Neutral Citation Number: [2021] EWCA Civ 714

Case No: A3/2020/1528

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS, BUSINESS LIST (CHANCERY DIVISION)
His Honour Judge Dight CBE sitting as a High Court Judge
[2019] EWHC 3429 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 May 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE LEWIS

- -

Between :

(1) KANAYA DANSINGANI **(2) SIGLO 21 LIMITED**	**Appellants**
- and -	
CANARA BANK	**Respondent**

- -
- -

Patrick Green QC, **Elizabeth Tremayne** and **Hazel Jackson** (instructed by **Keystone Law LLP**) for the **Appellants**
John Brisby QC and **Alastair Tomson** (instructed by **Penningtons Manches Cooper LLP**) for the **Respondent**

Hearing dates : 5-6 May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 20 May 2021

Lord Justice Arnold:

Introduction

1. This is an appeal from an order of His Honour Judge Dight CBE dated 12 December 2020 granting judgment in favour of Syndicate Bank ("the Bank") against Siglo 21 Ltd ("Siglo") and Kanaya Dansingani in the sum of JPY 306,659,521 (comprising the principal sum of JPY 217,933,928 and accrued interest) for the reasons given by the judge in his judgment of the same date [2019] EWHC 3439 (Ch). The Bank's claim against Siglo was in respect of loans made pursuant to successive facility letters providing that the loans were repayable on demand. Its claim against Mr Dansingani was made under a guarantee of Siglo's present and future liabilities dated 27 May 1993 (a "Guarantee"). The Bank subsequently merged with Canara Bank, which is the Respondent to the appeal.

2. In addition to the claims against Siglo and Mr Dansingani on which it succeeded, the Bank brought a claim against Mr Dansingani's wife Pushpa Dansingani on a guarantee she had given on the same date as her husband (also a "Guarantee") and a claim against both Mr and Mrs Dansingani for possession of their matrimonial home ("the House") pursuant to a mortgage dated 16 December 2008 ("the Mortgage") they had executed in favour of the Bank. The judge dismissed those claims on the grounds that Mrs Dansingani had entered into her Guarantee and the Mortgage as a result of the exercise of undue influence over her by Mr Dansingani and the Bank had failed, having been put on inquiry, to take reasonable steps to satisfy itself that there was no undue influence. The judge also dismissed various counterclaims brought by Siglo and by Mr and Mrs Dansingani against the Bank.

3. The trial lasted 14 days between 29 November 2016 and 31 January 2017. The judgment was provided to the parties in draft on 29 November 2019, some 34 months after the conclusion of the trial.

4. The Appellants appeal on 11 grounds with permission granted by Asplin LJ, but in essence they make two main complaints about the judgment. First, they contend that the inordinate and inexcusable delay in producing the judgment amounts in itself to a serious procedural or other irregularity which renders the decisions against them unjust. Secondly, they contend that, whether as a consequence of the delay or otherwise, the judge failed properly to analyse the evidence when making his findings of fact, rendering those findings unsafe. In particular, they contend that the judge failed to address certain important points they relied upon and that the judge was one-sided in his assessment of the witnesses. Counsel for the Appellants accepted that it was not possible for this Court to substitute its own findings for those of the judge. Accordingly, he submitted that there should be a re-trial of the Bank's claims against the Appellants.

Essential background

5. Although, as will appear, the judge had to consider an extensive factual history in his judgment, the essential background to the claims which are the subject of the appeal can be summarised relatively briefly.

6. Siglo was incorporated in 1991 and carried on the business of importing, exporting and distributing electronic entertainment goods. Its initial practice was to carry out back-to-back trades, buying goods from major electronic suppliers in Japan (such as Sony and Panasonic), for which it had to pay in Japanese yen, and selling the goods in the USA and Europe, being paid mainly in US dollars. Siglo's business model was to pre-sell the goods to its customers before purchasing them, using back-to-back letters of credit provided to Siglo by the customer and by Siglo to its supplier. Thus it only required finance which would have to be funded by banking facilities for the short period of time between the payments under the two letters of credit.

7. At all material times Mr and Mrs Dansingani were directors of, and equal shareholders in, Siglo. Mr Dansingani was the managing director of Siglo. Mrs Dansingani's brother Mohan Buxani, who had been involved with the business since its inception, became the chief executive officer of Siglo and at some point the company secretary. Mr Buxani also lived with Mr and Mrs Dansingani in the House. Although well-educated, Mrs Dansingani took no part in running the business apart from signing documents when requested to do so by her husband.

8. The Bank was (and the Respondent is) an undertaking which is part-owned by the Government of India. The Bank had a London branch authorised and regulated by the Financial Conduct Authority (referred to below as "the Branch" or "London"), which was the only overseas branch of the Bank. The Branch was supervised by the Treasury & International Banking Department in Mumbai (referred to below as "the International Division" or "Mumbai" or "Head Office").

9. In 1993 Siglo became a customer of the Bank. At that stage the only security which the Bank required was (i) a debenture from Siglo, (ii) the Guarantees from Mr and Mrs Dansingani and (iii) a negative pledge by Mr and Mrs Dansingani not to create further charges over the House, which was subject to a first charge in favour of Nationwide Building Society ("Nationwide").

10. Siglo was provided with multi-currency credit facilities during the course of the banking relationship pursuant to a series of facility letters all of which provided for the loans to be repayable on demand. Although Siglo's currency of account for its financial statements was sterling, it opened and operated various foreign currency accounts with the Bank, in particular US dollar current and deposit accounts, which were generally in credit, and a Japanese yen current account, which was generally overdrawn. In calculating Siglo's overall indebtedness to the Bank, these sums were, unsurprisingly, netted off against each other. Curiously, but importantly, the Bank paid Siglo a relatively high rate of interest on its dollar credits, but Siglo paid the Bank a relatively low rate of interest on its yen debits.

11. As explained in more detail below, in about 2003 Siglo ceased to buy goods in yen, but nevertheless it maintained a substantial debit on its yen current account rather than pay that sum off from the credit on its dollar accounts. In the second half of 2008 Siglo got into financial difficulties, partly due to a movement in the exchange rate between the yen and the dollar and partly due to a downturn in the demand for electronic goods. As a result, Siglo exceeded the borrowing limit on its facilities and sought an increase. The Bank sought additional security in the form of a second charge over the House.

12. Following a meeting between representatives of Siglo and of the Bank on 3 December 2008 ("the Meeting"), Mr and Mrs Dansingani executed the Mortgage on 16 December 2008. As explained in detail below, the main issue on the Bank's claims against Siglo and Mr Dansingani was whether, as they alleged but the Bank denied, certain assurances were given to them orally by the Bank's Chairman at the Meeting which the Bank subsequently acted in disregard of.

13. Following the Meeting Siglo's deficit not only continued to exceed the new limit which had been agreed, but rose still further.

14. In February 2009 the Bank failed for a period of about 18 days to honour instructions from Siglo to pay the sum of €194,000 to a Swiss supplier called Technocell AG as part of a back-to-back transaction, a failure which was alleged to have caused Siglo to suffer substantial losses.

15. Eventually the Bank's patience was exhausted, and on 28 July 2011 the Bank demanded repayment of the outstanding sums by Siglo. On 15 August 2011 the Bank made demands on Mr and Mrs Dansingani under the Guarantees. Those demands were not complied with.

16. The Bank brought proceedings against Mr and Mrs Dansingani in early January 2012. Siglo was joined to the proceedings at a later date.

The judgment

17. The judgment runs to 300 paragraphs and 141 pages. On its face, it appears to contain a very careful and detailed consideration of the issues. It may be summarised (with a few interpolated explanations which I shall identify) as follows.

18. The judge began by outlining the various claims before him, and the key issues arising out of those claims, at [1]-[16]. He summarised the case advanced jointly by the Defendants (as opposed to the undue influence case advanced solely by Mrs Dansingani) at [5] in the following terms:

> "The essence of their joint case is that … a meeting took place at the Branch, on 3 December 2008, ('the Meeting') at which Mr Dansingani and Mr Buxani were given assurances by very senior officers of the Bank (including the chairman of the Bank, a Mr Joseph) that the Bank would 'support the Company to the hilt for the long term' if a (second ranking) legal charge were to be executed by Mr & Mrs Dansingani over the House, which assurances then [sic] UK manager of the Bank is alleged to have said could be relied upon 'as binding the Bank'. They were said to be, in effect, representations of open-ended support. It is also alleged that at the Meeting the Bank's officers assured Mr Dansingani and Mr Buxani that they could ignore the terms of any documents produced by the Bank which were inconsistent with the representations which had been given at the Meeting relating to support. It is said that Mr Dansingani and Mr Buxani believed those assurances and passed those assurances on to Mrs Dansingani. Mr & Mrs

> Dansingani allege that they then executed the Mortgage on or about 16 December 2008 in reliance on those assurances, which proved to be untrue because the Bank failed to support Siglo in the way that had been promised, and that therefore the Mortgage should be rescinded. It is also said that the Bank acted unconscionably and unlawfully and that neither the Guarantees nor the Mortgage may be relied on."

19. Having set out the legal principles applicable to the issue of undue influence at [17]-[28], the judge described his approach to the evidence in an important section of the judgment at [29]-[35] which included the following passages:

> "29. The disputes which I have to resolve are, as I mention above, essentially factual and require me to analyse a considerable quantity of documentary and oral evidence. The principal witnesses were in direct conflict on a number of the main factual issues. There was very extensive cross-examination of the witnesses and they were variously challenged as to their honesty, their reliability and their recollection of the relevant events. I had a number of helpful tools to assist me in finding where the truth lay. In preparing this judgment I have re-read the statements of case, the skeleton arguments, the witness statements and each of the very large number of documents to which my attention was drawn during the course of the trial. I also had the very considerable benefit of a daily transcript (in total running to more than 1800 pages) of the testimony of the witnesses and the submissions of counsel which supplemented my detailed manuscript notes of the evidence and arguments.
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> 30. I was reminded of, and respectfully adopt to the necessary degree, the approach to the analysis of oral evidence based on the witnesses' alleged recollection of events by Leggatt J, as he then was, in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) drawn to my attention by [counsel for the Bank] …
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> 31. I think that it is fair to say that [counsel for the Defendants] was less keen than [counsel for the Bank] that I should place much reliance on this reasoning, which reflected his view that the factual case of the Bank was in shreds by the conclusion of the oral testimony of the Bank's witnesses.
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> …
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> 33. Siglo and Mr Dansingani submit that the evidence taken as a whole does not support the Bank's case. They say that at the conclusion of the evidence 'the Bank's case is in ruins'. In particular, it is submitted that the Bank's witnesses did not support the Bank's pleaded case in a number of respects, particularly in relation to the Meeting of 3 December 2008, that the reliance placed on the (date of) creation and status of a

> draft facility letter dated 28 October 2008 was entirely misplaced and undermines the credibility of the Bank's witnesses and that the final versions of what purport to be contemporaneous documents were not created at the dates which they bear and are not of assistance to the Bank. I will deal with each of those submissions in due course as I examine the material which was put before me.
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> …
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> 35. During the course of the trial reference was made to a large number of bundles containing contemporaneous correspondence and other documents, running (on my best estimate) to something like 8,000 pages. That material contains, from both the Bank and the Defendants, an almost continuous running commentary on the events which occurred in relation to Siglo's banking arrangements and its finances. They are written, in the relevant period, by the witnesses who have given evidence in this case. They provide, in my view, not only a useful record of the events as they unfolded but they also reveal the thought processes of the authors of the documents (even if the thought processes are disguised in some cases by the document(s) having been drafted in a deliberately misleading way), and of the negotiations between them and of the agreements which they reached. Like Leggatt J I find that they are a sound source of material against which the oral recollections of the parties can be measured and judged and have proved invaluable to me in making the findings of fact which I set out below, and has led, I am afraid, to extensive (perhaps overly extensive) citation from them. While there are instances in which there is some doubt about the date or provenance or reliance on a particular document nevertheless the overall picture from the documentation is, in my judgment, very clear. I have taken account of all the oral and documentary evidence and the allegations made in the (verified) statements of case. There are very many inconsistencies. However, in the light of all that material, I have been able to make findings of fact on all the key issues as I set out below."

