the allegation.

600. In *Webster v British Gas* [2003] EWHC 1188 (QB), Tugendhat J refused to grant summary judgment on the issue of publication of an alleged slander. Despite the absence of any first-hand evidence from either alleged publishee, Tugendhat J (at paras.22-23) found that inferences which could be drawn from a fax and a letter passing between the individuals concerned gave rise to a properly arguable case that the words had been spoken as alleged.

601. In *Umeyor v Ibe* [2016] EWHC 862 (QB) Warby J (as he then was), at para. 1, remarked on the rarity of slander claims. He suggested several reasons why this was likely to be the case: *"…the difficulties sometimes encountered in proving the exact words spoken […] and the fact that spoken words are, as a rule, less likely than written publications to cause serious harm to reputation."*

602. The burden of proof is on the claimant to establish that the words complained of, or words not materially different, were published to a third party. It is not sufficient for a claimant to prove that the words complained of were spoken on a different occasion or to a different individual. The following passages from *Bode v Mundell* [2016] EWHC 2533 (QB) per Warby J are in point:

> *"13 …CPR 53 PD 2.4 …provides that 'In a claim for slander the precise words used and the names of the persons to whom they were spoken and when must, so far as possible, be set out in the particulars of claim if not already contained in the claim form.'*
>
> *14 …a claimant has to prove publication of particular words at the trial. Gatley puts it this way: '32.13 Action for slander. Where there is no admission by the defendant that he spoke the words complained of or words to like effect, the claimant must call evidence of what the defendant said and of who heard him. The actual words spoken must be proved; it is not sufficient for witnesses to state what they believe to be the substance or effect of the words, or their impression of what was said. The burden is of course on the claimant to do so.'*

603. These requirements are not *"mere technicalities"*: per Warby J in *Bode v Mundell*. The *"best evidence"* of the words spoken will be a recording. In *Bode*, there was neither any recording nor any witnesses to the alleged slander. The case was dependent on inferences from documents obtained *"some months"* later. Although proof of publication will be fact-specific, the defendant in *Bode* was granted summary judgment on the claims in slander which were described by the judge as *"fanciful"*. Factors relevant to the determination that there was no realistic prospect of proving that the words complained of were spoken were the absence of any contemporaneous recording, and the fact that there was no evidence from any of the alleged publishees: the *"sole basis for the claimant's contention that the defendant spoke to Dr Foley and Dr Sheth in the terms alleged is inference from the contents of […] email correspondence"* (at para. 41).

604. In *Raynor v Seabourne-Hawkins* [2020] EWHC 2895 (QB), Nicklin J noted at para. 74 that: *"Had an allegation … been made as alleged in the First Slander, I would have expected the Claimant to have confronted the Defendant about it very shortly afterwards. There is no trace of any such complaint from the Claimant about what would have been a serious and baseless allegation".* Nicklin J struck a cautionary note for claimants in slander claims that: *"Those contemplating slander actions would be well-advised to prioritise the gathering of evidence in support of their claim whilst events are still fresh in witnesses' minds."* The absence of contemporaneous notes, records, or accounts of an alleged slander is likely to make it very difficult for a claimant to discharge their burden and prove publication in a slander claim. If a claimant is unable to prove – on the balance of probabilities – that the words complained of were spoken by the defendant on the occasion pleaded, that is the end of the matter, and the claim will be dismissed: see *Raynor v Seabourne Hawkins* at paras. 75-77.

605. The case of *ABC v Chief Constable of West Yorkshire Police* [2017] EWHC 1650 (QB) acknowledges the *possibility* of an inferential case in slander. At para. 67, Warby J (as he then was) said that:

> *"There are good reasons for these requirements, which are long-established. The actual words spoken are critical, because everything else flows from the words: meaning, whether defamatory, defences and damages […]. Put another way, these requirements protect freedom of speech by requiring a claimant to prove strictly the factual basis on which the court is asked to interfere with that freedom. Only then is the court able reliably to evaluate whether such an interference is necessary. One must not be too precious about this. Proof that words close to those specifically alleged were used will be enough. But it has never been acceptable to call evidence of the gist or meaning of the spoken words, rather than the words themselves."* (emphasis added)

606. In *ABC*, an inferential case was not made out and publication was not proven. Warby J noted that: *"it is often going to be hard to prove such a case, and there are real difficulties with the inferences invited in this instance"* [para. 72]. Although the claimant had proven one word (*"lied"*), as a whole, she had not been able to prove publication by inference of the precise words alleged to have been spoken.

607. The burden of proof in respect of publication in slander claims is often a difficult one for claimants to discharge. While it may be possible to prove publication in the absence of any direct evidence, it is not the case that the court should adopt a more lenient or relaxed approach in recognition of the fact that oral publications are more difficult to prove than written publications. As per Warby J in *Umeyor v Ibe*, slander claims are rare precisely because it can be difficult to prove the exact words spoken, and because spoken words are generally less likely to cause serious harm to a person's reputation.

608. The courts have confirmed repeatedly the difficulties in proving publication in slander claims. For example, in *Barkhuysen v Hamilton* [2016] EWHC 2858 (QB) Warby J said at para. 147: *"In large part I uphold his claims in slander. But not entirely. The reason is a shortage of evidence: in some respects he has – as is quite common in slander - fallen short of proving to the court's satisfaction the publication of particular words defamatory of him. Proof of the exact words spoken is crucial: see Bode v Mundell [2016] EWHC 2533 (QB) [12]-[16]. When witnesses are asked to recall spoken words some time after the event, memories can fail."* (Emphasis added)

609. The facts of *Barkhuysen* are different from those in issue in this case, involving a long-running dispute between neighbours and some salacious allegations, some of which had the benefit of being recorded on CCTV, direct evidence from the publishee, or having been the subject of a contemporaneous note produced in evidence. None of that type of objective evidence is available here. However, the point of general principle is instructive, particularly in relation to the evidence of witnesses, recalling events which occurred several years previously and without contemporaneous written material, as is the case here.

