



Neutral Citation Number: [2021] EWHC 26 (Comm)

**IN THE HIGH COURT OF JUSTICE**                      CL-2019-000254 and CL-2020-000353  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**COMMERCIAL COURT (QBD)**

Date: 12 January 2021

**BEFORE:**

**DANIEL TOLEDANO Q.C.**  
**(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)**

**Between:**

- 1) NET INSURANCE S.P.A.  
2) NET INSURANCE LIFE S.P.A

**Claimants/Applicants**

- and -

- (1) GIANLUIGI TORZI  
(2) GIANCARLO ANDREELLA  
(3) FEG INT ASSETS S.A.  
(a company incorporated in Luxembourg)  
(4) ODIKON SERVICES PLC  
(5) SUNSET FINANCIALS LTD  
(a company incorporated in Malta)

**Defendants/Respondents**

**And Between:**

- (1) NET INSURANCE S.P.A  
(2) NET INSURANCE LIFE S.P.A

**Claimants/Applicants**

-and-  
GIANLUIGI TORZI

**Defendant/Respondent**

**Mr Richard Southern Q.C. and Mr Stephen Du** (instructed by O’Melveny & Myers LLP) for the **First and Second Claimants**

**Mr Stephen Cogley Q.C.** (instructed by Orrick, Herrington & Sutcliffe (UK) LLP) for the **First and Fifth Defendants** (in CL-2019-000254) and for the **Defendant** (in CL-2020-000353)

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Hearing Dates: Thursday and Friday 17 and 18 December 2020

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**JUDGMENT**

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**Introduction**

1. This judgment concerns applications in two related actions.
2. By a Tomlin Order dated 29 July 2019, the first action (CL-2019-000254) was stayed as between the Claimants (“Net”) and the First Defendant (“Mr Torzi”) and the Fifth Defendant (“Sunset”) upon the terms of a confidential settlement agreement entered into by those parties dated 20 July 2019 (the “Settlement Agreement”). Net now applies to enforce the terms of the Settlement Agreement against Mr Torzi and Sunset, in particular as regards a €10m cash payment obligation imposed on Sunset. Whilst this is not an application for summary judgment as such, Net accepts that the Court should apply the same approach as would apply under CPR Pt 24 in view of the fact that it is seeking enforcement of the terms of the Settlement Agreement on the basis of witness statement evidence and without a full trial.
3. In the second action (CL-2020-000353), Net seeks summary judgment under CPR Pt 24 against Mr Torzi in the sum of €2m plus interest under a Guarantee dated 20 July 2019 (the “Guarantee”).

4. There are no pleadings applicable to the application for enforcement in the first action because all that has happened is that Net has issued the application. The issues raised by that application, however, overlap with the issues raised by the second application relating to the Guarantee. There are detailed pleadings in the second action to which I have had regard and to which I will refer in this judgment. Detailed witness statements have also been served by both sides for the purposes of these applications.

## **Background**

5. Net are two related Italian insurance companies. Mr Torzi is an Italian businessman who is also a director of Sunset.
6. Net brought the first action against Mr Torzi and Sunset for what it claimed was the misappropriation of certain Italian government treasury bonds (referred to as “BTP” which are treasury bonds with a fixed coupon) worth approximately €26,676,000.
7. The first action was settled by the Settlement Agreement. Without any admission of liability or wrongdoing by either Sunset or Mr Torzi, Sunset agreed to a series of payment obligations totalling €26,676,000 as follows:
  - (1) €6.3 million within 15 Business Days of the date of the agreement (clause 3.1);
  - (2) €1.7 million by 30 November 2019 (clause 3.2);
  - (3) €10 million by 31 December 2019 (clause 3.3);
  - (4) €2 million by 30 September 2020 (clause 3.4);
  - (5) €6.676 million by 31 December 2020 (clause 3.6).
8. Only the first two payments have been made.
9. Security was provided for Sunset’s obligations under clauses 3.2, 3.3, 3.4 and 3.6 of the Settlement Agreement as follows:

- (1) In accordance with clause 4.1(a), Mr Torzi executed and delivered the Guarantee as security for Sunset's obligations under clauses 3.2 and 3.4;
  - (2) In accordance with clause 4.1(b), Sunset transferred to Net the Augusto Bonds with a nominal value of €10 million to be held by Net as security for the €10 million payment obligation under clause 3.3;
  - (3) Also in accordance with clause 4.1(b), Sunset transferred to Net the Meti Shares to be held by Net as security for the €6.676 million payment obligation under clause 3.6.
10. The Settlement Agreement contained in clauses 3.7 to 3.9 provisions for "Acceleration" of Sunset's obligation to make the fourth payment of €2 million under clause 3.4 which was originally due by 30 September 2020, and the fifth payment of €6.676 million under clause 3.6 which was originally due by 31 December 2020. If these provisions were engaged, then the obligations under clauses 3.4 and 3.6 were accelerated (by clauses 3.7 and 3.9) on 30 April 2020 so as to require immediate performance. Whether these provisions were engaged or not, turns on whether Sunset committed a breach of its obligations under clause 3.3 of the Settlement Agreement, which is an issue I will return to below. If Sunset did act in breach of clause 3.3, then Mr Torzi and Sunset accept that the Acceleration provisions would have applied.
  11. Clause 3.3 contained a number of different options for performance by 31 December 2019. Sunset was entitled (i) to transfer BTP to Net's Account with a nominal value of €10m; or (ii) to pay to Net €10m in cash. If Sunset complied with (i) or (ii), then Net was obliged to transfer the Augusto Bonds to Sunset's Account simultaneously. Alternatively, (iii) Sunset could procure the sale of the Augusto Bonds to a third party with payment of €10m in cash as total price versus simultaneous delivery of the Augusto Bonds. The sale proceeds would have had to be paid through a first-class EU or UK bank to Net.
  12. Clause 3.3 was also subject to the following proviso which is relied on by Mr Torzi and Sunset:

*“Provided that [Net] have complied with their obligation under clause 4.2 and subject to clause 5.2, at any point before 31 December 2019, they shall have the right at their discretion to purchase the Augusto Bonds for a total consideration of €10 million. If [Net] exercise this right, Sunset shall be discharged from its obligations under this clause 3.3 (and, for the avoidance of doubt, shall be deemed to have complied with this clause 3.3).”*

13. Mr Torzi and Sunset allege that Net exercised this right and purchased the Augusto Bonds with the result that Sunset was discharged from its obligations under clause 3.3 and was deemed to have complied with that clause. Mr Torzi and Sunset contend that there was therefore no Acceleration under clauses 3.7 to 3.9. Net disputes that it exercised this right and contends instead that Sunset has breached clause 3.3 by failing to perform in any one of the three ways identified in the clause and summarised above.
14. The Settlement Agreement also contained the following clauses which are relevant to the applications before the Court:
  - (1) Clause 5.2: this clause provided that, if Sunset did not comply with its obligations under clauses 3.2 and/or 3.3 in full by 31 December 2019, that would be a First Transfer Event of Default and Net would be entitled to enforce its security against the Augusto Bonds.
  - (2) Clause 6.3: by this clause Net agreed *“to provide all reasonable assistance, in good faith, as may be necessary in order that: (a) Sunset may perform its obligations under clauses 3, 4 and/or 5; and/or (b) Mr Torzi may perform his obligation under the Guarantee.”* Clause 6.4 required the Parties to *“deliver or cause to be delivered such instruments and other documents at such times and places as are reasonably necessary or desirable, and shall take any other action reasonably requested by the other Party for the purpose of putting this agreement into effect.”*
  - (3) Clause 19: this clause provided that the terms of the Settlement Agreement and the substance of all negotiations in connection with it were confidential.

- (4) Clause 20: this clause provided that any notice given to a Party under or in connection with the Settlement Agreement had to be in writing, signed and sent to specified addresses.
15. So far as the Augusto Bonds are concerned, the evidence is that Augusto is an Italian holding company for various companies that operate in the Italian real estate sector. The Augusto Bonds were issued in April 2017 having a nominal value of €10 million and with a redemption date, as extended, of 30 April 2020. Part of the security for the loan to Augusto was the deposit of a number of shares in Aedes SIIQ S.p.A. (“Aedes”). Mr Torzi says that these shares were deposited with Beaumont Invest Services PLC, now called Odikon Services PLC, with whom Mr Torzi was at that time associated, albeit that he says he no longer is.
16. The Augusto Bonds were issued under Italian law. It is common ground that, as a matter of Italian law:
- (a) The Augusto Bonds constitute / are de-materialised securities.
  - (b) The effect of the transfer referred to within the Settlement Agreement is to treat and regard Net as the holder of the Augusto Bonds both legally and beneficially (“full title”).
  - (c) Net’s full title was nevertheless subject to Sunset’s contractual rights as referred to in the Settlement Agreement including its right to (re) acquire full title in the circumstances identified in the Settlement Agreement. Accordingly, Sunset had at all material times a reversionary interest, albeit contractual.
  - (d) Net could not act adversely to Sunset’s contractual rights and interests and in particular could not exercise any “patrimonial rights” as long as they held full title subject to Sunset’s contractual rights.
  - (e) Absent Sunset’s contractual rights, Net could exercise all the rights of a full sole and unencumbered legal and beneficial owner.

## **The Issues**

17. The following issues arise. The first three are common to both applications. The fourth issue only arises in the action on the Guarantee.
- (1) Did Net exercise its right under the proviso to clause 3.3 of the Settlement Agreement to purchase the Augusto Bonds?
  - (2) Did Net breach its obligations of co-operation under clauses 6.3 and/or 6.4 of the Settlement Agreement, and if so with what consequence(s)?
  - (3) Does Mr Torzi have a defence of set-off having a real prospect of success arising out of alleged breaches of confidence? What about Sunset?
  - (4) Has the Guarantee been terminated by repudiatory breach?
18. I will address these issues in turn below.

## **Proper approach to summary judgment**

19. In order to find in favour of Net on these applications, the Court must be satisfied that Mr Torzi and/or Sunset have no real prospect of successfully defending the claim(s) and that there is no other compelling reason why the case should be disposed of at a trial.
20. Net referred the Court to the principles applicable to such applications as summarised in the judgment of Popplewell J in **Barclays Bank Plc v Landgraf** [2014] EWHC 503 (Comm); [2015] 1 AER (Comm) 720 at [26]. I have not set those principles out in full in this judgment since there was no dispute between the parties about them.

## **Issue 1: Did Net exercise its right under the proviso to clause 3.3 of the Settlement Agreement to purchase the Augusto Bonds?**

21. The first point taken by Net is that it is not even alleged by Sunset that Net served a written notice exercising the right to purchase the Augusto Bonds. Net says that, absent

such a notice, it could not have exercised the right to purchase. Net contends that it was not permitted to exercise the right by conduct but must instead have served a notice in accordance with clause 20 of the Settlement Agreement.

22. I do not accept Net's argument on this point:

(1) There is nothing in the proviso to clause 3.3 or otherwise in the Settlement Agreement or its factual matrix to suggest that a notice must be served in order for Net to exercise its right to purchase. Clause 3.3 does not expressly refer to the need for a notice. This contrasts with at least clause 11.3 which does expressly identify the need for a notice to be served in a different context.

(2) Clause 20 does not assist Net because it does no more than identify how and in what form a notice is to be served where one is otherwise required by the Settlement Agreement. It does not say anything about when a notice is required in the first place.

23. In the absence of any machinery in the proviso to clause 3.3 specifying how the right to purchase is to be exercised, I consider that the right to purchase could be exercised by conduct. I do, however, accept Net's submission that "*the conduct would have to be clear and unequivocal that the election was being made*": see by analogy **Vitol S.A. v Norelf Ltd** [1996] AC 800 (HL); Lord Steyn at 810H to 811B. The exercise of the right to purchase would also have to be communicated in some form to Sunset, as is accepted by Sunset.

24. The matters relied on by Mr Torzi and Sunset as regards what they say constituted Net's exercise of its right to purchase the Augusto Bonds are set out in paragraph 4.4 of Mr Torzi's Defence and Counterclaim in the guarantee action and in Schedule 1 thereto. They are also described in detail in Mr Torzi's witness statements. Mr Torzi explains that he was interested in a proposal he began discussing with Augusto's Chairman and CEO from around July 2019 whereby Augusto would redeem the Augusto Bonds early and prior to 31 December 2019. Mr Torzi considered this to be a commercially sensible solution for all parties because Net would have received €10m directly from Augusto without Sunset having to raise the funds to make payment directly.



