Neutral Citation Number: [2018] EWHC 3063 (Comm)

Case No: CL-2017-000194

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23/11/2018

Before :

THE HONOURABLE MRS JUSTICE MOULDER

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Between :

Katara Hospitality **(a company incorporated in Qatar)**	**Claimant**
- and –	
(1) Gerard Guez **(2) Jacqueline Rose**	**Defendants**

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Mr Stuart Ritchie QC & Mr Samuel Rabinowitz (instructed by **Allen & Overy LLP**) for the **Claimants**
Mr Andrew Hunter QC (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Defendants**

Hearing dates: 22-25 October, 29 -31 October, 1 November 2018

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APPROVED JUDGMENT

Mrs Justice Moulder :

1. By this claim the claimant, Katara Hospitality ("Katara") seeks the sum of approximately €65 million from the defendants pursuant to an agreement which the claimant says was made either (in the case of the second defendant), pursuant to a deed (the "Deed") or, in the alternative, pursuant to an agreement (the "Contract") which was partly in writing and partly oral/by conduct.

Background

2. In 2008 the claimant was known as Qatar National Hotels Company ("QNH").

3. The defendants are Mr Gerard Guez and his wife, Ms Jacqueline Rose. Mr Raymond Visan founded a hospitality business which was run through a French company which in 2008 was trading under the name George V Eatertainment SA ("GVE"). Mr Guez invested in the business through shares held by his wife, Ms Rose. Ms Rose was also a director of GVE although Mr Guez would attend and participate in the board meetings. His sister, Monique Guez, also had a small shareholding in and was a director of GVE. Mr Visan also set up a separate company, Creative-Design for Restaurants and Bars which held the intellectual property rights for GVE. Mr Visan died in October 2010.

4. In July 2008 QNH signed two agreements for the acquisition of a 37% (approximately) shareholding in GVE and Creative Design FZ-LLC ("CD-FZ") for a total purchase price of approximately **€113.4 million** (the "GVE SPA" and the "CD SPA" respectively).

5. The sale of the shares in GVE was from Ms Rose and Waterfront SA, a company controlled by Mr Visan. In the case of CD-FZ the seller was Calato Management SA, a Panamanian company controlled by Mr Visan. CD-FZ was a company incorporated in the Dubai Technology and Media Free Zone to consolidate intellectual property held within the business. The transaction also contemplated the establishment of a property investment company ("Propco") which was intended to develop new hotels.

6. Atlantic Capital Group WLL ("Atlantic") was a company incorporated in Qatar represented by Donald Jordan. It facilitated the transaction and was also a proposed stakeholder in the acquired business. A subsidiary of Atlantic, Hospitality Development Ltd, was named as a purchaser in the agreement but ultimately Atlantic pulled out of the transaction in January 2009.

7. Completion of the transaction was due to occur by 14 September 2008; however, the conditions precedent were not satisfied within the time frame. In particular, the requirement to obtain approval for the subdivision of shares in CD-FZ from the regulatory authority ("TECOM") was not satisfied. The completion date was extended twice, to October and then November 2008. Thereafter negotiations continued in relation to a number of matters including Mr Visan's employment contract and the terms on which Mr Fortet and Mr Guez would continue to be involved in the business (paragraph 25 of Mr Macnab's witness statement). Completion was anticipated to occur on a number of dates (23 November 2008, 15 December and 16 December 2008). However, completion did not occur on these dates and a further "completion"

or signing meeting (the "completion meeting") was fixed for 28 and then 29 December 2008.

8. On 29 December 2008 the completion meeting was held at the offices of QNH in Qatar in a conference room. A board meeting of QNH was held at around 6pm (local time) in Doha. Mr Visan was present for part of the board meeting and during that meeting, the claimant sought a price reduction and a revised price of €68 million was agreed. None of Mr Guez, Ms Rose or their lawyer Mr Trunnell was present at the completion meeting.

9. Documents were initialled and then signed in the course of the evening. It is the claimant's case that Mr Visan agreed to a "personal guarantee" on behalf of himself and the defendants pursuant to which the defendants agreed to pay to the claimant the difference between the purchase price of €68.04 million and amounts received by way of dividends and distributions over the period of eight years from closing. It is the claimant's case that this agreement was either entered into (in the case of Ms Rose) by way of a deed (the "Deed") which was signed by Mr Visan on her behalf pursuant to a power of attorney and/or was a contract binding both defendants which was partly in writing (as regards the obligations of the defendants) and partly oral and/or by conduct (as regards the consideration provided by the claimant).

10. An advance payment of the consideration was paid on 31 December 2008 to Mr Visan. Payment of the balance of the consideration (other than the deferred consideration) and transfer of the shares took place on 15 January 2009.

Evidence

11. For the claimant the court heard evidence from the following witnesses:

    i) Mr Duncan Macnab, a partner of Allen & Overy LLP, gave a witness statement dated 3 July 2018 and was cross examined on that witness statement. Mr Macnab had no involvement in the matter prior to mid-September 2008 but thereafter was the lead partner on the transaction. In particular he was present at the completion meeting (but not the board meeting) on 29 December 2008. The associate at Allen & Overy, Fraser Dawson, who was also present at the meetings on 29 December 2008, has left the firm and did not give evidence.

    ii) Mr Hesham Kamal Soliman**,** who at the relevant time was QNH general counsel; he was present at the board meeting on 29 December 2008 as the board secretary.

    iii) Mr Ashley Fernandes, now the chief financial officer at the claimant who at the relevant time was director of accounting at the claimant reporting to Mr Sunil Vohra who was then QNH's Chief Financial and Business Development Officer. Mr Vohra did not give evidence. Mr Vohra left the claimant in May 2009. Mr Fernandes did not attend the meetings on 29 December 2008 but was present in the offices of the claimant until around 11pm.

    iv) Mr Ramzy who at the relevant time was Head of Internal Audit for the claimant and has now left the employment of the claimant. Mr Ramzy's

attendance at the completion meeting on 29 December 2008 was his only involvement in the transaction.

12. His Excellency Sheikh Nawaf Bin Jassim Bin Jabor Al Thani ("Sheikh Nawaf"), the chairman of the claimant, both currently and in 2008, was the subject of a successful application on the first day of the trial, 22 October 2008, to give his evidence via video conferencing but in the event failed to attend to give such evidence on 23 October 2008. The claimant then made an application on 31 October 2018 to admit his witness statement notwithstanding that the claimant's case had formally closed. That application was granted for the reasons set out in the ruling handed down on 1 November 2018. However, although the court concluded that it was in the interests of justice that the evidence of Sheikh Nawaf was before the court, I indicated in that ruling that the weight which this court gives to that evidence for the purposes of this claim will be assessed in the light of the circumstances in which the evidence has been put before the court.

13. The evidence in support of the application for Sheikh Nawaf to give evidence via video link indicated that Sheikh Nawaf was required to remain in Qatar to be on hand for urgent government business. The evidence presented to the court on behalf of Sheikh Nawaf made it clear that unless permitted to give his evidence by video link, he would not otherwise be available to give oral evidence to the court. Faced with that choice, the court concluded that the interests of justice lay in allowing Sheikh Nawaf to give video evidence. However notwithstanding that permission was granted, it was unclear why, given modern methods of communication, Sheikh Nawaf needed to remain in Qatar and could not have travelled to give evidence and still have remained in contact with officials in Qatar. It is noteworthy that even if that was the position on 22 October 2018, in the evidence in support of the application of 31 October 2018, it was stated that Sheikh Nawaf did in fact travel overseas on the afternoon of 23 October.

14. Although the application to give evidence by video link was only heard on the afternoon of 22 October at which point it was anticipated that Sheikh Nawaf would be giving evidence at 10.30 (London time) on 23 October, it would appear (from Sheikh Nawaf's evidence in his witness statement dated 31 October 2018) that on the morning of 23 October he was called to attend a meeting at the Ministry of Finance at short notice and as a result he was not able to give evidence as planned. The court notes that no explanation for his failure to give evidence was provided to the court either on 23 October or during the trial which continued that week. An explanation was only proffered in the witness statement dated 31 October 2018 which was filed in support of the application of 31 October 2018. As referred to above, this stated that on the afternoon of 23 October Sheikh Nawaf was required to travel overseas "unexpectedly on a confidential matter". No details were given as to the location except to say that it was in Europe and not in the UK. Sheikh Nawaf stated in his witness statement that he had not been able to give evidence from that location because he had "no visibility of the schedule of meetings on this matter".