(3) Conclusions

610. The Defamation Claim faces grave difficulties in the proof of the Statements both in law and in fact. Those difficulties include the following (without limiting the extent of the matters set out in preceding paragraphs), namely:

(1) Without the only publishee giving evidence, it is very difficult, but not impossible, to make out a case for slander based on hearsay;

(2) This difficulty is exacerbated by the absence of contemporaneous records of any kind about the Statements;

(3) A near contemporaneous record of the alleged conversations at which the Statements were said to be related to Mr Mathur and his inhouse lawyer Mr Murray, on the basis of what I have seen, does not exist.

(4) The alleged slander was not reported to Mr Siddiqi or anyone on Musst's side for months, with no satisfactory explanation of why not earlier.

(5) The absence of contemporaneous notes, records, or accounts of the alleged slander makes it very difficult for Astra to discharge their burden and prove publication in a slander claim. There was no contemporaneous note produced of the Statements by Mr Plotke or Mr Rigter.

(6) The alleged note of Mr Murray has not been produced, and there has been no explanation as to why it has not been available. Having considered the evidence in this regard, I conclude that there never was any such note.

(7) The evidence of Mr Mathur and Mr Murray in this regard is rejected. Their evidence displayed a desire to prove the Defamation Claim and was shown as regards the alleged note to be unreliable.

(8) The hearsay evidence was given by Mr Mathur and Mr Murray, whose evidence is undermined by their evidence regarding the note.

(9) Although evidence was given by Dr Adler and Mr Rigter, their written evidence was compiled long after the events in question. Both of them had ties of allegiance to Astra by virtue of their employment by Astra. In the case of Mr Rigter, before any statement, he had moved from LGT to Astra in 2019 during the pendency of the action.

(10) Their evidence showed considerable capacity for contamination. In my judgment, the apparent value of their confirming the same precise words was rendered nugatory. The precise correlation in statements taken years after the event wreaked of their being shown the words pleaded and confirming the same, instead of each starting from their own recollection and stating what it was. I do not accept that their statements represented their recollections at all. In these circumstances, the Court views with caution their evidence of how information about the alleged Statements was drawn to their attention.

(11) The judgment above goes through the evidence in some detail and considers the evidence of each of the witnesses on behalf of Astra who have given evidence. These criticisms are such that the evidence of each of the witnesses regarding the words in question is unreliable.

(12) The deficiencies above have not been compensated for by the alleged other times when allegedly defamatory statements were said to have been made by Mr Siddiqi. The evidence there given was unsatisfactory. In any event, the claim is not in respect of those statements, and nothing alleged to have been said on those occasions (even if true) alters the analysis above or leads to a conclusion that the Statements may have been said.

(13) Mr Siddiqi has given an account of what he said. He alone of the participants in the alleged conversation has been cross-examined on his account. His version has not been demonstrated to be false. He has in no way supported the case against him.

611. In the light of the authorities above and the conclusions which I have reached about the evidence, I find that Astra have failed to discharge the burden to establish that the Statements were made. This is not one of those cases of a slander being proven without the publishee giving oral evidence. Astra have not come in any way close in proving that the Statements were made. Bearing in mind the onus on Astra to prove the Defamation Claim, and all the matters set out above as regards the onus of proof, I conclude that Astra have failed to prove that the alleged Statements were made in whole or in part.

612. It therefore follows that the Defamation Claim must fail at the first hurdle, namely that Astra have failed to prove that the Statements were made in whole or in part. It is therefore unnecessary to deal with the other issues relating to the Defamation Claim, but in deference to the evidence and the arguments of the parties, I shall consider the points relating to damage.

(4) The law on proof of damage

613. The burden is on the claimants to satisfy the requirements of s. 1 of the Defamation Act 2013 ("the 2013 Act"), which provides as follows:

> *"Serious harm*
>
> *(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.*
>
> *(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not 'serious harm' unless it has caused or is likely to cause the body serious financial loss."*

614. This provides the alternatives of causing actual loss or being likely to cause serious harm to the reputation of the claimant.

615. There should also be considered the following, namely:

> (1) Section 2 of the Defamation Act 1952 ("the 1952 Act") which provides as follows:
>
> *"In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade, or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade, or business."*
>
> (2) Section 3(1) (b) of the 1952 Act provides as follows:
>
> *"(1) in an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage:*
>
> *[…] (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office,*

> *profession, calling, trade or business held or carried on by him at the time of the publication."*

616. Section 2 of the 1952 Act does not remove the requirement under s. 1 of the 2013 Act in relation to a claim for slander. As set out above, section 1(2) of the 2013 Act is distinct from any plea in relation to special damages or actual financial loss. In relation to the slander claim, all that s. 2 of the 1952 Act does is remove the usual requirement that slander is only actionable upon proof of special damage. Section 3 of the 1952 Act provides an exemption to the usual requirement that a claimant in an action for malicious falsehood must establish that the falsehood caused actual financial loss.

617. The requirements of a claimant seeking to rely on s. 3 of the 1952 Act were considered by the Court of Appeal in *Tesla Motors v BBC* [2013] EWCA Civ 152. *Tesla Motors* was a claim brought in both libel (before the introduction of the 2013 Act) and malicious falsehood, relying on s. 3 of the 1952 Act. It was common ground before the Court of Appeal in *Tesla* that – as held by Tugendhat J in the second of a series of interlocutory judgments - that the word *calculated* in s. 3 requires a claimant to prove that pecuniary damage was more likely than not to be caused by the publication complained of [para. 27].

618. The Supreme Court has confirmed that the correct interpretation of section 1 is that it *"requires its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words." Lachaux v Independent Print Ltd* [2020] AC 612 [para. 12] per Lord Sumption.

