Claim No: G03CL103

**IN THE COUNTY COURT AT CENTRAL LONDON**  Thomas More Building

Royal Courts of Justice
Strand

London WC2A 2LL

Date: 16th December 2022

**Before**:

**HIS HONOUR JUDGE SAUNDERS**

**Between:**

|  |  |  |
| --- | --- | --- |
|  | **ANGERMANN GODDARD AND LOYD LIMITED (T/A AGL)** | **Claimant** |
|  | **- and -** |  |
|  | **SPINK AND SON LIMITED**  | **Defendant**  |

**Mr George Woodhead of Counsel** (instructed by Sherrards Solicitors) for the **Claimant**

**Ms Katherine Ratcliffe of Counsel (**instructed by Cripps LLP) for the **Defendant**

Hearing dates: 17th and 18th October 2022

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

 **HHJ SAUNDERS:**

 Introduction

1. This is a claim made by the Claimant, an established property management and consultancy company, which alleges that it is entitled to commission from the Defendant, an equally well – established business which sells antiques, under a contract entered into between the parties in or about June 2018.
2. There is no dispute between the parties that they had a long – standing business relationship. These proceedings arose in June 2018 when the Claimant was retained by the Defendant to assist them with (a) extending the lease of its current premises at 69 Southampton Row, Bloomsbury (“69 Southampton Row”) with Bedford Estates and/or (b) sourcing and negotiating lease terms in respect of new premises.
3. This dispute concerns the extent to which the Claimant is entitled to be paid for providing such services.
4. The Claimant’s claim consists of the following:
	1. payment pursuant to the written contract between the Claimant and the Defendant, which is said to be broken down as follows:
		1. The sum of £12,000 (inclusive of VAT) (“the Fixed Sum”); and
		2. A sum based upon 8% of the difference between the Defendant’s landlord’s initial terms and the new lease entered into between the Defendant and its landlord “*whether that be given as rent free or… as a reduction in the initial rent payable*” (“the Commission”). This loss is calculated at £106, 331.76 plus VAT.
	2. In the alternative, the Claimant seeks reasonable compensation from D for the rendering of the work provided by the Claimant on a quantum meruit basis for and/or on behalf of the Defendant and restitution of the sum of £35,000 or such other sum as the court deems fit.
5. The Defendant accepts that the Fixed Sum is payable (as admitted at the outset of the trial) but disputes that its liability should extend to the Commission element sought, as pleaded or at all, or any further sums claimed as set out in paragraph 4(ii) above.
6. At the trial before me, the Claimant was represented by Mr George Woodhead of counsel; the Defendant by Ms Katherine Ratcliffe of counsel. I am indebted to them for their helpful skeleton arguments and submissions made during the trial which were extremely helpful to me in reaching my conclusion. I say this as much of my decision in relation to this case has been determined by matters of law (and the construction of the contract entered into between the parties) rather than the credibility of the personalities involved.
7. That is not to say that certain aspects of the oral evidence remained unimportant as it also assisted me greatly. For the Claimant, I heard from Mr Matthew Bailey, a director, who had conduct of business with the Defendant (together with his surveying assistant, Mr Hassan Abdalla). I heard from three witnesses for the Defendant. They were as follows:
	* 1. Ms Alison Bennett, the former Chief Finance Officer (now retired);
		2. Mr Olivier Stocker, its Chairman,and
		3. Ms Mira Adusei – Poku, its Chief Operating Officer.
8. In addition to this evidence, I had sight of the new Lease in respect of 69 Southampton Row and a comprehensive number of contemporaneous documents.

 The Contract

1. The written contract entered into by the parties has been created by a series of e-mails between Mr Bailey (who principally dealt with this transaction) for the Claimant and Ms Bennett (who principally dealt with the agreement for the Defendant). The emails cover the period from the 5th October 2017 (when there was original contact from Mr Bailey regarding this matter), 27th November 2017 (when Mr Bailey put forward his fee proposal), Ms Bennett’s reply dated 21st June 2018 (seeking a reduction in terms), Mr Bailey’s “reluctant acceptance” of the reduced terms dated 22nd June 2018, culminating in the instructions to act given to the Claimant by Ms Bennett on the basis of these terms, dated 28th June 2018.
2. From a reading of these emails, it can be seen that Mr Bailey’s initial proposal on the 27th November 2017 was as follows:

*“In the event that you decide to agree a reversionary lease on your existing premises thereby extending the existing term, I would look to charge you a fixed fee of £10,000 plus 10% of any discount I am able to negotiate on the landlord’s initial quoting terms whether that be given as rent free or is a reduction in the initial rent payable.*

*Should you decide to relocate from your existing premises, and I find you alternative accommodation, then I would charge you £15,000 plus 10% of any discount I am able* *to negotiate on the landlord’s initial quoting terms whether that be given as rent free or is a reduction in the initial rent payable.*

*If it should be necessary to negotiate a dilapidation settlement, I would again look to charge you 10% of the discount I am able to achieve on the landlords initial cost analysis. “*

1. These fees were quoted as exclusive of VAT and any other disbursements (such as building surveyor’s fees).
2. In her email of the 21st June 2018, Ms Bennett makes a counter – offer reducing the percentage sum to 8% (see the first and second paragraphs of Mr Bailey’s email above). That was “reluctantly” accepted by Mr Bailey in his email of the following day. On the 28th June 2018, Ms Bennett gave instructions to proceed.
3. From this I can discern that, as pleaded in the Claimant’s Particulars of Claim, and admitted in the Defence, the relevant express term of the contract is that the Claimant was entitled to recover:

*“8 % of any discount AGL [the Claimant] was able to negotiate on the Bedford Estate’s [the Defendant’s landlord] initial quoting term, “whether that be given as rent free or… [as] a reduction in the initial rent payable***.**

1. The Defendant’s position is clear. They say that the Claimant is not entitled to the sums claimed (save one notable exception which I refer to below) as they were not the effective cause of the discount provided in the new lease it entered into with its landlord on 17 April 2020. This, they say, was negotiated directly between the Defendant and Bedford Estates, that the Claimant was not involved in such negotiations and, therefore, in accordance with the terms of the contract they were not entitled to be paid. They deny the claim for Commission.

