Neutral Citation Number: [2019] EWHC 2750 (Comm)

Case No: CL-2018-000206

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st October 2019

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

ACON Equity Management, L.L.C.	**Claimant**
- and -	
Apple Bidco Limited	**Defendant**

- -
- -

James Willan (instructed by **PCB Litigation LLP**) for the **Claimant**
Andrew Westwood (instructed by **Enyo Law LLP**) for the **Defendant**

Hearing dates: 17-20 September 2019

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Approved Judgment

MRS JUSTICE COCKERILL DBE:

Introduction

1. In this case, the Claimant ("ACON") is seeking payment of the sum of US$ 4 million (the "Condition Payment"), which it says is due to it from the Defendant ("Bidco") pursuant to the terms of an agreement between ACON and Bidco contained in a letter dated 19 July 2017 (the "Letter Agreement").

2. The sole issue between the parties is whether the condition which underpinned Bidco's obligation to make the Condition Payment has or has not been met. The Letter Agreement provided that the Payment was conditional upon receipt by APR Energy Limited ("APR"), a subsidiary of Bidco, of its audited financial statements for 2016 from its auditors in a form compliant with the Credit Agreement between it and its lenders ("the Lenders") by 30 August 2017 or such later date on which such compliant financial statements for 2016 may be delivered and accepted by the Lenders *"without default or penalty"* (the "Condition").

3. The question which I have to determine is simply this: was that Condition satisfied?

4. ACON contends that it was: financial statements were in due course accepted by the Lenders. Bidco disputes this, arguing that the reference to *"default or penalty"* (and specifically "penalty" in this context) includes:

    i) Any sums charged by the Lenders as a penalty for the late delivery of the audited 2016 Accounts, regardless of whether it is imposed before or after the audited 2016 Accounts have been delivered and accepted; and

    ii) Any payments, significant concessions or onerous obligations that the APR Group and/or its shareholders had to make or comply with in order for the Lenders to agree (i) the amendments to the Credit Agreement required for a clean audit opinion; and (ii) the repeated extensions of time for the delivery of the audited 2016 Accounts.

The Trial

5. The trial of this matter has taken place over the course of four days. Four witnesses were called. My impression was that all of them were genuinely trying to assist the Court.

6. ACON called Mr Aron Schwartz, who is the Managing Member and Executive Officer of ACON. He was involved in the negotiation of the Agreement. He was a careful but honest witness, with a clear grasp of his business.

7. Bidco called three witnesses. The first was Mr Benjamin See, who is APR's Treasurer. He represented APR throughout the negotiations with the Lenders, effectively leading the team of negotiators. He was a notably straightforward and sensible witness; my impression was that much of the credit in navigating a difficult round of discussions in good time was likely to have been down to him.

8. The second was Mr Christos Gazeas, who is an in-house lawyer at Fairfax (Bidco's largest shareholder). Mr Gazeas was to some extent involved in the negotiation of the Agreement, as well as the negotiations with the Lenders from late summer 2017, though it was clear from his evidence, and he was scrupulous to make clear, that he was not heavily involved in the detail of those negotiations. He was a more defensive witness and, perhaps as would be expected of a lawyer, was very careful not to answer questions where answers were not within his personal knowledge.

9. The final witness was Mr William Harvey, who is a consultant associated with Fairfax and who was retained briefly by APR (at Fairfax's suggestion) between September 2017 and January 2018 to assist APR's finance team. His brief evidence, which was given by video link, was substantially limited to what was said in a single telephone call with the Lenders. It was candid and clear evidence.

10. ACON urged me to take note of the fact that Bidco did not call any of APR's directors or its CFO, who they said would be the obvious people to give evidence about whether APR considered that it was obliged to pay a "penalty" to its Lenders (and, if so, why they approved financial statements recording the contrary). I was not persuaded that there was anything in this criticism, more particularly perhaps in the light of ACON's second criticism of Bidco's evidence, namely that there was very little relevant factual evidence to give and that Bidco's evidence strayed considerably into the realms of inadmissible evidence.

11. I have been much assisted by the hard work of counsel on both sides, including by Bidco's detailed skeleton argument, prepared by Ms Miriam Schmelzer before her departure from the case. I would also add that this has been a pleasant example of a case conducted with the utmost of courtesy on both sides.

Background Facts

The parties

12. ACON is, via the LP of which it is general partner (ACON Power LP: "ACON Power"), a private equity investor.

13. Bidco is a company incorporated in England and Wales. Bidco was used by a consortium of investors, including ACON Power, Albright Capital Management LLC and Fairfax Financial Holdings Ltd ("Fairfax"), to acquire shares in a company called APR Energy Plc in January 2016. Following its acquisition by Bidco, APR Energy Plc ceased to be listed on the London Stock Exchange and was renamed APR Energy Limited.

14. APR, together with its subsidiaries (the "APR Group") builds, owns and operates rapidly deployable, large-scale power and fast track mobile power to under-served markets. It supplies two sorts of mobile power generator – mobile gensets with a 1-2MW output, and larger turbine type generators based around an aircraft engine. These are used both on infrastructure projects in areas where energy supply is lacking, or in cases of disaster. One example alluded to in the evidence was in Japan in 2011.

The Credit Agreement

15. APR's business requires financing. APR (as Parent) and APR Holdings Ltd (as Borrower) were and remain parties to a syndicated credit agreement for US$ 770 million with a consortium of Lenders led by Bank of America. The credit facility is comprised of a US$ 450 million revolving credit facility (the "Revolver") and a US$ 320 million term loan (the "Term Loan"). It matured in August 2019.

16. At the relevant time, the credit agreement was contained in the Third Amended and Restated Credit Agreement dated 15 August 2014, as amended on 31 March and 25 October 2015 (the "Credit Agreement").

17. The ability of the APR Group to operate as a going concern was dependent, *inter alia*, on the continued availability of the monies drawn under the Credit Agreement, which in turn was dependent on the APR Group not breaching its covenants, including financial covenants.

18. The relevant covenants are the information covenant at section 8.1(a) and the financial covenants at section 9.14 of the Credit Agreement.

19. Section 8.1 required APR to

> "Deliver to the Administrative Agent [i.e. Bank of America], in form and detail satisfactory to the Administrative Agent (which shall promptly make such information available to the Lenders in accordance with its customary practice):
>
> (a) Annual Financial Statements. As soon as practicable and in any event within 120 days (or, if earlier, on the date of any required public filing thereof) after the end of each Fiscal Year (commencing with the Fiscal Year ending December 31, 2014), an audited Consolidated balance sheet of the Restricted Companies as of the close of such Fiscal Year and audited Consolidated statements of income, retained earnings and cash flows including the notes thereto, … Such annual financial statements shall be audited by an independent certified public accounting firm … and accompanied by a report and opinion thereon …that is not subject to any "<u>going concern</u>" or similar qualification, exception or explanatory language or any qualification as to the scope of such audit … or with respect to accounting principles followed by any of the Restricted Companies not in accordance with IFRS. …"

20. The financial covenants at section 9.14 included a "Consolidated Total Net Leverage Ratio" (a maximum ratio of indebtedness to earnings/EBITDA), a "Consolidated Interest Coverage Ratio" (a minimum ratio of earnings to interest payments) and a "Minimum Liquidity Covenant" (a minimum US $20 million of unencumbered cash and unused revolving credit commitments). Breach of the covenants would be an event of default.

21. Section 10.1 of the Credit Agreement, the first part of the "Default and Remedies" section, dealt with "Events of Default". It stated:

> "Each of the following shall constitute an Event of Default:…
>
> (d) Default in Performance of Certain Covenants. Any Credit Party shall default in the performance or observance of any agreement contained in Section 8.1 (other than Section 8.1(e), 8.2(a), 8.3(a), 8.4, 8.13, 8.14 or 8.22 or Article IX.
>
> (e) Default in Performance of Other Covenants and Conditions. Any of the Restricted Companies shall default in the performance or observance of any term, covenant, condition or agreement contained in this Agreement (other than Section 8.1(e) and as specifically provided for otherwise in this Section) or any other Loan Document and such default shall continue for a period of 30 days after the earlier of (i) the Administrative Agent's delivery of written notice thereof to the Borrower and (ii) a Responsible Officer having obtained knowledge thereof."

22. Thus, a breach of section 8.1(a) would constitute an immediate Event of Default, whereas a breach of the financial covenants in section 9.14 would amount to an Event of Default if not cured within 30 days.

23. Section 10.2 of the Credit Agreement set out remedies:

> "Upon the occurrence of an Event of Default, with the consent of the Required Lenders, the Administrative Agent may, or upon the request of the Required Lenders, the Administrative Agent shall, by notice to the borrower:
>
> (a) Acceleration: Termination of Credit Facility. Terminate the Revolving Credit Commitment and declare the principal of and interest on the Loans and the Reimbursement Obligations at the time outstanding, and all other amounts owed to the Lenders … and all the other Obligations, to be forthwith due and payable.
>
> (b) Letters of Credit. With respect to all Letters of Credit with respect to which presentment for honor shall not have occurred at the time of an acceleration pursuant to the preceding clause (a), the borrower shall at such time deposit in a Cash Collateral account opened by the Administrative Agent an amount equal to 103% of the Dollar Equivalent of the aggregate then undrawn and unexpired amount of such Letters of Credit.
>
> (c) General Remedies. Exercise on behalf of itself and the other Secured Parties all of the rights and remedies available to it, the Lenders and the Issuing Lenders under this Agreement, the other Loan Documents and Applicable Law, in order to satisfy all of the Obligations."

24. Thus, either type of Event of Default would entitle the Lenders to terminate the Credit Agreement and declare the amounts outstanding as immediately due and payable and/or to require APR to deposit cash collateral in respect of unpresented letters of credit.

25. Breach of APR's obligations could also trigger other entitlements, such as an increase in the applicable interest rate by 2% under Section 5.1(c):

> "(c) Default Rate. Subject to Section 10.3 and to the fullest extent permitted by Applicable Law, (i) immediately upon the occurrence and during the continuance of an Event of Default under Section 10.1(a), (b), (i) or (j), or (ii) at the election of the Required Lenders, upon the occurrence and during the continuance of any other Event of Default, (A) the Borrower shall no longer have the option to request LIBO Rate Loans, Swingline Loans or Letters of Credit, (B) all outstanding LIBO Rate Loans shall bear interest at a rate per annum of 2% in excess of the rate (including the Applicable Rate) then applicable to LIBO Rate Loans until the end of the applicable Interest Period and thereafter at a rate equal to 2% in excess of the rate (including the Applicable Rate) then applicable to the Base Rate Loans, (C) all outstanding Base Rate Loans and other Obligations arising hereunder…"

26. The consequence of the requirements of the financial covenants was that in 2017 APR was required to deliver its financial statements to the Bank of America for the fiscal year 2016 (the "2016 Accounts"), which could not be subject to any going concern qualification (i.e. with a "clean audit") within 120 days of the end of the fiscal year. It is agreed before me that this meant by 30 April 2017.

27. In early March 2017, APR's auditors, PWC, identified a potential future covenant breach. In particular, it was projected that APR would not meet the required Consolidated Total Net Leverage Ratio in Q2/Q3 2017, principally because of issues arising out of projects in Argentina and Angola.

28. This caused a serious issue as, in light of these projected breaches, PWC was unwilling to certify that APR was able to continue as a going concern and to issue a clean audit. The breach of the covenants as to ratio and as to audit would entitle the Bank to call in the loan.

29. Accordingly, APR approached its Lenders to negotiate a *"pre-emptive amendment"* to the Credit Agreement that would avoid such a covenant breach occurring in the future. This was not the first time it had had to do so; and it was not the last time.

30. What this requirement for amendment amounted to was explored in evidence. I conclude, and it was not controversial, that it was understood that what was anticipated was not a single amendment but a portfolio of amendments and that these would almost certainly involve some amendment in the form of a relaxation of the financial covenants. As Mr See put it: *"we were requesting a modification of the financial covenants with the expectation that there would be additional terms of the agreement to be discussed with the lenders"*. And because of the need for such negotiations it would be necessary also to agree to extend the date for the delivery of the 2016 financial statements; so smaller amendments pushing back the date for the financial statements had to be made to enable negotiations for broader amendments modifying the covenants to take place.

31. Further, it was also clear in the light of the facts that this was not the first time that such negotiations had taken place, and that those involved were experienced in dealing with banks in relation to such facilities, that those involved for APR were aware that the price for broader relief would be some form of *quid pro quo* to be given by APR, and that such possibilities as equity injections, treatment of asset sales and payment of substantial amendment fees would be in play. And logically, the more APR wanted, the more they would expect the Lenders to extract.

32. From around this point there were effectively two parallel and interrelated narratives running until July 2017. One was the discussion with the Lenders. The second was the disquiet - and ultimately departure - of ACON.

The narrative with the lenders

33. While the negotiations were at first focused on the accounting treatment of the projects in Angola and Argentina, matters soon moved on with the Lenders expressing disquiet about liquidity. There was a meeting between APR and the Lenders on 4 April 2017. The Lenders were, in principle, willing to agree the changes needed to avoid a covenant breach in the future, and in exchange requested some changes to the Credit Agreement to address their own concerns. It was agreed that the parties would seek to negotiate an amendment to the Credit Agreement (the "Amendment"), which would satisfy the auditors' concerns.

34. A report of the meeting "*pencilled in*" an amendment fee of US$ 500k and recorded as follows:

> "Agree to negotiate in good faith an amendment to the credit facility by [31 May 2017] addressing (i) APR's need to negate the impact of Argentina COD penalties and Angola bad debt reserves on financial covenants (sufficient to satisfy auditors' requirements to issue unqualified 2016 opinion); and (ii) Lender concerns regarding treatment of asset sales related to EBITDA impact and loan prepayment/reinvestment parameters."

35. The meeting also addressed APR's immediate default risk, namely the requirement to deliver its 2016 Accounts with a clean audit by 30 April 2017. The Lenders agreed to extend that deadline to 31 May 2017 to allow time for the negotiations.

36. The extension of the audit deadline was formally recorded in the Fourth Amendment to the Credit Agreement dated 21 April 2017 It required the parties to *"negotiate in good faith to agree to a subsequent amendment on or before May 31, 2017 to address, amongst other things, Asset Dispositions, prepayment requirements associated with Asset Dispositions, calculations of financial covenant components and treatment of certain costs… in the calculation of financial covenants, and financial covenant treatment of certain penalties arising from [Angola and Argentina]"*.

37. Following that meeting, the parties exchanged a number of draft Term Sheets. By 3 May 2017 the proposed amendment fee had increased to US$ 1 million. There were also draft provisions covering Asset Dispositions, and mandatory pre-payments.

38. On 24 May 2017 Bill McGann (APR's CFO) provided an update on APR's discussion with the Lenders:

> "…the lenders' concerns centred primarily around a perceived dilution of their asset collateral without a corresponding reduction in leverage or unambiguous reinvestment of asset sale proceeds back into "hard" assets that would rebuild the collateral pool. The Company has essentially been funding operations and mobilizations from the proceeds of the Pratt sale…
>
> Since the April meeting it was agreed … that APR would require amendments to its credit facility agreement in order to avoid a default caused by the audit ("going concern" issue), along with consideration for covenant treatment to avoid a projected financial covenant breach in the 3rd and 4th quarters of 2017. … The Company also required an extension of the date stipulated in the Credit Agreement (April 30th) by which the unqualified audit opinion and annual financials were due to avoid a default under the financial reporting affirmative covenant.
>
> …the term sheet for this amendment … contemplates a tightening of language and limitations around accounting treatment, use of proceeds and certain other aspects of future asset sales. The Company can still pursue asset sales; however, it will be limited to a ceiling on aggregate accounting gains allowed in any 12-month period (10m), be subject to additional reporting requirements specific to asset sales and be subject to a more focused definition of Asset Dispositions and allowable "Reinvestment" Assets" with cash proceeds from future asset sales. Additionally, in return for the necessary covenant considerations and EBITDA add-backs required by the Company to avoid a 2017 financial covenant breach, it was agreed that APR would use the $35m in net cash proceeds received from Yemen and Egypt asset sales to permanently retire a portion of the Term A.
>
> …. The new target date for executing this subsequent amendment is the end of June with a $1m consent fee attached…." "This extra month is being requested to allow additional time to work through the 'going concern' audit issue with Price Waterhouse and allow time for further negotiation and refinement of the broader amendment that will provide necessary covenant flexibility to preclude a financial covenant default in 2017."

39. On 30 May 2017 the parties executed the Fifth Amendment to the Credit Agreement, which extended the deadline for the delivery of the 2016 Accounts to 30 June 2017.

40. On 18 June 2017 ACON noted that the banks were pushing back more and that KPMG for the Lenders was going to focus on *inter alia* liquidity.

41. On 19 June 2017 the Lenders circulated a further revised term sheet (the "June Term Sheet"). This reflected the position *"per discussions right now"*. It was therefore a snapshot part way through the negotiations. It did not reflect any final agreement.

42. It also highlighted a number of actions that were anticipated to be necessary to be taken by APR and the Lenders prior to 31 August 2017. Primarily this involved the provision of financial information by APR to KPMG (who were advising the Lenders), which KPMG was to analyse: "*in order to agree a subsequent amendment ... [by 31 August 2018] addressing financial covenant calculations, potential equity injections, business plans and additional items as may be agreed*."

43. This June Term Sheet was the last full recap of the status of the negotiations prior to the agreement to sell ACON's shares. It set out what was then proposed in terms of matters to be included – which amounted to a contingency plan to deleverage the business, and specifically:

    i) A provision to the effect that US$ 35 million in proceeds from the sale of certain assets were to be applied as a permanent reduction of the term loan;

    ii) An obligation on APR to provide the Lenders with a 5-year projection model by 30 April of each calendar year; and

    iii) A number of amendments to the provisions governing "Asset Dispositions" and the re-investment / mandatory pre-payment of the related sales proceeds.

44. However, what is clear is that while there is no further draft Term Sheet before the end of July, matters were very far from agreed – indeed Mr See accepted that negotiation of the real details of any agreement had not really been begun. The parties had begun discussing what they thought APR would need, but had not substantively begun negotiating the details of changes.

45. This was because an important factor in where the Bank would eventually land was going to be an evaluation of APR's financial position, which was being undertaken by KPMG. Both Mr See and Mr Gazeas shied away from characterising KPMG's input (as Mr McGann of APR had in an email) as *"the basis"* of future discussions, but both readily accepted that KPMG's input was a significant factor – the worse their forecasts, the tougher it would be for APR. The importance of their input was reflected in Mr Gazeas' evidence that KPMG were practically *"living at the offices of APR"*.

46. In the background, negotiations continued. As part of this, extensions for the submission of the financials were agreed with very little fanfare or difficulty. On 30 June 2017, the parties executed the Sixth Amendment to the Credit Agreement, which extended the deadline for the delivery of the 2016 Accounts to 17 July 2017 and provided for the application of the US$ 35 million in proceeds from the sale of certain assets in Egypt and Yemen to be applied as a permanent reduction of the term loan.

47. On 17 July 2017, the parties executed the Seventh Amendment to the Credit Agreement, which extended the deadline for the delivery of the 2016 Accounts to 30 August 2017. The Seventh Amendment provided for the payment "*on account*" of an amendment fee in the sum of US$ 100,000. As Mr See explained in an email sent the same day, that fee *"is an advance against the $1M consent fee we agreed with the banks for the larger*

amendment, so we will pay the remaining $900K if/when we close the subsequent amendment."

48. Only one area was really contentious before me: the state of play as to equity contribution. This was first demanded in August 2017. It was in issue how live this had been earlier.

49. Bidco stressed that while the June Term Sheet alludes to the possibility of equity injections, it does not include any actual demands for such an equity injection by the Lenders. ACON contended, and it was ultimately clear that equity injections were "live" at the time. No demand had been made, but in correspondence this possibility had been mentioned. Liquidity was a hot topic by June. In early July Mr McGann of APR was relaying information that some of the Lenders were looking for Bidco's *"willingness to support liquidity needs and reduce leverage of business"* – a scarcely veiled reference to equity injections.

50. I conclude that although, with KPMG's review incomplete, the parties could not be sure which way matters would develop, it would have been considered likely by all concerned that some form of equity injection (whether shares or guarantees) would be sought. This was essentially because it was clear that the Lenders were concerned about liquidity, and that an obvious *quid pro quo* where APR was seeking a relaxation of the covenants, was a corresponding tightening up on liquidity by this or similar means, such as a guarantee from a shareholder. Further I conclude that the parties were aware that if this likelihood materialised, the scale of that contribution was likely to be significant – the sums involved in the liquidity analysis would effectively ensure this, and there would be no point in stipulating for an insignificant injection.

51. As to the course of events once the demand was made, although APR attempted to push back on this demand, saying that its shareholders would not be prepared to invest further funds, before long the shareholders offered a US$ 10 million capital infusion on the closing of the amendment. However, the Lenders still did not think this was sufficient and asked for US$ 40 million instead. After some debate, the minimum equity contribution that the Lenders would accept was US$ 30 million. Of this US$ 30 million, US$ 10 million was to come from Bidco and the remainder from APR's ultimate shareholders.

ACON Exit

52. In the meantime, in or around May 2017, ACON had decided to exit its investment in APR. There were two strands to this decision: a concern about the business's fundamentals but also, as Mr Schwartz put it: *"starting in April we were concerned about how we were being treated and what we perceived to be violations of the shareholders' agreement."*

53. Between May and July 2017, ACON therefore negotiated a sale of its interest to Fairfax. During this period, a number of calls and emails between various members of ACON and Fairfax took place, during which the parties attempted to reach agreement on the terms of sale. Throughout, both parties were advised by major City law firms: ACON were represented by Hogan Lovells and Fairfax and Bidco by Shearman & Sterling. It was agreed (rightly) that these exchanges were not admissible in the context of this issue as to construction of the Letter Agreement.

54. In the end, it was agreed that Fairfax would acquire the ACON shares at cost; and Bidco agreed to release US$ 4 million in distributable reserves to ACON by way of further consideration for business and management services and support previously provided by ACON - subject to the satisfaction of the Condition (the Condition Payment).

55. Mr Gazeas informed Mr Schwartz on 19 July 2017 that he did *"not know of anything"* other than the *"going concern"* issue affecting the 2016 financial statements which would lead to the Condition Payment not being paid.

56. Accordingly, on 19 July 2017 the relevant parties executed, *inter alia*, the following documents:

i) A share purchase agreement providing for the sale and purchase of ACON's shares in Bidco to Fairfax;

ii) The Letter Agreement, which stated as follows:

> "In consideration for the business and management services and support ACON provided to [Bidco], and conditional upon the fulfilment of the Condition (as defined below), [Bidco] will pay ACON the sum of US$ 4,000,000 (the "Payment").
>
> The Payment is conditional upon (x) the receipt by APR Energy Limited of its Audited Financial Statements for the financial year ending 31 December 2016 from its auditors in a form compliant with section 8.1(a) of the [Credit Agreement] by August 30, 2017 or such later date on which such Audited Financial Statements may be delivered (i) in a form compliant with section 8.1(a) of the [Credit Agreement], and (ii) accepted by such lenders without default or penalty."

iii) A written resolution of the directors of Bidco (the "Board Resolution"), which approved the terms of the Letter Agreement and noted:

> "…a majority in number and value of Bidco's shareholders have approved the [Letter Agreement], and that, conditional upon fulfilment of the Condition, Bidco should make the … Payment to [ACON] in consideration for the business and management services and support [ACON] provided Bidco and as a reflection [of ACON's] contribution to the increase in value of Bidco if the Condition is met."

57. It was common ground (and Bidco have placed much emphasis on this), that the *"purpose of the [Letter Agreement] was to align [ACON's] interests and those of APR and its remaining investors"*.

Further negotiations with the Lenders

58. Following ACON's exit from the business, negotiations between APR and the Lenders continued. Everyone was still working towards the 31 August 2017 deadline and between 14 and 16 August 2017 representatives from APR, including Mr See, attended a meeting with the three lead banks and KPMG in New York in order to continue

discussions surrounding APR's liquidity and the forecasted covenant breaches (the "August Meeting").

59. As part of the August Meeting an erroneous cashflow forecast was presented to the banks, which projected a large liquidity deficit in Q4 2017 of between US $23 and US $49 million. This caused the Lenders to demand a credible plan to address APR's forecast cash shortfall, as well as *"equity risk sharing in the near-term liquidity crunch"*.

60. A summary produced at the end of the August Meeting records the following:

> "In return for equity contribution/participation in APR's liquidity risk, the banks are willing to grant the necessary covenant relief, a further audit extension, and equitable treatment on cash proceeds from future ordinary course asset sales …"

61. In the following days it became increasingly clear that APR would not be able to agree the required amendments to the covenants, and obtain a clean audit, without such an equity contribution from its shareholders. As Mr See explained in his email of 24 August 2017:

"We get them happy on the risk-sharing, they will give us what we need on covenants, which should address the going concern issue on the audit."

62. In addition to an equity contribution, the Lenders also sought greater debt paydowns from asset sales. On 20 September 2017, McGuire Woods (lawyers acting for the Lenders) circulated a bullet point list of items that the lead banks wanted to include in the Amendment. These included, proposals that:

i) 100% of the proceeds from a planned Asset Sale were to be applied as a permanent repayment of the term loan;

ii) For all other Asset Disposition, only 33% of sale proceeds (in excess of a US$ 10 million Prepayment Amount) would be eligible to be reinvested. Further, no reinvestments were to be permitted within 9 months of the credit facility maturity date in August 2019. The remaining 66% of sale proceeds were to be applied to a permanent repayment of the Term Loan;

iii) APR should be subject to enhanced reporting requirements.

63. Meanwhile, the parties executed a series of further amendments to the Credit Agreement which extended the audit deadline to 16 October 2017.

64. By 4 October 2017 the parties were substantially agreed on all points. The draft Term Sheet for what was to be the Eleventh Amendment noted that *"$900,000 amendment fee will be paid at closing of the Amendment and shared by the consenting Lenders"*. Final agreement was imminent.

65. Unfortunately, on 4 October 2017 APR identified that the manner in which the revenue from a certain project (the SAPN Project) had been recorded in the accounts was incorrect and had to be revised. While the impact of this was cash-neutral, it resulted in a reduced EBITDA and therefore required a further last-minute change to the

covenant levels in the Credit Agreement. That change in turn required at least some of the Lenders to convene their credit committees again.

66. Mr See worked together with KPMG to address this issue and KPMG provided updated covenant levels to the banks for approval.

67. On 6 October 2017, McGuire Woods circulated a draft of the Eleventh Amendment to the Credit Agreement. The draft was circulated after the SAPN accounting issue had been notified to the Lenders, as is apparent from the cover email, which states:

> "We recognize that the covenant levels may need to change based on Ben's discussions with KPMG this afternoon, but we can post any edits to those covenant levels for Lenders once those are determined."

68. On 6 October 2017 via the draft the Lenders stipulated for an increase in the "amendment fee" from US $900,000 (as had been recorded as an agreed item in the prior term sheets) to US $1 million ("the October Fee"). Mr Harvey flagged the change in an email to Mr See on 10 October 2017. Mr See responded as follows:

> "I'm hoping that was a typo. The agreed fee has always been $1M for consenting lenders to share, of which we have already paid $100k."

69. Mr See was very unhappy about this late change, regarding it is *"reactionary, punitive and flippant"* – and a dangerous precedent. He determined to push back on it. He therefore discussed this additional US$ 100,000 with Mr McDuffie from Bank of America during a telephone call on or around 10 October 2017. Mr McDuffie told him in no uncertain terms that he would not drop this requirement. The conversation was short, and Mr McDuffie was very clear – the impression I received was that he was positively brusque. Mr See's written statement said that Mr McDuffie said that the additional payment was being charged *"to punish APR"* for requiring further amendments to the covenants at a very late stage. In his oral evidence however, pushed as to his recollection, his account was that, while he had himself seen it as punitive of APR, Mr McDuffie had referred to the *"pain and suffering"* of the Lenders - and to the need to go back to credit committees.

70. Mr Gazeas, upon hearing about this conversation, instructed Nelson Mullins (APR's lawyers) to email McGuire Woods on 12 October 2017 and ask that the additional US$ 100,000 be recorded in the documentation as a penalty payment. His reasons for doing so were examined in some depth, with it being suggested that this was a deliberate attempt to trigger the condition in the Letter Agreement. My own conclusion on his evidence was that he imbibed some of Mr See's sense that the demand was punitive, and with two facts (i) the hope of persuading the Lenders to drop the demand and (ii) the terms of the condition, in his mind, he considered it appropriate to seek that change to the wording. In essence, for him the change had two possible advantages – it might bring the Lenders to reconsider, or it might assist in an argument as to the Condition Payment.

71. Mr Gazeas and Mr Harvey then spoke to Mr McDuffie the next day, on 13 October 2017, to question the additional payment. They were told (again in no uncertain terms) that the Lenders *"deserved"* this extra payment and that this was levied due to a need for last minute changes to the covenant position. Mr Gazeas also re-iterated his request that this payment be characterised as a penalty, but Mr McDuffie also refused this request flatly, adding that this would require him to re-circulate the amendment agreement for signature (though this was going to be necessitated in any event).

72. During the telephone call on 13 October 2017, APR also requested a further extension for the delivery of its accounts to 15 November 2017 and Bank of America agreed an extension to 10 November 2017. This change to the deadline was submitted to the Lenders for re-affirmation on 13 October 2017. This extension was agreed without objection by the Lenders, and no additional fee was levied.

73. The Eleventh Amendment, which provided for the substantive amendments to the Credit Agreement, was executed on 16 October 2017. The Eleventh Amendment and the Credit Agreement amended thereby (the "Amended Credit Agreement"), *inter alia*, provided that:

i) By way of condition precedent, that APR had received an equity contribution in an amount equal to US$ 30 million;

ii) By way of condition precedent, that the Administrative Agent had received an amendment fee in an amount equal to US$ 1 million;

iii) APR agreed to pay the costs and expenses of the Administrative Agent (including McGuire Woods and KPMG) in connection with preparation, execution and delivery of the amendment and any other related documents;

iv) Certain further expenses (including the Argentina penalties) be added back for the purposes of the calculation of "Consolidated EBITDA";

v) Certain proceeds from the planned and other asset sales be applied as a permanent repayment of the term loan;

vi) The deadline for the delivery of the 2016 Accounts be 10 November 2017;

vii) APR be subject to enhanced reporting requirements, including the provision of further detailed information as part of its monthly information packet for Bank of America, as well as a monthly call with the Lenders and KPMG;

viii) The permitted Consolidated Total Net Leverage Ratio for fiscal quarters after 30 June 2017 be increased;

ix) The permitted Consolidated Interest Coverage Ratio for the fiscal quarters ending 31 December 2017 and 31 March 2018 be reduced; and

x) The minimum liquidity requirement be reduced to US$ 5 million.

74. Following execution of the Amended Credit Agreement, APR's 2016 Accounts were signed off on 27 October 2017 and filed at Companies House on 1 November 2017. The 2016 financial statements were delivered to, and accepted without complaint by,

the Lenders well in advance of the 10 November 2017 deadline. APR approved its 2017 financial statements on 30 April 2018.

75. This equity contribution which was part of the amendment was a condition precedent to the effectiveness of the Eleventh Amendment and was effected by:

i) APR issuing 11,689,800 ordinary shares with a par value of 10 pence for a consideration of US$ 30 million; and

ii) Bidco issuing 4,493,200 ordinary shares with a par value of 10 pence for a consideration of US$ 20 million.

76. This present dispute first surfaced when by email dated 17 October 2017 Mr Gazeas informed Mr Schwartz that:

> "We still have not been able finalize the audit and received another extension for delivery of the audit to November 10th. However, the continued delay in getting audit done has resulted in us having to pay penalties to the bank and made the conditions for the US$4 million contingent payment to ACON incapable of being satisfied."

77. This was answered by a firm response from ACON, followed by a number of email exchanges between Mr Gazeas and Mr Schwartz disputing the position.

78. On 2 November 2017, a Managing Director of Bank of America sent an email to ACON confirming that there had been no default or penalty because APR *"completed an amendment with the bank group"*.

79. On 3 November 2017 ACON sent a formal letter demanding payment under the Letter Agreement to Bidco. Proceedings were commenced in March 2018.

The Issues

80. After this long story, the issue in this case is simple: was the Condition satisfied? The sub-issues had been broken down by agreement in the List of Issues thus:

i) **Issue 1**: What is the true construction of the Condition contained in clause 2 of the Letter Agreement? In particular:

a) Issue 1A: Does a fee charged by the Lenders in connection with executing an amendment to the terms of the Credit Agreement (which avoided any default occurring) qualify as a penalty for the purposes of the Condition?

b) Issue 1B: Does a payment, significant concession or onerous obligation to be made or complied with by the APR Group and/or its shareholders in order to obtain the Lenders' agreement to the amendments to the terms of the Credit Agreement required to enable APR to obtain a clean audit opinion qualify as a penalty?

c) Issue 1C: Must the fee, concession or obligation (as appropriate) be specifically attributable to the extension of the deadline for delivery of the audited 2016

Accounts, as distinct from amendments to other terms of the Credit Agreement, to qualify as a penalty?

d) Issue 1D: Is the Condition concerned only with penalties imposed or default which occurs as a result of the delivery and acceptance of financial statements, or is it concerned with any default or penalty imposed by the Lenders throughout the process of negotiating the Amended Credit Agreement and before or after the audited 2016 Accounts had been delivered and accepted (the "Timing Point")?

ii) **Issue 2**: Did the Lenders impose a relevant penalty? In particular:

a) Issue 2A: In October 2017 did the Lenders require payment of an additional US$ 100,000 fee for the delay in the delivery of the 2016 Accounts and, if so, does this qualify as a penalty for the purposes of the Condition?

b) Issue 2B: Did the Lenders insist on a capital injection in the amount of US$ 30,000,000 and, if so, does this qualify as a penalty for the purposes of the Condition?

c) Issue 2C: Did the Lenders require significant concessions and/or onerous obligations in respect of (a) the SAPN Asset Sale proceeds, (b) the proceeds of Asset Dispositions and/or c) financial reporting and, if so, do these (or any of them) qualify as a penalty for the purposes of the Condition?

d) Issue 2D: Did the Lenders cause APR Energy to incur unexpectedly high costs in respect of the legal and other advisory fees payable in connection with the amendments and, if so, does this qualify as a penalty for the purposes of the Condition?

81. There was a degree of overlap between some of the issues, and ultimately Issues 2C and 2D were not pursued. With the greatest of respect to the parties' detailed arguments, I do not propose to analyse all of the live sub-issues separately.

The Exercise of Construction

82. The essence of the main dispute between the parties was whether, as ACON said, the wording *"without default or penalty"* applies only when APR either suffered an Event of Default or had some sanction applied to it because of a breach of its obligations under the Credit Agreement; or whether, as Bidco contended, this wording was a convenient shorthand or catch-all for any *"significant payment or concession or onerous obligations"* that APR had to make or comply with in order for the Lenders to agree the amendments to the credit agreement required for a clean audit.

83. The law applicable to the exercise of construction was not in issue. Both parties cited *Wood v Capita* [2017] AC 1173 at [10]-[13] and *Arnold v Britton* [2015] AC 1619 [14-15]. Reference was also made to *Chartbrook Homes Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101. Predictably, each placed emphasis on different authorities, with ACON giving pride of place to *Wood* while Bidco urged the charms of *Arnold v Britton*.

84. This preference (as so often) reflects the place where each side stood on the weight to be given to the words. ACON's case placed stress on the words and their natural

meaning. Bidco, recognising the difficulties in this approach for its case, placed more weight on commercial common sense.

85. It is of course important to remember that one point on which the Supreme Court is pellucid is that these cases do not embody any distinction as to the correct approach to the exercise of construction (*Wood* at [8]-[15]), which is an iterative process into which both elements will come (*Wood* at [12]). As we are reminded at [13] of that same judgment:

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements."

86. The starting point is the agreement. The nature of that agreement was itself contentious. ACON argued that it was a formal agreement, amongst sophisticated parties, drafted in precise terms by lawyers. Bidco's position was that, compared to the other agreements entered into as part of ACON's exit from its investments in APR, the Letter Agreement was a relatively short and informal document on whose precise wording I should not place too much stress. This is, in my view, a slightly artificial contrast. The agreement was at neither end of the scale.

87. However, it was in my judgment more to the formal end of the scale than the informal end. The document was certainly short; but shortness does not itself import informality. Although there was no suggestion that it was arrived at by a process of tens of carefully considered drafts, as some documents are, it was drafted by lawyers from major City (and international) firms. As Bidco volunteered, the precise phrase in question was inserted by lawyers. It formed part of a suite of documents dealing with a sale of shares worth very nearly US $110 million. It was signed by representatives of each party. I conclude this is a document where the parties gave serious and well-advised thought to the wording of the document; and that wording therefore deserves to be given considerable weight.

88. Once one gets thus far, it is right to look at the words. Although much was said on this subject, it was plain that both sides considered that the wording better favoured ACON's argument than it did Bidco's. Bidco did not positively suggest that the wording favoured it; rather it contended that *"the meaning of the words used is far from clear"*.

89. The relevant condition in the Letter Agreement provides as follows:

> "The Payment is conditional upon (x) the receipt by APR Energy Limited of its Audited Financial Statements for the financial year ending 31 December 2016 from its auditors in a form compliant with section 8.1(a) of the [Credit Agreement] by August 30, 2017 or such later date on which such Audited Financial Statements may be delivered (i) in a form compliant with section 8.1(a) of the [Credit Agreement], and (ii) accepted by such lenders without default or penalty."

90. It was common ground that the Condition effectively split into two. First it would be met if the 2016 Accounts are delivered by 30 August 2017. They were not, so the clause can be simplified thus:

> "The Payment is conditional upon (x) the receipt by APR Energy Limited of its Audited Financial Statements for the financial year ending 31 December 2016 from its auditors in a form compliant with section 8.1(a) of the [Credit Agreement] by … such later date on which such Audited Financial Statements may be delivered (i) in a form compliant with section 8.1(a) of the [Credit Agreement], and (ii) accepted by such lenders without [default or] penalty."

91. Although Bidco contended that it is not clear what is meant by *"without default or penalty"* given the absence of specific definitions, this very structure gives a powerful clue to what the clause means. If the accounts are delivered by 30 August, there is no question of *"default or penalty"*. Therefore logically *"default or penalty"* is something which has a link to late delivery; and it has at least an appearance of being related to the accounts, rather than any broader concessions.

92. Although Mr Westwood for Bidco rightly pointed out that the term "penalty" is not defined in the Credit Agreement, and suggested that this indicated an intention to reference something much broader than the Lenders acting in some way within the bounds of that agreement, that absence of specific definition is not of much assistance to Bidco, once reference is had to the Credit Agreement in the context of these two words, wittingly joined together by the parties.

93. In the first place, with the knowledge of this most immediate piece of background one has to have some regard to the concept of "default", even though it was not on the facts suggested that this was a relevant provision in this case. Not only is the concept of default one that is well known in the context of banking, the terms "Default" and "Event of Default" are defined terms in the Credit Agreement. This gives a natural and obvious starting point for the word default.

94. Nor does Bidco's argument that the term makes no sense, given that a failure to provide the 2016 Accounts within the time stipulated by section 8.1(e) results in an immediate and automatic Event of Default under section 10.1(d) of the Credit Agreement, gain much traction. The obvious answer is (even without looking at the factual matrix) that a default can be waived – just as it can be negotiated around ahead of time. This may, as ACON suggested, be one reason to account for the fact that the term was used without capitalisation (or indeed specific cross-reference to the Credit Agreement).