619. Lord Sumption in *Lachaux* dealt with the meaning of *"financial loss"* in the context of s. 1(2) of the 2013 Act at paragraph 15 of his judgment:

> *"The financial loss envisaged here is not the same as special damage, in the sense in which that term is used in the law of defamation. Section 1 is concerned with harm to reputation, whereas (as I have pointed out) special damage represents pecuniary loss to interests other than reputation. What is clear, however, is that section 1(2) must not refer to the harm done to the claimant's reputation, but to the loss caused or is likely to cause. The financial loss is the measure of the harm and must exceed the threshold of seriousness. As applied to harm which the defamatory statement "has caused", this necessarily calls for an investigation of the actual impact of the statement. A given statement said to be defamatory may cause greater or lesser financial loss to the claimant, depending on his or her particular circumstances and the reaction of those to whom it is published. Whether that financial loss has occurred and whether it is 'serious' are questions which cannot be answered by reference only to the inherent tendency of the words."*

620. The particular requirements of s. 1(2) were recently considered by Warby J (as he then was) in *Gubarev and Ors v Orbis Business Intelligence Ltd and Ors* [2020] EWHC 2912 (QB). Considering the application of Lord Sumption's analysis above, Warby J noted that while proof of financial loss may not be the *"sole requirement"* in relation to s. 1(2), *"in principle, all cases that fall within s. 1(2) require proof of serious reputational harm that results from the statement complained of and financial loss that is (a) serious, and (b) consequent on the reputational harm"* [at para. 42].

621. Although it is open to the court to infer serious financial loss in some cases [at para. 44], *"inference is not the same as speculation; there must be a sound evidential basis on which to infer that the publication is more likely than not to have caused serious financial loss"* [at para. 45]. Wide publication and the seriousness of the allegation will rarely suffice. Moreover, the burden is on the claimant to establish that it is more likely than not that the loss it says it suffered is a consequence of the publication complained of and not *"some other cause or causes"* [at para. 45]. At para. 89, the Judge referred to the significance of the *"bottom line"* of a company in assessing whether there has been financial loss.

(5) Proof of damage

622. It is difficult to approach this matter, having regard to the findings already made. Even assuming that the Statements had been made, matters discussed making publication unlikely have to be considered in respect of damage. This includes the delay in putting the alleged disparaging remarks. This is a significant indicator against loss. If losses were being suffered, one would expect Astra or any other victim to move very quickly to ensure that loss was stopped and contained.

623. I shall first consider whether the Statements caused serious harm to Astra. The primary allegation is that, as a result of their publication, there were three redemptions made in the Crown 1 account as a consequence of the Statements. The three withdrawals of redemption moneys requested by LGT between October 2016 and April 2017 comprising a total sum of US$46 million were as follows:

(1) a request to redeem US$15m which was made in respect of the Crown AAM account on 14 October 2016 and to which the Claimants acquiesced and fulfilled in part, leading to a US$7.5m redemption on 25 October;

(2) a request to redeem US$24.4m which was made in respect of the Crown AAM on 3 April 2017 and fulfilled the following day (4 April 2017); and

(3) a request to redeem US$14.1m which was made in respect of the Crown AAM II account on 4 April 2017 and fulfilled the same day.

624. In my judgment, this assertion has not been proven by the evidence. The first redemption request was therefore almost 4 months after the conversations with Mr Plotke on 23 June 2016. There were two further redemptions over a period of six months. The final redemption was 10 months after the Statements were allegedly made.

625. The explanation of this delay is said to be that the redemption request had to be processed within LGT. This is a bare assertion, and it does not have an evidential basis e.g. of documents reflecting internal discussions within LGT. Nor is there any evidence of internal dissatisfaction about Astra within LGT. On the contrary, there is evidence of satisfaction. Between 23 June 2016 and 4 April 2017, Crown, acting for Crown III invested a further US $8 million into its fund with Astra.

626. Even in the written evidence of Mr Rigter, he did not say that the requests for redemptions were made because of the Statements. The most he says is that the Statements "remained in his mind" but that the decisions to request redemptions were made on the basis of a range of factors and taken in conjunction with other individuals.

627. As regards the four-month period prior to the first redemption, there are various pointers to the fact that the subsequent redemptions were not due to dissatisfaction including:

(1) A conversation on 26 September 2016 (just over 3 months after the Rome conversation): a transcript of the call was before the Court. This was the first record of any discussion relating to the Crown I investment between LGT and Astra since June 2016. The discussion was in general terms, and both parties appeared to agree that it is not clear what to do with Crown I, which had a large amount of cash sitting inactive in the account. There was no indication that LGT/Crown was unhappy with Astra's performance or management of its investment. There is no reference to LGT/Crown wanting to redeem its investment.

(2) On 4 October 2016, there was an exchange of emails between Mr Plotke and Mr Mathur. Mr Plotke expressed concern that cash (approximately US$15 million) "*lying around*" in the Crown I account was bad for both Astra and LGT/Crown. He raised the possibility of either recalling part of the capital in the account, or re-investing it elsewhere. This was not connected with dissatisfaction with LGT/Crown.

(3) On 5 October 2016, a call took place between Mr Plotke, Mr Mathur, Dr Adler, and Raymond Seeholzer (also of LGT) during which the options for the large amount of dormant cash in Crown I were again discussed. Mr Mathur told Mr Plotke that there was around US $15 million in Crown I which would be "*available to draw in normal circumstances*". He asked Mr Plotke whether there was a "*better use*" for the cash and said that the reason the cash had not been "*deployed"* previously was that Astra *"didn't know whether [LGT] wanted unwind the vehicle in end of '16, middle of '16, or you wanted to carry it on and how long do you have it for. That is why we stopped releasing the cash for a long time, as you know. This is sort of in that mode at the moment."*

(4) During this conversation, there was no expression of concern with the Defendants or mention of any previous concerns or remarks made by third parties. Mr Mathur ultimately accepted that Mr Plotke said that having the cash lying around was "*not a good idea*", but that if there is an investment he could buy with it, "*that would be good*" [T8/46-47]. However, there was no asset to buy in October, but if there had been, Mr Plotke would have asked him to buy it [T8/48; T8/53-54].

(5) On 14 October 2016, almost four months after the conversation between Mr Plotke and Mr Siddiqi in Rome, Crown made a redemption request for US $7.5 million. They requested that Astra waive the usual three-month notice requirement, with a view to a further redemption of US$7.5 million in the new year. The US$7.5 million was withdrawn on 17 October 2016, bringing the total cash investment in Crown I to US $35.4 million. That was a very large amount of money if it had been the case that the withdrawal had been prompted by existential or reputational concerns relating to Astra.