20. From [36] to [55] the judge set out his assessment of the witnesses. The Bank's witnesses were:

    i) Srinivasan Balakrishnan, who was the Deputy General Manager and Chief Executive Officer of the Branch from September 2007 until July 2011 and had retired from the Bank in 2014. The judge's assessment was:

> "37. … The Defendants submit that he was an unreliable witness and have cited in their arguments a number of instances in which they say that Mr Balakrishnan changed his evidence during the course of those three

> days. I have considered each of those examples and have come to the conclusion that Mr Balakrishnan was an honest witness whose recollection of events (particularly when pressed on detail) was not perfect but that did not cause me not to believe him on the central issues in respect of which I have to make findings. …
>
> 38. Notwithstanding the challenges made to his credibility I accept him as a witness of truth whose evidence on key issues was reliable. Where there were direct conflicts between his evidence and that of Mr Dansingani I had no hesitation in preferring the recollection of Mr Balakrishnan."

ii) George Joseph, who was the Chairman and managing director of the Bank from August 2008 to April 2009, when he retired from the Bank. The judge's assessment was:

> "39. … The Defendants assert that he was not a truthful witness. I reject that submission. Initially, in his witness statement Mr Joseph had described his recollection of his visit to London in late 2008, where he met with several customers of the Branch, as 'fairly vague', but in oral evidence he asserted that he had a fairly good, as opposed to what was put to him as a 'very vague', recollection of the Meeting itself with Mr Dansingani and Mr Buxani on 3 December 2008. His oral evidence was more precise and of better quality than his written statements. This has been described by the Defendants as absurd, but I do not find it so. He explained the reason for that in cross-examination. He said that he had a better recollection at trial for two principal reasons: first because he had, since making his statement, been given access to the documents from which to refresh his memory, which had not been available to him at the time that he made his first statement and, secondly, prior to going into the box himself he had been sitting in court listening to the submissions and evidence of others in respect of which he said, convincingly to my mind, 'On account of listening to the proceedings here I could go back, I could replay my memory and I know. I am fairly clear in my mind right now.' …
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> 40. In my judgment Mr Joseph gave convincing oral evidence about the meeting of December 2008 and his role in it. As he said in his witness statement … 'I did not have any involvement or familiarity with individual customers or accounts'. He also made the point that the purpose of meeting with [Mr Dansingani] was not the

> reason for his trip to London and that he had not discussed Siglo's affairs with the International Head Office in Mumbai (he having been based in Bangalore in any event) or with the officers of the Branch before coming to London. He was briefed about the general background of Siglo's affairs by the Branch prior to the meeting but was not provided with all the details of Siglo's banking arrangements. He emphasised that he viewed it as a goodwill meeting, that Siglo's banking arrangements were not in any event within his remit but fell within Mumbai's and it was they, not he, who were authorised to make decisions in respect of it. In answer to questions from [counsel for Mrs Dansingani] he frankly accepted that when he had been briefed 'there was no mention of Mrs Dansingani … [the Branch] only mentioned that there was a matrimonial home on which the bank has stipulated security.' He did not seek to embroider his evidence or cover apparent holes in the Bank's case or build a case against Mrs Dansingani.
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> 41. His evidence taken as a whole was measured, careful and credible. His credibility was not shaken in cross-examination. Where there was a conflict between the Bank's pleading, Mr Joseph's witness statement and his oral recollection I prefer the statement and oral evidence to the pleading and the oral evidence to the statement. His evidence was logical, it fitted well with the other evidence given by the witnesses for the Bank and, most compellingly, was consistent with the contemporaneous documentation."

iii) Gopinath Iyer, who was the Assistant General Manager and Chief Manager of the Branch from September 2007 to July 2011. His line manager was Mr Balakrishnan. He left the Bank on the same day as Mr Balakrishnan. Prior to that, they had worked closely together and between them managed the Siglo accounts. The judge recorded at [42] that there was no serious challenge by the Defendants to Mr Iyer's credibility and that the judge found him to be a reliable witness whose evidence he had no hesitation in accepting.

iv) Bhaskar Hande, who was the General Manager and Chief Executive Officer of the Branch from July 2011 to April 2016. The judge's assessment at [43] was that Mr Hande was a witness of truth whose evidence the judge accepted.

21. The Defendants' witnesses were:

i) Mr Dansingani. The judge's assessment at [45] was:

> "Mr Dansingani was an unsatisfactory witness. His evidence was not reliable in very many respects. On certain highly material issues he did not tell the truth. Insofar as he may have been truthful his evidence was largely not reliable. He was

> plainly prepared in his correspondence with the Branch to say almost anything that he thought might assist him, whether it was accurate or not. He took the same stance in giving evidence to the court. That is not to say that I reject all his evidence. There are issues on which I accept what he told me. In the course of my review of the evidence below I identify where I reject his assertions and where I accept them. However, his credibility (in the sense both of honesty and reliability) was damaged by his frequent attempts to avoid answering the question, particularly where he could not foresee where the questions were leading or what the consequences for his case might be."

The judge gave an example of this. He then gave "[a]nother example of Mr Dansingani failing to be candid under oath" at [46] and "another lie in which Mr Dansingani had been caught out" at [47], stating that "[t]here were many of them to follow, some of which I also set out below".

ii) Mr Buxani. The judge's assessment at [48] was:

> "I formed the conclusion that Mr Buxani was also an unsatisfactory witness. For example, [counsel for the Bank] demonstrated in cross-examination (Day 10) that in January 2010 Mr Buxani was prepared, in concert with Mr Dansingani, to mislead the Branch by telling them untruthfully that Mr Dansingani was unable to communicate with them or him because he was in a remote part of India. He told this lie, whether on his own behalf or on behalf of Mr Dansingani, so as to avoid having to deal immediately with requests from the Bank to bring Siglo's accounts back within their limits. The correspondence between the Branch, Mr Dansingani and Mr Buxani at that point paints a very clear picture and demonstrates that Mr Buxani was prepared to tell lies to the Branch. Moreover, in cross-examination Mr Buxani refused to accept the obvious inferences to be drawn from that correspondence: itself a failure to give frank evidence. It was apparent to me that Mr Buxani tailored his evidence to support his family."

The judge then gave another example "which demonstrates that [Mr Buxani] was prepared to lie to support Mr Dansingani".

iii) Mrs Dansingani. The judge's assessment at [49] was that she was "a much more reliable witness than her husband or brother … it was plain to me that the evidence which she gave which related to herself, her circumstances and the acts which she undertook, as opposed to her evidence which related to the business affairs of her husband and Siglo, was honest and for the most part reliable".

iv) Mrinal Dansingani, who is the younger of the two sons of Mr and Mrs Dansingani. For the reasons explained by the judge at [55], his evidence was "of very limited value".

22. At [56]-[61] the judge considered whether there was a relationship of trust and confidence between Mrs Dansingani and her husband and brother, and found that there was. At [65]-[66] the judge found that the Bank knew this. At [67] the judge noted that the Bank accepted that it was in difficulty in showing that it had taken reasonable steps in relation to the Mortgage, but its position was "more nuanced" in relation to Mrs Dansingani's Guarantee.

23. At [65]-[74] the judge described the early trading history of Siglo and the commencement of its relationship with the Bank. In this context the judge found at [74]:

> "The Bank operated a series of tiers of authorisation for lending to its customers. The Chief Executive Officer of the Branch had a limit on the amount of the facilities which he could authorise above which he had to seek authority from the Local Loans Committee (of which he was a member), and above that authorisation would have to be sought from the International Division of the Bank in Mumbai. There was a system by which the Branch reported to Head Office, which gave instructions, which were then implemented by the Branch. The evidence shows that such was the system which operated in relation to Siglo's accounts."

24. At [75]-[102] the judge considered the evidence concerning the execution of the Guarantees, and found that: (i) Mrs Dansingani had signed her Guarantee because she was asked to do so by her husband and had not read the document or understood what she was signing; (ii) the Bank had taken no proper steps to ensure that Mrs Dansingani understood the risks she was taking; and (iii) the Bank had doubts about the validity of her Guarantee from a relatively early stage, but took no steps to rectify the position.

25. At [103]-[130] the judge recounted the way in which, as Siglo's business grew, the Bank extended increased facilities to Siglo under successive facility letters between 1993 and 2007. In this context the judge made two important findings.

26. First, at [106]:

> "The Branch had a limit on the extent of the facilities which it could extend to Siglo and needed to seek approval, on a regular basis, from the Bank's head office in Mumbai. The Branch therefore provided regular reports to Mumbai, which in turn raised queries from time to time and gave instructions as to the approach which the Branch should take in its dealings with Siglo. Because the parent company of the Bank was subject to the regulatory regime of the State Bank of India it was also required to declare as a non-performing asset any account where the customer exceeded its agreed credit limits for a

> period of 90 consecutive days. If on any particular day the account came back within its limit the Bank treated the period of default as no longer running but would begin to calculate the 90 days afresh from the next occasion on which the account exceeded its limit. It will be seen from the correspondence which I set out below that there is frequent reference to this looming 90 day deadline both by the Bank and Mr Dansingani. The significance of it was that any customer whose account was deemed to be a non-performing asset ran the risk that the Bank would seek to recover the liabilities of that customer and realise any security which it held in respect of that liability. At a relatively early stage in his oral evidence, when being cross-examined by [counsel for the Bank], Mr Dansingani said that he had not become aware of the 90 day rule until after the Mortgage had been granted (ie December 2008): 'they told me only after they took my mortgage'. That was a lie: there are many examples in the correspondence which flatly contradict that evidence. While it did not become an important factor until about May 2008 it is plain that Mr Dansingani and Mr Buxani understood the importance of this deadline from a much earlier stage of the banking relationship between the Branch and Siglo."

27. Secondly, at [123]:

> "From about 2003 Siglo ceased to purchase goods in Japanese Yen, at a time when it had a considerable liability on its overdrawn Yen account with the Bank. At the same time Siglo was holding a considerable credit on its US dollar account. The interest rates paid on the dollar account were higher than the interest rates charged on the Yen account and should, it is said, have therefore operated in Siglo's favour. A deliberate strategic decision had obviously been taken by Siglo, and I find by Mr Dansingani and Mr Buxani, to profit (not improperly) from the difference in the interest rates applicable to the two currencies. That decision carried with it the inherent exchange rate risk which subsequently caused such a problem between Siglo and its bankers. In my judgment there was at this point no other reason to continue to hold a liability in Japanese Yen. Had a decision been made at that point to pay off the Yen liability using the dollar deposits Siglo would ultimately have been in a much better financial position than it subsequently found itself in. The failure to reduce the Yen liability at this stage (or thereafter) caused Siglo very significant financial difficulties which can only properly be attributed to Mr Dansingani and Mr Buxani. Many of the subsequent events flow from this failure."

The judge went on to find at [132] that Mr Dansingani's and Mr Buxani's evidence that they were not aware of the inherent risks in this strategy due to the fluctuation of foreign exchange rates was "simply not credible".

28. At [131]-[150] the judge explained that, between the middle and end of 2008, the financial crisis of that year affected exchange rates, and in particular led to the yen strengthening against the dollar. That had the effect of increasing Siglo's indebtedness to the Bank, because the value of its yen debits increased relative to the value of its dollar credits.

29. By 6 May 2008 Siglo's financial position had started to deteriorate. On that date the Branch notified Mr Dansingani that it had been operating outside its borrowing limit of £500,000 since 7 February 2008, and requested that Siglo reduce the borrowing to that level. Mr Dansingani replied on 12 May 2008 asking for "additional limits" and promising to "bring to normal limits every quarter from now on". This was one of the instances which the judge found (at [135]) showed Mr Dansingani's awareness of the significance of being outside the limit for 90 days. In the event Siglo only brought its accounts within the limit on 5 June 2008, after more than 119 days.

30. In this context the judge found:

> "137. … The Branch had been required by its internal procedures to report the excess up the line to [Mumbai] … On 17 July 2008 Mumbai sanctioned the breach of the facility limits because they viewed it as a 'very special case' but they required the Branch to keep a closer eye on the accounts and not allow it to exceed its facilities for more than 30 days at a time.
>
> 138. The net position on Siglo's account had, however, soon again been in excess of the authorised facilities and the Branch had again to seek sanction for the excess from ... Mumbai … "

31. This led to a series of communications and discussions over the following months between Siglo and the Branch and between the Branch and Mumbai concerning Siglo repeatedly and increasingly exceeding the limit on its facilities.

