Neutral Citation Number: [2026] EWCA Civ 1432

Case No: CA-2026-000919

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CHD)
MR JUSTICE RICHARDS
[2026] EWHC 244 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/11/2026

Before :

LORD JUSTICE MILES
LORD JUSTICE FOXTON
and
LORD JUSTICE BUTCHER

- -

Between :

ALPHIER CAPITAL TWO LLP	**Claimant/ Respondent**
- and -	
BLYVOOR GOLD CAPITAL (PTY) LTD	**Defendant/ Appellant**

- -
- -

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

Hearing date : 27 October 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 09 November 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Foxton:

1. The issue in this appeal is whether the Respondent ("Exotix") became entitled to payment of a success fee from the Appellant ("Blyvoor") by reason of the successful raising of finance for Blyvoor's mining project.

2. Mr Justice Richards ("the Judge") answered that question in the affirmative, and awarded Exotix US$2.25 million. Blyvoor appeals against that decision.

The facts

3. The Judge made detailed and careful findings about the facts in his judgment reported at [2026] EWHC 244 (Ch) ("the Judgment"). For the purposes of the appeal, the relevant facts were as follows.

4. Blyvoor is a comparatively small (or "junior") mining company. In 2016, it acquired a disused gold mine in South Africa, and set about raising the finance required to bring it back into production. It approached the Industrial Development Corporation of South Africa ("IDC"), a state-owned body which provided funding for inwards investment. The IDC was only willing to provide part of the funds required, and, on the recommendation of one of the IDC personnel, Blyvoor approached Exotix in November 2017 to act as its finance broker to help it raise the remaining funds from private investors. Exotix is a regulated investment bank, with offices in four continents and a substantial "back office" operation. In February 2018, Blyvoor also approached another finance broker for the same finance-raising project, Legacy Hill. Legacy Hill had a very different profile to Exotix, being essentially a two-person operation.

5. On 1 March 2018, Blyvoor entered into a non-exclusive engagement letter with Exotix ("the EEL"), the terms of which I set out below. By the end of the trial, it was common ground that, as originally entered into, this required Exotix to be the effective cause of any financing obtained if the success fee provided for under the EEL was to become payable. On 15 March 2018, Blyvoor retained Legacy Hill on a non-exclusive basis on the terms of an engagement letter ("the LHEL"), which imposed a similar effective cause requirement before a success fee would become payable to Legacy Hill.

6. In February 2018, Legacy Hill introduced Blyvoor to Orion Resource Partners (UK) LLP ("Orion"), a major investor in mining operations which in due course provided the finance which Blyvoor required. Orion almost immediately became the principal focus of the fund-raising exercise. As Exotix had not introduced Orion to the transaction, Exotix would not have been able to earn commission under the EEL as it originally stood, if Blyvoor closed a finance transaction with Orion. Commission was only payable under the EEL in respect of a transaction with an investor introduced by Exotix. However, Exotix was able to offer certain business capacities (in particular modelling and back-office functions) and enjoyed connections (with IDC) which Legacy Hill did not have. As a result, Blyvoor decided to use both finance brokers in closing the Orion deal. This was achieved by Blyvoor, Exotix and Legacy Hill entering into an agreement in late March/early April 2018 ("the Tripartite Agreement").

7. The terms of the Tripartite Agreement are considered in more detail below, but in summary it varied the success fee provisions in both the EEL and LHEL, to reflect the fact that the two finance brokers were now working jointly on the fund-raising exercise

with Orion. The Tripartite Agreement varied the success fee provisions in both engagement letters so far as the Orion capital-raising exercise was concerned.

8. The Judge found that, following the conclusion of the Tripartite Agreement, Exotix provided Blyvoor with analyses of Orion's proposed financing structure, gave advice on gold-offtake pricing mechanisms (this being one aspect of the terms on which Orion offered financing), reviewed term sheet provisions, and prepared financial modelling. The Judge held that these were useful and meaningful contributions. However, Legacy Hill had the closest relationship with Orion and played the leading role in the communications which culminated in Orion providing the necessary financing.

9. The Judge held that the IDC's participation in the project was important because it reduced perceived political risk and supported the financing package but that Exotix had little influence on the IDC's investment decision, as the IDC was already supportive of the project. The Judge's overall conclusion was that Legacy Hill introduced Orion and remained the primary intermediary, while Exotix contributed valuable technical and analytical support.

