Case No: K80LS026

IN THE COUNTY COURT AT LEEDS
BUSINESS AND PROPERTY WORK

Leeds Combined Court Centre,
Oxford Row, Leeds LS1 3BG

Date: 24/01/2024

Before :

HH JUDGE DAVIS-WHITE KC

- -

IN THE MATTER OF CELTIC PROPERTY DEVELOPMENTS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Between :

(1) MR DUDLEY CHAPMAN
(2) LLOYD WARWICK LIMITED

- and - **Claimants**

CELTIC PROPERTY DEVELOPMENTS LTD

Defendant

- -
- -

Mr Nicholas Jackson (instructed by **MD Law (Yorkshire) LLP**) for the **Claimants**
Mr Paul Strelitz (instructed by **RDP Law Limited**) for the **Defendant**

Hearing dates: 8-9 August 2023

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Approved Judgment

This judgment was handed down remotely by Teams at 10.00am on 24 January 2024

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HH JUDGE DAVIS-WHITE KC

HH Judge Davis-White KC :

Introduction

1. This case was heard on 8 and 9 August 2023. There was then a hiatus whilst a transcript of the cross-examination of one of the witnesses was prepared. That reached me on 6 September 2023. I apologise for the delay after that in preparing this judgment.

2. The issue in this case is the continued validity (or otherwise) of a debenture granted to the First Claimant by the Defendant and which has (if it still exists) been assigned to the Second Claimant, alternatively whether either claimant is entitled to rely on the same in circumstances where an alleged estoppel is said to operate against them.

3. The Defendant was, at the main material times, a joint venture company between Mr Chapman and a Mr Griffiths, who each originally held shares (directly or indirectly) and was a director. All the registered shares in the Defendant are now held by Mr Griffiths and his son, Mr Henry Griffiths.

4. The First Claimant, Mr Chapman, made a loan (the "Loan") of £2 million to the Defendant, Celtic Property Developments Limited ("Celtic"). The Loan was secured by a debenture dated 5 April 2006 granted by Celtic (the "Debenture"). Subsequently, in September 2011, the benefit of the loan was assigned to the Second Claimant, Lloyd Warwick Limited ("LWL") under a Deed of Assignment backdated to December 2010 (the "Assignment"). At that stage, the benefit of the debenture was not expressly assigned. It was not mentioned in the Assignment.

5. It is now accepted that the effect of the assignment of the benefit of the Loan at a time when the debenture was not expressly assigned does not have the automatic effect that the debenture thereby came to an end. The Claimant, whilst maintaining formally that the effect of the Assignment was to automatically transfer the Debenture (subject to any arguments on estoppel), did not pursue the point before me. That point had largely been relied on to overcome any issues of standing in the Claimants.

6. It not being pursued before me that the Assignment did carry with it the Debenture, it is unnecessary to consider a myriad of arguments about the validity of any assignment of the Debenture under the Assignment in terms of compliance with the detailed requirements of s136 Law of Property Act 1925.

7. The benefit of the debenture (so far as the debenture survives) has since been assigned to the Second Claimant (in 2023) pursuant to s136 Law of Property Act 1925. There are thus no standing issues: on any view Mr Chapman or LWL have had standing to pursue this case.

8. The issue that I have to decide is whether or not a promissory, or proprietary, estoppel arises by reason of the circumstances in which the benefit of the Loan was expressly assigned. That estoppel, it is said, if promissory, prevents the claimants from asserting the existence of the Debenture as a valid debenture, alternatively, if proprietary, has resulted or should result in the Debenture having been or now being terminated. Each way of putting the case on estoppel depends upon establishing that relevant

representations or assurances were made by Mr Chapman which were then relied upon and acted on by Celtic.

9. The Claimants, relying on the validity of the Debenture, seek rectification of the register of charges maintained by the Registrar of Companies in relation to Celtic pursuant to s859M of the Companies Act 2006 (later agreed by all parties to be the incorrect provision, the correct provision being s873 of the Companies Act 2006 which, so far as relevant, is in identical terms). There remains a dispute as to whether amendment of the Claim Form and statements of case is necessary and/or should be permitted. This application for rectification arises because Celtic signed a memorandum of satisfaction and lodged it with the Registrar of Companies in respect of the Debenture in October 2018, which the Registrar of Companies then gave effect to.

10. Originally Celtic put forward, in addition to its case on estoppel, a case (a) that the assignment of the Loan did not carry with it an assignment of the Debenture (that is now accepted by the Claimants); (b) that as a result the Debenture simply came to an end as a matter of law (that is now accepted to be incorrect by the Defendant) and (c) that the Second Claimant did not have title to sue, whether at law or in equity, as there had been no relevant transfer of any interest in the Debenture (it is now accepted that legal title was transferred more recently, if and to the extent that the Debenture still exists). Further, and in any event, whether or not LWL acquired any beneficial interest any earlier than the time of the s136 Law of Property Act assignment in 2023, Mr Chapman, the legal owner was a party throughout. Locus questions seem to me to have been barren in terms of resolving the proceedings before me).

11. Mr Nicholas Jackson represented the Claimants. Mr Paul Strelitz represented the Defendant. I am grateful to both Counsel for their assistance, given both orally and in writing (including the further submissions in writing received after oral closings).

The Pleadings

12. This claim was commenced, wrongly in my view, as a Part 8 Claim Form. There were clearly disputes of fact which made the appropriate regime to be Part 7 of the CPR and not Part 8. By Order dated 4 October 2022, the case was transferred to the Part 7 regime.

13. Unfortunately, at that time, it was ordered that a witness statement of Mr Chapman stand as particulars of claim. In my judgment that is usually not a convenient order to make and was not the best order to make in the context of these proceedings. Either particulars of claim are simple to draft, in which case there is no real prejudice in requiring them to be drafted; alternatively, the case is more complicated and proper particulars of claim are required for that reason. In this case, the relevant witness statement sets out (as one might expect) not just factual matters properly set out in particulars of claim but documents and other evidence which is not appropriately set out in particulars of claim and which then causes problems for the party pleading a defence and to the court when managing the case and conducting the trial. As is so often the case, a beguiling apparent cost saving short cut in place of following standard practice under the rules of court turns out, at the end of the day, to be a mistake.

14. On 3 February 2023 the claim was transferred from the High Court, Business and Property Courts in Leeds to the County Court at Leeds.

15. The pleading of estoppel is to be found in the Defence and Counterclaim as follows.

16. First, the representations/assurances relied upon, said to have been made by Mr Chapman (defined as the "C1 Representations") are described as follows:

> "*12.*
>
> *b.* [Mr Chapman] *confirmed orally to* [Mr Griffiths] *on various occasions both himself and through his lawyer and PA* (as more fully particularised in para.13 below) *that* [Mr Chapman] *no longer required security for his loans to* [Celtic] *and/or that* [LWL] *would not require any form of security over the loans (including* [Mr Chapman's] *Loan) that were to be assigned to* [LWL] *as part of the Proposal* (the "C1 Representations");"

The "Proposal" was described earlier in paragraph 12(a) and in substance was the assignment of the benefit of the Loan from Mr Chapman to LWL.

17. Paragraph 13 of the Defence and Counterclaim relies "without limitation" on a number of contemporaneous records "in support of its account of the C1 Representations". These are:-

(a) An email from a Mr Ken Brooks on 17 September 2010, forwarded to Mr Griffiths and referring to the loan as being unsecured.

(b) A contemporaneous note of a discussion between Mr Griffiths and his lawyer on 12 July 2011 referring to Mr Chapman not intending to take a replacement debenture. The old debenture, it was said in the note, would become obsolete.

(c) A letter from Celtic's solicitors to the Company's Bank (which had various mortgages and a Debenture ranking in priority to Mr Chapman's Debenture) on 13 July 2011, that Mr Chapman no longer wished to take a Debenture against Celtic and that the existing debenture would become obsolete and be torn up.

(d) An email from Mr Griffiths to Mr Chapman's solicitors confirming that LWL would not be registering a debenture in respect of the Loan.

18. Paragraph 11 of Mr Chapman's first witness statement (ordered to stand as a pleading) and confirms that the Assignment does not mention the Debenture but asserts no intention on the part of any of himself, LWL or Celtic that the Debenture would be released upon or in consequence of the Assignment. Paragraph 14 of the Defence and Counterclaim pleads to the said paragraph 11. It states that the reason the Assignment does not mention the Debenture is because of the "obsolescence of the same given the C1 Representations, [Mr Chapman's] absence of any intention to secure the benefit of the Loan after the assignment [to LWL], [Mr Chapman's abandonment of the same and/or as a result of the agreement reached between [Mr Chapman] and [Mr Griffiths] concerning the subject following the C1 Representations" (emphasis supplied). It therefore appears that a contract is also relied upon as well as an estoppel. This is confirmed by Issue 5 of the Defendant's proposed issues for trial. To be fair this may be inherent in paragraph 12(c) of the Defence and Counterclaim which refers to Mr Griffiths agreeing to "the Proposal on the above terms" which might be taken to mean

on the terms that security was no longer required by Mr Chapman and/or that LWL would not require any security (at all) in respect of the Loan.

19. The claim of reliance (further or alternatively, why it is unfair to permit Mr Chapman to resile from the C1 Representations and/or of detrimental reliance) is somewhat difficult to identify from the Defence and Counterclaim. Paragraph 12 of the Defence and Counterclaim may suggest that the reliance was in entering into the Assignment. Paragraph 25a refers to reliance by Celtic on the C1 Representations but without identifying what such reliance comprised. As regards "unconscionability" it is asserted in paragraph 25e of the Defence and Counterclaim that it would be unconscionable to now permit the Claimants to "impose" a Debenture in the terms sought in the claim "given the passage of time and events as aforesaid since the time at or around the assignment."

20. In oral closing Mr Strelitz pinned his colours firmly to the mast in submitting that the reliance in this case was (a) the entry into the Assignment (by Celtic) and/or (b) (some years later) the refinancing of Bank borrowings by further borrowing from Lloyds Bank plc, including the grant of security to Lloyds Bank plc.

The Facts

21. Celtic was incorporated on 9 September 2003 and, so far as relevant, has always traded as a property development company. As at the date of the Defence, in November 2022, Celtic owned approximately 14 commercial, and 31 residential, units.

22. Celtic was initially established as a joint venture company between the First Claimant, Mr Chapman and a Mr Tudor Griffiths. Mr Chapman was a businessman with a background in insurance at Lloyd's. Mr Griffiths has a background in banking. He is a former bank manager. As I understood it, Mr Chapman originally met Mr Griffiths when the latter was his bank manager. As at 2003 however, Mr Griffiths was no longer working as a bank manager.

23. The idea was that Mr Griffiths would provide the day-to-day management of Celtic and its business and Mr Chapman would provide the finance. Mr Chapman had no expertise in running a property business.

24. Initially, and until about 2015, Mr Chapman and Mr Tudor Griffiths each "owned" 50% of the issued share capital of the Company. I say "owned" in quotations because it appears from Companies House returns and other contemporaneous documents (Celtic's share register was not in evidence before me), that Mr Chapman's shares were always registered in the name of LWL and that, initially at least, Mr Griffiths' shares were registered in the name of his wife. Whether Mr Chapman and Mr Griffiths held beneficial interests in such shares and if so at what time or times was not explored in evidence and does not matter of the purposes of the current proceedings. I should add that returns to Companies House have to be treated with caution as evidence only. For example, as regards registered shareholdings, it is the Company's register of members which is definitive not returns made to Companies House which are capable of containing errors. It seems fairly clear that Mr Chapman and Mr Griffiths did not always distinguish clearly between shares being held indirectly by them through other family members or companies (see e.g. the 2009 Shareholders' Agreement referred to later in this judgment).

25. As regards the second claimant, LWL, it is undoubtedly a "Chapman company" in that at all material times shares in it appear to have been held by Mr Chapman and/or other members of his family and/or by companies in which he and/or members of his family have an interest and he has been a director of it. For most of the relevant period, there were two issued shares in LWL, one held by Mr Chapman and one by his wife, Christine.

Shareholders' Agreement November 2003 ("SA 2003")

26. The starting point is a shareholders' agreement dated 17 November 2003 made between Mrs Jacqueline Helen Griffiths, LWL and Celtic (the "SA 2003")). The SA 2003 was to last for 9 years, until 17 November 2012, unless certain specified events took place earlier. SA 2003 makes provision for a number of matters including:-

    (1) recording that the shareholders in Celtic were then Mrs Griffiths and LWL and that any share issue thereafter was to result in the total issued share capital remaining 50% as regards each of LWL and Mrs Griffiths. (At the start therefore, and subject to any question of beneficial ownership of the shares in Celtic, neither Mr Chapman nor Mr Griffiths were technically "owners" of the shares in Celtic);

    (2) providing that the shareholders would as soon as practicable after executing the agreement take or procure a number of steps including:

        (a) the appointment of Mr Chapman as director and chairman of the board of directors;

        (b) the removal of all other directors (which appear to be nominees of the company formation agents) but excluding any director appointed by nomination of Mrs Griffiths.

27. The SA 2003 also deals with loans to the Company, essentially for the purpose of providing initial and working capital.

28. Clause 8 provides that "LWL and Mr Chapman" shall together extend loans to the Company (defined as the "Loans") which shall, at any one time, be not less than £3 million and not more than £4 million. The Loans must be made within 30 days of service of a demand, by the board of directors of Celtic, that the same be made to Celtic. Thereafter the shareholders agreed to use reasonable endeavours to raise further finance to meet working capital requirements of Celtic but without allowing any lender any participation in equity share capital of the company as a condition of making the loan.

29. Clauses 8.5 and 8.6 provided for repayment of the Loan in certain circumstances, including certain events of insolvency occurring in relation to Celtic or the shareholders agreeing to repayment being made.

30. The Loans were to be non-interest bearing unless and until Celtic failed to repay when repayment fell due. Interest was then to accrue daily at 4% above London inter-bank rate. There was a right in Mr Chapman and/or LWL to claim reasonable costs where they arose in making the loans.

31. Clauses 8.8.2 and 8.9 and 8.20, provided that as long as the loan(s) were outstanding to Mr Chapman or LWL, "it" should be entitled to require Celtic to execute a legal charge over property owned by Celtic. The form of charge was to be approved by the board of directors of Celtic. Where finance was in place or contemplated from a bank or similar institution ("Bank Finance"), Mr Chapman and LWL were only entitled to register a "second priority charge" which was not to be in breach of the terms of any relevant Bank Finance.

32. Various documents at Companies House, lodged in October 2003, show the appointments of Mr Chapman and Mr Griffiths as directors of Celtic (and the latter also as company secretary) as from 9 September 2003.

Svenska Handelsbanken Charge, shareholdings, the Loan: October 2004-2006

33. By certificate dated 26 October 2004, the Registrar of Companies certified the registration of a mortgage dated 5 October 2004 by Celtic in favour of Svenska Handelsbanken AB (the "Bank") and securing £1.46 million. The mortgage apparently included the mortgaging of three units at Triangle Business Park near Merthyr Tydfil. Later, starting in November 2004. Further fixed mortgage charges in favour of the Bank over further properties were registered (and released) at various times at Companies House. As I understand matters, properties when acquired by Celtic would usually be charged in favour of the Bank and the charge released when the property was realised by way of sale.

34. As at 1 October 2004, Celtic's Annual Return showed the two issued shares of £1 each as being held as to one each by Mr Griffiths and Mr Chapman respectively.

35. Abbreviated accounts for Celtic for the year 28 February 2005 ending lodged at Companies House show Mr Chapman to have lent Celtic £2 million. In fact the full "minimum" £3 million loan, provided for in the SA 2003 and subsequent shareholders' agreement, seems never to have been made but this seems to have been informally agreed.

36. An Annual Return for Celtic made up to 1 September 2005 and registered at Companies House shows one of the two issued shares held by Mrs Griffiths and one held by LWL.

37. On 1 January 2006, an "all monies" debenture by Celtic in favour of the Bank was entered into and registered at Companies House.

38. Abbreviated Accounts for Celtic for the year end 28 February 2006 were signed off by the auditors and accountants, Griffiths, Green, Arnold on 5 June 2006. They show a loan of £2,310.350 being owed to Mr Chapman at the year end of which £310,350 was said to be repayable within one year and £2 million after more than one year.

39. The aggregate amount of debt for which security had been given was identified as being £2,160,000, which appears to be a reference to the Bank Debenture.

The Debenture April 2006 (the "Debenture")

40. By certificate dated 20 April 2006, the Registrar of Companies certified the registration on 12 April 2006 of a debenture dated 5 April 2006 created by Celtic to secure £2 million due or to become due from Mr Chapman (the "Debenture").

41. A copy of the Debenture is in evidence. It is made between Mr Chapman (defined as the "Debenture Holder") and Celtic. Among other things:

    (1) under clause 2 there is a covenant by Celtic to pay the principal sum, being £2 million together with any other sum due from time to time to the Debenture Holder.

    (2) Clause 4 creates a second floating charge in favour of the Debenture Holder for the purposes of securing all sums covenanted to be paid or discharged or otherwise secured. The floating charge is subject to and to ranks immediately after the charges and/or series of debentures created by Celtic, as set out in the First Schedule, for securing a principal sum not exceeding £1,460,000 together with interest and all other money intended to be secured by such charges. The First Schedule identifies the mortgages/charges to which the Debenture is subject and which rank in priority to it: they are four mortgages over four identified properties and the Svenska Handelsbanken AB debenture dated 27 October 2004.

    (3) There is an automatic crystallisation clause as regards various events including the creation of further charges without prior written consent of the Debenture Holder.

42. In oral evidence, Mr Chapman could not explain why there were three years between the making of the Loan and the entry by Celtic into the Debenture or indeed what triggered the entry into the Debenture, at the relevant time. I accept his evidence that he largely trusted Mr Griffiths and that this delay is not representative of security being unimportant to Mr Chapman.

43. There is in evidence an undated version of a Deed of Priorities, clearly intended to be signed in 2006, signed only on behalf of the Bank by two authorised signatories (the "2006 Deed of Priorities"). The 2006 Deed of Priorities is made between the Bank, Celtic (the first name being mis-spelled "Cletic") and Mr Chapman. In the recitals it refers to the fixed and floating security granted to the Bank, that Celtic is about to grant to Mr Chapman a floating charge security and that the Bank and Mr Chapman wish to regulate the ranking of securities. The 2006 Deed of Priorities then provides for priority as follows: the Bank fixed security to the extent of the Bank debt, then the Bank floating security to the extent of the Bank debt and the security of Mr Chapman to the extent of the Loan. The 2006 Deed of Priorities contains a non-transfer (without written consent of the other) provision regarding both the Bank security and Mr Chapman's security.

44. I am satisfied that the copy of the 2006 Deed was executed and that the copy in evidence is a copy of the counterpart signed by the Bank. This conclusion flows from later correspondence.

45. By letter dated 28 April 2006, Mr Chapman confirmed to Celtic's accountants, Griffiths Green Arnold, that he did not intend seeking redemption of his loan to Celtic of £2 million before 28 February 2007. There are letters in similar terms on an annual basis for a number of years which were clearly provided for the purposes of completion of Celtic's accounts (probably to enable them to be prepared on a going concern basis).

The Shareholders Agreement 2009

46. By written agreement dated 1 June 2009, a further Shareholders Agreement was entered into between Mr Griffiths, Mr Chapman and Celtic but somewhat surprisingly not LWL. It did not deal with the fact that the Debenture had now been granted and as, in broad effect, similar to the SA 2003, save that only Mr Chapman and not LWL is not mentioned in connection with the making of the loans of up to a minimum of £3 million and matters in respect thereof.

The Deed of Assignment of the Debt; New Shareholders Agreement: December 2010-2011

47. There are two documents dated 20 December 2010: an assignment of the benefit of the Loan from Mr Chapman to LWL (the "Assignment") and a shareholders' agreement (the "SA 2010"). These were not entered into on the dates placed on these documents. It is common ground that they were both executed on or about 13 September 2011 and at that stage backdated to December 2010 to justify the relevant accounting treatment of the Assignment in the accounts of each of LWL and Celtic.

48. It is also common ground that the background to the Assignment was a wish by Mr Chapman to re-arrange matters to enable him to achieve a more favourable tax position for himself overall.

49. The Assignment purportedly dated 20 December 2010 was executed as a deed by Celtic, and Lloyd Warwick and Mr Chapman and contains a number of "Explanatory Notes". These include that the shareholders of Celtic are Mr Griffiths and LWL; that it was agreed that the shares should be owned by LWL; that Mr Chapman wrote a cheque to Celtic by way of loan; that the share was subsequently issued to LWL; that as "it now stands" the share is owned by LWL, the debtor is Celtic and the creditor is Mr Chapman in a personal capacity; that this assignment is simply to regularise the arrangement and indebtedness between the parties; that the terms and conditions of the loan remain unaltered in that it is for an indefinite period without interest; and that all previous dividends had been paid to LWL and would continue to be so paid.

50. The recitals set out that Mr Chapman has loaned to Celtic £2,035,350; that the share in Celtic is registered in the name of LWL and that Mr Chapman is willing to assign the debt to LWL and LWL is willing to accept the debt.

51. The operative part of the deed is simply that in consideration of the payment of £1, the debt is duly assigned to LWL on 20 December 2010.

52. At the same time a new Shareholders' Agreement was entered into (also back- dated to 20 December 2010) and made between (1) Mr Griffiths (2) Mr Chapman (2) Celtic and LWL (the "SA 2010"). The agreement recites that Mr Griffiths and LWL are the shareholders in Celtic and wish to participate as shareholders in Celtic for the purposes of and as set out in the agreement.

53. In some respects the SA 2010 mirrors the SA 2003. Thus, for example, it repeats the clause about procuring the appointment of Mr Chapman and Mr Tudor as directors and the resignation of Corporate Appointments Limited and all other directors. It appears that the SA 2010 was created by taking the SA 2003 and the SA 2009 and simply amending parts of them.

54. The clauses dealing with the loan now refer to the Loan being made by LWL (only) and that there should be minimum loan of up to £2 million at any one time. The clauses continue on the basis that any liabilities regarding the making of loans in this respect is between LWL and Celtic and Mr Chapman's name no longer appears in this connection.

55. These documents (or at least the Assignment and/or the underlying transaction) appear to have been in discussion for some time before they were executed in September 2011.

56. In September 2010, there appears to have been concern about the effect of an assignment of the Loan from Mr Chapman to LWL as expressed by the Bank.

57. By email dated 2 September 2010, Mr Griffiths wrote to Mr Chapman saying that Celtic's accountants, Griffiths Green Arnold were of the view that the Loan could not be assigned to LWL "*mainly because of the Shareholders' Agreement*" but saying that he had confirmed to them that the "*Shareholders' Agreement*" was going to be changed and also the "*Loan postponement form*" to the Bank. The latter seems a reference back to the 2006 Deed of Priorities. It is also clear from the email that it was Mr Griffiths who was going to alter the shareholders' agreement and carry forward discussions with the Bank to make sure the latter had no issues about the assignment and to prepare a new, revised Deed of Priorities (to replace the 2006 Deed).

58. Margaret Dean of LWL (effectively Mr Chapman's personal assistant at the time) wrote to Ken Brooks (apparently LWL's/Mr Chapman's lawyer) by email of 17 September 2010 referring to the Bank asking for confirmation that the assignment of the loan "is do-able from a legal and accounting perspective". The reply received back was "*As I assume the bank is a secured creditor and the loan is unsecured I can't see the problem*."

59. This letter of reply by Mr Brooks is one of the first matters relied upon in support of the case on the making of the C1 Representations. It does not seem to me that it itself is or contains a relevant representation: the representation is the loan "is" unsecured not that it *is* secured but *will become* unsecured. It seems to me that any representation is not unequivocal. The reply letter is consistent with a misunderstanding by Mr Brooks. Further, I am not satisfied that this letter can reasonably be taken objectively to evince an intention to create legal relations and/or to the knowledge of Mr Chapman, to have been something that would be acted upon by Mr Griffiths/Celtic. The letter was written as regards assignability of the Loan and was for the Bank's comfort, not part of the negotiations or recording of negotiations between Mr Chapman and Mr Griffiths/Celtic. So far as it is relied upon as evidence that a clear representation was made by Mr Chapman separately, it is necessary to consider the witness evidence.

60. A request for advice was also made to Eversheds. In oral evidence, Mr Chapman explained that he wanted to be doubly sure there were going to be no problems with the tax man about the Assignment and therefor as the solicitor in question was dealing with other issues for him/his companies he also had the point run past her as well. By email dated 1 October 2010, Ms Michelle Thomas of that firm seems to have emailed Ms Dean to confirm that:

> "*If* [Mr Chapman*] assigns the £2m loan (which I understand he has made to Celtic) to* [LWL] *in return for him loaning the same amount on the same terms to* [LWL],

provided the terms of the loan which is assigned remains the same, particularly in terms of duration, terms of default, interest rate and any penalties then Celtic should not be prejudiced.

You will appreciate that I have not seen the documents giving effect to the above but if the loan terms remain unchanged Celtic should be in the same position."

61. Ms Dean seems also to have requested confirmation from the accounting perspective by a letter (sent by email) also dated 17 September 2010. Ms Dean wrote by email to Brian Kay at KBDR (Mr Chapman's then accountants), saying that Mr Chapman wanted to move along the assignment to LWL of the Loan made by him to Celtic. She said that: :

"*As the present situation is recorded by Celtic's bankers as part of their Loan Postponement Form, that they have asked for confirmation that the assignment of the loan is in order from both a legal and an accounting perspective."*

62. A revised letter from KBDR in this respect dated 21 September 2010 seems to have been sent on to Mr Griffiths by Ms Dean under cover of an email dated 12 October 2010 which confirmed that there were no accounting reasons why the loan from Mr Chapman to Celtic should not be assigned by Mr Chapman to LWL.

63. By email dated 25 November 2010, Mr Thomas of the Bank emailed Mr Griffiths about the proposed assignment of the Loan by Mr Chapman to LWL. He said that the Bank has now heard from its "legal services" department and the Bank supported the assignment subject to there being no legal or accounting issues. Two extra confirmations/concerns were raised about the transaction from LWL's perspective but the letter throws no light on the security position of the Loan. The two matters raised were (a) whether there was sufficient reason for LWL to be lending and therefore no reason for the loan to be set aside at any future date (commercial benefit) and (b) whether it was acceptable "in all areas" given LWL was not a lender by nature and the Loan not part of normal trade.

64. By 30 March 2011, the Bank's two points appeared to have been dealt with and Mr Griffiths wrote to Mr Chapman and Ms Dean regarding completion of the transfer of the Loan from Mr Chapman to LWL and saying that three documents needed to be completed: the Assignment, the Bank Loan postponement form and the revised Shareholder Agreement.

65. In considering the relevance of later documents, it is helpful at this point to set out the evidence given by witness statement.

66. Mr Chapman's first witness statement was to the effect that the Assignment does not mention the Debenture but:

"*there was no intention (either on my part or that of LWL or, in my view, that of* [Celtic]) *that the security conferred by the Debenture would be released upon or in consequence of the Assignment*."

67. Mr Chapman, in his first witness statement, also said that Mr Brooks (his lawyer) was obviously wrong in his, Mr Brook's, email of September 2010 about the Loan not being

secured but that, in any event, Mr Brook's email did not convey any intention on the part of Mr Chapman or LWL that "*we intended to release the debenture*".

68. Mr Griffiths, on the other hand, in his first witness statement says that in discussions between him and Mr Chapman, the latter had proposed that if the Loan was "re-assigned" from Mr Chapman to LWL, he would "*treat the debt to him and all matters set out within the Debenture as being fully discharged*." Further that Mr Chapman "*expressly confirmed*" to him orally on or about 12 July 2011 that LWL would not require security in respect of the Loan and that he, Mr Griffiths thought at the time that this was "*because he* [Mr Chapman] *was a director and therefore would always know what* [Celtic] *was up to*." The latter explanation is somewhat weak: the point of a debenture is to give security not to obtain information about, and indeed regardless of, what a company is "up to". Further, it does not explain why the Debenture was taken in the first place.

69. In his relevant witness statement, Mr Griffiths goes on to say that it was against the background and that conversation on 11 July 2011 that he emailed Mr Philip Davies of RPD Law on 12 July 2011 saying:

> "*Just had a discussion with Dudley, It is not his intention to take a replacement debenture.*
>
> *We do want to execute the replacement Deed of Postponement and keep the bank happy. At the same time we will sign the Loan Assignment document and the replacement Shareholders Agreement. We propose to date all three documents say 20 December 2010 to backdate this into* [Celtic's] and [LWL's] *accounts.*
>
> *The Old Loan Postponement form from Dudley and the old Debenture to Dudley will become obsolete.*
>
> *If you are happy please confirm such to Gareth Cooper at the bank and no doubt he will let you have the final version of the Loan Postponement Form.*"

70. This letter is the second contemporaneous written communication relied upon in the Defence and Counterclaim as supporting the case that the C1 Representations were made. However, there is no evidence that Mr Chapman or LWL saw the same at any time before the current dispute arose some years after 2011. As such, the letter cannot itself form a C1 Representation but can only be relied upon as evidence going to support Mr Griffiths' case of a conversation on 11 July 2011. I consider it against the witness evidence later in this judgment.

71. By letter dated 13 July 2011 Mr Philip Davies duly wrote to Mr Gareth Cooper the "Documentation Officer" at Svenska Handelsbanken AB was as follows:

> "*Further to our recent correspondence, I have now had various discussions with Tudor Griffiths and I understand the position is as follows :-*
> 1. *Lloyd Warwick Limited no longer wishes to take a Debenture against Celtic Property Developments Limited.*

> *2. The existing Debenture in favour of Dudley Chapman will become obsolete and will simply be torn up.*
>
> *3. There will be a new Loan Agreement and a replacement Shareholders Agreement between Celtic Property Developments Limited and Lloyd Warwick Limited.*
>
> *4. Similarly there will be a new Deed of Postponement and the old Deed of Postponement will become obsolete and will be torn up*
>
> *I think therefore that as Lloyd Warwick's loan is not going to be secured in any way, then it would appear that there is no need for any registration of the documentation at Companies House or otherwise.*
> *That is a matter for Lloyd Warwick Limited to take a view upon which I understand they have done, having taken separate advice and will simply rely on what amounts to a personal loan between the two companies and dealt with through the Shareholders Agreement.*
> *Accordingly the Bank's position remains as it is and indeed as it always has been, that it has a First Charge on all the properties and has a Debenture in place together with a duly executed Deed of Postponement, which will serve to remind all parties of the Bank's position.t*
>
> *I hope this assists and look forward to hearing from you*."

72. This is the third contemporaneous document relied upon in the Defence and Counterclaim as supporting the fact of the C1 Representations having been made. Again, there is no evidence suggesting that Mr Chapman or LWL saw this letter at or about the time and Mr Chapman gives positive evidence he did not see it at or about the time or at any time. I accept his evidence on this point. As such the letter cannot itself amount to any representation by Mr Chapman and/or LWL but only evidence of what it was that they said on a different occasion. I consider that aspect when considering the oral evidence at trial.

73. I should add that there is no evidence that the Debenture ever was "torn up" as suggested would happen in Mr Davies' letter and Mr Griffiths did not suggest that it was.

74. By email dated 14 June 2011, Mr Griffiths emailed Handelsbanken attaching a copy of what I surmise to be a draft deed of priority in which he says in the email he has "*changed the Dudley Chapman references to* [LWL]" He went onto say that the Bank needed to update the security which was set out from clause 13.3 to 13.7. This seems to be a reference to the Bank's security dealt with in those paragraphs of the 2006 Deed. He also commented that "*As discussed, if this does not need to be registered within a specific number of days that would be good as we intend to backdate it into our accounts to 28 February 2011. Let me know*."

75. By email dated 24 August 2011, Mr Tudor Griffiths confirmed to Mr Philip Davies' secretary that "*Lloyd Warwick will not be registering a debenture*".

76. By letter dated 24 August 2011 (sent by email), Mr Philip Davies wrote to Mr Griffiths confirming that the Bank had sent an updated list of properties charged to the Bank, which he enclosed, and went on to say:

> "*Gareth has asked specifically that* [LWL] *will not be registering a Debenture and will be relying on the Deed of Priority – again that is my understanding of the position and as long as that is the case then I think the Bank will be satisfied.*"

77. This letter to the Bank of 24 August 2011 is the fourth contemporaneous document relied upon in the Defence and Counterclaim as supporting the case that the C1 Representations were made. Again, there is no evidence that Mr Chapman and/or LWL ever saw this letter at or about the time and positive evidence from Mr Chapman that he did not. I accept his evidence on this point. As such the letter cannot itself amount to any representation by Mr Chapman and/or LWL but only evidence of what it was that they said on a different occasion. I consider that aspect when considering the oral evidence at trial. I also note that the letter is confused and ambiguous. It is true that LWL was not registering a new debenture but that did not mean that it had been agreed that the current Debenture would be terminated and the registration of the current Debenture would be ended. Further, reliance of a Deed of Priority seems unclear: if a reference to the Bank, the Deed would only be relevant if there was such debenture in favour of Mr Chapman. In that sense it is consistent with the Bank being content there was to be no new debenture and that the Bank's position on the existing debenture was protected by the or a Deed of Priority.

78. By letter dated 30 August 2011, Mr Philip Davies wrote to Mr Griffiths confirming that he now had all relevant information and a complete copy of the "Deed of Priorities" available for execution by Celtic and LWL. A handwritten note on that letter says "*Executed at RDP 13/9/11*".

79. The draft Deed of Priority that has come to light (in its apparently final iteration which is in evidence) is an undated, unsigned version of a draft with a (blank) 2011 date. It was to be made between the Bank, Celtic and LWL. The Deed very much follows the 2006 Deed of Priorities. However, the properties charged to the Bank under fixed charge mortgages include properties charged from 2007 onwards (as well as some from prior to 2006). There is a substitution of reference to Mr Chapman with references to LWL. In particular, it refers to Celtic being about to grant a floating security in favour of LWL but at the same time it refers (inconsistently) to the Subordinated Security as being one that Celtic <u>had entered into</u> and that the debenture was dated [blank].

80. In his witness statement, Mr Chapman said that he did not believe that the deed of priorities was signed by him as he did not think he had ever been to RDP's offices. However, and on balance, I am satisfied that this replacement deed was in fact executed by the non-Bank parties. There is contemporaneous correspondence from Mr Davies to Mr Griffiths confirming the deed of priorities had been sent to the Bank for execution (letter dated 20 September 2011) and from Mr Davies to the Bank enclosing the signed version in triplicate for execution (letter also dated 20 September 2011).

81. It is unclear why no executed copy of the 2011 deed of priorities has been found and no contemporaneous documents confirming execution by the Bank. There is an email from the Bank dated 10 May 2023 to Mr Griffiths referring to the Bank's belief that the deed of priorities was never completed as relayed to Mr Griffiths the year before and

that searches had been conducted and there was no record of the same leading the relevant individual to have the same belief.

82. I am satisfied on a balance of probabilities based on the evidence before me that the deed was not executed by the Bank. Of course, I cannot be sure why. It may be that the inconsistency in the draft Deed between LWL being intended to take a (new) debenture (carried over from the earlier Deed) and the definition of subordinated security suggesting that the debenture had been granted (but with no date for the same) was an issue. It may be that the Bank decided (as suggested at one point in the correspondence) to rely on the 1996 Deed of Priorities as it had been told there was to be no assignment of the Debenture and that Debenture remained protected by registration. I should say that in reaching this conclusion I do not rely on Mr Griffiths' oral evidence to this effect, it seems to have been based purely on the May 2023 email from the Bank.

83. Even if I am wrong on the non-execution of a deed of priorities by the Bank in 2011, the proposed 2011 deed of priorities was executed by Celtic and LWL and that demonstrates that Mr Griffiths was signing a document that he must have known was to regulate the priorities of security at the least proposed to be held by LWL and actually held by the Bank.

84. There is a mystery about the draft deed of priorities. Further drafts were apparently pursued and amended in the period after Mr Chapman is said to have made clear that LWL would not take a new Debenture. If that is so it is unclear why the deed of priorities dealing with such a new debenture were pursued. I suspect this was because the Bank had asked for one and neither Mr Griffiths nor his solicitors really understood one would not be necessary. Further of course what became the SA 2010 was never properly amended to remove the future security provisions. Mr Griffiths said "by oversight" but I suspect that it was because he did not really understand or grapple with the position. The fact that in due course there was to be no new debenture may explain why the Bank ultimately did not execute the last draft. In any event, there seems to have been no agreement terminating the 1996 Deed of Priorities nor any suggestion that it was now at an end or not necessary.

85. On 27 September 2011, Companies House records receipt of Abbreviated accounts for LWL for the year ending 31 December 2010. Those accounts show, at Note 8:

> "*The company was owed £2,000,000 (2009 £nil) as at December 2010 in respect of a loan to [Celtic] a company in which the company is a 50% shareholder. The amount owing is included in, Amounts owed by undertakings in which the company has a participating interest*".

86. These accounts therefore confirm that the assignment was taken into account on a retrospective basis as had been the intention of the parties.

87. These accounts of LWL also show Mr Chapman as being owed just over £1.2m (2009: £314,367) at the same year end. It is unclear whether or not as part of the overall Assignment he invested further sums by way of (for example) reduction of sums owed by him on his director's loan account or otherwise than by way of loan.

88. The accounts for Celtic for the year ending 28 February 2011, appear not to show security having been given for the Loan (see note 5) but then neither do they for the

year ending 28 February 2010 as the sum said to be secured is much the same (£2011: £2.8 million and 2010: £2.6 million). I accept Mr Chapman's oral evidence that he did not examine the accounts in detail from the perspective of whether or not they showed security for the Loan.

Realisation of Mr Chapman's indirect shareholding in Celtic

89. By email dated 14 August 2013, Ms Dean notified Mr Griffiths that Mr Chapman had been talking to a third party about a possible sale of Celtic. Mr Griffiths replied by saying that this had been quite a shock to him.

90. By email dated 14 July 2015, Mr Chapman explained to Mr Griffiths that he was experiencing cash flow difficulties due to various circumstances and saying that he had no option other than to seek to release some funds which at the moment were invested in Celtic. Mr Griffiths replied with various suggestions as to how matters might progress to that end.

91. Following a meeting between them on 21 July 2015, Mr Griffiths emailed Mr Chapman with a proposal to buy him out of Celtic, acknowledging that he had known "for some time" that Mr Chapman "*eventually wanted out of*" Celtic. The proposals related both to the shares (now held by LWL) and the loan (then a loan from LWL).

92. By the end of July an agreement in principle had been reached that Mr Henry Griffiths would buy the LWL shares in Celtic and that the loan from LWL would be repaid over time. However, later developments put paid to that agreement in principle and further discussions resulted.

93. On 28 September 2015 a share purchase agreement was reached as regards the 50% shareholding of LWL in Celtic. LWL would sell a 35% stake in the shares in Celtic to Mr Griffiths/Mr Henry Griffiths who would purchase the same. The remaining 15% stake would be sold at an agreed price in the future at the option of Mr Griffiths/Mr Henry Griffiths. Arrangements were also made to pay off the Loan from LWL. That in part involved various complicated arrangements in respect of any recoveries in respect of a loan made by Celtic to a company called TDR Consultancy Limited ("TDR"), which recoveries would be used (in part) and directly or indirectly to repay part of the Loan. TDR was a company in which Mr Griffiths and Mr Chapman had had a minority interest and the monies lent by Celtic to TDR had in fact derived from the proceeds of the Loan by Mr Chapman to Celtic. If any part of the Loan remained unpaid after such arrangements had been implemented then the parties were to agree a repayment programme acceptable to them and to Celtic's cashflow.

94. The ability of LWL to sell tranches of shares in Celtic had been brought about by a shareholders resolution earlier in September dividing each of the then two issued Ordinary Shares of £1 each into 100 Ordinary shares of £0.01 each.

95. Also on 28 September 2015, a new Shareholder Agreement was entered into (the "SA 2015"). This was entered into between the previous 4 parties and, in addition, Mr Henry Griffiths.

96. As regards the Loan provisions, Clause 8 dealt with "Loan finance". Clause 8.1 provided for LWL to extend loans the minimum amount of which was to be £2 million

at any one time. The clause ended with a new sentence (compared with the SA 2010) saying "This loan has already been provided". Clause 8.7 was truncated simply to provide that the Loans should not attract interest and the provisions about costs and interest if the loan were not repaid when due that had been in the SA 2010 had been removed. (It is unclear if Mr Chapman had understood this). Further, clauses 8.82, 8.9 and 8.10 dealing with security that had appeared in the SA 2010 had also been removed. Of the latter removal, Mr Griffiths in his first witness statement said that these clauses should have been removed by him from the (draft) SA 2010 before it was executed but that by "*oversight*" they were not and that this was "*later appreciated and subsequently corrected*" in the SA 2015.

97. Mr Chapman, in his third witness statement said that at no time prior to the execution of the SA 2015 had Mr Griffith indicated to him that there had been a mistake in including security provisions for LWL in relation to the Loan in the SA 2010 and that he, Mr Chapman, had not noticed the omission of these clauses in the SA 2015. I accept his evidence.

98. By an Addendum dated 10 February 2017 to the Share Purchase Agreement of September 2015, it was recorded that it had been agreed that Mr Henry Griffiths would buy a 5% stake (rather than the full 15% stake that LWL still held) in Celtic. This transaction appears to have completed by 13 February 2017, the date to which a confirmation statement lodged at Companies House speaks and which shows the transfer by LWL to Mr Henry Griffiths as having taken place on 13 February 2017.

99. The remaining 10% stake of LWL in Celtic is shown at Companies House as having been transferred on 7 December 2022. According to Mr Griffiths, LWL now holds no shares in Celtic.

Lloyds Bank plc taking over Celtic's bank debt

100. Meanwhile, on 19 October 2016, a debenture in favour of Lloyds Bank plc was created by Celtic. It was registered at Companies House on the same day. Memoranda of satisfaction were lodged regarding a number of Svenska Handelsbanken AB mortgages and charges the following day. It is unclear why Lloyds Bank plc had no concerns (or how they were assuaged, possibly by way of subrogation to Svenska Handelsbanken AB) as regards an outstanding charge in favour of Mr Chapman as apparently protected by registration. In this context I note however that the Business Loan Agreement pursuant to which the relevant banking facilities were provided and signed by Mr Griffiths and Mr Henry Griffiths on behalf of Celtic contained a covenant not to create or allow to be in place any security other than that to be provided to Lloyds Bank plc (see clause 5.1 of the Business Loan Agreement).

101. The documentation makes clear that at this time Lloyds Bank plc had lent in excess of £2.5 million to be used for the purpose of Celtic clearing its indebtedness with Svenska Handelsbanken AB.

2018: Dispute and filing of satisfaction of the Debenture in October 2018

102. By letter dated 29 June 2018, Harrison Clark Rickerby, solicitors for Mr Chapman, sent a pre-action letter to Mr Griffiths pursuant to the PD Pre-Action Conduct and Protocols of the CPR. That letter in terms described the Loan and it being "subject of a debenture

dated 6 April 2006". The main complaints made are the failure to agree terms regarding repayment of the loan and an alleged breach of duty/trust in preparing the documents in 2015 with regard to the TDR matter and how the proceeds were to be dealt with in discharging the Loan. Among the remedies called for was:

> "*In addition, an assignment of the existing debenture dated 6 December 2006 must be agreed and executed in favour of* [LWL]."

103. By letter dated 8 August 2018, RDP Law Limited ("RDP") solicitors for Mr Griffiths replied to the HCR letter of 29 June 2018. No challenge was made to the assertions that had been made regarding the continued existence of the Debenture (which is not mentioned at all in the letter). The letter focuses on assertions that the Loan was not due for repayment, that the 2015 documents were beneficial to Mr Chapman and that it is for him/LWL to explain and update on the TDR position, it being Mr Chapman's actions that had caused Mr Griffiths to agree to Celtic lending money to TDR.

104. Satisfaction of the Debenture is recorded as being filed at Companies House on 22 October 2018 by RDP. No notice was given to LWL or Mr Chapman that this was being done. According to Mr Griffiths' first witness statement, he instructed his solicitors to file the memorandum of satisfaction because the debt owed to DC had been "extinguished" (it had in fact been assigned) and a new loan postponement form entered into by LWL (it is difficult to understand why a Deed of Priority is relevant in this context, other than, if anything, affirming there was security in place). This was said by him to be merely a "housekeeping" exercise which reflected the agreement between the parties reflected in the Assignment and the SA 2015, so that he saw no issue in "updating" the Companies House register. As regards why this was done in 2018 and not earlier he said that it was "simple oversight". He also says that there is no prejudice in the Debenture having been marked as satisfied as the Loan to LWL is still repayable. It is difficult to understand why Mr Griffiths, as a former bank manager and businessman, would not understand that the existence of security is a benefit. It is also difficult to see how this view could have been taken knowing the position taken by the HCR correspondence, asserting the continued existence of the Debenture and which RDP had not denied.

105. According to Mr Chapman he first found out about this some years later and the first time that Mr Griffiths/Celtic dealt with the matter was through a solicitor's letter from RDP dated 26 November 2021. That letter followed a letter from BCIA, turnaround and recovery specialists based in Matlock Derbyshire, dated 22 October 2021 making formal demand for repayment of the Loan "*secured under charge dated 5 April 2006*" and threatening to serve notice of intention to appoint an administrator on Lloyds Bank as a chargee.

106. The RDP letter of 26 November 2021 letter recites:

> "*The purpose of this letter relates to the debenture which your client maintains remains in existence and ought to remain registered at Companies House. Our client's understanding, since 2010, when Mr Chapman's interest in the Company was assigned to your client was that your client did not require a debenture and that the debenture in place at the time of the assignment had fallen into abeyance.*

> *The above understanding on the part of our client notwithstanding, it is apparent from your letter of 22nd October 2021 that your client considers that the security provided by way of the debenture originally granted to Dudley Chapman ought to have remained in place."*

As regards the second paragraph of this letter I comment that the same was also evident from the HCR correspondence in June 2018, before a memorandum of satisfaction in relation to the charge was filed in October.

2023 Assignment of Debenture

107. By a Deed described as A Confirmatory Assignment of Security dated 20 February 2023 and entered into between Mr Chapman and LWL, the benefit of the Debenture was assigned by Mr Chapman to LWL as at the "Assignment Date" being 20 December 2010 or, to the extent that it is not possible to effect the assignment retrospectively, the date of the deed.

108. Notice of the assignment was given to Celtic by Mr Chapman on LWL headed notepaper by notice dated 5 May 2023, enclosing a copy of the deed of assignment.

The Law

109. I did not understand the essentials of the requirements for the existence of a promissory or proprietary estoppel to be disputed.

110. As regards promissory estoppel, the essential requirements to be established are:

(1) A promise by one party that it will not enforce its strict legal rights against the other;

(2) An intention (assessed objectively) on the promisor's part that the other will rely upon that promise;

(3) Actual reliance by the promisee on that promise such that it would be unfair to permit the promisor to resile from the promise/assurance, and rely on his strict legal rights.

111. As regards proprietary estoppel, the essential elements to be established are helpfully identified by Lord Walker in *Thorner v Major* [2009] 1 W.L.R. 776 at

(1) An unequivocable representation or assurance made to the claimant;

(2) reliance on it by the claimant and

(3) detriment to the claimant in consequence of his (reasonable reliance).

112. Both of these shorthand descriptions of the elements of the two types of estoppel run the risk of being inaccurate because of their high level of generality. Thus in *Spencer Bower Reliance-Based Estoppel* (5th Edn 2017) a wider description of each is given.

113. Promissory estoppel is described in *Spencer-Bower* as follows (at paragraph 14.1, but leaving out footnotes):

> "*Where by words or conduct, B makes an unequivocable promise or assurance to A which is intended to affect the legal relations between them or was reasonably understood to have that effect and, before it is withdrawn, A acts upon it altering his or her position so that it would be inequitable to permit B to withdraw it, B will not be permitted to act inconsistently with it for so long as that would be unfair to A. A must also show that the promise or assurance was intended to be binding in the sense that it was intended, on an objective basis, to affect the legal relationship between the parties and that B either knew or could have reasonably foreseen that the maker would act upon it."*

114. For reasons that will become clear, I do not at this stage need to delve further into the issue of whether detrimental reliance is a requirement of promissory estoppel on the facts of this case or not. Mr Strelitz submitted that reliance is all that is necessary and referred me (in further written submissions after oral closings) to *Snell's Equity* on the topic (Chapter 12, paragraphs 12-017-12-022 and 12-027 to 12-028). Sometimes the required unfairness will flow from some detrimental reliance. Sometimes, the unfairness will not arise from detrimental reliance but from reliance in the circumstances that the detriment to the promise if the promisor was wholly free to enforce his strict right and ignore the promise he made (as in the *High Trees* case itself: *Central London Property Trust Ltd v High Trees House Limited* [1947] KB 130).

115. Proprietary estoppel is described by *Spencer-Bowen* as follows (at paragraph 12.4, but, again, leaving out footnotes):

> "*A comprehensive and uncontroversial definition of proprietary estoppel has yet to be devised. Because the doctrine applies in a wide variety of situations, "any summary formula is likely to prove to be an over-simplification". Moreover, cases of proprietary estoppel are intensely fact sensitive. These features of the doctrine make for difficulty in capturing the principles and reducing them to a coherent body of rules. The first step, it is submitted, is to recognise that a proprietary estoppel arises out of a misapprehension, i.e. a mistake of fact or law (a false belief that something has happened or is the case) or a misprediction (an expectation, subsequently falsified, that something will happen or be the case). A proprietary estoppel arises out of a detrimental change of position by A on the faith of a misapprehension concerning property or rights over property*.

116. While detrimental reliance is clearly a required element of establishing proprietary estoppel it is of note that this is because the concept involves the court being concerned with "preventing or remedying the unconscionability of the actual or threatened conduct of the promisor" (see *Guest v Guest* [2021] UKSC 27; [2023] 3 W.L.R. 911 paragraph [61]).

117. For present purposes a key distinction between promissory and proprietary estoppel is that a promissory estoppel can only be used as a "shield and not a sword" and thus a defence against the enforcement of what would otherwise be clear contractual rights. There are also issues as to the effect of such an estoppel: normally it is suspensory, preventing the promisor from going back on his promises not to enforce strict legal rights for a period and not for ever. The estoppel does not operate to extinguish the strict legal rights of the promisor but only to suspend his enforcement of the same and, as said, usually for a period not for eternity. A proprietary estoppel on the other hand

can result in the acquisition of property rights, and therefore be used as a "sword". Further, it will not potentially be time limited in effect.

118. A proprietary estoppel can only operate as regards interests in property. In this case it seems to me that (if other requirements of a proprietary estoppel are satisfied) a proprietary estoppel is capable of arising in this case (or at least this is arguable) on the basis of the Defendant's case that the contractual and proprietary Debenture (which created rights over property and rights in contract, themselves choses in action and property), had come to an end so that the defendant's assets and property was no longer encumbered by the interests under the Debenture. In the end I was not addressed in detail on this point. That is because, in the light of the evidence, the main battleground was whether the basic requirements of (a) a promise or assurance and (b) reliance thereon were established. If, as the Claimants asserted, they were not, then that would be the end of the case and it would be unnecessary to consider other elements of the two estoppels that would need to be satisfied and the key question of what equity required by way of relief.

119. Mr Strelitz based his case on promissory estoppel rather than proprietary estoppel, apparently on the basis that detrimental reliance was required to establish the latter and not the former. He did not however really engage with the question of whether the permanent effect of a proprietary estoppel might be more beneficial to his client (in extinguishing the Debenture) rather than merely a suspension of its enforcement (under a promissory estoppel). I do not need to enter the debate as to which is applicable until I have decided that there is at least (a) relevant promises/representations and (b) reliance on the same by Celtic.

The witness evidence

120. I have already referred to some of the evidence set out in the witness statements. As will be clear from what I have already said the substance of the matter is whether there was an agreement between Mr Griffiths and Mr Chapman that the Debenture would cease to have effect or would not be relied upon by LWL/Mr Chapman or there were representations to this effect by Mr Chapman and/or on behalf of LWL. From Mr Griffiths' written evidence it is clear that what he says was said in a telephone conversation between him and Mr Chapman on 11 July 2011 really forms the high point of his case.

121. I turn to the witnesses' evidence.

122. I had four witness statements from Mr Chapman (though one was about a security for costs application and therefore not of great relevance) and heard oral evidence from him.

123. I had two witness statements from Mr Griffiths and heard oral evidence from him. As I have explained, I have also been provided with a transcript of his oral evidence. That was because such evidence was crucial and the notes and perceptions of myself and Mr Chapman's lawyers as to that evidence were at significant odds with the notes and perceptions of Mr Griffiths' solicitors.

124. I also had two witness statements from Mr Griffiths' solicitor, Ms O'Connor in connection with the security for costs application but she did not give oral evidence before me and the statements are irrelevant to the issues that I have to decide.

125. As regards the oral evidence of the witnesses, they were going back over matters of which the key period spanned dates just over or just under 12 years earlier. The documentary evidence was sparse. Necessarily some detail was lost in terms of recollection. However, recollections relevant to the substance of the key issue were, it seemed to me, matters that would be expected to be remembered and on that both Mr Chapman and Mr Griffiths, in giving oral evidence were, in my assessment, accurate. Both were, in my assessment, doing their best to assist the court.

126. As regards the approach to the assessment of the evidence in this case, I repeat in the next paragraph what I have said in other judgments.

127. I have well in mind the body of case law about the court's approach to evidence. As regards the difficulty of assessing the "demeanour" of a witness as a guide to truth and accuracy and the effect on memory of a continued re-consideration of a case and of documents over time, I would also refer briefly to the convenient summary set out in the judgment of Warby J (as he then was) in *R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) at paragraphs 39 to 41 where he said (with emphasis removed, and inserting sub-paragraph numbers for bullets in the extracts from the judgment in the *Kimathi* case, referred to below):

> *"[39] There is now a considerable body of authority setting out the lessons of experience and of science in relation to the judicial determination of facts. Recent first instance authorities include Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3650 (Comm) (Leggatt J, as he then was) and two decisions of Mostyn J: Lachaux v Lachaux [2017] EWHC 385 (Fam) [2017] 4 WLR 57 and Carmarthenshire County Council v Y [2017] EWFC 36 [2017] 4 WLR 136. Key aspects of this learning were distilled by Stewart J in Kimathi v Foreign and Commonwealth Office [2018] EWHC 2066 (QB) at [96]:*
>
> *"i) Gestmin:*
>
> *(1) We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate.*
>
> *(2) Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), i.e. memories of experiencing or learning of a particularly shocking or traumatic event.*
>
> *(3) Events can come to be recalled as memories which did not happen at all or which happened to somebody else.*
>
> *(4) The process of civil litigation itself subjects the memories of witnesses to powerful biases.*

(5) Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.

(6) The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose… But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

ii) Lachaux:

(7) Mostyn J cited extensively from Gestmin and referred to two passages in earlier authorities.[45] *I extract from those citations, and from Mostyn J's judgment, the following:-*

(8) "Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance…"

(9) "…I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities…"

(10) Mostyn J said of the latter quotation, "these wise words are surely of general application and are not confined to fraud cases… it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that the demeanour of a witness is not a reliable pointer to his or her honesty."

iii) Carmarthenshire County Council:

(11) The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence

> *is by confronting the witness. However, oral evidence under cross-examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of Gestmin, Mostyn J said: "…this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context.*
>
> [45] *The dissenting speech of Lord Pearce in Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403, 431; Robert Goff LJ in Armagas Ltd v Mundogas SA [1985] 1 Lloyd's Rep 1, 57."*
>
> *[40] This is not all new thinking, as the dates of the cases cited in the footnote make clear. Armagas v Mundogas, otherwise known as The Ocean Frost, has been routinely cited over the past 35 years. Lord Bingham's paper on "The Judge as Juror" (Chapter 1 of The Business of Judging) is also familiar to many. Of the five methods of appraising a witness's evidence, he identified the primary method as analysing the consistency of the evidence with what is agreed or clearly shown by other evidence to have occurred. The witness's demeanour was listed last, and least of all.*
>
> *[41] A recent illustration of these principles at work is the decision of the High Court of Australia in Pell v The Queen [2020] HCA 12. That was a criminal case in which, exceptionally, on appeal from a jury trial, the Supreme Court of Victoria viewed video recordings of the evidence given at trial, as well as reading transcripts and visiting the Cathedral where the offences were said to have been committed. Having done so, the Supreme Court assessed the complainant's credibility. As the High Court put it at [47], "their Honours' subjective assessment, that A was a compellingly truthful witness, drove their analysis of the consistency and cogency of his evidence …" The Supreme Court was however divided on the point, and the High Court observed that this "may be thought to underscore the highly subjective nature of demeanour-based judgments": [49]. The High Court allowed the appeal and quashed Cardinal Pell's convictions, on the basis that, assuming the witness's evidence to have been assessed by the jury as "thoroughly credible and reliable", nonetheless the objective facts "required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt": [119]."*

128. As regards the alleged agreement/discussion on 11 July 2011, Mr Chapman convincingly and consistently denied that he had ever agreed or suggested or concurred in a suggestion that the Debenture would become obsolete or would no longer be in force once the Loan was assigned.

129. However, in oral evidence he moved from his position in his witness statement that he might have said that LWL would not take a new debenture (the reason this may have been said was because it would rely on the existing one, which of course Mr Griffiths held and LWL was his company). In oral evidence he suggested that he would never have said that LWL would not take/did not want a new debenture.

130. I am satisfied however that whoever said it, it was at least discussed that no new debenture would be taken by LWL. This is not only more consistent with the contemporaneous documentation (where this is what the Bank was told) but it also makes sense because the Bank would have needed to know the mechanics.

131. I have already said that on the balance of probabilities I am not satisfied that a new deed of priorities was entered into by the Bank in 2011. If I am wrong in this respect, and a new deed of priorities was entered into, it is unclear what the final version provided because the only (unsigned by anyone) draft that is in existence refers to a debenture which was about to be entered into in favour of LWL but also to the "Subordinated Floating Security" as being the debenture granted (not to be granted) in favour of LWL dated [blank]. However, even if the new deed was entered into that is not inconsistent with the 1996 Deed of Priorities continuing to cover the position as regards the Debenture. In other words the new Deed would have covered any new debenture but the existing Debenture would have been covered by the 1996 Deed of Priorities.

132. If I am correct that such deed was not entered into by the Bank in 2011 and the matter never completed that may have been because the Deed was internally inconsistent as to whether LWL would be or had been granted a debenture and the Bank (as had been suggested it might do in the correspondence) may have eventually decided to rely on the 2006 Deed of Priorities which would of course have covered what was, on the Claimants' case, the continuing Debenture.

133. I do not consider that Mr Chapman's inaccuracy on this point fundamentally casts doubt on the overall credibility and reliability of his evidence on the crucial point, that is that he never represented or agreed that the Debenture would come to an end once the Assignment had gone through.

134. Mr Chapman was also cross-examined on why he signed the SA 2015 with the removed provisions about security. His memory on this was, not surprisingly. not very good. However, as an objective matter it is obviously correct that there was no need to have provisions about the grant of future security as no further loans were going to be made by him/LWL to Celtic and there was existing security in place. The crucial matter was to record the Loan terms (in terms of repayment and interest) and they had always been recorded in the various SA prior to that date. I do not consider that the SA 2015 really throws any light on the parties' then perceptions as to the then continuation of the Debenture.

135. Mr Griffiths, in his first witness statement said that at the meeting on 11 July 2011:

> "[Mr Chapman] *proposed that if the debt as a result of the Loan was re-assigned from* [Mr Chapman] *to LWL, he would treat the debt to him, and all matters set out within the Debenture as being fully discharged*. [Mr Chapman] *expressly confirmed to me orally on or about 12 July 2011 that LWL would not require security in respect of the Loan and I thought at the time that this was because he was a director and therefore he would always know what* [Celtic] *was up to."*

136. In oral evidence, he could not explain why he had referred to "re-assignment" when this was the first assignment. When asked about the term "discharged" and why he used that when the debt in question remained in being (albeit assigned) he rather unconvincingly suggested that it was discharged as regards Mr Chapman. If the Loan

was assigned and he treated this as "discharged" he was unable to explain why the "discharge" of the Debenture did not also mean that the Debenture would be assigned (or at least remain in being). However it then emerged that his view at the time was that the Debenture would cease to exist because Mr Chapman (who had the benefit of the Debenture) would be, after the Assignment, owed no money. At this point he suggested that there were two causal factors in operation: first his belief that the Debenture would cease to bite (or have effect) once Mr Chapman was no longer owed any money and secondly what he had been told by Mr Chapman.

137. When questioned further about this latter discussion, he said that it had taken place over the telephone and that it was the urgency of the situation (from Mr Chapman's tax saving perspective) that resulted in Mr Chapman deciding that no new debenture would be taken by LWL, as that would require a further document to be prepared, which would cause delay. This had not been mentioned or explained in Mr Griffiths' witness statement. It seems to me however that this version of events is correct. However, all that this reported discussion shows is that Mr Chapman decided at this point not to take any new Debenture for the benefit of LWL and that that is what he communicated. It does not amount to Mr Chapman having said anything about the status of the (existing) Debenture and certainly not amount to him saying that he agreed that it would be discharged:

> *"A. The primary purpose of the call, as you said, was he was not taking security. My assumption, and my lawyer's assumption, was as the debt to Mr Chapman was repaid, it would become obsolete.*
> *Q. I mean, might this simply not be the case? Might you not simply have assumed that the 2006 debenture would lapse, and, in fact, Mr Chapman did not say anything to that effect?*
> *A. The answer to that question is, "I don't know". All I can repeat, after 12 years, is that he confirmed, he was not taking security. I spoke to the lawyers and the bank, and it was dealt with.*
> *MR JACKSON: Is it possible, though ---*
> *JUDGE DAVIS-WHITE: Well, hold on. I mean, what Mr Griffiths actually said that as regards to not taking security, his assumption, and his lawyer's assumption, is that it would become obsolete in the assignment.*
> *THE WITNESS: Yes. Correct, Your Honour.*
> *JUDGE DAVIS-WHITE: So it was not anything Mr – the only thing that you had been told by Mr Chapman was that the new debenture would be in favour of Lloyd Warwick. [See below]*
> *THE WITNESS: Correct.*
> *JUDGE DAVIS-WHITE: He did not say anything about his old, his existing debenture.*
> *THE WITNESS: Correct.*
> *JUDGE DAVIS-WHITE: You just made an assumption, it would disappear.*
> *THE WITNESS: As did my lawyers.*
> *JUDGE DAVIS-WHITE: Yes."*

138. In the passage above, the transcribed position is as set out but my recollection, and the obvious sense of what was being asked by me in my second question (against which I have inserted "[See below]"), was that the only thing Mr Griffiths had been told by Mr Chapman was that no new debenture would be granted in favour of Lloyd Warwick. I

note that there are several places where the transcriber has had difficulty in hearing what was said by me, with several "[inaudible]" comments.

139. In short, Mr Griffiths' evidence was that Mr Chapman only said that LWL would not be taking a new Debenture. He said nothing about the continued existence of the existing Debenture. Mr Griffiths' belief that that Debenture came to an end on the Assignment was not derived from any unequivocal statement or promise to this effect by Mr Chapman and seems to have flowed from Mr Griffiths knowing that the only express assignment was of the Loan and his assumption that as Mr Chapman would not thereafter be owed anything, the Debenture would cease to have any legal effect. This belief was in no way encouraged or known about by Mr Chapman, or at least this is not suggested by any evidence, and accordingly there was no relevant promise or representation as to the Debenture coming to an end. Further, there was no relevant reliance by Mr Griffiths or Celtic on anything said or done by Mr Chapman. Finally, there was no agreement about the "ending" of the Debenture.

140. Mr Strelitz in closing challenged the above analysis. In particular, he said that Mr Griffiths' evidence that I have outlined was unclear and that, in effect, the relevant point had not been properly put to Mr Griffiths. I reject that submission. Having considered the transcript again carefully with my own notes, I consider that the questioning was entirely fair and the answers entirely clear. A transcript does not always pick up the entire circumstances in which evidence is given but it was very clear to me (and Mr Jackson) that Mr Griffiths was clear and unequivocal in his evidence.

141. Once Mr Griffiths had given the evidence that he did, Mr Jackson decided that there was no need for him to cross-examine further or test the evidence further. This meant that further aspects of the case were not tested. Among others, it is unclear whether, and if so how, Celtic relied on the absence of the Debenture when entering into the refinancing of bank lending with Lloyds Bank plc; what unfairness or detriment would flow from the Debenture now being relied on (Mr Strelitz suggested it was the provisions in the SA 2010 making the debt immediately due) and, if promissory estoppel applies, in what manner (and particularly for how long) the Debenture is to be suspended in effect.

142. Mr Strelitz also raised the question of laches or delay. I do not see how that is relevant given the findings that I have made. Laches is relevant to equitable claims but this claim is not an equitable claim but one (in effect) to establish a proprietary right and to seek rectification of records at Companies House to protect the same. As it happens, I do not consider there has been any real delay in any event. Mr Chapman only found out about the 2018 memorandum of satisfaction some years later and pursued the matter in correspondence, thereafter, culminating in issue of the Claim Form in this case in April 2022. Mr Chapman, through his solicitors, had made clear by the letter dated 29 June 2018 that he understood the Debenture still to exist. Mr Griffiths' solicitors did not deny this. Mr Chapman was not informed of intention to file or the filing of the Memorandum of Satisfaction being filed at Companies House. When reliance was placed on the Debenture by way of seeking to enforce the debt in 2021, Celtic's solicitors made clear that, for safety, Celtic was then acting on the basis there might be security in place (the solicitors asked for consent to a sale of land that, if the Debenture was valid would or might fall within the charge in the Debenture).

Conclusion

143. In light of Mr Griffiths' evidence, which is consistent with the evidence of Mr Chapman as I have evaluated it and the contemporaneous documents, the Defendant fails to establish its defence and counterclaim based upon either a promissory or proprietorial estoppel or on contract. Quite simply there was no relevant representation, assurance or promise by Mr Chapman that he and LWL would treat the Debenture as discharged or of no effect or that they would not enforce it once the assignment of the Loan to LWL was effected. Further, in thereafter assuming that the Debenture was at an end, Mr Griffiths and Celtic did not rely upon any relevant representation, assurance or promise by Mr Chapman but rather upon Mr Griffiths' assumption (whether or not confirmed by lawyers at some point) that as a matter of law once the Assignment took effect the Debenture automatically came to an end.

144. At this stage it followed that I would be minded to grant appropriate declaratory relief as to the continuing existence and effect of the Debenture. Mr Strelitz raised the issue of laches generally but I do not see how that arises, though he can make further submissions about that if he wishes to in the context of the relief to be granted.

145. As regards rectification of documents at Companies House, as I indicated and I believe the parties agreed, the Registrar of Companies will need to be joined if any issue remains. My suspicion is that the Registrar will not wish to retrospectively amend the Register but only prospectively as the rights of existing creditors, secured and unsecured, would be affected. The position is not free from doubt as the main Lloyds Bank plc debenture seems to have been registered at a time when the Debenture was still protected by registration at Companies House, though there may be other security granted to the Bank after the removal of the registration in 2018. I can see the Registrar might wish to suggest that any rectification is subject to the usual sort of proviso applying when the statutory time for registering a legal charge is extended by the Court. I would suggest that the Claimants contact both Lloyds Bank plc and the Registrar of Companies to find out their respective positions before they decide to join either or both of them to the proceedings for the purposes of further relief.

146. The parties should attempt to agree a Minute of Order to give effect to this judgment, so far as they can. If there is any disagreement a further short remote hearing will be organised. In the event that no Minute of Order is fully agreed by 4pm on Friday 26 January 2024, then a short remote hearing will be fixed to take place as soon as possible, at this stage I would hope at 10am on an appropriate day.