Neutral Citation Number: [2021] EWHC 367 (Comm)

Case No: LM-2019-000213

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

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

Date: 22/02/2021

Before :

MR ANDREW HOCHHAUSER QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

SETHIA LONDON LIMITED	**Claimant**
- and -	
(1) MR AJAY SETHI	**Defendants**
(2) MRS DEEPNA SETHI	

- -

WILLIAM EDWARDS (instructed by **CND Parker**) for the **Claimant**
DUNCAN MACPHERSON (instructed by **Zaiwalla & Co**) for the **Defendants**

Hearing dates: 29, 30 September and 1 October 2020

- -

Approved Judgment

.....

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 22 February 2021 at 3pm

MR ANDREW HOCHHAUSER QC :

Introduction

1. There are two applications before me. The first is an application dated 5 March 2020 by the Claimant for summary judgment pursuant to CPR 24.2, in respect of a claim, issued on 13 November 2019, for £1,720,200.20, together with interest, in respect of the unpaid balance of a loan of US$4m ("**the Loan**") made by the Claimant, Sethia London Limited ("**SLL**") to the First Defendant ("**Mr Sethi**"), which was guaranteed by the Second Defendant ("**Mrs Sethi**") (the "**Summary Judgment Application**"). That first came before the Court on 27 July 2020, and upon an application by Mr and Mrs Sethi (collectively the "**Defendants**") on 25 July 2020 to stay the proceedings until the outcome of ongoing proceedings in the United Arab Emirates (the "**UAE**"), alternatively to adjourn the Summary Judgment application, I adjourned the hearing until the present hearing, on the basis that the Defendants paid the costs thrown away. The second application is an application by the First Defendant made by an Application Notice dated 23 September 2020 for permission to amend his Defence and Counterclaim (the "**Amendment Application**"). The Amendment Application Notice attached a draft amended Defence, which was further revised from an earlier draft dated 18 September 2020. It is to the later draft to which I will refer. Both applications are vigorously opposed.

Representation

2. At both hearings SLL were represented by William Edwards. Mr and Mrs Sethi were represented by Duncan Macpherson. I am grateful to them for their helpful written and oral submissions.

The evidence

3. The evidence before me consisted of the following:

    (1) The second witness statement of Abhijit Kandeparkar, a solicitor and director in CND Parker, SLL's solicitors representing SLL, dated 3 March 2020 ("**Kandepakar 2**") and exhibit AK-2, in support of SLL's summary judgment application;

    (2) The first witness statement of Leigh David Crestohl, a partner in Zaiwalla & Co, the Defendants' solicitors, dated 25 July 2020 ("**Crestohl 1**") and exhibit LC-1, in support of an adjournment, alternatively a stay of SLL's application;

    (3) The first witness statement of Ajay Sethi Shakti Chand Sethi dated 25 July 2020 ("**Sethi 1**") and exhibit AS-1, in support of an adjournment, alternatively a stay of SLL's application;

    (4) The second witness statement of Leigh David Crestohl dated 18 September 2020 ("**Crestohl 2**") and exhibit LC-2, in opposition to SLL's summary judgment application;

(5) The second witness statement of Ajay Sethi Shakti Chand Sethi dated 18 September 2020 ("**Sethi 2**") and exhibit AS-2, in opposition to SLL's summary judgment application

4. I have also had sight of the pleadings and judgments in the Dubai Proceedings, as defined below.

Parties

5. SLL is an English company directed by Mr Sethia, an English national, who is resident in Dubai. SLL is a subsidiary of N Sethia Group Ltd and Companies House records that only the "Sethia 1999 Family Settlement" has significant control. Mr Sethia is also the director and controller of NS Investments Limited ("**NSIL"**), a company based in the UAE.

6. Mr Sethi is a Dubai businessman. Mrs Sethi is his wife. Mr Sethi owns Villa W43, Emirates Hills, Dubai ("**the Villa**"). The Villa is a luxury property, consisting of 22,000 square feet, where Mr Sethia has been a tenant since 2016.

Background

7. The background facts are not controversial. SLL and Mr Sethi entered into a Loan Agreement on 31 August 2017 (the **"Loan Agreement**") "for general commercial purposes", whereby SLL agreed to lend Mr Sethi US$4,000,000.00 (the "**Loan**"), at an interest rate of 15% per annum, repayable six months after the first drawdown date of the loan. It is governed by English law. The structure of the Loan Agreement is as follows:

(1) Clause 1 contains the following definitions:

> *"Default Interest Period: each period of days the Lender selects under clause 7.2 to calculate interest on Unpaid Amounts under clause 7.*
>
> *Event of Default: any event or circumstance listed in Schedule 7*
>
> *Repayment Date: 06 months from the first Drawdown Date specified in paragraph 1 of Schedule 3 for repaying the Loan*
>
> *Clause 1.21: Clause, schedule and paragraph headings shall not affect the interpretation of this agreement."*

(2) Clause 6 provides for the payment of interest, as follows:

> *"6.1 The interest rate on the Advance for each Interest Period is 15% (fifteen percent) per annum (360 days).*
>
> *6.2 The Borrower shall pay interest on the Advance in arrears on the Interest Payment Date for the Interest Period applicable.*

6.3 The length of the Interest Period shall be one month.

6.4 The initial Interest Period for the Advance shall start on the Drawdown Date of the Advance.

6.5 If an Interest Period would otherwise end on a day which is not a Business Day, that Interest Period shall, instead, end on:

(a) the next Business Day in that calendar month, if there is one; or

(b) the preceding Business Day, if there is not."

(3) Clause 7 is entitled Default Interest and provides as follows:

"7.1 If the Borrower does not pay any sum it is obliged to pay under the Finance Documents when it is due, the Borrower shall pay interest under this clause 7 on that Unpaid Amount from time to time outstanding for the period beginning on its due date and ending on the date the Lender receives it, both before and after judgment.

7.2 Interest under this clause 7 shall be calculated by reference to successive Default Interest Periods. The duration of a Default Interest Period shall be seven days or less, as selected by the Lender on or before the beginning of each Default Interest Period.

7.3 The first Default Interest Period shall begin on the due date for payment of the relevant Unpaid Amount and each succeeding Default Interest Period shall begin on the last day of the previous Default Interest Period.

7.4 The rate of interest applicable to any Default Interest Period shall be the rate per annum which is 5% higher than the rate of interest which would have applied under clause 6.1, had the Default Interest Period been an Interest Period.

7.5 The Lender shall promptly notify the Borrower of the amount of interest payable and the Interest Payment Date for that Default Interest Period.

7.6 Interest accrued under this clause 7 shall be due on demand by the Lender, but:

(a) if not previously demanded, shall be paid on the last day of each Default Interest Period; and

(b) if the Borrower does not pay that interest when due, it shall be added to the Unpaid Amount and

compounded at the end of each Default Interest Period."

(4) Clause 8 is entitled "Repayment, Prepayment and Cancellation" and states:

"Schedule 3 shall apply to repayment, prepayments and cancellation of the Facility."

(5) Schedule 3 paragraph 2 provides that:

"2.1 The Borrower may prepay part or all of an Advance, without any premium or penalty, by notifying the Lender 5 Business Days in advance. The Borrower may only do this if:

(a) the notice specifies the amount of the prepayment.

(b) the date of the prepayment is at least 5 Business Days from the date of the notice…."

(6) Clause 9.1 and 9.2 form part of the payment obligations:

"9. PAYMENTS

9.1 Subject to satisfaction of all the applicable conditions in clause 4, the Lender shall pay each Advance to the Borrower in immediately available cleared funds on the relevant Drawdown Date to, or for the account of, the Borrower as specified in that Drawdown Request.

9.2 Subject to clause 9.6, the currency of account shall be US Dollar and all payments that the Borrower makes under this agreement shall be made:

(a) in full, without any deduction, set-off or counterclaim; and

(b) in immediately available cleared funds on the due date to an account which the Lender may specify to the Borrower."

(7) Clause 14 concerns Events of Default:

"14.1 Each of the events or circumstances set out in Schedule 7 is an Event of Default.

14.2 At any time after an Event of Default has occurred and is continuing, the Lender may, by notice to the Borrower, declare:

(a) all outstanding Commitments immediately cancelled; and/or

> *(b) all outstanding Advances, accrued interest and all other amounts accrued or outstanding under the Finance Documents:*
>
> *(i) immediately due and payable; or*
>
> *(ii) payable on demand.*
>
> *(c) the Security Document to be enforceable.*
>
> *14.3 If the Lender gives notice under clause 14.2(b) then the Advances and other amounts shall be immediately due and payable by the Borrower."*

(8) Non-payment is an Event of Default under paragraph 1 of Schedule 7.

(9) Clause 24.2 states: "The lender is neither precluded from taking proceedings against the borrower in any other court of competent jurisdiction, nor shall the taking of proceedings in one or more jurisdictions preclude the taking of proceedings in any other jurisdictions, whether concurrently or not, to the extent permitted by the law of such other jurisdiction."

8. By Schedule 6, Part 2, paragraph 1.3 of the Loan Agreement, Mr Sethi gave a contingent equitable charge in these terms:

> *"the Borrower agrees that his property at Villa No. W-43, AI Tlianayah Fourth Emirates Hill, Dubai, United Arab Emirates (Premise Number: 394922018) shall immediately stand charged to the Lender upon the occurrence of an Event of Default and the Borrower unconditionally and irrevocably agrees that the property may be sold immediately by the Lender for the recovery of the Loan together with interest, default interest, costs and charges as applicable."*

9. While this is undoubtedly a valid equitable charge as a matter of English law, notwithstanding that it is over foreign land (see, e.g., *In re the Anchor Line (Henderson Bros) Ltd* [1937] Ch 483), its value can only be regarded as uncertain.

10. As required by Clause 2 of the Loan Agreement, Mrs Sethi entered into a guarantee (the "**Guarantee**") in respect of the Loan in favour of SLL on the same date. She received independent legal advice before doing so. Under the Guarantee, "Guaranteed Liabilities" were defined as:

> *"all monies, debts and liabilities of any nature from time to time due, owing or incurred by the Borrower to the Lender under or in connection with the Loan Agreement."*

11. Clause 2, entitled "Guarantee and Indemnity" provided:

> *"2.1 In consideration of the Lender making or continuing loans to, giving credit, accommodation or time to the Borrower at the*

Lender in its absolute discretion sees fit, the Guarantor guarantees to the Lender to pay on demand the Guaranteed Liabilities.

2.2 If the Guaranteed Liabilities are not recoverable from the Borrower by reason of illegality, incapacity, lack or exceeding of powers, ineffectiveness of execution or any other reason, the Guarantor shall remain liable under this Guarantee for the Guaranteed Liabilities as if she was a principal debtor.

2.3 The Guarantor as principal obligor and as a separate and independent obligation and liability from her obligations and liabilities under clause 2.1 agrees to indemnify and keep indemnified the Lender in full and on demand from and against all and any losses, costs, claims, liabilities, damages, demands and expenses suffered or incurred by the Lender arising out of, or in connection with, any failure of the Borrower to perform or discharge any of her obligations or liabilities in respect of the Guaranteed Liabilities."

