Neutral Citation Number: [2023] EWHC 1465 (Comm)

Claim No. CL-2022-000106

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Date: 16/06/23

Before :

John Kimbell KC
(sitting as a Deputy High Court Judge)

- -

Between :

ASTRA ASSET MANAGEMENT UK LIMITED	**Claimant/ Applicant**
- and –	
ODIN AUTOMOTIVE S.à.r.l	**Defendant/ Respondent**

- -

George Spalton KC (instructed by **DLA Piper UK LLP**) for the **Claimant/Applicant**
Nehali Shah (instructed by **Herbert Smith Freehills LLP**) for the **Defendant/Respondent**

Hearing date: 11 May 2023

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30 am on Friday 16 June by circulation to the parties or their representatives by email and by release to the National Archives

John Kimbell KC sitting as a Deputy High Court Judge:

Introduction

1. This is an application for summary judgment under CPR Part 24. The applicant is the Claimant ('**Astra**'). Astra seeks judgment on the entirety of its claim against the Defendant (**'Odin**').

2. Astra is a London-based credit and investment manager. One of the services it offers is to arrange credit facilities for clients with third party lenders.

3. Odin (now called B-ON) is a Luxembourg based company which operates in the electrically powered vehicle sector. The Chief Executive Officer of Odin is Stefan Krause.

4. Astra claims two sums said to be due under a Mandate Agreement with Odin dated 3 December 2021 ('**the Mandate Agreement**'). The first sum claimed is US$2 million said to be due under clause 5.1 of the Mandate Agreement. The second sum is an indemnity for costs and expenses in the sum of £219,830.56 under clause 8.1 of the Mandate Agreement. Odin disputes liability under both clauses.

5. Astra was represented on the application by George Spalton KC and Odin was represented by Nehali Shah. Both submitted very helpful skeleton arguments. The application was heard in a day.

Factual Background

6. In late 2021, Odin was seeking to acquire StreetScooter GmbH (and three associated companies) ('**the Streetscooter Business'**) from Deutsche Post by means of a share purchase agreement ('**the SPA'**). Odin needed to raise funds for this purchase.

7. To assist them with the StreetScooter acquisition, Odin appointed the international law firm Fried, Frank, Harris, Shriver & Jacobson LLP ('**Fried Frank**') in September 2021 and KingsRock Advisers LLC ('**KingsRock**'). KingsRock is a large international firm offering specialist corporate advisory services. KingsRock's founder and manging partner is Håkan Wohlin ('**Mr Wohlin'**).

The Mandate Agreement

8. The Mandate Agreement stated its purpose and function as follows:

> ***"USD 20 million term facility*** **(the "Facility")**
>
> We, Astra Asset Management UK Limited (the "**Arranger**") are pleased to set out in this letter, the terms and conditions on which we are willing to use our best efforts to arrange the proposed Facility (the "**Transaction**").
>
> Nothing in this letter constitutes a commitment by the Arranger, nor any of their respective Affiliates to provide any financing"

9. The Facility Documents which were to constitute the Facility were defined as follows (with emphasis added):

> **"Facility Documents**" means a facility/ies agreement and related documentation in form and substance satisfactory to the Arranger.

10. Astra emphasised at various points in its submissions that it had only undertaken in the Mandate Agreement to use its best efforts to arrange a Facility satisfactory to itself as the Arranger. The Facility offered would of course have to be procured from a lender by Astra. It was therefore envisaged that Astra and the proposed lender would agree terms before they were offered to Odin by Astra.

11. Clause 2 set out a number of conditions which needed to be satisfied. These included:

> "(d) the preparation, execution and delivery of the Facility Documents by no later than 31 December 2021 or any other date agreed between [Odin] and [Astra]"
>
> and
>
> "(g) completion of legal, regulatory and financial, due diligence in respect of [Odin] and the Group, the results being in all respects satisfactory to [Astra]".