32. On 20 October 2008 the Branch sent Siglo a draft facility letter signed by Mr Balakrishnan offering to continue to afford Siglo an overdraft limit of £500,000 until 30 June 2009 on the basis of the same items of security as previously, but this was not signed on behalf of Siglo.

33. By 22 October 2008 Siglo had exceeded its limit of £500,000 by £360,675, and the judge found at [142] that the Branch "expressed its concerns that the company was approaching the 90 day buffer limit for breach of facilities at which point it would be compelled to treat the account as a non-performing asset" . A small point which is not mentioned in the judgment at this point, but is recorded in the document to which the judge was referring and is mentioned later in the judgment, is that the account had been overdrawn since 5 August 2008 (meaning that the 90 day period would expire on 5 November 2008).

34. By 24 October 2008 Siglo had exceeded its limit by £494,844, and the Branch asked Siglo to regularise the position immediately. On the same day Mr Dansingani wrote to Mr Balakrishnan referring to the difficulties which Siglo was experiencing due to "currency movements and some delays in receipt of funds", but saying that it had "several payments in the pipeline". He went on:

> "We shall therefore greatly appreciate if you can please increase our temporary limits to £875,000. We shall endeavour to achieve this limit before the 90 days are up.
>
> Being peak business period for us, any additional facilities you can grant us for the next two months will be of great help. We shall be back on original limits by mid-January. …"

35. As the judge noted at [144]:

> "In cross-examination Mr Dansingani untruthfully said that this letter had been suggested to him by Mr Balakrishnan, to send on to Head Office, who told him what points to make. The letter demonstrates clearly, among other things, that Mr Dansingani and Mr Buxani knew full well about the 90 day rule and that it would expire, on that occasion, in the first week of November and that the facilities which they were looking for were short-term only ('mid-January'). The letter recognises the twin problems of currency fluctuations and customers delaying in payment ('delays in receipt of funds'), presumably because of the global recession which was setting in. Mr Dansingani and Mr Buxani were looking for additional support only into the beginning of the following year. It is also important to note that Mr Dansingani added, at the foot of the letter (which I have not quoted), that the directors' net worth was over £1,000,000 …"

As the judge went on to explain at [145], the House was informally valued at this time at about £1 million.

36. On 27 or 28 October 2008 there was a meeting between Mr Balakrishnan and Mr Iyer on behalf of the Branch and Mr Dansingani and Mr Buxani on behalf of Siglo. At [146] the judge quoted a paragraph from Mr Balakrishnan's witness statement which the judge said Mr Balakrishnan had not been specifically cross-examined about, although it was "inferentially challenged", in which Mr Balakrishnan said that "the Defendants had agreed to give a second charge over the Property as collateral to secure the additional limit".

37. On 27 October 2008 the Branch sent Mumbai a report with the reference number 123/08 stating that Siglo had now exceeded its limit by £494,706, requesting that an additional limit of £450,000 (i.e. making a total limit of £950,000 and slightly more than the total of £875,000 requested by Siglo) until 31 March 2009 (i.e. a longer period than Siglo had requested) be approved and repeating much of the content of Mr Dansingani's letter dated 24 October 2008. There is no express reference in the report to a second charge, but the judge stated at [147] that he took a statement that "the company has to execute the necessary documents/letters" as including this.

38. On 28 October 2008 the Branch sent Mumbai another report with the reference number 123-A/08 stating that Siglo had now exceeded its limit by £691,131, and repeating the request made in report 123/08 the day before that an additional limit of £450,000 until 31 March 2009 be approved. This document also stated:

> "Meanwhile , The [sic] company has requested for sanctioning of additional limit of £375,00 immediately in order to meet their orders due to incoming Christmas season as well as to take care of wide fluctuation in the exchange rates. The company has agreed to the second mortgage of their existing property (now under negative lien to us) as collateral to secure the additional temporary limit."

39. The judge found that this report was an accurate record for the following reasons:

> "148. Mr Iyer's evidence, which I accept, was that the note would not have referred to an agreement for the grant of a second charge 'unless such an offer had been made by the Defendants'. The Branch suggested that because of the urgency they might agree to an additional limit of £450,000 against a second charge, although they would tell Siglo that they were only prepared to extend the facility to £375,000, leaving themselves a cushion of £75,000. Mr Balakrishnan told me that he thought it prudent to get sanction for an excess of £450,000 even though Mr Dansingani had only asked for £375,00 because it would provide 'a bit of headroom'.
>
> 149. That the Branch believed that there had been agreement that a second charge would be granted over the House is reinforced by a separate report to the General Manager of the International Division in Mumbai of the same day, bearing reference 159/ID/LDN/SVS, in which it was said that a second charge had been agreed, adding 'The process of mortgage documentation have been already initiated and is under way through our solicitor Penningtons…'"

40. The judge proceeded at [150] to note that Mr Dansingani had denied in his witness statement that he had agreed to a second charge and continued:

> "I do not accept that evidence. It is contrary to all the contemporaneous documentation and conflicts with what was the obvious direction of travel. Crunch time had arrived. … I find that Mr Dansingani and Mr Buxani, knowing full well that they had little choice if they wished to continue to enjoy the support of the Bank, accepted the terms of Mr Balakrishnan's proposal and agreed to offer a second charge over the House so that the Branch could seek authorisation from Head Office for the increase in the limit of the facilities. That is the context in which the meeting with the Chairman of the Bank, considered in detail below, took place."

41. At [151]-[161] the judge considered in some detail the evidence relating to a facility letter dated 28 October 2008 of which there were four different versions in evidence: (i) a draft which is unsigned, but bears a manuscript annotation "no" against a paragraph requiring Siglo to convert the yen liability into sterling in a phased manner by 31 March 2009; (ii) another unsigned draft attached to an email from the Bank to

Mr Dansingani dated 9 December 2008 containing the same paragraph; (iii) another unsigned draft attached to an email from the Bank to Mr Dansingani dated 15 December 2008 which omits that paragraph; and (iv) the version signed by Mr Balakrishnan and by Mr and Mrs Dansingani which has the same text as a third version. Although the fourth version retains the date of 28 October 2008, it is common ground that it was not signed until 15 or 16 December 2008. All four versions state that a second charge will be created over the House.

42. As the judge explained, the Defendants' original case in cross-examination was that this document was only produced on 9 December 2008, or at least not before 6 November 2008. The judge went on:

> "153. For the reasons given below I reject the suggestion that the facility letter of 28 October 2008 was not created until later, even though the Defendants did not ultimately seek a finding as to the date of creation. Although the letter retained the date of 28 October 2008, and its final form was different to the original version, I find that it was not 'backdated' in any nefarious way. I draw no adverse inferences against the Bank on account of the letter retaining its original date despite subsequent revisions and this issue has not, as the Defendants would have me find, caused me to form the view that the Bank's case essentially lacked credibility.
>
> 154. In the course of interim submissions in the course of the trial the position taken by the Defendants on the facility letter was more nuanced than their initial arguments in that it was then suggested that while the letter may have been created around 28 October it was not in circulation at that point and was not the facility letter which the Bank had in mind when dealing with the Dansinganis during the period immediately afterwards, which was really the earlier facility letter of 20 October. However, it seems to me that the Defendants had already spent some considerable time and effort trying to show that the document had been backdated, whereas I find that it had not."

43. In the course of setting out his reasons for this finding, the judge quoted a paragraph from Mr Balakrishnan's second witness statement made on 30 November 2016 (day 2 of the trial) in which Mr Balakrishnan said:

> > "It is also my clear recollection that a copy of the initial [28] October 2008 [facility letter] was sent to Siglo at the end of October. This was important, because Siglo's account had been in excess of the permitted facility under the existing arrangements since early August. By early November there would have been 90 days of exceeding, and the bank would have been required to record Siglo's accounts as a non-performing asset as I explained in my previous statement. By getting sanction for the formal ad hoc limit and recording that in the facility letter which was sent to Siglo we were able to

> prevent that because Siglo's accounts were at the time within the offered overall facility limits (including the ad hoc facility) of £875,000. It is for this reason that there was urgency to get sanction for the extended facility and send out a facility letter before early November, and this is why I can be certain that a copy of the Initial October Facility Letter was sent to Siglo. The London branch confirmed to International Division that the Initial October 2008 Facility Letter had been sent out in its memo of [28 October 2008]."

44. The judge then said at [158]:

> "After he was asked a considerable number of questions about the dates when the facility letter was prepared he said 'Which particular letter was sent to whom at that time, I cannot recollect.' That is, in my judgment, a fair comment at that distance bearing in mind the quantity of correspondence passing between the parties. It seems to me that he cannot know when the letter was sent out but the reasoning contained in the above quoted paragraph is compelling."

45. At [162]-[175] the judge considered what happened between 28 October 2008 and 27 November 2008. In this context the judge made a number of important findings.

46. At [162] the judge found:

> "On 28 October Mr Santhanam had also emailed Mr Dansingani pointing out that the accounts were by then in debit by £1,311,658 (ie £811,658 over the facility of £500,000) and he asked the company to bring the total facility back within £875,000 by 5 November 2008, which would be the expiry of 90 days from the date of the start of the recent breach of the facility limits on 5 August 2008. That email also suggests that there had been discussions between the Branch and the company in which Mr Dansingani had made a commitment to an arrangement by which the total facility would, for the time being at least, not exceed £875,000. The correspondence shows that Mr Dansingani knew full well that the new temporary limit was £875,000. As at 3 November the excess stood at £499,391 and Mr Dansingani wrote to the Branch on 4 November, one day before the expiry of the deadline, to say that the company was expecting to receive about £167,000 by the following day. By 6 November Siglo's overdraft stood at £880,415 and Mr Dansingani, who accepted in cross-examination that he knew that the account was reaching the point at which it would have exceeded the permitted limit by 90 days and would have to reduce the amount by the 90 day point, commented that they were therefore only £5,000 short of the new temporary facility limit of £875,000. In reality, as I mention above, the Branch had authority from head office to tolerate an overdraft which exceeded its limit by £450,000. On 10 November the company

> continued to exceed its limit, with the account standing at £889,755 in debit."

47. At [163] the judge referred to a report by the Branch to Mumbai on 11 November 2008 which referred to Siglo having agreed to execute "fresh documents" prepared by Penningtons, and said that in his view this referred to "the agreement … that the second charge would be granted and which was in the process of being arranged by the Bank's solicitors". I interpolate that it is perhaps open to doubt whether that was what was being referred to in the quoted passage, but an earlier passage stated:

> "… while setting right the documentation, we propose [to] take third party mortgage instead of negative lien on the property which shall be completed through M/s Penningtons solicitors."

48. The judge went on:

> "165. The Branch again reported up the line on [14 November 2008], saying: 'Keeping in mind the long standing relationship and the fact that these are extraordinary times with exchange rates being highly volatile, we had recommended limit of GBP 950,000 up to 31.03.09. We confirm having already requested M/s Penningtons Solicitors to draft the necessary documents of second charge on their property and this will be carried out shortly. We request that the recommended limits may kindly be sanctioned', signed by Mr Balakrishnan.
>
> 166. The arrangements for the second charge were being taken forward by Penningtons who, on 17 November 2008, [wrote] to Nationwide Building Society, the Defendants' first mortgagee, for consent to charge the House in respect of the liabilities of Siglo to the Bank.
>
> 167. On 20 November 2008 Mr Balakrishnan again asked for permission from Mumbai to agree a higher facility on the grounds that Siglo was a 'special case' because the additional ad hoc limit was only for a short period and 'the company has agreed to offer mortgage of property'. …."

I would add that this document also recorded that £112,000 was owed to Nationwide and secured by its first charge over the House and that Siglo had represented that the value of House might be around £1 million (i.e. the equity was around £888,000).

