Neutral Citation Number: [2024] EWHC 2948 (Ch)

Claim No: CR-2023-005436

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

IN THE MATTER OF POCKET RENTING LIMITED (in administration)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 29/11/2024

Before:

HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

- -

Between:

PETER WILKINSON	**Applicant**
- and -	
(1) GAVIN MAHER and MATTHEW MAWHINNEY (as the joint administrators of Pocket Renting Ltd) (2) TRIMONT EUROPE LIMITED (3) MACQUARIE PRINCIPAL FINANCE PTY LIMITED, UK BRANCH	**Respondents**

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- -

Peter Shaw KC (instructed by **Gunnercooke LLP**) for the **Applicant**
Matthew Weaver KC (instructed by **Clyde & Co LLP**) for the **First Respondents**
Tom Smith KC and **Jon Colclough** (instructed by **Signature Litigation LLP**) for the **Third Respondent**

Hearing dates: 3-6 September 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 29 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

HH JUDGE KLEIN

HH Judge Klein:

1. By an Insolvency Act Application Notice issued on 12 April 2024, the Applicant ("Mr Wilkinson") has challenged the validity of the First Respondents' ("the administrators'") appointment as administrators of Pocket Renting Ltd ("the company"). The administrators were appointed out of court by the Second Respondent on the Third Respondent's ("Macquarie's") behalf on 29 September 2023. Mr Wilkinson has challenged the validity of the administrators' appointment on the ground that, he has contended, contrary to paragraph 16 of Schedule B1 to the Insolvency Act 1986 ("the Act"), Macquarie's floating charge on which that appointment rests was not enforceable on 29 September 2023. Mr Wilkinson has, alternatively, also sought an order under paragraph 81 of Schedule B1 to the Act ("para.81"), that the administrators' appointment ceases to have effect on the ground that Macquarie had an improper motive in causing the administrators to be appointed.

2. On 25 September 2024, I declared that the administrators' appointment as the company's administrators was valid. I have also decided to dismiss the para.81 application. This judgment contains the reasons for those decisions.

Representation

3. Peter Shaw KC represented Mr Wilkinson at the hearing and Tom Smith KC and Jon Colclough represented Macquarie. I am grateful to them all for their assistance; in particular for their helpful and comprehensive oral and written submissions (which, along with all the witness evidence I received and documents to which I was referred, I considered before reaching any decision).

4. The administrators were represented at the hearing by Matthew Weaver KC. The administrators are neutral on the application and Mr Weaver did not take an active part in the hearing, save that he very helpfully proposed a practical way I might give my decision, on Mr Wilkinson's challenge to the validity of the administrators' appointment, before 29 September 2024, so that an application could be made, if necessary, for the administrators' retrospective appointment from 29 September 2023 (which, as it has turned out, has not been necessary). I am very grateful to Mr Weaver for his proposal, which he had to develop under considerable time pressure.

5. The Second Respondent was not represented at the hearing. It has been represented by the same solicitors as Macquarie and, as I indicated during the hearing, I am satisfied that it has elected not to participate in the application.

6. In the circumstances, when I refer to "the parties" in this judgment, I have in mind Mr Wilkinson and Macquarie, unless I indicate otherwise.

Participants

7. It is helpful, in this case, to now introduce the participants in the events I have had to consider.

8. Mr Wilkinson: He is an estate agent of many years' experience. He was CEO of Dendro Ltd ("Dendrow") at the material times. Dendrow is an estate agency offering property sales and management services, amongst other services. It is based in Ealing. The

company (Pocket Renting Ltd) was Mr Wilkinson's in reality at the material times. He was its only director and, indirectly, its only shareholder. The company was a wholly owned subsidiary of Pocket Renting Holdings Ltd in which Mr Wilkinson was the only shareholder. He also claims to be a creditor of the company (a necessary pre-condition for making a para.81 application). I do not know the basis on which he claims to be a creditor, but I have assumed he is, because no-one has suggested otherwise. The company owned, directly or indirectly, a large portfolio of generally high-value residential property in West London. The number of properties which the company owned directly has not been agreed but, at the material times, it was a minimum of fifteen properties. The remaining properties in the portfolio (up to seventy six) were held on trust for the company by one or more of Mr Wilkinson, Chrystalla Wilkinson (Mr Wilkinson's former wife) and Mark Spurling. Dendrow managed the company's property portfolio and, in due course, marketed company properties for sale.

9. Matthew Wilkinson: He is Mr Wilkinson's son. He has worked for Dendrow since 2011 and managed Dendrow on a day-to-day basis at the material times.

10. John Concannon: He is Mr Wilkinson's nephew. He has worked for Dendrow since about 2019. He was responsible for the management of the company's property portfolio.

11. Mark Spurling: He has been a mortgage broker since 2000. He is, by his own account, a close personal friend and business associate of Mr Wilkinson who speaks with Mr Wilkinson about three times a day.

12. Alexander Pasche: He is a real estate finance broker at Avier Capital Ltd who introduced Mr Wilkinson to Macquarie (in particular, to Mr Cole).

13. Alexi Antolovich: He has been Macquarie's Global Co-Head of Real Estate since 2019. He is responsible for all regions in which Macquarie invests except for North America. He reports to Florian Herold, Macquarie's Global Head of Principal Finance.

14. James Mansell: He became an Associate in Macquarie's real estate finance group in August 2020 and was promoted to a Vice-President position in the same group in about May 2023. He was responsible for the financial modelling of the transaction in this case and for the preparation of internal investment memoranda, as well as for due diligence. He reports to Mr Antolovich.

15. Joshua Cole: He was a Vice President, and, in May 2023, became a Senior Vice President, in Macquarie's Principal Finance Group. He explains his role in this way in his witness statement:

> "My role is to originate and manage real estate investment transactions across a range of sectors involving diverse investment and transaction structures. I manage transactions from the origination to execution stage, and I continue to oversee the transaction in the post-execution stage by working closely and collaboratively with borrowers, sponsors and my internal colleagues."

He too reports to Mr Antolovich.

16. Edward (Ned) Creese: He was an analyst, and, in May 2023, promoted to an Associate role, in Macquarie's Principal Finance Group. I understand that he reports to Mr Cole. He also prepares financial models and internal memoranda and he acts as a principal point of contact with borrowers.

17. Ewan Macleod: He is a member of Macquarie's Risk Management Group. Mr Antolovich explained the function of the Risk Management Group in this way in his witness statement:

> "Macquarie's investment approach is relatively cautious. As primarily a banking group (albeit Macquarie Principal Finance Pty Limited is separate from the banking arm), the Macquarie Group's priority is to protect its capital. Macquarie is therefore different to specialised credit and equity funds who have appetite for riskier, higher leverage deals.
>
> We have rigorous processes in place to evaluate the risk of every transaction that we enter into and ensure that such risk is minimised where possible and, to the extent that the risk is determined to be unacceptably high, Macquarie's stance is to not proceed with the transaction, irrespective of the upside. To that end, Macquarie has a Risk Management Group ("RMG"), that sits alongside Macquarie's management that works with the deal teams to analyse each transaction. RMG is extremely conservative and if the individuals within RMG who we are working with have issues with a transaction that cannot be resolved, they will elevate the matter to more senior individuals within the risk group. Typically these will be elevated firstly to Xavier Eyraud, the Head of Macquarie Capital Credit and ultimately to Andrew Cassidy, the Chief Risk Officer of Macquarie Group. Ultimately, if RMG are not entirely comfortable with a deal and its structure it will not go ahead."

The events leading to Mr Wilkinson's application

18. Mr Wilkinson became concerned, towards the end of 2022, that increases in interest rates were affecting the company's revenue. He therefore decided to engage Mr Pasche to assist him in consolidating the company's borrowing secured on its property portfolio. At the time, the portfolio secured borrowing to a number of lenders on different terms. Mr Pasche introduced Mr Wilkinson to Mr Cole. The three men met at Dendrow's Ealing office on 20 January 2023. They, together with Mr Antolovich, then met again on 31 January 2023, when they inspected some of the company's property portfolio externally.

19. All the further events occurred in 2023. For the rest of this judgment, unless I specify a year, the date I am referring to was in 2023.

20. By 1 February, Mr Cole had sent Indicative Terms to Mr Wilkinson and the parties had discussed a plan for the sale, by the company, of properties in its portfolio. On 1 February, Mr Cole emailed Mr Wilkinson:

> "As discussed earlier this morning, please see attached revised term sheet in final form from a Macquarie perspective, with key changes summarised below:
>
> Minimum sale targets updated to ensure enough liquidity to service interest and expenses which we estimate to be approximately £4.8m / around 4 units by September 2023 (or October 2023) and approx. £3.6m each quarter the facility is on foot thereafter...
>
> Reflected an updated facility size which will be:
>
> £63m upfront (less any applicable upfront fees and transaction expenses)
>
> £2m of pay in kind interest for the first 6 months to allow time to get vacant possession, market and sell properties to ensure sufficient cash flow to meet cash interest on an ongoing basis…
>
> We have included language around the sales targets, which mandate the sales plan which we discussed yesterday in your office."

21. Mr Cole sent revised Indicative Terms, dated the previous day, on 2 February ("the 2 February Term Sheet") to Mr Wilkinson. A particular feature of the 2 February Term Sheet was, according to Mr Cole's covering email, that it included:

> "a requirement for £2m of sales by 30 June as per the waterfall schedule of the rest of the document. This is required so we can increase the facility amount [by £750,000 from the amount proposed in the term sheet sent by Mr Cole the previous day]."

22. By the 2 February Term Sheet, Macquarie proposed:

   i) a two year facility, secured by way of a first charge on the company's property portfolio, amounting to the lower of £65.75 million and 75% of the market value of the portfolio;

   ii) that the facility would include a payment in kind facility ("a PIK facility") of £1.5 million, which the company could utilise to cover the payment of interest due on the principal loan;

   iii) an asset disposal plan, as follows:

   > "Asset disposal plan to be complied with as follows:
   >
   > By June 2023 disposals of properties to be realised generating net disposal proceeds of a minimum of £2.0m
   >
   > By September 2023 disposals of properties to be realised generating net disposal proceeds of a minimum of £4.8m

> Disposals of properties generating a minimum of £3.6m in net sale proceeds to be generated quarterly thereafter";

iv) an arrangement fee of 1.25% of the facility amount, payable following entry, by the company, into the facility agreement;

v) a three month exclusivity period for Macquarie, beginning when the company signed the term sheet, which, if terminated by the company, would result in the company paying a £100,000 break fee;

vi) that the company and Mr Wilkinson would reimburse Macquarie's transaction expenses and would pay a "work fee" of £100,000 to Macquarie which would be set off against the arrangement fee if the transaction completed.

23. Mr Wilkinson returned the 2 February Term Sheet signed on the company's behalf to Mr Cole three hours later, under cover of an email in which he said:

> "Regarding the requirement of £2m sell in June I believe we already have one property in hand, and I have another bite on 2 more in Ealing which should cover this.
>
> In addition, once the deal is done, I will be placing on the market 2 flats from each block in Maida Vale and 4 more in Ealing which will more than cover the obligations of income during the allotted period."

24. Mr Wilkinson had valued the company's property portfolio at £94 million. Macquarie appointed Savills to provide an independent valuation. Savills took the view that the net internal floor areas of the portfolio had been over-estimated by about 13% (and, in due course, valued the property portfolio at somewhat less). Mr Wilkinson did not agree with Savills' assessment.

25. Mr Wilkinson, Mr Antolovich and Mr Mansell lunched at the Ivy restaurant in Chelsea on 3 March. What happened at this lunch ("the Ivy lunch") is central to Mr Wilkinson's application and is disputed.

26. Mr Wilkinson had instructed Mishcon de Reya LLP ("Mishcons") to act for the company in the transaction by the time of the Ivy lunch. Mr Wilkinson reported what happened at the Ivy lunch to Nick Strutt, a Mishcons partner the following working day, 6 March:

> "I had lunch with Macquarie last Friday.
>
> They feel the valuation may be slightly below par around £82,000,000 and still want the deal to go ahead so do I.
>
> There will be new terms coming, part original deal and part profit share the outline of which I am happy with subject to seeing and being advised on the details.

> Suffice to say they are looking to complete the third week of March 2023 this is possible as your team are working at full speed.
>
> We are here to help in any way we can."

27. Revised Indicative Terms were sent to Mishcons by Macquarie on 7 March. In response, Mr Strutt emailed Macquarie on 8 March:

> "Alex [Pasche] and I have been through the revised terms with [Mr Wilkinson]. All OK."

He suggested an amendment to the terms which is not relevant to the present dispute and asked for an execution copy of the Indicative Terms (as so amended).

28. Those Indicative Terms were emailed on 8 March ("the 8 March Term Sheet"). They provided as follows:

    i) a thirty month (a two and a half year) facility, secured by way of a first charge on the company's property portfolio, amounting to the lower of £65.75 million and 80% of the market value of the company's property portfolio;

    ii) rather than being made up of two tranches, as the 2 February Term Sheet had contemplated (a principal loan and a PIK facility), the facility was proposed to be in three tranches:

    > "Tranche A: senior term loan facility of the lower of £56.0m and an LTV of 70%
    >
    > Tranche B: profit participating loan of the difference between (i) Tranche A; and (ii) the lower of £65,750,000 and an LTV of 80% less the amount of the PIK facility.
    >
    > Tranche C: PIK facility [for 9 months] of £1.5m";

    iii) an asset disposal plan, which was more demanding than that proposed in the 2 February Term Sheet, as follows:

    > "By June 2023 disposals of properties to be realised generating net disposal proceeds of a minimum of £2.0m
    >
    > By September 2023 disposals of properties to be realised generating net disposal proceeds of a minimum of £6.0m
    >
    > Disposals of properties generating a minimum of £4.5m in net sale proceeds to be generated quarterly thereafter";

    iv) an arrangement fee of 1.25% of the facility amount, payable following entry, by the company, into the facility agreement;

v) a three month exclusivity period for Macquarie, beginning when the company signed the term sheet, which, if terminated by the company, would result in the company paying a £100,000 break fee;

vi) that the company and Mr Wilkinson would reimburse Macquarie's transaction expenses and would pay a "work fee" of £100,000 to Macquarie which would be set off against the arrangement fee if the transaction completed.

29. Mr Wilkinson signed the 8 March Term Sheet on the company's behalf the same day, after Mr Strutt and Mr Pasche had gone through its terms with him, according to Mr Strutt's email to Macquarie returning the signed term sheet.

30. By 23 March, Mr MacLeod had carried out an analysis of the amount Macquarie might lose, if company fully utilised the proposed facility and it defaulted, in the scenario that the company's property portfolio was sold to a property investor. He estimated that Macquarie might lose between £10 million and £35 million. He also advised that it would be likely to take up to two years to sell the properties in the portfolio on a piecemeal basis. This resulted in an internal discussion in Macquarie about reducing the amount of the PIK facility from £1.5 million. Mr Mansell noted that it was being proposed that the facility be reduced to £250,000, which he thought made it more likely that the company might more quickly default on its commitments. Mr MacLeod responded:

> "Reducing PIK turns up the heat on [Mr Wilkinson] to sell, which is the intention. We don't want him dawdling.
>
> With say 0.5 m PIK he can get away with fewer than 6 sales in first quarter but then he'll know he needs to set attractive pricing to get the units away."

31. Mr Concannon sent Macquarie a budget on 28 March. Mr Mansell responded the same day expressing reservations about the budget, adding:

> "We expect at least 6 sales to complete a quarter at average V (~€5.5m net proceeds), this is certainly necessary for the first three quarters - where amortising down is important to reduce the future interest bill."

32. Macquarie had, by now, received Savills' opinion that the company's forty one properties in Maida Vale would take six to eight months to sell. (In fact, Savills expressed the same opinion with respect to all the company's properties they valued, save for one which they thought would take six months to sell).

33. The amount of the PIK facility continued to be debated internally in Macquarie. On 28 March, Mr Mansell (and possibly Mr Creese) were advocating for a £250,000 increase in the amount of the £500,000 PIK facility then being proposed by Mr MacLeod. Mr Mansell estimated that an increase in the amount of the PIK facility to £750,000 would give the company headroom to sell one less property by any interest payment date than it might otherwise have to do if the amount of the PIK facility was £500,000.

34. On the same day, 28 March, Mr Cole informed Mr Pasche that Macquarie would only be able to offer the company a £750,000 PIK facility. He asked Mr Pasche to update Mr Wilkinson and Mishcons.

35. On 29 March, Mr Creese said in an internal discussion:

> "We as a deal team (incl. AA) plan to sit down with Peter after funding and get him to commit to a strategy.
>
> We assume peter will be in constant contact with buyer's agents/his broker network and formulate his own strategy to sell down parts of the portfolio. We think it is unlikely Peter would put multiple flats in the same mansion block at the market as once, and he will most likely take a diversified approach to this.
>
> It is likely depending on when offers come in & firm up, Peter may begin bringing other properties to market to keep "smooth" out properties on the market (but not to flood it/have too many on the market such that is become burdensome for Dendrow to manage all the sales). Furthermore, we have no mechanism that allows peter to apply [X] additional sales proceeds to the next quarter's mandatory amort, so he is also forced here to sell consistently/evenly as possible.
>
> MPF will be actively monitoring the sales/offers on market, and likely step in if there's a scenario where a listed property is getting no offers/interactions at the price listed by Peter – we would then suggest a price reduction, or to take off the market.
>
> We have also made it very clear to Peter that he must sell ~ 6 properties (based on MPF V) per quarter to hit the mandatory amortisation per quarter. Obviously if he achieves pricing above this, it may be 4 or 5 per quarter."

36. Mr Mansell continued to reflect on the budget the company was required to submit as part of the transaction. He prepared an updated draft budget which he sent to Mr Wilkinson, Mr Concannon and Mr Pasche on 30 March, under cover of an email in which he said:

> "Take a look, if you agree - send it back to us and we can accept as the budget and mark complete."

The draft budget assumed net sales proceeds of £2.75 million by 15 June, further net sale proceeds of £2.77 million by 15 July and a further £900,000 by 15 August. Referring to the property disposals contemplated by these figures, Mr Mansell said:

> "These net sale proceeds are what we think you need to hit."

Mr Wilkinson returned the budget to Macquarie on the same day without any adverse comment.

37. On 31 March, two agreements were entered into; namely:

i) a Facility Agreement between (i) the company (as borrower), (ii) Holdings and (iii) Macquarie effectively as Arranger, Original Lender, Agent and Security Agent ("the Facility Agreement");

ii) a Security Agreement between (i) the company and (ii) Macquarie ("the Security Agreement").

38. The Facility Agreement contains the following provisions:

"**1. Definitions and Interpretation**

1.1 Definitions

…

"Allocated Loan Amount" means that part of the Total Commitments allocated to each Property as set out in Part C and Part D of Schedule 1.

…

"Default" means an Event of Default or any event or circumstance specified in Clause 24 (Events of Default) which would (with the expiry of a grace period, the giving of notice, the making of any determination under the Finance Documents or any combination of any of the foregoing) be an Event of Default.

…

"Disposal Proceeds" means the net disposal proceeds derived from the disposal of a Property or the shares in the Borrower in accordance with paragraph (c) of Clause 22.4 (Disposals).

…

"Event of Default" means any event or circumstance specified as such in Clause 24 (Events of Default).

…

"Finance Party" means the Agent, the Security Agent, the Arranger, a Hedge Counterparty or a Lender.

…

"Interest Payment Date" means 15 February, 15 May, 15 August and 15 November in each year and the Termination Date, with the first Interest Payment Date being 15 August 2023…

…

"Lender" means…any Original Lender…

…

"Obligor" means the Borrower…

…

"PIK facility" means the term loan facility made available under this Agreement as described in paragraph (c) of Clause 2.1 (The Facilities).

"PIK Commitment" means…£750,000…to the extent not cancelled…

"PIK Interest" shall have the meaning given to that term in Clause 8.3 (Capitalisation of interest payable pursuant to the PIK facility).

"PIK Loan" means a loan made or to be made under the PIK facility or the principal amount outstanding for the time being of that loan.

…

"Secured Party" means a Finance Party…

…

"Termination Date" means the date falling 30 Months from and including the first Utilisation Date.

…

"Total Investment Commitments" means the aggregate of the Investment Commitments being the lower of:

(a) an amount that if borrowed by the Borrower would ensure that the Loan to Value would not exceed 70 per cent.; and

(b) £56,000,000.

"Total PIK Commitments" means the aggregate of the PIK Commitments being £750,000.

…

"Transaction Obligor" means…an Obligor…

…

1.2 Construction

…

(d) A Default (other than an Event of Default) is "continuing" if it has not been remedied or waived and an Event of Default is "continuing" if it has not been waived.

…

2. The Facilities

2.1 The Facilities

Subject to the terms of this Agreement, the Lenders make available to the Borrower:

(a) a sterling term loan facility in an aggregate amount equal to the Total Investment Commitments;

(b) a sterling term loan facility in an aggregate amount equal to the Total Profit Participating Commitments; and

(c) a sterling term loan facility in an aggregate amount equal to the Total PIK Commitments.

…

3. Purpose

3.1 Purpose

…

(c) The Borrower shall apply all amounts borrowed by it under the PIK facility towards the payment of interest under the Investment Loan pursuant to Clause 8.1 (Calculation of Interest) and Clause 8.2 (Payment of interest) and towards payment of any amounts to be capitalised in respect of the PIK Loan pursuant to Clause 8.3 (Capitalisation of interest payable pursuant to the PIK facility).

…

6. Repayment

6.1 Repayment of Loans

The Borrower shall repay the Loans in full on the Termination Date.

