Case No: CC-2020-MAN-000027
Neutral Citation Number: [2021] EWHC 3800 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
THE COMMERCIAL COURT QBD

Manchester and Civil Justice Centre
1 Bridge Street
West Manchester
M60 9DJ

Tuesday, 16 November 2021

BEFORE:

HIS HONOUR JUDGE HALLIWELL

BETWEEN:

MINT BRIDGING LIMITED

Claimant

- and -

(1) EARTHRISE DEVELOPMENTS LIMITED
(2) MR PALMER
(3) MR COX
(4) MRS PALMER

Defendants

MR G GRANTHAM QC appeared on behalf of the Claimant
MR COX director or Earthrise Developments Limited appeared on behalf of the First Defendant
MR PALMER the Second Defendant appeared in person
MR COX the Third Defendant appeared in person
MRS PALMER the Fourth Defendant appeared in person

APPROVED JUDGMENT

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(Official Shorthand Writers to the Court)

JUDGE HALLIWELL:

1. By these proceedings the Claimant ("Mint") seeks payment of monies allegedly due under a loan facility and supporting guarantees.

2. Before me Mr Andrew Grantham QC has appeared on behalf of Mint. The Second, Third and Fourth Defendants - Mr Palmer, Mr Cox and Mrs Palmer - have attended in person. No lawyer was instructed to appear on behalf of the First Defendant ("the Company"). However, Mr Palmer and Mr Cox are directors of the Company. I permitted Mr Cox to represent it and make submissions on the Company's behalf.

3. Mr Cox also took the lead in advancing the case of the other Defendants although I invited submissions from each. Mr Palmer occasionally took the opportunity to make submissions and ask questions of the witnesses. Mrs Palmer also did so but on even fewer occasions. On behalf of the Claimant, Mr Grantham referred me to some of the relevant principles and authorities and, mindful that the Defendants were not professionally represented, he fairly sought to assist the court when doing so.

4. Mint is in the business of providing development finance. The Company was formed for the purpose of buying and developing a building and property once known as The Tapster Inn at Seed Road, Sittingbourne in Kent ("the Property").

5. The development involved the conversion of the building into two separate residential units for resale. Mr Palmer and Mr Cox are directors and shareholders of the Company. Mrs Palmer is Mr Palmer's mother.

6. On behalf of the Company, Mr Palmer and Mr Cox agreed to purchase the property for £650,000 on the understanding that 50 per cent of the purchase price would be paid on completion and 50 per cent postponed until resale or refinance. During 2016, Mr Palmer and Mr Cox approached a company called Bond Finance Limited ("Bond Finance"), mortgage brokers, with a view to obtaining finance for the acquisition and development of the property. Bond Finance introduced them to Mint and, by an offer letter dated 30 November 2016 ("the Offer Letter"), Mint offered them an 11 month loan facility in the sum of £634,000. The Offer Letter required the Company to

provide it with a first charge over the property with Mr Palmer, Mr Cox and Mrs Palmer to provide Mint with personal guarantees and charges over their properties at 38 New Hythe Lane, Larkfield, Aylesford, 51 South Park Road, Maidstone and 68 Sutton Road, Maidstone. On 6 December 2016 Mr Palmer, Mr Cox and Mrs Palmer each signed the Offer Letter to confirm they understood and accepted the terms of the offer.

7. By a letter dated 7 February 2017 ("the First Facility Letter"), Mint confirmed its agreement to make available a loan facility of £670,000. By paragraph 3.1 of the First Facility Letter it was provided that the loan facility would be subject to an agreed retention which was defined in paragraph 1.1 so as to amount to £144,000. Net of the agreed retention, the amount payable on drawdown was thus £526,000. Elsewhere in the First Facility Letter it was provided, in paragraph 6.1, that a sum of £63,646 would be deducted, in advance, amounting to 11 calendar months' interest calculated at £5,786 per month.

8. Expressions used in the First Facility Letter were defined in paragraph 1.1. These included "Event of Default," which was defined so as to mean any event or circumstances as specified in paragraph 15; "Retention", defined to mean the retention of £144,000; and "Termination Date", defined so as to fall no later than 2.00 pm on the date which was 11 calendar months from the "Utilisation Date." The Utilisation Date was the date when the facility or any part of it was first drawn down. Since it incorporated, by reference, the provisions of paragraph 15, "Event of Default", in paragraph 15, included the following.

> 15.1 (b) "the borrower or any security party does not pay any amount payable by them under a finance document at the place and in the currency in which it is expressed to be payable."
>
> (i) "the borrower fails to allow the lender or its professional advisers full access to the property to inspect any works that are being carried out to the property and/or to revalue it or for any other purpose required by the lender."
>
> (cc) "where funds are being advanced for the refurbishment or construction of or any work to the property and (i) such work shall not proceed in the construction in accordance with the development appraisal; or (ii) the progress with or the quality or standard of

> works are not to the satisfaction of the lender or … (viii) the development appraisal should be found to be inaccurate or misleading in any respect."

9. The operative provisions of the First Facility Letter included paragraph 3.3:

> "The lender will only be obliged to make the facility available if upon the proposed utilisation date or as the case may be any proposed retention utilisation date: (a) there is no breach of any of the provisions in the finance documents (b) the representations of warranties set out in clause 13 are true in all respects (c) no event of default is continuing unremedied or unwaived or would result from the facility or any part of it being advanced and (d) the conditions precedent contained in clause 12 have been satisfied to the lender's satisfaction."

10. Paragraph 4.1 provided as follows.

> "In consideration of the lender making or continuing loans to, or granting loan facilities to the borrower as the lender in its absolute discretion sees fit, the guarantor guarantees to the lender, whenever the borrower does not pay any of the guaranteed obligations when due, to pay on demand the guaranteed obligations."