12. Clause 3.2 provides:

"The liability of the Guarantor under this Guarantee shall not be reduced, discharged or otherwise adversely affected by:

(a) any intermediate payment, settlement of account or discharge in whole or in part of the Guaranteed Liabilities; or

(b) any variation, extension, discharge. compromise, dealing with, exchange or renewal of any right or remedy which the Lender may now or after the date of this Guarantee have from or against any of the Borrower and any other person in connection with the Guaranteed Liabilities; or

(c) any act or omission by the Lender or any other person in taking up, perfecting or enforcing any Security, indemnity, or guarantee from or against the Borrower or any other person; or

(d) any termination, amendment, variation, novation or supplement of or to any of the Guaranteed Liabilities; or

(e) any grant of time, indulgence, waiver or concession to the Borrower or any other person; or

(f) any insolvency, bankruptcy, liquidation, administration, winding up, incapacity, limitation, disability, the discharge by operation of law, or any change in the constitution, name or style of the Borrower or any other person; or

> *(g) the death or incapacity (whether mental or physical) of the Guarantor, or any notice of her death or incapacity; or*
>
> *(h) any invalidity, illegality, unenforceability, irregularity or frustration of any actual or purported obligation of, or Security held from, the Borrower or any other person in connection with the Guaranteed Liabilities; or*
>
> *(i) any claim or enforcement of payment from the Borrower or any other person; or*
>
> *(j) any act or omission which would not have discharged or affected the liability of the Guarantor bad it been a principal debtor instead of a guarantor, or indemnifier or by anything done or omitted by any person which but for this provision might operate to exonerate or discharge the Guarantor or otherwise reduce or extinguish its liability under this Guarantee."*

13. The entirety of the Loan was advanced on 31 August 2017. It was therefore due to be repaid in full by the end of February 2018. It was not repaid in full by that date, although by 31 May 2018, US$2m had been repaid. The Loan Agreement was amended twice, first on 31 May 2018 (the "**First Amendment**"), extending the repayment date to 31 December 2018. No repayment was made by that date. On 30 April 2019, there was a further amendment (the "**Second Amendment**") to allow Mr Sethi until 30 June 2019 to make repayment. The Guarantee was further confirmed by Deeds of Confirmation, on each occasion the Loan Agreement was extended.

14. The Loan was not repaid by that date. Over the summer of 2019 settlement negotiations took place between Mr Sethia and Mr Sethi in Dubai for a further extension of time for repayment of the Loan. By 2 July 2019, Mr Sethia and Mr Sethi had agreed heads of terms, subject to contract, that Mr Sethia would allow Mr Sethi a final extension until 30 September 2019 to repay the outstanding amount of the Loan, and in default of repayment, Mr Sethi would transfer the Villa to Mr Sethia or his nominee. As a condition of this agreement, in the event that Mr Sethi failed to transfer the Villa, Mr Sethi would provide a cheque in the sum of AED 7.9 million, being the approximate outstanding amount under the Loan. These terms were to be reflected in two agreements, one entitled the "**Side Agreement**" and the other, which is entitled "Deed of Amendment and Variation to Loan Agreement" (which I shall refer to as the "**Third Amendment**"). I refer to them in more detail below. These were to be drawn up by Al Tamimi, lawyers in Dubai, instructed by Mr Sethia on behalf of himself, NSIL and SLL.

15. At the request of Mr Sethia, prior to the conclusion of a formal written agreement, on 2 July 2019, Mr Sethi provided an undated cheque in the sum of AED 7.9 million made out to NSIL (the "**Cheque**"). In an email to Al Tamimi on 2 July 2019, Mr Shah as agent for Mr Sethia, SLL, and NSIL, said *"an undated cheque of AED 7,900,000 has been received in the name of NS Investments who will act as agent for Sethia London Limited…*".

16. Mr Sethia's representatives provided Mr Sethi with a copy of a draft of the Side Agreement on 6 and 7 August 2019 (the first email failing to reach Mr Sethi due to a breakdown of the email technology). At paragraph 12 of Sethi 1, it is accepted by Mr Sethi that the draft reflected the agreement that he had made with Mr Sethia, except that by Clause 4 it required Mrs Sethi to provide another guarantee cheque in the sum of AED 7.9 million. Mr Sethi refused to sign on that basis, fearing that it would allow Mr Sethia doubly to recover on the Cheque and on the further cheque his wife was being asked to provide.

17. The parties to the draft Side Agreement were Mr Sethia, SLL, NSIL and the Defendants. It referred to the Loan Agreement and said the outstanding amount, described as the "**Loan Amount**" was "US$2,156,686 (AED 7,979,738)", and it provided:

> *"RECITALS*
>
> *C. For the avoidance of any doubt, the ultimate beneficial owner of SLL and NSIL is [Mr Sethia].*
>
> *1. The Parties have agreed that if [Mr Sethi] fails to repay the Loan Amount to SLL by 30 September 2019 ("**Deadline**"), [Mr Sethi] undertakes to transfer the [Villa] as settlement of the loan to [Mr Sethia] or his nominee ("Future Buyer") no later than the Transfer Date ("**Transaction**") ...*
>
> *1. Interpretation*
>
> *In this Agreement, except where the context otherwise requires, the following word shall have the following meanings:*
>
> > *"**Applicable Law**" means any law in the United Arab Emirates either as federal law or as law, order or regulation in the emirate of Dubai that requires the relationship between the parties in respect of the Property....*
>
> *3. Transaction*
>
> > *3.2 Prior to the Effective Date of this Agreement, [Mr Sethi] has handed over an original undated personal cheque drawn in favour of NSIL in an amount of AED 7,900,000 ("**Supplementary Cheque**") ....*
> >
> > *3.3 In the event that [Mr Sethi] fails to settle the Loan Amount by the Deadline, the Parties agree that [Mr Sethia], SLL and NSIL have the following remedies which they can exercise at their sole discretion, in any order:*
> >
> > > *(a) the Parties agree that [Mr Sethi] must transfer the [Villa] to the Future Purchaser before Dubai Land Department on a date nominated by [Mr Sethia] in his sole discretion ("**Transfer Date**"). For purposes of transfer, [Mr Sethi] irrevocably authorizes [Mr Sethia],*

SLL and NSIL to utilize the power of attorney and submit Contract F pursuant to Clause 3.1 of this Agreement. [Mr Sethi] further authorizes [Mr Sethia], SLL and NSIL to approach Dubai Islamic Bank for settlement of the Loan Amount and obtain their no objection certificate and to approach the master developer of the Property (i.e. Emaar Properties PJSC) for their no objection to complete the title transfer; and/or

(b) if the Future Purchaser is unable to acquire the Property on the Transfer Date due to any reason, [Mr Sethi] irrevocably authorises and directs NSIL to immediately date and encash the Supplementary Cheque towards the settlement of the outstanding Loan Amount …

5. Default

5.1 [Mr Sethi] and [Mrs Sethi] how be considered in the fault of its obligations under this agreement in any of the following events:

(a) [Mr Sethi] or [Mrs Sethi] fail to perform any of its obligations under this agreement;

(d) [The Cheque] is dishonoured at the time of encashment by NSIL …

5.2 Upon the happening of any event of default pursuant to clause 5.1 of this Agreement, the Parties agree and acknowledge that SLL NSIL and [Mr Sethia] reserved their legal rights under the applicable law to take the necessary civil and criminal actions against [Mr Sethi] and [Mrs Sethi] to protect their rights under the Applicable Law (defined as and pursuant to this agreement….

9. Governing Law and Jurisdiction

This Agreement and the rights of the Parties shall be governed by the laws of Dubai and the Federal Laws of the United Arab Emirates and the Parties agree that any legal action or proceeding with respect to this agreement shall be subject to the exclusive jurisdiction of the Courts of Dubai.

This Agreement does not affect the rights, powers and interests of the parties under this Agreement under any other law or jurisdiction for the time being in force."

18. Al Tamimi provided Mr Sethi with the draft Third Amendment on 15 August 2019. The parties were SLL, Mr Sethi and Mrs Sethi as a personal guarantor. This extended the deadline for repayment to 30 September 2019 and under Clause 2.1 under the heading "***Security Documents***", recorded that Mr Sethi had provided the Cheque as security. However, it raised three issues, as far as Mr Sethi was concerned. First, Clause 2.1(v) provided that the Cheque was security for repayment of the Loan. Secondly, Clause 2.1(vi) provided that Mrs Sethi would provide a guarantee cheque. Thirdly, Clause 4 failed to set out the terms on which it had been agreed the Villa would be transferred.

19. On 20 August 2019, Mr Tulshwani, an agent of Mr Sethi, returned the draft Third Amendment with amendments to reflect the terms that Mr Sethi said he had agreed with Mr Sethia. It amended the definition of Security Documents in Clause 2.1 by adding the underlined words and deleting certain words:

> *"(v) the original undated personal security cheque no. 401622 of Bank of Baroda, Dubai issued and already handed over by the Borrower ("Borrower Cheque") drawn in favour of NS Investments Limited, ("NSIL") in an amount of AED 7,900,000 to the Lender, and in case Borrower didn't transfer the property W43, Emirates Hills, Dubai to the Lender.*
>
> ~~*(vi) the original undated personal cheque issued by the Personal Guarantor ("Guarantor Cheque") drawn in favour of NSIL in an amount of AED."*~~

20. Clause 3 provided that:

> *"3. EFFECT OF AMENDMENT-III*
>
> *Except as expressly amended, restated or agreed in this Amendment-III, the Facility Agreement and the security provided by the Borrower and the Personal Guarantor shall continue in full force and effect. Default interest (at the rate of 20% per annum) till August 2019 shall be paid by the Borrower on or before 10th September 2019 and remainder default interest (at the rate of 20% per annum) along with the principal sum outstanding shall be paid on or before 30th September 2019."*

21. It also deleted Clause 4 entitled Additional Security and replaced it with a heading entitled "Remedy options:", with the following amended wording:

> *"As property Villa W43, Emirates Hills, Dubai was a security towards to the loan in the 1st Facility Agreement dated. 31st Aug, 2017 so the following remedy has been discussed and agreed*
>
> *4.1 The Borrower Cheque* ~~*and the Guarantor Cheque*~~ *shall be encashed if the Borrower fails* ~~*to repay the Unpaid Amount to the Lender by the Deadline date*~~*. Transfer the property W43,*

> *Emirates Hills, Dubai up to 30th Sept, 2019 (as discussed and agreed DIB outstanding loan of 18.574,228.00 will be paid by the Lender to cover the balance amount of UK loan USD.1,950,000.00 + remaining interest of USD.206,686.00 and will transfer the property W43 under the name of Lender).*
>
> *4.2 In case Borrower receive any other loan on property W43, Emirates Hills from other bank before 30th Sept, 2019 the amount will be paid by the Borrower to the Lender directly to UK account to settle the balance amount of UK loan + Interest.*
>
> *4.3 In case Borrower will able to Sell the property W43, Emirates Hills, Dubai before 30th Sept, 2019 after paying the outstanding DIB loan Lender will clear the outstanding UK loan and remaining interest.*
>
> *4.4 In case Borrower fails to settle the loan by 30th Sept, 2019, he will transfer the property W43 to the Lender and as discussed and agreed by the Lender outstanding loan amount of DIB will be settled by the Lender.*
>
> *4.5 In case Borrower didn't transfer the property W43 or if there is any block from the bank or Borrower, Lender has the right to use the Security Cheque 401622 of Bank of Baroda for AED.7,900,000.00 by 30th Sept, 2019 which has already been issued by the Borrower to the Lender."*

22. On 20 August 2019, Mr Sethi also sent Mr Sethia an email (the "**20 August 2019 email**") in which he set out his objections to the draft Third Amendment. In it, he stated:

> *"3) As discussed, security cheque for AED.7.90 Mn has been given in case there is any issue in the transfer of property then you may bank the security cheque.*
>
> *4) In worst case scenario as a goodwill gesture and my good intention I have already explained you my background of the losses by a very loan SMS. I couldn't sign the legal document because of bank loan and any legal issue may arise with bank. However your team has given a new version of agreement that in case I don't pay the outstanding UK loan and remaining interest by 30th Sept, 2019 you will encash the security cheque. If you please look into worst case scenario, how can I get funding and in case I block the transfer of Villa then you can use the cheque. I am under lots of pressure for sorting out my 3rd Sept loan payment & 10th Sept interest payment so I can focus to sell the property & settle the UK loan matter."*

23. Thereafter negotiations appear to have foundered. After 20 August 2019, there were further meetings between Mr Sethi and Mr Sethia, including a dinner at Mr Sethia's house on 29 September 2019, however no reference was made to the Cheque. The

Side Agreement and the Third Amendment was never signed. Nevertheless, on 29 September 2019, the Cheque was dated on behalf of NSIL and presented for payment the following day, with no warning being given to Mr Sethi. At that stage the balance of the debt, under the Loan Agreement, as amended by the Second Amendment, had been due since June 2019 and remained unpaid. The Cheque was returned due to there being an insufficient balance on Mr Sethi's account.