628. In respect of the months which followed:

(1) On 19 and 22 December 2016, there was an exchange of friendly emails between Mr Plotke and Mr Mathur thanking Mr Mathur and Dr Adler for a very generous Christmas gift. Mr Plotke described his/LGT's opinion of Astra's performance over the last twelve months as "*outstanding"*. Mr Rigter replied to say that they were "*looking forward to continue this for the years to come…".*

(2) Later in December 2016 two large credit default swap positions were sold in Crown I. Dr Adler suggested to Crown that they leave the money in the account rather than withdraw it, for last minute opportunities. Mr Mathur accepted that this is what was said [T8/81-82]. He also accepted that Crown did then keep the money in for last minute opportunities. [T8/832-83] Thus, LGT was content to leave money in Crown I in late December 2016 for last minute opportunities. Mr Mathur attempted to explain this by saying that Mr Seeholzer was very concerned about the matter, although Mr Plotke and Mr Rigter were broadly satisfied. He purported to explain that it was not his witness statement because "*…it is my supposition. It is not a fact."* The transcript continued: "Q. *That is all we have to go on?* A. *At the moment yes."* This is based entirely of supposition and speculation.

(3) A further redemption request was made by Crown for US $14.1m from the Crown II portfolio on 4 April 2017. However, between 29 April 2017 and 15 May 2017, there was an ongoing discussion between the Defendants and LGT of new *"co-investments"*, and an all-day meeting about different trades. During the course of 2017, the business relationship between LGT and the Defendants continued, for example in May 2017, Mr Plotke wrote an email to Mr Mathur enquiring about a potential co-investment. Crown III continued to make contributions throughout May 2017.

(4) On 9 August 2017, LGT sent its quarterly due diligence questionnaire to the Defendants for the reporting period 1 January 2017 – 30 June 2017. The disclosure suggests that the friendly business relationship between LGT and the Defendants continued until at least the end of 2019. For example, Mr Plotke wrote an email to Mr Mathur and Dr Adler (copying in Raymond Seeholzer) thanking them for the *"nice basket"* they had

been sent. Mr Plotke went on to say that *"highly appreciated was also your great performance from last year and I hope you are able to deliver such fantastic returns going forward."*

(5) There is no evidence that Astra's overall financial position worsened after 23 June 2016, less still that it worsened as a consequence of the words complained of. The focus of the evidence has been on the individual redemptions and their impact on a particular managed fund. When asked about Astra's overall financial health, Mr Mathur accepted that since 2016, Astra had continued to do well financially [T7/113:4]. There is an absence of evidence as to how any serious actual financial losses impacted on the overall financial position of Astra, or on Astra's *"bottom line"* in the words of *Gubarev* referred to below at para. 89.

629. Astra suggested that the matter escalated to due diligence in respect of Astra, showing that the words must have caused loss. However, a due diligence exercise was carried out at a meeting on 7 July 2016. It was arranged before the Statements were even made, showing that it was a routine meeting at its inception. It lasted approximately an hour to an hour and a half. To the extent that there were any concerns about the Defendants' *"operational risk"*, these were clearly addressed as of 7 July 2017. It did not lead to a complaint by Mr Mathur at the time. There was no evidence of financial loss in respect of the audits. In the light of the matters set out above, there is no evidence of actual loss, nor was actual loss a natural and probable result of the words spoken.

630. Mr Rigter's evidence was that at the conclusion of the meeting of 7 July 2016, LGT was *"broadly satisfied."* Mr Mathur accepted that LGT did not at any stage say to him, or to Dr Adler, that they were taking into account comments made by Mr Siddiqi in their investment decisions [T8/53-54]. Further, he accepted that at the 5 October 2016 meeting, Mr Seeholzer asked the Defendants to make some purchases for Crown I as well as for Crown II and III [T8/59] if the opportunity arose. The obvious inference here is that Mr Seeholzer, if he was aware of the statements at all, was unconcerned when it came to making investment decisions. The continuance of the relationship and the making of new investments strongly indicates that the alleged Statements did not cause actual financial loss.

631. On the contrary, if there was a problem which might have been caused by the alleged words used, a reasonable investor would not simply pull its money or reduce its investments unless satisfied that it was the right thing to do. This was accepted by Mr Mathur [T8/52-53]. The natural and probable result was that any issue would be resolved by disclosure of the financial position of Astra, which would have demonstrated the true position. In this case, a small amount of due diligence would have resolved the position without the need for detailed inquiry to the satisfaction of LGT. It should also consider the context in which the publication occurred. It should not assume that a publishee would take immediate or unreasonable action in relation to the statement. This was the approach of the Court in *Brady v Express Newspaper* [1997] EMLR 192, in which a claim for malicious falsehood brought by a prisoner on the basis that the falsehood could have resulted in the loss of a discretionary weekly allowance was struck out on the basis that no reasonable prison authority would withdraw a privilege without further inquiry.

632. That is what ensued here, and so not only are Astra not able to establish any loss, nor are they able to show that there was or would have been any natural and probable loss. Some of the proof of this is what happened after the statements were allegedly made. There was no likelihood of serious loss because it was likely that LGT would inquire of the true position and would ascertain that there was no problem, and the alleged words were not borne out by the true financial position of Astra. It is also to be borne in mind that if the Statements were made, they were not committed to writing, they were not widely published, but related to Mr Plotke. Further, the effect of not calling Mr Plotke is that there is no direct evidence of the way in which the words were uttered and the precise context which would be of value in order to prove a natural and probable effect of the words used. In all the circumstances, Astra have failed to prove that Mr Siddiqi and/or Musst caused or was likely to cause Astra serious financial loss.

633. There have been raised other defences of qualified privilege, honest opinion and truth to the claim in defamation. In view of the findings in respect of publication and damage, it is not necessary to make findings about these defences.

(6) Malicious falsehood

634. The Court has rejected the Defamation Claim on the basis that it has not been proven that there was a publication as alleged and likewise that the actual or natural and probable requisite loss has not been proven. There is a claim also in malicious falsehood. As regards publication, it fails in that the publication has not been proven.

