Neutral Citation Number: [2022] EWHC 2359 (Comm)

Case No: LM-2022-000148

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

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 20/09/2022

Before :

MR SIMON BIRT KC
(Sitting as a Deputy Judge of the High Court)

- -

Between :

S&B Consultancy Services Limited	**Claimant**
- and –	
1) Robert Bourn **2) Matthew Banks**	**Defendants**

- -
- -

Mr William Harman (instructed by **Cooke, Young & Keidan LLP**) for the **Claimant**
Ms Alison Potter (instructed by **Spring Law Limited**) for the **Defendants**

Hearing date: 6 September 2022

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Tuesday 20th September 2022.

Mr Simon Birt KC:

1. This is an application brought by the Claimant for strike out and/or summary judgment in relation to one of the issues that arises in this claim. The issue in question concerns section 26 of the Financial Services and Markets Act 2000 ("FSMA") and in particular the meaning and scope of section 26(3) and its application to the facts of this case. If the Claimant's application were to succeed, it would not dispose of the claim and there would still need to be a trial to deal with other issues that arise, but such success would (as both parties acknowledge) lead to some savings in terms of time and cost at the trial.

Background and the claim

2. The Claimant is a company in the business of, among other things, introducing businesses to potential funders.

3. The Defendants were general partners of a limited partnership called Agricultural Mortgage Finance Limited Partnership ("Agri") until it was dissolved on or around 3 October 2020.

4. On 28 April 2020, the Claimant and Agri entered into an Introductory Agency Agreement ("the IAA"), under which Agri appointed the Claimant to introduce Prospective Funders (as defined under clause 1.1 of the IAA) to Agri. Clause 4.1 of the IAA provided that the Claimant would be entitled to a fee in certain circumstances, namely if Agri (including any subsidiary or related person or company) entered into a Relevant Contract (also as defined under clause 1.1 of the IAA) or any other commercial agreement with a Prospective Funder introduced by the Claimant. Clause 4.2 provided that the fee would be 2% of the gross facility provided by the Prospective Funder, payable upon completion of the Relevant Contract, and clause 4.3 provided for a further fee in the event of Agri and a Prospective Funder entering into any future commercial agreement directly. I refer to the terms of the IAA in greater detail later in this judgment.

5. Between August and September 2020, the Claimant introduced Agri to a Prospective Funder known as the Arrow Group Global ("the Arrow Group").

6. There was then a period of time over which the potential funding to be provided by the Arrow Group to Agri was discussed and negotiated. The Claimant remained involved, though the extent of its involvement and the proper characterisation of its activity and involvement over this period is a matter of dispute in these proceedings, as further identified below. The Defendants contend that the Claimant's activities over this period amounted to carrying out regulated activities in breach of section 19 of FSMA.

7. The Arrow Group subsequently entered into a Pre-Funding Agreement (the "Pre-Funding Agreement") with a company called Farm Finance Limited ("FFL"). The Defendants are directors of FFL and have an ownership interest in a company which has an ownership interest in FFL. The Arrow Group also entered into an Asset Backed Facility Agreement related to the Pre-Funding Agreement, and a Working Capital Facility Agreement. It is the Claimant's case that these three agreements

(which the parties refer to collectively as the "Facility Agreement") are all Relevant Contracts within the meaning of clauses 4 and 1.1 of the IAA.

8. As a result, the Claimant contends that the Defendants are liable under clause 4.1 of the IAA to pay the Claimant a fee equal to 2% of the gross funding limit under the Facility Agreement and any other Relevant Contracts or other commercial agreements between persons or companies related to Agri and the Arrow Group, and also that the Defendants will be liable to make payment to the Claimant under clause 4.3 in the event that any person or company related to Agri enters into a future commercial agreement with the Arrow Group directly.

9. Following disclosure, on the Claimant's understanding of the agreements that it is now able to contend are Relevant Contracts, it says it is entitled to a fee of at least £2.08 million.

10. The Defendants admit that, as former general partners in Agri, they would be liable for any fees owed by Agri to the Claimant under the IAA. However, they contend that Agri (and therefore the Defendants) are not so liable for a series of reasons. In summary, they say there is no liability because:

    (1) On a proper construction of the IAA, the fee was to be collected from the Prospective Funder, and not from Agri.

