Neutral Citation Number: [2019] EWHC 2131 (Ch)

Case No: PT-2018-000510

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 06/08/2019

Before:

CHIEF MASTER MARSH

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Between:

(1) FOLGENDER HOLDINGS LIMITED
(2) ELBOGROSS SA **Claimants**

- and –

(1) LETRAZ PROPERTIES LIMITED
(2) ARBOMO FINANCIAL LIMITED
(3) MERCANTILE ESTATE HOLDINGS LIMITED
(4) MR SALAH MUSSA **Defendants**

Thomas Grant QC and Adam Smith (instructed by **Dechert LLP**) for the **Claimants**
Julian Kenny QC and Patrick Dunn-Walsh (instructed by **Waller Pollins Goldstein**) for the **Defendants**

Hearing date: 10 July 2019

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Approved Judgment

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

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CHIEF MASTER MARSH

Chief Master Marsh:

1. The claimants have applied for summary judgment under Part 24 and an order striking out part of the claim under CPR 3.4(2)(a) against the first defendant ("Letraz"), or, in the alternative to judgment under Part 24, a conditional order under Practice Direction 24 paragraphs 4, 5.1(4) and 5.2.

Background

2. In mid-2012, the Mercantile Group, which is a long-established property development business, was in the course of redeveloping two valuable properties, 108 Hamilton Terrace, London NW8 9UP ("Hamilton Terrace") and 8 Chesterfield Hill, London W1J 5BW ("Chesterfield Hill"). The Mercantile Group is run by Mr Salah Mussa, who is the fourth defendant. The third defendant, Mercantile Estate Holdings Limited ("Mercantile"), is a group company. The registered proprietors of the two properties were SPVs. Arklow Property Limited ("Arklow") held Hamilton Terrace and the second defendant, Arbomo Financial Limited ("Arbomo") held Chesterfield Hill. Letraz held the entire shareholdings in both Arklow and Arbomo.

3. On 4 July 2012 Brustorm S.A. entered into a loan agreement with Letraz, which is a wholly owned subsidiary of Mercantile. Under the loan agreement, Brustorm agreed to lend £10 million to Letraz for the redevelopment of Hamilton Terrace and Chesterfield Hill.

4. The loan agreement was drafted in a very simple form. Brustorm is described as the Lender and Letraz as the Borrower. There are three clauses that are principally relevant:

    (1) Clause 3 dealt with the giving of security:

        "3. Registered Charge

        3.1 The Lender shall be given a second charge on Hamilton Terrace and Chesterfield Hill." [There is no clause 3.2]

    (2) Clause 4 provided that no interest was to be payable on the loan.

    (3) Clause 6 set out conditions upon which the lending was to take place:

        "6. The Conditions

        6.1 The Borrower shall appoint Mr Salah Mussa and Mr Richard Hillier as Directors ("the Directors") who shall, together with the Lender, oversee the redevelopment of Hamilton Terrace and Chesterfield Hill.

        6.2 The Directors will as soon as practicable after the completion of the redevelopment, place both Hamilton Terrace and Chesterfield Hill on the open market for sale and will use their reasonable endeavours to effect a Completion at the best available open market price.

> 6.3 Upon the sale of the redeveloped Hamilton Terrace and Chesterfield Hill, the full loan amount shall be redeemed to the Lender by the Borrower plus an additional 30% of the Net Profit.
>
> For the purposes of this clause, Net Profit shall mean the total sale price of both Hamilton Terrace and Chesterfield Hill less mortgage and debt repayment, mortgage and debt interest and all expenses relating to the development of the properties and the subsequent sales of the properties. Expenses are to include architects, marketing, construction, management, legal and professional fees, accounting, taxes and any other directly related costs."

5. The loan was to be paid in two tranches of £5 million which were duly paid over in 2012.

6. At the time the loan agreement was entered into, Hamilton Terrace had been valued at £14.5 million and had borrowing secured against it of £9 million. Chesterfield Hill had been valued at £18 million and had borrowing secured against it of £7.5 million. The value of each property, and the current borrowing at the time of the loan, were stated in recitals to the loan agreement. Although it is not stated in the loan agreement, the expectation was that the market value upon completion of the redevelopments would be considerably in excess of the 2012 valuations.

7. The simple manner in which the loan agreement is drafted is surprising given the size of the loan and the fact that it was intended to be used in connection with the redevelopment of prime real estate in London. It is apparent, however, that the loan was not ordinary secured lending and the agreement has some of the features of a joint venture. In particular, the loan was interest free and, instead of interest, Brustorm was entitled to participate in the fruits of the two redevelopments by receiving 30% of the net profit (as it is defined).

8. Hamilton Terrace was sold by Arklow on 17 April 2015. The claimants say that the circumstances of the sale were such that Letraz was in breach of the loan agreement. However, that is not an issue that arises directly in this application.

9. Despite the apparently clear and unequivocal terms of clause 3.1, second charges in favour of Brustorm were never executed. In February 2016, nearly four years after the loan agreement was entered into, an enquiry was made on behalf of Brustorm, in connection with a proposed restructuring asking whether the charge mentioned in clause 3.1 of the loan agreement had ever been registered over the title to Chesterfield Hill. The answer given was: "The charge has not been registered". In fact, no charge had been executed and the position remains that lending made seven years ago has only the limited security provided by a unilateral notice registered against the title to Chesterfield Hill. The claimants' case is that they were unaware of the absence of a registered charge until 2016.

10. Brustorm merged into the second claimant in 2018 and the second claimant became the party with such rights as may arise under the loan agreement. On 11 August 2018 the second claimant assigned its rights to the first claimant. For the purposes of this judgment, it is unnecessary to distinguish between them.