15. As a result of the failure of Sheikh Nawaf to attend for cross-examination, the evidence of Sheikh Nawaf in his witness statement has not been tested. I take into account the reasons given by Sheikh Nawaf as to why he was unable to attend either in person or by video link. As noted above, the court was initially told that Sheikh Nawaf had to remain in Qatar and subsequently that Sheikh Nawaf had travelled

abroad but was unable to commit to a time to give evidence. There was no explanation provided to the court as to why the evidence as to his failure to give evidence either on 23 October, or at any point subsequently that week, could not have been provided prior to 31 October. There is also no indication in the evidence that Sheikh Nawaf was endeavouring to take steps to see if his schedule would accommodate the giving of evidence. This is a case where the events on the evening of 29 December 2008, and in particular the alleged contract which on the claimant's case is pleaded to have been partly oral, was described in closing submissions as the claimant's primary case. Reference is made in the particulars of claim expressly to negotiations between Sheikh Nawaf and Mr Visan on that evening. It is the claimant who brings this case and the claimant bears the burden of proof. Whilst I accept the evidence of Sheikh Nawaf in support of his application to admit his evidence, it is nevertheless unclear why in the circumstances Sheikh Nawaf was unable to arrange his schedule in order to allow his evidence to be given, either in person or through video link at some point during the trial. Regrettably therefore he has not had the opportunity to present his evidence orally in support of the claimant's case and the defendants have not had the opportunity to challenge his witness statement in the proceedings. In the circumstances it is only fair that the weight which I give to that evidence is significantly reduced and the court will look carefully at the other evidence to see whether it supports the account of Sheikh Nawaf as set out in his witness statement dated 3 July 2018.

16. For the defendants the following witnesses gave evidence:

    i) Mr Christian Trunnell, a Californian attorney, represented Mr Guez and Ms Rose. In addition, he represented Mr Visan in relation to the transaction and in relation to two of the companies. He did not attend the meetings on 29 December 2008;

    ii) Mr Guez;

    iii) Ms Rose. Although legally the shareholder in GVE, Ms Rose accepted in cross-examination that Mr Guez was responsible for doing the negotiating and the dealings with the parties involved in the transaction and he would, so far as necessary, simply report back to Ms Rose and ask her to do whatever needed to be done. She had no independent input into the transaction and did not follow the correspondence or get involved in the day-to-day dealings;

    iv) Ms Guez, the sister of Mr Guez, who represented Ms Rose at board meetings of GVE and in particular was present at a board meeting in April 2011. She had no involvement in the events of 2008.

17. In writing this judgment, the court has had the benefit of the transcripts of both the submissions and the factual evidence. Both counsel prepared written opening submissions and notes for closing. The court has had regard to the totality of the evidence: the fact that the court has not referred to a particular submission, either oral or written, in the course of this judgment, does not mean that it was not taken into account by the court in reaching its conclusions.

Issues for the court

18. Mr Visan had a power of attorney from each of the first and second defendants. In essence it is the claimant's case that this authorised Mr Visan to enter into the Deed on behalf of Ms Rose and/or to agree the contract on behalf of the defendants.

19. The following issues fall for determination by the court:

    i) The nature of the powers of attorney;

    ii) The scope of the powers of attorney;

    iii) The validity of the deed;

    iv) Whether there was a contract which was partly in writing pursuant to which the defendants agreed to the undertakings as set out in the deed and partly oral/by conduct; and

    v) Estoppel.

Powers of Attorney

20. The two powers of attorney executed by each of the defendants are in identical form and were executed on 20 December 2008. They are headed "Power of Attorney" and state:

> "Know all men by these presents:
>
> I [D1/D2]… do hereby make, constitute and appoint Raymond Visan… as my true and lawful attorney-in-fact, with full power of substitution, to represent me, sign in my place and stead, and take other steps for my benefit, in connection with the completion of the sale of 40% of the issued and outstanding shares of George V Eatertainment SA ("GVE"), the formation and restructuring of the assets of GVE into one or more new companies, and the formation and capitalisation of a related property holding company.
>
> Given this 20th day of December 2008, in Los Angeles, California USA. "

21. The power of attorney is then signed by the respective defendant and attested by Mr Trunnell as follows:

> "Acknowledgement…
>
> "On December 20, 2008, before me, Christian W Trunnell, notary public, personally appeared [D1/D2], who I know to be the person whose name subscribed to the within instrument, and acknowledged to me that she executed the same."
>
> Witness my hand and official seal [signature and seal of CT]".

22. Mr Trunnell sent by email on 28 December 2008 to Mr Dawson the powers of attorney from the two defendants. The email said, so far as relevant:

> "…Also, in the event there are any last-minute changes that require documents to be re-signed, attached are copies of the signed powers of attorney by Mr Guez and Ms Rose giving Mr Visan the power to sign on their behalf at completion…"

The Deed

23. The Deed provides in clause 1:

> "the Obligors [defined as Mr Visan, Mr Guez and Ms Rose] undertake that to the extent that during the Relevant Period [defined as eight years from 29 December 2008] QNH does not receive by way of dividend and/or other distributions from GVE and CD an amount equal to the Relevant Amount [defined as Euro 68.04 million], then within 30 days following the expiry of the Relevant Period, the Obligors will pay to QNH an amount equal to the Balancing Amount [defined as Euro 68.04 million less the amount received by QNH by way of dividend and other distributions].

24. Clause 2 sets out the relevant definitions used in clause 1.

25. Clause 3 contains warranties as follows:

> "RV, GG and JR warrant to QNH that:
>
> …
>
> (b) They have the power to execute and deliver this deed, and to perform their respective obligations under it
>
> …
>
> (d) This guarantee constitutes their respective legal, valid and binding obligations enforceable against them in accordance with its terms …"

26. There are several versions of the Deed which have been disclosed in the course of the proceedings. The version on which the claimant now relies (referred to as "Version A") bears the signature of Mr Visan against the signature block for himself, Mr Guez and Ms Rose. The signature of Mr Visan against the signature block for Ms Rose has apparently been witnessed by Mr Ramzy as his name and signature appear in the attestation block. The version of the deed upon which the claimant no longer relies ("Version B") was created in June 2010 and bears the signature of Sheikh Nawaf and in addition bears the signature of Mr Ramzy as a witness against the signatures of Mr Visan and Mr Guez.

Chronology

27. Reference was made above to delays in completion of the transaction between September and December 2008 and ultimately a completion meeting being held on 29 December 2008. The material events (so far as relevant to the issues) which, on the evidence before the court, occurred from mid December 2008 leading up to the meeting of 29 December 2008 are set out below.

Events leading up to the meeting on 29 December 2008

28. In early December 2008 a price reduction was agreed and amended documents were circulated on 15 December 2008 by Allen & Overy which reflected the amendment to the consideration.

29. On 17 December 2008 Mr Dawson emailed Mr Trunnell:

> "… On a related matter I have been informed that completion will now take place on December 28 in Qatar. In light of this I believe it is the intention for all documents to be finalised by close of business tomorrow and for all documents which require to be signed by persons other than QNH, Raymond and Atlantic to be signed by such persons in the week prior to completion. It is my understanding that all documents would then be brought to Doha in order that the final signatures of QNH, Raymond and Atlantic may be added and completion may occur…" [Emphasis added]

30. On 22 December 2008 Mr Dawson emailed Mr Trunnell attaching revised drafts of the amendment agreements to the GVE and CD SPAs.

31. On 23 December 2008 there was an exchange of emails between Mr Dawson and Mr Trunnell concerning the signed letters of Mr Fortet and Mr Guez. The side letter to Mr Fortet was agreed and in relation to Mr Guez a minor change was requested by the claimant.

32. On 23 December 2008 Mr Dawson sent an email to Mr Trunnell sending "what he believed to be the final forms of all documents".

33. On 24 December 2008 Mr Dawson sent a further email to Mr Trunnell and Atlantic enclosing a deed concerning commissions (the "Antibribery Deed").

34. On 26 December 2008 there was an executive committee meeting of the claimant.

35. Mr Trunnell sent an email at 18.20 (Dubai time) on 28 December 2008 (the "28 December email") to Mr Dawson (referring to an earlier telephone conversation) accepting the revised side letter relating to Mr Guez, the Propco guarantee (a guarantee of the investments of Calato in the property holding company) and the payment letter. The email also attached the powers of attorney from the two defendants. The email said, so far as relevant:

> "…as also discussed, with respect to the signatures of Jacqueline Rose and Gerard Guez, rather than wait and see if

> the originals arrive in Doha on time, I will email you copies of the signed documents… and arrange to have a set of originals delivered to your office in New York on Monday morning.
>
> Also, in the event there are any last-minute changes that require documents to be re-signed, attached are copies of the signed powers of attorney by Mr Guez and Ms Rose giving Mr Visan the power to sign on their behalf at completion…"

36. Under cover of a letter dated 28 December 2008 to Mr Cunningham at the New York office of Allen & Overy, Mr Trunnell sent the following documents signed by Ms Rose and Mr Guez, as applicable:

    i) shareholders agreement signed by Ms Rose;

    ii) deed of amendment to the GVE SPA signed by Ms Rose;

    iii) Propco guarantee signed by both defendants;

    iv) Antibribery Deed signed by both defendants;

    v) "noncompete letter" signed by Mr Guez;

    vi) powers of attorney from Mr Guez and Ms Rose;

    vii) certification of satisfaction of conditions precedent signed by Ms Rose;

    viii) certificates of good standing and trademark registrations.

Events on the evening of 29 December 2008

37. The evidence is that Mr Macnab and Mr Dawson arrived from Dubai at around 5pm. According to the minutes of the board meeting, the board meeting started at around 6pm. Other matters were discussed before the board discussed the GVE transaction. Mr Visan joined the meeting and the issue of the reduction in the price was raised.

38. According to Mr Macnab by around 9pm a reduction in the purchase price had been agreed. At 10:39pm (Doha time) Mr Dawson sent to Mr Trunnell under cover of an email revised drafts of the two SPA and the shareholders agreement which Mr Dawson stated had been amended to reflect the change in the consideration. The email stated (so far as material):

> "The parties are currently initialling the documents so please let me know your comments as soon as possible.
>
> No other changes to the documentation have been made.
>
> I also attach a short warranty letter which QNH have requested by (sic) entered into by Raymond in respect of the solvency of the GVE group."

39. Mr Trunnell responded at 11pm:

> "Revised agreements are fine. I'm reviewing the warranty agreement now and will revert with any comments ASAP.
>
> Any changes to Raymond's CDFZ employment agreement?"

40. Mr Trunnell then sent a further email at 11:27pm approving the warranty agreement subject to two small changes.

41. At 11:51pm Mr Dawson responded:

> "… I believe that everything is now agreed…"

42. Mr Macnab's evidence in cross-examination (discussed further below) was that he was told that the return on investment had been agreed around 12:30am. The Deed was then apparently produced by Mr Macnab and signed by Mr Visan but not (on that evening) by Sheikh Nawaf.

The nature of the powers of attorney

43. In their amended defence (paragraph 20.1) the defendants assert that the powers of attorney were not valid deeds as they did not comply with section 1 of the Powers of Attorney Act 1971 (the "1971 Act") which provides that a power of attorney must be executed as a deed.

44. Section 1(2) of the Law of Property (Miscellaneous Provisions) Act 1989 (the "1989 Act") provides that:

> "an instrument shall not be a deed unless-
>
> (a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise)…"

45. I was referred to the Law Commission Report which led to the 1989 Act (*Law Commission 163 on Deeds and Escrows* dated 29 June 1987) at 2.16 which reads in material part:

> "…We remain persuaded that documents should not acquire the still significantly different status of being deeds unless this was patently intended by the parties. Accordingly, we recommend that, in addition to our proposals that the formal requirements of the deed should be that the document had been signed, attested and delivered it should also, as a matter of law, be clear on the face of the document that it was intended to be a deed. In the working paper we stated that generally this will be clear because the word "deed" will appear somewhere on the document.… Nevertheless, it is not intended that such words should be essential; they are recommended in order to give some indication of a general uniform practice which could usefully be adopted. This provision would still leave the court free to decide whether or not a document was intended to be a

> deed where a different formula was used, but only where there was evidence of such a finding within the document itself." [Emphasis added]

46. As noted by Mr Christopher Nugee QC sitting as a deputy judge in *HSBC Trust Company (UK) Ltd v Gabriel Quinn* [2007] EWHC 1543 (Ch) at [50] who was also referred to this passage from the Law Commission report, whilst it is plain that the use of the word "deed" is not essential, the wording of the Act does not help to identify what other indications in a document might suffice to persuade the court that it was intended to be a deed. In that particular case the judge accepted that formal language was used and signatures were witnessed and witnesses gave their names and addresses. However, whilst accepting that these were all indications that the document was intended to be a formal one, the judge did not regard any of them, singly or together, as any indication that the parties intended it to take effect as a deed, let alone as making it clear in the face of the document that they did. He said at [51]:

> "…All that they show is that the parties intended it to be legally binding, and in my judgment this is plainly not enough; what is needed is something showing that the parties intended the document to have the extra status of being a deed."

47. For the claimant it was submitted that:

i) the powers of attorney were headed "power of attorney" and that itself was a reference to a document that must of necessity be a deed and that was sufficient to show that the document was intended to be a deed;

ii) the language "know all men by these presents" is wording which is "classically used" in a deed that is not inter partes;

iii) the body of the powers of attorney referred to a "lawful attorney" and the powers of attorney are signed and sealed by the attesting witness; and

iv) others considered the powers of attorney sufficient to grant power to enter into deeds; thus, Mr Visan entered into the deeds of amendment to the SPAs and the Propco deed.

48. It was submitted that it would have been "objectively known" that a deed was required in order to enter into the deed. It seems to me that has not been established on the evidence at the time the power of attorney was entered into. The claimant has not pleaded the Californian law on this subject and there is no evidence before the court that either the defendants or their California lawyer knew that the power of attorney from an English law perspective needed to be in the form of a deed. Such intention cannot be inferred in my view from the mere use of the description "power of attorney".

49. The claimant also relies on the language "*know all men by these presents…*". Even if this is language that was used historically in deed polls and may add apparent formality, it does not demonstrate that the parties intended that the document should be a deed. Counsel for the claimant referred the court to *Chelsea and Waltham Green Building Society v Armstrong* [1951] Ch 853 at 857 but accepts that the wording was

not part of any formalities of the deed even in 1951. In my view it provides no assistance that this wording demonstrates that it was the patent intention of the parties to create a deed.

50. The reference in the body of the power of attorney whereby Mr Visan is appointed as "*my true and lawful attorney*" does not in my view make it clear that it is intended to be a deed. As in the case of *Quinn*, there are indications that the document was intended to be a formal one and to have formal legal effect, but this does not amount to showing that the parties intended the document to have the extra status of being a deed. The fact that the powers of attorney are signed and sealed by the attesting witness would satisfy the requirements of subsection 1(3) for it to be validly executed as a deed (provided it is delivered as a deed) but that in itself does not "make it clear on its face" as required by subsection 1(2)(a) that it is intended to be a deed. As the Law Commission noted, the requirement that it should be clear on the face of the document was felt to be desirable in order to make it easy to distinguish in practice deeds from other documents which have similar provisions for witnessing and signing.

51. The fact that other deeds may have been entered into by Mr Visan pursuant to the powers of attorney again cannot satisfy the requirement of the subsection. There has to be evidence for such a finding within the document itself.

52. On balance for the reasons discussed above, I am not persuaded that the powers of attorney satisfy the requirements of section 1(2)(a) of the 1989 Act and thus I find that they take effect as an appointment in writing and not as a deed (*Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] 1 Ch 375 at 394).

53. It is accepted for the claimant that the authority to execute a deed governed by English law must be itself conferred by a deed (s1 Powers of Attorney Act 1971). It follows that if (as I have found) the power of attorney was not executed as a deed, the deed itself cannot have taken effect as a deed in law. However, I accept that even if the power of attorney is not a deed, the claimant's primary case (as stated in closing submissions) is that the claimant relies on the Deed as a contract for which there is no need for it to be in the form of a deed (*Bowstead & Reynolds on Agency* (21st edition, 2017) at 2– 042).

The scope of the powers of attorney

54. It is the claimant's case that the authority conferred on Mr Visan was sufficiently broad to encompass entry into the Deed and/or the Contract, whether the powers of attorney were formal powers of attorney or informal powers of appointment.

55. Counsel for the defendants submitted that it is common ground that the powers of attorney did not grant Mr Visan a general power of attorney or some general contracting negotiating authority. The documents must therefore be interpreted strictly. Further ordinary principles of contractual construction apply and the words used must be construed in light of the relevant factual matrix. In particular, it was submitted that in ascertaining the factual matrix and commercial purpose, the court should have regard to the agreed procedure for the closing meeting that the defendants would not attend but would sign agreed completion documents in advance. As set out in the 28 December email from Mr Trunnell, the purpose of the power of attorney was

to enable re-signature of any of the signed GVE documents if there were last-minute changes to the documents.

