Neutral Citation Number: [2026] EWHC 244 (Ch)

Case No: BL-2023-000300

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 9 February 2026

Before:

MR JUSTICE RICHARDS

- -

Between:

ALPHIER CAPITAL TWO LLP

Claimant

V

BLYVOOR GOLD CAPITAL (PTY) LTD

Defendant

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- -

Arnold Ayoo and **Weishi Yang** (instructed by **Three Graces Legal**) for the **Claimant**
Richard Power (instructed by **Mishcon de Reya LLP**) for the **Defendant**

Hearing dates: **25 – 27 November 2025**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Richards:

INTRODUCTION

1. The Claimant (to which I will refer as **Exotix** since it was formerly known as Exotix Partners LLP), claims payment of a fee of US$2.25m (plus interest) that it says the Defendant (**Blyvoor**) owes pursuant to an agreement (the **Tripartite Agreement**) between Exotix, Blyvoor and LHC Mine Finance Limited (**Legacy Hill**). Exotix says that the fee is due by way of commission for finance that it helped Blyvoor to secure from Orion Resource Partners (UK) LLP (**Orion**) to develop the Blyvooruitzicht Mine (the **Mine**) in South Africa's Gauteng province.

2. Prior to the trial, there was some debate between Exotix and Blyvoor about the level of fee said to be due. That matter was cleared up during the trial and Exotix quantifies its claim as 3.75% of US$60m of funding that Blyvoor obtained from Orion. It is now common ground that Exotix is either owed US$2.25m (plus any such interest as may be due) or nothing.

3. I must determine (i) what the Tripartite Agreement obliged Exotix to do, both by its express terms and any implied terms, and in particular whether Exotix was entitled to a fee only if its actions were an "effective cause" of Orion's funding and (ii) whether Exotix performed any acts necessary in order to earn the fee.

4. Blyvoor had also pleaded a claim for damages for negligent misrepresentations that it says Exotix made to induce it to enter into the Tripartite Agreement. Blyvoor applied to amend its pleadings to rely on further alleged misrepresentations, but I refused that application on Day 2 of the trial and gave oral reasons for doing so. In closing, Blyvoor said that it no longer pursued any separate remedy for misrepresentation.

5. I will order the remainder of this judgment as follows. Part A will set out factual and other findings, broadly by following a chronology of relevant events. Part B will contain conclusions on the construction of the express terms of various agreements including the Tripartite Agreement. Part C will address whether any term imposing an "effective cause" requirement should be implied into the Tripartite Agreement. Part D will consider whether Exotix performed its obligations under the Tripartite Agreement so as to become entitled to the fee.

PART A – FACTUAL AND OTHER FINDINGS

Witness evidence

6. For Exotix, I had witness evidence from (i) Mr Andrew Moorfield, who is a partner in Exotix and (ii) Mr Mark Tyler, who worked as a consultant to Exotix at relevant times, though was never an employee or partner.

7. For Blyvoor, I had witness evidence from (i) Mr Alan Smith, who was the CEO of Blyvoor from September 2016 until January 2024, (ii) Mr Michael Barton, the Deputy Group Chief Executive Officer of Orion and (iii) Mr William Slack, a co-founder of Legacy Hill. All witnesses were closely involved in the events surrounding the transaction that Orion ultimately concluded with Blyvoor and could speak from personal experience.

8. I considered Mr Tyler and Mr Barton to be honest and reliable witnesses, doing their best to assist the court. No further comment is needed on the reliability of their evidence.

9. Mr Moorfield struck me as a man with strong views on many matters, including the dispute with Blyvoor, who was not reticent about sharing his views in a direct manner. He was, therefore, occasionally prickly in cross-examination but behind that was an honest witness seeking to assist the court.

10. Mr Smith was a satisfactory, but not a good, witness. He showed some tendency in cross-examination to overstate matters in an attempt to support Blyvoor's case. I do not accept his evidence that Legacy Hill was doing lots of work connected with Orion's due diligence after the term sheet was signed (see paragraph 58 below). He was in my judgment wrongly reluctant to accept that Exotix had delivered any value at all in helping to explain and model the cost of the 8-day quotation period described in paragraph 47. I will not conclude that Mr Smith was telling deliberate untruths: I can accept that over time in long-running litigation a witness can develop fixed views that are difficult to shake. However, even making allowance for that, I did not consider that Mr Smith was as frank as he should have been in his oral evidence.

11. Mr Slack's witness statement did not mention that Blyvoor had put pressure on Legacy Hill to accept a lower fee for its work under the Tripartite Agreement than might well have been said to be contractually due. Nor did he mention in that statement that Legacy Hill had yielded to that pressure and signed an agreement to do "everything required of it or within its powers…for the purposes of assisting Blyvoor in defending [Exotix's claim]". He did not mention that some US$50,000 of Legacy Hill's fee would become payable only if Exotix abandoned its claim or reached a settlement with Blyvoor. In fairness to Mr Slack, he accepted (as he had to) the fact of this arrangement when it was put to him in cross-examination. However, it should have been mentioned in his witness statement and my impression of his candour has suffered somewhat from that omission.

The role of brokers in helping "junior miners" to obtain finance

12. Blyvoor is incorporated in South Africa. Its principal business consists of the reconstruction and mining of the Mine. It is, in the industry jargon, a "junior miner": a comparatively small mining company that cannot straightforwardly raise capital from large investors or the capital markets. Since junior miners typically lack the internal financial expertise required to structure and secure complex funding packages from specialist investors, they tend to engage finance brokers to help them to secure finance and to act as intermediaries with potential investors.

13. Both Exotix and Legacy Hill were, at material times, brokers whose business involves them providing broking services to junior miners. Since the dispute between Exotix and Blyvoor involves a debate as to whether Exotix performed broking services that it was required to perform, it is appropriate to start with an overview of the tasks that brokers generally perform. Later in this judgment, I will consider the tasks that Exotix and Legacy Hill actually performed for Blyvoor.

14. Brokers to junior miners are frequently rewarded by means of a success fee, payable when the miner succeeds in raising finance and often expressed as a percentage of the total finance raised. That can be an attractive arrangement for both the miner and the broker. If no finance is ultimately raised, the miner does not have to pay for work that

has ostensibly led nowhere. By the same token, the broker has to accept that sometimes it will perform work that does not culminate in a successful raising of finance and so is not remunerated. However, when a deal is successful and finance is raised, the broker will hope to obtain a good fee that recoups the cost of unpaid work on abortive deals.

15. Where a broker is to be remunerated by means of a success fee it can expect to perform work in the following stages (which are the **Stages** referred to in the rest of this judgment):

    i) At Stage 1, the broker will wish to undertake a preliminary assessment of the project. If it is being remunerated by way of a success fee, it will not want to take on projects that have an insufficient prospect of success. This preliminary assessment involves the broker reviewing technical and financial information provided by the mining company. The broker may prepare a financial model to determine an appropriate capital structure. If it does so, the discipline of preparing the financial model will help the broker to assess the viability or otherwise of the project. If the project is viable, the financial model can form a basis for discussions with potential investors at later Stages.

    ii) If a broker considers that a project is sufficiently viable, at Stage 2, it will seek to identify possible investors by using its network and sector relationships. Stage 1 and Stage 2 may overlap: a broker's initial assessment of viability might involve it conducting a "market-sounding exercise" on a no-names basis to seek to gauge interest. A variety of approaches might be used at Stage 2. Sometimes a broker will prepare detailed documentation to stimulate interest from investors such as an investment memorandum (**IM**). It may supplement that IM with a shorter form "teaser" document that sets out the essentials of the investment opportunity. That approach permits a number of investors to be approached with a considered and serious proposal that names the miner in question. However, it takes time to assemble the information and some brokers may prefer a more informal approach that is quicker, although it may be perceived as less serious by investors.

    iii) Ideally, following Stage 2, a broker will have identified a likely investor or investors. At Stage 3, the broker will seek to persuade an investor or investors to agree a term sheet setting out the broad terms of finance to be offered. Ideally, a broker would want to have a number of potentially interested investors in the hope that competitive tension would drive down the cost of finance. That means that the process of agreeing a term sheet could be pursued in parallel with Stage 2 attempts to interest other investors.

    iv) The end of Stage 3 is typically marked by the miner and the investor signing a term sheet not so as to create a legally binding contract to provide finance but to provide reassurance that, all being well, finance will be provided on those terms. The extent of a broker's work at Stage 3 can vary. At one extreme, a negotiation could be lengthy and involved with the investor having a number of queries and concerns. In such a case, a broker might be closely involved in acting as an intermediary between the investor and the miner, ensuring that the miner understands the issues on which a commercial decision is needed, and preparing various iterations of the term sheet. However, at another extreme the negotiation might be straightforward, the investor might lead on the drafting of the term sheet and the broker would have a lesser role. Before any term sheet is signed, a broker would provide the miner

with an appraisal of the merits of the funding being offered and the prospects of the miner securing better funding from alternative sources.

v) Following signing of a term sheet, the miner and the investor will work towards Stage 4, the execution of a binding contract for the provision of finance. That will involve the investor continuing due diligence as well as the involvement of lawyers to draft the necessary documentation. Brokers could add little to the legal process. However, there was a difference of opinion between various witnesses as to the extent to which they would be involved in due diligence. Mr Smith's evidence was that he would expect that the broker would assist with ongoing due diligence and specifically would be a crucial attendee of the investor's site visit to the mine which was central to that due diligence process. Mr Tyler's evidence was that, by the time the term sheet had been signed, much of the broker's work was done with ongoing due diligence being dealt with by the miner, the investor and the parties' lawyers. I preferred Mr Tyler's explanation. Mr Smith's evidence struck me as influenced by the tendency I have identified in paragraph 10 whereas Mr Tyler's evidence was consistent with Mr Slack's acceptance in cross-examination that a broker's involvement in commercial due diligence would "mostly" be complete by the time the term sheet was signed. However, it was clear from the evidence as a whole that all deals are different and there can be cases in which a broker would be more involved in due diligence after the term sheet is signed.

vi) A legally binding agreement would be signed at the end of Stage 4. Stage 5 would involve the parties working towards the satisfaction of any conditions precedent set out in the agreement. Once any conditions precedent are satisfied, Stage 5 would culminate with the finance being provided pursuant to the terms of the agreement. A broker would have little to do in Stage 5.