Issues

1. It follows, therefore, that the issues that I must determine, based upon the pleadings, consist of the following:
	1. The proper construction of the contract, including whether terms are to be implied (and, if so, which);
	2. whether by the provision of its services the Claimant fulfilled the trigger event for payment of the Commission under the contract (inter alia whether it was the “effective cause “and whether that is, in any event, relevant);
	3. if not, whether the Claimant is nonetheless entitled to damages or a quantum meruit claim.

Findings of Fact

1. There is a fair measure of agreement between the parties as to the facts of this case. It is uncontroversial that, when they served their Section 25 Notice upon the Defendant, Bedford Estates were seeking a rental income of £860,000 upon 69 Southampton Row.
2. On the 20th June 2019, that offer was reduced, in negotiations, to £795,000.
3. Ultimately, it is further uncontroversial that the Defendant was able to obtain more favourable terms - at £590,000 per annum – following direct discussions between the Defendant’s Mr Stocker and Bedford Estates after a meeting which took place (without the Claimant present) on the 23rd January 2020 (shortly before the national coronavirus lockdown) with the renewed Lease being entered into on the 17th April 2020 (shortly after the start of the lockdown)
4. The contentious area is how the parties reached this position and, following from that, whether the Defendant is liable for anything applying contractual principles apart from the Fixed Sum. The main areas of factual dispute surround the extent of the work that Mr Bailey (upon behalf of the Claimant) did, and the extent of the work had any effect, or any material effect, on the negotiations between the Defendant and Bedford Estates.
5. As an overall view of the witness evidence, I considered that all the witnesses who gave evidence sought to assist the court.
6. Mr Bailey gave his evidence in what I considered a straightforward manner. He was prepared to concede where matters might have been dealt with better by his firm but, overall, I gained the impression that he was a good witness and gave an accurate recollection of events.
7. Likewise, I found Ms Bennett to be credible in her evidence. She gave what I considered a comprehensive and credible account of her understanding of the contractual arrangement between the parties.
8. Mr Stocker is also a man of considerable experience, in my view, and, as Chairman of the Defendant, it was obvious to me that his dealings with these matters were seen by him through the understandable prism of his own entrepreneurial skill and belief in his ability. I formed the impression during his evidence that, perhaps not unexpectedly with so much at stake, he was not patient at this time and anxious to agree terms with Bedford Estates, particularly because of his natural fear of the unknown effect of the national lockdown on the Defendant’s business (which could have been catastrophic).
9. In that sense, his negotiating skills at the meeting on the 23rd January 2020 speak for themselves – he secured a considerable reduction in the proposed rent. What is interesting to me, though, and I put it no higher than the machinations of conducting business and securing the best deal for his company, is that I consider that there was an element of sleight of hand over his dealings with the Claimant at that time in failing to keep them properly informed. I will deal with this later.
10. Ms Adusei – Poku, the Defendant’s Chief Operating Officer, gave relatively brief evidence. Again, I found her to be a credible witness, simply recording what she had done. I did form the view that decisions as to the wider picture were above her pay grade and that she relied heavily upon Mr Stocker for instructions. I recall that she gave evidence that their discussions were not necessarily committed to emails as they worked closely together in the same office – and that is, in my view, entirely plausible.
11. My findings in relation to the evidence of work that Mr Bailey carried out are very much in his favour. Lay clients in any field often do not see the underlying work that goes on in relation to their instructions and - whilst Mr Stocker’s frustration and concern may have been understandable in the context of the lockdown – I am satisfied on balance that, on any view of the evidence, that the Claimant was actively engaged in performing the contract in accordance with their instructions.
12. There are numerous examples of this. Mr Bailey gave entirely credible evidence of the work that he carried out with his trainee, Mr Abdulla. This involved two specific and separate functions. First, in securing acceptable terms on the renewed lease. Secondly, in finding alternative properties that would be suitable for the Defendant’s business.
13. I heard evidence from him, and accept, that he ran numerous database searches using a database which is not available to the general public and which I understand costs the Claimant many thousands of pounds each year in licence fees.
14. I heard evidence (which I accept) that he walked the streets to find alternative premises for the Defendant. As a consequence, he viewed other premises with this in mind – having organised viewings for them.
15. There is evidence that he negotiated with third parties.
16. The email correspondence shows that he advised and assisted the Defendant in some aspects of negotiating lease renewals and the terms to be applied. Mr Bailey’s evidence (and he was right about this) is that he sent approximately 500 emails on the subjects above from the date of his instructions.
17. If there was any doubt about the extent of this work, it can be seen in two specific ways. The first way is demonstrated by the Claimant’s involvement in concurrent negotiations for alternative properties. I have copies of the Heads of Terms negotiated and prepared by the Claimant in respect of three alternative properties. These were at 110 Canon Street, 24 Monument Street, and 1 Great Tower Street. The latter is of significance because Mr Bailey was led to believe that the Defendant would be relocating to these premises.
18. The second way is that it is my view that the work carried out by Mr Bailey helped inform the Defendant (principally Mr Stocker) by providing a negotiating platform upon which basis he could enter directly into negotiations with Bedford Estates.
19. It is clear from the evidence that Mr Stocker used the negotiated terms with the other properties as leverage in his discussions with Bedford Estates. That was a perfectly understandable tactic which a businessman of some experience used to negotiating in the wider business world would use. An example of this can be found in an email sent to Ms Bennett and Mr Bailey by Mr Stocker on the 21st November 2019 – shortly before the final terms were agreed in respect of 69 Southampton Row. It concerns 1 Great Tower Street, but it is informative. Essentially, it shows Mr Stocker’s impatience to conclude matters – he refers to the need to “stop the train” - and to use another property as leverage in reaching an agreement in relation to that property. It does not need a quantum leap of reasoning to suggest that the reverse tactic was being used in relation to Bedford Estates due to its timing.
20. That email is also indicative of what I consider to be another important aspect of this evidence. There is no mention of any negotiations regarding 69 Southampton Row. This gives weight to Mr Bailey’s evidence that he was simply unaware (at this time) that this was being progressed.
21. What is clear is that by the following month, and into January 2020, the Defendant was actively negotiating with Bedford Estates. On the 4th December 2019, Mr Stocker was keeping the pot boiling by contacting Bedford Estates direct. On the 20th December 2019, there was internal communication (from which Mr Bailey was excluded) regarding an offer being made to Bedford Estates. There is evidence of direct contact between the Defendant and Simon Elmer of Bedford Estates on the 18th December 2019 – Mr Bailey is not copied into that correspondence, with a view to meeting on the 23rd January 2020. The meeting takes place on the 23rd January 2020 wthout Mr Bailey’s knowledge.
22. By stark contrast, all the correspondence between the Defendant and the Claimant in this period (a) fails to mention ongoing negotiations with Bedford Estates and (b) appears to concentrate entirely on securing 1 Great Tower Street – where the Claimant was able to agree terms subject to contract. Examples of this include Mr Bailey providing a schedule of evidence dated 17th January 2020 which Ms Adusei -Poku described as “very helpful” but there are other examples where the Defendant wrote to the Claimant in this period, and which demonstrate this including details of floor loadings at these premises
23. It was only the day before the meeting on the 23rd January 2020 when Mr Bailey’s advice was further sought on Bedford Estates. That email (from Ms Adusei – Poku but copied to Ms Bennett) is significant in that it sets out terms that the Defendant were seeking. It reads:

 *“10 years with 5-year break exercised by Spink only*

 *Yr1 12M + Yr6 12M rent free (if break not exercised after 5 years)*

 *Inside the Landlord and Tenant Act 1954*

*Total rent £630,00 per year equating to £47.53 per sq ft (taking lower ground at 60%)”*

1. That significance is enhanced because Mr Bailey (who has been asked to give advice) replies to it less than 2 hours later – suggesting that it be marked “subject to contract” and alternatives in relation to the break clause proposed, replacement rather than bringing up to modern standards of M&E and improvements to repairing and insurance covenants (or their inclusion as they appear to have been omitted from the Defendant’s original draft).
2. The significance is further enhanced as those terms which were put forward to Bedford Estates are identical to the Claimant’s suggested terms. There is an undated document showing this at page B/461 of the trial bundle.
3. Bedford Estate’s “best offer” following that meeting was a rent of £670,000 per annum (which ironically coincides with advice on rent initially given by Mr Bailey). That was subsequently reduced to £590,00 per annum in further negotiations but I think there is considerable merit in the suggestion that unknown factors were at play here – the effects of Brexit and in particular the impact of the coronavirus lockdown. If one is looking at it from Bedford Estate’s point of view at this time, they would not wish to lose an established tenant and so it is realistic to infer that their bargaining position was weakened – which would be, in my view, the most likely reason for the further reduction. It also leads to further support for the argument that they were worried that the Defendant would move to an alternative property.
4. I am concerned that the Claimant was not kept fully informed or at all about the continued direct negotiations with Bedford Estates. The correspondence shows that Mr Bailey was encouraged to believe that the Defendant was to relocate to 1 Great Tower Street, although this was not the case. The Defendant failed to inform Mr Bailey that they were progressing negotiations directly with Bedford Estates through the latter part of 2019 into the early part of 2020, and then only advised him the day before the meeting arranged by Mr Stocker. Indeed, there is evidence at this time of the landlords of 1 Great Tower Street being misled by the Defendant when chased about progress in finalising the lease on that premises. This is found in a series of emails between the 14th and 15th April 2020. It is slightly dishonest and perhaps informs of the Defendant’s thinking and attitude towards these negotiations at that time – because avoiding a response would avoid any involvement of the Claimant. I accept that this of itself is speculative, but it does form part of the evidence which builds up a picture that the Defendant was seeking to keep the Claimant significantly out of the loop – which by its nature may have been seen to keep the Claimant out of the significant fees to which it may have been entitled.
5. In summary, my conclusions in relation to the evidence (which should be read in addition to the above) are as follows:
	1. Although admitted, the Fixed Sum has not been paid by the Defendant to the Claimant and is owed and outstanding (together with interest);
	2. The Claimant carried out a significant amount of work in relation to negotiating a renewed lease in respect of 69 Southampton Row and in respect of three alternative properties.
	3. That, although the negotiated lease with Bedford Estates was conducted by Mr Stocker on behalf of the Defendant, that Mr Bailey did have some input into that final outcome for reasons set out above.
	4. That Mr Stocker used the negotiations with the alternative properties as a bargaining tool in relation to his discussions with Bedford Estates from December 2019.
	5. That the Defendant was not entirely frank in its dealing with the Claimant as matters neared the signing of a renewed lease for reasons set out above.