95. Bidco then suggests that the term "default" does not sit well within the relevant sub-clause of the Condition (*"accepted by such lenders without default or penalty."*) It argues that if the sub-clause proceeds on the basis that the Lenders have accepted the 2016 Account, why would there be a default? To this the answer is twofold: firstly, acceptance and default can be seen as the two possibilities: thus, default in this context is a default acted upon, using the Event of Default regime. Secondly the use of the word default in this context may provide *"belt and braces"* against any later suggestion by Bidco that waived default is still (because automatic) a default.

96. Nor does Bidco's argument that the Credit Agreement does not include any particular provisions that would allow the Lenders to impose so-called penalties on APR have merit. The Credit Agreement may not have had a specific regime entitled "Penalties", but there was a range of options open to the Bank in the event of a default – including an option to impose a penal interest rate: clause 5.1(c).

97. Bidco suggested that this could not have been what the parties had in mind because it only operates where there has been a default – and if there has been a default that portion of the clause would be triggered, rendering the penalty wording meaningless. But that is an argument which only works if one does not accept ACON’s argument that default in this context references not any default (whether acted on or waived), but only a default which is ultimately acted on. Adopting this approach, the wording makes perfect sense in the context of the Credit Agreement.

98. Bidco's argument also fails to engage with the submissions made by ACON as to the natural meaning of the words default and penalty – a matter which is of some significance where a document has been drafted by professionals, who may be assumed to have a propensity to use words precisely. ACON drew my attention to the definitions in:

    i) The Cambridge Business English Dictionary: *“an amount of money that someone is forced to pay for failing to obey a rule, law, etc.”*.

    ii) The Oxford English Dictionary: *“a punishment imposed for breach of a law, rule, or contract; a loss or disadvantage of some kind, either prescribed by law for some offence, or agreed on in case of breach of contract; spec. a fine”*.

99. While I am naturally alive to the caution which must be exercised when looking at dictionary definitions, there is nonetheless some significance to them when considering words used by professionals in a signed agreement in a situation where one is trying to ascertain whether they meant (in essence) a sanction or a concession. Both of these definitions are consistent with the case advanced by ACON, and the provisions in the Credit Agreement which would naturally appear to be referable to that wording. That consistency is seen again when one considers the contextual guidance given by the use of the words *“default or penalty”* together; default is a very specific term and its use with “penalty” might be said to suggest that “penalty” was indeed being used as a specific link to a punishment for a breach of contract.

100. ACON's argument on the text of the clause therefore seems to me to be a strong one.

101. It is notable that Bidco have no positive case based on the text of the clause; their argument is focussed on finding vulnerabilities in ACON's argument. However, since a consideration of the wording of the clause should be a part of the exercise of construction, it is worth considering Bidco's approach in this context. Bidco’s contention ultimately seemed to come down to a submission that any significant or onerous concession in the negotiations and/or any provision *“not freely negotiated”* (ie. *“take it or leave it”* issues) are what are intended to be covered by the clause.

102. This will obviously have to be considered further in the context of factual matrix/commercial purpose, but on language alone there is simply nothing in the language of the clause which gives support to Bidco's case that the objective intention

of the parties was that ACON lose its US $4 million fee if APR made any significant concession of any sort as part of the negotiations with its Lenders so as to secure the significant relaxation of the financial covenants which it required. Nor does the word "penalty" seem at all well suited to convey this meaning.

103. I conclude that looking at the language alone, it provides an indication that the parties' intention was to make the Condition Payment conditional on the accounts either being accepted in time, or if accepted later, being accepted without any of the contractual mechanisms within the Credit Agreement (whether by way of calling in the loan, or penal interest or so forth) being deployed.

Factual matrix and commercial purpose

104. Bidco submitted that this was a case where the Court should have particular regard to the factual matrix behind, and the commercial purpose of, the Letter Agreement and the Condition. The points on which it relied (qualified where appropriate by my conclusions on the evidence) were as follows.

105. ACON and Fairfax invested in APR in January 2016. However, as ACON explained to its own investors in a memorandum circulated on 27 July 2017, the investment performed less well than expected:

> "[APR] faced several financial and operational challenges that together threatened to erode the margin of safety we underwrote, including …[t]he emergence of a new Turkish competitor … the non-renewal of several existing projects …. [t]he slow pace of new project signings, cancellation of awarded projects …and delayed execution of signed projects which unfortunately eroded liquidity, increased leverage and reduced our confidence in the Company's ability to restore asset utilization to targeted levels … [a]n adverse judgement on pre-existing litigation in Australia that resulted in the drawdown of $44 million in L/Cs in June 2017…"

106. In addition, ACON had fallen out with APR's management (in particular, its CEO, John Campion). ACON was unhappy with the way in which Mr Campion was running the business (whereas Fairfax was broadly supportive of Mr Campion). There were particular issues about bonuses being declared without ACON's consent being obtained. Generally, ACON felt *"dismayed by some of the things that we observed in terms of rights that we had not being respected, with respect to some of the decisions being made"*.

107. As a result of both these factors, ACON was keen to exit its investment in APR after less than 18 months. However, Bidco's shareholders were all subject to a lock-in agreement preventing them from selling or otherwise disposing of their shares until 2020. Accordingly, ACON approached Fairfax and asked it to buy its shares in Bidco.

108. Given the difficulties caused by the breakdown in relationship between ACON and APR's management, Fairfax reluctantly agreed to purchase ACON's shares. There appears to have been a miscommunication about whether this purchase was to be at cost. Bidco's perception was that it was to be at cost and that subsequently ACON demanded more money, apparently due to investor pressure. ACON's understanding was that it had always made clear that it expected to get not just cost but what it regarded as "its" portion of the $20 million cash which APR was holding.

109. Payment of such a further sum was not capable of being agreed unconditionally in circumstances where:

i) The investment was not performing well;

ii) APR was struggling to obtain a clean audit because it was forecasting a breach of the financial covenants – which also gave rise to a 'going concern' issue;

iii) Negotiations with Lenders had been started but had not progressed very far, because KPMG were assessing APR's financial position for the Lenders;

iv) Substantial amendments to the covenants were going to be required from the Lenders and this would take time, requiring extensions of time for the delivery of the financial accounts;

v) A clean audit would only be issued if and when APR had obtained the required covenant relief from its Lenders (both as to the financial covenants and the deadline for the delivery of the audited 2016 Accounts to its Lenders);

vi) The Lenders were in a position to require concessions from APR and its shareholders in exchange for such covenant relief. They had already made a number of demands and were pushing back more, with an increasing focus on liquidity. An amendment fee of considerable size was plainly going to be demanded, equity contribution was *"in play"* as were plans to de-leverage the business;

vii) The negotiations with the Lenders were expected to be difficult;

viii) The negotiations with Lenders might *"drag on"*, which would likely allow the Lenders to extract greater concessions.

110. There was not much contention about this factual matrix background. ACON however argued, it seems to me fairly, that facts which also would go into the equation include much of the material outlined above in relation to the background to the negotiations with the Lenders, which I have not reiterated in the list above. In particular, ACON drew attention to the Sixth Amendment, which made clear that there were not agreed terms and the documents indicating that as at July (and indeed August) while temporary relief in the form of extensions had been granted, the parties knew that the meat of the Lenders' requirements on financial covenants were still to come and that equity injections were very much *"in the frame"*.

111. Pausing here, I conclude that clearly and persuasively as the case was put for Bidco by Mr Westwood, there is nothing in this factual matrix which offers a route to transforming the clear picture which is suggested by the pure exercise of textual

analysis. Although one might say that the factual matrix could be said to support either side's approach, in reality the factual background, certainly when combined with the wording used, tends very much to support ACON's case. What the background shows is that at the time of the Letter Agreement negotiations had started, but had scarcely done more than that. Against that background, absent some other evidence informing the commercial purpose, one would expect any agreement dealing with the uncertainties of the future negotiation either to do so with some degree of specificity, setting out clear criteria by which outcomes could be gauged or, if any change were to suffice to make the Condition Payment not due, to say that in terms.