56. The approach to construction of powers of attorney was considered by Hamblen J in *Brown v Innovatorone* [2012] EWHC 1321 (Comm). At [806] he quoted Article 24 of *Bowstead & Reynolds on Agency*:

> "Powers of attorney are strictly construed and are interpreted as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction:
>
> …
>
> (2) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular act;
>
> (3) General words do not confer general powers, but are limited to the purpose for which the authorities given, and are construed as enlarging the special powers only when necessary for that purpose;
>
> (4) A deed must be construed so as to include all incidental powers necessary for the effective execution of the power it confers."

57. Hamblen J continued:

> "[809] Whilst the article refers to the strict construction of P/As it also refers to construing them <u>having regard to the purpose for which the authority is conferred. That involves a consideration of the relevant context</u>…" [Emphasis added]

58. In the light of the court's finding that the powers of attorney were not in the form of a deed, the court is entitled to take a more liberal approach to interpretation and has regard more generally to the factual matrix against which the powers of attorney were agreed: *Bowstead Article 25* and 3- 017.

<u>The language of the powers of attorney</u>

59. For the claimant it was submitted that:

i) the subject matter of the agency was "*in connection with the completion of the sale of 40% of the issued and outstanding shares of…GVE, the formation and restructuring of the assets of GVE into one or more new companies, and the formation and capitalisation of a related property holding company"* and execution of the deed falls within the subject matter scope of the authority; without the deed/contract there would have been no completion of the sale and secondly the terms of the deed/contract were agreed at the meeting scheduled for completion.

ii) Mr Visan had "*full power of substitution, to represent me, sign in my place and stead, and take other steps for my benefit*" and thus negotiation and agreement of the contract is within the scope of the authority as being "other steps";

iii) "*for my benefit*" does no more than signify that the agent must be carrying out his mandate in the interests of his principal.

60. For the defendants it was submitted that:

i) it conferred only specific authority on Mr Visan to sign agreed documents in connection with the completion of the GVE share sale;

ii) it only authorised Mr Visan to act for the benefit of the defendants.

61. Looking first at the language used in the powers of attorney, the authority granted is expressed to be:

> "to represent me, sign in my place and stead, and take other steps for my benefit, in connection with the completion of the sale of 40% of the issued and outstanding shares of George V Eatertainment SA ("GVE"), the formation and restructuring of the assets of GVE into one or more new companies, and the formation and capitalisation of a related property holding company." [Emphasis added]

62. The phrase "in connection with" is broad but the authority conferred is in connection with "the completion" of the sale of shares of GVE. The language refers however not just to completion of the sale of shares in GVE but also to the formation and restructuring of the assets of GVE into one or more new companies, and the formation and capitalisation of a related property holding company and it was submitted for the claimant that some meaning must be given to this language.

63. As noted above, where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular act. In my view therefore, the power to take "other steps" cannot be construed broadly but must be limited to steps in connection with the purpose for which the authority is given.

The factual context

64. In order to interpret the language, it is necessary to have regard not only to the language of the clause but also to the factual context and the purpose of the powers of attorney.

65. It was submitted for the claimant that:

i) there was no specific material casting light on the intentions of the defendants and Mr Visan; and

ii) such material as was objectively known to the parties indicated that powers wider than simply re-signature were required.

66. Risk of renegotiation: It was submitted for the claimant that the defendants were aware objectively, that they were at risk of there being a renegotiation in a financially adverse market.

67. However, when the powers of attorney were executed on 20 December 2008, a price reduction had already been agreed and revised documents reflecting the price reduction had been circulated, as noted above, by an email of 15 December 2008. There was no reason to expect a further renegotiation of the commercial terms: the evidence of an email from Mr Jordan of Atlantic to Mr Vohra on 14 December 2018 **[CB/464]** was that Mr Visan had agreed to the discount to the purchase price "predicated on a firm closing on the 16th". Further by email of 15 December, Mr Dawson had sent to Mr Trunnell what he hoped to be "final execution versions" of the SPA and the shareholders agreements. An email of 17 December referred to an intention for all documents to be finalised by close of business on 18 December.

68. The proposal (as set out in the email from Mr Dawson on 17 December quoted above) was that documents would be signed by the defendants in advance of the signing meeting and only QNH, Atlantic and Mr Visan would be present to sign at the meeting itself. The relevant documents (identified above) were in fact signed by the defendants and sent to the New York office of Allen & Overy.

69. In his witness statement Mr Macnab refers to the outstanding matters which prevented completion taking place in mid-December as set out in a completion checklist sent by Allen & Overy to Mr Trunnell on 15 December 2008. The outstanding documents as at 15 December were: employment contracts for Mr Fortet and Mr Visan, the Waki Limited contract with Creative Design, side letters for Mr Fortet and Mr Guez and the Propco deed of guarantee. Mr Macnab was asked in cross-examination about the email from Mr Dawson and it was put to him that there was no indication in the email that the meeting on the 28 December would be for anything other than to complete the transaction as agreed. Mr Macnab was asked whether he had a different understanding and he said that he did not.

70. In his witness statement, Mr Soliman stated (paragraph 11) that by December 2008 the claimant was "reconsidering all of its options including whether to withdraw its proposed investment". Further (at paragraph 13) that the claimant was concerned that the target was "overpriced" and that "Autumn 2008 was a period of great commercial uncertainty."

71. However, in cross-examination Mr Soliman appeared to be unable to recall the detail of what had occurred during this period and in the light of that, his evidence on this point (which in any event was unspecific as to dates), to the extent that it conflicts with the contemporaneous documentary evidence on the detailed chronology, should in my view be accorded little weight.

72. Although the claimant stresses that the defendants had not satisfied the conditions precedent in the SPA and asserts that the claimant could therefore have walked away from the deal, the contemporaneous documentary evidence does not suggest that this was the claimant's intention in mid-December. Rather it suggests that a completion meeting was fixed and, having secured a substantial reduction in the price, there was no objective reason to suppose that a further renegotiation of the price or the main

commercial terms was to be anticipated at the time the powers of attorney were entered into.

73. Counsel for the claimant referred in closing submissions to the evidence of Mr Guez in cross-examination, where he said that the claimant "kept negotiating" and telling them they were closing. Counsel submitted that that was the position: the transaction was moving forwards but with factors coming in. It seems to me not inconsistent to accept the evidence that the claimant kept negotiating for a better deal but to infer, looking at the position which had been reached by 20 December 2008 when the powers of attorney were entered into, that the negotiations appear to have been concluded other than in certain minor respects: a significant price reduction had been agreed and Mr Dawson in his email of 17 December to Mr Trunnell said:

> "… I have been informed that completion will now take place on December 28 in Qatar…" [Emphasis added]

At this point therefore, completion did not appear to be a moving target but was fixed.

74. It was put to Mr Guez in cross-examination that there were matters which as at 14 December were outstanding. The evidence of Mr Guez was that these were matters which were "very minor level". It seems to me that this evidence is consistent with the documentary evidence of what was outstanding at that point. Mr Dawson sent an email on 16 December 2008 to Mr Trunnell referring to the side letters and the Propco deed of guarantee. He stated that he believed that these were "the only outstanding issues". In his response of 17 December, Mr Trunnell did not disagree but stated that he would revert on the "three remaining open items" when he returned to LA the following day. A further point was then raised by Mr Dawson on 17 December as to expenses in relation to key man insurance but the concluding paragraph of that email, as referred to above, recorded that completion would take place on December 28.

75. In closing submissions, counsel for the claimant referred to the "development" with Atlantic on 22nd December and the request for the antibribery deed on 24th December but both these matters were after the powers of attorney had been executed. On the evidence I reject the submission that, at the time the powers of attorney were entered into, it would have been clear to an objective observer that the claimant was getting "cold feet" about the transaction and was not prepared to do it unless further concessions were made. I further reject on the evidence the submission that "at the very least" that was to be contemplated.

76. Role of Mr Visan: It was submitted that the evidence was that what was important was being negotiated by Mr Visan at a principal level. Mr Guez accepted in cross-examination that Mr Visan had led the commercial negotiations on behalf of the sellers and that they both wanted the deal completed. However, Mr Guez expressly rejected the proposition that he wanted Mr Visan to complete the deal on whatever terms were required to get it completed. Although it was suggested to Mr Guez in cross-examination that he had a financial need for the deal to go through, notably because he had made an offer to take his separate company, Tarrant Apparel Group, private, this was rejected by Mr Guez. The evidence of Mr Guez was that his exposure on the buyback would only have been about US$4 million.