11. By paragraph 9.1, it was provided that:

> "all payments by the borrower under the finance document shall be made in sterling to such bank account as the lender may specify from time to time and without deduction, set-off or counterclaim (save as required by law)."

12. By Paragraph 10:

> "The borrower should repay the loan by a single repayment on the termination date together with the exit fee, repayment administration fee and other fees and any other fees in accordance with the tariff of charges as may apply from time to time."

13. Conditions precedent were defined in paragraph 12. They included conditions precedent in paragraph 12.2 that:

> "The lender should be under no obligation to make the facility available to the borrower or provide any monies to the borrower until it has received the following documents and evidence in form and substance satisfactory to it."

14. The documents and evidence following included "(f) the report on title in relation to the property; and (h) a professional valuation of the property addressed to the lender together with any additional specialist reports recommended by the valuer."

15. On the eve of completion, there was a discussion, on 7 March 2017, between Mr Daniel Newbery of Bond Finance, Mr Cox, and Mr Showman of Mint in which Mr Showman confirmed he was content to authorise release of the funds to enable the transaction to conclude on the basis that the net sum held would be retained until Mint's quantity surveyor had undertaken a pre-drawdown inspection and was able to confirm everything was in order.

16. The formal documentation for the transaction was completed on 8 March 2017 with funds advanced by Mint under the Facility Letter. On that day, the registered title to the Property was transferred to the Company, utilising the funds advanced by Mint, and the Company formally mortgaged the Property to Mint. The vendor Mr Abbs was paid a sum equal to half the purchase price and the balance of the purchase price was secured by a charge over the Property. Mr Abbs entered into a deed of priority, denoted as an intercreditor deed, in which it was agreed the amount advanced by him would rank in priority ahead of the amount secured by Mr Abbs or provided by his charge. In this way, priority was given to all amounts advanced under the First Facility Letter, and all amounts secured by the mortgage to Mint. By clause 10.6 of the intercreditor deed, Mr Abbs expressly waived his right or marshalling.

17. If contracts for the purchase of property were exchanged with Mr Abbs prior to completion, they were exchanged on the same day. No formal contract has been admitted in evidence but, subject to any declaration to the contrary in the contract itself, the provisions of the contract would then have merged in the transfer.

18. Mr Palmer, Mr Cox and Mrs Palmer had each separately received legal advice in connection with the transaction already. Following such advice they each signed deeds of personal guarantee to Mint in respect of the company's liabilities and indebtedness in anticipation that the transaction was completed. Upon completion, the deeds were formally dated and delivered as a deed, no doubt on the basis they would then take immediate effect.

19. The guaranteed obligations were set out in paragraph 1.1 of the guarantees. Clause 2.1 of the guarantees provided:

> "In consideration of the lender making or continuing loans to, giving credit or granting banking facilities, accommodation or time to the borrower as the lender in its absolute discretion sees fit, the guarantor guarantees to the lender whenever the borrower does not pay the guaranteed obligations when due, to pay on demand the guaranteed obligations."

20. Clause 8.1 provided for:

> "The guarantor to terminate the guarantee at any time on notice to the lender with effect from the date specified in that notice provided that that would not be less than three calendar months after the notice was received by the lender."

21. In Clause 13, there was provision that:

> "Any certificate, determination or notification by the lender for a rate or any amount payable under this guarantee is (in the absence of manifest error) conclusive evidence of the matter to which it relates and shall contain reasonable details of the basis of determination."

22. No formal completion statement was admitted in evidence. However, it can be seen from the accounts ledger of Ratio Law LLP who acted on behalf of Mint, that on 7 March 2017 the sum of £526,000 - that is the agreed advance of £670,000 less the

£144,000 retention - was credited to its client account and, on completion, the following day the sum of £326,800 was remitted to Ratcliffes, presumably the vendors' solicitors. This corresponds with the recollections of the solicitor from Ratio Law LLP who acted on the transaction, Ms Joanna Norris. When giving her evidence, Ms Norris confirmed that £325,000 or thereabouts was transferred to the vendor's solicitors on completion and another £3,500 or thereabouts was applied towards fees and SDLT. On the Accounts Ledger ,there is another debit that day, £86,976. No doubt this encompasses, in part, the agreed sum of £63,646 in respect of interest in advance and £3,129.05 in respect of Notary Express's costs and fees on behalf of the Defendants. Once miscellaneous items of expense were deducted the net amount standing to credit on the Accounts Ledger that day was £101,691.25.

23. On 10 March 2017, Mr Preston attended the site where he met Mr Cox and Mr Palmer and discussed the project. Mr Preston was concerned that the Defendants had not yet identified their contractors or reached agreement on costings and start dates. He also considered that the Defendants had seriously underestimated their building costs. After receiving a cost plan from Mr Cox on 13 March 2017, he produced an initial report for Mint which was disclosed to the Defendants. Having referred to Mr Cox's cash flow statement, he stated that allowance for the external and landscaping work was in need of review and the contingency was right given the nature of the project. It was recorded that the developers proposed to seek competitive tenders for the work, this was acceptable and the developer was proposing to use the JCT Minor Works Contract which was appropriate for the nature and scope of the proposed works.

24. However, Mint maintains that from the outset the Defendants had underestimated the cost of the works. They committed themselves to unrealistic margins and were slow in engaging contractors. Their preferred contractors at this stage, P&R, were slow in providing the Defendants with a quotation and, on 1 August 2017, they pulled out. It appears from Mr Preston's drawdown report dated 2 September 2017 that, by then, the Defendants had not commenced physical work on the site other than some clearance work and tree cutting. A revised programme had thus been produced. In view of the fact that the transaction had completed on 8th March 2017, and the loan was for a period of 11 months measured from the initial application of funds, that left little more

than six months to carry out and complete the building project then market and dispose of the two units under construction.