…

7. Prepayment and cancellation

7.3 Mandatory prepayment

The Borrower must apply the following amounts in prepayment of the Loans…in the order of application contemplated by Clause 7.4 (Application of mandatory prepayments):

(a) the amount of Disposal Proceeds…

7.4 Application of mandatory prepayments (partial payments)

(a) An amount referred to in paragraph (a) of Clause 7.3 (Mandatory prepayment) in respect of the disposal of a Property…shall be applied on the date provided for in accordance with paragraph (f) of Clause 17.3 (Rent Account) or paragraph (d) of Clause 22.4 (Disposals), as applicable, as follows:

(i) first, in or towards payment pro rata of any unpaid amount owing to the Agent, the Security Agent, any Receiver or any Delegate under the Finance Documents;

…

fourthly, in an amount equal to the aggregate of:

(1) 100% of the Allocated Loan Amount of the Property the subject of…the relevant disposal in or towards prepayment of the Investment Loan and the PIK Loan pro rata until paid in full and thereafter, the Profit Participating Loan;…

…

8. Interest

…

8.2 Payment of Interest

(a) Except as provided in Clause 8.3 (Capitalisation of interest payable pursuant to the PIK facility), the Borrower shall pay accrued interest on that Investment Loan and that PIK Loan on each Interest Payment Date.

(b) The Borrower may satisfy its obligations to pay interest pursuant to this Clause 8.2 (Payment of interest) in respect of an Investment Loan by either:

(i) so long as no Default is continuing and subject to Clause 8.2(d) below utilising the PIK facility serving a Utilisation Request in respect of the PIK facility no later than five Business Days prior to the relevant Interest Payment Date…

(d) No more than £500,000 of the PIK Commitment shall be available for utilisation prior to the Second Interest Payment Date and thereafter, the full amount of the PIK Commitment shall be available for utilisation.

8.3 Capitalisation of interest payable pursuant to the PIK facility

(a) Except as provided below, interest payable in respect of a PIK Loan (the "PIK Interest") will be capitalised on each Interest Payment Date and added to the principal amount of the outstanding PIK Loans. References to the Loans will include the capitalised interest added to it.

(b) Paragraph (a) above will not apply:

…

(ii) if a Default is continuing;…

…

8.6 Notification of rates of interest

(a) (i) Subject to paragraph (ii) below, the Agent shall, promptly upon an interest payment being determinable, notify:

(1) the Borrower of that interest payment;…

…

17. Bank Accounts

17.1 Designation of Accounts

(a) The Borrower must maintain the following bank accounts in its own name:

(i) a rent account designated the "Rent Account";

(ii) a deposit account designated the "Deposit Account"; and

(iii) a current account designated the "General Account".

…

17.3 Rent Account

…

(f) The Obligors must ensure that the Disposal Proceeds of a Property are paid into the Rent Account and immediately applied in accordance with Clause 7.3 (Mandatory prepayment) or Clause 7.5 (Mandatory prepayment – Refinancing).

…

22. General Undertakings

…

22.4 Disposals

…

(e) The Obligors must ensure that the Disposal Proceeds are immediately applied…:

…

(ii) (in the case of the disposal of a Property) paid into the Rent Account for application in accordance with Clause 17.3(f) (Rent Account)…

…

22.18 Conditions subsequent

…

The Borrower shall provide to the Agent no later than the date falling three Months from the date of this Agreement a copy of a Satisfactory FRA for each Property where the Borrower is the freeholder in respect that Property.

…

23. Property Undertakings

…

23.2 Occupational Leases

(a) The Borrower may not without the consent of the Agent (such consent not to be unreasonably withheld):

(i) enter into any Agreement for Lease which:

(1) is for a term of more than two years; or

…

(4) would by entering into that Agreement for Lease would result in a material reduction in the Market Value of the relevant Property;…

…

23.13 Property Disposals

(a) On or before 30 June 2023 (or such later date as agreed by the Agent), the Borrower must ensure that it has deposited Disposal Proceeds in an aggregate amount of not less than £2,000,000 into the Rent Account.

(b) On or before 30 September 2023 (or such later date as agreed by the Agent), the Borrower must ensure that it has deposited Disposal Proceeds in an aggregate amount of not less than £6,000,000 into the Rent Account.

(c) In respect of each quarter following 30 September 2023 (or such later date as agreed by the Agent), the Borrower must ensure that it has deposited Disposal Proceeds in an aggregate amount of not less than £4,500,000 into the Rent Account in that Interest Period.

…

24. Events of Default

Each of the events or circumstances set out in this Clause 24 is an Event of Default (save for Clause 24.17 (Acceleration)).

24.1 Non-payment

An Obligor does not pay on the due date any amount payable pursuant to a Finance Document at the place and in the currency in which it is expressed to be payable unless:

(a) its failure to pay is caused by:

(i) administrative or technical error; or

(ii) a Disruption Event; and

(b) payment is made within three Business Days of its due date.

…

24.3 Other obligations

(a) An Obligor does not comply with any term of:

…

(iv) Clause 23.2 (Occupational Leases) [or] 23.13 (Property Disposals)…

(b) A Transaction Obligor does not comply with any provision of the Finance Documents (other than those referred to in Clause

24.1 (Non-payment), Clause 24.2 (Financial covenants) and paragraph (a) above).

(c) No Event of Default under paragraph (b) above will occur if the failure to comply is capable of remedy and is remedied within ten Business Days of the earlier of (i) the Agent giving notice to the Borrower and (ii) any Transaction Obligor becoming aware of the failure to comply.

…

24.17 Acceleration

(a) On and at any time after the occurrence of an Event of Default which is continuing the Agent may, and shall if so directed by the Majority Lenders:

(i) by notice to the Borrower:

(1) cancel the Available Commitment of each Lender whereupon each such Available Commitment shall immediately be cancelled and the Facilities shall immediately cease to be available for further utilisation;

(2) declare that all or part of the Loans, together with accrued interest, and all other amounts accrued or outstanding under the Finance Documents be immediately due and payable, whereupon they shall become immediately due and payable; and/or

(3) declare that all or part of the Loans be payable on demand, whereupon they shall immediately become payable on demand by the Agent on the instructions of the Majority Lenders; and/or
(ii) exercise or direct the Security Agent to exercise any or all of its rights, remedies, powers or discretions under the Finance Documents.

…

37. Remedies and Waivers

No failure to exercise, nor any delay in exercising, on the part of any Finance Party, any right or remedy under a Finance Document shall operate as a waiver of any such right or remedy or constitute an election to affirm any of the Finance Documents. No election to affirm any Finance Document on the part of any Finance Party shall be effective unless it is in writing. No single or partial exercise of any right or remedy shall prevent any further or other exercise or the exercise of any other right or remedy. The rights and remedies provided in each Finance

Document are cumulative and not exclusive of any rights or remedies provided by law."

39. The Security Agreement contains the following provisions:

"**1. Definitions and interpretation**

…

1.2 Construction

(a) Capitalised terms defined in the Facility Agreement have the same meaning in this Deed unless expressly defined in this Deed.

(b) The provisions of clause 1.2 (Construction) of the Facility Agreement apply to this Deed as though they were set out in full in this Deed except that references to the Facility Agreement will be construed as references to this Deed.

…

2. Creation of Security

2.1 General

…

(b) All security created under this Deed…is created in favour of the Security Agent;…

…

2.2 Land

(a) The Chargor charges:

(i) by way of a first legal mortgage all estates or interests in any freehold or leasehold property now owned by it; this includes the real property (if any) specified in Schedule 1 (Real Property); and

(ii) (to the extent that they are not the subject of a mortgage under paragraph (i) above) by way of a first fixed charge all estates or interests in any freehold or leasehold property now or subsequently owned by it.

…

2.11 Floating charge

(a) The Chargor charges by way of a first floating charge all its assets not otherwise effectively mortgaged, charged or assigned

> by way of fixed mortgage, fixed charge or assignment under this Clause 2.
>
> ……
>
> The floating charge created by this Clause 2.11 (Floating charge) is a "qualifying floating charge" for the purpose of paragraph 14 of Schedule B1 to the Insolvency Act 1986.
>
> …
>
> **10. When Security becomes enforceable**
>
> 10.1 Event of Default
>
> This Security will become immediately enforceable if an Event of Default occurs and is continuing."

40. Mr Wilkinson wrote to Mr Cole on 4 April:

> "Great news listed these on the market with offers in.
>
> 3 Flats at 241 on at £1,350,000 (Offer in at £1,250,000 from Freeholder) complete May 2023 buying with tenants in situ.
>
> 120 Wymering,140 Wymering and 99 Wymering at £950,000, 33 Wellesley £850,000 55 Sheffiled at £1.200.000 million,15 £1.1 million 21 £1.2 million and 111 Castellain £1.1 million all the Chippenham's at £1.1Million each 52, 58a and 64a and 83 Carlton at £950,000. (I have identified a buyer for these)
>
> Saam, 5 Greenlaw at £550,000 5 Hilton House at £650,000 and 9a Montpelier at £1.5 Million (Offers in at £1.3 and £1.5 Million) and 292 Western Avenue at £950,000."

41. Mr Wilkinson, Matthew Wilkinson, Mr Concannon, Mr Mansell, Mr Cole and Mr Creese lunched at the Aphrodite Taverna, W2 on 19 April ("the Aphrodite lunch").

42. The following exchange took place the same day between Mr Mansell and Mr MacLeod:

> "Mr Mansell: …sounds like a couple of offers, but meeting was more about how we wanted reporting to be.
>
> …
>
> Mr MacLeod: I thought there was a sales tests of £2m by 30th June which [Mr Wilkinson] needs to meet?"
>
> Mr Mansell: He knows this."

43. Mr Mansell also emailed Mr Wilkinson, Matthew Wilkinson and Mr Concannon:

> "Thanks for lunch today, 7 hours later I am still very full!
>
> …
>
> In terms of the nearest two proceeds hurdles:
>
> 23.13 Property Disposals
>
> (a) On or before 30 June 2023 (or such later date as agreed Borrower must ensure that it has deposited Disposal Proceeds
>
> 1) As per above the first one is £2m Disposal Proceeds by 30th June 2023
>
> 2) In order to meet the IPD interest it is likely it could be a further £6-£7m by 15th August (IPD 1). The balance really depends on the operation of the waterfall and achieved price vs savills values.
>
> Let us know if you have any questions."

44. Mr Wilkinson responded the next day:

> "Thank you to you, guys.
>
> On the case with attached."

The reference to "attached" was a reference to a monitoring sheet which was attached to Mr Mansell's email and which he had asked Matthew Wilkinson to complete by close of business on 20 April.

45. Matthew Wilkinson returned the monitoring sheet on 21 April. Mr Creese summarised what it showed in an internal Macquarie email:

> "Currently 19 properties on the market (17% of Collateral) value of £13.7m/MPF ALA £10.9m
>
> Average of 14 days on market as of today (majority placed on mkt 6th April)
>
> Of these 19, 5 have confirmed offers (3.2% of Collateral) at an offer value of £2.92m (+11.8% vs Savills V)
>
> These 5 are expected to generate net sales proceeds of £2.85m."

46. Mr Creese emailed Mr Wilkinson on 10 May:

> "…for the first interest payment to be made on August 15 in whole with no PIK utilisation or additional contributions, we estimate a further ~£4m of gross sales will need to be made and settled by Mid-August. To this extent, we think it would make sense to put some of the larger stock on the market e.g. the

houses in Ealing etc which will help move the dial and if any mini portfolio transactions were available these will greatly assist in achieving the targets."

47. Mr Wilkinson replied the following day:

> "We are on the case, and I already have deals pending on the ones that are going through the next Tranche as it is difficult to issue Sales Memorandum without the correct ownership this was the major issue with 24 Elgin, 130 Wellesley and 9a Montpelier this will bring in around £3 million. We are also in discussions re 21 Castellain and 30 Lauderdale and 2 flats in Leith Mansions which will bring in around £4 Million.
>
> I am also in discussions with 2 buyers for all the 3 houses in Chippenham just shy of £3 Million. The neighbour of 85 Elgin Mansions £1.2 Million has expressed an interest through a third party to buy to complete in June.
>
> As for selling strategy although some of these are on the market.
>
> Although it is a lot more tempting for the buyer to see properties that are not on the Market and because of Dendrow I can do it at arm's length and still be control, for example the Dendrow team are talking off the record to the new proposed freeholder of 245 Elgin Avenue to buy all flats with the tenants £1.7 Million.
>
> We have a saying in the industry if the property must go on the web to sell everyone knows about it and it is liable to become stale.
>
> **I am very confident about August and the commitment we have made**" (emphasis added).

48. Mr Wilkinson emailed Mr Cole on 17 May:

> "…
>
> I am advised by the solicitors that 241 Elgin will exchange next week all in with Solicitors (buyers) funds in, completion £1.25 Million on 12th June 2023.
>
> This is the first of many to go."

49. Mr Wilkinson emailed Mr Cole on 8 June:

> "…just agreed 3 Morshead at £850,000 tenant deal will be done 2 weeks 3 at [outside]."

50. Mr Creese emailed Mr MacLeod on 9 June:

> "Please see below detailing the targeted exchange dates from Peter. This amounts to approximately £3.7m of net sales proceeds. Peter has also indicated that there's an additional 7 units that he is close on and expects to contract next week - (245 Elgin (3x), 52, 58a, 64a Chippenham, and 21 Castellain Mansions).
>
> Please let us know if this is sufficient to get sign off on the amendment letter?
>
> Thanks
>
> …
>
> Flat 9A, Ground Floor Flat, Montpelier Road, Ealing, London £1,300,000 Pending - July
>
> 1, 241 Elgin Avenue, Maida Vale, London, W9 1NJ £480,500 June 12th 13th
>
> 2, 241 Elgin Avenue, Maida Vale, London, W9 1 NJ £370,500 June 12 13
>
> 3, 241 Elgin Avenue, Maida Vale, London, W9 1NJ £399,000 June 12 13
>
> Flat 3, 1 Morshead Road, London, W9 1JH £850,000 Late June
>
> 130 Wellesley Court, 44-54 Maida Vale, London, W9 1RN £368,000 Late June or July."

Macquarie was apparently contemplating extending the time the company was required, in accordance with clause 23.13(a) of the Facility Agreement, to deposit £2 million Disposal Proceeds into the Rent Account.

51. Contrary to clause 23.13(a) of the Facility Agreement, no sum was paid in the Rent Account by the company by 30 June. The company wished to draw down £13.6 million under the Facility Agreement that day. Mr Creese emailed Mr MacLeod early in the morning:

> "Today we have our first covenant with West London Residential, in which Peter needed to generate £2,000,000 net sales proceeds. Peter will miss this covenant as he has generated no net sales proceeds to date.
>
> …
>
> What is our proposal?
>
> 1. We would like to waive this covenant and fund the remaining units today (£13.6m amount of proceeds), as part of this Sponsor will add £110k amount to the funds flow

> 2. We have said this leniency will not be shown on the IPD (15th August)
>
> 3. We are discussing finding portions of the portfolio to bulk sale
>
> 4. Although we are in frequent contact already, we are setting up a recurring weekly meeting to monitor progress on all sales/assets on market."

Mr MacLeod responded a little later:

> "I believe you shouldn't fund the £13.6m proceeds for now..."

Mr Wilkinson, Mr Cole and Mr Creese then took part in a video call. Mr Creese and Mr Cole prepared a note of the call the same day ("the 30 June note") (the accuracy of which Mr Wilkinson disputes):

> "Think this is the crux of it
>
> Call initially started with Borrower asking why we would not be settling today and what could be done
>
> MPF stated that we absolutely would not be settling today
>
> MPF explained that the £2m net sales proceeds/mandatory amortisation due 30 June 2023 was not met
>
> No settled sales to date
>
> Borrower explained situation was out of his control - i.e. land registry delays and price chip on agreed deal
>
> Borrower explained that he thought HL/MPF were not being 'commercial' around not settling earlier based on the outstanding notice of assignments/leaseholder consents
>
> MPF informed borrower that the contract had been breached as a result of no sales proceeds and this is a binary undertaking and the contract doesn't attempt to allocate blame only states what must be achieved to comply with the contract
>
> Stressed the importance of making the interest payment in mid August
>
> Explained we would have to reserve our rights on Monday and explained what this would entail, and explicitly advised the borrower he should take his own legal counsel on the topic
>
> Borrower threatened 'legal battles' stating MPF had promised Borrower that we would be able to settle today

> MPF stated that no such promise had been made and that all drawdowns would be subject to conditions precedent, including no occurring EOD
>
> MPF informed Borrower that we are in a difficult situation where we have no evidence to show sales progress/a pathway to generating sales proceeds
>
> MPF requested that Borrower communicates a clear plan on Monday am to MPF on a pathway to sales/amortisation of facility and that this would allow us to have a more constructive internal conversation around any amendments or waivers
>
> Borrower agreed to this."

Consistent with the attendance note, Mr Wilkinson confirmed to Mr Cole in an email sent the same day that he was "pulling out all the stops [with Mr Pasche] to report to [Macquarie] on Monday".

52. Macquarie wrote to the company on 3 July ("the First Reservation of Rights Letter"):

> "…
>
> 2. We write to inform you of a breach of Clause 23.13(a) (Property Disposals) of the Facility Agreement (the "Breach").
>
> 3. We note that the Breach constitutes an Event of Default. We hereby remind you that Events of Default entitle us to take the action specified in clause 24.17 (Acceleration) of the Facility Agreement.
>
> 4. We reserve any right or remedy we may have now, or in the future, in connection with, or arising from, the Breach, including those set out in clause 24.17 (Acceleration) of the Facility Agreement, which includes repayment of the Loan and enforcement of the Transaction Security.
>
> 5. The terms of this letter do not constitute a waiver of the Breach or of any other Defaults and all rights with respect to any Default are hereby expressly reserved. The Facility Agreement shall remain in full force and effect and nothing in this letter shall be deemed to be a waiver by us of, or consent by us to, any breach or potential breach (present or future) of any provision of the Finance Documents.
>
> 6. No failure to exercise, nor any delay in exercising, on the part of any Finance Party, any right or remedy under the Finance Documents, including the Security Documents, nor anything else which any Finance Party has or may have agreed or done or may in the future agree to do (including any receipt and/or acceptance of any sum payable under the Finance Documents,

> including the Security Documents) does, will or is intended to operate as a waiver of any Event of Default, any Default, any of your obligations or any right or remedy of any Finance Party. No waiver of the Finance Documents, including the Security Documents on the part of any Finance Party shall be effective unless in writing….”

53. The same evening Mr Creese emailed Mr Wilkinson:

> "…there are several items under the facility now outstanding relating to this transaction - can you please address each one individually and endeavour to provide the information/action as soon as possible.
>
> …
>
> Fire Risk Assessment - Freehold property
>
> The Borrower shall provide to the Agent no later than the date falling three Months from the date of this Agreement a copy of a Satisfactory FRA for each Property where the Borrower is the freeholder in respect that Property
>
> Per my count, there was 12 Freehold FRAs not available to us throughout DD – [Mr Creese then listed them]…”

54. Mr Concannon forwarded some of the fire risk assessments ("FRAs") to Mr Creese under cover of an email sent on 4 July, in which he added:

> "…
>
> With regards to:
>
> 54 Highfield - Not a HMO so FRA was never required.
>
> 52 / 58a / 64a Chippenham - HMO license held by tenant so it's their responsibility to complete FRA not the Landlord. We have however requested copies and will send once we receive."

55. Mr Creese prepared an email for Florian Herold on 5 July in which he said:

> "…
>
> Our preferred route forward would be to fund the final tranche (£13.6m - expiring 13th July) and reassess the enforcement/receiver route at the first [Interest Payment Date]…"

56. By 13 July, Hamptons had been engaged, in addition to Dendrow, to market the company's property portfolio. On the same day, Mr Creese responded to an enquiry by Mr MacLeod about whether Macquarie should take enforcement action. Mr Creese said:

> "At this stage, we think it's unlikely to be the best path to realising value given Peter is strongly motivated and aligned and has significant experience in selling residential within the area. MPF is separately assisting via engagement with brokers for bulk sales. Given the economics of the instrument and the implications of appointing a receiver in terms of cost, optics to buyers we're not sure it serves as the optimal solution for this stage. If the sponsor was less incentivised and responding poorly to the situation, we think it would be more appropriate to look at enforcing at that point, potentially even on a sub portfolio as per the unique structure we have in this deal."

57. The prospective purchaser of the Morshead Road property had sought a mortgage from Lloyds Bank plc. The bank wrote to his solicitors on 17 July:

> "As the seller has only owned the property since 6th June 2023 this is unacceptable to Lloyds Banking Group as detailed in Part 2 of the Lenders Handbook.
>
> In the meantime, please note that the transaction must not be allowed to proceed until this matter is resolved and the property has been owned for 6 months.
>
> …"

The Morshead Road property had been one of the properties in the company's portfolio which had been held on trust for the company. Title to the property was only transferred to the company after the Facility Agreement was entered into.

58. Mr Creese continued to support the company. In an internal Macquarie credit watch form completed on the same day, he wrote:

> "Owner is considered to be highly motivated to sell units and doing all he can in this regard, for example in early July doubling the number of properties listed for sale to 39 (£33m value). MPF is in nearly daily communication with the borrower."

59. Macquarie started to contact restructuring lawyers at the end of July. The conclusion had been reached by then that the company was "highly likely" to default on its 15 August interest payment obligation (see clause 8.2(a) of the Facility Agreement). It was being suggested, even at that stage, that it was "slightly pre-emptive" to take action immediately after the 15 August interest payment date if the company defaulted then. Alternative solutions were being proposed internally in Macquarie, although Mr Antolovich thought at "first blush" that these were "like a bit of a kick the can down the road strategy".

60. Mr Wilkinson met with Mr Cole and Mr Creese at Macquarie's office at Ropemaker Street, EC2 on 31 July ("the Ropemaker meeting").

61. The administrators were approached by Macquarie on 14 August and had an introductory call the same day.

62. The company paid £200,000 on the 15 August (the interest payment date). The amount of interest due that day was calculated by Macquarie, and communicated to Mr Wilkinson the following day, to be £1.818 million.

63. Macquarie wrote to the company on 23 August ("the Second Reservation of Rights Letter"):

> "…
>
> 3. We write to inform you of a breach of Clause 8.2 (Payment of Interest) of the Facility Agreement in respect of the Interest Payment Date falling on 15 August 2023 (the "IPD Breach").
>
> 4. We refer to our previous correspondence dated 3 July 2023 and note that there is an existing breach under clause 23.13(a) (Property Disposals) of the Facility Agreement (the "Existing Breach", together with the IPD Breach hereinafter referred to as the "Breaches").
>
> 5. We note that the Breaches constitute Events of Default. We hereby remind you that Events of Default entitle us to take the action specified in clause 24.17 (Acceleration) of the Facility Agreement.
>
> 6. Pursuant to clause 8.2(b)(i) (Payment of Interest) of the Facility Agreement as a consequence of the Breaches, we hereby give you notice that the PIK Commitment is no longer available for drawing.
>
> …
>
> 8. We reserve any right or remedy we may have now, or in the future, in connection with, or arising from, (i) the Breaches, including those set out in clause 24.17 (Acceleration) of the Facility Agreement, which includes repayment of the Loan, payment of default interest, payment of any fees payable under the Finance Documents and enforcement of the Transaction Security; (ii) the cancellation of Commitments referred to in paragraphs 6 and 7 above; and (iii) any further Events of Default which may occur in the future.
>
> 10. No failure to exercise, nor any delay in exercising, on the part of any Finance Party, any right or remedy under the Finance Documents, including the Security Documents, nor anything else which any Finance Party has or may have agreed or done or may in the future agree to do (including any receipt and/or acceptance of any sum payable under the Finance Documents, including the Security Documents) does, will or is intended to operate as a waiver of any Event of Default, any Default, any of your obligations or any right or remedy of any Finance Party. No waiver of the Finance Documents, including the Security

> Documents on the part of any Finance Party shall be effective unless in writing…"

64. Macquarie wrote to the company again, on 25 September ("the Demand Letter"):

> "…
>
> 2.3 As notified in the July Reservation of Rights Letter sent via email on 3 July 2023, the Borrower failed to deposit aggregate Disposal Proceeds of an amount not less than £2,000,000 into the Rent Account on or before 30 June 2023…
>
> …
>
> 2.6 Between 10 August 2023 and 1 September 2023, £3,515,729.39 of Disposal Proceeds was received and applied as follows as at 25 September 2023:
>
> (a) £442,176.29 to pay unpaid interest, leaving an unpaid balance of £1,175,750.08 of interest due as at 25 September 2023; and
>
> (b) £3,073,553.10 to pay outstanding amounts under the Investment Facility, leaving an unpaid balance under the Facility Agreement of £47,420,093.38 as at 25 September 2023.
>
> 2.7 Accordingly, and as notified to you in the August Reservation of Rights Letter sent via email on 23 August 2023, an Event of Default under clause 24.1 (Non-payment) of the Facility Agreement has occurred and is continuing…
>
> …
>
> 4.1 In light of the Continuing Events of Default and the potential further Events of Default, we hereby give you notice that, pursuant to the Agent's rights under clause 24.17 (Acceleration) of the Facility Agreement, all outstanding Loans under the Facility Agreement, together with all accrued interest, applicable fees and all other amounts accrued or outstanding under the Facility Agreement, are hereby immediately due and payable. As at the date of this letter, these amounts total £57,797,530.31 (the Total Outstanding Amount) …
>
> 4.2 We hereby demand immediate payment of the Total Outstanding Amount by the Borrower.
>
> …"

As I set out below, Mr Shaw has suggested (and the agreed chronology records) that, in addition to the £200,000 payment made on 15 August, the company had paid £62,000 more than the £3.515 million sum referred to in the letter, as follows:

i) 10 August - £1.085 million in Disposal Proceeds were paid;

ii) 1 September - £2.492 million in Disposal Proceeds were paid.

(By the Application Notice, Mr Wilkinson also accepts that, in September, £47.42 million was outstanding to Macquarie under the Facility Agreement).

65. As I have noted, the administrators were appointed out of court on 29 September. The administrators met Mr Wilkinson on 3 October. Their attendance note does not record Mr Wilkinson mentioning the representations which he now contends were made at the Ivy lunch.

66. As I have also noted, Mr Wilkinson's application was issued on 12 April 2024. Deputy ICC Judge Schaffer ordered a speedy trial on 26 April 2024. He also directed that the Application Notice stand as Points of Claim, and he gave directions for Points of Defence and Points of Reply.

The parties' pleaded cases

67. As I indicated, at the beginning of the hearing, I intended to do, I have determined Mr Wilkinson's application by reference to the statements of case, save where it has been just to do otherwise, particularly because the Deputy ICC Judge gave directions for statements of case and because the parties' statements of case have been the subject of amendment. There is Court of Appeal support for this approach. In *Dhillon v. Barclays Bank plc* [2020] EWCA Civ 619, Coulson J noted, at [19]:

> "…It is too often the case in civil litigation that the pleadings become forgotten as time goes on, and the trial can become something of a free-for-all. That is not appropriate. I can only echo and agree with the recent warning by David Richards LJ in *UK Learning Academy Ltd v. Secretary of State for Education* [2020] EWCA Civ 370 when he said:
>
> > "47. I would add here that I endorse the view expressed by the judge to the parties at the trial and repeated in his judgment at [11] that the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties' own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate. If, as he said, there was "a prevailing view that parties should not be held to their pleaded cases", it is wrong. That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished.""

In consequence, Mr Shaw made a mid-hearing application to re-amend Mr Wilkinson's Points of Reply, which I allowed to a limited extent, but substantially refused, for the reasons I gave at the time.

68. Nevertheless, despite what I had indicated, Mr Shaw advanced a case in closing which, in part, had not been pleaded and about which, I understand, the other parties had largely not been warned. This is a matter to which I will need to return.

69. As pleaded, the parties' cases are as follows.

70. The parties agree that, as matter of general principle, if an Event of Default specified in the Facility Agreement (see clause 1.2(a) of the Security Agreement and clause 1.1 of the Facility Agreement) had occurred and was continuing on 29 September 2023, the floating charge created by the Security Agreement was enforceable and the administrators were validly appointed (see clauses 2.11 and 10.1 of the Security Agreement). They also agree that, as a matter of general principle, if such an Event of Default had occurred and was continuing on 25 September, Macquarie could accelerate payment as it did by the Demand Letter, with effect that, from that date, "all outstanding Loans under the Facility Agreement, together with all accrued interest, applicable fees and all other amounts accrued or outstanding under the Facility Agreement, [became] immediately due and payable" (see clause 24.17 of the Facility Agreement).

71. The parties disagree about when an Event of Default is "continuing".

72. Mr Wilkinson contends that, in any event, the company's breach of clause 23.13 of the Facility agreement (because the company did not deposit £2 million Disposal Proceeds into the Rent Account by 30 June) and the company's breach of clause 8.2(a) of the Facility Agreement (because the company only paid £200,000 of the £1.818 million interest payable on 15 August) cannot be treated as continuing Events of Default and so were not a valid basis for the administrators' appointment.

73. He contends that, at the Ivy lunch, Mr Antolovich made the following representation; that:

> "if interest rate rises in 2023 or other issues [cause] delays in sale of the company's properties with the consequence that the company [cannot] meet its repayment obligations…Macquarie [will] not take any enforcement action in the first year of the facility…" ("the Ivy representation").

74. Mr Wilkinson also contends that, at the Ivy lunch, Mr Antolovich also represented that:

> "unpaid interest could be added to the principal of the amount of the loan drawn down whether under the…PIK facility…or otherwise…"

Having considered Mr Wilkinson's evidence on this particular matter (see para.15.6 of his first witness statement) as well as para.9.5 of Mr Shaw's skeleton argument, it is clear that what Mr Wilkinson contends in this respect (and what he can establish) is no more than that Mr Antolovich explained, as was true, that the proposed facility arrangement would incorporate a PIK facility, which it did.

75. Mr Wilkinson contends that the Ivy representation, which, he claims, the company relied on to enter into the Facility Agreement and Security Agreement, has estopped Macquarie from appointing the administrators for any breach, by the company, of clauses 23.13 or 8.2(a) of the Facility Agreement ("the Financial Covenants") (see paras.5.3, 9 and 10 of the Application Notice). Mr Wilkinson contends, in the alternative, that the Ivy representation together with the company's reliance on it has given rise to a collateral contract which has had the effect of preventing Macquarie from relying on a breach of the Financial Covenants to appoint the administrators (see para.19 of the Application Notice). (It must be the Ivy representation on which Mr Wilkinson relies in this context, rather than the second one said to have been made at the Ivy lunch relating to a PIK facility, because only the Ivy representation covered enforcement action).

76. Mr Wilkinson supports his case, that the Ivy representation was made, by reference to what he says was a representation made by Mr Mansell at the Aphrodite lunch: (as quoted in the Application Notice) "to always talk to them [if there were any problems] as they [Macquarie] had no interest in calling it [the facilities] in".

77. Mr Wilkinson also supports his case that the Ivy representation was made by reference to what he says was represented at the Ropemaker meeting; namely, that the First Reservation of Rights Letter was "nothing to worry about" and was "normal practice", and that "Macquarie weren't about to do anything". (I note, in passing, that it is reasonable to suppose that it is normal practice for Macquarie to send a reservation of rights letter if a borrower defaults in complying with a key milestone in a transaction and that it is true that Macquarie did not then take enforcement action. The administrators were not appointed for another two months. I also note, in passing, that an assertion that the First Reservation of Rights Letter was "nothing to worry about" is not obviously consistent with the 30 June note (the accuracy of which Mr Wilkinson disputes) which was made at about the time the letter was actually sent).

78. Although Mr Wilkinson goes further in the Application Notice to suggest that the alleged representations made at the Aphrodite lunch and at the Ropemaker meeting themselves give rise to an actionable estoppel or collateral contract, he does not plead that the company relied on them. Neither an estoppel nor a collateral contract claim is sustainable in such circumstances and I did not understand Mr Shaw to rely, at the hearing, on either alleged representation as an independent basis for any claim.

79. Mr Wilkinson contends, alternatively, in relation to the company's breach of clause 8.2(a) of the Facility Agreement (the interest payment obligation), that it was not a continuing Event of Default on 29 September because almost all the interest due on 15 August had been paid by the September date and the company had recourse to the PIK facility for the outstanding balance. (I explain this alternative case more fully later in this judgment, because Mr Wilkinson's case as presented at the hearing is different to his pleaded case).

80. Macquarie denies that the Ivy representation was made. It accepts that, at the Aphrodite lunch, Mr Wilkinson "was told to communicate with Macquarie about any difficulties which arose (as he was also told at the Ivy [lunch])" (see para.23.2 of the Amended Points of Defence). It also accepts that, at the Ropemaker meeting, Mr Cole said it is ""normal practice"…to send a reservation of rights letter to a defaulting borrower" (see

para.27.2 of the Amended Defence). Otherwise, it denies that the representations alleged by Mr Wilkinson to have been made at the Ropemaker meeting were made.

81. Macquarie also contends that, at the time the administrators were appointed, there were other continuing Events of Default on which their appointment could be validly based; including that:

    i) the company (as is not disputed) had granted five year leases of 9 Gordon Road, Ealing (on 1 July), (ii) 54 Highfield Road, Acton (on 1 August) and (iii) 41a Gordon Road, Ealing (on 1 August) without Macquarie's consent. Macquarie contends that these grants breached clause 23.2(a)(i)(1) of the Facility Agreement, which immediately gave rise to Events of Default (see clause 24.3(a)(iv) of the Facility Agreement) and, not having been waived, were continuing Events of Default. (Clause 23.2(a)(i)(1) of the Facility Agreement actually provides that a breach occurs on an agreement for lease being reached, rather than on the actual grant of a lease which follows. No-one sought to make a distinction between the two events. Inevitably, in this case, there will have been an agreement for lease before the leases in question were entered into. A focus on when the agreements for lease were entered into would have only had the effect of backdating when the company might have breached the clause);

    ii) the company had failed to provide satisfactory fire risk assessments ("FRAs") in accordance with clause 22.18 of the Facility Agreement, which breach, although remediable, was not remedied within 10 business days of the company being aware of the breach (which period ended before the administrators' appointment), so that this breach, not having been waived, was a continuing Event of Default when the administrators were appointed (see clauses 24.3(b), (c) of the Facility Agreement).

82. There appears to be no dispute that the company failed to provide FRAs in relation to 54 Highfield Road, Acton or in relation to the properties at 52, 58A and 64A Chippenham Road, London.

83. Mr Wilkinson does agree (as Mr Shaw confirmed in opening and as is confirmed in the Agreed List of Issues) that neither his estoppel claim nor his collateral contract claim extends to any breaches of the Facility Agreement by the company by its grant of five year leases or its failure to provide FRAs. However, Mr Wilkinson (by his pleaded case, at least) contends that neither of these matters can be relied on to justify the administrators' appointment because they were not referred to in the Demand Letter (see para.38(b) of the Re-amended Points of Reply).

84. By an amendment to the Points of Reply I permitted at the hearing, Mr Wilkinson contends, alternatively, that any breach of the Facility Agreement by the company not providing any FRAs was not an Event of Default because (i) Macquarie did not give the company notice of the breach as contemplated by clause 24.3(c)(i) of the Facility Agreement, (ii) any breach was waived by Macquarie's inaction in response to Mr Concannon's 4 July email and/or (iii) any default was "de minimis".

85. Mr Wilkinson also contends, and has sought a declaration, that the Facility Agreement and the Security Agreement ("the transactional documents") are void for common mistake, which Macquarie denies. If the transactional documents are void for common

mistake, the administrators' appointment cannot have been valid. (Mr Wilkinson brought a similar misrepresentation claim which was abandoned during Mr Shaw's closing, with good reason. The misrepresentation claim faced a number of what were, at least, significant hurdles, including, amongst others, in relation to whether Mr Wilkinson had standing to make the claim, to whether any representation made was actionable and not merely a non-actionable matter of opinion or prediction about the future and to whether Mr Wilkinson could establish that the company could give counter-restitution if the transactional documents were rescinded).

86. Mr Wilkinson contends that the company and Macquarie both mistakenly assumed that there would be no obstacle to the sale of the part of the company's property portfolio which, before the transaction, was held on trust for the company ("the trust properties") by virtue of the fact that it had been held on trust and, as part of the transaction, was being re-registered at HM Land Registry to record the company as being the registered proprietor of the trust properties. The company and Macquarie were mistaken, Mr Wilkinson contends, because, he further contends, there is a rule, as recorded in the UK Finance Handbook for Lenders, that "UK lenders will refuse absolutely, or conditionally, to lend money to a borrower for the purpose of purchasing any property where the seller has held the legal title for a period of less than six months" (which Mr Wilkinson refers to as "the 6 month rule") (see para.23 of the Application Notice). Mr Wilkinson contends that, because of the 6 month rule, proceeds from the sale of the trust properties could not be available to the company to discharge the Financial Covenants for at least 8 months, so that "contractual performance by the company [was] rendered entirely different from that contemplated [when the transactional documents were signed] and/or impossible" (see para.26 of the Points of Claim).

87. As I have indicated, Mr Wilkinson makes a para.81 application in the alternative.

88. Para.81 provides:

> "(1) On the application of a creditor of a company the court may provide for the appointment of an administrator of the company to cease to have effect at a specified time.
>
> (2) An application under this paragraph must allege an improper motive -
>
> …
>
> (b)…on the part of the person who appointed the administrator.
>
> (3) On an application under this paragraph the court may -
>
> (a) adjourn the hearing conditionally or unconditionally;
>
> (b) dismiss the application;
>
> (c) make an interim order;
>
> (d) make any order it thinks appropriate (whether in addition to, in consequence of or instead of the order applied for)."

89. Mr Wilkinson contends (in para.40 of the Application Notice) that:

> "Macquarie knew…that it was bound by and subject to the legal effect and consequences of the promissory estoppel and/or collateral contract and/or mistake…set out [in the Application Notice]. [Mr Wilkinson] infers from the circumstances of the [First Reservation of Rights Letter and the Second Reservation of Rights Letter] and the inflated [Demand Letter] that the motive in instructing the Second Respondent to appoint [the administrators] was to seek to take control of [the company] and stifle any litigation based on the matters pleaded [in the Application Notice]."

Macquarie denies that contention.

90. As it happens, Mr Wilkinson did not pursue this serious allegation at the hearing, although he pursued a para.81 application on different (unpleaded) grounds, which I consider further below (and which I have indicated must be dismissed).

Witnesses

91. Mr Wilkinson, Matthew Wilkinson, Mr Concannon and Mr Spurling gave evidence in support of Mr Wilkinson's case. Mr Cole, Mr Creese, Mr Antolovich and Mr Mansell gave evidence in support of Macquarie's case. Mr Maher (one of the administrators) filed a witness statement.

Mr Wilkinson

92. Mr Wilkinson gave the following evidence.

93. Explaining why he wanted to consolidate the company's borrowing, he said that he was, at the time, "an experienced property manager, who was…faced with potential future difficulty due to interest rate rises".

94. The purpose of his initial meetings with the Macquarie team was to "showcase" his business.

95. He said in his witness statement that:

> "I also recall that in the period prior to the lunch at The Ivy (after receipt of the indicative terms in each of February and again in March) that Mr Pasche told me: "Don't worry, they will support you if you are doing all that can be done as Macquarie always support their customers.""

He explained, in re-examination, that he understood Mr Pasche to mean:

> "…nothing would be done for the term of the loan; they wouldn't do anything. They would look after us…"

Expanding on this evidence in cross-examination, he said that Mr Pasche repeatedly made similar comments; he suggested about four times a month for five months.

96. He was asked why specifically he "did not push back" on the provision in the 2 February Term Sheet requiring the company to generate net disposal proceeds of £2 million by 30 June. He explained that he was told he did not need to worry about that requirement by Mr Pasche. He continued:

> "…it is sort of a general conversation that Alex Pasche and I would have had."

He added that he was happy to agree with the asset disposal plan proposed in the 2 February Term Sheet (including the requirement for the company to generate net sale proceeds of £2 million by 30 June) because he "assumed it would be best endeavours…because, when you are working with people, that's what we do", although he later in his cross-examination he acknowledged that he had appreciated that the asset disposal plan had to be complied, albeit, he added, "subject to valuation".

97. Early in the meal during the Ivy lunch, according to Mr Wilkinson, Mr Mansell explained that Savills had valued the company's property portfolio lower than expected with the result that the proposed loan to portfolio value was "not quite within Macquarie's normal parameters". Mr Wilkinson continued, in his witness statement:

> "They then went into the details of the number of properties to be sold and by what time in order to service interest and other payments under the facilities. I said to them that this was: "a tall order". I looked them both in the eye and asked them twice (in a row I believe to stress the question): "What happens if we don't sell the required amount [of properties] in the required time?" Mr Antolovich was very clear in confirming that Macquarie would not do anything in the first year of the Facilities and that, if an issue came up, they would talk to me about how best to resolve it They both replied, first Mr Antolovich and then Mr Mansell (emphasising what Mr Antolovich had just said): "As long as we are talked to each other all will be OK and that in the first 12 months nothing will be done anyway.""

He added:

> "Towards the end of the meal, I know that I asked the question again about not selling enough (properties) within the time (to make the payments under the Facilities) and they continued say: "Not to worry, as long as we are talking."
>
> …
>
> …I was very concerned about this happening as the market was very poor at that time with interest rates still going up."

(On this evidence, strictly the Ivy representation was not limited to circumstances where property sales were delayed because of "interest rate rises…or other issues", but would apply even if there was no reason that sufficient properties were not sold by the company to meet the Financial Covenants. In fact, in cross-examination Mr Wilkinson said that he could not recall any mention of any pre-condition to enforcement action not

being taken, although he later apparently resiled from that suggestion and appeared to suggest that reference was made at the Ivy lunch to delays in sales being a pre-condition for no action being taken, and later still reverted to the position he took originally during cross-examination. When Mr Smith continued to try to establish whether any representation about not taking enforcement action was subject to any pre-condition, Mr Wilkinson initially did not address the point but said: “We are talking about three gentleman shaking hands on a transaction and working out the best way we can for all parties concerned”).

98. Not obviously consistent with this evidence, he said in cross-examination:

> “…when people agree a transaction, we just assume that providing we were talking, we would sit around the table and talk and work it out...We normally do come to an agreement with a sensible lender.”

99. He was also cross examined by Mr Smith about his claim that, at the Ivy lunch, it was represented to him that “unpaid interest could be added to the principal of the amount of the loan drawn down whether under the…PIK facility…or otherwise…”:

> “Q. So you say that Macquarie said that unpaid interest could be capitalised, rather than that it would be; is that right?
>
> A. …as I said in my witness statement, both Alexi and James said that nothing would be done for 12 months, and that is what I understood, this whole matter.
>
> Q. Well, they weren’t, according to this, as I understand it, they were not promising that unpaid interest necessarily would be added under the PIK facility, were they?
>
> A. All I remember is that they were talking about another customer in Battersea, that if he had the same issues that I was afraid of happening did in fact happen, they kept saying they did loan on loan on loan, and I inferred that to be that they would always help me and talk.
>
> Q. I see. So it is something which you inferred because of what they had said about the Battersea customer; is that right?
>
> A. All I am saying is that they said that during the 12 months and referring to my witness statement, that nothing would happen for 12 months.
>
> Q. Yes, but just this point about adding the interest to the loan; you just said a moment ago that that’s something that you inferred, because of what they had said about the Battersea customer; is that right?

A. In my witness statement, in my witness statement I referred to them saying that nothing would happen; we would -- if you didn't sell anything, we would help you throughout.

Q. Can you just listen very carefully to the question and actually answer the question, please. You said a moment ago that you inferred, from what they had said about the Battersea customer, that interest could be added to the loan; do you recall giving that evidence?

A. Well, there's no inference. I know what they said.

Q. Right. So, you are now saying that it was something they said expressly, is it, rather than something which you inferred?

Judge. You have to speak your answer, Mr Wilkinson, for the recording…You can't just nod your head. Listen to Mr Smith's question again, and answer the question…

Mr Smith. So, on this point about whether interest could be added to the loan; do you follow? And you said a moment ago that that you had inferred from what Macquarie had said about the Battersea customer that the same would apply in your case; do you recall that? You said that that was something you had inferred. Do you remember giving that evidence?

A. All I can remember is them saying -- using the Battersea as an example and then saying, "We would do nothing for 12 months".

Q. Right. So, they didn't actually say anything about unpaid interest being added to the loan in your case?

A. We may have spoken, I think it is in my witness statement, with regard to capitalised and crystallised. I think we had spoken. I think it is in my witness statement.

Judge. Mr Wilkinson, Mr Smith has asked you a pretty straightforward question: if you look at (ii) on {A/2/7}, did someone say the words: "Unpaid interest could be added to the principal of the amount of the loan drawn down whether under the Payment in Kind ... facility under the Facility Agreement or otherwise ..."?

A. My Lord, I think that is in my witness statement.

Q. Well, I would like to know what your answer is.

A. And my answer to that is yes."

100. Mr Wilkinson appeared to resile from that position when he was re-examined on the question of what was said about interest payments at the Ivy lunch:

> "Q. You were asked about the statement in the application notice about unpaid interest in relation to the loan could be capitalised; and my learned friend put to you, the question is: was what was being said to you either that the interest could be capitalised or it would be capitalised? What was your understanding of what was being said to you?
>
> A. My understanding, within the 12 months nothing would happen and everything, including the sales, would be capitalised. That was my understanding."

101. Mr Wilkinson was cross-examined about the Ivy lunch more generally:

> "Q. …it is right, isn't it, that you previously said things about what was supposedly said at the Ivy lunch that have turned out to be incorrect? …Do you recall having previously said things about what was supposedly said at the Ivy lunch which have turned out to be incorrect?...Let me just show you the document…This is a letter from your lawyers, Gunnercooke, of 15 December 2023. Do you see that?
>
> A. Yes, I do.
>
> …
>
> Q. Do you see in paragraph 3 there is a reference to matters that were supposedly said at the Ivy lunch on 3 March 2023; do you see that?
>
> A. Yes, I do.
>
> Q. It says: "If it assists,…Mr Wilkinson confirms that he told all of Joshua Cole ... [Mr] Pasche ... [Mr] Antolovich ... and [Mr] Mansell ... at their first meeting to discuss the proposed new facilities with them on 3 March 2023, that such funds had been used and would need to be reinstated as part of the second PIK tranche of Macquarie's funding, which then did not transpire." Do you see that?
>
> A. Yes, I do.
>
> Q. And that's obviously wrong, isn't it, because you accept that Mr Cole and Mr Pasche weren't at the lunch?
>
> A. Mr Cole and Mr Pasche were not at the lunch, no."

102. Mr Wilkinson was asked whether he told Mr Pasche about what he claims was represented at the Ivy lunch:

> "Q. Did you tell Mr Pasche about these representations?
>
> A. Yes, I did.

> Q. And why don't we see any document to or from Mr Pasche referring to the representations?
>
> A. Because Mr Pasche, I think in my witness statement, always reassured me that Macquarie wouldn't do anything, and they always looked after their customers.
>
> …
>
> Q. Why don't you make reference in your witness statement to telling Mr Pasche about the representations?
>
> A. I can't remember.
>
> …
>
> Q. There are references to Mr Pasche, but you don't say in your witness statement that you told Mr Pasche about the representations. Why not?
>
> A. I can't remember.
>
> …
>
> Judge. At the time you made your witness statement, had you forgotten what you now say to be the case, which is that you told Mr Pasche about these assurances that you say were given at the Ivy lunch?
>
> A. My Lord, I think I must have forgotten; that's all I can say."

103. Mr Wilkinson was asked why he did not mention what he claims was represented at the Ivy lunch in his email to Mishcons on 6 March:

> "Q. …if these representations had been made at the Ivy lunch, then inevitably you would have mentioned them in the email sent to Mishcon; do you accept that?
>
> A. It may not have been necessary.
>
> …
>
> Q. …did you decide that it was unnecessary for you to mention these representations to Mishcon?
>
> A. It may have slipped my mind, my Lord.
>
> Q. So you're saying that you didn't mention them to Mishcon because they may have slipped your mind; is that right?
>
> A. My Lord, they were not mentioned in the email.

> Q. Yes. And the question I asked you: did you consciously decide that it was unnecessary for you to mention these representations to Mishcon; is that your evidence?
>
> A. There was no consciousness about it. They were not mentioned.
>
> Q. I mean, are you able to explain why, in this email sent on 6 March, a few days after the Ivy lunch, you didn't mention the representations?
>
> A. I cannot explain that.
>
> Q. Did you ever mention the representations to Mishcon?
>
> A. In passing, with all of us, yes, it would have been mentioned.
>
> Q. When you say, "In passing, with all of us", what do you mean?
>
> A. Well, that nothing would happen for 12 months.
>
> Q. So did you tell Mishcon that these representations had been made to you by --
>
> A. It would have been mentioned at some time. I cannot remember when.
>
> Q. I'm sorry, I'm going to have to tie you down. When you say it would have been mentioned, do you recall telling Mishcon that these representations had been made to you?
>
> A. I do not recall it, but it must have been mentioned.
>
> Q. Well, why must it have been mentioned, if you don't recall it?
>
> A. Because it would have been mentioned…"

104. When discussing the 8 March Term Sheet, Mr Smith asked Mr Wilkinson if he understood that the main purpose of written legal agreements is to accurately record what the agreement is between the parties. Mr Wilkinson confirmed he understood that at the time of the transaction.

105. He said, of the draft budget which Mr Mansell sent through on 30 March, which he returned without comment the same day:

> "Arguably the biggest change in this latest budget [compared to the version prepared by Mr Concannon] was the increase in the net sales proceeds from the original c£15m, to c£23m; an increase of around c£8m; which given the state of the market at that time, coupled with the dramatic increases in the Bank of

> England Base Rate, meant that the original budget net sales proceeds were much closer to the truth.
>
> In short, in my view, neither of the Macquarie revised budgets had any bearing on reality, or what I had discussed and agreed with the Macquarie team in relation to how the Facilities would operate in practice…"

He said in cross-examination that it was clear from this budget that "Macquarie was requiring sale proceeds to be achieved by 15 June of a sum in excess of £2 million".

106. When asked about the reduction, shortly before completion of the transaction, in the amount of the PIK facility to £750,000, Mr Wilkinson said:

> "A. …All I can say is what they told me at the Ivy: that nothing would happen, and we would work together.
>
> Judge. And that's all you remember them saying?
>
> A. Yes.
>
> Mr Smith. Right. So, we have now, I think, gone back to the position that they didn't tell you anything expressly about the PIK facility at the Ivy lunch; is that right? Well, this is very important, Mr Wilkinson. You are bringing a very serious claim here, based fundamentally on what you say was said at the Ivy lunch. With respect, you keep changing your position. I want to be very clear about what, if anything, you expressly said about the use of the PIK facility at the Ivy lunch.
>
> A. Well, I can only refer to my witness statement.
>
> Q. No. What do you recall, sitting here now, in the witness box, under oath; what do you recall was said to you by Macquarie, if anything, about the PIK facility at the Ivy lunch?
>
> A. At the Ivy it was said that we would do nothing for 12 months and, if need be, we would capitalise/crystallise. That's it."

107. He said as follows about the Aphrodite lunch (which he described as "light-hearted"):

> "I recollect, specifically, that Matt, in full hearing of everyone there, asked Mr Mansell: "What happens if we can't sell enough properties within the time frame?" Mr Mansell, said again, which we could all hear: "It's not a concern. Macquarie wouldn't do anything during the first 12 months anyway and that all would be well as long as we talked", or words very similar to that.
>
> Mr Mansell also assured us very calmly that: "To always talk to us [Macquarie - if there were any problems] as we [Macquarie] had no interest in "calling it [the Facilities] in" and that: "As long

> as we communicate, we can work through and capitalise [or crystalise] the interest on the loan.""

(Three points should be noted about this evidence. First, Mr Wilkinson suggests that Matthew Wilkinson raised the question about breach of the Financial Covenants. Secondly, the allegation that, at the Aphrodite lunch, Mr Mansell suggested that Macquarie would not take enforcement action for the first year of the facility arrangement is not pleaded in the Application Notice. Thirdly, Mr Wilkinson appears to be quoting Mr Mansell when he says "capitalise [or crystalise]").

108. Mr Wilkinson was asked in cross-examination why, when Matthew Wilkinson asked, "What happens if we can't sell enough properties within the time frame?", no-one said "Oh well, that's fine. We agreed at the Ivy lunch that this wouldn't be an issue". Mr Wilkinson responded: "I follow your point but [para.24.4 of] my witness statement is a parallel between two lunches". As it happens, para.24.4 of Mr Wilkinson's witness statement dealt only with whether another borrower had been permitted to capitalise interest under their arrangement with Macquarie and the paragraph makes no reference to the Ivy lunch.

109. Mr Wilkinson said that, at the 30 June meeting, "the first thing Mr Cole said was that we need £2 million of sales and then all will be well". Indeed, he said that Mr Cole and Mr Creese told him repeatedly throughout May and June that he "needed to 'sell, sell, sell'".

110. He was asked why he did not respond to the First Reservation of Rights Letter:

> Q. …Well, we don't see any response from you, do we, to this reservation of rights letter?
>
> A. Again, my Lord, I was told not to concern myself with it.
>
> Q. Well, this was a serious legal letter, wasn't it?
>
> A. But again I was told that it is a matter of fact and not to worry about it.
>
> Q. …you do not in fact respond to this letter, do you?
>
> A. I can't remember if I responded or not.
>
> Q. You can't remember whether you responded or not? I mean, if it was the position that there had been some form of agreement whereby Macquarie had indicated that it wouldn't rely on any breach of 23.13(a), you would have responded making that point, wouldn't you?
>
> A. …I was told not to concern myself with this reservation of rights letter.
>
> Q. …your allegation is that you were told [by Macquarie] that the reservation of rights letter was nothing to worry about on 31

July 2023 at what had been referred to as the Ropemaker meeting. Do you see that?

A. Yes, I do.

Q. So that didn't take place, that alleged conversation, until some three weeks later, on your case; do you follow?

A. Yes.

Q. So why, when you received the first reservation of rights letter on 3 July, didn't you reply to it then saying: "Hang on a minute, this isn't right. You agreed at the Ivy lunch that we would have 12 months forbearance"?

A. Again, my Lord, I was told not to concern myself with this reservation of rights letter.

Q. Yes, but you weren't told that, on your case, until 31 July, were you?

A. …I would have spoken to people and they would have said to me: these things happen and not concern myself with it.

Judge. Who did you speak to?

…

A. I would have spoken to other businesspeople at the time, my Lord, and they would have said: it's just one of those things, you get them and you work through it.

Q: Was Mr Pasche one of the people you spoke to?

A. Yes, he was.

Mr Smith. So, who were these other businesspeople that you say you spoke to? Mr Pasche, anyone else?

A. Well, it was generally accepted that it was not something to concern myself with; which was why I didn't worry about it.

Q. It was generally accepted by whom?

A. By all of us.

Q. ...Who are these other businesspeople you spoke to? You have mentioned Mr Pasche. Who else?

A. As I say, I can't remember exactly who I spoke to…

Q. …as I understand it, what you are now saying is that you spoke to other businesspeople who were not from Macquarie, and they told you that it was nothing to worry about; is that right?

A. I was under the impression, given the factors, given the assurances by people at -- and as in my witness statement, that it was nothing to concern myself with.

Q. I'm sorry, just answer the question. I'm going to put it to you again. Are you now saying that upon receipt of the 3 July letter, you spoke to other businesspeople who were not from Macquarie, and they told you that it was not something to worry about?

A. Well, I spoke to people at Macquarie who said --

Q. I'm sorry, just answer the question. I am going to press you on this, Mr Wilkinson. Listen to the question and answer it. Are you now saying that upon receipt of the 3 July letter, you spoke to other businesspeople who were not from Macquarie, and they told you that it was not something to worry about?

A. I did speak to other people. Yes, my Lord.

Q. And who were those other people?

A. Well, do I have to answer that, my Lord?

Judge. Yes, please.

…

Mr Wilkinson. You want me to answer that?

Judge. Yes, please.

Mr Wilkinson. I spoke to a person I used to work for by the name of Bruce Ritchie…of Residential Land.

…

Mr Smith. I see. So, on the basis of what Mr Ritchie told you, you decided not to reply to the 3 July letter; is that right?

A. No, I felt that I was advised that it was nothing you can do about it and we were focusing on selling properties, my Lord."

111. Mr Wilkinson was asked about his solicitors' letter, dated 12 October 2023 (shortly after the administrators were appointed) to the administrators' solicitors. The letter does not expressly mention the Ivy representation. Mr Wilkinson said that he could not remember whether he had told his solicitors about the Ivy representation at that point.

Matthew Wilkinson

112. Matthew Wilkinson apparently prepared his witness statement with Mr Wilkinson's first (principal) witness statement to hand, because he repeatedly refers to it by paragraph number, confirming that certain paragraphs in Mr Wilkinson's statement are correct.

113. He said, in his witness statement, that, after the Ivy lunch:

> "To the best of my recollection, Mr Wilkinson returned to the office after the meeting and that he explained that: "They agreed to pay for all of the valuations"; and that: "They agreed not to call it in [the Facilities] for 12 months, provided he talks to them"."

He was asked in cross-examination whether Mr Wilkinson qualified the second statement by indicating that a pre-condition had to exist before enforcement action was not taken if the company breached the Financial Covenants. He said that he could not recall whether Mr Wilkinson did speak about such a qualification and added that he did not know "where counsel is going with that question".

114. About the Aphrodite lunch, he said, in his witness statement:

> "I remember Mr Wilkinson raising his concerns as to the sales target for 30 June…and what would transpire if the full payment wasn't made. If I recall correctly, both Mr Cole and Mr Mansell…definitely said that: "[Macquarie] wouldn't do anything for the first year provided [Mr Wilkinson] talks to them."

115. He was asked in cross-examination whether, at the Aphrodite lunch, he or Mr Wilkinson made any reference to what he claimed Mr Wilkinson had reported to him about what had been said at the Ivy lunch. He did not answer: yes or no. Instead, he answered:

> "…I recall asking the question: what happens if we don't sell enough properties? And I believe, after having read Mr Wilkinson's witness statement, paragraphs 24 and 25, where he states that the conversation entirely consistent with the type of conversation from the Ivy, so I would have to defer to Mr Wilkinson's witness statement because I was not at the Ivy meeting."

He continued:

> "My Lord, to the best of my recollection I did not mention the Ivy lunch, it was not the topic of conversation…"

(This may be a surprising response, when, on Mr Wilkinson's case, only six weeks before, the same point had been discussed at the Ivy lunch and then reported by Mr

Wilkinson, and when the point was apparently sufficiently important that it was raised again, on Mr Wilkinson's case, at the Aphrodite lunch).

116. As I have noted, Mr Wilkinson suggested (in para.24 of his witness statement) that Matthew Wilkinson was the person who, at the Aphrodite lunch, asked, "What happens if we can't sell enough properties within the time frame?" As I have just set out, however, Matthew Wilkinson's witness statement does not record that he did ask that question. Rather, it says that Mr Wilkinson asked the question. Yet, as I have also just set out, Matthew Wilkinson said in cross-examination that it was he who asked the question. He was cross-examined about these apparent inconsistencies and, in particular, why he did not mention, in his witness statement, that he asked the question. He responded:

> "I'm not entirely sure why I didn't put it in there."

He then said:

> "…to the best of my recollection, both my father and I raised a concern."

(Mr Wilkinson did not suggest that he himself "raised a concern" or asked the question at the Aphrodite lunch and it may be surprising if he did, because his case is that he was reassured by what he claims to have been told at the Ivy lunch).

117. Matthew Wilkinson also said that he could now not recall who, from the Macquarie team, said that Macquarie would take no enforcement action in the first year of the facility, although his witness statement (made less than a month before) says that both Mr Cole and Mr Mansell said this. He said in cross-examination:

> "To the best of my recollection, it would have been Mr Cole or Mr Mansell or in general conversation over a very light-hearted lunch."

118. He also said, in his witness statement:

> "When the issue of our concern about not being able to sell enough properties at the right price came up in conversation, I recall that the Battersea building was referred to by Mr Mansell who said that: "they would crystalise [or maybe capitalise] the interest payment" [so not to worry if this happens]."

(Mr Concannon's witness statement contains a similar formulation for what Mr Mansell allegedly said about crystallisation and capitalisation, with the reference to capitalisation in square brackets. In his first witness statement, Mr Wilkinson, in relation to the same matter, used the phrase "capitalise [or crystalise]").

119. Matthew Wilkinson was asked in cross-examination about similarities in the wording of his, and Mr Concannon's, witness statements.

120. He was asked about the following statement:

> "To the best of my recollection, Mr Wilkinson returned to the office after the meeting and that he explained that: "They agreed to pay for all of the valuations"; and that: "They agreed not to call it in [the Facilities] for 12 months, provided he talks to them".

(The identical statement appears in Mr Concannon's witness statement):

> "Q. …So were those your father's exact words, do you say?
>
> A. To the best of my recollection, those were the words - words or words to that effect were said.
>
> Q. And you can remember the exact words, can you, some 18 months later?
>
> A. No, my Lord. I would not be able to remember the exact words. But to the best of my recollection, words or words to that effect would have been said.
>
> Q. Can I just ask why you have qualified that statement with the opening words "To the best of my recollection"? I mean, is this something that you recall or not?
>
> A. My Lord, I do recall that Mr Wilkinson did say that they would pay for the valuations, and they would not do anything for the 12 months or -- I say "to the best of my recollection", because today I'm sat here giving the evidence, and it must be to the best of my recollection. I have to be honest about that."

121. He was also asked about the part of his witness statement, relating to the five year lease terms which Macquarie contends breach clause 23.2(a)(i)(1) of the Facility Agreement:

> "Mr Wilkinson arranged and agreed these tenancies. I understand that all three of these involve repairing/improvement obligations on the part of the tenants."

Mr Concannon's witness statement uses identical language. The following exchange with Mr Smith took place:

> "Q. …And again, they are identical, aren't they?
>
> A. Yes.
>
> Q. Now, Mr Wilkinson, what I suggest to you is this: that your statement is not, in fact, written in your own words; it has been written by Gunnercooke, and they have cut and pasted sections between your statement and the statement of Mr Concannon or vice versa; do you accept that?
>
> A. No, I do not accept that.

> Q. Well, if the statement is in your own words, how are you able to explain that we see exactly, word-for-word, the same statements appearing in Mr Concannon's statement?
>
> A. I am unable to explain that, my Lord.
>
> Q. Well, I suggest to you that the only possible explanation is that the statements were prepared by Gunnercooke and they have simply cut and pasted between the two. That's right, isn't it, Mr Wilkinson?
>
> (Pause).
>
> A. My Lord, yes; but I have read and signed the statement of truth in relation to the witness statement and the evidence that I give.
>
> Q. So you said, in answer to my question: "My Lord, yes ..." So, you accept that the statements were prepared by Gunnercooke, and they have simply cut and pasted between the two, in part? Do you accept that?
>
> (Pause).
>
> A. My Lord, yes. I am able to accept that the witness statement was prepared with the assistance of the acting solicitor, Gunnercooke. The preparation of Mr Concannon's witness statement is not of my purview, so I'm unable to comment that they have indeed cut and pasted between the two."

Mr Concannon

122. Mr Concannon too made similar use of Mr Wilkinson's first witness statement when preparing his own.

123. Mr Concannon said, in his witness statement, that he was in Dendrow's office when Mr Wilkinson returned from the Ivy lunch. He continued:

> "…I recall when he came back he told me that: "They agreed to pay for all of the valuations", and that: "They had agreed not to do anything [meaning enforce] for 12 months, so this was the more attractive lender"…"

124. The following exchange took place in cross-examination:

> Q. Now, in your witness statement, you obviously refer to this exchange with Mr Peter Wilkinson in relation to the Ivy lunch. You don't refer to any other matters being discussed with Mr Wilkinson, do you, such as the reservation of rights letters or the letter of demand?
>
> A. Yes, they weren't discussed.

> Q. So you never discussed those matters at all with Mr Peter Wilkinson?
>
> A. Not that I'm aware of. I can't recall.
>
> Q. But it just so happens that this particular matter, this one instance, you did happen to have an exchange with Mr Peter Wilkinson; is that right?
>
> A. Yes, that's correct."

125. Mr Concannon endorsed what Mr Wilkinson said in his witness statement was said at the Aphrodite lunch. He added, as I have noted when summarising Matthew Wilkinson's evidence:

> "I also remember Mr Mansell, with reference to the Battersea deal [(an unrelated transaction between Macquarie and another borrower)], saying that: "he [the borrower] would not take any price so they crystalised [or maybe capitalised] the interest for him so he could get the price he wanted and this could be something we could do, if needed." I had to ask Mr Wilkinson and MW what "crystalised" [or "capitalised"] meant on our way home. I remember Mr Wilkinson explaining that this mean a further loan to cover the interest that was payable at the end of the term of the facility."

126. Early in cross-examination, Mr Concannon was asked to explain how come the content of his witness statement was so similar to Matthew Wilkinson's:

> "Q. Now, I'm not going to go through that exercise again with you, unless you want me to; but do you accept that there are passages in your statement that are in exactly the same terms as the same passages in Mr Matthew Wilkinson's statement?
>
> A. Yes.
>
> Q. Now, are you able to explain how that has come about?
>
> A. Yes. So, our solicitor asked us questions and in our own words, we emailed him or spoke to him on the phone, and he wrote the statement for us, in our words that we provided him with; and then we approved what was written, as long as it matched the words we provided our solicitor with.
>
> Q. I see. So, you gave answers to the solicitor, and then the solicitor effectively transcribed those into words, but he, in doing so, has used exactly the same words in your statement and Matthew Wilkinson's statement; is that right?
>
> A. Yes, that's correct, because obviously a lot of the time, Matthew and I were together.

> …
>
> "Q. But do you see, my point is, when you answered the solicitor's questions, you can't have used the same words that Matthew Wilkinson did, when he answered the solicitor's questions? But they nonetheless appear in the witness statement, in exactly the same terms; do you follow? Which I would suggest means that this is written in the solicitor's words, rather than your own words. Do you accept that?
>
> A. No, because they are my words.
>
> Q. I see. They just happen to be the same as what we see in Matthew Wilkinson's statement?
>
> A. Yes, because we recollect the same event."

Later in cross-examination, Mr Concannon was specifically asked about the reference in his witness statement to the crystallisation and capitalisation of interest. (which, as I have said, is similarly formulated in Matthew Wilkinson's witness statement):

> "Q. …you say: "I also remember Mr Mansell, with reference to the Battersea deal, saying that: "he [the borrower] would not take any price so they crystallised [or maybe capitalised] the interest for him ..." Now, can you explain why we see the square brackets there, with the words "or maybe capitalised"?
>
> A. Yes, because in my recollection, it was crystallised. When discussing it with the solicitor, they were like: are you sure it wasn't capitalised? And I was like: oh, maybe, I'm not sure. So that has been put in square brackets, in case I have misheard the word.
>
> Q. So you thought you heard Mr Mansell saying "crystallised"; is that right?
>
> A. Yes…
>
> …
>
> Judge: Just so I'm clear, Mr Concannon, your recollection [is that] what was referred to was crystallisation, rather than capitalisation?
>
> A. But the word "crystallised", yes.
>
> Q. In fact, you don't recall the word "capitalised" being used?
>
> A. It could be that maybe I misheard and it was "capitalised".
>
> Q. I'm only interested in what you recall. You recall "crystallised" --

> A. I recall "crystallised".
>
> Q. …In fact, it is your solicitor who suggested possibly the word "capitalised"?
>
> A. He said: yeah, maybe it could have been that and you have misheard that. I'm not 100% sure.
>
> Q. If this witness statement is supposed to be in your own words and your own recollection, why does it contain the phrase "or maybe capitalised", because you don't recall the word "capitalised" being used? You told me it is a suggestion from your solicitor.
>
> A. Well, it's -- yes, but it's in -- I may have misheard, and it was "capitalised". So, I wasn't 100% sure.
>
> Q. Why may you have misheard that? On what basis do you think you may have misheard that?
>
> A. I don't know.
>
> Q. There is no basis, is there, for you thinking you may have misheard that ---
>
> A. Well, maybe, yes.
>
> Q. --- apart from what you tell me your solicitor told you?
>
> A. I don't really know what they mean, but I definitely heard either "crystallised" or "capitalised". I'm not 100% sure."

Mr Spurling

127. Mr Spurling gave evidence on two matters; first, in relation to the Ivy lunch and, secondly, in relation to the 6 month rule.

128. He too prepared his witness statement apparently with Mr Wilkinson's first witness statement to hand.

129. On the first matter, he said as follows in his witness statement:

> "I distinctly recall speaking to Mr Wilkinson shortly after his lunch with Macquarie at The Ivy on 3 March 2023. In this regard:
>
> …
>
> I clearly recall Mr Wilkinson telling me that he had expressly sought assurances…and that Mr Antolovich had promised him that [Macquarie] would not seek to enforce for lack of sales during the first 12 months as long as they were talking. I also distinctly remember Mr Wilkinson telling me that Mr

> Antolovich had expressly "shaken hands" on this promise, who Mr Wilkinson referred to as "the head honcho" or the "top guf".
>
> …
>
> …Mr Wilkinson told me that he specifically sought reassurance from Macquarie (which he confirmed to me on more than one occasion that Macquarie had given him) that: if sales were not happening quickly enough, they wouldn't call in the loan - specifically they had agreed not to enforce for lack of sales (which everyone understood would be required to cover the interest not just the capital repayments) during the first 12 months."

130. Mr Smith cross examined Mr Spurling about discussions he had with Mr Wilkinson at later stages of the transaction:

> "Q. Now, neither Mr Wilkinson, nor you, say that he discussed with you either the reservation of rights letters, which he received from Macquarie, or the subsequent letter of demand. Are you able to explain why he didn't discuss those with you?
>
> A. No…He might have mentioned [the reservation of rights letters], yes, he might have, but I don't recall any specifics.
>
> Q. Well, can you recall now whether you discussed the reservation of rights letters with Mr Wilkinson?
>
> A. We didn't discuss it in detail, because I didn't broker that deal…
>
> Q. …Can you recall now whether you discussed the reservation of rights letters with Mr Wilkinson?
>
> A. No, we did not discuss it.
>
> Q. You didn't discuss it?
>
> A. We didn't discuss it.
>
> Q. …As I understand what you said a moment ago, your recollection now is that you didn't discuss the reservation of rights letters with Mr Wilkinson; is that right?
>
> A. No, we did not discuss.
>
> Q. And your recollection now is that you didn't discuss the letter of demand with Mr Wilkinson?
>
> A. No, we did not.
>
> Q. Despite the fact that you speak two to three times a day?

A. Yes, correct. However, he might have mentioned it, but there would be no point in discussing that with me, because I did not broker the deal; I did not know the terms.

Q. Can you recall now whether or not he did mention those letters to you?

A. Yes, I think he mentioned them.

…

Judge. The letter of demand required, if it was going to be complied with, Mr Wilkinson to pay Macquarie in pretty short order, something in the region of £60 million. Did you know that?

A. Yes, I'm aware of it now, yes.

Q: And that could have brought about the collapse of the business that Mr Wilkinson had built up over 30 years or so; is that right?

A. Yes.

Q: And it might have had an effect on you, I think, because you're a trustee of one of the related properties?

A. Yes, I am, yes.

Q. …Does it surprise you now that Mr Wilkinson didn't discuss the letter of demand with you?

A. No, it doesn't.

Q. …imagine you weren't a trustee, but knowing your relationship with Mr Wilkinson, and you speak to him multiple times a day…does it surprise you now that he didn't talk to you about the letter of demand, as you are so close to him?

A. No it doesn't. As I say, he might have mentioned it, but because I didn't know the detail, you know, he might have mentioned that we have got this, but, you know, I wouldn't speak to the other broker or whatever. I might have said: well, if you need any help, let me know. Or whatever, you know. We have had lots of conversations. I can't recall exactly what was said. He mentioned it, but I think he said to me at the time, maybe, we have got this reservation of rights, but I need to speak to somebody about it and you know, we have had another conversation and it moves on."

131. On the second matter, the 6 month rule, Mr Spurling, a longstanding mortgage broker, adopted, in his witness statement, a definition provided to him, rather than summarising the "rule" in his own words. He said:

> "I understand from gunnercooke that the 6 Month Rule is defined in the Annulment Application effectively as: "in accordance with the UK Finance Lenders Handbook, UK mortgage lenders will refuse absolutely, or conditionally, to lend money to a borrower for the purposes of purchasing any property where the seller had held the legal title for a period of less than six months." I think that is a fair description of the very many lenders that adhere to this rule. In my experience, some, in certain circumstances, if the property has been inherited for example, may accommodate a purchase within this time. My references in this statement to the "6 Month Rule" are to this definition of it.
>
> …
>
> …it is only a small minority of lenders that allow a purchase or refinance within 6 months, not the other way around.
>
> …Even the minority that are willing to consider lending where the property has been owned for less than 6 months, impose caveats in the form of onerous additional information requirements".

132. He explained that he had little experience of the 6 month rule in operation. He said:

> "Purchasers of properties that have been owned by the seller for less than 6 Months are extremely rare as they are either dodgy (i.e. they look like money laundering), or because of an inheritance for example. I can probably count on one hand the number I have done. As far as I can remember, all of the ones I was involved with, did complete, as they had genuine reasons. I walk away from one or two a year when the story does not appear to hold up. Indeed, I walked away from one this week saying: "Not for me, thank you", as the story didn't sound right to me.
>
> The last mortgage I did on an "acquisition" involving the 6 Month Rule was around 4 or 5 years ago…"

In that case (where the seller's documents were apparently in order), the mortgage was apparently delayed "no more than a week or so" because of the 6 month rule. In that case, Santander was apparently the lender.

133. Mr Spurling said that the following lenders will lend when the seller has not been registered as proprietor for at least six months, but with "caveats" (although he did not particularise the "caveats" in any particular case): Barclays Bank UK plc, HSBC UK Bank plc, National Westminster Bank plc, Nationwide Building Society, Santander UK plc, Virgin Money. He also identified other lenders who also fall into this category.

134. In cross-examination, Mr Spurling accepted that the 6 month rule "was not something that [before March 2023, he thought] was critical to achieving…property sales".

Mr Cole

135. Mr Cole was at the Aphrodite lunch. The evidence in his witness statement about what happened at the lunch includes the following:

> "To meet its obligations under the loan, in broad terms PRL needed to do two things. First, to collect rental income. Second, to achieve a certain level of sales per quarter. It did not matter which properties were sold each quarter, what mattered was the total quarterly sales amount achieved. This gave PRL sufficient flexibility and to sell only those properties where true market values would be realised.
>
> I reiterated these points to Mr Wilkinson during the lunch at the Aphrodite Restaurant on 19 April 2023. My colleagues James Mansell and Ned Creese ("Ned") were also present at this lunch, as well as Matthew Wilkinson and John Concannon. The purpose of the meeting was to mark the closing of the deal and the fact that this was just the start of the journey with PRL. We wanted to bolster morale and encourage Mr Wilkinson to work with us in a collaborative manner to build success.
>
> It was a relatively informal meeting and I recall that somebody discussed their travel plans. The discussion was inter-weaved with more formal discussions around the management of the property portfolio and the need for constant dialogue between Mr Wilkinson's team and ours. We reminded Mr Wilkinson of the various milestones under the loan.
>
> As regards Mr Wilkinson's evidence as to the substance of the discussions, given in paragraphs 24.1 to 25 of his witness statement, I comment as follows:
>
> (a) Paragraph 24.1: I did not hear anybody from Macquarie telling Mr Wilkinson that Macquarie "would not enforce for the first 12 months as long as we kept talking". I am certain that I did not say these words or words to that same effect. We would never make an assurance of that kind, and if we had done I would certainly remember it.
>
> (b) Paragraph 24.2 [("I recollect, specifically, that Matt, in full hearing of everyone there, asked Mr Mansell: "What happens if we can't sell enough properties within the time frame?" Mr Mansell, said again, which we could all hear: "It's not a concern. Macquarie wouldn't do anything during the first 12 months anyway and that all would be well as long as we talked", or words very similar to that")]: I did not say these words, and I did not hear anybody from Macquarie saying these words or words

> to that same effect. Again, if something like that had been said, I am certain that I would remember it.
>
> (c) Paragraph 24.3 [("Mr Mansell also assured us very calmly that: "To always talk to us [Macquarie - if there were any problems] as we [Macquarie] had no interest in "calling it [the Facilities] in", and that: "As long as we communicate, we can work through and capitalise [or crystalise] the interest on the loan.")]: I do remember us stressing the importance of communication, but I did not hear anybody from Macquarie going any further than that and saying (for example) that Macquarie had no interest in calling the facilities in. Again, I would have remembered such a comment.
>
> …"

He said, in cross-examination, that he could not recall Mr Mansell saying "to always talk to us…if there were any problems".

136. Mr Cole said as follows in his witness statement about the 30 June meeting:

> "…a call, which was scheduled by Mr Pasche, took place between Mr Wilkinson, Ned [Creese] and me on 30 June 2023. The phone call was tense as Mr Wilkinson was visibly upset that Macquarie was unwilling to fund the final tranche of the loan (as we were entitled to do under the terms of the facility) due to the prior event of default that had occurred. Mr Wilkinson complained about factors apparently outside his control including land registry issues and notices of assignment and leaseholder consents taking longer than anticipated. He kept saying it was not his fault. I informed Mr Wilkinson that the minimum sales requirement was a binary target which had not been met. I specifically recall telling Mr Wilkinson that the contract does not seek to allocate blame for defaults. I then explained that we would reserve our rights due to the event of default and that he should obtain his own legal counsel in respect of the issue. I also stressed the importance of meeting the first interest payment that was due in mid-August. Mr Wilkinson threatened Macquarie with "legal battles" on the basis that we had promised he could draw down. I said words to the effect that we had never promised this and that drawdowns are always subject to conditions precedent being met."

He denied saying, during the meeting, contrary to Mr Wilkinson's evidence, "we need £2 million of sales and then all will be well".

137. He explained that the Ropemaker meeting was arranged because Macquarie was concerned that the company would not be able to meet its 15 August interest payment obligation:

> "I recall that the discussion was at times pretty uncomfortable, because we were pressing him on various things including what assets would be sold, when and what other steps were being taken to maximise liquidity in the portfolio. There was a discussion about bringing in an external estate agent (i.e. not Dendrow, which was Mr Wilkinson's company) to assist with the marketing effort. I explained that it was important for PRL to meet the first interest payment. The gist of Mr Wilkinson's response to us was that he wouldn't let us down, and that he had everything under control. It was clear to me that he understood the seriousness of the situation.
>
> …
>
> I vaguely recall Mr Wilkinson mentioning the 6-month rule but cannot remember the specifics of what he said.
>
> …
>
> I am certain that I did not say that the first reservation of rights letter was nothing to worry about, that it was normal practice and that Macquarie were not about to do anything. If I had said such a thing, I am certain that I would remember it now. Our message was quite the opposite: the situation was serious and there needed to be a plan as to how to resolve it.
>
> I do recall encouraging Mr Wilkinson to put all of the properties on the market…"

138. He explained how, and how come, Macquarie took the decision to place the company into administration:

> "The final decision to enforce was a culmination of various facts, breaches and unfulfilled promises over the prior couple of months. The first interest payment had been missed, we had not been provided with access to or viewing rights over the bank accounts, there were not enough sales, and what limited sales there were appeared to be at discounted prices. I also recall that Ned was provided with printouts of bank statements from PRL's Metrobank account and it showed unauthorised transfers to related parties in breach of facility terms in relation to the waterfall of payments. In short, it became clear that Macquarie needed to protect its interests.
>
> The process leading up to enforcement involved various discussions between the deal team members (Alexi, Ned and I), risk management and our legal team. There may also have been a discussion involving Florian…"

Mr Creese

139. Mr Creese explained, in his witness statement, in relation to the Aphrodite lunch:

> "This lunch meeting was arranged 19 days after the loan was signed. The purpose of the meeting was to celebrate our working relationship and to reinforce to Mr Wilkinson the importance of meeting the targets that had been agreed during the execution stage of the transaction. We felt it was important that Mr Wilkinson understood that making sales was crucial to the success of the whole transaction.
>
> After about 30 minutes to an hour of "niceties" we began enquiring about how the sales were going. To the best of my recollection Mr Wilkinson did not raise any issues and seemed positive about the progress of sales. Contrary to what is said in Mr Wilkinson's evidence, I do not recall his son, Matthew Wilkinson, asking what happens if sales rates fell below target and what the expected consequences would be.
>
> …
>
> Mr Wilkinson states that James [Mansell] said to him that Macquarie would not call in the loan for at least 12 months as long as the parties kept talking, and that they had no interest in calling in the loan at any point. I do not recall James or any member of Macquarie team providing this assurance to Mr Wilkinson. I would certainly have remembered if someone from Macquarie had made this promise to Mr Wilkinson, as it would be such an unusual thing for anyone from the organisation to say. We did however emphasise that it was important to keep talking. I recall that we said that this would help to overcome any particular issues, but I certainly do not recall anybody from Macquarie promising not to call in the loan even if we did keep talking."

In cross-examination, Mr Creese repeatedly said that he could not recall Matthew Wilkinson asking what might happen if sufficient sales were not achieved, but, on being pressed by Mr Shaw, he added that Matthew Wilkinson "could have" asked the question. He maintained, however, that:

> "…if someone had mentioned a 12-month standstill, that would have struck me as very odd, especially for a transaction that had just closed."

140. Mr Creese gave evidence about the 30 June meeting:

> "30 June 2023 was also the date that the final draw down by PRL of £13.8 million was supposed to occur. However, as PRL had not completed any sales or repaid any principal, our risk team stepped in and told us that they were not comfortable advancing the final drawdown of the loan to PRL. Having received this update from the risk team we organised a Microsoft Teams call

> with Mr Wilkinson. This call occurred in the morning of Friday, 30 June 2023. During the call we informed Mr Wilkinson that we would be sending PRL a reservation of rights letter and I recall Josh advising Mr Wilkinson once if not twice to seek out independent legal advice. Mr Wilkinson seemed a bit shocked by what we were saying, and certainly discontent. However, the call ended on a more productive note with Mr Wilkinson agreeing to tell us his plan for achieving the requisite sales. We sent the reservation of rights letter on the following Monday, 3 July 2023."

141. In relation to the Ropemaker meeting, Mr Creese said in his witness statement:

> "I do not recall Josh saying that the reservation of rights letter was "nothing to worry about", that it was "normal practice" or that "Macquarie weren't about to do anything"."

Mr Antolovich

142. In his witness statement, Mr Antolovich gave the following evidence about the Ivy lunch:

> "On 3 March 2023, not long before the transaction was entered into, Mr Wilkinson, my colleague, James Mansell ("James"), and I had lunch at The Ivy restaurant in Chelsea. I would not typically go for lunch with a sponsor on such a small deal, but we wanted to discuss with him the importance of making sufficient sales to service the loan as well as the issue that had arisen in respect of the square footage of the properties in PRL's portfolio. Valuations that we had commissioned by Savills recorded lower internal areas than the areas Mr Wilkinson had provided us with. The difference was sufficiently great to materially impact our valuation of the portfolio.
>
> …
>
> …One of the purposes of the lunch was to stress to Mr Wilkinson the importance of making sufficient sales to meet the interest payments required under the loan. I recall Mr Wilkinson reassuring us that, as an estate agent, he was well-connected and well-positioned to make sales. I also recall him stating that he had sales lined up and knew which properties he was going to sell "immediately". There was no discussion about what Macquarie would do if insufficient sales were made and no commitment that Macquarie would not take any steps whether in the first year of the facility or otherwise. I would never provide a commitment like that. Macquarie is a large organisation with internal procedures that need to be followed and no-one, including me, has the power to make commitments of that kind. Further any terms that are agreed are always documented.

> …
>
> … Neither I nor James said that the interest on PRL's loan could be capitalised or otherwise added to the loan."

143. Mr Antolovich did not participate in the later meetings. So, he can give no direct evidence about them.

144. He did explain how come Macquarie decided to take enforcement action:

> To the best of my memory, the trigger for our decision to enforce was the lack of sales achieved. Dendrow, the estate agent linked to Mr Wilkinson, was previously handling the sales by itself and we had pushed for additional, third-party agents to be appointed. However, I recall going onto Rightmove around this time and seeing that not all the properties had even been put on the market. Further, there were issues regarding obtaining signing rights and visibility over PRL's bank accounts. Ultimately, we lost trust in the borrower and took the steps we felt necessary to protect Macquarie's capital having considered the various options open to us.
>
> I discussed the appointment of administrators with Florian and with Xavier Eyraud and we agreed that the appointment was necessary to protect Macquarie's position.
>
> I understand that Mr Wilkinson has suggested that it might have been Macquarie's plan all along to seize PRL's property portfolio. That could not be further from the truth and represents a fundamental misunderstanding of our business. Apart from anything else there is a huge amount of time and cost involved in accelerating a loan and managing the administration process. It is also unlikely that Macquarie will even earn back the outstanding principal of the loan, from the sales of the property portfolio now that PRL is in the administration (given the discounts that distressed situations of this kind typically attract), let alone the interest and other fees we would have earned if the borrower had not defaulted…[A] defaulting borrower is damaging for my reputation and always something that I am keen to avoid."

Mr Mansell

145. Mr Mansell's evidence, in his witness statement, about the Ivy lunch included the following:

> "On 3 March 2023, when the transaction was closer to being finalised, Alexi and I went for lunch with Mr Wilkinson at The Ivy restaurant in Chelsea. The purpose of that lunch was to meet face-to-face to explain to him how a residual stock loan works, namely that he would need to sell properties quickly in order to

> meet the interest on the loan and pay down the principal, and to address with him the issue regarding the areas of the properties (the square footage issue).
>
> We explained to Mr Wilkinson that we viewed the relationship as a partnership, his success was our success, and that we needed him to go and sell properties. I recall Mr Wilkinson spending a lot of time talking about hot yoga which he had recently started attending.
>
> …
>
> Contrary to what Mr Wilkinson states there was no discussion about what would happen if insufficient properties were sold. In fact, it was the opposite. Mr Wilkinson was explaining how good his knowledge of the market was, given his history as an estate agent, in order to reassure us that he would achieve the sales that were needed. Neither Alexi nor I made any kind of commitment along the lines suggested by Mr Wilkinson. We would never commit to not taking any action in respect of the loan for twelve months which would undermine the protections for Macquarie that we seek to include in any deal. Further, neither of us have the power to make a commitment like that as any material term would need to be signed off by RMG and would need to be documented.
>
> …
>
> We never stated that all interest on PRL's loan could be added to the principal or capitalised…
>
> …
>
> I don't believe Mr Wilkinson asked any questions about what would happen if he did not make sufficient sales and the focus of the discussion was instead on how important it was that he achieved sales. We did say that we viewed the relationship as a partnership and may well have stressed the importance of communication."

146. Mr Mansell was cross-examined by Mr Shaw about the Ivy lunch in some detail, during which he said:

> "I would have said: "You need to sell X amount of properties in the first quarter and Y amount of properties in the second quarter", and I remember Mr Wilkinson saying: "This is very much achievable".
>
> …

> Mr Wilkinson kept on emphasising he had 30 years of experience, he could sell very quickly, he already had deals in hand, which gave me confidence that he could far outshoot those requirements."

147. The following exchange then took place:

> "Mr Shaw. Could we go to paragraph 15.9 of Mr Wilkinson's statement, where he says that at the end of the meal, he asked the question again about what would happen if the properties weren't sold in time. That's right, isn't it? He put that question to you?
>
> A. I disagree. We didn't need to lend to Peter. He spent the lunch trying to convince us that he was a very good estate agent. And it would have made no sense, after committing to say, "I'm going to sell a lot of properties", to say, "What happens if I don't do it?" And so, he did not ask that question. He was being a salesman."

148. Mr Mansell gave evidence about the Aphrodite lunch. He said, in his witness statement:

> "The purpose of the meeting was to reiterate to Mr Wilkinson and his colleagues the importance of selling properties now that the deal had closed.
>
> …
>
> … Contrary to what Mr Wilkinson says, there was no discussion about what would happen if PRL could not sell enough properties and no commitment that Macquarie would do anything for 12 months or otherwise…I would never commit not to take enforcement action in respect of any loan not least as I do not have the authority to make such a commitment. Further, it would not have made any sense for me to say anything like that. If PRL did not sell enough properties it would miss its first interest payment (as it in fact did) leading to accrual of interest and increased leverage on the loan making PRL's position much more difficult. Our priority was to encourage sales not to discourage them.
>
> I definitely said that the relationship between Macquarie and PRL was a partnership and that open lines of communication were important. However, I did not say that Macquarie had no interest in "calling [the Facilities] in" or words to that effect or that interest could be capitalised. There was a PIK facility that had been agreed as part of the transaction however that was precisely defined and so Macquarie's exposure in that respect was capped. Again, I would not have authority to unilaterally promise to capitalise any interest on the loan (and did not do so)."

Mr Maher

149. By agreement of the parties, Mr Maher, one of the administrators, was not cross-examined on his witness statement. In it, he made the following points.

150. There is a real prospect of achieving a statutory objective of administration in this case; either (i) by achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being placed in administration) or (ii) by realising property to make a distribution to Macquarie.

Discussion – continuing Events of Default

151. As I have indicated, the parties disagree about when an Event of Default is continuing for the purposes of the transactional documents. Mr Shaw submitted that an Event of Default would not be continuing if it was remedied or had been waived. Mr Smith submitted that an Event of Default would not be continuing only if it had been waived. Who is right is important, because Mr Shaw also argued, as I have recorded, for example, that the company's breach of clause 8.2(a) of the Facility Agreement (the interest payment obligation) was not a continuing Event of Default on 29 September because almost all the interest due on 15 August had been paid by the September date and the company had recourse to the PIK facility for the outstanding balance; in short, because, he argued, that breach was remedied.

152. Mr Shaw submitted that he is right because, under the transactional documents, Defaults and Events of Default are synonymous. I disagree. Mr Smith is right.

153. Clause 1.2(d) of the Facility Agreement (which is to be read across to the Security Agreement (see clause 1.2(b) of the Security Agreement)) is unambiguous is defining Defaults as a larger category of events amongst which are Events of Default. Defaults comprise all Events of Default and those defaults which "would (with the expiry of a grace period, the giving of notice, the making of any determination under the Finance Documents or any combination of any of the foregoing) be…Event[s] of Default."

154. There is a clear purpose in the distinction between Defaults and Events of Default. The consequences of an event being a Default or being (or maturing into) an Event of Default are different in the Facility Agreement on occasion.

155. Take the company's interest payment obligation for example. By clause 8.2 of the Facility Agreement:

> "(a) …the Borrower shall pay accrued interest on that Investment Loan and that PIK Loan on each Interest Payment Date.
>
> (b) The Borrower may satisfy its obligations to pay interest pursuant to this Clause 8.2 (Payment of interest) in respect of an Investment Loan by…so long as no Default is continuing…utilising the PIK facility serving a Utilisation Request in respect of the PIK facility no later than five Business Days prior to the relevant Interest Payment Date…"

By clause 24.1 of the Facility Agreement, there would be an Event of Default if:

> "An Obligor does not pay on the due date any amount payable pursuant to a Finance Document at the place and in the currency in which it is expressed to be payable unless:
>
> (a) its failure to pay is caused by:
>
> (i) administrative or technical error; or
>
> (ii) a Disruption Event; and
>
> (b) payment is made within three Business Days of its due date."

Whilst the company was in Default in its interest payment obligation (for example), it was not able to have recourse to the PIK facility. However, it does not follow automatically that an Event of Default occurred immediately on the company first being in Default and, if an Event of Default did not occur, Macquarie could not accelerate payment under clause 24.17 of the Facility Agreement and the floating charge would not become enforceable. Whether or not a Default in the company's interest payment obligation was, or became, an Event of Default depends on whether or not the requirements of clauses 24.1(a) and (b) of the Facility Agreement were satisfied. By clause 24.1 of the Facility Agreement, the company was allowed a short opportunity to remedy a Default in certain circumstances, and if it did not do so in time, the Default would mature into an Event of Default and would continue unless and until it was waived. If it did remedy the Default in certain circumstances in time, the Default would never become an Event of Default.

Discussion – can Macquarie rely on Events of Default not referred to in the Demand Letter?

156. As I have indicated, Mr Wilkinson contended, in his pleaded case, that Macquarie could only rely on the Events of Default identified in the Demand Letter as a valid basis for appointing the administrators. He argued, in particular, that Macquarie could not rely on any breach of clause 23.2(a) of the Facility Agreement (the grant of 5 year leases) or clause 22.18(b) (the non-provision of FRAs) by the company to justify the administrators' appointment.

157. I understood Mr Shaw to accept, in closing, that Macquarie is entitled to justify the administrators' appointment by reference to Events of Default which were continuing at the time of the administrators' appointment even where those Events of Default were not referred to in the Demand Letter. If he did, he was right to do so. Mr Smith's and Mr Colclough's analysis of the true position, in paragraph 88.1.2ff of their skeleton argument, appears to be correct:

> "…As explained in Lightman & Moss on The Law of Administrators and Receivers of Companies (6th edition) at [7-025]: "An appointment for the wrong reason will be valid if a correct ground existed at the time of appointment…". See also Goode on Principles of Corporate Insolvency Law (5th edition) at [10-26]: "an appointment made on an invalid ground is

> effective if at the time of the receiver's acceptance of the appointment a valid ground of appointment existed".
>
> In *Brampton Manor (Leisure) Ltd v. McLean* [2007] BCC 640, Evans-Lombe J referred at [11] to "the principle that a debenture holder may rely on any circumstance, existing at the time of the appointment of receivers, which would justify their appointment notwithstanding that it was not being expressly relied on by the debenture holder at the time the appointment was made". See also *Nautch Ltd v. Mortgage Express* [2012] EWHC 4136 (Ch) at [26]."

Discussion – grant of 5 year leases

158. There is no dispute that the company granted 5 year leases of three properties. Nor is there a dispute that, on a plain reading of the Facility Agreement, by doing so, Events of Default occurred immediately.

159. I have explained that I refused, in part, Mr Wilkinson's mid-hearing application to amend. In particular, I refused permission for a proposed amendment to plead that the prohibition, in clause 23.2(a)(i)(1) of the Facility Agreement, on granting leases (or, rather, on making agreements for leases) for more than two years was subject to an implied exception for any longer lease which did not result in a material reduction in the market value of the company's interest in the property in question. For the first time in closing, and, I understand, without warning to the other parties, Mr Shaw sought to resurrect this point under the guise of documentary construction. He sought to argue that, properly construed, the prohibition on granting leases for more than two years should be read as not extending to any lease which did not result in a material reduction in the market value of the company's interest in the property in question, to give the sub-clause "commercial meaning".

160. I did not permit Mr Shaw to develop his argument on this point. As I have said, I made it clear to the parties at the beginning of the hearing that I intended to hold them generally to their pleaded cases. Mr Shaw had accepted in opening that, on a plain reading of the relevant provision, any lease for a term of more than two years was a breach. Mr Wilkinson had applied to amend his pleaded case in relation to the grant of the leases in question, but did not, at that stage, seek permission to plead the construction point Mr Shaw sought to advance, and, as I have said, I had refused Mr Wilkinson permission to plead the very point which Mr Shaw effectively now sought to resurrect. To allow Mr Shaw to develop his argument on this point would have been unfair. It would have meant that Mr Wilkinson was not being held to his pleaded case. It would have required Mr Smith to deal with a point of which he had had no notice. Most importantly, it would have risked a wholly unjustified adjournment of the hearing, because there was no evidence about the effect on the market value of the company's interest in the properties by the grants of the leases in question.

161. As it happens, the construction point is unsustainable. Clause 23.2 of the Facility Agreement provides:

> "(a) The Borrower may not without the consent of the Agent (such consent not to be unreasonably withheld):

> (i) enter into any Agreement for Lease which:
>
> (1) is for a term of more than two years; or
>
> …
>
> (4) would by entering into that Agreement for Lease would result in a material reduction in the Market Value of the relevant Property;…"

If the construction point was a good one (a) the word "or" would have to be read as "and" or, (b) because sub-clause (4) effectively covers the entirety of the relevant circumstances when, on the proposed construction, there would be a breach of the clause, the whole of sub-clause (1) would effectively have to be treated as being struck through or removed. Either approach would be contrary to the unambiguous language of the clause.

162. Suggesting that the proposed construction is necessary to give the relevant sub-clause "commercial meaning" does not make the construction point more sustainable. The circumstances (which do not exist in this case) when a commercially purposive construction of a document is justified are set out in Lewison: The Interpretation of Contracts (8th ed):

> "2.44 In recent years the court has paid increasing attention to what it has determined to be the commercial purpose of the contract, or even a particular clause in it. In many cases the commercial purpose has not been proved by evidence or even formally agreed, but has been determined by the judge. Such determination is likely to be based on the judge's general experience of contracts of a similar type to that under scrutiny. However, there is high authority deploring that approach.
>
> 2.64 …In *Arnold v. Britton*, Lord Neuberger said:
>
> > "…while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

> …
>
> 2.77 Since the decision of the Supreme Court in *Arnold v. Britton*, the courts have become much more cautious in giving weight to alleged considerations of commercial common sense. In *Teva Pharma-Produtos Farmaceuticos Lda v. Astrazeneca-Produtos Farmaceuticos Lad*, the Court of Appeal held that the clear and natural meaning of a contractual definition should not be subverted by considerations of the court's perception of business common sense. In *Carillion Construction Ltd v. Emcor Engineering Services Ltd*, Jackson LJ explained:
>
> > "Recent case law establishes that only in exceptional circumstances can considerations of commercial common sense drive the court to depart from the natural meaning of contractual provisions."
>
> Even though in that case the natural meaning of the words produced anomalies likely to give one party or the other a windfall benefit, the court declined to depart from the natural meaning of the contractual words. In *Britvic Plc v. Britvic Pensions Ltd*, the Court of Appeal emphasized that before considerations of commercial commonsense come into play, there must be two or more possible interpretations of the disputed words. As Nugee LJ put it: "one does not get into the question of choosing which interpretation is more consistent with business common sense unless there are two rival interpretations available".

163. Mr Wilkinson does not contend that the company's breaches of clause 23.2(a)(i)(1) of the Facility Agreement were waived. It follows from what I have said that these breaches of the Facility Agreement were continuing Events of Default which were a valid basis for the administrators' appointment.

<u>Discussion – failure to provide FRAs</u>

164. As I have said, there appears to be no dispute that the company failed to provide FRAs in relation to 54 Highfield Road, Acton or in relation to the properties at 52, 58A and 64A Chippenham Road, London. As I have also said, by an amendment to the Points of Reply I permitted at the hearing, Mr Wilkinson contends that any breach of the Facility Agreement by the company not providing any FRAs was not an Event of Default because (i) Macquarie had not given the company notice of the breach as contemplated by clause 24.3(c)(i) of the Facility Agreement or (ii) any breach had been waived by Macquarie's inaction in response to Mr Concannon's 4 July email. (Mr Shaw, in closing, abandoned the third defence, that any breaches in this context were "de minimis" and so could not give rise to Events of Default.)

165. I reject Mr Wilkinson's case. At the time the administrators were appointed, the company's failure to provide FRAs was a continuing Event of Default, so amounting to a valid basis for the administrators' appointment.

166. In relation to this matter, the following provisions of the Facility Agreement are particularly relevant:

> "22.18 Conditions subsequent
>
> …
>
> The Borrower shall provide to the Agent no later than the date falling three Months from the date of this Agreement a copy of a Satisfactory FRA for each Property where the Borrower is the freeholder in respect that Property.
>
> …
>
> 24. **Events of Default**
>
> Each of the events or circumstances set out in this Clause 24 is an Event of Default (save for Clause 24.17 (Acceleration)).
>
> …
>
> 24.3 Other obligations
>
> …
>
> (b) A Transaction Obligor does not comply with any provision of the Finance Documents (other than those referred to in Clause 24.1 (Non-payment), Clause 24.2 (Financial covenants) and paragraph (a) above).
>
> (c) No Event of Default under paragraph (b) above will occur if the failure to comply is capable of remedy and is remedied within ten Business Days of the earlier of (i) the Agent giving notice to the Borrower and (ii) any Transaction Obligor becoming aware of the failure to comply.
>
> ….
>
> **37. Remedies and Waivers**
>
> No failure to exercise, nor any delay in exercising, on the part of any Finance Party, any right or remedy under a Finance Document shall operate as a waiver of any such right or remedy or constitute an election to affirm any of the Finance Documents…"

167. By the beginning of July 2023, the company had committed a Default by breaching clause 22.18 of the Facility Agreement in relation to the four properties I have identified. Those breaches would mature into Events of Default if not remedied within ten business days of the company becoming aware of the breaches (whether or not Macquarie gave notice to the company as strictly required by the Facility Agreement).

168. As I have recorded, on 3 July Mr Creese emailed Mr Wilkinson:

> "…there are several items under the facility now outstanding relating to this transaction - can you please address each one individually and endeavour to provide the information/action as soon as possible.
>
> …
>
> Fire Risk Assessment - Freehold property
>
> The Borrower shall provide to the Agent no later than the date falling three Months from the date of this Agreement a copy of a Satisfactory FRA for each Property where the Borrower is the freeholder in respect that Property
>
> Per my count, there was 12 Freehold FRAs not available to us throughout DD – [Mr Creese then listed them]…"

It follows that the company became aware of the breaches of clause 22.18 of the Facility Agreement by 3 July. Those breaches were never remedied and so did mature into Events of Default.

169. Mr Wilkinson's defence, to the effect that the breaches were waived, is unsustainable for the following reasons.

170. Mr Concannon's 4 July response to the Mr Creese's 3 July email clearly shows that, in relation at least to 52, 58A and 64A Chippenham Road, London, the company was taking the responsibility for remedying the breaches by seeking to provide the FRAs, so that Macquarie was entitled to do nothing for some time, to permit the company to provide those FRAs.

171. On the same day as Mr Creese emailed Mr Wilkinson, Macquarie sent the First Reservation of Rights Letter which stated:

> "No failure to exercise, nor any delay in exercising, on the part of any Finance Party, any right or remedy under the Finance Documents, including the Security Documents…does, will or is intended to operate as a waiver of any Event of Default, any Default, any of your obligations or any right or remedy of any Finance Party. No waiver of the Finance Documents, including the Security Documents on the part of any Finance Party shall be effective unless in writing…"

The Second Reservation of Rights Letter, sent on 23 August, contained the same text. Macquarie's inaction, if any, in relation to the company's breaches in this context, cannot therefore have amounted to waiver, because sufficient time did not elapse in the period between 3 July and 29 September for it to be said that Macquarie did waive the defaults by inaction and because Macquarie did not provide a written waiver in accordance with the Reservation of Rights Letters.

172. If that is not sufficient for Mr Wilkinson's case on this point to fail, clause 37 of the Facility Agreement puts the point, that Macquarie cannot have waived the defaults by inaction, beyond doubt.

Discussion – breaches of the Financial Covenants

173. Because Mr Wilkinson accepts that his estoppel and collateral contract cases only relate to the Financial Covenants, and in light of the conclusions I have already reached, it follows that the administrators were validly appointed (if the transactional documents are not void for common mistake) and I do not need to consider whether, at the time of the administrators' appointment, there were continuing Events of Default arising out of the company's breaches of the Financial Covenants. However, I will consider the company's breaches of the Financial Covenants, in order to address a number of unpleaded points made on Mr Wilkinson's behalf.

Clause 23.13 of the Facility Agreement

174. Clause 23.13 of the Facility Agreement provides as follows:

> "(a) On or before 30 June 2023 (or such later date as agreed by the Agent), the Borrower must ensure that it has deposited Disposal Proceeds in an aggregate amount of not less than £2,000,000 into the Rent Account.
>
> (b) On or before 30 September 2023 (or such later date as agreed by the Agent), the Borrower must ensure that it has deposited Disposal Proceeds in an aggregate amount of not less than £6,000,000 into the Rent Account.
>
> (c) In respect of each quarter following 30 September 2023 (or such later date as agreed by the Agent), the Borrower must ensure that it has deposited Disposal Proceeds in an aggregate amount of not less than £4,500,000 into the Rent Account in that Interest Period."

By clause 17.1 of the Facility Agreement, it was for the company to maintain a Rent Account. By clause 24.3(a)(iv) of the Facility Agreement, immediately on a failure by the company to comply with a term of clause 23.13, an Event of Default occurred which, as I have explained, would thereafter continue unless waived by Macquarie (the company being unable to "remedy" the default, as I have explained). (It is not suggested that Macquarie ever waived any breach of clause 23.13 of the Facility Agreement).

175. There is no dispute that the company did not deposit at least £2 million in the Rent Account by 30 June. It must follow from what I have said that (subject to the company's estoppel, collateral contract and common mistake cases) that default was a valid basis for the appointment of the administrators.

176. For the first time in closing, Mr Shaw submitted (cf. paragraph 34 of the Re-amended Points of Reply) that, by "accepting" late payment of £2 million, as acknowledged by Macquarie in the Demand Letter, Macquarie had "elected" not to rely on the company's breach in this context. Mr Shaw did not develop the submission any further, other than

to say that, in this context, he did not have in mind any waiver of a breach of clause 23.13 of the Facility Agreement, and he referred to no authorities in support of his submission. I am afraid I do not understand the point Mr Shaw was trying to make. There was no question in this case of Macquarie accepting any late payment from the company because clause 23.13 of the Facility Agreement did not require the company to pay Macquarie anything. The clause required the company to pay specified sums of money into its own bank account (the Rent Account). In any event, the doctrine of election seems to be inapplicable to the circumstances of this case. Stannard: Delay in the Performance of Contractual Obligations (2nd ed) explains:

> "5.66 The essence of waiver by election, as Lord Goff explains in *The Kanchenjunga*, is that a party with inconsistent rights or remedies choose to exercise one rather than another. In this situation he or she cannot blow hot and cold; 'a party to a contract may not both approbate and reprobate'…
>
> …
>
> 5.68 The effect of waiver by election in this situation is that the right in question is lost and cannot be revived without the promisor being given another chance to perform…"

Mr Shaw did not identify the two inconsistent right or remedies between which he contended Macquarie elected and I have not independently identified any relevant inconsistent rights or remedies.

Clause 8.2 of the Facility Agreement

177. Mr Shaw said, in his skeleton argument:

> "103. The two specified Events of Default [in the formal demand] were (i) the non-payment of sale disposal proceeds of £2m due on 30 June 2023 pursuant to clause 23.13 and (ii) non-payment of interest due to be paid on 15 August 2023 of £1,817,926.37…The total sums claimed outstanding were thus £3,817,926.23.
>
> 104. Between 10 August - 1 September 2023 the Company paid the [following] sums to Macquarie:
>
> By the time that the Formal Demand was served the Company had paid the following sums to Macquarie:
>
> 10 August 2023 - Sale Proceeds - £1,085,318.43
>
> 15 August 2023 - Payment - £200,000
>
> 1 September 2023 - Sale Proceeds - £2,492,045.80
>
> Total - £3,777,364.23

> 105. As at the date of the formal demand (25 September 2023), the total shortfall between sums claimed (£3,817,926.23) and sums paid (£3,777,364.23) was just £40,567.77.
>
> 106. The shortfall was within the initial PIK facility of £500,000.
>
> …
>
> 114.4 By 1 September 2023 the Company had paid all but £40,567.77 which was within the £500,000 PIK facility that had not been effectively withdrawn.
>
> 114.5. The PIK facility was still available to be drawn upon. Save to the extent of £40,567.77, the Company had made good all its previous defaults…
>
> …
>
> 120. The practical upshot of this is that by 25 September 2023 when formal demand was made:
>
> 120.1. The Company had remedied its defaults (save for the remaining £40,567.77);
>
> 120.2. The PIK facility had not been validly withdrawn and was available to be applied against the outstanding £40,567.77."

178. There are a number of flaws in this analysis, including the following.

179. Putting aside that it is incorrect to suggest that Macquarie claimed £3.817 million by the Demand Letter – in fact, it sought payment of £57.8 million – it is wrong to make a straight comparison between the sums the company had been due to remit by 15 August (£3.818 million) and the sums the company had remitted by 25 September (£3.777 million), so giving rise to the submission that only £40,000 was outstanding in September 2023. That submission assumes that the company could appropriate sums remitted as it wished, which is incorrect.

180. The Facility Agreement does not permit the company to appropriate sums as it wishes. Rather, the Facility Agreement provides particularly for how Disposal Proceeds (the net proceeds of property sales) are appropriated. The relevant provisions of the Facility Agreement are clauses 22.4, 17.3(f), 7.3(a) and 7.4, which I have already set out. After the payment of priority expenses, Disposal Proceeds are appropriated first to discharge that part of the loan to the company which are attributed (or allocated), by the Facility Agreement, to the property (or properties) being sold. If, as appears to be the case from the Demand Letter, the company sold properties to which the Facility Agreement attributed (or allocated) more than £2 million of the loan, Mr Wilkinson cannot argue (as Mr Shaw effectively sought to do in his skeleton argument) that only £2 million of the £3.777 million remitted should be appropriated to meet the company's obligation to remit £2 million to the Rent Account by 30 June (and before 30 September). It appears that, by the Facility Agreement, a sum equivalent to roughly 80% of Savills' valuation of each property, was fixed as the amount of the loan attributed (allocated) to

each property. That is unsurprising because, as the 8 March term sheet illustrates, Macquarie was willing to lend up to 80% of the value of the company's property portfolio. The company remitted £3.577 million as Disposal Proceeds. On the assumption that 80% of that sum is appropriated, by the Facility Agreement, to discharging the loan (rather than to paying interest), that would leave available to pay interest about £716,000. As Mr Shaw notes in his skeleton argument, £1.817 million was due to be paid on 15 August for interest. Appropriating £716,000 to that liability leaves outstanding by way of interest, not £40,000, but £1.1 million (as the Demand Letter suggests). This is an amount substantially in excess of the £500,000 PIK facility which Mr Shaw submitted, in his skeleton argument, was available to the company in September 2023.

181. Mr Shaw suggested in closing that, on the proper construction of clause 7.4 of the Facility Agreement, none of the Disposal Proceeds have in fact been appropriated to discharge any particular liability of the company. He pointed out that clause 7.4(a)(i) provides that Disposal Proceeds are to be applied:

> "(i) first, in or towards payment pro rata of any unpaid amount owing to the Agent, the Security Agent, any Receiver or any Delegate under the Finance Documents".

He pointed out too that Macquarie was designated the "Agent" and he argued that, as a result, all the Disposal Proceeds were available to pay, without distinction, all of the company's liabilities to Macquarie.

182. Mr Shaw's construction of clause 7.4 is wrong. The purpose of sub-clause (i) is to ensure that sums owed to the Agent, Security Agent etc. in that capacity were paid as a priority. In this case, Macquarie was not owed any sums as Agent.

183. Further, in this case, Macquarie happened to be designated also as the "Security Agent". If Mr Shaw's construction of clause 7.4 was right, there would have been no need, in the Facility Agreement, to refer to both the "Agent" and the "Security Agent", or to refer to either rather than Macquarie by name. Nor would later provisions of the clause have any purpose.

184. In any event, the PIK facility was not available to the company in September. By clause 8.2(b) of the Facility Agreement, the PIK facility was only available to the company "so long as no Default is continuing". As I have shown, by 1 July the company was in Default and, by September, there were multiple continuing Events of Default. Indeed, in addition to the Events of Default I have already discussed, because the company did not pay the interest due to Macquarie on 15 August and because that failure had become an Event of Default within the meaning of clause 24.1 of the Facility Agreement before September, the company's breach of clause 8.2 itself also precluded the company from having recourse to the PIK facility in September (and was a valid basis for the administrators' appointment) (subject to Mr Wilkinson's estoppel, collateral contract and common mistake cases).

185. Further still, even if the PIK facility was available to the company in September, the company did not have recourse to it. As clause 8.2(b) of the Facility Agreement makes clear, it was a pre-condition for the company to use the PIK facility that it served a

Utilisation Request five business days before the relevant Interest Payment Date (15 August). The company never served a Utilisation Request.

186. Mr Shaw suggested that the requirement to serve a Utilisation Request was not a pre-condition for the company to use the PIK facility. He suggested that the requirement to serve a Utilisation Request was, instead, merely "mechanical". He did not develop this suggestion any further and I am afraid I do not understand it. Treitel: The Law of Contract (15th ed) explains what a condition precedent is, at paragraph 17-015:

> "Performance by one party, A, is a condition precedent to the liability of the other, B, when A has to perform before B's liability accrues. This will most obviously be the case if the contract expressly provides that A's act is to be done before B's. Thus if A agrees to work for B at a weekly wage payable in arrear, B need not pay A until A has done a week's work…"

I cannot see how the service of a Utilisation Request was not a pre-condition for the company to use the PIK facility. If the company did not serve a Utilisation Request, Macquarie could not know that the company wished to use to the PIK facility. Nor could it know what, if any, amount it would need to treat as being set aside as a PIK Loan.

Discussion – was the Ivy representation made?

187. Because I have concluded that the administrators' appointment was valid on grounds other than the company's breach of the Financial Covenants and, because Mr Wilkinson accepted that his estoppel and collateral contract cases only relate to breaches of the Financial Covenants, I do not need to determine the estoppel or collateral contract cases. In particular, I do not need to determine some of the difficult legal issues counsel raised. However, I do need to decide whether or not the Ivy representation, in particular, was made, because Mr Wilkinson prays it in aid of his para.81 application.

188. For the reasons I now set out, I have concluded that the Ivy representation was not made.

189. It is improbable that any of the Macquarie team would have made the Ivy representation (or, even more so, the broader representation that, unconditionally, Macquarie would not take enforcement action for the first year of the facility). The transaction in this case was an arm's length, commercial loan facility for a substantial sum, between two parties who were not previously in business with each other. It would be surprising if Macquarie gave up, for almost half the period of the facility, its principal mechanism for ensuring that the company complied with its very significant obligations and I can think of no sound basis for Macquarie to do so (none having been suggested at the hearing on Mr Wilkinson's behalf). To the contrary, there was a very sound basis for Macquarie not giving up its enforcement rights. The risk of enforcement action can discourage a borrower from defaulting on its obligations. As Mr Antolovich explained, it is detrimental to Macquarie (and to Mr Antolovich, who is said to have made the Ivy representation) to have a defaulting borrower. As I have recorded, Mr Antolovich said:

> "…Apart from anything else there is a huge amount of time and cost involved in accelerating a loan and managing the

> administration process. It is also unlikely that Macquarie will even earn back the outstanding principal of the loan, from the sales of the property portfolio now that PRL is in the administration (given the discounts that distressed situations of this kind typically attract), let alone the interest and other fees we would have earned if the borrower had not defaulted…[A] defaulting borrower is damaging for my reputation and always something that I am keen to avoid..."

This is supported by Mr MacLeod's internal analysis, made on 23 March, of the consequences of the company defaulting.

190. None of Macquarie's internal correspondence suggests that the Ivy representation was made. To the contrary, it is all consistent with Macquarie perceiving that enforcement action was always available to it if the pre-conditions for it, in the transactional documents, were satisfied. I agree with Mr Smith that the internal correspondence is significant, because the Macquarie team never expected it, at the time, to be available to Mr Wilkinson; see, for example:

    i) Mr Creese's contribution, on 29 March, to an internal discussion;

    ii) the internal exchange between Mr Mansell and Mr MacLeod on 4 April.

191. Mr Wilkinson has suggested that, at the Ivy lunch, he raised the question about what might happen if property sales were delayed because he thought the sale timetable (the asset disposal plan) required to satisfy the requirements of the 2 February term sheet (and later the Facility Agreement) was "a tall order". That suggestion is not borne out by the evidence. To the contrary, the evidence establishes that Mr Wilkinson was confident about property sales (perhaps, in part, because he thought that Savills had significantly undervalued properties in the company's portfolio). So, for example:

    i) he never expressed any concern or reservation about the asset disposal plan proposed in the 2 February Term Sheet when he received it. To the contrary, on the same day, he returned it signed under cover of an email in which he suggested that there would be sufficient to "more than cover the obligations of income during the allotted period";

    ii) he never expressed any concern or reservation about the asset disposal plan proposed in the Revised Indicative Terms or the 8 March Term Sheet;

    iii) he wrote to Mr Cole on 4 April saying that he had "great news" about purchase offers;

    iv) he wrote to Mr Creese on 11 May: "I am very confident about August and the commitment we have made".

192. In fact, rather than suggesting, at the Ivy lunch, that the asset disposal plan was "a tall order", it is most likely that Mr Wilkinson used the lunch to promote (or to use his phrase "to showcase") his business to Macquarie, because:

i) Mr Wilkinson himself said that the purpose of his initial meetings with the Macquarie team was to showcase his business;

ii) Mr Wilkinson was confident about property sales;

iii) Mr Antolovich and Mr Mansell said as much in their evidence.

193. The contemporaneous documents (and Mr Wilkinson's own evidence that the asset disposal plan was discussed at the Ivy lunch) point to the Macquarie team stressing to Mr Wilkinson and others the importance of property sales and compliance, by the company, with its obligations. If Macquarie had so freely given up (or qualified) it enforcement rights as Mr Wilkinson contends, it is unlikely that the Macquarie team would have repeatedly stressed the importance of the company complying with its obligations. On a related point, there were many occasions when Mr Wilkinson could have been expected to, but did not, refer to the Ivy representation, if it had been made. That he did not refer to it on a single occasion until shortly before his application was issued is incredible, if the Ivy representation had been made; particularly because Mr Wilkinson understood that the main purpose of legal agreements is to accurately record the parties' agreement. I have in mind the following occasions (amongst others) when Mr Wilkinson could have been expected to refer to the Ivy representation if it had been made, but did not:

i) when he emailed Mr Strutt on 6 March reporting what had been discussed at the Ivy lunch;

ii) when he went through the Revised Indicative Terms with Mr Strutt and Mr Pasche on 7 or 8 March. Those terms did not mention the Ivy representation. Nevertheless, Mr Strutt described them as "all ok";

iii) when he went through the 8 March Term Sheet with Mr Strutt and Mr Pasche;

iv) when Mr Mansell wrote, on 28 March, that six sales per quarter was "certainly necessary for the first three quarters";

v) when he responded, on 30 March, to the updated draft budget Mr Mansell had sent that day, even though he effectively described it as a fiction in evidence;

vi) when he signed the transactional documents;

vii) when he responded to Mr Mansell's email of 4 April in which Mr Mansell set out clause 23.13 of the Facility Agreement;

viii) when he responded to Mr Creese's email of 10 May;

ix) when, according to Mr Wilkinson, he was repeatedly told he "needed to sell, sell, sell";

x) when he received the Reservation of Rights Letters and the Demand Letter;

xi) when he met the administrators on 3 October.

194. It is notable too that the Ivy representation was not mentioned in any internal communication between Mr Wilkinson, Matthew Wilkinson and/or Mr Concannon to which I was referred.

195. What I have said is reinforced by the 30 June note. Mr Wilkinson suggested that the note is not accurate. As I now explain, I have decided that I should only give weight to Mr Wilkinson's evidence where it is corroborated by other evidence. His claim that the 30 June note is not accurate is not corroborated by other evidence. The note was made contemporaneously. I have no reason to think that it may be inaccurate. In fact, the contemporaneous evidence suggests that it is accurate because Mr Wilkinson wrote to Mr Cole that he was "pulling out all the stops" to report as the note records Mr Cole and Mr Creese had requested.

196. Mr Wilkinson's case, that the Ivy representation was made, depends entirely on his own, and his witnesses', evidence.

197. For the reasons I now give, I have come to the conclusion that Mr Wilkinson is not a reliable historian. I have also come to the conclusion that I must treat his evidence, and his witnesses' evidence with caution, and that it is only appropriate to attach weight to it if corroborated by other evidence (which, on the question of whether the Ivy representation was made, it is not. Similarly, the witness evidence about what was said at the Aphrodite lunch, which is broader than Mr Wilkinson's pleaded case as it happens, and includes the allegation that, effectively, the Ivy representation was repeated, is also not corroborated by other evidence).

198. To be clear, in reaching this decision, I considered the whole of Mr Wilkinson's evidence, and that of his witnesses, and took into account my observation of their cross-examination.

Mr Wilkinson

199. Mr Wilkinson's evidence, about what was said at the Ivy lunch, was not consistent. All he could really consistently bring to mind, on this most central of disputes, was the claim that the Macquarie team represented that no enforcement action at all would be taken in the first year of the facility.

200. Indeed, the impression I have formed, from observing and listening carefully to Mr Wilkinson's cross-examination, is that he was not familiar with his witness statements (even though he claimed to have read them shortly before the hearing). In response to some questions, he effectively said that the answer was contained in one of his witness statements, I believe because he could not recall what was said there and, because he does not have an independent memory on the points in issue, he did not want to contradict that evidence. For example, when he was cross-examined on the issue of discussions about the capitalisation or crystallisation of interest, he repeatedly made a different point, to the effect that he was promised that no enforcement action would be taken in the first year of the facility and, when pressed, he referred me to his witness statement on the question of interest payment discussions. This, and his cross-examination more generally on that subject, has also led me to conclude that, contrary to what he said in his first witness statement, he cannot (and could not, at the time he made the statement) remember any discussions about the capitalisation or crystallisation of interest.

201. Further, Mr Wilkinson did not initially tell me the truth when he said that he could not recall the businesspeople he spoke to about the First Reservation of Rights Letter. He knew he had spoken with Bruce Ritchie, but did not want to reveal that fact.

Matthew Wilkinson

202. It appeared to me that, in cross-examination, Matthew Wilkinson was not merely attempting to answer truthfully the questions put to him, but was calculating why particular questions were being put, so causing me to become concerned that his answers were being influenced by that calculation, whether consciously or sub-consciously (see, for example, his response to a question about whether Mr Wilkinson had said, after the Ivy lunch, that Macquarie had promised that enforcement action would not be taken only if pre-conditions existed). He also equivocated when answering other questions, such as whether he or Mr Wilkinson referred to the Ivy lunch at the Aphrodite lunch, it seems to me also because he was calculating why the questions were being asked.

203. Further, as I have demonstrated, his evidence, about who asked, at the Aphrodite lunch, about the consequences of delayed property sales, was not consistent. The evidence in his witness statement contradicted Mr Wilkinson's evidence on the point. His evidence in cross-examination, at least at one point, changed to become consistent with Mr Wilkinson's evidence. He then gave an answer (that both he and Mr Wilkinson had raised the matter) which was not consistent with his earlier evidence but which, it seemed to me, was calculated to support both what he and Mr Wilkinson had said in their witness statements. He did not offer a satisfactory explanation for the change to his evidence.

204. As I have also demonstrated, his oral evidence departed from his witness statement (made less than a month before) in at least one other respect; namely, about who, from the Macquarie team, said, at the Aphrodite lunch, that no enforcement action would be taken in the first year of the facility.

205. I am also concerned that Matthew Wilkinson did not initially accept what he later did, apparently on reflection; namely, that text in his witness statement which was identical to text in Mr Concannon's witness statement was "cut and pasted" between the two statements (an acceptance from which he then resiled). This reinforced the impression that his answers in cross-examination were calculated.

Mr Concannon - and the language of the witness statements

206. I am also concerned about the similarity in the language of the witness statements of Mr Wilkinson, Matthew Wilkinson and Mr Concannon and how that came about. I have in mind, in particular, how the claim that, at the Aphrodite lunch, Mr Mansell said that interest could be crystallised or capitalised, has been presented in the witness statements.

207. Mr Concannon eventually admitted, in effect, that, despite what his witness statement suggests, he has no independent memory of the word "capitalised" being used at the Aphrodite lunch, and he suggested that Mr Wilkinson's solicitor had proposed that the word might have been used (which would more align with Mr Wilkinson's first statement). Mr Concannon also admitted, in effect, that, whilst he had (and has) no

independent memory of the word being used, he was prepared to suggest that he had. It was wrong for Mr Concannon to hold out this evidence as his own, when it was not. He could not properly sign a statement of truth. What he suggests Mr Wilkinson's solicitor did is troubling, if it did happen. Mr Concannon made the situation worse by trying to justify his use of the word on the ground that he may have misheard what was said.

208. As I have indicated, Mr Wilkinson cannot recall any discussion at all about whether interest payments might be crystallised or capitalised and, bearing in mind all I say, I am troubled that he claims, in his witness statement, to have recalled such a discussion.

209. Matthew Wilkinson's justification, in cross-examination, for the similarity of the language in his, and Mr Concannon's, witness statements (albeit on a different matter, relating to the grant of five year leases) is not a good one. It was to the effect that this part of his witness statement was not in his words, but in the words of Mr Wilkinson's solicitor, which he, Matthew Wilkinson, was prepared to adopt as his own.

210. More generally, square brackets in witness statements, used in the way they have been when referring to interest payments, are unusual; particularly where the concepts in issue - capitalisation of interest and the crystallisation of interest - are not obviously the same and where the phrases are technical and not necessarily interchangeable.

Mr Spurling

211. Mr Spurling's evidence, that Mr Wilkinson discussed with him what was said at the Ivy lunch when they did not discuss the Reservation of Rights Letters or the Demand Letter, is not credible. Nor is it credible that Mr Spurling recalls what was said by Mr Wilkinson during any discussion about the Ivy lunch so long after the lunch, when the transaction between the company and Macquarie was apparently so inconsequential from his perspective. In fact, Mr Spurling's cross-examination evidence about whether he and Mr Wilkinson discussed the Reservation of Rights Letters and the Demand Letter was not consistent, which is also concerning.

212. In the case of Mr Spurling, the conclusions I have already reached are reinforced by the further conclusions I have reached, and set out below, about his evidence relating to the 6 month rule. Taken together, they support the conclusion I have also reached about Mr Spurling; that he has effectively become an advocate for Mr Wilkinson.

213. Taking into account all I have said, I have come to the conclusion that, as a result of the litigation process, Mr Wilkinson has convinced himself that the Ivy representation was made when it was not. He gave evidence that about four times a month for five months Mr Pasche said to him, in effect, "…nothing would be done for the term of the loan; they [Macquarie] wouldn't do anything. They would look after us…" I have not heard from Mr Pasche. Considering all the material before me, I think it is likely that what Mr Pasche (and perhaps others) apparently repeatedly told Mr Wilkinson has been projected by Mr Wilkinson, in the litigation process, on to the Macquarie team.

214. I have also come to the conclusion that, as a result of the litigation process, Mathew Wilkinson, Mr Concannon and Mr Spurling have convinced themselves that Mr Wilkinson reported the Ivy representation to them, when he did not, and that Mr Wilkinson, Matthew Wilkinson and Mr Concannon have convinced themselves that a similar representation was made at the Aphrodite lunch, when it was not.

215. Mr Wilkinson, Matthew Wilkinson and Mr Concannon work closely together. By Mr Spurling's own admission, he and Mr Wilkinson are close friends and business associates. It is reasonable to suppose that they discussed Mr Wilkinson's case before their witness statements were prepared (as Mr Concannon suggested he and Matthew Wilkinson did). It appears that it is in their own interests, more or less, for Mr Wilkinson's application to succeed and for the company to fall back under his control; particularly if the transactional documents are void for common mistake.

216. Whether Matthew Wilkinson, Mr Concannon and Mr Spurling did or did not discuss Mr Wilkinson's case (with Mr Wilkinson or otherwise) before their witness statements were prepared, they all apparently had Mr Wilkinson's first witness statement to hand when their witness statements were prepared. I am concerned that, whether consciously or not, their evidence has been influenced by the content of that witness statement.

217. I have already expressed my concern about the language used in Mr Wilkinson's, Matthew Wilkinson's and Mr Concannon's witness statements and about the justifications offered for that. In the circumstances, I cannot rule out the possibility I am afraid that, as part of the statement drafting exercise, Mr Wilkinson and his witnesses have been persuaded, or persuaded themselves, that things were said when they were not.

218. In reaching these conclusions about the witness evidence given in support of Mr Wilkinson's case, I have borne in mind that what Mr Wilkinson and Mr Concannon say about who, at the Aphrodite lunch, raised the issue of delayed property sales (Matthew Wilkinson) is different from Matthew Wilkinson's witness statement evidence (that is was Mr Wilkinson who raised the issue). Any weight to be attached to that distinction is markedly reduced because Matthew Wilkinson's evidence on the point was not consistent, as I have shown. In any event, the witness evidence cannot be considered in isolation. It has to be considered together with the other material to which I have referred which has led me to the conclusion that the Ivy representation was not made. Taken together with that material, even though there is an inconsistency in the witness evidence, as I have said most probably Mr Wilkinson, Matthew Wilkinson, Mr Concannon and Mr Spurling have convinced themselves that things were said when they were not, as a result of the litigation process.

Discussion – common mistake

219. The parties agreed that, for the purposes of this case, the legal principles relevant to the issue of whether the transactional documents are void for common mistake are set out in the judgment of Peter MacDonald Eggars QC (sitting as a Deputy High Court Judge) in *Triple Seven MSN 27251 Ltd v. Azman Air Services Ltd* [2018] 4 WLR 97. I have considered the whole of the judgment, the key parts of which are as follows:

> "66. …I consider that the test determining the application of the doctrine of common mistake is best applied by (a) assessing the fundamental nature of the shared assumption to the contract, and (b) comparing the disparity between the assumed state of affairs and the actual state of affairs and analysing whether that disparity is sufficiently fundamental or essential or radical.

67. The doctrine of common mistake is not meant to apply to those cases where the shared assumption is not sufficiently fundamental and/or where the difference between the assumed and actual states of affairs is anything less than fundamental or essential or radical. If it were otherwise, the value of certainty attached to a contract would be unjustifiably undermined. Thus, in *Associated Japanese Bank (International) Ltd v. Credit du Nord SA* [1989] 1 WLR 255, Steyn, J said (at page 257):

> "Throughout the law of contract two themes regularly recur - respect for the sanctity of contract and the need to give effect to the reasonable expectations of honest men. Usually, these themes work in the same direction. Occasionally, they point to opposite solutions. The law regarding common mistake going to the root of a contract is a case where tension arises between the two themes."

68. At page 268, in the same judgment, Steyn J said that the first imperative must be to uphold contractual bargains, not to undermine them.

69. There is no precise test to measure what constitutes a fundamental assumption underlying the contract and what constitutes a fundamental or essential or radical difference between the assumed and actual state of affairs. It is obviously a question of degree, but the nature of the test is such that it necessarily applies to a small number of cases, given that the doctrine applies in circumstances which, in Steyn, J's words, are "unexpected and wholly exceptional" (see also paragraphs 84-85 of Lord Phillips MR's judgment *in Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd*).

…

76. …[T]he elements of a common mistake which has the effect of rendering the contract based on that common mistake void are as follows:

(1) There must have been, at the time of the conclusion of the contract, an assumption as to the existence of a state of affairs substantially shared between the parties.

(2) The assumption itself must have been fundamental to the contract.

(3) That assumption must have been wrong at the time of the conclusion of the contract.

(4) By reason of the assumption being wrong, the contract or its performance would be essentially and radically different from what the parties believed to be the case at the time of the

conclusion of the contract; alternatively, the contract must be impossible to perform having regard to or in accordance with the common assumption. In other words, there must be a fundamental difference between the assumed and actual states of affairs.

(5) The parties, or at least the party relying on the common mistake, would not have entered into the contract had the parties been aware that the common assumption was wrong.

(6) The contract must not have made provision in the event that the common assumption was mistaken."

220. There is no 6 month rule as alleged in Mr Wilkinson's application notice. Rather, whilst some lenders will not provide mortgages to buyers where their seller has not been registered as the proprietor of the property in question for at least six months, other major lenders (which account for at least 56% of the mortgage market) are willing to do so, as Mr Spurling confirmed, albeit, in the case of some of them (or, indeed, perhaps all of them) only after certain information is provided.

221. In 2023, the following lenders were the principal participants in the UK mortgage market according to UK Finance:

Name of lender	Rank	Market share (%)
Lloyds Banking Group ("Lloyds")	1st	18.9
Nationwide Building Society (Nationwide")	2nd	12.5
NatWest Group ("NatWest")	3rd	11.9
Santander UK	4th	10.7
Barclays	5th	9.9
HSBC Bank	6th	7.7
Virgin Money plc	7th	3.5

222. Part 2 of the UK Finance Handbook ("Part 2") contains a schedule of lenders' contact points if "the seller has owned the property for less than 6 months". Under the entry for Lloyds, Part 2 notes:

> "Sub-sales, where the seller has owned the property for less than 6 months, and back to back transactions are not acceptable. We also regard as sub-sales cases where the seller acquires the freehold (or superior leasehold) title to the property, which they then immediately sell on to the borrower by the grant to them of a lease (or sub-lease)."

No similar outright objection is noted in relation to the other six lenders. Two, NatWest and Nationwide, ask for further information:

a) in the case of NatWest:

> "When reporting back to us, please provide the following information:
>
> The name and address of the person who sold the property to the current owner/registered proprietor.
>
> The amount the current owner/registered proprietor bought the property for.
>
> Details of any connections between the current owner/registered proprietor and their seller.
>
> Details of any connections between the current owner/registered proprietor and the applicant.
>
> Details of any work carried out between the date that the current owner/registered proprietor bought the property and the current date";

b) in the case of Nationwide:

> "All circumstances where the owner/registered proprietor has owned the property for less than 6 months from purchase should be referred to the issuing office, ensuring that the following details are provided:
>
> The name and address of the person who sold, or will be selling, the property to the applicant's vendor;
>
> The amount paid for the property by the applicant's vendor;
>
> Details of any connection between the original and the applicant's vendor, or between either vendor and the mortgage applicant;

> Details of any work carried out to the property between the two transactions;
>
> When the two transactions took place or will take place".

223. In any event, any obstacle to the sale, to third party purchasers, of the trust properties, because of their recent re-registration in the company's name, did not have a significant impact on the company's performance of its obligations under the Facility Agreement, for the following reasons.

224. First, there was no obstacle to the company selling properties to buyers who did not need a mortgage.

225. Secondly, there was no obstacle to the company selling non-trust properties. Taking into account the number of those properties and their value as shown in the Facility Agreement, I am not satisfied that the company was unlikely to be able to meet its obligations under the Facility Agreement which arose before 30 September (six months after the transactional documents were entered into) solely from the sale of these properties.

226. Thirdly, Mr Spurling explained that, in the one specific instance he recounts where the seller had acquired title to the property in question in the previous six months, the prospective buyer did not apparently face a significant obstacle from his lender, because the seller's documents were in order, as they are likely to have been in this case (where competent and specialist solicitors were involved). There is therefore unlikely to have been any significant obstacle to the company selling properties to buyers who sought mortgages from those lenders who are prepared to offer mortgages in the circumstances I am considering (which account for over half the mortgage market, as I have said). Indeed, the fact that the majority (by volume of lending) of lenders are prepared to offer mortgages in such circumstances, tends to indicate that there is unlikely to have been any significant obstacle to third party sales in this case.

227. Fourthly, there is only evidence that one prospective sale was obstructed in this case (that is, a sale of the Morshead Road property). Had any other prospective sales been obstructed, there is likely to have been evidence of that, but I was not provided with any. Any such obstruction would have come to light after a prospective buyer had made an in-principle offer to buy a property. Dendrow marketed the company's property portfolio for sale. It has been able to enquire whether any prospective buyer had difficulties obtaining mortgages and, if so, why. Such information would have been available to Mr Wilkinson in practice, but, as I say I was not referred to any such information.

228. Fifthly, I also have to note that, according to the 30 June note, Mr Wilkinson did not give, as a reason for delays in sales, that lenders were refusing mortgages to prospective buyers of trust properties.

229. Sixthly, if there was an obstacle to the sale of the properties recently registered in the seller's name, it is likely that both Mr Wilkinson (given his many years' experience in the estate agency business) and Mr Spurling (as a mortgage broker) would have been alive to it. Yet, Mr Wilkinson was clearly not alive to it. He never mentioned it. To the

contrary, as the evidence to which I have already referred demonstrates, he was very positive about achieving sales. Nor was Mr Spurling alive to such an obstacle. He accepted effectively that, before March 2023, he did not see any 6 month rule as a significant obstacle to property sales.

230. Lastly, Mr Spurling purports to give evidence in support of the existence of the 6 month rule and that it has a significant impact, but his evidence does not, in fact, support either point.

231. Mr Spurling has not attempted to articulate, in his own words, any rule which lenders apply to limit mortgages where prospective sellers have only recently become registered proprietors. Rather, he has adopted, and advances as his own evidence, a rule apparently articulated by Mr Wilkinson's solicitors. In doing so, he has represented that Part 2 says something it does not. Indeed, his claim that "only a small minority of lenders…allow a purchase…within 6 months" is apparently contrary to Part 2 and is not supported by his own (limited) experience of the situation.

232. In fact, his claim is not supported, but is undermined somewhat, by his further evidence that major lenders will lend in this situation, albeit with unparticularised "caveats" (which appear to be no more than requirements for the provision of further information).

233. Further, as I have said:

i) Mr Spurling does not have much experience of any 6 month rule in practice;

ii) he also accepted effectively that, before March 2023, he did not see any 6 month rule as a significant obstacle to property sales;

iii) in the one specific instance he recounts where the seller had acquired title to the property in question in the previous six months, the prospective buyer did not apparently face a significant obstacle from his lender because the seller's documents were in order.

234. For all these reasons (and in also the light of what I have already said about Mr Spurling's evidence), I attach no weight to his evidence about the 6 month rule, save where it is contrary to Mr Wilkinson's interests.

235. I have therefore concluded that, in this case, there was not a common mistake which makes the transactional documents void.

Para.81 application

236. The parties agree that the decision of HH Judge Stephen Davies (sitting as a High Court Judge) in *Re Aatree Bright Bar Ltd (in administration)* [2023] BCC 704 sets out the legal principles that the court should apply when determining a para.81 application. The judge said in that case:

> "28. …[I]t seems to me that Judge Halliwell was, with respect to him, entirely right [in *Koon v. Bowes* [2019] EWHC 3455 (Ch)] to conclude on a proper interpretation of paragraph 81 that there is no threshold pre-condition to making a paragraph 81 order to the effect that the applicant must satisfy the court at the

substantive hearing on the balance of probabilities that he has established his allegation that the appointor was motivated by an improper motive when he appointed the administrator. It is sufficient to found the jurisdiction that the allegation is made, and that it is made honestly and on reasonable grounds.

29. However, it also seems to me to be evident that in most if not all cases, the judge dealing with the substantive hearing can and should go on to make a positive finding one way or another on the issue of improper motive, insofar as he or she is able to do so, by reference to the evidence and the submissions before him or her. That is because whether the allegation is made out is clearly a matter of great weight to be placed into the balance when the judge is considering whether or not to make an order. If the judge concluded that the allegation was simply not made out at the hearing then that would, I am prepared to accept, in most if not all cases militate very strongly against the making of an order.

30. Nonetheless, I do not accept the argument advanced by Mr Weaver that it is requisite upon the applicant to set out in precise detail what he alleges the improper motive was and then to support it by positive evidence and to make it out at the hearing on the balance of probabilities or that a failure to do so meant that the application simply could not proceed further or should lead to an order not being made, either at all or only save in exceptional circumstances.

31. The second issue of law, which I have found more difficult to found, is what is meant by an improper motive.

32. In paragraph 52 of his judgment, Judge Halliwell identified the types of conduct which might constitute an improper motive as comprehending: "…fraud, dishonesty, bad faith or an intention to achieve a collateral purpose to the disadvantage of other creditors."

33. In paragraph 55, he suggested that circumstances where the court would be likely to grant relief would include those where: "…the appointment amounts to a serious abuse of the administration procedure or there is something in the circumstances of the appointment which is likely to undermine the administration or interfere with the administrator in the proper performance of his duties…"

34. To similar effect, in [*Thomas v. Frogmore Real Estate GP1 Ltd* [2017] EWHC 25 (Ch)], Mr Marshall said, at paragraph 47(1), that the motivation must be: "…not in harmony with the statutory purpose of administration and causative of the decision to appoint."

> 35. He also said at paragraph 47(3) and again at paragraph 50 that if the statutory purpose of administration was likely to be achieved, irrespective of the appointor's motivations, then it was unlikely that an order would be made under paragraph 81, thus endorsing the observation in Lightman & Moss, The Law of Administrators and Receivers of Companies, 5th ed (2014), para.27-028 (note 193), cited at paragraph 49 of his judgment, that the remedy should not be available to frustrate appointments, "where the purpose of administration is reasonably likely to be achieved".
>
> 36. It seems to me that these authorities are both emphasising that what is required is conduct which amounts to an improper use or abuse of the administration procedure for some purpose which is inconsistent with, or not in harmony with, the statutory purpose of administration. This broad approach seems to me to be broadly consistent with the approach in relation to liquidation, both corporate and individual, which is exemplified, for example, in the decision of the Privy Council in the case of *Ebbvale Ltd v. Hosking* [2013] UKPC 1, paragraphs 25 through to 33."

237. I accept that para.81(2), in terms, only requires an applicant to allege that, in making an administrator's appointment, a qualifying floating charge holder had an improper motive. I accept too that, in terms, para.81(3) gives the court a broad discretion when determining a para.81 application. Contrary to the judge (and to Judge Halliwell) however, I am not sure that, to succeed, an applicant does not have to establish that a charge holder's motive, in making the appointment, was improper. On the approach the judge (and Judge Halliwell) favoured, a court can second guess the charge holder's decision (and/or take into account matters a charge holder does not need to take into account when deciding to make an appointment), which is not obviously consistent with the favourable treatment Schedule B1 to the Act gives to charge holders. Having said this, because I did not receive submissions on the point and because the parties agree that I should follow *Aatree*, in this respect I do so.

238. I do distinguish this case from *Aatree* in a different respect however. It appears that *Aatree* proceeded as interim applications conventionally do. Case management directions do not appear to have been given in that case. Statements of case do not appear to have been ordered in that case, in particular. As I have already recorded, statements of case were ordered in this case. In the circumstances, particularly having regard to what I have already said about the function of statements of case, in this case the parties ought generally to be just as much held to their statements of case on the para.81 application as on the rest of the application.

239. Mr Wilkinson's pleaded case is that Macquarie was motivated to cause the administrators to be appointed to stifle this case before it began. That claim was not pursued at the hearing, rightly so because it has no foundation at all and is inconsistent with the evidence (which I have already set out) which clearly establishes that Mr Wilkinson did not make even a passing reference to the allegations he has made in the application until after the administrators' appointment. The claim is also inconsistent

with the credible reasons given in evidence, by Mr Antolovich and Mr Cole, for the administrators' appointment.

240. The para.81 application should be dismissed on this ground alone, because, on the material before me, Mr Wilkinson does not have a reasonable ground for making his pleaded allegation.

241. Mr Wilkinson said in his witness statement:

> "…I must admit that I have subsequentially wondered whether this was Macquarie's plan all along. To seize the portfolio. Whack on loads of fees and all make a nice profit…I appreciate that this is pure speculation. I can't know Macquarie's motives…"

That is the totality of the witness evidence in support of the para.81 application.

242. Mr Wilkinson admits that he does not know Macquarie's motive for causing the administrators' appointment. He also appears to concede that the para.81 application is speculative. These are further grounds for dismissing the para.81 application, because, on this basis too, Mr Wilkinson does not have a reasonable ground for claiming that Macquarie had an improper motive when it caused the administrators to be appointed.

243. In any event, as I have said, the material I have just quoted is the totality of the witness evidence in support of the para.81 application.

244. Mr Shaw disavowed, in closing, what Mr Wilkinson said in his witness statement. He was right to do so. Mr Wilkinson accepts that his evidence is no more than speculation. In any event, the contemporaneous evidence is inconsistent with the evidence, establishing, rather, that members of the Macquarie team worked hard to make the transaction work and to support the company; see, for example, Mr Creese's efforts (on behalf of members of the Macquarie team), on 30 June and 5 July, to allow the company to draw down £13.6 million, and his opposition, on 13 July, to Macquarie taking enforcement action. Mr Wilkinson's evidence is further undermined by Mr MacLeod's 23 March analysis of what might happen if the company defaulted and Mr Antolovich's wholly credible evidence that it has been detrimental to Macquarie and his own reputation that administrators have been appointed.

245. On these grounds too, the para.81 application ought to be dismissed.

246. In opening, Mr Shaw pointed to five matters which he said established that Macquarie had an improper motive, as follows:

i) the administrators' appointment was inconsistent with the Ivy representation;

ii) Macquarie knew, by the time the transactional documents were signed, that the company's property portfolio would take at least six months to be sold, because Savills had provided that advice;

iii) the company had the benefit of the PIK facility, which, Mr Shaw submitted, indicates that Macquarie did not intend to hold the company strictly to its legal obligations;

iv) when, on Mr Wilkinson's case, the PIK facility was withdrawn, Macquarie knew that 28 Mount Park Crescent, Ealing was about to be sold. I think that Mr Shaw must have had in mind 38 Mount Park Crescent, because I cannot find a reference in the papers to 28 Mount Park Crescent. 38 Mount Park Crescent was sold on 1 September, according to the agreed chronology. I also think that the period Mr Shaw must have had in mind is August 2023, because the Second Reservation of Rights Letter, dated 23 August, said:

> "…Pursuant to clause 8.2(b)(i) (Payment of Interest) of the Facility Agreement as a consequence of the Breaches, we hereby give you notice that the PIK Commitment is no longer available for drawing…";

v) the company was, according to Mr Wilkinson, making diligent efforts to sell its property portfolio when the administrators were appointed.

247. When considering the weight to be given to these matters, it has been important for me to also keep in mind two further matters; namely that:

i) a statutory objective of administration is to realise property in order to make a distribution to a secured creditor (in this case, Macquarie). In the light of Mr Antolovich's and Mr Cole's evidence (which was uncontroverted on the question of Macquarie's decision to take enforcement action), and the Demand Letter, I am satisfied that this was a purpose Macquarie had in mind when it caused the administrators to be appointed;

ii) Mr Maher's unchallenged evidence is that there is a real prospect of achieving a statutory objective of administration in this case.

248. None of the five matters referred to by Mr Shaw relates directly to the administrators' appointment. As assertions, even if made out, they cannot themselves establish that there was, in this case, "an improper use or abuse of the administration procedure". Something must be inferred from any of the matters which are established before such use of the administration procedure might be established. Mr Shaw did not tell me what I should infer from the matters. In any event, it is not appropriate to infer an improper use of the administration procedure from them. To explain why, I deal with each of the matters in turn.

249. *The Ivy representation*: I have already found that the Ivy representation was not made. So, no inference can be drawn from it.

250. *The company's property portfolio would take at least six months to sell*: Mr Shaw was right to say that Savills' opinion was that the company's property portfolio would take at least six months to sell, but it was no more than that: an opinion, albeit a professional one. It was an opinion with which Mr Wilkinson disagreed. He disputed Savills' valuation of the property portfolio, effectively on the ground that Savills was too pessimistic (undervaluing properties). Further, the evidence to which I have made reference establishes that Mr Wilkinson – involved in the estate agency business for many years and most familiar with the company's property portfolio – was much more enthusiastic about property sales at the time the transactional documents were signed. It cannot be said, therefore, that Macquarie "knew", by the time the transactional

documents were signed, that the company's property portfolio would take at least six months to sell. In any event, the asset disposal plan was agreed by the company, as were the Financial Covenants. The company took the risk that property sales might take at least six months. Macquarie had no contractual, or non-contractual, obligation to wait for at least six months before taking enforcement action. To the contrary, the Facility Agreement – an arm's length, commercial transactional document – permitted it to take earlier enforcement action. It follows that this matter cannot be a basis for establishing that the administration procedure was used improperly in this case.

251. *The PIK facility*: The PIK facility was part and parcel of the contractual arrangement between the company and Macquarie. It is not possible to infer from the fact of the PIK facility that Macquarie did not intend to hold the company strictly to its legal obligations. Nor is it possible to infer from the fact of the PIK facility that Macquarie improperly used the administration procedure.

252. *Mount Park Crescent*: It is not right to say that Macquarie withdrew the PIK facility. In the Second Reservation of Rights Letter, it informed the company that the PIK facility was not available. That was true. As I have shown, the PIK facility had not been available to the company since the beginning of July 2023. If the point I am supposed to take from the complaint is that Macquarie wrongly withdrew the PIK facility when it did not have the power to do so, then it is not a good one because (i) as I have just explained, Macquarie did not "withdraw" the PIK facility and (ii) the PIK facility was not available to the company in August 2023 in any event. In any event, even if Macquarie did do something wrong in this context (and, as I have said, it did not), it cannot be inferred from that fact that Macquarie improperly used the administration procedure. As I have said, Mr Shaw did not explain why such an inference should be made and I cannot see how one could be. If Mr Shaw was inviting me, instead, to conclude that Macquarie should have subordinated its own interests to the company's, then the point is a bad one, as I explain below.

253. *Diligent efforts to sell*: On the material to which I was referred, I cannot determine whether or not the company was making diligent efforts to sell properties. Even if it was, it does not follow that it was improper, or a misuse of the administration procedure, for the administrators to be appointed. Macquarie was not obliged to subordinate its own financial interests to the company's. To the contrary, as the statutory objectives of administration show, Macquarie was entitled to prioritise its own financial interests arising out of what was, after all, a high value, arms' length, commercial transaction. Macquarie's decision to cause the administrators to be appointed, to protect its own financial interests, was proper.

254. For these reasons too, the para.81 application must be dismissed.

Disposal

255. As I said at the beginning of this judgment, I have already announced my decision that the administrators' appointment was valid, and this judgment sets out my reasons for that decision. As I also said at the beginning of this judgment, for the reasons I have given in this judgment, the para.81 application is also dismissed.

256. I will hear further from counsel on all costs and consequential matters.