BL-2023-001585
Neutral Citation Number: [2024] EWHC 1920 (Ch)

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

The Rolls Building
7 Rolls Buildings
London EC4A 1NL

Tuesday, 18 June 2024

BEFORE:

MASTER KAYE

BETWEEN:

MAYFAIR CAPITAL RESIDENTIAL 2 LLP

Claimant

- and -

REIM KATCH SECURITIES LTD

Defendant

MR R LAVILLE appeared on behalf of the Claimant
MR J ENGLAND appeared on behalf of the Defendant

JUDGMENT
(Approved)

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MASTER KAYE:

1. This is my determination of the Claimant's application for summary judgment, dated 26 February 2024, to which I will refer to as "the application". The application relates to a claim issued on 30 November 2023, arising out of the operation of an intercreditor deed of priorities, dated 4 January 2022 (to which I will refer to as the "ICD") between the Claimant Mayfair Capital Residential 2 LLP as junior lender, the Defendant, Reim Katch Securities Ltd, who is in fact the security agents for Katch Investment Ltd as senior lender, and the borrower, Boat Race House Limited. The lending was to assist or facilitate the completion and sale of the development of luxury flats at Boat Race House. Some flats had been sold prior to the refinance in January 2022 but some remained.

2. As one might expect, the ICD seeks to regulate the priority of the securities granted to the borrower by the lenders over the same assets. Whilst as a general rule the risk allocation in such documents is intended to favour the senior lender, ultimately the terms of any ICD are a matter of negotiation between the parties. In this case all parties were represented at the time it was drafted.

3. Boat Race House was a development of luxury flats. The borrower had, it appears, previously had general borrowing from another lender and borrowing which had been provided by the junior lender in about 2017 in relation to the development costs. It appears by late 2021/2022, it was necessary for the borrower to refinance. In doing so, they appear to have, in error, removed the registration of the junior lender's 2017 charge. Nothing turns on that but explains the variation to the ICD against what one might call "standard terms".

4. The senior lender took over the financing of the project on a short-term basis providing 12 months of finance against security to enable the balance of the flats at Boat Race House to be sold off. It did so on terms that were beneficial to it but which put considerable pressure on the position in relation to the level of which the flats could be sold to achieve repayment and/or avoid breaching the covenants and the borrowing arrangement entered into between the borrower and the senior lender.

Indeed, it appears on the facts that even when the new lending arrangements were put in place the margin or headroom was very tight indeed for the senior lender and the junior lender was probably already in difficulty. That no doubt formed part of the general background to the agreements that were entered into between the senior and junior lender and the borrower in 2022.

5. It appears, for example, that the GPC valuation obtained by the senior lender to support its lending provided a value for all the unsold flats in the sum of about £10.5 million. The senior lender was providing borrowing of in excess of £7.8 million and the junior lender's position was that although it had originally loaned some £2 million-odd in 2017, it was owed around £4 million-odd in January 2022. Some basic maths (£7.8m + £2m = £9.8m or £7.8m + £4m = £11.8m) demonstrates that the margins were very tight even for the senior lender. The flats would need to be sold for a very full price to avoid any difficulties with recovery.

6. The ICD appears to be in broadly standard terms, with many of the clauses being at least based on what one might call "boiler plate" clauses. The broad shape of the ICD was that the senior lender took priority over the junior lender (the priorities having been set out in clause 2 of the ICD), in relation to the realisation and enforcement of recoveries made following the sale of the flats. Clause 13 of the ICD regulates the application of proceeds, a clause to which I will return.

7. It is not uncommon for parties to ICDs to agree that, notwithstanding the order of priorities in terms of payments, that certain payments may be made to a junior lender in any event. These are usually described as "permitted payments". Often, they might relate to, say, interest on a loan. The usual way in which permitted payments work is that notwithstanding the general provisions for allocation of proceeds of sale in accordance with the priorities, certain permitted payments will be paid out to a junior lender which will have the effect of advancing the payment of those permitted payments ahead of some of the payments to the senior lender in accordance with the priorities. There is therefore a general provision in relation to allocation of proceeds with a carve-out for the permitted payments.

8. In this case the parties had agreed a permitted payments clause (clause 5). Subject to those permitted payments the junior lender was subordinated to the senior lender.

9. The clause 5 permitted payments provided for two types of payment. In simple terms it provided that from the net proceeds of each sale of each flat, the junior lender would receive 50 per cent of those net proceeds until it had received a total of £1.5 million. In addition, if it had incurred any costs in seeking to have its charge reinstated on the Register at Companies House, those additional costs were also to be a permitted or priority payment. In fact, there have not yet been any such costs.

10. For whatever reason the offers received in relation to the flats in 2022 were substantially below the values in the GPC valuation. There is a dispute between the parties about whether the senior lender inappropriately blocked sales at the lower values and as such acted in bad faith and/or was the cause of the borrower falling in to default or being unable to repay the loan on time.

11. As it is only one flat, Flat 13, was in fact sold in the 12-month period before the senior lending became due for repayment. From that sale, the senior lender recovered more than 50 per cent of the net proceeds and there is a dispute between the senior and junior lender as to whether that was agreed or not and whether that is a breach of clause 5. It is now accepted that that dispute involves disputes about questions of fact and so that is not something that can be determined on this application, despite it having originally formed part of the application. It will therefore need to go to trial together with the broader dispute about bad faith.

12. The borrower did not maintain its interest payments and, with the non-sale of the rest of the flats, was unable to repay the borrowing in time. It fell into default and, in March 2023, a Receiver was appointed. In August 2023, the Receiver became joint Receivers and at about the same time Flat 15 was sold. Net proceeds of sale for Flat 15 are about £1.6 million. That appears to have been paid in full to the senior lender. The junior lender considers that 50 per cent of the net proceeds of sale should have been paid to them in accordance with clause 5. They say they were entitled to continue to benefit from the terms of the permitted payments clause under the terms

of the ICD even after the appointment of the Receiver and an event of default or enforcement.

13. There are other disputes between the parties, as I have identified, but on the application the junior lender seeks a declaration in relation to the permitted payments clause and its continuing operation. In addition, they sought an order that the senior lender account to the junior lender in relation to 50 per cent of the net proceeds of the sale of Flat 15 which took place in August 2023.

14. The application was supported by two witness statements from Mr Seligman, dated 26 February 2024 and 17 May 2024. Mr Seligman is a RICS surveyor and employed by the junior lender's ultimate parent company. He has the job title of "Investment Director" and from the documents it is clear he has been involved with this matter on a day-to-day basis. He is one of the signatories to the ICD. The evidence in response to the application is provided by Mr Clark, a solicitor for the senior lender (in a witness statement dated 19 April 2024).

15. The Claimant is represented by Mr Laville and the Defendant by Mr England. I have had the benefit of both written and oral submissions from both of them, for which I was grateful. I have also reflected on the evidence in the documents and have in particular considered the terms of the ICD.

16. The hearing was listed for one day and, although it did not run a full day, given some parts of the application were no longer pursued, I am satisfied that both counsel had the opportunity to make the submissions they wanted to make.

<u>The Legal Principles</u>

17. This is a summary judgment application which, if successful, requires the Court to also consider whether to exercise its discretion to make a declaration. Summary judgment is a discretionary remedy available against a Defendant if there is no real prospect of defending a claim or issue and there is no other compelling reason why

the claim or issue should be disposed of at trial. Real means realistic and not fanciful. The test for resisting summary judgment and the principles for the Court to consider are not in dispute and are set out in the *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. That decision has subsequently been approved by the Court of Appeal in a number of subsequent authorities. Given the scope of this application it appeared to me that the parties' particular focus was on subparagraph (vi) and (vii) of Lewison J's decision, with Mr England referring to these in his skeleton argument.

18. Subparagraph vi) relates to whether or not there is further evidence that might come to light, which means that the Court requires fuller investigation into the facts. Subparagraph (vii) is the other half of that in which Lewison J discusses situations in which a summary judgment application can give rise to a short point of law or construction and, if the Court is satisfied that it has before it all the necessary evidence, that it should grasp the nettle and decide it. Mr Laville, for the Claimant, relies in particular on that part of *Easyair* and asks the Court to grasp the nettle on construction argument, which I address below.

> "(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Company 100 Ltd* [2007] FSR 63;
>
> (vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of

> succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725"

19. If I were to decide there was a basis for granting summary judgment then the secondary question is whether I should then grant the declaration sought by the Claimant. It is now well established (see, for example, *Abaidildinov v Amin [2020] EWHC 2129 (Ch))*, a decision of Robin Vos (Sitting as a Deputy High Court Judge), that the Court must be satisfied that it is appropriate to exercise its discretion to grant a declaration having first determined the summary judgment question. As Vos says at [48]:

> "Once it is established that the Defendant has no real prospect of mounting a successful defence in respect of the facts and matters, it is unlikely to be in accordance with the overriding objective to require a full trial in order to decide if the Court should exercise its discretion to make a declaration."

20. However, declaratory relief is, of course, a discretionary remedy. The test was summarised by Neuberger J in *FSA v Rourke* [2001] EWHC 704 (Ch) and provides that the Court should take into account the justice of the Claimant and the justice of the Defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why the Court should or why it should not grant a declaration. Thus the Claimant would still have to persuade me that I should, in my discretion, give a declaratory determination.

21. I emphasise that the touchstone for any application involving a declaration is utility where the declaration would serve no useful purpose it should be rejected. The prime

purpose is to do justice in a particular case. The Court would need to be satisfied it was appropriate and it would need to be grounded in concrete facts. There must in general be a real and present dispute as to the existence or extent of a legal right and some real reason for granting the declaration sought. When I come to consider that aspect of the application I will keep those points in mind.

22. On this application there is no underlying claim for rectification by either party and no suggestion by either party that a mistake has been made. Both rely on their own interpretation of the ICD as providing an answer to the application. Subject to the submission by Mr England that the Court would need to consider evidence from the parties to undertake the analysis, it appeared that, as set out in *Easyair*, this was a claim in which the question of construction might be suitable for determination on the application and it might be appropriate to grasp the nettle.

23. Before looking at the ICD and the evidence of the submissions, it is worth reflecting the Court's role when considering the question of construction or interpretation. There is no difference between the parties as to the applicable principles of interpretation of contracts which were summarised by Lord Hodge in *Wood v Capita* [2017] UKSC 24 at [8] to [15]:

> "8. In his written case counsel for Capita argued that the Court of Appeal had fallen into error because it had been influenced by a submission by Mr Wood's counsel that the decision of this court in Arnold v Britton [2015] AC 1619 had "rowed back" from the guidance on contractual interpretation which this court gave in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900. This, he submitted, had caused the court of appeal to place too much emphasis on the words of the SPA and to give insufficient weight to the factual matrix. He did not have the opportunity to develop this argument as the court stated that it did not accept the proposition that Arnold had altered the guidance given in Rainy Sky. The court invited him to present his case without having to refer to the well-known authorities on contractual interpretation, with which it was and is familiar.
> 9. It is not appropriate in this case to reformulate the guidance given in Rainy Sky and Arnold; the legal profession has sufficient judicial statements of this nature. But it may assist if I explain briefly why I do not accept the proposition that Arnold involved a recalibration of the approach summarised in Rainy Sky.
> 10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to

that objective meaning. In Prenn v Simmonds [1971] 1 WLR 1381 (1383H-1385D) and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, A new thing under the sun? The interpretation of contracts and the ICS decision Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.
11. Lord Clarke elegantly summarised the approach to construction in Rainy Sky at para 21f. In Arnold all of the judgments confirmed the approach in Rainy Sky (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in Rainy Sky (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the uestcations of the competing constructions the court must consider the quality of drafting of the clause (Rainy Sky para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: Arnold (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the

> absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in Sigma Finance Corpn (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.
> 14. On the approach to contractual interpretation, Rainy Sky and Arnold were saying the same thing.
> 15. The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation."

24. In particular, I note that at paragraph 10 the requirement of the Court to ascertain the objective meaning of the language which the parties have chosen to express their agreement and the entirety of paragraph 11, which sets out the need to strike a balance between the rival interpretations and the application of business common sense. Both parties relied on commercial common sense for their own interpretation of the ICD.

25. However, I also note that Lord Hodge points to the Court and the parties needing to be alive to the fact that they may have agreed something which with hindsight did not serve their interests. *Wood v Capita* includes references to *Rainy Sky SA v Kookmin Bank*, and I remind myself that, "where the parties have used unambiguous language, the Court must apply it". As I say, there is no application to rectify the ICD by either party. Both rely on their own view and analysis of the way in which the ICD should be interpreted as being the correct view. Nor was there any suggestion by either party that a mistake had been made and/or that the court should correct the ICD relying on the Chartbrook principle.

26. I remind myself it is not the Court's role to read into the ICD additional words or meaning simply because there may have been a failure to think through the consequences for the drafting in all scenarios, the fact that the drafting might cause inconvenience of delay for one party and may even have more profound consequences does not mean that there has been an error or mistake in the drafting. It may just be a failure to think through the potential consequences as noted by Lord Hodge.

27. In summary therefore, the main principles for contractual interpretation are the importance of the text, the provisions in issue, the whole contract approach, context, business common sense and reasonableness. It is therefore helpful to have regard to the ICD as a whole when seeking to interpret or construe the context of a particular clause. It is rarely helpful to consider a clause or paragraph in isolation. In this case, as I have said, the ICD was negotiated and prepared with the assistance of skilled professionals. It is necessary to balance the potentially competing principles but there is a single exercise involving an iterative process.

28. The Court should not disregard or override the language of the contract in favour of commercial common sense where the meaning of the contract makes sense, even if it may not be the outcome or meaning which the parties contend for but business common sense steps in, for example, where there is more than one tenable reading of the provisions, that does not save the parties from the natural meanings of the words. There can be some space for looking at the wider context but the Court is looking at an objective test. Any such context must be background, for example, known to all the parties not just one of the parties otherwise it would not be available to assist.

29. In terms of evidence, evidence of prior negotiations, earlier drafts or correspondence or evidence in relation to negotiation of the contract terms is not admissible for the purposes of the construction argument, which is objective save for limited circumstances. It is not admissible to explain the origin of a provision in the absence of a claim for rectification.

30. Mr England submitted that one of the reasons why the application should not succeed was that there was evidence which the defendants had not yet had an opportunity to collect that would provide relevant background information. He explained that the senior lender was in fact the security trustee and therefore they were not the contracting party and not actually the senior lender. It appeared that the security trustee was however a signatory to the facility agreement and the party to the ICD. Mr Oakley, for the security trustee, appeared to have been in active communications throughout 2022 and 2023, including it appears obtaining legal advice. It was not clear what information was missing or why it was necessary to obtain information from former directors of the senior lender.