25. Nevertheless, works commenced in late September and, when they did, a certain amount of progress was made. Against this background, Mint agreed to release the sum of £41,675 in April 2017 – this is reflected in an entry on its Accounts' Ledger on 11 April - and a further sum of £45,000 was released on 10 October 2017.

26. However, there was insufficient time for the Company to conclude the project within the agreed timescale and there were discussions between the Company and Mint with a view to the grant of a new facility.

27. By an offer letter dated 21 November 2017, Mint offered the company a new facility. This was followed up by a formal facility letter dated 14 December 2017 ("the Second Facility Letter"). By this letter, Mint agreed to make available to the Company a loan facility of £1,030,000 with the intention this would be applied to discharge the outstanding indebtedness under the First Facility Letter, the loan under the First Facility Letter and make available additional funds to enable it to complete the project. The new facility was to be available for acceptance for a period of 120 days bearing in mind that the first facility was scheduled to come to an end on 8 February 2018, 11 months from the initial application of funds under that facility.

28. It was again provided that Mr Cox, Mr Palmer and Mrs Palmer would guarantee the facility to the Company.

29. This time there was an agreed retention of £357,000. The facility was on similar terms to the First Facility Letter. Paragraph 3.2 provided that the borrower would utilise the facility for the purpose of refinancing and developing the property. Paragraph 3.3 provided that:

> "The lender will only be obliged to make the facility (including any retention) available if on the proposed utilisation date or, as the case may be, any proposed retention utilisation date: (a) there is no

> breach of any provisions in the finance documents (b) the representations and warranties in clause 13 are true in all respects (c) no event of default is continuing unremedied or unwaived or would result from the from the facility or any part of it being advanced and (d) the conditions precedent contained in clause 12 have been satisfied to the lender's satisfaction."

30. For these purposes, “Event of Default” was defined, in paragraph 15.1, so as to include the following:

> "the borrower or any security party does not pay any amount payable by them under a finance document at the place and in the currency in which it is expressed to be payable."

31. There were provisions in essentially the same form as the first facility letter. Paragraph 5 provided for the borrower to pay interest on the loan at the standard rate but the lenders were to accept payments of interest on the loan at the reduced rate – contractually defined - where the amounts required to be paid by the borrower were paid on the due date for payment and no Event of Default had occurred.

32. In Paragraph 6.1 it was provided that specific payments would be deducted from the facility advanced to the borrower when the facility or any part of it was drawn down. This time, the amounts to be deducted included (a) a sum equal to £81,433 - again 11 calendar months interest calculated at £7,403 per month at the reduced rate (b) the arrangement fee, the asset management fee, the legal fee, the set up fee, the title indemnity fee and 2 x TT fee and any other fees and (c) the broker fee.

33. Paragraph 9.1 provided for all payments to be made to such bank accounts as Mint might specify from time to time and without deduction, set-off or counterclaim save as required by law. This is a significant provision to which I shall refer as the “the Anti-Set Off provision."

34. By paragraph 10, repayment was required within the period, again, of 11 months from the initial drawdown of the facility.

35. Paragraph 20.5 is also a significant provision. This provided that:

> "Any certificate or determination by the lender of a rate or an amount payable under this letter shall in the absence of manifest error be conclusive evidence about the matter to which it relates."

36. Completion took place on 13 January 2018 when Mint took a mortgage to secure the second facility. Again, Mint entered into an intercreditor deed with Mr Abbs and the company. The company also executed a debenture over its assets. On the same day Mr Cox, Mr Palmer and Mrs Palmer entered into deeds of guarantee ("thee Guarantees") in respect of all the monies, debts, liabilities and obligations as the company might incur to Mint. Again, they were independently advised and no issue of undue influence has been raised. Again, by clause 10.1 of the Guarantees it was provided that they would make repayment in full "without any set-off, condition or counterclaim whatsoever" and "free and clear of any deductions or withholdings whatsoever except as may be required by law or regulation which is binding on the Guarantor.

37. By paragraph 13 of the Guarantees, it was provided that "any certificate, determination or notification" by Mint "as to the rate or any amount payable under this guarantee is (in the absence of manifest error) conclusive evidence of the matter to which it relates and shall contain reasonable details of the basis of the termination."

38. Since the second facility was deemed to be utilised from completion, the 11 month facility was scheduled to expire on 30 December 2018. During this period, the works progressed, and funds were drawn down to meet the costs of the works. Following the application of £32,329.24 on completion, £29,451.83 was drawn down on 9 February 2018; £102,051 on 25 April 2018; £51,674.70 on 1 July 2018; £50,000 on 3 August 2018; and £68,250 on 11 September 2018. These amounts were generally released on Mr Preston's recommendation.

39. However, the certificate of practical completion was not issued until 4 or 7 January 2019 - there are two versions of the certificate - albeit practical completion was certified with effect from 22 December 2018.

40. By then however, the newly developed residential units in the property had not been marketed or disposed of and on 9 March 2019 Mint appointed LPA receivers.

41. The units were finally sold on 30 August and 27 September 2019. When they were sold, they realised the net proceeds of sale in the sum of £534,724.60 and £526,366.60. The sum of £54,752.22 has also been realised in respect of Mint's security over the property at 38 New Hythe Lane, Aylesford.

42. The current proceedings were issued on 16 April 2020. They encompass a claim for £351,053 on the basis that, following realisation of Mint's security, this was then the company's outstanding indebtedness, together with legal costs and amounts accruing in respect of legal costs and interest. By 9 November 2021, when the trial commenced, Mint filed a statement of account in which the outstanding amount was stated to have climbed to £625,236. On this basis, over a period of some 19 months, the outstanding indebtedness was stated to have almost doubled according to Mint's tariff of charges. The statement of account has been broken down into its constituent elements in a detailed five page schedule.