10. In the event, the process of taking Orion from its initial expression of interest through to a concluded deal proved surprisingly straightforward. Orion and Blyvoor signed a term sheet on 23 April 2018 and Orion and Legacy Hill (but not Exotix) visited the mine as part of Orion's due diligence on 21 May 2018. Final funding agreements were signed in August 2018, albeit Exotix did not become aware of this until January 2019.

11. At some point thereafter, a dispute emerged between Exotix and Blyvoor as to Exotix's entitlement to a success fee under the Tripartite Agreement, and proceedings were commenced on 1 March 2023.

The EEL

12. Paragraph 1.1 of the EEL appointed Exotix as Blyvoor's:

> "structuring agent, financial adviser, and placement agent 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."

13. Paragraph 2.1 provided:

> "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…"

14. "Completion" is defined in the attached conditions as:

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

15. The effect of the definitions of "Completion" and "Exotix Investor" was that commission would only become due to Exotix under the EEL if the financial investment was made by an investor introduced by Exotix, which in the vast majority of cases would mean that Exotix was the effective cause of that investment.

The Tripartite Agreement

16. The Tripartite Agreement opens with the following recital:

> "Whereas Blyvoor has collaborated with Exotix via [the EEL] and has similarly collaborated with Legacy Hill via [the LHEL], 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."

(it being common ground that this imposed a contractual obligation on Blyvoor, Exotix and Legacy Hill "to jointly pursue the funding of some $70 million… from Orion").

17. Clause 1 provided:

> "Unless otherwise specified, or modified, herein the terms and conditions of the:
>
> 1.1 [EEL] shall apply to this Tripartite Agreement insofar as it relates to the relationship between Blyvoor and Exotix; and
>
> 1.2 [LHEL] shall apply to this Tripartite Agreement insofar as it relates to the relationship between Blyvoor and Legacy Hill."

18. Clause 2 provided:

> "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')."

19. Clause 3, headed "Fees", provided:

> "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 purpose of this Tripartite Agreement only, Clause 2.1 (a) in [the EEL] 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.'"

The Judgment

20. The Judge defined the key issue of construction as being "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" (Judgment, [93]). The Judge rejected Blyvoor's alternative case that the Tripartite Agreement contained an implied requirement of effective cause ([112]-[115]) and Blyvoor has not sought to revive that alternative case on this appeal.

21. The Judge also rejected Exotix's contention that, once the Tripartite Agreement had been concluded, its entitlement to the fees as provided for in that Agreement did not depend on showing that its services had had any particular effect ([104]). Exotix has not sought to revive that argument by a respondent's notice.

22. The Judge found that the causal requirement which still applied after the signing of the Tripartite Agreement was to be found in paragraph 1.1(e) of the EEL, and the requirement that Exotix "help place the Investments" (an obligation which, in the light of the Tripartite Agreement, was to be read as an obligation to "help place the Investments with Orion", rather than "with investors introduced by Exotix") ([96]). The Judge held this required Exotix's individual actions to have "a real world effect on securing the funding from Orion" ([97] and [106]). The Judge found that Exotix had satisfied that "real world effect" test ([128]).

The Grounds of Appeal

23. Blyvoor advances three grounds of appeal.

24. Ground 1 is as follows:

> "The Judge erred in law concluding that, on its proper construction, the Tripartite Agreement required no more of Exotix than that its actions "helped" contribute to

> the process by which Orion and Blyvoor came to a deal, or secure the funding from Orion, however limited that help. On its proper construction, the Tripartite Agreement required Exotix to take actions that were an effective cause of, or materially contributed to, the placing of the Investments with Orion - which required something meaningfully more than advice and assistance of the kind described in paragraphs 1.1(b) and (c)."

25. As developed in Blyvoor's skeleton argument and orally by Mr Power KC, that argument had the following elements:

    i) The EEL originally contained an effective cause requirement, and that requirement continued to operate after the Tripartite Agreement. That imposed a more exacting "effective cause" than that applied by the Judge.

    ii) The requirement that Exotix "help place the investment with Orion" was not satisfied if the only "real world" effect of its actions was to bring Blyvoor to a position in which it was willing to accept that funding on the terms offered by Orion, rather than changing Orion's behaviour in some way (an argument originally advanced as part of Ground 2, but positioned under Ground 1 at the hearing).