77. Further, although Mr Visan had led the negotiations, the evidence shows the correspondence passing between Mr Trunnell and Allen & Overy as various points were discussed and amendments made. This would therefore imply that although Mr Visan was leading the negotiations, Mr Guez, largely through Mr Trunnell, was fully involved in the deal as it was being negotiated. Further, as referred to above, the email of 17 December from Mr Dawson to Mr Trunnell, shortly before the powers of attorney were executed, clearly states that the intention was that all documents would be finalised by close of business on 18th December and that all documents which required to be signed by persons other than the claimant, Mr Visan and Atlantic would be signed in the week prior to completion. The email concludes:

> "it is my understanding that all documents would then be brought to Doha in order that the final signatures of [Katara, Mr Visan] and Atlantic may be added and completion may occur."

78. Although the signed documents were then emailed, with originals being delivered to Allen & Overy in New York rather than to Doha, nevertheless the documents were in an agreed form which allowed the defendants to sign them. It is therefore in my view abundantly clear on the evidence that by this stage the commercial negotiations appeared to have been completed and against that background, there was no need to give Mr Visan a broad power to negotiate and conclude a sale of GVE.

28 December email

79. The 28 December email was sent by Mr Trunnell after the powers of attorney were entered into. It cannot therefore be part of the factual context, although it is admissible evidence as to the purpose of the document.

80. Counsel for the defendants submitted that this email is more significant, and it acts to limit the scope of the power of attorney. Counsel relies on the authority of *Overbrooke Estates Limited v Glencombe Properties Ltd* [1974] 1 WLR 1335 and *Collins v Howell-Jones* [1981] 2 EGLR 108. In the latter case, Waller LJ said:

> "in the *Overbrooke Estates* case, however, Brightman J says at page 1341:
>
> "It seems to me that it must be open to a principal to draw the attention of the public to the limits which he places on the authority of his agent and that this must be so whether the agent is a person who has or has not any ostensible authority. If an agent has prima facie sum ostensible authority that authority is inevitably diminished to the extent of the publicised limits that are placed on it."
>
> … In my judgment there is no warrant for the submission that where the authority is direct, any different conclusion should be arrived at. The principal announces to those who are dealing with his agent what are the limits of that agent's authority…"

81. Counsel for the claimant expressly accepted in closing submissions the principle that a principal can communicate a limitation of authority of his agent. Counsel for the

claimant sought to distinguish the *Overbrooke* and *Collins* cases as cases where "clear notices" were provided. Counsel submitted that in those cases the notices did not sit alongside other documents which on one view may be said to be inconsistent or not in the same terms. They were notices that communicated the extent and limit of the authority.

82. I do not accept the submission on behalf the claimant that the email should be regarded as "in the nature of the negotiating gambit" because it was not in the defendants' interests to invite further negotiation adverse to their interests. This seems to me to be without foundation on the evidence: in circumstances where the documentation had been signed by the defendants and was being sent in hardcopy in preparation for closing, the email from Mr Trunnell it seems to me was entirely consistent with the factual context when he stated that it was intended to cover "any last-minute changes that require documents to be re-signed".

83. However, it does seem to me that this email is different in nature from the type of notice which was considered in *Overbrooke* and *Collins*. In *Overbrooke* auctioneers had informed the defendants that the local authority did not have any plans for the property, and the sellers sought to rely on the general conditions of sale that the auctioneers did not have authority to make or give any representation or warranty. It was thus in this context that Brightman J said:

> "it seems to me that it must be open to a principal to draw the attention of the public to the limits which he places upon the authority of his agent …"

84. *Collins* concerned an alleged misrepresentation made by the vendor's estate agents. The particulars of sale contained a statement that the estate agents were not authorised to make or give any representation or warranty in relation to the property. Waller LJ giving the judgment of the Court of Appeal held that a principal was able to limit the agent's authority. Waller LJ referred to *Overbrooke* and concluded that there was no warrant for the submission that where the authority was direct, any different conclusion should be arrived at. He said:

> "the principal announces to those who are dealing with his agent what are the limits of that agent's authority."

85. In my view the statements relied upon were clearly intended in that case to limit the authority of the agent. By contrast in this case, whilst in my view this email reflects the view of Mr Trunnell as to the purpose of the powers of attorney, something clearer would be required in order to conclude that the email was to be interpreted as having the effect of limiting the scope of the powers of attorney. Although I have held that the powers of attorney do not satisfy the formalities which would amount to a deed as a matter of English law, nevertheless the powers of attorney are expressed in formal language and were drafted by a lawyer. In the circumstances this email is not sufficient in my view to amount to a clear statement that the scope of the power of attorney was to be limited by the terms of the email. Clearer language would in my view be required in order to conclude that the email was to be interpreted as having the effect of limiting the authority otherwise conferred by the powers of attorney.

Purpose of the powers of attorney

86. As noted above, the powers of attorney are to be construed having regard to the purpose for which the authority is conferred. In this regard I do take into account the 28 December email from Mr Trunnell stating that the powers of attorney were to cover the event that there were "last-minute changes" that require documents to be "re-signed".

87. It is inherent in the provision of a power of attorney to allow for re-signing, that documents would only need to be "re-signed" if either an error was identified in the documents which needed to be corrected or a change had been agreed to the terms.

88. However, it is submitted for the defendants that the powers of attorney conferred only specific authority on Mr Visan to sign documents in connection with completion which had been agreed by the defendants (directly or through their lawyer).

89. Counsel for the defendants also submitted that it was not a broad power to act in commercial negotiations to agree a sale of GVE but only a power to act in connection with the "completion of the sale" and that must be completion of the sale contemplated at the time of the grant of the powers of attorney.

90. It was submitted for the claimant that the transaction encompassed all the completion documents that were sent through on 23 December and that was the matrix against which the powers of attorney need to be assessed. Further that when the powers of attorney were executed, the CD – FZ sale was being designed to put the assets of the GVE group into. Counsel for the claimant therefore submitted that the powers of attorney could not be interpreted as merely a "re-signing power" because the power of attorney insofar as it refers to the restructuring of assets into one or more new companies went beyond any document they had signed.

91. The fact that the transaction taken as a whole encompasses not just the sale of shares in GVE but also the restructuring of assets of GVE into other companies and the formation of a property holding company does not in my view lead to an inference that the purpose of the powers of attorney given to Mr Visan on 20 December 2008 needed to be broad enough to allow him to negotiate the terms of the transaction. Thus it seems to me that the phrase "*in connection with the completion of the sale of 40% of the issued and outstanding shares of George V Eatertainment SA ("GVE"), the formation and restructuring of the assets of GVE into one or more new companies, and the formation and capitalisation of a related property holding company*" can be read as referring to what Mr Trunnell describes in his witness statement as "the sale transaction relating to GVE and related interests". In other words this was a sale of the hospitality business operated through GVE but which was achieved by a number of steps including firstly the actual transfer of shares in GVE, secondly the transfer of the intellectual property rights concerning GVE into CD-FZ and thirdly the formation of a property holding company (Propco). Thus, it seems to me that the language of this section of the powers of attorney encompasses the various elements of what could be termed the "GVE sale transaction".

92. I do not therefore accept the submission that because the documents which had already been signed by the defendants only related to GVE, this supports a wider interpretation of the powers of attorney. Even if the construction of the claimant were

accepted, the factual matrix shows that in practice no documents were required to be signed by the defendants on completion in relation to CD-FZ or were contemplated.

Conclusion on interpretation

93. The broad wording to "sign in my place" and "take other steps… in connection with the completion of the sale", would suggest that the powers of attorney were not limited to the signature of agreed documents but would have extended to signing other documents in connection with the completion of the sale. The language gives power to sign and take other steps "in connection with" completion of the sale; it does not for example restrict the power to a specific list of documents. The factual context suggests that additional matters might have been raised which may have required additional documents to be signed at completion and thus powers wider than simply re-signature were required.

94. However, the words "in connection with completion" were notably added to the form of the powers of attorney used in connection with the signing of the SPA in July 2008. Meaning should be given to the use of the words "the completion" in the phrase "in connection with the completion of the sale".

95. The purpose as evidenced by the email of Mr Trunnell was to allow documents to be re-signed. The documents at the time of execution of the power of attorney were identified and largely agreed.

96. Counsel for the claimant submitted that the court is then faced with a materiality threshold. Counsel for the defendants rejected this and submitted that the power of attorney allows last-minute changes but that the terms have to be agreed by the defendants.

97. On the evidence discussed above, the factual context as at 20 December 2008 was in summary that:

    i) the commercial terms of the GVE sale transaction were agreed save for a few minor matters;

    ii) a completion date had been fixed and there was no evident risk of the claimant withdrawing from the deal or seeking a further renegotiation of the commercial terms;

    iii) Mr Guez did not need the deal to be done at any price;

    iv) there was no need for Mr Guez to give Mr Visan power to act in any commercial negotiation in connection with completion of the GVE sale;

    v) the documentation and all proposed changes were raised with Mr Guez (largely through Mr Trunnell);

    vi) no documents were contemplated to be signed by the defendants on completion in relation to CD-FZ.