43. I heard evidence from 13 witnesses including Mr Cox, Mr Palmer and Mrs Palmer themselves. Mint called as a witness Simon Tanner, Andrew Lazare, Dan Newbery, Bruce Mainwaring, Ian Davidson, Adam Robson, John Buckley, Joanna Norris, Marc Preston and Richard Showman. I shall refer to them all by surname with their title designation so it will be “Mr” or in the case of Joanna Norris, “Ms” Norris.

44. Mr Preston is a director of Vertice Development Management Limited, the quantity surveyors engaged in the project by Mint. He was instructed to act as its monitoring surveyor. In this capacity, he would meet Mr Palmer and Mr Cox. He made several site visits. At an early stage, he reported that the Company had seriously underestimated the build costs for the project. He also expressed concerns about the progress of the works.

45. As a busy professional man Mr Preston could not be expected to have a detailed recollection of everything that happened. This is, no doubt, one of several projects in which he was involved. To an extent his evidence was thus based on inference. Some aspects of his evidence were also quite defensive. For example, whilst I am not satisfied he ever required or purported to require the Defendants to engage a main contractor as the Defendants have suggested, more likely than not he did discuss this

possibility with them and led them to understand it was his expectation they would do so. This was raised as a matter for discussion at the site meeting on 10 March 2017. However, whether this ultimately has any material bearing on the outcome of these proceedings is a different matter to which I shall come later. More generally, I have treated Mr Preston's evidence with a measure of caution.

46. Mr Tanner carries out work for Mint and other lenders as a field asset manager. He gave evidence about a visit he made to the Property on 12 December 2016 when he met Mr Palmer and Mr Cox, and an email the following day from Mr Cox. When he gave his testimony to the court, it emerged his evidence is not in dispute.

47. Mr Showman is head of lending at Mint. He gave evidence about the way in which he dealt with the initial application for a facility and, from that point, the way in which the loan account was managed. He also gave evidence more generally in relation to Mint's lending procedures. In my judgment, he was an impressive witness and I can safely rely on his evidence.

48. Ms Norris is a solicitor and partner at the firm of Ratio Law LLP. She acted on behalf of Mint in connection with the relevant transaction and she attended to the completion formalities in March 2017 when £325,000 or thereabouts was transferred to the vendor and Mint took a charge over the property with provision in the so called intercreditor deed for this to rank in priority ahead of the vendor's security on the unpaid part of the purchase price. Ms Norris' evidence was clear, helpful and reliable. In substance, it was not challenged by the Defendants.

49. Mr Newbery is a director of Bond Finance. He confirmed that Bond Finance acted as the company's agent and Bond introduced the company to Mint with a view to obtaining finance for the transaction and development. He was the company's primary contact with Bond Finance and was in communication with the company until January 2019 when he sought to explore avenues to refinance with another lender. In my judgment, he was an honest and reliable witness. His factual account was accurate, and he was willing to make concessions where appropriate, for example, he conceded that that he didn't offer or set out, at the outset, to provide the company with advice or

help with issues that might subsequently arise. As it happens, he did ultimately cease to provide the company with help obtaining additional funding when invited to do so.

50. Mr Lazare is a director of Mint. He gave evidence about Mint's methods of business. Having made only a short witness statement, he was cross-examined at some length about the whole transaction. He is plainly an astute businessman and was able to demonstrate a detailed knowledge of the company's accounts when explaining Mint's procedures in connection with the drawdown funds, reduction of fees, expenses and retentions from advances and the commercial view Mint took when it became necessary for the company to obtain an extension to its facilities. Whilst he did not make any concessions about Mint's case, at times his evidence was quite frank. In my judgment his factual account was accurate and reliable.

51. Mr Buckley is employed by Mint as a field asset manager. He held the pre-drawdown telephone interview with Mr Cox on 7 March and was subsequently Mr Cox's primary contact with Mint at most stages. He liaised with the defendants but relied on the evidence or the advice of Mr Preston for his assessment of the progress of the works. If it is being suggested he was not as proactive as he might have been to ensure the project was progressing swiftly and expeditiously in the early the stages, the criticism does not obviously lead anywhere since this would have been more a matter for the Company than it was for Mr Buckley. Had he set out to be more proactive there is doubtless a limit to what could have been achieved in the circumstances. In any event, I am not satisfied there is a substantial basis for this criticism. His evidence was generally reliable.

52. Mr Robson is employed by Mint as a senior underwriter, and he joined in March 2017. He gave evidence about the telephone conversations with Mr Mainwaring and the email with him in November 2017 when he explained that money was being taken from the first facility on the basis he understood the company had not developed the Property in accordance with the development appraisal. His evidence was limited in scope and is significant only on the basis it is explanatory of the stance that Mint took at the time.

53. Mr Davidson is employed by Mint as an asset manager. Later on, he had some limited contact with Mr Cox in connection with the demands of the project and emphasised the importance of proceeding promptly with the development. At one point he said that the whole project was predicated on time. Consistently with this, he required Mr Preston to make site visits when necessary. He sought to do what he could to progress the project. He came across as an honest and straight talking witness who said things as he saw them. I am satisfied he gave a reliable account.

54. Mr Mainwaring is a director of Bond Finance. He was the last of the witnesses to be called on behalf of Mint**.** He is currently resident in Brisbane, Australia. Unlike the other witnesses he was examined remotely in the courtroom using CVP and he was interposed after Mrs Palmer who was the first of the Defendant's witnesses. He confirmed the evidence in Mr Newbery's more detailed witness statement and I have no reason to consider his evidence was incorrect.

