Approved Judgment

Neutral Citation Number: [2024] EWHC 1202 (Comm)

Case No: CL-2023-000553

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 May 2024

Before:

MR JUSTICE PICKEN

- -

BETWEEN:

CINDAT NEPHTHYS HOLDING LIMITED **Claimant**

- and -

HUNTER HOLDINGS LIMITED **Defendant**

- -
- -

Mr David Caplan (instructed by **Enyo Law LLP**) for the **Claimant**
Ms Tamara Kagan (instructed by **Gibson, Dunn & Crutcher UK LLP**) for the **Defendant**

Hearing dates: 9 May 2024.
Judgment provided in draft: 16 May 2024.

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JUDGMENT

Mr Justice Picken:

Introduction

1. This is an application by the Claimant, Cindat Nephthys Holding Limited ('Cindat'), for summary judgment pursuant to CPR 24 in respect of its claim under an agreement described as the Amended and Restated Shareholders' Agreement dated 30 May 2019 (the 'Agreement') against the Defendant, Hunter Holdings Limited ('Oaktree', owing to the fact that this is how the company was described in the Agreement).

2. Cindat is part of a Beijing-headquartered international investment management company. Oaktree is part of a very substantial global asset management group with nearly US$200 billion worth of assets under management and over 1,000 employees.

3. The Agreement relates to a company, 30 South Colonnade Holding Limited (the 'Company'), which indirectly holds a long-term leasehold interest in a valuable property in Canary Wharf (the 'Property').

4. Clause 8.1 of the Agreement provides that:

> *"At any time after the 4th anniversary of Completion under the Purchase Agreement, Cindat shall have the right to require Oaktree to purchase all (and not part only) of the Relevant Securities free from all Encumbrances and all rights attaching thereto (the 'Put Option') by delivering notice in writing to Oaktree and the Company (the 'Put Option Notice'). The Put Option Notice shall specify:*
>
> *8.1.1 that it is a Put Option Notice under this Agreement; and*
>
> *8.1.2 a date for completion of the sale and purchase of the Relevant Securities (the 'Put Option Completion Date') which shall be on the Business Day falling 30 days after service of the Put Option Notice."*

5. There is no issue that the *"4th anniversary of Completion under the Purchase Agreement"* was 31 May 2023. Nor is there any issue that the *"Relevant Securities"* are the shares which Cindat holds in the Company.

6. On the face of it, therefore, subject to Oaktree's case that Clause 8.1 should be rectified (as explained more fully later), Cindat was entitled under the Agreement to do what it did on 1 June 2023, which was to deliver a put option notice to Oaktree (the 'Put Option Notice') requiring Oaktree to purchase the Relevant Securities from Cindat and to pay it a purchase price calculated in accordance with Clause 8.2 of the Agreement, which provides that:

> *"The price for the Relevant Securities to be sold pursuant to the Put Option shall be the amount equal to Cindat's Initial Funding and any Subsequent Funding contributed to the Company together with the amount of the accrued but unpaid Preferred Return (if any) up to the date on which such repayment is made (the 'Put Option Price'). Cindat and its Shareholder's Group shall be bound to sell the Relevant Securities specified in the Put Option Notice on the Put Option Completion Date conditional only on the*

receipt of the Put Option Price and Oaktree (or its designee) shall be bound to purchase the Relevant Securities specified in the Put Option Notice. Completion of the sale and purchase of the Relevant Securities pursuant to the Call Option shall be in accordance with clause 10."

7. The Agreement, which is subject to English law, also contains an entire agreement clause (Clause 22) in these terms:

"Whole Agreement

22.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover.

22.2 Each party acknowledges that, in entering into this Agreement and any documents referred to in it, it does not rely on, and shall have no remedy in respect of, any statement, representation, assurance or warranty of any person other than as expressly set out in this Agreement or those documents."

Applicable principles

Summary judgment

8. The correct approach to be taken to summary judgment applications is very well-known. It is as set out in many cases, including perhaps most notably by Lewison J (as he then was) in ***Easyair Ltd v Opal Telecom Ltd*** [2009] EWHC 339 (Ch) at [15].

9. I need not, in the circumstances, restate the applicable principles here, although it is worth highlighting that in a later case, ***Calland v Financial Conduct Authority*** [2015] EWCA Civ 192, the by then Lewison LJ noted at [28] that the *"fact that some factual or legal questions may be disputed does not absolve the judge from her duty to make an assessment of the claimant's prospects of success"* and at [29] that in *"evaluating the prospects of success of a claim or defence the judge is not required to abandon her critical faculties"*.

10. ***Calland*** is an authority to which Mr Caplan (on Cindat's behalf) took me. For her part, Ms Kagan (on behalf of Oaktree) referred to ***Director of the Assets Recovery Agency v Woodstock*** [2006] EWCA Civ 741 where, at [14], Hughes LJ (as he then was) explained that he considered that summary judgment ought not to be granted where it is *"simply not possible to say"* that a case advanced is *"bound to be disbelieved"* or that *"a story which is advanced by a defendant is so obviously untrue that it is fanciful to suggest that it might be accepted"*.

11. Ms Kagan also cited ***Optaglio Limited v Tomas Tethal*** [2015] EWCA Civ 1002, in which Floyd LJ said this at [35]:

"… In order to justify disposing of a factual issue at the summary judgment stage the contemporary material must be sufficient to allow the court to say that the contrary assertion has no real prospect of success. This is not really a question of weight, or of weighing competing material. …".

12. I bear these various observations in mind when considering the present application. I bear also in mind what is stated in *Hodge on Rectification (2nd Ed*.) at paragraph 11-52, as follows:

> *"A claim for rectification may, in principle, be the subject of an application for summary judgment; but since a claim necessarily involves a fact-based inquiry, only rarely will it be appropriate to dispose of a claim for rectification summarily on written evidence, and without a trial".*

Rectification

13. As to rectification, the requirements were helpfully described by Leggatt LJ (as he then was) in ***FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd*** [2020] Ch 365 at [176]:

> *"… before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an 'outward expression of accord' - meaning that, as a result of communication between them, the parties understood each other to share that intention."*

14. There is no issue about this being what is required if rectification is to be achieved. In addition, however, Mr Caplan drew attention to the fact that in ***Britoil Plc v Hunt Overseas Oil Inc*** [1994] CLC 561, at page 572D-G, Hobhouse LJ (as he then was) referred, with apparent approval, to authority (***Crane v Hegeman-Harries*** [1939] 1 All ER 662 at page 664H) in which it was said that there was a need for there to be *"convincing proof that the concluded instrument does not represent the common intention of the parties"*. In that same case, as Mr Caplan went on to note, Hobhouse LJ described how the relevant contract had been *"carefully prepared and scrutinised over several weeks by highly qualified lawyers and their clients"* (page 572H), before explaining in relation to the contention that something stated in an informal document not intended to have legal effect *"should be treated as a superior statement of the parties' agreement and is to displace the clear language of [a] considered and carefully drafted definitive agreement"*:

