Neutral Citation Number: [2020] EWHC 2760 (Comm)

Case No: CL-2019-000807

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2020

Before :

Mr Peter MacDonald Eggers QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

ADARE FINANCE DAC	**Claimant**
- and –	
(1) YELLOWSTONE CAPITAL MANAGEMENT SA	**Defendants**
(1) MICHEL OHAYON	

- -
- -

David Allison QC and Ryan Perkins (instructed by **Allen & Overy LLP**) for the **Claimant**
Andrew Stafford QC and **James Chapman-Booth** (instructed by **Kobre & Kim LLP**) for the **Defendants**

Hearing dates: 20 July 2020

- -

Approved Judgment

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

....

Mr Peter MacDonald Eggers QC sitting as a Deputy Judge of the High Court

"Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 9:30 AM on Monday 19 October 2020."

Peter MacDonald Eggers QC:

Introduction

1. The Claimant applies, pursuant to CPR rule 24.2, for summary judgment to allow its claim against the Defendants and to dismiss the Defendants' counterclaim against the Claimant. Alternatively, the Claimant applies for an order striking out the Defendants' Defence and Counterclaim pursuant to CPR rule 3.4(2)(a) on the ground that the Defendants' statement of case discloses no reasonable grounds for defending the claim or bringing the counterclaim.

2. The Claimant's claim is for an order for payment of sums outstanding under finance agreements relating to a loan advanced by the Claimant to the First Defendant, Yellowstone Capital Management SA, which was guaranteed by the Second Defendant, Mr Michel Ohayon (who beneficially owns and controls the First Defendant). The claims are made principally under or by reference to (i) a credit facility agreement dated 29th August 2019 between the Claimant and the First Defendant ("the New Facility Agreement"), a deed of guarantee and indemnity dated 29th August 2019 between the Claimant and the Second Defendant ("the Personal Guarantee"), and (iii) the Extension Fee Deed dated 27th September 2019 ("the Extension Fee Deed").

3. The Claimant's claim is for US$10,539,779, comprising (i) US$9,571,015 under the New Facility Agreement, (ii) US$968,764 under the Extension Fee Deed, (iii) default interest, and (iv) costs and expenses (including legal fees) incurred in connection with the enforcement of or the preservation of any rights under the relevant finance agreements.

4. The Defendants' defence to the Claimant's claim is that:

    (1) The Extension Fee Deed is an unconscionable bargain and therefore unenforceable.

    (2) The Defendants were the victims of economic duress, because the Claimant refused to extend the date for the completion of the refinancing, without being paid a fee, which led to the agreement of the Extension Fee Deed.

    (3) The acceleration clause in the New Facility Agreement is an unlawful penalty.

    (4) The First Defendant had an option to pay the amounts set out in the Extension Fee Deed by 18th November 2019 such that there had been no Event of Default.

5. The Defendants' counterclaim is based on alleged breaches of contract resulting in damages of US$2,300,000. The Defendants' Defence and Counterclaim pleads that the damages are due to the First Defendant, but both Defendants in fact are presenting the counterclaim.

6. The Claimant disputes the counterclaim because the cause of action on which the First Defendant relies has been released under a Deed of Termination in favour of the

Claimant and, in any event, the First Defendant has no *locus standi* to bring the counterclaim.

7. The basis of the Claimant's application is that the Defendants' defences and counterclaim have no real prospect of success. Alternatively, the Claimant claims a conditional order pursuant to CPR PD 24, para. 4-5.

Factual background

8. I set out below a summary of the factual background to the dispute between the parties. Except where I have indicated to the contrary, the following facts as summarised are not substantially in dispute.

The Original Facility Agreements

9. In 2018, the Claimant provided financing to Mr Ohayon and certain of his companies to fund the acquisition of the equity interest in the Waldorf Astoria Hotel in Jerusalem (managed by the Hilton Group) and an apartment complex in Jerusalem (the "Properties").

10. The financing took the form of a US$105,300,000 term loan facility agreement dated 18th January 2018, between the Claimant as lender and one of Mr Ohayon's companies, Silverstone Capital Management SARL ("Silverstone"), amongst other parties ("the Hotel Facility Agreement") and a US$8,000,000 term loan facility agreement dated 27th April 2018 between the Claimant and Silverstone amongst other parties ("the Apartment Facility Agreement"). The First Defendant owns 100% of the share capital of Silverstone.

11. Certain of the sums owing under the Hotel Facility Agreement and the Apartment Facility Agreement ("the Original Facility Agreements") were guaranteed by Mr Ohayon pursuant to a personal guarantee dated 24th May 2018.

12. The commercial purpose of the Original Facility Agreements was to enable Silverstone to acquire the entire share capital of IPC Jerusalem Limited ("IPC"), which was the owner of the Properties.

13. The acquisition of IPC's share capital by Silverstone completed on or about 24th May 2018 using the funds borrowed under the Original Facility Agreements. On the same date, IPC acceded to the Original Facility Agreements as a borrower.

14. Following completion, IPC duly issued utilisation requests amounting to US$113,300,000 so that the funds could be applied to the intended purpose of financing the acquisition of the Properties. The Defendants contend that, in breach of the Original Facility Agreements, the Claimant transferred to IPC only US$111,000,000, having deducted unilaterally sums which it asserted represented its costs of the transaction; the Defendants argue that the Original Facility Agreements did not contain any term which permitted the Claimant to make this deduction and the Claimant did not obtain IPC's or Mr Ohayon's consent to this deduction. According to Mr Ohayon at para. 27-29 of his first witness statement dated 26th May 2020, because the acquisition of the Properties could not proceed until the shortfall of US$2,300,000 had been closed, Mr Ohayon was forced to direct the First Defendant

to remit that sum to enable the transaction to complete; Mr Ohayon said that he did not think that the Claimant could make this deduction "*but there was nothing I could do*".

The refinancing

15. Starting in November 2018, a dispute arose as to whether a series of Events of Default had occurred under the Original Facility Agreements. According to Mr Ohayon's first witness statement, at para. 32-48, there were no Events of Default, but they were alleged by the Claimant in respect of matters which were either inconsequential or disputed and were relied on by the Claimant to demand an increase in the applicable interest rates.

16. At para. 49-50 of his first witness statement, Mr Ohayon stated that, following a meeting in February 2019, because the Defendants were concerned that the Claimant was seeking to forcibly acquire the Properties, Mr Ohayon ultimately decided to refinance the loans in order to exit the relationship with the Claimant.

17. On 29th August 2019, it was agreed that the Original Facility Agreements would be partially refinanced. Pursuant to the refinancing transaction, the majority of the amounts outstanding (in total, US$121,941,414) to the Claimant were to be repaid primarily using the funds provided by a consortium of new lenders. This sum was to be held in escrow by an Escrow Agent, and was to be paid to the Claimant by the Escrow Agent in accordance with the terms of two escrow agreements dated 29th August 2019.

18. The unpaid balance (US$12,026,015), by way of novation under a deed of assumption, was to remain owing to the Claimant by the First Defendant, instead of IPC. The advance was restated as three fully-drawn loans owing by the First Defendant to the Claimant under the New Facility Agreement. Under the New Facility Agreement, it was provided that:

"***Definitions***

In this Agreement:

Finance Document *means this Agreement, the Personal Guarantee and any other document designated as such by the Lender and the Company ...*

1.2 Construction

(a) Unless a contrary indication appears, any reference in this Agreement to:

(vi) a Finance Document or any other agreement or instrument is a reference to that Finance Document or other agreement or instrument as amended; ...

(e) An Event of Default is "continuing" if it has not been waived ...

3. CONDITIONS PRECEDENT

This Agreement shall have effect on and from the earliest date on which: (i) the Lender has received (or waived receipt of) all of the documents and other evidence listed in Schedule 1 (Conditions precedent) in form and substance satisfactory to the Lender (and the Lender shall notify the Company promptly upon being so satisfied); and (ii) the Existing Lenders' Repayment Amount (as defined in the First Escrow Agreement) has been received in immediately available cleared funds to the account designated by the Original Lender in accordance with the First Escrow Agreement.

4. REPAYMENT

4.1 Repayment of Loans

(a) Subject to Clause 6 (Early redemption), the Company shall repay the Loans in full together with (in the case of the Deferred Shortfall Loan and the Deferred Escrow Amount Loan) all accrued interest and any other amounts owed to the Lender on the Termination Date.

(b) The Company may not reborrow any part of the Loans which is repaid …

6. EARLY REDEMPTION

(a) Subject to paragraph (c) below, if:

(i) the Company prepays or repays (whether pursuant to Clause 5 (Prepayment) or Clause 15.8 (Acceleration) or otherwise) the Loans in an aggregate amount of at least the sum of:

(A) the Deferred Escrow Amount;

(B) USD 3,250,000;

(C) the Deferred Costs less USD 113,000; and

(D) an amount equal to any interest accrued on the Deferred Escrow Amount Loan in accordance with Clause 7 (Interest) (if any); and

(ii) the Deferred Escrow Amount Repayment Date has occurred,

on or before the first anniversary of the date of this Agreement, the Loans together with any interest which would have accrued thereon after the first anniversary of the date of this Agreement shall be deemed to have been repaid and discharged in full …

7. INTEREST

7.1 Calculation of interest

(a) The Deferred Shortfall Loan shall bear interest at a rate of 10.5% per annum …

7.3 Default interest

(a) If the Company fails to pay any amount payable by it under a Finance Document on its due date, interest shall accrue on the Unpaid Sum from the due date up to the date of actual payment (both before and after judgment) at a rate which is 2% per annum higher than the rate which would have been payable if the Unpaid Sum had, during the period of non-payment, constituted a Loan in the currency of the Unpaid Sum for successive Interest Periods. Any interest accruing under this Clause 7.3 shall be immediately payable by the Company on demand by the Lender.

(b) Default interest (if unpaid) arising on an Unpaid Sum will be compounded with the Unpaid Sum at the end of each Interest Period applicable to that Unpaid Sum but will remain immediately due and Payable …

15. EVENTS OF DEFAULT

Each of the events or circumstances set out in this Clause 15 is an Event of Default (save for Clause 15.8 (Acceleration).

15.1 Non-payment

The Company does not pay on the due date any amount payable pursuant to a Finance Document at the place and in the currency in which it is expressed to be payable unless its failure to pay is caused by an administrative or technical error or disruption in the relevant market payment systems and payment is made within three Business Days of its due date …

15.8 Acceleration

On and at any time after the occurrence of an Event of Default which is continuing, the Lender may by notice to the Company:

(a) declare that all or part of the Loans, together with accrued interest (if applicable), and all other amounts accrued or outstanding under the Finance Documents be immediately due and payable, whereupon they shall become immediately due and payable; and/or

(b) declare that all or part of the Loans, together with accrued interest (if applicable), and all other amounts accrued or outstanding under the Finance Documents be payable on demand, whereupon they shall immediately become payable on demand by the Lender …

19. PAYMENT MECHANICS

…

19.2 No set-off by the Company

All payments to be made by the Company under the Finance Documents shall be calculated and be made without (and free and clear of any deduction for) set-off or counterclaim ...