    (2) The Claimant is estopped from asserting that the fee is due from Agri (or the Defendants) pursuant to market convention, common assumption or representation to the effect that the fee would be paid by the Arrow Group and not by Agri.

    (3) It is not admitted that FFL was a company related to Agri within the meaning of clauses 4 and 1.1 of the IAA.[1]

    (4) The IAA is unenforceable against Agri or the Defendants under section 26 of FSMA as a result of the Claimant engaging in regulated activity in breach of the general prohibition under section 19 of FSMA. The Claimant was, as is admitted, not authorised by the FCA to carry out any regulated activity.

11. The issue on which the Claimant now seeks summary judgment and/or in respect of which it seeks a strike out is one that arises under the last of these defences. In order to place the issue in context, it is necessary to identify the Claimant's response to the defence under section 26 of FSMA. In summary, the Claimant contends:

    (1) It did not carry on any regulated activity, and thus nothing that it was doing engaged the prohibition under section 19 of FSMA.

    (2) Even if it had been carrying on any of the regulated activities alleged by the Defendants, those activities were not, and could not have been, carried on in performance of the IAA and, as a result, the IAA is not rendered unenforceable under section 26 (more specifically, the IAA does not constitute an "agreement" under section 26(3)).

[1] It is also denied that the Asset-Backed Facility and/or the Working Capital Facility were Relevant Contracts and that persons or companies related to Agri entered into any other Relevant Contracts with the Arrow Group.

(3) Alternatively, if the Claimant is wrong and the IAA is unenforceable under section 26, it invites the Court to permit its enforcement pursuant to section 28(3) of FSMA on the basis that it is just and equitable to do so.

12. The Claimant recognises that, for the purpose of this application, it must accept the Defendants' position as to (1) and (3) above, those matters not being suitable for summary determination, but it says that even if the Defendant's position is accepted in those respects, the Claimant must succeed on (2) as a matter of construction of (i) section 26, and (ii) the IAA. The Claimant contends, therefore, that there is no dispute of fact that needs to be resolved for the purpose of this application, and that a determination of this part of its response to the section 26 defence is suitable for summary determination.

The Application

13. This application was issued on 9 May 2022. By it, the Claimant seeks an order that "paragraphs 43 to 54 of the Defence are struck out and/or summarily dismissed" (those being the paragraphs containing the defence that the IAA is unenforceable under section 26 of FSMA), on the basis that the defence advanced in those paragraphs has no real prospect of success and/or discloses no reasonable grounds for defending the claim.

14. The application notice also included an alternative basis for the application, namely (so the Claimant contended) that those paragraphs of the Defence had been inadequately pleaded. On the day before the hearing of this application, the Defendants served a document entitled "Voluntary Particulars of Defence" expanding upon what had previously been pleaded at paragraph 50 of the Defence concerning the regulated activities that the Defendants allege the Claimant had undertaken. In the light of that document, Mr Harman (who appeared for the Claimant) confirmed at the hearing that he was no longer pursuing the application on this alternative basis, but did so expressly without prejudice to the form and content of those particulars, in particular as to whether those particulars are adequate in terms of a pleaded case. In those circumstances, I say no more here about that alternative basis for the application.

15. For the purpose of its application (and only for that purpose) the Claimant accepts certain matters (recognising that it cannot ask the court to determine them on a summary basis). Most importantly, these include the allegation that the Claimant carried out the regulated activities alleged by the Defendants and that doing so was a breach of the general prohibition under section 19 of FSMA. For obvious reasons, Mr Harman stressed that this was not any sort of admission on the part of the Claimant that it did carry out those activities or that it was in breach of section 19, but rather it was an acceptance that this application would proceed on the basis that the Defendants were right about those matters.

16. There was no dispute between the parties as to the general approach to be taken by a Court on an application for summary judgment, and both parties were content to refer to the oft-cited summary given by Lewison J in *EasyAir Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at paragraph 15:

"i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success*: Swain v Hillman* [2001] 2 All ER 91;

ii) 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].

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*.

iv) 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].

v) 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;

vi) 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] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 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."

17. There is no material difference in the context of this application between the application for strike out under rule 3.4(2) and that for summary judgment under rule 24.2. If a defendant is entitled to summary judgment because the claimant has no realistic prospect of success, then the statement of claim discloses no reasonable grounds for bringing the claim and should be struck out: see *Begum v Maran (UK) Limited* [2021] EWCA Civ 326; [2022] 1 All ER (Comm) 940 at [20]-[21].

18. Also relevant in the context of this application is that it is not normally appropriate to use the strike out power on this ground on assumed facts in an area of developing jurisprudence. Decisions as to novel points of law should be based on actual findings of fact: see *Farah v British Airways* (The Times, 26 January 2000, Court of Appeal) [42]-[43]; *Begum v Maran (UK) Limited* at [23]-[24].

Statutory provisions

19. FSMA section 19 provides as follows:

> "19. The general prohibition
>
> (1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is-
>
> (a) an authorised person; or
>
> (b) an exempt person.
>
> (2) The prohibition is referred to in this Act as the general prohibition."

20. FSMA section 22 defines regulated activity. Insofar as is relevant, section 22 provides as follows:

> "22. Regulated activities
>
> (1) An activity is regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and-
>
> (a) relates to an investment of a specified kind;
>
> […]
>
> (4) "Investment" includes any asset, right or interest.
>
> (5) "Specified" means specified in an order made by the Treasury."

21. There are serious consequences for a breach of the general prohibition, including criminal offence. The issue in this application, however, is only concerned with the effect of such a breach on the agreement between the parties. This is dealt with under section 26 of FSMA, which provides as follows:

> "26. Agreements made by unauthorised persons

> (1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.
>
> (2) The other party is entitled to recover-
>
> (a) any money or other property paid or transferred by him under the agreement; and
>
> (b) compensation for any loss sustained by him as a result of having parted with it.
>
> (3) "Agreement" means an agreement-
>
> (a) made after this section comes into force [i.e. 1 December 2001]; and
>
> (b) the making or performance of which constitutes, or is part of, the regulated activity in question.
>
> (4) This section does not apply if the regulated activity is accepting deposits."

22. FSMA section 28 gives the Court the power to allow an agreement which would otherwise be unenforceable under section 26 to be enforced where it is just and equitable to do so.

23. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO") identifies the specified activities that the Defendants allege were being undertaken by the Claimant under (i) Article 25: Arranging deals in investments, and (ii) Article 53: Advising on investments.

24. The first issue that arises on this application is as to the meaning and scope of section 26. As set out above, section 26(1) states that an agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party. The relevant party must therefore be carrying on a regulated activity and must have made the agreement in question in the course of carrying on that regulated activity.

25. Mr Harman, for the Claimant, suggested that the wording of section 26(1) may have to be read slightly more widely than only where agreements were "made" in the course of carrying on regulated activity, and may also have to accommodate agreements "performed" in the course of regulated activity, suggesting this may be required by the wording of section 26(3). For my part, I do not see that is necessarily the case. Section 26(1) requires the agreement to have been made in the course of carrying on the regulated activity. Section 26(3) deals with what constitutes an agreement for that purpose. It is right that the second part of that sub-section refers to the "making or performance" of the agreement, but there seems no need to read those words back into section 26(1), as opposed to grappling with them in the context of what constitutes an "agreement" for this purpose (under section 26(3)). In other

words, section 26(3) is a definition that limits the operation of section 26(1), and both section 26(1) and 26(3) need to be satisfied on their own terms.

26. In any event, the point taken by the Claimant on this application was not as to whether, if there was "an agreement" within the section, the terms of section 26(1) were fulfilled, but rather that the IAA was not an agreement under section 26(3) (such that section 26(1) could not apply for that reason). The argument turned on the meaning and scope of section 26(3).

27. The words of section 26(3) limit what constitutes an "agreement" for the purposes of section 26 in two ways. The first way – under limb (a) – limits it to those agreements made after section 26 came into force. In other words, it makes it clear that the section is not retroactive (and thus avoiding a doubt which had arisen in relation to a similar provision in the Financial Services Act 1986). This application does not concern limb (a).

28. The second limitation – under limb (b) – limits the operation of section 26 to those agreements whose making or performance constitutes or is part of the regulated activity. In other words, even if an agreement has been made by a person in the course of carrying on a regulated activity, it will not fall within section 26 where its making or its performance did not constitute, and was not part of, the regulated activity in question. Under section 26(3) the starting point may be wider than that under section 26(1) (being "the making or performance" rather than only "made by…"), but the required link ("constitutes or is part of" rather than "in the course of carrying on…") may be narrower.

29. On this application, no argument was made by the Defendants that the "making" of the IAA constituted or was part of the alleged regulated activity. Rather, it was contended that its "performance" constituted or was part of the regulated activity. Before considering that further, I turn now to the IAA.

The IAA and the conduct of the Claimant

30. The IAA is a relatively short agreement. The only recital stated that the Claimant would introduce "Prospective Funders" to Agri in return for payment as specified in the agreement.

31. By clause 2 of the IAA, Agri appointed the Claimant to "Introduce" prospective funders to Agri. That term was defined as follows in clause 1.1:

> "Introduction: the provision to [Agri] of the contact details of an employee at a Prospective Client[2] by the [Claimant], or an intermediary introduced by the [Claimant], who is of sufficient seniority to authorise or recommend the Services [i.e. the provision of funding facilities in accordance with [Agri]'s funding requirements] to [Agri], and "Introduce" and "Introduced" shall be construed accordingly."

32. Clause 4.1 of the IAA provided that the Claimant would be entitled to a fee if Agri (including any subsidiary or related person or company) entered into a Relevant

[2] It seems likely this ought to have read "Prospective Funder" instead of "Prospective Client".

Contract or any other commercial agreement with a prospective funder introduced by the Claimant. Clause 1.1 defined a Relevant Contract as follows:

> "Relevant Contract: a contract for the supply of Services or any other commercial agreement in connection with agricultural lending / providing finance to farmers and landowners, entered into between the Client, including any subsidiary or related person or company, and a [prospective funder] who was Introduced directly or indirectly by the Introducer [i.e. the Claimant]."

33. Clause 4.2 provided that the fee payable in accordance with clause 4.1 would be 2% of the gross facility provided by the prospective funder and clause 4.3 provided that the Claimant would be entitled to payment of 50% of the fee if Agri and the prospective funder entered into a future commercial agreement.

34. There are various other clauses, including clause 3 requiring each party to comply with all laws and regulations relating to its activities under the IAA, clause 5 requiring Agri to act in good faith towards the Claimant and to provide it with information it reasonable requires, and clause 6 imposing obligations of confidentiality on each party in respect of confidential information of the other party.

35. The IAA therefore requires little from the Claimants in terms of express positive obligation to do something. Even the extent of the obligation to effect any introductions is unclear – clause 2.1 provides that the Claimant is appointed "to Introduce Prospective Funders to the Client" i.e. to provide contact details, but how far the Claimant needs to go in that respect (e.g. what efforts it has to make to find one or more Prospective Funders) is not clear on the face of the agreement and was not something that was explored in argument.

36. The clause which contains the real commercial bargain is clause 4 dealing with the fee. That is payable not upon the "Introduction", but only when a Prospective Funder who has been "Introduced" by the Claimant has entered into a "Relevant Contract" or any other commercial agreement with Agri (or a related party).

37. The Claimant, therefore, is incentivised by the terms of the agreement not only to make one or more introductions, but also to ensure that a deal amounting to a Relevant Contract is completed and to assist the parties to reach that deal.

38. The Claimant accepted that, for the purpose of this application, the Defendants' evidence about what the Claimant had done had to be accepted. That included the Claimant's attendance at meetings and on calls, with the Defendants and/or with the Arrow Group, and exchanging various communications with both the Defendants and the Arrow Group, over the course of a number of months towards the end of 2020. The Defendants summarise this as follows:

    (1) Discussing the business of Agri and the proposed funding arrangements with the Arrow Group.

    (2) Negotiating on behalf of Agri and/or the Defendants with the Arrow Group as to the terms of the proposed funding arrangements.

(3) Drafting correspondence for Agri and/or the Defendants to send to the Arrow Group.