31. Mr England explained that document preservation notices and questions had been sent to the relevant persons at the senior lender who had said they had documents which they would supply. He referred to Underwoods Solicitor's file – they had been involved in the drafting the suite of documents including the ICD and it appeared they may have continued to have involvement after the ICD was entered into and the other security documentation was finalised. He suggested that the Court might be assisted by evidence or material from the senior lender which would be relevant to the terms of clause 5 and what it was intended to cover. But it was not obvious to me how this would be admissible, nor could I see any relevance to any legal advice Mr Oakley had received in about November 2022 about how the ICD might operate some 11 months after it was entered into. It may be that the senior lender relied on that advice but it is not obvious how legal advice, at that stage, was going to assist in construing the objective meaning of the ICD when it was entered into in January 2022 and Mr England did not persuade me that it could. It was unclear to me what relevant admissible material there was or could be on which senior lender could rely, or what would come to light from the process of disclosure. And if there was such evidence why it had not yet been deployed in response to the application which had been issued in February.

32. In a construction context the subjective intentions or understanding of one party were not going to be of much assistance particularly if it was not a shared understanding between all the parties to the ICD. Evidence from individuals might be relevant to the other claims such as those relating to bad faith claims or indeed what was agreed in relation to the proceeds of Flat 13. They might even be relevant to an application for rectification but on a pure question of construction or interpretation of the ICD, where the negotiations themselves were not admissible, I struggled to see the relevance of this type of evidence or why if it was considered relevant or admissible it had not been deployed in response to the application to head off the summary judgment application. As I say, it was not at all clear from Mr England's submissions that there was any relevant evidence to be deployed in relation to the construction question.

33. It is for the Court to assess the objective meaning of the disputed provisions from the ICD. What the senior lender wants the ICD to mean is not going to help me particularly if that is not information that was available at the time to the junior lender

and the borrower and so was not known to all parties to the negotiations. Even then, one wonders why it would assist on a construction point and not be a matter for seeking rectification. I was not persuaded there was any obvious difficulty for the Defendants in accessing or deploying any evidence as they considered would be of assistance in responding to the summary judgment application. Whilst Mr Oakley and the senior lender (as defined) was in fact the security trustee, as I have said, it was in fact the security trustee who signed off on the ICD rather than the senior lender itself. There is no explanation why it had not been possible to obtain information in the 3½ months since the application had been issued, even if prior to that it was appropriate to only have sent disclosure preservation letters. Mr England did appear to accept that no material had so far been identified that might be relevant but, despite that, argued that it was not right to say there would be nothing. He suggested that information in relation to GPC valuations might turn up and be relevant. For the reasons set out in this judgment even if more evidence did turn up on the GPC valuations that would not affect the construction question.

34. So far as the construction part of the application is concerned, it seemed to me that this argument all fell into the "something might turn up" category in circumstances where, even if something turned up, it was not at all clear to me how or why it would be admissible on the construction question. Mr England had been unable to identify any relevant admissible evidence that might assist on the construction or adequately explain why any that might be available had not been obtained. It appeared to me that the Court was in a position to determine the construction point, adopting the approach identified by Lewison J in *Easyair*. The Court should therefore grasp the nettle and determine the construction issue at this stage.

35. I again reiterate there is no claim for rectification and neither party appeared to be suggesting there was some error. The order in which one considers the facts, context and analysis for a construction question is not fixed and it is ultimately necessary to consider it all in the round. The ICD was entered into on 4 January 2022, at the same time as a new suite of documents relating to the lending to the borrower. These were substantial documents drafted by the legal teams retained by the senior, junior lender and the borrower. They are the culmination of a negotiation and drafting exercise undertaken on behalf of these well-represented parties and entered into by represented

parties. However, it is often the case that, no matter how careful parties are, errors and inconsistencies can creep in.

Background

36. I have already said that the junior lender's original loan appears to have been in the region of £2 million towards the development costs in 2017, which was secured by fixed and floating charge in respect of which the borrower accidentally filed a discharge of its registration in 2021/2022. By the time the lending was entered into in January 2022, it appears that the junior lender was owed about £4 million. This helped place in context the terms of the ICD.

37. There had been another prior lender but in about late 2021 the current senior lender obtained valuations to the remaining flats. It used this valuation (the GPC valuation) to support its decision to lend on the development. The GPC valuation valued each flat and came to a total of about £10.2 million for the portfolio. On 4 January, the senior lender replaced the prior lender providing its loan of £7.85 million for 12 months with repayment falling due in January 2023. As I have said, the combination of sums due to the junior and senior lender meant that, even at that time the parties entered into the new loans, the position was already very tight; absence an increase in property values the prospect of a repayment in full for both the senior and junior lender would have been unlikely.

38. The junior lender had of course been a prior lender and without some formal agreement it is not obvious that the senior lender could have stepped in in priority to the junior lender. The loss of the 2017 registration of the junior lender's charge would have been unlikely to have substantially affected the position.

39. There is obviously no evidence as to the nature of the negotiations nor would they be relevant. However just looking at the relative positions of the parties and taking a business and commercial approach to this, at the time the ICD was negotiated those relative positions provide context and assist. When looking at the commercial common sense or business sense of any arrangement, the ICD was negotiated and entered into on the same date as the funding arrangements were put in place, and sets

out the arrangements between the lenders at a time when there was very little room for manoeuvre between the valuation obtained and the borrowing that was being provided. As set out above, save for the permitted payments, the junior lender is subordinated to the senior lender in an ICD which appears to be made up of mainly standard clauses.

40. In 2022 only Flat 13 was sold. There is a dispute between the parties and the borrower as to why more flats were not sold. Offers were received but these were under the GPC valuation figures. Other valuations during 2022 appear to suggest that the sums offered were close to market value despite being less than the GPC valuation. In broad terms, the borrower and junior lender alleged that the senior lender was acting in bad faith and blocking sales in turn caused the borrower to default. The senior lender says it had an absolute discretion in relation to the sales at market value and that, in any event, had it permitted the sales to go ahead at the prices offered the borrower would have breached its covenant to the senior lender and been in default. In fact, the evidence available shows that the borrower was not servicing the borrowing from shortly after the new arrangements were put in place in any event. Whether this was due to the absence of any sales which it is said to be the fault of the senior lender or simply because the borrower was not in a position to service the loans is a matter for a different day.

41. Flat 13 was sold in 2022 for a sum less than GPC valuation. The parties appear to have agreed the distribution of the net proceeds of the sale on a basis said to be inconsistent with the terms of the ICD and more favourable to the senior lender. The sum received by the senior lender was the equivalent of 50% net of the GPC Valuation. There is a dispute about whether the different distribution was in fact agreed and/or whether further sums are due to the junior lender. Mr England says that the arrangements in relation to Flat 13 are relevant context when construing the terms of the ICD. He says that the fact that there was an agreement that senior lender would be entitled to a sum equivalent to 50 per cent of the GPC valuation from the net proceeds demonstrates what was intended by the parties in the operation of the ICD in clause 5. Mr England argued that what happened in relation to Flat 13 was evidence of how the ICD was intended to work not evidence of any one off agreement. In the absence of any application to rectify, or any evidence that that was the parties'

intentions, it was unclear how this submission helped. As we will come to, there is no reference to the GPC valuation in the ICD let alone in clause 5. It is, and was, of course possible for the parties to seek to negotiate and agree informal different terms on a flat by flat basis, but some formal variation to the terms of the ICD intended to apply to the ICD generally would have to have been documented in accordance with its terms, and none had been.

42. The relationship between the lenders and the borrower deteriorated. As early as May 2022, there were exchanges of correspondence about whether the senior lender was behaving in a proper manner or acting with good faith or in relation to the sales. The borrower fell into default despite the senior lender having received a larger percentage of the net proceeds of Flat 13.