12. Clause 2.2 of the Mandate Agreement provides as follows:

> "Subject to the conditions set out in this letter and without any commitment to underwrite any part of the Facility, the Arranger (whether itself or through an Affiliate) intends to hold USD 20 million in relation to the Facility ("Loan Facility Amount"). The terms of the Facility include but are not limited to the following:
>
> (a) **Upfront Fee**: A non-refundable USD 400,000 fee to be paid to the Arranger upon execution of this document. The Arranger shall retain the fee as liquidated damages to the Arranger for its losses and damages related to the failure of the Facility to close. Company and Arranger acknowledge and agree that such losses and damages are difficult, if not impossible, to ascertain and that the amount of the fee constitutes a reasonable estimate thereof
>
> (b) **Interest**: The interest rate will be 18% per annum on the Loan Facility Amount paid quarterly in arrears on each interest payment date as defined in the Facility
>
> (c) **Termination Date**: 18 months from the date of draw of the Facility
>
> (d) **Equity Participation**: As part of the Facility, an entity designated by the Arranger will be issued common equity shares in Odin Automotive S.A.R.L. The percentage ownership of common equity shares issued shall be calculated as follows:
>
> The product of (a) The Loan Facility Amount divided by the valuation of the Company used by external equity investors and (b) 40.00%
>
> Provided however, such shares are to be issued corresponding to a minimum external equity funding round of USD 55.0 million and for the purposes of the valuation of the Company to be used in the above formula the minimum valuation for the funding round will be used to the extent there are different valuations"

Thus, clause 2.2 (d) makes clear Astra was not merely undertaking to arrange finance from a third party lender but was intending (though an affiliated company of its choosing) to take a stake in Odin.

13. Clause 4 contained a series of undertaking by Odin as follows:

> "In consideration of us incurring costs in carrying out due diligence investigations in connection with the proposed Transaction, the Company undertakes that during the period from the date of this letter until 5.00 pm (London) on the date falling on the 60th day thereafter (the "**Exclusivity Period**") it will not:
>
> a. solicit, initiate or encourage the submission of proposals or offers from any person (other than us and our Affiliates) in relation to (a) the financing associated with the purchase of the whole or any part of the shares or assets or business of the Target Group; or (b) the financing associated with the operational or capital expenditure in relation to the Borrow or the Target Group; or (c) any similar transaction to any of the above ("**Alternative Transaction(s)**");
>
> b. enter into or participate in any discussions or negotiations or otherwise communicate with any person (other than us and our persons acting on our behalf) in relation to any Alternative Transaction;"

14. The Exclusivity Period, as defined, therefore started on 3 December 2021 and ended on 2 February 2022.

15. Clause 5.1 provided for a further payment in the following terms (with emphasis added):

> **"Fees, Costs and Expenses**
>
> The Company acknowledges that we will incur significant costs, fees and expenses in reliance on the undertakings made by it in this letter and in particular paragraph 4. Accordingly, if the Company or any of its Representatives breaches any of those undertakings or fails to close the transaction for any reason, the Company will (without prejudice to any other rights or remedies which we may have) immediately on demand by us, pay us an amount equal to USD 2 million (2,000,000) together with any other external costs and expenses (together with any VAT on them) which have been incurred by us in connection with your investigation, evaluation and negotiation of the Transaction (including any costs, fees, disbursements or expenses incurred prior to the signature of this letter (including VAT). Such amount will be the liquidated damages for the Arranger's losses and damages related to the failure to close.

> The Company acknowledges and agrees that such losses and damages are difficult, if not impossible, to ascertain and that such amount constitutes a reasonable estimate thereof."