635. The central ingredient of malicious falsehood is malice. The law is that *"a defendant should only be liable for malicious falsehood if the falsehood represents one of the possible correct meanings of the defendant's words and the defendant intended to convey the falsehood": Cruddas v Calvert* [2015] EMLR 16 at [para.114] per Jackson LJ. Evidence of an improper dominant motive, or proof that the maker of the statement knew that it was false, may be evidence of malice. However, it is the defendant's subjective understanding of the meaning which is relevant: *Cruddas v Calvert* [2013] EWHC 2298 (QB) at [para.206] and Clerk & Lindsell on Torts 23rd Ed. paras. 22.12 – 22.15. The submission of Astra is that Mr Siddiqi made the statements maliciously in that he wanted 2B and/or Crown to withdraw the investments and thereby to bring about what he perceived as an entitlement to a performance fee. He did so because he was short of money, and he either knew that he was saying was false, or he did not care whether it was true or false.

636. Astra draw attention to the differences between a claim in slander and a claim in malicious falsehood. However, the differences in the end do not assist the position of Astra. This is because, on the two central issues of publication and malice, the case has not been proven. It is not therefore necessary to go into detail about alternatives to alternatives.

637. At common law, a claimant can maintain an action for malicious falsehood if it can be shown that: (i) the defendant published false words which refer to, or impact upon, the claimant or his business or his property or his economic interests; (ii) that they were published maliciously in the meanings which they are reasonably understood; and (iii) that special damage has followed. However, as with slander, the common law

requirement for proof of special damage has been removed by statute in respect of certain types of falsehood: – see s.3 of the 1952 Defamation Act.

638. The subject of the publication is the same in malicious falsehood as in slander. I have found that the claim must fail in slander on publication, and it must fail for the same reasons in malicious falsehood. It is then necessary to consider whether the words were published maliciously in the meaning which they are understood. It is difficult to consider alternative cases. I have considered the matter from the perspective of publication, but I must now consider the matter from the perspective of the state of mind of Mr Siddiqi.

639. In my judgment, the claim in malicious falsehood fails not only on publication, but if there was a publication, on malice. It was not in the perceived interests of Mr Siddiqi to publish falsehoods about Astra. I have seen Mr Siddiqi being cross examined. Contrary to what is alleged, he did not seek to traduce Astra. The scheme of seeking to get investors to leave or to pay the fees directly to Musst has not been established. He was interested in seeking to persuade Mr Mathur to pay what he believed was owed. That did not mean that he would make up matters intentionally or recklessly. The approach of him and his wife was more analytical than that, and they would know that falsehoods would not assist their cause.

640. Having found against Astra on the central features of publication and malice in the malicious falsehood claim, it is unnecessary to prolong this judgment by considering whether any differences in respect of proving special damage in malicious falsehood from slander might have led to a different conclusion on damage. It appears from the *Tesla* case that, due to section 3 of the Defamation Act 1952, there is no difference, and the claim in malicious falsehood must fail due to an inability to prove either actual loss or that the words were calculated to cause loss in the sense that pecuniary damage was more likely than not to be caused by the publication.

641. For all the reasons above, the Defamation Claim is dismissed.

XXII The Seventh Issue: Contractual claim relating to disparaging statements.

642. This arises not in tort, but as a contractual claim under the Octave Contract. It is brought in the event that (as has occurred) the Court has found that the Octave Contract has been novated. There are two principal consequences of the alleged breach or breaches of contract. First, it is to seek to say that statements made by Mr Siddiqi in May 2016, June 2016 and July 2017 amounted to repudiatory breaches and/or gave rise to a contractual right to terminate. It is said that the Octave Contract was terminated by the notice given in the Defence and Counterclaim with effect from 18 January 2019. It is said that Musst's right to a revenue share terminated either at common law or pursuant to Clause 13.2 of the Octave Contract. Second, it is to claim damages for breach of contract.

643. The relevant clauses are as follows:

> *"5.1 [Musst] shall at all material times act in good faith towards Octave."*
>
> *"5.7 [Musst] agrees that it will not, and shall procure that its employees, officers, members, directors and agents will not, disparage, slander, comment maliciously or make any accusation of any nature whatsoever against or in relation to the business of Octave, the Manager or their affiliates, or any officers, members, directors or employees of the foregoing, and, without limiting the generality of the foregoing, will not procure anyone to do the same or acquiesce in anyone's doing so on its behalf."*
>
> *12.2 Without prejudice to any rights that have accrued under this Agreement or any of its rights or remedies, any party may at any time terminate this Agreement with immediate effect by giving written notice to the other parties if:*
>
> *...*
>
> *12.2.2 another party commits a breach of any term of this Agreement (other than failure to pay amounts due under this Agreement) and (if such breach is remediable) fails to remedy that breach within a period of 14 days after being notified in writing to do so ...*
>
> *13.2 The Introducer shall continue to be entitled to the revenue share in respect of all Eligible Investments (as defined in Clause 3) for so long as such Eligible Investments in the Current Strategy are maintained by the Investor; provided that, notwithstanding the foregoing, should this Agreement be terminated following a repeated (after written notification) material breach of the Introducer's obligations hereunder including a sustained failure to comply with its obligations under Clause 2.3, the right of the Introducer to receive revenue share will terminate as of the Termination Date."*

644. It is first necessary to identify the alleged breaches. As noted above, the Defamation Claim was brought only in respect of alleged slander on 23 June 2016 at the Rome Conference. The Counterclaim alleging defamatory statements relies additionally on a conversation in May 2016 between Mr Rigter and Mr Siddiqi and a conversation in July 2017 between Dr Chander and Mr Siddiqi. These conversations have already been considered in the context of the contention of Astra that they are said to be evidence that the alleged defamatory statements were made on 23 June 2016.

645. I bear in mind in considering the matters now in the Contract Claim that the burden on a claimant is to prove a disparaging statement and that the questions are not the same as in a slander case, albeit that there is overlap of subject matter in this regard between the Counterclaim in the Contract Claim and the Defamation Claim. A disparaging statement may occur even if it is true and no loss occurs. In *RSM International Ltd v. Harrison* [2015] EWHC 2252 (QB), a successful summary judgment application was made to enforce the provisions of a settlement agreement prohibiting the defendant from making "*any disparaging or derogatory statements*", in which HHJ Waldon Smith said:

> *"The statements made by Mr Harrison in the course of the email correspondence are disparaging and derogatory and, as was set out in the lengthy judgment of His Honour Judge Seymour sitting as a judge of the High Court, those words, "disparaging" and "derogatory" are ordinary English words and whether or not they are true, and whether or not loss is suffered does not take away from the words being disparaging and/or derogatory.".*

646. With reference to the Rigter conversation in May 2016 which has been discussed in the context of the Defamation Claim, I make the following findings, namely:

(1) Mr Rigter does not recall exactly what was said.

