Neutral Citation Number: [2023] EWHC 221 (Comm)

Case No: CL-2021-000680

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Rolls Building
Fetter Lane
London, EC4A 1NL

10th February 2023

Before :

MR SIMON COLTON KC
(sitting as a Deputy High Court Judge)

- -

Between :

(1) DAVID MAN **Claimants**

(2) SANDFORD ELECTRICAL SERVICES LIMITED

- and -

HAZELEND LLP **Defendant**

- -
- -

Justin Perring (instructed by direct access) for the **Claimants**
Thomas Robinson (instructed by **Provenio Litigation LLP**) for the **Defendant**

Hearing date: 2 February 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 10th February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

Mr Simon Colton KC:

Introduction

1. The Claimants in these proceedings have applied for summary judgment on all or part of the Defence of the Defendant ('**Hazelend**'), on the grounds that Hazelend has no real prospect of defending this claim and there is no other compelling reason why the claim should be disposed of at a trial.

The uncontentious facts

2. The First Claimant ('**Mr Man**') is the director and sole shareholder of the Second Claimant ('**Sandford**'). Hazelend is a limited liability partnership whose business is property development. Mr Mark Holyoake ('**Mr Holyoake**') is Designated Member of Hazelend.

3. In May 2014, Mr Man and Hazelend entered into a written loan agreement, under which Mr Man agreed to loan Hazelend the principal amount of £125,000, to be repaid on 19 May 2015 (or, at Mr Man's discretion, after 6 months with 30 days' notice in writing), with interest calculated at 15% per annum. That sum was advanced, but Hazelend did not repay the loan in accordance with its terms. Between May and September 2015 there were discussions between Mr Man and a Mr William Pym ('**Mr Pym**') during which, on 11 September 2015, Mr Pym proposed by email that the loan would be repaid on 23 November 2015, with enhanced interest, equating to a total sum of £159,845.89.

4. The sum owed was not repaid on 23 November 2015, or thereafter.

5. In July and August 2018, there were further discussions between Mr Nick Marks (on behalf of Mr Man) and Mr Pym (on behalf of Mr Holyoake), in the course of which it was agreed that there would be an assignment of the outstanding debt to Mr Holyoake, in return for the payment of £125,000. This led to a written assignment agreement on 22 August 2018 (the '**Written Assignment**'), with the Claimants defined as Assignors and Mr Holyoake as Assignee.

6. The Written Assignment included the following provisions:

> *" Introduction*
>
> *...*
>
> *(C) The Assignors have agreed to assign all their legal and beneficial rights, title and interest in the Debt and the Loan Notes to the Assignee on the terms and conditions set out below.*
>
> *Agreed terms*
>
> *1 Definitions and Interpretation*
>
> *1.1 The definitions and rules of interpretation in this clause apply in this deed.*

...

***Debt** means any present or future liability (actual or contingent) payable or owing by the Borrower to the Assignor under or in connection with the Loan Notes.*

...

2.1 Assignment of rights

Subject to the terms of this deed, the Assignors unconditionally, irrevocably and absolutely assign to the Assignee all the Assignors' rights, title, interest and benefits in and to the Loan Note with effect from the Assignment Date. All rights to receive amounts due under the loan note prior to the assignment shall remain due by the borrower Hazelend to the assignor. All rights due under the loan note post the assignment shall be due to the assignee.

...

2.3 Consideration

The assignee shall upon the signing of this deed by the party signing last in time pay to the assignor the sum of £1 (one pound GBP), in cash, acknowledged as received, and £125,000 (one hundred and twenty five thousand pounds GBP), by way of electronic funds transfer into a bank account nominated by the assignor, without deduction or set-off, by 30th November 2018.

Payment will be made to the following account [###]

...

4 Investigation and Reliance

...

4.3 On the Assignment Date, the Assignors represents and warrant to the Assignee that:

...