26. Ground 2 provides:

> "If the Judge was correct in the interpretation of the Tripartite Agreement, the Judge failed to apply that test: having rejected the submission that the provision of advice and assistance was sufficient to earn the Claimant a fee, the Judge went on to conclude that the advice and assistance provided by the Claimant was sufficient to earn a fee. Further, the test the Judge applied was not whether Exotix's work influenced Orion's decision to provide funding (which was the test his Lordship had identified), but whether it influenced Blyvoor's decision to accept that funding. Further, the Judge erred in concluding at paragraph 124 that because the transaction required little work overall, little was required of Exotix."

27. Ground 2 comprises a number of complaints:

    i) A suggestion that there is an inconsistency between [104] and [128] of the Judgment which pointed to a lack of coherence in the Judgment.

    ii) A complaint about the Judge's statement at [124] that "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'". It was suggested that this involved the Judge impermissibly reasoning from the amount of work in fact provided by Exotix to what was necessary for Exotix to become entitled to a fee.

    iii) Reliance on a distinction between conduct which influenced Blyvoor's readiness to transact and conduct which influenced Orion's readiness to contract (which I will address under Ground 1).

28. Ground 3 provides:

> "The Judge was plainly wrong in concluding that the matters set out at paragraph 128 of the Judgment were enough to satisfy the threshold for payment under the Tripartite Agreement. As the Judge noted: (i) 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 even if that expertise had no actual effect on the obtaining of finance from Orion [102], (ii) 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 [101]. Yet the result of the Judgment is that Exotix earned its fee for limited advice provided to Blyvoor and for doing considerably less than Legacy Hill. The result is commercially unreal."

29. This is an attack on the Judge's evaluative conclusions when applying the legal test to the facts, even assuming the Judge identified the correct test. It faces the difficulties inherent in challenges to a trial judge's conclusion on findings of that character before an appellate court.

Ground 1

The legal test

30. As I have stated, Blyvoor does not seek to revive its implied term case on appeal, with the result that the issue before the court is a straightforward question of contractual interpretation of the EEL and Tripartite Agreement, read together. As to the legal principles engaged by that task, the Judge stated at [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)."

31. That remains true on this appeal, and this judgment will follow the commendable restraint shown by the parties and the Judge in terms of citation.

The factual matrix

32. The Judge made a number of findings as to the commercial and factual context to the conclusion of the Tripartite Agreement:

    i) Blyvoor had appointed both Exotix and Legacy Hill to perform essentially the same task ([32]).

    ii) Orion was showing real interest in providing funding but that funding could not be guaranteed ([32]). It is "one of the largest private mining investors in the world" ([26]) and "a very large and sophisticated investor" ([35]).

    iii) Legacy Hill, rather than Exotix, had introduced Orion to Blyvoor ([32]).

iv) Exotix had a large back office, but Legacy Hill consisted of just two individuals ([32]).

v) 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 ([99]).

vi) 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 ([101]).

33. There is another feature of the circumstances in which the Tripartite Agreement was concluded which merits highlighting. The original "effective cause" requirement in the EEL essentially came from the fact that only financing from an investor introduced by Exotix would trigger payment of the success fee: if Exotix did not introduce the investor, it would not be entitled to a fee. If it did so, and the transaction closed with that investor, it would be the effective cause of the transaction in the vast majority of cases. At Judgment [81], the Judge referred in this connection to *Bowstead & Reynolds on Agency* (23rd ed.), [7-028] and the judgment of McPherson J in *Doyle v Mount Kidston Mining and Exploration Pty Ltd* [1984] 2 Qd R 386, 392 where he stated:

> "… 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."

34. The particular state of affairs McPherson J was referring to had arisen in *Rasmussen & Russo Pty Ltd v Gaviglio* (1982) Qd Rep 571, a case he cited in *Doyle* and in which he had delivered the principal judgment. In *Rasmussen*, the agent claiming commission had introduced a purchaser, who had been unable to raise funds to complete the transaction. The purchaser withdrew from the sale and the agent's instructions were withdrawn. The purchaser was later approached by another agent who was able to arrange finance and the transaction completed. In those circumstances, the mere fact of the original introduction did not entitle the first agent to commission.

35. In *Nahum v Royal Holloway and Bedford New College* [1999] EMLR 252, Waller LJ considered whether a contractual reference to "introducing" a purchaser carried with it some form of "effective cause" requirement, including by reference to McPherson J's judgment in *Doyle* and a statement of Barwick CJ in another case quoted by McPherson J, *LJ Hooker Ltd v W J Adams Estates Pty Ltd* (1977) 138 CLR 52, 58, where Barwick CJ had stated:

> "The most common way of performing the agent's task is to introduce to the principal a person who becomes the purchaser under a binding contract of sale. In terms of causation, the agent has thus been an effective cause of the sale. It is nothing to the point in such a case that that person would have become the purchaser without the intervention of the agent: or that the principal's own efforts were also an effective cause of the sale."

