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Case No: BR-2020-000544,545,546,563,564,565, and BR2021-000148

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

The Rolls Building
Fetter Lane
London
EC4NL 1NL

Date: 3/11/2022

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between :

(1) TINA CHOPRA **(2) AMAN GURU CHOPRA** **(3) MONIKA SHARMA** **(4) PAUL ADAM SMITH**	**Applicants**
- and -	
(1) KATRIN PROPERTIES LIMITED **(2) KSEYE CAPITAL HOLDINGS LIMITED**	**Respondents**

- -
- -

AEJAZ MUSSA (One Law Chambers) **and BERTIE BEOR-ROBERTS** (instructed by One Law Chambers) **for the First Applicant against the First Respondent**
BEN STIMMLER (Direct Access**) for the Second Applicant against the First Respondent**
BEN STIMMLER (Direct Access**) for the First, Second and Third Applicants as against the Second Respondent**
JENNIFER MEECH (instructed by Osmond & Osmond) for the **Fourth Applicant against the First Respondent**
FRANCIS HORNYOLD-STRICKLAND (instructed by Howard Kennedy LLP) for the **First Respondent**
JON COLCLOUGH (instructed by Brecher LLP) **for the Second Respondent**

Hearing dates: 10 December 2021, 11,12,13 October 2022

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Approved Judgment

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This judgment was handed down remotely with circulation to the parties' representatives by email. It will also be released to the National Archives for publication. The date and time for hand-down is deemed to be 10:00 hrs on 3 November 2022.

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

1. This case concerns seven different applications to set aside statutory demands issued against four individuals by two purported creditors (the "Applications"). The purported creditors, Katrin Properties Limited ("KP") and KSEYE Capital Holding Limited ("KCH") (together the "Respondents") lent money to companies owned and controlled by the individual applicants (the "Applicants"). The Respondents are not related lenders. The statutory demands served on the Applicants are based on a failure to make payment pursuant to personal guarantees. It is common ground that the guarantees, on a proper construction, contain a promise by the guarantor Applicants to pay the principal sum due and interest in the event that the debtor company fails to pay. Accordingly, the sum said to be due is a liquidated debt for the purpose of the Insolvency Act 1986. In common with all the Applications, the relevant company has failed to pay and an attack is made on the validity of the personal guarantees by various but similar means.

2. All but one of the Applications were issued in the County Court of Romford and transferred to the Insolvency and Companies Court at the Business and Property Courts of England and Wales. On 25 January 2021 ICC Judge Jones made an order that all Applications should be listed and heard together on 10 December 2021. On 3 November 2021 ICC Judge Mullen gave directions to add an Application made by Paul Smith to set aside a demand made by KCH. That Application had been made to Medway County Court and transferred to the Insolvency and Companies Court.

3. The listing for a day was a woeful underestimate. The day was taken with the submissions made by Tina Chopra in respect of two Applications she made to set aside the demand made by KP. It is regrettable that the Applications were adjourned and even more regrettable that the parties did not cooperate to bring the matter back to court at the earliest opportunity. It became apparent that the resumed hearing would take place at some distance from the hearing in December 2021. Accordingly, I released the matter on the basis that the parties may prefer an earlier hearing even if it meant re-hearing the first day. A more realistic time estimate was provided, and the matter set down for a hearing in late May 2022 with a pre-trial review to be heard the week before. At that hearing ICC Judge Mullen was persuaded to re-reserve the hearing of the Applications to myself, and adjourned the May listing until October.

Commonality (direction of this judgment)

4. Judge Jones recognised that there were common issues to be decided in respect of the Applications. Although there are some factual differences the Applications include the following:

    i) An agency argument. Mr. Vidya Sagar Sharma ("VS") has close links with the Applicants, the detail of which I shall go into later in this judgment. It is argued that VS was agent of KP and KCH. His failures and knowledge are said to be the failures and knowledge of his principals. I shall refer to this argument as the "Agency Argument".

    ii) VS has produced witness statements in support of the Applications claiming that he exerted undue influence over the Applicants which affects KP and

KCH by reason of the agency. I shall refer to this as the "Undue Influence Argument".

iii) Similarly, it is claimed that VS negotiated the terms of the loans to the various companies owned and managed by the Applicants. As agent he had the authority to agree terms that were different to the written instruments relied upon in the statutory demands. These variations were not ultimately relied upon, but they form part of the factual matrix. One such variation is the interest rate applicable after default. I shall refer to the variation arguments generically as the "Variation Argument".

iv) Some of the Applicants claim that VS asserted duress as well or as an alternative to the Undue Influence Argument. No Applicant pursued the duress argument so it will not be directly referred to in this judgment. The issue has been decided indirectly.

v) A few of the Applications rely on the wording of the demand letter. Although it is accepted that letters of demand were sent, it is argued that the letters of demand were not intended and cannot be construed as triggering the obligations under the personal guarantees (the "Demand Argument").

vi) Lastly a new argument has arisen in some Applications (after the close of evidence). It is claimed that the signatures of the Applicants applied to the personal guarantees are forged (the "Forgery Argument").

5. The common factual background is that the Respondents lent money to several property development companies. The relationship was one of creditor-debtor. The Respondents specialised in short term finance to the construction/development industry. Facility letters were issued to each company providing the term and interest rate for the loan. Security was obtained by way of a charge over the undertaking and attached to property held by the borrower company.

6. The Applicants were appointed directors of a company that acquired a property or wished to acquire a property to develop and resell. The company required short term finance to complete an acquisition or obtain planning permission and develop. The companies that obtained the short-term finance have been described as special purpose vehicles. I am not sure that is entirely accurate, but it appears that each of the companies is concerned with just one property.

7. The Applicants in their capacity as directors are concerned in the finance and management of at least one of the companies. In each case the director Applicant executed a guarantee by deed in favour of KP or KCH. It is common ground that the loans advanced to the companies were not repaid at the expiry of the term and have not been repaid since.

8. The first Applicant, Tina Chopra ("TC") is a director of Ascot Investments and Developments Limited ("Ascot") and NRD Property Development Ltd ("NRD"). The husband of TC is Naresh Chopra ("NC"). NC was admitted as a solicitor in 1984 and struck off 1993 after being convicted in the High Court for contempt of court. He had been accused of destroying or altering documents relating to an alleged mortgage fraud. His practising certificate was restored in 2004 with conditions. He was struck

off for a second time in 2017 as he had "deliberately" deceived lenders. He, TC, and their sons have all been directors of Property Finance and Law Limited ("Property Finance and Law").

9. NC drafted and produced the Applications and some of the supporting evidence, including the evidence produced by VS. The common authorship may explain why the witness evidence has a similar appearance using similar or the same language, relies on similar facts and deploys the same or similar defences.

10. VS is a co-director with TC and NC of a company known as NT Consultancy Plus Limited ("NT Consultancy"). NT Consultancy does not feature in the Applications. He has been described as a friend or former friend and associate of TC and Aman Chopra.

11. Aman Chopra ("AC") is the son of TC. He is a director of Insipid Oak Limited ("IOL") and director of Property Finance and Law.

12. Monika Sharma ("MS") is the niece of VS. She is a director of a company known as LVN Limited ("LVN"). LVN required finance to acquire a property known as 43 Old Gloucester Street London.

13. Paul Smith ("PS") is a director of NRD with TC and shares an office with TC, VS, AC and TC's husband, NC.

14. All the companies mentioned share the same registered address. The Applicants share and work from the same address which is also the address of VS and NC.

15. As will become apparent the new Forgery Argument led to the admission of new evidence and an application by KCH for an adjournment with costs thrown away. The application was not resisted. It was granted and directions for a new hearing provided. KP did not make the same application deciding that it could deal with the Forgery Argument.

16. The Demand Argument arose at the hearing in December 2021 for the first time. It was resisted by KP on the basis that it was not set out in the Applications. Given the need for an adjournment, I permitted it to be pursued. KP and KCH were to have the best part of 10 months to consider the legal argument.

17. This judgment will deal in detail with the Application made by TC to set aside the statutory demand served by KP. The statutory demand relies on a personal guarantee purportedly executed by TC in favour of KP for monies advanced to Ascot. Due to the common factors, the subsequent Applications need not be dealt with in the same detail.

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18. The statutory demand under consideration is dated 6 May 2020.

19. The particulars of debt are as follows:

> "The Debtor is an individual who is also the sole director of Ascot Investments and Developments Ltd (the "Company"), a private limited company in England and Wales (company no. 11113663), whose registered office is at Property Finance and Law, 902 Eastern Avenue, Newbury Park, Ilford, Essex, IG2 7HZ.
>
> The Creditor made a loan of £549,465 to the Company on 17 July 2019 (the "Loan"). This was pursuant to a Facility Letter (attached) dated the same (the "Facility Letter"). The Loan was inclusive of an arrangement fee (£10,000) plus interest at 1.25% for the first 6 months (£39,465).
>
> The Debtor provided a Personal Guarantee (attached) dated 22 July 2019 in respect of the Loan (the "Personal Guarantee"), guaranteeing the repayments of the Company.
>
> In accordance with the Facility Letter, the loan had a 6 month term. The Loan became repayable at the expiration of 6 months from 17 July 2019, or earlier on demand where there had been a failure to make payment as and when it fell due.
>
> The Loan has failed to be repaid and it is outstanding in full plus interest. Pursuant to the Personal Guarantee, and in particular, paragraph 1 of the Personal Guarantee, the Debtor is liable to repay the Loan and any interests due immediately in accordance with the Facility Letter."

20. The grounds upon which TC relies are developed in her witness statement dated 30 May 2020.

21. Her evidence is that Ascot was advised by KP's agent, VS to raise funds by providing its property, Heath Villas, Ascot (the "Property") as security. No explanation is provided why VS would provide advice to Ascot to raise funds. VS's witness evidence does not assist with this question. It can be reasonably inferred that Ascot was in need of funds and was actively looking to find a suitable lender. To this extent the witness evidence does not stand scrutiny.

22. VS is said to have informed TC that KP was a suitable lender as it provided loans quickly. VS is said to have "assured" TC that funds would be provided "immediately after the loan documents had been executed". I infer from this that funds were needed quickly and the fact that KP provided funds quickly was a strong reason to ask it to advance funds to Ascot. TC explains that she received an assurance from VS that the rate of interest "referred to in the facility letter" would "never be charged" and that interest would be simple and not compound. Neither of these assurances featured in the submissions made to the court. It is apparent, however, that TC read and understood the terms of the facility letter (the "Facility Letter") or at the very least was aware of the terms in the Facility Letter. Her evidence continues:

> "I was than (sic) told to sign [the personal guarantee]. I was concerned about signing the personal guarantee without getting

> independent legal advice. Vidya confirmed however that the personal guarantee would not be enforced without the Property being sold before any enforcement action against me personally….Although alternative cheaper finance was available to Ascot, Vidya insisted and coerced me to accept the lending from the Respondent without giving me any opportunity to obtain financial or independent legal advice. I unwillingly agreed (without the benefit of proper advice) to sign the Loan Documents under severe pressure and duress."

23. The extent of the evidence contained in her second witness statement regarding the Undue Influence Argument, said to have been exercised by VS, is as follows:

> "I was never shown any of the Loan Documents but he [VS] presented me with a personal guarantee deed ("personal guarantee") on 11th February 2019. I was driven by Vidya to the offices of Ewan & Co Solicitors, who, unknown to me at that time, were acting for the Respondents as their solicitors. This I understand is a clear conflict of interests. I signed the personal guarantee in front of Mr Charles Ewan, without really understanding what I was signed and why. I signed the personal guarantee under duress and the undue influence of Vidya without the benefit of independent legal advice."

24. The term "Loan Documents" is to be distinguished from the personal guarantee. The Loan Documents refer to the Facility Letter and loan documentation agreed between the Ascot and KP. In her first witness statement in support of her Application and dated May 2020 she explains:

> "[VS] immediately organised the drafting of the Loan Documents and directed me to go Ewan & Co Solicitors, who were acting for the Respondent, to execute the documents in front of them. The Loan Documents were executed by me on 18th July 2019 under undue influence of Vidya. This was clear a conflict of interests as ewan & Co (sic) were acting for the Respondent at the time. The execution of the personal guarantee was without the benefit of independent advice of any kind."

25. The documentary evidence relied upon in support of (i) the Agency Argument and (ii) the Undue Influence Argument comes in the form of a letter purportedly written and sent by VS dated 18 July 2019. The letter states:

> "Further to our meeting today I write to confirm, as requested, that you must sign all the loan documents today, including your personal guarantee. I know that you are worried about signing the capital personal guarantee without independent legal advice, however I assure you, as agent for Katrin Properties Ltd, that the guarantee will not be called in unless the prior sale proceeds are not enough of (sic) pay off the loan. The company, Ascot investments is the borrower and the first party

> responsible for this loan, not you personally. You will only be liable for the shortfall, if any.
>
> Also please don't be alarmed about the 2% interest rate referred to in the Facility Letter. This is a mere formality for the paperwork. Again, as agent for Katrin I swear that you will never be charged interest at more than 1.25% per month. This will be simple interest and not compounded."

26. It is accepted on behalf of TC that this letter contradicts the express terms of the Facility Letter and the personal guarantee. Clause 1 of the personal guarantee states (where relevant):

> "In consideration of you making or continuing credit facilities or other accommodation from time to time to the Borrower (or for other valuable consideration receipt of which is acknowledged), we irrevocably and *unconditionally guarantee to you the full and prompt payment or discharge by the Borrower of all obligations and liabilities now or in future* due, owing or incurred, or expressed or intended to be due, owing or incurred, to you (whether actually or contingently, *alone or jointly, as principal or surety* and in whatever style, name or form) by the Borrower in any currency together with interest (before as well as after judgment) to the date of payment at such rates and upon such terms as may from time to time be payable or expressed or intended to be payable by the Borrower and all costs, commissions and fees incurred by you in relation to the Borrower or any other guarantee, indemnity or security for any obligation or liability guaranteed by this Deed (the "Guaranteed Obligations"), and *we irrevocably and unconditionally undertake with you that, if at any time and from time to time the Borrower does not pay any of the Guaranteed Obligations, we will on your first written demand pay the unpaid amount* (our obligations under this paragraph, and those in paragraph 2 below, together being the "Guarantee") provided that (i) our liability under the Guarantee is limited to the principal amount of GBP 549,465…" (emphasis added).

27. VS has provided two witness statements in support of the Agency Argument. In his first statement dated 12 October 2020 he says:

> "I have been a *broker* working mostly with private bridging loan providers for the past 20 years. I work as an agent for these bridging loan companies who pay me a share of their arrangement fee. *Where I consider necessary*, I also provide *guidance* to the borrowers. (emphasis added)

28. Four evidential matters may be taken from his sworn evidence. First, VS self-styles himself as a "broker". Secondly, he positions himself as "agent for these bridging loan

companies". Thirdly, he considers it part of his role to provide guidance to borrowers. Lastly, VS does not give any evidence as to his qualifications to be an agent, or if he is regulated by the Financial Conduct Authority. He produces no documentation to support an agency agreement, and no documentation that supports his authority or terms of engagement, notwithstanding he says he has occupied this position of such companies for 20 years.

29. VS says that after he was introduced (by Ewan & Co solicitors) to Kerem Yavuzarslan ("KY"), the director of KP, he was asked "to become his agent". He does not distinguish between KP and KY. It may be that he intended to say that KY asked him to act as KP's agent as he goes on to say:

> "I had full authority from Katrin to represent it and negotiate in relation to loans/personal guarantees relating to, amongst others, the following properties…"

30. The properties he lists are owned by companies where the directors and members are those making the Applications. VS rejects any suggestion that he was merely "an introducer or simply a commission agent" as he "negotiated the rates and terms of the loans" on behalf of KP. On his evidence his engagement with KP was to:

i) Provide instructions to the solicitors Ewan & Co on behalf of KP;

ii) Assist KP in the drafting of the legal charges over the Property and personal guarantee;

iii) Negotiate the interest rates, terms of the loans;

iv) Undertake "ID and AML" checks on behalf of KP;

v) Negotiate and procure the repayment of the loans on behalf of KP; and

vi) Instruct valuers.

31. He says that he "does not dispute TC's version of events" and then makes a qualification. He says that he did not physically force her to sign the personal guarantee but warned her that if she did not KP: "would withdraw financial support not only for Ascot but also her other loans and those of family members." He says his motivation was to "get the deal done".

32. The Facility Letter is dated 17 July 2019 and was signed by TC on 18 July 2019. This bolsters the inference that funds were needed in a hurry. The Facility Letter does not include a requirement that a personal guarantee be provided by TC. The loan term is 6 months. During the term of the loan the interest rate is expressed to be 1.25%. After the expiry of the term a higher default rate applied. The legal fee charged by Ewan & Co (said to be the solicitors acting for KP) was the responsibility of the borrower and a professional valuation of the Property was required. The loan offer was expressed to be available for a period of 14 days following the acceptance of the facility. The Facility Letter advised TC to take independent legal advice:

> "By signing the Facility Letter you declare and warrant that:

> You have read and understood the terms and conditions of this Facility Letter and have been (sic) the Legal Charge secured by it and you acknowledge that you have been recommended by us to take independent (and, where there is more than one person borrowing, separate) legal or other appropriate professional advice on their contents, on the contents of any other documents that we require you to sign and in respect of the loan generally, and…You acknowledge that we have relied upon the declarations and warranties made by you in arriving at our decision to lend to you the sum …We reserve the right to alter the terms hereof or to withdraw this Facility at any time without assigning a reason. In the event of this Facility being withdrawn under this, or any preceding clause, we shall in no way be liable for any liabilities incurred by you."

33. On the same day TC signed a declaration that the facility to be provided to Ascot is: "wholly or predominantly for the purposes of a business carried on by me."

34. With the express terms of the Facility Letter firmly in mind, the warning provided by VS to TC about the potential to withdraw the facility does not obviously appear to amount to a misrepresentation, although it can fairly be said that withdrawing all other facilities to family members would not have been appropriate. None of the parties before me ventured to suggest that VS had made a misrepresentation inducing her to enter into the personal guarantee.

35. The letter relied upon and dated 18 July 2019 sent by VS to TC references several elements of the factual matrix in this case. These are:

    i) TC was aware that the Loan Documents needed to be signed if the facility was to be advanced;

    ii) TC was equally aware at the time that KP required her to execute the personal guarantee;

    iii) TC was aware of the terms since the letter refers to a discussion about the personal guarantee at a meeting held on the same day; and

    iv) TC had expressed a concern about signing the personal guarantee without first having the benefit of independent legal advice.

36. The personal guarantee was signed on the same day as it was dated. The personal guarantee is witnessed by Charles Ewan of Ewan & Co. There is no suggestion that Charles Ewan was associated with KP, KCH or the Applicants, other than for the purpose of providing professional services.

37. In his witness statement, KY refutes the evidence given by VS. He says that VS was not the agent of KP:

> "We have lent money to a number of her [TC] companies over the last few years... we were introduced to Ascot by Mr Vidya Sharma. He is one of a number of individuals we used to

> develop our network in order to expand our bridging loan portfolio…for these introductions we would normally pay a finder's fee.
>
> …he sometimes relayed terms between the parties (as an introducer might be expected to do), but all key contract terms in the loan were drafted by me personally and relayed to Ewan & Co and then on the other side, as my email to Ewan & Co on 17 July 2019 shows. Moreover, although the facility agreements are drawn from standard loan templates the key terms (amount, interest, rate, term, security) were all independently negotiated by us, with a careful analysis of the risk profile of the loan. This was then enshrined in the facility agreement. Mr Sharma was not our agent and had no authorisation to sign any documents on our behalf (nor did he, to our knowledge) or to change the terms of the agreements that were made."

38. No documents were produced to the court where VS had executed documents on behalf of KP. VS does not explain how he negotiated any terms including interest rates by reference to factors when weighing the risk.

39. KY comments on the commercial common-sense of TC's arguments. First, it would be contrary to commercial common sense to produce and enter into a detailed written agreement that had been varied prior to signing it. It also fails the commercial common-sense test to have a side agreement where KP does not instruct solicitors to assist or reduce such a side agreement to writing. He says that an oral side agreement to the effect that the written signed agreement would not be enforced or not enforced in certain circumstances, or the interest rate would differ is not credible. I note that in previous cases similar contentions have been dismissed as incredible as they tend to be "a solemn farce".

40. Secondly, he says, the evidence given by VS is tainted by reason of his relationship with TC. He shares a work address with TC, has had a working relationship with TC for a number of years and is her co-director in two companies. It follows that his association with TC is close. Thirdly, there is no contemporaneous evidence that TC was pressured into signing the personal guarantee. Fourthly, Ewan & Co acted for TC as well as KP in the transaction. Fifthly, the senior partner (Charles Ewan) at Ewan & Co wrote to KP stating he had explained the loan documentation and personal guarantee to her. This discredits both the evidence of TC and VS. Sixthly, KP received a letter from the "in-house" lawyer to TC (NC, who is TC's husband). This suggests that she not only engaged Ewan & Co but had available additional legal advice. Lastly, TC is said to be an experienced businesswoman, a director of 17 companies and had taken previous loans with KP. The previous loans included security and a personal guarantee from the director, TC.

41. KY adds additional detail in his second witness statement:

> "Mr. Sharma [Vidya] also invoiced us from an address that is the same as another of Mrs. Chopra's companies – Property

> Finance and Law, at 902 Eastern Avenue, Ilford IG2 7HZ. Accordingly, Mr. Sharma was/is far more closely associated with the Chopras than he was/is with us. Indeed, on 30 January 2020 I even agreed to meet Mr. Sharma at this address which he shares with Tina Chopra. In relation to that meeting Mr. Sharma explained: "*Sir will be pleasure to show around our offices and our team and let me confirm soon so Tina can join us too."* In short, Mr. Sharma was not our agent, he was a business associate of the Chopras and has a vested interest in their ventures." (emphasis added)

42. It may be added that in her second witness statement to support the Application to set aside the demand of KP, TC refers to VS as "at the time a family friend". KY exhibits an e-mail sent by VS asking him to "check over documents in order to get the deal done". If VS had authority to agree the facility to Ascot, if he had authority to negotiate and if he assisted in the drafting of the loan documentation, one might expect an explanation as to why he needed KY to check the documents. An explanation may have helped understand the nature of the purported agency. No explanation has been provided.

43. KY exhibits an e-mail sent by VS on 27 February 2020 (after the term of the loan made to the Company had expired):

> "I am hoping to close all with you by end of this month sir as 2.5 per is hurting my clients as I remind them every day to push and redeem you." (sic)

44. The e-mail is curious if the story told by VS is true, namely that the default interest rate would not be enforced. It is at odds with him having "negotiated the interest rates and terms of the loans" as he swears in his witness statements and writes in the July 2018 letter. It is at odds because "his client" would not be paying 2.5%. The tenure of the e-mail also appears to contradict his evidence. He is writing from the perspective of TC not his alleged principal. Further, no explanation is offered for the reason why his e-mail did not remind his principal of the orally agreed side deal. These anomalies become stark when having regard to the default rate; twice the purported negotiated rate.

45. According to KY, the explanation for the curiosities is simple. It was he who negotiated the terms of the loans to all the Chopra companies. It was VS who acted for the Chopra family and their various companies and received a fee for making the introduction. In support of this contention are two invoices submitted by VS to KP. The first is dated 1 October 2018 seeking payment of £12,300 for his services. The fee is for the "Introduction to NRD Property Limited". The second is dated 2 January 2019 for £4,115 for the introduction to David Harrison and expressly states that it is for: "1% Introducer Fee". Curiously the account details for payment given on the invoice for the introduction of David Harrison is that of Property Finance and Law (a company in which TC and NC are directors). The Companies House registered address of Ascot is care of Property Finance and Law.

46. The funds to be advanced under the facility in respect of Ascot were sent to Ewan & Co. The firm acknowledged receipt of the funds on 18 July 2019. A paralegal, Vijay Kumar, wrote to KY: "Our Client will be in today and we will forward you all the signed documents later today and submit the registration of your charge with Land Registry." Vijay Kumar ("VK") also acted as an introducer of business to KP and introduced VS to KP. Charles Ewan witnessed the signature of TC and the facility was advanced.

47. In his second witness statement VS accepts that he has "had a close business relationship with various members of the Chopra family" and is uncle to MS. He contends that it is because of the close relationship that he was able to "put unfair pressure on them to sign the guarantees…". He exhibits a letter dated 22 December 2020 from solicitors now acting for KP (Howard Kennedy). The letter is sent to Ewan & Co. The letter states "As you are aware, Katrin instructed Ewan & Co to act as Katrin's legal representative for the purposes of effecting bridging loans made to various companies over the past decade." The simple sentence is relied upon to support the contention that Ewan & Co were instructed by KP and not TC. The practice of having two clients in respect of the same lending application is established but no reference by any party to these proceedings was made to the CML handbook or the solicitor regulations. TC (and all Applicants) suggest there was a conflict of interest. This is not a point I intend to decide given the lack of focus and submission on the argument. The fact that KP instructed Ewan & Co to act for it to effect the transactions does not, without more, improve the arguments or shine a light on the issues.

48. In respect of the Agency Argument reliance is made on an e-mail dated 22 January 2021 sent by Ewan & Co. The letter expresses concern that KP assert that VS was not its agent:

> "We are concerned in particular that your clients only now allege that Mr Viday Sharma is not an agent, employee or representative of your client. Right from the outset on or about early 2018 it was Mr Sharma and only Mr Sharma who gave instructions to us on behalf of Katrin. All letters received from Katrin on their letter heading were signed only by Mr Sharma. He drafted all offer letters and most were signed by him on behalf of Katrin.
>
> At no time have we received letters of instructions on Katrin letterhead signed by anyone other than Mr Sharma. So far as we were concerned Mr Sharma was Katrin and the only person authorised by Katrin to instruct us, negotiate with clients, arrange bridging loans, agree terms, valuations etc…"

49. At first sight this appears strong evidence since it is from the firm of solicitors involved in the transactions. The fact that it is written by VK disturbs that first appearance. Further cuts are made into the evidential weight of the letter. An e-mail dated 4 February 2019 and sent by Ewan & Co responds to some concerns expressed by KY to the solicitors about the lending. The response is provided by VK (of Ewan & Co) and provides a strong indication of his allegiances. He informed KY that TC

"has a net worth of over £30million" and "I know Mrs Tina Chopra personally and her personal guarantee is priceless. It is as good as money in the bank. She has never defaulted I can personally vouch for her. 100% solid." A strong sell.

50. An e-mail sent from VS to KY dated 30 January 2020 provides further evidence of a conclusion that the statements by VS should be doubted. The e-mail has the value of being contemporaneous and provides a window into the relationship. The e-mail concerns a property known as "Freemasons Road". KP made a loan to IOL in which AC and another were directors. Similar defences are raised. The e-mail provides evidence that VS identified with the Chorpa companies and the Applicants rather than with the Respondents. The e-mail is likely to surprise a principal if the author owed it fiduciary duties:

> "Loans sir. I will never let you down sir as I truly believe in Karma. Anything which is not right *we will* get it correct so the brotherhood always there and *I will show you our projects we are doing and you will* like them sir." (sic) (emphasis is added)

51. In March 2020 VS writes to KP regarding the loans made to Ascot and NRD. In respect of Ascot, he provides an update on the development. Reflecting the short-term lending he says: "Tons got the funds to finish". He then explains:

> "*Our sites* have stopped and *we all are* helpless. *Pl bear with me and I will keep chasing all*…".

52. Mr Hornyold- Strickland for KP submitted that the evidence shows VS: "is effectively an employee or, to put it in common parlance, a lackey of Mrs Chopra".

53. The arguments in favour of setting aside the statutory demand were advanced by Mr Mussa in December 2021. I have a transcript of the hearing and the benefit of his skeleton argument. I also made notes at the time.

54. Mr Mussa submitted that the debt said to be due in the demand is disputed on substantial grounds because of the common factors I mentioned earlier in this judgment: the Undue Influence Argument, the assurance in respect of interest rates, and the assurance that the personal guarantee will not be called upon until the outcome of enforcement actions against Ascot. In respect of this last matter, it is said that KP is acting unreasonably in seeking repayment under the personal guarantee before seeking redress against the Ascot.

55. Mr Mussa took the court to the various loan documents. He submitted that the pressure referred to in the witnesses statement of TC and VS was duress. I asked Mr Mussa to explain what evidence there was for duress or undue influence and he referred me to paragraph 5 of the witness statement provided by TC. That reads:

> "I was never shown any of the Loan Documents, but he presented me with a personal guarantee deed…on 11th February 2019."

56. He accepted that the evidence at its "height" was that TC signed the personal guarantee under the undue influence of VS.

57. The contemporaneous documents are the most reliable source of evidence and these show that TC knew she had to execute the personal guarantee as described above. There is no evidence that the requirement to provide the personal guarantee was a surprise. I asked Mr Mussa that if VS was agent of KP, what was wrong with the transaction? He responded that "there may be" something wrong. Mr Mussa's submission was that this is sufficient to raise a triable issue.