(2) There was no contemporaneous record of what was said.

(3) The allegation was raised long after the event.

(4) There was a real risk of contamination of the kind referred to in *Gestmin* above.

(5) I was critical of the evidence of Mr Rigter in the Defamation Claim, which is relevant to the weight which can be placed on his evidence as regards the conversation in May 2016.

(6) In the circumstances, the allegation of express disparaging statements being made in May 2016 is not proven.

(7) Further, the statement that there was an implication is not proven without the words used or the context. It is not proven that there was the alleged or any implication or that anything was said that was disparaging.

647. In any event, even if the statements were made to Mr Rigter in May 2016, there is no evidence that either the statements caused or were likely to cause loss to Astra for the reasons set out in the Defamation Claim. The reasons here are very similar to those in the Defamation Claim relating to the Rome Conference. The alleged statements did not cause Astra to make a complaint or LGT to stop its business with Astra. On the contrary, on the basis of his statement at para. 19, Mr Rigter said that

he reported this to the Chief Investment Officer of Liquid Alternatives at LGT. It was decided to take no action given Astra's positive performance. Mr Rigter suspected some personal reason on the part of Mr Siddiqi.

648. As regards the Rome conference, the findings in the Defamation Claim are repeated. Although that was a finding about slander, whereas disparaging statements are broader because they might include true statements, it has not been proven that disparaging statements were made about Astra or Mr Mathur. The rationale is substantially the same as the reason why the Statements were not found to have been at the Rome Conference. In any event, even if the statements were made there is no evidence that either the statements caused or were likely to cause loss to Astra for the reasons set out in the Defamation Claim. They were not taken up for months with Mr Siddiqi. Since Mr Plotke has not given evidence, there is no contextual evidence from which to shed light on how the alleged words were uttered and how grave any alleged breach of contract was, which would be relevant to materiality and whether any breach was remediable.

649. As regards the conversation with Dr Chander, the Court repeats its criticisms of the evidence of Dr Chander, and its findings regarding the overall credibility of Mr Siddiqi. The Court does not find proven the allegations made by Dr Chander and bears in mind the absence of contemporaneous record, the absence of contemporaneous challenge and the real risk of contamination in respect of Dr Chander's evidence. It is arguable that the admitted comments of Mr Siddiqi, namely his belief that Mr Mathur was unreliable and had a dark side were disparaging statements about Astra and therefore amounted to a breach of contract: see the fourth statement of Mr Siddiqi para. 184.

650. Here too, there is no evidence that either the statements caused or were likely to cause loss to Astra. The Court bears in mind the fact that this was a passing conversation in the London Underground to a solitary person who was a friend and not a customer. At worst, it was an attempt to enlist an intended go-between to assist in a dispute. There has been no evidence of actual loss. Further, it is not proven that any loss was a natural and probable result of the words used.

651. On the basis of these findings, it is necessary to consider whether there was a right of termination on the basis of the admitted comments of Mr Siddiqi. In my judgment, there was not a right of termination for the following reasons, namely:

(1) There was not a right of termination at common law. If there was a breach of contract, it did not go to the root to the contract bearing in mind the nature of the conversation with the intention that Dr Chander assist in finding a solution to the dispute, the lack of consequence and the other features related in the paragraph immediately above of this judgment;

(2) In respect of the contractual termination, the breach was not irremediable in the sense defined below.

(3) Likewise, the breach was not material in the sense defined below.

652. There was a right to termination for breach where the breach was not remediable. Given the lack of gravity of the breach, it would be surprising if the parties intended that, without more, there could be a termination. In some cases, courts have inferred that this does not apply to every breach, but only to a breach of a particular gravity: e.g. see *Rice v Great Yarmouth Borough Council* (2001) 3 L.G.L.R. 4; The Times, July 26, 2000. If this was a breach, it was not a repudiatory breach or (as noted below) a material breach.

653. In my judgment, this construction does not arise for consideration since in my judgment, the breach was remediable. If it was remediable, there can be no termination without a notice to remedy. Astra submit that the breach was not remediable on the basis that the disparaging words had been uttered, and that act cannot be undone. However, in connection with less serious breaches, the Courts have interpreted breaches capable of remedy in a broader sense. This was expressed by Lord Reid in *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1974] A.C. 235 HL at 248-250:

> *"The question then is what is meant in this context by the word 'remedy'. It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right for the future. I think that the latter is the more natural meaning. The word is commonly used in connection with diseases or ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect or result of the disease before the cure took place, and in general it can only be in a rare case that any remedy of something that has gone wrong in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all damage past and future can be put right would leave hardly any scope at all for this clause. On the other hand, there are cases where it would seem a misuse of language to say that a breach can be remedied. For example, a breach of clause 14 by disclosure of confidential information could not be said to be remedied by a promise not to do it again. So the question is whether a breach of Wickman's obligation under clause 7 (b) (i) is capable of being remedied within the meaning of this agreement. On the one hand, failure to make one particular visit might have irremediable consequences, e.g. a valuable order might have been lost when making that visit would have obtained it. But looking at the position broadly I incline to the view that breaches of this obligation should be held to be capable of remedy within the meaning of clause 7. Each firm had to be visited more than 200 times. If one visit is missed I think that one would normally say that making arrangements to prevent a recurrence of that breach would remedy the breach*." (emphasis added)

654. In this case, if there was a breach of contract, then it could have been put right by clarification to Dr Chander. In the second sense of Lord Reid, the breach, if any, could have been remedied.