25. There are 11 items pleaded in Schedule 1 to the Defence and Counterclaim. Most of them relate to the period prior to 16 December 2019 but at least item 9 and part of item 11 concern the period from 16 December 2019. Mr Torzi's pleaded case in the guarantee action is that Net had already purchased the Augusto Bonds prior to 16 December 2019, so it would seem that items 9 and part of item 11 are not relied on in this regard.
26. The first 5 items (Schedule 1, paras 1-5a) are admitted by Net for the purposes of these applications. Items 1 to 3 relate to alleged communications between Mr Trevisan, Net's Italian lawyer, and representatives of Augusto (i) seeking information regarding the relationship between Sunset and Augusto, (ii) referring to the Augusto Bonds as "theirs" (apparently referring to Net) and (iii) strongly advising Augusto not to deal with Sunset but only with Net as the owner of the Augusto Bonds. These communications are said to have taken place against the backdrop of Sunset seeking to effect an early redemption of the Augusto Bonds or to facilitate a potential sale to a third party, in each case before the end of 2019. Item 4 concerned a request from Augusto's Italian lawyer to Mr Torzi's and Sunset's Italian lawyer, for confirmation that Sunset was the current holder of the Augusto Bonds and for evidence showing the same. Item 5a consisted of the CEO of Augusto asking Mr Torzi whether Net were the owner of the Augusto Bonds, and indicating that he (the CEO) was confused by the situation and wondered whether Sunset had a call option over the Augusto Bonds.
27. I am unable to accept that any of these items could possibly amount to the exercise by Net of the right to purchase contained in the proviso to clause 3.3. In particular, items 1 to 3 were not communications between Net and Sunset/Mr Torzi. They were communications between Mr Trevisan for Net and Augusto. They did not purport to be either the exercise of a right to purchase or a communication of the same. In so far as Mr Trevisan was asking for information, this could not have been the exercise of a right to purchase. Moreover, it did not follow that by referring to the Augusto Bonds as "theirs" or by saying that Net was the "owner" of the Augusto Bonds that this could only mean that Net had exercised the right to purchase. On the contrary, as I have said above, it was common ground that, as a matter of Italian law, Net was already the owner of the Augusto Bonds as at the date of the communications in question without any exercise of the right to purchase under the proviso to clause 3.3, albeit that its ownership was subject to contractual reversionary rights vested in Sunset. It follows that nothing alleged to have

been said or done by Mr Trevisan in these communications indicated in any way, and certainly not to the standard of clearly and unequivocally, an exercise of the right to purchase contained in the proviso to clause 3.3. Nor do Items 4 and 5a assist Mr Torzi/Sunset. These items did not involve communications for or on behalf of Net at all. They were communications between those acting on behalf of Augusto and Mr Torzi/Sunset/their lawyer.

28. It follows that for Sunset/Mr Torzi's case as regards Issue 1 to have any real prospect of success it must be based on a short exchange of correspondence between Orrick, Herrington & Sutcliffe (UK) LLP ("Orrick"), the solicitors for Mr Torzi/Sunset and O'Melveny & Myers LLP ("OMM"), Net's solicitors. These communications are items 5b to 8 in the Schedule to the Defence and Counterclaim.
29. On 3 December 2019 Mr Ferm of Orrick emailed Mr Foster and Ms Sweet at OMM and stated that Orrick's clients required "*a document from Net's bank confirming that [Sunset] is the ultimate owner of the Augusto bonds, notwithstanding the fact that [Net] are currently holding them as security for [Sunset's] obligations under the settlement agreement.*"
30. I note that this email itself supports the view I have already expressed that Net had not exercised the right to purchase the Augusto Bonds at any time prior to 3 December 2019.
31. On 4 December 2019 Ms Sweet of OMM emailed Orrick to say that OMM had been informed by Net's Italian co-counsel that they did not understand the reason for the request. OMM asked for an explanation to pass on to them, and a draft of the statement required. In the same email, Ms Sweet indicated that Italian co-counsel had also informed OMM that Augusto could, on 15 December 2019, pay Net the amount of €10m (plus accrued interest), in exchange for receipt of (on the same date): (i) the Augusto Bonds from Net; and (ii) the Aedes shares which OMM stated it understood to be owned by one of Mr Torzi's companies. Ms Sweet asked for Orrick's views on this proposal.
32. On 4 December 2019 Mr Beeley of Orrick replied as follows:

*“Our clients do not understand on what basis you[r] client is having discussions with Augusto S.p.A. regarding the disposition of the bonds. Your clients purely hold the bonds by way of security interest, and the discussions on their face appear to be contrary to that position.*

*Accordingly, please confirm on an immediate and open basis that Net accepts that it cannot deal with the Augusto Bonds, and that ownership remains with Sunset, subject to the security interest created under the Settlement Agreement. This is a particularly urgent question for our clients.*

*We will otherwise revert regarding the form of statement.”*

33. OMM responded by email the same day. For whatever reason, OMM’s response is omitted from the Schedule 1 to the Defence and Counterclaim. OMM stated as follows:

*“The suggestion (originating from Italian co-counsel) in paragraph 2 of [Ms Sweet’s] email was intended merely to elicit your clients’ views. There is no suggestion in our email that Net intends to deal with the Augusto bonds, nor that ownership of the bonds is disputed. If that was how your client has interpreted the email, then we apologise for any misunderstanding. May we assume that your client is not interested in pursuing or exploring the proposal?*

*I don’t understand why you believe that discussions between our client and Augusto S.p.A. would be contrary to, or inconsistent with, our client merely holding the bonds by way of a security interest. However, if you wish me to seek further details, I will try to do so.”*

34. Mr Beeley of Orrick replied asking for open confirmation of the matters referred to in OMM’s email (prior communications having been marked without prejudice).
35. On 5 December 2019 OMM emailed to suggest holding a telephone conference between the parties which in the event took place on 6 December 2019.

36. Sunset/Mr Torzi allege that during the telephone conference Mr Trevisan informed Orrick that he had been engaged in discussions with Augusto and referred to discussions with the management of Aedes. Mr Trevisan said he had been approached by Aedes and Augusto about a proposal for the early reimbursement of the Augusto Bonds. In his witness statement, Mr Beeley of Orrick adds that Mr Trevisan “*did reluctantly acknowledge that Net was merely holding [the Augusto Bonds] as security for Sunset’s obligations under the Settlement Agreement.*”
37. Pausing at this point, the communications between OMM and Orrick do not support Sunset/Mr Torzi’s case that Net had exercised the right to purchase the Augusto Bonds. At its highest, it could be said that Sunset/Mr Torzi was concerned about the implications of discussions between Mr Trevisan and Augusto and wanted reassurance which was immediately provided by OMM.
38. On 10 December 2019 Orrick sent an email to OMM and attached a draft letter to be placed on Net letterhead regarding “*our clients’ respective interests in the Augusto Bonds.*” The email from Orrick stated that the draft letter had “*sought to keep the wording faithful to the terms of the settlement agreement*” and should be “*uncontroversial*”.
39. So far as the draft attachment is concerned:
- (1) Paragraph 3 stated that, as a matter of English law, Sunset was the legal and beneficial owner of the Augusto Bonds and Net had a valid and subsisting security interest in them.
  - (2) Paragraph 4 referred to contractual restrictions on the rights of each party as regards the transfer of the Augusto Bonds.
40. There are two striking points that arise from this:
- (1) First, Orrick would not have sent the attachment in this form had it formed the impression from the earlier communications that Net had already exercised its right to purchase the Augusto Bonds. It was fundamental to the way the attachment was drafted that Orrick (and presumably its clients) did not consider that Net had done so.

- (2) Secondly, the draft attachment was not capable of being agreed to by Net as drafted because it referred to English law only and failed to reflect the reality of the position which was that, under Italian law, which law governed the Augusto Bonds, Net had full title to the Augusto Bonds subject to contractual reversionary rights vested in Sunset.
41. Although, as I have said, Mr Torzi/Sunset's case is that Net's exercise of the right to purchase took place prior to 16 December 2019, I have also considered the impact of the further items pleaded in the Schedule at paragraphs 9 to 11 to see whether they would support Mr Torzi/Sunset's case concerning the alleged exercise of the right to purchase.
42. Item 9 is the response of OMM dated 16 December 2019. OMM sent a revised draft of the proposed letter which was said to incorporate comments from Italian co-counsel. Mr Torzi/Sunset complain that this revised draft stated that the Augusto Bonds were regulated by Italian law, the necessary implication of which was that Net was the owner of the Augusto Bonds. Mr Torzi/Sunset also complain that Net failed to provide "*the simple proof of holding*" that they had requested.
43. However, as I have already indicated, I do not see how Net could have provided "*the simple proof of holding*" which had been requested because it was not accurate as drafted. Nor do I see how any complaint can fairly be levelled at the revised draft for indicating that the Augusto Bonds were governed by Italian law, which was (as is common ground) correct. I should add that the revised draft made it clear that Sunset had rights relating to the Augusto Bonds which restricted the circumstances in which Net could transfer them. I can see no proper basis for criticism of the revised draft.
44. Item 10 of the Schedule is a sweep up paragraph which states, by consequence of the other matters, Sunset was prevented from communicating with Augusto to effect a redemption of the Augusto Bonds prior to the end of 2019 or otherwise realise the value of the Augusto Bonds. This item does not advance the debate because it depends on the earlier items and stands or falls with them. I do not, in any event, consider that item 10 can be said to flow from the earlier 9 items.

45. Finally, item 11 of the Schedule pleads that certain coupon payments from Augusto were received and retained by Net on the following dates: 31 July 2019, 31 October 2019 and 31 January 2020. Net accepts that this was so but contends that they have been held in a segregated account and that Net was ready to return them to Sunset once Sunset had complied with its obligations under clause 3.3 of the Settlement Agreement. I do not consider that I can place any reliance on these coupon payments for the purposes of Issue 1. The receipt and retention of the payments is entirely equivocal. It does not support the allegation that Net had exercised a right to purchase the Augusto Bonds.
46. Having now dealt with all of the pleaded matters relied on by Mr Torzi/Sunset as part of their case on Issue 1, I am satisfied that Mr Torzi and Sunset do not have anything approaching a real prospect of success on Issue 1. There is simply no material before the Court to suggest that Net had exercised a right to purchase the Augusto Bonds at any time prior to 16 December 2019. In those circumstances, I do not think that the case should be allowed to go to trial on Issue 1 in the mere hope that something may turn up. The authorities on the proper approach to summary judgment applications make it clear that a mere hope or wish of this kind is not enough to defeat an application under Pt 24. Moreover, I am not persuaded that there are reasonable grounds for believing that a fuller investigation of the facts would add to or alter the evidence available to a trial judge and so affect the outcome of the case.
47. In addition to the matters pleaded in the Schedule, Mr Torzi/Sunset rely on an additional matter which has recently taken place. On 13 November 2020 Net obtained an order from the Ordinary Court of Milan against Augusto that requires Augusto to pay to Net €10.1m plus procedural costs. This order is subject to a right of challenge by Augusto within 40 days (this time period had not expired as at the date of the hearing before me). Mr Torzi/Sunset contend that Net could only have brought the proceedings against Augusto on the basis that they were the full owner of the Augusto Bonds, free of any rights of Sunset, and that, by proceeding in this way, Net has thereby caused Sunset's obligation to pay the debt under clause 3.3 to be extinguished. Mr Torzi/Sunset say that the position is analogous to one of foreclosure where the charge holder is not obliged to account to the debtor for the proceeds of sale but can no longer sue the debtor on its covenant.

48. Whether this is the right analysis raises a question of construction of the Settlement Agreement. It seems to me that it is an issue that is capable of being determined as part of these applications and neither side suggested otherwise.
49. In view of my conclusion on Issue 1 above, I will proceed to analyse this question on the basis that Sunset failed, in breach of clause 3.3, to make payment of the €10m to Net in any of the ways identified in that clause by 31 December 2019 and that Net had not exercised its right to purchase the Augusto Bonds so as to discharge Sunset from its obligations. In those circumstances, there was a First Transfer Event of Default in accordance with clause 5.2 of the Settlement Agreement with the result that “[Net] shall be entitled to enforce their security against the Augusto Bonds.” This ties in with clause 4.1(b) which provided that the Augusto Bonds were held “as security for the obligation at clause 3.3, subject to the terms of this agreement”. In order to enforce its security against the Augusto Bonds, Net would obviously be entitled to make a demand for repayment under the Augusto Bonds on their maturity (30 April 2020) and, if that demand was not met, Net would then be entitled to bring a claim against Augusto for payment.
50. Mr Torzi/Sunset’s argument, therefore, is that in circumstances where Net bring such a claim and obtain judgment against Augusto, Sunset is thereby discharged from all liability under clause 3.3 regardless of the extent of recovery (if any) ultimately made by Net against Augusto.
51. I do not consider that this is the correct construction of the Settlement Agreement. My reasons are:
- (1) The Settlement Agreement says nothing to suggest that the obligation in clause 3.3 is discharged upon the security being enforced against or upon judgment being obtained. This is a significant point which the parties could be expected to have expressly recorded had they truly wished this to be the outcome. Yet, not only did they not make the point expressly, they gave Net an unrestricted right to enforce its security without in any way suggesting that this would or may have any disadvantageous consequences.

- (2) It was common ground that foreclosure is a rare matter which ordinarily requires an order of the court. It is in my judgment implausible that the parties to the Settlement Agreement intended the rare remedy of foreclosure to be applicable and to be so without court order and without any way of moderating the potential for injustice that could result from foreclosure.
- (3) I also think that commercial common sense leads to the same conclusion. It makes no commercial sense to think that, if Net sought to enforce its security, Sunset's underlying obligation under clause 3.3 would be extinguished. Rather, the obligation would remain intact but, if any surplus proceeds of sale resulted, these would be held by Net on trust for Sunset (which Net accepts would be the position). The no double recovery provisions of clause 11 of the Settlement Agreement also suggest that this is the correct analysis.

52. In the circumstances, I find in favour of Net on Issue 1.

**Issue 2: Did Net breach its obligations of co-operation under clauses 6.3 and/or 6.4 of the Settlement Agreement, and if so with what consequence(s)?**

53. As I have stated above, Net was obliged by clause 6.3 of the Settlement Agreement “*to provide all reasonable assistance, in good faith, as may be necessary in order that: (a) Sunset may perform its obligations under clauses 3, 4 and/or 5; and/or (b) Mr Torzi may perform his obligation under the Guarantee.*” Clause 6.4 requires the parties to deliver documents and take any other action reasonably requested by the other Party for the purpose of putting the agreement into effect.
54. For reasons which are similar to those I have already set out under Issue 1, I am satisfied that Mr Torzi/Sunset do not have a real prospect of successfully defending the claims made against them based on a breach of clauses 6.3 and/or 6.4. These clauses obviously cannot be construed so as to require Net to provide a letter for Augusto that was inaccurate. Net was willing to provide a revised form of letter which accurately set out the relationship between Net and Sunset. Net (through OMM) also expressed to Mr Torzi/Sunset (via Orrick) its willingness to explore Augusto's proposal for early



redemption of the Augusto Bonds on 15 December 2019 and indeed sought views on this proposal. None of the matters pleaded and relied on by Mr Torzi/Sunset could possibly amount to a breach by Net of clauses 6.3 or 6.4.

55. Even if there had been a breach, it is impossible to see what the damages would be. Mr Torzi/Sunset contend that they lost the prospect of early redemption of the Augusto Bonds and therefore lost €10m in value which would have been obtained. But their own case is that such a redemption would not have been possible without Augusto receiving back the Aedes shares. Yet Mr Torzi/Sunset accept that they were not in a position to procure the delivery of these shares to Augusto. As such, it is entirely unclear how an early redemption in December 2019 could have been achieved even if Net had agreed to provide the letter sought by Orrick.

56. I therefore find in favour of Net on Issue 2.

57. I should add that Mr Torzi/Sunset also relied on breaches of the confidentiality clause in the Settlement Agreement (clause 19) in Net's dealings with Augusto in relation to the Augusto Bonds. This was on the basis that the terms of the Settlement Agreement were themselves confidential. However, it seems to me that nothing in the pleaded communications involved disclosure of the terms of the Settlement Agreement by Net to Augusto, and I bear in mind that Mr Torzi/Sunset were also in discussions with Augusto about early redemption of the Augusto Bonds. Moreover, any such claim would be met with the Aedes shares point in the same way as the claim for breach of clauses 6.3 and 6.4.

**Issue 3: Does Mr Torzi have a defence of set-off having a real prospect of success arising out of alleged breaches of confidence? What about Sunset?**

58. Mr Torzi contends for a set-off based on a counterclaim for breach of confidence. This counterclaim arises out of documentation and information which entered the public domain through publication of two press articles in Italy. According to Mr Torzi, the

documentation and information could only have emanated from the Freezing Injunction proceedings which formed part of the first action. Mr Torzi claims to have suffered a loss of €10m on the basis that, absent the breach of confidence, *“he would have been appointed to promote a new €200m fintech securitization investment vehicle to be established by IGEA Banka S.p.A. for which he would have earned a €2m annual fee for at least 5 years (equating to €10m).”* Mr Torzi says that three days after publication of the second article in May 2020 he was informed that this appointment would not be proceeding due to the adverse publicity.