25. AMENDMENTS AND WAIVERS

Any term of, or any right or remedy under, the Finance Documents may be amended or waived only with the consent of the Lender and the Company."

19. The First Defendant's obligations under the New Facility Agreement were guaranteed by Mr Ohayon under the Personal Guarantee.

20. Under the terms of the New Facility Agreement, the First Defendant was required to pay nothing to the Claimant for 18 months, but was granted an option to repay a specified smaller sum, plus interest, within 12 months, in which event, the remaining debt and any further interest would be forgiven.

21. The parties agreed that the refinancing would be completed by no later than 27th September 2019.

Delayed completion of the refinancing transaction

22. There was a delay in the completion of the refinancing.

23. The repayment amount of US$121,941,414 was duly deposited with the Escrow Agent. However, this sum could be paid to the Claimant by the Escrow Agent only upon the satisfaction of the conditions set out in one of the Escrow Agreements, which included the registration of new first-ranking security interests over the Properties in favour of the new lenders, together with the de-registration of the existing security interests securing the liabilities owing to the Claimant under the Original Facility Agreements.

24. The relevant Escrow Agreement contemplated that written certification be provided to the Escrow Agent that these conditions were satisfied, upon receipt of which the Escrow Agent was required to pay the sum to the Claimant within two business days. The deadline for the receipt of this certification was 27th September 2019 ("the Drop Dead Date"). If the certification was not received by the Drop Dead Date, the refinancing transaction would terminate and the repayment sum of US$121,941,414 would be returned to the new lenders.

25. The relevant conditions for the release of the sum in the Escrow Account were not satisfied by the Drop Dead Date (27th September 2019). Therefore, unless all of the relevant parties agreed to extend the Drop Dead Date, the refinancing transaction would terminate. It is common ground that none of the parties were under any obligation to agree to an extension of the Drop Dead Date.

26. On 25th-26th September 2019, the Claimant and the Defendants (and their legal advisers) discussed the terms of any extension to the Drop Dead Date. The Claimant explained that it expected to be compensated in consideration for agreeing to any extension of the Drop Dead Date, having regard to the loss of the time value of money that would result from such an extension.

27. According to the Defendants, the Claimant refused to consent to an extension unless the Defendants conceded to pay significant further amounts under what was to become the Extension Fee Deed.

28. On 25th September 2019, at 1524, Mr Tim Watson of Allen & Overy, on behalf of the Claimant, sent an email to Mr Ronen Kantor (on behalf of the Defendants) and Mr Roy Nachimzon (on behalf of the Claimant) stating that:

> "*I am free until 4pm Israel time. Roy, can you do 1.30pm UK time / 3.30pm Israel time?*
>
> *In advance of the call, DK's ask is as follows:*
>
> - *In consideration of DK granting the extension, Silverstone shall pay an amount equal to the interest that accrues on the additional amounts as a fee under the reinstated credit facility (with the scope of the PG extended to cover these amounts) – this is the c. $30k per day number that was agreed in the calculation of the amounts for the escrow agreements.*
> - *The is [sic] will be documented in a fee letter (designated as a Finance Document under the reinstated facility) between Adare, Silverstone and Michel.*
> - *The additional fees are payable by Silverstone within 1 Business Day of the Effective Date under the reinstated facility.*"

29. On 26th September 2019 at 0959, Mr Yohan Kadoche (an adviser to the Defendants) sent the following email to Mr Romain Ferron (an adviser to the Claimant):

> "*As we spoke earlier, I explain our position*
>
> *Due to different administrative issue with the land register in Jerusalem and also to the fact that Apex bought link, some questions was raise by the ILA and occur a delay in the process of completed the pledges to the new lenders*
>
> *According to our different counsels that working on the pledges registrations, all the documents required are now in place but because we are entering to the new year holidays in Israel the first meeting we can get with the ILA administration is next Wednesday the 2nd of October then the money will be released to DK by the agent*
>
> *Therefore we are proposing a flat fee to compensate DK of this delay of USD100,000 up to next Friday and then if by any situation this date has to be postponed another time we will start again paying the full interest of USD32,000 per day …*"

30. The reference to "*DK*" is a reference to Davidson Kempner Capital Management LP ("DKCM"), an adviser to the Claimant.

The Extension Fee Deed

31. On 27th September 2019, the Claimant and the Defendants executed a deed in substantially the terms proposed by Mr Kadoche in the above email: the Extension Fee Deed.

32. In order to compensate the Claimant for the delay, the First Defendant agreed, under the Extension Fee Deed, to pay a flat fee of US$100,000 in respect of the period from 28th September 2019 to 4th October 2019 plus a daily fee of about US$33,000 for each day from 5th October 2019 until the refinancing completed.

33. By Clause 2.1 of the Extension Fee Deed, "*the Extension Fee is payable by the [the First Defendant] within ten Business Days of the Facility Agreement Effective Date*". The Facility Agreement Effective Date is defined in the New Facility Agreement as "*the date on which the Existing Lenders' Repayment Amount ... has been received in immediately available cleared funds to the account designated by the [Claimant] in accordance with the First Escrow Agreement*".

34. The Extension Fee is defined as "*an amount equal to USD 100,000 plus the total aggregate amount of the Daily Fees (if any)*". The Daily Fees are "*for each day during the Relevant Period, an amount equal to USD 33,414*". The Relevant Period is "*the period from and including 5 October 2019 to (and excluding) the Facility Agreement Effective Date*". By clause 2.2, the Extension Fee was non-refundable and was payable without set-off, deduction or withholding.

35. Clause 8 of the Extension Fee Deed provides that "*This deed is a Finance Document*". Accordingly, the Extension Fee Deed constitutes a Finance Document as defined in Clause 1.1 of the New Facility Agreement. Clause 4 of the Extension Fee Deed amended the New Personal Guarantee so as to bring the Extension Fee within Mr Ohayon's guarantee.

36. Clause 3 of the Extension Fee Deed amended clause 6(a) of the New Facility Agreement whereby the original provision - quoted above - was deleted and replaced with the following:

"*(a) Subject to paragraph (c) below, if:*

(i) the Company prepays or repays (whether pursuant to Clause 5 (Prepayment) or Clause 15.8 (Acceleration) or otherwise) the Loans in an aggregate amount of at least the sum of:

(A) the Deferred Escrow Amount;

(B) USD 3,250,000;

(C) the Deferred Costs less USD 113,000; and

(D) an amount equal to any interest accrued on the Deferred Escrow Amount Loan in accordance with Clause 7 (Interest) (if any),

on or before the first anniversary of the date of this Agreement

(ii) *the Deferred Escrow Amount Repayment Date has occurred, and*

(iii) *the Company has paid the Extension Fee under (and as defined in) the extension fee deed between the Company, the Original Lender and the Sponsor Guarantor dated on or about 26 September 2019 to the Original Lender on the date on, and in the manner in, which it is expressed to be payable thereunder*

the Loans together with any interest which would have accrued thereon after the first anniversary of the date of this Agreement shall be deemed to have been repaid and discharged in full …"

37. The refinancing finally completed on 31st October 2019.

Failure to pay

38. The Facility Agreement Effective Date fell on 31st October 2019, being the date when the sum of US$121,941,414 was released from the Escrow Account.

39. In accordance with the provisions of the Extension Fee Deed, the Extension Fee amounted to US$968,764 (representing the flat fee of US$100,000 plus 26 days of Daily Fees at US$33,414 per day, amounting to US$868,764).

40. Accordingly, pursuant to Clause 2.1 of the Extension Fee Deed, the Extension Fee was "*payable*" by the First Defendant by no later than 18th November 2019 (being ten Business Days from the Facility Agreement Effective Date).

41. However, the First Defendant failed to pay the Extension Fee or any part thereof by 18th November 2019 or by any subsequent date.

42. Clause 15.1 of the New Facility Agreement provided that it is an Event of Default if the First Defendant does not pay on the due date any amount payable pursuant to a Finance Document unless its failure to pay was caused by an administrative or technical error or disruption in the relevant market payment systems and payment was made within three Business Days of its due date.

43. On 22nd November 2019, the Claimant served a notice of acceleration on the First Defendant under Clause 15.8 of the New Facility Agreement, which notice (i) accelerated all amounts accrued or outstanding under the New Facility Agreement; (ii) declared all such amounts to be immediately due and payable; and (iii) demanded immediate payment of such amounts.

44. By a letter dated 26th November 2019, the Claimant made a demand for payment against Mr Ohayon under the New Personal Guarantee.

45. The First Defendant and Mr Ohayon have not paid the sums demanded by the Claimant.

Principles to be applied on an application for summary judgment or strike out

46. The application for summary judgment is made pursuant to CPR rule 24.2. By CPR rule 24.2(a)(ii) and (b), the Court may grant summary judgment against a defendant if it considers that the defendant has no real prospect of successfully defending the claim and there is no other compelling reason why the case should be disposed of at a trial. This means that in order to avoid summary judgment, the Defendants' defence must have a realistic, and not merely a fanciful, prospect of success (subject to the question whether there is a compelling reason to proceed to trial). The prospect of success may be analysed by scrutiny of the evidence before the Court at the hearing of the application for summary judgment.

47. At a hearing of a summary judgment application, the Court may determine issues of law or contractual construction which have the potential to dispose of the proceedings.

48. In *ICI Chemicals & Polymers Limited v TTE Training Limited* [2007] EWCA Civ 725, Moore-Bick, LJ said at para. 12-14 that:

> "*12. It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better …*
>
> *14. Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.*"

49. In *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch), at para. 15, Lewison, J summarised the principles governing the Court's approach to an application for summary judgment and relied on Moore-Bick, LJ's judgment.

50. However, in *TFL Management Services Limited v Lloyds TSB Bank Plc* [2013] EWCA Civ 1415; [2014] 1 WLR 2006, at para. 26-27, Floyd, LJ having quoted Lewison, J's approach, made the following additional observation:

> *"The court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the*

> *ultimate trial of the action … Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; … Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy …"*

51. The Court must not conduct a "*mini-trial*" and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by the trial process (*Global Assets Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37; [2017] 4 WLR 163, para. 27). That said, it is not incumbent on the Court on an application such as this to take at face value statements made in the evidence, if it is clear that they have no substance (*ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, para. 10). If the Court considers that it is appropriate to deal with an issue of law or construction on a summary judgment application, any relevant disputed issues of fact, which cannot be resolved on a summary basis, should be assumed in favour of the person against whom summary judgment is sought (*Daniels v Lloyds Bank Plc* [2018] EWHC 660 (Comm), para. 49(vi)).

52. If, on the determination of the point of law or construction (which might be a point which is well arguable by both parties), the Court determines that the defendant has no real prospect of successfully defending the claimant's claim and there is no other compelling reason for the disposal of the case at trial, the claimant will be entitled to summary judgment. If, however, the defendant has a real prospect of success or if there is a compelling reason for the matter to proceed to trial, the application for summary judgment should be dismissed.

53. There may be circumstances where the Court is satisfied that the defence has no real prospect of success, but there is yet a compelling reason for a trial. This was considered by Cairns, LJ in *Bank fur Gemeinwirtschaft AG v City of London Garages* [1971] 1 WLR 149, which was concerned with the pre-CPR Rules of the Supreme Court:

> "*Finally Mr. Finlay relies on the provision recently introduced into Ord. 14, r. 3 (1) whereby even if there is no issue to be tried the court - may give leave to defend for some other reason. The only reported case in which that provision has been applied is Miles v. Bull [1969] 1 Q.B. 258. Megarry J. there gave leave to defend because the documents on which the claim was based had some appearance of a sham. It is not difficult to think of other circumstances where it might be reasonable to give leave to defend although no defence was shown: for example, if the defendant was unable to get in touch with some material witness who might be able to provide him with material for a defence; or if the claim were of a highly complicated or technical nature which could only properly be understood if oral evidence were given; or if the plaintiff's case tended to show that he had acted harshly and unconscionably and it was thought desirable that if he was to get judgment at all it should be in the full light of publicity. In this case I can see no reason why there should be leave to defend in the absence of a reasonable defence being disclosed. And I consider it of great importance that*

the right of a holder in due course to obtain judgment as speedily as possible for what is due to him under a negotiable instrument should be maintained."

54. I consider that it would be an exceptional case where a claim or a defence has no real prospect of success, but the Court would allow the action to proceed to trial for some other compelling reason (see *Bruce v TTA Management Limited* [2015] EWHC 936 (Ch), para. 28-29). An exceptional case means one which is out of the ordinary. There may be occasions where, on the materials before it, the Court is not satisfied that there is a real prospect of success, but there is reason to believe that the Court does not have sufficient of the evidence to reach a definitive conclusion, although in that event the Court might well conclude that there is a real prospect of success. Further, it might be thought that the process of undergoing a public trial where the parties' cases and evidence are scrutinised outweighs the desirability of an otherwise efficient and expeditious disposal of the claim. Nonetheless, if the dispute is a commercial one where one party claims monetary remedies or the repayment of moneys, and the reason for denying the claimant of the relief to which it is plainly entitled or the defendant of a dismissal of a plainly unmeritorious claim is likely to be one which extends beyond the commercial character of the dispute. In *The Law Debenture Trust Corporation plc v Ukraine* [2017] EWHC 655 (Comm); [2017] QB 1249, at para. 377 (affirmed on this point at [2018] EWCA Civ 2026; [2019] QB 1121, para. 218), Blair, J said:

"*Irrespective of its prospects of success on its four defences, Ukraine submits that there are compelling reasons to proceed to trial because the claim is in reality a tool of oppression which includes military occupation, destruction of property, the unlawful expropriation of assets, and terrible human cost. Ukraine submits that these matters should be the subject of the full rigours of a public trial, and that the summary judgment process is not something to which Russia should be entitled to benefit given its egregious conduct. (2) This point was powerfully put by Finance Minister Danyliuk in his evidence, and the court has given it careful consideration. However, ultimately, this is a claim for repayment of debt instruments to which the court has held that there is no justiciable defence. It would not be right to order the case to go forward to a full trial in such circumstances*."

55. The approach to an application for a strike out pursuant to CPR rule 3.4(2)(a) is not substantially different insofar as the Court is concerned, not with the sufficiency or adequacy or clarity of the statement of case, but the prospects of success of the claim or defence as pleaded. In that event, there must be no real prospect of success or as Peter Gibson, LJ said in *Hughes v Colin Richards & Co* [2004] EWCA Civ 266; [2004] PNLR 35, at para. 22, the Court must be certain that the claim or defence is bound to fail. See also *TBS v Commissioner of Police of the Metropolis* [2017] EWHC 3094 (QB), para. 7. If the Court is satisfied that there is no real prospect of the claim succeeding, it may strike out the statement of case or give summary judgment, suggesting that the test is the same or substantially similar (*Andric v Credit Suisse (UK) Ltd* [2017] EWHC 1724 (Comm), para. 5).

The application for summary judgment or strike out

56. It is common ground that the sums claimed by the Claimant are due under the New Facility Agreement and the Extension Fee Deed, subject to the defences pleaded by the Defendants. The matter in dispute between the parties are whether the Defendants have viable defences as follows:

    (1) The Extension Fee Deed is an unconscionable bargain and therefore unenforceable.

    (2) The Defendants were the victims of economic duress.

    (3) The acceleration clause in the New Facility Agreement is an unlawful penalty.

    (4) The First Defendant had an option to pay the amounts set out in the Extension Fee Deed by 18th November 2019.

57. There is also an application for summary judgment in respect of the Defendants' counterclaim.

58. Each of these matters was addressed by the parties in their skeleton arguments. However, during the hearing of the applications, Mr Andrew Stafford QC, with Mr James Chapman-Booth, on behalf of the Defendants limited his oral submissions to the issues of unconscionable bargain and economic duress, but relied on the skeleton argument in support of the other defences and the counterclaim.

Unconscionable bargain

59. At para. 18 of the Defence and Counterclaim, the Defendants' defence based on unconscionable bargain (as well as economic duress) is as follows:

    (1) DKCM knew that the Defendants were in a situation of extreme vulnerability, because if the Claimant did not agree to extend the Drop Dead Date, the sum held in the Escrow Account would have to be returned to the new lenders and an Event of Default would likely be triggered under the Original Facility Agreements.

    (2) The Defendants had no choice but to agree to whatever terms were imposed by DKCM.

    (3) With this knowledge, DKCM exploited the Defendants' vulnerability to induce them into agreeing to DKCM's wholly unreasonable demands, which dramatically altered the bargain already struck under the New Facility Agreement.

    (4) Under clause 15.1 of the New Facility Agreement, an Event of Default would occur if the First Defendant did "*not pay on the due date any amount payable pursuant to a Finance Document*". No sums were due under the New Facility Agreement until the Termination Date, namely 28th February 2021 (being 18 months from the date of the New Facility Agreement).

(5) By declaring the Extension Fee Deed as a Finance Document, the Claimant imposed a different bargain and brought forward the theoretical date on which an Event of Default could occur, permitting it to call in not only the Extension Fee, but also the sums due under the New Facility Agreement, at a significantly earlier date and accompanied by a punitive rate of interest.

(6) In addition to altering the bargain already struck, DKCM (through the Claimant) extracted further, unconscionably large, payments from the Defendants.

(7) In exploiting the Defendants' extreme vulnerability aforesaid, DKCM failed to act within the basic norms of commerce and fair and honest dealing, and/or its conduct fell below the basic minimum standards of acceptable behaviour, rendering the Extension Fee Deed voidable, and it has been rescinded by the First Defendant; and/or DKCM did not consider in good faith that it was entitled to require the First Defendant to execute the Extension Fee Deed as a condition of extending the Refinancing Drop Dead Date, rendering the Extension Fee Deed voidable, and it is has been rescinded by the First Defendant.

60. Mr Stafford QC on behalf of the Defendants submitted that:

(1) The Defendants found themselves at a serious disadvantage to the Claimant, which enjoyed an unassailable position to dictate terms to the Defendants.

(2) If the Defendants rejected the Claimant's terms, they would have faced the collapse of the refinancing, the loss of months' worth of effort and significant sunk costs; the burden of discharging their liability to the new lenders for accrued interest on the sums held in escrow; and being forced to return to the terms of the original financing with the Claimant.

(3) If the Defendants accepted the Claimant's terms, then the Defendants would be able to proceed with the refinancing, but at the cost of whatever terms the Claimants imposed as a condition of providing its consent.

(4) The Claimant's conduct in this regard should shock the Court: in circumstances where it was plainly not an option for the Defendants to simply walk away from the refinancing, the Claimant's presentation to the Defendants of the Extension Fee Deed was unconscionable, particularly in the light of the interpretation the Claimant now seeks to impose, by which it argues that an Event of Default under the New Facility Agreement has occurred.

61. Mr David Allison QC, with Mr Ryan Perkins, on behalf of the Claimant submitted that:

(1) It is well established that the equitable doctrine of unconscionable bargains can only apply if one party was at a serious disadvantage to the other so that circumstances existed of which unfair advantage could be taken (*Alec Lobb Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87, 94-95).

(2) A sophisticated commercial counterparty acting with the benefit of legal advice will rarely, if ever, be at a "*serious disadvantage*" for this purpose (*Chitty on Contracts*, (33rd ed., 2018), para. 8-137).

(3) The Defendants were not at a serious disadvantage to the Claimant of which unfair advantage could be taken. In particular, Mr Ohayon was an experienced businessman and property developer whose personal wealth purportedly runs into hundreds of millions of euros. He acted with the benefit of legal advice at all times and instructed at least four sets of law firms in three jurisdictions for the purpose of dealing with the Claimant. He did not fall into any of the established categories to which the doctrine of unfair bargains applies.

(4) The equitable doctrine of unconscionable bargains is designed for the protection of vulnerable people. It is not designed to enable sophisticated businessmen such as Mr Ohayon to avoid paying their debts.

(5) The doctrine of unconscionable bargain is only applicable where a party has acted in a "*morally reprehensible manner*" which requires "*moral culpability or impropriety*" (*Boustany v Pigott* (1995) 69 P & CR 298, 303).

(6) The Defendants do not come close to showing that the Extension Fee Deed is an unconscionable bargain, because the indisputable facts are as follows:

(a) The Defendants freely entered into the Extension Fee Deed without compulsion, with the benefit of legal advice and in the exercise of their own commercial judgment.

(b) Indeed, the ultimate terms of the Extension Fee Deed were proposed by Mr Ohayon's own adviser (Mr Kadoche) in the email dated 26th September 2019 quoted above.

(c) The purpose of the Extension Fee Deed was to compensate the Claimant for the loss of the time value of money that resulted from the delayed completion of the refinancing transaction, as acknowledged in Mr Kadoche's email.

(d) The daily fees were broadly equivalent to the amount of daily interest that would otherwise have been accruing under the Original Facility Agreements (para. 3.31 of the first witness statement dated 16th March 2020 of Mr Andrew Denny of Allen & Overy LLP, the Claimant's solicitors). The fees under the Extension Fee Deed were entirely proportionate in comparison to the very significant sums then outstanding under the Original Facility Agreements.

(e) The delayed completion of the refinancing was not the Claimant's responsibility; the delay was primarily due to the Israeli Land Registry and the time that it took one of the new lenders to produce revised board minutes (para. 27-28 of Mr Denny's first witness statement).

(7) There is no basis for suggesting that the Claimant acted in a morally reprehensible manner or a manner which shocks the conscience of the Court or

that the Extension Fee Deed was "*not merely hard or improvident, but overreaching and oppressive*".

62. The equitable jurisdiction of the Court to set aside contracts which are unconscionable has been recognised for a considerable time. It is essentially a protective jurisdiction, the protection being afforded to those who require it. Those who require this protection are those who suffer from a position of a relevant disadvantage. That of itself is not sufficient to attract the Court's jurisdiction. In addition, there must be unconscionable conduct or actual imposition, whereby another person takes unfair advantage of the disadvantaged party.

63. In *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221, Ward, LJ said of this jurisdiction in the context of a case where the building society advanced funds which were used by a son to purchase a supermarket secured by a mortgage granted by the father, who was both illiterate and had poor language skills, said at pages 230 and 232:

> "*What are the hallmarks of unconscionability? In Multiservice Bookbinding Ltd v Marden [1979] Ch. 84, 110, Browne-Wilkinson J. said:—*
>
> > *"In my judgment a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience." ...*
>
> *The salient features here are that the son had committed himself to the purchase of the small supermarket business. There is no reason to think that he did not believe that it would be a profitable venture which would turn out to his advantage. He needed money to complete the purchase. He persuaded his father to lend it. On the findings of the judge there was no undue influence and no misrepresentation. So it was a case of father coming to the assistance of his son. True it is that it was a financially unwise venture because, absent good profit from the business, there was never likely to be the income to service the borrowing and the father's home was at risk. But there was nothing, absolutely nothing, which comes close to morally reprehensible conduct or impropriety. No unconscientious advantage has been taken of the father's illiteracy, his lack of business acumen or his paternal generosity. True it may be that the son gained all the advantage and the father took all the risk, but this cannot be stigmatised as impropriety. There was no exploitation of father by son such as would prick the conscience and tell the son that in all honour it was morally wrong and reprehensible*."

64. Ward, LJ relied on the "*penetrating analysis*" of Peter Millett QC (sitting as a deputy judge of the High Court, as he then was) in *Alec Lobb Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87. In that case, the defendants had advanced funds to the plaintiff secured by mortgages on the plaintiff's property; while in financial difficulties and subject to a tie to accept petrol supplies exclusively from the defendants, the plaintiff agreed to a long-term lease of the property to the defendants at a nominal rent. The plaintiff sought to have the lease set aside as an unconscionable bargain. At pages 94-95, Mr Millett QC said:

> "*… if the cases are examined, it will be seen that three elements have almost invariably been present before the court has interfered. First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken: see, for example, Blomley v. Ryan (1954) 99 C.L.R. 362, where, to the knowledge of one party, the other was by reason of his intoxication in no condition to negotiate intelligently; secondly, this weakness of the one party has been exploited by the other in some morally culpable manner: see, for example, Clark v. Malpas (1862) 4 De G.F. & J. 401, where a poor and illiterate man was induced to enter into a transaction of an unusual nature, without proper independent advice, and in great haste; and thirdly, the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive. Where there has been a sale at an undervalue, the under-value has almost always been substantial, so that it calls for an explanation, and is in itself indicative of the presence of some fraud, undue influence, or other such feature. In short, there must, in my judgment, be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself (though the former may often be inferred from the latter in the absence of an innocent explanation) - which in the traditional phrase - "shocks the conscience of the court," and makes it against equity and good conscience of the stronger party to retain the benefit of a transaction he has unfairly obtained.*"

65. On appeal, the Court of Appeal affirmed Mr Millett QC's decision: [1985] 1 WLR 173. At pages 182-183, Dillon, LJ said:

> "*The whole emphasis is on extortion, or undue advantage taken of weakness, an unconscientious use of the power arising out of the inequality of the parties' circumstances, and on unconscientious use of power which the court might in certain circumstances be entitled to infer from a particular - and in these days notorious - relationship unless the contract is proved to have been in fact fair, just and reasonable. Nothing leads me to suppose that the course of the development of the law over the last 100 years has been such that the emphasis on unconscionable conduct or unconscientious use of power has gone and relief will now be granted in equity in a case such as the present if there has been unequal bargaining power, even if the stronger has not used his strength unconscionably. I agree with the judgment of Browne-Wilkinson J, in Multiservice Bookbinding Ltd. v. Marden [1979] Ch. 84, which sets out that to establish that a term is unfair and unconscionable it is not enough to show that it is, objectively, unreasonable*."

66. At pages 188-189, Dunn, LJ said:

> *"Mere impecuniosity has never been held a ground for equitable relief. In this case no pressure was placed upon the plaintiffs. On the contrary the defendants were reluctant to enter into the transaction. The plaintiffs took independent advice from their solicitors and accountants. They went into the transaction with their eyes open, and it was of benefit to them because they were enabled to*

continue trade from the site for a number of years. In my view the judge was right to refuse equitable relief."

67. In *Boustany v Pigott* (1995) 69 P & CR 298, 303, the Privy Council explained the parameters of this doctrine:

"*(1) It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that "one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience": Multiservice Bookbinding v. Marden [1979] Ch. 84, 110.*

(2) "Unconscionable" relates not merely to the terms of the bargain but to the behaviour of the stronger party, which must be characterised by some moral culpability or impropriety: Lobb (Alec) (Garages) Limited v. Total Oil (Great Britain) Limited [1983] 1 W.L.R. 87, 94.

(3) Unequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness, "it was not right that the strong should be allowed to push the weak to the wall": Lobb (Alec) (Garages) Limited v. Total Oil (Great Britain) Limited [1985] 1 W.L.R. 173, 183.

(4) A contract cannot be set aside in equity as "an unconscionable bargain" against a party innocent of actual or constructive fraud. Even if the terms of the contract are "unfair" in the sense that they are more favourable to one party than the other ("contractual imbalance"), equity will not provide relief unless the beneficiary is guilty of unconscionable conduct: Hart v. O'Connor [1985] A.C. 1000 applied in Nichols v. Jessup [1986] N.Z.L.R. 226.

(5) "In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances": per Mason J. in Commercial Bank of Australia Ltd. v. Amadio (1983) 46 A.L.R. 402, 413."

68. In *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221, 228, Simon Brown, LJ described the doctrine has been circumscribed by "*clear limitations*".

69. In my judgment, in light of the authorities, a contract can be set aside as an unconscionable bargain if the following elements are established to the satisfaction of the Court:

(1) The party alleging an unconscionable bargain has been labouring under a disadvantage which renders it vulnerable to unconscientious conduct by the other party. In other words, the weaker party is in the power of the stronger party. It is unlikely that this requirement will be established where there is no substantial inequality of bargaining power. On the other hand, such inequality in bargaining power in the respective positions of the parties is not sufficient

on its own to entitle the weaker party to relief. The nature of the weakness or disadvantage is not a closed category and it may extend to the weaker party being illiterate, having poor language skills, or labouring under physical, emotional or mental illness, injury or trauma. That said, mere impecuniosity is not sufficient. As stated in *Chitty on Contracts*, (33rd ed., 2018), para. 8-137, "*there is little authority supporting the grant of relief where the claimant's "serious disadvantage" consists only of the difficult circumstances in which he finds himself*".

(2) The stronger party must have acted unconscionably, by taking advantage of the weaker party's disadvantage. Such conduct must shock or offend the conscience of the Court. This would suggest that the stronger party would have been aware of, or at least had the means of becoming aware, of the other party's disadvantage or weakness, and acted cynically to take advantage or exploit that weakness.

(3) The terms of the contract concluded between the stronger and weaker parties must be unfair and unreasonable, for example the weaker party must clearly not be adequately compensated for the value transferred by it by the value received. The degree of unfairness and unreasonableness must be such as to render the contract overreaching and oppressive. However, mere inadequacy of the consideration alone is not a ground for equitable intervention. If the terms are not in themselves overreaching and oppressive, the mere fact that the party in a weaker position has failed to consider the implications or consequences of the transaction would not render the agreement overreaching and oppressive.

70. Applying these principles to the case at hand, and asking myself the question whether the Defendants have a real prospect of successfully contending at trial that the Extension Fee Deed was unconscionable and should be rescinded as such, in my judgment, the Defendant has no real prospect of succeeding on this ground. My reasons are as follows.

71. First, there is nothing in the position of the Defendants, or either of them, which suggests or even indicates a position of endemic disadvantage or a weakness which is the product of extreme circumstances so as to engage the doctrine of unconscionable bargains. My Ohayon is, I have no doubt, a sophisticated and well experienced businessman well used to the vicissitudes of economic fortune and the benefits and burdens of particular financial transactions. Moreover, with such experience, he had the benefit of legal advice (para. 3.4-3.5 of Mr Denny's first witness statement).

72. Second, the difficulty in which the Defendants found themselves in agreeing the Extension Fee Deed was that (a) they sought to refinance the loans advanced by the Claimant, with the balance of the loan replaced by the New Facility Agreement, (b) the refinancing depended on the release of the sums advanced by the new lenders, (c) those funds had to be released by the Drop Dead Date of 27th September 2019, (d) because of events which were not the result of any wrongful conduct, or indeed any conduct, of the Claimant, the funds could not be released in time, and (e) the Defendants had either to lose the benefit of the refinancing or agree an extension of time with the Claimant. This may well have been an unfortunate position for the

Defendants to find themselves in, but this is not the product of the Claimant's overbearing conduct. The Defendants' complaint is that the Claimant did not respond sufficiently sympathetically to the Defendants' position.

73. Third, the proposal for the Extension Fee Deed was itself the proposal of the Defendants or, at least, some of the terms of which were proposed by the Defendants. The Extension Fee Deed was the product of an ongoing commercial negotiation. It was not imposed on the Defendants by the Claimant. This demonstrates that it was a commercial solution which at the time was acceptable to the Defendants and which appeared to them to provide a means to proceeding with the refinancing transaction. Indeed, it was an arrangement which benefitted both parties.

74. Fourth, there is nothing to suggest that the Extension Fee Deed was itself unfair or unreasonable or indeed so unfair and unreasonable so as to be overreaching and oppressive. Indeed, the Extension Fee Deed was intended to compensate the Claimant for the delay. The adequacy of the fee to fulfil that purpose was no doubt itself the product of a commercial negotiation between the parties. The result of the Extension Fee Deed was that any default under it was an Event of Default which enabled the Claimant to call for the repayment of the outstanding loan, even though there was no obligation on the Defendants to repay any part of the loan for a considerable period in the absence of an Event of Default. In circumstances where the Extension Fee Deed was itself the result of a commercial negotiation between persons who had a sophisticated and experienced understanding of such transactions, there is nothing which can be said to undermine the fairness of the transaction.

75. Fifth, the parties were free to enter or not to enter into the Extension Fee Deed on the terms agreed. The mere fact that one of the parties - the Claimant - may have enjoyed a commercial advantage over the other party - the Defendants - because of the financial circumstances in which the Defendants found themselves is not on its own sufficient to brand the Extension Fee Deed an unconscionable bargain.

76. Sixth, in evaluating the Extension Fee Deed, I have in mind the submissions made as to the dispute about whether there were Events of Default before the New Facility Agreement was concluded, but I do not see how any such dispute could undermine the Extension Fee Deed, whose oppressive character (if any) should be determined in light of the circumstances confronting the Defendants as a result of the refinancing transaction, not the circumstances giving rise to the refinancing transaction.

Economic Duress

77. Mr Stafford QC on behalf of the Defendants submitted that the Claimant's conduct constituted an exercise of lawful act economic duress (*Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2019] EWCA Civ 828; [2020] Ch 98):

    (1) The Claimant refused to extend the Drop Dead Date unless the First Defendant entered into the Extension Fee Deed.

    (2) As of 29th August 2019, when the New Facility Agreement was concluded, the First Defendant had negotiated for itself a valuable benefit, which it would lose if the refinancing did not proceed. Under the terms of the New Facility Agreement, the First Defendant would not be required to pay any sums to the

Claimant for 18 months so that no Event of Default could occur for non-payment during that period. However, on 27th September 2019, the Extension Fee Deed substantially altered the bargain under the New Facility Agreement, because an Event of Default for non-payment under the New Facility Agreement could occur as soon as ten business days after the agreement of the Extension Fee Deed, which would permit - on the Claimant's case - the Claimant to demand that the First Defendant immediately pay all sums owed under the New Facility Agreement as well as the Extension Fee Deed.

(3) By contrast, the Extension Fee Deed represented "*an obvious commercial benefit*" to the Claimant (see Mr Denny's first witness statement, para. 5.7(c)).

(4) Although the pressure exerted by the Claimant upon the First Defendant to enter into the Extension Fee Deed was lawful in the sense that the Claimant was under no legal obligation to agree to the extension sought by the First Defendant (Mr Denny's first witness statement, para. 5.7(a)), it is possible for lawful pressure to be applied for illegitimate reasons, as in this case. In particular, in this case, the position occupied by the Claimant was so superior to that of the First Defendant that "*there was simply no (or no legitimate) bargaining to be had, and the Defendants had no practical choice but to enter into the Extension Fee Deed*" (*Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2019] EWCA Civ 828; [2020] Ch 98, para. 31).

(5) The pressure exerted by the Claimant was not exercised in the *bona fide* belief that it was entitled to its demands, because on the Defendants' pleaded case, the Claimant was aware of the delay in closing the refinancing transaction, the Claimant had no reason to think that the refinancing transaction would not complete and knew that the refinancing sums had already been placed in the Escrow Account for the Claimant's benefit, and because given that the New Facility Agreement was at the time of the agreement of the Extension Fee Deed only one month old, "*there is no evidence to suggest that the risk profile to Adare had changed in those few intervening weeks*".

(6) The expectation was that the refinancing would close in a matter of days (Mr Ohayon's first witness statement, para. 62-65).

(7) The Claimant knew that the refinancing was being pursued by the Defendants because it was commercially impossible for the then existing financing relationship to continue because of the "*toxic relationship*" between the parties. DKCM's representative Mr Ferron stated that the original financing was "*too risky*" to continue (Mr Ohayon's first witness statement, para. 49).

(8) Confronted with the Claimant's entrenched position, the First Defendant had no choice but to execute the Extension Fee Deed (Mr Ohayon's first witness statement, para. 66).

78. Mr Allison QC on behalf of the Claimant submitted that:

(1) None of the conditions required to establish economic duress, set out in *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2019] EWCA Civ 828; [2020] Ch 98, para. 29, is satisfied.

(2) The Claimant did not apply illegitimate pressure to the Defendants in relation to the Extension Fee Deed.

(3) The facts pleaded by the Defendants do not constitute illegitimate pressure as a matter of law. As to this:

(a) The Claimant had no obligation whatsoever to extend the Drop Dead Date. It was entitled to stand on its contractual rights and refuse to grant an extension. The position adopted by the Claimant was that it would not tolerate any delay unless it was compensated for the loss of the time value of money.

(b) It is well established that a refusal to waive performance of an existing contractual obligation does not constitute illegitimate pressure (*Alec Lobb Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87).

(c) There is no suggestion that the Claimant did (or threatened to do) anything unlawful.

(d) It is extremely rare for any lawful act to constitute illegitimate pressure. The doctrine of economic duress has no application where one party exerts pressure on another party by making a lawful demand or applying lawful pressure to achieve a result to which the first party believes in good faith it is entitled (regardless of whether this belief is objectively correct or even reasonable) (*Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2019] EWCA Civ 828; [2020] Ch 98, para. 105-106).

(e) Although the Defendants have pleaded, at para. 18.3 of the Defence, that DKCM failed to act within the "*basic norms of commerce and fair and honest dealing*" and further that DKCM did not consider in good faith that it was entitled to require the First Defendant to execute the Extension Fee Deed as a condition of extending the Drop Dead Date, no proper particulars of the allegation have been pleaded (*Three Rivers DC v Governor and Company of the Bank of England (No. 3)* [2001] UKHL 16; [2003] 2 AC 1, para. 51; *Hersi & Co v The Lord Chancellor* [2018] EWHC 946 (QB) at para. 133-134; Commercial Court Guide, para. C1.3(c)).

(4) The most that can be said is that the Claimant relied on its contractual rights and insisted upon being compensated for losing the time value of money. This is not a form of bad faith and is a wholly unsustainable basis for alleging that the Claimant applied illegitimate pressure for the purposes of the economic duress doctrine.

(5) For similar reasons, any purported pressure applied by the Claimant was not a significant cause that induced the Defendants to enter into the Extension Fee Deed. On the contrary, the terms of the Extension Fee Deed were in fact derived from a proposal made in an email dated 26th September 2019 made by the Defendants' own adviser, Mr Kadoche. The Defendants have failed to plead or adduce any evidence of causation or inducement.

(6) Any purported pressure applied by the Claimant did not have the practical effect of creating a lack of choice for the Defendants. The Defendants had a free choice to enter into the Extension Fee Deed, and they made their choice with the benefit of legal advice and representation from law firms in multiple jurisdictions. It was in the interests of the Defendants to enter into the Extension Fee Deed (since this ensured that the refinancing transaction ultimately completed despite the delay), but the Defendants could have refused to sign the Extension Fee Deed if they were unwilling to consent to its terms.

(7) Accordingly, the economic duress argument is plainly unsustainable.

79. In considering whether there is a realistic prospect of the Defendants successfully establishing economic duress as a defence to the Claimant's claim, it is worth noting that:

(1) The Defendants do not contend that the Claimant acted unlawfully in refusing to extend the Drop Dead Date unless the terms of the Extension Fee Deed were agreed in the sense that the Claimant failed or refused to comply with a legal obligation to consent to the requested extension.

(2) Instead, so argue the Defendants, the Claimant's refusal was motivated by "*illegitimate reasons*".

(3) Having regard to Mr Stafford QC's submissions and para. 18 of the Defence, the Defendants' case is that the Claimant did not act in good faith because (a) the Claimant unreasonably exploited the Defendants' "*extreme vulnerability*", (b) the Extension Fee Deed enabled the Claimant to declare an Event of Default and accelerate the Loan for immediate payment much earlier than would have been the case under the New Facility Agreement, and (c) the Claimant knew that the extension of the Drop Dead Date was required only for a few days and that the new lenders' funds were already held in the Escrow Account.

80. The law concerning lawful act economic duress was considered and explained by the Court of Appeal in *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2019] EWCA Civ 828; [2020] Ch 98, at para. 29, where the Court endorsed the decision of the judge below in identifying the elements of economic duress, namely (1) there must be illegitimate pressure applied to the claimant, (2) the pressure must be a significant cause inducing the claimant to enter into the contract, and (3) the practical effect of the pressure is that there was compulsion on, or a lack of practical choice for, the claimant.

81. David Richards, LJ explained the importance of the role of contracts, freely entered into, delineating the rights and obligations of the contracting parties and stated that interference with the validity and enforcement of such contracts should be limited to clear cases of an improper advantage being taken by one party over another. The words "*improper advantage*" are difficult to define and apply when one considers the doctrines of unconscionable bargains, undue influence and economic duress.

82. At para. 39-41, David Richards, LJ said in this respect:

> "*39. … it should be observed that the common law attaches great significance to the enforceability of contracts validly made. A contract which is not validly made—for lack of an essential element such as agreement on terms or lack of consideration or for want of capacity or consent—is necessarily unenforceable. A validly made contract will be set aside or be voidable at the option of a party on only a few grounds which are clearly defined. Most of these grounds will involve fault, sometimes limited to bad faith, on the part of a party. Examples are fraudulent misrepresentation, unilateral mistake (which may bar remedies or ground a claim for rectification), unconscionable transactions and, in some cases, undue influence.*
>
> *40. The equitable doctrines of unconscionable transactions (or undue pressure, as it is called in some jurisdictions such as Australia) and undue influence are particularly relevant in the context of economic duress. Both involve the possibility of the court setting aside a contract made in circumstances which may involve pressure being put on a party to enter into the contract. There is no lack of clarity in the criteria that must be satisfied for their application. Undue influence, which may be actual or presumed, is based on the relationship between the parties. The doctrine of unconscionable transactions applies where a party is suffering from a particular kind of vulnerability, the terms of the transaction are oppressive to that party and the other party knowingly took advantage of his vulnerability: see Snell's Equity, 33rd ed (2015), para 8-042. The elements of an unconscionable transaction were summarised by Lord Templeman giving the judgment of the Privy Council in Boustany v Pigott (1993) 69 P & CR 298, 303. It has not been suggested that the New Agreement in the present case could be set aside under either of these equitable doctrines.*
>
> *41. The common law and equity have not countenanced as grounds for setting aside contracts factors such as inequality of bargaining power or the exploitation of a monopoly position. Intervention in relation to these and other factors seen as going to the fairness of contractual terms and the relative positions of the parties has been through legislation, directed principally to consumer contracts and consumer credit. Commercial dealings have been left largely untouched by statute*."

83. After a review of the principal judicial decisions on economic duress and a survey of academic opinion on lawful act economic duress, David Richards, LJ referred to the decision of Leggatt, LJ (sitting in the Commercial Court) in *Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 CLC 216 and then said at para. 102-106:

> "*102. At para 187, Leggatt LJ said that, in determining whether:*
>
> > *"the defendant can retain money or other benefits demanded from a claimant in a situation of extreme vulnerability … it is appropriate to take account of the legitimacy of the demand and to judge the propriety of the defendant's conduct by reference not simply to what is lawful but to basic minimum standards of acceptable behaviour."*
>
> *The reference to a "situation of extreme vulnerability" again suggests a case to which the equitable doctrine of unconscionable transactions might apply. But, if*

it does not apply (and it is not suggested that it applies in the present case), it becomes very unclear what constitute the applicable "basic minimum standards of acceptable behaviour". In particular, I find it difficult to see why the use of lawful means in pursuit of a bona fide demand should contravene such basic standards. Leggatt LJ refers to the standard of unconscionability being a high one and that the courts will intervene only in cases where the demand made, and the means used, are "completely indefensible" and where intervention is needed to enforce "basic norms of commerce and of fair and honest dealing". Expressed in these general terms, it is difficult to disagree with these sentiments, but the difficulty and uncertainty comes in applying them to particular cases.

103. In deciding the present case, it is enough to say that these precepts are not, in my judgment, engaged where a party uses lawful pressure to achieve a result to which it considers itself in good faith to be entitled. I say this in a context of commercial dealings where parties owe no duties as to the manner in which they exercise their personal rights and where parties may choose whether to enter into a contract and, if so, on what terms, and against a background where the courts have repeatedly rejected both inequality of bargaining power and the use of a monopoly position as grounds for setting aside contracts …

105. My conclusion on the central legal issue is that the doctrine of lawful act duress does not extend to the use of lawful pressure to achieve a result to which the person exercising pressure believes in good faith it is entitled, and that is so whether or not, objectively speaking, it has reasonable grounds for that belief. The common law and equity set tight limits to setting aside otherwise valid contracts. In this way undesirable uncertainty in a commercial context is reduced. I appreciate that in the context of the present case, which concerns the reasonableness of the grounds for resisting a claim, it can be said that a test of unreasonableness is not uncertain, because it can be tested and decided according to conventional legal standards. But that will not be the case in the much more common situation of a party using lawful commercial pressure in support of a purely commercial demand. There is no yardstick by which to judge such demands, save those that can be set out in legislation such as that applying to consumer contracts. Such demands are a matter of negotiation against the background of the pressures operating on both parties.

106. The relevant considerations go beyond uncertainty. In judging the use of lawful acts or threats of lawful acts as commercial pressure, there is a sharp distinction between such use to pursue demands made in good faith and those made in bad faith. As I earlier mentioned, a lack of good faith on the part of a contracting party is a feature in a number of the grounds on which contracts may be avoided. Rescission on grounds of fraudulent misrepresentation or unconscionable transaction are examples. It is a clear criterion involving conduct which all can agree is unacceptable and which is a fact capable of proof, often as it happens by reference to the lack of any reasonable grounds for the belief. By contrast, not only is reasonableness in this context a standard of very uncertain content but it is also very unclear why or on what basis the common law should hold that a party with a private law right, whose exercise is

> *not subject to any overriding duty, cannot use it to achieve a purpose which is both lawful and advanced in good faith*."

84. Therefore, in order to constitute lawful act economic duress, the pressure in the form of the relevant party exercising a lawful right must be exerted in bad faith, rather than in good faith. Whether the party exerting the pressure is acting in good faith is not determined by whether that party is acting reasonably or with reasonable cause. There is no applicable external standard based on reasonableness. Nor could it be legitimately said that lawful act economic duress rests only on an unreasonable exercise of a lawful right, because that would be to recast the very nature of a legal right which is not in itself shaped by standards of reasonableness. However, an act motivated by bad faith will very often also be unreasonable.

85. Identifying the exercise of a lawful right in bad faith is not altogether an exercise which is easily carried out. A person might regard the exercise of a legal right by another person with some distaste, but the other person might be exercising it in the sincere belief that it is entitled to do so and possibly for honourable reasons. A person may exercise a legal right cynically and in order to gain an advantage, but it might be an advantage to which that person is legally entitled. In those circumstances, what is it which marks the exercise of the lawful right as an act in bad faith?

86. David Richards, LJ drew support from the decision in *DSND Subsea Limited v Petroleum Geo-Services ASA* [2000] BLR 530, para. 131, where Dyson, J said:

> "*In determining whether there has been illegitimate pressure, the courts take into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining*."

87. In his clear judgment, David Richards, LJ gave examples of bad faith in conduct which amounts to fraudulent misrepresentation or an unconscionable bargain (para. 106). However, such conduct is by its nature unlawful and therefore one may question whether it would, at least in most cases, amount to lawful act duress. Then David Richards, LJ states of bad faith that "*It is a clear criterion involving conduct which all can agree is unacceptable and which is a fact capable of proof, often as it happens by reference to the lack of any reasonable grounds for the belief*". This appears to pitch the test by reference to what "*all can agree*" is morally unacceptable conduct.

88. At para. 57-62, David Richards, LJ was plainly and rightly influenced by the judgment of Steyn, LJ in *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, 717-719. In that case, the defendant had arranged credit facilities for the plaintiff which the defendant was legally permitted to withdraw in its discretion. The defendant accepted the plaintiff's order for the supply of cigarettes, but delivered them at the wrong warehouse. Before the defendant could transport them to the new warehouse, the cigarettes were stolen. The defendant invoiced the plaintiff for the cigarettes in the belief they were at the risk of the plaintiff. The plaintiff disputed the

invoice, but paid it after the defendant threatened to withdraw the plaintiff's credit facilities. The plaintiff subsequently sued for restitution of the invoiced amount. The Court of Appeal held that the defendant had not been guilty of duress, because the relationship between the plaintiff and the defendant was not a protected relationship, the defendant was lawfully entitled to carry out its threat to withdraw the credit facilities, and the defendant in good faith thought that the plaintiff owed the defendant the invoiced amount. This last factor was regarded by Steyn, LJ as "*critically important*". Steyn, LJ said:

> "*We are being asked to extend the categories of duress of which the law will take cognisance. That is not necessarily objectionable, but it seems to me that an extension capable of covering the present case, involving 'lawful act duress' in a commercial context in pursuit of a bona fide claim, would be a radical one with far-reaching implications. It would introduce a substantial and undesirable element of uncertainty in the commercial bargaining process. Moreover, it will often enable bona fide settled accounts to be reopened when parties to commercial dealings fall out. The aim of our commercial law ought to be to encourage fair dealing between parties. But it is a mistake for the law to set its sights too highly when the critical inquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable. That is the inquiry in which we are engaged. In my view there are policy considerations which militate against ruling that the defendants obtained payment of the disputed invoice by duress.*
>
> *Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which 'lawful act duress' can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying 'never' …*"

89. Steyn, LJ seemed to equate bad faith with "*morally or socially unacceptable*" conduct, but recognised that it will be a rare case where lawful act economic duress can be established. On the facts of that case, if the defendant demanded the payment of its invoice, on pain of withdrawing the plaintiff's credit facilities, even though it genuinely believed that the invoice was not due and payable, one can see that might well constitute economic duress. In that event, the act of issuing an invoice implicitly representing that it is due, whereas the defendant knew that it was not, would be an instance of a fraudulent misrepresentation. So, while the pressure being exerted was itself lawful, the demand itself would not be lawful. In this context, in assessing the unlawful nature of pressure, one cannot ignore the demand. In other words, the demand and the pressure must be considered together (*Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2019] EWCA Civ 828; [2020] Ch 98, para. 51-54).

90. The meaning of good faith or bad faith, insofar as it resides outside a fraudulent intention, is difficult to measure. Nevertheless, the Court of Appeal has with admirable clarity explained the boundaries of lawful act economic duress.

91. In the present case, the parties are agreed that the issue before the Court is concerned with lawful act economic duress. The Defendants have pleaded that the Claimant

(through DKCM) failed to act within the "*basic norms of commerce and fair and honest dealing*" and did not consider in good faith that it was entitled to require the First Defendant to execute the Extension Fee Deed as a condition of extending the Drop Dead Date. I do not accept the Claimant's submission that the plea was unparticularised, but I accept that it was not adequately particularised to justify the defence of economic duress. The Defendants plead, in para. 18 of the Defence, that the Claimant knew that the Defendants were "*in a situation of extreme vulnerability*" and exploited that vulnerability to induce the Defendants to agree to the unreasonable demand of agreeing to enter into the Extension Fee Deed, which represented a different bargain from that under the New Facility Agreement. This is the same plea supporting the Defendants' defence that the Extension Fee Deed was an unconscionable bargain.

92. In my judgment, even accepting the truth of the Defendants' allegation, this is not sufficient to constitute lawful act economic duress in the present case. It is plain that the Defendants' plea is based on the judgment of Leggatt, LJ in *Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 CLC 216, at para. 181 and 187. However, the Court of Appeal in *Times Travel (UK) Ltd v Pakistan International Airlines Corp* said that cases of "*extreme vulnerability*" are cases to which the equitable doctrine of unconscionable transactions might apply, but where the party exerting the relevant pressure is acting lawfully in pursuit of a demand in good faith, there is no economic duress. Apart from the alleged condition of the Defendants - extreme vulnerability - and the Claimant's alleged knowledge of that condition, there are no relevant facts pleaded in support of the allegation that the Claimant acted in bad faith or failed to act within the "*basic norms of commerce and fair and honest dealing*". The Defendants' plea is insufficient to justify the defence of economic duress.

93. This conclusion is further supported by the fact that the Extension Fee Deed was itself an agreement reached as an accommodation of the First Defendant insofar as the refinancing transaction would not be completed by the Drop Dead Date, whereby the Claimant had foregone its own lawful rights under the New Facility Agreement in exchange for the terms of the Extension Fee Deed. In those circumstances, there can be no lawful act economic duress. In *Alec Lobb Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87, 94, Peter Millett QC said that:

> "*Mr. Christie insisted that pressure was exercised by the defendants; it was, he said, the existence of the petrol tie, with, at the time, its four years to run, which made it impossible for Mr. Lobb to seek help elsewhere, and put the plaintiff company at the mercy of the defendants. But the defendants could not be required to release the plaintiff company from its pre-existing contractual obligations, freely entered into without duress of any kind, before entering into fresh dealings with the plaintiff company, on pain of having those fresh dealings vitiated by duress if they did not. It is not necessary to consider to what extent, in order to constitute economic duress the pressure must be improper, but it must, in my judgment, consist of something more than a refusal to waive performance of an existing contractual obligation.*"

94. Moreover, the proposal for the Extension Fee Deed in fact appears to have emanated from the Defendants, not the Claimant, or at least some of the terms of the Extension Fee Deed emanated from the Defendants, suggesting that it was not the pressure

exerted by the Claimant which was the cause of the parties' agreement of the Extension Feed Deed, but rather the Defendants' own assessment of their financial position.

95. Therefore, the Defendants have no real prospect of successfully relying on the defence of economic duress.

Unlawful penalties

96. Mr Stafford QC on behalf of the Defendants made the following written submissions in his skeleton argument, but did not develop them during his oral argument. The Defendants submitted that:

(1) It is trite law that a contractual clause, found to be a penalty, is unenforceable beyond the sum which represents a party's actual loss (*Chitty on Contracts* (33rd ed., 2018), para. 26-191).

(2) A contractual provision is penal in nature where "*the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance*" (*Cavendish Square Holding BV v Makdessi* [2015] UKSC 67; [2016] AC 1172, para. 32).

(3) Even if the Claimant can show that it has a legitimate interest in obtaining actual performance instead of damages in lieu of performance, an agreed damages clause or other clause that is within the penalty clause rules will not be valid if it is extravagant or unconscionable compared to the legitimate interest (*Chitty on Contracts* (33rd ed., 2018), para. 26-226).

(4) The Defendants' case is set out in para. 19 of their Defence. In essence, the Extension Fee Deed permitted the Claimant to accelerate the repayment of the Loan based on an Event of Default soon after the Extension Fee Deed was agreed, whereas under the New Facility Agreement, there could be no Event of Default until February 2021. The acceleration constituted a detriment out of all proportion to any legitimate interest the Claimant might have in the enforcement of the Extension Fee Deed, and merely extracted a windfall for the Claimant. Accordingly, the operation of the Extension Fee Deed upon the New Facility Agreement would constitute an unenforceable penalty under the test in *Cavendish Square Holding BV v Makdessi*.

(5) The primary obligation under the Extension Fee Deed imposed upon the Defendants was accompanied by the imposition of a detriment on them out of all proportion to any legitimate interest the Claimant had in the payment of the sums due to it under the Extension Fee Deed, because it would give rise to an immediate obligation on the Defendants to pay millions of dollars that they would not otherwise been liable to pay for more than a year. In other words, it is the acceleration of a separate obligation which is penal, rather than the obligation itself.

(6) It cannot be said that the Claimant's legitimate commercial interests as to the Extension Fee Deed were in any way served by the drastic acceleration of the First Defendant's obligations under the New Facility Agreement.

97. Mr Allison QC on behalf of the Claimant submitted that:

(1) The Defendants' argument relies on the fact that, under the New Facility Agreement (as amended by the Extension Fee Deed), the amounts owing to the Claimant in respect of the Deferred Costs Loan, the Deferred Shortfall Loan and the Deferred Escrow Amount Loan could be accelerated and declared immediately due and payable in the event that the First Defendant failed to pay the Extension Fee on the due date. The Defendants assert that this contractual arrangement involves an unlawful penalty.

(2) However, as a matter of law, a provision for the acceleration of a pre-existing debt does not constitute an unlawful penalty (*Chitty on Contracts* (33rd ed., 2018), para. 39-273; *The Angelic Star* [1988] 1 Lloyd's Rep 122, 126; *ZCCM Investments Holdings Plc v Konkola Copper Mines Plc* [2017] EWHC 3288 (Comm), para. 34).

(3) In *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67; [2016] AC 1172, at para. 35, Lords Neuberger and Sumption said that "*In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach*" such that the starting position is that the rule against penalties does not apply to commercial contracts between sophisticated counterparties. Accordingly, as the Claimant and the Defendants had the benefit of legal advice and comparable bargaining power, there is a strong initial presumption that the provisions of the New Facility Agreement and the Extension Fee Deed are valid.

(4) Quite apart from this presumption, an acceleration clause is not an unlawful penalty because (i) it does not impose a secondary obligation on the borrower (but simply accelerates the payment of an amount that is already owing by the borrower), and (ii) the acceleration of a loan upon a default does not impose a detriment on the borrower out of all proportion to any legitimate interest of the lender in the enforcement of the loan.

(5) The parties are free to agree on the events that will entitle the lender to accelerate the loan. The simplest and most obvious form of default is a failure to make a payment of principal or interest on the loan itself.

(6) In the present case, the New Facility Agreement stated that an Event of Default would occur if the First Defendant failed to make any payment due under a Finance Document, including the Extension Fee Deed. As a result, the First Defendant's failure to pay an amount owing under the Extension Fee Deed is an Event of Default under the New Facility Agreement. This is a simple form of "cross-default" arrangement in which a default under one agreement is treated as a default under another and which is ubiquitous in commercial loan agreements. As stated in *Chitty on Contracts* (33rd ed.,

2018), para. 39-275, "*there is no doubt that such a clause will be upheld in a commercial agreement*".

(7) Accordingly, the argument based on the rule against penalties is unsustainable on the in law.

98. In *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67; [2016] AC 1172, Lords Neuberger and Sumption stated the circumstances in which the rule against penalties might be engaged. The rule is that a contractual provision which provides for a sanction - often money - in the event of a party's breach of duty and where that sanction is extravagant or unconscionable in comparison to the innocent party's legitimate interest in ensuring performance by the party in breach, is penal and is therefore unenforceable. At para. 12-14, Lords Neuberger and Sumption said:

> "*12. In England, it has always been considered that a provision could not be a penalty unless it provided an exorbitant alternative to common law damages. This meant that it had to be a provision operating on a breach of contract. In Moss Empires Ltd v Olympia (Liverpool) Ltd [1939] AC 544, this was taken for granted by Lord Atkin (p 551) and Lord Porter: p 558. As a matter of authority the question is settled in England by the decision of the House of Lords in Export Credits Guarantee Department v Universal Oil Products Co [1983] 1 WLR 399 (" ECGD "). Lord Roskill, with whom the rest of the committee agreed, said, at p 403:*
>
> > *"perhaps the main purpose, of the law relating to penalty clauses is to prevent a plaintiff recovering a sum of money in respect of a breach of contract committed by a defendant which bears little or no relationship to the loss actually suffered by the plaintiff as a result of the breach by the defendant. But it is not and never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain."*
>
> *As Lord Hodge JSC points out in his judgment, the Scottish authorities are to the same effect.*
>
> *13. This principle is worth restating at the outset of any analysis of the penalty rule, because it explains much about the way in which it has developed. There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves. This was not a new concept in 1983, when ECGD was decided. It had been the foundation of the equitable jurisdiction, which depended on the treatment of penal defeasible bonds as secondary obligations or, as Lord Thurlow LC put it in 1783 in Sloman v Walter 1 Bro CC 418, 419, as "collateral" or "accessional" to the primary obligation. And it provided the whole basis of the classic distinction made at law between a penalty and a genuine pre-estimate of loss, the former being essentially a way of punishing the*

contract-breaker rather than compensating the innocent party for his breach. We shall return to that distinction below.

14. This means that in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, ie whether as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages at law. Thus, where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty; but if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty."

99. At para. 31-35, Lords Neuberger and Sumption proceeded to explain the rule against penalties itself:

"*31. … The real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss. These are not natural opposites or mutually exclusive categories. A damages clause may be neither or both. The fact that the clause is not a pre-estimate of loss does not therefore, at any rate without more, mean that it is penal. To describe it as a deterrent (or, to use the Latin equivalent, in terrorem) does not add anything. A deterrent provision in a contract is simply one species of provision designed to influence the conduct of the party potentially affected. It is no different in this respect from a contractual inducement. Neither is it inherently penal or contrary to the policy of the law. The question whether it is enforceable should depend on whether the means by which the contracting party's conduct is to be influenced are "unconscionable" or (which will usually amount to the same thing) "extravagant" by reference to some norm.*

32. The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach … But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations …

33. The penalty rule is an interference with freedom of contract. It undermines the certainty which parties are entitled to expect of the law. Diplock LJ was neither the first nor the last to observe that "The court should not be astute to descry a 'penalty clause'": the Robophone case [1966] 1 WLR 1428, 1447. As Lord Woolf said, speaking for the Privy Council in Philips Hong Kong Ltd v Attorney General of Hong Kong (1993) 61 BLR 41, 59, "the court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld", not least because "any other

> *approach will lead to undesirable uncertainty especially in commercial contracts" ...*
>
> *35. ... the circumstances in which the contract was made are not entirely irrelevant. In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach. In that connection, it is worth noting that in the Philips Hong Kong case 61 BLR 41, 57–59, Lord Woolf specifically referred to the possibility of taking into account the fact that "one of the parties to the contract is able to dominate the other as to the choice of the terms of a contract" when deciding whether a damages clause was a penalty. In doing so, he reflected the view expressed by Mason and Wilson JJ in the AMEV-UDC case 162 CLR 170, 194 that the courts were thereby able to "strike a balance between the competing interests of freedom of contract and protection of weak contracting parties" (citing Atiyah, The Rise and Fall of Freedom of Contract (1979), chapter 22). However, Lord Woolf was rightly at pains to point out that this did not mean that the courts could thereby adopt "some broader discretionary approach*" …

100. In my judgment, the provisions of the Extension Fee Deed by which the Claimant has required the acceleration of the payment of sums due to be repaid under the New Facility Agreement, as amended by the Extension Fee Deed, are not penal and are legally enforceable for the following reasons.

101. First, the parties were commercially experienced and sophisticated and benefited from legal advice in respect of a complex financial transaction, which represented a negotiated commercial solution.

102. Second, the terms of the Extension Fee Deed were agreed by way of an indulgence to suit the Defendants to preserve their own position with respect to the refinancing transaction. Had the Extension Fee Deed not been agreed, the Defendants faced the termination of the refinancing transaction (see *Thompson v Hudson* (1869) LR 4 HL 1, 15-16, 27-28, 33).

103. Third, there is nothing in the terms of the Extension Fee Deed which impose a detriment on the First Defendant out of all proportion of the Claimant's legitimate interest in the payment of the sums due under the New Facility Agreement, as amended by the Extension Fee Deed. The acceleration provision merely required the repayment of sums due to the Claimant at a date earlier than they would have been due had there been no Event of Default; the cross-default clause was entirely in line with the Claimant's legitimate interest. This conclusion is consistent with that reached by Mr Lionel Persey QC (sitting as a deputy High Court judge) in *ZCCM Investments Holdings Plc v Konkola Copper Mines Plc* [2017] EWHC 3288 (Comm), at para. 33-34:

> "*33. The first question for me to consider is whether the right to accelerate future payments under the Settlement Agreement imposes a detriment on KCM which is out of all proportion to any legitimate interest of ZCCM and/or provides ZCCM with a remedy that is in all the circumstances extravagant, exorbitant or unconscionable. In answering that question I am*

> *required to look at the legitimate interests of ZCCM in the performance of the contract and also to look at the circumstances in which the contract came to be concluded, including matters such as the relative bargaining power of the parties and whether KCM had legal advice at the time the contract was concluded.*
>
> *34. I have no hesitation in rejecting KCM's assertion that the right to accelerate future payments constitutes a penalty. The Settlement Agreement in effect operated as a loan pursuant to which KCM was, subject to compliance with certain agreed terms, granted yet further time in which to discharge its admitted liability to ZCCM. An accelerated payment clause in a loan agreement entitles the lender to immediate repayment of the sums that he has lent: ie to the repayment of his own money. As Neill LJ observed in The Angelic Star [1988] 1 Lloyd's Rep. 122 at p.126:*
>
> > *"… I know of no rule that prevents a lender from stipulating that in the event of a failure to make an instalment payment on the due date the whole loan becomes due and repayable forthwith…"*
>
> *There is to my mind nothing extravagant, exorbitant or unconscionable in requiring a commercial party under the terms of a settlement agreement such as the present immediately to pay the full amount of the loan in the event of any non-compliance with its terms. ZCCM had a legitimate interest in requiring strict compliance with the Settlement Agreement and KCM knew exactly what it was signing up to when concluding this arms' length agreement with the benefit of expert legal advice*."

104. Fourth, having regard to Mr Persey QC's judgment, the provision which entitled the Claimant to accelerate the repayment of the Loan, as far as that provision goes, defines a primary obligation of the First Defendant, namely that of repayment of the funds lent, in that the repayment must take place at a specified time, unless there is an Event of Default, in which case it must take place at an earlier time. In this respect, it is a conditional primary obligation of the type referred to by Lords Neuberger and Sumption in *Cavendish Square Holding BV v Makdessi*, at para. 14.

105. Therefore, for these reasons, the Defendants have no real prospect of succeeding on this defence.

Was there an option available to the Defendants preventing an Event of Default?

106. Mr Stafford QC made the following submissions on behalf of the Defendants in his written skeleton argument, which he did not develop orally:

(1) The Defendants' case is that, on the proper construction of the Extension Fee Deed, the First Defendant was not required to make payment of US$968,764 by 18th November 2019, and so its non-payment of that sum (which is admitted) did not constitute an Event of Default. This is expressed to be an alternative case.

(2) Clause 6 of the New Facility Agreement provided to the First Defendant an option to repay certain sums within one year, which at that time amounted to

US$3,450,000 plus interest. The payment of these sums constituted conditions precedent to the exercise of the option: if the First Defendant satisfied the requirements, its remaining liability under the New Facility Agreement would be forgiven. In the alternative, the First Defendant could choose to repay the entire liability (including interest) within 18 months. Neither choice would constitute an Event of Default.