11. The only other background facts that are relevant concern the primary funding obtained by Mercantile. At the time the loan agreement between Brustorm and Letraz was entered into, Mercantile had a facility with Lloyds TSB Bank plc under which it could borrow up to £23 million. The facility was secured by a Debenture and by a number of charges.

12. At the end of July 2012, Mercantile refinanced its borrowing in relation to Hamilton Terrace and Arklow, the registered proprietor of Hamilton Terrace, obtained a facility from EFG Private Bank (Channel Islands) Limited with Lloyds TSB releasing Hamilton Terrace from its Debenture.

13. In August 2014, EFG granted Arbomo a loan facility of £6.5 million. A legal charge was executed by Arbomo dated 11 December 2014. A restriction was registered against the title on 5 January 2015 under which no disposition of the registered estate could be registered without EFG's written consent.

The claim

14. The claim was issued in July 2018. The principal relief sought by the claimants is:

    (1) Specific performance of Letraz's obligation under clause 3.1 of the loan agreement to procure the execution of a registrable second charge by the second defendant over Chesterfield Hill.

    (2) An injunction to restrain Letraz from taking any steps that might undermine the second defendant's ability to produce a registrable second charge.

    (3) An account of net profit in relation to Hamilton Terrace.

15. The particulars of claim plead a number of provisions that are said to arise on a true interpretation of the loan agreement or are to be implied into it including:

    (1) The borrower is to be provided with full and proper information relating to the development of the properties and interim and final accounts;

    (2) The borrower is to be provided with full and proper information and security before either property is sold.

    (3) The loan is not to be utilised until second charges over the respective properties have been provided.

    (4) The borrower is obliged not to do anything whereby the borrower or the registered proprietor is disabled from giving or procuring that the Lender is given a second charge.

16. On 24 September 2018 a full defence was served on behalf of all the defendants. The defence was settled by leading and junior counsel. Neither Mr Kenny QC nor Mr Dunn-Walsh, who appeared at the hearing before me, were involved at that stage. It is not unfair to characterise the position adopted by the defendants as taking every point open to them and, in addition, points which on more mature reflection have proved to be untenable and should never have been pleaded. The defence maintains the defendants' position that the claimants are not entitled to a second charge or,

alternatively, that the charge did not extend to the profit share. They denied that the claimants were entitled to an account of net profit in relation to Hamilton Terrace or to information about the redevelopment of Chesterfield Hill. The defendants went on to say that by virtue of a promissory estoppel, the claimants are prevented from alleging a breach of the loan agreement based on a failure to provide a registrable charge. Surprisingly, the defendants put forward no pleaded case about the relief sought by the claimants. They merely denied that the claimants were entitled to the relief sought. No case was made that specific performance should not be granted in view of the intervention of a subsequent lender's rights or because of laches or acquiescence.

The application

17. The claimants' application was issued on 24 January 2019 supported by a witness statement from Stephen Surgeoner, a partner at Dechert LLP. The application seeks judgment in three respects:

    (1) Specific performance of the loan agreement by the execution of a registrable second charge over Chesterfield Hill: "the Charge Claim".

    (2) An injunction ancillary to the order for specific performance to prevent the second defendant being disabled from granting a second charge until it has been registered: "the Injunction Claim".

    (3) Specific performance of the obligation to provide information to the claimants and orders for the taking of accounts: "the Information Claim".

18. An order was made on 22 May 2019 requiring Letraz to serve its evidence in reply to the application by 4pm on 7 June 2019. No evidence was served by that date and on 15 June 2019 an order was made requiring Letraz to serve its evidence by 19 June 2019, or in default it would be barred from relying on evidence in reply.

19. On the last possible day, a witness statement made by Marc Livingston, a solicitor with Waller Pollins Goldstein was served. Before summarising the relevant parts of his evidence, I would say something about the form of the evidence. As a general rule, it is desirable where a party faces an application for summary judgment for evidence to be given by a witness who has first-hand knowledge of the events for the obvious reason that such evidence is likely to carry greater weight than evidence based on instructions. It may, however, be convenient in some cases for evidence to be provided by the party's solicitor based on instructions. There may also be tactical considerations in play in making a choice between the two options. Mr Livingston was chosen as the mouthpiece for the first defendant and he sets out in his statement the usual rubric saying that the facts contained in the statement are within his own knowledge unless he states otherwise and where facts are not within his knowledge he has identified his sources of information and belief. The CPR permits secondary evidence to be given provided that the requirements of Practice Direction 32 paragraph 18.2 are complied with. This is an important requirement. However, the maker of a statement must not only provide the usual rubric but also meticulously comply with its requirements. The court must in every instance know from what source the secondary evidence comes. There are, unfortunately, numerous examples in the statement of Mr Livingston making assertions of fact about matters that he

could not possibly know about without stating the source of his information. He goes further and ventures opinions about the state of the property market and about the normal terms of lending. If a party chooses in response to an application for summary judgment, or indeed any application, to provide evidence through a solicitor, strict compliance with the CPR is required if that party is to avoid the risk that limited, or possibly no, weight is given to the evidence.

20. The point is of importance in every case. It is however of particular importance in this case because Mr Livingston's statement has been used by the defendants to abandon their central defence based on promissory estoppel. Mr Kenny said at the hearing that, despite the defence having been settled by leading and junior counsel, the first defendant had been advised that the defence of promissory estoppel was legally unsustainable. Such candour was welcome, if surprising. It has left the first defendant's position very unclear because Mr Livingston set out grounds to oppose the application that are not pleaded. No suggestion was made in the statement that the defence would require amendment, and no attempt to amend the defence was made until half-way through the hearing at the point at which Mr Grant was closing the claimants' case. When the draft amended case was revealed, it transpired that the first defendant wished to rely on defences that had neither been forecast in Mr Livingston' witness statement nor in Mr Kenny's skeleton argument. Mr Kenny made an oral application for permission to amend the defence. I will return to that application later in this judgment.