The criminal proceedings in Dubai

24. Following this, NSIL issued proceedings against Mr Sethi in Dubai (the "**Dubai proceedings**"). The first were criminal proceedings for dishonouring the Cheque, because under Article 401 of the UAE Federal Penal Code, it is a criminal offence to provide a cheque drawn on an account with insufficient funds for it to clear. This resulted in Mr Sethi being fined AED 300,000 by the Dubai Criminal Court on 29 January 2020, although on appeal on 10 March 2020, the sum was reduced AED 100,000.

25. Thereafter Mr Sethi unsuccessfully brought criminal proceedings against NSIL for breach of trust, an order for the return of the cheque and sought his acquittal in the criminal case brought against him. The Dubai Criminal Court dismissed his complaint on 30 July 2020. An appeal from the dismissal of his criminal complaint was dismissed on 20 September 2020.

The civil proceedings in Dubai

26. On 1 March 2020, NSIL issued a claim in the Dubai Commercial Court of First Instance for judgment on the Cheque. In their first instance pleading in the commercial proceedings, NSIL presented matters very differently from the evidence before me. It was said that (a) it was NSIL, not SLL, that had loaned Mr Sethi the money; (b) it was a personal loan for AED 7.9 million, not a commercial loan for US$4 million and (c) the Cheque was issued on 29 September 2019, when in was in fact issued on 2 July 2019. Further, it stated that NSIL had '*tried in all amicable ways to push and urge the Defendant to pay the value of the cheque, but all attempts were unsuccessful'.* That does not appear to have been the case at all.

27. On 2 March 2020 that court gave judgment on the Cheque in the amount of AED 7.9 million, with interest at 9% per annum, together with costs of AED 2,000 (the "**Dubai Judgment**"). On 10 March 2020 Mr Sethi appealed the Dubai Judgment. In an amended Defence, he argued that the agreement to which the Cheque related was unsigned and had not come into effect. NSIL contended that "*the facts contended by the appellant were incorrect and are not true … The appellant received the value of the loan*" and relied upon a partial extract of the 20 August 2019 email, referred to at paragraph 22 above, in the following terms: "*4) In the worst case ... In the event that the outstanding loan in the UK and the remaining interest are not paid by September 30, 2019, you shall cash the guarantee cheque ...*)". On 26 June 2020 Mr Sethi's appeal was dismissed.

28. On 30 June 2020, there was then a further appeal by Mr Sethi to the Dubai Court of Cassation. In his Grounds of Appeal he argued that:

(1) the unsigned Side Agreement had no legal effect, although the Grounds of Appeal stated "an initial loan agreement was signed on **August 6, 2019**, stating that [SLL] will grant the Appellant a loan of four million US dollars, to be repaid at agreed periods between the two parties in accordance with paragraph E of the agreement." [emphasis added];

(2) NSIL had no basis for retaining the Cheque;

(3) the Cheque was security provided in respect of a loan under the Side Agreement that was never agreed and which remained "in the negotiating stage";

(4) the burden of proof lay on NSIL to show that the fulfilment of the condition to cash the Cheque, namely the non-payment of the Loan and the failure to transfer the Villa, which it had not done;

(5) there should be an adjournment of NSIL's claim until the conclusion of Mr Sethi's criminal complaint against it and these proceedings, which by then were on foot.

29. In its submissions to the Dubai Court of Cassation dated 19 July 2020, NSIL continued to rely on the 20 August 2019 email. There it maintained at p. 2:

> *"2. The Appellant received the loan amount. It is not true what the Appellant claimed that the Loan Agreement was still in the negotiation stage." and at p. 3 "Whereas the Appellant acknowledged in paragraph 2 of the facts mentioned in his statement of objection that a preliminary loan agreement was signed 6 August 2019, and in the reasons for the objection, he denies signing any loan agreements."*

30. NSIL then initiated proceedings in the Dubai Execution Court for execution of the Dubai Judgment of AED 8,540,320 (including costs & interest). On 20 August 2020, Mr Sethi paid into court the sum of AED 790,000 being 10% of the Dubai Judgment (less costs and interest) as required by the Dubai Execution Court.

31. On 26 August 2020, the Dubai Execution Court approved a two-year payment plan for the satisfaction of the Dubai Judgment, pending settlement of which and as security for which the Court directed an attachment of a number of properties proposed by Mr Sethi. The value of these properties apparently exceeds the value of the Dubai Judgment.

32. On 13 September 2020, the Dubai Court of Cassation stayed execution of the Dubai Judgment until the hearing of Mr Sethi's final appeal. On 4 October 2020, it dismissed Mr Sethi's appeal, rejecting all the grounds he raised.

The English proceedings

33. On 5 September 2019, SLL's solicitors, relying on non-payment of the balance of the Loan as an Event of Default under the Loan Agreement, wrote to Mr Sethi, cancelling the Loan and declaring that all amounts due thereunder, including accrued interest and costs were immediately payable. The sums said to be due at that date were said to be

US$2,127,223, including interest. On the same date, SLL's solicitors wrote to Mrs Sethi, demanding payment of the same sum under the Guarantee. Neither of the Defendants have paid anything.

34. On 13 November 2020 SLL issued proceedings to recover the unpaid balance of the Loan, claiming the sterling equivalent of US$2,209,673.16 as a debt. Neither the Claim Form nor the Particulars of Claim made any reference to NSIL, the Cheque or the Dubai Proceedings.

35. The Defendants' then solicitors, Messrs Chan Neil, filed an acknowledgment of service and served a Defence and Counterclaim dated 20 February 2020, settled by Counsel. It took no points in relation to the Dubai Proceedings and made no reference to or complaint about the presentation of the Cheque. NSIL's civil proceedings in Dubai had yet to be issued, but the criminal complaint had been heard. In essence it raised three defences:

    (1) an allegation of illegality as a matter of UAE law, advanced on the basis that the Loan Agreement provides for interest;

    (2) an allegation that the rate of interest is liable to be extinguished or reduced under Sections 140A and 140B of the Consumer Credit Act 1974;

    (3) an allegation that SLL is not entitled to charge default interest because it has not satisfied a condition precedent; and, even if it has, the rate amounts to a penalty.

    There was also a non-admission that SLL's calculations were correct.

36. A summary judgment application was made by SLL on 5 March 2020. By the time the application came on for hearing on 27 July 2020, no evidence had been served by the Defendants in opposition to SLL's application. In fact, on 30 June 2020, Chan Neill had obtained an Order under CPR 42.3, declaring that they had ceased to act for the Defendants. It was not served on SLL or its solicitors, nor was a new address for service provided by the Defendants, as required by CPR 6.23(1).

37. By 23 July 2020, Zaiwalla & Co had been instructed on behalf of the Defendants. On that date, they wrote to SLL's solicitors referring to the Dubai Proceedings and stating, "*we will need time to consider carefully whether there are any overlapping issues in the parallel proceedings conducted in the two jurisdictions and the extent to which there is any risk of conflicting judgments, res judicata, lis pendens, abuse of process and or estoppel arising in respect of your client's claim in the English courts*." As a result, the Defendants "*request that your client agree to a stay of proceedings for a limited period of two months, that is, up until 27 September 2020 to allow time for ADR and to provide adequate time for an outcome in the Dubai proceedings*."

38. In response to that letter, on 24 July 2020, SLL's solicitors responded:

> "**Alleged Overlap**
>
> *Your clients are aware that our client is not a party to any proceedings in the United Arab Emirates: the proceedings to*

> *which we understand you to refer involve neither the Claimant nor the Defendants to the English action nor do they involve the contract of loan the subject of the English action. Thus, the suggestion that there is some overlap between the present proceedings and proceedings abroad is wrong."*

39. On 25 July 2020 Mr Sethi issued an application to adjourn these proceedings pending the determination of the UAE proceedings, alternatively an adjournment of the Summary Judgment Application. That application was supported by Crestohl 1 and Sethi 1. Crestohl 1 raised a number of concerns relating to double recovery, the proper parties to the Loan Agreement and a risk of conflicting judgments being issued by the English and Dubai courts. It stated:

> *"16. If the Loan is apparently being settled in Dubai, by way of payment to a company that is not the Claimant, this raises a question as to who in fact are the true parties to the Loan, and connectedly what is the proper law governing it. While on the face of it, the parties to the Loan Agreement are the Claimant and the First Defendant, the arrangements in Dubai suggest that the Loan may in reality have been made directly between Mr Nirmal Sethia and the First Defendant, two individuals domiciled in the UAE …*
>
> *…*
>
> *21. If the UAE Cassation Court finds for NS Investments Ltd, this means that NS Investments Ltd has the right in the UAE to sue on the Security Cheque. If in parallel, this Court were to find that the Claimant had the right to sue on the Loan Agreement and the Guarantee, Mr Sethia (who for all intents and purposes is the ultimate beneficial owner and directing mind of both companies), would in effect have obtained double recovery: a remedy under the Loan as if it had not been compromised AND a remedy under the Settlement Agreement which was intended to compromise the Loan.*
>
> *…*
>
> *24. Put another way, there is a direct conflict between the claim brought in the English Courts on the basis of the sum outstanding on the Loan, and NS Investment Ltd's proceedings in the UAE, which are premised upon the Loan having been settled on the terms of the Settlement Agreement."*

40. At the hearing on 27 July 2020, I raised concerns that there was insufficient protection to avoid double recovery of money, representing the sums outstanding under the Loan, by virtue of judgment in the Dubai proceedings and this present claim. I asked Mr Edwards specifically "*Was the Cheque given in respect of the Loan?*" He replied that: "*There were other dealings to which the Cheque related. There were negotiations about treating it as security in this way, but no binding agreement.*" He said he needed to take further instructions.

41. On the basis that they paid the costs thrown away, I granted the Defendants' request for an adjournment to 25 September 2020, with a two day estimate. I gave further directions, including a timetable for the service of evidence and service of any draft amendments to the Defence and Counterclaim by either of the Defendants by 11 September 2020. Directions were also given in the event that the Defendants intended to make an application for a further adjournment. At paragraph 3, I made the following Order:

> *"The Claimant's solicitors shall by 4pm on Friday 21of August 2020 state in a letter to the Defendants' solicitors whether it contends that any sums recovered by NSIL pursuant to orders of the courts of Dubai and/or the United Arab Emirates in respect of [the Cheque] should not be applied against the sums claimed by the claimant in this action; and if it so contends, file and serve a witness statement setting out the evidence on which it relies in that regard."*

42. On 21 August 2020, SLL's solicitors wrote to Mr Sethi's solicitors (the "**21 August 2020 Letter**") stating:

> *"We hereby confirm on behalf of the Claimant that it accepts that any sums recovered by NS Investments Limited ('NSIL') pursuant to Orders of the Courts of Dubai and/or the United Arab Emirates in respect of the Cheque are to be applied against the sums claimed by the Claimant in this action. We make clear that this is on the basis that merely obtaining judgment on the Cheque would not amount to making recovery: it is only sums actually realised that fall to be applied. We also make clear that it is net recoveries (i.e. less the costs and expenses of any enforcement action) that fall to be applied."*

43. At the same time SLL offered the following undertaking (the "**Undertaking**"):

> *"1. In this undertaking:*
>
> *(i) the 'Cheque' means cheque No 401622 drawn by the First Defendant on the Bank of Baroda in the sum of AED 7.9 million;*
>
> *(ii) the 'Judgment' means the judgment entered in favour of the Claimant against the Defendants in this action;*
>
> *(iii) 'NSIL' means NS Investments Limited, a company registered in Jebel Ali Free Zone Authority under commercial registration no. 177447, having its registered address at 2001, Vision Tower, Business Bay, Dubai, United Arab Emirates;*
>
> *(iv) 'Outstanding Amount' means the amount of the Judgment (plus interest pursuant to the Judgments Act 1838) less any Recoveries made from time to time;*

> *(v)'Recoveries' means any recoveries (less the costs and expenses of any enforcement action) made pursuant to Orders of the Courts of Dubai and/or the United Arab Emirates in respect of the Cheque.*
>
> *2. The Claimant undertakes that:*
>
> *(i) it will credit any and all Recoveries against the Judgment;*
>
> *(ii) it will not seek to enforce the Judgment in England or in any other jurisdiction in an amount in excess of the Outstanding Amount."*

44. NSIL's claim is simple. There is no dispute that the Loan was advanced pursuant to the Loan Agreement and it has not been repaid in full by the due date, pursuant to the Second Amendment, namely 30 June 2019. It therefore sues for the balance, together with interest, having served the letter of 5 September, referred to at paragraph 33 above.

45. Mr Sethi served a draft amended Defence on 18 September 2020. An Application Notice was served on 23 September 2020, with a revised draft Defence. In the revised draft, in addition to the defences contained in his original Defence, summarised at paragraph 35 above, he advances three new defences:

    (1) SLL is contractually estopped from bringing a claim upon the Loan Agreement pursuant to an implied agreement entered on or around 2 July 2019, by which the Claimant agreed not to bring a claim upon the loan while NSIL retained possession of the Cheque. As NSIL has obtained judgment from the Dubai Commercial Court against Mr Sethi on 2 March 2020 in respect of the Cheque, SLL cannot now bring a claim upon the Loan (the "**Contractual Defence**"); alternatively

    (2) SLL cannot obtain double recovery or impose double recovery on the Defendants by obtaining judgment for a debt due pursuant to the Loan in circumstances where NSIL has judgment for the debt due pursuant to the Cheque (the "**Double Recovery Defence**").

    (3) the Dubai Proceedings preclude this claim either by virtue of Section 34 of the Civil Jurisdiction and Judgments Act 1982 or by virtue of *Henderson v Henderson* abuse (the "**Res Judicata Defence**").

46. SLL has not served evidence in response to the Defendants' evidence. Its position is that it does not thereby accept the factual correctness of what the Defendants have to say, but it does not invite the Court on the present occasion to attempt to resolve any disputes of fact. I should therefore proceed on the basis of the facts set out in Crestohl 2 and Sethi 2. SLL's position is that the draft Amended Defence, as with the unamended version, does not disclose a defence with a real prospect of success in relation to Mr Sethi. In addition, it provides no defence to Mrs Sethi, even if it were capable of providing a defence to the First Defendant.

47. Before I turn to the law, I should make clear that at the resumed hearing the Defendants indicated that the application to adjourn these proceedings further was no longer pursued.

The law in relation to summary judgment

48. It was common ground as to the principles to be applied to the applications. The power to award summary judgment is to be found in CPR 24.2, which, so far as material, states that:

> *"The court may give summary judgment against the defendant ... on the whole of the claim or on a particular issue if-*
>
> *(a) it considers that:*
>
> *(ii) that the defendant has no real prospect of succeeding on the claim or issue ... and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial."*

49. The relevant principles were summarised by Floyd LJ in *TFL Management Services Limited v Lloyds TSB Bank Plc* [2014] 1 WLR 2006 at [26] to [27]. In that passage, Floyd LJ referred to an earlier decision of Lewison J (as he then was) in *Easy Air Limited (Trading as Open Air) v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15], where he summarised the principles in the following way:

> *"... the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];*
>
> *(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it*

> *on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
>
> *(vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

50. I also remind myself of the following:

(1) the criterion "real" is not one of probability, it is the absence of reality: see Lord Hobhouse in *Three Rivers District Council v Bank of England (Number 3)* [2003] 2 AC 1 [158];

(2) an application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a

trial of the issues having regard to all the evidence: see *Apovdedo NV v Collins* [2008] EWHC 775 (Ch);

(3) in relation to the burden of proof, the overall burden of proof rests on the applicant to establish that there are grounds to believe the respondent has no real prospect of success and there is no other compelling reason for trial. The standard of proof required of the respondent is not high; it suffices merely to rebut the applicant's statement of belief.

51. I was also asked by Mr Macpherson to take into account what he called the "*Altimo* principle", to be derived from the Privy Council case of *Altimo Holdings and Investment Limited and Ors v Kyrgyz Mobil Tel Limited and Ors* [2011] UKPC 7, where Lord Collins stated at [84]

> *"The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts."*

52. In my view such a principle has little application to the present case. The law I am being asked to considered stems from old authority and the fact that it has not been recently challenged shows not that it is developing but the contrary. This is well established law. Further, as I stated earlier, the material primary facts are not in dispute.

The applicable principles when considering whether to grant permission to amend a statement of case

53. The test to be applied in an opposed application to amend a statement of case is the same as the test applied to an application for summary judgment. The question is whether the proposed new defence has a real prospect of success: see *Slater & Gordon (UK) 1 Ltd v Watchstone Group plc* [2019] EWHC 2371 (Comm) at [34]-[37])]. *SPI North Ltd v Swiss Post International (UK) Ltd* [2019] EWHC 2004 (Ch) at [5]. In that regard I refer to the authorities summarised at paragraphs 49 and 50 above.

54. Before turning to the detail of the draft amended Defence, I should make two preliminary points:

(1) Neither the evidence filed by the Defendants nor the skeleton arguments served on their behalf sought to engage with any of the points made by SLL in relation to the existing defences to which I have referred to in paragraph 35 above. At paragraph 33 of SLL's skeleton, Mr Edwards stated that it was unclear whether the Defendants accepted that the existing defences were unarguable. Mr Macpherson's position to this was somewhat unusual. He stated expressly that they were not being relied upon for the purposes of defending the summary judgment application, but they were not being wholly abandoned. Should the additional defences in the draft amended Defences be permitted to proceed to trial, he reserved the right to raise the

original defences in due course, but for present purposes they could be ignored.

(2) Having seen the submissions made by NSIL in the Dubai Court of Cassation, the Defendants accept that there are not inconsistent positions being advanced by SLL in these proceedings and NSIL in the Dubai Proceedings in that it is not being asserted by NSIL that either the Side Agreement or the Third Amendment were validly executed.

55. I now turn to the each of the new defences advanced in the revised draft amended Defence, taking the Contractual and Double Recovery Defences together.

The Contractual and Double Recovery Defences – Mr Sethi's submissions

56. His first amendment is by reference to the fact that the Cheque was given to NSIL, sued on and a judgment successfully obtained. This is said to have resulted in an estoppel by an implied term or an implied agreement. Mr Macpherson argued that, although there was no concluded written agreement reached between the Defendants and Mr Sethia and NSIL in Dubai, by 2 July 2019, Mr Sethia and Mr Sethi had agreed heads of agreement (subject to contract) to provide Mr Sethi with a final extension of time until 30 June 2019 to pay the sum outstanding, and in default, for the transfer of the Villa to Mr Sethia or his nominee. He described this agreement as the "**Final Extension Agreement"**. Mr Sethi provided the Cheque on 2 July 2019, as security for the transfer of the Villa, pursuant to the Final Extension Agreement.

57. He contended that there was a binding implied term in the Final Extension Agreement, alternatively a binding implied agreement between SLL, NSIL, Mr Sethia and Mr Sethi that SLL would not enforce its rights under the Loan Agreement if NSIL sought and or obtained judgment on the cheque against Mr Sethi. As NSIL has done so, SLL is contractually estopped from bringing this claim.

58. In making this submission Mr Macpherson set out some general propositions on the law of cheques and other negotiable instruments. Payment of a debt by a cheque normally constitutes a conditional payment. The acceptance of the cheque by the creditor gives the debtor a good defence to an action for the debt, at least until the cheque has been dishonoured. He relied on the following passage of Chitty on Contracts (33rd addition incorporating the 1st Supplement) at 21-075 and 21-076:

> *"**Payment by negotiable instrument***
>
> *Apart from express agreement, a creditor is not bound to accept payment in any way except cash, i.e. legal tender. If, however, the creditor accepts a negotiable instrument, such as a bill of exchange, promissory note or cheque, it is a question of fact depending on the intention of the parties, whether it is taken in absolute satisfaction of the debt, or only in conditional satisfaction. In either event, the acceptance of the instrument gives the debtor a good defence to an action for the debt, at least until the instrument matures.*
>
> ***Conditional payment***

> *Normally where a creditor accepts a negotiable instrument for its debt it is presumed to be taken by it as a qualified or conditional payment, and, accordingly, although the original debt is still due during the currency of the instrument, the creditor's remedy is suspended until it is due. If it is then paid, this amounts to payment of the debt; if it is dishonoured when it is presented for payment in the ordinary way, the right to sue upon the original debt revives as if no negotiable instrument had been taken. Hence, if interest was due on the debt, it continues to accrue after the date of acceptance of a cheque which is subsequently dishonoured. It has been held that a claimant who accepts a cheque for part of the debt cannot sign judgment in default of appearance for the full amount claimed unless the cheque is dishonoured. Similarly, acceptance of an irrevocable documentary credit does not constitute absolute payment to the seller so as to release the buyer; if the credit is not honoured, the seller sue the buyer."*

59. The debtor therefore has a good defence to an action for the debt even where the cheque has been made payable to a third party at the creditor's request. Chitty summarises the position at note 425 to paragraph 21-075:

> *"The same result follows:(ii) where the bill or note is, at the creditor's request, payable to a third person: Price v Price (1847) 16 M. & W. 232, 241; National Savings Bank Association Ltd v Tranah (1867) L.R. 2 C.P. 556."*

60. Whilst the creditor can normally bring a claim on the debt once the cheque has been dishonoured, the position is different where the creditor has asked the debtor to make out a cheque to a third party. Chitty summarises the position at note 430 to paragraph 21-076:

> *"Where the bill has been negotiated and is outstanding in the hands of a third party, the creditor's remedy is still suspended: Davis v Reilly [1898] 1 Q.B. 1; Re A Debtor [1908] 1 K.B. 344 (except where the third party is a trustee for the claimant: National Savings Bank Association Ltd v Tranah (1867) L.R. 2 C.P. 556; or agent for the claimant: Hadwen v Mendisabal (1825) 10 Moo C.P. 477."*

61. The propositions for which those cases stand are well-established and, as I understand it, Mr Edwards did not dispute them. In *Davis v Reilly* [1898] 1 QB 1, a debtor gave a bill for £20 payable at 3 months. The creditor indorsed the bill to a third party. The bill was dishonoured and the creditor sued the debtor for the underlying debt. The creditor was adjudicated bankrupt and the third party returned the bill to the creditor's trustee in bankruptcy. The trustee in bankruptcy continued the claim against the debtor and obtained judgment from the County Court. The debtor appealed. In the Divisional Court, Wright J (with whom Kennedy J agreed) found that:

> *"It seems to be clearly settled at common law that an action will not lie for the price of goods, for which a bill of exchange*

> *has been given, while the bill is outstanding in the hands of a third party."*

62. In *National Savings Bank Association Ltd v Trana* (1867) L.R. 2 C.P 556, the Court of Common Pleas considered the equivalent of a strike out or summary judgment. The creditor issued a claim for a debt of £150. The debtor filed a defence that he had delivered a promissory note to a third party on account of the debt and that the third party continued to hold the bill. The creditor replied stating that the third party was and remained his trustee, that the debtor knew this, and that the note was due and unpaid. The court gave judgment for the creditor on the grounds that the third party was trustee for the creditor. Bovill, CJ, with whom Willes J agreed, found at p. 558 that:

> *"The defendant, however, relies on the fact that the note is outstanding in the hands of Williamson and Wieland. It was, however, placed in their hands by consent of both parties, and not in satisfaction but only on account of the claim made in this action, and it is still held by them as trustees for the plaintiffs. It seems to me, therefore, that the replication is good both in law and equity, and differs very little from one averring that the note is overdue and unpaid and in the hands of the plaintiffs themselves."*

63. In *Re A Debtor* [1908] 1 KB 344, a solicitor was owed £115 by his client. The debtor then accepted a one-month bill for £120 (the debt plus costs) drawn by the solicitor expressly for the purpose of giving the debtor more time to pay. The solicitor then indorsed the bill in blank and gave it to his bankers, who said they would collect it when due. Once the bill was due, the bank pressed the debtor who paid only £5. The solicitor then issued and served on the debtor a bankruptcy notice for the remaining £115 in respect of the underlying debt. The bank returned the bill and the solicitor issued a bankruptcy petition. The Registrar made a receiving order and the debtor appealed. The appeal succeeded. Cozens-Hardy MR found, at 348, that:

> *"I think the authorities which have been cited to us shew that what was done operated as an agreement not to sue, and an agreement not to sue not merely during the currency of the bill, but afterwards, notwithstanding dishonour, so long as the bill was outstanding in the hands of a third party. The authorities which have been called to our attention seem to me to establish that proposition beyond question."*

64. Fletcher Moulton LJ agreed. He recorded, at p. 350, the argument by the creditor that the principle is only to create a suspension of the rights of the creditor during the currency of the bill, and that when the bill became overdue this suspension came to an end, but considered this argument unsustainable:

> *"A parallel case where a bill is taken in payment of a debt, say for instance in payment for goods sold, exactly illustrates what is the effect of taking a bill. It is perfectly true that it is only a conditional payment. It is a payment if the bill is paid, and if it is in your hands when it becomes due and is dishonoured the*

> *debt revives. But if you have availed yourself of the character of the bill as a negotiable instrument, and have passed it out of your possession so that the right to proceed on that bill is vested in some one else and not in you at the date of the dishonour, the suspension of the debt continues just as much as if the bill was not overdue. A moment's consideration will shew that the Courts would not be administering justice if they did not hold this to be the case, because otherwise you could sue for the price of the goods, while another man, through possession by your act of the negotiable instrument which had been given for the price, could make the debtor pay the amount over again."*

65. Accordingly, Mr Macpherson submitted that where, as in the present case, a debtor has provided a cheque to a third party at the request of the creditor on account of the debt, the position at common law is that there is an implied agreement that the creditor will not bring a claim against the debtor for the underlying debt, not only while the cheque is outstanding but also after the cheque has been dishonoured. The creditor can only bring a claim on the underlying debt after it has recovered possession of the cheque. This is said to be to avoid the position whereby the creditor could obtain judgment on the debt at the same time as the third party on the cheque.

66. Further, that argument is said, *a fortiori*, to be stronger where the third party has already obtained judgment on the cheque as the cheque cannot be returned to the creditor in a way that avoids the mischief of two judgments.

67. Mr Macpherson also argued that the Cheque was said to be in settlement of the Loan. The basis of this is the evidence of Mr Sethi at paragraph 15 of Sethi 2, where he says "*The Cheque was provided under the terms I had agreed in principle with Mr Sethia to settle the loan."* Moreover, NSIL now accepts that the sums recovered under the Dubai Judgment should be deducted from the sums due under the Loan Agreement. Mr Macpherson acknowledged, however, that neither the draft Side Agreement nor the draft Third Amendment included terms that expressly described the Cheque as being paid in full settlement of the Loan.

68. Further, when during the course of argument, I highlighted that Clause 3 of the draft Third Amendment (recited at paragraph 20 above), which remained unaltered, even after Mr Sethi's amendments to the draft, appeared to contradict such an interpretation, Mr Macpherson submitted that I should assume the parties had intended to excise Clause 3 and that it did not reflect the oral agreement.

69. Mr Macpherson argued that although the authorities referred to an implied contract, it may be better regarded as a matter of public policy. The mischief that this rule is designed to prevent is the possibility that the creditor could obtain judgment for the debt while the third party could at the same time obtain judgment on the cheque. The settled practice of the court is to deal with this problem at the stage of judgment, not at the stage of recovery. There is no authority whereby the creditor has been given judgment on the debt but must account for any recovery that the third party might make under the cheque.

70. There is a disagreement about whether NSIL was entitled to present the Cheque for payment or should have returned the Cheque to Mr Sethi. Mr Macpherson submitted this was a matter principally for the UAE courts. This disagreement is irrelevant to the underlying question of whether the English court should dismiss NSIL's claim, unless it recovers the Cheque in its form as a negotiable instrument. The Dubai Court of Cassation has given judgment for NSIL on the Cheque. SLL cannot maintain its claim under the Loan in circumstances where NSIL has a valid judgment against Mr Sethi on the Cheque.

71. In relation to the undertaking offered by SLL, Mr Macpherson submitted that this did not preclude double recovery. At paragraphs 18 to 23 of Crestohl 2, supported by an exhibited letter dated 18 September 2020 from Mr Alshamsi, Mr Sethi's lawyers in the UAE, Mr Crestohl set out the difficulties it is said that Mr Sethi will face were SLL to seek to enforce the English judgment in Dubai. It is said there is a real risk that both judgments could be executed in parallel in Dubai and that active steps would have to be taken by Mr Sethi to resolve any issues of double recovery and conflicting judgments through a judicial process in the Abu Dhabi High Court. This could take up to a year to resolve, and that will put him to considerable inconvenience and expense.

72. In Crestohl 2, Mr Crestohl also referred to the lack of candour by SLL in these proceedings by: (i) stating by their solicitors' letter of 24 July 2020 that there was no overlap between the Dubai Proceedings and these proceedings; and (ii) denying in oral submissions on 27 July 2020 that sums recovered under the Dubai Judgment related to the Loan. Mr Macpherson said these matters raised a genuine concern that the undertaking given by SLL will be inadequate to protect the Defendants against the possibility of double recovery. In the alternative Mr Macpherson submitted that for the undertaking to be fully effective, it should also be given by Mr Sethia, a British national, and whom he described as the "puppet master" of both SLL and NSIL.

SLL's submissions on the Contractual and Double Recovery Defences

73. Mr Edwards submitted that the new defences had to be examined against the following undisputed points:

    (1) By mid-2019, there had been two formal extensions to the term of the loan. The second extended the repayment date to 31 June 2019. Non-payment by that date amounted to the clearest possible Event of Default.

    (2) On the occurrence of that Event of Default, the Villa stood charged in equity to SLL. Thus, by the time of the conversation in early July 2019 on which the Defendants now rely, the Villa was charged in equity to SLL.

    (3) The Cheque was handed over on 2 July 2019. At paragraph 10 of Sethi 1, Mr Sethi says that the AED 7.9 million was "*the approximate amount outstanding under the Loan*" at that time. It was obviously foreseeable that if it came to be presented, the amount due would have increased or that the US$/AED exchange rate would have moved, because under Clause 9.2 of the Loan Agreement, the currency of account was US$.

    (4) There is nothing to show that the intention was that, if by the time the Cheque was presented, the amount due in US$ was, for whatever reason,

more than AED 7.9 million, SLL was foregoing any right to the balance. Indeed, the draft Side Agreement provides by Clause 3.3(b) that NSIL shall "*date and encash the Supplementary Cheque towards the settlement of the outstanding Loan Amount*". [emphasis added]

(5) It was plainly foreseeable that if the Cheque were presented it might be dishonoured.

(6) What Mr Sethi now seeks to do is avoid paying what he undoubtedly owes under the Loan Agreement. The Cheque was dishonoured when presented and throughout the Dubai Proceedings Mr Sethi denied his liability to pay in those proceedings. Simultaneously, he seeks to defend this action on the basis that the Cheque was presented by NSIL. The inconsistency is obvious: Mr Sethi says to this Court that the Cheque amounted to payment and to the UAE court that he is not liable on it.

(7) There is no risk of double recovery. That is because SLL accepts that any recoveries made by virtue of the action on the Cheque must be credited against the debt due under the Loan Agreement and has offered an undertaking to the Court in the event that judgment is entered in its favour, as set out in the 21 August Letter.

74. SLL avers that, where a cheque is handed to a third party who is not an agent (or trustee) Mr Macpherson's analysis of the law is substantially correct. A cheque or other negotiable instrument may be handed over in respect of a debt either as payment (absolute or conditional) or as security. The practice of giving a cheque as security is no longer very prevalent in England but it remains common in other jurisdictions.

75. Where a cheque is handed over in payment, the basic principle is clear and not in dispute:

> *"Normally where a creditor accepts a negotiable instrument for its debt it is presumed to be taken by it as a qualified or conditional payment, and, accordingly, although the original debt is still due during the currency of the instrument, the creditor's remedy is suspended until it is due. If it is then paid, this amounts to payment of the debt; if it is dishonoured when it is presented for payment in the ordinary way, the right to sue upon the original debt revives as if no negotiable instrument had been taken."* (Chitty on Contracts, para 21-075)

76. Mr Edwards, however, adds that the implication held to arise – that the creditor's contractual remedy is suspended – results from the intention to treat the cheque as (conditional) payment either immediately or on some future date. If there is no intention that the cheque will be presented, it necessarily follows that the cheque is merely security for the due performance of the underlying contractual obligations.