43. On 22 November 2022, the senior lender wrote to the borrower explaining that the loan was in default and the borrower had failed to service the interest and that there was an LTV breach. The senior lender had not managed to persuade the junior lender to renegotiate the terms of the ICD to provide the senior lender with more favourable terms. This attempt to renegotiate appears to recognise that the terms of the ICD were not as the senior lender would have liked but even then, there was no suggestion that the ICD was wrong or contained an error. From a statement of account, dated April 2024, it appears that several months of interest were unpaid by this point and no further payments were made. A point relied by the junior lender is that by 22 November, Mr Oakley had received legal advice which the senior lender says was to the effect that if they appointed a Receiver this would void the junior lender's claim.

44. Following that advice the senior lender appeared to have believed that if they appointed Receivers they would no longer have to make any permitted payments and could just rely on the original priorities in the ICD, such that until its loan was satisfied the junior lender would not receive any further sums from the sales of the flats.

45. The senior lender decided to appoint Receivers. On 14 December 2022, the senior lender notified the junior lender of its intention to make a demand to the borrower

under the loan and appoint Receivers. On 5 January 2023, the senior lender made that demand to the borrower in accordance with the terms of the loan. The borrower did not bring tis arrears up to date and instead sent a detailed letter of claim on 12 January 2023. The letter of claim raised the allegations of bad faith in respect of the conduct of the senior borrower and is reflected in aspects of the junior lender's claim in these proceedings but not relevant to the application. The borrower has not yet issued any claim.

46. Receivers were then appointed in March 2023 to take possession of the flats and sell them. On about 8 August 2023, they sold Flat 15 for about £1.7 million. The statement of account dated 18 April 2024 shows that a net sum of £1.61 million was received by the senior lender as a capital repayment on or about 11 August 2023. The junior lender says that 50 per cent of the net proceeds of that sale should have been accounted back to it under clause 5 of the permitted payments clause. No further flats have yet been sold at the time of this application.

The Claim

47. This claim was issued on 30 November. The claim form is short, and it says it is money claimed for breach of contract or equitable compensation and there is a claim for declaratory relief. The claim is put at £1.11 million (being the sum of £1.5 million as set out in clause 5 less the sums received by the junior lender on the sale of Flat 13 in 2022 of £388,000).

48. The particulars of claim set out some factual background and then at paragraph 10 plead that "in exercising its right under the [senior lender's] charge the [senior lender] owed an equitable duty to the [junior lender] to act in good faith and for the proper purpose of the [senior lender's charge] and the [ICD]". The particulars of claim plead the GPC valuation at paragraphs 11 and 12.

49. At paragraph 14, the junior lender pleads the basis for the payments upon disposal of each flat, setting out what it says was intended. Paragraph 14 reads specifically "the Claimant, Defendant and borrower all intended that upon each disposal of a flat the borrower would first pay the costs of sale and then pay (i) to the Defendant a sum

equal to 50 per cent of the GPC valuation for the flat in question less half the costs of sale and (ii) to the Claimant, the remainder of the proceeds of sale".

50. This was not the claim that was reflected in the terms of the ICD and was inconsistent with the claim advanced on this application and the declaratory relief sought. It gave some credence to the senior lender's argument (but not reflected in the terms of the ICD) that the GPC valuation had some relevance to clause 5. Mr England relied on paragraph 14 as demonstrating that the parties had intended a division of the net proceeds of sale that was different to that set out in the ICD. This would appear to be a submission that something had gone wrong and the ICD did not reflect what had been agreed between the parties but in the absence of claim/counterclaim to rectify, it is not clear how either the reference in the particulars of claim or submissions of Mr England could assist the Court at all or change the words of the ICD. As I have already noted, neither party in fact argues that the terms of the ICD are wrong and need to be corrected only that they need to be construed in a particular way. And evidence in relation to prior negotiations would not assist on a construction point. However, Mr England relies on the Claimant's own pleading to support his contention that ICD does not mean what the words say.

51. Paragraphs 15 to 25 set out the alleged blocking strategy in relation to the sales and the subsequent attempts of the senior lender to negotiate different terms of the junior lender in 2022. Paragraph 23 pleads the refusal to agree those sales was an act of bad faith and/or for an improper purpose to enable the senior lender to appoint a Receiver. These may be relevant factors in the bad faith claim, but do not appear to be relevant to the question of the construction of ICD.

52. Paragraphs 24 to 29 then deal with the appointment of the Receiver. Paragraph 30 sets out the claim for a declaration which is essentially that clause 5 continues to apply despite the receivership. Paragraph 30 does not refer back to or rely on paragraph 14 or plead that clause 5 should be read as referring to the GPC valuation.

53. Paragraph 31 seeks an order that the senior lender account to the junior lender if the senior lender has already received any payment from the borrower as a result of disposals without the borrower having complied with clause 5. This plea for an

account is a reference to the net proceeds of Flat 15 but would cover any other disposal where the net proceeds have been distributed other than in accordance with clause 5 pending the dispute being determined. To complete the review of the particulars they include at paragraph 32, an alternative plea of breach of the equitable obligation to act in good faith causing loss – not a matter for this application, and finally, there is a claim for interest including compound interest.

54. The prayer seeks only a declaration in respect of the continuing effect of clause 5, and equitable compensation or damages. It does not seek an account or a payment of the sums found due on the taking of an account.

The equitable claims

55. Although it is something of a detour given the issue arises on the pleadings and not on the ICD itself, I address the issues around the claim for equitable remedies now in advance of the balance of the application. A claim to enforce an equitable duty to account, which is what paragraph 31 appeared to be, does have to be pleaded and does have to form part of the prayer. It appeared clear that this was what had been intended given that Mr Laville's submissions and the section of his skeleton argument addressing the arguments in relation to the equitable obligation to account.

56. However, the particulars of claim did not obviously set out the basis on which the senior lender was to account, although the junior lender may consider it to be self-evident, it does still have to be pleaded with all its constituent elements and the claim for an account and payment of the sum found due as the remedy must be set out in the prayer.

57. Mr Laville's skeleton argument, from paragraph 30 onwards, set out an entirely credible basis and analysis of why he says the senior lender should account to the junior lender in equity, subject to any decision about the operation of clause 5 but none of that formed part of the particulars of the claim nor could I identify in the particulars of claim a pleading which amounted to a claim for an equitable wrong in relation to the proceeds of Flat 15 against which to attach the claim subsequently made for equitable compensation. Equitable compensation is a personal monetary

remedy for breach of trust, breach of fiduciary duty, knowing receipt and the like. Mr Laville relied on *Hughmans v Central Steam*, arguing that the junior lender had an equitable interest in 50 per cent of the net proceeds of sale of Flat 15 and that the payment of that share to the senior lender was a breach of trust. Again, there is a bit missing in the particulars of claim. He relied on *Burr v Barclays* to argue the borrower, who is not a party to the claim, received the proceeds of Flat 15 as a fiduciary, subject to the lender's security interests. He submitted that the effect was that when the net proceeds were paid in full to the senior lender that part which the junior lender was entitled to receive was impressed with a trust in favour of the junior lender and was paid to the senior lender in breach of that security interest or trust. Indeed, at paragraph 35 of Mr Laville's skeleton, he relies on the junior lender's equitable interest and the senior lenders' knowing receipt. This was a claim, if pleaded to which the equitable compensation claim might attach. A skeleton argument is not a statement of case.

58. Mr England made a number of points in relation to this but his best point in response to the equitable claims was that they were not properly pleaded. This was raised in the evidence in response to the application but has not been remedied prior to the hearing.