4.3.2 no amount of principal, interest, fees or other amounts due has been paid under the Assigned loan note as at the date of the assignment. Amounts due under the loan note as at the date of the assignment continue to be due to the assignor (clause 2.1).

...

6 Release

> *The parties agree that from the Assignment Date the Assignor no longer has any rights in relation to the Debt and the Assigned Document save for those described above in clause 2.1 and clause 4.3.2."*

7. The Claimants say that the effect of the final two sentences of clause 2.1, as reflected in clauses 4.3.2 and 6, is that while the principal amount of the loan was assigned to Mr Holyoake by the Written Assignment, the Claimants remained entitled to claim from Hazelend interest which had accrued up to the date of the assignment. It is accepted by Hazelend that that is the effect of clause 2.1, although I confess that it is not obvious to me that this is so: on its face, clause 2.1 refers to "*all rights to receive amounts due under the loan note prior to the assignment*", and it seems to me that since payment of the principal loan had fallen due under the loan note, the literal effect of this clause would be that the Claimants would remain entitled to claim even the principal sum from Hazelend, and not just accrued contractual interest. Nonetheless, I proceed on the basis, common to the parties, that the effect of clause 2.1 is as the Claimants say.

8. The final matter of agreement between the parties is that there were further discussions between Mr Marks and Mr Pym in August 2019, and that on 29 August 2019, Mr Holyoake paid £5,000 to Sandford.

The dispute between the parties

9. The Claimants' case is that they are entitled to payment of the contractual interest on the loan which had accrued by 22 August 2018, that that interest has not been paid, and that they are now entitled to payment of it, with interest. They say the Written Assignment did not deprive them of the ability to claim such accrued interest, and that the discussions in August 2019 had no effect on this entitlement.

10. Hazelend denies that Mr Pym's agreement with Mr Man in September 2015, by which the date for repayment was extended to 23 November 2015, was concluded with the authority of Hazelend. Hazelend's case is that in around June or July 2018, Mr Marks and Mr Pym orally agreed that all of Mr Man's rights, title and interest in the loan would be assigned to Mr Holyoake, in consideration of which Mr Holyoake would pay the sum of £125,000 to Sandford (the '**Oral Assignment Agreement**'). Hazelend says that the subsequent Written Assignment did not accurately record the Oral Assignment Agreement. Hazelend says that clause 2.1, which retained for Mr Man the right to all sums which had previously fallen due, was introduced in error. Accordingly, by way of counterclaim, Hazelend seeks rectification of the Written Assignment. In any event, Hazelend says that in August 2019 the Written Assignment was varied orally so that the right to pre-assignment interest would be assigned to Mr Holyoake, in return for which Mr Holyoake arranged for £5,000 to be paid to Sandford (the '**2019 Variation**').

The principles to apply in an application for summary judgment

11. The applicable legal principles can be taken from the judgment of Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. The principles include (with references omitted):

> *"i) The court must consider whether the claimant has a "realistic" as opposed to a 'fanciful' prospect of success…;*
>
> *ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable:…*
>
> *iii) In reaching its conclusion the court must not conduct a 'mini-trial'…*
>
> *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…*
>
> *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…;*
>
> *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"*

12. In *Calland v Financial Conduct Authority* [2015] EWCA Civ 192, in the context of another summary judgment application, Lewison LJ observed at [28] that "*The fact that some factual or legal questions may be disputed does not absolve the judge from her duty to make an assessment of the claimant's prospects of success*". He also noted at [29] that "*In evaluating the prospects of success of a claim or defence the judge is not required to abandon her critical faculties*".

Identification of the issues in respect of which summary judgment is sought

13. The issues for summary judgment identified by the Claimants were:

    i) Whether Mr Pym acted with the authority of Hazelend at all material times (Issue 1);

    ii) Whether there was an oral assignment agreement (Issue 2);

    iii) Whether the written assignment agreement was entered into on the basis of a mistake (Issue 3);

    iv) Whether there was an oral variation in 2019 (Issue 4);

v) Whether the claim was brought in time (Issue 5).