(3) Once executed, clause 3 of the Extension Fee Deed expressly amended clause 6 of the New Facility Agreement to provide, as an additional condition precedent for the early repayment option, that the First Defendant must have paid the Extension Fee on the date on, and the manner in, which it is expressed to be payable thereunder.

(4) Whilst it is accepted that clause 2.1 of the Extension Fee Deed provided, on its face, that the Extension Fee "*is payable ... within ten Business Days of the Facility Agreement Effective Date*" (defined as the date on which the refinancing sums held in escrow were released to the Claimant) the effect of that clause is to be read in the light of the Extension Fee Deed as a whole, including in respect of its amendment to clause 6 of the New Facility Agreement, given that clause 9.4 of the Extension Fee Deed, which provides that the New Facility Agreement and the Extension Fee Deed "*shall be read together and construed as one document*."

(5) The inclusion of payment of the Extension Fee as a condition precedent in this manner necessarily envisages the possibility that, in the alternative, the option would not be exercised.

(6) Accordingly, it cannot have been intended that an Event of Default would occur in the event of non-payment of the Extension Fee by the time provided under clause 2.1 of the Extension Fee Deed. It would make no business sense: had that been the case, there would have been no need to require clause 6 of the New Facility Agreement to be amended since, in the event of an Event of Default, the Claimant would have been entitled to demand immediate payment of the entire sum (and the First Defendant would lose the early repayment option).

107. Mr Allison QC on behalf of the Claimant submitted that:

(1) It is telling that this argument is developed as the Defendants' last line of resistance to the Claim (despite the fact that, as a matter of logic, the argument should in fact come first). The argument is unsustainable because it contradicts the express terms and the commercial purpose of the Extension Fee Deed.

(2) Clause 1.2 of the Extension Fee Deed provided that "*in consideration of, amongst other things, [the Claimant] instructing the Agent to extend the Drop Dead Date ... the [parties] wish to enter into this deed in order to (a) document the terms on which the Extension Fee <u>shall be payable</u> by [the First Defendant] to [the Claimant] and guaranteed by [Mr Ohayon]*" (emphasis added).

(3) Clause 2.1 provides that "*the Extension Fee* *is payable by [the First Defendant] within ten Business Days* *of the Facility Agreement Effective Date*" (emphasis added).

(4) The language of these provisions is plainly inconsistent with the Defendants' assertion that they merely had an option to pay the Extension Fee by 18th November 2019.

(5) The New Facility Agreement includes a mechanism whereby the First Defendant can repay a reduced amount to the Claimant if it complies with certain conditions. One such condition is that the First Defendant must pay the Extension Fee on its due date (clause 6(a)(iii) of the New Facility Agreement, as amended by Clause 3 of the Extension Fee Deed).

(6) The Defendants' argument that it was optional for them to pay the Extension Fee on 18th November 2019 is unintelligible. It is not understood why the condition under Clause 6(a)(iii) leads to the conclusion that it was optional for the Defendants to pay the Extension Fee by 18th November 2019, given that paragraph 2.1 of the Extension Fee Deed expressly states that the Extension Fee was "*payable by* [the First Defendant] *within ten Business Days of the Facility Agreement Effective Date*" (*i.e.* on or before 18th November 2019).

(7) This argument is also inconsistent with the Defendants' own case on unconscionable bargain (which expressly relies on the fact that a failure to pay the Extension Fee Deed on the date specified in paragraph 2.1 of the Extension Fee Deed is an Event of Default under the New Facility Agreement).

108. In my judgment, the Defendants have no real prospect of succeeding on this defence at trial, because as a matter of construction of the New Facility Agreement as amended by the Extension Fee Deed, there was an obligation upon the First Defendant to pay the Extension Fee under clause 2.1 of the Extension Fee Deed within the time specified. The failure to pay that sum within time was an Event of Default under a Finance Document, which enabled the Claimant to exercise its rights under clause 15 of the New Facility Agreement. The option available to the First Defendant under the amended clause 6(a) did not interfere with the Claimant's rights in this respect, because its exercise was itself conditional on the First Defendant having paid the Extension Fee as required "*on the date on, and in the manner in, which it is expressed to be payable thereunder*". As the Extension Fee was not paid as required by the Extension Fee Deed, the option available under clause 6(a) is of no relevance.

109. There was therefore an Event of Default and the Claimant was entitled to exercise its rights of acceleration. The Defendants have no real prospect of succeeding on this defence.

The First Defendant's counterclaim

110. Mr Stafford QC made the following submissions on behalf of the Defendants in his skeleton argument, but did not address this issue in his oral submissions:

(1) The First Defendant claims damages or an account in the sum of US$2,300,000, being an amount asserted by the Claimant to have represented

its legal costs in connection with the preparation and negotiation of the Original Facility Agreements. The First Defendant also claims interest and costs.

(2) The First Defendant's cause of action arises from the Claimant's breach of the Original Facility Agreements in that:

(a) The First Defendant was party to the Original Facility Agreements and, on the true construction of those agreements, was bound by and enjoyed the same rights and obligations as IPC, and so has standing, subject to proof of damage, to pursue the Claimant for its breaches of the Original Facility Agreements.

(b) Under the Original Facility Agreements, once IPC had submitted written utilisation requests to the Claimant, the latter was required to advance to IPC loans amounting to US$113,300,000 ("the Utilisation Clauses"). The loans were to be made for the full amount, could not be divided, and only one loan could be borrowed pursuant to each Original Facility Agreement ("the Non-Division Clauses").

(c) The Original Facility Agreements also provided that IPC, as borrower, was liable on demand to pay to the Claimant's costs that had been "*properly incurred*" in connection with (amongst other things) the negotiation and preparation of those documents ("the Costs Clauses").

(d) Implicit to this agreement were certain terms ("the Implied Costs Terms") necessary to give business efficacy to the contract, pursuant to which (i) the Claimant would only attempt to recover costs that it believed in good faith that it was entitled to claim, (ii) by presenting a demand for payment, the Claimant was representing its good faith belief that the costs claimed had been properly incurred, (iii) IPC would be entitled first to verify that the Claimant's costs were "*properly incurred*", since it should not be liable to pay any costs that were not "*properly incurred*" and, accordingly, the Claimant was required to provide upon request details of its costs to allow IPC to satisfy itself that the costs claimed fell within the boundaries of the Original Facility Agreements.

(3) In breach of the Non-Division Clauses, the Utilisation Clauses, the Costs Clauses, and/or the Implied Costs Terms, the Claimant (a) presented a costs demand that is to be inferred to have included costs that were not properly incurred, (b) refused to provide, when requested, information which would help verify that the costs claimed were properly incurred, (c) deducted unilaterally US$2,300,000 from the loans advanced to IPC.

(4) The Claimant's breach of contract resulted in a shortfall US$2,300,000 for the acquisition of the hotel. In the circumstances, Mr Ohayon had no choice but to cause funds to divert from the First Defendant to IPC (Mr Ohayon's first witness statement, para. 27-28), thereby ensuring the acquisition could complete but causing the First Defendant loss and damage of US$2,300,000.

(5) The compromise reached between the parties was tainted by the fact that Mr Ohayon, who had instructed Mr Kadoche to agree to these fees, was not aware that this sum would be taken from the loan (Mr Ohayon's first witness statement, para. 27). Even if the Court were to conclude that Mr Ohayon or his representatives are bound by the purported compromise, the Claimant's unilateral deduction of that sum from the loan was a material breach of the Original Facility Agreements by (a) dividing the loans, in breach of clause 4.2(b) of the Original Facility Agreements; and/or (b) failing to make available its participation in the loans equal to the proportion of its commitments, in breach of clauses 5.4(a) and (b) of the Original Facility Agreements.

(6) The First Defendant did not waive and release any claims it might have had against the Claimant under the Original Facility Agreements by its execution of the Deed of Termination dated 29th August 2019, because (a) clause 2.1(c) of the Deed of Termination provides that the parties "*fully, finally and irrevocably waives, releases and discharges the other Parties from all obligations, undertakings, duties, responsibilities and liabilities of any kind (past, present, future, actual or contingent or otherwise) pursuant to or arising out of (directly or indirectly) the [Original Finance Documents]*", but omits the words "*claims and demands*", which are included in clause 2.2(c). Accordingly, the Deed of Termination does not release the Claimant from liability in respect of the First Defendant's counterclaim.

111. Mr Allison QC on behalf of the Claimant submitted that the First Defendant's counterclaim is "*a truly hopeless claim*" on any one of the following three grounds:

(1) By clause 2.1 of the Deed of Termination, each of IPC, Silverstone, the First Defendant and Mr Ohayon irrevocably waived and released any claims against the Claimant arising directly or indirectly out of the Original Facility Agreements. The counterclaim undoubtedly falls into this category.

(2) Moreover, although the counterclaim is ostensibly brought by the First Defendant, it does not have *locus standi* to sue. This is because the counterclaim is a claim for breach of certain implied terms relating to the payment of costs by IPC (not the First Defendant) under the Original Facility Agreements (not the New Facility Agreement). There is no suggestion that the First Defendant paid any of the Claimant's costs; rather, the costs were paid by IPC.

(3) The relevant costs were discussed with IPC in advance and enthusiastically agreed by IPC. For example, after the Claimant provided the relevant figures to Mr Kadoche by email on 23rd May 2018, the latter replied: "*Agreed!*". That being so, it is not understood what cause of action is asserted by the counterclaim or how it can be reconciled with the fact that the costs were agreed in advance.

112. In my judgment, I can deal with the counterclaim by reference to the impact of the Deed of Termination (which is called the "*Deed of Termination and Release*"). The Deed of Termination was intended to draw a line under the Original Facility Agreements. Clause 2.1 provided that the Finance Documents were terminated and ceased to have effect and that "*rights of any kind (past, present or future, actual or*

contingent or otherwise) of whatever nature under the Finance Documents or Apartment Finance Documents shall cease".

113. Clause 2.1(c) was clearly an important part of the agreement and provided for a mutual release between the parties from "*all obligations, undertakings, duties, responsibilities and liabilities of any kind (past, present, future, actual or contingent or otherwise)*". Given the breadth and all-embracing nature of the language used in this provision, it would be odd if certain claims pursuant to or arising out of the Original Facility Agreements in some manner slipped through the net. I appreciate that the words "*claims and demands*" are not included in this provision, but the words "*obligations*", "*responsibilities*" and "*liabilities*" at the very least encapsulate the First Defendant's counterclaim.

114. Therefore, even if the First Defendant's counterclaim was a claim of substance, any liability on the part of the Claimant has been discharged and released by the Deed of Termination.

115. The Defendants accordingly have no real prospect of success on this counterclaim.

Conclusion

116. For the reasons explained above, the Claimant is entitled to summary judgment entitling it to enter judgment in respect of its claims against the Defendant and to enter judgment dismissing the Defendants' counterclaim, because (1) the Defendants have no real prospect of succeeding in their defences and counterclaim and (2) there is no compelling reason for the trial to take place: this is a monetary claim for sums outstanding under financial agreements to which there is no justiciable defence.