16. One Stage will not necessarily come to a distinct end before the next Stage started. Frequently the Stages overlap, particularly if the miner wishes to introduce new parties into the transaction. Nor will each finance proposal proceed inexorably through the Stages. I accept Mr Smith's evidence that on "many occasions", even "very credible term sheets" did not result in a binding agreement to provide funding.

17. The economics of this success fee arrangement mean that a broker often does work on getting deals to the end of Stage 3, at which a term sheet is signed, only to find that on "many occasions" deals do not proceed to completion and so the broker receives no success fee. Indeed, a broker might have to do even more unpaid work since some deals would not even get to Stage 3. Overall, Mr Moorfield's evidence, which I accept, is that only one deal in five successfully proceeds through all the Stages.

18. Finally, I note that there was a difference of view among the witnesses as to when a broker would typically sign an engagement letter that would give it a contractual entitlement to a fee should the funding be provided. Mr Moorfield's evidence was that it would be improper for an SEC or FCA-regulated broker such as Exotix to make an approach to potential investors that named the miner without having a signed engagement letter in place. He described that as a "grey line we would never cross". By contrast, Mr Slack's evidence was that Legacy Hill frequently approached potential funders in connection with a named miner without having a signed mandate in place. I conclude from the very fact that the evidence conflicted, and Mr Moorfield's description of a "grey line", that there was no single typical approach.

The main protagonists in the search for funding of the Mine

19. The Mine had been in operation between the 1940s and around 2013 when its previous owner went into liquidation. Blyvoor acquired the Mine out of the liquidation in 2016, believing it had significant untapped reserves of gold. However, Blyvoor estimated that, having acquired the Mine, it would need US$60m of funding to put the Mine back into production.

20. Blyvoor's attempts to secure financing in 2016 and 2017 were unsuccessful largely because international investors considered that there would be undue political risk associated with an investment in South Africa.

21. In September 2017, Blyvoor approached the Industrial Development Corporation of South Africa (the **IDC**) for funding. The IDC is a finance company backed by the South African government. It considered the Mine to have potential and it wanted to support the Mine to create jobs. Initially, the IDC indicated that it would be prepared to provide the full US$60m of funding. However, as discussions proceeded, it offered to provide only some US$6m to US$7m with the balance to come from "foreign direct investment" provided by financiers outside South Africa. It was suggested to Mr Tyler in cross-examination that it was he who persuaded the IDC to reduce the amount that they were prepared to invest in the hope that he could earn a fee for broking a deal with other financiers, knowing that he would not earn any such fee if the IDC provided all the funding. I do not accept that. A contemporaneous email dated 18 December 2017 from Mr Moorfield records his understanding that the IDC had prepared a term sheet for around US$45m of funding, but would "prefer to do less".

22. Mr Tyler used to work at the IDC and he had both a personal friendship and a strong professional relationship with Mr Kevin Hodges of the IDC. Once it became clear that the IDC was looking for an international co-financier, Mr Hodges recommended that Mr Tyler be engaged as a corporate adviser. Blyvoor was amenable to that suggestion and Mr Tyler was approached on 6 November 2017. Mr Tyler considered that raising funding for the Mine might involve the performance of regulated activities which he was not himself authorised to perform. He also noted that Exotix had access to a wide variety of investors, including those who did not traditionally invest in mines. He suggested involving Exotix, which held the necessary regulatory approvals. Mr Tyler had been appointed as a consultant to Exotix and could therefore do work under the Exotix "banner" and benefit from its regulatory approvals.

23. Mr Moorfield described Exotix as "an internationally regulated investment bank with offices in London, New York, Dubai, Nairobi and Lagos". That description was not challenged and I accept it. Exotix had a significant "back office" operation that could help with labour-intensive and time-consuming tasks such as the preparation of an IM and the drafting of complicated term sheets.

24. On 7 February 2018, Blyvoor also approached Legacy Hill to help raise finance for the Mine. Legacy Hill had a much smaller business than Exotix. At the time, it was a two-person operation that involved Mr William Slack and Mr Guy Wilkes. It had no back-office operations.

25. Exotix and Legacy Hill were not aware that Blyvoor had asked them both to pursue funding for the Mine until March 2018 (see paragraph 32 below).

26. Perhaps because of their different sizes, Exotix and Legacy Hill had different perspectives on how best to approach potential investors. Exotix favoured producing a full IM and, in line with its practice summarised in paragraph 18 above, once it had an engagement letter in place with Blyvoor, using that IM as a means of approaching investors naming Blyvoor as the miner. Exotix set about producing that IM, using information provided by Blyvoor to do so. The IM took some time to prepare and was not ready until around 19 March 2018. By that time, Exotix had signed an engagement letter with Blyvoor (on 1 March 2018) so Exotix felt able to contact potential investors on a named basis. Exotix sent details of Blyvoor's request for funding to Orion on 19 March 2018. Orion is, in the unchallenged evidence of Mr Barton, "one of the largest private mining investors in the world".

27. Because Legacy Hill had been following a more streamlined approach, unconstrained by any need to prepare an IM or a perceived requirement to have an engagement letter in place before approaching financiers, Legacy Hill beat Exotix to the Orion introduction.

28. On 23 February 2018, Mr Wilkes of Legacy Hill sent an email to Mr Michael Barton of Orion. He mentioned Blyvoor by name and stated that the Mine had a "massive gold resource" of 27 million ounces. In just a few paragraphs, he outlined Blyvoor's need for US$45m of funding, with US$25m to come from the IDC.

29. This email piqued the interest of Orion with Mr Barton responding that it "seems like a sensible foray back into [South Africa]". Just a few days later, on 5 March 2018, Orion, Legacy Hill and Blyvoor participated in a conference call to discuss a possible financing transaction. Having participated in that call, Blyvoor knew that Legacy Hill, rather than Exotix, had introduced Orion to them.

30. Exotix was to realise the same shortly afterwards. On the same day that it received Exotix's approach, Orion emailed back to say that it was already in discussions with Blyvoor. Thus, as 19 March 2018 all of Orion, Blyvoor, Legacy Hill and Exotix knew that it was Legacy Hill, rather than Exotix, who had first put Blyvoor in touch with Orion as someone who might be prepared to provide funding for the Mine.

The engagement letters of Exotix and of Legacy Hill

31. Exotix and Blyvoor signed an engagement letter on 1 March 2018 (the **Exotix Engagement**). Blyvoor and Legacy Hill signed an engagement letter (the **Legacy Hill Mandate**) on 15 March 2018. It will be convenient to consider the terms of both engagement letters later in this judgment when I consider disputed questions of construction. It suffices to say at this stage that, the Exotix Engagement would not have entitled Exotix to receive any fee if Orion provided funding for the Mine because Exotix had not "introduced" Orion to Blyvoor.

Events leading to the Tripartite Agreement

32. By 19 March 2018 the following matters were known by all of Exotix, Legacy Hill and Blyvoor:

    i) Blyvoor had appointed both Exotix and Legacy Hill to perform essentially the same task, namely to identify prospective investors and seek to get through Stages 2 to 5 so that Blyvoor actually obtained funding for the Mine.

ii) Orion was showing real interest in providing funding but that funding could not be guaranteed. Orion had not yet signed the term sheet that would mark the end of Stage 3 and, even if it had, many deals that got to that point did not result in funding being provided at Stage 5.

iii) Legacy Hill, rather than Exotix, had introduced Orion to Blyvoor.

iv) Exotix had a large back office, but Legacy Hill consisted of just two individuals.

33. This state of affairs did not pose too many problems for Legacy Hill. It had introduced Orion and provided it continued to perform its duties under the Legacy Hill Engagement Letter, it could expect a success fee if Orion ultimately provided funding. It was not suggested that Legacy Hill had seen the Exotix Engagement and it would not, therefore, have known its terms. However, Legacy Hill must have suspected that Exotix would likely make nothing if a deal with Orion closed since that was a normal incident of remuneration by way of success fee.

34. The situation was, however, problematic for Exotix. It had not introduced Orion. Therefore, even if it worked hard on Blyvoor's behalf to get Orion to Stage 5, it would not be entitled to any success fee under the Exotix Engagement. The best outcome from Exotix's perspective at that point was that it introduced an investor other than Orion who completed a funding transaction with Blyvoor.

