Case No: HT-2019-BHM-000021

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
TECHNOLOGY AND CONSTRUCTION COURT

Birmingham Civil and Family Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Date: 29/10/2020

Before :

HHJ SARAH WATSON

- -

Between :

John Kelly	**Claimant**
- and -	
(1) DSM Demolition Limited	**Defendant**
(2) DSM SFG Group Holdings Limited	

- -
- -

Mr Ali Tabari (instructed by **Shakespeare Martineau**) for the **Claimant**
Mr Geoffrey Kuehne (instructed by **Pinsent Masons**) for the **Defendants**

Hearing dates: 7 July to 10 July, 21 July 2020 and with further written submissions

- -

JUDGMENT

HHJ Sarah Watson:

Background and nature of claim

1. The Claimant, Mr Kelly, was a Director and co-owner of the First Defendant, DSM Demolition Ltd (DSM). DSM was his family's business, owned and run by Mr Kelly, his two brothers and his sister. Mr Kelly helped build DSM into a very successful business. On 31 March 2017, Mr Kelly and his siblings sold DSM and other family businesses. The Second Defendant, DSM SFG Holdings Ltd, was one of the purchasers. The transaction was a management buyout. Mr Robert Braid and Mr Brian Baker were part of the management buyout team. The purchase was partly financed by Metric Capital Partners.

2. As part of the transaction, Mr Kelly and his two brothers entered into an agreement with the Second Defendant, which was termed a Transitional Services Agreement (the TSA). Under the TSA, Mr Kelly agreed to provide consultancy services for a period of twelve months after the sale. The TSA provided for him to be paid a consultancy fee of £40,000 for up to 40 days' work and further payment at a daily rate of £1,000 for additional days worked. The TSA also provided for a profit share to be paid in certain circumstances, to incentivise him and his brothers to increase the profitability of DSM. In very general terms, the TSA provided for a 50% profit share when Mr Kelly or his brothers negotiated an increase in the amount payable under a project (Uplift).

3. Before the MBO, Mr Kelly was a Director of DSM with contractual and operational responsibility. He established good relationships within the construction industry and was clearly good at his job. He was well connected and trusted by DSM's customers.

4. At the time of the MBO, DSM was involved in a contract with Tottenham Hotspur (Tottenham) for the demolition of White Hart Lane. After the MBO, Mr Kelly negotiated the final account for the Tottenham contract. The result he achieved was better than DSM had assumed in the accounts of the group of companies of which DSM was a member. DSM paid Mr Kelly a profit share as a result.

5. At the time of the MBO, DSM was also undertaking a major project for Carillion Construction Limited (Carillion) at Paradise Circus in Birmingham. Carillion was the main contractor to the developer, Paradise Circus Limited Partnership (PCLP). DSM was a sub-contractor to Carillion. In January 2018, Carillion went into liquidation. Mr Kelly was involved in discussions with Argent Property Development Services LLP (Argent), who were agents for PCLP. Following those discussions, PCLP contracted directly with DSM for DSM to complete the demolition work

at Paradise Circus. As part of that contract, PCLP agreed to pay DSM what Carillion owed it at the time it went into liquidation. Under the contract with PCLP, DSM assigned to PCLP the debt Carillion owed it.

6. Mr Kelly considers he is entitled to a profit share as a result of his involvement in securing the contract with PCLP. He claims 50% of the £755,467.30 that PCLP agreed to, and did, pay DSM which Carillion had owed DSM when it went into liquidation. He alleges he orally agreed with Mr Braid on behalf of DSM and/or the Second Defendant that he would be entitled to a 50% profit share. He also claims in the alternative that he is entitled to a profit share pursuant to the TSA.

7. The Defendants deny the oral agreement and also deny that the terms of the TSA entitle Mr Kelly to a profit share in the circumstances of this case.

8. The key issues in the case are as follows.

    a. The true construction of the TSA, and in particular
        i. whether Mr Kelly's work must be the cause of any Uplift in DSM's income or whether Mr Kelly needs only to contribute to achieving an Uplift in order to be entitled to a profit share;
        ii. whether PCLP's payment of or agreement to pay Carillion's debt in place of Carillion qualifies as an Uplift under the TSA;
        iii. how any consultancy fee should be accounted for in the profit share calculation;
    b. whether the parties entered into the oral agreement alleged by Mr Kelly; and
    c. whether, in all the circumstances, Mr Kelly's work entitled him to a payment either under the TSA or under the alleged oral agreement.

9. Although there is no claim in these proceedings arising out of the contract with Tottenham, the circumstances under which DSM paid Mr Kelly a profit share in relation to that contract are also in issue, since Mr Kelly alleges that he made a similar oral agreement in relation to that contract, and that the oral agreement in relation to PCLP was a continuation of the agreement in relation to the Tottenham contract, or that it was that he be paid on the same basis as he was paid on the Tottenham contract.

10. Although the issues identified by the parties included the question of whether Mr Kelly was obliged to provide the services to DSM under the TSA that resulted in the agreement with PCLP, that issue is no longer relevant. Mr Kuehne conceded in his submissions that an entitlement to a

profit share could arise in respect of work Mr Kelly was obliged to carry out as part of his consultancy obligations under the TSA.

11. In the background, but not directly relevant to the issues in this case, is a separate and ongoing dispute over the circumstances in which the buyers acquired DSM and its associated companies and Mr Kelly's conduct in relation to that dispute.

The true construction of Clause 3.3, Part 1, Schedule 2 of the TSA

12. The relevant provisions of Part 1 of Schedule 2 of the TSA read as follows:

> *"2.1 Each Family Shareholder shall provide the relevant Newco Services set out below his name in Schedule 1 to Holdco for itself and on behalf of the Newco Group in accordance with this agreement"*
>
> *"3.3 If ... Holdco ... requires the provision of services that are materially outside the scope of the services, or materially different in nature or volume to the nature and volume of the services provided by the applicable person during the 12 month period immediately before the Commencement Date, the parties shall follow the procedure set out in clause 8"*
>
> *"8.1 If a party wishes to make a change to the nature, volume or execution of any of the Services it receives or supplies, it shall submit details of the requested change in writing to the other party ...*
>
> *"8.2.1 Where a change has been requested, the estimate for the cost of the change to the Services shall be considered at the next meeting of the Services Manager and the relevant Family Shareholder(s)"*
>
> *"8.2.2 The relevant parties shall consider the request in good faith but no party shall be under any obligation to accept any requested change to the Services"*

13. Schedule 1 Part 1, entitled *'Services Required from the Family Shareholders'* sets out the services required in the case of Mr Kelly as follows:

> *"John Kelly*
>
> - *Hand over key Contracts to Matt Sprayson/Kieran Madden.*

- *Introduce Kieran Madden/Matt Sprayson to key contacts/subcontractors/labour providers*
- *Continue in consultancy role to identify key project and sites with return on capital is achievable* (sic)
- *Assist in the preparation and bid formulation and in securing key contracts of demolition/remediation as and when required by Holdco whether for itself or for any member of the Newco Group*
- *Identify potential joint venture (funding) opportunities for the Newco Group*
- *Such other services as are agreed in writing to be required by the Services Manager on behalf of the parties at the date rate of £1,000 for 10 hours work"*

14. Schedule 1 Part 2, entitled 'Services that the Family Shareholders require from the Newco Group' provides as follows:

"3.1 Holdco will ensure that each Family Shareholder receives a consultancy fee of £40,000 …. .for the continuing performance of their obligations under this agreement ..."