 The issues

1. The proper construction of the contract
2. These findings of fact are, however, entirely subject to a consideration of the construction of the contract, the material part of which I have set out in paragraphs 9 – 13 above. Despite my findings, I remind myself that the Defendant may not be required to pay the unadmitted sums claimed if they are not entitled to pay under the terms of the contract.
3. This is a loosely worded informal contract between the parties who had a long-standing business relationship. As a result, it is a document (or series of documents forming the agreement) which demand some scrutiny.
4. The recent authority of *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd [2022]* EWHC 2234 (Comm) at [27] is instructive. In that judgment, HHJ Pelling QC sitting as a Judge of the High Court neatly summarises the existing law. In particular, I would refer to the following section of his judgment:

*“27. The principles that apply to the construction of contracts are well known. In summary:*

*(i) The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see Arnold v Britton*[*[2015] UKSC 36*](https://www.bailii.org/uk/cases/UKSC/2015/36.html)[*[2015] AC 1619*](https://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKSC/2015/36.html)*per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;*

*ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 21;*

*iii) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 17;*

*iv) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v Kookmin Bank*[*[2011] UKSC 50*](https://www.bailii.org/uk/cases/UKSC/2011/50.html)[*[2011] 1 WLR 2900*](https://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKSC/2011/50.html)*per Lord Clarke JSC at paragraph 23;*

*v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 18;*

*vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 21 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 19;*

*vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v Capita Insurance Services Limited*[*[2017] UKSC 24*](https://www.bailii.org/uk/cases/UKSC/2017/24.html)*per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent – see Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 13 and National Bank of Kazakhstan v Bank of New York Mellon*[*[2018] EWCA Civ 1390*](https://www.bailii.org/ew/cases/EWCA/Civ/2018/1390.html)*per Hamblen LJ at paragraphs 39-40; and*

*viii) A court should not reject the natural meaning of a provision as incorrect simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11. As Lord Leggatt JSC held at paragraph 108 of his judgment in Triple Point Technology Inc v PTT Public Co Ltd*[*[2021] UKSC 29*](https://www.bailii.org/uk/cases/UKSC/2021/29.html)*;*[*[2021] AC 1148*](https://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKSC/2021/29.html)*the "… modern view is … to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation".*

1. In terms of construction, I agree with Ms Ratcliffe that the most important approach in this case is to consider the language used by the parties as it is the parties that have control over the language they use. It must follow that the parties must have been specifically focusing on the issue covered by the disputed clause or clauses (or section of wording) when agreeing the wording of that provision.

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1. Secondly, where the parties have used unambiguous language, the court must apply it.

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1. Thirdly, a court should not reject the natural meaning of a provision as incorrect simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain. I again remind myself that, despite my findings of fact, they in themselves do not render the Defendant liable.
2. The Claimant says that:
	1. it negotiated “*any*”/a discount on the Defendant’s landlords initially quoted terms by negotiating directly with their landlords (and prospective landlords of other premises) as well as advising and assisting the Defendant with its own negotiations with its landlord. As such, it is said that the approach of the parties to negotiating with Defendant’s landlord was flexible, pragmatic and ambulatory.
	2. It is also claimed that “*negotiating*” in this case is broad enough to include not only actual negotiations between the Claimant and the Defendant’s landlord (that is by the making and receiving of offers) but also advice, preparatory works and assisting the Defendant with its own negotiations with their landlord.
	3. That the Defendant simply would not have been able to confidently and knowledgeably negotiate with its landlord without its professional advice and assistance in the two years leading up to the execution of the new lease in April 2020;
	4. That the Defendant in point of fact entered into a new lease of 69 Southampton Row; such that the conditions for payment (the trigger event) were met and the Defendant is liable to remunerate the Claimant for a sum equal to 8% of such discount from the initially quoted terms achieved by the new lease in the sum of £106,331.76 plus VAT; and on a proper construction of the contract, this is not a case where showing “effective cause” is necessary.
3. These are well made points. However, whilst an examination of the circumstances surrounding the transaction following the guidance in *Trafigura* is relevant and, in this case, following the findings of fact that I have made this must work unfavourably against the Claimant who carried out significant work, I cannot ignore that it is the language used by the parties in their bargain which is the most important consideration. Both parties were experienced in business, and well used to entering contractual relationships. It is not for the court to relieve a party from a bad bargain.
4. The key phrase is “*any discount I* [meaning Mr Bailey] *am able to negotiate”*. There are, in my view, two key words here – “*I*” and “*negotiate*”. The use of the word “*I*” in this context appears to me to mean that the Claimant would only receive a commission in respect of any discount if Mr Bailey was able to negotiate the terms personally. That did not happen – he provided considerable assistance, but it was Mr Stocker who negotiated the final terms. This must be the unambiguous and ordinary meaning of this word.
5. Similarly, in my view, the unambiguous and ordinary meaning of the word “*negotiate*” cannot be expanded to acts which are indirectly carried out by Mr Bailey. I agree with Ms Ratcliffe that such an interpretation would mean that the meaning of the word would be so broad as to stretch it beyond its ordinary meaning if it were to include advice and assistance. The Oxford English definition of “*negotiate*” is “*to communicate or confer (*with*another or others) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to some compromise or settlement.”*
6. Looking at the phrase, “*any discount that I am able to negotiate*” as a whole, then this has the same effect, as if the Claimant’s interpretation was to be accepted then it would widen the scope of work that Mr Bailey could do in order to receive payment, thereby rendering the phrase meaningless.
7. Here, in my view, insufficient care was exercised by the Claimant (and indeed the Defendant) in forming the express terms of the agreement. It is a pity that a formal agreement was not drawn up between the parties setting out the terms. That was, I am sure, due to a combination of continuing work over a few years and trust, but, sadly, in this case, looking at its precise wording, the contract does not enable (at least in its express terms) the Claimant to recover its commission. It is not for the court to rectify a bad bargain and any defect is not consistent with the suggestion that, in its context, it provides business common sense to interpret it in any other way. The parties were fully aware of what they were entering into.
8. Did the Claimant fulfill the trigger requirement and implied terms?
9. This does, of course, leave to one side the question of whether the contract implied terms so as to give business efficacy to the agreement and/or commercial common sense. In the Particulars of Claim, this is set out as follows:

 *“13 b. Spink would not:*

*i. Directly negotiate the terms of the new lease with The Bedford Estate in respect of the premises, or another landlord of alternative premises; or*

*ii. take any action to prevent AGL (the Claimant) earning its commission /remuneration as per the contract, including (without limitation) by excluding AGL form negotiations or the finalizing of new lease terms with the Bedford Estate or another landlord,*

*which would obstruct or hinder AGL from earning its commission under the express terms of the contract, without first having terminated the contract”*

*“c. AGL would be entitled to a commission payment of 8% of any discount negotiated and/or rent-free period under either the (renewal of the lease) or (finding relocated premises) if AGL was the effective cause of any such negotiated discount, or otherwise contributed towards a negotiated discount.*

*d. if both AGL and Spink were the or an effective cause of any negotiated discount and/or rent-free period under (the renewal of the lease) (finding relocated premises), or otherwise contributed to it, then Spink would be liable to under the contract:*

 *i. to pay AGL 8 % of any discount or any rent-free period negotiated with Spink’s existing or new landlord.*

*ii. to pay AGL such commission in addition to the fixed fee as was fair and/or reasonable in all the circumstances with regard to the contribution of AGL had made to the discount negotiated.”*

1. It is, therefore, submitted by the Claimant that the court should imply two terms into the contract – one dealing with “effective cause”, the other, in effect, that the Defendant should not act in a manner such as to deprive the Claimant of its commission. It is said that the Defendant is in breach of these implied terms. I will deal with them in that order.
2. Ms Ratcliffe has taken me to the authority of HHJ Pelling KC in *Winlink Marketing Ltd v The Liverpool Football Club* [2020] EWHC 2271 (Comm) at [53] which, as she correctly identifies, set out a four-stage test for whether an ‘*effective cause*’ term should be implied into a contract. Those four stages are as follows:
	1. First, as a matter of construction is the contract to be construed as including an effective cause requirement. If the answer is yes, then move to question (d).
	2. If the answer is no, it is next necessary to decide whether, again as a matter of construction, the contract includes any provision that would be contradicted by or inconsistent with the implication of an effective cause term. If the answer is yes, then that is the end of the effective cause issue because applying general principles the implication of an effective cause term would be impermissible in those circumstances.
	3. If the answers to (a) and (b) are both negative, the next stage is to decide whether the implication of such a term is necessary in order to give the contract commercial or practical coherence.
	4. Finally, if it is concluded that either as a matter of construction or by necessary implication the contract is subject to an effective cause provision it will be necessary to decide whether as a matter of fact the steps taken by the claimant were or are an effective cause of the transaction.
3. Applying this test to the facts of this case, she says:
	1. The answer to (a) is clearly negative – there is no express effective cause requirement in the Contract.
	2. The answer to (b) is affirmative. An effective cause term, which includes indirect causes, is inconsistent with the wording of “*any discount I am able to negotiate*” for the reasons set out above. No term should therefore be implied.
	3. However, even if the answer to (b) was negative, the answer to (c) should not be affirmative. An effective cause term is not necessary in order to give the Contract commercial or practical coherence. Unlike in many agency cases, AGL were entitled to a fixed fee in any event and only to a commission where they had negotiated it. There is therefore no risk of an unfair outcome here as there may be in other types of agent cases where the only payment to which the agent is entitled is a commission.
4. This proposition requires, in my view, an examination of the relevant law relating to agency – and it is clear (by the very nature of the contract as the Defendant accepts) that this is an agency case.
5. As set out in Bowstead & Reynolds (22nd Ed.) at Article 56 (at §7-013), where an agent is entitled to remuneration upon the happening of a future event, that entitlement does not arise until the event has occurred.
6. Article 57 (Bowstead at §7-027) provides:

“*Subject to any special terms or other indications in the contract of agency, where the remuneration of an agent is a commission on a transaction to be brought about, the agent is not entitled to such commission unless the services performed were the effective cause of the transaction.”* (my underlining)

1. “*Effective cause*” has not been defined by the authorities. It must follow, in my judgment, that each case will depend on the findings of fact that are made and the terms of the contract.
2. Helpful guidance is given by the recent authority of *EMFC Loan Syndications LLP v The Resort Group plc [2021] EWCA 844* and the leading judgment of Carr LJ (in particular between paragraphs 68 to 80 (inclusive)). It must be said that this was decided on a different set of facts – with a much more formal agreement – and that the complex problem that the court had to grapple with involved a contract for the purpose of raising long term finance.
3. That case did decide, however, that where an agency contract did not contain an express effective cause requirement - when it could have done if that is what the parties intended - the trigger event (requiring payment) was not securing or “executing” the final transaction (or being the effective cause of such), but the performance by the agent of the services contracted for.
4. On the facts of that case, the agency contract did not require the agent to bring about execution or to execute; rather, that the agent was to be paid a commission for the delivery of its services. Significantly, (at paragraph 71) a distinction was made between the facts of that case and what was described as a “typical introducer’s agreement” in which an agent was required to introduce a purchaser (as is commonly found in residential estate agency contracts) in order to receive a commission.
5. That is helpful to the Claimant, but it still requires examination, in my view, regarding the test set out in *Winlink*.
6. The contract does not include an effective cause requirement. However, in my view, the contract itself is not inconsistent with the implication of an effective cause term. The Defendant argues that this would be inconsistent with the wording *“any discount I am able to negotiate*” but that seems a very narrow interpretation. The contract clearly envisaged extra work which was interrelated.
7. I disagree with the Defendant’s submission because of a number of conclusions that I reached from the evidence:
	1. Mr Bailey (and his assistant) carried out a substantial amount of work – to include agreeing terms on three alternative properties (to include the property at 1 Great Tower Street where heads of terms were agreed).
	2. They were encouraged to carry out this work – even though the Defendant’s attentions from November 2019 onwards were directed towards 69 Southampton Row.
	3. That work impacted and largely cross – referenced with negotiations for the new lease on 69 Southampton Row.
	4. The Claimant carried out that work – I have found that it was not trivial in nature (it was substantial) and, despite what is submitted by the Defendant, I do not accept that the level of fees chargeable were proportionate to the agreed Fixed Sum (which remains outstanding).
8. More importantly, it gives commercial coherence to the contract – applying *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited [2015] UKSC 72*. If unchecked, the Claimant could have carried out even more substantial work (on the Defendant’s analysis) and not been paid a greater sum than the Fixed Sum. That would be inequitable (*Marks and Spencer plc* at [21]) – as at the time that the contract was formed, if the Defendant’s interpretation was accepted then it would (a) give them complete freedom to run up substantial costs (short of the Claimant negotiating final terms) which, I suspect, would be commercially unworkable so far as the Claimant was concerned and (b) enable the Defendant to do as I have found here, plough their own furrow at the conclusion of the work and relieve themselves of the costs of all the advice, assistance and help that they had received. That leads me to the conclusion that such a term should be implied in this contract.
9. That is not by itself enough. Having established that such a term is implied, it is necessary for the Claimant to prove, as a matter of fact, that the steps they took were the effective cause of the transaction.
10. Whilst EMFC widens the scope of what might be “*effective cause*”, such a term is not defined by the authorities, and depends on what can be discerned from the factual matrix in each case.
11. In this case, the question arises as to whether the Claimant was the “*effective cause*” of the renewed lease. The position is not straightforward. There is no doubt that Mr Stocker concluded the terms with Bedford Estates following the meeting on the 23rd January 2020 and, subsequently, when those terms were improved (in so far as rent is concerned) in April 2020.
12. However, it follows from my findings of fact, as set out above, that the Claimant carried out a substantial amount of work in order that the Defendant could achieve that. It is perhaps crucially significant that (a) whilst negotiations with Bedford Estates were proceeding directly, the Claimant was actively involved in finalising heads of terms in relation to 1 Great Tower Street (and understood that to be proceeding), and (b) on the 22nd January 2020, Mr Bailey was approached by email regarding a meeting to be held the following day with Bedford Estates, resulting in him giving advice on terms to be sought in such negotiations.
13. These matters were intrinsically linked. The agreed head of terms were no doubt being used by Mr Stocker as leverage in his direct negotiations with Bedford Estates. The advice on terms given by Mr Bailey was adopted by the Defendant in the proposal put to Bedford Estates at the meeting. In short, they were using Mr Bailey’s template.
14. It is useful to examine, in my view, the examination of the law relating to “*effective cause*” carried out by Carr LJ in *EMFC* and, in particular, to read the section between paragraphs 56 and 65 of her judgment which I reproduce in full for the purposes of my own reasoning:

*“56. The relevant well-known legal principles of contractual construction are non-
contentious and to be found in a series of recent cases, including Rainy Sky SA v
Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900; Arnold v Britton and others [2015] UKSC 36; [2015] AC 1619 and Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173.*

 *57. In summary only then, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood the language in the contract to mean. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of the natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense, but disregarding evidence of the parties' subjective intention. While commercial common sense is a very important factor to
be taken into account, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed. The meaning of a clause is usually most obviously to be gleaned from the language of the provision. Where the parties have used unambiguous language, the court must apply it; if there are two possible constructions, the court is entitled to prefer the construction consistent with common sense and to reject the other (see Rainy Sky (supra) at [21] and [23]).*

 *58. In Wood v Capita Insurance Services Ltd (supra) at [9] to [11]) Lord Hodge JSC described the court's task as being to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise focused solely on a "parsing of the wording of the particular clause"; the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercialconsequences investigated.*