77. It must be right, he said, that where a negotiable instrument is negotiated to a party by the creditor, the creditor's remedy remains suspended, notwithstanding dishonour. The justice of this is obvious: the creditor has obtained value from the instrument by negotiating it; and the holder in due course "*holds the bill free from any defect of title*

of prior parties, as well as from mere personal defences available to prior parties among themselves" (section 38(2) of the Bills of Exchange Act 1882). Thus, to allow the creditor to sue would expose the debtor to the risk of having to pay twice because the holder in due course is neither obliged to hand over the fruits of the instrument to the creditor nor exposed to a purely personal defence: see *In re a Debtor* [1908] 1 KB 344, 350 per Fletcher LJ, recited at paragraph 64 above. While the instrument is in the hands of a third party, the debtor would not be entitled to assert against the third party a defence available against a creditor.

78. However, if the third party is merely a trustee or agent for the creditor then the situation is no different from that where the negotiable instrument is in the hands of the creditor himself and upon dishonour the suspension of the creditor's entitlement to sue on the underlying claim ends: *National Savings Bank Association Ltd v Tranah* (1866-67) LR 2 CP 556, *Hadwen v Mendisabal* (1825) 2 C&P 21.

79. The reason for this is that the agent is in no different position in relation to the debtor than the creditor himself. Where the holder of a bill sues for the benefit of someone else, any defence or set-off available against the creditor is available against the holder and the agent/trustee must pay over to his principal beneficiary the fruits of the instrument. Mr Edwards drew my attention to paragraph 34-099 of Chitty and in particular the case of *Barclays Bank v Aschaffenburger Zellstoffwerke AG* [1967] 1 Lloyds Rep 387.

80. In the *Barclays Bank* case, A accepted bills drawn by B in payment for goods sold to him by B. C purchased the bills from B for 73% of their face value and agreeing that when the bills matured, the balance would be paid to B. When some of the bills were dishonoured, A sought to rely on a counter claim in respect of the goods sold by B. It was held that C was a holder for value as to 73% of the claim and trustee for the balance of the claim on behalf of B. Accordingly, there was summary judgment on the whole amount, with a stay of execution in respect of 27% of the amount.

81. Equally, if a cheque is handed over merely as security and not as conditional payment, it does not suspend the creditors underlying contractual claim. Mr Edwards relies on *Modern Light Cars Ltd v Seals* [1934] 1 KB 32, which concerned a hire-purchase agreement in relation to a car. A promissory note was given for the total amount of the monthly instalments which would fall due. The hirer (in breach of contract) sold the car to the defendants. The plaintiff (which owned the car) then sued the defendant in conversion. It was held that the promissory note amounted merely to a security and not payment.

82. Further, if the instrument is dishonoured on presentation and the creditor sues on the instrument, he does not thereby debar himself from suing on the underlying contractual obligation (except insofar as there are actual recoveries: these of course going to discharge, wholly or partly, the underlying obligation). In *Drake v Mitchell* (1803) 3 East 251 (reprinted at 172 ER 10) there were three co-debtors. One gave a bill of exchange for part of the debt. Judgment was entered against him in an action on the bill. All three were then sued on the underlying obligation and raised the proceedings on the bill as a defence. Lord Ellenbrough CJ said at p. 596:

> *"I have always understood the principle of transit in rem judicatam to relate only to the particular cause of action in*

> *which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy [259] which the party may have. If indeed one who is indebted upon simple contract give a bond or have judgment against him upon it, the simple contract is merged in the higher security. So one may agree to accept of a different security in satisfaction of his debt; but it is not stated here that the note and bill were accepted in satisfaction, and in themselves they cannot operate as such until the party has received the fruits of them: and then, although they were not originally given in satisfaction of the higher demand, yet, ultimately producing satisfaction, it would be a bar to so much of the present demand. But here they are neither averred to have been accepted as satisfaction, nor to have produced it in themselves; and therefore the matter pleaded is no bar to the action."*

83. The other judges expressed themselves shortly at pp. 596-7:

> Grose J at p. 596: "*The note or bill, not having been accepted as satisfaction for the debt, could only operate as a collateral security; and though judgment has been recovered on the bill, yet not having produced satisfaction in fact, the plaintiff may still resort to his original remedy on the covenant."* [emphasis added]
>
> Lawrence J at p. 597: "*Nothing has happened to alter the situation of the parties in respect of the plaintiff's original remedy on the covenant. It is clear that the bill and note when first given were no satisfaction: and the judgment recovered on the bill is in itself no satisfaction until payment be obtained upon it*." [emphasis added]
>
> Le Blanc J at p. 597: "*The giving of another security, which in itself would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruit of a judgment."* [emphasis added]

84. Mr Edwards also referred me to the Court of Appeal decision in *Wegg Prosser v Evans* [1895] 1 QB 108, where the decision in *Drake* was followed. There the plaintiff, a farm owner, rented his farm to a tenant, and doubted his ability to pay. He therefore took a joint guarantee from the defendant and from a man called Thomas. The rent was not paid and the plaintiff took a cheque from Mr Thomas. That cheque was conditional payment and had it been honoured it would have prevented the claimant from suing the defendant. At p. 112 of the judgment, however, Lord Esher MR stated:

> *"The cheque was dishonoured and Thomas did not pay it. Thereupon the plaintiff sued him upon the cheque. The cause of action in that action was the dishonour of the cheque, and upon that the plaintiff recovered judgment. If that judgment had been satisfied, and the plaintiff had obtained the fruits of it by execution, that would have been equivalent to payment of the debt on the guarantee; but it has not been satisfied … It is contended, nevertheless, that the rule of law on the subject is that by reason of this transaction with regard to the cheque which took place between the plaintiff and Thomas, and which did not prejudicially affect the defendant in any way, the plaintiff cannot now sue the defendant on the guarantee. To my mind, if the rule were as alleged, it would be a technicality of the most stringent kind, and one which would make the law on the subject contrary to the justice and truth of the matter. I for one object to such a technicality and will not act upon it, unless I am obliged to do so by authority."*

85. Lord Esher MR considered that *Drake v Mitchell* decided that where a judgment is recovered against one of two contractors, on a cheque but not an original contract, it is no bar to suing the other joint contractor on the original contract. Citing the judgment of Lord Ellenbrough CJ, which I have set out above at paragraph 82 above, he stated at p. 113:

> *"Anything plainer than these expressions there cannot be. In this case no judgment had been recovered against Thomas in respect of the particular cause of action on which the defendant is sued, viz., the breach of the guarantee."*

86. In the course of the hearing my attention was also drawn to the dicta of Lopes LJ and Rigby LJ, who considered whether Thomas could have been joined as a co-defendant.

87. Lopes LJ stated p. 116:

> *"It was suggested that the defendant has a ground of complaint in that he could not have Thomas joined as a co-defendant. It seems to me that it was his own fault that that was not done, and that he had the means of compelling such joinder if he had wished it. For these reasons, I come to the conclusion that the judgment is right and should be affirmed."*

88. Rigby LJ added at p. 118:

> *"The only remaining point is this. When it is established that the mere judgment in the action on the cheque was no satisfaction of the joint contract of the guarantors, the question arises how it came about that Thomas was not sued jointly with the defendant. It was involved in the decision in Kendall v. Hamilton that it remains the substantial right of one joint contractor not to be sued without the other. But it is at his option whether he will raise any such defence or not. In the*

> *case of a plaintiff's suing only one of two joint contractors, the defendant could originally have pleaded in abatement, and since the Judicature Act he can take other means to enforce the joinder of the other joint contractor. Here no such step was taken. If the defendant had taken the proper steps I think the plaintiff could not have obtained judgment against the defendant without joining Thomas. He chose not to take such steps, and, consequently, judgment was rightly given against him alone."*

89. By reference to the plea at paragraph 36(i) of the draft amended Defence, Mr Edwards made four submissions in relation to the contention that SLL were bound not to enforce the Loan, notwithstanding its dishonour, because it had not recovered possession of the Cheque:

    (1) First, the Cheque was handed over merely as security and therefore was not suspensory of SLL's rights under the Loan Agreement. Mr Sethi's argument that the Cheque was payment on account of the debt due under the Loan Agreement is inconsistent with the plea in paragraph 34(iii) of the draft Amended Defence that "*it was an implied term that the Cheque would be returned if the parties failed to agree the terms of the Written Agreement within a reasonable time*.";

    (2) NSIL was acting merely as an agent for SLL. Indeed, the Defendants positively allege this at paragraphs 40 and 42 of the draft Amended Defence[1]. It is what the document the Defendants identify says and there is no suggestion that NSIL itself gave value for the Cheque. Moreover, the acceptance by SLL that recoveries must be credited against the Loan Agreement debt, puts the point beyond doubt. Accordingly, that NSIL hold the Cheque, and has sued upon it, makes no difference;

    (3) Even if NSIL were not acting as agent/trustee for SLL, it gave no value for the Cheque. NSIL was not a holder in due course for value. Accordingly, any defence which was available against SLL would be available against NSIL and therefore SLL's rights are not suspended;

    (4) There is no basis for saying that on 2 July 2020, the sum of AED 7.9 million would be sufficient to meet the US$ sum due under the terms of the Loan Agreement, if and when presented, nor that SLL gave up any of its contractual rights under the Loan Agreement, such that it gave up its right to recover the balance of the Loan or the difference in value between what the Cheque realised in US$ and the actual US$ sum due under the loan agreement.

90. In relation to the plea at paragraph 36(ii) of the draft Amended Defence, which states:

> *"It was a further term of the Final Extension Agreement, implied to ensure business efficacy further or alternatively*

[1] Although I note that this is not the Defendants' primary case.

> *because it was obvious alternatively by law, that: ('the Implied Term')….*
>
> *'The Claimant would not enforce its rights under the Loan Agreement if NSIL sought and/or obtained judgment on the Cheque against the First Defendant as (A) the presentation of the Cheque was intended to settle the Loan; and (B) to avoid the prospect of double recovery by separate claims by the Claimant and NSIL.' Mr Edwards submitted that the premise of that sub-paragraph was the presentation of the Cheque was to be treated as an absolute, rather than a conditional payment, because it was payable to NSIL rather than SLL."*

Mr Edwards submits that the underlying premise is that the Cheque was payable to NSIL and not SLL. He makes three points:

(1) First, to suggest that the Cheque was being treated as absolute, rather than conditional payment, is entirely inconsistent with the general rule outlined above. It is only said to amount to absolute payment because of the involvement of NSIL: but, as with the plea in paragraph 36(i) of the draft amended Defence, the short answer is that NSIL was acting as agent/trustee for SLL and so its involvement means that the position is the same as if the Cheque had been made payable to SLL;

(2) Even if it were being treated as absolute payment, it could only be for the US$ equivalent of the AED 7.9 million at the prevailing exchange rate, not the whole debt due under the Loan Agreement;

(3) There neither was nor is a prospect of double recovery. Because NSIL was acting as agent/trustee for SLL, payment to it is the same as payment to SLL. A payment to NSIL would operate as a (partial) discharge of the debt due under the Loan Agreement.

91. In relation to the adequacy of the undertaking offered by SLL, Mr Edwards submitted that there was no reason why this should not afford the Defendants sufficient protection. He relied upon the decision of Hart J in *Westminster City Council v Porter* [2002] EWHC 2179 (Ch), where he was dealing with the issue of cumulative remedies, he said "…*the position is that the claimant is entitled to a judgment based on the auditors certificate and is also entitled to a judgment, almost certain to be larger, based on the breach of trust claim and that it is clear that the cumulative entitlement does not entitled the claimant to recover anything more than the higher of the two sums. That being so, there seems to me to be no reason in principle while the court's order should not reflect that entitlement*." Were judgment to be granted in this case on the outstanding amount due under the Loan Agreement, with credit being given for any net recovery arising from the Dubai Judgment, by reason of the undertaking offered, SLL's recovery will be limited to the amount due under the Loan Agreement and nothing more.

92. As far as any difficulties to be experienced by the Defendants in relation to enforcement of a judgment in these proceedings, Mr Edwards submitted that Mr Sethi's enforcement point is a bad one. If SLL were compelled to enforce the

judgment in this action in Dubai that would be because Mr Sethi had failed to pay a debt this Court had found to be owing. It is not for Mr Sethi to complain that his own obstructive behaviour causes him inconvenience.

Discussion and conclusion on the Contractual and Double Recovery Defences

93. I have reached the conclusion that the draft amendments relating to the Contractual Defence and Double Recovery Defences should not be granted because they do not stand real prospects of success.

94. I reach that conclusion for the following reasons:

(1) It is common ground that neither the Side Agreement nor the Third Amendment was signed. I have some difficulty in accepting that the Heads of Terms agreed orally between Mr Sethia and Mr Sethi on 2 July 2020, which were always understood to be subject to contract (see: paragraph 34(i) of the draft amended Defence and paragraph 11 of the Defendants' skeleton dated 24 September 2020), could have contained a self-standing binding implied term or were subject to an implied agreement;

(2) There is no suggestion in the draft Side Agreement or the draft Third Amendment, even as further amended by Mr Sethi, that the Cheque was payment on account of the outstanding debt, as opposed to being provided as security. Indeed, the plea at paragraph 34(iii) of the draft amended Defence is inconsistent with a payment on account;

(3) In my judgment, NSIL is to be regarded as receiving the Cheque as agent for SLL. NSIL was not a holder in due course for value. On the authorities referred above [at paragraphs 77-88 above], that it is a distinguishing feature, because the position is the same as if the Cheque has been made payable to the SLL, and any defences available as against SLL could be raised against NSIL in relation to it. It is not for me to go behind the decision of the Dubai Court of Cassation;

(4) When the Cheque was provided on 2 July 2019, it was not on the basis that the sum of AED 7.9 million would be sufficient to meet the US$ sum due (including accrued interest) under the terms of the Loan Agreement, if and when presented, nor was it given on the basis that SLL gave up any of its contractual rights under the Loan Agreement. Indeed Clause 3 of the draft Third Amendment expressly provides that the Loan Agreement remains in full force and effect and made provision for the payment of accrued default interest to be paid on 10 September 2019. In my view the presence of that clause presents considerable difficulties for the Contractual Defence. It cannot simply be ignored when considering whether there was a binding implied agreement as contended by Mr Sethi;

(5) In the *Wegg Prosser* case, it is significant, in my view, that both Lopes and Rigby LJJ found that joint guarantor, Mr Thomas, who had provided the cheque could have been joined as a co-defendant, notwithstanding the earlier judgment against him in relation to the cheque. While Mr Macpherson rightly highlighted that both *Drake* and *Wegg Prosser* are joint

debtor cases, it seems to me that the dicta of Lopes and Rigby LLJ must be applicable here, with the effect that a claim still lies against Mr Sethi under the Loan Agreement, notwithstanding the presentation of the Cheque;

(6) Given the terms of the undertaking which has been offered by SLL, there is no element of double recovery. I do not accept the submission of Mr Macpherson that granting judgment on the basis of such an undertaking is unacceptable, applying the approach taken by Hart J in the *Westminster City Council* case. The undertaking from SLL will have the same force as if it were an Order of the Court. Were judgment to be granted in this case on the outstanding amount due under the Loan Agreement, subject to the credit being given for any net recovery arising from the Dubai Judgment, this achieves a just result, because SLL will be limited to the amount due under the Loan Agreement and nothing more. It eliminates the possibility of double (or excessive) recovery.

(7) I find that there is some force in the argument raised by Mr Edwards that the issues concerning enforcement of a judgment in this action in the UAE will only arise if Mr Sethi fails to pay a debt, which this Court found to be owing, and which should have been repaid at the end of June 2019. It is not for Mr Sethi to complain that his continuing refusal to pay the sums due causes him inconvenience.

(8) As for the alternative submission that given SLL's earlier lack of candour in relation to the overlap between the Cheque and the Loan Agreement requires the undertaking offered by SLL to be fortified by a further undertaking from Mr Sethia, whom I accept controls both SLL and NSIL, that is a matter which I consider further at paragraph 113(3) below, when considering the draft amendment to the defence based on the principle in *Henderson v Henderson.*

The res judicata defence – Mr Sethi's submissions on the application of Section 34 of the Civil Judgments and Jurisdiction Act (the "CJJA")

95. If it is right that NSIL are SLL's agent, then Mr Sethi pleads that SLL cannot bring the present action, either as a consequence of Section 34 of the Civil Judgments and Jurisdiction Act 1982 or because it is an abuse of process pursuant to the rule in *Henderson v Henderson.* I will address the point on Section 34 of the CJJA first.

96. First, Mr Macpherson submitted that in a domestic setting, the doctrine of merger operates to extinguish a cause of action once judgment has been given so that the claimant's sole right of recovery is under the judgment. The 'cause of action' for the purpose of merger in judgment includes not only the cause of action on which judgment was given, but also any inconsistent cause of action to which the claimant was entitled to but did not pursue. He referred to the decision of the House of Lords in *United Australia Ltd v Barclays Bank* [1941] 1 AC 1, where at p. 30 Lord Atkin said:

> *"On the other hand, if a man is entitled to one of two inconsistent rights, it is fitting that, when, with full knowledge, he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which, after the*

> *first choice, is by reason of the inconsistency, no longer his to choose. Instances are the right of a principal dealing with an agent for an undisclosed principal to choose the liability of the agent or the principal, the right of a landlord whose forfeiture of a lease has been committed to exact the forfeiture or to treat the former tenant as still tenant, and the like…"*

97. Lord Sumption discussed the principles within the term "res judicata" in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] 1 AC 160 at [17]. Of merger, he stated as follows:

> *"Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 2 Dow & L 382, 1 New Pract Cas 72, (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, s 34."*

98. Section 34 of the CJJA provides:

> *"No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland."*

99. Mr Macpherson submitted that Section 34 of the CJJA was enacted to fill a lacuna in the common law by reason of omission of foreign judgments from the doctrine of merger. I was referred to the dicta of Lord Wilberforce in *Carl Zeiss Stiftung v Rayner v Keeler Ltd* [1967] 1 AC 853, 966 that rule is '*if surviving at all, is an illogical survival*" and to the editors of Dicey, Morris & Collins, The Conflict of Laws, (15th Ed) view that the rule should not be extended to foreign arbitral awards. Accordingly, Section 34 of the CJJA applies so as to prevent a claimant from pursuing other causes of action, inconsistent to that on which he obtained a foreign judgment, as he would be prevented, had the judgment been obtained in domestic proceedings.

100. Mr Macpherson drew my attention to the fact that an order of the Dubai Court on claims by creditors for failure to honour a guarantee cheque has recently been enforced in England & Wales: see *Lenkor Energy Trading DMCC v Puri* [2020] EWHC 1432 (QB). Accordingly, he submitted that the Dubai Judgment would be capable of recognition or enforcement as (a) the judgment was final and conclusive;

(b) there are no defences to recognition; and (c) the foreign court had jurisdiction over the defendant. Secondly, Mr Macpherson submitted that if NSIL is the agent of SLL, which I have found it to be, it is also its privy for the purpose of this section. In support of this, he relied on the test in *Gleeson v Whippell* [1977] 1 WLR 510 and the law as summarised by Warren J in *Dadourian Group International v Simms* [2006] EWHC 2973 (Ch) [715]-[716], which was approved and applied by Morritt V-C in *Special Effect Ltd v L'Oreal SA* [2006] EWHC 481 (Ch) at [27].

101. In *Gleeson* Megarry VC said, at 515:

> *"I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase "privity of interest"."*

102. I do not understand it to be disputed by SLL for present purposes that it and NSIL are privies or that the Dubai Judgment is capable of recognition here (if that were sought).

103. Applying the above principles to the present case, Mr Macpherson submitted:

(1) A creditor who brought a claim on a debt and in parallel on a cheque offered on account of that debt would be obliged to elect on judgment between judgment on the debt and judgment on the cheque. He could not obtain judgment on both because it would provide the creditor with double recovery, unless the cheque was for less than the debt. In support of this proposition Mr Macpherson relied upon the late eighteenth century case of *Seddon v Tutop* (1796) 6 Term Rep 607, where a creditor brought proceedings on a promissory note for £5 and the underlying debt of £25/7. At trial, he only had evidence for the promissory note so took judgment for £7/10 (including interest). Later he brought new proceedings for the underlying debt of £25/7 and the defendant objected that he could have recovered this sum in the former action. The Court gave judgment on the grounds that the causes of action were different. He contended, however, that the report omits the key issue, namely the amount in which the court gave judgment.

(2) In this case, SLL has, by its agent NSIL, obtained judgment against Mr Sethi on the Cheque. Had either SLL or NSIL brought proceedings on the Cheque in this jurisdiction, the cause of action created by the Loan would have merged in the judgment on the Cheque. The Defendants would have been entitled to rely on the defence of "former recovery";

(3) Because NSIL obtained judgment on the Cheque in Dubai, the doctrine of merger in judgment does not apply. The scope of Section 34 of the CJJA applies equally, however, to prevent SLL from bringing a claim on the cause of action created by the Loan so long as the other factors referred to in the section are satisfied;

(4) The other factors referred to in Section 34 of the CJJA are satisfied because:

(a) SLL is a privy of NSIL because it has an interest in the Dubai Judgment, NSIL having obtained the Dubai Judgment as its agent; and

(b) the Dubai Judgment, being a final and conclusive judgment, is enforceable and entitled to recognition in England and Wales.

104. Mr Macpherson recognised, however, that the authors of Dicey, Morris & Collins are not supportive of his analysis, because in the 15th Ed, Chapter 14, Rule 42 at 14-043, they indicate that Section 34 of the CJJA does not apply when the English claim is in respect of a different cause of action from that litigated in the foreign proceedings. He submitted that, in drawing that distinction, they erred because they appear to have overlooked that the aspect of the law of merger in judgment, which prevents a claimant from pursuing other causes of action inconsistent to that on which he obtained judgment. As Section 34 of the CJJA and the law of merger in judgment are intended to cover the same ground, they are mistaken to that extent. The authors, however, make clear in that this would not preclude the application of the principle in *Henderson v Henderson*, to which I will return shortly.

SLL's submissions on the application of Section 34 of the CJJA

105. Mr Edwards' submission was short and simple. The provisions of Section 34 of the CJJA apply only to situations where the cause of action in both jurisdictions is the same. That is not the case here, as Mr Macpherson accepted. In such circumstances, the draft amendment relying on Section 34 of the CJJA stood no real prospect of success.

Discussion and conclusion on Section 34 of the CJJA

106. Despite Mr Macpherson's careful analysis, I do not accept that paragraph 14-043 of Dicey, Morris & Collins is an incorrect interpretation of Section 34 of the CJJA. Also, I did not regard the case of *Seddon v Tutop* as assisting his argument, because the Court there relied upon the fact that the causes of action were different there. I accept the submission of Mr Edwards that because the action on the Cheque in the Dubai Commercial Court and the present claim based upon an Event of Default under the Loan Agreement are different, the draft amendment which relies on Section 34 of the CJJA stands no real prospect of success and I do not permit it.

107. Further, as Mr Edwards submitted in relation to the Contractual Argument, which submission I accept, there is no inconsistency between a claim on the Cheque and a claim on the Loan Agreement, such that judgment on one amounts to an election. As set out above, an unsatisfied judgment on a cheque is no bar to an action on the underlying contractual obligation.

Mr Sethi's submissions on the breach of the principle in *Henderson v Henderson*

108. Mr Macpherson relied upon Clarke LJ's summary of the principles of the rule in *Henderson v Henderson* in the Court of Appeal decision in *Dexter Limited v Vlieland-Boddy* [2003] EWCA Civ 14 at [49]:

> *"The principles to be derived from the authorities, of which by far the most important is Johnson v Gore Wood & Co [2002] 2AC 1, can be summarised as follows:*
>
> *i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.*
>
> *ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.*
>
> *iii) The burden of establishing abuse of process is on B or C or as the case may be*
>
> *iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.*
>
> *v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.*
>
> *vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C."*

109. He set out the following reasons why these proceedings are oppressive:

(1) Mr and Mrs Sethi say that they have no assets in the jurisdiction. This is not denied by SLL;

(2) SLL has not stated any benefit to obtaining judgment in England on the Loan;

(3) Mr and Mrs Sethi should not be put to the expense of conducting a defence to the English proceedings as well as dealing with the enforcement of the Dubai Judgment. Had SLL brought the claim on the Cheque in England, it would have had to follow the requirement to notify the court of its intention to bring related proceedings on the Loan, see: *Aldi Stores v WSP Group plc* [2008] 1 WLR 748 at [29]-[31].)

(4) If SLL seeks to enforce the English judgment in the UAE, it will be enforced in parallel with the enforcement of the Dubai Judgment;

(5) The grant of a judgment in these proceedings raises a real risk that SLL could seek to enforce it in Dubai in a manner that would constitute harassment or oppression of the Defendants;

(6) The lack of candour by SLL in these proceedings increases the risk that SLL would seek to use the English judgment to harass Mr Sethi. In particular, lack of candour of SLL by initially: (i) stating by their solicitors'

letter of 24 July 2020 that there was no overlap between the Dubai Proceedings and these proceedings; and (ii) initially denying in oral submissions on 27 July 2020 that sums recovered under the Dubai Judgment should be set off against any judgment in these proceedings is said to raise a real risk of abuse;

(7) Mr and Mrs Sethi should not have to face the risk that SLL would use the English judgment oppressively in Dubai and to suffer the expense of applying for the English judgment and the Dubai Judgment to be enforced together.

110. In relation to SLL's undertaking, Mr Macpherson repeated his submissions set out at paragraphs 71 and 72 above.

SLL's Submissions on the principle in *Henderson v Henderson*

111. In relation to *Henderson v Henderson,* SLL submit that:

(1) The claim on the Cheque was properly brought in the UAE and there is no suggestion that it was governed by English law or that the English court would have had jurisdiction. By contrast, the Loan Agreement is subject to English law and jurisdiction.

(2) The asserted absence of English assets on the part of the Defendants is irrelevant. The Loan Agreement is subject to English jurisdiction and SLL is entitled to a judgment of this Court on it. That judgment will be for the full amount now due, including accrued interest, and not merely the dollar equivalent of AED 7.9 million and SLL will be entitled to enforce that judgment (subject to giving credit for recoveries resulting from the Dubai Judgment). There are further advantages to an English judgment, not least its enforceability in Europe and the Commonwealth.

(3) Mr Sethi's enforcement point is a bad one. If SLL were compelled to enforce the judgment in this action in Dubai that would be because Mr Sethi had failed to pay a debt this Court had found to be owing. It is not for Mr Sethia to complain that his own obstructive behaviour causes him inconvenience.

(4) There is no reason to believe that SLL will not abide by the undertaking it proposes to give to the Court.

Discussion and conclusion on the principle in *Henderson v Henderson*

112. I have reached the conclusion that the *Henderson v Henderson* defence does not stand a real prospect of success and the amendment based on it should not be allowed.

113. I do so for the following reasons:

(1) In my judgment the claim on the Cheque was properly brought in Dubai. This claim, in contrast, is governed by English law and in my view SLL was entitled to bring it here;

(2) The amounts recoverable as I have earlier found are not by any means identical. Clause 24 of the Loan Agreement expressly envisaged the possibility of claims in different jurisdictions and Clause 3 of the draft Third Amendment expressly provided that despite the proposed new arrangements, save as otherwise provided, the Loan Agreement remained in full force and effect.

(3) For the reasons given earlier at paragraph 94(6) above, I am not persuaded that the Court should refuse to accept the undertaking offered by SLL, which will have the same force as if it were an Order of this Court. I am, however, willing to hear further argument, upon the handing down of this judgment, as to whether Mr Sethi should give a personal undertaking so as to fortify that given by SLL.

Conclusion on the draft amendments

114. I have therefore reached the conclusion that the Amendment Application should be refused, on the grounds that none of the draft amendments to the Defence have a real prospect of success.

115. Since Mr Macpherson indicated that he was not intending to rely upon the original defences pleaded by his predecessor in order to defend the Summary Judgment application, there is no other defence to be taken into account. Having dismissed the Amendment Application, I do not therefore intend to go through each of the original defences, save for one point, because it affects the calculation of the sum due to SLL. That is the allegation that SLL are not entitled to charge default interest because it has not satisfied a condition precedent.

Is SLL entitled to default interest?

116. Mr Macpherson submits that Clause 7 of the Loan Agreement (recited at paragraph 7(3) above) obliged SLL, on or before the beginning of each Default Interest Period in respect of that Unpaid Amount, to select a Default Interest Period in respect of that amount, of up to 7 days and, further, promptly to notify the First Defendant both of the amount of interest payable and the Interest Payment date in respect of that Default Interest Period. Having failed to do so, no default interest arises.

117. Mr Macpherson reminded me that the heading to Clause 7, entitled "*Default Interest"* is not an aide to interpretation, by reason of Clause 1.21. He submitted that, in absence of selecting a Default Interest Period, SLL can only rely on the interest payable under Clause 6.

118. There is a further point on default interest. Mr Macpherson submitted that the Cheque provided on 2 July 2019 was accepted as forbearance to sue until at least 30 September 2019. As such there could not have been an Event of Default or a valid demand until then. The letters of 5 September 2019, referred to at paragraph 33 above, were sent prematurely. Accordingly, default interest could not, on any view, become payable until 30 September.

119. SLL contends that:

(1) Clauses 7.1 and 7.6 impose an absolute and unconditional obligation to pay default interest. Clause 7.2 provides merely for calculation, and in particular permits (but does not require) it to elect to calculate by reference shorter than 7 days. Absent an election to calculate by reference to shorter rests, default interest is calculated by reference to 7 day rests. It should be noted that SLL has in fact calculated the default by using 1 month rests. But like any compounding exercise, longer rests work to the advantage of the paying rather than the receiving party.

(2) In the absence of any binding written agreement between the parties after the Second Amendment, there was no forbearance to sue until 30 September 2019 by the provision of the Cheque on 2 July 2019. The letters of 5 September 2019 were valid.

Conclusion on default interest

120. I have reached the conclusion that SLL are entitled to default interest under Clause 7. I prefer SLL's submissions on both the construction of Clause 7 and whether a default period arose under the Loan Agreement. First, Clause 7.1 provides that the *'Borrower shall pay interest under this clause 7'.* Secondly, Clause 7.3 provides for the *'Default Interest Period shall begin on the due date for payment of the relevant unpaid amount'.* Thirdly, Clause 7.6 provides that interest '*if not previously demanded, shall be paid on the last day of each Default Interest Period'.* (emphasises added). These are mandatory provisions. In my view, in the absence of an express nomination by the Lender, seven day is the 'default' provision under Clause 7.2 of the Loan Agreement.

121. As far as forbearance to sue is concerned, I can see no basis as to why the provision of the Cheque, in the circumstances described above, should prevent SLL relying on non-payment of the outstanding sums after 30 June 2019, as an Act of Default, particularly as neither the Side Agreement nor the Third Amendment were signed. Even had the Third Amendment been signed, Clause 3 (recited at paragraph 20 above) expressly provided that, except as otherwise expressly provided by its terms, it would remain in full force and effect. That clause also stated that default interest would be payable until August 2019 and paid by 10 September 2019. This was despite the provision of the Cheque, which was referred to as one of the Security Documents referred to in the draft amended by Mr Sethi.

Is there some other compelling reason why the matter should go to trial?

122. Mr Macpherson submitted that, even if I were to find there is no real prospect of success, I should refuse to grant SLL summary judgment on the basis that there is some other compelling reason for trial. He relied on the notes to CPR 24.2.4, which state:

> *"Pre-CPR, the following circumstances were held to afford "some other reason for trial": where the claimant's case appears to be "devious and crafty" and not "plain and straightforward" (Miles v Bull (No. 1) [1969] 1 Q.B. 258; [1968] 3 All E.R. 632); where the defendant is an executor or administrator who can raise facts by reference to the existence or absence of letters, accounts or such like of the deceased*

> *which make it reasonable to require full investigation (Harrison v Bottenheim [1878] 26 W.R. 362) where the claimant's case tended to show that he had acted harshly and unconscionably and it is thought desirable that if he were to get judgment at all it should be in the full light of publicity (per Cairns LJ in Bank fur Gemeinwirtschaft Aktiengesellschaft v City of London Garages [1971] 1 W.L.R. 149 at 158; [1971] 1 All E.R. 541 at 548). However, in 2015, a somewhat different view was expressed by the Court of Appeal. In Berntsen v Tait [2015] EWCA Civ 1001 the lower court's decision to summarily dismiss a claim was upheld; the lower court had been right to conclude that the claimants had no real prospects of success; thus there was no point in letting this case proceed to trial even though the underlying facts raised matters of considerable concern as to the lending practice of banks."*

123. In the absence of a defence which stands a real prospect of success, in the present case I can see no compelling reason why the case should be disposed at trial.

Conclusion and disposal

124. I grant the Summary Judgment Application against both Defendants and dismiss the Amendment Application.

125. In advance of handing down this judgment, I invite the parties to agree the calculation of the outstanding sums under the Loan Agreement, and a draft Order reflecting the outcome of this judgment. If there is an absence of agreement on any particular point, I will deal with it when the judgment is handed down, together with any consequential applications. If there are rival contentions on particular points in the calculations or draft Order, I request the parties to make these in a track-changed form (identifying which relates to which party) on the documents to be provided. I will also deal with the issue of the undertakings to be provided.

126. It only remains for me to thank Counsel once again for their assistance in this matter.