35. The situation posed some problems for Blyvoor. Legacy Hill had done well to introduce a prospective funder. However, Orion would still need to be taken to Stage 5 and Blyvoor knew that many promising deals fail to complete. Moreover, Orion was a very large and sophisticated investor. Blyvoor might well need assistance in, for example, drafting and negotiating a term sheet with Orion that Exotix, with its large back office might be better placed to provide than Legacy Hill which consisted of just two individuals.

36. Blyvoor therefore recognised that it might still need Exotix. Accordingly, when Mr Tyler emailed Mr Smith on 19 March 2018 making the point, that having done lots of work already, Exotix had realised that Blyvoor had engaged another broker of whom Exotix had previously been unaware, Mr Smith was conciliatory. He reminded Mr Tyler politely that the arrangement with Exotix was not an exclusive one but also wrote in an email of 19 March 2018:

> we are keen to understand how we can jointly manage this situation going forward, as it was not our intention to get in the way of your efforts and/or those of Exotics [*sic*].

37. Mr Smith consulted Mr Barton at Orion and Mr Wilkes at Legacy Hill as to whether it was useful for Exotix to remain involved. Legacy Hill were magnanimous. In a WhatsApp conversation on 21 March 2018, Mr Smith noted that Mr Wilkes had recognised "that Mark's background with the IDC makes him a key component to getting an Orion deal across the line".

38. Around this time a number of discussions took place between Blyvoor, Legacy Hill and Exotix. In those discussions, Blyvoor was seeking to gauge the extent to which it might still need Exotix. Exotix was seeking to emphasise the work that it had already done, and the valuable work that it could still do, to enable Blyvoor to obtain the funding needed.

On or around 20 March 2018, Mr Smith and Mr Tyler spoke over the telephone. They gave different accounts of their discussion in their evidence. Given the tendency that I have identified in paragraph 10, I conclude that Mr Smith was exaggerating somewhat in his evidence that Mr Tyler insisted that he was "critical to the deal". I prefer Mr Tyler's recollection that he emphasised that his experience with debt investments, his strong relationship with Mr Hodges at the IDC and Exotix's large back office function meant that Exotix could still deliver real value in closing a deal with Orion even though Orion had been introduced by Legacy Hill.

39. On 23 March 2018, Mr Barton sent an email to Blyvoor and to Legacy Hill outlining the broad terms of a financing proposal. He invited comments in advance of a fuller term sheet being produced. Mr Barton's proposal was for Orion to provide up to $70m in aggregate funding. If the IDC was prepared to provide funding of US$10m to US$15m, Orion would be content to provide the balance. However, Mr Barton explained that Orion would be open to providing up to US$70m without the IDC being involved. Mr Barton also expressed a degree of flexibility as to how the funding would be split between debt, mezzanine debt and equity, but indicated that he had in mind an equal split across these components.

40. Orion was not proposing to advance "traditional" debt. Rather, it had in mind a combination of a "gold loan", a "gold prepay" and a "gold stream". Nothing turns on the detail of these arrangements. It suffices to note that ultimately, it was decided that Orion would advance the debt component by way of a "gold stream" under which it paid a sum to Blyvoor up front which was treated as a "deposit" that would over time have notional interest added to it and be applied over time to purchase a percentage of the gold output of the Mine at the lower of a stipulated price and the prevailing gold market price.

41. Orion also sought a "gold offtake" arrangement. That arrangement would entitle it to purchase further gold produced by the Mine in addition to that dealt with under the gold stream arrangement. Broadly, Orion sought the right to purchase gold at the lowest market price that had prevailed in an "8 day quotation period" either before, or after, the purchase. Alternatively, Orion sought the right to purchase gold at a 1.5% discount to market price. Some financial modelling would be needed to see which of those two options would be cheaper from Blyvoor's perspective. Mr Smith believed that Exotix would have the expertise to perform the necessary valuations, but Legacy Hill would not.

42. When Mr Tyler sent Mr Smith a WhatsApp message on 26 March 2018 suggesting that Legacy Hill did not have "any real desire to get involved in details", and that by implication Exotix did, he was making a sales pitch that Mr Smith was disposed to believe. Following these discussions, Blyvoor concluded that Exotix could still be of value in implementing a possible deal with Orion, even though they had not themselves introduced Orion.

43. That, however, introduced a further complication. Exotix would expect to be paid if they helped to put together a deal with Orion, but Blyvoor did not wish to pay both Exotix and Legacy Hill a 5% success fee. Ultimately the Tripartite Agreement, whose construction is considered in Part B, reflected a compromise under which (i) Exotix and Legacy Hill agreed to work together to secure funding from Orion and (ii) both agreed to reduce their fees.

Progress of the deal with Orion and Exotix's involvement with it

44. Blyvoor and Exotix signed the Tripartite Agreement on 29 March 2018. Legacy Hill signed it on 4 April 2018.

45. The transaction with Orion proceeded smoothly, and indeed rapidly. Orion was a sophisticated investor and keen to provide finance to Blyvoor. It proposed terms that were objectively fair and reasonable with the result that protracted discussions about a term sheet were not necessary. No doubt that was because Orion saw real value in the opportunity and wished to secure it quickly. Orion's commercial judgement on this matter has been vindicated: Mr Barton said in his oral evidence that the transaction has been very successful from Orion's perspective.

46. On 4 April 2018, the very day on which Legacy Hill signed the Tripartite Agreement, Mr Smith emailed Mr Tyler to ask for some help in "understanding the 8 day quotation period mechanism" that had been mentioned in Orion's email of 23 March 2018.

47. Mr Tyler responded the same day. He expressed the view that, if Orion were suggesting a 1.5% discount on gold purchases as an alternative, there probably would not be much to choose between the two proposals. However, he offered to ask contacts of his to value the likely cost of the 8-day quotation period. On 10 April 2018, having contacted people that he knew at "Auramet" in the US, Mr Tyler confirmed that there was little to choose between the 1.5% discount and the 8-day quotation period proposals. He suggested that Blyvoor could usefully seek to negotiate a cap on the period for which the gold offtake arrangement would apply. He made other suggestions as to how the arrangement might be structured. I do not accept Mr Smith's evidence that Mr Tyler's input was of little value. I regard it as meaningful and helpful input in an area in which Blyvoor's own experience, and that of Legacy Hill, were lacking.

48. As I have noted, Mr Barton was a reliable witness, with no reason either to exaggerate or diminish Exotix's role in discussions regarding the Blyvoor transaction. I accept his evidence that Orion's main interactions in relation to the Blyvoor deal generally were with Legacy Hill to such an extent that he was not aware that Legacy Hill and Exotix were operating under a joint mandate. I find that Exotix had very little direct contact with Orion on the terms of the proposed deal. (An email exchange of 9 April 2018 between Mr Slack and Mr Smith could perhaps be read as suggesting that Mr Tyler and Mr Slack were involved on a joint call with Mr Barton of Orion, but on balance I consider that not to be the correct interpretation. Rather, I consider that the email suggests that Mr Slack and Mr Tyler had a call separate from Orion, but during their call Mr Tyler suggested that Mr Slack could usefully update Blyvoor on discussions with Orion. It is possible that Mr Tyler joined a call with Orion to discuss the term sheet on 17 April 2018, but the evidence on that issue is inconclusive and I have concluded on balance that Mr Tyler did not join that call but rather was updated after it had finished.)

49. I also accept Mr Barton's evidence that Orion would have been happy to negotiate with any broker acting on Blyvoor's behalf. The fact that Legacy Hill had introduced Orion did not mean that Orion would insist on dealing only with Legacy Hill. Orion was a sophisticated mining investor. It expected to produce its own term sheets and financial models and to perform its own due diligence. It regarded it as a matter entirely for Blyvoor which advisers it chose to appoint.

50. On 9 April 2018, Mr Tyler sent Mr Smith his own summary of the terms he understood Orion to be finalising in their proposed term sheet. Mr Tyler's summary of the deal was expressed to be his "understanding from discussions with Legacy Hill". Moreover, his summary was different from that Mr Slack had prepared and was inaccurate insofar as he suggested that Orion was offering total funding of US$53m, whereas Mr Slack had outlined an offer of US$60m. That inaccuracy arose because Mr Tyler was not himself involved directly in the discussions with Orion. However, Mr Tyler did say in his email, "I have to say that the financing package appears very attractive to me". He also expressed the view that the Orion funding would "slot in with the IDC's financing quite seamlessly as the stream will be subordinated to the senior loan from a security point of view and will not therefore require an inter-creditor agreement with the IDC".

51. Mr Smith corrected Mr Tyler's understanding of the terms of the transaction and asked him to cast his email, with a correct summary of the transaction into a letter on Exotix's headed paper. I conclude from this that Mr Smith was seeking some formal confirmation from Exotix as to the fairness of Orion's proposals, perhaps because, since Blyvoor was not in negotiations with other potential funders, he had no competing offer with which to compare it. It was envisaged that Exotix's confirmation would be shown to the IDC and I conclude that Mr Smith believed that the IDC would derive some reassurance from Exotix's assessment. Mr Moorfield complied with this request, sending a letter headed "Fairness Opinion Letter" that confirmed Exotix's belief as to the fairness of the funding offered and the compatibility with the IDC's funding.

52. On 17 April 2018, Orion sent through a draft term sheet. Given that it was a self-sufficient and sophisticated investor, it produced that term sheet itself and did not obtain any assistance from Legacy Hill or from Exotix. On 17 April 2018, Mr Smith forwarded that term sheet both to Mr Tyler and to Mr Slack for their comment, including in his cover email some of Blyvoor's own observations.

53. The same day, Mr Tyler "replied all" by email with some comments on the term sheet. In his evidence, Mr Smith characterised Mr Tyler's comments as "high level", drawing an unfavourable contrast with Legacy Hill's more detailed comments. I do not accept that. Mr Tyler's comments amplified the points Mr Smith had made and added new ones. Moreover, while it was Legacy Hill rather than Exotix that prepared a mark-up of Orion's term sheet, and drafted an email to Orion that explained the key changes sought, Legacy Hill's mark-up incorporated a number of Exotix's observations.

54. Orion and Blyvoor signed a term sheet on 23 April 2018, just a few days later. Before then, Exotix carried out some modelling for Blyvoor that evaluated Orion's offer in the light of expectations as to future gold prices. Exotix also revisited the calculations that I have summarised in paragraph 47 to estimate the likely cost of the quotation period being for 4 days rather than 8 days, and participated in a conference call with Blyvoor and Legacy Hill to discuss the term sheet.

55. Beyond an email of 27 April 2018 which Mr Tyler sent to Blyvoor, and which was not copied to Legacy Hill, advising that it would be economical to draw down on IDC's funding last of all, Exotix does not assert that it performed any further work for Blyvoor thereafter that contributed to its receipt of funds from Orion.

56. That said, I accept Exotix's point that there was not much work (except for the site visit discussed below) for any broker, whether Exotix or Legacy Hill, to do in the interval

between signing of the term sheet on 23 April 2018 and signing of transaction documents on 29 and 30 August 2018. Still less was there much work for a broker to do between signing of transaction documents and Orion's provision of the first tranche of finance on 15 November 2018 as almost all the work in this latter period involved lawyers satisfying themselves that various conditions precedent to draw down had been achieved.

57. Blyvoor places some emphasis on the fact that Mr Wilkes of Legacy Hill attended Orion's site visit to the Mine, which took place on 21 May 2018, but no-one from Exotix attended. I accept Mr Barton's evidence that this site visit represented an important part of Orion's due diligence. I also accept his evidence that (i) it would be standard practice for a broker to attend that site visit "to oversee the process and make sure it all goes smoothly" and (ii) it would be "extremely abnormal for a broker not to attend". Therefore, either Legacy Hill or Exotix needed to attend the site visit and I conclude that Blyvoor preferred Legacy Hill to attend given that it had been more closely involved with Orion in the process to date. However, I do not consider that there was much tangible value that either or both Legacy Hill or Exotix could deliver by attending the site visit. Orion was a self-sufficient and sophisticated investor. Smooth talk, whether delivered by Legacy Hill, Blyvoor or Exotix would not persuade Orion to provide finance. If Orion's due diligence, of which the site visit formed an important part, did not produce satisfactory outcomes, Orion would have made no investment.

58. In his oral evidence, though not in his witness statement, Mr Smith gave the impression that Legacy Hill was closely involved in Orion's commercial due diligence, acting as an interface between Orion, its technical adviser and Blyvoor. I consider that oral evidence to have been overstated and the product of the tendency that I have identified in paragraph 10 above. Mr Slack did not, in his evidence, claim that Legacy Hill assisted much with due diligence after the term sheet was signed beyond attending the site visit in May 2018 and I prefer his explanation.

59. Blyvoor did not invite anyone from Exotix to the celebration when legal agreements were signed in August 2018. That celebration involved only Legacy Hill and Blyvoor. Indeed Exotix was not aware at the time that Orion had provided the first tranche of its funding in November 2018. It only became aware of this after the event in January 2019.

Work that Exotix undertook that was not directly connected to the Orion funding

60. As well as Mr Tyler's work described in the section above, Exotix also performed other work that was connected to attempts to secure funding for the Mine in general, even though it did not relate to Orion in particular.

61. On the very day that Exotix signed the Tripartite Agreement, Mr Tyler emailed Mr Moorfield, attaching a copy of the agreement and saying, "Now we just need to find another investor besides Orion". Mr Tyler suggested some possibilities to Mr Moorfield and until the Orion term sheet was signed, both continued to try to identify investors additional to Orion although Mr Moorfield did more of this than Mr Tyler.

62. These efforts were of potential benefit to both Blyvoor and Exotix. From a purely selfish perspective, if Exotix identified another investor, and took that investor to Stage 5, Exotix alone would be entitled to a 5% fee under the Exotix Engagement: a higher fee than it could expect under the Tripartite Agreement. However, identifying an additional investor could bring Blyvoor some benefits too as competition could be expected to lead to better

pricing. In addition, even if Exotix tried, but failed, to find another investor that too would provide useful information to Blyvoor since it would show that Orion was the only investor realistically likely to provide funding and that Blyvoor could not, therefore, afford to take too tough a stance with Orion in negotiations.

63. Mr Smith actively encouraged Exotix's attempts to find investors other than Orion, because he understood how Blyvoor could benefit from them. However, in the event it became clear that Exotix could not find anyone else and, even before the Orion term sheet was signed, Exotix and Blyvoor had come to accept that Orion, and to a much lesser extent the IDC, were the only realistic providers of funding.

64. Exotix also emphasises work that it says that Mr Tyler undertook to secure the IDC's participation in the transaction. That reliance raised the following questions of fact:

    i) the extent to which involvement from the IDC was important in securing funding from Orion;

    ii) the extent to which Mr Tyler actually did work with the IDC; and

    iii) the extent to which any work that Mr Tyler did with the IDC actually helped to secure the IDC's participation in the funding.

65. In my judgment, the IDC's involvement was, as Exotix says, important. The IDC was not providing much funding in absolute terms: only around US$10m out of a total of US$60m. However, in 2018, international investors' concerns about a risk of corruption acted as a brake on their appetites for investment in South Africa. The IDC was a government-backed organisation. Its involvement in the transaction, even to a small extent, was perceived to mitigate the political risk associated with the provision of finance to fund the Mine, which depended on government licences for its viability.

66. I will not go as far as to say that the IDC's involvement was "crucial". Mr Barton had indicated in early discussions with Blyvoor that Orion would in principle be prepared to provide all the funding. I am prepared to accept that it would have done so if necessary. However, Mr Barton needed to persuade Orion's investment committee that the proposed deal was a good one. A transaction without the IDC would have been less straightforward to approve than one in which the IDC was involved.

67. There is a more legalistic reason why the IDC's involvement was important. The term sheet for the Orion funding provided that the execution of a loan agreement between Blyvoor and the IDC was a condition precedent to Orion's agreement in principle to fund the Mine. Therefore, from 23 April 2018, when that term sheet was signed, there could be no deal with Orion of the kind set out in the term sheet unless the IDC also agreed to provide funding. As I have noted, if the IDC was unwilling to fund, Orion would probably have provided all the funding itself. However, that would be a different deal from that set out in the term sheet.

68. Turning to the issue in paragraph 64.ii), I have already made the finding in paragraph 51 that Exotix's "fairness opinion" was to be shown to the IDC. I am also prepared to accept Mr Tyler's evidence that, from time to time, he answered questions that Mr Hodges of the IDC raised. They were good friends and it makes sense that Mr Hodges might call

him up to ask the occasional question rather than sending him an email that would have been found in the disclosure process.

69. However, I do not consider that any of the interactions between Mr Tyler and the IDC, or the IDC's sight of Exotix's fairness opinion, had any material effect on the IDC's decision to provide funds. Neither Exotix nor Mr Tyler had introduced IDC into the deal. On the contrary, the IDC had introduced Mr Tyler, and through him, Exotix into the deal. The dynamic, therefore, was not that Exotix or Mr Tyler had to coax the IDC through the Stages. Rather, the IDC was interested in investing, right from the outset, and wanted Mr Tyler to help find a co-investor.

70. That process had proceeded very satisfactorily from the IDC's perspective. It looked likely to achieve its hoped-for result of generating jobs in South Africa for a modest investment that ranked senior to the much larger investment to be provided by Orion. Perhaps it derived some comfort from Exotix's view that the Orion funding was on favourable terms, but that could not have been important to the IDC's own decision to lend since its debt ranked senior to Orion's funding. Perhaps it obtained reassurance from Exotix's view that the IDC's security package would fit "seamlessly" with that applicable to the Orion funding, but ultimately lawyers would be needed to ensure that the security taken was effective and Exotix's opinion on that issue could not have been important either. No doubt it was helpful to Mr Hodges to have a good friend he could call with the occasional query, but that would have had little bearing on the IDC's decision to invest.

PART B – ISSUES OF CONTRACTUAL CONSTRUCTION

Legal approach

71. Both sides agreed that all the legal principles necessary to enable the court to resolve the disputed issues of contractual construction can be found in paragraphs [14] to [22] of the judgment of Lord Neuberger in *Arnold v Britton* [2015] AC 1619. There is little point in me burdening this judgment with a lengthy quote from that judgment. There is still less point in me seeking to summarise those paragraphs in my own words. I therefore record simply that I will follow the approach that Lord Neuberger summarised at [15] of his judgment and then expanded on at [16] to [22] ([23] being of little application to the circumstances of this case).

The Exotix Engagement

72. The Exotix Engagement consisted of a cover letter that both contained terms in numbered paragraphs and also incorporated some standard terms and conditions which neither side suggests are important to the resolution of this dispute. I will refer to the covering letter and the standard terms together as the "Exotix Engagement" and will refer to "paragraphs" of the covering letter and "clauses" in the standard terms.

73. Exotix had asked for an exclusive arrangement with Blyvoor, but Blyvoor had refused that request. Accordingly, the Exotix Engagement permitted Blyvoor to appoint other brokers, but obliged Blyvoor to notify Exotix if it did so.

74. The Exotix Engagement appointed Exotix as Blyvoor's "structuring agent, financial adviser and placement agent" in connection with the "Offering", which can be

paraphrased as Exotix's offering of debt or hybrid securities (defined as "**Investments**") to help to finance the Mine. Paragraph 1.1 required Exotix to:

> … provide the following services in respect of the Offering upon the terms of this Engagement Letter (the "**Services**", which term shall apply to all or any of the services described below):
>
> (a) act as "project manager" co-ordinating the Offering, holding regular meetings of the project team;
>
> (b) advise on the most appropriate corporate structure, timing and method of the Offering;
>
> (c) assist with valuation and other matters in relation to the Offering;
>
> (d) assist in the preparation of materials relating to the Offering (such as a private placement memorandum, prospectus, offering memorandum, information memorandum, offering circular, marketing materials or other disclosure documents);
>
> (e) help place the Investments with investors introduced by Exotix (the "**Exotix Investors**"); and
>
> (f) any other services as agreed in writing between [Blyvoor] and Exotix.

75. Paragraph 2.1 provided as follows:

> 2.1 in consideration of Exotix carrying out the Services, [Blyvoor] shall pay to Exotix the following non-refundable fees (collectively, the "**Exotix Fees**"):
>
> Success Fee(s)
>
> (a) a placement fee payable at the Completion of any Offering of 5% of the aggregate principal amount of the Investments arranged or issued in such Offering…

76. Exotix suggests that it was significant that the defined term "Services" applies to "all or any" of the services described in paragraphs 1.1(a) to (f). If by this Exotix suggests that it could necessarily claim a success fee if it had provided only one constituent of the Services, I disagree. The "all or any" language simply means that some of the boiler-plate provisions in Exotix's standard terms and conditions operate in a commercially sensible manner. For example, clause 1.1 provides that, "In rendering the Services, Exotix shall act as an independent contractor and not as a fiduciary advisor or agent…". The "all or any" language means that this provision is engaged in relation to each constituent of the Services as well as the entire package. It would make no commercial sense for Exotix, having prepared a single marketing leaflet (within paragraph 1.1(d) of the definition), but refusing to do acts necessary to "help place the Investments" (paragraph 1.1(e) of the definition) could still claim a success fee. I conclude, therefore, that Exotix had to provide all the Services set out in paragraphs 1.1(a) to (e) in order to

claim its success fee. Of course, if a particular Service was clearly not needed in the circumstances, Exotix and Blyvoor might agree expressly or by conduct that Exotix would not need to perform it. However, in the light of circumstances existing when the Exotix Engagement was signed, all the Services in paragraphs 1.1(a) to (e) could reasonably be expected to be necessary for Blyvoor to obtain funding and so Exotix was obliged to perform all those Services under the Exotix Engagement in order to claim its fee.

77. By paragraph 2.1(a), "Completion of any Offering" triggered Exotix's entitlement to the 5% success fee. Some potential confusion was occasioned by the fact that both the covering letter and the standard terms and conditions had a definition of "Completion". However, Exotix did not dispute Blyvoor's contention that the operative definition, at least for the purpose of determining entitlement to a success fee (as distinct from the due date for payment) was the definition in the standard terms namely:

> **Completion**: means the closing of any financial investment by an Exotix Investor in connection with the Offering, irrespective of the timing of such closing.

78. That definition cross-refers to the term "Exotix Investor" which, as noted in paragraph 74 above captures only investors "introduced by Exotix". It follows that Exotix was entitled to a success fee under the Exotix Engagement only if an investor that it had "introduced" proceeded to "closing of any financial investment".

79. As will be seen, there was much disagreement between the parties as to whether the Tripartite Agreement contains an "effective cause" requirement. There was much less debate on this issue in connection with the Exotix Engagement. However, it is appropriate to introduce that debate now since the precise nature of the "effective cause" requirement in the Exotix Engagement has something to say about the proper construction of the Tripartite Agreement which I address later.

80. There is room for debate on whether the relationship between Exotix and Blyvoor was an agency relationship (see clause 1.1 referred to in paragraph 76 above). I was, nevertheless, referred to extracts of the current edition of *Bowstead & Reynolds on Agency* (***Bowstead & Reynolds***) that address the question whether, in order for an agent to be entitled to commission of a transaction, services performed by that agent need to be an effective cause of that transaction.

81. The need, in many cases, for an "effective cause" provision is straightforward to explain. As pointed out at [7-028] of *Bowstead & Reynolds,* agents, such as estate agents acting on residential property transactions, are frequently engaged to "find a purchaser" and paid a percentage of the sale price paid on a successful transaction. As a matter of ordinary English, an agent could claim to have "found" a purchaser simply by identifying an individual who, by sheer coincidence and without any work being done by the agent, goes on to buy the property. Yet, as McPherson J said in the Australian case of *Doyle v Mount Kidston Mining and Exploration Pty Ltd* [1894] 2 Qd R 386, at 392:

> … It would have been quite artificial to suppose that the parties intended that the agent should earn his commission simply by finding an individual who, independently of any further action by the agent, later agreed to buy the subject property.

82. In some cases, the "artificial" result to which McPherson J refers is avoided by the express terms of the contract in question. Where the express terms do not deal with the matter, the law may imply a term to deal with it. In *The County Homesearch Co (Thames & Chilterns) Ltd v Cowham* [2008] EWCA Civ 26, Longmore LJ explained the rationale for the implication of such a term as being "mainly at any rate, the need for the client to avoid the risk of having to pay two sets of commission".

83. In other cases, the result that McPherson J identified may not be "artificial" at all. For example, in *Brian Cooper & Co v Fairview Estates (Investments) Ltd* [1987] 1 EGLR 18, an agent was held to be entitled to commission in circumstances where he had effected a pure introduction and nothing more. That was because the principal had its own personnel and lawyers who could take the transaction forward to completion and was only therefore interested in introductions.

84. Blyvoor's pleaded case, in paragraph 8 of its Re-Amended Defence, is that the Exotix Engagement provided, either on the proper construction of its express terms, or by the implication of a term, that Exotix had to be "the effective cause" of any receipt of funds for a success fee to be payable. Exotix did not dispute that case in closing. In my judgment a species of "effective cause" requirement is to be found in the express terms of the Exotix Engagement described in paragraphs 74 to 78 above. To obtain a success fee, under the Exotix Engagement, Exotix would need to "introduce" an investor and, having done so, "help place the Investments" with that investor. Exotix would not receive a success fee if it merely identified a potential investor and then sat back and did nothing more.

85. That then leads to the question of what it means to "introduce" an investor. As a matter of ordinary English, Exotix would "introduce" someone to Blyvoor if it put that person into contact with Blyvoor in circumstances where Blyvoor had not previously known of the person's interest in providing funding. Mr Tyler suggested in his cross-examination that he understood the term differently as carrying with it some implication that a financing transaction ultimately completed. However, Mr Tyler's subjective beliefs are not relevant to the interpretation of the Exotix Engagement and Exotix does not argue for the interpretation that Mr Tyler advanced.

86. Exotix had not "introduced" Orion to Blyvoor in the sense used in the Exotix Engagement. Orion was not, therefore, an "Exotix Investor" for the purposes of the Exotix Engagement. Two consequences flow from that. First, Exotix was not obliged by Paragraph 1.1(e) to "help place the Investments with [Orion]". Second, if Orion ultimately provided funding to Blyvoor, Exotix would not be entitled to receive any success fee pursuant to the Exotix Engagement.

The Legacy Hill Mandate

87. Blyvoor and Legacy Hill signed an engagement letter (the **Legacy Hill Mandate**) on 15 March 2018. The detail of its terms is not significant. It suffices to say that, the Legacy Hill Mandate did not appoint Legacy Hill on an exclusive basis. Legacy Hill was required to perform very similar services to those Exotix had to perform under the Exotix Engagement. Legacy Hill was to receive a success fee equal to 5% of any equity and 3% of any debt-like investments in Blyvoor made by investors procured by Legacy Hill.

The Tripartite Agreement

88. The Tripartite Agreement was signed on 4 April 2018. The parties to it were Blyvoor, Exotix and Legacy Hill. It took the form of a letter on Blyvoor's headed paper which the parties to it signed on signature pages at the end. Neither Blyvoor nor Exotix invites me to conclude that the document was, or was not, professionally drafted and therefore I conclude that this factor has nothing to say about issues of its proper construction.

Relevant provisions of the Tripartite Agreement

89. The Tripartite Agreement started with the following paragraph:

> Whereas Blyvoor has collaborated with Exotix via [the Exotix Engagement] and has similarly collaborated with Legacy Hill via [the Legacy Hill Mandate], and whereas Blyvoor, Exotix and Legacy Hill ("**the Parties**") wish to jointly pursue the funding of some $70 million, or part thereof, from Orion and the Parties wish to record in writing the basis on which such collaboration has been agreed to proceed.

90. Both parties are agreed that, even though this paragraph uses the language of a recital to an agreement, it imposed a contractual obligation on Blyvoor, Exotix and Legacy Hill "to jointly pursue the funding of some $70 million… from Orion".

91. Clauses 1 to 3 of the Tripartite Agreement provided, so far as material, as follows:

> **1 Terms and Conditions**
>
> Unless otherwise specified, or modified, herein the terms and conditions of the:
>
> 1.1 Exotix Engagement shall apply to this Tripartite Agreement insofar as it relates to the relationship between Blyvoor and Exotix; and
>
> 1.2 Legacy Hill Mandate shall apply to this Tripartite Agreement insofar as it relates to the relationship between Blyvoor and Legacy Hill.
>
> 2 **Limitation of this Tripartite Agreement**
>
> This Tripartite Agreement shall be limited to any funding that is sourced from Orion and shall cover the aggregate principal amount of all funding including both equity funding and debt funding ("**Orion Funding**").
>
> **3 Fees**
>
> 3.1 The fees payable to Exotix and to Legacy Hill shall comprise an initial fee ("**Initial Fee**") and a subsequent fee ("**Subsequent Fee**") as set out in the following table:

	Initial Fee	Subsequent Fee	Total Fee
Exotix	3.00%	0.75%	3.75%
Legacy Hill	2.00%	0.50%	2.50%
Total	5.00%	1.25%	6.25%

> 3.2 for the purposes of this Tripartite Agreement only, Clause 2.1 (a) in the Exotix Engagement is replaced as follows:
>
> *an Initial Fee payable upon the receipt of the Orion Funding of 3% (three percent) of the aggregate principal amount of the Orion Funding and a Subsequent Fee, payable on the 18 (eighteen) month anniversary of the Initial Fee payment of 0.75% (zero point seven five percent) of the aggregate principal amount of the Orion Funding*.
>
> 3.3 for the purpose of this Tripartite Agreement only, Clause 3.1 (ii) of the Legacy Hill Mandate is replaced as follows:
>
> *Success Fee (for the services under the Mandate Agreement):*
>
> *The manager shall receive an Initial Fee payable upon the receipt of the Orion Funding of 2% (two percent) of the aggregate principal amount of the Orion Funding and a Subsequent Fee, payable on the 18 (eighteen) month anniversary of the initial Fee payment, of 0.5% (zero point five per cent) of the aggregate principal amount of the Orion Funding.*

92. The following points emerge clearly from the words that the parties used in the Tripartite Agreement:

i) Clause 1.1 of the Tripartite Agreement provided that Exotix was to remain subject to the obligations set out in the Exotix Engagement unless those obligations were "modified" by the Tripartite Agreement or a different treatment was "specified" in the Tripartite Agreement. Therefore, although the Tripartite Agreement placed an additional contractual obligation on Exotix ("to jointly pursue the funding of some $70 million… from Orion"), that was not the only contractual obligation imposed. Clause 1.1 meant that, unless that obligation was modified, or a different obligation specified, Exotix remained obliged to provide the "Services" set out in the Exotix Engagement.

ii) Relatedly, Clause 3.2 (and the amendment to paragraph 2.1(a) of the Exotix Engagement that it effected for the purposes of the Tripartite Agreement) explicitly preserved Exotix's obligation to provide the "Services". Exotix's obligation to do so constituted the consideration for Blyvoor's obligation to pay the fee due under the Tripartite Agreement which continued to be labelled as a "success fee".

iii) However, Clause 3.2 of the Tripartite Agreement meant that Exotix's entitlement to a success fee was not linked to the defined term "Completion" in the Exotix Engagement. That in turn meant that it did not matter that Orion was not an "Exotix

Investor" as defined in the Exotix Engagement (see paragraph 78 above). In short, the Tripartite Agreement contemplated that Exotix might obtain a fee if Orion provided funding even though Exotix had not itself introduced Orion to Blyvoor.

iv) Blyvoor was accepting that, if Orion provided funding, it might have to pay fees totalling 6.25% of the principal amount of that funding (although the "Subsequent Fee" would be payable only 18 months after Orion provided that funding). If Blyvoor had entered into no Tripartite Agreement then, if Orion provided funding, it would at most have an obligation to pay Legacy Hill 3% of debt-like funding that Orion provided and 5% of any equity-like funding. Exotix would have been entitled to no fee under the Exotix Engagement (see paragraph 86). Blyvoor was therefore accepting the prospect of having to pay more in total fees than it was under the Exotix Engagement and the Legacy Hill Mandate.

v) It was envisaged that Exotix might be paid 50% more than Legacy Hill, under the Tripartite Agreement even though Exotix had not introduced Orion to Blyvoor.

Disputed questions of construction

93. The dispute on construction between the parties revolves around the question whether the express terms of the Tripartite Agreement require Exotix's performance of obligations under that agreement to be an "effective cause" of Orion providing funding. Exotix denies the existence of any such obligation. It says that its contractual obligation was "to jointly pursue" Orion funding together with Legacy Hill. It accepts that the Tripartite Agreement obliged it to continue to provide the "Services" that had been defined in the Exotix Engagement, although it submits that this obligation should be understood together with the obligation to "jointly pursue" funding from Orion. It submits that conceptually it could satisfy both obligations by providing advice and assistance to Blyvoor as part of a joint endeavour with Legacy Hill to obtain funding from Orion even if that advice and assistance was not an "effective cause" of Orion providing funding. (For completeness, Exotix submits that its work was in any event an effective cause of the Orion funding and I address that argument in Section D below).

94. Blyvoor argues that Exotix was to obtain a fee under the Tripartite Agreement only if Orion actually provided funding and Exotix had, with Legacy Hill, "jointly pursued" that funding. That scheme, coupled with Exotix's continuing obligation to provide "Services" was consistent only with an "effective cause" requirement. Any doubt on the issue can, Blyvoor submits, be resolved by considering the circumstances, known to both parties, in which the Tripartite Agreement was executed (see [21] of *Arnold v Britton*).

95. I will start with the ordinary and natural meaning of the relevant provisions of the Tripartite Agreement ([15] and [18] of *Arnold v Britton*). The concept of "jointly pursuing" is not a particularly unclear concept. The phrase is suggestive of an endeavour (to be pursued jointly) rather than an outcome. It does not obviously invite any examination of the respective contributions of Exotix, or Legacy Hill, if the pursuit is successful.

96. However, Exotix was not obliged only to "jointly pursue" funding from Orion. It remained subject to an obligation to provide the "Services" itself. One such service (though not the only one) was, by paragraph 1(e) of the Exotix Engagement to "help place the Investments with investors introduced by Exotix". In my judgment, that

obligation was modified by the Tripartite Agreement and became an obligation to "help place the Investments with Orion". Since the whole point of the Tripartite Agreement was to require Exotix and Legacy Hill to "jointly pursue" Orion, whom Exotix had not introduced, it would make no sense for Exotix to have to help only with investors it had introduced.

97. The obligation to "help place the Investments with Orion" refers to an outcome (a placing of investments). It is, in my judgment, consistent with Exotix being under an obligation to take actions, itself, which have a real world effect on the ability to place Investments. The contractual obligation could be met by taking suitable steps in an attempt to place the Investments, even if the attempt ultimately failed. However, if the attempt succeeded, the wording of the obligation can fairly be read as involving a consideration of whether the steps taken did actually "help" with an entitlement to a success fee arising only if they did.

98. I recognise, however, that the interpretation outlined in paragraph 97 is not the only interpretation possible. The Tripartite Agreement required both Exotix and Legacy Hill to contribute to a joint endeavour. It is quite possible, as Exotix argues, to read the obligation to "help place the Investments" as requiring it only to contribute to the joint endeavour and that, if that joint endeavour was successful in obtaining funding from Orion, Exotix would be entitled to its fee without any need to measure its own individual contribution to the endeavour.

99. It is, therefore, necessary to test the competing possible interpretations of the words in the light of the facts known to the parties ([21] of *Arnold v Britton*). The known facts that I have summarised in paragraph 32 are significant. They would have suggested to all parties that Exotix, having been in a position where it would earn no success fee out of a transaction with Orion was being afforded a further opportunity to earn a large fee. Commercial common sense suggests that Exotix must have been offering something of real benefit to achieve such a change in its fortunes.

100. Exotix's case on construction is that the additional "something" it offered was its continued availability to the joint endeavour. It notes that, under the Exotix Engagement, it was under no obligation to help to place the Investments with Orion, since it had not introduced Orion. By agreeing to become party to the Tripartite Agreement, Exotix says that it gave both Blyvoor and Legacy Hill access to its expertise, its significant back office operation and its relationship with the IDC that could be deployed if needed to help to obtain funding from Orion. Ultimately, Exotix did not need to deploy much of its efforts to place Investments with Orion. For example, Exotix's back office function was not needed because Orion was more self-sufficient than Blyvoor had expected. More generally, Exotix was not needed to perform much interaction with Orion since Legacy Hill was equal to the task and it would have been duplicative for both Legacy Hill and Exotix to be doing the same thing. However, Exotix argues that the fact that, with hindsight, Blyvoor might have struck a bad bargain cannot alter the proper construction of the contract.

101. In my judgment, viewed objectively, Exotix was party to the Tripartite Agreement largely because Blyvoor was persuaded that Exotix had particular attributes that Legacy Hill lacked that would help actually to close the transaction with Orion. Those attributes consisted primarily of Exotix's back office function, but Mr Smith was also persuaded that Mr Tyler had experience in debt investments that Legacy Hill did not have and that

his relationship with the IDC might be important. Viewed objectively, Exotix was being engaged to provide expertise and services that Blyvoor believed that Legacy Hill could not provide. Moreover, the pricing of the fees suggested that the parties were proceeding on the basis that Exotix's contribution had the potential to be 50% more valuable than that of Legacy Hill, even taking into account that Legacy Hill, rather than Exotix, had introduced Orion.

102. Considerations of "commercial common sense" cannot be invoked retrospectively to save someone from the consequences of a bad bargain ([19] of *Arnold v Britton*). However, a reasonable observer considering matters at the time of the Tripartite Agreement would find it commercially unreal for Exotix to obtain the prospect of such a significant fee, for deployment of expertise it had actively persuaded Blyvoor that Legacy Hill lacked, even if that expertise had no actual effect on the obtaining of finance from Orion. Such an observer would conclude that Exotix and Blyvoor were agreeing that Exotix would be entitled to its "success fee" only if it could be shown that it had indeed actually "helped to place the Investments with Orion".

103. Exotix suggests that, by the time the Tripartite Agreement was signed, a lot of the Services set out in the Exotix Engagement no longer needed to be performed, or were at least modified by the nature of the joint engagement. There is something in that. Exotix and Legacy Hill could not both individually "project manage" the transaction for the purposes of paragraph 1.1(a) of the Exotix Engagement. An IM was no longer necessary (paragraph 1.1(d)). Orion had already been "introduced" for the purposes of paragraph 1.1(e). I do, therefore, accept that the Tripartite Agreement modified the definition of "Services" by obviating any need for Exotix to project manage on its own, to provide a further IM, or to introduce any investors. However, I am quite unable to accept Exotix's argument that Exotix's obligation to "help place the Investments" fell away in circumstances where the whole reason why Exotix continued to be involved was because it was perceived to have expertise that would enable the deal to be closed that Legacy Hill lacked. Certainly Exotix had to "help place the Investments" in the context of a joint pursuit of Orion but, as I have explained, it remained subject to an obligation to take its own actions to achieve that.

104. It follows that I am unable to accept Exotix's case that the only real purpose for Exotix's continued involvement was to provide the advice and assistance specified in paragraphs 1.1(b) and (c) of the Exotix Engagement. At the time of the Tripartite Agreement, Orion had delivered what looked like a promising proposal in Mr Barton's email of 23 March 2018. However, it was quite possible that more work would be needed to turn that email into a concluded transaction and Blyvoor was worried about Legacy Hill's ability to do that on its own. Viewed objectively, Blyvoor was engaging Exotix to provide its own help in "plac[ing] the Investments" in paragraph 1.1(e) as well as the advice in paragraphs 1.1(b) and (c). In my judgment, nothing in the Tripartite Agreement excused Exotix from continuing to perform the Services set out in paragraphs 1.1(b), (c) and (e) (in each case as modified by the Tripartite Agreement). Of course, these paragraphs did not set out watertight compartments. A particular piece of "advice" falling within paragraph 1.1(b) or "valuation" falling within paragraph 1.1(c) might well also help to place the Investments with Orion. However, Exotix remained liable to provide all three categories of service.

105. Part of the difficulty in this case has stemmed from the parties' use of the phrase "effective cause requirement". Given that the debate is framed in those terms, it is not

surprising that Exotix emphasises that the Tripartite Agreement contains no mention of an "effective cause". Nor is it surprising that it relies, by parity of reasoning, on decisions such as the judgment of the Court of Appeal in *EMFC Loan Syndications LLP v Resort Group plc* [2022] 1 WLR 717 (***EMFC***) and the judgment of Males J (as he then was) in *Edmond De Rothschild Securities (UK) Ltd* [2014] EWHC 2165 (Comm) (***Rothschild***) which were cases in which the courts have found that a contract contained no "effective cause requirement".

106. However, Exotix's approach risks overlooking what the Tripartite Agreement did say, in its express terms as well as conclusions to be drawn from the background known to the parties. By that Tripartite Agreement, both Legacy Hill and Exotix were engaged to "jointly pursue the funding… from Orion". Exotix was under a contractual obligation to "help to place the Investments [with Orion]". Whether or not the contract used the phrase "effective cause", the requirement for Exotix's own individual actions to have a real-world effect on securing the funding from Orion comes from the combination of those provisions, considered against the background consisting of the factual matrix.

107. That also explains why the outcome in *EMFC* and *Rothschild* was different. In *Rothschild*, the contractual obligation was to provide advice and Males J held that the difficulty in establishing the extent to which that advice contributed to a particular outcome militated against the existence of an "effective cause requirement". In *EMFC*, two agents were engaged under a joint mandate: Investec, a large investment bank, was to pursue that funding and EMFC was to provide "loan execution support services". The Court of Appeal concluded that EMFC was entitled to its success fee provided it provided the necessary support services and did not need to establish that those services were an "effective cause" of funding being obtained. Here, by contrast with the facts of *EMFC* and *Rothschild*, Exotix's obligations were not limited to the provision of "advice and assistance".

108. I therefore prefer the interpretation set out in paragraph 97 above. To obtain its fee under the Tripartite Agreement, Exotix had to perform actions which actually "help place the Investments with [Orion]". That stood separate from the obligation to provide the advice and assistance specified in Clause 1.1(b) and (c) of the Exotix Engagement (although, as I have noted, Clauses 1.1(b), (c) and (e) were not watertight compartments). In his closing submissions, Mr Power referred to this as a requirement that Exotix be "important" to the deal, although he fairly acknowledged that this was a paraphrase. I do not accept that there was any contractual obligation for Exotix, or Mr Tyler, to be "important", but the express terms of the contract did mean that Exotix was entitled to a fee only if its own actions "helped" to secure funding from Orion.

109. That formulation of Exotix's obligations is firmly grounded in the express terms of the Tripartite Agreement. It can be understood as a species of "effective cause" requirement because it asks whether Exotix's actions contributed to an outcome. However, that is not necessarily the same as the "effective cause" requirements that are dealt with in [7-028] to [7-030] of *Bowstead & Reynolds*. The parties chose to express the requirement in terms of whether Exotix's provision of the Services "helped" to "place the Investments". That is not the same as asking whether Exotix's work was a *sine qua non*. Nor is it necessarily the same as asking whether Orion's investment was "really brought about by" Exotix's provisions of the Services (which is the way that *Bowstead & Reynolds* approaches the question at [7-030]). Since the parties used the concept of "helping", that is the test that I will apply.

110. Finally, the Tripartite Agreement did not provide that only work done directly with Orion could be treated as helping to secure funding from Orion. Nor should the concept of "helping to place Investments with Orion" be construed in that restrictive way. It would make no commercial sense for the Tripartite Agreement to incentivise Legacy Hill and Exotix to duplicate each other's work in liaising with an investor who was obviously interested in providing finance on reasonable terms. Nor would it make commercial sense for the Tripartite Agreement to incentivise Legacy Hill and/or Exotix to poach "Orion-facing" work from each other so as to bolster their claim to a success fee. Such actions would have been at odds with the "joint pursuit" that the Tripartite Agreement envisaged which involved tasks being divided up rather than duplicated or competed for. I conclude that work could conceptually "help" to secure funding from Orion even if that work did not involve direct interaction with Orion.

PART C – IMPLICATION OF TERMS

The law on implied terms

111. There was no disagreement between the parties on the law on the implication of terms into a contract. I was referred to the judgment of the Supreme Court in *Marks & Spencer PLC v BNP Paribas Securities Limited* [2016] AC 742 but given the agreement between the parties, I can state their common position on the law briefly as follows:

    i) Before I consider implying a term into the Tripartite Agreement, I should first determine its express terms. That is because of the "cardinal rule" that a term cannot be implied into the Tripartite Agreement if it would contradict an express term.

    ii) There are two tests for the implication of a term: the "business efficacy" test and the "officious bystander" test. They are alternatives, and only one need be satisfied. However, it will be rare for only one to be satisfied.

    iii) The business efficacy test asks whether, without the term to be implied the contract would lack commercial or practical coherence. The term can only be implied if it is necessary to give business efficacy to the contract.

    iv) The officious bystander test focuses on whether such a bystander would consider the term so obvious that it goes without saying.

Application to this case

112. I have explained how I consider the express terms of the Tripartite Agreement should be construed. Those express terms provide that Exotix is entitled to a success fee only if its own actions "help" to place the Investments with Orion. Given that conclusion, there is no room for a different form of "effective cause requirement" to be implied into the Tripartite Agreement. Either such a clause would add nothing to the express terms, in which case it would be unnecessary, or it would say something different from the express terms, in which case the implication of such a term would breach the "cardinal rule".

113. One way I could be wrong in my interpretation of the express terms of the Tripartite Agreement is if the Tripartite Agreement entitled Exotix to its success fee even if its own individual actions had no real world effect on Orion's provision of funding. If that were the position then there would similarly be no room for an effective cause requirement to

be implied into the Tripartite Agreement since it would be inconsistent with the express terms.

114. Moreover, in that case, the Tripartite Agreement would not lack commercial or practical coherence. It would be perfectly coherent for Blyvoor to agree to a contract under which Exotix was bound to "jointly pursue" funding from Orion. Whether or not Exotix's own individual actions actually contributed the outcome, Blyvoor would still have obtained a benefit consisting of the ability to draw on Exotix's expertise if needed. If, in practice, Legacy Hill was able to do all the necessary work on its own, Blyvoor might, with hindsight, consider that it had overpaid, but that would not of itself deprive the Tripartite Agreement of business efficacy.

115. For similar reasons, I do not consider that there is any room in the Tripartite Agreement for the implication of an "effective cause" term that is more exacting than a requirement that Exotix's performance of the Services helped to secure funding from Orion. Thus, a requirement that Exotix's performance be at least a *sine qua non* of Orion's investment or that Orion's investment "really [be] brought about" by Exotix's work, the kind of concepts that are mentioned at [7-029] and [7-030] of *Bowstead & Reynolds* would be at odds with the express terms and could not be implied.

116. I will not, therefore, imply any additional "effective cause" requirement into the Tripartite Agreement.

PART D – WHETHER EXOTIX PERFORMED THE OBLIGATIONS NECESSARY TO OBTAIN A SUCCESS FEE

117. At my request, Exotix prepared a "Chronology of Performance" that set out all of the actions on which it relied as complying with its obligations to provide the "Services" under the Tripartite Agreement and so substantiating its entitlement to a success fee.

118. In that Chronology of Performance, Exotix placed emphasis on discussions that Mr Tyler had with the IDC even before Exotix signed the Exotix Engagement. I am quite unable to accept that this constituted any provision of the "Services" pursuant to either the Exotix Engagement or the Tripartite Agreement that were signed subsequently.

119. In a similar vein, Exotix also emphasised two occasions, after the Exotix Engagement was signed, but before the Tripartite Agreement was signed on which Mr Tyler answered questions from Mr Hodges of the IDC. I do not consider that can represent any performance of obligations under the Tripartite Agreement either. However, in any event, those interactions were of a trifling nature. In one exchange, Mr Tyler updated Mr Hodges on the progress of attempts to find another investor. In another Mr Tyler expressed the view that Blyvoor would probably prefer to draw down any funding that Orion provided before drawing down the IDC's facility but "could do it differently if you would prefer". Neither of these email exchanges contributed, in any real world sense, to Orion providing funding. They did not "help" to place Investments with Orion.

120. Exotix's claim for payment of a success fee must, therefore, stand or fall by reference to the work that it did after the Tripartite Agreement was signed that can be summarised as (i) work done modelling the 8-day quotation period, and its successor 4-day quotation period summarised in paragraphs 46, 47 and 54 above, (ii) work done responding to Orion's draft term sheet summarised in paragraph 53 above, (iii) work done on the

"fairness opinion", including agreeing that it could be shared with the IDC, described in paragraph 51 above and (iv) other work done in modelling Orion's financial offer described in paragraph 54 above.

121. Blyvoor is correct to say that this did not involve much work, although of course the work drew on Exotix's expertise and network of contacts. However, the reason Exotix did not do much work after the Tripartite Agreement was signed was because, as events transpired, not much work was needed. Orion was more self-sufficient in terms of producing term sheets than might have been expected. Moreover, it was obviously keen to do the deal and made an attractive and reasonable offer to enable it to do so.

122. Legacy Hill did more work than Exotix, but not much more. Having rejected Mr Smith's evidence that Legacy Hill was doing a lot of work on due diligence, the difference between their efforts consisted largely of the fact that Legacy Hill attended the site visit, but Exotix did not. Legacy Hill was also more closely involved in day-to-day contacts with Orion than was Exotix. However, that contact did not involve any significant effort from Legacy Hill since (i) only 19 days elapsed between the execution of the Tripartite Agreement and Orion signing the term sheet and (ii) relatedly, Orion did not need much persuading to provide funding as they were keen to do so on reasonable terms.

123. Blyvoor's closing arguments suggested that Legacy Hill did not need to do much work under the Tripartite Agreement because it could bask in the glory of having introduced Orion in the first place. I do not accept that. The Tripartite Agreement did not require either Legacy Hill or Exotix to introduce anyone for the simple reason that Orion had already been introduced. Nor did it excuse Legacy Hill from any part of its obligation to "jointly pursue" funding from Orion in recognition of Legacy Hill's historic efforts.

124. Since not much work was needed by either Legacy Hill or Exotix to take Orion to Stage 5, it follows that not much was needed for Exotix's work to "help place the Investments" with Orion.

125. Exotix's Chronology of Performance suggested that all work that Exotix performed after execution of the Tripartite Agreement fell within either paragraph 1.1(b) or paragraph 1.1(c) of the Exotix Engagement. It was not expressly stated that Exotix did any work falling within Clause 1.1(e) no doubt because Clause 1.1(e) of the Exotix Engagement referred Exotix only to help place the Investments <u>with investors introduced by Exotix</u>. As I have explained in paragraph 96, that obligation became in the Tripartite Agreement, an obligation to help to place the Investments with Orion.

126. However, even though Exotix did not refer specifically to Clause 1.1(e) in its Chronology of Performance, its pleaded case at [17] of its Re-Amended Particulars of Claim was that it contributed to the arrangement of the Orion funding. In oral submissions, Exotix argued that the work summarised in paragraph 120, in Mr Ayoo's words "contributed to the agreement of a deal sheet". Exotix's skeleton argument served in advance of the trial similarly averred that its actions "were an effective cause of the Orion Funding" which necessarily involved an argument that its actions "helped" to "place the Investments [with Orion]".

127. My findings set out in paragraphs 68 to 70 above mean that I do not consider that Mr Tyler's occasional discussions with Mr Hodges at the IDC, or the provision of the fairness opinion, helped to secure funding from Orion.

128. However, I do agree that its work modelling the 8-day quotation period, its work reviewing the term sheet and its work on modelling Orion's offer "helped to place the Investments with Orion". This work was not just advice and assistance falling within Clause 1.1(b) and (c) of the Exotix Engagement, although it also involved the provision of such advice. A deal could be reached with Orion only if both Orion and Blyvoor were happy with a particular proposal. Exotix reviewed the term sheet, and commissioned the financial modelling for the purpose of evaluating specific proposals that Orion had made. Thus, Exotix's work went beyond the kind of advice and assistance in relation to the "Offering" described in paragraphs 1(b) and 1(c) and helped to contribute to the very process by which Orion and Exotix reached agreement on a particular deal. It can fairly be described as helping to "place the Investments with Orion". Exotix's work on reviewing the term sheet added something of value and was part of the process that culminated in both sides reaching agreement.

129. I was shown some self-deprecating emails from Mr Tyler in support of Blyvoor's argument that Exotix had not done "enough" to earn its fee. In one such email, Mr Tyler said to Mr Smith that he would not be able to attend a call on 19 April 2018, "But I don't think you will miss me – I am sure you have everything under control". I consider that to be nothing more than a pleasantry, perhaps intended to downplay the fact that Mr Tyler would not be joining a call as expected.

130. In another such email Mr Tyler wrote to Mr Moorfield on 17 April 2018 commenting on Exotix's lack of success in finding an investor other than Orion saying:

> That means the only contribution we can offer is to make comments on the term sheet so they will probably need to be staggeringly brilliant to convince Blyvoor that we are worth something in this process.

131. In this email, Mr Tyler is clearly acknowledging that Blyvoor might not feel that any fee payable under the Tripartite Agreement would represent good value for money. He turned out to be prescient. However, the statement does not bear the weight that Blyvoor seeks to put on it. At most it represents Mr Tyler's subjective beliefs as to the quality or otherwise of Exotix's contractual performance. However, it says little about whether Exotix's performance answered to the requirements of the Tripartite Agreement which must be construed objectively.

132. I acknowledge that, in the 19-day period between the execution of the Tripartite Agreement and the execution of the term sheet, Legacy Hill and not Exotix liaised directly with Orion. However, as I explain in paragraph 110, work done otherwise than directly with Orion could still be said to "help" secure funding from Orion.

133. Exotix performed the Service specified in paragraph 1.1(a) of the Exotix Engagement as modified by the Tripartite Agreement. It could not itself "project manage" the whole transaction since it was instructed under a joint mandate with Legacy Hill. However, Exotix did indeed participate in joint calls, took on some tasks itself and let Legacy Hill perform others. Not attending Orion's site visit involved no failure to perform Services that were required. Rather, Exotix did not attend that site visit precisely because Exotix and Legacy Hill concluded that their joint pursuit of Orion was best furthered by Legacy Hill attending alone since it was better placed to do so.

134. Exotix cannot be criticised for failing to prepare materials specified in paragraph 1.1(d) of the Exotix Engagement after the Tripartite Agreement was signed. Exotix had, after all, already prepared that material by the time the Tripartite Agreement was signed. It did not need to prepare them again since a joint pursuit of Orion alone did not require such materials (see paragraph 103 above).

135. I have concluded, on balance, that Exotix did indeed perform all of the Services specified in paragraph 1.1(a) to (e) of the Exotix Engagement, as modified by the Tripartite Agreement. There is no suggestion that it failed to perform any other services agreed in writing with Blyvoor. More generally, Exotix complied with its contractual obligation to "jointly pursue" funding from Orion and its actions did help to secure that funding. Exotix performed its obligations under the Tripartite Agreement and its claim succeeds.

136. I would ask the parties to agree an order giving effect to this judgment. I am conscious that I heard no argument on the question of interest and I assume that this is because there was no difference between the parties on this issue. If the parties cannot agree an order, then the matter will have to come back for a consequentials hearing, no later than the end of the current court term.