21. The approach adopted by the first defendant at the hearing bore little relationship to that adopted in the defence. The first defendant accepted that the claimants were entitled to a charge and were entitled to information about the Chesterfield Hill redevelopment. As to the latter point, there is a narrow difference between the parties as to scope of the information that must be provided. The substance of the defence was based upon three points. First, that the court should not, in the exercise of its discretion, make an order for specific performance of the obligation to grant a charge. Secondly, that if an order is made, it should not have the effect of limiting the amount of the first charge to £7.5 million. Thirdly, that there was no obligation to provide a charge that was capable of being registered.

22. Mr Livingston's statement sets out a number of matters upon which the first defendant relies and at the end of his statement he provides the defendants' response to the application for judgment. His evidence can be summarised as follows:

    (1) Pursuant to the debenture the third defendant and the wholly owned SPVs, which were the registered proprietors of Hamilton Terrace and Chesterfield Hill, charged the properties for "all monies and liabilities" owed by the third defendant to Lloyds.

    (2) The third defendant covenanted (clause 5.1(b)) not to create or permit to subsist any charge over its properties, including Hamilton Terrace and Chesterfield Hill.

    (3) Mr Livingston expresses the opinion, supported by his clients' opinion, that these sorts of stipulations are common "possibly even universal" and the reason for the covenant against creating further charges is that a second charge "can make the realisation of the lender's security more risky,

expensive or protracted". No proper evidential basis for these opinions is provided.

(4) In 2012, the third defendant was in the process of negotiating a new facility with EFG Private Bank (Channel Islands) Limited ("EFG").

(5) The loan agreement between Brustorm and Letraz was the culmination of several months of negotiations. Mr Roland Nuber conducted due diligence on behalf of Brustorm and Mr Mussa, who is the fourth defendant, instructs Mr Livingston that Mr Nuber was shown anything he asked to see. Mr Livingston then continues (in a sentence that was described by Mr Grant as being at "the outer limits of exiguousness"): "Brustorm would therefore have known about and presumably saw copies of the Lloyds Facility and the Lloyds Debenture".

(6) Subsequent to the loan agreement between Brustorm and Letraz, at the end of July 2012, a facility was agreed with EFG concerning Hamilton Terrace and representatives of Brustorm were told that EFG would not approve a second charge over Hamilton Terrace.

(7) In August 2014 a financing agreement was agreed by the third defendant and EFG in relation to Chesterfield Hill under which EFG granted a loan facility of £6.5 million. It is not suggested that Brustorm was aware of this charge or its terms. The charge prohibits the creation of any encumbrance without the written consent of EFG.

(8) In about April 2016, consent to grant and register a second charge on Chesterfield Hill was sought from EFG. Consent was refused on the basis that permitting a second charge "… would fundamentally change the credit risk of the deal from the bank's perspective…".

23. The first defendant's response to the application for judgment set out in Mr Livingston's statement deals with each of the three aspects of the application in turn. As to the Charge Claim, it is said that the second defendant, Arbomo, is prohibited from granting a second charge without EFG's consent and that the charge is an all monies charge. Mr Livingston goes on to provide, without stating the source of his knowledge, his opinion about the state of the property market. It would not be right to have any regard to it, even if it furthered the first defendant's case, which it does not.

24. Mr Livingston then makes a case concerning the claimants' requirement that the EFG charge can only secure £7.5 million, or no sums other than sums related to the redevelopment of Chesterfield Hill. He disputes that the loan agreement includes such a requirement and says that since a first charge generally contains an 'all monies' term, and the Lloyds Debenture includes such a term, the parties cannot have implicitly understood or intended that the first charge would be so limited. Letraz has offered to provide, with EFG's agreement, a second charge on condition that the claimants sign a deed of priority covering the full £15.335 million facility, which Letraz alleges it has arranged with EFG, with an allowance for interest, costs and overruns.

25. As to the Injunction claim, Letraz has offered an undertaking in similar terms to the injunction that is sought.

26. As to the Information Claim, Letraz accepts that the claimant should have reasonable access to such documents and information as it reasonably requires in order to exercise its right of oversight of the redevelopment of Chesterfield Hill. Letraz denies that the claimants are entitled to an order for an account in respect of either property on the basis that 'net profit' falls to be ascertained only when both properties have been sold.

27. The draft amendment to the defence put forward during the course of the hearing seeks to add two paragraphs to the defence, First, the defendants wish to plead that it would be inequitable to grant specific performance because of (a) the intervention of EFG's rights under EFG's charge dated 11 December 2014; (b) the claimants' laches and (c) the claimants' acquiescence in the execution of that charge. None of these grounds was referred to in Mr Livingston's statement (or in the defence). Secondly, if the claimants are seeking an order that the defendants should procure that the registration of that charge is not prevented by a restriction on the register by EFG, such an order should not be made because (a) the loan agreement does not require the same and (b) it is impossible because the right to maintain or withdraw the restriction belongs to EFG and the Defendants are not currently able to redeem the EFG charge.