(4) Advising Agri and/or the Defendants on the terms of the proposals made and how to proceed with the negotiations.

39. This conduct, says the Defendants, amounted to carrying on specified activities under the RAO, in particular (i) advising (RAO article 53) and/or arranging deals in investments (RAO article 25).

40. The Defendants do not allege that the making of the introduction was a specified activity. Indeed, the Claimant contended and the Defendant accepted in oral argument that effecting an introduction was not, itself, a regulated activity. The argument relates to the conduct identified above which the Defendants contend the Claimants were carrying on which, they say, did amount to regulated activity.

41. It is of course not a matter for determination on this application whether or not the Claimant was carrying out any of that conduct or whether any such conduct amounted to the regulated activities that are alleged. Rather, the application proceeds on the basis that the Defendants are correct in those allegations and that the Claimant was conducting those regulated activities. The issue then is whether the performance of the IAA constituted or was part of those regulated activities.

42. The Claimant recognised that, if it had carried on the regulated activity alleged, its argument meant that it had done so outside the IAA or any other contractual structure and therefore submitted that such additional services (including advice and arranging the deal) would "have been provided gratis". In one sense that may be right, in that whether or not such additional services were provided would not affect whether the fee became due if the requirements of clause 4 of the IAA had been met. However, if the Claimant was conducting those activities, it was doing so (at least for the purposes of this application) in pursuit of its fee and in order to obtain it.

The scope of section 26(3) and its application in this case

43. It was the Claimant's case in its skeleton argument that an activity was a "performance" of an agreement for the purpose of section 26(3) if that activity was required by the terms of the agreement. In other words, if there was an obligation under the agreement to do something, the doing of it was performance of the agreement, but not otherwise.

44. In his oral submissions, Mr Harman accepted that "performance" of an agreement might be wider than that, so as also to encompass conduct that may not have been required by the agreement, but which the contracting party had the "option" under the agreement to carry out. It was not entirely clear what he included within that terminology, but it seems to me that in principle he was right to suggest that "performance" may be wider than the narrow category of conduct that is required by the contract, and may include other conduct that it is envisaged by the agreement might be carried out and/or conduct that, if carried out, is regulated in some way by the terms of the agreement even if the conduct was not expressly required by it.

45. The Defendants, on the other hand, suggested a wider approach to "performance". It was not entirely clear what the boundaries of that might be, but they contended it went wider than doing something that was required, or that was the subject of an express option, under the contract. Ultimately, following exploration in oral argument, it appeared that the Defendants were contending that if a party was doing some act that was in pursuit of a contractual right that it had or that it might in the future have under the contract, even though that act was not required by or expressly envisaged in the terms of the contract, that could constitute "performance" of the contract.

46. In seeking to support their positions, both parties referred to a small number of authorities, as well as to the commentary on section 26 that appears in the *Encyclopedia of Financial Services Law* (Lomnicka and Powell) at paragraph 2A-061. The relevant extract from that commentary explains that, under section 26(3)(b):

> "agreements which are merely incidental to the regulated activity – even those related to the regulated activity such as the preparation of preliminary publicity material (but see s.21 and hence s.30) – are not covered [by section 26]."

47. That confirms the view that section 26(3) is a definition that limits the scope of section 26, excluding certain agreements from it, and suggests (consistent at least with the Claimant's submissions) that agreements that are related to the regulated activity may still not be covered by section 26.

48. At one point, the Defendants sought to rely on what was said in this commentary to suggest that it followed that if an agreement was other than "merely incidental" to the regulated activity, it must fall within section 26(3). That does not seem to me to follow, or to be what the authors of the commentary intended. Rather, they were describing agreements that would not be covered by the section, but not seeking to replace the words of the section itself or to identify a definitive test in relation to it. In any event, it is the words of section 26(3) themselves which need to be interpreted and understood.

49. Some time was spent by the parties on authorities. However, both counsel ultimately acknowledged that none of the cases dealt with the point in issue, or gave any view upon the scope of "performance" in section 26(3). They acknowledged there was limited assistance to be gained from them, though each urged that the cases were consistent with their client's position.