"3.3.1 Holdco intends to incentivise the Family Shareholders to seek to enhance profits for the Newco Group in relation to demolition and/or remediation works (DSM Works)";

"*3.3.2 Where the Newco Group has tendered for a DSM Works project, if a Family Member is able to negotiate an increase on the amount payable to the Newco Group on that project and this increase is duly contacted for (Uplift) the Family Member will be entitled, by way of additional fee, to an amount equal to 50% of the net profits associated with the Uplift (Uplift Fee). This incentive proposal applies to new projects and to projects that are already in existence at the date of this agreement where a Family Member identifies where additional value can be claimed without increasing the costs base".*

"3.3.3 By way of illustration of the above. If Newco Group price a project and would be happy to take on that project for, say, £500K and this would return normal profit but because of some reason a Family Member is able to negotiate a price increase without adding any additional work or cost to Newco Group (pure profit over what Newco Group's original price allowed for) and this increase is duly contracted for then that element of profit will be shared with the Family Member. So, by way of example (assuming that the consultancy payment has already been taken into account):

Base case

Original DSM price = £500K

Original costs = £200K

Original profit = £300K

Family Influence

Original DSM price = £500K

enhancement to price = £100K

total price £600K

original costs = £200K

total profit= £400K

Increase in profit from Family = £100K

50:50 share = £50K = Uplift Fee"

The law

15. The parties are broadly agreed as to the approach to be taken to interpretation of a contractual provision. I have been referred to the authorities of *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL), *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619, and *Wood v Capita Insurance Services Ltd* [2017] AC 117 and will not rehearse the law at length here. The parties are agreed that the court's task is to ascertain the objective meaning of the provision, taking into account the contract as a whole and not solely the particular provision. The court must also take into account the relevant background at the time the contract was made, which can include, in the words of Lord Hoffman in *Investors Compensation*, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man".

16. 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. The balance to be struck between the language of the clause and the implications of the rival constructions may depend on the quality of the drafting. The exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.

17. At one point, it appeared that Mr Tabari may be suggesting that an analysis of what the parties had mutually considered the relevant TSA terms to mean by reference to their post-contractual conduct could be an aid to construction. However, in oral closing, Mr Tabari clarified that was

not his contention, the parties' post-contractual conduct being relevant only to a possible argument in estoppel, which was not pursued.

18. In addition, Mr Tabari's submissions raised the principle of *contra proferentum* but he confirmed in his oral closing that he agreed with Mr Keuhne the argument was a "port of last resort" if the court could not reach an objective interpretation without resorting to it.

The first interpretation point – effective cause or material effect?

19. The Clamant argues that, in order to earn an Uplift Fee, there is no requirement that the Family Member was the only, or the principal, driver behind any outcome of a negotiation. Instead, it is sufficient that he had a material effect on the negotiation, so that his contribution made a difference to the outcome, but not the difference to it. The Defendants argue that the personal intervention or action of the Family Member must have caused the outcome in a "but for" sense. The Defendants argue that the wording of the provision, the commercial context and purpose of the TSA lead to the interpretation they place on the wording.

20. The relevant section of the provision is: "*if a Family Member is able to negotiate an increase"* (emphasis added).

21. In my judgment, the ordinary and natural meaning of the words "*negotiate an increase*" requires the Family Member to be the person who achieves the increase. The clause does not provide that the Family Member need only assist in negotiating, contribute to a negotiation or engage in a negotiation process. The word "negotiate" is used as a transitive verb. In my judgment, it requires the Family Member to negotiate the increase.

22. This interpretation also appears to me to be consistent with commercial common sense. Reading the provisions of Part 2 of Schedule 1 of the TSA as a whole, including the worked example, it is clear that the intention was to incentivise Family Members to enhance profits by achieving for Newco Group a result that it would not have achieved without the Family Member, "*because of some reason*". It is to reward a price increase that a Family Member achieves over that which DSM would have achieved.

23. If mere participation in a successful negotiation were sufficient, presumably it would be possible for two or three Family Members to claim a 50% profit share if they had each made a difference to the outcome. That would leave DSM with none of the Uplift that had been negotiated, or even

with a net loss after payment of the profit share entitlements. That is most unlikely to have been the intention of the parties. It is more likely that the intention was that only one Family Member would be entitled to payment, because the words "*negotiate an increase*" require the Family Member to have been the effective cause of the increase.

24. In my judgment, the Defendants' interpretation is to be preferred. I find that, on a true construction of clause 3.3.2, the Family Member must be the effective cause of the Uplift in order to be entitled to an Uplift Fee.

The second interpretation point – Uplift

25. The second issue of construction is what is required for there to be an "Uplift", and whether the avoidance or reduction of a loss, or recovery of a debt is sufficient.

26. The requirement is for *"an increase on the amount payable to the Newco Group on that project and this increase is duly contacted for (Uplift)"* (emphasis added).

27. The first requirement is that there must be an increase in the "*amount payable*". It is not sufficient that it increases only the amount actually paid.

28. The second requirement is that the increase must be "*duly contracted for*".

29. The third requirement is that the increase in the amount payable is an increase in the amount payable "*on the project*". It is a requirement that the amount payable on the project overall is increased.

30. In my judgment, recovery of a debt that is due under an existing contract is not an increase in the amount payable; nor is it "contracted for" no matter how influential the Family Member has been in persuading the customer to pay it, and even if it would not have been paid without the intervention of the Family Member.

31. Further, in circumstances where a payment obligation is novated from one paying party to another without there being an increase in the amount payable overall, there is no increase in the amount payable "on the project". There is an increase in the amount payable by the new contracting party, but a corresponding decrease in the amount payable by the old contracting party. There is no increase in the amount payable on the project.

32. However, Mr Tabari argues that, in the particular circumstances of this case, Mr Kelly's actions increased the amount payable because Carillion was in liquidation and, on a true construction of the TSA, where the old contracting party is in liquidation, novating that party's payment obligation to a new party does increase the amount payable under the project. He argues that, at the point Carillion entered liquidation, DSM was no longer able to take any steps to enforce the sum outstanding, its only entitlement being to submit its Proof of Debt and wait for the Liquidator to accept that Proof of Debt and ascribe a value to it, and then in due course to receive payment according to its entitlement to a dividend as an unsecured creditor in the liquidation. He argues that this means that, on Carillion entering liquidation, the debt it owed DSM ceased to be "payable" within the meaning of that word in the TSA.

33. Mr Tabari was not able to refer to me to any authority in which a debt that is provable in a liquidation has been held not to be "payable".

34. Mr Kuehne disagrees with Mr Tabari's submissions. He argues that a debt does not cease to be "payable" within the meaning of that word in the TSA when the paying party enters liquidation.

35. Mr Kuehne has referred me to one authority in which there has been judicial interpretation of the word "payable". However, he concedes that, because the word "payable" is not a term of art, and I must construe the Uplift provisions, including the meaning of the word "payable" in the TSA, following the usual principles of construction set out above, authorities arising in other contexts may be of limited assistance.

36. In *Morton v Chief Adjudication Officer* [1988] IRLR 444 at para. 16 [4], Slade LJ considered the meaning of "payable" in the context of the Social Security (Unemployment, Sickness and Invalidity benefit) Regulations 1983. He observed:

> "The word "payable" is not a term of art, as Lord Porter pointed out in *Latilla v. Inland Revenue Commissioners (1943) A.C. 377* at p. 384. It is a word which is capable of bearing different meanings in different contexts. However, I start from the definition of the word "payable", which is to be found in the Oxford Dictionary and was brought to our attention by Mr Mummery on behalf of the Chief Adjudication Officer. The primary meaning there given is as follows: "Of a sum of money, a bill, etc. That is to be paid; due; falling due (usually at or on a specified date or to a specified person)."

> "In my judgment there is no sufficient justification for confining the meaning of 'payable' in regulation 7(1)(k)(iii) to a sum for which there are available immediate and unconditional court remedies for its recovery."
>
> "For present purposes the fact that it is the liquidator who is charged with the duty of providing for the discharge of the liabilities is, in my judgment, irrelevant. The liability was, from the beginning, that of the Company itself and Mr Mummery was right in submitting that the liability of the Company must not be confused with the machinery for the enforcement of that liability.
>
> In my judgment it is clear that as soon as the award was made in favour of the appellant, the whole amount awarded became "payable" to her within the meaning of Regulation 7(1)(k)(iii), no less than if the Company had not previously gone into liquidation. That is the crucial point. The fact that the Company was already in liquidation did not cause the amount awarded to her not to be "payable" in this sense; nor did the fact that, unfortunately, there was no realistic prospect that any dividend would be paid to her."