112. Certainly, the wording seems almost perfectly inapt to cope with the case which was advanced for Bidco, which was neither *"all or nothing"* nor precise criteria. Bidco's case was that *"without default or penalty"* did not apply to all changes, but only to *"significant or onerous changes"*. Therefore, against a background where some terms were partly negotiated (for example the fee), some were clearly likely to happen in some form (terms on asset dispositions) and some were not yet formally sought, but *"in play"* (equity contribution) on Bidco's case there would be some changes which would count, and some which would not; and absolutely no wording to help delineate the line between the two.

113. Nor was there even a meaningful baseline for the substantive terms. In context there were always going to be concessions as the price of such a significant relaxation of the financial covenants against the troubled liquidity position of APR; if such concessions (even if qualified by the word *"*significant*"* or *"*onerous*")* were to disentitle ACON to the Condition Payment, the agreement to pay the fee would become meaningless - particularly so, one might say, when the concessions accepted by APR were within the power of Bidco.

114. Therefore, in my judgment the factual matrix evidence only goes to reinforce the impression provided by textual analysis.

Commercial Purpose

115. There were two further points on which Bidco placed considerable weight. Neither was strictly a factual matrix point. They were rather put forward as telling evidence of commercial purpose.

116. The first point on which Bidco placed particular emphasis was the agreed commercial purpose of the Condition. As Mr Schwartz put it in his statement it was "*to align [ACON's] interests and those of APR and its remaining investors*". Bidco's contention was that this meant that the parties' intention was that if the outstanding issues concerning the delivery of the 2016 Accounts (and therefore the underlying negotiations with the Lenders) were resolved smoothly and without any significant detriment suffered by APR/Bidco and/or its remaining shareholders, ACON was to receive the further payment. However, if this could not be achieved, it would be a mismatch for Bidco's remaining shareholders to be bearing the burden of those conditions alone and accordingly, ACON would not be entitled to the additional payment.

117. The problem with this argument was that (apart from being next door to being a piece of subjective intention evidence) it involved a particular, somewhat slanted, reading of

the evidence of Mr Schwartz – and for obvious reasons he was not cross-examined on this point.

118. Did Mr Schwartz mean that it was (subjectively) intended that ACON's and Bidco's interest be fully aligned; in the sense that any prejudice at all to Bidco meant the loss of the US $4 million? Or did he mean that it was (subjectively) intended that the interests of ACON and Bidco were aligned such that if the catastrophe occurred and APR was unable to deliver its financial statements in a clean form, and the Lenders were not willing to continue the negotiations without regarding that as a default or invoking other sanctions within the Credit Agreement, the paying of the fee would be out of kilter, and so should not be allowed?

119. There seems to me to be no reason why it should not mean the latter quite as well (if not better) than the former. Failure to get clean accounts was a clear, defined and serious risk, which imperilled APR's entire business; it would make sense for ACON not to get any premium over cost price for its shares in those circumstances. As a result, to the extent that this factor is properly relevant (which I doubt) I do not consider it provides assistance to Bidco's construction argument.

120. The second and related point on which Bidco placed great weight was the Board Resolution of 19 July and in particular, the wording *"Payment to [ACON] in consideration for the business and management services and support [ACON] provided Bidco and as a reflection [of ACON's] contribution to the increase in value of Bidco if the Condition is met."* Bidco contended that against this specific piece of background, if APR was having to make significant concessions in order to get the clean audit, then the expressed commercial purpose is not met and the basis on which it was intended that ACON would receive the further $4 million would not be satisfied.

121. However, this argument had two problems. The first was, as I have indicated in passing in relation to the previous point, that the issue of clean financial statements was a point of significant value, such that one might well say that the value of Bidco (as owner of APR) was increased if those statements were forthcoming. It was not simply a question of the ability to continue to access credit (a fairly fundamental point, it might be thought). It might well also impact on the terms on which APR could do business, for example with sellers of equipment, who would be minded to impose stricter credit terms on a company which was (by reason of qualified financials) perceived to be of higher risk. It might well also impact on deal flow, on the basis that customers will prefer a contractual counterparty who is perceived to be less likely to go out of business mid-deal.

122. Nor can it be said that the clause made no sense *vis a vis* ACON in this context, as it would have been open to ACON to act so as to render the obtaining of a clean audit more difficult – for example, because of its concerns as to long term prospects and corporate governance.

123. The second was that this wording itself has to be read against that background of the impasse/mismatch in expectations between ACON and Fairfax to which I have referred above. As Mr Schwartz explained, ACON was adamant it wanted cost plus; Bidco thought the deal should be at cost, and would want some justification for going above that level: the parties were *"looking for the justification for Bidco to essentially be making the payment that ... Fairfax did not wish to make, but which we needed in order*

to exit." As Fairfax regarded a clean audit as being of value, this linkage here made sense. On that basis, even this Board Resolution simply leads back to the same conclusion – the equation of the clean audit (as the words seem to indicate) with the entitlement to the Condition Payment.

124. I note that at points, Bidco's argument appeared to stray into eliding this clause and the condition itself. However, to the extent this was done, it was not permissible. The condition is clearly worded, and has no overlap in drafting terms with the resolution which would justify the *"reading across"* of a requirement that the value of Bidco be in fact increased.

125. In the light of the above issues, I have reached by this stage the clear conclusion that ACON's construction is to be preferred.

126. I would add that some yet further weight is added to this conclusion when one considers the issues not pursued. As noted above, Bidco initially argued that there were six matters which could count as reasons why the US $4 million was not payable. Just prior to closing submissions, it indicated that it did not pursue any of these points other than the fee and the equity injection. The other points were not formally conceded; Bidco simply said it chose only to pursue its best points and accepted that if it did not succeed on those it would not succeed on the others.

127. In this however, Bidco was to some extent in a cleft stick. As Mr Willan pointed out, if Bidco formally conceded those points could not succeed, it might be said to be actually fatal to the case overall. This is because it is hard to see – and was not explained – what was the conceptual distinction between the points not pursued and the points still pursued.

128. Yet on the other hand, if all of the points were in reality good ones, one is left with a situation where such a wide range of things could lead to the Condition Payment not being payable, that the Letter Agreement becomes effectively a dead letter. The court would, of course, be very slow to reach a conclusion that this is what the parties objectively intended, when drafting such a document through their lawyers, and going to the formality of signing it and cross referencing it in the Board Resolution.

129. As a result, I have come to the conclusion at this stage that ACON's claim succeeds. However, I will consider the issues as formulated (to the extent still relevant) for completeness, and for two other reasons. The first is that they did form part of the iterative process of construction. The second is that, in my judgment, the arguments and answers to the individual sub-issues reinforce the conclusion to which I have come.

The Specific Issues

The October Penalty: Issue 1A/Issue 2A

130. It will be recalled that in October 2017 the Lenders demanded (and received) payment of an additional US $100,000 fee for the delay in the amendment process (including in the delivery of the 2016 Accounts). This sum was demanded in addition to the US $1 million amendment fee agreed previously, of which US $100,000 had already been paid in June 2017.

131. In the end, this issue was quite clear. On the construction as I have found it, it did not arise. This was not a penalty in the sense that I have found the parties objectively intended.

132. Nor in fact did it even arise on the case advanced by Bidco. I note that it could not sensibly be called a *"significant or onerous concession"*; it was, as Mr Harvey said, not a big issue. The only way of getting to this result would be by saying that any *"take it or leave it"* term was a penalty.

133. In closing (in the light of the evidence) the case was indeed put by Bidco more nearly as a case that the October Fee was a penalty because it was unilaterally imposed by the Lenders, and in practical terms APR had no possible way of resisting it. This amounts to a submission that any term imposed on a *"take it or leave it basis"* in a negotiation where the balance of power may not be equal is a penalty. This is a novel and daring submission, with wide-ranging repercussions (for example in relation to the doctrine of duress) with which I cannot find myself in agreement.

134. To smooth the unattractiveness of this argument, Bidco relied on an alleged punitive intent on the part of the Lenders. I do not accept that this had, as a matter of law, any relevance (even if it were admissible). But, in any event, the evidence did not reach so far.