49. By 21 November 2008 Siglo's liability to the Bank had increased to £1.43 million, and Mumbai demanded that the Branch take steps to bring the liability down and to obtain a second charge over the House. The judge found that there was a meeting between Mr Dansingani and Mr Buxani on behalf of Siglo and Mr Balakrishnan and Mr Iyer (and possibly others) on behalf of the Bank on 24 November 2008. He recorded that it was Mr Balakrishnan's evidence in a paragraph of his witness statement that Mr Dansingani "explained that he and the Second Defendant were … prepared to provide a second charge over the Property as security until the temporary facility was repaid". The judge went on:

> "169. … In cross-examination about this meeting it was put to Mr Balakrishnan that Mr Dansingani had not yet agreed to the grant of a second charge. In reply he said that there had been continuous discussions throughout November, adding 'As per this document, there is no commitment, but it does not negate the fact that there were discussions on this. It was an ongoing discussion. It was not firmed up.' He accepted that it was a fair summary to say that the commitment to grant a second mortgage was firmed up at the meeting with the chairman.
>
> 170. Mr Iyer, whose evidence I also accept, said, at paragraph 23 of his witness statement …:
>
> > '…The First Defendant was unwilling to undertake to convert its Yen liability to GBP as required by the Initial October 2008 Facility Letter [ie the letter dated 28 October]. He reiterated the fact that he and the Second Defendant were willing to give a second charge over the Property as security until the ad hoc facility was repaid.'
>
> Standing back, it seems to me that the contemporaneous correspondence and records are a better guide to what happened than Mr Balakrishnan's recollection of the detail of the discussions in the witness box. I refer to a chain of emails below which support the contention that Mr Dansingani had in fact agreed in principle to the grant of a second charge."

50. The judge proceeded to quote from a letter from Mr Dansingani to Mr Balakrishnan dated 25 November 2008 following the meeting the previous day in which Mr Dansingani expressed optimism that there would be a correction in the yen:dollar rate which "could occur very quickly" and from a report by the Branch to Mumbai of the same date stating:

> "… when the company came up with ad hoc limit request of another £375,000 over and above the existing limit quoting current market fluctuation, we took the opportunity and started pressuring the Company simultaneously to offer the second mortgage [redacted]. The Company have agreed to execute the second mortgage documentation against the existing property. Our lawyer M/s Pennningtons have already initiated the process … and the mortgage will be created at the earliest."

51. The judge then referred to a chain of emails on 26 November 2008 relating to the attempt by Penningtons to obtain Nationwide's consent to the second charge and concluded at [175]:

> "Mr Dansingani in turn forwarded this, without comment, on the same day to Mr Buxani and Mrs Dansingani and their son Mrinal. In doing so Mr Dansingani provided no explanation to his wife as to what Mr Balakrishnan's request related. The only

> explanation contained within the email chain is to be found in the first sentence of Penningtons' email to Mr Balakrishnan but it gives no further details …. It seems to me that the Branch would not have instructed Penningtons to seek consent from the first mortgagee unless there had been at least an agreement in principle that a second charge would be granted. Equally, given his forthright nature, if Mr Dansingani had not agreed in principle to the grant of a charge one would have expected him to have said so in fairly plain language both in an email to the Branch and in the email which he sent to his family. The Bank submits that it was clear by this stage that the Mortgage was being discussed within the Dansingani family. I am prepared to find that Mr Dansingani and Mr Buxani knew full well what this related to but there is insufficient material from which I can draw the inference that Mrs Dansingani had a proper understanding of what was going on or what the arrangements between the Bank and Siglo were. On 27 November Penningtons received a letter from Nationwide confirming their consent to a second charge in favour of the Bank. It is more likely than not that the Nationwide had been in contact with their customers before giving such consent."

52. At [176]-[202] the judge considered in detail the evidence concerning the Meeting, and found that Mr Joseph had not given the assurances which the Defendants alleged, namely (i) an assurance that, if Mr and Mrs Dansingani provided a mortgage over the House, the Bank would support Siglo "to the hilt [for] however long it takes" (an unlimited and open-ended commitment) and (ii) an assurance that any correspondence or documentation from the Bank which appeared to conflict with the first assurance could be ignored because such documentation would have been created for formality only. His reasoning was as follows.

53. At [176] the judge considered the evidence as to the date of the Meeting, and found that it took place on 3 December 2008.

54. At [177] the judge set out what Mr Dansingani asserted Mr Joseph had said at the Meeting.

55. At [178]-[181] the judge quoted the positive case in respect of the Meeting which the Bank had pleaded in its Reply, and recorded that the Defendants argued that it gave rise to "a number of important concerns". He set out five such concerns, the first of which was that "this positive case was not supported by any of the Bank's witnesses". The judge said that he had "taken all of these serious criticisms of the Bank's pleaded case into account in my analysis of the evidence and my findings of fact in respect of the Meeting which I set out below".

56. At [182] the judge quoted what Mr Dansingani had said about the Meeting in his witness statement, and went on at [183]:

> "[Counsel for the Bank], in commencing his cross-examination of Mr Dansingani in relation to the Meeting put six propositions. First, that Mr Dansingani was at that point

> looking for short-term financial assistance. However, Mr Dansingani's refusal to accept that proposition is inconsistent with his correspondence to the Branch in October and November (set out above) in which he appeared to be asking for support for a short period. Secondly, as Mr Dansingani agreed, he believed that the imbalance between the main currencies of account would correct itself quickly. Thirdly, that he had already agreed in principle to grant a second charge over the House to secure the proposed facility of £875,000, a proposition which Mr Dansingani rejected. Fourthly, he also rejected the proposition that the Bank would not grant further facilities to Siglo without further security. His case was that Siglo would be granted further facilities without any additional security to support the continuing liability of the company to the Bank. At first he first said that the Branch had agreed to the new facilities without further security but when pressed he accepted that they had 'never' told him that he could have the further facilities he was asking for without any additional security. When pressed yet again he gave a third answer, namely that 'they did to some extent'. His fourth answer was 'they never asked me either way'. His evidence shows a constant change of position to meet what he saw as the potential harm in directly answering questions which had been asked by the Bank's counsel. The fifth proposition, which Mr Dansingani appeared to accept, was that ultimately the Bank's decision about facilities would be determined by Head Office, rather than the Branch. The sixth proposition, which he initially appeared to accept, was that the account had to be back within its agreed limit every ninety days in order to avoid it being treated as a non-performing asset, which would lead the Bank to take steps to recover the liability. Mr Dansingani asserted in cross-examination that he was only told that there was such a requirement after the Mortgage had been granted. That is plainly untrue and conflicts with the warnings earlier in the year in which the Bank had notified Mr Dansingani that the account needed to be back within its limit every 90 days to avoid it being treated as a non-performing asset some examples of which I have set out above. When I asked him whether he had been aware before the grant of the Mortgage that he needed to comply with the 90 day rule his (incredible and unhelpful) answer was 'Yes, my Lord, but not seriously aware.'"

57. At [184] the judge quoted Mr Buxani's account of the Meeting in his witness statement and went on:

> "Mr Dansingani's case was that he asked for the assurances to be put in writing but Mr Balakrishnan said that Mr Joseph had given his word in the course of the discussion and that the Defendants '*had Mr Joseph's word as chairman of the entire bank [and] could and should rely on his word as binding the*

> *Bank…*'. Mr Balakrishnan's evidence was that indeed Mr Dansingani had asked for confirmation in writing. One asks rhetorically why he would have done so but for the reasons which I give below it does not persuade me that Mr Dansingani told the truth about the Meeting."

58. At [185] the judge turned to Mr Joseph and said:

> "I find that before the Meeting with Mr Dansingani and Mr Buxani, Mr Joseph had been briefed by Mr Balakrishnan about Siglo's history and the problems caused by the currency risks to which both the Bank and Siglo were exposed because of the substantial Yen debit balance. He had not previously been provided with details of the account or Siglo's specific banking arrangements by Head Office in Mumbai or others. Mr Joseph denied that he gave the oral assurances relied on by the Defendants in these proceedings."

59. The judge proceeded to quote from Mr Joseph's witness statement, and said that his evidence in cross-examination was consistent with his witness statement and that it was summarised in a passage which the judge quoted. The judge went on at [186]:

> "In its Reply … the Bank had admitted that Mr Joseph understood that Siglo's problem had been caused by the exchange rate and would be corrected by the exchange rate but it is alleged that he explained that '*as far as the Bank was concerned the problem was of [Siglo's] own making because it had maintained an over-leveraged position in Yen at its own risk...*' and that due to the volatility of the international financial markets it would be some time before the Yen weakened again. In his oral evidence Mr Joseph denied saying this, explaining that currency movements would not be predicted, particularly in the turbulent period in which the meeting took place, and that he would not have said what is alleged. I accept his evidence on that point: it was rational, honest and reliable and insofar as there is a conflict with the Bank's pleaded case I prefer his oral evidence."

60. At [187] the judge quoted Mr Balakrishnan's account of the Meeting in his witness statement. The judge went on:

> "188. Mr Balakrishnan accepted in cross-examination by [counsel for the Appellants] that the purpose of the Meeting was 'to firm up [Mr Dansingani's] agreement to provide the mortgage' and that one of the reasons for having the chairman of the Bank present at the meeting was to 'maximise the chances of persuading Mr Dansingani to give a mortgage' but that does not lead me to find that Mr Balakrishnan's evidence on this important issue was either dishonest or inaccurate and I accept the contents of the paragraphs of his witness statement which I have set out above.

189. Mr Balakrishnan later denied 'absolutely' that he needed the chairman to 'persuade' Mr Dansingani to give the mortgage. I find that expression 'firm up' more accurately reflects the true position. Mr Balakrishnan's evidence, taken as a whole, was that there was an agreement or understanding in principle that Mr & Mrs Dansingani would grant a second mortgage (the understanding having been reached in the course of discussions over the preceding months as I have already found) but Mr Dansingani was playing for time and it needed to be brought home to him that if he wanted the facilities to continue, particularly the additional ad hoc facility, he had to provide the additional security.

190. As to the alleged assurances Mr Balakrishnan emphasised that 'there was no open-ended discussion' and 'no open-ended agreement;, in other words the facilities which were then on offer to Siglo were limited and conditional, although he had no recollection at the time when he came to give his oral evidence of any specific dates which may have been discussed for the end of the facilities which were then on offer. He did, however, recall that the Bank was being told that Siglo's problems were short-term and that there was no discussion and no commitment about long-term support. It was put to him that 'the Chairman said he would support Mr Dansingani to the hilt for the long-term if they gave a mortgage over their home' to which Mr Balakrishnan answered 'To the best of my knowledge, the Chairman made no such commitment, sir'. He was pressed on what he meant by 'to the best of my knowledge' and added 'I cannot remember. I cannot recollect'. He later précised the Meeting as follows:

> '…this was a discussion to securitise the debt, and not only securitise but also to give him support for some time to sort out his accounts…till January 2009'.

Mr Balakrishnan was a cautious and careful witness and I find that while he had a good recollection of the Meeting in general and of the outcome he struggled when asked to recall every step in the discussion and every word which was used. In context it is plain that Mr Balakrishnan did not remember Mr Joseph making the promises which Mr Dansingani relies on but he did have a recollection, which I accept, that the outcome of the discussion was that the Bank would support Siglo, for a limited period of time, subject to conditions, including in particular that future lending would only be against the security of a second charge over the House. His evidence did not leave room for doubt about whether Mr Joseph had made promises of the sort which the Defendants allege. Mr Balakrishnan was clear about that. He was also challenged on the basis that he accepted that Mr Dansingani had asked that the outcome of the

> conversation with the chairman be put in writing and therefore the chairman must have made promises of the sort which Mr Dansingani alleged. Mr Balakrishnan rejected the suggestion and said that he would have said something like 'Mr Dansingani, you met the chairman of the bank, a facility letter will follow…' adding 'That is that is all…' I accept that."

61. At [191] the judge found that Mr Iyer had given an accurate account of the Meeting in a passage of his witness statement quoted by the judge which Mr Iyer had confirmed in cross-examination, although a letter from the International Division which Mr Iyer had referred to was dated 18 December 2008 and therefore post-dated the Meeting. In that passage Mr Iyer said that "general words" to the effect that the Bank would "support" Siglo to get to grips with its Yen debit problem were spoken by Mr Joseph and Mr Balakrishnan, but with "clear qualifications" as to the need to provide a second charge over the House, to keep within the agreed limits and to put forward a plan to reduce the Yen debit position by conversion of dollar deposits.