55. The Defendants each gave their evidence personally. As I have already mentioned, Mrs Palmer was called first. I am satisfied she gave her evidence honestly and to the best of her recollection, as indeed did Mr Cox and Mr Palmer. She gave evidence about the progress of the project, and the delay as she saw it in Mint making funds available for drawdown in addition to her own contractual commitments. However, where she did give evidence about the progress of the project and Mint's performance of its own contractual commitment, her understanding can only have been based on what she was told by the other Defendants so it is not of any separate evidential value. Although given honestly, at times her evidence betrayed a lack of understanding or confusion. For example, she appears to have confused an application for summary judgment in the present proceedings with possession proceedings brought in the county court at Maidstone for possession of her house. At one point she was unsure whether a signature, purported to be hers on the facility letter of 14 December 2017, was indeed hers, but at least implicitly accepted it could have been hers on the basis her signatures were often inconsistent. Having heard her evidence, I am satisfied she was independently advised when she entered into the loan transactions and she did sign up to her contractual commitments. She has not sought to advance a case based on undue influence.

56. Mr Cox's evidence spanned the full history of the transaction. He also took the lead in advancing the defendants' case and did so with skill and moderation. He was, in my judgment, an honest witness who gave his evidence to the best of his perceptions and recollection. This is reflected in his readiness to make important concessions when he considered it right to do so. For example, in relation to the conversation on 7 March 2017 with Mr Showman on the eve of completion. This is a matter to which I return later.

57. Mr Palmer was also, in my judgment, an honest witness. He said things as he saw them, in simple and straightforward terms. His cross-examination was shorter than Mr Cox but was able to give helpful, explanatory evidence. There is a significant issue between Mr Palmer and Mr Cox on the one hand and Mr Preston on the other hand as to whether Mr Preston advised them that they were required to engage a main contractor. As I have said already, I will explain my findings on that issue later.

58. Once Mr Cox and Mr Palmer had given their evidence there remained issues in general terms about the progress of the project and costings and why it is that they were unable to complete the project in the time allowed. On some significant matters of detail, for example the parties' explanation for the delayed start of the project and the significance of M&R's failure to properly provide a quotation, it ultimately emerged that the differences were to a large extent differences of evaluation rather than issues of fact. Where this is not the case, a clear picture emerges from the contemporaneous documentary evidence and any divergence of oral testimony is attributable only to minor errors of recollection.

59. The expert report dated 14 June 2021 of Mr David Vinden was admitted in evidence. It was not challenged, and I am satisfied I can generally rely upon Mr Vinden’s conclusions.

60. The Defendants' Amended Defence was settled by counsel. They put Mint to proof in relation to the calculation of the balance due, but more specifically they advanced a set-off based on breaches of the terms of the first facility, the facility under the first facility letter. It is primarily on this basis they defend the claim. Their case is based, at least implicitly, on alleged breaches of Mint's obligation to advance or make available,

at the outset, for immediate drawdown, the sum of £110,000 or at least £100,000. The breaches are set out in paragraph 6 of the amended defence. It is contended that, in breach of contract Mint insisted on the instruction of a main contractor to oversee the development, failed to release the initial drawdown, failed to make payment and/or delayed the release of further sums when authorised by their QS and as a result the development was delayed, requiring the Defendants to enter into a facility described as the "initial facility" - in reality, the second facility - to repay the first facility pending completion of the development and the sale of the properties.

61. The nature of the losses sustained by the company as a result of Mint's breaches of the first facility are set out in paragraphs 12, 13 and 14 of the further and better particulars of the amended defence. It is alleged that as a result of the delays caused by Mint's breaches of the initial agreement, the project could not be completed within the timescale permitted by the initial facility. It is contended that, in November 2017, "the Claimant refused to release further sums and the Defendants were required to negotiate and enter the second facility, eventually completed in February 2018. The Claimant's refusal to release further or any funds, ie the fourth breach, resulted in the Company, being unable to pay its contractors and consequently the work on the site ceased until February 2018."

62. In Paragraph 13, it is alleged that "but for the delays caused by the Claimant's breaches of the agreement, ie the requirement for a main contractor causing the delay between completion for the purchase in March and July 2017, the refusal to release the £110,000 to fund the initial construction works at the commencement of the works on site between July and September 2017, the refusal to release the remainder of the £110,000 to fund the initial construction works at the commencement of the works on site between July and September 2017 and the refusal to release the remainder of the £110,000 or any further funds at all until after October until the second facility was completed in February 2018, the project would have been completed within the period of the initial February 2017 facility and the first defendant would not have been obliged to enter the second facility in February 2018."

63. As a result, it is contended the Company has suffered loss and damage. They refer to the Company's liability (and therefore the liability of Mr Palmer, Mr Cox and Mrs

Palmer as guarantors) at the termination or expiry of the first facility, amounting to £536,680. They state that Mint has confirmed, in its statement of account dated 31 August 2020, payments have been made totalling £1,139,742 in respect of the second facility. They also state that the Company seeks to offset the difference, £603,062, in diminution of or extinction of Mint's claim.

64. Mint disputes the Defendants' factual contentions but submits that, regardless of whether they can be substantiated, they do not furnish the Defendants with a defence in law.

65. Firstly, Mint submits that the Defendants can have no case based on set-off because their right of set-off has been excluded under the express terms of the second facility letter and the deeds of guarantee.

66. Secondly, Mint submits the second facility superseded or replaced the first facility and, by necessary implication, terminated the parties' rights and obligations and remedy under the first facility itself. This is at least the substance of its case on this aspect.

67. Thirdly, it submits that, since Mint has determined the amount that remains outstanding to be payable under the second facility under paragraph 20.5 of the second facility letter, it is not open to the court to go behind that determination in the absence of manifest error.

68. However, I should turn first to the issue of whether Mint can be shown to have committed a breach of its contractual obligations to the company under the first facility by initially withholding the drawdown funds and requiring the company to instruct a main contractor that oversees the development as a precondition to the release of funds.

