Neutral Citation Number: [2023] EWHC 1869 (Comm)

Case No: LM 2022-000134

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

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

Date: Friday 28 July 2023

Before :
Lesley Anderson KC sitting as a Deputy Judge of the High Court

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Between :

(1) Richard Slade and Company Limited
(2) Grenda Investments Limited
(a company incorporated in the Territory of the British Virgin Islands)

Claimants

- and -

(1) GUINEVERE HOLDINGS LIMITED
(a company incorporated in the Territory of the British Virgin Islands
(2) RICHARD LEIGHTON HAYWARD

Defendants

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Sebastian Kokelaar (instructed by **Richard Slade & Company Limited**) for the **Claimants**
William Edwards (instructed by **Geldards LLP**) for the **Defendants**

Hearing dates: 27 June 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Friday 28 July 2023.

Ms Lesley Anderson KC sitting as a Deputy High Court Judge:

1. This is my reserved judgment following the hearing of two opposed applications: the application of the Claimants by application notice dated 16 November 2022 for summary judgment on the claim pursuant to CPR rule 24.2; alternatively for an order striking out the Defence pursuant to CPR rule 3.4(2) ("the Strike Out/SJ Application") and the application of the Defendants by application notice dated 16 June 2023 for permission to amend their Defence to raise a new defence ("the Amendment Application").

2. By way of overview, the Claimants seek payment of the sum of £2,462,586.00 alleged to be due to the Second Claimant, and charged by way of equitable charge to the First Claimant, by the First Defendant as primary obligor and the Second Defendant as surety, under a Commitment Letter dated 22 December 2016 ("the Commitment Letter").

3. The Strike Out/SJ application was supported by the witness statement of Richard John Slade ("Mr Slade"), the managing director of the First Claimant, dated 15 November 2022 and opposed by the witness statement of Richard Leighton Hayward ("Mr Hayward"), the Second Defendant, dated 23 February 2023.

The Factual Background

4. Richard Slade and Company Limited ("Richard Slade"), the First Claimant, is a law firm practising from offices in Gray's Inn, London. Over a number of years it has acted in litigation and arbitration proceedings in this jurisdiction for Grenda Investments Limited ("Grenda"), a company incorporated in the Territory of the British Virgin Islands ("BVI") and the Second Claimant, and for various other entities including Phoenix Group Foundation ("Phoenix"), Minardi Investments Limited ("Minardi"), Bluestone Securities Limited ("Bluestone") and Bridgehouse (Bradford No. 2) Limited ("Bridgehouse") (together "the Other Entities"). Grenda and the Other Entities are said to be indebted to Richard Slade for a substantial sum in respect of the work done on their behalves.

5. Guinevere Holdings Limited ("Guinevere"), the First Defendant, is a company also incorporated in the BVI. It carries on the business of property development. Guinevere is the registered proprietor of 55 High Street, Newport, which is registered at the Land Registry with title number WA600930, Land at Port Talbot Industrial Estate, Port Talbot, which is registered at the Land Registry with title number WA615448 and 154 High

Street, Newport and 1-3 Station Approach, Newport which is registered at the Land Registry with title number WA148832 (together "the Release Properties").

6. Mr Hayward is a business owner and property investor and developer who has been involved in multiple businesses over a variety of sectors but who, more recently, focuses on his property business. Guinevere and Alymere Holdings Limited ("Alymere") are both ultimately owned by the Montpelier Trust, a Jersey trust of which Mr Hayward is the protector and a discretionary beneficiary. Alymere is a company incorporated in Jersey and, although not a party to this claim, is of some importance.

7. Although the precise relationship between them is in issue, Andrew Ruhan ("Mr Ruhan") and Anthony Stevens ("Mr Stevens") are said to be connected with Grenda. According to Mr Slade, Mr Stevens is the sole director of Grenda. Mr Hayward met and developed a business relationship with Mr Ruhan in 2013. It is not in dispute that Mr Ruhan and Mr Stevens have been involved in complex litigation on a number of fronts and that Richard Slade acted for Mr Stevens and various of the corporate entities involved. The litigation includes: (i) proceedings brought by the SFO arising from a fraud perpetrated by a Dr Smith; (ii) divorce proceedings between Tania Jane Richardson-Ruhan, Mr Ruhan's then wife, and Mr Ruhan and (iii) proceedings brought by Hotel Portfolio II Ltd and (iv) a dispute between Bridgehouse and BAE Systems Plc. I have been provided by the Defendants with various of the relevant reported authorities. The Hotel Portfolio proceedings were tried by Foxton J. who made certain adverse findings about Mr Stevens and Mr Ruhan, including that they had consistently lied about their relationship, and in respect of the transactions in issue in that case, that Mr Stevens was acting as Mr Ruhan's nominee. While I have not read the relevant judgments in full, for present purposes it seems to me right to conclude that in multiple pieces of litigation in which Richard Slade has acted for Mr Stevens, there have been allegations that he was acting as Mr Ruhan's nominee and that this was disputed by Messrs Ruhan and Stevens.

8. In summary, the present proceedings are concerned with a high-interest bridging loan made by Grenda to Alymere.

The Contractual Framework

9. Specifically, on 9 May 2014, a facility agreement was made between Alymere as Borrower (1) and Grenda as Lender (2) whereby Grenda agreed to lend Alymere a sum

not exceeding £600,000 ("the Total Facility Amount") ("the 2014 Facility Agreement"). Alymere drew down the Total Facility Amount on 9 May 2014.

10. Although I was not provided with a copy of it (because it was superseded in 2015 by a further intercreditor agreement which I describe below), on the same date an intercreditor deed was entered into between Alymere (1), Longbow Investment No. 3 s.à.r.l. ("Longbow") (2), Grenda (3) and Mr Hayward (4) ("the 2014 Inter-Creditor Deed"). It was not in issue that the earlier intercreditor deed was in substantially identical terms to the later one and that it had the effect that the Junior Liabilities (including the sums which had been lent by Grenda) were subordinated to the Senior Liabilities (being the much more significant liabilities of Alymere and Guinevere to Longbow). Longbow had lent Alymere and Guinevere something in the region of £30 million.

11. Clause 6 of the 2014 Facility Agreement provides for interest to be paid by Alymere on the Total Facility Amount at a rate of 10% per annum between 20 September 2013 (the date that Grenda committed the funds for the purposes of the loan) until the date of drawdown, at a rate of 20% per annum compounding annually after drawdown, and a default fixed rate of 30% per annum compounding annually.

12. Clause 8 of the 2014 Facility Agreement provides for repayment of the loan and all accrued interest on the earlier of (i) 9 May 2020 (being the sixth anniversary of the date of the agreement) or (ii) the date on which Alymere repaid the Senior Liabilities, as defined by the 2014 Intercreditor Deed.

13. On 30 June 2015, Alymere (1), Guinevere (2), various companies associated with Mr Hayward listed in Part 2 of Schedule 1 who had been the original guarantors of the debt (3), and Longbow (4) entered into a further Facility Agreement ("the 2015 Facility Agreement"). The 2015 Facilities Agreement is lengthy (145 pages) and complex.

14. Clause 2.1 of the 2015 Facility Agreement provides for a facility to Alymere of c. £30 million on a term facility (being £22,365,863.18 in respect of Sub-Facility A and £7,442,632.98 in respect of Sub-Facility B) and for a loan facility ("the Development Facility") to Guinevere.

15. Clause 3.1 of the 2015 Facility Agreement provides that the purpose is: (i) for Alymere to re-finance its existing indebtedness to Longbow pursuant to an earlier facility agreement dated 20 September 2013 between Alymere (1) and Longbow (2), (ii) to

enable Guinevere to re-finance its existing indebtedness to HSBC Bank Plc and (iii) to enable Guinevere to meet the costs of carrying out the refurbishment and development of the Release Properties into a 60 bedroom hotel with ancillary restaurant together with administration and back of house areas ("the Development"). According to the evidence, Premier Inn was lined up to take a lease of the hotel once it had been completed.

16. Clause 6 of the 2015 Facility Agreement, read together with the relevant definitions, provides that the loans made by Longbow to Alymere and Guinevere were to be repaid by 25 October 2019. Longbow had the benefit of a substantial package of security including guarantees from Alymere and Guinevere and the 9 other companies listed in Part 2 of Schedule 1 and charges over the 15 properties listed in Schedule 2, including the Release Properties.

17. Clause 10 of the 2015 Facility Agreement provides for Alymere to pay to Longbow (i) an arrangement fee in the amount and on the terms set out in a Fee Letter and (ii) an exit surplus fee in the amount and terms agreed in a Fee Letter. The Fee Letter is dated 30 June 2015 ("the Fee Letter").