> *"It can be immediately seen that this proposition needs to be carefully examined. As a matter of logic it can lead to the result that where there is a succession of documents of increasing formality but without legal effect leading up to a final considered legal document, the ascertainment of the actual agreement between the parties can be thrown back to the successively less formal, less considered and less carefully drafted earlier documents. This cannot be right. The process of negotiation and progressing towards a complete and formalised agreement is one which may contain many ambiguities. The purpose of the final document is to remove those ambiguities and to define authoritatively and clearly what the parties' respective rights and obligations are to be."*

15. I was referred also by Ms Kagan, and uncontroversially as far as Mr Caplan was concerned, to ***Investor Compensation Scheme Ltd v West Bromwich Building Society***

[1998] 1 WLR 896, where at page 913A-B Lord Hoffmann made it clear that evidence of negotiating history and declarations of subjective intent, although inadmissible for construction purposes, are admissible for the purposes of rectification, and to ***Colorcon Ltd v Huckell*** [2009] EWHC 979 (Ch), where at [16] HHJ Toulmin QC (citing ***Gallaher v Gallaher Pensions*** [2005] Pens LR 103 at [141] per Etherton J, as he then was) noted that *"in claims for rectification it is permissible to have regard to events after the transaction is entered into as evidence of the parties' intention at the time of the transaction and (where required) as objectively manifesting that intention"*.

16. Otherwise, given that the Agreement contains an entire agreement provision (Clause 22), I was also referred to ***Surgicraft Limited v Paradigm Biodevices Inc*** [2010] EWHC 1291 (Ch), in which Mr Christopher Pymont QC (sitting as a Deputy High Court Judge) observed at [75] as follows:

"I take the point that the existence of an entire agreement clause like clause 18 may affect the Court's consideration of what was in fact the parties' common intention and of whether they made a mistake. However, it is important in that context to identify from the evidence what, if any, effect the entire agreement clause had on the parties' actual intentions so as to determine what their common intention was. If an entire agreement clause was part of the travelling draft but there is no evidence that the parties themselves actually understood what it meant or let it affect their thinking in any way, it may be difficult to derive anything from it: its existence may simply be part of the mistake in expressing the parties' intentions. It could be different if the evidence showed that the parties actually considered what this clause meant as part of their negotiation. The fact that the parties signed up to this clause in the final form of their agreement and are therefore to be taken, in law, as having agreed to it is not, without more, an indication of what was the parties' common intention. …".

I agree with this. The existence of an entire agreement clause is not necessarily a bar to rectification.

17. Again, I bear these various points in mind as I now turn to the merits of the application in the present case.

Cindat's position (in outline)

18. Cindat adopts a straightforward position: that the Put Option Notice served on 1 June 2023 was valid and served in accordance with Clause 8 of the Agreement, and that as such Oaktree's failure to pay the contractually-specified purchase price represents a breach of contract on its part. Specifically, as to Oaktree's rectification case, Cindat contends that this should be rejected on the basis that all the evidence and the inherent probabilities are against it, so as to mean that it has no real prospects of success.

Oaktree's position (in outline)

19. Oaktree's case is that Clause 8.1 of the Agreement should be rectified in order that it reads as follows (the additional wording being shown by underlining):

"At any time after the 4th anniversary of Completion under the Purchase Agreement, Cindat shall have the right to require Oaktree to purchase all (and not part only) of the Relevant Securities free from all Encumbrances and all rights attaching thereto <u>if (and</u>

only if) the Company's Business Plan is modified such that the Company (or another entity managed and/or controlled by OCM [Oaktree Capital Management LP]) would hold the Property indefinitely in an open-ended investment fund without a specified end date (the 'Put Option') by delivering notice in writing to Oaktree and the Company (the 'Put Option Notice')."

20. Ms Kagan submits that, in the circumstances, given that rectification is an inherently fact-specific claim, summary judgment should not be awarded in Cindat's favour.

21. In this regard, Ms Kagan highlights how Oaktree's evidence (specifically from Mr Jeffrey Chalmers, at the time a senior vice president in Oaktree Capital Management LP – 'OCM' – who was in part responsible for leading the negotiations with Cindat, and from Mr Benjamin Bianchi, who became responsible for the transaction from about April 2019) is that both Oaktree and Cindat shared the requisite common intention and, in fact, agreed to a put option in the terms for which Oaktree contends.

22. Moreover, Ms Kagan submits, Mr Bianchi discussed the put option with Mr Gang Peng, CEO of Cindat Capital Management Limited ('CCM'), on at least two occasions in 2023, during which discussions Mr Peng acknowledged that the parties had agreed to a put option in the terms set out above.

23. Ms Kagan acknowledges that Cindat does not accept this evidence, Mr Peng maintaining that the parties agreed to a put option in the terms set out in the Agreement and flatly denying what Mr Bianchi has to say concerning the later conversations. Her submission is that this conflict means that it would be inappropriate to grant summary judgment since a trial is required where the evidence can be tested in cross-examination.

Discussion

24. As previously mentioned, the evidence adduced by Oaktree for the purposes of the summary judgment application includes evidence from Mr Chalmers and Mr Bianchi. Mr Chalmers, in particular, explains that a significant aspect of OCM's business involves identifying properties that it can revitalise or redevelop, with the aim of selling or leasing those properties for a commercial return.

25. He goes on to say that in 2017 or 2018, OCM identified the Property as a good candidate for redevelopment and in 2018 OCM attempted to acquire the Property from its then owner, the HNA Group (a large Chinese conglomerate) – with no success. In early 2019, OCM learned that Cindat had acquired an option to purchase the Property from the HNA Group, which at that point was insolvent. Cindat, however, apparently had no interest in redeveloping or leasing the Property itself, and discussions between OCM and Cindat began in February 2019.

26. Mr Chalmers observes that one option would have been for Cindat simply to acquire the Property from the HNA Group and 'flip' it to OCM. Cindat chose not to do this, however, preferring to retain an equity interest in the Property. Mr Bianchi notes that Cindat was concerned not to give the impression that it was looking to make a quick profit and that it wanted to avoid potentially embarrassing or angering the administrators of the HNA Group.