59. However, Mr England's argument that the ICD somehow excluded equitable claims because they were inconsistent with clauses in the ICD was not a persuasive argument. Certainly, if the terms of the ICD were such that, for example, there was no space left for equitable claims or if there were clauses in the ICD that specifically excluded certain types of claim that might be different. But there would need to be clear words to exclude rights and remedies that arise by operation of law, common law or in equity. There are no such words in the ICD and neither party sought to suggest there were.

60. As a consequence, whatever decision I come to on the construction of the ICD and whatever decision I come to on the declaration in relation to clause 5, there is no pleaded basis to make an order for payment to the junior lender absent a properly formulated amendment. If I otherwise accede to the Claimant's application for a declaration and/or agree with its construction of the ICD, it may well be that the

parties will be able to reach agreement and avoid further costs in relation to the proceeds of Flat 15. If the parties are unable to reach agreement and/or there was otherwise a need to amend, the right course is for Mr Laville to plead out the equitable claims he in fact advances and for the Defendant to have an opportunity to respond.

61. The majority of the defence joins issue with the claimant and/or puts them to proof, not accepting that, for example, the senior lender acted in bad faith and not agreeing with the Claimant's interpretation of the ICD. The interpretation points I pick up with when I deal with the general construction. In relation to the arguments on construction of the ICD they are addressed in the defence primarily at paragraphs 12 to 16, although other parts of defence apply the senior lender's construction of the ICD to the events that occurred and so are also relevant with the overall construction arguments.

The ICD

62. Turning last to the ICD, in simplistic terms the dispute between the parties is whether (a) clause 5, which allows for the permitted payments described earlier, continues to have effect after a Receiver has been appointed, such that even after a Receiver has been appointed any net set sale proceeds should continue to be distributed in accordance with clause 5 until the junior lender has received £1.5 million in total, after which the priority set out in clause 2 and clause 13 take effect (the claimant's construction); or (b) once an act of enforcement has taken place, such as the appointment of the Receiver clause 5 ceases to have effect and the entire net proceeds of any sale are distributed in accordance with the priorities in clause 2 and the application of the proceeds in clause 13, so that the senior lender receives all the net proceeds pursuant to clause 13 until it has been fully repaid (the defendant's construction).

63. Given the apparent difficulties in selling the flats and the offers made in 2022, from the junior lender's perspective the continued entitlement to repayments under clause 5, the permitted payments, up to £1.5 million is likely to provide them with the only recovery they will make in relation to their lending. For the senior lender, whether or

not the permitted payments continue, on the current position it seems likely that the senior lender will not recover their original lending. Both positions are part of the commercial reality of providing finance on tight margins. Consequently, the junior lender seeks a declaration to the effect that clause 5 continues to operate after the appointment of a receiver and that is resisted by the senior lender.

64. Stepping back and looking at the commercial position at the time the ICD was entered into and the relative strength of the senior and junior lender and borrower's positions, one can see that the commercial reality of the situation was such that without the senior lender the entire project would have collapsed and without the junior lender agreeing to step aside and give up priority, the whole project again would have collapsed and/or the senior lender would have had significantly more risk given the tight valuation from GPC, which valuation appears in any event to have been optimistic.

65. What the evidence does demonstrate is that the ICD represents a negotiated position between the parties and the Court is not in a position to, nor should it engage in a detailed analysis of why the parties might have negotiated as they did or reached the decision, they did in relation to the relative risk allocation and the risks they were prepared to take when entering in to the ICD. The ICD was negotiated as part of suite of documents. The Court should therefore take the ICD as it stands and construe it keeping in mind that it is a negotiated agreement as part of a wider suite of documents which represent an agreed position as between all the parties including the borrower who is not party to this particular application.

66. Looking first at the document overall, it seemed to me that in looking at it in context set out above, not only can it work as the Claimant suggests but it makes good commercial and business sense. It may or may not be quite what either party intended or thought they had negotiated but, having reflected on it and considered the disputed terms in context, it can and does work. If there has been a failure to think through the consequences of the drafting, that is not a reason to strain the construction of the ICD now to achieve what one party says they intended. That the ICD works on its own terms weighs against any need to imply terms even if it were permissible to do so in a carefully negotiated document.

67. Why do I say that? As I have said, the ICD appears to be a relatively standard form, including the carve-out for permitted payments as a general principle. After the definitions section (and there is only one definition we need to focus on and I will address that when I look at clause 5 in more detail) there is a clause relating to the priorities, that being the real purpose of the ICD. Clause 2.3 and 2.4 address the ranking and subordination of the debt, unexceptionally, the senior lender ranks above the junior lender who is subordinated to them. Clause 2.5 provides an unexceptional provision such that if junior lender receives monies to repay its lending when it should not have done and therefore contrary to the ICD priorities and the senior lender's rights, it holds them on trust. Mr England sought to suggest that the absence of a similar clause for the senior lender was significant but such a clause would not be an obvious requirement nor an obvious omission given the nature of the ICD and its purpose.

68. Clause 2.8 was not a standard clause but one that was added in to address the error in relation to the alleged satisfaction of the 2017 debenture. The broad structure of clause 2.8 was that the borrower had to apply to rectify the Register of Charges at Companies House and, if they did not do it in a short order, the junior lender could do it instead and recover their costs from the borrower, with such costs being a permitted payment and so to be paid in priority to the balance and the junior lender's loan as also referred to in clause 5.

69. Clause 5 is not only non-standard in the sense that permitted payments are non-standard but is a non-standard non-standard clause. The concept of permitted payments is not an unusual one in an ICD. It may be that a junior lender will be permitted to receive payments of, say, interest or certain expenses or the like. Such clauses are often narrowly defined and include protection from the senior debtor or lender so that such payments can be stopped in certain circumstances. But that is not this clause 5.

70. The full text of clause 5 is as follows:

> "Permitted payments
>
> 5.1 The borrower will, subject to 5.2

(a) make a repayment of the principal of the junior debt upon every disposal of 50 per cent of the net sale proceeds being the deductions from the sale price agreed between the senior and junior lender for each disposal and

(b) make any payments it is required to make to the junior lender pursuant to clause 2.8 (Charges Register).

5.2 When permitted appeals can be made.

The payments permitted by clause 5.1(a) will only be made if

(a) the senior lender has received no less than 50 per cent of the net sale proceeds pursuant to any relevant disposal and

(b) to the extent that the aggregate sum received by the junior lender does not exceed £1.5 million and for the avoidance of doubt partial payments are permitted in this regard."

71. The broad shape of the clause is that the borrower will (so it has no discretion) make a repayment of principal to the junior lender on every Disposal as defined of 50 per cent of the net sale proceeds with the balance, so the balance of 50 per cent going to the senior lender. This continues until the junior lender has received £1.5 million. After that the ICD reverts to its standard terms of priority and the application of the proceeds and their distribution as set out in clause 13. The junior lender then does not receive any further sums towards its outstanding indebtedness apart from the costs in relation to the Charge in clause 2.8, until the senior lender has been fully paid out. It is therefore a clause that provides some adjustments to the risk allocation between the senior/junior lender but not such as to suggest that it does not make commercial or business sense in the circumstances where the full sum due to the junior lender is said to be £4 million plus.

72. The effect of 5.2 is not, as Mr England suggested, to undermine this simple construction but a necessary part of it. One can see how it would operate by looking at the actual figures the parties have put in evidence. If 50 per cent of the balance of the net proceeds of Flat 15 is paid to the junior lender (so something in the region of £800,000) the balance still due to the junior lender out of the first £1.5 million it is entitled to receive as permitted payment is some £250,000 to £300,000. If the next flat is sold for, say, £1.7 million and the net is again, say, £1.6 million, unless clause

5.2 existed the 50/50 position would take effect which would provide the junior lender with a total sum of in excess of £1.5 million intended. The effect of clause 5.2 allows for an adjustment to the percentages and allows the senior lender to receive more than 50 per cent under the permitted payments provisions. In this scenario the senior lender would therefore receive something in the region of £1.3 million, a sum in excess of 50 per cent of the net proceeds, and the junior lender would receive the balance it was entitled to. Clause 5.2 therefore makes sense. As the payments are made to the junior lender on each disposal it is entirely possible and indeed very likely that the amount that the senior lender receives would exceed 50 per cent, it would be virtually impossible to achieve disposals in such a way as to ensure that the 50/50 split on net proceeds came out at exactly £1.5 million. It therefore makes sense internally, without any variation to the ICD or any strained construction but on its own wording.

73. Clause 5.1(b) is also entirely clear and does not pose any problem at all, it simply says that the costs which the junior lender incurs in having to take proceedings to rectify the Register are also payable as a permitted payment and in addition to the £1.5 million. If they were incurred later, after the £1.5 million had been paid in the usual course they would then be a permitted payment that could be made in priority to the senior lender's further payments the next time there was a disposal.

74. I am satisfied therefore that, on its face, clause 5 makes sense and can operate in a perfectly logical and sensible way. It prioritises receipts from the junior lender only to the extent of £1.5 million. I must assume the £1.5m was a negotiated figure – there is no suggestion by the parties that there is any doubt about that figure. This then leaves the junior lender to take their chances as subordinate to the senior lender for the balance due to them other than the costs of registration of the charge. Thus, if their total entitlement is £4 million-odd there is some clear benefit to them receiving some of their payment at an equal level to the senior lender in return for giving up their priority but having to wait for the balance. They priorities are not reversed or removed in full but adjusted to make some exception for the first £1.5 million.

75. Given the position on the extent of the borrowing and the GPC valuations at the time the ICD was negotiated and the respective positions of the parties, one cannot say that

this does not make commercial sense or business sense for all the parties. It is an agreed adjustment to the risks between them. It is not even said by Mr England that the payment of £1.5 million is wrong merely that once an act of default has occurred the position should change. If the senior lender had not recognised the consequences of the negotiated position in respect of the ICD, that does not mean that the clause does not mean what it says or that anything has gone wrong. Perhaps of greatest significance to this exercise is that Mr England does not demur from this broad construction of the ICD until the point at which a Receiver is appointed, or some act of enforcement takes place. Clause 5 on its face is not limited in the way Mr England suggests – he says that it is by reference to the other clauses in the ICD that it becomes apparent that that was the intention of the parties. So it is necessary to consider the ICD more broadly to understand whether Mr England's proposed restriction on clause 5 is sustainable as a matter of construction or whether, as argued by the junior lender, clause 5 continues to operate even after the receivership until the junior lender has received its £1.5 million.

76. Turning then to the definition of "disposal. "Disposal" is defined as:

> "A sale, lease, licence to transfer or other disposal of all or any part of any property whether by voluntary or involuntary single transaction or a series of transactions at market value as determined by the senior lender in its absolute discretion."

77. A disposal therefore includes both voluntarily and involuntary disposals. There is nothing in the definition to limit it to disposals before or after an act of enforcement or insolvency such as the appointment of a Receiver. A disposal could therefore occur at any time before or after an event of default or enforcement and an involuntary disposal could include a transaction that was caused by the sale of a flat or a property by a Receiver.

78. Mr England's submission that I should treat the words "involuntary" in the definition of "Disposal" as padding and/or that it was intended to apply to pre-enforcement involuntary sales such as compulsory purchase, did not appear to me to be consistent with the plain wording of the definition of "Disposal". Had the parties not intended to include it they would have excluded it and had they had perhaps, oddly one might

think, only intended to apply to pre-enforcement sales or realisations then they would have said so.

79. It seems clear to me on its wording that it is not limited to disposal prior to any enforcement application. It seemed to me to be strained construction to read into the definition of "Disposal" that it only applied to pre-default or enforcement disposals such as compulsory purchase. Even if it did apply to such disposals without clear wording seeking to limit or narrow the definition it seemed to me it would logically and on any fair reading also apply to a post default or enforcement disposal such as a sale by a receiver. Had the parties intended some narrower or specific limit to the definition of disposal, they would have said so; indeed, the more obvious and natural understanding of an involuntary disposal would be by way of some act of default or enforcement such as a forced sale or a sale by a Receiver. This then comes back to theuestionn of the non-standard permitted payments.

80. Absent permitted payments under clause 5 there is no mechanism other than clause 13 to moderate the process of sales, disposals and priorities, or any mechanism for determining the allocation of proceeds. Clause 13 is the clause that addresses how the proceeds are to be applied but only subject to clause 5 for so long as permitted payments are to be made. Even in the absence of an event of default clause 13 would determine the application of the proceeds for any disposal after the junior lender had received its £1.5m.

81. Clause 13 is headed Application of Proceeds. Mr England sought to rely on its position within the ICD as relevant to whether it applied after an act of default. In particular he relied on the fact that it followed clause 11 headed (Senior debt enforcement) and presumably after clause 12 (Junior debt enforcement). I was not persuaded that its position after clauses 11 and 12 limited the application to clause 13 to after senior or junior debt enforcement. Indeed, clause 14 and the subsequent clauses have little, if anything, to do with default. There is nothing in the run of clauses in the ICD which suggested there was any particular restriction on the application to clause 13 to events of default and enforcement under clauses 11 and 12. Whilst headings may have some influence on contractual interpretation, that would

usually only be in a case where there are clear delineation between different parts of a complex document.

82. Here the ICD is neither a long nor complex document. It is structured in a relatively conventional way so that each clause is a subheading and then under that subheading there are a series of subclauses relevant to that heading. Those headings include, definitions, priorities (clause 2), borrower covenants, junior lender covenants, permitted payments (at clause 5), preservation of rights, cooperation and so on. Clause 11 and 12, relate to debt enforcement; 13 is the application of proceeds, which, as I say, is a general application of proceeds clause. Then there are clauses relating to refinancing, Powers of Attorney, all the way through to severance, counterparts, third-party right, notices and governing law. Twenty-six clauses in all. There is nothing in this combination of headings or the position of clause 13 in the run of clauses that suggests that the ICD should be interpreted such that clause 13 only applies to clauses 11 or 12. Indeed, quite the contrary, the headings demonstrate there is nothing unusual in the running order of the clauses at all and, to the extent the position of the clauses or the headings are of any assistance at all, they serve only to assist me reaching the conclusion as a matter of construction interpretation that clause 13 is not limited to enforcement matters.

83. Turning then to clause 13, it is a long clause, and I will only read in 13.1:

> "13. The application of proceeds.
>
> 13.1 Priorities.
>
> The priority of the lender shall stand regardless of the order of execution, registration or notice or otherwise, so that all amounts from time to time received or recovered by the lender, pursuant to the terms of any debt document or in connection with the realization or enforcement of all or any part of the security constituted by any of the security documents shall, after providing for all reasonable outgoings, costs, charges, expenses and liabilities of enforcement, exercising rights or winding up repayments ranking in priority as a matter of law, be applied in the following order of priority.
>
> (a) In or towards the discharge of the senior debt.

(b) Once the senior debt has been fully discharged in or towards the discharge of the junior debt and

I Once the junior debt has been fully discharged, to the borrower or any other person entitled to it."