50. Both parties referred to *Watersheds Ltd v DaCosta* [2010] Bus LR 1; [2009] EWHC 1299 (QB), a decision of Holroyde J. However, insofar as relevant to section 26 of FSMA, the dispute in that case was about whether the claimant had been undertaking regulated activities, rather than whether those regulated activities were carried out in performance of a particular contract. The judge held that they were not carrying out such activities (see paragraphs 64-72). The terms of engagement of the claimant were considered, but as part of the determination of whether the claimant had been undertaking a regulated activity, not as part of an inquiry as to whether the agreement fell within section 26(3). That question was not expressly addressed (perhaps because, in that case given the terms of the agreement in question, it was thought it would necessarily have followed from the answer to the determination of whether a regulated activity had been undertaken, or because the court (having determined there

was no such regulated activity) did not need to determine it – it is not entirely clear from the judgment).

51. The Defendants relied upon the fact that the judge in *Watersheds* said (at paragraph 69) that, had it not been for a particular part of the guidance in the Perimeter Guidance Manual, he would have been inclined to think that article 25(2) of the RAO did apply to the claimant's activities, but still did not address the issue of whether performance of the agreement constituted or was part of those activities. However, that does not seem to me to take matters further. The judge did not conclude that article 25(2) applied, and in any event also held that article 25(2) would have been excluded by article 27 in that case, such that he would in any event have concluded there was no regulated activity being carried out. That case does not therefore really advance matters on this application.

52. The parties also referred to *Various Angelgate & Baltic House Claimants v Key Manchester Limited and others* [2020] EWHC 3643 (Ch), a decision of HHJ Hodge QC (sitting as a Judge of the High Court). That dealt with an application to amend in order to allege that a property development scheme was an unregulated collective investment scheme under section 235 of FSMA and that the defendant firm of solicitors who had acted in relation to it had acted in breach of the prohibition against carrying on a regulated activity. The judge held that although it was arguable that the development was a collective investment scheme, there was no arguable case that the defendant solicitors were so acting. The judge also (in case he was wrong about that) said that the relief sought under section 26(2) could not in any event be available against the defendant solicitors because the contract with them was not the contract pursuant to which the funds in question had been paid – that was a different contract with the property developers (paragraphs 35 to 37). Again, there was no consideration there of whether or not, if the defendant solicitors had been carrying on a regulated activity, they would have been doing so in performance of their contract of retainer or otherwise.

53. The Defendants also relied upon *Kinled Investments Limited v Zopa Group Limited* [2022] EWHC 1194 (Comm), a decision of HHJ Klein (sitting as a High Court Judge). However, again, this does not address the question that arises in this case. There, the judge said (at paragraph 197) that for the purposes of section 26 of FSMA he did not need to determine whether, as a matter of statutory construction, he should take into account the services set out in the engagement letter or the services that Kinled actually provided and he did not do so. He concluded that regulated activities were being carried out, and then (at paragraph 202) that the engagement letter had been made in the course of Kinled carrying on regulated activities. However, in addressing that latter issue, the judge did not expressly address the scope of "performance" under section 26(3), but rather the question he dealt with was whether or not an engagement letter made before Kinled had provided any services could nonetheless be made "in the course of" its carrying on regulated activities (under section 26(1)), and he concluded (based upon the terms of section 26(3)) that it could. The wording of the engagement letter in *Kinled* was substantially wider than the wording of the IAA in this case (see paragraph 24 of *Kinled*, which includes a summary of the terms as well as the judge's comment that those terms were "not obviously apt to cover the arrangement") and so it is perhaps not surprising that the point that arises here did not expressly arise in that case.

54. The result is that none of these cases are of particular assistance on the point that arises here.

55. Neither of the parties identified any other material that assisted with the interpretation of section 26(3), and no submission was made suggesting that any assistance could be gained from looking at its predecessor provision in the Financial Services Act 1986 or from any other material that would assist with the legislative purpose.