16. Clause 8.1 provided for an indemnity as follows:

> "(a) Whether or not the Facility Documents are signed, the Company shall within three Business Days of demand indemnify each Indemnified Person against any cost, expense, loss or liability (including without limitation legal fees) incurred by or awarded against that Indemnified Person in each case arising out of or in connection with any action, claim, investigation or proceeding commenced or threatened (including, without limitation, any action, claim, investigation or proceeding to preserve or enforce rights) in relation to:
>
> (i) the use of the proceeds of the Facility/ies;
>
> (ii) any Mandate Document or any Facility Document; and/or
>
> (iii) the arranging of the Facility/ies.
>
> (b) For the purposes of this paragraph **Error! Reference source not found.**:

> "**Indemnified Person**" for the purposes of clause 8.1 was defined as Astra or "any of its Affiliates and each of their (or their respective Affiliates') respective directors, officers, employees and agents".

17. Given that the terms of the Mandate Agreement were agreed on 3 December and required Astra to arrange a potential US$20 million facility from a third party lender by 31 December 2021, Astra found itself under some time pressure. I have not seen any evidence of what was done in the period 3 – 21 December 2022. However, at 19.05 on 22 December 2022, a telephone conference took place involving representatives of Astra and Odin to discuss where they stood. Mr Wohlin also attended as did Mr Joywin Mathew of DLA Piper UK LLP ('**DLA**'). DLA was responsible for preparing the Facility Documents.

18. A transcript of the conference was in evidence. It is clear from the transcript that the SPA for purchase of the Streetscooter Business was well advanced and that the terms of a potential Facility arranged by Astra had already been the subject of detailed discussion. A new investor had also been found by Odin, Sparta Global Opportunities Master Fund LP ('**Sparta**').

19. Mr Krause said this in the course of the conference call about and Sparta's and Odin's attitude to the loan facility proposed by Astra:

> "Sparta never had an issue with the loan … and at the end of the day what makes it work for us as a company is that … this is cheaper than getting the same amount of money as equity. That's why we're willing to do this transaction, we're not financially irrational people that want to waste money, right. We're doing this in a conscious manner".

20. There was a further conference call later that evening. In the later call, it appears that although detailed terms had been shared with Odin, Mr Krause was keen to emphasise that Odin had not yet agreed the terms of any loan facility:

> "I haven't signed anything okay. I signed an agreement with you that I pay you a break fee if I don't sign the contract that's all I have negotiated okay…. we need to make a decision whether we accept your terms".

The comment demonstrates that it was Mr Krause's understanding that under the Mandate Agreement it was for Astra to propose the terms of a facility and for Odin to decide whether or not to accept them but if Odin decided not to sign, then a break fee was payable. It was decided in the end that Mr Krause would go back to his investors to discuss the facility terms then under discussion and speak to Mr Mathur of Astra at 11 a.m. on 23 December 2021.

21. I have not seen any evidence of what was discussed on 23 December 2021 but at 04.23 on 24 December 2021, Mr Mathew of DLA sent to Odin and its advisers an "execution version" of a loan facility proposed by Astra to Odin pursuant to the Mandate Agreement. This did not prompt any protest or surprise from Odin.

22. After a short break in communications for Christmas, Mr Wohlin sent an email on 27 December 2021 in which he expressed the view that there was still some "clean up work" for Fried Frank and DLA to do on the draft facility agreement sent by Astra on Christmas Eve. He also commented that an agreement on financial covenants was still outstanding. Nevertheless, Mr Wohlin also asked on Odin's behalf when the money might be available, if Odin accepted the Facility. Further emails were exchanged between the parties on 28 December 2021. Mr Krause informed Astra that they need to address some issues raised by Mr Lambert in relation to the financial covenants.

23. At midnight on 29 December 2021, DLA sent a revised draft of the proposed facility. This draft incorporated a number of changes proposed by Astra including changes to the definition of Financial Covenants Event as requested by Mr Jerome of Fried Frank in an email sent at 7.53 pm on 27 December 2021. The email to which the draft Facility Documents was sent said that it was still to be subject to review by Astra itself.

24. It was recognised that the 29 December 2021 draft was not quite a final ready-to-be-signed draft because Mr Brougher had noted in the afternoon of 29 December that a requested change in relation to a share pledge had not been made. Mr Brougher also attempted to call Mr Vohra of Astra later the same day to discuss any "open points" in order to "close them out".

25. At 16.18 Mr Wohlin sent a message to Astra thanking them for their work on Project Odin:

> "A short note of sincere and deep appreciation from me personally for all the work you have put in across your team, around the clock, delivering on time , using your best in every one of you, always with a positive attitude, to provide the financing for Project Odin as outlined in the executed Term Sheet between you and Odin"

26. There were no further discussions on 29 December 2021.

27. Mr Krause sent a message in the late afternoon on 31 December 2021 to Mr Mathur of Astra. In this message he revealed that Odin had obtained sufficient funds from other sources to complete the purchase of the Streetscooter Business. Nevertheless, Mr Krause did not regard the facility proposed by Astra as dead. The message read (with emphasis added):

> "Dear Anish
>
> Thank you again for being ready yesterday to back us within a day's notice. Luckily the Neapco funds were found by Citi and we now should be in good shape to close the transaction on Monday.
>
> I appreciate the predicament you are in with respect to having issued the note but without an asset against it. So, in response to your request for comfort on us signing the Facility Agreement and closing our transaction with Astra in January, I would like you to know that I have full intention to get you in to our deal.
>
> Yes we will have new shareholders now of course. And while that may require some selling on our part, I see no reason why we could not get there. They all already know about the terms. And this would mean us being able to sign the facility agreement before the end of next week."

This message shows (a) that Mr Krause was sufficiently happy with the terms of the facility proposed by Astra on 29 December 2021 that he wanted to be able to draw down on it with a day's notice and (b) even though another source of funds had been found he expected Odin to sign the Facility Documents within a week. That is consistent with the tone and content of Mr Wohlin's message to Astra sent at 16.18 on 29 December 2021.

28. In an email sent on 31 December 2022, Mr Mathur forwarded Mr Krause's optimistic e-mail to the rest of the Astra team and said this:

> "Stefan has confirmed to me several times verbally along with Hakan that he has all the intentions for getting us in the deal. He has also confirmed categorically several times that in the unlikely event he is not able to he will promptly pay us the break fee."

29. The Streetscooter SPA completed on 3 January 2022.

30. There are no further communications between Astra and Odin until 15 January 2022. On that day, Astra indicated that they were ready to proceed with the signing of the Facility Documents. Mr Krause responded by saying:

> "Maybe I am not getting it. We are discussing a financing agreement that we haven't signed yet? Hakan asked for different terms so we can get my board on board."

31. On 18 January 2022, Mr Krause said in an email that "the deal as it was progressed has not found acceptance" and that Odin needed "a different structure".

32. On 20 January 2022, Astra responded as follows:

> "Thank you for your email. We would be happy, in principle, to explore alternative financing terms in due course; however, regrettably, it is now clear that Odin are unwilling to progress with the original terms of our proposed transaction as contemplated in the Mandate Letter. On the basis that the transaction under the Mandate Letter cannot close as envisaged, we would like to request you for the amounts as set out in Cl 5. of the Mandate Letter to be paid to us.
>
> The amount payable is USD 2 million plus costs on account currently estimated to be GBP 220,000.
>
> Please make payment into the following relevant account as soon as possible and in any event by 4pm on 28 January 2022."

33. Mr Krause did not response to this email.

34. On 31 January 2022, DLA sent a letter before action to Odin in which they demanded, on behalf of Astra, payment of the US$2 million fee under clause 5.1 of the Mandate Agreement and £220,000 in costs under clause 8.

35. Odin rejected the claim on the basis that Astra had failed to provide a facility that satisfied the requirements of the Mandate Agreement and had "unilaterally cancelled any further negotiations".

36. DLA rejected Odin's arguments in a further letter dated 10 February 2022.

These proceedings

37. A claim form was issued by Astra on 4 March 2023 accompanied by a detailed particulars of claim. In addition to the two liquidated claims made in the letter before action, Astra added a claim for breach of the undertaking in clause 4.1 (b) of the Mandate Agreement set out above. Thus, it was alleged that there were two (alternative) triggers for Odin to be liable to pay the US$2 million figure in clause 5.1: (i) the failure to close a proposed facility transaction and (ii) a breach of the clause 4.1 (a) undertaking. In relation to the breach of undertaking allegation, Astra relied on a statement made in a letter to DLA dated 3 February 2022 in which there was reference to Odin having been "in discussion" with another potential arranger during the Exclusivity Period.

38. In their defence, Odin admit that the Mandate Agreement contains the terms and conditions on which Astra agreed to use its best efforts to arrange a USD20 million facility for Odin. However, Odin plead that:

    a. On the proper interpretation of the Mandate Letter, the amounts set out in clause 5.1 are not payable, and Odin is not to be regarded as having failed to close the transaction, if the transaction fails to close due to a

failure by Astra to use its best efforts to arrange the Facility on the terms of the Mandate Letter. Were it otherwise, Astra would be allowed to take advantage of its own wrong (Defence para 15(1)).

b. Astra failed in its best efforts obligation because it placed "undue pressure" on Odin to sign the proposed Facility Agreement (Defence para 21(3) and 37).

c. Astra also failed to use its best effort because the terms of the proposed Facility Agreement offered on 29 December 2021 were "onerous, unusual, and unreasonable and unacceptable to Odin". In particular, Astra's proposed cash cover covenant appeared to Odin to be designed to seek to trigger a default of the facility, rather than to provide reasonable protection to the lender (Defence para. 27 and 37).

d. It was Astra and not Odin who unilaterally broke off discussions of the terms of the potential Facility (Defence paras 33(2) and 37).

e. Odin deny any breach of the undertaking in clause 4.1 (b). All that had happened, according to Odin, is that Sparta (who was aware of the terms of the proposed Facility through its role as investor), had suggested in its consideration as investor of the proposed Facility that it could match Astra's proposal. Odin immediately rejected this suggestion and there were no further discussions about it (Defence para 35(2)).

f. If there had been a breach of the undertaking in clause 4.1 (b), Astra were not entitled to claim the sum of US$2 million it is an unenforceable penalty (Defence para 15(2) and 40(2)).

g. The sums claimed under clause 8.1 have not been properly particularised (Defence para 36(1) and 48(3)).

39. Astra served a Reply on 17 June 2022

The Summary Judgment Application

40. The application notice for this application was filed on 29 July 2022 but this hearing could not be listed until 11 May 2023. The application was supported by two witness statements of Sohail Ali of DLA. The first statement is dated 29 July 2022 and the second dated 10 October 2022. A witness statement by Mr John Corrie, a solicitor at Herbert Smith Freehills, dated 26 September 2022 was served on behalf of Odin.

The relevant legal principles

41. There was no dispute between the parties as to the applicable legal principles. They were summarised by Lewison J (as he then was) in *Easyair Limited v Opal Telecom* [2009] EWHC 339 (Ch) at [15], as approved by the Court of Appeal in *AC Ward & Sons Limited v Catlin (Five) Limited* [2009] EWCA Civ 1098 at [24]:

    a. The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All E.R. 91;

    b. A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

    c. In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;

    d. This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];

    e. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550;

    f. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court

should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3;

g. On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.

42. The overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472; [2003] CP Rep 51 at [9].

43. In addition, Mr Spalton referred me to the following passage in the judgment of Mrs Justice Cockerill in King v Stiefel [2021] EWHC 1045 (Comm), which is also reproduced in para. 24.2.3 in Vol 1 of the White Book 2023:

> "21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that -even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.

> 22. So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up."

Alleged undue pressure

44. I have no doubt that the allegation that Astra put Odin under undue pressure is entirely fanciful has no reasonable prospects of success. Although it has been pleaded in a statement of case signed by the General Counsel of Odin, it is an allegation which is completely inconsistent with the tone and content of communications between the parties which I have set out above.

45. Such time pressure as there was (a) was inherent in the acquisition of the Streetscooter Business from Deutsche Post and (b) affected Astra at least as much as Odin. The Mandate Agreement required Astra to use its best efforts to arrange a US$20 m facility by the end of December 2021. That deadline was no doubt chosen because Odin wanted to be able to have the option to draw on funds in whole or in part to assist with the purchase of the Streetscooter Business. It seems to me highly artificial for Odin to suggest that Astra put Odin under pressure when all that Astra did was to produce a draft facility agreement on 24 December 2021 followed by a further revised draft facility on 29 December 2021 which incorporated changes proposed by Odin and its advisers. Both proposals were produced in accordance with the timetable laid down in the Mandate Agreement. Astra would no doubt have borne in mind that the 31 December 2021 deadline was extendable but only by mutual agreement.

46. The suggestion of undue pressure is inconsistent with Mr Wohlin's warmly worded message to the Astra Team which went out of its way to praise Astra for their hard work "around the clock, delivering on time". Furthermore, there is no suggestion in Mr

Krause's contemporaneous emails and or contributions during either of the telephone conferences that he felt he was being put under undue pressure. Quite the opposite was the case. Mr Krause took time at each stage to assess his options.

47. For those reasons, in my judgment, the allegation that Astra exerted undue pressure falls squarely into the category of a fanciful defence which has no reasonable prospects of success. In fact, on the basis of the contemporaneous exchanges I have seen, I struggle to understand how it was thought appropriate to advance it in the first place.

Unusual or onerous terms

48. I am similarly unconvinced by the defence that Astra might be said to have failed to fulfil its obligation under the Mandate Agreement to use its best efforts to arrange a facility on the basis that the draft agreement proposed on 29 December 2021 contained financial covenants where were onerous, unusual, or unreasonable. I don't consider this to be arguable either as a matter of construction or as a matter of fact for the following reasons.

49. As to the underlying factual allegation:

    a. The draft Facility Agreement presented on 29 December 2021 had been the subject of detailed discussion between Astra on the one hand and the highly experienced international law firm, Fried Frank, Mr Wohlin of KingsRock, and Mr Lambert, of Odin, on the other. At no point was it suggested in any of the communications I have seen between that any of the covenants were "onerous, unusual or unreasonable".

    b. There were three changes proposed by Odin to clause 21.2 in the 24 December draft. These were accepted in full by Astra and incorporated in the 29 December

draft facility agreement. It would make no sense to ask for these changes if even if they were accepted (as they were) the financial covenants remained "onerous, unusual, unreasonable". If that had been what Odin thought, Mr Wohlin and/or Mr Friederich or Mr Lambert would have said so. They did not. On the contrary, Mr Wohlin said on 28 December in an email at 11.36 to Astra (with emphasis added) "You now have Odin's email with what financial covenants they can agree to. So you now have to decide if you can accept these or not. If you can't there is no agreement and if you can, you have an agreed FA (updated with Jerome's comments from Friday)." That is wholly inconsistent with the allegation being advanced now that the draft facility presented on 29 December contained "onerous, unusual or unreasonable terms".

c. Mr Krause did not suggest in any of his communications following receipt of the 29 December draft that the financial covenants were onerous, unusual or unreasonable. On the contrary he said he expected to be able to sell the Facility to the new shareholders: "They all already know about the terms. And this would mean us being able to sign the facility agreement before the end of next week". It is inconceivable that he would have said this if believed (or had been advised) that the financial covenants were onerous, unusual or unreasonable.

d. Even when on 18 January 2022 Mr Krause reveals that the Odin board is not "on board" for the proposed facility he does not say it is because Odin has discovered a serious problem with onerous, unusual or unreasonable financial covenants.

e. The one email which Odin rely on as evidencing a contemporaneous concern is an ambiguous email from Mr Lambert to three Sparta representatives sent on 6 January 2021. It refers to the lack of a clear definition for "projected quarterly costs" and says that a default might be inevitable depending on what elements may be included within it. The point made in this email falls far short of evidenced that the facility proposed contained "unreasonable, onerous or unusual terms". At most it amounts to a suggestion that projected costs needed a tighter or clearer definition.

f. Odin did not put before the court any explanation or evidence as to the type or range of reasonable or standard covenant terms one might usually expect to find in a facility of this sort which could then be compared with the terms actually proposed by Astra. To that extent Odin's case is based on a bare assertion that the financial covenant terms offered on 29 December were unusual, onerous or unreasonable.