59. Net denies any or any actionable breach of confidence. However, it accepts that the factual correctness of Mr Torzi’s allegations cannot be resolved as part of these applications. Net therefore agrees that the Court should proceed for now on the basis that Mr Torzi has a real prospect of establishing the matters pleaded as a breach of confidence. Nevertheless, Net contends (i) that any such claim is personal to Mr Torzi giving rise to alleged damage to him personally and not to Sunset, such that it cannot avail Sunset or provide Sunset with any answer to the application against it; and (ii) that Mr Torzi has failed to put before the Court any material on which the Court could be satisfied that the alleged loss and damage was in fact suffered.
60. In its skeleton argument, Net had also relied on two further arguments, namely, (iii) that clause 2.12 of the Guarantee required all sums payable to be paid in full, free and clear of any deductions or withholdings of any kind and (iv) that the counterclaim could not amount to a defence of set-off. However, at the hearing Mr Southern Q.C. for Net accepted that, for the purposes of these applications and in view of the various points advanced by Mr Cogley Q.C. for Mr Torzi/Sunset, he would not rely on argument (iii) and would also not press argument (iv). I am in any event satisfied that it is arguable that the alleged facts would constitute a defence of set-off if made out bearing in mind the connections between (a) the claim on the Guarantee and (b) the alleged breaches of confidence which concern matters related to the first action/the freezing order.
61. As regards point (i) (only Mr Torzi can take the benefit, not Sunset), I did not understand Mr Torzi/Sunset to raise any answer to this point which seems to me to be correct. The

cross-claim can only avail Mr Torzi in his defence of the action on the Guarantee but not Sunset in its defence of the enforcement action.

62. As regards point (ii) (no factual legs to the loss allegedly sustained), the position is as follows. Mr Torzi explains in his witness statement that he has exhibited 30 pages of documents which show both the outline of the proposed transaction and IGEA Banca's interest in it. The documents show a proposal sent on 4 May 2020 from JCI Investment Banking to IGEA Banca and the arranging of a Zoom meeting. It is fair to say that there is no documentation concerning Mr Torzi's role in any of this, or what his remuneration would have been had the proposal gone ahead.
63. Net also rely on the fact that on 5 June 2020 Mr Torzi was arrested and detained by the Vatican authorities, a matter which was widely reported in the press at the time. Net say that this would have caused Mr Torzi to lose the promoter role in any event, such that the loss of this role cannot have been caused by any breach of confidence by Net. Mr Torzi denies that and claims that he would have had a binding contract prior to the Vatican arrest, and that IGEA Banca would not have been able to pull out of the transaction. I do not think that I can place any reliance on this arrest and detention in view of the dispute between the parties about its impact.
64. I am, however, troubled about the paucity of material that has been advanced by Mr Torzi as regards his alleged loss and damage. Nevertheless, in circumstances where Mr Torzi has put forward witness statement evidence and some, albeit limited, documentation, I am not persuaded that the court is in a position to reject out of hand the cross-claim which requires a fuller investigation than is possible on this occasion. I also do not think that this would be an appropriate case for the grant of a conditional order which was barely mentioned by either side at the hearing (save for one line in Net's skeleton argument). Accordingly, I have concluded that the right course is for the guarantee action to proceed to trial but only as regards the alleged defence of set-off based on the counterclaim for breach of confidence. I will therefore refuse summary judgment on the guarantee action for this reason.

#### **Issue 4: Has the Guarantee been terminated by repudiatory breach?**

65. Mr Torzi alleges that the Guarantee has been terminated for repudiatory breach. This suggestion appears to be based on the same matters that I have already addressed under Issues 1 and 2 above. Since I have found for Net on those Issues, I do not consider that the Guarantee can have been repudiated by Net, or validly terminated by Mr Torzi, in each case as alleged. In any event, I agree with Net that, even if terminated, it would not have released Mr Torzi from liabilities under the Guarantee which had accrued prior to the alleged date of termination (and the alleged repudiatory conduct is not alleged to have been accepted any earlier than 24 July 2020 which was the date of service of the Defence and Counterclaim). I therefore find for Net on Issue 4.

#### **Disposition**

66. I will invite the parties to provide a form of order in line with the conclusions that I have described above.

67. As regards the first action, the draft order provided by Net with its application will need to be modified so as to remove sub-paragraph 1(ii) which is no longer capable of being satisfied. Otherwise, and subject to any further submissions made by the parties, I am minded to make the orders sought in paragraphs 1, 2, 3 and 5. As agreed by the parties in writing subsequent to the hearing, paragraph 4 of the draft order will be adjourned with liberty to apply if so advised. I will hear from the parties on costs which are dealt with in paragraph 6 of the draft order.

68. As regards the guarantee action, I decline to grant summary judgment on the basis that Mr Torzi has a real prospect of successfully defending the claim based on the alleged set-off arising out of the counterclaim for breach of confidence. I will hear from the parties as to whether any further declarations are required and also on the question of costs.

69. I am very grateful to both sides for the care and thought which has gone into all of the submissions.