18. On the same day as the 2015 Facility Agreement, Alymere (1), Longbow (2), Grenda (3) and Mr Hayward (4) entered into an intercreditor deed ("the 2015 Intercreditor Deed") which had the effect that the liabilities of Alymere and Guinevere to Longbow (defined as "the Senior Liabilities") were to rank in priority to the liabilities owed by Alymere and Guinevere to Grenda and Mr Hayward (defined as "the Junior Liabilities"). Clause 11 of the 2015 Intercreditor Deed also provided that new facilities (defined to mean "New Senior Liabilities") were not to be extended without the prior written consent of Grenda and Mr Hayward, the Junior Funders.

19. Two further relevant agreements were made in December 2016. Although they are separate agreements, it is common ground that they document a single transaction and so the two agreements must be construed together (see Lewison on the Interpretation of Contracts at [3.06] to [3.12]. First, by a letter dated 15 December 2016, Longbow (1), Alymere (2), Grenda (3) and Mr Hayward (4) varied the terms of the 2015 Facility Agreement. I will, as the parties did, refer to this as "the Amendment Letter" although Mr Edwards is correct to say that it did more than simply carry into effect amendments to the 2015 Facility Agreement.

20. Paragraph 1(a) of the Amendment Letter refers to the 2015 Facility Agreement and paragraph 1(c) incorporates clause 1.2 (Construction) of the 2015 Facility Agreement into the Amendment Letter. Clause 1(e) then recites that the letter is intended to document the changes which have been agreed between Longbow, Alymere, Guinevere (as Obligors) and Grenda and Mr Hayward (as Junior Funders) to the 2015 Facility Agreement, the Fee Letter and the 2015 Intercreditor Deed the principles of which were set out in an email dated 13 December 2016 (timed at 20:30) ("the Email") from Longbow to Mr Hayward and which were communicated by Mr Hayward to Grenda on or about 13 December 2016.

21. By paragraph 3 of the Amendment Letter it is provided that with effect from and including the Effective Date, the 2015 Facility Agreement is amended as set out in schedule 1 to the letter and the Fee Letter (in respect of the Exit Surplus Fee) is amended as set out in schedule 2 to the letter.

22. Paragraph 4 of the Amendment Letter provides for Longbow to release £600,000 of rental income to enable Guinevere and Alymere to make certain payments in respect of specified professional fees (Geldards and Underwood & Co) and other fees, costs and expenses incurred by it in relation to the Development. However, by paragraph 5 of the Amendment Letter that sum was to be made up from the proceeds of sale of the first property to be sold.

23. By paragraph 6 of the Amendment Letter, Alymere and Guinevere agreed to pay Longbow an additional fee of £847,000 in consideration of it entering into the Amendment Letter.

24. By paragraph 7(a) of the Amendment Letter, it was provided that any consents submitted to Longbow in accordance with the terms of the 2015 Facility Agreement in respect of the Release Properties would not be unreasonably withheld or delayed and by paragraph 7(b) Longbow (as Security Agent) agreed that upon the Senior Discharge Date, to release the Release Properties from the Security Documents notwithstanding that the Exit Surplus Fee had not been paid in full and to release Guinevere as an obligor under the 2015 Facility Agreement. The Senior Discharge Date was the date on which all of the Senior Liabilities excluding the Exit Surplus Fee had been discharged. The Security Documents bears the same meaning as in clause 1.1 of the 2015 Facility Agreement.

25. By paragraph 8(a) of the Amendment Letter, Grenda and Mr Hayward (as Junior Funders) each irrevocably and unconditionally consented to the provisions of the Amendment Letter notwithstanding any of the terms of the 2015 Intercreditor Deed. By paragraph 8(b) of the Amendment Letter, Grenda and Mr Hayward (as Junior Funders) irrevocably and unconditionally acknowledged and agreed that upon Longbow (as Security Agent) releasing the Release Properties from the Security Documents the Junior Liabilities (as defined in the 2015 Intercreditor Deed) were deemed to be satisfied and paid in full and the Junior Security Documents (as defined in the 2015 Intercreditor Deed) were deemed to be released.

26. The second document was a letter dated 22 December 2016 ("the Commitment Letter") made between Guinevere (1), Mr Hayward (2) and Grenda (3). Paragraph 3 of the Commitment Letter is central to the Claimants' case and I set it out here in full noting that references to the Facility Agreement are to the 2014 Facility Agreement:

"*3. Provided that Completion occurs on the Completion Date, in consideration for Grenda entering into the obligations contained within the Amendment Letter and any related or ancillary document required to give effect thereto, Guinevere Holdings Limited ("Guinevere") agrees to do the following on the Repayment Date (as defined in paragraph 4 below) subject to the further terms of this letter:*

(a) pay to Grenda a sum equal to the Total Facility Amount together with accrued but unpaid interest on the Total Facility Amount (calculated in accordance with the terms and conditions of the Facility Agreement) as at the Completion Date;

(b) pay all accrued but unpaid interest on the Total Facility Amount (calculated in accordance with the terms of the Facility Agreement) that accrues from the Completion Date to the Repayment Date ("the Additional Interest" at the rate of 20% per annum;

(c) to pay all reasonable fees of Grenda (including legal counsel fees)incurred in accordance with the negotiation, execution, preparation and administration of this letter and in relation to the negotiation of a personal guarantee (agreed but not completed) by Mr Richard Hayward (in the form set out in Schedule 3 to this letter) during the period commencing on 1 August 2016 to the date of this letter;

(the sums payable as referred to in paragraphs 3(a) to 3(c) (above) collectively "the Total Repayment Sum")."

27. "Completion" is defined by paragraph 2 of the Commitment Letter to mean "the release of the Release Properties from the Security Documents" and the date on which Completion was to take place was defined as the "Completion Date".

28. Paragraph 4 of the Commitment Letter goes on to state that the Repayment Date in relation to the Total Repayment Sum shall be 30 June 2017.

29. By paragraph 5 of the Commitment Letter, Guinevere agreed on the Completion Date to enter into a debenture in favour of Grenda securing the Total Repayment Sum substantially in the form attached at Schedule 2 of the letter. For the avoidance of doubt, any failure on behalf of Guinevere to pay the Total Repayment Sum on the Repayment Date was to amount to an event of default pursuant to the debenture.

30. By paragraph 6 of the Commitment Letter, it was provided that with effect from Completion, Mr Hayward guaranteed the obligations of Guinevere pursuant to the Commitment Letter and, subject to Guinevere being unable to pay the Total Repayment Sum to Grenda, agreed that, within 30 days of the Repayment Date, he would either (i) pay the Total Repayment Sum to Grenda in full (in the event that Guinevere was unable to satisfy any of its obligations in relation to the same or (ii) pay an amount to Grenda being the Total Repayment Sum less any sums actually received by Grenda as at the Repayment Date (in the event that Guinevere had satisfied only part of its obligations in relation to the same).

31. By paragraph 7 of the Commitment Letter, Mr Hayward acknowledged that failure by him to comply with the obligations under paragraph 6 of the Commitment Letter, would entitle Grenda to take any enforcement action against him (in his personal capacity) as allowed by the applicable law. Paragraph 13 of the Commitment Letter provides that the letter and any non-contractual obligations arising out of or in connection with it are governed by English law.

32. It is relevant to note that Mr Hayward's explanation as to the commercial background to the Amendment Letter and the Commitment Letter in paragraphs [18] to [24], has not been contradicted. His evidence is that by mid-December 2016 he had been exploring

options with Longbow which had indicated that it was prepared to release the Release Properties if a payment of £3 million was made in reduction of the debt to it. Although he tried to raise third party funding for this purpose, it proved impossible to do so. At the same time, he was in discussions with Mr Ruhan about re-financing the sums lent by Grenda under the 2014 Facility Agreement and he told Mr Ruhan of the agreement in principle which had been reached with Longbow. On the other hand, he says, no-one was focusing on all of the secured properties being released because repayment of all that Longbow was owed was simply not possible at that time. His evidence is that Guinevere became involved because Grenda requested additional security.

33. On 6 April 2018, Grenda as Chargor (1) and Richard Slade (then known under the style Richard Slade and Company Plc) as Chargee (2) entered into a document entitled "Equitable Charge of a Receivable" ("the Equitable Charge") by which Grenda assigned to Richard Slade the whole of its interests in (i) the Alymere Receivable (described in the recital at (1)(a) to mean the right to receive repayment of a loan and the payment of interest by Alymere under the 2014 Facility Agreement being at least £1,288,235.93 as at the date of the Equitable Charge) and (ii) the Guinevere/Hayward Receivable (described in the recital at (1)(b)to mean the right to receive payment of a sum equivalent to the Alymere Receivable by Guinevere and/or Mr Hayward under the terms of the Commitment Letter).

34. By paragraph 1 of the Equitable Charge, the assignments of the Alymere Receivable and the Guinevere/Hayward receivable were to be held as security until payment had been made by Grenda and/or Phoenix, Minardi and Bluestone and/or Bridgehouse of the incurred and future liabilities of Grenda and the Other Entities to Richard Slade up to 31 May 2018.

35. It is common ground that the Release Properties were not released from the Security Documents until 28 September 2021. Longbow released one of the Release Properties on 17 July 2020 but the remaining two were not released until 28 September 2021 following repayment of the sums owed to it under the 2015 Facility Agreement.