84. There is nothing particularly unusual in this clause, the substance is to apply the proceeds in accordance with priorities negotiated between the parties. It does this by making clear that **all** amounts received or recovered by the lenders in connection with the realisation or in connection with enforcement of all or any part of the security constituted by the security documents is paid in accordance with the priorities set out in clause 2.

85. On its face, it covers **any** realisation not just any enforcement event. It is not therefore limited to enforcement events on its face, and that makes complete sense within the context of the ICD absent the specific requirements of clause 5 and indeed it makes sense with clause 5 since the permitted payments only apply until the junior lender has received £1.5 million. After the junior lender has received £1.5m it is clause 13 which moderates the payments to the senior and junior lender in accordance with their respective priorities. It must and does therefore apply to the realisations that are pre-enforcement (and to which clause 5 does not apply) which appears to me to undermine Mr England's argument that it did not apply to realisations. Absent the permitted payments clause 13 simply regulates the payments to the lenders in accordance with their priorities.

86. There is no dispute between the parties that the permitted payments in clause 5 were permitted, only whether they continue apply after enforcement. There is no carve-out within clause 13 on its face for permitted payments and yet the parties treated clause 13 as "subject to" clause 5 and would have continued to do so but for the senior lenders' analysis of the effect of the enforcement. And for the reasons set out above they would have had to have done so until the junior lender had received £1.5 million. Mr England accepts that position in a non-enforcement world, despite his submissions about realisations, but says that clause 5 ceased to operate like this on the appointment of the Receiver; this despite there being no equivalent to say a stop notice within clause 5 or anywhere else in the ICD. On both parties' construction of clause 13 it

appeared there was an unspoken addition of the words “subject to”, so far as they were needed at all, into clause 13 but for Mr England only in a pre-enforcement world.

87. Despite accepting the position in relation to the pre-enforcement world Mr England argued that when one considered the ICD in context either clause 13 was not subject to clause 5 at all or clause 5 ceased to apply once enforcement had taken place. This appeared to me to strain the construction of clause 13 and clause 5.

88. It seemed to me that clause 13 was a general clause modified by clause 5, that appeared the construction that made obvious commercial and business sense of the ICD. From a contextualised and textual analysis of the ICD it seemed to me obvious and consistent with the structure the parties had agreed that the more precise, narrow and limiting specific provisions of clause 5 took precedence over the general provisions in clause 13. Indeed, the addition of the words “subject to” were not in fact essential since the general (clause 13) would be obviously subject to the specific (clause 5). This is a recognised approach to construction and there is nothing unusual in it. This was the way in which the parties had operated the permitted payments clause until the Receivers were appointed and, absent the appointment of the Receivers, the way in which they accepted it would have continued to operate with the consent of the parties until the £1.5 million had been reached. It seemed to me that either clause 13 operated as a general overarching clause relating to the application of proceeds subject to clause 5 in full and to any disposal whenever it occurred or not at all.

89. Why was it then that Mr England considered that an act of enforcement and the appointment of a Receiver changed that position other than it may have what the senior lender thought, believed or wanted?

90. Mr England submitted that the position the junior lender in relation to both Flat 13 and the way in which they had pleaded paragraph 14 of the particulars of claim demonstrated an element of flexibility in their approach. He pointed to the position they had agreed to in relation to Flat 13 agreeing to the senior lender receiving more than 50 per cent of the net proceeds. He relied on the junior lender’s apparently

position in paragraph 14 as being inconsistent with their construction of clause 5 now. But that is not the position adopted by the junior on this application, the declaration that is sought relates only to clause 5 of the ICD not some hybrid version that the parties may have operated under prior to the dispute arising. Further the question of what as agreed in relation to Flat 13 involves a factual dispute to be determined at trial. But in either case it was not clear how either of these submissions could help in construing the main question of whether clause 5 continued to apply to disposals after enforcement.

91. What these submissions did seem to go to was an argument that in any event clause 5 should someone be read as relating to and being contained by the GPC Valuations. The argument appeared to be that what had happened in relation to Flat 13 – simply reflected how clause 5 was supposed to work. The argument appeared to be that the no matter what the value at which the flats were disposed of that the senior lender was entitled to an amount from the net proceeds that amounted to 50% of the GPC valuation. Just saying that out loud demonstrates that it is entirely at odds with the wording of clause 5 as set out in this judgment and how it works.

92. Mr England submits that since both parties say that the GPC valuation have some relevance to the factual matrix that the Court can deduce that it was inherently unlikely that they would have agreed to clause 5, allowing the junior lender to recover a net 50 per cent of any disposal. But I remain unclear what relevance the GPC valuation has to the ICD. It may have underpinned the negotiations and the terms on which the parties agreed to lend to the borrower, but beyond that it does not appear to me to have any relevance to the construction question in relation to the ICD which regulates the priority position between the lenders. There is no reference to it in the ICD and it would have been easy to do so. Clause 5 did not refer to it. The definition of "Disposal" refers to market value not the GPC valuation. The senior lender is permitted to sell at market value as determined by the senior lender in their absolute discretion so neither the senior lender nor anyone else is bound to rely on the GPC valuation for those purposes. And although the senior lender was lending for 12 months what is market value changes over time, so it makes sense that the ICD simply refers to market value rather than some valuation obtained at the time the lending was

negotiated in late 2021. This does not assist when seeking to construe the interaction between clauses 5 and 13 neither of which refer to or rely on the GPC valuations.

93. The only other reference to valuation in the ICD which was relied on by Mr England was in clause 11.6. Clause 11.6 comes under the heading "Senior lender enforcement" and so is a relevant clause following the appointment of a Receiver by the senior lender. Clause 11.6 is a clause that requires the junior lender to cooperate, to facilitate a disposal (with a small D not in the defined sense of the term). The junior lender is required to consent if the price is not less than 90 per cent of the market value, set out in the most recent valuation addressed to the lenders.

94. Mr England appeared to suggest that this would be a reference to the GPC valuation but, even by the time of the hearing of the application, there appeared to be other later valuations which would be considered the most recent valuation addressed to the lenders, such that the relevance of the GPC valuations to this exercise was even more unclear. It is also unclear whether the reference to addressed to the lenders meant it needed to be addressed to both the lenders or one of the lenders. In so far as it had any relevance to this exercise the GPC valuation was certainly not addressed to both of the lenders.

95. By the time of the hearing it is already 2½ years after the GPC valuation had been undertaken. There was evidence of more recent valuations of the flats and that evidence of the market value of the flats does not appear to coincide with the GPC valuations, which were higher. There was some suggestion that it was known that the GPC valuations had been optimistic for the purposes of the lending which may explain why there is such a differential between the GPC valuations and the offers received. But since on the terms of the ICD, the GPC valuations are not relevant that is something that may only need to be looked at in the context of the arguments about bad faith.

96. As it is for the purposes of clause 11.6 any disposal has to be at market value and the most recent market value it therefore becomes increasingly unlikely that even if in early 2022 the GPC valuation might have been a market value for the purposes of clause 11.6 that anyone could credibly argue it was in 2024. More significantly for

this exercise clause 11.6 does not refer to the GPC valuation at all. Nor did it appear to have any particular significance or provide any assistance or understanding the interaction between clauses 5 and clause 13.

97. Mr Laville submitted the market value in the definition of "Disposal" and in clause 11.6 valuation were different things. They are but I do not see them as inconsistent. However, I do not see how clause 11.6 affects the application of clause 5. A Disposal will proceed at the senior lender's absolute discretion at market value. The junior lender has no right to interfere or block such a sale under clause 5 of the ICD. Under clause 11 if the senior lender or the Receiver appointed by them in an enforcement situation intends to seek to dispose at less than 90% of the current valuation then they need to seek approval from the junior lender. The junior lender only has the right to refuse consent in those circumstances. Where the senior lender and their Receiver were proceeding at market value in their absolute discretion, the junior lender would not have the right to block any disposal (big or some small D) pre or post enforcement. And of course, Clause 5 and clause 13 only take effect once a disposal has been agreed as they relate to the application of the proceeds of sale not the process for determining if it should take place. It is difficult to see why the valuation issues would therefore affect the operation or construction of these clauses. But more importantly absolutely none of these arguments provides any basis for construing the ICD or the disposals (big or small D) as being governed by the GPC valuations in some way.

98. In relation to the ICD generally, Mr England argued that there is a significance to the carve-outs for permitted payments in some clauses but not in clause 13. He referred me to those clauses which made specific reference to permitted payments and noted that they were earlier in the ICD and not included in the clauses relating to enforcement. Mr England argued therefore that it was clear that clause 13.1 applied to the exclusion of clause 5 in an enforcement scenario and such construction reflected the balance of power between the senior and junior lender. His submissions were that when the parties intended a clause to be subject to clause 5, they made it clear that there was no such reference in clause 11 onwards which he argued was the enforcement section. Again, I was unpersuaded by this analysis of the clauses in ICD, as I have set out – the clauses run through in normal order and there is nothing in the

terms of the ICD as drafted or in clause 13 itself to suggest clause 13 only applies post-enforcement. For the reasons I have been given, it appears more consistent to view clause 13 as applying to both realisations and enforcement sales where realisations had also happened before enforcement, given the limited nature of the permitted payments.

99. Two additional points can be made: First, the reference to permitted payments within the borrower covenants and the junior lender covenants were permissive; they allowed an exception to the general position in relation to priorities. Second, the absence of the reference to permitted payments in clause 13 did not mean it only applied to enforcement and not for realisations generally for the reasons I have given. Clause 5 is an exception to the broader application to clause 13 in relation to all realisations and enforcements.

100. Mr England further submitted that there was some significance to the fact that clause 5 referred to the borrower not the Receiver, despite the Receiver being a defined term. Mr England argues that the obligation to comply with clause 5 is an obligation of the borrower and argued that it was only consistent the borrower not being in default or insolvent. However, since the Receiver would have been acting as agent for the borrower in relation to sales post-receivership, the absence of a specific reference to the definition "Receiver" in clause 5 did not appear to me to add anything to the construction arguments, and indeed the fact that the Receiver was the borrower's agent for the purposes of the disposal added support to the argument that clause 5 could and did continue to have effect post-enforcement.

101. Mr England argued it was unlikely that the senior lender would have agreed to a clause that continued to permit the permitted payments after enforcement and that most permitted payment clauses cease on enforcement. But that is not what has been drafted and it is not what the ICD says. Here clause 5 includes no stop notice provisions and does not say on its face it ceases on enforcement. I cannot read into a permitted payments clause the series of clauses or provisions or words that are not there and, as I have set out above, there is good reason for clause 13 to apply to both realisations and enforcement on the parties own understanding of clause 5 – both clauses had a role to play prior to enforcement and not only after enforcement, and the

senior lender does not say otherwise. This is why there would have needed to be clear words or drafting to then exclude the operation of clause 5 once the enforcement has taken place. Whether in error or otherwise, as a matter of construction on the plain words of the ICD and on its natural not strained meaning, clause 5 does not cease to have effect when a Receiver is appointed and nothing in clause 13 says it does; indeed for the reasons set out, it is clear that clause 13 applied both before and after enforcement.

102. Mr Laville submitted (and perhaps more a jury point) that since all the evidence available suggests the margins were tight and enforcement was a real possibility, that had the parties intended to disapply clause 5 on enforcement they would have said so. It seems to me the very fact that it seems clear that enforcement was a real risk when the ICD was negotiated forms part of the context in which this ICD needs to be considered and is a further reason to suspect that it reflects a carefully negotiated compromise between the parties and means what it says.

103. Mr England's submissions appear to me to be caused by a late or after-the-event realisation by the senior lender that in the absence of stop provisions clause 5 would continue after enforcement. It is clear from my analysis of the clauses that both clause 5 and clause 13 are needed for the ICD to operate, with clause 5 being the specific as against clause 13 general provisions and that once the permitted payments have been made, clause 13 applies across the board. This seemed to me to be a case of the type that Lord Hodge warned against in *Wood v Capita*, here it appears that the senior lender has agreed something which with hindsight did not serve their interests

104. For these reasons it seems to me that, on the construction of the ICD, I am satisfied that clause 5 continues to apply after the appointment of the Receiver. It may have been preferable for additional words such as "subject to" to have been included in clause 13, but it seems to me plain that clause 13 operates subject to the permitted payments clause in clause 5. Once the junior lender has received £1.5 million it will sit behind the senior lender until the senior lender is fully paid. Clause 13 will then be the only clause which moderates how the proceeds of sale should be applied thereafter.

105. I was not persuaded that any of the arguments advanced by Mr England that sought to limit the application of clause 5 to a non-enforcement world appeared to me to fit with the natural meaning of words used and nothing about the conclusion I have reached is inconsistent with common sense, commercial sense or business sense. In this scenario that appears likely to mean there will be no surplus left and indeed it seems possible the senior lender will not recover all of its own lending and neither will the junior lender. But in both cases the lenders took a commercial decision to lend and negotiate commercial terms – that neither will fully recover is the nature of the beast.

106. As I have already indicated, this is a case in which the Court has, it appears, all the material necessary for it to grasp the nettle, as I have just done. It seems clear to me on this construction point that the defence advanced is entirely fanciful and that the Defendant has no real or realistic prospect of defending the claim on this narrow construction issue. It is consistent with the overriding objective and good case management to have determined the narrow point of construction and there is no other compelling reason why the construction point should go to trial and every reason to summarily determine it.

107. Turning then to the declaration, clearly given this dispute a declaration is helpful to clarify the position between the parties. It quite obviously has value and utility, and will help to clarify the position in relation to the parties' respective legal rights, should it need to be clarified, and for third parties who may have to deal with the sales of the flats going forwards. It provides certainty not just for the parties to these proceedings but to the borrower, the Receiver, any purchaser of the flats and against the world at large. It seems to me in the circumstances it is a paradigm case for granting a declaration. I will therefore make a simple declaration to the effect that clause 5 continues in full force and effect after the Receivership.

108. For the reasons I have given however, I will not make any order yet that the Defendant account or pay a sum of money in relation to Flat 15, as I am not satisfied that that claim for equitable relief is pleaded adequately. The senior lender may however want to reflect on whether they maintain their current position in light of this judgment. The dispute between the parties is not over since some those parts of the

claim relating to the allegations of bad faith were never part of the summary judgment application and the Flat 13 issues were accepted in light of the evidence to be matters for trial. I would intend to list a CCMC but not until the autumn term, which will allow time for any amendments and reflection by the parties.

109. The development of Boat Race House has clearly had difficulties. It appears that the market may have turned against it as a consequence of events outside the control of the borrower or the lenders. Whether it is useful for the senior lender, junior lender, or the borrower to continue to throw what may be good money after bad is something for the parties to reflect on.

110. For the reasons set out in this judgment, I will grant summary judgment and a narrow declaration in relation to clause 5. I will not make an order for summary judgment in relation to the Flat 15 proceeds and the Flat 13 argument is not pursued on a summary basis. I will hear submissions on the terms of the order and costs.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge