OUTER HOUSE, COURT OF SESSION

[2018] CSOH 55

P1050/17

OPINION OF LORD DOHERTY

in the Petition of

JAMES BERNARD STEPHEN, chartered accountant, and FRANCIS GRAHAM NEWTON, chartered accountant, the joint administrators of GRANITE CITY ASSETS LIMITED

Petitioners

for directions in terms of paragraph 63 of Schedule B1 to the Insolvency Act 1986

Petitioners: Delibegovic-Broome QC; Morton Fraser LLP
Respondent: Dunlop QC, MacGregor; Anderson Strathern LLP

1 June 2018

Introduction

[1] The petitioners are the joint administrators of Granite City Assets Limited ("Granite"). In this petition they seek directions as to whether certain sums are secured in terms of a standard security granted by Granite in favour of FirstPoint Security Trustee Limited on 2 October 2013.

The background and the documents

[2] Granite was incorporated as a special purpose vehicle to acquire a property at 96-126 John Street, Aberdeen. The property was to be demolished and re-developed as a hotel and retail unit. Granite had two sets of funding arrangements, one for the payment of

the purchase price of the Property and one for financing the development. The purchase price was to be paid in instalments. The development was to be financed by a loan. Granite's obligations to pay the purchase price were to be guaranteed by BridgePoint Ventures LLC ("BPV"). The respondent, IPN Global Capital Limited, is the successor of BPV. Granite proposed to lease Units (hotel bedrooms) within the proposed development to raise money to pay the purchase price.

[3] In order to facilitate the proposed purchase a Master Agreement dated 19 December 2012 was entered into between Granite, BPV, and SES Equity Partners Limited ("SESEP") (6/3 of process). The introduction to the Master Agreement narrated the proposed purchase and development of the Property by Granite; that BPV had negotiated terms and conditions with Granite on which Units would be made available for purchase by BridgePoint Purchasers introduced by SESEP; that Granite would enter into agreements to sell leasehold interests in the Units to BridgePoint Purchasers; and that the Master Agreement was intended to set out the relationship between BPV, SESEP and Granite. Clause 1.1 provided:

> "...
> "BridgePoint Documentation" means (1) this Agreement, (2) the Addendum, (3) the Standard Security, (4) the Floating Charge, (5) the Property Deposit Bond, (6) the Security Trust Deed, and (7) the indemnity granted by Granite City for the benefit of the Property Deposit Bond Provider; ..."

In terms of clause 2.1 Granite undertook to procure that the BridgePoint Units would be available for the grant of leasehold interests to the BridgePoint Purchasers. In terms of clause 3 Granite and BPV each undertook certain different obligations relating to Deposits paid by BridgePoint Purchasers. In terms of clause 5.1 Granite agreed with BPV and SESEP that it would procure delivery of a Property Deposit Bond to each BridgePoint Purchaser. Clause 5.3 provided that, in the event that the Property Deposit Bond did not reimburse the relevant BridgePoint Purchasers in whole in the event of any Granite default under the

Purchase Agreement with the Purchaser, Granite undertook to SESEP and BPV that it would make up any shortfall owed to such BridgePoint Purchaser out of its own monies within three business days of having been given notice to do so by SESEP. Clauses 15 and 16 provided:

> "**15 Indemnity**
> 15.1 Granite City undertakes to fully indemnify each of the BridgePoint Purchasers, BPV, SESEP, their respective affiliates, shareholders, partners, members, managers, officers, directors, employees, representatives, agents, heirs, successors and assignees (collectively the "Indemnified Parties") from and against any and all claims, liabilities, actions, losses, costs, expenses (including all reasonable legal fees and expenses) and damages howsoever arising from and relating to:
> (a) any breach, violation or non-performance of any representation, warranty, undertaking, condition or agreement in this Agreement, any of the Purchase agreements, and/or any other contract between any of the Indemnified Parties and the Granite City to be fulfilled, kept, observed and/or performed;
> and/or
> (b) any act or omission of Granite City in connection with the offer and/or sale of any Unit in the Development or any violation of any law, rule or regulation by Granite City.
> 15.2 If so requested by any of the Indemnified Parties, Granite City shall, to the extent permitted by law, agree to defend all such actions or claims to which this clause 15 applies and to conduct the defence thereof at its expense in good faith and by using Counsel of appropriate seniority as shall be approved by the Indemnified Parties who shall act reasonably and in good faith in giving such approval.
>
> **16 Property Deposit Bond Security**
> Granite City undertakes to BPV that it shall enter into the Standard Security and the Floating Charge as security for Granite City's obligations to the Secured Parties..."

Clause 21 provided:

> "**21 Insolvency**
> If Granite City suffers any of the following events, namely:
> ...
> (d) in relation to a company ...
> ...
> (iii) an administrator a receiver or an administrative receiver or a receiver and manager are appointed ...
> ...
> then BPV shall no longer be obliged to comply with its obligations under this Agreement and shall be entitled (but not obliged) to terminate this agreement at any time thereafter by notice to Granite City. … Following any such termination all Deposits shall be repaid by Granite City in full to the BridgePoint Purchasers."

In terms of clause 24 Granite agreed to maintain the confidentiality of the BridgePoint Documentation and not to use or disclose it to any third party without the express prior written consent of BPV.

[4] The Master Agreement contemplated that the documentation listed in Schedule Part 1A would be delivered by Granite to BPV, including a bond and floating charge by Granite in favour of FirstPoint Security Trustee Limited in the form annexed as Part 9 of the Schedule; a standard security by Granite in favour of FirstPoint Security Trustee Limited in the form annexed as Part 8 of the Schedule; the Security Trust Deed between FirstPoint Security Trustee Limited, FirstPoint Agent Limited and the Property Deposit Bond Provider; and Property Deposit Bonds granted by the Property Deposit Bond Provider in favour of each BridgePoint Purchaser in the form annexed as Part 5 of the Schedule.

[5] In article 4 of the petition the petitioners aver that Granite entered into a floating charge in favour of FirstPoint Security Trustee Limited as Security Trustee for various parties (including the BridgePoint Purchasers) dated 19 December 2012 and amended on 2 October 2013 and 13 November 2015; and that Granite executed a Standard Security in favour of FirstPoint Security Limited, as security trustee for various parties including the BridgePoint Purchasers, "dated 2 October 2013 as amended". Those averments are admitted by the respondent.

[6] The Standard Security of 2 October 2013 in favour of FirstPoint Security Trustee Limited (6/10 of process) narrates that it was granted to FirstPoint Security Trustee Limited "for itself and in its capacity as security trustee for the Secured Creditors (the "Security Trustee")". Clause 1 defines inter alia the following terms:

> "1.1 'BridgePoint' means BridgePoint Ventures LLC ...;

1.2 'BridgePoint Agent' means FirstPoint Agent Limited ... in its capacity as agent for the Bridgepoint Purchasers ...;
1.3 'BridgePoint Purchasers' means each person which has paid a Deposit under and in accordance with a Sale Agreement and which has not had its Deposit and/or other sums due to it from Granite City paid back to it in full (each a 'BridgePoint Purchaser');
1.4 'Bridge Lender' means Red Friar Private Equity Limited ...;
...
1.7 'Deposit' means the deposit paid by each BridgePoint Purchaser pursuant to the terms of their respective Sale Agreement;
...
1.13 'Insurer' means Northern & Western Insurance Co. Ltd ...;
...
1.15 'Master Agreement' means the agreement between BridgePoint Ventures LLC, SES Equity Partners Limited and Granite City dated 19th December 2012 in terms of which BridgePoint Ventures LLC has agreed to make certain facilities available to Granite City;
...
1.17 'Sale Agreements' means the sale and purchase agreements entered into by each BridgePoint Purchaser and Granite City for the sale and purchase of a leasehold interest in each Unit (each a 'Sale Agreement') ...;
...
1.19 'Secured Creditors' means together the Lender, the BridgePoint Purchasers, BridgePoint, the Insurer, the BridgePoint Agent, the Bridge Lender and the Security Trustee (each a 'Secured Creditor');
1.20 'Secured Liabilities' means all liabilities and obligations of Granite City or the Granite City owed or expressed to be owed to:
...
1.20.2 the BridgePoint Purchasers, the Insurer and/or BridgePoint under the Master Agreement and the Security Documents;
...
1.20.5 the Security Trustee,
whether owed jointly or severally, as principal or surety or in any other capacity ...;
1.21 'Security Documents' means this Standard Security, the floating charge and any other agreement or document designated a security document by the Security Trustee;
...
1.23 'Security Trust Deed' means the security trust deed dated 18 March 2013 entered into between the BridgePoint Agent, the Insurer and the Security Trustee;
1.24 'Units' means one or more of the units forming part of the Development designated by the Granite City to be offered for sale to the BridgePoint Purchasers (each a 'Unit').
..."

Clauses 2, 3 and 4 provide:

"**2 Undertaking to Pay**

Granite City undertakes with the Security Trustee (for the benefit of the Secured Creditors) to pay the Secured Liabilities to the Secured Creditors when due.

3 Security

In security of the Secured Liabilities Granite City grants a standard security in favour of the Security Trustee for itself and for the Secured Creditors over the Security Subjects.

4 Proceeds of Sale

4.1 Subject to clause 4.2, in the event that the Security Subjects (or any part of the Security Subjects) are sold, the relevant Proceeds shall be paid to the Security Trustee and the Security Trustee shall apply such Proceeds in accordance with the terms of the Security Trust Deed.

4.2 Notwithstanding the generality of Clause 4.1 above, in the event that the Security Subjects (or any part of the Security Subjects) are sold in accordance with the terms of the Master Agreement, other than as a result of the exercise of the Security Trustee of any of the remedies available to a creditor on default of a security provider by virtue of the provisions of the Act and where no Enforcement Event is continuing, such amount of the Proceeds as is required to repay and discharge the Secured Liabilities in full shall be paid to the Security Trustee and the Security Trustee shall apply such amount of the Proceeds in accordance with the terms of the Security Trust Deed."

[7] The Recital (D) of the Security Trust Deed (6/12 of process) narrates that Granite had undertaken certain obligations to, inter alia, the BridgePoint Purchasers. Clause 3 provides:

"**3. Ranking and Priority**

3.1 Ranking of Secured Liabilities

The Secured Creditors agree that the Secured Liabilities owed by Granite City to each Secured Creditor shall rank ... in right and priority of payment in the order set out in this deed.

3.2 Application of Proceeds

Subject to the terms of any Ranking Agreement and the claims of creditors which are given priority by law, any and all Proceeds any other amounts payable pursuant to the provisions of clause 9 or otherwise will be applied by the Security Trustee in the following order of priority:

...

(b) Following an Insurer Default

...

(ii) secondly, in payment to the BridgePoint Agent to pay or discharge the Purchasers' Secured Liabilities;

..."

[8] On 19 December 2012 the Master Agreement, the Floating Charge (6/7 of process) and the Security Trust Deed were executed. On 20 September 2013 the Property was purchased by Granite. Between 9 January 2013 and 15 December 2013 Agreements for Lease

of Units by BridgePoint Purchasers were entered into. The Deposit payments made by them amounted in total to £4.5 million.

[9] Due to solvency problems, on 8 December 2015 Granite's director filed Notice of Intention to appoint Administrators. The petitioners were appointed as joint administrators on 15 December 2015. On 27 June 2016 the joint administrators sold the Property for £4 million (plus VAT). The funds realised were sufficient to repay in full the secured creditor under the Facility Agreement. Interim payments were also made to the syndicate of investor/purchasers under the Floating Charge. On 8 November 2017 the respondent gave written notice to the petitioners under clause 21 terminating the Master Agreement (7/1).

[10] An issue has arisen as to whether the BridgePoint Purchasers, as a group of creditors, have the benefit of the Standard Security. The petitioners seek an order giving directions either that:

> "a. The sums paid to Granite ... by the BridgePoint Purchasers ... are secured in terms of the standard security...
> or
> b. The sums paid to Granite ... by the BridgePoint Purchasers ... are not secured in terms of the standard security..."

If the BridgePoint Purchasers are secured in terms of the standard security there will be no funds available for distribution to unsecured creditors.

[11] Both counsel prepared written Notes of Argument (11 and 12 of Process). The petitioners had obtained an Opinion of Senior Counsel (6/17 of Process), as had the respondent (6/18 of Process). Both of those Opinions pre-dated the respondent's notice of termination of the Master Agreement.

[12] I note for the record that the following documents were executed on the dates stated: an Instrument of Alteration of Floating Charge (6/8) and a Supplemental Security Trust Deed (6/13) (2 October 2013); a Deed of Variation of the Master Agreement (6/4)(December

2013); a Secured Facility Agreement (6/15), a Second Supplemental Security Trust Deed (6/14), and a Variation of Standard Security (6/11)(16 April 2014); a Deed of Guarantee (6/16)(2014); and a Second Instrument of Alteration of Floating Charge (6/9)(13 November 2015). However it was not suggested that the terms of any of these documents were material to the issues before the court.

Senior counsel for the petitioners' submissions

[13] Senior counsel for the petitioners at the hearing was not the author of the Opinion for the petitioners 6/17 of process. She indicated that in light of the advice in that Opinion the petitioners considered it their duty to put forward the interests of unsecured creditors at the hearing. She submitted that the key issue is whether Granite's liability to repay the Deposits of Bridgepoint Purchasers is one of the "Secured Liabilities" within the meaning of clause 1.20 of the Standard Security. That could be further distilled into whether a liability or obligation of Granite to repay the Deposits was owed or expressed to be owed under the Master Agreement. No such liability or obligation was owed or expressed to be owed under the "Security Documents". That term was defined as "this Standard Security, the Floating Charge and any other agreement or document designated a security document by the Security Trustee". Neither the Standard Security nor the Floating Charge were a source of any relevant liability or obligation, and it was common ground that no document was ever designated a security document by the Security Trustee.

[14] Turning to the Master Agreement, neither of the bases of liability/obligation to the BridgePoint Purchasers which the respondent suggested was well-founded.

[15] Clause 15 did not undertake to indemnify the BridgePoint Purchasers in respect of non-repayment by Granite of the Deposits. On a proper construction the undertaking was to

indemnify the named parties (including the BridgePoint Purchasers) from and against claims made against them by third parties, and from consequential losses arising as a result of such claims. That was because the words "losses, costs, expenses" were to be construed by looking at the other words which were listed and by applying the principle *noscitur a sociis*. That was the ordinary and natural reading of the clause. It also accorded with the commercial expectations of the parties to the Master Agreement. Reference was made to *Wood* v *Capita Insurance Services Limited* [2017] AC 1173, per Lord Hodge JSC at paras 28, 40-41.

[16] In any case, even if (i) the scope of the indemnity was wide enough to include the liability to repay the BridgePoint Purchasers' Deposits, and/or (ii) in terms of clause 21 Granite was liable to repay the BridgePoint Purchasers' Deposits, the liability/obligation in each instance was owed to the other parties to the Master Agreement. It was not owed to the BridgePoint Purchasers. On a proper construction of the Agreement neither clause contained a promise by Granite to the BridgePoint Purchasers. Reference was made to *Royal Bank of Scotland plc* v *Carlyle* 2015 SC (UKSC) 93, per Lord Hodge JSC at para 35; *Cawdor* v *Cawdor* 2007 SC 285, per Lord President Hamilton at para 15; and *Gloag and Henderson, The Law of Scotland* (14th ed), para 8.06. Moreover, the contracting parties had not conferred a *jus quaesitum tertio* on the BridgePoint Purchasers. The mere fact that those purchasers had an interest in the payments being made did not give them title to sue. It was not without significance that as part of the overall arrangements the BridgePoint Purchasers had had Deposit insurance. That had been the way in which it had been envisaged that their interests would be protected. Even if on a proper construction of clause 15 and clause 21 the contracting parties had intended to confer enforceable rights on the BridgePoint Purchasers, for such rights to have been conferred the grant would have to have been irrevocable

(*Carmichael* v *Carmichael's Executrix* 1920 SC (HL) 195, per Lord Dunedin at pp 201-204; *Morton's Trustees* v *The Aged Christian Friend Society of Scotland* (1899) 2F 82, per Lord Kinnear at p 88; *Finnie* v *Glasgow and South-Western Railway* (1857) 3 Macq 75, per Lord Cranworth at p 3 and Lord Wensleydale at p 4; *Mercedes-Benz Finance Ltd* v *Clydesdale Bank plc* 1997 SLT 905, per Lord Penrose at pp 912J-913G). That was not the case here. There had been nothing to prevent the parties to the Agreement from varying it. There had been no delivery of the Master Agreement to the BridgePoint Purchasers, nor had there been any equivalent of delivery. Indeed, Granite's confidentiality obligations (clause 24) had precluded such delivery or intimation without BPV's prior written consent.

[17] Besides, even if a *jus quaesitum* had been conferred, it was not a contractual right but was *sui generis* (McBryde, *The Law of Contract in Scotland* (3rd ed), para 10-23). It followed that it was not a liability or obligation "owed ... under the Master Agreement", with the result that it was not secured by the Standard Security. The words "or expressed to be owed" added nothing to the breadth of the definition in clause 1.20. It was difficult to see that a liability which was not owed but was only expressed to be owed could be effectively secured under a standard security.

Senior counsel for the respondent's submissions

[18] Senior counsel for the respondent submitted that it was plain from the suite of documents relating to the development that the intention of the parties to the Master Agreement had been that Granite was to undertake liability to the Bridgepoint Purchasers to repay the Deposits; and that that liability was to be secured by the Standard Security. That was clear from clause 16 of the Master Agreement. It was also clear from the terms of the Security Trust Deed. That document had been executed at the same time as the Master

Agreement. One of the parties to it - FirstPoint Agent Limited - had been acting for and on behalf of the Bridgepoint Purchasers. Recital (D) narrated that Granite had undertaken certain obligations to, inter alia, the Bridgepoint Purchasers. Granite had been aware of the terms of that document. It was referred to in the Master Agreement, and its receipt by BridgePoint Ventures LLC was a condition precedent of release of the Deposits to Granite. Since the commercial intent was plain the court should aim to give effect to it. Reference was made to *Royal Bank of Scotland plc* v *Carlyle*, *supra,* per Lord Hodge JSC at para 29; and *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900, per Lord Clarke of Stone-cum-Ebony JSC at para 25.

[19] On a proper construction of clause 15 the indemnity given was wide enough to include the losses which the BridgePoint Purchasers suffered by reason of Granite failing to return their Deposits. The BridgePoint Purchasers' losses fell within the scope of "losses, costs, expenses". On an ordinary and natural reading of those words they were wide enough to include the relevant losses. It had been an aim of the Master Agreement, and the suite of documents as a whole, that the obligation to repay the Deposits to the BridgePoint Purchasers should be a secured debt. From a commercial point of view it was perfectly understandable that the indemnity should extend to the BridgePoint Purchasers' own losses. It was commonplace to find indemnities given against losses which are incurred without a third party claim, eg against theft or natural peril; or in the event of inability to recover damages as a result of insolvency of the paying party; or in collateral warranties granted in building contracts (where it was entirely usual to find that a construction professional gives a warranty breach of which would render him liable in damages, but also gives an undertaking to indemnify the recipient against any losses arising from the breach: cf *Royal Insurance (UK) Ltd* v *Amec Construction Scotland Ltd* 2008 SLT 825 at para 1). It would be

wrong to conclude that clause 15 cannot have been intended to indemnify the BridgePoint Purchasers for their own losses caused by Granite's breach or non-performance just because there was already a direct liability for damages. Collateral warranties generally created a contractual nexus between the parties, breach of which would sound in damages, yet such warranties commonly included an obligation to indemnify. There were good reasons for this. The remedy for failure to obtemper an obligation to indemnify is a claim for payment, not a claim for damages (*Scott Lithgow Ltd* v *Secretary of State for Defence* 1989 SC (HL) 9 at p 20). For a number of other reasons a claim for indemnity could be more advantageous than a claim for damages. The fact that the Master Agreement also contemplated that the Bridgepoint Purchasers' Deposits should have insurance protection (the Property Deposit Bond) was not a good reason for construing clause 15 narrowly. It would have been obvious to the parties that, for a variety of reasons, the insurer might not make payment to the Bridgepoint Purchasers. The Security Trust Deed had contemplated default by the insurer and had made provision for it. In fact the insurer had defaulted - it had become insolvent.

[20] In relation to both the clause 15 right and the clause 21 right the intention of the parties to the Master Agreement had been to confer a *jus quaesitum tertio* on the BridgePoint Purchasers. That was the correct conclusion construing the Master Agreement objectively. In fact, in each case Granite had made a clear promise to the BridgePoint Purchasers to perform the relevant obligation. The Bridgepoint Purchasers were the only persons with a material interest in the obligations being performed cf *Mercedes-Benz Finance Ltd* v *Clydesdale Bank plc, supra,* per Lord Penrose at pp 912J-913G. Those promises were binding without the need for delivery of the Master Agreement (or an equivalent to delivery) to the BridgePoint Purchasers. Reference was made to *Royal Bank of Scotland plc* v *Carlyle*, *supra,* per Lord Hodge JSC at para 35; *Cawdor* v *Cawdor*, *supra,* per Lord Pesident Hamilton at para 15;

Erskine, Inst, III,ii,43; *Carmichael* v *Carmichael's Executrix*, supra; McBryde, supra, para 4-37. In any case, the equivalent of delivery had taken place. The BridgePoint Purchasers had been aware of the terms of the Master Agreement, not least because it had been delivered to their solicitors who had received it on their behalf. If the petitioners did not accept that there had been an equivalent of delivery inquiry on that question would be necessary.

[21] The *jus* arose from the Master Agreement. It was "owed ... under" it. If that was not so it was certainly "expressed to be owed under" it.

[22] Finally, during oral submissions senior counsel sought to advance a further argument which had not been foreshadowed in the pleadings or in the respondent's note of argument. If there were clause 15 and clause 21 obligations to repay the deposits to the Bridgepoint Purchasers, but the clause 15 obligation was owed only to BPV and SESEP and the clause 21 obligation was owed only to BPV, each of those obligations was nevertheless a "debt" in terms of the Conveyancing and Feudal Reform (Scotland) Act 1970, s 9(8)(c) (because it was an obligation *ad factum praestandum*). Since the Secured Liabilities under the Standard Security included liabilities and obligations of Granite owed or expressed to be owed to BPV under the Master Agreement (clause 1.20.2), the obligations *ad factum praestandum* owed to BPV were secured by the Standard Security.

Decision and reasons

Clause 15

[23] I feel able to set out my views in respect of clause 15 relatively briefly. The petitioners advocate giving the clause a narrower meaning than a literal interpretation would suggest is appropriate. They rely upon application of the maxim *noscitur a sociis.* They also suggest that the narrower interpretation would accord with commercial expectations because an

indemnity with a greater scope would not materially increase the benefit which the indemnified party would obtain from the indemnity. I am not persuaded that the petitioners' approach is correct.

[24] The *noscitur a sociis* principle involves identifying a common characteristic of a group of words. One or more general words may be construed as having a more limited meaning in light of the common characteristic. However, as Diplock LJ put it in *Letang* v *Cooper* [1965] 1 QB 232 at p 247:

> "The maxim *noscitur a sociis* is always a treacherous one unless you know the *societas* to which the *socii* belong."

[25] The ordinary and natural meanings of the words "losses, costs, expenses ... and damages" are wide enough to include more than just indemnification against third party claims and consequential losses caused by such claims. While the three preceding words have the common characteristic that they concern third party claims against the indemnified party, I think it would be going much too far to say that that is a common characteristic of all seven words. In my view it is also significant that the words which follow, and which link the seven words to the breaches etc described in (a) and the acts or omissions described in (b), - "howsoever arising from and relating to" – are of very wide import.

[26] I am not convinced that an indemnity which extended to the BridgePoint Purchasers' own losses would, to that extent, merely duplicate other rights of redress which the petitioners have, or that it would be of no material commercial benefit to them. I agree with senior counsel for the respondent that that is not so; and that indemnities of similar scope are familiar in the other commercial contexts which he described. I also agree, looking at clause 15 in the context of the Master Agreement as a whole, including the draft documents in the Schedule, that the wider construction sits more comfortably with the commercial aims

of the contracting parties, ascertained objectively, than the narrower construction does. It makes business common sense that persons in the position of the contracting parties would have agreed that the indemnified parties should be indemnified against all losses caused by the breaches etc/acts or omissions described in parts (a) and (b) of clause 15.1. I am not persuaded that any of the other terms of the Agreement ought to cause me to conclude that that was not the contractual intention (cf *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173, per Lord Hodge JSC at para 40). In particular, I am not persuaded that the insurance arrangements for the BridgePoint Purchasers ought to rule out the broader construction. First, the BridgePoint Purchasers were not the only indemnified parties. The other indemnified parties did not have the benefit of such insurance arrangements. Second, it is clear that insurer default was contemplated. Third, while in terms of clause 5.3 Granite undertook to SESEP and BPV that it would make up any shortfall owed to a BridgePoint Purchaser in the event of Granite's default under a Purchase Agreement, apart from clause 15 there were no undertakings by Granite to make good losses SESEP or BPV sustained as a result of the breaches etc described in parts (a) and (b).

Clause 21

[27] The construction of clause 21 gave rise to no controversy. Granite's obligation to repay the Deposits was a contingent obligation. Its existence was dependent upon the occurrence of one or other of the events listed in clause 21 and on BPV giving notice of termination following such an event. The happening of each of those contingencies was uncertain. The contingencies were suspensive conditions.

[28] The suspensive conditions were fulfilled. Administrators were appointed to Granite (clause 21 (d)(ii)). Notice of termination was given. Granite became obliged to repay all the

Deposits in full to the BridgePoint Purchasers. That obligation is owed by Granite to the other contracting parties. I did not understand senior counsel for the petitioners to suggest otherwise.

Jus quaesitum tertio

[29] The more difficult question is whether the BridgePoint Purchasers have a *jus quaesitum tertio* to enforce Granite's clause 15 obligation (in so far as it concerns them) or Granite's clause 21 obligation. While the common law rule of *jus quaesitum tertio* has been abolished in relation to contracts constituted on or after 26 February 2018 (Contract (Third Party Rights)(Scotland) Act 2017 ("the 2017 Act"), s 11(1) and the Contract (Third Party Rights)(Scotland) Act 2017 (Commencement) Regulations 2018 (SSI 2018/8), regs 1 and 2) and has been replaced by the provisions of the 2017 Act, the common law rule continues to apply in respect of contracts constituted before that date.

[30] The BridgePoint Purchasers plainly have an interest in each of the relevant obligations being performed. I did not understand it to be suggested that BPV or SESEP had substantial interests of their own in the performance by Granite of the obligations (and none are evident to me from the terms of the Master Agreement). In any case, I respectfully agree with Lord Penrose's rejection in *Mercedes-Benz Finance Ltd* v *Clydesdale Bank plc, supra,* of the extreme proposition that a third party right can only arise where the third party alone has a substantial interest in performance. Looking at the terms of the Agreement objectively, I am in no doubt that the contracting parties intended that each of the relevant obligations was to protect the BridgePoint Purchasers' interests, and that third party rights to enforce the obligations were to be bestowed upon the BridgePoint Purchasers. I do not consider that the confidentiality provisions in clause 24 preclude that conclusion. First, those provisions

impose obligations of confidentiality on Granite. They do not impose confidentiality obligations on BPV or SESEP. Second, even in the case of Granite, it may disclose information to a third party with BPV's prior written consent (which consent is not to be unreasonably withheld or delayed)(clause 24.2).

[31] However, it is clear from *Carmichael* that something more than the contracting parties' intention to create a third party right is needed. While Lord Dunedin's speech in that case has been the subject of academic criticism and debate (see eg MacQueen, "*Third Party Rights in Contract: Jus Quaesitum Tertio*" (in K Reid and R. Zimmermann (eds), *A History of Scottish Private Law in Scotland*), p 220, and the different views there discussed at pp 244-250; Lord Rodger of Earlsferry, *"Law for all times: the work and contribution of David Daube"* [2004] 2 Roman Legal Tradition 3, at pp 15-17; McBryde, *Contract* (3rd ed), paras 4.32 - 4.43), the decision is authoritative and I am bound by its *ratio*. As a first instance judge I have no alternative but to proceed on the basis that it correctly sets out the common law. It follows that for third party rights to have been constituted in the present case it must be shown not only that the contracting parties intended to create those rights, but also that they intended their creation to be irrevocable.

[32] In *Carmichael* Lord Dunedin explained that irrevocability may be achieved in various ways: (1) delivery of the contract to the third party; (2) registration of the contract, for example in the Books of Council and Session; (3) intimation of the contract to the third party; (4) the third party's reliance upon the contract term in its favour; and (5) the third party's knowledge of the term in its favour. Lord Dunedin concluded (at p 203):

> "I have gone through these various ways in which the intention that a *jus tertio* should be created can be shown, but, after all, they are only examples and not an exhaustive list, for in the end it is a question of evidence, and the only real rule to be deduced is that the mere expression of the obligation as giving a *jus tertio* is not sufficient".

[33] Accordingly, in order to succeed the BridgePoint Purchasers have to demonstrate the necessary irrevocability. In my opinion that requirement cannot be elided by seeking to characterise the clause 15 and clause 21 obligations as promises by Granite to the BridgePoint Purchasers, and by maintaining that, as such, they are binding without delivery or an equivalent (Stair, *Institutions,* I, 10,4; *Cawdor* v *Cawdor*, *supra,* per Lord President Hamilton at para 15; *Regus (Maxim) Ltd* v *Bank of Scotland plc* 2013 SC 331, per Lord President Gill at para 34). The fact is that here the primary obligations form part of a multilateral contract, in terms of which each of the contracting parties undertook obligations to each other. While, arguably, the underlying inter-relationships between the contracting parties and the BridgePoint Purchasers might be explained in terms of promises by the debtor and by the stipulator to the third party (there is a long-standing academic debate as to whether the *jus quaesitum tertio* is an application of the concept of unilateral promise, or something *sui generis*, see eg Hogg, *Promises*, pp 305-7; McBryde, *Contract* (3rd ed), para 10-23), it is nevertheless clear from *Carmichael* that when it comes to determining whether a *jus quaesitum* has been constituted it is necessary to demonstrate delivery or an equivalent.

[34] The difficulty here is that the petitioners and the respondent do not appear to be in agreement as to the relevant facts. The respondent suggests that the BridgePoint Purchasers were aware of the terms of the Master Agreement and that a copy of it had been intimated to their solicitors. Since the petitioners do not admit either of those matters, it seems that some form of inquiry may be required.

[35] The petitioners say that it is unnecessary to have an inquiry as, even if the Bridgepoint Purchasers have third party rights, they are not debts which are secured by the standard security. They say that is because, on the hypothesis that Granite and the other

contracting parties owe obligations to the Bridgepoint Purchasers, those obligations are not contractual but are *sui generis* (McBryde, *Contract*, para 10-23). That being so, none of them are liabilities or obligations owed or expressed to be owed by Granite to the BridgePoint Purchasers under the Master Agreement. They are therefore not "Secured Liabilities" in terms of clause 1.20.

[36] I am not persuaded that the petitioners' analysis is correct. The BridgePoint Purchasers were not parties to the Master Agreement but, on the hypothesis that the Agreement was followed by delivery to them or an equivalent, third party rights were constituted by the contracting parties in terms of, and by means of, that Agreement and subsequent action. As a result the BridgePoint Purchasers were added to the persons who had the right to enforce the relevant clause 15 and clause 21 obligations. On that scenario the sensible view would be that Granite's counterpart obligations are "liabilities or obligations ... owed or expressed to be owed to ... the BridgePoint Purchasers ... under the Master Agreement" in terms of clause 1.20 of the Standard Security.

Obligations ad factum praestandum

[37] I do not think it is necessary or appropriate at this stage to comment upon senior counsel for the respondent's alternative argument. It was a fall-back argument, and it was not focussed in the pleadings or in the Notes of Argument. As a result senior counsel for the petitioners was, understandably, not in a position to make fully developed submissions in relation to it.

Conclusions

[38] In my opinion the respondent's construction of clause 15 of the Master Agreement is correct. No issue arises as to the proper construction of clause 21. The debt owed by Granite to each of the relevant BridgePoint Purchasers is a secured debt if the BridgePoint Purchaser has a *jus quaesitum tertio* to enforce clause 15 or clause 21. In my view, a BridgePoint Purchaser has such a right if there was delivery to it, or an equivalent to delivery, of the Master Agreement (or intimation to it of the terms of the relevant clause(s)). As there appears to be a dispute as to whether there has been such delivery or its equivalent, it seems that further inquiry will be necessary.

Disposal

[39] I shall put the case out by order to discuss (i) an appropriate interlocutor to give effect to my decision and (ii) any necessary further procedure.