28. It is in my judgment helpful to distinguish applications for permission to amend that are made in the context of an application to strike out a claim from an application for summary judgment. In the case of the former, where the focus is principally on the statement of case, it is not uncommon for the respondent to be given an opportunity to correct defects in the pleading after the hearing. That is because in some cases, the application has highlighted weaknesses in the way in which the claim is pleaded but the court is not satisfied that the claim is bound to fail. The respondent is given an opportunity to produce a statement of case that, as a pleaded claim, might prosper. This is a manifestation of the exercise of the court's discretion when considering whether to strike out a claim. By contrast, on the hearing of an application for summary judgment, although the court has an overall discretion, it is difficult to conceive of circumstances in which the court is satisfied that the applicant has proved its case on both limbs of Part 24.2 but the court, nevertheless, considers judgment should not be entered. On the hearing of an application for summary judgment, it is incumbent on the respondent to put forward its best case and, if the statement of case does not reflect the basis upon which the defendant says it has a real prospect of defending the claim, an application must be made for permission to amend the defence which should be listed for hearing with the application for summary judgment. The hearing of an application under Part 24 may not be the trial of the claim. It is, however, an analogue for a trial for the purposes of applying the principles concerning amendment.

29. Generally, the question of lateness is approached by reference to the trial date, and a very late amendment is one which will cause the trial date to be lost. The notion of lateness is, however, a flexible one. As Briggs LJ put in *Hague Plant Ltd v Hague* [2014] EWHC 1609 at [33]: "Lateness is not an absolute but a relative concept". It seems to me that an application to amend a defence that is made part way through the hearing of an application for summary judgment is properly regarded as a 'very late' application. The approach the court should adopt in relation to late and very late applications to amend statements of case is well known and it is discussed in detail at

paragraphs 17.3.7 and 17.3.8 of Civil Procedure 2019. It is unnecessary to set out the relevant passages in this judgment.

30. The fact that the defendants' case had undergone a radical change and required re-pleading would have been obvious to the defendants' advisors, at the latest, upon service of Mr Livingston's evidence on 19 June 2019, some three weeks before the hearing. The defendants' advisors had second thoughts after service of Mr Livingston's statement about their case because the amendment seeks to rely on grounds for refusing to grant an order for specific performance that were not raised in Mr Livingston's evidence or in Mr Kenny's skeleton argument.

31. Mr Grant's skeleton argument necessarily deals with the defendants' attempt to raise allegations that had not been pleaded. It would have been obvious to Mr Kenny and his junior that they were being asked to put forward a case that had not been pleaded. In those circumstances, is very surprising that the draft amended defence was produced immediately after the short adjournment at a point when Mr Grant had only a few minutes left of his submissions. Mr Grant, having received the draft amendment at court shortly before the hearing resumed had no opportunity to take instructions or consider it.

32. No explanation was provided for the defendants' extraordinary behaviour. They have had a great deal of time in which to consider their case due to an unusually lengthy period between issue of the application and the hearing. On 16 January 2019, Waller Pollins Goldstein suggested in a letter to Dechert LLP that the defendants were likely to wish to amend their defence. On 24 January 2019, Dechert LLP asked for the draft amendments to be provided by return. They were told on 6 February 2019 by Waller Pollins Goldstein that the amendments would be provided when they were available. That was five months before the hearing.

33. It is clear that the defendants have struggled to find a coherent basis upon which to oppose the application for judgment. It is troubling that a defence was served, with a statement of truth, based primarily on the existence of a promissory estoppel, a plea that has now been abandoned as being untenable. Mr Kenny submitted that the defendants cannot be criticised for signing a statement of truth about the facts pleaded in the defence when the legal conclusions to be drawn from those facts are abandoned. Whilst there is some force in that submission, it remains of concern that not only have the defendants abandoned the majority of their pleaded case but also the majority of the case set out in Mr Livingston's witness statement; a statement that was served only after an 'unless' order had been made.

34. In my judgment it would be wrong to grant permission to the defendants to amend the defence based on the draft provided part way through the hearing. No explanation was provided for its lateness and it was obviously highly prejudicial for the claimants to be required to deal with a case that took them by surprise. The defendants' informal application to amend is dismissed. This leaves the first defendant with limited ability to oppose the grant of relief on the charge claim. I will, however, deal with the submissions put forward by Mr Kenny other than those that arise from the draft amended defence.

35. I turn to deal with the three elements of the application.

The Charge claim

36. The defendants now accept that the loan agreement created a valid contractual obligation requiring Letraz to provide a charge securing the loan of £10 million and the claimants' share of the net profit. They take issue with the terms of the loan and the claim for an order for specific performance. Although the defendants' pleaded case merely denies the entitlement to the relief sought, the claimants must show they are entitled to grant of specific performance in the terms that are sought and demonstrate that the court should exercise its discretion to make the order.

37. Mr Kenny submits on behalf of Letraz that:

    (1) It would be wrong for the court to make an order for specific performance in the circumstances despite there being an enforceable contractual obligation.

    (2) There should be no requirement that first charge is limited to a sum not exceeding £7.5 million.

    (3) There should not be a requirement that the charge is in a form that is capable of being registered at HM Land Registry.

38. I take as a starting point the well-established principle that is summarised in Fisher and Lightwood's Law of Mortgage at paragraph 1.21:

    "Specific performance of an enforceable contract to give security will be ordered where the loan has actually been made or the debt or other obligation incurred, because a mere claim to damages or repayment is obviously less valuable than a security in the event of the debtor's insolvency."

39. The claimants rely on a further principle that is described in Specific Performance 2nd ed by Jones and Goodhart, citing the decision of Peter Gibson J in *Harvela Investments Ltd v Royal Trust Company of Canada (CI) Ltd* [1985] 1 Ch 103 at 122F, that the court will not order specific performance if the order would compel the defendant to commit a breach of a prior agreement with a third party. The decision in *Harvela* at first instance was overturned on appeal but the aspect of his decision that deals with the effect of a prior contractual obligation did not arise on the appeal.

40. The court in *Harvela* was faced with two claims to an order for specific performance arising under two separate contracts for the purchase of shares, one being made immediately after the other. Mr Kenny rightly observes that Peter Gibson J does not provide any reasoning for deciding on the facts before him that the court would not make an order for specific performance of the later contract because that would necessitate the claimant being placed in breach of a prior contract. Mr Kenny submits that it is not possible to extrapolate from the decision a principle that the court will never grant specific performance if it will place the defendant in breach of a contract made after the contract that the claimant seeks to enforce.

41. Mr Kenny referred to the decision of the Court of Appeal in *Warmington v Miller* [1973] QB 887 where Stamp LJ at p.886 said:

> "I can see nothing in this case to take it outside the practice of the court, in determining whether to exercise its discretionary power to grant the equitable remedy of specific performance, not to do so where the result would necessitate a breach by the defendant of a contract with a third party or would compel the defendant to do that which he is not lawfully competent to do: see *Fry's Specific Performance* , 6th ed. (1921), p194 and *Willmott v Barber* (1880) 15 Ch.D 96 per Fry J. at p.107."

42. In *Warmington v Miller*, the claimant sought to establish that an agreement had been made to grant an underlease. Although the findings of the judge at first instance supported the existence of an underlease, an order for specific performance was refused because the head-lessee would have been placed in breach of the head lease which contained a covenant against sub-letting. The decision is therefore an example of the court refusing to grant specific performance due to the provisions of a prior contract and is therefore consistent with the decision in *Harvela*. Support for this view can be obtained from the fact that Stamp LJ refers to the decision of Fry J. in *Willmott v Barber* which is another case in which there was a prior obligation not to assign a lease without consent.

43. There is to my mind an obvious distinction between a contract entered into by a defendant prior to the obligation that the claimant seeks to enforce and one entered into subsequently. As a general proposition, the court should respect the hierarchy of obligations that have been created; and the hierarchy will almost invariably, in the absence of clear wording to the contrary, arise from the order in which the obligations were created, particularly where interests in land are created by the respective obligations. If there is a wish to alter the natural hierarchy, terms will have to be agreed between all the interested parties.

44. There is nevertheless some risk in applying principles as if they are hard and fast rules. Specific performance is a discretionary remedy and the court is required in each case to consider all the circumstances before deciding whether to grant or refuse an order. For example, the court may refuse an order for specific performance in a case of great hardship – see Snell's Equity 32nd ed. at 17-045. The cases referred to in that passage are a useful reminder about how general principles have exceptions.

45. In light of the refusal to grant permission to amend, it is not open to the defendants to rely on the allegations of laches and/or acquiescence.

46. Nor is it open to the defendants to rely on Brustorm having knowledge of the intervention of the EFG charge dated 11 December 2014. But in any event, there is no evidence before the court about Brustorm's knowledge of the EFG 2014 charge over Chesterfield Hill. Mr Livingston says that persons associated with Brustorm were told about EFG's loan in 2012 that was charged over Hamilton Terrace. He does not make a similar assertion about the EFG loan made in 2014 that was secured over Chesterfield Hill.

47. It is right to acknowledge there is an evidential deficit on the part of the claimants. They have not provided any explanation for their failure to take steps to ensure that Brustorm's contractual right to a charge was secured. Even in the absence of a plea of laches or acquiescence the court is entitled to place Brustorm's curious behaviour in the factual mix when considering the grant of discretionary relief. However, it carries

little or no weight when put against the contractual obligations and the fact that the loan was made.

48. Looking at the position overall, it seems to me that the claimants have made out a compelling case for the grant of specific performance. It would be deeply unattractive if the claimants were to be deprived of an effective remedy for breach of the first defendant's obligations. When Letraz caused Arbomo to make arrangements in 2014 with EFG, it knew of its prior contractual obligation with Brustorm and that it had done nothing to provide a charge. It is possible to infer that EFG was not told about the 2012 loan agreement and it is plain that had EFG been made aware of the loan agreement made in 2012 made with Brustorm, and the obligation to provide security, the facility agreed by EFG would not have gone ahead without an agreement about priorities.

49. I do not accept Mr Kenny's submissions about the authorities. I conclude that:

    (1) There is no general principle that affects the exercise of the court's discretion in the case of obligations entered into after the contract the claimant seeks to enforce. To conclude otherwise would mean that a contracting party could, with impunity, enter into a subsequent contract and deprive the claimant of the value of the promises made to it.

    (2) The court will lean in favour of granting specific performance where a lender has a contractual entitlement to security and there is nothing in this case that re-balances the equities in favour of the defendants.

50. Mr Livingston's witness statement takes a different point where he suggests that the court will not order specific performance of an obligation that the defendant does not have the power to perform[1]. The point has not been pleaded but it is in any event a bad one. The fact that an order would place a defendant in breach of a separate contract, whether made prior to or after the court order does not mean that the defendant necessarily lacks the power to comply with the order. A simple example of this can be seen in *Warmington v Miller*. If the court had in the exercise of its discretion decided to make an order for specific performance, the defendant would have had power to grant the sub-lease. A covenant against alienation does not remove the tenant's power to alienate the leasehold estate.[2]

51. The second issue in relation to the Charge claim is whether the court should require the first defendant to procure that the amount secured by the first charge does not exceed £7.5 million. The point is largely academic because the current borrowing secured under the first charge on Chesterfield Hill is in the region of £5.6 million and EFG will not lend further monies while the claimants have a notice registered against the title.

52. There is a short point of construction that is raised in the claim and it is appropriate that it is dealt with. Clause 3.1 merely states that Brustorm was to be given a second charge on both properties. Nothing is said in terms that restrict the amount of lending secured under the first charge as a matter of contractual obligation. However, a recital

[1] See Chitty on Contracts 33rd ed 27-047 and *Watts v Spence* [1976] Ch 165.
[2] See *Sanctuary Housing Association v Baker* [1998] 1 EGLR 42, CA at 43-44.

to the loan agreement stated both the current value of each property and the current borrowing charged on each property. In the case of Chesterfield Hill, it was valued at £18 million and the amount borrowed against the property was £7.5 million. Given that £10 million was being loaned, it is clear that the parties intended valuable security was to be provided. Without a limit on the first charge, the security to be provided by the second charge was capable of being eroded at Letraz's will. That cannot have been the intended effect of the loan agreement.

53. Had the charge been granted when the loan agreement was entered into, notice would have been served under section 49 of the Land Registration Act 2002 ("LRA 2002") which would have prevented Letraz from securing more than £7.5 million under the first charge. If the court makes an order for specific performance and this leads to a second charge being granted, the provisions in section 49 LRA 2002 relating to 'tacking and further advances' will operate. The claimants will give notice to EFG of the second charge which will prevent further advances under the first charge taking priority. Given the current level of debt secured against Chesterfield Hill under the first charge, the effect of section 49 LRA 2002 will reflect what the position should have been had the charge been granted in 2012 in accordance with the loan agreement.

54. The third element of the Charge claim concerns whether Letraz can be required to provide a charge that is capable of registration against the title of Chesterfield. The difficulty that arises for Letraz, so it is said, is that EFG has a restriction registered against the title and the court cannot order that Letraz procures the restriction to be removed. That, however, is not what is sought by the claimants.

55. The starting point, again, is a short point of construction. Clause 3.1 of the loan agreement does not say that the second charge should be capable of being registered; but this is a clear example of the need for registration being so obvious that it did not need to be stated in the agreement. Plainly Brustorm expected to obtain a charge that would provide valuable security for its loan and registration was an essential element of this security. In reaching this conclusion it is unnecessary to rely on the heading to clause 3.1 - "Registered Charge" - for the purposes of this issue of construction, although it must be said that in this instance the heading is a proper aid to construction and reinforces the conclusion I have reached.

56. The court will not make an order for specific performance where it is impossible for the defendant to comply with it. At present, it is said on behalf of the defendants that "as a favour" EFG has agreed to registration of a second charge provided the claimants execute a deed of postponement which gives EFG security up to £15.53 million ahead of the claimants. Unsurprisingly, this offer has been rejected by the claimants.

57. The evidence provided by Mr Livingston about EFG's position is limited to stating what EFG will do, or not do, under the current contractual arrangements. Even on its own terms, the evidence is very limited. There is no sense of the defendants having tried to persuade EFG to amend its facility in order to enable the claimants' second charge to be registered.

58. At paragraph 66 of his witness statement, Mr Livingston says that "in theory" Arbomo could discharge the EFG loan secured on Chesterfield Hill and borrow

money elsewhere. He then goes on, without describing the source of this evidence, to explain why this would be impossible by reference to a number of points, including the property market having been chilled by Brexit. It would not be right to have any regard to this evidence which is entirely unsupported opinion evidence from a person who has no relevant expertise in the subject.

59. I consider that the court should make an order for specific performance in the terms that are sought. Letraz has not provided evidence that it will be impossible for it to comply with the court's order. Evidence of impossibility needs to be both cogent and unequivocal. The evidence here does not meet either of these criteria. It is open to Letraz and Arbomo to agree terms that will permit the registration of a second charge, with the borrowing under the first charge limited to £7.5 million or to make fresh arrangements with an alternative lender.

Injunction claim

60. This element of the application has the limited objective of ensuring that no steps are taken in the future by Letraz and Arbomo that would prevent a charge being granted. The claimants have to show that they have a reasonable fear of such steps being taken and that the grant of an injunction is reasonably required.

61. It seems to me that there is ample material to support the claimant's concerns and the need for an injunction. It is only necessary to instance:

    (1) The failure to grant charges when required to do so under the loan agreement coupled with the development and sale of Hamilton Terrace without reference to Brustorm and/or the claimants.

    (2) The 'stop at nothing' approach adopted by the defendants both before and in this litigation. Having put every conceivable point in issue, with only minor concessions in the defence, they have resiled from the substance of their pleaded defence, put forward an alternative series of defences in Mr Livingston's witness statement and then sought to rely on further defences that were not notified to the claimants until halfway through the hearing. This demonstrates an entirely cynical attitude to the contractual obligations under the loan agreement.

62. In my judgment it is right for the court to provide additional protection to the claimants in the form of the injunctive relief they seek as an aid to ensuring that the order for specific performance is complied with. The court will accept an undertaking in lieu of an injunction.

Information claim

63. There are two elements to this aspect of the claim. First, the claimants seek information about the development works at Chesterfield Hill by the provision of a witness statement and relevant documents. Secondly, the claimants seek an order for the taking of accounts of the net profit, as it is defined in the loan agreement in respect of both Hamilton Terrace and Chesterfield Hill. It is convenient to take these two elements in that order.

64. The position adopted by Letraz in its defence is a surprising one. Its primary case is that the claimants are not entitled to information about the development at Chesterfield Hill until after its sale. In the alternative, it is said that the limited information that has been supplied is sufficient. The defence pleads facts at length seeking to demonstrate that Brustorm had shown little interest in the Hamilton Terrace development. It seems to me, however, that this is beside the point without a plea (which is absent) of acquiescence. Brustorm's failure to take up its contractual rights, if that were the case, says nothing about what those rights were. In any event, a somewhat more realistic approach emerged from Mr Livingston's statement with an acceptance that the claimants were entitled to information and documents that are necessary for the right of oversight to be exercised.

65. The request for information arises from clause 6.1 of the loan agreement: (see paragraph 3 above). Under that clause, two related matters are dealt with. First, Mr Mussa and Mr Hillier ("the Directors") were to be appointed as directors of Letraz. This was clearly to ensure that Letraz had the benefit of their expertise in property development. Secondly, the clause deals with overseeing the redevelopment of the two properties. The Directors are required to oversee the redevelopment "together with" Brustorm. A sense of hierarchy between the named Directors and Brustorm emerges from the drafting. Mr Mussa and Mr Hillier were the key persons to be undertaking the redevelopment. By contrast, Brustorm as a corporate entity is appointed as an overseeing party. No indication is given about by whom Brustorm will act during the course of the works.

66. This sense of hierarchy is reinforced by the drafting in clause 6.2 which concerns the obligation to sell the properties and to obtain the best available open market price. This obligation is placed solely on the Directors. It seems to me that the Directors have a role that is more obviously an executive role than that of Brustorm which is limited to oversight.

67. Even if this construction of Brustorm's role is too restrictive, there is a substantial difference between overseeing a development and managing one. It is quite unnecessary for the purposes of oversight to see all the documents. It seems to me the best analogue is that of a non-executive director who will wish to see reports summarising the work that is being, or is to be, undertaken.

68. This approach to the proper construction of clause 6.1 has some impact on the extent to which Letraz is required to provide information to the claimants, an obligation that is not now disputed by the defendants. An undertaking to the court is offered by the defendants. The claimants formulate the obligation in terms of the provision of "full and proper" information; Letraz says it is limited to information that is reasonably necessary for the purposes of oversight. The practical difference between these two formulations is slight. However, I accept the latter formulation as being closer to the spirit of the loan agreement. "Full and proper" is both tautological and imprecise and was clearly designed as a platform from which to make very wide-ranging requests.

69. The parties have prepared a Scott Schedule with four columns: (1) the claimants' requests; (2) Letraz's response; (3) the claimants' reply and (4) Letraz's reply. Letraz has agreed to supply the information at numbers 2, 3, 12, 15, 22 and 23 in the schedule. The claimants will therefore receive details of planning and other consents, offers to purchase the property, documents containing advice and reports relating to

the redevelopment (other than privileged advice) and details of sums currently charged and to be charged on the property.

70. The claimants have sought some information to be provided in the form of a witness statement and some by way of the provision of documents. This appears to me to be an unhelpful approach because it is inevitable that a summary in a witness statement referring to documents will lead to a request for the documents to be provided under paragraph 21 of Practice Direction 51U, or possibly even to a request for examination of the witness. The better approach is to require information to be supplied by the provision of documents.

71. Like any similar project, the redevelopment of Chesterfield Hill is a complex affair with many strands. Inevitably it will have led to vast amounts of data being created. The claimants have made requests that are drafted in an extravagant style that is typical of requests of this type. In the attempt to leave no brick unturned, the requests have become diffuse and with much use of "all", "any" and "full" "without limitation" and so on. This has led to requests which in some instances are simply absurd, such as the request for all documents "which relate to the redevelopment or sale of the property" and all documents that are "communications in relation to the development".

72. It is obvious that there is an irreducible minimum amount of information to which the claimants are entitled and in view of the refusal to provide any information to date, the volume of information which must now be supplied will be substantial. It is important to distinguish, however, between the level of detail that is needed for oversight of the project and that which may be needed if there are grounds for challenging the account that is provided by Letraz. The claimants will need to know about the building contract that has been let and the professional team that has been engaged to run it. In order to manage a complex development project such as this one, Letraz will have ensured that much of the detail is summarised in management reports. There will be a programme of works that is adjusted where necessary as to actual and anticipated progress towards completion. Quantity Surveyors will be reporting on the cost of works as they proceed; and there will be other documents such as the cost of the banking facilities and interest and marketing advice and projections. These are surely the key documents that the claimants need to see.

73. Although I would not encourage an iterative approach to the requests for information, it is obvious that information will be created as the project proceeds. The claimants must be entitled to see copies of reports from the professional team and amendments to the programme as they are produced. By contrast, it is difficult to conceive that all the detailing of the design and finishes, and so on, is of genuine interest to the claimants. Indeed, until it is clear on what basis the property will be sold, requests for such detail are made without knowing whether any documents are likely to exist. It may be the case, however, that in light of the production of information pursuant to an order by the court, there will be some obvious gaps that ought to be filled to ensure that the claimants have an adequate degree of knowledge about both the works undertaken and to be undertaken. I would not encourage such additional applications under a permission to apply provision unless the supply of additional information is really essential.

74. I will comment briefly on items in the Scott Schedule other than item 1 (where I have already provided observations) and those that are agreed:

> 4 to 11, 13, 15, 20 and 21: The offers made by Letraz appear to me to be reasonable. I assume that "progress reports" in item 4 includes the contract programme as it develops but if I am wrong the programme should be supplied. In item 8, Letraz should supply the current and expected redevelopment schedule. In item 20, I assume "principal contractors" includes the professional team.
>
> 14, 16 and 18 are too broad and do not appear to add anything that is material.
>
> 17. If the request is limited to sale and excludes redevelopment it is reasonable.
>
> 19. If the request is limited to documents about marketing the property it is reasonable.

75. I expect the parties, in light of the guidance I have provided, to agree the terms of an order. If they are not able to do so, I will hear brief submissions at a consequentials hearing in relation to each disputed area.

76. I turn to the claim for orders for accounts. Different considerations apply to the two properties. Whereas Hamilton Terrace has been redeveloped and sold, the Chesterfield Hill works are ongoing and will not be completed for some months. The Defendants oppose the making of an order for both accounts.

77. The obligation is set out in paragraph 6.3 of the loan agreement (see paragraph 3 above). It is not in doubt that the agreement necessitates the carrying out of a detailed calculation in order to establish what is the net profit, as it is defined. Issue is taken by the defendants about when the calculation should be carried out. They say, relying on their construction of clause 6.3, that:

> (1) The obligation to pay Net Profit only arises "upon the sale of the redeveloped Hamilton Terrace and Chesterfield Hill" meaning the sale of both properties. They say there is no intermediate obligation to calculate Net Profit at the point when the first redevelopment is completed.
>
> (2) The word "redeem" where it is used in relation to repayment of the loan speaks of the date of sale of the properties.
>
> (3) Net Profit is defined by reference to the total sale price of both properties. Thus, it cannot be calculated until both have been sold.
>
> (4) They point to clause 6.3 of the particulars of claim in which the claimants say, as part of a term to be implied, that Letraz should provide security before either property is sold in order to obtain a release of the charge. This appears to concede that an account cannot be concluded before the redeveloped properties are sold.

78. The contrary submissions rely on a common-sense approach to the construction of the obligation. It is submitted that there is no logical reason why the process of calculating net profit should only start upon the second sale and furthermore, if there

is an obligation to pay upon the sale, the calculation of net profit must have been started previously.

79. The loan agreement provides no clue about the machinery that is to be used to calculate net profit. It is clear to me, however, that the obligation to provide information, which has been accepted by the defendants in relation to Chesterfield Hill, is closely linked with calculating net profit.

80. The nature of an account will vary in accordance with the context. An account of profits will differ from an account by trustees to beneficiaries and the machinery for preparing the account, and the form of the account, will vary too. But, in essence, an account is the provision of information, often financial information, that has been prepared in a suitable format. In some cases, but not all, the account involves the reduction of large amounts of data to a comprehensible format that is the fruit of a number of calculations that underlie the formal account. It is usually the case that the corollary to an order for the production of an account is an order for disclosure of some, possibly all, of the documents that have led to the accounts. But that will depend on the nature of the accounting obligation.

81. In this case, the court is required to make sense of a provision in a business agreement that relates to two complex developments. A developer does not wait until the last element of the development has been sold before calculating the profit; and there is no reason to suppose Brustorm and Letraz intended to approach matters differently. Had Letraz complied with its obligation to provide the claimants with documents that were reasonably necessary for oversight when Hamilton Terrace was redeveloped, those documents would have gone a very considerable way towards providing an account of net profits. The only differences of substance between the provision of information for oversight and the provision of an account are that (i) the account provides a summary of the information in a readily comprehensible format and (ii) the summary seeks to draw conclusions from the information on a date. The claimants would have been in receipt of documents showing the cost of the redevelopment and income derived from sale. Indeed, it seems inconceivable to me that Letraz will not have carried out, for its own benefit, a calculation of the net profit derived from the redevelopment of Hamilton Terrace some time ago.

82. I am unable to accept the defendants' construction of clause 6.3 as it relates to Hamilton Terrace for three reasons. First, it conflates the notions of calculation and payment: although one follows on from the other, the process of calculation will be time consuming whereas payment after the calculation can be undertaken speedily. Secondly, the clause must be read in light of the obligation to provide information, an obligation that is now accepted. Thirdly, given that the clause is silent about the machinery for calculating net profit, it is permissible for the court to proceed on the basis that the parties must have intended a common-sense approach to prevail. Leaving the accounting process to the moment when the second redevelopment is sold, which may be some time after the building work has been completed, flies in the face of common sense.

83. I consider that, properly construed, the loan agreement requires Letraz to provide the claimants with a calculation of the net profit for Hamilton Terrace together with documents to support the calculation. The claimants are entitled to sufficient documents in the first instance to enable them to understand how net profit has been

calculated. It is not a requirement that Letraz must supply every document that forms part of the calculation. If it transpires that the account is disputed, further disclosure of documents may be required.

84. Letraz's obligation to account in this way arose not later than the sale of Hamilton Terrace. I find it hard to see the refusal to provide an account of the net profit as being anything other than cynical. I would only add that the provision of this account does not give rise to an immediate contractual right of payment because net profit for the purposes of payment is the aggregate net profit arising from both developments. It is distinctly possible, for example that one project may be profitable and the other is loss making.

85. The position in relation to Chesterfield Hill is different. The claimants seek an order for an account of "all mortgage and debt repayments, mortgage and debt interest, and expenses and costs, which are referred to in the definition of "Net Profit" (together "Debit Items"), so far as they relate to the Property and have been incurred …". It seems to me that this is essentially the same as their request for information that arises from their duty jointly to oversee the redevelopment. This should hardly be a matter of controversy. Letraz has maintained management accounts for the Chesterfield Hill redevelopment (see item 20 in the Scott Schedule) and they will be provided pursuant to the order I propose to make. All the claimants ask Letraz to provide is a summary of the Debit Items. In the unlikely event that the management accounts do not contain this information, it will be of benefit to both parties to the agreement that it is produced, and I will require it to be provided.

86. In my judgment, the claimants are entitled to the orders they seek, subject to the qualifications I have made.

Strike out application

87. The claimants seek an order that a substantial proportion of the defence is struck out in light of the significant concessions the defendants have made. The order is not opposed in principle but there are differences of detail between the parties.

88. The claimants provided an appendix at the hearing that lists the paragraphs in the defence that should be struck out. It was agreed at the hearing that the defendants should have an opportunity to consider the appendix and state where they disagree. They have now done so and in a large number of cases they agree with the claimants' proposals. Any differences between the parties that remain can be dealt with, together with approving a schedule of the documents that the first defendant is to supply, on the handing down of this judgment.

Conclusion

89. The claimants are entitled to judgment against Letraz on the claims that form the subject of the application in the terms indicated in this judgment. It is not appropriate to make a conditional order under Practice Direction 24.