655. In any event, even if the statements amounted to a breach under clause 12.2.2 of the Octave Contract so as to entitle Astra to terminate it, this did not have the effect of terminating Musst's rights to payment of fees for introductions already made, unless the *"Agreement be terminated following a repeated (after written notification) material breach of the Introducer's obligations hereunder"*: see clause 13.2. The courts have in the past considered what is meant by a *"material breach"* (as opposed to *"repudiatory breach"*) in the context of clauses giving rise to a right to terminate (which is analogous to the right here to stop paying fees), and they have held that:

> *"Materiality involves considering the following: the actual breaches, the consequence of the breaches to [the innocent party]; [the guilty party's] explanation for the breaches; the breaches in the context of [the agreement]; the consequences of holding [the agreement] determined and the consequences of holding TEL Agreement continues.":* per *Phoenix Media Ltd v Cobweb Information*, unreported, 16th May 2000, Neuberger J (as he then was), cited by Mann J. in *Crosstown Music v. Rive Droit* [2009] EWHC 600 at paras. 96 to 100.

656. Even if any of the alleged statements is found to have been made, none of them constituted a *"material breach"* within clause 13.2 of the Octave Contract such as to entitle Astra to escape ability to pay for future entitlements, because (a) none was likely to cause, nor did any of them cause, any loss, and (b) as regards the actual breaches themselves, they were statements to single individuals, not reduced to writing and without any evidence of wide circulation thereafter.

657. In respect of the statement to Mr Rigter, Mr Rigter says that, although he reported the first statement to the Chief Investment Officer of Liquid Alternatives at LGT, it was decided to take no action. This was because LGT's investments were doing so well with Astra, and he suspected that Mr Siddiqi simply had personal reasons for saying what he said.

658. In any event, there was no *"repeated (after written notification) material breach"* within clause 13.2. The only statement after written notification was the one to Dr Chander. However, there was no material breach, nor any repeated material breach, even if Mr Siddiqi did say the words to Dr Chander. Even if that was a breach, which is not accepted, it was not material. There is no suggestion that there was or could have been any adverse consequence from the words spoken to Dr Chander.

659. For all these reasons, in all the circumstances, there has been no entitlement to terminate on the part of Astra, let alone any right to deprive Musst of its right to the revenue share.

XXIII The Eighth Issue: remedies

(a) Areas to consider

660. It is necessary to consider the following matters, namely:

(1) the extent of relief in respect of Crown I and 2B;

(2) the extent of relief in respect of Crown II and Crown III;

(3) the extent of relief in respect of *"any other entity"* or customer;

(4) the indemnity claim;

(5) any other relief.

(1) The extent of relief in respect of Crown I and 2B

661. The claim in respect of the novation is in relation to the 2B and Crown Contracts. I have found that these have been transferred over to form a new agreement with Astra LLP, and then with Astra UK. Musst submits that it is entitled to payment of all outstanding management and performance fees accruing since May 2016 on the Crown and 2B accounts on which it has so far been paid. It is not clear what they are. It is known from responses 29 and 30 of their Response to Musst's Request for Further Information (served in July 2019), that this includes:

(1) In relation to the "Crown I" account, Astra UK had become "*prospectively entitled"* as of September 2018 to an accrual of success fees of £1,637,282, and it was expected that it would become entitled to a further accrual of £1,384,384 as at July 2019.

(2) As for 2B, Astra UK *"became entitled to and received performance fees"* in the total sum of £6,671,813 between December 2016 and October 2018.

662. It is necessary to consider whether these sales have arisen out of the investments made from the start on the Crown I account or at least from proceeds of the investments being reinvested within the same account. If there are further investments which are not the proceeds of the original investments, then there may be a question as to whether they are Eligible Investments. If they are from proceeds, then that would seem to arise out of the original investments. There is an indication in the papers that in respect of the bulk, it is expected that the investments in the Crown I account are likely to arise out of the original investments.

663. This will also have to be considered at the consequential stage in order to consider whether the 20% is to be made on all the management fees and performance fees received on the Crown I account. It is clear from disclosure that, although some sales have been made in order to realise these performance fees, Astra UK has continued to manage both the 2B and the Crown accounts. Therefore, the sums referred to above do

not take into account either: (a) the continuing the management fees received by Astra UK since May 2016, or (b) any other performance fees received since July 2019 in respect of the 2B or Crown Contracts.

664. Musst is entitled against Astra UK, under clause 4.1 of the Octave Contract (as novated), to the following:

(1) Particulars of all investments in the Crown I and 2B accounts since May 2016;

(2) A breakdown of all fees due and payable to Astra since then in respect of the Crown I account and the 2B account;

(3) A statement of the net asset value of all the 2B and Crown funds under management in the relevant account.

665. That suffices, and it is not necessary to make an order under Clause 11 to permit Musst to attend the premises of Astra UK on reasonable notice, to take copies of all records required to enable it to calculate the sums due to it.

666. An order may be made that Astra UK pay the appropriate revenue shares on these sums on account of whatever its liability may eventually turn out to be upon inspection of its books and records. Further, under clause 4.7 and/or pursuant to section 35A of the Senior Courts Act 1981, Musst is entitled to interest running at 2% above the base rate from time to time on all unpaid fees from May 2016, from the time such fees should have been paid. However, the Court wishes to consider making an order reflecting the conclusions in this judgment which works in practice. To this end, it will want to receive the information about the accounts in order to make an order as to the revenue share with the benefit of this information. The precise order to be made can again be considered as a part of the consequentials.

(2) The extent of relief in respect of Crown II and Crown III;

667. This does not apply to other Crown Contracts which have been operated, namely Crown II and Crown III. They were set up for different portfolios in Crown. On 30 April 2015, Astra LLP told Musst that what was called Crown II had been set up for a new strategy, *"and therefore it is not covered by the existing Introduction Agreement* [the Octave Contract]*"*. The management of this account was subsequently transferred to Astra UK at the time of the transfer of Astra LLP's business to it. On 5 December 2019, Payne Hicks Beach reiterated that the Crown II account followed a different strategy.

668. On disclosure in relation to the Defamation Claim, Astra, on 18 September 2020, disclosed for the first time an internal email (from Mr Adler (of Astra) to Crown) dated 3 February 2016 in which he said, talking of the Crown I and the Crown II accounts and two other entities: *"As you know, all our credit vehicles have pursued a very similar if not identical strategy so far; forward ASCIL (another entity) will invest in slightly more liquid credit assets to reflect its changed liquidity profile."*

669. Musst say that it was agreed between the parties that any questions in relation to non-payment in relation to Crown II could not be conveniently dealt with in these proceedings (i.e. because of the need for disclosure and expert evidence) but would have to be dealt with in subsequent proceedings, if need be. It is not apparent whether that means in this action or in another action. There was not an express plea as regards non-payment in relation to Crown II and Crown III. An application to amend this action so as to include reference to Crown II and Crown III was withdrawn by consent. There was a holding claim form issued on 29 April 2021 in which Musst sought to claim for the fees in respect of Crown II and Crown III.

670. In the meantime, Musst submits that an order should be made in these proceedings allowing Musst to inspect the books and records in relation to Crown II and/or Crown III if it otherwise proves its case on liability, without having first to show that Crown II and Crown III consisted of *"Eligible Investments"*. It relies on para. 105(1) and 105(2) of RAMPOC seeking production of statements *"in relation to <u>all payments</u> made to it … since May 2016 by 2B, Crown and any other entity introduced by the Claimant …." and* see also paras. 105(3) and 105(4) and 113 (which claims the same relief against Astra LLP if there was no novation to Astra UK). This is said to arise also out of the wide requirements of clause 13, which provides an obligation to keep books and records, and to allow inspection, in relation to *"its activities relating to this Agreement, including but not limited to recording any Eligible Investments"*. It also relies on the last words of clause 3.1 referring to "*additional investments <u>made</u> for the Current Strategy (*emphasis added) *directly or indirectly by an Investor into a Fund whether before or after the Cut-off Date are also Eligible Investments."* It submits that there is an argument that the investments in Crown II and Crown III are additional investments, and that is therefore sufficient to open the door to disclosure relating to Crown II and Crown III.

671. Since this part of the judgment had been prepared in draft, the Court has been provided with the evidence in support of an application to strike out the 2021 action claiming management and performance fees in respect of Crown II and Crown III. It comprised a 40-page witness statement of Lucas Julian Moore dated 29 September 2021. This was forwarded to the Court on 13 October 2021 by solicitors for Musst with relatively short letters summarising its position. It is not necessary or reasonably possible at this stage to consider that in any detail. One feature of the witness statement is that Astra disagree with the submission of Musst that there was agreement that a claim in respect of Crown II and Crown III might be made in a second action. The submission is that Musst could and should have brought any claim relating to Crown II and Crown III, if at all, in this action. It is submitted by Astra that a fuller analysis of the documents between the parties shows that Musst was not misled as to the strategy adopted in respect of Crown II and Crown III, and there is nothing in the suggestion that there was a recent discovery that the position was not as previously represented. It is also submitted on behalf of Astra that the claim in respect of Crown II and Crown III ought to be struck out on a whole variety of grounds, including abuse of process and no reasonable prospect of success. Astra also say, in any event, that the reference to *"other entity"* in RAMPOC is not sufficient to open the door to a disclosure in respect of Crown II and Crown III if the claims in respect of those entities are not being dealt with in this action.

672. This recent development has the effect that it is premature at this stage for the Court to make findings as to whether there ought to be disclosure in this action about Crown II and Crown III. The different understandings of the parties regarding the consequences of the abandonment of the amendment application in respect of Crown II and Crown III require further consideration. Musst may wish to consider which way to turn in respect of any claim in respect of Crown II and Crown III, and in that context, Astra will wish to submit that whichever way Musst turns, it will be to no avail.

673. In these circumstances, this judgment will not, at this stage, make any determination relating to how any claim in respect of Crown II and Crown III will be dealt with or about how disclosure might take part in respect of the same. It is premature in the face of the matters considered above, not least the voluminous evidence in support of the strike out application, for this Court to make any determination at this stage. Further consideration of these matters will be a part of the consequential matters to be considered.

(3) The extent of relief for "any other entity" or customer

674. The focus of the novation claim has arisen out of the transfer of the business and the renewed contracts in respect of 2B and Crown to Astra LLP and Astra UK. The like of this has not been identified in respect of other entities or customers, despite the reference to other entities in paras. 105 and 113 of RAMPOC. Without further consideration of the matter with the parties, the Court will not make an order for disclosure which is broader than in respect of 2B and Crown. No other entities have been identified. It would beg the question as to whether such entities, if there were any, had been introduced by Musst, and whether the Octave Contract had been novated to Astra LLP and/or to Astra UK in respect of such entities. I do not rule this out, but without further consideration with the parties, I confine the order made at this stage to 2B and Crown. Whether such an order is appropriate in this action may be considered further as a part of the consequential matters.

(4) The indemnity claim

675. This judgment has already referred to Musst's indemnity claim that in the event that there has not been a novation to Astra UK, but only one to Astra LLP, that the indemnity which Astra UK agreed to provide in the context of the relevant transfer, Musst should have the benefit of the same. MUSST argued that receipt of fees by Astra UK was sufficient to give rise to a claim for those fees against Astra LLP. This was on the basis that Astra UK was an affiliate, per the Octave Contract, of Astra LLP. It is said that Astra LLP would have a right of indemnity against Astra UK under the deed of transfer of 29 April 2016. This is widely drawn, but it provides in Clause 16.4 to no person other than the parties thereto having any right to enforce any term of the deed (including the indemnity) under the Contracts (Rights of Third Parties) Act 1999. It is not necessary to consider how this would be enforced in practice. Having found that there was a novation on to Astra UK, this point does not arise.

(5) Any other relief

676. Nothing arises in respect of the alternative claims for unjust enrichment since the primary claims have succeeded. Nothing arises in respect of the claim to rectification which does not arise due to the success of the primary claims. If there are other matters which arise in respect of relief, they should be considered in the context of consequential matters.

XXIV Conclusion

677. It remains to thank the legal advisers for putting together the case with such efficiency and for the assistance given at all times to the Court. All Counsel who appeared at trial have advanced their respective cases in the best way for their clients. They have done so with great courtesy to each other and to the Court. They have acted at all times in command of the vast amount of information before the Court.