69. This issue and the sub-issues to which it gives rise involve mixed questions of law and fact. However, having heard and considered the evidence as a whole, I am satisfied that the answer is no, and I will endeavour to explain why.

70. Mint contends that it was entitled to withhold payment of the net loan monies of £100,000 or thereabouts because it was expressly provided under paragraph 12.2(h) of

the first facility letter that Mint would be under no obligation to make the facility available until it had received a professional valuation of the property addressed to Mint together with any additional specialist reports recommended by the valuer. Mint contends that, on this basis, it was entitled to withhold payment pending a positive recommendation from Mr Preston. If not, Mint maintains that it was an implied term of the first facility, based in trade custom, that the funds would only be released in arrear following A site inspection, report and drawdown certificate from its own quantity surveyor. In any event, Mint maintains that it could have been under no obligation otherwise than to make payment because the Company had provided an inaccurate development appraisal which amounted to an Event of Default as defined in paragraph 15.

71. I am not persuaded by any of those submissions.

72. In my judgment, paragraph 12.2(h) is a reference to the lender's valuation of the Property itself, and such report as a valuer might himself have recommended in connection with his valuation, for example, a survey in relation to the physical condition of the building, or a structural engineer's report, so as to inform Mint's decision on the application of funds for the purchase of the site. In any event I was not referred to a valuer's recommendation for a quantity surveyor to be engaged to produce reports during the course of the building and it would have been a surprise to see such a recommendation.

73. Nor am I satisfied that a term would have been implied ,by trade custom, for the release of funds to be subject to the recommendation of Mint’s quantity surveyor. It is true that, in paragraph 3.1 of his report dated 14 June 2021, Mr Vinden stated that “whilst a development finance agreement may allow for the cost of the site acquisition as is the case here, construction funds are invariably…released in arrears following the site inspection, report and drawdown certificate prepared by the IMS (independent monitoring surveyor)”. However, in the present case the facility letters were drawn up in detailed and comprehensive terms subject to a long series of conditions precedent to the performance of Mint's payment obligations. In my judgment, there is no room here for the implication of yet another condition precedent on the specific basis now suggested, whether by trade custom or otherwise.

74. Finally, whilst it is true that "Event of Default" was defined so as to encompass a "development appraisal found to be inaccurate or misleading", I am not satisfied it has been established, to the required level of specificity, that the Defendants provided inaccurate or misleading information. An unduly optimistic outlook or estimate would not, in my judgment, suffice. Nor, to the extent that it is relevant, can it be shown funds were withheld on that ground at the time.

75. Indeed, it is no doubt precisely because there was no specific provision in the First Facility Deed for funds to be withheld pending a positive recommendation from Mint's quantity surveyor tthat Mr Showman mentioned, in his conversation with Mr Cox and Mr Newbery on 7 March 2017, that funds would only be released subject to those recommendations. This meant that Mint's quantity surveyor would be required to attend the site and report back to Mint on the requirements of the project and the progress being made on site before the loan monies could be released. Consistently with this, Mr Cox accepted, in cross-examination, that he was aware from the outset that the £100,000 would only be released when Mr Preston agreed it should be released. When it was put to Mr Cox that he knew the money would not be released until Mint understood the budget "stood up", Mr Cox agreed that that was so.

76. It is clear from Mr Showman's evidence that he was only willing to release the monies for the purchase of the property on this basis. It was for this reason he stipulated that this was a condition in his discussion with Mr Cox and Mr Newbery on 7 March 2017. Having made that known to Mr Cox, I am satisfied that this was thus a collateral contractual condition.

77. An issue arises as to whether Mr Preston or through him, Mint, required the company to instruct a main contractor to carry out the works. The case, as pleaded in the Amended Defence, is that Mint insisted on "the instruction of a main contractor to oversee the development". In evidence, Mr Cox and Mr Palmer were adamant that Mr Preston did purport to impose such a requirement. Mr Preston maintained otherwise although he did seek to suggest that there would have been good reason for the company to engage a main contractor given the nature of the project. There is no contemporaneous documentary evidence to suggest Mr Preston did purport to impose such a condition. However, I am satisfied that, whilst on some issues Mr Cox and

Mr Palmer were mistaken in their recollection of events, they were essentially honest witnesses doing their best to assist the court and it is difficult to see how they could each be mistaken on an issue as fundamental as this. I have come to the conclusion, on the balance of probability, that the most likely explanation is that Mr Preston took the view at their initial meeting on 9 February 2017 that there was something to be said for engaging a main contractor and mentioned this to Mr Cox and Mr Palmer who believed one of their contractors, P&R contractors, could perform such a role and, together, they formed an expectation that the company would proceed on that basis. However, that fell short of a requirement. Mr Preston did not seek to impose or even suggest that any condition would be imposed to that effect nor did he suggest funds would be withheld if they decided to pursue it differently.

78. Consistently with this, Mr Preston noted simply in paragraph 9B of his report dated 17 March 2017 that "the developer is proposing to use the JCT Minor Works form of contract in 2016 edition that is appropriate for the nature and scope of works".

79. If, consistently with the agreement and understanding reached between Mr Showman and Mr Cox on 7 March 2017, funds were only to be released on Mr Preston's recommendation, it was at least implicit that Mr Preston might need to be satisfied that there was sufficient progress in the works on the site and, indeed, that the works had been properly costed before making recommendations to enable Mint to make payment. As it happens, little was done on the site other than some clearance work and tree cutting, before September 2017. However, on 11 April 2017 a payment of £41,675 was agreed, and once the defendants had started to make progress during September 2017, a further payment of £45,000 was approved and released on 11 October 2017. Following the evidence, Mr Grantham submitted with good reason that much of the early delay was attributable to the failure of the contractors initially preferred by the defendants, that is P&R contractors, to provide their quotation, followed by their decision of August 2017 to pull out of the project altogether.