27. Be that as it may, Mr Chalmers states that the fact that Cindat wanted to make a profit on its option and wanted to retain an equity interest in the Property made the deal structure unusual and the negotiations more complicated. Moreover, because Oaktree and Cindat had to do a deal before Cindat's option to acquire the Property from the HNA Group expired, according to Mr Chalmers, the parties were *"racing against the clock"* to get a structure agreed and the deal documented. That meant, Mr Chalmers explains, that the negotiations focused on OCM's ability to get its deposit secured (Cindat had insisted that OCM pay £6 million before it would enter into negotiations with it but was maintaining that OCM would not get that back if there was no deal) and on the price.

28. As the parties' negotiations were focused on such matters, Mr Chalmers notes that the details of how the structure would operate were very much a secondary focus for OCM, with the negotiations about the structure focused on the control rights that would attach to the 5% stake that Cindat ultimately retained in the Property. Accordingly, as it acknowledges in the Reply and Defence to Counterclaim, Cindat was to have *"relatively limited minority rights under the Agreement"*: only Oaktree would be entitled to appoint directors and *"Oaktree Decisions"*, which include material aspects of the Company's business (such as approving the five-year Business Plan, approving the annual Business Plan and Annual Budget and calling for additional capital from the shareholders by way of Subsequent Funding), were effectively reserved to Oaktree. In addition, the (Oaktree-appointed) directors were entitled to propose amendments to the Business Plan, meaning (as explained by Mr Chalmers) that Oaktree had *"full control over the Property"* and Cindat had *"no control over [the Company's] business plan"*.

29. This, Mr Chalmers goes on to explain, left Cindat exposed since, although it knew that the Business Plan for the Property was for OCM to buy, fix, lease up and sell the Property within five years in order to maximise the return on the investment, Cindat had no contractual rights which would allow it to ensure this outcome. Thus, Mr Chalmers explains:

> *"… because Cindat had no control over the business plan, they were concerned that they retain the ability to exit if the business plan were changed. In particular, they were uncomfortable with the possibility of being locked into their investment of over the long term, e.g., a ten-year period, and I recall discussing with Yasmin [Ms Jiang, a Director of CCM, a company in the Cindat group] a scenario where OCM might try to hold the Property indefinitely, such as by transferring it to another OCM fund, and Yasmin specifically saying that, in that scenario, Cindat should be entitled to exit."*

30. Mr Chalmers, then, explains as follows in relation to how Cindat's request for a put option was viewed within OCM:

> *"Our view was that if Cindat wanted to be involved in the Transaction as our partner, they needed to stick with us and give us some leeway on timing. The redevelopment of the Property required designing the new building, working with architects and engineers, etc., and obtaining relevant approvals, then completing the refurbishment works and ultimately marketing and leasing the building. … There is always a risk that these steps can take longer than anticipated, and I laid out these risks to Yasmin in an effort to make sure Cindat had realistic expectations on the timing for this deal structure."*

31. He continues at paragraph 20:

> *"However, if OCM were to change the business plan to hold the Property indefinitely in an open-ended (or 'evergreen') investment fund or if we decided to transfer the Property to another OCM fund, then we saw Cindat's point. In that case, the deal would be fundamentally different, and it was not unreasonable for Cindat to want the option to exit the Transaction in those circumstances. That is what I recall discussing and agreeing with Yasmin: that Cindat would be entitled to exit if – but only if – the business plan was fundamentally changed in this way, and that the put option would give Cindat this right."*

32. Mr Chalmers also puts forward an explanation as to why neither the Agreement nor the various term sheets (or drafts exchanged between the parties' solicitors) reflect the agreement which, on Oaktree's case, the parties had, in fact, made. He says this:

> *"I suspect that the discrepancy between my agreement with Yasmin and the language that is in the term sheets, the drafts of the Agreement and, ultimately, in the Agreement itself, arose because when I reported on my discussions with Yasmin about the commercial terms for the transaction to the deal team at OCM and GDC [Gibson, Dunn & Crutcher UK LLP, OCM's solicitors], this point was either omitted (by me) or not picked up (by those to whom I reported my discussions) in the subsequent draft agreements. In this respect, it is important to stress that the put option was one part of a complex transaction and something that, at the time, OCM did not consider to be of great significance. That was because the business plan anticipated that we would aim either to sell, or to be very close to selling, the Property before Cindat would have an opportunity to exercise the put option. The put option was, therefore, not at all our primary focus during negotiations, which may help to explain why it ended up being overlooked in the drafts of the agreements and in the Agreement itself."*

33. As for Mr Bianchi, although he was not himself involved in negotiating the put option provision, he states that his understanding of its purpose, derived from discussions with OCM's deal team when he came on board, was the same as that of Mr Chalmers, namely that *"the purpose of the put option was to allow Cindat to exit the Transaction if OCM changed the business plan to hold the Property over a longer term, in circumstances where Cindat had an equity interest but did not have any voting rights or control over the business plan"*.

34. Mr Bianchi, then, deals with the subsequent conversations on which Oaktree relies.

35. The first two of these are said to have taken place in around October or November 2022, Mr Peng having contacted Mr Bianchi to discuss Cindat selling its stake in the Company. Mr Bianchi says that Mr Peng told him that Cindat wanted to exit because China Cinda (HK) Asset Management Co. Ltd ('Cinda'), understood by Mr Bianchi to be an investor in Cindat and the ultimate shareholder of the Cindat group of companies, was trying to *"clean up its international positions"*, which Mr Bianchi took to mean that Cinda's management was trying to repatriate its international assets to the greatest extent possible, and as quickly as possible, in order to appease its regulators. According to Mr Bianchi, Mr Peng said that Cindat might be willing to accept a discount if a sale could be accomplished by the end of the accounting year, explaining that he had a third party interested in acquiring Cindat's stake and, pursuant to the terms of the Agreement, wanted first to confirm whether OCM might instead want to acquire Cindat's stake at

a discount. Mr Bianchi says that at no point in this conversation did Mr Peng suggest that Cindat considered it would have an unqualified right of exit by May 2023, some six months later.

36. Mr Bianchi explains that the next conversation took place on or around 20 June 2023, and so after the Put Option Notice. Mr Bianchi says that his understanding from this call was that Cinda was now making decisions on behalf of Cindat and that Cindat's position was, therefore, being directed by Cinda. He says that Mr Peng *"lamented this turn of events and apologised for losing control of the situation with Cinda"*. Mr Bianchi continues by saying this:

"Now that Cinda was clearly directing the Cindat decisions I was concerned that Cinda, who had never been directly involved in the Transaction, was unaware of the commercial agreement between the parties as to the circumstances in which the put option could be exercised. I reminded Greg that the intention of the put option was not to enable Cindat to treat its investment like a debt instrument coming due. Cindat's intention behind the put option (as I understood it) was to protect Cindat in the event OCM tried to unilaterally elongate the business plan and lock Cindat in for an indefinite period of time: for example, if OCM transferred the Property into a continuation fund (i.e., one without a specified end date, and so with no definite time for the Property to be sold and for Cindat to receive its anticipated return), and this is what we had agreed. I explained to Greg that the delays with leasing and ultimately selling the Property were the result of the pandemic, not OCM trying to extend or change the business plan to something more indefinite. Greg accepted my description as correct, saying something like, 'I know man, I know'. I then reminded Greg that Cindat had insisted on being a part of the Transaction and having an equity stake in the Company. Greg's response was along the lines of: 'I know Ben. I'm just passing messages. I'm out now, Cinda is now in control.'"

37. Mr Bianchi says that, having been told this, he asked Mr Peng to arrange a call with Cinda, and that that call took place on 29 June 2023 – attended by Mr Bianchi on behalf of Oaktree, Mr Peng and a Mr Steve Liu on behalf of CCM, and a Mr Wu and a Mr Xiao on behalf of Cinda. Mr Bianchi's evidence on what was discussed is this:

"I told them what I told Greg [Mr Peng], they listened to me and I asked what their response was. They explained they had no authority to reconsider their request. I reiterated that this right existed for the purpose that if we changed the business plan to a long-term hold – then they have protection. Mr Wu or Mr Xiao just said something along the lines of: 'We understand the background to the put, and that is now our right.' I suggested they speak to their superior if they didn't have the authority to reconsider their position and they simply said, 'No, the decision is made. We are unable to consider anything else.' That was the last time I spoke to Greg or anyone at Cinda."

38. In response to this evidence, as well as the evidence given by Mr Chalmers concerning the negotiations leading up to the Agreement, Mr Peng has made a witness statement in which he says, in essence, the following.

39. First, he says that, although Ms Jiang was a Director at CCM at the time (at a mid-level rank below Partner, Managing Director and Executive Director but above Vice President), and although she was the primary point of contact for the negotiations with OCM, *"she was there to move the negotiation process along, not to agree anything*

unilaterally" since she had no authority to do that. He adds that Ms Jiang reported to him, explaining also that he was not the sole decision-maker in relation to the Agreement and that approval would have been needed both from others within CCM and from Cinda.

40. Mr Peng goes on to say that Ms Jiang never told him that she had agreed, or had been asked by OCM to seek agreement for, a put option of the type described by Mr Chalmers, and that the only version of the put option of which he was aware was the one included in the Agreement. He also says that, had Ms Jiang told him about *"a counter proposal from OCM as described by Mr Chalmers"*, he would not have agreed and, even if he had been open to agreeing any change, he *"would have had to take the point to Cinda for their approval first given the material nature of such a change to what would have been the original proposal of a put option …"*.

41. Mr Peng, then, addresses what Mr Bianchi has to say concerning the various conversations. In relation to the 2022 call, he says that Mr Bianchi asked him what the buyer was seeking and that he told Mr Bianchi that the buyer's plan was to acquire Cindat's position at a slight discount and exercise the Put Option in June 2023 so as to realise a profit in a relatively short period of time. He says that Mr Bianchi did not object to his understanding of how the Put Option worked or suggest that it was incorrect.

42. In relation to the 2023 calls, Mr Peng states that he gave certain confirmations to Mr Nicholas Jones, a partner in Enyo Law LLP, Cindat's solicitors, for the purposes of the witness statement which he made on 19 December 2023 and in which Mr Jones confirms the denial of the conversations set out in the Particulars of Claim and Reply and Defence to Counterclaim.

43. To repeat, Ms Kagan submits that, in the circumstances, given the conflict between the evidence of Mr Chalmers and Mr Bianchi, on the one hand, and Mr Peng, on the other, not only as to what was said in the lead-up to the Agreement being executed but also to what was said by Mr Bianchi and Mr Peng in the course of the telephone conversations in 2022 and 2023, this is not a case in which it can safely be concluded, at this interlocutory stage, that Oaktree's rectification case has no real prospects of success.

44. I do not agree. On the contrary, I am unpersuaded that there are real prospects of Oaktree being able to establish – with convincing proof – at trial (if there were a trial) that the Agreement does not represent the common intention of the parties as far as Clause 8.1 is concerned, so as to justify a determination that that provision should be rectified. I say this for a number of reasons.

45. First, although Ms Kagan submits that the documents do nothing to contradict the rectification case sought to be advanced and she adds that, in any event, the documents currently before the Court are unlikely to be complete, the fact is that there is nothing in the material which I have seen that supports the case which Oaktree puts forward. This is because the documents show negotiations taking place which entailed, amongst other things, agreement as to the Put Option in terms which became Clause 8.1 of the Agreement; there is no hint at all that the parties really intended (and, indeed, agreed) that the ability to exercise the Put Option should be more limited.

46. As to the exchanges between the parties, it is convenient to begin with an email sent on 3 April 2019 from a Mr Mark Hulbert of Oaktree to Ms Jiang, copying in a Mr David Snelgrove, Mr Chalmers and a Mr Julian Busch also of Oaktree. In that email, Mr Hulbert referred to an attached *"revised version of the proposed LOI based on your [Ms Jiang's] discussions with David [Mr Snelgrove] today, marked against the version sent on March 27"*. In the email no reference was made to what was to become Clause 8.1 but there was a reference to what was to become Clause 7.1 (as to which see later). The attachment – described as *"Project Hunter - Term Sheet"* and dated 3 April 2019 – began with this at the top of the first page:

"SUBJECT TO CONTRACT

This term sheet is for discussion purposes only, and is not an offer, commitment or agreement of any kind by any party hereto or any of its affiliates and may not be relied upon as such. No party shall be contractually bound by any of the terms set forth below unless and until such time as final transaction documents are executed by each party.

Any party may terminate or withdraw from discussions at any time and for any reason without liability to the other parties. ...".

47. The document ended with this:

"This summary of terms does not include all essential terms of the proposed transaction between the parties hereto and, except as set forth above, is not intended to be, nor shall it be construed or considered to be, a binding agreement or obligation on the part of any party hereto ... . Rather, this term sheet is intended only to set forth an outline of the terms and conditions from which the definitive agreements will be drafted by counsel for submission to the parties for review and further negotiation. In particular, it is recognised that due diligence and further investigations and negotiations may bring to light new facts and questions which would call for changes in the transaction including the structure thereof, as to which this summary is not meant to be in any sense dispositive) or the abandonment of the transaction."

48. The next day, 4 April 2019, Ms Jiang replied, saying this:

"Thank you for the quick turnaround on this. Please find our comments below. Kindly note that this is still subject to further review from our GC and legal counsel. Once the commercial points are agreed, we will seek their advice. Also, it's the option agreement that we are not comfortable with, can you please share with us the revised version ASAP?"

49. She concluded, having made various points concerning existing issues, by saying this:

"In addition, we will ask tag along right and option to sell our shares to you during the business plan period. That is to say, if you want to hold for 10 years, we might want to come out in year 5."

This, then, was the first mention of what was to become Clause 8.1.

50. Later the same day, Mr Chalmers replied, saying this:

"Please see our comments below in green. We'll put a hold in the diary for 3pm UK time can you confirm if that works for you?"

The comments included, for example, in relation to *"Timing"* the following:

"[This is not what has been discussed, but assuming we can agree on all other points, we will be okay with this.]"

They also included this under *"Additional Contribution"*:

"[This is not consistent with the discussions you've had with Dave [Mr Snelgrove], but we can accommodate this if all other points are agreed.]"

As to Ms Jiang's request that there be a put option, Mr Chalmers wrote as follows:

"[This is a totally new ask and we will have to consider and discuss with our IC.]"

Mr Chalmers explains in his witness statement that *"IC"* is a reference to OCM's Investment Committee, but that he did not mean that he (or anybody else at OCM) would discuss the put option specifically with the Investment Committee. He says that it is common in their business for people to refer to the need to run matters past a committee or confer with senior personnel as a negotiating tactic, and that he was doing that in this instance.

51. Two days later, on 5 April 2019, Ms Jiang emailed back, including comments in red. These included, as regards the last paragraph concerning the put option, the word *"NOTED"*.

52. The next day, 6 April 2019, Mr Chalmers emailed Ms Jiang, saying this:

"Thank you for your comments. I've copied the outstanding issues and our responses below. Note that OCM's accommodation of certain points in our last email was subject to agreement of all other positions put forward by us.

Following agreement of all commercial points below (including those requiring input from your counsel), we will recirculate the LOI. Given the number of turns so far, please share the SPA ASAP so that we can fully understand the underlying transaction and make any conforming changes in the LOI.

Feel free to call me with any questions."

One of the comments, in relation to the proposed put option, was this:

"OCM TO REVERT WHEN ALL OTHER POINTS ARE AGREED."

53. On 8 April 2019, Ms Jiang replied saying this:

"Thank you again for your patience. Having had several lengthy discussions internally over the weekend, we have come up with the following proposal."

Shortly afterwards, Mr Snelgrove asked Ms Jiang whether she was *"free to discuss"*, to which she replied saying '*yes*'. Subsequently, after that call took place, Ms Jiang emailed saying this:

"Thank you for your earlier.

I think it would be more efficient for CMS to speak to your internal or external counsel directly. If you pass me their contact details, I'll ask CMS to get in touch with them."

54. After this, exchanges were between Gibson Dunn & Crutcher LLP ('Gibson Dunn') on behalf of Oaktree and CMS Cameron McKenna Nabarro Olswang LLP ('CMS') on behalf of Cindat, CMS emailing Gibson Dunn on 10 April 2019 setting out *"our clients' complete position"*. This included the following:

"Put option: Cindat to have the right to sell its interest to OCM at a price equal to its capital contributions plus all accrued and unpaid preferred return at any time after the 4th anniversary of the completion of the SPA."

55. Gibson Dunn replied later the same day, saying that they had discussed matters with OCM *"and their response is as follows"*. The responses included in relation to the Purchase Price of £135 million:

"AGREED SUBJECT TO ALL OTHER COMMERCIAL POINTS BEING AGREED."

Then, in relation to the proposed put option, this was stated in block capitals:

"*Put option: Cindat to have the right to sell its interest to OCM at a price equal to its capital contributions plus all accrued and unpaid preferred return at any time after the 4th anniversary of the completion of the SPA. AGREED - ACCRUED AND UNPAID PREFERRED RETURN WILL BE UP TO THE DATE OF THE PUT OPTION EXERCISE."*

56. The next day, Gibson Dunn sent CMS a revised term sheet, which included the following:

> *"Put Option* *At any time after the 4th anniversary of the completion of the Underlying SPA, Cindat to have the right to sell its interest to Oaktree at a price equal to its capital contributions plus all accrued and unpaid Cindat Preferred Return up to the date of the put option exercise."*

57. The following week, on 18 April 2019, Gibson Dunn sent a draft of the Agreement. That contained the following at Clause 8.1:

"Cindat Put Option

8.1 At any time after the 4th anniversary of Completion under the Purchase Agreement, Cindat shall have the right to require Oaktree to purchase all (and not part only) of the Relevant Securities free from all Encumbrances together with any SPV Loans provided by a member of Cindat's Shareholder's Group and all rights attaching to each of the foregoing (the 'Put Option') by delivering notice in writing to Oaktree and the Company (the 'Put Option Notice'). The Put Option Notice shall specify:

8.1.1 that it is a Put Option Notice under this Agreement; and

8.1.2 a date for completion of the sale and purchase of the Relevant Securities and SPV Loans which shall be on the Business Day falling [20 Business Days][30 days] after service of the Put Option Notice."

58. The following day, CMS responded with a marked-up version, in which as regards Clause 8.1 they merely inserted the words *"(the 'Put Completion Date')"* into Clause 8.1.2 which ultimately came to be included in Clause 8.1 of the (final) Agreement.

59. Other drafts were subsequently exchanged with revisions proposed by the respective solicitors. However, it is clear that Mr Chalmers and Ms Jiang were still themselves directly involved (aside from, no doubt, being in contact with their lawyers) since, for example, as highlighted by Mr Caplan, on 24 April 2019, Mr Chalmers emailed Ms Jiang, copying in Gibson Dunn and CMS, saying as follows:

"Thank you for your comments. Our responses are below. Please note that since you have not agreed to our language on Remedies or the Potential Tax on Cindat Acquisition Fee, and you have changed your position on the White List / Last Look concept, we will be putting pens down and stopping all advisor DD workstreams. In the interest of trying to reach agreement, Gibson is reviewing this turn of the docs and will provide feedback directly to CMS on the mark-ups If you decide to accept those points which we have identified as non-negotiable per our Investment Committee and we sign the Option and JV Agreements, we can continue our diligence. We will, however, require a 1 business day extension to the Option Exercise Date for each additional day (beyond today, April 24) required to sign the agreements. For example, if we sign tomorrow, the Option Exercise Date will be 9 May.

Hopefully we can get these last points agreed and then proceed to signing. Feel free to give a call if you would like to discuss."

60. Indeed, on 11 May 2019, the solicitors having continued their work, Gibson Dunn sent an email to Ms Jiang, Mr Chalmers and Mr Snelgrove (and others, including CMS) stating that the *"drafts are subject to review, including by our client …"*. This was followed by an email from Gibson Dunn on 12 May 2019, in which they stated that:

"We've been through your changes to the docs with OCM and their position (which reflects a package to get this finally agreed tonight or latest early morning) can be summarised as follows:"

There followed detailed comments on a number of provisions but nothing in respect of Clause 8.1.

61. As will be apparent from these documents, there is no suggestion that Cindat and Oaktree had agreed something different from what was set out in Clause 8.1; there is nothing to indicate this at all. There is nothing, in particular, which even hints at an intention on Oaktree's part that the agreement concerning the Put Option should be different – even assuming that such an intention (unilateral to Oaktree) would be sufficient, which obviously is not, in any event, the case. In short, it is evident that negotiations took place throughout, and there was express agreement, on a put option

of the type that ended up in the Agreement. There was never any suggestion of something much more limited.

62. As to the suggestion made by Ms Kagan that there is reason to suppose that there are other documents not before the Court which might support Oaktree's rectification case, Mr Peng's evidence is that Cindat has carried out a thorough search and that he does not believe there to be any relevant documents other than the ones which have been produced. Although this may not equate to a disclosure-type statement, it is nonetheless the evidence which is before the Court on this application, and I see no reason to think that Cindat has suppressed relevant material.

63. This is obviously not the position in relation to exchanges with Oaktree given that, if there were relevant such exchanges which have not been produced (and it is not suggested by Ms Kagan that there were), then Oaktree would be able to produce those exchanges as easily as Cindat – and, as Mr Caplan points out, Oaktree has, in fact, not exhibited any documents in support of its rectification case on this application.

64. As far as any internal Cindat documentation is concerned, again Mr Peng's evidence is that there is nothing relevant that has not yet been disclosed. Furthermore, the fact that Oaktree has not itself disclosed any internal document showing that Mr Chalmers or anybody else considered that agreement had been reached with Cindat along the lines now contended for by Oaktree rather suggests that there would not have been equivalent internal documentation at Cindat. It is, in any event, open to some doubt whether any internal documents would assist Oaktree in view of the external exchanges – the exchanges which crossed the line and went to Oaktree – and the fact, to repeat, that those exchanges contain not the merest hint that what was being negotiated (and agreed) by way of the wording of Clause 8.1 was a mistake.

65. It follows that I do not agree with Ms Kagan when she submits that, since the documentary record is incomplete, the Court should not have regard to it when reaching a determination that summary judgment should be granted to Cindat. In this respect, she relies upon ***Alpha Rocks v Alade*** [2015] EWCA Civ 685 at [25], where Vos LJ (as he then was) noted as follows:

"In my judgment, it is perfectly apparent from a reading of the judgment itself that the judge forgot his own repeated warnings to himself about not conducting a mini-trial and about the draconian nature of what he was contemplating doing. He did conduct an inappropriate mini fraud trial without hearing any witnesses. He decided that a solicitor was lying and that other witnesses were untruthful without their being cross-examined. In my judgment, that was a most unsatisfactory state of affairs. Of course, it can very occasionally be appropriate to conclude that there has been fraud without oral evidence being heard, but in this case the judge relied on forensic deduction in a case where oral evidence at least might have put a different complexion on the allegations made."

That was, however, a very different case from the present. It was a fraud case. Furthermore, if Ms Kagan were right in the submission that she makes, then, it would mean that, in any rectification case where there is an application for summary judgment, all that a respondent would have to do is say that there might be other documents which have not yet been disclosed, and so it would not be appropriate for summary judgment to be granted. I do not accept, however, that this can be right. The more so, where the

documents that are before the Court provide not even a glimmer of support for the rectification case which is sought to be advanced.

66. Secondly, although this is wrapped up with the first point, there is the point that the negotiations which led to the Agreement being entered into were carried out by (and between) sophisticated businesses which were represented by experienced commercial solicitors. As can be seen, and as was to be expected, the various drafts were the subject of detailed consideration not only by the lawyers concerned but also by (and in conjunction with) clients whose job was to ensure that what was being agreed was what suited them from their different perspectives. Drafts were exchanged, and revisions were proposed, in the usual way. I agree with Mr Caplan when he submits that, in such circumstances, there is a strong presumption that the parties intended to be bound by precisely the words they used.

67. In this context it is no answer, in my view, for Mr Chalmers to say (and for Ms Kagan to submit) that the wording of Clause 8.1 *"ended up being overlooked"* because the put option was not the parties' primary focus during the negotiations and that this explains why the documents show no further discussion on the topic after Mr Chalmers responded to Ms Jiang's email on 4 April 2019 raising Cindat's desire for a put option (when she explained that it wanted a put option that would allow it to *"come out in year 5"* if Oaktree *"want to hold for 10 years"*) by saying, on 6 April 2019, that OCM would *"revert when all other points are agreed"*.

68. The simple fact is that, had Oaktree intended to revisit the put option issue, then, it could easily have done so and, having consulted its lawyers, reverted with a revised Clause 8.1 wording.

69. That wording might, for example, have replicated the approach adopted, albeit in a different context, in relation to Clause 7.1 of the Agreement (*"Cindat Repurchase Option"*). That is in these terms:

> *"If:*
>
> *… within 36 months of Completion under the Purchase Agreement, there is a Significant Deviation from the initial Business Plan;*
>
> *… Cindat shall have the right to require the Company to repay in full all of Cinda's Initial Funding and any Subsequent Funding contributed by it to the Company …".*

Although Ms Kagan makes the point this is dealing with a somewhat different commercial concern to that which animated the put option, which was to allow Cindat to exit if the Business Plan was changed from one in which both parties would exit once the Property had been redeveloped, leased and sold to one in which Oaktree did not intend to exit at all, the relevance of Clause 7.1 for present purposes is that it shows that, had the parties really agreed that Clause 8.1 should have a limitation associated with a change being made to the Business Plan, then the Clause 7.1 wording makes it likely that they would have included similar wording in Clause 8.1 and that they could have done so with no difficulty.

70. The fact that they did not do so and that Oaktree, in particular, did not revisit the Clause 8.1 wording, but instead agreed (through its lawyers) to the wording of Clause 8.1

which came to be included in the Agreement, demonstrates that there was not the agreement which Oaktree now suggests that there was.

71. Indeed, if there had been such an agreement (as there would need to be for rectification to be made out since it would obviously not be enough for it merely to be established that the issue was one to which Oaktree intended to return by way of negotiation), then it is difficult to see why the wording of Clause 8.1 did not reflect that agreement from the moment that that agreement was achieved. The fact that, instead, Oaktree went along with wording which, on its case, did not reflect the agreement which it considered it had reached makes it clear, to my mind, that there was no such agreement at all.

72. Thirdly, but again this point is linked to the last, it is clear that, from the very outset, the parties were negotiating on a 'subject to contract' basis. As will be recalled, this was made clear in the initial term sheet of 3 April 2019 (prepared by Oaktree), where it was stated that *"definitive agreements will be drafted by counsel for submission to the parties for review and further negotiation"* and that terms would not be contractually binding *"unless and until such time as final transaction documents are executed by each party"*.

73. This supports the conclusion that it was incumbent upon the parties to pay attention to what was proposed to go into the final version of the Agreement and, as part of that, ensure that their respective lawyers were made aware of any discussions between them which involved an agreement, in order to ensure that the Agreement included everything that it needed to include. It is telling that it appears that Oaktree did not tell its lawyers that, consistent with what is now said, there was an agreement as to the put option which did not find itself reflected in the final wording of Clause 8.1.

74. I agree with Mr Caplan when he submits that it is extremely unlikely, given the sort of parties involved and their legal resources (internal and external), that if they had intended to agree a much narrower put option, they would have done the following, all by mistake: expressly agreed in correspondence to a wider put option; had their lawyers draft a much wider put option; and not spotted the mistake at any point despite detailed amendments being made to the Agreement – including in relation to the Put Option.

75. Fourthly, I agree also with Mr Caplan that Oaktree's case has something of an air of unreality about it since the put option for which it now contends would have been so narrow and so easy for Oaktree to circumvent that it is difficult to imagine any sensible commercial party agreeing to it, even in principle.

76. Fifthly, looking at what Mr Chalmers and Mr Bianchi have to say in the witness statements which they have made in response to the summary judgment application, their evidence on the rectification issue is somewhat vague.

77. In this context it is convenient, indeed, to have in mind what is pleaded in the Defence and Counterclaim concerning the discussions in the lead-up to the Agreement (as opposed to the later conversations between Mr Bianchi and Mr Peng). In paragraph 6, the following is alleged:

> *"…*

(e) Cindat's belief and concern was that its limited minority rights would not protect it in the event Oaktree unilaterally changed the Company's Business Plan from one in which the Company would buy, redevelop, lease and sell the Property to one in which it (or another entity managed and/or controlled by OCM) would hold the Property indefinitely in an open-ended investment fund without a specified end date. That risk was of significant concern to Cindat, who insisted on obtaining contractual protections for that eventuality.

(f) That concern was discussed in conversations between, among others, Jeffrey Chalmers and David Snelgrove (on behalf of Oaktree) and Yasmin Jiang and Greg Peng (on behalf of Cindat) between February and May 2019. In those conversations the parties agreed that Cindat's concern would be addressed if Cindat was entitled to exercise a put option if (and only if) the Company's Business Plan was modified such that the Company (or another entity managed and/or controlled by OCM) would hold the Property indefinitely in an open-ended investment fund without a specified end date.

(g) That was the subjective intention of Mr Chalmers and Mr Snelgrove (whose intention is to be attributed to Oaktree) and Cindat as regards the put option (and it was therefore the parties' continuing common intention and shared understanding), and the parties' outward expression of accord in relation to the put option was reflected in those conversations. This remained the parties' continuing common intention and shared understanding at all material times until the execution of the Agreement. For the avoidance of doubt, the parties had no common intention or shared understanding to the effect that Cindat would have an unqualified right to exercise any put option after four years.

(h) By common mistake the first sentence of clause 8.1 failed to record the parties' agreement in this regard."

78. The first thing to note is that in his witness statement Mr Chalmers makes no mention of anything being agreed in discussions which involved Mr Snelgrove and Mr Peng in addition to Ms Jiang and himself. Accordingly, what is alleged in the Defence and Counterclaim is not, at least in this respect, supported by the evidence now relied upon by Oaktree. Why that would be the case is not clear.

79. The second thing to note is that the case set out in paragraph 6(f) is that the relevant discussions took place between February and May 2019. This is reflected in Mr Chalmers' witness statement at paragraph 9 where the reference is to *"approximately February 2019"*. It is, however, vague and the position is explained in no less vague terms by Mr Chalmers.

80. Mr Chalmers is, indeed, really rather vague in everything that he says – except, somewhat improbably, when it comes to what he says that he agreed with Ms Jiang, in relation to which he is a little more precise – again somewhat improbably and although he himself states that he does not have *"a very specific recollection as to [the] genesis"* of the Put Option.

81. I have already set out what he says concerning the latter but it is worth quoting from earlier parts of his statement where he says this:

"… During the negotiations I primarily liaised with Yasmin Jiang ('Yasmin') from Cindat. Those discussions were almost always just the two of us and took place via mobile phone. Those calls also tended to take place early UK/late China time or late UK/early China time, and the time zone difference was at least part of the reason that it was difficult to arrange large group calls for these discussions. I also had some group calls with Yasmin and others at Cindat (including her boss, Greg Peng ('Greg'), but I cannot recall whether he joined calls in relation to the Transaction until Ben joined). Greg did not really take a hands-on approach in relation to the Transaction until Ben joined."

He goes on in the next paragraph to say this:

"During the course of negotiations Yasmin and I would typically negotiate various deal points, which Yasmin would then take away to discuss with her superiors and revert to me with a proposal. I did not typically keep notes of my discussions with Yasmin, but I would report back to others at OCM. Yasmin and I covered a lot of ground very quickly; the Transaction was complex and fast moving."

82. This is the background to what Mr Chalmers, then, has to say at paragraph 20, as previously quoted, which is that he discussed and agreed with Ms Jiang that Cindat would be entitled to exit if – but only if – the business plan was fundamentally changed in the way he describes, and that the put option would give Cindat this right. It is, however, all really rather vague and unconvincing.

83. Aside from the vagueness of this evidence and the absence of any documentary support for the rectification case sought to be advanced, there is also the point raised by Mr Peng (and Cindat) concerning Ms Jiang's status as a *"mere negotiator"* to consider. As previously mentioned, Mr Peng's evidence is that Ms Jiang had no authority to agree anything, and so not what it is alleged by Oaktree was agreed concerning the Put Option. Mr Caplan submits that there is nothing to gainsay that evidence, and no reason to believe that the position will be any different at a trial.

84. Although I suspect that, were the matter to go to trial, Mr Caplan would prove to be right about this, nonetheless I am persuaded by Ms Kagan that this is an aspect about which it is not possible, at this stage, to conclude that Oaktree's case that Ms Jiang was able to agree (and did agree) what it is alleged she agreed on behalf of Cindat has no real prospect of success. I say this, however, by a fine margin since Oaktree's case in this respect has a Micawberish aspect to it. Nonetheless, as Patten LJ put it in ***Hawksford Trustees Jersey Limited v Stella Global UK Limited*** [2012] EWCA Civ 55 at [41]:

"Mr Stewart is, I think, right in his submission that the decision-maker ought in principle to be the person who has the authority to bind the company to the contract. The expressed intentions of a mere negotiator will therefore be immaterial unless he is also the decision-maker or shares in a relevant way those intentions with the person who is the decision-maker on behalf of the company. But, whilst those principles are easily stated, their application to the facts of any given case may be less straightforward. …".

85. The fact, therefore, that Mr Peng denies that Ms Jiang shared the relevant intention with him, as Ms Kagan submits, confirms the inherently factual nature of this question. So,

too, is the question of whether Ms Jiang was, in fact, a *"mere negotiator"*. This is the position, in my view, despite the fact that in his witness statement Mr Chalmers' evidence, as will be apparent from what I have previously quoted, is that he and Ms Jiang would typically negotiate various deal points, following which Ms Jiang would take away those points to discuss with her superiors and revert to him with a proposal. As Ms Kagan submits, the fact that Ms Jiang discussed and agreed a common position with her superiors does not necessarily mean that she was not herself a decision-maker and, in any event, that she did not share *"in a relevant way"* the requisite intention with Cindat's decision-makers.

86. Similar considerations apply to Mr Chalmers and Cindat's suggestion that he, too, was not a decision-maker. It is not appropriate to reach a conclusion on this at a summary judgment stage.

87. Returning to the vagueness issue, as for Mr Bianchi's evidence concerning the lead-up to the Agreement, this is hardly compelling either since, as Mr Caplan rightly characterised it, his evidence, in truth, amounts to no more than his saying that, during internal Oaktree *"discussions"* (the dates of which he cannot recall), it was *"explained"* to him (though he does not recall by whom) that Cindat had a put option, and his *"understanding"* was that the *"purpose"* of the option was to allow Cindat to exit if Oaktree wanted *"to hold the Property over a longer term"*. This is some distance away from constituting convincing proof. Indeed, even if Mr Bianchi's understanding of the *"purpose"* of the Put Option were correct, it would not justify the specific rectification plea which is put forward.

88. Sixthly, as for Oaktree's reliance on the telephone conversations in 2022 and 2023 described by Mr Bianchi, whilst Mr Caplan rightly accepts that the fact that these took place after entry into the Agreement (indeed, some years later) is not a bar to Oaktree's reliance on the conversations, nonetheless the evidence put forward by Mr Bianchi is hardly compelling. On the contrary, nothing that he has to say concerning the first two of the conversations, in October/November 2022, provides support for Oaktree's rectification case. The most that Mr Bianchi says is this (in paragraph 17):

"Greg [Mr Peng] did not suggest in either of these calls that Cindat considered they would have an unqualified right of exit by May 2023. …".

This is evidence which goes nowhere near establishing – let alone amounting to convincing proof – that in the lead-up to the Agreement the parties had agreed what Oaktree now says was agreed and ought to have been included in Clause 8.1 of the Agreement.

89. Nor in relation to the telephone conversation on 20 June 2023 does what Mr Bianchi has to say amount to such convincing proof. I have previously set out what he says in his witness statement; it is vague. Mr Bianchi recalls Mr Peng as saying *"I know man, I know"*, apparently considering that this constituted his acceptance of how he had described the idea behind Clause 8.1. That, however, is denied by Mr Peng, and I regard it as wholly unrealistic to suppose that Mr Bianchi was entitled to read into Mr Peng's *"I know man, I know"* comment what he now says he read into it. It is much more likely that Mr Peng was merely trying to placate Mr Bianchi.

90. As for the conversation on 29 June 2023, again I have set out what Mr Bianchi has to say about this. He says nothing which supports the rectification case now advanced. In fact, the response of the Cindat representatives seems to me, if anything, to demonstrate that what Mr Bianchi apparently told them, which was to repeat what he had told Mr Peng in the call nine days earlier, was *not* accepted by Cindat.

91. My clear conclusion, in the circumstances and for the reasons I have sought to give, notwithstanding the observation made in *Hodge* at paragraph 11-52 concerning a rectification claim being *"a fact-based inquiry"*, is that Oaktree's rectification case has no real prospect of success, and so that summary judgment is appropriate in this case.

92. I should, nonetheless, if only out of completeness, make it clear that I do not arrive at this conclusion based on the entire agreement provision to be found at Clause 22 of the Agreement. Mr Caplan submits that, in view of this provision, the parties should be regarded as having agreed that, whatever might be discussed on informal phone calls, any prior understandings or agreements (even assuming that they existed) would be superseded by the final Agreement. I agree with Ms Kagan when she submits, in line with ***Surgicraft***, that the question in a claim for rectification for common mistake is whether the agreement in fact records the parties' common intention and, as such, it is no answer to that question to point to the fact that the agreement contains an entire agreement clause whose existence may itself simply be part of the mistake in expressing the parties' intentions.

Conclusion

93. It follows that there will be summary judgment in favour of Cindat as sought.

94. In line with the draft order which accompanies the application, there will, accordingly, be an order that Oaktree pay the Put Option Price to Cindat.

95. As to that amount, Cindat's case is that the appropriate amount (calculated in accordance with Clause 8.2 of the Agreement) was £9,339,766.00 as at 30 April 2024, whereas Oaktree's calculation methodology produces a slightly lower amount, namely £9,339,452.06. It is to be hoped that the parties will reach agreement as to what is the correct figure.

96. The order will also provide that Oaktree should take all such other steps as may be required in order to effect Transfer Completion (as defined in the Agreement at Clause 10.1).

97. I end by thanking both Mr Caplan and Ms Kagan for their assistance. As I remarked at the conclusion of the hearing, their advocacy was of the highest quality.