14. However, in *Anan Kasei Co v Neo Chemicals & Oxides (Europe) Ltd* [2021] EWHC 1035 (Ch) at [82], in a passage that has been repeatedly followed at first instance, Mr Justice Fancourt held:

> *"The 'issue' to which rule 24.2 ('the claimant has no real prospect of defending the claim or issue') and PD24 refers is a part of the claim, whether a severable part of the proceedings (e.g., a claim for damages caused by particular acts of infringement or non-payment of several debts) or a component of a single claim (e.g., the question of infringement, or the existence of a duty, breach of a duty, causation or loss). It is not any factual or legal issue that is one among many that would need to be decided at trial to resolve such a claim or part of a claim. If the determination of an issue before trial has no consequences except that there is one fewer issue for trial then the court has not given summary judgment and the application was not for summary judgment. If it were otherwise, parties would be able to pick and choose the issues on which they thought their cases were strong and seek to have them determined in isolation, in an attempt to achieve a tactical victory and cause the respondent to incur heavy costs liability at an early stage."*

15. I do not consider that Issues 1 to 3, as formulated, are properly the subject of an application under CPR 24, in light of the decision in *Anan Kasei*. Issue 1 is no more than a stepping-stone on the way to deciding whether the claim is time-barred. Issues 2 and 3 are questions arising as part of the wider question whether the counterclaim for rectification of the Written Assignment can succeed.

16. Accordingly, the questions I consider fall for determination are:

i) Should the counterclaim for rectification be dismissed on the grounds that the claim for rectification has no real prospect of success? (Issue (i))

ii) Should the counterclaim for a declaration that the Written Assignment was varied in 2019 be dismissed on the grounds that it has no real prospect of success? (Issue (ii))

iii) Does the limitation defence have no real prospect of success? (Issue (iii))

and whether there is any compelling reason why these issues should be disposed of at trial.

Issue (i): The counterclaim for rectification

The nature of the counterclaim

17. Hazelend's pleaded position is that in around June-July 2018 Mr Marks and Mr Pym orally agreed that all of Mr Man's rights, title and interest in the loan would be assigned to Mr Holyoake, and that the Written Assignment Agreement was "*made under a mutual mistake of fact, namely the mistaken belief that it*

accurately expressed the Oral Assignment Agreement". On that basis, Hazelend seeks rectification of the Written Assignment.

18. The test to be met when rectification is sought for common mistake was summarised by the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust* [2019] EWCA Civ 1361 at [46] and [176]:

> *"46. At a general level, the principle of rectification based on a common mistake is clear. It is necessary to show that at the time of executing the written contract the parties had a common intention (even if not amounting to a binding agreement) which, as a result of mistake on the part of both parties, the document failed accurately to record. This requires convincing proof to displace the natural presumption that the written contract is an accurate record of what the parties agreed."*
>
> *"176. We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an 'outward expression of accord' meaning that, as a result of communication between them, the parties understood each other to share that intention."*

19. Hazelend says that it has an arguable case under both of the limbs described by the Court of Appeal in *FSHC*. Such a case can, in my judgment, only succeed if communications 'crossing the line' between the parties support such an argument. While Hazelend's witnesses state that they were personally mistaken, overlooking the impact of the relevant clauses in the Written Assignment, that of itself cannot establish a basis for rectification. Hazelend's case is one of common mistake, which it cannot establish if, for example, the communications between the parties, objectively interpreted, show a deliberate choice that the Written Assignment should not reflect an earlier oral agreement. I understood Mr Thomas Robinson, Counsel for Hazelend, to accept this proposition.

What the documents show

20. Relevant contemporaneous emails, with attached drafts of what became the Written Assignment, were exhibited to the witness statements of Mr Marks and Mr Man. Hazelend's witnesses (Mr Pym, Mr Holyoake and Mr David Wells) do not dispute the authenticity of these emails and of the attached drafts; on the contrary, these witnesses each provide their own narrative on the basis of the documents exhibited.

21. On 9 July 2018, Mr Pym sent to Mr Marks an email with subject line '*Draft Debt purchase agreement*'. Mr Pym wrote: "*Attached is the draft agreement. Let's try and knock it into shape so everyone can relax and enjoy their summers!! It is a draft and starting point so feel free to make any amendments you see fit*". The draft provided for all of the rights, title, interest and benefits in the loan to be assigned to the Assignee with effect from the Assignment Date.

22. On 18 July 2018, Mr Marks sent to Mr Pym an email with subject line '*Draft re David Man*'. Clause 2.1 of the attached draft written assignment included the words: "*All rights to receive amounts due under the loan note prior to the assignment shall remain due by the borrower Hazelend to the assignor. All rights due under the loan note post the assignment shall be due to the assignee.*" Clause 4.3.2 stated "*Amounts due under the loan note as at the date of the assignment continue to be due to the assignor (clause 2.1)*". Clause 6 cross-referred to clauses 2.1 and 4.3.2. I refer to this wording of these three clauses as the '**Final Language**'.

23. On 6 August 2018, Mr Pym sent Mr Marks an email with subject line '*Final Draft*'. Mr Pym wrote: "*Please check the attached as the final draft*". The Final Language had been deleted. Mr Marks replied, noting that two changes were not acceptable:

> *"1) the assignment is to be on signature with settlement deferred for up to 90 days of signature. NOT the assignment being within 90 days of signature.*
>
> *2) the rights up to the assignment remain with david and david."*

(Mr Marks was negotiating on behalf of two creditors, the other being named David Adomakoh.)

24. Mr Pym replied that same day, "*Changes made, see if that now makes sense*". However, while a change had been made to the definition of 'Assignment Date', the Final Language had not been reinstated. There is no documentary evidence as to whether or how Mr Marks responded to this, although later that evening Mr Pym sent a further draft to Mr Wells, with the message "*Please ask Mark to sign the attached*", which did now contain the Final Language again.

25. On 10 August 2018, Mr Marks chased Mr Pym: "*I'm seeing [Mr Man] this afternoon. Please have this finalised prior. It's all going to ratchet up if I can't put it to bed.*"

26. In an email of 14 August 2018, which does not seem to have crossed the line to Mr Man or Mr Marks, Mr Holyoake emailed Mr Wells and Mr Pym, saying (among other things) "*Can you please check we are just paying the principle* [sic] *and that there is no chance of any further monies being claimed*".

27. On 16 August 2018, Mr Wells sent Mr Pym a further draft, which was forwarded to Mr Marks. This draft did include the Final Language. Further amendments were made before 22 August 2018, but without the Final Language being amended.

What the Defendant's witnesses say about the contemporaneous documents

28. Mr Pym's evidence is that on 9 July 2018 he reached an agreement with Mr Marks acting for Mr Man. Mr Pym says that the agreement was that the entirety of the loan would be transferred to Mr Holyoake, in return for £125,000 (equal to the principal amount, which remained outstanding). He says that the 9 July 2018 draft agreement (which did not contain the Final Language) reflected that. Mr Marks' evidence was initially consistent with this, saying "*Mr Pym sent me a draft agreement on 9 July 2018. It embodied what we had discussed and agreed*". Mr Marks resiled from that position in a later statement, saying this was a mistake because "*I had made it clear to Mr Pym when I spoke to him shortly before the first draft was provided that (in accordance with my instructions from Mr Man) the right to recover interest from Hazelend had to be maintained, and this was not reflected in the first draft*".

29. Mr Wells' evidence is that when he reviewed the draft provided by Mr Marks on 18 July 2018, he misunderstood the impact of the Final Language. Although he sent an email to Mr Pym on 3 August with amendments to clause 2.1, he did not understand the impact of the Final Language inserted by Mr Marks. Similarly, when sending the further draft to Mr Pym on 16 August, and when reviewing the final draft on 22 August, he did not appreciate that the Final Language was included with the effect that some monies would remain due to the Assignor.

30. Mr Pym gives similar evidence about these later drafts, saying that he would not have agreed to sums remaining due to the Assignors, and it was a mistake and not his intention to include the Final Language in the draft he sent to Mr Wells on the evening of 6 August.

31. Mr Holyoake's evidence is that his intention, and what he believed had been agreed between Mr Marks and Mr Pym, was that the Written Assignment would be full and final settlement of the debt under the loan.

Conclusion on the rectification issue

32. I consider that the counterclaim for rectification meets the standard of arguability. In those circumstances, and aware that the matter may go forward to a trial, I do not intend to say too much about the claim.

33. It is, in my judgment, plainly arguable that there was the Oral Assignment Agreement on 9 July 2018 under which the entirety of the loan (including any accrued contractual interest) would be assigned to Mr Holyoake. The terms of what was agreed will at trial provide an important backdrop to what followed.

34. After 9 July 2018, on the face of the documents provided to date, it does appear that there was, at the least, an attempt by Mr Marks on behalf of Mr Man to negotiate that Mr Man would retain the right to the accrued interest. That is shown by the 6 August 2018 email in which Mr Marks said: "*the rights up to the assignment remain with david and david*".

35. But there is then an important gap in the documentary record: despite the position adopted by Mr Marks, Mr Pym first sent to Mr Marks a version without the Final

Language (on 6 August 2018) and then sent a version with the Final Language (on 16 August 2018). It seems to me, on what I have seen, likely that there was some further communication between Mr Pym and Mr Marks at this time – perhaps a conversation, or perhaps in emails which have not been placed before the court. That gap may be filled by disclosure. But without knowing whether or how Mr Pym and Mr Marks communicated concerning the matters in Mr Marks' email of 6 August, I cannot be sure why the Final Language was included. It could be that Mr Marks persuaded Mr Pym to accept that Mr Man would retain accrued contractual interest, just as the Written Assignment states; but it may be that they agreed to revert to the position of the entirety of the rights being transferred, and, by a mistake, failed to reflect that in the contractual language of the Written Assignment.

36. I raised with Counsel a separate issue, which is whether it was open to Hazelend to seek rectification of an agreement to which it was not party. In this regard, Mr Robinson, took me to paragraph 16-026 of Snell's Equity, which deals with 'Bad Defences' to a claim for rectification. Snell identifies among such (bad) defences "*the absence of any privity of contact between the parties so that rectification may in appropriate cases be granted to or ordered against successors in title*". Snell refers in this regard to a number of cases, most (if not all) involving conveyances of land. Mr Robinson also noted that third parties to a contract may obtain a declaration as to the meaning of a contract affecting them, even though not party to it, citing *Milebush Properties Ltd v Tameside MBC* [2011] EWCA Civ 270, esp at [44]. Mr Robinson's submission was that, by parity of reasoning, if a non-party had a sufficient interest then, in principle, the non-party could also obtain an order for rectification of a contract. Mr Robinson also noted that, as a fall-back, Mr Holyoake could be joined in the proceedings. In light of these submissions, Counsel for the Claimants, Mr Perring, accepted that this legal question could not of itself be determinative of his application. I agree: on the basis of what I have been shown, this is not a point on which the law is clear, and if the test is (as Mr Robinson submits) whether the non-party has a sufficient interest, then a debtor might very well have a sufficient interest in respect of an agreement, to which it was not party, assigning the debt in question.