80. In any event, I am not satisfied it has been shown that Mint committed any material breach of its contractual commitments under the first facility and, on the hypothesis it could be shown it did commit such a breach, I am not satisfied that such a breach would have been causative of the delay of which the Defendants complain in

advancing their set off. In reality, the Defendants set themselves a tight timetable to complete the works and the marketing and disposal of the completed units. Any significant slippage in the timetable would inevitably preclude them from completing the project within the time agreed. As it happens, they were ultimately unable to complete the project within the additional 11 month period under the second facility letter.

81. The Defendants' set-off was based on the proposition that, had it been not been for Mint's breaches of contract, the project would have been completed within the 11 month period for which the first facility provided. If it were possible to identify a material breach or breaches of contract on the part of Mint, I am not satisfied that the test of causation is satisfied.

82. That alone is sufficient to dispose of the defence of set off. However, as I have already mentioned, Mint raises three additional arguments.

83. Firstly, Mint relies on the provisions in paragraph 9.1 of the Second Facility Letter and clause 10.1 of the deeds of guarantee. The Second Facility Letter provided that payment should be made without "deduction, set-off or counterclaim (save as required by law)", and the deed of guarantee provided that payment was to be made "(a) without set-off, condition or counterclaim whatsoever; and (b) free and clear of any deductions or withheld monies except as may be required by law or regulation which is binding on the Guarantor".

84. In my judgment, the critical provision is in paragraph 9.1 of the second facility letter since, in advancing their defence of set off, the Defendants are seeking to deploy against Mint the Company's claim for withholding monies under the first facility rather than the claim that might have been advanced by the other Defendants albeit it is material to their defence as guarantors of the Company's indebtedness to Mint.

85. On the true construction paragraph 9.1, it plainly excludes a right of set-off against Mint. As litigants in person, the Defendants have not advanced a case based on the Unfair Contract Terms Act 1977 ("the 1977 Act"). However Mr Grantham accepts that

I can and should take into consideration the provisions of the 1977 Act when dealing with this aspect of the case.

86. By section 3(2)(a) of the Unfair Contract Terms Act 1977 one party to a contract is not entitled to exclude or restrict its liability to another party for breach except in so far as the contract term satisfies the test of reasonableness in section 11 of the 1977 Act. Mr Grantham accepts that this is capable of applying to a restriction on a right offset off.

87. Section 11(1) of the 1977 Act provides that the requirement of reasonableness is that the term shall be a fair and reasonable one to be included having regard to the circumstances which were or ought reasonably to have been known to or in contemplation of the parties when the contract was made.

88. Mr Grantham referred me to a judgment of the Court of Appeal *Overseas Medical Supplies Ltd v Orient Transport Services Ltd [1999] 2 Lloyd's Reports 273* in which Potter LJ provided guidance about the application of this requirement at page 276 and 277. He also referred me to the judgment of Mance J in *Skipskredittforeningen v Emperor Navigation [1998] 1 Lloyd's Reports 66*. ("*Skipskreditt*").

89. In the *Skipskreditt* case, as in the present one, the borrowers under a loan agreement promised to make each repayment "without set-off as free and clear of and without deduction or on account any present or future taxes". The loan related to the refinancing of an old ferry boat. When the borrower applied to make four repayments alleging that it had been induced to enter into the loan agreement by the lenders' misrepresentations, the lenders sought to rely on the contractual restrictions on set-off.

90. The issues before the court were not the same as in the present case because the lenders proceeded to exclude a set-off based on damages for misrepresentation to which section 3 of the Misrepresentation Act 1967 applied. However, Mance J implicitly endorsed a submission on behalf of the lenders at page 76 that the restriction operated "to avoid arguments about whether there had been default under the loan which contained detailed provisions in relation to default, interest and other matters which would be difficult to operate if a borrower could contend that he had met his financial

obligations by setting off other claims -whether alleged debts or, all the more so, for damages". Ultimately the judge concluded that the restriction could not be regarded as generally unfair. It was familiar, sensible, and understandable. There was nothing about the nature of the particular loan before the court that made it otherwise.

91. In the present case, as in *Skipskreditt*, I can see that there would have been sound commercial reason to exclude the borrower's rights of set-off. Unlike *Skipskreditt,* the loan was not repayable by a series of instalments, it is payable by a single repayment on the Termination Date. However the Termination Date was scheduled to take place only 11 months after the date the facility was first drawn down. Upon repayment in full, the charge over the Property would be redeemed and the Company would be entitled to require Mint to vacate the registration of its security at the Land Registry which ranks in priority to the charge of the vendor. In these circumstances I can see good reason for Mint to seek to sever from the company's secured indebtedness to Mint any cross-claim in damages to which the Company might otherwise be entitled. The Company would thus be required to repay its secured indebtedness under the charge in order to redeem it and, at that stage, uncertainty and pre-emptive litigation would be avoided since it would be unnecessary to quantify the Company's cross claim. In this way, the Company would avoid the uncertainty of a redemption action where the amount necessary to repay the charge could not be calculated as a simple arithmetic exercise in advance. Once the borrower has redeemed the charge by paying the secure indebtedness in full, the damages claimed could then be litigated in court according to such timescale as might be necessary to accommodate the issues of the litigation. Excluding the company's right of set-off in this way would not, in my judgment, be disproportionate because the Company would remain entitled to issue a claim or counterclaim for damages.

92. In my judgment, the anti set-off clause in paragraph 9.1 of the second facility letter satisfies the reasonableness test in section 11 of the Unfair Contract Terms Act 1977 and thus precludes the Company and its guarantors from setting off the company's losses owing to Mint's putative breach of contract as a defence to the claim.

93. In any event, the Second Facility can be taken to have superseded or replaced the First Facility and, by necessary implication, terminated the parties' rights and obligations

and remedies under the First Facility itself. The Second Facility was plainly intended to replace the First Facility in its entirety. By entering into the Second Facility without reserving any of their rights under or in respect of the First Facility, the parties are to be taken to have given up such rights, see *Chitty on Contracts* (34th edn), Volume 1, paragraph 30, and the case of *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48 page 67.

94. In relation to the quantification of the Defendants' indebtedness, Mint relies on paragraph 20.5 of the second facility letter and clause 13 of the Deed of Guarantee dated 20 January 2018. Paragraph 20.5 of the Second Facility Letter provides that "any certificate or determination by the lender of as to a rate or any amount payable under this guarantee shall, in the absence of manifest error be conclusive evidence of the matters to which it relates." Clause 13 of the Deed of Guarantee provided in similar terms that "any certificate, determination or notification by the lender as to a rate or any amount payable under this guarantee is (in the absence of manifest error) conclusive evidence of the matter to which it relates and shall contain reasonable details of the basis of the determination."

95. On this basis Mr Grantham submits that Mint has made a determination of the amount payable which is recorded in its statement dated 9 November 2021 and the constituent elements within that statement. Consistently with his submission, the statement records that the company is liable to Mint in the sum of £625,226 and, in support of that calculation, there is a detailed breakdown of the constituent amounts. The constituent amounts include late payment interest, Mint's management fees and Mint's tariff charges.

96. In support of his case, Mr Grantham referred me to the judgment of the Court of Appeal in *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] Ch, page 31 ("*North Shore*"). In this case the Court of Appeal adjudged that there was a manifest error in a lender's certificate about the guarantor's indebtedness on the basis that it did not properly reflect a contractual variation in relation to the amount of interest payable and thus allowed the guarantors to challenge the certificate. However, Mr Grantham submits that the *North Shore* case establishes the following propositions in the case of the conclusive evidence clause in these terms where there is an express qualification in respect of manifest error. Firstly, a clause such as this should be strictly construed with any ambiguity being

resolved in favour of the guarantor. Secondly, when applying such a provision it is necessary to identify what the guarantor has agreed to pay and of what the certificate is conclusive evidence. This is an essential part of the exercise. Thirdly, a manifest error must be identified.

97. Applying those principles, Mr Grantham submits that the clause in the present case is clear and unambiguous. He submits that the guarantors have agreed to pay the company's indebtedness under the second facility, the certificate or determination is conclusive evidence of the indebtedness and no manifest error has been identified.

98. In my judgment, Mr Grantham's submissions on this issue are well founded and his conclusions are correct. The clause is sufficient and clear. The express reference in the clause to "the matter to which the certificate relates" is capable of bearing a wide connotation. However, it can be taken as a reference to the rates or amounts payable under the guarantee. The company and their guarantors have agreed to pay the company's indebtedness under the second facility. The determination, certificate and statement quantify those amounts and no manifest error has been identified.

99. The conclusive evidence clause is essentially concerned with the identification and quantification of the amount due under the second facility and the guarantees. It does not confer an overall discretion on Mint and does not allow Mint to override the contractual machinery. Although Mr Grantham sought to contend otherwise, it is, in my judgment, at least conceivable that Mint was and is under an implied duty to act honestly in providing a certificate, although in the absence of full argument from both sets of parties I would be reluctant to conclude that Mint was also under a duty of good faith and a duty to act rationally in a way analogous to the guidance in *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661. However, this is academic because it is not suggested there has been an absence of good faith or rationality in the performance of Mint's contractual obligations.

100. I am thus satisfied that Mint is entitled to judgment on the amount certified, £625,225.97.

101. For the avoidance of doubt, I have reached that conclusion according to the narrow parameters of the case based on the parties' statements of case, the issues that were specifically advanced before me and the evidence that has been admitted.

102. The Defendants have produced a schedule of the amounts drawn down under each of the facilities. It amounts, in aggregate, to £420,431.24. If there is added to that amount the sum that was initially applied in the purchase of the property and transferred to the vendor's solicitors on completion - £326,800 thereabouts - together with £3,129.05 in respect of fees and costs, accounted for at that stage to Notary Express, and another £3,500 or thereabouts for fees and SDLT, and comparable amounts under the second facility letter, the net amount received from Mint is significantly less than £800,000. Conversely, from the realisation of the two residential units of the property and the net proceeds of 38 New Hythe Lane, Larkfield, Aylesford, Mint has already received £1,115,843.42. It has thus received upwards of £200,000 more than the amounts advanced or applied in connection with the project before otherwise accounting for Mint's financial commitments not least in respect of professional fees.

103. Bearing in mind the amounts it has already received, the Defendants are aggrieved Mint has elected to pursue them in these proceedings for another £625,227.97. Mint's answer is that, having freely signed up to their contractual commitments in the facility letters, the mortgages and the guarantees, the Defendants are liable to Mint on the certified amount. Mint's tariff of charges is significantly higher than might have been expected in an ordinary mortgage transaction but Mint was providing a different service under which it was necessary to assess the project, monitor the works on site and engage staff or contractors to assist it in doing so. On this basis, Mint could be expected to incur expenses and liabilities that transcend an ordinary mortgage transaction. Not without good reason, Mint also submits that much of the difficulty encountered on the project can be attributed to the Defendants' own failures at the outset to properly assess the cost and time scale for the project and put in sufficient working capital to meet their commitments, funds characterised by Mint itself as "hurt money". On this basis, the Defendants overextended themselves and are ultimately responsibility for their own difficulties. However, in these proceedings, they have conducted themselves with moderation and propriety and I hope that, following judgment, Mint will itself take a moderate and realistic view when pursuing its rights of recovery.

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

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge