Neutral Citation Number: [2018] EWHC 3137 (Ch)

Case No: BL-2018-000819

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

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 21/11/2018

Before:

CHIEF MASTER MARSH

- -

Between:

UBS AG	**Claimant**
- and -	
(1) Rose Capital Ventures Limited	
(2) Dr Vijay Mallya	
(3) Mrs Lalitha Mallya	
(4) Mr Sidartha Vijay Mallya	**Defendants**

- -
- -

Thomas Grant QC and Benjamin Faulkner (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Jonathan Gavaghan and James Kirby (instructed by **Joseph Hage Aaronson LLP**) for the **Defendants**

Hearing dates: 8 and 9 October 2018

- -

Judgment Approved

Chief Master Marsh:

1. This is my judgement on the claimant's application issued on 9 August 2018 by which it seeks orders striking out certain parts of the amended defence dated 11 May 2018. It is necessary to put the application in its relevant context by describing the background to the claim and the history of these proceedings to date.

2. The proceedings relate to 18 and 19 Cornwall Terrace London NW1 which forms part of a well-known terrace of Grade 1 listed buildings. The property was formerly used for offices and was purchased by the first defendant ("Rose Capital") in October 2005 with a view to it being converted back to residential use. A charge in favour of Lloyds Bank, entered into on 23 February 2006, was registered against the title. At the time

the property was acquired in 2005, Rose Capital had no direct, or indirect, connection with the second defendant or his family. During 2007, the shares in Rose Capital, which is a company registered in the British Virgin Islands, were purchased by Gladco Properties Inc which is owned by the Sileta Trust. The Sileta Trust is a Mallya family trust. The third defendant is said to have been the settlor.

3. In March 2012, Rose Capital borrowed £20.4 million from the claimant ("UBS"). It is common ground that the second defendant acted as agent for Rose Capital in its dealings with UBS.

4. The second defendant is the chairman of United Breweries Group and the ex-chairman of United Spirits Ltd. Those businesses either have or had interests in businesses such as Kingfisher beer, aviation infrastructure and real estate. The second defendant launched Kingfisher Airlines in 2003 which later collapsed. He is a former member of the Parliament of India. He is now accused of money laundering, forgery, criminal conspiracy, dishonesty and corruption and has been found guilty of contempt of court by the Indian Supreme Court. He is facing criminal proceedings in India and is subject to extradition proceedings. Furthermore, a judgement has been obtained in India against the second defendant for the sterling equivalent of over £1.1 billion at the suit of a consortium of Indian banks. In November 2017 the Commercial Court in London registered that judgement in England and granted an interim freezing injunction over the second defendant's and Rose Capital's assets in the sum of £1.145 billion. The second defendant's attempt to set aside the registration and the freezing order was unsuccessful and permission to appeal against that decision has been refused.

5. The third defendant is the second defendant's mother. She is aged about 92 years. The fourth defendant is the second defendant's son and he is aged about 31.

6. At the time the property came under the control of the Mallya family, it was in a derelict state. Refurbishment works were undertaken from about 2009 by Kier Construction but paused for a time in early 2011 when there was a falling out with the contractors. At that time the property remained a shell and uninhabitable. In 2011 a new building contract was entered into between Rose Capital and Quad Contracts Limited ("Quad") for fitting out works and completion works for a high-class residential property. Following discussions between UBS and the second defendant, UBS made a mortgage offer dated 9 March 2012 to Rose Capital under which UBS offered to lend, on an interest only basis, £20.4 million subject to its standard conditions and a number of special conditions. One of the special conditions (unsurprisingly) was that the mortgage lending by Lloyds Bank was to be discharged. It will be necessary to consider the terms and conditions of the lending by UBS in more detail. The loan drawdown took place on 27 March 2012. The defendants say that the building contract between Rose Capital and Quad was entered into prior to the completion and draw down of the loan made by UBS.

7. The mortgage loan is stated to be for a period of five years and subject to early termination on the part of the claimant by three months' notice. On 9 March 2016, some four years after the loan drawdown, UBS served notice demanding repayment with the notice due to take effect on 9 June 2016. On 30 August 2016 UBS appointed fixed charge receivers and on 8 November 2016 the receivers commenced proceedings for possession of the property in the County Court at Central London

("the Receivers' Claim"). The proceedings, however, were met with a defence served on 13 January 2017 which raised three issues. In summary form they are:

(1) The notice served by UBS to call in the loan was defective because three months' notice had not been given: ("the Notice Issue").

(2) UBS was not entitled to call the loan in early, on the basis that it was unreasonable and/or irrational and/or arbitrary and/or capricious for it to do so: ("The Early Termination Issue").

(3) The individual defendants were entitled to occupation rights as against Rose Capital, and therefore also against the receivers who act as agent for Rose Capital. The occupation rights are said to arise from representations made by Rose Capital to the individual defendants that they could remain in the property for as long as they liked and in reliance upon those representations they provided or secured the provision of guarantees and procured the continued funding of the construction works at the property through a family trust: ("the Occupation Rights Issue").

8. The defence to the Receivers' Claim, which has a statement of truth signed of the behalf of the defendants, admits that the term of the mortgage was 5 years. A different position has been adopted in this claim. This point has not been taken formally by UBS, but the inconsistency is a matter of concern to the court. The term of the loan goes to the heart of this claim and the inconsistency is material. It is an abuse of the court's process, without there being compelling reasons, for a party to make entirely inconsistent statements, both supported with a statement of truth, in different proceedings.

9. At the time the defence was served in the Receivers' Claim, the five-year term of the mortgage was shortly due to expire. UBS formed the view that it was preferable for fresh proceedings to be brought and the claim by the receivers stayed. The thinking behind this approach was that the issues in a claim brought by the claimant after the expiry of the five-year period of the loan would be uncomplicated, or at least less complicated than those raised in the Receivers' Claim. The assumption at the time was that neither the Notice Issue, the Early Termination Issue nor the Occupation Rights Issue could arise in the fresh proceedings. In the case of the Occupation Rights Issue, it was assumed that the case made by the personal defendants in the Receivers' Claim was that any rights they might have would only bind Rose Capital but not UBS as mortgagee.

10. The decision to stay the Receivers' Claim was the subject of correspondence between the parties' solicitors (then Denton's acting for the claimant - who also acted for the receivers - and Blake Morgan acting for the defendants). It was agreed between the parties that a stay was appropriate. Naturally, the stay was the subject of an order made by consent. This claim was issued in the County Court at Central London on 5 September 2017. The particulars of claim refer to the Receivers' Claim in the course of reciting the relevant history but make it clear that UBS does not rely upon the notice to terminate the loan early. In their original form, the particulars of claim are entirely straightforward and are based upon the five-year term of the loan having expired by effluxion of time. UBS seeks an order for possession against all the defendants and an order for payment of the sum due against Rose Capital. On 23

November 2017 a defence was served. UBS says that the terms of the defence took them by surprise because it resurrects the Early Termination and the Occupation Rights Issues. It is now said that the second to fourth defendants' occupation rights took priority over UBS' mortgage on the basis that they were in actual occupation of the property at the time of the loan, their occupation being through the building contractors employed by Rose Capital. The defence also raises new issues, in particular that the term of the loan was at least 10 years and that the claimant had deliberately delayed and frustrated Rose Capital's attempts to refinance the loan.

11. The remaining procedural steps can be set out in summary form:

- On 29 November 2017 the County Court gave directions for the continuation of the claim.
- On 5 February 2018 the defendants responded to the claimant's request for further information.
- On 5 March 2018 UBS served its reply.
- On 23 March 2018 UBS served amended particulars of claim introducing a subrogation claim in response to the defence.
- Following an application to the High Court, an order was made on 28 March 2018 transferring the claim to the High Court.
- On 19 April 2018 trial listing directions were given. The claim is due to be tried with a time estimate of 10 days starting on 7 May 2019.
- An amended defence was served on 11 May 2018 and an amended reply on 1 June 2018.
- Directions for the procedural steps up to the trial were the subject of an order, made by consent, on 30 July 2018. The timetable has subsequently been amended by consent.
- On 9 August 2018 UBS issued its application to strike out parts of the defence.
- On 31 August 2018 the parties attended a listing appointment before me in connection with that application.
- On 26 September 2018 an order was made declaring that Blake Morgan LLP had ceased to act for the defendants.
- Notice of acting for the defendants was filed by Joseph Hage Aaronson LLP on 27 September 2018.
- Disclosure was due to take place on 16 November 2018 and witness statements are due to be exchanged on 18 January 2019.

12. The listing hearing that took place on 31 August 2018 came about because UBS, by then represented by Herbert Smith Freehills LLP, sought directions concerning their application to strike out. They proposed, in order to ensure that particular issues were resolved prior to the deadline for service of list of documents, that the application to strike out should be dealt with in two parts. This was not a course of action I found attractive and I was able to accommodate the two-day hearing by making special arrangements for an earlier date than had been anticipated. Mr Gavaghan who appeared for the defendants, instructed by Blake Morgan, at the listing appointment, expressed concern about the hearing coming on too quickly because that would prevent the defendants from having a proper opportunity to prepare their response to it. Account was taken of the defendants' position, and Mr Gavaghan's commitments, in fixing the date for the hearing of the application and setting directions. The defendants' evidence in response to the application was to be served by 4:30 on 28 September 2018. No indication was given that the defendants might have difficulty in complying with the directions given by the court.

Defendants' application to adjourn the hearing

13. On 27 September 2018, the defendants, through Joseph Hage Aaronson LLP who came on the court record that day, issued an application seeking an extension of time for service of their evidence and an adjournment of the hearing. There was no practical possibility of a contested application being heard in the period before the date of the hearing of the strike out application and I directed that the defendants' application should be listed to be dealt with at the outset of the hearing on 8 October 2018. Having heard the defendants' application, I made an order dismissing it stating that my reasons for doing so to be included in this judgement.

14. There are two witness statements filed in support of the application to adjourn made by Michelle Duncan, who is a partner with Joseph Hage Aaronson LLP. She says, expressing herself carefully, that there was a breakdown in the relationship between Blake Morgan LLP and the defendants "including in relation to fees, from late July 2018 onwards". I mean no criticism when I say that this statement is not specific about the reasons for the breakdown, although it points in an obvious direction, and she must mean that the relationship had broken down by the end of July 2018. I remark that on application of the type made by the defendants, they have a choice about the extent to which they assist the court by waiving privilege. However, it is unattractive to use privilege as an excuse for providing only a limited explanation to the court when the privilege is theirs to waive.

15. The court is naturally reluctant to adjourn a hearing of an interlocutory application listed for two days for reasons that barely needed to be articulated. Time has been allocated in the court diary which could have been devoted to other cases and an adjournment risks disruption to the progress of the claim, prejudice to the other party and wasted costs; all the more so when the hearing date has been fixed to the convenience of the parties.

16. It is not normally necessary to hold a listing hearing to fix a date for the hearing of an application. In this case the parties were directed to attend for a brief hearing, which was essentially administrative in nature, because they were unable to agree arrangements for the hearing of UBS' application and holding a short hearing of that type can sometimes be more efficient use of court time than dealing with a flow of

correspondence. At the short hearing on 31 August 2018, Mr Gavaghan was instructed by Blake Morgan LLP. No indication whatsoever was given to the court that relations between the solicitors and their clients had broken down at least a month previously. Submissions were made about the appropriate date for the hearing, and the date by which the defendants might be able file evidence if they wished to do so, taking into account the fact that UBS' application had been issued in early August (which was not entirely accurately described by the defendants as being 'the middle of the long vacation'), Mr Gavaghan's professional commitments and, crucially, personal circumstances concerning the partner at Blake Morgan LLP who had conduct of the claim, Ms Lamkin. The court was told that she had been on holiday when the application was served and, tragically, her husband died whilst they were away with their children. Such an unfortunate event necessitated a proper period for adjustments to be made in the team representing the defendants.

17. In making the application for an adjournment Mr Gavaghan submitted that:

(1) The application to strike out parts of the defence was issued late in the proceedings and was not forecast in correspondence. It came 'out of the blue' on 9 August 2018 when Ms Lamkin was away.

(2) Joseph Hage Aaronson LLP had had no opportunity to consider the application and to take instructions. There had been no opportunity to consider whether further amendments to the defence might be warranted in view of the criticisms made by UBS.

(3) Strong objection was taken both to the length of the skeleton argument served by Mr Grant QC and Mr Faulkner (49 pages).

(4) The hearing could be adjourned without the timetable up to trial being significantly affected.

18. Mr Grant submitted that:

(1) Although the skeleton is long, it contains a lengthy introduction providing background with which the defendants, but not the court, are familiar, there are 11 separate sections of the defence that are the subject of the application, each involving legal analysis and it was lengthened by the need to deal with the defendants' application.

(2) The purpose lying behind UBS' application is to trim the claim to ensure that the scope of disclosure is not wider than is necessary.

(3) Mr Gavaghan is familiar with the issues to be considered at the hearing because he is the draftsman of the amended defence. Furthermore, none of the issues involve disputed issues of fact with the consequence that no factual evidence from the defendants is required. Thus, an adjournment is not needed.

(4) Careful thought had been given on 31 August 2018, taking into account Ms Lamkin's circumstances about the timing of the hearing. It was the defendants' choice not to reveal that relations had broken down in July 2018 thereby putting the hearing in peril.

(5) An adjournment would inevitably affect the future progress of the claim which was issued over a year ago. The claim is the second attempt to resolve the claim to possession and should not be delayed any further.

19. The defendants' application rightly does not ask for relief from sanctions. However, the court should apply the *Mitchell/Denton* principles by analogy in relation to the defendants' failure to serve evidence on 28 September 2018 in accordance with the order dated 31 August 2018. Mr Gavaghan accepted that this was a serious breach. However, the real substance of the application was a request to adjourn the hearing which is only indirectly related to compliance with an order. It is nevertheless helpful to apply the three-stage approach.

20. I accept that the change of solicitors put the defendants' legal team under considerable pressure. However, I am not satisfied that the defendants have shown a good reason for seeking an adjournment. Taken in isolation, the tragic death of Ms Lamkin's husband would obviously amount to a good reason. But it was not the cause, or at least the principal cause, of the difficulty created by the change of solicitor because relations broke down before UBS' application was issued and the defendants chose not to share that information with the court on 31 August 2018. It seems to me that the defendants are largely the authors of their current misfortune.

21. An adjournment of the hearing would, in my judgment inevitably have the effect of disrupting the steps up to the trial of the claim and, possibly, would lead to the trial date being changed. I accept that the application is made at a relatively late stage and was made without prior notice. However, in reality, the lack of notice has not made any difference because it is not the defendants' position that with proper notice an application to amend the defence would have been made.

22. There was at one time some confusion on the part of UBS about the test that is to be applied on the strike out application. The suggestion was made that the test is the same as under the first limb of CPR 24.2. Reference was made in the skeleton argument to the summary of the principles applicable to that test provided by Lewison J in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch). But the test under CPR 3.4(2)(a) is different. The applicant must establish that the statement of case shows no reasonable grounds for bringing or defending the claim. The focus is on the statement of case that is under attack. This is different to considering whether the claim or defence has a real prospect of success; the test under CPR 3.4(2)(a) is more stringent than under CPR 24.2. As the notes in Civil Procedure 2018 at paragraph 3.4.2 record, the right approach is that indicated by the Court of Appeal in *Hughes v Colin Richards & Co* [2004] EWCA Civ 266, namely the court must be certain that the claim (or defence) is bound to fail. And even if the court reaches that conclusion based on the current state of the law, if there is a legal issue in a developing area of jurisprudence, the court may conclude that the issue is best determined against the facts found at a trial in order that it is decided against actual rather than hypothetical facts.

23. The test under CPR 3.4(2)(a) is a relevant consideration on the defendants' application to adjourn. It has the consequence that if there is any material issue of fact, the court will not strike out the claim, or the relevant part of it. The ability of the court to evaluate the evidence on an application under CPR 24.2 is limited but it affords the court, nevertheless, an occasion when a wider review of the claim may be

undertaken than on an application under CPR 3.4(2)(a). The court may treat an application under CPR 3.4(2)(a) as if it were made in addition under CPR 24.2 (see the commentary at 3.4.6 in Civil Procedure 2018). However, this is not an appropriate occasion to do so as that would potentially be unfair to the defendants. The defendants have, therefore, not been disadvantaged by not serving evidence to bolster their pleaded case. They have been put under some pressure but, overall, I was satisfied that as the draftsman of the amended defence, Mr Gavaghan was in a position to respond to the application and it was not unfair to the defendants to dismiss their application. It emerged during the hearing, that the defendants may wish to reconsider some aspects of their amended defence. I will consider, to the extent it is relevant to do so, later in this judgment whether the defendants should have an opportunity to re-plead their case. In that connection, it is right to have regard to the extent to which the defendants took full opportunity to clarify their case, and consider amendment, when answering the Part 18 request for information served by UBS.

The loan

24. By a legal mortgage deed dated 27 March 2012, Rose Capital mortgaged the property to UBS as security for an interest only loan of £20.4 million. The loan was subject to UBS' standard Mortgage Conditions for residential property and the terms set out in the mortgage offer dated 9 March 2012, including the Special Conditions set out in the offer.

25. The mortgage offer was made on 9 March 2012. Four of the "Special Conditions Precedent" are relevant:

    (1) Paragraph 1, under the heading "Occupancy Waiver", required that any person aged 17 or over (other than Rose Capital) who would be living in the property on the completion date or at any time thereafter should sign UBS' consent to mortgage which would have the effect of postponing that person's interest in the property, if any, to that of UBS.

    (2) Two guarantors of the loan were to be provided; the second defendant and Birchwood Hills Inc ("Birchwood"), an entity with a registered address in the Bahamas. Birchwood is wholly owned by The Balaji One Three Gift Settlement which is one of the Mallya family owned investment entities of which the third defendant is a beneficiary. The Settlement has been administered by UBS Trustees (Bahamas) Limited since 2008.

    (3) £14,771,294.54 of the loan facility was to be used to be repay the sum due to Lloyds TSB Bank plc ("Lloyds").

    (4) Cash was to be deposited with Lloyds to secure Rose Capital's liabilities under a £10.7 million interest rate swap and that agreement novated to UBS.

26. These conditions were complied with but only the second defendant completed an Occupancy Waiver form. The existence of the waiver signed by him was overlooked when the defence was drafted and it is accepted now that he cannot claim occupancy rights as against UBS.

27. Condition 9.3 of the standard conditions is entitled "Final repayment date". This is a defined term meaning "the last day of the mortgage term". The condition in its unamended form provided that:

> "Subject to our rights to require early repayment of the mortgage debt in the circumstances set out in condition 23.3, you must repay the mortgage debt in full on the earlier of:
>
> (a) the final repayment date;
>
> (b) [omitted]
>
> …"

28. Condition 23.3 provides that if any of the events set out in 23.3.1 to 23.3.15 applied UBS was entitled to demand the immediate repayment in full of the mortgage debt. The type of event provided for in the 15 sub-conditions included non-payment of sums due and breach of the mortgage conditions.

29. Condition 37.9 makes the distinction between 'discretions' and 'absolute discretions':

> "We shall always exercise our rights under the mortgage documents in a reasonable way. Unless a provision states that a right may be exercised in our absolute discretion, each of the provisions of the mortgage documents shall be read as if it said that we will exercise any rights that we have in the relevant provision reasonably if it does not expressly say that."

30. The mortgage offer dated 9 March 2012 has a number of important terms.

(1) It states that the mortgage is not regulated by the Financial Services Authority.

(2) It describes the 'Type of Mortgage' as being an "Interest only, uncommitted and on-demand facility".

(3) The term of the loan is specified as being "5 Years (subject to the Overriding Condition…)". The overriding condition is set out in the Special Conditions.

(4) Special Condition 2 provides:

> "Despite the mortgage term mentioned in sections 3 and 4 of this offer [of five years], the mortgage facilities are offered on an uncommitted basis and are repayable on demand. It is a fundamental term of the mortgage facilities that we are entitled to cancel them, and call for repayment of the mortgage debt, at any time on giving you three months' notice. Accordingly, the conditions are amended as follows:
>
> (a) by inserting the following additional condition as condition 23.4
>
> "Notwithstanding any other provision of these conditions, we shall be entitled <u>at our absolute</u>

> discretion to require repayment in full of the mortgage debt by giving you not less than three months' notice in writing to that effect." [my emphasis]
>
> (b) in condition 9.3.1, by deleting "condition 23.3" and replace it with "condition 23"; and
>
> (c) by stating "fixed term loans are not available under these mortgage facilities. Drawings may be made only under the variable loan facilities."

The effect of the Special Conditions was to supplement the compendious list of events giving rise to an entitlement to demand early repayment in condition 23.3, with new condition 23.4. Instead of being entitled to give notice for one of a number of causes, UBS could give notice 'in its absolute discretion'. By using that expression, the Special Conditions' disapply the general provision in condition 37.9.

The Amended Defence

31. UBS does not apply to strike out the whole of the amended defence. There are issues of fact that are raised which can only be determined at a trial. For example, the defendants rely on dealings between Mr Kumar, acting on behalf of UBS, and the second defendant, acting on behalf of Rose Capital, before the loan was taken up to the effect that whatever the term of the loan was said to be in the documents, it would be rolled over and extended to at least a 10 year period. This is directly inconsistent with their defence to the Receivers' Claim. The defendants say that the Special Condition was of no effect and UBS is not entitled to rely on the expiry of the five-year term, or indeed the earlier attempt to serve notice of early termination.

32. The eleven elements of the strike out application are set out in the draft order. Paragraph numbers, unless otherwise stated, refer to the amended defence.

Issue 1 – the duty of good faith and the 'Braganza' term

33. Paragraph 12a. pleads that the Special Condition was ineffective because it gave UBS a discretion to call in the loan early and that discretion was subject to a duty of good faith. Paragraph 12b. goes on to say the Special Condition was also ineffective because it was subject to:

> "b. A fetter namely that the discretion would be exercised in a manner which was not irrational, arbitrary, capricious and/or unreasonable. This fetter was imposed on the discretion as a result of the term's proper construction or was as a result of an implied term to that effect (by reason of business efficacy and/or because it was so obvious as to go without saying."

34. UBS accepts that it was subject to a duty of good faith. Mr Grant submitted that the duty does not assist the defendants because of its narrow scope and he relied on the summary of the law set out in Megarry & Wade Law of Real Property (8th ed) at 25-0018 and 25-025. Mr Grant submits that the duty has no relevance because UBS was entitled to put its own interests ahead of those of the borrower. As it was put by

Hoffman J in *Re Potters Oils Ltd* [1986] 1 WLR 201 at 206B a mortgagee "… is under no duty to refrain from exercising its rights merely because to exercise them may cause loss to the [mortgagor] or its unsecured creditors. He owes a duty of care to the [mortgagor] but this duty is qualified by being subordinated to the protection of [its] own interests. As Salmon LJ said in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, 965H: "If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests …"."

35. Mr Gavaghan relies on the well-known dictum of Lord Denning MR in *Quennell v Maltby* [1979] 1 WLR 318 at 322H:

> "A mortgagee will be restrained from getting possession except when it is sought bona fide and reasonably for the purpose of enforcing the security and then only subject to such conditions as the court thinks fit to impose."

36. He also describes the mortgage contract as a 'relational contract' and suggests that a duty of good faith is to be implied and that duty includes a duty of cooperation and communication. He relies on dicta by Leggatt J in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 All ER Comm 1321 at paragraph [142]. This dicta has been much commented upon, including by Jackson and Beatson LJJs in *Mid Essex Hospital Services NHS Trust v Compass Group UK* [2013] EWCA Civ 200 at [105] and [150]. In any event, the controversy on that subject does not arise here because the duty of good faith as between a mortgagor and a mortgagee does not arise by contractual implication but by virtue of the creation of a mortgage: see the observations of Lloyd LJ in *Socimer International Bank Ltd (In liquidation) v Standard Bank London Ltd* [2008] EWCA Civ 116 at [148] – [150]. The mortgagor's duty of good faith has developed along a different path to notions of good faith as they relate to other business contracts.

37. The scope of a mortgagee's duty of good faith has been considered by the Privy Council recently in *Cukurova Finance International Ltd and another v Alfa Telecom Turkey Ltd (Nos 3 to 5)* [2016] AC 923. In that case there were allegations of bad faith and improper purpose in connection with a decision to appropriate shares held as security for a loan. The Board observed at [78]:

> "… the Board considers that if a chargee enforces his security for the proper purpose of satisfying the debt, the mere fact that he may have additional purposes, however significant, which are collateral to that object, cannot vitiate his enforcement of the security. If the law were otherwise, the result would be that the exercise of the right to enforce the charge for its proper purpose would be indefinitely impeded because of other aspects of the chargee's state of mind which were by definition irrelevant."

38. It follows that in the absence of an allegation that UBS' decision to call in the loan was disconnected from a desire to obtain repayment of the loan and to enforce its security, the duty of good faith will not avail the defendants. UBS was not required to have 'purity of purpose' as it is put in Fisher and Lightwood's Law of Mortgage 14th ed. at 26.15. The dicta from *Quennell v Maltby* cited by Mr Gavaghan is not inconsistent with this principle.

39. So far as the fetter pleaded at paragraph 12b is concerned, the defendants rely on the decision of the Supreme Court in *Braganza v BP Shipping* [2015] 1 WLR 1661. The legal principles that were approved and applied by the Supreme Court were well-established before that decision. In *Paragon Finance Ltd v Nash* [2001] EWCA Civ 1466 the claimant was given a power expressed in general terms to vary interest rates in a consumer credit contract. The Court of Appeal held that the power was not completely unfettered and implied a term that the power would not be used dishonestly, for an improper purpose, capriciously or arbitrarily. That decision was reached in the context of extortionate credit bargains under the Consumer Credit Act 1974. In *Socimer International Bank Ltd v Standard Bank London Ltd* a seller of securities on a forward basis had a discretion to value assets in default of payment by the buyer. The analysis by Rix LJ at paragraph [66], with which Laws and Lloyd LJJ agreed, was cited with approval by the Supreme Court in *Braganza*.

40. The decision in *Mid Essex Hospital Services NHS Trust v Compass Group UK* [2013] EWCA Civ 200 was not referred to in the judgments of the Supreme Court or cited in argument in *Braganza*. This oversight does not diminish its importance. In a judgment with which Lewison and Beatson LJJ's agreed, Jackson LJ noted at paragraph [83] that in each authority where the court had been willing to imply a term akin to the fetter:

> "… the discretion did not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term. The precise formulation of that term has been variously expressed in the authorities. In essence, however, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner. Such a term is extremely difficult to exclude, although I would not say it is utterly impossible to do so."

41. The contractual arrangements that were under consideration in *Mid-Essex Hospital Services* concerned the provision of cleaning and catering services over a period of seven years in a hospital in Essex. They are analysed at paragraph [89] of Jackson LJ's judgment. Broadly, clause 5.8 of the contract enabled the Trust to award Service Failure Points which could lead to a warning and deductions from sums otherwise due if the contractor had not met performance criteria in the Service Level Specification. At paragraph [92] Jackson LJ set out his conclusion that there was no justification for implying into clause 5.8 a term that the Trust would not act in an arbitrary, irrational or capricious manner because if the Trust awarded or deducted more than the correct number of points, that would be a breach of the terms of clause 5.8: "There is no need for any implied term to regulate the operation of clause 5.8."

42. Lewison LJ reached the same conclusion, saying:

> "138. I can see no reason to depart from the language of entitlement in which clause 5.8 and Part C are expressed. Thus in my judgment it was up the Trust to decide whether or not to levy payment deductions; and whether or not to award SFPs."

43. In *Braganza*, the claimant's husband had been an employee of the defendants and under his contract of employment his widow was entitled to receive a death in service payment unless "in the opinion of the company or its insurers, the death … resulted from … the officer's wilful act, default or misconduct…". He had a contractual entitlement unless his employer formed the opinion that his death resulted from one of those three causes. This left the employer with a fact-finding role, the result of which could deprive his estate of a benefit it was otherwise entitled to expect to receive. Mr Braganza was lost overboard from MV British Unity in circumstances that were not immediately clear. The second defendant's general manager decided, having received a report from its investigation team, that Mr Braganza had committed suicide and, thus, his widow was not entitled to receive payment of the death in service benefit because of his wilful act. I observe that such a decision is about as far away from a decision by a secured lender to call in a loan as it is possible to conceive.

44. Baroness Hale at para [17] referred to the role of Mr Braganza's employer as being a "contractual fact-finder" and the relevant issue for these purposes being whether its decision must be a reasonable one. She went on to say:

> "18. Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest.[1] That conflict is heightened where there is a significant imbalance of power between the contracting parties as there will often be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given." [my emphasis]

45. Having reviewed the authorities, and referred to the famous dictum from Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 233-234, Baroness Hale went on to say:

> "30. It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable – for example, a reasonable price or a reasonable term – the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the *Wednesbury* formulation in the rationality test. Indeed, I understand Lord Neuberger PSC (at para 103 of his judgment below) and I to be agreed as to the nature of the test.
>
> 31. But whatever term may be implied will depend on the terms and the context of the particular contract involved.
>
> …

[1] The language used to describe the type of decision under consideration is very similar to that of Rix LJ at [60] in *Socimer*.

> 32. …The particular context of this case is an employment contract, which, as Lord Hodge JSC explains, is of a different character from an ordinary commercial contract. Any decision-making function entrusted to the employer has to be exercised in accordance with the implied obligation of trust and confidence. This must be borne in mind in considering how the contractual decision-maker should approach the question of whether a person has committed suicide."

46. More recently the Court of Appeal has considered the *Braganza* principles in the context of a bank facility in *Property Alliance Group Ltd v Royal Bank of Scotland* [2018] 1 WLR 3529 ("*PAG*") albeit that it was very much a subsidiary aspect of the decision. The relevant clause provided that:

> "The Lender [RBS] may, at any time, require the Valuer [Lambert Smith Hampton or such other valuer or surveyor as RBS might appoint] to prepare a Valuation of each Property [i.e. each of the properties over which RBS held security]. The Borrower [PAG] shall be liable to bear the cost of that valuation once in every 12 month period from the date of this Agreement or where a default is continuing."

47. It was contended that the cost of a valuation commissioned by the bank at a time when it had decided not to renew the facility could not be recovered because although the terms of the clause appeared to give the bank the right obtain a valuation whenever it wished, the exercise of that right must be tempered by a duty to act "reasonably, in a commercially acceptable or rational way, in good faith, for a proper purpose (i.e. the purpose for which such power or discretion was conferred), not capriciously or arbitrarily and not in a way that no reasonable lender, acting reasonably, would do".

48. The judgment of the Court of Appeal accepted that the power to obtain a valuation and recover the cost from *PAG* was not unfettered. However, the following passage from paragraph [169] shows that the Court of Appeal considered the term to be implied was of limited scope.

> "In the circumstances, it seems to us that RBS must have been free to act in its own interests and that it was under no duty to attempt to balance its interests against those of PAG. <u>It can, however, be inferred that the parties intended the power granted by clause 21.5.1 to be exercised in pursuit of legitimate commercial aims rather than, say, to vex PAG maliciously.</u> It appears to us, accordingly, that RBS could not commission a valuation under clause 21.5.1 for a purpose unrelated to its legitimate commercial interests or if doing so could not rationally be thought to advance them." [my emphasis]

49. I draw from these authorities the following principles:

(1) It is not every contractual power or discretion that will be subject to a *Braganza* limitation. The language of the contract will be an important factor.

(2) The types of contractual decisions that are amenable to the implication of a *Braganza* term are decisions which affect the rights of both parties to the contract where the decision-maker has a clear conflict of interest. In one sense all decisions made under a contract affect both parties, but it is clear that

Baroness Hale had in mind the type of decision where one party is given a role in the on-going performance of the contract; such as where an assessment has to be made. This can be contrasted with a unilateral right given to one party to act in a particular way, such as right to terminate a contract without cause.

(3) The nature of the contractual relationship, including the balance of power between the parties is a factor to be taken into account: per *Braganza* per Baroness Hale. Thus, it is more likely for a *Braganza* term to be implied in, say, a contract of employment than in other less 'relational' contracts such as mortgages.

(4) The scope of the term to be implied will vary according to the circumstances and the terms of the contract.

50. The language of the contractual terms in this case could not be more stark. The loan was made on an uncommitted basis and repayable on demand. UBS' standard conditions were amended to remove the need for there to be a trigger event before it was entitled to call in the loan and UBS was entitled to call in the loan in its absolute discretion. There was what was described as a fundamental term that UBS was entitled to cancel the facilities. This language does not obviously provide fertile ground for implying a *Braganza* term.

51. Mr Gavaghan approaches this aspect of the application by inviting the court to consider whether UBS could have given notice to call in the loan one day after the loan was drawn down. He points to the substantial fees charged by UBS as a condition of granting the loan and submits that UBS, for the purposes of the application, have to show it is unarguable that there are fetters on the exercise of UBS' power to call in the loan. He submits that his illustration demonstrates that when the terms of the loan are construed at the date they were agreed, there is a respectable argument to the effect that some fetter on the absolute discretion must be imported.

52. I do not find it easy to contemplate that a *Braganza* type clause could be found in a contract of the type under consideration as a matter of the proper construction of the contract. The Supreme Court has considered the proper approach to construction in a number of recent well-known cases: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36 and *Wood v Capita Insurance Services* [2017] UKSC 24. The guidance, for example, contained in Lord Neuberger's judgment in *Arnold v Britton* [17] – [23] is well-known and does not need to be cited here. I have in mind the notion that commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language the parties have used. As a general proposition, it seems to me that a *Braganza* clause will only find its way into a contract by way of an implied term.

53. The Supreme Court has also considered the test for the implication of terms into contracts in *Marks and Spencer plc v BNP Parisbas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72. The test for implication is one of business necessity and whether, without the term, the contract would lack commercial or practical coherence; whether it is necessary to imply the term to make the contract work.

54. I do not consider that the question posed by Mr Gavaghan is the right one because it ignores the words the parties have agreed, the nature of the contract they entered into and the relative equality of their bargaining power. The words used by the parties to the secured loan are unequivocal. As is commonly the case with 'on demand' lending, the lender will have no plan to call in the loan immediately, but reserves the right to do so. A lender will normally have no reason to demand repayment of the loan on the day after it was made. But if the lender were to take that step, the borrower has the protection of the duty of good faith.

55. Based on the terms the parties agreed, I do not see there is a basis for implying a *Braganza* term. Mortgage lending has built up its own protections in the form of the duty of good faith. The inclusion of that duty, by reason of the relationship itself, points against the possibility of a *Braganza* clause being imported in relation to a core contractual provision of the type under consideration here.

56. The contractual terms relied upon by UBS to exercise a right to demand repayment and realise its security are some considerable distance from the contract in *PAG* or *Braganza*. Although the special conditions refer to UBS' "absolute discretion", calling in of the loan is not the exercise of a discretionary power of the type Baroness Hale describes. It is difficult to see how a decision to demand repayment of loan could ever be in the interests of the mortgagor. There is, however, a degree of mutuality because it is open to the mortgagor to discharge the loan at any time. The power under consideration here is a fortiori a power that is always exercised solely for the benefit of the mortgagee.

57. If contrary to the conclusion I have expressed, a Braganza term is to be implied in the mortgage contract, its scope would be no wider than scope of the duty of good faith. UBS would be under a duty not to call in the loan other than for proper purposes. As long as the mortgagee exercises the power for proper purposes, and not for the sole purpose of vexing the mortgagor, it will neither be in breach of its duty of good faith nor a *Braganza* term, if one is capable of being implied on the basis of business necessity.

58. It is telling, as Mr Grant submitted, that none of Megarry & Wade The Law of Real Property (8th ed.), Fisher and Lightwood's Law of Mortgage (14th ed.) and Cousins The Law of Mortgages (4th ed.) mention *Socimer* clauses. That is not to say that such a clause might be implied in some circumstances; but it is clear that it is not appropriate to construe UBS' contractual terms as they were applied to the first defendant as if the fetter were part of them or to imply a term to import them into the contract.

Issue 5 – Principle 2.1.1 of the FCA Handbook

59. Paragraph 13 of the defence pleads an implied term that UBS would comply with Principle 2.1.1 of the Financial Conduct Authority Handbook. It is convenient to deal with it at this stage because, like the good faith and irrationality fetters it involves the terms of the loan between UBS and the first defendant. Paragraph 13 pleads:

> "… it was an implied term of the Conditions and/or Special Conditions (because it was so obvious as to go without saying) that the Claimant would abide by the Financial Conduct Authority Handbook in all its dealing with the First and/or

other Defendants and in particular would comply with its obligations under Principle 2.1.1 of the said Handbook namely to:

a. conduct its business with integrity;

b. pay due regard to the interests of its customers and treat them fairly;

c. pay due regard to the information needs of its clients;

d. communicate information to them in a way which is clear, fair and not misleading;

e. manage conflicts of interest fairly, both between itself and its customers and between a customer and another client;

f. take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment."

60. In response to a request for information the defendants confirmed that the implied term was one owed only to Rose Capital. However, the defendants' case is that so far as it is necessary they will say that the second to fourth defendants each fell within the definition of "client" or "customer". The defendants rely on the fact that the Mallya family, including the second defendant, were already clients of UBS before the loan was taken out.

61. UBS submits that the implied term is wrong as a matter of law for two reasons. First, there is no implied duty arising from the FSA Handbook at all. Secondly, even if a duty was owed to Rose Capital, the duty could only relate to the way in which UBS dealt with Rose Capital, and not to the remaining defendants. These submissions need to be taken in turn.

62. Section 1 of the Mortgage Offer expressly states that the mortgage will not be regulated by the FSA. It was not a regulated mortgage contract because it was not made to an individual or a trustee. So UBS was not engaged in regulated activity when making the loan. Furthermore, although section 150 of the Financial Services and Markets Act 2000 provides that a contravention of a rule is actionable at the suit of a private person, Principle 3.4.4 of the FCA Handbook in force at the material time carved Principle 2.1.1 out from section 150 by stating expressly that a contravention of the Principle did not give rise to a right of action.

63. The defendants' case for implying the implied term runs counter both to the specific provisions to which I have referred and the basis upon which terms will be implied into a contract. The loan documents state expressly that the lending is not regulated. To imply a term would offend against the 'cardinal rule' of implication – see *Marks & Spencer plc v BNP Parisbas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [18] and [28]. Even if the parties had not expressly stated that the loan was unregulated, they have agreed detailed terms of the loan in relation to which there is no need either for obviousness or necessity to imply this provision.

64. It is also plainly right that such an implied term could only enure to the benefit of Rose Capital and not the other defendants.

65. If that were not enough, the relevance of the terms and how they might have been breached is left unpleaded. Mr Gavaghan accepted that the way paragraph 13 of the defence has been pleaded is too broad as it stands.

Issue 2 – Breach of the duty of good faith and the Braganza term

66. Issue 2 concerns whether UBS was in breach of its duty of good faith (the existence of which is accepted) and, assuming (contrary to the determination I have made) that the fetter forms part of the Special Conditions, whether UBS was in breach of the fetter. The defendants' case is set out in paragraph 16 of the amended defence.

> "16. … the Claimant purported to exercise its discretion to call in the debt early in a manner which was not in good faith and/or which was irrational, arbitrary, capricious or unreasonable. In particular:
>
> a. The Claimant had or gave no legitimate reason for its' calling in of the debt and has thereafter failed, despite request, to explain its actions.
>
> b. In the absence of disclosure and in any event, in the circumstances, the correct inference to draw is that the decision to call in the debt early was irrational, arbitrary, capricious or unreasonable or was not made in good faith.
>
> c. [Omitted from the scope of the application]
>
> d. In the circumstances, the calling in of the debt was in breach of the terms pleaded in this Defence above at paragraphs 9(a), 9(b), 12 and 13."

67. I need only mention in passing that an explanation of the decision taken by UBS has now been provided in a witness statement made by Julia Tobbell on behalf of UBS. That explanation might have been helpful for an application under CPR 24.2 but it does not assist where I am considering whether the amended defence shows reasonable grounds for defending the claim. Evidence about UBS' reasons for calling in the loan cannot be of any assistance in determining the issue in hand.

68. UBS is critical about the way in which sub-paragraphs 16a. and 16b. of the defence are pleaded. Mr Grant submits that the defendants' pleaded case amounts to a bare assertion that UBS had no legitimate reason for calling in the loan and the remainder of the defendants' case appears to be premised upon UBS being under an obligation to provide reasons for its decision to call in the loan. Read as a whole, the defendants are saying:

> (1) UBS had no legitimate reasons for calling in the loan;
>
> (2) UBS gave no explanation or reasons for calling in the loan and it is appropriate to infer that the decision was a breach of the fetters (or at least one of them).

69. Mr Grant is right that it is not sufficient for the defendants merely to assert that UBS had no legitimate reasons for calling in the loan. Something more is needed. It is notable that no particulars of bad faith are given. A request was made by UBS under Part 18 in connection with a later paragraph in the defence (paragraph 32) concerning the alleged breach of the duty of good faith. The defendants were asked to say what

they alleged UBS' motivations were in calling in the loan and why it is said they were in breach of the duty of good faith. The defendants said in response that the claimants were 'not entitled' because the defendants' case is adequately set out in the pleading. The answer goes on:

> "The Defendants' primary position is that it is not necessary for them to prove the motive for the Claimant's wrongful actions. Alternatively, if that were wrong, the Defendants in any event would require disclosure from the Claimant relating to the Claimant's decision-making process before they would be able to answer this question with the particularity requested. Without prejudice to the aforesaid, had the Claimant acted in good faith it would not have called in the debt early or appointed receivers. The Defendants will point to the fact that the Claimant had been paid substantial fees for the five-year loan and it should either not have called in the debt early. [sic] ….".

70. The defendants' case as it was explained in submissions is that in light of UBS' failure or refusal to provide an explanation for its decision, the burden shifts back to UBS to explain its decision. The defendants rely on the decision in *Hills v Niksun Inc* [2016] EWCA Civ 115 at [23 – 25]. However, it is clear from the judgment of Vos LJ that the burden in that case only shifted after the claimant had demonstrated there were grounds for thinking that the decision of his employer was not reasonable. This approach accords with an earlier decision of the Court of Appeal in *Commerzbank AG v Keen* [2006] EWCA Civ 1536, which is another employment case. At paragraph [110] Moses LJ said that the failure to give reasons will not necessarily establish irrationality and it is for the employee to establish irrationality; and at paragraph [111] he said an employee must at least establish a prima facie case of irrationality before an employer will be required to justify its decision.

71. It might be thought that in the context of employment, the court would be more willing to lean in favour of the employee because there is an obvious imbalance of power. It is clear that the duty of good faith in the context of mortgage lending has limited scope. Even assuming in favour of the defendants that the principles in the employment cases will apply without qualification, the defendants have failed to provide any basis upon which they can say that the burden has shifted to UBS to justify its decision. It does not suffice merely to assert a breach of the duty of good faith and/or the fetters. It is incumbent upon the defendants to plead facts which make a case for there having been a breach.

72. The defendants are unable to point to any principle of law or equity which entitles them to require UBS to provide reasons for its decision to call in the loan. Even in public law there is no unqualified duty to provide reasons. The idea that a lender on terms such as those in this case must give reasons, and if it refuses the court will infer that the lender is in breach of its duties is problematic. Is the lender obliged to give reasons in advance of making a demand for repayment? Or if the duty to give reasons arises after the demand, what is the effect of a request for reasons and a refusal to give them? Does it suspend the demand? These are all questions which, happily, I am not required to answer.

73. The demand for repayment was made four years into a five-year term (that is the term in the written loan documents) and there is nothing that is prima facie irrational or in breach of a duty of good faith that can be shown. It does not suffice to say the

defendants need disclosure to make out their case. Standard disclosure is responsive to a party's case (see CPR 31.6), not a case a party has not made but hopes to make.

74. It remains part of the defendants' case that the first defendant was promised a 10 year term. UBS accepts that this allegation involves an issue of fact which will have to be tried.

Issue 3 – Wrongful appointment of the receivers

Issue 4 – UBS relying on its own wrong

Issue 6 – UBS delayed and frustrated the Defendants' attempts to refinance the loan

75. It is convenient to take issues 3, 4 and 6 together because they each involve further aspects of the defendants' case concerning UBS' alleged wrongful conduct.

76. Issue 3 relates to paragraph 26 which alleges that calling in the loan and appointing the receivers was wrongful conduct. It seeks to import the relevant parts of the defence in the claim brought by the receivers in the County Court. The appointment of the receivers is said to have been wrongful because calling in the loan was in breach of the duty of good faith or a *Braganza* term. The defendants' response to the application is that the wrongful conduct allegation raises issue of fact and therefore the allegation is not amenable to being struck out. However, this complaint falls away in light of the conclusions I have reached earlier in this judgment. In the Receivers' Claim, the defendants asserted that the notice was defective because less than 3 months' notice was given but that point does not arise in this claim.

77. Issue 4 which arises from the allegation in Paragraphs 18(c) and 23(b)(ii) and (iii) that UBS in seeking possession is relying on its own wrong in appointing the Receivers. Paragraph 18(c) alleges in general terms that the defendants' dealings with the property were interfered with by UBS' wrongful conduct. The allegation is taken further in paragraph 23:

> "(b)(ii) Further or alternatively, the wrongful appointment of the receivers has interfered with the First Defendant's rights to deal with the property whether by re-mortgaging, marketing, selling or otherwise dealing with it in order to pay off the Loan; and/or
>
> (iii) In the circumstances, the Claimant is not entitled to rely on its own wrong."

78. Issue 6 arises from the allegation in paragraphs 23(b)(i), 23(b)(iii), 27 and 30-33 that the claimant delayed and frustrated the defendants' attempts to refinance the loan, that such delay was wrongful and that as a consequence UBS is not entitled to possession. The defendants' case is pleaded in a highly generalised way. At paragraph 28 of the defence it is said that from about 16 August 2016 cooperation was sought from UBS and its group companies to arrange the transfer of assets (investments) held on behalf of the Mallya family to facilitate re-mortgaging of the property and repayment of the loan from UBS. CBH Bank had agreed to the re-mortgage provided the investment portfolio was transferred to it.

79. Paragraph 30 pleads facts in support of the claim that UBS, or associated companies, delayed dealing with the transfer of the portfolio and it was not until 11 August 2017 that the portfolio was ready to be moved. However, by then the Swiss Authorities had issued an *Ordonnance de séquestre* on 2 August 2017 with the result that CBH Bank withdrew its offer.

80. The defence goes on:

> "32. While the Defendants reserve the right to particularise matters further once disclosure is given, the Claimant's said actions (and/or lack of action), in particular in calling in the loan early, appointing receivers and/or thereafter delaying or obstructing the re-mortgaging of the property at the same time as the receivers sought possession were in breach of the Conditions and/or Special Conditions in particular as those actions or omissions were:
>
> a. Irrational, arbitrary, capricious or unreasonable;
>
> b. In breach of the Claimant's duties under the FCA Handbook listed above in paragraph 13 of this Defence;
>
> c. Not undertaken in good faith.
>
> 33. In the circumstances:
>
> a. The Claimant is not entitled to exercise a right of possession as to do so would be exercising a power under the mortgage in breach of the claimant's duty of good faith as pleaded above at paragraph 9(b) of this Defence; and/or
>
> b. Further or alternatively, the Claimant is not entitled to rely on the allegation that the Defendants have breach their obligations and/or rely on the current failure to re-mortgage the property;
>
> as to do so would for them to rely upon the Claimant's own wrong." [sic]

81. There are issues of fact that are bound up with the allegation that UBS delayed or obstructed the re-mortgaging and if the legal basis for the defence shows reasonable grounds, the issues will have to go to trial for the factual dispute to be resolved. However, the legal basis for UBS being said to rely upon its own wrong is not easy to follow. Mr Grant submitted that the court should consider the general consequences that might flow from the allegation that UBS relied on its own wrong. He makes two initial submissions:

(1) It is not spelled out in the defence what the consequences are for UBS. Assuming it is right that, say, UBS was not entitled to give notice to call in the loan and thus not entitled to appoint receivers, where is UBS left? Can it be right that thereafter UBS is unable to rely upon the effluxion of the term of the loan as is now suggested and, if so, for how long is UBS barred from recovering its loan? The logic of the defendants' pleading is that UBS, having made an error in giving notice, cannot recover its loan until Rose Capital chooses to re-mortgage or sell.

(2) He submits that the legal response to the alleged wrong is completely disproportionate to its weight. The notice of demand was ineffective but that is hardly a wrong that warrants UBS being prevented from exercising rights to realise its security. It is a commonplace in many legal contexts that a defective notice is served (perhaps there is an error within the notice or an insufficient period of notice is given) followed by one that complies with the contractual requirements, without prejudice to the validity of the first notice.

82. The legal principle that a person is not entitled to take advantage of his own breach of duty to avoid the contract or in order to take a benefit under it is found in *Alghussein Establishment v Eton College* [1988] 1 WLR 587 at 594 C-D. Leaving aside for immediate purposes whether there has been a wrong of the type that might engage the principle, it is a principle that derives from the construction of the contract – see Patten LJ in *BDW Trading Ltd v JW Rowe (Investments) Ltd* [2011] EWCA Civ 548 at [31]. It is not just a matter of construing the contract to accord with the principle or implying the principle as an implied term at a general level. The consequences of construing the contract in that manner are a necessary part of the process. The defendants have not said what those consequences are. This is fatal to this part of the defence and it is not just a matter of the defendants being given an opportunity to fill the gap in their case because, for the reasons put forward by Mr Grant, which I accept, there are no logical consequences that could be defined on a principled basis.

83. Mr Grant also submits that UBS does not need to rely on its own wrong. UBS does not have to rely upon calling in the loan early. Indeed, by bringing this claim it was seeking to avoid any reliance on the step the defendants criticised in the receivers' claim. In this claim UBS relies only on the expiry of the term of the loan by effluxion of time. Again, I agree with Mr Grant's submission.

84. It is not part of the defendants' case that, but for UBS calling in the loan early, Rose Capital would have been able to refinance the loan. They were asked in a request made under Part 18 to provide details of the receivers interfering with the defendants' dealings with the property. The response was in general terms that "… it is self-evident that the wrongful appointment of receivers is an interference with its rights as owner to deal with the Property: it cannot deal with its property freely while receivers remain appointed." Mr Grant submits that the response is the plea of a party who cannot advance a case. I agree.

85. Mr Gavaghan submitted that the appointment of receivers had an obvious chilling effect on the ability to sell at full market value and that to strike out this element of the claim now would amount to the court trespassing into evidence on a strike out application. However, it is incumbent on a party to plead the facts it relies upon and it does not suffice to rely on general statements of principle that are not grounded in those facts. No facts are pleaded. The defendants have had an opportunity to supplement their case and have declined to take it advantage of it.

Issue 7

86. Paragraphs 18(d), 19(a) and 23(a) allege that the claimant made an election to call in the loan early, and cannot now act as if had not done so and would be so acting in seeking possession.

87. As the defence is pleaded, it appears to suggest that in light of UBS' decision to call in the loan early, and in light of the decision being an unlawful one, UBS is now unable to pursue a claim for possession upon the term of the loan expiring by effluxion of time. However, if the act of calling in the loan had no legal effect, because it was unlawful, it is as if it did not happen. A defective notice is not a notice.

88. This is not a case of UBS being faced with two mutually inconsistent choices such as a party subject to a repudiatory breach of contract having to decide whether to affirm the contract or accept the breach. The doctrine of election simply has no application to the facts that are relied on. In the course of his submissions, Mr Gavaghan accepted that the defendants are not entitled to pursue this element of the defence although they reserve their position as to the recoverability of the receivers' fees either in this claim or the receivers' claim.

Issue 8

89. Paragraph 18(h) alleges that bringing this claim separately from the receivers' claim while that claim is stayed or outstanding is an abuse of process. As this point has been explained by Mr Gavaghan at the hearing, the defendants are saying no more than that UBS is not entitled to pursue a claim for the costs of the receivers in this claim while the same claim is made by the receivers in the proceedings they brought, which are stayed.

90. It is unnecessary to consider the authorities relating to abuse of the court's process to deal with this aspect of the claim. The law in relation to mortgagees is clear. A mortgagee is entitled to exercise all or any of its remedies either simultaneously or successively – per Peter Gibson LJ in *Alliance & Leicester v Slayford* [2001] 1 All ER Comm 1 at [20]. The first claim was of course brought by the receivers acting as agent for Rose Capital. This claim is the first claim made by UBS. In any event, there is a short and complete answer to the suggestion that this claim is abusive. The defendants agreed to a stay of the receivers' claim to enable this claim to be pursued. No reservation was made by their solicitors when they provided consent to the stay and the order staying the claim in the County Court was made by consent. They are not entitled now to say that these proceedings are an abuse of the court's process. If as appears to be the case, the defendants merely wish to be able to object to the receivers' costs, that is quite a different matter.

Issue 9

91. Paragraph 17(c) alleges that the claimant is estopped from alleging that the loan expired after 5 years insofar as it relates to the third and fourth defendants. This issue concerns the representation alleged to have been made by Mr Kumar on behalf of UBS that it would roll over the debt after the five year period for at least another five years. Paragraph 17(c) says "the Defendants" relied upon the representation. Plainly this is too loose and the only reliance that could be relevant is that of Rose Capital. It is an easy matter to correct the amended defence by substituting "the first Defendant" for "the Defendants".

Issue 10

92. Paragraphs 34, 35 and 36 allege that the second to fourth defendants have a right to remain in the property that takes priority over UBS' interest. This right arises in two stages.

    (1) Paragraph 34 pleads that the second to fourth defendants have rights as against Rose Capital due to the grant of an irrevocable contractual licence, a proprietary estoppel that entitles them to remain at the property or their right to enforce the trust upon which Rose Capital holds the property for them. The case on Occupation Rights is not part of the strike out application. The court is asked to assume that they existed.

    (2) Paragraphs 35 and 36 plead that these rights are binding on UBS by virtue of the actual occupation of the property by the second to fourth defendants at the time of the mortgage via the builders carrying out works of renovation. If they are not binding on UBS paragraphs 34, 35 and 36 of the defence must be struck out.

93. Mr Grant points out that if the defendants are right in this part of their claim, the consequences are startling. UBS lent £20.4 million to a company with no known assets other than the property but it will find that, in effect, the loan is unsecured due to the rights granted by the borrower to the second to fourth defendants. The fourth defendant is only 31 years old and it must follow, if the second to fourth defendants are right, that if he lives until his 80's, UBS could be deprived of its security for about 50 years.

94. For the purposes of the application the relevant facts are not in dispute:

    (1) Rose Capital bought the property in 2005 when it was derelict.

    (2) Planning permission to convert the property from offices to residential use was granted in 2008.

    (3) Rose Capital started building works in 2009 when the first phase of works was carried out by Kier Construction Ltd.

    (4) Kier was asked to leave the site in 2011. At that time the property was a shell and required major works to fit it out and to make it habitable.

    (5) In February 2011, Rose Capital entered into a building contract with Quad Contracts Ltd.

    (6) The building works continued after the mortgage was drawn down in March 2012.

    (7) The property was not habitable or inhabited until some time after March 2012.

95. In the pre-contract enquiry stage, UBS asked on 6 January 2012 in enquiry 3.1 for confirmation that on completion "… no-one other than the [Rose Capital] will be in occupation of or will have a beneficial interest in the Property." The enquiry went on to ask that if the confirmation could not be provided, full details were to be given and any persons other Rose Capital "who has entered into any arrangement or

understanding under which any right may arise to remain in occupation of the whole or any part of the Property or to share in the proceeds of sale of the Property."

96. The response on 16 January 2012 was:

> "Confirmed a high class home for Dr Vijay Mallya and his family members and United Breweries Group corporate guests."

97. It seems to me that the question that was asked was clear enough and the response to the enquiry provided the 'confirmation' sought and thus it was unnecessary for the alternative enquiry to be answered.

98. On 17 January 2012, Eversheds acting for UBS, replied to Harold Benjamin acting for Rose Capital and said:

> "31. We note that Dr Mallya and his family members will be in occupation. We will forward an Occupiers Waiver for Dr Mallya to sign. Please would you confirm the names of the family members as forms of Occupiers Waiver will be required from each of the family members who will be in occupation. The original signed Occupiers Waiver will be required prior to completion." [my emphasis]

99. Further clarification of the position was sought and Eversheds asked on 10 February 2012:

> "For the avoidance of doubt, please can you confirm that … none of Dr Mallya's family members will be required to sign an Occupiers Waiver form (ie are over the age of 17)."

100. On 19 March 2012, Eversheds said:

> "Occupiers Waiver required from any occupiers. We will require evidence that any signatories have receive independent advice (received)." [The words in brackets clearly are intended to indicate that Eversheds had received the Occupiers Waiver form signed by the second defendant.]

101. Harold Benjamin replied to the 'for the avoidance of doubt' request dated 10 February 2012 on 22 March 2012. They said:

> "The property is currently uninhabitable and vacant possession. The Quad contract will last for at least 6 months. Dr Mallya has completed an Occupiers Waiver." [sic]

102. It is now common ground that the second defendant cannot claim occupation rights because he signed the Occupation Waiver form. It also seems to me clear that Rose Capital's solicitors were saying two things in response to being pressed by Eversheds. First, no-one was in occupation and occupation was not possible because the property was uninhabitable. Secondly, that the only person who needed to sign the Occupiers Waiver form was the second defendant. There was an obligation placed on Rose Capital to provide Occupiers Waiver forms for anyone who was or would be in occupation: see the condition summarised at paragraph 24(1) above.

103. The third and fourth defendants seek to take advantage of the provisions in paragraph 2 of Schedule 3 of the Land Registration Act 2002 which deals with interests that override registered dispositions such as UBS' charge. They plead that they have the benefit of:

> "An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation". …".

104. This is subject to one material exception:

> "(c) an interest – (i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and (ii) of which the person to whom the disposition is made does not have actual knowledge at that time; …".

105. UBS' case relies on the following facts which are undisputed and are, in part, taken from the defence in the Receivers' Claim (paragraphs 25 to 30):

(1) The property was subject to the charge to Lloyds.

(2) New funding was needed in the form of a loan form UBS to enable Rose Capital to refurbish the property. There was a substantial balance left over after discharging the Lloyds loan.

(3) The third and fourth defendants would only be able to occupy the property through the expenditure of the money loaned by UBS.

(4) The third and fourth defendants knew that Rose Capital was seeking new lending and must have known that the lending would require priority for UBS' charge.

(5) The third defendant knew this because she asserts in the defence to the Receivers' Claim that she authorised the funding of further building work to the property out of UBS' lending and in a response to a request made under Part 18 she said knew that the second defendant had authority to act on behalf of Rose Capital.

(6) The defence in the Receivers' Claim pleads that the fourth defendant agreed to procure that Birchwood Hills Inc would provide a guarantee for the UBS loan in accordance with one of the Special Conditions Precedent.

106. Mr Grant relies on what is commonly referred to as the *Brocklesby* principle after *Brocklesby v Temperance Permanent Building Society* [1895] AC 173 and the analysis by Newey J in *Bank of Scotland v Hussain* [2010] EWHC 2812 (Ch) and the Court of Appeal in *Wishart v Credit & Mercantile plc* [2015] EWCA Civ 655. Two recent summaries of the *Brocklesby* principle illustrate how it operates:

(1) In *Thompson v Foy* [2010] 1 P&CR 16 Lewison J explained the principle in the following way:

> "… the owner [of the alleged beneficial interest] is found to have given the vendor or borrower the means of representing himself as the beneficial owner,

> the case forms one of actual authority apparently equivalent to absolute ownership, and involving the right to deal with the property as owner, and any limitations on this generality must be proved to have been brought to the knowledge of the purchaser or mortgagee."

(2) In *Wishart* Sales LJ gave the leading judgment and at paragraph [52] said:

> "The *Brocklesby* principle is not based on actual authority given to the agent, but rather on a combination of factors: actual authority given by the owner of an asset to a person authorised to deal with it in some way on his behalf; where the owner has furnished the agent with the means of holding himself out to a purchaser or lender as the owner of the asset or as having the full authority of the owner to deal with it; together with an omission by the owner to bring to the attention of a person dealing with the agent any limitation that exists as to the extent of the actual authority of the agent. This combination of factors create a situation in which it is fair, as between the owner of the asset and the innocent purchaser or lender, that the owner should bear the risk of fraud on the part of the agent whom he has set in motion and provided (albeit unwittingly) with the means of perpetrating the fraud."

107. Mr Grant submits that the steps taken by the third and fourth defendants (and the second defendant) to borrow money from UBS on the security of the property in order to refurbish it with a view to them occupying the property, once refurbished, while privately reserving to them themselves a right said to bind UBS falls squarely with the *Brocklesby* principle.

108. Mr Gavaghan points to UBS' failure to obtain Occupier's Waivers from the third and fourth defendants. He submits UBS knew they were in occupation and, therefore, is not able to say it had reasonable grounds for priority. It seems to me however, this is a difficult submission to make in light of the enquiries that are described above. There was a contractual obligation placed on Rose Capital to provide Occupier's Waivers from persons who were in occupation or were intended to occupy in the future. Nevertheless, I consider that despite the obviously unattractive nature of the third and fourth defendants' case, the application of the Brocklesby principle and an examination of events leading up to the loan offer and draw down make it impossible for the court to conclude that this part of the defence is bound to fail. The position on an application under CPR 24.2 might have been different.

109. However, even if the third and fourth defendants can be assumed to have the rights they plead at paragraph 34 of the defence, they are only effective as against UBS if (i) they were in actual occupation at the date of either acceptance of the offer or the draw down (for present purposes it matters not which) and (ii) their interest would not have been obvious on a reasonable careful inspection of the land and (iii) UBS did not have actual knowledge of their rights.

110. The case on actual occupation, like much of the defendants' pleaded case, is merely an assertion. It is said in paragraph 35 they were in actual occupation "through builders who were developing the property to be their home". The responses to UBS' Part 18 request are careful but not illuminating. At the time the contract with Quad had not been located. However, it is said that Quad were in occupation and they were "… carrying out works so as to finish the construction of the home for the First

Defendant for use by the Second to Fourth Defendants". In answer to a request for information about how the occupation of the second to fourth defendants would have been obvious on a reasonably careful inspection, the defendants say:

> "The builders were working for the First Defendant to provide a home for the Second to Fourth Defendants who would occupy the premises as their home once it was finished." [my emphasis]

111. What amounts to "actual occupation" was considered by Lewison J in *Thompson v Foy* and at paragraph [127] he provided a summary of the principles:

> "(i) The words actual occupation are ordinary words of plain English and should be interpreted as such. The word actual emphasises that physical presence is required: *Williams & Glyns Bank v Boland* [1981] AC 487 per Lord Wilberforce at 504;
>
> (ii) It does not necessarily involve the personal presence of the person claiming to occupy. A caretaker or the representative of a company can occupy on behalf of his employer: *Abbey National BS v Cann* [1991] 1 AC 56 per Lord Oliver at 93;
>
> (iii) However, actual occupation by a licensee (who is not a representative occupier) does not count as actual occupation by the licensor: *Strand Securities Ltd v Caswell* [1965] Ch 958 per Lord Denning MR at 981;
>
> (iv) The presence of some of the claimant's furniture will not usually count as actual occupation; *Strand Securities Ltd v Caswell* [1965] Ch 958 per Russell LJ at 984;
>
> (v) If the person said to be in actual occupation at any particular time is not physically present on the land at that time, it will usually be necessary to show that his occupation was manifested and accompanied by a continuing intention to occupy: compare *Hoggett v Hoggett* (1980) 39 P&CR 121, per Sir David Cairns at 127."

112. Mr Gavaghan submits that the issue of actual occupation is fact sensitive and not one that is suitable for summary determination. Plainly he is right that this element of the defence could only be struck out if on the basis of the pleaded case as explained in the answer to the request for information it is bound to fail. He points to a letter written by Herbert Smith Freehills LLP ("HSF") to the court when requesting that the claim should be transferred. At paragraph 22.5 they, in making the case for transfer on the basis that the claim was more suitable for determination in the High Court rather than the County Court due to its complexity, they said:

> "The Actual Occupation issue covers a range of factual and legal points, concerning whether the Defendants are entitled to priority over the Claimant's mortgage. There will need to be extensive factual findings as to what was said, on whose behalf, and what was known by whom, at the time the Mortgage was executed as to the existence of the alleged Rights to Occupy."

113 The point Mr Gavaghan makes is a fair one. However, the view expressed by HSF some time before the application to strike was issued can only be of very limited weight after the court has heard extensive submissions on the subject.

114. More compellingly, Mr Gavaghan refers to the decision in *Thomas v Clydesdale Bank* [2010] EWHC 2755 (QB) at [21], [32] – [33] as demonstrating that in some cases the presence of builders who were not employed by the person asserting the interest may be taken into account. In that case, Ramsay J heard an appeal against a determination in the County Court that, amongst other matters, the claimant, Mrs Thomas, had no reasonable prospect of establishing that she was in actual occupation of a property owned by Mr Burtenshaw with whom she was in a relationship. She claimed an interest in the property by virtue of a common intention constructive trust. Her evidence was that building works were being carried out to the property spanning the date when the mortgage was entered into. She was involved with the building works and attended the site at least every other day. The judge held that the combination of the presence of the builders, who were employed by Mr Burtenshaw, and her regular presence at the property gave her a reasonable prospect of establishing that she was in actual occupation.

115. The facts in *Thomas v Clydesdale* can readily be distinguished. Mr Grant submits that there is no basis for believing that the second to fourth defendants ever went to the site or that the builders were their agents. However, that does not lead to the conclusion that this element of the defence is bound to fail. It might fairly be characterised as being 'thin' but that is not to the point.

116. Next UBS submits that even if a sufficient case on actual occupation is made out for present purposes, the interest claimed would not have been obvious on a reasonably careful inspection of the property and UBS did not have actual knowledge of the interest.

117. I do not accept Mr Gavaghan's submission that these are elements for UBS to plead and establish. The defence settled by Mr Gavaghan pleads them and he settled the response to the Part 18 Request that deals with them. The defendants' case as explained in the answers to the request is:

> "31. It is unknown whether this is or will be an issue in these proceedings as the Claimant has not served a reply. However, the Claimant had actual knowledge by reason of the conversations that took place between its employees and the directors of the First Defendant and the Second Defendant and the correspondence between it (or its solicitors Eversheds LLP) and the First Defendant's solicitors Harold Benjamin. While this will be the subject to disclosure and witness evidence, the Defendants will in particular refer to:
>
> (a) From the outset in all conversations which took place with Jay Vallabh (director of the First Defendant), the Second Defendant and Dr Kanthan in relation to the property, it was and would have been clear to any reasonable participant that the property was being re-mortgaged to provide a residential home for the Mallya family.

(b) On 16 January 2012, paragraph 3.1 of the Replies to Lenders Requirements … stated that the property was to be used as *"... a high-class home for Dr Vijay Mallya and his family members and United Breweries Group corporate guests."*

(c) The Claimant was aware that the Second Defendant gave a personal guarantee in respect of the loan and that the Fourth Defendant assented to the giving of a corporate guarantee from Birchwood Hills Inc in respect of the Loan."

118. These answers do not take the defendants' case much further. It is accepted that UBS knew the property was to be subject to building work and was intended as a family home. The significance of the answer at (c) above is far from clear. The occupation relied on by the defendants derives from two combined elements; occupation of the builders and their presence representing the individual defendants. The former would have been obvious; it is difficult to see how the latter would have been revealed. The defendants do not make a positive case about this beyond that which I have set out above none of which comes near to making out a viable case. It seems to me that unlike the issues of fact that would need to be investigated concerning actual occupation, the court can safely conclude based on the pleaded case that the elements deriving from the exceptions in Schedule 3 paragraph 2(c) that the case is bound to fail. In relation to the second limb, UBS was entitled to rely upon Rose Capital's obligation to provide occupier's waiver forms. Eversheds pressed for these to be supplied if there were persons in occupation, or to be in occupation other than the second defendant, and they were not supplied. There was no requirement for UBS to do more than it did. The defendants cannot rely on the generalised statements about the intended future use when there was a failure to provide at completion the waiver forms Rose Capital was obliged to produce.

119. Subsidiary submissions were made by UBS concerning the second to fourth defendants' Occupation Rights having arisen before completion of the loan but it is unnecessary to deal with them.

Issue 11

120. Paragraphs 48, 49(a), 49(b)(i), (iii) and (iv) and 49(c) deny that UBS is entitled to be subrogated to the Lloyds Bank charge and that such subrogated rights would take priority to any subsisting interests in the property. The defendants' approach to the subrogation claim changed in light of service of the reply and the defendants no longer assert that the subrogation claim should be struck out (paragraph 48 of the defence) or that UBS is not entitled to be subrogated because it obtained what it bargained for (paragraph 49a. of the defence). The elements of the defence that are subject to attack comprise the following sub-paragraphs of paragraph 49 of the defence:

"b. In any event, the Claimant is not entitled to subrogation because its conduct in attempting to enforce its security has been inequitable. In particular, the Claimant has inequitably and/or in breach of its equitable duty of good faith as mortgagee (as pleaded in detail in this Defence above):

i. irrationally, arbitrarily, capriciously and/or unreasonably purported to exercise its discretion to call in the Loan early;

iii wrongfully appointed receivers over the Property; and

ii. delayed, prevented and frustrated the re-mortgaging of the Property and the redemption of the Mortgage.

c. Further and in any event, if the Second and Fourth Defendants were enriched (which is not pleaded by the Claimant and is in any event denied), they gave value for that enrichment in good faith and/or they changed their position in reliance upon it in that they gave and/or assented to the giving of guarantees for the Loan (as pleaded in this Defence above and in the Response to the Request for Further Information filed herein). They would therefore have a further defence to any claim for subrogation if the claimant was to amend to plead such a case."

121. This element of the defence, to some extent, stands or falls with the defendants' case on good faith, contractual fetters, wrongful appointment of the receivers and delay and frustration of attempts to re-mortgage the property. The defendants rely on the proposition that because restitution is an equitable remedy the maxim "he who comes to equity must come with clean hands" and the recognition in *Day v Tiuta* [2014] EWCA Civ 1246 at [51], [65] – [66] that the maxim was applicable in similar circumstances.

122. Taking the elements of the defence in turn:

(1) Paragraph 49b. and b.i – I have already determined that the duty of good faith does not assist the defendants and that there is no basis for implying a *Braganza* clause. In any event, it is not easy to see how the breaches that are pleaded could prevent subrogation operating. The decision to call in the loan early is not part of UBS' case and it does not rely on it in this claim which is based on the loan having fallen due at the end of the five-year term, a term which the defendants admit in the defence to the Receivers' Claim.

(2) Paragraph 49b.iii – The appointment of receivers gives rise to similar points. It is nothing to do with UBS' claim in these proceedings. If the appointment were to have been wrongful, due to the failure to give adequate notice to call in the loan, the high point of the defendants' case would be an entitlement to damages.

(3) Paragraph 49b.iv – I have accepted this element of the defence is not bound to fail. However, it has no relevance whatsoever to the subrogation claim and does not engage equitable rights and duties.

(4) Paragraph 49c. – This paragraph involves the proposition that the second and fourth defendants gave value for their enrichment in good faith. I accept Mr Grant's submission that this part of the defence is misconceived. All the defendants did was to comply with the terms upon which the UBS loan was made, a loan that was intended to achieve a first charge with no prior encumbrances.

Conclusions

123. Before stating my conclusions, I return to the concern I expressed about the inconsistent positions the defendants have taken with regard to the length of the mortgage term. Given that UBS did not take the point, it would not be right for the court, of its own volition, to strike out the defendants' case in this claim that the term was longer than 5 years. However, I expect the defendants to address this issue on the handing down of the judgment and to show cause why their case that is inconsistent with the defence in the Receivers' Claim should not be struck out. During the course of the hearing, it was mooted that the defendants might wish to apply to amend their defence in the Receivers' Claim. Whether that is possible, in light of the consent order staying that claim, and whether this should be permitted, will need to be considered. If an application is to be made in the Receivers' Claim, I will make an order that it be transferred to the High Court so that I may hear the application.

124. Turning to UBS' application, striking out a claim is a step that the court will not take lightly and the test to be applied, namely that the claim, or the relevant part of it, is bound to fail sets the bar high. In addition, the court must consider (a) whether the case or issue is part of a developing area of law and would be better resolved at a trial and (b) whether the respondent should be given an opportunity to produce an amended statement of case.

125. Paragraph 17c. (Issue 9) is capable of being amended to cure the defect that has been acknowledged and permission to do so will be granted. There is no need for the paragraph to be struck out.

126. Although the *Braganza* issue has been the subject of a number of recent decisions, and in that sense the law is developing, the law is not in a state of flux or change so far as mortgage contracts are concerned. For the reasons I have given, I consider that the law is clear with regard to a mortgagee's entitlement to call for repayment of a loan where the language of the loan agreement is as clear and unequivocal as it is in this case. Even if I were to be wrong about that, there are no issues of fact that warrant a trial taking place.

127. There are no other issues which might arguably be seen as arising from developing areas of law.

128. I can see no basis upon which the defendants should be given an opportunity to amend their defence, other than in relation to issue 9. They have had an ample opportunity to explain their case in answers to UBS' request for information. The case they put forward is not curable by simple amendments.

129. I am satisfied that the defendants' case that forms issues 1 to 8 and 10 and 11 is bound to fail and that it is appropriate to strike out the relevant paragraphs of the defence.