 *59. The relevant legal principles in relation to the implication of contractual terms are also non-contentious (see Marks & Spencer plc v BNP Paribas Securities Services [2015] UKSC 72; [2016] AC 742 (at [15] to [31]) and the recent overview in Yoo Design Services Limited v Iliv Realty Pte Limited [2021] EWCA Civ 560 (at [47] to [51])). For present purposes, it suffices to repeat that a term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test. Whilst those tests are alternative, it will be a rare (or unusual) case where one, but not the other, is satisfied. The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test.*

 *60. The position of an agent's entitlement to remuneration under commission agreements has received attention both in the textbooks and authorities. Where an agent is entitled to remuneration upon the happening of a future event, that entitlement does not arise until the event has occurred: see Bowstead & Reynolds on Agency (22nd ed) at Article 56 (at 7-013). Article 57 goes on (at 7-027):
"Subject to any special terms or other indications in the
contract of agency, where the remuneration of an agent is a
commission on a transaction to be brought about, the agent is
not entitled to such commission unless the services performed
were the3 effective cause of the transaction."*

 *61. This principle has been illustrated variously in the authorities, most obviously in the residential consumer context. As Lord Neuberger stated in Foxtons v Pelkey Bicknell and another [2008] EWCA Civ 419 ("Foxtons") at [18], an effective cause term will"relatively readily be implied into an estate agency contract". Lord Neuberger drew the relevant strands from the authorities together as follows (at [20]):
i) The term in Article 57 is very readily implied, especially in a residential
consumer context, unless the provisions of the particular contract or the facts
of the particular case negative it;
ii) The main reason for implying the effective cause term is to minimise the risk
of a seller having to pay two commissions;
iii) It is not entirely clear whether the test is "an effective cause" or "the effective
cause;
iv) Whether an agent was the effective cause is a question whose resolution turns
very much on the facts of the particular case;
v) While two commissions are to be avoided, there will be cases where the terms
of the relevant contracts and the facts compel such a result;
vi) Where the term is implied, the burden is on the agent seeking the commission
to establish that he was the effective cause.*

*62. However, as Lord Neuberger expressly recognised in Foxtons (at [18]), the issue of whether or not an effective cause term is to be implied is to be resolved by reference to the normal rules relating to implication of terms. As Viscount Simon stated in Luxor, Eastbourne Ltd and others v Cooper [1941] AC 108 ("Luxor"), the leading case on estate agents' commission, (at 119 to 120):*

 *"There is, I think considerable difficulty, and no little danger, in
trying to formulate general propositions on such a subject, for
contracts with commission agents do not follow a single pattern
and the primary necessity in each instance is to ascertain with
precision what are the express terms of the particular contract
under discussion, and then to consider whether those express
terms necessitate the addition, by implication, of other
terms...in contracts made with commission agents there is no
justification for introducing an implied term unless it is
necessary to do so for the purpose of giving to the contract the
business effect which both parties to it intended it should have."*

*63. Luxor has been considered judicially on many subsequent occasions, including in
Brian Cooper & Company (a firm) v Fairview Estates Investments Ltd [1987] 1
EGLR 18 (a case dealing with commercial property development) and County Home
search Co (Thames and Chilterns) Limited v Cowham [2008] 1 WLR 909 (a residential consumer case). In neither instance was an effective cause term implied,
in the former because it was not necessary to do so, and in the latter because of
inconsistency with the express terms of the contract.*

 *64. Thus the authorities stress that there are commission contracts to which the principle enunciated in Article 57 may not apply, particularly outside the residential estate agency context: see for example Freedman v Union Group plc [1997] EGCS 28; Raja v Rollerby Ltd [1997] 74 P & CR D25; Watersheds Ltd v Simms [2009] EWHC 713 (QB) ("Watersheds") at [23] to [27]; Edmond De Rothschild Securities (UK) Ltd v Exillon Energy plc [2014] EWHC 2165 (Comm) ("Rothschilds") at [25]. At the same time, where an agency is not exclusive and there might be multiple agents working independently to secure a transaction, the implication of an "effective cause"
requirement may be necessary to provide business efficacy: see for example (in the
context of a finance introducer) Silvercloud Finance Solutions Ltd (t/a Broadscope
Finance) v High Street Solicitors Ltd [2020] EWHC 878 (Comm) at [93].*

 *65. The general principle in Article 57 is therefore always subject to any special terms of indications in the Contract (as Article 57 states on its face). Ultimately, everything
will turn on the particular circumstances and terms of each contract by reference to
the application of normal contractual principles of construction and relating to the
implication of terms.”*

1. In view of the widening of the definition in *EMFC*, it is my view, on balance, that the Claimant did become the effective cause of the transaction and, at that point, this trigger event entitled them to call for payment in accordance with the contract.
2. My reasons for that are, I hope, quite straightforward.
3. First, the negotiations conducted by the Claimant in relation to the alternative properties were inextricably linked to the negotiations for a renewed lease. It would be obvious to the objective observer that this involved a substantial amount of work – as I have found as a fact. In my view, the payment of a fixed sum of £10,000 to cover such work would be commercially unworkable as far as the Claimant was concerned.
4. Secondly, the evidence demonstrates that the negotiations for the renewed lease were conducted up until the end by the Claimant (at which point they were sidelined but, for reasons given above, still substantially involved).
5. Thirdly, the implication of such a term must give business efficacy to it in the commercial context otherwise it would lead to a situation whereby the Claimant could be deprived of their commission by a client simply abandoning them at the end of the negotiating process (as appears to have happened here). This is underpinned by the fact that I have found that the Defendant kept the Claimant largely in the dark about such direct negotiations.
6. The Defendant is in breach because they have simply failed to pay to the Claimant what they are entitled to under the implied term in the contract.
7. For completeness, I should deal with two other grounds. First, the suggestion made by the Claimant that the Defendant is in breach of an implied term that it should not (a) directly negotiate and or (b) take any action preventing the Claimant from earning its commission.
8. In this case, according to my findings of fact, the Defendant has done these very same actions – negotiating directly with Bedford Estates and, by a slight sleight of hand, sought to avoid the Claimant its commission by finalising the terms of the renewed lease itself.
9. However, if I needed to go on and determine this point, the Claimant cannot succeed in law, for the following reasons. I accept, as Mr Woodhead suggests, that terms against a principal preventing an agent from earning its commission are often implied into agency contracts. It has been held that a term was to be implied to prevent a vendor from “*playing a dirty trick on the agent… a term which prevents the vendor from acting unreasonably to the possible gain of the vendor and the loss of the agent*” (*Alpha Trading Ltd v Dunnshaw-Patten Ltd* [1981] Q.B. 290 at 306).
10. However, the facts of that case were somewhat different from these. Interestingly, Brandon LJ says, at page 304 of the judgment, *“…a person is free to deal with his property as he chooses, and a person is entitled to carry on his business or give up carrying on his business as he wishes. It would not be right, therefore, to imply in a contract between him and an agent a term that he should not be free to deal with his property as he chooses or should not be able to continue or give up his property as he chooses.” In so doing, he distinguishes that scenario from one where there is an express term of the contract.*
11. In *Debenture Trust Corporation v Ukraine [2018] EWCA Civ 2026,* it was stated that there was no general rule that such an implied term should exist. The authorities suggest that in cases where an agent is promised a commission upon completion of a transaction in which he is instructed, that there is “*no room*” for an implied term that the principal will not act so as to prevent the agent earning his commission.
12. In the House of Lords decision in *Luxor (Eastbourne)Limited v Cooper [1941] AC 108* at page 120, this is made clear by Viscount Simon LC. In discussing whether implied terms of such nature are appropriate, he says *“…there is a third class of case…where, by the express language of the contract, the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about…there seems to be to be no room for the suggested implied term in such a case. The agent is promised a reward in return for an event, and the event has not happened.”*
13. That, in my view, is the end of the matter. House of Lords authority is clear in that such an implied term cannot be incorporated into the contract.
14. Even if I were wrong about that, the evidence that the Defendant obstructed, hindered, or sought to prevent the Claimant’s entitlement to commission is somewhat limited and, in my view, insufficient to show that that was the case. It is, for example, contrary to the active steps that Mr Bailey took to seek to advise the Defendant regarding the meeting on the 23rd January 2020.
15. Quantum Meruit
16. In respect of quantum meruit, it is unnecessary for me to determine this issue in view of the findings that I have made. For the avoidance of doubt, I agree with Ms Ratcliffe in that it is a general rule that quantum meruit should not apply unless there is a contractual relationship between the parties which contains an express provision as to payment.
17. In this contract, payment is demonstrated by two payment provisions, the first relates to payment in respect of advice and assistance apart from negotiating a discount of the lease, the second relates to negotiating a discount on the lease.
18. On the face of it, I see no reason to depart from the general rule. The Claimant succeeds on other grounds set out in this judgment.
19. Damages
20. Having found in favour of the Claimant for the reasons set out above, I have gone on to calculate the damages payable.
21. The Fixed Sum of £10,000 plus VAT is admitted and so (together with interest) is due and payable by the defendant to the Claimant.
22. The Commission due is calculated by reference to the Particulars of Claim which reads:

“*8% of the difference between D’s landlord’s initial terms and the new lease entered into between D and its landlord “whether that be given as rent free or… as a reduction in the initial rent payable” (“the Commission”).*”

1. Bedford Estates initial terms were £860,000 per annum. The rent under the new lease was:
	1. Peppercorn (rent-free) from 24 June 2020 to 23 March 2021, a period of 272 days rent-free.
	2. £295,000 per annum between 24 March 2021 and 23 November 2022, a period of 609 days at half-rent, or 304 days rent-free; and
	3. £590,000 per annum from 24 November 2022 until 16 April 2030 (subject to review on 17 April 2025).
2. By my calculation, the contract provides that the Claimant is entitled to 8% of the difference between £860,000 and £590,000 (£270,000), giving a figure of £21,600.
3. They are also entitled to 8% of the rent-free period which amounts to the difference between £590,000 and £0 over 576 days – that being calculated at 272 days and 304 days respectively. 576 days represents 1.583 years. When multiplied by the rent free discount of £590,000 gives a total of £934,147 – to which 8% should be applied giving a figure of £74,731.76.
4. This gives a combined total of £96,331.76 for the Commission.
5. VAT should be added to these amounts.
6. This provides a total figure of £106,331.76 plus VAT (£127,598.11) in which sum I award damages.

Disposal

1. I invite the parties to agree an order which can be sent to my clerk at monica.kane@judiciary.gov.uk. If there any matters which arise out of my judgment such as the final orders to be made or the question of costs or any other applications, then I invite the parties to contact my clerk when the case can be listed for a disposal hearing.
2. Finally, I wish to place on record my thanks to both Counsel, Mr Woodhead and Ms Ratcliffe for their able advocacy and assistance during the trial.

 **HHJ SAUNDERS**

 **16th December 2022**