Neutral Citation Number: [2021] EWHC 3395 (QB)

Case No: QB-2015-002125

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2021

Before :

MRS JUSTICE EADY DBE

- -

Between :

ASIF MAHMOOD	**Claimant**
- and -	
THE BIG BUS COMPANY	**Defendant**

- -
- -

Mr Daniel Piccinin of counsel (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Mr Tom Roscoe of counsel (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 18-20 and 22 October 2021

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Approved Judgment

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MRS JUSTICE EADY DBE

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 10.30 am on Wednesday 15 December 2021.

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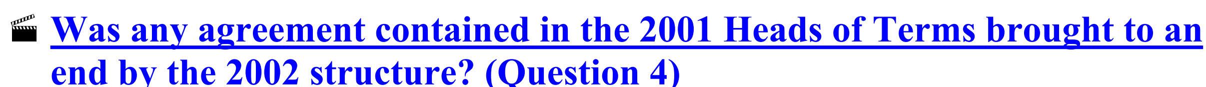
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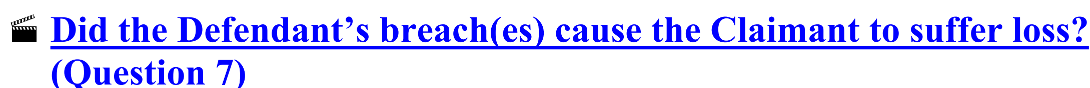
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Mrs Justice Eady DBE:

Introduction

1. On 27 July 2001, during discussions in London regarding a possible joint venture to operate tour buses in Dubai, the parties signed a document entitled "Heads of Terms". That document provides the basis for the claim now before me, which was issued by the Claimant on 5 March 2015. The Claimant says the Heads of Terms gave rise to a binding contract between the parties, which the Defendant subsequently breached. The claim is resisted by the Defendant, arguing that, whether assessed under the law of England and Wales or under the law of the United Arab Emirates ("UAE"), the claim is time-barred. In the alternative, the Defendant contends there was no binding contract between the parties, or, if there was, that it was superseded by events that took place in 2002, or that the Claimant acted in repudiatory breach of any such contract, whereas the Defendant itself did not breach a contractual obligation owed to the Claimant. It further disputes that there is any basis for the damages claimed by the Claimant in these proceedings.

2. A hearing took place before me on 18-20 and 22 October 2021, limited to issues of liability and causation. I received oral evidence from the Claimant, and from Mr Waterman and Mr Cooper for the Defendant. I also received reports and heard oral testimony from the parties' experts in UAE law: Mr Al Muhtaseb for the Claimant and Mr Al Hashimi for the Defendant. Some of those giving evidence before me were based in the UAE and, by agreement, their testimony was received over video link; this was a proportionate means of ensuring a fair hearing, in particular given continuing difficulties relating to international travel due to the on-going coronavirus pandemic. The documentary evidence was presented in an agreed trial bundle of some 1,421 pages, along with a short supplemental bundle.

3. As well as written and oral opening arguments, both parties produced written closing submissions and spoke to these on the last day of the hearing. During the course of the Defendant's closing, it was intimated that it intended to make an application to adduce a further document in evidence, an application that was made later that day. Having considered further written submissions from both parties, I refused the Defendant's application for reasons provided in my Order of 26 October 2021.

The issues

4. The questions I am required to determine at this stage are agreed as follows:

   (1) Does UAE law (as the Claimant contends) or English law (as the Defendant contends) apply to the Heads of Terms?

   (2) Is the claim time barred?

   (3) Did the Heads of Terms impose contractually binding obligations on the parties? (In addressing this issue, it is helpful to add the further question: if so, what?)

   (4) If the answer to question (3) is "yes", was any agreement contained in the Heads of Terms brought to an end by the arrangements put in place in 2002 ("the 2002 Structure")?

(5) If the answer to question (4) is "no", was the Claimant in repudiatory breach of an implied term of any agreement contained in the Heads of Terms?

(6) If the answer to question (5) is "no", did the Defendant breach the Heads of Terms as alleged by the Claimant?

(7) If the answer to question (6) is "yes", did the Defendant's breach(es) cause the Claimant to suffer loss?

5. By the time of the hearing before me, the parties were agreed that question (1) (the applicability of UAE or English law) is only relevant to the issue of limitation; it is common ground that, for all other purposes, I should proceed on the basis that there is no material difference between UAE and English law.

The parties

6. The Claimant describes himself as an international businessman with over 40 years' experience doing business in the Middle East and Asia. He was born in India, in 1946, but his family moved to Pakistan after the Partition and the Claimant grew up in Karachi. The Claimant says that, between 1968 and 1981, he spent time in and around Pakistan and the Middle East, where he undertook a number of business development and marketing consultancy roles for various companies. In 1981, the Claimant moved to the United Kingdom ("the UK"). In oral evidence, he said this was because he had been invited to join the investment bank EF Hutton and he said that he then worked for Merrill Lynch and various other companies (generally in the banking and finance sector). In his second witness statement, he had, however, suggested that this was what had happened when he returned to the UK in 2007. Mr Piccinin sought to clarify his client's career history in re-examination, and the Claimant explained that he had carried out various roles between 1981 and 2001, sometimes as an employee, sometimes as a consultant, but also sometimes carrying on business as an entrepreneur, although he was unable to provide specific detail in this regard.

7. The Defendant is a company registered in England, which operates double decker bus sightseeing tours in London. The company was established by members of the Maybury family and, by the summer of 2001, the Defendant had been successfully operating sightseeing tours in London for over a decade. At that stage the Defendant did not operate outside London albeit Mr Patrick Waterman, an engineer who had previously been the Managing Director of London Coaches Limited, had started employment as the Defendant's Business Development Director in August 2000 and part of his role was to seek opportunities to expand the company's operations internationally.

Findings of fact

Initial observations

8. Before setting out the factual background, I make some observations about the oral evidence I received.

9. As Mr Piccinin fairly acknowledged in his closing submissions, the Claimant was generally not a reliable or helpful witness. Some aspects of his evidence were plainly incorrect (for example, his assertion that the buses used by the Defendant, when starting operations in Dubai, had the passenger doors on the wrong (left-hand) side, when photographs from that time showed that was not the case) and he was unable to provide a reliable history of events in a number of respects (for example, in relation to his career history (see my observations at paragraph 6 above); as to when he was aware of his shareholding in Big Bus Incorporated; or as to when he learned of the incorporation of Double Decker Bus Tours LLC). Save where corroborated by other material or the testimony of others, I give little weight to the Claimant's evidence.

10. The Defendant urges me to go further and to find the Claimant was dishonest in his evidence. Having reflected on this question, I do not consider I can fairly reach that conclusion. The documentary evidence does not suggest the Claimant was the kind of person to keep a careful written record and such contemporaneous documents that exist, which set out his understanding of events at the time, reveal a degree of confusion on his part even then (for example, as to the benefits he would be entitled to receive as an employee of the business to be established in Dubai); while that confused understanding might have been informed by the Claimant's self-interested aspirations, I am unable to say that he was being dishonest. As for the Claimant's testimony before me, as well as bearing in mind his limited grip on the detail of conversations and events at the time, I have to allow for the diminution in his recall given the passage of time and the problems that he apparently experienced when giving evidence as a result of his hearing difficulties.

11. In contrast, Mr Waterman was a reliable witness. Assisted by the documents he produced at the time, he was able to provide a clear account of events relevant to the claim (from which I have largely taken my findings of fact) and, acknowledging the difficulties in recalling events from so long ago, made appropriate concessions in giving his evidence. To the extent there is any conflict in the testimony provided to me by the Claimant and by Mr Waterman, I prefer that of the latter.

12. Mr Cooper's evidence was on the periphery of what was relevant for the purpose of the issues before me. I consider, however, that he sought to assist the Court to the best of his ability and provided an honest account of what he genuinely believed to be the case, albeit he was largely relying on what he had been told by others.

13. For the Claimant it is urged that I should draw an adverse inference from the Defendant's failure to call the witnesses on whose accounts (dating back nearly 20 years) Mr Cooper and Mr Waterman had relied. Given that the individuals in question had long since moved on from their involvement with the Defendant, or any related companies, and their evidence would, in any event, be of limited relevance to the issues to be determined, I am not persuaded that I should draw any inference other than that the Defendant has taken a proportionate view as to how to present its case in this regard.

14. As for the UAE law experts, I accept both demonstrated the requisite expertise to assist the Court. For the Defendant it is objected that Mr Al Muhtaseb's expertise was questionable given that he does not appear in UAE courts. My understanding of Mr Al Muhtaseb's evidence was that he does not have rights of audience in the UAE but is licensed to advise on UAE law. Certainly Mr Al Muhtaseb's evidence to me

demonstrated a knowledge and understanding of UAE law that was largely uncontradicted.

The relevant history

15. Having visited Dubai at some point prior to June or July 2001, and witnessing first-hand the pace of development in the region, the Claimant had formed the view that there was potential for a successful tourist bus business. Familiar with the Defendant's tour buses in London, but apparently with little more knowledge of the business than that, the Claimant made contact with the Defendant, asking for a meeting to discuss his idea.

16. The Claimant's message having been passed to Mr Waterman, a meeting was arranged in the Defendant's office in London. The Claimant introduced himself as an experienced businessman, based in London but with connections in the Gulf, and explained his proposal for the Defendant to operate bus sight-seeing tours in Dubai. As well as identifying this as a potential business opportunity, the Claimant explained how he could work with the Defendant to establish operations in Dubai, where he had high-level connections and would be able to help obtain the necessary approvals and permissions. He made clear, however, that he would not be investing any money in the venture himself and it would be for the Defendant to supply the necessary funding, as well as the buses, branding and technical support.

17. For the Defendant's part, I accept Mr Waterman's evidence that, while looking for opportunities to expand, it had reservations about establishing operations in Dubai, which was (so far as the Defendant was concerned) an unknown jurisdiction in the Middle East. The Claimant's stated familiarity with the region had, however, provided Mr Waterman with some reassurance and he agreed that he and Richard Maybury (then Managing Director of the Defendant) would visit Dubai that summer to explore the feasibility of establishing sight-seeing bus tours there (or, as the Claimant put it in his evidence, to "*kick the tyres out there*").

18. Mr Waterman and the Claimant had a number of meetings around this time and discussed how things might progress should the Defendant decide to proceed with the Claimant's idea. References made in later correspondence suggest that these discussions ranged more generally over the Defendant's potential aspirations for overseas development, with the Claimant possibly playing some continuing (but undefined) role in that regard. As for establishing an operation in Dubai, the Claimant explained that a UAE sponsor would be required but he already had someone in mind for this role, a Mr Mohammed Al Duhaim, then UAE Ambassador to Italy, who the Claimant described as a friend and as someone with the appropriate connections and influence needed to obtain a tourist licence in Dubai. Mr Waterman was also reassured by the fact that the Claimant was talking of moving to Dubai, which would mean he would be able to oversee the project and operations from there, albeit I accept Mr Waterman's evidence that this was not something the Defendant had asked of the Claimant or made a condition of the negotiations.

19. Before the feasibility trip took place, the parties agreed the Heads of Terms document on which the Claimant's case in these proceedings is based. Mr Waterman has explained that the Claimant had wanted some form of contractual agreement before the trip to Dubai but this was out of the question for the Defendant: it was not willing

to agree to any contractual arrangement with the Claimant on the back of a mere idea and his representations without even having visited Dubai. Given the Claimant's insistence on having something in writing, however, Mr Waterman agreed that the Defendant would enter into Heads of Terms, to be replaced by an enforceable contractual document in the event the Defendant decided to proceed with the project. That, I accept, was the context for the Heads of Terms that Mr Waterman then drew up, absent any legal advice, and the parties each signed two copies of that document in London on 27 July 2001.

20. Given the importance of the Heads of Terms document, I set it out in full at this stage:

> "Heads of Terms between:
>
> The Big Bus Company, whose registered office is Grosvenor Gardens House, 35-37 Grosvenor Gardens, London SW1W OBS
>
> and
>
> Asif Mahmood and others, of 45 Woodland Way, London N21 3QB
>
> Whereby
>
> 1. Mr Mahmood approached the Big Bus Company to discuss the possibilities of a joint venture to operate and market open top sightseeing tours in Dubai.
> 2. Following discussions the Big Bus Company has agreed to pursue the idea further with Mr Mahmood and his local UAE representative to establish the feasibility of such an operation.
> 3. In order to achieve this representatives from the Big Bus Company and Mr Mahmood plan to visit Dubai in August/September to assess the potential of the city and to meet with the relevant authorities in order to ensure that the necessary permission can be obtained to allow the operation to run, should the decision be reached to go ahead with the project.
>
> It is agreed by both parties on signing this agreement:-
>
> 1. Neither party shall commence nor continue conversation with any other third party in relation to the operation of sightseeing tours in Dubai or the UAE until such time as it has been agreed in writing that the proposed joint venture will not be pursued by the signatories to the agreement.
>
> 2. All written information supplied by either party will remain confidential and will be returned on termination of this agreement.

> 3. Each party to this agreement shall bear their own costs until such time as the terms of the joint venture are fully agreed and implemented.
>
> 4. The proposal is for a 50/50 joint venture company, set up in accordance with local law, and the shareholding split accordingly. This would also set the profit share which may be separately prescribed, unless varied by mutual consent between Asif Mahmood and others and the Big Bus Company.
>
> 5. Funding for the project in terms of capital equipment is to be provided by the Big Bus Company. Final details for the structuring of the remainder of the requirement will be determined following the visit to Dubai.
>
> 6. In signing this agreement Mr Mahmood accepts that he is signing on his and the local representative's behalf, who agrees to be bound by the terms of this agreement.
>
> 7. The Big Bus Company agrees that it will not attempt to circumvent Asif Mahmood or his Nominee prior to the signing of a formal contract between the parties or following cessation of the contract between them.
>
> 8. Both parties will use reasonable endeavours to ensure that contracts are prepared and signed before the end of September 2001.
>
> Signed for and on behalf of the Big Bus Company …
>
> Signed for and on behalf of Mr A Mahmood and others …"

21. The Claimant does not now seek to argue that the Heads of Terms were legally binding in their entirety; it is his case, however, that the provisions on which he relies, in particular, clauses 1 and 7, gave rise to an enforceable contract between himself and the Defendant. While maintaining his position that the Heads of Terms were not intended to amount to a binding contract, in his oral evidence Mr Waterman accepted that at least some of the provisions were written to provide comfort for the Claimant by setting out the parties' respective negative obligations, thus recording what they had agreed not to do.

22. On or about 8 September 2001, meeting his own costs, the Claimant travelled to Dubai. He went out with his family, although it is unclear whether anyone from the Defendant was aware of that at that stage. Mr Waterman and Mr Maybury flew out on 9 or 10 September 2001 and spent some time driving around to get a sense of Dubai. All vividly recalled that the 11 September 2001 terrorist attacks occurred shortly after they had arrived and, assuming the Defendant would not then wish to proceed with the project, the Claimant told Mr Waterman he would understand if they backed out at that stage. Mr Waterman responded, however, that Richard Maybury had fallen in love with Dubai and he felt the Defendant would want to proceed, although this would be subject to Board approval and he would confirm the position

after returning to London. Mr Waterman and Mr Maybury used the remainder of their visit to meet with various officials and gained a greater sense of the challenges involved in establishing a tourist bus operation in Dubai. Considering, however, that the potential benefits were likely to outweigh the risks, Mr Waterman made a recommendation to the Defendant's Board (comprising three members of the Maybury family) that they should proceed.

23. At this stage, questions still existed for the Defendant as to how the venture would be structured. In particular, in investigating the feasibility of the project, the Defendant had taken advice from UK solicitors with a branch in Dubai and had become aware that UAE law did not merely require a sponsor to be involved in the project but that a UAE citizen should be the majority shareholder, albeit the business could be structured in such a way that the individual concerned was remunerated by way of a fixed fee. The proposal for "*a 50/50 joint venture company*" with the Claimant, with "*the shareholding split accordingly*" (clause 4, Heads of Terms) thus needed to be re-visited.

24. On 1 October 2001, Mr Waterman wrote to the Claimant to tell him that the Defendant's Board had accepted the recommendation to proceed with the project albeit "*not without some reservations*". In particular, he wanted to understand the Claimant's proposals for the structure of the company that would need to be established to meet UAE legal requirements and for his role in relation to the business thereafter. The structure of the business and the profit share would also need to take account of the sponsor's fee, which the Defendant understood would come out of the Claimant's share. The Defendant's view at this stage was explained as being that the Dubai company would be established as a stand-alone operation, with the share capital divided as necessary, taking account of the relevant UAE rules, and with the profit split set at 60:40 in favour of the Defendant. It was envisaged that the Defendant would lease the buses to the new company and funding would be by inter-company loan, so initial start-up costs could be recouped. It was further proposed that the Claimant would be employed by the Defendant as a consultant, on a salary of £60,000 per annum (this being the sum the Claimant had requested), with an initial brief to ensure that the Dubai project "*gets off the ground*" and to then develop "*further markets as we have discussed*". As the letter made clear, the Defendant was concerned that, as it would be taking all the financial risk, an equal profit share in the business was not equitable, particularly when the Claimant was also asking to receive a salary. Although Mr Waterman acknowledged that the Claimant had moved to Dubai, this, he observed, was something the Claimant had wanted to do in any event (and, on this point, I note that in the Claimant's first statement in these proceedings, dated 16 May 2017, he states that he in fact only served notice on his rented home in London *after* receiving Mr Waterman's letter of 1 October 2001).

25. More generally, it is apparent that, at this still early stage, there were tensions in the relationship between the parties, with significant differences in their respective views as to the role the Claimant was to play in the new venture. As the Defendant's further letter of 4 October 2001 made clear, Mr Waterman felt the Claimant had overstated his knowledge of, and influence in, the Dubai tourist market and that he (Mr Waterman) was having to salvage the project. A feasibility study was required for the Department of Tourism and Commerce Marketing but this needed a marketing plan, which the Claimant had yet to produce and, although the Claimant had given the

impression that he could ensure the Defendant was granted a licence for its tours – that he had the "*green light from the Big man*" – this had not happened. On top of this, although the parties had agreed to bear their own costs until the terms of their joint venture could be finalised, the Claimant was now seeking an income from the Defendant as he needed to support himself and his family in Dubai.

26. The Claimant has pointed to the various things he says he did to ensure the Defendant could establish its operations in Dubai but there are disputes as to whether it was his work, or that of Mr Waterman and others working for the Defendant, that ultimately enabled the bus tours to start. To the extent that it is possible to establish the truth of the position at this stage, it seems that the Claimant largely operated on the basis of face-to-face dealings with people in Dubai but Mr Waterman had to then follow-up with the more formal, documented communications that finalised the various steps that had to be taken to (for example) provide reassurance to the relevant authorities regarding the use of right-hand drive buses, establish an office base, and explain the routes the buses would follow. From the Defendant's perspective, the Claimant was giving little value to the project and any profit-share needed to be re-visited given what was now known as to how UAE law required the business to be structured; the Claimant, on the other hand, was left feeling undervalued and was still insistent on being treated as an equal partner. The underlying problem was that the Claimant's role was never clearly defined and the parties' respective views as to his position were never aligned.

27. In late October 2001, Mr Waterman returned to Dubai and met with the Claimant. Although the precise legal structure was still to be determined, it was clear by this stage that the tour bus operation in Dubai would be run not by the Defendant but by a new company. Mr Waterman and the Claimant discussed the Defendant's proposal for a 60:40 profit split (in the Defendant's favour) and for the Claimant to be employed on a consultancy contract on a salary of £60,000 per year. I accept Mr Waterman's evidence that the Claimant indicated that he was agreeable to this. At this stage, however, it appeared that there was some question as to Mr Al Duhaim's involvement in the enterprise and the Defendant's lawyers drew up draft incorporation documents for the new company with an alternative sponsor in mind.

28. The draft incorporation documents explained that the new company would be known as Big Bus Company Dubai LLC ("Big Bus Dubai"), with the sponsor owning 51% of the shareholding. The remaining 49% was to be held by an offshore entity, incorporated in the British Virgin Islands ("BVI"), known as The Big Bus Company Incorporated (in this Judgment, "Big Bus BVI"), of which the Claimant would be one of the shareholders, along with Mr Waterman and the three members of the Maybury family who were Board members and shareholders of the Defendant. Documents relating to the establishment of Big Bus Dubai made provision for the sponsor to be paid an annual fee in return for which control of Big Bus Dubai would be given to Big Bus BVI. The draft documents were sent to the Claimant who took legal advice on their contents and forwarded his lawyers' proposed amendments to the Defendant's solicitors on 26 November 2001.

29. The changes to the incorporation documents proposed by the Claimant's lawyers were considered unacceptable, not least as these would give the Claimant control over the business or, at least, the power of veto. On 29 November 2001, Mr Waterman wrote to the Claimant setting out his concerns relating to the position the Claimant had

adopted and suggesting that, as well as any salary that might be due (subject to "*a full time, proper contract*"), the equity and profit might be split equally between the Claimant and the four other shareholders. At this stage, although the Claimant had not yet entered into a formal contract, the Defendant was already paying him £5,000 per month. Looking ahead to the incorporation of the new company and the investment that would be required, as made clear in Mr Waterman's covering fax of 30 November 2001, it was envisaged that this might be the start of a wider overseas operation, in which the individual shareholders (Mr Waterman and the three Mayburys) were investing, not the Defendant itself.

30. Mr Waterman again returned to Dubai in early December 2001 and met with the Claimant at the Royal Méridien Hotel. I accept Mr Waterman's evidence that he communicated to the Claimant the frustration that he and the other shareholders in the Defendant (the investors in the new Dubai operation) felt over the continued lack of progress in getting operations up and running in Dubai. Given this situation, and the fact that the Claimant would not be taking any financial risk but would be further remunerated by way of a salary, Mr Waterman made clear that the investors were no longer prepared to proceed on a 60:40 split but considered that the Claimant's shareholding and share of the profits would need to be reduced to 30%.

31. It was on this basis that, on 10 December 2001, Big Bus BVI was incorporated. It is Mr Waterman's recollection that, on the incorporation of Big Bus BVI, share certificates were sent to all shareholders; the Claimant disputes that. I can see no reason why the share certificate would not have been sent to the Claimant at this point but, in any event, am satisfied that Mr Waterman had made the share distribution clear to the Claimant at their meeting earlier that month. On anyone's case, however, this was something that had been presented to the Claimant as a *fait accompli*; it was not something to which he had previously agreed.

32. Also in December 2001, the Claimant travelled to Rome to meet with Mr Al Duhaim, taking with him the relevant documents relating to Big Bus Dubai. Mr Al Duhaim was ultimately prepared to confirm his involvement and Big Bus Dubai was incorporated on 6 February 2002. Later that month, Big Bus Dubai obtained its tourism licence and entered into agreements with the Defendant for the leasing of equipment (essentially the buses that would be used for the tours) and for a licence to use the "Big Bus" name. I note that, by clause 14 of the lease agreement, it was provided that this was to be governed by English law.

33. In early March 2002, the Department of Economic Development issued a licence for the use of the buses by Big Bus Dubai and, on 30 April 2002, a "*no objection*" letter was obtained from the Dubai Municipality for Big Bus Dubai to operate its proposed bus routes. Going into May 2002, therefore, Big Bus Dubai could at last start operating bus tours in Dubai and, after some delay, on 11 May 2002, the Claimant signed a service agreement appointing him as Site Supervisor of Big Bus Dubai, working a 48-hour week.

34. The Defendant has referred to the arrangements thus put into place for the Dubai operation as "*the 2002 Structure*". I find that the Claimant was aware of these arrangements, understanding that the joint venture could not be established as originally envisaged and that the way the business had to be structured inevitably introduced a number of additional parties into the operation, most obviously Big Bus

Dubai and Big Bus BVI as well as Mr Waterman and the three members of the Maybury family who were providing the necessary financial investment and were his fellow shareholders in Big Bus BVI. This had all been made clear to him by Mr Waterman and had been confirmed by the draft incorporation documents he had received in November 2001. More specifically, I do not accept the Claimant's evidence that he was unaware of the content of the documentation he took to Rome for Mr Al Duhaim's signature; given their relationship, it is not credible that he would present the documents to the sponsor without being aware of their content. I am further satisfied that the Claimant acquiesced in these arrangements by his continued participation in the business, although he also continued to assert what he saw as his right to a greater profit share and was not prepared to sign a formal contract expressly agreeing the detail of what had been put in place.

35. Although the business was now operational, the relationship between the parties continued to decline. Mr Waterman met the Claimant in Dubai in May 2002, followed up by a letter dated 22 May 2002, in which he expressed concerns regarding the Claimant's contribution. Although Mr Waterman was not based in Dubai, he was receiving reports from Big Bus Dubai's Commercial Manager, Gibb Barron, who had been employed to run the company on a day-to-day basis. Based on those reports, and in the light of a press article featuring the Claimant in the Gulf News, on 13 August 2002, Mr Waterman again wrote to the Claimant expressing his dismay about the content of the article and voicing the investors' continuing concerns: the marketing plan was still outstanding and the Claimant had yet to sign off the director's service agreement or the shareholders' agreement drawn up for Big Bus BVI. Mr Waterman concluded his letter by asking for the Claimant's comments, having made clear that his approach would have to change if the project was to continue "*in its current form*".

36. On the same day, Mr Waterman wrote to Mr Al Duhaim, drawing his attention to the difficulties that had arisen in the relationship with the Claimant and enclosing a copy of the letter he had written to the Claimant on behalf of the investors. Mr Waterman explained that he was writing to Mr Al Duhaim because of comments the Claimant had made to Mr Barron and his wife (also employed by Big Bus Dubai) to the effect that he would be able to persuade Mr Al Duhaim to withdraw his sponsorship.

37. By 19 August 2002, Mr Waterman was informed, by Mr Barron, that the Claimant would not be coming into work until things were sorted out.

38. On 20 August 2002, the Claimant emailed Mr Waterman to set out his perspective on events. Mr Waterman responded on 21 August 2002, making clear that he was acting on behalf of all the London-based shareholders (which I take to be the shareholders in Big Bus BVI other than the Claimant), and reiterating his requests for a marketing plan, for the Claimant's written response to the concerns raised, and for resolution of the outstanding issues regarding the director and shareholder agreements.

39. It was around this time that documents were found on the Claimant's computer in Dubai, dating from June-July 2002, and relating to a consultancy agreement with Mitsubishi Electric Europe and its possible involvement in Dubai railway. It has been suggested by the Defendant that this might explain the Claimant's lack of efforts in respect of Big Bus Dubai and was inconsistent with his obligation under the service agreement to work a 48-hour week. In a further letter from Mr Waterman of 3

September 2002, the Claimant was asked to explain the position relating to his involvement with any consultancy work with Mitsubishi. It was also recorded that Mr Barron had said that the Claimant had stated he would "*get the sponsor to suspend operations*" unless he received his pay that day. In light of what was perceived to be a veiled threat, and given that the Claimant was still to produce a marketing plan and provide a written document setting out his concerns, and had still not agreed the director and shareholder agreements, Mr Waterman stated that no further payments would be made to the Claimant and he was requested not to do any more work on the project.

40. On 3 September 2002, the Claimant sent Mr Waterman a lengthy email, suggesting that the real difficulty lay with the fact that he (Mr Waterman) was receiving inaccurate reports and explaining that he (the Claimant) was not willing to sign the shareholders' agreement without receiving a response to his request for an additional £25,000 for the further reduction in his shareholding (which could only mean the reduction from 40 to 30%). Mr Waterman responded on 4 September 2002, explaining that the "*feeling we have in London is that things have now reached a point of no return*". Although prepared to pay the Claimant's salary for August, thereafter it would be necessary to resolve matters and, to this end, Mr Waterman stated he would send the Claimant some proposals for his consideration.

41. Having discussed matters with the other investors, Mr Waterman met with the Claimant on 27 September 2002 and wrote to confirm their discussions the next day. Considering that relationships "*have been stretched to the extent that they are not recoverable*", Mr Waterman pointed to the Claimant's apparent failure to complete any substantive deals and to the lack of any documentary evidence of any activity on his part. Acknowledging that a marketing plan had now been provided, Mr Waterman complained that this added nothing to what was already known and failed to address any future strategy. As the Claimant's strengths lay in initiating projects rather than in being involved in the ongoing running of the business, the investors proposed that the Claimant should continue to be paid for six months as a consultant to the Defendant but should no longer be involved in any aspect of the running of the Dubai operation unless specifically asked, albeit he would continue to have rights as a shareholder and board member of Big Bus BVI.

42. The Claimant did not agree to this proposal, although his day-to-day involvement in the business came to an end in September 2002, and his contract as Site Supervisor for Big Bus Dubai was terminated in March 2003, with the Claimant signing a settlement agreement in relation to that appointment in July 2003. Although the Claimant continued to be paid until March 2003, delays in receiving payment led him to express his frustrations in a message sent to Mr Waterman on 22 January 2003, copied into Mr Al Duhaim, stating "*My patience has been stretched to the limit. These tactics will not be appreciated by the sponsor …*". Meeting with Mr Waterman on 23 February 2003, the Claimant expressed the view that "*the situation with the Dubai operation is now past the point where [I] can come back into it …*" and made various proposals for how the impasse might be resolved, including a possible buy-out of the Dubai business, although he recognised that its value might be adversely impacted by the situation in Iraq. On 24 February 2003, Mr Waterman reported back that none of the Claimant's proposals were acceptable to the London investors.

43. As discussions between the parties failed to identify an agreed way forward, and with the end of the monthly payments in sight, on 15 March 2003, the Claimant wrote to Mr Al Duhaim, referencing their mutual membership of a members' club in Karachi, expressing his concern that Big Bus Dubai was failing and asking that Mr Al Duhaim (through his lawyer) should,

> "tell Pat Waterman that unless Big Bus agrees to comply with their contractual obligations i-e to continue to pay my salary … that he … will not agree to the renewal of the sponsorship for another year. He should also make clear to them that they cannot close down the company without your consent and therefore if they do not want to continue running this operation then they should handover this company to the sponsor as he is 51% shareholder in the eyes of the law."

44. On 16 March 2003, the Claimant wrote to Mr Waterman, referring to what he described as the memorandum of understanding "*we signed in London*" (i.e. the Heads of Terms) as "*that is the basic document pertaining to the company and clearly states that I hold a 50% share in the company. Since you, in effect, hold 100% of the company it follows that you are holding my 50% interest in trust*." Mr Waterman's response of 31 March 2003 referred to the difficulties experienced as a result of the "*massive downturn in business brought about by the conflict in Iraq*" and made clear that the Claimant's interpretation of the Heads of Terms document was firmly rejected:

> "The heads of terms form a basis on which subsequent agreement is reached. They are in no way enforceable and are not meant to be for that purpose. As you are aware, you hold a 30% stake in the BVI holding company, and I certainly am not holding your shares in trust. …"

45. In his reply of 3 May 2003, the Claimant disputed Mr Waterman's characterisation of the position, continuing to state his view that the Heads of Terms gave him a 50% interest in "*the UAE Company*", observing:

> "As regards the enforceability of the heads of agreement, a UK Court will be the better judge."

46. Thereafter, the parties continued to assert their respective positions and an attempt at mediation failed. On 17 August 2003, Mr Waterman wrote to the Claimant explaining that the investment into the Dubai operation (money lent by the Defendant, representing an investment of some £750,000 by the other shareholders in Big Bus BVI) was now to be reviewed, with the possibility that the Defendant might choose to call in its debt; as he explained:

> "To date the Big Bus Shareholders in the BVI company have lent in the region of £750,000 to the operation in Dubai with little or no prospect of recovering that money at least in the short term. A quick calculation would suggest that you have been paid in the region of £200,000 of that (including the recent

> settlement) for "giving us the idea" in the first place. We now feel that we have paid fully for this and the time has come for the Big Bus shareholders to review their position. If the company is to continue trading it needs further cash injected. We now intend to review the position formally at a BVI shareholders meeting to decide what action we should take and to seek further funds from the shareholders in order to allow the company to continue trading. This maybe by using some form of rights issue. There is also the possibility that the Big Bus Company Ltd may choose to call in its debt."

47. Responding to Mr Waterman on 24 August 2003, the Claimant countered:

> "The Dubai Company came into existence on the basis of the agreement we signed on 20 July 2001. I have never agreed to any BVI company, nor have I agreed to a lesser share than 50% in any entity be it Dubai howsoever such shares are managed or controlled. I have never agreed to any shareholding other than with Big Bus Company … I am sure a court in England will have no difficulty in drawing a straight line from the agreement of 20 July 2001 through to the Dubai company (without involving any BVI or other company). I am quite prepared to approach the UK courts."

48. Returning to the position of Big Bus Dubai, in the latter part of 2003 and going into 2004, problems arose in its relationship with the sponsor and with some of its employees. Mr Cooper had commenced employment as General Manager of Big Bus Dubai in September 2003 but there were difficulties obtaining Mr Al Duhaim's consent for the papers needed for his UAE residence and there were some initial frictions between Mr Cooper and drivers employed by the company. In particular, complaints were made by two employees, who alleged that he had insulted their faith. Mr Cooper denied this and pointed out that the employees in question were suspected of having stolen from the company, although insufficient evidence was available to satisfy the sponsor that they should be dismissed. Ultimately, Big Bus Dubai successfully defended its position in relation to the employees before the UAE Ministry of Labour but the relationship with Mr Al Duhaim never recovered and, in April 2004, he instituted proceedings to seek to have Big Bus Dubai's incorporation set aside. The dispute with Mr Al Duhaim was finally settled in July 2005, with an agreement that Big Bus Dubai should be wound up.

49. Although the Claimant had no direct role in Big Bus Dubai by this time, it is apparent that Mr Cooper believed he was involved in these events and had deliberately sought to paralyse the business. For his part, the Claimant denies this, objecting that he would have no reason to undermine the business in which he believed he had a 50% interest. That said, he does accept that he met with the two employees around the time of their complaint and they mentioned this matter to him, but he denies this was anything more than a chance encounter or that he did anything to encourage them to take it further. Given, however, the timing of the meeting between the Claimant and the disgruntled employees, and having regard to the content of the letter that they then sent to Mr Al Duhaim, I consider it more likely than not that the Claimant did indeed

encourage the drivers to approach the UAE sponsor of Big Bus Dubai with their concerns and may have assisted with the drafting of the letter. Allegations of disrespect shown towards employees' religious beliefs would be a serious matter and I consider the Claimant is likely to have seen this as something that should be brought to the sponsor's attention. Certainly, it was a matter that was viewed seriously by those acting for Mr Al Duhaim when they wrote to Mr Waterman on 14 January 2004, citing this and other violations of local laws (in particular, in relation to compliance with visa requirements) as the reason for Mr Al Duhaim's decision to withdraw from his shareholding in Big Bus Dubai.

50. In any event, the breakdown in the relationship with Mr Al Duhaim became the catalyst for the investors to take steps to protect their investment by establishing a new trading company, Double Decker Bus Tours LLC ("Double Decker"), with a new sponsor, to take the place of Big Bus Dubai. Given the risk posed by Mr Al Duhaim's decision to withdraw his support, this was a necessary step if the investors were to continue operations in Dubai. As for their expectations at this time, I accept Mr Waterman's evidence (in answering questions in cross-examination on the point): the aspirations of the investors were fairly neutral at this stage, they had no real expectation that the business would be particularly successful but they were unwilling to simply walk away from the money they had already put into the venture.

51. The steps taken by the investors were set out in a document drafted by Mr Waterman, dated 14 December 2004. On 5 May 2004, Double Decker was incorporated, with Eleanor Maybury holding 49% of the shares (the 51% majority shareholding being held by the local sponsor, in accordance with UAE requirements). Meanwhile, on 24 May 2004, the Defendant terminated its lease and licence agreements with Big Bus Dubai (thus meaning that Big Bus Dubai could no longer use the buses or "Big Bus" branding), and called in the inter-company loans. In or around June 2004, the Defendant entered into new leasing and licensing agreements with Double Decker (the lease agreement again providing that it was to be governed by English law), as well as a technical assistance agreement, to provide Double Decker with "*the know-how, technical and background information and expertise relating to the management and operation of tourist buses possessed by [the Defendant]*". I accept Mr Waterman's evidence, that the investors were concerned to protect their investment in light of the threat made by Mr Al Duhaim. The steps that were then taken required, however, positive actions on the part of the Defendant; specifically, it was the Defendant that took the step whereby assets were removed from Big Bus Dubai (the entity in which the Claimant had an interest as a shareholder in Big Bus BVI), so as to mean that it could no longer operate a tour bus business in Dubai, and it was the Defendant that then made those assets available to Double Decker.

52. On 20 September 2005, Mr Waterman wrote to the Claimant, as one of the shareholders of Big Bus BVI, giving notice of a Board meeting on 26 September, regarding a resolution to close down Big Bus Dubai and wind-up its operations. This prompted a response from the Claimant's then legal advisors, who wrote to Mr Waterman on 22 and 25 September 2005, objecting that the establishment of Double Decker amounted (amongst other things) to a breach of the Defendant's obligation under the Heads of Terms not to "*attempt to circumvent*" the Claimant, and threatening to commence "*a series of legal actions in Dubai, against you and the company in London*" in order to protect the Claimant's interests. Notwithstanding

those objections, at the Board meeting on 26 September 2005, it was resolved that the necessary steps would be taken to wind up Big Bus Dubai.

53. Double Decker had been granted the necessary licences such that it had been able to start providing sightseeing bus tours in Dubai in June 2004. As the Claimant acknowledged in evidence, although the buses used "Big Bus" branding, it was a requirement of UAE law that the legal owner was identified on the side of the bus. The Claimant had remained in Dubai and was aware that the tour buses were continuing to operate notwithstanding the winding up of Big Bus Dubai. As the correspondence from his legal advisors at the time also made clear, I am satisfied that, at the latest, by mid to late September 2005 the Claimant was aware that the Defendant had granted the necessary leases and licences to enable a new company to operate the tour buses and had removed those assets from Big Bus Dubai. He was similarly aware that Big Bus Dubai was to be wound up, thus bringing to an end the means through which he had, by reason of his shareholding in Big Bus BVI, been involved in the operation of bus tours in Dubai.

54. Double Decker proved to be a success, enjoying a profit from its first year of operation. In the years that followed, the Defendant embarked on a major push to expand its operations internationally and, in 2007, Big Bus Tours International Ltd (BVI) ("Big Bus International") was established as the holding company for the Defendant and other subsidiaries around the world. As part of that expansion, in 2009, it was decided to establish a second entity in the UAE, and Big Bus Tours LLC was incorporated ("Big Bus Abu Dhabi") with the shareholding split between a local sponsor and Big Bus International. As with Big Bus Dubai, licensing and technical assistance agreements were entered into between the Defendant and this new entity and it also started to run sightseeing bus tours under the "Big Bus" brand.

55. On 24 February 2015, Big Bus International was acquired by Exponent Private Equity.

56. On 5 March 2015, the Claimant issued these proceedings, asserting his claim for damages based on the Heads of Terms. Although the claim was initially struck out, on the basis that the Heads of Terms did not give rise to any legally enforceable agreement, on the Claimant's appeal, on 23 November 2017, Laing J (as she then was) set aside the strike out Order (see [2017] EWHC 3582 (QB)) and the claim thus proceeded to trial.

Are the Heads of Terms governed by UAE or English law? (Question 1)

The relevant legal principles

57. It is common ground that, pursuant to section 2 of the Contracts (Applicable Law) Act 1990, this question falls to be determined under the Convention on the Law Applicable to Contractual Obligations signed in Rome on 19 June 1980 (80/934/EEC): "the Rome Convention".

58. By Article 3 of the Rome Convention it is provided:

> "Freedom of choice

> (1) A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract."

59. The first question is thus whether the parties have chosen any applicable law and, if so, which. The Heads of Terms include no express choice of law clause, but the Defendant contends that the parties' choice of English law can be implied ("*demonstrated with reasonable certainty*") either "*by the terms of the contract*" or by "*the circumstances of the case*". This is disputed by the Claimant, who says that it is apparent that no choice of law was made.

60. In determining whether or not such a choice has been demonstrated, both parties refer me to the commentary in *Dicey, Morris and Collins on The Conflict of Laws 15th edn*, at paragraphs 32-059 to 32-060, where the following observations are made (I summarise):

(1) Pursuant to Article 3, the Court may, in the light of all of the facts, find that the parties have made a choice of law although this is not expressly stated, *but* it cannot infer a choice of law that the parties might have made where they had no clear intention of doing so.

(2) In determining whether the parties did have such a clear intention, it should be open to the Court to take into account their subsequent conduct; the English view that subsequent conduct cannot be taken into account in construing a contract not being shared in other jurisdictions.

(3) In any event, the circumstances that may be taken into account when deciding whether or not the parties have made an implied choice of law for these purposes will range more widely than the considerations ordinarily applicable to the implication of a term into a written agreement.

61. If it is found that no choice was made, the applicable law is to be determined in accordance with Article 4 of the Rome Convention, which provides:

> "Applicable law in the absence of choice
>
> (1) To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.
>
> (2) Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect

> the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.
>
> …
>
> (5) Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country."

62. In discussing the meaning of "*characteristic performance*" in this context, the learned editors of *Dicey* opine (at paragraph 32-077):

> "The object of the doctrine of characteristic performance is to isolate the obligation incumbent on one of the parties which is peculiar to the type of contract in issue, or which marks the nature of the contract, and thereby link the contract to the social and economic environment of which it will form a part. … In practice the place of performance and the place of habitual residence, or central administration, or principal place of business, or branch, will often (but not necessarily) be the same, because most contracts are performed in the country of the party's place of business."

The parties' positions

63. For the Claimant it is submitted as follows:

(1) No sensible reading of the Heads of Terms suggests that the parties made any choice of law; this issue must therefore be determined in accordance with Article 4 of the Rome Convention.

(2) It was difficult to identify any characteristic performance of the contract for Article 4(2) purposes, but the residence of the parties at the date of signing was not determinative: (i) because it was known the Claimant was about to move to Dubai; and (ii) more significantly, the parties were intending to form a business in the UAE and one of the parties was planning to move to that jurisdiction, such that the presumption under Article 4(2) was displaced (by analogy, see *Coward v Ambrosiadou* [2019] EWHC 2105 (Comm) at paragraph 116).

(3) The key clauses (the *raison d'être* for reducing the agreement to writing) concerned conduct that would take place in the UAE; there was no suggestion that further negotiations would take place in England. In the circumstances, the closer connection was with the UAE and, accordingly, UAE law should be held to be applicable.

64. For the Defendant, it is argued (assuming for these purposes that the Claimant could establish that the Heads of Terms gave rise to a binding contract):

(1) For Article 3 purposes (looking at the circumstances before and after the signing of the Heads of Terms): (i) the document was in English, between two parties resident in England, and was signed in this jurisdiction; (ii) clause 4 recorded an intention to set up a joint venture company "*in accordance with local law*", indicating that the applicable law prior to the establishment of that company must be other than UAE law (i.e. English law); (iii) the draft shareholders' agreement for Big Bus BVI included an express English law clause and the Claimant (and his advisers) raised no question about this at the time; (iv) equally the leasing agreement between the Defendant and Big Bus Dubai was expressed to be subject to English law. A choice of English law was thus demonstrated with reasonable certainty by the terms of the contract and/or the circumstances of the case.

(2) Even if that were not so, English law should be held to be the applicable law by operation of Article 4 of the Rome Convention: (i) to the extent the Heads of Terms created binding obligations between the parties, this was not for the establishment of a joint venture in Dubai but to regulate their conduct whilst investigation and negotiations were on-going; (ii) as both parties were based in England and the performance that was "*characteristic of the contract*" (most obviously, not to circumvent the Claimant) was to be effected by the Defendant, which had no place of business other than in England, pursuant to Article 4(2), it was to be presumed that the closest connection was with this country; (iii) that presumption was not displaced by Article 4(5): (a) because the characteristic performance of the contract could be determined, and (b) the closest connection was with England (not the UAE) in any event.

Discussion and conclusions

65. In considering the applicable law question, I proceed on the basis that the Heads of Terms created a binding contract between the parties. It is not suggested, however, that this was a contract establishing a joint venture to operate bus tours in Dubai or even that it was an agreement to establish such a venture; the Claimant's case is put on the basis that the parties entered into legally binding obligations to govern their relationship during the investigation of the idea he had pitched to the Defendant and their negotiations should it be determined to proceed with that idea. I consider the content of those obligations in more detail below (see under Question 3), but it is important to keep in mind the nature of the contract relied on.

66. As is common ground, the Heads of Terms contain no express choice of law clause. I consider, however, that it is obvious – both from the Heads of Terms document and from the circumstances more generally – that the parties did not intend any agreement between them at this stage to be governed by UAE law. First, because this was not an agreement about bus tours in Dubai but about the (at that stage) London-based

negotiations between the parties. Second, because the Heads of Terms made express provision for the applicability of "*local law*" (that is, UAE law) in relation to the setting up of any future joint venture company, something that would not have needed to be stated if the parties already considered their relations were governed by UAE law. Third, because it is apparent that the parties had little understanding of how UAE law might apply (at that stage, they were even unaware of the requirement that a UAE national should be the majority owner of the business); it was an entirely "*unknown jurisdiction*" so far as the Defendant was concerned. That said, a finding that the parties did not intend their agreement to be governed by UAE law does not mean I can simply infer that they must have chosen to be bound by English law. As the Claimant points out, Article 3 allows for the possibility that the parties might simply have made no choice of law.

67. In this case, however, I find the terms of the agreement, and the circumstances more generally, demonstrate with reasonable certainty that, when signing the Heads of Terms, the parties had a clear intention that their agreement was to be governed by English law. That, it seems to me, is the clear inference to be drawn from the otherwise unnecessary reference to "*local law*" at clause 4. It is equally suggested by the surrounding circumstances: the fact that the terms were drafted on behalf of the Defendant, an entity that only operated in London; the use of English and English terminology; the timing of the agreement (prior to any visit to Dubai to assess feasibility); the fact that the agreement related to London-based negotiations; and by the express provision that English law should apply to the lease agreement subsequently made between the Defendant and Big Bus Dubai, consistent with the Defendant choosing to be bound by the law of the jurisdiction in which it was based. Furthermore, and to the extent it is permissible to consider statements made by the parties post-dating the Heads of Terms, it was plainly the Claimant's understanding (evidenced by his communications in 2003 and his lawyers' letters in 2005) that jurisdiction would vest in the English courts.

68. If I am wrong about this, however, I am nonetheless satisfied that the application of Article 4 of the Rome Convention means that English law is, in any event, the applicable law. Again it is important to keep in mind the nature of the contract in question: on the Claimant's own case, this was an agreement to protect his interests during the investigation of his proposal and while the parties were in negotiations about that. As the Claimant has been at pains to stress, in order to protect his interests, the Heads of Terms (to the extent that they gave rise to any legally enforceable contract) primarily imposed obligations on the Defendant: it was the party that was to effect the performance characteristic of the contract in question (by complying with the negative obligations imposed by clauses 1 and 7) and, other than a visit to Dubai to test the feasibility of the proposal ("*to kick the tyres*"), it would remain based in England, from where it would perform its side of the bargain. Moreover, while Mr Waterman might have been aware of the Claimant's intention to move to Dubai, that would not impact upon the characteristic performance of the contract by the Defendant and, in any event, Dubai was not then the Claimant's habitual residence and his move to the UAE was no part of the parties' bargain. The present case is very different from that of *Coward v Ambrosiadou*, where the Court was considering the effect of Article 4(5) in circumstances in which, by the time of the agreement in issue, the parties already had the formed intention (notwithstanding their then residence in Bahrain) to establish a business in England and to move back

to this jurisdiction (indeed, it seems the parties may have already moved back to England and established an unwritten UK partnership at the relevant time, see paragraphs117-119 of the Judgment).

69. In the circumstances of the present case, I am satisfied that the presumption at Article 4(2) applies and, given the fact that the Defendant's central administration (indeed, its only place of business) was in England, the contract must be taken to be governed by English law. More than that, however, I am satisfied that the circumstances as a whole make clear that the contract in question was most closely connected with this country. Although the parties might have aspired to enter into a joint venture for the operation of tour buses in Dubai, the obligations imposed under the Heads of Terms related only to the parties' relations during the investigation into the feasibility of such an operation and their negotiations in that regard. Other than what was seen as a relatively short visit to Dubai, the negotiations were taking place in the Defendant's London office. Again, having regard to the nature of the contractual obligations in issue, it is apparent that England was the country with which the parties' agreement was most closely connected.

Is the claim time barred? If so, to what extent? (Question 2)

Limitation under English law – the applicable legal principles

70. Given my findings on Question 1, I have first considered the question of limitation under English law. It is not in dispute that, pursuant to section 5 Limitation Act 1980, a breach of contract claim must be brought within a period of six years from the date on which the cause of action accrued. It is the Defendant's case that any cause of action in these proceedings must have accrued in 2004. The Claimant contends, however, that this is a case of continuing breach: by continuing to involve itself in the operation of sightseeing tour bus businesses in the UAE, through the agreements it entered into in 2004 and 2009, the Defendant has continued to breach clauses 1 and 7 of the Heads of Terms. Alternatively, the Claimant's claim in respect of the Defendant's involvement in the establishment Big Bus Abu Dhabi, constituting a fresh cause of action, had been brought in time.

71. In determining when the cause of action accrued in this case, I take the following principles to be uncontroversial:

(1) The general rule in contract law is that the cause of action accrues when the breach of contract takes place, not when the damage is suffered (*Gibbs v Guild* (1881) 8 QBD 296).

(2) When a breach of contract occurs will normally be a question of fact, to be determined in the light of the surrounding circumstances, *McGee Limitation Periods* 8th ed, paragraph 10-011.

(3) Where there are multiple breaches of a contract, fresh causes of action may accrue in respect of later breaches (*Amott v Holden* (1852) 18 Queen's Bench Reports 593). Repeated breaches of recurring obligations or intermittent breaches of a continuing obligation will not, however, give rise to a continuing cause of action, see *National Coal Board v Galley* [1958] 1 WLR 16, CA per Pearce LJ at p 27, although, where the contract gives rise to a continuing obligation, a failure to

comply might amount to a continuing breach and thus provide a continuing cause of action. Such an obligation (as was found to exist, for example, in *Shaw v Shaw* [1954] 2 QB 429, CA, and *VAI Industries (UK) Ltd v Bostock and Bramley* [2003] EWCA Civ 1069) has, however, been described as "*exceptional*"; it must have "*a continuing quality and character*" (see per Newman J at paragraph 56 *VAI Industries*).

(4) To the extent that the Claimant relies on a continuing breach, it is, therefore, necessary to establish both the content of the obligation in issue (see *NCB v Galley* at p 26) and to determine the nature of the breach. In each instance, it must be considered whether there is the necessary quality and character to give rise to a continuing breach: "*There must be a quality of continuance both in the breach and in the obligation*", *NCB v Galley* per Pearce LJ at p 27.

72. I further consider it notable that in *NCB v Galley* it was held that the carrying out of another business contrary to a contractual restraint (in that case, in an employment contract) would give rise to a continuing breach ("*the employee would de die in diem be continuously in breach of the stipulation so long as the prohibitive business was carried on*", see per Pearce LJ at p 26).

Limitation under English law – discussion and conclusions

73. For the reasons I explain when addressing Questions 3, 4 and 6 below, I am satisfied that:

(1) By clause 1 of the Heads of Terms, the parties had agreed they would not start or continue conversations with others in relation to sightseeing tours in the UAE until such time as they had agreed in writing that their proposed joint venture would not be pursued. The Claimant's effective acquiescence to the establishment of the 2002 Structure, however, amounted to a waiver of any continuing rights he had under clause 1.

(2) Under clause 7 of the Heads of Terms, it was agreed that the Defendant would not take a positive step to evade ("*attempt to circumvent*") the Claimant's involvement in the operation of open top bus tours in Dubai. This obligation did not fall away with the establishment of the 2002 Structure and, as the parties never signed the hoped for joint venture contract, it continued to apply.

(3) The Defendant acted in breach of the obligation under clause 7 in 2004: when it terminated its lease and licence agreements and called in its inter-company loans with Big Bus Dubai, and then entered into new agreements with Double Decker, facilitating the establishment of that company, the Defendant took positive steps that attempted to circumvent the Claimant's involvement in the operation of the open top tour bus business in Dubai.

74. Returning then to the question of limitation, although I am satisfied that clause 1 imposed an enforceable obligation on the Defendant, I have found this came to an end with the establishment of the 2002 Structure. As for clause 7, the binding obligation thus imposed gave rise to a negative obligation not to take a positive step to avoid the Claimant's involvement in bus tours in Dubai. I have found that was a continuing obligation, breached by the Defendant's removal of the assets required by Big Bus

Dubai (the means by which the Claimant had an interest in the operation of bus tours in Dubai) and its entering into new lease, licensing and technical assistance agreements with Double Decker, understanding that the Claimant would play no part in that entity. Although those steps were initiated in 2004, thereafter the Defendant sustained its facilitation of the Dubai tour bus business carried out by Double Decker in what I have concluded amounts to a continuing breach of clause 7. On that basis, time has continued to run and the claim is not statute barred.

75. Should I be wrong in that conclusion, I record (for the sake of completeness) that this is not a case where it has been pleaded that time should be extended under section 32 of the Limitation Act by reason of any deliberate concealment by the Defendant. In any event, as I have found, by mid to late September 2005 the Claimant was aware of the relevant actions of the Defendant. Had I not found this to be a case of continuing breach, the limitation period under English law would have expired in 2010 or 2011.

Limitation under UAE law

76. Should I be wrong in my conclusions as to the applicable law, I have, in any event, gone on to consider the question of limitation under UAE law.

The parties' positions

77. It is the Defendant's case that, under UAE law, this claim would be time-barred pursuant to the 10 year limitation that applies under Article (95) of the UAE Commercial Transactions Law. The Claimant says, however, that under UAE law the standard limitation period is 15 years, as set out in Article (473) of the UAE Civil Code; the 10 year period only applies to contractual obligations owed between "*traders*", which would not include the Claimant.

The relevant limitation period under UAE law: findings and conclusions

78. The experts agree that, unless Article (95) of the UAE Commercial Transactions Law applies in this case, the standard limitation period would be one of 15 years; as Article (473) of the UAE Civil Code provides:

> "A right shall not expire by the passage of time but no claim shall be heard if denied after the lapse of fifteen years without lawful excuse, but having regard to any special provisions."

79. By Article (95) of the UAE Commercial Transactions Law, it is, however, provided:

> "Where there is a denial and non-existence of a legitimate excuse, the obligations of traders towards each other and concerning their commercial activities, shall not be heard on the lapse of ten years from the date on which the performance of the obligation falls due, unless the law stipulates a shorter period."

80. On the face of this provision, the application of the 10 year limitation period will be triggered where the claim concerns: (i) "*the obligations of traders to each other*", and (ii) "*commercial activities*".

81. The term "trader" is defined in Article (11) of the Commercial Transactions Law, which provides:

> "The following shall be deemed a trader:-
>
> 1. Every person who works in his own name and for his own account in commercial activities and has the proper qualification when taking on such activities as his occupation.
>
> 2. Every company which undertakes a commercial activity or has adopted one of the legal forms stipulated by the Commercial Companies Law, even if such an activity is civil in nature."

82. Giving evidence for the Defendant, Mr Al Hashimi contended that a purposive approach is to be adopted to this provision under UAE law, in particular given that Article (1) of the Commercial Transactions Law provides:

> "The provisions of this Law shall apply to traders as well as all commercial activities carried out by any person even though he be not a trader."

83. Although, in his original report, Mr Al Hashimi had only referred to UAE case-law under Article (95) in which *both* parties were traders, he subsequently referred to UAE *Federal Supreme Court Judgment 502/2011*, which allowed (referring back to Article (10) of the Commercial Transactions Code) that Article (95) can apply if *either* party is a trader. The English translation of this Judgment, sets out the Court's reasoning as follows:

> "Whereas this challenge is inapposite, as the provision of article (10) of the Commercial Transactions Law states that "Where a transaction is commercial with regard to one party and civil to the other party, the provisions hereof shall apply to the obligations of both parties unless the law states otherwise or there is an agreement between the parties to the contrary." Moreover, article 95 of the same law states that: " Where there is a denial and non-existence of a legitimate excuse, the obligations of traders towards each other and concerning their commercial activities, shall not be heard on the lapse of ten years from the date on which the performance of the obligation falls due, unless the law stipulates a shorter period." Accordingly, the aforementioned means that if the capacity of trader is established as for any of the contracting parties, the provisions of the Commercial Transactions Law shall apply to the other party even if he is not a trader, unless the law or agreement stipulates otherwise. Accordingly, the aforementioned means that if the capacity of trader is established as for any of the contracting parties, the provisions of the Commercial Transactions Law shall apply to the other

> party even if he is not a trader, unless the law or agreement stipulates otherwise. …"

84. Although Mr Al Muhtaseb, for the Claimant, accepted that the UAE Courts will adopt a purposive approach to construction, he did not agree that this would justify the approach apparently laid down in that Judgment.

85. On the material before me, I find that Article (95) of the UAE Commercial Transactions Law applies only in circumstances in which *both* parties are traders. Although Article (10) (which is key to the reasoning in *Federal Supreme Court Judgment 502/2011*) states that the provisions of the Commercial Transactions Law shall apply to contracts that are "commercial" for one party and "civil" for the other, it is a provision that falls within that part of the Commercial Transactions Law that defines "commercial activities" and does no more than assist in defining the *activities* to which the Commercial Transactions Law will apply. On its face, therefore, Article (10) does nothing to remove the requirement that, for the purposes of Article (95), both parties should be "traders". Indeed, by Article (11.2) it is allowed that a company undertaking commercial activities will be deemed to be acting as a trader even if engaged in an activity of a civil nature, which clearly suggests that it is not the activity alone that will define whether a person or entity is a trader for these purposes.

86. Returning to Article (95), it is expressly stated to relate to the "*obligations of traders towards each other and concerning their commercial activities*". That this is a provision that requires that both parties are acting as "traders" is suggested not only by the language used but also by the purposive approach both experts agree should be adopted: it is because those engaged in a trade will be more used to commercial dealings, and will more obviously need certainty in those dealings, that a shorter time limit is imposed. The same cannot be said in cases where only one party has acted as part of their customary trade; a finding that the parties were nonetheless engaged in a commercial activity would not answer this point.

87. This view is supported by the fact that the combined industry of the parties' experts has only uncovered one case that might suggest a different approach; otherwise, the case-law is consistent in stating that Article (95) requires both parties to be traders. Moreover, the reasoning in *Federal Supreme Court Judgment 502/2011* relies on Article (95) being read in the light of Article (10), but Article (10) expressly states that the provisions of the Commercial Transactions Law shall apply to a party who is not a trader, *unless* the law states otherwise. As Article (95) does expressly state otherwise, I find that the shorter, 10 year, time limit it imposes will only arise where both parties are traders.

88. The Defendant is obviously a trader for these purposes; the dispute between the parties relates to the position of the Claimant. For the Defendant it is contended that, in the circumstances of this case, the Claimant is to be deemed to be a trader for Article (11) purposes as he was entering into the Heads of Terms: (i) as a commercial act, (ii) for his own benefit, and (iii) on a professional basis. The Claimant disagrees, arguing that, notwithstanding the potentially commercial nature of the hoped for joint venture, he could not be said to have been a person who was operating as a trader undertaking these actions as his profession or trade (and see *Dubai Court of Cassation, Judgment No. 15 of 2021* (February 2021)).

89. On this question, I again prefer the Claimant's evidence. Even if it is accepted that entering into the Heads of Terms was a commercial activity (and commercial activities are broadly defined under Articles (4)-(10) of the Commercial Transactions Law and can extend to speculative activities, carried out by a non-trader but with a view to realizing a profit, see Article (4.2)), for Article (95) to apply, he would have had to be engaged in that activity as a profession or trade. That, I conclude, must ultimately be a question of fact to be determined having regard to the particular circumstances of the case in question. Where, however, a person has engaged in a commercial activity as a one-time transaction it seems to me that this is unlikely to be sufficient: although the commercial activity requirement would be met, that alone would not establish that the individual is carrying out that activity as a trader, albeit I can see that there may be cases in which the carrying out of the commercial activity points towards trader status. Thus, in the *Dubai Cassation Court Judgment 295/2007*, referred to by Mr Al Hashimi, the parties were held to be traders for the purpose of Article (95) because they had entered into a speculative enterprise in establishing a number of schools (setting up the schools, furnishing them, employing teachers and so on) from which they intended to derive a profit. Properly understood, it seems to me that that case did not involve a one-off commercial transaction but the pursuit of a longer-term business venture. In that instance, by committing themselves to that enterprise, the individuals in question became traders.

90. The facts of that case are very different from those before me. Although the Claimant self-describes as an international businessman, it would be hard to categorise him as someone who was carrying out a particular business, trade or profession. Rather, on the evidence before me, the Claimant has enjoyed a career in which he has moved between various roles at different times. Sometimes he has worked as an employee for established companies in the banking sector, on other occasions he has worked as a consultant for different entities. Although the Claimant may have sought to portray himself as a businessman and entrepreneur, other than the proposed joint venture with the Defendant, there is little evidence of his actually acting in an entrepreneurial capacity. Assessing the position as at July 2001, I find that the Claimant was certainly interested in entering into a speculative commercial undertaking with the Defendant but he could not be characterised as someone who was committed to a particular form of enterprise, whether that is understood as the particular venture he was seeking to explore with the Defendant or as someone interested in engaging in speculative business activity more generally.

91. For all those reasons, should I be wrong in my conclusion as to the applicable law (Question (1)), I find that, under UAE law, this claim would be in time, given that it has been brought within the 15 year time limit that applies under Article (473) of the UAE Civil Code.

Did the Heads of Terms impose contractually binding obligations on the parties? If so, what? (Question 3)

Preliminary observations

92. Although framed solely as a question whether the Heads of Terms gave rise to any legally binding obligation between the parties, a subsidiary issue raised by Question 3 is as to how any such obligation should be construed. At trial, the parties' arguments were focussed on clauses 1 and 7 of the Heads of Terms, albeit the context, provided

by the recitals and other clauses, will be relevant to the construction of those provisions. In his pleaded case, the Claimant had also placed reliance on clause 5; although not developed at trial, I have therefore also considered the enforceability of clause 5 of the Heads of Terms.

93. An additional issue convenient to address at this stage is as to whether any obligation imposed by the Heads of Terms was necessarily to be read as subject to the further term, which the Defendant contends must necessarily be implied, that the parties would use reasonable care and skill in carrying out the joint venture and not act so as to frustrate it.

94. The parties agree that, whatever my conclusion as to the applicable law (under Question (1)), UAE law can be deemed to be the same as English law in relation to the validity, construction, and effect of the Heads of Terms. I have accordingly approached the various issues raised under Question 3 applying English law principles.