37. Mr Kuehne submits that, in the context of the TSA, the word "payable" has its ordinary and natural meaning of "due", and there is no reason to limit that interpretation to sums that can be enforced by legal action. He also argues that, whilst there is no section of the Insolvency Act or related instruments that expressly addresses the question of whether debts owed by a company remain "payable" when it has entered liquidation, the scheme and terms of the Act and the Rules and relevant authorities make clear that the making of a winding-up order does not alter the character of a debt which is payable (in the sense of being due) at the date of the order.

38. He argues that the question of whether a debt is due and the question of whether it is a debt that is provable in the liquidation are separate questions. A debt that has not fallen due is provable in a liquidation. It is a mistake to confuse the question of whether a debt is due or payable with whether it is provable in the liquidation.

39. In addition, he refers me to s130 Insolvency Act 1986, which is the provision which prohibits a creditor from commencing or proceeding with an action except with the leave of the court. The

ability of a creditor, with leave, to bring proceedings presupposes the continued existence of the underlying right on which the action is based.

40. He also draws an analogy with the moratorium that applies when an administration order is made. In the case of *Barclays Mercantile Business Finance Ltd. v Sibec Developments Ltd* [1992] 1 WLR 1253, Millet J recognised that the moratorium that applies in the case of administration orders has a procedural effect but does not alter the substantive rights of the parties.

> "The administrators submit that the claim is doomed to fail because by virtue of section 11(3)(c) of the Act the immediate right to possession of the goods was no longer vested in the applicants after the making of the administration order. That submission treats section 11 as affecting substantive rights. In my judgment it does not have that effect. The section is couched in purely procedural terms: "(c) no other steps may be taken to enforce any security… or to repossess goods…" Similarly, paragraph (d): "no other proceedings… may be commenced or continued…
>
> Those paragraphs presuppose that both the legal right to enforce the security or repossess the goods and the cause of action remain vested in the party seeking leave. By giving leave the court does not alter the parties' legal rights. It merely grants the person having a legal right liberty to enforce it by proceedings if necessary. The section imposes a moratorium on the enforcement of the creditor's rights but does not destroy those rights."

41. Mr Kuehne also suggests that an analogy can be drawn with the time bar under the Limitation Act 1980. The right is not extinguished. A debt remains "payable" even though it cannot be enforced by recourse to the courts.

42. In addition, Mr Kuehne argues that the fact that, as Mr Tabari acknowledges, a creditor may set off against any claim the insolvent company has against it the full value of its debt, and not only the value of the likely distribution to creditors, further illustrates that the nature of the debt is not altered.

43. Further, s 189(2) Insolvency Act recognises that debts that are provable in the liquidation remain outstanding after the date of the insolvency.

> "Any surplus remaining after the payment of the debts proved in a winding up shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the company went into liquidation."

44. I agree with Mr Kuehne's submissions. I am not persuaded by Mr Tabari's argument that the word "payable" should be construed in the TSA as excluding a debt owed by a company in liquidation. I am not persuaded that the prohibition on enforcement of a debt against a company in liquidation without the court's permission means that a debt ceases to be "payable" within the meaning of that word in the TSA.

45. Mr Tabari argues that the interpretation for which he contends is in accordance with the commercial purpose behind the TSA, and that it is less likely that the interpretation of the word "payable" refers to "notational paper numbers", but to monies actually recovered. I disagree. An interpretation that refers to monies recovered rather than contractual entitlement is not consistent with the plain wording of the TSA, which clearly requires a new contractual entitlement to arise for an Uplift Fee to become payable. It requires not only an increase in the amount payable but also that the increase is contracted for.

46. In addition, I note that other provisions of the TSA are inconsistent with Mr Tabari's argument. The illustration as to the intended operation of the Uplift Fee provisions in clause 3.3.3 of the TSA does not use the words "*the amount payable*" at all. It uses the words "*price increase*". That reinforces the view that, at least in the TSA, the words "*the amount payable*" mean the price contracted for, and not the amount actually recovered.

47. In my judgment, in order to entitle a Family Member to an Uplift Fee, there must be an increase in the amount contractually payable on the project, and not only in the amount paid. I am not persuaded that the word "payable" in the TSA does not include a debt due from a paying party which is in liquidation.

The third interpretation point – consultancy fee

48. Paragraph 3.3.3, which illustrates the profit share arrangements, contains the following wording: "*then that element of profit will be shared with the Family Member. So, by way of example (assuming that the consultancy payment has already been taken into account)"* (emphasis added). From this it appears clear to me that the consultancy fee payable to the Family Member should be deducted before the profit share is calculated.

The facts of the case

49. For the Claimant, I heard evidence from Mr Kelly himself. Mr Kelly struck me as a witness who felt strongly that he was entitled to the sum he was claiming, but who did not have a detailed recollection of events.

50. As I have mentioned, in the background to this dispute is a wider dispute over the purchase of DSM and other family businesses. Mr Kelly believes there has been some impropriety in relation to the transaction. This was not explored in these proceedings as it is irrelevant to this claim. Because of his concerns over the conduct of the MBO team, Mr Kelly arranged to bug the offices of the Defendants. The Defendants sought an injunction against him as a result, and he denied his actions in those proceedings. He has conceded that the statement he made in those proceedings denying his actions was untrue. He says that he made untrue statements because he was protecting another person who was involved in helping him. It is also clear that he believes his actions were in some way vindicated by the results of the investigations he made. It is clear to me that, whether or not Mr Kelly is correct in his beliefs as to the buyers' conduct, his beliefs are strongly and genuinely held.

51. For the Defendants, I heard from Mr Robert Braid, Chief Executive Officer of the group of companies of which the Defendants form part ("the Group"), and a Director of both Defendants; Mr Andrew Fletcher, the Managing director of DSM; Mr Kieran Madden, a Director of DSM; Mr Michael Meenaghan, a Quantity Surveyor employed by DSM; and Mr Adrian Kennedy, a solicitor and the Legal Director of the Group. Mr Tabari suggested that the Defendants' witnesses stuck to an agreed party line rather than seeking to assist the court. However, they are all Directors and managers of DSM and I do not find it surprising that they had discussed the claim before giving their evidence.

Was there an oral agreement in relation to the Tottenham Hotspur contract?

52. DSM had already paid Mr Kelly a profit share on the Uplift Mr Kelly achieved when he negotiated the final account on the Tottenham contract. The relevance of the Tottenham contract is only that the Claimant's case is that he reached an oral agreement with Mr Braid in respect of Tottenham and later reached an agreement to be paid on the same terms in relation to the Paradise Circus project. The question of whether Mr Kelly and Mr Braid reached an oral agreement in the terms claimed by Mr Kelly is therefore an issue which I must decide.

53. Mr Kelly claims that, in late 2017, Mr Braid asked him to assist in negotiating the final account for the Tottenham job and that Mr Kelly agreed to organise a meeting between the parties and to negotiate on DSM's behalf, on condition that he would be paid 50% of the uplift from what DSM was then to be paid (i.e. Tottenham's offer) and that Mr Braid agreed to that. Mr Kelly also claims that he was entitled to payment under the TSA for his work in relation to Tottenham so that, even if the oral agreement had not been made, he would have been entitled under the TSA to receive a 50% share of the uplift he achieved.

54. Mr Kelly's position is therefore that he reached an oral agreement with Mr Braid and also that the uplift he achieved on the Tottenham final account would have entitled him to be paid under the TSA. Mr Kelly has not given evidence that there was any difference between the terms of the oral agreement he negotiated and the TSA. On the face of it, it would seem surprising for parties to negotiate an oral agreement in more or less identical terms to a written agreement that they had executed a few months earlier. However, Mr Kelly argues that it was not surprising for the parties to have done so, as neither party had the terms of the TSA at the forefront of their mind at the time the oral agreement was reached.