56. In terms of the interpretation of section 26(3), it does not seem to me that the answer is clear cut. As I have already noted above, I would incline to the view that the reference to "performance" in section 26(3) goes beyond acts which are strictly "required" by the agreement, but that the acts in question need in some way to be regulated by the contract in order to constitute "performance" of it. However, I also note that the answer that the Claimant asks the Court to reach is that, even if the Claimant had been carrying out a regulated activity in breach of the general prohibition, and even if the effect of that (and indeed, potentially, the reason for their having so acted) was to ensure that it obtained the fee under the IAA, it is entitled to its fee under the IAA notwithstanding the terms of section 26(3). Whilst not drawing any conclusion about that, it seems to me at least arguable that section 26 was intended to cover such a circumstance.

57. There are competing arguments both ways that go beyond the points sketched out above. As I explain further below, in the circumstances of this case I do not find it appropriate to summarily determine the issue, and accordingly I do not make any ruling on what is encompassed within the term "performance" for the purposes of section 26(3).

Disposal of the application

58. I have considered carefully whether, on this application, I should determine the correct interpretation of section 26(3) and whether I should determine on the facts of this case whether the Defendants have no real prospect of success of showing that section 26 applies. As set out in *Easyair* at paragraph 15(vii) there are circumstances in which it is right, under a part 24 application, to determine points or law and/or construction. However, I have concluded that I should not do so, and that in the circumstances of this application, these are not issues which are suitable for summary determination in this case for the following reasons.

59. First, and the principal reason, is that this is a novel point that arises under section 26(3), that does not appear to have been taken or determined in any previously decided case. As I have already noted, it is not normally appropriate to use powers of summary determination on assumed facts in an area of developing jurisprudence, and decisions as to novel points of law should be based on actual findings of fact: *Farah v British Airways and Begum v Maran (UK) Ltd* (both cited above). (See also in the context of section 26, *Bull v Gain Capital Holdings Inc* [2014] EWHC 539 (Comm), where this was the reason for dismissal of part of the application: see paragraphs 189, 193, 198-210).

60. Second, the investigation at trial of what activities the Claimant undertook, whilst not directly relevant to the question of construction of the IAA (as post-dating it), may nonetheless assist with the extent to which the "Introducing" and the other activities

(insofar as they may be proved at trial) were connected, or otherwise have an impact on the court's assessment of whether or not the Claimants were carrying on any of the alleged regulated activities in a way which would mean they were regulated in some way by the IAA.

61. Given the uncertainty about the scope of the section (and where it is not appropriate to determine the issue about its interpretation on this application), it seems to me not realistic to say, on a summary judgment application, that the Defendants have no real prospect of showing at trial that the performance of the IAA was part of the regulated activities. It may be possible for the Defendants to show that the introduction (although not itself a regulated activity) was sufficiently connected with the regulated activities that it was "part of" them, and/or that the regulated activities (advising and/or arranging deals in investments) were "performance" of the IAA in circumstances where they were undertaken in pursuit of the fee that (following a successful deal) would be due under the IAA. I emphasise that I am not making any determination that either of those arguments would succeed, whether as a matter of fact or of construction (of the statute or of the IAA), but they seem to me to be capable of argument, and it seems to me a realistic proposition that further investigation of the facts at trial is likely to be helpful when considering such an argument.

62. When the Court comes to consider this issue at trial, it may be that some of the documents bear upon it. I note for example that, when emailing the Arrow Group in December 2020 in pursuing payment of the fee it contended was owed, the Claimant started by referring to the fact that both sides had acknowledged the Claimant's "role in introducing and intermediating this deal along the way". In other words, the Claimant was relying on at least some of its conduct beyond the narrow "introduction" in justifying its fee under the IAA. Whilst that document itself is not admissible when it comes to construction of the IAA, if for example it turns out that the parties had always envisaged that part of the services that would be provided in return for the fee included (notwithstanding the narrow express terms of the IAA) some of those alleged to constitute regulated activity, that may have a bearing.

63. Also, third, this is not a case where a summary determination in the Claimant's favour would avoid the need for a trial. There will still be a trial of the other defences (albeit there would be some saving of time and costs), which will include (among other things) grappling with questions of construction of the IAA (albeit different ones that arise on this application). Whilst in this case this may not have been a sufficient factor on its own, in support of the matters already set out above, it seems to me an additional point to be taken into account.

64. As a result, I dismiss the Claimant's application for summary judgment on, and/or strike out of, paragraphs 43 to 54 of the Defence.