Issue (ii): The oral variation issue

37. As an alternative defence, Hazelend pleads that on or around 29 August 2019 Mr Marks and Mr Pym both realised (and orally represented to each other) that the Written Assignment had failed to accurately embody the Oral Assignment Agreement. This led to discussions following which they orally agreed that the Final Language of the Written Assignment would be varied such that Mr Man would have no right to receive any amounts due under the loan; there would be further discussions between the parties as to an *ex gratia* payment; and in consideration of these variations Mr Holyoake would pay Sandford the sum of £5,000 (the '**2019 Variation**'). It is common ground that £5,000 was indeed paid at this time.

38. I am acutely aware that I have heard no cross-examination of witnesses, and there has been no process of compulsory disclosure. Nonetheless, I consider that the true position is clear from the contemporaneous documents.

i) A statutory demand was served by Sandford on Hazelend in late March or April 2019, seeking payment of the pre-assignment contractual interest to which Sandford claimed to be entitled. (There is real doubt as to whether Sandford had such an entitlement, since the original lender was Mr Man, and there is no evidence he had assigned his claim to Sandford, but that does not matter for present purposes.) Thereafter, there were discussions between the parties as to the date by when the demand was to be complied with. Alongside this, Mr Man had been paid only £120,000 of the £125,000 consideration which was due from Mr Holyoake under the Written Assignment Agreement, and Mr Man was insisting that the outstanding £5,000 be paid.

ii) By 16 August 2019, no agreement on interest had been reached: Mr Pym emailed Mr Marks that day asking: "*please confirm the current demand is extended until 22/8 as agreed and I will seek to get the 5k paid but what comfort can you provide me in regards to your interest position after that?*".

iii) On 20 August 2019, Mr Marks proposed: "*As discussed, once [Mr Man] is paid the £5000 contractually due to him by [Mr Holyoake] you and I can sit down and finalise the ratchet mechanism we have tentatively discussed re the interest due under the now assigned agreements*."

iv) Mr Pym replied the next day saying this "*seems sensible*" and offering to agree:

> *"1) The current stat demand will be extended until close of business next Tuesday 27th and during that time David Mann will receive the 5k payment in cleared funds. I will try to get this done this week but I am aware [Mr Wells] is away from today over the bank holiday so have suggested a date that allows us not to have to revisit this again.*
>
> *2) Upon receipt of the 5k the stat demand will be automatically extended a further 30 days until Monday 26th September. During this time no legal action on either side will take place and myself and yourself will meet at the earliest opportunity to agree and document a suitable path forward in accordance with our discussions."*

Mr Marks replied "*Agreed subject to £5k being paid*".

v) On 22 August 2019, Mr Pym emailed again:

> *"To confirm I now have agreement our side therefore to reconfirm:*
>
> *1) 5k will be with David Mann by close of business Tuesday 27/8.*
>
> *2) The stat demand is extended now until 28/8. On the basis David receives the 5k it is further extended until 26/9 to allow myself and yourself to meet up and document accordingly. No legal action will be taken during this time."*

vi) On 30 August 2019, Mr Pym emailed Mr Marks:

> *"On the basis that David has received his 5k I just wanted to confirm that the Stat Demand is now extended to the 26th September, as agreed below, so that we can come up with the agreement and a suitable path to resolve the outstanding interest payments."*

Mr Marks replied "*Confirmed*".

vii) On 24 September 2019, Mr Pym emailed Mr Marks again:

> *"Re-reading this, I see we had to resolve this by Monday 26th September, which is obviously wrong. Notwithstanding, it would be great to knock this on the head, as agreed, now that everyone has their money back. I had dinner with David Man last week and we both agreed to get this resolved and move on from here. Do you still have a copy of the letter that was sent as an offer that reflects what was agreed many months ago. I have attached it for your review. Let me know what you think."*

viii) On 26 September 2019, Mr Pym emailed again: "*Please can you approve an extension for a further 14 days to resolve this. I would suggest Friday the 11th October*." Mr Marks replied "*Confirmed*".

39. This documentary record is inconsistent with the plea that some agreement on interest was reached "*on or around 29 August 2019*", or that the payment of £5,000 on that day was consideration for such an agreement on interest. The email correspondence all points to discussions concerning interest being parked for a later date, with no agreement having been reached in that respect. There is no hint that there was some sudden discovery that the Written Assignment failed to embody the Oral Assignment Agreement, or that Mr Man agreed to give up his rights to interest under the Written Assignment.

40. The witness evidence in support of Hazelend's case, Mr Pym's first witness statement, does not advance Hazelend's case in this regard: after selectively reciting emails between May and August 2019, including the exchange of 21 August 2019 cited at paragraph 38.iv) above, there is the bare assertion, "*Around 29 August 2019 we therefore agreed that the Written Assignment Agreement did not reflect what had been agreed and payment of the £5,000 was made*".

41. Recognising the difficulties with his pleaded case in light of the underlying documents, Mr Robinson invited me to treat the pleaded date expansively, on the basis that the 2019 Variation was perhaps concluded after this run of emails. But in my judgment that is not tenable. That is not a fair reading of the pleaded Defence, and there is in any event no evidence of an agreement being reached after 26 September 2019. Moreover, by that time the £5,000 would have already been paid, so could not be consideration for the alleged 2019 Variation. I also note that such an expanded case is not suggested by either the Further Information of Hazelend (served just one week before the hearing) or by Mr Pym's second statement (served the next day).

42. Mr Robinson submitted that Mr Pym's (near-contemporaneous) reference in his email of 24 September 2019 to having had dinner with Mr Man undermines Mr Man's witness evidence in these proceedings to the effect that he did not have dinner with Mr Pym at this time. If I were relying for my conclusion on disputed elements of Mr Man's witness evidence, that could be relevant. But it is no part of my task to weigh the credibility of different witnesses, so this forensic point does not assist Hazelend.

43. For these reasons, I consider Hazelend's case on the 2019 Variation to be unarguable.

44. In reaching this conclusion I have not had regard to Mr Perring's submissions concerning findings relating to Mr Holyoake and Mr Pym made by Nugee J in *Holyoake v Candy & Ors* [2017] EWHC 3397 (Ch). On a summary judgment application, I could not possibly weigh up the credibility of witnesses from whom I have heard no oral evidence. Moreover, it seems to me likely that the findings of Nugee J as to the credibility of these men are inadmissible in accordance with the principles set down in *Hollington v Hewthorn* [1943] 1 KB 587.

45. Mr Robinson submitted that even if I found some part of Hazelend's case to be unarguable, if I were to find other issues arguable then I should let all of the issues go to trial. I do not accept that submission: while I accept that I have a discretion under CPR 24.2 ("*The court may give summary judgment…*"), I do not consider that it is right to allow one issue to go forward to trial if I have concluded that it is unarguable, absent some compelling reason to do so. I do not consider there is a compelling reason here. On the contrary, giving summary judgment on the alleged 2019 Variation may well (for example) reduce the scope of disclosure, saving costs for all parties.

Issue (iii): The limitation defence

46. As noted at paragraph 3 above, it appears to have been agreed between Mr Man and Mr Pym on or about 11 September 2015 that the loan made to Hazelend would be amended so that both principal and interest would only fall due on 23 November 2015, together with contractual interest (including at a default rate) that would have accrued by that date. The claim form in the present proceedings was issued on 22 November 2021. Accordingly, if the agreement between Mr Man and Mr Pym had the effect of varying Hazelend's obligations, the present claim against Hazelend was undoubtedly brought in time.

47. There is, however, an issue as to whether Mr Pym's agreement bound Hazelend. In its Defence, Hazelend pleads that it is unable to admit or deny the extent (if any) to which Mr Pym's actions can be attributed to Hazelend, or the extent (if any) to which the terms of the loan were varied between May and November 2015. By the time of its Further Information, that position had hardened into an outright denial.