55. Mr Kelly's evidence was that he did not have a copy of the TSA at the time he reached the oral agreement with Mr Braid, as he had not been given a copy. Mr Kelly's family business, known as Corbally, was represented by solicitors in the sale. The TSA was negotiated between solicitors acting for the buyers and Corbally's solicitors. Mr Kelly's evidence, which I accept, is that he was not separately represented and the solicitors acting for Corbally were not acting separately for him personally. Whether or not he had ever been given a copy of the executed TSA, I am satisfied Mr Kelly did not have it to hand. In particular, I note that, when he sent to DSM a screenshot of the worked example given in paragraph 3.3.3 of the TSA in support of the invoice he raised for his claimed Uplift Fee for Paradise Circus that is the subject of this claim, the screenshot of the relevant provisions of the TSA does not appear to have been taken from a copy of the TSA itself. Its format is slightly different from that in the TSA. I accept Mr Kelly's evidence that he took that extract from an email and not from the TSA itself because he did not have the TSA to hand at that time.

56. However, the documentary evidence shows that Mr Kelly gave Corbally's solicitors express instructions in relation to the negotiation of the TSA before it was executed. In addition, Mr Kelly executed the TSA on completion of the sale. At the time of the MBO, therefore, Mr Kelly considered the proposed terms of the TSA, gave instructions as to its negotiation on behalf of Corbally, and executed it in his personal capacity. He was aware of its terms at that time. I do

not consider that the fact he did not have a copy of it to hand when he discussed his involvement for DSM with the Tottenham contract is reason to construe any discussions between the parties as giving rise to a new oral agreement on the same terms as the written agreement they both knew they had recently entered into, rather than as confirming the terms of the written agreement.

57. Mr Tabari submitted that another reason why they might have entered into a new oral agreement was because DSM was not paying much attention to the TSA at the time. He argued this was the case since Mr Fletcher, DSM's Managing Director, was unaware of the TSA and Mr Kennedy, its Legal Director, had no more than a cursory knowledge of it. I do not find it surprising that Mr Fletcher, who was not a Group Director, was unaware of the terms of a profit share agreement between the outgoing Directors and owners of DSM and the new owners of it. In addition, there is no allegation that Mr Kennedy was involved in the discussions for the oral agreement in relation to Tottenham. His knowledge (or lack of knowledge) of the TSA at the time is not relevant to whether the parties entered into an oral agreement. It is Mr Braid who is alleged to have made the oral agreement, not Mr Fletcher or Mr Kennedy.

58. Mr Braid was cross-examined as to why he had not considered the terms of the TSA before going into a meeting with Mr Kelly to discuss his claim for an Uplift Fee for the Tottenham contract. It was suggested that his failure to do so indicated that DSM paid little heed to the terms of the TSA. His evidence was that he had negotiated the TSA and had a good understanding of its terms. Also, it is clear from the evidence that Mr Kelly and Mr Braid had been good friends as well as colleagues, and that they were still friendly at that time. I do not find it surprising that Mr Braid attended a meeting with Mr Kelly without refreshing his memory of the TSA. He was not under any obligation to reach an agreement with Mr Kelly during that meeting. There is no reason to conclude from his preparedness to go into a meeting without checking the contractual terms that he did not intend to rely on them, or that the Defendants placed little importance on the terms of the TSA, so that I should conclude that any discussions between Mr Braid and Mr Kelly are likely to have given rise to a new oral agreement.

59. I am satisfied that both Mr Braid and Mr Kelly were aware of the terms of the TSA, whether or not either of them had a copy of it to hand when they met to discuss Mr Kelly's claim for an Uplift Fee for the Tottenham final account.

60. Mr Kelly's evidence as to what was discussed with Mr Braid was vague and lacked detail. In his witness statement, he gave evidence that he and Mr Braid reached an agreement under which he would be entitled to 50% of any sum over the valuation that Tottenham had placed on the final account, that the TSA was not mentioned in the discussion with Mr Braid, and that, as far as Mr

Kelly was concerned, this was a new, stand-alone agreement. He did not explain why the fact that the TSA was not expressly mentioned in that discussion means that it gave rise to a separate oral agreement, rather than confirming the terms of the TSA. In my judgment, a more natural and reasonable interpretation of such a discussion, at a time shortly after the parties had executed the TSA, would be that Mr Braid was confirming the terms of the TSA, rather than that he was entering into a new oral agreement on behalf of the Defendants on the same terms as the TSA.

61. Further, there is not a single contemporaneous document to which I have been referred which makes reference to any oral agreement. If there had been a separate oral agreement between Mr Braid and Mr Kelly which did not depend on the TSA, I would have expected Mr Kelly to have mentioned that oral agreement either in his invoice in relation to Tottenham or in the correspondence surrounding it.

62. Mr Kelly's claim was discussed in a meeting between him, Mr Braid and Mr Baker after he had negotiated the final account with Tottenham . If there had been a separate oral agreement between Mr Kelly and Mr Braid in the terms alleged, it is not clear why there would have been a need for a meeting. Mr Braid would already have been aware that DSM was obliged to pay 50% of whatever uplift Mr Kelly had achieved. All that would have been required would be for Mr Kelly to send the figures to DSM showing the difference between the final account and what Tottenham had proposed.

63. On 13 November 2017, Mr Kelly sent an email to Mr Braid and Mr Baker in the following terms:

> *"Hi guys*
>
> *Is there a good day/time this week to meet up for half an hour on my own with you two? Just wanted to go over the days of work/expenses/and a couple of additional monies I've got extra work.*
>
> *Can we keep my business with you guys confidential."*

64. Mr Kelly has explained that the reference to keeping the business confidential was because Mr Kelly did not want his business discussed with other members of his family.

65. Mr Kelly's email requesting the meeting does not refer to the need to discuss the quantification of the amount he is due pursuant to the oral agreement made with Mr Braid, as one might expect if the claim was made pursuant to an oral agreement. Instead, the email gives the impression that

Mr Kelly wanted to discuss with Mr Braid and Mr Baker something of which they would not already be aware.

66. On receipt of that email, a meeting was arranged for 16 November 2017 between Mr Kelly, Mr Braid and Mr Baker.

67. Mr Fletcher's and Mr Braid's evidence was that they had a telephone conversation within which Mr Braid asked Mr Fletcher whether he was expecting a large deduction from the Tottenham account. Mr Fletcher had confirmed that he was. He also confirmed that he was pleasantly surprised, and that the outcome of the negotiation was better than he had expected.

68. On 13 December 2017, Mr Jarvis of DSM forwarded by email to Mr Fletcher, Mr Baker and Mr Braid a breakdown he had received from Mr Kelly setting out days worked and a claim for £200,000 for completing the final account. Mr Jarvis stated that he was not aware of the agreement to pay £200,000 for completing the final account on Tottenham and no accruals had been made in the management figures for that amount. He asked for advice. Mr Fletcher responded that he knew nothing about £200,000 for completing the final account. Mr Baker responded on 14 December 2017 in the following terms:

> *"Hi Aaron/Andy. Page 12 of the attached Reciprocal Services Agreement shows the calculation of fees due to John for negotiating an increase in profits for DSM. The £200K relates to Spurs Phase 2. It is based on John negotiating the payment of £400K additional final sum for work that was included in the original contract but not done and so strictly speaking should not have been received. If the details of the contract negotiation are correct, then the £200K is correct.*
>
> *John is also due £1,000 per day for work done, so if you're happy that 77 days work has been done then the amount is due. I know that we have paid some already, so that needs to be taken into account in agreeing number of days to be paid now."*

69. On the basis of the interpretation of the TSA that I consider to be correct, the invoice was higher than it should have been under the TSA because it claimed both the time spent at the daily rate provided for in the TSA in full and 50% of the uplift achieved, whereas the TSA required account to be taken of the consultancy fee before calculating the uplift. Mr Braid gave evidence that he had his doubts as to whether Mr Kelly was entitled to the daily rate claimed but did not wish to offend him. It is clear to me from Mr Braid's oral evidence at trial that the fact that the result Mr Kelly achieved was indeed about £400,000 better than the figure for which DSM had accounted in the Group accounts was important to his decision to pay the Uplift Fee.

70. In the Defence, the Defendants pleaded that the payment in respect of the Tottenham contract had been a gesture of goodwill. One of the issues for trial identified by the parties was whether the payment was a gesture of goodwill. The Defendants' witnesses were cross-examined on this. Their oral evidence was that Mr Kelly had been paid under the TSA. They conceded that he had not been paid out of a gesture of goodwill.