The Forgery Argument

58. At the resumed hearing of the case, some 10 months later, counsel submitted a further witness statement made by TC exhibiting a report from a hand-writing expert. Having given evidence that she had signed the personal guarantee, TC claims that the signature on the personal guarantee is not her signature. Her evidence is:

> "As I mentioned in my previous witness statements Mr Vidya Sharma insisted and coerced me to hastily sign documents under severe pressure and duress without the opportunity to read what I was signing and without the benefit of independent advice of any kind. Each time I went to the offices of Ewan & Co I was presented with a number of documents to sign but not given any opportunity to read or consider them. I went there to sign loan documents, however I am now not certain if the documents I signed were loan documents for relating to the Respondents or other documents. It is now clear however that the documents I in fact signed have not been produced before this honourable court and certainly no personal guarantee document has been produced signed by me… The evidence as to the personal guarantees I gave in my earlier statements was not correct. I mistakenly believed at the time that the personal guarantees were genuine and signed by me. I can now confidently confirm the loan documents that have been produced before this honourable court were not signed by me at all."

59. Her contention is supported by the report exhibited to her statement. The report is produced by Louise Floate, a forensic scientist for over 25 years. She had been instructed by Property Finance and Law on behalf of TC. Ms Floate analyses the signatures of TC and her son AC. After looking at the material mentioned in her report she concludes:

> "I consider there to be very strong evidence to support the proposition that Tina Chopra did not write out the questioned signatures in her name on the two Personal Guarantees or the Director's Guarantee in her name."

60. That is, the evidence is not extremely strong or conclusive (grades above "very strong").

61. KP elected not to adjourn the hearing to consider the evidence further, choosing to attack the inconsistency in the witness statements.

Tina Chopra -v- KPL (NRD)

62. The second statutory demand served by KP and served upon TC is also dated 6 May 2020. The personal guarantee is dated 11 February 2019 and the loan it supports was made on the same date (the "Second Loan"). The Second Loan repaid a loan made by KP to NRD on 20 September 2018 (the "Initial Loan"), although no money exchanged hands. The transaction was intended to facilitate an agreement for a new term since the term for the Initial Loan had expired without repayment. The Initial Loan was used for the purpose of obtaining planning permission and to refurbish a property known as New Road Chatham ("Chatham").

63. In December 2018 NRD borrowed £1,332,237 from Together Commercial Finance Limited ("Together"). It was submitted that the purpose of the refinance was to redeem the Initial Loan. Whatever the intention it is accepted that the money advanced by Together was paid to Ewan & Co on 7 January 2019 but did not redeem the Initial Loan.

64. Together took a first legal charge over Chatham (registered on 28 January 2019), a debenture over the assets of NRD and a personal guarantee from TC and PS. Ewan & Co acted for the Applicants and NRD.

65. The Second Loan was for a term of 12 months with the first 9 months at a reduced or concessionary interest rate. Although it was argued that there was no consideration at the early stages of the hearing, it was recognised that consideration may also have passed since (i) KP agreed to give priority to Together and take a second charge over Chatham (ii) the personal guarantee was executed on 11 February 2019 by way of a deed, and (iii) KP did not call in the first loan despite the expiration of the term but entered into a new facility with a longer term.

66. On 16 March 2020 solicitors for KP made demand. The language of the demand was picked over by counsel at the hearing as it is contended that the it did not constitute a demand made pursuant to the personal guarantee. As it took on some importance I set it out the body of the demand letter in full. All demand letters are in the same form. It is addressed to "Ms Tina Chopra, NRD Property Limited" at her home address and "Mr Paul Adam Smith, NRD Property Limited" at his home address. It states that it was "also" sent by e-mail and gives three e-mail addresses. These have been identified as the e-mail addresses of PS, TC and NC. It begins "Dear Sir and Madam" and reads:

> "We act for Katrin Properties Limited. Please direct all future correspondence in respect of this matter to this firm.
>
> We write further to the loan which was made to NRD Property Limited on 11 February 2019 in the sum of £1,533,779 ('the Loan'). The term of the Loan has expired without repayment and we write to formally demand immediate repayment of the same on behalf of our client, in addition to outstanding interest and costs.
>
> Your failure to repay the Loan will result in our client taking legal action against you. All of our client's rights are strictly

> reserved, including the right to enforce the personal guarantees given by Ms Chopra and Mr Smith in respect of this Loan.
>
> Kindly arrange payment in full within 7 days of the date of this letter, namely by 23 March 2020.
>
> The amount now owing (including interest) totals to £1,717,235.24 and unless paid within 7 days (and ignoring this letter) will result in your increased liability to our client for interest and costs."

The letter is copied to NRD at the Chatham property.

67. The evidence in support of the application to set aside the statutory demand is similar if not the same as that provided in support of the application made in respect of the Ascot demand (above):

    a) VS was the agent of KP.

    b) She was "informed by VS" that he had arranged a loan with KP.

    c) TC was never shown any of the "Loan Documents" but she did receive the Guarantee on 11 February 2019.

    d) She signed the Guarantee "in front of Mr Charles Ewan" of Ewan & Co "without really understanding what I was signed and why" (sic).

    e) The Guarantee was signed under duress and the undue influence of VS without the benefit of legal advice.

68. As with the Ascot statutory demand, VS swears a witness statement in almost identical terms. He says he introduced "Tina Chopra, Aman Chopra and Paul Smith to Katrin", and introduced "Katrin to Ewan & Co". He says that KY had not met TC in person. He does not mention that a meeting was set up at the offices of TC, AC, VS and PS by e-mail on 30 January 2020.

69. In the teeth of contemporaneous documents suggesting the contrary VS asserts that as far as the borrowers were concerned, he was KP. In his second witness statement he claims that he had drafted the facility letters using KP headed paper and had full authority to do so: "Having agreed the terms with the borrowers, I drafted the agreed terms on Katrin letterhead and sent them to Mr Kerem". KY, he says, redrafted the letters on standard terms saying that I should issue a "Side Letter" setting out the agreed terms. As in the Ascot matter VS expresses some regret in respect of the "pressure" he claims to have exerted.

70. KY claims that the assertions made by VS are baseless. KY says that they make no sense as he was acting for his close associates (friends), seeking to obtain short term lending for companies they were interested in, and that the negotiations he had were with Ewan & Co who were acting on behalf of the Chopras. As an example, he refers to an e-mail dated 17 July 2019 he wrote to Ewan & Co attaching the "final facility latter (sic) for ascot investments's (sic) and developments limited". It is to be noted

that VS wrote to KY on 11 February 2019 informing him that the: "Client is with solicitors now for the independent legal advice paperwork that is being signed" and asking "are we ok to complete today?". The e-mail suggests that it was his "client" who was with the solicitor and not the client of KP. KY's evidence is that VS: "brought us deals (for ventures being undertaken by close business associates and/or even involving himself" and he was paid a "finder's fee". It has the ring of truth when set against the factual background, but this is not a trial.

PS v KP

71. The statutory demand served by KP on PS relates to NRD and is dated 6 May 2020. PS shares an office with TC, VS, AC and TC's husband, NC.

72. PS attended the offices of Ewan & Co and signed the Loan Documentation on behalf of NRD on 25 September 2018. The monies were sent by KP to Ewan & Co on 27 September 2018.

Aman Chopra v KP

73. AC is a director of IOL. IOL received an advance of £329,679.23 on 20 December 2018. The loan was provided pursuant to a facility letter and included an arrangement fee. AC provided a personal guarantee dated 17 February 2020 in respect of the advance, guaranteeing the performance of IOL. Ewan & Co were the solicitors involved in the transactions. The loan made to IOL was not repaid and a letter of demand was sent on 16 March 2020. The fact of the loan and failure to repay the loan is not in dispute. On 6 May 2020 a statutory demand was served on AC.

74. In his first witness statement AC explains how he executed the personal guarantee:

> "Later on 17th February 2020 Vidya took me to the offices of the Respondent's solicitors, Ewan & Co forcing me to sign a Personal Guarantee ("personal guarantee"). Vidya confirmed that the personal guarantee would not be enforced without the Property being sold. After the sale of the Property, if there was a shortfall than I could be liable to pay any shortfall, although that was unlikely as the value of the Property would be enhanced once planning and the development is completed. Vidya insisted and coerced me to sign the personal guarantee without giving me an opportunity to obtain independent legal advice. I unwillingly agreed (without the benefit of proper advice) to sign the personal guarantee under severe pressure and duress."

75. AC relies on the same defences as TC. In short KP acted through its agent VS and VS exerted undue influence upon him to sign the personal guarantee. VS made the same representations to AC as he did to TC and PS. He contends that until KP realises the security it has by way of a first legal charge over the property owned by IOL it cannot seek to enforce the guarantee.

76. AC also introduces the Forgery Argument.

MS v KCH

77. The statutory demand made on MS is dated 19 August 2020 and relates to a liability said to be due to KCH under a personal guarantee dated 29 March 2019 given to secure a facility made available to LVN Ltd and Property Finance and Law. LVN and Property Finance and Law borrowed £1,568,000. The facility was used to purchase a property known as 43 Old Gloucester Road London for LVN. The sum said to be due under the personal guarantee is £770,474.96.

78. The arguments raised by MS are slightly different to those I have outlined above. First, it is said that 43 Gloucester Road was not registered at Land Registry (due to a failure of Ewan & Co) therefore the personal guarantee: "is now void and unenforceable due to a failure of consideration." The reason for the failure is said to be due to "the bogus seller". The second ground is that KCH should have recourse to its security attached to 43 Gloucester Road. A Part 8 claim has been issued seeking a vesting order. KCH should wait the outcome of those proceedings or take action against Ewan & Co.

79. In her second statement she says that VS (as purported agent of KCH) informed her that the personal guarantee would only be "operative" in specific circumstances. The first, that 43 Gloucester Road was registered at Land Registry. The second, if 43 Gloucester Road had been sold by KCH first. Lastly it is said that VS put "me under pressure to sign the guarantee otherwise I was informed by him that the loan transaction would fall through and that there were no other options to borrow money." She says that VS failed to inform her that she would have to sign a personal guarantee and overall "my uncle acted unscrupulously."

80. The approval in principle is dated 5 March 2019. The bridging loan was "strictly subject" to certain minimum requirements including a personal guarantee from MS. Charles Ewan of Ewan & Co (solicitor and partner) sent a certificate to KCH dated 25 March 2019. The documentation included the name of the solicitors acting for the "applicant". It named Ewan & Co. The documentation was signed by MS as "applicant" on 7 March 2019. An e-mail dated 8 March 2019 supports the contention that Ewan & Co acted for LVN, and a further e-mail of the same date makes clear that ELS are the solicitors acting for KCH.

81. A solicitor note dated 11 March 2019 produced by Charles Ewan records that he spent 30 minutes with the borrower. The borrower in this context is LVN. It states that the "Security Documents", defined to include the personal guarantee, were signed by MS (the sole director) in his presence and that he provided advice that MS would not be able to dispute "the legal binding nature of the Security Documents once the Loan Facility is completed."

82. In respect of the personal guarantee, Charles Ewan certified that MS executed the documents and was satisfied that she understood the meaning and effect of the personal guarantee, it was signed in the absence of any duress and "we have taken all reasonable steps to satisfy ourselves that no circumstances exist which might diminish her capacity to appreciate the liabilities undertaken".

Setting aside statutory demands-the role of the court

83. Fortunately, the majority of the parties produced an agreed bundle of authorities. Although not all legal submissions made were agreed, I did not detect a difference about the test for setting aside a statutory demand. It is a result of the common ground on the test that shall deal with this element of law in brief.

84. The Insolvency Rules 2016 ("IR 2016") provides a statutory framework to set aside statutory demands. By rule 10.5 of the IR 2016 the Court may set aside a statutory demand where:

> "(a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt specified in the statutory demand;
>
> (b) the debt is disputed on grounds which appear to the court to be substantial;
>
> (c) it appears that the creditor holds some security in relation to the debt claimed by the demand, and either rule 10.1(9) is not complied with in relation to it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or
>
> (d) the court is satisfied, on other grounds, that the demand ought to be set aside."

85. The majority of Applications rely on ground (b). Some rely on ground (d) as an additional ground.

86. To succeed under IR 2016 10.5 (b), the Applicant must demonstrate that the dispute raised is genuine and substantial. It is substantial if it bears a real prospect of success: *Crossley-Cooke v Europanel (UK) Ltd* [2010] EWHC 124 (Ch) [2010] BPIR 561 at 16; *Alexander-Thedotou v Michael Kyprianou and Co LLC* [2016] EWHC 1493 (Ch) [2016] BPIR 1114, at 12-13.

87. In determining whether the dispute is substantial, the court should not conduct a mini-trial but it is permissible to scrutinise the evidence presented to establish if it is sustainable. Following a submission that the court should be cautious as it is only too easy for a debtor to raise many objections and claim that the cannot be resolved without cross-examination, Patten J (as he then was) explained in *Portsmouth v Alldays Franchising Ltd* [2005] BPIR 1394 (Ch) at para12:

> "[t]he mere fact that a party in proceedings not involving oral evidence or cross examination asserts that certain things did or did not occur, is not sufficient in itself to raise a triable issue That evidence inevitably has to be considered against the background of all the other admissible evidence and material in order to judge whether it is an allegation of any substance. Once the court considers that the evidence is reliable in that sense, and not some attempt to obfuscate the real issues by raising a series of hopeless allegations then it does, of course,

> become necessary to consider what the legal consequences of it are."

88. In *Re Kerkar* [2021] EWHC 3255 ICC Judge Burton found that the evidence in support of an application to set aside a demand was "inherently implausible" as the applicant, an experienced businessman, advanced an argument that he relied on a representation made in respect of a different lending agreement and made at a different time, to contradict the express wording of an agreement that gave rise to the liquidated debt. This is one legitimate application of the exercise described by Patten J where the court considers all the admissible evidence and finds that the argument raised fails to raise a serious and genuine dispute.

89. In respect of the Undue Influence Argument little authority was presented to the court but reference was made to Chitty on Contracts Volume 1. It was submitted that undue influence is presumed where there is a transaction requiring an explanation and a relationship of trust and confidence is found to exist between the influencer and the person influenced. However, it formed no part of the cases put for the Applicants that the facts gave rise to a presumption.

90. In the absence of a presumption, the Applicants must demonstrate actual undue influence. Reliance is placed on the statements made by VS (as purported agent of KP and KCH) and in particular that his "motivation was to get the deal done" and he wanted to justify his commission. In this way it is claimed that VS preferred his own interests.

91. Three arguments were raised in respect of contracts, but not necessarily in all Applications. They all concern the purported representations made by VS. It is said that those representations were relied upon and varied the contractual obligations between the lender and borrower. First, *Byblos Bank SAL v Al-Khudhairy* (1986) 2 BCC 99,549 was cited for the proposition that if there had been an oral statement that security in addition to the guarantee would be given, then the giving of the guarantee was conditional. In *Byblos Bank SAL* the bank applied for summary judgment against a company director who had guaranteed the repayment of a facility advanced to the company. Many defences were run. The only defence found capable of success (a shadowy chance at trial) was the conditional argument. *Byblos Bank* does not assist in the circumstances of this case. No reliance is made on contributions. It is not part of any case that there was an implied term that a personal guarantee would only be valid if other guarantees (or additional security) were also taken by either Respondent. In one case it is asserted that due to fraud by the seller, security could not be taken. The property in question was not transferred. That is a very different and does not obviously effect the position of KP or KCH.

92. Secondly, *Brikom Investments Ltd v Carr* [1979] 1 QB 467 was argued This is a case about a lease taken by various different tenants in a block of flats. The lease provided that each tenant was to make a contribution toward the expenditure of roof repairs and sued for the amount. The tenants argued that the landlords had told them that they would repair the roof at their own cost. *Brikom Investments Ltd* is cited for the proposition that a contract entered on the basis of an oral statement that the strict terms will not be enforced amounts to waiver of the written terms or a collateral contract. The argument is dependent on how the court treats the Agency Argument.

93. Lastly, reliance was made on the lack of a non-oral modification clause ("NOM") in the personal guarantee: *Rock Advertising v MWB Business* [2018] UKSC 24. In Rock, the Supreme Court found that there is no public policy reason not to permit such clauses. On the facts of the case the variation was invalid for want of writing and signatures prescribed by the NOM which read:

> "This Licence sets out all of the terms as agreed between MWB and Licensee. No other representations or terms shall apply or form part of this Licence. *All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties* before they take effect." (emphasis added).

94. The effect of the NOM was that it deprived the alleged oral agreement of any binding force as a contractual variation.

95. The relevant clause in the KP personal guarantees is not the same. Clause 6 operates as an acknowledgment and warranty by the guaranteeing party that:

> "…[the surety] represent[s] and warrant[s] that the Guarantee and the other obligations contained in this Deed are valid and binding on us, and enforceable in accordance with their terms."

96. It is a form of entire agreement clause as its intention, as viewed by the objective observer, is to prevent the surety from raising claims that statements made during contractual negotiations and not included in the personal guarantee, constitute additional terms or some kind of side agreement. Clause 6 provides a promise or warranty that the obligations between the parties are those contained in the deed. It does not prevent an oral modification after the personal guarantee was executed nor does it preclude a defence based on undue influence. Unlike the facts in *Rock*, there were no prescribed requirements, and the personal guarantee was purportedly executed as a deed.

Undue Influence Arguments

97. There are many curiosities to this defence not least that the preferment is that of VS and not KP or KCH. There is no evidence that KP or KCH knew of or should have known that VS was seeking to prefer himself in the transactions. The evidence points in the opposite direction. It was Property Law and Finance that was to benefit from at least one invoice rendered by VS. However, the most obvious obstacle to categorising the argument as serious and genuine is the lack of evidence of influence that can properly be described as undue.

98. In *Royal Bank of Scotland v. Etridge No. 2* [2002] 1 AC 773, para 8 Lord Nicholls described the two forms of undue influence:

> "a. Overt acts of improper pressure or coercion, such as unlawful threats.
>
> b. A relationship where one has acquired over another a measure of influence or ascendancy of which the ascendant

> person then takes unfair advantage… without any specific acts of coercion."

99. Actual undue influence needs to override a vulnerable person's will and coercion and unlawful threats are likely to amount to influence that is undue. Pressure that overrides a person's will is likely to be improper. Actual undue influence, unlike presumed undue influence, needs not only to be asserted but supported by evidence. The simple assertion by TC that she, for example, signed the personal guarantee under the undue influence of VS fails the threshold and is insubstantial. The evidence fails to demonstrate the relationship status (who was in the dominant position) and fails "to fortify the case by evidence, for example, of the pressure which was unfairly applied by the stronger party to the relationship": see *Etridge (No 2)*, para 92.

100. In the case of AC v KP, where the evidence of actual undue influence is a little more full, AC says:

> "VS insisted and coerced me to sign the PG without giving me an opportunity to obtain independent legal advice. I unwillingly agreed (without the benefit of proper advice) to sign the PG under severe pressure and duress."

101. The greater part AC's evidence has reduced impact because of the admissions apparently made by VS who says, as he says in all cases, that he did not force or physically make AC sign the documents but he was insistent. As with all the cases the height of the case is that VS "insisted". Insistence set within the background is without substance, since signing the Loan Documents and personal guarantee was to benefit the company which obtained the loan, and indirectly the benefit of each member of the relevant company. The members were the guarantors. To simply say that VS "insisted" is insufficient as insistence does not without more equate to influence that may be described as undue.

102. Other arguments were raised by the Respondents such as the endorsement of the signature by the partner at Ewan & Co and in some cases certificates were provided or e-mails sent stating the documentation had been signed by the director. These arguments would ordinarily be sufficient in themselves as they disrupt the chain whereby a lender is affected by undue influence exercised on a surety by the person benefiting from the loan. The fact pattern is different from *Etridge (no 2)*. For KP or KCH to be affected by undue influence they would need to be on notice (see below where I find against the Agency Argument). Other than the Agency Argument, there is nothing in the facts of these cases that suggest, nor has it been argued in any depth, that KP was aware of any influence that can properly be described as undue.

103. As the loans were advanced to companies on applications made by directors of the same companies which were intended to benefit the members of those companies the position aligns more easily with *CIBC Mortgages plc v Pitt* [1994] AC 200.

104. An attraction of the short-term finance to the relevant company was that it enabled the company to do something it could not otherwise do, such as purchase an asset of equal value to the loan facility, or lesser value so that there was some head room for refurbishment. Once purchased an opportunity arose to turn a profit. This factual matrix makes the assertion of undue influence by a friend or close business associate

or uncle who, at least on one occasion, invoiced on behalf of Property Finance and Law, inherently implausible.

105. In an e-mail sent to court after the close of the hearing a new argument arose. It is argued for AC that the personal guarantee should be avoided even though there was no undue influence. Mr Stimmler argues that as KP gave no consideration. He was a volunteer. On this ground alone the personal guarantee can be set aside. He directed me to paragraph 69 of his skeleton argument. The argument is different in the skeleton argument:] "Katrin would only be protected from VS' undue influence if it were effectively a bona fide purchaser for value…". I shall deal with it briefly.

106. The factual matrix is that AC executed his personal guarantee after IOL entered the facility agreement in circumstances where the facility agreement did not require a personal guarantee from a director. The maxim relied upon is that equity will not aid a volunteer.

107. Reliance is made on Snell's Equity (34th Edition) at para 4-022 where it states: "The purchaser must have given some value in the form of executed consideration". It does not directly deal with personal guarantees given under seal. In support of the volunteer argument *Huguenin v Baseley* (1807) 14 Ves 273 was cited. This was a case where a voluntary settlement was made by a widow on a clergyman. It was set aside for undue influence. It is a very different case. The voluntary act was to deprive Huguenin of property for the benefit of Baseley where the instrument failed to include a power of revocation. The court explained the circumstances that led to its decision:

> "The question is, not, whether she knew what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those, who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf… Repeating therefore distinctly, that this Court is not to undo voluntary deeds, I represent the question thus: *whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature and consequences, which the Defendants Baseley and the attorney were bound by their duty to communicate to her, before she was suffered to execute them; and, though perhaps they were not aware of the duties, which this Court required from them in the situation, in which they stood, where the decision rests upon the ground of public utility, for the purpose of maintaining the principle it is necessary to impute knowledge, which the party may not actually have had. These parties therefore cannot possibly hold the benefit of these instruments*." (emphasis added)

108. In other words the fact of being a volunteer was not sufficient in itself to set aside the gift. In the same way *Barron v Willis* [1900] 2 Ch. 121 does not assist. It concerned a case of emotional or physical (or both) dependency and it was a case decided on the basis that the solicitor failed to ensure the "bargain" was freely entered.

109. No acts of influence by the lender or solicitor are relied upon, whether they be undue or otherwise. It was AC who sought finance from KP for his company. KP provided that finance. The undue influence in *Huguenin* was self-evident and not rebutted. The potential for undue influence in *Barron* required a solicitor to ensure that the wife was entering the "bargain" under her own free-will.

110. The personal guarantee given by AC was entered into by deed. A deed has the advantage that valuable consideration need not be proved. If it can be said, which I doubt [see paragraph 65], that AC was a mere volunteer, that alone is insufficient. If it (being a volunteer) were sufficient every surety would be set aside. A surety is a contract "by which one person (the surety) agrees to answer for some *existing* or future liability of another…": Law of Guarantees (7th Edition) 1-001 (emphasis added). This is not a case where it is argued that the personal guarantee should be discharged for any particular reason, such as non-compliance with section 4 of the Statute of Frauds 1677. The argument fails.

111. Furthermore, if the personal guarantees were not signed by TC, AC or PS as contended, they could not have been executed by undue influence. That aside, in my judgment the Undue Influence Argument is not genuine and not serious. It fails to pass the threshold test.

The Agency Argument

112. The close relationship between VS and the Applicants immediately puts the court on notice that the argument of agency is not genuine. It would not be the first time that the court has seen a friend, business associate or relative provide a witness statement to support a claim or defence of another friend or relative, and that evidence has been wanting. It is therefore important to examine the Agency Argument objectively by reference to what has been said by reference to the contemporaneous documents where available.

113. The evidence given by the Applicants is unconvincing in that the statements in support of the Applications are only general remarks such as VS "assured me on behalf of the Respondents". Strikingly the statement of TC given in support of the Application in respect of Ascot and NRD, does not refer to the letter dated 18 July 2019. This is the letter written by VS to TC which expressly states that he is the agent of KP: "I assure you as agent of KP". The letter, which one would have thought important if genuine, is only exhibited to the second witness statement of VS.

114. Nearly all other correspondence was conducted by e-mail. The 18 July 2019 correspondence was by letter, said to be delivered by hand. If it were by e-mail its date could be verified. The letter stands out as extraordinary. Owing to the close connections between the author and recipient, the obvious and blatant alignment of the first witness statement, and the content of the letter it may objectively be inferred that it is self-serving. As such I give it the appropriate evidential weight.

115. Other than the statements by VS that he acted as agent of KP and KCH there is the e-mail from VK purportedly written on behalf of Ewan & Co and sent on 22 January 2021. The e-mail does not have the imprimatur of a partner's hand, which is more likely if the firm was "concerned". To consider probabilities however, is to cross the line to trial. It is possible to state that the representations made by VK to KY about the

credit worthiness of TC demonstrates a close connection between him and TC: "I know Mrs Tina Chopra personally and her personal guarantee is priceless."

116. KY denies any agency agreement. The contemporaneous documents are few but valuable just the same. First, and most obvious, are the invoices. Not many invoices are exhibited but those that are demonstrate (i) VS asked for one invoice to be paid direct to a Barclays Bank account in his name, and another to Property Finance and Law. No explanation is provided as to why, as agent for KP he would ask for the invoiced monies to be sent to Property Finance and Law. Secondly the invoices are for "introductions" made and not for acting as agent of KP or KCH. This is consistent with his statement made in support of the PS Application where he says: "I introduers (sic) Mrs Tina Chopra and Paul Smith to the Respodents (sic)." Lastly, despite the evidence of VS, no document has been exhibited to demonstrate that he drafted the terms of any agreement between the parties or sent by e-mail to KY the terms of any agreement.

117. In his statements VS places reliance on the contention that the Respondents did not have a face-to-face meeting with the Applicants. That does not improve or strengthen the argument that he had authority to act for KP or KCH as he contends.

118. The contemporaneous correspondence between KY and VS is revealing. They are scattered around the exhibits to the various Applications. They have in common three things. First, they support the contention that VS acted as an introducer of clients as described. One example is the introduction of PS as contained in an e-mail sent by VS to KY on 22 January 2019: "I assure you Paul Smith is an excellent builder…I do all his funding…this will b (sic) a great relationship". Secondly, they demonstrate that the purported representations about interest rates, initially relied upon by some of the Applicants, are insubstantial. VS asks KY for forbearance on behalf of these Applicants as the default rate is "hurting". Given the lengths VS has gone to in order to support the Applicants, the contemporaneous e-mail is inconsistent with his agency and representations purportedly made. Thirdly, there is no correspondence between VS and KY evincing his authority to act for KP or KCH to the extent he claims. The correspondence shows that VS deferred to KY, and KY sent the terms of a Facility Letter direct to Ewan & Co.

119. The failure to produce a single document passing between KP or KCH and VS to support an agency agreement of the substance and extent contended for, is in my view telling. It is less surprising that there be an oral agreement for commissions to be paid after the making of an introduction for new business. In any event the invoices support the position as introducer. The invoices are produced by VS, and provide the best evidence of his role: "introducer".

120. Nisha Rayvadera ("NR") (the in-house lawyer for KCH) provides a witness statement that in part counters the Agency Argument. NR notes in a statement dated December 2020:

> "All three Applicants have now alleged that a Mr Vidya Sharma ("Mr Sharma"), who is a family friend of Mr Chopra and Mrs Chopra (and is Miss Sharma's uncle), was acting as a broker and was the agent of the Respondent... It is not

> explained by the Applicants why this fundamental reason as to why they agreed to provide the Guarantees, was not made known to the Court when they first made the Applications… The allegation that Mr Sharma is the agent of the Respondent and could negotiate the terms of the guarantees on the Respondent's behalf is simply untrue."

121. The following opposing factors brought to the court's attention by NR are as follows:

i) VS has not produced a single document or email or other exchange between him and the Respondent in which he was appointed as the Respondent's "agent";

ii) VS' role was simply to act as a broker/introducer introducing prospective borrowers to the Respondent. In certain situations (but not always) the Respondent will pay such brokers/introducers a share of the arrangement fee that they charge to borrowers. VS had introduced prospective borrowers to the Respondent in the past, and Vs's usual role was to act as a liaison between the Respondent and a potential borrower. It is common for brokers/introducers to be liaising with multiple lenders in respect of the same loan in order to get the best deal for the borrower. It would be absurd for VS to consider that he is an agent of each lender that he manages to obtain a set of terms from

iii) VS liaised with the Respondent to negotiate terms for the Borrower, but he was also liaising with other lenders.

iv) The role of VS as broker was to negotiate terms on behalf of the borrower, not on behalf of the Respondent. There is an example where Ms Read O'Connor of the Respondent sent an email to VS saying "I have attached our Approval in Principle...If you would like to proceed with the loan, please....". As can be seen, the Respondent was negotiating with VS who was acting for the borrower. VS was not the agent of the Respondent.

v) VS had no power to agree terms on behalf of the Respondent. In fact, he made requests to the Respondent. That can be seen in his email where he asks "Please let me know if the lending can be increased". The background to this request was that the Respondent was only prepared to offer a 65% loan to value due to the zoning nature of the building. Part of the property was believed to be commercial rather than residential. Following further planning enquiries it became apparent that the lower part of the building was residential and the commercial lease was being surrendered therefore the loan to value was able to be increased.

vi) E-mails are referred to as demonstrative of his position as agent of the Applicants and not the Respondents. The email where he writes "We now have had some funds come in so only require funding on the 2 lower flat? and "We need to compete the upper parts". References to "we" were references to the Borrower and the Applicants. Other emails show that Mr Sharma made requests of the Respondent, indicating he was well aware that he had no authority or power or make decisions or representations on the Respondent's behalf.

122. The KCH Facility Letters contain a clause of acknowledgement that there is no agency agreement between lender and broker. That is not the same as the KP documents. Nevertheless there is much in common with the Agency Argument advanced by the Applicants in the KCH and KP Applications, including contemporaneous documents that evince VS acting for an Applicant and not a Respondent.

123. It is of note that in the second witness statement of PS he states that the original response to the statutory demand dated 11 February 2019 drafted by NC is not correct. The witness statements of TC, AC and PS repeat the content of the e-mail. This casts further and serious doubt on the Agency Argument. TC treads more carefully in her statement dated 6 October 2022. Her new evidence is that although VS "insisted and coerced me to hastily sign documents under serve pressure and duress" the "earlier statements was (sic) not correct". She does not mention the e-mails sent by NC nor does she directly resile from her position that VS was agent of the Respondents.

124. The submission made on behalf of the Applicants is that the applicable principles that determine whether a person has the requisite authority to contract on another's behalf, are those relating to actual authority. The burden of proof lies with the asserting party, namely the Applicants are to show that VS had actual authority to contract or vary a contract. Other than the self-serving letter referred to, it is remarkable that there are no contemporaneous documents to support actual authority to contract, of any kind.

125. If there was a contract or consensual agreement between the parties whereby the terms of the authority were agreed, evidence of that agreement would be both evident and sworn to in the witness statements. The following factors lead me to conclude that there is no real prospect of success in respect of the Agency Argument:

    i) The absence of evidence to support a consensual agreement between agent and principal as to the authority claimed.

    ii) Contradictory contemporaneous documents in the form of the invoices.

    iii) No invoice produced that includes work for anything other than an introduction of new business.

    iv) No documentation to support the variations purportedly agreed.

    v) No evidence VS knew or understood the finances of KP or KCH to inform him whether the varied negotiated rates of interest were sustainable.

    vi) Contemporaneous correspondence demonstrating deferral to KCH and KY, for example 31 January 2018, VS asked KY to check the documents.

    vii) Contradictory evidence in the form of the e-mails whereby VS refers to his clients as the Applicants. For example, the e-mail dated 27 February 2020 where he states that paying the default rates on the Ascot loan was hurting "my clients".

viii) Contemporaneous correspondence referring to introductions and including himself in the plural when referring to the Applicants, for example, 30 January 2020 where VS says he will not let KY down referring to the projects "we" are doing.

ix) The e-mail dated 11 February 2019 stating that "his clients" were receiving independent legal advice and asking about draw-down.

x) The lack of any particularity to support the Agency Argument.

126. I mention for the sake of completeness that it was not argued that actual authority had been implied. There was no evidence to support an implication. The inconsistencies and failures to provide any documentation to support an important agreement leads me to the conclusion that the Agency Argument is not genuine or substantial.

127. The arguments about variation of terms, collateral agreements and implied terms fall with the failure of the Agency Agreement as any representations made by VS, if true, did not bind KP or KCH.

Recourse against other security

128. It follows from the conclusions reached in respect of the Agency Argument that any argument regarding recourse to other security prior to enforcing the terms in the personal guarantee is to be decided only by reference to the personal guarantees. Typically, clause 1 of the KP personal guarantee provides that the Applicant:

> "…irrevocably and unconditionally undertake with you that, if at any time and from time to time the Borrower does not pay any of the Guaranteed Obligations, we will on your first written demand pay the unpaid amount."

129. I understand that no argument is advanced to contradict a plain reading of this provision. No argument is advanced on the basis that if the Agency Argument fails, the Applications may still succeed on the basis that KP should exhaust all other avenues for repayment before turning its attention to the personal guarantees.

Letter of Demand

130. The Agency Argument does not affect the issue concerning the failure to make demand under the personal guarantees advanced by TC, PS and AC against KP. It is common ground that a letter of demand is required to trigger liability. The issue is whether the letter dated 16 March 2020 is sufficient (the same letter of demand was sent to all Applicants. Ms Meech for PS sums up the argument for all Applicants:

> "1. The 16 March 2020 letter is clearly a letter demanding payment from the Company.
>
> 2. It is sent to "Mr Paul Adam Smith/ NRD Property Limited.
>
> 3. It is expressly a demand for repayment of the Loan being the loan from R to the Company (second paragraph).

> 4. The third paragraph refers to a failure to repay the loan leading to legal action against "you" (i.e. the Company) and goes on: "All of our client's rights are strictly reserved, including the right to enforce the personal guarantees given by Ms Chopra and Mr Smith in respect of this loan.""

131. I shall focus on the letter sent in respect of NRD but the same arguments apply to similar letters. For example, Mr Stimmler makes the same arguments about the letter of the same date sent to AC in respect of IOL.

132. It is agreed that the question about the letters dated 16 March 2020, and whether they constitute letters of demand under the guarantees is to be decided by the language used: a question of interpretation.

133. The letter is addressed to PS and TC but that is not unexpected since PS and TC are directors of NRD. Under their individual names is the name of the company, NRD. The inclusion of NRD in the address indicates that the letter is addressed to an officer of NRD (Mr X, Company Y). No convincing argument has been advanced for the inclusion of NRD in the address if the letter was not intended to be sent to NRD to make the demand.

134. I have in mind that the inclusion of NRD and copying-in NRD itself to the demand may have been a mistake. Some things are said that are not intended. The House of Lords considered whether a notice given by a tenant pursuant to a break clause in a lease was an effective notice in *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd*. [1997] A.C. 749. Lord Hoffmann remarked:

> "No one, for example, has any difficulty in understanding Mrs. Malaprop. When she says "She is as obstinate as an allegory on the banks of the Nile", we reject the conventional or literal meaning of allegory as making nonsense of the sentence and substitute "alligator" by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like "allegory""

135. The mistake does not really matter as we commonly use a process of adjustment to make sense of what has been said. However, as Lord Hoffmann said, the law is not concerned with subjective intentions.

136. One cannot readily conclude, and I was not invited to do so, that something had gone wrong with this formal letter. The words used are to be interpreted by giving their "natural and ordinary meaning". In this case it is not that the meaning of the words is disputed but that the tenor of the whole demand does not convey to the reasonable person that a demand is being made in respect of the personal guarantee.

137. In my judgment the letter (or letters) properly interpreted is not a demand under the personal guarantee of PS or TC. First, the letter is addressed to the individual followed by the company name, NRD. Secondly, it is e-mailed to the individuals separately. Thirdly, the recital states 21-23 New Road Chatham. This is a property owned by NRD and not the individuals. Fourthly, the second recital is "Loan in the sum of £1,533,779-Demand for Repayment". This is a reference to the loan made to

NRD and not the individuals. The recital is curious if it was intended to mean that it was a demand under the personal guarantee for the loan made to NRD in the sum of £1,533,779. Fifthly, the first main substantive paragraph states that the letter concerns the loan made to NRD on 11 February 2019. Sixthly in the same paragraph it is stated that the loan term has expired and "we write to formally demand immediate repayment…". This is an oddity as no formal demand is required unless the loan is called-in before the expiry of the term. The reasonable person would objectively interpret the use of the language "formally demand" to mean that the lender had not been repaid and was therefore making a demand to make clear that the sums are due and should be paid. Seventhly, there is no mention in the letter that demand is made pursuant to the personal guarantee. Eighthly, the second substantive paragraph states that rights are strictly reserved, including the right to enforce the personal guarantees. To enforce the personal guarantees a demand is required pursuant to clause 1. A reasonable observer would conclude that enforcement had not started (it was reserved) and part of the enforcement process required a demand. Lastly, the letter of demand is copied to NRD addressed to the Chatham address (a property owned by NRD). The registered address of NRD is the same as the address of Property and Finance Law. The author had sent the demand to the directors at their home address, the lawyer said to represent NRD (NC) at the registered address of NRD. Copying the company into the letter of demand at the Chatham address would serve no purpose if the demand was intended to be made pursuant to the personal guarantees.

138. The letter of the same date sent in respect of the loan made to Ascot copies in Ascot and Property Finance and Law.

139. For the reasons I have given, the letter does not constitute a demand under the Personal Guarantee.

The Forgery Argument

140. The argument raised on behalf of KP is that the introduction of the Forgery Argument is so inconsistent with the Undue Influence Argument that it is inherently implausible. Mr Hornyold-Strickland did not oppose the inclusion of a statement made by PS exhibiting a handwriting report produced by an expert to support his contention that he did not execute the Personal Guarantee. Mr Hornyold-Strickland argued that the allegation of forgery is "monumentally" far-fetched. He argues:

    i) The introduction of the Forgery Argument cannot survive the earlier evidence where PS states that he had signed the personal guarantee.

    ii) The signing of the personal guarantee is supported by the evidence given by VS and witnessed by Charles Ewan.

    iii) The evidence (unlike that tendered by TC and AC) of the expert is "inconclusive".

    iv) PS does not say who would have forged the Personal Guarantee.

    v) None of the Applicants give evidence that they reported the forgery to the police.

141. I was attracted by the inconsistent evidence argument (not so much about what was not said in the late witness statements) at first. There is an obvious inconsistency between stating that the personal guarantee (and Facility Letter) had been executed by reason of undue influence, and evidence that they had not been executed by the guarantor. On the other-hand, an allegation of fraud supported by a hand-writing expert who concludes that there is strong evidence to support forgery or that the evidence is inconclusive, cannot be so easily dismissed.

142. In his dated statement dated 17 May 2022 PS recalls signing the Facility Letter in respect of the loan made to NRD in or about 20 September 2018. He recalls the monies were used for the purchase of Chatham and that a few months later there was a refinance with Together. Having made a statement that the e-mail from NC sent in response to the statutory demand was incorrect, he also says that his first witness statement drafted by NC is incorrect. He says that he queried the statement but was told to leave it as it was. He then explains:

> "I am afraid that this evidence in my witness statement was not correct and I offer an unreserved apology for having put this before the Court…
>
> When it became clear that there would be a hearing to determine my application. I instructed Mr. Alasdair Begbie of Richards Solicitors. I informed him that I had not signed the two facility letters of 9 January and 11 February 2019 and the personal guarantee but he thought 1 should leave the evidence as it was as it had already been submitted to the Court. He thought that the evidence that I had been unduly influenced to sign the facility letter and personal guarantee and that I had not received independent legal advice would be sufficient to set aside the statutory demand."

143. It appears that first NC, and then a practising solicitor, Mr Begbie, were prepared to permit PS to perjure himself. If that is not true, PS is prepared to perjure himself now.

144. It is unlikely that the evidence will be improved upon as PS makes specific remarks in relation to his earlier statement and the e-mail sent by NC. The change of mind about the truth of statement was not made until May 2022, shortly before the adjourned hearing. Due to further adjournment the determination of the argument was delayed to the hearing taking place in October 2022. If the protest made by PS were to be sustainable one would expect some supporting evidence. There were three possible sources. The first would be a statement from NC. The second a statement from VS and the last and most satisfactory would be a statement from Mr Begbie exhibiting a copy of his attendance note.

145. After careful reflection I conclude that the contradiction without supporting evidence, given the lapse of time, is unsustainable, not serious or genuine.

146. The evidence of VS is that he: "persuaded both her [TC] and Paul Smith to go to Ewan & Co solicitors for the Respondents and got them to sign the PGs". This statement of VS may not be incorrect. There is no suggestion in this sentence alone that he was agent of KP or exercised undue influence.

147. It is inherently implausible that: (i) VS "got them to sign the PGs"; (ii) NC knew that the evidence was incorrect and refused to assist rectifying the evidence before it was filed and served; (iii) NC (as a qualified lawyer) was prepared for PS to perjure himself; (iv) NC who is supposed to have drafted the witness statement, made up the defence, or did not want PS to tell the truth that his real defence was forgery; and (v) similarly Mr Begbie did not want PS to tell the truth about the forgery and was prepared to conspire with PS to lie to the court.

148. This is not a case where I find myself considering whether something is more probable than not (crossing the border to the forbidden land of the mini-trial). In my judgment the inherent implausibility of the Forgery Argument arises because it is simply not credible that PS, a man of business, admitted to executing a guarantee under pressure of VS, was comforted to be told by VS that it would only be enforced in certain circumstances, and swore a statement of truth to that effect, when all along his story was very different. His case is that wanting to tell the truth he was advised not to do so first by NC and subsequently by Mr Begbie, a practising solicitor.

149. In her October 2022 witness statement TC provides an account of why her story changed. She explains:

> "At the beginning of September 2022, I had a meeting with Paul Smith regarding his company NRD generally. At that meeting he mentioned that he had successfully made an application for leave to file supplemental evidence to correct his earlier witness statement as he was now certain that he in fact had not signed any PG. He suggested that I should also have a careful look at my documentation. He also mentioned that the supplemental statement was filed at the May 2022 hearing. I told him that I had not seen or read his statement nor the evidence attached to it as the May 2022 hearing did not take place and I had assumed that the hearing bundles remained the same as previously. I asked him to send me a copy of his statement. He said that he would do so but never did. I only saw a copy of that statement a couple of days ago.
>
> A few days later me and my son Aman Chopra considered the signatures on the purported PGs provided to us by Katrin's solicitors, Ewan & Co. After carefully looking at all the alleged PGs, it was clear to both of us that the signatures on the documentation were not our genuine signatures and therefore we in fact had not sign (sic) any PGs as we had lead (sic) to believe by Ewan & Co and Mr Vidya Sharma"

150. The story of TC and AC differ to that of PS in several ways. First, TC and AC do not assert that they always knew that they had not signed the personal guarantees. Secondly, their common evidence is that they signed a lot of documents at the offices of Ewan & Co and cannot be sure they signed the documents relied upon in these proceedings.

151. This is notable for two reasons. The first is that they do not shy away from attending the solicitor offices for the purpose of signing the loan documents. It is not denied that a personal guarantee was signed.

152. The second is because they say that VS and Charles Ewan provided TC with the personal guarantee prior to preparing the earlier statements. No explanation is given why they had "both…presented" them with the executed personal guarantee (which in and of itself casts doubt):

> "Before preparing my earlier witness statements both Vidya Sharma and Charles Ewan presented me with PGs and other documents and wrongly convinced me that I had signed those loan documents…"

153. The evidence at its height is:

> "I can now confidently confirm the loan documents that have been produced before this honourable court were not signed by me at all."

154. On this basis it may be inferred that the earlier statements were false because they were misled by others as to the authenticity of the personal guarantee.

155. They are careful not to "confidently" assert the same case as PS: that they did not sign a personal guarantee or that the terms of the personal guarantee relied upon in the statutory demand are in any way different to the personal guarantee signed.

156. The position of AC is that he is uncertain that he signed any of the loan documents relied upon in the statutory demand. This begins to stretch credibility since the loan was made:

> "I believe that I did sign loan papers. I am now *not certain* if the documents I signed were loan documents for (sic) relating to the Respondents loans. It is *now clear to me that the documents I in fact signed have not been produced before the Court and certainly no PG document has been produced with my signature…* I can now confidently confirm the loan documents that have been produced before the Court were not signed by me at all." (emphasis added)

157. The deep cuts into the credibility of the evidence of PS are not so easily made in respect of TC and AC since the recent evidence is not inconsistent with signing a personal guarantee. Further I lend some weight to the exhibited expert evidence. It could be said that it is highly unlikely that TC would not know what she was signing as she is a person with much commercial experience. It would not be hard to argue similarly about AC although he has not had quite so much experience.

158. The fact of a forgery seems to me to be improbable given that the Personal Guarantees were executed before Charles Ewan. He has not played any part in these proceedings but there is no obvious reason to discount his attestations and certificates. Nevertheless, I am reminded that: "rejecting a defence is not appropriate merely

because the defence is improbable. Probabilities are, properly, a matter for trial": Briggs J (as he was) *Markham v Karsten* [2007] BPIR 1109, paragraph 44.

159. Accordingly, I reject the evidence of PS as inherently implausible. Although the evidence of TC and AC is improbable it is sufficient to raise an issue that is to be resolved at trial and not on an application to set aside a statutory demand.

Reliance on ground 10.5(5)(d) Insolvency Rules 2016

160. I have mentioned that some Applicants rely on ground (d) as an alternative to ground (b). In MS v KCH, for example, the basis of reliance is that KCH is unable to have recourse to its security over 43 Old Gloucester Road before enforcing the personal guarantee. To set aside the statutory demand on this basis is said to provide a fair outcome.

161. There are some obvious flaws in the argument. First, there is no contractual provision that provides that KCH should have recourse against the company's property before enforcing the personal guarantee [see paras 128 and 129 above]. The parties are entitled to agree their own bargain. Secondly, connected to the first flaw, is the lack of a substantial dispute raised in respect of the facts that are said to make the issue of a petition unjust. If the solicitors failed in their duty to register the property that is a matter between the solicitors and the company. Thirdly, and connected to the second flaw, ground (d) is to be read and understood not as a free-wheeling discretion to prevent injustice from the point of view of an applicant, but read in-line with the particular grounds specified in subparagraphs (a), (b) and (c) of rule 10.5(5): *Re a Debtor (no 1 of 1987)* [1989] 1 WLR 271 at 271D-F. In this case that means, read in the context of ground (b). It would be unjust if the Applicant was to be regarded as being unable to pay if the debt was disputed on substantial grounds: *Re a Debtor (No 1 of 1987).* Lastly, there is nothing unjust or unfair in permitting the creditor who is out of pocket and has been out of pocket for a long time, from pursuing enforcement proceedings or a class action for bankruptcy where a bankruptcy debt is outstanding.

Conclusions

162. On the seven Applications:

i) TC: Application to set aside a statutory demand served by KP dated 6 May 2020 in respect of Ascot (BR-2020-000546). Application granted.

ii) TC: Application to set aside a statutory demand served by KP dated 6 May 2020 in respect of NRD (BR-2020-000544). Application granted.

iii) AC: Application to set aside a statutory demand served by KP dated 6 May 2020 in respect of IOL (BR-2020-000545). Application granted.

iv) PS: Application to set aside a statutory demand served by KP dated 6 May 2020 in respect of NRD (BR-2021-000148). Application granted.

v) TC: application to set aside a statutory demand served by KCH dated 19 August 2020. Application adjourned.

vi) AC: application to set aside a statutory demand served by KCH dated 19 August 2020. Application adjourned.

vii) MS: application to set aside a statutory demand served by KCH dated 19 August 2020. Application dismissed.

163. Pursuant to Rule 10.5 (8) IR 2016, I authorise KCH to present a petition against MS as soon as reasonably practicable following the hand-down of this judgment.

164. I invite the parties to agree orders.