Neutral Citation Number: [2023] EWHC 843 (Ch)

Case No: BL-2023-000449

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14/04/2023

Before :

MR JUSTICE MILES

- -

Between :

CHELSEA MIDCO 1 LIMITED — **Claimant**

- and -

HARWOOD CHELSEA INVESTMENT LP — **Defendant**

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- -

Adam Deacock (instructed by **Keystone Law**) for the **Claimant**
Edmund Cullen KC (instructed by **Dentons UK and Middle East LLP**) for the **Defendant**

Hearing dates: 31 March 2023

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30 am on 14 April 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

Mr Justice Miles :

Introduction

1. This is the return date of a without notice order of Mr Justice Marcus Smith made on 24 March 2023 by which he restrained the defendant from exercising its rights arising or arguably arising by virtue of there being an Event of Default within the meaning of clause 3.1 of a Loan Note Instrument dated 21 February 2022 (**the LNI**) without first giving one clear working days' notice in writing. The claimant applies for an order until trial or further order restraining the defendant from exercising such rights.

2. The claimant is the penultimate holding company in a group which owns Mr Fothergill's Seeds Limited (**MFS**), a trading company which was until recently a family-owned business.

3. The claimant is the issuer of the notes under the LNI. These are tradeable securities.

4. The defendant is a limited partnership which operates as a private equity vehicle, the general partner of which is Harwood Private Capital GP LLP (**Harwood**) which acted on its behalf throughout. The defendant is the holder of all the notes issued under the LNI.

5. Under the terms of the notes, cash interest is payable quarterly in arrears on the last days of May, August, November and February in each year. The claimant has not paid interest under the terms of the notes for May, August or November 2022 or for February 2023.

6. The claimant's case is essentially that this has arisen because of (a) Harwood's erroneous (and negligent) advice that a company lower in the same corporate structure as the claimant was prohibited by a covenant in a facility with a senior lender, OakNorth Bank PLC (**Oaknorth** and **the Oaknorth facility**), from making upstream payments which would have enabled the cash interest on the notes to be paid, and (b) Harwood's assurances that the non-payment of the quarterly interest was acceptable to the defendant and that it was content to wait until the technical obstacle caused by that covenant could be overcome (which was likely to be in April-June 2023).

7. The claimant contends that if it had understood the position properly it could and would have made all payments of loan note interest from July 2022 onwards (including the amounts then outstanding for the May 2022 quarter). It says that the reason it did not pay the interest was because Harwood wrongly told it that upstream payments within the group would require dividends to be paid and that this was not possible in accordance with the covenants in the Oaknorth facility. The claimant says that Harwood's advice was wrong and negligent. It says that upstream payments could have been made to the claimant otherwise than as dividends, and that permitted payments could have been made in accordance with the Oaknorth facility.

8. The claimant contends that it reasonably relied on Harwood's advice and assurances that things could wait until May or June 2023. It says that Harwood had a great deal of experience in setting up and managing complicated private equity structures of this sort, while the non-Harwood directors and management had none. Harwood's

representatives put the structure in place and, indeed, negotiated the various financing agreements including the Oaknorth facility.

9. The claimant's witnesses say that Harwood's representatives said that the non-payment of the quarterly interest was not an issue for the defendant and that it was comfortable with not being paid loan note interest until the Oaknorth covenants permitted dividends to be paid up the corporate chain (which was expected to be in May-June 2023). The claimant says that had Harwood not given these assurances the claimant would have realised that the apparent obstacle to payment was nothing of the sort.

10. The claimant argues that Harwood changed its ground in late 2022 or early 2023. The defendant began in late 2022 to assert that the outstanding instalments of interest should have been paid and, in early 2023, demanded repayment. The claimant contends that this was motivated by a desire to restructure the equity and debt in the group to give it a bigger share.

11. The claimant's case is that, having taken independent professional advice, the non-Harwood directors of the claimant became aware in the middle of February 2023 of the errors in the earlier advice that upstream payments had to be by way of dividend and satisfy the relevant dividend covenants. It says that it then understood for the first time that the outstanding payments could have been made as what were called "Permitted Payments" under the facility and that these did not require compliance with the separate dividend covenants.

12. The claimant did not however pay the outstanding covenants or the February 2023 instalment of interest under the notes, which fell due on 28 February 2023. This was because the borrowing company under the Oaknorth facility was unable to satisfy a separate covenant requiring it to certify that its projected ratio of senior debt to earnings does not exceed a specified figure for the following twelve months.

13. From mid-February onwards the non-Harwood directors have been seeking the agreement of Oaknorth to waive the breach of that debt/earnings covenant or to agree a cure for the breach. Those efforts have continued but Oaknorth has still not been willing to waive the relevant breach or agree a cure. The claimant's evidence is that it anticipates being able to agree such a waiver or cure with Oaknorth by June 2023.

14. By a letter of 21 March 2023 the defendant asserted that the non-payment of interest was an Event of Default (**EoD**) under the notes and demanded repayment of all outstanding principal and interest. It also reserved the right to exercise its security. This consists of a debenture over the claimant's assets and undertaking; a guarantee by the claimant's holding company; and a charge by that holding company of the shares in the claimant.

15. The claimant contends in essence that the defendant cannot now treat the non-payment of interest under the loan notes as an EoD under the loan notes and/or exercise its security rights because Harwood's representatives caused those non-payments by their negligent advice and assurances that non-payment was not an issue and that they would wait until April or June 2023 before payments of dividends could be made. The claimant contends that the defendant is to be treated as having given or acquiesced in the advice and assurances given by the Harwood representatives. The

claimant says that it would be contrary to equity for the defendant, which is simply the investment vehicle of the Harwood group, to be allowed to assert that the claimant's failure to pay interest is an EoD or to exercise its security on that footing.

16. The claimant frames its case a number of ways. It says that there has been a waiver or promissory estoppel; it says that the defendant (through the Harwood directors) was negligent and that it has a set-off or counterclaim for damages against any sums payable under the notes; it says that the defendant should not be allowed to rely on its own wrong; and it asserts that the defendant is in breach of an implied duty of good faith.

17. The claimant contends that it would suffer irremediable loss if the defendant were to be able to enforce its security by (for instance) appointing receivers or administrators over the claimant or its business. The possible damage to the claimant includes a loss of value from a hurried or rushed sale of the underlying business, reputational damage from the appointment of receivers or administrators, the costs and expenses of a receivership or administration, interference with the management of the underlying trading businesses, and a possible stifling of the claims brought in these proceedings (which are an asset of the claimant company). It contends conversely that the defendant would not suffer materially from the imposition of an injunction. Interest will continue to accrue and will be paid once a waiver or cure has been agreed with Oaknorth, which the claimant anticipates will occur in June 2023.

18. The defendant contends that the original injunction should not have been granted and should not be continued. It says that an EoD had already occurred and, indeed, been called by the defendant before the injunction was granted by Mr Justice Marcus Smith. The defendant therefore has the right to enforce its security and says that it should not be prevented from doing so. It contends that there is no serious issue to be tried. Alternatively, it says that the risk of injustice from the grant of an injunction outweighs that to the claimant from the refusal of an injunction. The defendant says that there has been serious underperformance by the MFS group against the business plan in place at the time the notes were issued; that the evidence shows that the notes may be worth or be valued at many millions of pounds less than when issued; and that the performance of the group continues to deteriorate. It says that it has concerns about the way the group has been managed. It says that it wishes to be able to safeguard its interests as a secured creditor. This may include taking steps with a view to changing the management of the group, which it says has underperformed. It says that damages will be impossible to assess. It also says that steps taken to enforce the security are unlikely to damage the value of the group. It says that the defendant, which is a private equity business, has a legitimate interest in seeking to maximise value, and will not take steps which are calculated to damage it.

19. Both sides also say that the grant or refusal of an injunction may also have an impact on their bargaining positions in any renegotiation or restructuring of the group's equity and capital structure. The claimant says that the defendant wishes to be able to use the threat of enforcement to negotiate a bigger share of the equity and improve its priority in the debt structure. The defendant for its part says that the claimant is seeking an injunction in order to improve its position in any negotiations.

Factual background

20. The claimant has served a substantial body of witness evidence. Its principal evidence is found in two statements by Mr David Carey (the group chief executive officer) and one by Mr Philip Hurst (the group finance director). Both are directors of the various group companies.

21. The defendant relies on a statement by Mr Jerry Wilson, a partner in the defendant and in Harwood. He is also a director of various of the group companies.

22. This is not a trial and it is impossible to resolve the many factual disputes between the parties. The following section of this judgment largely summarises the case set out in the claimant's evidence. Not all of it is accepted by the defendant and I shall highlight some of the main disputes.

23. MFS was a well-established and profitable family-run trading company. By early 2022 the owners of MFS had become interested in selling their interests. They were advised by well known restructuring advisers, who introduced them to various private equity houses including Harwood. They chose Harwood in the belief that Harwood would work in partnership with the founders and family owners. The claimant says that Harwood said they were going to be invested in the business for five years before they would exit. They represented that they would adopt a supportive role, that they would help the owners get the business to where it could be, that they would be minority shareholders and so would not control the business, that they were not going to be overly involved on a day to day basis and they were going to help advise and support the family owners to grow the business to where it could be.

24. The plan was for some of the owners to sell and cease their involvement, with Mr Carey and Mr Aaron Whitehouse to remain as shareholders. The defendant was to become a minority shareholder in the group structure and it would also invest through the loan notes.

25. Harwood caused the incorporation of the claimant and other companies (together **the group companies**) to form a structure for the acquisition of MFS. These were (from the top down) Chelsea Topco Limited (**Topco**); the claimant, also known as **Midco**; Chelsea Midco 2 Limited (**Midco 2**); Chelsea Midco 3 Limited (**Midco 3**); and Chelsea Bidco Limited (**Bidco**). Bidco was formed to acquire the shares in MFS, the trading company.

26. Before the completion of the acquisition of MFS each of the group companies was controlled by Harwood via Harwood partners or staff who were their directors including, in each case, Mr Wilson.

27. The acquisition was funded by (among other things):

    i) a £15m business loan facility (the Oaknorth facility) by Oaknorth to Bidco the terms of which (including significant restrictions and financial covenants) were negotiated by Harwood partners or staff including Mr Wilson and was signed on behalf of Bidco by Mr Wilson;

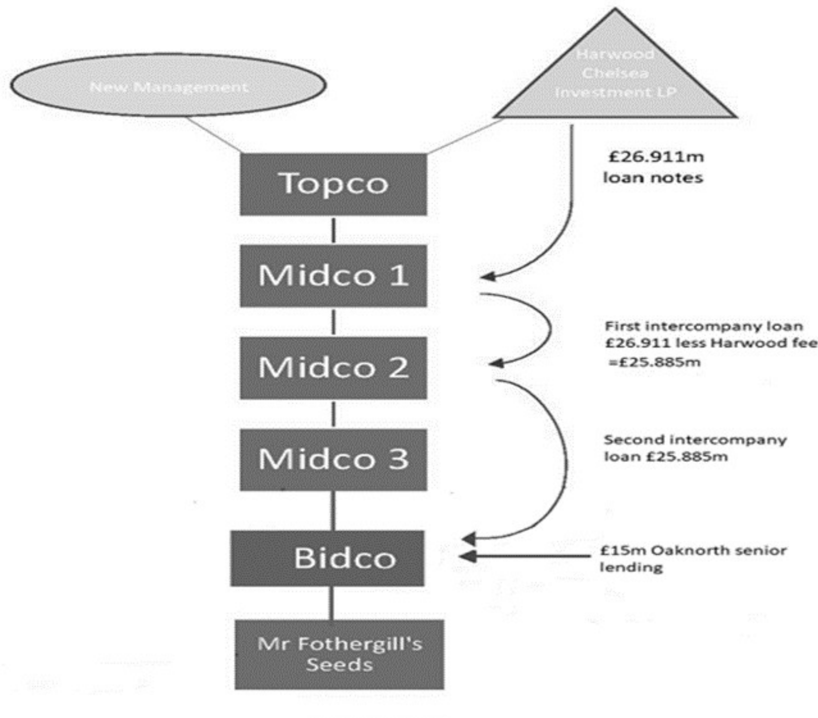
    ii) the issue of the loan notes in the sum of £26.9m odd by the claimant to the defendant under the LNI. This was secured by a debenture by the claimant in favour of the defendant, a guarantee from Topco and a charge by Topco over

the shares in the claimant. The LNI and the security was signed on behalf of the claimant and Topco by Mr Wilson; and

iii) the loan of substantially the whole of the sums advanced under the loan notes by the claimant to Midco 2 and by Midco 2 to Bidco pursuant to intercompany loans which were also signed by Mr Wilson.

28. Harwood also became a minority holder of equity in Topco.

29. The structure was this:



30. After completion, the directors of the claimant (and of other group companies) were two non-Harwood directors, Mr Carey and Mr Hurst; and two Harwood directors, being Mr Wilson, and Harwood's managing partner Habeeb Aziz until the end of September 2022 and thereafter Mr Brade.

31. The claimant says that the Harwood representatives did not inform the non-Harwood directors about the intercompany loans. Its witnesses say that Mr Hurst and Mr Carey became aware of the intercompany loans in November 2022, but only understood their full significance in February 2023 when they received outside professional advice that they could and should have been used to upstream money to pay the loan note interest.

32. The claimant's case is that the non-Harwood directors of the group companies were unfamiliar with the finance and structure put in place by Harwood. It says that they relied on Harwood representatives, especially Mr Wilson, for advice about the operation of the Oaknorth facility and the LNI and the mechanism for payment of the cash interest under the loan notes.

33. The defendant takes issue with the idea that the non-Harwood directors were entitled to rely on the views or advice of the Harwood representatives. It says that the non-Harwood directors were always able to take separate advice. It also says that they had far more financial nous and experience than their evidence suggests. The court cannot resolve this dispute at this hearing.

34. The Oaknorth facility contained financial covenants which had to be met by the group (with a certificate of compliance issued to Oaknorth) in respect of each of the quarters ending 30 June, 30 September, 31 December and 31 March consisting of a requirement that (a) Gross Leverage (as defined) did not exceed a particular specified ratio in respect of each quarter; (b) Senior Interest Cover (as defined) in respect of any quarter did not exceed 5:1; and (c) Debt Service Cover (as defined) in respect of each quarter did not exceed a particular specified ratio.

35. Gross Leverage was defined to mean, in respect of any relevant period, the ratio of Total Debt to Adjusted EBITDA for that period. Total Debt was defined (to simplify) as the external borrowings of the group companies but excluding the loan notes.

36. The Oaknorth facility also contained restrictions (a) by clause 20.14, on any dividends except "Permitted Distributions" and (b) by clause 20.15, on the payment of any interest due under any subordinated loans (which covered the intercompany loans) except for "Permitted Payments".

37. The facility also contained a provision that a distribution from Midco 3 to Midco 2 would be a Permitted Distribution if Bidco had delivered to Oaknorth not less than 10 Business Days before paying such dividend a certificate signed by two directors providing calculations that Gross Leverage (pro forma the dividend) was equal to or less than 1.5:1 and that Gross Leverage in respect of each of the four quarters following the Relevant Period in which the dividend was proposed to be paid was projected to be equal to or less than 1.5:1 (referred to by the parties as the **Enhanced Gross Leverage Test**, though not defined as such in the facility agreement). This ratio was more restrictive than that in the Gross Leverage covenants.

38. The ratio for the Gross Leverage requirement changed over time. At the beginning of the arrangement it was at 2.1:1. For the period ended March 2023 the required ratio was 1.8:1.

39. The agreement allowed Bidco to make "Permitted Payments" including payment by Bidco of cash pay yield in an amount of 5% on the loan notes in any financial year payable quarterly in arrears provided that Bidco had delivered to Oaknorth not less than 10 Business Days before making such payment a certificate signed by two directors providing calculations showing that, if the financial covenants were to be tested on the proposed date for payment of such Permitted Payment, Bidco would be in compliance with the financial covenants for both the 12 month period prior to the proposed payment and the 12 month period following the proposed payment assuming, in each case, the payment had occurred (**the look forward test**).

40. Clause 2.1 of the conditions to the loan notes provided that cash interest on the loan notes would accrue from the date of first issue of the loan notes and be first payable on 31 May 2022 and thereafter payable quarterly in arrears at 5% per annum. There was also separate rolled up PIK (payment in kind) interest. Clause 3.1 of the

conditions provided that the failure to pay principal and interest within 5 days of a notice that it was due, or if no notice was given within 30 days of it falling due, would be an EoD. Where there was an EoD the holders of the notes had the right to accelerate and call for redemption of the principal amount outstanding under the notes. As already mentioned the loan notes were secured and were guaranteed by Topco.

41. As mentioned, the acquisition completed in February 2022.

42. The claimant's case, as set out in its witness statements, is that between May and June 2022 Mr Hurst liaised with and sought and obtained advice from Mr Wilson as to the appropriate production and presentation of financial information to Oaknorth and generally as to the performance of the group finance function. Mr Wilson advised Mr Hurst that the priority was to produce the figures for the group's year end (30 June 2022) and budget for the following year. The year-end coincided with the first period in which the claimant had to show compliance with the financial covenants and projections for the next 12 months in order to demonstrate compliance with the financial covenants and in order to show that the look forward test could be met. That information had to be provided to Oaknorth by 31 July 2022.

43. The claimant's case is that Mr Hurst and Mr Wilson agreed and understood that it was not practical to provide a certificate of compliance with the look forward test in time to make the first quarterly payment of loan the interest by 31 May 2022 but that Mr Wilson was content that this would be taken care of once the above information was provided to Oaknorth at the end of July 2022.

44. The claimant also says that Mr Carey spoke to Mr Wilson at the end of May and had a meeting with him and Mr Aziz on 15 June 2022 and that the Harwood representatives indicated that the non-payment of the loan note interest was not an issue for them.

45. The required financial information was prepared by Mr Hurst in consultation with Mr Wilson and Mr Aziz and was circulated as a finance pack in advance for a group board meeting on 13 July 2022 with a view to the approval of the information to be provided to Oaknorth and certification of compliance with the look forward test in order to permit payment of the loan note interest.

46. The claimant's case is that at the group board meeting on 13 July 2022 Mr Aziz and Mr Wilson on behalf of the Harwood parties represented and advised the others present including Mr Atkinson (the Chair), Mr Carey, Mr Hurst and Mr Whitehouse that payment of the loan note interest would not be possible because under the terms of the Oaknorth facility it would be necessary to meet the Enhanced Gross Leverage Test in order to be able to pay a dividend. They said that upstream payments had to be made by way of dividends.

47. The claimant says that this was a surprise to Mr Hurst and the other members present because the finance pack demonstrated compliance with the financial covenants (which did not require compliance with the more stringent Enhanced Gross Leverage Test – which was a bespoke test for Permitted Distributions), but Mr Aziz and Mr Wilson insisted that this was necessary to enable the upstream payments to be made for the cash interest.

48. As already explained, the claimant says that it now understands that this advice was wrong and that interest could and should have been paid by means of repayment of the intercompany debt, which only required compliance with the general Oaknorth covenants (including the Gross Leverage covenant), with which the claimant was then fully compliant. This state of affairs was reflected in the covenant compliance certificate signed by Mr Wilson two weeks later on 30 July 2022. The claimant's case is that Mr Wilson's advice (echoed by Mr Aziz) that the monies could only be upstreamed as dividends (and that the more stringent Enhanced Gross Leverage Test applied) was wrong and negligent.

49. At the 13 July 2022 meeting Mr Hurst showed Mr Aziz and Mr Wilson that, in accordance with the figures shown in the finance pack, the claimant would not meet the Enhanced Gross Leverage Test until April 2023 and accordingly that loan note interest would only be paid after April 2023. The claimant's case is that Mr Wilson and Mr Aziz indicated that they (and hence Harwood) accepted this and were not concerned about the late payment of the instalment. It was resolved at the meeting that Mr Hurst and Mr Wilson would liaise further about the required test.

50. The claimant's case is that after the 13 July board meeting Mr Hurst had many discussions by telephone and email in which Mr Wilson continued to express the view that money could only be passed up from MFS to the claimant by way of a dividend payment - and that it was accordingly necessary in order to permit payment for the loan note interest to meet the Enhanced Gross Leverage Test. Its case is that Mr Wilson (and therefore the defendant) understood and said repeatedly that cash loan note interest would only be paid on or after the end of April 2023 (when the Enhanced Gross Leverage Test would probably be met). It says that Harwood accepted and took no issue with the fact that it was not going to receive payment before then. It also says that Mr Wilson understood that there would probably be a delay until about June 2023 to allow a reasonable period to allow the payment actually to be made.

51. After an initial suggestion by Mr Wilson that default interest would be payable on the late interest under the LNI, Harwood withdrew this suggestion and accepted that the late interest would merely accrue and compound at a non-default rate.

52. On 27 July 2022 Harwood drafted and approved an International Stock Exchange notice (required because the notes are listed) which stated that the claimant had missed the first quarter's payment under the loan notes and that interest would accrue on the unpaid amount on a quarterly compounding basis. It also stated that the group "continues to trade profitably and in compliance with its banking covenants" and that the interest payment had not been made because the group had not met the Enhanced Gross Leverage Test required by the Oaknorth facility. The terms of this notice were agreed between Harwood and Mr Hurst.

53. Similar notices were agreed by Harwood and sent out in subsequent quarters.

54. The claimant's witnesses say that they understood these notices to indicate that delay in payment of interest was not an issue for Harwood.

55. On 28 July 2022 Harwood approved a revised finance pack containing revised forecasts which showed that the quarterly interest due at the end of May 2002, August 2022, November 2022 and February 2022 would not be paid when due. The pack

showed that the Enhanced Gross Leverage test would not be met until April 2023. These figures were reflected in the financial statements and certificate (signed by Mr Wilson) sent to Oaknorth.

56. The claimant's witnesses say that in further discussions with Mr Hurst in August 2022 Mr Wilson reiterated that payment of loan note interest would not be made until after the covenant was met in April 2023 and that interest would accrue and compound in the meantime. They say that Mr Wilson indicated in advance that he knew that the next quarter's interest due at the end of August 2022 would not be paid and settled a further International Stock Exchange Notice in similar terms to the previous one.

57. In August and September 2022 Oaknorth's representatives questioned the idea that payment of loan note interest had to be treated as a Permitted Distribution rather than a Permitted Payment. They said that the payments could be made as a Permitted Payment. The claimants say however that Mr Wilson continued to tell Mr Hurst and Mr Carey that this was wrong and that the payments had to be made by Permitted Distributions. He also expressed the view that the interest under the loan notes should not be included within indebtedness for the purposes of another test under the Oaknorth facility (the Debt Service Cover Ratio) as it was accruing but not being paid. He and Mr Hurst discussed this in detail when producing the relevant figures. The claimant says that Mr Wilson told Mr Hurst that the loan note interest was not currently payable and that this was a good thing for everyone as there was more cash in the business .

58. In October 2022 a quarterly covenant compliance certificate was prepared which showed that no payment of loan note interest would be made in the following quarter. This was approved by Mr Wilson.

59. Mr Carey says in his witness statements that throughout this period he was repeatedly assured by Mr Wilson that the non-payment of interest was not an issue for Harwood and that payment would be made when the Enhanced Gross Leverage Test could be met. He and his colleagues received the same impression at regular weekly Teams meetings with Harwood. Mr Carey says that Harwood made it clear at those meetings that they were comfortable with the non-payment of quarterly interest and that there was no issue about it.

60. The claimant says that the defendant changed its stance in November 2022 when it sent a letter dated 14 November 2022 (on Harwood letter paper) stating that the claimant was in breach of the LNI by not paying the interest. In the same letter it said "[a]t the date of this letter, as discussions with Midco 1 [*sc.* the claimant] are ongoing, it is not currently the intention of the Investor to enforce their rights at this time nor to take any immediate action in respect of the Relevant Breach."

61. Mr Carey says in his statement that Mr Wilson assured him before sending this letter that it was nothing to worry about. He says that Mr Wilson and Mr Aziz said at a meeting on 17 November 2022 that there was no way the claimant could make a payment as money could not be passed up to it due to the terms of the Oaknorth covenants; that Harwood understood this and said there was no issue with the missed payments and that the current situation could continue; that the letter of 14 November was a formality and Harwood had no intention of enforcing its rights; and that Harwood were interested in a consensual discussion about restructuring.

62. At about this date a further notice to the market was approved by Harwood in similar terms to the earlier ones, indicating that MFS had a £4.6m cash balance but could not make the payment as it could not meet the Enhanced Gross Leverage Test required to allow a Permitted Distribution under Oakworth's loan.

63. The defendant sent a letter on 7 December 2022 again contending that the claimant was in breach of the notes by failing to pay the quarterly interest, reserving all of the defendant's rights, and making a request for proposals for restructuring. The claimant's witnesses say that Harwood again gave assurances that there was nothing to worry about and that Harwood was looking for a consensual arrangement.

64. Mr Wilson and Mr Carey liaised in advance of a call with Oaknorth on 11 January 2023. In that call nothing was said about any default on the loan notes, or Harwood's letters of 14 November or 7 December. Mr Carey says he understood this as confirming that Harwood was not in reality going to treat the non-payment of interest as a default.

65. The claimant's witnesses say that it was only in mid-February 2023, as a result of obtaining external professional advice, that they understood that the previous advice given by Mr Wilson and Mr Aziz was wrong; and that the three missed payments to date could have been upstreamed by Bidco as Permitted Payments.

66. However by the end of December 2022 the group's "look forward" projections showed an anticipated covenant breach for March 2023: the Gross Leverage ratio would fall below 1.8:1. As a result it was not possible to satisfy the requirements for a Permitted Payment for the quarterly interest payment due on 28 February 2023.

67. On 17 February 2023 Mr Hurst sent an email to Oaknorth explaining that the claimant now understood that upstream payments could have been made for the previous quarters without needing to satisfy the test for Permitted Distributions. He explained however that on a look forward basis Bidco was unable to satisfy the Gross Leverage covenant in the facility. This was because Gross Leverage was projected to be 2 times LTM Adjusted EBITDA for the quarter ended March 2023 as against the required limit of 1.8:1 for that period. Mr Hurst set out financial information about the underlying business, asked Oaknorth to waive the breach of the covenant, and asked Oaknorth to agree that Bidco should be allowed to pay the outstanding quarterly interest instalments under the notes and to pay the instalment due at the end of February 2023. A waiver was sought in respect of the earlier instalments because of a separate covenant in the facility concerning debt service.

68. In his witness statement Mr Hurst explains the business reasons for the failure to meet the Gross Leverage ratio for the quarter ended March 2023. He explains that it was a limited issue, concerned only with that quarter. He describes the breach as technical. He explains that a waiver has however yet to be agreed with Oaknorth. In summary his evidence shows that Oaknorth has said that it is not in general prepared to agree advance waivers of covenant breaches. It has asked for further, updated, information. Mr Hurst also explains that he has been discussing another route with Oaknorth, to seek to "cure" the breach by reducing the level of debt by making agreed repayments of principal. This too requires Oaknorth's agreement and this has not yet happened. Mr Hurst explains that it has not been possible to agree a cure without further,

updated, financial information, which is not yet available. He believes that it should be possible to agree a waiver or cure with Oaknorth by June 2023.

69. In short Mr Hurst's evidence shows that the claimant has been seeking since mid-February 2023 to agree a waiver or cure with Oaknorth but that this has not yet been achieved. Until this has happened it will not be possible to pay the February 2023 instalment. It appears from his evidence that it is unlikely that a waiver or cure will be agreed earlier than June 2023.

70. On 21 March 2023 the defendant wrote to the claimant. It gave notice that the claimant had breached the notes by failing to pay the quarterly instalments of interest for May, August and November 2022 and February 2023. It asserted that this was an EoD and demanded payment of the entire principal and interest outstanding under the notes. It reserved the right to exercise the security.

71. On 27 March 2023 some of the non-Harwood shareholders made an open proposal in principle inviting Harwood to consent to the non-Harwood shareholders lending the claimant the funds to make the outstanding interest payments on the basis that they will be repaid when funds can be "upstreamed".

72. I have already explained that much of the account of the factual background set out above reflects the case set out in the claimant's witness statements. Much of this is disputed. The defendant relies on a witness statement of Mr Wilson. He takes issue in general terms with the claimant's case. In broad summary, he accepts that he sought to provide Mr Carey and Mr Hughes with comfort from time to time about Harwood's then current intentions. Mr Wilson says that he was acting in good faith throughout and was expressing his views as a director of Bidco and the other companies, but that it was for the non-Harwood directors to decide for themselves whether to accept his position that upstream payments could not be made or to seek outside advice.

73. He also says that the letters from November 2022 onwards speak for themselves and denies that he qualified the message conveyed by those letters or gave any assurances that the defendant would not call a default. The defendant accepts that the court cannot on this application adjudicate on the disputes about the assurances said to have been given.

74. Mr Wilson denies the claimant's case that the defendant has acted inequitably in calling an EoD. He points to the disappointing performance of the MFS business since the structure was created in February 2022. He says that the business has seriously underperformed against the original management buyout plan under numerous metrics and that the trading figures are continuing to deteriorate. He says that the value of the notes has been seriously impaired, by many millions of pounds. He complains about the performance of the management, saying for example that they have failed to re-price products despite the inflationary climate. He says that the defendant wishes to protect its interests, including by seeking to require changes in management. The defendant is also seeking a consensual restructuring of the capital structure of the group. Under its proposals Harwood will increase its equity stake and improve the priority of its debt in the structure. Again the court cannot reach any conclusions about the accuracy or cogency of Mr Wilson's complaints about the trading performance of the group companies, but there is no reason to doubt that they are genuinely held views.

The parties' submissions in outline

75. The claimant has not served particulars of claim. This is unhelpful as its legal contentions were only articulated in the skeleton argument and oral submissions. An applicant for an injunction should generally plead its case so that the respondent is able to understand the case it is required to meet. The claimant has had more than a week since the original without notice application to do this.

76. Be that as it may, at the hearing the primary case advanced by the claimant was that the defendant was estopped from asserting that the non-payment of the quarterly instalments constitutes an EoD. Its argument included the following steps:

    i) the representatives of Harwood had repeatedly advised the claimant that the quarterly interest could not be paid. This advice was wrong and was negligent;

    ii) the Harwood representatives gave assurances that the non-payment of the interest was not a problem and that interest would not be treated as payable until Bidco was able to make payments as Permitted Distributions in accordance with the Oaknorth covenants;

    iii) the advice and assurances by Harwood personnel were not merely made in their capacity as officers of the claimant or other group companies but on behalf of Harwood and hence the defendant. In this context Mr Wilson and Mr Aziz attended what were called "board meetings" of MFS – but these were really meetings of the group (and with Harwood as investors). Mr Wilson and Mr Aziz were never directors of MFS, but were directors of the companies in the group from Bidco upwards. Moreover Mr Aziz attended meetings after he ceased to be a director of any of the group companies, and Mr Brade attended before he ever became a director of any of the group companies. Mr Wilson, Mr Aziz and Mr Brade did not deal with the non-Harwood directors as directors but as representatives of Harwood and the weekly Teams meetings between Mr Carey and Mr Wilson (and sometimes Mr Aziz) were specifically meetings with Harwood to update Harwood and receive Harwood's views. Numerous emails from Mr Wilson referred to the position or views of Harwood expressly; and

    iv) as a result, the defendant assured the claimant that it would not rely on the requirement to pay interest strictly by the end of each quarter, but would wait until payment could be made as Permitted Distributions in compliance with the Oaknorth covenants. The defendant therefore waived the right to treat non-payment of loan note interest as a breach of the LNI or an EoD.

77. The claimant relied on the principle expressed in Chitty on Contracts (34th edn.) at [25-042] that where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its original tenor. This form of waiver by estoppel may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation.

78. The claimant also relied on Chitty at [6-094] for the proposition that an estoppel may arise where there is: a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that they will not enforce against the other their strict legal rights arising out of that relationship; an intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party.

79. There was no dispute about these principles.

80. It was also common ground that this form of waiver or estoppel may be oral, written or inferred from conduct.

81. The claimant also contended that the defendant is liable for damages caused by its negligent advice and that the claimant is entitled to set off this liability against the claims of the defendant, so as to extinguish any such liability. The claimant contended that the defendant had (at least) a common law duty of care arising out of its special relationship with the claimant and had voluntarily assumed responsibility for its advice.

82. The claimant also argued that the defendant is unable to call an EoD caused by its own wrong, i.e., the failure to pay interest caused by its incorrect and negligent advice. The claimant relied on Chitty at [15-113].

> "It has been said that, as a matter of construction, unless the contract clearly provides to the contrary it will be presumed that it was not the intention of the parties that either should be entitled to rely on their own breach of duty to avoid the contract or bring it to an end or to obtain a benefit under it. This presumption applies only to acts or omissions which constitute a breach by that party of an express or implied contractual obligation, or (possibly) of a non-contractual duty, owed by them to the other party. Breach of a duty, whether contractual or non-contractual, owed to a stranger to the contract will not suffice. However, such a "principle of construction" appears to be somewhat different in nature from the principle that a document will be construed against the grantor. It may therefore be that it is better regarded as depending on an implied term of the contract in question or as one illustration of a more general principle that "[a] man cannot be permitted to take advantage of his own wrong". .

83. The claimant also contended that there was an implied duty not to prevent performance by another party; an implied duty of good faith and fair dealing, relying on *Al Nehayan v Kent* [2018] 1 CLC 216 per Leggatt LJ at para [174-176]; and a duty of ordinary skill and care when giving advice about the operation of the group and its financial covenants. The claimant contended that the non-payment of the quarterly interest payments was caused by a breach of contractual duty by the defendant and that it would be a breach of the duty of good faith for the defendant to take advantage of its own wrong as giving rise to an EoD.

84. The claimant contended that damages would not compensate it properly if the defendant were (wrongly) allowed to enforce its security. I have already summarised the claimant's position in this regard. It said that the defendant would be adequately compensated. It said that the balance of convenience fell in its favour.

85. The defendant submitted that the claimant's case was legally flawed and that the claimant had failed to establish a serious issue to be tried. It specifically invited the court to concentrate particularly on the February 2023 instalment and said that there was no serious case about it, whatever conclusion might be reached about the earlier instalments (though it said there was no serious issue concerning those either).

86. As to the principles concerning waiver or estoppel, the defendant did not take issue with the principles set out in Chitty and summarised above but added the following points:

    i) there is no real difference between waiver and equitable or promissory estoppel (see Chitty at [6-113]);

    ii) that the assurance or promise required for any estoppel or waiver must be clear and unequivocal (see Chitty at [6-008 to 6-009]); and

    iii) that any relevant waiver or estoppel is generally only suspensory in nature (see Chitty at [6-014]) and the touchstone of any estoppel is that the estopped party is prevented from inequitably going back on its assurance or promise (see Chitty at [6-013]).

87. These further points were common ground.

88. The defendant submitted that there was no serious issue in respect of any of the instalments:

    i) the claimant had failed to show that the defendant had given any relevant assurances or promises. Mr Wilson and Mr Aziz were acting as directors of the group companies, including Bidco. They did not give any assurances as to the defendant's exercise of its rights;

    ii) the claimant had failed to establish that there was a clear and unequivocal promise or assurance. At the most favourable view for the claimant's case, Mr Wilson gave comfort as to the defendant's current intentions from time to time. But he never gave any assurance or promise that the defendant would not be able to call or would not call a default or exercise its security;

    iii) in any case any estoppel could only suspend the defendant's rights and from November 2022 onwards the defendant made clear that it reserved the right to take steps based on the failure of the claimant to make quarterly payments. By any standard the claimant has had more than a reasonable period of time since then to repair the default;

    iv) there is no realistic claim for negligence: there was no duty of care; Mr Wilson and Mr Aziz were acting as directors of Bidco when expressing their views about its ability to make upstream payments to the claimant; it was always open to the other directors to take another view;

    v) in any case the claimant would not be able to set off a liability for damages against the sums payable under the notes;

vi) even if it could assert a set off, the claimant would not be able to rely on a claim for unliquidated damages as an answer to the enforcement of security by the defendant as a secured party: see *National Westminster Bank v Skelton* [1993] 1 WLR 72 and *Barclays Bank v Choicezone* [2011] EWHC 1303 (Ch);

vii) there was no room for the application of the principle that a party may not rely on its wrong, since there was no relevant wrong which had caused loss to the claimant; and

viii) nor was there any room for the implication of a duty of good faith: the notes are commercial debt instruments and they are tradeable securities. In any case there has been no breach of any such putative duty.

89. The defendant said that these points applied to all of the instalments. But it also asked the court to concentrate specifically on the defendant's failure to pay the February 2023 instalment. It argued that, whatever view the court might reach more generally, there was no serious issue to be tried about that instalment. The reason for the non-payment of the February 2023 instalment was separate and independent of the earlier non-payments and would have occurred even if the earlier instalments had been paid. The failure to make that payment was an EoD which entitled the defendant to accelerate the repayment of principal and to exercise its security.

90. The defendant argued that, in any case, damages would adequately compensate the claimant and would not adequately compensate the defendant. The defendant also argued that if it reached the stage of considering the balance of convenience, the court could and should take account of the merits and that on any view the claim was a weak one.

Application for an injunction

91. The principles in *American Cyanamid v Ethicon* [1975] AC 396 are too famous to warrant paraphrase and are to be taken as read.

92. The first question is whether there is a serious issue to be tried.

93. I accept the defendant's submission that the court should start by concentrating on the non-payment of the February 2023 instalment on 28 February 2023. As the defendant said, if there is no serious issue in relation to that instalment the application cannot succeed.

94. I have reached the conclusion that there is no serious issue to be tried in relation to the February 2023 instalment. This is for several reasons.

95. First, by mid-February 2023 the claimant was, on its own case, no longer under any misapprehension about the ability of Bidco to make upstream payments for the note interest as Permitted Payments (and without having to meet the Enhanced Gross Leverage Test). This is shown by the email of 17 February 2023 from Mr Hurst to Oaknorth. Any misapprehension had been dispelled by then.

96. Secondly, the reason for the non-payment of the February 2023 instalment was the failure of Bidco to comply with the need to meet the look forward test for the following 12 month period, including satisfying the Gross Leverage Test. The

claimant was unable to do this because it exceeded the ratio of anticipated Total Debt to Adjusted EBITDA for the March 2023 quarter. That had nothing to do with payment or non-payment of interest under the notes for the previous periods. It was the result of the anticipated trading of the group.

97. I accept the submissions of the defendant that the inability of the claimant to satisfy the look-forward requirements of the Gross Leverage Test would have occurred whether or not Mr Wilson (or Mr Aziz) had made statements about the ability of Bidco to make upstream payments; or indeed whether or not the earlier instalments of interest had actually been paid. The reason for the inability of the claimant to pay the February instalment as a Permitted Payment had nothing to do with the non-payment of those instalments or the reasons for such non-payment. The failure in February to meet the covenant was independent of the earlier events.

98. The claimant submitted that there was a connection between the advice of Mr Wilson and Mr Aziz about the earlier instalments and the non-payment of the February 2023 instalment. Ultimately its argument was that if the claimant had known earlier that it could (in principle) have made upstream payments as Permitted Payments and was not constrained by the Enhanced Gross Leverage Test, its representatives would have started discussions with Oaknorth earlier than mid-February to achieve a consensual waiver or cure and that, had they done so, they might well have been able to achieve it before the end of February 2023.

99. I am unable to accept that submission. It appears to me to be entirely contrary to the evidence of what has happened and to amount to wishful speculation. The evidence shows that Mr Hurst sought a waiver in his email of 17 February 2023. Mr Hurst explained that the breach of the covenant for the March quarter was temporary and technical and that the underlying trading and financial position of the group was robust. Oaknorth was nonetheless unwilling to agree a waiver before the end of February 2023. Indeed it has still not agreed a waiver. Nor has it agreed a cure. In essence it appears from Mr Hurst's evidence that Oaknorth requires further information and results before it will agree either course. Mr Hurst explains that Oaknorth was unwilling to agree a waiver in advance of the February quarter date and he also explains that further information is still required before a cure can be finalised. Some two months after the point was first raised with it, Oaknorth has not agreed a waiver or cure. Mr Hurst's evidence is that he anticipates a solution should be reached by June 2023. There is no plausible evidential basis for the contention that Oaknorth would have agreed a waiver or cure before the end of February 2023 (or even within 30 days thereof) had Mr Hurst written the 17 February email earlier, say in December 2022. On the evidence, Oaknorth would still not have agreed a waiver in advance and it would still have sought further, updated, information after the February payment date had passed. It is telling that even now, nearly two months after the 17 February email no solution has been reached.

100. Moreover, as counsel for the defendant observed Bidco was always required to meet the Gross Leverage covenant in any event. The requirement was independent of the intention or otherwise of Bidco to make a Permitted Payment – though meeting the test is a condition of being able to make such a payment. It follows that the management of Bidco had an incentive to meet the Gross Leverage covenant in any event. The claimant indeed knew by the end of December 2022 (when it produced the projected figures) that the Gross Leverage test would not be met for March 2023. It

knew from then on that it would have to agree a waiver of the covenant breach with Oaknorth, whether or not it was seeking to agree a Permitted Payment. No such waiver has been obtained. There is no reason to think that the claimant would have taken any different action if it had had (say in December 2022) a different understanding of the requirements for upstreaming payments to the claimant to enable the payment of quarterly interest on the notes. The points are separate and independent.

101. So I do not think that there is any substance in the submission that things would have turned out differently had Mr Wilson and Mr Hurst understood before mid- February 2023 that Bidco could make upstream payments for note interest without satisfying the Enhanced Gross Leverage Test. Bidco would still have been in breach of the Gross Leverage ratio in respect of the projected March 2023 quarter and it would not have been able to make the payments as a Permitted Payment.

102. Thirdly, it follows that the failure to pay the February 2023 instalment is independent of anything Mr Wilson or Mr Aziz may have said about the contractual mechanism for upstream payments for note interest. It would have happened anyway. It cannot therefore be seriously argued that defendant should be prevented from asserting that the failure to pay the February 2023 instalment was an EoD, or from accelerating or from exercising its security rights in respect of that breach. There is nothing inequitable about the defendant asserting its rights in respect of that instalment, whatever case may be advanced in respect of the earlier instalments. For these reasons there is no basis for the alleged estoppel or waiver concerning that instalment.

103. Fourthly, for similar reasons there is no serious issue as regards damages for negligence. The loss alleged by the claimant is damage arising from any decision of the defendant to call an EoD and/or exercise its security. As already explained, the defendant is entitled under the terms of the LNI and security to call an EoD and exercise its security based on the failure of the claimant to pay the February 2023 instalment alone. The defendant does not have to establish that it was entitled to call an EoD by reason of the non-payment of the earlier instalments. It follows that if (as I have concluded) the non-payment of the February 2023 instalment would have happened anyway, the damage would also have occurred anyway. It would have arisen whether or not the defendant and its representatives had given negligent advice about the earlier instalments. The claimant is therefore unable to establish a serious case that it would not have suffered the damage claimed but for the alleged negligence of the defendant.

104. Fifthly, there is no serious issue that the defendant is relying on its own wrong. The wrong complained of is the alleged negligent advice. The claimant accepted that it would be necessary to show that the alleged wrong caused the events now complained of (i.e. the assertion of an EoD and the exercise of security). As explained above, the defendant is able to exercise such rights as it has arising from the non-payment of the February instalment. I have explained above why the February instalment would not have been paid irrespective of any advice that might have been given about the earlier payments.

105. Sixthly, there is no serious issue that the defendant would be acting contrary to a duty of good faith in relying on the non-payment of the February 2023 instalment. The reasons are essentially a repeat of the previous ones: the failure to pay that instalment

would have occurred anyway, entirely independently of any erroneous advice or assurances given by the defendant or its representatives about the mechanism required for the earlier instalments.

106. It follows that the claimant has failed to raise a serious issue to be tried in relation to the non-payment of the February 2023 instalment. It also follows that there is no basis for an injunction to restrain the defendant from asserting its contractual and security rights arising from that event. I do not therefore need to reach any conclusion about the parties contentions concerning the earlier instalments.

107. Given this conclusion it is unnecessary to consider the parties' contentions about the adequacy of damages and balance of convenience. I will however express some brief conclusions.

108. I do not think that damages would adequately have compensated the claimant in the event that it had a valid claim to prevent the defendant from exercising its security. If the defendant were to appoint a receiver or administrator over the shares or business of the claimant (which is simply a holding company in the group structure) it would potentially be able to change the management of the underlying companies, including MFS, with a view to affecting the conduct of its business. Any such changes might turn out to be damaging to the business. I do not think it is a complete answer to say, as the defendant does, that it would wish to enhance the value of the business. That may well be its intention, but it may or may not succeed in that aim. There is also the risk that the appointment of a receiver or administrator would be damaging to the reputation of the group with its suppliers and customers. It appears to me that any damages would be very difficult to assess and this is itself a reason for concluding that compensation would be at best an imperfect remedy. I do not think there is any reasonable way at the moment of establishing even a proxy for such damages. Given this conclusion I do not need to consider the claimant's further argument about the stifling of this claim.

109. On the other hand I do not think that damages would adequately have compensated the defendant in the event that it was wrongly restrained from exercise its security rights. It has serious concerns about the management of the business and that the group has consistently failed to achieve the projections in the buy-out business plan. It says that it wishes to take steps to protect the value of its investment and that this may require changes to the management of the business. It also says that the group requires a restructuring of debt and equity. I consider that it would again be very difficult to assess any damages that might be suffered by the defendant if it is not able to take these steps.

110. It is no answer to say, as the claimant did, that the defendant is simply being kept out of its interest for a shortish period (perhaps until June 2023). The question is, as counsel for the defendant submitted, the damage it would suffer from being restrained from exercising the security rights it would otherwise have; and the assumption in this stage in the analysis is that the defendant is indeed entitled to exercise such rights.

111. For these reasons damages would adequately compensate neither party.

112. As to the balance of convenience or (probably a better expression) the risk of injustice, I accept the defendant's contention that the court is entitled to consider the

merits. It seems to me that in predicting the risk of injustice the court may in an appropriate case ask which party will probably win. It is not always possible to reach a view about this, but in some cases it is. I am required to assume for the purposes of this stage of the analysis that the claimant has done enough to show a serious issue to be tried. But even making that assumption (which is contrary to my earlier conclusions) it appears to me that on any view the defendant has much the better chances of succeeding at trial in showing that it is entitled to call an EoD in respect of the February 2023 instalment. This is for the reasons already given. Had the claimant been able to surmount the serious issue hurdle, I would therefore have concluded that the risk of injustice came down decisively against the grant of an injunction.

Disposition

113. The application for an injunction is dismissed.