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Case No: BL-2020-000524

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

7 Rolls Building,
Fetter Lane, London,
EC4A 1NL

Date: 15 May 2020

Before :

Simon Salzedo QC,
Sitting as a Deputy High Court Judge

- -

Between :

PATHWAY FINANCE S.A.R.L.	**Claimant**
- and -	
THE DEFENDANTS SET OUT IN ANNEX 1 TO THE CLAIM	**Defendants**

Matthew Abraham (instructed by **Sidley Austin LLP**) for the **Claimants**
The **Defendants** were **not present or represented** at the hearing

Hearing dates: 5th May 2020

- -

Approved Judgment

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

MR SIMON SALZEDO

Mr Simon Salzedo QC :

1. This case concerns a single mistake that was made and repeated in the drafting of 87 finance documents and whether the mistake can be repaired by the process of contractual construction or by equitable relief in the form of rectification. It raises a question about the admissibility and weight of extrinsic materials in the construction of a registerable corporate charge.

Introduction

2. The Claimant, Pathway Finance S.À.R.L. ("**Pathway**"), is a treasury company in the IWG group of companies to which all 87 defendant companies also belong (the "**Group**"). Between 24 February 2017 and 12 April 2019, on various dates the Claimant granted to each of the Defendants borrowing facilities under a Facility Agreement dated 16 September 2011, as amended on 17 November 2016 to increase the sums available under it from £3,000,000 to £180,000,000.

3. A Security Agreement also dated 16 September 2011 had been entered into by the initial borrowers under the Facility Agreement under which they agreed to give to Pathway a first ranking floating charge over substantially all of their assets. Unlike the Facility Agreement, the Security Agreement dated 16 September 2011 was not amended on 17 November 2016, or any other date.

4. In order to gain access to borrowing from Pathway, each of the Defendants executed documents to accede to the Facility Agreement and the Security Agreement, including an Accession Deed in a format set out in a schedule to the Security Agreement. Prior to 24 February 2017 this was done without incident, but as from the application for finance made on that date, the error was made. There are 87 individual Accession Deeds before the Court and I am told that they are all in similar form. The first erroneous Accession Deed is dated 3 March 2017 and relates to the First Defendant, London Hanger Lane Centre Limited (the "**3 March 2017 Accession Deed**"). It is annexed to this Judgment. The provisions of the 3 March 2017 Accession Deed included at clause 2: "*The Acceding Chargor hereby agrees to become a party to and be bound by the terms of the Security Agreement as a Chargor* …" and at Clause 3: "*In*

accordance with the foregoing, the Acceding Chargor now grants to the Chargee the floating charge described in the Security Agreement as being granted, created or made by a Chargor thereunder …"

5. In the 3 March 2017 Accession Deed, "Security Agreement" was defined in Recital B in the following way:

> "The Chargee has entered into a security agreement dated 17th November 2016 (as supplemented and amended by Deeds of Accession or otherwise from time to time, the "**Security Agreement**") between the Chargors and the Chargee referred to in the Security Agreement."

6. That, of course, was an error, because the Chargee had not entered into a security agreement dated 17 November 2016, but only one dated 16 September 2011. The precedent of the 3 March 2017 Accession Deed was copied when each of the subsequent 86 Accession Deeds was drafted and all 87 were signed by Mr Wilkinson for Pathway and by Mr Gibson for the relevant borrower.

7. The error came to light during the Group's security audit in October 2019. On 14 February 2020, the parties entered into new Accession Deeds which referred to the Security Agreement by its proper date. There is no dispute between the parties that Recital B to the original 87 Accession Deeds contained an error in the way I have set out. By the Claim Form in these proceedings, the Claimant claims a declaration as to the true construction of the Accession Deeds, alternatively rectification of them, to correct the error in their wording. Each of the Defendants has filed an Acknowledgment of Service on which has been ticked the box stating "*I **do not** intend to contest this claim.*" The Defendants have not been represented before me.