36. On 1 May 2022, Richard Slade gave notice of the assignment effected by the Equitable Charge to Guinevere and Mr Hayward and demanded payment from them of the Total Repayment Sum calculated at £2,462,586. It is not in dispute that neither Guinevere nor Mr Hayward has made any payment in respect of the Total Repayment Sum.

The Proceedings

37. The proceedings were issued by Claim Form and Particulars of Claim dated 17 June 2022. The Statement of Truth on the latter is signed on behalf of Richard Slade and Grenda, by Mr Slade as solicitor. Guinevere and Mr Hayward filed and served a Defence on 19 August 2022. I will summarise its nature and effect when dealing with the parties' respective cases on the two applications.

38. For present purposes it is relevant to note that Counsel for the Claimants, Mr Kokelaar, invited me to proceed on the basis that certain factual matters in the Defence at sub-paragraphs (1), (2), (3), (4), (5), (6) and (7) in paragraph [12] were true. In particular, the Claimants therefore accept that none of the instruments defined as Security Documents in the 2015 Facility Agreement conferred security on Grenda (whose only security was in the form of a debenture granted by Alymere) and that the release of Release Properties from the Security Documents could happen in events other than provided for by paragraph 7(b) of the Amendment Letter provided that Longbow consented. They also accept that in mid-December 2016 Guinevere and Alymere were in discussions with a view to obtaining finance that would have allowed the £3 million payment to Longbow and that this was known to Grenda at the time of the Amendment Letter and the Commitment Letter. The point is reiterated in Counsel for the Claimants' Skeleton Argument for these applications at [35] and [36] that the court should assume for these purposes that it was not envisaged in December 2016 that the Senior Liabilities would be paid by the Repayment Date (30 June 2017).

39. On 19 August 2022, the Defendants served a Request for Further Information in relation to the Particulars of Claim pursuant to CPR Part 18 seeking further information as to: (a) the nature of the assistance in legal proceedings provided by Richard Slade to Grenda and the Other Entities; (b) the nature of the relationship between Grenda and the Other Entities and (c) a breakdown of the sum of £1,883,594 alleged to be outstanding by way of legal fees by Grenda and the Other Entities to Richard Slade.

40. On 26 October 2022, Richard Slade and Grenda filed and served a Reply. Paragraph 2 of the Defence had noted that the Statement of Truth on behalf of Grenda was signed by Mr Slade and stated that in view of the conclusions reached by Foxton J. in the Hotel Portfolio litigation as to the nature of the relationship between Mr Ruhan and Mr Stevens, the Defendants did not admit that Grenda had authorised the commencement of the

proceedings by it. Paragraph 3 of the Reply responds to paragraph 2 of the Defence by stating that the issue of the proceedings was authorised by Grenda acting as its sole director, Mr Stevens, and that in authorising these proceedings in the name of Grenda Mr Stevens acted within the scope of his authority as Grenda's sole director, and in accordance with all applicable requirements of BVI company law. On the same date, the Claimants served a response to the Request for Further Information in which they denied any entitlement to most of the further information requested on the grounds that they were not relevant to the issues in dispute.

The Parties' Cases

41. Although their formulations of them and the prominence attached to them are slightly different, the parties broadly agree that the claim is defended, on the following ten grounds, which I will deal with in turn below:

i) Whether, on the proper construction of the Commitment Letter, Guinevere and Mr Hayward are liable (see paragraphs 45-56 of the Defendants' Skeleton Argument and paragraphs 28 to 39 of the Claimants' Skeleton Argument) – I will refer to this as the construction issue;

ii) Whether a term is to be implied into: (a) the Amendment Letter that the releases provided for by paragraph 8 are conditional upon release of the Release Properties from the Security Documents occurring within a reasonable time and (b) the Commitment Letter that the obligations for which paragraphs 3, 5 and 6 provide were conditional upon Completion occurring within a reasonable time (see paragraphs 45, 46 and 53-54 of the Defendants' Skeleton Argument and paragraphs 40 to 44 of the Claimants' Skeleton Argument) – I will refer to this as the implied term issue;

iii) Whether the obligation in paragraph 3 of the Commitment Letter was to pay on the Completion Date and as that date has passed without Completion having occurred it has become impossible to perform the obligation on the occurrence of Completion such that the Commitment Letter has been frustrated (not dealt with by the Defendants in their Skeleton Argument but see paragraphs 45 to 51 of the Claimants' Skeleton Argument) – I will refer to this as the frustration issue;

iv) Whether Grenda has authorised the commencement of these proceedings by it – (see paragraphs 57-58 of the Defendant's Skeleton Argument and paragraphs 21 to 27 of the Claimants' Skeleton Argument) – I will refer to this as the authority issue;

v) Whether the retainer agreement between Richard Slade and Grenda and the Other Entities were contentious business agreements as defined in section 59 of the Solicitors Act 1974 ("the SA 1974") such that it is debarred by the terms of that Act from bringing this claim (see paragraphs 59 to 68 of the Defendants' Skeleton Argument and paragraphs 52 to 60 of the Claimants' Skeleton Argument) – I will refer to this as the Solicitors Act issue;

vi) Whether (if the Defendants are permitted to amend to add this issue), the Equitable Charge on which Richard Slade sues is unenforceable because it is contrary to public policy (see paragraphs 69 to 74 of the Defendants' Skeleton Argument and paragraphs 74 to 85 of the Claimants' Skeleton Argument) – I will refer this as the public policy issue;

vii) Whether, even if Guinevere is liable to Grenda, Mr Hayward is not because Grenda has failed to obtain the debenture for which paragraph 5 of the Commitment Letter provides which has the effect that his liability as surety is discharged (see paragraphs 75 to 76 of the Defendants' Skeleton Argument and paragraphs 61 to 66 of the Claimants' Skeleton Argument) – I will refer to this as the surety issue;

viii) Whether Richard Slade provided legal services to Grenda and the Other Entities such that they are indebted to it (not separately addressed by the Defendants but see paragraph 67 to 70 of the Claimants' Skeleton Argument) – I will refer to this as the provision of services issue;

ix) Whether, if Guinevere or Mr Hayward are liable, they are liable under the Commitment Letter to pay interest at the contractual rate of 20% per annum due from Alymere under the 2014 Facility Agreement after the Repayment Date (see paragraphs 77 to 80 of the Defendants' Skeleton Argument and paragraphs 71 to 73 of the Claimants' Skeleton Argument) – I will refer to this as the interest issue;

x) Whether the Total Repayment Sum has been correctly calculated at £2,462,586 (see paragraphs 77 to 80 of the Defendants' Skeleton Argument and paragraphs 71 to 73 of the Claimants' Skeleton Argument) – I will refer to this as the quantum issue.

42. By contrast, the position of the Claimants is that the case is quite straightforward. They submit that Completion (as defined in the Commitment Letter) occurred on 28 September 2021 (because that is when the last of the Release Properties were released from the Security Documents) and that, accordingly, Guinevere's obligations under paragraph 3 of the Commitment Letter and Mr Hayward's obligations under paragraph 6 of the Commitment Letter became unconditional.

The Law

43. So far as the principles governing the proper interpretation of written contracts is concerned, these have been authoritatively stated recently by Lord Hodge in *Wood v Capital Insurance Services Ltd* [2017] AC 1173 at [10] to [15]. I was also referred by Counsel for the Claimants to the very recent statements by Lord Hamblen JSC in *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2, [2023] 1 WLR 575 at [29]:

"*(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. (2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more of less weight to elements of the wider context in reaching its view as to its objective meaning. (3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated.*"

44. As to the role of commercial common sense, this plays an important part in the iterative process but only where there is more than one possible meaning for the relevant contractual wording. If the meaning of the words is clear, the court must give effect to it – see the observations of Nugee LJ in *Britvic Plc v Britvic Pensions Ltd & Another* [2021] EWCA Civ 867, [2021] ICR 1648 at [70]:

"*... one cannot jettison the language used by the parties. As both Sir Geoffrey Vos MR and Coulson LJ have referred to, the consistent teaching of the Supreme Court is that one does not get into the question of choosing which interpretation is more consistent with business common sense unless there are two rival interpretations available: see Rainy Sky at paras 21-30, per Lord Clarke JSC, where the entire passage is about the*

consequences of a term being "open to more than one interpretation", especially at para 23 ("Where the parties have used unambiguous language, the court must apply it"; Arnold v Britton [2015] AC 1610, paras 18-18, per Lord Neuberger PSC ("commercial common sense and surrounding circumstances ... should not be invoked to undervalue the importance of the language ... [the court is not justified in]... searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning"), and at para 77, per Lord Hodge JSC ("there must be a basis in the words used and the factual matrix for identifying a rival meaning"."

45. The law on implication of terms has also authoritatively stated in recent years in the highest court in *Marks & Spencer Plc v BNP Paribas Securities Trust Co (Jersey) Ltd & Another* [2016] AC 742 at [14] to [21]. There the Supreme Court (Lord Neuberger PSC with whom Lord Sumption and Lord Hodge JJSC agreed) confirmed that a term will only be implied into a commercial contract if it is necessary to give business efficacy to the contract or so obvious as to go without saying. The implication is not dependent on proof of an actual intention of the parties but on what notional reasonable persons, in the position of the parties at the time at which they were contracting, would have agreed. A term cannot be implied into a contract simply because it is fair or because one party might have agreed to it if it had been suggested. However, the relevant test is not one of absolute necessity, rather that a term can be implied if, without the term, the contract would lack commercial or practical coherence.

46. The classic formulation of the doctrine of frustration was set out by Lord Simon in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 700. Frustration of contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such a case the law declares both parties to be discharged from further performance.

47. I was also referred by Counsel for the Claimants to the observations by Rix LJ in *Edwinton Commercial Corp & Another v Tsavliris Russ(Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547 at [111]. The doctrine of frustration is not lightly to be invoked and requires a "multifactorial approach" involving consideration of, amongst other factors, the terms of the contract itself, the matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract and then to consider the nature of the supervening event and the

parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. The mere incidence of delay or onerousness is not sufficient.

48. Any contract which tends to abuse, prevent or impede the due course of justice is against public policy – see Chitty on Contracts (34th ed) at [18-083]. In *Egerton v Earl Brownlow* (1853) 10 ER 359 it was said that an agreement which has "a tendency, however slight, to affect the administration of justice" is contrary to public policy and unenforceable". In *Lound v Grimwade* (1883) 39 Ch D 695 at 612-613 a stipulation in consideration of a bond and mortgage that criminal proceedings should not be brought, or that they should be conducted in such a way as not to mention the Plaintiff, was held to be illegal because the course and result of those proceedings might be affected.

49. More recently, in *Fulham Football Club Ltd v Cabra Estates Plc* [1992] BCC 863 at 872 to 874, Neill LJ delivering the judgment of the court said at 874:

"*The principle which underlies both the law of contempt of court and the rules governing the immunity of witnesses from suit, however, is that, as a matter of public policy, the court will prevent, and if necessary punish, conduct which interferes with the proper administration of justice. Thus, "any contract which has a tendency to affect the due administration of justice is contrary to public policy": see Halsbury's Laws of England (4th ed.), vol.9, para 407. In any individual case therefore the question is: has the act impugned interfered with, or will it interfere with, the due administration of justice? It is not sufficient merely to pose the question: is the effect of the agreement that a party or a witness may be prevented from putting forward a particular contention in court of before a tribunal? It is necessary to take a broad view of the public interest and, where necessary, seek to achieve a balance between countervailing public policy considerations. Thus in the present case there is the public interest in allowing business to be transacted freely and in holding commercial men to their bargains".*

50. That was a case where the impugned act in question was an agreement to support a planning application at an inquiry. The action was held not to be contrary to public policy. Neill LJ went on as follows:

"*The court will consider the facts of each case. But where, as here, a commercial agreement relating to land has been entered into between parties at arm's length and one party agrees in return for a very substantial payment to support the other party's applications for planning permission we can see no rule of public policy which renders such an agreement illegal or unenforceable."*

51. One of the rights available to a surety is his right of contribution against his co-sureties, if there are any. The rationale underlying the discharge of the surety where the principal

is no longer liable is that the creditor cannot do anything to put the rights of the surety in danger, for if he does, the surety is entitled to be discharged -see Andrews and Millett *The Law of Guarantees* (7th ed) at [9-040]. The authors go on at [9-041]:

"*Similarly, one of the most important rights that a surety has by reason of his position is the right to call for all securities held by the creditor for the guaranteed debt in the same condition as they were when they were originally received by the creditor, whether given at the time of the guarantee or subsequently, and whether he has notice of them or not. The precise extent of a creditor's obligations in respect of securities is discussed below, but can be summarised briefly: the creditor may not act or neglect to act so as to worsen the position of the surety, and if by his act or neglect the benefit of a security is lost or diminished, the surety will be discharged, either wholly or in part.*

In Barclays Mercantile Business Finance Ltd v Marsh unreported, June 25, 2002, CA Dyson LJ said (at [14]) that:

> *"The law is clear: a surety is not released by the loss of a security unless that loss is brought about by the wilful act of the creditor or by his neglect to take some step which the surety has stipulated he should take ... A surety is not discharged, whether absolutely or pro tanto, unless the creditor has acted or neglected to act so as to lose or diminish the benefit of the security."*

The Law – Strike out/Summary Judgment

52. Unsurprisingly, there was no dispute between the parties as to the relevant legal principles applicable to the court's power to strike out and/or to enter summary judgment. Under CPR 3.4(1), the court has power to strike out a statement of case, or part thereof, if it appears to the court, that the statement of case, or part thereof, discloses no reasonable grounds for bringing or defending the claim.

53. Under CPR rule 24.2, the court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if: (a) it considers that the claimant has no real prospect of succeeding on the claim or issue, or that the defendant has no real prospect of successfully defending the claim or issue and (b) there is no other compelling reason why the case or issue should be disposed of at trial.

54. The principles were classically formulated by Lewison J. (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and, more recently, by Floyd LJ. In *TFL Management Services Ltd v Lloyds Bank plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006 at [26]-[27] and are summarised in the current edition of Civil Procedure (volume 1) at [24.2.3]. In particular, at [27] Floyd LJ. reminds 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: see Partco Group Ltd v Wragg, para. 28(7)*".

55. The same is true of difficult points of contractual construction – see the observations of Lord Hodge in *Hallman Holdings Ltd v Webster and another* [2016] UKPC 3 at [17].

"*... it will often be appropriate to determine a dispute about a short point of law or the construction of a simple contract by summary judgment, where the legal issue between the parties is straightforward and the court is satisfied that there is no need for an investigation into the facts which would require a trial: Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch), para 15 propositions (v) – (vii) per Lewison J. Where, in the absence of any factual dispute, more complex legal issues arise, including difficult issues of contractual construction, they may be determined on an application for a preliminary issue ...*".

The Law - Amendments

56. CPR Rule 17.1(2) provides that if a statement of case has been served, a party may amend it only (a) with the written consent of all the other parties; or (b) with the permission of the court. CPR rule 17.3 provides that the Court has a discretion to permit amendment of a party's statement of case and to give directions as to consequential amendments and service.

57. However, the court will generally refuse to permit a party to amend to raise a case which does not have a real prospect of success – see the observations of Popplewell LJ. in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [16] to [18].

58. At [18], the Judge said that in this context:

"*(1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 471 at paragraph 8; Global Asset Capital Inc v Aabar Block Sarl [2017] EWCA Civ 37; [2017] 4 WLR 163 at paragraph 27(1).*

(2) The pleading must be coherent and properly particularised: Elite Property Holdings Ltd v Barclays Bank plc [2019] EWCA Civ 204 at paragraph 42.

(3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: Elite Property at paragraph 41.

The Construction Issue

59. In summary, the position on behalf of Guinevere and Mr Hayward on the true and proper construction of the Commitment Letter, is that it is clear that liability under it to Grenda only arises if, and is conditional upon, Completion occurs on or before the Repayment Date.

60. For this purpose, I accept that it is appropriate to take as the relevant factual matrix or context the matters identified in the Defence at sub-paragraphs (1), (2), (3), (4), (5), (6) and (7) in paragraph [12] and I proceed on the basis that these (and insofar as put differently in Mr Kokelaar's Skeleton Argument at paragraphs 35 and 36) are true. Secondly, I accept that it is important as part of that context to have regard to the precise chronological position. In particular, Mr Edwards points to the facts that: (i) the Commitment Letter is focused on a relatively short window of just under six months (ie. from 22 December 2016 being the date of the Commitment Letter to 30 June 2017 (being the "Repayment Date")); (ii) the date for repayment to Longbow under the 2015 Facilities Agreement was 25 October 2019, some 2 ¾ years after the date of the Commitment Letter; (iii) the date for repayment to Grenda under the 2014 Facility Letter was 9 May 2020, some 3 ¼ years after the date of the Commitment Letter but (iv) the last of the Release Properties was not until 28 September 2021 – 3 ¾ years after the date of the Commitment Letter. Or, as Mr Hayward put it more succinctly in his witness statement at [20] and [24], the intention in the Commitment Letter was for 30 June 2017 to be in the nature of a longstop date because the only deal under consideration at the time of the Commitment Letter was one involving, in short order, the release of the Release Properties in return for a payment of £3 million to Longbow not one which would enable the total debt to Longbow to be repaid.

61. These concessions on factual matters are important and enable me to be satisfied that this is the type of case where, although dealing with complex commercial documents, the points of construction are relatively short and capable fairly of being determined

summarily in the context of an application of this sort, rather than being determined on the hearing of the trial of a preliminary issue.

62. However, before considering the potentially rival contentions as to the proper construction of the documents I must then consider whether the wording of paragraphs 3 and 6 of the Commitment Letter are clear and unambiguous (as submitted on behalf of the Claimants) or whether something has gone wrong in the drafting (as submitted on behalf of the Defendants).

63. In his Skeleton Argument at [45] it was suggested that what had gone "wrong" was contained within paragraphs 2 and 3 of the Commitment Letter. Whereas clause 3 of the Commitment Letter was properly contemplating that the liability of Guinevere was conditional it was argued that it was simply nonsensical for the trigger to be Completion occurring on the Completion Date because it would necessarily have done so. I don't accept that. There was perhaps strictly no need for the parties to define "Completion Date" separately from the definition of "Completion" because the obligation in paragraph 3 makes as much sense if the trigger is "Completion" as if it is "Completion" on the "Completion Date" but it is not uncommon for a belt and braces approach to be adopted in commercial contracts.

64. In my judgment, the analysis of Nugee LJ in *Britvic* provides a complete answer here. It is not in issue that the liability of Guinevere and Mr Hayward was intended to be conditional. The condition is that specified in the proviso in the opening words of paragraphs 3 (that "Completion" has occurred on the "Completion Date"). Similarly, in paragraph 6 the only proviso is that "Completion" should have taken place and not by reference to that having occurred at any specific time. In my view, any reasonable person armed with the knowledge of the admissible factual matrix available to both parties, would conclude that the only relevant condition was Completion (defined internally by paragraph 2 to mean the time that the Release Properties ae released from the Security Documents). There is simply no support in the actual words used here to conclude that there was an additional condition, namely that Completion had to occur on or before the Repayment Date. Whilst not admissible on the narrow question of construction, I accept, on the evidence, one of the transactions which was in the contemplation of the parties was the c. £3 million repayment of Longbow in the short term and so before the Repayment Date. However, that was not the only circumstance contemplated by the parties as giving rise to a liability on the part of Guinevere and Mr Hayward. If it had

been, they would have said so. There is no reference in the Commitment Letter or the Amendment Letter to the only circumstance in which the Release Properties would be released being the payment of £3 million.

65. Further, the use of contractual longstops is commonplace in commercial transactions and I can find nothing in the language of the Commitment Letter (or the other documents including the Amendment Letter) to support the view that the Repayment Date is a contractual longstop). Again, if the parties had intended "Completion" to be the trigger for something to occur only by the Repayment Date, they would have said so. Rather it seems to me that the Claimants are right to say that the insertion of the Repayment Date in paragraph 3 of the Commitment Letter is more consistent with the parties' intention being that Guinevere should have at least until 30 June 2017 to pay the Total Facility Amount even if Completion occurred much earlier (say for illustration on 24 December 2016).

66. Finally, it seems to me that the Defendants' characterisation of the relationship between the Commitment Letter and the Repayment Date as being akin to a contractual "window" for the performance of the obligations is self-serving and not supported by the wording itself. Rather than being limited by any temporal conditionality, the core obligations namely those to pay in paragraphs 3 and 6 are triggered by "Completion" (ie the release of the Released Properties from the Security Documents) and not subject to any limitations on the time for that trigger to occur. If, as Mr Edwards submits, that has the effect that it virtually guarantees Grenda the advantage of payment rather than simply conferring on it the potential advantage of earlier payment, then that is the effect of the language the parties have chosen and not a reason to reject is at commercially unworkable. Not infrequently, the effect of the precise drafting of a contract is to confer a greater advantage or disadvantage on one party than was intended. There is nothing inherently implausible or improbable in the Claimants' case that the liability should be triggered if the release of the Release Properties is some considerable time after 30 June 2017. There is more than a whiff of buyer's regret in the Defendants' submissions.

67. It is important that I recognise a shift in the Defendants' position on this point. As I have already noted, prior to the hearing, the only error in drafting which was relied upon as opening up arguments based on commercial common-sense was the wording in paragraphs 2 and 3 of the Commitment Letter itself.

68. However, in the course of oral argument, Counsel for the Defendants advanced a rather different basis for saying that something had gone wrong in the drafting of the suite of agreements namely that there was an obvious error in the wording of paragraph 8(b) of the Amendment Letter which ought to be cured, as a matter of construction, by reading into the opening parts of paragraph as if they read "*upon the Security Agent releasing the Release Properties from the Security Documents and releasing Guinevere as an Obligor from the Original Facility Documents"*. This was purportedly in response to the point which has been made by the Claimants' Skeleton Argument to the effect that the construction advanced by the Defendants would produce the commercially absurd result that the loan made by Grenda to Alymere pursuant to the 2014 Facility Agreement would, in the events that have happened, never have to be repaid. As it was accepted to be a new argument, and because I was not entirely sure that I fully followed it, I gave the parties the opportunity to set it out in brief written submissions which each took up (the Defendants' submissions were provided on 29 June 2023 and those of the Claimant on 3 July 2023). It has not been pleaded and there has been no explanation why the Defendants did not raise this point earlier because the point now made in paragraph 39 of the Claimants' Skeleton Argument has been set out in paragraph 8(b)(iii) of the Reply which was served on 26 October 2022, and it seems to me that the Claimants are right to observe that the way in which this point arose is not a promising start for a submission that something has "obviously gone wrong" with the drafting of the Amendment Letter.

69. In the end, in view of my conclusions on the application of *Britvic,* it is probably not necessary for me to deal with the arguments advanced on either side as to commercial absurdity for the determination of construction issue. However, in view of the fact that both parties have addressed it in their supplemental submissions, I will do so.

70. The Defendants' submit that, if the "flip" envisaged by the Amendment Letter and the Commitment Letter was to occur only on the condition of the release of the Release Properties from the Security Documents (the wording in paragraph 8(b) of the Amendment Letter) and without the release of Guinevere as Obligor by Longbow, this would be contrary to the 2015 Intercreditor Deed. This, they reason, must mean that the omission of the words "and release Guinevere as an Obligor" from paragraph 8(b) of the Amendment Letter when those words do appear earlier in paragraph 7(b) of the Amendment Letter means that something has gone wrong in the drafting and, consequently, the mere release of the Release Properties from the Security Documents does not trigger the discharge of what is owed to Grenda by Alymere.

71. Ingenious though this argument is, I am satisfied that it is wrong and that there has been no obvious mistake, or not one which is so obvious that it can properly be reached through a process of construction (as opposed to by implication of a new term) or one which leads to the conclusions submitted on behalf of the Defendants. Paragraph 7(b) of the Amendment Letter is the operative clause when considering how and when Guinevere is released as Obligor whereas paragraph 8(b) is concerned with the relevant acknowledgements by the Junior Funder. It is far from obvious to me that the parties must have intended that the release of Alymere under paragraph 8(b) would be conditional upon the release of the Release Properties from the Security Documents and the release of Guinevere as an Obligor under from the 2014 Facility Agreement.

72. I also cannot accept that Guinevere's liability to Grenda under paragraph 3 of the Commitment Letter falls within the definition of "Junior Liabilities" in the 2015 Intercreditor Deed such as to prevent payment of that Liability to Grenda. In my view, the Claimants are right to say that Guinevere's liability to Grenda under that paragraph is not a liability "under" the Junior Finance Documents and nor can it be said to be a liability "in connection" with the Junior Finance Documents. I have already set out that the central purpose of the 2015 Intercreditor Deed was to subordinate Alymere's liability to Grenda under the 2014 Facility Agreement to its liabilities to Longbow under the 2015 Facilities Agreement. It does not prevent Guinevere from taking on fresh liabilities and the liability assumed under the Commitment Letter would not have ranked ahead of its liabilities to Longbow.

73. For all these reasons, I reject the Defendants' contention that they have a real prospect of establishing at trial that the Commitment Letter should be construed such that the payment obligations in clauses 3 and 6 are subject to a further condition that Completion should have occurred prior to the Repayment Date. I also reject so far as necessary the new argument based on the alleged mistake in paragraph 8(b) of the Amendment Letter or at least I can derive no assistance from it on the proper construction of the obligations in the Commitment Letter. I can see no other reason why that aspect of the case should go to trial when the court then would be assessing precisely the same material that is before me now.

The Implied Term Issue

74. The Defence at paragraph 13(2) pleads, further or alternatively to the case on the proper construction of the Commitment Letter, that a term is to be implied (a) into the Amendment Letter that the releases for which paragraph 8 provides were conditional upon the release of the Release Properties from the Security Documents occurring within a reasonable time; and (b) into the Commitment Letter that the obligations for which paragraphs 3, 5 and 7 provide were conditional upon Completion (as defined in the Commitment Letter) occurring within a reasonable time.

75. In the Defendants' Skeleton Argument at [53] and [54] essentially two arguments are advanced in support of these implied terms: first, on the Claimants' construction of the Commitment Letter, it did not fix a time by which Completion should take place and so engages the general principle that, the contract being silent as to the time by which something is to be done, it should be done in a reasonable time – for which see Lewison, *The Interpretation of Contracts* (7th ed) at [6.153ff]. Secondly, it is submitted that what is a reasonable time for these purposes is fact-sensitive and that the Defendants have a real prospect of success in contending that the actual time which elapsed was not reasonable.

76. The principal difficulty for the Defendants is that they have simply not alleged or identified any basis why the implication of these terms into the Commitment Letter or the Amendment Letter is necessary to give business efficacy or why these terms are so obvious as to go without saying. In my view that is sufficient in itself for me to conclude for the purposes of this application that the Defendants have no real prospect of establishing at trial that the terms should be implied.

77. However, it seems to me that the Defendants have no real prospect of establishing at trial that, without the implied terms contended for, the Amendment Letter and the Commitment Letter lack commercial or practical coherence. It is not in issue that, on the assumed facts, the Release Properties would be released from the Security Documents either (a) on payment of the £3 million by Guinevere or (b) at the latest on repayment of the whole debt due to Longbow. If, on the other hand, the Release Properties were never released (for example because Longbow instead enforced its security because of a default by Alymere or Guinevere), the arrangements put in place under the Amendment Letter and the Commitment letter would presumably simply fall away. That does not mean that the Commitment Letter or Amendment Letter lack commercial or practical coherence. In that event, the parties agree that if Guinevere is not liable, Alymere remains liable. The

implied term is not necessary or obviously needed in circumstances where the parties have provided for these eventualities by their contract.

78. There is an apparent dispute between the parties as to whether, in other circumstances, Alymere remains liable if Guinevere is not liable. It seems to me that whoever is right does not affect the central issue before me which is whether it can confidently be said that reasonable people in the position of the contracting parties, when considering the circumstances in which the Amendment Letter and the Commitment Letter provide for the release of the Release Properties, would think that such release should only happen within a reasonable time. Given the uncertainties to which such a condition would give rise, I am satisfied that the notional reasonable people would not have agreed such a provision.

79. There is a further point which was taken on behalf of the Claimants only in their written submissions dated 3 July 2023 (at footnote 1). It is submitted there that the general proposition relied upon by the Defendants (as discussed in the extract from Lewison) has no application to the fulfilment of a condition precedent to a contractual obligation as opposed to the time for performance of unconditional contractual obligations. I have not been provided with any authority to make good the submission, heard no oral argument on this point and the sequential nature of the additional written submissions means that the Defendants have not had the opportunity to address it. In those circumstances, I have discounted the submission in the reasons for my conclusions.

80. For all of the other reasons, I am satisfied that the Defendants have no real prospect of persuading a court at trial that either of the terms should be implied into the Amendment Agreement or the Commitment Letter or that there is any compelling reason why this issue should be determined at a trial.

The Frustration Issue

81. I can deal with this point shortly because, although pleaded in the Defence at paragraph 19(3), Counsel for the Defendants did not press the point in his written Skeleton Argument or in his oral submissions. In short, I am satisfied that the obligation on Guinevere in paragraph 3 of the Commitment Letter is an obligation to pay money and that has not become impossible to perform or been subject to some supervening event not otherwise in the contemplation of the parties. I have already found that, on the assumed facts, whilst the release of the Release Properties before the Repayment Date

was one possible outcome it was not the only one and, on the proper construction of the Commitment Letter as I have found it to be, that the parties also contemplated that the release might occur after the Repayment Date. As Rix LJ notes in *The Sea Angel* the fact that the release may have occurred later than reasonably contemplated by the parties is not generally sufficient for the doctrine of frustration to be engaged,

82. In my judgment, the Defendants have no real prospect of persuading the court that the Commitment Letter has been frustrated. The doctrine of frustration has to be kept within careful boundaries. I am also satisfied that there is no other reason why this issue should be determined only at a trial.

The Authority Issue

83. As I have already noted this issue arises because of a non-admission in the Defence at paragraph 2 that Grenda has authorised the commencement of these proceedings by it. I have already set out the way in which this issue has been dealt with in the pleadings. If matters had rested there I might have been more open to persuasion, narrowly, that the issue of authority was something which gave rise to a dispute of fact which was not suitable for summary determination. Even then, given that as I have observed the Statements of Truth were signed by Mr Slade on behalf of Richard Slade and Grenda I would have required something more than a non-admission on the part of the Defendants. Contrary to the Defendants' submissions in their Skeleton Argument at [57], there is nothing intrinsically unusual or problematic about a solicitor signing a statement of truth on behalf of its client.

84. However, matters have moved on because in his witness statement at [21], Mr Slade, a solicitor and managing director of Richard Slade, has expressly confirmed that Richard Slade was duly authorised by Grenda, acting by its sole director Mr Stevens, to bring this claim. Absent cogent evidence to contradict this, I can see no basis on which the court would go behind that evidence, especially on an application such as this. Unsurprisingly, there is nothing in Mr Hayward's witness statement to contradict Mr Slade on this point. Far from contradicting that Mr Stevens was acting on behalf of Grenda, paragraph 11 of his statement broadly supports that he was. It is simply not correct to say, as the Defendants do at [57] that there is no evidence that Mr Stevens was a director at the date of the issue of the proceedings or that there is no evidence of any act by Mr Stevens authorising them. That is precisely what, in simple terms, Mr Slade says in his [21]. In

my judgment, based on the evidence before me, the grounds of challenge in paragraph 57 of the Skeleton Argument are without merit. Absent proper grounds, parties should not be encouraged to engage in speculation or to encourage the court to engage in speculation as to whether a statement of truth has been duly authorised.

85. Insofar as the basis of challenge is apparently rooted in the findings of Foxton J. in the Hotel Portfolio litigation, I am unable to see how this assists the Defendants. Foxton J. at [214] found that Mr Stevens had acted as nominee for Mr Ruhan in certain respects but declined at the consequentials hearing to go wider. Even if such a nomineeship existed, it would not follow that Mr Stevens was not authorised to bring the present claim.

86. Finally, I am also satisfied that the joinder of Grenda is procedural not substantive (see *Guest on the Law of Assignment* (4th ed) at [3-19] to [3.20]) and that this would not provide any defence to the claim brought by Richard Slade as equitable assignee of the relevant debt.

87. For all of these reasons, I am satisfied that the Defendants have no real prospect of establishing at trial that the issue of the present proceedings have not been authorised by Grenda or that this provides a reason why the case must proceed to trial.

The Solicitors Act Issue

88. As I have already set out in summary, this point arises because the Defendants submit that the Equitable Charge secures what is due to Richard Slade in relation to the work conducted on behalf of Grenda and the Other Entities. They submit that, on the present evidence, they have a real prospect of establishing that this work was undertaken in the context of litigation and so contentious business within the meaning of the SA 1974 and that the relevant retainer agreements were contentious business agreements within that Act. So far as relevant here, the effect of a finding that an arrangement is a contentious business agreement is that (a) the remuneration payable under it is not subject to an assessment of costs; and (b) save in the case of an agreement which provides for the solicitor to be remunerated by reference to an hourly rate, the parties are subject to the provisions of section 69 SA 1974 which prevents a solicitor from bringing an action to recover his costs until one month after delivery of a bill.

89. As now in force, section 59(1) of the SA 1974 provides that:

"*(1) Subject to subsection (2), a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a "contentious business agreement") providing that he shall be remunerated by a gross sum or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated".*

90. Section 87(1) of the SA 1974 defines "contentious business" to mean: "*business done, whether as solicitor or advocate, in or for the purpose of proceedings begun before a court or before an arbitrator appointed under the Arbitration Act 1950, not being business which falls within the definition of non-contentious or common form probate business contained in section 128 of the Supreme Court Act 1981".*

91. So far as material, section 60(1) of the SA 1974 provides that:

"*Subject to the provisions of this section and to sections 61 to 63, the costs of a solicitor in any case where a contentious business agreement has been made shall not be subject to assessment or (except in the case of an agreement which provides for the solicitor to be remunerated by reference to an hourly rate) to the provisions of section 69".*

92. Section 61of the SA 1974 provides that:

"*(1) No action shall be brought on any contentious business agreement, but on the application of any person who-*

(a) is a party to the agreement or the representative of such a party; or

(b) is or is alleged to be liable to pay, or is or claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates,

the court may enforce or set aside the agreement and determine every question as to its validity or effect".

(2) On any application under subsection (1), the court-

(a) if it is of the opinion that the agreement is in all respects fair and reasonable, may enforce it;

(b) if it is of the opinion that the agreement is in any respect unfair or unreasonable, may set it aside and order the costs covered by it to be assessed as if it had never been made'

(c) in any case, may make such order as to the costs of the application as it thinks fit".

93. In their request for further information under CPR Part 18 dated 19 August 2022, the Defendants asked, in respect of each of Grenda and the Other Entities, whether: (i) the legal services in question amounted to contentious business as defined by the SA 1974 and (ii) Richard Slade entered into a contentious business agreement as defined by the SA 1974? The Claimants' response to these requests dated 26 October 2022 confirms (i) the legal services provided to Grenda and the Other Entities included (but were not limited to) contentious business as defined in section 87(1) of the SA 1974 and (ii) Richard Slade did not enter into a contentious business agreement as defined by section 59 of the SA 1974 with Grenda or any of the Other Entities.

94. In the Defence at [17](1) to (3) and Skeleton Argument, the Defendants take three points in relation to the SA 1974 on the basis that the work was contentious business done under contentious business agreements. First, it is submitted that no action can be brought by Richard Slade upon the contentious business agreements because of section 61 of the 1974 Act and that for this purpose "action" is to be construed "liberally" – see the observations of Sir Donald Nicholls VC in *In re A Debtor (No 88 of 1991)* [1992] Ch 286 at 291. Secondly, it is noted that Richard Slade does not contend that it has obtained an order under section 61 of the 1974 Act. Thirdly, it is said that enforcement of the security provided by the Equitable Charge is prevented until Richard Slade obtains such an order from the court. The Defendants point to the underlying mischief which is that the court has always been concerned to ensure that a contract between solicitor and client should be fair <u>and</u> reasonable (see *Clare v Joseph* [1907] 2 KB 369) and Lord Esher MR in *In re Stuart, ex p Cathcart* [1983] 2 QB 201 at 204-205.

95. As the Claimants' Skeleton Argument acknowledges, the purpose of a contentious business agreement is to fix the fees, or provide a fixing mechanism so that the parties knows where they stand: see the observations of Mann J. in *Wilson v The Spectre Partnership* [2007] EWHC 133 (Ch) at [16]. It must be sufficiently specific: see *Chamberlain v Boodle & King* [1982] 1 WLR 1443 at 1445 and the observations in Friston on Costs (3rd edition) at [27.147].

96. I have been provided with copies of the relevant "umbrella" retainer letters but, as the Defendants point out, these contemplate individual "matter" letters which have not been disclosed. In these circumstances, whilst I incline to the view that the Defendants are correct to say that the agreements provide for an hourly rate and so are contentious business agreements, it is not possible for me safely or fairly to form a conclusive view on this point, certainly not in the context of an application of this type for strike out/summary judgment.

97. However, even if the retainers constitute contentious business agreements within the meaning of the SA 1974, it seems to me that the Defendants have no real prospect of establishing that this constitutes a defence to the present claim. First, Richard Slade is not bringing an action on its retainer agreements. Rather it is suing for a debt due under the Commitment Letter the benefit of which has been assigned to it in equity under the Equitable Charge. I was taken to the decision of the Court of Appeal in *Jonesco v Evening Standard Company Limited* [1932] 2 KB 340 on a predecessor to section 59(1) of the SA 1974 where the court held that the section did not apply to an agreement by a client to give his solicitor security for the amount of costs to which the solicitor might be entitled on taxation of his costs and to the decision of Mustill J. in *Walton v Egan* [1982] 1 QB 1233 at 1238F (on a different but equivalent provision) which confirms that the mischief of section 59(1) is the ascertainment of the amount of the solicitor's remuneration rather than the way in which it is to be paid.

98. In any event, bearing in mind the essential purpose of the contentious business agreements provisions in the SA 1974 is to protect the lay client, the Defendants have simply failed to demonstrate why Guinevere and Mr Hayward (who are not Richard Slade's clients) would be entitled to the benefit of section 61(1) of the SA 1974.

99. In my judgment, the Defendants have no real prospect of succeeding at trial on the Solicitors Act issue, even if the underlying retainers are contentious business agreements, and there is no other reason why this issue should be dealt with at trial.

The Public Policy Issue

100. This issue only arises if I permit the Amendment Application.

101. I have already set out some of the background to the wider relationship between Mr Ruhan and Mr Stevens and, in particular the allegation that Mr Stevens has habitually

acted as the nominee of Mr Ruhan. In essence, the Defendants submit that, at the same time that they were fighting that allegation on the factual basis that it was not true in the Orb litigation, the Hotel Portfolio litigation and Mr Ruhan's divorce proceedings, Bridgehouse was involved in a dispute with BAE in which Richard Slade acted for it. Despite the Equitable Charge having been entered into on 6 April 2018, the Defendants say it was not disclosed in any of the previous proceedings and not to them until 1 May 2022. On that basis, the Defendants invite this court to conclude that it can be inferred that a positive decision was taken not to reveal the existence of the Equitable Charge prior to judgment going against Mr Ruhan and Mr Stevens in the Hotel Portfolio litigation. The Equitable Charge, they submit, enabled Mr Ruhan to use the value in Grenda to fund the dispute with BAE whilst at the same time it was being asserted (especially before Foxton J. in the Hotel Portfolio proceedings) that Mr Stevens was not Mr Ruhan's nominee and that Grenda was truly Mr Steven's vehicle. On the face of it, they say, the Equitable Charge involved Grenda making a substantial gift to Bridgehouse. This would make no sense if the companies were in separate ownership but every sense if, as the Defendants contend, both companies were beneficially owned by Mr Ruhan.

102. Where does this all go? As formulated in the proposed Amended Defence at paragraph 17A, the new defence is put as follows (all shown in red):

103. *"Yet further:*

*(1) As at the date of the Equitable Charge (6 April 2018), Richard Slade was acting for Phoenix Group Foundation ("**Phoenix**"), Minardi Investments Ltd ("**Minardi**"), and Mr Stevens in disputes in which it was alleged (and denied) that Mr Stevens acted as the nominee of Mr Ruhan. That allegation was made in both (a) the claim brought by the SFO (CL-2017-000323) in which no decision was made on the question in the judgment dated 18 May 2021; and (b) in the claim brought by Hotel Portfolio II UK Ltd ("**HP II**") (CL-2018-000226), in which in the judgment dated 23 February 2022, Foxton J concluded that Mr Stevens was the nominee of Mr Ruhan (considering, among other things, the position in relation to Grenda).*

*(2) As at the date of the Equitable Charge, Richard Slade was also acting for Bridgehouse (Bradford No 2) Ltd ("**Bridgehouse**") in a dispute with BAE. Bridgehouse was a company which was, and obviously was, owned and controlled by Mr Ruhan.*

*(3) The recitals to the Equitable Charge distinguish between two groups of companies said to be in different beneficial ownership: (a) Grenda, Mindardi, and Bluestone Securities Ltd ("**Bluestone**"); and (b) Bridgehouse. The Equitable Charge proceeds on the basis that group (a) was in the beneficial ownership of Mr Stevens (in fact, all four companies were in the beneficial ownership of Mr Ruhan).*

(4) The effect of the Equitable Charge was to charge a receivable due to Grenda with payment of (a) sums due from Grenda, Minardi, and Bluestone to Richard Slade in respect of legal services previously provided to them; (b) sums to be incurred by those companies in respect of legal services to be provided to them; (c) sums due from Bridgehouse to Richard Slade in respect of legal services previously provided to it; and (d) sums to be incurred by that company in respect of legal services to be provided to it.

(5) On the face of the Equitable Charge, Bridgehouse provided to Grenda no consideration for the benefit conferred by Grenda on Bridgehouse. Such use of a receivable due to Grenda to fund Bridgehouse's dispute with BAE is explicable only on the basis that (as was the case), Grenda was beneficially the property of Mr Ruhan. Accordingly, had the existence of the Equitable Charge been revealed in the context of the claims advanced by the SFO and by HP II, that would have materially damaged the case that Mr Stevens was not the nominee of Mr Ruhan.

(6) So far as the Defendants have been able to establish from the judgments given in the claims brought by the SFO and HP II, the Equitable Charge was not disclosed in those proceedings. As pleaded in paragraph 22, the Defendants were not informed of the existence of the Equitable Charge until Richard Slade's letter dated 1 May 2022. In these circumstances, it is to be inferred that Richard Slade and Grenda chose not to reveal the existence of the Equitable Charge until after Foxton J's judgment dated 23 February 2022.

(7) Accordingly, the Equitable Charge allowed Mr Ruhan to access value in Grenda to fund Bridgehouse's dispute with BAE while it was simultaneously contended in other proceedings that Grenda was not beneficially his (because Mr Stevens did not act as his nominee).

(8) The Equitable Charge therefore tended to abuse and/or prevent and/or impede the due administration of justice because it allowed Mr Ruhan to access the value in an

asset (a receivable due to Grenda) to fund arbitration and litigation against BAE while it was contended in other proceedings that he had no beneficial interest in Grenda. The Equitable Charge is accordingly contrary to public policy and uenenforceble."

104. The sole question for me is whether the new pleading discloses a defence with a real, not fanciful, prospect of success.

105. In my view, it does not for the following reasons. First, and foremost, the Equitable Charge is not an agreement as to the future course of proceedings. All of the cases relied upon by the Defendants and/or to which my attention was drawn concern agreements as to the future conduct of proceedings (mainly but not exclusively criminal proceedings). The Equitable Charge operates as an assignment of the underlying debt owed by Guinevere to Grenda to Richard Slade and there is nothing capable of impeding the due administration of justice. There is nothing to suggest that the decision of Foxton J. would have been different if the Equitable Charge had been known about or that it has interfered with the due administration of justice (in those proceedings or any other proceedings), but the position as of today is the Equitable Charge has been disclosed and so its alleged suppression will not operate prospectively so as to interfere.

106. Secondly, I agree with Counsel for the Claimants that even if there was an agreement not to disclose a disclosable contract in legal proceedings (which as we have seen is an integral part of the Defendants' complaints), the application of the public policy rule would be to strike out that agreement not to disclose. I am simply unable to see how the disclosable contract itself would not be enforced. Put simply, the Defendants' argument conflates the impugned act (the agreement not to disclose) with the underlying contract (here, the Equitable Charge).

107. Thirdly, the proposed amendment does not (at least as presently drafted) actually impugn Richard Slade because it falls short of alleging that Richard Slade was privy to the alleged agreement not to disclose the Equitable Charge. Although Mr Edwards submitted in the course of his oral submissions that that was the case, there is no evidence to that effect. The highest it is put in the draft pleading is to seek an inference from the fact that notice of the assignment was not given until 1 May 2022 when Foxton J's judgment was dated 23 February 2023.

108. Fourthly, each case falls to be considered on its own facts, but as in the *Fulham Football Club* case I am dealing with a commercial agreement which has been entered into at arm's length. It is not obvious to me why the Equitable Charge should not be enforced in those circumstances.

109. Finally, even if I had concluded that the Equitable Charge was unenforceable on public policy grounds, this would not have prevented Grenda, as the legal and beneficial owner of the debts owed by Guinevere and Mr Hayward, from enforcing them.

110. It seems to me that Mr Kokelaar may be correct to say that the argument is based on two false premises as to the relevant facts. First, he disputes that Bridgehouse provided no consideration to Grenda for the benefit of the receivable because recital (5) of the Equitable Charge provides that any sums payable under it by Bridgehouse shall, as between it and Grenda, be a loan on terms documented elsewhere. However, no such "other" document has been disclosed for the purpose of the present applications and so it would not be safe for me to conclude that he is correct on this point. Secondly, in circumstances where neither Richard Slade not Grenda were parties to the other proceedings, he challenges the premise that either was obliged to disclose the Equitable Charge. At the very least, I am entitled to take into account that the source of such an obligation has not been identified by the Defendants, either in the draft pleading or elsewhere.

111. For all of these reasons, I am satisfied that the Defendants have no real prospect of making good at trial the public policy defence and I refuse permission to amend in the form of the proposed amendments at paragraph 17A of the draft Amended Defence.

The Surety Issue

112. As I have already noted, by paragraph 5 of the Commitment Letter, Guinevere promised on the Completion Date to provide a debenture securing the Total Repayment Sum substantially in the form attached at Schedule 2 to the letter. The Defendants' case is that Grenda's failure to obtain the security in the form of the debenture for which paragraph 5 of the Commitment Letter provides, had the effect of discharging the liability of Mr Hayward as surety because it amounted to a loss of a right of recourse.

113. The relevant inquiry is whether Mr Hayward has a real prospect of establishing at trial that Grenda has wilfully failed to take the security of the debenture such that its benefit has been lost or diminished.

114. I can deal with this point fairly shortly. First, there is no evidence here to suggest that the benefit of the security has been lost. The obligation in paragraph 5 of the Commitment Letter is still specifically enforceable by Grenda against Guinevere which has the effect in equity that it has an equitable charge on substantially the same terms as the draft debenture in schedule 2 to the letter – see *Swiss Bank Corporation v Lloyds Bank Ltd* [1982] AC 684 at 595. Secondly, whilst there is an assertion to the relevant effect in the Defence, there is no particularised case (there or elsewhere) to the effect that the failure to obtain the debenture is due to a wilful act or neglect on the part of Grenda. It is Guinevere which has, for the reasons more fully dealt with in this Judgment, sought to argue that its obligations under the Commitment Letter do not, as a matter of construction, arise or have been frustrated. It would require cogent evidence to displace that as a starting point and perverse in those circumstances to say that the failure is down to Grenda, let alone wilful. Thirdly, there is no evidence to the effect that Grenda's failure has varied the risk of default by Guinevere. Mr Hayward, who has filed evidence on behalf of Guinevere as well as himself, does not even say as much.

115. For all these reasons, I am satisfied that Mr Hayward has no real prospect of establishing at trial that his liability as surety has been discharged by reason of the failure of Grenda to obtain the debenture from Guinevere.

The Provision of Services Issue

116. Again, I can deal with this point fairly shortly.

117. The Particulars of Claim at [15] and [18] were verified by a statement of truth signed by Mr Slade. In the Defence at [16], the Defendants do not admit that Richard Slade has provided any legal services to Grenda and/or the Other Entities and/or that any sums are owed from Grenda and/or the Other Entities to Richard Slade. A non-admission is just that, a putting of the other side to proof but on an application such as this, in circumstances where the Particulars of Claim has been duly verified, the burden is on the Defendants to prove that the particular defence has some real prospect of success or that there is some other reason for trial. The Defendants have adduced no evidence to undermine the Claimants' case on this point.

118. In any event, I agree with Counsel for the Claimants that the points are not relevant in circumstances where, pursuant to the Equitable Charge Richard Slade is suing as the assignee of the right to recover the debt. The state of the account between it and Grenda is irrelevant, not least because Guinevere and Mr Hayward are strangers to the assignment affected by the Equitable Charge.

119. In my view, the Defendants have failed to demonstrate that they have a real prospect of establishing at trial that the relevant services were not provided or that any such failure provides them with a relevant defence to the claims. I can also see no other compelling reason why this issue should be disposed of at a trial.

The Interest Issue

120. In the Defence at [15], the Defendants plead that the Commitment Letter contains no provision for the payment of interest after the Repayment Date (as recognised by the interest claim in paragraph 23 (of the Particulars of Claim) and that Guinevere did not assume an obligation to pay interest at the contractual rate (20% per annum) due from Alymere under the 2014 Facility Agreement.

121. The Claimants' case in the Reply at [10] is that under paragraph 3(a) of the Commitment Letter, Guinevere is liable to pay Grenda a sum equal to the Total Facility Amount together with accrued but unpaid interest on the Total Facility Amount at the contractual rate of 20% per annum as at the Completion Date (i.e 28 September 2021).

122. In my view, paragraph 3(a) of the Commitment Letter does have the effect that the Defendants are liable to pay interest on the Total Facility Amount "calculated in accordance with the terms and conditions of the 2014 Facility Agreement" and "as at the Completion Date". There is no issue that the Completion Date was 28 September 2021. Accordingly, interest was in my view payable at the contractual rate of 20% per annum between the Repayment Date and Completion Date.

123. So far as interest after the Completion Date is concerned, the court is invited to exercise its power under section 35A Senior Courts Act 1981 to award interest on the Total Repayment Sum at a rate of 1% above base (5% at the date of the Claimants' Skeleton Argument). As a matter of principle, it seems to me that interest should be paid. This was a commercial arrangement between commercial parties and the Claimants have been

kept out of their money. The variable rate sought of 1% per annum above base is a rate which is frequently ordered in this court and is in my judgment justifiable here.

124. In my view, the Defendants have failed to demonstrate that they have a real prospect of establishing at trial that the claimed interest is not payable and I can also see no other compelling reason why this issue should be disposed of at a trial.

The Quantum Issue

125. Again, I can deal with this point shortly. Paragraph 21 of the Particulars of Claim (verified by a statement of truth on behalf of both Claimants by Mr Slade) sets out that the Total Repayment Sum (excluding any fees under paragraph 3(c) of the Commitment Letter which are not claimed) is £2,462,586. In the Defence at [22] the Defendants complain that no break-down of that figure has been provided and do not admit its arithmetical accuracy. Aside from reiterating the interest rate issue (which I have dealt with), the Defendants have advanced no positive case that the Total Repayment Sum is something other than the sum claimed by the Claimants. Moreover, in his witness statement at [7], Mr Slade has annexed at page 3 of "RJS 1" a calculation of the sum outstanding at that date. He confirms that the Claimants are content for judgment to be entered in the lower sum claimed in the Particulars of Claim. There is nothing in Mr Hayward's witness statement to challenge this amount.

126. I am therefore satisfied that the Defendants have no real prospect of establishing at trial that the Total Repayment Sum is something other than the figure of £2,462,586 claimed and there is no compelling reason why that issue must be determined at a trial.

Conclusion

127. For all of these reasons, I refuse permission to the Defendants to amend the Defence by the insertion of paragraph 17A and I order that the Defence is struck out pursuant to CPR rule 3.4; and/or judgment is entered for the Claimants in the sum of £2,462,586 together with interest up to the date of the judgment at a rate of 1% above base.

128. I will hear Counsel on the precise form of the Order which they are invited to agree in the usual way and on any consequential matters.

129. Finally, I am grateful to Counsel for their submissions and to their solicitors for their assistance and co-operation in connection with this hearing.