48. Mr Holyoake gives evidence that Mr Pym acted "*as a conduit*", but that he did not have authority to bind Hazelend to variations to the loan. Mr Pym gives evidence to like effect. In its Further Information, Hazelend pleads that Mr Pym

made clear (albeit, at an earlier stage) that if a proposal was acceptable, he would then have to go and get it "*formally confirmed*".

49. From the materials I have seen, I am dubious as to whether Hazelend can make good its case in this regard, but I cannot say that it has no real prospect of doing so. Mr Perring was not entirely clear as to whether the Claimants' case was one of actual authority, ostensible authority, ratification, or something else. But there are no documents that I have been shown that demonstrate Hazelend holding out Mr Pym as having authority to bind it in respect of the matters set out in his email of 11 September 2015. Nor have I been shown documents demonstrating that Mr Pym had actual authority to do so, nor that Hazelend ratified the proposal made by Mr Pym in his email of 11 September 2015. So, while, from the documents I have seen, a judge at trial might be able to infer that Mr Pym had the necessary authority, at this stage I cannot say that the contrary is unarguable.

50. For these reasons, I cannot conclude that the limitation defence is hopeless. It is an issue which must go forward to trial.

A conditional order?

51. Mr Perring submitted that, if I were to decline to give summary judgment on the whole claim, I should nonetheless conclude that the defence is weak and make a conditional order pursuant to paragraph 5 of Practice Direction 24. I decline to make such an order, for two reasons:

    i) While I have doubts as to the strength of the remaining elements of Hazelend's defence, I have not yet seen the disclosure that each side will give.

    ii) I am also troubled by the circumstances in which these proceedings came to be brought. Much of the evidence adduced in support of the Claimants' case is to be found in emails between Mr Pym, Mr Holyoake and Mr Wells, to which the Claimants were not copied. Until the hearing before me, the Claimants had not identified the source of these documents, despite Hazelend in its Defence putting in issue the means by which these emails came to the Claimants' attention, and reserving the right to bring a counterclaim for breach of confidence. On instructions, Mr Perring told me that his clients had obtained the emails from a former director of a company (now in liquidation) on whose servers Mr Pym's emails had been held. Mr Perring was not in a position to make any positive submission as to the lawfulness of these acts. Accordingly, while it may be that everyone involved acted lawfully, and it may be that Hazelend has no grounds for a counterclaim, I cannot rule out the contrary possibility.

Conclusion

52. For these reasons, I grant the Claimants' application for summary judgment only to the extent of dismissing Hazelend's Defence based on the alleged 2019 Variation and dismissing Hazelend's counterclaim for a declaration that the Written Assignment has been varied in accordance with the alleged 2019 Variation.

53. As discussed with Counsel at the hearing, I shall as part of my order consequential on this judgment direct the transfer of the proceedings to the Central London County Court, given the limited value of the claim.

54. Since this will now be a County Court case, PD57AD does not apply: see paragraph 1.2 of PD 57AD. Accordingly, I will not grant the Claimants' application that Hazelend be ordered to provide Initial Disclosure (an application which was, in any event, pursued only as part of the application for a conditional order).

55. I will also not order Hazelend to improve upon the Further Information which it recently served. In light of the limited sums at stake, and the extent to which Hazelend has (albeit belatedly) answered the Request for Further Information, I do not consider it reasonable or proportionate to require further expense to be incurred in this regard.

56. There was, in addition, a strike out application, seeking to strike out Hazelend's plea concerning Mr Pym's (lack of) authority, and its plea concerning common mistake in the Written Assignment, on the grounds, in essence, that these pleas were inadequate. I was unclear whether this was pursued, but in any event I would reject such application; I consider the information in the Further Information is sufficient to make good any defect in Hazelend's original pleading.