8. Why then has a claim come before the Court for trial rather than the matter being dealt with by agreement? As a practical matter, the sums involved are large and certainty is therefore important, especially perhaps for the directors of the 87 defendant companies, who must act only in ways that they conclude to be in the interest of each such company. The Claimant's representatives, Sidley Austin LLP and Mr Matthew Abraham of counsel, have very properly brought before

the Court the issue that the Accession Deeds have been registered at Companies House pursuant to Companies Act 2006 section 859A as charges created by each Defendant company. As a result of registration, the Accession Deeds are in a sense public documents. Mr Abraham has referred me to the case of *Cherry Tree Investments v Landmain* [2013] Ch 305, in which a majority of the Court of Appeal held that the relevance of background information to the construction a registered land charge was limited owing to the public nature of the registered charge.

9. The fact that I am being asked to give relief which on its face could affect third parties, when such third parties are not before the Court (nor even identifiable) has given me pause for thought. In the end, I am persuaded that it is right to consider this claim on its merits for three main reasons, which must be taken together. First, given the potentially awkward position in which the directors of the defendant companies may find themselves, I accept there is a legitimate purpose to the claim. Secondly, any order I may make cannot bind any person who is not a party to this claim. If any third party hereafter considers that they have arguments to make that would lead to a result different from that at which I arrive in this judgment, they will not be barred from raising those points. Thirdly, on the evidence before me, I am satisfied that the risk that any non-party will in fact have been prejudiced by the error on the face of the Accession Deeds is very small indeed. My reasons for so concluding are set out at paragraph 14 below.

10. In support of its claims, the Claimant has adduced the evidence of three witnesses. They appeared before me (by remote video hearing) and confirmed the contents of their witness statements. They also answered some additional questions put to them at my prompting by Mr Abraham.

11. Mr Stephen Wetherall is the general counsel of the Group. He gave evidence as to the history of the facility, how the Accession Deeds were created and executed, how the error occurred and how it was detected. Mr Wetherall also explained that within 21 days of execution of each Accession Deed the Group's UK Finance Team arranged for it to be filed at Companies House in support of the online form which was completed to give particulars of the charge. In

response to my concerns about the position of third parties Mr Wetherall stated that: (i) the Group had revenue in the last year of £2.6 billion with an operating profit of £140 million; (ii) he was not aware of any imminent insolvency risk in respect of any of the defendant borrower companies; (iii) he was not aware of any subsequent charges in favour of third parties being registered in respect of the assets of any of the borrower companies; and (iv) he would expect to be aware of the matters at (ii) and (iii) had they been the case.

12. Mr Paul Wilkinson is a director of Pathway who signed the Accession Deeds on its behalf. He says that he would have checked in each deed that the name of the borrower was correct, but not otherwise checked the terms of the documents. He was familiar with the Facility Agreement and the Security Agreement and he believed that the deeds he executed were for the accession of the Defendants to those agreements. He confirmed that he would have known if there had been any updates to the Security Agreement which in fact there were not.

13. Mr Peter Gibson was a director of each of the Defendants during the period when the Accession Deeds were executed, and they were executed by him. He ceased to be a director on 28 October 2019. Similarly to Mr Wilkinson, Mr Gibson's evidence is that he would have checked the details of each borrower before signing, but otherwise assumed that the Accession Deed did as it appeared to do and provided for accession to the Security Agreement. His evidence is that the reference to a security agreement dated 17 November 2016 is clearly a mistake and does not reflect the intentions of the Defendants. Mr Gibson confirmed that while he was a director of the Defendants no person sought to inspect the Security Agreement and that they did not grant any subsequent charges to any other creditor.

14. I have no reason to doubt the veracity or accuracy of the evidence of all three witnesses and I accept it. It is on the basis of this evidence that I have concluded that the risk of a third party having been affected by the mistake made in the drafting of the 87 Accession Deeds is very small. In particular, it seems that no subsequent charges have been granted, no person has ever sought to inspect the Security Agreement and the defendant companies are not presently believed to present an imminent insolvency risk. In any event, it is hard to envisage that any

third party, even if they had relied on the Accession Deed, could have conducted themselves differently as a result of believing that the Security Agreement had one date rather than another.