62. At [192] the judge quoted the Bank's minute of the Meeting, which was probably prepared by Mr Iyer:

> "M/s Siglo 21 Ltd have a sanctioned limit of GBP 500,000/- They have been dealing with us since 1993.
>
> Mr K W Dansingani explained the working of Siglo 21 Ltd in brief and described the transaction flow in his company. He explained his requirement of multicurrency account and how the latest exchange volatility has affected his business operations reducing his overall limit in terms of availability in GBP.
>
> His sales were brisk and he had certain deadlines to meet for the ensuing Christmas Sales. He had a limit for GBP 500,000. However he required an equal amount as his available limit had shrunk in size due to the exchange volatility and also in order to meet the growing orders.
>
> Our CEO [Mr Balakrishnan] explained the satisfactory operation of the account. Our CMD [Mr Joseph] noted the longstanding relationship, but stressed on the need for additional collaterals to be provided by the borrower to cover the additional requirement.
>
> Mr Dansingani agreed to examine the request for providing second charge on his property. Mr Dansingani thanked CMD for his valuable time and support for examining his request."

63. The judge commented:

> "That minute supports the evidence of the Bank's witnesses and is consistent with the correspondence before and after the Meeting. I find that it is an accurate record so far as it goes. The

> heart of the proposed arrangement referred to in the minute was the short term nature of the need for additional facilities, there being no suggestion of an open-ended facility."

64. At [193] the judge noted that the Defendants relied upon two informal and unsigned statements of what had occurred at the Meeting prepared by Mr Dansingani and Mr Buxani which were undated, but had been placed in the chronological bundle of documents in the third week of May 2010. Having quoted Mr Dansingani's statement the judge went on at [194]:

> "It is surprising, if the note is accurate, that there is no mention in it of the assurance allegedly given at the end of the Meeting that Siglo could ignore the strict wording of future facility letters and other documents insofar as they were inconsistent with what it is said had been promised by the chairman at the meeting. The assertion that the Bank had said that subsequent inconsistent documents could be ignored is an obvious lie which Mr Dansingani needed to tell to counter the apparent inconsistency with the assurances which he alleges were given during the meeting and the terms of the subsequent facility letters which plainly showed that the Mortgage was to be given in return for strictly limited facilities which were subject to a number of conditions. Mr Joseph's position in respect of the allegation that he had said that the formal provisions of future facility letters could be ignored was 'I did not say any such words and [nor] would I ever have done so.' Mr Iyer did not accept that either of his superiors told Mr Dansingani in the course of the meeting that Siglo could ignore the provisions of any facility letters which were sent to him on the basis that they were produced as some type of formality only."

65. The judge continued:

> "195. At trial Mr Dansingani insisted that such an assurance had been given but his oral evidence on the issue, in response to questions asked by [counsel for the Bank], was wholly unreliable and I reject it: [quoting a passage from the cross-examination].
>
> 196. It is also to be noted that in the course of his cross-examination about the Meeting Mr Dansingani could not say what period of time was meant by 'long term'; his plain assumption was that it would be open-ended. Similarly the extent or nature of the support said to have been offered by the chairman at the Meeting could not properly be explained by Mr Dansingani."

66. At [197] the judge quoted Mr Buxani's undated statement and commented:

> "As with the statement of his brother-in-law there is no express mention in this note of the Bank officers having assured Siglo that future documentation would be prepared for the sake of

> form only and without any intention that it should govern the relationship between banker and customer. The notes appear to have been prepared together, albeit using slightly different wording, but I find that neither is accurate."

67. The judge summarised his conclusion and the reasons for it in a passage which I should set out in full:

> "198. I find that the alleged representations were not made. In my judgment Mr Dansingani knew by December 2008 that the point had been reached at which the Bank would not continue to grant facilities to Siglo without a second charge, he had agreed in principle to the grant of a charge but was prevaricating about executing it, and at the Meeting with the chairman the position of the Bank was effectively underlined: he had to grant the charge or the facilities which Siglo needed would not be forthcoming. I also find that at the Meeting it had been agreed that the Bank would support Siglo, on conditions. However, none of those findings persuade me that the officers of the Bank, and the chairman in particular, gave the open-ended assurances that Mr Dansingani alleges.
>
> 199. In summary, I reject the Defendant's case about the Meeting with the Chairman and the open-ended assurances which were allegedly given to Siglo for the following reasons:
>
> i) the context of the Meeting, apparent from the correspondence and meetings which had preceded it, was that Siglo wanted further facilities, which it needed if it was to survive, but Mr Dansingani believed that its fortune would change with a strengthening of the Yen which he (wrongly) believed would happen, and which he (wrongly) believed would happen within a couple of months. Mr Dansingani was aware that the Bank would require a second charge in return for extending the facilities for the period which he required, he knew that he had little choice and he had agreed in principle to provide a second charge;
>
> ii) Mr Dansingani was not an honest witness and was prepared to lie to protect and promote the interests of Siglo and his family and his evidence on this, as on many other issues, was not credible;
>
> iii) Mr Dansingani is not a reliable witness and even when telling the truth I am not prepared to accept what he told me without very careful scrutiny in the context of the other material relating to the same issue;
>
> iv) Mr Buxani was prepared to say what was necessary to support his brother-in-law and his family. He was not a

reliable witness and his evidence as to the meeting is not to be relied on. Nor does his evidence fit with the other evidence which I do accept;

v) On the other hand Mr Joseph, Mr Balakrishnan and Mr Iyer are honest and reliable and I accept the evidence which they gave in their witness statements and from the witness box about this meeting, even if their evidence on the detail of the meeting was less strong than their recollection of the outcome;

vi) I reject any assertion that the officers of the Bank acted dishonestly or that any expressions of general support were not genuinely made;

vii) The evidence of Mr Joseph, Mr Balakrishnan and Mr Iyer is not only internally consistent but the evidence of each of them is consistent with the recollection and evidence of the others;

viii) It is highly improbable that any banker, let alone the chairman of a bank, would have given open-ended promises of the sort alleged by Mr Dansingani, with an indefinite period of what appears to be unlimited lending. Such an arrangement makes no commercial sense, particularly at a time when the world financial markets were in a state of turmoil and Siglo was struggling to keep within the facilities which it had been granted by the Bank previously;

ix) The internal correspondence within the Bank, between the Branch and the International Division and on the Branch's own files are consistent with the Bank's case that no such assurances were given;

x) The correspondence from the Bank to Siglo also referred to a limited period of support and a structured reduction of liabilities against the security of a second charge. The alleged assurances are inconsistent with such an arrangement;

xi) The process that the Bank plainly had intended to adopt was that the terms of the future arrangements between it and Siglo were to be hammered out in the formal documentation and the discussions at the meeting were just a prelude to that, with no intention that a binding agreement should be made at that stage;

xii) The acts of the parties after the Meeting, in doing just that, namely negotiating and agreeing the terms of a

> facility letter and the Mortgage, are inconsistent with the assurances having been given;
>
> xiii) It is highly improbable (and in my judgment simply not credible) that the senior officers of the Bank who were present at the meeting would have suggested or agreed that any future correspondence (including facility letters) which appeared to be inconsistent with the assurances was for the sake of form only or that the strict terms of such documents could be ignored by Siglo and the Dansinganis. Not only is it not the rational act of a commercially minded banker but it would necessarily involve a conspiracy between the Bank officials dishonestly to mislead the Head Office of the Bank and other of their colleagues. It is also to be noted that this allegation was not made, despite considerable correspondence between the parties, until it appeared in a pleading filed by the Defendants (it was not, as I have said, in the undated statements made by Mr Dansingani and Mr Buxani probably in around 2010). I reject the assertion. The telling of that lie is necessary because otherwise the Defendants cannot explain why the documents which were negotiated and signed after the meeting are inconsistent with what was said at the meeting itself. The telling of this lie alone is a compelling reason for concluding that the evidence of Mr Dansingani and Mr Buxani about the meeting is untrue."

We were informed by counsel for the Bank that the pleading referred to by the judge in sub-paragraph (xiii) first appeared in draft on 20 August 2012.

68. At [203]-[219] the judge considered the evidence concerning the execution of the Mortgage, and found that (i) Mrs Dansingani had signed the Mortgage because her husband had asked her to and without properly understanding the risks she was taking and (ii) the Bank took no steps to bring those risks home to her. In this context the judge made certain findings which are relevant to the appeal.

69. At [205] the judge considered the evidence concerning the third version of the facility letter dated 28 October 2008 and found:

> "[The third version] removed the provision which Mr Dansingani objected to [in the earlier versions] because, as Mr Balakrishnan commented in his witness statement, the Bank accepted that it was unrealistic to expect Siglo to have converted all its Yen into sterling within 4 months. …. [The evidence] does not demonstrate that the October facility letter was created in December 2008. The reduction of the Yen liability was a continuing concern of the Bank, as Mr Dansingani was well aware, and featured in future facility letters which I refer to below."

70. The judge continued:

> "206. Once the Yen reduction provision had been removed Mr & Mrs Dansingani signed the revised 2008 Facility Letter in December 2008, despite it still being dated 28 October 2008, and returned it to the Branch together with a board minute signed by Mr Buxani which purported to record the fact that there had been a meeting of the directors of Siglo on 30 October 2008 (two days after the date of the original draft of the facility letter), at the House at which Mr & Mrs Dansingani and Mr Buxani had been present. Mr Buxani had drafted the board resolution and emailed it to Mr Dansingani to be printed on 16 December. The minute recorded the following:
>
> > 'The letter was read out and it was resolved that it be accepted. Facility letter to be signed as accepted and returned to Syndicate Bank.'
>
> 207. The date of the board meeting is unlikely to be correct and I find that no such meeting took place in any event. I also note that Mr Dansingani's actions in respect of this facility letter are inherently inconsistent with his case that the Bank assured him that all future documents (including facility letters) could safely be ignored because they had only been created as a formality to satisfy Mumbai. If that were the case, why did Mr Dansingani take the trouble to comment on the draft facility letter and ask the Branch to amend it? That action demonstrates the obvious lie in his assertion that the letter had been drafted by the Branch for the sake of form alone. He knew that it was intended to govern the relationship between the Defendants and the Bank."

71. At [213] the judge found:

> "The Head Office of the Bank then ratified the grant of the facilities (see the internal memoranda from Mumbai dated 18 December 2008) but laid down quite strict conditions, including that the *ad hoc* facility of £450,000 on top of the base facility of £500,000 was to be repaid by 31 March 2009. There was further reference in the Branch's records to Penningtons being asked to sort out the documentation issues with the security which the Bank held for the liabilities of Siglo, but unfortunately the memorandum does not identify what those issues were. It also contains a note of caution, under the heading 'Justification for the Ratification':
>
> > 'The adhoc limit is permitted to facilitate the party to have a cooling time to come with a definite plan to reduce the exposure. However, it appears unlikely that cash flows from business alone will help the party to extinguish the adhoc limit. It is clear that the party is

> relying on possible weakening of the JPY vis a vis GBP and further strengthening of USD and EURO against GBP to reduce the ad hoc liability. Hence, Branch to have discussions with the party and if necessary restructure the present liabilities granting them sufficient time to reduce the liabilities in stages in tune with their future cash flows.'"

72. At [220]-[226] the judge considered the support provided to Siglo by the Bank after the execution of the Mortgage. In this context the judge found at [221]:

> "On 30 December Mr Dansingani had transferred £100,000 from Siglo's account with HSBC to the company's account with the Bank. Mr Dansingani said in cross-examination that this was done to regularise the account. It is an implicit recognition of the fact that the Bank had not offered or agreed to provide open-ended and unlimited support"

73. The judge proceeded to quote from a letter which Mr Balakrishnan wrote to Mr Dansingani on 22 January 2009 reflecting, in part, the views of the Executive Director from Mumbai, which noted that Siglo's deficit had increased to £1,404,833 and stated in paragraph 3:

> "The additional temporary limit of GBP 375,000 was permitted to facilitate the Company to have a cooling time to come with a definite plan to reduce the exposure. Therefore, it is highly essential that the Company indicate the cashflows over the next 3-6 months and also a definite plan to cap the exposure and scale down the Yen liability in stages."

74. The judge went on:

> "223. … Siglo was very substantially over its new limit. In his written evidence Mr Dansingani said that he was very surprised to receive this email. In his oral evidence he said that he did not remember seeing it. The letter is inconvenient to Mr Dansingani because it implicitly contradicts the assertion that the chairman of the Bank gave the assurances which the Defendants now rely on. In my judgment this letter is entirely consistent with and supports the Bank's case as to the Meeting of 3 December 2008.
>
> 224. Mr Dansingani told me that the conditions set out in numbered paragraph 3 of the letter had not been discussed with the chairman of the Bank at the meeting in December 2008. The Defendants suggest that this requirement was a breach of contract and shows that the assurances given at the December Meeting were false. Mr Buxani likewise asserted that the Bank started acting very differently after the December meeting and contrary to what the chairman had assured them would be the Bank's position. I reject the evidence of both Mr Dansingani

> and Mr Buxani on the stance of the Bank at this point and the lines of defence which relied on such evid[e]nce. The Bank's position was consistent. The correspondence was, in my judgment, consistent with the Bank's case as to what took place at the meeting. The only factual basis on which the assertion that the Bank changed its stance could be correct is if the chairman had given various open-ended assurances and Siglo had been told that subsequent correspondence was for form only, neither of which allegations are true. I find that the converse is the case and that the Bank, from the date of the meeting, acted as it had said that it would, on the basis that Mr Dansingani had agreed to give a second charge over the House."

75. At [226] the judge noted:

> "It was not until his letter to Mr Balakrishnan dated Monday 16 February 2009, after the disagreement about the payment to a company called Technocell AG referred to below, that Mr Dansingani alleged that the chairman had given assurances in the form that they have now been relied on in defence of these Claims and some time after the facility letter and Mortgage had been signed. It would appear that the first appearance of the allegations in writing is to be found in an email which Mr Dansinganisent to Mr Buxani on the afternoon of Sunday 15 February in an email which was plainly intended as a draft for Mr Buxani to approve or comment on. The letter which was sent to the Branch dated 16 February 2009 was in a fuller form and reads as follows: [quotation].
>
> It is to be noted that there is no reference to the alleged additional assurance that the Defendants could ignore the terms of documents which were in conflict with the assurances given by the chairman. Mr Balakrishnan said that he did not respond to this letter because, so far as he was concerned, the directors of Siglo knew the true position (ie the basis on which the Bank would continue to afford facilities) and the letter was just an angry response to the Bank's refusal to make the Technocell payment which I will now turn to and he did not see it as some sort of challenge to the basis on which the Bank had agreed to support Siglo."

76. At [227]-[242] the judge considered the evidence concerning the payment to Technocell which Siglo requested the Bank make on about 2 February 2009, but which the Bank did not make until 20 February 2009. The judge found that (i) the Bank was well within its rights not to make the payment when first requested, (ii) in any event the delay was not unreasonable and (iii) there was no evidence of any causal link between this incident and any loss said to have been suffered by Siglo.

77. In this context the judge found as follows:

"237. A meeting took place on Monday 2 March 2009, principally to discuss the Yen liability, as a result of which on 4 March Siglo made proposals for reducing the sums due on that account in the short term but only eliminating it over a longer period and only when the Yen weakened in the foreign exchange market. Nor was Siglo able to offer a detailed proposal to reduce their overall debt to the Bank. In an email of that date Mr Dansingani wrote to Mr Balakrishnan:

> 'These are extraordinary times of turmoil. It is precisely at this time that we need your co-operation, being our sole bankers. We have worked together for nearly 17 years. During the visit of your Chairman, he agreed to support us all out…'.

To that email was attached a schedule which was headed 'Anticipated Reduction in Yen Debits' and proposed a series of escalating monthly payments to reduce the liability by $1,650,000 over two years. On the following day (5 March 2009) Mr Dansingani sent a revised plan to pay off $1,600,000 over two years with a view to clearing all the Yen borrowing within that period, adding the words, 'God willing'.

238. There was no discussion at that meeting and no mention in that email of the pleaded assurances which Mr Joseph was said to have given to Mr Dansingani and Mr Buxani, nor of the suggestion that subsequent documents from the Bank were for the sake of form only. However, in his witness statement at paragraph 74 Mr Dansingani alleged that at the meeting on 2 March Mr Balakrishnan asked for such a schedule 'with reassurance that it was for "showing to India" only'. That is quite plainly untrue. It is a lie which Mr Dansingani has to make to explain his apparent agreement to the terms by which the Yen liability was to be reduced in the short or medium as opposed to long term. Nor was the suggestion put to the Bank's witnesses in cross-examination.

239. The proposed conversion and reduction of dollars to Yen due to take place on 1 April 2009 did not happen. Mr Dansingani asserted in evidence that he never had any intention of converting dollars to Yen to reduce Siglo's liability to the Bank (because he alleged that Mr Joseph had agreed that the market would correct the currency imbalance in due course) and that the schedules which he had sent to the Branch setting out a proposal to do just that (referred to above) had been dictated to him by Mr Balakrishnan so that the Branch could reassure Head Office. There is no mention of this allegation in Mr Dansingani's witness statement and it was not put to Mr Balakrishnan in cross-examination. The allegation, if true, would amount to dishonest collusion between Mr Balakrishnan and Mr Dansingani deliberately to mislead Head Office. It was

> put to Mr Dansingani by [counsel for the Bank] at the end of his cross-examination on this issue that the former would say anything to save his business, to which he answered 'Of course. Why should I not save my business? It is my business.' I accept that Mr Dansingani had no intention at the time of sending the proposed repayment schedules to the Branch of reducing Siglo's liability by selling off dollars but I reject as utterly untrue the suggestion that Mr Balakrishnan colluded with Mr Dansingani in the way suggested. The exploration of this issue in cross-examination reaffirms my very clear view that Mr Dansingani was not an honest or truthful witness and was prepared to make things up, 'on the hoof', to cover a gap in his case when it suited him. This material demonstrates that he was prepared to lie to the Bank in 2009 and to the court at trial."

78. At [243]-[263] the judge reviewed the negotiations between Siglo and the Bank for a new facility letter which took place in the second half of 2009. As the judge observed at [243]:

> "If the Bank had really given the assurances asserted by the Defendants no such negotiations would have taken place, and there would have been no need for them."

79. As the judge observed at [250] after quoting an email from Mr Dansingani to Mr Iyer on 4 October 2009:

> "Mr Dansinganis [sic] was wrong to blame the Bank. The problems which Siglo faced as a result of the adverse currency exchange rates was, as I have said above, one entirely of its own making and part of a deliberate strategy which backfired. It is also to be noted that there was no mention in that letter of any agreement said to have been made by the Bank to provide open-ended support whether as a result of the meeting with the chairman of the Bank or otherwise. The tone of and request made by the letter are inconsistent with there being any such arrangement."

80. The judge noted at [255] that the final version of the facility letter which was agreed and signed on 10 December 2009 differed from what the Bank had offered six months previously, and commented that this again demonstrated that:

> "… the negotiations between the Bank and its customers were genuine (as opposed to being for the sake of form only), that at the meeting of the previous December the parties had not reached the agreement or understanding alleged by the Defendants and that the Bank was prepared to continue to support its customer on terms which it negotiated with it from time to time."

81. At [264]-[275] the judge considered a dispute between the parties as to the interest rates payable on the yen account which is not material for present purposes.

82. At [276]-[290] the judge considered the events which led to the Bank making demands for repayment. In this context the judge found:

> "276. From 30 June 2010 Siglo continuously exceeded its limit, reaching an excess of more than £400,000 by the middle of August 2010. The Branch asked for this to be cleared. By a letter dated 20 September 2010 Mr Dansingani again suggested that the Yen would soon weaken. He failed to make any concrete proposals but ended the letter by saying "Your bank has been very understanding so far as we trust you will continue supporting us during the difficult few weeks ahead". There was no reference to the assurances allegedly given by the chairman of the Bank.
>
> 277. Around 29 September 2010 Mr Dansingani appears to have drawn (and paid into Siglo's account with the Bank) approximately £120,000 from accounts with Nationwide Building Society and Barclays Bank Plc – I was taken to various bankers' drafts inclosing but heard no evidence about them– $400,000 from Banks in New York and £90,000 from HSBC Plc in London. These payments were necessary to avoid breaching the 90 day limit which would have occurred on that or the following day. It demonstrates, again, that Mr Dansingani had access to assets which had not been disclosed, that he was well aware of the 90 day deadline and that he knew that there had been no unconditional assurance of support 'up to the hilt'."

83. The judge concluded this section of his judgment at [290] as follows:

> "Siglo and Mr Dansingani ask me to find that the Bank acted unlawfully and unconscionably in its dealings with them. Having reviewed all the evidence and reached my findings of fact I do not accept either of those propositions. Notwithstanding the regular breaches of the facilities and the regular excesses on the account the Bank continued, until a form of impasse had been reached and its patience exhausted, to support its customer when it may be thought that the point had been reached when other commercial lenders would have long since ceased to do so"

84. At [291]-[294] the judge set out the demands for repayment made by the Bank. At [295]-[298] he considered whether the Bank was entitled to set off Siglo's credits and debits in different currencies against each other in calculating what was due, and concluded that it was. At [299] he found that Siglo had not proved that it had suffered any loss as a result of the acts or failures alleged against the Bank. He summarised his disposition of the claims and counterclaims at [300].

Delay

85. The principles to be applied by an appellate court when considering an appeal on the ground that the judgment under appeal was unduly delayed have recently been reviewed by Sir Geoffey Vos C (as he then was) in *Bank St Petersburg PJSC v Arkangelsky* [2020] EWCA Civ 408, [2020] 4 WLR 55 at [77]-[88], by Lord Hodge giving the judgment of the Judicial Committee of the Privy Council in *Plant v Pickle Properties Ltd* [2021] UKPC 6 at [27]-[29] and by Asplin, Andrews and Birss LJJ in *NatWest Markets plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 at [43]-[59]. In summary, (i) delay – even inordinate and inexcusable delay – in giving judgment is not itself a ground for allowing an appeal; but (ii) where there has been a lengthy delay in giving judgment, it is incumbent on the appellate court to exercise special care in reviewing the evidence, the judge's treatment of that evidence, his findings of fact and his reasoning. Since counsel for the Appellants accepted these propositions in the course of his submissions, it is not necessary to consider them any further. It follows, however, that, in so far as the present appeal is brought solely on the ground of delay, it cannot be sustained. In particular, it was not suggested by counsel for the Appellants that the judge's recollection of the evidence and submissions had been impaired by the delay, nor could this be suggested given that (i) the judge had, as he pointed out, a full transcript of the oral evidence and submissions as well as a large volume of written materials and (ii) the judgment contains a full review of all the key contemporaneous documents.

86. In saying this, I do not intend to downplay the seriousness of the judge's dereliction of his duty to give judgment in a timely manner. As Peter Gibson LJ said when delivering the judgment of this Court in a passage from *Goose v Wilson Sandford & Co* [1998] TLR 85 at [112] which has frequently been cited in subsequent judgments:

> "A judge's tardiness in completing his judicial task after a trial is over denies justice to the winning party during the period of the delay. It also undermines the loser's confidence in the correctness of the decision when it is eventually delivered. Litigation causes quite enough stress, as it is, for people to have to endure while a trial is going on. Compelling them to await judgment for an indefinitely extended period after the trial is over will only serve to prolong their anxiety, and may well increase it. Conduct like this weakens public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law. Delays on this scale cannot and will not be tolerated. A situation like this must never occur again."

87. That said, the function of this Court is to do justice between the parties, not to sanction the judge. I should therefore record that on 19 May 2020 the Judicial Conduct Investigations Office issued the following statement:

> "His Honour Judge (HHJ) Dight has been subject to an investigation into his conduct following complaints of a serious delay in producing a judgment. The Lord Chancellor and Lord Chief Justice found that the delay was unacceptable and concluded that HHJ Dight's behaviour amounted to misconduct

> having fallen below the standards expected of a member of the Judiciary. They have issued HHJ Dight with formal advice."

Did the judge fail properly to evaluate the evidence?

88. No doubt for the reason I have just identified, counsel for the Appellants placed at the forefront of his submissions the judgment of this Court delivered by Lord Dyson MR in *Harb v Aziz* [2016] EWCA Civ 556, [2016] 3 FCR 194. In that case Mrs Harb alleged that she had concluded an oral agreement with Prince Abdul Aziz bin Fahd after accosting the Prince in the lobby of the Dorchester Hotel on 19 or 20 June 2003 accompanied by her friend Mrs Mustafa-Hasan. Mrs Harb subsequently brought proceedings in effect to enforce the agreement. At trial in 2015 the key issue was what was said by Mrs Harb and the Prince during their meeting: did they enter into an agreement, and if so who were the parties to it (given that the Prince contended that he was acting as agent for King Fahd) and was it intended to be binding either immediately or upon satisfaction of a condition subsequent (and if the latter, was that condition satisfied)? The resolution of these issues depended primarily upon the evidence of the witnesses. The judge's task of getting at the truth was made more difficult by the fact that, although the Prince had served a witness statement under cover of a Civil Evidence Act notice and the judge had ordered him to attend for cross-examination, the Prince did not do so. The judge found that an agreement had been made between Mrs Harb and the Prince acting as principal which was immediately binding. This Court allowed an appeal by the Prince and ordered a re-trial.

89. The reasons why a re-trial was ordered in that case can be summarised as follows. First, the judge had treated the Prince's failure to attend the trial as being in order to avoid cross-examination without giving adequate reasons for doing so having regard to the alternative explanation for his non-attendance given by the Prince. Secondly, the judge had failed properly to analyse the evidence of Mrs Harb and Mrs Mustafa-Hasan. Although he referred to the fact that counsel for the Prince had made extensive criticisms of Mrs Harb's evidence in submitting that she was not a reliable witness, he had failed to deal with those criticisms when accepting her evidence. For example, he had brushed aside points based on discrepancies between her witness statement and her oral evidence by saying that it was unrealistic to expect Mrs Harb to remember events 12 years before when the witness statement had been made not long before trial. Similarly, he said that Mrs Mustafa-Hasan's recollection was clear when the transcript suggested that she was anything but clear and he failed to deal with the submission that she had collaborated with Mrs Harb. In addition, the judge had failed to deal with a number of aspects of the evidence that were potentially relevant to important aspects of the case. Thirdly, the judge's reasoning had not adequately addressed the agency issue.

90. Counsel for the Appellants particularly relied upon what the Court said in relation to the second of these reasons at [34]-[39], culminating in the following passage:

> "Our system of civil justice has developed a tradition of delivering judgments that describe the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. This requires that a judgment demonstrates that the essential issues that have been

> raised by the parties have been addressed by the court and how they have been resolved. In a case (such as this) which largely turns on oral evidence and where the credibility of the evidence of a main witness is challenged on a number of grounds, it is necessary for the court to address at least the principal grounds. A failure to do so is likely to undermine the fairness of the trial. The party who has raised the grounds of challenge can have no confidence that the court has considered them at all; and he will have no idea why, despite his grounds of challenge, the evidence has been accepted. That is unfair and is not an acceptable way of deciding cases."

91. Counsel for the Appellants submitted that the judgment in the present case suffered from similar deficiencies to the judgment in *Harb v Aziz*. It is therefore necessary to consider the alleged deficiencies, and to do so with special care given the inordinate and inexcusable delay in producing the judgment.

92. Before turning to consider the alleged deficiencies, it is important to put them in context. As counsel for the Appellants acknowledged both in his submissions to the judge and in his submissions to this Court, the starting point when evaluating the Appellants' case on the oral assurances is that (as the judge noted at [199(viii)]) it is highly improbable that any banker, let alone the chairman of a bank, would have given open-ended promises of the sort alleged, involving an indefinite period of unlimited lending. Such an arrangement would make no commercial sense, particularly at a time when the financial markets were in a state of turmoil and Siglo was failing to keep within the limits of the facilities previously agreed. It is (as the judge noted at [199(xiii)]) even more highly improbable that the senior officers of the Bank present at the meeting would have agreed that any future inconsistent documents were for form only and could be ignored by Siglo. That is particularly so for the reasons given by the judge, namely that it would have involved a conspiracy dishonestly to mislead Mumbai and that this allegation was only made at a late stage. As the judge said, the obvious explanation for this second allegation is that otherwise the Appellants could not explain why the documents negotiated and signed after the Meeting were inconsistent with the first assurance they alleged had been given at the Meeting. Moreover, as the judge recognised, a conclusion that Mr Joseph had not given the second assurance alleged by the Appellants would inevitably undermine their case that he had given the first assurance.

93. Both before the judge and before this Court, counsel for the Appellants sought to meet these points by arguing that the probability or otherwise of the allegations depended on the context in which they made, relying upon the well-known observations of Lord Hoffmann in *Re B (Children)* [2008] UKHL 35, [2009] 1 AC 11 at [72]. The Appellants' case is that, by 3 December 2008, the Bank was "desperate" to persuade Mr Dansingani to agree to mortgage the House when Mr Dansingani was unwilling to do so, and therefore it was more likely than it would otherwise have been that Mr Joseph was prepared to give the assurances he was alleged to have given. Although the judge did not accept this case, the Appellants contend that he failed properly to address evidence which supported it. In particular, they contend that he failed properly to consider the Bank's motivations and to address evidence that Siglo's account was a non-performing asset and the Bank needed to conceal this from its

regulator. They also contend that the judge's assessment of the witnesses was one-sided.

94. Before turning to consider those points, it is worth noting that there are two further reasons, not relied upon by judge, why the Appellants' case was implausible. The first is the value of the security on offer. As discussed above, the equity in the House was only about £888,000. This was barely sufficient to cover the £875,000 facility requested by Siglo, insufficient to cover the £950,000 facility which the Branch asked Mumbai to approve and wholly insufficient to cover the Bank's exposure of £1.43 million as at 21 November 2008. Counsel for the Appellants' response to this point was to argue that it cut both ways, because Mr Dansingani would not rationally have taken the risk of granting a second charge if the Bank could enforce it immediately. That is no answer, however. The documentary evidence clearly shows that, as the judge found, Mr Dansingani was optimistic that Siglo's financial position would improve quickly and therefore it only required additional support for a short period. Furthermore, on the date that the Mortgage was executed, which is the point at which it became legally binding, the Bank could indeed have enforced it immediately. As both sides recognised, however, it was not in the Bank's interest to do so. Rather, it made sense for the Bank to give Siglo some breathing space to see if Mr Dansingani's optimism proved well founded. As it was, the Bank showed considerable forbearance before demanding repayment in 2011.

95. The second additional reason is that there is no evidence that Siglo requested a facility of more than £875,000 or for a period lasting longer than a few months prior to the Meeting. Why then would Mr Joseph offer Mr Dansingani much more than he had asked for? There is no rational explanation for this.

The "disputed suite" of documents dated 28 October 2008

96. In the Appellants' skeleton arguments in support of the application for permission to appeal and in support of the appeal, an important plank of the Appellants' case was that the judge had failed to analyse the significance of what was described as a "disputed suite" of documents dated 28 October 2008: (i) the first version of the facility letter, (ii) the report from the Branch to Mumbai numbered 123-A/08 (referred to by the judge at [148]) and (iii) the letter from the Branch to Mumbai reference 159/ID/LDN/SVS (referred to by the judge at [149]). In particular, it was contended that the judge was wrong to find that these documents had been created on or close to that date and should have found that they were not created until much later, most likely after the Meeting.

97. As the Respondent pointed out in its skeleton argument, however, the Appellants (i) had not served a notice of disputed authenticity in respect of these documents before trial and (ii) had not persisted in their challenge to the authenticity of the documents when that objection was raised at trial (as the judge recorded at [154]).

98. In oral argument counsel for the Appellants accepted that he could not challenge the authenticity of these documents, but instead submitted that the judge should have found that the Bank was not dealing with Siglo on the basis of these documents during the subsequent period (or at the very least should have addressed evidence which supported such a finding). In this regard, particular reliance was placed upon an answer given by Mr Iyer in cross-examination accepting that "at the time" (which I

take to be late October to early November) "everyone was dealing on the basis of" the report numbered 123/08 dated 27 October 2008 which the judge ignored in the judgment.

99. It is not necessary to examine this argument in detail, because it went nowhere for the following reasons. The principal significance of the so-called "disputed suite" of documents for present purposes is that they expressly refer to a second charge over the House, and thus appear to support the Bank's case that Mr Dansingani agreed to this at the meeting on 27 or 28 October 2008, whereas the 20 October 2008 draft facility letter and the report numbered 123/08 dated 27 October 2008 do not. The reason why this matters is that, on the Appellants' case, there had been no agreement, even in principle, by Mr Dansingani to a second charge at that stage; on the contrary, he was refusing to agree to a second charge. This is relied upon in support of the contention that Mr Joseph had to persuade Mr Dansingani to agree to the second charge at the Meeting.

100. As counsel for the Appellants was constrained to accept, however, it is plain from the documentary evidence that Mr Dansingani did agree at least in principle to execute a second charge, subject to agreement on the terms of the new facility letter, by 24 November 2008 at the latest, as the judge found at [170]. It follows that, as the judge found at [189], all that Mr Joseph needed to do at the Meeting was to get Mr Dansingani to "firm up" that agreement in principle.

101. Faced with this difficulty, counsel for the Appellants sought to rely instead upon Mr Dansingani's unwillingness to close out Siglo's yen/dollar position at the time of the Meeting, but that does not assist the Appellants either. As the judge found, it is clear from the documentary evidence that the Bank wanted Siglo to agree to pay down the Yen debit from its dollar (or sterling) credit(s) over a relatively short period of time, whereas Siglo was unwilling to commit to this because Mr Dansingani was optimistic that the exchange rate would soon move in Siglo's favour. After the Meeting and the day before the Mortgage was executed, however, the Bank deleted the relevant paragraph from the 28 October 2008 facility letter, whereupon Mr and Mrs Dansingani signed it, as the judge found at [205]-[206].

102. Thus there was no flaw in the judge's assessment of the context in which the assurances were alleged to have been given at the Meeting. Furthermore, the fact that it is now accepted that the Appellants cannot challenge the authenticity of the "disputed suite" of documents undermines many of the criticisms of the judgment advanced in the Appellants' skeleton arguments, which are premised at least in part on the documents having been falsely dated.

The Bank's motivations

103. A related contention advanced by the Appellants is that the judge scrutinised the Appellants' motivations at the time of the Meeting, but not the Bank's motivations. In this regard counsel for the Appellants relied upon four aspects of the Bank's alleged motivations which he submitted that the judge had failed to take into account.

104. First, he relied upon the fact that the Bank's relationship with Siglo had been a long term one, from which the Bank had profited. Leaving aside the fact that the judge did not ignore this, it is beside the point anyway. As the judge found, from May 2008

onwards Siglo was in increasing difficulties: over the period from early June 2008 to late November 2008, Siglo's indebtedness to the Bank rose from just under £500,000 to £1.43 million. As he also found, the Bank was increasingly concerned about this. It would be completely irrational for a bank faced with a customer in such a position to respond by offering it open-ended and unlimited support, rather than the limited and conditional short-term support which the Respondent accepts that the Bank offered Siglo.

105. Secondly, counsel for the Appellants relied upon an answer given by Mr Iyer in cross-examination accepting that, as at the date of the Meeting, the Bank appreciated that, if it failed to provide support and "pulled the rug out" at that stage, Siglo would be insolvent, and the Bank was concerned about the security it had. This is nothing more than a statement of the obvious, however. It is plain from the contemporaneous documents that the reason why the Bank wished to obtain the Mortgage was that it regarded the existing security as insufficient. Furthermore, it can be seen from the judgment that the judge fully recognised this. He was not persuaded that this made it likely that Mr Joseph would have given the assurances alleged by the Defendants. There is no reason to question that assessment. Any bank faced with a customer in the position of Siglo would want to obtain further security as a condition for extending its credit facilities.