36. At p.261, Waller LJ summarised the law as follows:

> "First, subject to there being no express words of a contract requiring a different interpretation, the word introduction of a buyer carries with it a causative element, indeed an effective causative element, in the words of Nourse L.J., in the 'bringing in of the purchaser to that transaction'; I do not think that is any different from the test of Jacobs J. of establishing 'whether the actions of the agent really brought about the relation of buyer and seller'. Second, I have used the indefinite article above. I doubt whether it makes any difference whether it is 'an' or 'the' effective cause except possibly where there are two agents with agreements that they are entitled to commission if they introduce a purchaser. Third, thus what Mr Nahum was obliged to establish in relation to the Constable was that it was his actions that really brought about the relation of buyer and seller between the College and the buyer."

37. Finally, at least when the issue of whether an effective cause requirement should be implied arises, it has been noted that "the main reason for implying such a term is to minimise the risk of the client having to pay two commissions" (e.g. *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB), [143]).

38. Leaving aside cases where there is a clear break after the initial introduction such that the introduction has become "spent" (*Russo*) or where the issue is which of two agents is entitled to commission in respect of a transaction with one purchaser, it will be a rare case in which anything beyond the introduction of a purchaser who then proceeds to negotiate a sale will be required for an agent to meet an effective cause requirement. As *Bowstead & Reynolds* notes at [7-030]:

> "An agent will normally be entitled to commission if the agent causes a person to negotiate with the principal and contract, no substantial break in the negotiations having taken place. It appears that the agent does not have to complete or even take part in the negotiations, nor arrange any meeting, nor persuade either party to enter into the contract."

39. It will be apparent from this consideration of the authorities that the Tripartite Agreement, and the circumstances which led to it, necessarily effected a fundamental alteration in the existing arrangements so far as earning commission was concerned:

    i) First, it was no longer possible for Exotix to introduce Orion, the only potential investor with whom the Tripartite Agreement was concerned.

    ii) Second, the usual role of 'effective cause' requirements (to provide a basis for adjudicating as between the competing claims of two agents, and avoiding the principal having to pay twice) was not in play, the two agents working "jointly" and the Tripartite Agreement contemplating both being paid commission in respect of the same financing from Orion.

40. The issue of what Exotix would have to do or achieve to obtain commission under the Tripartite Agreement was, therefore, a fundamentally different one from what it would have had to do or achieve to obtain payment under the EEL save that in both cases, the finance had to be obtained. Blyvoor's repeated submission that the Judge could not recognise a requirement of effective cause under the EEL (as he did) without recognising an equivalent obligation under the Tripartite Agreement fails to recognise that reality.

Blyvoor's case on construction

41. With that background, I turn to Blyvoor's construction argument. I found the distinction between the construction adopted by the Judge (that Exotix's own "individual actions [had] to have a real world effect on securing the funding from Orion": Judgment [106]), and the alternative advanced by Mr Power KC (that Exotix "had to have a real-world effect on obtaining the funding from Orion") elusive. By the end of the oral argument, Ground 1 had been refined to embrace the arguments set out at [25] above.

42. As to the first, as I have explained at [40] above, the effective cause requirement under the EEL was essentially found in provisions which ceased to apply after the conclusion of the Tripartite Agreement, and in the decision to confine the remuneration contemplated by that Agreement to a transaction with an investor whom Exotix had not introduced. The Judge was right to conclude that, if there was an effective cause requirement at all so far as earning a commission from finance provided by Orion was concerned, it was an attenuated one.

43. Beyond suggesting that the causal test applied by the Judge was too weak, Mr Power KC did not clearly explain what stricter test should have been applied. He initially disclaimed a suggestion that Exotix's work had to be a "but for cause" of the concluded transaction with Orion, although at times he did seem to suggest that Exotix had to show that what it did had "made a difference" to Orion's decision to provide finance or the terms on which it did so. However, no such requirement is implicit in the phrase "help place the investment". Nor is such a requirement commercially likely in a context in which two agents were participating in a joint endeavour to obtain the financing and in which it was contemplated that both could earn commission. Imposing a "but for" requirement on each agent in these circumstances would have had the commercially undesirable consequences identified by the Judge at [110], namely incentivising Exotix and Legacy Hill to poach work from each other or to duplicate the other's work.

44. Mr Power KC also criticised aspects of the Judge's reasoning, suggesting that the Judge's reasoning was inconsistent and that this contributed to a lack of coherence in the Judgment:

    i) He suggested that having rejected the argument at [98] that Exotix was only required to contribute to the joint venture, without "any need to measure its own individual contribution to the endeavour", the Judge then effectively found at [128] that Exotix had satisfied the causal test without showing that its own individual actions had had any impact or effect on the deal.

    ii) He also pointed to the fact that the Judge, at [104], had rejected the argument that, following the signing of the Tripartite Agreement, it was only necessary for Exotix to provide the advice and assistance specified in paragraph 1.1(b) and (c) of the EEL in order to earn commission ([104]), and suggested that this was, in effect, what the Judge found.

    iii) In my view, these submissions do not fairly reflect the Judge's reasoning. The Judge's target at [98] was Exotix's argument that if it provided services to the joint venture, and the joint venture culminated in obtaining funding, that was sufficient, even if those services had had no "real world effect" at all. Similarly, at [104] the Judge was rejecting Exotix's submission that the mere provision of the services at

1.1(b) and (c) to the joint venture, without any requirement that they have any "real world effect", was sufficient for commission to be payable.

iv) At [128], the Judge did consider the services provided by Exotix on an individual basis and found that those individual services *did* have a real world effect on the obtaining of finance. That finding cannot, therefore, be said to be inconsistent with the Judge's rejection of Exotix's arguments at [98] and [104]. Further, in finding that Exotix's individual services had had a "real world impact", the Judge was "measuring its own individual contribution". The Judge did not find at [98] that it was necessary to measure the extent to which Exotix's individual contribution had changed the terms of the transaction or closed the deal when this would not otherwise have been the case. Nor does the language of "help place the investment" support any such requirement.

v) The Judge did not find that the only services provided by Exotix fell exclusively within paragraphs 1.1(b) and (c). On the contrary, he held that Exotix had "helped the placing" within paragraph 1.1(e) (while noting that these sub-paragraphs of 1.1 were not "watertight compartments").

vi) Finally, Mr Power KC contrasted the Judge's findings that Exotix's interaction with IDC did not have a material effect on the IDC's decision to provide funds ([69]), and hence did not help secure funding from Orion ([127]), with the findings that Exotix's work on modelling Orion's offers and providing input to the term sheet did help secure that funding ([128]). However, the fact that the Judge found that Exotix's interactions with IDC in relation to the terms of IDC's funding did not have a real world effect on the obtaining of finance *from Orion* is entirely consistent with the Judge's finding that work which engaged much more directly with Orion's proposal did so.

45. As to the argument that Exotix could not "help place the investment" with Orion if the only "real world" effect of its actions was to bring Blyvoor to a position in which it was willing to accept that funding, rather than changing Orion's behaviour in some way:

i) That construction does not accord with the ordinary meaning of the words "help place the investment", which would include helping Blyvoor assess and get comfortable with a funding proposal which was then closed, as well as encouraging Orion to make a funding proposal with which Blyvoor was able to get comfortable.

ii) As the Judge noted at [110], the distinction for which Blyvoor contends would have placed a premium on "Orion-facing" work, when the parties cannot have contemplated that Legacy Hill and Exotix would be incentivised to duplicate such work, or to poach it from each other.

iii) Blyvoor's argument sits uneasily with the Judge's finding at [41] that one of the reasons why Blyvoor entered into the Tripartite Agreement was that "some financial modelling would be needed to see which of [Orion's] two options would be cheaper from Blyvoor's perspective" and that "Mr Smith believed that Exotix would have the expertise to perform the necessary valuations, but Legacy Hill would not."

iv) Finally, Blyvoor's argument would attribute a very different legal effect to financial analysis by Exotix which demonstrated that Orion's pricing was acceptable, and work which led to a counter-offer which Orion then accepted. There is nothing in the phrase "help place the investment" or the commercial context to the Tripartite Agreement which supports the drawing of such a distinction.

46. In short, I am satisfied that, on the basis on which Ground 1 of the appeal falls to be approached, the Judge was entitled to conclude that the extent of any "effective cause" requirement imposed by the words "to help place the Investment" was satisfied by the services provided by Exotix having a "real world effect" on the obtaining of financing, whether that effect comprised getting Blyvoor into a position where it felt able to accept Orion's offer, or changed the terms of Orion's offer. That interpretation:

i) accords with the ordinary meaning of the words "to help";

ii) reflects the inevitable attenuating of the original effective cause requirement in the EEL, once the services were confined to dealing with Orion as part of a joint brokerage endeavour;

iii) gives the phrase "to help place" a sensible meaning when considering what paragraph 1.1(e) would have required in circumstances in which Exotix had actually introduced the eventual investor; and

iv) allows for the fact that the Tripartite Agreement contemplates that both Exotix and Legacy Hill could earn commission if an investment was obtained from Orion.

47. I should also address Mr Power KC's reliance on the factual matrix, and, in particular (i) the Judge's findings that the reason that Exotix was involved was because of Blyvoor's belief that there were things it could do which Legacy Hill could not; and (ii) the expectation inherent in the pricing in the Tripartite Agreement that Exotix's contribution had "the potential" – an important word – to be 50% more valuable than Legacy Hill's. Those beliefs on the part of Blyvoor explain why it entered into the Tripartite Agreement on the terms on which it did. Exotix was able to provide those services when and to the extent they were required to get the deal over the line. However, that is a very different thing from Blyvoor contracting on the basis that Exotix would only be entitled to commission should the work required from Exotix be commensurate with Blyvoor's estimate of Exotix's potential contribution. The Judge was, with respect, absolutely correct to state at [124] that:

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

48. As it happens, the risks of the deal not closing which the Judge identified at [32(ii)] did not materialise. However, the fact that Exotix was not, in the event, required to provide the level of assistance the parties had anticipated does not mean that it did not help place the investment. As the Judge found at [14], fees which are contingent on successful deals:

> "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."

It is in the nature of such arrangements that there will be occasions when the broker obtains a fee which significantly exceeds the objective value of the work, just as there will be many occasions when work of considerable objective value is done but no fee received.

49. For those reasons, I would dismiss the appeal on Ground 1.

Ground 2

50. I can deal with Ground 2, on which we did not call on Mr Ayoo, very shortly:

    i) The criticism that "having rejected the submission that the provision of advice and assistance was sufficient to earn the Claimant a fee, the Judge went on to conclude that the advice and assistance provided by the Claimant was sufficient to earn a fee" is wrong for the reasons given at [44] above.

    ii) The criticism of the Judge's statement at Judgment, [124] that because the transaction required little work overall, little was required of Exotix is misplaced for the reasons I have set out at [47]-[48] above.

    iii) I have rejected the argument that the "real world effect" required by the words "help place the Investment" in clause 1.1(e) had to be on the conduct of Orion and not on Blyvoor at [45] above.

Ground 3

51. Ground 3 challenges what is accepted to be the Judge's evaluative conclusion that the services provided by Exotix achieved the "real world effect" which the Judge held that the words "help place the Investment" required. This requires Blyvoor to show that no reasonable judge could have reached the same conclusion as the Judge, or as it is put by Lord Reed in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [67], that the Judge's conclusion "cannot reasonably be explained or justified".

52. In this case, the Judge set out clear and reasonable explanations for his decision at Judgment, [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 [Blyvoor] 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."

53. The three pieces of work which the Judge referred to had been set out in greater detail earlier in the Judgment:

    i) Orion's funding proposal included a "gold offtake agreement" which would entitle it to purchase gold produced by the Mine at a favourable price, being "the lowest market price that had prevailed in an '8 day quotation period' either before or after the purchase date", or in the alternative at a 1.5% discount to market price ([41]). On 4 April 2018, Blyvoor had asked Exotix for help in understanding the 8-day quotation period, which Exotix provided ([46]-[47]). The Judge found that Exotix provided "meaningful and helpful input in an area in which Blyvoor's own experience, and that of Legacy Hill, were lacking" ([47]).

    ii) At [53], the Judge found that Mr Tyler of Exotix had provided written comments on the Orion term-sheet which were reflected in the mark-up sent back to Orion.

    iii) At [54], the Judge found that Exotix had carried out modelling before the term sheet was signed which evaluated Orion's offer (which was linked to the future price of gold) by reference to expectations as to future gold prices, including revisiting its earlier calculations by reference to a 4-day quotation period.

54. Those findings provide a sufficient basis for the Judge's conclusion that the individual contribution of Exotix to the joint endeavour had a "real world effect" on the obtaining finance from Orion.

Conclusion

55. For those reasons, I would dismiss the appeal.

Butcher LJ

56. I agree.

Miles LJ

57. I also agree.