50. For those reasons I am not satisfied that there is a realistic factual basis with any degree of conviction for Odin's allegation that the terms offered on 29 December 2021 were unusual, onerous or unreasonable.

51. However, there is a further reason why, in my judgment, Astra is entitled to summary judgement for its claim under clause 5.1. Even if Odin did in fact at some point form the view that the terms offered on 29 December were unacceptable because they were unusual onerous or unreasonable, that is a risk they agreed to take under the terms of the Mandate Agreement. I accept Mr Spalton's submission that Astra's contractual obligation under the Mandate was simply to use its best efforts to produce a facility

which was satisfactory to it as Arranger. The words "in form and substance satisfactory to the Arranger" in the definition of "Facility Documents" are very clear.

52. There is no reason for the Court to strain to read a qualification to those words along the lines that any facility proposed must contain reasonable or usual or non-onerous terms. Whilst Astra had every commercial incentive to put together a facility package which would appeal to Odin, the type and nature of the financial covenants in particular were primarily a matter for Astra and the lender found by it. It was Astra who was going to have to go into the market to get the finance for Odin from a third-party lender. Given that reality it is not at all surprising that Astra should be obliged to do no more than use best efforts to propose terms satisfactory to itself as the Arranger (and the lender). It would then be up to Odin whether to accept the whole package depending no doubt on how easy or hard it had found it to find other sources of funding.

53. I am therefore satisfied that as a matter of construction too, Odin has no defence to the claim for the break fee under clause 5.1 even if it were assumed in its favour as a matter of fact that the Facility, as offered on 29 December, contained some terms which Odin regarded as unusual onerous or unreasonable. The inclusion of such terms would not in my judgment, amount to Astra an arguable breach of its obligation to use best efforts to offer a loan facility on terms acceptable to it.

Designed to fail

54. I am also entirely unpersuaded that the suggestion that the cash cover covenant was "designed to trigger a default" rather than to provide reasonable protection to the lender is anything other than a fanciful suggestion for the following reasons:

a. Astra clearly wanted "in on the deal". Astra or an affiliate was to become an owner of shares in Odin. The idea that Astra would put together a loan facility designed to fail makes no commercial sense.

b. At no stage in any of the communications between Odin and its advisors and Astra, is the suggestion made that the Facility is unacceptable because it is designed or bound to trigger a default.

c. Odin's proposed changes to the financial condition clause which were most relevant to potential default were accepted.

d. The draft Facility Agreement proposed contained an unsurprising hierarchy of obligations including the obligation to submit remedial plans if any of the conditions in clause 21.2 were not met before any default could be declared.

e. Mr Krause was sufficiently happy with the terms offered by Astra that he was prepared to put Astra on one day's notice of draw down and even after alternatively funding was found he said that he expected Odin to sign the Facility Documents offered on 29 December. He would not have expressed himself in that way if he had in fact been advised that the terms appeared to be designed to trigger a default.

f. In any event, the pleaded case is that it "appeared to Odin" that the cash covenant was designed to seek to trigger a default. That is clearly not how it appeared to Astra and it was Astra and the Lender who had to agree terms on which it was prepared to offer a facility to Odin. If those terms were not acceptable to Odin for any reason whatsoever it could walk away (as it in fact did) and seek finance elsewhere.

55. As to the suggestion that Astra cannot "take advantage of its own wrong" by being allowed to walk away from negotiations, I consider that this too does not give rise to an arguable defence. In my judgment, the conditions in clause 5.1 were satisfied by the agreed deadline of 31 December 2021 and it was clearly Odin who decided not to accept the facility for the following reasons:

    a. By 29 December 2021, Astra had arranged a facility on terms that it and the proposed lender was content with.

    b. It had proposed the terms to Odin and Odin had asked for time to sell it to its board which contained representatives of the new shareholder, Sparta.

    c. Mr Krause was happy with the Facility Documentation offered on 29 December and believed it would be executed in the first week of January.

    d. Astra gave Odin the extra time to consider its position but then sought execution on 17 January 2021 of the terms which had been circulated on 29 December 2021.

    e. It is clear that at some point in January Odin decided that it wanted a different structure and did not want to accept the Facility as offered. Odin decided thereby that it did not want to close the transaction within the meaning of clause 5.1.

    f. Odin's reasons for not signing the Facility Documentation tendered are not relevant. The words "fails to close the transaction for any reason" should be given their usual meaning.

    g. Mr Krause was clearly under no illusions about the relationship between the Mandate Agreement and any facility proposed under it. He understood that if

Odin decided not to sign the loan offered by Astra, Odin would have to pay Astra what he himself referred to as a "break fee".

56. Ms Shah accepted in her submissions that if the conditions in the Mandate Agreement were satisfied then she could not invoke the penalty clause jurisdiction as a defence. It does not matter therefore whether the US$2 million figure is in excess of Odin's reliance losses or contains an element loss of profit or not.

57. In light of the foregoing Astra are entitled to judgment on its claim for US$2 million under clause 5.1 because it used its best efforts to arrange a proposed facility for Odin but Odin chose not to accept it.

58. Given my conclusions as to Odin's liability under clause 5.1, it is not necessary for me to decide whether Odin acted in breach of its undertakings and if so whether the stipulated sum constitutes a penalty or not. However, I would not have given summary judgement in any event on this claim because whether there was a breach of the undertaking was a triable issue of fact which was not suitable for summary determination.

The indemnity claim

59. In my judgment, clause 8.1 contains a pay on demand and quibble later provision. The wording of clause 8.1 creates a right of indemnity in wide terms in favour of Astra, its directors, officers and employees and agents. "Agents" for these purposes includes Astra's solicitors. There is in my judgement no basis for implying a term that before being entitled to be paid, Astra has to disclosure documents or spreadsheets or provided a detailed breakdown. Ms Shah did not draw my attention to any cases in which such a proviso had been read into or implied into such a widely framed indemnity provision.

60. By its Reply (accompanied by a statement of truth signed by Mr Ali of DLA), Astra incorporated a letter dated 17 June 2022 into the statement of case. This stated that "the current figure for all costs and expenses incurred by [Astra] arising out of or in connection with the claim is £219,830.56. This figure claimed is said to be- inclusive of third-party costs including costs fees, translation services and court fees". That in my judgment is sufficiently precise and clear to constitute a demand under clause 8.1 of the Mandate Agreement. The sum claimed is clearly in respect of "cost" and "expense" incurred by Astra "in connection with" a "claim or proceeding" in relation to the Mandate Agreement.

61. The sum demanded, in my judgment, fell due three days later on 20 June 2022.

62. That is not to say that Odin are not entitled to ask for a breakdown. If after paying the sum demanded Odin wishes to instruct a solicitor to conduct an enquiry that is a matter for it. Astra may well be content to provide more information or more details but may well point out that the costs of doing so will itself give rise to a further claim under clause 8.1 being a cost incurred in respect of the Mandate Agreement. This is something which the Court can safely leave the parties to resolve. The only dispute which the court needs to decide on this application is whether as a matter of construction of clause 8.1, Astra is required to provide particulars beyond those provided on 17 June 2022 before being entitled to be paid. In my judgment, it is not required to do so.

Conclusion

63. In summary, Astra is entitled to judgment:

    a. In the sum of US$2 million under clause 5.1

b. In the sum of £219,830.56 under clause 8.1

c. Interest on both sums, to be decided by the court on written submissions if not agreed by the parties.