15. I have had the benefit of clear and helpful written and oral submissions from Mr Abraham on behalf of the Claimant and a well prepared PDF trial bundle for which I am grateful to Sidley Austin LLP, the Claimant's solicitors.

Order of decision: construction or rectification first?

16. I have to decide whether to consider first the question of construction or that of rectification. The two cannot both be ordered, so it might be important which is considered first. The Claimant, after some wavering, invited me to consider first the question of construction on the footing that was the relief they would prefer if I were willing to grant both. To the extent that it has an election, it was made in that sense. Since these are inconsistent remedies, the Claimant may well have an election as to which to pursue, but even if it does not I would arrive at the same decision.

17. Authority suggests that the question whether to address a drafting error by construction or by rectification is to be determined pragmatically rather than under any clear logic favouring one or the other. This is the sense in which I read Carnwath LJ's statement in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus LR 1336 at [16] that he "*[found] it more logical to reverse the order*" from that applied by the first instance Judge in that case and consider rectification before construction. It is more usual in the cases to consider construction first and rectification only if necessary, or if pragmatically appropriate. A statement of the pragmatic approach may be found in the decision of Henderson J in *The Hampel Discretionary Trust 1999* [2012] EWHC 2395 (Ch), where he said at [16]:

> "The next question is whether the Trust Deed as executed failed to represent the true intention of the parties. As I have already indicated, I think it may be arguable that clause 7 does not in fact suffer from the defect which has been suggested, but the contrary is certainly arguable, and it appears from the correspondence that

> HMRC had indicated, without I think committing themselves to the argument, that they saw some merit in it. The existence of a real doubt is enough in a suitable case to permit the court to rectify a document. That was made clear in Victorian times in the case of *Walker v. Armstrong* (1856) 8 De G. M. & G. 531; see in particular the judgment of Knight Bruce LJ at 541 to 542."

18. This citation reflects that in most cases, construction will come first as a matter of logic, because it is necessary to establish an error – or at least a real doubt that there might be an error – before rectification can be ordered by way of equitable relief; and if there is doubt about whether the error exists as matter of interpretation, then that requires the construction of the instrument to resolve it. Where, as in the present case, it is obvious that there is an error in the drafting, whether or not that error can be corrected as a matter of construction, I can well see that it might make pragmatic sense to consider rectification first.

19. However, in the present case, I would prefer to deal with the matter by construction if possible. The principal reason for that is the position of non-parties. If I decided that rectification was justified and ordered it, then the rectified Accession Deeds would be placed on the Companies Register and could be relied on by non-parties. If another non-party came later to argue that the rectification had interfered with their rights and should not have been granted, then there would be a risk that the position could not be reversed without prejudice to those who had relied in the meantime on the rectified deed. For the reasons given above, including the nature of the error in this case, these possibilities seem very remote on the evidence before me, but I nonetheless think it is preferable, if possible, to arrive at a decision which keeps any residual risk of prejudice to third parties to an irreducible minimum.

Construction

20. The Claimant seeks a declaration in the following terms: "*The words "*a security agreement dated 17th November 2016*" in Recital (B) of the Accession Deeds be construed as "*a security agreement dated 16th September 2011*"*."

21. Of course, that construction cannot be arrived at by reference to the words of the Accession Deeds without more. It can only be reached by the admission of extrinsic material. As between the parties to the Accession Deeds, the relevant extrinsic materials are (1) the existence of the Security Agreement (dated 16 September 2011) including its parties and other terms, and (2) the fact that there did not exist any relevant security agreement dated 17 November 2016. It might be said the parties were also aware of (3) the fact that the Facility Agreement had been amended on 17 November 2016, which provides a kind of explanation for the error in the wording of the Accession Deeds.

22. The evidence demonstrates that all the parties were aware of each of the three facts in the preceding paragraph when they executed the Accession Deeds. In my judgment, a reasonable person with the background knowledge of the parties to the Accession Deeds at the time they were made would have understood the definition of "*Security Agreement*" to be erroneous and would have understood it to refer to the Security Agreement dated 16 September 2011.

23. Mr Abraham has reminded me of the well known principles of contractual construction in English law and in particular the approach to the correction of mistakes set out by Lord Hoffmann at paragraphs 22 to 25 of his speech in *Chartbrook v Persimmon Homes* [2009] 1 AC 1101. As there set out, the correction of drafting errors is not a separate branch of contract law, but "*part of the single task of interpretation*" in relation to which "*the background and context must always be taken into consideration*". As also there set out, the limits to interpretative error correction are set by the need for clarity both that something has gone wrong with the language and also as to "*what a reasonable person would have understood the parties to have meant*" (in other words clarity as to what the words used were, objectively, intended to convey).

24. The first fact I have referred to as being known to both parties – the non-existence of any Security Agreement dated 17 November 2016 – is sufficient to satisfy the first requirement, namely clarity that something has gone wrong with the drafting. In my judgment, the second fact that both parties knew – the existence and terms of the Security Agreement dated 16 September 2011 – satisfies the second requirement, namely clarity as to what <u>was</u> intended. The

third fact I identified – the amendment of the Facility Agreement on 17 November 2016 is a makeweight that I would rely on if necessary to confirm the same conclusion as being the objectively reasonable one that parties in the position of these parties would have reached had they applied their minds to the question of the meaning of the definition of "*Security Agreement*" in the Accession Deeds. I therefore conclude that, insofar as the relevant exercise is the interpretation of the Accession Deeds purely as between the parties to them, the result of that exercise is the one that the Claimant requests the Court to declare.

25. It is then necessary to consider whether the public nature of the Accession Deeds by virtue of their registration alters the availability or weight to be attached to the extrinsic facts to which I have referred. The underlying principle is: "*The interpretation of a legal document involves ascertaining what meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed*", per Lord Hoffmann in *Homburg Houtimport v Agrosin Private Ltd: The Starsin* [2004] 1 AC 715, [73]. This formulation was adopted by Lord Bingham of Cornhill speaking for the Privy Council in *Dairy Containers v Tasman Orient Line* [2005] 1 WLR 215, [12] and by Lord Toulson JSC (with the agreement of Lord Mance, Lord Sumption and Lord Hodge JJSC) in *Impact Funding Solutions v Barrington Support Services* [2017] AC 73, [35]. I select this particular formulation of the approach to contractual interpretation because the issue raised in the present case is as to the "*person or class of persons to whom the document is addressed*", which is wider and more apt to the present issue than other formulations which refer to facts reasonably available to the parties to the contract.

26. The question, then, is to what person or class of persons was each of the Accession Deeds addressed? Before seeking to answer that question it is convenient to examine a few authorities.

27. In *KPMG v Network Rail Infrastructure* [2007] Bus LR 1336, the Court of Appeal (Mummery and Carnwath LJJ and Sir Paul Kennedy) held in relation to the interpretation of a lease that an earlier agreement for lease between the

parties' predecessors in title was admissible as background material. In so holding, Carnwath LJ giving the leading judgment rejected counsel's submission that since a lease creates an interest in land it is addressed not only to the original landlord and tenant, but also to their successors in title, under-tenants, chargees and so on, with the consequence that a prior agreement not known to the relevant successor parties could not be admitted. Carnwath LJ characterised the unavailability of the earlier agreement as "*an issue of proof, not principle*".

28. In *Cherry Tree Investments Ltd v Landmain Ltd* [2013] Ch 305 ("**Cherry Tree**"), the Court of Appeal was divided as to the role to be played in construing a land charge by a facility agreement that had been executed on the same day. In that case, the charge in question was created on a standard Land Registry form which stated that the defendant charged the property by way of legal mortgage as security for payment of the sums detailed in panel 9. The side note to panel 9 read "*insert details of the sums to be paid (amount and dates) and so on*". Panel 9 was left blank and the charge was registered pursuant to the Land Registration Act 2002. The majority (Lewison and Longmore LJJ, Arden LJ dissenting) held that the charge could not be corrected by any process of construction, but that a properly pleaded and proved claim for rectification could be brought to achieve, if successful, the desired result.

29. Cherry Tree had purchased the charged property from the chargee creditor, Dancastle, but the chargor debtor, Landmain, contended that no power of sale had arisen under the charge. The issue turned on whether the statutory power of sale had been enlarged by the provisions of the facility agreement, which Cherry Tree said should have been referred to in Panel 9 of the charge. As Arden LJ noted at [5], by statute any such enlargement had to be effected by the charge itself, not by some separate agreement.

30. Arden LJ dissenting on the main issue – whether extrinsic evidence should be given any weight on the construction of the charge – summarised her conclusions at [36] as follows:

> "… registration at the land registry does not prevent the court from using extrinsic material as an aid to interpretation of the charge provided that the court can be satisfied that the interpretation involved would not prejudicially affect the rights of any third party. The charge is not to be treated as addressed to third parties simply because a third party might have inspected the register. Only third parties to a subsequent disposition are likely to be prejudicially affected. In this case, Landmain has not created any further interest in the property which might be prejudicially affected by interpreting the charge in the manner sought on Cherry Tree's application."

31. The main majority judgment was given by Lewison LJ, with a concurring judgment by Longmore LJ. At [99], Lewison LJ made the important point that:

> "Whatever [the charge] means, it has always meant what it means. A contract cannot mean one thing when it is made and another thing following court proceedings. Nor, in my judgment, can it mean one thing to some people (eg the parties to it) and another thing to others who might be affected by it."

Thus, the question was not "*what did the parties intend to agree?*", but "*what does the instrument mean?*" I apply that approach to this case.

32. At [101] – [103], Lewison LJ referred to *KPMG v Network Rail* and noted that no argument was addressed to the Court in the earlier case on the significance of registration and that the question had been approached as a binary one: was the earlier agreement admissible or not. Acknowledging that the Court was bound (as of course am I) by the *KPMG case,* Lewison LJ held at [104] that the facility letter in *Cherry Tree* was admissible evidence, but then said "*there is still the question: what do you do with the evidence once it has been admitted?*" It follows from this that I am bound to treat the Security Agreement dated 16 September 2011 as part of the admissible background; and I can see no basis on which to distinguish the fact of the non-existence of any security agreement with a different date, which was equally known to the parties.

33. In answering the question "*what do you do with the evidence once it has been admitted?*" Lewison LJ began with the objective and provisions of the Land Registration Act 2002 which, as he set out, was intended to ensure that registration and registration alone conferred title, for which purpose the ability to obtain easy and open access to information held at the Land Registry was essential. At [108] Lewison LJ set out s 120 of the 2002 Act and drew particular attention to s 120(2) which provided that, as between the parties to the disposition, the document kept by the Registrar was to be taken to be correct and to contain all the material parts of the original document. Thus, by statute, the registered charge contained all the material parts of the charge. As a result of this, the fully retrospective effect of a declaration as to interpretation (as opposed to the partially retrospective effect of rectification as Lewison LJ explained at [122]) would "*bypass the carefully calibrated rules of priority which are an essential feature of our modern system of land registration*."

34. At [124] and [125], Lewison LJ referred to earlier authorities on other types of "*negotiable and registrable contracts or public documents*" such as a licence to operate a ferry service, a planning permission, a company memorandum and articles of association and an injunction or receivership order. He concluded from the cases: "*In all these cases the justification for the restrictive approach [to the use of extraneous evidence in interpretation] is that third parties might (not will) need to rely on the terms of the instrument under consideration without access to extraneous material*."

35. At [130] Lewison LJ set out that a reasonable reader of the charge would know that it would be registered. "*In other words a publicly registered document is addressed to anyone who wishes to inspect it*." As he explained, the reasonable person would know that by s 120(2) of the 2002 Act, the documents retained by the Registrar were to be taken as containing all material terms and would understand that if the parties chose to keep parts of their bargain private, that should not affect the parts that they chose to make public by registration.

36. Recent cases in the Supreme Court have emphasised that the differential approach to construing public documents is a difference of degree, not of kind. In *Buckinghamshire v Barnado's* [2019] ICR 495 in the context of a pension scheme, Lord Hodge JSC (with whom Baroness Hale of Richmond PSC, Lord Wilson, Lord Sumption and Lord Briggs JJSC agreed) said at [13]:

> "In deciding which interpretative tools will best assist in ascertaining the meaning of an instrument, and the weight to be given to each of the relevant interpretative tools, the court must have regard to the nature and circumstances of the particular instrument."

And in *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] 1 WLR 4317 at [18] – [19] Lord Carnwath JSC (with whom Lord Reed DPSC, Lady Black, Lord Lloyd-Jones and Lord Briggs JJSC agreed) referred to his own concurring judgment in *Trump International Golf Club Scotland v Scottish Ministers* [2016] 1 WLR 85 where he had said that the interpretation of planning permissions "*do not require the adoption of a completely different approach to their interpretation*" and concluded:

> "In summary, whatever the legal character of the document in question, the starting point – and usually the end point – is to find 'the natural and ordinary meaning' of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

37. These most recent authorities are important in the present context because they show that there is not a bright line division of documents into two categories – private and public – in respect of which different approaches to extrinsic material apply. Instead, the law requires a careful consideration of "*the nature and circumstances of the particular instrument*" which will inform the decision what, if any weight, can be given to extrinsic material known the parties, but possibly not known or readily available to all those who might rely upon the document in question.

38. Adopting this approach to the case in hand, it seems to me that it is important to identify the relevant effects of ss 859A to 859Q of the Companies Act 2006 so far as material, just as in *Cherry Tree* Lewison LJ held it was important to identify the effects of the Land Registration Act 2002.

39. Companies Act 2006 s 859A applies "*where a company creates a charge*". Where the section applies, the registrar must register the charge if a statement of particulars as defined in s 859D is delivered and, if the charge is created or evidenced by an instrument, a certified copy is delivered together with the statement of particulars.

40. If a charge created by the company is not registered within the time permitted by the Companies Act 2006, then the sanction under s 859H is that the charge would be void against a liquidator of the company, an administrator of the company or a creditor of the company. It would not, however, lack effect as between the parties. In other words, the purpose of registration is limited to maintaining the chargee's priority over later creditors.

41. There is an important distinction between (i) the policy and effect of registration of security interests under the 2006 Act as amended and (ii) the much broader policy and effect of land registration under the 2002 Act as explained by Lewison LJ in *Cherry Tree*. The former is criticised in *Goode on Commercial Law (5th ed)* at [24.12] for having "*largely abandoned*" the former policy of providing clear information to the public about the company's financial position.

42. Companies Act 2006 s 859P provides that a Company must keep any instrument creating a charge capable of registration available for inspection. If certain particulars are not contained in the instrument creating the charge, but are contained in "*other documents which are referred to in or otherwise incorporated into the instrument*", then those must also be kept available for inspection. S 859P is supported by criminal sanctions under s 859Q if inspection is not given within 14 days.

43. Unlike the charge in *Cherry Tree*, the Accession Deeds were not drafted on an official form and they did not have to be filed. The fact that they were filed cannot affect the true construction of the Accession Deeds because their meaning cannot have been changed upon filing. The statutory requirement which is most relevant for present purposes is the requirement under s 849P that the Accession Deeds be kept available for inspection.

44. By virtue of s 859P and s 859Q, an instrument creating a charge, or an instrument containing the relevant particulars that is referred to or otherwise incorporated in the instrument creating the charge, is an inherently public document, in that it is capable of being inspected and relied upon by a third party. However, the purpose for which corporate charges are made public in this way is relatively narrow. A third party would require to inspect a corporate charge if that person is considering extending credit to and/or taking security from the chargor. Although others are entitled to inspect and might do so, it is not easy to conceive of significant reliance which it would be reasonable for them to place on a corporate charge thus inspected.

45. In my judgment, for the purposes of construction, a registrable corporate charge as addressed to the parties and also to such third parties as may consider extending credit and/or taking security from the chargor during the currency of the charge. I would not regard it as being addressed to the public at large, notwithstanding the requirement to make it available for inspection under s 859P.

46. Mr Abraham submits that if third parties did seek to inspect one of the Accession Deeds, whether by application to Companies House or to the relevant defendant company, they would discover from the Deed that there was an underlying security agreement which contained details of the security created by the Deed. If they were interested in the terms of the security, they would request a copy of the security agreement referred to in the Deed and they would inevitably be provided with the Security Agreement dated 16 September 2011. On any further inquiry, they would be provided with an explanation that no security agreement dated 17 November 2016 existed. Such third parties would therefore have the Security Agreement and, sooner or later, would discover the non-existence of

the misdated security agreement. They would therefore be in the same position as the parties in terms of extrinsic knowledge.

47. This submission seems to me to be well founded on the basis of the evidence I have heard. It follows that as at the date each Accession Deed was made, the non-existence of a Security Agreement dated 17 November 2016 and the existence of the one dated 16 September 2011 are facts which would have been reasonably available to any third parties who might in the future seek to understand the terms of the security. Since I have held that the class of persons to whom the Accession Deeds should be treated as being addressed is no wider than this, it is right to give full weight to this extrinsic material in construing the Accession Deeds.

48. It follows that I find and hold that on the true construction of the Accession Deeds, where they each refer to "*a security agreement dated 17th November 2016*", they mean "*a security agreement dated 16th September 2011*".

49. I mention a further supplementary consideration upon which I do not base my decision. It ultimately reflects the particular nature of the error in this case, which supports the appropriateness of correcting it by construction. If extrinsic material were excluded from the construction process on the basis of the public nature of the Accession Deeds, then the reference to "*a security agreement dated 17th November 2016*" would be empty. In other words, the Accession Deeds would not refer to any existing Security Agreement. On that footing, it is hard to see that they created charges at all. Whether in that event there would have been charges created in some other way (for example, by the operation of some form of estoppel), I do not speculate. Even if there would, it would be a nice question whether such charges were "*evidenced by*" the Accession Deeds so that the Deeds would fall within s 859A, but in any event they would not be "*created by*" the Accession Deeds, so the Deeds would not fall within s 859P. In other words, if extrinsic material is excluded then the Deeds would cease to be registrable charges, which would undermine the premise upon which the extrinsic material was excluded in the first place.

Rectification

50. Mr Abraham took me through the requirements for rectification as set out in *FSHC Group Holdings v GLAS Trust Corp* [2020] 2 WLR 429. On the basis of the evidence adduced before me, those requirements were clearly met and had I not been prepared to grant the requested declarations as to construction, I would have granted relief by way of rectification. But in circumstances where I have held that the Accession Deeds have always meant what the parties say they intended them to mean, there is no benefit to extending this judgment by giving reasons for that conclusion. These proceedings are uncontested, but in the event that my conclusion as to construction is challenged hereafter by a non-party, if such challenge succeeds, then any claim for rectification would need to be made afresh and reconsidered, including in the light of the position of such third party which might affect, if nothing else, the appropriateness of the granting of equitable relief by way of rectification.

Conclusion

51. I will make the order sought by the Claimant as their primary claim, which is a declaration that:

> "The words "a security agreement dated 17th November 2016" in Recital (B) of the Accession Deeds be construed as "a security agreement dated 16th September 2011"."

DEED OF ACCESSION

THIS DEED is dated 03 March 2017

BETWEEN:

(1) **London Hanger Lane Centre Limited** (registered number **10422064**) with its registered office at **1 Burwood Place, London, W2 2UT** (the "**Acceding Chargor**");

(2) **Pathway Finance Société À Responsabilité Limitée**, as chargee referred to in the Security Agreement referred to below (the "**Chargee**").

BACKGROUND:

(A) The Acceding Chargor is a Subsidiary of the Chargee.

(B) The Chargee has entered into a security agreement dated 17th November 2016 (as supplemented and amended by Deeds of Accession or otherwise from time to time, the "**Security Agreement**") between the Chargors and the Chargee referred to in the Security Agreement.

(C) The Acceding Chargor has, at the request of the Chargee and in consideration of the Chargee making advances available to the Chargor from time to time and after giving due consideration to the terms and conditions of the Intra-Group Facility Agreement and the Security Agreement and satisfying itself that there are reasonable grounds for believing that the entry into this Deed by it will be of benefit to it, decided in good faith and for the purpose of carrying on its business to enter into this Deed and thereby become a Chargor under the Security Agreement. The Acceding Chargor will also, by execution of a separate instrument, become a party to the Intra-Group Facility Agreement as a borrower.

IT IS AGREED as follows:

1. Terms defined in the Security Agreement shall have the same meaning in this Deed unless given a different meaning in this Deed.

2. The Acceding Chargor hereby agrees to become a party to and to be bound by the terms of the Security Agreement as a Chargor with immediate effect and so that the Security Agreement shall be read and construed for all purposes as if the Acceding Chargor had been an original party thereto in the capacity of Chargor (but so that the security created consequent on such accession shall be created on the date of this Deed). The Acceding Chargor hereby undertakes to be bound by all the covenants and agreements in the Security Agreement which are expressed to be binding on a Chargor.

3. In accordance with the foregoing, the Acceding Chargor now grants to the Chargee the floating charge described in the Security Agreement as being granted, created or made by a Chargor thereunder, to the intent that its charge shall be effective and binding upon it and its property and assets and shall not in any way be avoided, discharged or released or otherwise adversely affected by any ineffectiveness or invalidity of the Security Agreement, any other Deed of Accession or the Intra-Group Facility Agreement or of any other party's execution of the Security Agreement, any other Deed of Accession or the Intra-Group Facility Agreement, or by any avoidance, invalidity, discharge or release of any charge contained in the Security Agreement, any other Deed of Accession, or the Intra-Group Facility Agreement. The Security Agreement and this Deed shall be read as one to this extent and so that references in the Security Agreement to this Deed and similar phrases shall be deemed to include

"this Deed".

4. All this Security:

   (a) is created in favour of the Chargee;

   (b) is security for the payment, discharge and performance of all the Secured Liabilities; and

   (c) is made with full title guarantee in accordance with the Law of Property (Miscellaneous Provisions) Act 1994.

5. The floating charge created by this Deed is a qualifying floating charge for the purpose of paragraph 14 of Schedule B1 to the Insolvency Act 1986.

6. This Deed may be executed in any number of counterparts and all of those counterparts taken together shall be deemed to constitute one and the same instrument. Without prejudice to Clauses 1.2(b) of the Security Agreement, and except for any Receiver, attorney, manager, agent or other person appointed by the Chargee, no person who is not a Party may enforce any rights under this Deed. No consent of any person who is not a Party is required to amend this Deed.

7. This document takes effect as a deed notwithstanding the fact that a party may only execute this document under hand.

8. This Deed is governed by English law.

THIS DEED has been executed and delivered as a deed on the date stated at the beginning of this Deed.

SIGNATORIES
(to Deed of Accession)

The Acceding Chargor

EXECUTED as a DEED by)
acting by)

DocuSigned by:
Peter Gibson
3A3F9F8AE8B84F3...
Peter Gibson, Director

DocuSigned by:
Yongmei Liu
5A5DA85E1B1D486...

Witness
Name: Yongmei Liu

Occupation: General Ledger Accountant

Address: Forsyth House, Cromac Square, Belfast BT2 8LA, Northern Ireland

The Chargee

Pathway Finance S.à.r.l.

By:)

DocuSigned by:
A7E80677605E491...
Paul Wilkinson, Director

GB427