98. Against the factual context, the broad language should not be construed as a power to renegotiate the commercial terms of the deal. The obligations set out in the Deed

involved an entirely new liability which was not contemplated at 20 December 2008. The powers of attorney authorised Mr Visan to take steps in connection with the "completion of the sale". He was not authorised to agree a sale on different commercial terms which had not been agreed by the defendants.

99. For all these reasons I therefore find that the powers of attorney did not authorise Mr Visan to agree on behalf of the defendants to the undertakings set out in the Deed but conferred only specific authority on Mr Visan to sign documents in connection with completion which had been agreed by the defendants (directly or through their lawyer). The reference to "other steps" was not as a matter of objective construction intended to allow Mr Visan to agree undertakings which amounted to a change of the commercial deal and which were not contemplated at the time the powers of attorney were entered into and were not agreed by the defendants (either directly or through their lawyer).

"For the benefit of" the defendants

100. If I am wrong on that and the powers of attorney are broad enough to authorise Mr Visan to enter into the contract on behalf of the defendants, a further issue arises as to whether such an agreement can be said to be "for [the] benefit" of the defendants.

101. Counsel for the defendants submitted that on the evidence, the court should infer that the claimant required a personal guarantee from Mr Visan alone and that for Mr Visan to enter into an agreement on behalf of the defendants could therefore not be said to be "for [their] benefit." Counsel submitted that it was in effect a gratuitous undertaking.

102. Counsel for the claimant submitted that "for my benefit" should be understood as "in my interest" that is that the agent must act in the interests of the principal and that it is a personal power of attorney not a corporate power of attorney. Counsel submitted that the court cannot undertake a value judgement on whether the ultimate deal is in fact for the benefit of the individuals who have been signed up to it.

103. It has not been alleged that Mr Visan deliberately exercised powers against the interests of the defendants. However, in determining the scope of the mandate, the court must have regard to the purpose for which the power is given. The powers of attorney state expressly that it is a power to take other steps "for my benefit". Accordingly, it seems to me that if the power is not exercised for the benefit of the defendants it will be outside the actual scope of the power of attorney: *Bowstead* (paragraph 3-011).

104. The case as advanced for the defendants is straightforward; it does not require a value judgement by the court as to the benefit of the transaction. Counsel for the defendants submitted that agreeing an obligation to repay €68 million cannot be for the benefit of Mr Guez or Ms Rose. Counsel submitted that the minutes of the board meeting of QNH held on 29 December 2008 refer to a personal guarantee from Mr Visan and not to the sellers more broadly. Thus, to volunteer something which had not been requested by QNH was gratuitous and thus could not have been "for the benefit of" Mr Guez or Ms Rose.

Evidence

105. In cross-examination Mr Soliman confirmed that he kept the minutes of the meeting on 29 December 2008 as the board secretary. He said that he made handwritten notes of the meeting and the meeting was recorded, although after the minutes had been signed by the board members, the notes and audio recordings were destroyed. He confirmed that the board members would check the minutes, some of them would make comments and they were then approved by signing it and initialling the pages.

106. Mr Soliman was taken through the board minutes including the statement that Mr Visan agreed to reduce the price to €68.04 million. The minutes then noted that:

> "…QNH has already received a personal guarantee from Mr Visan on the recovery period of QNH's investment."

The minutes then stated, so far as material,:

> "the board accepted the final offer of Mr Raymond Visan and HE the chairman continued the negotiations in order to secure all aspects of the deal and raised the following matters:
>
> Recovery Period:
>
> The board of directors insisted on the fact that Mr Raymond Visan should determine for QNH the investment recovery period.
>
> Therefore Mr Raymond Visan agreed to sign a personal guarantee that QNH will recover its investment within eight years or else he will have to compensate."

107. The minutes then continue under the heading "Personal and corporate guarantees":

> "The Board requested additional guarantees from Mr Raymond Visan and Mr Abdullah Al Jufairi as follows:
>
> …
>
> 6 Personal Guarantee from Raymond Visan that QNH shall recover its investment within eight years maximum or he shall compensate."

108. In cross-examination Mr Soliman was asked whether the minutes at item 6, quoted above, correctly recorded what was requested and agreed. Mr Soliman replied:

> "yes, that's exactly what Raymond Visan confirmed in the meeting. He said: we guarantee to you will get your money back within five, six years."

109. In re-examination, counsel for the claimant sought to clarify whether Mr Soliman understood that the guarantee was going to be given by Mr Visan or by the sellers.

Counsel pointed out that in his witness statement, Mr Soliman (at paragraph 24) stated that:

> "Various matters were discussed at the QNHC board meeting including… personal and corporate guarantees to be given by the Sellers".

In response to this question from counsel, Mr Soliman said:

> "in the meeting they speaking in general for the guarantee how they going to recover their money back. How they going to return on investment and Raymond Visan was very confident he was gonna make money and he gonna return the money within five, six years maximum. Sheikh say, no-that's during the meeting-say: no, we give you more, we give you eight years and that's what's happened, that's what's drafted and that's what signed."

110. Counsel for the claimant pressed the point as to whether it was Mr Visan personally or the sellers. Having been pressed on the point, Mr Soliman said:

> "no no because that's what I'm saying, of the guarantee by the sellers because he is on behalf of the sellers. He signed the SPA on behalf the sellers. He didn't sign alone. He used the power of attorney to sign all documents related to that deed."

111. In my view the evidence of Mr Soliman on this point was unconvincing. He appeared to rely on the fact that the deed mentioned the defendants as well as Mr Visan rather than being able to recollect the discussion at the meeting. Further his evidence as to how the board minutes were prepared would suggest that the minutes, as a contemporaneous document, correctly reflected the discussion and, apart from the evidence referred to above which followed him being pressed by counsel, he gave no evidence which would suggest that the minutes were anything other than an accurate reflection of what was agreed, namely a personal guarantee from Mr Visan.

112. As to the evidence of Mr Ramzy, in his witness statement (paragraph 15) he said it was referred to as the "personal guarantee" because the purpose of the deed was to guarantee QNH's investment in GVE and CD. He also stated (paragraph 17) that there was a lot of negotiation "about the duration of the Sellers' guarantee". However, the evidence of Mr Ramzy in cross-examination was at odds in a number of respects with other witnesses: for example Mr Ramzy suggested (contrary to the evidence of Mr Macnab) that Allen & Overy were present during the board meeting and that the documents were signed in the main boardroom where the board meeting was being held. Most strikingly he insisted that he signed the Deed as a witness three times to witness the signature of Mr Visan on the night of 29 December, even though that is inconsistent with the claimant's case in that the claimant now only relies on a version of the document with one signature of Mr Ramzy. Counsel for the claimant submitted in closing that the evidence of Mr Ramzy with regard to his witness statement where he referred to "the sellers" was not fully challenged. However, in the light of the other apparent flaws in his evidence, it seems to me that, at best it could be said that his recollection on a number of matters was inaccurate and in those circumstances, I

accord little weight to his description in his witness statement of the guarantee as a "Sellers' guarantee".

113. Turning then to the evidence of Mr Macnab, his evidence was that a draft of the deed was prepared by him around 2pm on 29 December 2008 and the final draft was prepared around 9pm that evening. The draft originally prepared is the subject of privilege asserted by the claimant. Mr Macnab's evidence was that he was told around 9pm that there was a new price but in relation to the deed only the "concept" had been mooted at that time. Mr Macnab was pressed on this point in the light of the email at 10.39pm from Mr Dawson which said that no other changes to the documentation had been made. Mr Macnab's evidence was that he was aware that the concept of a return on investment had been raised with Mr Visan, that he had been "asked to consider" the return on investment. Mr Macnab was then taken to the email from Mr Dawson at 11.51pm in which Mr Dawson told Mr Trunnell that he believed that everything was now agreed. Mr Macnab then said that he was told after 11.51pm that the return on investment was agreed, that is after the other documents had been agreed, probably around 12:30am.

114. There was an inconsistency in Mr Macnab's evidence on this point which appeared to arise out of the obvious difficulty that his associate, Mr Dawson had told Mr Trunnell that he believed that everything was now agreed. Mr Macnab also said that he didn't have "visibility on the commercial discussions, negotiations that were taking place." Mr Macnab accepted that the deed was a "material change". Mr Macnab said he had confirmation from Mr Vohra that it had been agreed and that Mr Visan confirmed he was willing to sign.

