Neutral Citation Number: [2024] EWHC 1308 (Ch)

Case No: CH-2023-000009

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ON APPEAL FROM THE ORDER OF MASTER CLARK OF 21 DECEMBER 2022

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 June 2024

Before :

RICHARD SPEARMAN K.C.
(Sitting as a Deputy Judge of the Chancery Division)

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Between :

HOPE CAPITAL 2 LIMITED	**Claimant**
- and -	
STEPHEN MICHAEL JONES	
	Defendant

- -

Damian Falkowski and Dr Anton van Dellen (instructed on Direct Access) for the **Defendant**
Andrew Vinson (instructed by Prosperity Law LLP) for the **Claimant**

Hearing date: 24 April 2024

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Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email, release to Bailii and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 5 June 2024.

Richard Spearman K.C.:

1. This is an appeal against the Order of Master Clark dated 21 December 2022, granting summary judgment in favour of the Claimant in the sum of £2,585,723.37 inclusive of interest to 21 December 2022, and continuing at a daily rate of £554.78. It comes before the Court pursuant to the Order of the Honourable Mrs Justice Bacon DBE dated 28

July 2023, which was made upon the Defendant's renewed oral application for permission to appeal. The Grounds of Appeal advanced on behalf of the Defendant before Bacon J related to a range of topics, and as originally formulated they did not include the sole grounds upon which Bacon J was prepared to grant permission to appeal, which were added to those Grounds of Appeal by amendment. By paragraph 1 of her Order, Bacon J ordered "Permission granted to the [Defendant] to amend the Grounds of Appeal in the form attached to this Order", and by paragraph 2 she ordered:

> "The application for permission to appeal is granted solely in respect of whether, as to the New Agreement, the Judge erred when she (a) held that the [Defendant] did not have a real prospect of success on the issue of whether the New Agreement varied or discharged any of the provisions of the agreements relied upon by the [Claimant] in its Particulars of Claim; and (b) did not adequately consider whether further evidence might become available which would materially assist the Court in deciding the litigation when considering whether the New Agreement might be disclosed by the [Claimant]."

2. In the amended Grounds of Appeal attached to the Order of Bacon J, all the original text was struck out, save for some introductory paragraphs including that "In October 2018 the [Claimant] entered into a Deed of Guarantee and Indemnity ("the PG") in respect of a loan agreement of £2.1 million ("the Loan Agreement") made to a property development company of which the [Defendant] and one Alexander Collier were Directors" and "The company did not repay the loan on the date when repayment fell due i.e. 29 April 2019". In addition to those paragraphs, and the Grounds of Appeal identified in paragraph 2 of the Order of Bacon J, the following paragraphs were added by amendment, which laid the foundation for those particular Grounds of Appeal: "The [Defendant] alleges that a new agreement was entered into by the [Claimant] after the Loan Agreement and Deed of Guarantee and Indemnity which had the effect of varying obligations under the Loan Agreement and/or the PG" and "The [Claimant's] Chief Executive Officer has stated in a witness statement dated 17 August 2021 at paragraph 41 (sic) that the [Claimant] had agreed to grant additional security and agreed to defer enforcement. The [Defendant's] position is that this constitutes the New Agreement."

3. The background to the appeal can be taken substantially from the judgment of Master Clark, who, first, explained the parties and the claim as follows:

> "2. The claimant is a specialist provider of business loans. The defendant was at all material times a director of a company called Sphere Property 2 Limited ("the company"). His co-director was Alexander Collier.
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> 3. The company owned the freehold properties known as:
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> (1) 18 Balcombe Road, Poole BH13 6DY (Title Number DT261185); and
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> (2) 18a Balcombe Road, Poole BH13 6DY (Title Number DT409305);
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> (together, "the Properties").
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> 4. In October 2018, the claimant entered into a suite of agreements ("the Agreements") including a loan agreement ("the loan agreement") with the company under which it provided a loan of £2.1 million ("the loan") to the company, secured on the Properties. In support of the loan, the defendant and Mr Collier entered into a Deed of Guarantee and Indemnity dated 29 October 2018 ("the Guarantee").

5. The following facts are common ground:

(1) The loan fell due on 29 April 2019;

(2) The company failed to make payment of any of the loan on the due date;

(3) The amount of the loan has been reduced by the sale of the Properties by LPA receivers appointed for that purpose;

(4) Substantial sums remain outstanding;

(5) The claimant has demanded payment from the defendant under the Guarantee;

(6) The defendant has failed to pay.

6. On 20 January 2020 another company in which Mr Collier was (and remains) the sole director, Sphere Property 3 Ltd ('Sphere 3'), entered into a second charge ("the second charge") in favour of the claimant in respect of 20 Balcombe Road, Poole BH13 6DY, in order to provide the claimant with additional security in respect of the company's indebtedness to it. Shortly afterwards, on 15 May 2020, LPA Receivers were also appointed over 20 Balcombe Road, who sold it. The net proceeds of sale were less than the debt owed to the first charge holder, and the claimant did not receive anything in respect of the second charge.

7. The claim is for the balance of the loan due. Of the defences raised by the defendant, it is only necessary to consider those remaining after the order dated 6 July 2022 of Deputy Master Glover striking out parts of the Defence. The defences to be considered fall into two categories: remaining defences raised in the original Defence as filed, and defences raised in the proposed amended Defence."

4. At paragraphs 8 and 9 of her judgment, Master Clark summarised the various defences which the Defendant relied upon at that time. As set out at paragraph 9(3), these included that "The claimant and Mr Collier entered into a new loan agreement which the defendant was informed replaced the loan agreement: ¶23 Defence".

5. Master Clark then summarised the procedural chronology as follows:

"11. The claim was issued on 29 April 2021. The Defence was filed on 25 June 2021. The application was issued on 10 September 2021. It was supported by a witness statement dated 17 August 2021 ("Sealey 1") of Robert Sealey, the Chief Executive Officer of the claimant.

12. The defendant filed and served his evidence in opposition to the application ("Jones 1") on 7 February 2022.

13. The first hearing of the application was listed on 14 February 2022, but was vacated (because the claimant's counsel had Covid). The first effective hearing was before Deputy Master Glover on 6 July 2022. At that hearing the defendant's counsel made an oral application to adjourn the hearing to enable him (as recorded in the order) to seek permission to amend his Defence in order to incorporate the allegations contained in paragraphs 45 and 46 of Jones 1 (discussed in paras 41 to 54 below), and to join additional parties.

14. On 20 July 2022 the defendant served upon the claimant a draft amended Defence. No application to amend the Defence in accordance with the draft was made at that stage.

15. On 27 July 2022 the defendant issued an application notice seeking to join 4 additional parties, and bring additional claims against them. The draft statement of case attached to the application notice included the proposed amendments in the draft amended Defence served on 20 July 2022; and the claimant was a respondent to the application. However, the application did not formally seek permission to amend the Defence at all. That application was not listed (and is therefore not before me today), apparently because the defendant did not respond to the court's directions that he file the parties' agreed dates and agreed time estimates for the hearing and pre-reading. It is unclear whether it has been served on the proposed additional parties.

16. On 11 November 2022, 7 days before the hearing before me, the defendant issued a further application seeking only to amend the Defence (and not to add additional parties); and to add a counterclaim alleging misrepresentation and/or breach of duty, and seeking rescission of the Guarantee, alternatively damages. The proposed amended Defence and Counterclaim is identical to that in the draft attached to the July application notice, albeit permission was not formally sought at that stage."

6. The main procedural events since that time which are of immediate relevance to the appeal that is currently before the Court are as follows:

(1) On 18 January 2023, upon consideration of the Appellant's Notice and Grounds of Appeal filed by the Defendant on 11 January 2023 and the approved judgment and order of Master Clark dated 21 December 2022, Leech J allowed the Defendant's application for a stay of execution of the Order of Master Clark until the determination of the Defendant's application for permission to appeal.

(2) By Order dated 10 February 2023, Leech J varied his Order of 18 January 2023 so as to permit the Claimant to proceed to enforce the Order of Master Clark dated 21 December 2022 by applying to continue the interim charging order relating to the Defendant's home that had been served on the Defendant on 18 January 2023 (but not otherwise), essentially on the grounds that there was no real prospect that the Claimant would be able to obtain an order for sale and possession of that property "before the Court has determined the application for permission to appeal (or, indeed, the appeal itself)".

(3) On 5 April 2023, Leech J refused the Defendant's application for permission to appeal on consideration of the papers. In giving his Reasons for that refusal, and having considered and rejected the three Grounds of Appeal which were contained in the Notice of Appeal, Leech J stated at paragraph 9 that "In his Skeleton Argument Dr van Dellen has raised a number of grounds which are not set out in the Grounds of Appeal. In particular, he submits that the Defendant has a defence based on … the existence of a new loan agreement. I am satisfied that these grounds have no real prospect of success for the following reasons … (3) There was no

evidence of any new agreement and the Defendant's case appears to me to have been fanciful: see [34]". At paragraph 10, Leech J stated "In those circumstances, the Master was entitled to find that the Defendant had no real prospects of succeeding on the new allegations raised in the draft Amended Defence and for the reasons which she gave". At paragraph 12, Leech J stated: "If the Appellant wishes to renew his application orally, however, he must apply to amend the Grounds of Appeal to include all of the grounds set out in the Skeleton Argument".

(4) On 29 January 2024, Bacon J granted the Defendant's application dated 17 January 2024 for an adjournment of the hearing of the current appeal, which was then listed for 7 February 2024, and ordered it to be relisted for the first available date between 21 February 2024 and 27 March 2024. On 26 February 2024, Mr Robin Vos, sitting as a Deputy Judge of the High Court Judge, granted the Defendant's application for a further adjournment dated 26 February 2024, and ordered that the appeal, which was then listed for 27 February 2024, should be adjourned and relisted for the first available date between 9 April 2024 and 30 April 2024.

7. Master Clark dealt with, and rejected, the defence based on a new loan agreement at paragraphs 34 to 39 of her judgment, for the following reasons:

> "34. Paragraph 23 of the Defence states:
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> "The Claimant and Mr Collier agreed a new loan agreement which the Defendant was informed would replace the Loan Agreement. The Defendant is unaware of the details of this loan and cannot therefore plead it. Neither the Claimant nor Mr Collier provided the Defendant with a copy of the new loan agreement, and at all times, it was the Defendant's reasonable belief that the liability of [the Company] had been extinguished by this new loan and that accordingly that his obligations pursuant to the Deed of Guarantee and Indemnity had been extinguished."
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> 35. As to this, Mr Sealey's evidence at [61] is that there was no new loan agreement, and the defendant has not adduced any evidence to the contrary.
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> 36. The defendant's counsel submitted that the company would have been a party to an agreement for Sphere 3 to provide collateral security, in the form of the second charge over 20 Balcombe Road. Sphere 3 would, he said, only have provided collateral security if the claimant and the company had agreed that, in return for the additional security, the claimant would hold off enforcing its rights against the company. That agreement, he said, was a variation of the loan agreement, and the effect of that variation was to discharge the defendant from his obligations under it.
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> 37. None of this is pleaded. The Defence does not refer to Sphere 3 or the second charge, nor does the proposed amended Defence, even though the granting of the second charge is set out in Sealey 1, so that the defendant has been aware of it for 14 months.
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> 38. In any event, the Guarantee contains, at clause 3.2, provisions that the guarantors' liability shall not be reduced, discharged or otherwise adversely affected by:

"3.2.2 any variation, extension, discharge, compromise, dealing with, exchange or renewal of any right or remedy which the Lender may now or after the date of this guarantee have from or against any of the Borrower and any other person in connection with the Guaranteed Obligations; or

3.2.3 any act or omission by the Lender or any other person in taking up, perfecting or enforcing any Security, indemnity, or guarantee from or against the Borrower or any other person;

3.2.4 any termination, amendment, variation, novation, replacement or supplement of or to any of the Guaranteed Obligations … ; or

3.2.5 any grant of time, indulgence, waiver or concession to the Borrower or any other person; or

…

3.2.10 any act or omission which would not have discharged or affected the liability of the Guarantors had they been a principal debtor instead of a guarantor or indemnifier or by anything done or omitted to be done by any person which, but for this provision, might operate to exonerate or discharge the Guarantors or otherwise reduce or extinguish their liability under this guarantee."

"Guaranteed Obligations" is defined as "all monies, debts and liabilities of any nature from time to time due, owing or incurred by the Borrower to the Lender …"

39. Each of the above provisions, and particularly, clause 3.2.10 is sufficient to prevent the agreement postulated by the defendant's counsel from discharging the defendant from his obligations under the Guarantee."

8. The Claimant's application for summary judgment was supported by the first witness statement of Mr Sealey, dated 17 August 2021. At paragraph 40 of that witness statement, in a section entitled "Appointment of LPA Receivers and the sale of the Properties", Mr Sealey stated:

> "Following the appointment of the LPA Receivers, Sphere Property 3 Limited (being another company of which Mr Collier is the sole director) granted additional security to Hope Capital by way of a second legal charge over a property owned by it, namely 20 Balcombe Road, Poole BH13 6DY ("20, Balcombe Road"). This additional security was granted in consideration of Hope Capital agreeing to defer commencing steps to enforce its security over the Properties until April 2020, in order to allow additional time for Sphere 2 to obtain planning permission for the site and to refinance."

9. In paragraph 41 of that witness statement, Mr Sealey states that "By the end of April 2020, Sphere 2's indebtedness had still not been discharged"; and in paragraph 42 he explains why "Hope Capital's second legal charge over 20, Balcombe Road will not result in any recovery".

10. It would appear that paragraph 6 of Master Clark's judgment was based on this evidence.

11. In paragraph 61 of the same witness statement, Mr Sealey states:

> "At paragraph 23 of the Defence, Mr Jones alleges that Hope Capital entered into a new loan agreement with Mr Collier. This is incorrect. At no stage did Hope Capital enter into a new loan agreement with Mr Collier, Sphere 2 or Mr Jones."

12. The Defendant's witness statement in answer is dated 7 February 2022. At paragraphs 63 and 72 respectively, the Defendant states:

> "… an application to redevelop the site was submitted, although I understand that this application was not in the name of Sphere Property 2 and 3 Limited, but rather appears to have been made in the interests and for the benefit of yet another of Mr Collier's companies. Despite my attempt to discover the truth regarding when and how exactly the properties of Sphere 3 were committed as collateral to the Claimant, I still do not know what the terms of the new agreement made between the Claimant and Mr Collier were regarding the renegotiation of the original loan agreement. I have made requests for information from the Claimant but have not received any information with regard to how these properties, which I believed I owned via what I believed were my shares in Sphere Property 3 Limited, were pledged as collateral to the Claimant as part of a new agreement. I have no documentation in order to establish what was agreed between the Claimant and Mr Collier. I don't know what documents were forged and have been denied access to them…"
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> "In paragraph 40, Mr Sealey refers to the new agreement made between the Claimant and Mr Collier whereby the assets of Sphere 3 were pledged to the Claimant. I was not informed of this, and this clearly breaches the Claimant's own loan agreement and guarantee contracts. Since I wasn't informed of this, the properties of Sphere 3, which constitute the proceeds of crime, were transferred to the Claimant unlawfully. I have made a request for information regarding the Claimant's agreement with Mr Collier, but this information has been denied me by the Claimant."

13. These passages plainly include complaint about lack of transparency concerning the circumstances in which the Claimant acquired security over properties owned by Sphere 3. However, their focus is not on whether and to what extent the loan agreement and guarantee relied on in the Particulars of Claim may have been varied or discharged, but is instead on suggested dishonest, or otherwise wrongful, dealings by Mr Collier with properties belonging to Sphere 3 to the detriment of the Defendant in his capacity as a shareholder in Sphere 3 with, he says, an ultimate ownership interest in its assets.

14. The Defendant's argument before me was founded on this evidence. It was submitted that (1) it is clear from Mr Sealey's evidence that (a) there was an agreement following the appointment of the receivers ("the New Agreement"), (b) one term of the New Agreement was that the Claimant agreed to defer enforcing its security, and (c) the consideration for the New Agreement was that additional security was granted, but (2) neither the Defendant nor the Court knows the full extent of what was agreed. It was further submitted that "If the Claimant had provided disclosure in relation to the New Agreement, this matter could have been resolved easily", that "Putting it at its lowest, it cannot be said that the Court would not be in a much better position to decide the

issue if the documents had been disclosed" and that "Without knowing the terms of the New Agreement the major question remains as to whether this arrangement, unknown to the Defendant, varied or discharged the obligations between [Sphere 2] and the Claimant, such that it amounted to a discharge of the guarantee and indemnity".

15. In terms of propositions of law, reliance was placed upon:

(1) The summary of the principles to be applied on applications for summary judgment contained in the judgment of Lewison J, as he then was, in *Easyair Ltd v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15], in a formulation which, as Master Clark pointed out, has been approved in a number of subsequent cases at appellate level, including *AC Ward & Sons v Catlin (Five) Limited* [2009] EWCA Civ 1098 and *Mellor v Partridge* [2013] EWCA Civ 477. In particular, the following:

> "(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
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> (vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63."

(2) The judgment of Miles J in *ABP Technology Limited v Voyetra Turtle Beach, Inc.* [2021] EWHC 3096 (Ch) at [35-36], affirming that "one of Lewison J's points in *Easyair* was that the court must hesitate before making a final decision where reasonable grounds exist for believing that a fuller investigation at trial would add to or alter the evidence available or would show the existing evidence in a new light".

(3) The judgment of Ms Amanda Michaels, sitting as a Deputy Judge of the Intellectual Property Enterprise Court, in *Costa v Dissociadid Ltd* [2021] EWHC 3275 (IPEC) at [38] (dealing with an application by the Defendant for summary judgment):

> "However, the consideration relied upon by the Defendants as moving from the Second Defendant raises issues which are far from straightforward. Indeed, the unusual nature of the consideration was accepted by Mr Beebe. He submitted that it was telling that the Claimant had not produced any additional documents clarifying the extent of the agreement between the parties, so that the court is able to determine the contractual issues on a summary basis, in the light of the

limited number of documents exhibited at this stage. I do not accept that submission. The Defendants' position on consideration depends upon unusual and uncertain legal points, which it seems to me can only be determined in light of all of the evidence. I have considered carefully whether this falls into the error of 'Micawberism,' but as Lewison J said in *Easyair* at paragraph 15(vi), the court must hesitate before making a final decision where reasonable grounds exist for believing that a fuller investigation at trial would add to or alter the evidence available or would show the existing evidence in a new light. Ms Reid, for the Claimant, submitted that it would be inappropriate to decide this point without hearing from the witnesses and seeing the full run of correspondence. I agree. Overall, I have concluded that the court is likely to be in a better position to decide the issue of consideration at trial than it is at this summary stage. It is likely to be assisted by more extensive evidence about the communications between the parties both before and after the date when the Contract is said to have been made, which, as I have mentioned, were far more extensive than the limited number of emails which I have been shown."

16. The Claimant's principal contentions before me may be summarised as follows:

(1) The manner of emergence of the sole Grounds of Appeal which Bacon J had allowed to go forward is telling. The late advancing of one unmeritorious point after another constitutes a hallmark of the Defendant's approach to this litigation.

(2) The basis on which the appeal has been allowed to proceed is a long way removed from, and far more limited than, the original Grounds of Appeal. Moreover, the Defendant's case as to how he sought to argue that there was a new agreement and that it "varied or discharged any of the provisions of the agreements relied upon…in the Particulars of Claim" has never been properly articulated so that the Claimant can address it. The relevant paragraph of the Defendant's Skeleton Argument from which it originates contains nothing more than bare assertion unsupported by authority. In these circumstances, the Claimant had expected a new Skeleton Argument to be produced which articulated the case that it was expected to meet. The Claimant has been hampered in what it could say by way of detailed response because there is no detailed case on the part of the Defendant for it to answer.

(3) The only element of the Defence (or any desired amendment thereto) that falls to be considered in this Appeal was set out not in any Statement of Case but in the Skeleton Argument of Dr Anton van Dellen dated 10 February 2022, in which the Defendant invited the Court to dismiss the Claimant's application for summary judgment on the grounds that: (a) that the Defendant had a real prospect of successfully defending the claim; (b) there were several disputes of fact; and (c) the Claimant had failed to attach a further agreement which appeared to vary the terms of the loan agreement appended to its Particulars of Claim. Concentrating on the third ground: (i) the Claimant was under no obligation to attach that further agreement; (ii) the Defendant's position appears to arise from paragraph 10 of the Particulars of Claim and paragraph 40 of Sealey 1, which, in essence, explain that following default and the appointment of LPA Receivers, in return for the grant of additional security for the indebtedness by a third party (Sphere Property 3 Limited), the Claimant held off from enforcing its rights through LPA Receivers

pursuant to the Loan Agreement and securities provided thereunder until April 2020, and (iii) the foregoing does not, as a matter of fact or law, amount to a variation of the Loan Agreement - and nor does it give rise to any defence.

(4) Expanding on the suggestion that the Claimant has failed to disclose a relevant document in the form of any such "New Agreement": "there is simply no such document, nor is there evidence of it … There is nothing to disclose and no basis to suppose that there was material that might be before the Court following a disclosure exercise which would affect the situation such that summary judgment ought not to have been ordered … The evidence was that there was no new loan agreement and [the Defendant] has not adduced any evidence to the contrary … That being the case, the Learned Master was quite right not to decide that there was material on this issue that might emerge on disclosure so as to change the evidential picture … the suggestion that any new agreement (whether in document form or otherwise), had the effect of varying or discharging [the Defendant's] obligations under the Guarantee and Indemnity … is simply not made out … it is patently clear that there was no variation to the Loan Agreement … [The Defendant's] case: that the Loan Agreement has somehow been varied by some "new agreement" so as to discharge [him] from liability under the Guarantee and Indemnity … is not the evidence that was before the Learned Master. What is set out in the one paragraph in Sealey 1 is that [the Claimant] took additional security over third party property. That cannot be a variation to the Loan Agreement as a matter of fact or law. The terms of the Loan Agreement remained the same, they were simply secured further. It is the same obligation that was secured. There was no variation and no need to vary the Loan Agreement or any other agreement to take such security."

(5) In any event, as noted by Master Clark, Clause 3.2 of the Guarantee and Indemnity provided that the Defendant's liability was not to be reduced, discharged or otherwise adversely affected by a large number of matters. Those included variation of any right or remedy which the Claimant might have against the Borrower, any variation of any of the Guaranteed Obligations or the grant of time, indulgence or waiver or concession to the Borrower. Clause 3.2.10 was even wider, as set out by Master Clark at paragraph 38 of her Judgment. Accordingly, even if there were to have been a variation (which there was not) it would not have discharged the Defendant because he had contractually agreed that it would not. There is a long list of other matters that would also not have discharged the Defendant (lest he now seek to categorise matters in yet a further different way at the hearing). The Defendant does not address these terms at all. There is no answer to them.

(6) Further still, Clause 17 of the Loan Agreement provided that any amendment to a Finance Document was to be in writing and signed, that any waiver of any right or remedy or consent under a Finance Document would only be effective if in writing and signed, and no delay or failure to exercise any right or remedy under any Finance Document was to operate as a waiver of any such right or remedy. Accordingly, there could have been no operative amendment/variation to the Loan Agreement, no waiver, and also any delay or failure to exercise a right or remedy was not a waiver. The contractual documentation was before the Court, and issues of its effect were considered by Master Clark, and the Claimant's primary case is that reliance on Clause 17 "is simply addressing the reasoning of the Learned

Master set out in the Judgment." If that is wrong, it is accepted that the Claimant needs to rely upon its Respondent's Notice, which was produced very late, and that this is a serious breach, but there is an application for relief from sanctions within the Respondent's Notice, supported by the first witness statement of Andrew Peter Farrell, and the application should be allowed in all the circumstances to enable the Claimant to raise this further point by way of service of a Notice out of time.

17. So far as concerns legal principle, the Claimant submitted that this was a case in which the Court could be "satisfied that it has been availed of the evidence necessary to properly determine the issue, and that the parties have had an adequate opportunity to address the same" and accordingly "the Court should grasp the nettle and decide it".

18. The Claimant relied, in particular, on the following:

(1) *Three Rivers D.C. v Governor and Company of the Bank of England (No. 3)* [2003] 2 AC 1, Lord Hobhouse at [158]:

"The important words are "no real prospect of succeeding". It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a "discretionary" power, i.e. one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly. …Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the "bottom line" is what ultimately matters."

(2) The judgment of Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) at [21]-[22]:

"21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues...But there will be cases where the Court will be entitled to draw a line and say that - even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.

22. So, when faced with a summary judgment application it is not enough to say…that something may turn up."

19. Pausing there, it is apparent that the Defendant's case concerning the "New Agreement" has changed over time. What is pleaded in paragraph 23 of the Defence is that there was, or perhaps more accurately that the Defendant had reason to believe that there was, a new loan agreement which replaced the Loan Agreement relied on in the Particulars

of Claim and which extinguished both the liability of the principal debtor and also the Defendant's liability pursuant to the Deed of Guarantee and Indemnity sued on. It is that case which Mr Sealey met by the specific denial that "At no stage did Hope Capital enter into a new loan agreement with Mr Collier, Sphere 2 or Mr Jones" and which Master Clark rejected on the basis of that evidence and the absence of any evidence to the contrary. However, the case which Bacon J allowed to go forward by the amended Grounds of Appeal is different, as appears from the text quoted in paragraph 2 above: it is that a new agreement was entered into by the Claimant which had the effect of varying obligations under the Loan Agreement relied on in the Particulars of Claim and/or that Deed of Guarantee and Indemnity and that "The [Defendant's] position is that this [i.e. the grant of additional security and the agreement to defer enforcement referred to by Mr Sealey] constitutes the New Agreement." This case is reflected in the Defendant's Skeleton Argument for the current appeal (see paragraph 14 above).

20. It is unfortunate that in the many months between 28 July 2023 when Bacon J granted permission to appeal and the hearing of the appeal on 24 April 2024 the parties appear to have done nothing to resolve the only live issue raised by the Defendant's amended Grounds of Appeal, which boils down to arguing that there may be more to the subsequent arrangements mentioned by Mr Sealey than he describes, and that whether or not that is so, and whether or not it affects the Defendant's liability under the Deed of Guarantee and Indemnity, can only fairly be determined by production of the relevant documents, which the Claimant has and which the Defendant has not seen. Instead, the Claimant seems to have proceeded on the basis that all that is in issue is whether there was a new loan agreement, and that as there was not it had nothing it could produce.

21. In these circumstances, it seemed to me that either acceding to the Defendant's arguments that the claim should be allowed to go to trial on the basis that the suggestion that his liability may have been affected by subsequent transactions entered into by the Claimant was not unreal, or acceding to the Claimant's arguments that the Defendant should be shut out from defending the claim on the basis that he was clutching at straws, were both likely to be imperfect solutions if they were decided on incomplete materials. I therefore took the view that the better course (in accordance with the overriding objective) was to make the following Order, which was cast as widely as it was because the Claimant's position before me was that it had no further agreement to produce:

> "1. By 4.30pm on 8 May 2024 the [Claimant] must produce all documents in its possession, custody and control relating to the making and terms of the agreement that is referred to in paragraph 40 of the First Witness Statement of Mr Sealey dated 17 August 2021 together with a witness statement verified by a statement of truth stating, if and to the extent that is the [Claimant's] case, that the agreement in question did not vary or discharge any of the contractual provisions relied upon by the [Claimant] in the Particulars of Claim and/or did not reduce or extinguish the liability of Sphere Property 2 Limited which the [Defendant] had guaranteed and/or did not reduce or extinguish the liability of the [Defendant] pursuant to the Deed of Guarantee and Indemnity relied on in the Particulars of Claim.
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> 2. If the [Defendant] and the [Claimant] are unable to agree whether the appeal should be allowed or dismissed in the light of the contents of the further

materials and evidence to be provided as above, and to agree also the appropriate order for costs, the matter is to be restored for further determination by the Court, reserved to Richard Spearman KC sitting as a Deputy Judge of the High Court, to be dealt with on a consideration of the papers alone, if practicable. The parties are to apply to restore the matter if such agreement is not reached within 7 days of the [Claimant] complying with paragraph 1 of this Order, and are permitted (if so advised) to make further written submissions in light of the [Claimant's] compliance as aforesaid."

22. In making that Order, I had it in mind that whether or not there was any merit in the amended Grounds of Appeal ought to be readily apparent on production of the further documents and evidence by the Claimant. I did not make provision for the service of evidence by the Defendant as, on his case, the Claimant alone had material evidence. As appears below, the way in which matters unfolded did not accord with these expectations. Instead, it appears to me that the Defendant did not conscientiously reevaluate the merits of the appeal in light of the further materials produced by the Claimant in response to my Order, and served evidence which took matters no further.

23. In compliance with that Order, the Claimant served a further witness statement of Mr Sealey dated 8 May 2024 which exhibited 169 pages of documents relating to the agreement referred to in paragraph 40 of his first witness statement and stated that it was clear that those documents and that agreement did not have any of the effects identified in paragraph 1 of my Order. Those documents were sent to Dr Anton van Dellen by email and post on that day, because he is on the Court record as acting for the Defendant as a barrister authorised to conduct litigation. The Claimant says that the documents were downloaded by him on that day. However, he made no response.

24. In these circumstances, the Claimant waited until the expiry of the 7 days referred to in paragraph 2 of my Order, and then sent those materials together with Written Submissions dated 17 May 2024 to the Court and asked for the appeal to be dismissed. Those written submissions included the following analysis of the exhibited documents:

    (1) On 29 January 2020 Sphere Property 3 Limited entered into a Deed of Guarantee and Indemnity under which it guaranteed the obligations of Sphere Property 2 Limited to the Claimant. The counterparts executed by the Claimant and Sphere Property 3 Limited had been provided.

    (2) Sphere Property 3 Limited granted a Legal Mortgage over 20 Balcombe Road in favour of the Claimant, as security for its obligations as guarantor under the Deed of Guarantee and Indemnity. The counterparts executed by the Claimant and Sphere Property 3 Limited had been provided.

    (3) An Intercreditor Deed was entered into between Interbay Funding Limited (the existing charge holder for 20 Balcombe Road), the Claimant and Sphere Property 3 Limited by which Interbay Funding Limited's security was given priority over the Claimant's security. The counterparts executed by the Claimant and Sphere Property 3 Limited had been provided.

    (4) On the previous day, 28 January 2020:

(a) The directors of Sphere Property 3 Limited were expressly authorised by a members' written resolution of that company to execute the Deed of Guarantee and Indemnity, the Legal Mortgage, and the Intercreditor Deed.

(b) There was a meeting of the board of Sphere Property 3 Limited where it was resolved that the terms and contents of the Deed of Guarantee and Indemnity, the Legal Mortgage and the Intercreditor Deed were noted, approved and accepted and authority was given to any director to execute and deliver them.

(5) It seems that the genesis of the arrangements put into effect by the Deed of Guarantee and Indemnity, Legal Mortgage and Intercreditor Deed was a conversation between Mr Alex Collier (a director of Sphere Property 2 Limited and of Sphere Property 3 Limited) and Mr Edward Gee, the LPA Receiver appointed by the Claimant in respect of its existing security over 18 and 18a Balcombe Road, which Mr Collier followed up with an email to Mr Gee dated 13 January 2020. Mr Collier asked Mr Gee to "support the sales to Rafferty Property Limited as per the current option agreements for Sphere Property 2 Ltd & Sphere Property 3 Ltd".

(6) On 29 January 2020, immediately prior to completion of the documents listed in (1) above, Mr Gee confirmed that the LPA Receivers, on behalf of the Claimant, would "stay enforcement until the end of April 2020 to allow the option to complete" once the documentation was signed.

(7) The remaining exhibited documents, not specifically referred to above, show the communications between the solicitors acting for the Claimant, Sphere Property 3 Limited and Interbay Funding Limited to prepare and agree the contents of the documents listed in (1) above and ensuring that they were executed, delivered and, therefore, binding upon the parties to them.

(8) Neither the Defendant nor Sphere Property 2 Limited were a party to any of the documents that were executed, and nowhere within those documents is there any reference to the existing obligations of the Defendant or Sphere Property 2 Limited.

(9) Specifically, there is nothing within the documents to substantiate the Defendant's contention that there might be some provision within them that has, or could have, any of the effects identified in paragraph 1 of my Order.

(10) The documents and the matters which they evidence are, therefore, entirely consistent with Mr Sealey's evidence before Master Clark. In particular, at paragraphs 35 and 36 of his first statement in relation to that application, Mr Sealey sets out that Sphere Property 2 Limited had failed to repay the loan to it, but that the Claimant did not then declare all amounts outstanding as being immediately due and payable as it understood that Sphere Property 2 Limited intended to seek planning permission to demolish the relevant properties and construct 30 residential apartments. As can be seen, obtaining planning permission for such 30 apartments followed by a sale was the basis on which the Claimant was asked to defer commencing steps to enforce its security in the email of 13 January 2020. The email at page 157 of the exhibit sets out that enforcement would be deferred until 30 April 2020. This remained the position as set out in paragraph 40 of Mr Sealey's first statement in support of the application before Master Clark. That is all that occurred.

25. At the hearing of the appeal, Mr Damian Falkowski appeared for the Defendant, and Mr Andrew Vinson appeared for the Claimant. In the course of discussion about the Order that I proposed to make, Mr Vinson expressed concern that the Defendant's legal

representation had fluctuated over time, and that this might give rise to difficulties concerning compliance with my Order on the part of the Defendant. However, Mr Falkowski confirmed that he considered that it fell within his remit, as Counsel briefed for the hearing, to deal with the implementation of my Order on behalf of the Defendant.

26. In light of this background, when I received these further papers from the Court, I raised with Mr Vinson and Mr Falkowski the question of why the Claimant's evidence and documents had not been copied to Mr Falkowski. That elicited a prompt response from Mr Falkowski confirming that he would deal with the Defendant's response. In the end, I decided to allow the Defendant until 4.30pm on 28 May 2024 to either agree matters or file and serve responsive submissions. As far as I am aware, however, no attempt was made to agree anything. Instead, on 27 May 2024 there were served on behalf of the Defendant (i) responsive submissions over the names of both Mr Falkowski and Dr van Dellen, together with (ii) a witness statement of the Defendant dated 27 May 2024.

27. The Defendant's position as set out in those written submissions is as follows:

    (1) Mr Sealey exhibits some documents (not all, see the Defendant's witness statement dated 27 May 2024) relating to the New Agreement, but he does not say what it was.

    (2) There is no admissible evidence from the Claimant before the Court as to what the terms of the New Agreement were.

    (3) Even though Mr Sealey fails to say what the terms of the New Agreement were, it is clear that not only was further security granted, but the New Agreement extended the Repayment Date under the Loan Agreement from 29 April 2019 "….until the end of April 2020 to allow the option to complete". Mr Sealey fails to reveal what the "option" is and how "the option to complete" fits into the New Agreement. But the option to complete is clearly part of the New Agreement with a further security and extending the Repayment Date.

    (4) The Defendant therefore contends that this matter should now be restored for further consideration by the Court on the papers alone.

28. The above reference to the Defendant's witness statement dated 27 May 2024 appears to be a reference to paragraph 3 of the same, which reads as follows:

> "Extensive communications and steps taken to finalize the new agreements show Mr Sealey's involvement. On page 137 there is an email from Mr Sealey to Mr O'Mahony of Brabners solicitors sent on 17 January 2020. It is a reply to an email – "Thanks Andrew…" but the email to which this is a reply is not exhibited. Emails dated 27 and 28 to 29 January 2020 confirm his active role in negotiating and finalizing these terms, pages 147 to 149, 153, 157, 162-169, (Exhibit JRS1)."

29. The remainder of the Defendant's witness statement dated 27 May 2024 takes other points, which may be summarised as follows:

(1) A new agreement was formed between Hope Capital and Mr Collier which included a new counterparty, namely Sphere Property 3 Limited. This new agreement was substantially to the Defendant's detriment as the guarantor, because the Repayment Date had been 29 April 2019 under the deed dated 29 October 2018, but the new agreement extended the time for payment to the end of April 2020 during which period interest would continue to run thereby increasing his exposure beyond the Repayment Date of 29 April 2019 for another year (paragraph 2).

(2) The minutes from the board meeting on 29 January 2020 show that Sphere Property 3 Limited entered into a new Deed of Guarantee and Indemnity, granting a legal charge over 20 Balcombe Road. This was not disclosed to the Defendant, was substantially to his detriment and was done to support the borrowing of Sphere Property 2 Limited (paragraph 4).

(3) Although Mr Sealey does not explain exactly what the new agreement is (a) it is clear that there was a new agreement which involved multiple parties, and (b) it is apparent that the new agreement involved option agreements relating to Sphere Property 2 Limited and Sphere Property 3 Limited (paragraph 5).

(4) Significant procedural steps were taken to formalise these obligations, and the new agreement also included specific requirements for shareholder resolutions and board resolutions (paragraph 6).

(5) "The new guarantee and legal charge created additional obligations and altered the security landscape, impacting the overall liability and risk profile of the parties involved. The new agreement acknowledges that the properties which the Claimant has charges over are to be demolished and for there to be a significant redevelopment of the site involving the assets of Sphere Property 3 Limited" (paragraph 7).

(6) The involvement of numerous professionals, the detailed email exchanges and the necessity to draft and execute multiple legal documents all serve to highlight the complexity and formality of the new agreement (paragraph 9).

30. The Claimant's solicitors sent a brief response to these materials, contending as follows:

(1) The repeated assertions that Mr Sealey has not explained or provided admissible evidence as to the New Agreement are unfounded. Mr Sealey addressed these matters in his previous witness statements (and references to the relevant passages are contained within the Claimant's written submissions dated 17 May 2024).

(2) The argument that the Defendant suffered detriment due to an increase in the amount of interest for which he was liable has not been raised by him before. However, that allegation implicitly accepts that his liability under the Deed of Guarantee and Indemnity he entered into was not discharged by the fact that the

Claimant had obtained additional security from Sphere Property 3 Limited. Although the Defendant asserts that the additional interest was caused by an extension of the Repayment Date, there is no evidence that such an extension was ever agreed (as opposed to evidence of an agreement to defer the enforcement of security for a short period on the Claimant's part). In any event, his liability for interest arose from the failure by Sphere Property 2 Limited to repay the loan to the Claimant by the due date, and has continued to date, with the additional security provided by Sphere Property 3 Limited having no bearing on the accrual of interest at all. So there cannot have been any detriment to him in the manner that he alleges.

31. I have no hesitation in preferring the Claimant's submissions to those of the Defendant on these matters. It is a striking feature of the Defendant's submissions that they make no attempt to grapple with the analysis and submissions contained in the Claimant's submissions, which, in the events which have happened, were served on the Defendant some 10 days before the Defendant's written submissions were prepared. The suggestion that there is no evidence concerning the New Agreement is, in my judgment, entirely unreal. On the contrary, the Claimant's evidence concerning it has been before the Court at all material times. What was missing, and what essentially formed the basis of the Defendant's argument that this claim was not properly susceptible to summary judgment, was the documents which showed the full ambit of the New Agreement, and whether, in addition to the provisions articulated by Mr Sealey, it may have contained some other provision(s) which had or arguably had the effect of reducing or removing the Defendant's obligations relied on in the Particulars of Claim. The further documents which the Claimant has produced remove that uncertainty. The Defendant has not identified any feature of those documents which supports his case that those obligations were varied or discharged in any way, and nor has he identified any material gap or potential gap in those documents, so as to suggest that they do not show the full picture.

32. The remaining points taken in the Defendant's submissions and witness statement do not advance his case for purposes of the appeal against the Order of Master Clark:

(1) Even if it is missing, the email to which the email from Mr Sealey to Mr O'Mahony of Brabners solicitors sent on 17 January 2020 is a reply is not suggested by the Defendant to be germane to the issue of whether the New Agreement varied or discharged any of the provisions of the agreements relied upon by the Claimant in its Particulars of Claim; and nor does the Defendant suggest that if that email become available it would materially assist the Court in deciding the claim.

(2) The "option to complete" is not obscure (among other things, see paragraphs 24(5) and 24(10) above), but even if it was, the Defendant does not suggest, and it cannot credibly be suggested, that, being contained in an agreement to which neither the Defendant nor the principal debtor was a party, whatever it provided would have any effect on the Defendant's obligations relied on in the Particulars of Claim.

(3) The New Agreement does not appear to have extended the time for payment to the end of April 2020, but even if it did, and even if during that period interest continued to run and that was to the detriment of the Defendant, those points do not arise from any of the new materials provided by the Claimant, but are instead based on (as the Claimant would say, a misreading of) Mr Sealey's evidence that was before Master Clark. None of this falls within the amended Grounds of Appeal, and nor did any aspect of it form any part of the Defendant's submissions before me on appeal.

(4) The fact that a legal charge was granted over 20 Balcombe Road is not new (see, for example, paragraph 6 of the judgment of Master Clark), and if and to the extent that it is correct that this was not disclosed to the Defendant, was substantially to his detriment, and was done to support the borrowing of Sphere Property 2 Limited, nor are any of those facts. None of this falls within the amended Grounds of Appeal, and nor did any aspect of it form any part of the Defendant's submissions on appeal.

(5) The same considerations apply to the points that the new agreement involved multiple parties, and (if and to the extent that it did) option agreements.

(6) The points summarised in paragraphs 29(4)-(6) above are equally beside the point.

33. For all these reasons, I propose to dismiss this appeal, and to order that the costs of and occasioned by the same, including for the avoidance of doubt the costs of complying with my Order dated 24 April 2024, should be paid by the Defendant to the Claimant.

34. As discussed at the hearing, it seems that the precise amount of those costs is likely to be of academic interest only, because the Defendant is probably unable to satisfy the judgment against him, let alone the costs of the proceedings. Accordingly, if the Claimant is content with an Order for costs to be subject to detailed assessment on the standard basis if not agreed, then I would be prepared to make an Order in those terms. In my view, however, it would be preferable for those costs to be finally disposed of at this stage. Accordingly, although I appreciate that the Claimant may not want to expend further time and costs on this issue, I invite the parties to agree an appropriate figure for summary assessment of the Claimant's costs. If that cannot be agreed, a payment on account of costs appears appropriate in any event, and I invite agreement on that.