135. On my reading of the evidence, what happened was that the Lenders were already somewhat vexed with Bidco/APR because the process of negotiating the amendments had taken too long. The late requirement to change covenant levels – and the need for yet further work - because of the late discovery of an accounting issue led to a loss of patience on their part, when credit committees had to be reconvened very late in the day. It was imposed not specifically to punish APR/Bidco, but in a fit of annoyance at the extra work involved for the Lenders. The wording used in the discussions was about the Lenders having deserved this fee and having suffered, not about any breach or wrongdoing by APR/Bidco, or even to cause pain and suffering to APR/Bidco. This decision may have been unexpected and regarded by Mr See as "extraordinary" or "*completely different*" to what had gone before, but it was reflective of the fact that the Lenders did not get any compensation for their management as opposed to their out of pocket expenses, and the change required at least some of the Lenders to call meetings of credit committees under time pressure to approve the changes.

136. Importantly, too, it was not imposed as a result of a request for extension because there was no request for an extension then being sought. The later request for an extension was a separate "*belt and braces*" request, which came after the October Fee had already been demanded.

137. The facts on the ground also reflect the way that the October Fee was described both in the Eleventh Amendment – following consideration by the Lenders, when Mr See (who was concerned that this change set a damaging precedent) asked them to call it a penalty, and also in the accounts following due consideration by APR's auditors PwC. It also reflects how Mr See subjectively thought about it – he did not like the October Fee one bit, but he regarded it as an additional (punitive) fee, not as a penalty.

138. Whichever way one looks at it, the October Fee was a fee levied as part of the amendment process because a late amendment required more work. It was an

amendment fee, not a penalty. Nor in terms of timing (were Issue 1C live) was it a payment which was related to the timing of the delivery of the 2016 financial statements. The timing of the statements was entirely unaffected by this issue, which related to lender-side work, and not anything to do with the timing of the accounts.

139. In the light of my conclusion on construction, this argument fails. However, even if I had not so found, Bidco's argument was ultimately not supported by the evidence, for reasons which I explain below in relation to Issue 1D (the timing point). In essence, the evidence demonstrated that the October Fee was imposed not for delay to the process but to compensate the Lenders for extra work caused to them at a late stage. It was (rightly) not suggested that such a rationale for imposition of a fee could make it a penalty.

140. This point related solely to the October Increase, rather than to the full Amendment Fee. Bidco contended that this was not an amendment fee, but a penalty imposed by the Lenders for the delay in the amendment process, including the late delivery of the audited 2016 Accounts.

141. For the reasons given above, the answer to this question is 'No'. However, the specific arguments relating to the alleged penal nature of the fee are dealt with below as part of the consideration of the October Fee.

Significant concession/Equity injection: Issue 1B/Issue 2B

142. It was common ground that the Lenders first demanded an equity contribution from APR's shareholders following the August Meeting. It was not seriously in issue, and I have found that the possibility, indeed the likelihood, of an equity contribution being demanded was mooted and very much live before the July Agreement.

143. On the construction of the relevant clause as I have found it, this issue is straightforward. Simply put, this requirement was not a penalty in any normal sense: it is not intended to hurt or punish, it is unrelated to a breach of any agreement and it has no link to the Credit Agreement as it stood at all.

144. However, even if I had been inclined to find for Bidco's construction, I would have been unwilling to accept the submission that on the facts this was a penalty in the sense of being a significant or onerous concession. It seems nonsensical to regard as a penalty something which both parties would, at the time of the July Agreement, have regarded as a realistic or likely outcome – and which would have been seen as what it was – a *quid pro quo*. It was submitted that it was far from clear that an equity injection would be required; I cannot entirely accept that submission, to the extent that it suggests that the parties would not have anticipated an equity injection as likely. As for the scale of the contribution, I have concluded that a significant contribution was what would have been anticipated; and once that conclusion is reached the precise figure is immaterial.

145. Bidco's case was that one should regard the equity injection as punitive in circumstances where APR was highly leveraged, because the investment of further equity likely resulted in an overall loss of value for the shareholders. However, I cannot accept this submission. This is to look only at the debit side of the account. It was a price paid for very significant advantages for APR/Bidco, in terms of easing of lending terms, in terms of a very concrete issue – the practicalities of the servicing of the company's debt - and

which was described in partnership terms at the time: the phrase used was *"equity risk sharing"*. And in concrete terms it improved APR's balance sheet with assets going up by the amount of the investment, without any further liabilities being created.

146. Again, the Bidco argument in the end shaded into a case that any unwanted concession of the *"take it or leave it"* sort was a penalty. So Bidco contended that *"the shareholders were forced to make this payment in order to obtain the lenders' agreement to the amendments to the terms of the Credit Agreement required to enable APR to obtain a clean audit opinion. As such, the US$ 30 million equity contribution is plainly encompassed within the term "penalty" in the Letter Agreement."* As I have already indicated, this argument flies in the face of any sensible understanding of the concept of a penalty.

147. In the end this argument was tacitly acknowledged to be dependent on the *"alignment of interests"* argument which I have already rejected; this was put forward as a key component in the logic underpinning the argument that *"it must have been the parties' objective intention that the Condition for the payment of US$ 4 million would not be met in the event that such an equity contribution was insisted on"*.

Issue 1C: Must the fee, concession or obligation (as appropriate) be specifically attributable to the extension of the deadline, as distinct from amendments to other terms of the Credit Agreement, to qualify as a penalty?

148. Given my conclusions thus far, this issue is entirely academic. ACON submitted that the relevant fee/concession must be attributable to the extension of the deadline. Bidco's case was that the reference in the Letter Agreement to the delivery and acceptance of the 2016 Account by the Lenders *"without default or penalty"* was effectively a convenient shorthand way of saying that the amendment process had been concluded successfully (enabling a clean audit to be issued), without APR and/or its shareholders being required to incur further payments or to accept significant concessions or onerous obligations.

149. I confess that so clear does the issue of construction seem to me to be that I struggle to analyse what the parties' intentions as to linkage with extension were if they had intended (say) the introduction of an equity contribution to be covered.

150. In the end I have arrived at the view that if, contrary to my conclusion, either the amendment fee or the equity contribution were capable of being penalties, Bidco is probably right to say that the distinction between (i) payments, concessions or obligations *"specifically attributable"* to the extension of the audit deadline; and (ii) payments, concessions or obligations *"specifically attributable"* to the amendment of other terms in the Credit Agreement is artificial and misconceived.

151. If (*ex hypothesi*) the commercial purpose or factual matrix compelled a conclusion that a significant concession could be a penalty, it would be hard to see the commercial sense in making the rider specifically attributable to extension only – particularly when the evidence was that extension was in commercial terms neither here nor there. If a concession in the broader negotiations was capable of being a penalty, the logic for the linkage to the extension does disappear. But in a sense, that only goes to reinforce the earlier conclusion that the parties cannot objectively have intended this result, since as

I have earlier noted, the wording of the clause does seem to point to a link to the accounts, and hence to the extension.

Issue 1D: The timing point

152. The next point – the timing issue - is also academic.

153. The wording of the clause clearly appears to indicate (as ACON contended) a temporal link between the delivery of the accounts and the default or penalty. Yet one might say that if on the true construction of the clause it covered broader concessions, such a requirement would effectively hamstring the commercial purpose which required that conclusion.

154. But here the position is somewhat different to that which pertains to the subject matter linkage. If the broader view urged on me by Bidco is taken, it would seem to produce what Mr Willan characterised as an *"uncommercial and unjustifiable dichotomy"* in that the question of whether an equity injection would be a penalty or would trigger non-satisfaction would depend on whether there had been an extension.

155. I would therefore, were it necessary to do so, find that Bidco's case would fail on this issue, even if it had succeeded on the issue as to the meaning of the word "penalty".

Conclusion

156. It follows from the above that ACON's claim succeeds, and the Condition Payment became due in November 2017 (specifically on the expiry of five days after the acceptance of the accounts by the Lenders – 8 November 2017).

157. Interest is also claimed from that date at a commercial rate. ACON's submission is that given its position as a private equity investor which demands a significant return on any capital which it invests its businesses, a rate of US$ LIBOR (6 month) + 5% would be appropriate.

158. In the absence of full submissions on this point, I will confine myself here to a preliminary indication that I will require persuasion (i) that interest should not be awarded at US$ LIBOR (6 month) plus an appropriate percentage and (ii) that that appropriate percentage should be anything higher than + 2.25%.