115. In his witness statement (paragraph 53) Mr Macnab stated that he was informed that the sellers would personally guarantee the investment and that from his discussion with Mr Vohra he understood Mr Visan to have agreed to this commitment not only on his own behalf but also on behalf of Mr Guez and Ms Rose. This evidence, coming from the partner of a major law firm, must be accorded weight. However, it is difficult to reconcile with the contemporaneous board minutes and I note that (according to his own evidence) Mr Macnab was not present at the board meeting and therefore as he acknowledged had no "visibility" on the commercial negotiations. Further he relied on what he was told by Mr Vohra and the court has not received any evidence from Mr Vohra.

116. The evidence of Mr Fernandes was that he was told by Mr Vohra that the sellers had agreed to give a personal guarantee. However, his evidence was unsatisfactory in that he stated that he had been told this at the same time as being informed that the price reduction had been agreed. This conflicts with the evidence of Mr Macnab who, as referred to above, stated in cross-examination that he was told around 9pm that the price reduction had been agreed and only later that the personal guarantee had been agreed. The evidence of Mr Macnab accords with the email correspondence between Mr Dawson and Mr Trunnell. I therefore prefer the account given by Mr Macnab. The account of Mr Fernandes both in relation to timing and a single point of time at which agreement had been reached is at odds with the other evidence including the contemporaneous documents. This accordingly affects the weight which I give to his evidence that in that conversation Mr Vohra referred to the sellers giving a personal guarantee.

117. The evidence of Sheikh Nawaf in his witness statement (paragraph 10) was that after the executive committee meeting on 26 December 2008 and prior to the board meeting Sheikh Nawaf "decided that we should not go ahead unless we secured further protections." He then refers to emails to Mr Vohra and Mr Soliman setting out the agenda for the board meeting on 29th December stating that he mentioned a "personal guarantee" as being "essential" to close the deal. Sheikh Nawaf also stated (paragraph 15) that at the meeting on 29 December he told Mr Visan that QNH wanted to recover the sum it invested in a certain period of time or "the sellers" would have to compensate QNH.

118. The evidence of Sheikh Nawaf has to be weighed against the contemporaneous documentation. In particular his witness statement fails to make it clear that although the items were listed as "essential" to close the transaction, the emails stated a requirement for a:

> "personal grantee (sic) (not signed) from Raymond Visan that QNH shall recover its investment within 12 years maximum or he shall compensate" [Emphasis added].

On their face therefore, these emails referred to an obligation on Mr Visan personally that "he" shall compensate. There is no evidence which would explain why this should be read as meaning anything other than as stated on the face of the emails. The emails are consistent with the way in which the guarantee is expressed in the board minutes, which were themselves checked and signed by the board members.

Discussion

119. Counsel for the claimant submitted that reliance on the board minutes was misplaced because the parties were operating "their own dictionary" and what they mean is Mr Visan acting on behalf of others. Counsel submitted that the minutes were not a word for word transcription and that reference in the minutes for example to the antibribery deed as a "personal guarantee" from Mr Visan was in fact a reference to the antibribery deed which was signed by all three defendants.

120. Whilst the point in relation to the antibribery deed may be correct, there is no explanation in the evidence of Sheikh Nawaf or Mr Soliman as to why the minutes would have been inaccurate in relation to the return on investment, even though this is clearly an important issue in the case.

121. Counsel for the claimant stressed the importance of the guarantee and referred to evidence that demonstrated its significance. In particular the emails from Sheikh Nawaf on 26/27 December referred to above, the minutes of the board meeting which recorded that the board "insisted on the fact that Mr Raymond Visan should determine for QNH the investment recovery period", Mr Soliman's oral evidence that without the letter of guarantee they were not going to continue and Mr Macnab's evidence that he was acutely aware of the need for the deed to be signed "given its significance".

122. In my view this evidence supports a conclusion that the guarantee was required by the claimant in order for it to proceed with the deal, but it does not establish that it was a guarantee to be given on behalf of the defendants as well as Mr Visan himself.

123. The fact that a draft of the Deed was prepared and signed providing for both Mr Visan and the defendants to give the undertakings does not in my view establish that such undertakings were required by the claimant, having regard to the fact that the (undisputed) evidence was that firstly, the deed was not produced to Mr Visan at the board meeting but was only produced by Mr Macnab immediately prior to signing by Mr Visan and secondly, the deed was not signed by Sheikh Nawaf either that night or prior to completion in January 2009.

124. It was submitted for the claimant that the deed was an obligation which Mr Visan was personally prepared to enter into and Mr Visan was well placed on behalf the defendants to determine what was in his own and their interests. However, the court does not need to examine the commercial implications of the deal in order to conclude that there was no "benefit" to the defendants if in fact it was a "gratuitous" undertaking.

Conclusion on "benefit"

125. The evidence of Mr Soliman of the way in which the board minutes were prepared and then checked means that the board minutes are in my view strong evidence of the agreement reached at the meeting on 29 December 2008. Neither Mr Macnab nor Mr Fernandes were at that meeting. Both the account of Mr Fernandes and the account of Mr Ramzy of the events that evening have been shown to be unreliable and this affects the weight which I give to their evidence on this issue. The evidence of Sheikh Nawaf is untested and for the reasons set out above, I afford it little weight in the circumstances. The evidence of Mr Soliman on this point was unconvincing for the reasons referred to above.

126. That leaves the evidence of what Mr Macnab says he "understood" from his discussion with Mr Vohra. There are three possibilities: firstly that Mr Macnab was told by Mr Vohra that the sellers would guarantee the return; alternatively that with the passage of time Mr Macnab's recollection is mistaken and thirdly that he misunderstood what he was told by Mr Vohra. I note that Mr Macnab's recollection, understandably given the passage of time, as to the chronology of the events was shown to be unclear in cross-examination. It is therefore possible that his recollection of this point is influenced by hindsight and the fact that the deed provided for the sellers to give the undertakings. I note that there might have been further evidence before the court in the form of the earlier drafts of the deed and the instructions given to prepare the deed but the claimant has chosen to assert privilege over those documents. If it is an accurate recollection then it would appear to be at odds with the board minutes and the court must accord more weight to a contemporaneous written document than the recollection of the witness, almost 10 years after the events in question.

127. On the balance of probabilities, I find that what was agreed at the board meeting between Sheikh Nawaf and Mr Visan was a personal guarantee from Mr Visan. Accordingly, the giving of undertakings on behalf of the defendants was not required and therefore was not to the benefit of the defendants.

128. Accordingly, if it had been necessary to decide the point, I would have held that the negotiation and signing of the Deed/contract was outside the scope of the power of attorney as it was not "for the benefit of" the defendants.

The validity of the deed

129. Even if (contrary to my findings above) the power of attorney is a deed as a matter of English law and thus the Deed was entered into pursuant to a power of attorney which itself is in the form of a deed, only one signature in the Deed was witnessed. Accordingly, it is submitted for the defendants that the obligations under the deed are joint obligations of the defendants and Mr Visan and the deed cannot be binding on one obligor without the signature of the others. Counsel for the defendants relies on the authority of *Harvey v Dunbar Assets plc* [2002] EWCA Civ 1101.

130. The operative clause of the Deed, Clause 1, states that:

> "the Obligors undertake that to the extent that during the Relevant Period QNH does not receive by way of dividend and/or other distributions from GVE and CD an amount equal to the Relevant Amount, then within 30 days following the expiry of the Relevant Period, the Obligors will pay to QNH an amount equal to the Balancing Amount."

131. The presumption is that a promise made by two or more persons is joint so that express words are necessary to make it joint and several *(Chitty on contracts (32nd edition)* at 17-005; *White v Tyndall* (1888); *Johnson v Davies* [1998] 3 WLR 1299 at 127).

132. Counsel for the claimant submitted that the warranties in clause 3 (b) refer to "the power to execute and deliver this deed, and to perform their respective obligations under it…".

133. However, it seems to me that this is insufficient to infer that the language "the obligors undertake" was objectively intended to impose several liability on the parties. To the extent there can be said to be any ambiguity in the language by reference to clause 3, I have regard to the factual context: the Propco deed which was one of the suite of documents executed on 29 December 2008 expressly states that the guarantors are jointly and severally liable and that the warranties are given jointly and severally. Further, unlike in the Propco deed, the warranties in clause 3 are not expressed to be given severally and the relevant language reads "RV, GG and JR warrant to QNH that…".

134. This is a professionally drafted document: it is common ground between the parties that it was drafted by Allen & Overy. Accordingly, there is no reason to depart from the objective meaning which can be derived from the language of the deed which does not expressly refer to several liability nor is it expressed in a way which would imply several liability. If regard is had to the factual context then it is striking that the Propco deed expressly states that the obligations are joint and several. The evidence as to whether the deed was intended to be entered into by the sellers or solely by Mr Visan does not address the issue of whether the obligations were intended to be joint or several.

135. In the case of joint liability there is only one obligation: *Chitty on contracts* at [17-002]. It therefore would follow that for joint liability to be created, all of the joint obligors must execute the deed.

136. Counsel for the claimant accepted that the question whether the deed can take effect against Ms Rose individually is a question of construction of the deed. Counsel for the claimant submitted that on its proper construction the deed is binding on Ms Rose as a person that has executed the deed not least given that it has been signed by the other parties. Counsel for the claimant referred to the *Law Commission Report* (at para 2.15) recommending that it "*would be undesirable if failure to have just one signature witnessed …would render the whole deed invalid*" and recommended that in those circumstances "*the deed, if capable of operating without that signatory, would still be valid"*. Counsel further submitted that the circumstances of the present case are such that it is to be distinguished from the line of case law (*Harvey*) indicating that where intended co-obligors have not signed, the obligor who has signed is not bound because the obligation is subject to a condition that the signatures of all are required for its validity.

137. Even if the Law Commission report reflects the current legal position (which the defendants dispute), given that in my view this was a joint obligation, this is not a case where the Deed is "*capable of operating*" without the other signatories. To give effect to the Deed as binding on only Ms Rose, the court would be rewriting the contract between the parties and imposing several liability in circumstances where joint liability was intended. The fact that Mr Visan has signed for himself and Mr Guez does not assist the claimant in circumstances where the statute provides that a deed is validly executed by an individual only if it is signed in the presence of a witness who attests the signature. Without the attestation therefore, there is no valid execution of the Deed by Mr Visan for himself or Mr Guez and no (joint) obligation is created.

138. It is not necessary therefore to decide as a matter of construction whether the Deed was subject to a condition that it would be signed by all the other intended obligors and that liability was only imposed in circumstances where all the named individuals signed the Deed. However, I note that Recital (B) refers to the three obligors being willing to give certain undertakings. It is not expressed in language such as "each of the obligors" is willing to give certain undertakings and it provided for all three individuals to sign the deed. In the circumstances it seems to me that clause 3 (a) which provides that "upon execution this deed will constitute a valid and legally binding agreement …" (emphasis added) should be construed on the basis that the words "upon execution" referred to execution by all three obligors and was not intended to take effect if only one of three signatories executed it.

139. Accordingly, if it were necessary to decide the point, I find for the reasons set out above that the Deed was not binding on Ms Rose. Given the findings above, I do not see any need to deal with the submissions advanced on validity based on *Pigot's case*.

Whether there was a contract (which was partly in writing pursuant to which the defendants agreed to the undertakings as set out in the Deed and partly oral/by conduct)

140. The claimant's case as advanced at trial in relation to the Deed was that it took effect only in relation to Ms Rose. The claimant's primary case was therefore dependent on

establishing a contract entered into by Mr Visan on behalf of the defendants. In the light of my findings in relation to the scope of the powers of attorney, the issue does not fall for determination. However, having heard full argument I propose for completeness to address it.

141. The claimant's case as set out in the particulars of claim (paragraph 4G) with regard to the case in contract is that the terms of the deed contained (in part) a contract in accordance with which the defendants and Mr Visan agreed to undertake the obligations contained in the terms of the deed and in consideration for these undertakings, the claimant agreed orally and/or by conduct to enter into the amendments and not to terminate the GVE SPA and the CD-FZ SPA and to complete the transactions. The claimant's case is that the contract was in writing as regards the obligations of the defendants and oral/by conduct as regards the consideration given by the claimant.

142. If therefore one was to assume (contrary to my findings above) that Mr Visan was authorised to undertake the obligations contained in the deed on behalf of the defendants, the claimant's case is dependent on establishing that the consideration for the assumption of those obligations, was either an oral agreement to enter into the documents/not to terminate the SPA or through the conduct of completing the transactions in January 2009.

143. In closing submissions counsel for the claimant placed reliance on the alternative case that consideration was provided by the claimant's conduct in entering into the amendments to the SPA and completing the transaction. Thus, counsel submitted that either consideration was provided orally by the statements made at the meeting to enter into the documents/the refusal to continue without the deed or in the alternative against "the backdrop of the requirement for conditionality", the deed being signed and then the claimant signing the documents, entering into the transactions and completing.

144. It seems to me that counsel for the claimant accepted that not only did the claimant need to show that there was consideration for the undertakings, but in addition the claimant needed to show that a contract was formed on the terms alleged by the claimant, in other words that there was an agreement that QNH would only proceed with the transaction and sign the documents if the defendants gave the undertakings.

145. Dealing first with the oral statements alleged to have been made at the meeting to the effect that the claimant would not continue without the Deed. In the witness statement, Sheikh Nawaf states (paragraph 15) that:

> "[he] told Mr Visan that we would only continue with the transaction if the sellers agreed to two demands. First, we wanted a drop of 40% in the price agreed in July 2008… Secondly, I told him we needed to have our investment personally guaranteed. I explained QNHC wanted to recover the sum it invested from the business in a certain period of time or the sellers would have to compensate us. I was very clear with Mr Visan. I told him that if there was no agreement on the Deed and no price reduction, QNHC would simply not proceed with the transaction." [Emphasis added]

146. Although Sheikh Nawaf makes reference (at paragraph 10) to the emails that he sent to Mr Vohra and Mr Soliman on 26/27 December, Sheikh Nawaf does not make any reference in his witness statement to the board minutes of the meeting on 29 December which as chairman he signed. As discussed above, references in the emails sent by Sheikh Nawaf in advance of the meeting to Mr Vohra and Mr Soliman referred to a personal guarantee from Mr Visan and the board minutes refer only to a personal guarantee from Mr Visan. The witness statement does not provide any evidence or explanation as to why the minutes do not refer to the sellers or the defendants in this respect.

147. The evidence of Mr Ramzy, Mr Soliman, Mr Fernandes and Mr Macnab with regard to the issue of whether there was a requirement for a guarantee to be given personally by Mr Visan or by Mr Visan on behalf of himself and the defendants is discussed above in relation to the scope of the power of attorney. There is no need therefore to repeat the evidence and the discussion which are equally valid in this context.

148. As concluded above, on the balance of probabilities, I find that what was agreed at the board meeting between Sheikh Nawaf and Mr Visan was a personal guarantee from Mr Visan. Accordingly, I find that the claimant has not established there was an oral promise that the claimant would only proceed with the transaction and sign the documents if the defendants gave the undertakings.

149. Turning then to the alternative case advanced on the contract, as partly in writing and partly by conduct, counsel for the claimant submitted that consideration was provided by the fact that the claimant proceeded with the transaction and completed on 15 January 2009. Counsel for the claimant appeared to accept in closing submissions that even where the claimant was relying on the conduct of the claimant entering into the amendments to the SPAs and completing the transaction as consideration, that had to be against what counsel termed "the backdrop of the requirement for conditionality and the deed being signed".

150. The court was referred by counsel for the claimant to *Andrews and Millett on Guarantees* (7th edition) at 2-005 where it is stated that:

> "it is often more difficult to determine whether and when an offer to act as surety has been accepted than is usually the case in respect of other forms of contract. The issue of acceptance may be very closely connected with other issues such as whether consideration has been given and whether conditions precedent have been fulfilled. It may be hard to say in a given case whether as a matter of contractual intention and interpretation the surety's offer is unilateral ie not binding until it is acted upon by the creditor, or whether, on the contrary, there is a binding promise given by the creditor in return for the promise to guarantee, and the contract is operative and bilateral even if the creditor's promise has not yet been acted upon."

151. In my view this passage under the heading "Unilateral and bilateral offers" does not assist the court since the key issue for this court is not whether an offer has been accepted or when the contract was formed but whether a contract was formed on the terms alleged. As stated above, the claimant has not established that in the board

meeting, there was a promise from the claimant to enter into the amendments to the SPA and complete the transaction only if the Deed was entered into by the defendants. On the alternative case, the claimant has not established that there was an agreement for the undertakings in the Deed from the defendants in return for completing the deal. There is no reference to any such requirement in the Deed or in any of the other transaction documents and the other evidence of the board minutes and the factual witnesses was discussed above.

152. Accordingly, even if the conduct of the claimant in completing the transaction could have amounted to good consideration, it seems to me that on the alternative case based on conduct, the claimant has not established that a contract was formed (partly in writing and by conduct) on the terms alleged.

Estoppel

153. In view of my findings in favour of the defendants in relation to the scope of the powers of attorney and in the alternative, in favour of Ms Rose on the Deed and the defendants on the case brought in contract, it is not necessary for me to deal with the further case in estoppel.