71. Mr Tabari pointed to the Defendants' change of position between the Defence and the oral evidence. I am not persuaded that there is anything sinister about this change. From the evidence of Mr Kennedy, it appears that the instruction to plead a goodwill payment came from Mr Kennedy, who gave instructions to the Defendants' solicitors and who was not involved in agreeing the payment.

72. The reference to a goodwill payment is in the following terms in the Defence:

> *"(8) The Claimant, Mr Braid and Mr Baker duly met at 3:30pm on 16 November 2017 at the SFG offices. The Claimant told Mr Braid that he had managed to persuade Tottenham Hotspur to reduce the proposed deductions by approximately £400,000 and said he would expect DSM to pay him 50% of the resulting uplift he had been able to achieve. Mr Braid had not been involved in day-to-day management of the Tottenham Hotspur Job, so the Claimant explained that Tottenham Hotspur's initially proposed deductions related in large part to the fact that DSM had priced for material processing off-site, which was not needed as this had been undertaken on site. The Claimant explained that despite this, he had negotiated an uplift of approximately £400,000. Based on what he was told by the Claimant, and as a goodwill gesture, Mr Braid agreed on behalf of DSM that they would share the uplift 50:50 with the Claimant.*
>
> *(9) Save to the extent it is consistent with the foregoing, paragraph 8 is denied."*

73. Paragraph 8 of the Particulars of Claim alleges an oral agreement in relation to Tottenham and makes no reference to the TSA. The focus of paragraphs 8 and 9 in the Defence, therefore, is a response to the allegation of a separate oral agreement, and not to any allegation that the Claimant was entitled to payment under the TSA.

74. It is clear from the contemporaneous correspondence, and in particular the email from Mr Baker to Mr Fletcher of 14 December 2017, that Mr Braid and Mr Baker were authorising the payment to Mr Kelly under the TSA. Whether, in doing so without making a more detailed investigation

of the precise uplift Mr Kelly had achieved compared with what DSM expected, they were generous to Mr Kelly is not clear on the evidence available to me. Further, it may be that, in failing to challenge the day rate claimed in full in addition to the profit share, they were generous to Mr Kelly. I find that the profit share paid to Mr Kelly in respect of Tottenham was not paid purely out of goodwill. Mr Braid considered that Mr Kelly was entitled to a profit share when it was paid. However, I am satisfied that, in doing so, Mr Braid and Mr Baker probably felt they were being generous to Mr Kelly, for example, in not quibbling about the day rate claimed in addition to the full profit share, so there was an element of goodwill in agreeing to the invoice in its entirety.

75. In summary, I find that there was no oral agreement made between Mr Braid and Mr Kelly before Mr Kelly negotiated the final account on the Tottenham contract. I find that the agreement to pay for his work was made after he had negotiated the final account and that, when Mr Braid and Mr Baker authorised the payment of Mr Kelly's invoice, they did so pursuant to the terms of the TSA, and not pursuant to any separate oral agreement.

Was there an oral agreement in relation to Carillion and PCLP?

76. On 15 January 2018, Carillion went into liquidation. At that time, it owed DSM a considerable sum.

77. Mr Kelly's pleaded case in relation to the agreement is as follows:

> *"16 Also on 15 January 2018, during the course of a series of text messages and telephone conversations between the Claimant and Rob Braid, Mr Braid asked the Claimant to organise a meeting between DSM and Argent for the purpose of discussing whether and to what extent PCLP would be willing to: (a) pay to DSM the monies then due to DSM from Carillion; and (b) engage DSM directly to complete the works which remained to be completed under the Sub-Contract."*
>
> *"19 Prior to entering the January External Meeting the Claimant met with Rob Braid, Andrew Fletcher and Kieran Madden of DSM or related companies outside Arden's offices adjacent to the Copthorne Hotel in Birmingham ("the January Internal Meeting"). During the course of the January Internal Meeting Mr Braid informed the Claimant, and the Claimant agreed, that he would be paid "like on the Spurs job", which statement the Claimant understood Mr Braid to mean, and Mr Braid intended to be understood as meaning, that the Claimant would be paid*

50% of any monies which the Claimant was paid by reason of the January External Meeting in lieu of the monies owed to DSM by Carillion. The agreement aforesaid was entered into by Mr Braid as director of DSM and/or the Second Defendant and was to the effect that one or both of those companies would pay the Claimant any monies which were due to him."

78. Mr Kelly's evidence is that he sought a meeting with Argent at Mr Braid's request. There is a conflict of evidence between Mr Braid and Mr Kelly as to whether Mr Braid asked Mr Kelly to arrange a meeting with Argent on 15 January 2018. I have been referred to text messages passing between Mr Kelly and Mr Braid that day.

79. At 10.21 Mr Braid sent Mr Kelly a text in the following terms

"*Hi John, I have rung Adrian but he didn't answer. I have a couple of meetings now but I will keep trying and let you know once I have spoken to him. Regards, Rob"*

80. At 12.04 on 15 January 2018, Mr Kelly sent a text to Mr Braid in the following terms:

"*Thanks Rob. Would you be able to come with me to see Argent at 3 today".*

81. Mr Braid replied:

"*Hi John, could we make it 2 PM. I have another meeting at 4*?".

82. A further text message follows:

"*Meeting changed see you in Brum just before 3*"

83. From that correspondence, it would appear likely that Mr Kelly had spoken to Mr Braid recently, since he was reporting on his attempts to get hold of Mr Kennedy. The parties agree that Mr Kelly wanted to speak to Mr Kennedy to discuss a dispute involving windows with which Mr Kennedy was helping him. The correspondence does not shed light on whether in that conversation they discussed arranging a meeting with Argent. What is clear, though, is that Mr Braid's initial reaction to the request that he attend a meeting at 3pm with Argent was to seek to rearrange the meeting, which would be surprising if Mr Braid had asked Mr Kelly to ask Argent for an urgent meeting. One would not expect a sub-contractor asking for a meeting with the

developer's agent as a matter of urgency to ask for the time offered to be changed when the meeting was offered.

84. I find that Mr Braid did not specifically request Mr Kelly seek to arrange an urgent meeting with Argent.

85. Mr Kelly's claim is that he orally agreed with Mr Braid that he would be paid "like on the Spurs job". His evidence is that this agreement was reached shortly before the meeting with Argent on 15 January 2020. His evidence is that it was agreed in the presence of Mr Fletcher and Mr Madden. Mr Braid denies making this agreement and Mr Fletcher and Mr Madden deny hearing Mr Braid saying those words.

86. In any event, the question arises as to what an agreement in those terms would mean. Mr Kelly construes that to mean that he is entitled to a 50% share of any uplift or additional profit he helped to negotiate. However, if, as appears now to be agreed by all parties, Mr Kelly's entitlement in respect of the Tottenham contract was consistent with the terms of the TSA, it is difficult to see why agreeing to pay "like on the Spurs job" would mean any more than that the terms of the TSA would apply. In other words, if Mr Braid had said these words, it is far from clear to me how it follows that they should be interpreted as meaning that Mr Kelly has any greater entitlement than he would have under the TSA.

87. Mr Kelly's evidence is that, at the meeting with Argent, he offered to fund the work on a temporary basis if necessary if PCLP gave the contract for the remaining work to DSM. All parties agree that he did so. DSM's witnesses say that his offer was unexpected and unwelcome. Whilst Mr Kelly's evidence was that he had agreed with DSM before the meeting that he would make that offer, his evidence is that he would not have made that offer had he not understood that he would be entitled to a profit share as a result of concluding a deal with PCLP. He contends his offer to Argent supports his case that he had made an agreement with Mr Braid for a profit share, because he would have no reason to put his own money on the line for the sake of £1,000 per day consultancy fees. However, DSM owed Mr Kelly a very considerable sum of money after the sale of DSM. Mr Kelly therefore had an interest in DSM's continued profitability. If he was concerned that DSM may not have sufficient cash to be able to finance the work before DSM were paid, he may well have considered it in his interests to provide the working capital required on a temporary basis to ensure this contract was not lost, even if he would not receive a profit share as a result.

88. On 26 January 2018 Mr Braid sent a text to Mr Kelly in the following terms: *"LOI* [meaning Letter of Intent] *just came in!"*.

