Neutral Citation Number: [2009] IEHC 512

THE HIGH COURT

COMMERCIAL

2009 3082 S

BETWEEN

GE CAPITAL WOODCHESTER LIMITED AND

GE CAPITAL WOODCHESTER FINANCE LIMITED

PLAINTIFFS

AND

AKTIV KAPITAL, ASSET INVESTMENT LIMITED AND AKTIV KAPITAL ASA

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 19th November, 2009

1. Introduction

1.1 These proceedings arise out of contractual arrangements entered into between the parties relating to the sale of debts owed to the plaintiffs (together "GE Capital") by customers of those companies. The arrangements between the parties continued in an uncontroversial fashion for some time. However, notice of termination was served by the first named defendant ("Asset Investment") which, in accordance with the terms of the relevant contract, provided for a six month notice period. During the course of that notice period GE Capital were, at least at the level of principle, still entitled to the benefit of the Agreement which provided for the sale to Asset Investment of between 80% and 100% of certain debts owed to GE Capital by its customers. These proceedings relate to one such sale.

1.2 The proceedings were commenced by summary summons and, in the ordinary way, a notice of appearance having being filed, GE Capital bring these proceedings before the court on a motion for summary judgment. That summary judgment application is resisted, both by Asset Investment and the second named defendant ("ASA") who act as guarantor of the obligations of Asset Investment under the underlying contract. No separate issues are raised by ASA on the relevant guarantee so that the issues arising in relation to ASA are the same as those arising in relation to Asset Investment. In order to understand the basis of GE Capital's claim, the defence which it is said is available to Asset Investment and, therefore, to ASA in respect of that claim and the issues which I have to decide, it is necessary to turn briefly to the relevant factual background.

2. Factual Background

2.1 GE Capital are Irish companies who are in the business of finance and lending. GE Capital entered into an agreement with Asset Investment for the sale and purchase of debts owed to GE Capital by its customers. Asset Investment is an English registered company. ASA is a Norwegian registered company and is a related company of Asset Investment. As pointed out earlier ASA is joined to the proceedings as it agreed to guarantee the obligations of Asset Investment in relation to the sale and purchase of the relevant debts and undertook to indemnify GE Capital in respect of non-performance of that agreement by Asset Investment.

2.2 The agreement to purchase the relevant debts was evidenced in writing on the 1st February, 2004 and subsequently amended by a side letter dated 19th December, 2006, (together the "Agreement"). The Agreement provided that:-

> a) GE Capital agreed to sell and Asset Investment agreed to purchase all of the GE Capital's rights, title and interest in certain debts and associated rights specified in the Agreement ("qualifying debts").
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> b) The sale and purchase of the qualifying debts would be by way of assignment executed by GE Capital and Asset Investment, which said assignment would specify the purchase price in relation to the qualifying debts.
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> c) ASA agreed to irrevocably and unconditionally guarantee the due and punctual performance by Asset Investment of its obligations under the Agreement and agreed that if Asset Investment defaulted in performance of any such obligations, ASA would indemnify GE Capital in respect of such non-performance by Asset Investment.

2.3 The sale and purchase of the qualifying debts was to be completed by GE Capital executing a deed assigning the qualifying debts to Asset Investment. The individual contracts (between GE Capital and its customers) which gave rise to qualifying debts together with the associated rights were to be identified as a list of contracts attached to the relevant assignment.

2.4 As deposed to in the affidavit of Deirdre Hannigan, the chief risk officer in the GE Group, the Agreement provided for the purchase of debts arising out of individual contracts for the hire purchase or lease of motor vehicles and loan contracts which GE Capital had with its customers. The debts which were to be purchased were described as qualifying debts. Qualifying debts were defined as those which were nonperforming (i.e. that there were outstanding obligations which remained unpaid) to a sufficient extent to be regarded as qualifying debts in accordance with recovery decision criteria specified in the Agreement. The relevant recovery decision criteria could not, under the Agreement, be changed by GE Capital without prior notice to Asset Investment, and in the case of material change, without having first obtained

the consent of Asset Investment.

2.5 At clause 3.2, the Agreement required that GE Capital assign at least 80% of qualifying debts to Asset Investment, with no upper limit. The qualifying debts were to be selected for sale on an alphabet order basis, meaning that Asset Investment were to purchase the first 80% of the qualifying debts listed alphabetically or randomly.

2.6 It should also be noted that GE Capital was, again at least in principle, entitled to sell the entire 100% of qualifying debts in any monthly period. Thus, GE Capital had an entitlement to sell between 80% and 100% of the qualifying debts concerned. Furthermore, there was an agreed rate at which the relevant debts were to be purchased. In the earlier stages of the operation of the Agreement that rate was 19%. Subsequently the rate was increased to 20%, at which point it rested at the time material to the dispute which arises in these proceedings. In substance, therefore, GE Capital was required to determine the qualifying debts in accordance with the recovery decision criteria to which I have referred. GE Capital could then decide whether to sell all or any percentage equal to or in excess of 80% of those debts to Asset Investment. Asset Investment was, at the material time, to pay 20% of the full value of the debt concerned. As I understand it, in substance the benefits of the business from the perspective of Asset Investment was that they might hope to actually recover more than 20% of the debts concerned so as to cover any recovery costs and still leave them with a profit. Obviously if the net recovery on any relevant debts began to fall close to or, indeed, below 20%, then Asset Investment would suffer a loss.

2.7 It was a further term of the Agreement that same should be governed and construed in accordance with the laws of Ireland and that the parties thereto submitted to the exclusive jurisdiction of the Irish courts for the purposes of hearing and determining any dispute arising from the Agreement. This Court has, therefore, jurisdiction to hear the proceedings pursuant to the provisions of EC Regulation 44/2002.

2.8 After, it would appear, the profitability of the Agreement became questionable, Asset Investment served GE Capital, in accordance with the Agreement, with a six month notice of termination of the contract on 28th November, 2008.

2.9 The assignment which gives rise to the dispute between the parties is a deed of assignment made under seal on 3rd March, 2009, whereby GE Capital assigned certain qualifying debts to Asset Investment for a total purchase price of €2,158,652.45 (the "March Assignment"). The volume of qualifying debts for the month of March 2009 was set out at €10,793,256.76. This was four times greater than the volume of qualifying debts experienced by GE Capital in January, 2009, and over 150% in excess of the February figure. The February figure had, itself, been the highest monthly figure experienced during the currency of the Agreement. This much is not in dispute between the parties. By email of 6th April, 2009, an email of a Mr. Pickering of GE Money to Asset Investment, it is suggested that "the volumes are linked to the increase levels of write-off and delinquency that we are seeing flow through all of the portfolios."

2.10 Despite demands from GE Capital, Asset Investment has failed to pay GE Capital any of the purchase price arising out of the March Assignment. The defendants' principal argument for not so doing is to the effect that the increased volume of debts was so great that it was in breach of an implied term in the Agreement, or gives rise to an inference of other non compliance with the terms of the Agreement. Against that factual background it is necessary to turn to the procedural history of these proceedings.

3. Procedural history

3.1 A summary summons was issued on 28th July, 2009, followed by an appearance on the 14th September, 2009. In this motion GE Capital are seeking summary judgment in the sum of €2,158,652.45 against Asset Investment and ASA on the grounds that they have not put forward any *bona fide* defence to the proceedings.

3.2 The proceedings were admitted to the Commercial list, under O. 63A, r. 2 on 22nd October, 2009.

3.3 The basis for the defendants' defence is to be found in an affidavit, which has been sworn by a senior executive within the Aktiv Kapital group of companies, Mr. Mark Scott. GE Capital swore a replying affidavit on 5th November, 2009. These grounds of potential defence were elaborated on by counsel at the hearing.

4. Defence as Put Forward

4.1 The defendants have suggested that there are four potential defences to GE Capital's claim:-

> a) That there was a breach of the Agreement by GE Capital due to the sudden and extreme increase in the volume of qualifying debts;
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> b) As part of the argument under (a) it is also suggested that the large increase in the volume of qualifying debts which occurred in March and which had, obviously, a large and corresponding increase in the purchase price to be paid by Asset Investment in that month, when coupled with certain other facts to which reference will be made in due course, gives rise to at least a realistic possibility that GE Capital may not have properly complied with their obligations under the Agreement. It is said that whether this be so and if it be so the extent to which it may be so, is a matter which could not be established until proper discovery had been obtained;
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> c) That there was a breach of the Agreement by GE Capital in failing to provide notice of the consistency of the recovery decision criteria in relation to the qualifying debts; and
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> d) That there was a breach of the Agreement by GE Capital in failing to sell to Active Capital Asset no less than 80% of the qualifying debts listed alphabetically or randomly.

4.2 In relation to the first and, indeed the second, arguments, the defendants assert that the volume of the qualifying debts for March, 2009 was so far above any previous monthly volume that had been experienced since the commencement of the Agreement as to make it a breach of an implied term of the Agreement. The defendants point to the fact that the volume of qualifying debt increased from €2,467,542.09 in January, 2009 to €10,793,256.76 in March, 2009. The defendants pointed out that this is a growth of over 250%. While the defendants accept that it would be expected that there would be some increase in the volume of bad debt as a consequence of the unfortunate decline in

the fortunes of the Irish economy in the recent past, it is argued that the relevant increase could not reasonably be accounted for by economic reasons alone. The defendants argue that the parties had established trading norms over the course of the Agreement and that the sudden and unpredictable departure from those norms in March, 2009 was in breach of those trading norms, and as such was, it is said, a breach of what had become an implied terms of the Agreement.

4.3 In addition, or in the alternative, the defendants argued that the only way that such a sudden and pronounced spike could be explained is by way of a change in the recovery decision criteria, or a cessation of an unknown parallel debt sale agreement between GE Capital and a third party, both of which would, if true, be in breach of the Agreement. The defendants argue that the selection by GE Capital of the qualifying debts was, therefore, not entirely random, as required by the Agreement, and that, as a consequence, in the March Assignment, Asset Investment were left with inferior quality debt.

4.4 In that context it is said by Asset Investment that GE Capital approached them in relation to the sale of a one off batch of debts in May, 2008. It is argued by the defendants that this attempt in May, 2008 raises a significant question as to whether GE Capital were, in general terms, entering into sales arrangements with third parties in respect of debts which should have been or become qualifying debts under the Agreement.

4.5 Counsel for the defendants argued that the increase in the volume of debts was in breach of what had become implied terms of the Agreement. To this end, counsel pointed to a passage from Chitty on *Contracts*, 29th Edition. Paragraph 13.022 of Chitty sets out as follows in relation to implied terms:-

> "It is, however, clear that a term may be implied in any given case from the circumstances of the parties having consistently on former and similar occasions adopted a particular course of dealing. Thus, a covenant to pay interest or to allow interest to be added to principle at stated periods and to pay interest on the whole, has been held to be implied from the fact that on former occasion the accounts between the parties have been stated and settled on that footing. And it had been held that an oral contract between the buyer and seller of goods incorporated by a long course of dealing conditions printed on the back of "sold notes" as conditions of sale, in so far as a condition was appropriate to the oral contract."

4.6 Counsel for the defendants argued that the level of debts offered by GE Capital to Asset Investment over the course of the Agreement essentially became an implied term of the Agreement.

4.7 In their third point, the defendants further argue that GE Capital were in breach of the Agreement by failing to comply with the requirement to provide written confirmation to Asset Investment to the effect that the recovery decision criteria had not changed. That there is an obligation in the Agreement to provide monthly written confirmation that the relevant selection criteria had not changed is clear. It would also appear on the evidence currently available that no such written confirmation was, in fact, given. To that extent it would currently appear that there was a breach of the Agreement in that regard. However, it is said on behalf of GE Capital that there was, in fact, no change in the relevant selection criteria used for the purposes of determining qualifying debt. It is, therefore, said that there are no consequences which flow from the failure to provide written confirmation of that fact. In those circumstances it is said that, while there may have been a technical breach of the Agreement, any such breach does not provide a defence to the claim for recovery of the monies due on foot of the March Assignment.

4.8 In relation to the fourth potential defence, attention is drawn to the fact that it would appear, from the affidavit evidence tendered on behalf of GE Capital, that for one month, GE Capital fell below the 80% threshold of debts sold. Thus, again, it is argued that there was an undoubted breach of the Agreement in respect of that month. GE Capital, while accepting that there is evidence of such a breach, again argue that no, or at least no significant, consequences could be said to flow from that breach as the relevant shortfall was marginal. In that context there is a dispute between the parties as to the proper construction of one clause in the contract which requires GE Capital to identify all qualifying loans in respect of any particular month. GE Capital argue that the relevant clause simply requires an internal exercise on the part of GE Capital designed to identify the qualifying loans concerned. Therefore, in the event that less than 100% of such loans are to be sold the exercise of random selection provided for in the Agreement is applied to the debts thus identified. Asset Investment argue, on the other hand, that GE Capital were required to identify the relevant qualifying loans to them so as to enable Asset Investment to monitor the total volume of loans, so as to ensure that Asset Investment were only required by GE Capital to purchase randomly selected loans in the event that less than 100% of all qualifying loans were sold.

5. Submissions of Counsel for GE Capital

5.1 As pointed out counsel for GE Capital accepted that no notice was sent of the non-change in recovery decision criteria but, it is said, that no damage was caused by this omission. In relation to the defendant's claim that less than 80% of qualifying debt was sold, counsel for GE Capital noted that there was one isolated incident when Asset Investment was not assigned the requisite amount of qualifying debts, which arose in November 2007, and, it is said, was caused by analyst error and gave rise to no, or no significant loss. Neither of these points, it is said, amount to a defence to these proceedings.

5.2 In relation to the spike in the volume of debts in March 2009, counsel for GE Capital argued that the average balance of debts had steadily increased since the commencement of the Agreement with significant monthly variations. Counsel argued that this was a consequence of the level of income inflation in the economy over that period which allowed customers of GE Capital to service a higher level of debt. Counsel pointed to the fact that GE Capital had experienced an overall increase in arrears throughout 2008 and 2009, and that month to month, GE Capital experienced considerable variation in the amount of qualifying debts. Counsel for GE Capital further asserted that Asset Investment continued to work the debts assigned through the March Assignment without any complaint. It was also said that there was no evidence from which it was appropriate to draw an inference that there was an arguable defence to the effect that GE Capital had sold debt to third parties in circumstances where such sale would amount to a breach of the Agreement.

5.3 Against the background of those arguments it is necessary to turn, briefly, to the legal principles applicable to an application such as this.

6. The Law

6.1 The legal test to be applied in an application for summary judgment is set out in *Banc de Paris v. de Naray* [1984] 1 Lloyds Law Rep.21, as adopted by the Supreme Court in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75, where, at p.79, the following is said by (Murphy J.):-

> "In my view the test to be applied is that laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Rep. 21, which was referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank Plc v. Daniel* [1993] 1 W.L.R. 1453. The principle laid down in the *Banque de Paris* case is summarised in the head note thereto in the following terms:-
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> > 'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or *bona fide* defence.'"

6.2 The standard to be applied in examining whether a defendant has a fair or reasonable probability of the defendants having a real or *bona fide* defence is set out in the decision of the Supreme Court in *Aer Rianta v. Ryanair Limited* [2001] 4 I.R. 607. In his judgment in *Aer Rianta* Hardiman J. noted that a fair and reasonable probability of a real or *bona fide* defence is not the same thing as a defence which will probably succeed or even a defence whose success is not improbable. At p. 621 of his decision, Hardiman J. states that "the defendant's hurdle on a motion such as this is a low one and the jurisdiction is one to be used with great care". In summary, Hardiman J. concluded, at p. 623 of his decision:-

> "In my view the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

6.3 In *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, at p. 7, McKechnie J. set out a summary of the principles, following *Aer Rianta v. Ryanair*, to be applied by the courts in the assessment of summary judgment application in the following terms:-

> "From these cases it seems to me that the following is a summary of the present position:—
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> (i) The power to grant summary judgment should be exercised with discernible caution,
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> (ii) In deciding upon this issue the Court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done,
>
> (iii) In so doing the Court should assess not only the Defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the Plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting Affidavit evidence,
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> (iv)Where truly, there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use,
>
> (v)Where however, there are issues of fact which in themselves are material to success or failure, then their resolution is unsuitable for this procedure,
>
> (vi)Where there are issues of law, this summary process may be appropriate but only so, if it is clear that fuller argument and greater thought, is evidently not required for a better determination of such issues,
>
> (vii) The test to be applied, as now formulated is whether the Defendant has satisfied the Court that he has a fair or reasonable probability of having a real or *bona fide* defence; or as it is sometimes put, 'is what the Defendant says credible?', —which latter phrase I would take as having as against the former an equivalence of both meaning and result,
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> (viii) This test is not the same as and should be not elevated into a threshold of a Defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence,
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> (ix) Leave to defend should be granted unless it is very clear that there is no defence,
>
> (x) Leave to defend should not be refused only because the Court has reason to doubt the *bona fides* of the Defendant or has reason to doubt whether he has a genuine cause of action,
>
> (xi) Leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally,
>
> (xii) The overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter Judgment or leave to defend, as the case may be."

6.4 Counsel for the defendants also pointed to my decision in *McGrath v. O'Driscoll and Ors* [2006] IEHC 195. In *McGrath* I applied the relatively low hurdle as set out by Hardiman J. in *Aer Rianta.* In relation to the resolution of factual issues and questions of law, I said the following at paras. 3.4 and 3.5 of the judgment:-

> "3.4 So far as factual issues are concerned it is clear, therefore, that a mere assertion of a defence is insufficient but any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved.
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> 3.5 So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only

do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

6.5 There was no dispute between counsel as to the proper principles to be applied on an application such as this. It was accepted that the relevant principles are to be found in the case law to which I have referred. There is, perhaps, however, one issue of principle which arises in this case which needs to be touched on. It is clear that the mere assertion of a defence is insufficient. Insofar as factual issues arise it is ordinarily necessary for a defendant to place affidavit evidence before the court setting out facts which, if true, would arguably give rise to a defence. However, that proposition should not, in my view, be taken over literally. For example, the factual basis on which a defendant may wish to oppose a plaintiff's claim may not derive from facts within the defendant's own knowledge. There may be a variety of circumstances, nonetheless, where the defendant may be able to persuade the court that the *Aer Rianta* test is met. Where, for example, a defendant establishes a credible basis for suggesting that witnesses will be available who will depose to facts which might arguably give rise to a defence, the fact that the evidence of those witnesses is not strictly speaking before the court in the form of an affidavit sworn by such witness will not necessarily be fatal. To take but one, albeit extreme, example a defendant may have been told something by a witness who is unwilling to swear an affidavit but who would be amenable to subpoena. Provided the defendant concerned puts forward a credible basis for the contention that such evidence might be forthcoming, it could never be the case that the relevant defendant would be deprived of the opportunity of requiring the witness concerned to attend under subpoena and seeking to establish relevant facts through the evidence of that witness.

6.6 Likewise, there will always be cases where the true nature of a defendant's defence will rest in evidence (whether documentary or otherwise) which will only become available through procedural devices such as discovery, interrogatories or the like. That is not to say that it is open to a defendant, on a summary judgment application, to make a vague and generalized contention which would amount to nothing more than an assertion that something useful to his case might turn up on discovery or the like. However, it seems to me that where a defendant satisfies the court that there is a credible basis for asserting that a particular state of facts might exist which state of facts, if same were in truth to exist, could be established by appropriate discovery and/or interrogatories, then such defendant should be entitled to liberty to defend. It should, again, be emphasized that mere assertion is insufficient. A credible basis for the assertion needs to be put forward even if it is not, at the stage of the motion for summary judgment, possible to put before the court direct evidence of the assertion concerned.

6.7 Having set out what seemed to me to be the relevant principles I now turn to the application of those principles to the facts of this case.

7. Application to Facts of Case

7.1 It seems to me that it is possible to dispose of two of the arguments put forward on behalf of Asset Investment quite shortly. While it is true that a basis has been established for suggesting that GE Capital were in breach of the Agreement in respect of both a failure to give formal notice of the absence of any change in investment criteria and in respect of the failure to sell at least 80% of qualifying debt in one specific month, it does not seem to me that either of those two matters could possibly provide Asset Investment (and by extension ASA) with a defence to these proceedings. In order for those undoubted breaches of the Agreement to be material to the claim which is now made, it would be necessary to establish either an entitlement to set the Agreement aside on the basis of such breaches or alternatively, a casual connection with losses attributable to those breaches which might arguably extinguish the claim made by GE Capital. There does not seem to me to be an arguable basis for either proposition.

7.2 In the absence of any evidence to the effect that there was a change in investment criteria, then any failure to formally notify the absence of such change is undoubtedly a breach but a breach from which no consequences flow and, indeed, a breach which Asset Investment must have been aware of and not pursued given that it would have known that it was not receiving the relevant confirmation on a monthly basis. Likewise, the drop below 80% in one month only of the volume of qualifying debt actually sold to Asset Investment was marginal in the extreme and there is no basis for suggesting that anything more than a loss which would be entirely nominal in the context of these proceedings could have arisen from it. Likewise, there is no arguable basis for suggesting that Active Investment would be entitled to terminate the Agreement or treat it as at and end as a result of that breach.

7.3 That leads to the question of the undoubtedly large increase in the volume of qualifying debt referable to the March Assignment. It is important to emphasize that, on the basis of the evidence put forward on behalf of Asset Investment, the attempt to sell some debt the previous year outside the scope of the Agreement was said to have been an attempt to sell not just to Asset Investment but to a third party. It may be that the account given on behalf of Asset Investment of what transpired is disputed in important points of detail by GE Capital. However, there is evidence before the court which, if ultimately accepted, would suggest that, at a minimum, GE Capital attempted to sell debt to a third party outside the scope of the Agreement.

7.4 It should be noted that there are difficult questions of construction of the Agreement as to precisely how it was meant to operate in relation to debts being, as it were, removed from the process prior to such debts becoming qualifying debts in accordance with the criteria referred to in the Agreement. The relevant portion of the Agreement refers to a flow chart whose interpretation could well be a matter on which oral evidence would be relevant as an aid to its construction. In those circumstances, it seems to me, that the construction of such aspects of the Agreement is not a matter on which it would be safe for the court to reach a conclusion without the benefit of oral evidence. On that basis it is, in my view, arguable, sufficient for the purposes of giving liberty to defend, that the sale of debt which might ultimately become qualifying debt for the purposes of the Agreement to a third party prior to the time when that debt had reached the stage of delinquency when it would qualify as qualifying debt, would have been in breach of the Agreement. It is obvious that any such sale could have a material effect by skewing the precise type of debt which would ultimately be transferred to Asset Investment under the Agreement and thus could have material consequences. When coupled with the undoubtedly very significant change in what would appear to be the volume of qualifying debt occurring in March, 2009, I am satisfied that Asset Investment has established that there is a credible basis for suggesting that the Agreement may not have been properly operated by GE Capital in accordance with its terms and in accordance with the relevant criteria for debt selection which, it must be recalled, are said to have been constant throughout the entire relevant period.

7.5 In those circumstances, I am satisfied that this is one of those cases where, while the defendants have not been able to put forward direct evidence of such matters, the defendants have, nonetheless, put forward a credible basis for their

suggestion to the effect that the Agreement was not properly operated by GE Capital. The truth or otherwise of any such suggestion is a matter which will require analysis of evidence which is only available within GE Capital and in respect of which Asset Investment (and ASA) will, undoubtedly, be entitled to explore by procedural devices such as discovery and interrogatories.

7.6 I should, however, emphasise that the only basis on which I am satisfied that Asset Investment (and through them ASA) have established a sufficient basis for putting forward a defence is the grounds connected with the large increase in qualifying debt in March, 2009 coupled with the events concerning the possible sale of debt before it reached qualifying status in 2008, and the inference that those matters may give rise to, to the effect that the Agreement was not properly implemented by GE Capital. I am not satisfied that the technical points to which I have referred earlier provide any proper basis, although in the context of giving leave to defend the second such point (that is the failure to hit the 80% threshold in one month) although marginal, nonetheless might provide some albeit limited basis for defence and can be pursued as a counterclaim or set off.

8. Conclusions

8.1 In those circumstances I propose giving Asset Investment and ASA liberty to defend, but will confine them in that regard to the arguments in respect of which I have indicated that an arguable defence has been made out (including, for the avoidance of doubt, and to the extent to which it may be available, the point concerning failure to hit the 80% threshold).

8.2 I should also add that it is, in my view, incumbent on Asset Investment, when they have had the benefit of discovery and any other procedural devices to which they may be found entitled, to come to a view as to whether evidence has been uncovered which would allow those defences to now be put forward. If there is no evidential basis for the suggestion that the Agreement was not properly operated (other than the failure to hit the 80% threshold in one month) then it would seem to me that judgment for all, or a very significant portion, of the amount claimed should be immediately entered.