The parties' positions

95. The Claimant's primary case assumes that the Heads of Terms "*constitutes a legally binding agreement ... as is apparent from its wording*" (paragraph 5, Amended Reply). The Defendant contends, however, that, when made, the Heads of Terms document was not intended to have legal effect but was merely an agreement to agree, (paragraph 9, Re-Amended Defence).

96. At trial, it was common ground that the Heads of Terms did not constitute a binding agreement to conduct a joint venture. The Claimant contends, however, that is not fatal to his case as the Heads of Terms contained several obligations that were intended to bind the parties until they either entered into a formal joint venture agreement or agreed to go their separate ways, and he places reliance on the earlier Judgment of Laing J, where she observed:

> "30. … the claimant has at least a real prospect of establishing that clauses 1 and 7 are protections which the parties intended the claimant to have if the future relationship did not materialise. …"

97. The Claimant says that the commercial context supports a finding that these provisions were intended to be binding: as Mr Waterman agreed, the document was drawn up to assuage the Claimant's concern that he would introduce the Defendant to his contacts only to then be circumvented from the business that had been his idea; the whole exercise of producing the Heads of Terms would have been pointless had the provisions in issue not been binding.

98. The Defendant observes, however, that Laing J's Judgment merely determined that the Claimant had a real prospect of establishing that clauses 1 and 7 gave rise to binding obligations; it was for this Court to reach its own conclusion on the issue. In considering this question, it was the Defendant's submission that: (i) at the time the Heads of Terms were drawn up, there were on-going negotiations between the parties and it would be wrong to take a snap-shot in time and seek to construe a binding agreement at that date; (ii) to do so would be to re-write the parties' bargain (or lack

thereof), cherry-picking various negative obligations favourable to the Claimant, while ignoring others; (iii) at most, the Heads of Terms constituted an agreement to agree or to negotiate in good faith, which would be void either as an agreement to never negotiate with any third party, alternatively as locking the Defendant into negotiations with the Claimant (see *Walford v Miles* [1992] 2 AC 128); (iv) to the extent any enforceable obligation arose, it could only have been intended to have effect until the parties entered into a formal legal arrangement to operate the Dubai bus tour business, or until one or other of them decided not to proceed, or for so long as no joint venture was pursued in Dubai.

99. In the alternative, should it be found that clauses 1 and 7 had some immediate binding effect, the Defendant contends those provisions must be narrowly construed given the restraints they imposed upon the Defendant's ability to carry out what would otherwise be a lawful business. In particular, if not void for uncertainty, clauses 1 and 7 must refer to a particular act or event and could not impose a continuing obligation without limit of time.

100. In responding to the Defendant's arguments, the Claimant submits that (unlike the provision in issue in *Walford v Miles*) clauses 1 and 7 gave rise to no uncertainty but served to protect the Claimant's continuing interest in the idea of a bus tour operation in the UAE and his connections in that regard. Thus clause 7 made express provision for the anticircumvention obligation to continue even if the parties' anticipated joint venture came to an end; there was no uncertainty: the Defendant's obligation was to last in perpetuity.

The relevant legal principles

101. The principles governing the determination of whether there are binding contractual obligations are not in dispute, as set out by Lord Clarke in *RTS Ltd v Molkerei Alois Muller Gmbh* [2010] UKSC 14; [2010] 1WLR 753, at paragraph 45:

> "… Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement."

102. Where the Court is satisfied that the parties intended to enter into a binding contract, it will seek to give effect to that intention, having regard to the substance of the agreement rather than the form. As the Supreme Court observed in *Wells v Devani* [2019] UKSC 4, at paragraph 18:

> "It may be the case that the words and conduct relied upon are so vague and lacking in specificity that the court is unable to identify the terms on which the parties have reached agreement or to attribute to the parties any contractual intention. But the courts are reluctant to find an agreement is too vague or uncertain to be enforced where it is found that the parties had the intention of being contractually bound and have acted on their agreement. As Lord Wright said in *G Scammel & Nephew Ltd v HC and JG Ouston* [1941] AC 251, 268:
>
> > "27. The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found.""

103. Where the contract is said to have arisen during on-going negotiations, the parties' intentions are to be ascertained by reference to the entirety of those negotiations; it would be wrong to simply take a snap-shot at one point in time and to ignore the fuller picture (*Hussey v Horne-Payne and anor* [1879] 4 App Cas 311 at 316). That said, if the Court is satisfied that there was a point at which parties entered into a binding agreement, the fact their negotiations continued cannot detract from that (*Perry v Suffields* [1916] 2 Ch 187 at 192).

104. In cases involving on-going contractual negotiations between the parties, however, an open-ended agreement to negotiate with each other will be void for uncertainty, either because it is an unenforceable agreement to agree or, to the extent it records a potentially enforceable agreement not to negotiate with others, as failing to specify the period of time for which otherwise lawful approaches might be made to other parties, see *Walford v Miles* [1992] 2 AC 128, per Lord Ackner at pp 138-139).

105. As for how any contractually agreed terms are to be construed, the Court must focus on the meaning of the words used, taken in their documentary, factual and commercial context, disregarding subjective evidence of any party's intentions (*Arnold v Britton* [2015] UKSC 36, per Lord Neuberger at paragraph 15). Moreover, in having regard to what might be seen, in context, as commercial common sense, the Court must be astute not to undervalue the importance of the actual language of the provision to be construed and cannot retrospectively improve the positions of the parties by re-writing the contract in an attempt to avoid the consequences of what proved to be a poor bargain (generally, see the principles set out in *Arnold v Britton* at paragraphs 17-23).

106. As for the determination of whether a term should be implied, the Court must avoid conducting its task through the prism of hindsight, fashioning a term that reflects the merits of the situation as they then appear (*Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 per Bingham MR at p 482). In broad terms, the principles that govern the implication of a contractual term remain as laid down by Lord Simon of Glaisdale (speaking for the majority of the Privy Council) in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, at p 283:

> "… for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

And see further the observations of Lord Neuberger in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and anr* [2015] UKSC 72, [2016] AC 742, at paragraphs 16-21.

107. Moreover, the content of any term to be implied must be tailored to the necessity of the particular case, see *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, [2017] ICR 531, per Lord Hughes JSC at paragraph 9. Specifically, where the parties enter into an arrangement that can only take effect by the continuance of a certain state of circumstances, a term will be implied such that each party will do nothing of their own motion that would put an end to the circumstances thus necessary for the arrangement to be operative, *Stirling v Maitland* (1864) 5 B&S 840, per Cockburn CJ at p 852.

Discussion and conclusions

108. The document setting out the Heads of Terms, which is at the centre of the present case, was not drawn up by a lawyer, although clearly Mr Waterman had considerable business experience and would have had some familiarity with formal contractual terminology. In any event, it seems to me that the language used makes clear the parties' intentions.

109. The opening recitals make apparent the background context: the parties were in discussions regarding the possibility of a joint venture to operate and market open top sightseeing tours in Dubai. Although nothing in the Heads of Terms establishes such a joint venture agreement between the parties (in this regard, the document speaks only of a "*proposal*", see clause 4), that does not mean that none of the terms could have contractual force. It is not unusual for commercial agreements to have both binding and non-binding obligations; the question is: what is the specific content of the obligation created by the clause in issue and is it sufficiently certain and enforceable?

110. Accepting that the parties' discussions regarding a joint venture were at a relatively early stage, the commercial context was acknowledged by Mr Waterman: the Heads of Terms were expressly drawn up to meet the Claimant's concern that, during the course of investigating his proposal and the parties' negotiations regarding this, he

would effectively hand over most of what he could bring to the bargain while the Defendant was still considering the question of feasibility. His position left him potentially vulnerable should the Defendant decide to proceed, using the Claimant's ideas and contacts, but then act to exclude him and thereby prevent him pursuing the opportunity he had identified. At the same time, however, it is apparent that the Defendant would not wish to discuss matters confidential to its business with the Claimant (about whom the Defendant had very little knowledge) without a degree of protection during the negotiations. Although, therefore, the Heads of Terms included provisions that looked to what the parties aspired to agree, the document also laid down obligations that were consistent with an intention to enter into a binding agreement to govern their relations during those early stages. Indeed, a number of the clauses within the Heads of Terms can be seen to impose clear obligations on the signatories, and the mandatory terminology used in particular instances can be contrasted with the heavily caveated language elsewhere.

111. Thus, clause 1 set out the parties' agreement that they would not start or continue conversations with others in relation to sightseeing tours in the UAE until such time as they had agreed in writing that their proposed joint venture would not be pursued. This, I consider, was an enforceable contract. It did not purport to require the parties to negotiate in good faith but protected their respective interest in the exclusivity of the discussions at that stage. Equally, it did not impose an obligation without limit of time: the commitment would come to an end at such time as the parties were agreed that they were no longer pursuing their proposed joint venture (and, although strictly unnecessary for my decision, to give business efficacy to the agreement, it would need to be implied that the parties would not unreasonably refuse to signify their written agreement in this respect).

112. I would also consider that clause 2 gave rise to a contractually binding obligation. Given the context, both parties had an interest in protecting the confidentiality of the information they provided in their early discussions, and the language of clause 2 again signifies an intention to enter into a binding agreement in this regard.

113. In contrast, however, no enforceable contract arises from clause 5. It is a provision that has to be read in the light of clause 4, both addressing what was then proposed as to the shape of any future joint venture agreement. There is no attempt to define what is to be included within the term "*capital equipment*" and it is made plain that the final details for funding arrangements would be determined at some later date. Clause 5 provides no certainty as to the way the proposed project would be funded and the language used gave rise to no binding obligation governing relations between the parties at that stage.

114. Turning then to the provision that is at the heart of this case, by clause 7 it is stated that the Defendant "*will not attempt to circumvent [the Claimant] … prior to the signing of a formal contract between the parties or following cessation of the contract between them*." The negative obligation that this would impose upon the Defendant can thus be seen to operate across two distinct time periods: (i) prior to the signing of the proposed joint venture agreement (in my judgement, the words "*formal contract*" plainly refer to that agreement), and (ii) following the cessation of that joint venture agreement (again, that is the natural reading of the reference to "*the contract*").

115. For the Defendant it is argued that clause 7 either amounts to an unenforceable lock-in provision (an agreement to negotiate or an agreement to agree) or is void for uncertainty as a lock-out agreement without limit of time (and see the discussion in *Walford v Miles*, at pp 138-139). I am not, however, persuaded that either objection applies in this case. Clause 7 does not operate as an agreement to negotiate; indeed, the language used gives rise to no positive obligation on the Defendant to negotiate with the Claimant at any stage. It also cannot be said to be void as failing to specify the time for which the obligation is to last. Firstly, if no formal contract is signed then, as the Claimant observes, the plain reading of clause 7 is that the obligation is to last in perpetuity. Secondly, however, once any formal contract is terminated, if the parties have not reached any further agreement in this regard, the requirement that the Defendant must not attempt to circumvent the Claimant will similarly continue in perpetuity (albeit the natural implication is that the obligation will be read as being subject to the terms of any formal joint venture agreement).

116. This, in my judgement, would be consistent with the intention behind the Heads of Terms; namely, to protect the Claimant's interests should the Defendant simply walk away from their discussions, or later terminate their joint venture agreement, and (in either event) to then proceed to cut the Claimant out of the business while still benefitting from his idea and from the information and contacts he had previously provided. On entering into a joint venture contract (as proposed), the parties might reasonably be expected to make provision for how their respective interests would be protected on termination, effectively varying (whether expressly or implicitly) their earlier agreement: to the extent that the Claimant's interests were thus protected by the terms of the joint venture agreement, clause 7 would fall away; otherwise, however, it imposed an enforceable obligation that could endure.

117. The real issue, it seems to me, relates to the content of the obligation thus imposed on the Defendant; in particular, as to what is meant by "*circumvent*". Given the context in which the Heads of Terms came to be drafted, I do not consider this term is to be read in a necessarily pejorative way (to deceive or outwit), but rather that it can be understood as meaning (more neutrally) to evade or to find a way around something: in my judgement, the natural reading of the use of the word "circumvent" in clause 7 is that it imposes an obligation on the Defendant not to take a positive step to avoid the Claimant's involvement in any tourist bus business that it was to operate in Dubai; effectively, the Defendant was agreeing that it would not take the Claimant's idea and contacts and establish a Dubai sightseeing bus business without him.

118. For the Claimant it is contended that the protection from circumvention under clause 7 must be read as extending to the operation of sightseeing tours throughout the UAE. I disagree. Although I have found that the parties were, in very general terms, discussing other potential international opportunities at this time, the Heads of Terms are plainly focussed on the more specific negotiations relating to the establishment of a joint venture in Dubai (as the opening recitals make clear). Save for clause 1, which imposed a more general negative obligation not to hold discussions with others about operating sightseeing tours in the UAE (and it is notable that the parties felt this needed to be specified), there is nothing that would evince an intent to be bound other than in respect of the specific negotiations in which the parties were then engaged, relating to the establishment of a tourist bus business in Dubai.

119. Although the Defendant has not advanced a case that such a provision would amount to an unenforceable restraint of trade, it argues that clause 7 must be narrowly construed as otherwise potentially restricting the Defendant's lawful business in perpetuity. I see the force of that objection and consider it supports a construction of the term as limited to Dubai: if the restriction imposed under clause 7 was intended to extend to the UAE as a whole, the parties could reasonably be expected to have made that clear (as they had at clause 1). Similarly, I do not consider clause 7 can be read as imposing a restraint other than on the Defendant itself. With the benefit of hindsight, the Claimant may wish he had secured similar commitments from the individual shareholders of the Defendant – those who would ultimately provide the financial investment for the Dubai project – but his agreement was solely with the Defendant, it imposed no obligation on others. This, it seems to me, is not only clear from the language used but also accords with the commercial context. Clause 7 reflected the parties' plan at that time, that it would be the Defendant that would take forward the Claimant's idea and be his partner in this venture. The expectation was plainly that the parties would then enter into a formal joint venture contract, which would effectively supersede the Heads of Terms. It was in that context that the Defendant was agreeing not to participate in a Dubai tourist bus business without the Claimant.

120. Finally, I turn to the Defendant's contention that the Heads of Terms must be taken to include an implied term that the parties would use reasonable care and skill in carrying out the joint venture and not act so as to frustrate it (paragraph 10 Re-Amended Defence). I can take this point shortly as I can see no clear basis for finding that such a term is to be implied in this case. The enforceable contractual obligations that I have found to be expressed within the Heads of Terms do not relate to a joint venture between the parties but to the position prior to, or on the termination of, such an arrangement and, whether viewed in the context of the clause 1 agreement not to negotiate with others or the anti-circumvention provision at clause 7, the further obligations the Defendant says must be implied cannot be said to be necessary to make any enforceable agreement contained within the Heads of Terms work.

Was any agreement contained in the 2001 Heads of Terms brought to an end by the 2002 structure? (Question 4)

The parties' positions

121. It is the Defendant's case that even if any binding obligations arose under the Heads of Terms in July 2001, those came to an end as a result of the incorporation of Big Bus BVI and Big Bus Dubai (the "2002 Structure"). The Defendant says it is apparent that a joint venture did proceed, albeit pursuant to a structure in which it had no stake. The Defendant's letter of 1 October 2001 had made clear this would be the position and the Claimant's share would be reduced to 40%. The Claimant was content to proceed on this basis and, although he never signed the Big Bus BVI shareholders' agreement, the events of 2002 nevertheless superseded and discharged any binding obligations arising from the Heads of Terms.

122. The Claimant disagrees and notes the rejection of this argument by Laing J, who concluded that the Claimant had a real prospect of establishing his claim as he had signed nothing that would indicate he was giving up his rights under the Heads of Terms. More fundamentally, the Claimant contends that the Defendant's argument is

founded upon a misconstruction of the Heads of Terms, which never gave rise to a binding agreement to establish a joint venture but to obligations that governed the parties' relations outside such an agreement. The fact that the 2002 Structure established a joint venture did not discharge or replace the obligations imposed under the Heads of Terms.

Discussion and Conclusions

123. Although the Heads of Terms recorded the parties' proposal for a 50/50 joint venture, it created no enforceable agreement to enter into such an arrangement. Indeed, as I have found, such binding obligations as were imposed under the Heads of Terms governed the relationship of the Claimant and the Defendant *other* than as parties to a joint venture contract. Moreover, by October 2001, it was apparent that the Claimant and the Defendant could not establish a 50/50 joint venture company under UAE law and they had agreed to move forward on the basis that another entity would need to be involved. By the end of that month, I am also satisfied that the Claimant had agreed to a reduction in his share to 40%. Not only was this seen as fairer by those who were investing financially, it also reflected the need for some payment to be made to the local sponsor and the further agreement that the Claimant should receive an income of £60,000 per year.

124. Moving into 2002, it is apparent that the Claimant was content to move yet further away from the initial proposal for a joint venture with the Defendant. He accepted a service agreement with Big Bus Dubai and was then paid by that entity rather than as a consultant for the Defendant. Although he made clear his disagreement with the further reduction in his profit share to 30%, and never signed a director's agreement or the Big Bus BVI shareholder agreement, I have found that the Claimant knew how the Dubai operation was structured (with Big Bus Dubai's ownership being split between Mr Al Duhaim (the 51% owner) and Big Bus BVI) and that (subject to his objection to the reduction in his shareholding) he was prepared to work to that arrangement. The question that arises is what, if any, implication this position had for the relevant obligations under the Heads of Terms?

125. In respect of clause 1, I agree with the Defendant that the Claimant's acceptance of the 2002 Structure (even allowing for his refusal to agree the reduced shareholding or to sign the shareholders' agreement) must mean that this obligation was superseded. The Claimant was aware that the Defendant had commenced, and was continuing, discussions with third parties (the investors, Big Bus BVI, Big Bus Dubai) in relation to the operation of sightseeing tours in the UAE, not least because that was the inevitable consequence of UAE laws relating to foreign investment. Without objecting to those conversations, the Claimant essentially accepted the structure thus established. He thereby waived any continuing rights he had under clause 1.

126. The same, however, cannot be said for clause 7. Accepting that it was not possible to operate the proposed business through a straightforward 50/50 joint venture company, and that third parties had to be involved, did not amount to a waiver of the Claimant's right not to be circumvented by the Defendant. The Claimant had not signed a formal contract to reflect the arrangements that were put in place and, although I have found that he had agreed to a reduced (40%) profit share, he had not thereby given up his interest in being party to a joint venture to operate and market sightseeing bus tours in Dubai. From the Claimant's perspective, while the formal joint venture contract

remained outstanding, he had a continuing interest in ensuring that the Defendant – the entity with which he was dealing – took no positive step to exclude him from such an enterprise.

Did the Claimant act in repudiatory breach of an implied term of any agreement contained in the Heads of Terms (Question 5)

127. Given the conclusion I have reached on the Defendant's case on the implication of a term not to use reasonable care and skill in carrying out the joint venture and not to act so as to frustrate the joint venture, it inevitably follows that I similarly reject the contention that the Claimant acted in repudiatory breach.

128. For completeness, however, should I be wrong about the implied term, I make clear that I do not accept that the matters relied upon by the Defendant at sub-paragraphs 17 a), b) and c) of the Re-Amended Defence would amount to breaches of the obligations alleged. The suggestion (a)) that the Claimant attempted to have colleagues removed from Big Bus Dubai has not been made good on the evidence adduced before me and, given his poorly defined role within the venture, I cannot see that the Claimant's failure to keep paper records (b)) establishes either a lack of reasonable care and skill or that he was thereby acting so as to frustrate the joint venture. As for the delay in submitting a marketing plan (c)), I cannot see that this was sufficient to amount to a repudiatory breach. So far as the Claimant was concerned, he had made clear the marketing plan in his various oral dealings with the Defendant and with relevant officials in Dubai; he did not consider it was his role to set this down in writing. Again, given the lack of clarity regarding the precise nature of the Claimant's role, the evidence does not establish a breach in this regard. At trial, the Defendant also referred to the Claimant's work for Mitsubishi as evidencing his failure to adequately support the joint venture. While this might have been a matter relevant to the Claimant's consultancy contract with Big Bus Dubai, without more, I cannot see that it could demonstrate a breach of any enforceable obligation between the parties.

129. At sub-paragraph 17(d), however, the Defendant relies on what is said to have been a threat that the Claimant would "*get the UAE Sponsor, [Mr Al Duhaim], to suspend operations*". In setting out my findings of fact, I have recorded how Mr Waterman's letter to the Claimant of 3 September 2002 referenced the report from Mr Barron that the Claimant had said he would "*get the sponsor to suspend operations*". Although I have received no direct evidence from Mr Barron, such conduct would be consistent with the Claimant's subsequent letter to Mr Al Duhaim, on 15 March 2003, in which he sought to encourage the sponsor to refuse to renew his sponsorship of Big Bus Dubai which would inevitably mean that company could no longer operate. Had the obligations with which I am concerned been subject to the implied terms contended for, I would have found this conduct amounted to a repudiatory breach of the requirement not to act so as to frustrate the joint venture.

130. That, however, would not have been the end of my task; it would then be necessary to consider whether the Defendant accepted that repudiation as bringing its agreement with the Claimant to an end.

131. On the evidence, it is not clear to me that it did. At best, the Defendant's case comes down to an assertion that the Claimant's repudiation was accepted through Big Bus BVI's actions in winding up Big Bus Dubai in 2004, but there is no obvious causal

relationship between that event and this conduct. Accepting (as I do) the very real difficulties existing between the Claimant and the Defendant at this time, by 2004, the relationship with Mr Al Duhaim had declined for reasons that had no direct link to the Claimant's earlier threats. As the 14 January 2004 letter from Mr Al Duhaim's lawyers makes clear, the sponsor was concerned about possible visa violations for employees of Big Bus Dubai and, most seriously, about the alleged insult to the religious beliefs of local Muslim workers. Even if the Claimant had encouraged a complaint to be sent to Mr Al Duhaim regarding the latter, that, of itself, would not amount to a breach of any implied obligation: even if the allegations were untrue, it is not suggested that they were manufactured by the Claimant and, given the seriousness of what was alleged, he would have been entitled to consider the sponsor should be made aware of such concerns. To the extent that the Defendant brought about the termination of the joint venture in which the Claimant had been involved, I find that was due to its view that this was a necessary step given the withdrawal of support by the sponsor, which had occurred for reasons other than any steps taken by the Claimant pursuant to his threat in September 2002 or the content of his letter in March 2003.

Did the Defendant breach the terms of the Heads of Terms as alleged by the Claimant? (Question 6)

The parties' positions

132. The Claimant's pleaded case alleges breaches by the Defendant as follows:

(1) Contrary to clause 1 and/or clause 7 of the Heads of Terms: (a) establishing Double Decker with a different local sponsor and third party shareholders to the exclusion of the Claimant; (b) continuing to participate or be involved in a sightseeing tour business in Dubai; (c) establishing Big Bus Abu Dhabi with a different local sponsor and third party shareholders to the exclusion of the Claimant; (d) participation or involvement in a sightseeing tour business in Abu Dhabi.

(2) In addition, contrary to clause 7 of the Heads of Terms: winding up Big Bus Dubai and purporting to close down the sightseeing tour business in Dubai.

(3) Contrary to clause 5 of the Heads of Terms, failing to provide funding for the project in terms of capital equipment, in particular in failing to provide funding to install air conditioning in the tour buses.

133. At trial before me, the Claimant did not seek to make good his contention that clause 5 of the Heads of Terms gave rise to an enforceable contract between the parties and I have already found that it did not. For completeness, however, I note that there was also little evidence regarding what was, or was not, provided by the Defendant in terms of the funding of capital equipment.

134. By its Re-Amended Defence, the Defendant contends that none of the matters relied on by the Claimant gave rise to a breach of any obligation owed under the Heads of Terms, not least as it was not the Defendant that wound up Big Bus Dubai, or established Double Decker or Big Bus Abu Dhabi. Alternatively, to the extent that the Defendant entered into agreements with Double Decker and Big Bus Abu Dhabi

(for the leasing of buses, the granting of licences, and for the provision of technical assistance), those acts could not be said to breach either clauses 1 or 7 of the Heads of Terms.

135. The Claimant objects that the attempt to distinguish between the different legal entities involved is "*mere sophistry*" and fails to recognise the Defendant's part in what he says was "*its asset stripping operation*"; it is his case that "*The words of the contract should be given their ordinary meaning and full breadth, not contrived technical definitions that leave gaping loopholes through which the Defendant could defeat the commercial purpose of the contract*" (see the Claimant's Written Closing, paragraph 29); on that basis, he argues, clause 7 must extend to the operation or marketing of open top sightseeing tours in the UAE, by both Double Decker and Big Bus Abu Dhabi, without the Claimant.

Discussion and conclusions

136. I have already set out my conclusion that the Claimant's acquiescence in the 2002 Structure meant that he had waived any continuing rights owed to him under clause 1 of the Heads of Terms (see discussion and conclusions, under Question 4). I do not, therefore, find that the Defendant acted in breach of any continuing obligation under clause 1.

137. As for clause 7, my construction of the obligation arising from that provision is explained under Question 3. As I have there set out, I reject the Claimant's argument that clause 7 must be read as extending to the operation of sightseeing tours throughout the UAE and consequently do not find that the establishment of a bus tour operation in Abu Dhabi in 2009 could amount to a breach of any obligation under clause 7.

138. The questions that remain for me to answer thus relate to the actions taken in respect of the operation of the tour bus business in Dubai: (1) the withdrawal of assets from Big Bus Dubai and the winding up of that business, and (2) the establishment and continued operation of Double Decker, without the Claimant's involvement.

139. I first note that the Defendant was not a shareholder of Big Bus Dubai and did not itself play a direct role in the winding up of that company. Similarly, the Defendant did not establish Double Decker and was not a shareholder in that business; the incorporation of Double Decker resulted from actions taken by Ms Eleanor Maybury (arguably in association with the other investors), not the Defendant.

140. I do not consider it to be "*mere sophistry*" to make these distinctions. The Claimant's agreement was with the Defendant, not the investors, and there is no basis (whether considering the language of the provision or the commercial context in which it came to be agreed) for thinking that the parties intended the reach of the Heads of Terms to extend to individual shareholders, or that those individuals would have agreed to be bound, in perpetuity, by the negative obligation imposed by clause 7. To the extent that the Claimant seeks to persuade me to look behind the corporate veil in this regard (albeit not a point developed at trial), I am not persuaded there are grounds for doing so. This is not a case where there has been an abuse of the corporate legal personality. From a fairly early stage, the parties had had to accept that, given the requirements of UAE law, the Defendant could not play the kind of role in the Dubai

operation that had initially been envisaged. The arrangements that gave rise to the 2002 Structure arose from that realisation and, as the Claimant was aware, effectively removed the Defendant from playing any direct role in the venture. When faced with an impasse in the relationship with Mr Al Duhaim, the decision about how to proceed was thus not for the Defendant but the investors in Big Bus BVI (the three Mayburys and Mr Waterman). The distinctions the Defendant draws are, therefore, not contrived but arise from the entirely genuine structural arrangements put into place sometime before.

141. All that said, it was the Defendant that terminated the lease and license agreements with Big Bus Dubai and called in the inter-company loans, thus ensuring that business could no longer operate: as a result, Big Bus Dubai no longer had any buses for its tours, could not use the "Big Bus" branding, and had no access to the funds it would need for its continued operation. Having terminated its lease and licensing agreements with Big Bus Dubai, the Defendant then facilitated Double Decker's start-up as a Dubai tour bus business by entering into new leasing, licensing and technical assistance agreements with that entity. As Mr Waterman acknowledged in cross-examination, this was done in the knowledge that the consequence would be to facilitate a new Dubai tour bus business that "*cut the Claimant out*". By its actions, the Defendant effectively closed down the entity by which the Claimant was able to participate in a tour bus business in Dubai and, almost simultaneously, entered into new agreements to facilitate the establishment of a different Dubai-based tour bus business, in which (as it knew) the Claimant could play no part. Seen in this way, it is hard to conclude other than that the Defendant's actions were an attempt to circumvent the Claimant.

142. I therefore find that, by its actions in 2004, the Defendant breached the negative obligation imposed under clause 7 of the Heads of Terms, not to attempt to circumvent the Claimant.

143. The question then arises as to whether the nature of the Defendant's actions had the necessary quality of continuance so as to amount to a continuing breach.

144. Consistent with my findings under Question 3, I am satisfied that clause 7 gave rise to a continuing obligation: the Defendant had thereby agreed that it would not pursue the Claimant's idea of a tour bus business in Dubai without him; it thus operated as a continuing restraint of trade. I am further satisfied that, by its enduring agreements with Double Decker – providing that entity with the buses and branding it uses for its business and supplying know-how under the technical assistance agreement – the Defendant has continued to attempt to circumvent the Claimant. By analogy with the analysis in *NCB v Galley* (*supra*, paragraph 72), the Defendant has, from day to day, continuously acted in breach of the obligation imposed by clause 7.

Did the Defendant's breach(es) cause the Claimant to suffer loss? (Question 7)

The parties' positions

145. For the Claimant the loss claimed has been put as "*his share of the profits of what should have been a joint venture with him, or (equivalently) a buy-out payment that the Defendant should have made to pursue the venture without him (i.e. negotiating damages)*" (Claimant's Skeleton Argument paragraph 3). At trial, the focus of the

Claimant's arguments related to the negotiating damages claim: the purpose of the obligation imposed under clause 7 of the Heads of Terms "*was not to protect the Claimant from competition from any business launched by the Defendant. It was to protect the value of the Claimant's idea, knowhow and connections that he brought to the table in the Summer of 2001*." (Claimant's Written Closing paragraph 58). This, it is said, gave rise to a valuable intangible asset, for which negotiating damages provided the appropriate measure of loss (see the Judgment of Lord Reed JSC (with whom Lady Hale, Lord Wilson and Lord Carnwath agreed) in *Morris-Garner v One Step (Support) Limited* [2018] UKSC 20, [2019] AC 649).

146. The Defendant contends, however, that, given the breakdown in the parties' relationship, the circumvention can have caused the Claimant no loss, as "*if he had not been circumvented the venture would not have proceeded anyway, either successfully or at all*" (Defendant's Skeleton Argument paragraph 69). Alternatively, and in any event, the Claimant cannot establish that any loss suffered was caused by the actions of the Defendant given that it was possible for the investors to simply carry on an alternative tour bus business, whether or not the Defendant's leasing and licensing agreements with Big Bus Dubai had continued: no claim for negotiating damages (a concept, in any event, not known in UAE law) can properly arise in circumstances in which the rights in question could only be asserted against the Defendant.

Discussion and conclusions

147. In pursuing his claim for a share of profits, the Claimant contends that, had it been understood that the tour bus business in Dubai could not legally have been carried out without his consent, his participation as a shareholder in the venture would have continued. Although Mr Waterman's evidence in cross-examination allowed for that possibility, it is a scenario that is firmly contradicted by the contemporaneous documentation. As early as September 2002, it was the Defendant's view that "*things have now reached a point of no return*" and that relationships "*have been stretched to the extent that they are not recoverable"*. On 23 February 2003, the Claimant made clear that "*the situation with the Dubai operation is now past the point where [I] can come back into it ...*". The decision to close down Big Bus Dubai may have been forced by the conduct of the sponsor but, on the contemporaneous evidence, I cannot find that there was any real world possibility that the Defendant, or any of its directors or shareholders (those who were providing the investment), would have carried on with the project if this had required the Claimant's continued involvement. Rather, I consider the position to be most accurately summarised by Mr Waterman's final word on the point in his cross-examination: "*we would probably have tried to buy him out*".

148. More particularly, given that the obligation imposed by clause 7 was limited to the Defendant, the investors were not faced with the binary choice of continuing with the project with the Claimant's involvement or walking away from it altogether; if they were still minded to pursue an investment in a tourist bus business in Dubai, they were free to do so, with or without the Claimant. To establish his claim for damages, the Claimant must, of course, demonstrate that his loss arises from the Defendant's breach of contract. For its part, the Defendant relies on the investors' freedom from restraint in saying that he cannot prove the necessary causation given that the business pursued by Double Decker could have been established whether or not the Defendant itself was involved. The Claimant contends, however, that this is to ignore the

practical difficulties of establishing such a business absent the buses, branding and know-how that the Defendant had to confer. He says that, in these circumstances, his loss is appropriately measured by way of negotiating damages: the sum that would have been paid to him to enable the Defendant to be involved in a tourist bus business in Dubai without him.

149. Before considering this question further, at this stage I should address the point taken in the Defendant's pleaded case that, if UAE law applies to the Heads of Terms, negotiating damages are not available. Although I have found that the applicable law is English law, if that was not the case, the evidence before me is insufficient to enable me to determine whether UAE law in fact includes the concept of negotiating damages: other than as a point briefly touched upon in the cross-examination of the Claimant's expert, Mr Al Muhtaseb, this was not otherwise pressed to any particular degree, and was not the subject of detailed submissions or expert evidence.

150. Given that broader issues of quantum are not before me, at this stage I do not state a concluded view on this question but note the Claimant's argument (at paragraph 19 of his Reply), that "*there is no basis for the suggestion that UAE law would not utilise the mechanism of negotiating damages to calculate loss in an appropriate case such as this. Neither expert has opined that in a case where the true measure of loss was captured by negotiating damages, the UAE courts would award no damages*". As an entirely preliminary observation, it seems to me that this submission has some attraction, in particular given the analysis of Lord Reed in *Morris-Garner*, whereby negotiating damages are not to be seen as some separate head of loss or remedy but merely as a tool for arriving at the value of the claimant's loss in particular, applicable circumstances. For present purposes, therefore, I have proceeded on the assumption that, *if* UAE law was to be held to govern the Heads of Terms, negotiating damages would, in fact, still be available.

151. Returning then to the claim for negotiating damages, in identifying the circumstances in which this will be the appropriate measure of loss, in *Morris-Garner* (supra) at paragraph 93, Lord Reed identified that:

> "…what is important is that the contractual right is of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way…"

152. The critical question, therefore, is whether the Claimant's right under clause 7 of the Heads of Terms, not to be circumvented by the Defendant, was a right of the kind described by Lord Reed in *Morris-Garner*. The Claimant characterises the right protected by clause 7 as an anti-circumvention right protecting "*the value of the Claimant's idea, knowhow and connections that he brought to the table in the Summer of 2001*" which he submits is analogous to the types of rights described at paragraph 92 of *Morris-Garner*, being restrictive covenants over land, intellectual property or confidentiality agreements. The Defendant argues, however, that, if anything, clause 7 is akin to a non-compete covenant of the type which did not find favour in *Morris-Garner*, arguing that the anti-circumvention clause did not amount to a 'valuable asset' or confer any property right on the Claimant.

153. In my judgement, this is a case in which negotiating damages are an appropriate measure of loss, insofar as it is a case "*where the breach of contract has resulted in the loss of a valuable asset created or protected by the right which was infringed*" (*Morris-Garner*, per Lord Reed at paragraph 92). The asset protected in this instance was not an entitlement to enter into a joint venture, but, rather, the Claimant's right to participate in any such venture with the Defendant *if* the Defendant pursued such a business in Dubai. Critically, the anti-circumvention obligation created by clause 7 protected the Claimant's idea for a Dubai-based tourist bus business and his initial contacts and information; it provided that protection by effectively affording the Claimant a right of veto over the Defendant entering into a tourist bus business in Dubai without his involvement. That was the valuable asset lost by the Defendant's breach of clause 7 and its value is capable of being measured by identifying a hypothetical release fee payable by the Defendant to release the anti-circumvention or veto right.

154. The Defendant's arguments, focusing on the ability of other parties (including the investors) to pursue a tourist bus business in Dubai regardless of any obligation imposed by the Heads of Terms, may be relevant to the quantification of the Claimant's loss but do not undermine his case on causation. The quantification of loss may well need to take into account the diminution in the value of the asset (once the concept of a Dubai-based tourist bus business had been tested and demonstrated, the value of the Claimant's initial idea and knowledge would inevitably be reduced and there would be a risk of other entrants into the market, whether backed by the investors or by other parties), but even if the value of the Claimant's right under clause 7 was limited to the difficulty of starting up a tour bus business in Dubai without the buses, branding and know-how the Defendant could provide, that would not mean he had suffered no loss as a result of the Defendant's breach.

155. I therefore find that the Claimant's claim for negotiating damages is not defeated by the Defendant's arguments on causation.

Conclusions and Disposal

156. For the reasons I have set out in my Judgment, my conclusions are as follows:

(1) The Heads of Terms are governed by English law.

(2) Under English law, the relevant limitation period is six years from the accrual of the cause of action. If the Heads of Terms were governed by UAE law, the relevant limitation period would be 15 years.

(3) Clauses 1 and 7 of the Heads of Terms gave rise to binding contractual obligations between the parties.

(4) Although clause 1 was superseded by the 2002 Structure, that was not the case in respect of clause 7.

(5) The Defendant has not established that the Claimant acted in repudiatory breach of any implied term.

(6) By reason of its facilitation of a Dubai tour bus business by Double Decker, the Defendant has acted in continuing breach of clause 7 of the Heads of Terms; as such, the Claimant's claim is not statute barred. No breach arose from any involvement by the Defendant in Big Bus Abu Dhabi.

(7) The Defendant's breach has caused the Claimant to suffer loss, measurable in negotiating damages.

157. On those grounds, therefore, the Claimant's claim, so far as issues of liability and causation are concerned, is upheld.

158. My Judgment in draft form having been circulated to the parties' legal representatives in advance of the formal hand-down, counsel are asked to provide an agreed, draft minute of Order by 4pm the day prior to the listing of the formal handing-down of Judgment. That Order should include the parties' proposed case-management directions in respect of quantum and any other outstanding issues arising in these proceedings.