89. Mr Kelly replied:

> "*Told you so, think last Monday the library was over and you are at 900K lost – you are the only Subby in UK to have recovered with 10 days from Carillion collapse without a scratch! You have a very kind Guardian Angel looking after you and not expensive*."

90. Mr Braid replied "*Thanks John*" and added an angel emoji and a thumbs up emoji.

91. Mr Kelly's evidence is that, when he said he was a guardian angel and that he was not expensive, it was something of a joke.

92. The Defendants argue that this exchange is inconsistent with the oral agreement alleged because agreeing to pay 50% of the amount PCLP agreed to pay in place of Carillion was expensive and could not be described as recovering "without a scratch". I agree that the exchange of texts appears inconsistent with Mr Braid having agreed to pay Mr Kelly 50% of the amount PCLP had agreed to pay. Recovering only half of the debt at risk as a result of Carillion's insolvency would not be described by many people as recovering "without a scratch".

93. The Defendants also point to the initial letter of claim sent by the Claimant's solicitors. That letter made no mention of any oral agreement and expressly stated that the claim was made pursuant to the TSA.

94. The Defendants also argue that the oral agreement alleged would not have made commercial sense. Mr Kelly argues that it did make sense, because he was able to recover for them half of what had been lost that morning, when Carillion went into liquidation. However, no one knew at that time (and neither the parties nor I know now) what, if any, recovery there will be for creditors. Mr Kelly's evidence was that the question of what recovery there may be in the liquidation was not on the agenda, because, in his experience, contractors tend to recover nothing in such situations. Unless the parties knew that there would be no recovery, or next to no recovery, it would not appear commercially attractive to agree to pay half what PCLP had agreed to pay by way of commission. It might well result in a higher than 50% Uplift Fee.

95. Also, if the agreement was to pay half the difference between the recovery that would have been made from Carillion and the amount that PCLP agreed to pay, it would not be possible to quantify

the liability at the time the invoice was raised, or even today, since it is not known what recovery DSM would have made by proving in the liquidation (DSM having assigned its rights against Carillion to PCLP). It seems unlikely that the parties would have entered into an arrangement that would result in an unworkable formula, which would depend on the parties awaiting the outcome of the Carillion insolvency before they were able to calculate the profit share due to Mr Kelly.

96. In addition, and very importantly, when Mr Kelly put forward his claim for payment in respect of the agreement with PCLP, he sent with his claim an extract emails leading up to the TSA, showing how the profit share was to be calculated under the TSA. If there had been an oral agreement that went beyond the terms of the TSA (as opposed to Mr Braid merely confirming the provisions of the TSA would apply to any deal Mr Kelly negotiated) there would be no reason to send this extract with the invoice. Instead, the correspondence would refer to the oral agreement. The fact that Mr Kelly sent this extract from the TSA with his claim indicates that Mr Kelly's understanding, at least at that time, was that any payment he was to receive was to be calculated in accordance with the TSA and that DSM may need to be reminded of how the profit share was to be calculated under the TSA.

97. For these reasons, I find that Mr Braid did not orally agree with Mr Kelly to pay half what PCLP agreed to pay as a result of any negotiation by Mr Kelly.

98. The Defendants invite me to decide whether Mr Kelly has been dishonest in advancing the claim in the way that he has, by alleging oral agreements that I have found were not made. In response to questioning as to why the alleged oral agreement in respect of Tottenham had not been raised at the outset, but only in later correspondence from his solicitors, Mr Kelly stated that there had been a lot going on at the time and he could not remember everything around that time.

99. It is precisely because, with the passage of time, parties and witnesses go over events in their own minds and become more and more convinced of their own case that the court gives considerable weight to contemporaneous documentation. It is common for a party to convince himself, and genuinely believe, that something was agreed which was not agreed at the time. I have found there was no oral agreement before Mr Kelly negotiated the Tottenham Hotspur final account, the only agreement being the TSA. However, it does not follow that Mr Kelly was being deliberately untruthful when he gave evidence that he had reached an agreement. In fact, Mr Kelly's evidence as to how that agreement was made was limited. In his witness statement, he gave evidence that Mr Braid agreed to pay a 50% profit share, that the TSA was not mentioned, and that Mr Kelly understood there to be a new stand-alone agreement for a profit share for Tottenham. He did not seek to embellish his allegations with details of those discussions.

100. I do not consider that Mr Kelly was deliberately untruthful. I consider it more likely that Mr Kelly has convinced himself over the passage of time that any discussions he had with Mr Braid after he had negotiated the Tottenham final account amounted to the oral agreement he now alleges was made.

101. As far as the PCLP agreement is concerned, I note that the focus of Mr Kelly's email dialogue with Mr Johal of Argent, from whom he sought support for his claim, appears to have been the role he played generally and the fact that he was key to the relationship with Argent, rather than the fact that it was he, and not others at the meeting on 15 January 2018, who had negotiated the deal with Argent. In other words, it appears to me that Mr Kelly believed that, if he could demonstrate, possibly with support from Argent, that he had been key to achieving the result that had been achieved following the 15 January meeting, he would be entitled to payment, just as he had received on the Tottenham contract. Again, in relation to this agreement, Mr Kelly's evidence as to how the agreement was made is brief. He alleges that Mr Braid agreed that he would be entitled to be paid "like on the Spurs job". As I have already said, in my judgment, even if Mr Braid had used those words, they would not give rise to a separate oral agreement but instead be indicative that Mr Braid was confirming the terms of the TSA. Whilst I am not satisfied that Mr Braid did use those words, I consider it more likely that Mr Kelly has convinced himself that he reached agreement with Mr Braid than that he was deliberately untruthful.

102. I do not find that Mr Kelly is deliberately putting forward a false claim. I do find that he is mistaken in his recollection that he reached an oral agreement with Mr Braid.

Does Mr Kelly's contribution fulfil the requirements for payment under the TSA?

Was there an "Uplift" for the purposes of the TSA?

103. I have found that, properly construed, the TSA requires there to be an Uplift on the amount contracted for and not merely an uplift in the amount recovered on the project.

104. PCLP agreed to pay Carillion's debt. They did not agree to pay more than Carillion owed. In exchange, DSM assigned their book debt to PCLP. PCLP's obligation replaced Carillion's on the project, but did not result in any increase in the amount payable on the project. I have found that the TSA should not be construed so that the amount payable under the contract did not include the sums Carillion owed when it went into liquidation.

105. It follows that the criterion for payment of an Uplift Fee was not met.

106. Although that means that the claim must fail on that basis, I will consider the other issues identified by the parties as relevant to the question of Mr Kelly's entitlement.

Was Mr Kelly the effective cause of the PCLP agreement?

107. Mr Kelly's evidence is that he instigated the discussions with Argent that led to the agreement with PCLP, and he relies on this as supporting his claim that his efforts led to the PCLP agreement, and the fact that he drove the negotiations. Mr Kelly was cross-examined in relation to his phone records, which do not show an outgoing call that morning to Mr Johal. The Defendants accepted that the phone records are not necessarily a complete record of all activity that morning, as they would not show calls made by Wi-Fi, for example. However, they did show other calls made that morning and did not show a call to Mr Johal.

108. In the report that DSM prepared for its investors, which Mr Johal approved, there is a statement that Argent contacted Mr Kelly to discuss Argent's proposal for DSM to take a direct principal contract on 15 January 2018. Mr Johal did not correct that aspect of the report.

109. I find that it was Mr Johal who contacted Mr Kelly on the morning of 15 January 2018 and asked Mr Kelly to attend a meeting, and not Mr Kelly who contacted Mr Johal.

110. The negotiation of the agreement with PCLP began with discussions at the meeting on 15 January 2018. Mr Kelly's position is that the agreement was negotiated at that meeting, albeit that it was not documented until later. Mr Kelly concedes that he was not involved with any discussions or negotiations after 15 January and therefore his case depends on the agreement having been negotiated at the meeting of 15 January 2018, and not subsequently.

111. All parties agree that, at the meeting, Argent indicated they wanted DSM to enter into a direct contract with PCLP for the remainder of the sub-contract work, and that either Mr Johal or Mr Groves said words to the effect that DSM would not be out of pocket. The Defendants deny that meant that an agreement to pay Carillion's debt was made at that meeting.

112. In answer to the question of what else could be intended by the expression "not be out of pocket", one suggestion put forward by DSM was that it might mean that DSM would be offered further work such as another contract. It is hard to understand, unless that contract would be at an inflated price, how that could be consistent with DSM not being out of pocket. However, another

suggestion was that it might mean that DSM would recover its costs but not the entire contract sum including its profit. That does appear to me a possible interpretation of the expression.

113. Shortly after that meeting, Ms Miller of Hogan Lovells, who was acting for PCLP, sent an email to Mr Fletcher with a letter of intent for a direct contract between PCLP and DSM. It did not mention payment of Carillion's debt.

114. The following morning, Mr Kennedy sent Ms Miller an email in the following terms:

> *"Following a meeting yesterday between your client and DSM, it was agreed that DSM would continue with the demolition works for your client directly, initially proceeding on the basis of a letter of intent but with the intention of later entering into a formal contract. It was also agreed that your client would pick up payment of monies due to DSM from CCL under DSM's existing sub-contract. There are two payment applications which are outstanding from CCL, which I am awaiting copies of. However, I understand that these were discussed with Argent and they have agreed to cover these.*
>
> *I therefore attach an amended letter of intent. I have added a new paragraph 9 to deal with Argent's agreement to make good on the outstanding payment applications. I have also added in the works that I understand are still to be performed into a schedule and the drawing referred to is attached to this email.*
>
> *I look forward to hearing from you on the amended draft."*

115. Mr Kennedy was cross-examined on that email and its apparent inconsistency with the Defendants' case. In particular, it was put to him that there was no recognition in this email of the fact that Argent had said they did not have authority to reach agreement on behalf of PCLP and also that it expressly stated agreement had been reached to pay all that Carillion owed. Eventually, Mr Kennedy said that it suited him to assume that was the case and that he was putting forward DSM's best interpretation of the outcome of the meeting and that the word "agreed" was "lawyer craft". When pressed, he conceded he did not believe that an agreement had been reached that was not subject to further confirmation from PCLP, but he had an honest belief that that was what Argent was putting forward as a solution. When asked whether he had an honest belief that it had been agreed that PCLP would pick up payment of monies due under DSM's existing sub-contract, he said that the only belief he had was that Argent said that DSM would not be left out of pocket and that he was giving the best possible interpretation of that. He

conceded that he did not believe there had been an agreement by Argent to pay the payment applications that were outstanding or that these had been discussed with Argent and they had agreed to cover them. He said he wrote that in his email to elicit a response and to see whether PCLP would agree or disagree.

116. Whilst it is not attractive to hear a solicitor concede that he made a statement in a letter knowing it to be untrue, I accept Mr Kennedy's evidence that he was seeking to put forward the best possible case for DSM based on the discussions, and what he put in that letter went further than he believed could properly be put forward as the correct interpretation of that meeting.

117. I am satisfied, based on all the evidence, that Argent made clear at the meeting that they had no authority to conclude an agreement on PCLP's behalf. In addition, I am satisfied that it was also obvious to all parties that the precise terms of a direct contract would have to be negotiated. In effect, any agreement made by Argent was subject to their clients' approval and subject to negotiating the precise terms. There was no guarantee at that meeting that PCLP would pay Carillion's debt, or the whole of it, or the terms on which they might do so.

118. Over the course of the next few days, Mr Kennedy and Ms Miller of Hogan Lovells negotiated the precise terms and agreed a Letter of Intent and, later, the terms of the contract.

119. Contrary to the submissions made by Mr Tabari, in my judgment, this was different from the situation in relation to Tottenham, where Mr Kelly agreed a final account at a meeting with Tottenham and all that was required was for a director of DSM to sign it, as he no longer had authority to do so. In my judgment, no agreement was concluded at the meeting on 15 January 2018.

120. The parties are also not agreed as to the extent of Mr Kelly's contribution to the outcome of the meeting on 15 January 2018.

121. The Defendants concede in the Defence that discussions at the meeting were led by Mr Kelly and Mr Braid. They do not deny that Mr Kelly had an influence on the discussions or that he assisted. They deny that he negotiated the agreement.

122. On behalf of Argent, PCLP's agents, the discussions were conducted by Mr Groves and Mr Johal.

123. Despite the fact that both parties have clearly approached Mr Johal to ask for his support, neither party called him as a witness. The Claimant has criticised the Defendants for not calling

Mr Johal as a witness. However, in case management documents, Mr Johal was identified as a possible witness for the Claimant. Mr Kelly has explained that Mr Johal stopped talking to him when the Defendants went to see him after the dispute arose. However, there is no evidence that the Defendants were aware of that or that Mr Johal would not be called by Mr Kelly. It seems to me unsurprising that the Defendants would not seek to call Mr Johal but would leave the Claimant to do so. It also seems to me to be entirely reasonable for a company such as DSM not to wish to put a key contact such as Mr Johal to the inconvenience of being a witness in a case of this type. I draw no adverse inference from the failure to call Mr Johal.

124. Both parties asked me to place reliance on correspondence between them and Mr Johal in which he expresses his views and recollections. In the case of the Claimant, it consists of emails sent by Mr Johal to him expressing thanks and offering some support to Mr Kelly. In the case of the Defendants, it consists of Mr Johal's approval of a report prepared by the Defendants for its investors. There are inconsistencies between those documents, at least in relation to the emphasis given to Mr Kelly's involvement.

125. Of course, given Mr Johal was not called as a witness, the court places little weight on what he has said in correspondence as evidence as to the relevant facts. Not only is correspondence of this type no substitute for sworn evidence from a witness subjected to cross examination, but also it appears unlikely from the correspondence I have read Mr Johal understood when he wrote his emails to Mr Kelly or when he approved the Defendants' report that his words would be relied on in court to support or refute Mr Kelly's claim for a profit share arising out of the agreement reached between DSM and PCLP.

126. However, given the reliance placed by the parties on Mr Johal's correspondence, I will consider it.

127. On 10 May 2018 shortly after a meeting between Mr Kelly and Mr Johal (evidenced by a calendar entry in Mr Kelly's diary) Mr Johal wrote to Mr Kelly as follows:

> *"Hi John,*
> *I had realised that we hadn't passed on our thanks to you for the effort and commitment led by yourself to enable us to complete the demolition works on Paradise phase 1. It has been a real achievement since we started the process back in December 2015, and all the discussions we had to have to get into contract via. CCL.*

The DSM team led by yourself have certainly helped us keep momentum throughout the works, and especially through the very difficult period when CCL went into liquidation.

Firstly offering to fund the works personally yourself really showed the dedication we needed from our supply chain at the time, and the fact we were still able to deal with you face to face (with the strong relationship established), helped us agree to maintain works with DSM and not go out and procure the works from a new position.

Please can you let us know whether you are involved in the Phase 2 enabling works element, which is seeming to be difficult to get over the line at the minute. ……"

128. On 19 June 2018, Mr Kelly forwarded to Mr Johal a copy of the Defendants' letter rejecting his claim. It would have been clear to Mr Johal from that letter that Mr Kelly was claiming commission from DSM. It is not clear whether Mr Johal had also seen the letter of claim itself, or whether he understood that Mr Kelly was making a claim for 50% of the amount PCLP had agreed to pay in lieu of Carillion's payment.

129. Mr Johal replied promptly in the following terms:

"*The whole reason we trusted to go to DSM was because of the relationship with yourself John. The commercials were agreed between those who they mention but this discussion wouldn't have happened unless we had built the ties we did during the days Carillion were around. I don't believe they have issued this to you I can't believe they have issued this to you. Totally unethical*."

130. Mr Kelly responded as follows:

"*I could do with you and Rob to make a statement to say this on true and that you didn't have to use DSM*".

131. Mr Johal responded:

"*I'm not sure you'll get anything from Rob, John, I'll write something though."*

132. However, it does not appear that Mr Johal did write anything further. Mr Kelly's evidence is that he stopped talking to Mr Kelly after Mr Braid and Mr Kennedy had been to see him.

133. Whilst I place very little weight on this correspondence, I do note that these emails from Mr Johal do not appear to bear the construction that Mr Kelly would like me to place on them. They undoubtedly make clear that Mr Kelly had built strong ties with Argent and was trusted, and that his involvement was positive. However, I do not read those emails as meaning that Mr Johal thought Mr Kelly had negotiated the deal with PCLP at the meeting on 15 January 2018. Indeed, although he suggests that the discussion would not have happened unless those ties had been built, he says "*The commercials were agreed between those who they mention."* I also note that Mr Johal made that comment even before the Defendants' Directors had visited him. From this, it appears that Mr Johal agreed that the commercial terms were agreed by those people mentioned in Mr Braid's letter of 18 June 2018, being Mr Fletcher and Mr Kennedy.

134. The document on which the Defendants rely as evidence of Mr Johal supporting their version of events is a document headed*: "Collective report into relevant events leading into the novation of Phase 1 - Paradise Circus Sub- Contract*" prepared in August 2018. This followed a meeting between Mr Braid, Mr Kennedy and Mr Johal, prompted by Mr Kelly's reliance on Mr Johal's emails. Mr Johal approved the report, subject to some comments. It reads as follows:

> *"John Kelly was the senior point of contact for DSM in respect of sub contract prior to the MBO (31 March 2017). Argent continued to perceive John Kelly as senior point of contact post MBO including at the time of the Carillion liquidation. Argent's principle (sic) point of contact at DSM, in relation to the works (on site), was and remains Kieran Madden."*

135. Mr Johal has added a note as follows:

> *"We did say that John was the main contact for the works due to the relationship developed with DSM through initial sub-contract negotiations when employed by Carillion back in 2015. Kieran was key site contact for the works"*

136. The report goes on to state that Argent favoured the appointment of DSM as principal contractor in place of Carillion, which had the benefit of maintaining the programme for the development; road closures had been booked for 20th to 21st January and rearranging the road closures would have required a new application and 3 months' statutory notice, delaying the project significantly; and there was a risk that a new contractor would have been required by Birmingham City Council to obtain a new agreement in principle to the works methodology that had been prepared by DSM and rebadged by Carillion, which would have led to substantial delay.

137. In relation to the meeting of 15 January 2018, the report reads as follows:

> *"15 Argent were looking to agree DSM taking a principal contractor appointment to maintain programme timings. DSM was looking to get a commitment from Argent that monies owed by Carillion under the sub contract would be covered."*
>
> *"During the meeting, an "off-the-cuff" comment was made by John Kelly to the effect that he would fund the works until such time as a principle (sic) contract could be put in place between PCLP and DSM ("the funding comment"). In reply to this Rob Braid said to John words to the effect that DSM would not require him to fund any works. There was no further discussion in relation to the funding comment either during the meeting or afterwards.*
>
> *…….*
>
> *18. The meeting on 15th concluded on the basis that DSM agreed in principal (sic) to take a principal contractor appointment in place of Carillion for the remainder of the sub-contract works and maintain programme and Argent agreed in principal (sic) that DSM would not be left out of pocket in relation to the Carillion liquidation. There was no discussion as to how DSM's outstanding monies from Carillion would be covered.*
>
> *19. Following the meeting on 15th January, the principal negotiations for DSM were passed on to Adrian Kennedy and Andrew Fletcher for DSM. John Kelly had no involvement in the matter after the meeting on 15th January."*

138. The report goes on to describe the subsequent negotiations involving Hogan Lovells, including the negotiation of the letter of intent and subsequent complex negotiations to agree a formal principal contract between PCLP and DSM. It confirms that Mr Kelly was not involved in any of those negotiations. They were carried out by Adrian Kennedy and Andrew Fletcher on behalf of DSM.

139. Considering the correspondence with Mr Johal as a whole, it seems to me that he was trying to be helpful, was sympathetic to Mr Kelly and felt that the Defendants' letter in response to his letter of claim did not recognise Mr Kelly's contribution and the good relationship Mr Kelly had with Argent. However, I do not read the correspondence as indicating that Mr Johal considered Mr Kelly was the person who negotiated the deal with PCLP. Recognising Mr Kelly's importance to the relationship with Argent is not the same thing as stating that he was responsible for negotiating the deal with PCLP.

140. In my judgment, for the reasons I have already set out, for Mr Kelly to be entitled to payment of the contract, he needed to do more than have a sufficiently good relationship with a customer

so that they would prefer to enter into contracts with DSM in the future to finding a new contractor. He must have negotiated an uplift on the value of the contract above the value that DSM could negotiate or had negotiated.

141. One further issue between the parties is whether it was Mr Kelly who raised the issue of Carillion's debt in the meeting on 15 January 2018. In their Defence, the Defendants concede that the discussions at the meeting were led by Mr Kelly and Mr Braid for DSM. However, the Defendants' witnesses gave evidence that it was Mr Madden, and not Mr Kelly, who raised the question of whether PCLP would pay Carillion's debt.

142. The Defendants' witnesses were cross-examined at length in relation to this point. At that time, Mr Madden was not a director of DSM. Two of its directors were present at the meeting, being Mr Braid and Mr Fletcher. It was suggested that it was unlikely that Mr Madden would have been the person first to mention the issue of payment in the presence of two Directors and one former Director of DSM. Having heard Mr Madden give evidence, I have little difficulty in accepting that this is what happened. Mr Madden has a direct style. He gets to the point. My impression of him was that he was an honest and very straightforward witness.

143. It is clear from the evidence of all witnesses that the meeting with Argent went well and that Argent were amenable to recommending a direct contract with PCLP. I can well believe that Mr Madden saw that things were going well and decided that he would mention the elephant in the room, since no one else had done so.

144. As I have already mentioned, all parties agree that Mr Kelly offered to fund future work if necessary, at that meeting. It seems to me there is an inconsistency between making that offer to inject into DSM capital equivalent to the amount that Carillion owed DSM and asking for payment of the Carillion debt. If the debt were paid, there would be no need for Mr Kelly to fund the project.

145. I find that it was Mr Madden who first raised with Argent the question of whether PCLP would pay Carillion's debt to DSM if DSM took a direct contract with PCLP. That does not mean that, had Mr Madden not raised it, it would not have occurred to anyone else to do so, whether at that meeting or later. However, I find that Mr Kelly was not the person who first raised the payment issue with Argent.

146. In summary, I find that Mr Kelly played a part in securing the PCLP contract. However, he was not the cause of it, or the person who negotiated the contract. The negotiation of the contract

was a team effort. The team was pushing at an open door, however, since it was clear that Argent wanted DSM to continue with the contract. Mr Braid, Mr Madden and Mr Kelly all played a part in the discussions with Argent at the meeting on 15 January 2018, at which they agreed to recommend to their clients, PCLP, that they should enter into a direct contract with DSM for the remaining work and not to leave DSM out of pocket. It was Mr Madden who first raised the issue of payment with Argent. Mr Fletcher and Mr Kennedy continued those discussions, particularly Mr Kennedy with Hogan Lovells. They negotiated the terms of the letter of intent and, later, the contract with PCLP.

147. Mr Kelly's actions did not satisfy the requirements of the TSA. He was not the effective cause of the agreement with PCLP, but was a contributor to it. In my judgment, his contribution was not sufficient to entitle him to an Uplift Payment under the TSA.

Conclusion

148. In conclusion, for the reasons set out above, I find that:
    a. The parties did not reach an oral agreement under which Mr Kelly would be entitled to a profit share. His only entitlement was under the TSA.
    b. His actions in relation to PCLP's agreement to pay Carillion's debt did not satisfy the conditions for payment under the TSA because:
        i. On a true construction of the TSA, the requirement was for an increase in the amount payable and not only the amount paid on the project. The agreement with PCLP increased the amount paid, but did not increase the amount payable, on the project. There was therefore no entitlement to an Uplift Fee.
        ii. In any event, even if the agreement with PCLP had increased the amount payable on the project, Mr Kelly was not the effective cause of the agreement with PCLP.

149. The Claim is dismissed.