106. Thirdly, counsel for the Appellants contended that another factor which the judge had failed to take into account was that, in the period immediately before and after the Meeting, there was a difference in attitude between London and Mumbai towards Siglo: London was supportive prior to the Meeting, whereas Mumbai took a harder line after it. In support of this counsel relied in particular upon paragraph 3 of the letter dated 22 January 2009, which came from Mumbai's instructions (see paragraphs 73-74 above). But there are numerous problems with this contention, including the following:

    i) the documentary evidence shows close communication between London and Mumbai throughout the relevant period, and little difference in their attitude to Siglo;

    ii) it is part of the Appellants' own case that Mr Joseph came to the Meeting from Mumbai (see paragraph 120 below);

    iii) Mumbai expressly ratified the action of the Branch in sanctioning on 28 October 2018 (as evidenced by the report numbered 123-A/08) an ad hoc additional limit of £450,000 until 30 March 2019 in the memoranda dated 18 December 2018 referred to by the judge at [213]; and

    iv) the judge rejected the Defendants' argument that paragraph 3 was inconsistent with what the Bank had previously said.

107. Fourthly, counsel for the Appellants argued that the judge had ignored evidence that the Bank was concerned that Siglo had become a non-performing asset and wished to conceal this from its regulator. There are three fundamental problems with this argument, however.

108. The first problem is that the case which was put by the Appellants to the Bank's witnesses in cross-examination was of conspiracy by the Branch officials to mislead Mumbai, not a conspiracy by both London and Mumbai to mislead the regulator. The case that was put was rejected by the judge at [199(xiii)] and [239].

109. The second problem is that, not only did the judge make no finding that Siglo had exceeded the 90 day limit in the run up to the Meeting, but also there is no evidence which showed that it had. On the contrary, as the judge found at [162], the evidence is that the Branch sanctioned an additional limit of £450,000, taking the total facility to £950,000, on 28 October 2008 and this was subsequently ratified by Mumbai on 18 December 2008, as discussed above. As Mr Balakrishnan explained in unchallenged evidence which the judge evidently accepted, this was something the Branch had the authority to do in an emergency situation. Although Siglo exceeded the £875,000 limit it had requested as at 6 November 2008 by £5,415, it did not exceed the £950,000 limit which the Branch had sanctioned. While Siglo did soon exceed the new limit, the clock had started again, and 90 days was a long way off as at 3 December 2008.

110. The third problem is that there is any event no evidence to support the existence of the alleged conspiracy, whereas there is evidence which goes the other way. For example, the judge found out at [135]-[136] that Siglo exceeded its limit for over 119 days in the period up to 5 June 2008, that the Bank reported to this to Mumbai and that Mumbai sanctioned the breach (see paragraphs 29-30 above). There is no suggestion that this was concealed from the regulator. Why, then, should the Bank have conspired to conceal from its regulator a breach of the 90 day limit by Siglo in the run up to the Meeting, even if there was such a breach?

The judge's treatment of the witnesses

111. Counsel for the Appellants made seven main submissions in support of the Appellants' contention that the judge had been one-sided in his treatment of the witnesses, or at least had failed properly to assess their evidence.

112. First, counsel for the Appellants submitted that, despite citing at [30] an extensive passage from *Gestmin v Credit Suisse* at [15]-[23] and stating that he adopted the approach to the analysis of oral evidence based on witnesses' alleged recollection of event described in it, the judge had failed to apply that approach, and instead had given undue credence to the evidence of the Bank's witnesses. I do not accept this submission. It can be seen from the judgment that the judge tested the recollection of the witnesses by reference to the contemporaneous documents. One of the key reasons he gave for accepting the evidence of the Bank's witnesses was that their evidence was broadly consistent with the documents. By contrast, important parts of the evidence of Mr Dansingani and Mr Buxani were inconsistent with the documents. The same was true with respect to the inherent probabilities of the situation.

113. Thus it can be seen from the judgment that the approach the judge adopted corresponded to that described in the very well-known passage from the judgment of Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at 57 (described as "salutary" by Lord Mance in *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 at [164]):

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the independent facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."

114. Secondly, counsel for the Appellants submitted that the judge had failed properly to take into account the fact that the Bank's witnesses had not supported the Bank's pleaded case as to what was said at the Meeting. There are two answers to this submission. The first is that the judge stated in terms at [33] and [181] that he had taken this into account. The weight to be attached to it was a matter for the judge. The second is that, as counsel for the Respondent pointed out and counsel for the Appellants had to accept, the evidence of both sides departed from their pleaded cases. For example, the Defendants had admitted receipt of the first version of the 28 October 2008 facility letter "in October" in their Defence, but three weeks before trial they served a statement from Mr Dansingani denying this.

115. In addition, counsel for the Appellants complained that the judge had failed to take into account the fact that the Bank had pleaded that Mrs Dansingani was present at the Meeting, but accepted at trial that she was not. This adds nothing to the previous point, however.

116. Thirdly, counsel for the Appellants criticised the judge's assessment at [158] of what Mr Balakrishnan had said in his second witness statement. Counsel for the Appellants argued that the judge had failed to recognise that in cross-examination the witness had contradicted his written evidence of just days before. I do not accept this. The judge quoted both the witness' statement that he had a clear recollection of the first version of the 28 October 2008 facility letter being sent to Siglo at the end of October 2008, and his acceptance in cross-examination that he could not recollect this. Unsurprisingly, the judge preferred the latter evidence. The judge nevertheless regarded the witness' reasons for thinking the letter must have been sent to Siglo at that date as compelling. That was a conclusion the judge was entitled to reach despite the witness' acceptance that he could not recollect it being done. In any event, this point goes nowhere for the reasons I have already explained above.

117. In addition, counsel for the Appellants criticised the judge for failing to take into account in his assessment of Mr Balakrishnan's evidence Mr Balakrishnan's admission that the final version of the 28 October 2008 facility letter had not been re-dated when it was signed and the Siglo board minute dated 30 October 2008 had been backdated (as discussed by the judge at [206]-[207]) for regulatory reasons (namely to support the sanction given by the Branch for the additional limit on 28 October 2008 to avoid the 90 day period being exceeded). I do not accept this criticism. If anything, Mr Balakrishnan's candour on this point supports the judge's finding about the date of

the "disputed suite" of documents, but as discussed above (i) that finding is not open to challenge and (ii) does not matter anyway.

118. Counsel for the Appellants also criticised the judge for ignoring the fact that a document which Mr Balakrishnan had relied in his first witness statement upon as evidencing "very clear instructions from Mumbai on how this account was to be dealt with" in November 2008 could not have been drafted before February 2009. As counsel for the Respondent pointed out, however, the document in question was undated and it is therefore easy to understand how it came to be misplaced in chronological sequence and hence incorrectly referred to by Mr Balakrishnan in his statement. Mr Balakrishnan nevertheless maintained in cross-examination that he had received clear instructions from Mumbai by telephone.

119. Fourthly, counsel for the Appellants criticised the judge's assessment of Mr Joseph's evidence at [39]-[41], repeating the submission made to the judge that it was absurd to suggest that Mr Joseph's recollection could be better at trial than it had been when he made his witness statement. The judge addressed this submission head-on, however, and rejected it for two reasons. Whatever might be said about the second reason, the first reason was a solid one: at the time of making his statement Mr Joseph had not had access to the contemporaneous documents, but had been given access to them subsequently, which had refreshed his memory.

120. In addition, counsel for the Appellants criticised the judge for not mentioning the fact that Mr Joseph had said in his first witness statement that he came to London from Bangalore, but in his second witness statement he corrected this to say that he came from Mumbai. As the judge explained at [176], however, the dates and places of Mr Joseph's itinerary were established at trial by reference to Mr Joseph's passport, which is what Mr Joseph relied upon when making the correction in his second witness statement. Thus there is nothing in this point.

121. Counsel for the Appellants also criticised the judge for not making a finding as to the extent of Mr Joseph's authority, claiming that this was an important aspect of the Defendants' case at trial. I do not accept this criticism. It may be doubted that Mr Joseph had the authority to make the assurances alleged by the Defendants given (i) Mr Joseph's evidence on the point summarised by the judge at [40] and (ii) the inherent improbability that the chairman of a bank would have such authority. Since the judge found that Mr Joseph did not give those assurances for other reasons, however, the judge did not need to make a finding as to the extent of Mr Joseph's authority.

122. Fifthly, counsel for the Appellants submitted that the judge's statement at [192] that the Bank's minute of the Meeting supported the evidence of the Bank's witnesses was "not even an available view", in particular because the minute referred to a "sanctioned limit of GBP 500,000". I do not accept this submission. The reference to the sanctioned limit of £500,000 is readily explicable on the bases that (i) at that date Mumbai had not yet ratified the Branch's action in sanctioning the additional limit of £450,000 and (ii) the discussion was about Siglo's need for an increased limit until after Christmas. Moreover, the minute is plainly more supportive of the Bank's case than it is of the Appellants' case. (In the Appellants' skeleton argument it was also suggested that the statement in the minute that Mr Dansingani "agreed to examine the request for providing second charge on his property" was inconsistent with him

having agreed to the second charge previously, but this suggestion has no purchase for the reasons explained above.)

123. Sixthly, counsel for the Appellants submitted that the judge had repeatedly let the Bank's witnesses "off the hook" in respect of answers helpful to the Defendants' case in the judgment, when he had shown no such indulgence to the Defendants' witnesses. There are four answers to this complaint.

124. First, the judge had to assess each witness' evidence as a whole, and in relation to (i) the documentary evidence, (ii) the evidence of other witnesses and (iii) the inherent probabilities. As I have shown, that is precisely what he did. The fact that the Bank's witnesses gave some answers which could be viewed as helpful to the Defendants did not compel the judge to disregard the rest of their evidence.

125. Secondly, the judge did not ignore the fact that the Defendants contended that the Bank's case was seriously undermined by the cross-examination of its witnesses. On the contrary, he recorded this at [31] and [33]. It is clear from his subsequent reasoning that he did not accept this.

126. Thirdly, as discussed above, the documentary evidence supported the evidence of the Bank's witnesses, but not the evidence of Mr Dansingani and Mr Buxani, for the reasons explained at length and in detail by the judge.

127. Fourthly, even if the Bank's witnesses had all said that they could not remember a word of what was said at the Meeting, the Defendants' case would still have failed if the judge did not accept the evidence of Mr Dansingani and Mr Buxani on this point. The judge found, however, that both witnesses had lied both in their dealings with the Bank and in their evidence to the court. Particularly in the case of Mr Dansingani, the judge gave extensive and solid reasons for this assessment. Although counsel for the Appellants attempted to rebut the first two examples of Mr Dansingani's lack of candour given by the judge at [46]-[47], he made no such attempt in respect of most of the more serious lies identified by the judge later in the judgment. Nor did counsel attempt to rehabilitate Mr Buxani's credibility. Given that the judge did not believe Mr Dansingani and Mr Buxani, it was inevitable that the Defendants' claim that the oral assurance had been given by Mr Joseph failed. I am not remotely persuaded that the judge should have believed them.

128. Seventhly, counsel for the Appellants complained that the judge had failed to mention in the judgment the fact that, on one point, counsel for the Bank had wrongly accused Mr Dansingani of lying during cross-examination, had withdrawn that specific allegation and had apologised for his mistake. There is no merit in this complaint. There is no reason why the judge should have mentioned the episode, and his failure to do so does not begin to demonstrate partiality on his part. The judge rightly concentrated on the allegations of lying that were pursued, and found multiple instances substantiated.

Mrs Dansingani's case

129. Finally, the Appellants contend that the judge entirely disregarded his conclusions about the Bank's conduct with respect to Mrs Dansingani while vindicating the Bank on every issue with respect to the Appellants. There is no merit in this point either. As

can be seen from my summary of the judgment, the judge dealt with both aspects of the case as they arose. None of his findings with respect to Mrs Dansingani cast any doubt on his findings with respect to the Appellants. On the contrary, they confirm that the judge was even-handed in his approach to the case.

Conclusion

130. For the reasons given above I conclude that, despite the inordinate and inexcusable delay in delivering the judgment, there is no reason to doubt the findings the judge made. On the contrary, I am convinced that the judge was correct. I would therefore dismiss this appeal.

Lewis LJ:

131. I agree.

Lewison LJ:

132. I also agree.